

Sleighted

Accounting Tricks Create False Impression That Small Businesses Are Getting Their Share of Federal Procurement Money, and the Political Factors That Might Be at Play

Acknowledgments

This report was written by Taylor Lincoln, research director for the Congress Watch division of Public Citizen.

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Public Citizen's Congress Watch
215 Pennsylvania Ave. S.E
Washington, D.C. 20003
P: 202-546-4996
F: 202-547-7392
<http://www.citizen.org>

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“It is time to end the diversion of small business contracts to corporate giants.”

—*Sen. Barack Obama (D-Ill.)*

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Introduction

The United States, with a procurement budget of about \$460 billion in 2013, is the world’s biggest customer.²

The massive amount of U.S. purchasing provides enormous opportunities for small businesses. These opportunities are bolstered by a longstanding U.S. policy calling for a certain share of federal procurement dollars (23 percent for prime contracts and 36 percent for subcontracts, at present³) to go to small businesses.

In 2013, the government reported meeting its goal on prime contracts to small businesses (referring to those issued directly from the government to a business) for the first time in eight years.⁴ But the government’s purported success in 2013 (and near misses in previous years) relies on methodologies that present a false impression of the percentage of procurement that small businesses actually receive.

For example, the list of contracts the government counted toward meeting its small business contracting goals in 2013 included some held by the largest companies with which the government does business. In fact, the government counted at least one contract held by seven of the ten largest federal contractors toward meeting its small business goals in 2013.⁵

Small Business Administration (SBA) Administrator Maria Contreras-Sweet in 2014 told lawmakers that some contracts held by large businesses were counted toward small business procurement

¹ *The American Small Business League Endorses Barack Obama*, Web site of presidential candidate Barack Obama (Feb. 26, 2008), <http://bit.ly/1DDDdey>.

² *Office of Entrepreneurial Development*, U.S. SMALL BUSINESS ADMINISTRATION (undated; viewed on April 16, 2015), <http://1.usa.gov/1Gct7Y5> and *Federal Subcontracting: Linking Small Business Subcontractors to Prime Contracts Is Not Feasible Using Current Systems*, GOVERNMENT ACCOUNTABILITY OFFICE (December 2014), <http://1.usa.gov/1OzvkvZ>.

³ 15 U.S. Code § 644 – Awards or Contracts, <http://bit.ly/1EgT3Bq>.

⁴ John Shoraka, *Small Businesses Win in SBA’s FY2013 Federal Procurement Scorecard*, SMALL BUSINESS ADMINISTRATION (Aug. 1, 2014), <http://1.usa.gov/1bctleU>.

⁵ *Top 100 Contractors Report*, Federal Procurement Data System (2013), <http://1.usa.gov/1QrftTP> and *FY13 Vendors That Received Small Business Contracts Awards*, SMALL BUSINESS ADMINISTRATION (extracted on Feb. 19, 2014). (Obtained by American Small Business League by Freedom of Information Request and provided to Public Citizen by ASBL.)

goals because of a rule permitting small businesses acquired by large business to retain their small business status for up to five years.⁶ But this claim appears to be inaccurate. A federal regulation that took effect in 2007 requires contractors that are acquired to recertify their size almost immediately. Subsequent orders relating to contracts held by acquired businesses that no longer qualify as “small” may not be counted toward the government’s fulfillment of its small business goals.⁷

There is an additional reason that calculations used by the SBA exaggerate the true share of procurement that small businesses receive: the calculations exclude whole swaths of procurement that the agency deems not to be small business “eligible.” This methodology does not appear to be grounded in law. As a report commissioned by the SBA’s Office of Advocacy observed in 2014, federal law includes an “unequivocal” mandate that 23 percent of all federal procurement go to small businesses.⁸

Small businesses’ share of procurement also may be suffering due to a program that exempts some particularly large defense contractors from filing subcontracting reports for each contract they hold. This program, which permits contractors to submit company-wide goals and results, was begun in 1990 as a temporary experiment to see if it would help small businesses obtain subcontracts. A quarter of a century later, the Pentagon still categorizes this program as a “test.” The department never has released an analysis of the program’s results despite multiple demands – and even a statutory requirement – to do so. Still, Congress in 2014 reauthorized the program for two more years.⁹

Elements of these anomalies and oddities have previously been reported in the media and by oversight agencies within government. Yet, with rare exceptions, there has been little outcry from lawmakers. This relative quiet is somewhat surprising because, in their rhetoric, members of Congress tend to afford exalted status to small businesses.

This paper will briefly put forth five political factors that might be tipping the contracting scales in favor of large businesses and inhibiting members of Congress from objecting more loudly to policies and practices that appear to be shortchanging small businesses.

These factors include the massive number of jobs that large contractors control; contractors’ prodigious rate of hiring former military officials; contractors’ significant lobbying activities; contractors’ significant campaign contributions; and, potentially, influence garnered through

⁶ Testimony of Small Business Administrator Maria Contreras-Sweet, U.S. House Committee on Small Business (Sept. 10, 2014), <http://bit.ly/1yIcxN7>.

⁷ 13 CFR 121.404 (g)(2), <http://1.usa.gov/1cj2nZw>.

⁸ Evaluation of the Small Business Procurement Goals Established in Section 15(g) of the Small Business Act: A Report Pursuant to Section 1631(d) of the National Defense Authorization Act of 2013, HENRY B. R. BEALE MICROECONOMIC APPLICATIONS INC. FOR SBA OFFICE OF ADVOCACY (June 2014), <http://1.usa.gov/1zy5SA2>.

⁹ See, e.g., J.D. Harrison, *Businesses, Pentagon Agree This Program Doesn’t Work. Congress Saved It Anyway*, THE WASHINGTON POST (Dec. 31, 2014), <http://wapo.st/1FXQuiO>.

undisclosed, unregulated contributions that are made by contractors to third-party entities that engage in electioneering activities.

