

SMALL BUSINESS ADVOCATE ACT OF 2012

DECEMBER 21, 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. 3851]

The Committee on Small Business, to whom was referred the bill (H.R. 3851) to amend the Small Business Act with respect to Offices of Small and Disadvantaged Business Utilization, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

	Page
I. Amendment	1
II. Purpose of the Bill and Summary	3
III. Background and the Need for Legislation	4
IV. Hearings	8
V. Committee Consideration	8
VI. Committee Votes	9
VII. Section-by-Section Analysis of H.R. 3851	11
VIII. Unfunded Mandates	15
IX. New Budget Authority, Entitlement Authority, and Tax Expenditures	15
X. Oversight Findings	15
XI. Statement of Constitutional Authority	15
XII. Congressional Accountability Act	15
XIII. Federal Advisory Committee Statement	15
XIV. Statement of No Earmarks	15
XV. Performance Goals and Objectives	16
XVI. Changes in Existing Law Made by the Bill, as Reported	16

I. AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Small Business Advocate Act of 2012”.

SEC. 2. OFFICES OF SMALL AND DISADVANTAGED BUSINESS UTILIZATION.

(a) **APPOINTMENT AND POSITION OF DIRECTOR.**—Section 15(k)(2) of the Small Business Act (15 U.S.C. 644(k)(2)) is amended by striking “such agency,” and inserting “such agency to a position that is a Senior Executive Service position (as such term is defined under section 3132(a) of title 5, United States Code), except that, for any agency in which the positions of Chief Acquisition Officer and senior procurement executive (as such terms are defined under section 44(a) of this Act) are not Senior Executive Service positions, the Director of Small and Disadvantaged Business Utilization may be appointed to a position compensated at not less than the minimum rate of basic pay payable for grade GS–15 of the General Schedule under section 5332 of such title (including comparability payments under section 5304 of such title);”.

(b) **PERFORMANCE APPRAISALS.**—Section 15(k)(3) of such Act (15 U.S.C. 644(k)(3)) is amended—

(1) by striking “be responsible only to, and report directly to, the head” and inserting “shall be responsible only to (including with respect to performance appraisals), and report directly and exclusively to, the head”; and

(2) by striking “be responsible only to, and report directly to, such Secretary” and inserting “be responsible only to (including with respect to performance appraisals), and report directly and exclusively to, such Secretary”.

(c) **SMALL BUSINESS TECHNICAL ADVISERS.**—Section 15(k)(8)(B) of such Act (15 U.S.C. 644(k)(8)(B)) is amended—

(1) by striking “and 15 of this Act,” and inserting “, 15, and 44 of this Act;”; and

(2) by inserting after “of this Act” the following: “(giving priority in assigning to small business that are in metropolitan statistical areas for which the unemployment rate is higher than the national average unemployment rate for the United States)”.

(d) **ADDITIONAL REQUIREMENTS.**—Section 15(k) of such Act (15 U.S.C. 644(k)) is amended by inserting after paragraph (10) the following:

“(11) shall review and advise such agency on any decision to convert an activity performed by a small business concern to an activity performed by a Federal employee;

“(12) shall provide to the Chief Acquisition Officer and senior procurement executive of such agency advice and comments on acquisition strategies, market research, and justifications related to section 44 of this Act;

“(13) may provide training to small business concerns and contract specialists, except that such training may only be provided to the extent that the training does not interfere with the Director carrying out other responsibilities under this subsection;

“(14) shall carry out exclusively the duties enumerated in this Act, and shall, while the Director, not hold any other title, position, or responsibility, except as necessary to carry out responsibilities under this subsection; and

“(15) shall submit, each fiscal year, to the Committee on Small Business of the House of Representatives and the Committee on Small Business and Entrepreneurship of the Senate a report describing—

“(A) the training provided by the Director under paragraph (13) in the most recently completed fiscal year;

“(B) the percentage of the budget of the Director used for such training in the most recently completed fiscal year; and

“(C) the percentage of the budget of the Director used for travel in the most recently completed fiscal year.”.

(e) **REQUIREMENT OF CONTRACTING EXPERIENCE FOR OSDBU DIRECTOR.**—Section 15(k) of the Small Business Act (15 U.S.C. 644(k)), as amended by this Act, is further amended, in the matter preceding paragraph (1), by striking “who shall” and insert the following: “, with at least 10 years of experience serving in any combination of the following roles: federal contracting officer, small business technical advisor, contracts administrator for federal government contracts, attorney specializing in federal procurement law, small business liaison officer, officer or employee who managed federal government contracts for a small business, or individual whose primary responsibilities were for the functions and duties of section 8, 15 or 44 of this Act. Such officer or employee”.

