



Proposed Legislation Offers Potential Rewards To Small Businesses...Along With A Few Risks

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The government's emphasis on promoting small business contracting continues to be the subject of congressional attention. Thus, it comes as no surprise that the House of Representatives' National Defense Authorization Act of 2013 ("NDAA"), H.R. 4310, includes several provisions that present both opportunities and challenges to small business concerns.

Although it remains to be seen whether the final version of the NDAA will include those provisions, they deserve the close attention of small firms.

Section 1631 of the NDAA attempts to benefit small companies by increasing the government-wide small business prime contracting and subcontracting goals to 25% and 40%, respectively. The current prime contracting goal is 23%. The provision would also forbid federal agencies from setting prime contracting goals that are less than 25%. This reflects Congress' interest in creating additional opportunities for small contractors. However, the White House has voiced opposition to increasing the goals, noting that, while "laudable," such increases could be "overly ambitious."

NDAA Section 1651 should be of particular interest (and concern) to small business owners. It would change the subcontracting limitation requirements applicable to set-asides.

The provision would forbid firms from expending more than 50% of their contract revenues on subcontractors, which suggests that Congress may be shifting its emphasis from the amount of work small firms perform to the revenues such businesses generate. However, an important exception to this requirement is that it would not apply to monies paid to "similarly situated" subcontractors, which the NDAA defines as, among other things, other small business concerns, 8(a) firms, and firms owned by service-disabled veterans, depending on the

set-aside. Importantly, section 1652 provides that violators could face fines of \$500,000 or more, underscoring the importance of satisfying the new requirement.

Another proposed change that could be helpful to small contractors is in Section 1641, which would grant the Small Business Administration authority over all mentor-protégé programs, apart from those of the Defense Department. Non-defense programs would not be permitted without the SBA's approval. Section 1641 would also task the SBA with creating a mentor-protégé program for all small business concerns identical to that of the 8(a) program. Thus, the SBA could become the final arbiter for mentor-protégé programs throughout the federal government. Such an arrangement could provide substantial guidance to small vendors on avoiding affiliation with their mentors.

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Section 1611 would create a set-aside program for mid-tier businesses, referred to as "advanced small businesses" by the NDAA. Essentially, advanced small businesses are companies that are too large for other set-asides, but too small to compete directly with larger firms. Section 1611 would provide for the set-aside of contracts in excess of \$25 million when at least two advanced small businesses could be expected to compete. Thus, the provision would be a boon for contractors that are no longer small by expanding the menu of contracts eligible for set-aside. However, the program may also fragment the marketplace and render certain contracts unobtain-

able for some small firms.

One proposed change in the NDAA regarding suspensions and debarments could be a cause for concern. Currently, discretion to institute suspension or debarment proceedings is vested in federal officials. However, Section 1683 would amend the Small Business Act to provide that size status misrepresentations are independent bases for instituting suspension and debarment proceedings. While the provision would not make such proceedings mandatory, it would diminish the discretion of federal officials in this regard.

Recent events have substantially expanded the contracting opportunities available to small companies, and the emphasis placed by the federal government on continuing this expansion bodes well for those businesses. However, it is critical that business owners monitor legislative developments as they occur, because every change in the laws carries a risk of unanticipated challenges. While the future of the NDAA remains uncertain, the fact that small business contracting has assumed such a prominent role in legislative discourse means that small business concerns must prepare for the benefits and burdens that attend a growing universe of federal contracting opportunities.

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