

## Government Contracts Update

February 2014

### Recent National Defense Authorization Act Presents Opportunities for Small Business Contractors

#### AUTHORS

Paul A. Debolt  
George W. Wyatt  
Christina K. Kube

---

#### RELATED PRACTICES

Government Contracts

---

#### RELATED INDUSTRIES

Government Contractors

---

#### ARCHIVES

2014 2010 2006  
2013 2009 2005  
2012 2008 2004  
2011 2007

The recently enacted National Defense Authorization Act for Fiscal Year 2014 (NDAA 2014) contains some noteworthy provisions that will impact how small business contractors compete for and perform Federal contracts. The NDAA 2014 provisions relating to small business contracting reflect the continued efforts to assist small businesses in navigating the Federal procurement process and to incentivize the utilization of small business subcontractors with the ultimate goal of increasing competition by small businesses in the Federal marketplace.

#### Credit for Certain Small Business Subcontractors

The NDAA 2014 (Sec. 1614) encourages greater use of small business contractors on Federal procurements through an amendment to the Small Business Act, which allows single award prime contractors to receive credit towards the achievement of their small business subcontracting plan percentage goals by utilizing small businesses to perform work as lower-tier subcontractors. This change will increase opportunities for small businesses to work as subcontractors on Federal contracts, by expanding the subcontractor pool from which prime contractors may fulfill their small business subcontracting percentage goals. The ultimate result, however, may not be as beneficial for small businesses as hoped. Instead of incentivizing large business prime contractors to increase the utilization of small businesses as subcontractors, this provision may simply push small businesses further down the contracting tier to second- and third-level subcontractor positions, while other large businesses take the more advantageous first-tier subcontracting roles.

With this new credit scheme for lower-tier small business contractors also comes new requirements on prime contractors' small business plans, including requirements that prime contractors:

- i. approve their subcontractors' subcontracting plans;
- ii. monitor their subcontractors' compliance with these approved plans;
- iii. confirm submission and receipt of subcontracting reports;
- iv. assess their subcontractors' fulfillment of identified subcontracting goals; and
- v. discuss small business subcontracting compliance with their subcontractors to ensure good faith efforts towards meeting identified goals.

Prime contractors will need to carefully comply with these new requirements, because under the Federal Acquisition Regulations contractors can face liquidated damages for failing to make a good faith effort to comply with their subcontracting plan (see FAR § 52.219-16). As such, contractors (both large and small) should carefully review the regulations implementing these additional requirements once they are available to ensure they maintain compliance with their small business subcontracting plans.

#### Revised Reporting Requirements

The NDAA 2014 contains a new requirement (Sec. 1613) that the head of each Federal agency must include within its annual small business participation report "a remediation plan with proposed new practices to better meet such goals, including analysis of factors leading to any failure to achieve such goals." Eventually, this requirement should lead to greater contracting opportunities for small businesses by mandating proactive action to rectify deficiencies impeding small business participation and to developing new practices that enable the agency to meet its small business goals.

#### Clarification of Compliance Requirements

The NDAA 2014 (Sec. 1615) also confirms that all small businesses must comply with the subcontracting limitations within the Small Business Act, clarifying potentially contradictory requirements within the NDAA 2013. Section 802 of the NDAA 2013 created a system that requires Contracting Officers to consider the availability of alternative contract vehicles (including contracting directly with prime contractors' subcontractors) when a prime contractor informs the agency that it intends to award subcontracts for more than 70% of the total cost of work (see FAR § 52.215-22). Questions arose as to whether this 70% threshold exceeded or trumped the 50% limitation on subcontracting under the Small Business Act (see 15 U.S.C. § 657s). The NDAA 2014 clarifies that for small business set-aside contracts, Section 802 of NDAA 2013 (and its 70% threshold) does not apply, thereby ensuring that the "50% rule" as it applies to small business set-aside contracts is not affected.

### **New Contract Clause**

Finally, the NDAA 2014 (Sec. 1611) requires the Department of Defense (DoD) to issue and include a new clause in its awarded small business contracts that will require small business contractors to acknowledge that accepting the contract may cause the business to exceed the applicable small business size standards for the industry concerned, thereby disqualifying that contractor as a small business for a particular industry. The ultimate goal of this provision is to promote greater competition on future awards by encouraging small business contractors to develop identified "capabilities and characteristics typically desired in contractors that are competitive as an-other-than small businesses" within the industry.

While the new clause will include the above language, no further details are included as to how the DoD will "encourage" small businesses to develop the desired capabilities. Consequently, small businesses will need to wait and see if the DoD simply proposes aspirational, non-binding language that mirrors the statute, or if it will go further and propose incentives or disincentives to facilitate the desired development of capabilities.

Small business contracting will continue to be an evolving area as the government implements the NDAA 2014 amendments, providing for increased opportunities and competition among small businesses, as well as additional compliance requirements. As a result, small businesses should continue to monitor these requirements as they develop and consider the practical impact the increased contracting opportunities may have on their status as small business contractors. Conversely, large businesses must be vigilant of the changing landscape to prevent potential noncompliance determinations and to avoid the imposition of penalties that may accompany its failure to follow the identified requirements.

Venable's **Government Contracts Practice Group** will continue to monitor the government's implementation of the NDAA 2014 small business-related provisions, as well as other legislation and regulations relating to small business contracting. For more information on how the new provisions in the NDAA 2014 might impact your business, or to better understand the Federal government's requirements regarding small business contracting, please contact **Paul Debolt** at , **George Wyatt** at , **Christina Kube** at , or any of the other attorneys in Venable's **Government Contracts Practice Group**.