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FULL COMMITTEE HEARING ON ARE NEW PROCUREMENT METHODS BENEFICIAL TO SMALL BUSINESS CONTRACTORS?

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UNITED STATES HOUSE OF REPRESENTATIVES

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FULL COMMITTEE HEARING ON: ARE NEW PROCUREMENT METHODS BENEFICIAL TO SMALL CONTRACTORS?

Thursday, March 6, 2008

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The Committee met, pursuant to call, at 10:00 a.m., in Room 2360 Rayburn House Office Building, Hon. Nydia Velázquez [chairman of the Committee] presiding.

Present: Representatives Velázquez, Cuellar, Johnson, Chabot, and Gohmert.

OPENING STATEMENT OF CHAIRWOMAN VELÁZQUEZ

Chairwoman VELÁZQUEZ. I call this meeting to order.

This morning the Committee will continue its examination of small business' role in the federal marketplace. Today we will review the effect of emerging contracting methods which are being driven by the decline in the federal acquisition work force.

Just 25 years ago, there were more than 135,000 contracting personnel. Now it has shrunk to only 85,000 staff, a decline of more than half. This has occurred while the dollar amount of contracts has increased by nearly $200 billion dollars.

Clearly, something has to give, and unfortunately it is small businesses that are left out and suffer the most. The result of this dramatic shift has been more pressure on agencies to consolidate contracts and employ automatic IT driven procurement systems.

People keep saying that this is easier, but for whom? Not small business; not easier for the taxpayer. It is just easier for the bureaucrat, and that should not be driving federal procurement policy.

The truth is that we hear a lot about the problems of contract bundling, but the increased reliance of these new approaches is just as significant for small businesses. Many cannot even gain access to these systems, and when they do, they're forced to compete with larger firms.

Similar to the big box retailers rooting the local hardware stores out of businesses, these new methods are creating an uneven playing field for small businesses. Three of the major methods that have been growing in significance are GSA Schedules, reverse auctions, and the e-travel initiative. Some of them are unproven and may only be suitable for certain types of purchases. Others create

administrative nightmares that cause small businesses to incur unnecessary costs.

And some of these approaches may run counter to federal law and may be providing taxpayers with a bad deal.

Taken together, these new processes are creating roadblocks for small firms as they try to navigate the federal procurement system. If left unchanged, this could lead to a marketplace without the contributions of small business ingenuity and innovation. This will result in a less diverse supplier base, leaving taxpayers to pay more for less.

It is important that those small businesses are not being put at a competitive disadvantage simply because of the adoption of new systems. These practices must be modified to provide greater equity and fairness to small firms. This will help ensure that government is getting the best value.

After all, what good is a one dollar hammer that falls apart after its first use and then you have to purchase another one? That is not the lowest cost, and it is not the best deal for the taxpayer.

With this hearing, these new procurement methods will be examined in a more systematic manner than has been done before. Each new approach should be evaluated as is done with federal regulations.

What is its impact on small businesses? How will their ability to compete be affected? Going forward these questions must be asked and the pros and cons weighed before any procurement method is implemented.

Small businesses are the bedrock of the economy and must be given the opportunity to compete in the federal procurement marketplace. Methods that obstruct their participation would only serve to reduce the government access to innovative goods and services.

I thank all of the witnesses for being here today, and I look forward to all of your testimony.

I now recognize Mr. Chabot for his opening statement.

OPENING STATEMENT OF MR. CHABOT

Mr. CHABOT. Thank you, Madam Chair.

Good morning, and thank you, Chairwoman, for holding this hearing on how well federal agencies' acquisition strategies balance the need for quick and efficient contracting with the achievement of small business goals.

The agencies must implement this balance in the face of a shrinking federal workforce and increased federal spending.

I would like to extend a special thanks to our witnesses who have taken the time to provide this Committee with their testimony this morning.

Small businesses have been long recognized as one of the nation's most valuable economic resources and serve as seeds of innovation. Small businesses participate in all major industries and represent 50 percent of all private sector workers. In addition, small businesses employ 39 percent of high tech workers, such as scientists, engineers, and computer workers.

The federal government is the single largest buyer in the world, spending over $400 billion in 2006.

Until the mid-1990s, procurement rules as implemented by the Federal Acquisition Regulation, were designed around two major procurement statutes. The Competition and Contracting Act of 1984 established the rules for awards based on full and open competition, and two, the Truth in Negotiations Act of 1992 established rules for disclosure of cost information.

Acquisition reform from the mid-1990s to present resulted in several changes to government-wide procurement practices. Legislative reform included the Federal Acquisition Streamlining Act of 1994, FASA, that formalized the use of large, multi-agency, indefinite delivery, indefinite quantity, ID/IQ, order contract. FASA also encouraged the use of electronic tools, like government purchase cards to improve efficiency and to insure supplies and services were acquired at a competitive fair price with timely delivery.

The Service Acquisition Reform Act of 2003, SARA, established an advisory panel to review and improve acquisition laws and regulations. The SARA panel published a final report on January 2007 with 89 recommendations.

We have excellent witnesses here today to provide us with insight into how well the federal agencies' acquisition strategies are structured and how to balance the need for quick and efficient contracting with the achievement of small business goals.

I want to again thank you, Madam Chairwoman, for holding this hearing. I know we look forward to hearing from both panels, and I yield back the balance of my time.

Chairwoman VELÁZQUEZ. Thank you.

And we are going to proceed with our first panel. I welcome all of you, and I thank you for your participation.

Our first witness the Honorable Paul Denett. Mr. Denett is the Administrator for Federal Procurement Policy in the Office of Management and Budget. The Office of Federal Procurement Policy plays a central role in shaping the policies federal agencies use to acquire goods and services.

You will have five minutes to make your presentation.

STATEMENT OF THE HONORABLE PAUL DENETT, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET

Mr. DENETT. Thank you.

Chairwoman Velázquez, Ranking Member Chabot, and members of the Committee, I appreciate the opportunity to appear before you today to discuss small business contracting and the impact that emerging acquisition trends are having on small businesses.

I have prepared written remarks that I would like the Committee to enter into the record and would like to briefly summarize them now.

Chairwoman VELÁZQUEZ. Without objection.

Mr. DENETT. Thank you.

Mr. DENETT. Let me say at the outset that the Office of Federal Procurement Policy is committed to providing maximum opportunities for small business in federal contracting and subcontracting. Increasing opportunities for small businesses has always been a priority for me. When I was the Senior Procurement Executive at the Department of Interior, I pursued a number of initiatives to

create a small business friendly environment. Those efforts helped ensure Interior's small business contracting awards were well above the government-wide goal.

In fact, Chairwoman Velázquez, I left in 2001, and I am proud that Interior is probably the only department that you ever gave an A rating to that year. So I am just letting you know I am a strong and consistent supporter of small business.

Chairwoman VELÁZQUEZ. I am waiting to do the same with the rest of all the federal agencies.

Mr. DENETT. Okay.

[Laughter.]

Mr. DENETT. I am looking forward to teaming up with you to accomplish that.

As OFPP Administrator, I have taken a number of actions to increase management attention government-wide on small business issues. Many of these actions have been taken in close partnership with SBA Administrator Steve Preston.

In 2007, SBA and OFPP launched the small business procurement score card to hold agency leadership accountable for improving success in meeting small business goals. Our offices also worked together to increase the number of SBA's Procurement Center Representatives and ensure agencies have access to the assistance they need to create and develop small business opportunities.

At my request, the FAR Council established the small business regulatory team to improve communications between SBA and the drafters of the Federal Acquisition Regulation during the development of rules that have a bearing on the small business community. We are making sure our workforce is proficient in small business contracting.

Last year agencies evaluated their competencies in small business contracting as part of the first ever acquisition workforce skills assessment survey conducted by the Federal Acquisition Institute in collaboration with OPM and my office.

Based on the results of this survey, FAI is developing new online training courses to further increase awareness of small business program requirements and improve acquisition planning to promote small business participation.

In terms of emerging trends, OFPP has paid especially close attention to task and delivery order contracting, which has increased dramatically since 1990. Our goal is to make sure task and delivery order contracting is used effectively and in an open and fair manner that facilitates small business participation. We are strengthening competition rules for orders placed under multiple award contracts by requiring both a clear explanation for the basis for evaluating offers and public notice of sole source orders.

Agencies continue to provide significant opportunities for small businesses on the government's most popular interagency task and delivery order contracts, the Multiple Award Schedules and the GWACs. I am pleased, for example, that GSA continues to manage a variety of GWACs set-aside exclusively for small businesses, including GWACs that are devoted to 8(a) contractors and veterans.

We are making sure that efforts to leverage our purchasing power are pursued in coordination with our commitment to small businesses. In 2006, small businesses received more than $1.5 bil-

lion from contracts that DoD set up under the Administration's strategic sourcing initiative. This represents more than 41 percent of the dollars awarded by DoD under the strategic sourcing initiative that year.

More recently, GSA awarded 13 blanket purchase agreements to facilitate strategic sourcing for office supplies. Eleven of the BPAs were awarded to small businesses, including 8(a) small businesses and women-owned and veteran-owned small businesses.

Finally, we are recognizing exceptional achievements in our workforce, including efforts to facilitate access to small businesses. Last year Ms. Jean Todd of the Army Corps of Engineers was recognized under the SHINE Initiative for her best in class contracting to support Hurricane Katrina and Rita reconstruction efforts, which included nearly a billion dollars in subcontracts to small disadvantaged businesses and local small businesses.

In short, the administration is working to ensure that the federal contracting environment allows small businesses to flourish and apply their talents to the many pressing demands facing our government. We look forward to working with this Committee in our continued pursuit of these efforts.

This concludes my prepared remarks. I will be happy to answer any questions.

[The prepared statement of Mr. Denett may be found in the Appendix on page 37.]

Chairwoman VELÁZQUEZ. Thank you, Mr. Denett.

Our next witness is Mr. James Williams. He is the Commissioner of the Federal Acquisition Service. This organization has responsibility for the GSA Schedules Program.

Welcome.

STATEMENT OF JAMES WILLIAMS, COMMISSIONER, GENERAL SERVICES ADMINISTRATION, FEDERAL ACQUISITION SERVICES

Mr. WILLIAMS. Good morning, Chairman Velázquez, Ranking Member Chabot, and members of the Committee. Thank you for inviting me here today to discuss how GSA's Federal Acquisition Service and its electronic systems support small business.

GSA has been and will continue to be a good friend to the small business community. I am pleased to report on GSA's procurement methods and their positive impact on small business. My testimony will focus on how electronic, or e-systems, our processes, contract vehicles, and solutions have helped GSA strengthen the relationship with this community.

Since 1995, GSA has been offering e-systems to help small businesses participate in GSA acquisition programs. E-systems increase accessibility and transparency and minimize cost to small businesses wanting to sell to the government. Simply put, GSA's e-systems help small business do business with the federal government and facilitate the connections between agency customers and small businesses.

The GSA Advantage! online shopping and ordering system provides access to thousands of contractors and millions of products and services and allows customers to tailor their searches specifi-

cally for products and services provided by small business. The total amount of sales that went to small business contractors using this system has steadily increased from 49.5 percent in fiscal year 2001 to 76.5 percent in fiscal year 2007.

GSA's e-Buy is an electronic RFQ/RFP system for the millions of services and products offered through GSA Schedules and GWACs. Customers can request quotations specifically from disadvantaged, veteran, service-disabled veteran, women-owned, and other small businesses.

E-offer is a tool to submit online contract offers and contract modification requests to GSA, and over the last five fiscal years, small businesses have accounted for about 95 percent of all electronically submitted offers.

The Schedule Input Program, or SIP, assists small companies in loading their products electronically onto GSA systems such as Advantage! and e-Buy. It is free, and it requires only basic computing equipment to use.

When small businesses are transacting with federal applications, they can avoid multiple identity credentials by using the E-Authentication system, which GSA operates as an e-Gov initiative. This system offers greater accessibility for small businesses by allowing the use of a single online security identity credential, which enables millions of safe online transactions while reducing their online identity management burden.

Perhaps one of the most advantageous programs that the government manages that provides access for small business owners has been the GSA Multiple Award Schedule, or ″Schedules″ Program, which accounts for about $36 billion annually in sales. Eighty percent of the 17,000-plus scheduled contractors are small businesses, and they receive about 37 percent of the total dollars under the Schedules Program, well above the government goal of 23 percent.

The Schedules Program is advantageous for small business because it provides them with training and access to the entire government marketplace, which has led to recent annual small business sales of over $13 billion a year.

Given that the Schedules Program is how most small companies get their start in the federal marketplace, it allows them to have a single market access point to sell efficiently to all federal customers and to partner with large businesses. The Schedules Program has been the best friend of small businesses.

GSA also offers greater accessibility for small businesses to sell to an expanded marketplace, reaching state and local customers at no additional cost under certain allowable regulations based in law. These federal, state and local customers also have access to all of our e-systems, which allows them greater efficiencies, market access to, and tailored searches for small businesses and their procurements.

In addition to electronic tools, GSA provides customers with a wide range of governmentwide acquisition vehicles, some specifically designed to provide opportunities to the small business community, including the 8(a) STARS contract vehicle, the Alliant Small Business GWAC and the VETS GWAC.

In closing, we are very proud of the great results small businesses have achieved using the GSA systems and processes that

maximize their opportunities and minimize their costs. However, we will continue to aggressively seek ways to build upon this successful foundation.

Again, thank you for inviting me here today, and I will be glad to answer any questions you may have.

[The prepared statement of Mr. Williams may be found in the Appendix on page 48.]

Chairwoman VELÁZQUEZ. Thank you, Mr. Williams.

Our next witness is Major General Ronald L. Johnson. Major General Johnson is the Deputy Commanding General of the U.S. Army Corps of Engineers. He directs the management of 181 Army installations and a budget exceeding $8 billion.

Welcome.

STATEMENT OF MAJOR GENERAL RONALD L. JOHNSON, DEPUTY COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS

General JOHNSON. Madam Chairwoman and members of the Committee, thank you for the opportunity to testify before you concerning the impact of the emerging procurement methods on small business contractors.

Your staff has asked that you would like me to address one particular emerging procurement method that falls under the genre of e-systems, and I am going to talk about that one particular method, reverse auction.

In 2004, the Army Corps of Engineers completed a pilot study on a specific procurement method called reverse auction. In 2002 in the Defense Appropriations Act, Congress provided $1.4 million to FreeMarkets, Incorporated, an e-sourcing contractor to explore reverse auctions.

In conjunction with this appropriation and direction, the Corps of Engineers received the funds from the Department of Defense to analyze online markets, and we did four particular things.

We conducted the pilot study to test online e-sourcing, specifically full service reverse auctioning for use by the Corps and its industry partners.

We encouraged activities within the Corps to explore the potential of online reverse auctioning.

We conducted training in the use of the new and emerging acquisition tool.

And finally, we determined the appropriateness of augmenting our acquisition strategies and processes with reverse auctioning to improve efficiency of the acquisition process.

So in 2003, we conducted the pilot program to evaluate the use of e-sourcing and see how it would apply in the complex mission of the Corps. The Corps contracted with FreeMarkets to provide reverse auction software technology and training to eight separate Corps districts, to provide two different forms of reverse auction technology training and to provide their expertise, assistance, and advice to the reverse auction process.

FreeMarkets introduced a concept of reverse auctioning to the Corps and its reverse auction software tool to our pilot sites. Four

contracting officers used the reverse auction process on nine individual projects, the majority of which were construction projects.

We received protests on two of these projects, and one of the protests was sustained due to a problem with the reverse auction software. Through the pilot study, we found no basis for the claim that reverse auctioning provided any significant or marginal savings over the traditional contracting process for construction or construction services.

Reverse auctioning has a chance to provide benefit when the commodities or manufactured goods procured possess a controlled and consistent nature with little or no variability. Construction and construction services are, by their nature, variable. Therefore, the reverse auction functionality that allows a comparison of past projects does not provide usable results for contracting officers of our construction projects.

Our study also found that there is considerably more time involved in the preparation and execution of reverse auctions which increases the level of labor and project costs associated with the procurement. Labor costs are an important aspect of our project cost, and we strive to insure that they're controlled to the extent possible and appropriate.

In summary, the Corps was not able to support the potential benefits of reverse auction for our construction program. While this tool may be appropriate and beneficial in more repetitive types of acquisition, we did not find it to be a useful tool for our construction program and do not utilize it today.

I would like to briefly mention one other program where the Corps is utilizing lessons learned from recent experience and specifically targeting small businesses to meet our needs. The Corps under the National Response Plan Emergency Support Function number three for public works and engineering, is responsible for providing power and temporary roofing, debris removal and reduction. We have some set-aside contracts that are awarded in advance to support potential responses to future natural or manmade disasters.

We recently awarded 12 contracts for temporary roofing. Of these 12 contracts, seven were awarded to 8(a) small, disadvantaged businesses, one to a HUBZone business, and one to a service disabled veteran-owned small business.

If and when the services are required, we have nine small businesses to whom we can immediately turn for assistance. We are looking forward to awarding similar contracts to other small businesses.

Before closing, let me update you on the Corps' Small Business Program for the last two fiscal years. The Corps has long considered the small business community an important partner in the success of its mission. Historically, the Corps has been, and continues to be, one of Department of the Army's strongest small business supporters.

However, we know that we must always strive to improve, and as such, as an agency, we have a very aggressive small business goal, including the overall small business goal which is almost twice the statutory goal.

Our continued commitment to successful small business partnerships will help to insure that a vibrant and robust cadre of small businesses is available and utilized in performing our mission.

That concludes my opening statement. I will be happy to answer any questions you or members of your Committee have today.

[The prepared statement of Major General Johnson may be found in the Appendix on page 55.]

Chairwoman VELÁZQUEZ. Thank you, sir.

Mr. Denett, I would like to address my first question to you. In 2003 during Small Business Week, President Bush, in announcing his commitment to the small business agenda, said, and I quote, "Wherever possible, we are going to break down large federal contracts so that small business owners get a fair shot at serving the needs of the nation." That was in 2003.

In 2005, OMB sent a memo to all the federal agencies asking them to implement strategic sourcing. My question to you is: if the President said that we are supposed to break up large contracts, isn't strategic sourcing counter to that directive?

Mr. DENETT. I do not believe so. In fact, the thing we put out on strategic sourcing, we have as one of the criteria that people look at when they pursue strategic sourcing is to see the impact on small business. In fact, we want them to look at what portion of the dollars currently go to small business, and then when they do a strategic sourcing initiative, that the percentage will stay the same or improve, not go down.

Thus far we have been very successful in strategic sourcing. The ones that we have initially done, in fact, have increased small business. So as long as we keep reminding people of the importance of that and that strategic sourcing is not to hurt small business, the early data that I am getting from different departments is, in fact, the small business numbers have gone up.

So we are just going to have to keep reminding them of that.

Chairwoman VELÁZQUEZ. I am sorry. Who is telling you that the small business contracts—

Mr. DENETT. On strategic sourcing?

Chairwoman VELÁZQUEZ. Yes.

Mr. DENETT. Well, you know, for example we did office supply strategic sourcing.

Chairwoman VELÁZQUEZ. Okay. So you are telling me that strategic sourcing does not prevent more small businesses getting a higher number of federal contracts, and that is why every year, including last fiscal year when we release our score card regarding federal procurement practices, it shows that the federal government has not accomplished small business contracting goals of 23 percent.

So you are telling me that the fact that the federal government has not reached the contracting goal of 23 percent has nothing to do with strategic sourcing.

Mr. DENETT. I am saying strategic sourcing in most instances has helped small business.

Chairwoman VELÁZQUEZ. Are you telling me the number of contracts awarded to small businesses is not going down while the amount of money spent in federal contracting dollars is going up?

Mr. DENETT. In the strategic sourcing area, we can say that. Overall, I mean, Administrator Preston I know is working real hard to try to increase the number of dollars that are going to small business. He is utilizing a score card system which is holding agencies more accountable, to put more pressure on them to find more opportunities for small businesses.

Chairwoman VELÁZQUEZ. This is after the Inspector General of the SBA came out with a report that showed that $12 billion that were intending to go to small businesses went to large firms, what we call miscoded. Were you aware of that?

Mr. DENETT. I am aware that there was a coding problem and that Administrator Preston worked very aggressively with the departments to have them cull through their data, correct any errors that they made, so that we could have correct numbers.

Chairwoman VELÁZQUEZ. Okay. Thank you.

In your testimony, you mentioned that you worked with the SBA Administrator to increase the number of SBA Procurement Center Representatives, PCRs.

The SBA budget imposed a cap of 60 PCRs. In 1993 when the federal marketplace was half the size it is now, there were 68.

Is the SBA ignoring the recommendations of OFPP?

Mr. DENETT. No, they are not. I asked them to increase, and that was this past year. They were going down as you have already stated, and I was concerned by that. So I pressed them to increase the number, and I am told that they, in fact, have increased the number.

It is still not as large as the reference year that you were using, but they did increase it by three or four after I urged them to do so.

Chairwoman VELÁZQUEZ. Can you tell us if you recommended a figure, a number?

Mr. DENETT. I did not. I just said that it seemed to me that using the logic that you had just described, the dollars had gone up. They serve a very useful purpose. Can we not have more of them?

And I am told we, in fact, do now have more of them.

Chairwoman VELÁZQUEZ. So you are telling me that the cap that they imposed of 60 is no longer in place; that they are going to increase that number?

Mr. DENETT. No, I am not saying that. I am saying that they increased the number over what they had the previous year, in part, from my urging.

Chairwoman VELÁZQUEZ. I want to see that.

In your testimony you also mentioned that you launched the small business procurement score card in partnership with the SBA and formed a small business team within the FAR Council.

Three of the agencies on the FAR Council small business team received red small business scores on the procurement score card, the lowest score, which can be interpreted as a failing grade.

Do you find it ironic that the team that is supposed to help small business is not receiving a passing grade?

Mr. DENETT. Do you mean members of that team?

Chairwoman VELÁZQUEZ. Yes. The agency, that part of—

Mr. DENETT. I would hope that they are just more motivated, having gotten a failing grade. Working with us on regulations, they

can help come out with regulations that will foster an atmosphere to assist small business quicker.

Chairwoman VELÁZQUEZ. Sir, it is not for you to come here and say that you hope that they are doing, that they will do much better.

Mr. DENETT. Well, they will do better, but the fact that—

Chairwoman VELÁZQUEZ. Because there are small businesses that are suffering due to the fact that the federal government is failing them at a time when the economy is in bad shape. We have to get the federal agencies to do better.

So to issue press releases saying we are going to assemble a federal agency team to increase contracting opportunities and help small businesses, and then when I ask you about how the team that is charged with accomplishing this is composed, all of those federal agencies are getting a red score. We need some oversight from the federal government.

Mr. DENETT. I will give it oversight. I am looking at what the team's results are, I am told that we are now moving things that help small business faster as a result of this team. Certainly, some of the members are going to come from departments that have not had good scores, but the whole aggregate of the team, they have been given clear orders to do what they can to help small business, and that is what they are going to do.

Chairwoman VELÁZQUEZ. Thank you for that. Thank you.

Mr. Williams, GSA claims that e-Travel help small businesses because more small firms are eligible for contracts. In 2004, before e-Travel, only 13 small businesses were eligible, and that has now increased to 34.

However, an increase in the potential bidders has not correlated to an increase in business, which is the true measure of whether or not this works for small firms.

In 2006, small travel agents received less than one percent of the dollar awarded on the e-Travel TSS schedule. So can you tell me how this demonstrates fair opportunity?

Mr. WILLIAMS. Yes, Madam Chairwoman. In 2004, those 13 firms that received the travel agency contracts received sales of about $26 million. That was in 2004.

In 2006, the 16 companies that now receive dollars under travel agency business get about $80 million. It is true what you said under the travel services schedule, the TSS, that those companies are not getting a lot of business. It is as you said.

However, the $80 million that they are getting is under our e-Travel initiative. They are getting that in a subcontract role primarily. So they are getting dollars. We would like to see small businesses get more direct prime contracts from the federal government, and that is why we have the TSS schedule.

Chairwoman VELÁZQUEZ. So in conclusion, and I am going to recognize Mr Chabot, you are telling me that you are proud of the fact that 98.9 of the dollars went to six large corporation.

Mr. WILLIAMS. No, we are not.

Chairwoman VELÁZQUEZ. Okay. Thank you.

Mr. WILLIAMS. You are welcome.

Chairwoman VELÁZQUEZ. Thank you.

Mr. Chabot.

Mr. CHABOT. Thank you, Madam Chair.

Maybe I will start at this end, Major General, if that is okay.

How does reverse auctioning affect small business concerns' opportunities to do business with the federal government?

General JOHNSON. I think it does based upon my dialogue with small business owners and working with them over time; I think the way it impacts them is, you know, reverse auctioning, you think of eBay. It is the opposite of eBay. With reverse auctioning, no construction contractor is going to give the government the best price the first time. It requires an immediate response. You have to be there, right there at the screen. Small businesses really cannot afford to do that, nor do they have the wherewithal to allocate resources for someone to sit at a screen, make an immediate assessment whether it is affordable for them to make this or go into this business decision as a big business could.

I do not think big businesses could do this either.

Mr. CHABOT. Thank you very much.

Mr. Williams, GSA sent a letter to VA dated January 4, 2008, that addressed the possibility of VA implementing corrective action to a VA Office of Inspector General report that would prohibit the eligibility of a category of large and small business dealers from being placed on the VA schedule.

The letter stated that the terms of delegation of authority from GSA to VA to operate the schedule program indicate that the method of supply would be governed by criteria established under GSA regulations. It further states that the issuance of procurement policies and methods necessary to implement the VA delegation are understood to be under GSA control.

Is this still GSA's position? And if you know, what is the current status and when do you think that it will be resolved?

Mr. WILLIAMS. Congressman, I just became familiar with this issue. The letter was sent by our Chief Acquisition Officer to the VA, telling the VA that under the delegation that we gave to the VA to do certain Schedules, the authority to set policy resides with GSA. What their IG, as I understand it, was recommending to the VA Acquisition Office was that when they enter into contracts with resellers, they could ask the reseller for information from the manufacturer in order to establish a fair and reasonable price.

However, once you enter into that contract, trying to track those sales by requiring information from the manufacturer, we actually do not have privity of contract with that manufacturer, and we are afraid, first of all, that if we required that to happen, frankly, it would violate the way we should be doing business with the private sector.

But more so, it would take small businesses who would not have access to that information and take them out of the reseller marketplace. So we will continue to work with the VA and with the VA IG on that. We are trying to help small business, but also to make sure as we delegate the authority for VA to do those Schedules that they do not do anything that we think violates sound Schedules policy.

Mr. CHABOT. Thank you.

And, Mr. Denett, please explain how the strategic sourcing established by your office in 2005 insures small business participation.

Mr. DENETT. One of the criteria that we gave to everybody is their culling through all of the money that they spend and trying to see where it might make sense to save money for taxpayers if we buy things strategically, is they give full consideration to the impact on small business. In other words, we do not want them doing it if the net effect is negative on small business.

So they do market research. They see how many companies are out there, if there is an adequate number of small businesses that can participate, and like I said, the early results are quite favorable. You know, on the GSA area, 11 of 13 office supply companies were, in fact, small businesses. Some of the early data we are getting that is some of the Defense ones that they did had 41 percent small businesses.

So I am encouraged, and we have it as one of the five criteria that they have to look at before they make a decision to use strategic sourcing.

Mr. CHABOT. And, finally, how does technology enable agencies to increase small business concerns' opportunities to do business with the federal government?

Mr. DENETT. Well, electronically they can check all of the opportunities that are listed. I think it saves them the trouble of having to go and visit every procurement office. They can get access to things online. Big companies can afford to have hundreds of sales forces going around and beat the bushes and knock on doors. A lot of small businesses cannot. Most of them can get access to a computer, and through Schedules and a variety of other means, it opens up doors for them in a way that is not as labor intensive. So I think that is a plus for them.

Mr. CHABOT. Thank you very much.

I yield back the balance of my time, Madam Chair.

Chairwoman VELÁZQUEZ. Mr. Cuellar. How much time?

Mr. CUELLAR. I think we have about eight short minutes.

Let me just ask one short question, a general question. And, first of all, we appreciate what you all are doing. I know it is a difficult task, but one of the things I have seen is when I talk to the small business in, let's say, the border community, south Texas, there seems to be a disconnect. In other words, we get testimony up here saying it is working, but then when you talk to the small businesses we get a very different picture saying that it is still very different for them to do business with you all, and it is just a very different picture.

Why do you think here is such a stark difference in what you all tell us and what we actually hear in our districts?

Mr. WILLIAMS. I would be glad to start. I think sometimes there are misperceptions and a lack of understanding about how to do business with the federal government, and as I said before, the Schedules Program is usually the first entry place into the federal marketplace.

What we provide to small businesses is training, free training. We call it Pathways to Success, not only how to get on the GSA schedule, which then really gives you a license to sell anywhere in the federal government, and in some cases selling to state and local governments, too.

And in providing that training, we not only tell them how to get onto the schedule, how to fill out the application form and the process we go through, we also try to tell them how to market to the federal government so that once they get that license to sell, they can be a success.

I think the federal government can be somewhat of a hard market to understand if you have never dealt with it, and we try to ease and mitigate that burden by providing this free training and doing numerous, as everybody does, numerous outreach events to small business.

We love having a very broad and diverse industrial base in GSA. We consider it is part of our mission to make sure that agencies, on one hand, trying to do business with the private sector can do business in an efficient way, but can have access to small business, women-owned, HUBZone, service-disabled veterans, veteran-owned businesses, and we provide that entry point and provide it in a low cost way to small business and also train them on how to get in that door.

Mr. DENETT. I think expectations are high when they get Schedules. They think, "Oh, boy, I am going to get government business." That just gives them the license. They have not actually won any business yet.

The same across the board, not limited to Schedules. Small businesses see all of the money the federal government is spending. They want in on the activity. We want them in on the activity because they are the backbone of our country. They get all excited. They put in proposals.

Well, you know, for every one that wins one, there are two or three that do not. Those are the ones that I would suspect you hear from with some regularity, the disappointment, all of the effort they put into it and not getting some immediate government business.

On job fairs, we heard that loud and clear, that a lot of small businesses would come. They would participate. They would be all excited, and then they would come away with contacts and cards, but not any actual business. So we encourage agencies now to bring live requirements with them to give opportunities. In some instances, small businesses actually leave the market fairs with orders, which had never been done before.

So we need to push more of that.

General JOHNSON. I think one of the things we could do better is establish relationships and develop some trust. I think small businesses generally do not trust the federal government. They perceive that we are too bureaucratic, and we are. We have laws to follow. Unfortunately, perceptions are always true.

So we have to work at that each and every day. I think you will hear some examples from some of our partners that will testify in a panel after we do and hopefully they will substantiate that we have tried to do the best we can in bringing in small businesses. The best small business example there is in the world is something that used to be called the Army Air Corps, now called the United States Army, not the United States Air Force. So they should still be a small business.

I think if you look at our—

Chairwoman VELÁZQUEZ. I am sorry, but I need to interrupt things. We have to go to the floor to vote.

The Committee will stand in recess for about 20 minutes.

[Recess.]

Chairwoman VELÁZQUEZ. The Committee is called back to order.

Mr. Denett, the SARA panel recommended that OFPP develop best practices and strategies to unbundle contracts. That is consistent with what the General Accounting Office recommended as well. Unfortunately, this has been under review for over a year, while 34 of 51 recommendations to OFPP have already been implemented or are in the process of being implemented.

