S. HRG. 110–373

ACCESS TO FEDERAL CONTRACTS: HOW TO LEVEL THE PLAYING FIELD

FIELD HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP

UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

October 29, 2007

Printed for the use of the Committee on Small Business and Entrepreneurship

Available via the World Wide Web: http://www.access.gpo/gov/congress/senate

U.S. GOVERNMENT PRINTING OFFICE

40–541 PDF WASHINGTON : 2008

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

JOHN F. KERRY, Massachusetts, *Chairman*

CARL LEVIN, Michigan
TOM HARKIN, Iowa
JOSEPH I. LIEBERMAN, Connecticut
MARY LANDRIEU, Louisiana
MARIA CANTWELL, Washington
EVAN BAYH, Indiana
MARK PRYOR, Arkansas
BENJAMIN L. CARDIN, Maryland
JON TESTER, Montana

OLYMPIA J. SNOWE, Maine
CHRISTOPHER S. BOND, Missouri
NORMAN COLEMAN, Minnesota
DAVID VITTER, Louisiana
ELIZABETH DOLE, North Carolina
JOHN THUNE, South Dakota
BOB CORKER, Tennessee
MICHAEL B. ENZI, Wyoming
JOHNNY ISAKSON, Georgia

NAOMI BAUM, *Democratic Staff Director*
WALLACE HSUEH, *Republican Staff Director*

C O N T E N T S

Page

OPENING STATEMENTS

Cardin, The Honorable Benjamin L., a United States Senator from Maryland . 1
Sarbanes, The Honorable John P., a United States Representative from Maryland 53

WITNESS TESTIMONY

Jenkins, Calvin, Deputy Associate Administrator, Office of Government Contracting and Business Development, U.S. Small Business Administration, Washington, DC 9
Martoccia, Anthony, Director of Small Business Programs, Office of the Secretary of Defense, U.S. Department of Defense, Arlington, VA 16
Rigas, Michael J., Deputy Associate Administrator, Office of Small Business Utilization, General Services Administration, Washington, DC 30
Frazier, Wayne R., Sr., President, Maryland-Washington Minority Contractors Association, Baltimore, MD 47
Green, Hubert "Petey", President, Prince George's County Black Chamber of Commerce, Oxon Hill, MD 54
Martinez, Ricardo, President, Maryland Hispanic Chamber of Commerce, and CEO, Project Enhancement Corp., Germantown, MD 61
Forbes, Melvin, President and CEO, Wilkerson Sports Enterprise, Forbes Consulting and Associates, Largo, MD 73
Larsen, Carmen Ortiz, CEO, AQUAS, Inc., Bethesda, MD 77
Adams, Timothy, President and CEO, Systems Application and Technologies, Inc., Largo, MD 82

ALPHABETICAL LISTING AND APPENDIX MATERIAL SUBMITTED

Adams, Timothy
- Testimony 82
- Prepared statement 85

Cardin, The Honorable Benjamin L.
- Opening statement 1
- Prepared statement 4
- Post-hearing questions posed to:
  - Calvin Jenkins 94
  - Anthony Martoccia 94
  - Michael J. Rigas 95

Forbes, Melvin
- Testimony 73
- Prepared statement 75

Frazier, Wayne R., Sr.,
- Testimony 47
- Prepared statement 50

Green, Hubert "Petey"
- Testimony 54
- Prepared statement 58

Jenkins, Calvin
- Testimony 9
- Prepared statement 12
- Responses to post-hearing questions from Senator Cardin 94

Page

Larsen, Carmen Ortiz
Testimony 77
Prepared statement 80
Martinez, Ricardo
Testimony 61
Prepared statement 64
Martoccia, Anthony
Testimony 16
Prepared statement 18
Responses to post-hearing questions from Senator Cardin 94
Rigas, Michael J.
Testimony 30
Prepared statement 32
Responses to post-hearing questions from Senator Cardin 95
Sarbanes, The Honorable John P.
Opening statement 53

COMMENTS FOR THE RECORD

Aguinaldo, Joe, Owner, J. Aguinaldo Group, Inc. 98
Bowie, Terry, Managing Partner, Ingalls Lumber & Supply, LLC 100
Christiansen, Nicholas V., Sr., President and CEO, Eagle Technologies, Inc. ... 101
Cunningham, William Michael & Creative Investment Research, Inc. 108
Fay, Tim, Fay Communications, Inc. 118
Genwright, Melvin, President, Power Cleaning Services, Inc. 125
Jenkins, Luwanda W., Special Secretary, Maryland Governor's Office of Minority Affairs 126
Lawson, Chris, President, Insuraty, Inc. 128
Lumpkins, Nancie, CEO/President, Imagine One Technology & Management, Ltd. 129
McRae, Randy, Central Prince Georges, CDC 132
Supporting documents 134
Pence, Robert, President, Lakota Technical Services, Inc., and Shirley D. Collier, CEO, Optemax, LLC 160
Supporting document 162
Rekemeyer, Darryl D., Director, Fort Detrick Business Development Office 165
Thurman-Custis, Saundra, Principal, Crystal Enterprises, Inc. 168
Women Impacting Public Policy 169
Zhu, Jerry, Ph.D., President, UCSoft 175

ACCESS TO FEDERAL CONTRACTS: HOW TO LEVEL THE PLAYING FIELD

MONDAY, OCTOBER 29, 2007

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

The Committee met, pursuant to notice, at 1:00 p.m., in Library Special Collections Room 2202, Thurgood Marshall Library, Bowie State University, 14000 Jericho Park Road, Bowie, Maryland, Hon. Benjamin L. Cardin, presiding.

Senators present: Cardin.

Representatives present: Sarbanes.

OPENING STATEMENT OF THE HONORABLE BENJAMIN L. CARDIN, A UNITED STATES SENATOR FROM MARYLAND

Senator CARDIN [presiding]. The Senate Committee on Small Business and Entrepreneurship will come to order, and I want to thank you all for being here at Bowie State University. I particularly want to thank our Chairman John Kerry for allowing me to bring a hearing to Prince George's County, Maryland, and Bowie State University on the issues of small business, minority, and women-owned businesses, to look at the efforts being made by Federal policies and agencies, because our Committee is looking at ways of strengthening the programs to achieve our goal of offering more opportunity for small businesses and for minority and women-owned businesses and this hearing will play a very important part of our committee record.

I am going to put my opening statement into the record, without objection, and since there is no other member of the Committee here to object, I shouldn't have any trouble with my unanimous consent requests.

[Laughter.]

Senator CARDIN. Without objection, we will be placing in the record all of the statements of the witnesses that are on both panels and the statements that have been submitted for the record and we would ask our witnesses to summarize their testimony or proceed as they see fit in order to make the points that they believe are important points to be made.

Senator CARDIN. I particularly want to thank all the witnesses on both panels for being here. I think that we have a well-balanced presentation from the government agencies that are responsible and have major roles to play in government procurement that af-

fect minority and small businesses as well as from individuals who have real life experience here in Maryland with these programs.

I want to again congratulate and thank Senator Kerry, our Chairman, for his commitment in this area. He has been very active in having hearings in Washington and encouraging us to have field hearings and in working in areas that will strengthen the programs and deal with these problems that we have.

I don't think I need to talk too long to the audience that we have here today as the importance of small business to the economy of our country. It represents one-third of the new patents that are coming from small business. Sixty percent of our new job growth comes out of the small business community. It is a very important part of Federal contracting, and as a result, goals have been set as to the amount of procurement that we anticipate from small businesses. We will talk about those goals today, as to whether we are meeting those goals and whether these goals are the right goals for our country.

In 2006, SBA went through the issues concerning contracting goals and looked at whether we have achieved those goals and there was a report that showed that we had not met those goals. I know there is some disagreement as to how it is calculated and I look forward to clarifying those points perhaps at this hearing.

Let me go through very quickly some of the obstacles I think we face in achieving the goal of providing opportunities for small businesses and minority and women-owned businesses. One is the issue of bundling, and I hope that we will have a chance to talk about bundling, because in 2004, there was a GAO report that urged SBA to disseminate best practices to maximize small business contracting opportunities with Federal procurement. I am interested as to how much progress has been made since that 2004 GAO report. Bundling has clearly been an area that has presented challenges to whether we are achieving our objectives for small business.

I also want to look at the issues concerning how prime contractors treat their subcontracts. I must tell you, I favor more prime contracts going to small businesses. I think that would solve a lot of the problems, so I hope that we can do that. But in the meantime, there have been many circumstances brought to my attention of where prime contractors have used small businesses for procuring contracts and then have been very suspect as to using those subcontractors or paying them on time. I want to talk a little bit about that today.

I want to talk about the 8(a) program and its growth over the last several years and whether the Administration's budget is adequate to meet the challenges of Section 8(a) programs.

We are meeting here in Prince George's County, which I think is noteworthy. Prince George's County has, I think, one of the most significant African-American populations in the country. It is a strong community. It is actively involved in business ownership, start-up companies, educational attainment, home ownership, capital formation. It is here. Plus, it is closely located in proximity to the Nation's capital. Now, that should be the formula for great opportunity for expansion, and yet I don't think that potential has been met. It also should be an area that is prime for Federal facili-

ties and Federal leases. Its leasing cost is less than the other areas within the metropolitan area. And yet, I am not satisfied with the progress that has been made here.

We have new opportunities. The BRAC process should be providing additional opportunities. How will the BRAC process, and I particularly appreciate that we have a representative from DOD that perhaps can talk a little bit about how BRAC will work into the opportunities for small businesses.

So we have our work cut out for us and I very much look forward to hearing the testimony from our witnesses and I can assure you that it will be reviewed by the Committee and part of our record in trying to come up with the right type of policies to achieve our objectives will be based on testimony provided here.

[The prepared statement of Senator Cardin follows:]

SENATOR CARDIN'S OPENING STATEMENT ON LEVELING THE PLAYING FIELD FOR SMALL BUSINESS

ACCESS TO FEDERAL CONTRACTS: HOW TO LEVEL THE PLAYING FIELD

Good afternoon and welcome. I want to thank all our witnesses for being here today to discuss the issues that minority and women owned small businesses face in contracting with the federal government. All of us seated here are interested in one thing – and one thing only - finding solutions to the persistent problems that minority and women owned businesses confront in their efforts to contract with the federal government.

Small business is the engine that drives our economy and sustains our technological lead in the global marketplace, producing one-third of all new patents issued. Furthermore, over 60 percent of all new jobs created each year are the direct result of small business entrepreneurs stepping into the turbulent waters of business and creating opportunities for themselves and others. Government has a responsibility and interest in fostering and promoting a business climate that supports such growth. Small business plays a vital role in the federal contracting system by ensuring competition and supplying the federal government with a constant supply of new entrants who bring new ideas and novel approaches for doing the job at hand and supplying services at a competitive rate.

However, it has become all too common during the past six years for the federal government not to meet its small business contracting goal and this year is no exception. Figures recently released by the SBA reveal that the Administration failed to meet any of the small business contracting goals for 2006, including goals for women and minorities which fell well below the five percent objective. According to Eagle Eye Publishers, an independent source for federal contracting statistics, the federal government spent more than $412 billion dollars in 2006 on federal procurement. Of these funds, 23 percent are required to be used for small business assistance. However, only 20 percent actually wound up there. This failure by federal departments and agencies in their small business contracting goal represents $12 billion dollars in lost opportunities and revenues for the nation's small businesses.

Contributing to such failure is the common practice of consolidating contracts, or "contract bundling", which limits small businesses from competing for procurement contracts that would otherwise be divided and performed by small businesses. Such bundling reduces competition and ultimately hurts the taxpayer. In 2004, the GAO released a report entitled "Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain" and recommended that the SBA disseminate best practices to maximize small business contracting opportunities. We are anxious to hear what steps the SBA and the other agencies testifying today have taken to address this perennial problem and to hear how they have responded to GAO's recommendations.

Furthermore, in a recent analysis by this Committee, it was revealed that at least 6 of the top 30 small business vendors doing business with the federal government in 2005 were actually large corporations. Allowing large businesses such as General Dynamics, Lockheed Martin, Northrop Grumman and other Fortune 500 companies to receive or maintain small business contracts for a period of five years makes a mockery of the very definition of small business. Last year our colleagues on the House side discovered that $12 billion in contracts that agencies claimed went to small businesses actually were held by Fortune 500 companies. This must stop.

The Small Business Administration is tasked with the responsibility of protecting the interests of small business concerns, preserving free competitive enterprise and maintaining and strengthening the overall economy of our nation. The success of any government agency depends on the resources that are allocated to that agency that allow it to fulfill its mission. In order for the SBA to properly do its job, the Administration must fund the SBA at a level that allows it to manage, monitor and maintain its core programs.

The 8(a) program is a good barometer of the Administration's funding commitment to small business. The 8(a) program was established in the late 1960s and remains the primary gateway for minority and women owned small businesses to enter the federal marketplace. The Administration's 2008 fiscal year budget request of 35 million dollars for operating this program is over a million less than the 2007 fiscal year request, despite the fact that in the last five years, the 8(a) program has witnessed a near doubling of new participants accepted into the program.

This has led the SBA's Inspector General to list the 8(a) program as one of the SBA's Top Ten Most Critical Management Challenges for the last 7 years, citing various problems that require the Administrator's attention and that remain unresolved. The current funding level is simply insufficient to manage the steady growth of the 8(a) program and address such critical problems as oversight and contract awards. The SBA's 2008 fiscal budget proposal does little to address these problems and the resources that are provided are insufficient to address the management challenges raised by GAO and the SBA's Inspector General Office. I hope that we will get into some of these issues today.

I am also concerned about the complaints I receive regarding subcontractors being victimized by powerful prime contractors. First let me say this, there should be more prime contracts awarded to minority owned small businesses. All too often, a subcontractor will spend hundreds and in some cases thousands of dollars preparing a proposal that the prime incorporates into its successful bid proposal – only to learn later that the prime contractor has selected another subcontractor or elected to perform the work in-house. In either case, the prime contractor is still credited competitively in the selection process with having employed a small business and may have been awarded the contract based on such false representations. There are also numerous complaints about the subcontractors not being paid on time, paid less then agreed upon or not paid at all. Many subcontractors fearing that they will be shut out if they complain simply chalk the loss up as the cost of doing business and accept the abuse. This conduct is unconscionable and prime contractors that are found to engage in such practices should be banned from competing for federal contracts.

It was not by coincidence that we chose to have this field hearing in Prince Georges County. By any measure, the African American community here is regarded in studies and surveys as leading the nation in business ownership, start-ups, educational attainment, homeownership and capital formation. While some communities may have one chamber of commerce or business association, Prince Georges has several. This fact underscores the vitality, diversity and prosperity that exist in this fertile business environment. In short, when you combine all the assets that I have described, you have the ingredients and setting for the growth and emergence of an entrepreneurial class and that is what we have gathered here today.

When you juxtapose this vibrant entrepreneurial class next to the seat of the federal government you should have a recipe or formula for success. But this has not been the case. African American, Hispanic and women owned small businesses have had to battle the federal bureaucracy to get their fair share and provide essential services and products to the American public. The Committee on Small Business and Entrepreneurship, chaired by my distinguished colleague, Senator John Kerry of Massachusetts, hopes to change that and I and others serving on the Committee are working with him to accomplish this goal. Chairman Kerry and I are working together on legislation that will address a number of issues that will be discussed today. First, we're working on legislation that limits the practice of bundling contracts that could and should go to minority and women owned small businesses. Second, we're going to look at ways to protect small businesses engaged in subcontracting from the various abuses prime contractors get away with – such as not paying subs on a timely basis. Third, we want to update the net worth threshold for the 8(a) program. And last, we're working on a number of provisions that will bring some accountability and transparency to the procurement process.

With the Base Realignment and Closure (BRAC) Commission recommendations, we now have in our backyard a tremendous opportunity to change and redefine the way the federal government deals with small and minority business contractors for the better not only here but nationally. Our region is uniquely poised to benefit from the billions of dollars that will be deposited here in the form of construction, service and product procurement contracts that will fuel BRAC's expansion. This reality will provide an excellent opportunity for the Defense Department and the military services to reach out and work with the various chambers within Maryland and the region. It also provides DOD's procurement office with an excellent opportunity to create an innovative platform for working with small businesses that can become a model for the nation. The stakes here are high and we want DOD to succeed. I and other members of the Maryland congressional delegation, as well as the Senate's Small Business Committee, will be closely monitoring DOD's efforts over the next few years.

I would also like to note that Maryland and Prince Georges County' cost per square foot for commercial space is among the lowest in the region. Prince George's county offers proximity and easy access to Washington via mass transit and excellent roadways, so locating

federal facilities here would not only reduce congestion in Washington but save tax payers money as well.

While some of my comments paint a bleak picture of the SBA's performance up to this point, I wish to recognize Administrator Steven Preston, who in his short tenure has demonstrated a willingness to tackle difficult issues. In particular, I wish to note his efforts in creating a scorecard that shine a light on those agencies that have failed to meet their small business goals. However, even a scorecard that holds a department up to public scrutiny is no substitute for enforcement powers that would allow the SBA or some other agency to compel compliance and impose sanctions. This is a legislative option that must be considered.

In the SBA's recently released scorecard report, GSA received a "Red" designation which is equivalent to an "F" on a report card. While a "Green" designation means that an agency is meeting most of its goals and a "Yellow" means that agency needs improvement but is putting programs and methodologies in place to achieve compliance, a "Red" means that agency has failed. GSA plays too important a role in the overall federal contracting scheme to fail.

It is the only agency that other federal agencies look to in addressing fast track contracting and procurement needs that cannot wait to be bid out. For this reason, GSA must have minority and women owned small businesses listed on their GSA schedule in sufficient numbers to comply with fast track contracting demands. However, I see no urgency on the part of GSA to do this. The GSA Schedule is one of the most exclusive clubs one can hope to join in Washington and this must stop. I want to hear today how GSA plans to open up the doors to competition and allow such business in.

The testimony and evidence that will be entered into the record here and the various other hearings we have held during the course of this legislative session will help the Committee recommend congressional action to encourage more business opportunities for minority and women owned small businesses.

Senator CARDIN. I do want to acknowledge some people who are in the audience that are here representing some of my colleagues. I saw Terrance Taylor, who is here representing Congressman Hoyer, and I appreciate Terrance being here. Trudy Perkins, who is representing Congressman Elijah Cummings. We have Julius West representing Congressman Chris Van Hollen, Nicole Schultz representing Senator Barbara Mikulski. Luwanda Jenkins is here in her capacity as the Special Secretary for Minority Affairs in the State of Maryland and we appreciate her being here, along with Assistant Secretary Herbert Jordan. So we welcome all of you that are here and we will now proceed with the first panel.

The procedures that we use in our Committee allows the witnesses an opportunity to present their testimonies. We are using a 7-minute clock today. Then we will have time for questions that I will be presenting that some of you have asked for me to ask, and I will be using those questions.

So if we might, we will start first with Calvin Jenkins, who is the Deputy Associate Administrator for Government Contracting and Business Development. Calvin Jenkins was appointed Deputy Associate Administrator for Government Contracting and Business Development of the U.S. Small Business Administration in October 2005. He is the Small Business Administrator's top career senior executive for government contracting and business development programs. Mr. Jenkins is responsible for overseeing the administration of the umbrella office with jurisdiction over the agency's Offices of Technology, Size Standards, Government Contracting, Business Development, 8(a), and Small Disadvantaged Business Certification.

Mr. Jenkins, welcome. You may proceed.

STATEMENT OF CALVIN JENKINS, DEPUTY ASSOCIATE ADMINISTRATOR, OFFICE OF GOVERNMENT CONTRACTING AND BUSINESS DEVELOPMENT, U.S. SMALL BUSINESS ADMINISTRATION, WASHINGTON, DC

Mr. JENKINS. Thank you. Chairman Cardin, thank you for inviting me here today to Bowie State University to testify. Bowie State plays a key role in educating future business owners in this country, so I am particularly pleased to be here today to discuss the role the U.S. Small Business Administration plays in supporting the small business community within the Federal marketplace.

As Maryland prepares for an influx of new jobs that will continue into the State as a result of the 2005 Base Realignment and Closure Commission recommendations, the SBA stands ready to provide small businesses with the tools that they need to succeed in the Federal contracting arena.

The primary way by which SBA provides assistance to minority-owned businesses in the Federal marketplace is through the 8(a) Business Development Program. This program offers a broad range of assistance to firms deemed to be socially and economically disadvantaged. Today, there are about 8,867 firms participating in the 8(a) program, with Federal contract dollars of $12.5 billion in fiscal year 2006. In Maryland, 8(a) participants received over $1.5 billion in contracts in 2006. As SBA provides 8(a) participants with business development training through our 7(j) training program, this

training consists of 80 workshops in 40 different cities and is being conducted by Unlimited Services Systems Management and Consulting, a small business located in Largo, Maryland.

Through the various small business programs, the Federal Government has made significant progress towards achieving its small business goals. In fiscal year 2004, women-owned small businesses grew from $5.5 billion to $11.6 billion in fiscal year 2006. Service-disabled veteran small businesses grew from $554 million to $2.9 billion in fiscal year 2006. Firms located in the HUBZone increased from $1.6 billion to $7.2 billion in fiscal year 2006. And overall, small businesses grew from $50.1 billion to $77.6 billion in fiscal year 2006.

The SBA takes its responsibility for oversight of contracting activities very seriously and has taken a number of steps to remedy deficiencies found by the GAO. For instance, SBA has revised the partnership agreement to clarify Federal agencies' roles and responsibilities for monitoring contract compliance of and performance by 8(a) participants. SBA has also increased training to field staff responsible for working on contracting issues, including the 8(a) Business Development Program. In addition, the agency is exploring possible regulatory changes that will strengthen the program and increase SBA's overall capabilities.

SBA recognized the need to improve management and efficiencies of its business development programs and has requested $500,000 in fiscal year 2008 budget to examine how best to serve the 8(a), HUBZone, Small Disadvantaged Business communities, and women-owned and service-disabled veteran-owned small businesses while not restricting the success of any one program.

