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Final Panel Working DRAFT

December 2006

CHAPTER 4

SMALL BUSINESS

REPORT OF THE
ACQUISITION ADVISORY PANEL

December 2006

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I. Introduction

Small businesses have been long recognized as one of the nation's most valuable economic resources. 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.¹ 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.² 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
Goods-producing industries	48.41	24.65	23.87	22.55	21.81	21.88
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
Service-producing industries	55.03	107.14	107.96	107.79	108.19	109.59
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.

¹ 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).

² *Id.*

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Recognizing the vital role of small businesses in the U.S. economy, both the Legislative and Executive Branches 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.”³ To effectuate that policy, Congress established 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.⁴ 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 Woman Owned Small Businesses (WOSBs); a three percent goal for HUBZone (Small Business Concerns (SBCs)); and a three percent goal for Service Disabled Veteran Owned (SDVO) small businesses.⁵

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.⁶ As part of that Agenda, the President reiterated 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.⁷ 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”) 2005, small businesses received a record \$79.6 billion in federal prime contracts.⁸ Those dollars represent 25.4 percent of the total \$314 billion of federal prime contracting dollars awarded in FY 2005, as adjusted for goaling

³ 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).

⁴ 15 U.S.C. § 644(g)(1).

⁵ *Id.*

⁶ 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).

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

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

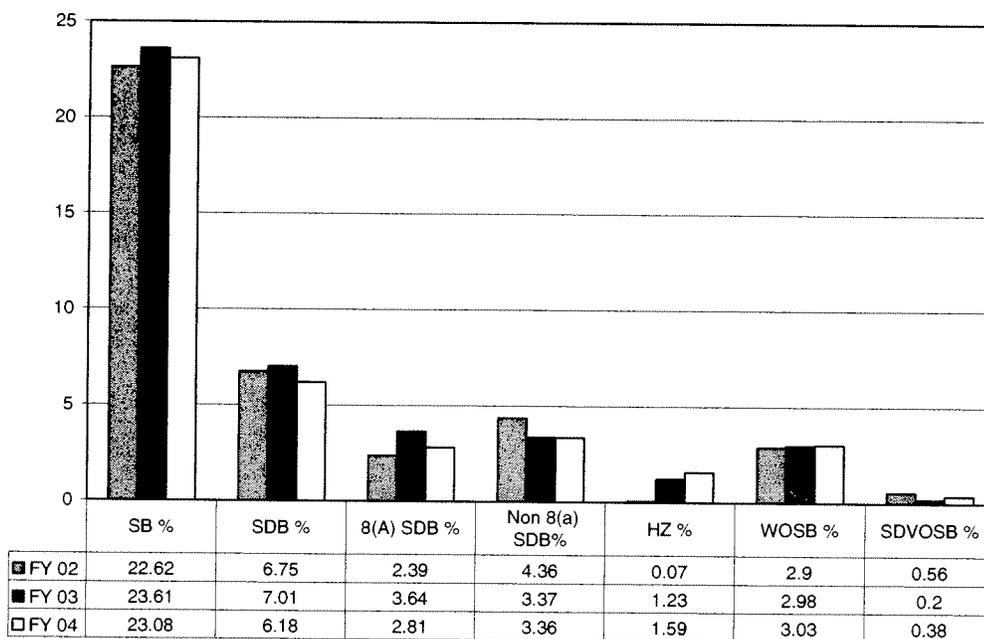
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purposes.⁹ A list of the percent of small business contracting dollars for FY 2005, by major federal department and small business category is provided at Appendix 2.

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 government-wide 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



⁹ 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 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/ggetotal71503.pdf> (last visited on Nov. 10, 2005).

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Source: FPDS Annual Reports.

As discussed in greater detail later in this Chapter, 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 37.6 percent, or \$13.2 billion, of FSS sales in FY 2006.¹⁰

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.

A. Statement of Issues

In reviewing small business issues, the Panel focused on five general areas of consideration: commercial practices, performance-based service acquisitions, interagency contracts, workforce, and inherently governmental functions. The Panel identified two primary issues relating to interagency contracting, commercial practices, and workforce.

First, the Panel analyzed 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 Panel 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 Panel further analyzed the laws and policies governing the process for defining requirements. The Panel'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.

Second, the Panel examined the adequacy of guidance for utilizing small business contracting methods against multiple award task order contracts, including government-wide agency contracts ("GWACs") and the GSA schedules. The Panel's underlying objective in this second area 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 item buys from GSA's Schedule. Further, the Panel sought strategies to promote small business contracting opportunities, without compromising the overarching goals of contracting integrity, competition and efficiency.

¹⁰ GSA Data, *Contractors Report of Sales – Schedule Sales FY2006 Final* (Oct. 24, 2006).

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The Panel initially explored possible issues regarding compliance in small business subcontracting, as a result of early public statements recommending reforms in this area. However, the Panel concluded that more accurate and reliable data is necessary to fully analyze small business subcontracting issues. The 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 3 to this Chapter.

Further, the Panel recognized as a threshold matter that although there are many small business contracting issues of substantial importance to the federal procurement community, time and resources constraints would not permit examination of every issue. 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.¹¹ The Panel is aware that SBA has recently promulgated final regulatory amendments.¹²

Likewise, the Panel 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,¹³ that issue was viewed as not appropriate for consideration here. Nonetheless, the Panel expresses its full support of SBA’s effort to simplify small business size standards.

B. Methodology

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

¹¹ See, e.g., U.S. GAO, *Reporting of Small Business Contract Awards Does Not Reflect Current Business Size*, GAO-03-704T (May 7, 2003).

¹² See 71 Fed. Reg. 66434 (Nov. 15, 2006).