Why is this one still under review?

Mr. DENETT. Well, we had 60 of the 89 recommendations from the SARA panel that were directed to us. So there are a lot of them. We have a staff of about 12 people. We were fortunate that we hired Laura Auletta, who was one of the managing people supporting Marcia Madsen on the SARA panel, who headed up the SARA panel. She is working very diligently.

Chairwoman VELÁZQUEZ. I understand that. My issue with the question is that the most critical, important issue for small businesses is precisely this one, and so my question is: why is it when we heard President Bush in 2003, who spoke about it, you are still dragging your feet on this issue?

Mr. DENETT. Well, we have good people working on it. It is a complex issue. We want to make sure we get the right results. We want input from industry and all of the government agencies.

Chairwoman VELÁZQUEZ. When do you think it is going to be implemented?

Mr. DENETT. I hope to have a recommendation to me within the next 60 days.

Chairwoman VELÁZQUEZ. And you will be submitting it to the Committee in writing?

Mr. DENETT. We will be glad to share with you the results.

Chairwoman VELÁZQUEZ. Thank you.

Mr. Denett, the SARA panel recommended that bid protests be allowed for task and delivered orders in excess of $5 million. The GAO reports that OFPP disagreed with this recommendation and felt that the bid protest threshold should be higher. Why is this?

Mr. DENETT. On task and delivery orders, we—

Chairwoman VELÁZQUEZ. In excess of five million.

Mr. DENETT. In excess of five million, yes. Well, we think that task and delivery orders have already gone through competition earlier when they are setting up the original contracts. When they place individual orders afterwards, we don't want to slow the process down. We want to keep it quick. We think when people have objections they should place them in the beginning when contracts are initially being awarded, not on individual task and delivery orders.

Chairwoman VELÁZQUEZ. Sir, aren't the legal fees that the small business will have to pay and the 20 percent success rate enough to discourage frivolous protests so that they do not slow down the process?

Mr. DENETT. It certainly would be a factor you would hope that would cause people not to. Unfortunately, some people still when

they do not win a particular piece of business feel that in order to protect themselves that they want to file protests and go through a long, rigorous process that slows everything down and usually does not help anybody.

Chairwoman VELÁZQUEZ. If ID/IQ contracts are increasing and small businesses continue to receive small contracts, shouldn't they have an opportunity for a fair chance?

Mr. DENETT. Of course, small businesses should be given an opportunity.

Chairwoman VELÁZQUEZ. Major General Johnson, in a study of reverse auctions, what did the Corps find in terms of acquisition workforce issues? And will reverse auctions save on manpower?

General JOHNSON. Madam Chairwoman, in a word, no, it will not. What we found was you need to have some contracting officer readily available to kind of, if you would, watch the screen, as well as the guy providing the service on the other side because this goes pretty quick.

One of the other issues we found was the standardization of the timing of the reverse auction. The one protest we had had to do with whether the auction had ended or not. The clock on the computer at that end said it had not. The provider of the software said it had, and that is why that protest was substantiated.

Chairwoman VELÁZQUEZ. Mr. Denett, do you have any comments on the finding of Major General Johnson's study?

Mr. DENETT. I think it has a lot of merit, that there are certain commodities where reverse auctions probably will not be—

Chairwoman VELÁZQUEZ. Make money?

Mr. DENETT. —they will not be beneficial and save money. Again, we have a work group working on that. I have told them to make sure that they keep in mind not to harm small business. I am looking forward to the results of that work group.

Chairwoman VELÁZQUEZ. Can you give us some examples?

Mr. DENETT. Well, the one that he already gave of construction, I think, is a—

Chairwoman VELÁZQUEZ. But do you have one that is different than the one that he has given us?

Mr. DENETT. Anywhere where the requirement is not well defined. I mean, if you are buying something, you know, a pen or a supply that is well defined, we all know what it is. That is a commodity that people can reverse auction on, one would think. Anything where there is uncertainty so that there is not a level playing field, people are not bidding the same thing, that is likely to be more problematic.

But, again, I am going to wait and see what the experts say. We have gathered a group of people that have been using reverse auctions, that have a lot of knowledge of it. Some are proponents of it; some do not like it, and they are working together to make a recommendation on what is the best way to implement reverse auctioning.

Chairwoman VELÁZQUEZ. Mr. Denett, the Brooks Act requires that more than just the price is considered when procuring architectural and engineering services. Will OFPP specifically reference the Brooks Act when it releases its findings on reverse auctions?

Mr. DENETT. I do not know that. I am going to wait and see what is recommended, but certainly price is just one factor, especially when you are doing things such as architect and engineering. That is a longstanding principle that we adhere to.

Chairwoman VELÁZQUEZ. I will recognize Mr. Chabot.

Mr. CHABOT. Madam Chair, I have no additional questions. I would be happy to get to the next panel.

Chairwoman VELÁZQUEZ. Okay. Thank you very much. This panel is dismissed.

Mr. DENETT. Thank you.

Mr. WILLIAMS. Thank you.

General JOHNSON. Thank you.

Mr. CHABOT. Thank you.

Chairwoman VELÁZQUEZ. Do we still have any staff from OMB? Right here, good. And GSA? And our Army Corps is here.

Thank you for staying here. I just forgot to ask them to provide the names of the staff that will be staying with us.

I welcome the second panel, and our first witness is Mr. John Palatiello. John Palatiello is the Administrator of the Council of Federal Procurement of Architectural and Engineering Services. The council represents companies in the architectural, engineering, and mapping industries.

Welcome, sir, and you will have five minutes to make your presentation.

STATEMENT OF JOHN PALATIELLO, ADMINISTRATOR, COUNCIL ON FEDERAL PROCUREMENT OF ARCHITECTURAL AND ENGINEERING SERVICES

Mr. PALATIELLO. Thank you, Madam Chairman. Thank you for the invitation. I congratulate you on the very correct pronunciation of my name. It is not often that people do that. It took me four years to learn how to pronounce it. So I congratulate you.

COFPAES is made up of the American Congress on Surveying and Mapping, the American Institute of Architects, the American Society of Civil Engineers, MAPPS, and the National Society of Professional Engineers. We have been the organization that has strongly supported the Brooks Act, which you mentioned in a question to the earlier panel, which provides for a qualifications based selection, or QBS, process for the selection of architect-engineer services.

A&E services amount to about one-tenth of one percent of the life cycle costs of a project or a program, but the quality of the A&E service determines the price and the efficiency of the other 99.9 percent of what government does. That is why Congress enacted the Brooks Act in 1972, to promote competition and quality in contracting of A&E services.

The Brooks Act predated the introduction of concepts that Mr. Chabot mentioned in his statement of best value and past performance in a lot of the procurement legislation that was passed in the '80s and '90s, and we like to say that we were for best value and past performance before it was cool to be for those things.

QBS is simple. Agencies publicly announce their requirements for A&E services. Firms submit their qualifications, resumes of

personnel, and their past projects that demonstrate their competence and qualifications for a project.

The agency reviews and evaluates and interviews the firms, and then selects the firm it deems most qualified, and there is then a negotiation of a price that is fair and reasonable to the government. And as the law says, the price must be fair and reasonable to the government.

And if agreement cannot be reached, the agency then moves on to a negotiation with the next ranked firm.

In your letter of invitation, you asked that we comment on whether new procurement methods are beneficial to small business contractors. I believe in the old adage that if it ain't broke, don't fix it. The QBS process has stood the test of time. It has not only been federal law for 35 years, but it is in the American Bar Association model procurement code for state and local government, and over 35 states have enacted mini-Brooks Acts. It has enjoyed bipartisan support in Congress for decades.

So if it ain't broke, why are agencies trying to fix it? In my written statement I have detailed several administrative threats to the Brooks Act that we believe have been not advantageous to architects, engineers, surveyors, and mapping professionals, and particularly small business. Let me highlight those concerns.

First is the Office of Federal Procurement Policy and the FAR Council has for more than ten years failed to write regulations that accurately reflect the intent of Congress and the legislative history, and the body of state law which governs architecture, engineering, surveying and mapping.

We actually went to federal district court to finally try to force proper rulemaking, but we were unfortunately denied based on standing.

Secondly, the GSA supply schedules program for services has been a disaster for small A&E firms. I would remind you that GSA implemented its schedule contracts for A&E services without any consultation with our community. They did this unilaterally. We believe the schedules are in direct violation with the Brooks Act.

As I outlined before, the Brooks Act is a qualification based selection process. The schedules process is a price based schedule. They are inherently incompatible, but for reasons I do not know, GSA will not modify the schedules based on about ten years of us asking them to do so.

Madam Chairman, I have been around this community long enough to have worked with Congressman Jack Brooks on these issues. One of the overriding reasons why he wrote the Brooks Act was that he believed in competition. He believed that federal A&E contracts should not go to the biggest firms with the slickest brochures and the most effective lobbyists.

Rather, there should be competition, particularly by small business. The GSA Schedule has gone back to exactly what Mr. Brooks feared: the biggest firms get on the Schedule, and as Mr. Williams said, it is then a license to sell.

I would use a little different word as to what it is a license to do, but it is a license that very much disadvantages small business.

Third, it has been ten years now since Congress enacted legislation authorizing the design-build process for federal construction

projects. That is a project delivery method by which an agency can contract with one entity to perform both the A&E services and the construction services.

Design-build was never intended to supplant the Brooks Act. We supported the legislation. It was intended to work with the Brooks Act. We believe now that there is a ten-year history it is time for Congress to evaluate whether design-build, in fact, has been a success. Is it permitting the independent oversight on the part of the designer? Is it saving time, money, and upholding quality? And is it having a negative impact on small businesses not only as prime contractors, but for specialty subcontractors, such as geotechnical engineers, land surveyors, topographic mapping firms or landscape architects who are relegated down to third or fourth tier subcontractors.

Chairwoman VELÁZQUEZ. Mr. Palatiello, how are you doing on time?

Mr. PALATIELLO. Okay. I am sorry. Let me take 30 seconds if I may and just say that you hit the nail on the head in your opening statement, Madam Chairman. These are all symptoms of a larger problem, and that is the declining acquisition workforce, particularly in the A&E field. As you said, you have got more and more work going out with fewer and fewer contracting officers, and so they are being forced to try to implement these other methods, but we do not think the result has been good for the taxpayer.

Thank you very much.

[The prepared statement of Mr. Palatiello may be found in the Appendix on page 59.]

Chairwoman VELÁZQUEZ. Thank you very much, Mr. Palatiello.

Our next witness is Mr. Anthony Zelenka. He is the President of Bertucci Contracting Corporation in New Orleans. Bertucci works on flood control and coastal restoration projects along the Gulf Coast. He is testifying on behalf of the Associated General Contractors. AGC is the largest and oldest national construction trade association.

Welcome.

STATEMENT OF ANTHONY ZELENKA, PRESIDENT, BERTUCCI CONTRACTING CORPORATION, ON BEHALF OF ASSOCIATED GENERAL CONTRACTORS

Mr. ZELENKA. Thank you, Chairwoman Velázquez, Ranking Member Chabot, and the distinguished members of the Committee for this opportunity to testify on AGC's documented concerns and experience with the procurement method known as reverse auctions.

AGC strongly supports full and open competition for the many contracts necessary to construct improvements to real property. As the Committee considers the changing federal procurement landscape, AGC offers the following points for consideration during your evaluation of reverse auctions.

Reverse auctions do not provide substantial benefits for procuring construction services. Vendors promoting reverse auctions have yet to present persuasive evidence that reverse auctions will generate savings in the procurement of construction services or will

provide benefits of best value comparable to currently recognized selection procedures for construction contractors.

Manufactured goods are subject to little or no variability or change in manufacture or application. Construction projects, on the other hand, are inherently variable and present immeasurable risk to contractors. We do not manufacture buildings, highways or other facilities. In fact, the construction process is fundamentally different from the manufacturing process and cannot be compared with the purchase of commodities.

Reverse auctions do not guarantee lowest price. In the context of construction, AGC believes that most of the claims of savings are unproven, and that reverse auction processes may not lower the ultimate cost. A bidder has little incentive to offer his best price and subsequently may never offer his best price.

Reverse auctions may encourage imprudent bidding. Reverse auctions create an environment in which bid discipline is critical, yet difficult to maintain. If competitors act rashly and bid imprudently, the results may be detrimental to everyone, including the owner, in this case the federal government.

Consequently, imprudent bidding may lead to performance and financial problems for owners and successful bidders, which may have the effect of increasing the ultimate cost of construction, as well as the cost of operating and maintaining the structure.

Negotiated procurements allow thorough evaluations of value. Over the past few years, owners, particular in the federal government, have recognized the value and quality of project relationships and other factors that promote greater collaboration among the owner and project team members.

Reverse auctions, on the other hand, do no promote collaboration, much less communication between the owners and bidders. Rather, they have a negative effect on the relationship between buyer and seller.

Sealed bidding assures that the successful bidder is responsive and responsible. Where prices is the sole determinate, the sealed bid procurement process was established to insure integrity in the award of construction contracts.

Reverse auctions ignore the protections of the sealed bid procurement laws, regulations and user precedent that address these critical factors and insure the integrity of the process.

Reverse auctions may contravene federal procurement laws. The Federal Acquisition Regulation and current procurement statutes reflect a clear policy of not disclosing contractor price information. Given these restrictions on contractor price disclosure in the U.S. Code and the FAR, it is unclear that any authority truly exists for the federal government to conduct reverse auction on fixed price type contracts or that current law can be interpreted to permit the practice of reverse auctions.

AGC strongly recommends that the Committee encourage OMB, OFPP, and the FAR Council to closely examine the finding of the congressionally mandated reverse auction pilot program the Army Corps of Engineers issued in 2004, as was discussed earlier. The findings of the report clearly state that reverse auctions are an inappropriate tool to procure construction and construction related services.

To sum up, AGC believes that where reverse auctions for construction have been studied, they have failed to provide savings. They are an unproven method for selection of construction contractors, specialty contractors, subcontractors, and suppliers.

At best, reverse auctions raise significant issues for owners and construction team members for the following reasons. They do not guarantee the lowest price. They may encourage imprudent bidding. Negotiated procurements allow a more thorough evaluation of best value. Sealed bidding assures that the successful bidder is responsive and responsible, and reverse auctions may contravene federal procurement laws.

Additionally, AGC is supportive SBA's regulatory recommendations to address the impact of reverse auctions on small business and to offer retainage relief for small A&E firms.

Thank you for this opportunity to comment. I look forward to working with the Committee, and I will be happy to answer any questions.

[The prepared statement of Mr. Zelenka may be found in the Appendix on page 79.]

Chairwoman VELÁZQUEZ. Thank you, Mr. Zelenka.

And how I recognize Mr. Johnson for the purpose of introducing our next witness.

Mr. JOHNSON OF GEORGIA. Thank you, Madam Chair.

I am proud to introduce today a fellow Georgian, Mr. Arthur Salus. Mr. Salus founded Duluth Travel, a service disabled, veteran-owned business, in 1993, and in the last 15 years, Duluth Travel has become a leading travel management company. In 2005 and 2006, it was named the travel agency of the year in government travel.

In addition to being a successful business owner, Mr. Salus has been a strong advocate for expanded veterans opportunities in federal procurement. He is a member of the National Veteran-owned Business Association and is a small subcommittee chairman of the Society of Government Travel Professionals.

Mr. Salus is also a member of Operation One Voice, which supports special operation forces by providing transportation and funding of wounded veterans and their families to and from rehabilitation facilities. He has testified on the Hill for veterans rights before the Veterans Affairs and Small Business Committees, and he is known in the local and national media as the Travelmaster, and I am pleased that he is here to share his expertise on federal procurement with the Small Business Committee today.

Thank you.

Chairwoman VELÁZQUEZ. Welcome, sir.

STATEMENT OF ARTHUR SALUS, PRESIDENT, DULUTH TRAVEL, ON BEHALF OF THE SOCIETY OF GOVERNMENT TRAVEL PROFESSIONALS

Mr. SALUS. Thank you, Congressman, and hooray for Georgians, right?

Good morning, Madam Chairwoman, Ranking Member Chabot, and the Committee. My name is Arthur Salus, and I am pleased

to talk about the impact of emerging procurement methods and small business.

I am president of Duluth Travel, a small, service disabled, veteran-owned travel agency. My company is located in Atlanta, Georgia, and we have 26 employees. We have been providing travel services to state and local government agencies, corporations, and leisure travelers since 1993.

I am an active member of the American Society of Travel Agents, the Society of Government Travel Professionals, and the National Veteran-owned Business Association.

I have been competing for federal contracts since 2003 when I was approved by GSA, and I believe I am well qualified to testify on how government procurement methods affect small business travel agencies.

The federal government has been competitively procuring travel services from the private sector since 1989. On the civilian side, federal agencies may procure travel services directly by their own efforts or use contracting vehicles designed by the General Services Administration.

At one time GSA did design set-aside opportunities exclusively for small businesses. These opportunities were either federal agencies with relatively small travel budgets or were or were discrete geographical areas around the country where federal agencies had offices. Any small business who qualified for these opportunities received a copy of any travel request. There were multiple travel opportunities and multiple small businesses being awarded travel contracts around the country.

This changes in 2003 when GSA implemented two new travel programs, one, the e-Travel Government, and one is the Travel Services Solutions Schedule.

The e-Travel Services contract was awarded to three large corporations, ETS, Northrup Grumman, and Carlson Wagonlit Travel, to provide end-to-end travel systems to the federal agencies other than DoD. These three large corporations no only provide the technology, but provide the end-to-end services, but also can provide one stop shopping to include all services used in travel agencies and subcontractors.

These three large corporations use both large and small travel agencies and subcontractors, known as imbedded travel. I receive business through a subcontractor relationship with ETS to date, but have not received any business from the other two ETS vendors.

That means despite my track record of excellent past performance, I am locked out of over 66 percent of the civilian travel government business. In fact, I am here to tell you that I am unhappy to report that one of the ETS vendors refuses to answer any of my calls or e-mails.

The GSA has stated that more small business are eligible to federal business contracting before ETS and TSS that includes 53 travel agencies of which 30 are small businesses. I first want to commend Tim Burke and his staff at e-Travel, GSA, for their continued efforts to bring e-Travel to the 21st Century.

However, according to the information on GSA's own Web site, only ten of these small agencies reported any sales. This is less

than one percent of the total sales, as, Madam Chairwoman, you quoted, going to small business travel agencies. I am probably that one percent.

I believe GSA has a special role to insure small business a meaningful opportunity to compete for travel contracts. Although I am listed with two on the TSS schedule, I have not received any business from it. I was awarded a contract directly by the Department of Veterans Affairs and it is a competitive set-aside for small, service disabled veterans.

The fact is that most small business travel agencies have received less business than they did before the two programs were created. Why has this occurred? Unlike prior GSO programs, the TSS schedule itself does not include any small business set-asides. The TSS schedule is merely a listing of travel agencies that has been pre-qualified by GSA much like the Yellow Pages.

While many small businesses are listed, few are chosen as there is no requirement from a federal agency to offer each of the vendors an opportunity to bid. Without discrete set-aside opportunities, small businesses receive less consideration and less business.

GSA is urged to include set-asides in the schedules for travel services. We are only asking that we have direct and meaningful opportunities to compete.

To sum up my testimony, I would like to recommend the following: that GSA implement acquisition alternatives for small business set-asides; and, number two, create a voluntary, independent, my suggestion, panel made up of persons from each of the following agencies: GSA, GAO, SBA and OMB, a staff member from this Committee, and members of the small business sector.

This panel could also look outside the federal government at those large corporations who have government contracts who do not use small business in their work.

Please let me go back and spread the word from the Committee saying that you understand the plight of small businesses.

I appreciate your time this morning, and I will be glad to answer any questions.

[The prepared statement of Mr. Salus may be found in the Appendix on page 84.]

Chairwoman VELÁZQUEZ. Thank you, Mr. Salus.

Our next witness is Mr. Mark Leazer. He is the President of Forms & Supply, Inc., based in Charlotte, North Carolina. He is testifying on behalf of the National Office Products Alliance.

The National Office Products Alliance represents companies in the office products industry.

Welcome.

STATEMENT OF MARK LEAZER, FORMS & SUPPLY, INC., ON BEHALF OF THE NATIONAL OFFICE PRODUCTS ALLIANCE

Mr. LEAZER. Thank you, Madam Chairwoman and Ranking Member Chabot and members of the Committee.

My name is Mark Leazer. I am the Director of Sales Technology for Forms & Supply, Incorporated, an independent, woman-owned small business, office products, and furniture dealer located in

Charlotte, North Carolina. I would like to thank you all for the opportunity to testify today.

Testifying today on behalf of NOPA, the National Office Products Alliance, a not-for-profit trade association established in 1904, NOPA represents and serves more than 700 small independent dealers nationwide, along with their key suppliers.

NOPA appreciates the opportunity to speak to the committee about a serious growing problem facing small office products dealers who have government business small business fronts, also known as pass-throughs.

What are small business fronts? Today I would like to concentrate on the small business pass-through problem which we feel requires focused legislative and regulatory remedies to be addressed effectively.

Just what are these pass-throughs or small business fronts? In the simplest terms, these are situations in which a large national company approaches a small business and proposes to create a partnership for the sole purpose of gaining improper access to contracts set aside for small business. It is, in effect, a small business being able to sell their socioeconomic status.

Let me emphasize that these fronts are not the same thing as legitimate small business mentoring program relationships. In that case, the small firm plays a commercially useful and much larger subcontracting role. NOPA is fully in support of legitimate small business mentoring relationships.

The abuses highlighted in Appendix 1 to my prepared remarks which lead to small business fronts usually occur when, number one, the small business has little or no prior experience as a reseller of office products, particularly to government customers and little or no ability to itself support such business.

Two, the large company performs most or all of the selling, order management, customer service, product delivery and invoice and payments processing behind the scenes on behalf of the pass-through dealer partner.

Three, the small business performs few, if any, commercially useful functions once the contract award is made beyond providing an entry point through its Web site to the full operating infrastructure of the large corporation.

And, fourth, the small business typically receives a commission for its willingness to serve as the front for this business, which is passed through to the large corporation.

Let's now look at the negative impact of fronts on small business and government. The known direct loss of federal business experienced by legitimate small, independent dealers already totals tens of millions of dollars annually, and these losses are growing. Conservatively, these losses have reached more than $100 million per year on a national basis, including federal and state government contracts.

Government also is harmed as competition declines when independent dealers are excluded and large national chains and their small business fronts are awarded the business under false pretenses.

GSA and many federal agencies are working to help legitimate small businesses expand business with them, and we heard that

from the testimony earlier today from Panel 1. The inclusion of small dealers in the Army blanket purchase agreement for office products in a recent 19-agency strategic sourcing contract award that includes small businesses are positive signals, and we appreciate that.

But even those contract awards appear to include some potential small business pass-throughs as well as legitimate independent small businesses. We encourage the Committee to review recent state contracting developments as outlined in our prepared statement. They are enlightening to many of the harmful practices that are occurring.

What do we as NOPA feel should be done to address this situation? We feel that federal legislation is essential to end small business fronts. NOPA and its members greatly appreciate the exceptional efforts of this Committee to assist small businesses in our industry and others, but more focused legislation is needed to address the small business fronts problem.

Specifically NOPA asks this Committee to work with us to develop legislation to, number one, establish stricter bid evaluation criteria to insure that federal contracts set aside for small businesses are not awarded to companies that play only minimal roles in servicing such contracts.

Two, require federal agencies to insure that all bidders on small business set-aside contracts fully disclose and certify the functional roles they will play in contract fulfillment.

Three, require each federal agency to report annually to the appropriate Committees of jurisdiction in the House and Senate regarding their implementation of these provisions to end the use of small business fronts in federal contracting.

Four, establish meaningful penalties for companies found in violation of the proposed new legislative and FAR provisions aimed at elimination of fronts.

On behalf of NOPA, I thank you for the opportunity to testify before this Committee today about one of the most damaging and unfair contracting practices that often prevents independent office products small dealers from competing on a level playing field for federal government business.

I will be happy to answer any questions that the Committee may have.

[The prepared statement of Mr. Leazer may be found in the Appendix on page 91.]

Chairwoman VELÁZQUEZ. Thank you very much, Mr. Leazer.

Our next witness is Mr. John Spotila. He is the Chief Executive Officer and President of R3i Solutions, LLC, a management consulting firm in Fairfax, Virginia. He also serves as Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget.

Welcome.

STATEMENT OF JOHN SPOTILA, CHIEF EXECUTIVE OFFICER, R3i SOLUTIONS

Mr. SPOTILA. Thank you.

Chairwoman Velázquez and Ranking Member Chabot and members of the Committee, for all of us who know that small business is the engine that drives our economy, getting federal procurement to help small business deserves attention. I understand the good intentions and logic of those who helped create procurement reform. Unfortunately, that reform has not been sensitive enough to small business needs. Nor has the government done enough to make its procurement system efficient and transparent.

For many small business owners, federal procurement is a very difficult environment. Reform led to staff reductions that have left offices with too few people to do the work. Much of that staff is inexperienced and poorly trained. Procedures are complex and not well understood. Decisions take too long and are communicated in documents filled with boilerplate and legalese. The small business owner feels like an inconvenience at best.

With reduced staffing, most procurement offices focus on fighting off alligators, not draining the swamp. Too often they do not fix their processes, and they do not try to communicate clearly. Large firms that assign people to work with the procurement offices full time navigate the maze better than small firms that cannot afford such full-time help.

So the lack of streamlining and clear communication becomes a competitive advantage for larger firms. There are other problems as well. Agencies combine a wide range of minimally related tasks into larger contracts to get more dollars out the door with a single action. This makes it harder for small firms to demonstrate broad enough capability to qualify as primes for the large awards. They do not have the diverse capability that only a large firm would have.

I understand why procurement offices do what they do in this regard. I am just concerned about the unintended consequences. I doubt very much that we can reverse this trend towards aggregated contracts. It is worth trying, but any victories will probably be on the margins.

We can do something else positive, however. We can turn procurement offices into centers of process improvement and plain language communication. If we streamline the way procurement offices operate and get them to communicate clearly, small firms will benefit tremendously. Plain language communication is the place to start. It is cost effective, achievable, and of real value to small contractors.

In the procurement area, legalese and obscure language are dead weights that drag small firms down. They cannot afford expensive advisors to reinterpret confusing government communication. They need to be able to understand things the first time they read them.

Congressman Braley from this Committee has introduced a bill, H.R. 3548, the Plain Language in Government Communications Act, that would require federal agencies to use plain language in any new or revised documents relating to benefits or services.

If it becomes law, it will make the procurement world much more understandable to small contractors. Procurement forms will become less obscure, procurement procedures more transparent. This will not fix all that is wrong with our procurement system, but it

is not a bad place to start, and I commend Congressman Braley for his vision in introducing this bill.

Plain language is language the intended reader can understand and use on one reading. It is audience focused. The most important rule in plain language, indeed, perhaps the only rule, is to be clear to your intended reader.

You did not mention, but when I was General Counsel at the SBA in the mid-'90s, I led a ten month effort in which career employees rewrote all of SBA's regulations in plain language. It was a tremendous success.

In the White House, I helped implement President Clinton's executive memorandum on plain language, making OMB review part of the solution rather than part of the problem.

Plain language works whenever and wherever we try it, and with Congressman Braley's bill, perhaps the government will try it in more places.

Process improvement is the second step we should take. Streamlining how procurement offices operate would pay large dividends for small business. When the government cut back on its procurement staff, it failed to reexamine how procurement offices should run their operations. Instead of applying best practices in process transformation and project management, agencies largely left their procurement offices to flounder.

Now they struggle with cumbersome processes, useless complexity, poor training, inefficient use of resources, and understandably poor morale. No wonder decisions take forever and small businesses fall victim.

It does not have to be this way. Our career government employees are a terrific resource. They just need leadership and support. We know how to fix sad sack offices. There are a host of examples where the government has improved its processes and delivered better results for less money. If we do the same with procurement, the effort will more than pay for itself and both small contractors and the American taxpayer will benefit tremendously from the result.

Madam Chairwoman and Ranking Member Chabot, I commend you and the Committee for shining a light on this topic. You are absolutely right that government can do a better job in this area. It just needs a Congressional push now and then to get back on track.

Thank you, and I would be happy to answer any questions you may have.

[The prepared statement of Mr. Spotila may be found in the Appendix on page 126.]

Chairwoman VELÁZQUEZ. Thank you very much, Mr. Spotila.

Mr. Zelenka, I would like to address my first question to you. I understand that the Army Corps has been increasing its use of indefinite delivery, indefinite quality, or ID/IQ, contracts rather than traditional sealed bids for construction work. How does this affect the construction industry, particularly small companies?

Mr. ZELENKA. The biggest problem that I face with an ID/IQ contract is you just do not know how much work you are ultimately going to get. So as a small business, you have a very set amount

of resources, and you have to set them aside so in case you get the call to start performing, and it makes it difficult to go out and procure other contracts during that duration.

The second big problem is the bonding. You post a bond, and sometimes they want the bond for the full amount, and most small businesses have limited bonding ability. So it ties up your capacity that way, both equipment that you have to have at the ready and bonding that gets tied up for work that you may never do.

Chairwoman VELÁZQUEZ. Thank you.

Mr. Salus, GSA says that small businesses can participate in e-Travel by being listed on the TSS Schedule. What is the process for getting onto the Schedule, and do small businesses have the resources?

Mr. SALUS. Madam Chairwoman, yes, the resources are there. Small business can do the business, can do the e-Travel work. However, in our case, we only have two ways of doing travel for the government. One is either using one of the three large corporations, and if you remember my testimony I said that I am doing work with one of them. So therefore, 66 percent of my business is not there. I am losing that business.

And remember when I am talking about myself, I am talking about other small travel agencies, too.

But to be on the TSS Schedule, it is a listing to be on the TSS Schedule. The GSA schedule is a little bit more involved. You have to be approved by GSA, but even though you are approved by GSA does not guarantee you any work.

And I just want to mention something else to add to that. The federal agencies, when I said I went directly with the VA, and VA has been really gracious in working with a small service company, and we actually took it away from a large business, but I have in my hand here 40 letters that I wrote to the federal agencies, and out of the 40 agency letters that I sent, only four replies, and that is shameful, and I believe that the contracting officers of these agencies, there is not enough teeth. There is not responsibility. There are no consequences in their actions.

Chairwoman VELÁZQUEZ. Thank you.

Mr. Spotila, you said in your testimony that it is unlikely that we can stop contract bundling, but that we can try to restructure procurement offices. How would this help address the same problems as the unbundling of contracts?

Mr. SPOTILA. I think in part the reason that contracts are being bundled and aggregated is that procurement offices are left with a work load that they cannot handle, and they are afraid that they will not get the contracting dollars out the door, and they will be criticized for that.

If we improve their processes so that procurement offices are more productive, then less bundling would happen. It takes some of the pressure off of procurement officers who may, in fact, have good intentions. Then when they are pushed to try to create more small business opportunities, they will have some capability of doing so.

Now, additional staffing would help as well. Better training would help. Anything that improves productivity would help, because I think the reason that it is so difficult to stop bundling is

that in these offices where people make the actual specific decisions, they are just overwhelmed, and they are just trying to survive.

Chairwoman VELÁZQUEZ. So given the fact that the Small Business Administration budget has been consistently cut and the fact that they impose a cap of 60 contracting officers, procurement officers, does not help.

