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SMALL BUSINESS CONTRACTING: ENSURING OPPORTUNITIES FOR AMERICA'S SMALL BUSINESSES

ROUNDTABLE

BEFORE THE

COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

SEPTEMBER 22, 2009

Printed for the Committee on Small Business and Entrepreneurship

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SMALL BUSINESS CONTRACTING: ENSURING OPPORTUNITIES FOR AMERICA'S SMALL BUSINESSES

TUESDAY, SEPTEMBER 22, 2009

UNITED STATES SENATE,
COMMITTEE ON SMALL BUSINESS
AND ENTREPRENEURSHIP,
Washington, DC.

The Committee met, pursuant to notice, at 10:12 a.m., in room SR–485, Russell Senate Office Building, Hon. Mary L. Landrieu (chair of the committee) presiding.

Present: Senators Landrieu and Risch.

Staff present: Greg Willis, Don Cravins, Karen Hontz, Adam Reece, and Matt Walker.

OPENING STATEMENT OF HON. MARY L. LANDRIEU, CHAIR, AND A U.S. SENATOR FROM LOUISIANA

Chair LANDRIEU. Good morning, everyone. Thank you so much for joining us for our Small Business Committee Roundtable, the focus of which is contracting with the Federal Government. Please forgive us for being a few minutes later and for the awkward set-up. This is not our normal room, but we are grateful for whoever allowed us to use it this morning. It is just a little different than what our staff is used to, but we are grateful for the space since ours is under renovation.

I thank you for joining me for this roundtable, and we look forward to hearing from all of you today who are experts on this subject so that we can improve and expand small business opportunities for contracting with the Federal Government, which is the largest purchaser of services, products, and machinery in the world. We want small businesses represented here today to have an opportunity, a maximum opportunity, to participate in the purchasing power of the Federal Government for many reasons, but one of them is that the small businesses in America are often the drivers of innovation. They are an absolutely essential component of a vibrant economy, creating high-paying jobs, new prospects for women and minorities, innovation, technology, and cutting-edge products. These are, in fact, challenging times. We have all been struggling through them, and more than 80 percent of the jobs lost since November coming from small and medium-sized businesses.

This Committee has been focused on many important issues the last couple of months since I have come into the chairmanship, working closely with my very able Ranking Member, Senator

Snowe. We have focused on health care issues, we have focused on access to capital. Today we want to focus on contracting with the Federal Government.

Let me just make a few brief opening remarks, and then I am going to ask everyone to introduce themselves and then turn some of the questions over to the staff, both Greg Willis and Don Cravins and the minority staff, for questioning.

In these particular areas that I mentioned, Government can be very helpful. Today we want to explore how the Federal Government has or has not been hopeful. We want to explore increased contracting opportunities, and we want to review the goals that are set by the Federal Government. Generally, at 23 percent of expenditures, those goals have not been met in the last year; however, the volume of contracting work has increased, which is good, but the percentages have slipped. We are going to review those in just a minute.

President Obama has pledged to improve these numbers. It is a goal that his Administration supports, and one that we support as well.

Let me go over just a few things that are probably obvious to those here, but small businesses have trouble gaining access to contracts because, unfortunately, there is a maze of complicated laws and regulations that make it difficult. Some of the barriers include contract bundling, standard sizes with loopholes for big businesses, lack of protection for subcontractors, difficult-to-navigate General Services Administration schedules at times.

When Federal agencies bundle contracts, it limits a small business' ability to bid, reduces competition, and, unfortunately, leaves the taxpayer to pick up the tab for increased costs over time. We will review some of the other barriers as we move forward today.

Let me also mention I have heard from a number of small businesses that they have waited months to get paid after completing their work. That can be very difficult for businesses that are on tight credit lines and budget restraints. So please be free to make some of those suggestions as well.

And finally, as we prepare to reauthorize the contracting provisions of the Small Business Act and create legislation to strengthen contracting opportunities, I look forward to learning how to fix these problems and moving forward.

I also would really prompt your feedback, ladies and gentlemen, on the stimulus package, the extra spending that has been given to almost every agency at the Federal level and to the states as well. Is your business or those that you represent experiencing an uptick in contracting because of that? Or is that money available or that expenditure available? I would like to learn more about that today.

Basically that is our charge for this morning. I would like to ask each of you, starting with Ann, our representative from GSA, to start by introducing yourself. We will go around the room, and then we will start with some questions and comments to lead this discussion. So, please.

[The prepared statement of Chair Landrieu follows:]

Opening Statement of Chair Mary Landrieu
September 22, 2009
Small Business Committee Roundtable

"Small Business Contracting:
Ensuring Opportunities for America's Small Businesses"

INTRODUCTION

- Good morning and thank you for joining us at this roundtable today to look at ways to improve and expand small business contracting.

- Small businesses are responsible for a stronger economy, high-paying jobs, new prospects for women and minorities, and innovative, cutting-edge products.

- But in these dire economic times they've been especially hard hit, with more than 80 percent of the jobs lost since November coming from small and medium-sized businesses.

- For this trend to change, small businesses need:

    1. Access to capital – which we will focus on in the coming weeks at another Committee roundtable.

    2. And increased sales.

CONTRACTING

- In both of these areas the federal government can be especially helpful. Today we want to look at how the federal government can increase sales for small businesses through government contracts.

- Increasing contracting opportunities for small businesses is important for a number of reasons.

- First, the federal government is the largest purchaser in the world so it is uniquely positioned to offer business opportunities for small businesses of every shape, size and product offering.

- Second, because federal contracts can provide small firms with a consistent source of revenue over a longer period of time, they can help small businesses maintain a stable cash flow during these uncertain times.

- And third, by helping to stabilize small businesses through government contracting we can speed up the economic recovery and job growth that we all want.

- That's the good news. The not so good news is that we can and must do much more to ensure that small businesses are getting contracting opportunities across the federal government.

- As everyone here knows the federal government has a goal of spending 23 percent of its procurement dollars with small businesses. Unfortunately, the latest numbers from FY 2008 leave a lot to be desired.

  - Last month, the Small Business Administration released data on the contracting dollars disbursed last year. In 2008 small businesses received $93.3 billion in federal contracts, an increase of almost $10 billion from 2007.

  - However, that meant that the government fell short of its 23 percent goal, with 21.5 percent of contracting dollars going to small businesses.

- We can do better. President Obama has pledged to improve those numbers by increasing public knowledge of federal contracting opportunities and I will continue to do the same. We all know that there is still much work to be done.

PROBLEMS WITH CONTRACTING

- Small businesses have trouble gaining access to contracts because of a maze of complicated laws and regulations that make it difficult for them to succeed.
    - Those barriers include contract bundling, size standards with loopholes for big businesses, a lack of protections for sub-contractors, and a difficult to navigate General Services Administration (GSA) schedule.
- When a federal agency bundles contracts, it limits a small business' ability to bid for the contract, reduces competition, and leaves the taxpayers to pick up the tab for increased costs over time.
- Size standards are also a very important issue. As you all know, a size standard is in most cases the highest gross income a business can have and still be considered small.
    - There has been no serious update to size standards in years. We need to update them, we can update them, but in a way that doesn't harm small businesses.
- I have heard from a number of small business owners that they have waited many months to get paid after they've completed their subcontracting work for a prime contractor.
    - Many have also partnered with large businesses to bid on projects only to never hear from those large businesses again once the contract has been won.
    - I want to know if this is still going on, and if so why, because that's just plain unacceptable.
- And last, many small business owners have expressed their frustration that it is tough and expensive to get on the GSA schedule, not to mention a nightmare to navigate for a small firm with few resources.

- They are thrown into a pool with many other businesses, some the largest in the world, and they are told "you are on your own." That is a problem.

CONCLUSION

- As we prepare to reauthorize the contracting provisions of the Small Business Act and create legislation to strengthen contracting opportunities for small businesses, I look forward to learning your ideas on how to fix the problems small businesses are facing in getting contracts.

- The Committee made a good attempt last year to legislate on a number of these issues as a part of last year's comprehensive small business reauthorization bill, S.2300.

- Although there were many good provisions in S.2300 last year that I supported, we couldn't get them through the Senate. This year we want a bill that will move.

- We are not interested in putting a lot of provisions in a bill that makes everyone happy, but cannot get out of the Senate.

  - We are going to do something that is measured and that has a chance to succeed. It will not be perfect, but it will be a good start.

- I would also like to learn what positive effects, if any, the Recovery Act may be having in expanding access to government contracts. I held a hearing on this back in May, but am interested to hear of any progress.

ROUNDTABLE FORMAT

- Let me now take a moment to explain the format for the roundtable. We've got a large group so if you would please stand your name placard up long ways to be recognized to speak.

- I unfortunately cannot stay due to my schedule, but in my absence Donald Cravins and Greg Willis from my staff will moderate and help lead the discussion.

- He will be reporting back to me on the details of the roundtable.

- We will leave the record open for one week, until September 29th.

- Before I turn the panel over to Donald and Greg I would like to start off by asking the roundtable what their experience has been with respect to Recovery Act contracts. It's extremely important for me to hear from you about whether you or your members are seeing an increase in federal contracts.

- In about a year most of the stimulus money is scheduled to be spent. It will be unacceptable to me if at the end of this time small businesses have not significantly benefitted from Recovery Act contracts.

- I will listen until I need to leave.

Mr. DRABKIN. Thank you, Senator. I am Dave Drabkin. I am the senior procurement executive, the Deputy Chief Acquisition Officer and the Deputy Associate Administrator for Acquisition Policy at the General Services Administration.

Chair LANDRIEU. Thank you, Dave, and your nameplate is coming. I am sorry we did not have it ready for you.

Mr. DRABKIN. That is okay. I prefer to remain anonymous.

[Laughter.]

Chair LANDRIEU. That is okay. You can run, but you cannot hide. So we are going to get you a nameplate.

Go ahead, Ann.

Ms. SULLIVAN. I am Ann Sullivan. I represent Women Impacting Public Policy in Washington, as well as many other small businesses.

Chair LANDRIEU. Thank you.

Mr. Hesser.

Mr. HESSER. Bob Hesser. I am a small business owner, but I am representing the vet force.

Chair LANDRIEU. Wonderful. Push the button.

Ms. DORFMAN. Margot Dorfman, CEO with the U.S. Women's Chamber of Commerce.

Chair LANDRIEU. Thank you, Margot.

Mr. CHVOTKIN. Alan Chvotkin, Professional Services Council, a trade association representing firms that provide professional and technical services to the Federal Government.

Mr. BRUBECK. Ben Brubeck, Director of Labor and State Affairs with Associated Builders and Contractors. We are a construction trade association.

Ms. FINGARSON. Ashley Fingarson, Director of Legislative Affairs, Associated Builders and Contractors.

Mr. WILLIS. Greg Willis, Procurement Counsel for the Senate Committee on Small Business and Entrepreneurship.

Ms. HONTZ. Karen Hontz. I do contracting for Senator Snowe on the Small Business Committee.

Mr. WALKER. I am Matt Walker. I am the Deputy Republican Staff Director for the Small Business Committee, and I just want to thank the Chair and also explain that Senator Snowe would have liked to have been here today. Unfortunately, this conflicts with the Finance Committee's markup of the health care bill, so, of course, she had to be there for that. She wanted to send her regrets for not being able to make it and thank everyone for participating today.

Chair LANDRIEU. And considering there are over 500 amendments pending, I think she would prefer to be there to wade through that challenge.

[Laughter.]

Mr. REECE. Adam Reece. I am contracting staff for Senator Snowe.

Mr. NEWLAN. Ron Newlan, HUBZone Council, the only national trade association focused on the HUBZone program.

Ms. OLIVER. I am Linda Oliver. I am the Acting Director for the Office of Small Business Programs for the Department of Defense.

Mr. JORDAN. I am Joe Jordan. I am the Associate Administrator for Government Contracting and Business Development at the Small Business Administration.

Ms. ROBINSON-BERRY. I am Joan Robinson-Berry. I am the Co-Chair of TRIAD. That is an organization, a sponsoring organization of the aerospace industry that includes primes and small businesses.

Mr. FERRERA. David Ferrera, Vice President for——

Chair LANDRIEU. You need to turn your microphone on and speak into the microphone if you would.

Mr. FERRERA. David Ferrera, Vice President for Government Relations at the U.S. Hispanic Chamber of Commerce.

Mr. ZEPEDA. Good morning. I am Sam Zepeda, Owner of Vistas Construction, a small minority-owned business.

Chair LANDRIEU. Thank you all so much, and let me also recognize back here against the wall Don Cravins, who is the staff Director of the Small Business Committee. We are happy to have Don's leadership. Thank you, Don, for helping us organize this.

Let me open it up with some initial comments and questions. The way we have normally done this, Greg, is people put their cards up like this, if you want to answer a question or comment, and I will call on you.

Let me just begin with the questions here. We want this to be very informal, and we have got some follow-up questions from the staff. In your opinions that any of you that would like to offer, are any of you experiencing in your realm of responsibility the stimulus funding or the impacts coming for stimulus funding, either from agencies that have more opportunities to contract with small businesses particularly, for companies that you all are representing that are attempting to bid on some of these contracts, whether it is being successful or not? Are you feeling any immediate impacts that you would like to share?

Robert, we will start with you. And, please, you have got to turn your microphone on and speak closely into it. I know it is a little awkward, and I am sorry.

Mr. HESSER. No problem.

Chair LANDRIEU. Again, we are in a different room.

Mr. HESSER. Senator, I sent you a letter about 2 weeks ago on this subject, maybe 3 weeks ago, and the ARRA—I guess the title is—it is the stimulus bill. Throughout the stimulus bill, 457 pages, you can find "8(a)" once and you can find "small business" once. They are both in the same sentence, and they are in one little subparagraph, and it is only under the broadband. So the only thing that the Secretary of Commerce is responsible for considering—they must only consider it; they do not have to do anything, just if they consider it. There is no small business in the stimulus program, no direction, nothing about anybody. Just one thing, and one thing on 8(a).

We recently went through the broadband first part of grants, and one of the problems with a small business, if you have any kind of complaint or you think you were shortchanged or whatever it might be, there is no way you can do anything about it because the grants are not under the procurement, they are not under FAR.

However, the 2300 bill and many other bills have always put in there grants, but the actual legislation is not there to require the Government to give an opportunity when there is a complaint or something might be going wrong. And we did have some problems with this one, the broadband. But the point is no small business in 457 pages for $29-some billion.

Chair LANDRIEU. Okay. Mr. Brubeck.

Mr. BRUBECK. Yes, I work for ABC, Associated Builders and Contractors. We are a construction trade association. We have a variety of Federal contractors that received contracts from the stimulus bill.

I will reiterate that they are large businesses. We have heard from many small businesses who have not had any opportunity to participate on the construction projects.

We are finding that a lot of the projects under the stimulus bill are being bid very competitively. The private market right now for construction is very weak. There has been quite a bit of job loss. About a million jobs in the last 12 months have been lost to the industry.

The stimulus was a welcome investment of cash into public infrastructure, but it has been very competitive, and there is certainly not enough work to go around.

Chair LANDRIEU. Your organization represents large and small businesses?

Mr. BRUBECK. Large and small, subcontractors, general contractors, materials suppliers, and the construction industry.

Chair LANDRIEU. Okay. Ms. Dorfman.

Ms. DORFMAN. Thank you, and thank you very much for the invitation to be here today. We represent women-owned firms. We have over 500,000 members, but we represent all small businesses.

We have heard from our constituents that they are not able to access the Recovery Act contracts, just as Mr. Brubeck mentioned. Additionally, we noted that there was a report that was floated out—a press release, actually—last month when Congress was out, from the SBA talking about isn't it wonderful $93 billion in contracting dollars went to small businesses for year ending 2008. When we took a deeper look, what we found was women-owned firms lost $12 billion of opportunities, and small businesses overall lost $30 billion.

I suspect that what we will see with year ending 2009 is even higher because of the increase of dollar coming out from the Federal spending.

Chair LANDRIEU. Margot, what you are saying—and I think this is very important, Ms. Dorfman—is that while the overall number went up from $83 billion, I think, to $93 billion, the percentages went down. So you are calculating that loss of opportunity between what would have been had we hit those higher percentages, the numbers that you just gave us?

Ms. DORFMAN. The Federal spending actually has increased overall, but they did not meet their goals. So that is part of it.

Chair LANDRIEU. Correct, so it is a lost opportunity between——

Ms. DORFMAN. So there are lost opportunities——

Chair LANDRIEU [continuing]. What the percentage would have been?

Ms. DORFMAN. Exactly. Additionally, some of the opportunities that the SBA has taken off the table for small businesses—for instance, contracting dollars overseas—that type of spending is not included in the dollars that should be included.

Chair LANDRIEU. Okay. Does anyone—go ahead, yes.

Mr. DRABKIN. Senator, first of all, I would like to make sure that the Senator is aware that GSA is the only agency, according to the SBA, who met and exceeded all of its goals last year. We are also one of the agencies that has one of the larger construction programs under the stimulus package, and we are working very well so far at achieving our goals in fiscal year 2009 with the stimulus package.

The only area that we experienced where small business was unable to play was in the $300-plus million for new cars, because new cars are purchased from large companies, and small businesses could not play there.

I would like to observe also that some of the larger projects in the construction arena are difficult to reach small businesses through because of other issues associated with, for example, their ability to get a Miller Act bond at the dollar level required to do the work. But we are making up for those where those instances occur by increasing subcontracting goals for those prime contractors and ensuring that those prime contractors meet those subcontracting goals under their prime contracts.

Chair LANDRIEU. Thank you very much for offering that. I would only suggest—and I do not have the numbers; maybe some of the staff do—that the stimulus funding that went for the Cash for Clunkers program, which is part of an extension of the stimulus, was very helpful to the dealers, and many of those dealers are small businesses. It did not just go to the large companies, but the dealers on the ground, and I think we could agree there are many small businesses that were dealers. I heard very positive feedback, at least from the dealers in Louisiana. I am not sure what other people have heard, but it was extremely popular in our state.

Whether it was effective to meet environmental goals, I am not sure, but it was an effective stimulus.

Mr. DRABKIN. Yes, ma'am. I am talking about a different piece of money. GSA was given a little over $300 million specifically to purchase new cars for the Federal fleet.

Chair LANDRIEU. Oh, I am sorry. Okay.

Mr. DRABKIN. Those cars have been purchased. They were obviously purchased from a large business. In fact, you will find on Federal recovery.gov our list of those cars. I believe there are 16,000 entries which track each individual car so that we can demonstrate that the car purchased was actually more efficient than the car it replaced.

But my only purpose of reporting that to you is that the only area in GSA's funding where we could not reach directly to small businesses was for the cars, because there are no small businesses who manufacture cars, and we buy those cars directly from manufacturers.

Chair LANDRIEU. Thank you very much for meeting your goals and for the efforts that GSA is making, and we will come back to that.

Does anybody else want to comment about any stimulus issues before we move on to the next set of issues? Go ahead, Mr. Zepeda.

Mr. ZEPEDA. Yes, well, we believe that the recovery money is very welcome into the industry, especially in today's economic environment.

I do believe that there are a lot of hurdles through the contracting activity that they are having to overcome, such as the spending with small businesses. They are bundling more of the contracts. It kind of restricts the access to capital and bonding, restricts us rather than kind of helps us in many ways. But if they were to focus more with the SBA in conjunction of obtaining bonding capacity, I think it would kind of help be able to level out the playing field a little bit for us and kind of work hand in hand together to get access to those opportunities.

Chair LANDRIEU. Thank you.

Mr. Ferrera, and then I will call on you, Mr. Jordan.

Mr. FERRERA. With the membership of the Hispanic business community representing both large and small, the feedback we have gotten from the ground is relatively positive, businesses saying they are engaging, that they are putting in requests for proposals and responding to them.

At the same time, though, one of the primary needs of many of the chambers we represent is to try to track the data, how are the States actually contracting these dollars since a lot of the dollars are being handed out at the local level and the State level. How is the data being tracked? And a lot of the Recovery.gov data is very macro, a 30,000-foot view. And one of the items that we would love to see is for that taxpayer ability to review the small business components of these contracting activities.

In some cases, like the Department of Transportation, they have actually threatened, for instance, the State of California to withhold portions of their transportation funds unless they revived some of their small business contracting 8(a) programs. But we do not know if that is the case for a lot of different States, and we do not know how consistent those efforts are being done throughout the Federal Government.

Chair LANDRIEU. Okay. Mr. Jordan, and then Mr. Newlan.

Mr. JORDAN. Thank you. First, I just wanted to briefly touch upon some of the data that I do have, which is regarding the Federal contract dollars. There has been about $13 billion in Federal Recovery and Reinvestment Act dollars, contracts that have gone out thus far, and about $3 billion of that has gone to small businesses. So when you talk about the goals that several people have mentioned, that is running at 23.5 percent, so above the 23-percent goal.

In terms of the subprograms or the socioeconomic groups, the HUBZone program, as Mr. Newlan knows, is currently running at 6.1 percent of stimulus contracts, so $811 million in HUBZone contracts have gone out through the Recovery Act; $1.3 billion in contracts have gone to small disadvantaged businesses, so that is 10.6 percent, more than double their 5-percent statutory goal. Service-disabled veterans are at $490 million, so 3.7 percent. And as Ms. Dorfman and I are aware, the women-owned small businesses, because there is not yet—and I believe we will touch on this later,

not yet a set-aside program that contracting officers can utilize for women-owned small businesses, they are the one group that is currently below their statutory 5-percent goal, but they are at 3.6 percent with $481 million of Recovery Act contracts.

So as Mr. Ferrera pointed out, the State portion is still something that we are trying to get the numbers around, but at the Federal level I am cautiously optimistic that we are in the right place in terms of driving these contracts to small businesses. And I just want to briefly touch upon, well, what are we doing proactively to ensure that that continues throughout the duration of the Recovery Act, and that is where I point to the President and Vice President had talked about the Stakeholder Outreach Initiative. This is an effort to really drive contracts to small businesses and businesses owned by women, minorities, veterans, people living in impoverished rural or urban areas, to ensure that we both help agencies identify qualified small businesses quickly, given the rapid period over which these funds are being disbursed, and help build capacity and awareness in the small business community.

Some of the examples of things incorporated into the Stakeholder Outreach Initiative are all Federal agencies are tasked with participating and hosting of outreach events. In aggregate, that will be over 200 in the 90 days since we began this at the beginning of August.

The SBA has recently posted on sba.gov a "How to win Recovery Act Federal contracts" training. It is a 30-minute, self-directed, totally free training that we are now pushing out to small businesses to make sure that they are aware of this resource and can quickly get up to speed.

As Mr. Brubeck said, with some challenges in the commercial buying base in many economic sectors, the Government can often step in, since it is the largest procurer of goods and services in the world, and we want to make sure that small businesses who may not have sold to the Government before are capable.

So I just wanted to point out a few of those things and make sure that since we have this opportunity with all these representatives of great groups, so you can take some of this information back. And, conversely, I am always welcome to discuss more offline.

Chair LANDRIEU. Thank you, Mr. Jordan, and thank you for your emphasis and your effort, and maybe some of the panelists will have questions directly to you, which would be appropriate as we move forward.

Mr. Newlan, let me get you.

Mr. NEWLAN. Thank you, Madam Chair.

Joe just reported the quantifiable data, more than 6 percent. I have inferential data. We ran our national conference a week and a half ago here in D.C. where we bring in HUBZone firms from all over the Nation, and we had a couple of dozen report to us: "We would love to come, but we are too busy staying home writing orders, bidding jobs and writing orders," including some from Louisiana. And that is the good news.

Chair LANDRIEU. Good. A little extra to Louisiana.

[Laughter.]

And Maine. That is the idea.

Mr. NEWLAN. Sort of the bad news is about one-third of the land mass of Louisiana is today qualified a HUBZone. That has got good and bad aspects to it since any firm in those would probably qualify.

But it looks like HUBZone first at least are out there getting more than their 3-percent share and doing well, writing orders, bidding jobs.

Chair LANDRIEU. That is good to know.

Go ahead, Ann. Ann Sullivan.

Ms. SULLIVAN. WIPP launched a real effort to try to educate all of our members on how to avail themselves of stimulus money, and, it is a very detailed briefing. And what we have found is that mostly if you have not been a contractor, it is really hard to find money. But if you are a successful contractor already, a number of our members are having great success because they are already in the system. And since the Government is using existing contracts to put that stimulus money through, they are having a great deal of success.

So it really varies, I think, by experience of the contractor and by how the money is flowing.

Chair LANDRIEU. Let me ask this to press down a little bit. I was reviewing this with my staff in terms of the reporting mechanisms for the numbers and percentages of contracts that go to small businesses.

