

SMALL BUSINESS OPPORTUNITY ENHANCEMENT ACT
OF 2001

MAY 2, 2002.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. MANZULLO, from the Committee on Small Business,
submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 2867]

[Including cost estimate of the Congressional Budget Office]

The Committee on Small Business, to whom was referred the bill (H.R. 2867) to amend the Small Business Act to require the Administrator to submit certain disagreements to the Director of the Office of Management and Budget for resolution, and to establish a minimum period for the solicitation of offers for a bundled contract, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF LEGISLATION

The purpose of this legislation is to amend the Small Business Act to require the Administrator of the Small Business Administration to submit certain disagreements involving small business concerns to the Director of the Office of Management and Budget for resolution, and to establish a minimum period of sixty days for small businesses to respond to a solicitation for offers with respect to a bundled contract.

BACKGROUND AND NEED FOR LEGISLATION

The vital nature of the small business community to the economy can be statistically validated. Small businesses account for more than 50 percent of the Gross Domestic Product and have proved

more innovative than big businesses. In times of economic decline, small businesses have been job-creators and have led the economy out of economic hard times.

Many of the large technology and computer companies that have made this Nation a world leader in science and technology started as two or three person firms. One of the fastest growing sectors of our economy is small business concerns owned and controlled by women and by socially and economically disadvantaged individuals.

The federal procurement system has historically been a prolific and competitive source of growth for small businesses. This is understandable since the federal government is the largest buyer of goods and services in the world, with \$200 billion in purchases for fiscal year 2000.

Unfortunately, in the rush to streamline the federal procurement system, the importance of small business concerns to the federal marketplace has been neglected. In recent years, federal agencies have combined requirements, previously provided by small businesses, into enormous, mega-contracts, that only large corporations can bid on as prime contractors.

The result of resorting to mega-contracts has been a less competitive marketplace and a steady decline in the number of prime contracts going to small businesses. In his speech of March 19, 2002, to the Women's Entrepreneurship in the 21st Century Summit, the President emphasized that "government contracting must be open and more fair to small businesses." However, he pointed out that the use by federal agencies of mega-contracts was the major hurdle impeding small business from realizing the President's goal of "more ownership in more communities all across America." In this respect the President stated:

But you know as well as I do that there are some large hurdles for small businesses. One is that—and the main one is—that agencies sometimes, many times, only let huge contracts with massive requirements, and they tend to go to the same group of large corporate bidders. * * * [T]he term of art in Washington is called bundling. It effectively excludes small businesses. And we need to do something about it.

The President has assigned to the head of the Office of Management and Budget the task of reviewing the federal procurement process and the responsibility of finding ways "to encourage entrepreneurial growth, the capacity for our government to stimulate small business ownership in all communities across America." Specifically, the President stated:

And so one of the things we're going to do is we're going to examine the federal government's contracting policies; to make sure the process is open; to make sure the process helps to achieve a noble objective, which is more ownership in our country. And wherever possible, we're going to insist we break down large federal contracts so that small business owners have got a fair shot at federal contracting.

H.R. 2867 is bipartisan legislation, in line with the President's Small Business Plan, and assigns to the Office of Management and Budget the ultimate responsibility of determining whether a mega-

contract is fair to small businesses and is in the best interests of the Nation. It also provides more time for small businesses to respond to a bundled contract, an essential element to forming teams of small business who will have an opportunity to compete.

This legislation is necessary to restore needed competition to the federal marketplace and to reduce use by federal agencies of mega-contracts which the President has identified as the major hurdle to restoring openness and fairness to small business in the federal marketplace.

SUMMARY OF LEGISLATION

The present provisions of the Small Business Act permit the Administrator of the Small Business Administration to appeal to the Secretary or head of the appropriate department or agency when a proposed acquisition (usually a mega-contract) will render small business prime contract participation unlikely and efforts to resolve the issues involved have failed at a lower level.

Instead of appealing to the head of the procurement agency or department, the legislation requires the Administrator of the Small Business Administration to appeal to the Director of the Office of Management and Budget, who must render a timely decision. The Director may delegate his decisional responsibilities, but only to a subordinate official within the Office of Management and Budget appointed by the President, with the advice and consent of the Senate.