¹³ 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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This Chapter describes the Panel's findings and accompanying recommendations based on its analysis of the extensive information reviewed. The Chapter 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 Panel'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 (and as discussed elsewhere in this Report), the contracting community must balance the need for quick and efficient contracting (especially in light of current workforce issues and the emphasis on strategic sourcing) with the achievement of socioeconomic, or small business, goals. Consequently, the Panel 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,¹⁴ HUBZone,¹⁵ SDVOSB¹⁶ and WOSB¹⁷ programs. These 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.¹⁸ The Government collects data on the number of contracts and the amount of contract dollars each of these small businesses receive

¹⁴ 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).

¹⁵ 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).

¹⁶ 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).

¹⁷ 15 U.S.C. § 637(m) (permits agencies to restrict competition to WOSBs in industries in which WOSBs are underrepresented).

¹⁸ 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).

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from the different agencies.¹⁹ The Government uses this data to determine whether or not the agency is meeting its small business goals.²⁰

The SBA has attempted to reconcile the Act's various programs, including the various set aside and sole source provisions, in its regulations.²¹ For example, the regulations provide discretion to the CO by stating that the CO should consider setting aside the SBA's requirement for 8(a), HUBZone, or SDVO SBC participation before considering setting aside the requirement as a small business set-aside.²²

The FAR has also attempted to reconcile the various programs through its regulations.²³ 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.²⁴ According to the FAR, if the acquisition is offered to the SBA, SBA regulations give first priority to HUBZone 8(a) concerns.²⁵ As noted above, this regulation now conflicts with the SBA's regulations and leaves less discretion to the CO.

The courts and GAO also have 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."²⁶ 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.²⁷ The GAO

¹⁹ See FPDS Next Generation, www.fpds.gov.

²⁰ 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.

²¹ The SBA implements its statutory programs in its regulations as follows: 8(a) BD, 13 C.F.R. pt. 124; SDB, 13 C.F.R. pt. 124; HUBZone, 13 C.F.R. pt. 126; and SDVO, 13 C.F.R. pt. 125. The SBA has not yet issued regulations implementing the WOSB program.

²² 13 C.F.R. §§ 124.503(j), 125.19(b), & 126.607(b).

²³ 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).

²⁴ 48 C.F.R. § 19.800(e).

²⁵ 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).

²⁶ *Contract Mgmt., Inc. v. Rumsfeld*, 291 F. Supp. 2d 1166, 1177 (D. Hawaii 2003); *aff'd* 434 F.3d 1145 (th Cir. 2006).

²⁷ *USA Fabrics, Inc.*, B-295737; B-295737.2, 2005 CPD ¶ 82 (Apr. 19, 2005).

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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.²⁸

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.²⁹ 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.³⁰ 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.³¹ Currently, there is no statute or regulation that precludes a cascading procurement, and only recently has there been a statutory provision providing guidance on its use.³² This has caused some problems with carrying out the acquisition.³³

Some businesses believe that cascading procurements allow the procuring agency to avoid performing the requisite market research and selecting its acquisition strategy at the outset of the acquisition.³⁴ At least one procurement official acknowledged that agencies appear to be using cascading procurements at the end of the fiscal year, when fiscal year money is about to

²⁸ *Id.*

²⁹ 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.

³⁰ 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.

³¹ *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 Commc'n Sys., 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).

³² 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 & Assocs., Inc.*, B-281352, B-281353, Jan. 28, 1999, 99-1 CPD ¶ 25 at 7.

³³ *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.

³⁴ Prepared statement of Steve Ayers, SAIC, AAP Pub. Meeting (July 25, 2005) 3 (available at <http://www.arnet.gov/comp/aap/documents/SAIC%20Prepared%20Statement%2007%2027%2005.pdf>).

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expire and “time to re-solicit is not available.”³⁵ In addition, businesses must spend time and money preparing bids or proposals and yet, their bid or proposal may never be considered by the procuring agency.³⁶

In sum, the Panel 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 a particular procurement.³⁷ If not, this can create a burden (in time and administration, and cost if there is a subsequent protest) on the procuring agency. As a subset of this issue, the Panel reviewed a current, creative contracting practice – cascading procurements – to see if it addresses the agency’s socioeconomic requirements while at the same time providing an 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.³⁸ Further, contract consolidation may be necessary if an agency is interested in strategic sourcing – which is the leveraging of an agency’s spending power to the maximum extent possible by acquiring commodities and services more effectively and efficiently.³⁹

However, the President, in his Small Business Agenda,⁴⁰ and Congress have expressed concern about contract consolidation or bundling.⁴¹ Thus, there are specific statutory provisions

³⁵ Test. of Paul Stone, U.S. SBA, AAP Pub. Meeting (May 23, 2005) Tr. at 194.

³⁶ Ayers Statement at 3.

³⁷ 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.

³⁸ 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>.

³⁹ 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 (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.*

⁴⁰ 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).

⁴¹ 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”).

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defining and addressing bundling.⁴² Both the SBA and the FAR have further defined these bundling provisions in regulations.⁴³ Recently, the SBA and the FAR Council amended their regulations to address interagency contract vehicles and bundling.⁴⁴ Specifically, these regulations state that orders placed against an FSS contract or multiple award indefinite delivery indefinite quantity (IDIQ) contract awarded by another agency must comply with all requirements for a bundled contract when the order meets the definition of “bundled contract.”⁴⁵

Bundling, as defined by the Small Business Act, is not *per se* prohibited. The statute allows an agency to bundle its requirements, if the agency has performed sufficient market research and has justified the bundled action.⁴⁶ In sum, a bundled procurement is justified if the agency will derive measurably substantial benefits as a result of consolidating the requirements into one large contract.⁴⁷ This is true even if the acquisition involves “substantial bundling.”⁴⁸

The Act requires all agencies to provide SBA’s Procurement Center Representative (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.⁴⁹ If the bundling is justified, the PCR will work with the procuring activity to preserve small business prime and subcontract participation *to the maximum extent practicable*.⁵⁰ 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.⁵¹

⁴² 15 U.S.C. §§ 632(o), 644(a) & 644(e).

⁴³ 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.

⁴⁴ 48 C.F.R. §§ 2.101, 8.404(c)(2), 16.505(a)(7)(iii); 13 C.F.R. § 125.2(d)(1)(iii).