SBA is also working with the Office of Management and Budget's Office of Federal Procurement Policy to carry out a number of improvements to the Federal contracting programs. These initiatives include working with agencies to ensure that their small business contracting numbers reported to the Federal Procurement Data System Next Generation is accurate. The integrity of the data reported to Congress and the public is critical to instill confidence in the Federal contracting system.

A great example of the progress being made in this area is SBA's recent publication of the first biannual Small Business Procurement Scorecard. The scorecard is a method of ensuring that Federal agencies provide maximum practical opportunity for small business in the Federal marketplace, especially those characterized as socially and economically disadvantaged. Consistent with contracting goals, it reflects current performance and, more importantly, progress Federal agencies are making in improving such performance. The new scorecard used the same approach as the President's Management Agenda scorecard to ensure that agencies have clear goals and action plans that the agencies are regularly assessed on their performance. Data integrity is a key element. Additionally, the scorecard is an important tool to both increase procurement opportunities for small businesses while more accurately measuring each individual agency's results. This scorecard, along with the advances made in the Federal Procurement Data System, are significant steps in adding transparency and greater accuracy to the Federal procurement process.

As you know, the President issued an Executive Order to address the issue of contract bundling. SBA is committed to this policy and is working with all Federal agencies to ensure compliance with this policy and create opportunities for small business in the Federal procurement market.

As part of this effort, SBA is redefining roles and responsibilities so that the Procurement Center Representatives, or PCRs, can devote more time to finding opportunities for small businesses with procurement agencies. SBA's district offices and its resource partners will focus on providing training and counseling to get small businesses positioned to compete for Federal contracts. Currently, there are 52 Procurement Center Representatives serving small businesses throughout the Federal marketplace. We have begun to implement a plan to increase the number of PCRs to 66 by the end of fiscal year 2008.

SBA is also in the process of implementing a new size recertification rule. This new regulation requires small businesses to recertify their size standard on long-term contracts at the end of the first 5 years of a contract and thereafter whenever a contract option is exercised. Recertification is required for short-term contracts when a small business is purchased or merged with another business. When contractors can no longer certify their small business size standards, buying activities may no longer count them as part of their procuring agency's small business goals. Ultimately, the new size recertification rule will ensure that more accurate data and further support our efforts to receive more prime contracts throughout the Federal Government.

This will conclude my testimony before the Committee. Thank you for the opportunity to come to Bowie State University to discuss these issues important to Maryland's small businesses, and I look forward to answering your questions.

[The prepared statement of Mr. Jenkins follows:]

Statement of Calvin Jenkins
Deputy Associate Administrator,
Office of Government Contracting and Business Development
U.S. Small Business Administration

Before the Senate Small Business and Entrepreneurship Committee
October 29, 2007

Introduction

Chairman Cardin and members of the Committee, thank you for inviting me here to Bowie State University to testify. Bowie State plays a key role in educating future business owners in this country, so I am particularly pleased to be here today to discuss the role the U.S. Small Business Administration (SBA) plays in supporting the small business community within the federal market place. I am Calvin Jenkins, the Deputy Associate Administrator for the Office of Government Contracting and Business Development at the SBA.

Business Environment

As Maryland prepares for the influx of new jobs that will come into the state as a result of the 2005 Base Realignment and Closure (BRAC) Commission recommendations, the SBA stands ready to provide small business owners with the tools they need to succeed in the federal contracting arena.

An important element of the federal contracting marketplace that has a dramatic impact on the US economy is the growth of minority-owned small businesses. According to the SBA's Office of Advocacy, in 2002, minorities owned 4.1 million firms that generated $694.1 billion in revenues and employed 4.8 million workers. Of the 23 million non-farm firms, 6.8 percent were owned by Hispanic Americans, 5.2 percent by African Americans, 4.8 percent by American Indians or Alaskan Natives, and .14 percent by Native Hawaiian or Pacific Islanders.

Entrepreneurs, including minority entrepreneurs, face a number of challenges as they pursue their dreams and begin to create and expand their businesses. These challenges include: access to capital, the cost of health insurance, the need for training and technical assistance, access to federal contracts, and regulatory burdens. SBA is focused on addressing the challenges of small businesses, and in particular, minority-owned small businesses and entrepreneurs.

SBA Programs

The SBA administers two business development programs for small disadvantaged businesses. These programs are the 8(a) Business Development Program and the Small Disadvantaged Business (SDB) Certification Program. The 8(a) Program offers a broad scope of assistance to socially and economically disadvantaged firms, SDB certification strictly pertains to benefits in Federal procurement. The 8(a) BD program, established in the 1960s, offers training through the 7(j) program, teaming, mentor

protégé agreements and contracting assistance. Today, there are 8,867 firms participating in the 8(a) BD Program, with Federal contracting dollars of $12.5 billion in FY 2006. Additionally, in 2006 Federal contracting dollars overall to Small Disadvantaged Businesses, including 8(a) was $23 billion. SBA provided firms in the 8(a) program with business development training across the country through our 7(j) training program. This training consists of 80 workshops in 40 different cities and is being conducted by Unlimited Services Systems Management and Consultants, a small business located in Largo, Maryland.

Through the 8(a) BD Program and other business development programs, the federal government has made significant progress toward achieving its goal of 23 percent of prime contracting dollars to businesses that qualified as small businesses. In FY 2004, women-owned businesses grew from $5.5 billion to $11.6 billion in FY 2006, service-disabled veteran-small businesses grew from $554 million to $2.9 billion, firms located in Historically Underutilized Businesses Zones (HUBZones) increased from $1.6 billion to $7.2 billion, and overall small business grew from $50.1 billion to $77.7 billion.

Reforms

While deficiencies in the 8(a) Program have been identified by the U.S. Government Accountability Office (GAO) with respect to SBA oversight of contracting officers, the SBA takes this responsibility very seriously and has taken a number of steps to remedy the deficiencies found by the GAO. For instance, SBA has revised its Partnership Agreements, which delegate SBA's 8(a) contract execution function from SBA to various Federal procuring agencies (including the U.S. Department of Defense), to clarify their roles and responsibilities for monitoring contract compliance of and performance by 8(a) participants. SBA has also increased training to field staff responsible for working on contracting issues, including the 8(a) BD Program. In addition, the Agency is exploring possible regulatory changes that will strengthen the program and increase SBA's oversight capabilities.

SBA recognizes the need to improve the management and effectiveness of its business development programs and has included a request for $500,000 in its FY 2008 budget to examine how best to serve the 8(a), HUBZone, Small Disadvantaged Business Communities and women-owned and service-disabled veteran-owned small businesses, while not restricting the success of any one program. These resources will be used to analyze, among other things, training and the use of technology to determine how best to serve the businesses that use these products.

SBA is also working with the Office of Management and Budget's Office of Federal Procurement Policy, to carry out a number of improvements to the government contracting programs. These initiatives include working with agencies to ensure their small business contracting number reporting to FPDS-NG is accurate. The integrity of the data reported to Congress and the public is crucial to instill confidence in the Federal contracting system.

A great example of the progress being made in this area is SBA's recent publication of the first of a biannual Small Business Procurement Scorecard. The scorecard is a method of ensuring that federal agencies provide the maximum possible opportunity for small businesses in the federal marketplace, especially those categorized as socially and economically disadvantaged, consistent with statutory contracting goals. It reflects "current" performance, and more importantly "progress" federal agencies are making in improving such performance. The new scorecard uses the same approach as the President's Management Agenda to ensure that agencies have clear goals and action plans, that agencies are regularly assessed on their performance. Data integrity is a key element. Based on this approach, we rated 24 agencies red, yellow, or green for goal achievement and progress. The Scorecard can be viewed online at www.sba.gov. Additionally, the Scorecard is an important tool to both increase procurement opportunities for small businesses while more accurately measuring each individual Agency's results. This scorecard, along with the advances made in FPDS-NG, are significant steps in adding transparency and greater accuracy to the federal procurement process.

To better serve small business who do business with the government, SBA is redefining roles and responsibilities so that Procurement Center Representatives (PCRs) can devote more time to finding opportunities for small businesses with procuring agencies, while the district offices, SBA, and SBA's resource partners focus on providing training and counseling to get small businesses positioned to compete for federal contracts. Currently there are 53 PCRs serving small businesses throughout the federal marketplace. We have already begun to implement a plan to increase the number of PCRs to 66 by the end of FY 2008. Furthermore, a succession plan has been created to account for the future retirements of these PCRs. We are very focused on backfilling any positions that become vacant in a timely fashion as we realize the importance these individuals play.

I would like to take just a moment to let the committee know that SBA is in the process of implementing its new size recertification rules. This new regulation requires small businesses to recertify their size status on long-term contracts at the end of the first five years of a contract and thereafter whenever a contract option is exercised. In addition, recertification is required for short-term contracts, when a small business is purchased by or merged with another business. When contractors can no longer certify their small business size status, buying activities assigned to their company may no longer be counted as part of the purchasing agencies small business procurement goals. These changes do not affect the terms and conditions of the underlying contract, nor do they require termination of existing contracts where size status has changed. Ultimately, the new size recertification rules will ensure more accurate data and further support our efforts to help small businesses receive more prime contracts throughout the federal government.

This concludes my testimony before the Committee. Thank you for the opportunity to come to Bowie State to discuss these issues important to Maryland's small businesses. I look forward to answering any questions that you may have.

SCORECARD CRITERIA

COLOR FOR CURRENT STATUS	CRITERIA	COLOR FOR PROGRESS STATUS	CRITERIA
GREEN	THE AGENCY MUST MEET ITS SMALL BUSINESS GOAL, 3 SOCIO-ECONOMIC GOALS, PROGRESS IN 1 GOAL, AND MEET ALL YELLOW STANDARDS	GREEN	THE AGENCY'S CURRENT STATUS MUST BE AT LEAST A "YELLOW" WITH ALL YELLOW STANDARDS MET.
YELLOW	SMALL BUSINESS GOAL, 2 SOCIO-ECONOMIC GOALS, PROGRESS IN 1 GOAL, MUST MEET ALL YELLOW STANDARDS	YELLOW	THE AGENCY CAN MISS NO MORE THAN 2 YELLOW STANDARDS REGARDLESS OF ITS CURRENT STATUS GRADE
	DOES NOT MEET EITHER OF THE ABOVE CONDITIONS		DOES NOT MEET EITHER OF THE ABOVE CONDITIONS

THE GOALING PERFORMANCE DATA WAS FROZEN ON JUNE 30, 2007. NO EXCEPTIONS

Senator CARDIN. Thank you for your testimony.

I do want to acknowledge that Dr. Burnim was here, the President of Bowie State University and—oh, he is still here. Dr. Burnim, thank you, again for your hospitality here. I know this is a busy weekend with homecoming——

Mr. BURNIM. Yes, indeed, but it is our pleasure to have you here.

Senator CARDIN. Well, thank you. We really appreciate the courtesies that have been shown here at Bowie. As I told you privately, you are doing great work here and we are very proud of the work being done here at Bowie State University.

Mr. BURNIM. Thank you.

Senator CARDIN. Our next witness will be Mr. Anthony Martoccia. Anthony Martoccia is the Director of the Department of Defense Office of Small Business Programs. Mr. Martoccia has served in a number of procurement management positions at the Department of Defense, NASA, and the Department of Transportation. Most recently, he was the Associate Administrator for Government Contracting and Business Development at the U.S. Small Business Administration. He served as the Chief Advisor to the Small Business Administration who is responsible for providing direction, oversight, and policy to all Federal small business contracting programs.

It is a pleasure to have you here, Mr. Martoccia.

STATEMENT OF ANTHONY MARTOCCIA, DIRECTOR OF SMALL BUSINESS PROGRAMS, OFFICE OF THE SECRETARY OF DEFENSE, U.S. DEPARTMENT OF DEFENSE, ARLINGTON, VA

Mr. MARTOCCIA. Thank you, sir. Chairman Cardin, good afternoon. I am Tony Martoccia, the Department of Defense Director of the Office of Small Business Programs. Thank you for inviting me to discuss the Department's small business programs. I welcome the opportunity to participate in this hearing because this is a topic that is clearly important to me.

My testimony will encompass challenges and ongoing initiatives within the DOD small business program. We have many challenges facing the small business program. One you mentioned, contract bundling. Contract bundling occurs when requirements that were previously or could have been performed by small businesses are consolidated into a single procurement, resulting in an acquisition that is unsuitable for award to a small business. Any Defense acquisition strategy that uses bundling or consolidation of requirements must undergo a rigorous and thorough review to get approved to consolidate or to bundle a particular requirement.

Subcontracting—DOD contracting offices must ensure that prime contractors put forth their best efforts to achieve their small business subcontracting goals. Contracting officers must challenge any Small Disadvantaged Business subcontracting goal that is less than 5 percent. A Small Disadvantaged Business goal of less than 5 percent must be approved one level above the contracting officer.

Competition—competition is the preferred method of acquiring goods and services. The Department's preference for competitions extends to the Small Disadvantaged Business and 8(a) procurements involving 8(a), Alaska Native corporations, and others. Noncompetitive acquisition strategies are the exception to the norm,

and the rationale for not using competitive techniques must be justified.

Alaska Native corporations—the Government Accountability Office noted that oversight was an area of vulnerability under 8(a) ANC contracts. DOD discussed the GAO's findings during the 2007 Small Business Training Conference. The military departments have also stepped up their training efforts with respect to this initiative.

Now I would like to focus on some ongoing initiatives to increase opportunities for Small Disadvantaged Businesses in DOD procurement. Minority Contract Enhancement Program—my office has awarded a contract to a minority-owned 8(a) firm for the development and support of a DOD Minority Enhancement Program to assist small minority-owned businesses, including 8(a) participants.

Training the acquisition workforce—the Department has placed increased emphasis on educating the acquisition workforce in key areas of small business contracting.

DOD's Small Business Community of Practice—my office, in collaboration with the Defense Acquisition University and the military departments, developed a Small Business Community of Practice to provide an easy to use online source of small business program information for the acquisition workforce.

Small business size standards—the Defense Department is concerned that a number of size standards critical to defense industries have not kept pace with the U.S. economy. Early this year, DOD met with representatives from SBA and the Office of Federal Procurement Policy to discuss the issue at length. All parties agreed that a comprehensive review of size standards is needed.

Procurement Technical Assistance Centers—we have many Technical Assistance Centers to help small businesses provide a road map to do business in the Federal marketplace. We have one such located at the University of Maryland in College Park.

Base Closure and Realignment Act, BRAC—while the Department does not have a small business program that specifically addresses BRAC, DOD was actively involved in the passage of a law to designate all military installations affected by BRAC as HUBZones. Providing maximum opportunity for small business is always a primary consideration in any acquisition strategy, including procurements to fulfill BRAC requirements.

I would also like to mention that the Deputy Under Secretary for Defense for Acquisition and Technology, the Honorable Dr. James Finley, is a strong proponent of the Department of Defense small business program. Working together, we obtained senior DOD leadership commitment to promote small business programs within the Department.

Today, I have provided a brief overview of a number of DOD issues and initiatives that affect minority-owned small businesses. I appreciate the Committee's continued interest and oversight of DOD's small business program and look forward to your questions and any comments you may have that will guide us towards working more effectively with small businesses. This concludes my testimony. Thank you.

[The prepared statement of Mr. Martoccia follows:]

Testimony of

Mr. Anthony R. Martoccia

Director, Office of Small Business Programs
Office of the Under Secretary of Defense
Acquisition, Technology and Logistics
U.S. Department of Defense

Hearing before the
U. S. Senate Committee on Small Business and Entrepreneurship

On

Access to Federal Contracts: How to Level the Playing Field

October 29, 2007
Bowie State University, Maryland

Statement of
Mr. Anthony R. Martoccia
Director, DoD Office of Small Business Programs,
U. S. Department of Defense
Before the
U. S. Senate Committee on Small Business and Entrepreneurship
October 29, 2007
Bowie State University, Maryland

Chairman Cardin and Members of the Senate Committee on Small Business and Entrepreneurship:

Good afternoon. I am Anthony Martoccia, Director of the Department of Defense (DoD) Office of Small Business Programs (OSBP), in the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD/AT&L). Thank you for inviting me to appear before you to discuss the Department's Small Business Programs. I welcome the opportunity to participate in this hearing because this is a topic that is very important to me.

Small business and small disadvantaged business (SDB) are vitally important to the job growth and the economic strength of the country. They play an important role in the Department's overall mission to deter our enemies and protect the security of the United States. With this in mind, I am very proud to report that from fiscal year (FY) 2000 through FY 2006, the Department has met or exceeded the 5 percent government-wide statutory goal for small disadvantaged business. Preliminary analysis of FY 2007 data indicates that DoD will again achieve the SDB goal. Nevertheless, I am concerned that DoD has not achieved the 23 percent overall small business goal. DoD OSBP has begun a preliminary investigation to determine the reason for this disparity.

Mitigating Potential Barriers

The Federal Government is required to provide all small businesses the maximum practicable opportunity to participate in its procurements. This guiding principle, in combination with progressive legislation and a healthy economy, has created an optimal environment for small business. Due to the unique requirements, terms, and conditions imposed on Federal procurement however, the ability of DoD and the other agencies to achieve the statutory goals may be inhibited. The following discussion considers a number of these potential barriers, and how they are addressed within the Department:

Contract Consolidation and Strategic Sourcing - In the mid-1990s, Congress passed several statutes requiring the Government to buy products and services

more efficiently. DoD acquisition professionals became adept at leveraging the immense buying power of the Defense Department to enable prudent stewardship of public funds. The consolidation of several requirements into a single contract to save money and gain other benefits became one such strategy. Consolidation occurs when requirements previously performed by either large business or small business under two or more separate, smaller contracts are combined into one contract or order. Benefits of such consolidated actions must be documented, justified, and approved prior to such action being taken.

Since October 2005, the Office of Management and Budget has required Federal agencies to use strategic sourcing as a means to streamline the procurement process. Strategic sourcing uses an agency's spend analyses to make informed business decisions about acquiring commodities and services more effectively and efficiently. This process helps agencies optimize performance, minimize price, increase achievement of socio-economic acquisition goals, evaluate total lifecycle management costs, improve vendor access to business opportunities, and otherwise increase the value of each Federal dollar spent.

Although consolidation and strategic sourcing reduces the number of available contract opportunities, both consolidated and strategic sourcing actions are awarded to small businesses and may be awarded under one of the special small business set-aside or sole source authorities.

An example of small businesses benefiting from strategic sourcing is the U. S. Department of Navy Clerical Support Services contracts awarded October 13, 2006. This consolidated solicitation limited competition to 8(a) small disadvantaged businesses, Historically Underutilized Business Zone (HUBZone) small business concerns, and service-disabled veteran-owned small business (SDVOSB) firms. Over 100 proposals were received and evaluated, and nine contracts were awarded. Contracts were awarded to one SDVOSB firm, one SDVOSB that is also a HUBZone concern, one SDVOSB that is also a woman-owned small business, one HUBZone small business that is also a veteran-owned small business, one 8(a) SDB that is also a veteran owned small business, three 8(a) SDB's that are also women-owned small businesses (WOSB), and one 8(a) SDB.

Contract Bundling - Contract bundling occurs when requirements that previously were, or could have been, performed by small business are combined into a single procurement, resulting in an acquisition that is unsuitable for award to small business. The bundled action may be unsuitable for award to a small business due to its dollar value, geographic dispersion, technical diversity, size or specialized nature, or any combination thereof.

DoD discourages the practice of contract bundling; any acquisition strategy that contemplates bundling must first undergo a rigorous justification and approval process. The Federal Acquisition Regulation requires contracting officers and/or acquisition teams to consult with the Small Business Administration (SBA) Procurement Center Representative (PCR) as soon as feasible once it has been determined that a bundled contract will result from the solicitation. Early consultation with the SBA PCR helps to focus the contracting officer's/acquisition team's market research, aid in the development of a more effective acquisition strategy, and minimize any adverse impact on incumbent small business. Bundling may only be used when the Department has determined it will derive a measurable and substantial benefit through the use of this type of acquisition strategy.

The Department requires analysis of alternatives including methods for mitigating the impact to small business, even if bundling can be justified by its anticipated benefits. If small business prime contracting opportunities are not available, DoD acquisition professionals are obliged to develop strategies that set aggressive small business subcontracting goals, including methods for ensuring that the goals are achieved.

Subcontracting – It is the responsibility of both DoD contracting officers and small business specialists to ensure prime contractors put forth their best efforts to achieve subcontracting goals. In particular, DoD procurement regulations require contracting officers to challenge any SDB subcontracting goal less than 5 percent. A small disadvantaged business goal of less than 5 percent must be approved one level above the contracting officer.

Military Departments and Other Defense Agencies (ODAs) use various techniques to encourage prime contractors to subcontract and team with small business concerns. Contractual incentives that reward prime contractors for exceptional subcontract performance is one technique. Another effective approach is to use prime contractors' proposed subcontract performance as a source-selection factor.

Since monitoring subcontracting achievements can be very complex and time-consuming, many Military Departments and ODAs delegate this responsibility to the Defense Contract Management Agency (DCMA). Such delegations may involve the administration of individual subcontracts and/or a prime contractor's entire small business program. DCMA has developed extensive guidelines to evaluate a prime contractor's individual subcontracting plan(s) and overall compliance with its small business program. DCMA also negotiates divisional and corporate-wide subcontracting goals with major defense contractors under the DoD Comprehensive Subcontracting Plan Test Program and evaluates and monitors these plans.

DCMA conducts annual small business program compliance reviews to assess the effectiveness of a prime contractor's overall small business subcontracting program. These reviews are conducted for major DoD prime contractors, i.e., those contractors that have been awarded $100 million or more during the past fiscal year. The reviews focus on the prime contractor's deficiencies in small business subcontracting performance based upon completed subcontracting plan reports. In accordance with the Memorandum of Understanding (MOU) between DCMA and the SBA, the SBA shall be notified of an anticipated compliance review. DCMA must perform all small business program compliance reviews in accordance with the MOU.

