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## House Small Business Bill Could Have a Large Impact on Small Businesses

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*On March 25, 2015, the House Small Business Committee approved The Small Contractors Improve Competition Act of 2015 (H.R.1481) (“SCICA”), which would amend the Small Business Act and the National Defense Authorization Act for Fiscal Year 2013, and is intended to increase the number of awards made to small businesses by addressing several perceived obstacles that inhibit opportunities to increase small business participation in Federal contracting.*

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One obstacle that SCICA addresses is the practice of contract bundling. Contract bundling occurs when an agency consolidates multiple tasks into one large solicitation, rather than issuing several separate solicitations for the tasks. According to the House Small Business Committee, this practice hurts small businesses because they are often unable to win, or even bid on, these large bundled contracts. SCICA addresses this issue by requiring an agency intending to issue a bundled solicitation to post notice of its decision to do so on a public website at least 7 days before the bundled solicitation is issued. This notice must include information regarding the reason for the decision, as well as the negative impact that the bundling may have on small businesses. Additionally, agencies are required to issue a justification for bundling a contract at the time that the bundled solicitation is issued. This is a significant change because, under current law, agencies have a year to issue such a justification. These changes will no doubt increase the incidence of protests, on the ground that some bundling either does not comport with applicable regulations and unlawfully reduces competition. However, since the changes focus on the pre-solicitation phase of bundled procurements, the changes are designed to encourage the prevention as well as the resolution of the propriety of bundling for a particular procurement at the earliest possible time. Arguably, the change should not only favor opportunities for small businesses but also increase efficiency in appropriately bundled procurements.

Another key element of SCICA is its treatment of small business joint ventures and teaming agreements. Small businesses often form joint ventures or enter into teaming agreements with each other in order to bid on contracts that a single small business would not otherwise be able to perform. However, small business joint ventures and teams often have difficulty meeting the past performance requirements of such contracts. This is in large part due to the way in which agencies evaluate past performance. In the case of

joint ventures, agencies may consider only the past performance of the joint venture itself, and not that of the parties that make up the joint venture. In the case of small business prime-sub teams, agencies often consider only the past performance of the small business prime contractor, and do not consider the past performance of the small business subcontractors. SCICA changes this practice by requiring agencies to consider the past performance of the individual small business parties to a joint venture, and, in the case of small business teaming agreements, to consider the past performance of all first-tier small business subcontractors. This requirement should encourage teaming among qualified small business subcontractors and result in the opportunity for higher collective past performance ratings for the joint venture or team, thereby potentially increasing the likelihood of awards to such qualified small business joint ventures and teams.

SCICA also imposes limitations on when reverse auctions may be used. In a reverse auction, the agency issues a solicitation for goods or services, and contractors try to underbid each other until the auction period ends. While reverse auctions are only intended to be used in procurements for non-complex commodities and simple services, the House Small Business Committee expressed concern that reverse auctions are being used more widely, to the detriment of small businesses. Thus, SCICA strictly limits the use of reverse auctions to instances in which award can be made on a technically acceptable or technically unacceptable basis, and where no further technical evaluation is required. Additionally, the rule states that only a contracting officer who has had specific reverse auction training may make decisions regarding whether the use of reverse auctions is appropriate, or regarding how to conduct a reverse auction. Overall, this change should serve to ensure the appropriate use of reverse auctions.

SCICA also clarifies that the Small Business Administration's non-manufacture rule does not apply to service contracts. The non-manufacture rule requires non-manufacturer recipients of small business set-aside contracts to perform the contract by supplying goods manufactured by other small businesses. The purpose of the existing non-manufacture rule is to prevent brokerage-type arrangements in which small business prime contractors essentially serve as conduits of large businesses to sell supplies manufactured by the large business under a small business set-aside contract supply. While the non-manufacture rule clearly applies to supply contracts in accordance with the Small Business Act, the Court of Federal Claims held in a recent decision that the non-manufacture rule also applies to service contracts that have a supply component, despite Small Business Administration regulations to the contrary.<sup>1</sup> SCICA clarifies that this is not the case, by stating that the non-manufacture rule: "shall not apply to a contract that has as its principal purpose the acquisition of services or construction". See SCICA §7(a)(2)(C). While this change will not directly advantage small business product manufacturers, it provides a clarification that invites the rule to be implemented more consistently.

Finally, SCICA requires the Small Business Administration to take steps to ensure that the Federal government's small business goals are being met, and that agencies are not receiving higher small business grades than they deserve. Specifically, SCICA requires the Small Business Administration to develop a methodology for calculating a score to be used to evaluate the compliance of each Federal agency in meeting the goals of the Small Business Act, and to develop a scorecard for each agency based on this methodology. The scorecard will assess an agency's success in meeting not only its annual small business prime contracting goals, but also its small business subcontracting goals. These scorecards will then be submitted to the President and Congress annually. This change will encourage transparency, and this transparency may incentivize a more active commitment to small business opportunities by agencies. It is also possible that more robust reporting requirements may also affect agency interest in large business subcontracting plans.



<sup>1</sup> See *Rotech Healthcare Inc. v. United States*, 118 Fed. Cl. 408 (Fed. Cl. 2014).

Collectively, these changes promise to increase the efficiency and effectiveness of Federal policy favoring the opportunity for small businesses to compete fairly in the Federal marketplace. The changes would incentivize procuring agencies and Federal contractors by clarifying Federal policy and increasing accountability.

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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