⁴⁵ 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).

⁴⁶ 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).

⁴⁷ 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).

⁴⁸ 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).

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

⁵⁰ 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).

⁵¹ 15 U.S.C. § 644(e)(3); see also 13 C.F.R. § 125.2(d)(7), 48 C.F.R. § 7.107(e).

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Sometimes, the agency is amenable to the SBA's suggestions to promote small business participation in a bundled procurement.⁵² Other times, the agency itself attempts to mitigate the impact.⁵³ For example, in *Phoenix Scientific Corporation*, the Air Force issued a multiple award IDIQ task order supply and support contract for maintenance of the agency's weapons systems.⁵⁴ All offerors, including SBCs, could compete for four unrestricted awards.⁵⁵ After that selection process, the Air Force would consider any previously unselected SBCs for the award of two contracts reserved for SBCs.⁵⁶ At least 15 percent 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 percent of the total value of their task orders to SBCs.⁵⁷ 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.⁵⁸

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.⁵⁹ The Air Force did not reserve any of the Big BOS for small business participation as prime contractors but reserved the Little BOS for SBCs.⁶⁰ The Air Force required a minimum of 25 percent 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.⁶¹ The GAO believed this satisfied the requirement to maximize small business participation on the requirement as a whole.⁶²

Nevertheless, reports issued by the Office of Federal Procurement Policy (OFPP) and the SBA's Office of Advocacy indicate that the use of bundled and consolidated contracts has resulted in a decline of awards to SBCs.⁶³ These reports also state that contract bundling and

⁵² 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).

⁵³ 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.

⁵⁴ *Phoenix Scientific Corp.*, B-286817, 2001 CPD ¶ 24 (Feb. 22, 2001).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Teximara*, B-293221.2, 2004 CPD ¶ 151 (July 9, 2004).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ 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 (OFPP Reports), citing to Office of Advocacy, U.S. Small Bus. Admin., *The Impact of Contract Bundling on Small Business FY 1992 – FY*

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consolidation has grown with the increased use of interagency contracting vehicles.⁶⁴ Further, testimony received demonstrates that 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).⁶⁵

Meanwhile, other reports concerning contract bundling have commented on the need for timely and accurate data on bundling.⁶⁶ According to one GAO report, 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 even though, by definition, a small business is precluded from award of a bundled contract).⁶⁷ Similarly, a report by the SBA's Inspector General's (IG's) office reveals that procuring agencies are incorrectly applying the statutory definition of bundling to their requirements or simply failing to notify the SBA of such actions.⁶⁸ Specifically, the report stated that officials at two of four agencies contacted did not know they were mandated to report

2001, at 5 (Oct. 2002), available at 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.

⁶⁴ 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).

⁶⁵ See Testimony of William Correa, Paragon Project Resources, May 23, 2005, p. 30; see also Amey, p. 329; Lozano at p. 1-2.

⁶⁶ 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.

⁶⁷ 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.

⁶⁸ 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. *Audit of the Contract Bundling Process*, at 6.

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all potential bundled contracts.⁶⁹ Further, the IG noted three instances where an agency did not classify a procurement as bundled, but the SBA Procurement Center Representative (PCR) did.⁷⁰

As evidenced from the above, the Panel studied current practices, law and available data to identify issues the contracting community faces with respect to defining requirements and particularly with respect to the practice of consolidating requirements. Specifically, the Panel 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 Panel's review of governing laws, policies, practices, available data, testimony, and court and administrative board decisions, the Panel has made several findings concerning the structuring of acquisition strategies to afford adequate small business participation.

The Panel made four specific findings concerning the adequacy of guidance in selecting among the myriad of small business contracting mechanisms. The Panel 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, cascading procurements curtail competition by SBCs who may not want to spend the time and money to submit a proposal that may never be evaluated. The specifics for each finding is set forth below.

First, the Panel determined that contracting officers need definitive guidance on the priority for applying the various small business contracting preferences to specific acquisitions. 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, 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 Council 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 among 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

⁶⁹ *Id.* at 5.

⁷⁰ *Id.*

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SBC participation before considering setting aside the requirement as a small business set aside. The FAR provides some discretion to contracting officers; however, it currently 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 research multiple statutory and regulatory directions to reconcile 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 Panel finds that contracting officers need explicit guidance on how to exercise their discretion and flexibility in selecting the appropriate small business contracting method for a procurement. 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. As an example, testimony received from a small business reveals that if a priority is given to one "group" over another, it effectively eliminates the one "group" from competition for those products or services.⁷¹

Further, according to FPDS data, in FY 2004 many agencies exceeded their small business goals and met or exceeded their 8(a) goals.⁷² On the other hand, most agencies made a dismal number of awards to HUBZone and SDVO SBCs.⁷³ 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.⁷⁴ It is clear from 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 goals, 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 goals and needs of the agency.

Third, the Panel finds that the agencies must use the FPDS-NG in real time to assess whether or not the agencies are meeting their goals. The government uses FPDS-NG 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-NG,

⁷¹ Testimony of Mark Toteff, Traverse Bay Manufacturing, Sept. 27, 2005, p. 192 ("Because of some of the rules and regulations under one of the JWOD programs, we just seemed to never get the opportunity to bid on them, and the opportunity that we did have when we were a subcontractor, it worked very well, but because of some rules and regulations that we're really not accustomed to, don't know a lot about, we are no longer able to assist in manufacturing.").

⁷² See FPDS Next Generation Small Business Goaling Report FY 2004, <http://www.sba.gov/GC/goals/Goaling-Report-08-21-2005.pdf>

⁷³ *Id.*

⁷⁴ *Id.*

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agencies have (almost) real time information on their contracting actions.⁷⁵ 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.