Mr. SPOTILA. Well, those are negative steps clearly, and I think that we have to make certain that our actions align with our words. It is not enough to say ″we believe,″ ″the SBA believes,″ ″government believes″ that small business procurement needs should be addressed. We actually have to do something about that, and I think that there has been a disconnect at times.

Chairwoman VELÁZQUEZ. Mr. Leazer, the office products industries are having a problem with small business pass-throughs as you mentioned in your testimony, and so I would like to ask you are there any current cases where these types of relationships have been investigated?

Mr. LEAZER. Yes, Madam Chair, there are. There is one particular case that we have documented in our Appendix 2, a company headquartered in Colorado called Faison that was judged by an SBA ruling out in California to be other than small. So that case is documented.

Chairwoman VELÁZQUEZ. I will recognize now Mr. Chabot, and I will come back and ask some more questions.

Mr. CHABOT. Thank you.

Mr. Palatiello, how can the federal government improve its process for the acquisition of architectural and engineering services? What suggestions would you specifically make?

Mr. PALATIELLO. We actually find the ID/IQ process to be very advantageous, and a number of agencies have very successfully implemented ID/IQs. The A&E community operates very differently than our construction friends. We are generally held to professional liability requirements and not a performance bond requirement, and it is not as capital intensive as some of the construction activities. So the problems that Mr. Zelenka identified are not the same in our community.

ID/IQ has actually worked very well, and it is an opportunity for an agency, particularly when their requirement over a year or over a period of years are not well defined, they can basically do a competitive procurement and put firms on retainer and then call on them on an as needed basis.

We are very glad that, for example, the USGS has done that in a memorandum of understanding with FEMA so that now in an emergency response, when you need aerial photography or mapping after a hurricane, they just activate a task order, but the contract is prepositioned. So it is a very effective way of using the service when you need it, but then not having to pay for it or pay for a procurement when you do not need it.

Mr. CHABOT. Thank you.

Mr. Zelenka, how can bidder behavior be improved when reverse auctioning is used?

Mr. ZELENKA. You know, it is very difficult to police. You know, you have some inherent problems, especially when you look at it from a small business and a large business standpoint.

Large business is just in much better position to sustain bigger losses that are inherent with the variables that you are dealing with in construction than small business. So it is very easy for them to look at it and cut a small business number, and if that job goes south, they can absorb the loss. So it is hard to control that behavior.

Small business, on the other hand, you know, is faced with a whole different set of problems. In construction if a job goes south, you know, it is not like manufacturing where when you are doing a reverse auction, you are just cutting away at maybe potential profits and all of your costs are controlled. You can have a job go bad in our industry, in civil works in south Louisiana. A hurricane could come through. You could have some bad weather sustained over long periods and actually lose money, not profits, not overhead, but you go through that and into, you know, getting upside down on your production costs.

So as you sit there, those are real risks that a small business has to weigh a lot heavier than a large business, and you know, some people will take that risk, you know, because we're driven by, you know, survival as opposed to just increasing our profits. When you are out of business and you are out of work and you are looking for business, you can be tempted to cut below what is reasonable given those weather factors, and it puts a small business at a problem, and I do not know how to control that.

You know, we are kind of fighting an uphill battle at that point that a large business does not even have to consider. They could absorb those losses and move right on to the next project.

Mr. CHABOT. Thank you.

Mr. Salus, what acquisition alternatives would you recommend to GSA that they pursue that would give small business concerns a greater opportunity to do business with the federal government for travel services?

Mr. SALUS. I think the simple answer is that GSA, if they will agree to implement just set-asides in their contracts; if they put set-asides in their contracts for small businesses in the e-Travel side, I think that the TMCs, as were noted, will get more business, and I believe that GSA is going to be open to this, but we have to wait and see.

Mr. CHABOT. Thank you.

Mr. Leazer, when National Office Products Alliance or any of its members suspect the existence of a ″pass-through″ or ″fronts,″ do they notify the Small Business Administration or the agency that is sponsoring the monitoring program, or what should they do?

Mr. LEAZER. Typically what a dealer would do or a GSA schedule holder in our industry would do is notify NOPA, the National Office Products Alliance, and typically what happens is our staff counsel will work with SBA to try to address that issue, and that has happened a number of times in the past.

This case with Faison that I mentioned was one brought by a dealer in California. The dealer did protest through the proper channels, and through SBA's actual ruling on the matter, was able

to determine that Faison was truly a front and did have financial ties to a large competitor, and that the relationship was solely for the purpose of gaining access to a contract that was set aside for small business.

So the process is typically as follows: work through our national organization, NOPA, work through SBA, and see what can be done about it, and go through the typical protest processes that are in place.

Mr. CHABOT. Thank you.

And then finally, Mr. Spotila, you had mentioned about the plain language communication that our colleague, Mr. Braley, has been initiating and pushing, and could you again discuss why that is such an important piece of legislation or that concept is one that we ought to pursue?

Mr. SPOTILA. Well, I think, again, it has a very practical effect on small businesses. Much of the procurement world language, whether it be in the FAR, whether it be in contract documents, whether it be in statements of work and solicitations, is very difficult for small businesses to interpret without expensive professional advisors. So all of this builds up additional costs and additional impediments. It makes it more difficult for a small business to compete effectively, and there is no excuse for it because these things can all be fixed.

If decisions are faster and communicated clearly, if expectations are communicated clearly, including statements of work, then a small business can be much more cost conscious, can control the costs of going after these contracts much more effectively, and can make fewer mistakes.

And I think all of these things would help considerably.

Mr. CHABOT. Thank you very much, Madam Chairman.

I want to thank the panel for their testimony here this morning and this afternoon now.

Chairwoman VELÁZQUEZ. Thank you.

Mr. Zelenka, if a company makes a rash decision to try to underbid a competitor in a reverse auction and wins with an unrealistically low figure, how will this affect the government and taxpayers?

Mr. ZELENKA. It puts the completion of the project at risk. As a prime contractor, I will not take a subcontractor's price if I believe it is marginal. Performance is everything for my business. You know, you only get one chance to screw the jobs up. So I think the government gets in the same spot.

If they take a price that they know is marginal, you know, it puts the completion of the project at risk, which then a project has inherent costs, and if you get too far below them, you know, you are going to end up with not being able to finish the job, and somebody else having to come back in, and that gets very expensive and delays the project or completion.

Chairwoman VELÁZQUEZ. Thank you.

Mr. Palatiello, the Brooks Act requires agencies to use qualification based selection of QBS. This requires factors besides just price that are used when evaluating firms for the provision of architectural and engineering services. If any agency fails to do this, what enforcement mechanisms are in place to compel a corporation?

Mr. PALATIELLO. They are actually rather limited, Madam Chairwoman. As Mr. Leazer indicated, we provide the same service to our members. If a firm sees a procurement that is not in full compliance with the Brooks Act, the firm will contact us, and we will try to be in touch with the agency, point out what the requirements are under the laws and regulations, but that is very voluntary on the part of the agency as to whether they want to try to work with us and make it right.

The only other alternative is for the firm itself then to file a protest. We would like to see a provision. We do not have standing for protests. We are not under the definition of an interested party on behalf of our members. We think that ought to be changed and associations ought to have the right to protest, not the award, the associations do not want to get in the middle of does Company A or Company B win the contract, but in order to help make sure that the Brooks Act is properly enforced, we would like to have protest standing to do that on behalf of our member or our members so that their name is kept out of it.

Chairwoman VELÁZQUEZ. Thank you.

Mr. Zelenka, the Office of Federal Procurement Policy conducted an online survey late last year on reverse auctions. Do you think that this was a useful method for gathering input on reverse auctions?

Mr. ZELENKA. I am not too familiar with the survey that they did. It would just all depend on who the target was of the survey. You know, certainly there are industries like the manufacturing industry where you are making paper clips or supplies, you know, that would give you some positive feedback on it, and there are other industries, you know, the complex service industry or a construction industry I think you had noted. So I am not sure who the target was on it.

Chairwoman VELÁZQUEZ. Okay. Well, do you have any other questions?

I want to thank the witnesses for spending time with us this morning and providing some insightful information as to the dynamics that are going on with federal procurement practices.

With that I ask unanimous consent that members will have five days to submit a statement and supporting materials for the record. Without objection, so ordered.

This hearing is now adjourned.

[Whereupon, at 12:18 p.m., the Committee meeting was adjourned.]

NYDIA M. VELAZQUEZ, NEW YORK
CHAIRWOMAN

STEVE CHABOT, OHIO

Congress of the United States
U.S. House of Representatives
Committee on Small Business

2361 Rayburn House Office Building
Washington, DC 20515-6315

STATEMENT
of the
The Honorable Nydia Velázquez, Chairwoman
Committee on Small Business
"Emerging Procurement Methods"
Thursday, March 6, 2008

This morning the Committee will continue its examination of small businesses' role in the federal marketplace. Today, we will review the effect of emerging contracting methods, which are being driven by the decline in the federal acquisition workforce.

Just 25 years ago, there were more than 135,000 contracting personnel. Now it has shrunk to only 85,000 staff – a decline of more than half. This has occurred while the dollar amount of contracts has increased by nearly $200 billion.

Clearly something has to give – and unfortunately, it is small businesses that are left to suffer the most. The result of these dramatic shifts has been more pressure on agencies to consolidate contracts and employ automated IT-driven procurement systems. People keep saying that this is easier – but for who? Not easier for small business, not easier for the taxpayer. It is just easier for the bureaucrat. And that should not be driving federal procurement policy.

The truth is that we hear a lot about the problems of contract bundling – but, the increased reliance on these new approaches is just as significant for small businesses. Many can't even gain access to these systems. And when they do – they are forced to compete with larger firms. Similar to the big box retailers putting the local hardware stores out of business, these new methods are creating an uneven playing field for small businesses.

Three of the major methods that have been growing in significance are GSA schedules, reverse auctions, and the e-Travel initiative. Some of them are unproven – and may only be suitable for certain types of purchases. Others create administrative nightmares that cause small businesses to incur unnecessary costs. And, some of these approaches may run counter to federal law – and may be providing taxpayers with a bad deal.

Taken together, these new processes are creating roadblocks for small firms as they try to navigate the federal procurement system. If left unchanged, this could lead to a marketplace without the contributions of small business – ingenuity and innovation. This will result in a less diverse supplier base – leaving taxpayers paying more for less.

It is important that those small businesses are not being put at a competitive disadvantage simply because of the adoption of new systems. These practices must be modified to provide greater equity and fairness for small firms. This would help ensure that the government is getting the best value.

After all, what good is a one-dollar hammer that falls apart after its first use – and then you have to purchase another one? That is not the lowest cost and it is not the best deal for the taxpayer.

With this hearing, these new procurement methods will be examined in a more systematic manner than has been done before. Each new approach should be evaluated as is done with federal regulations. What is its impact on small businesses? How will their ability to compete be affected? Going forward, these questions must be asked, and the pros and cons weighed, before any new procurement method is implemented.

Small businesses are the bedrock of the economy and must be given the opportunity to compete in the federal procurement marketplace. Methods that obstruct their participation will only serve to reduce the government's access to innovative goods and services. I thank the witnesses for being here today and look forward to all of your testimony.

U.S. House of Representatives
SMALL BUSINESS COMMITTEE
Representative Steve Chabot, Republican Leader

Thursday,
March 6, 2008

Opening Statement of Ranking Member Steve Chabot

Are New Procurement Methods Beneficial to Small Business Contractors?

Good morning. Thank you, Madam Chairwoman, for holding this hearing on how well federal agencies' acquisition strategies balance the need for quick and efficient contracting with the achievement of small business goals. The agencies must implement this balance in the face of a shrinking federal workforce and increased federal spending. I'd like to extend a special thanks to our witnesses, who have taken the time to provide the committee with their testimony.

Small businesses have been long recognized as one of the nation's most valuable economic resources and serve as seeds of innovation. Small businesses participate in all major industries, and represent 99.7 percent of all employers and 50 percent of all private sector workers. In addition, small businesses employ 39 percent of high tech workers such as scientists, engineers, and computer workers.

The federal government is the single largest buyer in the world, spending over $400 billion dollars in 2006.

Until the mid 1990s, procurement rules as implemented in the Federal Acquisition Regulation were designed around two major procurement statutes. One, the Competition and Contracting Act of 1984 established the rules for awards based on full and open competition. And two, the Truth in Negotiations Act of 1992 established rules for the disclosure of cost information.

Acquisition reform from the mid 1990s to present resulted in several changes to government-wide procurement practices. Legislative reform included the Federal Acquisition Streamlining Act of 1994 (FASA) that formalized the use of large multi-agency indefinite-delivery/indefinite-quantity (IDIQ) order contracting. FASA also encouraged the use of electronic tools like government purchase cards to improve efficiency and to ensure supplies and services were acquired at a competitive fair price with timely delivery.

The Service Acquisition Reform Act of 2003 (SARA), established an advisory panel to review and improve acquisition laws and regulations. The SARA panel published a final report in January 2007 with 89 recommendations.

We have excellent witnesses here today to provide us with insight into how well the federal agencies' acquisition strategies are structured and how to balance the need for quick and efficient contracting with the achievement of small business goals.

Thank you, Madame Chairwoman, for holding this hearing, and I yield back.

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Statement of Rep. Jason Altmire
Committee on Small Business Hearing
"Are New Procurement Methods Beneficial
to Small Business Contractors"
March 6, 2008

Thank you, Madam Chairwoman, for holding today's hearing to examine if new procurement methods are beneficial to small business contractors. The federal government spends nearly $400 billion annually on federal contracts. While small firms make up over 99 percent of all employer firms, they receive less than 23 percent of direct federal procurement. Today, we will discuss what measures are being taken to provide small firms with their fair share of federal contracting opportunities.

On average, small firms produce 14 percent more patents per employee than their larger counterparts, illustrating their innovation and ability to find new niches that larger firms do not. The federal government should take advantage of what small firms can offer. Over the past twenty five years, the total dollar amount for federal contracting opportunities has increased by $200 billion. However, federal agencies have cut their personnel staff and opted instead for automated systems. While this shift may result in less of an administrative burden for contracting officers, it has also precluded small firms from participation and has compromised the quality of goods and services.

At a time when our economy is facing a slow down, it is important for the federal government to invest in small firms that have the ability to stimulate economic growth. I hope that today's discussion will yield positive results and lead us on a path to develop new methods for how the federal awards contracts.

Madam Chair, thank you again for holding this important hearing today. I yield back the balance of my time.

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STATEMENT OF PAUL A. DENETT

ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY

BEFORE THE

COMMITTEE ON SMALL BUSINESS

UNITED STATES HOUSE OF REPRESENTATIVES

MARCH 6, 2008

Chairwoman Velazquez, Ranking Member Chabot, and Members of the Committee, thank you for the opportunity to appear today to discuss the current state of federal procurement. In particular, you have asked me to discuss the impact that emerging trends are having on small businesses.

The federal government is more reliant than ever before on contracting to support our agency missions. Annual contract expenditures have more than doubled since FY 2000, from about $200 billion to more than $400 billion today, with service contracting outpacing spending on products. Opportunities for the government contracting community continue to increase as agencies turn to contractors for their expertise and innovation. The Office of Federal Procurement Policy (OFPP) is committed to providing maximum opportunities for small businesses in federal contracting and subcontracting, so that they may flourish and apply their talents to the many pressing demands facing our government.

Increasing opportunities for small businesses has been a priority throughout my federal career. As the Senior Procurement Executive (SPE) for the Department of Interior (DOI) from 1993 to 2001, I created a small business friendly environment. DOI regularly sponsored trade fairs for the express purpose of matching small business capabilities with departmental needs.

The office for which I was responsible, the Office of Acquisition and Property Management, partnered with the Department's Office of Small Disadvantaged Business Utilization (OSDBU) to review acquisition plans, develop acquisition regulations and policies, and conduct acquisition management reviews evaluating bureaus' success on outreach and meeting small business goals. I was a strong advocate of the OSDBU's awards program to recognize small business accomplishments, measured both by the level of small business contracting and overall quality of outreach. I am proud to say that during my last two years as SPE at DOI, in FY 2000 and FY 2001, small business contracting represented 61% and 57% of the Department's contracting dollars, respectively – more than double the government-wide achievements in those years.

During my confirmation to become Administrator, I pledged to strengthen the management attention given to small business policy and contracting matters. I have taken a number of important steps to meet this goal. Specifically, OFPP has:

- Created the position of Deputy Administrator within OFPP with responsibility for small business contracting to ensure appropriate and consistent senior level attention on small business matters.
- Launched the Small Business Procurement Scorecard in partnership with the Administrator for the Small Business Administration (SBA) to hold federal agency leadership accountable for improving success in meeting small business contracting goals.
- Worked with the SBA Administrator to increase the number of SBA's procurement center representatives, so that agencies have access to the assistance they need for creating and developing more small business opportunities.
- Formed a Small Business Team to focus on small business regulatory issues in the Federal Acquisition Regulation (FAR) and improve the efficiency and effectiveness of regulatory development for small business issues through improved coordination and communication between SBA and the FAR regulatory drafters.
- Actively participated on the Small Business Procurement Advisory Council, which is chaired by SBA's Deputy Administrator and provides an important forum for information exchange and policy discussions with the directors of agency Small and Disadvantaged Business Utilization Offices.

Under my leadership, OFPP is pursuing acquisition initiatives to support an acquisition environment that is operationally efficient and responsive, but also open and fair. Operational efficiency is critical for agencies who find themselves constantly facing complex and time-sensitive problems. Transparency and fairness are equally critical elements of a healthy acquisition system, because they encourage contractors to compete for federal contracts and promote responsible stewardship of taxpayer dollars. Achieving these goals requires both a properly-staffed and well-trained workforce that is able to exercise sound business judgment and policies that promote the effective use of competition.

This morning, I would like to share with the Committee what we are doing to strengthen the acquisition workforce and our use of competition and how these efforts benefit our contracting community, especially small businesses. I would then like to describe how we are working to improve task and delivery order contracting, which represents one of the most significant growth areas in federal contracting over the past decade.

Strengthening the Workforce

The skills and good judgment of our acquisition workforce are closely tied to our government's ability to take effective advantage of the marketplace to meet mission needs. OFPP has taken unprecedented actions to improve the caliber, agility, and professionalism of the workforce.

Closing skills gaps. Recognizing that each agency's acquisition workforce differs in terms of size, capability, and skill mix, the Federal Acquisition Institute (FAI), in coordination with OFPP and the Office of Personnel Management (OPM), conducted the first-ever contracting workforce survey to aid civilian agencies in assessing their proficiency in core contracting competencies. These proficiencies include the ability to identify opportunities for small

businesses and effectively strategize with program officials to encourage small business participation. They also include more general contracting competencies that also foster small business participation, such as effective market research and defining requirements effectively and clearly. Each civilian agency, in consultation with OPM, is using the results of this survey to develop a tailored plan for closing its own skills gaps. OFPP is working with OPM to review these plans. The Department of Defense (DoD) is also conducting a contracting competency assessment of all military and civilian members of the Defense contracting workforce.

The FAI survey indicated that our workforce has substantial experience and competence in small business contracting. Basic certification requirements for contracting professionals have long included training on principles, rules, and techniques for contracting with small businesses. To reinforce and strengthen these skills, FAI is partnering with SBA, the General Services Administration (GSA), and DoD to develop two new on-line training modules for contracting professionals, requirements developers, and program managers. The first module, which will be launched in the third quarter of FY 2008, is designed to increase awareness of small business program requirements and improve acquisition planning to promote small business participation. The second module, which will be launched in early FY 2009, will focus on building small business friendly requirements and will provide tools and templates to facilitate this process.

Certifying the acquisition workforce. We have developed certification programs that, for the first time, standardize training and experience requirements for contracting officers, contracting officer technical representatives, and program managers across all civilian agencies. Focusing on the entire acquisition community -- as opposed to just contract specialists -- will significantly improve our stewardship of taxpayer dollars. Developing program and project managers will enable them to collaborate early in the process with contracting personnel,

including OSDBUs and competition advocates, to consider opportunities for small businesses and to write clear requirements. Clearer requirements will help small businesses make reasoned decisions as to whether and when they compete for work and, in turn, improve small businesses' opportunities to compete.

Recognizing acquisition excellence. The SHINE initiative, which I established upon my arrival at OFPP, recognizes individual achievements of our acquisition workforce and ensures best practices are highlighted and shared. These achievements touch on all aspects of the acquisition process, including use of small business contracting. Today, I would like to briefly acknowledge the achievements of Ms. Jean Todd of the Army Corps of Engineers, who set up an on-site, full service contracting office in New Orleans to provide critical reconstruction support in the wake of Hurricanes Katrina and Rita, including the award of contracts for more than 81,000 temporary roofs. Nearly $1 billion in subcontracts were awarded to small disadvantaged businesses and significant opportunities were also created for local small businesses.

Improving the Quality of Competition

Competition is the cornerstone of our acquisition system. Competition helps agencies save money and maximize value by considering viable alternatives in a reasoned and structured manner to identify and select the best possible solution for the taxpayer. I have made it a top priority to increase competition and related practices for achieving a competitive environment.

Last spring, I reinvigorated the role of the agency competition advocate. I instructed competition advocates to work closely with their Chief Acquisition Officers and Senior Procurement Executives to evaluate the overall strength of their agency's competition practices and develop plans for maximizing competition. We provided competition advocates with a checklist of questions to consider in conducting this evaluation, including whether plans are

being developed to provide maximum practicable opportunities for small businesses, both in the prime contracting and subcontracting. The checklist addresses a number of additional issues that bear on effective small business participation, such as whether: (1) information in statements of work is sufficient and stated clearly so that offerors may make informed business decisions on whether to respond and (2) the agency is building sufficient time into the acquisition schedule to maximize competition and encourage contractors to provide quality proposals.

Agencies were asked to provide copies of their competition advocate reports to OFPP. We are reviewing the reports for lessons learned and best practices, such as including increased use of competition in employee position descriptions and performance plans and appointment of local competition advocates. We intend to release the results of our review shortly.

Improving Task and Delivery Order Contracting

One of the most significant trends of the past decade has been the dramatic increase in agency expenditures through task and delivery order contracts. Data in the Federal Procurement Data System (FPDS) shows that these expenditures have grown from approximately 14 percent of total dollars obligated in FY 1990 to over 50 percent of total dollars obligated today. There are a number of reasons for this trend. In 1994, the Federal Acquisition Streamlining Act authorized agencies to award multiple award task and delivery order contracts and then place orders using streamlined procedures. Less than two years later, the Clinger-Cohen Act statutorily recognized government-wide acquisition contracts (GWACs) and multi-agency contracts, both of which are typically structured as multiple award task and delivery order contracts. During this same general period, GSA enhanced the Multiple Award Schedules (MAS) Program, which is also built on task and delivery order contracting.

OFPP and agencies are taking a variety of steps to ensure task and delivery order contracts are used effectively and in an open and fair manner that facilitates small business participation. These efforts include: (1) strengthened regulatory guidance to facilitate better competition and increased transparency, (2) smarter use of technology to reduce transaction costs and improve contractor visibility, (3) providing effective access to small business contractors through government-wide contract vehicles, and (4) integrating small business participation into emerging buying strategies.

Regulatory guidance. OFPP has placed particular emphasis on improving the use of competition under multiple award contracts. At my direction, the Civilian Agency Acquisition Council and Defense Acquisition Regulations Council are developing changes to the FAR to require:

- Public notice of orders awarded on a sole source basis;
- Receipt of at least three proposals on MAS contract buys and fair notice to all contract holders on other multiple award contracts;
- Clear statements of requirements, greater disclosure of the government's evaluation criteria, reasonable response times, and documentation of the basis for best-value award decisions; and
- An explanation of the government's award decision for unsuccessful offerors.

These changes, which are designed to achieve more consistent use of competition, greater clarity, and transparency, should help to improve opportunities for all multiple award contract holders, including small businesses.

Although not focused directly on competition or task and delivery order contracting, an important amendment will soon be made to the FAR to require that small business subcontract reports be submitted using the Electronic Subcontracting Reporting System (eSRS), rather than

on paper forms. Use of eSRS will motivate prime contractors to increase their subcontracting with small businesses by making it easier for agency management to track this activity.

Technologies. Agencies are using the efficiency, transparency, and administrative simplification that technology enables to stimulate the type of robust participation that makes for a successful marketplace. This morning, you will hear the Commissioner of GSA's Federal Acquisition Service describe how their e-systems are making it easier and less costly for small businesses to transact with GSA and federal customers across government. For example, e-Buy, the electronic quote system for MAS contract ordering, is serving as a catalyst for enhanced competition and informed decision-making without sacrificing the efficiencies that draw federal customers to the MAS Program.

The "interagency contract directory" (ICD) is another example of how we are using the powers of technology to improve our buying practices. The ICD, which is being reinvigorated as part of the FPDS infrastructure, will provide information about task and delivery order contracts and other vehicles available for interagency use, including information about the scope of the contract, small business status -- including the various categories of small business -- ordering procedures, and fees. Agencies will be able to use the ICD as another information source during market research to see what small businesses may be available to meet their needs.

Contract vehicles. I applaud GSA, as our central buying agency, for the numerous steps it has taken to successfully facilitate significant opportunities for small businesses through its MAS Program. Eighty percent of the 17,000 plus contactors on the MAS Program are small businesses. In FY 2006, these businesses received almost 37 percent of total sales under the MAS Program, well above the government-wide goal of 23 percent. This translates into sales of over $13 billion. I also appreciate GSA's ongoing commitment to managing a variety of

GWACs set aside exclusively for small businesses, including "8(a) Streamlined Technology Acquisition Resources for Services," the VETS GWAC, and Alliant Small Business. Each of these vehicles provides federal customers across government with easy and efficient access to different types of small businesses to meet their varied information technology needs.

Buying strategies. Interagency contracting, which is facilitated through task and delivery order contracts (especially multiple award contracts), has increased in recent years. Interagency contracts offer important economies and efficiencies to federal agencies. OFPP has developed comprehensive guidance that will soon be released to strengthen acquisition practices under interagency contracts. The guidance will feature a model interagency agreement to help agencies delineate their respective roles and responsibilities throughout the acquisition process, including reporting on and crediting for small business achievements.

To further ensure effective use of interagency contracting and task and delivery order contracts, OFPP established the strategic sourcing initiative in 2005. This initiative is designed to identify multi-agency solutions for commonly purchased goods and services in a structured fashion that allows the government to leverage its purchasing power, reduce cost, and improve performance. From its inception, the strategic sourcing initiative has sought to increase achievement of socio-economic acquisition goals. In fact, increased small business participation is one of five principal performance metrics. I am pleased to tell you that we are having significant success in meeting this metric:

- In 2006, DoD had 42 strategic sourcing efforts totaling $4.3 billion. Forty-one percent of these dollars went to small businesses.
- Under the Air Force's Medical Services Commodity Council, all awards for medical services, which totaled $40.7 million, were made to small businesses through competition.

- In August 2007, GSA awarded 13 blanket purchase agreements for office supplies of which 11 awards were made to small businesses. Awards were made to 8(a) small businesses, two veteran-owned small businesses, including a woman-owned, veteran owned small business, and a service-disabled veteran-owned small businesses.

Reverse auctions

Another emerging procurement tool is a reverse auction, where sellers compete by offering to sell products or services at progressively lower prices. Sellers have the opportunity to continually reduce their prices until price reductions stop or until close of the auction. Agency use of reverse auctions is typically facilitated by a third party.

The Conference Report for the National Defense Authorization Act for FY 2006 requested that OFPP, in consultation with the Federal Acquisition Regulatory Council, review the use of reverse auctions and identify the types of acquisitions that are suitable for these online services and features that should be included. OFPP and the Acquisition Committee for E-Gov formed an interagency working group to review the regulations, policies, and business considerations for using these online procurement services. I have tasked the working group, at a minimum, to consider: compiling lessons learned by agencies; obtaining information from the private sector; and developing a best practices guide and coverage in the FAR. I am reminding the working group to carefully consider in their deliberations whether adequate protections exist for sellers, particularly small businesses, and if additional protections are needed. As part of their efforts, the working group has conducted surveys in which sellers and government buyers were asked questions about their experience and views regarding agency use of reverse auctions. The working group is currently analyzing the results of the surveys.

Conclusion

Chairwoman Velazquez and Members of the Committee, the Administration is committed to providing maximum opportunities for small businesses in federal contracting and

subcontracting. We are increasing the dollars awarded to small businesses. At the same time, we appreciate that there is more to do. We will continue to work with SBA and other agencies to ensure that they increase their contracting and subcontracting with small businesses. We look forward to working with this Committee and other members of Congress as we pursue these endeavors.

This concludes my prepared remarks. I am happy to answer any questions you might have.

STATEMENT OF

JAMES A. WILLIAMS

COMMISSIONER

FEDERAL ACQUISITION SERVICE

U.S. GENERAL SERVICES ADMINISTRATION

BEFORE THE

COMMITTEE ON SMALL BUSINESS

U.S. HOUSE OF REPRESENTATIVES

MARCH 6, 2008

Chairwoman Velázquez, Ranking Member Chabot and Members of the Committee, I would like to thank the House Committee on Small Business for inviting me here today to discuss how GSA's electronic systems support small businesses.

As Administrator Doan has often said to this committee in the past, GSA has been and will continue to be a good friend to the small business community. I am pleased to report on GSA's emerging procurement methods and their impact on Small Business. My testimony will focus on our electronic systems (e-systems), and our processes, contract vehicles and solutions, and how they have helped GSA strengthen the relationship with this community.

Background

At present, there are many electronic tools available for use by both large and small businesses. GSA has developed electronic systems specifically designed to allow small businesses to participate in GSA acquisition programs since 1995, when e-commerce was in its inception. E-systems allow for faster and easier processes, and can increase accessibility and transparency and minimize costs to small businesses wanting to sell to the government.

Although contracting continues to evolve and increasingly utilizes electronic methods, paper processes still exist and are often used in combination with our e-systems. GSA offers e-systems to help companies obtain GSA contracts, manage GSA procurement transactions, place orders, and publicize business opportunities. GSA provides PC-based tools free of charge to allow small businesses to submit their catalogs and receive and fill online purchase orders. The only costs small businesses incur to fully participate in these e-systems are for their computer equipment, email accounts and telecommunications. Simply put, e-systems help small businesses do business with the federal government and facilitate the connections between agency customers and small businesses.

We see GSA's role as providing a centralized delivery system for federal agencies to obtain commonly used goods and services. In that role, GSA provides an efficient interface for the private sector to have low-cost and effective market entry into the government marketplace. GSA also increasingly turns to more efficient e-systems and processes to lower transactional costs for our customer agencies, thereby ensuring a broad industrial base and maximizing opportunities for small and disadvantaged businesses. We try to ensure that ordering agencies, when attempting to meet their requirements and small business goals, can do so in an efficient manner through the use of GSA's services and programs.

Perhaps one of the most advantageous programs GSA manages that benefits small business owners has been the Multiple Award Schedules Program. The Multiple Award Schedules Program accounts for about $36 billion in orders

annually. Eighty percent of the 17,000 plus contractors in this program are small businesses and they receive about 37 percent of the total dollars spent under this program, well above the government-wide goal of 23 percent. The Schedules Program is advantageous for small businesses because it provides them with training and access to the entire government marketplace.