In FY 2007, DCMA completed 108 compliance reviews. The review findings will give the Department a better understanding of the difficulties small business owners encounter as subcontractors under DoD contracts.

If a contractor fails to make a good faith effort to achieve its subcontracting goals, contracting officials annotate this information in the contractor's official past performance record. Past performance information is maintained in the Government-wide Past Performance Information Retrieval System (PPIRS). PPIRS is used by DoD contracting officers to make required contractor responsibility assessments. DoD contracting officers must evaluate the extent to which small business, SDB, HUBZone, veteran-owned small business, SDVOSB, and women-owned small business are proposed for participation contract performance in all negotiated procurements that are required to have a subcontracting plan.

Competition – The Administrator, Office of Federal Procurement Policy's memorandum of May 31, 2007, underscores the importance of competition as a means to save taxpayer money, improve contractor performance, curb fraud and promote accountability for results. Within DoD, competition is the preferred method for acquiring goods and services. The importance of competition and the need to dedicate even greater emphasis towards its promotion was recently addressed in the Director, Defense Procurement and Acquisition Policy's memorandum of July 26, 2007. The Department's preference for competition extends to small business, SDB and 8(a) procurements and in procurements involving 8(a) Alaska Native Corporation (ANC) firms. Noncompetitive acquisition strategies are the exception to the norm, and the reasons for not using competitive techniques must be justified.

Accountability

One of the concerns that emerged from the Federal downsizing period of the

1990s was the effect these efforts may have had on Government accountability. With regard to DoD's Small Business Program, there is a process in place to ensure the Department is accountable for its small business performance. The DoD Small Business Program Strategic Management System (SMS) is used to administer the DoD Small Business Program, to drive continuous improvement, and to promote consistent reporting to the Office of the Secretary of Defense (OSD) by all DoD components, including the Military Departments and Other Defense Agencies (ODAs).

In accordance with the DoD SMS, each Military Department must submit two Small Business Program reports each year including a mid-year and a year-end (annual) report. The annual report serves to document the Component's Defense Small Business Program results for the ending fiscal year, describes progress in implementing its small business initiatives, and identifies any new initiatives to improve the Component's Small Business Program. These individual reports are consolidated into the DoD Small Business Report that is reviewed by the Secretary of Defense and used in DoD's Annual Report to Congress to establish appropriate DoD-wide goals for future fiscal years.

In addition, the SBA's Small Business Procurement Scorecard has brought an added degree of transparency to the Federal Government's small business achievement record. The Scorecard rates Federal agencies' progress in providing small business opportunities and is part of a larger movement emerging in new procurement regulations to more accurate tracking of small business contracting.

Contracting with 8(a) Alaska Native Corporation Firms

The Department adheres to statutory and regulatory requirements when contracting with 8(a) Alaska Native Corporation (ANC) firms, to ensure that the interests of the taxpayers are safeguarded. (The term "8(a) ANCs" refers to small businesses owned and controlled by ANCs.) Section 8(a) of the Small Business Act, as amended by Public Law 85-536, the SBA's 8(a) Business Development Program and the Alaska Native Claims Settlement Act and Title 13 of the Code of Federal Regulations provide the framework for the Department's 8(a) ANC acquisition policy. Under Title 13 of the Code of Federal Regulation, Section 124, 506(b), the SBA may award a sole source 8(a) contract to an 8(a) Program Participant owned or controlled by an Indian tribe or an ANC where the anticipated value of the procurement exceeds the applicable competitive threshold, if the SBA has not already accepted the requirement into the 8(a) Program as a competitive procurement.

The Department is monitoring the dollars obligated under 8(a) ANC contracts. In FY 2005, approximately 17.3 percent of the 8(a) dollars obligated by the Defense Department were in support of 8(a) ANC contract actions. By FY 2006 this percentage had dropped to 15.8 percent. The DoD OSBP will continue to closely monitor 8(a) ANC award data.

The Government Accountability Office (GAO) Report GAO-06-399 "Contract Management – Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight" noted that oversight was an area of vulnerability under 8(a) Alaska Native Corporation (ANC) contracts. DoD addressed the GAO's findings in its FY 2007 Small Business Training conference. The Military Departments have also stepped up their training efforts within their respective organizations.

On February 28, 2007, a new 8(a) Partnership Agreement between the SBA and the DoD was signed. The 8(a) Partnership Agreement between the SBA and the DoD allows for much more expeditious award of 8(a) contracts. Under the Partnership Agreement, the SBA delegates to the USD/AT&L its authority to enter into 8(a) prime contracts and to award performance of those contracts to eligible 8(a) firms. In keeping with the findings noted in GAO-06-399, the new Partnership Agreement provides greater clarification of the responsibilities of the SBA and DoD, and emphasizes the need to include and adhere to monitoring and oversight provisions for all DoD 8(a) contract actions directly awarded to the 8(a) Participants via SBA's delegation of authority.

Ongoing Initiatives To Improve DoD's Small Business/SDB Performance

The Department of Defense has implemented numerous initiatives aimed at improving its small/small disadvantaged business performance:

Minority Contract Enhancement Program – In FY 2007, DoD OSBP was provided funds by Congress to develop a Minority Contract Enhancement Program. The funds were used to award a contract to a minority-owned 8(a) firm for the development and support of a DoD Minority Contract Enhancement Program (MCEP). The contractor will provide specialized and professional assistance to small, minority-owned businesses, including 8(a) Participants, to help these firms become successful DoD suppliers. The assistance provided will be in addition to, and not duplicative of, the services already provided by Government agencies to small businesses. The DoD MCEP will also include measurable goals and metrics to assess the success of the program.

The Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Programs – SBIR and STTR have long provided excellent opportunities for minority-owned small businesses to participate in technology research and development for the Department of Defense. Historically, about 10 percent of both Phase I contract awards for technology feasibility and Phase II contracts for technology prototyping and demonstration have gone to minority-owned firms. In FY 2006, 296 Phase I and Phase II contracts were awarded to minority-owned firms, with a total value of over $101 million.

The DoD Mentor-Protégé Program (MPP) – The DoD MPP was initiated in late 1990 by Public Law and was formulated to incentivize large Defense prime contractors to work with small disadvantaged businesses to enhance their capabilities and their competitiveness within the defense supplier base. Since then, WOSB, veteran-owned small business, SDVOSB and HUBZone small business concerns have also been extended eligibility under amended legislation.

Of the 803 small businesses that have participated in the DoD MPP since its inception, fully 522 or 65 percent of the small businesses helped as protégés qualified as SDBs. These protégés, about 150 active agreements each year, are located in virtually every state in the union. More significantly, SDB protégés have accounted for an average of 12 percent of all SDB prime contract awards made by the Department during the last four years, over $1.5 billion in prime contract awards annually. Equally significant is the fact that the average prime contract award for SDB protégés in the program was over $5 million, nearly three times that of a non-protégé SDB concern. In the last three years DoD MPP has made an effort to instill a more technology based manufacturing focus to the DoD MPP to better address the evolving needs of the warfighter. This has included an

emphasis on such joint programs as Robotics, where three of the ten protégés are SDBs.

Training the Acquisition Workforce – The Department has placed increased emphasis on educating the acquisition workforce in key areas of small business contracting, especially in the area of bundling and consolidation. DoD has established a small business training program as a joint initiative between DoD OSBP and the Defense Acquisition University (DAU). In FY 2006, a member of the DoD OSBP staff presented a live Webcast on contract bundling and consolidation that is available for viewing online. (The Air Force small business office has also developed an online bundling course that is available on their Web site.) Subsequent to DoD OSBP's initial Webcast, this office featured a presentation on subcontracts, and in the near future we will Webcast a segment on the DoD's SBIR/STTR programs. In addition to these on-line presentations, DoD OSBP staff has provided train-the-trainer sessions at many conferences throughout the past two years.

DoD Small Business Community of Practice – Recently, DoD OSBP and DAU collaborated with representatives from the Army, Navy, and the Air Force to develop a Small Business Community of Practice to provide an easy to use, online source of small business program information for the acquisition workforce. The intent of DoD's Small Business Community of Practice is to provide a "one stop" location to easily access best practices and lessons from acquisition professionals throughout DoD. The site was unveiled in March of 2007 and may be accessed at https://acc.dau.mil/smallbusiness.

Small Business Size Standards – DoD OSBP is concerned that a number of size standards in critical Defense industries have not kept pace with the U.S. economy. We believe an upward adjustment of the small business size standards in these industries will improve small business's ability to take on an even greater role in DoD procurement. In March of FY 2007 DoD OSBP met with representatives from the SBA and the Office of Federal Procurement Policy, Office of Management and Budget to discuss this issue at length. All parties agreed that a comprehensive review of the size standards is needed.

Base Closure and Realignment Act (BRAC)

The National Defense Authorization Act for Fiscal Year 2002 amended the Defense Base Closure and Realignment Act (BRAC) of 1990 (P.L. 101-510) to authorize a round of closures and realignments in 2005. The Department is in the process of initiating activities to ensure it implements the recommendations within the statutory six-year period that will end on September 15, 2011. BRAC 2005 affects over 800 locations across the United States through 24 major closures, 24

major realignments, and 765 lesser actions.

DoD was actively involved in the passage of law to designate all military installations affected by BRAC as HUBZones. This measure was signed into law by the President in December of 2004. While the Department does not have a small business program that specifically addresses BRAC, all such acquisitions must adhere to the same laws and regulations set forth in the Small Business Act, the Federal Acquisition Regulation (FAR) and the Department of Defense FAR Supplement. In short, providing maximum opportunity for small business is always a primary consideration in any acquisition strategy that has been developed to fulfill BRAC requirements.

The following discussion highlights a few of our BRAC success stories:

Southern Performance-Based Contracting (U.S. Air Force)

The Air Force plans to consolidate several BRAC environmental projects under two separate contracts, one of which will be set-aside for small business. The objective of this project is to implement reasonable, aggressive, and appropriate cleanup actions to ensure protection of human health and the environment, reduce the Air Force's financial liabilities, and achieve site closure for 18 open and post-closure sites at Bergstrom Air Force Base (AFB) and Reese AFB, Texas; Eaker AFB, Arkansas; England AFB, Louisiana; Homestead AFB, Florida; and Myrtle Beach AFB, South Carolina. This effort will involve environmental restoration, environmental remediation and/or environmental monitoring activities.

The original acquisition strategy for this requirement contemplated a single full and open competitive solicitation. The change in acquisition strategy is a result of industry comments and intense market research on the part of the DoD small business specialist.

BRAC Transition Assistance Contract (U.S. Navy)

The Naval Air Warfare Center Weapons Division (NAWCWD) has awarded an 8(a) contract for employee transition assistance to an SDVOSB firm, C. J. Turner, Incorporated. Mr. Calvin Turner, the owner of the firm, was severely injured in an Army helicopter accident which killed ten in his command. During the 52 months Mr. Turner endured his thirteen surgeries and intense physical therapy, he was also giving careful consideration to his future career. He chose transition counseling. Mr. Turner and his highly experienced team now operate the Career Transition Center at the NAWCWD Pt. Mugu, California site to assist individuals impacted by realignment of functions as a result of BRAC 2005.

U.S. Army Staff Augmentation Contract

The Army Contracting Agency (ACA) intends to award a contract to provide critical staffing support during the BRAC period at affected Army installations. This requirement has been set aside for SDVOSBs. The ACA will issue a multiple-award contract with an estimated total value of approximately $500 million, and a period of performance of one year, with four one-year options, to obtain staffing support. This action is the largest staff augmentation contract ever awarded by the ACA; several SDVOSBs are preparing to take part in this contract, and it is anticipated that there will also be opportunities for small businesses to participate as subcontractors.

Commitment to Achievement of Small Business Goals by Senior DoD Management

As the Director of DoD's Small Business Program Office, I am a member of the USD/AT&L staff. This provides an opportunity to meet with senior level management staff at weekly USD/AT&L staff meetings and share DOD OSBP's small business agenda with them. Through these interactions I have obtained leadership commitment to promote small business programs within their organizations. DoD small business programs are an integral part of the USD/AT&L Strategic Goals Implementation Plan. At the Component level, the Small Business Program Directors at the Army, Navy, Air Force, the Defense Contracts Management Agency, and the Defense Logistics Agency have each implemented small business strategic plans for their respective departments and agencies.

The Deputy Under Secretary of Defense for Acquisition and Technology, the Honorable Dr. James Finley, is a strong proponent of the DoD Small Business Program. Among his many duties, it is his responsibility to brief the Secretary of Defense on DoD's progress in achieving small business goals. Dr. Finley is a frequent keynote speaker at small business events, either those sponsored by the Department or by small business organizations. DoD's small business performance is a topic that Dr. Finley frequently refers to when he addresses DoD leadership

Conclusion

Today I have given a brief overview of a number of DoD issues and initiatives that effect small and minority-owned small businesses. I wish to thank the small business community for their outstanding support of our men and women in uniform.

I appreciate the Committee's continued interest and oversight of DoD's Small Business Programs and look forward to your questions and to any comments you may have that will guide us toward working more effectively with small business. This concludes my testimony.

Thank you.

Senator CARDIN. Thank you very much, Mr. Martoccia.

We will now hear from Michael Rigas, who is the Deputy Associate Administrator for Small Business Utilization at the General Services Administration. He is responsible for assisting the Associate Administrator in monitoring and implementing small business policies and managing small business programs. Prior to his appointment at GSA, Mr. Rigas was at Mellon Financial Corporation and Brown Brothers Harriman and Company, where he managed client relations, streamlined operations, and created efficiencies across global operations.

STATEMENT OF MICHAEL J. RIGAS, DEPUTY ASSOCIATE ADMINISTRATOR, OFFICE OF SMALL BUSINESS UTILIZATION, GENERAL SERVICES ADMINISTRATION, WASHINGTON, DC

Mr. RIGAS. Thank you. Good afternoon, Chairman Cardin. Thank you for the opportunity to appear before you today to discuss access to Federal contracts for small businesses. I am pleased to be here this afternoon.

I am also happy to be here today at Bowie State University because it is the home of the Procurement Acquisition Center of Excellence. As the premier acquisition agency of the Federal Government, GSA's mission is to help Federal agencies better serve the public by offering at best value superior workplaces, expert solutions, acquisition services, and management policies.

Within GSA, the Office of Small Business Utilization works to ensure that small businesses, small disadvantaged businesses, women-owned, HUBZone, veteran-owned, and service-disabled veteran-owned small businesses have ample opportunities to compete in GSA procurements. We know that small businesses are the engine of our national economy and that they bring to the market new and innovative solutions to government challenges, and a successful and strong small business community is integral to job creation, community empowerment, and economic revitalization.

GSA works hard so that small businesses have every opportunity to participate in the Federal procurement process, and as an agency, we actually exceed the small business goals Congress has set. The Small Business Act established an annual goal of awarding 23 percent of prime contract dollars to small businesses. At GSA, over 32 percent of all prime contract procurement dollars go to small businesses. That impressive result is nearly 40 percent higher than the statutory goal of 23 percent.

But the story of GSA's support for small business doesn't end with our own direct GSA contracting. GSA has a strong record of supporting small business contracting throughout the Government through government-wide acquisition contracts and the GSA Schedules Program. The Schedules Program offers Federal agencies a broad range of products and services from private sector vendors and suppliers at prices that have been negotiated by GSA and meet accepted levels of expertise, performance, and best value. Its ordering process makes it easier for GSA and other agencies to reach small businesses. And I am happy to report that 80 percent of the companies which have been awarded GSA schedules contracts are small businesses. The Schedules, in short, offer small businesses an expansive avenue of potential work in the Federal Government.

In fiscal year 2005, through GSA's Schedules Program, Federal agencies awarded over $12 billion in Schedule orders to small businesses. That amount increased to over $13 billion in fiscal year 2006, which is approximately 37 percent of all prime contracting Schedules spending government-wide going to small businesses.

GSA's Small Business Government-Wide Acquisition Contracts, or GWACs, are another way GSA supports small business. It gives me great pleasure to tell you that this year, we awarded our GSA IT Infrastructure Technology Global Operations, or GITGO, contract to an 8(a) service-disabled veteran-owned small business headquartered right here in the State of Maryland. We determined that this opportunity, valued at over $200 million, could be competed among and awarded to small business if those businesses were given the chance.

This success story for small business is a direct result of the commitment of our administrator, Lurita Doan, to expanding opportunities for small businesses. As one of the few government agency heads who was an entrepreneur, a former small and minority business owner, and a Federal Government contractor, Ms. Doan is our agency's biggest advocate for small business.

One example of her leadership is the MAS (Multiple Award Schedule) Express Program. Historically, it has taken too long to review offers and reward contracts under GSA's Schedules Program. Under the leadership of Administrator Doan, GSA has reduced the amount of time it takes for an eligible small company to apply for and receive a GSA schedules contract from over 157 days to 30 days.

We at GSA pledge to continue to improve and to keep fighting to make sure that any small company with a great idea will have a much easier path of obtaining a GSA schedule than ever before. Our Office of Small Business Utilization assists small businesses by answering the many questions that are submitted by phone, e-mail, letters, and in person. We also conduct hundreds of outreach events a year across the country for small businesses, including 57 events in the metropolitan DC area last year alone. These conferences open doors to Federal contracting opportunities to small businesses, and GSA conducts workshops that teach small business owners how to do business with GSA.

We share the Administration's view, and I am sure this Committee's view, as well, that small businesses are the backbone of our economy and that a healthy small business community contributes greatly to the health of our national economy.

Mr. Chairman, GSA has a strong record of supporting small business and small business contracting and we look forward to continuing our work to improve on our already impressive performance record with regards to small business contracting.

I thank you for the opportunity to appear before you today and I will be happy to answer any questions you may have. Thank you.

[The prepared statement of Mr. Rigas follows:]

STATEMENT OF

MICHAEL J. RIGAS

DEPUTY ASSOCIATE ADMINISTRATOR

OFFICE OF SMALL BUSINESS UTILIZATION

U.S. GENERAL SERVICES ADMINISTRATION

BEFORE THE

COMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP

UNITED STATES SENATE

OCTOBER 29, 2007

Good afternoon, thank you for the opportunity to appear before you today to discuss access to Federal contracts for small businesses. I am Michael Rigas, Deputy Associate Administrator for Small Business Utilization at the General Services Administration (GSA), and I am pleased to be here this afternoon.

I am also happy to be here today at Bowie State University, because it is the home of the Procurement Acquisition Center of Excellence. In September 2004, GSA completed a competitive out-sourcing of the Federal Acquisition Institute in which we awarded a contract to SRA whose partner, Bowie State University, is a Historically Black University. The Procurement Acquisition Center of Excellence was established to support the Federal Acquisition Institute's goals and initiatives of sustaining procurement and acquisition professionalism, integrity and growth across the Federal workforce.

As the premier acquisition agency of the Federal Government, GSA's mission is to help Federal agencies better serve the public by offering, at best value, superior workplaces, expert solutions, acquisition services, and management policies.

Within GSA, the Office of Small Business Utilization works to ensure that small businesses have ample opportunities to compete in GSA procurements. We know that small businesses are the engine of our national economy and that they bring to the market new and innovative solutions to Government challenges; and a successful and strong small business community is integral to job creation, community empowerment and economic revitalization.

GSA works hard so that small, small disadvantaged, women-owned, Hubzone, veteran-owned, and service-disabled veteran-owned small businesses have every opportunity to participate in the Federal procurement process. GSA has significantly increased its spending with small businesses, and as an agency, we actually exceed the goals Congress has set.

The Small Business Act established an annual goal of awarding 23 percent of prime contract dollars goes to small businesses. At GSA, over 32 percent of all prime contract procurement dollars spent goes to small business. That impressive result is nearly 40 percent higher than the statutory goal of 23 percent. From FY 2005 to FY 2006, GSA increased its small business spending from $1.5 billion to $1.7 billion, an increase of over 13 percent. We are proud that we have surpassed the goals established by the Small Business Act.

But the story of GSA's support for small business doesn't end with our direct GSA contracting. GSA has a strong record of supporting small business contracting throughout the Government through the GSA Schedules Program and Government-wide

Acquisition Contracts. Over 80 percent of the companies on GSA Schedules are small businesses. In FY 2005, through the GSA's Schedules program, Federal agencies awarded over $12 billion in schedule orders to small business. That amount increased to over $13 billion for FY 2006, which is approximately 37% of all prime contracting Schedules spending government wide going to small business.

It gives me great pleasure to tell you that we also recently awarded our GSA IT Infrastructure Technology Global Operations (GITGO) contract to an 8(a) Service Disabled Veteran Owned Small Business headquartered in the State of Maryland. We determined this opportunity, valued at over $200 million dollars, could be competed amongst, and awarded to, small business, if those businesses were given the chance. And now an 8(a) Service Disabled Veteran Owned Small Business is providing alignment of GSA's IT helpdesk operations and supporting the desktops, laptops, and servers of GSA's approximately 15,000 employees and contractors in 500 plus locations around the world, including Puerto Rico, Europe, and Asia.

This success story for small business is a direct result of GSA's policy on bundling, and the commitment of our Administrator, Lurita Doan, to expanding opportunities for small businesses. As one of the few Government agency heads who was an entrepreneur, a former small and minority business owner, and a Federal Government contractor, Ms. Doan is our agency's biggest advocate for small business. She knows from experience that starting a business is hard, that sustaining and growing a business is even harder. She is determined, as the Administrator of GSA, to do whatever is within her power to ensure that doing business with GSA is not one of those hardships.

GSA's guidelines toward contract bundling dictate that any time consolidation of two or more existing contracts that are already performed by, or could be performed by, small business are considered, then the acquisition plan must address contract bundling.

The General Services Administration Acquisition Manual (GSAM) states that contract requirements must be structured to "facilitate competition by and among small business concerns" and that contracting officers must "avoid unnecessary and unjustified bundling that precludes small business participation as contractor."

