



P.L. 95-507 Defines ‘Procurement Set-Asides’

In 1978, Public Law 95-507¹ amended the Small Business Act and the Small Business Investment Act of 1958, by incorporating the ‘set-aside provisions’² of Executive Order 11458³ which had formally established a Small Disadvantaged Business (SDB) Program to make federal procurement more readily accessible to all small businesses. ***P.L. 95-507 stipulates that it is the policy of the Government to provide maximum practicable opportunities in its acquisitions to small businesses, small disadvantaged businesses and women-owned businesses.*** This set-aside stipulation also extends the ‘maximum practicable opportunity’ to the participation as subcontractors in contracts awarded by any executive agency.

The head of each agency is responsible for effectively implementing the small business programs within his agency, including setting and achieving yearly procurement opportunity program (POP) goals for small and small disadvantaged business contracting.

Office of Federal Procurement Policy (OFPP) Letter No. 79-1, dated March 7, 1979 on the implementation of Section 15(k) of the SBA Act requires each agency with contracting authority to establish an Office of Small and Disadvantaged Business Utilization (OSDBU,) and appoint a director, who reports to the agency head (or deputy), and who will have responsibility for carrying out the purpose of the Act. Specifically the OFPP directs that the position of OSDBU director include the following:

- Responsibility for the implementation and execution of the functions and duties of Section 8 and 15 of the SBA Act. [Section 15 states that a fair proportion of the total purchases and contracts for property and services for the Government are to be placed with small business concerns. Because the law requires the Government to buy at competitive prices, contracts are set-aside only when at least two qualified small businesses are expected to bid. Section 8(a) of the SBA Act authorizes the SBA to enter into contracts with other Federal agencies to supply needed goods and services through certified businesses owned and controlled by socially and economically disadvantaged individuals. The objective of the 8(a) program is to assist eligible small firms to become independently competitive.
- Assigning a small business technical advisor who shall be a full time employee of the procuring activity and whose principal duty shall be to assist the SBA procurement representative in his duties related to Section 8 and 15.
- Cooperate and consult on a regular basis with SBA with respect to carrying out the functions and duties of Section 8 and 15.
- Developing systematic procedures for insuring the effective execution of the SBA Act, as amended.
- Recommending agency goals.
- Training and education of agency staff whose duties and functions relate to Sections 8 and 15.

¹ <http://thomas.loc.gov/cgi-bin/bdquery/z?d095:HR11318:@@D&summ2=1&>

² **set-aside** - \set-ə-sīd\ - According to Webster, “a program requiring a percentage of opportunities to be reserved for an underrepresented group.”

³ <http://www.presidency.ucsb.edu/ws/index.php?pid=60475>

- Conducting outreach, liaison, source listings and seminars for small and disadvantaged business.
- Publishing required information brochures and documents.
- Interagency liaison of program procurement activities relating to small and disadvantaged businesses.
- Oversight of the implementation of Section 223(a) or P.L. 95-507. [This section requires that for any contract being left by a Federal agency, the agency will provide to any small business, upon request, a copy of the bid specifications ; the name and telephone number of a employee to answer questions with respect to the contract and adequate citations to each major Federal law or agency rule to which the business must comply in performing the contract.

In addition to these duties, Section 211 of P.L. 95-507 requires the OSDBU to review all subcontractor plans submitted by prime contractors to ensure compliance. This Section directs that the successful offeror or bidder on contracts valued at \$500,000 or more must submit, before an award is made, a subcontracting plan setting percentage and dollar goals for the award of subcontracts to small and disadvantaged businesses.

Subcontracting Assistance

The Federal government's role in subcontracting assistance to small business has been changed significantly by P.L. 95-507, which amended Section 8(d) of the Small Business Act. Prior to the enactment of the law, the emphasis was on voluntary best efforts by cooperating prime contractors. Once contractors had made their make-or-buy decisions, they attempted to subcontract many of the buy items to small business. Over the years the percentage of small business subcontracts grew, but as Federal prime contracting became more complex and specialized, it was realized that more could and should be done for small business in subcontracting in the high-dollar, complex procurements.

P.L. 95-507 changed the emphasis from voluntary to mandatory and from best efforts to maximum practicable opportunity. The Act directs that Federal Government contracts greater than the simplified acquisition threshold shall contain a clause entitled, Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals.

For larger contracts, i.e., those over \$500,000 (\$1,000,000 for construction), the law also requires a subcontracting plan setting forth percentage goals for utilizing small business concerns, including separately identified goals for disadvantaged small business and women-owned small business. In addition, the prime contractor must describe the efforts it will take to assure that such firms have an equitable opportunity to compete for subcontracts.

For large negotiated contracts, the contracting officer may approve, cause to be modified, or reject the submitted subcontracting plan. Although the agency's contracting officer has the final decision, SBA may perform a pre-award review and evaluation of the subcontracting plan. In most cases, if SBA has serious objections to a proposed plan, the contracting officer will require the large business submitting the plan to make changes to overcome SBA's objections. If the contracting officer determines that the plan provides "the maximum practicable opportunity" for small, small disadvantaged, and women-owned business concerns to participate as subcontractors in the performance of the contract, the approved plan is incorporated as part of the contract. Failure by the large prime contractor to carry it out can constitute a material breach of the contract and, unless remedied, could result in termination.

For large sealed bid (as opposed to negotiated) contracts, the plan submitted by the successful bidder is incorporated into the contract and, if not carried out, can constitute a material breach. The plan is not negotiated ahead of time between the large business and the buying agency. If the agency's contracting officer believes that the subcontracting plan submitted does not reflect the best effort by the bidder to award subcontracts to small, small disadvantaged, and women-owned concerns to the fullest extent, the agency shall request a review by SBA. Although this request does not delay award of the contract, prior compliance of the bidder with such subcontracting plans shall be considered by the Federal agency in determining the responsibility of the bidder for the award of the contract.

Requirements for subcontracting plans do not apply to: small business prime contractors; contracts under the prescribed amounts; prime contracts not offering subcontracting possibilities; or contracts which are to be performed entirely outside the United States.

SBA has Commercial Market Representatives (CMRs) located throughout the country. Their basic responsibilities are to:

1. Assist small businesses in discovering and expanding subcontracting opportunities.
2. Work with large prime contractors to identify competent small business contractors, and assist them in interpreting Section 8(d) and its implementing regulations, including the formulation of subcontracting plans.
3. Conduct pre-award evaluation of sub-contracting plans upon request.
4. Conduct post-award review and evaluation of contractually required subcontracting plans.
5. Conduct subcontract program reviews and compliance evaluations to make sure that prime contractors are implementing their subcontracting program requirements under Section 8(d).

A "Small Business Subcontracting Directory" is available on the SBA website. It provides a listing of large prime contractors by state and includes the name and telephone number of the Small Business Liaison officer at each company, along with a brief description of the company's product or service.

Sources:

<http://www.sba.gov/gopher/Government-Contracting/General-Information-And-Publications/opa5.txt>
http://www.villageofdolton.com/business/business_mbe_wbe_dbe.pdf

