

**Section 1423**  
**Acquisition Advisory Panel**

**Small Business**  
**Cross-Cutting Working Group**

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**Preliminary Draft Report**

**February 2006**

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***EXECUTIVE REPORT***

The Acquisition Advisory Panel Small Business Cross-Cutting Working Group submits this Report addressing the small business issues that cut across the Panel's statutory charter. The Report is divided into three general sections. Section I provides an introduction, defining the specific issues under consideration and the methodology for analysis. Section II of the Report addresses the first major issue area involving acquisition planning, while Section III examines the second main issue area concerning competition for multiple award services contracts. The discussion of each of those two issue areas begins with a review of the relevant legal background and is followed by an analysis of the Group's findings and proposed recommendations.

**Statement of Issues and Methodology**

In defining the small business cross-cutting issues for consideration, the Working Group examined the Panel's statutory charter within the context of the basic statutory directive that lies at the heart of the Federal Government's small business contracting policy. That directive, which is codified in the Small Business Act, requires that small businesses have the "maximum practicable opportunity" to participate in Federal procurement on both the prime and subcontracting level. As explained in the Report's Introduction, the directive is based on both the Legislative and Executive recognition of the vital role of small businesses in stimulating the Nation's economy, creating employment, and spurring technological innovation.

To facilitate small business contracting opportunities, the Small Business Act establishes a government-wide small business contracting goal of not less than 23 percent of the total value of all Federal prime contract awards each fiscal year. It further provides separate contracting goals for various categories of small business concerns and for small business subcontracting opportunities. Generally, the Government has been more successful in achieving the overall small business goal of 23 percent, than in realizing the separate goals for each small business category, particularly the women-owned small business ("WOSB"), HUBZone small business concern ("SBC"), and service-disabled veteran-owned ("SDVO") small business categories.

Accordingly, to identify the cross-cutting small business issues, the Group examined the extent to which the Panel's general issues involving commercial practices, performance-based service acquisitions, interagency contracts, acquisition workforce, and inherently governmental functions impact small business goal achievements and the ability of agencies to provide the "maximum practicable" small businesses contracting opportunities. In addition, consistent with the Panel's mandate to protect the Government's interest in the efficient and fair award of Federal contracts, the Group balanced its examination against the Government's overriding interest in encouraging efficiency, transparency, integrity and competition in the services acquisition process.

Based on the Group's review and the Panel's development of specific issues in those five areas, the Small Business Working Group identified two primary issue areas relating to interagency contracting, commercial practices, and the acquisition workforce. Conceptually, the Group organized the specific issues under the acquisition planning and competition phases of the services contracting process. With respect to the first area of acquisition planning, the Group

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examined the extent to which Federal services acquisition strategies are structured to afford small business participation on the prime contracting level. Specifically, in this area the Group focused on the adequacy of the existing guidance in:

1. Utilizing small business contracting programs, including in connection with the growing practice of cascading procurements; and
2. Defining requirements to facilitate small business contracting opportunities, particularly as it relates to defining requirements to avoid unnecessary and unjustified contract bundling.

With respect to the second major issue area involving competition for multiple award contracts, the Group considered the extent to which small businesses have access to fair competition for such awards. In exploring this area the Group focused on the dual issues of the adequacy of guidance in:

1. Reserving prime contracts for small businesses in full and open multiple award contracts; and
2. Utilizing small business contracting methods when placing orders against multiple award contracts.

In analyzing these issues and in developing the related findings and recommendations, the Small Business Working Group reviewed available data from the Federal Procurement Data System-Next Generation (“FPDS-NG”), Inspector General and General Accountability Office (“GAO”) reports, and Comptroller General bid protest decisions. The Group also reviewed various Congressional hearing testimony and interviewed procurement experts to obtain information on best practices. In addition, the Working Group considered the various written and oral public comments submitted to the Panel.

### **Findings and Recommendations**

Based on its analysis of the extensive information collected, the Working Group developed a total of 10 findings and corresponding recommendations with respect to the two major issue areas identified. Of those 10 findings and recommendations, the first seven are in the area of acquisition planning, and the remaining three involve competition for awards. In describing each of the recommendations in Sections II(C) and III(C) of this Report, the Working Group provided specific line-in/line out language for the proposed amendments. The proposed statutory and regulatory provisions are indicated in **bold**. The provisions the Working Group proposes to delete are indicated with a ~~strikethrough~~.

**Finding #1: Contracting officers need definitive guidance on the priority for applying the various small business contracting preferences to particular acquisitions.**

The Working Group determined that there is potentially inconsistent guidance on the priority for utilizing the various small business contracting mechanisms. This inconsistency operates to blur rather than clarify the application of small business contracting programs, and thereby impedes the

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ability of contracting officers to plan services acquisitions efficiently and effectively to achieve small business procurement goals.

There are at least five statutory small business preference mechanisms contracting officers must consider in planning acquisitions—the 8(a) BD, HUBZone, SDVO, small business reservations, and the soon to be implemented WOSB program. Each of these programs has its own statutory and/or regulatory requirements that provide guidance on its use. Although recently promulgated SBA regulations contemplate relative parity between the 8(a) BD, HUBZone and SDVO programs, there are other provisions of law that suggest otherwise. For example, the Small Business Act appears to provide a priority for the HUBZone program by dictating that contracting officers “shall” utilize HUBZone contracts in certain circumstances, “notwithstanding any other provision of law.” By contrast, the statutory provisions governing the 8(a) BD and SDVO programs, as well as the not yet implemented WOSB program, provide for only discretionary use of those contracting techniques. Even the Federal courts analyzing the legislative scheme have recognized the fundamental difference in the statutory language of the programs. In one recent decision issued January 11, 2006, the Ninth Circuit concluded that the term “shall” in the HUBZone statutory provision indicates the mandatory nature of the HUBZone program, while the permissive authority underlying the statutory 8(a) BD provisions establishes that program’s discretionary nature.

When read together, the mandatory statutory language authorizing the HUBZone program may be construed to give it precedence over the purely discretionary 8(a) BD, SDVO, and WOSB programs, despite existing regulatory provisions to the contrary. The potential inconsistency between the statutory framework and the regulatory guidance has created confusion among contracting officials and has hindered the proper application of these programs to ensure small business goal achievements.

**Recommendation #1: Amend the Small Business Act to provide consistent statutory language governing the applicability of the various small business preference programs.**

The Small Business Working group proposes to amend the Small Business Act to resolve the apparent confusion regarding the mandatory and discretionary nature of the small business contracting programs. Based on the Group’s review of the relevant statutory and regulatory language, as well as the various Congressional and Executive pronouncements regarding the issue, the Group has determined that the statutory amendment should eliminate the mandatory nature of the HUBZone statutory provisions. That amendment would harmonize the statutory language with the legislative provisions authorizing the 8(a) BD, SDVO, and WOSB programs. It would also clarify the existing parity between those programs.

The Working Group noted in Section II(C)(1) of this Report that SBA has issued a policy statement explaining that parity is consistent with the Congressional intent in authorizing the HUBZone program. The Group has also recognized that agencies may have difficulty meeting their small business goals if there is a multi-tiered order of priority for using the Programs. The Group therefore concluded that parity between the programs would afford contracting officer discretion and flexibility, which may be necessary to structure acquisition strategies more conducive to achieving small business contracting goals.

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Consequently, as its Recommendation #1, the Working Group proposes to amend Section 31 of the Small Business Act, codified at 15 U.S.C. § 657a(b)(2), to substitute the term “shall” with “may” and to delete the provision “notwithstanding any other provision of law.” This amendment will afford contracting officers similar discretion to utilize HUBZone contracts as they have with respect to the 8(a) BD, SDVO, and the statutory WOSB program.

**Finding # 2: Contracting officers need explicit guidance on how to exercise their discretion and flexibility in selecting the appropriate small business contracting method for a procurement.**

To provide greater transparency and efficiency in the acquisition planning process, the Small Business Working Group further determined that contracting officers need specific guidance in exercising their discretion to select the appropriate small business contracting technique to afford small business procurement opportunities and to increase goal achievements. As explained in Section II(A)(1) of this Report, SBA negotiates specific agency small business goals based on the agency’s particular mission and its unique procurement needs and history. In theory, these agency goals serve as minimum targets, rather than inflexible quotas dictating each agency’s annual small business contracting dollars. In practice, they provide a simple bottom-line matrix that is both easy and convenient to measure under the current FPDS-NG collection and reporting requirements.

Currently, there are no express guidelines on how contracting officials should exercise their discretion in planning acquisitions to achieve these goals. In the face of the shrinking acquisition workforce, and the continually evolving Federal marketplace, the absence of such guidance will increase the likelihood for arbitrary decision-making by contracting officers and could potentially provide a disincentive for utilization of the programs. The lack of guidance also deprives the contracting community of specific standards against which contracting officials may be held accountable for their small business procurement decisions. Hence, to ensure a more transparent and meaningful small business contracting decision-making process, the Working Group finds that contracting officials need specific guidance on how to exercise their discretion in choosing the appropriate small business contracting method.

**Recommendation #2: Provide specific guidance clarifying that contracting officers should exercise their discretion to select the appropriate small business contracting methods based on their small business goal achievements and market research on the availability of small business vendors.**

Building on the Group’s finding regarding the lack of guidance in structuring small business contracting opportunities, the Working Group recommends the adoption of specific guidelines requiring contracting officials to identify the appropriate small business contracting method based on the procurement needs of the agency, an assessment of the agency’s progress in achieving its small business contracting goals, and market research on the availability of small businesses vendors. The Group proposes the addition of specific language to Section 15(g) of the Small business Act, which is codified at 15 U.S.C. § 644(g), and to various provisions of FAR Subpart 19 and SBA’s regulations codified in Title 13 of the Code of Federal Regulations. The Group further recommends that SBA revise its Goaling Guidelines to incorporate similar language encouraging contracting officials to assess their goal achievements in making their small business contracting determinations.



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The Group believes that empowering agencies to take goal achievements into account in developing acquisition strategies will allow them greater control in meeting their small business goals.

**Finding #3: Agencies need accurate, real-time FPDS-NG data to assess small business goal achievements.**

Related to the recommendation that agencies should take into account their small business goal achievements in planning acquisitions, is the Working Group's Finding #3 that agencies need real-time access to accurate goal achievement data in order to monitor and access their progress in meeting their small business goals. In the existing Integrated Acquisition Environment, the Government relies on FPDS-NG for unclassified Federal contracting data and information. In the past, this data was used to, among other things, evaluate the agency's goal achievements in the prior fiscal year. Today, the new FPDS-NG system upgrades reportedly equip agencies with near real-time information on their contracting actions. According to FPDS-NG, generally, the contract data is available to the public when the contract is awarded to the vendor. Agencies can therefore use this data to determine their goal achievement on a daily basis, rather than at the end of the fiscal year.

Despite this proclaimed ready access to contracting data, there remain significant issues as to the completeness and accuracy of the information available on FPDS-NG. Among other deficiencies, there have been reported issues with the contracting writing systems at agencies, continuing data entry errors, and apparent misunderstandings concerning the policies, processes and instructions for utilizing the data elements and fields. To capitalize on the potential value of FPDS-NG data in guiding procurement strategies, the Working Group finds that FPDS-NG data must not only be available in real time, but it also must be reliable and accurate.

**Recommendation #3: Direct GAO to conduct a review to determine the accuracy and timeliness of FPDS-NG data.**

As a result of the important role of FPDS-NG, including its function as the official source of government-wide socioeconomic contracting information and goal achievements, the Working Group proposes as Recommendation #3 that Congress direct GAO to perform a systems review of the functionality of FPDS-NG and its enhancements. As the central repository for information on unclassified Federal contract awards and actions, Congress, the Executive Branch and the general public rely on FPDS-NG data for management and oversight, to ascertain general procurement trends and patterns, and for many other purposes. To ensure that the system is effective in accomplishing its intended purposes, it is imperative that the challenges and deficiencies that continue to plague the system be fully examined and resolved. Over the years, GAO has performed a number of system reviews of FPDS, and its successor system FPDS-NG. It is therefore best situated to conduct the proposed review to determine what, if any, additional modifications are necessary to improve the operation and reliability of the system.

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**Finding #4: Cascading procurements fail to balance the Government’s interest in quick and efficient contracting with governing requirements for the maximum practicable small business contracting opportunities.**

As explained in Sections II(A)(1) and II(B)(1) of this Report, agencies are increasingly utilizing cascading procurements in an effort to truncate the time and procedures for procuring services. The Working Group has determined that this controversial contracting technique disregards important procurement requirements to the detriment of both small and large businesses.

Cascading procurements enable agencies to divide the evaluation of offers into separate tiers based on the socioeconomic status of the offeror. For example, an agency may establish a four-tiered evaluation, beginning with 8(a) BD firms, HUBZone SBCs, small businesses and finally large business offerors. The contracting officer’s evaluation of offers will then cascade to each succeeding tier until a winning offeror is identified. This type of acquisition strategy has garnered widespread opposition in the contracting community. Many large and small businesses alike have complained that it is a poor substitute for market research. They contend that cascading procurements unfairly shift the burden on contractors by necessitating that they expend precious resources to prepare proposals that contracting officers may never even review.

The Small Business Working Group agrees that cascading procurements appear to be a questionable practice that may hurt rather than help small businesses. That procurement strategy was apparently developed for its administrative convenience and as a quick substitution for market research. However, the recent enhancements to the Central Contractor Registration (“CCR”) have significantly simplified the process of conducting market research and identifying capable small business vendors. As a result, the Working Group finds that the undue burden cascading procurements place on both large and small contractors outweighs their potential administrative convenience to the Government.

**Recommendation #4: Amend governing statutes and regulations to expressly preclude cascading procurements as an acquisition strategy.**

Based on the Working Group’s finding that the current practice of cascading procurements is unduly burdensome to Government contractors, the Group recommends a statutory amendment specifically prohibiting the practice. The Group recognizes that Congress recently enacted legislation limiting the use of cascading procurements for the Department of Defense (“DoD”).

Specifically, the legislation allows such acquisition strategies if the contracting officer conducts the required market research, is unable to make the necessary determination as to the availability of small business vendors, and includes a written explanation in the contract file. Although Congress intended this provision to deter the use of cascading procurements, the Working Group has concluded that adequate market research obviates the need for any exception to a general prohibition against such acquisitions. As indicated earlier and as set forth more fully in Section II(C)(1) of this Report, advances in electronic commerce and processes have simplified and improved the tools for conducting effective and efficient marketing research. Contracting officers should be encouraged to capitalize on these new and improved techniques, rather than provided a mechanism to circumvent their responsibility to conduct adequate market research.

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The Working Group therefore recommends that Congress repeal the recently enacted Section 816 of the National Defense Authorization Act for Fiscal Year 2006, which currently allows for cascading procurements under certain limited situations. The Working Group further recommends that Congress add language to 10 U.S.C. § 2304, which applies to DoD and the National Aeronautics & Space Administration (“NASA”), and to 41 U.S.C. § 253, which applies to civilian agencies, to expressly prohibit cascading procurements.

**Finding #5: The contracting community does not properly apply and follow the governing contract bundling definition and requirements in planning acquisitions.**

Continuing its analysis of issues arising in the area of acquisition planning, the Small Business Working Group examined the extent to which procuring officials define contract requirements to afford the maximum practicable small business contracting opportunities. In focusing on the ongoing practice of defining overly broad statements of work, and of consolidating and bundling contract requirements, the Group concluded that there remains a fundamental misunderstanding about what constitutes contract bundling, and what procedures apply to those procurements. As a result, although there have been several statutory and regulatory amendments designed to curtail the practice, many have had limited effect because of the numerous misunderstandings concerning their application.

As discussed in Section II(A)(2) of this Report, the Small Business Act and implementing regulations provide a specific definition of the term “contract bundling.” They also provide various procedures agencies must follow to justify bundled procurements. Taken together, these provisions do not prohibit agencies from bundling contracts. To the contrary, they expressly allow agencies to structure such acquisitions, provided they perform the requisite market research and document that the bundled procurement is necessary and justified.

The Working Group determined in Section II(B)(2) of this Report that there are two primary reasons for the confusion surrounding the application of those provisions. First, the contracting community often uses the terms contract “consolidation” and “bundling” interchangeably. This is problematic because the Small Business Act has a specific legal definition for the term “bundling” but provides no definition for the term “consolidation.” Consequently, agencies fail to recognize that consolidating requirements under the conventional meaning of the word “consolidate” may not necessarily constitute contract “bundling” under the technical, legal definition of the term “bundling” in the Small Business Act.

Second, the existing regulatory bundling requirements impose various reporting and review obligations on contracting officials who propose to bundle contract requirements. Essentially, these provisions require contracting officers to report bundled actions to SBA’s Procurement Center Representatives (“PCR”). PCRs are charged with responsibility for reviewing the procurements and recommending strategies to unbundle them or afford greater small business participation as subcontractors. These reporting and review procedures have apparently confused contracting officials. They are unclear as to which procurements qualify as bundled and are therefore unaware of when those procedures are triggered. Further, many contracting officials complain that the

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reporting and review provisions contain no clear instructions for identifying the responsible PCR or for referring the procurements to them for review.

Also with respect to contracting bundling, the Working Group has determined that there is some uncertainty regarding the requirement to mitigate the impact of contract bundling on small businesses. Under governing law, once an agency determines that a bundled procurement is necessary and justified, it must attempt to preserve small business prime and subcontracting participation to the maximum extent practicable. If the requirement involves “substantial bundling,” as defined by law, the agency is required to describe what actions it intends to take to encourage small business participation in the procurement.

While these requirements aim at mitigating the effects of necessary and justified contract bundling, they provide little by way of specific guidance for developing mitigation strategies. For example, the SBA’s regulations generally call for “recommendations” on maximizing small business participation. Likewise, if the bundling is “substantial,” the regulations direct procuring agencies to simply document their “actions” to increase small business participation as primes and subcontractors. Nowhere, however, do the provisions spell out specific actions agencies should take to mitigate the potentially deleterious effects of contract bundling on small businesses. While some agencies, such as DoD, have attempted to establish such guidance, that guidance often is not widely publicized and some agencies may not perceive it as an authoritative resource on bundling.

Because of the workload pressures facing the acquisition workforce and the often time-sensitive nature of procurements, contracting officers have little opportunity or inclination to wade through complicated or confusing legal requirements to figure out the proper procedures that apply to bundled procurements. The absence of specific government-wide guidance for structuring creative and innovative alternatives also may make it more difficult for agencies to develop a bundling mitigation plan, particularly given the too often limited time and resources to execute procurements. The Small Business Working Group therefore determined that the lack of guidance coupled with the continuing inability of contracting officials to properly understand and apply the provisions governing the practice, will undermine the efficacy and utility of the laws designed to curb contract bundling and mitigate its effects.

**Recommendation #5: Provide additional training and create an interagency group to develop best practices and strategies to unbundle contracts and mitigate the effects of contract bundling.**

To improve the effectiveness of the legal requirements governing contract bundling, the Small Business Working Group recommends additional training as part of the government-wide training module proposed under Recommendation #7 below. Further, as a result of the limited government-wide guidance on effective strategies for mitigating the potentially harmful effects of contract bundling, the Small Business Working Group recommends the creation of a government-wide bundling website to serve as a central repository of best practices for unbundling contracts and mitigating the effects of contract bundling.

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Best practices, guidelines and standards are commonly recognized as helpful in simplifying the exercise of agency discretion. Indeed, in an October 2002 Report on Contract bundling, OFFP recommended that SBA work with agencies to collect and disseminate best practices for encouraging small business participation in bundled contracts. That recommendation proved unsuccessful because SBA lacked significant input from other procuring agencies.

Accordingly, the Small Business Working Group recommends that the Office of Federal Procurement Policy (“OFPP”) create an interagency task force for the specific purpose of identifying and suggesting successful strategies and best practices for unbundling contracts and mitigating its effects. The task force should be composed of SBA and procurement representatives from several of the major contracting agencies. This will ensure a diversity of perspectives and presumably joint accountability for the ultimate work product. Furthermore, the Group recommends that agencies be encouraged to update the database as they develop new and creative strategies that may be helpful to other agencies.

**Finding #6: The Government needs more data on contract bundling to be able to assess and quantify its impact on small businesses.**

As a result of the confusion regarding the meaning and application of governing bundling provisions and the failure of the government to collect sufficient information on bundled contracts, there is a dearth of objective contracting data and information to assess the true impact of contract bundling on small businesses. There have been a number of studies on bundled procurements, including studies by GAO, OFPP and SBA’s Office of Inspector General and Office of Advocacy. Although those studies concluded that bundling has a negative effect on small business, each recognized that more data is needed to quantify the true impact of bundled contracts.

In an effort to address the insufficiency of available data, Congress enacted new laws requiring SBA to provide annual reports on various aspects of contract bundling, including information on the claimed justification and cost savings of bundled actions. Although much of the information Congress requested is necessary to evaluate the effect of contracting bundling, it is not collected on a government-wide basis. Accordingly, the Small Business Working Group finds that additional data on contract bundling is needed to fully assess and quantify its actual impact and to analyze the effectiveness of the laws and policies established to address the practice.

**Recommendation #6: Revise the FPDS-NG data fields to allow for the collection of specified information concerning contract bundling.**

In light on the limited available data on the effects of contract bundling on small businesses, the Small Business Working Group recommends that agencies report to FPDS-NG certain data necessary to allow an objective, statistical assessment of its effects on small businesses. FPDS-NG is the most appropriate system for collecting this additional information because of its role as the central repository of Federal contracting data. The Working Group specifically proposes that data fields be added for contracting activities to enter the number of small business contracts that have been displaced by the bundled procurement and the projected cost savings of the bundled action. This information is critical to assessing the impact of bundling on small businesses and is readily available to agencies as part of their written bundling justifications.

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**Finding #7: Agency officials need targeted training to better acquaint them with the requirements and benefits of contracting with small businesses.**

Finally, in the area of structuring acquisitions, the Small Business Working Group determined that agencies with a strong leadership commitment to small business contracting and a clear understanding of the applicable requirements are the most successful in achieving small business procurement goals. As part of its analysis, the Working Group interviewed various contracting officials at major procuring activities to ascertain best practices and strategies for enhancing small business goal achievements. Those officials reported consistently that senior management commitment to small businesses is the single most important criteria for meeting and exceeding small business goals. Many of the officials interviewed indicated that it is imperative that senior program managers understand and appreciate governing small business contracting requirements because they are the ultimate end user of the services to be procured and they play a critical role in shaping the overall procurement.

