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**BEFORE THE  
COMMITTEE ON SMALL BUSINESS  
UNITED STATES HOUSE OF REPRESENTATIVES**

**OCTOBER 4, 2007**

Chairwoman Velazquez, Congressman Chabot and Members of the Committee, I appreciate the opportunity to appear before you today to discuss the issues facing this Committee as you draft legislation to increase federal procurement opportunities for small businesses. I commend the Committee for examining these difficult issues. As the former Administrator for Federal Procurement Policy in the Office of Management and Budget, with direct responsibility for developing procurement policies to promote the achievement of small business goals, I aggressively fought to ensure that America's small businesses had maximum access to federal procurement opportunities. From a Presidential initiative on contract bundling to comprehensive changes to anti-competitive practices by Federal Prison Industries, I worked for three very long years to patch up what I can only describe as leaky levee system created over many years for small business concerns with very diverse interests and varying levels of experience and knowledge.

During my federal service, I worked with a passion for small business and I had small victories of which I am very proud. I will, however, never forget my first month in office at OMB when I asked my small business expert, Michael Gerich, to spend a few hours discussing my statutory responsibilities to small businesses and explaining the current state of the small business procurement programs. He brought the biggest, most complex chart I ever recall seeing to explain the federal small business procurement programs. While I had been working in federal procurement for many years, it was still difficult to fully grasp the nuances and complexities of these varied programs. Mr. Gerich spent countless hours educating me on the complexities of the statutes, regulations and policies governing small business procurement. Over time, I realized that I wasn't the only one having trouble fully understanding and implementing the complex system. We were expecting an acquisition workforce without a legal education, that was overburdened by drastic staffing cuts from the 1990s and a doubling of federal contracting dollars, to understand and attempt to execute a complex and often illogical system.

Now in private practice as a government contracts partner at the law firm of Crowell & Moring LLP in D.C., I have come to strongly believe that the system is too complex for either federal contracting officers or small businesses to understand.<sup>1</sup> I am particularly concerned that the more complex this system becomes, the greater the opportunity for fraud, abuse and simple error. We can't deny that fraud and abuse in the system has been on the increase. The stories are on the front page of our nation's papers everyday. And they rock the public's faith in the integrity of the entire contracting system.

In an ideal world, I would wipe the slate clean and start from scratch with a new structure for federal small business contracting programs. I would examine our goals for each program and question what statutes and regulations would need to be in place to meet those goals. Importantly, I would emphasize uniformity and consistency in the application of these programs among different federal agencies. I would keep the requirements for entry and the priorities among competing interests simple, clear, and easily verifiable. Finally, the penalties for fraud would need to be severe and tangible. While political reality makes the clean slate impossible, a close examination of the trends in the federal contracting system hold some clear indications of how our system can be improved to the benefit of small business.

#### **Trends Affecting Small Business Contracting Programs:**

- Federal contracting workforce cut approximately in half from 1994 – 2007.
- Smaller contracting workforce forced federal agencies to use fewer contracts, leading to the consolidation and bundling of requirements.
- Federal contracting dollars double from 2001 to 2007 from approximately \$200 billion to \$400 billion/year.
- In spite of large increases in federal dollars going to small businesses, Congress increases pressure to meet small business percentage goals.
- Small business programs are difficult to understand and subject to frequent statutory, regulatory and policy changes.
- Contracting Officers receive little, if any, training on small business programs.

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<sup>1</sup> I appear before your Committee today in my personal capacity and the views I express are my own.

- Implementation of small business programs has been inconsistent at different federal agencies, with varying interpretations of regulations and law, particular with regard to mentor-protégé programs.
- The Small Business Administration's ("SBA") budget has not increased to meet new demand, seriously affecting morale.

In essence, we have half the contracting officers, spending double the money in a constantly changing and complex regulatory environment with little training on small business issues. On the small business side, the complexity of the programs is a significant barrier to entry. Many small businesses give up trying to understand the regulatory complexities or make significant errors in application with little help from the SBA. Those inclined to commit fraud or abuse the system have a complex and changing structure to hide their misdeeds. It is not a wonder that the system is experiencing problems.

### **Recommendations for Improvements:**

#### **➤ Create a Single Automated Point of Entry for Small Businesses**

The barriers to entry into the federal marketplace are significant. The simple task of understanding whether you are small and the programs for which you are qualified can take weeks of research when you don't know the regulations or where to look. I get dozens of calls a year from companies asking whether they are small and what programs they are qualified to utilize. These businesses have spent days or weeks sifting through regulations before they find me. I am sure there are thousands that give up before they call someone like me. For those companies that navigate the small business maze, many of them make significant unintentional errors in the application process. Of particular note, I have seen a high and increasing error rate in understanding the affiliation rules.

