

**SMALL BUSINESS EXTRA-TERRITORIAL  
SET-ASIDES: IS THE SKY REALLY FALLING?**

MAJOR CRAIG M. SCROGHAM\*

*Chicken Little was in the woods one day when an acorn  
fell on her head. It scared her so much she trembled all  
over. She shook so hard, half her feathers fell out.  
“Help! Help! The sky is falling! I have to go tell the  
king!” So she ran in great fright to tell the king.<sup>1</sup>*

I. Introduction

You advise the command at U.S. Army South (ARSOUTH), the Army Service Component Command for U.S. Southern Command.<sup>2</sup> ARSOUTH has spent months in negotiations with the State Department, the Government of Guatemala, and the Guatemalan military to plan its upcoming training mission to Guatemala. As always, time is of the essence for this mission. During the next planning meeting, the representative from the Contract Support Brigade (CSB) interjects and

---

\* Judge Advocate, United States Army. Presently assigned as the Brigade Judge Advocate, 20th Engineer Brigade, 18th Airborne Corps, United States Army. J.D., 2006, Seton Hall University School of Law; B.S., 2000, University of Georgia. Previous assignments include: Future Concepts Officer, The Judge Advocate General’s Legal Center & School, Charlottesville, Virginia (2014–2015); Contracts Attorney, 410th Contract Support Brigade, Fort Sam Houston, TX (2012–2014); Chief of Operational Law, U.S. Army South, Fort Sam Houston, TX (2010–2012); Operational Law Attorney, 4th Brigade Combat Team, 4th Infantry Division, FOB Fenty, Afghanistan (2009–2010); Trial Counsel, Fort Carson, CO (2008–2009); Legal Assistance Attorney/Tax Center OIC, Fort Carson, CO (2007–2008). Member of the bar of New Jersey. This article was submitted in partial completion of the Master of Laws requirements of the 64th Judge Advocate Officer Graduate Course.

<sup>1</sup> The story of Chicken Little is well known all over the world. The story’s ending changes depending on the storyteller. One version ends with Chicken Little mustering the courage to face her fears. The other version ends with Chicken Little and her friends, who Chicken Little has worked into hysteria, meeting Foxy Loxy along the way to tell the king that the sky is falling. Foxy Loxy eats Chicken Little and her friends. The moral of the story is to stay calm and not believe everything you hear. E.L. Easton, *The Story of Chicken Little*, <http://archive.is/Ev1rT> (last visited May 30, 2017).

<sup>2</sup> “U.S. Southern Command leverages rapid response capabilities, partner nation collaboration, and regional cooperation within our Area of Responsibility in order to support U.S. national security objectives, defend the Southern approaches to the United States, and promote regional security and stability.” U.S. Southern Command, <http://www.southcom.mil/About/>.

informs the commander that the process may take longer than expected on some of the contract actions, saying,

Sir, a number of these actions are going to take a little longer than we are used to. Some rules have changed in the contracting world. This procurement is under the simplified acquisition threshold (SAT)<sup>3</sup> and under the new rule it is now reserved for American small businesses, regardless of the place of performance. We're going to need to make sure an American small business gets first crack at this. But if no U.S. small businesses bid on the contract, we can then resolicit the contract so the Guatemalan companies can bid.

All the commander hears is “the CSB is delaying my mission.” He knows the Guatemalans are not going to be happy about this.

This hypothetical centers around the Small Business Administration's (SBA) efforts to apply Federal Acquisition Regulation (FAR) Part 19 small business set-asides extraterritorially. The efforts have been the topic of numerous protests to the Government Accountability Organization (GAO) over the last twenty years.<sup>4</sup> The debate, while fierce, has only been fought in the world of administrative law courts and chat forums.<sup>5</sup> While the two camps are firmly digging into their trenches, trading dubious stares, and tossing legal hand-grenades labeled “*Chevron* deference”<sup>6</sup> and “validly-promulgated, long-standing regulation,”<sup>7</sup> little has been said about why it should or should not apply practically.

---

<sup>3</sup> The Simplified Acquisition Threshold (SAT) is a dollar amount where contracts under that threshold trigger a set of simplified procedures for procuring supplies, services, and items in hopes of lowering costs and providing efficiency. See FAR Part 13.

<sup>4</sup> FAR Part 19 implements acquisition related portions of the Small Business Act (The Act) and typically consists of setting aside certain contracts appropriate for small businesses.

<sup>5</sup> See Don Mansfield, *Did the SBA Invalidate FAR 19.000(b)?*, WIFCON (Jun 17, 2015), <http://www.wifcon.com/discussion/index.php?blog/6/entry-3081-did-the-sba-invalidate-far-19000b/> (discussing the overseas exception to SBA set-asides).

<sup>6</sup> “*Chevron* Deference” is a term derived from a Supreme Court opinion that created a test used to determine whether to give deference to a government agency's interpretation of a statute they administer. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>7</sup> *Latvian Connection Gen. Trading & Constr. LLC, Comp. Gen. B-408633*, 2013 CPD ¶ 224 (Comp. Gen. Sept. 18, 2013). The quoted language was used by the Government Accountability Office (GAO) as it denied a protestor's claim that Small Business Administration (SBA) set-asides should be applied extraterritorially.

Why does it matter if FAR Part 19 is read to apply extraterritorially? What is the real world impact of extraterritorial application of FAR Part 19 set-asides for the Army (and the Department of Defense (DoD) for that matter) on the strategic, operational, and tactical levels? Application of mandatory extraterritorial small business set-asides would have serious negative impacts on a commander's ability to contract strategically, negatively affecting his/her ability to accomplish the mission. Chicken Little is not as irrational as the rest of the barnyard might think.

