

104TH CONGRESS
2D SESSION

H. R. 4313

To amend the Small Business Act to strengthen existing protections for small business participation in Federal contracting opportunities, to provide for assessments of the impacts on small businesses of the steadily increasing use of contract bundling by the procurement activities of the various Federal agencies, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 28, 1996

Mrs. MEYERS of Kansas introduced the following bill; which was referred to the Committee on Small Business, and in addition to the Committee on Government Reform and Oversight, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend the Small Business Act to strengthen existing protections for small business participation in Federal contracting opportunities, to provide for assessments of the impacts on small businesses of the steadily increasing use of contract bundling by the procurement activities of the various Federal agencies, 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,*

1 **SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.**

2 (a) SHORT TITLE.—This Act may be cited as the
3 “Small Business Opportunity Preservation Act of 1996”.

4 (b) TABLE OF CONTENTS.—

- Sec. 1. Short title and table of contents.
- Sec. 2. Statement of policy.
- Sec. 3. Definition of contract bundling.
- Sec. 4. Assessing proposed contract bundling.
- Sec. 5. Fostering contractor teaming.
- Sec. 6. Reporting of bundled contract opportunities.
- Sec. 7. Evaluating subcontract participation in awarding contracts.
- Sec. 8. Improved notice of subcontracting opportunities.
- Sec. 9. Deadlines for issuance of regulations.

5 **SEC. 2. STATEMENT OF POLICY.**

6 (a) SUSTAINING SMALL BUSINESS PARTICIPATION IN
7 GOVERNMENT CONTRACTING DESPITE CONTRACT BUN-
8 DLING.—Section 2 of the Small Business Act (15 U.S.C.
9 631) is amended by adding at the end the following new
10 subsection:

11 “(j) In complying with the statement of congressional
12 policy expressed in subsection (a)(2)(B), relating to foster-
13 ing the participation of small business concerns in the con-
14 tracting opportunities of the Government, each Federal
15 agency, to the maximum practicable extent, shall—

16 “(1) comply with the provisions of this Act ex-
17 pressing congressional intent to foster the participa-
18 tion of small business concerns as prime contractors,
19 especially section 15;

20 “(2) structure its contracting requirements to
21 facilitate competition by and among small business

1 concerns, taking all reasonable steps to eliminate ob-
2 stacles to their participation;

3 “(3) avoid the bundling of contract require-
4 ments that preclude small business participation as
5 prime contractors; and

6 “(4) comply with the provisions of this Act ex-
7 pressing congressional intent to foster the participa-
8 tion of small business concerns as subcontractors
9 (including suppliers), especially section 8(d).”.

10 (b) CONFORMING AMENDMENT.—Section 2(a) of the
11 Small Business Act (15 U.S.C. 631(a)) is amended—

12 (1) in the first sentence, by striking “The es-
13 sence” and inserting “(1) The essence”; and

14 (2) by striking the fifth sentence and inserting
15 the following:

16 “(2) It is the declared policy of the Congress that
17 the government should aid, counsel, assist, and protect,
18 in so far as is possible, the interests of small business con-
19 cerns in order to—

20 “(A) preserve free competitive enterprise;

21 “(B) insure that a fair proportion of the total
22 purchases for property or services (including con-
23 struction) be placed with small business concerns as
24 prime contractors or subcontractors (including sup-
25 pliers);

1 “(C) insure that a fair proportion of the total
2 sales of Government property be made to small busi-
3 ness concerns; and

4 “(D) maintain and strengthen the overall econ-
5 omy of the Nation.”.

6 **SEC. 3. DEFINITION OF CONTRACT BUNDLING.**

7 Section 3 of the Small Business Act (15 U.S.C. 632)
8 is amended by adding at the end the following new sub-
9 section:

10 “(o) For the purposes of this Act, the terms ‘contract
11 bundling’, ‘bundled contract’, and ‘bundling of contract re-
12 quirements’ mean the practice of consolidating two or
13 more procurement requirements of a type that were pre-
14 viously solicited and awarded as separate smaller contracts
15 into a single contract solicitation likely to be unsuitable
16 for award to a small business concern because of—

17 “(1) the diversity and size of the elements of
18 performance specified;

19 “(2) the aggregate dollar value of the antici-
20 pated award;

21 “(3) the geographical dispersion of the contract
22 performance sites; or

23 “(4) any combination of the factors described in
24 paragraphs (1), (2), and (3).”.

