

103^D CONGRESS
1ST SESSION

H.R. 1609

To amend title 10, United States Code, to change and clarify provisions relating to the Department of Defense program for contracting with small disadvantaged businesses and other entities, to require potential defense contractors to certify compliance with equal opportunity requirements, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 1, 1993

Mrs. COLLINS of Illinois introduced the following bill; which was referred to the Committee on Armed Services

A BILL

To amend title 10, United States Code, to change and clarify provisions relating to the Department of Defense program for contracting with small disadvantaged businesses and other entities, to require potential defense contractors to certify compliance with equal opportunity requirements, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Department of Defense
5 Set Aside Enforcement Act of 1993”.

1 **SEC. 2. FINDINGS.**

2 The Congress finds the following:

3 (1) It has been a longstanding policy of the
4 Federal Government to assist in the development of
5 small business concerns owned and controlled by so-
6 cially and economically disadvantaged individuals.

7 (2) This affirmative action policy is deemed
8 necessary because of the existence of historical pat-
9 terns of discrimination in procurement contracting
10 that persist to this day against small disadvantaged
11 businesses owned by minority individuals and
12 against historically Black colleges and universities
13 and minority institutions.

14 (3) In order to overcome these persistent pat-
15 terns of discrimination, which serve to perpetuate
16 the economically disadvantaged status of minority
17 small business owners, the Federal Government has
18 created a large number of programs to enable small
19 disadvantaged business concerns to compete success-
20 fully for procurement contracts let by Federal agen-
21 cies.

22 (4) One of the most notable of these programs
23 was created by section 1207 of the National Defense
24 Authorization Act for Fiscal Year 1987, and was re-
25 cently codified as section 2323 of title 10, United
26 States Code, under the heading "Contract goal for

1 small disadvantaged businesses and certain institu-
2 tions of higher education”.

3 (5) Although the percentage share and dollar
4 value of contracts and subcontracts awarded to
5 small disadvantaged business concerns slowly in-
6 creases each year, the percent goal has never been
7 met either in prime contracts or in subcontracts,
8 with achievements of only 3.5 percent and 2.7 per-
9 cent, respectively, in fiscal year 1991.

10 (6) The failure to achieve the goals mandated
11 by section 2323 is due in part to insufficient out-
12 reach to small disadvantaged businesses that are po-
13 tential contractors or subcontractors with the De-
14 partment of Defense.

15 (7) Another factor in the failure to achieve the
16 section 2323 procurement goals is failure of prime
17 contractors to make adequate plans for subcontract-
18 ing with small disadvantaged business concerns and
19 failure of the Department of Defense to enforce
20 compliance with those plans.

21 (8) Greater commitment to the section 2323
22 procurement goals is required both on the part of
23 the Department of Defense and on the part of de-
24 fense prime contractors in order to overcome the

1 manifest deficiencies in program management and
2 implementation.

3 **SEC. 3. REQUIREMENTS RELATING TO SMALL DISADVAN-**
4 **TAGED BUSINESSES AND OTHER ENTITIES.**

5 (a) 10 PERCENT REQUIREMENT UNDER SECTION
6 2323.—Section 2323 of title 10, United States Code, is
7 amended as follows:

8 (1) Subsection (a) is amended—

9 (A) by striking out “GOAL.—” and insert-
10 ing in lieu thereof “REQUIREMENT.—”;

11 (B) in paragraph (1), by striking out “Ex-
12 cept as provided in subsection (d), a goal of 5
13 percent of the amount described in subsection
14 (b) shall be the objective of the Department of
15 Defense” and inserting in lieu thereof “Except
16 as provided in paragraph (4) of this subsection
17 and in subsection (d), 10 percent of the amount
18 described in subsection (b) shall be the require-
19 ment of the Department of Defense”; and

20 (C) in paragraphs (2) and (3), by striking
21 out “5 percent goal” each place it appears and
22 inserting in lieu thereof “10 percent require-
23 ment”.

1 (2) Subsection (c)(1) is amended by striking
2 out “goal” and inserting in lieu thereof “require-
3 ment”.

