Songress of the United States U.S. House of Representatives Sommittee on Small Business 2361 Rayburn House Office Building Washington, DS 20515-0515

To: Subcommittee on Contracting and Workforce
From: Committee Staff
Date: December 7, 2015
Re: Hearing: "Supporting Success: Empowering Small Business Advocates"

The Committee on Small Business Subcommittee on Contracting and the Workforce will meet for a hearing titled, "Supporting Success: Empowering Small Business Advocates." The hearing is scheduled to begin at 11:00 A.M. on Wednesday, December 9, 2015, in Room 2360 of the Rayburn House Office Building.

As part of the Subcommittee's ongoing effort to improve the competitive viability of small contractors, the hearing will examine how the small business advocates at the Small Business Administration (SBA) and at other federal agencies support small business success. Specifically, the Subcommittee will receive testimony from small businesses and their representatives on their experiences working with the Offices of Small and Disadvantaged Business Utilization, the Procurement Center Representatives, the Business Opportunity Specialists, and the Commercial Market Representatives.

I. Overview of Small Business Advocates

There are two principle types of advocates who help small businesses pursue and perform federal contracts and subcontracts. First, there are those within the SBA, and then there are also those at other federal agencies. Some are statutorily established positions, and others are only referenced in the Small Business Act (the Act) without a clear explanation of their roles and responsibilities. This memorandum will briefly explain how each of the advocates operate, and begin by looking at those within SBA – the Procurement Center Representatives (PCRs), the Commercial Market Representatives (CMRs), and the Business Opportunity Specialists (BOSs), – before looking at the Offices of Small and Disadvantaged Business Utilization (OSDBU) outside of SBA.

a. PCRs

Of the advocates within SBA, only the PCRs have a specific set of roles and responsibilities under the Act. The PCRs are established in section 15(I) of the Act.¹ Required to be experts in federal contract law,² the PCRs are charged with implementing the requirement that small businesses be afforded the maximum practicable opportunity to compete for prime contracts and the ability to compete for subcontracts on contracts not awarded to small businesses.³ To achieve that goal for prime contract opportunities:

¹ 15 U.S.C. § 644(I).

² *Id.* at § 644(I)(5).

³ 15 U.S.C. § 644(e).

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

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

48 C.F.R. § 19.502-2(b).

The PCRs are the individuals within SBA directly responsible for helping ensure that small business have the opportunity to compete for these contracts.⁴ Before an agency decides not to set aside a contract for small business, the SBA PCR is required to sign off on the acquisition strategy, or if a PCR is unavailable, the agency's own small business specialist is to sign off on the acquisition plan.⁵ If a contract is bundled, PCR review of the bundling justification is required by statute. In either case, if the PCR disagrees with the contracting officer's decision, the PCR may file an appeal delaying the implementation of the contract strategy. Such an appeal is known within SBA as a Form 70. If the PCR and the agency disagree on the Form 70, the Administrator of the SBA may file an appeal with the head of the contracting agency. An award may not be made while the appeal is pending, but the ultimate decision on contracting strategy rests with the contracting agency.⁶

When a contract is awarded to an other-than-small business and the contract is for more than \$650,000, the contract must include a subcontracting plan enumerating the opportunities for small businesses to participate as subcontractors and the plan must assign both percentage and dollar value goals to these opportunities.⁷ The PCR, when available, provides an opinion to the contracting officer on the appropriate subcontracting goals.

SBA currently has 49 PCRs; however, these 49 individuals serve in 25 other roles as well as having responsibilities as PCRs. Further, there were 61 PCRs in 2011 – a time when there were vacancies in the PCR program. ⁸

⁴ According to the SBA, PCRs "increase the small business share of Federal procurement awards by initiating small business set-asides, reserving procurements for competition among small business firms; providing small business sources to Federal buying activities; and counseling small firms. In addition, PCRs, advocate for the breakout of items for full and open competition to affect savings to the Federal Government." SBA, GOVERNMENT CONTRACTING FIELD STAFF DIRECTORY (2011) [hereinafter FIELD STAFF DIRECTORY], available at

http://www.sba.gov/content/government-contracting-field-staff-directory.

⁵ 48 C.F.R 19.501(d); 19.505(a).

⁶ 15 U.S.C. § 644(a).

⁷ *Id.* at § 637(d); 48 C.F.R. § 19.704.