1 **SEC. 4. ASSESSING PROPOSED CONTRACT BUNDLING.**

2 (a) IN GENERAL.—Section 15(b) of the Small Busi-
3 ness Act (15 U.S.C. 644(b)) is amended to read as follows:

4 “(b)(1)(A) To the maximum extent practicable, pro-
5 curement strategies used by the various agencies having
6 contracting authority shall facilitate the maximum partici-
7 pation of small business concerns as prime contractors.

8 “(B) Whenever a proposed procurement strategy re-
9 flects a bundling of contract requirements, such proposed
10 procurement strategy shall—

11 “(i) identify specifically the benefits anticipated
12 from bundling the contract requirements;

13 “(ii) assess the specific impediments to partici-
14 pation by small business concerns as prime contrac-
15 tors and specify actions designed to maximize small
16 business participation as subcontractors (including
17 suppliers) at various tiers; and

18 “(iii) include a specific determination that the
19 anticipated benefits of the proposed bundled contract
20 justify its use.

21 “(2)(A) The Administration, acting through one of
22 its Procurement Center Representatives (or such other
23 employee of the Administration as may be designated), is
24 empowered to review for a period of 30 days a proposed
25 solicitation for compliance with the requirements of this
26 subsection and subsection (a). The 30-day review shall

1 occur concurrently with other reviews required prior to the
2 issuance of the solicitation.

3 “(B) Within 15 days after receipt from a procure-
4 ment activity of a Federal agency of any proposed contract
5 solicitation that in the opinion of the representative would
6 constitute a bundling of contract requirements, the rep-
7 resentative (or other designee of the Administration)
8 shall—

9 “(i) request the head of the procurement activ-
10 ity to furnish recommendations to modify the pro-
11 curement strategy and the proposed solicitation for
12 the purpose of increasing the probability of partici-
13 pation by small businesses as prime contractors; or

14 “(ii) recommend to the procurement activity an
15 alternative procurement strategy that would increase
16 the probability of participation by small businesses
17 as prime contractors.

18 “(C) Whenever the Procurement Center Representa-
19 tive and the head of the procurement activity fail to agree
20 to a revision of the procurement strategy (or the proposed
21 solicitation) under subparagraph (B), the matter may be
22 submitted by the Administrator to the head of the agency
23 in which the procurement activity is located for determina-
24 tion.

1 “(D) Any determination by an agency head to issue
2 a contract solicitation with no revision of the procurement
3 strategy (or the proposed solicitation) shall be supported
4 by findings and an assessment addressing the matters de-
5 scribed in subparagraph (E). Such determination and
6 findings shall be submitted to the Administrator.

7 “(E) The findings accompanying a determination
8 made pursuant to subparagraph (D) shall include—

9 “(i) the estimated benefits of the proposed bun-
10 dling of contract requirements, including improved
11 performance of programmatic objectives to be met
12 by the contract, savings in terms of acquisition costs
13 and contract administration costs, and how such es-
14 timated benefits were calculated;

15 “(ii) specific adverse impacts on the participa-
16 tion of small business concerns as prime contractors,
17 especially small business concerns that are perform-
18 ing (or have previously performed) contracts of the
19 type that are proposed for inclusion in the solicita-
20 tion for the bundled contract;

21 “(iii) specific actions to foster the participation
22 of small businesses in the performance of the bun-
23 dled contract as subcontractors (including suppliers)
24 at various tiers; and

1 “(iv) such other matters as the agency head
2 considers appropriate.

3 “(F) Unless otherwise authorized by the head of the
4 agency for urgent and compelling reasons, the solicitation
5 shall not be issued until the determination under subpara-
6 graph (D) has been made by such agency head and sub-
7 mitted to the Administrator.”.

8 (b) CONFORMING AMENDMENT.—Section 15(a) of
9 the Small Business Act (15 U.S.C. 644(a)) is amended
10 by striking the third, fourth, fifth, and sixth sentences.