Once a company determines what kind of small business they are, the company is forced to complete endless representations and certifications regarding their size and status. A single company performing a single contract, currently certifies or makes representations regarding their size and program status as many as five times: (1) submission of data to the SBA for certain programs; (2) completion of the Online Certifications and Representations ("ORCA"); (3) registration with the Central Contractor Registration (CCR.gov); (4) responding to a specific Request for Proposals ("RFP"); and (5) receipt of a task order under a contract. The duplicative representations could not be more inefficient.

For small businesses that step into the more complex world of joint ventures and mentor protégé agreements, a Single Automated Point of Entry could normalize and speed up the SBA approval process. One of the most significant problems

facing 8(a) joint ventures is the failure by the SBA to approve the mentor protégé agreement and the joint venture in time to bid on the federal contracting opportunity.

Congress needs to tear down the barriers to entry, eliminate the vast opportunities for error and fraud, do away with the duplicative certifications, and automate the mentor-protégé/joint venture process. Small businesses should have a Single Automated Point of Entry for (1) determining whether they are small and the programs for which they are eligible; (2) certifying that the information they have supplied is accurate and complete; and (3) seeking approvals of joint ventures and mentor-protégé agreements. Small businesses should be able to complete the required forms on-line and know quickly whether they are qualified for most programs. Such on-line systems exist for the HUBZone and 8(a) programs which have robust on-line applications. Unfortunately, to get to these on-line systems, small businesses have to collect a great deal of information to determine whether the effort of completing an on-line application is worth their limited resources. Finally, businesses should be required to certify that all information is accurate and complete and must be required to periodically update that information. The certification should be tied to all subsequent contract actions with clear attachment of False Claims Act liability to inaccurate information submitted by the contractor that leads to the award of a federal contract.

Connecting the HUBZone and 8(a) systems, adding functionality for programs that do not currently require SBA certification, eliminating duplicative certifications, and automating mentor-protégé and joint venture agreements through a Single Automated Point of Entry would tear down a significant barrier for entry into the federal marketplace, reduce the opportunities for error and fraud, and eliminate vastly inefficient processes. I urge this Committee to give serious consideration to the creation of a Single Automated Point of Entry through the SBA.

➤ **Create Process for Verifying Information Submitted through Single Automated Point of Entry**

Federal agencies, Congress, and the public need assurance that the information submitted through the Single Automated Point of Entry is accurate and complete. For some programs, like the 8(a) program, SBA already undertakes an extensive review of a company upon initial application and entry. For other programs the Single Automated Point of Entry would facilitate the creation of proper audit and sampling by the SBA to ensure accuracy and completeness. The depth and level of verification could be mandated for all programs, be it through data mining or on-site verification. Congress could also mandate periodic updates to information, as well as periodic verification of accuracy. However, the standards for verification should apply equally across all small business procurement programs.

➤ **Directly Populate Central Contractor Registration with Information from Single Automated Point of Entry**

While there is not currently a single automated point of entry for small businesses, the SBA has made Herculean efforts to modify and populate the Central Contractor Registration (“CCR”) with fields that cannot be altered by contractors indicating whether a contractor is an SBA Certified 8(a), an SBA Certified HUBZone, or an SBA Certified Small Disadvantaged Business. While these SBA populated fields are important improvements, they are not enough for contracting officers. The contracting officers need assurance that other small business fields are accurate.

All CCR small business fields should be automated, populating directly from the Single Automated Point of Entry (after verification by SBA). The CCR fields should be updated daily. The CCR fields indicating type of business should not be subject to change by small businesses. A small businesses’ only point of interaction for determining whether they are small, determining the programs for which they are qualified, and making small business certifications should be through the Single Automated Point of Entry, not in multiple locations where great room for error and abuse exist.

➤ **Create an Automated System to Prioritize Small Business Program Decisions for Contracting Officers**

Under the current laws and regulatory structure, it is almost impossible for a contracting officer to know when a procurement should be (1) set-aside for small business; (2) competed among small business; (4) partially competed among small business; (4) competed among HUBZone firms; (5) competed among Service Disabled Veteran Owned firms; (6) sole-sourced to an 8(a); (7) sole-sourced to an Alaskan Native 8(a); (8) sole-sourced to an Indian tribe 8(a); (9) competed among 8(a)’s; (10) competed among Veteran Owned or Service Disabled Veteran Owned firms; or (11) subject to a different permutation of competition or sole-source requirements.