⁸ SBA, PCR Directory *available at* <u>https://www.sba.gov/content/pcr-directory</u>. 2011 data from Committee Memorandum, "Helping Small Businesses Compete: Challenges within Programs Designed to Assist Small Contractors" Appendix B (2011) *available at* <u>http://smbiz.house.gov/uploadedfiles/memo_9.15.11.pdf</u>.

b. CMRs

While the PCR provides an opinion on subcontracting goal, it is the CMR who assumes responsibility for post award compliance. While CMRs are available to help small businesses seeking subcontracts through counseling and matchmaking, and they are also responsible for ascertaining a prime contractor's compliance with its subcontracting plan.⁹ Agencies and prime contractors are required to report on subcontract performance, and compliance with the subcontracting goal is reflected in past performance reports on prime contractors.¹⁰ The CMR reviews the prime contractor's reports, a responsibility they share with the agencies, and flag a failure to comply.

The 24 CMRs at SBA have educational requirements in the Act, but no other job description in statute.¹¹ Instead, their responsibilities are covered by SBA's Standard Operating Procedure (SOP) for the Subcontracting Assistance Plan.¹² Unfortunately, this job description has not been updated to reflect significant legislative changes to the subcontracting requirements made by the National Defense Authorization Acts (NDAAs) for Fiscal Year (FY) 2013, 2014, 2015, and 2016.¹³ For example, the FY 13 NDAA changed the requirements for subcontracting plans..¹⁴ The FY 14 NDAA allowed prime contractors to take credit for lower tier subcontracts awarded to small businesses – something the current SOP does not reflect.¹⁵ The FY 15 NDAA altered subcontracting requirements for some of the largest defense contractors.¹⁶ The FY 16 NDAA made senior agency executives responsible for subcontracting goals.¹⁷ None of these changes are reflected in the SOP or the job description. Indeed, the SOP does not even recognize the existence of the federal subcontracting reporting system (FSRS) which has been in place for nearly ten years.

c. BOSs

Like the CMR, the BOS has educational requirements imposed by statute, and is tangentially referenced in the Act without a job description or a clear statement of responsibilities.¹⁸ So, like the CMR, the BOS is reduced to an out-of date SOP to understand the full job description.¹⁹ However, to understand their role, it is first necessary to understand the SBA's 8(a) Business Development Program (8(a) program).

⁹ GAO, IMPROVEMENTS NEEDED TO HELP ENSURE RELIABILITY OF SBA'S PERFORMANCE DATA ON PROCUREMENT CENTER REPRESENTATIVES 2 (2011) [hereinafter PROCUREMENT CENTER REPRESENTATIVES]; according to the SBA, "CMRs are stationed in area offices, conduct compliance reviews of prime contractors, counsel small businesses on how to obtain subcontracts, conduct matchmaking activities to facilitate subcontracting to small business, and provide orientation and training on the Subcontracting Assistance Program for both large and small businesses." FIELD STAFF DIRECTORY.

¹⁰ 48 C.F.R. § 19.704.

¹¹ 15 U.S.C. § 633(h).

¹² SBA, SOP 60-03 (2006)

 ¹³ FY 13 NDAA, Pub. Law No. 112-239, 126 Stat. 2087 (2013); FY 14 NDAA, Pub. Law No. 113-66, 127 Stat. 672 (2013); FY 15 NDAA, Pub. Law No. 113-291, 128 Stat. 3292 (2014); FY 16 NDAA Pub. Law No. 114-92, 129 Stat. _____ (2015).

¹⁴ FY 13 NDAA at § 1653, 126 Stat. at 2082.

¹⁵ FY 14 NDAA at § 1614, 126 Stat. at 948.

¹⁶ FY 15 NDAA at § 821, 128 Stat. at 3433.

¹⁷ FY 16 NDAA at § 871, 129 Stat. at _____.

¹⁸ 15 U.S.C. § 633(g).

¹⁹ SBA, SOP 80-05-3A (2008).

The 8(a) program is a subset of the small and disadvantaged business (SDB) program. SDBs are small businesses at least 51 percent unconditionally owned by one or more socially and economically disadvantaged individuals.²⁰ Social disadvantage is presumed for members of designated groups, or may be established by a preponderance of the evidence for any other individual.²¹ Economic disadvantage is defined as a net worth of less than \$750,000, after excluding the value of the individual's ownership interest the small business and the value of the individual's equity in a primary personal residence.²² A firm certifies as an SDB to either the procuring agency or to a third-party certifier, although all 8(a) firms are automatically considered SDBs.²³ There is a statutory goal of awarding five percent of all prime contract and five percent of all subcontract dollars to SDBs.²⁴