Also, as indicated throughout this Report, there are areas in which contacting officials lack a clear understanding of applicable small business requirements and procedures. Since the effectiveness of the acquisition process in general and the small business contracting policy in particular, is contingent upon the training and competency of the Federal acquisition workforce, the Working Group finds that senior program managers as well as members of the acquisition team need targeted training on the requirements and benefits of contracting with small businesses.

**Recommendation #7: Require that OFPP coordinate the development of a government-wide small business contracting training module targeting program managers and acquisition team members.**

Based on the Working Group's finding that a clear understanding of and commitment to small business contracting is critical to ensuring that agencies provide the maximum practicable small business procurement opportunities, the Working Group recommends the development of a government-wide small business training module targeting senior program managers and acquisition team members. The training module should be designed to educate these officials on the requirements, value, and benefits of contracting with small businesses, including acquainting them with the substantial capabilities, sophistication and innovation of the Nation's small business concerns.

The Working Group further recommends that the module include training on the laws, regulations and policies governing small business subcontracting requirements. In Appendix 2 of this Report, the Working Group identified several inconsistencies and deficiencies in the understanding and implementation of small business subcontracting policies. The Group has concluded that including training on small business subcontracting will assist in improving the understanding of those requirements and may thereby facilitate an increase in subcontracting opportunities for small businesses.

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**Finding #8: The existing procurement strategy of reserving prime contract awards for small businesses in full and open multiple award procurements may be effective in providing small business prime contracting opportunities if properly utilized.**

Turning to the Group's second major area involving competition for awards, the Small Business Working Group's review of governing policies, practices, available data, as well as court and administrative board decisions has demonstrated that a growing number of agencies are reserving small business prime contract awards under full and openly competed multiple award procurements. The Group finds that this acquisition strategy has been successful in furnishing small business opportunities on the prime contracting level, in assisting agencies in achieving their small business prime contracting goals, and in mitigating the effects of contract bundling.

Procuring agencies apparently initiated this practice primarily as a tactic to improve small business goal achievements when utilizing multiple award contracts with broad statements of work or expansive scopes. According to various Federal court and GAO decisions, under these procurements, the contracting agency would divide the acquisition requirements into various functional or other areas, and reserve awards for various categories of small businesses in one or more of the areas. As Sections III(A)(1) and III(B)(1) of this Report further explain, the firm awarded one of the reserved prime contracts, may then be required to compete for task orders with all contract holders, including concerns that are other than small.

Section III(A)(1) of this Report makes clear that there is no express authority for that type of hybrid small business reservation in full and open procurements. Nonetheless, many in the contracting community have recognized its effectiveness in providing small business prime contracting opportunities. In a report issued in 1998, for example, GAO singled out this approach in examining the multiple-award practices of six Federal organizations. GAO explained that three of the six organizations had conducted such procurements, and it concluded that the strategy appears to have been successful in enhancing small business participation in the acquisition.

Based on a review of the available information on the practice and on its results, the Working Group agrees that when properly applied, the strategy may be effective in providing the maximum practicable contracting opportunities to small businesses. With the ever growing size, scope, complexity and geographical dispersion of individual acquisitions, it is becoming increasingly challenging for any one vendor, particularly one that is a small business, to be capable of providing the range of contract work covered under a single solicitation. Reserving a portion of work for small businesses, including the various categories of small business concerns, enables them to compete for those prime awards, rather than having to look for opportunities exclusively on the subcontracting level. In addition to the advantages to small businesses, these partial reservations in full and open acquisitions also help satisfy small business procurement goals. Since the reservations provide a greater assurance of small business participation in the procurement on the prime contracting level, there is a greater opportunity for agencies to count additional small business prime contract awards toward their goaling achievements.

The Working Group therefore finds that reserving small business prime contract awards in the context of full and openly competed multiple award procurements may be beneficial to both small businesses and procuring agencies when used in situations where the entire procurement is not suitable for an exclusive small business reservation. When, however, the procurement may be

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reserved entirely for small businesses, or the various statutory small business categories, a partial reservation would not be advantageous to small businesses, since they would have to compete with large business contract holders for individual task orders.

**Recommendation #8: Provide express statutory authorization for small business reservations of prime contract awards in full and open procurements that are not suitable for competition exclusively by small businesses.**

The Small Business Working Group recommends that 10 U.S.C. § 2304a(d)(3) and 41 U.S.C. § 253h(d)(3) be amended to expressly grant contracting officers discretionary authority to reserve prime contract awards for HUBZone firms, SDVO small businesses, WOSBs, or for small businesses generally, in full and open multiple award contracts that are not appropriate for exclusive small business competition. This recommendation is based on the absence of explicit authority for such procurements, and the potential negative effect such partial reservations would have on small businesses if they were improperly used in place of a possible total, HUBZone, 8(a) BD, SDVO, WOSB, or small business reservations.

The Small Business Act and various implementing regulations provide specific requirements to determine when contracts should or are required to be set aside for HUBZone, 8(a) BD, SDBO, WOSB, or small business concerns. In a nutshell, the rules contemplate total reservations when there is a reasonable expectation that two or more of the particular category of small businesses will submit an offer, and that award can be made at a fair market price. In addition, the FAR provides requirements for setting aside a portion of an acquisition for small business participation. However, unlike the partial set asides of the multiple award procurements at issue here, that FAR provision does not contemplate that the small business awardees of the set aside compete with large businesses for award of the actual contract work.

To avoid situations where contracting officials fail to conduct adequate market research or fail to make an independent determination as to the suitability of a traditional total or partial reservation, the Working Group proposes a statutory amendment authorizing partial reservations in full and openly competed multiple award procurements, only in those instances that the contracting officer determines in writing that the procurement is not suitable for a total HUBZone, 8(a) BD, SDVO, WOSB or small business reservation. As further explained in Sections III(A)(1) and III(C)(1) of this Report, the proposed amendment does not authorize such hybrid small business reservations of prime contracts for 8(a) BD awards because of the unique statutory requirements for conducting 8(a) BD competitions.

**Finding #9: Contracting officials need express guidance on the application of small business subcontracting requirements to small business reservations of prime contract awards in full and open multiple award procurements.**

The lack of express authority and guidance for reserving small business prime contract awards in full and openly competed multiple award procurements may result in inconsistent applications of the limitations on subcontracting requirements to individual task order awards. Under governing law, a small business is precluded from subcontracting more than a specified portion of a contract that was reserved for small business concerns or the various categories of small



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businesses. Contracting officials are unclear as to the applicability of these limitations on subcontracting in the context of the hybrid small business reservations of prime contracts for two principal reasons. First, since there is no express authority for small business reservations in full and open multiple award procurements, there is no specific provision indicating whether or not they are subject to the limitations on subcontracting. Further, because the small business awardees of the reserved contracts are required to compete for task orders with all contract holders, including large businesses, it is questionable whether the small business that receives the task order was awarded the order by virtue of its socioeconomic status.

Without clear guidance as to the applicability of the limitation of subcontracting requirements, some contracting officers may be unwilling to use the hybrid small business prime contract reservations for fear of misapplying the law. The lack of guidance may also result in inconsistent applications of the requirements, and may impair the ability of contracting officials to conduct procurements efficiently. As a result, the Small Business Working Group finds that the contracting community needs specific guidance as to the application of the limitations of subcontracting requirements to partial small business reservations in full and open multiple award contracts. This will ensure that the contracting community has a consistent understanding of the rules of engagement and will help protect the transparency and efficiency of the process.

**Recommendation #9: Provide a statutory and regulatory amendment to clarify that the limitations on subcontracting provisions do not apply to contracts that are reserved for small business concerns in full and open multiple award procurements.**

The Small Business Working Group recommends that the limitations on subcontracting requirements should not apply to task order awards that are competed with all contract holders because it would be unfair to small business awardees competing for orders with large businesses that are not subject to the same requirements. Specifically, the award of a reserved prime contract in the context of a full and open multiple award procurement only grants the small business awardee the opportunity to compete for orders with other awardees, including firms that are other than small. Since the contract awardees that are other than small are not subject to the same limitations on subcontracting, the small business awardees of the reserved contracts may be placed at a competitive disadvantage in having to compete with firms that are not required to perform any particular portion of the work. Further, as detailed in Section III(B)(1) of this Report, other regulations, such as SBA's ostensible subcontractor rule, may operate to prevent small businesses from improperly using their socioeconomic status to obtain awards for the benefit of ineligible firms. This may obviate the need to enforce the limitation of subcontracting rule in this context.

Accordingly, in order to provide a fairer and more leveled playing field for competition of task orders, the Small Business Working Group recommends that Section 15(o) of the Small Business Act, codified at 15 U.S.C. § 644(o), and SBA's regulations found at 13 C.F.R. § 125.6, be amended to clarify that the limitations on subcontracting provisions do not apply to contracts that are reserved for small business concerns in full and open multiple award procurements.

The Working Group recognizes that there is potentially a similar state of uncertainty with respect to the applicability of the limitations on subcontracting provisions to small business

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reservations of orders against multiple award indefinite delivery, indefinite quantity (“IDIQ”) contracts, which are described in Finding #11 below. While the Working Group is inclined to believe that the limitations on subcontracting should not apply to orders against such IDIQ vehicles, it declines to recommend a provision to that effect at this time.

Of particular concern, is the fact that unlike small business reservations of prime contract awards where small businesses compete for orders with all contract holders, including large businesses, small business reservations of task orders allow small businesses to compete for orders with other small business contract holders exclusively. Nonetheless, as explained in Section III(C)(2) of this Report, imposing the limitations on subcontracting on small businesses at the order level in full and open multiple award IDIQs, would be inconsistent with the important simplicity and convenience purposes of multiple award task order contracts. Furthermore, if applied, small business contracting officers may be less likely to limit competition for orders to small businesses because they may lack the resources to monitor contractor compliance with those requirements.

The Working Group also noted in Section III(A) of this Report that the limitations on subcontracting appear to apply more squarely to the contract formation phase, where contractors would be in a better position to comply with the requirements over the life of the contract. Moreover, some in the contracting community have questioned whether the limitations on subcontracting make sense in today's contracting environment. Unlike the past, agencies today seek total solutions that only teams of multiple contractors can provide. Consequently, the Group urges a study, possibly by SBA's Office of Advocacy, on the continuing utility and relevance of the limitations on subcontracting requirements in the evolving Federal marketplace.

**Finding #10: The contracting community needs explicit guidance on utilizing small business reservations for orders against multiple award IDIQ contracts.**

In reviewing the extent of competition for orders against full and openly competed multiple award IDIQ contracts, the Small Business Working Group determined that a number of agencies are limiting competition for orders to various categories of small businesses. Because there is no explicit legal authority to do so, many agencies are reluctant to conduct such limited competitions in full and open multiple award IDIQs. Recognizing that such limited competitions may be effective tools for increasing small business goal achievements, the Working Group finds that specific guidance on utilizing small business reservations for orders against multiple award IDIQ vehicles is necessary to resolve the continuing uncertainty as to their legality.

Generally, the FAR provisions governing HUBZone, 8(a), SDVO, and small business reservations of awards are interpreted to apply to the acquisition planning process of the underlying contract rather than the task orders placed against the contract. As set forth more fully in Sections III(A)(2) and III(B)(2) of this Report, the FAR authorizes ordering activities to consider socioeconomic status when identifying contractors for consideration or competition for awards under the U.S. General Services Administration's (“GSA”) Multiple Award Schedule (“MAS”) program. However, there are no provisions that specifically authorize agencies to conduct small business reservations for competition of orders. There also are no specific statutory or regulatory guidelines expressly addressing the ability of agencies to conduct small business reservations for task orders consistent with the FAR fair opportunity requirements, which dictate that each contract awardee of a

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multiple award IDIQ be given a fair opportunity to compete for orders valued over \$2,500. Nor is there specific guidance that addresses whether such reservations are consistent with the separate “Section 803” DoD requirement for services orders valued at over \$100,000. That requirement mandates that ordering activities provide notice of a purchase to all contractors and that they fairly consider each response.

Given this uncertainty in the contracting community, the Small Business Working Group finds that specific guidance on small business reservations for task orders is needed to protect the Government’s interest in fair, efficient and transparent procurements.

**Recommendation #10: Provide a statutory and regulatory amendment granting agencies explicit discretion to limit competition for orders to small businesses.**

To resolve the uncertainty regarding the ability of agencies to limit competition for orders to small businesses, the Working Group recommends specific amendments to 10 U.S.C. § 2304c and 41 U.S.C. § 253j, as well as to the FAR Subparts 8.4 and 16.5. The proposed amendments would authorize agencies to conduct such limited competitions and would provide a specific exception to the fair opportunity and DoD Section 803 requirements. For the same reasons as the Working Group proposed Recommendation #8 providing specific guidance for reserving prime contract awards for small businesses in full and open multiple award procurements, the Working Group has also concluded that reserving small business competition of task orders benefits small businesses in providing prime contracting opportunities, and furthers the interests of agencies in enhancing their prime contract goal achievements.

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## I. INTRODUCTION

Small businesses have been long recognized as one of the nation’s most valuable economic resource. As reflected in Table 1, small businesses participate in all major U.S. industries. Indeed, studies commissioned by the U.S. Small Business Administration (“SBA”) Office of Advocacy reveal that small businesses represent 99.7 percent of all employers and employ about half of all private sector employees.<sup>1</sup> The Office of Advocacy studies further show that small businesses pay 44.3 percent of the total U.S. private payroll and have generated 60 to 80 percent of net new jobs annually.<sup>2</sup> In addition, small businesses employ 39 percent of high tech workers (such as scientists, engineers, and computer workers) and produce 13 to 14 times more patents per employee than large firms.

**Table 1: Small Business Employment by Major Sector**

Industry	Percent of Small Business Employees	Number of Employees (in millions) By Major Sector				
		2000	2001	2002	2003	2004
<b>Goods-producing industries</b>	<b>48.41</b>	<b>24.65</b>	<b>23.87</b>	<b>22.55</b>	<b>21.81</b>	<b>21.88</b>
Natural resources and mining	38.24	0.60	0.61	0.58	0.57	0.59
Construction	96.15	6.79	6.83	6.71	6.73	6.96
Manufacturing	42.34	17.27	16.44	15.26	14.51	14.33
<b>Service-producing industries</b>	<b>55.03</b>	<b>107.14</b>	<b>107.96</b>	<b>107.79</b>	<b>108.19</b>	<b>109.59</b>
Trade, transportation and utilities	52.32	26.22	25.99	25.50	25.29	25.51
Wholesale trade	62.79	5.93	5.77	5.65	5.61	5.65
Retail trade	42.92	15.28	15.24	15.02	14.92	15.04
Information	25.56	3.63	3.63	3.39	3.19	3.14
Financial activities	39.73	7.69	7.81	7.85	7.98	8.05
Professional and business services	44.83	16.67	16.48	15.98	15.99	16.41
Education and health services	47.84	15.11	15.65	16.20	16.59	16.95
Leisure and hospitality	61.43	11.86	12.03	11.99	12.18	12.48
Other services	86.16	5.17	5.26	5.37	5.40	5.43
Government	0	20.79	21.12	21.51	21.58	21.62

*Notes:* Seasonally adjusted. See <http://www.bls.gov/ces/cessuper.htm> for NAICS code equivalents for each sector. The small business percentage by sector is based on 2002 firm size data.

*Sources:* U.S. Small Business Administration, Office of Advocacy, using data from the U.S. Department of Commerce, Bureau of the Census; U.S. Department of Labor, Bureau of Labor Statistics.

<sup>1</sup> See U.S. Small Bus. Admin., *Frequently Asked Questions: Academic Research on Small Businesses (How important are small businesses to the U.S. economy?)*, available at <http://app1.sba.gov/faqs/faqindex.cfm?areaID=24> (last visited Aug. 31, 2005).

<sup>2</sup> *Id.*

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Recognizing the vital role of small businesses in the U.S. economy, both the Legislative and Executive Branches of government have emphasized small business contracting as a fundamental socioeconomic goal underlying Federal procurement policy. In Section 8(d) of the Small Business Act, for example, Congress explicitly declares that “[i]t is the policy of the United States that small business concerns have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems.”<sup>3</sup> To effectuate that policy, Congress established a governmentwide small business contracting goal of not less than 23 percent of the total value of all Federal prime contract awards each fiscal year.<sup>4</sup> Congress further established separate contracting goals for the various categories of small businesses, including a five percent goal for small disadvantaged businesses (“SDBs”); a five percent goal for WOSBs; a three percent goal for HUBZone SBCs; and a three percent goal for SDVO small businesses.<sup>5</sup>

The Executive Branch also has consistently acknowledged the government’s fundamental interest in supporting small businesses through Federal contracting. The current Small Business Agenda, which President George W. Bush unveiled in March 2002, outlines specific proposals to improve the access of small businesses to Federal contracts.<sup>6</sup> As part of that Agenda, the President reiterates that small businesses are the heart of the American economy and that the contracting process should be fair and open to these businesses. More recently, President Bush issued an Executive Order designed to strengthen and increase contracting opportunities for SDVO small businesses.<sup>7</sup> In that October 20, 2004 Order, President Bush charged agencies with responsibility for developing strategies to reserve contracts exclusively for SDVO small businesses and to encourage their participation in competitive contract awards.

Consistent with the National policy to maximize small business participation in procurements, the total small business share of Federal contracting dollars has continued to grow in recent years. FPDS-NG reports that in Fiscal Year (“FY”) 2004, small businesses received a record \$69.23 billion of Federal prime contracts.<sup>8</sup> Those dollars represent 23.09 percent of the total \$299.9 billion of Federal prime contracting dollars awarded in FY 2004, as adjusted for goaling purposes.<sup>9</sup>

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<sup>3</sup> 15 U.S.C. § 637(d). As the basis for the government’s small business contracting policy, Section 3(a) of the Small Business Act explains that encouraging and developing the capacity of small business is critical to promoting the country’s economic well being and national security. 15 U.S.C. § 631(a).

<sup>4</sup> 15 U.S.C. § 644(g)(1).

<sup>5</sup> *Id.*

<sup>6</sup> President Bush’s Small Business Agenda is available on the official Whitehouse web site at <http://www.whitehouse.gov/infocus/smallbusiness/agenda.html> (last visited Aug. 31, 2005).

<sup>7</sup> See “Executive Order: Service-Disabled Veterans Executive Order,” <http://www.whitehouse.gov/news/releases/2004/10/20041021-5.html> (last visited Aug. 31, 2005).

<sup>8</sup> The complete Small Business Goaling Report is available at <http://www.sba.gov/GC/goals/Goaling-Report-08-21-2005.pdf>.

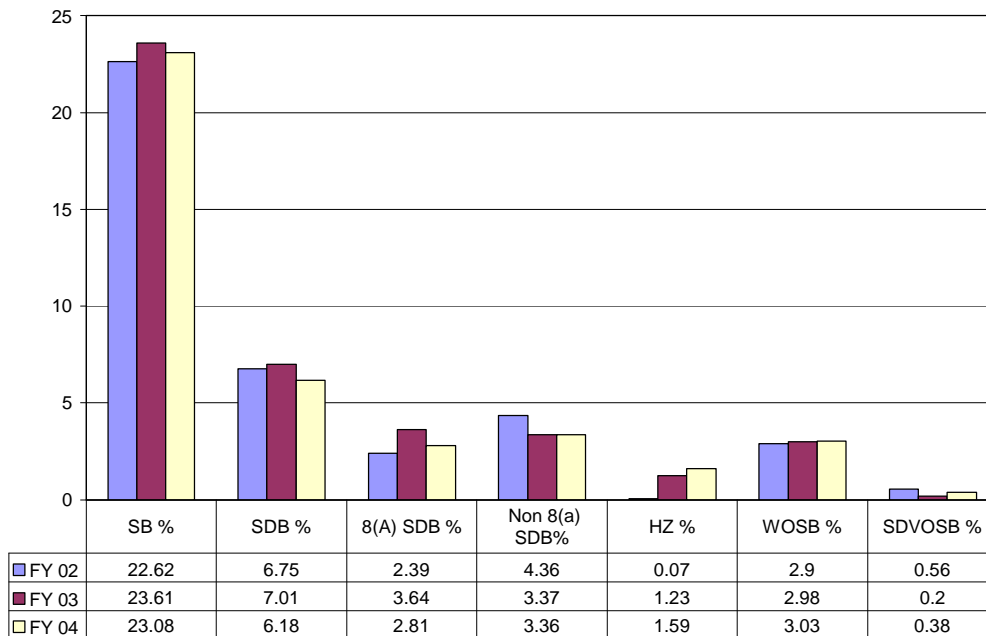
<sup>9</sup> As explained in SBA’s Goaling Guidelines, the baseline for the total value of prime contract awards used to determine small business goal achievements excludes several categories of procurements that are not covered under the goaling program. Among the exclusions are procurements using non-appropriated funds; procurements using mandatory sources

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A list of the percent of small business contracting dollars for FY 2004, by major Federal department and small business category is provided at Appendix 1.

As reflected in Figure 1 below, many of the small business categories experienced a steady climb in the amount of prime contracting dollars in recent years. For example, the prime contracting dollars awarded to WOSBs increased by \$814.6 million to a record \$9.1 billion. That represents about three percent of the total Federal prime contracting dollars, up from 2.98 and 2.9 in FY 2003 and 2002, respectively. Likewise, HUBZone and SDVO SBCs have received a record amount of contracting dollars in FY 2004. In particular, HUBZone SBC dollars increased by 40 percent, to \$4.78 billion. Also in FY 2004, SDVO SBC dollars more than doubled, reaching \$1.15 billion, up from \$550 million in FY 2003. Despite the increase in contracting dollars to WOSBs, HUBZone and SDVO SBCs, however, agencies have never achieved the statutory goals for any of those three categories of small businesses. In addition, even in the SDB category where the government has exceeded the governmentwide statutory goal of five percent, the total dollars to SDBs decreased from 7.01 percent in FY 2003, to 6.18 percent in FY 2004.

**Figure 1: Small Business Percent of Total Federal Prime Contracting Dollars  
 FY 2002 – 2004**



Source: FPDS Annual Reports.