Requiring an appeal to the Director of the Office of Management and Budget is both logical and fair. The present provisions of the Small Business Act make the department or agency head the final arbiter. This is hardly a fair approach since there is a natural tendency for a department or agency head to rubber stamp the decision of subordinate officials.

A required appeal to the Director of the Office of Management and Budget restores fairness to the process and ensures that decisions will have some degree of continuity, rather than being on an agency-by-agency basis. Further, it provides the President with the opportunity to resolve, at the highest level the problem of mega-contracts, and to provide a basis for realizing his objective of more ownership for all America.

In addition, the legislation gives small businesses more time, i.e., a minimum of sixty days to respond and bid on a procurement that is admittedly bundled. Current law gives small businesses only 30 days to respond. The 60-day response period that this legislation would provide is the minimum time to permit small business to join with other small business to compete for a contract that one small business could not alone perform.

COMMITTEE ACTION

The Committee has held recent hearings concerning the procurement practices of the federal government. On May 2, 2001, the Committee held a hearing entitled: "Black Beret Procurement; Business as Usual at the Pentagon." On June 20, 2001, the Committee held a hearing entitled: "Procurement Policies of the Pentagon with respect to Small Businesses and the New Administration." The Committee held three additional hearings with respect

to federal procurement issues. The first in Santa Fe, New Mexico, on August 27, 2001, was entitled: “Small Business Views on Federal Procurement and other Programs.” The second the same day in Albuquerque, New Mexico, was entitled: “Challenges that Small, Disadvantaged, and Minority Business Owners Face in the Federal Procurement Arena.” The third hearing was on September 6, 2001, and was entitled: “Procurement Policies of the Department of Defense with Regard to Small Businesses—Finding Solutions to Problems that Exist.”

H.R. 2867 was introduced by Nydia M. Velázquez (D-NY), Ranking Democratic Member of the Committee on Small Business, on September 6, 2001, and was referred to the Committee on Small Business. On April 17, 2002, the Committee on Small Business met to consider the bill. There were no amendments. The bill was ordered favorably reported by voice vote.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the recorded votes on the motion to report legislation. There was no recorded vote taken in connection with ordering H.R. 2867 reported.

COMMITTEE OVERSIGHT FINDINGS

With respect to the requirements of clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee’s oversight findings are reflected in this report.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, and section 308(a) of the Congressional Budget Act of 1974, the Committee references the report of the Congressional Budget Office included below.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

With respect to the requirements of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the performance goals and objectives of this legislation are to: (a) stimulate growth of small business and to increase ownership throughout the Nation; (b) break down large federal procurements so that the small business community has a fair chance to win and perform them; and, (c) empower small businesses to go after mega-contracts by permitting at least sixty days for small business to respond to procurements that are identified as bundled.

STATEMENT OF CONGRESSIONAL BUDGET OFFICE ESTIMATE

With respect to the requirements of clause 3(c)(3) of rule XIII of the rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the cost estimate for H.R. 2867 from the Director of the Congressional Budget Office as follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 29, 2002.

Hon. DONALD MANZULLO,
*Chairman, Committee on Small Business,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2867, the Small Business Opportunity Enhancement Act of 2001.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

H.R. 2867—Small Business Opportunity Enhancement Act of 2001

H.R. 2867 would amend the Small Business Act to require the Small Business Administration (SBA) to report contracting disputes between itself and other federal agencies to the Office of Management and Budget (OMB) for resolution. Such disputes are currently resolved by each contracting agency. In addition, the bill also would increase the solicitation period for bundled contracts (multiple contracts combined into a single procurement contract) from 30 days to at least 60 days.

CBO estimates that implementing H.R. 2867 would cost less than \$500,000 a year, subject to the availability of appropriated funds. There is no comprehensive information concerning the annual number of contract disputes involving SBA and other federal agencies, but CBO does not expect that the requirements of this bill would lead to significant increased costs for the OMB. In addition, CBO expects the new minimum 60-day solicitation period for bundled contracts would have no significant cost. Because the bill would not affect direct spending or receipts, pay-as-you-go procedures would not apply.