I am hearing some feedback from small businesses in my state. At a reception for the Jefferson Parish Chamber recently, it came up with some of my small businesses that said, "Senator, we are part of larger contracts. Our larger contractors contact us to include us as part of their bid. The problem is we never really see any of the funding through the contract, but we think that our participation in the bidding of that contract is getting counted towards goals achieved."

Is that your experience? If it is, could you comment about it? Could you give some feedback? Ms. Dorfman?

Ms. DORFMAN. That is a very common complaint with our members. They are asked to provide information like they are going to be included in the contract award. They spend a lot of money doing that, preparing for the bid, only to find afterwards they never hear from the contractor again. And I agree. I think the subcontracting plan should also include enforcement of using the small businesses, not just saying you have to get information included in the plan.

Chair LANDRIEU. Mr. Ferrera.

Mr. FERRERA. Our perspective is that a large number of Federal contractors do not generally comply with P.L. 95–507, which requires them to include small and minority businesses in their subcontracting programs. And, generally, when a large contractor puts together its bid, gets a lot of bids from small and minority-owned businesses, which they need in order to be able to compete it, but then generally there is no mechanism in place that requires them to use these SDBs once they actually receive the award, and they end up recompeting them afterwards. So it becomes almost a bit of a bait-and-switch sometimes, and there is nothing to stop them from then creating a subdivision within their own private con-

tracting company to carry out what those SDBs or small or minority companies would have done.

Chair LANDRIEU. Mr. Zepeda.

Mr. ZEPEDA. Yes, from my own experiences, the process is a best-value process that requires a percentage of small and minority goals to be included in the proposal when it is submitted. And it looks good when the proposal is evaluated, but there is no mechanism in place, such as liquidated damages, that after award it could be followed or tracked that, in fact, they are using those goals that they submitted at the time of bid. And, unfortunately, you know, submitting a proposal does take resources from our company where we could be allocating them elsewhere, and it becomes a problem for us.

Chair LANDRIEU. Thank you. I would like to hear from David at GSA about this, and then I am going to ask the SBA to comment about this particular complaint and what might we do about it.

Mr. DRABKIN. Senator, you may be aware that I guess now a little over 2 years ago, we put online a new database called "ESRS." ESRS is a database which requires prime contractors to report their actual subcontracting performance.

In the past, the subcontracting performance was reported in paper to the various contracting officers. You probably know we have about 2,600, give or take 20 or 30, contracting offices spread around the world. We do about 11 million contracts each year, which means that is 11 million separate contract files into which these reports were being put. And by now, going online and having prime contractors report their actual performance under their subcontracting plans, we are beginning to gather data that we can use to determine whether or not prime contractors are living up to their commitments in the contract to achieve a certain level of subcontracting with small businesses.

I would observe that the Federal Government avoids—we have historically avoided—since before the passage of the Armed Services Procurement Act of 1947, we have avoided becoming involved in the relationship between prime contractors and subcontracts. That is referred to as "privity." The Government does not want to be in a direct relationship with a subcontractor. So who a prime contractor negotiates with up front to submit their bid to the Government is less important to us as the purchaser of goods or services than their actual performance after they have received subcontracting—after they have received their prime contract award.

In fact, one might argue that the whole process of having prime contractors what we call "sub up" before they submit a proposal actually gives the Government a sub-optimal proposal, and that it might be better if we did not allow them to sub up before they submit a proposal so that after they have won the contract, they can go out and put together the best subcontracting team instead of a subcontracting team that might have the best in one category, but not the best in another. It would serve both the taxpayer and the small businesses better.

But having said all of those things, I believe you will find that as ESRS matures—and we are working on its maturation right now; you will hear from Mr. Jordan on what they are doing at SBA—we should have better and better, more discrete data on

what is actually being done under prime contracts, and we will be able to better and better enforce prime contractors' responsibilities to meet their subcontracting goals because that data will be transparent and readily available not only to the agency's senior procurement executives responsible for managing that, but also to your staff and other people in the oversight community.

Chair LANDRIEU. Thank you for those comments, and I can appreciate it. I might want to just respectfully argue that it might be in the Federal Government's interest not to get between contractors, large and small; but most certainly, if the Federal Government is going to require, if we are going to require, that a certain amount of our goods and services go to small business, then we have a vested interest in finding out if that requirement is being met.

So how we do that, whether you say we are getting between contractors or not, or some sort of reporting mechanism, because otherwise it becomes—I do not know—work with no meaning. If you are requiring a certain amount of money that we are spending to go out to small businesses, but then you accept on face value the contracts from larger contractors saying, oh, yes, 20 percent of our work is going to small businesses, but then you never check.

I think that is what we are trying to get to, but I appreciate your comments there.

Mr. DRABKIN. Yes, ma'am. If you do not mind, just to make sure we are clear, ESRS allows us to check. When I said we do not get between the prime contractors and their subcontractors, that is to say, whatever relationships they have and how they establish those relationships are between those two individuals. But the prime owes us a duty of meeting those subcontracting goals. ESRS is designed to help us make sure that they do what they promised to do, which is clearly our responsibility to execute.

Chair LANDRIEU. Thank you for clarifying that.

Mr. Chvotkin.

Mr. CHVOTKIN. Thank you, Senator. Mr. Drabkin is a good friend, and he is right on the philosophy, but the fact is that the Government is heavily involved in the relationship. There are many of the rules you talked about earlier, but the rules that apply—and the Government evaluates contractors' purchasing system methodologies, they question some of the make-buy decisions that companies make. They look for the extent of competition in the subcontractor arena, and so there is a lot of activities.

The reporting, as you said, contractors have been reporting on performance, and those are monitored by both the small business offices as well as contracting officers. More can be done. ESRS is one way because it provides an electronic method for matching up prime contracts and subcontract awards, and more can be done in the enforcement side. We agree with that.

Your first question was: Is the Government reporting on taking credit for work that is not being done? And I do not think that is the case because they should be reporting on awards made and not simply that a company has proposed a set of small businesses. So if they are reporting simply on proposals, you ought to double-check with the agencies, but I think they are only reporting on actual awards made.

Chair LANDRIEU. Let us hear from DOD on that and also from Small Business, and then we will get back to others. Ms. Oliver.

Ms. OLIVER. I am not sure which way to scoot.

[Laughter.]

Mr. NEWLAN. Come towards HUBZone.

Ms. OLIVER. At risk of getting too technical about all this, I am afraid we are having some talking past each other, and I do not want that to happen, especially with this group, most of whom I know, who have such great influence over so many different small businesses.

There is a great deal of confusion about what is in a small business plan and what is in a contract. If it is in a contract, it is probably going to get enforced. If it is not in the contract but, rather, in the small business plan—this has been my experience—the chances of enforcement seriously diminish, and part of the reason is small business performance—it did actually from my standpoint—whatever the small business requirements are in the contract, that is the best place for them to be. And that is in part because when the contracting—whoever the contracting officer is that receives—rather, it is the procuring contracting officer or the administrating contracting officer. Small business should not be off to the side. It should be just part of the regular review and enforcement. And if it is in the contract, that is the natural way for it to go.

There was a mention earlier about enforcement, liquidated damages. We might as well just be realistic about this. In order to get liquidated damages, which I do not know if it has ever happened. David, has anybody ever gotten liquidated damages?

Mr. DRABKIN. Linda, actually there are quite a few contracts—not a majority, but particularly large contracts—where failure to meet the subcontracting goals has resulted in liquidated damages. And, in fact, when I was in the Department of Defense, we had a number of those types of contracts. It is not a preferred method because once you get into liquidated damages, your ability to work with a prime contractor becomes adversarial, and they begin building their claims files, which is normal in any kind of relationship.

What we prefer is incentives that are managed well, and, unfortunately, Senator, as you know, you have heard about how incentives have not been managed well. But when I was on the Pentagon renovation, we managed our incentives on small business participation every month, and they either performed and they got an incentive, or they did not perform and we took that incentive away.

When managed well, it works great, but when you manage 11 million contracts across the Government, with only 27,000, 28,000 people to manage those contracts, your ability to manage incentives on each and every contract on a quarterly or even semi-annual basis, it is very difficult

Ms. OLIVER. I agree with everything——

Chair LANDRIEU. Go ahead and finish, and then I am going to get to Ms. Berry. Go ahead.

Ms. OLIVER. I agree with everything that you have said, David, except the difficulty of proving liquidated damages. You——

Chair LANDRIEU. Can you all hear in the back? Okay. Could you speak—I am sorry. You just have to lean up to the microphone.

Ms. OLIVER. I will try to yell.

What I want us to stay focused on is what works the best, just as a practical matter, and that is having the part of the contract—David is very knowledgeable. I just never—although I spent most of my life worrying about Government contracts, I have never seen liquidated damages work. It is too hard to prove, and it becomes—there are a lot of reasons. But liquidated damages are a product of having something be in the subcontracting plan, not in the contract. If you do not perform—if it is in the contract and you do not perform——

Chair LANDRIEU. Correct. Being in the contract, there is an enforcement mechanism that is easily understood.

Ms. OLIVER. Exactly.

Chair LANDRIEU. So that is very good, and thank you for clarifying that.

Ms. Robinson-Berry.

Ms. ROBINSON-BERRY. Yes, I represent a lot of—can you hear?

Chair LANDRIEU. Yours is not—okay, try it now.

Ms. ROBINSON-BERRY. I am representing a lot of the primes, and I think there is a lack of communication. Folks assume that after you win a contract the construct of that contract is the same. You come in with a great RFP and you win that contract, and by the time it is awarded, it is a totally different plan. And we do not always effectively communicate that change in that contracting scope. And so some small businesses believe that they were bamboozled. But, again, it is phased over a longer period or they slow it down or they change the content. So I think that that is what we can work on to make sure that we communicate effectively to all the small businesses of the actual award.

The second point is that we also—our members do get evaluated every year. There is very, very rigorous audits—we call them 640 audits—every year on our performance, and we get a report card. And if that report card is not good, it affects our performance. And when you are going after new activities, they ask for your past performance. And when you are competing, when you look at the past performance and all of the technical requirements are there, I know that a lot of our contracting officers look at that past performance and then we are impacted.

And, again, many of our contracts, also our small business goals are tied to the contract, and if we do not perform in all areas, it affects our award fee. So I think that a lot of that information on our report card and the actual winner of the contracts is not always communicated clearly. So I just wanted to go on record that that does, in fact, happen.

Chair LANDRIEU. Mr. Hesser has had his banner up for a while, and then Mr. Newlan, and then we are going to move on to another issue or two.

Mr. HESSER. I want to make two comments. My first one was with Mr. Jordan. The vet forces found many—questioned several of the statistics that come out, and we seem to be right most of the time, because how was all these funds that you said for 8(a)s, for SDBs, for women-owned, how was each one of those awarded? And

that is a big question, because when—the very first time in 1998 or 1999 through 2001 to 2002, service-disabled veterans—what was being counted was they were finding an 8(a) who was also a service-disabled veteran. They were awarding it as an 8(a) contract. But then they would count service-disabled veterans and 8(a)s. A fact. We have testified about four or five times in front of the House or Senate about this subject.

Now what they do is they have the same ability, but if it is easier to give an 8(a) contract, which it always is, they will give an 8(a) contract, and if you are also a service-disabled veteran, you have got it made because they really want you. And they will give you two counts.

Some people say, well, they do not count it twice. Well, they do, in fact, count it twice in a roundabout way. Sometimes they do only report it once. For instance, if the service-disabled veteran goal is not doing very well, they will count it over on this side. But what is important that the vet force is very, very serious about, we do not want a contract awarded as a service-disabled veteran—I am sorry, as an 8(a). We want it as a service-disabled veteran because the law protects the 8(a), the law protects service-disabled vet, the law protects HUBZone, et cetera. That is what it should be and only be that. That is number one.

Number two, accounts have not been brought up here about the subcontracting contracting is—frequently, an 8(a) will get a contract, and they will share that with a large business. Or they will do it all by themselves. But as time goes by, the original seven people that they had in 3 years is about 21 people. So the contracting officer follows the "once an 8(a), always an 8(a)" rule. But the point in the law, as I understand it—and we have had this kind of researched out. The point in time when the award was made, that is what the SBA Small Business Act protected. They protected the competition for them to win seven, only seven. Now, in 3 years, when it grows up to 21, they should only award the seven as an 8(a) and break the other one, the other 14 back out. Or take the whole contract and put it out either women-owned, but somebody different other than 8(a), because it keeps hanging in there all the time. I do not know if the HUBZone runs into that. I know I do. It is 8(a), 8(a), 8(a). I am not against the program. I love it. I have run four 8(a) companies. So I am not against it. I am only saying the way it is being done.

Chair LANDRIEU. Okay. Thank you.

Mr. Newlan. And then, Mr. Jordan, you may want to comment.

Mr. NEWLAN. Madam Chair, as the Nation prepares to attempt to prevent the H1N1 flu epidemic this fall, we have an epidemic right now in the topic you asked the question about. Small businesses are getting the raw end of the deal by large businesses every day nationwide, and have for 30 years, and I speak with firsthand experience running small businesses and large businesses.

If this Committee wanted to step in, this Committee would be recognized for the work that it did in that area. It is a tremendously important area to improving small business contracting.

One quick example. As I understand it, the Federal Government contracting officer cannot make an award to a prime without put-

ting some money in the contract. You cannot make an empty, hollow award. There is usually at least $5,000 or $50,000 put on this billion-dollar contract because it consummates the contract. There is a transference of cash. But the small businesses help the big business win. We do a lot of work, we do a lot of writing, and all we get is a promise that downstream maybe.

Perhaps the same concept could be applied where the prime contract cannot mention in their proposal anything that they are not prepared to pay for and put up real money to a small business to help write the winning proposal.

That is what hurts the most. These small businesses spend $10,000, $20,000, $50,000 of their own time and energy to help a big business win. Big business wins, then they never talk. But if we got paid that $50,000, it would not be quite as big a complaint because we got paid for at least the work we did.

Chair LANDRIEU. Thank you, Mr. Newlan. I am glad someone on this panel is more articulate than I have managed to be. That was very good. Thank you very much.

Mr. NEWLAN. I have got 30 years' experience.

Chair LANDRIEU. Thank you, Mr. Newlan.

Mr. Jordan.

Mr. JORDAN. I cannot promise to be articulate, but I will address the issue.

[Laughter.]

Bait and switch, especially when it comes to subcontracting plans, is certainly something that we are concerned about that is frequently raised to us typically through our procurement center representatives or in our district offices, and it is something that we work very hard to help address. So what are the actions that back up those words?

I think, you know, from our standpoint there are two main arenas in which we can effect some change here, and one is working collaboratively with the agencies, so this is both through our effort with the various OSDBUs and other small business people within the agencies, as well as the contracting officers and our procurement center representatives who work with those contracting officers and sit at those buying activities and look over many of these contracts. And with the larger primes, it is making sure that you have a dialogue with groups such as TRIAD. Ms. Oliver and I just recently went down to Fort Worth, Texas, and met with the Lockheed Martin team working on the F–35 to talk about: Okay, as this ramps up, what are your small business contract plans? We are going to hold you to what you say, so do not make these empty promises, as you put it.

That is where the second level is, almost a trust but verify sense, using the electronic subcontract reporting system to ensure that primes are following through on the allocations that they have signed up to do, and with the agencies conducting things like surveillance reviews where we can evaluate the performance around that.

So we certainly hear it anecdotally as well, but we are also trying to put the data against it and marshal our resources to ensure that in a collaborative but enforceable way we can address this issue.

Chair LANDRIEU. Thank you for taking those extra steps. I am going to have to step out and turn the microphone over to Don Cravins, the Staff Director of our Committee, and he is going to be joined by able assistants on both the Republican and Democratic side to continue the questions.

This record will stay open for 2 weeks after today. This meeting will go on probably until 11:30, quarter to 12:00. So thank you all. It has been very informative, and I am just going to have to slip out for another engagement but the roundtable will continue. Thank you all very, very much for participating, and I am going to turn the questions over to Don now. Thank you.

Mr. CRAVINS. All right. Thank you, Senator Landrieu.

At this time I am going to ask my colleagues, my able colleagues from Senator Snowe's staff, to ask the next question.

Ms. HONTZ. Thank you, Don.

Well, you see we have sort of skipped around. We had an agenda, but it is hard to stay on the agenda because all these issues somewhat intertwine. Before I begin the questioning, I want to thank all of the panelists for showing up. I think in the discussion already we have learned a lot, and it will be helpful as we progress in trying to improve small business contracting.

I want to go back to the goaling for a minute. I know there are other things that we need to cover, such as size standards and some of the individual programs. But I think it is important because obviously Senator Snowe is very upset every time she sees a report coming out that says the governmentwide goals were not met.

The question is—well, there are lots of questions, but the law states that it is maximum practical extent—practicable, I guess, which is a very hard word to say, but I want to discuss that a little bit.

For example, congratulations, GSA, on meeting all your goals. Unfortunately, DOD, which is 75 percent of the buy, is not quite in that situation—not that they have not tried. I have been working with Linda for a long time on this issue, and I know she is passionate about it, as are her staff across the world, really.

But, for example, now in the Recovery Act, if you look at the statistics, I believe DOD is 56 percent and GSA is 8 percent. And, Mr. Drabkin, you said you were buying a lot of cars, and you buy them from large manufacturers, and that was what some of your money in the stimulus bill was. I think for DOD it was construction, and, of course, small businesses do well in construction.

So I am going to throw out a couple of things here: one, the maximum practicable extent and some discussion on that; and then related to that is this Small Business Demonstration Act, Comp. Demonstration Act, which limits in certain fields that small businesses seem to exceed in that they cannot have set-asides. This has been on the books since 1988, and I am wondering if maybe it is time to look at it and see if this is prohibiting small businesses from getting contracts through set-asides.

Anyone care to comment?

Mr. DRABKIN. Well, a couple of points. When you look at the stimulus money alone and you look at what GSA is required to do with that money, there are a couple of points that become obvious.

And this is a difficulty, by the way, with small business goaling generally. You have to look to the marketplace to who is capable of performing the particular work that needs to be done.

So, for example, if we are building a several-hundred-million-dollar courthouse—we build those—finding a small business that can get a Miller Act bond for—well, first of all, there are not several-hundred-million-dollar Miller Act bonds available. You cannot get them. And they have to be bonded to do the work, and so small businesses in those circumstances are excluded from the market that we can go to to purchase that service. So we have to redouble our efforts in other areas to try to make up for those goals.

This is just like when I was in DOD. There is no small business that builds a fighter aircraft or an aircraft carrier or, for that matter, a tank. And so when you get to large construction projects—and GSA's dollars were almost $6 billion total—5.8, I think—5.5 for building and construction, $300 million or so for cars. Cars cannot be bought from small businesses for that entire $300 million—there was nothing we could do to reach out to small business as part of that $300 million.

Of the 5.8, you are correct that our recent report shows that overall of the 1.3 that we have obligated in accordance with our goals for obligating ARRA money, only 8 percent so far has gone to small businesses. When you look at the projects that were awarded, you will observe that where they could go to small businesses, they did. Where they could not because of the size of the project or inability for the people to compete, in accordance with the rules that Congress has set up, they did not go to small businesses.

If you look at our subcontracting goals in those projects, you will notice that they are very aggressive; in many cases 50 percent of the project is laid out. And unlike other agencies, we in GSA—and this is not to make negative remarks about other agencies, but we manage aggressively the performance of the subcontracting goals by our prime contractors to make sure that they meet them.

But this is a general observation about small business goaling altogether, and it is one which you did not ask, but you opened the door. As you look at the marketplace today, what you have to evaluate is where are small businesses that can perform in accordance with the rules that we have set for small business performance. And I think you will find that the market has changed dramatically, and so finding a small business that can deliver a small business-manufactured IT product is awfully hard to do because nobody manufactures IT products in the United States at all. And we buy a lot of IT.

And you have a rule—remember, we have a rule—that says that small business, to be a small business for goaling purposes, has to either manufacture the product itself or sell the product of another small business. Now, I know SBA was considering changing that rule, but that is still the rule.

In the services world, you have the same rule. A small business to be counted for goaling purposes as a small business has to offer the services, at least 50 percent of the services as a small business. And so I guess my point is what we have never done, as far as I know, is do a complete market analysis of where it is appropriate—

where there are small businesses available to do the work, who can follow the rules that have been set by Congress in the statute, and then set our goals based upon those numbers, as opposed to trying to take a salami-cut approach to the total number of dollars we spent.

And, believe me, I am committed and everybody in GSA is committed to small businesses. We want to do business with small businesses. As you know, we are the only ones, the only agency with a small business GWAC for 8(a)s, which we are recompeting. We are the only one with a service-disabled-veteran-owned small business GWAC. We are the only ones with a HUBZone small business GWAC. We are the only who created a GWAC just for small businesses in Alliant. We are committed to small businesses. But we have a difficulty achieving those goals when they are spread across an entire marketplace where small businesses cannot compete.

Ms. HONTZ. Okay. Thank you very much for those comments.

Mr. WILLIS. Can I follow up really briefly?

Ms. HONTZ. Yes.

Mr. WILLIS. What I am hearing is because it is difficult we should abrogate our responsibility to do it.

Mr. DRABKIN. That is not what you are hearing. What I am talking about——

Mr. WILLIS. That was the long answer.

Mr. DRABKIN [continuing]. Is impossibility. That is not the answer I gave you, sir. The answer I gave you was——

Mr. WILLIS. You are saying it is impossible for small business——

Mr. DRABKIN [continuing]. If there is no small business capable of doing the work, then having a goal in that particular part of the market makes no sense.

Mr. WILLIS [continuing]. Abrogate the agency's goal to meet small business goals generally. You might have to work harder in another area.

Mr. DRABKIN. That is true.

Mr. WILLIS. But it does not relieve you of the responsibility——

Mr. DRABKIN. And I did not say it did.

Mr. WILLIS [continuing]. To meet the goal. I am not saying you did.

Mr. DRABKIN. Actually, you did say——

Mr. WILLIS. But what I am saying is if you are saying that, that is a wrong assertion. That is exactly what I heard. But if you are telling me that that is not what you are saying, then I will accept——

Mr. DRABKIN. Not what I am saying at all.

Mr. WILLIS. But——

Mr. DRABKIN. What I am saying is we need to do an analysis——

Mr. WILLIS. Excuse me——

Mr. DRABKIN [continuing]. Of the marketplace——

Mr. WILLIS. Excuse me. What I am telling you is the fact that it is hard does not relieve you of the responsibility to meet the goal.

Mr. DRABKIN. And we did. And what I am telling you, sir, is that——

Mr. WILLIS. Let us move on.

Mr. DRABKIN [continuing]. Our obligation is——

Mr. WILLIS. Let us move on from there. Karen.

Ms. HONTZ. Okay. Can I have DOD—and, you know, this discussion could go on forever, but we have a lot to talk about, so if you could keep your remarks somewhat short. Linda.

Ms. OLIVER. Well, I just almost do not know where to go there. There is so much material here.

The Senator mentioned very early on and Karen just re-mentioned that what the law requires is maximum practicable opportunity. And that is what is reflected in the Federal Acquisition Regulation. And that is what we need to keep our eye on, and one way we have tried to keep our eye on that is to begin to do exactly what David Drabkin just said we should be doing, which is to do more and more analysis.

Now, we are nowhere near the stage that you are speaking of, David. We are working on it all the time, and we are getting better. If we understand our data well enough, it seems to me like we should be able to—I am sure you do not want a big technical explanation of why I think this, but we should be able to say—in my office, for example, we should be able to say, Department of the Navy, you are buying this, there are other parts—and you are not buying much of it from small businesses. We can look at the data and see that there are—I do not know, Justice Department is buying from small businesses. You need to focus.

That is where we need to go with the data. But it is always maximum practicable opportunity. I am here to tell you, the Army does not get by with 23 percent because of what they buy. And David is correct. You know, no small businesses make fighter planes or combat ships or all sorts of systems, and Greg is right, that is what David did say. That means we have to focus on the other thing. But David has the key, and it is really where we are trying to go, is to keep on the maximum practicable opportunity so that we find what is possible, because it does not help any for me to say, NAVAIR, why aren't you buying more jets from small business? They cannot get there.

Ms. HONTZ. Do you want to comment?

Mr. WILLIS. I think what we are saying is do whatever you need to do internally to meet your goals. We are not going to micromanage how you manage your work flow. But the goal is what it is. And I think it sounds like you are stepping back from wanting to meet that goal because it is difficult. The goal——

Ms. OLIVER. I am sorry. It comes across that way. And, actually, this is not—I think you are probably right that I sound—because I am somebody who tends to see problems. I agree that it probably sounds like I am stepping back. I am not, not intending to. I think Margot and Bob and I have all had this discussion at one time or another. We are not stepping back.

But if we do not look at the problem, if we do not try to analyze where the possibilities are, if we use our limited resources to beat up parts of the Department of Defense who cannot do otherwise, it is just—it does not help anything.

