

112TH CONGRESS
2D SESSION

H. R. 3893

To amend the Small Business Act with respect to subcontracting and insourcing, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 2, 2012

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

A BILL

To amend the Small Business Act with respect to subcontracting and insourcing, and for other purposes.

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

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Subcontracting Transparency and Reliability Act of
6 2012”.

7 (b) TABLE OF CONTENTS.—

Sec. 1. Short title; table of contents.

TITLE I—LIMITATIONS ON SUBCONTRACTING

Sec. 101. Limitations on subcontracting.
 Sec. 102. Penalties.
 Sec. 103. Conforming amendments.
 Sec. 104. Guidance.

TITLE II—SUBCONTRACTING PLANS

Sec. 201. Subcontracting plans.
 Sec. 202. Notices of subcontracting opportunities.

TITLE III—INSOURCING

Sec. 301. Definitions relating to procurement protest system.
 Sec. 302. Insourcing.

1 **TITLE I—LIMITATIONS ON** 2 **SUBCONTRACTING**

3 **SEC. 101. LIMITATIONS ON SUBCONTRACTING.**

4 The Small Business Act (15 U.S.C. 631 et seq.) is
 5 amended—

6 (1) by redesignating section 45 as section 47;

7 and

8 (2) by inserting after section 44 the following:

9 **“SEC. 45. LIMITATIONS ON SUBCONTRACTING.**

10 “(a) IN GENERAL.—If awarded a contract under sec-
 11 tion 8(a), 8(m), 15(a), 31, or 36, a covered small business
 12 concern—

13 “(1) in the case of a contract for services (ex-
 14 cept construction), may not expend on subcontractors
 15 more than 50 percent of the amount paid to the
 16 concern under the contract;

17 “(2) in the case of a contract for general con-
 18 struction, may not expend on subcontractors more

1 than 85 percent of the amount, less the cost of ma-
2 terials, paid to the concern under the contract;

3 “(3) in the case of a contract for construction
4 by a special trade contractor, may not expend on
5 subcontractors more than 75 percent of the amount,
6 less the cost of materials, paid to the concern under
7 the contract;

8 “(4) in the case of a contract for supplies
9 (other than from a regular dealer in such supplies),
10 may not expend on subcontractors more than 50
11 percent of the amount, less the cost of materials,
12 paid to the concern under the contract;

13 “(5) in the case of a contract described in more
14 than 1 of paragraphs (1) through (4)—

15 “(A) shall determine for which category of
16 services or supplies, described in 1 of para-
17 graphs (1) through (4), the greatest percentage
18 of the contract amount is awarded;

19 “(B) shall determine the amount awarded
20 under the contract for that category of services
21 or supplies; and

22 “(C) may not expend on subcontractors,
23 with respect to the amount determined under
24 subparagraph (B), more than—

1 “(i) 50 percent of that amount, if the
2 category of services or supplies applicable
3 under subparagraph (A) is described in
4 paragraph (1);

5 “(ii) 85 percent of that amount, if the
6 category of services or supplies applicable
7 under subparagraph (A) is described in
8 paragraph (2);

9 “(iii) 75 percent of that amount, if
10 the category of services or supplies applica-
11 ble under subparagraph (A) is described in
12 paragraph (3); and

13 “(iv) 50 percent of that amount, if the
14 category of services or supplies applicable
15 under subparagraph (A) is described in
16 paragraph (4); and

17 “(6) in the case of a contract for supplies from
18 a regular dealer in such supplies, shall supply the
19 product of a domestic small business manufacturer
20 or processor, unless a waiver of such requirement is
21 granted—

22 “(A) by the Administrator, after reviewing
23 a determination by the applicable contracting
24 officer that no small business manufacturer or
25 processor can reasonably be expected to offer a

1 product meeting the specifications (including
2 period for performance) required by the con-
3 tract; or

4 “(B) by the Administrator for a product
5 (or class of products), after determining that no
6 small business manufacturer or processor is
7 available to participate in the Federal procure-
8 ment market.

