

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6515

To: Members, Subcommittee on Contracting and the Workforce, House Committee on Small Business
From: Mick Mulvaney, Chairman
Date: September 12, 2011
Re: Hearing: "Helping Small Businesses Compete: Challenges within Programs Designed to Assist Small Contractors."

The Subcommittee on Contracting and the Workforce of the House Committee on Small Business will meet at 10:00 a.m. on Thursday, September 15, 2011 in Room 2360 of the Rayburn House Office Building for the purposes of reviewing three recent reports by the Government Accountability Office (GAO). These reports are: (1) GAO-11-548R, *Mentor-Protégé Programs Have Policies That Aim to Benefit Participants but Do Not Require Postagreement Tracking*; (2) GAO-11-549R, *Improvements Needed to Help Ensure Reliability of SBA's Performance Data on Procurement Center Representatives*; and (3) GAO-11-418, *Small Business Contracting: Action Needed by Those Agencies Whose Advocates Do Not Report to Agency Heads as Required*. Witnesses will include Joseph G. Jordan, Associate Administrator of Government Contracting and Business Development, Small Business Administration; Jiyoung Park, Associate Administrator, Office of Small Business Utilization, General Services Administration; and William B. Shear, Director, Financial Markets and Community Investment, GAO.

I. Federal Mentor-Protégé Programs

a. Overview of Mentor-Protégé Programs

The Small Business Jobs Act of 2010 (Jobs Act) defines mentor-protégé relationships as "relationships and strategic alliances pairing a larger business and a small business concern partner to gain access to Federal Government contracts."¹ Within the realm of federal procurement, thirteen departments or agencies² sponsor mentor-protégé programs,³ which are arrangements by which experienced prime

¹ Small Business Jobs Act of 2010, Pub. Law No. 111-240, §1245, 124 Stat. § 2504, 2546 (2010) [hereinafter Jobs Act].

² The thirteen, and their program guidance, are: the Department of Homeland Security (DHS); Department of Defense (DoD); Department of Energy (DOE); Department of State (DOS); Environmental Protection Agency (EPA); Federal Aviation Administration (FAA); General Services Administration (GSA); Department of Health and Human Services (HHS); National Aeronautics and Space Administration (NASA); Small Business Administration (SBA);

contractors, including small businesses, serve as mentors to eligible small businesses, or protégés. Pursuant to the agreements, the mentors provide technical, managerial, and other business development assistance to their protégés. Agencies, through the Offices of Small and Disadvantaged Business Utilization (OSDBUs)⁴, encourage mentor participation by providing the mentor with credit toward subcontracting goals, additional evaluation points toward the awarding of contracts, an annual award to the mentor providing the most effective developmental support to a protégé, and in three cases, cost reimbursement.⁵ The programs tend to fall into three categories: programs where mentors are eligible for cost reimbursement; the Small Business Administration's 8(a) Mentor-Protégé programs, and general mentor-protégé programs.

Cost reimbursement agreements provide mentor firms with reimbursement for reasonable, allocable, and allowable expenses related to providing technical assistance that are reimbursed to the mentor through a contract line item. These programs include the DoD, DOE and FAA Mentor-Protégé programs. While DoD has the distinction of being both the oldest program and the only statutorily authorized program,⁶ and FAA's is the only program not subject to the Federal Acquisition Regulation (FAR), it is the ability to receive payments that makes these programs distinctive.

The SBA 8(a) Mentor-Protégé Program is by far the largest – it has over twice as many participants as the next largest program. Established in 1998 by regulation, it is intimately tied to the 8(a) Business Development Program, which regards contracts as a tool for business development for small firms owned and controlled by socially and economically disadvantaged individuals. While the managerial and technical assistance offered by mentors to protégés under this program generally mimics that of other programs, there are several notable exceptions. First, the program allows the mentor to own a greater percentage of the protégé firm – up to 40 percent.⁷ Second, the program permits mentor-protégé joint ventures to compete as either small or 8(a) firms.⁸ Third, the program permits the protégé to receive any assistance pursuant to the mentor-protégé agreement without a finding of affiliation.⁹ Finally, the SBA program allows participants to contract at any agency.

Any contract valued at over \$650,000 that is awarded to an other-than-small business is required to have a subcontracting plan that demonstrates how small businesses will be used as subcontractors, and this plan is frequently used as an evaluation factor to decide which company will receive the award.¹⁰ These remaining mentor-protégé programs allow prime contractors to receive additional credit towards their subcontracting goals or towards the evaluation of their subcontracting plans. In some cases,

Department of the Treasury (Treasury); United States Agency for International Development (USAID); and the Department of Veterans Affairs (VA).

³ A chart briefly summarizing the programs is provided as Appendix A.

⁴ Some agencies refer to the statutorily defined OSDBU position by different titles. For example, GSA refers to their office as the Office of Small Business Utilization. However, for simplicity's sake, all such offices and positions shall be referred to as OSDBUs in this document.

⁵ GAO, MENTOR-PROTÉGÉ PROGRAMS HAVE POLICIES THAT AIM TO BENEFIT PARTICIPANTS BUT DO NOT REQUIRE POSTAGREEMENT TRACKING, 1 (2011) (GAO-11-548R) [hereinafter MENTOR PROTÉGÉ PROGRAMS].

⁶ The DoD program came into existence in 1991 via the National Defense Authorization Act for Fiscal Year 1991, 10 U.S.C. § 2302 note.

⁷ 13 C.F.R. § 124.520(d)(2).

⁸ *Id.* at § 124.520(d)(1).

⁹ *Id.* at § 124.520(d)(4).