## II. The History of the Small Business Administration and Application of Overseas Small Business Set-Asides

The roots of the SBA took form early in 1932 with the creation of the Reconstruction Finance Corporation (RFC) in hopes of increasing wartime production.<sup>8</sup> The RFC went through various other forms until 1953, when Congress created the SBA. Its mission would be to “aid, counsel, assist and protect, insofar as possible, the interests of small business concerns.”<sup>9</sup> To accomplish the mission, Congress gave the SBA a mandate to ensure small business would receive a “fair proportion” of government contracts.<sup>10</sup> Government agencies, in turn, created internal procedures to ensure that a fair proportion was set aside for small business.<sup>11</sup>

---

<sup>8</sup> SMALL BUSINESS ADMINISTRATION, <https://www.sba.gov/about-sba/what-we-do/history> (last visited May 30, 2017). The Reconstruction Finance Corporation, began by Herbert Hoover, in coordination with other government agencies like the Smaller War Plants Corporation, the Small Defense Plants Administration, and the Office of Small Business found in the Department of Commerce, all worked together to help small businesses participate in war-time production. *Id.*

<sup>9</sup> The Small Business Act of 1953, Pub. L. No. 83-163, § 202, 67 Stat. 230, 232 (codified as amended at 15 U.S.C. § 631(a) (2012)).

<sup>10</sup> *Id.*

<sup>11</sup> Two mechanisms have primarily been used to set aside contracts for small businesses. The first and primary mechanism is known as the “Rule of Two.” The rule applies by directing contracting officers to set aside “any acquisition over \$150,000 for small business participation when there is a reasonable expectation that: (1) Offers will be obtained from at least two responsible small business concerns...; and (2) Award will be made at fair market prices.” FAR. 19.502-2(b) (2016). The second mechanism is the automatic set-aside, where any action over the micro-purchase threshold and under the simplified acquisition threshold (SAT), is automatically reserved for small business concerns that are competitive in terms of market prices, quality, and delivery. *See* FAR 19.203(b) (2016). Congress has also created other preferences to award contracts to small businesses owned by socially and economically disadvantaged individuals, women-owned small businesses, small businesses in historically underutilized business zones, and small businesses owned

Almost from the inception of small business set-asides, the DoD, in the Armed Services Procurement Regulation (ASPR), created an overseas exception.<sup>12</sup> This exception continued in 1984 when the ASPR was replaced by the FAR. That same limitation is found in the FAR today. FAR Part 19, which implements the acquisition-related portions of The Small Business Act (The Act), is limited by FAR Part 19.000(b), which states “this part, except for Subpart 19.6, applies only in the United States or its outlying areas. Subpart 19.6 applies worldwide.”<sup>13</sup>

#### A. Small Business Administration Set-Asides’ Expansion Overseas

Since GAO’s first decision regarding a protest on the overseas exception for small business, rationales for whether to apply the exception have been somewhat inconsistent and piecemeal.<sup>14</sup> The first few cases decided by GAO expanded a portion of the SBA’s reach overseas. The first such case, *Eastern Marine, Inc.*, focused on a protest filed by the second-lowest bidder on a contract to deliver a tugboat to Panama.<sup>15</sup> The awardee, a small business concern, did not satisfy the solicitation’s requirement that a “successful bidder must have been engaged in construction of similar tugboats for the past 5 years.”<sup>16</sup> The SBA issued a certificate of competency (CoC) on the awardee’s behalf.<sup>17</sup> The protestor

---

by veterans with service-connected disabilities. See 15 U.S.C. § 637 (2012). These socio-economic preferences are discretionary set-asides.

<sup>12</sup> The “overseas exception,” as it first appeared in the Armed Services Procurement Regulation (ASPR) in 1958, stated, “This subpart applies only in the United States, its Territories, its possessions, and Puerto Rico.” Armed Services Procurement Regulation, 23 Fed. Reg. 9209, 9209 (Nov. 29, 1958).

<sup>13</sup> Subpart 19.6 is the SBA’s Certificate of Competency (CoC) program.

<sup>14</sup> GAO, headed by the Comptroller General, attempts to provide an impartial and independent forum where bid protests can be resolved without the delay and cost associated with formal litigation. These decisions “have resulted in a uniform body of law applicable to the procurement process upon which the Congress, the courts, agencies, and the public rely.” Bid Protests at GAO: A Descriptive Guide, 2010. <http://www.gao.gov/assets/210/203631.pdf>

<sup>15</sup> *Eastern Marine, Inc.*, 63 Comp. Gen. 551, 551 (1984).

<sup>16</sup> *Id.* at 552.

<sup>17</sup> *Id.* at 553. “The Certificate of Competency (CoC) program allows a small business to appeal a contracting officer’s determination that it is unable to fulfill the requirements of a specific government contract on which it is the apparent low bidder. When the small business applies for a CoC, SBA industrial and financial specialists conduct a detailed review of the firm’s capabilities to perform on the contract. If the business demonstrates the ability to perform, the SBA issues a CoC to the contracting officer requiring the award

argued there was an overseas exception to small business set-asides and that the contracting officer acted arbitrarily by accepting the CoC.<sup>18</sup> GAO, after inquiring into the SBA's stance on the applicability of the CoC program, gave deference to the SBA.<sup>19</sup> Similarly, six years later in *Discount Machinery*, a small business protested another solicitation by the Panama Canal Commission (PCC), arguing the PCC was not using the SBA's CoC program to award contracts.<sup>20</sup> The PCC again pointed out that FAR Part 19.000(b) did not apply extraterritorially. The SBA's argument, which GAO again accepted, was that the Act imposed no geographical limitation to its applicability.<sup>21</sup> The first round of the fight regarding the overseas exception went to the SBA. In that decision, GAO recommended the Federal Acquisition Regulatory Council<sup>22</sup> (FAR Council) to redraft the FAR specifically to exempt the CoC program. The FAR was then rewritten to exempt the CoC program from 19.000(b)'s geographical limitation.<sup>23</sup>

## B. GAO Begins Limiting Overseas Application

---

of that specific contract to the small business." See *Certificates of Competency*, SMALL BUSINESS ADMINISTRATION, <https://www.sba.gov/content/certificate-competency-program> (last visited May 30, 2017); see also FAR 19.600(a) (2016).

<sup>18</sup> The protestor pointed to the Federal Procurement Regulations, 41 C.F.R. § 1-1.700(b) (1984)—another precursor to the FAR—which provided that the small business set-aside regulations applied only in the United States. *Id.* at 2.

<sup>19</sup> GAO held "There is nothing in the SBA's regulations, however, that would limit the application of the CoC program to either contracts awarded or items to be delivered in the United States. In fact, the SBA has informed us that it believes that the CoC program is not so limited. We therefore find no basis to object to the CoC referral." *Id.* at 2.

<sup>20</sup> *Discount Mach. & Equip., Inc.*, 70 Comp. Gen. 108, 109 (1990).