(f) **TECHNICAL AMENDMENTS.**—Section 15(k) of such Act (15 U.S.C. 644(k)), as amended, is further amended—

(1) in paragraph (1)—

(A) by striking “be known” and inserting “shall be known”; and

(B) by striking “such agency,” and inserting “such agency;”;

(2) in paragraph (2) by striking “be appointed by” and inserting “shall be appointed by”;

- (3) in paragraph (3)—
 - (A) by striking “director” and inserting “Director”; and
 - (B) by striking “Secretary’s designee,” and inserting “Secretary’s designee;”;
- (4) in paragraph (4)—
 - (A) by striking “be responsible” and inserting “shall be responsible”; and
 - (B) by striking “such agency,” and inserting “such agency;”;
- (5) in paragraph (5) by striking “identify proposed” and inserting “shall identify proposed”;
- (6) in paragraph (6) by striking “assist small” and inserting “shall assist small”;
- (7) in paragraph (7)—
 - (A) by striking “have supervisory” and inserting “shall have supervisory”; and
 - (B) by striking “this Act,” and inserting “this Act;”;
- (8) in paragraph (8)—
 - (A) by striking “assign a” and inserting “shall assign a”; and
 - (B) in subparagraph (A), by striking “the activity, and” and inserting “the activity; and”;
- (9) in paragraph (9)—
 - (A) by striking “cooperate, and” and inserting “shall cooperate, and”; and
 - (B) by striking “subsection, and” and inserting “subsection;”; and
- (10) in paragraph (10)—
 - (A) by striking “make recommendations” and inserting “shall make recommendations”;
 - (B) by striking “subsection (a), or section” and inserting “subsection (a), section”;
 - (C) by striking “Act or section 2323” and inserting “Act, or section 2323”;
 - (D) by striking “Code. Such recommendations shall” and inserting “Code, which shall”; and
 - (E) by striking “contract file.” and inserting “contract file;”.

SEC. 3. SMALL BUSINESS PROCUREMENT ADVISORY COUNCIL.

(a) DUTIES.—Section 7104(b) of the Federal Acquisition Streamlining Act of 1994 (15 U.S.C. 644 note) is amended—

- (1) in paragraph (1) by striking “and” at the end;
- (2) in paragraph (2) by striking “authorities.” and inserting “authorities;”; and
- (3) by adding at the end the following:

“(3) to conduct reviews of each Office of Small and Disadvantaged Business Utilization established under section 15(k) of the Small Business Act (15 U.S.C. 644(k)) to determine the compliance of each Office with requirements under such section;

“(4) to identify best practices for maximizing small business utilization in Federal contracting that may be implemented by Federal agencies having procurement powers; and

“(5) to submit, annually, to the Committee on Small Business of the House of Representatives and the Committee on Small Business and Entrepreneurship of the Senate a report describing—

“(A) the comments submitted under paragraph (2) during the 1-year period ending on the date on which the report is submitted, including any outcomes related to the comments;

“(B) the results of reviews conducted under paragraph (3) during such 1-year period; and

“(C) best practices identified under paragraph (4) during such 1-year period.”.

(b) MEMBERSHIP.—Section 7104(c)(3) of such Act (15 U.S.C. 644 note) is amended by striking “(established under section 15(k) of the Small Business Act (15 U.S.C. 644(k))”.

(c) CHAIRMAN.—Section 7104(d) of such Act (15 U.S.C. 644 note) is amended by inserting after “Small Business Administration” the following: “(or the designee of the Administrator)”.

II. PURPOSE AND BILL SUMMARY

H.R. 3851, the “Small Business Advocate Act of 2012,” amends the Small Business Act (the Act) in order to improve the effectiveness of the Offices of Small and Disadvantaged Business Utilization (OSDBUs) within each federal agency. In turn, this should in-

crease prime contracting and subcontracting opportunities for small businesses.

Ultimately, more effective OSDBUs will ensure that the goals set forth in H.R. 3850 will be achieved. Small business contractors bring necessary competition to the government marketplace, add innovation, and create new jobs. Despite these benefits to the government and taxpayers, there are significant barriers to entry for small businesses in the federal marketplace that favor large businesses. Congress created the OSDBUs to help break down these barriers. OSDBUs prevent contract bundling, ensure prompt payment, and increase the use of small businesses as prime contractors. However, the Committee's own investigations and reports by the Government Accountability Office (GAO) have highlighted areas in the law that need to be addressed if the OSDBUs are to be effective advocates for small businesses.

H.R. 3851 increases the effectiveness of the OSDBUs by improving the leadership of the offices, expanding the responsibilities of the OSDBUs, and improving the functionality of the Small Business Procurement Advisory Council (SBPAC). The bill places the directors on par with the senior procurement officials within the agency, so that they may negotiate as equals. H.R. 3851 requires that the directors have a base level of experience in federal procurement so that they will be qualified advocates. The bill also requires that the job of OSDBU director be treated as a full-time position, rather than being just an additional title assigned to the Chief Financial Officer, the Chief Acquisition Officer or some other official. This will ensure that top level attention is being paid to small business participation in federal procurement.

The bill expands the responsibilities of the OSDBUs to reflect changes in procurement law. OSDBUs will be required to proffer their opinion on the conversion of work from performance by a small business to work performed by federal employees. H.R. 3851 also requires that the OSDBUs advise and comment on acquisition strategies, including those resulting in contract bundling and consolidation. The OSDBUs are allowed to provide training to small businesses and contract specialists, as long as it does not interfere with their core advocacy responsibilities.

Finally, the bill improves the way the OSDBUs work together by reforming the SBPAC. Pursuant to the revisions, the OSDBUs would regularly assess each other's compliance with the requirements of the Act. Reformation of the SBPAC will help ensure that OSDBUs develop best practices for increasing small business participation in federal procurement and strengthen their ability to advocate on behalf of small businesses in the development of federal acquisition regulations.