Mr. WILLIS. I do not want to step on Karen's——

[Laughter.]

Ms. HONTZ. That is all right. Joan.

Ms. ROBINSON-BERRY. Yes, I agree with both Linda and David that it is a real challenge from our industry—this one does not work. Sorry. We are all sharing one.

Mr. JORDAN. That is all right. I am good at sharing.

Ms. ROBINSON-BERRY. I agree with both Linda Oliver and David. It is a challenge, especially in a high-tech arena. But I agree with you. We cannot stop. We have got to find creative ways to expand the pool of qualified technical small businesses, and we really, really embrace the SBIR program that is designed to help small business go after high-technology fields. But we do not have the—the pool is not there. We have done the analysis, and industry and a lot of our partners have. But it goes to your point. We have got to find a way.

And I believe if we try to integrate some of the very successful SBA and other programs like SBIR—that is, small innovative research projects—as well as mentor-protege, and align them with universities, maybe one day we can have a car manufacturer or have more of our small businesses in technology so that we can take advantage of that. But it takes a more integrated effort where small businesses have to understand the technology road map for DOD and be willing to make the investment in those areas. In that comes the challenge. When you have a personal net worth of $750,000 for small disadvantaged businesses, how practical is it going to be for them to be able to compete in the high-tech arena?

But both sides are right. We need to do more. We never need—we cannot give up. But we have to be realistic about the real art of the possible.

Ms. HONTZ. I know others have had their signs up, but in the interest—and I remind you that you can always submit for the record up to 2 weeks. If you do not mind, I will turn it back over to Greg, and maybe in the course of the next questioning, you can get in what you wanted to say.

Greg.

Mr. WILLIS. Thanks, Karen.

I am going to try to move a little quickly now. We are kind of running out of time, and we have a number of topics that we need to cover quickly.

The first thing I wanted to kind of ask the participants here—and I especially want to hear from the small businesses and those who represent small businesses. There is this challenge with bundling, and we have spoken a little bit about that, but I want to talk a little bit about what we can do in terms of policy to make it easier for small businesses to get at larger procurements, i.e., teaming, joint ventures. What structurally prohibits small businesses from doing joint ventures, from teaming? And what can we do to kind of change that environment?

Mr. HESSER. I can comment on the joint ventures. That happened a lot during the vets' GWAC and veterans trying to get joint ventures. 8(a)s and HUBZones—I know 8(a)s—you may correct me. I think HUBZone also has to have SBA's approval for a joint venture. I know that 8(a)s do. On service-disabled veterans, we do not have to have that, and that is a very good thing. And I was part of the discussions of getting the law together to do that. So that is one thing. Joint ventures should be between two companies.

They have a responsibility. They report to the Government. They say, "We can do this. Here is our joint venture." They can do it. If it is a HUBZone, it is 51 percent or whoever—whatever it has to be, they are the ones responsible for making that response to the government, say, "We did that." They raise their hand—or whatever they do, they sign it and say that is it. It used to be that way years ago. You do not put so much requirements on that small business just to win the award. That is one thing I know I have run into. That was just joint venture.

Mr. WILLIS. David.

Mr. FERRERA. It is funny you should bring up the question of joint ventures since we have been approached by—many of our companies that we represent have been approached by folks from a particular State trying to get into joint ventures, but never mind that gets us into an entirely different issue.

Now, one of the things that we would propose, actually, outside of the joint venture issue, is the expanded use of two plus two could be very useful towards—getting towards the issue of breaking—forcing procurement officers to start redirecting a lot of contracts that could be used by—that could be awarded. It is already in the law. And if there is any way that we can find ways to expand the enforcement and the use of two plus two, that would be very useful. That is about the one comment there.

Also, to say that Chairwoman Velasquez and several folks in the other chamber, of course, you know, not to say that they would ever draft anything a little better, but I think a lot of inspiration can be taken from the contracting reform bill and the contract debundling provisions that they wrote into the bill that they passed.

Mr. WILLIS. Mr. Zepeda.

Mr. ZEPEDA. Yes, first of all, I think that as I climb the ladder from getting from one year's revenue to the next year's revenue, I think we always run into the challenge of the capacity both with bonding and capital, and they are always very restrictive of what we can and cannot do. We have options such as partnerships, mentor-proteges and others that we mentioned here.

I think that probably the one solution that we could think of would be a partnership maybe with the SBA as well as a large company that kind of becomes the mentor in between and the large company that would facilitate or alleviate the bonding headache on the overall project requirement or a portion of the requirement. I think that in itself would be a big restriction that you would overcome.

I think others that we probably would be dealing with is the past performance. Every contracting officer has at his disposal discretionary issues of past performance. If you have not done it before, there is no past performance that you could offer to an agency. So it is climbing the ladder type attitude that how do we get to the next level if you have—or go to Lockheed or go to one of the larger companies, more than likely they are not going to want to allocate resources for a smaller project. The mentor-protege gives you that or affords you that opportunity. But if we look at the historical statistics of the mentor-protege, it has not been very successful, and

it does continue to be a hassle for all of us in trying to go to the next project.

Thank you.

Mr. WILLIS. Ms. Dorfman.

Ms. DORFMAN. I have a statistic here. The top 100 contractors were awarded about 60 percent of all Federal spending in 2008; 200,000 contractors were remaining in the rest of that portion. I think bundling is a big issue. I am not sure that just having teaming will work. I know that in some instances it is a very good tool. We encourage, especially with the women's program not there, we encourage our members to try and team to access these contracts. But I think that we have a much bigger issue on hand.

One of the thoughts I had was if you take a look at the Department of Defense, with the large contracts, the other thing that we are seeing is the majority of contracts are centered in four States—Virginia, Texas, California, and Maryland—which says to me that these contracts, while there are bases all over the place, there are less and less contracts going to the local community because they are getting bundled in.

So I think there are some areas where we can take a look and identify where we can pull some of the contracts apart, and with that I say we need to put more money into the SBA and get the PCRs in place to handle the situation.

Mr. WILLIS. I think we need to move briefly on because we need to——

Ms. HONTZ. Okay.

Mr. WILLIS. It is a similar topic, but we have heard a number of different opinions about the relative size standards that are currently in place. We have over the last two Congresses heard SBA comment about how they are going to update those size standards at some point. And so, first of all, I want to hear whether or not size standards need to be increased, decreased, what the opinion is, and also whether or not SBA intends to update those size standards in my lifetime.

[Laughter.]

Mr. JORDAN. How long are you going to live, Greg?

Mr. WILLIS. Beyond tomorrow, with the Lord's help.

[Laughter.]

Ann.

Ms. SULLIVAN. I would just like to point out that while I think everybody kind of thinks that the size standards need to be updated, the consequences to small business are just enormous, because small businesses are basing their next 5 years on the current size standards. So every time this issue comes up before WIPP members, it is with great trepidation that they think about an update in the standards just simply because it could completely change their business plan. So I would just say that if you are going to do that, you need some kind of phase-in. You would need some kind of way to accommodate the change. That is what they struggle with.

Mr. WILLIS. Alan.

Mr. CHVOTKIN. The current size standards are out of date. They need to be updated. They are woefully undersized—pardon that expression—for the Federal procurement marketplace. So there are

actually two other things that need to be done. My own view and the Professional Services Council, the recommendation is that we go back to a separate size standard for Federal procurement. The size standards are actually suppressed when you look at—because of the standard used to establish them, which is where 95 percent of the businesses are in the economy as a whole, that the requirements that the Senator talked about, some of the statutory requirements, the unique burdens, says that the SBA ought to take a look at what it takes to do business in the Federal procurement marketplace, which is different than what it takes to be a small business in the regular marketplace.

Secondly, the size standards are based on the NAICS codes, which are really a manufacturing base. The preponderance of Federal spending over time is on services, and while we cannot change the NAICS codes—it would take a papal dispensation to do that—we ought to take a look at whether there are other measures that can be used to help the Federal procurement agencies particularly when they are trying to acquire services. That is where the marketplace has been in the last 5 or 6 years. It is clearly where the marketplace is going in the next 5 to 6 years. And we see a lot of effort at trying to squeeze procurement opportunities into the existing NAICS code standards, which really are manufacturing—in many cases are manufacturing or an antiquated basis for describing the work that is actually being done today.

Mr. WILLIS. Mr. Jordan.

Mr. JORDAN. Sure. You know, one of the biggest challenges I face is that when people ask me, okay, so what is a small business, the answer takes about 10 minutes.

The confusion around size standards is something that we certainly feel, and there is also—it is not as cut and dried, as Ann said. Even increasing a size standard can have a negative impact on a certain sector of small businesses, so as often as I hear the size standards need to be raised so that we can effectively grow and hire and create jobs, I frequently hear from businesses just starting, if you raise them, you are creating even within this protected environment an unfair competitive situation where we cannot possibly ever grow, and all you are doing is perpetuating the exact same set of "small businesses," without really letting them graduate and then letting us climb the ladder as well. So there are certainly many sides to this issue, and I hear them all quite frequently.

But to your point about what are we doing about it, we are conducting a comprehensive size review, so looking at all the different standards. We have recently gotten, with the Department of Defense's help, a whole bunch of data from GSA that we can use to analyze historical trends, which industries are growing, as was mentioned, utilizing the North American Industry Classification System, for both manufactured goods and services, to look at where those standards should be, and we have a methodology that we have been using—that we have been applying to this review, and w hope to have both that methodology and the first few industries to which that methodology was applied in a size standard review out for public comment in the near future, sometime between tomorrow and the end of Greg's long life.

[Laughter.]

Mr. CRAVINS. Seriously, Joe, when? I mean——

Mr. JORDAN. I cannot promise a time, but they are in an internal review right now, and we really do hope to have them out in the near future, both the methodology and then the first few size standards, so that we can receive the many public comments that we would anticipate, incorporate—or make any changes based on those comments that, you know, are deemed appropriate, and then resubmit them for final clearance and publish them. Then that will set the tone for the process that we will undergo as we review all of the various industries for both manufactured products and services, not just manufactured goods.

Mr. WILLIS. This is the challenge that we have, and Don brought it home with what he asked. We have been promised these updates for—I have been on the Committee 3 years. We have been promised them for the 3 years, and I have been told that we have been promised them since before then. And people are anxious because they are managing up or down their work flow. That is probably the last thing we need right now in this economy, is people managing down their opportunities.

Mr. JORDAN. Sure. And I would just say that since this administration has been in, it has only been a short period of time, and while, you know, you have had to deal with many frustrations on many issues for quite some time, several of these issues did not crop up overnight. Some of the problems and concerns are not brand-new.

However, in a short period of time, I am proud of the progress that we have made against things like conducting the size standards review. We are working on—I know it is an agenda item for later, but working on the women's procurement rule that I know is a concern of this Committee and has been for some time. Mr. Newlan and the HUBZone folks are well aware of the progress we have tried to make in addressing that program.

And so I do fully anticipate being held accountable for delivering the actual results, not just the promises, but I would encourage you to look at what we have done thus far.

Mr. WILLIS. Well, that is a good segue to the women's procurement rule. Obviously—what are we on? Year 9, give or take, of waiting for implementation of the women's procurement program. And we had some challenges last Congress that we hopefully worked through to get to this point. So I want to hear from those who represent women-owned businesses, owners, about where we are, where we should be going forward. So we will start with Margot and then Ann.

Ms. DORFMAN. Thank you. Again, obviously it is needed. A statistic: a $300 billion increase in Federal spending since 2001, but the increase for women-owned firms was only $6.5 billion. We have been consistently losing about $6 billion annually until 2008 where it jumped up to $12 billion. I suspect that in 2009, which is coming up in a few days, we will see that increase even further because of the recovery money that has been put into the economy.

I have heard a lot of folks say, well, an answer would be to get more women-owned firms registered in CCR. There are currently 75,000 registered in CCR. Only 26,000 of them have contracts. I

have heard from numerous women-owned firms that there is no point for them to register because they do not have access to these contracts until the women's program has been implemented. We are seeing that that—this is like the number one thing that needs to be done. July 24th was our last status hearing with the court, and the SBA and the U.S. Women's Chamber filed a motion to stay so that we could hopefully work through this process. And there is work in the background and I keep—I am anxious, too. When will it happen?

Thank you.

Mr. WILLIS. Ann.

Ms. SULLIVAN. We believe that it is absolutely critical that this is put in place by the end of the year. And I know that is ambitious, but I know that your General Counsel is very ambitious, so—because of the stimulus dollars. Without that program, you know, we are just going to keep on losing many more opportunities than otherwise we would.

We need the program in place. We know that is ambitious. We will help you in any way when it comes to maybe shortening the review periods to get it into place. I think we have waited long enough, so, you know, I do not think there is a lot more that people have to add to your bank of knowledge to be able to put it in place.

One of the things that WIPP did was, when we saw that there were only 55,000 women registered in the CCR, when the RAND study came out, I mean, the first no-brainer was, well, you better increase people registering on CCR. And as Margot said, there are now 75,000.

We did a major push with American Express—it is called "Give Me Five"—where we have a very ambitious program to get every woman we basically meet registered on the CCR so that they will be counted in your statistics.

We urge the SBA to take the interpretation from the RAND study, since that is the study that you have right now, to include industries up to 87 percent rather than the four little industries that the last administration put in place.

And we appreciate the support of this administration to put this program into place. The President is on record as saying that. So we look forward to an expeditious program.

Mr. WILLIS. Joe.

Mr. JORDAN. Yes, absolutely. As Margot and Ann know, we are working quite hard on this. There were some challenges presented by the fact that the RAND study was conducted in the past, and we are working through a number of those, and the various legal challenges, as Ms. Sullivan alluded to, our General Counsel has been leading this effort because this is absolutely a top priority to the Administrator to get a rule out there quickly.

You know, I hear all the time—I am a metrics person, and as I am quoting various statistics, I always have to put the little asterisk in there, well, but the women-owned small business number, you know, there is not a lot that contracting officers can do about it because there is no tool in place. And they say, Oh, well, what are you doing about that?

So we hope to have—we have made a lot of progress in the last few months, and we hope to have, again, something out there, you know, quite quickly.

Mr. WILLIS. With that, Karen.

Ms. HONTZ. I am going to turn it over to Matt.

Mr. WALKER. Let me just add to that that Senator Snowe as well is very interested and concerned with having the women's contracting program up and in place, and it is a high priority for her.

I would like to shift briefly to the HUBZone program. The HUBZone program, of course, is a critical program. It helps individuals in economically distressed communities. There were some GAO reports—in fact, there were three of them of late that were critical of the program, found problems with fraud, the monitoring system that was in place at the SBA and others. And, unfortunately, there are those who would try to destroy the program or use that against the program to try to do something detrimental to it. And we are strong proponents—by "we," I mean Senator Snowe as well as other Republicans on the Committee—of trying to support this program. She thinks that it is a critical program that does a lot of great work, and that none of the programs are immune to problems. There have certainly been problems with each individual program, and that the proper measure to take place is to try to fix the programs that continue to do great things.

We were fortunate enough to recently speak with Mr. Jordan about some of the efforts that the SBA has been taking to address those issues. To the credit of both Administrator Mills and to him, they have taken great, incredible steps to try to address those problems. But I think that it is important that others hear this as well so that they can be aware that there are a lot of things that are being done to try to address those issues, particularly his reference to a 100-fold increase in the monitoring that has been done. But I will let you just briefly speak about that, if you can, just so that others in this room can hear about the benefits of everything you guys have been doing.

Mr. JORDAN. Absolutely. Thank you.

The Administrator, the agency, and myself, we take our need to execute and oversee the HUBZone program effectively and efficiently incredibly seriously. We are well aware of the GAO and some of the IG reports around the difficulties that have been found in the program, and so we have taken some quick action to both improve the sort of up-front certification processes and also assess and clean the current pool of certified firms to ensure that we eliminate all small business contracting programs of fraud, waste, abuse, or mismanagement.

Now, the problems did not crop up overnight, and they will not be fixed overnight, but I feel we have made a lot of progress, and there are a few tangible things that I would just briefly highlight.

On the certification front, we have engaged some external experts to help us with the business process reengineering, so we are currently operating a very strict level of certification review, and we want to figure out what is the best level that we can effectively and efficiently certify firms, so ensure that no fraudulent firms get in but also do so in a timely manner so that firms that want to

pursue the certification and avail themselves of some great HUBZone set-aside opportunities are able to do so.

Then in terms of evaluating the firms who are currently in the program, while we are doing a number of things, leveraging technology in our databases, we did understand the GAO's point about conducting actual site visits. And when Acting Administrator Hairston had testified in March in front of the House Small Business Committee, he was asked, "How many sites visits have you conducted in the first 6 months of the fiscal year?" And his answer, unfortunately, was seven. And so Administrator Mills has built on what Acting Administrator Hairston set up to conduct quite a few site visits to verify eligibility of HUBZone firms, and so in the less than 6 months since that testimony, we have conducted over 800 site visits, and these are comprised of typically verifying the principal office location and the fact that 35 percent of the employees reside in the HUBZone.

And so we are very proud of—as you said, it is over a 100-fold increase in the number of sites visits that we have conducted; also in the fact that we are still not taking our eye off the ball and encouraging contracting officers to utilize this program to drive contracts to small business owners in historically underutilized business zones. I would point again to the Recovery Act statistics where while the HUBZone program has a 3-percent statutory goal, it is currently at 6.1 percent, so it is certainly a focus to make sure that the program is run effectively from a certification and eligibility standpoint, but also effectively from a serving the people for which it was set up standpoint.

Mr. WALKER. Okay. Thank you very much for that.

The other question I wanted to shift over to the service-disabled-veteran realm as well. Maybe first, did you want to say anything in addition to that about the HUBZone program, Mr. Newlan?

Mr. NEWLAN. I never want to pass up the opportunity.

[Laughter.]

We fully support everything that the SBA is doing. We clearly do not want any other HUBZone firms headquartered in a Starbucks. We have got to stop that. You know, we are reporting to the SBA any incidences that we know about.

But consider, as the House is, throwing the program out, it is like throwing the baby out with the bath water. It is the only program designed to bring jobs where America needs them the most. The most recent census report shows more Americans living in poverty this year than last, and it is one in eight. One in eight Americans right now live below the poverty level. And the HUBZone program is the only program we are going to talk about today in this forum that is designed to help that situation.

So we appreciate Senator Snowe's strong support for the program. We hope we have Senator Landrieu's strong support for the program. And I know we have strong support from other members of this Committee.

Thank you.

Mr. WALKER. Great, thank you.

Like I said, I would like to briefly, in the interest of time, quickly shift over to the service-disabled-veteran program, the women's

program, and the HUBZone program, too, in other aspect, and that is in terms of parity for the programs.

As we know, there was an issue—most people are familiar with it—where there was a question as to whether or not each program should be put on equal footing when awarding contracts or whether one contracting program had a preference over others. That is something that Senator Snowe strongly cared about making sure that there was true parity, and that in her definition, true parity is giving every program equal opportunity to compete. Chair Landrieu as well cared very deeply about this, and they worked together to ensure that the DOD authorization bill included a provision to make that very clear. So we appreciate Chair Landrieu and her staff's work on that as well to make sure that happens, and we are hoping that that gets retained in conference.

But as another side of that, another aspect of it, as I said, Senator Snowe believes that true parity requires an equal opportunity for all the programs to compete, and as part of that provision that she included in an amendment would called for the creation of a mentor-protege program modeled after the 8(a) program for service-disabled veterans, HUBZones, women-owned firms. And I just wanted to get some feedback from those on why that would be beneficial and what the benefits are to making sure that true parity should include mentor-protege, because if the programs are going to be on an equal footing, they should truly be on an equal footing, in our opinion.

Anyone who would like to response?

Ms. SULLIVAN. Well, I would like to say that, absolutely, please do. It is so much common sense, it is almost embarrassing to have to say that you have to do it.

Why would you have different mechanisms in different programs that are all designed to help the small, disadvantaged business community? To not give it parity and not give the same mechanisms for every program seems to me to defy logic.

Mr. WALKER. Mr. Newlan.

Mr. NEWLAN. We certainly support mentor-protege, and thank you for sponsoring that amendment. We do hope it gets passed. Anything we can do to encourage. We support parity, even though we happen to find ourselves right now today probably at the top of the heap. That is not a position we have worked for or asked for, but it is certainly one GAO protest decisions have thrust upon us. But we support parity.

We ask you to keep in mind that even after that bill, if it does become law, we will not be in parity with the 8(a) and certainly with the ANC sole-source rules and the 8(a) sole-source rules dramatically different than what the service-disabled vets have, what we have, and probably what the women will have, I think the next thing we will have to look at is should there be a change in the sole-source rules for the up-and-coming women's program, the service-disabled vet, and the HUBZone program.

Thank you.

Mr. WALKER. Would you like to comment, Ms. Robinson-Berry.

Ms. ROBINSON-BERRY. Yes. I think that it is very important that we do have parity, because right now a lot of the programs and the socioeconomic categories are in competition. We have some—espe-

cially in the small disadvantaged businesses, some are grandfathered for life, like the Native American and the ANCs, where others are not. And then we have emerging new socioeconomic categories that come up and some that people just make up on certain RFPs. And so I think it is really important that we have standards in that area.

To address the mentor-protege issue, I think mentor-protege is a good program. As a matter of fact, many of our industry partners have graduated, and more small disadvantaged businesses, into large business because of the successful mentor-protege. But there are funding limitations and so forth. But having a mentor-protege program aligned by itself I do not think works. You need to align it with the other initiatives. You have the historical black college and minority institute initiative. You have the SBIR program. You have the mentor-protege program and others that are all separate. And I think the best model would be to look at how we can integrate those various programs together so we can benefit and grow our small businesses more rapidly.

If we are going after high-tech companies, we align the innovative research projects with a mentor-protege opportunity, align it with a university so we are fixing the pipeline for the future, but we are also pushing our small business community in the same alignment with our technology road map.

Mr. WALKER. Certainly, it is important to have synergy and to foster coordination and leverage, and I think that is something that we should do as well.

Mr. Hesser.

Mr. HESSER. I agree.

[Laughter.]

Mr. WALKER. Well put.

Mr. HESSER. The vet force does, in fact, agree. Recently, last month, we presented to the congressional roundtable at the House, and we had a report to the Nation entitled "Breakdown: National Security Crisis in a Small Business World." What we were first doing was writing a paper on veterans back from the beginning of the country as to how it has gone, and then we got involved with small business, and all of a sudden, we found that we wanted our report to be only on small business. And I hope you get an opportunity to see it. There are some out on the table. But it is also on vet-force.org. That paper is on there, and any small business, I think, should read it because it has been presented everywhere around the House, the Senate, and the executive branch, and wherever we could get it.

It basically says we are in trouble because—Ron Newlan said it. We are in crisis right now, true crisis of small business. That was our concern about the ARRA brought up, no small business in there. And I do not care what your figures say, I would like to have a separate meeting about what money is really going where. And I know $4.2 billion that just went right out the window, no small business.

We are very concerned from the service-disabled-veteran side about the slowness for the veteran resource centers. We are talking about the women-owned program. They have got centers all over the place. We have none—well, we have three. I am sorry. I think

we may have gone up to four now. We are up to four now. Wow. I mean, why are the veterans not getting veteran resource centers? That is something that does not make sense to me.

The other thing is I will refer to S. 2300, but it has been put in other bills about verification, certification of all the things, 8(a), women-owned, everybody, about how they have to be verified and everything else.

I think there has to be a separate powwow between several agencies and organizations looking at what has happened to the Center for Veteran Enterprise. The Center for Veteran Enterprise picked up this thing of verifying service-disabled veterans. They now have 2,000 who have been verified, and there are 13,000 total. So they have another 11,000 to go. In about 5 years they will make it, because they have the staff that they have. All the contracting, they are working hard to do this. This is not a slight against CVE. They are working, but it is an example that if you put that same thing in there for 8(a)s, the same thing for all the others, women-owned, everything, it is just going to tie things up again, because someone had a brilliant idea at CVE of giving a logo and letting people use this logo and having a pin. You go to a show now, and you go along the booths, and you will see this one has a logo, this one doesn't, oh, the other two do not—it automatically put a fence around all the service-disabled veterans who have not had their turn yet to be verified. This is a very serious problem. We brought this up over and over and over at CVE.

They are working on it now, trying to figure out what they are going to do. We now have 2,000 companies out there with a logo saying they are verified, a real pretty logo, and they put it everywhere, on their letterhead and everything. There are people who did not have the verification. It looks like they are less than they are. In fact, they have changed the wording on what they are.