¹⁰ 48 C.F.R. § 19.7.

mentors are also allowed to incorporate program costs into their indirect rates, although such inclusion would not lead to their inclusion in the cost-reimbursement category of mentor-protégé programs.

b. GAO Review

In the Jobs Act, Congress required that GAO study both the SBA's 8(a) Mentor-Protégé program and the other mentor-protégé programs "to determine whether the programs and relationships are effectively supporting the goal of increasing the participation of small business concerns in Government contracting."¹¹ Specifically, the report was to address a broad cross section of industries and evaluate how the procurement agencies were administering the programs, what types of controls were in place, and how agencies were ensuring that the protégés were deriving benefit from the programs which prepared them to better compete for federal contracts.¹²

As part of their study of the mentor-protégé programs, GAO reviewed the policies and procedures for the thirteen programs and then focused on the controls used "to help ensure that mentor-protégé programs are beneficial to program participants and eligibility requirements are being met"¹³ and then finally looked at the data to see whether the programs met the goal of helping firms ultimately compete for federal contracts. While GAO found that the agencies had different levels of controls, each had defined policies and procedure, enforced eligibility requirements, and required reporting on what assistance was being provided. Although greater consistency in the types of metrics being used would have better enabled comparisons, GAO was more concerned that only three of the programs – DoD, NASA and USAID – follow up with protégés after the conclusion of the program to see if the programs help the protégé ultimately compete independently for federal contracts.¹⁴ These three agencies require that for the 2 years following completion of the program, protégé firms report on the prime contract and subcontract awards, both with the mentor and independent of the mentor.

GAO's sole recommendation was that the OSDBUs at DHS, DOE, DOS, EPA, FAA, GSA, HHS, SBA and Treasury collect and maintain protégé information after completion of the program. DHS, DOE, GSA, HHS, SBA and Treasury generally concurred with the recommendations. DOS stated that it would implement post-program reporting if such reporting were required, but that was concerned that reporting would "increase the burden on all parties without adding significant value to the existing program."¹⁵

c. Issues Before the Subcommittee

There are four issues the Subcommittee will be addressing regarding the mentor-protégé programs. First, do the programs assist small businesses, or do they encourage undue reliance on other firms? Second, is it necessary to have thirteen programs, or could small businesses benefit from consolidation of the programs? Third, should the GAO recommendation for post-program reporting be implemented? Finally, should the programs be available to all small businesses?

¹¹ Pub. L. No. 111-240, § 1345, 124 Stat. § 2504, 2546 (2010).

¹² *Id.*

¹³ MENTOR PROTÉGÉ PROGRAMS at 2.

¹⁴ *Id.* at 43.

¹⁵ *Id.* at 53.

i. Affiliation

The Subcommittee is concerned that due to the structure of the mentor-protégé programs at many of the agencies, small businesses participating as either mentors or as protégés could lose their small business size status due to the principle of affiliation. Clearly, the potential loss of size status would be a significant disincentive to participation in any mentor-protégé program. Unfortunately, many of the programs claim that that affiliation is waived for the participants, even though the agencies may not have the authority to do so. Further, the technical assistance provided by mentors to protégés frequently risks triggering a finding of affiliation.

Affiliation is the name given to the series of rules SBA uses to determine whether two entities will be considered under common management or control, and thus considered one company, for the purposes of determining whether a firm is small.¹⁶ Pursuant to SBA regulations, two firms may be considered affiliated if SBA finds that one firm is controlled by the other.¹⁷ To determine affiliation, SBA's Office of Hearings and Appeals considers factors such as "ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists."¹⁸ Indeed, SBA looks at the totality of factors when considering affiliation, and "may find affiliation even though no single factor is sufficient to constitute affiliation." Affiliation can be found based on "identity of interest" which includes firms that are "economically dependent through contractual or other relationships."¹⁹ Affiliation can be found based on shared space and employees,²⁰ joint ventures,²¹ undue use by the protégé of the mentor as a subcontractor,²² and license agreements.²³ Each of these affiliation triggers can be found in the non-DoD and non-SBA programs.

These types of development assistance provided under the typical mentor-protégé agreement risk triggering a finding of affiliation. For example, DHS – the second largest of the mentor-protégé programs – encourages mentors to provide the following types of assistance:

- (a) Management guidance related to—
 - (1) Financial management
 - (2) Organizational management
 - (3) Overall business management/planning
 - (4) Business development
- (b) Technical assistance;
- (c) Rent-free use of facilities and/or equipment;
- (d) Temporary assignment of personnel to the protégé firm for the purpose of training;
- (e) Property;
- (f) Loans; and

¹⁶ 13 C.F.R. § 121.103(a).

¹⁷ *Id.*

¹⁸ *Id.* at § 121.103(a)(2).

¹⁹ *Id.* at § 121.103(f).

²⁰ *Id.* at § 121.103(g).

²¹ *Id.* at § 121.103(h).

²² *Id.* at § 121.103(h)(4).

²³ *Id.* at § 121.103(i).

(g) Any other types of mutually beneficial assistance²⁴

This type of assistance is fairly typical of all programs except the SBA Mentor-Protégé Program. Other programs suggest that a mentor could purchase up to 10% of the protégé,²⁵ or may award subcontracts to a protégé without competition.²⁶ Despite the fact that participation in a program is not cause to find affiliation, the Subcommittee is concerned that by encouraging well-intentioned mentors and protégés to engage in activities, the programs put the small businesses' size at risk.

Of the thirteen mentor-protégé programs, nine claim to waive affiliation.²⁷ However, pursuant to the Small Business Act, only the SBA has this ability,²⁸ and SBA has simply stated that a protégé firm is not an affiliate of a mentor firm "solely because the protege (sic) firm receives assistance from the mentor firm under Federal Mentor-Protege programs" but that "[a]ffiliation may be found for other reasons."²⁹ The DoD program has a statutory exemption from affiliation,³⁰ but seven of the remaining programs claim this exemption without a basis in law or a waiver from SBA.

A purported waiver is particularly dangerous, as it may lead small firms to believe that they have safe harbor from the affiliation rules when they provide or accept assistance pursuant to a mentor-protégé agreement. However, even the programs that do not claim to waive affiliation inadvertently put small businesses in danger, since the underlying technical assistance itself may trigger a loss of small business status. Since SBA is the only entity with the authority to waive affiliation for mentor-protégé participants, the Subcommittee is reviewing whether SBA should be given regulatory authority over all mentor-protégé programs.

ii. Duplication

As previously noted, with the exception of the SBA, DoD, DOE and FAA mentor-protégé programs, the programs reviewed by GAO provide the same benefits to mentors, provide very similar assistance to small businesses, and have similar reporting requirements. Despite the similarities and the SBA's overarching role in determining the size of firms in federal procurement, a firm that wants to participate in more than one program must be vetted by each agency. One of the strengths of the SBA program is that it allows a mentor and protégé to contract at any federal agency. However, the SBA program is limited to participants in the 8(a) and HUBZone programs. Given the diversity of the programs and the limitations of the SBA programs, should there be a civilian agency mentor-protégé program? In such a case, SBA could define the parameters for such a program, and each OSDDBU could then be responsible for implementation and reporting to SBA. Benefits would include greater participation, less paperwork burden on businesses, and greater access to contracts.