9 “(b) SIMILARLY SITUATED ENTITIES.—Contract
10 amounts expended by a covered small business concern on
11 a subcontractor that is a similarly situated entity shall not
12 be considered subcontracted for purposes of determining
13 whether the covered small business concern has violated
14 a requirement established under subsection (a) or (d).

15 “(c) MODIFICATIONS OF PERCENTAGES.—

16 “(1) IN GENERAL.—The Administrator may
17 change, by rule (after providing notice and an oppor-
18 tunity for public comment), a percentage specified in
19 paragraphs (1) through (4) of subsection (a) if the
20 Administrator determines that such change is nec-
21 essary to reflect conventional industry practices
22 among business concerns that are below the numer-
23 ical size standard for businesses in that industry
24 category.

1 “(2) UNIFORMITY.—A change to a percentage
2 under paragraph (1) shall apply to all covered small
3 business concerns.

4 “(d) OTHER CONTRACTS.—

5 “(1) IN GENERAL.—With respect to a category
6 of contracts to which a requirement under sub-
7 section (a) does not apply, the Administrator is au-
8 thorized to establish, by rule (after providing notice
9 and an opportunity for public comment), a require-
10 ment that a covered small business concern may not
11 expend on subcontractors more than a specified per-
12 centage of the amount paid to the concern under a
13 contract in that category.

14 “(2) UNIFORMITY.—A requirement established
15 under paragraph (1) shall apply to all covered small
16 business concerns.

17 “(e) DEFINITIONS.—In this section, the following
18 definitions apply:

19 “(1) COVERED SMALL BUSINESS CONCERN.—
20 The term ‘covered small business concern’ means a
21 business concern that—

22 “(A) with respect to a contract awarded
23 under section 8(a), is a small business concern
24 eligible to receive contracts under that section;

1 “(B) with respect to a contract awarded
2 under section 8(m)—

3 “(i) is a small business concern owned
4 and controlled by women (as defined in
5 that section); or

6 “(ii) is a small business concern
7 owned and controlled by women (as de-
8 fined in that section) that is not less than
9 51 percent owned by 1 or more women
10 who are economically disadvantaged (and
11 such ownership is determined without re-
12 gard to any community property law);

13 “(C) with respect to a contract awarded
14 under section 15(a), is a small business con-
15 cern;

16 “(D) with respect to a contract awarded
17 under section 31, is a qualified HUBZone small
18 business concern; or

19 “(E) with respect to a contract awarded
20 under section 36, is a small business concern
21 owned and controlled by service-disabled vet-
22 erans.

23 “(2) SIMILARLY SITUATED ENTITY.—The term
24 ‘similarly situated entity’ means a subcontractor
25 that—

1 “(A) if a subcontractor for a small busi-
2 ness concern, is a small business concern;

3 “(B) if a subcontractor for a small busi-
4 ness concern eligible to receive contracts under
5 section 8(a), is such a concern;

6 “(C) if a subcontractor for a small busi-
7 ness concern owned and controlled by women
8 (as defined in section 8(m)), is such a concern;

9 “(D) if a subcontractor for a small busi-
10 ness concern owned and controlled by women
11 (as defined in section 8(m)) that is not less
12 than 51 percent owned by 1 or more women
13 who are economically disadvantaged (and such
14 ownership is determined without regard to any
15 community property law), is such a concern;

16 “(E) if a subcontractor for a qualified
17 HUBZone small business concern, is such a
18 concern; or

19 “(F) if a subcontractor for a small busi-
20 ness concern owned and controlled by service-
21 disabled veterans, is such a concern.”.

