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SUBPAR SUBCONTRACTING: CHALLENGES FOR SMALL BUSINESSES CONTRACTORS

HEARING

BEFORE THE

SUBCOMMITTEE ON
CONTRACTING AND WORKFORCE

OF THE

COMMITTEE ON SMALL BUSINESS
UNITED STATES
HOUSE OF REPRESENTATIVES

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FIRST SESSION

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SUBPAR SUBCONTRACTING: CHALLENGES FOR SMALL BUSINESSES CONTRACTORS

THURSDAY, OCTOBER 6, 2011

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
SUBCOMMITTEE ON CONTRACTING AND WORKFORCE,
Washington, DC.

The Subcommittee met, pursuant to call, at 10 a.m., in room 2360, Rayburn House Office Building. Hon. Mick Mulvaney (chairman of the subcommittee) presiding.

Present: Representatives Mulvaney, West, Ellmers, and Chu.

Chairman MULVANEY. Folks, before we start officially today, thank you for coming. I was just pointing out to Ms. Chu that clearly the majority leader does not call the Subcontracting Workforce Committee to clear their schedule for votes with us. And we just received a note that we will be voting today at about 10:15. It will be a fairly long series of votes. It looks like there are three or four amendments plus a Motion to Recommit and then the vote on the underlying bill. So I would imagine the vote series will take someplace between a half an hour and 45 minutes. So we will go as far as we possibly can until they ring the bell and then we will adjourn the meeting and come back as quickly as we possibly can. I apologize in advance to the witnesses and to the folks who are here to participate and to watch, as those of you who have done this before know that this happens probably more often than not.

So, with that, we will call this meeting to order. And we are here today to talk about small business and specifically, subcontracting. We are going to look at the challenges small businesses face when they are both the prime contractor, as well as when they are the subcontractor. Additionally, this hearing will examine the three systems the government uses to monitor and promote small business subcontracting.

When a prime contract is set-aside for small business, the government wants to make sure that the small business is not simply a front for a large business. So the Small Business Act requires that the small business perform a certain percentage of the work. However, there are two problems with the current system. It is very hard to catch bad actors and very hard for small businesses who want to to comply. These problems make legitimate small businesses pay even more in compliance costs and in turn waste even more taxpayer money.

While many of the contracts we will hear about today deal with the 8(a) program, especially the Alaska Native Corporations program, these problems are not limited to any single program. How-

ever, it is inevitable that the larger dollar contracts obviously attract more attention. By addressing these challenges, we hope to hold—hope to open up opportunities for legitimate small businesses to obtain government contracts. The government-wide goal, again, we have talked about many times in this Committee, for small business prime subcontracting dollars—excuse me, prime contracting dollars, is 23 percent and legitimate small businesses, not fronts for large corporations, deserve those contracts.

There are also challenges when small businesses are the subcontractors. In Fiscal Year 2010, federal prime contractors subcontracted over $200 billion. The SBA has established a government-wide goal of awarding 35.9 percent of those subcontracting dollars to small businesses, a goal that has decreased from 40 percent less than five years ago. To help small businesses compete for those $200 billion in subcontracts, large prime contractors are required to submit subcontracting plans. These plans detail how much a business will subcontract to each type of small business. Failure to make a good faith effort to comply with this plan is supposed to result in a fine; however, companies are failing to report to the government on their actual subcontracting achievements, and yet no prime contractor ever, ever has been fined as a result. So clearly, in the last five years, all of the almost 3,000 prime contractors have always perfectly submitted their subcontracting plans worth over $1 billion or we have a serious problem on enforcement. We need to address how to retool the subcontracting program.

Finally, there are three systems that the federal government uses to monitor and promote subcontracting. First, the Federal Subcontractor Reporting System, which requires that all contractors report each subcontract above $25,000. Second, the Electronic Subcontracting Reporting System, which requires that firms with subcontracting plans report their subcontracts; and third, there is the SBA Subcontracting Network, which allows prime contractors to post subcontracting opportunities over $10,000 for small businesses to compete for. We need to examine duplication in these systems, as well as their effectiveness.

Small business, both prime and sub, are good for government and good for the economy. They increase competition, increase innovation, create jobs, and save taxpayer jobs. As this Subcommittee considers today these issues surrounding small business and subcontracting, we want to learn how we can improve compliance without unduly unburdening—excuse me, unduly burdening, small firms. If we succeed at that goal, we will help businesses compete, create jobs, and save taxpayer dollars.

I want to thank our witnesses in advance for their participation again today—it is good to see both of you—which will help us achieve these ends.

I now yield to Ms. Chu for her opening remarks before introducing the witnesses.

Ms. CHU. Thank you, Mr. Chair.

Today, small businesses are looking for so many opportunities to grow stronger and expand. As the driving force behind nearly two-thirds of new jobs, this is critical for the economy. One way that we can enhance small firms' job creating power is through the federal procurement marketplace. In the last decade, the government

has doubled its contracting efforts to more than $500 billion per year. This makes the U.S. Government one of the largest single buyers of goods and services in the world.

Typically, prime contracts are generally viewed as the most lucrative way for entrepreneurs to participate in this marketplace; however, subcontracts are nearly as important. I am so glad that today's hearing is focused on this very important issue. In fact, last year, small businesses received $97 billion in prime contracts while receiving an additional $74 billion through subcontracting opportunities. For subcontracts, this totaled 35 percent of all contracts, just shy of the 35.9 percent goal. This reality is that subcontracting is a critical avenue for entrepreneurs to work with the government, particularly for those dealing with the current economic slowdown.

Although subcontracts are an important entry point, more needs to be done to make them accessible to small firms, and today's hearing will help us shed light on this. The preparation and enforcement of subcontracting plans is a critical area that needs to be strengthened. For businesses, like the ones here today, such plans are absolutely essential to winning work. However, given recent GAO reports, it is clear that more needs to be done to make these plans more effective. One of the main issues is that limiting the effectiveness of these plans is both a lack of SBA personnel, namely PCRs and CMRs, and I am glad that the Agency is here to address this point.

An adequate and thorough review of these plans is important but there is simply not enough staff to do so. With more than three million contracting actions each year, the less than 100 staff assigned to these reviews is insufficient. Additionally, it is well understood that there is a lack of penalties and incentives regarding the implementation of a subcontracting plan. This means that in many cases small businesses will continue to be an afterthought rather than a primary focus.

I am also looking forward to exploring the tools that exist for small businesses to become subcontractors. For example, the SBA operates a database called Subnet. Through this system, prime contractors can post subcontracting opportunities and small businesses can search through these entries. However, as posting is not mandatory, the website presents limited opportunities. A current search of the database reveals only 100 active solicitations. If we want to draw in more small businesses, particularly those that are not regular government contractors, we must improve mechanisms like this.

Finally, in light of recent allegations about fraud and abuse in SBA's contracting programs, it is worth talking about subcontracting from another perspective. Unfortunately, in some instances, subcontracts have become a means to defraud the government and take opportunities away from legitimate small businesses. To prevent those abuses from occurring, more resources must be directed to oversight and penalties have to be strengthened.

Despite these challenges, subcontracting remains a vital means for small businesses to access government contracts. Channeling more procurement opportunities to them is a smart policy. Doing so spreads the economic power of the federal procurement market-

place to more companies and communities. With the economic challenges on the horizon, this is more important than ever. While we are always talking about the need for diversification in business models, the slowdown has made this particularly important, especially for small firms. For these businesses, government contracts put another option on the table. By further opening the federal marketplace to small businesses, we can ensure that entrepreneurs have an opportunity to win new customers in a new market, and this is key because while our economy is showing promise, the recovery remains fragile. We will need to see significant job growth and this job growth can come mainly from small business.

Chairman MULVANEY. Thank you, Ms. Chu.

Just by way of logistics here, we have always been a little loose with the five-minute rule in this Committee, so what you will see is the green light in front of you as you begin your testimony. Yellow will go on when you have one minute left, and red, technically, when your five minutes is up. But until you hear me quietly banging the gavel, please feel free to continue.

STATEMENTS OF MARY KENDALL, ACTING INSPECTOR GENERAL, DEPARTMENT OF THE INTERIOR; JOSEPH G. JORDAN, ASSOCIATE ADMINISTRATOR, GOVERNMENT CONTRACTING AND BUSINESS DEVELOPMENT, U.S. SMALL BUSINESS ADMINISTRATION

Chairman MULVANEY. I will introduce the first panel now. The first witness is Mary Kendall, the acting inspector general for the Department of the Interior. Ms. Kendall spent much of her career as an attorney for federal law enforcement programs and as a state and federal prosecutor. Since 1999, she has served as the deputy inspector general.

Sitting next to her is Mr. Jordan. Welcome back, Mr. Jordan. He served as the associate administrator of Government Contracting and Business Development at the U.S. SBA since March 2009. The Office of Government Contracting and Business Development works to create an environment for maximum participation by small, disadvantaged, and women-owned businesses and federal contract awards and large prime subcontract awards. It also plays a major role in the formulation of federal procurement policies and affects small business.

Ms. Kendall, we are going to begin with you today, so fire away.

STATEMENT OF MARY KENDALL

Ms. KENDALL. Thank you, Mr. Chairman, Ranking Member Chu. Thank you for the opportunity to testify today about the challenges in the administration of contracts between the federal government and small businesses.

The Office of Inspector General does not purport to know or understand all of the intricacies or challenges that attend to contracts between the federal government and small businesses, but we can comment on our findings relative to the Department of the Interior's handling of several small business contracts which are, we believe, representative of some of the challenges that influence the management of federal contracts with small businesses.

During a recent review, we discovered a service contract with an 8(a) small business, United Service and Solutions, LLC, (US2) that was not in compliance with the statutory subcontracting limitations which require the prime contractor to satisfy at least 50 percent of the personnel-based contract cost with its own employees. The Small Business Administration Participation Agreement requires that the contracting officer monitor and enforce that provision. US2, an Alaska Native corporation had been noncompliant with the 8(a) subcontracting limitations for more than two and a half years. The contracting officer told us that she believed the contractor on an indefinite quality, indefinite delivery contract, as was the case with US2, has the life of the contracting limit.

To the contrary, the Code of Federal Regulations state that in order to ensure the required percentage of costs on an indefinite quantity 8(a) award is performed by the participant, the participant must demonstrate semi-annually that it has performed the required percentage to that date. The CFR goes on to say that the participant must perform 50 percent of the applicable costs for the combined total of all task orders issued to date at six-month intervals. In other words, US2 is required to perform 50 percent of the work every six months that the contract was in force.

Our Recovery Oversight Office also addressed compliance with the 8(a) limitations on subcontracting in certain construction contracts funded by the American Recovery and Reinvestment Act monies. We found inconsistency in how and whether compliance with the limitations on subcontracting was assessed by DOI contracting officers. This inconsistency was found in compliance monitoring and absence of department-wide guidance and a lack of training for contracting officers. Confusion on the roles and responsibilities between SBA and DOI contracting officers contributed to our findings.

In the US2 case, in particular, the contracting officer had identified potential problems with the limitations on subcontracting quite early in the life of the contract. SBA, however, indicated that it found US2's plan to address these problems sufficient. Therefore, the contracting officer took this as a signal to continue with the contract. We found this confusion to affect the recovery-funded contracts as well. The Department of Interior has since issued department-wide guidance on the limitations on subcontracting, provided a worksheet with instructions to all contracting officers to assess a contractor's compliance, and has agreed to provide annual training to the acquisition workforce regarding their responsibilities under the 8(a) partnership agreement between SBA and DOI.

Even with a clear understanding of the roles and responsibilities, contracting officers are hampered in their monitoring efforts by receiving incomplete and inaccurate data from their 8(a) contractors. For example, US2 broke down labor costs by those incurred by US2 and those incurred by its subcontractors, but did not break down other direct costs in the same way. Based on the other direct costs we reviewed, we believe that additional subcontractor labor costs were contained in this category, exacerbating the extent to which US2 was out of compliance with the limitations on subcontracting. In fairness to US2, we do not believe that such manipulation of reporting data is limited to this company but may well be happening

with other 8(a) contractors as well. Contracting officers are placed at a significant disadvantage to identify such data problems and correct them.

Mr. Chairman, Ranking Member Chu, that concludes my prepared testimony. I would be happy to answer any questions you may have.

[The statement of Ms. Kendall follows on page 42.]

Chairman MULVANEY. Thank you, Ms. Kendall. And our practice here is to save all the questions until after the testimony of the witnesses.

Mr. Jordan.

STATEMENT OF JOSEPH G. JORDAN

Mr. JORDAN. Thank you, Chairman Mulvaney, Ranking Member Chu, and members of the Subcommittee. Thank you for inviting me back here to testify today.

As I told you when I was here a few weeks ago, and I sincerely mean, our top priority at SBA is to maximize opportunity for small businesses and ensure the benefits of our programs flow to the intended recipients. My office works each day to provide increased opportunities for eligible small businesses to compete for an win federal prime contracts, as well as subcontracts. We are always looking for ways to increase small business contracting opportunities, and in the two and a half years I have been in my position, the federal government has made significant improvements. For example, in Fiscal Year 2010, small businesses won nearly $100 billion or 22.7 percent of federal prime contracting dollars. Small businesses also won $74 billion or 35.4 percent of subcontracting dollars, which is a marked increase from the 28.6 percent they won in 2008 and the 31.8 percent in 2009.

In terms of subcontracting, our focus at the SBA is on three main areas. One, working with agencies and prime contractors to make sure small businesses get their fair share of federal subcontracting opportunities; two, ensuring that when a small business is a federal prime contractor it complies with the limitations on subcontracting requirements; and three, developing and maintaining the tools, systems, and resources needed to monitor and track subcontracting achievements.

I would like to take this opportunity share with you our initiatives to address each of these areas. First, one of our top priorities is to ensure that small businesses receive substantial federal subcontracting opportunities. For small businesses, subcontracting is not only a good source of revenue, but also allows them to gain relevant federal government contracting experience, which may be used as examples of past performance when they bid on future contracts.

To help increase small business subcontracting and improve oversight of the process, my office has a team of commercial market representatives (CMRs), who are stationed across the country. Their responsibilities include counseling small businesses, conducting matchmaking events, providing training on the Subcontracting Assistance Program and conducting compliance reviews of large business prime contractors.

Additionally, the Small Business Jobs Act included several provisions specifically related to holding prime contractors more accountable to their subcontracting plans. In fact, we published these proposed subcontracting rules in the Federal Register just yesterday. The first provision is designed to prevent small business small contracting misrepresentations. The second provision is aimed at mitigating "bait and switch," which is when a prime contractor references a small business as its subcontractor in bid or proposal but does not utilize the small business in actual performance. The last provision requires prime contractors to notify a contracting officer whenever they reduce a payment or are more than 90 days delinquent in paying a small business subcontractor.

Our second area of focus in subcontracting is ensuring that when a small business is a prime contractor it meets the limitations on subcontracting. Statutes and regulations were developed to ensure that if a small business concern is awarded a set-aside contract, the fund will perform a substantial portion of the contract. Although monitoring compliance with limitations on subcontracting is the responsibility of the contracting officer, SBA is committed to working closely with the Office of Federal Procurement Policy and the federal agencies to ensure they have the appropriate training, tools, and resources needed to monitor compliance.

My office also conducts surveillance reviews of contracting activities. These are periodic examinations to provide recommendations on how to increase opportunities for small businesses and to ensure contracting officers are in compliance with small business policies and regulations. As part of these reviews, my team evaluates compliance with subcontracting regulations and provides recommendations to agencies on how to improve these processes and procedures. In addition to these reviews, SBA takes action against firms that violate the limitations on subcontracting. Our comprehensive fraud and abuse prevention strategy has already had significant impact. For example, last year SBA suspended a large company based on evidence indicating a lack of business integrity and federal procurements involving small businesses and an intentional disregard for compliance with the limitations on subcontracting. In the last two years, SBA has initiated more government-wide suspension and debarment actions than it had in the previous 10 years.

Our third area of focus is ensuring agencies and contracting officers have the tools, systems, and resources needed to monitor and track subcontracting achievements. We work closely with the Office of Federal Procurement Policy and the General Services Administration to ensure these tools are available. The two primary systems used to capture federal subcontracting information are the electronic Subcontracting Reporting System (SRS) and the Federal Subaward Reporting System (FSRS).

GSA is currently undergoing an effort to combine the various procurement databases into one new system called the System for Award Management, which is being deployed in phases with the first phase scheduled to be available in the first half of 2012. As demonstrated by the initiatives and efforts described in this testimony, SBA is taking great strides to strengthen our small business prime and subcontracting programs. While we have made signifi-

cant progress, we continue to look for ways to identify further opportunities for improvement and to maximize small businesses' access to this important source of revenue so they can grow their businesses and create jobs.

Thank you for allowing me to share SBA's views and initiatives with you today, and I will be happy to answer any questions you may have.

[The statement of Mr. Jordan follows on page 37.]

Chairman MULVANEY. Thank you, Mr. Jordan. And as our practice here, Ms. Chu will begin with her questions and then we will go down to the members and I will go last.

So Ms. Chu, fire away.

Ms. CHU. Mr. Jordan, as you know, there are these major kickback schemes that were discovered—the major kickback scheme that was discovered at the Army Corps of Engineers involving two 8(a) firms. SBA should be at the vanguard of federal small business procurement and combat the misuse of these small business contract programs, yet the IG office at SBA reported that SBA itself had inadequately planned and inappropriately awarded these two 8(a) sole source contracts. What tools does SBA need to enforce the federal contract standards and conduct better oversight?

Mr. JORDAN. Well, I believe the case in which you are referring to was not where SBA had awarded contracts, but it did involve an 8(a) firm and a different agency actually awarded and monitored those contracts.

It is hard for me to comment on an ongoing investigation, but what I can say is that that type of action is a real demonstration of the type of partnership we have with our inspector general and the Department of Justice, and evidence that this administration has absolutely zero tolerance for fraud, waste, and abuse.

I have talked in the past about some of the enforcement actions that SBA can take, and these are suspensions, debarments, terminations and those types of things. We do not have subpoena power. We cannot prosecute. So what we do is we take all the actions that we can and then turn over all of that evidence not the inspector general and the Department of Justice so that they can investigate further and take appropriate action. I think that is what you saw the outcome of yesterday or over the last couple of days.

Ms. CHU. Well, one issue has to do with who is responsible for monitoring compliance. There is the agency and then there is SBA. The Interior's IG office previously indicated that the agency's 8(a) program partnership agreement with SBA did not say which agency would oversee the subcontracting restrictions. So what is your comment? Who is responsible?

Mr. JORDAN. The contracting officers have the primary responsibility for ensuring small businesses that they enter into contracts with comply with the limitations on subcontracting. That being said, SBA is fully committed to working with the agencies and the Office of Federal Procurement Policy to make sure they have the tools, training, and resources necessary to do that. Now, that is true in any small business set-aside context, be it 8(a) or any of the other small business set-aside programs. In the 8(a) contacts though we did see some areas where clarification would be helpful. So in March of this year we released the first comprehensive revi-

sion of the regulations—government program in more than a decade and made clear, especially in areas like joint ventures, what was permissible and what was not, clarified some of those rules, and bolstered some of the oversight.

Also, just yesterday, we released three different subcontracting regulations that implement provisions that Congress passed in the Small Business Jobs Act. The first of those really reaffirms and makes it very clear that it is the contracting officer's responsibility to monitor the limitations on subcontracting compliance when they enter into a set-aside contract with a small business.

Ms. CHU. So you are saying the agency is responsible?

Mr. JORDAN. The contracting officer is. Yes. But we definitely want to partner with all of the agencies to ensure that that is happening, that they have the training and awareness about what their responsibilities are, the tools to, you know, fulfill their responsibilities, and that the oversight is happening.

Ms. CHU. But is not SBA ultimately responsible?

Mr. JORDAN. The contracting officer is ultimately responsible for those clauses in a contract that they are entering in, but SBA wants to work to makes sure that the policies are set up to ensure compliance and robust oversight and work with those agencies to make sure that they have the tools necessary to do that.

Ms. CHU. And Ms. Kendall, is that your understanding?

Ms. KENDALL. My understanding is that in the agreement between SBA and the agency, at least with Interior, the contracting officer is, in fact, ultimately responsible. I think what we were pointing out in the US2 example, however, was that there was some review conducted by the SBA that indicated that US2's plan to come into compliance was adequate. While US2 never did come into compliance but the contracting officer took that signal by SBA as an okay to continue with the contract. I think that is where the confusion lay.