²⁴ Department of Homeland Security, MENTOR-PROTÉGÉ PROGRAM DETAILS, *available at* http://www.dhs.gov/xlibrary/assets/opnbiz/OSDBU_MentorProtegeDetails.pdf at 1.12.

²⁵ 48 C.F.R. § 1819.7201

²⁶ *Id.* at § 552.219-76(g)

²⁷ SBA, DoD, DHS, DOS, Treasury, VA, NASA, FAA, and HHS.

²⁸ *see, e.g., Associated Refuse & Compactions Services, Inc.*, B-189,740 at 1-2 (Comp. Gen. 1977).

²⁹ 13 C.F.R. § 121.103(b)(6).

³⁰ 10 U.S.C. § 2302 note.

Alternatively, agencies could collaborate on best practices and voluntarily unify their programs. The Subcommittee suggests that SBA consider encouraging such practices through the Small Business Procurement Advisory Council.³¹

iii. Accountability

While nine of the agencies agreed to implement GAO's recommendation on post-program success, to date none have made the changes. If mentor-protégé programs are intended to develop the capacity of small firms to compete for contracts, measuring post-program performance is crucial. A uniform program administered by SBA with each agency reporting on its progress could give a more complete picture of a firm's successes and challenges.

iv. Accessibility

Of the thirteen programs reviewed, only eight accept small businesses that do not qualify for one of the other socio-economic contracting or business development programs. Some of the restrictions are logical. For example, the SBA only admits 8(a) and HUBZone firms into its mentor-protégé program because the program is intended to be a business development tool, and the VA only admits veteran or service disabled veteran firms in keeping with the agency's mission. In other cases, the restriction is statutory – DoD is statutorily barred from allowing small businesses or veteran-owned small businesses from participating as protégés, accepting only small disadvantaged business, women-owned small businesses, HUBZone firms and service-disabled veteran-owned small businesses as protégés. Other restrictions are harder to fathom – the EPA only allows protégés that are small disadvantaged, woman-owned, or historically black colleges and minority institutions, excluding small, HUBZone, veteran or service disabled veteran-owned firms.

In the Jobs Act, Congress authorized the creation of SBA Mentor-Protégé programs for service-disabled veterans, women and HUBZone small businesses.³² The Subcommittee is interested in SBA's intentions in this regard. Further, the Subcommittee is interested in whether restricted access to mentor-protégé programs should be addressed, or whether it should be broadened to include all small businesses.

II. Procurement Center Representatives (PCR) and Commercial Market Representatives (CMR)

a. The Role of the PCR and CMR

The Small Business Act strives to afford small businesses with the maximum practicable opportunity to compete for prime contracts and the ability to compete for subcontracts on contracts not awarded to small businesses.³³ To achieve that goal for prime contract opportunities:

The contracting officer shall set aside any acquisition over \$150,000 for small business participation when there is a reasonable expectation that:

³¹ The Small Business Procurement Advisory Council is the official council of OSDDBU directors, chaired by SBA, and authorized to develop positions on proposed procurement regulations affecting the small business community; and submit comments reflecting such positions to appropriate regulatory authorities.

³² Jobs Act, § 1347, 124 Stat. at 2547.

³³ 15 U.S.C. § 644(e).

- (1) Offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns . . . ; and
- (2) Award will be made at fair market prices. Total small business set-asides shall not be made unless such a reasonable expectation exists.

48 C.F.R. § 19.502-2(b).

The PCRs are the individuals within SBA directly responsible for helping ensure that small business have the opportunity to compete for these contracts.³⁴ Before an agency decides not to set aside a contract for small business, the SBA PCR is required to sign off on the acquisition strategy, or if a PCR is unavailable, the agency's own small business specialist is to sign off on the acquisition plan.³⁵ If a contract is bundled, PCR review of the bundling justification is required by statute. In either case, if the PCR disagrees with the contracting officer's decision, the PCR may file an appeal delaying the implementation of the contract strategy. Such an appeal is known within SBA as a Form 70. If the PCR and the agency disagree on the Form 70, the Administrator of the SBA may file an appeal with the head of the contracting agency. An award may not be made while the appeal is pending, but the ultimate decision on contracting strategy rests with the contracting agency.³⁶

When a contract is awarded to an other-than-small business and the contract is for more than \$650,000, the contract must include a subcontracting plan enumerating the opportunities for small businesses to participate as subcontractors and the plan must assign both percentage and dollar value goals to these opportunities.³⁷ The PCR, when available, provides an opinion to the contracting officer on the appropriate subcontracting goals, then the CMR assumes responsibility for post award compliance. While CMRs are available to help small businesses seeking subcontracts through counseling and matchmaking, and they are also responsible for ascertaining a prime contractor's compliance with its subcontracting plan.³⁸ Agencies and prime contractors are required to report on subcontract performance, and compliance with the subcontracting goal is reflected in past performance reports on prime contractors.³⁹ The CMR reviews the prime contractor's reports, a responsibility they share with the agencies, and flag a failure to comply.

³⁴ According to the SBA, PCRs "increase the small business share of Federal procurement awards by initiating small business set-asides, reserving procurements for competition among small business firms; providing small business sources to Federal buying activities; and counseling small firms. In addition, PCRs, advocate for the breakout of items for full and open competition to affect savings to the Federal Government." SBA, GOVERNMENT CONTRACTING FIELD STAFF DIRECTORY (2011) [hereinafter FIELD STAFF DIRECTORY] *available at* <http://www.sba.gov/content/government-contracting-field-staff-directory>.

³⁵ 48 C.F.R. 19.501(d); 19.505(a).

³⁶ 15 U.S.C. § 644(a).

³⁷ *Id.* at § 637(d); 48 C.F.R. § 19.704.