So the veteran enterprise resource centers we have talked about, the certification, of course, there are all the other ones, but I guess the last thing I would like to say about veterans, I have heard the figure from 94 percent to 98 percent, saying that 98 percent of those employed Americans are employed by small businesses. I want to emphasize over and over. How can you increase employment, which the stimulus bill is supposed to be doing, when you keep giving all the money to big business? They do not hire anybody. They usually fire them. Or they work with a small business and get them up there where they have got to maintain $2 million, $3 million support, and then they let go of them, and they are out there by themselves. What are they going to do now?

This is happening all over the place. I do not know all the answers. I do not think any of us have all the answers. But I do think we need to look real close at those other points.

Mr. WALKER. Yes, I just want to quickly, before turning it over to Don, thank you for that as well as just give notice to Jim Wilfong. Jim Wilfong is from Maine, a veteran, who contributed to that report and did a phenomenal job, and he is a close friend to the Senator as well as the Committee.

I also just want to mention that this Committee could not agree with you more about the veteran centers. We worked together on a bipartisan basis to pass a bill that would take the funding for the

Office of Veterans Business Development for a traditional level of $750,000 up to multiple million dollars. We worked together and passed that bill out of Committee unanimously.

So we agree completely. We are on your side. We agree with it, and thank you for your time.

Mr. HESSER. We know that. Thank you.

Mr. WALKER. Thank you. That is all.

Mr. CRAVINS. All right. First of all, let me just on behalf of the Chair and on behalf of the Ranking Member and our staffs thank all of you for participating in the roundtable today. Again, we hope this is just the beginning. We have had a relationship with many of you for many, many years, and we hope that we can continue that.

Just to give you a heads up of what we are going to be doing in the future, we are going to have a hearing on October 1st where we will look into the Recovery Act and look at the provisions of the Recovery Act as they relate to small businesses to make sure that our small businesses do have access to capital and that they are participating in the procurement opportunities in the Recovery Act. Senator Landrieu and Senator Snowe will have a full Committee hearing on October 1st.

Also, both of our staffs are working very hard to craft legislation that will hopefully fix some of the issues that we talked about here today, so we would love to continue having input from your respective agencies and organizations.

And as Senator Landrieu said, the record will be open for 2 weeks, so if you have more information that you would like to submit for the record, we would appreciate it.

Thank you all very much, and thank you to those of you in the audience for participating.

[Whereupon, at 11:56 a.m., the Committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

STATEMENT FOR ROUNDTABLE ON SMALL BUSINESS CONTRACTING
"Small Business Contracting: Ensuring Opportunities for America's Small Businesses"
Ranking Member Olympia J. Snowe
Senate Committee on Small Business & Entrepreneurship
September 22, 2009 (Version 1, 9-18-09, at 3:00 PM)

Thank you, Chair Landrieu for holding this *critical* roundtable on small business contracting and your continued focus on issues that affect small businesses. As Congress attempts to pass legislation on high profile issues such as health care reform and climate change, we must also not lose focus on additional ways to provide relief to America's small business. I know at times it may be hard for our constituents to believe, but it is possible for politicians in Washington to do multiple things at the same time. That said, we must remain diligent in our efforts to improve the business climate for small firms and ensure that the Federal government is holding up its end of the bargain with regard to small business goals and objectives. I appreciate all of the witnesses for participating in this roundtable that will provide valuable insight into ways to improve our existing small business contracting programs.

As Ranking Member and former Chair of this Committee, I have witnessed firsthand the Federal government's inability to satisfy the majority of the small business goals. Recently, I sent a letter to Administrator Karen Mills urging her to focus on filling key vacancies within the SBA and to identify more prime and subcontracting opportunities for small businesses. Year in and year out, with the exception of small disadvantaged businesses, the government fails to reach goals for small businesses in general and service-disabled veteran-owned, women-owned, and HUBZone firms in particular. This is simply unacceptable, and I look forward to hearing from the participants on *specific* and *realistic* solutions for increasing small business participation in Federal contracting and

for the government to not only achieve the statutory small business goals, but to exceed them.

In February of this year Congress passed the American Recovery and Reinvestment Act. I am eager to hear from the panel on the affect this legislation has had thus far and how we can increase small business participation in Recovery Act contracts. This week, the SBA released current figures on Recovery spending that are encouraging, but also highlight how much more must be done. As of September 14, 2009, the total dollars in Recovery Act contracts equaled approximately $12.8 billion. The good news is that 23 percent of that figure, just under $3 billion, has gone to small businesses. Unfortunately only one-fifth of the total monies allocated in the Recovery Act have been rolled out. It is imperative that the Administration release projects quickly and allow the Recovery Act to provide the opportunities we in Congress intended.

With the exception of women-owned small businesses, the Federal government is doing a much better job meeting and exceeding the small business goals for Recovery Act contracts. These figures prove that the small business goal requirements are attainable. I remain puzzled at why the Federal government is unable to meet the annual objectives if it is possible in Recovery Act contracts!

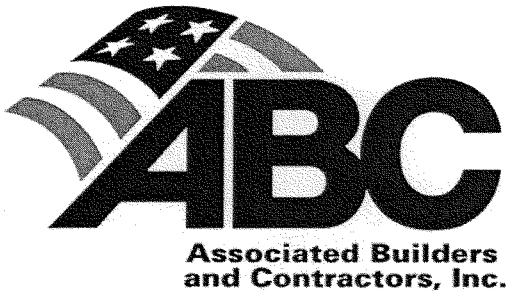
In addition to goaling requirements, there are numerous issues I hope to see probed this morning to find ways to increase small business participation in Federal contracting. These include: subcontracting, teaming, small business size standards, contract bundling, and consolidation. I hope there is a frank and honest discussion of what is presently working and what needs to be done to improve these provisions. These are not new issues, and in fact, this committee

has held multiple hearings and roundtables on an assortment of contracting issues over the years.

I would like to close by commenting on the need for parity among the small business contracting programs. On July 21, 2009, I introduced the Small Business Contracting Parity Act of 2009. This piece of legislation makes clear that HUBZones, Service-Disabled Veteran-owned, 8(a), or women-owned firms should be treated equally and no program should be given preferential treatment over another. Chair Landrieu and I also included an amendment in the DOD authorization that would bring the SBA contracting programs closer to true parity, and I am cautiously optimistic the provision will be retained. I have been a longstanding champion for these small business programs, and it is imperative that small business contractors be given an equal opportunity to compete for Federal contracts.

Federal contracts provide vital economic benefits for small business. In the 109th and 110th Congresses, I partnered with former Chair Kerry to introduce the Small Business Contracting Revitalization Act of 2007, which passed this committee unanimously but failed to pass the full Senate. I am hopeful that with Chair Landrieu's leadership and your input today we can improve the legislation and ensure it becomes law this Congress. It is critical that the Federal government do more to satisfy its small business contracting goals, helping small businesses to continue to create two-thirds of all new jobs across our nation.

Thank you, Madam Chair.



U.S. SENATE COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP

"Small Business Contracting: Ensuring Opportunities for America's Small Businesses"

Tuesday, September 22, 2009
10:00 a.m.
SR-485

Comments of Associated Builders and Contractors, Inc.

INTRODUCTION

ABC commends the Senate Committee on Small Business and Entrepreneurship's leadership in finding solutions to improve contracting laws for America's small businesses. ABC appreciates the opportunity to provide input on this critical issue. We strongly urge the committee to examine the negative impact that Executive Order 13502, government-mandated project labor agreements (PLAs), and the FAR Council's related proposed rule will have on small businesses in the construction industry.

1. ABC's Interest In Small Business Contracting

ABC is a national construction industry trade association representing 25,000 individual employers in the commercial and industrial construction industry. ABC represents both general contractors and subcontractors throughout the United States. The majority of ABC's member companies are small business "merit shop" companies, who support and practice full and open competition, without regard to labor affiliation. The merit shop philosophy helps ensure that taxpayers and consumers alike receive the most for their tax and construction dollars.

Conservatively, ABC's members employ more than 2.5 million skilled construction workers whose training, skills, and experience span all of the twenty-plus skilled trades that comprise the construction industry. The Bureau of Labor Statistics (BLS) most recent report states that the non-union private sector workforce in the construction industry comprises more than eighty four (84) percent of the total industry workforce.[1]

The majority of ABC's contractor members are classified as small businesses by the Small Business Administration.[2] This is consistent with the findings of the Small Business Administration that the construction industry has one of the highest concentrations of small business participation (more than 86 percent) in the U.S. economy.[3]

Many of ABC's small business members, along with numerous other small nonunion contractors who are not ABC members, perform work on federal and federally-funded construction projects.

ABC would like to call the Committee's attention to a recent shift in federal construction procurement policy that will harm small businesses that participate in the federal construction marketplace.

2. ABC Concerns About The Impact of President Obama's Executive Order 13502 on Small Businesses in the Construction Industry

On February 6, President Obama issued Executive Order 13502, which encourages federal agencies to require government-mandated PLAs on federal construction projects whose total costs exceed $25 million.

A PLA is a contract that discourages competition from nonunion contractors and their nonunion employees by requiring a construction project to be awarded only to contractors and subcontractors that agree to recognize unions as the representatives of their employees on that job; use the union hall to obtain workers; obey the union's restrictive apprenticeship and work rules; and contribute to union pension plans and other funds in which their employees will never benefit unless they join a union.

ABC's membership strongly opposes government-mandated PLAs because they discourage, if not prohibit, qualified ABC member companies and their employees from competing for construction projects paid for by their own tax dollars unless they agree to the costly and discriminatory terms in typical PLAs.

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[1] *See* bls.gov "*Union Members Summary*" (Jan. 2009). http://www.bls.gov/news.release/union2.nr0.htm

[2] Small businesses are defined by the SBA as general building or heavy contractors with annual receipts under $33.5 million, or specialty trade contractors with annual receipts under $14 million. http://www.sba.gov/contractingopportunities/officials/size/table/index.html

[3] *The Small Business Economy: A Report To The President*, U.S. Small Business Administration, Office of Advocacy (2009), at 8.

Executive Order 13502 also repealed Executive Order 13202, which prohibited PLAs on federal and federally-funded construction projects from 2001-2009. It is estimated that between 2001 and 2008, Executive Order 13202 ensured that at least $147.1 billion worth of federal construction projects was bid without discriminatory and wasteful government-mandated PLAs.[4] The actual value of construction projects protected by Executive Order 13202 is exponentially larger, as the above figure does not include local construction spending that received federal funding or assistance protected by the executive order.

3. ABC Comments on FAR Council's Proposed Rule, Federal Regulation FAR Case 2009-005, Use of Project Labor Agreements for Federal Construction Projects

Section 6 of Executive Order 13502 ordered the Federal Acquisition Regulatory Council (FAR Council) to amend the Federal Acquisition Regulations to implement the provisions of Executive Order 13502.

On July 14, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) issued a Proposed Rule, *Federal Acquisition Regulation FAR Case 2009-005, Use of Project Labor Agreements for Federal Construction Projects,*[5]and solicited comments from the public on the Proposed Rule.

The FAR Council's comment period closed on September 23, 2009. More than 900 ABC member companies and employees filed comments opposing the FAR Council's Proposed Rule and Executive Order 13502. Many of these comments came from ABC's small business members who perform work on federal and federally-funded construction projects, including projects whose total cost exceeds $25 million.

In a recent ABC membership survey, more than 35 percent of the respondents stated that they perform work on such projects. Significantly, 98 percent of these survey respondents further indicated that they would be less likely to bid on such work if a PLA were imposed as a condition of performing the work.[6]

ABC's attached comments argue that neither Executive Order 13502 nor the FAR Council's Proposed Rule provides support for the assertion that PLAs promote economy and efficiency in federal procurement. In addition, ABC's comments argue that PLAs will dramatically reduce competition and increase costs on federal construction projects and discourage bids from small businesses, including minority-owned and women-owned firms.[7]

4. Economic Impact Of The Proposed Rule On Small Businesses

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[4] U.S. Census Bureau, *Annual Value of Federal Construction Put in Place 1993-2008.* http://www.census.gov/const/C30/federal.pdf

[5] http://edocket.access.gpo.gov/2009/pdf/E9-16619.pdf

[6] *Newsline* (July 22, 2009), available at abc.org.

[7] See Attachment C

The reason why so many small businesses refuse to bid on PLA-mandated projects, as explained in greater detail in ABC's attached comments, is that PLAs have a discriminatory impact on the costs and business methods of non-union contractors and their workers, increasing the contractors' costs while reducing their workers' take home pay on public projects covered by prevailing wage laws. Individual statements to this effect have been filed with the FAR Council by many small contractors and subcontractors, which are hereby incorporated by reference. Representative samples of such statements by small subcontractors are attached to these comments for ease of reference.[8]

A recent study of the discriminatory impact of PLAs on federal construction, performed by Professor John McGowan of St. Louis University demonstrates conclusively that PLAs have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. § 601.[9] As calculated therein, if only 10 percent of non-union contractors are forced to enter into PLAs as a condition of performing work on federal projects, the costs to such contractors will exceed $360 million. The increased costs to small businesses could exceed $1 billion if more contracts are affected than the Council is currently estimating.

The adverse economic impact of PLAs on small businesses in the construction industry is directly contrary to Congress's repeatedly expressed intent to promote and encourage federal procurement to small businesses. Since 1978, when Congress amended the Small Business Act to require all federal agencies to set percentage goals for the awarding of procurement contracts to MBEs,[10] the amount of federal procurement dollars directed towards small businesses has increased dramatically. The Small Business Administration reports that more than 38 percent of federal subcontracts, including construction contracts, are awarded to small businesses.[11]

Further evidence of the impact of PLAs on small businesses is contained in comments submitted to the FAR Council by prime contractors who have themselves performed contracts in the $25 million-plus range. These comments uniformly confirm that they have subcontracted much of the work on such projects to small business subcontractors. See, for example, the comments of Nova Group, a non-union contractor who has performed more than $700 million in construction contracts on federal projects with costs exceeding $25 million.[12] Nova's comments, which describe ABC members' typical experience, show that more than 60 percent of the work on large federal construction contracts has been subcontracted to small businesses, the majority of whom are non-union. Such small business subcontractors are very unlikely to continue to

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[8] See Attachment A.

[9] McGowan, *The Discriminatory Impact of Executive Order 13502 On Non-Union Workers and Contractors*, available at http://www.abc.org/plastudies.

[10] P.L. 95-507 (1978), 15 U.S.C. 644 (g).

[11] *See* Clark, Moutray and Saade, *The Government's Role in Aiding Small Business Federal Subcontracting Programs in the United States,* Office of Advocacy, Small Business Administration (2006), available at http://sba.gov/advo/research.

[12] Attachment B

perform work on federal construction contracts under the Proposed Rule because they know that they will be put at a severe competitive disadvantage by the terms and conditions of a PLA.

5. Requirements of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 601.

The U.S. Senate Committee on Small Business and Entrepreneurship should be concerned that the FAR Council's Proposed Rule failed to conduct an Initial Regulatory Flexibility Analysis.

The RFA requires all agencies conducting rulemakings to "prepare and make available for public comment an initial regulatory flexibility analysis," which "shall describe the impact of the Proposed Rule on small entities."[13] As part of its analysis, the agency is required to consider other significant alternatives to the rule which could affect the impact on small entities, and explain any rejection of such alternatives in its final regulatory flexibility analysis.[14] The sole relevant exception to this requirement arises if "the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[15] The agency must provide a factual basis for its certification.[16] Such a determination is subject to judicial review for its correctness under a non-deferential standard.[17]

6. Comments On The FAR Council's Specific Grounds For Non-Compliance With The Regulatory Flexibility Act.

The FAR Council's entire justification for failing to conduct an Initial Regulatory Flexibility Analysis is contained in one sentence: "[B]ecause the rationale for this determination is based on the discretionary nature of the regulation being promulgated and the fact that the application of the rule is only in connection with large scale construction projects over $25 million (those that would likely impact large businesses)."[18] This finding is legally insufficient and, to the extent that it states a factual basis at all, the facts are wrong.

First, the discretionary aspect of the policy is an insufficient ground to determine that the policy will not have a substantial impact, and in fact the impact of the Proposed Rule will be very significant. As specifically stated in the Proposed Rule, the Rule's purpose is to impose a new policy on all procurement agencies of the federal government, *i.e.*, to encourage all executive agencies to consider requiring the use of project labor

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[13] 5 U.S.C. § 603(a).
[14] *Id.* at § 604. A "significant regulatory alternative" is defined as one that: 1) reduces the burden on small entities; 2) is feasible; and 3) meets the agency's underlying objectives. See, *A Guide to Federal Agencies, How to Comply with the Regulatory Flexibility Act*, SBA Office of Advocacy, May 2003, p. 73-75 (available at http://www.sba.gov/advo/laws/rfaguide.pdf).
[15] *Id.* at § 605(b).
[16] See *North Carolina Fisheries Association v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1988).
[17] *See Aeronautical Repair Station Assn, Inc. v. FAA*, 449 F. 3d 161, 175-177 (D.C. Cir. 2007), reversing agency certification of lack of impact on small entities.
[18] 74 Fed. Reg. at 33954.

agreements on all construction projects whose costs exceed $25 million.[19] By the Council's own (unsupported) estimate, 10 percent of all federal construction contracts with costs exceeding $25 million will become subject to PLAs as a result of the Proposed Rule. Based upon the value of such contracts in 2008, which according to usaspending.gov exceeded $28 billion for facilities construction alone, even 10 percent of that figure will exceed a value of $2.8 billion per year. Based on recent reports of federal procurement officials subjected to political pressure to attach PLAs on projects to reward political patrons of members of congress and political appointees, the actual figure is likely to be higher

The only justification cited by the Council for ignoring this substantial amount of federal construction that will be impacted by the Proposed Rule is the claim referenced above, that large scale construction projects would likely impact only large businesses. As described *infra* at p. 2-3 and in numerous small business comments filed with the FAR Council, however, many small construction subcontractors regularly perform work on large scale construction projects in the federal market. Indeed, the small business preferences established by Congress and by each federal agency mandate such subcontracting to small and disadvantaged businesses. As is further set forth in the Proposed Rule, all PLAs imposed by such federal agencies must require both contractors *and subcontractors* to enter into union agreements.[20] Therefore, it is simply false for the Council to claim that only large contractors will be impacted by the Proposed Rule, and the Council could only have reached this conclusion by impermissibly excluding from consideration the economic impact on subcontractors.

The Council's failure to address the economic impact of its Proposed Rule on subcontractors plainly violates the Regulatory Flexibility Act, 5 U.S.C. § 601. The U.S. Court of Appeals for the D.C. Circuit recently addressed this issue in the closely analogous case of *Aeronautical Station Assn, Inc. v. FAA*, 494 F. 3d 161 (D.C. Cir. 2007). There the Court held that the FAA was required to consider the economic impact of a proposed drug testing rule on subcontractors who performed safety-related functions for air carriers. The FAA asserted that subcontractors were not "directly regulated" employers for purposes of the Proposed Rule. Rejecting that claim, the D.C. Circuit found that both contractors and subcontractors (at whatever tier) "are entities subject to the proposed regulation – that is, those small entities to which the proposed rule will apply." The court distinguished *Cement Kiln Recycling Coalition v. EPA*, 255 F. 3d 855, 868-9 (D.C. Cir. 2001) and similar cases relied on by the FAA.

For the same reason, the Council is required to analyze the impact of the Proposed Rule on subcontractors, because they are plainly subject to the proposed regulation, *according to its express language*. Certainly, whenever a federal agency implements a union-only PLA on future federal construction work, such a PLA will directly regulate subcontractors by requiring them to enter into a labor agreement. Such a requirement will increase such subcontractors' costs by at least 25 percent and possibly more. See discussion above at p. 2-3. As numerous contractors have commented to the FAR

[19] 74 Fed. Reg. at 33955, proposed amendment to 48 C.F.R. 22.503 "Policy."
[20] 74 Fed. Reg. at 33956, proposed amendment to 48 C.F.R. 22.504(b)(1).

Council, either they will be unable to comply with the union-only requirement (thereby losing the chance to perform the work); or if they do sign the PLA, they will be confronted with increased administrative costs of compliance and subjected to unwanted liability to union pension funds, among other costs. The number of small businesses affected will be "substantial," as that term has been defined by legislative history and SBA guidance.[21]

CONCLUSION

ABC commends the Senate Committee on Small Business and Entrepreneurship's leadership in finding solutions to improve contracting laws. We strongly urge the committee to examine the negative impact that Executive Order 13502, government-mandated PLAs, and the FAR Council's proposed rule will have on opportunities for small businesses who compete for federal construction contracts.

A legislative solution, the Government Neutrality in Contracting Act (S.90), introduced Jan. 6 by Sen. David Vitter (R-LA.), would prohibit federal agencies from requiring costly and discriminatory government-mandated PLAs on federal and federally-funded construction projects.

If future legislation aimed at ensuring opportunities for America's small businesses incorporated language from S. 90, the Committee would be serving the best interests of small business owners, taxpayers and the U.S. construction industry.

Respectfully submitted,

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[21] As noted in the SBA Guide to the RFA: "The intent of the RFA, ... was not to require that agencies find that a large number of the entire universe of small entities would be affected by a rule. Quantification of "substantial" may be industry- or rule-specific. However, it is very important that agencies use the broadest category, "more than just a few." *See "A Guide for Government Agencies: How to Comply With the Regulatory Flexibility Act,"* at 19, SBA Office of Advocacy (May 2003), available at sba.gov/advo/laws/rfaguide.pdf. Clearly, this threshold test is met by the substantial number of small subcontractors in the construction industry who perform work on large federal contracts.

Attachment A

Contractor Comment and Submission

Re: Federal Acquisition Regulation; FAR Case 2009-005, Use of Project Labor Agreements For Federal Construction Projects").[1]

My name is Ronald M. Fedrick. I am the President of Nova Group, Inc. ("Nova"). Nova performs the following types of work: DOD prime construction contracts, primarily fueling and hydrant fueling systems and marine waterfront and waterfront utilities projects.

Over its thirty (30) plus years history, Nova has performed one-hundred seventy-eight (178) federal construction projects totaling $1,478,584,040 as a prime contractor to the Federal Government, starting as a small business performing prime construction services at Mare Island Naval Shipyard, Vallejo, California, growing into a large general or prime contractor performing prime construction services for the Federal Government in some thirty-two (32) states, Washington, D.C., Guam, Diego Garcia, Israel, and Qatar, where we are working at present.

Over the last nineteen (19) years, Nova has performed more than $704,500,000 worth of construction work on twelve (12) federal construction projects whose total costs were $25 million or more. No federal agency -- NAVFACENGCOM, USACE, DLA -- required me or Nova to sign a union labor agreement on any of these projects.

While Nova self performs much of its work, we subcontract work to both signatory and non-signatory firms. Neither Nova's performance of work nor that of its subcontractors on the above referenced federal construction projects has been delayed, stopped, or suspended by any labor disputes. There have been no jurisdictional disputes on our projects. We have also never encountered any of the other labor problems cited as justifications for union-only PLAs in Section 1 of Executive Order No. 13502 or Section A of the Proposed Rule (such as the claims of problems predicting labor costs, interruptions in labor supply, lack of coordination among union and non-union contractors, uncertainty about labor conditions, or jobsite frictions or disputes). From my personal experience on federal construction projects, I can state that there is no need for union-only PLAs to prevent labor problems.

All of our construction work is competitively bid. For the first twenty (20) years of our history, all of our work was let under an Invitation for Bid where the lowest priced offer from a construction contractor who would financially support the project and provide payment and performance bonds was awarded the project. For the last ten (10) years, the overwhelming majority of our work is let under a Request for Proposal where the award is made to the contractor who provides

[1] Executive Order No. 13502 for the first time declares as a matter of law that federal agencies whose construction projects exceed $25 million may require construction contractors on such projects to sign union-only project labor agreements as a condition of being awarded such work.

"best value" to the Government, price and technical proposal roughly equal. Among the technical factors evaluated are our experience – having performed the same type of work before, our past performance – how well we performed the same type of work before, our use of and commitment to small business. The majority of our federal projects are evaluated by the Government. The majority of our projects receive an "Outstanding" evaluation by the Government. The technical evaluation factors upon which we are evaluated by the Government include: quality control and quality of workmanship; timely performance; effectiveness of management with subcategories for compliance with laws and regulations and implementation of small business subcontracting plan; compliance with labor standards, including "compliance with labor laws and regulations with specific attention to the Davis Bacon Act and EEO requirements"; and compliance with safety standards. Our "Outstanding" Performance Evaluations attest to a number of things: (1) The skill level, competence, commitment, and proficiency of our craft workers who construct acknowledged quality, timely, safe projects for the Government and for the U.S. taxpayer; (2) the commitment of Nova management to delivering quality, timely, safe projects while providing "the maximum practicable opportunity" for small business, veteran and service disabled veteran owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns to participate as subcontractors on our construction projects. I am personally very proud of the fact that Nova was the recipient of highly prestigious Eisenhower Award for support to small business in the form of subcontracting opportunities and particularly proud that since 1992 Nova has afforded $316,847,227 subcontracting opportunities for small business.