<sup>21</sup> See *id.* at 110.

<sup>22</sup> "The Federal Acquisition Regulatory Council was established to assist in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities in the Federal Government, in accordance with Title 41, Chapter 7, Section 421 of the Office of Federal Procurement Policy (OFPP) Act. The Administrator, in consultation with the Council, shall ensure that procurement regulations, promulgated by executive agencies, are consistent with the Federal Acquisition Regulation (FAR) and in accordance with any policies issued pursuant to Section 405 of Title 41. The Council manages[,] coordinates[,] controls[,] and monitors the maintenance and issuance of changes in the FAR." OFFICE OF MANAGEMENT AND BUDGET, [https://obamawhitehouse.archives.gov/omb/procurement\\_far\\_council](https://obamawhitehouse.archives.gov/omb/procurement_far_council) (last visited May 30, 2017).

<sup>23</sup> The FAR went through a number of iterations explaining where the SBA applies. Its current form states, "This part, except for Subpart 19.6, applies only in the United States or its outlying areas. Subpart 19.6 applies worldwide." FAR 19.000(b) (2016).

The next major protest occurred in 2013, in a GAO protest affectionately known in the contracting world as “*Latvian*,” where Latvian Connection General Trading and Construction LLC (Latvian), an American small business, filed a protest with GAO arising from an Air Force request for quotes (brand name or equal armored cable to be used at Thumrait Air Base, Oman).<sup>24</sup> Latvian claimed the procurement should have been set-aside for small business.<sup>25</sup> Latvian argued that Section 644(j) of The Act should have applied, which provides that contracts above the micro-purchase threshold, but not greater than the simplified acquisition threshold, “shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchased.”<sup>26</sup> The Air Force relied on the plain language of 19.000(b).<sup>27</sup> GAO, siding with the Air Force, made two points: (1) The FAR (and its predecessor) have long applied the overseas exception to small business set-asides; and (2) SBA’s implementing language is silent regarding §644(j)(1)’s application outside of the United States.<sup>28</sup> Using a *Chevron* analysis to resolve that ambiguity and silence, GAO gave deference to the FAR and its longstanding exception.<sup>29</sup> Almost coincidentally, just weeks after this decision, the SBA published redrafted implementing regulations to resolve any ambiguity. The SBA’s implementing regulation, now reads:

Small business concerns must receive any award (including orders, and orders placed against Multiple Award Contracts) or contract, part of any such award or contract, and any contract for the sale of Government property, *regardless of the place of performance*, which SBA and the procuring or disposal agency determine to be in the interest of:

- (1) Maintaining or mobilizing the Nation's full productive capacity;
- (2) War or national defense programs;

---

<sup>24</sup> Latvian Connection Gen. Trading & Constr. LLC, Comp. Gen. B-408633, 2013 CPD ¶ 224 (Comp. Gen. Sept. 18, 2013).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

(3) Assuring that a fair proportion of the total purchases and contracts for property, services and construction for the Government in each industry category are placed with small business concerns; or

(4) Assuring that a fair proportion of the total sales of Government property is made to small business concerns.<sup>30</sup>

The addition of those five italicized words to the SBA's implementing regulation fundamentally changed the analysis of SBA set-aside bid protests. Due to the consistent application of *Chevron* in bid protests regarding FAR Part 19.000(b), and its likely application in any new cases heard by GAO or the U.S. Court of Federal Claims, the *Chevron* decision warrants more discussion. In *Chevron*, the Supreme Court of the United States heard a petition regarding whether the Environmental Protection Agency (EPA) had authority to implement permit requirements pursuant to the Clean Air Act Amendments of 1977.<sup>31</sup> Implementation hinged on the EPA's definition of source, which the Court, after applying the test below, determined was a permissible construction of the statute.<sup>32</sup> To get the answer, the Supreme Court came up with a two-part test:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>33</sup>

The next major protest occurred in 2014 where Maersk, a large corporation, protested a small business set-aside it felt was to be performed outside of the United States and its outlying territories, thus making it

---

<sup>30</sup> 13 C.F.R. § 125.2(a) (2016) (emphasis added); *see also* 13 C.F.R. § 125.2(c) (describing procuring agency responsibilities to foster small business participation "regardless of the place of performance of the contract").

<sup>31</sup> *Chevron*, 467 U.S. at 839.

<sup>32</sup> *Id.* at 866.

<sup>33</sup> *Id.* at 842–3.

exempt from a small business set-aside.<sup>34</sup> Ruling against Maersk because part of the requirement was to be performed in the United States, GAO attempted to clarify its decision in *Latvian*. GAO explained that when a procurement is conducted outside of the United States and where the work is to be performed outside the United States as well, it is reasonable for an agency to determine that it is not required to set-aside the procurement for small business concerns.<sup>35</sup> GAO made it clear that if both the contracting office and requirement were outside the United States, then SBA set-aside requirements would not apply.<sup>36</sup> The tide had turned again. The Government Accounting Office, thirteen years after deciding its last protest on the extraterritoriality of the Act and ruling in favor of the SBA, based on not much more than SBA's opinion, had now ruled against the SBA.

In an interesting series of events, it seemed the tide was turning back in the SBA's favor. In a protest with the Department of State (DoS), the SBA was prepared to argue that GAO's previous ruling in *Latvian*, based in part on the SBA implementing regulation's silence regarding extra-territoriality, had now been resolved.<sup>37</sup> Department of State in turn canceled the solicitation, resolicited it to include small businesses, and even redrafted the Department of State Acquisition Regulation to extend

---

<sup>34</sup> See *Maersk Line, Ltd.*, Comp. Gen. B-410280, 2014 CPD ¶ 359 (Comp. Gen. Dec. 1, 2014). Military Sealift Command (MSC) had a requirement for multimodal cargo transportation services. It involved a contracting officer at MSC attempting to promote small business concerns. Not having the time to do complete market research for the "rule of two," the contracting officer issued a solicitation with a tiered evaluation of offers that first apply the "rule of two" if two or more small businesses replied. If the "rule of two" was not satisfied, then large corporations would be considered. See *id.*

<sup>35</sup> *Id.* at 5.