³⁸ GAO, IMPROVEMENTS NEEDED TO HELP ENSURE RELIABILITY OF SBA'S PERFORMANCE DATA ON PROCUREMENT CENTER REPRESENTATIVES 2 (2011) [hereinafter PROCUREMENT CENTER REPRESENTATIVES]; according to the SBA, "CMRs are stationed in area offices, conduct compliance reviews of prime contractors, counsel small businesses on how to obtain subcontracts, conduct matchmaking activities to facilitate subcontracting to small business, and provide orientation and training on the Subcontracting Assistance Program for both large and small businesses." FIELD STAFF DIRECTORY

³⁹ 48 C.F.R. § 19.704.

b. The GAO Report

The Jobs Act required that GAO examine the PCR program and “address ways to improve the effectiveness of the [PCR] program in helping small business concerns obtain Federal contracts,” examine the effectiveness of the PCRs and CMRs, and include recommendations on how to improve PCR the program.⁴⁰ To do so, GAO first reviewed its prior reports, and the reports of the SBA Inspector General (IG) which had found:

- PCRs had failed to review the majority of reported bundled contracts;⁴¹
- CMRs monitored “less than half of the . . . large prime contractors in FY 2006;”⁴²
- The majority of PCRs covered multiple agencies and buying activities within an agency;⁴³ and
- CMRs covered between 90 and 200 prime contractors apiece, “which diminished their ability to monitor prime contractors through compliance reviews.”⁴⁴

Thus, it was well established that these officials faced significant resource constraints. Rather than address this issue directly, GAO: (1) reviewed SBA’s own measures of PCR and CMR effectiveness; (2) assessed the challenges the PCRs and CMRs themselves cited; (3) examined options to increase the effectiveness; and (4) presented options for improving the programs.⁴⁵

i. Measures of Effectiveness

SBA measures the effectiveness of its PCRs and CMRs through a tool call the Government Contracting Area Report (GCAR). GAO examined five of these measures: formal Form 70s filed, informal Form 70s filed;⁴⁶ surveillance reviews conducted; subcontracting reviews; and training for federal agencies.⁴⁷ GAO found these measures to be unreliable – dollar values on formal and informal Form 70s varied from contract reports, dates for surveillance reviews were incorrect, documentation was not available for nearly a third of subcontracting reviews, and the number of training sessions was incorrectly entered.⁴⁸

These findings led to the only recommendations for executive action that GAO presented as part of its report. Specifically, GAO recommended that SBA “provide clear and complete guidance to the PCRs and CMRs on accurately recording and maintaining the appropriate back up documentation of accomplishments reported in the GCAR.”⁴⁹ GAO also recommends that SBA “require that monthly GCAR data are verified and that documentation for PCR and CMR records [be] periodically reviewed for quality

⁴⁰ Jobs Act, § 1312, 124 Stat. at 2538.

⁴¹ PROCUREMENT CENTER REPRESENTATIVES at 2, *citing* SBA Office of the Inspector General, AUDIT OF THE CONTRACT BUNDLING PROCESS (2005).

⁴² *Id.* at 2, *citing* SBA Office of the Inspector General, REVIEW OF SBA’S SUBCONTRACTING ASSISTANCE PROGRAM (2007).

⁴³ *Id.*, *citing* GAO, SMALL BUSINESS ADMINISTRATION: AGENCY SHOULD ASSESS RESOURCES DEVOTED TO CONTRACTING AND IMPROVE SEVERAL PROCESSES IN THE 8(A) PROGRAM (2008) [hereinafter PROCESSES IN THE 8(A) PROGRAM].

⁴⁴ *Id.*

⁴⁵ PROCUREMENT CENTER REPRESENTATIVES at 3.

⁴⁶ An informal Form 70 is the threat of a Form 70, usually in draft form.

⁴⁷ PROCUREMENT CENTER REPRESENTATIVES AT 3.

⁴⁸ *Id.* at 3, 5-7.

⁴⁹ *Id.* at 9.

and completeness.”⁵⁰ SBA has stated that it will be addressing the data challenges and will have updated the standard operating procedures for PCRs and CMRs before the end of the year.⁵¹

ii. Challenges Facing PCRs and CMRs

The results of GAO’s interview with the PCRs and CMRs highlighted significant problems, but were consistent with prior IG and GAO reports. Specifically, GAO identified seven key challenges faced by PCRs and CMRs, six of which are discussed here. These are:

- PCRs and CMRs said conducting size determinations⁵² and issuing certificates of competency [(COC)]⁵³ took priority over and reduced time for PCR and CMR duties. SBA officials told [GAO] staff reductions required them to cross-train most PCRs and CMRs on size determinations and certificates of competency.
- CMRs told [GAO] that the CMR function increasingly has become part-time. According to SBA, more than half the staff with CMR functions spent 25 percent or less of their time on CMR duties as of November 1, 2010.
- PCRs and CMRs told [GAO] that the lack of in-person interaction with the buying activities and prime contractors limited their ability to influence procurements and subcontracting opportunities. PCRs working at buying activities said their access to procurement planning discussions helped influence procurements.
- PCRs told [GAO] that contracting officers may not understand the small business contracting provisions in the [FAR], and some did not know how to conduct market research to identify qualified small businesses during acquisition planning. A few PCRs said turnover at certain buying activities explained these gaps.
- Many PCRs (13 of 22)⁵⁴ told [GAO] that some agencies would not send procurements to them for review, although the [FAR] requires agencies to provide certain procurements to SBA for review prior to award. SBA officials told [GAO] they were meeting with officials from three agencies to resolve this issue.

⁵⁰ PROCUREMENT CENTER REPRESENTATIVES at 9.

⁵¹ *Id.* at 7, 40-41.

⁵² SBA is responsible for determining which firms are small and which are other than small. Previously, this responsibility was carried out by a dedicated size specialist, whose decision a firm could appeal to the SBA Office of Hearings and Appeals. 13 C.F.R § 121. At this time, there are no longer dedicated size specialists, but the work is performed by individuals whose primary responsibility is as a PCR, CMR or Certificate of Competency (COC) expert. FIELD STAFF DIRECTORY.