I. The Law and Regulations

The Small Business Act, first passed in 1953 and most recently updated in 2013, expresses a U.S. policy of aiding small businesses, “For the purpose of preserving and promoting a competitive free enterprise economic system.”¹⁰ The law sets goals for small businesses to receive 23 percent federal procurement dollars. The law also calls for smaller slices of procurement to go to other categories of businesses, including businesses owned and controlled by service-disabled veterans (3 percent), socially and economically disadvantaged individuals (5 percent) and women (5 percent).¹¹

Regulations issued by the Small Business Administration define what qualifies as a small businesses. Broadly, small businesses must be independently owned and operated, and not dominant in their field. Additional parameters, which vary by industry, limit the number of employees or amount of revenue participants may have. Employee limits peak at 1,500 employees; revenue limits at \$38.5 million.¹²

Federal acquisition regulations stipulate that holders of prime contracts must give small businesses “the maximum practicable opportunity to participate in contract performance ...”¹³ The law also requires recipients of most federal contracts of at least \$650,000 (\$1.5 million for construction) to submit plans to subcontract parts of the work to small businesses.¹⁴ The SBA has set a goal in recent years for 36 percent of all dollars that are subcontracted to go to small businesses.¹⁵ Contract recipients are required to report their subcontracting data to the government.

An exception to the law’s requirements on subcontracting plans exists for particularly large defense contractors. The Comprehensive Subcontracting Plan Test Program (CSP), which dates to 1990, authorizes participating companies to engage in the “negotiation, administration, and reporting of subcontracting plans on a plant, division, or company-wide basis as appropriate.”¹⁶

¹⁰ 15 U.S. Code § 631 – Declaration of Policy, <http://bit.ly/1bs0TcP>.

¹¹ 15 U.S. Code § 644 – Awards or Contracts, <http://bit.ly/1EgT3Bq>.

¹² *Table of Small Business Standards*, U.S. SMALL BUSINESS ADMINISTRATION (viewed on April 17, 2015), <http://1.usa.gov/1bdZnfS> and *Am I a Small Business*, U.S. SMALL BUSINESS ADMINISTRATION (viewed on April 27, 2015), <http://1.usa.gov/1DuCXNO>.

¹³ Federal Acquisition Regulation 19.702, <http://1.usa.gov/1INyd66>.

¹⁴ *Id.*

¹⁵ *Government-Wide Performance, FY2013 Small Business Procurement Scorecard*, SMALL BUSINESS ADMINISTRATION, <http://1.usa.gov/1DYh7Hi>.

¹⁶ *Participants Under the Comprehensive Subcontracting Test Program*, U.S. DEPARTMENT OF DEFENSE OFFICE OF SMALL BUSINESS PROGRAMS, <http://1.usa.gov/1yIh7LC>.

II. Controversies Over Small Businesses' Share of Prime Contracts

Reports issued by the SBA tend to show the government narrowly missing the goal of awarding 23 percent of prime federal contracts to small businesses. In 2013, the SBA said the goal was met.¹⁷ But practical meaning of these reports is unclear because some contracts given to large businesses are scored as if they went to small businesses, and some federal contracts are excluded altogether from the SBA's calculations.

In each of its annual reports since fiscal year 2006, the SBA's office of inspector general (OIG) has listed procurement flaws that "allow large firms to obtain small business awards" as the first item in its enumeration of challenges facing the agency.¹⁸

As an example of procurement flaws, a report by the SBA OIG in 2014 reviewed \$4.6 billion worth of contracts that were categorized as going to disadvantaged businesses and business located in historically underutilized business zones (known as HUB zones.)¹⁹ The OIG concluded that about 8 percent of the contracts it reviewed were awarded to firms that may have been ineligible for the program for which credit toward goal fulfillment was claimed.²⁰

There are several explanations for why contracts counting toward small business goals (or subsets of small business goals) may end up in the hands of large businesses or why small business procurement percentages may be inflated.

1. Grandfathering. A 2003 report by the U.S. General Accounting Office (GAO, now known as the Government Accountability Office) found that large businesses received \$13.8 billion of \$50 billion in procurement that was categorized as going to small businesses in 2001. The GAO concluded that the primary reason for this phenomenon was that federal regulations permitted companies to be considered "small" over the life of a contract. In its examination of 131 contracts given to five large firms that received contracts categorized as going to small businesses, the GAO attributed 114 to small businesses growing into large businesses.²¹

¹⁷ John Shoraka, *Small Businesses Win in SBA's FY2013 Federal Procurement Scorecard*, SMALL BUSINESS ADMINISTRATION (Aug. 1, 2014), <http://1.usa.gov/1bctleU>.

¹⁸ *FY 2006 Report on the Most Serious Management Challenges Facing the Small Business Administration*, U.S. SMALL BUSINESS ADMINISTRATION OFFICE OF INSPECTOR GENERAL (Oct. 14, 2005), <http://1.usa.gov/1bx7LHr> and *Report on the Most Serious Management and Performance Challenges Facing the Small Business Administration In Fiscal Year 2015*, U.S. SMALL BUSINESS ADMINISTRATION OFFICE OF INSPECTOR GENERAL (Oct. 17, 2014), <http://1.usa.gov/1DptPKF>.

¹⁹ *Agencies Are Overstating Small Disadvantaged Business and HUBZone Goaling Credit by Including Contracts Performed by Ineligible Firms*, SMALL BUSINESS ADMINISTRATION OFFICE OF INSPECTOR GENERAL (Sept. 24, 2014), <http://1.usa.gov/1HlaY3w>.

²⁰ *Id.*

²¹ *Reporting of Small Business Contract Awards Does Not Reflect Current Business Size*, U.S. GENERAL ACCOUNTING OFFICE (May 7, 2003), <http://1.usa.gov/1H3vDA1>.

