



Charles Tiefer
Professor of Law
CTIEFER@ubalt.edu

UNIVERSITY OF BALTIMORE SCHOOL OF LAW

3904 Woodbine Street
Chevy Chase, MD 20815

**OPINION ON:
THE COMPREHENSIVE SUBCONTACTING PLAN
TEST PROGRAM**

Thank you for the opportunity to express my opinion on the subject of the Comprehensive Subcontracting Plan Test Program, namely that the program is a sham and its extension will be seriously harmful to vital opportunities for small business to get government contracting work. I am Professor of Government Contracts at the University of Baltimore Law School and the co-author of GOVERNMENT CONTRACT LAW IN THE TWENTY-FIRST CENTURY (Carolina Academic Press 2012). I was Commissioner in 2008-2011 on the Congressionally chartered, independent Commission on Wartime Contracting., including my 25 participation in televised hearings about procurement and my 3 personal missions to Iraq and Afghanistan. This is solely my opinion and not the opinion of my school or any other institution.

To summarize: the Comprehensive Subcontracting Plan Test Program (CSPTP or "Test Program") (1) reduces vital opportunities for small business; and, (2) has a background of doubt and criticism. CSPTP is seriously harmful to small business. It

should not have gotten its more than 20 years of extension as a never-tested "Test Program." Let it expire.

Background

The government has a very important Small Business Subcontracting Program pursuant to Federal Acquisition Regular (FAR) 19.7 and 15 U.S.C. 637(d). For every large contract, the prime contractor must have a subcontracting plan. This plan sets goals for the large contractor to award small businesses a substantial percentage of the contract's dollars, and this plan lays out the means for making that happen. Devon E. Hewett, Jonathan T. Williams, and Isaias (CY) Alba, IV, Small Business Contracting Programs—Part II, 10-13 Briefing Papers 1 (2010). The small business subcontracting goal is 35.9%. But that is the goal within whatever fraction of the contract is chosen by the contractor to be subcontracted: the goal becomes a low dollar figure, in absolute terms, when the contractor does not subcontract much. For defense contracts, the Defense Contract Management Agency does oversight of the implementing of the subcontracting plan; for civilian contracts, the Small Business Administration does that oversight.

The so-called Test Program was created temporarily, or at least with the expectation that for the time being it would be temporary, pursuant to statute in 1989. Section 834 of the National Defense Authorization Act for FY 1990 and 1991.¹ Today this Test Program includes up to a dozen or two of the largest defense contractors like Lockheed Martin and Northrop Grumman. At the time, the CSPTP was adopted under the guise of increasing subcontracting opportunities for small businesses. In reality, it

¹ Recent Developments in Contract Law -- 1989 in Review, at subhead "Comprehensive Small Business Subcontracting Plans."

created a loophole that has allowed many of the Pentagon's largest prime contractors to circumvent the law on small business subcontracting goals. "The program is overseen by the Office of Small Business Programs (OSBP) in the Office of the Secretary of Defense (OSD)." U.S. Small Business Office of Government Contracting, Subcontracting Assistance Program (2006), at 90.

The Test Program applies only to DOD contracts, and does not apply to civilian contracts, but this does not limit its significance as one might think. A study found that "DOD accounts for . . . 71 percent of the reported subcontracting dollars [in the Small Business Subcontracting Program], and the civilian agencies account for about . . . 29 percent."²² So the fact that the Test Program applies to DoD contracting still makes it potentially applicable to about three-quarters of the small business subcontracting.

Rather than bidders on prime contracts pledging specific means and goals for small business subcontracting, the Test Program let the prime contractors merely speak of generalized companywide notions of such subcontracting. The "DoD Test Program for the Negotiation of Comprehensive Subcontracting Plans . . . allows participating contractors to have one company-wide subcontracting plan for all defense contracts, rather than individual subcontracting plans for every contract over \$550,000."

Subcontracting Assistance Program *supra*, at 90. In this way, the Test Program let the Defense Department radically dilute and weaken its requirements for subcontracting plans from the large defense contractors.