22 **SEC. 102. PENALTIES.**

23 Section 16 of the Small Business Act (15 U.S.C. 645)
24 is amended by adding at the end the following:

25 “(g) SUBCONTRACTING LIMITATIONS.—

1 “(1) IN GENERAL.—Whoever violates a require-
2 ment established under section 45 shall be subject to
3 the penalties prescribed in subsection (d), except
4 that, for an entity that exceeded a limitation on sub-
5 contracting under such section, the fine described in
6 subsection (d)(2)(A) shall be treated as the greater
7 of—

8 “(A) \$500,000; or

9 “(B) the dollar amount expended, in excess
10 of permitted levels, by the entity on subcontractors.
11 tors.

12 “(2) MONITORING.—Not later than 1 year after
13 the date of enactment of this subsection, the Admin-
14 istrator shall take such actions as are necessary to
15 ensure that an existing Federal subcontracting re-
16 porting system is modified to notify the Adminis-
17 trator, the appropriate Director of the Office of
18 Small and Disadvantaged Business Utilization, and
19 the appropriate contracting officer if a requirement
20 established under section 45 is violated.”.

21 **SEC. 103. CONFORMING AMENDMENTS.**

22 (a) HUBZONES.—Section 3(p)(5) of the Small Busi-
23 ness Act (15 U.S.C. 632(p)(5)) is amended—

24 (1) in subparagraph (A)(i) by striking sub-
25 clause (III) and inserting the following:

1 “(III) with respect to any sub-
2 contract entered into by the small
3 business concern pursuant to a con-
4 tract awarded to the small business
5 concern under section 31, the small
6 business concern will ensure that the
7 requirements of section 45 are satis-
8 fied; and”;

9 (2) by striking subparagraphs (B) and (C); and
10 (3) by redesignating subparagraph (D) as sub-
11 paragraph (B).

12 (b) ENTITIES ELIGIBLE FOR CONTRACTS UNDER
13 SECTION 8(a).—Section 8(a) of such Act (15 U.S.C.
14 637(a)) is amended by striking paragraph (14) and insert-
15 ing the following:

16 “(14) LIMITATIONS ON SUBCONTRACTING.—A con-
17 cern may not be awarded a contract under this subsection
18 as a small business concern unless the concern agrees to
19 satisfy the requirements of section 45.”.

20 (c) SMALL BUSINESS CONCERNS.—Section 15 of
21 such Act (15 U.S.C. 644) is amended by striking sub-
22 section (o) and inserting the following:

23 “(o) LIMITATIONS ON SUBCONTRACTING.—A concern
24 may not be awarded a contract under subsection (a) as

1 a small business concern unless the concern agrees to sat-
 2 isfy the requirements of section 45.”.

3 **SEC. 104. REGULATIONS.**

4 Not later than 180 days after the date of enactment
 5 of this Act, the Administrator of the Small Business Ad-
 6 ministration shall issue guidance with respect to compli-
 7 ance with the changes made to the Small Business Act
 8 by the amendments in this Act, with opportunities for no-
 9 tice and comment.

10 **TITLE II—SUBCONTRACTING**
 11 **PLANS**

12 **SEC. 201. SUBCONTRACTING PLANS.**

13 (a) SUBCONTRACTING REPORTING REQUIRE-
 14 MENTS.—

15 (1) IN GENERAL.—Section 8(d)(6) of the Small
 16 Business Act (15 U.S.C. 637(d)(6)) is amended—

17 (A) by striking “(6) Each subcontracting
 18 plan” and inserting the following:

19 “(6) SUBCONTRACTING PLAN REQUIREMENTS.—
 20 Each subcontracting plan”;

21 (B) by amending subparagraph (E) to read
 22 as follows:

23 “(E) assurances that the offeror or bidder
 24 will—

25 “(i) submit—

1 “(I) not later than 180 days after the
2 date on which performance under the ap-
3 plicable contract begins, and every 180
4 days thereafter until contract performance
5 ends, a report that describes all subcon-
6 tracting activities under the contract dur-
7 ing the preceding 180-day period;