The 8(a) program is an important subset of the SDB program. 8(a) firms are small businesses owned and controlled by socially and economically disadvantaged individuals who have applied for and been accepted into a nine-year business development program at SBA.²⁵ While the definition of social disadvantage is the same in the 8(a) program as it is in the SDB program, the definition of economic disadvantage is much stricter, with a \$250,000 cap on assets outside of the business and primary residence, and a requirement that the individual demonstrate a limited access to capital.²⁶ Participation in the 8(a) program provides important contracting preferences such as sole-source contracts up to \$4 million (\$6.5 million for manufacturing contracts) are the preferred contracting method, although competitive 8(a) awards are allowed with the permission of the SBA.²⁷

In the 8(a) program, SBA is considered the prime contractor, and the 8(a) firm is its subcontractor, which requires agencies to negotiate awards with SBA.²⁸ However, since the 1990s, SBA has been entering into Memorandums of Understanding (MOUs) with agencies, allowing agencies to bypass SBA and award contracts directly to the 8(a) firms.²⁹ The 8(a) certification is processed by SBA, and annual reviews are required throughout the nine years of program participation to ensure a firm's continued eligibility.³⁰ Unlike other small business programs, the eligibility of an 8(a) participant cannot be challenged by another 8(a) firm or any other party.³¹

²⁰ 13 C.F.R. § 124.1002.

²¹ There is a rebuttable presumption that "Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal)" are socially disadvantaged. 13 C.F.R. § 124.103.

²² 13 C.F.R. § 124.1002(c).

²³*Id*. at § 124.1003.

²⁴ 15 U.S.C. § 644(g)(I).

²⁵ 13 C.F.R. § 124.

²⁶ *Id* at § 124.104.

²⁷ *Id* at§ 124.506

²⁸ 15 U.S.C. § 637(a).

²⁹ 13 C.F.R. § 124.508.

³⁰ *Id.* at § 124.201, 124.601.

³¹ 13 C.F.R. § 124.517.

It is the BOS who monitors 8(a) firms to ensures their continued eligibility for the program, negotiate contracts, and otherwise protect the firms and the taxpayers.

Unlike the CMR and the PCR, there is no comprehensive list of BOS available from SBA. Instead, a small business concern must visit each district office's website. A visit to these sites reveals that while an average of two to three BOS are assigned to each office, most of these BOS are also serve as the HUBZone program liaison, veteran-owned small business liaison, and woman-owned small business liaison. However, the BOS have an incredibly important responsibility that should not be diluted: they are able to authorize sole source contracts, and last year these contracts exceeded \$9 billion.³² The BOS are the government's defense against waste, fraud and abuse in these programs – necessary as federal data shows that over \$115 million in 8(a) contracts went to companies that are not 8(a) firms.³³

d. OSDBUs

The final category of small business advocates is the OSDBUs. In 1978, Section 15(k) of the Small Business Act established an OSDBU within "each Federal agency having procurement powers."³⁴ While the nomenclature of these offices varies slightly from agency to agency, both the offices and the heads of the offices are collectively referred to as OSDBUs. Each OSDBU is to be appointed by the head of the agency, and be "responsible only to (including with respect to performance appraisals), and report directly and exclusively to, the head of such agency or to the deputy of such head, except that the Director for the Office of the Secretary of Defense shall be responsible only to (including with respect to performance appraisals), and report directly and exclusively to, such Secretary or the Secretary's designee'."³⁵

The Act assigns specific duties and responsibilities to the OSDBU. The OSDBU is responsible implementation and execution of contracting assistance-related functions and duties in the Small Business Act. This includes the small business set-aside program and other socio-economic contracting programs, as well as assisting small businesses in obtaining payments and late payment interest from their agency or from prime contractors. The primary focus of the OSDBU should be advocating for small business contracts, and "the failure of the contracting officer to accept any such recommendations shall be documented and included within the appropriate contract file."³⁶

The OSDBUs are specifically charged with fighting unjustified bundling. Contract bundling occurs when two or more requirements of a type that would be suitable for award to small business are consolidated into a larger contract requirement that is no longer suitable for award to small business. Due to concerns regarding limiting competition and excluding small business participation, the Small Business Act has very specific procedures agencies must follow in order to justify bundling, and the OSDBUs are a critical part of this process. Specifically, the Small Business Act directs them to "identify proposed solicitations that involve significant bundling of contract requirements."³⁷ When bundled requirements are identified, the OSDBU is to "work with the agency acquisition officials and the [SBA] to revise the procurement strategies for such proposed solicitations where appropriate to increase the probability of

³² Data from the Federal Procurement Data System (on file with the Committee).

³³ Id.

³⁴ 15 U.S.C. § 644(k).

³⁵ *Id.* at § 644(k)(3).

³⁶ *Id.* at § 644.

