

The Government's Role in Aiding Small Business Federal Subcontracting Programs in the United States

A Working Paper by

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Historically, small businesses in the United States have received a share of federal procurement dollars not quite commensurate with their relative importance in the U.S. economy. While 99.7 percent of all employer firms are small, they receive about 23 percent of direct federal procurement dollars and almost 40 percent of subcontracting dollars. While subcontracting has been a part of the federal procurement framework, it has not received the same focus and attention as the prime contracting program.

The purpose of the paper is fourfold. First, it discusses the importance of the small business sector to the overall economy. Second, it lays out the policy framework for the federal government's involvement in requiring "other than small" federal prime contractors to subcontract with small businesses. This policy discussion focuses on the period from 1958 to the present. Third, it examines the legislative and regulatory approaches that have been put forth to increase subcontracting opportunities for small businesses; and fourth, it discusses steps needed to improve the American small business subcontracting program to accommodate greater participation by these businesses in new and emerging global markets.

Major Recommendations

While procurement data are available in the United States, better data are needed to measure the true effectiveness of achieving procurement goals and policies. Current data cannot measure benefits from procurement. For instance, has discrimination been reduced or eliminated? Are local minority communities benefiting from government contract awards? A concerted effort must be made to produce a more comprehensive data set that will allow analysts to

more fully examine procurement policy toward small business. Ideally, new regulatory policy should be introduced alongside data requirements specific to the policy's goals and objectives.

The global economy is rapidly creating a need in America for greater flexibility in its small business programs. Public Law 95-507 was enacted in 1978 and has changed very little. Section 211 of this law is not flexible enough to account for new practices in the procurement marketplace. For example, the policy still assumes that the prime contractor is doing all of the work, whereas the reality is quite different—hence the need for more flexible policies.

The traditional contract theory of "privity of contract" has a valid place in contract law to prevent interference in the business relationship between prime contractor and subcontractor. The federal government argues that because it is in contract with the prime contractor and not the subcontractor, it does not have "privity" to enforce a claim by the sub against the prime. While public policies aim to protect small entities, "privity of contract" prevents any intervention by the federal government in resolving disputes, for example, concerning prompt payment or nonpayment between sub- and prime contractors. A more consistent implementation of Congress' intent and a more focused enforcement of set principles would be ideal in helping small subcontractors bring claims against larger primes. In other settings, mechanisms should be in place for the resolution of such disputes.

The federal marketplace is no longer national; it is international. International trade agreements between the United States and other countries have facilitated this transformation. On one hand, small

and small disadvantaged businesses are encouraged to participate in exporting goods and services, but on the other hand, the government continues to impose undue restrictions. This inconsistency harms small entities. For example, FAR Part 19.000(b) does not require prime contractors to submit subcontracting plans for federal contracts where the work is being performed outside of the United States, as previously established. Such policies are a disincentive to small business owners who are ready, willing, and able to compete in the international marketplace. Moreover, these policies may place American small businesses on an uneven footing vis-à-vis their foreign competitors. A model international small business subcontracting program should encourage the free flow of business.

Comment

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