It had one saving grace, now being wiped out: that it was meant to be tested to see whether, as was claimed, it would somehow actually increase small business subcontracting, and, absent such a basis to justify a renewal, it was time-limited and

²² GAO, Small Business Subcontracting Report Validation Can Be Improved, Dec. 13, 2001, at 1.

would expire. Indeed, it was originally (in the National Defense Authorization Act for Fiscal Years 1990 and 1991) scheduled only for FY 1992-1993, anticipating testing and a decision on expiration or continuation 20 years ago. But, the only test study appears to have been deliberately not published in final form, just as information has not been released under the Freedom of Information Act. Business Research Services, Inc. reported a decade ago, in 2004, that even back then, "After 12 years jury is still out on DOD subcontracting program . Twelve years ago, the Defense Department created the Test Program Today the department does not know whether the Test Program is achieving its goals and has established no metrics to find out What is known is that the percentage of first-tier subcontract dollars going to small businesses fell from about 43% in 1995 to about 34% in 2002." After 12 Years Jury is Still Out on DOD Subcontracting Program, 2004 WLNR 22099385.

The dozen or two largest defense contractors who benefit from the program have gotten it extended over, and over, and over. Calling a 25 year old program a "Test Program" is like a "test program" of a 2 year temporary amnesty program for tax evaders, or a 2 year temporary program for illegal aliens, still being called a temporary "test program" after 25 years. If this initially 2 year old "Test Program" were a baby when it started then referring to it as just temporary is like still calling it a toddler when it reached its commencement ceremony for college graduation -- except that it had never had to take a test to continue its education. The title "Test Program" for this 25 year untested program, and the rationalization that it should still be extended to give further time to someday do a hypothetical study are, frankly, absurd. Yet extending the program to 2017 is under consideration.

1. CSPTP Reduces Vital Opportunities for Small Business

Let us look first at what subcontracting plans do and what CSPTP changes.

DoD prime contract dollars have swelled since 1993. Of course, hopefully some fraction of those prime contract dollars flow directly in prime contracts to small businesses. However, those prime contracts do not offer the only opportunities in defense contracting for small business, and maybe not the main opportunities. A prime contract like building a ship, taken as a whole, involves challenges of scale, complexity, and productive capacity that would make it hard for any small businesses to take on the contract themselves. In contrast, a large contractor can compete for the prime contract, and pledge that it will try to keep for itself just those overall aspects of dealing with scale and complexity that are out of range for small businesses. Then, to reach the goals of its own agreed-to subcontracting plan for getting the contract awarded, the prime contractor will break down the supporting pieces so that much of the needed components, services and other inputs come from subcontracts to small businesses which each do a manageable piece of the work. So, some of the most vital opportunities for small business consist of prime contractors having goals and means for subcontracting, to small businesses, to do parts contributing to an overall prime contract.

To foster the participation of small businesses in subcontracting, the Federal Acquisition Regulation (FAR) specifies that contracts have subcontracting plans for large contracts. FAR 19.704. Subcontracting is an evaluation factor for competitive offers, so, contractors potentially have a potent incentive to have strong goals for small business and strong means for achieving those goals. For DoD contracts, during the life of the contract, DCMA receives reports on that particular contract about small business's role,

overseeing that the prime implements their subcontracting plan. Subcontracting Assistance Program, *supra*.

The Test Program or CSPTP frees the big defense contractor from doing individual small business subcontracting plans. "The test program allows these companies to have one company-wide or division-wide subcontracting plan for *all defense contracts*." Subcontracting Assistance Program, *supra*, at 18 (all italics in this memo are added.)

. That does not merely mean non-preparation of a document. The large defense contractor in the program does not need to commit to a goal of small business subcontracting in any of its particular defense contracts -- no goal at all. The large defense contractor in the program does not need to commit to the means to achieve small business subcontracting -- no means at all. It is like letting prisoners in a prison system, seeking parole, no longer have to commit to and to show individual good behavior and worthiness, but just that the prison population as a whole will, in some broad, vague way, not be so bad -- even though many or even most of the individuals being paroled are not worthy.