Fourth, the Panel finds that the current practice of cascading procurements fails to balance adequately the need for quick 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, given the costs associated with a proposal.⁷⁶ 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), then he or she should 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

The Panel made two findings in analyzing the issues concerning the adequacy of guidance in promoting small business participation in consolidated contracts. First, the Panel determined that the contracting community does not properly apply and follow the governing contract bundling definition and requirements in planning acquisitions. There is a misunderstanding of contract bundling, inaccurate bundling data, and disparate mitigation strategies for justified bundled contracts. These issues appear to stem from the complicated statutory provisions relating to bundling, including the reporting and review requirements.

These 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 appeared to have confused officials at agencies, some of whom do not believe they have to report all bundled procurements to the SBA and others of whom 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

⁷⁵ 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. 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.*

⁷⁶ 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); Ayers, p. 3.

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longer considered a bundled contract and therefore there are no reporting and review requirements.

Testimony shows that staffing is short at the procuring agencies, and many experienced procurement officials are retiring, which leaves new and untrained procurement officials the task of structuring the acquisition.⁷⁷

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.

Moreover, there have been several reports issued that attempt to address the impact of contract bundling, the results and findings of which differ.⁷⁸ Some reports directly attribute bundling to a decrease in contract awards to SBCs. However, one of these reports used a definition for the term “bundling” that differs from the statutory term 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).

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 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 do not provide enforceable requirements. 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 mitigation actions. At least one procurement official acknowledged that “every case is really an individual case. I don’t think you can just say we are going to consolidate all aspects of a base operation for every base. . . .”⁷⁹ Another procurement official acknowledged that in some cases, the procuring agency has

⁷⁷ Testimony of Thomas Reynolds, September 27, 2005, p. 31 (“Currently where I am stationed at, we have got approximately 15 people trying to manage a \$1.4 billion a year cost reimbursement contract. We are now getting pressure to try and award more small business contracts out of this large management contract, which is fine. There’s still only 15 people there. How are they going to do that?”).

⁷⁸ GAO, GAO-04-454, *Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain*; IG, *Audit of the Contract Bundling Process*, No. 5-20; OFPP, *Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Businesses*; Office of Advocacy, U.S. Small Bus. Admin., *The Impact of Contract Bundling on Small Business FY 1992 – FY 2001*, (Oct. 2002).

⁷⁹ Testimony of Ronald Poussard, U.S. Air Force, September 27, 2005, p. 176.

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taken steps to ensure “that a certain portion of the business needs to go to small business. In other cases, they haven't been as explicit.”⁸⁰ Therefore, the mitigation strategy must be tailored to fit the particulars of the acquisition, and should be readily apparent so that the small business is aware of the opportunities for potential contracts. .

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.⁸¹ Agency officials recognize it is necessary to “create opportunities within the multiple award service acquisitions for small business” or else small businesses will lose their contracts to large business.⁸² Other agencies separate a bundle into two requirements – one reserved for SBCs and the other for large businesses.⁸³ In addition, the DoD has issued a Guidebook with specific examples of ways to mitigate bundling.⁸⁴ 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.⁸⁵

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. Testimony reveals that even those SBCs that receive the subcontracts are hurt by the bundled procurement. Specifically, those SBCs are “beholden” to the large business prime contract and sometimes must perform the work at a lower rate than what they had on their original prime contract with the Government or their work has actually been reduced.⁸⁶

Accordingly, existing law offers little in the way of guidance or requirements for mitigating the potential harm caused by bundling on SBCs. Although implementing regulations provide some guidance, they are only recommendations. While some agencies, such as DoD, have attempted to create guidelines for mitigating bundling, these guidelines are not universal.⁸⁷ While 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.

The Panel’s second finding with respect to contracting bundling, which also relates to the government’s small business contracting programs generally, is that the acquisition community

⁸⁰ Testimony of Eugene Waszily, Office of Inspector General, General Services Administration, p. 223.

⁸¹ See e.g. *Phoenix Scientific Corp.*, B-286817, 2001 CPD ¶ 24 (Feb. 22, 2001).

⁸² Poussard, p. 175.

⁸³ *Teximara*, B-293221.2, 2004 CPD ¶ 151 (July 9, 2004).

⁸⁴ U.S. DoD’s Office of Small and Disadvantaged Business Utilization Contract Consolidation Guide, <http://www.acq.osd.mil/sadbu/news/contractconsolidation.pdf>.

⁸⁵ Id. at 2-2 - 2-5.

⁸⁶ Waszily Test. at 224.

⁸⁷ See DoD’s Contract Consolidation Guide, <http://www.acq.osd.mil/sadbu/news/contractconsolidation.pdf>.

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needs more training on current small business contracting policies and programs. 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.⁸⁸ On the other hand, most agencies made few awards to HUBZone and SDVO SBCs.⁸⁹ 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.⁹⁰

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.

C. Recommendations

1. Guidance in Using Small Business Contracting Programs

The Panel has made several findings concerning the need to structure acquisition strategies to afford adequate small business participation. The Panel determined that there is currently inadequate guidance in both statute and regulation for deciding which small business preference is applicable to an acquisition. The Panel 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 Panel recommends several changes to both statute and regulation.

The Panel 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.⁹¹

The Panel 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)

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ See FPDS Next Generation Small Business Goaling Report FY 2004, <http://www.sba.gov/GC/goals/Goaling-Report-08-21-2005.pdf>

⁹¹ 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).

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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.⁹²

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."⁹³ In addition, the SBA stated its belief 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.⁹⁴ 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."⁹⁵ 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."⁹⁶ 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).⁹⁷ At least one court has ruled that the SBA's interpretation, *i.e.*, parity for the 8(a) and HUBZone programs, is reasonable.⁹⁸

Nonetheless, there appears to be some confusion regarding this issue, including conflicting FAR and SBA regulations. Further, the Panel 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 Panel believes that the 8(a), HUBZone and SDVO set-asides programs should be given parity and priority over regular small business set-asides. A statutory change to the HUBZone statute would be necessary to accomplish this goal.

⁹² Letter from SBA's Acting General Counsel to the Honorable Christopher S. Bond, dated August 17, 2001. *See* Appendix 3.

⁹³ *Id. citing to* 73 Am. Jur. 2d *Statutes* § 254 at 425 (1974).