III. BACKGROUND AND NEED FOR LEGISLATION

A. ROLE OF DIRECTOR

Prior to 1978, small business advocates within contracting agencies lacked the stature to truly promote small business utilization. Indeed, the Committee on Small Business of the Senate found that "many are located in the lower echelons of the bureaucracy and, therefore, are unable to advocate or effectively assist in the pro-

curement of contracts for small business.”¹ Thus, in 1978, section 15(k) of Act was added to require that all federal agencies with procurement powers establish an OSDBU to advocate for small businesses.² Section 15(k)(3) requires that OSDBU directors, with the exception of the Department of Defense, “be responsible only to, and report directly to, the head of such agency or to the deputy of such head.”³ To explain this choice, the Committee on Small Business of the Senate stated:

The committee believes that small business procurement officers must have direct access to top level agency policymakers to improve their effectiveness as small business advocates. These amendments thus establish the position of Director, [OSDBU] in all federal procuring agencies. These directors would report directly to the agency head or an official . . . one level of responsibility lower than the agency head. Creation of these offices is central to the goal of the Small Business Act which directs that small businesses receive a fair portion of Federal procurement through vigorous action on the part of Federal departments and agencies.⁴

More than 30 years after Congress mandated direct reports to the head or deputy of the agency, OSDBUS frequently remain mired in the bowels of the bureaucracy. The GAO examined 16 agencies—seven agencies that each procured more than \$15 billion in goods and services in 2009, and nine that GAO had previously reported had reporting schemes that were not complying with the Act.⁵ Of these sixteen agencies, seven were found to be noncompliant—the Departments of Agriculture, Commerce, Interior, Justice, State and Treasury and the Social Security Administration.⁶ These same seven agencies were also found to be noncompliant in 2003.⁷

Of these agencies, the OSDBU directors at the Departments of Commerce, Interior, and Justice, and the Social Security Administration reported to lower level officials. These officials were also the Chief Acquisition Officers (CAOs)⁸ or their deputies within the agencies. At the remaining three agencies, the OSDBU director in title and the OSDBU director in fact varied.⁹ In each case, the CAO was also the official OSDBU,¹⁰ with a lower level employee

¹ S. Rep. No. 95-1070, at 18 (1978).

² Act of October 24, 1978, Pub. L. No. 95-507, ch. 3, § 221, 92 Stat. 1757, 1771.

³ 15 U.S.C. § 644(k)(3).

⁴ S. Rep. No. 95-1070 at 18.

⁵ *Id.* at 3. The seven \$15 billion agencies were the Defense Logistics Agency, NASA, and the Departments of the Army, Air Force, Navy, Energy, and Health and Human Services. The additional nine agencies were the Environmental Protection Agency, Social Security Administration, and the Departments of Education, Agriculture, Commerce, Justice, Interior and Treasury. DOI, and Treasury.

⁶ *Id.*

⁷ GAO, *Small and Disadvantaged Businesses: Some Agencies’ Advocates Do Not Report to the Required Management Level* (2003).

⁸ CAOs are political appointees and the most senior official within each agency responsible for the acquisition activities programs. The CAO may be the Senior Procurement Executive (SPE) of the agency, or has direct responsibility of that individual. By statute, CAOs must be members of the Senior Executive Service or Senate-confirmed. Per 41 U.S.C. 1702, SPEs are responsible for management direction of the procurement system of the executive agency, including implementation of the unique procurement policies, regulations, and standards of the executive agency.

⁹ Small Business Contracting at 48.

¹⁰ The CAOC Council Membership List is available at <http://www.caoc.gov/index.cfm?function=membersall>.

as the “de facto OSDBU.”¹¹ This creates a significant conflict of interest between the CAO’s support for a particular acquisition strategy and the OSDBU’s advocacy for a pro-small business agenda for a particular procurement.¹² This conflict is exacerbated when the OSDBU must appeal procurement in an effort to garner more small business participation. Such an appeal has little chance of success if there is not a division in authorities between the OSDBU director and the CAO.

After the GAO report was released, the Chairman of the Subcommittee on Contracting and the Workforce, Mick Mulvaney, sent letters to each of the noncompliant agencies asking the Secretaries for their plans to bring the departments into compliance with the Act.¹³ The Social Security Administration promptly changed its reporting structure, but each of the other agency responses asserted that the agencies were indeed in compliance with the Act. The Secretaries or Deputy Secretaries were then invited to appear before the Subcommittee to explain why they believed they were in compliance and all declined to appear. Consequently, on October 20, 2011, the Committee issued subpoenas to compel the attendance of the Deputy Secretaries for the Department of Agriculture, State, and Treasury, as well as for the Deputy Attorney General.¹⁴

Throughout this process, the Committee was routinely informed by the agencies that the OSDBU director need not personally perform the function set out in § 15(k). Additionally, the agencies asserted that it was inappropriate to have employees who were not members of the Senior Executive Service¹⁵ reporting directly to the Deputy Secretary of an agency. Given the recalcitrance by the agencies, the Committee had no alternative but to legislate changes. H.R. 3851 is the result and clarifies the duties and reporting structure of the OSDBU to eliminate confusion created by existing agency interpretations of § 15(k) of the Act.

¹¹ Small Business Contracting at 48.