⁵³ As authorized by 15 U.S.C. § 637(b)(7), the small businesses deemed unable to fulfill the requirements of a specific government contract for which it is the otherwise successful offeror may appeal to SBA, and one of SBA’s industrial and financial specialists will review the firms capabilities.

⁵⁴ The number refers to the number of PCRs interviewed, not the total number of PCRs, which GAO stated was 57.

.....

- PCRs and CMRs cited a lack of authority to influence subcontracting opportunities. PCRs told [GAO] that they had no means to dispute agency procurements if contracting officers did not use their recommendations on subcontracting plans. PCRs and CMRs also said it was difficult to enforce prime contractor performance under subcontracting plans because determining that a contractor was not acting in good faith was difficult.

PROCUREMENT CENTER REPRESENTATIVES at 7-8 (footnotes added).

Clearly, the key challenges are based on anecdotal evidence, but for the most part they echo the findings of the early GAO and SBA IG findings, specifically that the PCRs and CMRs are overburdened and lack sufficient resources to be effective. SBA's response to the report did not address these issues.

The burden on PCRs is particularly troubling considering that the Small Business Act requires that SBA assign a PCR to each major procurement activity,⁵⁵ yet many PCRs are covering seven or more procurement activities. Indeed, some PCRs cover procurement activities in three or more states or territories, including states outside the continental United States – one covers 27 procurement activities in five states.⁵⁶ Appendix B to this memorandum includes the current distribution of PCRs and CMRs.

iii. Options

GAO presented six options to increase the effectiveness of PCRs and CMRs. These are:

- (1) increase the PCR and CMR workforce;
- (2) remove size determination and certificate of competency duties from staff with PCR and CMR responsibilities;
- (3) increase opportunities for PCRs and CMRs to have in-person interactions with buying activities and large prime contractors;
- (4) increase SBA's server capacity;
- (5) increase small business training that PCRs conducted for agency contracting officers; and
- (6) allow PCRs to dispute a procurement if their recommendations on a subcontracting plan were not implemented.⁵⁷

Each of these options had advantages and disadvantages, which will be addressed in order.

First, GAO found that increasing the size of the PCR workforce would allow the PCRs to cover more by activities and review more procurement actions. Concurrently, an increase in the number of CMRs would permit more compliance reviews and prime contractor outreach. However, "these

⁵⁵ 15 U.S.C. § 644(l).

⁵⁶ FIELD STAFF DIRECTORY.

⁵⁷ PROCUREMENT CENTER REPRESENTATIVES at 8.

changes would require additional resources or a reallocation of resources, which could have negative implications for other SBA programs.”⁵⁸

The second option has a similar set of advantages and disadvantages. Removing extraneous duties such as size status determinations and COCs from PCRs and CMRs would allow greater coverage of buying activities, review of procurements, and time to conduct compliance reviews.⁵⁹ However, unless SBA adds or reallocates personnel, it would then leave a void in the performance of size determinations and COC findings, each of which benefit small businesses.⁶⁰

The third and fourth options – increasing opportunities for PCRs and CMRs to have in-person interactions and increasing SBA’s server capacity – were addressed together. GAO stated that increasing in-person contact with agencies and prime contractors could allow SBA personnel to “increase their influence over procurements and subcontracting.”⁶¹ Increasing server capacity would allow contracting officers to email procurement documents to PCRs rather than having to fax them, and would therefore increase coordination.⁶² However, each of these options requires resources.

The fifth option involved increasing PCR training of contracting staff. Such training helps “maximiz[e] small business participation as it makes contracting officers aware of the small business requirements and improves coordination with the PCR.”⁶³ However, GAO suggests that it may be more effective to have the OSDDBU train the contracting officers, thus sparing the PCR any travel.⁶⁴

The sixth and final option was to allow PCRs to challenge contracts when the PCRs’ subcontracting recommendations were not adopted. This recommendation would force the contracting officer to listen to the PCR on subcontracting, and serve to increase subcontracting goals and opportunities for small businesses. Agencies opposed this option because they “did not think the PCRs had enough information about the overall contract or the prime contractor to accurately assess the subcontracting plan.”⁶⁵ GAO also noted that this would require a statutory change.⁶⁶

c. Issues Before the Committee

i. Resources

Many of the key challenges identified by GAO, and the options they presented, reflect a lack of resources for PCRs and CMRs at the SBA. In the Committee’s Budget Views and Estimates, the Committee urged that other duplicative programs be eliminated and \$2 million in appropriations instead be allocated to hire 15 additional PCRs.⁶⁷ Additionally, the Subcommittee questions whether the

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 27.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 28.

⁶⁶ *Id.*

⁶⁷ Committee on Small Business, House of Representatives, *Views and Estimates of the Committee on Small Business on Matters to be set forth in the Concurrent Resolution on the Budget for Fiscal Year 2012* (March 17, 2011) at 14.

requirements of the Small Business Act are being adhered to by the agencies where PCRs are located. Specifically, the OSDUBUs are required to “assign a small business technical adviser to each office to which the Administration has assigned a procurement center representative.”⁶⁸ The technical advisor is required to be a full-time employee of the procuring activity and familiar with the supplies or services purchased at the activity. The technical advisor’s “principal duty shall be to assist the [PCR] in his duties and functions relating to sections 8 and 15 of [the Small Business Act].”⁶⁹

If OSDUBU-based staffing requirements were adhered to, the number of small business resources contracting resources would increase exponentially. GAO reports that at the time of its report, there were 57 PCR assigned to 868 major procurement activities. Thus, the Small Business Act would require that there should be 868 small business technical advisors assisting the PCRs. Given that the federal government spent \$536 billion on prime contracts in FY 2010,⁷⁰ each PCR was, in theory, responsible for reviewing over \$9.4 billion in contracts. If the technical advisors had been available, the workload would drop to approximately \$580 million per individual. While even \$580 million is more than any one individual can handle, it would significantly improve the SBA’s ability to triage contracting opportunities.