Description and Success of e-Systems and the Impact on Small Business

GSA continues to increase its reliance on e-systems for procurement and delivery of its services to customer agencies. The e-systems GSA manages, including those listed below, have a profound impact in creating opportunities for small businesses:

- **GSA Advantage**
  GSA *Advantage!®* serves as the online shopping and ordering system that provides access to thousands of contractors and millions of supplies (products) and services. It offers the most comprehensive selection of approved products and services from GSA/VA Schedules, as well as all GSA Global Supply products, which include over 16,000 contracts and over 15 million products online. GSA *Advantage!®* promotes increased access to the small business community by allowing customers to tailor their searches specifically for products and services provided by disadvantaged, veteran-, service-disabled veteran-, women-owned and other small businesses.

  The use of this system is impressive. GSA *Advantage!®* has recorded over 14,000 new users and has logged over 182,466 shopping sessions, just since the beginning of the 2008 fiscal year. This provides immediate market access to our many GSA contract holders.

  Additionally, GSA *Advantage!®* has been a proven procurement-winning tool for small business. The total amount of sales that went to small business contractors has steadily increased from 49.5 percent in FY 2001 to 76.5 percent in FY 2007. This shows a much faster increase in the amount of sales being made to small businesses than large businesses every year since 2001.

- **e-Buy**
  GSA's e-Buy is an electronic Request for Quote (RFQ) / Request for Proposal (RFP) system designed to allow federal buyers to request information, find sources, and prepare and post RFQs/RFPs online for millions of services and products offered through GSA's Multiple Award Schedules (MAS) and Government-wide Acquisition Contracts (GWACs).

  Federal buyers can use e-Buy to obtain quotes or proposals for services, large quantity purchases, big ticket items, and purchases with complex

requirements. Just through January 2008, there have been over 8,000 closed RFQs in the e-Buy system, with an estimated award value of over $1.1 billion in awards. Customers can use e_Buy to request invitations to bid specifically from disadvantaged, veteran-, service-disabled veteran-, women-owned and other small businesses.

This not only allows agency customers to open their procurements to small businesses, but allows for low-cost competition among those small businesses. This is a great tool for small businesses, taxpayers and agency customers alike.

- **e-Offer/Mod**
  e-Offer is a tool to submit online contract offers and contract modification requests to FAS. The purpose of e-Offer is to create an interactive, secure electronic environment that simplifies the contracting process from submission of proposal to awards. It enables a seamless transmission of data from the vendor community to the FAS contracting offices.

  Our data show that small businesses regularly take advantage of this tool. Over the last five fiscal years, with very little deviation from year to year, small businesses account for about 95 percent of all electronically submitted offers. Small businesses have readily adapted to the e-Offer process; of the 511 awards made through e-Offer, 488 have gone to small businesses. This is evidence that our e-systems have been adopted and are benefiting small businesses.

- **Schedule Input Program (SIP)**
  The Schedule Input Program (SIP) was created in 1996 to assist small vendors with using GSA e-commerce systems. The capabilities designed into SIP include all the functions a business requires to interact with GSA *Advantage!®* and e-Buy. Vendors can load their catalog information to GSA *Advantage!®*, download purchase orders and provide status back to the customer. It is provided free to vendors and requires only basic computing equipment to use.

  GSA also operates a Vendor Support Center (VSC) to assist vendors in resolving any issues that may arise with the SIP tool. The call center operates 5 days a week, 7:30 am-5:30 pm EST. The VSC also provides weekly training webinars with an average attendance of 60 vendors. In addition, many other tools, such as FAQs and user guides, are provided for vendor use at http://vsc.gsa.gov .

  GSA is currently planning a redesign of the SIP process that will take advantage of commercial catalog management services that have evolved in the past ten years in the e-commerce world. GSA will only implement a new SIP process if it results in more efficient and effective systems,

process and procedures for our vendors. Through industry meetings on this project, GSA has become aware of several small businesses whose capabilities would allow them to meet GSA's requirements for this process, and will develop an acquisition strategy that allows full participation for these small businesses.

Benefits of GSA E-Systems

GSA e-systems and processes promote transparency, accessibility and efficiency, making it easier for all businesses—including small businesses—to do business with the government and also making it easier for customers to find best value, quality small business partners.

Transparency

GSA is focused on making its processes more transparent to its small business partners. The increase in transparency allows for all businesses, particularly small businesses, to have a greater awareness of contracting opportunities. GSA has been revamping its IT procurement systems to ensure they are more user friendly for our customers and our business partners.

Systems such as e-Buy promote the ability of small businesses to gain access to procurements and an opportunity to participate in the procurement process. With the increased utilization of e-Buy, more opportunities are available and can be more easily reviewed by small businesses. Additionally the GSA *Advantage!®* system allows easy access to small business information by the federal acquisition community.

Accessibility

The e-Authentication system is a means of enabling accessibility for businesses and citizens. When transacting with federal applications, businesses are often burdened by having to maintain multiple identity credentials. E-Authentication allows these entities to securely identify themselves when accessing federal government applications online. It enables millions of safe, secure, trusted online transactions between government agencies and the citizens and businesses they serve, while reducing the online identity management burden. GSA manages the e-Authentication initiative which will facilitate small businesses being able to use a single identity credential to interface with many small-business-facing systems across the Federal government.

GSA itself operates the e-Authentication program as an e-Gov initiative. More than 20 agencies are participating in the e-Authentication program, which currently supports more than 70 federal online services and continues to grow. In FY 2008, GSA has taken steps to expand the services offered by e-Authentication and therefore expand benefits to federal agencies, businesses

and citizens. GSA's programs—which offer standardized, electronic ways to interact with the federal government, whether selling to the government or just interacting with agencies—are particularly helpful to small businesses, since they may have more limited resources for establishing connections to the government and cannot afford to engage with the government using multiple stove-pipe means.

GSA also offers greater accessibility for small businesses to sell to an expanded government marketplace, reaching state and local customers at no additional cost. Through their Multiple Award Schedule contracts, vendors are eligible to sell to state and local governments, in addition to federal agencies, under three specific regulations:

- Section 211 of the E-Government Act of 2002 (Cooperative Purchasing), which provides open use of IT Schedule 70 products and services for purchase from approved vendors for any reason;
- Section 833 of the 2007 Defense Authorization Act, which provides open use of products and services from approved vendors on all Multiple Award Schedules, as long as those products are used for disaster recovery only; and,
- Section 1122 of the Fiscal Year 1994 National Defense Authorization Act, which provides limited purchasing authority to state and local law enforcement to purchase from approved vendors—using specific MAS contracts that offer law enforcement equipment—as long as the equipment is used in the performance of counter-drug activities.

Efficiency

In addition to providing transparency and accessibility, GSA e-systems facilitate greater efficiency in the procurement process for small business through lowering transaction costs and providing greater market access, to name just two ways. Additionally, federal, state, and local government customers have access to GSA e-systems—specifically GSA E-library and GSA *Advantage!*®—to conduct vendor and market research in order to locate eligible Multiple Award Schedule vendors throughout the country. Offering customers an efficient means to conduct market research gives small businesses the ability to provide additional procurement tools without straining their valuable—and often limited—resources.

Acquisition Solutions for Small Businesses

In addition to electronic tools, GSA provides customers with a wide range of acquisition vehicles, some specifically designed to provide opportunities to the small business community. These include:

- 8(a) STARS (Streamlined Technology Acquisition Resources for Services), is a contract vehicle that provides a full range of IT solutions—including application development, computer facilities management services, and information assurance—through small, disadvantaged 8(a) firms.

  As an 8(a) set-aside, this contract vehicle provides small businesses which have been historically left out of the procurement process with a chance to compete in the federal marketplace. GSA customers benefit by having access to a portfolio of over 200 industry partners distributed across eight areas of expertise. Federal agencies also receive 8(a) and other small business credits toward their procurement preference goals through the use of these contracts.

- Alliant SB, a small business set-aside GWAC, is designed to provide worldwide information technology solutions to federal agencies, while strengthening federal contracting opportunities for small business concerns. Alliant SB will assist agencies in reaching their small business utilization goals, while providing small businesses with opportunities to win prime contracts in the information technology arena and develop their business skills before moving into unrestricted acquisition environments.

- VETS (Veterans Technology Services), a service-disabled, veteran-owned small business set-aside GWAC, encompasses the functional areas of systems operation and maintenance, and information systems engineering. VETS is designed to provide worldwide information technology solutions to federal agencies, while strengthening federal contracting opportunities for service-disabled veteran-owned small businesses.

- The VETS GWAC assists agencies in meeting their three percent service-disabled veteran-owned small business goals by providing pre-qualified industry partners in one easy-to-use contract vehicle. Service-disabled veteran-owned small businesses will, in turn, be provided with opportunities to compete within a smaller group of contract holders, allowing self-marketing opportunities and a chance to develop their businesses before moving into larger acquisition environments.

In closing, we offer superior service, innovation and value to our clients and partners through all of our GSA e-systems and solutions. While we are very proud of the great results that these e-systems advances have produced in terms of helping small businesses do business with the government—maximizing their opportunities and minimizing their costs—we will continue to aggressively seek ways to build upon this successful foundation.

COMPLETE STATEMENT OF

MAJOR GENERAL RONALD L. JOHNSON
DEPUTY COMMANDING GENERAL

U.S. ARMY CORPS OF ENGINEERS

DEPARTMENT OF THE ARMY

BEFORE THE

Committee on Small Business

HOUSE OF REPRESENTATIVES

March 6, 2008

Madam Chair and Members of the Committee, I am Major General Ronald Johnson, Deputy Commander General of the U.S. Army Corps of Engineers (Corps). Thank you for the opportunity to testify before you today concerning the impact of emerging procurement methods on small business contractors. In 2004, the Corps completed a pilot study and report on reverse auctioning and it is my understanding that the Committee specifically requested that I discuss this report, entitled "Final Report on USACE Reverse Auction Pilot Program." This report was prepared by LTC A. J. Castaldo, the Corps' Deputy Principal Assistant Responsible for Contracting at that time. While the results of the pilot program were never submitted formally, we did provide the results to our industry partners and the public. My testimony will be split into two main topics; the Corps' experience with reverse auctions and a general update on the Corps' Small Business Program.

In the 2002, Defense Appropriations Act, Congress provided $1.4 million to "Freemarkets" to explore reverse auctions. In turn, the Corps of Engineers received the funds (Department of Defense - Operations and Maintenance) to explore online markets. The Corps sought to do four things with this funding:

- Conduct a pilot program to test online E-sourcing, specifically full-service reverse auctioning for use by the Corps and its industry partners;
- Encourage activities within the Corps to explore the potential of online reverse auctioning;
- Conduct training in the use of this new and emerging acquisition tool; and
- Determine the appropriateness of augmenting our acquisition strategies and processes with reverse auctioning to improve efficiency of the acquisition process.

During Fiscal Year 2003, the Corps conducted a pilot program to evaluate the use of e-sourcing, specifically reverse auctioning in conjunction with the diverse and complex mission of the Corps. To accomplish the goals of this pilot program in accordance with Congressional direction, the Corps entered into a contract with FreeMarkets, Inc., an e-sourcing contractor who has subsequently been acquired by Ariba, Inc. FreeMarkets provided reverse auction software technology and training to eight separate Corps Districts (Louisville (2), Ft. Worth, Norfolk, Omaha, Philadelphia, Savannah, Huntsville Center, and Pittsburgh), provided two different forms of reverse auction technology training and gave their expertise, assistance and advice to the reverse auction process. Reverse auction software, such as that provided by FreeMarkets, Inc., provides a contracting officer with a pricing tool that can be used during the acquisition process.

In a typical online reverse auction, there is an initial starting price that is posted by the purchaser. Sellers have the ability to submit multiple and consecutively lower bids for a requirement during a set time period. Each seller has the ability to see the lowest bid, although they are not able to see the identity of that bidder. A potential benefit is that

competition will help drive prices lower, because the sellers have the ability to see the lowest bid.

FreeMarkets, Inc. introduced the concepts of reverse auctioning to the Corps and its reverse auction software tool to our pilot sites. Contracting Officers used the reverse auction process on nine individual projects for construction (5), commodities (3), supplies and services (1). The Corps received protests on two of the construction projects and one of the protests was sustained due to a problem with the Reverse Auction software.

The Corps, through our pilot study, found no basis to claim that reverse auctioning provided any significant or marginal savings over a traditional contracting process for construction or construction services. Reverse auctioning has a chance to provide benefit when the commodities or manufactured goods procured possess a controlled and consistent nature with little or no variability. Construction and construction services are, by nature, variable due to factors such as changing customer requirements and site conditions.

Specifically, due to the variability of each construction project, the reverse auction functionality that allows comparison to past projects does not provide usable results for Contracting Officers of our construction projects. Our study also found that there is considerably more time involved in the preparation and execution of reverse auctions, which increases the level of labor and project costs associated with the procurement. Labor costs are an important aspect of our project costs and we always strive to ensure that they are controlled to the extent possible and appropriate.

In summary, the Corps, working with Freemarkets, Inc. and through the pilot programs, was not able to support the potential benefits of reverse auction for our construction program. While this tool may be appropriate and beneficial in more repetitive types of acquisition, we did not find it to be a useful tool for our construction program and do not currently utilize it today to any great extent.

Update on the Corps' Small Business Program

Before closing, I would like to update you on the Corps' small business program for the last two fiscal years. The Corps has long considered the small business community an important partner in the success of its mission. Historically, the Corps has been and continues to be one of the Department of the Army's strongest small business supporters as demonstrated by its accomplishments in small business prime contract awards. The following table shows a comparison of small business accomplishments for Fiscal Year (FY) 2006 and FY 2007. In FY 2006, 37% of total procurement dollars or $5.7 billion went to small businesses. In FY 2007, the accomplishments were slightly higher. As an agency, the Corps has very aggressive small business goals; the overall small business goal is almost twice the statutory goal.

FY06/FY07 Small Business Prime Award Comparison

US Business Base		***FY06 - $15.1B***			***FY07 - $15.4B***		
	Statutory	***Goal***	***SB Dollars***	***Corps***	***Goal***	***SB Dollars***	***Corps***
Small Business	*23%*	***43.0%***	***$5.7B***	***37.8%***	***44.8%***	***$5.8B***	***38.0%***
Small Disadvantaged Business	*5%*	***16.5%***	***$2.3B***	***15.4%***	***19.9%***	***$2.66B***	***17.2%***
8(a)-part of SDB goal	*NA*		***$1.39B***	***9.2%***		***$1.9B***	***12.4%***
Service Disabled Veteran Owned	*3%*	***1.5%***	***$244M***	***1.6%***	***1.5%***	***$205M***	***1.3%***
Woman Owned	*5%*	***5.6%***	***$832M***	***5.5%***	***5.4%***	***$905M***	***5.9%***
HBCU/MI	*NA*	***13.9%***	***$10M***	***22.0%***	***13.4%***	***$15M***	***30.4%***
HUBZone	*5%*	***8.0%***	***$1.5B***	***10.1%***	***9.2%***	***$1.7B***	***11.1%***

The Corps will continue to explore other small business prime options, such as buying construction supplies from small business to be provided as government furnished equipment. The Corps will strive to exceed our small business goals, but our main focus will be on increasing the dollars going to small businesses year after year.

We engage the small business community not because federal statutes require us to do so, but rather because it makes good business sense. Our continued commitment to successful small business partnerships will help to ensure that a vibrant and robust cadre of small businesses is available and utilized in performing our mission.

Summary

To close, I would like to thank you once again, Madam Chair, for allowing the Corps of Engineers the opportunity to appear before this Committee today. I will be happy to answer any questions you or Members of the Committee may have.

Thank you.

Testimony of John M. Palatiello
Administrator
Council on Federal Procurement of Architectural & Engineering Services (COFPAES)
before the
House Committee on Small Business
March 6, 2008

Madam Chairman, members of the Subcommittee, I am John Palatiello and I serve as Administrator of the Council on Federal Procurement of Architectural and Engineering Services (COFPAES). COFPAES was formed in the 1960s to serve as the unified voice of the architectural, engineering and related (A/E) services profession on issues related to Federal contracting. Our member organizations are the American Congress on Surveying and Mapping (ACSM), American Institute of Architects (AIA), American Society of Civil Engineers (ASCE), Management Association for Private Photogrammetric Surveyors (MAPPS) and National Society of Professional Engineers (NSPE). Throughout its history, COFPAES has focused on ensuring quality and competence in procuring professional A/E services. COFPAES serves the American public by assisting Congress and Federal agencies in ensuring that projects to satisfy the building, infrastructure, resource, defense, and security needs of our Nation are conducted in an efficient and quality manner. The Council is the major policy advocate for the "Brooks Act" (40 U.S. Code 1101 et. seq. and part 36.6 of the Federal Acquisition Regulation (FAR)), the qualifications based selection (QBS) process that governs Federal procurement of A/E services. While acting as a sounding board on federal procurement procedures, policies, and regulations, COFPAES has stimulated the development of SF254 and SF255 questionnaires, and their successor, the SF330, and published guides to contracting with the federal government. COFPAES also hosts a forum for the exchange of information between public servants and private practitioners on issues affecting A/E procurement.

Thank you for this opportunity to share our views on "Are New Procurement Methods Beneficial to Small Business Contractors?"

The Federal Government has an annual construction budget (direct and grant-in-aid) of more than $55 billion and contracts for A/E services of more than $5 billion. America's architects, engineers, surveyors and mapping professionals, in large business and small, are the world's leaders and they contribute to the health, welfare and safety of the American people.

Brooks Act Qualifications Based Selection (QBS)

The basis for present statutory authority for procurement of personal and professional services, and the use of QBS, can be traced back to an 1861 Appropriations Act. 12 Stat. 214 (1861). This Act provided for the appropriation of funds for various purposes, including the compensation of civilian surveyors. Section 10 directed that all contract for supplies or services be made by advertising for proposals "except for personal services." Id. at 220. A year later, the Attorney General ruled that a contract for surveying was a contract for personal services within the meaning of the Act and, therefore, could be made without advertisement and competitive bidding. 10 Op. Atty. Gen. 261 (1862). In reaching his decision, the Attorney General observed:

"...although this policy (price competition) is certainly desirable in all cases, there are yet some to which it cannot well be applied. Such are contracts for services which require special skill and experience... In all contracts for services which presuppose trained skill and experience, the

public officer who employs the service must be allowed to exercise a judicious discrimination, and to select such as, in his judgment, possesses the required qualifications.

Of this class are contracts for surveying the public lands. The service to be performed requires not only fidelity and integrity, but a certain kind of skill and knowledge, and the officer whose duty it is to let the contract, is bound to know that the person he employs possesses these qualifications. It is not half so important to have the work done cheaply as to have it done well, and the price to be paid for it, whilst it should be but fair and reasonable, ought to be far from controlling consideration". (Id. at 262 (emphasis added)).

The process was codified in 1972 in Public Law 92-582 and amendments to the Brooks Act were enacted in 1988 in section 724 of Public Law 100-656 and section 8 Public Law 100-679. Congress has clarified or applied the Brooks Act to Federal agency activities, or Federal grant programs, in a variety of laws, including the 1982 Military Construction Codification Act, 1983 Supplemental Appropriations Act, 1983 Competition in Contracting Act, 1986 Superfund Amendments, Section 119(f), 1986 Water Resources Act, Section 918, 1986 Defense Appropriations Act, Section 8087, 1987 Defense Appropriations Act, 1987 Highway Act, Section 111(2)(A), 1987 Airport and Airway Safety and Capacity Expansion Act, Section 109(g), 1988 Energy and Water Development Appropriations Act, Section 377(b), 1997 Omnibus Consolidated Appropriations Act, and the 1999 Department of Defense Appropriations Act.

This time-tested and proven process is also codified in more than 40 state "mini-Brooks Acts," and is recommended in the American Bar Association's Model Procurement Code for State and Local Government.

The need for the Brooks Act was articulated by then-Representative Albert Gore, Jr., as Chairman of the Subcommittee on Investigations and Oversight of the House Committee on Science and Technology -

"Federal procurement practices that lead to or promote the selection of architects and engineers on a "low-bid" basis should be changed to require prequalification of bidders, with greater consideration given to prior related experience and past performance of the parties seeking the contract award...The government should also ensure that all necessary architectural and engineering design and on-site services in public construction projects are furnished by licensed professionals who are qualified and experienced to assure the construction of safe structures." ("Structural Failures in Public Facilities," March 15, 1984)

When the Brooks Act was being debated in the Congress in 1972, the rationale for qualifications based selection was articulated by several members.

Mr. Jackson: This legislation would not establish any new policy regarding the procurement of architect-engineer services by Federal agencies, but it would confirm long-established existing practices whereby such professional services are secured by a professional selection and negotiation process under which the emphasis is on professional qualification and expertise for the specialized services which are needed from time to time for the Federal agencies to carry out their missions ... we have over the years excluded professional services from the normal competitive bidding requirements for government purchase of services (41 U.S.C. 252(c), 10 U.S.C. 2304(a), 41 U.S.C. 5). 118 Cong. Rec. 36182 (1972).

Mr. Randolph: Ask 10 A/E firms to bid on the design of a particular facility and many agencies will take the easy way out and select the low bidder. Under such circumstances, we may end up with a technically capable architect or engineer, but one who, for lack of experience or because of a desire to stay within his bid reduces the time spent on field surveys or in the preparation of detailed drawings, or in providing inspection services. As a result, the government may have saved itself a half of one percent to the cost of construction, operation or maintenance. Id. at 36188.

Congress provided clear and unambiguous statutory authority clarifying Brooks Act application to surveying and mapping in Public Law 98-63, a bill making supplemental appropriations for FY 1983.

"Contracts for architect and engineering services, and surveying and mapping services, shall be awarded in accordance with title IX of the Federal Property and Administration Services Act of 1949 (40 U.S.C. 541) et. seq.)." (H.R. 3069, page 11, 98th Congress, 1st Session)

As a result of that language, the Corps of Engineers (civil work division, which is not a title 10 agency) returned to the Brooks Act procedure for surveying and mapping procurements. The Corps also promulgated a broad and expansive definition of surveying and mapping subject to Brooks Act procedures (SEE EFARS 36.601-4).

In providing an explanation of the provision, Congress appeared to have intended to make the authority both permanent and government-wide. Although the relevant language is provided in the Corps of Engineers section of the bill's accompanying report, (H. Rept. No. 98-207, 98th Congress, 1st Session. (at pp. 40 & 100)), the language is repeated under a section entitled "Changes in the Application of Existing Law" (at p. 111) without qualification or limitation of its application.

This fact was underscored by the Congress when the Competition In Contracting Act first passed the Senate. Prior to its inclusion in the Budget Deficit Reduction Act, (P.L. 98-369), the Senate considered and passed S. 338, the original Competition in Contracting Act, on November 11, 1983. During Senate debate on the bill, Senator Cohen, the bill's sponsor, and Senator Percy, a Senate manager of the Brooks Act in 1972, engaged in a colloquy to clarify the intent of Congress with regard to the application of the Brooks Act to surveying and mapping services:

"Mr. Percy. Mr. President. I rise with an inquiry. The Competition In Contracting Act would revise the Federal Property and Administrative Services Act to broaden the requirements for competition, but the language of section 303 contains the words "...except as ...otherwise authorized by law...," carrying forward a very important distinction made in the Brooks Act, 40 U.S.C. 541. The distinction provides that architect and engineering services, defined as "those professional services of an architectural or engineering nature as well as incidental services that members of these professions and those in their employ may logically or justifiably perform," may be procured by competitive negotiation -- a time-tested method for acquiring professional services of this kind. Am I correct that this important distinction will be preserved under the language of section 303?

Mr. Cohen. Yes; it would be preserved.

Mr. Percy. I thank the Senator. I have also been concerned that the Comptroller General has given an overly restrictive interpretation to this definition of architecture and engineering

services, and has decided on several occasions that surveying and mapping services are not included. However, the issue has been more recently addressed in the Supplemental Appropriations Act for 1983. The section of that act appropriating funds for the Corps of Engineers of the Department of the Army provides that "contracts for architect and engineering services, and surveying and mapping services, shall be awarded in accordance with title IX of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 541 et seq.)..." Under this language, the Corps of Engineers will award contracts for mapping and surveying in accordance with the Brooks Act.

Mr. Cohen. That is a positive step. I think it is important to note, moreover, that this language does not only apply to the Corps of Engineers, but to all Government procuring agencies.

Mr. Percy. Would the Competition in Contracting Act then carry forward the construction of the Brooks Act contained in that language from the Supplemental Appropriations Act?

Mr. Cohen. That is correct.

Mr. Percy. I thank the Senator from Maine for his most helpful clarification."

See: Cong. Rec. (Daily Edition) Vol. 129, No.155, November 11, 1983, p. S.16007

It is apparent Congress intended to make application of the Brooks Act to surveying and mapping services permanent and government-wide. This is not only evident by the aforementioned colloquy between Senators Percy and Cohen, but also by the construction of the provision in the 1983 Supplemental Appropriation (Public Law 98-63).

The fact that Congress defined the QBS process for A/E selection as a "competitive procedure" in the Competition in Contracting Act (codified in 10 U.S.C. 2302(2)(A) and 41 U.S.C. 259 (b)(1)) underscores the comments made by Senator Gurney during consideration of the Brooks Act in 1972, when he said,

"Any Federal procurement officer...will tell you that competition based on professional-technical qualifications is every bit as hot and demanding as competition based upon price." (118 Cong. Rec. 36185 (1972)).

When the Brooks Act was amended in 1988 (section 742 of PL 100-656 and section 8 of PL 100-67 9), the definition of A/E services was modified to provide:

"The term ``architectural and engineering services" means—
professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this paragraph;
professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and
such other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, <u>surveying and mapping</u>, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services,

soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services." (emphasis added).

Congress provided no limitation to this provision. The legislative history shows Congress intended a broad, government wide application of the provision. In debate in the Senate, Senator Breaux said:

"By surveying and mapping, I am referring to the many professional services the Government obtains from private surveying and mapping firms. This includes activities associated with measuring, locating, and preparing maps, charts, or other graphical or digital presentations depicting natural or man made features, phenomena and legal boundaries of the Earth, performance of which, under this provision, is provided by licensed, certified or otherwise qualified professionals, such as surveyors, geodesists and photogrammetrists. Under this provision, if there is an applicable State licensing law, it shall be followed."

(SEE: Congressional Record, Daily Edition, October 18, 1988, p. S16672-3.)

In the House, Rep. Myers commented:

"(s)ince the measure known as the Brooks Act was enacted in 1972, there have been a number of Comptroller General decisions which have had the effect of narrowing the application of the law, particularly in the field of surveying and mapping. The purpose of the new definition in the bill before us is to recognize the realities of current professional practice and new technology in engineering and related disciplines. It also clarifies the intent of Congress with regard to those relevant GAO decisions ... It is the intent of the new definition and an identical provision in the House-passed OFPP Act ... to clarify and make permanent the application of the Brooks A/E Act to the services of surveying and mapping firms and other appropriate services for all Federal agencies."

(SEE: Congressional Record, Daily Edition, October 12, 1988, p. H10058-9.)

Also in the House, Rep. Livingston commented:

"The provision in title VII will clarify and make permanent the application of the Brooks A/E law to services of surveying and mapping firms and other appropriate services to all Federal agencies ..."

(SEE: Congressional Record, Daily Edition, October 12, 1988, p. H10056.)

When the House gave final approval to one the bills amending the Brooks Act, Rep. Mavroules raised questions concerning the new definition's applicability to the Defense Mapping Agency (later named the National Imagery and Mapping Agency and then the National Geospatial-Intelligence Agency). As a result of that colloquy, DMA viewed certain of its contracts for services as exempt. (SEE: Congressional Record, Daily Edition, October 12, 1988, p. H10613)

That single-agency exemption was later reflected in the FAR in 36.60-1. It read:

"However, mapping services such as those performed by the Defense Mapping Agency that are not connected to traditionally understood or accepted architectural and engineering activities or

have not themselves traditionally been considered architectural and engineering services shall be procured pursuant to provisions in parts 13, 14 and 15."

(SEE FAR 36.601-4(a)(4), Federal Register, Daily Edition, June 25, 1991, p. 29129.)

Since the time that FAR provision was promulgated, Congress again repeatedly sought to change the provision and obviate the Marvoules colloquy.

Congress clarified the aforementioned FAR provision when it enacted section 403 of Public Law 101-574. It provided:

"Pursuant to section 742 of Public Law 100-656, modifications to Part 36 of the Federal Acquisition Regulation (48 CFR Part 36) shall specify that the definition of architectural and engineering services includes surveying and mapping services to which the section procedures of Subpart 36.6 of the Federal Acquisition Regulations apply."

Again, Congress did not exempt any agency, did not limit this provision to certain agencies and did not limit it to certain types of mapping services.

The application of the Brooks Act qualification based selection (QBS) process to DMA, and other agencies, was again reinforced by Congress in 1992:

"Solicitations for the award of contracts for architectural and engineering services issued by a Military Department or a Defense agency shall comply with the requirements of subsections (a) and (b) of section 2855 of title 10, United States Code." (SEE Section 202(d) of Public Law 102-366.)

Congress again addressed the single agency exempted (Defense Mapping Agency) in FAR 36.601-4(a)(4), when it included language in the appropriations for that agency. (SEE H. Rept. 104-617, to accompany H.R. 3610, 104th Congress, the fiscal year 1997 Defense Appropriations bill and H. Rept. 104-863, to accompany H.R. 3610, Public Law 104-208; and H. Rept. 105-265 (H.R. 2266, PL 105-56, 105th Congress, the fiscal year 1998 Defense Appropriations bill.)

Moreover, the 1999 Defense Appropriations bill clearly and unambiguously settled the matter. It provided:

"None of the fund in this Act may be used by the National Imagery and Mapping Agency for mapping, charting and geodesy activities unless contracts for such services are awarded in accordance with the qualifications based selection process in 40 U.S.C. 541 et. seq. and 10 U.S.C. 2855: Provided, that such agency may continue to fund existing contracts for such services for not more than 180 days from the date of enactment of this Act; Provided further, that an exception shall be provided for such services that are critical to national security after a written notification has been submitted by the Deputy Secretary of Defense to the Committee on Appropriations of the House of Representatives and the Senate." (SEE section 8101, Public Law 105-262)

Finally, in House Report 105-746, to accompany this language the Appropriations Conferees said:

"The conferees included a general provision (Section 8101) to provide permanent clarification of the application of the "Brooks Act" qualifications based selection (QBS) process to surveying, mapping, charting and geodesy contracts of the National Imagery and Mapping Agency (NIMA). The conferees expect the officials responsible for the Federal Acquisition Regulations (FAR) to strike and revise the last sentence of section 36.601-4(a)(4) of the FAR (48CFR 36.601-4(a)(4)) to define "Surveying and mapping" in such a manner as to include contracts and subcontracts for services for Federal agencies for collecting, storing, retrieving, or disseminating graphical or digital data depicting natural or man made physical features, phenomena and boundaries of the earth and any information related thereto, including but not limited to surveys, maps, charts, remote sensing data and images and aerial photographic services."

It should be noted that DMA/NIMA/NGA now uses the FAR part 36 process for its contracting for these services. It is also noted that the matter of application of this provision of law and regulation to surveying and mapping services has also been consistently upheld by the Comptroller General (SEE Forest Service, Department of Agriculture, Request for Advance Decision, B-233987, July 14, 1989; White Shield, Inc., B-235522, September 21, 1989; and White Shield, Inc., B-235967, October 30, 1989).