<sup>36</sup> *Id.* The decision in *Maersk* came after the SBA had redrafted its regulations to include the language that applied The Act regardless of place of performance. GAO pointed out that their decision in *Latvian* was made "prior to the issuance of the SBA's regulations on the topic." *Id.* GAO refrained from discussing whether a decision in *Latvian* would be different today now that the SBA redrafted its regulations. *Id.*

<sup>37</sup> "State argues that the GAO decision of [*Latvian*] applies here. In that case, GAO ruled that FAR 19.000(b) limits the application of FAR part 19 . . . to acquisitions conducted in the United States (and its outlying areas). We believe the basis for GAO's ruling was the SBA's regulations were silent on this issue and there, the more specific FAR regulation controlled. Heeding this advice, SBA recently promulgated regulations to address this issue. Specifically, SBA made wholesale changes to 13 CFR § 125.2 on October 2, 2013." Letter from John W. Klein, Associate Gen. Couns. for Procurement L., U.S. Small Bus. Admin., & Laura Mann Eyester, Deputy Associate Gen. Couns. for Procurement L., U.S. Small Bus. Admin., to Gary Allen, Senior Att'y, Procurement L. Division, U.S. Gov't Accountability Off., RE: B-410081 Protest of Latvian Connection, LLC (Aug. 25, 2014), [http://www.wifcon.com/EXHIBIT\\_18\\_Latvian.pdf](http://www.wifcon.com/EXHIBIT_18_Latvian.pdf).

the scope of small business set-asides.<sup>38</sup> At the same time, Latvian protested an Army solicitation for installation of sunshades at Camp Arifjan, Kuwait.<sup>39</sup> In light of the recent developments with the DoS protest and the redrafting of the SBA regulation, the 408th CSB, located in Kuwait, seemed unsure of its legal footing. Despite falling squarely within the type of procurement the *Maersk* decision held did not have to be set aside, the 408th CSB cancelled its solicitation.<sup>40</sup>

### III. The Current Legal Arguments

#### A. The Small Business Administration's Argument

The SBA's argument rests partially in its very existence, being the embodiment of Congress's manifest intent to create an agency whose purpose is to ensure a fair portion of government contracts are awarded to American small business interests.<sup>41</sup> The SBA argues it was designated by Congress to administer the Act, and that nowhere within the Act does it give it the Office of Federal Procurement Policy (OFPP) or the FAR Council responsibility for implementing and administering the Act, pointing to the implementing language of the Act itself, which states:

---

<sup>38</sup> The Department of State Acquisition Regulation (DOSAR) now reads:

“(b) It is the Department’s policy to provide maximum opportunities for U.S. small businesses to participate in the acquisition process. DOS contracts that are awarded domestically for performance overseas shall be subject to the Small Business Act as a matter of policy. Contracts that are both awarded and performed overseas should comply on a voluntary basis.”

DOSAR, 619.000(b) (2015).

<sup>39</sup> See *Latvian Connection, LLC*, B-410921, (Comp. Gen. Aug. 11, 2015), <http://www.gao.gov/assets/680/671952.pdf>.

<sup>40</sup> Latvian's protest was dismissed when the 408th CSB cancelled its solicitation. In its cancellation notice, the 408th CSB included the following language: “The purpose of this amendment is to cancel the solicitation in its entirety and pursue a revised acquisition strategy considering small business set-aside requirements, without regard to Federal Acquisition Regulation (FAR) Part 19.000(b).” See Amendment 0004 to W912D1-15-R-0004, <http://www.wifcon.com/W912D1.pdf>.

<sup>41</sup> See Letter from Kevin Harber, Att’y Advisor, U.S. Small Bus. Admin., to Peter Verchinski, Off. Of Gen. Couns., U.S. Gov’t Accountability Off., RE: SBA Comments on Protest of Latvian Connection LLC (B-408633) 2 (Aug. 29, 2013), [http://www.wifcon.com/EXHIBIT\\_17\\_5.pdf](http://www.wifcon.com/EXHIBIT_17_5.pdf) [hereinafter Harber Letter].

In order to carry out the policies of this Act there is hereby created an agency under the name “Small Business Administration” (herein referred to as the Administration), which Administration shall be under the general direction and supervision of the President and shall not be affiliated with or be within any other agency or department of the Federal Government.<sup>42</sup>

To the contrary, the SBA argues it is “charged with carrying out the policies of The Act and issuing such rules and regulations as it deems necessary.”<sup>43</sup> Because the SBA is clearly designated by Congress as responsible for the implementation and administration of the Act, SBA argues its interpretation of the Act should be given deference under a *Chevron* analysis. This particular argument was persuasive early in the SBA’s attempts to expand the reach of the Act. In both *Eastern Marine* and *Discount Machinery*, GAO ruled in favor of the SBA, relying on not much more than the SBA’s argument that it was an SBA regulation and SBA’s interpretation controlled.<sup>44</sup>

Second, the SBA points out there is no geographic limitation placed on 15 U.S.C. § 644(j)(1).<sup>45</sup> The SBA argues that if Congress had intended to limit the application of The Act, Congress would have done so, as it did in 15 U.S.C. § 637(d)(2).<sup>46</sup> The SBA argues that absent clear congressional intent to limit the application in certain circumstances, the Act should be applied in a manner that ensures small business concerns are given “the maximum practicable opportunity to participate in the performance of contracts . . .”<sup>47</sup>

Finally, the SBA also relies on the fact that both the U.S. Court of Federal Claims and GAO have held that the SBA’s implementation of a

---

<sup>42</sup> *Id.* (quoting 15 U.S.C. § 633(a) (2012)).

<sup>43</sup> *Id.* (quoting *Contract Management, Inc. v. Rumsfeld*, 434 F.3d 1145, 1147 (9th Cir. 2006)).

<sup>44</sup> See *Discount Mach. & Equip., Inc.*, 70 Comp. Gen. 108, 110 (1990); *Eastern Marine, Inc.*, 63 Comp. Gen. 551, 553 (1984).

<sup>45</sup> See Harber Letter, *supra* note 41 at 3.

<sup>46</sup> This portion of the statute required mandatory language to be included in contracts that required prime contractors to effectuate U.S. policy by subcontracting to small business concerns. See 15 U.S.C. § 637(d)(1) (2012). This section specifically stated the required language was not required in “such contracts [which] will be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.” 15 U.S.C. § 637(d)(2)(B) (2012).