To the best of the Subcommittee’s knowledge, no PCR has an assigned technical advisor, although some OSDUBUs do have technical advisors in their employ, they are not assigned to assist the PCR as their primary responsibility. Despite the requirements of the Small Business Act, the Department of the Air Force (USAF), Department of the Army (Army), Department of Commerce (DOC), DOE, Department of the Interior (DOI), Department of Justice (DOJ), Department of the Navy (Navy), Department of Transportation (Transportation), VA and the Defense Logistics Agency (DLA) actually stated that this was not a responsibility of their office.⁷¹ VA further clarified that its office does not assign technical advisors, but that OSDUBU staff perform similar duties to a technical advisor.⁷²

While additional personnel would help address the resources issues facing PCRs, the Subcommittee is also interested in how the SBA is using technology to address these problems. Specifically, the Subcommittee wishes to learn how the SBA intends to use its authority for a three electronic PCR (e-PCR) pilot, as authorized by the Jobs Act, which must be implemented by the end of this year. The Subcommittee hopes the e-PCR pilot will explore ways to mitigate a lack of personnel through technology, improve acquisition planning, and address some of the other issues raised in the GAO report.

ii. Training

The Subcommittee is investigating how much time PCRs and CMRs spend on training Contracting Officers and Contract Specialists. Contracting officers are required to master the FAR,⁷³ and the FAR is explicit regarding a Contracting Officer’s responsibilities towards small business,⁷⁴ so the lack of training seems to be a greater problem than even the suggested issue of division of labor between the OSDUBUs

⁶⁸ 15 U.S.C. § 644(k)(8).

⁶⁹ 15 U.S.C. § 644(k)(8).

⁷⁰ Federal Procurement Data System, April 2011.

⁷¹ GAO, SMALL BUSINESS CONTRACTING: ACTION NEEDED BY THOSE AGENCIES WHOSE ADVOCATES DO NOT REPORT TO AGENCY HEADS AS REQUIRED, 15-16 (2011) [hereinafter SMALL BUSINESS CONTRACTING].

⁷² *Id.* at 54.

⁷³ Office of Management and Budget, *Federal Acquisition Certification in Contracting Program*, 2006.

⁷⁴ 48 C.F.R. Part 19.

and the PCRs. For example, the Subcommittee wishes to know why small business contracting is only taught at the advanced level of the Defense Acquisition University, and then only for “acquisition professionals who partake in matters relating to the DoD Small Business Program.”⁷⁵ Yet Part 19 of the FAR addresses a panoply of small business programs. Similarly, civilian acquisition officials are not taught about Part 19 in their training.⁷⁶ It remains an open and serious question about the adequacy of training federal procurement officials receive if a critical element is simply omitted.

iii. Subcontracting

The Subcommittee wants to assess the challenges faced by PCRs and CMRs in negotiating and enforcing subcontracting plans. Specifically, when PCRs are making recommendations to agency personnel on subcontracting plans, what is the typical response? How often is an increase in subcontracting goals used to address an informal or formal Form 70? Finally, once the subcontracting goals are in place, what is the experience of the CMRs with adherence to the goals? How often do companies adhere to the requirement of reporting their subcontracting achievements in the Electronic Subcontracting Reporting System? What additional authorities do the CMRs and PCRs believe they need to increase opportunities for small businesses subcontracting?

III. Offices of Small and Disadvantaged Business Utilization (OSDBU)

a. The Role of the OSDBU

In 1978, Section 15(k) of the Small Business Act established an Office of Small and Disadvantaged Business Utilization within “each Federal agency having procurement powers.”⁷⁷ While the nomenclature of these offices varies slightly from agency to agency, both the offices and the heads of the offices are collectively referred to as OSDBUs. Each OSDBU is to be appointed by the head of the agency, and, with the exception of the Department of Defense, “be responsible only to, and report directly to, the head of such agency or to the deputy of such head.”⁷⁸

The Small Business Act assigns specific duties and responsibilities to the OSDBU. The OSDBU is responsible implementation and execution of contracting assistance-related functions and duties in the Small Business Act. This includes the small business set-aside program and other socio-economic contracting programs, as well as assisting small businesses in obtaining payments and late payment interest from their agency or from prime contractors. The primary focus of the OSDBU should be advocating for small business contracts, and “the failure of the contracting officer to accept any such recommendations shall be documented and included within the appropriate contract file.”⁷⁹

The OSDBUs are specifically charged with fighting unjustified bundling. Contract bundling occurs when two or more requirements of a type that would be suitable for award to small business are consolidated into a larger contract requirement that is no longer suitable for award to small business. Due to concerns regarding limiting competition and excluding small business participation, the Small Business

⁷⁵ Defense Acquisition University website at http://icatalog.dau.mil/onlinecatalog/courses.aspx?crs_id=124.

⁷⁶ Federal Acquisition Institute, FAC-C COURSE DESCRIPTIONS (July 29, 2011) available at <http://www.fai.gov/certification/classdesc.asp#100> Small business is not mentioned in the course description for any of the current Federal Acquisition Institute classes.

⁷⁷ 15 U.S.C. § 644(k).

⁷⁸ *Id.* at § 644(k)(2)-(3).

⁷⁹ *Id.* at § 644.

Act has very specific procedures agencies must follow in order to justify bundling, and the OSDDBUs are a critical part of this process. Specifically, the Small Business Act directs them to “identify proposed solicitations that involve significant bundling of contract requirements.”⁸⁰ When bundled requirements are identified, the OSDDBU is to “work with the agency acquisition officials and the [SBA] to revise the procurement strategies for such proposed solicitations where appropriate to increase the probability of participation by small businesses as prime contractors, or to facilitate small business participation as subcontractors and suppliers.”⁸¹

Given the scope of their task, the Small Business Act grants the OSDDBUs resources and authority, and tasks them cooperating with SBA. This includes having supervisory authority over personnel carrying out the functions of the Small Business Act.⁸² To assist SBA, as previously mentioned, OSDDBUs are required to assign small business technical advisors to each PCR and the OSDDBUs are directed to “cooperate, and consult on a regular basis, with the [SBA] with respect to carrying out the functions and duties” vested in them by the Small Business Act.⁸³