Ms. CHU. And how could that be corrected?

Ms. KENDALL. Well, I think just clearer communication between SBA and the contracting officers would be one of the very simple ways in this case. And I can really only speak on this case. And I think there was responsibility on both sides quite frankly for the contracting officer to push back in their communications with SBA and SBA to be perhaps more clear in terms of what they meant by "the plan was sufficient."

Ms. CHU. Okay. Ms. Kendall, last year your office found a U.S. Geological Survey contract that did not contain the subcontracting limitations provisions and this clause is there to ensure that small business contracts do not act as a pass-through to large firms. So why is this clause being left out of contracts?

Ms. KENDALL. I am not familiar with the instance that you are referring to but I would say probably human error. The contracting officers are, like many people, working as hard as they can with the tools that they have, but many of them are overworked, they have more responsibilities in terms of oversight than sometimes they can actually carry out, and again, I do not know which case you are talking about but I would guess that it was probably just a matter of human error.

Ms. CHU. This was in the October 2010 IG Report by the Department of Interior which said that the agency was not including the limitation on subcontracting clause in their contracts. And it seems like it should be standard practice.

Ms. KENDALL. It should be. Yes, you are right.

Ms. CHU. And not something that is due to human error but something that should be a practice.

Ms. KENDALL. No, I absolutely agree. Again, I am sorry that I am not familiar with the report that you are talking about. Perhaps what I could do is review it after the hearing and get back to you on what the result of that report was. I would hope that we recommended that there be some sort of process or a checklist where this is always included. And I am just not sure if USGS had done that but I can certainly get back to you about that.

Ms. CHU. Okay. Also in your testimony you discuss how US2 broke down its own costs and the costs of its subcontractors for only some categories. And it hid additional subcontracting costs where they were actually doing less work than was required. And part of the reason why it seems so easy to circumvent the system is because the accounting and other measures are also so complex. How could we simplify the system so that anyone can figure out whether or not someone is in compliance?

Ms. KENDALL. Ooh, I wish I could answer that question for you. Perhaps the reporting process would need to be simplified and clarified. In this case, and I am really only familiar with what happened precisely in this case, but in the category of " Other Direct Costs," US2 was putting subcontractor labor costs into that category. A careful review of this by my office revealed that, in fact, the individuals that were contained in other direct costs were subcontractors, but it would not be apparent necessarily to a contracting officer without some greater scrutiny. So there may be a way to simplify the other contract or the other direct costs category or require them to break it out more thoroughly where it would become more apparent to the contracting officers.

Ms. CHU. Mr. Jordan, do you have something to say on this? How could we better fix the reporting system to root out fraud?

Mr. JORDAN. Sure. I think there are three things that I would say. One is ensuring that contracting officers and all folks involved in the contracting process are aware of what their responsibilities are. So I mentioned that we came out with new regulations yesterday that clarify a lot of that responsibility and making sure that everyone is aware and trained on that is going to be very important. The second thing is making sure that we are doing everything we can to drive efficiencies, especially leveraging technology and systems to help contracting officers do their job.

I mentioned in my opening statement that the Electronic Subcontracting and Reporting System, the Federal Subcontracting (FSRS), Subcontracting Reporting System, as well as some of the other databases and systems involved in federal contracting are all being combined into one system for award management. So let us give contracting officers a single point of entry where they can check a number of these things systematically.

Third is we really need to look at the resources dedicated to the contracting officer workforce. You mentioned in your opening state-

ment that contracting spend has doubled. Well, the contracting officer workforce charged with getting those contracts out has not doubled over that same period, and so it is very difficult for these folks, as Ms. Kendall said, to keep pace with all the things that we would like them to do. You know, we are very clear in the 8(a) regulations and in other regulations that it is applied to limitations of subcontractors responsibility of the procuring agency, and in a set-aside contract you want obviously to make sure that that clause is in the contract and all these types of things. We need to make sure that we are staffed appropriately, trained appropriately, and we are giving them all the tools so they can do that.

Ms. CHU. Mr. Jordan, let us talk about the issue of penalties. Last year, GTSI was suspended for performing the majority of work for several small business prime contracts, but GTSI was suspended only for a couple of weeks. And yet, the small businesses that were involved remained suspended for about a year. I know that firms should face consequences but why is there this disproportionate treatment for small businesses?

Mr. JORDAN. Well, over the last two and a half years we have had five proposed debarments and eight suspensions for issues involving subcontracting. And 10 of those involved the prime contractor violating limitations on subcontracting. So there are enforcement actions happening. When it comes to the specific case that you have referenced, I am not the agency's suspension department official so there is only so much that I can comment on. But what I can say is the decisions that you reference are those of the agency's suspension debarment officials, so if they made the decision to suspend GTSI a year ago, subsequently suspending EG Solutions and MultimaxArray FirstSource 11 months ago, and to the extent that those decisions could be made public, they are all posted on our website.

The letters make clear that the agency evaluated the evidence and acted decisively based upon everything that we had at the time. So I am not free to comment further about why additional actions did or did not occur at the time, but I can say that the inspector general is continuing to investigate GTSI, EG Solutions, MultimaxArray, on issues arriving out of their—arising, excuse me, out of their involvement in these various contracts. And I would direct further questions on that case and on that front to our inspector general.

Ms. CHU. Okay. I yield back.

Chairman MULVANEY. Thank you, Ms. CHU. We now turn to Mr. West from Florida.

Mr. WEST. Thank you, Mr. Chairman, and Ranking Member, thank you.

This is a very appropriate subject because just last week I was down in the District talking to the Brower County Small Business Advisory Council. And two of the critical issues they brought up are relating to the subject here today.

The first issue is there is a federal building that is being constructed in Miramar, Florida, and for whatever reason the prime contractor in that federal building has not gone to look at any of the local subcontractors for opportunities for them being there. Is there some system in place to make sure that when we have these

type of contracts down there that we do look at the local subcontractors because this does come back to, you know, jobs and opportunities within a local environment before we go to outside sources.

Mr. JORDAN. So in terms of ensuring that small businesses are a part of it, the prime contract will have to submit as part of—a material part o the contract, the subcontracting plan that says, "By percentage basis, typically how they plan to allocate their subcontracting among small businesses and various groups of small businesses." And SBA reviewed about 5,0000 of those plans last year.

Then in terms of which businesses they use, that, as long as it falls into compliance with the contract terms, is really up to the prime contractor. Many of them, as they are formulating the solicitation, engage small businesses to understand exactly how much they are going to be able to subcontract to which types of small businesses. Others have a general idea of what small business representation is in those industries and sets aside a percentage and then goes and looks for small businesses to fulfill that percentage. And at that point in either of those cases that they are looking for subcontractors, we work with our SBA district offices and some of our resources partners to try to make small businesses aware of these opportunities and make both the agency and the prime contractors aware of the great small businesses in all of those industries. In terms of forcing them to utilize businesses from a particular location, other than certain types of contracts, I am not aware of a provision that allows or forces them to do that.

Mr. WEST. Right, yeah, I am not talking about forcing them but at least making sure that the opportunity is provided to the local small businesses.

Mr. JORDAN. Absolutely.

Mr. WEST. The second point was very near and dear because there are a couple of people on this council that were about to lose their businesses because obviously what happens, you know, a prime contractor comes down, gets a small business subcontractor. Let us say it is an 18-month, 24-month project. Well, you bring in the small business contractor. They do what they are supposed to do in the three- to four-month period within that overall larger project. Some of these small businesses, like I said, two people there on this council have been affected. Their payment was being held up even though their work had been completed, it had been certified, it had been signed off, and their payment was being held up until the end of the entire project.

Now, you know, small businesses have a very small margin upon which they can operate. You know, we cannot continue to allow that to happen to them because that puts them in very untenable positions. Is there some kind of means by which we can, you know, eliminate that from happening or, you know, make sure these prime contractors are meeting their obligations, you know, within a 90-day period after work being completed? And is there an enforcement mechanism in place?

Mr. JORDAN. Yeah, I completely agree with you, Congressman, that the issue of payment and cash flow is of paramount importance right now. A lot of these small businesses are really going pay period to pay period and need that cash as quickly as possible.

There are two things that we have done already, very recently. One is, as you heard the president say in his address to Congress, and later saw the Office of Management and Budget release, when it comes to small business prime contractors, we have cut the time in which the government takes to pay small business prime contractors in half, from 30 days down to 15 days. And we are working aggressively to make sure that is happening across the board.

When it comes to subcontracting, just yesterday SBA released regulations that say if a prime contractor is delinquent, which we have defined as—after substantial input and public comment period—defined as more than 90 days late, just like you said, in paying its small business subs. And assuming the prime has been paid, then they need to report that to the contracting officer and we are going to put that in the past performance database so that it can be a mark against them for any future awards to really give them that monetary and performance incentive to make sure they are doing it.

We are not done. There are more things that we are looking at to try to accelerate payments to small business subcontractors, much like we worked hard to do so at the prime contractor level. There are a few more issues but I totally agree. And I would point to those things we have already done and say we are looking to do more.

Mr. WEST. Thank you very much. I yield back.

Chairman MULVANEY. Thanks very much.

Ms. Ellmers from North Carolina.

Ms. ELLMERS. Thank you, Mr. Chairman. Thank you both to our panel.

Ms. Kendall, along the lines of the US2 situation, I know that we were talking about other direct costs. Do you know why—I mean, were they looking at those direct costs? Were they not? Do you have any insight into that?

Ms. KENDALL. I really do not, Congresswoman.

Ms. ELLMERS. And then, too, you had stated that some other Recovery Act contracts also had problems in meeting subcontracting limits. Can you explain what those would have been?

Ms. KENDALL. These were very much the same. In construction, the requirement is significantly less than in services. It is a 15 percent requirement. But we found in the handful of National Park Service construction contracts that we looked at, that the same problem was occurring. They just simply were not conducting the amount that they were supposed to be.

Ms. ELLMERS. And so just in listening to your discussion and your comments it sounds to me like it has more of a simplification of reporting, things like that. How can that be improved? What are your thoughts on that? How can we get more information and everybody onboard doing it in a, you know, routine manner?

Ms. KENDALL. I wish I knew the answer to that. My experience in this is looking at it from an oversight body and really looking at how they are complying with the requirements. I do not feel like I have the expertise myself to really respond to that.

Ms. ELLMERS. Okay. I appreciate that. Thank you.

And Mr. Jordan, you know, in talking with the situation of, you know, basically zero tolerance for fraud, waste, and abuse, and

looking at the issues that are facing us right now with some of those things that have been developed now and some of the fraud that is going on, if a small business is not compliant, what measures are available right now? I mean, I am assuming that there are things in place right now for enforcement. And what happens to a contracting officer if they are failing to meet those requirements?

Mr. JORDAN. Sure. So the contracting officer would ask, you know, issue a show cause letter to the small business concerned saying, you know, show me how you are or will be in compliance with the limitations on subcontracting. Again, one of the challenges there is that you have got a contract that goes for a period of time. They may be below the 50 percent at one point in time but by the end of the contract they have a clear and rational plan to get above it. So it is not just a snapshot in time; it is what is your plan to at the end of this contract meet that limitation on subcontracting.

That being said, there are, you know, certainly analytical and common sense evaluation factors that the contracting officer is looking for. If it, you know, is clear that they will not be meeting that contract requirement, you know, you can terminate the contract and there are a host of things the contracting officer could do. If it is something that moves more into the abusive or fraudulent area, then SBA may get involved as things are referred to us. And that is where we would take things such as suspension and debarment from federal contracting. And these are real tools. As you have seen, you know, the reason that suspensions, I believe, are so important is because the investigations into these bad practices can take—it is not a week's or even a month's thing; it can be a year's or years' things. So we try to act when we have clear evidence on a suspension as quickly as possible.

For example, in 2008, SBA had done zero suspensions in this area. 2009, one. And then 2010, six. And then 2011, 15. So we really are utilizing this tool in an aggressive way and being serious about that zero tolerance. Then, we give all of the things that we find to an inspector general and to the Department of Justice so they can further investigate and take the more serious actions if appropriate.

Ms. ELLMERS. Thank you very much. And I give back the balance of my time.

Chairman MULVANEY. All right. Thanks very much. As you can see we have got about five or six minutes left to vote. We are going to go ahead—for those of you who are not familiar with the system, if you want to know when we are going to be back, keep an eye on the TV which we will leave on. And when it gets to "on passage" that means we will be back about 15 minutes after that. So if you want to poke your head in from time to time, that will be great. I expect that we will be back somewhere around 11:15. That is what we will be shooting for.

So what we are going to do is recess here for about 45 minutes and we will be back as soon as we possibly can. I apologize for the delay. Thank you.

[Recess.]

Chairman MULVANEY. All right. We are going to call the meeting back to order, which means I have to do that. And again, I apologize.

Ms. Kendall, I understand your time constraints and I assure you we will be out of here in just a few minutes and move on to the next panel.

My question—it is always difficult to pick right back up where we were when we have an hour break, but I want you all to help me understand the process. Okay? I run a small business but I have never done any government contracting. Let us say that I am one of these 8(a) organizations. I will come back to that in some more detail later but let us say that I am on one of these big contracts. Walk me through the process, either Ms. Kendall, I think this is, to begin with Mr. Jordan, on how I get the contract, briefly, but then more importantly, how you make sure that I am doing what I am supposed to be doing, both in terms of me as a contractor and then my relationship with my subcontractors.

Mr. JORDAN. Sure. So your first step in the 8(a) context would be application and certification in this business development program. So now you are in the program and you want to compete for contracts. In the sole source context that you talked about, the agency would identify a contract that, you know, they had a particular need, they were going to contract out, and it was suitable for the 8(a) program. They did their market research. They knew there were 8(a) firms out there. It was the best small business program to use. So they would contact a district office or maybe they knew about it—there are multiple ways that this can happen. But they could talk to the district office and say, hey, we know you have an 8(a) portfolio with various firms here or we know that this firm can do it, what have you. The district office, the SBA district office would then evaluate, hey, can this firm, you know, does it have the capacity? Does it jive with their business development plan that they submitted to us? Yes, it does.

Okay. That contract can go forward and the agency would then award on a sole source basis, assuming it is within the various limits, this contract to that firm.

So over the period of that contract term, every year it has an annual review with SBA as a firm, not just on that contract but on everything they are doing. How are they improving against their business plan? Are they achieving their targeted objectives? All those types of things, one of which would be looking at what contracts they performed against. Then, in terms of subcontracting out, in that contract that they had entered into it would have limitations on subcontracting. So, you know, if it is a services contract it would say that that small business, because this was a set-aside, has to perform at least 50 percent of the labor costs with its own——

Chairman MULVANEY. Let me stop you there.

Mr. JORDAN. Please.

Chairman MULVANEY. Some of the things that I read say I am supposed to be able to—I would not know how to allocate that in my business. We did not use the cost accounting system. So tell me how we get around that hurdle? How do I satisfy that requirement? That 50 percent requirement?

Mr. JORDAN. We talk a lot about when we are engaging with small businesses and getting them up to speed to sell to the government about being contract ready. That is a phrase that you hear

a lot. And what that means is—a lot of things—but one of which is you have to have all of the systems in place, approved systems in place to do business with the government. So it is very clear what the responsibilities are for the agency in terms of oversight and in terms of the small business to make sure that they can prove that. Because at any time it is a clause in the contract. The contracting officer can say, show me the documentation that says you are in compliance.

Chairman MULVANEY. Let me ask a quick question, Ms. Kendall, because Ms. Chu was asking an interesting line of questions about the examples that you—one example that you gave where there was no subcontracting language in the contract. And she asked if there was a standard procedure. And I guess she is asking—what I am asking in a different way is, is there not a standard contract? Is it preprinted or is it written from scratch every single time that Mr. Jordan just described that it gets let?

Ms. KENDALL. I am going to have to defer to Mr. Jordan on that one. I truly do not know the answer to that.

Chairman MULVANEY. Okay. That is fine.

Mr. JORDAN. There are some differences where clauses get inserted or taken out or whatever. But in the set-aside context, even if, you know, the example that Ms. Chu raised earlier it happened. And if Ms. Kendall's supposition proved to be correct that it was a contracting officer, Erin. We do not care. The fact that it was a small business set-aside means that that limitation on subcontractor requirements. Whether or not the contracting officer forgot to include that or did not cut and paste correctly, it does not matter in terms of the law. You still have to abide by limitations of subcontracting because it is a set-aside and all small business set-asides must——

Chairman MULVANEY. I will stop you again, Mr.—I have got news for you. You and I sign a contract for me to do something and it is not in the contract, I am pretty sure I do not have to do it.

Mr. JORDAN. Our position has always been for all small business set-asides the regulations are very clear that the limitations on subcontracting exist. So whether or not they included that, it is applicable to that small business set-aside.

Chairman MULVANEY. The staff tells me that may be the case. It is something unique to small business contracting. So again, that shows you what my law degree is worth.

Mr. JORDAN. I am not a lawyer.

Chairman MULVANEY. All right. So now we are in this process. You have signed the contract with me. I am an 8(a) provider. I have got this contract. It is under $6.5 million. I am not an Alaska Native. How often do you come to make sure I am in compliance and how often do I have to show to you, prove to you that I am in compliance?

Mr. JORDAN. So for the contracting officer, who is really monitoring that contract——

Chairman MULVANEY. He is an agency, right?

Mr. JORDAN. Yeah. They can do it periodically. They can—if they have any reason to believe you are not in compliance. And then typically it is semiannually or annually that they would check, you know, if it is a firm, fixed price, you know, sole source contractor.

In this case, then the contractor, the 8(a) from you, would have to show that you have a plan that you are going to meet the limitations of subcontracting for that whole contract. And so if you dip below the 50 percent, but you are saying, yeah, we know, but here is why we are. At the end, we are going to be back above it. And then that can be acceptable.

If it is an IDIQ, one of those indefinite delivery, indefinite quantity contracts where you do not know exactly how much money you are going to get over the life of that contract. You are supposed to always be above the limitation on subcontracting.

Chairman MULVANEY. Okay. I have got this contract. Listen, it is going to be $4.5 million. She has looked at it and says, okay, it is going to be $4.5 million. And it is not; it is $2.5 million, really. And what I have done is I have inflated the value of this deal by $2 million. And you see where I am going with this. I am not going to ask you specifics about the case that is ongoing, the Yacht Tech, but let us say that I did that. Let us say I did exactly what these gentlemen are accused of doing. And instead of telling you, giving you a number of $2.5 million, I told you it was $4.5 million and you said, okay, that makes sense. Where are you going to catch—how are you going to catch my fraud in this process?

Mr. JORDAN. There are multiple ways in which these frauds can be caught. Does it become challenging in a generic situation where you have a contracting officer, a representative of the prime contractor, and a representative of the subcontractor all in a hypothetical sense engaging in fraudulent activity? Yes. But that is why there are so many different points at which people are checking this.

Chairman MULVANEY. But even if the contracting officer is not part of this deal, okay, maybe he just thought the $4.5 million was a reasonable number, is not one of the standards he has to establish is that the government is being harmed by what he sees?

Let me find the research. Hang on a second. There is a list of reasons that—where was it? Was it the memo? Contracting officers need to prove that the pass-through of the work harmed the government before most agencies take action against the companies. However, if I am delivering exactly what I promised to deliver, how does he meet that threshold? How does he prove that I am in noncompliance?

Mr. JORDAN. So it depends on exactly what is going on. If it was just a case of inflated pricing or things of that nature, the government before the contract should or may have come up with an independent government estimate of what they expect it to cost. And if they expected it to be that inflated price and it was, then that would be more difficult to prove. If it was coming in above what they thought, they would ask a lot of questions and ask for documentation, ask for proof. And that is why you have seen the Office of Federal Procurement Policy push agencies to go more towards these from fixed-priced contracts because when you are all in agreement at the outset of what this is going to cost for you to provide me the goods and services that I have asked for, then it is hardest to play those games with inflated costs and try and hide that.

Now, the contracting officer would look at these limitations of subcontractors and say, how much is the prime actually performing? So is it the sub who is inflating costs because they are then getting passed back through the prime? Well, that is going to hurt that limitation because the subcontracting dollars will go up. The amount the prime—the percentage the prime is doing would go down and again, that would have to stay. So that is some of the ways.