Regrettably, if a federal agency mandates a union-only project labor agreement on future federal construction work, Nova will be much less likely to bid on such work. Additionally, many, if not the majority of my subcontractors, primarily small businesses, are much less likely to submit sub-bids for the work. Nova and many of our subcontractors will be discouraged from bidding because a union-only mandate will discriminate against our workers and against our business.

If Nova signs a union project labor agreement, our workers will be discriminated against because a sizable portion of their current Davis-Bacon wages would have to be paid into union pension funds, from which our craft employees will not get any benefits. Additionally, our employees may also be forced to pay dues to a union against their will. They may also be denied employment altogether under union hiring hall requirements. All Nova employees have medical and dental insurance for themselves and their dependents and have a fully vested savings and retirement plan. In fact, our craft workers will experience a decrease in take home pay if the projects upon which they work are subject to a PLA. Nova's health and welfare, which includes employee and dependent, and pension plans cost less than the union programs. The excess fringe rate is added to the employee's base rate in the form of additional wages. One Navy and one Corps of Engineers projects illustrate this point. On a Navy project at the Naval Station

in San Diego, California there were a total of 147,923 crew hours. The total Davis Bacon combined fringe benefit was $2,175,657.19. The cost of Nova's medical and mental insurance for these hours was $338,197.62 while the costs of its retirement plan for these hours were $521,532.80. The excess fringe of $1,315,926.77 was paid to the employees. On the Corps of Engineers project in Hawaii, there were a total of 74,513.5 crew hours. The total Davis Bacon combined fringe benefit was $$1,739,399.71. The cost of Nova's medical and mental insurance for these hours was $122,029.93 while the costs of its retirement plan for these hours were $773,725.87. The excess fringe of $843,643.91 was paid to the employees. Under PLA's, on these two (2) projects alone Nova craft workers would lose some $2,159,570.68 in income.

If Nova signs a union project labor agreement, we will be discriminated against by having to pay into the union benefit funds over and above the employee benefits that we already provide, and we will be exposed to new liability under federal pension laws. We will also be unable to use our normal work crews and will have to operate under different and expensive work rules. The majority of our craft employees is cross trained and is, therefore, able to work from the commencement of the construction project to its completion. Signing a union project labor agreement will make us less productive and less efficient, with no increase in quality or safety.

If Nova did sign a union project labor agreement, we would have to factor the increased costs into our bid. Either way, the costs to the government for construction projects will increase if a union-only PLA is imposed.

Finally, I must take issue with the Council's failure to find that this Rule will have a significant economic impact on a substantial number of small entities. As stated above, many small entities perform work as subcontractors on projects whose total cost exceeds $25 million. In fact, we subcontract well over 60% of all work to small businesses, the majority of whom are not signatory to any union contract. Under the Proposed Rule, all subcontracts on such projects, no matter how small, will become subject to the union project labor agreement and will suffer the discrimination and increased costs referred to above. For this reason alone, the Proposed Rule must be rescinded so that a Regulatory Flexibility Analysis can be performed as required by law.

For all of these reasons, the Proposed Rule is arbitrary and capricious and contrary to federal law. No federal agency should be allowed to force bidders to sign a union project labor agreement as a condition of performing federal construction work. My personal experience with federal construction projects shows that union-only PLAs are unnecessary and discriminatory favoritism. They will do nothing to achieve the goals of economy and efficiency in federal procurement; instead they will have the opposite result of injuring competition, reducing the number of bidders, and increasing costs to taxpayers.

Attachment B

ATTACHMENT TO ABC COMMENTS FILED
IN RIN 9000-AL31, FAR CASE NO. 2009-005

ABC MEMBER RESPONSES TO JUNE 2009 SURVEY REGARDING PLAS ON FEDERAL CONSTRUCTION PROJECTS

ABC asked its members whether they had performed any construction projects for the U.S. government in which the total cost of the project (not just their portion) exceeded $25 million. Out of 239 responses, 35% said that they had. Those affirmative responders were then asked to "help us explain to federal procurement officials why government mandated PLAs discriminate against merit shop workers and harm taxpayers." Narrative responses were received from 69 contractors and are set forth below:

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1. (Respondent 80045, AR, Specialty Subcontractor) Our company relies on very talented labor that performs multiple tasks involving many trades such as concrete, carpenter, steel erection, welding, piping, etc. PLAs implement inefficient union work rules that prevent our workers from completing tasks in multiple trades.

2. (Respondent 80075, IN, Sprinkler Subcontractor) PLA supporters and union only contractors fail to recognize that the union business model is a failed model. Union construction has declined to less than 15 percent of the work force for a good reason. Merit shops perform work as good and in most cases better than union shops, and pay competitive wages that are determined by "MERIT" not entitlement or government intervention. Our fitters are crossed trained in fire alarm and fire sprinklers. We often perform both work elements on the same job with the same man and this economy reduces the cost of the project. PLA's would force a much higher cost because the union must enforce work rules preventing such economies.

3. (Respondent 80040, Owner, NJ, Specialty Subcontractor) 1. My employees will be unable to participate in a project that is financed with their tax dollars. 2. My employees are mostly Black or Hispanic. In this area of the country unions have historically discriminated against them. This pattern will not change in the future as the labor unions continue to operate as "an old boys club".

3. My employees prefer to manage their own fringe benefits, after all, it is their money. They prefer the freedom of choice. 4. Economic theory and common sense dictate that the restriction of supply always leads to higher prices. 5. A PLA is the closest thing to legalized racketeering we have ever seen in the history of our nation. It is akin to the protection rackets the Mafia was famous for. Really, use my people and follow my rules and we will ensure labor peace. If that is not racketeering, please tell me what is? 6. Some or all of my employees would not be able to work on the project. It is difficult to factor the loss of your productive workers and new unfamiliar workers that may not be trained in our construction sequencing (or have the proper skills to get the job done) into a bid.

4. (Respondent 79931 Owner, CA, Mechanical Subcontractor) When we work on federal projects covered by a PLA we have to pay benefits into a union fund which our workers will never receive. We will also have to use union workers that have never worked for us and have no loyalty to us and no incentive to do a good job. We will not be able to use ABC apprentices on these projects. because of these and many other reasons we will not bid on these project so this makes it a form of discrimination.

5. (Respondent 80205, FL, Mechanical Subcontractor) Adding PLAs will limit competition as unions represent a small portion of the employees within the construction industry. Our employees choose not to join the union and to make their own decisions and have their own opinion with regards to employment issues. In fact we have several employees who in years past were represented by unions and chose to leave the union as they felt the union was a hindrance to their opportunity for success. If PLAs are instituted, the merit shop firms and their employees will effectively be denied access on these projects.

6. (Respondent 80099, CA, Electrical Subcontractor). This has the potential to take away more than 75% of the competitive labor force on federal construction projects.

7. (Respondent 80016, GA, Owner, Specialty Subcontractor) Federally mandated PLAs would put my company at a disadvantage by restricting us from hiring the long-term, non-union employees whom we have trained to be successful in our business and forcing us to hire employees through Union hiring halls. In addition, we would be forced to pay Union benefits, even though none of our non-Union employees would receive those benefits.

8. (Respondent 80053, NY, Owner, Concrete Contractor) ON A PLA PROJECT WE CAN NOT EMPLOY OUR REGULAR EMPLOYEES.

9. (Respondent 80073, FL, General Contractor). In Florida only 3% of construction companies are union and a PLA would mean that we would have to bring 97% of the workforce from outside the state which harms local companies and imposes higher costs on projects.

10. (Respondent 80023, CA, Owner, Specialty Contractor, Small Business Owner) We all have a right to choose -- where we live, how we live, what we eat, with whom we associate. For whom we work is no different. Our employees have chosen to work for us. We have not hidden from them the fact that we are a merit shop and not a union signatory. They have made a choice and no government institution or promulgation should violate that choice. If our employees want to work for a union signatory contractor there is nothing that prevents them from exercising that choice to do so but the fact that they are with us indicates their vote. They have decided that they don't want

to pledge allegiance to their union hall and not their company. They want to work for a company that doesn't send them back to the hall when business is slow, that looks after them and their family and, in effect, becomes an extension of their family.

11. (Respondent 80078, NY, Owner, Specialty Contractor) As an open shop contractor, PLAs will prevent our company from bidding on public and federal construction projects because as a specialty contractor, we cannot afford to hire people out of a union hall with no experience in our trade. Most PLAs call for 75% union affiliation and 25% of your own people. Why would I want to hire three people to sit and watch my own people perform the work because they don't know how to do it? This is extremely expensive and is a waste of the taxpayer's money. In addition, PLAs allow labor to come from out of town rather than in your own neighborhoods. In Upstate New York, 80% of the construction workforce in open shop, so a PLA project means that the labor will come from out of town to do the work. How does this help the local people, who will be on the outside of the construction fence looking in and asking why they are laid off when workers 300 miles away are doing the work?

12. (Respondent 80068, NY, Owner, Specialty Subcontractor) As a pavement marking subcontractor on highway projects, our crews are on the project sporadically, not every day. As such, they would not work the total number of hours required by the PLA to take advantage of any of the benefits provided by the union. The dues they would pay, along with the fringe benefit portion of their hourly wage, would go to the union. The union in turn would receive these dollars and have no obligation to provide the employee with benefits. This would be a windfall for the union and a loss for the employee. The employee would still need to arrange health and other benefits outside of the union umbrella.

13. (Respondent 80092, NY, Owner, Specialty Subcontractor) 1) If Demco works under a PLA we cannot use our own people, obviously putting them out of work. This places union workers in a better position to get the work that they cannot win in the marketplace just because their leadership bought the President's allegiance with campaign financing. This is corrupt. 2) The IBEW has sworn to put us out of business in a letter to their membership. We would have to hire workers loyal to them and be subject to all of the costly tactics of salting. 3) Union workers' productivity is less than our workers and we have no way of knowing what productivity factors to apply to estimates if forced to use their workers. 4) Taking bidders out of the marketplace who have a history of competitive success obviously raises the cost to the taxpayer. You can't print money forever, so, eventually this means fewer projects and lower employment.

14. (Respondent 79967, NC, Owner, Specialty Subcontractor) As a firestop Contractor, we work for the drywall, hvac, plumbing, electrical, mechanical, masonry and telecommunication contractors. The unions do not have the trained firestop installers to perform the firestop correctly. If the firestop on the project is not claimed by a single union then a firestop specialty contractor would have to belong to all the unions that apply for the different trades, with separate foreman and installers and bookkeepers for each union. It would also significantly increase the cost of the project as much as four percent of the overall cost of the project. Seventy-five percent of our work is military or government work and I would have to lay off my employees and close our business if I had to deal with this.

15. (Respondent 7995, MD, Specialty Subcontractor) IF I HAVE TO PAY UNION DUES THE END RESULT IS I AM GOING TO PASS ON TO THE CUSTOMER WHATEVER THE ADDED COST IS. I AM SURE EVERY NON-UNION COMPANY WILL DO THE SAME.

16. (Respondent 80465, CO, worker, Specialty Subcontractor) The percentage of merit workers in the Rocky Mountain Region out-weighs the union worker. Federally mandated PLAs will lead to out-of-state union workers taking local jobs, and Colorado will lose tax revenue and will continue to have workers on their unemployment rolls in this slow economy. America is based on capitalism and if there is a mandate for union labor, then this is taking the very right to be an American away from us as merit shop workers.

17. (Respondent 79974, CA, Electrical subcontractor) PLAs require that merit shop contractors participate in union mandated retirement and benefit programs, which benefit only union members and contractors. This simply increases the overall cost of construction, thus wasting taxpayer money, as well as providing union contractors (who employ just 20% of the construction workforce in California) with an unfair bid advantage. Davis-Bacon laws already mandate that merit shop contractors pay their workers union wages on federally funded projects. Adding PLA requirements only inflates the overall construction costs that much more and it will discourage many merit contractors from bidding on this work.

18. (Respondent 79947, FL, Mechanical Contractor) We cannot agree to a labor agreement when we are an open shop merit based contractor. We employ upwards of 300 tradesmen that the labor agreement could potentially put out of work. The effect of this order on the income of tradesmen families would be catastrophic. Using a labor agreement does not allow us to reward personnel based on individual performance or provide the correct skill level of personnel based on the project's needs. Labor agreements are a potential disadvantage for merit shop contractors as we bid projects based on the history of our merit shop worker production rates, some of which have worked for our company upwards of 20years, so we know what production rates that we can project at bid time. Having to use a labor agreement will not allow us to provide an accurate forecast of labor cost.

19. (Respondent 79957, CA, Electrical Contractor) Studies across the nation have demonstrated costs dramatically increase when a PLA is implemented. Furthermore, open shop employees do not want to pay union dues to work on a project or pay into a union pension plan because they will never see a dime of that money! "Open shop" contractors do not want to pay into a union Health & Welfare program or union trust fund because they have their own benefits program and would have to pay twice. Lastly, PLAs are exclusionary and discriminatory "union only" agreements in which 85% of the available labor is frozen out of publicly funded construction!

20. (Respondent 80061, MD, Employee, General Contractor) I know that by watching our costs, we are able to bid competitively. We make money and are able to hire people because everyone is accountable. A union environment would destroy any incentive to control costs and eventually cost the taxpayers even more money which I personally object to.

21. (Respondent 79989, MD, Manager, General Contractor) Our employees, if allowed to work on a union job, would be required to contribute to the union funds which would never benefit them. Unions will make us less efficient, less safe, & increase our costs, which will ultimately cost the taxpayers more money. I personally think it is discriminatory to require us as a successful, large,

merit shop contractor to be a signatory to a PLA. I believe the main reason the unions & Obama & his Congressional cohorts are pushing for these PLAs is to help bail out the unions w/ new "blood" dues since their pension funds are in trouble & they can't properly fund their pensions, etc. w/out outside monies. This PLA arrangement is a terrible idea, like so many of this administration's.

22. (Respondent 8029, CA, Owner, Specialty Contractor, Small Business) If I have to sign one time agreements with the unions to do a job, my employees & myself as the employer have to pay twice for medical benefits none of which they will ever receive from the union, because they will never work enough hours to qualify. Second, it drives up the cost of the job significantly and at a time where we are hearing our President tell us how he is trying to keep jobs and save money, this is sending the wrong message. Small businesses like mine provide 60% of employment in this nation. By not allowing us to perform these jobs during this economic crisis, this order will surly put us all out of business. This would put 34 families out of work and 25 children at risk of losing homes and food if their parents are not able to work for me.

23. (Respondent 79938, MA, Owner, Specialty Contractor, Small Business) No one in the unions are trained in my specialty, therefore, journeyman`s wages are paid to teach them the trade.

24. (Respondent 79953, OK, Large General Contractor) PLAs as well as Davis Bacon will require that all trades abide by the jurisdictional requirements established in the 1930's. As with any other business, the construction industry has changed since this time period. We no longer train personnel in just one trade, we cross train them to perform many tasks so we can keep them as employees for the duration of the project. Our employees perform general labor, carpentry work, cement finishing, iron work (tying rebar and miscellaneous steel), and operate small equipment such as bobcats and lulls. If they perform different types of work in one day, which is normal, we are required to report their hours worked in each established trade, and pay them differently for each task which is ridiculous and a waste of time, resources and money.

25. (Respondent 80338, CA) All PLA discriminate. First, If only unions can bid on a project the price of the project is inflated. The prevailing rates are artificially high in the first place. It does not mean the quality is any better in most circumstances. Everyone should have the chance to bid on projects unless they do not play by existing rules and regulations.

26. (Respondent 80059, UT, Owner, Specialty Contractor) We are a specialty subcontractor. No unions really cover the scope of our work. Therefore, we have to employ various trades that have no training for our jobs. This results in the necessity to utilize several different union workers to do the work of a single one of our workers. The inefficiency and added costs are tremendous. Obviously, we try to bid these higher costs into our proposals, but the end user (in this case the government and taxpayer) pays an extraordinary amount for basically the same product.

27. (Respondent 80054, MO, Owner, General Contractor) My company is open shop. We train our employees to be multi-craft professionals. We pay our employees the base wage plus fringes on their check. If we sign a PLA the empolyees' pay would be reduced between 20% to 30% and that money would go to the unions for which the employees would get no benefits. On top of that our company would be tied to pension plans with unfunded liabilities for which our company may have to pay at the conclusion of the agreement with the unions.

28. (Respondent 80179, TN, General Contractor) We have no problem finding qualified workers and the additional job rules via the PLA would create wasteful spending

29. (Respondent 80031, MS, Owner, Concrete Supplier) Limits the number of companies that can perform work on projects; adds higher costs due to control by labor; unfairly picks "selected companies" that meet union or labor requirements.

30. (Respondent 80019, KY, Specialty Subcontractor) Our company and workforce opposed government mandated PLAs for obvious reasons. PLAs put more burden on a job with union mandated excessive and inefficient rules and labor jurisdiction issues. Not to mention the added costs involved dealing with unions. Prevailing wage is bad enough but utilizing the labor unions to govern a job is just plain wasteful and not efficient. Non union workers, which comprise 85% of the U.S. construction workforce, remain non union for a reason. They enjoy less hassle, and are more productive and better employees, etc. Unions offer nothing except more costs.

31. (Respondent 80039, CA, General Contractor) PLAs reduce the number of contractors bidding a project and drive up costs. Costs are driven up in several ways: 1) By reducing the number of general contractors bidding the project - supply and demand always shows the cost will go up. 2) As a general contractor, if my pool of subcontractors is restricted, those costs go up and I have to pass them on to the Owner [taxpayer]. 3) If I chose to have my employees work on the PLA job I now have to pay into the union for their benefits [that they will never see] plus maintain their existing benefits, raising my labor costs which will get passed on to the Owner. 4) By requiring me to use an unknown workforce (those from the union hall) I have to put more money in the job to account for unknown productivity, vs. known productivity of our existing crews.

32. (Respondent 80008, WA, Owner, Specialty Subcontractor) They add cost to the project with out adding value. As an employer we treat our people fairly, communicate directly and allow people to excel based upon their efforts and abilities. This ultimately leads to greater efficiencies and value to the taxpayer.

33. (Respondent 80395, TN, General Contractor) When required to utilize union labor, the total cost of the job increases; therefore increasing the cost to the taxpayer. In an economy such as ours, I consider this nothing short of stealing from our citizens.

34. (Respondent 80123, NY, General Contractor) PLA agreements discriminate against open shops by requiring them to hire union labor regardless of skill or qualification of that labor for the job.

35. (Respondent 80484, NY, Electrical Contractor)The government mandated project labor agreement will eliminate open and competitive bidding and will increase construction costs. The Government should not be in the business of dictating contracts that are directed to market specific groups or organizations.

36. (Respondent 80088, PA, Electrical Contractor) The PLA Executive Order will cut out a lot of the competition and provides only for organized labor. Additional costs to the taxpayer as a result of PLAs is not good government policy.

37. (Respondent 80080, PA, Specialty Contractor) We provide, install and start-up a specialty control system to a certain government agency that we would in turn have to subcontract to a union

installer to complete the installation portion under this Executive Order 13502. This in turn causes (we have had to hire a union sub on PLA projects before) the entire price to balloon way out of normal price range due to the fact that there are the following: Additional overhead of the union subcontractor, our project management time is greatly increased due to an installation crew that is not properly trained on the system as our in house non-union crews are (training is not a one or two day course, we continuously train our employees since the system changes regularly), our start-up time is greatly increased due to mistakes and not properly installing due to training as described above. We know this from experience not from a hunch or guesswork.

38. (Respondent 80017, PA, Employee, General Contractor) We can keep the bidding completive, by keeping cost down. Everyone has the right to work. Any other means of bidding is discrimination.

39. (Respondent 79984, KS, Electrical Contractor) PLAs discriminate against our employees by forcing them to join a labor union in order to work on those projects. They inflate the cost of these projects to the taxpayer by imposing these regulations, instead of letting the free market system work as it is intended. I liken it to placing a tariff on the majority of the construction workers in this country. How is it fair that we as taxpayers are excluded from working on the very projects that our tax money is paying for?

40. (Respondent 80052, MO, Specialty Contractor, Woman Business Enterprise) Our Company hires insulators. The DB wage on a current federal project over 25M we have is $29.64 base +$12.76 fringe. Our Company pays for health, life, dental, vacation, and training, but do not take a credit for these benefits as allowed by the law. We pay half of the fringe as gross wages and half into a retirement account which employees are vested in day one. So, on this job our employees receive $36.02/hr gross pay + $6.38/hr into their retirement accounts. Our portion of this project is 2176 man hours. If this job were subject to PLA, the employees would receive $13,883 less in wages and $13,883 less in retirement benefits, plus have to pay union dues of $1.37/hr totaling $2,981. The unions would receive $27,766 + $2981 = $30,747 with no expenses, and the employee would get 33.3% LESS in wages and benefits.

41. (Respondent 79993, TX, General Contractor) PLAs exclude qualified workers and their employers from bidding on projects, which decreases competition and increases cost. This country is built and fosters free enterprise. PLAs prevent free enterprise, by excluding the individuals it is designed to protect.

42. (Respondent 80033, CO Industrial Contractor) Our employees work with our clients to build a better project and our clients have come to expect that of us. If we work Union, we are not the same company and our clients will not be able to rely on the same service they have come to expect. As a merit shop company working on a federal construction project, we have to pay the prevailing wages. Prevailing wages equalize merit shop company's wages and benefits with a union company as these rates are almost always set to union scale. On these same projects, the unions do not have to pay the same scale to apprentices as they do journeyman, a merit shop company does not get the whole benefit of this difference. So the reality is that the union companies already are getting a more competitive advantage on federal projects. Lastly, if any government agency selects one group over another and eliminates the opportunity for free enterprise and free choice, that agency goes completely against the constitution and basis for which this country was founded.

43. (Respondent 80095, IN, Owner, General Contractor, Small Business) With PLAs construction costs will balloon.. PLAs will virtually destroy the competitive advantage that local and state governments enjoy today. As a small business owner, I will not bid projects with PLAs simply because we believe in the free enterprise market and our employees believe in freedom of choice and the right to work and I will not betray them. Years ago we were a union shop and our employees carried union cards. As a union contractor we were held hostage and our workers were the ropes that tied us. Due to this "we control the worker by which we control you" mentality of the union bosses, we lost customers and our workforce. We made a decision not to sign a new contract with the union and our employees took withdrawal cards and stayed with us. Since that time our employees have been approached many times to rejoin the rank and file and on every occasion they have said no. It is because of this that I will not bid a project with a PLA.

44. (Respondent 79936, PA, Employee General Contractor) PLAs inflate the cost of the project thus costing tax payers more while at the same time forcing the contractor to staff and execute projects following union guidelines which ultimately makes the contractor less profitable and limited in his ability to perform.

45. (Respondent 79934, KY, Specialty Contractor) PLAs will effectively exclude the majority of construction companies and their employees in the area from working on the projects (In Kentucky, 90% of construction employees are open shop and only 10% are union). • PLAs will drive up the cost of the project by effectively eliminating competition from open-shop contractors. • PLAs will preclude many local contractors and their employees from working on the projects even though their tax dollars are paying for the project. • PLAs will provide less access to skilled manpower on the projects. • In 2006 Gov. Jerry Abramson and Gov. Ernie Fletcher agreed to veto a any attempt to implement a PLA for the New Downtown Arena in Louisville, KY. They both stated that wanted all workers in the metropolitan area to have an opportunity to work on the project. If PLA had been used, only union workers would have been working there. Which as you can see above is a small portion of the workforce in Kentucky's largest city.

46. (Respondent 80003, PA, General Contractor) PLAs have an inherent level of inefficiency due to mandated jurisdictional definitions which alters crew make-up or prohibits use of composite crews, often resulting in higher net crew rates. – PLAs restrict the use or transfer of key personnel, and/or "name-hiring" resulting in inefficiencies because crews are not as familiar with work methods or procedures as are merit shop crews that have worked together for many years. – PLAs negatively impact subcontracting opportunities, particularly DBE's are limited to union-shops, resulting in increased cost. - - - PLAs are inflexible with respect to times of work (split-shift, etc), shift hours (4x10's, etc), make-up days, travel time, etc. which require additional contingencies and inefficiency costs to be included in bids. - - - PLAs contain restrictions on allowing equipment operators to operate multiple pieces of equipment in a shift .... or allowing a "non-operator" to operate equipment on an as-needed basis ... results in additional cost etc.

47. (Respondent 80039, PA, Owner, Specialty Contractor) My company has a core group of 150 construction employees. If we were forced to use union employees, our own employees would be home on layoff.