¹² Meeting this goal means limiting competition through the programs of the Act, for which the director is specifically responsible under section 15(k)(4). Simultaneously, as CAO, the individual was required to have acquisition management as his primary responsibility, and shall “(2) increasing the use of full and open competition in the acquisition of property and services by the executive agency.” 41 U.S.C. § 414(b)(2). Thus, having the same individual fill both roles left the official OSDBU charged with both increasing and decreasing the use of set-asides—a mathematical impossibility—and with being a check on himself. Alternatively, if the OSDBU director was a lower level official, the individual invariably reported to and was reviewed by the CAO. Thus, the person responsible for increasing the use of set-aside contracts was overseen by the person charged with decreasing the use of set-aside contracts. This also meant that any protests the OSDBU director made of contracting decisions went not to the Deputy Secretary but to the CAO—the very individual ultimately responsible for making the contracting decisions. Such a reporting structure is untenable. The Committee leaves the question of whether officials serving as CAO actually have acquisition management as their primary function to the Committee on Oversight and Government Reform.

¹³ Copies of the letters are on file with the Committee.

¹⁴ Copies of the subpoenas are on file with the Committee. Commerce and Interior were not subpoenaed at that time, because Commerce had an acting Secretary and acting Deputy Secretary, and Interior had offered to change its reporting structure. Interior has since changed its reporting structure to mirror the reporting structures that GAO found noncompliant at Agriculture, State, and Treasury. The Subcommittee is continuing to work with these agencies to resolve their reporting deficiencies, and may hold future hearings with these witnesses.

¹⁵ Members of the Senior Executive Service (SES), are federal employees serving in political and career managerial, supervisory, and policy positions classified above civil service’s General Schedule grade 15 or equivalent positions in the Executive Branch. 5 U.S.C. § 3132(a). For 2012, these positions pay a base salary between \$119,554 and \$179,700, and with bonuses may receive compensation up to \$230,700. *Id.* at § 5307.

B. ROLE OF OSDBU

The OSDBU is responsible for implementation and execution of contracting assistance-related functions and duties in the Act. This includes the small business set-aside program and other socio-economic contracting programs, as well as assisting small businesses in obtaining payments and late payment interest from their agency or from prime contractors. The primary focus of the OSDBU should be advocating for small business contracts, and “the failure of the contracting officer to accept any such recommendations shall be documented and included within the appropriate contract file.”¹⁶

The OSDBUs are specifically charged with fighting unjustified bundling. Contract bundling occurs when two or more requirements of a type that would be suitable for award to small business are consolidated into a larger contract requirement that is no longer suitable for award to small business. Due to concerns regarding limiting competition and excluding small business participation, the Act has very specific procedures agencies must follow in order to justify bundling, and the OSDBUs are a critical part of this process. Specifically, the Act directs them to “identify proposed solicitations that involve significant bundling of contract requirements.”¹⁷ When bundled requirements are identified, the OSDBU is to “work with the agency acquisition officials and the [SBA] to revise the procurement strategies for such proposed solicitations where appropriate to increase the probability of participation by small businesses as prime contractors, or to facilitate small business participation as subcontractors and suppliers.”¹⁸

Given the scope of their task, the Act grants the OSDBUs resources and authority, and tasks them to cooperate with SBA. This includes having supervisory authority over personnel carrying out the functions of the Small Business Act.¹⁹ To assist SBA OSDBUs are required to assign small business technical advisors to each Small Business Administration (SBA) Procurement Center Representative (PCR) and the OSDBUs are directed to “cooperate, and consult on a regular basis, with the [SBA] with respect to carrying out the functions and duties” vested in them by the Act.²⁰

In addition to the responsibilities mandated by statute, OSDBUS, through their own initiative, have taken on additional duties in an effort to meet with the evolving nature of federal procurement.²¹

Additionally, while the input of the OSDBU on proposed solicitations, as authorized by section 15(k)(5) of the Act, remains useful, it is simply not as relevant as it was in 1978. Now, by the time an acquisition reaches the proposed solicitation stage, many months if not years of work have taken place. Changes to the proposed solicitation in these cases carry with them very real costs and delays. However, by involving the OSDBU in the initial acqui-

¹⁶*Id.* at § 644.

¹⁷*Id.* at § 644(k)(5).

¹⁸*Id.* at § 644(k)(5).

¹⁹*Id.* at § 644(k)(7).

²⁰*Id.* at § 644(k)(9).

²¹Since the creation of the OSDBUs, there have been three major pieces of federal procurement legislation: 1) the Competition in Contracting Act; The Federal Acquisition Reform Act, and the Federal Acquisition Streamlining Act. In addition, the Federal Acquisition Regulation was promulgated in 1984. Finally, federal procurement has grown from less than \$100 billion annually to \$538 billion in FY 2010.

sition planning process, the Committee believes that OSDBU involvement will be more collaborative and productive.

C. ROLE OF THE SMALL BUSINESS PROCUREMENT ADVISORY COUNCIL

Section 7104 of the Federal Acquisition Streamlining Act of 1994 created an interagency SBPAC to develop positions on proposed procurement regulations affecting the small business community and submit comments reflecting such positions to appropriate regulatory authorities. The SBPAC is chaired by SBA, with each of the OSDBUs and the Administrator of the Minority Business Development Agency. Unfortunately, the SBPAC has never submitted comments on proposed acquisition regulations. Its meetings are of such little value that the OSDBUs have formed their own OSDBU council independent of SBPAC. The OSDBU Council has no official standing or authorization, yet has its own website and hosts an annual conference—more than the SBPAC has ever accomplished. However, even the OSDBU Council does not comment on regulations. H.R. 3851 imposes new requirements on the SBPAC to ensure that it achieves the original intent of Congress—to be an effective advocate on behalf of small businesses in the federal procurement regulatory arena.