H.R. 2867 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect state, local, or tribal governments.

The CBO staff contact for this estimate is Matthew Pickford. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

PREEMPTION CLARIFICATION

Section 423 of the Congressional Budget Act of 1994 requires the report of any committee on a bill or joint resolution to include a statement of the extent to which the bill, or joint resolution is intended to preempt state, local, or tribal law. This bill involves federal agency transactions under federal law, and does not preempt any state, local, or tribal law.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the Constitutional authority for this legislation is provided in Article I, section 8 of the Constitution of the United States, which grants to Congress the power to enact this bill.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

The short title is the “Small Business Opportunity Enhancement Act of 2001.”

Section 2. Submission of certain disagreements to the Director of the Office of Management and Budget

The section would amend the Small Business Act to require the Administrator of the Small Business Administration to submit a dispute to the Director of the Office of Management and Budget where the Administrator and the contracting procurement department or agency are unable to agree and the Administrator believes the procurement, as proposed, will render small business prime contract participation unlikely.

The Director of the Office of Management and Budget must make a decision with respect to a disagreement within 10 days after receiving the matter. The Director may not delegate his responsibilities with respect to making a decision, except to a subordinate official nominated by the President, and confirmed by and with the advice and consent of the Senate.

Section 3. Minimum period for solicitation of offers for a bundled contract

The section would amend the Small Business Act to require that small businesses be permitted no less than sixty days, beginning on the date the solicitation is issued, to respond to a solicitation for offers with respect to a contract that is bundled.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

SECTION 15 OF THE SMALL BUSINESS ACT

SEC. 15. (a) * * *

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(e) PROCUREMENT STRATEGIES; CONTRACT BUNDLING.—

(1) * * *

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(5) *MINIMUM SOLICITATION PERIOD.*—*In the case of a solicitation of offers for a bundled contract that is issued by the head of an agency, small business concerns shall be allowed to submit offers for a period of not less than 60 days beginning on the date the solicitation is issued.*

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ADDITIONAL VIEWS

Democratic Members of the Committee on Small Business have focused significant legislative energy on ensuring that small businesses are fully empowered to participate in the federal marketplace. Although small businesses account for well over 95 percent of businesses nationwide, small businesses receive less than their fair share of federal contract dollars, despite goals put in place by Congress to encourage small business participation.

Further, as highlighted in reports issued by the Democratic Members of the Committee on Small Business in July 2000 and September 2001, the number of contracts awarded to small businesses has decreased over the past several years, while the dollar amount of contracts is increasing. In short, the contracts are getting larger, and there are fewer opportunities for small businesses.

This legislation attempts to increase small business participation in the federal marketplace. First, the bill enhances the Small Business Administration's (SBA's) ability to negotiate with Federal agencies, prior to the issuance of draft or final solicitation for bid, to break up large contracts into smaller pieces. Secondly, the bill provides additional time to small businesses that bid on contracts meeting the definition of "bundling" as outlined in Section 3 of the Small Business Act.

Currently, the SBA has limited authority to recommend that agencies split large contracts into smaller pieces to increase small business participation as prime contractors. Under the current statute, the SBA has the authority to appeal a procurement strategy back to the agency that developed the original strategy. The implementing regulations have set in place two-phased appeal process. The SBA's first appeal is to the head of the contracting activity. The second appeal is to the Secretary—(or equivalent) level of the agency. The SBA's appeal authority occurs prior to the issuance of the draft or final solicitation for bids by the agency, as part of the development of a procurement strategy for a solicitation issued by the agency for a proposed acquisition.