48. (Respondent 80330, CO, General Contractor) It took years to get away from the corrupt thugs that run the unions. To go back to that would be six steps backwards. They have nothing to offer our employees that we don't already provide. Our employees would have less pay, benefits, and

stability with a union and would not want to be assigned to that project and forced to pay union dues. The union has robbed from their own pension fund to buy politicians and offers no security to their members for retirement. The retirement funds that our employees earn are part of a protected plan. Union work rules protect lazy under performing workers and inflate the cost of the project for the tax payer.

49. (Respondent 80021, TN, Specialty Contractor) PLAs prevent the large majority of workers - merit shop workers - from working on government projects that they fund as taxpayers. It's the worse kind of discrimination - the Federally mandated kind.

50. (Respondent 80105, NY, General Contractor) PLAs restrict competition and take away an individuals' freedom of choice. PLAs harm the taxpayer by increasing construction costs due to the inefficient labor structure forced by the unions.

51. (Respondent 79939, WA, Electrical Contractor, Small Business, Woman Business Enterprise) We are frequently only a small subcontractor on a much larger project-way down the food chain. We are unable to afford to bid on PLA only projects-the costs are too high. We are an open shop and our employees have chosen not to join a union. But they should have the opportunity to work on projects that are funded with their tax dollars.

52. (Respondent 80064, MD, General Contractor) Mandated PLAs force merit shops to take on additional cost in the form of effort, time, and money spent on securing the PLAs as well as the need to maintain two sets of pricing data for bidding work with and without PLAs. Finally, there is the obvious corresponding rise in labor costs associated with a PLA. That's three ways in which a merit shop incurs additional cost when bidding work which requires a PLA. Those costs are reflected in our price to the owner (i.e. the government and therefore all tax payers). Rather than forcing additional time, effort, and expense (all of which eventually gets passed on to the taxpayers), why not let merit shops and union shops compete as they are without additional rules? If unions really add value to their companies, they need not fear direct competition with merit shop companies.

53. (Respondent 79952, NJ, Owner, Specialty Contractor, Women Business Owner) Merit shops are run by good, hard working people, and provide safe work areas, good pay and benefits. We and our employees are very capable of managing our own company, without paying an outside entity to disrupt our daily activities. The paperwork and other extra costs to implement a PLA is absurd. We would not have to have tax increase if we would just STOP the waste within government. There are many laws in place to protect everyone from everything. A PLA ends up providing money to a private organization who harasses merit shop businesses. Unfortunately, merit shops do NOT have any laws protecting them (without great cost to then merit company, and none to the Unions). I just can't believe this is legal and/or constitutional.

54. (Respondent 80070, NY, General Contractor) PLAs actually cost taxpayers more money and tend to bring in non-local labor to build major public work projects. With 85% of the construction industry merit based, a PLA completely restricts the majority from building the project. Unions would argue that quality suffers. Are Toyota vehicles built by non-union labor of less quality than GM or Ford vehicles. I'd say they are comparable.

55. (Respondent 80067, PA, Specialty Contractor, Small Business Owner) Besides being harassed by unions and threatened, we are forced to burden tax payers with the extra costs with union work rules and other requirements within typical PLAs. Our company pays very fair wages, has insurance and 401K plans. The government needs to be fair to all taxpayers as well as allowing the small businesses to survive in the never ending union favoritism the government is showing. Go after the small guys who don't have fair wages and plans for their employees - not the upright small businesses who are fair and using their right to free enterprise.

56. (Respondent 80038, CA, Electrical Contractor) A properly administered certified payroll compliance process will confirm total compliance with Davis Bacon and make sure wages and benefits are equal between union and non-union workers. A Merit contractor would have to contribute to two separate employee benefit programs, such as pension and medical benefit plans. The Merit contractor would have to continue to offer the plan he has been offering to his employees and also make contributions to the Union sponsored benefit programs. Employees of the Merit contractor may never reach eligibility to receive benefits under the union's benefit plans and the contractor does not want to place his employees in this situation. A Federal PLA excludes its own taxpayers from working on a project that is using their tax dollars to build. The PLA prohibits a Merit shop federally approved apprentice from earning on-the-job hours of experience to company apprentices.

57. (Respondent 80316, CO, Specialty Contractor) PLAs increase the cost of construction, require contractors to adjust their benefit packages to conform to the PLA, and do not allow the contractors to utilize their existing workforce unless the workers join the union.

58. (Respondent 80316, NY, Specialty Contractor) PLAs would effectively force us to use union workers in lieu of our own workers. Some of our existing crews have worked together for years and have increased efficiency as a result. Using a large number of union employees who may not have our company's best interests as one of their goals may cause problems between work groups. Also, as a result of being forced to hire union workers we might be force to lay off existing workers. PLAs are the "poison pill" that we cannot accept which leaves union only firms with less competition which is exactly what PLAs are really all about.

59. (Respondent 80081, MD, Specialty Contractor) PLAs result in overinflated costs with less production. Union members have no motivation to put forth any more effort than the minimum required. I know many of them well, we are friends but our work ethics are complete opposites. Furthermore, our company has struggled with the same obstacles as any other company. Our employees taxes will go to fund projects that they will not even be permitted to work on unless we agree to a PLA. This sounds less like government and more like organized crime. This administration is hell bent on bankrupting the entire country.

60. (Respondent 80032, MS, Specialty Contractor) PLAs are a disgrace to American owned companies. They contradict the most basic rights as an American such as free enterprise. Why would you want to limit your choice of contractors to ones with additional burden? Open Shop contractors save taxpayer dollars.

61. (Respondent 80462, TN, General Contractor) PLAs drive up cost and reduce competition. Reputable contractors will use fair practices and obtain qualified and competitive market labor that provides the best value to the taxpayer - they do not require government mandates. PLAs put the

free market process at risk. Federal procurement officers should focus on qualifying the bidding contractors in lieu of taking bids from anyone and then saddling the project with unnecessary restrictions such as PLAs.

62. (Respondent 79961, NY, Mechanical Contractor) I would not be bidding on projects with a government mandated PLA. On projects where we would have been the theoretical low bidder, the federal and state taxpayers would therefore be paying MORE than needed to have the same work accomplished by a firm willing to sign a PLA. PLAs reduce competition.

63. (Respondent 80298, TN, Concrete Contractor) Unions cost the taxpayer more money. I see it firsthand on jobsites. And while everyone thinks the unions offer more benefits, they are dead wrong where our company is concerned. This discrimination should be against the law. The taxpayers are the ones taking it in the shorts when the government artificially limits its awards to union companies and the few open shop contractors who are willing to sign a discriminatory and costly PLA.

64. (Respondent 80015, NM, Specialty Contractor) Signing a PLA raises my costs and exposes my workforce to union organizing and intimidation. My company offers competitive wages and benefits. Our workers are more efficient because we are not subject to union work practices. Our trades people undergo apprenticeship training and are just as skilled as union workers, but have the flexibility to innovate execution methods to achieve shorter schedules and lower costs. They would not be allowed to work on typical PLA projects.

65. (Respondent 79990, TX, Mechanical Contractor) If a person tests out to be a journeyman then that is what I pay them. If they test out less than a journeyman then they get paid less because they are not as skilled and knowledgeable about the trade. If they are a Union members they get paid a fixed amount without any field qualification. PLAs implement the inefficient union business model.

66. (Respondent 79972, NJ, Specialty Contractor) The fact of the matter is our company is qualified to federal work now with our own manpower. My company is cross trained in the HVAC trade. Each installer is capable of fabricating ductwork, installing ductwork insulating ductwork installing pipe work and also insulating. Start up and testing is also done by our own workforce. This practice makes us more productive which allows more competitive pricing. We do not have restrictive work rules that cause several different trade unions to be involved in a project along with restrictive work rules.

67. (Respondent 80398, TN, Electrical Contractor) We recently completed a $40million dollar project for the Oak Ridge National Labs that was awarded to myself and other merit shop contractors because of our low bid. We competed with union contractors who were not competitive in their pricing. The owner received his project on time, on budget and was happy with the end product. The government is presently constructing a $60 million project adjacent to the project we just completed, but we cannot compete because it has a PLA agreement. We are not afraid of competition, and Davis-Bacon has worked in the past, why are we locked out in working in projects in our own back yard?

68. (Respondent 80048, NY, Specialty Contractor) 1. PLAs discriminate against our workers, who have decided that they do not want to belong to a labor organization. 2. PLAs increase the costs for

the projects which will thereby increase the costs to the taxpayer. 3. Fewer projects will be able to be constructed due to higher costs, therefore reducing the number of workers that will be employed in the construction industry, which already has a high unemployment rate. 4. Benefit money will be paid into the union pension funds for which our workers will not have the benefit of. Since PLAs are established for individual projects, normally one to two years in length, our workers would not be able to gain enough time to be vested in the union benefit plan. 5. Our company would find itself less competitive in competing for projects since we would be required to hire from a union's hiring hall and be forced to break up our existing team of experienced and loyal employees.

69. (Respondent 79958, TX, Specialty Contractor) PLAs are a crooked way of promoting unions in many open/merit shop states. Why should the worst worker get paid the same as the best hand, people should be compensated on their value, not an artificial benchmark.

Attachment C

BEFORE THE CIVILIAN AGENCY ACQUISITION COUNCIL AND THE DEFENSE ACQUISITION REGULATIONS COUNCIL

Notice of Proposed Rule: Federal Acquisition Regulation
FAR Case 2009-005
Use of Project Labor Agreements For Federal Construction Projects

RIN 9000-AL31

Comments of Associated Builders and Contractors, Inc.

Associated Builders and Contractors, Inc. (ABC), hereby comments in opposition to the Notice of Proposed Rule issued by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) in the above referenced matter. The Proposed Rule purports to implement the President's Executive Order No. 13502 (Feb. 6, 2009), which for the first time establishes a policy of "encouraging" federal agencies to consider imposing union-only project labor agreements (PLAs) on federal construction projects whose total costs exceed $25 million dollars.[1]

[1] *See* 74 Fed. Reg. 33953 (July 14, 2009). In accordance with the NPR, *id.* at 33954, ABC is this same date filing separate comments challenging the Councils' failure to conduct an Initial Regulatory Flexibility Analysis as required by the Regulatory Flexibility Act, 5 U.S.C. § 601. There is no statutory requirement for the filing of such separate comments, however, and ABC objects to this process. The Councils are required to consider all comments filed in this proceeding in both its aspects, and ABC hereby incorporates its separately filed RFA comments by reference.

1. ABC's Interest In The Proposed Rule

ABC is a national construction industry trade association representing 25,000 individual employers in the commercial and industrial construction industry. ABC represents both general contractors and subcontractors throughout the United States. The majority of ABC's member companies are "merit shop" companies, whether unionized or non-union, who support and practice full and open competition without regard to labor affiliation. The merit-shop philosophy helps ensure that taxpayers and consumers alike receive the most for their tax and construction dollars.

Conservatively, ABC's members employ more than 2.5 million skilled construction workers whose training, skills, and experience span all of the twenty-plus skilled trades that comprise the construction industry. The Bureau of Labor Statistics (BLS) most recent report states that the non-union private sector workforce in the construction industry comprises more than eighty four (84) percent of the total industry workforce.[2]

The great majority of ABC's contractor members are classified as small businesses by the Small Business Administration. This is consistent with the findings of the Small Business Administration that the construction industry has one of the highest concentrations of small business participation (more than 86 percent).[3] At the same time, ABC includes among its members many larger construction companies who have contracted directly with the federal government for many years in the successful construction of large projects of the type that will be covered by the Proposed Rule.[4]

ABC and its members, large and small, are greatly concerned that the Proposed Rule seeks to implement a Presidential Executive Order which is itself an unlawful exercise of power that violates numerous federal laws and the Constitutional rights of government contractors and their employees. Specifically, as further explained below, the Proposed Rule should be rescinded or greatly modified for the following reasons:

- The Proposed Rule, and the Executive Order on which it is based, interferes with the Congressional mandate that federal agencies should strive to "obtain full and open competition" in procurement of government contracts, as set forth in the Competition in Contracting Act (CICA).[5] The Proposed Rule instead injures competition by discriminating against and discouraging bids from non-union contractors and by showing blatant favoritism toward a small class of unionized contractors on large federal construction projects.

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[2] *See* bls.gov *"Union Members Summary"* (Jan. 2009).

[3] *The Small Business Economy: A Report To The President*, U.S. Small Business Administration, Office of Advocacy (2009), at 8.

[4] All of the top 10 companies on Engineering News-Record's 2009 Top 400 Contractors list, and 21 of the top 25, are ABC member firms.

[5] 41 U.S.C. § 253.

- The past decade of experience under President Bush's Executive Order *prohibiting* PLAs proves that PLAs are unnecessary to achieve any legitimate federal procurement goals. None of the labor-related "challenges" cited in the Proposed Rule as purported justifications for PLAs have in fact caused any significant delays or overruns on any of the thousands of large federal construction projects built during the past decade.

- The Proposed Rule will not increase the economy or efficiency of the federal government's procurement of construction, but will instead achieve only the opposite results by increasing costs and delaying construction. The Proposed Rule, and the Executive Order on which it is based, therefore exceed the authority of the Executive Branch under the Federal Property and Administrative Services Act.[6]

- The Proposed Rule establishes a new regulatory policy that interferes with and discriminates against rights of construction contractors and their employees that are protected by the National Labor Relations Act, ERISA, the National Apprenticeship Act, and the U.S. Constitution, including the forced taking of non-union workers' pay for the benefit of union pension plans, without just compensation.

- The Proposed Rule interferes with the Congressional mandate that federal agencies should encourage and give preference to small and disadvantaged businesses in procurement of government contracts. The Proposed Rule and the Executive Order therefore violate the Small Business Act.[7]

- The Proposed Rule promotes discrimination against minority contractors and employees, the vast majority of whom are non-union. The Proposed Rule and the Executive Order therefore violate the affirmative action principles set forth in Executive Order 11246.

- The Proposed Rule improperly declares that "this rule is not a major rule under 5 U.S.C. § 804" and thereby violates the Congressional Review Act codified therein.

- The Proposed Rule fails to include an Initial Regulatory Flexibility Analysis and therefore violates the Regulatory Flexibility Act.[8]

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[6] 40 U.S.C. § 101.

[7] 15 U.S.C. § 637(d).

[8] 5 U.S.C. § 601.

- The Proposed Rule establishes no meaningful criteria for federal agencies to follow in considering whether to impose PLAs on large federal construction projects. The findings purporting to support the Proposed Rule are also inadequate to meet the standards set forth in the Data Quality Act. The resulting agency decisions will be inherently arbitrary and capricious and will delay construction projects.

For each of these reasons, and as further explained below, the Proposed Rule should be rescinded or at least significantly modified in order to mitigate the irreparable harm otherwise likely to be caused by the President's Executive Order.

2. The Proposed Rule Violates CICA's Mandate Of "Full and Open Competition" In The Award Of Federal Construction Contracts.

The foundation for the federal government's procurement requirements is the Competition In Contracting Act of 1984 (CICA).[9] CICA was enacted to assure that all interested and responsible parties have an equal opportunity for the Government's business. CICA not only reaffirmed the intent that all procurements be "open", but required "full and open" competition. Full and open competition means that all responsible sources are permitted to submit competitive proposals on a procurement action. CICA requires, with certain limited exceptions, that the Government promote full and open competition in awarding contracts.[10]

Of particular significance to the Proposed Rule, CICA expressly bars federal agencies from using restrictive bid specifications in such a way as to effectively discourage or exclude contractors from the pool of potential bidders or offerors. As the Act states, agencies must solicit bids and offers "in a manner designed to achieve full and open competition" and "develop specifications in such a manner as is necessary to obtain full and open competition."[11]

Since the enactment of CICA, no President has previously adopted a rule or executive order authorizing, let alone encouraging, any federal agency to require contractors or subcontractors to sign union labor agreements as a condition of performing federal construction projects.[12] Nor has any federal court authorized federal agencies to

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[9] 40 U.S.C. §471 *et seq.* and 41 U.S.C. §251 *et seq.*

[10] For a full and recent discussion of CICA's requirements, *see* Manuel, *Competition in Federal Contracting: An Overview of the Legal Requirements* (Congressional Research Service April 2009).

[11] *Id.* at 18, citing 10 U.S.C. § 2305(a)(1)(A) and 41 U.S.C. § 253a(a)(1)(A-C); *see also* Cohen, *The Competition in Contracting Act*, 14 Pub. Con. L. J. 19 (1983/1984).

[12] The first President Bush issued Executive Order 12818 in 1992 prohibiting the use of PLAs by any parties to federal or federally funded construction projects. Though President Clinton revoked Bush's Executive Order in 1993, he never issued a contrary Order authorizing federal PLAs during his term. Instead, he issued only a "guidance memorandum" encouraging the use of PLAs, which did not have the force of law and was not tested in court prior to the end of Clinton's term. In 2001, President George W.

impose PLAs on federal construction contracts under CICA.[13] Indeed, to ABC's knowledge no federal agency has imposed a PLA over the objection of construction contractor offerors since CICA's enactment in 1984.[14]

As is further explained below and in hundreds of comments filed by contractors in this proceeding, the Proposed Rule conflicts directly with CICA by encouraging federal agencies to impose PLAs which discriminate against and discourage competition from potential bidders, *i.e.*, those contractors who are not signatory to any union agreements.[15] By showing favoritism towards a narrow class of unionized contractors, government-mandated PLAs clearly do not "obtain full and open competition" and are therefore unlawful under CICA.

a. How Government-Mandated PLAs Under The Proposed Rule Discriminate Against Non-Union Contractors and Their Employees.

As defined in the Executive Order and the Proposed Rule, imposition of a PLA on a federal construction project would have the following effects:

First, non-union employees working on a prevailing wage project under a PLA would be penalized monetarily, compared to their earnings on the same federal project covered by

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Bush issued Executive Order No. 13202, prohibiting any government mandate of PLAs on federal or federally funded construction projects.

[13] In the only case involving a PLA on a federal project where the CICA issue was previously raised, the Court of Appeals for the Sixth Circuit found that the agency involved, the Department of Energy, was not a party to the PLA, and was not responsible for the actions of the D&O Contractor who was the responsible party. The court therefore found that subcontractor plaintiffs lacked standing to challenge the PLA under CICA. *Phoenix Engineering, Inc. v. M-K Ferguson of Oak Ridge Co.*, 966 F. 2d 1513 (6th Cir. 1992). This case is wrongly reported in an oft-cited GAO Study on PLAs as authorizing DOE to impose PLAs notwithstanding CICA, when in fact the merits of that issue were never addressed. *See Project Labor Agreements: The Extent of Their Use and Related Information*, at 5 (GAO 1998).

[14] The above cited GAO study erroneously conflated both government-mandated and purely voluntary PLAs in concluding that 26 PLAs were performed on federal construction work in the 1990's. *Id.* at 2. Voluntary PLAs are expressly authorized by the National Labor Relations Act so long as they are entered into without coercion by "employers in the construction industry" and "in the context of collective bargaining." See 29 U.S.C. § 158(e) and (f). At issue in the present Proposed Rule and the Executive Order are *government-mandated* PLAs which federal agencies are for the first time being authorized to impose over the objection of bidding contractors.

[15] As noted above, more than 84% of the construction industry now consists of contractors who are not signatory to any union agreements. http://bls.gov. This represents a total transformation of what was once, but certainly is no longer, a union-dominated industry. As described in numerous publications by the late Dr. Herbert Northrup, unions represented 87% of the industry's workforce after World War II, a period in which the industry was notorious for strikes, featherbedding inefficiencies, and discrimination against minorities. *See* Northrup, OPEN SHOP CONSTRUCTION REVISITED (Wharton School 1984). Thanks largely to the benefits of increased competition for construction services, strikes have become rare, work rules have become much more efficient, and minority participation is at its highest levels.

the Davis-Bacon Act without a PLA. Under Davis-Bacon, without a PLA, such employees receive "prevailing" wages and benefits which are equal to those paid to union employees.[16] On projects subject to a PLA, however, the employees must pay dues to the union, which are deducted from their regular take home pay. Such employees would also forfeit significant dollar amounts that their employer would be required to pay into union benefit funds. Because of the relatively short duration of most construction projects, however, those non-union employees would receive no benefits from their pension contributions.

Numerous comments from experienced government contractors filed in this proceeding testify to this discriminatory impact on their employees. The comments of Ron Fedrick, President of Nova Group, a large and sophisticated Defense Department contractor, are representative, and explain the impact as follows:

> [O]ur craft workers will experience a decrease in take home pay if the projects upon which they work are subject to a PLA. Nova's health and welfare, which includes employee and dependent, and pension plans cost less than the union programs. The excess fringe rate is added to the employee's base rate in the form of additional wages. One Navy and one Corps of Engineers projects illustrate this point. On a Navy project at the Naval Station in San Diego, California there were a total of 147,923 crew hours. The total Davis Bacon combined fringe benefit was $2,175,657.19. The cost of Nova's medical and mental insurance for these hours was $338,197.62 while the costs of its retirement plan for these hours were $521,532.80. The excess fringe of $1,315,926.77 was paid to the employees. On the Corps of Engineers project in Hawaii, there were a total of 74,513.5 crew hours. The total Davis Bacon combined fringe benefit was $1,739,399.71. The cost of Nova's medical and mental insurance for these hours was $122,029.93 while the costs of its retirement plan for these hours were $773,725.87. The excess fringe of $843,643.91 was paid to the employees. Under PLA's, on these two (2) projects alone, Nova craft workers would lose some $2,159,570.68 in income.

Many other contractor comments testify to the same impact of PLAs on non-union workers on federal construction projects.[17] The contractors have rightly noted that their employees generally cannot work long enough on any of the particular federal projects likely to be covered by PLAs to receive any benefit from the union pension funds, due to the multi-year vesting requirements that all multi-employer funds impose. Thus, the PLAs necessarily cause employee fringe benefits to be taken from non-union workers without any just compensation.[18]

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[16] *See* 40 U.S.C. § 3141, *et seq.*

[17] *See, e.g.,* Comments filed by Hensel Phelps Construction, Facchina Construction, Miller & Long Concrete Construction, and hth Construction, among others.

[18] *See also* Contractor Responses to ABC Survey (July 2009), attached hereto and incorporated by reference.

These and other facts have been recently analyzed by Professor John McGowan of St. Louis University in a study that is hereby incorporated by reference.[19] McGowan projects that hundreds of millions of dollars will be lost by non-union employees due to an estimated 20% reduction in their take home pay on federal construction projects subject to PLAs under the Proposed Rule.[20]

Professor McGowan has further analyzed the discriminatory cost to contractors in the form of increased and/or duplicative benefit payments that will be required as a result of PLAs. He has found that non-union contractors who enter into PLAs would have to pay added and duplicative costs directly to the Union for various "benefits and fringes," while at the same time paying for many of these same benefits through their own company benefit plans. These duplicative costs may include payments for holidays, sick days, and vacation time, as well as apprenticeship training, insurance benefits, profit sharing, and company contributions into employee 401K plans. Professor McGowan projects that non-union contractors' labor costs will increase by 25% or more under PLA requirements, over and above the prevailing wage and fringe benefit costs that such contractors already expect to pay under the Davis-Bacon Act. As a result of these (wholly unjustified) cost increases, non-union contractors will either be discouraged from bidding or will pass on their increased costs to the taxpayers.

In addition to having to pay these draconian costs, non-union contractors who become subject to a PLA are typically not able to use their own employees for the PLA-covered Project. Instead, such contractors are forced to staff the project with union journeymen and apprentices with whom they are completely unfamiliar, or else pay penalties to the union. Contrary to the Executive Order's stated intent, this requirement will make the contractor, and hence the contracting federal agency, less efficient. PLAs also typically restrict the ability of non-union contractors to schedule their work crews in any manner other than that dictated by the PLA without first receiving "permission" from the designated trade union or the designated Labor Coordinator. This again makes the contractor less efficient and less able to staff the job properly.[21]

The Proposed Rule also discriminates against non-union apprenticeship training programs that are supposed to be protected from such discrimination by ERISA and the National Apprenticeship Act. In particular, employees of non-union contractors who are

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[19] McGowan, *The Discriminatory Impact of Union Fringe Benefit Requirements On Non-Union Workers Under Government-Mandated Project Labor Agreements* (Aug. 2009), available at http//abc.org/plastudies.

[20] The action of a federal agency in redirecting part of non-union workers' compensation into union pension plans from which they receive no benefits constitutes a form of government "taking" without just compensation in violation of the Fifth Amendment to the Constitution. At a minimum, the Councils are required to comply with Executive Order 12630 and to address the takings implications of the Proposed Rule, which has apparently not been done in the current rulemaking to date. The new government mandate also violates employee rights under ERISA, as is further discussed below.