And then in the 8(a) context, you are going to have an annual review and we are going to be talking with you and your firm to make sure you are operating within the business plan. There is a whole host of checks we do, too.

Chairman MULVANEY. I guess it strikes me that my example of inflating a $2.5 million contract to a $4.5 million might raise some red flags because it is a relatively large percentage, but when you get to the larger contracts, especially ones with the Alaska Native companies, the potential for fraud would grow. Would it not? Because the difference between a $2.5 million and $4.5 million contract is a relatively sizable chunk. The difference between a $100 million and a $102 million would not stand out as much, would it?

Mr. JORDAN. Certainly, you know, the percentage—the percentage difference based on the overcharging in that larger example is less, but the size of the contract would probably indicate that there is more attention being paid to it by the agency overall. And there are two pieces to your question, really, or to my answer to your question. One is the surveillance and monitoring. So making sure that folks at the agency, and when SBA does surveillance reviews and compliance reviews and these types of things, are looking for this type of behavior. And then making sure the enforcement is there to not just punish the bad actors we catch but disincentivize anybody from trying.

So there are some new proposed regulations that will go out. And I have talked about them in terms of the Jobs Act statute that create them around presumption of loss. So in the past, and this is where that " harm no government" piece really came in, in the past if you misrepresented your size or status to win the award, we would suspend, debar, maybe pursue a False Claims Act action against you through the Department of Justice. But it was hard if the government got exactly what we wanted for a fair price, for us to go after you significantly because you lied about being a service-disabled vet. It is really that second place finisher, the true wounded warrior who should have got a contract that was harmed. Well, now, it does not matter. That stuff does not matter. The law clearly states if you lie about your size or status to win the award, we can sue you civilly for the full amount of that award and keep what you provided, and still do the suspensions and termination debarments.

Chairman MULVANEY. In the last 12 months, how many times have you all done those things?

Mr. JORDAN. Well, this presumption of law is new so it is still being stood up. In terms of the suspensions and debarments, we stepped it up quite a bit. We have done—more referrals for suspension and debarment have happened in the last two years than the previous 10 years. And I mentioned before the suspension tool, which I think is a really important tool because it is something

where SBA can take action while we are waiting for an investigation to run its course and we want due process to happen and we want any accused parties to get a full investigation and due process. But we can take the suspension action. In 2008, there were zero. In 2009, there was one. And then six in 2010, and then 15 this year. So we are stepping up the utilization of that tool when we think it is appropriate.

Chairman MULVANEY. Does the use of that tool partially explain—I guess it cannot fully explain—does it partially explain why no fines have ever been issued? The liquidated damages provision? I heard that in my opening comment and I was actually reading the details during the break. And it is actually worse than I thought. In 30 years, there is no record of any company paying liquidated damages. Ever.

Mr. JORDAN. So when I started two and a half years ago and we started to work on or continue to do work that was happening on getting small businesses more subcontracting opportunity, preventing some of this "bait and switch," all these types of things that were now—we just came out with some of the proposed regs on yesterday, that was one of the areas we pushed. The subcontracting plays a material part of the contract. So if you were violating that, you were violating the terms of the contract and there is a whole host of actions, including liquidated damages.

Well, the problem that I am told by agencies is that you can drive a truck through what it means to make a good faith effort to meet the limitations or meet the subcontracting plan requirements. We have now shored up through these new regs whose responsibility it is, what some of the things that you should be looking for are, and what some of the penalties are. But you are right; that is—I have never heard of anybody actually using——

Chairman MULVANEY. I will make you a deal. If you want to come up with some suggestions on how to close those loopholes and this Committee will take up those things. Because our research indicated the same thing, which is it is very difficult for you all to prove. There are safe harbor provisions in the good faith requirements, and if we need to start closing some of those, let us get together and see if we can do that.

I am also—we will take up probably another day. It is a relatively minor issue I know for—in terms of its footprint but it seems like these Alaska Native companies really wear some more tension. Does the SBA have an official position on that policy as to why ANCs get special treatment?

Mr. JORDAN. Well, the provisions that allow those types of things are all statutory part of the Alaska Native Settlement Act and fall on amendments to that. So it is not something that SBA has a position on one way or the other, but what I will say is a point to the regulations that we came out with in March where we really—and we went around and did tribal consultations and talked to the community about how to get these right, but one of the key provisions in that comprehensive revision, the 8(a) regulations deals with the joint ventures. And that was a place where some of the actions that were happening before really did not pass the smell test, and we have tightened those quite a bit about when you form a joint venture between the 8(a) firm and a mentor, a larger busi-

ness, what percentage of the work the 8(a) firm has to do and what are some of the subcontracting rules there. And I am proud of what we did there to move as quickly as possible but also thoughtfully to close any loopholes there.

Chairman MULVANEY. All right. There was—just a couple more questions. There was a Washington Post story about a year ago and in that story it pointed out the SBA had been relying on three employees and paper records in Anchorage. I am going to spend more time another day on these ANCs but I want to ask this one question. That you all were using three employees and paper records to track some of these companies and there was $6 billion worth of sole source contracts. Tell me more about that.

Mr. JORDAN. Sure. So I have had the privilege of testifying in front of Congress.

Chairman MULVANEY. By the way, that does not mean I believe everything that I read in the Washington Post.

Mr. JORDAN. No, that is all right.

Chairman MULVANEY. They are here someplace.

Mr. JORDAN. No. Yes. So I certainly welcome the conversation around native entities and the community benefits that they bestow versus the individual business development of the traditional individually-owned 8(a) firms.

When it comes to our operating and overseeing the program, our inspector general raised some concerns, had, you know, six recommendations on things that we need to look at. Well, by the time I testified on that report, we already fixed four and we subsequently fixed the other two. We agreed, and have taken care of, increasing staffing, increasing training on how do you process and oversee the native entity applications, which are much different than when an individual applies or is in the 8(a) program. And what are the rules that govern the behavior that do fall within our regulatory authority?

Chairman MULVANEY. Thank you, Mr. Jordan.

Ms. Kendall, very briefly. Come back to the US2 issue. My understanding is that they had contracts of about $250 million but were running out of a guy's house essentially. How did you all get involved? Help me understand the process as to where the inspector general's office got involved in this investigation.

Ms. KENDALL. We got involved in two ways. We actually conducted—we were conducting a joint review with the Department of Defense IG, which is mandated for them to do but because it was Sierra Vista's Contracting unit, we joined with them and found this contract and flagged it as a problem. We also——

Chairman MULVANEY. What about the contract made you flag it?

Ms. KENDALL. I am not sure I can tell you right now.

Chairman MULVANEY. Fair enough.

Ms. KENDALL. But we also got a referral from one of the deputy assistant secretaries where they had identified this as a potential problem. So we looked at it both as a result of the audit where this came to light for reasons I will be glad to tell you later, but then we also—the entity itself identified a problem with this particular contract and asked us to take a look at it.

Chairman MULVANEY. Is it fair to say that that would have been an inquiry within the agency that was initiated by the contracting officer?

Ms. KENDALL. I do not know if it was initiated by the contracting officer or someone in the chain of command, but somebody internal to Interior identified it.

Chairman MULVANEY. And I guess my question is this—did it happen—let us take your independent investigation off the table. I want to focus on the one that came from the deputy director. Did that happen by accident or did it happen the way it is supposed to happen?

Okay. All right. And so you got involved with it and then what happened next? You are doing your independent investigation. You are also getting an inquiry from the agency itself.

Ms. KENDALL. Yes.

Chairman MULVANEY. How did you come to find out that this was a problem?

Ms. KENDALL. We went in and looked at their records. We interviewed the contracting officer. We interviewed the entity. It was clear it was a problem on many, many levels. And I guess I feel like I maybe missed an opportunity with the congresswoman when she asked a question about fixing. And I refer to Mr. Jordan's answer just a minute ago. I think on all fronts we could do better to look at the capacity of these companies. In this case it was a company of one or two people. And I have only heard, I do not know for a fact, that it was run out of someone's living room, but previously they had never done more than $100,000 a year in business. To suggest that they had the capacity to do 50 percent of a $250 million contract is——

Chairman MULVANEY. Mr. Jordan, are you familiar with the US2 situation?

Mr. JORDAN. I have read the inspector general's report just in preparation for this conversation but not in depth.

Chairman MULVANEY. To the extent you can then, here is the question I am hoping to get an answer to—why were they allowed to get as far as they did? Why was a company that had never done more than a couple hundred thousand dollars worth of contract end up with such a huge chunk? What part of the process broke down to here that company could get as far along as they did?

Mr. JORDAN. I am not familiar enough with this case to speculate as to exactly where it broke down.

Ms. KENDALL. Well, and I am not pointing fingers certainly at SBA. I think that the Sierra Vista Contracting folks should have asked the question themselves, but it is——

Chairman MULVANEY. Is that not part of the standard procedure though? I mean, is there not a form that says "Have you ever done any other government contracting? If so, how big were they?"

Ms. KENDALL. There is past performance that accompanies "Who Wants to Do Business with the Government?" It attaches to their application. I am not familiar enough with the entire process to say that it is part of a process or not but it seems to me that it is a practical thing that somebody would want to ask the question or would look at the capacity of a company to say, hmm, not sure that they could do this.

Chairman MULVANEY. I recognize you are not familiar with this exact situation but that has got to be part of the past performance, is it not?

Mr. JORDAN. Yeah. The contracting officer will make what is called "responsibility determination" that this prime contract is responsible or capable of performing on the contract and abiding by all of the clauses. And in the 8(a) context, it is a business development program so we want them to grow and that sort of thing. But, so SBA will look at that and agree with them. But in this specific case I am not sure.

Chairman MULVANEY. Thank you all very much.

Mr. Jordan, I am serious about those suggestions. If the SBA wants to start looking at a way to close some of those good faith, safe harbor loopholes, it is certainly something this Subcommittee would be interested in taking up in the upcoming year.

So Ms. Kendall, thank you very much. I understand you have another time commitment. Thank you all both.

We will go ahead and seat the second panel now and move through that as quickly as we can.

Mr. JORDAN. Thank you.

Chairman MULVANEY. Thank you very much again to everybody for waiting.

STATEMENTS OF JENNIFER BISCEGLIE, PRESIDENT, INTEROS, ON BEHALF OF WOMEN IMPACTING PUBLIC POLICY; JAMIE BORROMEO, PRESIDENT, THE E & J COMMISSION, LLC

Chairman MULVANEY. The second panel, I am going to introduce Mrs. Bisceglie, who is, excuse me, Jennifer Bisceglie, who is the owner of Interos, a small women-owned supply chain and logistics company. Ms. Bisceglie is testifying on behalf of Women Impacting Public Policy. And Ms. Chu is going to introduce our other witness.

Ms. CHU. Yes. I have the honor of introducing Jamie Borromeo, and she is the president of E & J Commission, a federal contracting research and strategies firm which is based in Washington, D.C. And she is the co-founder and CEO of Generation Drive Entrepreneurs Network, which is a national non-profit that mentors young adult start-up firms. She has consulted with over a dozen Fortune 500 senior executives, CEOs, and community-based organizations on issues of economic development, public contracting, supplier diversity, and public policy. And also is a former executive director of the National Council of Asian-American Business Associations. Welcome.

Chairman MULVANEY. Thank you. Ms. Bisceglie. We ask you to begin. And again, five minutes, give or take. When you see the red light on it means your five minutes is up.

STATEMENT OF JENNIFER BISCEGLIE

Ms. BISCEGLIE. Chairman Mulvaney, Ranking Member Chu, my name is Jennifer Bisceglie. Thank you for inviting me to testify today on behalf of Women Impacting Public Policy (WIPP), a nonpartisan organization that represents nearly one million women business owners with a coalition of 59 organizations that support its policy objectives. I serve as chair of the board of WIPP, and I am also president of Interos Solutions, which is a small, women-

owned company specializing in integrated logistics strategies, specifically as it relates to cyber security and supply chain risk management. Currently, 100 percent of our billable work is subcontracting in the federal government sector.

Just two years ago, my company was growing, we had 10 employees, and we were very optimistic about our work in the government. Unfortunately, we had a development transpire with our largest prime contractor. In the span of about two months, they released five of my people, which in fact, cut my business in half. We had no recourse. The company had cut off any relationship we would have had with a contracting officer or with a government program manager. The only relationship was with the prime. At that point, I could not point to any other violations in the subcontracting plan because those were never shared with us. In short, there was really nothing we could do about the situation and we really felt pretty powerless. If there is a silver lining that I could share today, it really forced us to diversify the prime contractors and customers that we were working with, and we are now actually seeking prime contracts on our own. But it is not really a pretty solution, if you will, and it has been a pretty painful experience.

The title of this hearing is Subpart Subcontracting, which encapsulates the experiences of many members who do subcontracting in the federal government. Many of us are happy for the work but frustrated when it comes to the limited rights that our small businesses have with respect to carrying out that work. The Small Business Jobs Act of 2010 contained an important provision which WIPP advocated for—a requirement that prime contractors must use those subcontractors listed in the subcontracting plans. We refer to this as "if you list us, use us." We are interested in knowing whether this requirement has actually made any tangible impact within the agencies.

While we are on the subject of the subcontracting plans, we wonder if prime contractors actually formally filed those subcontracting plans. Does anyone in the government actually read them? And if they read them, how or are they enforced at all?

WIPP also suggests that the federal government should require disclosure of the portion of the subcontracting plan as it relates to that sublist. The government should require the primes to share that information with the subcontractor upon award. If the subcontractors do not have access to these plans, how can we ever be sure if the prime is actually compliant? WIPP does not believe the answer is to do away with filing the subcontracting plans; we think the answer is really better enforcement of those plans. Reminders are commonly used tools and calendaring software, so the solution we would think would be something just as simple, alerting the affected parties or the monitoring parties that their plan has not been filed or updated.

A more fundamental problem is the confusion surrounding limitations on subcontracting contained in the Small Business Act. First, we actually learned something in preparing this testimony because we as small businesses are repeatedly told that prime are required to perform 51 percent of the work. Upon reviewing the law, we actually found that the actual percentage is only 50 percent. Let me just say that if the agencies do not understand the

rules, small businesses are certainly not going to understand them or argue with that. While we definitely assume that and accept that our responsibility as federal contractors are to read and understand the FAR, we are, after all, running businesses and the rule just does not really make much sense.

In the case of service contracts, the prime is actually required to perform 50 percent of the cost of contract performance incurred for personnel with employees of the prime. As we interpret this, in order for us to be compliant with this requirement we would actually have to know our subcontractors' personnel costs to make that calculation. No business that we know is really going to share that information, whether it be a commercial contract or a government contract. Second, this requirement basically requires a cost-based accounting system to monitor that many small businesses are not required to use and therefore, we do not use because of the cost.

WIPP suggests that the Subcommittee take a look at amending the law to require 50 percent of the price of the contract, not the cost of the contract. In addition, it is our view that in the case of small business set-aside contracts, 50 percent should be calculated by including all of the small businesses on the contract, not just the prime.

While we are on the subject of subcontracting plans, again, we note that there really are only two databases in which subcontracting plans are entered—FSRS and ESRS. It seems to us that the two databases are collecting much of the same information and really do not communicate with each other. This strikes us as an example of wasteful effort on the part of the government and the businesses that file the paperwork with those systems. We are unable to identify any penalties for non-compliance in either system as well.

In conclusion, subcontracting is a good way for women-owned businesses to get involved in government contracting. With the implementation of the women-owned small business procurement program, we expect the ability to bid on prime contracts will increase. Nevertheless, many small businesses excel in the subcontracting arena. WIPP urges the Subcommittee to examine and push for changes that will make more small businesses successful subcontractors.

Our suggestions and observations in summary are as follows: Compliance requirements can only work if penalties are in place. WIPP believes that in order to make the subcontracting rule effective, the percentage should be clarified. Is it 50 percent or is it 51 percent? In the case of small business set-aside contracts, we urge that all small businesses on the contract should be counted towards the 50 percent requirement. And finally, we believe a few basic changes in the electronic reporting systems could result in much better data on subcontracting plans, thereby enhancing compliance.

Thank you for giving WIPP the opportunity to testify on this important issue, and we welcome any questions.

[The statement of Ms. Bisceglie follows on page 44.]

Chairman MULVANEY. Thank you, Ms Bisceglie. Again, we will hold our questions until the end.

Ms. Borromeo, please. Five minutes, give or take.

STATEMENT OF JAMIE BORROMEO

Ms. BORROMEO. Chairman Mulvaney, Ranking Member Chu, thank you for inviting me to testify today. My name is Jamie Borromeo, and I am the president of the E & J Commission, LLC, which is a contract research and strategies consulting firm for disadvantaged businesses. We are based here in Washington, D.C.

In my former capacity as executive director of the National Council of Asian-American Business Associations, and in my former position as intern to Congressman Mike Honda, who was the chair of the Congressional Asian Caucus at the time, I was exposed to a number of small business owners across America who had voiced their challenges within both commercial and government contracting. Entering the federal market is one of the most challenging areas to break into as a small business owner, but even more so if cultural and linguistic barriers prevent one from being able to understand the complexities of government systems. So now after 10 years of working with communities of color, I am certain that institutional discrimination within federal contracting still exists and this is highlighted in the lack of subcontracting opportunities for our community.

Subcontracting is the first point of entry for most small businesses attempting to enter the federal market because, one, agencies like to see past performance from those seeking award; and two, subcontracting allows for the slow growth necessary so that the small business can gain experience, capacity, and can acclimate to doing business in the federal contracting space. Discrimination within the subcontracting process is very difficult to prove, especially when those on the program level are not outwardly excluding small business from participating. What some are doing is turning a blind eye to the issues. It is in their dispassionate and apathetic approach to the matter, rather than their intentional overtly discriminatory practices which is the injustice in this case. Doing nothing is just as bad as causing harm, and the lack of oversight of these passive actions are what concern me the most.

The first point I would like to address is the lack of compliance with the subcontracting plans administered by the contracting officers. I understand from many industry experts that there is an issue with contracting officers not properly evaluating subcontracting plans or monitoring, evaluating, and documenting contractor performance. I have worked alongside the Asian-American Justice Center, a civil rights organization for Asian-Americans that address these issues through the contractor empowerment program currently led by Ms. Jeanette Lee. We have partnered to identify some of these challenges and have collected testimonials from small business contractors. Some are hesitant to provide testimonial because they are afraid of being blackballed or not maintaining good rapport with an agency they still would like to receive work from. However, some brave contractors have emerged from the pack to describe their unjust experiences.

In our findings, we discovered fraudulent practices that create barriers to contracting opportunities for Asian-Americans, women, and other minorities as outlined by Ms. Jeanette Lee in this statement where she describes "bait and switch." And I quote, "Because there is no enforcement, prime contractors often team up with mi-

nority contractors in order to win a bid but then drop them from the contract once they receive the award. I have heard this from several Asian-American contractors that this is a prevalent and pervasive occurrence." These, among many others, are testimonials from contractors that are still looking for an entity to hold firms accountable for what was promised to these small businesses.

Another issue I would like to point out is that most contracts that are moved from large defense contractors to small businesses to reach set-aside goals are still controlled and dictated by the large contractor in the end in regards to who needs to be hired, what salaries they will be paid, and what benefits they will receive. The way that this occurs is large contractors keep a list of disadvantaged business enterprises that are willing to do just about anything for our contract. It is common practice for a large contractor to work with an agency to move some of their contracts which have recently been designated for set-aside programs to large contractors preferred vendors. These vendors will then continue to employ virtually all the same employees that the large contractor employed with identical compensation packages. Therefore, in essence, these employees are still working for the large defense contractors who maintain the specifics of their employment throughout the process. When the small business protests, they seem to find that their current and/or future contracts disappear from the federal agency, if not the federal space as a whole.

Because the small business owner is hungry for work, they feel lucky to be in the game. Money for morals is what is up for trade here and until there are more small business opportunities and legitimate ones, it is all one closed network that is circulating contracts and dollars among their own without informing or much less encouraging competition.