In order to discourage unnecessary bundling, GSA has issued specific steps that must be taken if an order is considered for bundling. Those steps include, conducting market research to determine if bundling is necessary, assessing the impact on small business, and determining if bundling would have "measurable substantial benefits" to the Government.

As I mentioned earlier, in addition to our agency specific procurement opportunities, GSA manages the Federal Acquisition Service's Multiple Award Schedules Program (Schedules or the Schedules Program). The Schedules Program is a standardized procurement process whereby contracts are established with firms for commercial off the shelf products, services, and solutions. The Schedules Program offers Federal agencies a broad range of products and services from private sector vendors and suppliers at prices

that have been negotiated by GSA and meet accepted levels of expertise, performance and best value.

For Federal agencies, this program represents a much more simplified procurement process. Federal agencies turn to these Schedules contracts to fulfill agency requirements, knowing that they can depend on the quality of the products or services these companies provide. And I am happy to report as noted above that 80 percent of the companies which hold GSA Schedules contracts are small businesses. The Schedules, in short, offer small businesses an expansive avenue of potential work with the Federal Government.

The ordering procedures applicable to the Schedules Program make it easier for GSA and other agencies to reach small businesses. Contracting officers ordering via GSA's Schedules may make socioeconomic status a primary evaluation factor when making a best value determination, and, GSA specifically asks our customers about their socioeconomic goals when we conduct an assisted acquisition.

Historically, however, it has taken too long to review offers and award contracts under GSA's Multiple Award Schedule Program. Under the leadership of Administrator Doan, GSA has had a number of successes in opening doors to small businesses. During the past year, we have reduced the amount of time it takes for an eligible small company to apply for and receive a GSA Schedules contract from over 157 days to 30 days.

We at GSA pledge to continue to improve, and to keep fighting, to make sure that any small company with a great idea will have a much easier path of obtaining a GSA Schedule than ever before, and to make sure that GSA does a good job of tracking that participation.

Our Office of Small Business Utilization assists small businesses by answering the many questions that are submitted by phone, e-mail, letters, and in person. We consult with most companies over the phone; however, we also conduct one-on-one counseling sessions to help companies in understanding and participating in the Federal procurement process. We also attend procurement conferences to conduct workshops that teach small business owners how to do business with GSA.

GSA has many resources available to help small businesses and provide them with useful information. One such resource is our *Doing Business with GSA* booklet, which is geared toward new and prospective contractors. It explains the process, offers practical advice, and lists helpful websites, including www.gsa.gov/sbu.

Our website also provides links to better help small businesses better understand how to get started with Government contracts. It provides them with points of contact and keeps them informed of upcoming conferences in which we will be participating.

Mr. Chairman, GSA has a strong record of supporting small businesses and small business contracting. We conduct hundreds of outreach events a year across the country

for small businesses, to open doors to Federal contracting opportunities to them, and continually work to improve on our already impressive performance record with regards to small business contracting. We share the Administration's view that small businesses are the backbone of our economy. I am sure we share this Committee's view that a healthy small business community contributes mightily to the health of our national economy.

Mr. Chairman, I thank you for the opportunity to appear before you today. I will be happy to answer any questions you and other members of the Committee may have.

Senator CARDIN. Well, thank you for your testimony. I particularly appreciate your pointing out that the Procurement Acquisition Center of Excellence is here at Bowie State University.

The three of you represent critical agencies and the opportunities for small businesses in our community. What is done at SBA, what is done at DOD, and what is done at GSA will literally affect the ability of companies to be able to grow and expand.

We could argue the percentages. There was a study done in 2006 by Eagle Eye, which you are probably familiar with that said that we missed our goal on small businesses by 3 percentage points, which is equivalent to $12 billion, which is not inconsequential. It is a lot of money.

And then we have the concerns as to whether minority and women-owned businesses are getting a fair share of the work of small businesses. In the testimonies that have been given before the Small Business Committee in the Senate, you look at the capital programs and you see the number of small business minority companies that are participating and they are not equivalent to what you would expect it to be. So we are finding problems in the development of opportunities for minority and women-owned businesses.

I really do appreciate SBA developing a scoring system on their Web page, where it tries to bring more transparency as to the success and failures of each agency. It is interesting that the two agencies that are represented here, DOD and the General Services Administration, are unfortunately both in the "red" category here, which means that maybe your percentages are OK, but there is something that needs to be improved, as you indicated through your own testimony. By the way, "red" is not good.

[Laughter.]

Senator CARDIN. "Yellow" is not that good. "Green" is what we should be striving for. I think it is helpful to have this scoring system. I thank SBA for starting it and for getting it going. But it does point out that we need to do better.

So let me first just ask the question, I can tell you, from looking at the numbers, we need to do better, so why aren't we? What changes do we need to make in order to give greater opportunities to the economic engine of this Nation, small businesses, with particular emphasis on minority businesses? Who wants to take that on? What changes do we need to make? Mr. Jenkins, do you want to start?

Mr. JENKINS. Sure, I will start. One of the things that we are looking at at the SBA, as I mentioned in my testimony, is to refocus our procurement center representatives. We believe that they play a very vital role in working with the Federal agencies and helping identify small business opportunities within their procurement process. We also, by refocusing the PCRs, we are shifting more responsibilities to our district offices and our resource partners to help us develop and create a pipeline of small businesses that can meet the needs of the individual agencies.

Senator CARDIN. As I understand, you are moving from 58 to 66, is that the——

Mr. JENKINS. Currently, we have 52 and we will be going to 66.

Senator CARDIN. Is that enough?

Mr. JENKINS. We believe it is enough. We are also looking at the use of technology. We have begun to look at something called EPCR, Electronic PCR. When you think of 3.5 million—actually, 5.5 million procurement transactions that take place, both with small and other than small, our physical PCRs are only looking at a very small percentage of that. With the Electronic PCR, our hope is that we will look at every single procurement a contracting officer does not wish to set aside for small business and be able to challenge those.

Senator CARDIN. Well, I must tell you, I am concerned as to the Administration's budget requests as it relates to the SBA. You mention in your testimony the importance of the 8(a) program, and I think you also mentioned it in your oral presentation. We also know the 7(j) program, which you mentioned. The Administration's budgets for that were reduced substantially, and I guess my concern is I hear you with a commitment to try to improve the service level so that we can get to the goals that we know are right for our country, but then I take a look at the budgets that are being submitted and it doesn't seem to balance.

Mr. JENKINS. Well, one of the challenges we have is that we are looking at a program that was created back in the 1960s. Over time, SBA has looked to improve the 8(a) program. We continue to look to improve the 8(a) program to make it a viable business development program.

One of our biggest challenges is that the 8(a) program is not a contracting program. It is a business development program. Our primary responsibility is to help develop the firms. The use of contracts is just one of many tools. And so we believe we submitted an adequate budget to the Congress in which we will leverage technology and our resource partners. We will also do a better job in realigning our staff and we think that will get us to where we need to be.

Senator CARDIN. Well, that is not true, though, in 7(j), the budget that was submitted. That actually reduced it substantially.

Mr. JENKINS. Well, it is approximately one-point—we are actually increasing the amount of work we are doing on the 7(j). For example, last year, we did about 40 cities. Our plan this year is to make our 7(j) management and technical assistance available to all 68 SBA district offices.

Senator CARDIN. Well, I don't think it adds up. I hear what you are saying, and technology can certainly make every agency more efficient. But with the challenges we are facing, the increased volume alone has been dramatic over the last 5 years of applicants in these programs. So it seems to me it is difficult to see how that could be done.

How many of these procurement center representatives "PCR" are going to be in the State of Maryland?

Mr. JENKINS. We currently have coverage for PCR—basically, our procurement center representatives cover multiple locations and some remote locations that are isolated pretty much at a particular base. We have recently reviewed all of the buying throughout the United States and we have assessed every location that we consider to be a major buying activity. Those major buying activities are the ones that are on the priority list for a PCR.

Senator CARDIN. So the answer to my question?

[Laughter.]

Senator CARDIN. How many PCRs do we have—I will even broaden it. For the District and for Maryland, how many PCRs are we going to get?

Mr. JENKINS. I believe we are looking at at least adding one. Our long-term is possibly going as high as three for this particular area—three additional PCRs. We have since moved our area office from Philadelphia to Washington, DC because of the amount of volume that goes on here.

Senator CARDIN. So DC will receive——

Mr. JENKINS. At least one in this round and we will look to increase as we——

Senator CARDIN. And Maryland will receive——

Mr. JENKINS. Well, when we say DC, we look at this area as one area, DC, Maryland, and Northern Virginia.

[Laughter.]

Senator CARDIN. Well, that is ambitious. I mean, there is a lot of——

Mr. JENKINS. Sure.

Senator CARDIN [continuing]. Of activity in that, what you just said, particularly adding Northern Virginia to the mix. And Maryland is a State that has—we are here in Prince George's County, which is one of the strongest growth areas in our State, but in the Baltimore region, we also have a need for these services. So it seems to me—I can tell you, we get numerous requests in our office of problems that are being confronted on qualifications and legitimacy of contracts and all these other problems and the concerns of bundling.

I do think that the PCRs you are referring to are going to be very helpful. I question whether the number, 66 nationwide, will be adequate, considering the challenges we are facing today and sophistication of some of the operators within the procurement system to try to circumvent the intentions of our law.

Mr. JENKINS. Sure.

Senator CARDIN. Let me move on, if I could, to give you a break for a second.

[Laughter.]

Senator CARDIN. Let me go to DOD. You obviously can't be happy about being in the "red" category.

Mr. MARTOCCIA. No, we are not happy. The way the scorecard was structured, that if you didn't make your 23 percent, in our case, you didn't make your goal, whether it reads 22.9 or 1 percent, you received a red. So we didn't reach the 2006 goal of 23 percent. Therefore, we were rated red. Now, we are working to improve the scorecard so that maybe it might have some ranges in there, so if we come close, we are not a red. But we do need to improve opportunities for small businesses within the Department.

Senator CARDIN. Well, let me mention a couple areas that have been mentioned to me over and over again as an impediment to small businesses being able to operate with DOD. One is the security clearance issues, which I hear of all the time, of concerns of moving that process in a way in which small companies can qualify for DOD contracts. The other is the surety bond issue, which is an

area that has also been one that has caused difficulty for small minority businesses to qualify. Any comments as to how we can streamline that?

Mr. MARTOCCIA. With the BRAC coming up and the surety bond issues for especially construction contracting, we work with DOD and I think—correct me if I am wrong—we are raising the guaranteed limit up to $3 million per contract, so we are working on that. I know it is at a pretty low level. And there is also some private entrepreneurs and service organizations that are helping with the surety bond issue. I know there are some veterans' groups that are helping the disabled veterans and other veteran-owned companies to gain guarantee money when they perform under construction contracts.

With regard to the security clearance, that obviously is an issue that takes time and I am really not well versed in that. I know it is difficult and time consuming for a company to get the security clearances needed, and that is out of my realm. I haven't heard too much complaints about the process, so I will have to defer on that issue.

Senator CARDIN. Well, I can tell you it is a huge problem. It is a huge problem and we need to figure out a way so that it doesn't become justification for inadequate progress being made.

Mr. MARTOCCIA. Are you talking about the time——

Senator CARDIN. Yes.

Mr. MARTOCCIA [continuing]. It takes?

Senator CARDIN. The whole process. We have had testimony before our Committee and we will have more today on the issue of security clearance issues, that it has prevented small companies from participating in contracts and bid making process. It has been a problem, getting the clearance issues for small companies to fully participate.

Mr. MARTOCCIA. Again, I know that it is time consuming and there are facilities clearance and individual clearances, but I will look into it when I get back.

Senator CARDIN. Well, it——

Mr. MARTOCCIA. I mean, I just——

Senator CARDIN. And that is all I can ask you today, I can say that NSA has developed a streamlined process to try to make it work, where we have had much more difficulty with DOD. So one of the things I would ask you to do is check what was done at NSA, because I think greater progress has been made there on the security clearance issues than within the Department of Defense.

Mr. MARTOCCIA. I will do that.

Senator CARDIN. Now, we have BRAC coming up. Maryland is one of those States that is very fortunate. We are going to see a lot more economic activity as a result of BRAC and it will provide many, many more opportunities for small businesses. I must tell you, there is nervousness among the business community as to how those contracts are going to be determined and whether there is sensitivity in the Department of Defense using its leverage to make sure that when you have an expanding pie, it gives you a greater opportunity to expand with small business and minority businesses because you are not taking work away from companies. There is a concern that we might miss this opportunity by just sitting back

and letting the procurement process work its way without priority leadership.

Mr. MARTOCCIA. We work with the Small Business Administration's procurement center representatives you were just talking about, and DOD has, I think, a pretty effective team of small business people looking at requirements every day for opportunities for small businesses, along with the program managers. And BRAC obviously is an opportunity well suited for strong participation of small businesses. We had a meeting, an outreach meeting in my office—this happened to be a veterans' group asked for it and we put together a program and there are actions being taken to set aside many requirements for small businesses in the BRAC.

So we are going to focus on it. My boss is extremely sensitive to small business and looking for participation of small businesses. So you can be assured through the services and the components that when they go out on their requirements, that they look to small businesses first.

Senator CARDIN. I appreciate that, and I will just underscore this point again. When you have an expanding pie, which is not normally the case today in government procurement because so many budgets have been cut and so many areas have been brought back that it is difficult to expand opportunity when companies are trying to preserve a workforce. Here, we are talking about expanding a workforce, expanding opportunity. It would be, I think, a real tragedy and loss of opportunity if we didn't use that to really reach out. To me, we should be going well beyond the percentages. This is a chance to really expand the base and opportunity and I just hope DOD has help, because again, you are the leadership agency on this, on BRAC, and we need your help. Otherwise, I don't think it is going to be done on base. I think it really requires——

Mr. MARTOCCIA. Sir, we will be focused on the requirements that come out of BRAC for small businesses. I can assure you of that.

Senator CARDIN. Well, I want to go beyond requirements. I want a sense that this is an opportunity that we can really make some progress that otherwise would not be available to a community, so I just urge you to—we will be watching on that. I will be very happy to work with you in trying to figure out the ways in which we can work together.

Mr. Rigas, I want to talk about the GSA Schedule Program. I was pleased to hear that 80 percent of small business is in that number. I know you are not going to be surprised to learn that there are more concerns that are expressed to us with companies trying to get on that Schedule than probably any other single issue that we get relating to your agency. I know it is a ticket to business and economic success——

Mr. RIGAS. Right.

Senator CARDIN [continuing]. And you mentioned 80 percent. Do you know how minority businesses are represented in that 80 percent, women-owned businesses? Do you have numbers that break it down a little bit more than just small businesses?

Mr. RIGAS. Right. I don't have those with me, but I would be happy to get back to you for the record——

Senator CARDIN. If you could, I would appreciate knowing that——

Mr. RIGAS. OK.

Senator CARDIN [continuing]. Because I must tell you, just my own observation is that there is still room for significant improvement on how a company gets scheduled. And again, GSA is marked "red" on this report, which is again something you don't want to see.

Mr. RIGAS. Right.

Senator CARDIN. I would urge you to look for creative ways to try to improve that rating. I think the schedule program is one that could really be a benefit to minority businesses and I urge you to——

Mr. RIGAS. Yes, and that is actually one of the areas that we are talking to SBA about right now in terms of they formed a committee with regards to the scorecard, because this, as you know, was the first year that they have come out with a scorecard, and as with anything, the first time you do it, it is a learning process. One of the things we are talking to SBA about is GSA's unique role in the procurement process in the Federal Government in terms of being a catalyst for other agencies to buy from small businesses, which those dollars rightfully go to the procuring agency. So even though we make all this effort to award 80 percent of those schedule contracts to small businesses, that effort and those contract dollars are not—there is no recognition of that in the scorecard in terms of the efforts we make with regards to small business.

And the other point that we are in the process of discussing is the fact that GSA is presently tasked with building all Federal buildings for the executive branch and the judiciary and those, while typically procurement dollars are credited back to the agency in terms of how they are measured for your small business goals, GSA is—we are required to count those dollars as GSA procurement dollars, even though we are building a $200 million courthouse for the judiciary or a Federal building somewhere. Those are all counted as GSA procurements, which—and as you know, the limit on bonding capability that SBA has right now is $2 million. It is moving up to three, but it still makes it very difficult for a small business to be able to win a contract to build a $200 million courthouse, or even a $50 million courthouse.

But we are definitely making strides. Our preliminary numbers show that we have increased our small business procurement within GSA from 32 to 35 percent this past year and our administrator is—she is the biggest advocate, I can assure you, of small business that we have because she used to be a schedules contract holder and has been there on the ground and understands what it means to be a small business trying to do procurement and reminds us of that on a regular basis.

But I would be happy to consider and hear any suggestions that you guys might have in terms of what we can do to improve, as well.

Senator CARDIN. Well, I thank you for that. We will have suggestions because I think it is a very important program.

When you get back to us on the numbers within the schedule contractors on minority and women, it would be useful also if we had an idea about what percentage of procurement goes through schedule contractors and also the dollar volumes. I understand you

said 80 percent are small business, but how much does that represent in the dollar volume of the procurement under schedule contractors? I think those numbers would be helpful for our Committee to try to evaluate the importance of the Schedule Contract Program, because I can tell you, again, we get a lot of concerns from minority businesses particularly about getting on the schedule.

Mr. RIGAS. Right. Yes, the overall number for schedule dollars going to small businesses is 37 percent.

Senator CARDIN. On schedule, or——

Mr. RIGAS. Yes. In terms of procurement dollars across the Federal Government that go to small businesses via the GSA schedules, 37 percent of all of those dollars——

Senator CARDIN. Go to——

Mr. RIGAS [continuing]. Go to small businesses.

Senator CARDIN. And I am not questioning that number, compare it to the numbers. That is 80 percent that are on there, and they get 37 percent of the——

Mr. RIGAS. Right.

Senator CARDIN. So we are talking about the same—OK. We will be coming to you with suggestions.

Mr. RIGAS. OK, great. I welcome them.

Senator CARDIN. Mr. Jenkins, I want to go back to the arithmetic here again.

Mr. JENKINS. OK.

[Laughter.]

Senator CARDIN. I am a little concerned about your budget and the support that you have and I want to go back to these PCRs and have a better understanding of the procedures you are using for allocating these new services. My staff tells me that there are currently over a million contracts nationwide, and I guess my question is how many Federal contracts will be supervised or under the responsibility of a PCR? Is there a guideline here that you are looking for? You mentioned remote areas. What are the standards being used to make sure that our community has the appropriate service level?

Mr. JENKINS. Sure. Well, first of all, the PCRs are assigned to buying activities. Some are assigned as a primary location. Others have multiple locations. Our standards for establishing where a new PCR would come in would be looking at whether or not it is what we call a major buying activity, an activity to purchase roughly $100 million or more in contracts. Those become our primary sites or priority sites to place a PCR.

Senator CARDIN. And we will have those numbers for us to be able to review as to where they are being located?

Mr. JENKINS. Oh, sure. Yes.

Senator CARDIN. Obviously, I want to make sure that all the areas of the country are fairly treated. I can tell you that we need the services here, and I am sure my colleagues from around the country feel equally strong for their particular region.

Let me just conclude by asking you about unbundling. This has been identified as a problem. We have had reports demonstrating we have to do a better job, that it has been used and abused. Can

you just give us an update of where we are in monitoring bundling activities?

Mr. JENKINS. OK. Well, reviewing the bundled contracts is part of the day-to-day activity of a PCR and we work very closely with the agencies. There are set criteria on which a contract can be classified as a bundle. All of the Federal agencies have those and we are working with the agencies to make sure that they understand what constitute a bundle and that they are, in fact, reporting those to the SBA.

One of our key ways of looking at these activities and these agencies is to look at whether or not they are achieving their goals. As we talked about placement of the PCRs, we may have a major activity where a PCR is not located, but that agency may be meeting their goals, and therefore we think it is important to put the PCR in another location where they may not so that we can look at things such as contract bundling, we can look at whether or not they are setting these contracts aside.

We believe the scorecard is going to be the whole catalyst behind it. It gives everyone the clear tool. It gives our staff the tool of who is and who is not meeting their goals. It gives the agencies a clear indication of whether or not they are meeting the goals.

As Mr. Rigas said, we have established a committee to look at not only the scorecard and the criteria that we use in the scorecard going forward, but we are also looking at the goals. Agencies are not scored on the government-wide 23 percent small business goal. Each year SBA negotiates goals with all of the Federal agencies. Some agencies, such as GSA, may have a very high goal compared to the 23 percent, and we are looking at those criteria, as well, in terms of how we set the goals for each agency with the intent that we will get to the overall Federal Government numbers of 23 percent.

Senator CARDIN. I mentioned in my opening comments subcontractor issue, prime contractors, and potential concerns about payments by primes to their subs, the abuse where primes getting contracts do not give the amount of work that was initially committed to subcontractors. Can you tell us the status of those types of concerns, how they are being handled by the SBA?

Mr. JENKINS. Sure. Well, let me first say that, this was our first full year of having a system called ESRS, which is the Electronic Subcontracting Reporting System. DOD was able to get their subcontracting data in, so we have a full year of electronic data. We now can look at each of the large business primes and determining whether or not they are meeting their subcontracting goals. We coordinate with the Federal agencies.

Part of what the PCR does, as well, is not just the prime side. When a PCR goes into an agency and they look at a procurement, they also look at the subcontracting goals that were established in the contract or the potential contract bid by a large business and we question those and we can protest those in terms of we believe they are too low. We are looking at those, as I mentioned.

Our plan is to continue to work with the agencies to do more training, to make sure that they understand the requirements. There have been some new folks that have come into the con-

tracting procurement arena and we are doing more training of all of the small business programs, but specifically the subcontracts.

In terms of actually resolving a dispute between the prime and the subcontractor, SBA does not have what we call privity of contract, meaning we can't necessarily engage in that dispute because we don't have a relationship with the subcontractor themselves. We talk to the agencies when we are approached on those problems and we ask the agencies if they can get involved or if they can put some procedures in future contracts that deal with those kinds of problems and relationships.