⁹⁴ *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).

⁹⁵ *Id.*

⁹⁶ *Id. citing to* 63 Fed. Reg. 31897 (June 11, 1998).

⁹⁷ *Id.*

⁹⁸ *Contract Management, Inc. v. Rumsfeld*, 291 F.Supp.2d 1166, 1177 (D. Hawaii 2003), *aff'd* 434 F.3d 1145 (9th Cir. 2006).

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The Panel does not believe such a 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 without jobs today” and to “provide for an immediate infusion of cash through the creation of new jobs and investment in economically distressed areas.”⁹⁹ 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.¹⁰⁰ The intent and purpose of the SDVO SBC program is to provide procurement opportunities for small businesses owned and controlled by service-disabled veterans.¹⁰¹ The Panel believes that the provision of adequate guidance and parity among 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 Panel 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 Panel also recommends that the implementing regulations provide the contracting community discretion in utilizing the various programs, based in part upon the goals and needs of the agency. This does not mean that the goals 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

⁹⁹ S. 208, *The HUBZone Act of 1997: Hearing Before the Comm. On Small Business*, 105th Cong., 1st Sess. 1 (1997).

¹⁰⁰ See 15 U.S.C. § 637(a); 13 C.F.R. § 124.1.

¹⁰¹ See 15 U.S.C. § 657f.

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

- 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 ~~should~~ **shall** consider setting aside the requirement for 8(a), HUBZone, or SDVO SBC participation

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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.~~

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 Panel 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 Panel also found that the current practice of cascading procurements fails to balance adequately the need for 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. 109-163.¹⁰²

¹⁰² This new statutory provision states:

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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 Panel 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 Panel 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

As discussed above, in analyzing the issues involving small business participation in consolidated contracts, the Panel made two findings. First, the Panel determined that the contracting community does not properly apply and follow the governing contract bundling

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 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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definition and requirements. Second, the Panel determined that agency officials need targeted training on the general requirements and benefits of contracting with small businesses.

Specifically, the Panel recommends that:

- The OFPP create an interagency task force to develop best practices and strategies to unbundle contracts and mitigate the effects of contract bundling.
- 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 to large businesses in relation to developing and/or specifying categorical small business goals for Small Business subcontracting plans. Training also should emphasize 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.

III. The Ability of Small Business to Compete in the Multiple Award Contracting Environment

A. Background

As discussed elsewhere in this Report, the Federal Acquisition Streamlining Act of 1994 (FASA)¹⁰³ 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.¹⁰⁴ Contracting officers were given wide latitude in conducting competitions for

¹⁰³ Pub. L. No. 103-355, 108 Stat. 3423 (1994).

¹⁰⁴ FAR 16.505(b).

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orders.¹⁰⁵ 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.

The passage of FASA, the enactment of the Clinger-Cohen Act¹⁰⁶ 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.¹⁰⁷ The data suggests that small business concerns (SBCs) have been able to compete for and obtain multiple IDIQ contracts and subsequent orders.¹⁰⁸ 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.¹⁰⁹ 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. However, it is unclear whether agencies 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 prevent DoD from limiting order competitions to SBCs.¹¹⁰ Under GSA's Multiple Award Schedule (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

¹⁰⁵ FAR 16.505(b)(1)(ii).

¹⁰⁶ 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)).

¹⁰⁷ 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.

¹⁰⁸ 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.

¹⁰⁹ 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).

¹¹⁰ 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) §§ 208.405-70, 216.505-70.

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agencies ability to target small business MAS contractors, and SBCs received 37.6 percent of the dollars awarded under the MAS program in fiscal year 2006.¹¹¹

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 policy-makers to address whether procuring agencies have the authority to reserve prime contract awards for SBCs under multiple award solicitations that are competed as 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.¹¹² 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.¹¹³ 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.¹¹⁴

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.¹¹⁵ However, if an

¹¹¹ As of the end of fiscal year 2006, approximately 80 percent of the 17,668 MAS contracts were held by SBCs. In fiscal year 2006, SBCs received \$13.2 billion of the \$35.1 billion in dollars awarded under the MAS program. See GSA Data, *Final FY 2006 Schedule Data - Contracts in Effect*; GSA Data, *Contractors Report of Sales - Schedule Sales FY 2006 Final* (Oct. 24, 2006).

¹¹² FAR 19.502-2(b).

¹¹³ 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.

¹¹⁴ 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").

¹¹⁵ 15 U.S.C. § 644(o); FAR 52.219-14; 13 C.F.R. § 125.6.

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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.¹¹⁶ GSA has implemented a Contractor Team Arrangement policy applicable to MAS orders that 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.¹¹⁷

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.¹¹⁸ Nevertheless, agencies have awarded IDIQ contracts with ordering procedures that provide that certain orders will be competed exclusively among SBCs.¹¹⁹ Limiting competition for orders to SBCs on a full and openly competed contract may be contrary to the fair opportunity requirements.¹²⁰ This issue was raised in a bid protest before the Government Accountability Office (GAO), but the protest was dismissed on jurisdictional grounds.¹²¹ 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.¹²² If an order competition is limited to SBCs under a full and openly competed

¹¹⁶ 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).

¹¹⁷ 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 credit towards its small business prime contracting goals for the portion of the requirement that small business team members perform.

¹¹⁸ FAR 8.404(a), 38.101(e).

¹¹⁹ 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 United States Court of Federal Claims denied an appeal of the OHA decision. *LB&B Associates, Inc. v. U.S.*, 68 Fed. Cl. 765 (Fed. Cl. 2005).

¹²⁰ 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.

¹²¹ *Professional Performance Development Group, Inc.*, B-294054.3, Sep. 30, 2004, 2004 CPD ¶ 191.

¹²² 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.