³⁷ *Id.* at § 644(k)(5).

participation by small businesses as prime contractors, or to facilitate small business participation as subcontractors and suppliers."³⁸ OSDBU are also responsible for helping small businesses receive payment, respond to insourcing, and other responsibilities intended to promote small contractors. Many new responsibilities were added to the OSDBU job description in the FY 13 NDAA, which also increased the independence of the office.³⁹

II. Issues Before the Subcommittee

Having explained the roles of each of the small business advocates, this memorandum now turns to areas where the Subcommittee may wish to suggest legislative changes to these programs.

a. PCR Review of Reserved Contracts

The PCR is the last best defense of small businesses when contracts are being structured in a way that limits small business participation. The Subcommittee has held numerous hearings exploring how contracts that include small business set-asides, partial set-asides, or small business reserves may still be harmful to small businesses and to principles of competition, specifically in cases of strategic sourcing and consolidation. Indeed, a contract may be a total small business contract and still be consolidated, meaning that many small businesses were unable to compete.

Therefore, it is problematic that SBA's regulations provide that the PCR will only, "review all acquisitions that are not set-aside or reserved for small businesses above or below the Simplified Acquisition Threshold."⁴⁰ Thus, none of the Federal Strategic Sourcing Contracts – which have excluded thousands of small competitors – are subject to PCR review.⁴¹ The Subcommittee is interested in learning whether this restriction keeps PCRs from reviewing contracts of significant importance to small businesses.

b. PCR Input on Subcontracting Plans

In a 2011 report, the Government Accountability Office (GAO) suggested that a way to increase the efficacy of PCRs was to "allow PCRs to dispute a procurement if their recommendations on a subcontracting plan were not implemented."⁴² This would force the contracting officer to listen to the PCR on subcontracting, and serve to increase subcontracting goals and opportunities for small businesses. Agencies opposed this option because they "did not think the PCRs had enough information about the overall contract or the prime contractor to accurately assess the subcontracting plan." ⁴³ GAO also noted that this would require a statutory change. ⁴⁴ However, given the documented decline in small business subcontracting, perhaps this suggestion deserves a second look.⁴⁵

⁴⁵ Committee Memorandum, "Continuing Challenges for Small Contractors" (2015), *available at* http://smbiz.house.gov/uploadedfiles/11-18-2015_hearing_memo.pdf

³⁸ *Id.* at § 644(k)(5).

³⁹ For a full list of responsibilities, see 15 U.S.C. § 664(k).

⁴⁰ 13 C.F.R. § 125.2(b)(i).

⁴¹ See, e.g., Committee Memorandum, "Contracting and Industrial Base II: Bundling, Goaling, and the Office of Hearings and Appeals" 2-18 (2015) *available at* <u>http://smbiz.house.gov/uploadedfiles/3-17-</u> 2015, hearing, memo.pdf

²⁰¹⁵ hearing memo.pdf. ⁴² PROCUREMENT CENTER REPRESENTATIVES at 8.

⁴³ *Id.* at 28.

⁴⁴ Id.

c. Post Award Compliance

The PCRs, BOS, and OSDBUs exert a great deal of effort to help small businesses obtain contracts, but very little effort is made to help small businesses understand the compliance requirements that come with that contract. This can lead to the small business giving the government the good or service it desires in a successful fashion, but failing due to regulatory peculiarities. There are private sector resources available to assist these small companies, some of whom will testify at the hearing. Therefore, the Subcommittee wishes to consider how to best connect small businesses with these resources, including using the existing small business advocates.

d. Job Descriptions

Both the CMR and the BOS lack clear, up to date job descriptions. The Subcommittee will consider whether providing this direction in statute could help ensure that each of these advocates is better able to fulfill the spirit of the Act. Further, it could prevent SBA from diverting these individuals to fill other roles.

e. Contracts Below the Simplified Acquisition Threshold

Small businesses have priority for contracts for less than \$150,000; however, the Subcommittee on Investigations, Oversight, and Regulations heard earlier this year that as much as \$6 to \$10 billion in these awards were made by VA annually without considering small business.⁴⁶ These purchases were made using government credit cards, and ignored all statutory competition requirements. In order to ensure that this fraud is not repeated, the Subcommittee questions whether the OSDBU should act as check on these awards.

f. Lack of Regulatory Action

One overarching problem for the PCRs, CMRs, BOSs, and OSDBUs is that the SBA's regulations and the Federal Acquisition Regulation have not kept up with changes to the Small Business Act. Consequently, these individuals are unsure what set of rules to follow and enforce. The Subcommittee wishes to hear suggestions on how to improve this rapidly compounding problem.