Lastly, a major issue I would like to present for the record is the lack of market research conducted to find qualified small businesses. With Silicon Valley as my former home, I witnessed some of the most creative, talented, and capable small businesses in the country produce and engineer products and services that are currently provided by large contractors. The boutique-size company has just as many robust capabilities to do the work; however, because adequate market research is not conducted, government agencies are not utilizing their services. Making the connection with these companies takes additional work, but as one large defense contractor admitted to me, I quote, " We do not have time to look through databases. If we find an opportunity, we are going to our existing contacts." The challenge for subcontracting then becomes who you know and whom you know is not necessary determined by your skill, capability, or work ethic.

My recommendation to the Subcommittee is twofold. Number one, we must ensure that contracting officers and technical representatives are complying with rules and systems in place to ensure prime contractors are performing well on existing contracts and subcontracting the proper amount to small business. This can be done by requiring past performance reports are executed by the COTR team. The contractor should perform monthly performance reports and check-ins with the contractors. I interviewed one former contracting officer who said that if the agencies and agency

heads made it a priority in the contracting office, surely the contracting officer would as well. It takes leadership to enforce these and agencies are predominantly focused on prime contracts, but now we need concerted efforts to focus subcontracting efforts.

Number two. Diligent and proper market research performed by program offices is necessary. I have met a number of small business representatives but access to the program office is nearly impossible unless you have an existing relationship. Existing relationships are usually formed through large federal primes that allow the small business into their network. Program office and technical reps should be required to do just as many meet-and-greets as the small business offices are. Taking a meeting with a new small business is declined for fear of protest on bids. Those are the excuses I have heard from the program offices, but it should be a requirement to know the leadership behind who is providing the goods and services for the federal government which is paid for by the American taxpayer.

It is our right to meet with those making the executive decision on who is winning these contracts and monitoring subcontracting plans. Leadership of agencies should also encourage the program office to network with the small business program office with an agency so they build good rapport amongst each other.

I have additional comments I would like inserted in the congressional record that were not stated in this verbal testimony, so in the interest of time I would like to thank the Subcommittee for inviting me to this hearing, and I would be happy to hear any questions you might have.

[The statement of Ms. Borromeo follows on page 50.]

Chairman MULVANEY. Thank you, Ms. Borromeo. Rest assured your additional comments will be made a part of the record.

Before I turn it over to Ms. Chu, I want to thank you ladies for coming in. I was making comments to staff as you were speaking along two lines. Number one, that many of the recommendations that you have simply made, just now made in your presentations, staff has made to this Committee as well, and we will be pursuing many of those in the upcoming months. Secondly, and I know Ms. Chu would back me up on this, I would like in the future to make sure—do every effort that we can to have the real people testify before the agency people do. I would like to hear from the business owners, from the business operators, before I hear from the agency. You raised several questions here today that I would like to have Mr. Jordan and Ms. Kendall back again. So next time we will try and get the real world testimony on the record before we let the agency folks go. What a great opportunity for you to ask questions through us of the folks who are actually in a position to help you right away.

So with that I will turn it over to Ms. Chu for her questions.

Ms. CHU. Well, Ms. Bisceglie, you had several suggestions for improvements on the subcontracting process. And one area had to do with how the costs are calculated. You have to—the small business prime contractor has to perform a percentage of work based on the cost of the contract, but in so many cases small businesses do not have the resources to calculate their own costs, let alone a subcontractor's cost.

So do the requirements as written make it difficult for small businesses to calculate the work that they must perform? And which ways could it be made simpler and easier for small businesses to understand?

Ms. BISCEGLIE. Okay. Thank you for the question. I think the difference that we are sharing is that all businesses should understand their costs. The challenge is that most businesses are not going to share their true costs with other businesses. So our suggestion is that the percentage of work is based on the overall price. So if I am working with a prime, I can give them my rolled up price that it will take me to do that work versus my cost, which in effect is profit minus what it actually costs me to do. And that is where the rub is. So the suggestion is to look at just the grand total of what it is going to—my price to that prime versus asking for any breakdown of costs. So that would be the difference, is to look at the grand total of price on the contract.

Ms. CHU. Very good suggestion.

Ms. Borromeo, in your testimony you talked about how some Asian-Pacific American businesses are afraid to speak up about the discrimination and challenges they face as small business contractors and subcontractors. Do you have an example of these testimonies that we can insert into the record?

Ms. BORROMEO. I do. Yes.

Ms. CHU. Okay. Mr. Chairman, I would like to have unanimous consent that this example be inserted into the record.

Chairman MULVANEY. Accepted without objection.

Ms. CHU. Okay. Thank you.

What systems need to be in place to make businesses comfortable with bringing up some of these problems to light?

Ms. BORROMEO. I think realistically small business owners probably will not just come out and, you know, say that they are going through this. Like I said in my testimony, they want to keep the current work they have or the relationships that they have with the agencies or the prime contractor. But if SBA or another entity within the federal government is actually—they actually have some measurements or oversight reports that are happening more frequently, I think that might be a way, instead of the small business owner having to come out. They are already the little guy in this, and if you are trying to take down Goliath, some of these large prime contractors that are making, you know, multi billion dollars off of federal government contracts, it is very difficult to come out with an honest testimony about what is happening to them. So I think that it is going to be the responsibility of either SBA or whatever entity you see fit for this to really hold them accountable with more reporting and, you know, just taking notes on where they are in their performance.

When I interviewed the former contracting officer he said he did not feel like the agency was enforcing it. And I said, well, do you have too much on your plate? You know, do you have too much work that would not allow you to do these reports? He said, no. If they made it a priority we could absolutely do it. So I know that from a testimonial from an actual contracting officer that it can be done. It is just you do not ever see these people and there is not really any accountability on the agency level. A lot of the time they

are going to small business for these answers when they should be going directly to the contracting officers.

Ms. CHU. What should SBA, MBDA, and other agencies tasked with improving access to these contracts do to make sure that more Asian-Pacific American businesses and other minority businesses and women-owned businesses secure contracts?

Ms. BORROMEO. What should they——

Ms. CHU. What should the SBA and MBDA and other agencies——

Ms. BORROMEO. Well, the subcontracting plans are already required for them to submit. And so it is about follow through and making sure that they actually stick to the subcontracting plan that was submitted. So like I said, they are not doing the reviews thoroughly, so I think that Mr. Jordan had expressed that they, you know, they meet with them annually but, you know, I mean, meeting annually does not mean that they are actually performing the work well or even subcontracting fairly. And so I think there has to be more frequent reviews and penalties incurred if they are not meeting the goals of their subcontracting plans.

Ms. CHU. Very good. I would like to ask about how the subcontracting plans are being carried out by, say for instance, the commercial market representatives which are supposed to be counseling the large prime contractors on their responsibilities. So either of you, I would like to ask that—in your opinion are the commercial market representatives doing their job on this front in aiding small businesses in marketing themselves to the large businesses?

Ms. BORROMEO. I can go ahead and answer. I have been to a number of trade shows, networking events that SBA hosts and I have never met a CMR before. Even when you—when someone had asked me about the CMRs and SBA before I said what is a CMR? So I think that they are not relevant in the contracting process. And unless people like myself, who are constantly meeting with, you know, contracting, or attempting to meet contracting officers, do not even know about CMRs. I think it is more of an awareness campaign maybe SBA needs to do to make sure that these CMRs are visible and relevant to the contracting process.

Ms. BISCEGLIE. I absolutely agree with that.

Ms. CHU. Have you ever met one?

Ms. BISCEGLIE. No. Not through my business, from an Interos perspective. No.

Ms. CHU. That is pretty shocking. Well, then let me ask about this. The large prime contractors must submit subcontracting plans for review, and if the contracting officer finds that plans are inadequate, he or she can decide not to award the contact. In your experience, how often does that happen?

Ms. BORROMEO. In the example of talking to another contracting officer, again, he said that he has had colleagues that want to terminate contracts after a prime has been performing for a year saying they are just not, you know, doing what they said they were going to do. And he asked a colleague why, you know, what are your grounds for terminating him? You have not been taking notes on or reporting anything that they have been doing. And he said, well, I mean, it is not a requirement so I am not going to do it.

So it is a lack of oversight. You just cannot terminate a contract without grounds. And so if they are not required to enter the data or report on how a contractor is performing, then it is just not going to happen. It is an enforcement issue from the agency level.

And my experience working with the agency reps is OSDBU—a lot of the time the OSDBU reps are doing a fantastic job. They just do not have any power within the agency to really effect any change. And that is where the barrier is. I only meet with OSDBU reps. When I ask for a COTR, when I ask for a technical rep or a contracting officer, they refuse to meet with me until the solicitation is out on the street. And it is like, well, I cannot—if I cannot understand what the requirements are before it is out on FedBizOpps, how are we supposed to prepare for the bid?

And so it is an unfair advantage to federal contractors who are experienced in this space because they already know the requirements. They already have the in with the agency. They already know the COTR. And so it does not allow for new vendors to enter the marketplace.

Ms. BISCEGLIE. And I think I would absolutely agree. I think from, again, from an Interos standpoint, it is twofold. As she mentioned, the first part is the compliance. Are they actually being filed? Is someone actually looking at them? And is there any penalty for not being compliant?

To the question or one piece of the question that you asked though, I think from a subcontractor standpoint and what I shared earlier in my testimony is that those subcontracting plans are never shared with us so there is a total lack of transparency. So when you ask if they are filed or if they are enforced, I do not have an idea. And again, when you have larger contracts that go on for five to 10 years, as Mr. Jordan mentioned, there is an ebb and a flow to how the subcontracting plans are implemented because it is over the lifetime of the contract. So in that, if there is a lack of transparency from the bottom up and there is a lack of compliance from the top down, there is a little bit of a who knows going on out there.

Ms. CHU. I would also like to ask about the contractors who overreport their subcontracting achievements. In 2010, it was reported that small businesses received over 34 percent of subcontracting dollars, yet there have been cases that found that prime contractors were overreporting their small business subcontracting. Either of you in your estimation, what percentage of subcontracting dollars is actually going to small businesses?

Ms. BISCEGLIE. And I will defer. I do not know if you have a shake on that again. I defer to the fact that we just—we have never been in the situation to have the transparency even on the contracts we are on to have an answer for you.

Ms. BORROMEO. Yeah. I mean, I think that for a lot of the small businesses that I represent, they are not even given the opportunity, so I cannot even answer that question. They are not given the opportunity to even compete. So it is a question of can I even just compete on this so that I can answer that question? I mean, that is a big issue.

Ms. BISCEGLIE. It is a competition but it is also, to your point, when the filing occurs and the percentages are reported, we have

no visibility to that. We do not have any visibility to how the overall subcontracting plan as executed, much less or actual role on it. So if at the time of the contract award, if the prime says we are going to subcontract 10 percent of the award to Interos, we are never told that. And we are never—it is never measured at the end because we are not actually, except for the public information that you can actually pay for on FOIA, that you can see how large the contract was. You do not know where that 10 percent falls at any point in time. So it is a very difficult answer to provide to you at this stage.

Ms. CHU. Thank you. I yield back.

Chairman MULVANEY. Thank you, Ms. CHU. And you—I think we shared a little bit of surprise at the fact that nobody had ever seen a commercial market representative. Staff informs me there are 35 or 36 of them nationwide, many of them part-time, overseeing $200 billion worth of contracts. Not a surprise that you have not seen them yet.

Ms. Borromeo, let me press you on one issue because I did read the submission from the Asian-American Justice Center. And I am more than willing to consider that the possibility for discrimination exists. I used to work with large contractors building roads and bridges and so forth, and you certainly did not see a lot of women-owned businesses out on those jobs. Again, I am willing to entertain the possibility that the potential exists, but are you saying that you are seeing evidence of discrimination based upon the fact that groups of particular race or creed or gender or is it because—do you believe you are being discriminated against based upon the size of your company?

Ms. BORROMEO. I think it is both. I think small businesses in general based on size all experience this, but I think it becomes even more complex when you have cultural or linguistic barriers that do not allow for you to communicate your point as well as maybe other vendors would. So I think small businesses as a whole are not being treated very fairly in the space. But when you add, like I said, the cultural and linguistic aspects to it, it becomes very difficult. And if you also do not understand how government works, they would be very—they would be afraid to talk to you right now thinking you are going to hand them over to the police.

Chairman MULVANEY. Do not feel bad. One of the traditional ways we try and deal with that is by trying to make the process as neutral as possible. Having been through the subcontracting process, do you see places where we can change the process in order to remove the potential for discrimination based upon race or gender?

Ms. BORROMEO. I think employing more folks in the federal government that would understand the cultural nuances of some of these folks. I think that if you have people that understand, you know, how a person grows up or how they communicate, you know, it is increasing the diversity within the pace. Hiring more women, hiring more minorities, to represent in the contracting space would make it much easier.

Chairman MULVANEY. Let me go through sort of a real world scenario. Let us say I am a prime contractor and I have got a Department of Defense subcontract and I am looking to subcontract some

of it out. I may post it on various websites and so forth. I do not understand the exact logistics of that but at some point I am going to receive a bunch of inquiries, either in paper or over e-mail or so forth. Is there some part of that process that says, oh, wait a second? It allows me to say that is a women-owned business, that is an Asian-owned business. Is there something that is broken in that system?

Ms. BORROMEO. I believe that they are not collecting data at this point regarding who is a minority or who is a woman. So that is one issue.

The second issue is they are not posting these things, do you do not even know that a subcontracting opportunity exists except within your own little network. And it is when the prime contractors let you in. You have to hobnob in the same circles with them and it can cost a whole lot of money to go and network with them, and you just have to have the connections. And if you are not familiar with the culture or with a language or, you know, things like that or you are not comfortable interacting with another gender then it might be very difficult to make that.

Chairman MULVANEY. If we had had more time today with Mr. Jordan we would have pressed him on some of the shortcomings that we perceive in the SBA regarding the postings and making information available.

Ms. Bisceglie, you looked like you had some input on that process as to where it might be improved.

Ms. BISCEGLIE. I actually, just from a support standpoint, one of the pieces from a governmental perspective to support what Jamie just shared, is the passage of the women's set-aside program. So the government is admitting that there is gender bias within government procurement. So I just wanted to bring that up as a resounding support point throughout her case.

Chairman MULVANEY. An again, I am willing to admit it. I am trying to fix it through the process. Again, if you gave me a document—if you made an application for a subcontract on my prime and the name of your business was ABC Subcontracting, it is unlikely that I would ever know that you were a women-owned business is my point. So again, I am willing to admit that the potential is there; I am just trying to figure out at what point in the process you expose—you have let people know you are a women-owned business so that you cannot be discriminated against.

Ms. BORROMEO. Well, maybe when they are looking for these subcontractors they could ask if they qualify for any of these set-aside programs or if, you know, they are a DBE. So, number one, let us post it on Subnet. I went on Subnet and I actually talked to Judge Orden's office about it and I said, you guys only have a couple hundred subcontracts posted on this. I said, is there a more robust database that I can go to for this? Oh, everything is posted on FedBizOpps. It is not posted there.

And I talked to a prime contractor, a large defense contract, who told me that they are not required by the federal government to do that. And so—and they just do not like your system so they are not going to do it. They have their own system of identifying qualified contractors.

Ms. BISCEGLIE. And I think that is, if I may, back to the compliance issue. Many of the large prime do follow similar compliance to socioeconomic standards that are out there, so they go for a certain percentage of 8(a)s, a certain percentage of women-owned businesses. So they are out there. And very frequently, directly to your question, when we receive an RFP from one of those large prime, there is a check box that says; which of these socioeconomic standards are set-aside so you file under? So you check women-owned. You check small business, what have you. So right up front very often you announce where you fit.

I think it goes back to compliance though, if I may, in that there is no teeth that says that we need to be—we need to actually implement the diversity that we are asking for. So we are starting to ask the questions and the information is being shared, but there is no compliance that says that we actually adhere to those levels.

Chairman MULVANEY. And it strikes me. I know I asked the question but it struck me as you were giving your answer that there is a catch-22 here, which is there is a requirement that is a target. I cannot remember if it is three percent or five percent for women-owned businesses. Certain for service-disabled veterans. And so forth. And in order to meet the requirement you are required to disclose that you would fall into those categories. So again, you are in a catch-22. If you want this completely blind test that would not allow discrimination, you would not be able to satisfy the requirements of the—requirements that we have set. Interesting issue.

Ms. Bisceglie, very briefly to you. You talked a bit about the transparency and about the small business plan not being shared with you. I am sympathetic to that but I have also been a subcontractor, I have been a contractor. It would be rare that I would share information about my contract with my owner with my sub. Not typically something that I would do. What would you be most interested in seeing in that if you had your will?

Ms. BISCEGLIE. If I had my will I would be most interested in seeing the part of the response that affected me. So how were they measuring the success of my relationship with the prime?

And you are right. Even as a potential prime contractor, there may be subcontractors that we share information with and some that we do not. I mean, again, from a small business to a small business, there is a bit more other relationships a little bit different than a very, very large business. So I can absolutely accept that. But I think understanding—if the prime contractor is going to be held to a level of compliance based on how they are dealing with me, it would be nice to have a voice in that fight.

Chairman MULVANEY. Agreed. Go back to the specifics of the contract that you all dealt with. Did they breach the contract with you? I mean, the reason I ask, and it is completely off topic perhaps why we are here today is we have had some in-sourcing hearings this year and we have heard testimony about folks getting kicked off of contracts. And one of the questions I always ask is, did they breach the contract? Did the contract terminate? What were the grounds under which they were allowed to displace five of your folks?

Ms. BISCEGLIE. I do not know. What I was told was that the folks, all five of them, were not working out and they were instantly replaced with five of the prime's people. So again, from our standpoint, it would have been nice to know what was reported to anybody managing the subcontracting plan. One, from just a reference ability from my own company. From the contracting, the people, all five of those people had worked on previous contracts for me with it never a problem, so it was a surprise. And the larger surprise, back to our wish and our desire to understand the compliance with the subcontracting plan, is that it was swift. It was your people are gone in less than five days. It was not this is not working out. We need to change it. It was just very quick and they replaced with their own people.

So it was all Department of Defense work. My guess is that it was a budgetary situation, but we do not know, which again, is why we are asking for the transparency and the understanding of the compliance of the contracting plan.

Chairman MULVANEY. All right. Thank you for that. Again, it strikes me that you have a contract and I could never just break my subcontract with my subcontractors unless the contract allowed me to do so.

My last line of question relates to the experience you had in transitioning from a sub to a prime. How did you find it generally? Was your experience as a sub helpful to you when you tried to do it? And are there things you learned as a sub that have made you a better prime contractor dealing with your own subs?

Ms. BISCEGLIE. Right. So the only two prime contracts we have right now are very large IDIQs. And we have not gotten billable work. They are relatively new for us. And right now we have three proposals to be prime contractors. So we have not been awarded as a prime yet.

As far as the process, the one thing I will share with you is—and I will tell you, one of the bids that we have in right now is with a very, very large contractor who is a sub to us. And the other two are with mid-tier or smaller businesses just because of the work.

And the one thing that is actually I have been educated on is a lot of what I shared here in the testimony, it was very easy for me to be here today because we have a very different relationship with our subs on these bids, as well as the ones that are on with the IDIQs, than we have had with our primes in the past. And part of it is the transparency and the working relationship that we are trying to foster, so it is kind of like, you know, be the change that you want to see. And I think that that is probably the biggest thing that we have learned. So we are already implementing a lot of that transparency with our subcontractors and hope and look to continue that once we get awarded the work.

Chairman MULVANEY. The Past Performance Report, did you find it to be a fair process? Did you find it to be helpful to you? Did you find it to be a hindrance?

Ms. BISCEGLIE. As far as filing our price performance?

Chairman MULVANEY. Right.

Ms. BISCEGLIE. It is—I think it is just we are fortunate. We have been in business for six years and I have been in the same industry

for over 20. So from a past performance standpoint, we are very, very fortunate in the fact that we can definitely stand on our own laurels. So it is a lot of paperwork but I think it is fair in the fact that it is pretty—again, to Jamie's point, it is pretty blind as far as that is concerned. It is a standard template. You fill it out. You put your point of contact so that they can check everything, and for us it has been fine.

Chairman MULVANEY. Would you have been able to go straight to prime contract? Or would you have had to have gone through the sub programs in order to qualify?

Ms. BISCEGLIE. It depends on the contract. Some of them need specific relevant past performance. Again, because of the way that I am building my company, all of my people have at least 10 to 15 years experience in this industry so I am a little bit of an anomaly in that standpoint. I think that the benefit of coming in as a subcontract is that I had the ability to learn a lot of what it takes to be a federal government contractor on somebody else's time, if you will. And we have been able to foster some of the relationships that are going to make us much more successful going forward.