In 2013, seven of the 10 largest contractors received at least one contract that the SBA counted toward fulfillment of small business goals. [Figure 1]

Figure 1: Enumeration of 10 Largest Federal Contractors and Whether Procurement From Them Was Counted Toward Meeting Small Business Goals, 2013

Contractor	At Least One Contract Counted Toward Small Business Goals?
1. Lockheed Martin Corp.	Y
2. The Boeing Co.	N
3. Raytheon Co.	Y
4. General Dynamics Corp.	Y
5. Northrop Grumman Corp.	Y
6. Science Applications International Co.	Y
7. Huntington Ingalls Industries Inc.	N
8. L-3 Communications Holdings Inc.	Y
9. United Technologies Corp.	N
10. BAE Systems Plc	Y

Sources: Federal Data Procurement System and Small Business Administration (via American Small Business League)

SBA Administrator Maria Contreras-Sweet was asked in a 2014 U.S. House of Representatives committee hearing why contracts given to large businesses Northrop Grumman, Raytheon and Chevron were counted toward small business goals. “We have a rule in place that says that once you get in a contract with government, that you are given five years. And so if a large company acquires a small business, then it is grandfathered in for a number of years,” Contreras-Sweet responded.²²

But Contreras-Sweet appears to have been in error when she claimed that small businesses could retain their small business status after being acquired by large businesses. An SBA rule that took effect in 2007 called for a business that has ceased to be “small” due to acquisition to promptly inform the SBA of this fact and for the agency not to count any future options or orders relating to the contract toward its small business goals.²³ That rule provided, as it does today:

In the case of a merger or acquisition, where contract novation is not required, the contractor must, within 30 days of the transaction becoming final, recertify its small business size status to the procuring agency, or inform the procuring agency that it is other than small. If the contractor is other than small, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its small

²² Testimony of Small Business Administrator Maria Contreras-Sweet, U.S. House Committee on Small Business (Sept. 10, 2014), <http://bit.ly/1yIcxN7>.

²³ *Small Business Size Regulations; Size for Purposes of Government-Wide Acquisition Contracts, Multiple Award Schedule Contracts and Other Long-Term Contracts; 8(a) Business Development/Small Disadvantaged Business; Business Status Determinations*, 71 FEDERAL REGISTER 66434, 66444, <http://1.usa.gov/1D3clDI>. Rule codified 13 C.F.R. 121.404(g)(2), <http://bit.ly/1HZK6xA>. See also 48 CFR 19.301-2 (Federal Acquisition Regulation implementing SBA rule through substantially similar language), <http://bit.ly/1bEebEM>.

business goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new size status.²⁴

The SBA explained this rule in a press release issued in July 2007. “There is no ‘five-year’ loophole,” the SBA wrote. “The new recertification policy prohibits government agencies from claiming small business status for contracts initially awarded to small businesses that have since been acquired by a large business, regardless of when that acquisition or merger occurred.”²⁵

In response an inquiry from Public Citizen challenging the accuracy of Contreras-Sweet’s claim, a spokeswoman for the SBA acknowledged that “in the case of a merger or acquisition, the agency should be notified within 30 days and the small business credit should be discontinued.”²⁶

Even if there were a five-year loophole, it is not clear that the SBA is purging contracts that large companies have held for more than five years from its rolls of “small business” contracts. For example, the SBA’s fiscal year 2013 listing of “Vendors that received Small Business Contracts” includes Lockheed Martin Management Systems Designers Inc. This company is a subsidiary of Lockheed Martin Corp., which was the largest U.S. contractor in 2013.²⁷

Lockheed Martin Management Systems Designers Inc. was acquired by Lockheed Martin Corp. on Feb. 1, 2007.²⁸ That was more than five years prior to fiscal year 2013, which commenced on Oct. 1, 2012.

2. Errors. Some percentage of the contracts that go to particularly large businesses are counted toward small businesses goals simply because of inaccurate government records.

The SBA OIG wrote in 2014 that “previous OIG audits and other government studies have shown widespread misreporting by procuring agencies, since many contract awards that were reported as having gone to small firms have actually been performed by larger companies.”²⁹

In its summary of these past reports, the OIG attributed most of these cases to errors by the government rather than businesses falsely claiming small business status. “While some contractors may misrepresent or erroneously calculate their size, most of the incorrect reporting results from

²⁴ *Id.*

²⁵ Press Release, U.S. Small Business Administration, *Myth/Fact: Is There a 5-Year Loophole in New SBA Contracting Rules?* (July 18, 2007), <http://prn.to/1J8G5Uy>.

²⁶ E-mail from Tiffani Clements, public affairs specialist for the U.S. Small Business Administration, to Taylor Lincoln, research director of Public Citizen’s Congress Watch division (May 1, 2015).

²⁷ *Top 100 Contractors Report*, Federal Procurement Data System (2013), <http://1.usa.gov/1QrftTP>.

²⁸ *Company Overview of Lockheed Martin Management Systems Designers, Inc.*, BLOOMBERG BUSINESS (April 28, 2015), <http://bloom.bg/1EAEfvL>.

²⁹ *Report on the Most Serious Management and Performance Challenges Facing the Small Business Administration In Fiscal Year 2015*, SMALL BUSINESS ADMINISTRATION OFFICE OF INSPECTOR GENERAL (Oct. 17, 2014), <http://1.usa.gov/1DptPKF>.

errors made by government contracting personnel, including misapplication of small business contracting rules,” the SBA OIG wrote.³⁰

Lloyd Chapman, president of the American Small Business League, questioned whether inaccurate data could truly be chalked up to errors, as opposed to intentional misreporting. “There’s two questions, small or large. If someone were to make a mistake, half the time a large business would be reported as a small business; half the time, contracts for small businesses would be categorized as going to large businesses. It’s a coin flip,” Chapman told Public Citizen. “But all of the alleged errors always hurt small businesses. Why do these random errors not have a random distribution?”³¹

3. Exclusions. The SBA calculates the percentage of contracts going to small businesses and other special classes of businesses in terms of small business “eligible” federal procurement dollars. This methodology excludes various categories of procurement for which the SBA has determined that small businesses are not likely to be competitive bidders.³² Procurement that is excluded from what the SBA deems as small business eligible includes purchases by agencies on behalf of foreign governments, contracts performed outside of the United States, and contracts funded predominantly with agency generated sources.³³

To illustrate the scope of this practice, the SBA reported total small business eligible federal procurement in 2013 of about \$355 billion.³⁴ Actual federal procurement was about \$460 billion in 2013, according to the Government Accountability Office.³⁵

A 2014 report conducted at Congress’s request by a private firm hired by the SBA’s Office of Advocacy, explained, “The fundamental logic exclusion is that, if small businesses cannot obtain certain types of contracts, that procurement should not be part of the baseline used to compute the percentage of contract dollars awarded to small businesses.”³⁶

³⁰ *Id.*

³¹ Taylor Lincoln, research director for Public Citizen’s Congress Watch division, interview with Lloyd Chapman, president American Small Business League (April 20, 2015).

³² Evaluation of the Small Business Procurement Goals Established in Section 15(g) of the Small Business Act: A Report Pursuant to Section 1631(d) of the National Defense Authorization Act of 2013, HENRY B. R. BEALE MICROECONOMIC APPLICATIONS INC. FOR SBA OFFICE OF ADVOCACY (June 2014), <http://1.usa.gov/1zy5SA2>.