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such as the Javits-Wagner-O’Day (“JWOD”) Act (41 U.S.C. 46-48c) participating nonprofit agencies; contracts for foreign governments or international organizations; and contracts not subject to the Federal Acquisition Regulation (“FAR”). See *Goaling Guidelines for the Small Business Preference Programs*, available at <http://www.sba.gov/GC/goals/ggtotal71503.pdf> (last visited on Nov. 10, 2005).

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As discussed in greater detail in Section III of this Small Business Working Group Report, the small business goal achievements on multiple award multi-agency contracting vehicles also has been mixed. The small business share of awards against GSA's Federal Supply Schedule ("FSS" or "Schedule") has been among the most significant, representing about 80 percent of the Schedule contract awards and 36.8 percent, or \$11.4 billion, of FSS sales in FY 2004.

Taken together, Federal agencies have made significant progress in expanding small business contracting. However, although the government has achieved the overall small business goal of not less than 23 percent of the total value of prime contract awards, agencies have fallen short of the statutory goals for the small business subcategories of WOSBs, HUBZone and SDVO SBCs. Accordingly, in carrying out its charge to recommend improvements to the services acquisition process, the Acquisition Advisory Panel established a Small Business Working Group to consider small business issues that cut across the Panel's statutory charter. In attempting to identify and analyze those issues, the Group focused on the governing statutory mandate to enhance small business contracting opportunities, as balanced against the government's fundamental interest in encouraging efficiency, transparency, and competition in the Federal procurement process.

**A. Statement of Issues**

As directed by the Panel Chair, the Small Business Working Group focused on the Panel's five general areas of consideration: commercial practices, performance-based service acquisitions, interagency contracts, workforce, and inherently governmental functions. Based on the Group's review and the Panel's development of various issues in those five areas, the Small Business Working Group identified two primary issues relating to interagency contracting, commercial practices, and workforce.

The first of the two major issues considered was the extent to which Federal services acquisition strategies are structured to afford small business participation on the prime contracting level. Specifically, in light of the varied small business goal achievements, the Group reviewed existing laws, regulations and policies to ensure that there is adequate guidance in selecting specific small business contracting mechanisms and appropriate interagency contracting vehicles to facilitate small business goal achievements. The Group further analyzed the laws and policies governing the process for defining requirements. The Group's primary objective in this regard was to identify effective incentives and acquisition planning tools to encourage small business contracting in the face of a shrinking acquisition workforce and the recent initiative to leverage spending through strategic sourcing.

The second of the two major issues examined was the adequacy of guidance for utilizing small business contracting methods against multiple award task order contracts, including governmentwide agency contracts ("GWACs") and the FSS. The Group's underlying objective in this second major area of consideration was to identify salient policies and practices that may be used to build on successful small business goal achievements, particularly in the context of commercial buys off GSA's Schedule. Further, in this major issue area, like the first, the Group sought strategies to promote small business contracting opportunities, without compromising the overarching goals of contracting efficiency, integrity and competition.

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It is noteworthy that the Working Group initially explored possible issues regarding compliance in small business subcontracting, as a result of early public statements recommending reforms in this area. However, the Group concluded that more accurate and reliable data is necessary to fully analyze small business subcontracting issues. The Federal government recently launched a new electronic Subcontracting Reporting System (“eSRS”), which is designed to create higher visibility and transparency in the collection of Federal subcontracting data and accomplishments. Once this web-based reporting tool is fully operational, it will provide more accurate and timely data, as well as analytical tools to permit a comprehensive examination of small business subcontracting activity. A summary of the relevant subcontracting requirements and eSRS reporting capabilities is provided at Appendix 2.

It is also noteworthy that the Working Group recognized as a threshold matter that there are many small business contracting issues, though of critical importance to the Federal procurement community, are beyond the scope of the Panel’s statutory charter. Notable examples involve issues relating to small business size standards. The issue of small business recertification on multiple award contracts, for example, has garnered significant attention in recent years.<sup>10</sup> That issue, however, is the subject of a pending SBA proposed rule.<sup>11</sup> At this writing, SBA has not yet promulgated final regulatory amendments. Without a final rule for the Working Group to review and assess its possible impact, an analysis of that issue in this Report would be premature, at best.

Likewise, the Small Business Working Group also acknowledged the fundamental need for reforms to the system for defining and applying the size status of a business concern. Since SBA has already published an Advance Notice of Proposed Rulemaking (“ANPRM”) to simplify and restructure small business size standards,<sup>12</sup> that issue may not be ripe for consideration in this process, particularly given its wider application to Federal procurement as a whole. Nonetheless, the Working Group expresses its full support of SBA’s declared purpose to simplify small business size standards. More specifically, the Working Group urges an approach that would allow small business status designation based on the firm’s primary North American Industry Classification System (“NAICS”) to remain effective for a fixed period, such as three years, and to apply across industries and procurements during that fixed period. The Working Group believes that such a simplified means of determining small business status would make contracting with small businesses easier and more convenient. In so doing, it will increase the effectiveness of programs to enhance small business participation in the Federal marketplace.

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<sup>10</sup> See, e.g., General Accountability Office, *Reporting of Small Business Contract Awards Does Not Reflect Current Business Size*, GAO-03-704T (May 7, 2003).

<sup>11</sup> See 68 Fed. Reg. 20350 (April 25, 2003).

<sup>12</sup> SBA published the ANPRM on December 3, 2004. It requested public input on how best to simplify and restructure small business size standards. 69 Fed. Reg. 70197 (Dec. 3, 2004). The ANPRM comment period closed on April 3, 2005. SBA received more than 6,100 comments. In June 2005, SBA also conducted public hearings in 11 locations across the country to provide interested parties an opportunity to meet with SBA officials and discuss their views on the issues. See 70 Fed. Reg. 25133 (May 12, 2005) (discussing the purpose, location and format of the scheduled hearings).



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**B. Methodology**

To analyze the two major issue areas, the Small Business Working Group reviewed the relevant statutes, regulations and policies. The Group also analyzed available data from FPDS-NG, Inspector General and Government Accountability Office (“GAO”) reports, and Comptroller General bid protest decisions. In addition, the Group reviewed various Congressional records and interviewed procurement experts from both industry and the public sector to obtain information on best practices. Furthermore, the Working Group took into account written public comments submitted to the Panel and relevant oral comments presented during the Panel’s public meetings held in Washington, DC, Texas and California.

This Report describes the Group’s findings and accompanying recommendations based on its analysis of the extensive information reviewed. The Report has two main sections corresponding to each of the two general areas of consideration. Each section begins with a discussion of the relevant legal background and is followed by an analysis of the Group’s findings and the supporting documentation. Each section then concludes with specific recommendations, including any necessary proposed line-in/line-out statutory and regulatory amendments.

**II. THE PROCESS OF STRUCTURING ACQUISITION STRATEGIES  
TO AFFORD SMALL BUSINESS PARTICIPATION**

**A. Background**

The performance of acquisition functions generally cuts across different agency lines of responsibility. Thus, for example, the contracting community finds it must balance the need for quick and efficient contracting (especially in light of current workforce issues and the need to strategically source services) with the achievement of socioeconomic, or small business, goals. Consequently, the Small Business Working Group has studied this balance with respect to two aspects of acquisition planning -- guidance in using the various small business contracting programs and guidance in promoting small business participation in consolidated contracts.

**1. Guidance in Using Small Business Contracting Programs**

The Small Business Act sets forth several specific contracting or business assistance programs, which include the 8(a) BD,<sup>13</sup> HUBZone,<sup>14</sup> SDVOSB<sup>15</sup> and WOSB<sup>16</sup> programs. These

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<sup>13</sup>15 U.S.C. § 637(a) (if the SBA certifies to any officer of the Government having procurement powers that there is a competent and responsible 8(a) Participant which can perform a specific Government contract, the officer shall be authorized in his discretion to let such procurement contract). Section 8(a) awards can be made pursuant to competition restricted to 8(a) concerns, or on a sole source basis. *Id.* § 637(a)(1)(D) & (a)(1)(B).

<sup>14</sup>15 U.S.C. § 657a(b)(2) (the statute provides that “[n]otwithstanding any other provision of law” . . . “a contract opportunity shall be awarded pursuant to this section on the basis of competition restricted to qualified HUBZone small business concerns. . . .” and allows the contracting officer (“CO”) to make sole source awards to responsible HUBZone SBCs in limited situations).

<sup>15</sup>15 U.S.C. § 657f(a) & (b) (permits agencies to award sole source and set aside contracts to SDVO SBCs when certain conditions are met).

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programs provide contracting preferences, either through a sole source or reserve (set aside) award, or through use of a price evaluation preference, to eligible small businesses in Federal contracting. The Act also sets forth requirements for reserving acquisitions for small businesses, depending on the dollar value of the procurement.<sup>17</sup> The Government collects data on the number of contracts and the amount of contract dollars each of these small businesses receive from the different agencies.<sup>18</sup> The Government uses this data to determine whether or not the agency is meeting its small business goals.<sup>19</sup>

The SBA has attempted to reconcile the Act's various programs, including the various set aside and sole source provisions, in its regulations.<sup>20</sup> For example, the regulations provide discretion to the CO by stating that the CO should consider setting aside the requirement for 8(a), HUBZone, or SDVO SBC participation before considering setting aside the requirement as a small business set-aside.<sup>21</sup>

The FAR has also attempted to reconcile the various programs in its regulations.<sup>22</sup> For example, the FAR provides that before deciding to set aside an acquisition for SBCs, HUBZone SBCs, or SDVO SBCs, the CO should review the acquisition for offering under the 8(a) program.<sup>23</sup> According to the FAR, if the acquisition is offered to the SBA, SBA regulations give first priority to

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<sup>16</sup>15 U.S.C. § 637(m) (permits agencies to restrict competition to WOSBs in industries in which WOSBs are underrepresented).

<sup>17</sup>15 U.S.C. §§ 644(a) & 644(j). The Act provides that contracts for the purchase of goods and services valued greater than \$2,500 but not greater than \$100,000 shall be reserved exclusively for SBCs unless there are less than two SBCs that will submit a competitive offer. *Id.* § 644(j)(1). In general, the Small Business Act also requires a fair proportion of contracts be let to SBCs. *Id.* § 644(a).

<sup>18</sup> See FPDS Next Generation, [www.fpds.gov](http://www.fpds.gov).

<sup>19</sup>These goals are summarized as follows: SBCs-23%; SDBs-5%; WOSBs-5%; HUBZone-3%; and SDVO SBCs-3%. 15 U.S.C. § 644(g)(1). Because these statutory goals are Government-wide, the percentages are based on the aggregate of all Federal procurement. The Act also requires that each Federal department and agency have an annual goal that presents, for that agency, the maximum practicable opportunity for SBCs. *Id.* This agency goal is separate from the Government-wide goal.

<sup>20</sup>The SBA implements its statutory programs in its regulations as follows: 8(a) BD, 13 C.F.R. part 124; SDB, 13 C.F.R. part 124; HUBZone, 13 C.F.R. part 126; and SDVO, 13 C.F.R. part 125. The SBA has not yet issued regulations implementing the WOSB program.

<sup>21</sup>13 C.F.R. §§ 124.503(j), 125.19(b), & 126.607(b).

<sup>22</sup>The FAR states that CO's must set aside acquisitions exceeding the simplified acquisition threshold for competition restricted to HUBZone SBCs and must consider HUBZone set-asides before considering HUBZone sole source awards or small business set-asides. 48 C.F.R. § 19.1305(a). Further, the FAR provides that a CO shall set aside any acquisition over \$100,000 for small business participation when there is a reasonable expectation that offers will be obtained from at least two responsible SBCs offering the products or services of different SBCs. *Id.* § 19.502-2(b). Further, the FAR provides that the contracting officer may set-aside acquisitions exceeding the micro-purchase threshold for competition restricted to SDVO SBCs and shall consider service-disabled veteran-owned small business set-asides before considering SDVO SBC sole source awards. *Id.* § 19.1405(a).

<sup>23</sup>48 C.F.R. § 19.800(e).

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HUBZone 8(a) concerns.<sup>24</sup> As noted above, this regulation now conflicts with the SBA’s regulations and leaves less discretion to the CO.

The courts and GAO have also attempted to address the preferences within the Small Business Act and interpret the implementing regulations. In Contract Management, Inc. v. Rumsfeld, the court ruled that “the SBA and FAR regulations pertaining to the HUBZone program sufficiently promote the congressional objective of parity between the HUBZone and 8(a) programs.”<sup>25</sup> In USA Fabrics, Inc., the protester challenged an agency's decision to set aside the acquisition for SBCs and not to set aside the procurement for HUBZone SBCs.<sup>26</sup> The GAO ruled that the agency failed to conduct adequate market research to determine whether at least two HUBZone SBCs could submit an offer at fair market price and sustained the protest.<sup>27</sup>

In an attempt to address the agency’s socioeconomic goals and need to quickly and efficiently conduct a procurement, some agencies are using “cascading” procurements.<sup>28</sup> In other words, the agency will issue a solicitation that is open to 8(a), HUBZone, SDVO SBCs and other than SBCs and set a cascading order of priority in the solicitation.<sup>29</sup> The GAO has stated that it has no basis to object to the scheme since it has the effect of increasing the opportunity for SBCs under an otherwise unrestricted solicitation.<sup>30</sup> Currently, there is no statute or regulation that precludes a

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<sup>24</sup>48 C.F.R. § 19.800(e). This is no longer true. The SBA amended its regulations to provide that “. . . the contracting officer shall set aside the requirement for HUBZone, 8(a) or SDVO SBC contracting before setting aside the requirement as a small business set-aside.” 13 C.F.R. § 126.607(b).

<sup>25</sup>Contract Management, Inc. v. Rumsfeld, 291 F.Supp.2d 1166, 1177 (D. Hawaii 2003); aff’d -- F.3d --, 2006 WL 51161 (Hawaii).

<sup>26</sup>USA Fabrics, Inc., B-295737; B-295737.2, 2005 CPD ¶ 82 (Apr. 19, 2005).

<sup>27</sup>Id.

<sup>28</sup>See Carriage Abstract, Inc. B-290676 et al, 2002 CPD ¶ 148 (Aug. 15, 2002). In that protest, the GAO stated that although an agency may review a large business proposal submitted under a cascading set aside preference, the agency is not required to do so. GAO also stated it found no reason to question the use of cascading set aside preference provisions previously used by HUD. HUD argued that the approach promotes the interests of small business concerns and provides the agency with an efficient means to continue the procurement in the event that sufficient small business participation is not realized.

<sup>29</sup>For example, the solicitation might state that the agency will first issue an award to an 8(a) BD concern, but if an award cannot be made to such a concern, it will issue an award to a HUBZone SBC, etc.

<sup>30</sup>Carriage Abstract, Inc., supra. We note, however, that the GAO has not technically addressed whether such procurements are in accordance with the law since the GAO has only addressed this issue post award. Also, agencies are using similar types of cascading procurements to address the Act’s preference programs as well as other programs, such as the Randolph-Sheppard Act (RSA). In Automated Communication Systems, Inc. v. United States, 49 Fed. Cl. 570, 578 (2001), the court ruled that the HUBZone price evaluation preference and the preference to certain blind persons licensed by a State agency pursuant to the RSA can be given its due and that the agency could issue the solicitation as a full and open competition and if the blind vendor submits a bid and the CO decides to conduct negotiations with that vendor, the RSA preference takes priority; if the blind vendor does not receive the contract award, the HUBZone SBCs receive the benefit of the price evaluation preference. See also Intermark, Inc., B-290925, 2002 CPD ¶ 180 (Oct. 23, 2002) (the GAO stated that the solicitation could contain a set of cascading preferences or priorities whereby competition is limited to SBCs and blind vendors).

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cascading procurement, and only recently has there been a statutory provision providing guidance on its use.<sup>31</sup> This has caused some problems with implementing the procurement.<sup>32</sup>

In sum, the Group analyzed the myriad of different laws providing for preferences to SBCs to determine whether the contracting community has adequate guidance in deciding which preference is applicable to an acquisition.<sup>33</sup> Assuming they do not, this can create a burden (in time and administration, as well as monetary if there is a subsequent protest) on the procuring agency. As a subpart to this issue, the Group reviewed a current, creative contracting practice – cascading procurements – to see if it addresses the agency’s socioeconomic requirements while at the same time providing a quick and efficient contracting mechanism.

## **2. Guidance with Contract Consolidation**

Contract bundling and consolidation are not new. For several years now, agencies have been consolidating contracts to streamline the procurement process, reduce administrative efforts and costs, and leverage their buying power.<sup>34</sup> Further, contract consolidation may be necessary if an agency is interested in strategic sourcing -- leveraging an agency’s spending power to the maximum extent possible by acquiring commodities and services more effectively and efficiently.<sup>35</sup>

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<sup>31</sup>See National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 106-163, § 816, 119 Stat. 3382. Prior to this statute, there was no statutory or regulatory guidance. See Urban Group, Inc.; McSwain and Assocs., Inc., B-281352, B-281353, Jan. 28, 1999, 99-1 CPD ¶ 25 at 7.

<sup>32</sup>Greenleaf Constr. Co. v. U.S., 67 Fed. Cl. 350 (2005). In Greenleaf, HUD had issued a cascading procurement. The initial competitive range offerors were SBCs. Later, however, one offeror was found to be other than small and another was found to be technically noncompetitive. Because this left only one offeror, the CO cascaded the procurement to the unrestricted category. The court ruled that HUD had adequate competition at the small business tier and the fact that only one SBC offeror remained in the competitive range did not compel a cascade to the unrestricted tier.

<sup>33</sup>We note that in addition to the small business preferences set forth in the Small Business Act, there are several statutes that provide contracting preferences to other types of entities. This includes preferences for products and services of the Federal Prison Industries, 18 U.S.C. § 4124, preferences for supplies and services of certain nonprofit agencies employing people who are blind or who have other severe disabilities, 41 U.S.C. § 47(d)(2)(A), and a preference for the operation of vending facilities on Federal property to blind persons licensed by a State agency, 20 U.S.C. § 107 (the RSA). We believe that it would be best to first address any problems associated with guidance in using the statutory preferences set forth in the Act before tackling the larger issue of guidance for the Act’s preference programs in conjunction with the ones set forth above.

<sup>34</sup>U.S. Government Accountability Office, GAO-04-454, Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain, at 4 (May 2004), available at <http://www.gao.gov/new.items/d04454.pdf>.

<sup>35</sup>Office of Management and Budget, Memorandum on Implementing Strategic Sourcing, (May 20, 2005), available at [http://www.whitehouse.gov/omb/procurement/comp\\_src/implementing\\_strategic\\_sourcing.pdf](http://www.whitehouse.gov/omb/procurement/comp_src/implementing_strategic_sourcing.pdf) (last visited on Oct. 26, 2005). The OMB explains that strategic sourcing will ultimately help agencies optimize performance, minimize price and increase achievement of socio-economic goals, among other things. Id.

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However, the President, in his Small Business Agenda,<sup>36</sup> and Congress have expressed concern about contract consolidation or bundling.<sup>37</sup> Thus, there are specific statutory provisions defining and addressing bundling.<sup>38</sup> Both the SBA and the FAR have further defined these bundling provisions in its regulations.<sup>39</sup> Recently, the SBA and FAR council amended their regulations to address interagency contract vehicles and bundling.<sup>40</sup> Specifically, these regulations state that orders placed against a FSS contract or task or delivery order contract awarded by another agency must comply with all requirements for a bundled contract when the order meets the definition of “bundled contract.”<sup>41</sup>

Bundling, as defined by the Small Business Act, is not per se prohibited. The statute allows the agency to bundle its requirements if the agency has performed sufficient market research and has justified the bundled action.<sup>42</sup> In sum, a bundled procurement is necessary and justified if the agency will derive measurably substantial benefits as a result of consolidating the requirements into one large contract.<sup>43</sup> This is true even if the acquisition involves “substantial bundling.”<sup>44</sup>

The Act requires all agencies to provide SBA’s PCR with a copy of the solicitation when the procurement renders small business prime contractor participation unlikely and the statement of work includes goods or services currently being performed by SBCs.<sup>45</sup> If the bundling is necessary

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<sup>36</sup>President Bush’s Small Business Agenda is available on the official White House web site at <http://www.whitehouse.gov/infocus/smallbusiness/agenda.html> (last visited on Aug. 31, 2005).

<sup>37</sup>See 15 U.S.C. § 631(j); see also S. Rep. No. 105-62, at 21 (1997) (“Often bundling results in contracts of a size or geographic dispersion that small businesses cannot compete for or obtain. As a result, the government can experience a dramatic reduction in the number of offerors. This practice, intended to reduce short term administrative costs, can result in a monopolistic environment with a few large businesses controlling the market supply”).

<sup>38</sup>15 U.S.C. §§ 632(o), 644(a) & 644(e).

<sup>39</sup>See 13 C.F.R. § 125.2, 48 C.F.R. §§ 2.101, 7.104(d)(2)(i), 7.107 and subparts 19.2, 19.4.

<sup>40</sup>48 C.F.R. §§ 2.101, 8.404(c)(2), 16.505(a)(7)(iii); 13 C.F.R. § 125.2(d)(1)(iii).

<sup>41</sup>48 C.F.R. § 8.404(c)(2); see also 48 C.F.R. § 16.505(a)(7)(iii); 13 C.F.R. § 125.2(d)(1)(iii); Sigmatech, Inc., B-296,401 (Aug. 10, 2005) (GAO sustained a protest challenging the bundling of system engineering and support services with other requirements under a single-award BPA issued under awardee’s FSS contract).

<sup>42</sup>The Small Business Act requires the agency to perform certain “market research to determine whether consolidation of the requirements is necessary and justified” before proceeding with a bundled acquisition strategy. 15 U.S.C. § 644(e)(2)(A); see also 13 C.F.R. § 125.2(d)(3); 48 C.F.R. § 10.001(a)(3)(vi).

<sup>43</sup>15 U.S.C. § 644(e)(2)(B); see also 13 C.F.R. § 125.2(d)(5)(i); 48 C.F.R. § 7.107(a).

<sup>44</sup>13 C.F.R. § 125.2(d)(7); 48 C.F.R. § 7.107(e). Substantial bundling is \$7 million or more for the Department of Defense; \$5 million or more for the National Aeronautics and Space Administration, the General Services Administration and the Department of Energy; and \$2 million or more for all other agencies. 13 C.F.R. § 125.2(b)(2)(i); 48 C.F.R. § 7.104(d)(2)(i).