[21] As noted above, non-union employees working under PLAs are forced by government mandate to pay dues to labor unions who they have not selected as their bargaining representative. Such a requirement, where imposed by a federal agency, will violate the First Amendment right of such employees to Freedom of Association.

forced by federal agencies to sign PLAs will no longer receive credit towards their existing apprenticeship programs, and such employees will be forced to enroll in union apprenticeship programs (or alternatively, the non-union contractors will be forced to hire existing union apprentices instead of their own).

Finally, non-union contractors who are required to sign the PLA lose the ability to hire subcontractors of their own choosing, inasmuch as all subcontractors also must adhere to the PLA. Most subcontractors of nonunion contractors are themselves non-union and are reluctant to sign a PLA for the reasons set forth above. Numerous contractor comments being filed in this proceeding testify to this impact on subcontractors.

b. PLAs Under the Proposed Rule Will Injure Competition, And Will Certainly Not "Obtain Full And Open Competition."

Because of the significant adverse impact of PLAs on non-union contractors and subcontractors described above, the inevitable result of the Proposed Rule will be to injure competition for federal construction projects by significantly reducing the number of bidders for such projects in direct violation of CICA's mandate. ABC has recently conducted a survey of its members as to whether they would be discouraged from bidding by a PLA requirement on federal construction projects. In an overwhelming response of hundreds of respondents, 98% of these contractors indicated that they would be less likely to bid on such work if a project labor agreement were imposed as a condition of performing the work.[22]

Previous surveys of non-union contractors (who it must be recalled constitute more than 84% of the industry) have reached similar results. Thus, in a study of infrastructure contractors in the Washington, D.C. area conducted by the Weber-Merritt Research Firm, more than 70% of the surveyed contractors stated that they would be "less likely" to bid on a public construction project containing a union-only PLA.[23] Across the country in Washington State, another survey of contractors revealed that 86% of open shop contractors would decline to bid on a project under a union-only PLA.[24] Government-mandated PLAs clearly have an adverse impact on competition by discouraging such contractors from bidding for government construction work.[25]

These survey findings have been repeatedly supported by evidence gathered on actual government construction projects where PLAs have been mandated. In March 1995, a study analyzed the effects of project labor agreements on bids for construction

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[22] *Newsline* (July 22, 2009), available at http://abc.org.

[23] *The Impact of Union-Only Project Labor Agreements On Bidding By Public Works Contractors in the Washington, D.C. Area* (Weber-Merritt 2000), available at http://abc.org/plastudies.

[24] Lange, *Perceptions and Influence of Project Labor Agreements on Merit Shop Contractors, Independent Research Report* (Winter 1997), available at http://abc.org/plastudies.

[25] Recent PLA apologists have either ignored or overlooked these studies. *See* Kotler, *Project Labor Agreements in New York State: In The Public Interest* (Cornell ILR School 2009), at 14.

work on the Roswell Park Cancer Institute, where the same contracts had been bid both with and without PLAs. The study concluded that, "union-only project labor agreements ... reduce the number of companies bidding on the projects."[26] A follow-up study conducted on behalf of the Jefferson County Board of Legislators by engineering consultant Paul G. Carr found that there was a statistically significant relationship between the number of bidders and the cost of projects, concluding that the relationship between these two factors does not occur by chance. Professor Carr further concluded that a PLA requirement would adversely impact the number of bidders and would thereby increase project costs.[27]

Ernst & Young agreed with these findings in connection with a study of PLAs in Erie County, Pennsylvania, concluding that "the use of PLAs adversely affects competition for publicly bid projects. This is to the likely detriment of cost effective construction. Our research revealed that the use of PLAs strongly inhibits participation in public building by non-union contractors and may result in those projects having artificially inflated costs."[28] Similar conclusions were reached by the Clark County, Nevada School District, which recommended against adoption of any union-only requirements on Clark County schools.[29]

Apart from these surveys and studies, specific adverse impacts on competition for actual construction projects have been publicly reported on numerous state and local government PLAs. These include a sewer project in Oswego, NY,[30] the Central Artery/Tunnel project in Boston,[31] schools projects in Fall River, MA,[32] Middletown, CT,[33] Hartford, CT,[34] and Wyoming County, WVA, [35] the Wilson Bridge project near

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[26] Analysis of Bids and costs to Taxpayers in Roswell Park, New York (ABC 1995), available at http://abc.org/plastudies. As further discussed below, the study found a direct correlation between the reduced number of bids and increased costs on the project.

[27] Carr, *PLA Analysis for the Jefferson County Courthouse Complex* (Submitted to Jefferson County Board of Legislators, Sept. 14, 2000), available at http://abc.org/plastudies. *See also* Thieblot, *Review of the Guidance for a Union-Only Project Labor Agreement for Construction of the Wilson Bridge* (Md. Foundation for Research and Economic Education Nov. 2000), available at http://abc.org/plastudies.

[28] Ernst & Young, Erie County Courthouse Construction Projects: Project Labor Agreements Study (2001), available at: http://abc.org/plastudiess/Erie.pdf.

[29] *School District Should Heed Conclusions of Report*, Las Vegas Journal, Sept. 11, 2000.

[30] *Sewer Project Phase Attracts No Bids*, Syracuse Post-Standard, Aug. 20, 1997, E-1.

[31] *Big Boston bids in 1996*, ENR Nov. 20, 1995, at 26; *Low Bid $22 Million Over Estimate*, ENR Jan. 13, 1997, at 1, 5.

[32] The City initially bid three school construction projects under a PLA in 2004. When the projects attracted a low number of bidders, the city cancelled the PLA and reopened bidding without the PLA, receiving many more bidders and saving millions of dollars. *See* Beacon Hill Institute, *Project Labor Agreements and Financing School Construction in Massachusetts* (Dec. 2006), available at www.beaconhill.org.

[33] *State's Dubious Labor Policy*, Hartford Courant, Aug. 20, 1998, 3.

Washington, D.C., [36] and the San Francisco International Airport project.[37] These and other incidents of government-mandated PLAs depressing the number of bidders dramatically below project managers' expectations are too wide spread to be ignored. They have been compiled and described in detail in a comprehensive Report that is incorporated by reference and made a part of these comments.[38]

Proponents of union-only PLAs have attempted to rebut the overwhelming proof of reduced bidding on public PLA projects by claiming that a significant number of non-union contractors bid for work on the union-only Boston Harbor project and/or on the Southern Nevada Water District project, two large state PLA projects built in the 1990s.[39] In each case, however, the claims of significant non-union participation on these PLA projects turned out to be grossly exaggerated.[40] Moreover, the fact that some non-union contractors may be so in need of work at a given time that they accept and comply with discriminatory PLA bid specifications in an effort to obtain jobs does not constitute "full and open competition" within the meaning of CICA.

It therefore remains clear that government-mandated PLAs injure competition, and certainly do not "obtain full and open competition" as required by the Competition in Contracting Act. As the Supreme Court of Rhode Island held upon consideration of a PLA in that state: "PLAs deter a particular class of bidders, namely, nonunion bidders, from participating in the bid process for reasons essentially unrelated to their ability to

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[34] *School Project Back in Limbo*, Hartford Courant, April 7, 2004.

[35] *New Wyoming County School to be Rebid*, Associated Press, Dec. 20, 2000.

[36] *Lone Wilson Bridge Bid Comes in 70% Above Estimate*, Engineering News Record, Dec. 24, 2001; *see also* Baltimore Sun, March 2, 2002.

[37] *Labor Protests Fly, Bids Are High*, ENR, July 22, 1996, at 16.

[38] *See* Baskin, *Government-Mandated Union-Only PLAs: The Public Record Of Poor Performance* (2009), available at http://abc.org/plastudies.

[39] *See, e.g.*, Kotler, *supra* n. 20.

[40] The Boston Harbor claim was based upon a letter from the project's construction manager asserting that 16 open shop general contractors and 102 open shop subcontractors performed work under the union-only requirement. However, a further study of the facts underlying the construction manager's letter by a Fitchburg State professor concluded that most of the contractors and subcontractors who had been identified as open shop, were in fact union contractors or had not actually worked on the project. Others were mere suppliers or professionals who were not covered by the PLA. *See New Study of Boston Harbor Project Shows How PLA Hurt Competition*, ABC Today, June 4, 1999, available at http//abc.org/plastudies. A similar follow-up study by professors at the University of Nevada Las Vegas found that the earlier report of non-union participation on the Nevada Water Project included as non-union bidders numerous firms that were actually unionized prior to bidding on the PLA. *See* Opfer, Son, and Gambatese, *Project Labor Agreements Research Study: Focus On Southern Nevada Water Authority* (UNLV 2000), available at http//abc.org/plastudies.

competently complete the substantive work of the project."[41] For this reason alone, the Proposed Rule must be rescinded or must take strong steps to mitigate the harm to competition that will otherwise be caused by encouraging federal agencies to impose PLAs on federal construction projects.

3. The Proposed Rule And Executive Order Exceed The President's Authority Under The Federal Property Administrative Services Act.

The sole statutory authority for the Proposed Rule, and for the President's Executive Order cited therein, is the Federal Property and Administrative Services Act (FPASA) of 1949.[42] That Act is intended to "provide the Federal Government with an economical and efficient system" of government procurement. The Act gives the President the authority to "prescribe policies and directives that [he] considers necessary to carry out" the Act, only so long as such policies are "consistent with" the Act and with other laws (such as CICA). Unless the President has acted in a manner consistent with this statutory authority, neither the Proposed Rule nor Executive Order 13502 is valid.[43]

In the present instance, the President's Executive Order and the Proposed Rule have offered no fact-based justification for their claim that PLAs are necessary to allow federal agencies to achieve "economy or efficiency" in the federal procurement of construction services. Rather, as discussed next below, the known facts regarding the federal government's prohibition of PLAs during the past decade show that none of the asserted justifications for federal PLAs have any basis in actual experience on federal construction projects in recent decades. As a result, the Executive Order and Proposed Rule cannot be found to be authorized by the FPASA.[44]

a. The Asserted Justifications For The Proposed Rule Have No Basis In Fact.

Section 1 of the Executive Order, mirrored in the Proposed Rule, asserts the following justifications, and *only* these justifications, for believing that PLAs will achieve greater "economy and efficiency" in federal construction procurement. As stated in the Proposed Rule:[45]

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[41] *Associated Builders & Contractors of Rhode Island, Inc. v. Department of Admin.*, 787 A.2d 1179, 1188-89 (R.I. 2002).

[42] 40 U.S.C. § 101, *et seq.*

[43] *See Liberty Mut. Ins. Co. v. Friedman*, 639 F. 2d 164, 169-171 (4th Cir. 1981) ("[A] court must reasonably be able to conclude that the grant of [legislative] authority contemplates the regulations issued.").

[44] Because of the President's failure to justify his Executive Order with facts demonstrating a close nexus between government-mandated PLAs and increase economy and efficiency of federal procurement, such cases as *AFL-CIO v. Kahn*, 618 F. 2d 784 (D.C. Cir. 1979) are distinguishable.

[45] 74 Fed. Reg. at 33954

> The E.O. explains that a "lack of coordination among various employers, or uncertainties about the terms and conditions of employment of various groups of workers, can create friction and disputes in the absence of an agreed-upon resolution and mechanism". The use of project labor agreements may "prevent these problems from developing by providing structure and stability to large-scale construction projects thereby promoting the efficient and expeditious completion of Federal construction contracts."

However, neither the Proposed Rule nor the Executive Order offer any factual basis for the above assertions in the current construction environment on federal projects. Indeed, the known facts refute any such claims. Specifically, the investigations of ABC and others indicates there have been no significant labor-related problems on any large federal construction projects since President Bush issued his Executive Order barring government-mandated PLAs on federal projects. There have been no publicly reported delays or cost overruns resulting from any "lack of coordination" among employers on labor issues, nor any reported labor disputes that have caused significant delays or cost overruns. In other words, none of the claimed labor problems, which again are the sole stated justifications for federal PLAs referenced in the Proposed Rule, have arisen on any of the thousands of large federal projects built since 2001, despite the outright prohibition of any PLAs on any large (or small) federal construction.

The Office of Management and Budget has essentially admitted the complete absence of any factual support for the Executive Order and Proposed Rule in response to a Freedom of Information Act request filed by ABC which asked for all documents identifying any federal construction projects suffering from delays or overruns as a result of labor-related problems of the sort identified in Section 1 of the Executive Order. OMB produced no such documents, citing only to the Clinton Memorandum, the GAO study, and other studies of state and local PLAs. None of these studies identify any federal project that has suffered from any labor "challenge" due to the lack of a PLA.

ABC submitted similar FOIA requests to every federal agency that has engaged in significant amounts of construction since 2001, and *no* agency identified in response any large federal construction project suffering significant cost overruns or delays as a result of any of the labor-related issues cited in the Executive Order or the Proposed Rule. ABC also surveyed its own members, receiving responses from contractors who have performed billions of dollars worth of large federal construction projects during the past decade. These contractors have uniformly confirmed that the absence of any of the labor "challenges" which were identified in the President's Executive Order as the sole justification for encouraging federal agencies to impose PLAs on future federal construction projects. Finally, a study of this issue conducted by the Beacon Hill Institute has also turned up no evidence of any significant labor problems on federal construction

projects in the absence of PLAs. That study is hereby incorporated by reference and made part of these comments.[46]

Thus, the entire factual premise underlying the President's Executive Order and the Proposed Rule is demonstrably false. ***There have been no labor problems on recent federal construction projects that justify imposition of PLA restrictions on future federal projects.***[47]

b. PLAs Will Not Achieve "Economy" But Will Instead Increase Costs

Neither the Executive Order nor the Proposed Rule identifies any factual basis to support the claim that government-mandated PLAs will cause any reduction in the costs of construction on large federal projects. Therefore, the Councils are not entitled to rely on any such claim in support of the Rule they have proposed. In any event, there is no factual basis for claiming that PLAs will reduce costs on federal construction projects, and the overwhelming weight of the evidence establishes that PLAs will cause increased costs to taxpayers.

Incorporated by reference in these comments is the new study issued by the Beacon Hill Institute (BHI), referenced above, which estimates that PLAs on federal construction projects will increase the costs to taxpayers by millions of dollars, *i.e.*, between 12% and 18% of the total costs of construction.[48] BHI has performed a series of cost studies on public construction projects under PLAs based upon rigorous comparisons of similar projects built in various jurisdictions with and without PLAs. The studies have adjusted the data for inflation and controlled for such factors as the size and types of the projects, and whether new construction was involved. Each of these studies has demonstrated that government-mandated PLAs increase the costs of public construction projects in the 12-18% range. According to BHI, such increased costs result from the decreased competition for PLA-covered work, described above, and from the increased costs to non-union bidders of being subjected to union hiring and work rules.

BHI's findings have been corroborated in many ways by both empirical and anecdotal evidence. Thus, a 2001 study published by the nonpartisan Worcester Regional Research Bureau estimated that PLAs increase project costs by approximately 15 %.[49] As

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[46] *See* Tuerck, Glassman and Bachmann, *Union-Only Project Labor Agreements On Federal Construction Projects: A Costly Solution In Search Of A Problem.* (August 2009), available at http//abc.org/plastudies.

[47] For the same reasons, the discriminatory impact of the Executive Order and Proposed Rule violate the rights of non-union contractors and employees to Equal Protection under the laws. As shown above, there is no rational basis for federal agencies to impose PLAs on construction projects, given the absence of any factual justification for such actions in the Executive Order itself.

[48] *Ibid.*

[49] Worchester Regional Research Bureau, Project Labor Agreements (2001), available at http://abc.org/plastudies.

further noted above, the Roswell Park Cancer Institute was partially constructed under a union-only PLA. Comparisons of bid packages released under the PLA and bid packages undertaken without any union-only requirement revealed that costs of construction under the union-only PLA were 48% higher than without the PLA.[50] Similarly, the Glenarm Power Plant in Pasadena, CA saw the low bid on its project increase from $14.9 million to $17.1 million expressly due to the imposition of a PLA.[51]

ABC has collected more than a dozen other examples from around the country of projects that were bid both with and without PLAs. In every instance, fewer bids were submitted under the PLA than were submitted without it; or the costs to the public entity went up; **or both**. That study is hereby incorporated by reference and made a part of these comments.[52]

In addition to these direct comparisons in the bidding process, experience with public sector PLAs after contract awards at the state and local level has revealed many instances in which PLAs have failed to achieve promised cost savings, and have instead led to cost overruns, on such diverse public projects as stadiums, [53] convention centers,[54] civic centers,[55] power plants,[56] and airports,[57] in addition to the several school comparisons previously mentioned.[58] The most notorious example of a PLA failing to achieve promised cost savings is the Boston Central Artery Project (the "Big Dig"). Originally projected to cost $2.2 billion dollars, the Big Dig wound up costing more than

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[50] Baskin, *The Case Against Union-Only Project Labor Agreements*, 19 Construction Lawyer (ABA) 14, 15 (1999).

[51] *Power Plant Costs To Soar*, Pasadena Star News, Mar. 21, 2003.

[52] *See Examples of Projects Bid With and Without PLAs*, available at http://abc.org/plastudies.

[53] *Nationals Park Costs Rise, Sports Commission Struggles*, Washington Examiner, Oct. 21, 2008. Similar cost overruns were experienced on PLA-covered stadiums in Cleveland, Detroit, and Seattle. *See Mayor's Final Cost at Stadium 25% Over*, Cleveland Plain Dealer, June 24, 2000; *Field of Woes*, Crain's Detroit Business Magazine, June 18, 2001; *New Seattle Stadium Battles Massive Cost Overruns*, ENR, July 27/Aug. 3, 1998, at 1, 9. By contrast, Baltimore's Camden Yards and Washington's FedEx Field, among many other merit shop stadiums built around the country over the past two decades, were built without any union-only requirements, with no cost overruns.

[54] Washington Business Journal (March 2003).

[55] *Troubled Center Moves Ahead*, Des Moines Register, July 12, 2003; *Say No to Project Labor Agreement*, Des Moines Register, July 23, 2003; *Civic Center Bids Exceed the Budget*, Post-Bulletin, Sept. 28, 1999.

[56] *Power Plant Costs to Soar*, Pasadena Star-News, March 21, 2003.

[57] *SFO Expansion Project Hundreds of Millions Over Budget*, San Francisco Chronicle, Dec. 22, 1999.

[58] Detailed discussion of these cost overruns on PLA projects around the country appears in Baskin, *supra* n. 34, at 5-12, available at abc.org/plastudies.

$14 billion dollars, among the biggest cost overruns in the history of American construction projects.[59]

Faced with this overwhelming evidence of PLA cost increases, the PLA apologists have put forward a series of unconvincing explanations for the mounting adverse data. First, they have attacked the BHI studies for allegedly focusing on bid costs as opposed to actual costs and for failing to segregate labor costs or account for additional factors.[60] BHI's new study, however, incorporated by reference in these comments,[61] addresses and refutes the PLA apologists' economic analyses. BHI notes therein that the counter-studies have failed to acknowledge the numerous variables controlled for by BHI's previous studies, and that the apologists have relied on inappropriate variables that undercut their own premises. As stated in the latest BHI report:

> If PLAs really did increase efficiency, it would be possible to show statistically that they also reduce costs. The very regression provided by [Belman-Bodah-Philips] shows that PLAs do not reduce costs.
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> * * *
>
> Economic theory suggests that by burdening contractors with union rules and hiring procedures, PLAs reduce the number of bidders and thus increase both winning bids and actual construction costs. We have provided many regressions, with various specifications, ... that confirm this hypothesis.

As BHI has further pointed out, the burden should be on PLA proponents and the Executive Branch to prove that PLAs actually save money. This is particularly so in light of the obvious conflict between union-only PLAs and the principles of open competition discussed above. The Proposed Rule makes no effort to meet this burden, and in reality there is no proof that PLAs reduce costs in a competitive environment, under generally recognized standards of evidence.

It should also be noted that in virtually every instance when PLA apologists have attempted to demonstrate how PLAs can reduce construction costs, they do so by comparing the costs of an *already unionized project workforce* with and without a PLA.[62] Such circumstances were once common in

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[59] http//www.issuesource.org.

[60] Kotler, *supra* n. 20; Belman, Bodah and Philips, *supra* n. 20.

[61] Tuerck, Bachmann, and Glassman, *Union-Only Project Labor Agreements On Federal Construction Projects: A Costly Solution In Search Of A Problem*, (Beacon Hill Institute at Suffolk University) August, 2009, at 36, available at http://abc.org/plastudies.

[62] *See* Kotler *supra* n. 20; Belman, Bodah and Philips, *supra* n. 20.

the construction industry, which was 87% unionized as recently as 1947. However, the demographics of the industry have so dramatically changed (only 15% unionized), that it is now extremely rare for a federal agency to undertake a project on which there are no potential non-union bidders or subcontractors.[63]

In the absence of such proof, and in light of the testimony in this proceeding demonstrating how and why PLAs increase costs to taxpayers, there can be no rational claim that government-mandated PLAs will achieve greater "economy" in the federal procurement process. For this reason as well, the Proposed Rule should be rescinded.

c. PLAs Will Not Achieve "Efficiency" But Will Instead Cause Procurement Delays

In addition to failing to serve the interests of greater "economy" in federal procurement in accordance with FAPA's requirements, the Proposed Rule cannot be said to make the procurement process more efficient. In fact, the Proposed Rule would build into the procurement process additional steps that will inherently delay construction projects.

According to the Proposed Rule, agencies are encouraged to decide whether to use a PLA *before* the agency knows the terms of the PLA or the alternatives. Specifically, the Rule requires that an agency decide whether to include a PLA in a bid solicitation which naturally occurs before bids are submitted by contractors. But at the pre-bid stage, the agency will not generally know the terms of the prospective PLA it is imposing, since the Proposed Rule contemplates that the PLA will be negotiated *after bidding is completed.*[64] In addition, an agency will not know the alternatives to using a PLA prior to receiving bids for the project that do not include a PLA.

Moreover, the Proposed Rule leaves to the successful offeror the task of negotiating a PLA with all applicable unions, provided that specific terms of the PLA must be included. This means that, at the time the agency makes the decision whether to impose a PLA, the agency will likely not know whether such negotiations have been successful. Projects will therefore be delayed pending the outcome of the negotiations and projects may have to be rebid depending on the terms that are actually negotiated.

An agency cannot make an informed decision about whether a PLA is in the government's procurement interests: (1) before it knows the terms of the PLA; (2) before the PLA is actually negotiated; and (3) before the alternatives to a PLA are known. On

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[63] See discussion above at n. 15. *See also* Northrup, *Government-Mandated Project Labor Agreements In Construction: A Force To Obtain Union Monopoly On Government-Funded Projects*, (2000), available at http://abc.org/plastudies.

[64] 74 Fed. Reg. 33955.

the other hand, waiting until after the successful offeror is selected and then imposing a PLA is inefficient as well as misleading to bidders. Either way, requiring a PLA under the Proposed Rule would be arbitrary and capricious and would clearly not bring greater "efficiency" to the federal procurement process.

d: PLAs Will Not Achieve Greater Efficiency In Terms Of Productivity, Quality, or Safety

Union-only PLAs do nothing to guarantee better quality, skills, or productivity on construction projects. There is certainly no evidence that union-only labor in the 21st century is more skilled than merit shop workers.[65] Some of the largest and most successful federal projects completed every year have been built on time and within budget by non-union contractors, or by a mixture of union and non-union companies, all without PLAs. Conversely, government-mandated PLAs have resulted in some of the poorest quality construction projects featuring extremely defective workmanship and lengthy delays in construction. Prominent examples of such inefficient and defective PLA projects include the Big Dig in Boston,[66] the Washington, D.C. Convention Center,[67] the Iowa Events Center,[68] Milwaukee's Miller Park,[69] and many others.[70] There is thus no "efficiency"-based justification for mandating a PLA on federal construction projects.

4. The Proposed Rule Discourages Bidding For Federal Construction Projects By Small And Disadvantaged Businesses, Thereby Violating the Small Business Act.

As noted above, a great many of ABC's small business members, along with many other small non-union contractors who are not ABC members, perform work on

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[65] After performing a thorough study of PLAs in the New York area, Ernst & Young concluded that "[t]here is no quantitative evidence that suggests a difference in the quality of work performed by union or open shop contractors." Erice County (NY) Courthouse Construction Projects: Project Labor Agreement Study (September 2001), available at http://opencontracting.com/studies. *See also* Northrup, *Government-Mandated Project Labor Agreements In Construction: A Force To Obtain Union Monopoly On Government-Funded Projects*, J. Lab. Res. (1998).

[66] *See* WBZTV: *$21 Million Settlement In Big Dig Tunnel Collapse*, available at http://wbztv.com/bigdig. *See also* Powell, *Boston's Big Dig Awash in Troubles: Leaks, Cost Overruns Plague Project*, Washington Post, Nov. 19, 2004, available at http://washingtonpost.com.