Over time, the OSDDBUs have taken on additional duties and responsibilities. OSDDBUs also perform outreach to small businesses as one of their primary responsibilities.⁸⁴ Eighty percent of OSDDBUs believe that training small businesses on the contracting process is one of their primary responsibilities,⁸⁵ and consequently spent their time “representing the agency at meetings, workgroups, and conferences related to small business; initiating and building partnerships with the small business community.”⁸⁶ Furthermore, the OSDDBUs negotiate their agency’s contribution to the statutory 23% small business goal.⁸⁷

b. The GAO Report

The Senate Small Business Committee requested that GAO “review OSDDBU practices for carrying out the requirements of the Small Business Act at federal agencies with major contracting activity.”⁸⁸ To carry out this request, GAO looked at three key elements of OSDDBU compliance with the Small Business Act. First, it reviewed the lines of authority between the OSDDBU and the agency heads. Second, it enumerated the various functions of the OSDDBUs. Finally, it assessed the challenges OSDDBUs were facing as they attempted to accomplish the goal of increasing procurement opportunities for small businesses.⁸⁹

i. Reporting Structure

Section 15(k) of the Small Business Act requires that all federal agencies with procurement powers establish an Office of Small and Disadvantaged Business Utilization (OSDBU) to advocate for small businesses. Section 15(k)(3) requires that OSDBU directors be responsible only to and report directly to

⁸⁰ *Id.* at § 644(k)(5).

⁸¹ *Id.* at § 644(k)(5).

⁸² *Id.* at § 644(k)(7).

⁸³ *Id.* at § 644(k)(9).

⁸⁴ One agency reported participating in over 100 outreach events in the last year.

⁸⁵ SMALL BUSINESS CONTRACTING at 21.

⁸⁶ *Id.* at 7.

⁸⁷ *Id.* at 26.

⁸⁸ *Id.* at 2.

⁸⁹ *Id.*

agency or deputy agency heads. To assess whether agencies complied with this reporting structure, GAO examined 16 agencies—the 7 agencies that each procured more than \$15 billion in goods and services in 2009, and 9 that GAO had previously reported had reporting schemes that were not complying with the Small Business Act.⁹⁰

Of the sixteen agencies, seven were found to be noncompliant – USDA, DOC, DOJ, DOS, DOI, Treasury, and SSA. These same seven agencies were also found to be noncompliant in 2003.⁹¹ Of these agencies, the OSDBU at DOC, DOI, DOJ and SSA reported to lower level officials. These officials were also the Chief Acquisition Officers (CAOs)⁹² or their deputies within the departments or agencies, thereby creating a significant conflict of interest. An OSDBU appeal has little chance of success if there is not a division in authorities between the OSDBU and the CAO. At the remaining three agencies, USDA, DOS, and DOS, the OSDBU in title and the OSDBU in fact varied.⁹³ In each case, the CAO was also the official OSDBU,⁹⁴ with a lower level employee as the “de facto OSDBU.”⁹⁵

While SSA agreed to change its reporting structure to bring it into compliance,⁹⁶ four of the seven noncompliant agencies submitted comments arguing that they were indeed compliant with the reporting requirements. DOC stated that the OSDBU “reports directly to the Deputy Secretary on all legislative and policy issues and the Chief Financial Officer and Assistant Secretary for Administration on administrative matters.”⁹⁷ DOJ stated that while the OSDBU was in the Justice Management Division, the placement was for administrative purposes and that the OSDBU “reports directly to the Deputy Attorney General on matters of substance requiring his direct attention.”⁹⁸ At DOS, the Assistant Secretary for Administration was officially the OSDBU even though the functions are carried out by the Operations Director, who GAO identified as the true OSDBU.⁹⁹ DOS argued that the Small Business Act does not require that the “director personally perform any specific functions.”¹⁰⁰ Interestingly, DOS argues that its approach is better, because if the GAO-identified OSDBU were given the official title and allowed to report to the Deputy Secretary of State, that individual would lack “access or influence.”¹⁰¹ GAO dismissed these challenges, stating that “none of the legal arguments the agencies raised caused us to revise our conclusions or recommendations.”¹⁰²

⁹⁰ SMALL BUSINESS CONTRACTING at 3. The seven \$15 billion dollar agencies were DLA, USAF, Army, Navy, DOE, HHS, and NASA. The additional nine agencies were the Departments of Education, Agriculture (USDA), DOC, DOJ, DOI, and Treasury, and the EPA and Social Security Administration (SSA).

⁹¹ GAO SMALL AND DISADVANTAGED BUSINESSES: SOME AGENCIES’ ADVOCATES DO NOT REPORT TO THE REQUIRED MANAGEMENT LEVEL, (2003).

⁹² CAOs are political appointees and the most senior official within each agency responsible for the acquisition activities programs. The CAO may be the Senior Procurement Executive of the agency, or has direct responsibility of that individual. By statute, CAOs must be members of the Senior Executive Service or Senate-confirmed.

⁹³ SMALL BUSINESS CONTRACTING at 48.

⁹⁴ CAOC Council Membership List available at <http://www.caoc.gov/index.cfm?function=membersall>.

⁹⁵ SMALL BUSINESS CONTRACTING at 48.

⁹⁶ *Id.* at 66. Interestingly, the SSA OSDBU reported that he had never met the Commissioner or Deputy Commissioner of SSA. *Id.* at 47.

⁹⁷ *Id.* at 57.

⁹⁸ *Id.* at 59.

⁹⁹ *Id.* at 61.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 63.

¹⁰² *Id.* at 9.

To address the reporting structure issues, GAO suggested that agencies failing to comply with the reporting structure should be required to report to Congress on why they believe additional flexibility is merited.¹⁰³ GAO suggested that this could be wrapped into SBA's annual scorecard process.¹⁰⁴

ii. OSDBU Functions

To review the primary function of the OSDBU required by the Small Business Act, GAO surveyed 25 OSDBUs at agencies that represented more than 98 percent of civilian obligations and 90 percent of DOD obligations in 2009. It found:

- 24 OSDBUs have supervisory authority over personnel with the duties and functions of the OSDBUs;¹⁰⁵
- 19 OSDBUs stated that they assist small businesses in obtaining payments from the agency.¹⁰⁶ Only 6 OSDBUs believed this was more than moderately a function of their office;¹⁰⁷
- 14 OSDBUs provide small businesses with assistance in obtaining payments from prime contractors;¹⁰⁸ Of these, only two OSDBUS thought that this was more than moderately their function;¹⁰⁹
- 18 OSDBUs review individual acquisitions for small business set-asides;¹¹⁰ and
- 10 OSDBUs assign small business technical advisors.¹¹¹

The majority of OSDBUs were at least somewhat engaged on contract bundling. When it came to contract bundling, 24 OSDBUs attempted to identify solicitations that involve contract bundling.¹¹² Yet the level of engagement is problematic – 7 OSDBUs believed that this was their function only to a moderate extent, some extent or little to no extent.¹¹³ Similarly, 24 OSDBUs stated that they worked with agency acquisition officials to revise procurements strategies for bundled contracts;¹¹⁴ however, 10 OSDBUs thought that this was their function only to a moderate extent, some extent or little to no extent.¹¹⁵ When it came to facilitating small business participation as subcontractors for bundled

¹⁰³ *Id.* at 31.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 15. SSA was the only OSDBU without this authority.