8 “(II) not later than 1 year after the
9 date on which performance under the ap-
10 plicable contract begins, and annually
11 thereafter until contract performance ends,
12 a report that describes all subcontracting
13 activities under the contract that have oc-
14 curred before the date on which the report
15 is submitted (except that, with respect to
16 the Department of Defense and the Na-
17 tional Aeronautics and Space Administra-
18 tion, a report under this subclause shall be
19 submitted not later than 180 days after
20 the date on which contract performance
21 begins and every 180 days thereafter until
22 contract performance ends); and

23 “(III) not later than 30 days after the
24 date on which performance under the ap-
25 plicable contract ends, a report that de-

1 scribes all subcontracting activities under
2 the contract; and

3 “(ii) cooperate with any study or survey
4 required by the applicable Federal agency or
5 the Administration to determine the extent of
6 compliance by the offeror or bidder with the
7 subcontracting plan;”; and

8 (C) by moving subparagraph (G), including
9 each clause therein, 2 ems to the left.

10 (2) REPORTING SYSTEM MODIFICATION.—

11 (A) IN GENERAL.—Not later than 1 year
12 after the date of enactment of this Act, the Ad-
13 ministrator of the Small Business Administra-
14 tion shall take such actions as are necessary to
15 ensure that the Federal subcontracting report-
16 ing system to which covered reports are sub-
17 mitted is modified to notify the Administrator,
18 the appropriate contracting officer, and the ap-
19 propriate Director of Small and Disadvantaged
20 Business Utilization if an entity fails to submit
21 a required covered report. If the Administrator
22 does not modify the subcontracting reporting
23 system on or before the date that is 1 year
24 after the date of enactment of this Act, the Ad-
25 ministrator may not carry out or establish any

1 pilot program until the date the Administrator
2 modifies the reporting system.

3 (B) COVERED REPORT DEFINED.—In this
4 paragraph, the term “covered report” means a
5 report submitted in accordance with assurances
6 provided under section 8(d)(6)(E) of the Small
7 Business Act (15 U.S.C. 637(d)(6)(E)).

8 (b) FAILURE TO SUBMIT SUBCONTRACTING RE-
9 PORTS AS BREACH OF CONTRACT.—Section 8(d)(8) of
10 such Act (15 U.S.C. 637(d)(8)) is amended—

11 (1) by striking “(8) The failure” and inserting
12 the following:

13 “(8) MATERIAL BREACH.—The failure”;

14 (2) in subparagraph (A) by striking “sub-
15 section, or” and inserting “subsection,”;

16 (3) in subparagraph (B) by striking “sub-
17 contract,” and inserting “subcontract, or”; and

18 (4) by inserting after subparagraph (B) the fol-
19 lowing:

20 “(C) assurances provided under paragraph
21 (6)(E),”.

22 (c) AUTHORITY OF SMALL BUSINESS ADMINISTRA-
23 TION.—Section 8(d)(10) of such Act (15 U.S.C.
24 637(d)(10)) is amended—

1 (1) by striking “(10) In the case of” and insert-
2 ing the following:

3 “(10) AUTHORITY OF ADMINISTRATION.—In the case
4 of”;

5 (2) in subparagraph (B) by striking “, which
6 shall be advisory in nature,”; and

7 (3) in subparagraph (C) by striking “, either on
8 a contract-by-contract basis, or in the case contrac-
9 tors” and inserting “as a supplement to evaluations
10 performed by the contracting agency, either on a
11 contract-by-contract basis or, in the case of contrac-
12 tors”.

13 (d) APPEALS.—Section 8(d) of such Act (15 U.S.C.
14 637(d)) is amended by adding at the end the following:

15 “(13) APPEALS.—

16 “(A) IN GENERAL.—If a procurement center
17 representative or commercial market representative
18 determines that a subcontracting plan required
19 under paragraph (4) or (5) fails to provide the max-
20 imum practicable opportunity for covered small busi-
21 ness concerns to participate in the performance of
22 the contract to which the plan applies, such rep-
23 resentative may delay acceptance of the plan in ac-
24 cordance with subparagraph (B).