Nevertheless, OFPP and the FAR Council is not only authorized and justified, but indeed is required by law to revise the FAR in 36.601-4(a)(4) to read as follows:

"Contracting officers should consider the following services to be "architect-engineer services" subject to the procedures of this subpart: Professional surveying and mapping services of an architectural or engineering nature. Surveying is considered to be an architectural and engineering service and shall be procured pursuant to 36.601 from registered surveyors or architects or engineers. Mapping associated with the research, planning, development, design, construction or alteration of real property is considered to be an architectural or engineering service and is to be procured pursuant to 36.601. ~~However, mapping services such as those performed by the Defense Mapping Agency that are not connected to traditionally understood or accepted architectural and engineering activities, are not incidental to such architectural and engineering activities or have not in themselves traditionally been considered architectural and engineering services shall be procured pursuant to provisions in parts 13, 14, and 15~~. Contracts and subcontracts for surveying and mapping including activities associated with measuring, locating and preparing maps, charts, or other graphical or digital presentations depicting natural or man made features, phenomena, and legal boundaries of the Earth, performance of which, under this provision, is provided by licensed, certified or otherwise qualified professionals, such as surveyors, geodesists and photogrammetrists, including but not limited to surveys, maps, charts, remote sensing data and images and aerial photographic services, shall be awarded pursuant to 36.601."

On April 19, 2005, the FAR Council issued a final determination on the public comments requested in 2004. COFPAES and other organizations that had been working on this issue throughout this period were deeply concerned about the conclusion of the FAR Council. The April 19, 2005 notice was replete with errors, misstatements of fact and inaccurate data. It misstated the legislative history of mapping in the Brooks Act, omitted major legislation that Congress enacted to broaden the application of QBS to mapping, erroneously characterized the NCEES model law, and was factually incorrect about the status of state law and regulation affecting architects, engineers, surveyors and mapping professionals.

After years of negotiation with OFPP and the FAR Council, the FAR was not amended to reflect the actions of Congress. Having exhausted all other remedies, a Complaint was filed in U.S. District Court in Alexandria, VA. It alleged the U.S. Government promulgated provisions in the Federal Acquisition Regulation (FAR) (48 CFR 36.6) that are in conflict with the Brooks Act (40 USC 1101) and seeks injunctive relief by directing the government to revise the FAR consistent with the Brooks Act as directed by Congress on numerous occasions and in several enacted provisions of enacted legislation.

The FAR currently provides that the Brooks Act applies to surveying, and to those mapping contracts "associated with the research, planning, development, design, construction, or alteration of real property" are considered to be an architectural and engineering services and subject to the Brooks Act. However the FAR goes on to say "mapping services that are not connected to traditionally understood or accepted architectural and engineering activities, are not incidental to such architectural and engineering activities or have not in themselves traditionally been considered architectural and engineering services" are to be procured pursuant to price competition provisions of the FAR.

That last sentence was the subject of the legal action. The Brooks Act unequivocally applies to surveying, and requires QBS for services defined in the applicable state licensing law. Over several years, many states have revised surveying licensure laws to include a variety of mapping services, including many that were not considered architectural and engineering services prior to the enactment of the new licensing law. Not only did the legal complaint argue that Congress never enacted the limitation on mapping contracts spelled out in the FAR, but the FAR language is in conflict with itself.

In a July 18, 2006 reply to the complaint, the Government stated, "... federal contracting officials must use QBS when procuring mapping services in states that define engineering or surveying to include mapping." Attorneys representing the profession have pointed out that while that is absolutely true, it is NOT practiced by the Government, and it is NOT reflected in the FAR.

The failure of the Government to follow that point of law was the crux of the litigation.

In many state licensing laws, surveying and mapping are indistinguishable. A wide variety of mapping services are part of the state licensing law definition of surveying, and require performance by a surveyor, or in some states, a surveyor or engineer. This fact is not being recognized in the FAR. Moreover, more than a dozen state licensing boards have ethics rules that prohibit licensed practitioners from securing work by competitive bidding. In Texas, for example, this ban even applies to private engineers who are seeking surveying services from a subcontractor. (See: http://www.txls.state.tx.us/sect01/news/ag_jc0374.html)

When the FAR Council issued its ruling that it would not revise its regulations, it administratively made a de facto new standard for determining Brooks Act application to a particular contract. It said it interprets the law to "leave to the contracting officer's discretion the decision whether a specific procurement falls within the Brooks Act, considering whether the services, 'independent of any project, or of an A/E nature which should logically or justifiably be performed by A/E professionals'." What this passage fails to recognize is the fact that under the Brooks Act, a contracting officer is required to apply the QBS law to a project in which the services are "professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed,

registered, or certified to provide such services as described in this paragraph," including surveying and mapping.

By eliminating from the April 19 ruling in the Federal Register the requirement for adherence with state licensing law, the FAR Council has established a new and dangerous loophole in the Brooks Act. It has given contracting officers carte blanche authority to make Brooks Act application decisions.

In a decision based entirely on process, the Federal District Court for the Eastern District of Virginia (1:06cv378, June 14, 2007) ruled that the plaintiffs did not have standing to bring the question of whether the FAR properly implemented the Brooks Act and its application to a broad scope of surveying and mapping, as repeatedly prescribed by Congress on numerous occasions and under numerous provisions of enacted law. By ruling on process, the Court did not address the legal merits and policy issues of the case as presented by the plaintiffs, which means the question of QBS applicability to mapping is unresolved and leaves the door open to further litigation.

However, the Court did reaffirm the fact that where an applicable state licensing law requires performance by a licensed surveyor, a Federal agency must abide by that state law and use QBS on the contract. This is an important victory with regard to programs, such as the U.S. Department of Agriculture's National Agriculture Imagery Program (NAIP), and others. We are also heartened by the fact that the court noted, "the record unambiguously reflects that the provision of "mapping" services in the modern marketplace includes a much broader scope of work than the traditional mapping work of land surveyors." We strongly agree with this statement. It is the essence of the substance in the case.

The Court did not comment on the full legislative history, nor on the more than a dozen individual pieces of enacted legislation and Congressional legislative history in which Congress ordered QBS for mapping activities broadly defined, nor the various state law definitions of surveying that include mapping activities.

We urge Congress to work with OFPP and the FAR Council, administratively or legislatively, to remedy this important issue.

GSA Federal Supply Schedules

COFPAES is deeply concerned about efforts by the GSA to hire private sector firms for A/E services through Federal Supply Schedule (FSS) contracts.

We believe FSS's actions result in waste, fraud and abuse. FSS has thwarted and undermined federal law and regulation and thereby threatens public health, safety and welfare by circumventing the government's policy to select firms for architecture, engineering and related services on the basis of demonstrated competence and qualification for the type of professional services required.

COFPAES is extremely concerned and deeply frustrated that FSS is enabling and empowering agencies to violate the Brooks Act.

Specifically, the FSS multiple award schedule contracts, which are based on price, are being abused to facilitate to acquisition of A/E services, as defined in 40 USC 1101 et. seq. and FAR

Part 36.6. These include the FSS contracts for Professional Engineering Services, Environmental Services, and Information Technology Services, among others.

Since 1999, COFPAES has provided volumes of documents, included examples of violations, proposed solutions, draft solicitations and GSA document revisions, legal analysis, and other submittals to GSA, in a good faith effort to remedy this matter.

In May 2004, the FSS produced a draft white paper entitled, "Creating a New Architect-Engineer Services Government-wide Procurement Vehicle." This proposed new A/E schedule was intended to remedy the concerns that COFPAES and its member organizations have raised.

COFPAES is deeply concerned that notwithstanding the white paper (which has not been adopted nor implemented by FSS), FSS has not addressed the underlying problem -- Federal agencies seeking to bypass qualifications based selection when using the FSS contracts on Professional Engineering Services, Environmental Services, and Information Technology Services for services that meet the definition of A/E services in 40 USC 1101 et. seq. and FAR Part 36.6.

We respectfully request the Committee's investigation of the following:

▪FSS maintains a Professional Engineering Services (PES) Schedule.
(http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_BASIC&contentId=10245&noc=T)
However, FSS has awarded contracts to a plethora of firms which are not licensed in their home state to do business in Professional Engineering, are not authorized by state law to offer Professional Engineering services, and do not have a Professional Engineer (PE) on staff and in responsible charge of engineering work, as required by state law.

Under the Brooks Act (40 USC 1101(3)(A)), contracts for architectural and engineering services are required to comply with state licensing laws. It states: "the term "architectural and engineering services" means - professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this paragraph;"

"Professional Engineering" is a term of art defined by state law. FSS has ignored and superceded state law, both statutory and case law, by facilitating firms which are not legally authorized to offer or engage in Professional Engineering services under State law to do so under the auspices of a Federal agency.

▪ Although the Professional Engineering Services schedule includes a disclaimer that such schedule is not to be used for A/E services, as defined in the Brooks Act, FSS includes such A/E services on the schedule. For example, civil engineering, by its nature and definition, is engineering related to real property and improvements thereon, and are clearly Brooks Act services.

However, FSS has included on the Professional Engineering Services schedule the following:

"Civil Engineering (CI):

It includes but is not limited to planning, evaluation and operations of power generating plants, the production, furnishing, construction, alteration, repair, processing or assembling of vessels, aircraft or other kinds of personal property, including heating, ventilation and air conditioning for such vessels and/or aircrafts.

There are several specialties within the civil engineering discipline scope of work. The following is a partial list:

- Environmental*
- Geotechnical
- Structural*
- Surveying
- Transportation
- Water Resources"

It is inconsistent to require compliance with the Brooks Act for acquisition of civil engineering services on one hand, and for FSS to offer civil engineering services via a non-Brooks Act schedule on the other hand. To do so, we believe, is a violation of the law.

Moreover, the Federal Acquisition Regulation 36.601-4(a)(4) includes the following unequivocal statement: "Surveying is considered to be an architectural and engineering service and shall be procured pursuant to section 36.601 from registered surveyors or architects and engineers."

Nevertheless, the FSS offers surveying services via the civil engineering portion of the Professional Engineering Services Schedule. Again, FSS provides a disclaimer that the surveying services offered via the civil engineering portion of the Professional Engineering Services Schedule exempts "Surveying as it relates to real property."

It is inconsistent to require compliance with the Brooks Act for acquisition of surveying services on one hand, and for FSS to offer surveying services as part of civil engineering services via a non-Brooks Act schedule on the other hand. To do so, we believe, is a violation of the law.

▪ The Federal Acquisition Regulation 36.601-4(a)(4) includes the following statement, "Mapping associated with the research, planning, development, design, construction, or alteration of real property is considered to be an architectural and engineering service and is to be procured pursuant to section 36.601." Nevertheless, the Environmental Services Schedule provides, "899-7 Geographic Information Services (GIS): Provide operational services, advice, or guidance in support of agencies' environmental programs utilizing Geographic Information Services. Services include but are not limited to: mapping and cartography, natural resource planning, site selection, migration pattern analysis, pollution analysis, and emergency preparedness planning. Provide services to support geologic logs, topographic data, 3D/4D interactive visualization packages, and data interpretation."

It is inconsistent to require compliance with the Brooks Act for acquisition of mapping services on one hand, and for FSS to offer mapping/GIS services as via a non-Brooks Act schedule on the other hand. To do so, we believe, is a violation of the law.

▪ The FSS for Temporary Administrative and Professional Staffing Services permits Federal agencies to procure services of architects via a Federal Supply Schedule.

It is inconsistent to require compliance with the Brooks Act for acquisition of architecture services on one hand, and for FSS to offer architects' services as via a non-Brooks Act schedule on the other hand. To do so, we believe, is a violation of the law.

• Although the practice of using the FSS for A/E services has been expressly and specifically prohibited by Congress with the enactment of section 1427(b) of PL 108-136, FSS has not implemented adequate reform, remediation, policing or enforcement to prevent violations of the law. FSS is still facilitating the ability of Federal agencies to violate the law by providing A/E services, as defined in 40 U.S.C. 1101 and FAR part 36.6.

Design-Build Contracting

Design-build ("D-B") is a form of project delivery in which an agency contracts with one entity to perform both the architectural/engineering and construction under one single contract.

Congress authorized Federal agencies (10 U.S.C. 2305a and 41 U.S.C. 253m) to utilize a design-build selection procedure as an alternative to the traditional design-bid-build or other authorized process in 1996. The D-B process has been used to a great extent by a number of Federal agencies (and state government, e.g. highway or transportation agencies, expending Federal funds), for both horizontal construction (highways) and vertical construction (buildings). D-B proponents claimed the process would save time and money by expediting the time for delivery of built projects.

For D-B to be successful, a design professional (licensed architect or engineer) must be retained by the government to prepare the project scope, description, function, standards, design criteria, analyses, reports and preliminary cost estimates for the proposed project. A sufficient level of detail should be produced to provide an adequate description of the project scope and level of quality expected by the government agency. The design-build team should include registered design professionals who are key components of the D-B team and who, likewise, are selected based on their qualifications and expertise.

The QBS process should be the primary means by which Federal agencies retain design professionals. COFPAES believes any acceptable alternative project delivery process should contain certain basic elements:

A registered design professional (either in-house or retained) should represent the government throughout the entire project. The design professional, if retained from the private sector, should be selected based on his or her qualifications and experience according to the requirements of the QBS law as amended.

The design professional should prepare the project scope, description, function, standards, design criteria, analyses, reports and cost estimates for the proposed project. A sufficient level of detail should be produced to provide an adequate description of the project scope and level of quality expected by the government agency.

The design-build team must include registered design professionals who are selected based on their qualifications and expertise.

The selection of a design-build team should include two steps. Step one, evaluation of the teams, would be based on the qualifications and experience of the competing teams. Step two would

include a detailed evaluation of the proposals from the short-listed teams. The selection of the top design-build team would be based on pre-determined criteria established for the specific project, such as technical expertise, past performance, management capabilities, design quality, approach, schedule and cost.

Federal agencies should fully develop and disclose their overall procurement process and project decision making process, including any special contractual provisions, all totally integrated to allow participants to fully evaluate the costs, benefits, and risk aspects of their participation on individual projects. Those participants selected to submit a detailed proposal should receive a reasonable stipend for their submission. In addition, the selection process should be consistent throughout and applicable to all Federal agencies and departments.

Given that it has been more than 10 years since D-B was authorized, it would be timely and appropriate for Congress to review the government's experience with the process to determine if it has lived up to its expectations and whether it is causing feared or unforeseen problems. Among the questions for inquiry –

Has the changing roles and relationships between project designer and construction contractor impacted the independence of the designer with regard to construction inspection and testing functions?

In D-B projects, has there been the requisite shift of allegiance from the owner to the contractor created a shift in design professional's business and ethical models that causes conflicts or compromises?

Has the emphasis on awarding the contract for both the design and construction phases of project development actually expedited the timeframe for committing available construction funds? Are the projects actually being delivered more rapidly? Has any evaluation of life-cycle costs (repairs, operation and maintenance (O&M) costs of D-B projects been conducted, in comparison to traditional design-bid-build projects?

Has D-B provided greater opportunity or a competitive advantage for larger construction and engineering firms to compete for projects, thereby reducing project opportunities for smaller construction or architecture or engineering firms?

Has there been any negative impact on small, specialty subcontractors, such as geotechnical engineers, land surveyors, topographic mapping firms, by being sub-tier contractors in D-B?

Has D-B undermined the inherent checks and balances between design and construction teams in the traditional delivery systems, with the design team no longer independent of the construction contractor?

Has D-B threatened the foundation of the traditional quality assurance/quality control role performed by design professionals (architects and engineers) through the marriage/combination of engineering and construction in the D-B process?

Have there been increases in project costs due to the elimination of the low bid contractor selection criteria?

Are small to mid-sized A/E firms disadvantaged by being required to perform uncompensated preliminary design services for construction contractors as part of unsuccessful D-B offers?

Is D-B being used solely for complex and significant projects, or is D-B becoming an ordinary and regular way of doing business?

Has any agency conducted audits or investigations to determine if D-B has resulted in hidden costs, such as increased change orders and delays, a higher incidence of design errors or poor construction workmanship due to meeting D-B bids and timetables, or if the amount of competition among design and construction teams on D-B projects has declined when compared to ordinary design-bid build?

Retainage on A/E Contracts

On February 28, the Small Business Administration (SBA) announced its 2008 Top 10 Rules for Review and Reform. The SBA's Regulatory Review and Reform Initiative is designed to identify and address existing federal rules creating barriers to small business that should be reviewed and may need reforming. In choosing the top 10, the SBA reviewed more than 80 constructive suggestions received from small businesses and associations.

Included in their final top 10 is the Federal Acquisition Regulation rule for fixed-price architectural-engineering services, 48 CFR 52.232-10, which allows agencies to impose a 10 percent withholding fee on A/E contracts. Originally intended to protect the government's interest, the provision seems counter to the Brooks Act, which allows A/E firms and the procuring agency to meet to discuss the design and scope of services before bidding on the work, thus guaranteeing the government's interest is met. The 10% withholding for design services is also out of line with other federal contract payment regulations which typically have no withholding fee or a maximum of a 5% withholding.

The withholding restricts the cash flow of small businesses, with little benefit to government, and in some instances is in addition to any bonding requirements.

The issue of a this withholding of payment for design services in federal contracts was brought to the attention of the AIA by a member who's firm, a small business of 12 employees, in working on their very first federal work had the withholding included in his firm's contract. This was also the first time they had faced a withholding in all their years of doing business. No payment timeframe was guaranteed. The small business was told by the contracting officer that if they wanted to receive full payment before the end of construction of the facility (well after the completion of the design phase) they would have to file a written request to release funds. Upon receipt of the request, dispersement of any funds would be at the discretion of the contracting officer. After 15 months, and having to borrow money to keep their business running, the small business finally received full payment for their services.

In some instances, A/E firms are seeing 10% withholdings for each phase of project. Therefore, for example, in a three phase design project a firm could actually see withheld 30% of their fee.

For small design firms with very small profit margins and tight cash flows, having 10 percent (or greater) of their fee held back for what could be years is a very troubling and unnecessary burden and a strong deterrent for small A/E firms to seek federal government contracts.

Small Business Competitiveness Demonstration Program

COFPAES strongly supports the Small Business Competitiveness Demonstration Program. We are concerned that Congress has attempted to terminate this important program, without any hearings being held. Latest is Section 11127 of the Senate Farm Bill. We would welcome hearings by the Committee to show them how well the program is working for our industries and professions and the related and NAICS codes.

COFPAES recognizes that some degree of preference for small firms may be necessary. COFPAES has worked closely with Congress to achieve an acceptable level of preference which will not be unfair to any firm and still permit the agencies to have the benefit of the services of the best qualified design firms. COFPAES has made a concentrated effort to create a system of opportunities for "small" firms in tune with the mandate of Congress in that regard, but without imposing undue and unwise procedures which penalize qualified A/E design firms by disallowing their consideration under QBS procedures. To deal with this problem in the area of military agency procurement, COFPAES supported enactment of provisions in the military agency procurement laws which require that smaller design contracts be limited to small firms, and that contracts with a higher amount be available to all firms, including small firms. This procedure has worked well and fairly for all concerned. COFPAES supports the Small Business Competitiveness Demonstration Program whereby each agency shall set-aside for small firms A/E design professional contracts only to the extent that agency awards to small business fail to exceed the designated threshold. The dollar definition of "small" has been confusing and remains uncertain. COFPAES has worked, and will continue to work, in cooperation with the Small Business Administration toward achieving a dollar definition which will best serve the objectives outlined above.

A related issue is counting specialty subcontracts in our profession. We duly collect the data and send it in via the SF 294 and 295, and it disappears. We strongly support a program by which small business subcontractor participation is tabulated and that such participation be used to truly and accurately reflect the full extent of small business involvement in Federal procurement.

Federal A/E Acquisition Workforce

The FY04 Defense Authorization bill for fiscal year 2004, enacted as section 1414 Public Law 108-136 on November 24, 2003, included provisions originally introduced in separate legislation known as the Services Acquisition Reform Act (SARA). Incorporated was a provision on improving the Federal government's workforce for the acquisition of architectural and engineering (A/E) services.

The provision reads as follows:

> SEC. 1414. ARCHITECTURAL AND ENGINEERING ACQUISITION WORKFORCE.
>
> The Administrator for Federal Procurement Policy, in consultation with the Secretary of Defense, the Administrator of General Services, and the Director of the Office of Personnel Management, shall develop and implement a plan to ensure that the Federal Government maintains the necessary capability with respect to the acquisition of architectural and engineering services to -- 1) ensure that Federal Government employees have the expertise to determine agency

requirements for such services; (2) establish priorities and programs (including acquisition plans); (3) establish professional standards; (4) develop scopes of work; and (5) award and administer contracts for such services.

Unlike many products, for which the government awards contracts to the lowest bidder, or other services, which are awarded based on the "best value," A/E services have long been recognized as having a significant impact on public health, welfare and safety. Moreover, A/E services amount to 1/10th of 1 percent of the life cycle cost of a project or program, but the quality of the A/E services determines the price and efficiency of the other 99.9 percent. As a result, Congress has long recognized the efficiency and economy of selecting firms for A/E services "on the basis of demonstrated competence and qualification for the type of professional services required", and negotiating a fee with the most qualified firm only after the firm's credentials have been established.

Over the past decade or more, the Federal Government's in-house A/E capability has been reduced. Retirements, attrition, recruitment and shifting priorities have all contributed to changes in the Federal personnel structure that has resulted in fewer Federal employees trained, qualified and actually engaged in evaluating, awarding and managing Federal A/E contracts. Notwithstanding this workforce reduction, the Federal government's demand and expenditures for A/E services has remained steady or in some cases increased.

The loss of an A/E acquisition workforce has caused a number of undesirable trends in A/E procurement. Federal contracts for A/E services have become larger in dollar value, longer in duration, bundled with other services, and less competitive. The advantages of QBS are being diminished. Moreover, given that the private A/E market is overwhelmingly comprised of small businesses, the trend has resulted in the creation of a virtual oligopoly. There are now fewer A/E contracts. They are now for longer time periods, with some potentially lasting 15 years when options are exercised. The use of design-build procedures, once reserved for rare and unique projects, has become more common. And the advent of GSA Federal Supply Schedules for services has resulted in rampant abuse of such schedule contracts in violation of the QBS law. None of these trends favor the government, and the taxpayer, and they certainly put small business A/E firms at a disadvantage.

The reason for this trend is simple - supply and demand - within the Federal government. Fewer government A/E professionals experienced in acquisition are responsible for awarding more work. The decline in the Federal A/E acquisition workforce led Congress to enact section 1414 of Public Law 108-136.

To reverse this trend, COFPAES recommends the following elements of a plan to rebuild the A/E acquisition workforce. We were deeply disappointed these recommendations were not adopted by OFPP, and that in fact little has been done to implement the recommendation OFPP did come up with in its section 1414 study.

1. To the maximum extent practicable, utilize the private sector for commercially available A/E services

Historically, A/E services have been considered commercial activities. A/E has long been listed as an illustrative example of commercial activities in Office of Management and Budget Circular A-76. However, since OMB Circular A-76 has required public-private cost competitions to make outsourcing or contracting-out decisions, and the QBS law is based on competition on

competence and qualifications, a conflict has long existed. Consequently, A-76 has not been an effective tool for determining when private sector performance of A/E services should be employed. This conflict has been noted in the May 29, 2003 revision to the Circular through recognition of FAR part 36, which had not been included in previous versions of A-76. The Circular advises (See ¶ D.3.a.(2) of Attachment B) that "agencies that have identified A&E services in their competition plans to consult with OFPP as they prepare to undertake competitions and request deviations as appropriate."

Due to the historical conflict between the law (40 U.S.C. 541 et. seq.) and the Circular, A/E services have not been subject to A-76. No process to conduct QBS-compliant public – private competitions on A/E services has been developed since the release of the A-76 revision on May 29, 2003.

In order to redirect the Federal government's in-house A/E workforce from the commercial activity of performing A/E services to the inherently governmental function of managing and administering contracts for A/E services, OFPP should limit the amount of A/E services to that which is necessary for government personnel to maintain professional and technical competency to effectively scope, negotiate and administer A/E contracts.

2. Training in A/E contracting should be a requirement for all Federal A/E personnel.

The U.S. Army Corps of Engineers is the Federal government's most experienced procurer of A/E services. The Corps has established a robust training program, Proponent Sponsored Engineer Corps Training (PROSPECT). http://pdsc.usace.army.mil/AboutUsProspect.asp
This includes a through 5-day course on A/E Contracting.
http://pdsc.usace.army.mil/CourseListDetails1.asp?Cntrl_Num=4.

OFPP should make completion of the A/E Contracting course a requirement for all Federal A/E personnel.

Although the Corps of Engineers makes this course available to personnel from other agencies, the Corps is prohibited from keeping any reimbursement funds it receives for such training. This results in a disincentive for the Corps to offer this course to personnel from other Federal agencies. Legislation to permit the Corps to retain these funds has been enacted in the Water Resources Development Act of 2007. OFPP should implement ways for this course to be available to Federal A/E personnel, including through the Federal Acquisition Institute.

3. Federal architects, engineers, surveyors, certified photogrammetrists and other design professionals and technical specialists should be fully engaged in the entire A/E contracting process.

Not all Federal agencies utilize their in-house A/E personnel in their acquisition process. A self-imposed "firewall" often separates agency A/E personnel from acquisition personnel. Given the nature of A/E services and the need for the Federal user to be a integral part of the acquisition process, OFPP should establish a process by which Federal architects, engineers, surveyors, certified photogrammetrists and other design professionals and technical specialists should be fully engaged in the entire A/E contracting process.

4. Require professional registration for key positions.

All 50 states license individuals in architecture, engineering and surveying. Licensure is an assurance that the individual has passed at least a minimum level of professional competence. In the private sector, only a licensed A/E may prepare, sign and seal, and submit plans and drawings to a public authority for approval, or seal work for public and private clients. A licensed survey's seal is required on surveys for quantity, construction, title transfer, subdivision, parcel consolidation and other transactions. The model licensing law promulgated by the National Council of Examiners for Engineers and Surveyors (NCEES), the body of the licensing boards of all 50 states and the possessions, now includes photogrammetric mapping and geographic information systems (GIS), and has been adopted by several state legislatures. Licensure is a legal requirement for those who are in responsible charge of A/E work. With the growing complexity and the increasing diversity of modern design, construction, resource and program management, the Federal A/E workforce must be current with processes and techniques, and be able to communicate and exchange ideas and views with other licensed design professionals. The scope of professional A/E practice is constantly changing, and activities that may be exempt today may eventually shift into a practice area that one day requires a license (for example, research and development may find practical application in the facilities design/construction process, requiring the practitioner to be licensed). A/E's must adapt to a rapidly changing workplace-restructuring, downsizing, outsourcing, privatization, and re-engineering. Only by becoming licensed can an A/E perform the broad scope of services within an area of competence as defined under state law.

The Federal government has had difficulty recruiting and retaining its A/E employees because its salary classification system is not competitive with the private sector. To rectify this situation, the federal government established a special wage rate system for certain professional or technical occupations, including engineering. "Specialty pay," as the system is known, is intended to close the gap in salary levels between federal government and private sector professionals. Doing so assists the federal government in overcoming barriers to the recruitment or retention of qualified professional personnel.

The Office of Personnel Management (OPM) classifies engineers *without regard* to the fact of whether they are licensed or not. Engineers, as technical specialists, in fact, can only be promoted up to a GS-12 level. In order to advance further they must be assigned to a management position, while doctors and lawyers may be promoted up to a GS-15 level as specialists.

OPM *does not* recognize the achievement of a Professional Engineering license as an appropriate event and additional credential of value to the government to merit additional compensation. In fact, many federal agencies do not distinguish between licensed and non-licensed engineers.

OFPP should work with OPM to overhaul its hiring and promotion system for A/Es, and remove barriers for promotion and job advancement for A/Es, while encouraging licensure.

The Defense Authorization Act for FY 2002, codified in 5 U.S.C. 5757, allows agencies to use appropriated funds or funds otherwise available to the agency to pay for expenses for employees to obtain professional credentials, including expenses for professional accreditation. The provision applies government-wide, not solely to the Department of Defense, and establishes statutory authority for agency payment of licensing fees through appropriated funds. This is a valuable recruitment and retention tool for engineers in the federal government and encourages the Federal A/E to seek and obtain his or her license. No regulations implementing this provision of law have been implemented. OFPP should work with OPM to more forcefully implement this provision with regard to licensure of Federal A/Es.

5. Share A/E contracting "best practices" among all Federal A/E personnel and acquisition centers.

Pursuant to Section 1431(b) of the Service Acquisition Reform Act (SARA), OFPP is establishing an Acquisition Center of Excellence (ACE) for Service Contracting. The purpose is to provide a central clearinghouse of service contracting best practices for both the public and private sectors. OFPP should establish as a top priority the development of a robust A/E section of the ACE. The Corps of Engineers has established very thorough procedures for A/E contracting in EP 715-1-7 and the EFARS. These, and other agency A/E best practices, should be in the ACE and implemented in the other training and workforce development recommendations suggested in this document.

The Corps of Engineers has developed engineering and design publications, available on TechInfo (www.hnd.usace.army.mil/techinfo/), and other agencies have similar collections. OFPP should inventory these resources and integrate them into the A/E workforce training plan, as well as in the SARA ACE.

6. Establish Government-wide Centers of Expertise in A/E Acquisition.

The declining Federal A/E acquisition workforce has made it imperative that the Federal government more efficiently manage, maintain, deploy and utilize the resources it has. That workforce resource cannot reasonably be maintained in every agency. Many agencies have only intermittent needs for A/E services, while others have more long-term and robust programs. OFPP should establish a system of technical expertise that includes centers of expertise and regional technical specialists to act as A/E acquisition service bureaus to manage A/E acquisitions for those agencies that cannot maintain adequate in-house capabilities of their own. Such centers could operate in a manner somewhat similar to the GSA Federal Supply Service or the National Business Center (www.nbc.gov) in the Interior Department, and other, similar "franchise fund" operations.

Conclusion

Madam Chairman, without Congress acting, we have seen an erosion of the time-tested qualifications based selection process. New procurement methods are being implemented that are not beneficial to small business, or the A/E profession in general. Nor are they beneficial to the taxpaying public, or their health, welfare and safety. We urge Congress to work to re-establish the time-tested and proven QBS process in Federal procurement of A/E services.

Brooks Act 40 USC 1101 et. seq.

TITLE 40-- SELECTION OF ARCHITECTS AND ENGINEERS

Sec. 1101. Definitions As used in this subchapter—

(1) The term ``firm" means any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the professions of architecture or engineering.
(2) The term ``agency head" means the Secretary, Administrator, or head of a department, agency, or bureau of the Federal Government.
(3) The term ``architectural and engineering services" means—
(A) professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this paragraph;
(B) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and
(C) such other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

Sec. 1102. Congressional declaration of policy. The Congress hereby declares it to be the policy of the Federal Government to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.

Sec. 1103. Requests for data on architectural and engineering services In the procurement of architectural and engineering services, the agency head shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The agency head, for each proposed project, shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding the proposed project, and shall conduct discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services and then shall select therefrom, in order of preference, based upon criteria established and published by him, no less than three of the firms deemed to be the most highly qualified to provide the services required.