<sup>45</sup>15 U.S.C. § 644(a); see also 13 C.F.R. § 125.2(b)(3); 48 C.F.R. § 19.202-1(e).

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and justified, the PCR will work with the procuring activity to preserve small business prime and subcontract participation to the maximum extent practicable.<sup>46</sup> If the requirement involves “substantial bundling,” the agency is required to specify actions designed to maximize small business participation as subcontractors at various tiers under the contract.<sup>47</sup>

Sometimes, the agency is amenable to the SBA’s suggestions to promote small business participation in a bundled procurement.<sup>48</sup> Other times, the agency itself attempts to mitigate the impact.<sup>49</sup> For example, in Phoenix Scientific Corporation, the U.S. Department of the Air Force (Air Force) issued a multiple award IDIQ task order supply and support contract for maintenance of the agency’s weapons systems.<sup>50</sup> All offerors, including SBCs, could compete for four unrestricted awards.<sup>51</sup> After that selection process, the Air Force would consider any previously unselected SBCs for the award of two contracts reserved for SBCs.<sup>52</sup> At least 15% of the total value of all task orders would be awarded to SBCs as prime contractors and the large business primes would be required to subcontract a minimum of 23% of the total value of their task orders to SBCs.<sup>53</sup> The GAO ruled that this was not a bundled requirement pursuant to the Small Business Act because it was suitable for award to a SBC since SBCs would receive at least two awards as prime contractors and would receive a percentage of the task order awards.<sup>54</sup>

Similarly, in Teximara, the GAO approved an Air Force acquisition in which the agency separated its requirement into two contracts – the Big BOS and the Little BOS.<sup>55</sup> The Air Force did not reserve any of the Big BOS for small business participation as prime contractors but reserved the

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<sup>46</sup>See 15 U.S.C. §§ 644(a) (create procurement that encourages small business prime participation); 15 U.S.C. § 644(e) (“To the maximum extent practicable, procurement strategies used by the various agencies having contracting authority shall facilitate the maximum participation of small business concerns as prime contracts, subcontractors, and suppliers); 15 U.S.C. § 644(e)(3) (maximize small business participation at the subcontract levels).

<sup>47</sup>15 U.S.C. § 644(e)(3); see also 13 C.F.R. § 125.2(d)(7), 48 C.F.R. § 7.107(e).

<sup>48</sup>See e.g. B.H. Aircraft Company, Inc., B-295399.2 (July 25, 2005) (SBA agreed to the bundling with certain conditions, intended to promote and preserve small business participation for these parts, and which were memorialized in writing between the SBA and DLA).

<sup>49</sup>The U.S. Department of Defense’s Office of Small and Disadvantaged Business Utilization has prepared a Contract Consolidation Guide, available at <http://www.acq.osd.mil/sadbu/news/contractconsolidation.pdf>, which addresses mitigation of consolidated requirements. For example, the Guidebook recommends giving evaluation points and greater credit to offerors that have identified small business teaming partners, joint ventures, or other small business subcontractors in their proposals, or establishing an award fee or other incentive that monetarily rewards contractors for meeting or exceeding goals in subcontracting plans. Guidebook at 2-2 through 2-5.

<sup>50</sup>Phoenix Scientific Corp., B-286817, 2001 CPD ¶ 24 (Feb. 22, 2001).

<sup>51</sup>Id.

<sup>52</sup>Id.

<sup>53</sup>Id.

<sup>54</sup>Id.

<sup>55</sup>Teximara, B-293221.2, 2004 CPD ¶ 151 (July 9, 2004).

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Little BOS for SBCs.<sup>56</sup> The Air Force required a minimum of 25% small business participation under the Big BOS, encouraged a greater percentage of small business participation through the award fee incentive provisions of the RFP, and stated it would continue to reserve the performance of approximately \$15 million in construction and other miscellaneous work for SBCs.<sup>57</sup> The GAO believed this satisfied the requirement to maximize small business participation on the requirement as a whole.<sup>58</sup>

Despite all of this, there are still SBCs that believe contract consolidation has resulted in a decline in contract awards to SBCs (despite the fact that Federal purchasing has increased).<sup>59</sup> Further, reports issued by the Office of Federal Procurement Policy (OFPP) and the SBA's Office of Advocacy state that the use of bundled and consolidated contracts has resulted in a decline of awards to SBCs.<sup>60</sup> These reports also state that contract bundling and consolidation has grown with the increased use of interagency contracting vehicles.<sup>61</sup>

However, we note that according to a report by the GAO, only 4 agencies reported a total of 24 bundled contracts in FY 2002 and 16 agencies reported no bundled contracts despite FPDS data indicating that there were 928 bundled contracts (of which 33% were awarded to SBCs).<sup>62</sup> Meanwhile, a report by the SBA's Inspector General's (IG's) office reveals that procuring agencies

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<sup>56</sup>Id.

<sup>57</sup>Id.

<sup>58</sup>Id.

<sup>59</sup>See SARA Advisory Acquisition Panel Summary of Statements Submitted by Small Businesses (Jorge G. Lozano, Condortech Services, Inc.; Betty Manetta, Argent Assoc.; Monika Moo-Young, MYI Consulting).

<sup>60</sup>Office of Federal Procurement Policy, Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Businesses, at 3-4 (Oct. 2002), available at [www.acqnet.gov](http://www.acqnet.gov) (OFPP Reports), citing to Office of Advocacy, U.S. Small Bus. Admin., The Impact of Contract Bundling on Small Business FY 1992 – FY 2001, at 5 (Oct. 2002), available at [www.sba.gov/advo/research/rs221tot.pdf](http://www.sba.gov/advo/research/rs221tot.pdf) (“for every increase of 100 bundled contracts there was a decrease of 60 contracts to small business; and for every additional \$100 awarded on bundled contracts there was a decrease of \$12 to small business. At a level of \$109 billion in FY 2001, bundled contracts cost small businesses \$13 billion annually. This is making it increasingly difficult for small businesses to compete and survive in the federal marketplace.”). We note that the report issued by the Office of Advocacy utilized a definition for the term “bundling” different than set forth in statute but nevertheless provides data on a “type” of contract consolidation.

<sup>61</sup>OFPP has stated that bundling has been “exacerbated by the use of contract vehicles that are not uniformly reviewed for contract bundling. Orders under agency multiple award contracts (MACs), multi-agency contracts, Government-Wide Acquisition Contracts (GWACs) and GSA’s Multiple Award Schedule program are not subject to uniform reviews for contract bundling issues.” OFPP, Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Businesses, at 5. According to the report issued by the SBA’s Office of Advocacy, there were over 10,000 consolidated orders/modifications issued in FY 1992 - FY 2001 off the FSS for a total of over \$50 million. Office of Advocacy, U.S. Small Bus. Admin., The Impact of Contract Bundling on Small Business FY 1992 – FY 2001, at 5, 15, 27 (the most frequently used contract vehicles for bundling are GSA Schedules, MACs, BOAs and IDIQ contracts).

<sup>62</sup>U.S. Government Accountability Office, GAO-04-454, Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain, at 2. The report takes issue with the data showing that 33% of the bundled contracts were awarded to SBCs since, by definition, a small business is precluded from award of a bundled contract. Id. at 6.

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are incorrectly applying the statutory definition of bundling to their requirements or simply failing to notify the SBA of such actions.<sup>63</sup> All of the reports commented on the need for timely and accurate data on bundling.<sup>64</sup>

As evidenced from the above, the Group studied current practices, law and available data to ascertain apparent issues the contracting community faces with respect to defining requirements and particularly with respect to the practice of consolidating requirements. Specifically, the Group considered whether the contracting community has adequate guidance in promoting the use of small businesses when consolidating requirements.

**B. Findings**

**1. Guidance in Using Small Business Contracting Programs**

Based upon the Small Business Working Group’s review of governing laws, policies, practices, available data, and court and administrative board decisions, the Group has made several findings concerning the structuring of acquisition strategies to afford adequate small business participation.

Specifically, the Group made five specific findings concerning the adequacy of guidance in selecting among the myriad of small business contracting mechanisms. The Working Group has determined that the contracting community needs better guidance in deciding which small business preference is applicable to an acquisition. This guidance should provide contracting officials with some flexibility to enable agencies to meet their small business goals. Further, the contracting community needs further training on the “newer” small business programs, as well as the use of all of SBA’s small business programs. Finally, although cascading procurements are an innovative way for a shrinking workforce to meet their small business goals, the result is that they curtail competition by SBCs who will not want to spend the time and money to submit a proposal that may never be evaluated. The specific basis and analysis for each finding is set forth below.

First, the Group determined that there is currently inadequate guidance in deciding which small business preference is applicable to an acquisition. There are at least five small business “programs” – 8(a) BD, HUBZone, SDVO, WOSB and SBC – that contracting officials must consider during acquisition planning. Each program has its own statutory and regulatory requirements that provide guidance on its use. For example, the Small Business Act’s provisions on the HUBZone program appear to provide a priority for HUBZone SBCs over all other SBCs,

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<sup>63</sup>Office of the Inspector General, U.S. Small Bus. Admin., Audit of the Contract Bundling Process, No. 5-20 at 4-5 (May 20, 2005); GAO, GAO-04-454, Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain, at 6 (agencies are confused by statutory definition of bundling). According to the report, officials at two of four agencies contacted did not know they were mandated to report all potential bundlings. Id. at 5. Further, the IG noted three instances where an agency did not classify a procurement as bundled, but the SBA Procurement Center Representative (PCR) did. Id.

<sup>64</sup>GAO, GAO-04-454, Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain, at 6; IG, Audit of the Contract Bundling Process, No. 5-20 at 8-9; OFPP, Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Businesses, at 8.



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including 8(a) BD and SDVO SBCs. Meanwhile, the statutory provisions regarding the 8(a) BD, SDVO and WOSB programs provide discretion to the contracting officer on the utilization of such programs.

Both the SBA and the FAR have attempted to interpret these statutory provisions and have implemented such interpretations in different sections of the Code of Federal Regulations (13 C.F.R. parts 124, 125 and 126 for the SBA and 48 C.F.R. parts 19.5, 19.8, 19.13, and 19.14 for the FAR). In general, the SBA's regulations provide for parity amongst most of the programs and give discretion to the CO by stating that the CO should consider setting aside the requirement for 8(a), HUBZone, or SDVO SBC participation before considering setting aside the requirement as a small business set aside. The FAR provides some discretion to contracting officers; however, it now conflicts with the SBA's regulations.

In a time when the Federal workforce is shrinking, but Federal spending is increasing, agency officials do not have the time to rummage through various statutory sections and a multitude of implementing regulations to decode the use of the SBA's small business programs. Thus, it is clear that the contracting community needs better guidance in deciding which preference is applicable to an acquisition. In addition, this guidance must be clear and concise, and if set forth in different regulations, consistent.

Second, the Group finds that any such guidance must provide flexibility to the contracting community to ensure that the agencies are able to achieve their small business goals. Agencies must meet the statutory government-wide goals, as well as the agency established goals, for all of the small business programs. An agency will have difficulty meeting its small business goals if any one small business program takes a priority over the others. For example, it is clear from the FPDS data that many contracting officials should be considering whether their acquisitions are suitable for award to HUBZone or SDVO SBCs as a result of their goaling numbers, rather than focusing on an established hierarchy of small business programs. Thus, the guidance must give the contracting officer discretion in utilizing the various programs, based upon the goaling requirements and needs of the agency.

Third, the Group finds that the agencies must use the FPDS-Next Generation in real time to assess whether or not the Government and the agencies are meeting their goals. The Government uses FPDS-Next Generation to collect data on the number of contracts and the amount of contract dollars each of the SBA's small business programs receives from the different agencies. In the past, this data was used to evaluate the agency's goal achievement in the prior fiscal year. Now, with the new FPDS Next Generation, agencies now have (almost) real time information on their contracting actions.<sup>65</sup> Thus, the agencies can use this database to determine their goal achievement on a daily basis, rather than at the end of the fiscal year. This will enable agencies to determine which small business programs are being underutilized.

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<sup>65</sup> According to FPDS Next Generation, generally, the contract data is available to the public when the contract is awarded to the vendor and thus the information is now available in "almost" real-time. FPDS-NG Report Suite Information, [http://www.fpds-ng.com/public\\_welcome\\_text.html](http://www.fpds-ng.com/public_welcome_text.html). Prior to FPDS Next Generation, the data would not be available for up to nine months from the time the contract was awarded. *Id.* With FPDS-NG, the information is now available in near real-time. *Id.*

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Fourth, the acquisition community needs more training on the SBA's programs, especially the "newer" ones. According to the most recent FPDS data, in FY 2004 many agencies exceeded their small business goals and met or exceeded their 8(a) goals.<sup>66</sup> On the other hand, most agencies made a dismal number of awards to HUBZone and SDVO SBCs.<sup>67</sup> For example, in FY 2004, the DoD awarded 22% of its contracts to small businesses, but only 1.479% to HUBZone SBCs and .327% to SDVO SBCs.<sup>68</sup>

One possible explanation is that agencies are familiar with and knowledgeable about the small business "rule of two" and the sole source and set aside provisions of the 8(a) BD program while at the same time less familiar with two of SBA's newer programs – the HUBZone program and the SDVO SBC program, both created within the last ten years. Thus, these contracting officials may be more comfortable utilizing the "older" programs rather than the "newer" ones. This could result in a perceived competition amongst the various small business contracting programs – a competition that is in reality nonexistent since ultimately each agency, and the Federal government in total, must meet certain contracting goals for all of the small business programs. Training, as well as clearer guidance on the use of these programs, is therefore needed.

Fifth, the Group finds that the current practice of cascading procurements fails to balance adequately the need for quick and efficient contracting with the requirement to provide maximum practicable opportunities to SBCs. If the agency structures the procurement to review 8(a) BD concerns first, then SDVO SBCs and then HUBZone SBCs, SDVO and HUBZone SBCs may not want to submit an offer knowing that the agency may never review it, especially since it costs money and takes time to prepare a proposal.<sup>69</sup> In addition, if the contracting officer performs adequate market research, which has been made easier through the merging of SBA's PRO-Net into the Central Contractor Registration ([www.ccr.gov](http://www.ccr.gov)), then he or she would know up front whether the acquisition is suitable for one of the SBA's small business programs and there would be no need for a cascading procurement. Consequently, cascading procurements appear to circumvent the requirement to perform market research.

## **2. Guidance with Contract Consolidation**

In analyzing the issues concerning the adequacy of guidance in promoting small business participation in consolidated contracts, the Small Business Working Group developed three findings. Specifically, the Group has determined that there is a misunderstanding of contract bundling (including a collapse of the check and balance system on bundled requirements), inaccurate data (and an inability to assess the impact of bundling on SBCs), and disparate mitigation strategies for justified, bundled contracts. The specific basis and analysis for each finding is set forth below.

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<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> See FPDS Next Generation Small Business Goaling Report FY 2004, <http://www.sba.gov/GC/goals/Goaling-Report-08-21-2005.pdf>

<sup>69</sup> See Ralph C. Nash, John Cibinic, Cascading Set-Asides: A Legal and Fair Procedure? 19 No. 8 Nash & Cibinic Rep. 39 (Aug. 2005); see also CODSIA Asks OFPP to Prohibit Agencies' Use of Cascading Set-Asides, 200 BNA A-4 (Oct. 18, 2005).

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First, the Group finds that the agencies are confounded by the bundling "process," including whether or not the procurement itself is bundled. This appears to be the direct result of confusing and complicated statutory provisions relating to bundling, including the definition of the term and the reporting and review requirements.

Although Congress has enacted statutory provisions regarding bundling, these provisions are spread throughout Title 15 of the U.S. Code and define bundling as a consolidated requirement meeting certain other conditions. The Act uses the term consolidated in the actual definition of contract bundling, and also uses the term when referring to construction contracts. Many in Federal contracting use these two terms -- consolidation and bundling -- interchangeably. This creates some uncertainty with respect to contract bundling versus contract consolidation and is problematic because there is one specific statute addressing contract consolidation for DoD only, but no real universal definition for the term as there is for bundling. Thus, some agencies may believe they are consolidating their requirements, but not bundling them, and therefore see no need to follow the statutory requirements regarding bundling. Meanwhile, some agencies have reported that bundled contracts have been awarded to SBCs, despite the fact the statutory definition of bundling precludes a SBC from receiving such a contract. The many reports issued regarding contract bundling evidence that contracting officials do not understand the statutory definition of a bundled requirement.

There are also statutory provisions requiring the reporting of bundled requirements to the SBA's PCR for a specific review process. These provisions attempt to create a check and balance on the use of bundling and require the procuring agency to decide whether the acquisition is bundled. If the agency determines it is, then the solicitation package must be sent to the PCR, regardless of whether the bundled procurement is justified or not. This reporting and review process has confused the officials at agencies, some of whom do not believe they have to report all bundled procurements to the SBA and others who are unsure whether they have to report the bundled procurements to the SBA without the SBA's specific request for the solicitation. In addition, some agencies may believe that if they have justified the bundle, it is no longer considered a bundled contract and therefore there are no reporting and review requirements.

As a result of the shrinking Federal procurement workforce, agency officials do not have the time to decipher the complicated statutory definition for bundling, as well as the confusing reporting requirements. The contracting community needs better guidance regarding contract bundling and contract consolidation. Specifically, contracting officials need a clearer, less complicated definition of bundling/consolidation, as well as clearer reporting guidelines. These new guidelines should create a bright line test for an agency to use when determining whether the procurement is bundled/consolidated and must be referred to the SBA's PCR (or other small business specialist) for review. Ultimately this new guidance, including a new definition of bundling, must take into consideration the need for an agency to strategically source while at the same time achieve its small business goals.

Whether or not new statutory provisions regarding bundling are enacted, contracting officials need training on bundling/consolidation, and the impact of the acquisition strategy on small businesses. Because there is always a need for the Federal Government to strategically source its requirements in order to leverage its enormous spending power and reduce the administrative efforts

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and costs associated with contracting, agencies will continue to bundle, or consolidate, many requirements into one contract -- a contract that is often too large to be performed by a small business. If the contracting community better understands contract bundling, mitigation of bundled requirements, and the impact of such bundling on small businesses, it could alleviate some of the concern many have that bundling is detrimental to SBCs.

Second, as a result of the confusion regarding whether or not a procurement is bundled, the contracting community has inadequate data upon which to assess the true impact of contract bundling on SBCs. There have been several reports issued that attempt to address the impact of contract bundling, the results and findings of which differ. Some reports directly attribute bundling (as spurred by the use of interagency contracting vehicles) to a decrease in contract awards to SBCs. However, one of these reports utilized a definition for the term bundling that differs from the statutory one for its analysis. Meanwhile, a recent report showed that only 4 agencies reported a total of 24 bundled contracts in FY 2002 and 16 agencies reported no bundled contracts despite FPDS data indicating that there were 928 bundled contracts (of which 33% were awarded to SBCs despite the fact SBCs, by statute, cannot receive a bundled contract).

Third, there is also confusion regarding the requirement of and need to mitigate the impact of contract bundling on small businesses. For example, if the bundling is necessary and justified, and assuming the agency realizes it must report the requirement to the SBA's PCR, the PCR will work with the procuring activity to preserve small business prime and subcontract participation to the maximum extent practicable. If the requirement involves "substantial bundling," the agency is required to specify actions designed to maximize small business participation as subcontractors at various tiers under the contract. Thus, the statute requires agencies to mitigate the effects of bundling on SBCs but does not provide specific strategies on such mitigation. The implementing regulations provide a little more direction, but have no teeth. For example, the SBA's regulations state that the agency will make "recommendations" on maximizing small business participation. Likewise, if the bundling is "substantial," the agency must merely document actions designed to maximize small business participation as primes and subcontractors. There is no requirement that the agency take certain actions, most likely because the mitigation strategy must be tailored to fit the particulars of the acquisition.

With respect to mitigation, generally, the SBA recommends that procuring agencies unbundle the requirement and break out specific parts of the bundle for award to SBCs. Some agencies reserve a few of the contract awards for SBCs, if the agency plans to issue multiple awards. Others agencies separate a bundle into two requirements -- one reserved for SBCs and the other for large businesses. In addition, the DoD has issued a Guidebook with specific examples of ways to mitigate bundling. For example, the Guidebook recommends giving evaluation points and greater credit to offerors that have identified small business teaming partners, joint ventures, or other small business subcontractors in their proposals, or establishing an award fee or other incentive that monetarily rewards contractors for meeting or exceeding goals in subcontracting plans.

It is not clear that such mitigation strategies, or the justification for such strategies, are a sufficient balance of the need to bundle and the need to ensure small businesses receive maximum practicable opportunities in Federal contracting. For example, if an agency consolidates 50 requirements currently being performed by SBCs into two separate procurements -- one reserved for SBCs and the other for large businesses, the end result is that 49 SBCs have still lost their prime

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contracts. Further, depending on the subcontracting plan in the large business' offeror or the ability of the large business to perform this work in-house, then these 49 SBCs will not even be able to perform as subcontractors for the same requirement they have been performing as primes for the last few years.

In sum, the statute currently offers little guidance or requirements for mitigating the potential harm caused by bundling on SBCs. Although implementing regulations provide some guidance, they are mere recommendations. While some agencies, such as DoD, have attempted to create guidelines for mitigating bundling, these guidelines are not universal. Although it may be best to allow each agency to develop its own mitigation plan tailored to the particular acquisition, there must be some specific, core mitigation techniques that should be followed by and available to all agencies.

**C. Recommendations**

**1. Guidance in Using Small Business Contracting Programs**

The Small Business Working Group made several findings concerning the structuring of acquisition strategies to afford adequate small business participation. The Group determined that there is currently inadequate guidance in both statute and regulation for deciding which small business preference is applicable to an acquisition. The Group also determined that any guidance provided the contracting community must allow for flexibility to ensure that the agencies are able to achieve their small business goals. Thus, the group recommends several changes to both statute and regulation.