Chairman MULVANEY. Have either of you ladies participated or known anybody who has participated in the mentor programs?

Ms. BORROMEO. I was actually just going to say that. One of my clients has been with the DHS Mentor Protégé Program for a year and there is no extra merit in being part of that program.

Ms. BISCEGLIE. We have actually done the Department of Defense and DHS, and I would absolutely agree. I think——

Ms. BORROMEO. They are for show.

Ms. BISCEGLIE. Well, I think that what I have seen, and I actually attended the Mentor Protégé conference. And I think that what I saw was that, and this again, this all is Interos, from a—I think that the programs largely came out of being product companies, so if I wanted to sell product to the government. And so the Raytheons and the Boeings and those sort of companies have very, very successful programs. We are services, and I think it is a little bit more difficult. And a clear example is that our mentor in the Department of Defense program, we thought it would work because they understood what we do for a living, yet then within their own company there was a stress factor of why should we bring in a sub because that takes work away from us? And we are not an IT company; we are a supply chain company. So if you can only imagine with as many IT contractors you have in this area, that that issue is all over the place.

So I think that what I have heard from peers that have been part of the program, if you are with one of the larger that started as a product and move over to services, that they have seen a lot of success. But just services to services, it is a little bit tougher to implement.

Chairman MULVANEY. Ladies, thank you very much. I appreciate the testimonies. It is fascinating stuff. We could do it all day but everybody has been here three hours and I do apologize again for the long hearing.

As we—this Committee will work to expand opportunities for small business and compete for federal contracts both as prime and subcontractors. We keep in mind that there is a lot of room for im-

provement. Thank you specifically for your suggested improvements. Those will not go unheard of or unresponded to.

Ms. Borromeo, thank you for this. This will be included in the record. And I think this really does help me and the ranking member try and get a feel for where we want to take this Subcommittee especially next year.

So with that I will ask unanimous consent that we have five days to revise and extend our remarks or to ask questions of the witnesses. Again, witnesses, thank you very much. Thank you all for sticking around for three hours. Ms. Chu, it is always a pleasure. And with that we will adjourn for the day.

Ms. CHU. Thank you.

[Whereupon, at 12:50 p.m., the Subcommittee hearing was adjourned.]

U.S SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

TESTIMONY OF JOSEPH G. JORDAN
ASSOCIATE ADMINISTRATOR, GOVERNMENT CONTRACTING AND BUSINESS DEVELOPMENT
U.S. SMALL BUSINESS ADMINISTRATION

BEFORE THE

SUBCOMMITTEE ON CONTRACTING AND WORKFORCE
U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON SMALL BUSINESS

"Subpar Subcontracting: Challenges for Small Businesses Contractors"

OCTOBER 6, 2011

Chairman Mulvaney, Ranking Member Chu, and members of this Subcommittee, thank you for inviting the U.S. Small Business Administration (SBA) to testify today. My name is Joseph Jordan and I am the SBA's Associate Administrator of Government Contracting and Business Development.

Our top priority at the SBA is to maximize opportunities for small businesses and ensure that the benefits of our programs flow to the intended recipients. My office works each day to provide increased opportunities for eligible small businesses to compete for and win federal prime contracts, as well as subcontracts. Contracting with small businesses is a win-win. Small businesses—who are drivers of the American economy—get the revenue they need to grow and create jobs. Meanwhile, the federal government and large prime contractors have the opportunity to work with the most innovative and responsive companies in the country.

My office's primary objective is to ensure that eligible small businesses receive their fair share of federal prime and subcontracts. We are always looking for ways to increase small business contracting opportunities, and in the two and a half years I have been in my position, the Federal government has made significant improvements. For example, in fiscal year 2010, small businesses won nearly $100 billion, or 22.7% of federal prime contracting dollars. This marks the second consecutive year of increase after three consecutive years of decline and was the largest two year increase in over a decade. Small businesses also won $74 billion, or 35.4% of subcontracting dollars, which was a marked increase from 2008 and 2009 when 28.6% and 31.8% of subcontracting dollars were awarded to small businesses, respectively. Although these numbers have increased over the last two years, SBA remains committed to working with Federal agencies to get more contracts and subcontracts into the hands of small businesses.

In terms of subcontracting, our focus at the SBA is on three main areas:

(1) Working with agencies and prime contractors to make sure small businesses get their fair share of Federal subcontracting opportunities.
(2) Ensuring that when a small business is a Federal prime contractor, it complies with the limitations on subcontracting requirements.
(3) Developing and maintaining the tools, systems and resources needed to monitor and track subcontracting achievements.

I would like to take this opportunity to share with you our initiatives to address each of these areas.

First, one of our top priorities is to ensure small businesses receive substantial Federal subcontracting opportunities. For small businesses, subcontracting to a prime contractor is not only a good source of revenue, but it also allows them to gain relevant federal government contracting experience. This may increase their chances of receiving future prime contracts because their subcontracting experience may be used as examples of past performance when they bid on future contracts.

To help increase small business subcontracting and improve oversight of the process, my office has a team of Commercial Market Representatives (CMRs) who are stationed across the country. Their responsibilities include counseling small businesses on how to obtain subcontracts; conducting matchmaking events between large prime contractors and potential small business subcontractors; providing training on the Subcontracting Assistance Program for both large and small businesses; and conducting compliance reviews of large business prime contractors. Our team also performs reviews on subcontracting plan compliance for specific contractors. Additionally, we maintain relationships with large prime contractors and work with them to ensure they are aware of the small business subcontracting programs and any updates to programs.

SBA is also focused on working with all federal agencies to ensure prime contractors are kept accountable to their subcontracting plans. When a prime contractor submits a bid for a contract that is expected to exceed $650,000, it must also submit its plan to utilize small businesses for subcontracting. Prime contractors must report their small business achievements in the electronic subcontracting reporting system (eSRS). After which, contracting officers are required to review the Individual Subcontracting Plan every six months to ensure the contractor is complying with the subcontracting plan. SBA works with agencies to ensure prime contractors stick to their subcontracting plans during the performance of the contract. Additionally, SBA reviews a sample of Individual Subcontracting Reports and contacts the contracting officer if a contractor is not on target to meet its goals and has not provided a plan of action. We are also in the process of scheduling training sessions for contractors and agencies on how to appropriately review and track subcontracting data.

Additionally, the Small Business Jobs Act of 2010 (Jobs Act), which we thank Congress for passing, included several provisions specifically related to holding prime contractors more accountable to their subcontracting plans and subcontractors. To ensure the best possible implementation of the Jobs Act provisions, SBA organized and hosted a comprehensive 13-city nationwide listening tour to solicit feedback from small businesses and key stakeholders. During this tour, we received positive feedback from small businesses about the subcontracting provisions. We published these proposed subcontracting rules in the Federal Register yesterday, October 5, and we will be accepting public comments for 60 days from the date of publication.

The first provision is designed to prevent small business subcontracting misrepresentations. As part of the implementation of this provision, SBA is proposing to amend our regulations to make it clear that contracting officers (or administrative contracting officers if applicable) are responsible for monitoring and evaluating the prime contractor's small business subcontracting plan compliance. Additionally, we are proposing that contracting officers have the ability to require contractors to provide updated subcontracting plans in certain circumstances, such as when an option is exercised and when a firm's status changes from small to other than small.

The second provision is aimed at mitigating "bait and switch," which is when a prime contractor references a small business as its subcontractor in its bid or proposal, but does not utilize the small business in actual performance. With this new provision, if this event occurs, the prime contractor must provide an explanation in writing to the contracting officer and it may have an impact on their contract performance review, which could result in them being rated lower in past performance for future contract opportunities.

The last provision requires prime contractors to notify a contracting officer whenever they reduce a payment or are more than 90 days delinquent paying a small business subcontractor if the prime contractor has been paid by the government. The Jobs Act requires contracting officers to consider failure to pay subcontractors in a timely manner when evaluating past performance and to describe and record these determinations in the Federal Awardee Performance and Integrity System.

Our second area of focus is ensuring that when a small business is a prime contractor, it meets the limitations on subcontracting that apply when a contract is set-aside for small business concerns. Statutes and regulations were developed to ensure that if a small business concern is awarded a set-aside contract, the firm will perform a substantial portion of the contract. For example, in the case of a contract for services (except construction), the concern must perform at least 50 percent of the cost of the contract incurred for personnel with its own employees. In the case of a contract for general construction, the concern must perform at least 15 percent of the cost of the contract with its own employees (not including the costs of materials). Although monitoring compliance with the limitations on subcontracting is the responsibility of the contracting officer, SBA is committed to working closely with the Office of Federal Procurement Policy (OFPP) and agencies to ensure they have the appropriate training, tools and support needed to monitor compliance.

My office also conducts surveillance reviews of contracting activities, which are periodic reviews to provide recommendations on how to increase opportunities for small business and to ensure the contracting officers are in compliance with small business policies and regulations. The purpose of these reviews is to:

- Assess the quality of a buying activity's small business program;
- Determine whether the activity routinely conducts adequate market research to identify set-aside opportunities and uses each of the small business programs;
- Evaluate the activity's impact on small business; and
- Recommend changes to improve small business participation in the contracting activity's acquisition process, both at the prime and subcontract level.

As a part of these reviews, my team reviews compliance with subcontracting regulations and provides recommendations to agencies on how to improve these processes and procedures to ensure compliance. We are currently in the process of developing a systematic and analytical procedure for conducting surveillance reviews. This method will establish clear and standardized selection criteria for determining contracting activities to review, as well as a standard approach to conducting the reviews.

In addition to these reviews, SBA takes action against firms that violate the limitations on subcontracting. For example, we have proposed firms for government-wide suspension and debarment for violation of these limitations. We recently tightened the rules applicable to the 8(a) program by requiring participants to report on how joint ventures met the limitations on subcontracting in connection with specific contracts, both during contract performance and upon completion of performance. Additionally, as I mentioned to this Subcommittee at a previous hearing, SBA has implemented a comprehensive three-pronged strategy to identify, prevent and pursue non-compliance or fraud across all our government contracting programs. The three prongs of our fraud, waste and abuse strategy are as follows:

1. Effective certification processes
2. Continued surveillance and monitoring
3. Robust and timely enforcement.

This comprehensive strategy has already had significant impact. For example, last year, SBA suspended a large company based on evidence indicating a lack of business integrity in federal procurements involving small business and an intentional disregard for compliance with the limitations on subcontracting and non-manufacturer rule provisions. We are highly focused on being more proactive and effective than ever before in protecting our programs and the legitimate small businesses that benefit from them. In the last two years, SBA has initiated more government-wide suspension and debarment actions than it had in the previous ten years.

Our third area of focus is ensuring agencies and contracting officers have the tools, systems and resources needed to monitor and track subcontracting achievements. We work closely with OFPP and the General Services Administration (GSA) to ensure these tools are available. The two primary systems used to capture federal subcontracting information are: the Electronic Subcontracting Reporting System (eSRS) and the Federal Subaward Reporting System (FSRS).

eSRS captures prime contractors' small business subcontracting accomplishments. Prime contractors enter the percent of their contracts that were subcontracted to small businesses and agencies are able to utilize this data to track and monitor their small business subcontracting performance in relation to their goals outlined in subcontracting plans. FSRS, in support of the Federal Funding Accountability and Transparency Act, collects data on subawards made by prime grantees or prime contractors, such as the amount of the subaward and place of performance. Collecting this data ensures that there is full transparency and accountability of subawards made by grantees or contractors to the general public.

eSRS and FSRS were built on the same platform and both tools pull award information from the Federal Procurement Data System, which captures prime contracting data reported by the agencies. GSA is currently undergoing an effort to combine eight federal procurement systems and the Catalog of Federal Domestic Assistance into one new system, called the System for Award Management (SAM). SAM will provide a single entry point for both contractors and government procurement personnel, integrating not only eSRS and FSRS, but also the other acquisitions systems in that portfolio, to assist in improved overall award management. According to GSA, SAM is being deployed in phases with the first phase is scheduled to be available in the first half of calendar year 2012.

As demonstrated by the initiatives and efforts described in this testimony, SBA has taken great strides to strengthen our small business prime and subcontracting programs and strategy to combating fraud, waste and abuse. These efforts are critical in ensuring small businesses have even greater access to federal contracting opportunities. While we have made significant progress, we continue to look for ways to identify further opportunities for improvement and to maximize small businesses' access to this important source of revenue so that they can grow their businesses and create jobs.

Thank you for allowing me to share SBA's views and initiatives with you today, and I will be happy to answer any questions you may have.

TESTIMONY OF MARY L. KENDALL
ACTING INSPECTOR GENERAL
FOR THE DEPARTMENT OF THE INTERIOR
BEFORE THE HOUSE COMMITTEE ON SMALL BUSINESS,
SUBCOMMITTEE ON CONTRACTING AND WORKFORCE
OCTOBER 6, 2011

Mr. Chairman and members of the subcommittee, thank you for the opportunity to testify today about challenges in the administration of contracts between the Federal Government and small businesses. The Office of Inspector General does not purport to know or understand all of the intricacies or challenges that attend to contracts between the Federal Government and small business, but we can comment on our findings relative to the Department of the Interior's handling of small business contracts, which are, we believe, representative of some of the challenges that influence the management of Federal contracts with small businesses.

During a recent review, we discovered a service contract with an 8(a) small business, United Services and Solutions, LLC (US2) that was not in compliance with the statutory subcontracting limitations which require the prime contractor to satisfy at least 50 percent of the personnel-based contract costs with its own employees. The Small Business Administration (SBA) participation agreement requires the Contracting Officer to monitor and enforce that provision. US2, an Alaskan native corporation, had been noncompliant with the 8(a) subcontracting limitations for more than 2-1/2 years.

The Contracting Officer told us that she believed the contractor on an indefinite-quantity, indefinite-delivery (IDIQ) contract, as was the case with US2, has the life of the contract to comply with the subcontracting limit. To the contrary, the Code of Federal Regulations (CFR) state that "in order to ensure that the required percentage of costs on an indefinite quantity 8(a) award is performed by the Participant, the Participant must demonstrate semiannually that it has performed the required percentage to that date." The CFR goes on to say that "the Participant must perform 50 percent of the applicable costs for the combined total of all task orders issued to date at six month intervals." In other words, US2 was required to perform 50 percent of the work every six months that the contract was in force.

Our Recovery Oversight Office also addressed compliance with 8(a) Limitations on Subcontracting in certain construction contracts funded by American Recovery and Reinvestment Act (ARRA) monies. We found inconsistency in how, or whether, compliance with Limitations on Subcontracting was assessed by DOI Contracting Officers. This inconsistency was found in compliance monitoring, lack of Department-wide guidance, and lack of training for Contracting Officers in the assessment of compliance with the Limitations on Subcontracting requirements.

Confusion on the roles and responsibilities of SBA and DOI Contracting Officers contributed to our findings in both of these reviews. In the US2 case, in particular, the Contracting Officer had identified potential problems with the Limitations on

Subcontracting quite early in the life of the contract. SBA, however, indicated that it found US2's plan to address these problems sufficient to continue with the contract. The Contracting Officer took this as a signal to continue with the contract. We found this confusion to affect the ARRA funded contracts, as well. For its part, the Department of the Interior has issued Department-wide guidance on the Limitations on Subcontracting, provided a worksheet with instructions to all contracting officers to assess a contractor's compliance, and has agreed to provide annual training to the acquisition workforce regarding their responsibilities under the 8(a) partnership agreement between SBA and DOI.

Even with a clear understanding of the roles and responsibilities, Contracting Officers are hampered with their monitoring efforts, receiving incomplete and inaccurate data from their 8(a) contractors. For example, US2 broke down labor costs by those incurred by US2 and those incurred by subcontractors, but did not break down "Other Direct Costs" in the same way. Based on the data we reviewed in "Other Direct Costs", we believe that additional subcontractor costs were contained in this category, exacerbating the extent to which US2 was out of compliance with the Limitation on Subcontracting requirement. In fairness to US2, we do not believe that such manipulation of reporting data is limited to this company, but may be happening with other 8(a) contractors, as well. Contracting Officers are placed at a significant disadvantage to identify such data problems and correct them.

Mr. Chairman and members of the committee this concludes my prepared testimony. I would be happy to answer any questions that you may have.

Testimony of Ms. Jennifer Bisceglie
President, Interos

On Behalf of
Women Impacting Public Policy

Before the House Small Business Committee
Subcommittee on Contracting and Workforce

"Subpar Subcontracting: Challenges for Small Businesses Contractors"

October 6, 2011

Chair Mulvaney and Members of the Subcommittee, my name is Jennifer Bisceglie. Thank you for inviting me to testify today on behalf of Women Impacting Public Policy (WIPP) a nonpartisan organization that represents nearly one million women business owners with a coalition of 59 organizations that support its policy objectives. I serve as Chair of the Board of WIPP and am President of Interos, a small woman owned company specializing in integrated logistics strategies specifically as it relates to cyber security and supply chain risk management. One hundred percent of our billable work is subcontracting in the federal government sector. Our only Prime contracts are IDIQs: SEAPORT-e and a corporate consolidated GSA contract to include MOBIS and LogWorld.

Just two years ago, my company was growing, we had 10 employees, and we were optimistic about our work with the government. But an unfortunate development transpired with our largest prime contractor. In the span of two months, the prime decided to take away five of those positions without any recourse, so my company was cut in half. I was not able to talk to the government—they only have a relationship with the prime. I could not point to any violations of the subcontracting plan because those were not shared with us. In short, there was not much we could do to change the situation and we felt pretty powerless. If there is a silver lining, it forced us to diversify our customers among prime contractors and we are now seeking prime contracts ourselves so that we could be in control of our contracts but it has been a painful experience.

The title of this hearing "Subpar Subcontracting" encapsulates the experiences of many WIPP members who do subcontracting. Yet, this is the route that is most available

to women owned businesses when it comes to the federal contracting arena. Many of us are happy for the work, but frustrated when it comes to the limited rights our small businesses have with respect to carrying out the work.

The Small Business Jobs Act of 2010 contained an important provision, which WIPP advocated for—a requirement that prime contractors must use subcontractors listed in their subcontracting plans. We refer to it as "if you list us, use us." Since subcontractors rarely have a direct relationship with the government customer, there are few avenues open to them to solve problems on a government contract, such as the one my company encountered. We are interested in knowing whether this requirement has made any impact in the agencies.

While we are on the subject of subcontracting plans, we wonder if prime contractors actually file the subcontracting plans? Does anyone in the government actually read the subcontracting plans? If no one reads them, how can there be any enforcement? If subcontractors do not have access to the plans, how can they tell if the prime contractor is in compliance?

WIPP does not believe the answer is to do away with filing subcontracting plans, we think the answer is better enforcement of the plans. With respect to primes who do not file their subcontracts, surely technology exists which triggers a red flag when a subcontract is not filed, for ease of monitoring purposes. Reminders are a commonly used tool in calendar software, so it does not seem to us to require extensive government resources to implement this suggestion. It would alert the prime, the contracting officer and the SBA of the missing data.

WIPP also suggests that the federal government should require disclosure of the

portion of the subcontracting plan to the sub that is listed. The government should require the primes to share that information with the subcontractor upon award as opposed to the current system, which if the prime does not readily agree to this disclosure, requires a subcontractor to actually pay for a FOIA report in order to access the information.

A more fundamental problem is the confusion surrounding limitations on subcontracting contained in the Small Business Act. First, we learned something by preparing this testimony because small businesses are told repeatedly by agencies that primes are required to perform 51% of the work. Upon reviewing the law, we found that the actual percentage the prime is required to perform is 50%. Let me just say that if the agencies do not understand the rules, small businesses certainly are not going to understand them. While it is our responsibility as federal contractors to read the FAR and understand acquisition rules, we are, after all, running businesses. This rule just does not make sense.

In the case of service contracts, the prime is required to perform 50% of the **cost** of contract performance incurred for personnel with employees of the prime. As we interpret this, in order for a firm to be in compliance with this requirement, they would have to know their subcontractors' personnel costs to make the calculation. No business we know is going to share that information in either the commercial or government market. Second, this requirement basically requires a cost based accounting system that many small businesses are not required to use – and therefore do not use - due to cost.