This legislation enhances the SBA's stature by giving the authority to the SBA to appeal the agency's final decision to the Office of Management and Budget (OMB). It is the intention of the author of this legislation, Ms. Velázquez, that the current two-phased agency appeal process shall remain in place, with the appeal to the Office of Management and Budget (OMB) being the appeal of last resort. If the SBA is satisfied, through either negotiations with procurement or lower level appeals, that they have negotiated a procurement strategy ensuring opportunities for small businesses to compete as prime contractors on the proposed acquisition, the SBA is not required to appeal to OMB. It is the goal of the author that all appeals of agency acquisition strategies by the SBA shall occur prior to the issuance of a draft or final solicitation for bids by the

agency. The author wants it clarified that agencies not issue draft or final solicitations prior to the completion of negotiations with the SBA, or until SBA's final appeal to OMB is exhausted, on the procurement strategy for any proposed acquisition.

This provision is further intended to ensure that the SBA look at ways to not only increase federal contract dollars to small businesses, but to also to increase the number of prime contracting opportunities for small businesses.

The legislation also allows small businesses 60 days to bid on bundled contracts. Historically, agencies have only allowed 30 days for businesses to bid on federal contracts. When it comes to bundled contracts, by definition, they are too large for a small business to perform on its own. Small businesses can only perform on bundled contracts as prime contractors, if they "team" with other businesses.

Through regulation, the SBA has ensured that affiliation rules do not apply to small businesses bidding as teams. As long as each business is small, according to SBA's size standards, the "team" may be considered small. However, the SBA had not assisted small businesses in identifying potential team members, other than through its PRO-Net database.

In order to "team," small businesses must identify qualified team members, decide which team member is going to perform what function, formalize the team through a potential joint venture or subcontracting arrangement, and put together a price. It is simply not reasonable for most small businesses to accomplish this in 30 days—the standard bid period for federal contracts.

Therefore, this legislation provides additional time for small businesses. The author of the legislation, Ms. Velázquez, wants it clarified that there is no intention in this bill to provide 60 days for the submission of bids on all bundled contracts. Rather, only those small businesses that have expressed interest may received an additional 30 days. Expressions of interest by small businesses, for this purpose, must be to the agency contracting officer and must be in writing. It is the author's intention that large businesses submitting bids after the initial 30-day bid period, shall not be considered timely.

No discussion of the SBA's role in the federal procurement process would be complete without including the SBA's Procurement Center Representatives (PCRs). These individuals are the "front line" with respect to ensuring that small business have full access of the federal marketplace. The PCRs are the SBA employees charged with negotiating procurement strategies, that are inclusive of small business with federal agencies. The PCR initiates the first appeal to the head of the contracting activity when negotiations are unsuccessful.

The SBA continues to disregard the importance of this employee function. Rather than providing adequate personnel to protect the interests of small businesses in the federal marketplace, the SBA consistently fails to fill vacant position in a timely manner, and request adequate funding for these individuals to perform their jobs. PCRs cannot effectively advocate for small businesses from behind a desk. These employees must have the ability to visit agencies on a consistent basis to ensure that the PCR is aware of the agency's

procurement activities and able to identify contracts for small business participation.

In order to conserve costs, the SBA has housed several PCRs at agency offices. Although this can result in increased access by PCRs to agency procurements, there remains a question as to whether this can disrupt the arm's length negotiations between the agency and the PCR that are most effective for small businesses.

Democrats remain skeptical about the SBA's cost cutting measures intended to make PCRs more effective, including increased use of electronic commerce. Democratic Members of the Committee have been vigilant over the past several years on the issue of prime contracting opportunities for small businesses in the federal marketplace. As a result, Committee Democrats recognize the important role that PCRs play in ensuring adequate small business participation. The effectiveness of the role of the PCRs diminishes in proportion to the lack of resources the SBA provides to this important function.

To conclude, issues of federal procurement and the inclusion of small businesses in the multi-billion dollar federal marketplace have been a priority with Democrats on the Committee. Reports issued by the Democrats have shown that small businesses, and especially minority- and women-owned small businesses, still do not receive that fair share of federal prime contracts. The reports also showed that mega contracts are, in large part, the primary issues affecting small businesses in federal procurement. After nearly five years of statutory protections afforded small businesses by the Small Business Reauthorization Act of 1997, it is clear that more can be done. The time has come to close the loopholes and allow small businesses the equity that they deserve in the Federal marketplace.

NYDIA M. VELÁZQUEZ.