4 (3) Subsection (e) is amended—

5 (A) in paragraphs (2) and (3), by striking
6 out “5 percent goal” each place it appears and
7 inserting in lieu thereof “10 percent require-
8 ment”; and

9 (B) by striking out “goal” each place it
10 appears and inserting in lieu thereof “require-
11 ment.

12 (4) Subsections (g) and (n) (as redesignated by
13 subsection (a)) are each amended by striking out
14 “goal” each place it appears and inserting in lieu
15 thereof “requirement”.

16 (b) COMPLIANCE WITH CONTRACT REQUIREMENT BY
17 USE OF PREVIOUSLY ELIGIBLE ENTITIES.—Subsection
18 (a) of section 2323 of title 10, United States Code, is fur-
19 ther amended by adding at the end the following new para-
20 graph:

21 “(4) During the period beginning on October 1, 1993,
22 and ending on September 30, 2000, the Secretary of De-
23 fense may meet the 10 percent contract award require-
24 ment of this subsection during a fiscal year by awarding
25 up to half of the total dollar amount of the contracts to

1 be awarded during such fiscal year to any entities that
2 meet either of the following criteria:

3 “(A) The entity was an entity described in sub-
4 paragraph (A) or (C) of paragraph (1) but is no
5 longer such an entity, by reason of size, as of the
6 date of the issuance of the solicitation for the con-
7 tract concerned.

8 “(B) The entity was a small business concern
9 eligible to receive contracts pursuant to section 8(a)
10 of the Small Business Act but is no longer so eligi-
11 ble, by reason of size, as of the date of the issuance
12 of the solicitation for the contract concerned.”.

13 (c) DETERMINATION OF COMPLIANCE WITH CON-
14 TRACT REQUIREMENT.—(1) Section 2323 of title 10,
15 United States Code, is further amended—

16 (A) by redesignating subsections (i) and (j) as
17 subsections (o) and (p), respectively; and

18 (B) by inserting after subsection (h) the follow-
19 ing new subsection:

20 “(i) DETERMINATION OF COMPLIANCE WITH CON-
21 TRACT REQUIREMENT.—For purposes of determining
22 compliance with the requirement of subsection (a), the
23 Secretary of Defense may include only the amounts obli-
24 gated for prime contracts entered into by the Department
25 of Defense with entities described in subparagraphs (A)

1 through (C) of subsection (a)(1). The Secretary may not
2 include amounts obligated by those or any other prime
3 contractors for subcontracts entered into with such enti-
4 ties.”.

5 (2) Such section 2323 is further amended—

6 (A) in paragraphs (1) and (2) of subsection (a),
7 by striking out “and subcontracts” both places it ap-
8 pears;

9 (B) in subsection (e)(3), by striking out “or
10 subcontractors”; and

11 (C) in subsection (f)(1), by striking out “or
12 subcontract”.

13 (d) SUBCONTRACTING REQUIREMENT AND OTHER
14 PROVISIONS.—Section 2323 of title 10, United States
15 Code, is further amended by inserting after subsection (i)
16 (as added by subsection (c)) the following new subsections:

17 “(j) REQUIREMENT AND PLAN FOR SUBCONTRACT-
18 ING.—(1)(A) Each entity which enters into a contract
19 with the Department of Defense shall, in carrying out the
20 contract, spend at least 5 percent of the amount of the
21 contract for subcontracts with entities described in sub-
22 paragraphs (A) through (C) of subsection (a)(1) (herein-
23 after in this section referred to as ‘covered entities’).

24 “(B) The Secretary of Defense may not enter into
25 a contract with a potential contractor unless the potential

1 contractor includes, with the contractor's subcontracting
2 plan required by section 8(d) of the Small Business Act
3 (15 U.S.C. 637(d)), a plan that provides for complying
4 with the 5 percent requirement of this paragraph. Such
5 plan shall include a list of the subcontracts that have been
6 entered into contingent upon award of the prime contract
7 for an amount equal to at least 5 percent of such total
8 amount of the contract.