In diluting and weakening the small business subcontracting, the CSPTP plays a large role, because of, first, its scale. Just looking at the percentage of DoD spending in awards to CSPTP prime contractors would be understating the program. Even that understates the program. DoD prime contracting has two other exceptions to requirements for meaningful subcontracting for small business. Spending overseas was not required to be subcontracted. And, commercial contracting had greatly watered-down subcontracting requirements. So the fraction of subcontracting subject to

meaningful small business requirements but excused under the CSPTP—the faction left over after putting aside these exclusions – was bigger than 1/6. The CSPTP, together with the exclusions, threatens to cut a huge piece out of the best hopes for defense small business subcontracting.

Usually, a defense contractor feels strong pressure, at least in theory, to build strong elements into their subcontracting plan for each contract. As noted, the typical procurement makes small business subcontracting an evaluation factor for award of each contract. All else being equal, a defense contractor has a competitive advantage from a strongly positive evaluation for their subcontracting plan for their bid on a solicitation, and, loses a competitive advantage from a less positive evaluation for their subcontracting plan.³

Another way to look at it: Contracting officials will suggest potent means for small business contracting. Here is a description of the potent means that officials will suggest for a subcontracting plan geared to a particular contract for a normal contractor (not CSPTP):

Conducting market research to identify small business subcontractors; breaking out contract work items into economically feasible unites to encourage small business participation; soliciting small business concerns early in the acquisition process; providing interested small businesses with timely information regarding subcontracting opportunities; directing small businesses to contacts at the SBA that can provide additional assistance and utilizing the services provided by small business organizations associations, and local, state and federal assistance offices.

See Briefing Papers, *supra*.

For example, a contractor outside the Test Program will seek a high evaluation factor in competition for a particular subcontract by saying how it would beef up

³ Devon E. Hewett, Jonathan T. Williams, and Isaias (CY) Alba, IV, Small Business Contracting Programs—Part II, 10-13 Briefing Papers 1 (2010).

subcontracting for the particular contract. This means specifics, like tapping some specific pool of subcontractors geographically or functionally related to the particular contract. In contrast, a contractor inside the Test Program just offers broad overall generalizations. It does not have to propose high goals for a particular contract nor, to devise strong focused means to subcontract to small business for a particular contract; nor, to win favorable evaluation of such strong focused ways; and, it does not have to implement such strong focused ways. All it signs onto are broad, vague companywide generalizations.

To approach this by another, concrete illustration, a large contractor may compete for an IT prime contract – a contract that potentially could have valuable opportunities to give small business subcontractors a way to improve their ability to do quality IT subcontracting and, eventually, quality IT prime contracting (on a small scale) too. Without the CSPTP, the large contractor would plan for focused ways to afford these small businesses those attractive opportunities, in order to secure evaluation points for seeking award of that prime contract. But, with the CSPTP, the large contractor would instead find it easier to do small business subcontracting in a less valuable way, like giving minor subcontracts for protective or janitorial services on a few of its less important contracts. This would look pretty much the same in companywide figures. And the large contractor could give the valued IT work to other large firms which return the favor.

There are some nuanced ways the CSPTP acts to undermine the effort at subcontracting to small business. Prime contracts ordinarily have a key reporting requirement that implements their commitments to subcontract to small business. This is

the “Individual Subcontract Report” (ISR)(formerly SF 294). “The ISR is not required if the company is participating in the Department of Defense Test Program for Negotiation of Comprehensive Subcontracting Plans.” From “Fact Sheet, October 2010, Subcontracting Assistance Program,” on the web at SBLO Handbook: 06/15/2010. The CSPTP "waives the requirement for the semi-annual *Subcontracting Report for Individual Contracts*." Subcontracting Assistance Program, *supra*, at 90

DoD cannot and does not do meaningful oversight of the contractor without that report on individual contracts. Giving up the key ISR reporting dilutes and undermines small business subcontracting. It is like giving up tax withholding from individual paychecks and watch as tax collections drop, or giving up collection of data from individual power plants and watching as pollution goes up. The ISR is the heart of the oversight of small business subcontracting. No ISR means much less subcontracting.

Initially, the Test Program started out with liquidated damages for contractors that fell short. In effect, the contract award had a built-in subsidy for fostering small business subcontracting; if the prime contractor failed to do that fostering, it repaid the government via the liquidated damages. But, contractors succeeded in killing the liquidated damages provision. That further weakened small business subcontracting in the Test Program.