<sup>47</sup> See Harber Letter, *supra* note 41 at 3 (quoting 15 U.S.C. § 637(d)(1)).

provision of The Act, via regulation, was viewed as controlling when there is an inconsistency with a FAR rule.<sup>48</sup> This argument was persuasive in the mid 1990's regarding application of the CoC program extra-territorially and successfully resulted in the FAR Council's redrafting FAR subpart 19.6 to apply the program globally.<sup>49</sup> At some point though, in the thirteen years between *Discount Machinery* and *Latvian*, something changed at GAO. GAO, which has not explained why this shift occurred, found the SBA's position less persuasive and began consistently giving deference to the plain language in the FAR.

#### B. An Argument for The Department of Defense

A strong argument can be made on behalf of The Department of Defense, relying partly on GAO's most current line of decisions in *Latvian* and *Maersk*, that the FAR deserves deference after applying its version of the *Chevron* test. Combining the facts that the overseas exclusion is a "validly-promulgated, long-standing regulation,"<sup>50</sup> OFPP's statutory

---

<sup>48</sup> See *id.* at 4-6.

<sup>49</sup> See *C&G Excavating, Inc. v. U.S.*, 32 Fed. Cl. 231, 239 (1994). In *C&G*, the Court of Federal Claims reviewed a protest where claimant argued the FAR improperly limited the SBA's review of portions for applications within the CoC program when the SBA's regulations were silent. The court stated,

With regard to the direct conflict between 13 C.F.R. § 125.5(e) and FAR § 19.602-2(a)(2), the court finds that the restrictive language in the FAR concerning the scope of SBA's site investigation cannot be interpreted to limit the scope of SBA's general review authority. The clear intent of 13 C.F.R. § 125.5 is that the SBA may perform a site investigation examining all elements of responsibility. This interpretation is consistent with the [Small Business Act] and shall be given deference.

*Id.* In another conflict between the FAR and SBA regulations, GAO held,

While FAR Sec. 19.302(j) treats size status protests received after award of a contract as having no applicability to that contract, SBA's regulations, which we view as controlling in this area, provide that "[a] timely filed protest applies to the procurement in question even though the contracting officer awarded the contract prior to receipt of the protest."

*Adams Indus. Services, Inc.*, B-280186, 98-2 CPD ¶ 56, (Comp. Gen. Aug. 28, 1998).

<sup>50</sup> *Latvian Connection Gen. Trading & Constr. LLC*, Comp. Gen. B-408633, 2013 CPD ¶ 224 (Comp. Gen. Sept. 18, 2013).

authority to create government-wide procurement regulations, and the legislative history where Congress has specifically declined to implement language in the Act that would apply set-asides globally, all support applying FAR Part 19.000(b) as business as usual.

The first hurdle of *Chevron* is to determine whether the language at question provides an unambiguous expression of congressional intent. If the intent is clear, analysis ends and Congress's intent will control.<sup>51</sup> The Act itself is silent regarding geographic limitations on small business set-asides. That silence, when combined with the existence of the overseas exception for the last 58 years, along with Congress's knowledge and inaction, seems to clear this hurdle with high jump prowess.

The next step, whether to give deference to the interpretation of an administering agency is dependent on the circumstances.<sup>52</sup> It seems there is an overlap of power (whether real or perceived) between the SBA and OFPP. The power of the SBA to interpret the Act and the power of OFPP to create procurement policy. GAO has recognized the SBA's broad authority under the Act to promote policies and take actions to ensure that small businesses obtain their fair share of contracts awarded by the U.S. government.<sup>53</sup> To extend this power of interpretation to the SBA would functionally give the SBA rulemaking authority over government procurement. Contrast that authority with OFPP, which was specifically delegated the authority to promulgate procurement policies.<sup>54</sup> It seems both the SBA and OFPP have a role to play in changing procurement policy in order to promote the Act. The U.S. Court of Federal Claims warned us of this very predicament in 1989.<sup>55</sup>

---

<sup>51</sup> *Chevron*, 467 U.S. at 842-43.

<sup>52</sup> *Id.* at 843.

<sup>53</sup> Latvian Connection Gen. Trading & Constr. LLC, Comp. Gen. B-408633, 2013 CPD ¶ 224 (Comp. Gen. Sept. 18, 2013).

<sup>54</sup> "The Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget plays a central role in shaping the policies and practices federal agencies use to acquire the goods and services they need to carry out their responsibilities. OFPP was established by Congress in 1974 to provide overall direction for government-wide procurement policies, regulations and procedures and to promote economy, efficiency, and effectiveness in acquisition processes. OFPP is headed by an Administrator who is appointed by the President and confirmed by the Senate." OFPP, [https://obamawhitehouse.archives.gov/omb/procurement\\_default](https://obamawhitehouse.archives.gov/omb/procurement_default) (last visited May 30, 2017).

<sup>55</sup> See *C & G*, 32 Fed. Cl. 231, 242 ("[T]he Government has been on notice since 1989 . . . that the conflict exists and poses problems. The Government's regulatory machinery has perpetuated a conflict that should have been resolved to avert future litigation.").

Finally, “where the agency’s position reflects an informal interpretation, *Chevron* deference is not warranted; in these cases, the agency’s interpretation is ‘entitled to respect’ only to the extent it has the ‘power to persuade.’”<sup>56</sup> The SBA’s argument is not persuasive when Congress has twice decided not to include language in the Act that would apply set-asides globally. The first attempt to amend the statute included a statement of congressional policy stating that “...Federal agencies shall endeavor to meet the contracting goals established under this subsection, regardless of the geographic area in which contracts will be performed.”<sup>57</sup> The second attempt to amend the statute included slightly different language, stating that procurement goals would “apply to all procurement contracts, without regard to whether the contract is for work within or outside the United States.”<sup>58</sup> Neither proposal became law. If DoD’s application of its longstanding overseas exception were contrary to Congress’s intent, Congress would not have passed the chance to correct it.

#### IV. Beyond the Legality: The Practical Impacts Of Applying Set-Asides Globally

More important than the legal arguments are the pragmatic arguments for why small business set-asides should or should not be applied globally. It is important to consider are the practical impacts possibly affecting both the SBA and the DoD. What does the SBA have to gain and what does the DoD have to lose?