9 “(C) In calculating whether the 5 percent require-
10 ment of this paragraph is met, a contractor may include,
11 in the case of a subcontract with a covered entity for com-
12 pany-wide services to the contractor (rather than services
13 to the contractor related only to the defense contract), an
14 amount equal to the amount of the company-wide services
15 under the subcontract that are proportionately attrib-
16 utable to the services related to the defense contract.

17 “(2) The Secretary of Defense shall require each con-
18 tractor to submit to the Department of Defense—

19 “(A) within 30 days after award of the prime
20 contract, copies of fully executed contracts between
21 the contractor and its subcontractors;

22 “(B) every 120 days after the submission under
23 subparagraph (A), information on the status of each
24 subcontract, including a notification of any intention

1 of the contractor to terminate or to replace a sub-
2 contractor; and

3 “(C) on each voucher submitted to the Depart-
4 ment of Defense, information on the payments due
5 to be paid to each of the subcontractors of the con-
6 tractor, either by the contractor or by the Depart-
7 ment of Defense pursuant to subsection (k).

8 “(3) After award of a prime contract, if the contrac-
9 tor competes, through sealed bid or competitive proposal,
10 for another contract with the Department of Defense, and
11 the Secretary determines that the contractor has not been
12 in compliance with the 5 percent spending requirement of
13 paragraph (1), the Secretary shall not award the other
14 contract to that contractor. If the contractor has not met
15 the 5 percent spending requirement at the end of any fis-
16 cal year during which the contract is in force, as evidenced
17 by an accurate and verifiable accounting of the contrac-
18 tor’s spending, the contractor shall submit to the Depart-
19 ment of Defense the following:

20 “(A) The names, addresses, phone numbers,
21 and type of business of the covered entities that the
22 contractor considered or solicited as subcontractors.

23 “(B) With respect to any covered entity listed
24 under subparagraph (A) that the contractor did not

1 enter into a subcontract with, the reasons why the
2 contractor chose not to enter into a subcontract.

3 “(C) Information on how the contractor initi-
4 ated contact with the covered entities listed under
5 subparagraph (A), including how the entities came
6 to the attention of the contractor, such as through
7 small disadvantaged business lists, compilations,
8 computer databases, and other references used by
9 the contractor to find small disadvantaged busi-
10 nesses and other covered entities who are ready, will-
11 ing, and able to do business with that contractor.

12 “(D) A description of what the contractor plans
13 to do in the next fiscal year to bring itself into com-
14 pliance with the 5 percent requirement for participa-
15 tion of small disadvantaged business and other cov-
16 ered entities.

17 “(k) ENFORCEMENT OF PLAN FOR SUBCONTRACT-
18 ING.—(1) With respect to each prime contract subject to
19 the 5 percent spending requirement of subsection (j)(1),
20 the Secretary of Defense shall withhold 5 percent of the
21 total amount of the prime contract from the contractor.
22 The amount withheld shall be used by the Department of
23 Defense to make payments for work performed under the
24 prime contract directly to subcontractors of the prime con-
25 tractor who are entities described in subparagraphs (A)

1 through (C) of subsection (a)(1). The Secretary of De-
2 fense shall prescribe regulations to administer this sub-
3 section not later than 180 days after the date of the enact-
4 ment of the Department of Defense Set Aside Enforce-
5 ment Act of 1993.

6 “(2) With respect to each prime contract subject to
7 the 5 percent spending requirement of subsection (j)(1),
8 the Secretary of Defense may not pay any amount for a
9 price adjustment of the contract unless the contractor is
10 in compliance with the spending requirement.

11 “(3) The administration of subsection (j) by a con-
12 tracting officer shall be a factor in the evaluation of the
13 performance of the contracting officer.