Sec. 1104. Negotiation of contracts for architectural and engineering services

(a) Negotiation with highest qualified firm The agency head shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Government. In making such determination, the agency head shall take into account the estimated value of the services to be rendered, the scope, complexity, and professional nature thereof.
(b) Negotiation with second and third, etc., most qualified firms Should the agency head be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price he determines to be fair and reasonable to the Government, negotiations with that firm should be formally terminated. The agency head should then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the agency head should terminate negotiations. The agency head should then undertake negotiations with the third most qualified firm.
(c) Selection of additional firms in event of failure of negotiation with selected firms Should the agency head be unable to negotiate a satisfactory contract with any of the selected firms, he shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached.

Statement of

Mr. Anthony Zelenka of Bertucci Contracting Corporation

on behalf of

The Associated General Contractors of America

to the

Committee on Small Business

U.S. House of Representatives

For a hearing on

The Impact of Emerging Procurement Methods on Small Business

March 6, 2008

Building Your Quality of Life

The Associated General Contractors of America (AGC) is the largest and oldest national construction trade association in the United States. AGC represents more than 33,000 firms, including 7,000 of America's leading general contractors, and over 12,000 specialty-contracting firms. Over 13,000 service providers and suppliers are associated with AGC through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

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Statement of Mr. Anthony Zelenka
Bertucci Construction Corporation, Jefferson, Louisiana
Committee on Small Business
United States House of Representatives
March 6, 2008

Thank you Chairwoman Velazquez, Ranking Member Chabot and the distinguished members of the Committee for this opportunity to testify on AGC's documented concerns and experience with the procurement method known as "Reverse Auctions."

I am Tony Zelenka, the President of Bertucci Contracting Corporation and Chairman of the Corps of Engineers Committee for the Associated General Contractors of America (AGC). My company is a small business that performs levee and coastal restoration work across the Gulf Coast. I was born and raised in New Orleans, and I have over 20 years of experience in the construction industry. My family's firm traces its history back to 1875, when my great-great grandfather founded the company in New Orleans.

The AGC Experience

AGC strongly supports full and open competition for the many contracts necessary to construct improvements to real property. This includes competition among general contractors, specialty contractors, suppliers and service providers. Over the years, it has been established that such competition energizes and improves the construction industry to the benefit of the industry and the nation as a whole. As the Committee considers the changing Federal procurement landscape, AGC offers the following points for consideration during your evaluation of reverse auctions.

Reverse Auctions Do Not Provide Benefits Comparable to Currently Recognized Selection Procedures for Construction Contractors

Vendors promoting reverse auctions have yet to present persuasive evidence that reverse auctions will generate savings in the procurement of construction or will provide benefits of "best value" comparable to currently recognized selection procedures for construction contractors, which have been carefully and specifically tailored for all types of construction.

Manufactured goods are subject to little or no variability or change in manufacture or application. Construction projects, on the other hand, are inherently variable. Each is subject to the unique demands of the project, such as the needs, requirements, personnel and budgetary criteria of the owner, site conditions, design features and parameters, and the composition of the project team. Federal procurement laws recognize that construction stands apart from commodities or manufactured goods.

AGC contends that vendors suggest reverse auctions for construction services misuses a procurement process originally designed for commodities. It ignores the unique nature of construction. Construction contractors, specialty contractors, subcontractors and suppliers offer and provide a mix of services, materials and systems. They do not "manufacture" buildings,

highways, or other facilities. In fact, the construction process is fundamentally different from the manufacturing process.

This distinction was reiterated in a July 2003 memorandum from the Office of Federal Procurement Policy (OFPP), which states that "...construction projects and complex alteration and repair, in particular, involve a high degree of variability, including innumerable combinations of site requirements, weather and physical conditions, labor availability, and schedules." This memorandum was sent to all federal procurement executives, advising them not to treat construction as a commodity for government procurement purposes.

Reverse Auctions Do Not Guarantee Lowest Price

In the context of construction, AGC believes that most of the claims of savings are unproven and that reverse auction processes may not lower the ultimate cost of construction. For example, "winning" bids may simply be an established increment below the second lowest bid not the lowest responsible and responsive price. Moreover, in reverse auctions, each bidder recognizes that he or she will have the option to provide successive bids as the auction progresses. As a result, a bidder has little incentive to offer its best price and subsequently may never offer its lowest price. In addition, savings from reverse auctions can be one time occurrences. Some reports show savings realized by an owner in the first reverse auction are significantly reduced in subsequent reverse auction events.

Reverse Auctions May Encourage Imprudent Bidding

Reverse auctions create an environment in which bid discipline is critical yet difficult to maintain. The competitors have to deal with multiple rounds of bidding, all in quick succession. The process may move too quickly for competitors to accurately reassess either their costs or the way they would actually do the work. If competitors act rashly and bid imprudently, the results may be detrimental to everyone, including the owner. There are even reported cases in which buyers actually step in to keep an overzealous supplier from obtaining an order that would potentially jeopardized the business viability of the supplier. Absent such steps, imprudent bidding may lead to performance and financial problems for owners and successful bidders, which may have the effect of increasing the ultimate cost of construction as well as the cost of operating and maintaining the structure.

Negotiated Procurements Allow Thorough Evaluation of Value

Where price is not the sole determinant, owners increasingly have utilized processes focused on negotiation to expand communication between the owner and prospective contractors for the purpose of discussing selection criteria such as costs, past performance and unique needs. These processes recognize the value and quality of project relationships and other factors that promote greater collaboration among the owner and project team members. These processes also consider quality, system performance, time to complete and overall value that can, in fact, outweigh the lowest price to arrive at the best value for the owner. Such an approach offers both the owner and contractor the opportunity to discuss, to clarify performance requirements of the project.

On the other hand, reverse auctions do not promote communication between the owner and bidders. Rather, they promote a dynamic in which bidders repeatedly attempt to best each other's prices. In fact, current studies of reverse auctions between buyers and suppliers have found that reverse auctions often have a deleterious effect on the relationship between buyer and seller. Moreover, non-price factors of consequence to the owner, such as quality of relationship, past performance, and unique needs, are deemphasized in the auction. As a result, reverse auctions do not offer owners a good way to evaluate non-price factors.

Sealed Bidding Assures that the Successful Bidder is Responsive and Responsible

Where price is the sole determinant, the sealed bid procurement process was established to ensure integrity in the award of construction contracts. Each bid is evaluated through the use of objective criteria that measure responsiveness of the bid to the owner's articulated requirements and the responsibility of the bidder. In this manner, sealed bidding ensures fairness and value for the owner. On the other hand, reverse auctions ignore this tradition. The pressure and pace of the auction environment removes any assurance that initial and subsequent bids are responsive and material to the owner's articulated requirements. These auctions expose owners to the real possibility that they may award contracts to what would otherwise be non-responsive bidders. In addition, reverse auctions ignore the protections of the sealed bid procurement's laws, regulations and years of precedent that address these critical factors and ensure the integrity of the process.

Reverse Auctions may Contravene Federal Procurement Laws and Certain State Laws

Federal procurement laws do not specifically address the use of reverse bid auctions to procure construction. The Federal Acquisition Regulation (FAR) and current procurement statutes, however, do reflect a clear policy of not disclosing contractor price information. Price disclosure is often a distinguishing feature of reverse auction processes. Given the restrictions on contractor price disclosure in the U.S. Code and the FAR, it is unclear that any authority exists for the federal government to conduct reverse auctions on fixed-price type contracts or that current law can be interpreted to permit the practice of reverse auctions by the federal agencies. In addition, some states, such as Pennsylvania and Kansas, have enacted statutes that prohibit procurement of construction through reverse auctions.

The Government Experience

AGC strongly recommends that the Committee encourage OMB, OFPP and the FAR Council to closely examine the finding of a Congressionally-mandated reverse auction pilot program the Army Corps of Engineers (USACE) issued July 26, 2004. The findings of the report clearly found that reverse auctions were an inappropriate tool to procure construction and construction-related services. The report further stated that reverse auctions fail to realize any additional savings over the sealed bid process.

In its final determinations, USACE found that the acquisition of construction services cannot and should not be equated with commodities for the following reasons:

- Within the operational parameters of Department of Defense contracting regulations, the dynamics are much too diverse between [construction services and commodities];
- Virtually all of the USACE construction services…are one-of-a-kind projects under one-of-a-kind conditions with numerous and consistent variables for cost and no-cost factors;
- Additionally, the Office of Federal Procurement Policy (OFPP) has recently supported this very significant fact. In a July, 2003 memorandum [recognizing] that construction services cannot be equated to commodities or manufactured goods when she acknowledged, "new construction projects and complex alterations and repairs…involve a high degree of variability."

The USACE report stated that there was no proof that reverse auctions provide any significant or marginal edge in savings over the sealed bid process for construction services for the following reasons:

- There was no proof that a consistent, reliable and valid measurement method for projecting savings could be established from reverse auctioning;
- Absent any specific price history for an identical project under identical conditions, there is no practical way to measure or compare any projected savings by reverse auctions over sealed bidding; and,
- There is no proof reverse auctions provided any significant or marginal savings in comparison to the government estimate.

Concluding Remarks

To sum up, AGC believes that where reverse auctions for construction have been studied, they have failed to provide savings. They are an unproven method for selection of construction contractors, specialty contractors, subcontractors, and suppliers. At best, reverse auctions raise significant issues for owners and construction team members for the following reasons:

- Reverse auctions do not guarantee the lowest price.
- Reverse auctions may encourage imprudent bidding.
- Negotiated procurements allow thorough evaluation of value.
- Sealed bidding assures that the successful bidder is responsive and responsible.
- Reverse auctions may contravene federal procurement laws and certain state laws.

We have taken the liberty of providing the Committee with the AGC White Paper, along with a copy of the OFPP July 3, 2003 memo, and a copy of the Executive Summary from the Corps of Engineers Report on Reverse Auctions, for the record.

Thank you for this opportunity to comment. I look forward to working with the Committee and would be happy to answer any questions.

March 6th, 2008
TESTIMONY OF
ARTHUR SALUS, PRESIDENT
DULUTH TRAVEL INC.
SDVOB
U.S. House of Representatives
Committee on Small Business

Good morning, Madam Chairwoman, Ranking Member Mr. Chabot and other distinguished members of the committee. My name is Arthur Salus and I have been invited to appear before the Committee as it examines the impact of emerging procurement methods on small business subcontractors. In May, 2005, I had the honor to testify on the Hill on small business and veterans issues.

I am appearing here today in my role as President of Duluth Travel, a small service-disabled, veteran owned travel agency. Our company is headquartered in Atlanta, GA and we employ 26 persons in our company. We provide travel services to state and local government agencies, corporations, and leisure travelers and have done so since 1993. We have serviced federal agencies since 2005. I am an active member of ASTA and a spokesperson for the Southeast U.S. region.

I am also co –chairperson for small business of the Society of Government Travel Professionals (SGTP). SGTP is the national, non-profit forum of all government travel market components, whose objectives are to educate its members and to facilitate innovation and best practices in government travel. SGTP's members include travel agencies, small, mid-size, and large hotel properties and management companies, car rental vendors, airlines, travel

consultants, government representatives and others individuals and companies serving the travel needs of the Government market.

I have been competing for federal contracts since 2003 when I was approved by GSA, and I believe I am well qualified to testify on how government procurement methods affect small business travel agencies.

The federal government has been competitively procuring travel services from the private sector since 1989. At one time, the individual military branches in the Department of Defense (DOD) procured travel services on their own in open competitive procurements that were advertised to all eligible and interested businesses. The U.S. Air Force took the lead in promoting opportunities for small businesses by using small business set-asides for various Air Force bases. Other military branches did compete their travel needs but generally grouped various installations and bases into large geographical regions. Today, travel services are centrally procured by the Defense Travel Management Office (DTMO). The DTMO has continued the practice of using discrete set aside solicitations which are reserved exclusively for qualified small business travel agencies.

For example, in 2004, the DTMO competed and awarded 31 different small business contracts. These contracts were geographically dispersed around the country and were of sufficient size to be meaningful for small businesses yet not too large to overwhelm the contractors. In addition to these small business set asides, the DTMO is also in the process of competing approximately 11 very large travel procurements, some of which are worldwide, which are open to all contractors who qualified on the initial

master contract schedule. There were 8 travel agencies overall who are listed on the DOD master contract schedules of which 4 are small businesses. All contractors who qualified on DOD's master contract schedule receive notice of any task order that DOD issues.

It is different on the federal civilian side. On the federal civilian government side, federal agencies and entities may procure travel services directly by their own efforts or use the contracting vehicles designed by the General Services Administration (GSA). At one time, GSA did design and set aside opportunities exclusively for small businesses. These opportunities were either federal agencies with relatively small travel budgets or were discrete geographical areas around the country where federal agencies had offices. Any small business who qualified for these opportunities received a copy of any travel service solicitation being competed. There were multiple opportunities and multiple small businesses being awarded contracts around the country. This changed in 2003 when GSA implemented two new travel programs. One was the e-Gov Travel Service contract and the other was the Travel Services Solution Schedule contract.

The e-Gov Travel Services contract was awarded to three large corporations, EDS, Northrop Grumman and CWT to provide end-to end travel systems to federal agencies other than DOD. These three large corporations not only provide the technology that provides the end-to-end services, but can also provide one stop shopping to include travel services through using travel agencies as subcontractors. Beginning in 2003, these three large corporations could market their technology and travel services to federal agencies that, by GSA's regulations, had to select a vendor by the end of 2004.

These three large corporations use both large and small travel agencies as subcontractors or "embedded travel agencies". I receive business through a subcontracting relationship with EDS and to date, have received no business whatsoever from the other two eTS vendors. That means despite my track record of excellent past performance, I am locked out of over 66% of civilian government travel. In fact, I am not happy to report that one of the eTS vendors refuses to answer my calls or e-mails.

As far as the federal agencies are concerned, they have the option to obtain travel agency services through the TSS schedule or by contracting independently with travel agencies or "accommodated travel". The TSS schedule is managed by GSA and allows federal agencies to supplement their eTS contracts. I believe that the eTS master contract and the TSS schedule are the primary contracting vehicle used by federal civilian agencies to procure their travel services. Since these contracts were designed by GSA, I believe GSA has a special role to ensure small businesses have meaningful opportunities to compete for government contracts. Tim Burke and his team at GSA should be commended for their efforts to move the government into the 21st century in travel management.

GSA has stated in a GAO report (GAO 06-911, September 2006) that the TSS schedule is designed to provide opportunities for all businesses to compete for federal travel business, with an emphasis on promoting opportunities for small businesses. GSA noted that the TSS schedule provides information to agencies about whether TSS vendors are small businesses, and agencies can use these vendors to address their small

business utilization goals. And GSA has also stated that "more small businesses are now eligible for federal business through GSA than before eTS and TSS" and points out that the TSS schedule includes 53 travel agencies, of which 30 are small businesses.

In that GAO report, based upon information provided by GSA, GAO noted that "under GSA's previous master contract for travel agencies, in effect from 1998 through 2004, 13 small travel agencies participated. In contrast, 34 are currently participating through eTS, TSS, or both."

The numbers in that GAO report do not tell the whole story. It is true that the TSS schedules do identify that 30 of the 52 contractors on that schedule are small businesses. However, according to information on GSA's own website (http://ssq.gsa.gov/entry.cfm), only 10 of these small travel agencies reported receiving any sales under TSS in Fiscal year 2007. Of those ten reporting any sales, none of the ten small businesses reported sales for FY 2007 above $57,386. The total sales reported by all 10 small businesses was $195,719 compared to the total sales reported by all contractors of $24,928,382. This is less than 1% of total reported sales going to small business travel agencies.

Although I am listed on the TSS schedule, I have not received any business from it. I was awarded a contract by the Department of Veterans Affairs for its travel. But this contract was conducted by the VA on its own and was a set-aside exclusively for small service-disabled veteran-owned businesses.

The fact is that most small business travel agencies have received less business then they did before these two travel programs. Why has this occurred? Unlike prior GSA programs, the TSS Schedule itself does not include any small business set-aside opportunities. The TSS Schedule is merely a listing of travel agencies that GSA has pre-qualified. It is a listing of vendors much like the Yellow Pages. While many small businesses are listed, few are chosen as there is no requirement that a federal agency must offer each vendor listed an opportunity to compete for any business. GSA's own rules for the schedule merely require that a federal agency consider any three travel agencies on the list.

Without discrete set-aside opportunities, small businesses receive less consideration and less business. That is why many persons and entities, like SBA, SGTP and me, urge GSA to include set-asides in the schedules. And GSA has done so for some of the schedules like meeting planning and IT. If it can reserve opportunities for small businesses on these other schedules, it can do so for travel services as well.

In addition, GSA should reconsider whether the manner in which it designed the e-Gov Travel Service contract, to include travel services within its offering, unreasonably bundled services, which if left separate, as DOD did with DTS, would provide more opportunities for small businesses.
While GSA has stated that all e-Gov Travel vendors must have subcontracting plans that include specific goals, these goals are not limited to travel agencies.

Small businesses are not opposed to these systems or against the transformation of the government travel management processes. We are only asking that we have direct and meaningful opportunities to compete for government businesses.

To sum up my testimony, I would like to make the following suggestions:

1. I would like to recommend to GSA to implement acquisition alternatives for small business set-asides.

2. Create a voluntary, independent panel made up of persons from each of the following federal agencies: GSA, GAO, SBA and OMB, a staff member from this committee, and members of the small business sector. They could meet two to three times a year and report back to this committee with their findings and recommendations. This panel could also look outside of the federal government at the thousands of large corporations with government contracts who are required to use small business as part of their sub-contract requirements. This would give us all a good reading on who is following the contractual obligations and who is not.

Please, let me go back and spread the word that this committee truly understands the plight of small business and that they will ensure that the current laws are enforced.

I want thank you for inviting me to testify. I will be happy to answer any questions you may have.

Testimony of Mark Leazer, Forms & Supply, Inc.
on Behalf of the National Office Products Alliance
Committee on Small Business, U.S. House of Representatives

Hearing on Impact of Emerging Procurement
Methods on Small Business Contractors
Thursday, March 6, 2008

Madam Chairwoman and members of the Committee, I am Mark Leazer, Director of Sales Technology for Forms and Supply, Inc. a small, independent WOSB office products and furniture dealer based in Charlotte, NC. I am testifying today on behalf of NOPA – the National Office Products Alliance – a not-for-profit trade association established in 1904 that represents and serves more than 700 small independent dealers nationwide, along with their key suppliers.

NOPA appreciates the opportunity to speak to the Committee about a serious, growing problem facing small office product dealers who have government business: Small Business "Fronts", also known as pass-throughs. This problem directly affects our 200-plus members who serve federal government customers in offices around the country, as well as in the Washington, DC metro area. NOPA members range in size from $1 million to $90 million in sales per year. Further pertinent industry background is provided at the end of this prepared statement for the hearing record.

Small Business "Fronts" – What Are They?

Last April, an industry colleague, Grady Taylor, representing the TriMega Purchasing Association, provided an overview of the various obstacles facing small businesses in the office products industry when they seek federal government business.

He touched on one obstacle – Small Business Pass Throughs or "Fronts" – which has become a large, growing problem and is particularly damaging and unfair to legitimate independent small dealers in our industry and others. Today, I would like to concentrate on this problem, which requires special congressional attention and focused legislative and regulatory remedies to be addressed effectively.

Just what are "pass-throughs" or small business "fronts"? In the simplest terms, these are situations in which a large national company approaches a small business and proposes to create a "mentoring" relationship for the sole purpose of gaining improper access to contracts set aside for small business.

Let me emphasize that these "fronts" are NOT the same thing as legitimate small business mentoring program relationships. In that case, the small firm plays a commercially useful subcontracting role.

The abuses, which are associated with the small business "fronts" problem, occur when:

- The small business has little or no prior experience as a reseller of office products, particularly to government customers, and little or no ability to itself support such business;
- The large company offers to performs most or all of the selling, order processing, customer service, product delivery, and invoicing and payments processing for the contract on behalf of the "pass-through" dealer "partner;"
- The small business performs few if any commercially useful functions once the contract award is made, beyond providing an entry point through its website to the full operating infrastructure of the large corporation; and
- The small business typically receives a commission for its willingness to serve as the "front" for this business, which is "passed through" to the large corporation.

Members of the National Office Products Alliance (NOPA) urgently need help from this Committee and Congress as a whole to end the large, growing use of small business "fronts" by large national chain stores. This practice allows them to improperly capture federal government contracts set aside for small businesses in our industry and others. It appears to be unethical and totally inconsistent with congressional intent to create a level playing field for legitimate small businesses in government contracting.

Congress has encountered and dealt with a similar issue in the form of Federal Prison Industries, through which purchasing preferences aimed at enhancing the work skills of federal prisoners often led to "drive-by manufacturing." In reality, prisoners were paid below minimum wage and received little or no training in the higher-level skills associated with production of office furniture or other products.

Congress has consistently voiced its disapproval of such practices by passing legislation to end them. NOPA asks that Congress now turn its attention to the urgent, comparable problem of small business fronts.

Negative Impact of "Fronts" on Legitimate Small Businesses

The known direct loss of federal business experienced by legitimate independent dealers already totals tens of millions of dollars annually. This loss will grow as these office products dealers continue to unfairly lose access to future multi-year federal, state and local government office products contracts as a result of the small business "fronts" problem. Conservatively, these total losses already have reached more than 100 million dollars per year on a national basis, including federal and state government contracts.

In FY 2006 federal agencies spent between $322 million and $540 million on office supplies, according to FederalTimes.com. Estimates are imprecise, because of incomplete government data collection. These data also exclude the large volume of business done through the government's credit card program.

Regrettably, this "pass-through" problem also is causing significant losses of current business and future opportunities for small office product dealers at the state and local government level and in institutional and commercial markets nation-wide.

How Small Business "Fronts" Work

NOPA has conducted research into a variety of small business "front" situations. This research shows a common pattern of unethical and misleading contracting behavior, which in most cases may not be illegal due to loopholes in present federal laws. Appendix 1 compares the legitimate independent dealer to the "pass-through" dealer. Pass-through situations typically work as follows:

1) The large office products corporation identifies a small business owner with socio-economic preferential selling status and some business experience – sometimes in a different industry – to serve as its "front" to gain access to government set-aside contracts for small business.

2) The large corporation offers to help the small business enter the office products industry with the understanding that the major company will handle all or virtually all of the value-added sales, order placement and processing, product delivery, customer service, quality assurance and even billing functions. In exchange for a commission, the smaller company agrees to serve as a mentored partner "front" through which orders are passed to the major corporate "partner".

3) Government orders placed with the small business "front" are usually captured by the website/customer management computer system of the major corporation, and the order management, customer service and fulfillment processes are then fully administered by employees of the major corporation.

4) Payments may even be handled through "lock boxes" established in the name of the "front", but with the major corporation making the actual payment collection. The commission is then paid to the "front" to close out the transaction.

NOPA believes that GSA and many federal agencies are trying to provide more opportunities for legitimate small businesses to compete on a level playing field for federal contracts. However, we do not believe they fully understand the "pass-through" phenomenon. The current Army Blanket Purchase Agreement (BPA) and a recent multi-agency strategic sourcing initiative contract awards that include small office product dealers are positive signals. But even those awards appear to include some potential pass-throughs.

Small Business Fronts Harm Government Customers

Small business "fronts" harm not only legitimate, independent small business dealers, but also the federal government as an office products buyer. Federal customers are injured by the steady erosion of effective competition for federal contracts as legitimate small

dealers are less willing and able to pursue new government business. Regular, ongoing competition involving multiple alternative office product suppliers – the best way to ensure best price and value – erodes and in some cases no longer occurs.

Pending legislation in the U.S. Senate (S. 2300) would require the General Accountability Office (GAO) to study the small business "fronts" problem at the federal level. Presumably, this study would address the issue of impact on competition for federal government contracts. However, NOPA notes that there already is strong hard evidence of the negative effects of reduced competition for state government office product contracts in several states. In several cases, state contracts that allow a large prime contractor to work with small business "fronts" have had significant problems and anticipated cost savings to governments in those states have not been realized.

In North Carolina, the state purchasing authority awarded a multi-year sole-source contract in 2006 to one of the large national office product chains. Over the prior 5-10 years, the state steadily eliminated the participation of independent, full-service dealers in this contract despite their long-standing, superior performance records. Competition suffered as a result.

Within a year after the sole-source contract was awarded, the Inspector General for the Department of Administration in North Carolina found significant examples of unauthorized product substitutions and incorrect (usually higher) pricing on a large number of contracted "core" office products, where charged prices did not match the awarded bid prices. The large office product chain was forced to make restitution, but was not removed from the state contract.

In Georgia, a similar audit found even more widespread product substitutions and overcharges by the large national chain. In February 2008, the State terminated its contract with the large national chain and has reopened office products business to all qualified suppliers, including independent dealers.

In the Georgia situation, the large national chain was awarded the state office products contract with the understanding that it would work with a consortia of small dealers in the State as "subcontractors". Most if not all of the small dealers chosen to participate by the national chain were small business "fronts", with little or no prior office products industry experience and little role in contract fulfillment.

A similar state contract arrangement with one of the national office product chains prevails in California, with 8 of 9 small business consortia members having no apparent significant prior experience in the office supplies business. That situation too has recently come under closer legislative and administration scrutiny, particularly after violations of contract terms by one of the national chains in 8 California counties.

NOPA believes that similar situations would be discovered if individual agencies conducted thorough audits of actual versus bid pricing and the scope of unauthorized product substitutions under federal office product contracts. In recent years, a growing

number of federal office product contracts have been awarded to one of the large national office product chains on a multi-year basis and/or to their small dealer "fronts".

These "fronts" are expanding as vehicles for large corporations to "demonstrate" a commitment to small business subcontracting, and specifically to providing "assistance" to disadvantaged or under-represented socio-economic groups. Unfortunately, the reality does not match the image shown.

Federal Legislation Essential to End Small Business "Fronts"

NOPA and its members greatly appreciate the exceptional efforts this Committee has made, particularly in the past 12-18 months, to assist small businesses in our industry and others. The results have been legislation to:

1) Require more complete and accurate government accounting of purchases from small businesses;

2) Create better standards for determining which federal contracts are appropriate for "bundling," a growing federal contracting practice that has taken new form under GSA's "Strategic Sourcing Initiative; and

3) Encourage increased government-wide contracting opportunities for small businesses through closer congressional oversight and more ambitious agency-level goal setting, monitoring and reporting to Congress.

None of these reforms, however, have become law as yet. And none will directly address the small business fronts problem, which can only be curbed or eliminated through more specific legislative and regulatory reforms.

Small Business "Fronts" Inconsistent with Recent Reform Legislation

Pending government contracting reform legislation in the House (H.R. 1873, passed in May 2007) and Senate (S. 2300) provide a foundation upon which additional reforms to eliminate small business "fronts" could be built. There are three elements of the "fronts" problem, each of which must be addressed:

1) Federal agencies should not receive credit for small business awards when the work done under a given contract is largely performed by employees of a large corporation;

2) Small business "fronts" should not be allowed to gain access to set-aside government contracts when they effectively serve as brokers that receive a commission from large companies, and when they add little or no value added to the contracted work; and

3) Large national companies should not improperly gain a larger piece of the federal market through sham mentoring programs.

In stark contrast, legitimate independent office product dealers typically perform a high percentage of the service work associated with government contracts. Appendix 1 provides a visual comparison of the typical functions performed by independent small office products dealers versus small business "fronts". One such "front", Faison, was recently determined by the Small Business Administration to be "other than small." And this decision was upheld on appeal (Appendix 2).

Independent dealers meet long-standing FAR requirements for government service subcontractors (50% minimum value-added rule) operating under set-aside contracts for small business. They also meet relevant state procurement requirements, such as the "commercially useful function" criteria used in California. A copy of those standards appears in Appendix 3.

Because there are no specific criteria in current U.S. law or the Federal Acquisition Regulation (FAR), small business "fronts" may be not be illegal and federal agencies have either not seen or tolerated the practice, despite reservations about it.

With new requirements in place to more accurately measure and report federal small business contracting and pending legislation to reform small business contracting in general, it is time to address small business fronts, which are one of the most glaring and widespread unfair federal contracting problems our industry faces.

Specifically, NOPA asks the Committee and Congress to draft and approve legislation to:

1) Establish strict bid evaluation and post-award review criteria to ensure that federal contracts set aside for small business are not awarded to companies that play only minimal roles in servicing such contracts;

2) Require federal agencies to ensure that all bidders on small business set-aside contracts fully disclose and certify the functional roles they will play in contract fulfillment, as well as the specific functions their primary suppliers and subcontractors, if any, will perform;

3) Require each federal agency to report annually to the appropriate committees of jurisdiction in the U.S. House of Representatives and the U.S. Senate regarding their implementation of these provisions to end the use of small business "fronts" in federal contracting; and

4) Establish meaningful penalties for companies found in violation of the proposed new legislative and FAR provisions aimed at elimination of "fronts".

Office Products Industry Background

Government and commercial customers typically buy office products from small independent dealers or from one of the four large national corporations that operate in this market. The same manufacturers and wholesalers sell to both dealers and the large national chains.

A few dealer-owned purchasing cooperatives negotiate direct purchasing agreements with manufacturers to buy large quantities of the highest-volume office products to help their independent dealer members stay cost-competitive with the major national office product specialist chains. For lower-volume products, both independent dealers and the national chains rely heavily on wholesalers to supply them.

With similar costs for goods they sell, the main differences between independent office product dealers and the national chains is their size and how they operate. Dealers are entrepreneurial businesses focused on government, institutional and commercial delivery accounts and are known for their flexibility and exceptional customer service. They usually are not retailers. The large national chains are mixed retailers and commercial resellers. Not surprisingly, their strategies for serving customers are quite different from those of independent dealers.

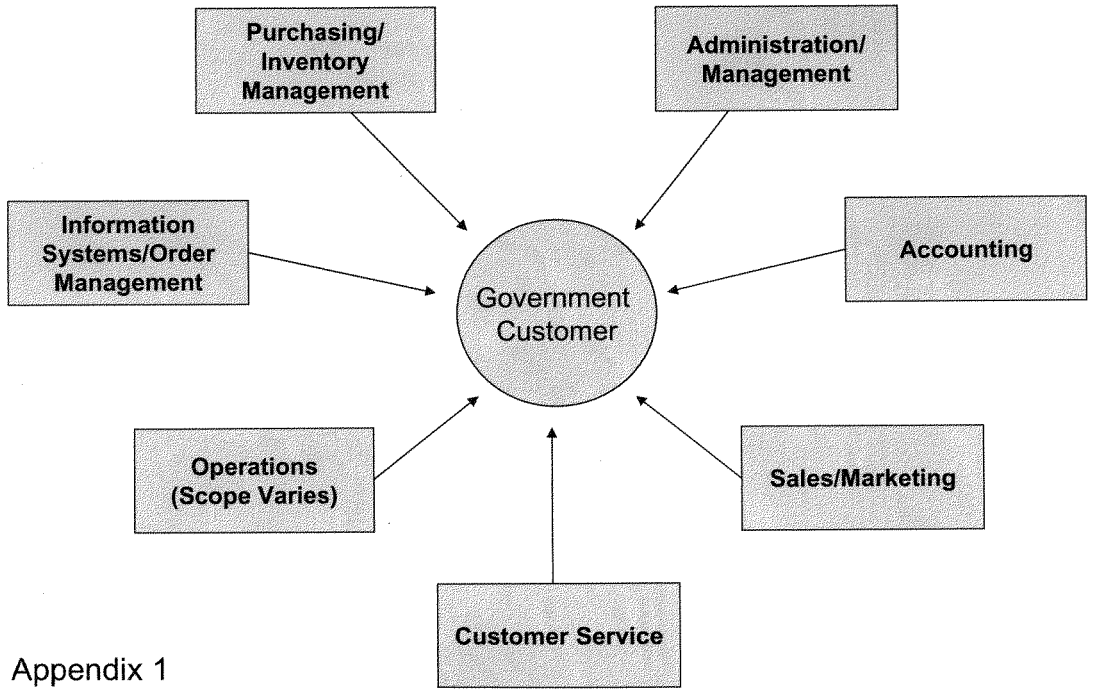
To serve government and commercial customers in multiple locations – especially for large national contracts, independent dealers often participate in special "teaming arrangements". My company, Forms and Supply, is an active participant in one of them: the American Office Products Distributors (AOPD), which has operated successfully since the 1970s.