³³ *Id.*, Appendix B, <http://1.usa.gov/1EM11jb>.

³⁴ *Government-Wide Performance, FY2013 Small Business Procurement Scorecard*, SMALL BUSINESS ADMINISTRATION, <http://1.usa.gov/1DYh7Hi>.

³⁵ *Office of Entrepreneurial Development*, U.S. SMALL BUSINESS ADMINISTRATION (undated; viewed on April 16, 2015), <http://1.usa.gov/1Gct7Y5> and *Federal Subcontracting: Linking Small Business Subcontractors to Prime Contracts Is Not Feasible Using Current Systems*, GOVERNMENT ACCOUNTABILITY OFFICE (December 2014), <http://1.usa.gov/1OzvkvZ>.

³⁶ *Evaluation of the Small Business Procurement Goals Established in Section 15(g) of the Small Business Act: A Report Pursuant to Section 1631(d) of the National Defense Authorization Act of 2013*, HENRY B. R. BEALE MICROECONOMIC APPLICATIONS INC. FOR SBA OFFICE OF ADVOCACY (June 2014), <http://1.usa.gov/1zy5SA2>. (Report Pursuant to Section 1631(d) of the National Defense Authorization Act of 2013.)

But there does not appear to be a basis in law for using these exclusions, the researchers indicated. “Congress was rather unequivocal in its requirement of ‘not less than 20 [now 23] percent of the total value of all prime contract awards for each fiscal year,’” the Office of Advocacy report said.³⁷

Not all of the excluded categories are truly out of bounds for small businesses. The Office of Advocacy report pointed out that about 7 percent of the contracts in the excluded categories went to small businesses. Perhaps because small businesses are not truly unsuited for all opportunities in the excluded categories, the SBA OIG in 2011 recommended that the SBA revise its goaling guidelines to include contracts awarded or performed overseas as part of its goaling guidelines.³⁸

How Much Do Anomalies Cost Small Businesses In Relation to 23 Percent Goal?

Some contracts that are counted toward meeting small business goals are indisputably going to large businesses. But perhaps the most important question is: what is the scale of contracts to large businesses that are counted toward small business goals?

One window of insight comes from research by the American Small Business League (ASBL), a longstanding, relentless critic of the government’s fulfillment of its small business obligations. The ASBL has close ties to GC Micro, a small, women-owned, minority-owned government contractor specializing in information technology hardware and software.³⁹ The ASBL works out of the same building as GC Micro. The ASBL’s founder and president is Lloyd Chapman, who served as a salesman for GC Micro and was previously married to GC Micro CEO Belinda Guadarrama.⁴⁰

For a quarter century, Chapman and Guadarrama have sought information from the government regarding adherence to small business goals. When the government has not complied, they have often pressed their case in court, where they have often succeeded.

For example, the ASBL sought an enumeration of small business awards supporting the claim by the SBA that \$77.7 billion of federal procurement went to small businesses in 2007. The SBA refused to turn that information over to the ASBL in response to a Freedom of Information Act request, but did so after the ASBL initiated litigation.⁴¹

Later, the ASBL used an SBA-furnished list to analyze the 100 largest federal contract recipients categorized as small businesses in fiscal year 2012. Of these recipients, according to the ASBL, 71 companies that exceeded the SBA’s small business standards received \$9.5 billion in payments.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Government Contracts*, GC MICRO, <http://bit.ly/1z1ckVH>.

⁴⁰ Taylor Lincoln, research director for Public Citizen’s Congress Watch division, interview with Lloyd Chapman, president American Small Business League (March 19, 2015 and March 30, 2015).

⁴¹ Motion for Summary Judgment, American Small Business League vs. U.S. Small Business Administration, U.S. District Court for Northern District of California (Aug. 25, 2008), <http://bit.ly/1FkgcCf>.

Meanwhile, 27 businesses the ASBL deemed to meet the small business standard received \$7.6 billion. (The ASBL categorized two of the top 100 recipients as anomalies.)⁴²

Thus, this analysis concluded that more than 70 percent of the largest purported small business recipients of federal contracts did not meet the requirements to qualify as small businesses.

Another window of insight comes from the 2003 GAO report referenced above. It concluded that large businesses received \$13.8 billion out of \$50 billion categorized as going to small businesses in 2001. That finding was not as dramatic as the ASBL's. But it indicated that nearly 28 percent of purported small business awards were going to large businesses.

Finally, the above referenced report by funded by the SBA's Office of Advocacy concluded that in 2012, the SBA's use of exclusions in its methodology inflated the reported share of business received by small business by about 3 percentage points. With exclusions, 22.2 percent of dollars went to businesses categorized as small; without exclusions, the small business procurement rate would have been 19.2 percent.

III. Congress Continues to Authorize Test Program for Large Defense Contractors Despite Vacuum of Data

In 1989, Congress approved an experiment aimed at improving subcontracting opportunities for small and disadvantaged businesses. The experiment was called the Comprehensive Subcontracting Plan Test Program (CSP). It allowed the Defense Department to engage in one or more demonstration projects in which contractors would be permitted to submit overarching subcontracting plans and reports instead of being required to submit plans and reports for each contract. The program was slated to last until Sept. 30, 1993.⁴³

The original congressional conference report (quoted in a 2014 letter from several small business groups) anticipated the program being evaluated on such matters as, "whether prime contractors are providing significantly more work in areas that traditionally have not been made available to small and small disadvantaged businesses in the company-wide base."⁴⁴

More than a quarter of a century later, despite admonitions from oversight agencies and members of Congress, and even the inclusion of a legal requirement in the 2012 defense authorization bill, no such determination has ever been made. The Defense Department's web site still characterizes the program as an ongoing "test" intended "to determine whether comprehensive subcontracting plans

⁴² *Fiscal Year 2012 Top 100 Federal Small Business Contractors*, AMERICAN SMALL BUSINESS LEAGUE, <http://bit.ly/1Hm30N1>.

⁴³ Public Law 101- 189 (Nov. 29, 1989).