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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.¹²³

GSA's MAS program "provides federal agencies . . . with a simplified process for obtaining commercial supplies and services at prices associated with volume buying."¹²⁴ Orders placed in accordance with FAR subpart 8.4 are considered to be issued using competitive procedures.¹²⁵ Ordering agencies are not generally required to notify all contractors on a particular Schedule of their intent to purchase.¹²⁶ For orders above the micro-purchase threshold (\$3000), contracting officers generally must review the capabilities of, or solicit quotes from, at least three MAS contractors.¹²⁷ 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.¹²⁸ Posting a requirement on GSA's electronic request for quotation system (e-Buy) is one way DoD can meet this requirement.¹²⁹ 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.¹³⁰ 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)."¹³¹ In addition, agencies have limited consideration for orders exclusively to SBCs, and one GSA MAS contract (Schedule 70, SIN 132-51) specifically

¹²³ 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).

¹²⁴ FAR 8.402(a).

¹²⁵ FAR 8.404(a); 41 U.S.C. § 259(b)(3) provides that the schedule program is a "competitive procedure" if participation in the program is open to all responsible sources, and orders and contracts under such procedures result in the lowest overall cost to the government. The term "full and open competition" is defined in 42 U.S.C. § 403(6) to mean that "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement".

¹²⁶ 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.

¹²⁷ FAR 8.405-1, 8.405-2.

¹²⁸ DFAR 208.405-70.

¹²⁹ FAR 8.405-2(d); DFAR 208.405-70(c)(2).

¹³⁰ FAR 8.404(a)(1), 38.101(e).

¹³¹ FAR 8.405-5(b).

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authorized ordering agencies to limit competition for award of an order to SBCs.¹³² 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.¹³³ Nevertheless, some agencies continue to limit competition for orders to SBCs, because there is no explicit prohibition in the FAR.¹³⁴ 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."¹³⁵

B. Findings

1. Competition for Multiple Award Contracts

Based upon its review of governing laws, policies, practices, available data, and court and administrative board decisions, the Panel has determined that 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. Specifically the Panel has determined 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. The Panel has also recognized 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.

Some 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.¹³⁶ 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.¹³⁷ 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.

¹³² 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.

¹³³ FAR 8.405-2(c)(4), (d).

¹³⁴ See *Systems Plus, Inc.*, B-297215-4, Dec. 16, 2005, 2006 CPD ¶ 10.

¹³⁵ GSA Acquisition Letter V-05-12 (June 6, 2005).

¹³⁶ See FAR subpart 16.5, part 19.

¹³⁷ See *Widnall v. B3H Corp.*, 75 F.3d 1577, 1578-9 (C.A. Fed. 1996), *on remand B3H Corp. v. Dep't of the Air Force*, 96-2 BCA ¶ 28360, GSBICA No. 12813-P-REM (G.S.B.C.A. May 3, 1996); *Phoenix Scientific Corp.* B-286817, Feb. 22, 2001, 2001 CPD ¶ 24; 13 C.F.R. § 125.2(b)(6)(i)(C); U.S. GAO, *Acquisition Reform: Multiple-*

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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,¹³⁸ relegating SBCs exclusively to a subcontracting role. Procuring agencies created the reservation mechanism as a result of concern about their ability to achieve their small business prime contracting goals when utilizing multiple award contracts competed on a full and open basis.¹³⁹ 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 contracts.¹⁴⁰ 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.¹⁴¹ 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.¹⁴² 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.¹⁴³ 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.¹⁴⁴

Finally, without guidance, the procurement mechanism will continue to be applied, most likely inconsistently. 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.¹⁴⁵ 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.¹⁴⁶ In

Award Contracting at Six Federal Organizations, GAO/NSIAD-98-215,10-11 (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).

¹³⁸ See Benjamin Test. at 440-1.

¹³⁹ See GAO/NSAID-98-215 at 8-11.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 10-11.

¹⁴² *Id.* at 11.

¹⁴³ 13 C.F.R. § 125.2(b)(6)(i)(C).

¹⁴⁴ See 15 U.S.C. § 632(o)(2); 13 C.F.R. § 125.2(d); *Phoenix Scientific Corp.*, B-286817, Feb. 22, 2001, 2001 CPD ¶ 24.

¹⁴⁵ 61 Fed. Reg. 26041, 26048 (1996).

¹⁴⁶ 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

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addition, the 8(a), HUBZone, and SDVO small business programs take precedence over the small business set-aside program.¹⁴⁷ 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), 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 Panel developed one specific finding concerning the ability of SBCs to compete for orders under multiple award contracts. Specifically the Panel has determined that explicit guidance is necessary for utilizing small contracting reservations for orders against multiple award contracts. The Panel recognizes that agencies are limiting competition for orders to SBCs under full and openly competed multiple award IDIQ contracts. The Panel has determined that the procurement mechanism is not contrary to the fair opportunity provisions, but 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 Panel 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,¹⁴⁸ even though there is no express legal authority to limit competition for orders based on socioeconomic status.¹⁴⁹ Agencies are limiting competition for MAS orders to SBCs,¹⁵⁰ even though there is no express legal authority to limit competition for MAS orders to

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).

¹⁴⁷ FAR 19.501(c)-(e); 13 C.F.R. § 125.19.

¹⁴⁸ See *LB&B Assoc., Inc. v. United States*, Case No. 05-1066c, United States Court of Federal Claims; *Profl Performance Dev. Group, Inc.*, B-294054, Sep. 30, 2004, 2004 CPD ¶ 191; *Size Appeal of the Dep't of the Air Force*, SBA No. SIZ-4732 (2005); Mary Mosquera, *21 Firms to Compete in New Treasury Initiative*, Wash. Post, Nov. 14, 2005, at D4 (Department of Treasury's five-year, \$3 billion TIPPS-3 contract, where orders under \$250,000 will be set aside for SBCs).

¹⁴⁹ See FAR subpart 16.5, part 19.