The Group recommends amending the Small Business Act to remove any statutory provisions (such as the one contained in the HUBZone Act) that appear to provide for a hierarchy of small business contracting among certain small business programs. This is necessary because an agency will have difficulty meeting its small business goals if any one small business program takes a priority over the others.<sup>70</sup>

The group also believes this is necessary despite the fact the SBA has not interpreted the HUBZone language as providing a preference for one small business program (such as the 8(a) or SDVO SBC) over another, with the exception of small business set-asides. According to an August 17, 2001 letter issued by the SBA's Acting General Counsel to the Honorable Christopher S. Bond, when the SBA promulgated its HUBZone regulations, the agency reviewed all of the provisions of the Small Business Act, including the provisions of the HUBZone program and the provisions of the 8(a) BD program.<sup>71</sup>

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<sup>70</sup> When the HUBZone Act was first introduced, it contained a priority for HUBZone awards over 8(a) awards. The bill was amended to include a provision on parity and the committee report states that the HUBZone program was not designed to compete with the 8(a) program. S. Rpt. 105-62 (Aug. 19, 1997). Ultimately, the parity language was removed. Amendment No. 1543 to S. 1139 (Oct. 31, 1997).

<sup>71</sup> Letter from SBA's Acting General Counsel to the Honorable Christopher S. Bond, dated August 17, 2001. See Appendix 3.

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The SBA stated that according to the rules of statutory construction, various provisions of a single statute must be read so that all provisions may have effect and that the statute be a “consistent and harmonious whole.”<sup>72</sup> In addition, the SBA believed that although the HUBZone Act provides that “[n]otwithstanding any other provision of law,” the CO may award a HUBZone sole source and shall award a HUBZone set-aside if certain requirements are met, courts have held that the phrase “notwithstanding any other provision of law” is not always dispositive.<sup>73</sup> Consequently, when promulgating the HUBZone regulations, the SBA took into consideration the requirement to read the Small Business Act, and all of its provisions, in concert so that it would be a “harmonious whole.”<sup>74</sup> Thus, as explained in the preamble to the final HUBZone regulations, “SBA balanced HUBZone contracting with the stated Congressional purpose in the Small Business Act of maximizing 8(a) contracting, where practicable.”<sup>75</sup> In doing so, the SBA determined that the phrase “notwithstanding any other provision of law,” contained in § 31 of the Small Business Act, is best interpreted as requiring the disregard only of provisions of law outside of the Small Business Act and not provisions of law contained in the Small Business Act, such as § 8(a).<sup>76</sup> At least one court has ruled that the SBA’s interpretation, *i.e.*, parity for the 8(a) and HUBZone programs, is reasonable.<sup>77</sup>

In addition, the group notes that parity amongst the programs has received Congressional support. Both Senators John F. Kerry and Christopher S. “Kit” Bond have expressed support for parity and believe it is consistent with the provisions of the Small Business Act.<sup>78</sup>

Nonetheless, there has still been some confusion regarding this issue, including conflicting FAR and SBA regulations. Further, the group believes that more discretion should be afforded to CO’s, and therefore believes that the CO should have discretion when selecting which small business program to utilize. In other words, the group believes that the 8(a), HUBZone and SDVO set-asides programs should be given parity and priority over small business set-asides. A statutory change to the HUBZone statute would be necessary to accomplish this goal.

The Group does not believe this change would harm the intent and purpose of any of the programs. For example, the purpose of the HUBZone program is to “help qualified small businesses located in economically distressed inner cities and rural areas create new jobs – new jobs for people

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<sup>72</sup> Id. citing to 73 Am. Jur. 2d Statutes § 254 at 425 (1974).

<sup>73</sup> Id. citing to Oregon Natural Resources Council v. Thomas, 92 F.3d 792 (9th Cir. 1996) (statutory phrase “notwithstanding any other provision of law” is not always construed literally); E.P. Paup Co. v. U.S. Dept. of Labor, 999 F.2d 1341 (9th Cir. 1992) (phrase “notwithstanding any other provision of law” is not necessarily preemptive); In re The Glacier Bay, 944 F.2d 577 (9th Cir. 1991) (phrase “notwithstanding the provisions of any other law” was not dispositive of whether that statute implicitly repealed limitation of liability provisions of a different statute).

<sup>74</sup> Id.

<sup>75</sup> Id. citing to 63 Fed. Reg. 31897 (June 11, 1998).

<sup>76</sup> Id.

<sup>77</sup> Contract Management, Inc. v. Rumsfeld, 291 F.Supp.2d 1166, 1177 (D. Hawaii 2003), aff’d -- F.3d --, 2006 WL 51161 (Hawaii).

<sup>78</sup> See, e.g., U.S. Senate Committee on Small Business Press Release, date Aug. 20, 2001. Appendix 4.

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without jobs today” and to “provide for an immediate infusion of cash through the creation of new jobs and investment in economically distressed areas.”<sup>79</sup> The intent and purpose of the 8(a) BD program is business development for small business owned and controlled by socially and economically disadvantaged individuals.<sup>80</sup> The intent and purpose of the SDVO SBC program is to provide procurement opportunities for small businesses owned and controlled by service-disabled veterans.<sup>81</sup> The Group believes that the provision of adequate guidance and parity amongst the programs will serve to enlighten and educate the contracting community on the powerful tools (set-asides and sole source awards) available to enable them to meet their socio-economic requirements and the above-stated intent and purpose of each program.

Thus, the group recommends the following:

- ? Amend 15 U.S.C. § 657a(b)(2) to resolve any confusion and ensure that contracting officer’s have the discretion to award HUBZone set aside and sole source awards.

15 U.S.C. § 657a(b)(2):

(2) Authority of contracting officer

~~Notwithstanding any other provision of law—~~

(A) ~~a~~A contracting officer may award sole source contracts under this section to any qualified HUBZone small business concern, if--

\* \* \* \* \*

(B) ~~a~~ A contract opportunity ~~shall~~ **may** be awarded pursuant to this section on the basis of competition restricted to qualified HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price; and . .

The Group also recommends that the implementing regulations provide the contracting community discretion in utilizing the various programs, based in part upon the goaling requirements and needs of the agency. This does not mean that the goaling requirement should become the sole determining factor in directing an agency’s contracting behavior. For example, when an agency has already met its HUBZone goal but has not yet met SDVO goal, the CO would still have the discretion to utilize the HUBZone program’s contracting mechanisms. Further, the CO must still comply with other statutory provisions for each program, *e.g.*, anticipated award price limits for sole source or competitive awards, awards to be made at fair market price etc.

Thus, the Group recommends that the SBA and FAR regulations be amended to comply with these statutory changes and to resolve any current conflicts. The group recommends the following:

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<sup>79</sup> S. 208, *The HUBZone Act of 1997: Hearing Before the Comm. On Small Business*, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1 (1997).

<sup>80</sup>See 15 U.S.C. § 637(a); 13 C.F.R. § 124.1.

<sup>81</sup>See 15 U.S.C. § 657f.

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- ?? Delete 48 C.F.R. § 19.800 (e)  
~~Before deciding to set aside an acquisition in accordance with subpart 19.5 [small businesses], 19.13 [HZ], or 19.14 [SDVO] the contracting officer should review the acquisition for offering under the 8(a) program. If the acquisition is offered to the SBA, SBA regulations (13 C.F.R. § 126.607(b)) give first priority to HUBZone 8(a) concerns.~~
- ? Amend 48 C.F.R. § 19.201(c) to add the following at the end of the paragraph:  
**\* \* \*In order to achieve the Government-wide and agency goals, the contracting officer is provided the discretion in deciding whether to utilize the 8(a) BD, HUBZone or SDVO SBC Programs for a specific procurement. The contracting officer must comply with all other statutory and regulatory requirements related to the conduct of market research and the use of the various small business programs.**
- ? Amend 13 C.F.R. § 124.504(j) to read as follows:  
The contracting officer ~~should~~ **shall** consider setting-aside the requirement for HUBZone, 8(a), or SDVO SBC participation before considering setting aside the requirement as a small business set aside.
- ? Renumber paragraphs (b) through (e) as (c) through (f) and add a new paragraph (b) to 13 C.F.R. § 125.2 to read as follows:  
**In order to achieve the Government-wide and agency goals, the contracting officer is provided the discretion in deciding whether to utilize the 8(a) BD, HUBZone or SDVO SBC Programs for a specific procurement. The contracting officer must comply with all other statutory and regulatory requirements related to the conduct of market research and the use of the various small business programs.**
- ? Amend 13 C.F.R. § 125.19(b) to read as follows:  
If the contracting officer determines that §125.18 does not apply, the contracting officer **shall** ~~should~~ consider setting aside the requirement for 8(a), HUBZone, or SDVO SBC participation before considering setting aside the requirement as a small business set aside.
- ? Amend 13 C.F.R. § 126.607(b) to read as follows:  
If the contracting officer determines that §126.605 does not apply, the contracting officer shall **consider** *setting* aside the requirement for HUBZone, 8(a), or SDVO SBC participation before setting aside the requirement as a small business set aside.
- ? Delete 13 C.F.R. §126.609:  
~~If a contract opportunity for competition among qualified HUBZone SBCs does not exist under the provisions of §126.607, the contracting officer must first consider the possibility of making an award to a qualified HUBZone SBC on a sole source basis, and then to a small business under small business set aside procedures, in that order of precedence. If the criteria are not met for any of these special contracting authorities, then the contracting officer may solicit the procurement through another appropriate contracting method.~~



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In addition, to achieve their small business goals, the agencies must have access to and utilize real time data such as the FPDS-NG and the acquisition community must be provided with more training on the SBA's programs, especially the "newer" ones. Thus, the group recommends that:

- ? GAO be directed to perform a systems review of FPDS-NG to examine: (1) the type of small business data being collected by the system; (2) how agencies are currently using the system to support goal achievement; and (3) whether agencies have real-time access to agency goaling data. The report should address necessary upgrades to FPDS-NG and any related data collection processes required to provide agencies with real-time access to goal achievements data.
  
- ? The OFPP coordinate the development of a government-wide training module for all Federal acquisition team members and program managers to acquaint them with the legislative and regulatory requirements of contracting with small business. The training module should include a segment on the laws and regulations regarding subcontracting with small businesses, with the goal of developing a common understanding and standard implementation of small business subcontracting goals across the government. Training should emphasize uniform guidance from the government to other than small businesses, especially in relation to developing and/or specifying categorical small business goals for Small Business Subcontracting Plans, as well as processes for determining realistic and achievable goals based on both the objective of achieving government-wide small business utilization goals, and consideration and analysis of the unique functional and programmatic requirements of each particular solicitation.

The Group also found that the current practice of cascading procurements fails to balance adequately the need for quick and efficient contracting with the requirement to provide maximum practicable opportunities to SBCs because it could impede competition and circumvent the requirement to perform market research. Congress believes the same and has recently issued guidance on the use of cascading procurements for the U.S. Department of Defense, set forth in § 816 of HR1815, the National Defense Authorization Act for Fiscal Year 2006, Public Law No. 109-163.<sup>82</sup>

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<sup>82</sup> This new statutory provision states:

**GUIDANCE ON USE OF TIERED EVALUATIONS OF OFFERS FOR CONTRACTS AND TASK ORDERS UNDER CONTRACTS.**

(j) *Guidance Required.*-- The Secretary of Defense shall prescribe guidance for the military departments and the Defense Agencies on the use of tiered evaluations of offers for contracts and for task or delivery orders under contracts. (b) *Elements.*--The guidance prescribed under subsection (j) shall include a prohibition on the initiation by a contracting officer of a tiered evaluation of an offer for a contract or for a task or delivery order under a contract unless the contracting officer-- (1) has conducted market research in accordance with part 10 of the Federal Acquisition Regulation in order to determine whether or not a sufficient number of qualified small businesses are available to justify limiting competition for the award of such contract or task or delivery order under applicable law and regulations; (2) is unable, after conducting market research under paragraph (1), to make the

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Although this new statutory provision is meant to deter the use of cascading procurements, it nonetheless still allows such procurements in limited situations. For the reasons set forth in the findings and above, the group believes that the use of cascading procurements should be precluded. If a contracting officer performs adequate market research, he/she will know whether there are two or more 8(a), HUBZone, SDVO SBCs or small businesses that can offer on the requirement. Therefore, the group recommends that Congress repeal this new provision and that language should be added to preclude the use of cascading procurement. This language should be included in 41 U.S.C. § 253, to apply to the civilian agencies, and 10 U.S.C. § 2304 to apply to the DoD. The recommended amendments are as follows:

? Add a new paragraph to 10 U.S.C. § 2304 as follows:

**(I) The Secretary of Defense shall prescribe guidance for the military departments and the Defense Agencies prohibiting the use of a tiered evaluation of an offer for a contract or for a task or delivery order under a contract.**

? Add a new paragraph to 41 U.S.C. § 253 as follows:

**(j) The Federal Acquisition Regulation shall prescribe guidance for the executive agencies prohibiting the use of a tiered evaluation of an offer for a contract or for a task or delivery order under a contract.**

## **2. Guidance with Contract Consolidation**

In analyzing the issues concerning the adequacy of guidance in promoting small business participation in consolidated contracts, the Small Business Working Group developed three findings. Specifically, the Group has determined that there is a misunderstanding of contract bundling (including a collapse of the check and balance system on bundled requirements), inaccurate data (and an inability to assess the impact of bundling on SBCs), and disparate mitigation strategies for justified, bundled contracts.

First, the Group finds that the agencies are confounded by the bundling "process," including whether or not the procurement itself is bundled. This appears to be the direct result of confusing and complicated statutory provisions relating to bundling, including the definition of the term and the reporting and review requirements. Although Congress has enacted statutory provisions regarding bundling, these provisions are spread throughout Title 15 of the U.S. Code and define bundling as a consolidated requirement meeting certain other conditions. The Act uses the term consolidated in the actual definition of contract bundling, and also uses the term when referring to construction contracts. Many in Federal contracting use these two terms -- consolidation and bundling -- interchangeably. This creates some uncertainty with respect to contract bundling versus contract consolidation and is problematic because there is no specific statute addressing contract consolidation for all federal agencies let alone a universal definition for the term as there is for

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determination described in that paragraph; and (3) includes in the contract file a written explanation of why such contracting officer was unable to make such determination.

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bundling. This confusion is exasperated by the fact that the Department of Defense must follow statutory provisions related to both bundling and contract consolidation.<sup>83</sup>

The many reports issued regarding contract bundling evidence that contracting officials do not understand the statutory definition of a bundled requirement. This has impacted the reporting and review process of bundled/consolidated procurements. Consequently, the group found that the contracting community needs better guidance regarding contract bundling and contract consolidation.

Second, as a result of the confusion regarding whether or not a procurement is bundled, the contracting community has inadequate data upon which to assess the true impact of contract bundling on SBCs. There have been several reports issued that attempt to address the impact of contract bundling, the results and findings of which differ. Therefore, the group recommends that agencies report to FPDS-NG certain data necessary to allow an objective, statistical assessment of the affects of contract consolidation on small businesses.

Third, the Group finds that there is also confusion regarding the requirement of and need to mitigate the impact of contract bundling on small businesses. For example, if the bundling is necessary and justified, and assuming the agency realizes it must report the requirement to the SBA's PCR, the PCR will work with the procuring activity to preserve small business prime and subcontract participation to the maximum extent practicable. Thus, the statute requires agencies to mitigate the effects of bundling on SBCs but does not provide specific strategies on such mitigation.

The group therefore recommends the creation of a Government-wide bundling database or central repository of best practices for unbundling contracts and mitigating the effects of contract bundling. For example, DoD has issued a Guidebook with specific examples of ways to mitigate bundling such as giving evaluation points and greater credit to offerors that have identified small business teaming partners, joint ventures, or other small business subcontractors in their proposals, or establishing an award fee or other incentive that monetarily rewards contractors for meeting or exceeding goals in subcontracting plans. Although it is not clear that such mitigation strategies, or the justification for such strategies, are a sufficient balance of the need to consolidate and the need to ensure small businesses receive maximum practicable opportunities in Federal contracting it is nonetheless helpful if there are some specific, core mitigation techniques that are followed by and available to all agencies.

Therefore, the group specifically recommends that:

- ? The OFPP coordinate the development of a Government-wide training module for all Federal acquisition team members and program managers to acquaint them with the legislative and regulatory requirements of contracting with small business, as well as contract bundling. The training module should include a segment on the laws and regulations regarding bundling, and subcontracting with small businesses, with the goal of developing a common understanding and standard implementation of small business subcontracting goals across Government. Training should emphasize uniform guidance

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<sup>83</sup> See 10 U.S.C. § 2382.

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from the Government to other than small businesses, especially in relation to developing and/or specifying categorical small business goals for Small Business Subcontracting Plans, as well as processes for determining realistic and achievable goals based on both the objective of achieving Government-wide small business utilization goals, and consideration and analysis of the unique functional and programmatic requirements of each particular solicitation.

- ? The FPDS currently collects information on each consolidated or bundled contract, including the value of the contract. This should not change. In addition, we recommend two data fields be added for the contracting activity to input the number of small business contracts that have been displaced by the consolidated contract and the projected cost savings of the bundled action. This information is key to assessing the impact of contract consolidation on SBCs and is readily available to agencies since it is used when preparing their justification and determining whether a contract is consolidated.
  
- ? Agencies (Department of Defense, SBA, etc.) form a working group to provide Government-wide training for all Federal acquisition team members and program managers and develop best practices and strategies to unbundled contracts and mitigate the effects of contract bundling. The group should consider establishing a contract bundling website/database for all agencies to use.<sup>84</sup>

**III. THE ABILITY OF SMALL BUSINESS TO COMPETE  
IN THE MULTIPLE AWARD CONTRACTING ENVIRONMENT**

**A. Background**

The Federal Acquisition Streamlining Act of 1994 (FASA)<sup>85</sup> formalized the task or delivery order contracting technique, whereby the government acquires supplies or services during the contract period by issuing an order to the contractor. Generally, the government is only obligated to acquire a stated minimum of supplies or services, and the contractor is only obligated to provide a stated maximum. Congress established a preference for the award of multiple contracts when utilizing the technique, and a requirement that each contractor be provided a "fair opportunity" to compete for an order, with limited exception.<sup>86</sup> Contracting officers were given wide latitude in conducting competitions for orders.<sup>87</sup> Thus, there are two levels of competition - offerors must compete for award of one of the contracts, and then must compete with other contract awardees for each order.

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<sup>84</sup>The database could be similar in nature to or modeled after the Share A-76 website, which is a "place for people throughout the Department of Defense community to share knowledge and experience about the A-76 cost comparison process." <http://sharea76.fedworx.org/inst/sharea76.nsf/CONTDEFLOOK/HOME-INDEX> (last visited on January 20, 2006). The Share A-76 "site contains guidance, sample documents, best practices, and tools to help you find knowledgeable peers." *Id.* The Bundling Share Consolidation website could contain the same information.

<sup>85</sup> Pub. L. No. 103-355, 108 Stat. 3423 (1994).

<sup>86</sup> Federal Acquisition Regulation (FAR) § 16.505(b).

<sup>87</sup> FAR § 16.505(b)(1)(ii).

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The passage of FASA, the enactment of the Clinger-Cohen Act<sup>88</sup> two years later, and the expansion of the General Services Administration's (GSA's) Multiple Award Schedules (MAS) program has led to a marked increase in the use of multiple award indefinite delivery, indefinite quantity (IDIQ) contracting vehicles.<sup>89</sup> The data suggests that small business concerns (SBCs) have been able to compete for and obtain multiple award IDIQ contracts and subsequent orders.<sup>90</sup> The reason may be due in large part to the creation of innovative procurement procedures by procuring agencies in an effort to meet their annual SBC prime contracting goals.<sup>91</sup> Some procuring agencies have "reserved" one or more prime contract awards for SBCs under solicitations that were competed full and open, although there is no express authority for such an action. Some procuring agencies have awarded IDIQ contracts that contain ordering procedures that provide that competition for an order may be limited to SBCs. It is unclear whether agencies in fact have authority to limit competition for orders to SBCs, in light of the fair opportunity provisions mentioned above. Moreover, the Section 803 procedures applicable to the Department of Defense (DoD) may in fact prevent DoD from limiting order competitions to SBCs.<sup>92</sup> Under GSA's MAS program, which has its own unique ordering procedures, procuring agencies have used a variety of methods to target small business MAS contractors. GSA has implemented policies and procedures that enhance procuring agencies ability to target small business MAS contractors, and SBCs received 36.8% of the dollars awarded under the MAS program in fiscal year 2004, up from 35.6% in fiscal year 2003.<sup>93</sup>

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<sup>88</sup> The Clinger-Cohen Act authorizes agencies to award multiple information technology task or delivery order contracts which are open to other federal agencies and are referred to as Government-Wide Acquisition Contracts (GWACs). Divisions D and E of the National Defense Authorization Act for Fiscal Year 1996 (Pub. L. No. 104-106, 110 Stat. 186 (1996)).

<sup>89</sup> According to the Government Accountability Office (GAO), total federal government expenditures valued over \$25,000 on Indefinite Delivery, Indefinite Quantity (IDIQ) contracts, Blanket Purchase Agreements (BPAs), and the General Service Administration's (GSA's) Multiple Award Schedules (MAS) program increased from 16 percent of federal procurement expenditures in fiscal year 1994 to 25 percent of federal procurement expenditures in fiscal year 1999. Gen. Acct. Off., Rep. No. GAO-04-738T, *Small Business: Trends in Federal Procurement in the 1990s*, p. 20 (2001). Sales under the GSA's MAS program have grown at least 21 percent sequentially for the past seven years, and totaled \$31.1 billion in fiscal year 2004.

<sup>90</sup> Gen. Acct. Off., Rep. No. GAO-04-738T, *Small Business: Trends in Federal Procurement in the 1990s*, pp. 12-20 (2001) (Small business concerns (SBCs) "received the legislatively mandated goal for federal contract expenditures each fiscal year from 1993 to 1999" and the small business share of dollars awarded under task and delivery order vehicles increased from 24 percent in fiscal year 1994 to 32 percent in fiscal year 1999); Gen. Acct. Off., Rep. No. GAO/NSIAD-98-215, *Acquisition Reform: Multiple-Award Contracting at Six Federal Organizations*, pp. 8-11 (1998). SBCs received approximately 22-23% of total federal procurement expenditures for fiscal years 2000-2003.

<sup>91</sup> Congress has established an annual government-wide goal for prime contracting with small businesses of not less than 23 percent of the total value of awarded contracts. 15 U.S.C. § 644(g)(1). Each agency also establishes its own annual goals for small business prime contracting. 15 U.S.C. § 644(g)(2).

<sup>92</sup> Section 803 of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001); Defense Federal Acquisition Regulation (DFAR) §§ 208.404-70, 216.505-70.

<sup>93</sup> As of the end of fiscal year 2004, approximately 80% of the 16,500 MAS contracts were held by SBCs. In fiscal year 2004, SBCs received \$11.4 billion of the \$31.1 billion in dollars awarded under the MAS program.