14 “(l) COMPOSITION OF LABOR FORCE.—(1)(A) Ex-
15 cept as provided in paragraph (2), with respect to any con-
16 tract to be entered into by the Department of Defense for
17 purposes of meeting the requirement of subsection (a) of
18 this section, an entity described in subparagraph (A), (B),
19 or (C) of subsection (a)(1) may not be awarded a contract
20 for such purposes unless the entity agrees that—

21 “(i) in the case of a contract for services (ex-
22 cept construction), at least 50 percent of the cost of
23 contract performance incurred for personnel shall be
24 expended for employees of the entity; and

1 “(ii) in the case of a contract for procurement
2 of supplies (other than procurement from a regular
3 dealer in such supplies), the entity will perform work
4 for at least 50 percent of the cost of manufacturing
5 the supplies (not including the cost of materials).

6 “(B) The Secretary of Defense may decrease, by not
7 more than 10 percent, the percentage under clause (i) or
8 (ii) of subparagraph (A) if the Secretary determines that
9 such change is necessary to reflect conventional industry
10 practices among business concerns that are below the nu-
11 merical size standard for businesses in that industry cat-
12 egory.

13 “(C) The Secretary of Defense shall prescribe regula-
14 tions similar to those specified in subparagraph (A) to be
15 applicable to contracts for general and specialty construc-
16 tion and to contracts for any other industry category not
17 otherwise subject to the requirements of such subpara-
18 graph. The percentage applicable to any such requirement
19 shall be determined in accordance with subparagraph (B).

20 “(2) In lieu of meeting the requirements of paragraph
21 (1) for any contract to be entered into by the Department
22 of Defense for purposes of meeting the requirement of
23 subsection (a), an entity described in subparagraph (A),
24 (B), or (C) of subsection (a)(1) may agree that—

1 “(A) in the case of a contract for services (ex-
2 cept construction), at least 75 percent of the cost of
3 contract performance incurred for personnel shall be
4 expended for employees of the entity or of other en-
5 tities described in subparagraph (A), (B), or (C) of
6 subsection (a)(1); and

7 “(B) in the case of a contract for procurement
8 of supplies (other than procurement from a regular
9 dealer in such supplies), the entity or other entities
10 described in subparagraph (A), (B), or (C) of sub-
11 section (a)(1) will perform work for at least 75 per-
12 cent of the cost of manufacturing the supplies (not
13 including the cost of materials).

14 “(m) RULE RELATING TO NON-MANUFACTURERS.—
15 (1) With respect to any contract to be entered into by the
16 Department of Defense for purposes of meeting the re-
17 quirement of subsection (a), an otherwise responsible busi-
18 ness concern that is in compliance with the requirements
19 of paragraph (2) shall not be denied the opportunity to
20 submit and have considered its offer for a procurement
21 contract for the supply of a product for purposes of meet-
22 ing the requirement of subsection (a) solely because such
23 concern is other than the actual manufacturer or proc-
24 essor of the product to be supplied under the contract.

1 “(2) To be in compliance with the requirements re-
2 ferred to in paragraph (1), such a business concern
3 shall—

4 “(A) be primarily engaged in the wholesale or
5 retail trade;

6 “(B) be a small business concern under the nu-
7 merical size standard for the Standard Industrial
8 Classification Code assigned to the contract sollicita-
9 tion on which the offer is being made;

10 “(C) be a regular dealer, as defined pursuant to
11 section 1(a) of the Act of June 30, 1936 (41 U.S.C.
12 35(a); popularly referred to as the Walsh-Healey
13 Public Contracts Act), in the product to be offered
14 the Department of Defense; and

15 “(D) represent that it will supply the product
16 of a domestic small business manufacturer or proc-
17 essor, unless a waiver of such requirement is grant-
18 ed—

19 “(i) by the Secretary of Defense, after re-
20 viewing a determination by the contracting offi-
21 cer that no small business manufacturer or
22 processor can reasonably be expected to offer a
23 product meeting the specifications (including
24 period for performance) required of an offeror
25 by the solicitation; or

1 “(ii) by the Secretary of Defense for a
2 product (or class of products), after determin-
3 ing that no small business manufacturer or
4 processor is available to participate in the Fed-
5 eral procurement market.