11 (c) RESPONSIBILITIES OF AGENCY SMALL BUSINESS
12 ADVOCATES.—Section 15(k) of the Small Business Act
13 (15 U.S.C. 644(k)) is amended—

14 (1) by redesignating paragraphs (5), (6), (7),
15 (8), and (9) as paragraphs (6), (7), (8), (9), and
16 (10), respectively; and

17 (2) by adding after paragraph (4) the following
18 new paragraph (5):

19 “(5) identify and report on proposed solicita-
20 tions that represent bundling of contract require-
21 ments, and work with the agency acquisition officials
22 and the Administration to revise the procurement
23 strategies for such proposed solicitations to increase
24 the probability of participation by small businesses
25 as prime contractors, or to facilitate small business

1 participation as subcontractors and suppliers, if a
2 solicitation for a bundled contract is to be issued,”.

3 **SEC. 5. FOSTERING CONTRACTOR TEAMING.**

4 Section 15(b) of the Small Business Act (15 U.S.C.
5 644(b)), as amended by section 2, is further amended by
6 adding at the end the following new paragraph:

7 “(3)(A) A small business concern intending to
8 submit an offer for an anticipated bundled contract
9 may propose to the Administration for approval a
10 team of subcontractors meeting the requirements of
11 subparagraph (B) without regard to the require-
12 ments of subsection (o) or the regulations of the Ad-
13 ministration regarding findings of affiliation or con-
14 trol, either direct or indirect.

15 “(B) A subcontracting team proposed under
16 subparagraph (A) may include—

17 “(i) other small business concerns; and

18 “(ii) business concerns other than small
19 business concerns, whose aggregate participa-
20 tion may not represent more than 25 percent of
21 the anticipated total value of the contract.

22 “(C) Any subcontracting team proposed under
23 subparagraph (A) and approved by the Adminis-
24 trator shall be subject to such alternative require-

1 “(4)(A) Each solicitation for the award of a contract
2 (or subcontract) with an anticipated value of \$1,000,000,
3 in the case of a contract for construction (including repair,
4 alteration, or demolition of existing construction) or
5 \$500,000, in the case of a contract for all other types of
6 services or supplies, that can reasonably be expected to
7 offer opportunities for subcontracting in the business
8 judgment of the contracting officer, shall—

9 “(i) in the case of a contract to be awarded
10 using competitive procedures, include solicitation
11 provisions described in subparagraph (B);

12 “(ii) in the case of a contract to be awarded
13 using procedures other than competitive procedures,
14 require submission and acceptance of a subcontract-
15 ing plan pursuant to subparagraph (C); and

16 “(iii) in the case of a subcontract award, re-
17 quire submission and acceptance of a subcontracting
18 plan pursuant to subparagraph (D).

19 “(B) With respect to subcontract participation by the
20 various types of small business concerns listed in para-
21 graph (1), the solicitation shall—

22 “(i) specify, whenever practicable, minimum
23 percentages for subcontract participation by the var-
24 ious types of small business concerns listed in para-
25 graph (1), determined in the exercise of business

1 judgment by the contracting officer considering the
2 matters described in subparagraph (F)(iii), that
3 must be met for an offer to be considered respon-
4 sive;

5 “(ii) assign a weight of not less than the nu-
6 merical equivalent of 5 percent of the total of all
7 evaluation factors to a contract award evaluation
8 factor that recognizes incrementally higher sub-
9 contract participation rates in excess of the mini-
10 mum percentages, if any;

11 “(iii) require the successful offeror to submit a
12 subcontracting plan that incorporates the informa-
13 tion prescribed in paragraph (6); and

14 “(iv) assign a significant weight in the evalua-
15 tion of past performance by offerors in attaining
16 subcontract participation goals.

17 “(C)(i) The apparent successful offeror for a contract
18 to be awarded using procedures other than competitive
19 procedures shall negotiate with the contracting officer—

20 “(I) separate goals for subcontract participation
21 by the various types of small business concerns list-
22 ed in paragraph (1); and

23 “(II) a plan for the attainment of the goals that
24 incorporates the information prescribed in paragraph
25 (6).