Senator CARDIN. So by the end of fiscal year 2008, you will have 66 PCRs?

Mr. JENKINS. That is our plan, yes, sir.

Senator CARDIN. And you will share with this Committee the standards being used for the allocation of those?

Mr. JENKINS. Yes.

Senator CARDIN. I appreciate that. Is there an objective as to a maximum workload for any PCR?

Mr. JENKINS. No, because the key is we try to look at as many procurements as possible in terms of the PCR. As I mentioned, if it is a large buying activity in a remote location, more than likely, that is going to be the primary site. But if there are multiple activities that are very close together, for example, the Washington, DC area, we may have one PCR assigned to five, six locations and they still may be considered major activities and they do some for——

Senator CARDIN. The reason I ask that question is that I am not convinced 66 is the right number. I don't know. But it seems to me with the increase in volume that you have been talking about and the increase in responsibility that the work is critically important to achieving our objectives. I would like to know that we have some process to evaluate those numbers and are prepared to recommend larger numbers if they are needed.

Mr. JENKINS. Yes. Well, as I mentioned, one of the critical pieces is we are shifting some work that the PCRs had done in the past. For example, our PCRs, the 52 that we had on board in fiscal year 2007, counseled and trained probably 20,000 to 25,000 small businesses. That workload is being shifted to our district offices and our resource partners. Just this past year, we have literally pulled every single SBA employee in the field into a training activity called SBA University in which we train them on the basic procurement information so that they can pass that kind of information on to the small businesses to free up the PCRs.

Senator CARDIN. Once again, let me thank our three witnesses from our governmental agencies for being here. I found this very helpful to understand the scope of our problem. I would just comment in conclusion that I think it is difficult to achieving the objectives, Mr. Jenkins, you have mentioned, with the budget that had been submitted.

I am hopeful that the budget that you are going to receive will allow you to achieve a more ambitious program. I am pleased to hear the commitments made by all three agencies to not only achieve the number of the goals that are set out there, but to achieve what is clearly the intent of Congress, and that is to provide opportunities for small businesses not only to grow and flour-

ish, but to continue to be a dominant part of our economy with particular emphasis on minority and women-owned businesses.

Thank you all very much for your testimony.

[Applause.]

Senator CARDIN. We are going to take a brief break while we reconfigure for the next panel.

[Recess.]

Senator CARDIN. We are going to get started. I must tell you, I very much appreciate the incredible attendance we have here. It is really——

[Applause.]

Senator CARDIN. And I am glad that some networking is being done here, too. That is also good.

[Laughter.]

Senator CARDIN. So I hope as a result of today's hearing, there will be some business connections that are made. That is one of the side advantages. I was saying, we are very pleased that we have such a large attendance and we thank you all for your interest in this subject.

During the short recess, I had a chance to talk to some of you. I want to assure you that under our committee procedures, the record will be left open for 2 weeks, so this is not the end of this hearing. There are additional questions that can be asked and we will follow up on some. Obviously, there is a limit to the amount of time that we have with the witnesses being personally present.

I do want to acknowledge the presence of those representing our veterans and the veterans' community, the disability community. These are all important goals that we have to increase activities, economic activities for our veterans and our disability community and those issues will be taken up by our Committee and our records will be clearly supplemented in those areas.

In regards to the women's programs, during the break, some additional questions were brought to our attention and we will make sure that they are also—my staff informs me that we have taken up some of these issues, but we will make sure that those questions are asked of our administration officials and that our Committee has ample information in order to move forward in all those areas.

So we always appreciate the input that we are receiving. Our objective is to increase economic activities in those areas that historically have not had the type of attention from our Nation as it should, which affects not only those communities that have not had the opportunity, but affects our entire country. And that is our objective, to expand economic opportunities for all of the vulnerable groups in America that have been historically denied the full economic participation in our country.

So with that, we will start the second panel. I am very excited about the witnesses that are here. I know them all and they have been extremely helpful in our community here in Maryland.

We will start with Wayne Frazier, who has close to 30 years of experience in development, finance, banking, and investment fields. His strong leadership in project financing and public-private development contracts have been instrumental in garnering new business and growth for numerous small and minority business con-

tractors in the State of Maryland as well as the Mid-Atlantic region.

Currently, he is the president of the Charlotte Development Company, a real estate development firm, WRF Financial Services Company, and the Maryland-Washington Minority Contractors Association. Then-Governor-elect Martin O'Malley asked him to serve as chairman of the Governor's Minority Business Enterprise Transition Team.

Mr. Frazier, it is a pleasure to have you with us.

STATEMENT OF WAYNE R. FRAZIER, SR., PRESIDENT, MARYLAND-WASHINGTON MINORITY CONTRACTORS ASSOCIATION, BALTIMORE, MD

Mr. FRAZIER. Yes. Good afternoon. Good afternoon, Senator Cardin, our Senator from Baltimore. Now we're honored that he is everybody's Senator. But Senator Cardin, I am so glad that you have called for this hearing because America's minority business is in trouble. Why? Because discrimination is running rampant throughout Federal Government procurement agencies.

I think that I am qualified to sit here and discuss this issue this morning simply because back in Baltimore, they call me the sheriff, the police of MBE, because I fight for inclusion for minority businesses. My testimony shall comprise of three prominent issues that surfaced during interviews that I have had with about 12 minority businesses hailing from Montgomery County, Prince George's County, Baltimore City, Baltimore County, Anne Arundel County, and Queen Anne's County. All of those businesses are attempting to do business with the Federal Government or doing business.

It came to my surprise that the No. 1 issue dealing with minority businesses attempting to do business with the Federal Government is bundled contract procurement. The No. 2 issue is financing. And the No. 3 is surety.

The issue centering around with bundled contracting with so many governmental agencies are procuring business. The General Services Administration, the GSA Schedule, the Multiple Task Award Contract, the MTAOC, the Indefinite Delivery Indefinite Quantity Contracting, IDIQ, Task Order Contracting, TOC, Job Order Contracting, JOC, SBA Small Disadvantaged Business, Disabled Service Veterans, Historically Under-Utilized Businesses, HUBZones, all in some shape, form, or way compete against one another and promote alternately discrimination.

The term constantly used around government procurement offices is, "What is the flavor of the day?" "What is the flavor of the day" can be heard from procurement offices at various agencies when selecting how to procure work.

Bundling contracts, according to the interviews, no matter what method selected by the procurement office, was the preferred scope of work. Now, we know that bundling has been outlawed. We know that. But it exists. Bundling appears to be easier for procurement officers to issue work, but is detrimental to small and minority businesses to compete against established, financially stronger firms. The general rule is that the stronger financially one's firm is, the more sophisticated and experienced the business has become. How can larger small businesses compete fairly against

smaller or real small businesses? There is no way that the two can compete. That has to change. These so-called strong small businesses compete equally with struggling small businesses. By adding minority business to the equation, the exclusion gets worse. Unbundling of procurements should commence to open up competition with more work put out to bid as opposed to adding task orders after task order after task order to a contract.

Other complaints surface during the interview process that the wonderful Native Alaskan firms can come to the lower 48 States plus Hawaii and compete the same as those firms domiciled in their States. That is wrong. We shouldn't allow that type of competition to come to Maryland, for example. And guess what? The task orders sometimes continue to get added for work that wasn't even part of the original scope, wasn't even part of the original scope, but yet it gets added. I am not beating on the Native Alaskan firms, but that is just an example.

GSA Scheduling is worse, and the flavor of the day is service-disabled veterans. Why? Because of the war and GSA Scheduling.

Now, financing was No. 2. The folks I interviewed had no problem with the long-term SBA financing that is offered. It works well. The concern is the short-term, less than 1 year, financing, Capline. That is the name of the product that the SBA is marketing. That is a product that will only guarantee if you win a contract and then they will take your receivables as collateral. But the bankers and the borrowers complain. The bankers say it is too expensive. They can't make a profit off of the fees as well as the rate because there is so much paperwork, so much due diligence involved. And the small business person says, hey, I can't run my business with pile-on after pile-on of paperwork. We need to address that. Remember, once you win a contract, the trials and tribulations just begin. If you can't get financing, forget it.

The third thing that was brought to my attention was the most startling, and that is the surety bond. I heard you mention that earlier, Senator. Right now, corporate sureties, the Travelers, the Mountbattans, the USA Surety, they have a monopoly, with Travelers the biggest monopoly. Small businesses dealing with the Federal Government cannot get surety bonding. Again, no financing, no bonding, no contract, no award, no way to compete.

There is an option. The option is a new product that was approved—excuse me, it is not new. It has been around just as long as corporate sureties have been around. It is called the individual surety. But the problem that we have with the individual surety is that it was approved last year in the State of Maryland unanimously in the General Assembly. Both the House and the Senate approved it with no dissenting votes. The problem is that, the Federal Government, on the other hand, won't accept it. The individual surety is a group of rich, I mean rich, individuals. Criteria, $2 billion or more in assets, not net worth, assets that you can pledge in order to back the bonds. The problem is, the Federal Government won't accept it because our belief is that the procurement officers are in line with the corporate surety brokers and dealers and they will not accept because of competition. And we also feel that that is discriminatory, as well. There are solutions, but the Federal Government won't consider them.

I appreciate you listening to me this afternoon and I hope that some of these suggestions will go a long way. Thank you.

[The prepared statement of Mr. Frazier follows:]

Small Business Committee Hearing
On
"Access to Federal Contracts: How to Level the Playing Field"

Monday, October 29, 2007

TO:	FROM:
Clerk of the Committee U.S. Senate Committee 428 A Russell Senate Office Building Washington, DC 20510	Wayne R. Frazier, Sr., President Md. Washington Minority Contractors' Association 1107 North Point Blvd., Ste 227 Baltimore, MD 21224

Most Honorable Members of the Committee:

I hereby submit the following testimony based on conversations with third party small and minority business owners, consultants and professionals who earn a living assisting these businesses doing business with the United States Government. The interviews were conducted based upon a request from Maryland's inclusive Senator Benjamin Cardin, that I bring forth compelling issues and concerns that affect minority and small businesses doing business with Federal Government.

As stated in my biography, submitted herewith, my professional background in banking, finance, small business ownership, contract negotiation, mediation, marketing, and advocacy for minority business qualifies me to discuss issues such as "Access to Federal Contracts and How to Level the Playing Field." This testimony shall be comprised of three prominent issues that surfaced during the interviews; Bundled Contract Procurement, Financing and Surety. It came as a surprise that all of the responders ranked discrimination in contract procurement as their top concern. The issue centers around on how government procures i.e. General Services Administration Schedule (GSA Schedule), Multiple Award Task Order Contract (MATOC), Indefinite Delivery Indefinite Quantity contracting (IDIQ), Task Order Contracting (TOC), Job Order Contract (JOC), SBA-8A, Small Disadvantage Business (SBDC), Disabled Veteran, and Historically Underused Business (HUB Zone) all in some way and shape over lap, compete against one another, promote bundling and discriminate. The term constantly used is "what is the flavor of the day" can be heard from procurement offices at the various agencies when selecting how to procure upcoming work. The two prominent forms now appear to be GSA Schedule and Service Disabled Veterans.

Bundled Contract Procurement

Bundled contracting, according to all of the interviewees, no matter what method selected by the

procurement officers was the preferred way to scope the various task orders. Bundling may be easier for the procurement officers to issue work but it is detrimental to small and minority business to compete against established financially stronger firms. The general rule is that the stronger financially ones business is the more sophisticated and experienced the business has become. Thus, making it impossible for minority and small business to compete. Furthermore, the playing field is tilted in favor of the financially stronger firms and they are able to bid lower because of their overall strength. Yet these same so called "strong" small businesses are allowed to compete equally with the real struggling small businesses. By adding minority business to the equation discrimatory exclusion gets worse. There needs to be a clearer declination of small business size when characterizing the various procurements.

The unbundling of procurements should commence to open up competition with more work put out to bid. As opposed to adding on task orders to existing contracts. It was reported that procurement officers are allowed to conduct business this way as a "reward to existing relationships for whatever reason and it making their jobs easier." Furthermore, complaints were heard that the current groups of procurement officers do not experience the commitment or spirit of inclusion as their predecessors. Multiple complaints surfaced about Native Alaskan firms having the ability to procure in the lower forty-eight (48) states with task order after task order add ons and many unrelated to the original task. Minority business owners in particular express feelings of unfair practices being conducted by some of these firms, who enjoy favorable procurement rights over all of the other programs. It was said that our government has reduced delivery quality when bundling occurs because basic fundamentals of procurement are replaced by how much can be saved by striking competition. Yes, line item staff procurement expense may be reduced because less staff is needed but overall cost savings is questioned because little to no competition occurred.

Financing

Overall, the interviewers were pleased with the various long term financing programs offered by the SBA loan guaranty program. The major compliant is with the Capline product for short term financing less than one year. This product offers participating banks the opportunity to underwrite and approve credit facilities under monitored account receivable lines. Capline though needed as a tool to assist growth, should be augmented with other short term products. Both, bankers and borrowers complain of Capline's cumbersome nature of intensified due diligence. Bankers complained that it cost them more to handle this line of business than what they earn on rate and fees plus the risk is higher in the current economy. Borrowers, especially small businesses complain that it is difficult to stay ahead of the paper game and that one must produce an invoice in order to receive funding.

Perhaps a solution is to allow more industry conventional short term financing under traditional 30, 60, or 90 notes or revolving credit facilities where less daily oversight is required.

The issue to keep in mind is that government contracting does not provide mobilization funds to get started. One can be fortunate to win a contract but may not proceed because lack of funds and no conventional bank financing with SBA Guaranty's.

Surety Bonding

The dilemma with bonding small and minority businesses starts with a thorough review of financial statements. Corporate sureties which monopolize the surety industry commence review of revenue size, cash flow, current assets, debt, contingent liabilities; retained earnings, net worth, and contract backlog which are key areas to be analyzed. Solvency of these ratios plays significant rolls when surety companies consider whether or not to approve a bond. Very small businesses will not be considered by corporate surety's approval at all and currently they have only one place to go. Midsize to large-small businesses may have existing relationships with regional corporate sureties but due to multiple awards, task orders and contract methods their existing corporate sureties may be too small to write the appropriate coverage or may simply be uncomfortable in taking on the additional risk. Several of the firms interviewed stated that this has happened resulting in them being unable to move forward with the award. Creative attempts to form joint ventures with 8(a) firms and larger general contractors often times become cumbersome or result in the small (8(a) firm giving up control to the larger firm. Therefore, the only hope for some businesses is to consider individual surety bonds as the only solution. However, it's known that many contracting agencies, including the United States Navy will not accept such bonds or try not to. This violates FAR. The discriminatory nature of the contracting officers needs to stop. The FAR needs to be amended to allow irrevocable trust receipts and allow more than one stock exchange. For example, FAR will only allow marketable securities with NYSE. Any stock, for example from NASDAQ is not accepted. Microsoft is traded on NASDAQ so it would not be accepted. FAR needs to be updated to allow more clarity for accepting Individual Surety Bonds, not declining them. Both individual surety and corporate surety can exist in the same market by serving their perspective Clients.

I pray I have briefly shed some light on what ails small and minority business attempting to do business with our United States Government. In the process, I have offered solutions to be considered. Senator Cardin, I appreciate the opportunity to research and provide you with the results. May the necessary eyes of changes view this and guide it to compassionate reform.

Respectfully,

Wayne R. Frazier, Sr.
President

Senator CARDIN. Mr. Frazier, thank you very much for your testimony.

We have been joined by my colleague from the Third Congressional District of Maryland, Congressman John Sarbanes. Congressman Sarbanes has been one of the leaders in the House of Representatives on the issues of fairness in government procurement and the issues of small and minority businesses and I am very pleased that he could find time to join us at this hearing and I would recognize Congressman Sarbanes for the comments that he might want to make.

OPENING STATEMENT OF THE HONORABLE JOHN P. SARBANES, A UNITED STATES REPRESENTATIVE FROM MARYLAND

Representative SARBANES. Thank you very much. I appreciate the opportunity and I want to thank Senator Cardin for holding this hearing on a critical issue, which is what is happening in terms of procurement with respect to minority and women-owned businesses.

Your testimony, for starters, points out a lot of the issues that are faced, particularly now with BRAC coming and the other opportunities that are presenting themselves. If we are not ready to take advantage of that on behalf of small business and minority-owned and women-owned businesses, we are going to look back 10 years from now, 15 years from now, or even 6 months from now and wish that we had been better prepared to make sure that these opportunities are available so that they are opportunities and they are not missed opportunities.

I don't think there is anybody better situated than Senator Cardin to lead an inquiry into this, given his experience, and also given his attitude of optimism. I don't know if anyone saw the paper today, the Washington Post article, but in terms of being able to get things done, and you can get things done even in a body as difficult as the U.S. Senate, you can get things done if you bring a can-do attitude, which is clearly the attitude that Senator Cardin has brought to the job even in the first few months. I am happy to participate in this hearing and to learn as much as I can about the issue so that I can work as hard as I can to make sure we move forward.

So thank you again for the opportunity to be with you today, Senator.

Senator CARDIN. Congressman, I really do appreciate you coming by. As I said, most people know Congressman Sarbanes' district includes Baltimore City and Baltimore County, Howard County, and Anne Arundel County. It comes right up the border here on Prince George's County. Obviously, the small business issues are critically important to all areas of Maryland and we thank the Congressman for joining us today for as long as you can. We understand your schedule may very well require you to leave and I thank you for coming by.

I also want to acknowledge that Steve Umberger was here, who is the District Director of the Small Business Administration. He is still here. Thank you. Thank you very much. We have had a wonderful working relationship with our office and we thank you

very much for the assistance that you have been able to give all of us in trying to do what is right for small business here in Maryland. Thanks for being here. I appreciate it.

We will now hear from Petey Green. Petey is the co-founder and president of the Prince George's Black Chamber of Commerce. The Prince George's Black Chamber was founded in February 2004 as an advocacy and educational organization representing small local and minority-owned businesses. Petey is also co-founder of the Prince George's Classic, a 3-day cultural celebration of community and education culminating with a football game at FedEx Field in Landover between two historically Black colleges.

Petey Green is involved in many charitable activities, including the Haines Frederick Scholarship Fund, the Coalition of Concerned Black Christian Men, Prince George's Financial Services Corporation, past president of Prince George's County Board of Trade, Prince George's Business Alliance for Education, the Business Roundtable for Education Achievement, Counts Program, and the list goes on and on and on.

It is a pleasure to have you with us today, Mr. Green.

STATEMENT OF HUBERT "PETEY" GREEN, PRESIDENT, PRINCE GEORGE'S COUNTY BLACK CHAMBER OF COMMERCE, OXON HILL, MD

Mr. GREEN. Thank you. Good afternoon, Senator Cardin and Congressman Sarbanes and Committee members. My name again is Petey Green. I am the president of the Prince George's Black Chamber of Commerce. It is truly an honor and a privilege to appear before you today and share my views and those of the Prince George's Black Chamber of Commerce in the area of Federal contracting.

I would first like to thank you for bringing government to the people of Prince George's County, especially to our institution here of higher learning, Bowie State University.

Incorporated in February 2001, the Prince George's Black Chamber of Commerce is a Maryland-based business association representing small, local, and minority-owned businesses as an advocate and educator. We are an affiliate of the National Black Chamber of Commerce. We are a 501(c)(3) non-profit, non-partisan, nonsectarian organization dedicated to the empowerment of minority communities. We promote and enhance the visibility of our business community, address institutional barriers that impede business progress, and provide support and resources that empower our members to grow their businesses and enrich their lives.

We are grateful for the daily sacrifices that small and minority-owned businesses and their families make in their efforts to achieve the American dream of entrepreneurship. Small businesses are essential to America's prosperity. Their drive, creativity, and innovation are the hallmarks of entrepreneurship and the key for job creation and economic growth.

Small and minority-owned businesses represent more than 90 percent of all America's employers. Small business owners are often found in unusual places. They frequently react to negative conditions by tightening their belt, hoping to ride out their storm. Even

when it is raining gloom, they fold up their umbrellas and see some sunshine.

But the business world in which they are operating has changed dramatically and the pace of change has accelerated at an alarming rate during the past few years. Today, these entrepreneurial businesses face major challenges. The most significant challenge has been the globalization of business, which has intensified the competitive pressures.

We recognize that it is not the role of government to create wealth, but to create an environment in which people are willing to take risk, to risk capital and personal property to achieve the American dream of success and prosperity. You accomplish this through a variety of financial, technical, and procurement assistance programs as well as counseling and training partnerships. You focus on customer satisfaction by streamlining services to small businesses. The Government needs to increase the number of small businesses owned by minorities, women, low- and moderate-income people. You must find a way to help these entrepreneurs overcome the challenges and reap the rewards of successful small business ownership.

There are a number of steps to take to remedy the situation. In order to achieve the mission, we must first level the playing field. Where disparities exist, we must remove the barriers. While financial barriers often impede the progress of small and minority-owned businesses, access to market is as important as access to capital.

The second and most important remedy is to create a single source certification that would open more doors and opportunities for the entrepreneur. As it stands today, Federal and State agencies have their own certification requirements with little or no reciprocity between them. This practice limits the opportunity to those minority and women business enterprises who possess the particular agency certification. A single source certification would open the doors of opportunities to all. Multiple certifications can be extremely costly to small and minority business owners and they are often too pricey to obtain. Minority-owned enterprises have been around for many years, yet many still struggle because of lack of capital and access to markets.

Just as access to capital and markets are important, it is also important that regulatory barriers be addressed. Small and minority-owned businesses need to be protected against the negative effects of burdensome Federal agency regulations. Tearing down regulatory barriers to job creation and giving small and minority-owned business owners a voice in the complex and confusing Federal regulatory process is key and essential to the overall success of the small and minority-owned business community.

Often hard to prove but seems to be running rampant throughout the small business community is the ugly head of discrimination. In order to level the playing field, there must be a wholesale reform of minority business programs at the State and Federal level. The State of Maryland recognized the fact that discriminatory practices existed throughout its agencies and took steps during the Minority Business Reform to remove them by passing cutting-

edge legislation that could serve as a model for Federal and State agencies throughout America.