IV. HEARINGS

In the 112th Congress, the Subcommittee on Contracting and the Workforce met on September 15, 2011, for a hearing titled “Helping Small Businesses Compete: Challenges within Programs Designed to Assist Small Contractors.” At the hearing, witnesses testified that federal agencies are not in compliance with section 15(k) of the Small Business Act.

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. 3851 reported, as amended, to the House by a Roll Call vote of 11 yeas and 7 nos at 1:47 pm. During the markup, two amendments were offered and adopted. 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 Chairman Graves (R–MO) requires the OSDBU director have at least 10 years of prior relevant experience. The amendment was adopted by voice vote at 1:42 pm.

Amendment Number Two filed by Ms. Hahn (D–CA) requires that the small business specialist assigned to assist the Procurement Center Representatives give priority to assisting small businesses located in metropolitan statistical areas with unemployment rates that are higher than the national average. The amendment was adopted by voice vote at 1:43 pm.

H.R. 3851 was ordered reported out of Committee by a Roll Call vote of 11 yeas and 7 nos at 1:47 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.

AMENDMENT TO H.R. 3851 OFFERED BY MR. GRAVES OF MISSOURI

Page 4, insert after line 19 the following (and redesignate provisions accordingly):

(e) REQUIREMENT OF CONTRACTING EXPERIENCE FOR OSDBU DIRECTOR.—Section 15(k) of the Small Business Act (15 U.S.C. 644(k)), as amended by this Act, is further amended, in the matter preceding paragraph (1), by striking “who shall” and insert the following: “, with at least 10 years of experience serving in any combination of the following roles: federal contracting officer, small business technical advisor, contracts administrator for federal government contracts, attorney specializing in federal procurement law, small business liaison officer, officer or employee who managed federal government contracts for a small business, or individual whose primary responsibilities were for the functions and duties of sections 8, 15 or 44 of this Act. Such officer or employee shall”.

AMENDMENT TO H.R. 3851 OFFERED BY MS. HAHN OF CALIFORNIA

Page 3, beginning on line 4, strike “Section (15)(k)(8)(B)” and insert the following:

(1) EXPANSION OF ROLE.—Section (15)(k)(8)(B)

Page 3, line 6, strike “by striking” and insert the following: “—

(1) by striking

Page 3, insert after line 7 the following:

(2) by inserting after “of this Act” the following: “(giving priority in assigning to small business that are in metropolitan statistical areas for which the unemployment rate is higher than the national average unemployment rate for the United States)”.

COMMITTEE ON SMALL BUSINESS

HR 3851
DATE: 3/7/2012
ROLL CALL:
AMENDMENT NUMBER:
VOTE: 11 (AYE) 7 (NO)

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. GRAVES, Chairman	X			
Dr. BARTLETT				X
Mr. CHABOT				X
Mr. KING				X
Mr. COFFMAN	X			
Mr. MULVANEY	X			
Mr. TIPTON				X
Mr. LANDRY				X
Ms. HERRERA BEUTLER				X
Mr. WEST	X			
Mrs. ELLMERS	X			
Mr. WALSH				X
Mr. BARLETTA	X			
Mr. HANNA				X
Mr. SCHILLING	X			
Ms. VELAZQUEZ, Ranking Member	X			
Mr. SCHRADER	X			
Mr. CRITZ	X			
Ms. CLARKE	X			
Ms. CHU		X		
Mr. CICILLINE		X		
Mr. RICHMOND		X		
Ms. HAHN		X		
Mr. PETERS		X		
Mr. OWENS		X		
Mr. KEATING		X		
TOTALS	11	7		

VII. SECTION-BY-SECTION ANALYSIS OF H.R. 3851 AS AMENDED

Section 1. Short Title

Section 1 designates the bill as the “Small Business Advocate Act of 2012.”

*Section 2. Offices of Small and Disadvantaged Business Utilization**Subsection (a)—Appointment and Position of Director*

In 1978, section 15(k) of the Small Business Act (the Act) established an Office of Small and Disadvantaged Business Utilization within “each Federal agency having procurement powers.”²² While the nomenclature of these offices varies slightly from agency to agency, both the offices and the heads of the offices are collectively referred to as OSDBUs. Each OSDBU is to be appointed by the head of the agency, and, with the exception of the Department of Defense, “be responsible only to, and report directly to, the head of such agency or to the deputy of such head.”²³

While it was clearly the intention of the Small Business Act that the OSDBU be a very senior executive of the contracting agency, in some agencies the OSDBU is a mid-level employee, far outranked by the Chief Acquisition Officer (CAO) or Senior Procurement Executive (SPE). Since the OSDBU is supposed to be a check on the procurement activities of the CAO and OSDBU, this de facto demotion has limited the OSDBUs effectiveness.

Therefore, subsection (a) amends the Act to ensure that the OSDBU is a member of the Senior Executive Service—the classification of federal employees serving in political and career managerial, supervisory, and policy positions classified above civil service’s General Schedule grade 15 or equivalent positions in the Executive Branch.²⁴ This action will put the OSDBU back on par with the CAO.²⁵ However, should an agency not have a CAO, the OSDBU is instead granted status as a General Schedule grade 15 employee. The Committee believes that the language ensures OSDBUs will have an appropriate stature depending upon the agencies in which they are located.