WIPP suggests that the Subcommittee take a look at amending the law to achieve the intention of the law, which we believe is to ensure that the prime performs at least

50% of the work. A suggested change that would be helpful in making this rule effective is to require 50% of the **price** of the contract, not the cost of the contract. In addition, it is our view that in the case of small business set aside contracts, the 50% should be calculated by including all small businesses on the contract, both prime and subcontractors. This will ensure a uniform allocation of small business work as more women owned businesses bid for prime contracts.

While we are on the subject of subcontracting plans, we note that there are really two databases in which subcontracting plans are entered—FSRS and eSRS. The FSRS states "Prime Grant Recipients awarded a new Federal grant greater than or equal to $25,000 as of October 1, 2010 are subject to FFATA sub-award reporting requirements as outlined in the Office of Management and Budgets guidance issued August 27, 2010. The prime awardee is required to file a FFATA sub-award report by the end of the month following the month in which the prime recipient awards any sub-grant greater than or equal to $25,000." The eSRS, on the other hand, according to its website collects the following: "This report collects prime contractor and subcontractor subcontract award data for a specific Federal Government agency when a Prime/Subcontractor: (a) holds one or more contracts over $650,000 (over $1.5 million for construction of a public facility); and (b) is required to report subcontracts awarded to Small Business (SB), Small Disadvantaged Business (SDB), Women-Owned Small Business (WOSB), HUBZone Small Business (HUBZone SB), Veteran-Owned Small Business (VOSB), Service-Disabled Veteran-Owned Small Business (SDVOSB), Alaskan Native Corporations (ANC) and Indian Tribes concerns under a subcontracting plan with the Federal Government."

It seems to us that the two databases are collecting much of the same information but do not communicate with each other. We suggest the Subcommittee review the systems and suggest changes because this strikes us as another example of wasteful effort on the part of government and the businesses that file the paperwork. We were unable to identify any penalties for noncompliance to either system.

In conclusion, subcontracting is a good way for women owned businesses to get involved in government contracting. With the implementation of the women owned small business procurement program, we expect the ability to bid on more prime contracts will increase. Nevertheless, many small businesses excel in the subcontracting arena. WIPP urges the Subcommittee to examine and push for changes that will make more small businesses successful subcontractors, such as clarification of the subcontracting rule. We believe that compliance requirements can only work if penalties are put into place. WIPP believes that in order to make the subcontracting rule effective, the percentage should be clarified—is it 50% or does the government really mean 51% of the work must be performed by the prime? And in the case of small business set aside contracts, all small businesses on the contract should be counted toward the 50% requirement. Finally, we believe a few basic changes in the electronic reporting systems could result in much better data on subcontracting plans thereby enhancing compliance.

Thank you for giving WIPP the opportunity to testify on this important issue. We welcome any questions.

Testimony of Jamie Borromeo
President of The E & J Commission, LLC
Before the Subcommittee on Contracting and Workforce
U.S. House of Representatives on Small Business
October 6, 2011

"Subpar Subcontracting: Challenges for Small Business Contractors"

Chairman Mulvaney, Ranking Member Chu, and members of the subcommittee, thank you for inviting me to testify today. My name is Jamie Borromeo, and I am the President of The E&J Commission, LLC, which is a contract research and strategies consulting firm based in Washington, D.C.

The E & J Commission prides itself in representing disadvantaged business communities by researching contracts available for small, disadvantaged businesses and assisting them with business development consultation. In my former capacity as Executive Director of the National Council of Asian American Business Associations, and in my former position as intern to Congressman Mike Honda who was the Chair of the Congressional Asian Pacific American Caucus at the time, I was exposed to a number of small business owners across America who would voice their challenges within both commercial and government contracting. This is why my business partner and I decided to create a social entrepreneurship initiative to assist some of the best and brightest minority and woman-owned companies in this space—so we could help them in understanding the nuances of this industry. Entering the federal market is one of the most challenging areas to break into as a small business owner, but even more so if cultural and linguistic barriers prevent one from being able to understand the complexities of government systems. So now, after 10 years of working with communities of color, I am certain that institutional discrimination within the federal contracting space still exists, and this is highlighted in the lack of subcontracting opportunities for our community. Subcontracting is the first point of entry for most small businesses attempting to enter the federal market because 1) Agencies like to see past performance from those seeking award and 2) subcontracting allows for the slow growth necessary so that the small business can gain experience, capacity and can acclimate to doing business in the federal contracting space.

Discrimination within the subcontracting process is very difficult to prove, especially when those on the program level are not outwardly excluding small businesses from participating. What some are doing is turning a blind eye to the issues. It is in their dispassionate and apathetic approach to the matter, rather than their intentional overtly discriminatory practices, which is the discrimination in this case. Doing nothing is just as bad as causing harm, and the lack of oversight of these passive actions are what concern me the most.

I would like to point out for the record that a good majority of OSDBU, SBA, MBDA and other small business advocates and agencies have good and well intentioned people working on behalf of their organizations, and we should continue to support their positions and even elevate their authority within the contracting space. However, much of the time, they are limited in their ability to advocate on behalf of qualified companies. They have not been allocated enough priority in their positions to effect positive change for the small business community because the agency does not see the value or does not grant them authority needed to affect contracts. Other times, they do not have enough of a relationship with the program office, where ultimately, the decisions are made when contracts are awarded. This could easily be remedied by ensuring that top agency officials from their respective agency mandate placing a higher priority on small business. The current leadership has to ensure this is reaching the contracting officer level.

Because this is a rather complex and nuanced issue, I would like to limit the issues I point out, as my brief time with you will only allow for a handful of these pressing issues to be discussed.

The first point I would like to address is the **lack of compliance with the subcontracting plans administered by the contracting officers**. I understand from many prime contractors, agency representatives, business community leaders and small business owners that I interviewed the past week that there is an issue with contracting officers not properly "evaluating subcontracting plans" or "monitoring, evaluating and documenting contractor performance" as prescribed in 48 C.F.R. 19.708 (b).

I have worked alongside the Asian American Justice Center, a civil rights organization for Asian Americans that addresses these issues through their Contractor Empowerment Program, currently led by Ms. Jeanette Lee. We have partnered to identify some of these challenges and have collected testimonials from small business contractors. Most are hesitant to provide testimonial because they are afraid of being black-balled or not maintain good rapport with an agency they still would like to receive work from; however, some brave contractors have emerged from the pack to describe their unjust experiences.

In our findings, we discovered the following fraudulent practices that create barriers to contracting opportunities for Asian Americans, women and other minorities, as outlined by Ms. Jeanette Lee:

1. "Because there is no enforcement, prime contractors often team up with minority contractors in order to win a bid, but then drop them from the contract once they receive the award. I've heard from several Asian American contractors that this is a prevalent and pervasive occurrence. "

2. "In addition, when there is no legal mandate for a goal – for example, in states that have passed legislation that prohibits affirmative action programs - then the prime contractors put in no real effort to utilize small or minority owned businesses. They will

hold "meet and greet" sessions and invite the businesses to attend, but in the end, none of these firms receive any work because the prime has already selected its sub-contractors. With no legal mandate from the government or authority from top management making diversity a priority, most of this activity is just lip service."

3. "Primes will also ask small and minority businesses to identify experts who can perform certain jobs and when the minority business delivers that person, the prime wants to hire the person away from the minority business – essentially poaching the employee from the minority business. The small business usually refuses and then the prime will pursue business with someone else. "

These, among many others, are testimonials from contractors that are still looking for an entity to hold primes accountable for what was promised to these small businesses.

Another issue I would like to point out is that most contracts that are moved from large defense contractors to small businesses to reach set-aside goals, are still controlled and dictated by the large contractor in the end, in regards to who needs to be hired, what salary they will be paid, and what benefits they will receive. The way that this occurs is large contractors keep a list of disadvantaged business enterprises that are willing to do just about anything for a contract. It is common practice for a large contractor to work with an agency to move some of their contracts, which have recently been designated for set-aside program, to large contractor's preferred vendors. These vendors will then continue to employ virtually all of the same employees that the large contractor employed with identical compensation packages. Therefore, in essence, these employees are still working for the large defense contractors who maintain the specifics of their employment throughout this process. When the small business protests, they seem to find that their current and/or future contracts disappear from that federal agency if not the federal space as a whole.

Because the small business owner is hungry for work, they feel lucky to be in the game. Money for morals is what is up for trade here, and until there are more small business opportunities and ***legitimate*** ones, it's all one closed network that is circulating contracts and dollars among their own without informing, or much less encouraging competition.

Lastly, a major issue I would like to present for the record is the lack of market research conducted to find qualified small businesses. With Silicon Valley as my former home, I witnessed some of the most creative, talented and capable small businesses in the country produce and engineer products and services that are currently provided by large contractors. The boutique-sized company has just as many robust capabilities to do the work, however, because adequate market research is not conducted, government agencies are not utilizing their services. Making the connection with these companies takes additional work, but as one large defense contractor admitted to me, "We don't have time to look through databases. "If we find an opportunity, we're going to our existing contacts."

The challenge for subcontracting then becomes "Who you know." And **whom** you know is not necessarily determined by your skills, capability or work ethic.

My recommendations to the sub-committee is two-fold:

1) **We must ensure that Contracting Officers and Technical Representatives (COTR) are complying with rules and systems in place to ensure prime contractors are performing well on existing contracts and subcontracting the proper amount to small businesses.** This can be done by requiring past performance reports are executed by the COTR team. The contractor should perform monthly performance reports and check-ins with contractors. I interviewed one former contracting officer who said that if the agencies and agency heads made it a priority in the contracting office, surely the contracting officers would as well. It takes leadership to enforce these and agencies are predominantly focusing on prime contracts, but now we need concerted efforts to focus on subcontracting efforts.

2) **Diligent and proper market research performed by program offices is necessary**. I have met a number of small business representatives, but access to the program office is nearly impossible unless you have an existing relationship. And existing relationships are usually formed through large federal primes that "allow" the small business into their network. Program Office and Technical Representatives should be required to do just as many "meet and greets" as the Small Business offices are. Taking a meeting with a new small business is declined, for fear of protest on bids. Those are the excuses I've heard from program offices, but it should be a requirement to know the leadership behind who is providing the goods and services for the federal government, which is paid for the American taxpayer. It is our right to meet with those making the executive decision on who is winning these contracts and monitoring subcontracting plans. Leadership of agencies should also encourage the Program Office to network with the Small Business Program Office within the agency so that they build good rapport amongst each other.

I have additional comments I would like inserted in the Congressional Record that were not stated in this verbal testimony, so in the interest of time, I would like to thank the sub-committee for inviting me to this hearing, and I'd be happy to hear any questions you might have.

Jamie Borromeo, October 6, 2011
President
The E&J Commission, LLC

1. What mechanisms are contracting officers using to monitor small business performance under the contract in accordance with the limitation on subcontracting clauses? Are administrative contracting officers required to monitor compliance under FAR part 42.3?

2. If the small business is not compliant, what measures are available to enforce compliance? What happens if the CO knowingly fails to enforce the requirement?

3. Is a small business concern's compliance or noncompliance with the limitation on subcontracting clause documented in its past performance evaluation?

4. What documentation is required and how do the agencies communicate their concerns to SBA regarding this regulatory requirement?

5. If these provisions are in place to help small businesses, how is SBA working with agency contracting officer and contractors to ensure compliance?

6. The government is collecting data in ESRS and FSRS to track subcontracting, so we have transparency with regards to subcontracting data. However, how is the data in these systems being used to monitor compliance with the limitation on subcontracting provisions? Why are both systems necessary? To conserve resources, are there any plans to combine the systems and instruct agencies on the best way to use the data to evaluate subcontracting plans and compliance?

7. In the past, subcontracting opportunities over $10,000 were publicized in the Commerce Business Daily which was a great way for small businesses to readily find opportunities. SUB-Net was established to serve that purpose but has not been integrated into FPDS or the FAR. What is the status of SUBNet?

8. You were interviewed for and quoted in a Washington Post story of September 30, 2010. In that story, it was pointed out that SBA had been relying on three employees and paper records in Anchorage, Alaska to track whether nearly $6 billion in sole source contracts were following the limitation on subcontracting rules. Indeed, the article says that SBA doesn't review a firms activities or continuing eligibility, and quotes the district office director as saying "Unless we have reason to believe otherwise, we take them at their word." So I'd like to ask you, how many people are now monitoring compliance with the limitation on subcontracting requirements, and is SBA still using a paper system to do so? Are you still taking firms on their word?

9. In your opinion, should SBA's Procurement Center Representatives be allowed to delay a contract if they believe it has an inadequate subcontracting plan?

10. Is compliance small business subcontracting plans a systemic problem that needs to be addressed or a series isolated incidents that resulted from a few contracting officers and contractors not following the regulations.

11. In your opinion, is compliance with the limitation on subcontracting provisions a systemic problem that needs to be addressed or a series isolated incidents that resulted from a few contracting officers and contractors not following the regulations.

12. The SBA OIG issued a report: "Effectiveness of the Small Business Administration's Surveillance Review Process," dated March 31, 2011. It said, among other things, that there was limited review by SBA to determine whether contracting officers monitored compliance with subcontracting limits. Of particular concern, SBA claimed that these surveillance reviews were supposed to monitor the delegation of 8a contracting authority, but they did not.

13. The IG report said there were only 2 instances in the surveillance reviews that mentioned such monitoring. In 1 instance, the review team reported there was no evidence that the contracting officer made an effort to monitor the percentage of work performed by the small business. In the other instance, which involved an 8(a) joint venture, the review team concluded that there was no way of tracking the percentage of work performed by the 8(a) firm.

    This leads to a number of questions:

- If your own review team reports that, "there is no way of tracking the percentage of work performed by the 8a firm," what changes are needed so they can be tracked?

- Is SBA now monitoring 8a-delegated authority and, if so, what are you finding, especially as it relates to subcontracting limits and any other restriction to limit "pass-through" contracting?

- Does SBA monitor subcontracting limits in any other manner, and if so, how and what are you finding?

- Has anyone on your staff performed a detailed analysis of contractor/subcontractor labor costs to determine compliance with the subcontracting limitations? If so, please describe the ease or difficulty in performing such an analysis.

- What guidance does SBA provide contracting officers on monitoring subcontracting limits? Is this type of guidance included in any contracting officers' training courses?

14. The SBA OIG issued a report: "SBA's Planning and Award of the Customer Relationship Management Contracts," dated 6/29/10, that said:

"While the 8(a) business development program is authorized by law to use sole-source contracting under certain circumstances, the Copper River contract did not appear to qualify for a small business set aside contract or an 8(a) award because it was basically a "pass through" contract to purchase Microsoft software and licenses."

Why would SBA, the agency that has ultimate responsibility for properly administering small business contracting, award a contract that apparently violated subcontracting rules? What is your office's reaction to this report?

15. In an April 2006 GAO report entitled "Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight" GAO stated: "For the 16 files we reviewed, we found almost no evidence that the agencies are effectively monitoring compliance with this requirement, particularly where 8(a) ANC firms have partnered with large firms."

    What action did SBA take to ensure that subcontract monitoring is performed and is effective?

16. What are the consequences for the small business if it does not perform the required amount of labor and therefore exceeds the subcontracting limits?

1. Since in your written statement you state that there is confusion on the roles and responsibilities of the SBA and DOI Contracting Officers, what are your suggestions for eliminating this confusion? Is training needed? Clearer regulations located in one place in the FAR as opposed to with the different socioeconomic sections in the FAR?

2. Do you know if IG audits are conducted periodically to ensure compliance with this requirement? If yes, how often has this been done in the past?

3. I know the two audits on limitation on subcontracting that you issued in FY 2011 both dealt with 8(a) contractors. Has any consideration been given to monitoring limitation on subcontracting for the other small business programs? Is there any reason to think this isn't an issue for all small business programs?

4. Given that the current rules require that compliance be based on cost, does that make it more difficult to ascertain if a firm is complying with the limitation on subcontracting rules?

5. Is it difficult to ascertain damages when firm is violating the limitation on subcontracting rules? I understand that the contracting officer has to make a determination that the price the government is paying is fair and reasonable at the time of award. If the contracting officer has made such a determination, how does the government prove harm?

6. Do the various subcontracting systems aid your investigations?

7. Were you able to ascertain how much of a price premium the government paid for the contracts your office found had been passed through to large contractors?

8. Ms. Kendall, your testimony states that US2 was non-compliant with subcontracting limits for 2½ years. Do you know whether this contract has continued to perform and if so, will it ever be compliant?

9. The Washington Post reported that US2 had only a handful of employees at US2 when Interior awarded it a $250 million sole source contract. Did the contracting officer have any explanation for awarding such a large contract to such a small business? Likewise, I understand SBA also "approves" the contractor for such a contract. Was there any analysis in the file by SBA or was there any explanation for awarding such a large contract to such a small business?

10. In one part of your testimony, you mention that it is the contracting officer's responsibility to monitor subcontracting limits. You also mention that SBA indicated US2's plan to address the subcontracting problems was sufficient to continue with the contract and that this caused confusion. Could you elaborate on this?

11. You say that US2 provided reports to the contracting officer, which showed that US2 was not performing 50% of the labor, and you add that it was possible that other subcontracting costs could have been included in an "other direct costs" category. Please elaborate.

12. Did the contracting officer examined the "other direct costs" category? If not, do you know why?

13. You state that some other Recovery Act contracts also had problems in meeting subcontracting limits. Please explain.

In your opinion, how difficult is it, in terms of time and access to information, to monitor subcontracting costs carefully?

Questions for the Record from Chairman Mulvaney

1. What mechanisms are contracting officers using to monitor small business performance under the contract in accordance with the limitation on subcontracting clauses? Are administrative contracting officers required to monitor compliance under FAR part 42.3?

According to FAR 42.302(c), "Any additional contract administration functions not listed in 42.302(a) and (b), or not otherwise delegated, remain the responsibility of the contracting officer." FAR 42.302(a) and (b) do not specifically provide that the administrative contracting officer should monitor a small businesses' performance with respect to the limitations on subcontracting. However, the FAR permits the contracting officer to delegate that responsibility.

Regardless, the subcontracting limitations requirement, in general, is a contract requirement set forth in a contract clause (see, e.g., FAR 52.219-14, "By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for --(1) *Services (except construction).* At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern....").

Contracting officers should be determining, prior to award, whether the small business will meet the subcontracting limitations requirement. For example, in the offer, the small business will provide the direct labor costs and any overhead which has only direct labor as its base, plus the concern's General and Administrative rate multiplied by the labor cost. The contracting officer would then determine, if it is a service contract, whether the offeror will be spending at least 50% of these costs on its own employees. The contracting officer can then use invoices subsequently provided to further determine whether the small business is meeting the subcontracting limitations requirement.

2. If the small business is not compliant, what measures are available to enforce compliance? What happens if the CO knowingly fails to enforce the requirement?

If a small business is not meeting the subcontracting limitations requirement set forth in the contract, the contracting officer may terminate the contract for default pursuant to FAR § 49.401.

Specifically, the FAR permits the contracting officer to completely or partially terminate a contract because of the contractor's actual or anticipated failure to perform its contractual obligations – in this case, the failure to meet the limitations on subcontracting. If the small business can demonstrate that it will be meet it obligations or the contracting officer determines that the failure to perform is excusable (e.g., arose out of causes beyond the control of the contractor and without the fault or negligence of the contractor), then no termination for default would be required. If the failure to meet the requirement is not excusable, the contracting officer can give the small business written notice specifying the failure and providing a period of ten days (or longer period as necessary) in which to cure the failure.

If the contracting officer knowingly fails to enforce the requirement, he/she is failing to enforce a material term of the contract, which is a performance issue on the part of the contracting officer, and not just the small business.

Although monitoring compliance with the limitations on subcontracting is the responsibility of the contracting officer, SBA is committed to working closely with the Office of Federal Procurement Policy

(OFPP) and agencies to ensure they have the appropriate training, tools and support needed to monitor compliance. Additionally, SBA conducts surveillance reviews of contracting activities, which are periodic reviews to provide recommendations on how to increase opportunities for small business and to ensure the contracting officers are in compliance with small business policies and regulations. The purpose of these reviews is to:

- Assess the quality of a buying activity's small business program;
- Determine whether the activity routinely conducts adequate market research to identify set-aside opportunities and uses each of the small business programs;
- Evaluate the activity's impact on small business; and
- Recommend changes to improve small business participation in the contracting activity's acquisition process, both at the prime and subcontract level.