Small businesses play a key role in our economy's job-creating and middle class aspects, and small business opportunities for government contracting dollars help small business in that key role. The CSTP has caused significant harm to small businesses playing that key role in the economy.

2. The Program has a background of doubt and criticism,

The GAO conduct a review of the CSPTP, albeit with the GAO's usually cautious wording. GAO, DOD Needs Measures for Small Business Subcontracting Program and Better Data on Foreign Subcontracts, April 2004. GAO noted that “the share of DoD’s contracting activity awarded to small businesses as subcontracts has declined steeply in recent years. . . . [from 43% to 34% in the half-dozen previous years] .” In a term which the GAO reserves for describing failures diplomatically, the GAO says twice – not just in the text of its report (p.3) but also in the abbreviated Summary (p.1) – the CSTSP has been having “mixed” success – “DoD contractors participating in the Test Program have experienced mixed success in meeting their various small business subcontracting goals.” GAO Review at 1, 3.

The GAO details the powerful current against small businesses. That GAO review discussed key trends in government contracting: “Two of the major challenges [contracting personnel] identified include (1) the breadth, scope, and complexity of DOD primary contracts that require, among other things, teaming arrangements with other, typically large contractors” -- a factor applying with maximum importance to the kind of large contractors in the Test Program like Lockheed Martin and Northrop Grumman; and “(2) prime contractors’ strategic-sourcing decisions to leverage their purchasing powers by reducing the number of their suppliers including small businesses” -- again a factor particularly applying to the large defense contractors in the Test Program. (GAO at 3.)

So the CSPTP weakens the protections for small business, right where two trends in contracting will induce large primes to reduce their small business subcontracting if allowed to do so by the CSPTP. Strikingly, officials and contractors both told GAO of this powerful current against small businesses. “According to DOD and contractor

officials, both [of these challenges] have the potential to either *restrict subcontracting opportunities* or push those opportunities to lower tiers of the supply chain.” *Id.*

Moreover, GAO obtained and reported some frankly critical comments on the Test Program. “DCMA and contractor officials we interviewed gave varied opinions – both positive and negative – on the program.” (GAO at 10.) Some “said the comprehensive plan sometimes resulted in lost visibility of individual contract performance and reduced accountability at the program level. In fact one contractor recently stopped participating in the program because of lost ability to monitor individual contract performance.” GAO’s emphasis of such criticism, from the inside, shows that there is not simply an absence of metrics or a lack of data. The participants know the problems and, in effect, condemn the program from within.

Another point is that there was one non-finalized effort, largely covered up, to assess the CSTSP. “DOD contracted for an assessment of the Test Program in 2002, *but the results of the assessment are considered preliminary and, therefore, have not been reported.*” GAO at 1. So, it is not just forgetfulness that has led to the program never having been properly tested. Rather, an effort was made, but did not reach the level to short to be finalized. If the supporters of the program really believed in it, they would have tried to carry such preliminary efforts to completion. Proponents of the program have backed it, not because of the existence, but rather of the absence, of proof the program helps small business.

Apart from the GAO, my understanding is that DoD has refused to release key subcontracting information relating to the CSTSP.

Conclusion

Ideally, the small business program should provide an invaluable stream of government contracting dollars in the form of appealing subcontracts with a potential to provide a ladder for small businesses up to bigger and better work. The small business program has a well-understood machinery to induce large contractors to plan, and then to implement their plans, for many ways of making individual contracts yield such appealing subcontracts.

Yet, instead, much of the potential value of the small business program has been sapped by the CSPTP Test Program. The Test Program allows 20 or so top defense contractors to slide by, with their providing just vague, general companywide reporting rather than meaningful focused efforts for particular contracts. And after 20 years, there has never been evidence to support the Test Program, but, instead, criticism by the GAO when it looked at the Test Program.

There is no doubt in my mind the CSPTP has significantly reduced subcontracting opportunities for small businesses. It should not have gotten its 25 years of extension as a never-tested "Test Program." Let it expire.