Key components of the legislation dealt with the relationship of prime contractors and subcontractors as they related to minority participation goals. A number of prime contractors with minority subcontracting goals didn't even bother to look for qualified MBEs to do the work. Instead, they automatically sought and received waivers that freed them from meeting their subcontracting goals. After a commission study was released, legislation requiring prime contractors to name their MBE subcontractors at a time of bid and use them if awarded the contract. It also created a Small Business Reserve Program which reserves 10 percent of contracting dollars in 22 State agencies exclusively for small businesses, which created a pool of new prime contractors. It doubled the MBE personal net worth cap to $1.5 million for State contracts and established a commercial non-discrimination policy.

This kind of sweeping reform at the Federal level would also aid immeasurably in leveling the playing field and creating access to Federal contracts for small and minority-owned businesses.

On September 27, 2007, Anthony Robinson, President, Minority Business Enterprise Legal Defense and Educational Fund, and someone I have a great deal of respect for his commitment to ensuring a level playing field for minority businesses, stated in his testimony before the U.S. House of Representatives Subcommittee on Government Management, Organization, and Procurement of the Committee on Oversight and Government Reform, and I quote, "The reasons minority-owned firms are not fully participating in the market are many, not least of which is discrimination."

The Kaufman study cited several reasons after concluding the gap that exists has not in any way been caused by a lack of effort on the part of minority entrepreneurs. The first reason cited by the foundation was that "discriminatory conditions that previously existed were deep and pervasive and have not been fully reversed," unquote. That is a tragedy, Senator. Government must prove its commitment to minority businesses by ensuring agencies such as the Small Business Administration are working to remove the disadvantages and increase the opportunity to access the marketplace as well as empower the small business community through education and training.

I would like to leave here today confident that the Small Business Administration will enforce Federal regulations that guarantee a good faith effort is put forth by governmental agencies to ensure minority-owned businesses have a fair and equitable chance at contracts and subcontracts on government projects. Congresswoman Gwen Moore of Wisconsin said, and I quote, "that it was clear to her that one of the next frontiers in the fight for civil rights is economics, that America is a capitalist society and until minority businesses have the same access to Federal contracts and subcontracts as other businesses, there is little hope for economic equality," unquote.

Mr. Chairman, I thank you for the opportunity to present my views. We stand ready at the Prince George's Black Chamber of Commerce to assist in the effort to achieve parity and to serve in

any way that we can to make a difference in the lives of small local and minority-owned businesses. Thank you.

[The prepared statement of Mr. Green follows:]

Testimony of Hubert "Petey" Green, President
Prince George's Black Chamber of Commerce, Inc.

Before the Senate Committee on Small Business
Bowie State University
Bowie, Maryland
October 29, 2007

Good afternoon Mr. Chairman and members of the committee. My name is Hubert "Petey" Green and I'm President of the Prince George's Black Chamber of Commerce.

It is an honor and a privilege to appear before you today and share my views and those of the Prince George's Black Chamber of Commerce in the area of federal contracting. I would like to thank Senator Cardin for bringing the government to the people of Prince George's County and to this fine institution of higher learning.

Incorporated in February 2001, the Prince George's Black Chamber of Commerce, Inc. (PGBCC) is a Maryland-based business association representing small, local and minority-owned businesses as an advocate and educator. PGBCC, an affiliate of the National Black Chamber of Commerce (NBCC), is a 501 (c) (3) nonprofit, nonpartisan, nonsectarian organization dedicated to the empowerment of minority communities. We promote and enhance the visibility of our business community, address institutional barriers that impede business progress and provide support and resources that empower our members to grow their businesses and enrich their lives.

We are grateful for the daily sacrifices that small and minority-owned businesses and their families make in their efforts to achieve the American dream of entrepreneurship. Small businesses are essential to America's prosperity. Their drive, creativity and innovation are the hallmarks of entrepreneurship and the keys to job creation and economic growth. Small and minority-owned businesses represent more than 90 percent of all American employers. Small business owners are often found in unusual places. They frequently react to negative conditions by tightening the belt, hoping to ride out their storm. Even when it's raining gloom they fold up the umbrellas and see some sunshine. But the business world in which they are operating has changed dramatically and the pace of change has accelerated at an alarming rate during the past few years. Today these entrepreneurial businesses face major challenges.

The most significant challenge has been the globalization of business which has intensified the competitive pressures. We recognize that it is not the role of government to create wealth, but to create an environment in which people are willing to take risks, to risk capital and personal property to achieve the American dream of success and prosperity. You accomplish this through a variety of financial, technical and procurement assistance programs as well as counseling and training partnerships. You focus on customer satisfaction by streamlining services to small businesses. The government needs to increase the number of small businesses owned by minorities,

women, low and moderate-income people. The government must find a way to help these entrepreneurs overcome the challenges and reap the rewards of successful small business ownership.

There are a number of steps to take to remedy the situation. In order to achieve the mission, we must first level the playing field. Where disparities exist we must remove the barriers. While financial barriers often impede the progress of small and minority-owned- businesses, access to market is just as important as access to capital. The second most important remedy is to create a single source certification that would open more doors of opportunities for the entrepreneur. As it stands today, federal and state agencies have their own certification requirements with little or no reciprocity between them. This practice limits the opportunity to only those Minority and Women Business Enterprises who possesses the particular agency's certification. A single source certification would open the doors of opportunity to all. Multiple certifications can be extremely costly to small and minority business owners and they are often too pricey to obtain. Minority owned business enterprises have been around for many years, yet many still struggle because of the lack of capital and access to market.

Just as access to capital and market are important, it is also important that regulatory barriers be addressed. Small and minority-owned businesses need to be protected against the negative effects of burdensome federal agency regulations. Tearing down regulatory barriers to job creation and giving small and minority-owned business owners a voice in the complex and confusing federal regulatory process is key and essential to the overall success of the small and minority-owned business community.

Often hard to prove but seems to be running rampart throughout the small business community is the ugly head of discrimination. In order to level the playing field, there must be wholesale reform of minority business programs at the state and federal level. The State of Maryland recognized the fact that discriminatory practices existed throughout its agencies and took steps during its minority business reform to remove them by passing cutting edge legislation that should serve as a model for federal and state agencies throughout America. Key components of the legislation dealt with the relationships of prime contractors and subcontractors as it related to minority participation goals. A number of prime contractors with minority subcontracting goals didn't even bother to look for qualified MBEs to do the work, instead they automatically sought and received waivers that freed them from meeting their subcontracting goals. After a Commission's study was released, legislation was signed requiring prime contractors to name their MBE subcontractors at time of bid and use them if awarded the contract; Created a Small Business Reserve program which reserves 10% of contracting dollars in 22 state agencies exclusive for small businesses which created a pool of new prime contractors; Doubled the MBE personal net worth cap to $1.5 million for state contracts; and established a commercial nondiscrimination policy. This kind of sweeping reform at the federal level would aide immeasurably in leveling the playing field and creating access to federal contracts for small and minority-owned businesses.

On September 27, 2007, Anthony Robinson, President, Minority Business Enterprise Legal Defense and Educational fund and someone I have a great deal of respect for his commitment to ensuring a level playing field for minority businesses, stated in his testimony before the U.S. House of Representatives Subcommittee on Government Management, Organization and Procurement of the Committee on Oversight and Government Reform and I quote " The reasons minority owned firms are not fully participating in the market are many, not least of which is discrimination. The Kaufman study cited several reasons after concluding, "The gap that exists has not in any way been caused by a lack of effort on the part of minority entrepreneurs." The first reason cited by the foundation was that "discriminatory conditions that previously existed were deep and pervasive and have not been fully reversed." unquote.

That is a travesty. Government must prove its commitment to minority businesses by ensuring agencies such as the Small Business Administration work to remove the disadvantages and increase the opportunities to access the market place as well as empower the small business community through education and training.

I would like to leave here today confident that the Small Business Administration will enforce federal regulations that guarantee a good faith effort is put forth by governmental agencies to ensure minority-owned-businesses have a fair and equitable chance at contracts and subcontracts on government projects. Congressman Gwen Moore of Wisconsin said and I quote "that it was clear to her that one of the next frontiers in the fight for civil rights is economics, that America is a capitalist society and until minority businesses have the same access to federal contracts and subcontracts as other businesses, there is little hope for economic equality." Unquote.

Mr. Chairman and members of the committee, I thank you for the opportunity to present my views and those of the Prince George's Black Chamber of Commerce. We stand ready to assist in the effort to achieve parity and to serve in any way that we can to make a difference in the lives of small, local and minority-owned businesses.

Senator CARDIN. I thank you very much for your testimony.

Ricardo Martinez is the president of Project Enhancement Corporation, which he founded in 1998 to provide solutions for projects in engineering managers. It is one of the fastest-growing businesses in the United States. It provides services to the U.S. Department of Energy, Offices of Environmental Management and Environment Safety and Health, as well as to prime contractors. He chairs the board of directors of the Western Maryland Hispanic Chamber of Commerce and is chairman of the board of directors of the Maryland Hispanic Chamber of Commerce. It is a pleasure to have you here.

STATEMENT OF RICARDO MARTINEZ, PRESIDENT, MARYLAND HISPANIC CHAMBER OF COMMERCE, AND CEO, PROJECT ENHANCEMENT CORP., GERMANTOWN, MD

Mr. MARTINEZ. Thank you, Senator, Congressman Sarbanes. Thank you. My name is Ricardo Martinez. I am the chairman of the Maryland Hispanic Chamber of Commerce.

The Maryland Hispanic Chamber of Commerce has been in existence for over 20 years and has and continues to be a recognized voice of the Maryland Hispanic business community. I am also the owner of a 10-year-old, $14 million-a-year company doing business with the Federal Government.

A particular focus of our chamber is Federal contracting. The Federal Government is the largest employer in our State. As such, we believe that Maryland Hispanics need to clearly understand the requirements and be equipped with the physical and intellectual tools to successfully compete in the Federal marketplace.

I would like to bring attention to a number of issues impacting the Maryland Hispanic business community, which is, for the most part, a subset of the Maryland small business community.

The Federal Government is just recently paying serious attention to the practice of lumping together, i.e. bundling, what could be several or perhaps many small and discrete scopes of both technical and administrative work. Requests for interests or information sometimes precede such requests for proposals in order to prove that there are no qualified small businesses that can do full scope. Sometimes bundled opportunities are indeed set aside for small businesses only to be canceled after the agency determines the work to indeed be too large for small businesses.

At times, the decision to finally award or cancel procurement comes after many months of torturous bid and proposal processes that can cost millions of dollars to the bidding small businesses. The impact on a given sector of small business due to a protracted or canceled procurement can be financially and morally devastating to many small businesses.

There is also bundling of requirements. Bundling of requirements, such as unreasonable expectations for security clearances, specialized technical expertise, incumbent knowledge, internal knowledge of agency operations, among others, is a way of discouraging or disqualifying small businesses. Security clearances, particularly after 9/11 are understandably harder to obtain and retain. Many clearances take over a year to issue from the time of submittal to the agency. This is a great disadvantage to small busi-

nesses designed to work with a number of Federal organizations that deal in high-tech, defense, and national security fields. Many small businesses are not able to hold on to valuable clearances and as such find obtaining similar work in the future more difficult to get.

The desire to deal with only one prime contractor forces either a clear advantage to the incumbent large company that is teamed up with a favored small business or the creation of elaborate and at times inefficient small business teaming arrangements. Either way, the Government loses out on bringing in a broader talent pool for multiple contracts to small business.

Most, if not all, if not close to all, small businesses start out as micro-businesses, that is, businesses averaging over a 3-year period less than $2.7 million a year. However, to get to do even this much business requires contract opportunities that allow a start-up small business owner to prove his or her capabilities to a Federal manager willing to provide an opportunity. Many of our members have stories of how, was it not for the wisdom and foresight of a particular manager, they might not have had the opportunities needed to succeed later on.

It is important to understand that the real decisionmakers for these types of opportunities are not high-level managers, SADBUs, or even procurement officials. They are the technical managers. So access to these individuals can be obstructed by a labyrinth of offices who are either not knowledgeable enough of the programs or focused on much larger procurements. Once accessed, those managers need to be sufficiently trained to understand the best mechanisms for procuring the services of a small company.

Agencies have relied on the subcontracting to small businesses through large prime contractors. These large contractors, sometimes called management and operating, or M&Os, are being relied on to fairly and ethically carry out the small business contracting objectives of the Federal Government. However, the performance metrics used by the Federal Government don't evaluate or hold to account the sometimes questionable behavior of some M&Os.

In one instance, an 8(a) SDB had been awarded a competitive contract to provide cost estimating and project controls, only to learn after several months of frustration that sole source contracts for the same scope were being awarded to non-8(a) businesses with close ties to procurement and technical managers. After several attempts to work with the prime to correct the matter, the small 8(a) decided to focus business development elsewhere rather than be blackballed by a large company.

Another example is the practice of large prime contractors prostletizing the employees and ideas of small subcontractors. This practice appears to be rampant in the high-tech industries. There are exceptions, but this is a common complaint among small businesses. Why do some large businesses do this? Well, in areas where large businesses enjoy virtual monopolies over the work, the answer is because they can.

The examples given are from real life experiences of small businesses. There are other issues, such as access to affordable capital, rising health care costs, and cuts to the resources within the Small Business Administration and procurement personnel that weigh

heavily on the prospects for small business contracting in the Federal Government.

We are seeing a transformation of the small business community to include a larger variety of products and services than ever before. With this change is an obligation to understand the old and emerging challenges facing small business. We in the various chambers and other business organizations stand ready to partner with our Government to lead the way to reform Federal procurement and business practices in harnessing the power of small business.

Thank you very much.

[The prepared statement of Mr. Martinez follows:]

RICARDO MARTINEZ, CHAIRMAN OF THE BOARD
MARYLAND HISPANIC CHAMBER OF COMMERCE

Testimony to the Committee on Small Business & Entrepreneurship

Dear Senator Kerry and Members of the Committee:

My name is Ricardo Martinez. I am the Chairman of the Board of the Maryland Hispanic Chamber of Commerce. The Maryland Hispanic Chamber of Commerce has been in existence for over 20 years and has and continues to be a recognized voice of the Maryland Hispanic Business Community. I am also the owner of a project management and technical services firm, doing business with the federal government, with 65 full time and over 75 part-time and consultant employees. Our firm is in its 10th year of business and on pace achieve close to $14 million in revenue this year.

A particular focus of our Chamber is federal contracting. The federal government is the largest employer in our state. As such we believe that Maryland Hispanics need to clearly understand the requirements and be equipped with the physical and intellectual tools to successfully compete in the federal market place. Our chamber collaborates with federal and state organizations as well as with other Hispanic and non-Hispanic Chambers and business organizations to bring the knowledge and tools through workshops, mentoring and networking to anyone aspiring to do business with the federal government.

I would like to bring attention to a number of issues impacting the Maryland Hispanic Business Community, which is for the most part, a subset of the Maryland Small Business Community:

1. **Bundling of Contract Scope and Requirements**

    a. **Contract Scope:** The federal government is just recently paying serious attention to the practice of lumping together (bundling) what could be several or perhaps many small and discrete scopes of both technical and administrative scopes of work. Often this has the impact of both discouraging quality small companies to respond to the request or encourage less qualified and perhaps naïve small companies to respond. Requests for interest or information sometimes precedes such requests for proposals in order to "prove" that there are no qualified small businesses that can do the full scope. Sometimes bundled opportunities are indeed set-aside for small businesses only to be cancelled after the agency (or sometimes, the Government Accountability Office (GAO)) determines the work to indeed be too large for small business. At times the decision to finally award or cancel procurement comes after many months of a tortuous bid and proposal process that can cost millions of dollars to the bidding small

businesses. The impact on a given sector of small business due to a protracted or cancelled procurement can be financially and morally devastating to many small businesses.

b. **Requirements:** Bundling of requirements such as unreasonable expectations for security clearances, specialized technical expertise, incumbent knowledge, internal knowledge of agency operations among others, is a way discouraging or disqualifying small businesses. Security clearances (particularly after 9/11) are, understandably, harder to obtain and to retain. (Many clearances take over a year to issue from the time of submittal to the agency.) The problem is that large contractors have the distinct advantage of being able to carry clearances on multiple or long term contracts. Small companies generally don't. Thus when a large contractor loses a contract that required a clearance, that contractor can simply have the clearance sponsored on another contract that requires clearances. This is a great disadvantage to small businesses desiring to work with a number of Federal organizations that deal in high tech, defense and national security fields. Many small businesses are not able to hold on to valuable clearances and as such find obtaining similar work in the future more difficult to get. Small businesses have reported that RFPs with size standards of $6 million or less have come out with requirements for up to 40 personnel with security clearances to be available on day one of the contract. The desire to deal with only one prime contractor forces either a clear advantage to the incumbent large company that is teamed up with a favored small business or the creation of elaborate and at times inefficient small business teaming arrangements. Either way the government loses out on bringing in a broader talent pool through multiple contracts to small business.

2. **Lack of Micro Opportunities:** Most, if not close to all small businesses start out as micro-businesses, that is, businesses averaging (over a three year period) less than $2.75 million per year. However, to get to do even this much business requires contract opportunities that allow a start-up small business owner to prove his/her capabilities to a federal manager willing to provide an opportunity. Many of our members have stories of how "was it not for the wisdom and foresight of a particular manager" they might not have had the opportunities needed to succeed later on. My own company was started with a $15,000 subcontract to a large prime contractor that turned into over $10,000,000 of continuing business over the past 9 years. It is important to understand that the real decision-makers for these types of opportunities are not high level managers, SABDU or even procurement officials. They are the technical managers (sometimes called Contract Officer Representatives (COR), Contract Officer Technical Representatives (COTR), Buyers Technical Representatives (BTR), etc.). Access to these individuals can be obstructed by a labyrinth of offices who are either not knowledgeable enough

of the programs, or are focused on much larger procurements. Once accessed these managers need to be sufficiently trained to understand the best mechanisms for procuring the services of a small company.

3. **Lack of oversight of large business (prime contractors):** Agencies have relied on the subcontracting to small businesses through large prime contractors. This is accomplished through specific small business set aside requirements that attach penalties or rewards for small business award performance. These large contractors (sometimes called Management and Operating (M&O)) are being relied on to fairly and ethically carry out the small business contracting objectives of the federal government. However, the performance metrics used by the federal government don't evaluate or hold to account the sometimes questionable behavior of some M&Os. In one instance, an 8(a) SDB had been awarded a competitive contract to provide cost estimating and project controls only to learn after several months of frustration, that sole-source contracts (for the same scope) were being awarded to non-8(a) businesses with close ties to procurement and technical managers. After several attempts to work with the prime to correct the matter, the small 8(a) decided to focus business development elsewhere rather than be "blackballed" by a large company.

   Another example is the practice (particularly in the technical services and high tech arena) of large prime contractors proselytizing the employees and ideas of small subcontractors. This practice appears to be rampant. There are exceptions but this a common complaint among small businesses. Basically the large prime garners what is close to a monopoly on the business in a given area and issues a request for proposal. Small businesses are lured to give their best ideas and commit to provide their best and brightest individuals for the work. As time goes on and the small business performs well, the prime determines that those services will be performed by their own employees. Often the capability sought is not within the prime's organization and pressure is placed on the small company's employee to either 1) accept employment within the large company, 2) face moving to another location where the small company may have work or 3) become unemployed. Some small companies have reported large companies unabashedly offering jobs to employees of small businesses during the delivery of solicited or unsolicited proposals. Why so some large businesses do this? In areas where large businesses enjoy virtual monopolies over the work, the answer is because they can.

The intent of this testimony is not to recklessly impugn the reputation of the federal government or its large contractors. My own company has benefitted greatly from subcontracting opportunities with several large government primes. The examples given are from real life experiences of small businesses. There are other issues, such as access to affordable capital, rising health care costs, and cuts to the resources (systems, training and personnel) within the Small Business Administration and procurement personnel that also weigh heavily on the prospects for small business contracting in the

federal government. It can be said without hesitation that small businesses do not need (or should get) a lowered bar for performance. Small businesses do however deserve and should get the benefit of a level playing field.

It is a privilege for me to be addressing this committee. I truly believe that despite its shortcomings, the federal procurement process is one in which many small businesses have and will continue to thrive. However, we are seeing a transformation of the small business community to include a larger variety of products and services than ever before. With this change is an obligation to better understand the old and emerging challenges facing small business. Our nation relies on the energy and intellectual capital of our small businesses. We in the various chambers and other business organizations stand ready to partner with our government to lead the way through reformed federal procurement and business practices in harnessing the power of small business.

Sincerely,

Ricardo Martinez, Chairman
Maryland Hispanic Chamber of Commerce
President/CEO Project Enhancement Corporation

Senator CARDIN. Thank you very much.

Let me start by talking about BRAC for one moment. As I said earlier to the previous panel, this is an opportunity to expand the pie so it gives you certain opportunities that would otherwise not be available because it is new contract work. I am interested in knowing as to whether responsible parties in procurement related to BRAC have been in touch with you in order to try to figure out strategies to get more participation from small business and minority businesses. I will start with Mr. Frazier.

Mr. FRAZIER. BRAC? I read about it every day, but there has never been—I have not received one call from any government procurement, not one. Not one.

Senator CARDIN. Mr. Green?

Mr. GREEN. Neither have I, Senator. What we are relegated to is an informational pipeline organization within the county that keeps us informed of posting on upcoming things involving BRAC. But we haven't had any contact with any official from the Government.

Senator CARDIN. Mr. Martinez?

Mr. MARTINEZ. Neither have we.

[Laughter.]

Mr. MARTINEZ. We do have an e-mail——

[Laughter.]

Mr. MARTINEZ [continuing]. For a meeting in January.