##### A. What the SBA Has to Gain

The goal and mission of the SBA—its very “raison d’etre”—is to increase small business opportunities.<sup>59</sup> The SBA will always be in the

---

<sup>56</sup> *Latvian Connection Gen. Trading & Constr. LLC, Comp. Gen. B-408633*, 2013 CPD ¶ 224 (Comp. Gen. Sept. 18, 2013).

<sup>57</sup> National Defense Authorization Act for Fiscal Year 2006, S. 1042, 109th Cong. (2005).

<sup>58</sup> Small Business Fairness in Contracting Act, H.R. 1873, 110th Cong. (2007).

<sup>59</sup> See 15 U.S.C. § 631(a) (2012) (“The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this

position where it is looking for ways and places to extend the Act. The status quo will never be good enough.<sup>60</sup>

While there may always be the bureaucratic motivation to justify its existence, in the SBA's defense, it is not as if it is an insatiable beast looking to devour all life that comes within its clutches. A good example is the setting of goals. The SBA has a definite self-interest in setting attainable goals, thereby encouraging efforts to reach them.<sup>61</sup> The SBA set its goals for the DoD in 2006 and 2007 at 23% and lowered their goal in 2008 to 22.24%.<sup>62</sup> It seems in 2008 the SBA did a reality check and lowered the goal, which it did again in 2014 when it lowered DoD's goal to 21.60%.<sup>63</sup> So while the SBA is part of the bureaucratic machine, it does not seem to be arbitrarily raising goals, year in and year out, simply in an effort to bring in more business for its constituency.<sup>64</sup>

---

Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.”)

<sup>60</sup> That is assuming the status quo is good enough. A good argument could be made that the SBA should focus first on attaining its goals in the United States before trying to extend its reach overseas. Only twice since 2007 has the Government met the goal set by the SBA. *Contracting—See Agency Small Business Scorecards*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/contracting/finding-government-customers/see-agency-small-business-scorecards> (last visited May 31, 2017).

<sup>61</sup> The SBA negotiates its goals with each agency. At the beginning of every fiscal year, agencies propose goals to the SBA and the SBA's Office of Government Contracting evaluates the proposals. The SBA then notifies the agency of their official goal. *See Contracting—Goaling*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/content/small-business-goaling> (last visited May 31, 2017).

<sup>62</sup> U.S. SMALL BUS. ADMIN., 2007 DEPARTMENT OF DEFENSE SCORECARD, [https://www.sba.gov/sites/default/files/files/dod\\_assessment\\_07.pdf](https://www.sba.gov/sites/default/files/files/dod_assessment_07.pdf). *See also* U.S. SMALL BUS. ADMIN., 2008 DEPARTMENT OF DEFENSE SCORECARD, [https://www.sba.gov/sites/default/files/files/goals\\_08\\_dod.pdf](https://www.sba.gov/sites/default/files/files/goals_08_dod.pdf).

<sup>63</sup> For the first time, in 2014, DoD met its goal, spending 23.47% with American small business. *See* U.S. SMALL BUS. ADMIN., DEPARTMENT OF DEFENSE FY2014 SMALL BUSINESS PROCUREMENT SCORECARD (2015), [https://www.sba.gov/sites/default/files/files/FY14\\_DoD\\_SB\\_Procurement\\_Scorecard\\_Public\\_View\\_2015-04-29.pdf](https://www.sba.gov/sites/default/files/files/FY14_DoD_SB_Procurement_Scorecard_Public_View_2015-04-29.pdf).

<sup>64</sup> Just because an agency did not meet its percentage goal does not mean less money is being spent with small business. For instance, in 2007, although DoD was short 2.5%, they still increased spending with small businesses by \$3 billion. In 2008, again falling short of

What is the impetus behind this push to have the overseas set-aside exclusion abolished? In years past, when DoD was short in reaching its goal, the inclusion would have certainly brought them closer. In the SBA's defense, its current goal of 21.60% for DoD is not a true 21.60%. In reaching its percentage determination, the SBA does not include certain procurements, like those procurements made overseas or those that have foreign funding (i.e. Foreign Military Sales).<sup>65</sup> The SBA is attempting to get 21.60% of that which is more reflective of what DoD is really spending.<sup>66</sup> An internal Office of the Secretary of Defense (OSD) study analyzed the potential difference between small business performance with overseas procurements included and without. The OSD determined that if the overseas exception were taken away, the net gain in small business would be roughly half of a percent.<sup>67</sup>

#### B. What the Department of Defense Has to Lose

The Department of Defense has everything to lose and little to gain. The unintentional side effects of mandatory set-asides could have serious ramifications on its unique mission. Most important of those unintended effects would be the negative impact on DoD's ability to contract

---

the percentage goal, DoD increased spending by \$7 billion. See 2007 and 2008 DoD Scorecards, *supra* note 63.

<sup>65</sup> The 2012 SBA scorecard mentions how the percentages are essentially skewed, noting that there are some procurements that no small business would ever compete for (i.e. prime contracts for jets and ships). If those contracts were excluded, DoD's percentage goals would be much higher. See U.S. SMALL BUS. ADMIN., DEPARTMENT OF DEFENSE FY2013 SMALL BUSINESS PROCUREMENT SCORECARD (2014), [https://www.sba.gov/sites/default/files/files/FY13\\_DoD\\_SB\\_Procurement\\_Scorecard\\_Public\\_View\\_2014-04-28.pdf](https://www.sba.gov/sites/default/files/files/FY13_DoD_SB_Procurement_Scorecard_Public_View_2014-04-28.pdf)

<sup>66</sup> In an attempt to correct this, the Transparency in Small Business Goaling Act of 2016 was submitted on January 6, 2016. This would amend The Act to apply to all contracts, regardless of where the contract is awarded or performed. Transparency in Small Business Goaling Act of 2016, H.R. 4329, 114th Cong. (2016). The reason for its proposal being that "exclusions allow for an over inflation of small business participation in the federal marketplace." Press Release, Judy Chu, U.S. Congresswoman, Reps. Chu and Kelly Introduce Bill to Help Small Businesses Earn More Government Contracts (Jan. 6, 2016), <http://chu.house.gov/press-release/rebs-chu-and-kelly-introduce-bill-help-small-businesses-earn-more-government-contracts>. The press release for the bill makes the SBA position very clear; if the exclusions are removed, then the federal government will be forced to use overseas contracts to meet its goals. *Id.*

<sup>67</sup> Powerpoint slide, Dina Jeffers, Senior Procurement Analyst, Deputy Secretary of the Army (Procurement), Small Business Prime Contracting FY 2016 Overseas Exclusion Comparison (on file with author).

strategically. In a complex and unpredictable world, Chicken Little needs every weapon it has at its disposal, and to lose one of its most powerful weapons would certainly feel like the sky was falling.