⁴⁴ Letter from American Institute of Architects, Business and Professional Women's Foundation, Minority Business RoundTable, National Small Business Association, National Women's Business Owners Corporation, Native American Contractors Association, Small Business & Entrepreneurship Council, U.S. Black Chambers Inc., U.S. Hispanic Chamber of Commerce and Women Impacting Public Policy, to chairs and ranking members of the U.S. House and Senate armed services and small business committees (April 2, 2014).

will result in increased subcontracting opportunities for small business while reducing the administrative burden on contractors.”⁴⁵

Complaints over the CSP program have existed for years. In a 2004 review of the program, the GAO wrote, “Although the Test Program was started more than 12 years ago, DoD has yet to establish metrics to evaluate the program’s results and effectiveness. As a result, there is no systematic way of determining whether the program is meeting its intended objectives and whether further changes need to be made.”⁴⁶

Further, the GAO reported, the “DoD is required to report the results of the Test Program in 2005, when the program is set to expire.”⁴⁷ The DoD evidently did not report the results of the CSP program by the end of 2005, but Congress extended it, nonetheless.⁴⁸

In 2010, five Democratic members of the House of Representatives submitted a letter to the U.S. comptroller general requesting that the GAO investigate several questions about the Test program, including “whether the subcontracting goals, as established in their master subcontracting plans, are being met annually.” No GAO report was filed in response to that inquiry.⁴⁹

The National Defense Authorization Act for 2012 stipulated that, “Not later than ... March 1, 2012, the Secretary of Defense shall submit a report on the results of the test program to the Committees on Armed Services and on Small Business of the Senate and the House of Representatives.”⁵⁰

A series of documents posted on the Defense Department’s web site (apparently released in response to a Freedom of Information Act request) show that DoD staff members recommended that the department not submit the required report, and that an undersecretary of defense accepted their recommendation.

A memo bearing hallmarks of an internal Defense Department document (but with the sender and recipient’s names redacted) said: “We do not believe that providing any data at this time would be

⁴⁵ *Comprehensive Subcontracting Plan Test Program*, OFFICE OF SMALL BUSINESS PROGRAMS U.S. DEPARTMENT OF DEFENSE (viewed on April 17, 2015), <http://1.usa.gov/1FXT6Nr>.

⁴⁶ *DoD Needs Measures for Small Business Subcontracting Program and Better Data on Foreign Subcontracts*, U.S. GENERAL ACCOUNTING OFFICE (April 2004), <http://1.usa.gov/1cMdXMG>.

⁴⁷ *Id.*

⁴⁸ The basis for saying that the Defense Department evidently did not report results is based on widespread reporting and observation of concerned parties that the department never has submitted such results. The Defense Department has not disputed these characterizations. *See, e.g., A Quarter Century Later, Pentagon’s Test Program for Small Businesses Still Untested*, THE WASHINGTON POST (Sept. 29, 2014), <http://wapo.st/1HmsLNg>.

⁴⁹ Letter from Rep. Yvette Clarke (D-N.Y.), Lynn Woolsey (D-Calif.), Chellie Pingree (D-Maine), Bennie Thompson (D-Miss.) and Carolyn Maloney (D-N.Y.) to Comptroller General Gene Dodaro (Oct. 21, 2010) and *A Quarter Century Later, Pentagon’s Test Program for Small Businesses Still Untested*, THE WASHINGTON POST (Sept. 29, 2014), <http://wapo.st/1HmsLNg>.

⁵⁰ Public Law 112-81, as reflected in memo from Andre J. Gudger, director, Department of Defense Office of Small Business Programs to Under Secretary of Defense (Oct. 22, 2012)..

productive.” The memo’s author deemed the timeframe allotted by Congress to produce the report “completely unrealistic.”⁵¹

Undersecretary of Defense Frank Kendall wrote letters date stamped Nov. 22, 2012, to Senate armed forces committee Chairman Carl Levin (D-Mich.) and House armed forces committee Chairman Buck McKeon (R-Calif.), notifying them of delays in reporting. “We intend to submit this report by March 1, 2013.” Kendall wrote.⁵² As of May 2015, the report has not been submitted.⁵³

A 2014 GAO study on the government’s contracting databases cast doubt on whether it would even be feasible to assess the subcontracting performance of CSP participants. The GAO found that the “lack of specific subcontract information makes it difficult or impossible to determine whether small businesses were awarded subcontracts under a specific contract covered by summary reports.”⁵⁴ CSP program participants submit summary reports.

The CSP was set to expire at the end of 2014. In April 2014, a letter signed by 10 organizations representing small businesses and businesses owned by women and minorities was sent to the chairmen and ranking members of the House Armed Services Committee and the House Small Business Committee. The letter expressed doubts about the effectiveness of the program.

“As the CSP Program is considered for its seventh reauthorization in the FY15 [National Defense Authorization Act], we urge you to take this opportunity to obtain data on the program moving forward. Despite the program’s longevity, we cannot find any data that suggests this is good for subcontractors and small businesses.”⁵⁵

The Small Business Technology Council, which says it “advocates for the 5,000 Small Business Innovation Research (SBIR) companies,” wrote in September 2014 to the chairmen and ranking members of the U.S. Senate and House armed services committees, “To our knowledge, no small business organization supports continuing CSP ... A program that is twenty-five years old and has no positive reviews should not be continued.”⁵⁶

In September 2014, a DoD spokeswoman told the *Washington Post* that the DoD’s position was “to not have Congress extend the CSP,” adding that the program “has led to an erosion of our small

⁵¹ Memo from redacted sender and recipient, office of the secretary of defense (Nov. 2, 2012).

⁵² Letter from Undersecretary Frank Kendall to Sen. Carl Levin (D-Mich.) (date stamped Nov. 12, 2012).

⁵³ E-mail from Department of Defense Spokeswoman Maureen Schumann to Public Citizen Researcher Taylor Lincoln (April 23, 2014).

⁵⁴ *Federal Subcontracting: Linking Small Business Subcontractors to Prime Contracts Is Not Feasible Using Current Systems*, GOVERNMENT ACCOUNTABILITY OFFICE (December 2014), <http://1.usa.gov/10zvkvZ>.

⁵⁵ Letter from American Institute of Architects, Business and Professional Women’s Foundation, Minority Business RoundTable, National Small Business Association, National Women’s Business Owners Corporation, Native American Contractors Association, Small Business & Entrepreneurship Council, U.S. Black Chambers Inc., U.S. Hispanic Chamber of Commerce and Women Impacting Public Policy, to chairs and ranking members of the U.S. House and Senate armed services and small business committees (April 2, 2014).