As a part of these reviews, SBA reviews compliance with subcontracting regulations and provides recommendations to agencies on how to improve these processes and procedures to ensure compliance.

3. Is a small business concern's compliance or noncompliance with the limitation on subcontracting clause documented in its past performance evaluation?

The FAR explains that "past performance" is all information that would be relevant for future source selection purposes regarding a contractor's actions under previously awarded contracts. It includes the contractor's record of conforming to contract requirements and the contractor's record of integrity and business ethics (see FAR 42.1501). If a small business is not meeting its subcontracting limitation requirements, it is violating a contract term. The contracting officer must input this information concerning past performance into the Past Performance Information Retrieval System (PPIRS) at www.ppirs.gov, in accordance with agency procedures (see FAR 42.1503(c)).

4. What documentation is required and how do the agencies communicate their concerns to SBA regarding this regulatory requirement?

According to FAR 42.1503, each agency has its own procedures with respect to submitting information to PPIRS. Agencies can communicate their concerns to SBA's Procurement Center Representatives or Commercial Market Representative, or if the small business is in the 8(a) Program, to the Business Development Specialist for that business.

5. If these provisions are in place to help small businesses, how is SBA working with agency contracting officer and contractors to ensure compliance?

SBA conducts surveillance reviews of contracting activities, as authorized by the Small Business Act, 15 U.S.C. § 644(m), and FAR 19.402(c)(5). Specifically, the Small Business Act authorizes Procurement Center Representatives to monitor the performance of contracting activities to which they are assigned for compliance with small business requirements. As a part of these reviews, SBA reviews compliance with subcontracting regulations and provides recommendations to agencies on how to improve these processes and procedures to ensure compliance. SBA is currently in the process of developing a systematic and analytical procedure for conducting surveillance reviews. This method will establish clear and standardized selection criteria for determining contracting activities to review, as well as a standard approach to conducting the reviews.

Likewise, the FAR states that SBA may conduct periodic reviews to assess Federal agencies' compliance with small business policy and regulations. In addition, SBA provides training to the agencies on these and other issues relating to small business contracting.

6. The government is collecting data in ESRS and FSRS to track subcontracting, so we have transparency with regards to subcontracting data. However, how is the data in these systems being used to monitor compliance with the limitation on subcontracting provisions? Why are both systems necessary? To conserve resources, are there any plans to combine the systems and instruct agencies on the best way to use the data to evaluate subcontracting plans and compliance?

The eSRS and FSRS are separate systems with different purposes. eSRS captures prime contractors' small business subcontracting accomplishments. Prime contractors enter the percent of their contracts that were subcontracted to small businesses and agencies are able to utilize this data to track and monitor their small business subcontracting performance in relation to their goals outlined in subcontracting plans. FSRS, in support of the Federal Funding Accountability and Transparency Act, collects data on subawards made by prime grantees or prime contractors, such as the amount of the subaward and place of performance. Collecting this data ensures that there is full transparency and accountability of subawards made by grantees or contractors to the general public.

Data from these systems are not commonly used to monitor compliance with the limitations on subcontracting because reporting in the systems has not generally been required on small business contracts. Small business prime contractors are specifically exempt from the requirement to submit small business subcontracting plans and therefore are exempt from eSRS reporting. Small business prime contractors generally did not need to report in FSRS because of the high-dollar thresholds that were in place up through March 2011. Additionally, businesses with less than $300,000 in revenue are exempt from FSRS reporting.

As currently structured, each system includes information that the other system does not. For example, FSRS includes information on executive compensation and subcontractors awarded by small-business prime contractors. FSRS also incorporates grant reporting. FSRS does not track the small or socioeconomic status of a subcontractor. ESRS is used to report lower-tier subcontractors if a subcontractor itself has a subcontracting plan.

As mentioned in SBA's testimony, eSRS and FSRS were built on the same platform and both tools pull award information from the Federal Procurement Data System, which captures prime contracting data reported by the agencies. GSA is currently undergoing an effort to combine eight federal procurement systems and the Catalog of Federal Domestic Assistance into one new system, called the System for Award Management (SAM). SAM will provide a single entry point for both contractors and government procurement personnel, integrating not only eSRS and FSRS, but also the other acquisitions systems in that portfolio, to assist in improved overall award management. According to GSA, SAM is being deployed in phases with the first phase is scheduled to be available in the first half of calendar year 2012.

7. In the past, subcontracting opportunities over $10,000 were publicized in the Commerce Business Daily which was a great way for small businesses to readily find opportunities. SUB-Net

was established to serve that purpose but has not been integrated into FPDS or the FAR. What is the status of SUBNet?

SUB-Net is still available for publishing subcontracting opportunities and currently lists over 100 subcontracting opportunities. SBA proactively works to help increase access and opportunities for small business contractors at all levels. We work closely with large primes and agencies to ensure more subcontracting opportunities are listed on SUB-Net. We are committed to ensuring there is appropriate outreach, training and awareness about the site. SUB-Net may be used by prime contractors to satisfy FAR 5.206. Unfortunately, FedBizOpps does not include clear functionality for publicizing subcontracting opportunities. Thus, SUB-Net is the most accessible government source for available subcontracts.

8. You were interviewed for and quoted in a Washington Post story of September 30, 2010. In that story, it was pointed out that SBA had been relying on three employees and paper records in Anchorage, Alaska to track whether nearly $6 billion in sole source contracts were following the limitation on subcontracting rules. Indeed, the article says that SBA doesn't review a firms activities or continuing eligibility, and quotes the district office director as saying "Unless we have reason to believe otherwise, we take them at their word." So I'd like to ask you, how many people are now monitoring compliance with the limitation on subcontracting requirements, and is SBA still using a paper system to do so? Are you still taking firms on their word?

SBA currently has 4 full-time Business Development Specialists and one administrative support staff working with 8(a) firms. There is an additional pending recruitment action for a similar role. These staff's responsibilities include reviewing the firms' annual reviews, financial statements, joint venture agreements, mentor-protégé agreements, reports of non-compliance and field visits.

Since September 2010, SBA has significantly overhauled the regulations governing participation of tribal and Alaskan Native Corporation-owned firms in the 8(a) program. As part of that overhaul, 8(a) participants must complete annual "Performance of Work" reports for all its 8(a) joint ventures. If these reports suggest that a participant is not meeting the limitations on subcontracting, SBA will investigate further, using both its own resources and through cooperation with the Inspector's General offices of SBA and the procuring activity. Indeed, since the publication of that article, SBA has initiated multiple enforcement actions against firms that fail to comply with the 8(a) regulations. Several of those actions have resulted in government-wide suspensions and debarments, including the government-wide suspension of GTSI.

9. In your opinion, should SBA's Procurement Center Representatives be allowed to delay a contract if they believe it has an inadequate subcontracting plan?

We believe that Procurement Center Representatives (PCRs) should be allowed to delay any contract that is not appropriately providing opportunities for small businesses as set forth in statutes and regulations. We have found that, where SBA's PCRs identify problems with a subcontracting plan on a large business's contract, contracting officers generally are receptive to addressing SBA's concerns.

10. Is compliance small business subcontracting plans a systemic problem that needs to be addressed or a series isolated incidents that resulted from a few contracting officers and contractors not following the regulations.

SBA monitors compliance with small business subcontracting plans for large business's contracts through SBA's Commercial Market Representative (CMR) program. CMRs' responsibilities include counseling small businesses on how to obtain subcontracts; conducting matchmaking events between large prime contractors and potential small business subcontractors; providing training on the Subcontracting Assistance Program for both large and small businesses; and conducting compliance reviews of large business prime contractors. CMRs also perform reviews on subcontracting plan compliance for specific contractors and issue their findings on the large contractor's compliance. For the most part, SBA has found through its CMRs that large contractors are complying and making credible efforts to comply with their small business subcontracting plans. We also maintain relationships with large prime contractors and work with them to ensure they are aware of the small business subcontracting programs and any updates to programs.

SBA is also focused on working with all federal agencies to ensure prime contractors are kept accountable to their subcontracting plans. When a prime contractor submits a bid for a contract that is expected to exceed $650,000, it must also submit its plan to utilize small businesses for subcontracting. Prime contractors must report their small business achievements in the electronic subcontracting reporting system (eSRS). After which, contracting officers are required to review the Individual Subcontracting Plan every six months to ensure the contractor is complying with the subcontracting plan. SBA works with agencies to ensure prime contractors stick to their subcontracting plans during the performance of the contract. Additionally, SBA reviews a sample of Individual Subcontracting Reports and contacts the contracting officer if a contractor is not on target to meet its goals and has not provided a plan of action. We are also in the process of scheduling training sessions for contractors and agencies on how to appropriately review and track subcontracting data.

Additionally, the Small Business Jobs Act of 2010 (Jobs Act) included several provisions specifically related to holding prime contractors more accountable to their subcontracting plans and subcontractors. The first provision is designed to prevent small business subcontracting misrepresentations. As part of the implementation of this provision, SBA is proposing to amend our regulations to make it clear that contracting officers (or administrative contracting officers if applicable) are responsible for monitoring and evaluating the prime contractor's small business subcontracting plan compliance. Additionally, we are proposing that contracting officers have the ability to require contractors to provide updated subcontracting plans in certain circumstances, such as when an option is exercised and when a firm's status changes from small to other than small.

The second provision is aimed at mitigating "bait and switch," which is when a prime contractor references a small business as its subcontractor in its bid or proposal, but does not utilize the small business in actual performance. With this new provision, if this event occurs, the prime contractor must provide an explanation in writing to the contracting officer and it may have an impact on their contract performance review, which could result in them being rated lower in past performance for future contract opportunities.

The last provision requires prime contractors to notify a contracting officer whenever they reduce a payment or are more than 90 days delinquent paying a small business subcontractor if the prime contractor has been paid by the government. The Jobs Act requires contracting officers to consider failure to pay subcontractors in a timely manner when evaluating past performance and to describe and record these determinations in the Federal Awardee Performance and Integrity System.

11. In your opinion, is compliance with the limitation on subcontracting provisions a systemic problem that needs to be addressed or a series isolated incidents that resulted from a few contracting officers and contractors not following the regulations.

It is unclear from the limited available data whether this is an isolated or systemic problem. Contracting officers are required to insert the limitations on subcontracting provision in all contracts that are set aside for small business concerns, and contractors are charged with knowledge of all of the terms and conditions of Federal contracts, including the limitation on subcontracting provisions. We intend to increase outreach to contracting officers to train them on the requirements of monitoring small business performance, as well as work closely with the Office of Federal Procurement Policy and federal agencies to ensure contracting officers have the tools and resources they need to monitor compliance. In addition, SBA's increased activity in the debarment and suspension arena, which has included debarments and suspensions for violation of the limitations on subcontracting provisions, will have a deterrent effect.

12. The SBA OIG issued a report: "Effectiveness of the Small Business Administration's Surveillance Review Process," dated March 31, 2011. It said, among other things, that there was limited review by SBA to determine whether contracting officers monitored compliance with subcontracting limits. Of particular concern, SBA claimed that these surveillance reviews were supposed to monitor the delegation of 8a contracting authority, but they did not.

13. The IG report said there were only 2 instances in the surveillance reviews that mentioned such monitoring. In 1 instance, the review team reported there was no evidence that the contracting officer made an effort to monitor the percentage of work performed by the small business. In the other instance, which involved an 8(a) joint venture, the review team concluded that there was no way of tracking the percentage of work performed by the 8(a) firm.

This leads to a number of questions:

- **If your own review team reports that, "there is no way of tracking the percentage of work performed by the 8a firm," what changes are needed so they can be tracked?**

  It might be difficult to track performance based on the information the contracting officer received in a given instance. There are limitations on the types of cost and pricing information that a contracting officer can request from a contractor. Further, an invoice from a joint venture might not contain a breakdown on performance by each participant in the joint venture. In addition, in a populated joint venture, the joint venture entity is the employer of the individuals performing the requirement, and there is no requirement to attribute the employees to one of the joint venture participants in a particular invoice. The contracting officer would have to ask for additional information, such as payroll records or a breakdown from the joint venture, in order to monitor compliance.

- **Is SBA now monitoring 8a-delegated authority and, if so, what are you finding, especially as it relates to subcontracting limits and any other restriction to limit "pass-through" contracting?**

We do not believe issues related to the limitations on subcontracting are more prevalent in any one of our programs. The requirement to limit subcontracting on set asides applies to all of our set aside programs.

- **Does SBA monitor subcontracting limits in any other manner, and if so, how and what are you finding?**

  New 8(a) BD program regulations require 8(a) joint ventures to report how they are meeting the limitations on subcontracting for each particular contract as part of the 8(a) Participant's annual review, and require the joint venture to submit a report at the end of each contract concerning how it met the limitations on contracting for the contract (see 13 CFR 124.513(i)).

- **Has anyone on your staff performed a detailed analysis of contractor/subcontractor labor costs to determine compliance with the subcontracting limitations? If so, please describe the ease or difficulty in performing such an analysis.**

  SBA's regulations provided definitions of the cost of the contract, the cost of the cost incurred for personnel, cost of manufacturing, cost of materials, etc. Difficulties arise when a subcontractor is providing a mix of goods and services for a set price. The subcontractor is not under any obligation to provide a breakdown of its price between costs incurred for personnel, cost of materials, etc. Thus, some cost of the contract incurred for personnel may not be included in the calculation, because the information is not available.

- **What guidance does SBA provide contracting officers on monitoring subcontracting limits? Is this type of guidance included in any contracting officers' training courses?**

  SBA has defined certain terms in its regulations at 13 CFR 125.6. In terms of training, SBA is working closely with the Office of Federal Procurement Policy, the Defense Acquisition University and Federal Acquisition Institute to ensure contracting officers have appropriate training on monitoring compliance with the limitations on subcontracting.

14. The SBA OIG issued a report: "SBA's Planning and Award of the Customer Relationship Management Contracts," dated 6/29/10, that said:

"While the 8(a) business development program is authorized by law to use sole-source contracting under certain circumstances, the Copper River contract did not appear to qualify for a small business set aside contract or an 8(a) award because it was basically a "pass through" contract to purchase Microsoft software and licenses."

Why would SBA, the agency that has ultimate responsibility for properly administering small business contracting, award a contract that apparently violated subcontracting rules? What is your office's reaction to this report?

It is our understanding that the contract was awarded without legal concurrence. There are no outstanding, unexpended funds on this contract and SBA is in the process of closing out the contract permanently. Recently, SBA's procurement function was transferred to SBA's Denver Finance Center and the Office of General Counsel provided training on the limitations on subcontracting and non-

manufacturer rule to its contracting personnel. SBA is committed to ensuring we are providing appropriate training, tools and resources for not only our own contracting personnel, but also other agencies' contracting officers to effectively monitor compliance.

15. In an April 2006 GAO report entitled "Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight" GAO stated:

"For the 16 files we reviewed, we found almost no evidence that the agencies are effectively monitoring compliance with this requirement, particularly where 8(a) ANC firms have partnered with large firms."

What action did SBA take to ensure that subcontract monitoring is performed and is effective?

SBA recently completed the first major revision of its 8(a) Business Development program regulations in over a decade. These revised regulations require joint ventures to report how they are meeting the limitations on subcontracting on particular contracts as part of the 8(a) Participants annual review, and to require joint ventures to report on each particular contract upon contract completion. In addition, SBA reviews compliance with 8(a) regulations, including the limitations on subcontracting, as part of our surveillance reviews.

16. What are the consequences for the small business if it does not perform the required amount of labor and therefore exceeds the subcontracting limits?

A contracting officer could possibly terminate the contract or not exercise the next option. In addition, a firm could face possible debarment, suspension, criminal prosecution, civil penalties, or termination from the 8(a) BD program. Furthermore, contracting officers must input any violations to contract terms into the Past Performance Information Retrieval System (PPIRS) at www.ppirs.gov, in accordance with agency procedures (see FAR 42.1503(c)). This information may impact a business's ability to secure future contracts.

U.S. DEPARTMENT OF THE INTERIOR
MARY L. KENDALL
ACTING INSPECTOR GENERAL
HOUSE COMMITTEE ON SMALL BUSINESS
SUBCOMMITTEE ON CONTRACTING AND WORKFORCE

1. Since in your written statement you state that there is confusion on the roles and responsibilities of the SBA and DOI Contracting Officers, what are your suggestions for eliminating this confusion? Is training needed? Clearer regulations located in one place in the FAR as opposed to with the different socioeconomic sections in the FAR?

Answer

Subcontracting limits are required by statute. SBA requires: 1) an 8a contractor to certify that it will meet subcontracting limits and 2) a procuring agency to ensure that the contractor perform in accordance with the subcontracting limitations. In the US2 case, SBA offered little to no guidance on what to do when it was apparent that the contractor was non-compliant. SBA's regulations require that the 8a Indefinite Delivery, Indefinite Quantity (IDIQ) contractor comply with subcontracting limits every 6-month period. US2 was out of compliance for 2 ½ years. US2 submitted several "plans" to both the contracting officer and SBA. In response to one plan, SBA e-mailed the contracting officer and said it reviewed US2's plan and "supported" it. The contracting officer assumed that SBA granted a waiver, in accordance with 13 C.F.R. § 124.510(3), based on SBA's "support". When DOI OIG requested a copy of its waiver from SBA, SBA said there was no waiver. After further inquiry about the plan and waiver, SBA provided an e-mail sent to the contracting officer where it said SBA ". . . reviewed it and approved it . . . ."

In following up on whether or not there was a waiver, we learned that the contracting officer was considering termination of the contract, and SBA's regulations specifically require the contracting officer to consult with SBA prior to termination. SBA stated that it is appropriate for a Business Development Specialist to "support" a Participant's efforts to avoid termination because termination of a contract is not only bad for the Participant but also bad for the program as a whole. SBA also stated that compliance with the subcontracting limitations is a "contract administration issue" that is dealt with on a case-by-case basis. SBA's regulations are silent about the consequences, when a firm is out of compliance with the limitations on subcontracting. They do provide for a waiver of the requirement by the SBA District Director under certain circumstances. Such a waiver was not requested or provided; however, the contracting officer assumed that the letter of "support" was such a waiver. The unclear communication between the contracting officer and SBA and the lack of clear guidance for the contacting officer led to the confusion.

As for remedies, there are no penalties or guidance in the FAR, or elsewhere, to enforce this statutory requirement. Penalties could reduce abuse and non-compliance with the requirement, and guidance in the FAR could reduce confusion.

2. Do you know if IG audits are conducted periodically to ensure compliance with this requirement? If yes, how often has this been done in the past?

Answer

No. We do not conduct periodic audits to ensure compliance with the Limitations on Subcontracting clause. Rather, we come across such issues during the course of our other audit, evaluation and investigation efforts.

The Department of the Interior's aggregate award value for contracts for FY 2011 is just over $4 billion 80,000 transactions. Separately, over 21,000 financial assistance awards totalled over $3.5 billion. Almost half of these are awarded to small businesses. The Office of Inspector General has a staff of less that 300 to oversee a Department of approximately 70,000 employees, with perhaps that again of ontractors and grantees. As such, we cannot audit to ensure compliance with a particular contracting requirement, but will identify issues as they arise in our other oversight work.

3. I know the two audits on limitation on subcontracting that you issued in FY 2011 both dealt with 8(a) contractors. Has any consideration been given to monitoring limitation on subcontracting for the other small business programs? Is there any reason to think this isn't an issue for all small business programs?

Answer

During our joint DOD/DOI audits, other small business programs were included in our review; however, we focused on the Alaskan Native Corporation contracts due to the large dollar value associated with them and the egregious abuse of this limitation in the US2 case. We would assume the Limitations on Subcontracting issue could occur on any of the contracts required to meet the applicable limitation.

4. Given that the current rules require that compliance be based on cost, does that make it more difficult to ascertain if a firm is complying with the limitation on subcontracting rules?

Answer

We have not performed extensive audit work on the specific causes of why contractors do not meet the applicable subcontracting limitations; rather we focused on compliance with the applicable subcontracting limitations. It may make more sense to require contractors to affirm compliance with the clause on a periodic basis, and provide their plan on how they will ensure compliance. The Contracting Officer does not normally have the ability to perform this level of analysis on a routine basis, and compliance is the responsibility of the contractor.