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Given the fact that procuring agencies have created varying procurement procedures applicable to SBCs in the multiple award contracting environment, it may be time for Federal policy-makers to address whether procuring agencies have the authority to reserve prime contract awards for SBCs under multiple award solicitations that are competed full and open, and whether competition for orders under full and openly competed contracts can be limited to SBCs.

**1. Competition for Multiple Award Contracts**

The FAR provides that a contracting officer shall set aside any acquisition over \$100,000 for exclusive small business participation if there is a reasonable expectation that offers will be obtained from at least two responsible SBCs and award will be made at a fair market price.<sup>94</sup> Obviously, this regulation was written to address a single-award procurement. If a contracting officer expects to award five contracts, the fact that he or she reasonably expects two SBCs to submit offers does not compel a total small business set-aside of all five contracts. What some agencies have done is "reserve" one or more contracts for SBCs in the context of a full and open multiple award procurement.<sup>95</sup> However, such an action may be illegal under current law. Arguably, the Competition in Contracting Act and its implementing regulations strictly provide for competition that is either full and open, i.e., contracts awarded without regard to size status, or competition that is only open to SBCs.<sup>96</sup>

If an agency does reserve one or more prime contract awards for SBCs, it is unclear whether the limitations on subcontracting should apply to the small business prime contractor.<sup>97</sup> Under existing regulations, for a total or partial small business set-aside service contract "[a]t least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern."<sup>98</sup> However, small business "reserves" are not "set-asides" under current regulations,

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<sup>94</sup> FAR § 19.502-2(b).

<sup>95</sup> See Michael J. Benjamin, *Multiple Award Task and Delivery Order Contracts: Expanding Protest Grounds and Other Heresies*, 31 Pub. Con. L.J. 429, 465-6 (2002); *Phoenix Scientific Corporation*, B-286817, Feb. 22, 2001, 2001 CPD ¶ 24; Gen. Acct. Off., Rep. No. GAO/NSIAD-98-215, *Acquisition Reform: Multiple-Award Contracting at Six Federal Organizations*, pp. 10-11 (1998). Some agencies have labeled these "reserves" as partial small business set-asides, but the partial small business set-aside FAR provisions only apply to definite quantity supply contracts - the acquisition must be divided into severable economic production runs or reasonable lots which have comparable terms and delivery schedules, and any small business which wants to compete for the set aside portion must submit a responsive offer on the non-set-aside portion. FAR § 19.502-3.

<sup>96</sup> See 10 U.S.C. § 2304(b)(2) ("The head of an agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding concerns other than small business concerns in furtherance of sections 9 and 15 of the Small Business Act (15 U.S.C. 638, 644)"); 41 U.S.C. § 253(b)(2) ("An executive agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding other than small business concerns in furtherance of sections 638 and 644 of Title 15"); FAR § 6.203(a) ("contracting officers may set aside solicitations to allow only such [small business] business concerns to compete").

<sup>97</sup> 15 U.S.C. § 644(o); FAR § 52.219-14; 13 C.F.R. § 125.6.

<sup>98</sup> FAR § 52.219-14; 13 C.F.R. § 125.6. The performance requirements of the HUBZone program actually exceed those of the other small business programs. See FAR §§ 52.219-3, 52.219-4, 52.219-14; 13 C.F.R. §§ 125.6(c), 126.700.

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and the limitations on subcontracting provisions do not address "reserves."<sup>99</sup> On the one hand, the award of a "reserved" prime contract in the context of a full and open multiple award procurement only entitles the awardee to the opportunity to compete for orders with other awardees, including concerns that are other than small and that are not required to perform any particular portion of the work themselves. Consequently, it might be unfair to make a small business awardee adhere to performance requirements that are not applicable to its competitors. Moreover, the size protest process is available to prevent a "front" SBC from being awarded a prime contract reserved for SBCs, through application of the ostensible subcontractor rule.<sup>100</sup> On the other hand, the limitations on subcontracting regulations are based on statute, which provides that the limitations apply to contracts that are awarded to SBCs "in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small business concerns."<sup>101</sup> Arguably, agencies reserve prime contracts for SBCs for the same reason they set aside contracts for SBCs - to ensure that a "fair proportion" of contracts are placed with SBCs.

Under current law, a procuring agency receives full credit towards its small business goals for a prime contract awarded to an SBC, regardless of the method of competition, i.e., regardless of whether the SBC must perform any specific portion of the work.<sup>102</sup> However, if an SBC teams with a large business as a prime, or teams with other SBCs as a prime and they collectively exceed the size standard, the agency will get no credit for the award towards its small business prime contracting goals.<sup>103</sup> GSA has implemented a policy applicable to MAS orders which allows an SBC to team with other MAS contractors, both large and small, and allows the procuring agency to receive credit towards its small business prime contracting goals for the portion of the order performed by SBCs.<sup>104</sup>

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<sup>99</sup> "The purpose of small business set-asides is to award certain acquisitions exclusively to small business concerns. A 'set-aside for small business' is the reserving of an acquisition exclusively for participation by small business concerns." FAR § 19.501(a); *see* FAR § 52.219-14, 13 C.F.R. § 125.6 (limitations on subcontracting provisions); SBA's regulations mention reserves as a way to mitigate bundling. 13 C.F.R. § 125.2(b)(6)(i)(6).

<sup>100</sup> 13 C.F.R. § 121.103(h)(4) (a concern is affiliated with its subcontractor if the subcontractor will perform primary and vital functions of the contract or if the prime is unusually reliant on the subcontractor).

<sup>101</sup> 15 U.S.C. § 644(a).

<sup>102</sup> 15 U.S.C. § 644(o); FAR § 52.219-14; 13 C.F.R. § 125.6.

<sup>103</sup> Concerns submitting an offer to perform a prime contract are generally considered to be joint venturers, and affiliated for purposes of determining size for that particular procurement. 13 C.F.R. § 121.103(h)(2). There are some exceptions to this general rule for bundled or very large contracts and joint ventures created pursuant to the Small Business Administration's (SBA's) 8(a) Business Development program Mentor-Protégé regulations. 13 C.F.R. § 121.103(h)(3).

<sup>104</sup> These so-called Contractor Team Arrangements (CTA) allow the "team" to meet the government agency's needs by providing a total solution that combines the supplies and/or services from the team members' separate GSA MAS contracts. It permits contractors, especially SBCs with limited specialties, to complement each other's capabilities to compete for orders for which they may not independently qualify. A customer benefits from a CTA by buying a solution rather than making separate buys from various contractors. In light of increasing demand for total solutions, often at odds with the effort to curtail contract bundling, a CTA may be an effective way for an SBC to enhance its competitiveness. GSA's CTA policy also promotes large-small business partnership, as opposed to subcontracting arrangements, which allows the small business team partner be paid in a timely manner. A procuring agency receives

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## **2. Competition for Task Orders**

The set aside requirements of FAR Part 19 generally apply before task or delivery order contracts are solicited and awarded, not when an order competition is conducted or the order is placed. Nevertheless, agencies have awarded IDIQ contracts with ordering procedures that provide that certain orders will be competed exclusively among SBCs.<sup>105</sup> Limiting competition for orders to SBCs on a full and openly competed contract appears to be contrary to the fair opportunity requirements.<sup>106</sup> This issue was raised in a bid protest before the Government Accountability Office (GAO), but the protest was dismissed on jurisdictional grounds.<sup>107</sup> Moreover, DoD may not be able to limit competition for orders to SBCs because of the Section 803 requirement to provide notice of a purchase to all contractors and fairly consider all responses.<sup>108</sup> If an order competition is limited to SBCs under a full and openly competed contract, it is unclear whether the winner of the order competition would have to comply with the limitations on subcontracting provisions, since the statute and regulations specifically reference "contracts" that are "set aside" for SBCs.<sup>109</sup>

GSA's MAS program "provides Federal agencies...with a simplified process for obtaining commercial supplies and services at prices associated with volume buying."<sup>110</sup> Orders placed in accordance with FAR subpart 8.4 "are considered to be issued using full and open competition."<sup>111</sup> Ordering agencies are not generally required to notify all contractors on a particular Schedule of their intent to purchase.<sup>112</sup> For orders above the micro-purchase threshold (\$2500), contracting

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credit towards its small business prime contracting goals for the portion of the requirement that small business team members perform.

<sup>105</sup> See *Size Appeal of the Department of the Air Force*, SBA No. SIZ-7432 (2005), where the SBA's Office of Hearings and Appeals (OHA) held that an agency can set aside a solicitation for an order under an IDIQ contract, and can request size new certifications in connection with the order competition. The OHA decision has been challenged in the United State Court of Federal Claims. *LB&B Associates, Inc. v. U.S.*, Case No. 05-1066c.

<sup>106</sup> FAR § 16.505(b) provides that each contract awardee must be provided a "fair opportunity" to be considered for award of an order valued over \$2,500, unless: (1) the need for the goods or services is so urgent that providing a fair opportunity would lead to unacceptable delays, (2) only one awardee is capable of providing the unique or highly specialized goods or services, (3) the order is a logical follow-on to a previous order and every awardee was provided with a fair opportunity to compete for the original order, or (4) the order is necessary to fulfill a minimum guarantee.

<sup>107</sup> *Professional Performance Development Group, Inc.*, B-294054.3, Sep. 30, 2004, 2004 CPD ¶ 191.

<sup>108</sup> Section 803 of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001); DFAR § 216.505-70.

<sup>109</sup> 15 U.S.C. § 644(o) ("A concern may not be awarded a contract under subsection (a) as a small business concern unless the concern agrees that" it will perform a specific portion of the work); 13 C.F.R. § 125.6 ("In order to be awarded a full or partial small business set-aside contract" an SBC must agree to perform a specific portion of the work).

<sup>110</sup> FAR § 8.402(a).

<sup>111</sup> FAR § 8.404(a).

<sup>112</sup> The fair opportunity provisions of FAR subpart 16.5 do not apply to MAS orders. FAR § 16.500(c). As discussed *supra*, there are additional notice requirements applicable to DoD when ordering services valued over \$100,000 under the MAS program.



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officers generally must review the capabilities of, or solicit quotes from, at least three MAS contractors.<sup>113</sup> However, when DoD orders services valued over \$100,000 under an MAS it must provide notice of its intent to purchase to: (1) all contractors under the applicable Schedule, or (2) as many MAS contractors as practicable to ensure that at least three quotes are received.<sup>114</sup> Posting a requirement on GSA's electronic request for quotation system (e-Buy) is one way DoD can meet this requirement.<sup>115</sup> Procuring agencies on average receive three quotes in response to a solicitation posted on e-Buy.

The set aside requirements of FAR Part 19 also apply to the MAS program "at the acquisition planning stage prior to issuing" a solicitation for a contract, not at the order level.<sup>116</sup> Although there is no requirement to conduct small business set-aside analysis prior to placing an order under GSA's MAS program, FAR subpart 8.4 provides that "Ordering activities may consider socio-economic status when identifying contractor(s) for consideration or competition for award of an order or BPA. At a minimum, ordering activities should consider, if available, at least one small business, veteran-owned small business, service disabled veteran-owned small business, HUBZone small business, women-owned small business, or small disadvantaged business schedule contractor(s)."<sup>117</sup> In addition, agencies have in fact limited consideration for orders exclusively to SBCs, and one GSA MAS contract (Schedule 70, SIN 132-51) specifically authorized ordering agencies to limit competition for award of an order to SBCs.<sup>118</sup> However, under current MAS ordering procedures procuring agencies are required to provide solicitations to any MAS contractor that requests it, and to evaluate all quotes received in response.<sup>119</sup> Nevertheless, agencies continue to limit competition for orders to SBCs, because there is no explicit prohibition in the FAR.<sup>120</sup> On June 30, 2005, GSA issued an Acquisition Letter which allows ordering activities to "make socio-economic status a primary evaluation factor when making a best value determination. [Citation omitted]."<sup>121</sup>

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<sup>113</sup> FAR §§ 8.405-1, 8.405-2.

<sup>114</sup> DFAR § 208.404-70.

<sup>115</sup> FAR § 8.405-2(d); DFAR § 208.404-70(c)(2).

<sup>116</sup> FAR §§ 8.404(a)(1), 38.101(e).

<sup>117</sup> FAR § 8.405-5(b).

<sup>118</sup> GAO upheld a procuring agency's decision to require MAS contractors to submit size certifications along with their quotations in an order competition limited to SBCs that was conducted among Schedule 70, SIN 132-51 MAS contractors. *CMS Information Services, Inc.*, B-290541, Aug. 7, 2002, 2002 CPD ¶ 132. The SBA's OHA has held that if a procuring agency limits competition for an MAS order (or BPA) to SBCs, a concern must be small at the time of their quote in order to be eligible for award. *Size Appeal of Advanced Management Technology, Inc.*, SBA No. SIZ-4638 (2004); *Size Appeals of SETA Corporation, Federal Emergency Management Agency*, SBA No. SIZ-4477 (2002). GSA requires contractors to re-certify their size status when an option is exercised, typically every five years. GSA Acquisition Letter MV-03-01, February 21, 2003.

<sup>119</sup> FAR §§ 8.405-2(c)(4), (d).

<sup>120</sup> See *Systems Plus, Inc.*, B-297215.

<sup>121</sup> GSA Acquisition Letter V-05-12, June 6, 2005.

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**B. Findings**

**1. Competition for Multiple Award Contracts**

Based upon the Small Business Working Group's review of governing laws, policies, practices, available data, and court and administrative board decisions, the Group has made several findings concerning the ability of SBCs to compete for multiple award contracts. Specifically the Group recognizes that agencies are reserving prime contract awards for SBCs under full and openly competed procurements. The Group finds that the procurement mechanism: helps ensure that SBCs have an opportunity to compete for orders at the prime contractor level; helps procuring agency achieve their annual small business prime contracting goals; and helps agencies mitigate the effects of bundling. Finally, the Group recognizes that because there is no express authority for the procurement mechanism, there are also no implementing regulations, which has resulted in inconsistent or confusing utilization of the procurement mechanism.

Agencies are reserving prime contracts for SBCs in the context of full and open multiple award procurements, even though there is no express legal authority for reserving prime contracts for SBCs in the context of full and open multiple award procurements.<sup>122</sup> The mechanism has been cited in Federal Court Decisions, General Services Administration Board of Contract Appeals decisions, GAO bid protest decisions, SBA's regulations, GAO reports and legal journal articles.<sup>123</sup> Reserving prime contract awards for SBCs in the context of full and open multiple award procurements has been beneficial to both SBCs and procuring agencies.

Reserving prime contract awards for SBCs ensures that SBCs have an opportunity to compete, as prime contractors, for future orders. Without the mechanism, SBCs would be unable to compete for award for prime contracts under many of the broadly written statements of work utilized in today's contracting environment,<sup>124</sup> relegating SBCs exclusively to a subcontracting role. Procuring agencies created the procurement mechanism in large part as a result of their concern about their ability to achieve their small business prime contracting goals when utilizing multiple award contracts competed on a full and open basis. In a report on multiple-award contracting, GAO examined the practices of six federal organizations and noted that most of the organizations had taken some action to enhance small business participation. Three of the six organizations that GAO reviewed had reserved one or more prime contract awards for SBCs under full and openly competed

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<sup>122</sup> See FAR subpart 16.5, part 19.

<sup>123</sup> See *Widnall v. B3H Corp.*, 75 F.3d 1577, 1578-9 (C.A. Fed. 1996), *on remand B3H Corp. v. Department of the Air Force*, 96-2 BCA ¶ 28360, GSBCA No. 12813-P-REM (G.S.B.C.A. May 3, 1996); *Phoenix Scientific Corporation*, B-286817, Feb. 22, 2001, 2001 CPD ¶ 24; 13 C.F.R. § 125.2(b)(6)(i)(C); Gen. Acct. Off., Rep. No. GAO/NSIAD-98-215, *Acquisition Reform: Multiple-Award Contracting at Six Federal Organizations*, pp. 10-11 (1998); Michael J. Benjamin, *Multiple Award Task and Delivery Order Contracts: Expanding Protest Grounds and Other Heresies*, 31 Pub. Con. L.J. 429, 465-6 (2002).

<sup>124</sup> See Michael J. Benjamin, *Multiple Award Task and Delivery Order Contracts: Expanding Protest Grounds and Other Heresies*, 31 Pub. Con. L.J. 429, 440-1 (2002).

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contracts.<sup>125</sup> GAO singled out the Department of Transportation's (DOT's) "comprehensive" initiative to promote small business competition, where the agency divided its information technology services requirement into three functional areas, and reserved one award in each functional area for a small business and a small disadvantaged business participating in the 8(a) BD program.<sup>126</sup> GAO concluded that DOT's approach "appears to have been successful," noting that ten of 20 contracts were awarded to small businesses, and small business prime contractors received 39 percent of the orders issued.<sup>127</sup> SBA's regulations specifically cite the reservation of prime contract awards for SBCs in the context of full and open multiple award procurements as a way for agencies to mitigate bundling.<sup>128</sup> In fact, because GAO has held that if an agency reserves one or more prime contract awards for SBCs the procurement is "suitable" for award to an SBC and therefore does not meet the definition of bundling in the Small Business Act, agencies that reserve awards for SBCs do not have to comply with the regulatory bundling analysis and justification provisions.<sup>129</sup>

Finally, without guidance, the procurement mechanism will continue to be applied, most likely inconsistently. As discussed in the background section, it is unclear whether the limitations on subcontracting provisions apply to the contract or each individual order, or whether agencies can limit competition for particular orders to SBCs. In addition, there are infinite variations on the small business "reserve." Agencies are reserving contracts for the various types of SBCs, e.g., 8(a), Small Disadvantaged Business (SDB), HUBZone, Service-Disabled Veteran-Owned (SDVO). Agencies reserve awards for SDBs, even though there is currently no authority to conduct SDB set-asides.<sup>130</sup> Contracts are reserved for 8(a) concerns, even though 8(a) contracts are defined by statute as contracts that are awarded sole source or on the basis of competition limited exclusively to 8(a) concerns.<sup>131</sup> In addition, the 8(a), HUBZone, and SDVO small business programs take precedence over the small business set-aside program.<sup>132</sup> Arguably, an agency could violate the law by reserving a contract for SBCs, if the contracting officer is aware that two or more responsible 8(a),

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<sup>125</sup> Gen. Acct. Off., Rep. No. GAO/NSAID-98-215, *Acquisition Reform: Multiple-award Contracting at Six Federal Organizations*, pp. 8-11 (1998).

<sup>126</sup> *Id.* at 10-11.

<sup>127</sup> *Id.* at 11.

<sup>128</sup> 13 C.F.R. § 125.2(b)(6)(i)(C).

<sup>129</sup> See 15 U.S.C. § 632(o)(2); 13 C.F.R. § 125.2(d); *Phoenix Scientific Corporation*, B-286817, Feb. 22, 2001, 2001 CPD ¶ 24.

<sup>130</sup> 61 Fed. Reg. 26041, 26048 (1996).

<sup>131</sup> Generally, dollars awarded to an 8(a) concern only count towards an agency's 8(a) prime contracting goals if the contract was an 8(a) contract. In light of the narrow definition of an 8(a) contract, it is questionable whether SBA can accept a contract that has been reserved for 8(a) concerns into the 8(a) BD program, where orders will not be competed exclusively among 8(a) concerns. Assuming that SBA can accept such an offer, because competition for that particular contract is limited to 8(a) concerns, it is questionable whether any order awarded to the 8(a) concern can be counted towards the agency's 8(a) prime contracting goals if the 8(a) concern competed with non-8(a) concerns for the order. 15 U.S.C. § 637(a)(1)(D); 13 C.F.R. § 124.501(b).

<sup>132</sup> FAR § 19.501(c)-(e); 13 C.F.R. § 125.19.

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HUBZone, or SDVO SBCs are likely to submit fair market price offers in response to the solicitation.

## **2. Competition for Task Orders**

Based upon the Small Business Working Group's review of governing laws, policies, practices, available data, and court and administrative board decisions, the Group has made several findings concerning the ability of SBCs to compete for orders under multiple award contracts. Specifically the Group recognizes that agencies are limiting competition for orders to SBCs under full and openly competed contracts. The Group finds that the procurement mechanism is not contrary to the fair opportunity provisions, but is contrary to the Section 803 requirements applicable to DoD orders for services valued over \$100,000. However, in the context of orders under the MAS program, Section 803 does not prevent agencies from limiting competition for orders to SBCs. Finally, the Group recognizes that because there is no express authority for the procurement mechanism, there are also no implementing regulations, which has resulted in inconsistent or confusing utilization of the procurement mechanism.

Agencies are awarding multiple-award contracts that allow competition for orders to be limited to SBCs,<sup>133</sup> even though there is no express legal authority to limit competition for orders based on socioeconomic status.<sup>134</sup> Agencies are limiting competition for MAS orders to SBCs,<sup>135</sup> even though there is no express legal authority to limit competition for MAS orders to SBCs,<sup>136</sup> and GSA's MAS regulations appear to prohibit an agency from limiting competition for an order based on socioeconomic status.<sup>137</sup>

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<sup>133</sup> See *LB&B Associates, Inc. v. U.S.*, Case No. 05-1066c, United States Court of Federal Claims; *Professional Performance Development Group, Inc.*, B-294054, Sep. 30, 2004, 2004 CPD ¶ 191; *Size Appeal of the Department of the Air Force*, SBA No. SIZ-4732 (2005); Mary Mosquera, *21 Firms to Compete in New Treasury Initiative*, The Washington Post, Nov. 14, 2005, D4 (Department of Treasury's five-year, \$3 billion TIPPS-3 contract, where orders under \$250,000 will be set aside for SBCs).

<sup>134</sup> See FAR subpart 16.5, part 19.