⁵⁶ Jere W. Glover, executive director, Small Business Technology Council, letter to the chairmen and ranking members of the U.S. Senate and House armed services committees (Sept. 10, 2014).

business industrial base.” The *Post’s* paraphrased the spokeswoman as saying that the Test “program has resulted in savings for the large prime participants, but that those participants have shown no evidence that the savings have translated into more opportunities for small subcontractors.”⁵⁷

A 2014 report by the House armed services committee acknowledged, “after nearly 24 years since the original authorization of the program, the test program has yet to provide evidence that it meets the original stated goal of the program.”⁵⁸

Despite these misgivings, Congress in 2014 extended the Test program for two more years. The legislation called the comptroller general of the United States (who oversees the GAO) to “submit a report on the results of the test program” to House and Senate armed services and small business committees by Sept. 30, 2015.⁵⁹

The renewal of the program in spite of opposition from small business representatives and even the Pentagon, itself, suggests that somebody must have strongly favored its continuation. Although most of the rhetoric championing the test program promotes it as a boon to small businesses, large contractors have not hidden their appreciation of the program.

“Without CSP, defense contractors would be forced to revert from advocates for small business to predominantly data collectors. It is estimated that without CSP, defense contractors would be forced to submit more than 10,000 additional reports to DoD annually,” the Aerospace Industries Association said in a statement in 2014.⁶⁰ At least eight current members of the AIA are part of the CSP, as is former CSP participant Boeing.⁶¹

Participants in the CSP program had \$85.6 billion federal dollars obligated to them in 2014. [Figure 2]

⁵⁷ *A Quarter Century Later, Pentagon’s Test Program for Small Businesses Still Untested*, THE WASHINGTON POST (Sept. 29, 2014), <http://wapo.st/1HmsLNg>.

⁵⁸ J.D. Harrison, *Businesses, Pentagon Agree This Program Doesn’t Work. Congress Saved It Anyway*, THE WASHINGTON POST (Dec. 31, 2014), <http://wapo.st/1FXQuiO>.

⁵⁹ H.R. 3979, National Defense Authorization Act for Fiscal Year 2015, Section. 821, Temporary extension of and amendments to test program for negotiation of comprehensive small business subcontracting plans, <http://1.usa.gov/1Q5ZL0i>.

⁶⁰ Charles S. Clark, *Will an Obscure Pentagon Small Business Program Live On?* GOVERNMENT EXECUTIVE (July 2, 2014), <http://bit.ly/1bhWgUI>.

⁶¹ *Our Members*, AEROSPACE INDUSTRIES ASSOCIATION (viewed on April 16, 2015), <http://bit.ly/1yIilkL> and *Participants Under the Comprehensive Subcontracting Test Program*, U.S. DEPARTMENT OF DEFENSE OFFICE OF SMALL BUSINESS PROGRAMS, <http://1.usa.gov/1yIh7LC>.

Figure 2: Selected Participants in the Comprehensive Subcontracting Plan Test Program

Company ⁶²	2014 Federal Dollars Obligated
Lockheed Martin	\$32,229,878,274
General Dynamics/ C4 Systems	\$15,350,243,010
Raytheon Co.	\$12,619,847,784
Northrop Grumman Electronic Systems	\$10,262,978,796
L3 Communications CSB Sector	\$5,789,741,861
BAE Systems	\$4,988,057,388
GE Aviation	\$2,453,988,899
Harris Corp Government Communications Systems Division	\$1,915,630,828
Total	\$85,610,366,840

Sources: Department of Defense and Federal Data Procurement System. (Through updates of May 5, 2015)

Aside from freeing large contractors from data reporting requirements, the CSP may be permitting them to retain a disproportionate share of contracts for themselves instead of subcontracting it. Semiannual reports that program participants are required to submit would theoretically lend insight into that question. But the Defense Department does not appear to believe that such reports are a matter of public record.

In 2013, the American Small Business League submitted a Freedom of Information Act request to the Department of Defense requesting the “most recent comprehensive subcontracting plan submitted by Sikorsky Aircraft Corp. for participation in the Comprehensive Subcontracting Plan Test Program.”⁶³ In declining the request, the Defense Department claimed that disclosing the comprehensive contracting plan would harm Sikorsky by revealing trade secrets.⁶⁴ In late November 2014, U.S. District Judge William Alsup rejected the government’s argument and ordered the government to release Comprehensive Subcontracting Plan.⁶⁵ An appeal is pending.⁶⁶

The Small Business Administration reported that in 2013, 34 percent of subcontracting dollars went to small businesses. Further, in data provided to Public Citizen, the SBA reported that overall subcontracting dollars (as well as subcontracting dollars to small businesses) were at their highest level in 2013 over the past five years, the period of data that Public Citizen requested. [Figure 3]

⁶² Figure does not include Pratt and Whitney or Hamilton Sundstrand Corporation, which are in the CSP program but are not listed in the federal government’s top 100 contractors for 2014. Also not included is former CSP participant Boeing, which had government revenue of \$18 billion in 2014. Some Boeing contracts are still subject to the rules of the CSP, according to a GAO report

⁶³ *Freedom of Information Request to Department of Defense*, AMERICAN SMALL BUSINESS LEAGUE (Aug. 9, 2013), <http://bit.ly/1DpEDIM>.

⁶⁴ Press release, American Small Business League, *Pentagon Sued for Refusing to Release Contracting Data on Sikorsky* (May 14, 2014), <http://prn.to/1Q60sqv>.

⁶⁵ *American Small Business League, v. Department Of Defense*, Order Denying Cross Motions For Summary Judgment, U.S. District Court for the Northern District of California (Nov. 23, 2014).

⁶⁶ Press release, American Small Business League, *9th Circuit Decides Pentagon Sikorsky Case Not Going To Mediation* (March 18, 2015), <http://prn.to/1PTjSh8>.