5. Is it difficult to ascertain damages when firm is violating the limitation on subcontracting rules? I understand that the contracting officer has to make a determination that the price the

government is paying is fair and reasonable at the time of award. If the contracting officer has made such a determination, how does the government prove harm?

Answer

The harm is that the prime small business contractor is violating a law (Small Business Act, Section 15(o)(1)) that is designed to protect the interests of small businesses and to enhance the integrity of the small business-contracting program. The law is supposed to prevent a small business from being a "front" or a "pass-through" for a large business. Without this requirement, small business set-aside contracts could be awarded to a small business that, in turn, subcontracts most or all of the work to a large business. The Small Business Act (Section 2(a)) states, in part:

> *". . . It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise,* ***to insure that a fair proportion of the total purchases and contracts or subcontracts*** *for property and services* ***for the Government*** *(including but not limited to contracts or subcontracts for maintenance, repair, and construction)* ***be placed with small business enterprises*** *. . .". (emphasis added to highlight the policy)*

Allowing a front or pass-through contract defeats the declared policy of Congress and harms the small business community.

6. Do the various subcontracting systems aid your investigations?

Answer

We have not used any of the subcontracting systems during our reviews. Our reviews have been based on certified contractor's reports on the incurred labor costs of the subcontractors.

7. Were you able to ascertain how much of a price premium the government paid for the contracts your office found had been passed through to large contractors?

Answer

No. Determining any amount that the government may have overpaid was not part of our review. We did notice, however, that, in addition to the direct costs associated with the prime for oversight of the subcontractor, the prime added 5.5% for general and administrative expenses (G & A) on all subcontractor costs. A full review of the price paid and its components may have been performed during the conduct of the criminal investigation by the U.S. Department of Defense.

8. Ms. Kendall, your testimony states that US2 was non-compliant with subcontracting limits for 2½ years. Do you know whether this contract has continued to perform and if so, will it ever be compliant?

Answer

We were informed by DOI's contracting office that the base IDIQ contract expired on September 30, 2011. DOI did not exercise the option to continue this contract. All performance on all task orders also ended on September 30, 2011, and no new task orders were awarded. Therefore, there are no active task orders and no performance is taking place. The contract is no longer active.

9. The Washington Post reported that US2 had only a handful of employees at US2 when Interior awarded it a $250 million sole source contract. Did the contracting officer have any explanation for awarding such a large contract to such a small business? Likewise, I understand SBA also "approves" the contractor for such a contract. Was there any analysis in the file by SBA or was there any explanation for awarding such a large contract to such a small business?

Answer

We did not verify the number of employees US2 had at the time the contract was awarded; however, the Dun and Bradstreet report in July 2008 disclosed the company consisted of three employees.

We did not find any documentation in the file explaining the contracting officer's rationale for awarding a large dollar contract to such small company. In fact, the only indication that the contracting officer even addressed the contractor's capabilities was in the Acquisition Plan, where he stated that he provided the Statement of Work to SBA and obtained formal acceptance of the requirement and that SBA determined the company has the requisite capabilities to satisfactorily perform the work. It goes on to say "The offeror's proposal will ... be evaluated to determine if the offeror's ...availability of qualified personnel and ability to effectively manage the contract is acceptable. This brief evaluation will be performed by the Contracting Officer's Representative. There will not be a formal evaluation, so to speak. However, technical representatives will ensure the offeror fully understands the requirement of the solicitation." We did not see this evaluation in the file.

We did see, however, concern raised by an attorney at DOI's Solicitor's Office in a legal review and a senior contracting official at AQD-Herndon during an internal peer review. The attorney stated "Looks good. I was concerned about its size, but SBA has signed off-so go forward!" The attorney is referring to an SBA letter that states, "Our analysis indicates that this requirement is suitable for 8(a) contracting and the 8(a) concern has the requisite capabilities to satisfactorily perform the work." We did not see any SBA analysis in the file. It is our understanding that the SBA district office does not review the contractor history/capabilities and only verifies that the contractor is small at the time of award.

10. In one part of your testimony, you mention that it is the contracting officer's responsibility to monitor subcontracting limits. You also mention that SBA indicated US2's plan to address the subcontracting problems was sufficient to continue with the contract and that this caused confusion. Could you elaborate on this?

Answer

Please see the answer to question 1.

11. You say that US2 provided reports to the contracting officer, which showed that US2 was not performing 50% of the labor, and you add that it was possible that other subcontracting costs could have been included in an "other direct costs" category. Please elaborate.

Answer

During our inspection, we reviewed proposals submitted to the contracting officer for the task orders in our sample. These proposals detailed the costs for performing the task orders, including the categories of US2 Labor, Subcontractor Labor and Other Direct Costs (ODCs). In reviewing the proposals, it appeared that US2 was including subcontractor labor costs in the cost category of ODCs. Typically ODCs include costs for travel and materials or items of similar nature. We saw, for example, expenses included in ODC for costs associated with the creation of commercials, the preparation of a studies, and development of training courses by subcontractors- all labor intensive requirements. If the contractor did not include the labor costs in their certified Subcontractor Reports as part of subcontractor labor, then US2 underrepresented the percent of work being performed by subcontractors.

12. Did the contracting officer examine the "other direct costs" category? If not, do you know why?

Answer

We asked the contracting officer during our site visit in January 2011 if she reviews the proposals for subcontractor labor. We explained that it appeared obvious to us that US2 was proposing to use multiple subcontractors and that some of the subcontractor labor costs were included in ODCs. She responded that she does not review the proposals for that information. We then asked how she verifies that the information in the certified Subcontractor Reports is accurate and she replied that she does not review them and only sends the reports to SBA.

Shortly after our site visit, the CO sent US2 a letter stating "It has come to our attention that the subcontract reports...may contain either incorrect or incomplete information." She then required US2 to provide an independent third party audit of all proposals and invoices submitted. We reviewed the independent audit and they did not include a review of the costs associated with ODCs in their review, rendering the audit meaningless.

13. You state that some other Recovery Act contracts also had problems in meeting subcontracting limits. Please explain.

As part of a review performed by our Recovery Oversight Office, we conducted a limited survey of 15 contracting officials responsible for 18 contracts worth $101,606,040 or 62 percent of the 8(a) Recovery Act contracts ongoing as of August 31, 2010, to assess how they monitored

contractor compliance with performance requirements. The contracts we reviewed were awarded by several DOI bureaus (National Park Service, U.S. Geological Survey, Bureau of Land Management, U.S. Fish and Wildlife Service, and U.S. Bureau of Reclamation).

Based on our survey, we found inconsistency in monitoring compliance with the Limitations on Subcontracting clause (Federal Acquisition Regulation (FAR) 52.219-14), lack of Departmental guidance and lack of training for contracting officers regarding how to assess compliance with the clause. We made recommendations to the Department to address these concerns.

In response, the Department agreed with the need for consistency in monitoring compliance and subsequently issued Department of the Interior Acquisition Policy Release (DIAPR) 2011-06, dated March 17, 2011, titled "Limitations on Subcontracting Monitoring Tool (Subcontracting Percentage Worksheet)." The DIAPR provides a worksheet and instructs all contracting officers to use the worksheet to assess a contractor's compliance with FAR 52.219-14. The DOI Office of Small & Disadvantaged Business Utilization (OSDBU) and Small Business Administration (SBA) also agreed to provide annual training "to the acquisition workforce personnel regarding their responsibilities under the 8(a) partnership agreement between SBA and the DOI." The partnership agreement addressed DOI's responsibilities for monitoring compliance with the performance clause.

OSDBU conducted a webinar training session on December 8, 2010, on the 8(a) partnership agreement for almost 400 DOI acquisition and program staff to enhance their understanding of compliance with monitoring requirements.

In your opinion, how difficult is it, in terms of time and access to information, to monitor subcontracting costs carefully?

Answer

We are unsure how difficult monitoring the subcontractor costs is for contracting officers. In the case of US2, monitoring the costs was certainly made more difficult with the inclusion of subcontractor costs in the general cost category of other direct costs. If the contracting officer does not analyze the actual costs submitted by the contractor, as it was in this case, then the contracting officer can never fully ensure the data is accurate.

Addendum to Testimony of Jamie Borromeo

House Committee on Small Business
Subcommittee on Contracting and Workforce

"Subpar Subcontracting: Challenges for Small Business Contractors"

October 6, 2011

*The Asian American Justice Center is home to the **Asian American Contractor Empowerment Project (AACEP)** which seeks to strengthen Asian American participation in public and private minority contracting programs. AACEP is building a record with real stories that accurately depicts Asian American participation in these programs. Below is a story from one of our business owners:*

Jane Doe
Engineering Consulting Firm

We are an engineering consulting firm established in 1987. Since 1991, we have worked in federal contracting, with the majority of our business being directly with federal government or indirectly as subcontractors.

The majority of our contracts are with DOE and DOD (Air Force). We also have contracts with EPA and FHWA. We are a minority owned business that graduated from the SBA 8(a) program in 1999. Over the years, we have relied on our reputation to continue to win contracts. Currently, we are in a bit of an awkward place because we are too big to be a small business but too small to be considered a "large" business.

As far as being Asian American, as long as we are included in the minority category, I think the minority contracting programs are very helpful. Asians are really small in number and we are still being discriminated against.

That being said, there are a couple of issues that small and minority owned businesses face in federal contracting that need to be addressed. First, even though the government puts percentage goals for small and minority owned businesses in the large open competition contracts, large contractors will usually use small or minority owned businesses to get a contract, but once they win the contract, they've never given the small or minority owned business any real work. There is no measure to enforce the percentage of goals to be met during contract performance. This has happened quite often to us and other small minority owned businesses. A prime contractor will bring us in on teaming to win the contract, but then after they win, we'll never see them again.

Unless we know the company and know that they are honest and sincere, we are always very careful teaming up with other businesses. Even other small businesses have done this to us. We teamed with a veteran-owned business to win a contract; they kept us on the contract for only one year and then took over the contract and pushed us out. In talking to other small businesses, this is a very prevalent occurrence.

This is an area where the federal government could help us – somehow enforcing the percentage goals throughout contract performance period. Currently, there is no one in government that you can talk to. Despite the percentage requirement, there is no penalty for not fulfilling that requirement. Thus, there is no consequence and no way to enforce. In the end, large businesses are only using small businesses to get in the door.

Second, when the federal government cuts back on its contracting staff, they will lump many smaller contracts together into a larger contract to be bid out to a larger contractor instead of having those available for small or minority owned businesses. They give the contract to a large contractor and expect the prime to share it with small and minority owned businesses. For example, ten contracts for $5 mil lion each get lumped into one $50 million contract to give to a large business. It saves the contracting office time, but then it's up to the large business to give some portion to the small and minority owned businesses. But, because there is no enforcement of that obligation, small and minority owned businesses lose that opportunity and we'll never get it back. Ultimately, the portion of contracts that go to small and minority owned businesses gets smaller.

Some agencies are better at monitoring than others, but overall these incidents happen today on a regular basis and they haven't been addressed. We need enforcement and monitoring from the top.

HOUSE COMMITTEE ON SMALL BUSINESS
SUBCOMMITTEE ON CONTRACTING AND WORKFORCE

STATEMENT FOR THE RECORD BY UNITED SOLUTIONS AND SERVICES, LLC
FOR THE OCTOBER 6, 2011 HEARING:
"SUBPAR SUBCONTRACTING: CHALLENGES FOR SMALL BUSINESS CONTRACTORS"

This statement is provided to the Subcommittee to provide the views of United Solutions and Services, LLC (US2) on this important matter and, in particular, in response to the testimony of Mary L. Kendall, Acting Inspector General for the Department of the Interior (DOI) before the Subcommittee on October 6, 2011. Unfortunately, it is necessary to submit this statement because the testimony by the Acting Inspector General contains a large number of misstatements and factual errors. Simply stated, DOI is attempting a wholesale rewriting of the rules for contract performance after the fact. US2 complied with each and every rule as required and applicable at the time of its actions to perform a contract awarded to it. DOI is now trying to change those rules after the fact and disparage US2 for lacking the foresight to anticipate this seemingly novel method of retroactive contract administration.

The contract under discussion is the prime contract NBCHD080004, awarded under the authority of the SBA 8(a) Business Development Program on September 2, 2008 to United Solutions and Services, LLC (US2), a subsidiary company of Cape Fox Corporation, by the Department of the Interior's National Business Center. It was a five year base contract with no options. US2 provided all Subcontracting Reports to both DOI and SBA starting in December, 2008 - soon after the contract was signed – together with detailed plans for compliance with the prime contractor performance requirements. Additional semi-annual reports were promptly submitted. Prior to 2011, not a single word was ever voiced questioning the format of the reports nor the methodology of the calculations of the plan for compliance. As of June, 2011, the cumulative US2 self- performance over the life of the contract for the cost of the contract incurred for personnel was 50.8 %, i.e., in compliance with Federal contracting requirements.

As noted, the US2 contract had a base period of 5 years with no option periods. The SBA regulations state that for purposes of calculating prime contractor performance: "the base contract period, excluding options, will be used to determine compliance." FAR 125.6 (h). DOI awarded the first task orders under this contract in September 2008. The initial task orders were awarded with over 70 percent subcontractor labor. The submitted proposals by US2 showed that US2 would not be able to immediately perform 50 percent of the cost of labor. Nonetheless, the Task Orders were issued by DOI with full knowledge that US2 had disclosed that it would initially not be performing at least 50 percent of the cost of the contract incurred for personnel.

Moreover US2 understood that the contract had five years to reach the 50 percent plus target. Indeed, US2 reached compliance in well under three years.

US2 was not aware of any confusion on the roles and responsibilities of SBA and DOI and without fail submitted its reports and plans to the cognizant officials in both agencies. US2 continued to increase its direct labor utilization over the course of the period of performance. When the contract was awarded, both DOI and SBA were fully aware of the fact that US2 would need to engage in substantial subcontracting until it has built the internal infrastructure to perform a majority of the work. This was acceptable to DOI and SBA at the time. This is also consistent with the essence of business development; the foundational purpose of the SBA 8(a) program.

US2 has been consistent in both its subcontracting labor calculations and reporting, and has proceeded in accordance with the format and instructions for the proposals submitted to DOI on each task order. The US2 proposals clearly delineated its direct labor details and the direct labor for any subcontractors, as well as "Other Direct Costs." This was the format mandated by DOI at the time US2 was requested to submit the information. These proposals were reviewed and accepted by the Contracting Officer and the US Army client in accordance with contract requirements. Separately US2 sought and obtained written confirmation from DOI on how to classify Other Direct Costs. This communication included a copy of the specific guidance DOI received directly from SBA concurring with US2's (and DOI's) methodology. The specific directive from SBA communicated through DOI stated that "the labor involved with a Fixed Price subcontract does not get included in the mix to determine if the prime is performing at least 50% of the effort. A Fixed Price contractor or subcontract is just that—Fixed- we are paying for the end item, not the labor." US2 has been consistent in its approach and calculation for direct labor using this guidance. The only change is the DOI *ex post facto* revision of the SBA regulations.

In compliance with a February, 2011 demand of DOI, US2 engaged an independent third party auditing firm to review all its proposals and invoices to provide "clarity" for the labor reporting. The auditing firm reviewed each proposal and all US2 invoices and third party invoices to determine the accuracy of US2's reporting. US2 and DOI had agreed on the procedures, protocols and reporting format for the independent examination by the auditing firm. The report summarized as follows: "as a general observation, this exercise has demonstrated that US2 consistently charged and reported prime contractor and subcontractor performance with noteworthy and commendable accuracy. Neither the internal review nor the external review has uncovered any material variations in the data." All of this information and semi-annual reports are appended to this testimony for consideration by the Subcommittee US2 would welcome an opportunity to meet to further explain the history of this contract and the conduct of both SBA and DOI.

.....

Many points made by the Acting Inspector General Kendall bear attention. Accordingly, the following is a point by point refutation of the testimony:

Kendall: During a recent review, we discovered a service contract with an 8(a) small business, United Services and Solutions, LLC (US2) that was not in compliance with the statutory subcontracting limitations which require the prime contractor to satisfy at least 50 percent of the personnel-based contract costs with its own employees.

Response: An 8(a) contract must comply with the performance requirement by the end of the contract term. This recognizes that the 8a program is a business development program and allows a contractor to "grow" in to the contract. US2 had incurred more than 50% of the cost of the contract incurred for personnel as of June 30, 2011, and DOI had possession of the data proving this claim. US2 was never out of compliance with the performance requirements.

...

Kendall: The Small Business Administration (SBA) participation agreement requires the Contracting Officer to monitor and enforce that provision.

Response: DOI has not and cannot identify a single instance where US2 failed to comply with any monitoring or enforcement requirement communicated to it by either DOI or SBA.

...

Kendall: US2, an Alaskan native corporation, had been noncompliant with the 8(a) subcontracting limitations for more than *2-1/2* years.

Response: This statement is flatly wrong. US2 has never been out of compliance with the requirement and DOI has been provided with an enormous amount of data proving this statement

...

Kendall: To the contrary, the Code of Federal Regulations (CFR) state that "in order to ensure that the required percentage of costs on an indefinite quantity 8(a) award is performed by the Participant, the Participant must demonstrate semiannually that it has performed the required percentage to that date." The CFR goes on to say that "the Participant must perform 50 percent of the applicable costs for the combined total of all task orders issued to date at six month intervals." In other words, US2 was required to perform 50 percent of the work every six months that the contract was in force.

Response: The testimony leaves out the most important portion of the regulations which makes the testimony misleading and gratuitously inflammatory of US2. The missing portion states:

> 13 CFR 125.510(c) (3) The applicable SBA District Director may waive the provisions in paragraphs (c)(1) and (c)(2) of this section requiring a Participant to meet the applicable performance of work requirement at the end of any six-month period where he or she makes a written determination that larger amounts of subcontracting are essential during certain stages of performance, provided that there are written assurances from both the Participant and the procuring activity that the contract will ultimately comply with the requirements of this section. Where SBA authorizes a Participant to exceed the subcontracting limitations and the Participant does not ultimately comply with the performance of work requirements by the end of the contract, SBA will not grant future waivers for the Participant.

US2 unfailingly submitted the six month reports to both SBA and DOI. Every report was accepted without objection and US2 was encouraged to keep up its good work.US2 did everything required of reporting and consistently improved its self-performance. As previously stated, the US2 performance for the entire life of the contract exceeded 50% of the cost of the contract incurred for personnel as of June 30, 2011. This is perhaps the most important fact in the entire record. This was not mentioned in the DOI testimony.

...

Kendall: Confusion on the roles and responsibilities of SBA and DOI Contracting Officers contributed to our findings in both of these reviews. In the US2 case, in particular, the Contracting Officer had identified potential problems with the Limitations on Subcontracting quite early in the life of the contract. SBA, however, indicated that it found US2's plan to address these problems sufficient to continue with the contract. The Contracting Officer took this as a signal to continue with the contract.

Response: US2 should not be responsible for the alleged failings of DOI; there is nothing in the record to suggest that the "potential problems" with the Limitations of Subcontracting were ever communicated to US2, which quite understandably was following the guidance actually provided to it.

...

Kendall: For example, US2 broke down labor costs by those incurred by US2 and those incurred by subcontractors, but did not break down "Other Direct Costs" in the same manner.

Response: US2 broke down its costs as directed by SBA and in the same format as the task order pricing mandated by DOI. Thus, it complied with the requirements of both agencies as

communicated to it. US2 clearly delineated its direct labor details and the direct labor for any subcontractors, as well as any "Other Direct Costs". These proposals were reviewed and accepted by the Contracting Officer and the US Army client in accordance with contract requirements. US2 sought and obtained DOI confirmation on how to classify Other Direct Costs, and received an email from SBA stating that, "the labor involved with a fixed price subcontract does not get included in the mix to determine if the prime is performing at least 50% of the effort. This email stated the same information to the contracting team at DOI.

....

In summary the testimony presented to the Subcommittee by DOI is based on an after-the-fact revision and renunciation of the directives provided to US2 by both SBA and DOI as well as a wholesale rewrite of the SBA regulations. In every aspect associated with this contract, US2 acted with integrity and in scrupulous compliance with every directive and instruction provided by both DOI and SBA.

Al Buoni, Chief Executive Officer
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Note: Documentation of the contract performance has been appended to this testimony.