Subsection (b)—Performance Appraisals

As previously mentioned, the OSDBU is required to report directly and exclusively to the head of the agency or the deputy of such head. However, through investigations related to the Subcommittee on Contracting and Workforce’s investigations into the role of the OSDBU, the Committee has become aware that in several agencies the OSDBU’s performance appraisals are conducted by the CAO or another official. Therefore, this bill clarifies that the requirements of section 15(k)(3) mean that the OSDBU’s performance appraisals must also be conducted by the head or deputy head of the agency. This requirement avoids the potential conflict of the OSDBU challenging the decisions of the individual that issues the OSDBU’s performance appraisal.

²² 15 U.S.C. § 644(k).

²³ *Id.* at § 644(k)(2)–(3).

²⁴ 5 U.S.C. § 3132(a).

²⁵ Pursuant to 41 U.S.C. § 1702 only agencies required by 31 U.S.C. 901(b)(2)(C) to have Chief Financial Officers are required to have CAOs.

Subsection (c)—Small Business Technical Advisers

Small business technical advisors are OSDBU employees assigned to assist the SBA's Procurement Center Representatives in section 15(k)(8)(B) of the Act. Currently, the OSDBUs are assigned to provide assistance consistent with sections 8 and 15 of the Act. However, when contract consolidation was added to section 44 of the Act, this reference was not updated even though the technical advisors and OSDBUs have responsibilities related to contract bundling and consolidation. Therefore, paragraph (1) updates section 15(k)(8) to reference section 44 and ensures that OSDBUs are involved in contract consolidation and bundling matters.

The bill also directs that the small business technical advisers prioritize assistance to small businesses in metropolitan statistical areas (MSAs) that have an unemployment rate higher than the national average. In section 3(p)(4) of the Act, MSAs are given the meaning assigned in section 143(k)(2)(B) of the Internal Revenue Code of 1986. As small business technical advisors currently provide assistance to any business requesting it including businesses that are not small, the Committee expects that this provision will not affect the delivery of assistance to any small business, but will instead remind the OSDBU offices of the connection between small business contracting and job creation.

Subsection (d)—Additional Requirements

H.R. 3851 adds five more duties on the OSDBUs. While the Committee recognizes that the OSDBUs have limited resources, the additional responsibilities are vital to ensuring maximum practicable opportunity is provided to small businesses.

First, a new paragraph (11) is added which requires that the OSDBU review and advise the agency on any insourcing decisions pertaining to small businesses. The OSDBU does not have the right to veto these activities; nevertheless their intercession may mitigate adverse impacts on small businesses by, among other things, prioritizing insourcing of contracts held by other-than-small businesses. This is in keeping with practice at some agencies, such as the Department of Homeland Security, and with guidance issued by the Office of Federal Procurement Policy.²⁶ While some may argue that this is an effort to have a government employee advocate against insourcing, this is only an effort to assign an advocate for small businesses in general within the process, much as a government employee was assigned responsibility for being the advocate for other federal employees under Office of Management and Budget Circular A-76 proceedings.²⁷

The bill also adds a new paragraph (12) which requires that the OSDBU advise the CAO and SPE with advice and comments on acquisition strategies, market research, and bundling or consolidation justification. This expanded role should promote better acquisition planning and market research so that contracting personnel are

²⁶ Administrator of the Office of Federal Procurement Policy (OFPP) directed that when insourcing "the agency should involve its small business representative in the same manner as it would in working with the acquisition and program office in evaluating opportunities for small businesses for new work." OFPP, Increasing Small Business Participation in Federal Contracting 15 (2011) directing that

²⁷ Furthermore, it is not substantially different than the role the Chief Counsel for Advocacy plays in arguing that regulations should be modified or halted if they have adverse consequences on small businesses. 15 U.S.C. § 634c.

cognizant of the roles and capabilities of small business throughout the acquisition process.

Paragraph (13) allows the OSDBU to provide training. Recent GAO reports indicate that this is a primary function of the OSDBU.²⁸ The Committee supports the initiative of the OSDBUs and codifies it in this paragraph. However, given that funding is provided to Procurement Technical Assistance Centers, Small Business Development Centers, the Federal Acquisition Institute, Defense Acquisition University and others to provide training to small businesses and contracting personnel, the bill limits the provision of training by stating that it cannot interfere with the other core functions of the OSDBU. The Committee intends that the priorities of the OSDBUs should be to advocate on behalf of small business not educate them or agencies on small business contracting programs.

Currently, many of the OSDBU directors concurrently serve as CAO, SPE, Chief Financial Officer, or in other roles. This presents a conflict of interest, since CAO is statutorily responsible for “increasing the use of full and open competition” while the OSDBU is responsible for increasing the use of small businesses.²⁹ Furthermore, it deprives small businesses of a dedicated advocate because a lower level employee, one that does not report to the agency head or deputy, is assigned the actual OSDBU responsibilities. Therefore, paragraph (14) requires that the Director carry out only the duties enumerated in § 15(k).

The Committee has heard concerns that some OSDBUs simply go from conference to conference, and are rarely available to assist small businesses or review acquisition strategies. Paragraph (15) requires the OSDBU to report on the amount of training they provide and how much of the OSDBU budget goes to training and travel. As the authority of the OSDBU is increased, and the OSDBU’s rank is similarly increased, the Committee intends that the OSDBU use this authority to advance opportunities by small business concerns in the federal procurement arena through active and dedicated participation in the planning and execution of the agency’s procurement strategies.