<sup>135</sup> See *Client Network Services, Inc. v. U.S.*, 64 Fed. Cl. 784 (Fed. Cl. 2005); *Systems Plus, Inc.*, B-297215; *Information Ventures, Inc.*, B-297225, Dec. 1, 2005, 2005 CPD ¶ \_\_\_\_; *Planned Systems International, Inc.*, B-292319.7, Feb. 24, 2004, 2004 CPD ¶ 43; *CMS Information Services, Inc. - Reconsideration*, B-290541.2, Nov. 13, 2002; *CMS Information Services, Inc.*, B-290541, Aug. 7, 2002, 2002 CPD ¶ 132; *Size Appeal of Client Network Services, Inc.*, SBA No. SIZ-4686 (2005); *Size Appeal of the MIL Corporation*, SBA No. SIZ-4641 (2004); *Size Appeal of Advanced Management Technology, Inc.*, SBA No. SIZ-4638 (2004); *Size Appeals of Vistrionix, Inc. and Department of Justice*, SBA No. SIZ-4585 (2003); *Size Appeal of Vistrionix, Inc.*, SBA No. SIZ-4550 (2003); *Size Appeal of Jason Associates, Inc.*, SBA No. SIZ-4489 (2002); *NAICS Appeal of SCI Consulting, Inc.*, SBA No. NAICS-4488 (2002); *Size Appeal of Advanced Technologies and Laboratories International, Inc.*, SBA No. SIZ-4484 (2002); *Size Appeals of SETA Corporation and Federal Emergency Management Agency*, SBA No. SIZ-4477 (2002).

<sup>136</sup> See FAR subpart 8.4.

<sup>137</sup> The FAR provides that "[t]he ordering activity shall provide the RFQ (including the statement of work and the evaluation criteria) to any schedule contractor who requests a copy of it" and "[t]he ordering activity shall evaluate all responses received using the evaluation criteria provided to the schedule contractors." FAR § 8.405-2(c)(4), (d).

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In the Group's view, limiting competition for orders is not contrary to the "fair opportunity" requirements. In contrast to the Section 803 requirements, the fair opportunity provisions do not require procuring agencies to formally notify all contractors offering the required services of their intent to make a purchase, or to fairly consider all offers to perform a particular order.<sup>138</sup> Moreover, the fair opportunity provisions do not prohibit a procuring agency from considering socioeconomic status when placing orders.<sup>139</sup> However, the Group finds that limiting competition for orders to SBCs is contrary to the "Section 803" requirements. In contrast to the fair opportunity provisions, Section 803 and its implementing regulations provide that when ordering services valued over \$100,000, DoD must provide notice of its intent to make a purchase to all contractors offering the required services, including a description of the work and the basis upon which selection will be made, unless one of the fair opportunity exceptions apply.<sup>140</sup> Further, DoD must afford "all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered."<sup>141</sup>

As discussed in the Background section, while the fair opportunity provisions do not apply to MAS orders, Section 803 did impose additional requirements on DoD activities ordering services under the MAS program. In the Group's view, limiting competition for an MAS order to SBCs is not contrary to the "Section 803" requirements. Section 803 provides that "notice may be provided to fewer than all contractors offering such services" under a MAS contract "if notice is provided to as many contractors as practicable."<sup>142</sup> Section 803 further provides that where notice is not provided to all contractors, a purchase may not be made unless: (1) offers were received from at least three qualified contractors or (2) a contracting officer determines that in writing that that no additional qualified contractors exist.<sup>143</sup> As of September, 2005, 4402 of 5086 contractors on GSA's Schedule 70 (General Purpose Commercial Information Technology Equipment, Software, and Services) are SBCs (approximately 87%). As of the same date, 1166 of 1666 contractors on GSA's 874 MOBIS Schedule (Mission Oriented Business Integrated Services) are SBCs (approximately 70%). Thus, under these very popular Schedules, a DoD procuring activity could provide notice of its intent to purchase to a small percentage of SBCs on the Schedule and easily receive at least three offers.

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<sup>138</sup> See FAR § 16.505.

<sup>139</sup> *Id.*

<sup>140</sup> DFAR § 216.505-70.

<sup>141</sup> *Id.*

<sup>142</sup> Section 803(b)(3) of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001); *see also* Defense Federal Acquisition Regulation (DFAR) §, 216.505-70.

<sup>143</sup> Section 803(b)(4) of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001); *see also* Defense Federal Acquisition Regulation (DFAR) §, 216.505-70.

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Finally, without guidance, the procurement mechanism will continue to be applied, most likely inconsistently. As discussed in the background section, it is unclear whether the limitations on subcontracting provisions apply to orders that are awarded pursuant to competition limited to SBCs. Moreover, there have been numerous size protest and appeal decisions concerning size status, and thus eligibility, for orders that were awarded pursuant to competition limited to SBCs.<sup>144</sup>

**C. Recommendations**

**1. Competition for Multiple Award Contracts**

An agency must conduct market research to determine whether a total or partial small business set-aside is appropriate before issuing any solicitation, including a solicitation where multiple contracts will be awarded. See FAR §§ 10.001, 10.002, 19.502-2, 19.800(e), 19.1305, 19.1405, 38.101(e); 13 C.F.R. § 125.19(b). If a set-aside is not appropriate, then a solicitation for multiple awards will be issued on a full and open competitive basis. As discussed in the Background and Findings, some procuring agencies are reserving one or more prime contracts for SBCs in the context of full and open multiple award procurements. The Working Group found that reserving multiple award contracts for SBCs helps procuring agencies achieve their annual small business prime contracting goals and mitigates the effects of bundling. As discussed in the Background and Findings, there is no express legal authority for a small business reserve in the context of a full and open procurement. In fact, reserving contracts based on socio-economic status under full and open multiple award procurements may be contrary to the Competition in Contracting Act and its implementing regulations. Consequently, the Group recommends that 10 U.S.C. § 2304a(d)(3) and 41 U.S.C. § 253h(d)(3) be amended to provide a new paragraph (C):

(3) The regulations implementing this subsection shall --

(A) establish a preference for awarding, to the maximum extent practicable, multiple task or delivery order contracts for the same or similar services or property under the authority of paragraph (1)(B); ~~and~~

(B) establish criteria for determining when award of multiple task or delivery order contracts would not be in the best interest of the Federal Government; **and**

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<sup>144</sup> *LB&B Associates, Inc. v. U.S.*, Case No. 05-1066c, United States Court of Federal Claims; *Client Network Services, Inc. v. U.S.*, 64 Fed. Cl. 784 (Fed. Cl. 2005); *Systems Plus, Inc.*, B-297215; *Planned Systems International, Inc.*, B-292319.7, Feb. 24, 2004, 2004 CPD ¶ 43; *CMS Information Services, Inc. - Reconsideration*, B-290541.2, Nov. 13, 2002; *CMS Information Services, Inc.*, B-290541, Aug. 7, 2002, 2002 CPD ¶ 132; *Size Appeal of Client Network Services, Inc.*, SBA No. SIZ-4686 (2005); *Size Appeal of the Department of the Air Force*, SBA No. SIZ-4732 (2005); *Size Appeal of the MIL Corporation*, SBA No. SIZ-4641 (2004); *Size Appeal of Advanced Management Technology, Inc.*, SBA No. SIZ-4638 (2004); *Size Appeals of Vistronix, Inc. and Department of Justice*, SBA No. SIZ-4585 (2003); *Size Appeal of Vistronix, Inc.*, SBA No. SIZ-4550 (2003); *Size Appeal of Jason Associates, Inc.*, SBA No. SIZ-4489 (2002); *NAICS Appeal of SCI Consulting, Inc.*, SBA No. NAICS-4488 (2002); *Size Appeal of Advanced Technologies and Laboratories International, Inc.*, SBA No. SIZ-4484 (2002); *Size Appeals of SETA Corporation and Federal Emergency Management Agency*, SBA No. SIZ-4477 (2002).

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**(C) establish criteria for reserving one or more contract awards for small business concerns under full and open multiple award procurements, including the subcategories of small business concerns identified in Section 15(g)(2) of the Small Business Act (15 U.S.C. 644(g)(2)), when a total set aside is not appropriate.**

Proposed paragraph (C) would give agencies the discretion to reserve contracts for HUBZone, SDB, SDVO and Women-Owned SBCs, but not 8(a) concerns, because of the way 8(a) procurements are conducted and the way dollars awarded to 8(a) concerns are counted. *See* Background and Findings, *supra*. The authority to reserve contract for SBCs in full and open multiple award procurements would not supersede or diminish statutory or regulatory set-aside analysis requirements applicable to multiple award procurements. *See* FAR §§ 10.001, 10.002, 19.502-2, 19.800(e), 19.1305, 19.1405, 38.101(e); 13 C.F.R. § 125.19(b).

As discussed in the Background and Findings, a concern awarded a contract reserved for SBCs under a full and open competitive procurement will compete for orders with all contract holders, including concerns that are other than small. Thus, the Group recommends that the Small Business Act and SBA's regulations be amended to clarify that the limitations on subcontracting provisions do not apply to contracts that are reserved for SBCs in full and open multiple award procurements, since concerns that are other than small are not required to perform any specific portion of work under contracts awarded under full and open competition. The Group recommends that a new paragraph (4) be added to 15 U.S.C. § 644(o):

**(4) The limitations on subcontracting do not apply to prime contracts that are reserved for small business concerns under full and open multiple award procurements.**

In addition, the Group recommends that 13 C.F.R. § 125.6 be amended to include the following new paragraph (k):

**(k) The limitations on subcontracting do not apply to prime contracts that are reserved for small business concerns under full and open multiple award procurements.**

Although the Working Group recommends that the limitation on subcontracting not apply to contracts reserved for SBCs under full and open procurements, SBA's affiliation regulations, including the ostensible subcontractor rule, would apply to contracts reserved for SBCs. *See* 13 C.F.R. §§ 121.103, 121.401. In general, if SBA determines that a subcontractor will be performing primary and vital requirements of the contract, the prime and subcontractor will be found to be affiliated for purposes of that contract. *See* 13 C.F.R. § 121.103(h)(4). If the two concerns when combined are other than small, the prime would be ineligible for award of a contract reserved for SBCs. *See* 13 C.F.R. § 121.103(a)(6).

## **2. Competition for Task Orders**

As discussed in the Background and Findings, agencies are limiting competition for particular orders to SBCs. The Working Group found that this practice benefits procuring agencies by enhancing their ability to meet their prime contracting goals, and benefits SBCs by providing them with an opportunity to compete for orders on a level playing field. The Working Group found that the practice is probably not contrary to the fair opportunity provisions, but is contrary to the

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Section 803 provisions applicable to DoD. Thus, the Group recommends that contracting agencies, including DoD, be given explicit discretion to limit competition for orders to SBCs. Consequently the Group recommends that 10 U.S.C. § 2304c and 41 U.S.C. § 253j be amended to redesignate paragraphs (c), (d), (e) and (f) as paragraphs (d), (e), (f) and (g) and include a new paragraph (c):

(a) Issuance of orders.--The following actions are not required for issuance of a task or delivery order under a task or delivery order contract:

(1) A separate notice for such order under section 18 of the Office of Federal Procurement Policy Act (41 U.S.C. 416) or section 8(e) of the Small Business Act (15 U.S.C. 637(e)).

(2) Except as provided in subsection (b), a competition (or a waiver of competition approved in accordance with section 2304(f) of this title) that is separate from that used for entering into the contract.

(b) Multiple award contracts.--When multiple task or delivery order contracts are awarded under section 2304a(d)(1)(B) or 2304b(e) of this title, all contractors awarded such contracts shall be provided a fair opportunity to be considered, pursuant to procedures set forth in the contracts, for each task or delivery order in excess of \$2,500 that is to be issued under any of the contracts unless--

(1) the agency's need for the services or property ordered is of such unusual urgency that providing such opportunity to all such contractors would result in unacceptable delays in fulfilling that need;

(2) only one such contractor is capable of providing the services or property required at the level of quality required because the services or property ordered are unique or highly specialized;

(3) the task or delivery order should be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to a task or delivery order already issued on a competitive basis; or

(4) it is necessary to place the order with a particular contractor in order to satisfy a minimum guarantee.

**(c) Notwithstanding paragraph (b) and Section 803 of Pub. Law No. 107-107, 115 Stat. 1012 (2002), a contracting officer has the discretion to set forth procedures in multiple award contracts that provide that competition for particular orders may be limited to small business concerns, including the subgroups identified in Section 15(g)(2) of the Small Business Act (15 U.S.C. 644(g)(2)).**

The Group recommends that FAR § 16.504 be amended to provide:

(a) *Description.* An indefinite-quantity contract provides for an indefinite quantity, within stated limits, of supplies or services during a fixed period. The Government places orders for individual requirements. Quantity limits may be stated as number of units or as dollar values.

(1) The contract must require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services. In addition, if ordered, the contractor must furnish any additional quantities, not to exceed the stated maximum. The contracting



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officer should establish a reasonable maximum quantity based on market research, trends on recent contracts for similar supplies or services, survey of potential users, or any other rational basis.

(2) To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but it should not exceed the amount that the Government is fairly certain to order.

(3) The contract may also specify maximum or minimum quantities that the Government may order under each task or delivery order and the maximum that it may order during a specific period of time.

(4) A solicitation and contract for an indefinite quantity must—

(i) Specify the period of the contract, including the number of options and the period for which the Government may extend the contract under each option;

(ii) Specify the total minimum and maximum quantity of supplies or services the Government will acquire under the contract;

(iii) Include a statement of work, specifications, or other description, that reasonably describes the general scope, nature, complexity, and purpose of the supplies or services the Government will acquire under the contract in a manner that will enable a prospective offeror to decide whether to submit an offer;

(iv) State the procedures that the Government will use in issuing orders, including the ordering media, and, if multiple awards may be made, state the procedures and selection criteria that the Government will use to provide awardees a fair opportunity to be considered for each order (see 16.505(b)(1)) **and state whether competition for particular orders may be limited based on socio-economic status;**

(v) Include the name, address, telephone number, facsimile number, and e-mail address of the agency task and delivery order ombudsman (see 16.505(b)(5)) if multiple awards may be made;

(vi) Include a description of the activities authorized to issue orders; and

(vii) Include authorization for placing oral orders, if appropriate, provided that the Government has established procedures for obligating funds and that oral orders are confirmed in writing.

The Group further recommends that FAR § 16.505 be amended to provide:

(b) Orders under multiple award contracts—

(1) Fair opportunity.

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(i) The contracting officer must provide each awardee a fair opportunity to be considered for each order exceeding \$2,500 issued under multiple delivery-order contracts or multiple task-order contracts, except as provided for in paragraph (b)(2) of this section.

(ii) The contracting officer may exercise broad discretion in developing appropriate order placement procedures. The contracting officer should keep submission requirements to a minimum. Contracting officers may use streamlined procedures, including oral presentations. In addition, the contracting officer need not contact each of the multiple awardees under the contract before selecting an order awardee if the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order. The competition requirements in Part 6 and the policies in Subpart 15.3 do not apply to the ordering process. However, the contracting officer must—

(A) Develop placement procedures that will provide each awardee a fair opportunity to be considered for each order and that reflect the requirement and other aspects of the contracting environment;

(B) Not use any method (such as allocation or designation of any preferred awardee) that would not result in fair consideration being given to all awardees prior to placing each order;

(C) Tailor the procedures to each acquisition;

(D) Include the procedures in the solicitation and the contract; and

(E) Consider price or cost under each order as one of the factors in the selection decision.

(iii) The contracting officer should consider the following when developing the procedures:

(A) (1) Past performance on earlier orders under the contract, including quality, timeliness and cost control.

(2) Potential impact on other orders placed with the contractor.

(3) Minimum order requirements.

(4) The amount of time contractors need to make informed business decisions on whether to respond to potential orders.

(5) Whether contractors could be encouraged to respond to potential orders by outreach efforts to promote exchanges of information, such as—

(i) Seeking comments from two or more contractors on draft statements of work;

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(ii) Using a multiphased approach when effort required to respond to a potential order may be resource intensive (*e.g.*, requirements are complex or need continued development), where all contractors are initially considered on price considerations (*e.g.*, rough estimates), and other considerations as appropriate (*e.g.*, proposed conceptual approach, past performance). The contractors most likely to submit the highest value solutions are then selected for one-on-one sessions with the Government to increase their understanding of the requirements, provide suggestions for refining requirements, and discuss risk reduction measures.

**(6) Whether competition for orders will be limited based on socio-economic status.**

(B) Formal evaluation plans or scoring of quotes or offers are not required.

The Group further recommends that DFAR § 216.505-70 be amended to provide:

(a) This subsection--

(1) Implements Section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107-107);

(2) Applies to orders for services exceeding \$100,000 placed under multiple award contracts, instead of the procedures at FAR 16.505(b)(1) and (2) (see Subpart 208.4 for procedures applicable to orders placed against Federal Supply Schedules);

(3) Also applies to orders placed by non-DoD agencies on behalf of DoD; and

(4) Does not apply to orders for architect-engineer services, which shall be placed in accordance with the procedures in FAR Subpart 36.6.

(b) Each order for services exceeding \$100,000 shall be placed on a competitive basis in accordance with paragraph (c) of this subsection, unless the contracting officer waives this requirement on the basis of a written determination that--

(1) One of the circumstances described at FAR 16.505(b)(2)(i) through (iv) applies to the order; or

(2) A statute expressly authorizes or requires that the purchase be made from a specified source.

(c) An order for services exceeding \$100,000 is placed on a competitive basis only if the contracting officer--

(1)(i) Provides a fair notice of the intent to make the purchase, including a description of the work the contractor shall perform and the basis upon which the contracting officer will make the selection, to all contractors offering the required services under the multiple award contract; and

(2) (ii) Affords all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered;~~or~~

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**(2) (i) Provides a fair notice of the intent to make the purchase, including a description of the work the contractor shall perform and the basis upon which the contracting officer will make the selection, to all small business contractors offering the required services under the multiple award contract; and**

**(ii) Affords all small business contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered.**

(d) When using the procedures in this subsection--

(1) The contracting officer should keep contractor submission requirements to a minimum;

(2) The contracting officer may use streamlined procedures, including oral presentations;

(3) The competition requirements in FAR Part 6 and the policies in FAR Subpart 15.3 do not apply to the ordering process, but the contracting officer shall consider price or cost under each order as one of the factors in the selection decision; and

(4) The contracting officer should consider past performance on earlier orders under the contract, including quality, timeliness, and cost control.

The Group has decided not to recommend that the limitations on subcontracting apply to orders that are placed pursuant to competition limited to SBCs under full and open procurements. Adding a performance requirement at the order level is inconsistent with the underlying intent and purpose of multiple award task and delivery order contracting provisions, i.e., ease and simplicity. Such a requirement may in fact have a negative effect on small businesses, by making it less likely that contracting officers will limit competition for orders to small businesses, either because they believe small businesses cannot comply with the performance requirements or because the contracting officer does not want to evaluate and monitor a contractor's compliance with the limitations on subcontracting. Some believe that the limitations on subcontracting more appropriately apply at the contract formation level, which gives the contractor the ability to comply with the requirements over the entire contract period, while others question whether the limitations on subcontracting, which first appeared in statute in 1986 (Section 921(c)(2) of Pub. L. No. 99-661, 100 Stat. 3816 (1986)), make sense in today's contracting environment, where agencies are seeking total solutions that only teams of multiple contractors can provide. *See* Background and Findings, *supra*. Consequently, the Group believes the Small Business Administration (SBA) is the appropriate body to consider whether the limitations on subcontracting should apply at the order level.

As discussed in the Background and Findings, procuring agencies are also limiting competitions for orders under the MAS program to SBCs. As discussed *supra*, the fair opportunity provisions do not apply to MAS contracts, and the Group found that DoD contracting agencies can limit competition for MAS orders to SBCs without violating Section 803. Consequently, the Group recommends that FAR § 8.405-5 be amended to provide as follows:

(a) Although the mandatory preference programs of Part 19 do not apply, orders placed against schedule contracts may be credited toward the ordering activity's small business goals. For purposes of reporting an order placed with a small business schedule contractor, an ordering agency may only take credit if the awardee meets a size standard that corresponds to

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the work performed. Ordering activities should rely on the small business representations made by schedule contractors at the contract level.

(b) Ordering activities may consider socio-economic status when identifying contractor(s) for consideration or competition for award of an order or BPA.

**(1) Ordering activities may, in their sole discretion, explicitly limit competition for an order to small business concerns, including veteran-owned small business, service disabled veteran-owned small business, HUBZone small business, women-owned small business, or small disadvantaged business schedule contractor(s). Ordering activities must comply with all applicable competition requirements when utilizing this authority.**

(2) At a minimum, ordering activities should consider, if available, at least one small business, veteran-owned small business, service disabled veteran-owned small business, HUBZone small business, women-owned small business, or small disadvantaged business schedule contractor(s). GSA Advantage! and Schedules e-Library at <http://www.gsa.gov/fss> contain information on the small business representations of Schedule contractors.

(c) For orders exceeding the micro-purchase threshold, ordering activities should give preference to the items of small business concerns when two or more items at the same delivered price will satisfy the requirement.

In addition, the Group recommends that FAR § 8.405-2(d) be amended to provide:

(d) *Evaluation.* The ordering activity shall evaluate all responses received using the evaluation criteria provided to the schedule contractors (**unless competition was limited based on socio-economic status (see 8.405-5(b)(1))**). The ordering activity is responsible for considering the level of effort and the mix of labor proposed to perform a specific task being ordered, and for determining that the total price is reasonable. Place the order, or establish the BPA, with the schedule contractor that represents the best value (see 8.404(d)). After award, ordering activities should provide timely notification to unsuccessful offerors. If an unsuccessful offeror requests information on an award that was based on factors other than price alone, a brief explanation of the basis for the award decision shall be provided.

The Group also recommends that DFAR § 208.404-70 be amended to provide:

(a) This subsection--

(1) Implements Section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107-107); and

(2) Also applies to orders placed by non-DoD agencies on behalf of DoD.

(b) Each order for services exceeding \$100,000 shall be placed on a competitive basis in accordance with paragraph (c) of this subsection, unless the contracting officer waives this requirement on the basis of a written determination that--

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(1) One of the circumstances described at FAR 16.505(b)(2)(i) through (iii) applies to the order; or

(2) A statute expressly authorizes or requires that the purchase be made from a specified source.