6 “(n) DEFINITION.—In this section, the term ‘covered
7 entity’ means an entity described in subparagraph (A),
8 (B), or (C) of subsection (a)(1).”.

9 (e) SMALL BUSINESS CONTRACT AWARDS.—Sub-
10 section (e)(5)(E) of section 2323 of title 10, United States
11 Code, is amended by adding at the end the following:
12 “Such efforts may include dividing up contracts for large
13 dollar amounts into contracts for smaller dollar
14 amounts.”.

15 (f) OUTREACH.—The Secretary of Defense, acting
16 through the Defense Contract Administration Services re-
17 gions, shall increase outreach, through a variety of meth-
18 ods, to small disadvantaged businesses that are potential
19 contractors or subcontractors with the Department of De-
20 fense. The methods for increasing outreach shall include
21 the following:

22 (1) Contacting minority nonprofit organizations
23 and national and local business organizations that
24 represent minority and small disadvantaged busi-
25 nesses, to inform them, through briefings, printed

1 listings, and other means, about opportunities for
2 small disadvantaged businesses to do business with
3 the Department of Defense.

4 (2) Directly contacting small disadvantaged
5 businesses that might be ready, willing, and able to
6 contract or subcontract with the Department of De-
7 fense. The businesses to be contacted could be found
8 through means such as compilations of small dis-
9 advantaged businesses, computer databases with in-
10 dices of such businesses, and small disadvantaged
11 business offices of each State and municipality in
12 which a contract with the Department of Defense
13 is entered into or performed.

14 **SEC. 4. PRE-BID COMPLIANCE WITH EQUAL EMPLOYMENT**
15 **OPPORTUNITY REQUIREMENTS.**

16 (a) IN GENERAL.—The Secretary of Defense shall re-
17 quire, as a condition for approval of a contract with the
18 Department of Defense, that the potential contractor pro-
19 vide documentation along with the bid for the contract cer-
20 tifying that the potential contractor is in compliance with
21 the equal opportunity clause in section 60–1.3 of title 41,
22 Code of Federal Regulations (as in effect on March 8,
23 1990).

24 (b) CERTIFICATION.—Certification required under
25 this section shall be conducted by an independent auditor

1 meeting criteria approved under regulations promulgated
2 by the Director of the Office of Federal Contract Compli-
3 ance Programs (hereinafter in this section referred to as
4 the “Director”) within 90 days after the date of the enact-
5 ment of this Act. Such certification shall include the re-
6 sults of on-site inspection by the auditor to determine the
7 requisite compliance and otherwise shall be in such form
8 and contain such information as the Director may require.

9 (c) COST OF AUDIT.—Each bid shall include the cost
10 of the audit required under this section under the pro-
11 jected costs of the contract.

12 (d) SUBCONTRACTOR COMPLIANCE.—Each potential
13 contractor shall require its subcontractors to provide self-
14 certified compliance reports as described in subsection (b)
15 to the potential contractor. The potential contractor shall
16 include such compliance reports with its bid.

17 (e) CERTIFICATION UPDATES.—At the end of each
18 12-month period during the term of any contract, an up-
19 date review of the contractor’s compliance during such pe-
20 riod shall be conducted by an independent auditor meeting
21 criteria approved under regulations promulgated by the
22 Director. Such update review may or may not be as com-
23 prehensive as the original certification audit described in
24 subsection (b).

1 (f) ENFORCEMENT.—Enforcement of this section
2 shall be in accordance with subpart B of part 60–1 of title
3 41, Code of Federal Regulations (as in effect on March
4 8, 1990), except that in no case may a contractor or sub-
5 contractor be barred from award of a contract by reason
6 of non-compliance with this section for a period exceeding
7 four years.

8 (g) EFFECTIVE DATE.—This section shall apply with
9 respect to any contract entered into with the Department
10 of Defense after the 60-day period beginning on the date
11 of promulgation of regulations under subsection (b).

12 (h) REGULATIONS.—Not later than 180 days after
13 the date of the enactment of this Act, the Secretary of
14 Defense shall promulgate regulations to administer this
15 section.

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