Subsection (e)—Requirement of Contracting Experience for OSDBU Director.

Subsection (e) inserts an additional qualification requirement for the OSDBU Director. Specifically, it requires that the Director have at least ten years of relevant experience prior to being appointed. This experience could be drawn from time as a federal employee or as a private sector employee. Qualifying public sector experience includes serving as a contracting officer or small business technical advisor. Relevant private sector experience includes contracts administrator for federal contracts, acting as a small business liaison officer for a large business, or managing federal contracts for a small business. Additionally, practicing federal procurement law, or filling a role requiring that an individual’s primary responsibilities be for the government contracting portions of the Act would qualify, regardless of whether the experience was as a

²⁸ GAO, Small Business Contracting at 21 (2011).

²⁹ 41 U.S.C. § 414(b)(2).

government employee or in the private sector. The ten years of experience could also come from a combination of these jobs. The intention of this provision is to ensure that OSDBU Director understands the role of small business in federal contracting as well as federal procurement in general. This will ensure that the OSDBUs are qualified advocates for small businesses.

Subsection (f)—Technical Amendments

Subsection (e) contains appropriate technical amendments needed to make the Act consistent with the changes made by the Committee in H.R. 3851.

Section 3. Small Business Procurement Advisory Council

Subsection (a)—Duties

The SBPAC was established by the Federal Acquisition Streamlining Act of 1994 to provide small businesses with an advocate in federal procurement regulatory process.³⁰ The SBPAC was tasked with commenting on proposed acquisition regulations. However, to date, the Committee is unaware of any such comment letters filed by the SBPAC. Instead, the group has turned into a best practices forum.

Consequently, subsection (a) of the bill assigns new duties to the SBPAC. First, in a new paragraph (3), it requires that the group conduct peer reviews of the individual agency OSDBU offices in order to assess how well the office complies with the requirements of section 15(k) of the Act. After GAO reported that many OSDBUs do not meet the requirements, these peer reviews should provide additional insight and serve as a check before the OSDBU position veers from its intended statutory role.

Next, a new paragraph (4) is added to require that the SBPAC identify best practices to improve small business procurement opportunities. This codifies an already existing activity, and will ensure that such practices are disseminated widely across agencies.

Finally, paragraph (5) is added to require that that SBPAC report annually to the Committee and the Committee on Small Business and Entrepreneurship of the Senate on the comment letters it files on procurement regulations pursuant to its authority under paragraph (2), including the disposition of such comments in the final rule; the results of the peer reviews conducted under paragraph (3); and the best practices identified by the SBPAC pursuant to paragraph (4). This will allow the Committees to monitor the effectiveness of the SBPAC OSDBU offices. The Committee expects that the reports also will reenergize the original mission of the SBPAC.

Subsection (b)—Membership

Subsection (b) contains appropriate technical amendments necessitated by H.R. 3851.

Subsection (c)—Chairman

Current law requires that the Administrator chair the SBPAC. However, this role has been delegated to the Associate Administrator for Government Contracting and Business Development.

³⁰ 15 U.S.C. § 644 note.

Subsection (c) makes this delegation permissible. Codification of this authority does not undermine the general administrative concept that, except if prohibited by statute, the Administrator may delegate any power granted by Congress to a subordinate.

VIII. UNFUNDED MANDATES

H.R. 3851 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

The Committee does not provide an opinion and estimate with respect to new budget authority, entitlement authority and tax expenditures in compliance with clause 3(c)(2) of rule XIII of the Rules of the House, as the Committee has not received a cost estimate prepared by the Director of the Congressional Budget Office pursuant to § 402 of the Congressional Budget Act of 1974.

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. 3851 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. 3851 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. 3851 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. 3851 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. 3851 includes a number of provisions designed to improve the effectiveness of small business advocates and to improve compliance with the Small Business Act.

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. 15.(a) * * *

* * * * *

(k) There is hereby established in each Federal agency having procurement powers an office to be known as the “Office of Small and Disadvantaged Business Utilization”. The management of each such office shall be vested in an officer or employee of such agency **[who shall]**, *with at least 10 years of experience serving in any combination of the following roles: federal contracting officer, small business technical advisor, contracts administrator for federal government contracts, attorney specializing in federal procurement law, small business liaison officer, officer or employee who managed federal government contracts for a small business, or individual whose primary responsibilities were for the functions and duties of section 8, 15 or 44 of this Act. Such officer or employee—*

(1) **[be known]** *shall be known* as the “Director of Small and Disadvantaged Business Utilization” for **[such agency,]** *such agency;*

(2) **[be appointed by]** *shall be appointed by* the head of **[such agency,]** *such agency to a position that is a Senior Executive Service position (as such term is defined under section 3132(a) of title 5, United States Code), except that, for any agency in which the positions of Chief Acquisition Officer and senior procurement executive (as such terms are defined under section 44(a) of this Act) are not Senior Executive Service positions, the Director of Small and Disadvantaged Business Utilization may be appointed to a position compensated at not less than the minimum rate of basic pay payable for grade GS-15 of the General Schedule under section 5332 of such title (including comparability payments under section 5304 of such title);*