[67] *Roof Section Collapses at D.C. Convention Center Site*, Washington Construction News (May 2001).

[68] Frantz, et al, *The PLA for the Iowa Events Center: An Unnecessary Burden On The Workers, Businesses and Taxpayers of Iowa*, Policy Study 06-3 (Public Interest Institute at Iowa Wesleyan College, April 2006), available at http://limitedgovernment.org/publications/pubs/studies.

[69] *Crane Accident Kills Three At Unfinished Miller Park*, Washington Times, July 15, 1999.

[70] A more comprehensive list can be found in Baskin, *Government-Mandated Union-Only PLAs: The Poor Record of Public Performance*, available at http://opencontracting.com/studies

federal construction projects, including projects whose total cost exceeds $25 million. In a recent ABC membership survey, more than 35% of the respondents stated that they perform work on such projects. As has also been noted, 98% of these survey respondents further indicated that they would be less likely to bid on such work if a project labor agreement were imposed as a condition of performing the work.[71]

The previously referenced discriminatory impact of PLAs falls particularly hard on small business subcontractors, many of whom are minority, women-owned and disadvantaged businesses. Several hundred individual contractor statements submitted in this proceeding testify to the negative impact of PLAs on small business procurements. *See also* the McGowan study of the discriminatory impact of PLAs on federal construction, cited above.

The adverse economic impact of PLAs on small businesses in the construction industry directly contravenes Congress's repeatedly expressed intent to promote and encourage federal procurement to small businesses. Since 1978, when Congress amended the Small Business Act to require all federal agencies to set percentage goals for the awarding of procurement contracts to MBEs,[72] the amount of federal procurement dollars directed towards small businesses has increased dramatically. The Small Business Administration reports that more than 38% of federal subcontracts, including construction contracts, are awarded to small businesses.[73]

Further evidence of the impact of PLAs on small businesses is contained in comments being submitted in this proceeding by prime contractors who have themselves performed contracts in the $25 million-plus range. These comments uniformly confirm that they have subcontracted much of the work on such projects to small business subcontractors. *See*, for example, the comments of Jeff Wenaas, President of Hensel Phelps Construction, a prime contractor who has performed more than $6 billion in construction contracts on federal projects with costs exceeding $25 million. Hensel Phelps has subcontracted more than $3.5 billion of that amount to small businesses, the majority of whom are non-union. These percentages are typical of the experience of many other ABC members. As the comments repeatedly show, such small business subcontractors are very unlikely to continue to perform work on federal construction contracts under the Proposed Rule because they know that they will be discriminated against by PLAs.

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[71] *Newsline* (July 22, 2009), available at abc.org.

[72] P.L. 95-507 (1978), 15 U.S.C. 644 (g).

[73] *See* Clark, Moutray and Saade, *The Government's Role in Aiding Small Business Federal Subcontracting Programs in the United States,* Office of Advocacy, Small Business Administration (2006), available at sba.gov/advo/research.

The conflict between the Proposed Rule and the Small Business Act is exacerbated by the Councils' failure to comply with the Regulatory Flexibility Act.[74] The RFA requires all agencies conducting rulemakings to "prepare and make available for public comment an initial regulatory flexibility analysis," which "shall describe the impact of the proposed rule on small entities."[75] As part of its analysis, the agency is required to consider other significant alternatives to the rule which could affect the impact on small entities, and explain any rejection of such alternatives in its final regulatory flexibility analysis.[76] The sole relevant exception to this requirement arises if "the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[77] The agency must provide a factual basis for its certification.[78] Such a determination is subject to judicial review for its correctness under a non-deferential standard.[79]

In particular, the Councils' failure to address the economic impact of the Proposed Rule on subcontractors plainly violates the RFA, as the U.S. Court of Appeals for the D.C. Circuit recently held in the closely analogous case of *Aeronautical Station Assn, Inc. v. FAA.*[80] There the Court held that the FAA was required to consider the economic impact of a proposed drug testing rule on subcontractors who performed safety-related functions for air carriers. The D.C. Circuit found that both contractors and subcontractors (at whatever tier) "are entities subject to the proposed regulation – that is, those small entities to which the proposed rule will apply."

It should also be noted that minority and disadvantaged businesses have voiced their opposition to government-mandated PLA requirements and are expected to do so again in this proceeding. The American Asian Contractors Association, The National Association of Women Business Owners, the National Black Chamber of Commerce, and the Latin Builders Association are among the groups that have gone on record as opposed to PLAs. The National Black Chamber of Commerce described PLAs as "anti-free-market, non-competitive and, most of all, discriminatory."

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[74] 5 U.S.C. § 601. ABC's separate comments on the Councils' noncompliance with the RFA are hereby incorporated by reference.

[75] 5 U.S.C. § 603(a).

[76] *Id.* at § 604. A "significant regulatory alternative" is defined as one that: 1) reduces the burden on small entities; 2) is feasible; and 3) meets the agency's underlying objectives. See, *A Guide to Federal Agencies, How to Comply with the Regulatory Flexibility Act*, SBA Office of Advocacy, May 2003, p. 73-75 (available at http://www.sba.gov/advo/laws/rfaguide.pdf).

[77] *Id.* at § 605(b).

[78] See *North Carolina Fisheries Association v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1988).

[79] *See Aeronautical Repair Station Assn, Inc. v. FAA*, 449 F. 3d 161, 175-177 (D.C. Cir. 2007), reversing agency certification of lack of impact on small entities.

[80] 494 F. 3d 161 (D.C. Cir. 2007).

For similar reasons, the Proposed Rule violates Executive Order 11246 and related longstanding affirmative action requirements. Far from encouraging contractors to employ minority employees or minority subcontractors, the Proposed Rule encourages federal agencies to impose PLAs which discourage non-union minorities from bidding on or performing the work. A significant number of PLAs have resulted in charges of minority discrimination and/or sexual harassment by union members.[81]

5. The Proposed Rule Constitutes Regulatory Interference With Private Employment Rights Under the National Labor Relations Act, ERISA, and the National Apprenticeship Act.

Although the Proposed Rule purports to serve the federal government's proprietary interests, its establishment of a new government-wide policy in favor of PLAs constitutes unlawful regulation which interferes with private sector labor relations and fringe benefit programs in violation of the National Labor Relations Act and ERISA. The Proposed Rule is not protected from challenge by the Supreme Court's limited holding in *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. ("Boston Harbor")*,[82] because it is not limited in its scope to a single project.[83]

In addition, the Proposed Rule violates Section 8(d) of the NLRA, which was not addressed in *Boston Harbor*, because it imposes labor agreements on construction contractors over their objection.[84] The Proposed Rule is also inconsistent with Sections 8(e) and 8(f) of the NLRA, which the Supreme Court referred to as exempting public entities from NLRA preemption, solely to the extent that such entities acted in a manner that was authorized for private construction users under the NLRA. Sections 8(e) and 8(f), however, only authorize PLAs to be entered into by "employers in the construction industry" and even then only in the "context of collective bargaining" on a voluntary basis, un-coerced by either unions or governments.[85]

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[81] See Baskin, Government-Mandated Union-Only Project Labor Agreements: The Public Record of Poor Performance, at 27-29 (2009), available at http://abc.org/plastudies.

[82] 507 U.S. 218 (1993).

[83] *See Chamber of Commerce v. Brown*, 522 U.S ___ , 128 S. Ct. 2408 (2008) ("In finding that the state agency had acted as a market participant, we stressed [in *Boston Harbor*] that the challenged action "was specifically tailored to one particular job," and aimed "to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost."

[84] *See* 29 U.S.C. § 158(d), which expressly states that neither party to collective bargaining can be compelled by the government to agree to a proposal. *See also H.K. Porter v. NLRB*, 397 U.S. 99, 103 (1970).

[85] *See Glen Falls Building and Construction Trades Council*, 350 NLRB 417 (2007) (Invalidating a PLA imposed by an owner on construction contractors outside the context of the owner's collective bargaining).

The Proposed Rule likewise violates ERISA[86] by encouraging federal agencies to mandate employer participation in union benefit programs covered by that Act, which ERISA has long declared to be voluntary, not mandatory. In addition, the Proposed Rule discriminates against non-union benefit programs that are supposed to be protected by ERISA, including non-union apprenticeship training programs. As noted above, employees of non-union contractors who are forced by federal agencies to sign PLAs will no longer receive credit towards their existing apprenticeship programs, and such employees will be forced to enroll in union apprenticeship programs (or alternatively, the non-union contractors will be forced to hire existing union apprentices instead of their own). Such government-mandated discrimination violates the National Apprenticeship Act, which has been previously found to prohibit union vs. non-union discrimination.[87]

6. The Proposed Rule Violates The Congressional Review Act.

The Proposed Rule incorrectly states that "This rule is not a major rule under 5 U.S.C. 804."[88] ABC disagrees. The Congressional Review Act (as codified at 5 U.S.C. §804(2)) defines a major rule as including any rule likely to result in:

> (A) an annual effect on the economy of $100,000,000 or more;
> (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
> (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

As discussed above, the imposition of PLAs on federal agency construction projects, even at the 10% level anticipated by the Councils will have significant adverse effects on competition, will also cause major increases in construction costs for federal agencies, and may have an annual effect on the economy of $100,000,000 or more. If any one of these effects is likely to occur then, at minimum the Councils are required to conduct a proper cost benefit analysis of PLAs, and otherwise comply with the "major rule" requirements of the CRA.

For each of these reasons, ABC believes that the Councils must reclassify the Proposed Rule as a major rule and comply with all of the requirements of the Congressional Review Act.[89]

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[86] 29 U.S.C. § 1001, *et seq.*

[87] *Associated Builders and Contractors, Inc. v. Reich*, 963 F. Supp. 35, 38 (D.D.C. 1997).

[88] 74 Fed. Reg. at 33954.

[89] ABC also objects to each of the findings contained in the Proposed Rule under the **Data Quality Act**, section 515 of P.L. 106-554 (2001). In particular, the findings in support of the new policy on PLAs and the impact of this new policy on small businesses lack sufficient thoroughness and/or accuracy to meet the level of quality that would permit their dissemination and use as the basis of the policy that the Councils'

7. The Proposed Rule Fails To Establish Any Meaningful Criteria For Federal Agencies To Apply In Considering Whether To Impose PLAs.

The Proposed Rule invites comments on the "factors for the contracting officer to consider in determining whether use of a PLA will be in the best interest of the government." Without conceding that a government-mandated PLA is ever appropriate or lawful on a federal construction project, ABC responds to the Councils' invitation as follows:

Before any agency decides to implement a PLA on a project, the agency should at a minimum take the following actions:

1) The agency should first determine that the project cost will exceed $25 million. If not, then no PLA should be considered or required.

2) The agency should then determine whether the PLA is consistent with applicable law. In particular, if the procurement is covered by the Competition in Contracting Act, 41 U.S.C. § 253, then no PLA should be required that would be inconsistent with CICA's mandate to "obtain full and open competition."

3) To determine whether the PLA will result in less than full and open competition, the agency should issue at least 30 days' notice to interested parties (potential bidders, construction trade associations, and other stakeholders) that the agency is considering whether to require a PLA on the project and obtain comments or hold a hearing on the issue. Without obtaining comments from affected stakeholders, the agency is unlikely to obtain information necessary to determine the impact of the PLA on full and open competition as required by CICA.

4) In the course of such hearing/notice and comment process, the agency should determine whether a PLA would discourage interested parties, including potential subcontractors, from bidding to perform work on the project. If there is evidence that a PLA would discourage interested parties from bidding, indicating an adverse impact on full and open competition then no PLA should be further considered or required.

5) The agency should also determine whether a PLA would achieve procurement cost savings for the agency, thereby increasing economy and efficiency in procurement. Unless it can be proven that a PLA would generate such increased costs, no PLA should be considered or required.

6) The agency should also determine whether there is evidence that a PLA would result in increased costs of construction. Unless it can be proven that a PLA

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are proposing to set through this rulemaking, as required by the DQA and the Office of Management and Budget guidance issued thereunder.

would not generate such increased costs, no PLA should be considered or required.

7) The agency should also determine whether there have been any labor-related disruptions causing delays or cost overruns, of the type identified in Section 1 of the Executive Order, on similar federal projects undertaken by the agency in the geographic area of the project. Such labor-related challenges include "lack of coordination among various employers, or uncertainties about the terms and conditions of employment of various groups of workers, causing friction and disputes." *Id.* If no such labor-related issues have arisen on similar federal projects undertaken by the agency in the geographic area of the project, then there is no justification for considering or requiring a PLA.

8) The agency should determine whether substantially all of the potential bidders for the project are already union signatory contractors who have agreed to union-only subcontracting clauses in their bargaining agreements. If not, then a PLA should not be considered or required.

9) The agency should determine whether the process of negotiating the PLA between the successful contractor and any applicable unions might delay the award of the project. If so, then a PLA should not be considered or required.

10) The agency should determine whether imposition of a PLA will have an adverse impact on small or disadvantaged businesses, including subcontractors. If so, then a PLA should not be considered or required.

11) In the event that the agency does exercise its discretion to require a PLA, the agency should take steps to minimize the discriminatory impact of the PLA on previously non-signatory contractors, subcontractors and non-union workers. Such steps should include but not be limited to prohibiting imposition of PLAs which require previously non-signatory contractors to participate in or contribute to union fringe benefit trust funds from which their employees cannot receive benefits during the life of the project. PLAs should also not be allowed to restrict contractors or subcontractors in their hiring practices, nor should they be allowed to force employees to join labor unions who such employees have not selected as their bargaining representatives.

12) At all steps in the process outlined above, the burden should always be on those who are considering or advocating a PLA to prove by clear and convincing evidence that the PLA will not injure competition, is justified by the needs of economy and efficiency, and will not adversely impact small and disadvantaged businesses, including subcontractors.

CONCLUSION

For each of the reasons set forth above and in ABC's separate comments on the Councils' apparent violation of the Regulatory Flexibility Act, the Proposed Rule should be rescinded or severely modified to avoid or mitigate the discriminatory and anti-competitive impact of PLAs on 84% of the construction industry, including many small and disadvantaged businesses and their employees, and to comply with applicable law.

Respectfully submitted,

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Written Comments

of

Robert Hesser, 1st Co-Chairman,
Veterans' Entrepreneurship Task Force
(VET-Force)

on

The American Recovery and Reinvestment Act of 2009 (ARRA)
and
The Small Business Contracting Revitalization Act of 2007 (S.2300)

to

The Senate Committee on Small Business and Entrepreneurship
Roundtable Entitled

"Small Business Contracting:
Ensuring Opportunities for America's Small Businesses"

Tuesday, September 21, 2009
Russell Senate Office Building
Washington, D.C.

Robert Hesser, Veterans' Entrepreneurship Task Force (VET-Force)
September 22, 2009

This document addresses PUBLIC LAW 111–5—FEB. 17, 2009, "American Recovery and Reinvestment Act of 2009 (ARRA)", specifically

123 STAT. 118, page 4, Department of Agriculture, "Distance Learning, Telemedicine, and Broadband Program" under Rural Electrification Act of 1936 for Grants up to $2,500,000,000; and,

123 STAT. 512, page 398, Department of Commerce, ''Broadband Technology Opportunities Program'' under the National Telecommunication and Information Administration (NTIA) for Grants up to $4,700,000,000.

These grants are to be given to states/companies capable of performing the requirements.

TITLE VI—BROADBAND TECHNOLOGY OPPORTUNITIES PROGRAM, Section 6001, subparagraph (h) is the only mention of a small business throughout the 457-page document.

"(h) The Assistant Secretary, in awarding grants under this section, shall, to the extent practical—

(1) award not less than 1 grant in each State;

(2)consider whether an application to deploy infra-structure in an area—

(A) will, if approved, increase the affordability of, and subscribership to, service to the greatest population of users in the area;
(B) will, if approved, provide the greatest broad-band speed possible to the greatest population of users in the area;
(C) will, if approved, enhance service for health care delivery, education, or children to the greatest population of users in the area; and
(D) will, if approved, not result in unjust enrichment as a result of support for non-recurring costs through another Federal program for service in the area; and

(3) consider whether the applicant is a socially and economically disadvantaged small business concern as defined under section 8(a) of the Small Business Act (15 U.S.C. 637)."

This one time recognition of a small business possibility is a recognition that only requires the Secretary to "consider whether the applicant is" an 8(a).

The stimulus ARRA Bill was to create more jobs and strengthen the economy. At least 94% of all employed citizens are employed by small business. How can the stimulus funds increase jobs when small businesses are not involved? This is a major error most likely caused because of the unprecedented speed in passing Public Law 111-5 (ARRA).

Grants are not normally subject to FAR procurement regulations. It is our understanding that there is nothing preventing a grant being based upon stipulations requiring fair inclusion of the

required small business procurement floor of 23%. The required 3% for prime and subcontracting dollars for Service-Disabled Veteran-Owned Small Businesses can be levied upon the states receiving the grant(s).

The Federal government has not provided 3% of procurement dollars in contracts with Service-Disabled Veteran-Owned Small Businesses on time since 1999. In fact, most agencies have not made greater than 1.0%. The fact that there is $7,200,000,000 stimulus funds allotted for the combination of the "Broadband Technology Opportunities Program" and "Distance Learning, Telemedicine, and Broadband Program," there is an opportunity to make up a part of the procurement dollar shortage by requiring states and large business to set-aside 3% of the Grant dollars for SDVOSB's.

Also, Telecommunications and IT skills among SDVOSB's is available throughout the United States.

We want to remind all that the United States Congress issued Findings within Public Law 106-50 under Title I, Section 101 stating:

"Congress finds the following:

(1) Veterans of the United States Armed Forces have been and continue to be vital to the small business enterprises of the United States.

(2) In serving the United States, veterans often faced great risks to preserve the American dream of freedom and prosperity.

(3) The United States has done too little to assist veterans, particularly service-disabled veterans, in playing a greater role in the economy of the United States by forming and expanding small business enterprises.

(4) Medical advances and new medical technologies have made it possible for service-disabled veterans to play a much more active role in the formation and expansion of small business enterprises in the United States.

(5) The United States must provide additional assistance and support to veterans to better equip them to form and expand small business enterprises, thereby enabling them to realize the American dream that they fought to protect."

Executive Order 13360 states:

"Section 1. Policy. America honors the extraordinary service rendered to the United States by veterans with disabilities incurred or aggravated in the line of duty during active service with the armed forces. Heads of agencies shall provide the opportunity for service-disabled veteran businesses to significantly increase the Federal contracting and subcontracting of such businesses. To achieve that objective, agencies shall more effectively implement section 15(g) of the Small Business Act (15 U.S.C. 644(g)), which provides that the President must establish a goal of not less than 3 percent for participation by service-disabled veteran businesses in Federal contracting, and section 36 of that Act (15 U.S.C. 657f), which gives agency contracting officers the authority to reserve certain procurements for service-disabled veteran businesses.

Robert Hesser, Veterans' Entrepreneurship Task Force (VET-Force)
September 22, 2009

The Federal government has not been close to meeting their 3% SDVOSB's minimum requirement in any year since 1999. This is a golden opportunity to show veterans that congress and the current administration is supporting the veterans.

The following comments are concerning the Center for Veterans Enterprise, Veteran Affairs:

Public Law 109-461 and Executive Order 13360 provide the VA Center of Veterans Enterprise (CVE) authority for maintaining a data base with data on Veteran-Owned (VOSB) and Service-Disabled Veteran-Owned (SDVOSB) small businesses. The legislation gives VA contracting officers the mandate to procure products and services from SDVOSB concerns first or VOSB concerns second. If the VA cannot find a SDVOSB or VOSB capable of meeting the requirement the procurement can then be sought elsewhere. It is logical that such a mandate (significantly different than other agencies) should accompany a program outside the normal Federal Acquisition Regulations. Thus, the VA published and instituted 38CFR74 setting forth policy assisting VA procurement personnel. Agencies other than the VA are not part of PL 109-461 or 38CFR74. The VA still uses the FAR for guidance.

Agencies other than the VA procure from VOSB and SDVOSB concerns under authority of Public Laws 106-50, 108-183, Executive Order 13360 and FAR 19.

Agency procurement authorities other than the VA, per Public Laws 106-50 and 108-183, accept self-certification of status from VOSB and SDVOSB concerns.

The VA CVE interpreted PL 109-461 and EO 13360 as giving them the authority to verify all VOSB and SDVOSB concerns requesting verification because the concern wants to do business with the VA. The VA CVE has created a verification process supposedly under the regulation 38CFR74. The concept of verifying VOSB and SDVOSB concerns is supported by many Veteran Organizations, Veteran Service Organizations, VOSB's, SDVOSB's, the legislative branch, and the VET-Force. VA CVE has published on their web page that PL 109-461provides "... an option when registering their businesses in VIP: be verified for ownership and control or self-represent." Where in the statute does it use the term "self-represent?" Also on their web page is "Verified businesses will be annotated in the database and will receive the rights to display the Verified logo in their marketing materials." Where did the statutes authorize a "Verified logo?" or Verified pin? Why is the VA CVE setting "Verified" concerns aside as being special?" The only "special" is that they got verified in the first 1,000 when there are still over 12,000 to go.

It is not productive when VA CVE management puts a fence around some and unjustly elevates others. The only plus in such a program is building a dynasty for CVE management. At four meetings with the CVE management, at four VET-Force meetings, and during meetings and panels at the August 2009 VET-Force Congressional Roundtable the VET-Force expressed deep concern that CVE's daily actions are severely damaging the VOSB/SDVOSB procurement program and destroying efforts contributed by thousands of supporters. The VET-Force has made its stance clear that providing agencies outside the VA with access to the company names who have been verified under Public Law 109-461 and 38 CFR 74, must be immediately

stopped. CVE has procurement officials at non-VA agencies referring to "self-certified" VOSB and SDVOSB concerns as being "self-represented."

There are cases where a non-VA agency sends out a sources sought for a SDVOSB concern selling a specific product or service. There are perhaps twenty responses received. The contracting officer, sincerely believing they are doing the "right" thing, checks the Central Contractor Register (CCR) and VA CVE VETBIZ data bases. They find all twenty in the both data bases. All twenty "self certify" (in accordance with PL 106-50) that they are SDVOSB's. Six have been fortunate to get through the VA CVE verification program. The six verifications are prominently shown in VETBIZ data base. The contracting officer sends six bid packages to six out the twenty SDVOSB's responding to the sources sought. The remaining 14 will possibly never know why they were rejected. If they do, it will most likely be after an award.

By the time all 13,000 VETBIZ entries are verified (6-years) there will be so much misunderstanding in the federal procurement sector that the program will be destroyed. We are providing one example as proof that VA CVE management's refusal to get things straight is, in fact, destroying the program and trust veterans have in the VA. Here is email text showing VA CVA management should be ashamed of their "self-represent," their "Verified Logo," and giving verification data to any one outside the VA.

"From: I. M. Him
Sent: Wednesday, August 19, 2009 9:06 AM
To: U. R. To
Subject: Outreach session for Service Disabled Veteran Owned Small Businesses (SDVOSB)

Ms. To,

I saw the FBO posting for the Outreach session for SDVOSB's that the Agency is hosting and we are interested in attending.

In the second paragraph of the posting, it states: "THIS OPPORTUNITY IS ONLY AVAILABLE TO BUSINESSES CERTIFIED AS SDVOSB." Under the FAR, SDVOSB's are self certifying. Could you please clarify what certification is being referred to in the posting?

Regards,

M. Him
Chief Operation Officer
MMM, Inc.
A Services Disabled Veteran Owned Small Business
Vienna, VA 22182
Tel: "

Robert Hesser, Veterans' Entrepreneurship Task Force (VET-Force)
September 22, 2009

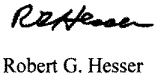
"From: U. R. To
Sent: Wednesday, August 19, 2009 9:46 AM
To: I.M. U
Cc:
Subject: RE: Outreach session for Service Disabled Veteran Owned Small Businesses (SDVOSB)

Still please attend the event, but you cannot self certify as a SDVOSB, you must go through VA, you can consult the Small Business Administration with the VA, or call YYY with xxx, SBA at 777.777.7777 for more information.

U. R. To
Office of Purchasing and Contracts
Bethesda, MD
E-mail:* U. R. To *@nnn.gov
***Phone:* "**

The VET-Force requests that the access to "verified or not verified data" be given to only VA personnel until a reasonable percentage of the 13,000 are verified. This must be done immediately without delay. We request the VA website be changed to reflect the correct legal wording of "self certified" versus the "self-represent." The CVE web page needs dramatic change from self-serving text and to stop misleading veterans, government employees, and large contractors.

The VET-Force is extremely concerned that it is taking such a long time to establish the necessary Veteran Resource Centers across the United States.



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