¹⁵⁰ 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 ¶ 216; *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-

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SBCs,¹⁵¹ and the FAR appears to prohibit an agency from denying participation in a competition for an order based on socioeconomic status.¹⁵²

In the Panel'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.¹⁵³ Moreover, the fair opportunity provisions do not prohibit a procuring agency from considering socioeconomic status when placing orders.¹⁵⁴ 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.¹⁵⁵ Further, DoD must afford "all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered."¹⁵⁶ However, the Panel finds that limiting competition for orders (under multiple award contracts, except for MAS) 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.¹⁵⁷ Further, DoD must afford "all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered."¹⁵⁸

As discussed in Section III(A) of this Report, 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 Panel'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."¹⁵⁹ 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

4484 (2002); *Size Appeals of SETA Corporation and Federal Emergency Management Agency*, SBA No. SIZ-4477 (2002).

¹⁵¹ See FAR subpart 8.4.

¹⁵² 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).

¹⁵³ See FAR 16.505.

¹⁵⁴ *Id.*

¹⁵⁵ DFAR 216.505-70.

¹⁵⁶ *Id.*

¹⁵⁷ DFAR 216.505-70

¹⁵⁸ *Id.*

¹⁵⁹ 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 DFAR 216.505-70.

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writing that that no additional qualified contractors exist.¹⁶⁰ 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.

Finally, without guidance, the procurement mechanism will continue to be applied, most likely inconsistently. As reflected in Section III(A) of this Report, 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.¹⁶¹

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 under Section III of this Report, 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. 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 Panel 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 --

¹⁶⁰ 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 DFAR 216.505-70.

¹⁶¹ *LB&B Assoc., Inc. v. U.S.*, 68 Fed. Cl. 765 (Fed. Cl. 2005); *Client Network Servs., Inc. v. United States*, 64 Fed. Cl. 784 (2005); *Sys. Plus, Inc.*, B-297215; *Planned Sys. Int'l, Inc.*, B-292319.7, Feb. 24, 2004, 2004 CPD ¶ 43; *CMS Info. Servs., Inc. - Reconsideration*, B-290541.2, Nov. 13, 2002; *CMS Info. Servs. Inc.*, B-290541, Aug. 7, 2002, 2002 CPD ¶ 132; *Size Appeal of Client Network Servs., Inc.*, SBA No. SIZ-4686 (2005); *Size Appeal of the Dep't of the Air Force*, SBA No. SIZ-4732 (2005); *Size Appeal of the MIL Corp.*, SBA No. SIZ-4641 (2004); *Size Appeal of Advanced Mgmt. Tech., Inc.*, SBA No. SIZ-4638 (2004); *Size Appeals of Vistrionix, Inc. & Dep't of J.*, SBA No. SIZ-4585 (2003); *Size Appeal of Vistrionix, Inc.*, SBA No. SIZ-4550 (2003); *Size Appeal of Jason Assoc., Inc.*, SBA No. SIZ-4489 (2002); *NAICS Appeal of SCI Consulting, Inc.*, SBA No. NAICS-4488 (2002); *Size Appeal of Advanced Techs. & Labs. Int'l, Inc.*, SBA No. SIZ-4484 (2002); *Size Appeals of SETA Corp. & Fed. Emergency Mgmt. Agency*, SBA No. SIZ-4477 (2002).

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(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~~

(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. 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).

2. Competition for Task Orders

As discussed in the Background and Findings, agencies are limiting competition for particular orders to SBCs. The Panel 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 Panel found that the practice is probably not contrary to the fair opportunity provisions, but is contrary to the Section 803 provisions applicable to DoD. Thus, the Panel recommends that contracting agencies, including DoD, be given explicit discretion to limit competition for orders to SBCs. Consequently the Panel 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)).

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(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 Panel 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.

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(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 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—

* * * *

(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 competitor for particular orders may be limited based on socio-economic status;**

* * * *

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

(b) Orders under multiple award contracts—

(1) Fair opportunity.

(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

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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—

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

* * * *

The Panel 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.

* * * *

(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**

(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

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

* * * *

With respect to the ability of procuring agencies to limit competitions for orders under the MAS program to SBCs, the Panel 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 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).

(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 Panel recommends that FAR § 8.405-2(d) be amended to provide:

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(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 Panel 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) for the acquisition of services, and establishes similar policy for the acquisition of supplies;

(2) Applies to orders for supplies or services under Federal Supply Schedules, including orders under blanket purchase agreements established under Federal Supply Schedules; and

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

* * * *

(c) An order 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 supplies to be delivered or the services to be performed 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 requirements, and the contracting officer--

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

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(B) Determines in writing that no additional contractors that can fulfill the 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 supplies or 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.

(d) See PGI 208.405-70 (Pop-up Window or PGI Viewer Mode) for additional information regarding fair notice to contractors and requirements relating to the establishment of blanket purchase agreements under Federal Supply Schedules.

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Appendices

Appendix 1
Federal Procurement Data System Small Business Goaling Report
Actions Reported Between FY 2005 (Q1) and FY 2005 (Q4)