(3) **[be responsible only to, and report directly to, the head]** *shall be responsible only to (including with respect to performance appraisals), and report directly and exclusively to, the head of such agency or to the deputy of such head, except that the **[director]** Director for the Office of the Secretary of Defense shall **[be responsible only to, and report directly to, such Secretary]** be responsible only to (including with respect to per-*

formance appraisals), and report directly and exclusively to, such Secretary or the [Secretary's designee,] Secretary's designee;

(4) **[be responsible]** *shall be responsible* for the implementation and execution of the functions and duties under sections 8 and 15 of this Act which relate to **[such agency,] such agency;**

(5) **[identify proposed]** *shall identify proposed* solicitations that involve significant bundling of contract requirements, and work with the agency acquisition officials and the Administration to revise the procurement strategies for such proposed solicitations where appropriate to increase the probability of participation by small businesses as prime contractors, or to facilitate small business participation as subcontractors and suppliers, if a solicitation for a bundled contract is to be issued;

(6) **[assist small]** *shall assist small* business concerns to obtain payments, required late payment interest penalties, or information regarding payments due to such concerns from an executive agency or a contractor, in conformity with chapter 39 of title 31, United States Code, or any other protection for contractors or subcontractors (including suppliers) that is included in the Federal Acquisition Regulation or any individual agency supplement to such Government-wide regulation;

(7) **[have supervisory]** *shall have supervisory* authority over personnel of such agency to the extent that the functions and duties of such personnel relate to functions and duties under sections 8 and 15 of **[this Act,] this Act;**

(8) **[assign a]** *shall assign a* small business technical adviser to each office to which the Administration has assigned a procurement center representative—

(A) who shall be a full-time employee of the procuring activity and shall be well qualified, technically trained and familiar with the supplies or services purchased at **[the activity, and] the activity; and**

(B) whose principal duty shall be to assist the Administration procurement center representative in his duties and functions relating to sections 8 **[and 15 of this Act,], 15, and 44 of this Act (giving priority in assigning to small business that are in metropolitan statistical areas for which the unemployment rate is higher than the national average unemployment rate for the United States);**

(9) **[cooperate, and]** *shall cooperate, and* consult on a regular basis, with the Administration with respect to carrying out the functions and duties described in paragraph (4) of this **[subsection, and] subsection;**

(10) **[make recommendations]** *shall make recommendations* to contracting officers as to whether a particular contract requirement should be awarded pursuant to **[subsection (a), or section] subsection (a), section 8(a) of this [Act or section 2323] Act, or section 2323** of title 10, United States **[Code. Such recommendations shall] Code, which shall** be made with due regard to the requirements of subsection (m), and the failure of the contracting officer to accept any such recommendations shall be documented and included within the appropriate **[contract file.] contract file;**

(11) shall review and advise such agency on any decision to convert an activity performed by a small business concern to an activity performed by a Federal employee;

(12) shall provide to the Chief Acquisition Officer and senior procurement executive of such agency advice and comments on acquisition strategies, market research, and justifications related to section 44 of this Act;

(13) may provide training to small business concerns and contract specialists, except that such training may only be provided to the extent that the training does not interfere with the Director carrying out other responsibilities under this subsection;

(14) shall carry out exclusively the duties enumerated in this Act, and shall, while the Director, not hold any other title, position, or responsibility, except as necessary to carry out responsibilities under this subsection; and

(15) shall submit, each fiscal year, to the Committee on Small Business of the House of Representatives and the Committee on Small Business and Entrepreneurship of the Senate a report describing—

(A) the training provided by the Director under paragraph (13) in the most recently completed fiscal year;

(B) the percentage of the budget of the Director used for such training in the most recently completed fiscal year; and

(C) the percentage of the budget of the Director used for travel in the most recently completed fiscal year.

* * * * *

FEDERAL ACQUISITION STREAMLINING ACT OF 1994

* * * * *

TITLE VII—SMALL BUSINESS AND SOCIOECONOMIC LAWS

Subtitle A—Small Business Laws

* * * * *

SEC. 7104. SMALL BUSINESS PROCUREMENT ADVISORY COUNCIL.

(a) * * *

(b) DUTIES.—The duties of the Council are—

(1) to develop positions on proposed procurement regulations affecting the small business community; **[and]**

(2) to submit comments reflecting such positions to appropriate regulatory **[authorities.] authorities;**

(3) to conduct reviews of each Office of Small and Disadvantaged Business Utilization established under section 15(k) of the Small Business Act (15 U.S.C. 644(k)) to determine the compliance of each Office with requirements under such section;

(4) to identify best practices for maximizing small business utilization in Federal contracting that may be implemented by Federal agencies having procurement powers; and

(5) to submit, annually, to the Committee on Small Business of the House of Representatives and the Committee on Small Business and Entrepreneurship of the Senate a report describing—

(A) the comments submitted under paragraph (2) during the 1-year period ending on the date on which the report is submitted, including any outcomes related to the comments;

(B) the results of reviews conducted under paragraph (3) during such 1-year period; and

(C) best practices identified under paragraph (4) during such 1-year period.

(c) MEMBERSHIP.—The Council shall be composed of the following members:

(1) * * *

* * * * *

(3) The head of each Office of Small and Disadvantaged Business Utilization [(established under section 15(k) of the Small Business Act (15 U.S.C. 644(k))] in each Federal agency having procurement powers.

(d) CHAIRMAN.—The Council shall be chaired by the Administrator of the Small Business Administration (or the designee of the Administrator).

* * * * *