Senator CARDIN. And I know that there is a lot of outreach being done by our counties and by different entities, but it seems to me that the Federal Government has a responsibility here and should have been planning some strategies, not necessarily individual contracts, but strategies so the pool would be as large as possible to expand opportunity in the areas that we have talked about. So it is somewhat disappointing that there has been no outreach to the leaders of the different organizations that encourage minority participation.

Let me go to this bundling problem, because I have heard about this. We have had other hearings in our Committee on bundling, and you are correct, we are supposedly doing things to bring an end to these practices of abuse. On the ground, it is still happening? You are still finding it a major issue from your testimonies?

Mr. FRAZIER. Yes, but it is sort of disguised now, and that is why in my testimony I placed emphasis on increasing the task orders, because it has become easier for the procurement officers if they have a certain comfort level in dealing with a particular contractor to, oh, you have done a good job. I am going to reward you with additional work. Well, one may not look at that as bundling, but in effect, it is because that opportunity was not put out to bid. So it was a lost opportunity perhaps for the Government, because that same procurement could come at perhaps a lower cost, or best, a new innovative way of achieving that. And so you are losing that potential intellectual capital for someone coming up perhaps with a better idea, plus you are losing that opportunity for a lower price. You never know unless you get a bid.

Senator CARDIN. Mr. Green, I think it was in your testimony you said that small companies or minority companies are concerned

about challenging too much because they could be prevented from getting work, that it actually could be used in a punitive way if they tried to be aggressive in saying, this company is not a small business and yet they are getting some of the percentages, or the bundling is being used to prevent the work from really going to the companies it should, or the prime contractor is abusing the relationship with a subcontractor in order to appear to be getting the job done for minority set-asides, but it is not real. It is having a chilling effect on companies that want to challenge this but are afraid to lose work if they do.

Mr. GREEN. Well, I can tell you that we are very thankful for the State of Maryland and its efforts to clean it up. But for sure, the practice was running rampant long before Maryland did its reform. There was no vehicle in places for small businesses really to take their message that were concerned about it. Oftentimes, they just gave up and then it became a situation where the ability to stay in business was preeminent, so we had to step forward to make it right.

When the Governor convened the commission to study it, that was the best thing that could have happened to the State of Maryland. They took the commission study and they corrected the problem and now the Government monitors the bid. So if there is a small business subcontractor who is listed in the bid and he is not a minority certified by the State of Maryland, the bid is kicked out. So that problem has literally been solved in the State of Maryland, but we believe that is something that an overhaul of the system in the Federal Government could undertake.

Senator CARDIN. Mr. Martinez, do you want to add anything on the bundling issue or the problems there?

Mr. MARTINEZ. Yes, sir. Basically for me, it is, as Mr. Frazier has mentioned, sometimes it is not very evident. It can be pretty sneaky in the way that happens, and that is why I broke mine out into terms of scope and requirements. I had a member that basically said that he was trying to go after a procurement and it was a $6 million-a-year set-aside, and the requirement was for 40 Q-cleared, that is top secret clearances, to be made available on day one. Do the math. That doesn't add up. So it was just an obvious attempt at basically eliminating any small business that might have an interest in doing that.

Senator CARDIN. Mr. Green, you seem to have a pretty sensible suggestion of some form of unified certification process. It seems like that would save a lot of money. I can understand there may be some variances that have to be dealt with, but a lot of the information is similar. What is stopping that? That seems so common sense.

Mr. GREEN. It is a combination of things. First of all, you have to have the buy-in from those that are not seeking SBA certification. See, primarily, we believe that within the framework is that if you have SBA certification, which is the hardest certification to get, then you should be exempt from requiring anybody else's certification as long as there are Federal dollars in the project, and for the most part, 99.9 percent of those projects are going to have some form of Federal dollars in it.

But there is a segment of the small business community that is not seeking SBA certification at all. They are doing what they can do to make a living through a different route. So if you take and create a single source certification that would make it easier—nothing is easy, but make it easier to participate, then we believe that they would come and step forward.

Our problem is that we haven't had an opportunity to sit with anybody from the Federal Government and talk about the possibility of a single source certification. We hear others, but nobody has invited us to the table and it is a message that we are trying to carry every time we get a chance because we want to see opportunities increase for all the small local minority-owned entrepreneurs.

Senator CARDIN. Let me ask one additional question, and that deals with the PCRs and the numbers of the PCRs and how helpful they are to dealing with the abuses in bundling or subcontract-prime contract issues. I have my doubts whether 66 will be enough, knowing the workload, knowing the problems that are out there. My staff tells me that the number that is needed is substantially higher than that number.

But having said that, I would like to get your assessment as to how important it is to have an adequately funded resource available to deal with these abuses that occur in minority contracting and procurement issues. Any thoughts on that?

Mr. GREEN. I think we need to have one in Prince George's County.

[Laughter.]

Mr. GREEN. I don't like that——

Senator CARDIN. And Congressman Sarbanes wants to make sure there is one in Baltimore.

Mr. GREEN. There is a need to increase the number. But I don't think that we can take a regional approach to this. Maryland is growing in its small business capacity, probably outpacing any other area in the country. So when you group us into Maryland, Virginia, and Washington, DC, it always seems to go to the Federal center and not out to the suburban community. I know it doesn't come to Prince George's County but it goes to Northern Virginia. So I would like to see that number increase and Prince George's County become a beneficiary of that.

Mr. MARTINEZ. I would agree with that. I think that Maryland needs a larger share of resources from the Small Business Administration, and we have more Hispanic-owned, minority-owned, women-owned businesses probably per capita than just about any State in the Nation. And so there is a real need here.

Without the SBA, I have to say, without the SBA, and as a small business I can say this, a lot of that segment of business is going to be lost. You have to have answers, and you have got to have the right answers, and you have got to have a government agency that is willing to step in and work with the people who are providing the business opportunities.

Senator CARDIN. Congressman Sarbanes?

Representative SARBANES. Just a couple of questions quickly. I am curious as to the extra kinds of barriers and obstacles that exist for minority-owned businesses over top of the issues you have

discussed for small businesses generally, because small businesses are affected by the bureaucratic nature of things, they can be affected by bundling, they are going to be affected by lack of education opportunities in terms of what is available, the information that is available on what is out there, et cetera. But you alluded to continuing, I think all of you did, continuing discriminatory practices that exist above and beyond the difficulties that any small business would encounter, and I wondered if you could just be a little more specific about the kinds of practices or issues you see in that respect.

Mr. FRAZIER. Well, one hates to use this highly-charged word in America, but it is racism. As an example, if you took a survey in this room of minority business owners, I would venture to say 95 percent or more are first-time business owners, first-time entrepreneurs. And if you dug even deeper, you would find that no one in their family had ever owned a business before. So when you talk about the initial barriers, it is, one, comprehension, understanding. We want to do a good job. We believe we can. We have worked for someone else and made them millions of dollars. Now let us do it on our own. But then when you step out, you have no money. All you have got is your house and your wife says, "Nope, you ain't putting that up."

[Laughter and applause.]

Mr. FRAZIER. And then when you attempt to win business, you are approaching someone in a government—an employee of the Government, a procurement officer who, for the most part, doesn't look like you, doesn't attend the same club, church, whatever, and no one wants to beg, but you find yourself in a begging position. Again, those relationships that those procurement officers have with those primes that have won, won, won, I mean, I don't want to say that things are going on shady, but——

[Laughter.]

Mr. FRAZIER. Those are the barriers.

Mr. GREEN. One of the additional barriers is the fact that we have a lot of people in government who are making decisions for business owners who have never been in business before.

[Applause.]

Mr. GREEN. So that in itself is creating a serious problem and that is part of the streamlining process that I am for. Most of the small businesses—I am a Prince Georgian, so I really want to stand up for my hometown. Most of the businesses in Prince George's County seek county and State contracts.

Now we have this new thing that is floating around in our State and counties is a living wage bill. It is a social bill that has become a business killer, all right, because what they have done, government is setting wages for private businesses and that is one of the worst things that could have happened to us. If you are going to hire this person for this contract, he or she must be paid a certain amount of money. Big businesses tend to be able to spread their costs over a number of people. They can handle it a little bit better than the smaller guy.

So those are, to me, they are institution, I will call them institutional barriers. I won't call them discriminatory barriers, but institutional barriers, but they were social issues brought to the table

on the backs of unions. They could have looked at other alternatives like tax breaks for people who were in an income level that needed a little bit more to work with, but they didn't do that. Counties and States bought into this living wage as, well, this is something that has got to happen.

I believe that everyone should make a decent living, but I don't think that the Government should be in the business of setting wage requirements for us. We hire people based on their ability to do the job and their qualifications for the job. So for me to hire an $11.50 person that I would normally pay $8.50 for, that is not a good thing and that is part of the problem.

So what happens is small businesses don't go after these contracts anymore. They just can't afford to, so they stay away from them. So that is another form of discrimination, I believe, Senator, or Congressman.

Representative SARBANES. Thank you. I do not have any more questions.

Senator CARDIN. Congressman Sarbanes, thank you very much for that question. I think it is a very critical question, because we are here to help small businesses and minority businesses, women-owned businesses, and Senator Kerry has really been the leader on our Committee on the special burdens and problems that minority businesses face and I have joined him in that effort because we are looking to address the shortcomings in our system for minority businesses, the problems that they confront that are different, and I think Mr. Frazier did a good job in outlining some of those problems.

But we are very mindful of the need for capital and the difficulty that minority businesses have had in raising capital, and the SBA programs that are aimed in this direction, the numbers do not reflect what we think are the needs of the country in that regard. So we are trying to figure out ways in which we can target these programs to where they are really needed to show better opportunities, particularly in the minority community.

But I think the question that Congressman Sarbanes asked is a critical question, because we are here to help small businesses and minority businesses and women-owned businesses and our veterans and our disabled population and those who we have targeted for help, but the answer is not always the same for each group and we should be mindful of that because we need to tailor the programs to meet those needs.

I want to thank Mr. Martoccia for remaining here to listen to these concerns because I think we all need to work together in order to try to figure out the solutions to these problems, so I thank you for staying during the panel.

We are now going to move to our third panel, starting with Mel Forbes. As our group comes up, I will save a little bit of time by starting with the introduction of Mel Forbes, who has spent more than 30 years in key management executive positions in corporate America with such companies as MCI Telecommunications, Amtrak, Geico Insurance Company, NASA Space Center. Mr. Forbes currently serves as CEO of Wilkerson Sports Enterprise and founder and CEO of Forbes Consulting and Associates. Mr. Forbes' serv-

ices include business development, political strategies, government relations, and telecommunications technology services.

Mr. Forbes, it is a real pleasure to have you before the Committee and we welcome your testimony.

STATEMENT OF MELVIN FORBES, PRESIDENT AND CEO, WILKERSON SPORTS ENTERPRISE, FORBES CONSULTING AND ASSOCIATES, LARGO, MD

Mr. FORBES. Thank you, sir. Good afternoon to everyone and let me just say that it is a privilege to be here. I have a vested interest being here for several reasons. One is because my son attends this great university, and God willing, I hope that it will be his last year.

[Laughter.]

Mr. FORBES. I also want to thank Senator Cardin, Senator Kerry and Mr. Sarbanes for having the sagacity and perspicacity to have this type of hearing. I already have provided written testimony, so to save time, can I just cut to the chase? Let me just talk about three things very quickly because I don't want to be redundant. I want to talk about policies, procedures, and people.

First, policies are very important. When we take a look at the elements that are in the current legislative policies for procurement regarding small businesses, it is clear some of the language is outdated, out of touch, and almost difficult sometimes for minority businesses to participate. Some of the language in the policy makes it very difficult for small businesses to sometimes attain the level of Federal procurement awards.

When I look at the process, we are in the 21st century and it is amazing to me that we can send people to the moon, we can do heart transplants, we can do all kinds of creative things, but when it comes to minority businesses, it always seems that we are never moving forward but moving backwards.

I would suggest to you that maybe it has to do with the timing of our current political administration, that's determining whether or not we are progressing. I have always believed that progress is upward movement and not just moving in place or moving backwards. In the last 8 years, I have seen a dramatic move backwards, when it comes to dealing with minority businesses by the current administrations to the point it just was mean-spirited.

Now let's discuss the third and final element: people. In some cases there are people doing a job without knowing the job. Dr. Green spoke very eloquently about it when he said that you have got people making decisions that don't even understand how businesses work. And then you have these specialists who are the same people that are supposed to help you that are often the biggest barriers. If they like you, they will help you. If you are on the right side of their ledger, they will help you. If not, you're in trouble.

In order to secure and ensure there is fairness, we must bring people to a plateau of understanding. A lot of our minority businesses don't even understand the process of how to really get involved and these people, these specialists are there to help them. But unfortunately, a lot of them are inadequate in their training. They get information that is delayed and sometimes outdated, and I am speaking from experience now.

So I think that the largest room in the world is the room for improvement, and God knows this one has a lot of room to be improved upon.

I want to thank you for the opportunity and I would wait for any questions that you would have. Thank you.

[The prepared statement of Mr. Forbes follows:]

Melvin Forbes
President and Chief Executive Officer
Wilkerson Sports Enterprise
Forbes Consulting & Associates

Good Afternoon:

Let me first thank Senator Kerry and Committee for this opportunity to speak on a subject that currently has and will have a futuristic impact on our economy.

My testimony today is based on my experiences and those of my clients who I represent as a consultant and minority-owned small businessman. There are documented successes of minority companies who have both the capacity and capabilities to provide value added services in various areas including but not limited to job creation, technology advancements and marketing development, to name just a few. Small and minority companies are responsible for infusing the economy with technology innovation, financial benefits and employment growth. In spite of their abilities and accomplishments they receive little or no opportunity to be a prime contractor.

I believe the policy language to attain the level of Federal Procurement Awards are outdated, out of touch and inappropriate for the 21st century. Much of the language creates difficulties for minority companies to progressively compete in areas of employment and growth. The SBA business development program 8(a) needs a major revamping to catch up with the global economy of competition with its oversight, language and restrictions placed on minority businesses. Many minority companies are asked to team with majority companies to help them win contracts but receive minimum benefits after the contract has been awarded. Insufficient follow-up or monitoring is provided by the Federal Agency to see how the minority companies are fairing after the award.

Minority companies need more informed people, i.e. SBA Business Specialist to assist them in assuring correct and timely information is conveyed. It appears that many of these specialists lack the business acumen and or clear understanding of contracting procurement procedures thus creating problems and delays for small and minority businesses.

In many cases, small business specialist and program managers receive little direction or delayed instructions on the proper promulgation of regulations. These specialists are also the ones whose mission is to review all procurement opportunities and to work with agency contract officers to determine the appropriate sourcing methods. Few minority companies understand the process and procedures on filing secretarial appeals that requires analysis of sourcing decisions by the small business specialist. As important as these appeals are, they are rarely actually reviewed by agency heads and are not reviewed or recorded for public record.

In summary, the playing field can be leveled by ensuring minority companies are provided with equal access to information, education and training of timely policies and procedures. There needs to be monitoring and accountability by federal agencies after awards are presented to majority companies to ensure parity occurs within the minority company. Additionally, severe penalties need to be levied against the majority company if found in violation of the procurement award. The largest room in the world is the room for improvement and there is plenty of improvement needed as it relates to access to federal contracts and leveling the playing field for minority companies.

Senator CARDIN. Thank you very much, Mr. Forbes, for your testimony.

Carmen Ortiz Larsen is the president and CEO of AQUAS, which was founded in 1990. Ms. Larsen has served as the president of the Hispanic Chamber of Commerce of Montgomery County, worked with the U.S. Small Business Committee in support of legislation impacting small business, served as vice chair of the Latin American Management Association. Ms. Larsen also serves at the Montgomery County Workforce Investment Board, the Board of Montgomery Alliance, a charitable foundation, and has served on the Montgomery County Gang Violence Prevention Task Force, just to mention a few of her attributes.

It is a pleasure to have you here.

STATEMENT OF CARMEN ORTIZ LARSEN, CEO, AQUAS, INC., BETHESDA, MD

Ms. LARSEN. Thank you. I want to thank you for calling this small business meeting and allowing us to provide testimony regarding small business and particularly minority small business. I am very proud to be part of these panels because I have heard so much about real issues that we deal with every day.

I just want to let you know, I have been running a small business for 25 years. AQUAS started in 1990, but I have been a small business owner for over 25 years in Maryland. My company has successfully been a contractor to the Federal Government for many years, so I have been a prime contractor to the Federal Government for many years after I set my mind to do that. I was a subcontractor prior to that. We are a graduate of the SBA 8(a) program and I am an American Hispanic and I have a company of expert business process analysts and information technology folks.

I have the qualifications and education to be in corporate America, but I chose to be a small business owner because I believe that small business is where you can get to create valuable solutions for the public sector and bring in the talent and the technical know-how to have innovative solutions and I really like that. I think it is part of the American dream that I believe in, which is waning a little bit, but I still believe very strongly that that is very important.

I want to particularly emphasize that I believe that minority small businesses and the ability to make them sustainable is critical for developing healthy communities. We have a lot of minority communities that are economically disadvantaged. I think the fact that they can see that there are success stories in minority businesses is a way to get the community to be inspired and move forward. I think that this is really critical and that is why minority small business is very, very important. I think we lose sight of that a lot, and we say, well, what about these social issues in minority communities, and yes, they are important and we have businesses that partner or provide services to address these issues. But I just want to emphasize minority small business is important.

The public sector has the power to make or break our tomorrows. Federal Government's contract awards still heavily favor large businesses, large companies with well-known names. These are companies that can afford a greater lobbying power and exercise in-

fluence on decisionmakers, and I think that is part of what is going on where we get into a disadvantaged situation.

A lot of times, Federal legislation is put in place because there are some national priorities where it seems an opportunity to justify expediting procurements to well-known, well-established corporations that are a known entity. I think legislation proposed under the umbrella of expediting procurements for critical missions are detrimental to small businesses. There are a lot of vehicles that facilitate awarding contracts to small businesses. Why not use those in certain situations that require expediting? Why not afford those small businesses those opportunities?

We need a broader range of procurement options. Government small business programs also are first in line for budget cutbacks. I mean, you mentioned this with regard to PCRs. We talked to SBA in terms of why they were cutting back on their budgets for PCRs. SBA has a shortage of business opportunity specialists.

Mr. Forbes mentioned the specialists. I want to clarify, I believe he is talking about business opportunity specialists. A lot of times, the small business procurement world has terminology and words that obfuscate and confuse people and you get into traps where you agree on legislation that really is detrimental to small business.

I want to say, when you go into an 8(a) program, you are appointed a business opportunity specialist that is supposed to work with you so that if you do see an opportunity and you want an advocate to go and speak on your behalf or give you a letter saying, yes, this small business is qualified, you go to your business opportunity specialist. I am going to wager that a greater proportion of the 8(a) firms don't even know that they have a business opportunity specialist. A lot of them don't even know what they look like, OK? I just want to point this out.

And the SBA is cutting back on business opportunity specialists. I was sitting there when you were asking the gentlemen about the PCRs. I want to also ask the question with regard to the business opportunity specialists, providing enough people to support the growing small business community. When I ask the SBA folks who are on the ground why they don't do more, they say, "because we have too many companies assigned to us and we don't really have the time." So I just wanted to bring that up.

Our Government increasingly relies on the perceived wisdom of representatives from large corporations to provide policy guidance and recommendations for the acquisition of products and services. I want to point this out because I have gone to Departments where I have spoken to the E-Gov person or the person in charge of the technology and they say, you know, "I would love to sit here and talk to you about what you have available, but I am relying on company fill-in-the-blanks who has always been my advisor for those," and generally it is some large corporation that has their own connections and their own preferences.

So I would like to point out that this is not going to result in a better America. This is just taking the comfortable way out. Those are people who don't want to take the time to find out for themselves what is available out there that can give us better solutions in the public sector.

Negotiations and paperwork, I don't need to tell you that these burdens are very big on small business. Small businesses are forced to accept lower prices to compete in the marketplace, whether because they are subcontractors and the prime contractor is giving them really what comes across as a favor, a handout, so they drive the prices down. So even though something may be worth a certain amount of money, you are forced to take a lot less just to have the opportunity, but also from the Federal Government.

We have been in situations where we have been asked to come in as an 8(a) to take on a job that a large corporation of well-known established name used to staff and we are told, "please hire this person." OK, that person comes with a pretty high salary, or actually for them to come and work for you, they want an even higher salary, so you put the appropriate price on and they say, well, no, you are a small business. You ought to be able to take less. So we have been in situations where our margins are so small that we are making 2 or 3 percent margins, and to borrow the money, we are paying out at least that, OK.

And so it is really very difficult, especially if you are on a cost-plus-fixed-fee contract, and again, here is terminology that sometimes is difficult in a sound bite to get, but cost-plus-fixed-fee contract, sometimes some Federal agencies go that way. Well, they are really meant for corporations that are providing 20, 30 people. Well, when you are providing one or two people and they say, "it is a cost-plus-fixed-fee contract, by the way, and it is on site so your risk is low so you have to accept 3 percent profit margin". Then you have a hard time because you can't spread the cost around, and plus then they always come to you to ask you for more than what is covered.

All right. So I want to just say three points. There is no direct path to obtain facility clearance. I know I mentioned the PISA program at NSA. They have a model. Why doesn't DOD use this?

I want to clarify that it is not just the length of time that it takes to get a security clearance but it is the fact that you can't get an award unless you have a facility clearance. And I want to say that having a facility clearance means that you have clearances for your key management people. It is not some voodoo thing, guys. It really isn't a voodoo thing. It is just that we have to have the opportunity to have a contract vehicle or some kind of legislation in place that allows us to apply for our own facility clearance if the Government won't let us do it any other way. It is not just the time, it is the access. That is what the NSA model is. It is actually the access to that.

We need contracting officers and program managers to have better training about how to deal with small business and being sensitive to that so that we don't get talked down to by these folks. Sometimes we know more than that.

And also, procurement evaluations should offer a "handicap" score for small businesses. There is a best value award method and I think that there should still be a 10 percent price preference.

Thank you very much for your time.