Department Name	Small Business Goal	Small Business Actual	Total SDB Actual	8(a) Goal	8(a) Actual	Other SDB Goal	Other SDB Actual
Total Federal	23.00%			3.00%		5.00%	
DEPT OF DEFENSE (9700)	23.00%	24.57%	6.63%	2.60%	3.24%	3.10%	3.38%
ENERGY, DEPARTMENT OF (8900)	5.50%	4.11%	1.35%	2.20%	0.85%	1.00%	0.50%
NATIONAL AERONAUTICS AND SPACE ADMINISTRATIO N (8000)	16.16%	14.44%	6.47%	3.69%	3.21%	3.00%	3.25%
HEALTH AND HUMAN SERVICES, DEPARTMENT OF (75 00)	30.32%	36.43%	8.33%	5.50%	3.99%	11.12%	4.34%
GENERAL SERVICES ADMINISTRATION (4700)	43.00%	34.95%	10.79%	5.00%	5.43%	8.00%	5.35%
HOMELAND SECURITY, DEPARTMENT OF (7000)	23.00%	46.30%	7.57%	2.50%	2.94%	2.50%	4.63%
AGRICULTURE, DEPARTMENT OF (1200)	45.00%	49.53%	8.34%	5.00%	3.29%	5.00%	5.05%
JUSTICE, DEPARTMENT OF (1500)	31.50%	34.63%	5.18%	3.70%	2.20%	12.00%	2.97%
INTERIOR, DEPARTMENT OF THE (1400)	56.14%	55.24%	21.67%	8.26%	11.41%	8.91%	10.26%
STATE, DEPARTMENT OF (1900)	40.00%	35.32%	13.29%	7.00%	2.17%	7.00%	11.11%
LABOR, DEPARTMENT OF (1600)	26.00%	33.68%	11.20%	4.84%	2.95%	5.20%	8.25%
EDUCATION, DEPARTMENT OF (9100)	23.00%	9.20%	3.01%	4.00%	1.13%	1.00%	1.87%
COMMERCE, DEPARTMENT OF (1300)	44.80%	51.96%	15.53%	6.11%	6.11%	10.35%	9.41%
ENVIRONMENTAL PROTECTION AGENCY (6800)	27.00%	33.76%	12.29%	6.30%	4.76%	3.00%	7.53%
AGENCY FOR INTERNATIONAL DEVELOPMENT (1152)	44.25%	4.10%	6.38%	1.23%	2.33%	24.56%	4.04%
HOUSING AND URBAN DEVELOPMENT, DEPARTMENT OF (8600)	38.13%	63.56%	37.20%	6.09%	18.73%	7.07%	18.46%
SOCIAL SECURITY ADMINISTRATION (2800)	33.50%	35.92%	10.12%	8.50%	6.73%	5.80%	3.38%
OFFICE OF PERSONNEL MANAGEMENT (2400)	19.90%	34.14%	6.03%	2.20%	0.25%	3.40%	5.78%
EXECUTIVE OFFICE OF THE PRESIDENT (1100)	50.00%	15.19%	5.21%	15.00%	1.08%	25.00%	4.12%
SMITHSONIAN INSTITUTION (3300)	50.00%	26.40%	11.09%	6.66%	1.60%	6.66%	9.49%

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**Federal Procurement Data System Small Business Goaling Report
 Actions Reported Between FY 2005 (Q1) and FY 2005 (Q4)**

Department Name	HUBZone		Woman Owned Small Business		Women Owned Small Business		Service Disabled Veteran Owned Small Business		Service Disabled Veteran Small Business	
	Goal	Actual	Goal	Actual	Goal	Actual	Goal	Actual	Goal	Actual
Total Federal	3.00%		5.00%		3.00%		3.00%		3.00%	
DEPT OF DEFENSE (9700)	3.00%	1.94%	5.00%		3.00%		3.00%		3.00%	0.49%
ENERGY, DEPARTMENT OF (8900)	1.50%	0.19%	3.30%		0.57%		1.50%		3.00%	0.21%
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION (8000)	3.00%	0.28%	5.00%		2.08%		3.00%		3.00%	1.12%
HEALTH AND HUMAN SERVICES, DEPARTMENT OF (7500)	3.03%	1.67%	5.05%		4.99%		3.00%		3.00%	0.44%
GENERAL SERVICES ADMINISTRATION (4700)	3.00%	4.06%	5.00%		6.19%		3.00%		3.00%	1.20%
HOMELAND SECURITY, DEPARTMENT OF (7000)	3.00%	2.05%	5.00%		4.53%		3.00%		3.00%	0.48%
AGRICULTURE, DEPARTMENT OF (1200)	3.00%	9.10%	5.00%		5.31%		3.00%		3.00%	0.60%
JUSTICE, DEPARTMENT OF (1500)	3.13%	1.15%	5.00%		6.40%		3.00%		3.00%	0.78%
INTERIOR, DEPARTMENT OF THE (1400)	3.00%	8.96%	5.47%		8.97%		3.00%		3.00%	1.09%
STATE, DEPARTMENT OF (1900)	3.00%	0.16%	5.00%		6.23%		3.00%		3.00%	2.01%
LABOR, DEPARTMENT OF (1600)	3.00%	1.33%	5.20%		5.28%		3.00%		3.00%	0.85%
EDUCATION, DEPARTMENT OF (9100)	3.00%	0.23%	5.00%		2.50%		3.00%		3.00%	0.08%
COMMERCE, DEPARTMENT OF (1300)	3.00%	2.20%	7.80%		9.63%		3.00%		3.00%	1.27%
ENVIRONMENTAL PROTECTION AGENCY (6800)	3.00%	1.01%	5.00%		4.65%		3.00%		3.00%	0.20%
AGENCY FOR INTERNATIONAL DEVELOPMENT (1152)	3.00%	0.08%	5.00%		1.27%		3.00%		3.00%	0.18%
HOUSING AND URBAN DEVELOPMENT, DEPARTMENT OF (8600)	3.00%	6.74%	15.03%		24.30%		3.00%		3.00%	1.52%
SOCIAL SECURITY ADMINISTRATION (2800)	3.00%	2.13%	5.00%		5.21%		3.00%		3.00%	0.42%
OFFICE OF PERSONNEL MANAGEMENT (2400)	3.00%	0.05%	5.00%		15.97%		3.00%		3.00%	0.13%
EXECUTIVE OFFICE OF THE PRESIDENT (1100)	3.00%	0.67%	9.00%		2.51%		3.00%		3.00%	0.10%
SMITHSONIAN INSTITUTION (3300)	3.33%	3.40%	7.77%		5.26%		3.33%		3.33%	0.01%

Appendix 2

Subcontracting with Small Businesses

The Panel's Small Business Working Group initially explored issues related to large entities subcontracting with small business concerns. Specifically, the panel 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 Panel's Working Group was unable to assemble comprehensive data required to permit in-depth analysis and the crafting of recommendations.

The Panel's 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 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 Panel 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 Panel's 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 Panel's 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 panel 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 panel 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:

- 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

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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.

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

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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.**

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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.
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.

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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 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 Authorization 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.

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- 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 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*