(c) An order for services exceeding \$100,000 is placed on a competitive basis only if the contracting officer provides a fair notice of the intent to make the purchase, including a description of the work the contractor shall perform and the basis upon which the contracting officer will make the selection, to--

(1) As many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that offers will be received from at least three contractors that can fulfill the work requirements, and the contracting officer--

(i)(A) Receives offers from at least three contractors that can fulfill the work requirements; or

(B) Determines in writing that no additional contractors that can fulfill the work requirements could be identified despite reasonable efforts to do so (documentation should clearly explain efforts made to obtain offers from at least three contractors); and

(ii) Ensures all offers received are fairly considered; or

**(2) As many small business schedule contractors as practicable, consistent with market research appropriate under the circumstances, and the contracting officer receives offers from at least three small business schedule contractors that can fulfill the work requirements; or**

~~(2)~~**(3)** All contractors offering the required services under the applicable multiple award schedule, and affords all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered. Posting of a request for quotations on the General Services Administration's electronic quote system, "e-Buy" ([www.gsaAdvantage.gov](http://www.gsaAdvantage.gov)), is one medium for providing fair notice to all contractors as required by this paragraph (c).

# Appendices

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## Appendix 1

### Federal Procurement Data System Small Business Goaling Report Actions Reported Between FY 2004 (Q1) and FY 2004 (Q4)

Department Name	Small Business Goal	Small Business Actual	Total SDB Goal	Total SDB Actual	8(a) Goal
Total Federal	23.00%	23.09%	8.00%	6.18%	3.00%
DEPT OF DEFENSE (9700)	23.00%	22.27%	5.70%	5.66%	2.60%
ENERGY, DEPARTMENT OF (8900)	5.06%	4.18%	3.20%	1.39%	2.20%
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION (8000)	16.16%	14.49%	6.69%	6.00%	3.69%
HEALTH AND HUMAN SERVICES, DEPARTMENT OF (7500)	30.32%	29.63%	16.62%	9.09%	5.50%
GENERAL SERVICES ADMINISTRATION (4700)	43.00%	42.32%	11.00%	6.43%	5.00%
HOMELAND SECURITY, DEPARTMENT OF (7000)	23.00%	38.46%	4.80%	9.55%	2.50%
AGRICULTURE, DEPARTMENT OF (1200)	45.00%	48.98%	10.00%	8.89%	5.00%
JUSTICE, DEPARTMENT OF (1500)	31.50%	32.79%	15.70%	6.63%	3.70%
INTERIOR, DEPARTMENT OF THE (1400)	56.14%	53.39%	15.17%	18.20%	6.26%
STATE, DEPARTMENT OF (1900)	40.00%	50.59%	14.00%	20.11%	7.00%
LABOR, DEPARTMENT OF (1600)	25.00%	34.96%	10.04%	12.12%	4.84%
EDUCATION, DEPARTMENT OF (9100)	23.00%	6.74%	5.00%	2.04%	4.00%
COMMERCE, DEPARTMENT OF (1300)	44.80%	53.26%	16.46%	18.58%	6.11%
ENVIRONMENTAL PROTECTION AGENCY (6800)	27.00%	29.47%	9.30%	13.59%	6.30%
AGENCY FOR INTERNATIONAL DEVELOPMENT (1152)	44.25%	1.75%	25.79%	4.39%	1.23%
HOUSING AND URBAN DEVELOPMENT, DEPARTMENT OF (8600)	36.13%	72.54%	13.16%	39.70%	6.09%
SOCIAL SECURITY ADMINISTRATION (2800)	33.50%	43.54%	14.30%	12.65%	8.50%
OFFICE OF PERSONNEL MANAGEMENT (2400)	19.00%	16.68%	5.60%	2.02%	2.20%
EXECUTIVE OFFICE OF THE PRESIDENT (1100)	50.00%	11.66%	40.00%	4.28%	15.00%
SMITHSONIAN INSTITUTION (3300)	50.00%	20.28%	13.32%	7.39%	6.66%



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**Federal Procurement Data System Small Business Goaling Report**  
**Actions Reported Between FY 2004 (Q1) and FY 2004 (Q4)**

Department Name	HUBZone Goal	HUBZone Actual	Woman Owned Small Business Goal	Women Owned Small Business Actual	Se Di Ve Ov Bu Gr
Total Federal	3.00%	1.60%	5.00%	3.03%	
DEPT OF DEFENSE (9700)	3.00%	1.48%	5.00%	2.68%	
ENERGY, DEPARTMENT OF (8900)	1.50%	0.13%	3.00%	0.56%	
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION (8000)	3.00%	0.80%	5.00%	2.29%	
HEALTH AND HUMAN SERVICES, DEPARTMENT OF (7500)	3.03%	1.63%	5.05%	5.65%	
GENERAL SERVICES ADMINISTRATION (4700)	3.00%	2.18%	5.00%	3.58%	
HOMELAND SECURITY, DEPARTMENT OF (7000)	3.00%	2.27%	5.00%	6.95%	
AGRICULTURE, DEPARTMENT OF (1200)	3.00%	8.05%	5.00%	6.17%	
JUSTICE, DEPARTMENT OF (1500)	3.00%	1.76%	5.00%	3.70%	
INTERIOR, DEPARTMENT OF THE (1400)	3.13%	7.76%	5.40%	9.36%	
STATE, DEPARTMENT OF (1900)	3.00%	3.86%	5.00%	6.37%	
LABOR, DEPARTMENT OF (1600)	3.00%	1.85%	5.20%	6.87%	
EDUCATION, DEPARTMENT OF (9100)	3.00%	0.32%	5.00%	1.16%	
COMMERCE, DEPARTMENT OF (1300)	3.00%	3.37%	7.80%	13.85%	
ENVIRONMENTAL PROTECTION AGENCY (6800)	3.00%	0.69%	5.00%	3.26%	
AGENCY FOR INTERNATIONAL DEVELOPMENT (1152)	3.00%	0.02%	5.00%	0.31%	
HOUSING AND URBAN DEVELOPMENT, DEPARTMENT OF (8600)	3.00%	4.83%	15.03%	30.24%	
SOCIAL SECURITY ADMINISTRATION (2800)	3.00%	3.04%	5.00%	5.50%	
OFFICE OF PERSONNEL MANAGEMENT (2400)	3.00%	0.10%	5.00%	8.94%	
EXECUTIVE OFFICE OF THE PRESIDENT (1100)	9.00%	1.11%	9.00%	0.98%	
SMITHSONIAN INSTITUTION (3300)	3.33%	1.00%	7.77%	5.22%	

## **Appendix 2**

### **Subcontracting with Small Businesses**

The Working Group initially explored issues related to large entities subcontracting with small business concerns. Specifically, the Group reviewed whether recommendations could be made to support greater integrity in the area of ‘other than small business’ (“OTSB”) subcontracting with small businesses. An OTSB is any entity that is not a small business. In most cases this includes large businesses, public utilities, universities, non-profits, and foreign-owned firms.

The Working Group spent significant time reviewing two primary facets of this question: prompt payments by OTSB to small businesses; and, OTSB compliance with small business subcontracting plans. A review was conducted of the legal and regulatory history, oversight reports, and government contracting databases, testimony was received from small business witnesses, interviews were conducted with leaders of the Small and Disadvantaged Business Offices from variety Federal agencies, and discussions were held with leaders from several large businesses.

Ultimately, the Working Group was unable to assemble comprehensive data required to permit in-depth analysis and the crafting of recommendations.

The Working Group does, however, believe an opportunity exists today to ensure that the next panel assigned to review this issue is in a better position to do so. The federal government recently launched the first generation of a new electronic Subcontract Reporting System (eSRS – see [www.esrs.gov](http://www.esrs.gov) for more information), which is designed to expand visibility and transparency in the collection of federal subcontracting data and accomplishments. In its initial release, the system will eliminate the need for paper submissions and processing of the SF 294's, Individual Subcontracting Reports, and SF 295's, Summary Subcontracting Reports, and replace the paper with an easy-to-use electronic process to collect the data. It is the Working Group's hope that once this web-based reporting tool is fully operational, it will provide more accurate and timely data, as well as analytical tools to permit a comprehensive examination of small business subcontracting activity.

The Working Group encourages eSRS program leadership to review the system to validate that it will capture data at a meta-level, as well as a contract-specific level, to permit future panels to better study the issues. The Working Group views this is an opportunity to further enhance the system's capabilities prior to full utilization. We strongly encourage eSRS program leadership to take advantage of this period as an opportunity to be more aggressive in their approach to ensure compliance with various subcontracting program requirements.

The Working Group recommends the eSRS program leadership review the following areas for inclusion in the eSRS system:

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- 1) A means of validating annual Federal-wide small business subcontract award statistics;
- 2) Characterization of the type of work being performed by a small business subcontractor on a given contract (e.g. technology, service, or product orientation);
- 3) Support for the gathering of small business subcontractor performance for past performance citations; and,
- 4) Finally, with regard to ‘stovepiping,’ the panel strongly suggests that eSRS leverage existing data collection systems and methods (e.g. CCR) and support the integration of those systems, and related data, to allow for more robust data collection and analysis.

**Background**

Over the past 20 years, small businesses have succeeded in winning significant business as subcontractors. According to data from the Small Business Administration (SBA), in a period from 1985 to 2003, small businesses were awarded subcontracting dollars ranging from a low of \$20.8 billion in FY 1993 to a high of \$45.5 billion in FY 2003. During this period, the percentage of subcontracting dollars ranged from a low of 35.1 percent to a high of 41.9 percent. Within the context of this success, however, the General Accountability Office (GAO), small businesses, agency representatives, and others document areas for improvement in the small business subcontracting program.

During the Small Business Working Group’s initial investigation into subcontracting with small businesses, the Group heard from many and widely varied small businesses. Two areas which emerged as common themes of concern included:

- 1) Compliance by OTSBs with subcontracting plans; and,
- 2) Prompt payments to small business subcontractors by their primes.

The degrees of concern expressed by witnesses, as well as anecdotal evidence brought by Panel members, drew the Group to focus on these two areas.

With regard to subcontracting plans, the impression exists that small firms are tapped by larger primes for the purpose of achieving compliance with Federal small business subcontracting requirements, with no real intent on the part of the prime to utilize the small businesses after an award is made. OTSB contractors must submit subcontracting plans establishing participation goals for small business and small disadvantaged businesses for all Federal contracts or subcontracts for goods and services exceeding \$1,000,000 in the case of construction contracts for public facilities, or \$500,000 for all other contracts.

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Prompt payment concerns emphasized the severe impact untimely payments can inflict on small businesses with limited working capital to float financial commitments to employees and suppliers. It is important, however, to note that within testimony received, the prompt payment issue was not limited to prime contractors but was also raised with regard to payments from Federal agencies working directly with small businesses.

The President's Small Business Agenda reiterates that the small business contracting process should be fair, open, and straightforward. To successfully execute this agenda, all stakeholders must have confidence that the spirit of existing subcontracting laws and regulations are consistently and fairly implemented. Federal agencies, prime contractors, and small business subcontractors all deserve fair treatment.

**Subcontracting with Small Businesses**

**Governing Law** - In 1958, Congress passed, and the President signed, Public Law (P.L.) 85-563, which amended the Small Business Act of 1953 and established a voluntary subcontracting program. An early mechanism used by Federal agencies to award subcontracts to small and socially and economically disadvantaged businesses was a contractual clause set forth in the Armed Services Procurement Regulation (ASPR) 7-104.36. In 1977, a Comptroller General Report concluded that this clause was ineffective because it did not specifically detail how contractors were to promote the subcontracting. Therefore, in 1978, Congress acted to explicitly declare, with the enactment of P.L. 95-507, codified at 15 U.S.C. § 637(d), that “[it] is the policy of the United States that small business concerns have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems.” Additionally, 15 U.S.C. § 644(a) also provides that it is in the interest of the government to ensure that “a fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small-business concerns”). As the basis for this policy, Section 211 of this Act provides that “no contract shall be awarded to any offeror unless the procurement authority determines that the plan of the proposed prime contractor offers such maximum practicable opportunity.”

The Federal Acquisition Regulation (FAR) Part 19.7 implemented the requirements of P.L. 105-507 by setting forth the structure for a subcontracting program. The Small Business Subcontracting Program's primary mission is to promote maximum possible use of small businesses by requiring OTSBs awarded Federal contracts to submit a subcontracting plan if: 1) The contract exceeds \$500,000 (\$1 million for construction of a public facility); and, 2) Offers further subcontracting opportunities. Among other elements, those small business subcontracting plans must contain the following information:

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- ? Goals stated in both dollars and percentages . The contractor must state the total subcontracting dollars, and then state separately the total dollars that will be subcontracted to SB, SDB, WOSB, HUBZone SB, VOSB and SD/VOSB. The SB dollar amount must include all the small business subset amounts. The percentages must be expressed as percentages of the total subcontracting dollars. Goals for option years must be broken out separately.
- ? Total dollars planned to be subcontracted to each group;
- ? A description of the types of supplies and services to be subcontracted to each group, including the supplies and services to be subcontracted to OTSB subcontractors;
- ? A description of the method used to develop each of the goals;
- ? A description of the method used to identify potential sources;
- ? A statement as to whether or not indirect costs were included in the subcontracting goals.

OSTB compliance with subcontracting plans are tracked and audited via a number of avenues, including periodic reports, compliance reviews, and audits. For a detailed discussion of the subcontracting plan creation and management, reporting requirements and auditing functions, please see the Small Business Administration's publication, *Small Business Liaison Officer Handbook*, published in January 2005.

### **Prompt Payment**

**Governing Law** - With regard to the prompt payment of small business subcontractors, Public Law 95-507 established the framework for OTSBs to subcontract with small businesses. Subsequent to the enactment of this law in the late 1970s, the Federal Acquisition Council implemented regulatory processes for agencies to comply with the law. FAR Clause 52.219-8, Utilization of Small Business Concerns, states that "it is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns."

FAR 32.5, Progress Payments Based on Costs, established the "paid cost rule." This rule required large businesses to pay a subcontractor before including the payment in progress payment billings to the government customer. In contrast, small businesses needed only have incurred those costs to include them in their billings, provided they paid their vendors in the ordinary course of business. In 2000, this FAR rule was eliminated. According to Department of Defense memoranda, this change meant that there would be consistent treatment of all incurred subcontract costs, without regard to whether the cost was incurred by a large or small business. Provisions now require that both large and small business prime contractors pay incurred subcontract amounts 1) in accordance with the terms of a subcontract or invoice and, 2) ordinarily before submittal of the next payment request sent to the government.

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FAR Supplement 32.112 addresses actions that contracting officers must take when a subcontractor alleges nonpayment, and requires an immediate response on the part of contracting officers to subcontractor complaints. Most recently, Defense Contract Management Agency issued an Information Memorandum No. 05-022, August 24, 2005, that provides administrative contracting officers and contract administrators with guidance on the remedies available to them for the untimely payment to subcontractors. An inquiry has been made as to the existence of similar guidance for civilian agencies.

Since Public Law 95-507, subcontracting on large federal contracts has become important to small business. Based on data from the Small Business Administration (SBA), the dollars paid to small subcontractors increased by 40 percent from fiscal year 1993 to fiscal year 2001.

***Prompt Payment – Background, Current Practices and Oversight***

Federal agencies maintain a high degree of interest in their contractor teams efficiently working together to achieve program and mission goals. A program where prime contractors consistently pay subcontractors on time can indicate financial solvency on the part of all involved, as well as satisfactory subcontractor performance. Failure to pay, however, can portend financial difficulties on the part of the prime or unacceptable performance on the part of the subcontractor and, as a result, increase the risk of program failure.

According to Defense Contract Management Agency Memorandum No. 05-022, Contracting Officers and Contract Administrators have the following remedies available when prime contractors fail to pay subcontractors in accordance with the terms and conditions of a subcontractor or subcontract invoice:

- ? Recommend removal of the prime from the Direct Billing Program for not following approved payment procedures, in coordination with DCAA.
- ? Assign high risk ratings on prime contractor subcontracting plans for failure to manage subcontracts.
- ? Decrement billing rates, in coordination with DCAA.
- ? Implement fee or payment withholding.
- ? Suspend or reduce progress payments.
- ? Document poor subcontract management in contract performance ratings
- ? Disallow unpaid subcontract costs for financing and interim payments.

**Legislation and Regulations Affecting Federal Primes and Subcontracts**

1. **Public Law 85-536**. Passed in 1958, this legislation amended the Small Business Act of 1953 and authorized a voluntary subcontracting program. Prior to 1978, this statute was implemented most effectively in the Armed Services Procurement Regulations (ASPR), a predecessor to the FAR. It required large contractors receiving contracts over \$500,000 with substantial subcontracting opportunities to establish a program that would enable minority business concerns to be considered fairly as subcontractors or suppliers.

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2. **Public Law 95-507**. Passed in 1978, this legislation amended Section 8(d) of the Small Business Act and created the foundation for the Subcontracting Assistance Program, as it is known today. It changed the participation of large contractors in the program from voluntary to mandatory, and it changed the language of the law from "best efforts" to "maximum practicable opportunities." Key features include:
  - a. A requirement that all Federal contracts in excess of \$100,000 (as amended) provide maximum practicable opportunity for small and small disadvantaged business to participate; and
  - b. A requirement that all Federal contracts in excess of \$500,000 (\$1,000,000 in the case of construction contracts for public facilities) is accompanied by a formal subcontracting plan containing separate goals for small business and small disadvantaged business.
3. **Public Law 98-577 (The Small Business and Federal Procurement Enhancement Act of 1984)**. This legislation amended the Small Business Act as follows:
  - a. By providing that small and small disadvantaged businesses be given the maximum practicable opportunity to participate in contracts and subcontracts for subsystems, assemblies, components, and related services for major systems; and
  - b. By requiring Federal agencies to establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small and small disadvantaged businesses.
4. **Public Law 99-661 (The National Defense Authorization Act of 1987)**. Section 1207 of this statute required the Department of Defense to establish as its objective a goal of five percent of the total combined amount obligated for contracts and subcontracts entered into with small and small disadvantaged businesses in each of fiscal years 1987, 1988, and 1989. Also, the use of SDB set-asides was authorized. (Subsequent legislation extended this period through the year 2000; however, the set-aside aspect of the program was suspended in fiscal year 1996.)
5. **Public Law 100-180 (The National Defense Authorization Act of 1988 and 1989)**. Section 806 required the Secretary of Defense to increase awards to small and small disadvantaged business.
6. **Public Law 100-656 (The Business Opportunity Reform Act of 1988)**. The principal focus of this legislation was the 8(a) Program, but it contained a number of other provisions which affected the Subcontracting Assistance Program. These other provisions included the following:
  - a. Section 304 requires that the FAR be amended to include a requirement for a contract clause authorizing the Government to assess liquidated damages against large contractors which fail to perform according to the terms of their subcontracting plans and cannot demonstrate that they have made a good faith effort to do so;
  - b. Section 502, now codified at 15 U.S.C. Section 644(g)(1), requires the President to establish annual goals for procurement contracts of not less than 20 percent for small business prime contract awards and not less than 5 percent for small

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disadvantaged business prime contract and subcontract awards for each fiscal year [emphasis added]; and,

- c. Section 503 requires the SBA to compile and analyze reports each year submitted by individual agencies to assess their success in attaining Government-wide goals for small and small disadvantaged businesses, and to submit the report to the President.
7. **Public Law 101-189 (Defense Authorization Act)** . Section 834 established the Test Program for the Negotiation of Comprehensive Subcontracting Plans. This statute authorized a pilot program limited to a few Department of Defense large business large contractors approved by the Office of Small and Disadvantaged Business Utilization (OSDBU) at the Pentagon. The program allows these companies to have one company-wide subcontracting plan for all defense contracts, rather than individual subcontracting plans for every contract over \$500,000, and it waives the requirement for the semi-annual SF 294 *Subcontracting Report for Individual Contracts*. The large contractor is still required to submit the SF 295 semi-annually, and it is required to have individual subcontracting plans and to submit SF 294s on any contracts with other Government agencies. Public Law 103-355, Section 7103, extended this test program through September 30, 1998.
8. **Public Law 101-510 (The National Defense Authorizati on Act for Fiscal Year 1991)**. Section 831 established the Pilot Mentor Protégé Program to encourage assistance to small disadvantaged businesses through special incentives to companies approved as mentors. The Government reimburses the mentor for the cost of assistance to its protégés, or, as an alternative, allows the mentor credit (a multiple of the dollars in assistance) toward subcontracting goals. Prior to receiving reimbursement or credit, mentors must submit formal applications.
9. **Public Law 102-366 (The Small Business Credit and Business Opportunity Enhancement Act of 1992)** . Section 232(a)(6) removes the requirement from SBA to do the Annual Report to Congress on Unacceptable Subcontracting Plans, which had been found in Section 8(d) of the Small Business Act.
10. **Public Law 103-355 (The Federal Acquisition Streamlining Act of 1994 (FASA))** . FASA significantly simplifies and streamlines the Federal procurement process. Section 7106 of FASA revised Sections 8 and 15 of the Small Business Act to establish a Government-wide goal of 5 percent participation by women-owned small businesses, in both prime and subcontracts. Women-owned small businesses are to be given equal standing with small and small disadvantaged business in subcontracting plans. In practical terms, this means that all subcontracting plans after October 1, 1995, must contain goals for women-owned small businesses and that all FAR references to small and small disadvantaged business have been changed to small, small disadvantaged and women-owned small business.
11. **HUBZone Empowerment (Public Law 105 -135)**. The HUBZone Empowerment Contracting Program, which is included in the Small Business Reauthorization Act of 1997, stimulates economic development and creates jobs in urban and rural communities by providing contracting preferences to small businesses



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that are located in HUBZones and hire employees who live in HUBZones.

12. **The Veteran's Entrepreneurship and Small Business Development Act of 1999 (Public Law 106-50)**. This established a goal for subcontracts awarded by prime contractors to service-disabled veteran-owned small business concerns of 3 percent. A best effort goal will be established for veteran-owned small businesses. Subcontracting plans must incorporate these goals.
13. **FAR Part 19 (48 CFR)**. Implements the procurement sections of the Small Business Act. Federal contracting agencies must conduct their acquisitions in compliance with these regulations. OTSB contractors are required to comply with certain clauses and provisions referenced in the FAR.
  - a. Subpart 19.1 prescribes policies and procedures for Size Standards. (Also in Title 13 of the U.S. Code of Federal Regulations.)
  - b. Subpart 19.7 prescribes policies and procedures for subcontracting with SB, SDB, WOSB, VOSB, SD/VOSB, and HUBZone SB concerns.
  - c. Subpart 19.12 prescribes policies and procedures for the SDB Participation Program including incentive subcontracting with SDB concerns.
  - d. Subpart 19.13 prescribes policies and procedures for the HUBZone SB Program.

**Source:** *Small Business Liaison Officer Handbook, 01/2005, produced by the Small Business Administration*