1 “(B) PROCESS.—A procurement center rep-
2 resentative or commercial market representative who
3 makes the determination under subparagraph (A)
4 with respect to a subcontracting plan may delay ac-
5 ceptance of the plan for a 30-day period by pro-
6 viding written notice of such determination to appro-
7 priate personnel of the contracting agency. Such no-
8 tice shall include recommendations for altering the
9 plan to provide the maximum practicable oppor-
10 tunity described in that subparagraph.

11 “(C) DISAGREEMENTS.—If a procurement cen-
12 ter representative or commercial market representa-
13 tive delays the acceptance of a subcontracting plan
14 under subparagraph (B) for a 30-day period and,
15 during such period, does not reach agreement with
16 appropriate personnel of the contracting agency to
17 alter the plan to provide the maximum practicable
18 opportunity described in subparagraph (A), the dis-
19 agreement shall be submitted to the head of the con-
20 tracting agency by the Administrator for a final de-
21 termination.

22 “(D) COVERED SMALL BUSINESS CONCERNS
23 DEFINED.—In this paragraph, the term ‘covered
24 small business concerns’ means small business con-
25 cerns, qualified HUBZone small business concerns,

1 small business concerns owned and controlled by vet-
 2 erans, small business concerns owned and controlled
 3 by service-disabled veterans, small business concerns
 4 owned and controlled by socially and economically
 5 disadvantaged individuals, and small business con-
 6 cerns owned and controlled by women.”.

7 **SEC. 202. NOTICES OF SUBCONTRACTING OPPORTUNITIES.**

8 Section 8(k)(1) of the Small Business Act (15 U.S.C.
 9 637(k)(1)) is amended by striking “in the Commerce
 10 Business Daily” and inserting “on the appropriate Fed-
 11 eral Web site (as determined by the Administrator)”.

12 **SEC. 203. REGULATIONS.**

13 Not later than 180 days after the date of enactment
 14 of this Act, the Administrator of the Small Business Ad-
 15 ministration shall issue guidance with respect to the
 16 changes made to the Small Business Act, with opportunity
 17 for notice and comment.

18 **TITLE III—INSOURCING**

19 **SEC. 301. DEFINITIONS RELATING TO PROCUREMENT PRO-**
 20 **TEST SYSTEM.**

21 (a) PROTEST.—Section 3551(1) of title 31, United
 22 States Code, is amended by adding at the end the fol-
 23 lowing:

1 “(F) Conversion of a function that is being
2 performed by a private sector entity to perform-
3 ance by a Federal employee.”.

4 (b) INTERESTED PARTY.—Section 3551(2) of such
5 title is amended—

6 (1) in subparagraph (A) by striking “and” at
7 the end;

8 (2) in subparagraph (B) by striking the period
9 at the end and inserting “; and”; and

10 (3) by adding at the end the following:

11 “(C) with respect to a conversion described
12 in paragraph (1)(F), includes any small busi-
13 ness concern (as that term is defined in section
14 3(a) of the Small Business Act) whose economic
15 interest would be affected by the conversion.”.

16 **SEC. 302. INSOURCING.**

17 The Small Business Act (15 U.S.C. 631 et seq.), as
18 amended by this Act, is further amended by inserting after
19 section 45 the following:

20 **“SEC. 46. INSOURCING.**

21 “A Federal agency may only convert a function that
22 is being performed by a small business concern to per-
23 formance by a Federal employee if—

24 “(1) the agency has made publicly available,
25 after providing notice and an opportunity for public

1 comment, the procedures of the agency with respect
2 to decisions to convert a function being performed
3 by a small business concern to performance by a
4 Federal employee; and

5 “(2) the procedures described in paragraph (1)
6 include that all decisions described in such para-
7 graph are reviewed by any appropriate—

8 “(A) Office of Small and Disadvantaged
9 Business Utilization; and

10 “(B) procurement center representative.”.

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