The Department of Defense is like no other government agency the SBA deals with.<sup>68</sup> To highlight that difference, one can look to the United States Army, whose mission, as defined by Congress is:

preserving the peace and security, and providing for the defense, of the United States, the Commonwealths and possessions, and any areas occupied by the United States; supporting the national policies; implementing the national objectives; and overcoming any nations responsible for aggressive acts that imperil the peace and security of the United States.<sup>69</sup>

That mission, to defend our nation, is far different than other government agencies whose sole focus is within the bounds of the United States. Take for instance, the Department of Housing and Urban Development, whose mission is limited in both geographical application and scope to “create strong, sustainable, inclusive communities and quality affordable homes for all.”<sup>70</sup>

To meet its mission, the DoD uses contracting officers established throughout the DoD and within each of the military services. However, military contracting and procurement is more than just a mechanism to supply troops with the things they need.<sup>71</sup> Procurement is a force multiplier that enables Soldiers on the ground to win wars, not just by outfitting the Soldier in his gear, but by anticipating their needs and

---

<sup>68</sup> The SBA consults with 24 government agencies (as outlined in the Chief Financial Officers Act of 1990) and sets a small business contracting goal for each. [https://www.sba.gov/sites/default/files/FY2015\\_Final\\_Agency\\_Goals\\_Spreadsheet\\_20150313.pdf](https://www.sba.gov/sites/default/files/FY2015_Final_Agency_Goals_Spreadsheet_20150313.pdf).

<sup>69</sup> 10 U.S.C. § 3062(a) (2012) (enumeration omitted).

<sup>70</sup> *Mission*, U.S. DEP'T OF HOUSING & URB. DEV., <http://portal.hud.gov/hudportal/HUD?src=/about/mission> (last visited June 1, 2017).

<sup>71</sup> An example of how procurement is a strategic tool used by commanders is seen in a document created to assist in the counter-insurgency operations of Iraq and Afghanistan. “Money As A Weapon’s System” (MAAWS), a document designed to help attorneys, contracting officers, and Soldiers navigate the complicated contract/fiscal law world in a deployed environment, by its very name highlights the importance of, and recognition of, the role procurement and contracting play in the fight itself. Department of Defense overseas contracting involves strategic aspects that far outweigh the SBA’s attempt to increase American small business.

shaping the environment in which they operate.<sup>72</sup> The importance of DoD's role can be seen in former Chief of Staff of the Army, General Raymond Odierno's introduction to the Army Operating Concept (AOC).<sup>73</sup> The Army sees a future where the enemy is unknown and increasingly skilled; a future where our forces are regionally aligned and part of globally responsive combined arms teams.<sup>74</sup> General Odierno goes on to say that "[w]hile the [AOC] underscores the foundational capabilities the Army needs to prevent wars and shape security environments, it also recognizes that to deter enemies, reassure allies, and influence neutrals, the Army must conduct sophisticated expeditionary maneuver and joint combined arms operations."<sup>75</sup> The last thing the Army needs to consider in the world General Odierno describes is small business set-asides.

The strategic relationships envisioned with partner nations in this increasingly complex world, as described in the AOC, could include the creation of a broad base of contractors and suppliers in areas of operation where future conflict is likely. Just as important could be making a show to our partner nation that we are in a collective effort and that they, and their people, play an important role in that effort. These relationships do not begin at the dawn of a conflict. The loss of goodwill from our partner nations when their own small businesses lose contracts does not appear to be worth the gain in American small business. The application could also have unforeseen consequences where host nations enact laws that so significantly limit foreign businesses from operating in their country that it could potentially create a net loss in American business.<sup>76</sup>

---

<sup>72</sup> To highlight the importance of strategic contracting, one can look to the missions of the various Army contracting commands. Army Contracting Command's mission is "[d]elivering readiness through contracting solutions in support of the Army and Unified Land Operations, anytime, anywhere." *Army Contracting Command*, U.S. ARMY, <http://www.army.mil/info/organization/unitsandcommands/commandstructure/acc/> (last visited June 1, 2017). The Expeditionary Contracting Command's mission is to "[p]lan and execute effective and agile contracting support for U.S. Army Service Component Commanders in support of Army and Joint Operations. Provide effective and responsive contracting support for OCONUS installation operations." *ECC: U.S. Army Expeditionary Contracting Command*, U.S. ARMY, <https://www.army.mil/ECC> (last visited June 1, 2017).

<sup>73</sup> The Army Operating Concept is a document that "describes how future Army forces will prevent conflict, shape security environments, and win wars while operating as part of the Joint Force and working with multiple partners." General Raymond Odierno, *Foreword to U.S. DEP'T OF ARMY, TRADOC PAM. 525-3-1, THE U.S. ARMY OPERATING CONCEPT: WIN IN A COMPLEX WORLD* i (31 Oct. 2014).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Many countries already have restrictive laws that essentially prohibit American businesses from operating in their country. For instance, Kuwait only allows foreign

Another strategic aspect of contracting is seen in the context of a humanitarian assistance/disaster relief operation.<sup>77</sup> The initial phase of the operation will be life-saving operations (the basis for DoD's involvement in the operation to begin with is that the incident is beyond the host nation and USAID's ability to respond sufficiently on their own). However, there will be a point in the operation where a strategic choice is made to contract with host nation businesses in order to provide economic stimulus to the affected country. Worse, the operation could take the unfortunate turn to a kinetic environment. In either situation, whether engaged in lifesaving or something akin to conflict, the last thing commanders need to worry about is improving American small business.<sup>78</sup>

Operationally and tactically, there will be an impact, but segregating the strategic impacts from their second- and third-order effects at the operational and tactical level, these issues would be more like growing pains. At the outset of new rules applying the set-asides overseas, as feared in the scenario at the beginning of this article, there would be an undeniable delay to contracting until it became the new norm. It will take

---

business to operate under either Article 23 or 24 of its commercial code, which allow a foreigner to conduct business if his/her business has a majority Kuwaiti stake or through a Kuwaiti agent. See Law Decree No. 68 of 1980 ("Commercial Law"), arts. 23, 24 (Kuwait). As restrictive as this seems, imagine what steps Kuwait would take if they learned we were automatically excluding Kuwaiti businesses from possible contracts.