III. Conclusion

The small business advocates are the individuals small business concerns interact with most frequently. Their ability to perform as Congress intended is critical to the success of these firms. The Subcommittee hopes to hear from the witnesses on ways to provide better support to the advocates and, in turn, the small businesses.

⁴⁶ Committee Memorandum, "Manipulation and Fraud in the Reporting of VA Small Business Goals" (2015), *available at* <u>http://smbiz.house.gov/uploadedfiles/6-23-2015_hearing_memo.pdf</u>.

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		Soldiers Systems Center, Natick, MA
		Portsmouth Naval Shipyard–Portsmouth, NH
		Army National Guard – NH
		Air National Guard –NH
		VA Healthcare Systems – VISN #3 NJ
		VA Healthcare Systems - VISN #2 – Albany, NY
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		U.S. Army Corps of Engineers – Buffalo, NY
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		U.S. Army Material Command – Watervliet Arsenal, Watervliet, NY
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		DOE - National Energy Technology Centers –Pittsburgh, PA
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		All activities within the state of West Virginia to include:
		DOE - National Energy Technology Centers – Morgantown, WV
		DoD - Army Corps of Engineers – Huntington, WV
		DOJ - FBI Criminal Justice Information Service – Clarksburg, WV
		Department of Treasury - Bureau of Public Debt – Parkersburg, WV

13.	MARTINA WILLIAMS (DC, VA) U.S. Department of the Treasury 655 15th Street, NW, Room 6B103 Mail Code 655 15th/6099 Washington, DC 20220 Tel: (202) 622-3804 Fax: (202) 481-2204 Martina.Williams@do.treas.gov	Department of the Treasury, HQ – Washington, DC Department of Veteran Affairs, HQ - Washington, DC Department of Labor, HQ – Washington, DC National Science Foundation, Washington, D.C. Nuclear Regulatory Commission, HQ – Washington, DC DoD - Defense Information Systems Agency– DITCO-NCR Fort Meade, MD National Guard Bureau – HQ – Alexandria, VA
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		National Institute of Environmental Health Sciences (NIEHS)–Research Triangle Park, NC U.S. Army Medical Center (WOMACK) – NC
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		U.S. Navy, Fleet Logistics Center San Diego – San Diego, CA U.S. Marine Corp, Camp Pendleton – Oceanside, CA
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	Also serves as Commercial Market Representative for Iowa, Kansas, Missouri, Nebraska, Minnesota, North Dakota, and South Dakota	Dept. of Veterans Affairs Medical Center-Iowa City, IA United States Property and Fiscal Office-Des Moines, IA U.S. Corps of Engineers-St. Paul District, St. Paul, MN U.S. Air Force-Minneapolis-St. Paul, IAP-ARS, Minneapolis, MN U.S. DOI Fish and Wildlife Services, Region 3, Contract & Facilities Management, Fort Snelling, MN U.S. Department of Veterans Affairs Medical Center, Minneapolis, Minneapolis, MN U.S. Department of Veterans Affairs Medical Center, St. Cloud, MN USDA Animal Plant Health Inspection Services, Minneapolis, MN United States Property and Fiscal Office, Little Falls, MN Army Corps of Engineers–Omaha, NE Offutt AFB–NE National Park Service, Regional Office - NE Dept. of Veterans Affairs Medical Center–Lincoln, NE United States Property and Fiscal Office-Lincoln, NE Grand Forks AFB, Grand Forks, ND Minot AFB-Minot, ND U.S. Department of Veterans Affairs Medical Center, Fargo, ND Air National Guard, Fargo, ND United States Property and Fiscal Office, Bismarck, ND

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		United States Property and Fiscal Office, Rapid City, SD
		USDA Black Hills National Forest, Custer, SD
		Bureau of Indian Affairs – Aberdeen, SD
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		Department of Energy, Kansas City, MO
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		Department of Housing and Urban Development, Western Field Contracting Operations – Denver, CO
		Dept of Interior, U.S. Geological Survey-Denver, CO
		Dept of Interior, U.S. Fish & Wildlife, DOL - Denver, CO
		Dept of Interior, Bureau of Land Management-Denver, CO
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		Dept of Interior, National Business Center – Lakewood, CO
		Dept of Interior, National Park Service Denver Service Center – Denver, CO
		Dept of Interior, National Park Service Intermountain Region-Denver, CO
		Dept of Interior, National Park Service WA Support Office – Lakewood, CO
		Dept of Interior, Bureau of Ocean Energy Management, Regulation & Enforcement – Denver, CO
		Dept of Transportation, Western Federal Lands Highway Division (WFLHD) – Lakewood, CO
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