Figure 3: Federal Procurement, Subcontracting Dollars (2009-2013)

Fiscal Year	Total Subcontracting Dollars	Small Business Subcontracting Dollars	Total Small Business Percentage
2013	\$254,927,110,732	\$86,704,643,233	34.0%
2012	\$242,481,594,180	\$81,443,436,097	33.6%
2011	\$210,373,245,914	\$73,553,162,174	35.0%
2010	\$209,809,688,067	\$74,183,275,535	35.4%
2009	\$216,303,255,405	\$68,823,506,680	31.8%

Source: Small Business Administration

These figures suggest an improved landscape for small business subcontracting. However, as reports by the SBA OIG and other government oversight entities have shown, aggregate government reports do not necessarily present a true picture of the amount of contracting work obtained by truly small businesses. Better transparency regarding the CSP program would be a start.

IV. What Political Influence Factors Might Stymie Small Businesses From Receiving Fair Hearing in Washington, D.C.?

This report shows longstanding concerns over the government's compliance with the legal requirement on small business contracting. These concerns have been put forth not only by advocates for small businesses but by independent investigators, such as the SBA's Office of Inspector General and the Government Accountability Office.

This report presents evidence that the share of prime contract procurement that small businesses are receiving is less than the 23 percent to which they are entitled by the letter of the law. Secondly, this report shows significant anomalies in subcontracting of federal contracts. The Defense Department's dereliction in complying with requests, legal mandates, and its own promises to furnish data on the Comprehensive Subcontracting Plan Test Program is alarming.

These conclusions suggest that small businesses are being shortchanged on programs expressly designed to help them. These circumstances have persisted without a great deal of outcry by lawmakers. This is somewhat surprising. Whether seeking to repeal the estate tax, roll back regulations or engender public support for most any other policy proposal, members of Congress almost reflexively invoke small businesses (or Main Street), which they habitually laud with almost religious fervor.

Methodological decisions by the SBA to inflate the reported share of contracts received by small businesses could be explained by agency officials' desire to meet their marks. Errors that categorize large businesses as small could be explained by an insufficient enforcement budget or simple lack of zealotry or care by civil servants.

But why would Congress pay so little lip service to tangible ways in which small businesses are being bilked in relation to the Small Business Act? This section will briefly discuss five ways in which large contractors may be deriving political power.

1. Jobs for congressional members' constituents. The massive scale of defense procurement ensures that defense contractors provide enormous numbers of jobs. Many experts have observed that this puts defense contractors in a symbiotic relationships with the members of Congress who appropriate the money that flows to them.

Contractors further enhance their power by dispersing work throughout the country. For instance, consider this example that James Fallows recounted in a lengthy recent piece in *The Atlantic* enumerating troubles with the military: Efforts to cancel production of the B-2 bomber in the 1980s were frustrated because work on the airplane was being conducted in 383 out of 435 congressional districts.⁶⁷

The B-2 bomber, 21 of which were eventually built, ended up costing \$2.2 billion apiece. To put that in perspective, the cost of each airplane would sustain a city of 40,000 at the average U.S. income for a year.⁶⁸

The enormous defense spending has arguably lead to the realization of warnings articulated by President Dwight Eisenhower in his farewell speech in which he coined the term "Military Industrial Complex."

"This conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence – economic, political, even spiritual – is felt in every city, every state house, every office of the federal government," Eisenhower warned in 1961.⁶⁹

Despite its typically rocky record on passing funding bills, Congress has approved the authorization bill for the Defense Department 54 years in a row, a streak that dates to 1961.⁷⁰

2. Future jobs for military officials. Military officials frequently take lucrative jobs or consulting positions with defense contractors after leaving the service, and that phenomenon has grown significantly, according to Vietnam veteran and former Sen. Jim. Webb (D-Va.).

In his *Atlantic* piece, Fallows quoted Webb from his book: "It is no secret that in subtle ways, many of these top leaders begin positioning themselves for their second-career employment during their final military assignments,' Webb wrote in *A Time to Fight*. The result, he said, is a 'seamless interplay' of corporate and military interests 'that threatens the integrity of defense procurement.'" ⁷¹

⁶⁷ James Fallows, *The Tragedy of the American Military*, THE ATLANTIC (January/February 2015), <http://theatlantic.com/1D2RrnU>.

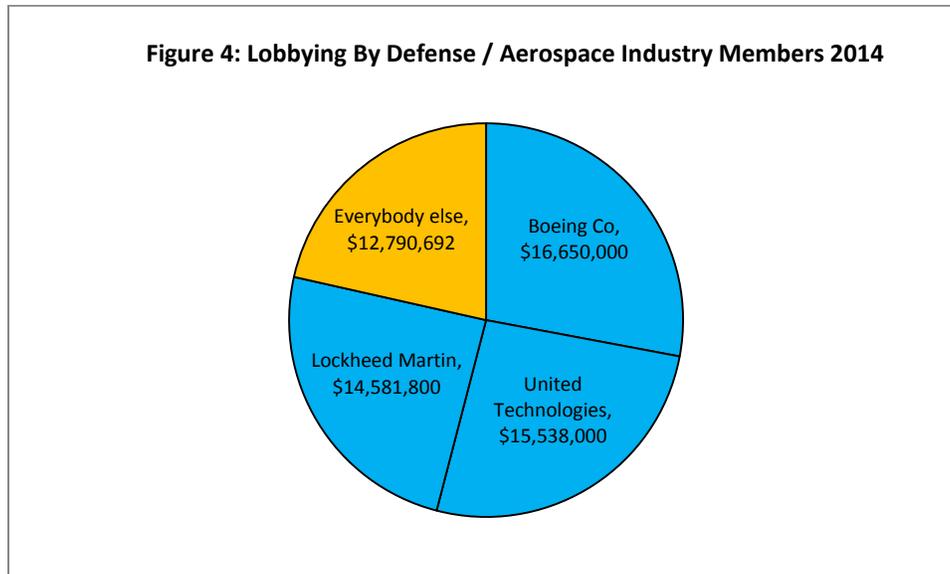
⁶⁸ Anthony Capaccio, *U.S. Bomber Planes at \$81 Billion Seen 47 Percent More Than Plan*, BLOOMBERG (Dec. 6, 2013), <http://bloom.bg/1D3WHaL>.

⁶⁹ President Dwight Eisenhower, address (Jan. 17, 1961), <http://1.usa.gov/1D3Xs3N>

⁷⁰ See, e.g., Rachel Alexander, *The Truth About the National Defense Authorization Act*, TOWNHALL.COM, Dec. 8, 2011, <http://bit.ly/1GaGdoO>.