<sup>77</sup> This scenario, a Humanitarian Assistance/Disaster Relief operation (HA/DR), is exactly the kind of event for which the Army has planned, and was the subject of 2014's Unified Quest. "Unified Quest (UQ) is the Chief of Staff of the Army's Title 10 future study plan designed to explore enduring strategic and operational challenges to identify issues and explore solutions critical to current and future development." *Unified Quest*, ARMY CAPABILITIES INTEGRATION CTR., <http://www.arcic.army.mil/Initiatives/UnifiedQuest> (last visited June 1, 2017).

<sup>78</sup> Strategic contracting is often implemented through various means at levels well above the commander. The SBA's interpretation of the Act would conflict with a number of these implementing mechanisms. These mechanisms take the form of class deviations (decisions by the Director of Defense Procurement that allow organizations to deviate from the FAR), Status of Forces Agreements (SOFA), and other bilateral agreements between the executive branch and other nations. For instance, a strategic procurement decision recently made in the form of a class deviation regarding Djibouti, where "[e]ffective immediately, contracting officers shall use the attached deviation to limit competition to, or provide preference for, products or services of Djibouti for procurements in support of DoD operations in the Republic of Djibouti (Djibouti)." Memorandum from the Office of the Under Secretary on Defense on Class Deviation—Enhanced Authority to Acquire Products and Services of Djibouti, DARS Tracking No. 2016-O0005 (Feb. 4, 2016), <http://www.acq.osd.mil/dpap/policy/policyvault/USA000269-16-DPAP.pdf>. DoD should not have its ability to strategically contract like this limited by the SBA's interpretation.

time for contracting professionals to navigate the new rules, apply the rule of two, and conduct market research. It will take time for planners and commanders to factor that into their operational timelines. It may even create an increase in bid protests, further delaying contracting actions, as small businesses protest each and every contract they are not awarded.<sup>79</sup> It may require the hiring of new contracting officers and the restructuring of contracting offices to accommodate the new level of work. Most of these are inevitable ground level impacts associated with any change in rule or law. However, no law or rule change would ever be implemented if the argument “it’s too painful” ruled the day.

#### V. Is There a Common Ground?

Congress could easily end the issue with the stroke of a pen and end all *Chevron* analysis, yet as the court in *C&G* has pointed out, it has chosen to do nothing in the last 27 years to correct it. OFPP could create an official policy, but this would not put to an end the SBA’s argument that the SBA should be given deference. The Court of Federal Claims could easily throw a dart at the board of congressional intent, but the court and Congress seem content with letting GAO handle the issue. In light of congressional silence and GAO’s recent and consistent—albeit not necessarily articulate—application of FAR Part 19.000(b), it seems nothing is likely to change.<sup>80</sup> Yet, in light of the SBA’s redrafting of its regulation and the continued attempts to raise small business goals, this seems far from over.<sup>81</sup> To solve this problem, the logical first step is to have Chicken Little and Foxy Loxy sit down and talk. Maybe Chicken Little’s fear is not so irrational and maybe Foxy Loxy is not so hungry.

---

<sup>79</sup> Small businesses will protest each contract they are not awarded, searching for the contracting officer’s explanation. This could be further compounded by the SBA stepping in and issuing a CoC each time only one small business bids on a contract.

<sup>80</sup> GAO dismissed yet another of Latvian’s protests on the ground that the contract was under the micro-purchase threshold and not subject to small business set-asides. *Latvian Connection Gen. Trading and Constr., LLC*, B-412777.1 (Comp. Gen. May 23, 2016) (on file with author). The decision included language, yet again, that deferred to the FAR’s interpretation that FAR Part 19 applied only in the United States and its outlying territories. *Id.*

<sup>81</sup> *See* Greater Opportunities for Small Business Act of 2014, H.R. 4093, 113th Cong. (2014) (attempting to raise the total goal to 25%).

The conversation should begin with the Defense Acquisition Regulation Council (DAR Council) and the SBA.<sup>82</sup> It would make sense for the SBA to find common ground with the DAR Council first (which would make a recommendation to the FAR Council regarding any proposed change or new rule). Each service is represented and would have the opportunity to express its fears over the unanticipated effects application of set-asides overseas may have, and provide the perfect opportunity to craft a rule that benefits the SBA and protects the commander. For instance, if the SBA recognized and took steps to protect the commander in contingency operations, whether it be in combat or humanitarian operations, it would likely garner some goodwill. That goodwill could easily turn into policy that encourages discretionary set-asides. Maybe the fox is not looking to swallow the chicken whole. To find out, they need to talk.

## VI. Conclusion

In light of Congressional silence and the quasi-judicial status quo, it seems DoD and the SBA are at a standoff. The trenches are squarely dug in and bayonets fixed. The SBA wants set-asides to apply globally so it can get a bigger piece of the pie for its constituents. The Army and DoD want the exception to remain, protecting its ability to contract strategically. However, if the SBA keeps poking DoD, SBA will pick a battle it will be hard-pressed to win. In a skirmish between a commander's ability to wage war and protect the nation versus small business getting a little bit more pie, the commander should and will win. American small business cannot hold foreign policy and military strategy hostage.

The Act's history is rooted in supporting wartime production and defense of our nation, not thwarting it. Chicken Little's fears are real and grounded in a complex and unpredictable world. But maybe, if Foxy Loxy reaches across the trench with an open hand and a smile, Chicken Little might give him a nibble.

---

<sup>82</sup> The Defense Acquisition Regulation Council (DAR Council) is authorized to make changes to the FAR and likely provides the best forum to create a rule change that could satisfy both DoD and the SBA. It consists of a director (the Deputy Director of Defense Procurement and Acquisition Policy) along with council members from each branch of the military, Defense Logistics Agency, Defense Contract Management Agency, and National Aeronautics and Space Administration (NASA).