¹⁰⁶ *Id.* USAF, Education, DOI, EPA, DoD and SSA do not provide this statutorily-mandated assistance.

¹⁰⁷ *Id.* at 17.

¹⁰⁸ *Id.* at 15-16. USDA, USAF, Education, DOI, Transportation, EPA, HUD, DoD, OPM, SSA, and USAID do not perform this statutorily-mandated function.

¹⁰⁹ *Id.* at 17.

¹¹⁰ *Id.* at 15. Army, Education, DOE, HUD, Transportation, DoD, and OPM do not perform this statutorily-mandated function.

¹¹¹ *Id.* at 15-16. USAF, Army, DOC, DOE, DOI, DOJ, Navy, Transportation, VA, and DLA do not perform this statutorily-mandated function. HUD, DoD, SSA, OPM and USAID claim that as there is no PCR assigned to their agencies, this is not required. *Id.* However, the SBA Government Contracting Field Staff Directory indicates that there are PCRs assigned to these agencies, often in multiple procurement centers. FIELD STAFF DIRECTORY.

¹¹² *Id.* The Office of Personnel Management (OPM) was the only OSDBU without this responsibility.

¹¹³ *Id.* at 17.

¹¹⁴ *Id.* at 15. SSA was the only OSDBU without this authority.

¹¹⁵ *Id.* at 17.

contracts, 20 OSDBUs thought this was their function.¹¹⁶ However, 7 OSDBUs thought that this was their function only to a moderate extent, some extent or little to no extent.¹¹⁷

iii. OSDBU Challenges

Each time an OSDBU reported that it was not responsible for one of the Small Business Act responsibilities assigned to its office, or that it was not the primary office with this responsibility, it means that another part of the agency is usurping this authority or that the function is simply not being performed. This ranges from SSA's OSDBU not actually having any staff, to numerous cases where contracting staff have primary responsibility for bundling, small business set-asides, subcontracting plans and payment assistance.¹¹⁸

Not surprisingly, OSDBUs also reported inadequate staffing levels and limited budgets posed challenges to their effectiveness.¹¹⁹ Over half stated that staffing levels were a moderate challenge or greater, with sixteen percent stating that they were a challenge to a "very great extent," resulting in "increased staff workloads, longer work days, and the need to cross train staff [because they were also responsible for grant programs].¹²⁰ Nearly half cited budgetary resources as a moderate to very great challenge, with a quarter stating that it was a very great challenge and hindered the ability to reach out to small businesses.¹²¹

More problematic is that half of the respondents felt that their lack of influence in the procurement process hindered their effectiveness.¹²² This problem was based in part on the lack of coordination in acquisition planning, and unclear roles for the OSDBUs in this area.

c. Issues Before the Subcommittee

i. OSDBU Reporting Structure

The Small Business Act is very clear regarding the expected reporting structure, yet nearly half of the agencies GAO reviewed are not following the law. The Subcommittee hopes to examine how SBA could address this by making it a factor in the SBA procurement scorecard or by requiring the Small Business Procurement Advisory Committee to assess the compliance of each agency. Additionally, the Subcommittee will consider whether additional statutory guidance or reporting requirements are required.

ii. OSDBU Stature

The OSDBU reporting requirements were intended to provide OSDBUs with independence and sufficient clout to be effective advocates for small businesses within their agencies. However, as acquisition itself has become more significant, the position of CAO is now held by a political appointee who is either a

¹¹⁶ *Id.* at 15. DoD, USDA, DOC, OPM and SSA do not perform this statutorily-mandated function.

¹¹⁷ *Id.* at 17.

¹¹⁸ *Id.* at 54-56.

¹¹⁹ *Id.* at 19.

¹²⁰ *Id.* at 28-29.

¹²¹ *Id.* at 28-29.

¹²² *Id.* at 28.

member of the Senior Executive Service (SES) or is Senate-confirmed.¹²³ While the Subcommittee does not have an opinion on whether OSDBUs should be political or career employees, it is essential that they be the equals of the CAOs, reporting to the same official and having the same stature in the eyes of the contracting workforce. In the highly bureaucratic and rank conscious environment of federal agencies, a GS-14 OSDBU may have a hard time getting a meeting with the GS-15 or SES head of a contracting activity, nor will the OSDBU have the clout to challenge a SES CAO as an equal. While the reporting relationship is important, it is worth noting that the administrative assistant to the head of an agency also reports to the head of that agency. While the reporting structure guarantees access, rank is often the proxy for clout. If OSDBUs are to be considered equals of their acquisition counterparts, is it necessary for them to also be SES members?

iii. OSDBU Responsibilities

The GAO report has highlighted that many OSDBUs do not believe the requirements of 15 U.S.C. 644(k) are their primary responsibilities, or even the primarily the responsibility of their offices. Does Congress need to amend the Small Business Act to clarify this issue, or does it need to be part of an annual report to the Committee? In particular, the role of the OSDBU in acquisition planning, including the decision to insource work for cost purposes, bundle contracts, and ensure subcontracting compliance, should be clarified and strengthened.

IV. Conclusion

The Subcommittee hearing should provide Members with the opportunity to explore the issues and lines of questions raised in this memorandum. The resulting information should help Congress and the Administration better develop policies and procedures that protect small businesses opportunity to compete for contracts, thereby promoting small business job creation.

¹²³ 41 U.S.C. § 403, et seq.