⁷¹ James Fallows, *The Tragedy of the American Military*, THE ATLANTIC (January/February 2015), <http://theatlantic.com/1D2RrnU>.

3. **Lobbying.** Members of the defense sector spent \$126.1 million and employed 806 lobbyists in 2014, according to the Center for Responsive Politics (CRP).⁷² Of the 806 lobbyists, 695 were former federal employees.⁷³ Among subset industries of the defense sector, defense aerospace was the highest at \$59.5 million. In the influence-pursuing casino of Washington, D.C., that ranked only 19th among industries. But, still, \$59.5 million is \$59.5 million. Lockheed, Boeing and United Technologies (which ranked 1st, 2nd and 7th among in federal contracting revenue in 2014), accounted for 79 percent of the spending among the defense aerospace industry members.⁷⁴ [Figure 4]



Source: Center for Responsive Politics (www.opensecrets.org) (Through updates of May 5, 2015)

4. **Conventional campaign contributions.** Corporations are not permitted to give campaign contributions to candidates or parties. However, they may form political action committees (PACs), which may receive contributions from their employees, then distribute them to candidates and parties. Individual employees also may contribute directly to candidates, of course.

The defense sector gave \$25.1 million in campaign contributions in the 2014 election cycle, according to CRP, causing it to be ranked 13th among sectors.⁷⁵ Of contributions, 60 percent went to Republicans and 40 percent to Democrats. Nine of the 10 largest donors were among the 10 largest recipients of federal contract dollars. All of the largest donors were among the top 28 recipients of contract dollars. [Figure 5]

⁷² *Sector Profile: Lobbyists, 2014*, CENTER FOR RESPONSIVE POLITICS (viewed on April 17, 2015), <http://bit.ly/1EhVNyx>.

⁷³ *Top Industries: Revolving Doors*, CENTER FOR RESPONSIVE POLITICS (viewed on April 17, 2015), <http://bit.ly/1P1pbdW>.

⁷⁴ *Influence and Lobbying*, CENTER FOR RESPONSIVE POLITICS (viewed on April 17, 2015), <http://bit.ly/1F4oVrX>.

⁷⁵ *Interest Groups, Sector Totals: 2013-2014*, CENTER FOR RESPONSIVE POLITICS (viewed on April 16, 2015), <http://bit.ly/1GaRHsj>.

Figure 5: Top Campaign Contributors, Defense Sector, 2013-2014

Rank Among Defense Sector in Contributions	Rank in Contracting Revenue (2014)	Company	Campaign Contributions From PACs and Employees
1	1	Lockheed Martin	\$2,961,022
2	5	Northrop Grumman	\$2,650,864
3	2	Boeing Co	\$2,622,329
4	4	Raytheon Co	\$2,631,723
5	7	United Technologies	\$1,702,645
6	3	General Dynamics	\$1,444,398
7	9	BAE Systems	\$1,020,579
8	10	Huntington Ingalls Industries	\$778,494
9	28	Harris Corp	\$770,764
10	8	L-3 Communications	\$497,335

Sources: Center for Responsive Politics (www.opensecrets.org) (Through updates of May 5, 2015) and Federal Procurement Data System.

Charles Tiefer is a law professor at the University of Baltimore who specializes in contracting issues. “Why is it that there is virtually no legislation to tighten things up and, I believe, that there is no enforcement?” Tiefer asked with regard to inequities in small business contracting programs.

“Of course, I think lobbying and campaign contributions are a factor,” Tiefer said, explaining that he believed that trade associations for large contractors consider it part of their mission to deter the SBA from being too aggressive.

5. Undisclosed campaign contributions. Another way for corporations to influence outcomes in Washington, D.C., is through so-called “outside expenditures.” These are expenditures to influence elections that candidates or parties may not legally influence. Corporations may make such expenditures in their own name or, indirectly, by contributing to third-party groups.

The amount of outside spending has risen markedly since the U.S. Supreme Court’s 2010 decision in *Citizens United v. Federal Election Commission*. This decision permitted corporations and unions to use money from their treasuries to explicitly advocate for the election or defeat of candidates.⁷⁶

Potential third-party groups to which a corporation or other entity might give include super PACs and groups registered under sections 501(c)(4), 501(c)(5) or 501(c)(6) of the tax code, which are reserved for social welfare groups, unions, and business trade associations, respectively. Notably, 501(c) groups do not have to disclose their contributors.

Since the Supreme Court permitted corporations to spend money to influence elections, corporations have made few disclosed electioneering expenditures. However, corporations almost certainly are making contributions to nonprofit groups that are using a share of that money, in turn, to influence elections.

⁷⁶ *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), <http://1.usa.gov/9Hn7y5>.

As with overall outside spending, the amount of electioneering spending by outside groups that do not disclose their donors also has risen markedly since *Citizens United*. Nondisclosing groups spent nearly \$193 million to influence the 2014 congressional elections.⁷⁷ In 2006, the last mid-term election cycle before *Citizens United*, such spending was only \$5.2 million.⁷⁸

There is no way of knowing how much money defense contractors have given to non-disclosing outside groups or if those outside groups have, in turn, pressured lawmakers or executive branch officials to adopt or retain procurement policies favor large contractors.

The administration of President Obama is reportedly contemplating an executive order that would require federal contractors to disclose their direct and indirect political spending.

Conclusion

U.S. programs intended to level the field for small businesses and other historically disadvantaged businesses are riddled with errors, anomalies and exceptions. These generally seem harmful to small businesses' ability to realize the contracting goals laid out in laws and regulations.

It is difficult to conclusively attribute any of these errors, anomalies or exceptions directly to a given political factor. However, it seems reasonable to assume that they would not exist to such a large degree if small businesses, for instance, furnished the majority of post-retirement jobs for military officials, performed the lion's share of contractor lobbying or gave the majority of campaign contributions from contractors.

⁷⁷ *Political Nonprofits*, THE CENTER FOR RESPONSIVE POLITICS (viewed on May 5, 2015), <http://bit.ly/1zypy73>.

⁷⁸ *Outside Spending by Nondisclosing Groups, Cycle Totals, Excluding Party Committees*, THE CENTER FOR RESPONSIVE POLITICS (viewed on May 5, 2015), <http://bit.ly/1zypy73>.