1 “(ii) The goals and plan shall reflect the maximum
2 practicable opportunity for participation of small business
3 concerns in the performance of the contract, considering
4 the matters described in subparagraph (F)(iii). If, within
5 the time limits prescribed in the Federal Acquisition Regu-
6 lation, the apparent successful offeror fails to negotiate
7 such goals and subcontracting plan, such offeror shall be
8 ineligible for award of the contract.

9 “(D) An apparent subcontract awardee shall nego-
10 tiate with the prime contractor (or higher-tier subcontrac-
11 tor) a goal for the participation of the various types of
12 small business concerns listed in paragraph (1), and a
13 plan for the attainment of those goals which incorporates
14 the information prescribed in paragraph (6). Such goals
15 and plan shall reflect the maximum practicable oppor-
16 tunity for the participation of such small business con-
17 cerns in the performance of the contract, considering the
18 matters described in subparagraph (F)(iii).”.

19 (b) CONFORMING AMENDMENTS.—Section 8(d) of
20 the Small Business Act (15 U.S.C. 637(d)) is amended
21 as follows:

22 (1) Paragraph (5) is amended to read as fol-
23 lows:

24 “(5) **【Reserved.】**”.

25 (2) Paragraph (6) is amended—

1 (A) in the matter preceding subparagraph
2 (A), by striking “or (5)”; and

3 (B) in subparagraph (D), by striking “or
4 (5)”.

5 (3) Paragraph (7) is amended by striking “(4),
6 (5),” and inserting “(4)”.

7 (4) Paragraph (10) is amended—

8 (A) in the matter preceding subparagraph
9 (A), by striking “(4), (5),” and inserting “(4)”;
10 and

11 (B) in subparagraph (B), by striking
12 “paragraphs (4) and (5)” and inserting “para-
13 graph (4)”.

14 **SEC. 8. IMPROVED NOTICE OF SUBCONTRACTING OPPOR-**
15 **TUNITIES.**

16 (a) USE OF THE COMMERCE BUSINESS DAILY AU-
17 THORIZED.—Section 8 of the Small Business Act (15
18 U.S.C. 637) is amended by adding at the end the following
19 new subsection:

20 “(k) NOTICES OF SUBCONTRACTING OPPORTUNI-
21 TIES.—

22 “(1) IN GENERAL.—Notices of subcontracting
23 opportunities may be submitted for publication in
24 the Commerce Business Daily by—

1 “(A) a business concern awarded a con-
2 tract by an executive agency subject to sub-
3 section (e)(1)(C); and

4 “(B) a business concern which is a sub-
5 contractor or supplier (at any tier) to such con-
6 tractor having a subcontracting opportunity in
7 excess of \$10,000.

8 “(2) CONTENTS OF NOTICE.—The notice of a
9 subcontracting opportunity shall include—

10 “(A) a description of the business oppor-
11 tunity that is comparable to the description
12 specified in paragraphs (1), (2), (3), and (4) of
13 subsection (f); and

14 “(B) the due date for receipt of offers.”.

15 (b) REGULATIONS REQUIRED.—The Federal Acquisi-
16 tion Regulation shall be amended to provide uniform im-
17 plementation of the amendments made by this section.

18 (c) CONFORMING AMENDMENT.—Section 8(e)(1)(C)
19 of the Small Business Act (15 U.S.C. 637(e)(1)(C)) is
20 amended by striking “\$25,000” each place it appears and
21 inserting “\$100,000”.

22 **SEC. 9. DEADLINES FOR ISSUANCE OF REGULATIONS.**

23 (a) PROPOSED REGULATIONS.—Proposed amend-
24 ments to the Federal Acquisition Regulation or proposed
25 Small Business Administration regulations shall be pub-

1 lished not later than 120 days after the date of enactment
2 of this Act for the purpose of obtaining public comment
3 pursuant to section 22 of the Office of Federal Procure-
4 ment Policy Act (41 U.S.C. 418b) or chapter 5 of title
5 5, United States Code, as appropriate. The public shall
6 be afforded not less than 60 days to submit comments.

7 (b) FINAL REGULATIONS.—Final regulations shall be
8 published not later than 270 days after the date of enact-
9 ment of this Act. The effective date for such regulations
10 shall be at least 30 days after the date of publication.

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