For these reasons, "subcontracting" is not necessary and generally has not been used in the office products industry, except in the context of the collaborative teams of independents I just mentioned. Independent dealers and large national chains are competitors who do not work well together, and have different operating strategies and philosophies. As a standard industry practice, the legitimate independent dealer has the sole responsibility to negotiate contracts with its supporting business partners as well as government customers, and remains legally liable for the performance of any and all functions to be performed under those contracts. In known pass-through situations, this is not typically the case, with the larger company playing the central role in bid development and negotiations with supporting vendors and the government customer.

On behalf of NOPA and its members, I thank you for opportunity to testify before this Committee about one of the most damaging and unfair practices that often prevents independent office product dealers from competing on a level playing field for federal government contracts.

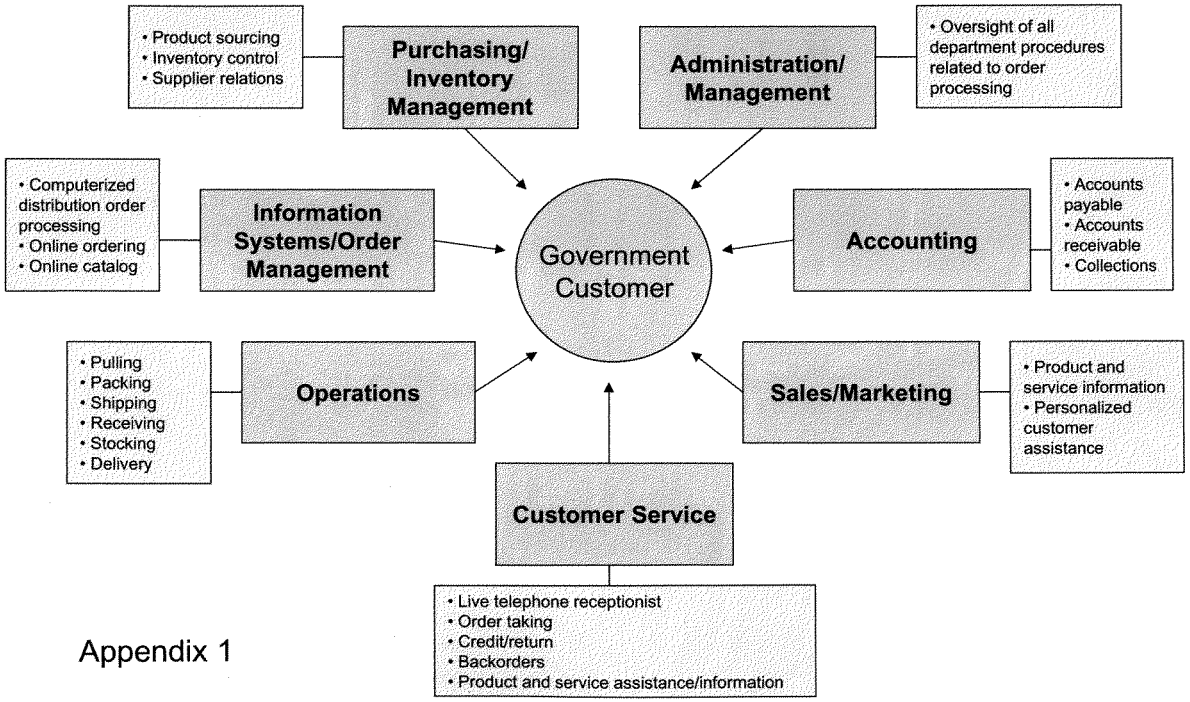
For Further Information Contact: Paul Miller, Miller Wenhold Capitol Strategies (703/934-0219) or Chris Bates, President, National Office Products Alliance (NOPA) at 703/549-9040, x 100).

Independent Small Dealer Business Functions for Customers



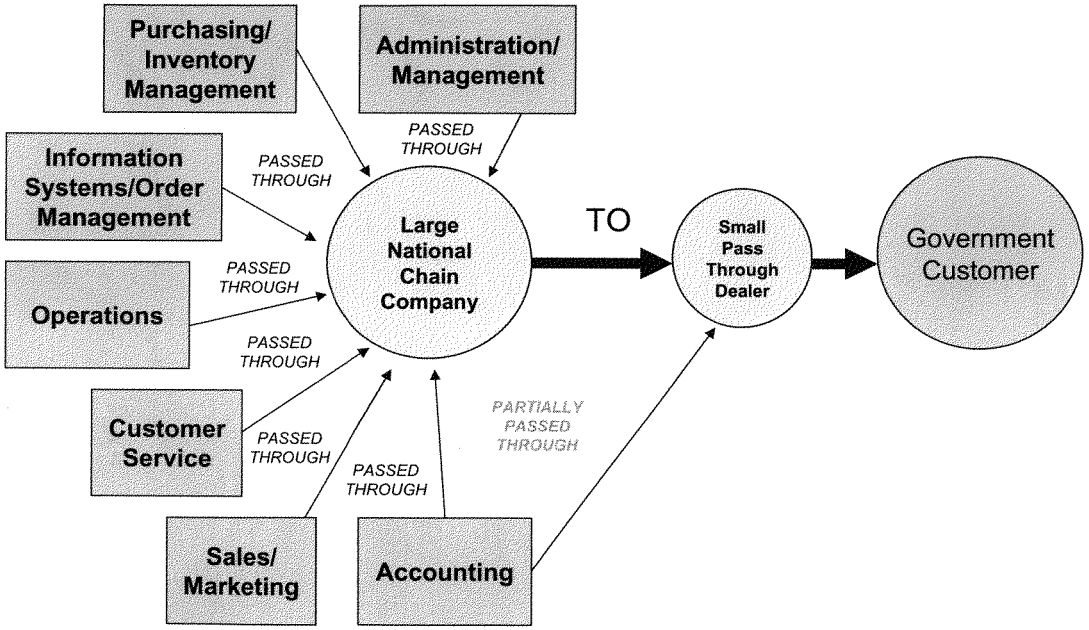
Appendix 1

Independent Small Dealer Business Functions for Customers (Detail)



Appendix 1

Large Company Business Functions Passed Through Small Business "Front" to Customer



Appendix 1

SIZ-4834

UNITED STATES OF AMERICA
SMALL BUSINESS ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
WASHINGTON, D.C.

SIZE APPEAL OF:	
Faison Office Products, LLC	Docket Nos. SIZ-2006-11-09-68 (RMD) SIZ-2006-06-26-46
Appellant	
Solicitation No. LC-2621-606150 Jet Propulsion Laboratory California Institute of Technology Pasadena, California	Decided: January 26, 2007

APPEARANCE

John G. Stafford, Jr., Esq., Greenberg Traurig, LLP, McLean, VA, for Appellant, Faison Office Products, LLC.

DECISION

PENDER, Administrative Judge:

Introduction and Jurisdiction

This appeal arises from a subcontract under a prime contract between the California Institute of Technology's Jet Propulsion Laboratory (JPL) in Pasadena, California, and the National Aeronautics and Space Administration.

On June 8, 2006, the Area Office issued Size Determination No. 05-2006-018 (size determination I or the first size determination), finding Faison Office Products, LLC (Appellant or Faison), to be other than a small business under North American Industry Classification System (NAICS) code 424120, Stationery and Office Supplies Merchant Wholesalers. Appellant appealed size determination I, and on September 27, 2006, I issued *Size Appeal of Faison Office Products, LLC,* SBA No. SIZ-4812 (2006) (the Remand Order), remanding the matter to the Area Office for a new size determination. Subsequently, JPL made award to Catalog Stationery, and the JPL contract is currently being performed by that company. On October 24, 2006, the Area Office issued its size determination on remand (size determination), again concluding that Appellant was "other than small for the subject size standard due to its

affiliation with Corporate Express, Inc., a large business." On November 9, 2006, Appellant timely appealed the size determination.

The U.S. Small Business Administration Office of Hearings and Appeals (OHA) decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Accordingly, this matter is properly before OHA for decision.

Issues

Whether the Area Office made a clear error of fact or law when it determined that Appellant was economically dependent, and thus affiliated under the identity of interest rule at 13 C.F.R. § 121.103(f), with a large concern because Appellant derived 70% of its revenue from the large concern and had a strategic alliance with the large concern.

Whether the Area Office made a clear error of fact or law when it determined the totality of the circumstances (13 C.F.R. § 121.103(a)(5)) between Appellant and a large concern caused them to be affiliated.

Whether the Area Office made a clear error of fact or law when it determined Appellant to be other than small due to its affiliation with another concern based upon findings that (1) the large concern was to perform primary and vital requirements of the solicitation; and (2) Appellant was unduly reliant upon the large concern. 13 C.F.R. § 121.103(h)(4).

Facts

The Remand Order contains the detailed facts of the case, including the following:

1. The Jet Propulsion Laboratory (JPL) Contracting Officer (CO) issued Request for Proposals (RFP) LC-2621-606150 on November 18, 2005. The RFP was a 100% small business set-aside. The RFP identified NAICS code 424120, Stationery and Office Supplies Merchant Wholesalers, with a 500 employee size standard as being applicable.[1] Proposals were due on January 11, 2006.

2. On March 17, 2006, JPL notified an unsuccessful offeror, Office Solutions, that Appellant was the apparent successful offeror. Office Solutions submitted a size protest to the CO on April 18, 2006. On April 25, 2006, the U.S. Small Business

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[1] The size standard for NAICS code 424120 is listed as 100 employees in 13 C.F.R. § 121. However, in the acquisition of commercial items, the Federal Acquisition Regulation (FAR) provides a 500 employee size standard for a business which submits an offer in its own name, but which proposes to furnish an item which it did not itself manufacture. 48 C.F.R. §§ 12.301, 52.212-1(a); *see also Size Appeal of GC Micro*, SBA No. SIZ-4365 (1999).

Administration, Office of Government Contracting, Area V (Area Office) dismissed the size protest as untimely.

3. On April 25, 2006, the Area Office notified Appellant that Office Solutions had filed an untimely protest regarding Appellant's size. The Area Office informed Appellant that even though the Area Office had denied Office Solution's protest, the Area Director had decided to initiate a size protest based on the information provided by Office Solutions.

4. Appellant's President and Chief Executive Officer, Mr. Jared D. Casey, Jr., owns 55% of Appellant's stock. Corporate Express owns the remaining 45% of Appellant's stock.

5. Appellant had an average of thirty-three employees for the 2005 calendar year. Appellant, without consideration for any potential affiliates of Appellant, meets the size standard for NAICS 424120.

6. Appellant has a corporate Advisory Board that makes recommendations about the furtherance of its business. Corporate Express has one member on this board.

7. Appellant admits that Corporate Express is responsible for generating "an approximate average of seventy percent" (70%) of Appellant's revenue over the past five years.

8. Appellant and Corporate Express share six common locations.

9. Corporate Express is the prime contractor for the University of Colorado (UC) and University of Northern Colorado (UNC) contracts referred to in the Record.

10. Appellant states that it has a "strategic alliance partnership" with Corporate Express (Appeal Petition at 14). This is consistent with representations contained in Appellant's website and its May 5, 2005 letter to the Area Office. In addition, the State of Colorado Basic Ordering Agreement (BOA) shows award was made to "Corporate Express dba Faison/Corporate Express," and is signed by Gail Morgan of "Faison/Corporate Express."

11. On June 8, 2006, the Area Office issued a size determination finding Appellant to be affiliated with Corporate Express, one of the world's largest office products suppliers with over 200 facilities, 38 distribution centers, and 10,775 employees. Based on affiliation with Corporate Express, Appellant was deemed other than small under NAICS code 424120.

12. Appellant filed an appeal on June 26, 2006. On September 27, 2006, I issued *Size Appeal of Faison Office Products, LLC,* SBA No. SIZ-4812 (2006), remanding the matter

to the Area Office for a new size determination. Subsequently, JPL made award to Catalog Stationery, who is currently performing the JPL contract. On October 24, 2006, the Area Office issued its size determination on remand, again concluding that Appellant was "other than small for the subject size standard due to its affiliation with Corporate Express, Inc., a large business." On November 9, 2006, Appellant appealed this size determination.

The Remand Order

In my September 27, 2006 Remand Order, I held that the Area Office's finding of affiliation based upon the totality of the circumstances was based upon three clear errors of fact or law. Specifically, the Area Office: (1) Incorrectly found facts regarding the Advisory Board; (2) Found facts concerning the RFP without it being part of the Record; and (3) Misunderstood the significance of the UC and UNC contracts. I vacated and remanded the June 8, 2006 size determination for the Area Office to make a size determination that: (1) Properly considers the RFP; (2) Makes correct findings, if any, concerning the Advisory Board; and (3) Makes correct findings, if any, concerning the UC and UNC contracts. I also strongly recommended the Area Office consider whether it believes an identity of interest under 13 C.F.R. § 121.103(f) exists in recasting its decision upon remand.

SBA Determination Upon Remand

In its October 25, 2006 size determination (size determination), the Area Office provided its clarification of the following three areas specified in the Remand Order:

1. The Area Office clarified that even if Corporate Express had no members on Appellant's Advisory Board and none ever attended any Board meetings, it would still have found affiliation based on other factors, including totality of the circumstances;

2. Its finding of affiliation was not dependent on Appellant's UC and UNC contracts. However, upon review of additional evidence supplied to OHA, it determined that while Corporate Express may have chased the contract, the ultimate award was made to "Faison/Corporate Express." In addition, the Area Office mentioned that "per conversations with UC and UNC, some of the customers ordering off this BOA are counting partial awards to a minority owned firm";

3. The RFP placed weighted importance on management and technical factors and the Area Office found that Appellant was reliant upon Corporate Express to equip it with the vast majority of these factors including: the Oracle iProcurement technology, e-Way, VANS, order fulfillment software, delivery, packaging, its business continuity plan, and four of the seven key personnel positions. Accordingly, the Area Office noted there was sufficient evidence to justify a finding that Appellant violated the ostensible subcontractor rule since Appellant was unusually reliant upon Corporate Express and because Corporate Express was performing primary and vital requirements of the contract as per 13 C.F.R. § 121.103(h)(4).

The Area Office found Appellant and Corporate Express affiliated under the identity of interest rule as provided in 13 C.F.R. § 121.103(f). Among the factors that convinced the Area Office an identity of interest existed between Appellant and Corporate Express were:

1. Appellant derives approximately 70% of its income through its relationship with Corporate Express;

2. Corporate Express represents it has an ongoing collaboration or "strategic alliance" with Appellant that permits customers to say they are awarding contracts to a minority firm by ordering from the Corporate Express/Faison strategic alliance;

3. Corporate Express owns 45% of Appellant's stock; and

4. Appellant is co-located with and relies heavily upon Corporate Express to perform contracts.

Appellant's Allegations Upon Appeal

In its November 9, 2006 Appeal Petition, Appellant makes several arguments why the size determination is clearly in error. Before stating its arguments, Appellant offered the following introductory paragraph:

> In its Order Remanding Size Determination, this Office guided the Area Office to review Faison's proposal for the JPL contract to determine whether, in fact, the Area Office's determination that Faison's services are ancillary to Corporate Express's [sic] for that contract is supported by the evidence, and to consider in greater detail whether an "identity of interest" under 13 C.F.R. § 121.103(f) arose between Faison and Corporate Express, so that, under a totality of the circumstances test, Faison and Corporate Express could be found to be affiliated. Each of these elements is discussed below.

(Appeal Petition at 4).

The other "elements" Appellant referenced include:

1. The Area Office mischaracterizes the State of Colorado contract to support its finding of identity of interest affiliation. For example, the Area Office continually refers to the contract as a "Faison contract" and "erroneously relies also upon the 'fact' that some State of Colorado customers ordering from the contract are counting partial awards to a minority owned firm. The...contract was not bid, however, as a SDB set aside." Furthermore, Appellant should not be penalized for the actions of third parties, such as State of Colorado customers, over whom Appellant has no control (Appeal Petition at 5);

2. The Area Office shows a clear and prejudicial predisposition to rule against Appellant because:

a. A Size Specialist informed Appellant that a small business performing at the national level raises "an automatic red flag for the Area Office"(Appeal Petition at 6); and

b. The size determination implies that national contracts "cannot be held by small businesses without dependence upon a large business to such an extent that it rises to the level of affiliation." *Id.*

Appellant asserts that these beliefs are in "direct conflict with Section 2 of the Small Business Act reflecting the express will of Congress that small businesses be given a fair proportion of Government sales with no mention whatever of limitation to local or regional markets...." *Id.*

3. The Area Office makes clear errors of fact with regard to the RFP and Appellant's proposal by:

a. Mischaracterizing Appellant's services as "ancillary" and Corporate Express's services as "core";

b. Inaccurately portraying Corporate Express as supplying order fulfillment services when these services are "sometimes performed by Corporate Express and sometimes contracted to other third party distributors"(Appeal Petition at 7);

c. Utilizing the RFP's proposal evaluation weighting scheme to establish that Appellant's services are ancillary when the weighting criteria were not intended to indicate core versus ancillary services;

d. Ignoring the fact that "JPL issued its solicitation as a small business set-aside knowing that small business offerors likely would team with a large business to meet the [Oracle] iProcurement requirements, which were assigned the most weight for evaluation purposes by the JPL." Therefore, by concluding that Corporate Express is performing the core iProcurement functions and this core function must be performed by a small business, the Area Office ignores that "no small business would likely be qualified to perform the JPL contract" (Appeal Petition at 9);

e. Mischaracterizing Appellant and Corporate Express's "partnering initiative" as a joint venture (*See* 4a-c, below);

f. Erroneously inferring that either Appellant failed to incorporate its own safeguarding procedures or inappropriately relied upon Corporate Express's safeguarding procedures. However, since Corporate Express was responsible for the iProcurement function, only Corporate Express was required to provide safeguarding procedures for confidential

information; and

g. Drawing erroneous conclusions from Appellant's list of key personnel in its proposal when the law does not require that all key personnel be employed by the prime contractor.

4. The Area Office makes a clear error of fact and law in finding an identity of interest between Appellant and Corporate Express by:

a. Concluding that a joint venture relationship exists because (1) Appellant has employees working at Corporate Express offices, when only six of Appellant's employees occupy Corporate Express offices; (2) Appellant "relies upon the infrastructure of Corporate Express (inventory, warehousing, delivery vehicles)," when "Corporate Express does not always provide warehousing and delivery services"; and (3) Appellant and Corporate Express's State of Colorado contract was awarded to "Faison/Corporate Express," when the status of this contract as a Corporate Express contract has already been addressed by OHA (Appeal Petition at 11-12);

b. Reiterating eight facts bearing on Appellant and Corporate Express' relationship despite the fact that OHA found these facts did not result in affiliation based on the totality of the circumstances (Appeal Petition at 15);

c. Erroneously concluding a joint venture relationship exists when Appellant and Corporate Express have a "strategic alliance relationship that is long-term for many opportunities...extend[ing] beyond the limited definition of a joint venture in 13 C.F.R. § 121.103(h)" (Appeal Petition at 14);

d. Relying upon *Size Appeal of Team Contracting, Inc.*, SBA No. SIZE-3875 (1994) when the facts are distinguishable. Specifically, Appellant and Corporate Express do not have a joint venture agreement and neither party enjoys management rights in the other party (Appeal Petition at 14-15);

e. Applying the wrong criteria, instead of the regulatory criteria at 13 C.F.R. § 121.103(f). First, the Area Office relies upon the fact that Appellant and Corporate Express are in the same line of business when that is only relevant to the newly organized concern rule at 13 C.F.R. § 121.103(g). Second, the Area Office places too much weight on the fact that Appellant and Corporate Express work together to promote the economic interests of each other, when teaming agreements are common in government solicitations and not indicative of identical business interests. Third, Appellant is not economically dependent upon Corporate Express but simply teams with them for specific projects. Appellant asserts that it "receives approximately 30% of its revenue from contracts outside the Corporate Express strategic alliance" and "there is no evidence that [Appellant] would cease to do business" if it could no longer team with Corporate Express (Appeal Petition at 16-17).

Discussion

I. Introduction

The Record in this Appeal supports the Area Office's determination that Appellant is other than small because of its identity of interest with Corporate Express (13 C.F.R. § 121.103(f)). In particular, the evidence that Appellant derives 70% of its revenue from its relationship with Corporate Express and that Corporate Express represents its ongoing relationship with Appellant as a "strategic alliance" is strong evidence of an identity of interest.

There is also sufficient evidence to support the Area Office's determination that Appellant and Corporate Express are affiliated under the totality of the circumstances (13 C.F.R. § 121.103(a)(5)). For example, although not establishing affiliation in isolation, the fact that Corporate Express owns 45% of Appellant, has an employee that serves on Appellant's Advisory Board, and shares common locations with Appellant can reasonably be viewed as affording Corporate Express the power to control Appellant through the totality of the circumstances, especially when considered with the evidence establishing identity of interest.

The Record also supports the Area Office's determination that Appellant's relationship with Corporate Express in submitting its offer under the instant procurement triggers the ostensible subcontractor rule (13 C.F.R. §121.103(h)(4)). The Area Office's careful analysis of the requirements of the solicitation and its finding that Corporate Express is performing primary and vital requirements of the solicitation is supported by the Record. In addition, the Record supports the Area Office's finding that Appellant was unusually reliant upon Corporate Express in submitting its offer.

In addition, in the introductory paragraph to its arguments in its Appeal Petition, Appellant seemingly fails to recognize that since 2004[2] there is a difference between identity of interest and totality of the circumstances. Specifically, Appellant argued that I had directed the Area Office to determine whether an identity of interest under 13 C.F.R. §121.103(f) arose between Appellant and Corporate Express "so that, under a totality of the circumstances test, [Appellant] and Corporate Express could be found to be affiliated" (Appeal Petition at 4). This argument is contrary to law and the Remand Order, for as I plainly explained, affiliation under 13 C.F.R. § 121.103(f) (identity of interest) is distinct from affiliation based upon the totality of the circumstances (13 C.F.R. § 121.103(a)(5)) and not a necessary predicate to finding affiliation under the totality of the circumstances (Remand Order at 8 - 10). *See Size Appeal of Lance Bailey and Associates*, SBA No. SIZ-4817, at 13-14 (*Lance Bailey*).

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[2] 69 Fed. Reg. 29192, 29202 (May 21, 2004).

II. Applicable Law

A. Timeliness

Appeals must be filed within 15 days of receipt of a size determination. 13 C.F.R. § 134.304(a)(1).

B. Standard of Review

It is undisputed that Appellant's size is below the size standard, but if found to be affiliated with Corporate Express, one of the largest businesses in the office product industry, Appellant will exceed the subject size standard. Thus, OHA must review whether the Area Office made a clear error of fact or law when it determined Appellant to be other than a small business due to its affiliation with Corporate Express. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size *de novo*. Rather, OHA reviews the record to determine whether the Area Office based its size determination upon a clear error of fact or law. *See Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775 (2006). Thus, I will only disturb an area office's size determination if I determine the area office clearly made key findings of law or fact that are mistaken.

C. Identity of Interest

SBA's size regulations recognize affiliation can occur in several specific instances. Under the facts of this appeal, the relevant regulation is 13 C.F.R. § 121.103(f) (identity of interest), which provides:

> Affiliation based on identity of interest. Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

The relevant portion of this regulation is "economically dependent through contractual or other relationships." Before SBA promulgated 13 C.F.R. § 121.103(f) in 2004, OHA recognized affiliation based on economic dependence in the context of the totality of the circumstances, which OHA found because facts suggested dependence by one or both concerns upon the other. OHA affirmed determinations based upon economic dependence when two concerns have identical or nearly identical business or economic interests, *e.g.*, when one or both of the concerns depends upon the other for a high percentage of its revenues. *See Size Appeal of Pointe Precision, LLC*, SBA No. SIZ-4466, at 9-10 (2001); *Size Appeal of J & R Logging*, SBA No. SIZ-4426 (2001) (an example of extreme dependency); *Size Appeal of Kansas City LLC d/b/a*

Best Harvest Bakeries, SBA No. SIZ-4574 (2003) (another example of extreme dependency); *Size Appeal of Wireless Technology Equipment Co., Inc.*, SBA No. SIZ-4204 (1996) (*Wireless Technology*); *Size Appeal of Supreme-Technology, Inc.*, SBA No. SIZ-4092 (1995).

OHA's past practice is consistent with the plain meaning of 13 C.F.R. § 121.103(f). Accordingly, if an area office finds a concern depends on another concern for a high percentage of its revenue, then the area office can reasonably determine the two concerns are affiliated because of economic dependence, *i.e.*, that they share an identity of interest. In making this holding, I am not fixing a certain percentage of revenue as being sufficient to prove economic dependence, for it could be as low as 30% or 40%, based upon the facts. However, I do hold, as a matter of law, that when one concern depends on another for 70% or more of its revenue, that the concern is economically dependent on the other. Given the high probative value of this kind of evidence, the only exception to this holding would be if the dependent concern could prove, by clear and convincing evidence, that its interests are separate from the other concern.

I note that there are other facts that strengthen a determination of economic dependence and bear on whether there is an affiliation based upon an identity of interest. For economic dependence, it is relevant whether the two concerns are involved in the same line of business as it is relevant whether the larger concern owns a potion of the smaller or retains some degree of influence within the smaller concern. *See Size Appeal of National Welders Supply Co., Inc.*, SBA No. SIZ-4315 (1998). This could consist of financing, a seat on the Board of Directors, contracts for exclusive dealings, existing subcontractor relationships, supply of raw materials, co-location, claims of a continuing commercial or strategic relationship, or an ownership stake. While all of these factors are plainly relevant to a totality of the circumstances determination, they are also relevant to an economic dependency determination. The key is whether the facts imply dependence. If a reasonable person could conclude there is economic dependence, I would not have a definite and firm conviction that the area office made a clear error of fact or law.

It remains relevant that the protested concern retains the burden of proving its size. 13 C.F.R. § 121.1009(c). The protested concern must do this when submitting its SBA Form 355 to an area office and answering subsequent requests for information. That is the path to rebutting any possible determination of economic dependency by an area office under 13 C.F.R. § 121.103(f).

D. Totality of the Circumstances

As mentioned above, affiliation through the totality of the circumstances provides an independent basis for an area office to determine affiliation from, amongst other things, affiliation based on identity of interest. *Lance Bailey,* at 13-14. Authorization for finding affiliation based upon totality of the circumstances is found at 13 C.F.R. § 121.103(a)(5). However, to comprehend affiliation through totality of the circumstances, it is necessary to read all the text in 13 C.F.R. § 121.103 before subparagraph (a)(5), as well as the text of (a)(5). This text states:

> (a) General Principles of Affiliation. (1) Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.
>
> (2) SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.
>
> (3) Control may be affirmative or negative. Negative control includes, but is not limited to, instances where a minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders.
>
> (4) Affiliation may be found where an individual, concern, or entity exercises control indirectly through a third party.
>
> (5) *In determining whether affiliation exists, SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation.*

(emphasis added).

As explained in *Lance Bailey*, the specific independent bases of affiliation, *i.e.*, those described in 13 C.F.R. § 121.103(c), (d), (e), (f), (g), and (h) can form a non-exclusive basis or "nucleus" of a finding of affiliation through the totality of the circumstances. Thus, while the evidence in the record may not establish affiliation under one of the specific factors enumerated in 13 C.F.R. § 121.103 or under other indicia of control, an area office's review of the totality of the circumstances arising from proof relevant to various factors may convince the area office that one concern has the power to control another and, thus, both are affiliated.

Based upon 13 C.F.R. § 121.103(a)(5), if an area office concludes that it is more likely than not that various facts give one concern the power to control another concern, it may find affiliation under the totality of the circumstances. In applying the totality of the circumstances standard for determining affiliation, area offices necessarily must exercise sound discretion. In exercising that discretion, an area office must find facts and explain why those facts caused it to determine one concern had the power to control the other.

An area office can consider facts it considered to be insufficient under an independent basis for affiliation and conclude affiliation exists under the totality of the circumstances. Similarly, an area office may aggregate facts that it found support one or more of the independent factors and conclude on a separate basis, that affiliation under the totality of the circumstances is warranted. However, as stated in *Lance Bailey*, our preference remains that an area office first evaluate whether affiliation should be found under the independent grounds described in 13 C.F.R. § 121.103(c), (d), (e), (f), (g), and (h).

E. The Ostensible Subcontractor Rule

SBA predicates its affiliation regulations upon the power of one concern to control another. 13 C.F.R. § 121.103(a). One independent basis of control area offices must consider is the ostensible subcontractor rule. 13 C.F.R. § 121.103(h)(4). The purpose of the rule is to prevent other than small firms from forming relationships with small firms to evade SBA's size requirements. The ostensible subcontractor rule permits the Area Office to determine a subcontractor and a prime have formed a joint venture (and are thus affiliates) for determining size. An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract or a subcontractor upon which the prime contractor is unusually reliant. 13 C.F.R. § 121.103(h)(4).

The ostensible subcontractor rule provides:

> A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract, or of an order under a multiple award schedule contract, or a subcontractor upon which the prime contractor is unusually reliant. All aspects of the relationship between the prime and subcontractor are considered, including, but not limited to, the terms of the proposal (such as contract management, technical responsibilities, and the percentage of subcontracted work), agreements between the prime and subcontractor (such as bonding assistance or the teaming agreement), and whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation.

13 C.F.R. § 121.103(h)(4).

The relationship between the prime and its putative subcontractor as reflected in the proposal can trigger the ostensible subcontractor rule. If the proposal shows the subcontractor is performing primary and vital requirements of the solicitation, then an area office is correct to find affiliation. Similarly, if the proposal shows the prime is unusually reliant upon the subcontractor, then an area office is correct to find affiliation.

OHA has interpreted the ostensible subcontractor rule many times. However, as explained in *Lance Bailey*, what is relevant in one decision is not necessarily relevant in the next, for these determinations usually turn on the unique facts presented in an individual RFP and proposal. *Lance Bailey,* at 16. Still, OHA has often affirmed size determinations where an area office determined that key personnel were subcontractor employees or that key tasks were to be performed by subcontractor employees. *See Size Appeal of BAMA Company*, SBA No. SIZ-4819 (2006), at 7-8; *Size Appeal of B&M Construction, Inc.*, SBA No. SIZ-4805 (2006), at 15-17.