This decision process has to be simplified and automated for the contracting officer. With out a clear decision path, contracting officers will make legitimate mistakes, abuse is more easily interjected in the process, and our limited resources will continue to be utilized litigating these issues. For every procurement action, a contracting officer needs an easy and reliable mechanism to determine the appropriate and proper legal actions relating to small business programs.

## Specific Legislative Proposals

While many of the legislative changes you are considering today are perfectly targeted at solving real problems in the system, there will be unintended consequences of adding a new layer of complexity that our overburdened federal contracting workforce will have difficulty implementing and small businesses will have difficulty understanding. Frequent changes to these programs also make it difficult to identify and ferret out fraud and abuse in the system. In addition, these small business programs are in a delicate balance, competing with each other for limited federal dollars. When certain programs are favored or placed with additional regulatory burdens, federal work and dollars are shifted from one deserving small business to another small business. The added friction among constituencies makes it difficult for small businesses to work together.

On initial review, several draft provisions appear to favor the 8(a) program and place harsher requirements on HUBZone and Service Disabled Veteran Owned companies.<sup>2</sup> While the 8(a) program is expanded in terms of years and net worth criteria, the HUBZone program will face unprecedented on-site verification requirements and restrictions on place of performance. No other small business program is subject to a mandatory on-site verification or restrictions on place of performance. It is unclear why such a heavy burden will be placed on the HUBZone program alone. In addition, the HUBZone program will be prohibited from performing construction work more than 150 miles away from the awardee's HUBZone. Such a severe limitation will dramatically limit, if not eliminate, the number of HUBZone companies that can perform particular construction contracts. The rationale for this provision is difficult to understand. Contracting officers are already vested with the authority to limit competition to contractors within a particularly locality. Should a contracting officer believe on a case-by-case basis that competition should be limited to local firms, they currently have the authority to enforce such a limitation. In sharp contrast, the proposed limitation takes away a contracting officer's flexibility and severely limits their ability to find the right firm for the right construction job. The proposed changes to the HUBZone program will interfere with the original intent—to create good paying jobs in the areas of America that have high unemployment or low wages. I strongly encourage the Committee to not build new roadblocks for a program that delivers jobs for tens of thousands of Americans each year.

For Service Disabled Veteran Owned firms, the proposed legislation appears to add civil penalties for false representation of status. Such penalties are likely duplicative of current penalties for false statements and false claims. It is also

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<sup>2</sup> The HUBZone Contractors National Council has been a client in past years.

unclear why Service Disabled Veteran Owned firms are being targeted for penalties in the legislation or why Service Disabled Veteran Owned firms should be subject to penalties different than other small businesses.

The final area of apparent disparity is the increase in sole source thresholds to \$10 million. Such an increase disproportionately favors 8(a) companies because sole-source awards can be made to an 8(a) company without a determination that there is only one 8(a) that can satisfy the requirement. For HUBZone firms and Service Disabled Veteran Owned firms, the contracting officer must make a determination that only one HUBZone firm or one Service Disabled Veteran Owned firm is capable of satisfying the requirements.

Finally, the proposed prohibition on award of a contract to company if an owner "lacks integrity" will be difficult to fairly and objectively implement and may be duplicative of the current system. For contracts exceeding the simplified acquisition threshold (generally contracts in excess of \$100,000), contractors are currently required to certify the responsibility of company owners. Namely, contractors must certify that company owners have not "within a three-year period preceding this offer, been convicted of or had a civil judgment rendered against them" or be "presently indicted or otherwise criminally or civilly charged" for "commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, state, or local) contract or subcontract; violation of Federal or state antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property . . . ." If the Committee wants to expand the definition of responsibility to include other offenses, they should be added in the context of the current system for certification and responsibility.

## Conclusion

Again, it is an honor to be invited to testify here today. Our contracting system is designed to "deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives." 48 C.F.R. § 1.102 (a). The most vital of those public policies objectives is a commitment to the inclusion of small businesses in the federal contracting process. The barriers to entry should be low, the statutes and regulations should be clear and easy to understand, and the information regarding these programs should be accurate. Everyone benefits when small business are allowed to compete. Our agencies find new solutions to meet mission critical needs, competition keeps costs low for the taxpayer, and our nation's small businesses keep unemployment low.

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