F. Improper Predisposition

Appellant has accused the Area Office of a predisposition to rule against small businesses competing for very large contracts. This necessarily suggests improper conduct by the Area Office. In evaluating this kind of accusation, I note that SBA does not permit its employees to act upon factors extraneous to the evidence in the record when processing size protests. If a party can show an SBA employee acted out of personal animus, prejudice, or bad faith, that is sufficient to prove a clear error of fact or law. Hence, OHA would take appropriate action in such circumstances.

However, before even reaching the question of improper action by an SBA employee, parties must recognize that OHA presumes all SBA employees act in good faith in the performance of their duties. I hold the presumption that SBA acted in good faith in issuing a size determination can only be overcome by clear and convincing evidence of personal animus, prejudice, or other irregular conduct.

The reason I hold the clear and convincing evidence standard is applicable in this instance is because the Court of Appeals for the Federal Circuit held the clear and convincing evidence standard "most appropriately describes the burden of proof applicable to the presumption of the government's good faith." *Am-Pro Protective Agency, Inc. v. U.S.*, 281 F.3d 1234, 1239 (Fed. Cir. 2002). This burden of proof is appropriate, for Appellant is essentially accusing the Area Office of acting in bad faith in issuing the size determination.

III. Analysis

A. Timeliness

Appellant appealed the size determination within 15 days of receiving it. Therefore, Appellant's appeal is timely. 13 C.F.R. § 134.304(a)(1).

B. Does Appellant Have an Identity of Interest with Corporate Express?

The evidence of an identity of interest due to Appellant's economic reliance upon Corporate Express is overwhelming. In addition to Appellant depending on Corporate Express for 70% of its revenue (which is sufficient to support a determination of economic dependence by itself), the record shows that: (1) Corporate Express claims Appellant and it have a strategic alliance; (2) Appellant is co-located with Corporate Express at several locations; and (3) Appellant relies upon Corporate Express infrastructure for its ability to perform large contracts. This evidence is precisely the kind of evidence of economic dependence anticipated by the plain meaning of 13 C.F.R. § 121.103(f) and most closely akin to the types of situations OHA addressed in its economic dependency decisions.

Appellant has not challenged or rebutted these facts by proving they are clearly in error as required by 13 C.F.R. § 134.314. Rather, I find that Appellant generally failed to contest

economic dependence beyond arguing that since 30% of its revenue was unrelated to Corporate Express, it would not go out of business if it ceased doing business with Corporate Express. Besides being insufficient to prove a clear error of fact, I hold that Appellant's argument is an admission of the facts found by the Area Office. Since I have held that a concern that depends upon another for 70% of its business is economically dependent upon the other concern for finding an identity of interest, I hold the Area Office made no clear error of fact or law in finding Appellant to be affiliated with Corporate Express on the basis of an identity of interest.

C. Is There Sufficient Evidence to Find Affiliation through Operation of the Ostensible Subcontractor Rule?

I find the Area Office expended significant effort to investigate the ostensible subcontractor rule as it applied to the relationship between Appellant and Corporate Express in Appellant's proposal. Not only did the Area Office carefully review and analyze the RFP, it also compared the RFP's requirements to Appellant's proposal. In its analysis, the Area Office chose to designate functions as "ancillary to the core services of the RFP" to indicate the opposite of the words "primary and vital," used in 13 C.F.R. § 121.103(h)(4).

In the size determination, the Area Office first recited the Technical Management criteria given the most weight by the RFP. It then identified whether the proposal stated Appellant or Corporate Express would be performing the services that related to each RFP factor. As the result of this analysis, the Area Office concluded Appellant would be performing ancillary tasks and thus found Corporate Express was to perform primary and vital services under the RFP.

The Area Office found that Corporate Express, either acting individually or as part of its strategic alliance with Appellant, would perform all the highest weighted Technical Management requirements of the RFP. For example, in quoting from Appellant's proposal, the Area Office found Corporate Express was to perform the iProcurement requirements, fulfill orders, and report activities. In addition, Appellant's proposal made it clear that it was Corporate Express that would be making the majority of the required deliveries as its strategic alliance partner. According to its proposal, Appellant was to manage the contract, provide customer service and sales support, and perform marketing functions, none of which were weighted factors in the RFP's Technical and Management criteria.

In addition, the Area Office recited language from Appellant's proposal emphasizing the importance of Corporate Express (Size Determination at 4). More specifically, Appellant attributed much of the capability needed to perform the contract, such as managing servers, operating delivery vehicles, utilizing warehouse replenishment software, and operating a Business Continuity Plan (safeguarding assets and maintaining accurate books)[3] to Corporate Express.

The Area Office completed its analysis of Appellant's proposal by assessing the source of

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[3] I recognize that Appellant avers this pertains to iProcurement, but find it irrelevant.

key personnel for the performance of the contract arising under the RFP. The Area Office found that four of the seven individuals identified in the "Key Personnel Positions" portion of the RFP were current Corporate Express employees.

The Area Office found that the services Appellant would be performing were ancillary to the core services required by the RFP. It concluded that while Appellant would be performing various administrative functions, such as providing sales representatives, customer service, and account management, Corporate Express was the concern enabling the office products to be stored, available, packaged, and delivered. Accordingly, given the weight placed on various factors by the RFP, Appellant's role was less important than the role Corporate Express was to perform.

Appellant's response to the Area Office's findings on the ostensible subcontractor issue is sparse. Moreover, its primary argument is more of an admission than a rebuttal. Specifically, Appellant argues that "JPL issued its solicitation as a small business set-aside knowing that small business offerors likely would team with a large business to meet the [Oracle] iProcurement requirements, which were assigned the most weight for evaluation purposes by the JPL." (Appeal Petition at 9). Accordingly, Appellant argues that the Area Office's finding that Corporate Express was performing the core iProcurement functions and this core function must be performed by a small business, ignores that no small business would be likely to be qualified to perform the JPL contract." *Id.*

Appellant's logic is flawed. The Area Office did not determine that a small business must perform the iProcurement function. Rather, it found that Corporate Express' performance of this function, along with the "vast majority" of the factors given weighted importance in the RFP, including delivery, packaging and order fulfillment, meant Corporate Express was performing primary and vital (core) requirements of the JPL contract.

In addition, although merely asserted and not proven by Appellant, it is irrelevant that JPL knew small business offerors would team with large businesses to meet the iProcurement requirements of the RFP. This is because whatever JPL intended, Appellant still must comply with SBA's size regulations. That is, Appellant could not assign so much of the primary and vital work evaluated under the RFP's Technical Management factors to an other than small concern and still comply with 13 C.F.R. § 121.103(h)(4).

The Record proves that the basis of Appellant's qualifications to perform the work required by the RFP were actually the qualifications and experience of Corporate Express, with whom it has a "strategic alliance." That is, Appellant's proposal largely attributed qualifications relevant to the RFP Management Technical factors (Operational Approach, Related Experience, and Management Approach) to Corporate Express. I hold this is sufficient to sustain a finding that Appellant is unusually reliant upon Corporate Express to both qualify for and perform the RFP's requirements.

D. Do the Totality of the Circumstances Support a Finding of Affiliation between Appellant and Corporate Express?

The Area Office considered many facts before determining that Appellant and Corporate Express are affiliated under the totality of the circumstances. In addition to the matters relevant to its identity of interest and ostensible subcontractor determinations, the Area Office cited other facts relevant to the relationship between Appellant and Corporate Express.

For example, the Area Office also further investigated the relationship between Appellant and Corporate Express as it related to the UC and UNC BOA. From its investigation, the Area Office found that although the contract listed Corporate Express as the contractor, the ordering information on file reflected that the company was listed as "Company: Corporate Express" and "Does Business As: Faison/Corporate Express." In addition, UC and UNC indicated that some customers ordering off of the contract are counting partial awards to a minority owned firm (Appellant).

After reciting clarifications to its original size determination, the Area Office also found eleven (11) facts. While I have already discussed some of these facts in analyzing the identity of interest and ostensible subcontractor issues, these facts do support the Area Office's finding of affiliation through the totality of the circumstances. They are:

1. Appellant's President and CEO owns 55% of Appellant and Corporate Express owns 45% of Appellant;

2. Corporate Express is a large business;

3. Appellant has an average of 33 employees, six of whom share Corporate Express space;

4. Appellant and Corporate Express are in the same line of business (providing office supplies);

5. Appellant repeatedly terms and promotes Corporate Express as its "strategic partner" (since 1994);

6. One Corporate Express employee serves as a member on Appellant's Advisory Board;

7. Approximately 70% of Appellant's revenue over the past five years was generated as a result of its "strategic partnering" with Corporate Express;

8. Appellant and Corporate Express share six common locations;

9. In multiple states, Appellant has its employees in the Corporate Express office to

provide "customer care and sales reps" along with Corporate Express staff;

10. For its large contracts, Appellant relies upon the infrastructure of Corporate Express (inventory, warehousing, delivery vehicles); and

11. A contract pursued and won by Corporate Express was awarded to "Faison/Corporate Express."

In addition to these eleven (11) facts, the Area Office noted that Appellant uses Corporate Express as a "subcontractor" in other contracts, including one for Pepsi-Cola advertising.

These eleven (11) facts, plus any independent facts arising under the Area Office's identity of interest and ostensible subcontractor findings, are extensive and material. For example, Corporate Express is not a spectator to Appellant's operation, for it owns 45% of Appellant, has an employee on its advisory board, transports Appellant's orders on its trucks, and accounts for 70% of Appellant's revenue. What is more, its "strategic alliance" with Appellant formed the basis of Appellant's ability to submit an offer under the RFP. In the aggregate, these facts show a very substantial, dependent, and enduring relationship between Appellant and Corporate Express. Moreover, these facts show the entity with the power to control the relationship is Corporate Express.

When I vacated and remanded the Area Office's June 8, 2006 size determination, I stated that since the Area Office based its totality of the circumstances determination upon some incorrect or undeveloped facts, I had to vacate the size determination. I remanded because the Area Office did not determine there was affiliation under the independent factors in 13 C.F.R. § 121.103 (whereupon I recommended it consider 13 C.F.R. § 121.103(f) upon remand) and because I could not tell whether the Area Office would have determined there was affiliation had it known some of the facts it recited were incorrect. Regardless, I did not say the remaining true facts were insufficient to justify a determination of affiliation under the totality of the circumstances.

The Area Office corrected the deficiencies of the June 8, 2006 size determination. For example, through further investigation, it developed additional and relevant facts concerning the UC and UNC contract. The Area Office also examined the RFP and Appellant's proposal in detail. On the whole, its attention to the requirements of the Remand Order was complete.

I hold that Appellant has both failed to identify any material errors of fact or prove there are any clear errors of fact applicable to the facts underlying the size determination. Moreover, I hold the most relevant or probative evidence of affiliation under the totality of the circumstances is so overwhelming that even if the Area Office did make an error of fact, it is very likely to be harmless.

Considering the foregoing, I cannot hold that the Area Office made a clear error of fact or law in concluding that Appellant and Corporate Express are affiliated under the totality of the

circumstances.

E. Was the Area Office Improperly Predisposed to Find Appellant was Affiliated with a Large Concern?

The Record contains no evidence of personal animus, prejudice, or bad faith. Arguably, the only suggestion of improper conduct comes from Appellant's statement in its Appeal Petition that the Area Office explained that small businesses attempting to do business on a large or nationwide scale "raises an automatic red flag" (Appeal Petition at 6).

Notwithstanding Appellant's failure to offer clear and convincing evidence of a predisposition by the Area Office, I find that explaining that certain business arrangements "raise a red flag" cannot constitute personal animus, prejudice, or bad faith (predisposition). Rather, I hold that mentioning the existence of a red flag is merely a recitation of what experience has taught area offices over time. Moreover, I take notice that size specialists in area offices are expected to be knowledgeable and are trained to spot various factors or "red flags." *See* 13 C.F.R. § 121.1009(b).

I also hold that the size determination does not imply or suggest that national contracts cannot be held by small businesses unless they are affiliated with a large business. Rather, I hold this size determination is supported by the Record.

F. Summary

The facts in the Record are probative of Appellant's economic dependence upon Corporate Express. The Record also shows that Corporate Express would be performing primary and vital requirements under the RFP and that Appellant was unusually reliant upon Corporate Express to qualify for the RFP and thus violated the ostensible subcontractor rule. Finally, the totality of the circumstances show a very strong and deliberate relationship between Appellant and Corporate Express that gives Corporate Express the power to control Appellant through that relationship.

Conclusion

I have considered Appellant's Petition and the Record. The Record shows the Area Office did not base its size determination upon a clear error of fact or law when it determined:

a. Appellant is an other than small concern because it is economically dependent upon and thus has an identity of interest with Corporate Express;

b. The relationship between Appellant and Corporate Express for the work required by the RFP constitutes a violation of the ostensible subcontractor rule; and

c. Appellant is affiliated with Corporate Express under the totality of the

circumstances.

Therefore, the size determination is AFFIRMED.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(b).

THOMAS B. PENDER
Administrative Judge

Questions: Pass-Through Issue

1) The pass-through situation you reference in your testimony, can you tell me exactly how the process works?

A large business seeking to gain access to a contract or a portion of a contract that is "set aside" or intended for a small or otherwise disadvantaged business, partners with a business of that type. Typically, the small business provides some small percentage of the total work to serve as a representative on the account, so that the small business status can be claimed per that company's socioeconomic status.

For that business "entrée'" and a minimal percentage of work, the small business typically gets some type of commission payment from the large business or perhaps gets to service a small local portion of that account's business. However, the vast majority of the work and service infrastructure is provided by the large company, ranging from internet ordering systems to product inventory shipped, to delivery on their own vehicles. In many cases even the billing, accounting, and reporting requirements are handled by the large business.

2) Can you tell me what a small business gets out of this relationship?

Typically, a commission of some sort or in some cases the opportunity to service a small percentage of the customer's business, usually in close proximity to their own office. Think of the small business as a "broker" of a sort for the large business, though in most cases, the large company develops the business relationship the government agency and maintains it.

3) Are there any current cases where this type of relationship has been investigated?

There is one confirmed pass-through case – Faison, which served as a "front" for one of the major Office Supplies companies. NOPA has identified similar cases of probable pass-throughs, but those have not yet been reviewed by SBA.

4) If so, what was the outcome of the investigation?

Faison, a minority company with HQ offices in CO, long suspected of being a "front" for a large OS company, was recently held to be "other than small" by an ALJ ruling in Orange County, CA. That determination was confirmed upon legal appeal.

5) When agencies award contracts to these small businesses do they typically know that the large corporate company is doing the work?

Some do and some don't. I was recently involved in a bid for a facility managed by a private contractor for DOE, which was to be a small business set aside. When questioned about a suspected bidder being a pass-through, the response from the customer was "I can't control with whom our vendors partner and it is not illegal." My response: "No it isn't illegal "YET", but what happens to the spirit of the set aside, when the primary beneficiary of the award is a large business?"

6) Do you have a sense of how much business is lost to small businesses by these partnerships?

NOPA's research has identified the number to now be in the "tens of millions" just in the federal government sector and growing. State and local government and commercial have been estimated to be "tens of millions" as well.

7) Have you contacted the SBA about this situation? If so, what has been their response?

SBA investigated and made a size determination ruling in the Faison case. Another probable pass-through situation was brought to SBA's attention, but they did not issue a ruling.

8) Could SBA play a bigger role in fixing this problem if they were to investigate these small businesses as they did in the Faison case you described?

I would certainly think so, since SBA has authority to make size determinations with respect to small business contracting matters. Generally, this has been a "self-certification" system, unless a protest is filed, in which case an official investigation is undertaken and a ruling is made.

It is our impression that SBA, with its limited resources, has not moved forward proactively in this area. The lack of clear legal standards defining "pass throughs" may have constrained SBA in determining that a small business is not eligible to participate in a set-aside contract opportunity.

9) Are you aware of recent contracts that have been awarded to these pass-through company's?

Yes. The Faison case was a clear example. NOPA also submitted background information with respect to another probable "pass through" company, but SBA did not move forward in the same way. There are several additional small companies that have federal contracts that NOPA believes are probably "pass throughs."

10) If so, can you provide us with a list?

We would be willing to share NOPA's research with the Committee staff to further its own review of this problem.

11) If Congress is to act, what is that we can do to close this loophole?

Please see NOPA's written testimony, page 6, for our general proposals. For quick reference, here they are:

Specifically, NOPA asks the Committee and Congress to draft and approve legislation to:

1) **Establish strict bid evaluation and post-award review criteria to ensure that federal contracts set aside for small business are not awarded to companies that play only minimal roles in servicing such contracts;**

2) **Require federal agencies to ensure that all bidders on small business set-aside contracts fully disclose and certify the functional roles they will play in contract fulfillment, as well as the specific functions their primary suppliers and subcontractors, if any, will perform;**

3) **Require each federal agency to report annually to the appropriate committees of jurisdiction in the U.S. House of Representatives and the U.S. Senate regarding their implementation of these provisions to end the use of small business "fronts" in federal contracting; and**

4) **Establish meaningful penalties for companies found in violation of the proposed new legislative and FAR provisions aimed at elimination of "fronts".**

12) Does the industry oppose legitimate mentoring relationships (answer is no)?

No, not at all. Legitimate "mentoring" relationships should be just what the term implies – a larger business assisting a small or fledgling business concern in developing best practices, its own infrastructure and expertise, so the small business can be successful and grow IN ITS OWN RIGHT.

My view would be that a true mentoring relationship would not be for the sole purpose of allowing large companies "access" to "brokered" business that is intended to go to "legitimate" small businesses.

13) If not, how does the situation you describe differ?

See #12 above. Also, you might refer to Appendix 1 which has charts comparing legitimate dealers to those that are "pass-throughs".

14) Do agencies that award contracts to these small business pass-throughs get small business credit for doing so?

That is my understanding.

15) <u>If Congress does implement legislation to correct this problem, do you see it having a negative impact on legitimate partnerships in industries where small businesses team with large businesses on government contracts?</u>

No, I do not. NOPA recognizes that there are many industries, especially manufacturing, where it is an absolute necessity for large businesses to partner with small businesses simply to meet the required need. This is legitimate "subcontracting".

Fortunately, in the office products industry, at least on the dealer/distributor side, there are plenty of legitimate small businesses with the buying power, technical and reporting capability and the national distribution capability through small business teaming arrangements to meet the requirements of large government and commercial accounts without the need to team with a large national/international concern.

Unfortunately, our four large national competitors continue to find ways to capture business not intended for them. Without some type of action, the negative impact will continue to be to the thousands of hard-working, technically capable, legitimate small businesses in our industry that could be creating thousands of jobs and providing exemplary service.

16) If not, why not? **See above.**

TESTIMONY OF
JOHN T. SPOTILA

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Before the Committee on Small Business
U.S. House of Representatives

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Chairwoman Velazquez, Ranking Member Chabot, and Members of the Committee:

Thank you for inviting me to testify today on the impact of emerging procurement methods on small business contractors. This is an important subject with significant implications for our nation. For all of us who understand that small business is the engine that drives our economy, finding a way to get federal procurement to support small business development is worthy of attention.

I speak to you today as a small business owner, but am fortunate to bring with me broad knowledge and experience gained in other roles. After graduating from the Yale Law School, I served at the Justice Department and then in a Philadelphia law firm. I then set up my own law firm and spent many years as a small business owner representing other small businesses. From 1993 to 1998, I had the privilege of serving as General Counsel for the U.S. Small Business Administration. I then moved to the Executive Office of the President to take on the Senate confirmed role of Administrator of OIRA, OMB's Office of Information and Regulatory Affairs, with responsibility for the review of significant federal regulations. After leaving the White House, I became Chief Operating Officer and President for a billion dollar, publicly owned federal contractor. Now I own and run a small federal contracting firm.

My experience over the past 15 years has given me a valuable perspective on the topic of this hearing. I understand the good intentions and logic of those who helped create procurement reform. I believe their reform effort has accomplished a great deal of good. Unfortunately, the reforms have not been sensitive enough to their negative impact on small business owners. Nor has the federal government done what it could and should do to improve its procurement system to help small business owners.

For many small business owners, federal procurement is a very difficult environment. Procurement offices do not have enough staff to do the work. The people they have are too often inexperienced and poorly trained. The procedures they follow are complex and not well understood. Decisions take too long and are communicated in documents filled with boilerplate and legalese. The procurement world seems "of the

lawyers, by the lawyers and for the lawyers". The small business owner feels like an inconvenience at best.

Since most agencies have cut back significantly on their procurement staffing, procurement offices often lack the resources to improve their internal processes. They are fighting off alligators, not draining the swamp. Too often, they don't fix their processes and they don't take steps to communicate with their customers more clearly. Large firms that can assign people to work with the procurement offices full time navigate the maze better than small firms that cannot afford such full time help. In essence, the lack of streamlining and clear communication becomes a competitive advantage for larger firms.

There are other unfortunate results as well. Many procurement offices continue to combine a wide range of minimally related tasks into larger contracts to get more procurement dollars out the door with a single action. Unfortunately, this makes it harder for small contractors to demonstrate broad enough capability to qualify for the large awards. The small firms may have excellent skills and experience in their areas of focus, but they do not have the capability that only a large firm would have. I understand why procurement offices do what they do in this regard. I am just concerned about the unintended consequences.

Here's an example of what I mean. On February 15th of this year, the Army published a "Sources Sought" Notice (Solicitation Number W91WAW-08-R-0028) with a 10 day turnaround. On its face, the Notice suggested that the Army wanted to steer the work to a qualified small business through a "set-aside". Thus it asked that interested small businesses submit their capabilities statements. But listen to the description of the anticipated tasks:

"The US Army Contracting Agency, Contracting Center of Excellence (CCE) at the Pentagon, on behalf of the Office of the Assistant Secretary of the Army for Installation & Environment (ASA-I&E), intends to procure professional support services in support of policy development, program oversight and coordination of a wide variety of Army activities as a small business set-aside or under full and open procedures. Only small businesses are to submit capability packages. Interested small businesses that are certified and qualified as a small business concern in NAICS code 541618 with a size standard of $6.5 million are encouraged to submit their capability packages outlining their experience in the following key areas or tasks. (1) Knowledge and Experience in dealing with unexploded ordnance policies, procedures and knowledge of unexploded ordnance detection and removal technologies. (2) Ability to manage an unexploded ordnance test range. (3) Ability to assess the environmental and safety aspects of chemical, biological and conventional munitions. (4) Expert knowledge and experience in dealing with Lean Six Sigma practices, to include the ability to provide a Master Black on a full-time basis. (5) Knowledge and Experience in restoration of contaminated areas, including ranges. (6) Knowledge and Experience in environmental outreach programs throughout the country. (7) Knowledge and Experience in gathering and evaluating state environmental laws and regulations. (8) Knowledge and Experience in the evaluation of and developing solutions to remediate the sea-disposal of chemical and conventional

munitions. (9) Knowledge and Experience in dealing with content management, maintenance and limited design effort of web-based data, information and knowledge management systems. (10) Knowledge and Experience with the development of requirements for environmental technology. (11) Knowledge and Experience with the management of a major technology and the testing and fielding of new technology program. (12) Experience in conducting studies involving world-wide environmental and sustainability issues. (13) Knowledge and Experience with Government/DOD financial and budget processes and related automated systems."

The Notice went on to add this advisory:

"If at least two responsible small business concerns are determined by the Government to be capable of performing this requirement at a fair market price based on an evaluation of the capability packages (limited to 25 pages, single sided) submitted by Monday 25, February 2008 at 10:00 A.M. (EST), the requirement will be solicited as a 100% set-aside for small business concerns. If capability packages are not received from at least two responsible small business concerns by the response date or if the Government determines that no small businesses are capable of performing this requirement based upon an evaluation of the capability packages submitted this requirement will be solicited under full and open procedures."

In other words, large businesses should get ready for the competition - unless they were already waiting with small business junior partners eager to claim the benefit of their broad capability through some type of "teaming" arrangement. What is not likely to happen is that a small business with revenue of less than $6.5 million a year will be able to show that it has experience and capability in 13 areas ranging from unexploded ordnance removal to the safety of chemical and biological munitions to Lean Six Sigma to environmental outreach programs to "web-based data, information and knowledge management systems" to "experience in conducting studies involving world-wide environmental and sustainability issues" to "knowledge and experience with Government/DOD financial and budget processes and related automated systems". If they could do all that, they probably wouldn't be small.

But at least "teaming arrangements" sometimes let the small business serve as a prime contractor. Even if the prime is dependent on a large firm on the team, at least the small prime retains some ability to work directly with the client and protect its long term position. Often, the reverse is true. Large firms win the contracts, perhaps with the help of small businesses, and then use their superior size and leverage to squeeze their subcontractors so that most of the profit (and all of the client relationship) goes to the prime.

The trend towards reduced staffing in procurement offices has clearly favored large firms over small ones. Huge sole source awards go to mega contractors, especially in the defense area, in the interest of speed and national security. Unrelated tasks get grouped together in ways that make small businesses less competitive. Large firms are in a better position to win prime contracts than small ones.

Government agencies don't seem to understand this or care about the implications. I can remember attending an Aeronautical Systems Center "Industry Day" Conference at Wright Patterson Air Force Base two years ago where government procurement people were discussing "the realities of tomorrow" and describing their forecast of future contracting opportunities. They showed no particular concern about small business participation. When I asked one small business representative about procurement opportunities for small business, she suggested that I introduce myself to Boeing or one of the other large "primes" because there wasn't likely to be much opportunity there for small business except as a subcontractor. All of the contracts they were planning were going to be very large.

For all of this, small business owners are resilient and entrepreneurial. They continue to work the system, relying on personal relationships and niche skills to carve out a role for their firms. Often they are the source of great energy and creativity. If only they had a more level playing field, think what they could do!

I doubt very much that we can reverse the trend towards aggregated contracts. It's worth trying, but any victories will probably be on the margins. We can do something else, however, that would help small contractors a great deal. We can make a serious effort to turn procurement offices into centers of process improvement and plain language communication. If we can streamline the way procurement offices operate and get them to communicate clearly, small business will benefit tremendously.

Plain language communication is the place to start. It is cost effective, achievable and of particular value to small contractors. In the procurement area, legalese and obscure language are dead weights that drag small firms down. They can't afford expensive advisers to re-interpret unintelligible government communication. They need to be able to understand things the first time they read them.

Last Thursday, the House Small Business Subcommittee on Contracting and Technology held a hearing on a bill introduced by Congressman Braley, H.R. 3548, the *Plain Language in Government Communications Act.* Senator Akaka of Hawaii has introduced a similar bill, S. 2291, in the Senate. These bills would require federal agencies to use plain language in any new or revised documents relating to benefits or services including letters, publications, forms and instructions. If it becomes law, it will help make the procurement world much more understandable to small contractors. Procurement forms will become less obscure, procurement procedures more transparent. This won't fix all that is wrong with our procurement system, but it's not a bad place to start. I commend Congressman Braley for his vision in introducing this bill.

Individual agencies have shown what can be accomplished by emphasizing plain language communication. The FAA has even applied these principles in the procurement area. On at least a partial basis, it converted its guidance on contract writing clauses to plain language as part of its FAA Acquisition System Toolset (FAST). See **http:fast.faa.gov**. This is the right approach and it shows that it can be done.

A word about plain language. Plain language is language the intended reader can understand – and use – on one reading. It is audience-focused. The most important rule in plain language communication, indeed, perhaps the only rule, is to be clear to your intended reader. When I was General Counsel at the SBA in the mid 1990s, I led a 10 month effort in which career employees throughout the agency rewrote all of SBA's regulations in plain language. It was a tremendous success. At OIRA, I helped implement President Clinton's Executive Memorandum on Plain Language, making OMB review part of the solution rather than part of the problem. Technical areas are no obstacle to plain language. Indeed, no areas need plain language more so that the intended audience can understand and use the material. Plain language works wherever and whenever we try it. I just hope Congressman Braley's bill passes so that the government tries it in more places.

Process improvement is the second step we can take. Streamlining the way procurement offices operate would also pay large dividends for small business. In no small measure, small contractors struggle more today because of something the government didn't do. When the government introduced procurement reform and cut back on its procurement staff, it made no real effort to re-examine how procurement offices should run their operations. Instead of applying best practices in Lean Six Sigma, change management and project management to their procurement offices, agencies largely left those offices to flounder. Now they struggle along with cumbersome processes, useless complexity, poor training, inefficient use of resources and understandably poor morale. No wonder decisions take forever and small businesses fall victim.

It doesn't have to be this way. Our career government employees are a terrific resource. Time and again they have served the American people with dedication, energy and creativity. They just need leadership and support. We know how to fix sad sack offices. There are a host of examples where the government has improved its processes and delivered better results for less money. We can do the same with procurement offices. If we do, the effort will more than pay for itself and both small contractors and the American taxpayer will benefit tremendously from the result.

Madam Chairwoman, I commend you and the Committee for shining a light on this topic. You are absolutely right that government can do a better job in this area. Perhaps it just needs a little Congressional "push" now and then to get back on track.

Thank you and I would be happy to answer any questions you may have.

John T. Spotila
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

MAY 0 2 2008

The Honorable Nydia Velázquez
Chairwoman
Committee on Small Business
U. S. House of Representatives
Washington, DC 20515

Dear Madam Chairwoman:

I am writing to follow up on two matters that were discussed at the Small Business Committee's March 6, 2008, hearing on federal contracting. During the hearing, you asked that the Office of Federal Procurement Policy (OFPP) provide you with its assessment of the Acquisition Advisory Panel's recommendation to convene an interagency working group to develop best practices and strategies to unbundle contracts and mitigate the effects of contract bundling. You also requested information about the number of Procurement Center Representatives (PCRs) at the Small Business Administration (SBA). The information you requested is provided below.

In light of the steps that have already been taken and initiatives underway on contract bundling, OFPP has concluded that it is not necessary to convene an interagency working group at this time. Responding to recommendations made by OFPP in its 2002 report, *Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business*, the Office of Small Business Programs at the Department of Defense (DOD) developed the *Benefit Analysis Guidebook* to help its acquisition workforce perform benefit analyses before consolidating or bundling contract requirements. DOD and SBA have both posted the guide. See http://www.acq.osd.mil/osbp/news/Bundling%20Guidebook%20October%202007.pdf and http://www.sba.gov/aboutsba/sbaprograms/gc/index.html. To further increase federal agency awareness of this assessment tool, OFPP is sharing the guide with the Chief Acquisition Officers and Senior Procurement Executives, and will have a link to the guide placed on the "Acquisition Central" website, accessible at www.acquisition.gov.

OFPP will soon be issuing guidance to strengthen and integrate acquisition reviews into the formal internal control program established in OMB Circular A-123, *Management's Responsibility for Internal Control*. This guidance will include considerations for: (1) identifying small business opportunities, (2) addressing contract bundling and consolidation issues, and (3) monitoring small business goal achievements. The guidance is based on best practices identified in a comprehensive framework that the Government Accountability Office developed for assessing agency acquisition functions.

With respect to your second request, I have conferred with SBA regarding their PCRs. SBA currently has 53 PCRs on board. Nine additional PCRs have been hired and are in the process of receiving their clearance, bringing the total to 62 PCRs. SBA will continue hiring additional PCRs this year with a goal of increasing the total number to 66 by the end of FY 2008.

I appreciate the opportunity to share this additional information and am confident that the steps described in this letter will further assist the Administration in meeting its commitment to providing maximum opportunities for small businesses in federal contracting and subcontracting.

Sincerely,

Paul A. Denett
Administrator

cc:
Administrator, Small Business Administration

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