[The prepared statement of Ms. Larsen follows:]

STATEMENT TO THE SMALL BUSINESS COMMITTEE -- October 29, 2007

CARMEN ORTIZ LARSEN, CEO AQUAS, Inc.
4833 Rugby Avenue, Suite 500, Bethesda, Maryland 20814 -- www.aquasinc.com 301-654-4000
SMALL BUSINESS OWNER -- GOVERNMENT CONTRACTOR SINCE 1990
PAST PRESIDENT HISPANIC CHAMBER OF COMMERCE MONTGOMERY COUNTY. MD

ESTEEMED REPRESENTATIVES OF THE SENATE SMALL BUSINESS COMMITTEE, AND INTERESTED PARTIES IN PROMOTING THE SUCCESS OF SMALL BUSINESSES IN THE INTEREST OF A BETTER AMERICA:

My company, AQUAS, Inc., has successfully been a contractor to the Federal Government for many years. The company is a graduate of the SBA 8a program. I am an American Hispanic, and my company of expert business process analysts and information technology professionals currently serves the US Department of Agriculture and Veterans Affairs. We deliver effective ways to use computers in case management and inspection processes, electronic permits and regulatory compliance. I have the educational and professional qualifications to compete well in corporate America, but I chose to live out an American dream of building a business and offering opportunities for employment and professional development to individuals who, like me, believe in excellence, hard work, and delivery of quality and innovative technical solutions to our Government.

There exist many obstacles for those who, like me, believe that good work and perseverance will be recognized and rewarded. My company wants to deliver value to the Government, to ensure that our hard earned tax dollars are put to the best use to build a better future for our children. The public sector has the power to make or break our tomorrows. Still, Federal Government contract awards heavily favor large companies with well known names. These are the companies that can afford a greater lobbying power and exercise influence on decision makers.

Federal legislation meant to ensuring more streamlined and cost effective procurement processes have eroded competitive opportunities for small businesses. Legislation is proposed under the umbrella of expediting procurements for critical missions and is detrimental to small business. We would argue that vehicles for expedited procurements are already in place specifically for 8a certified and service disabled small businesses. We need a broader range of procurement options. Government jobs that support small business programs are first in line for budget cut backs, and lack of training and sensitivity to the importance and relevance of small business procurement is widespread.

Our government increasingly relies on the perceived wisdom of representatives from large corporations to provide policy guidance and recommendations for the acquisition of products and services. This will not result in a better America; this is just taking the comfortable way out. Large corporations provide the less visible jobs and less desirable assignments to the small business contractor who is at a disadvantaged negotiating position. Prices paid for service to a small business, whether by Government or the Large Prime contract, tend to reflect a minimal margin of profit, from which the small

business must eek out funding for growth and stability. Negotiations and paperwork burdens on a small business are brutal, and prices offered to small businesses are significantly lower for the same work provided at a higher price to larger businesses. Small businesses are forced to accept the lower prices to compete in the market and to have access to some opportunity in the hopes of being recognized. This contributes to small business financial failures and lower survival rates. The ability for minority owned small business to succeed is important to the social and economic development of all our communities. Minority owned small business success stories are an inspiration to minority communities and encourage education, progress, and industry.

Many of the obstacles could be eliminated if our legislators took the time to see the forest for the trees, and stop listening to the "it can't be done" rhetoric. I ask that you consider the following clear obstacles to small business access to federal procurement, which will again be a factor in awarding contracts under BRAC, as they are under Homeland Security:

(1) There is no direct path to obtain facility clearance, and there is an increasing requirement for facility clearance as a pre-condition to being awarded a contract; I suggest that the NSA's PISA model be adopted by the military services, where a no-task contract is put in place to provide the contractor the opportunity to submit the necessary paperwork to obtain security clearances, and the Department of Defense or military service would sponsor the process. The process could be accompanied with a security clearance management training requirement for the company principals. This would broaden our base of available and security cleared contractors.

(2) We need contracting officers and program managers to have better training with regard to doing business with small business, the benefits thereof, and sensitivity to their cash flow and pricing issues. You can get outstanding work from small business if you are sensitive to their business needs. You have to provide fair and timely payments. We need significant contact awards (over a million dollar) for small business and minority owned small business of a significant duration (more than 90 days) in addition to the small procurements, in order to allow small business to have a sufficient pipeline to manage doing more good work for the public sector.

(3) Procurement evaluation should offer a handicap score for small business. The current "best value" award method is subjective, and can provide a means to eliminate a small business that is within a 10% technical and / or price range. As a minimum, the 10% price preference for small disadvantaged business entities should be reinstated to provide true competition. Often a large business can push away a qualified small business because they can afford to drop their price to win a contract without tracking subsequent amendments.

I know that you will do whatever is possible to include small businesses and especially minority owned small businesses in the procurement of products and services in support of BRAC, because the importance of supporting small businesses in America is paramount to the future welfare of our diverse communities. Thank you for the opportunity to share my concerns.

Senator CARDIN. Thank you very much for your testimony.

Our final witness is Tim Adams, who is president and CEO of Systems Application and Technologies. He serves on numerous committees and foundations, among those Bowie State University Foundation, Greater Prince George's Business Roundtable, Doctor's Community Hospital Foundation, U.S. Chamber of Commerce, the National Black Chamber of Commerce, the University System of Maryland Foundation Board of Directors. Tim is one of the most active individuals we have in our community.

It is a pleasure to have you with us.

STATEMENT OF TIMOTHY ADAMS, PRESIDENT AND CEO, SYSTEMS APPLICATION AND TECHNOLOGIES, INC., LARGO, MD

Mr. ADAMS. Thank you. Senator Cardin, Congressman Sarbanes, thank you for being here today. I applaud the choice of holding this hearing at Bowie State University, an institution that has a proud history of producing small business leaders and entrepreneurs, and the symbolism of our meeting in the Thurgood Marshall Library, named for the American hero who did so much to provide opportunity and justice to millions.

I also would like to praise you, Senator Cardin, for your strong record on small business issues, which was underscored by your meeting earlier this year with Prince George's County small and minority business owners at which you repeated your promise to continue to find ways to improve opportunities for all small business owners. That commitment was recognized throughout the State.

The title of today's hearing is very pertinent to our collective efforts to use the engine of small business to add to economic growth and job creation in society. And as much progress as we have made in our society towards enabling minority small businesses to make productive contributions to this process since Justice Marshall was first appointed to the High Court over 40 years ago, the issue of leveling the playing field is still a matter of critical importance.

This subject came up when the man who appointed Justice Marshall, President Lyndon Johnson, was asked why he aimed policies aimed at leveling the field for minorities. Johnson, whose life experience taught him about the barriers that minorities and the poor of all colors have faced in our country, said the following wise words in response, quote, "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race, and then say, 'You are free to compete with all the others,' and still justly believe that you have been completely fair," end quote.

Please allow me to clearly state my position about a critical point relating to the issue of leveling the playing field. I do not assert that the only means by which the Federal Government can take positive steps to help minority enterprises contribute to society's vital work is to create contract bidding systems that benefits one particular group or another. I do recommend that the Committee use its influence over Federal contracting and programs run by the Small Business Administration and the Department of Commerce's Minority Business Development Agency to implement positive policies that encourage small and minority-owned business growth.

The Federal Government can positively work to level the playing field through policies that help make capital more accessible, expand business education, promote a culture of entrepreneurship, reduce unnecessary regulatory burdens, and protect intellectual property.

First, to help minority and other small business entrepreneurs get started, the Federal Government should encourage banks to provide more seed money to these risk takers by establishing a larger pool of federally guaranteed small business loans.

Second, to help give new business the knowledge and know-how to succeed, the Federal Government plays a small but vital role by providing institutions such as Bowie State University financial incentives and tools to create and enhance business incubators. These are facilities where faculty business experts can teach and provide support to budding entrepreneurs in all areas, from sales and marketing to law and taxes. Similarly, expand the amount of information they offer to potential small business contractors on their Web sites. Implementation of best practices in a timely manner is key to success.

Third, the Federal Government can do more to recognize and tap the skills and wisdom of distinguished minority business owners on commissions dealing with important societal issues.

Fourth, the Federal Government can creatively use the tax code with an eye towards encouraging small business growth by offering credits for investment and training and education and increasing the deductions for investments. With respect to small business regulation, we must guard against stymieing small business expansion through unnecessary and burdensome rules and reporting requirements.

Fifth, to encourage small business entrepreneurs to be risk takers, the Federal Government must continue to zealously ensure that the Government is enforcing policies that protect firms' patent, copyright, trademark, and other vital intellectual property rights.

Finally and most importantly, the old adage, people often don't do what you expect but what you inspect, is truly still around in Federal contracting. Therefore, the Federal Government must implement a 21st century technology with the capability of real time minority business tracking analysis and strategic planning. This system should have the ability to identify disparities in the marketplace and to help determine if those disparities are the result of discrimination, benign or otherwise. The system should assist in determining if race-conscious or race-neutral programs should be implemented to address any identified disparities throughout the Federal marketplace. The technology should be implemented throughout the Federal Government. It should also provide an overall Federal report card on minority business participation as required by oversight entities. This type of technology, which is Croson, Adarand, and now Western States Paving compliant, is available today in the marketplace and could provide the backdrop for a serious minority business develop initiative.

To sum up, all of these proposed policies will help create win-win situations and provide a useful framework for Congressional action to level the playing field.

I thank the Committee for the honor of speaking to you today.

[Applause.]
[The prepared statement of Mr. Adams follows:]

Testimony By:
Timothy J. Adams
President & CEO
Systems Application & Technologies, Inc.

Field Hearing
Senate Small Business and Entrepreneurship Committee
Bowie State University
October 29, 2007

I applaud the choice of holding this hearing at Bowie State University, an institution that has a proud history of producing small business leaders and entrepreneurs, and the symbolism of our meeting in a room holding the special collections of Thurgood Marshall, the American hero who did so much to provide opportunity and justice to millions.

I also would like to praise Senator Cardin for his strong record on small business issues, which was underscored by your meeting earlier this year with Prince George's County small and minority business owners at which you promised to help find a way to improve opportunities for all small business owners. That commitment was recognized throughout the state.

The title of today's hearing is very pertinent to our collective efforts to use the engine of small business to add to economic dynamism and jobs creation in society. And as much progress as we've made in our society toward enabling minority small businesses to make productive contributions to this progress since Justice Marshall was first appointed to the High Court over forty years ago, the issue of leveling the playing field is still a matter of critical importance.

This subject came up when the man who appointed Justice Marshall, President Lyndon Johnson, was asked why he championed policies aimed at leveling the field for minorities. Johnson, whose life experience taught him about the barriers that minorities and the poor of all colors, have faced in our country, said the following wise words in response:

> "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'You are free to compete with all the others,' and still justly believe that you have been completely fair," said the President. "Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and more profound stage of the battle for civil rights. We seek not just freedom, but opportunity. We seek not just legal equality, but human ability, not just

> equality as a right and a theory, but equality as a fact and equality as a result. ..... To this end equal opportunity is essential, but not enough, not enough. Men and women of all races are born with the same range of abilities. But ability is not just the product of birth. Ability is stretched or stunted by the family that you live with, and the neighborhood that you live in - by the school you go to and the poverty and the richness of your surroundings. It is the product of a hundred unseen forces playing upon the little infant, the child, and finally the man."

Please allow me to clearly state my position about a critical point relating to the issue of leveling the playing field. I do not assert that the only means by which the federal government can take positive steps to help minority enterprises contribute to society's vital work is to create contract bidding systems that benefit one particular group or another.

Indeed, I am proud that in nearly 20 years, my company, Systems Application and Technologies, has achieved much success through simple hard work, and by pursuing a vision that recognized a void in the market place for professional services related to defense, homeland security, engineering and technical and investigative services and facilities management.

Systems Application and Technologies is representative of the three million minority-owned businesses in our country. Our firm was recently recognized as one of the top 100 minority business enterprises in Maryland, an honor that our entire staff shares justifiable pride.

It is important to point out that in addition to being important providers of quality goods and services, these businesses help strengthen the fabric of our neighborhoods and communities.

I recommend that the Committee use its influence over federal contracting, and programs run by the Small Business Administration and the Department of Commerce's Minority Business Development Agency, to implement positive policies that encourage small and minority-owned business growth.

With most of the world's business being conducted by small entrepreneurs, it makes good economic sense for our government to develop polices and use its purchasing power—some one-fifth of the gross domestic product—for this purpose.

The government can positively work to level the playing field through policies that help make capital more accessible, expand business education, promote a culture of entrepreneurship, reduce unnecessary regulatory burdens, and protect intellectual property.

With a debt of gratitude to business development expert Steve Strauss, whose ideas have influenced my thinking on this important public policy issue, here's my brief take on each of these subjects.

First, and most importantly, the Government must implement a 21st century technology with the capability of real time minority business tracking, monitoring, reporting, marketplace analysis and strategic planning. This Minority Business Development/Contract Compliance Monitoring and Strategic Planning System should have the ability to identify disparities in the marketplace and help to determine if those disparities are the result of discrimination benign or otherwise. The System should assist in determining if race conscience or race neutral programs should be implemented to address any identified disparities throughout the federal marketplace. The technology should be implemented throughout the federal government. The technology should also provide an overall federal report card on minority business participation (MBE, WBE, 8a, DBE SDB, HUB zone, etc.) as required by oversight entities. This type of technology which is Croson, Adarand and Western Paving compliant is available in the marketplace and could provide the backdrop for a serious Minority Business Development initiative. Information is power.

Second, to help minority-owned and other small business entrepreneurs get started, the government should encourage banks to provide seed money to these risk takers by establishing a pool of federally guaranteed small business loans.

Third, to help give new businesses the know-how to succeed, the federal government can play a small but vital role by providing institutions such as Bowie State University financial incentives to create business incubators. These are facilities where faculty business experts teach budding entrepreneurs everything from sales and marketing to law and taxes. Similarly, government agencies should be encouraged to expand the amount of advice they offer to potential small business contractors on their websites.

Fourth, and this is an easy one, government can do more to recognize and publicize the accomplishments of outstanding minority-owned and other small businesses, and to tap the skills and wisdom of distinguished minority business owners on commissions dealing with important societal issues.

Fifth, the government can creatively use the tax code with an eye toward encouraging small-business growth by offering credits for investments in training and education and increasing the deductions for investments. With respect to small business regulation, we must guard against stymieing small business expansion through unnecessary and burdensome rules and reporting requirements.

Finally, to encourage small business entrepreneurs to be risk takers, government must continue to zealously ensure that the government is enforcing policies that protect firms' patent, copyright, trademark and other vital intellectual property rights.

To sum up, all of these proposed policies will help create win-win situations, and provide a useful framework for congressional action to level the playing field.

In closing, I hope the committee recognizes that the success of minority-owned businesses will help us realize the vision of the Great Society that people like Lyndon Johnson and Thurgood Marshall devoted their careers in public service to, and which thousands of budding minority entrepreneurs are working to put into practice today. I thank the committee for the honor of speaking to you today.

Senator CARDIN. We thank all the witnesses. It has been extremely helpful, I think, to the Committee to hear those of you who are in the field and have to deal with the challenges that are out there.

There are several things I believe Congress can do to help in our role, and one is to look at strengthening of the underlying statutes and programs, and as I mentioned from the beginning, Senator Kerry is committed to doing that. There has been legislation already moved through our Committee and I expect there will be some additional bills that are going to be considered.

Of course, the second role we have is oversight, and one of the reasons we are having this hearing is to hear firsthand and to try to get our agencies working more effectively in administering the programs and doing that oversight as aggressively as we can.

The third way is the budget support, and I keep coming back to the budget support. Ms. Larsen, you mentioned the services that are provided under 8(a) and the numbers have gone up dramatically of those participating in the 8(a), yet the budget support by this administration has been to reduce funding in these levels. The PCRs that we have been talking so much about, it seems to me that if you had adequate services provided here, concerns of bundling will be much less. Bundling goes forward because there is no one there to stop it. So you need to have people there, which is what Mr. Adams was referring to as far as having the people who can really implement the program of enforcement.

We really do appreciate SBA having this report card, but now you have got to follow up on it and they have to do that. So I really do challenge this administration's commitment on budget support for this agency because I think they need a stronger budget and we are going to be working for that as we go forward.

Ms. Larsen, I want to ask you one specific question because you and I have had many conversations about security clearance issues. I was surprised by the brevity of your statement in that regard. Normally, you are——

Ms. LARSEN. Well, you had the hammer ready.

[Laughter.]

Senator CARDIN. But you mentioned and I am interested in the approach that NSA takes versus DOD. Perhaps you could elaborate. It seems to me that we have had progress made in NSA. Perhaps you could talk a little bit more about that, whether this is a much better model that we should be looking at to deal with the clearance issues which become a major issue for opportunity.

Ms. LARSEN. All right. The NSA model just happens to be the only model I know of, and so I talk about that—and I have sought other avenues, but I haven't seen any. So just to explain that a little bit better, when you bid on a government contract, increasingly, you are going to be required to have facility clearance. In order to have facility clearance, you have to already have a contract that requires security clearance. So if you are not already, well, you are not going to get that award.

If you do have facility clearance and your contract ends and you don't have another contract in line that requires you to have facility clearance, you then lose that clearance, OK. If you have facility clearance, you can then clear your own people, you can bring in

and hire people that are already cleared and what is called "hold their clearances" and so forth. So there are a lot of benefits to that. I can't, if I don't have facility clearance, I can't hire somebody who has a security clearance to go and work on a government contract because I can't hold their clearance.

So what NSA has done, they have something called the PISA program, and I don't have all the details in front of me on that, but I did forward them to your office.

Under the PISA program, and it was the Small Business Office at NSA that drove this forward, they will accept an application from a small business who wants to enter into the program and award them—and there are certain criteria you have to follow—but they will award them a contract, which is called a no work order contract—there is no value to that contract. This is where you get a contract under which you will have five positions that you can fill of people who have security clearance. Now, I think two or three of those positions are principals of the company or have to be fixed positions, what they call fixed positions—I think it is two of them are fixed positions and three are rotating, or vice-versa.

But what it allows you to do is to bring in people who are cleared and to work for you for a while, and during that time period what you can use it for is to go and talk to people at NSA and do presentations and sell them on your product. So that is what the model is about. So you have a 5-year contract, or a 3-year contract—I think it is just a 3-year contract where you can have this.

If DOD had something similar, people could then apply to be under this contract, which would then allow them to bid on DOD contracts that require clearances.

Senator CARDIN. Thank you for that.

To Mr. Forbes and Mr. Adams, I want to explore a little bit the concerns about small businesses being intimidated not to raise too many issues. My staff prepared for me a list of Fortune 500 companies that have qualified for small business contracts, and that happens——

[Laughter.]

Senator CARDIN. It does sound like a—but it happens because they acquire small businesses and it can count towards the set-asides, and whether that is abused or not is another issue. We also know that the Fortune 500 companies are the prime contracts and are used to allocate the subcontract work.

We have heard, and we have some very creative small businesses, minority businesses that are out there that really would like to be prime contractors. They think they are qualified to do that, but they are afraid to go in that direction, at least I have been told, because they are worried about losing their existing work. I don't know whether you have run into these types of circumstances or not, but it seems like it is holding down the potential growth in this country in the areas that we would like.

Mr. FORBES. Senator, let me just say that I think it is not just a myth, it is a fact that companies, especially small minority companies who understand they already have so many challenges to deal with just trying to get a contract, have sometimes been told by certain people, that if you don't make waves, you probably can wind up getting an opportunity. So it is not a myth. I was hoping

to see in the room a couple of my clients who had firsthand experience in that, and maybe at a later date I will have them come talk to you directly.

I represent a security company who has over 300 employees right here in Prince George's County and he was trying his best to get an opportunity and ran into that exact situation, where he was told, just don't make waves, you know. Your turn will come. Your time will come. It is just not your time. Now here is a man that is feeding 300 families times four. Small businesses are the life blood of a community, and he has 300 employees and yet doesn't have an opportunity to participate further? I think there is something that needs to be looked at very closely and I would love to have an opportunity to bring him to meet you.

Senator CARDIN. I have also heard of cases where a small company who owned a patent was pretty much required to sign that patent to the larger company in order to be able to get the type of opportunities through Federal procurement. It seems to me that we have got to be able to address those problems.

Mr. FORBES. Well, very often, small businesses are used to get contracts by majority companies. Once they get them, very little monitoring, if any, is done to find out how they are faring. So the minority company takes the majority company to the prom, but they take someone else home with them.

[Laughter.]

Mr. FORBES. And I think that is something that needs to be looked at.

Senator CARDIN. Mr. Adams?

Mr. ADAMS. Along those lines, I think it is important to understand that fear is pervasive not just on very small businesses, but also larger minority businesses. As I sit here today, I, too, have concerns, even to the extent of what I may say here regarding repercussions to my organization. I have been doing government contracting almost 20 years now. We have people all across the globe. But there is still that concern about addressing critical issues in an open forum and the repercussions of that, and they are real. They are not perceived. I sit here as testament to that. We have sat here and we talked a great deal about security clearances. My organization did security clearances. We are now no longer continuing in that process.

There are a lot of challenges that go along with being a business owner. There are a lot of challenges that go in the current marketplace. There are also a lot of concerns. When you have 500 people that you are responsible for feeding and families, one has to be very cautious in just how aggressive they can be.

Having said that, I probably said too much already today.

[Laughter.]

Representative SARBANES. Senator, I am going to have to leave——

Senator CARDIN. Let me recognize Congressman Sarbanes.

Representative SARBANES. I am going to have to leave, but I wanted to thank the witnesses and again thank Senator Cardin. I was actually going to ask a question about whether there are 10 specific things you would recommend, and I think you got to 8, Mr. Adams, so there is clearly no shortage of good recommendations

out there based on the knowledge and experience that you have accumulated and it is incumbent on us and others to make sure that we take that and try to move in the right direction with it.

So thank you very much for your testimony. Thank you for letting me participate.

Senator CARDIN. And I would welcome, and it doesn't have to be at this moment, but if you have specific recommendations, please let us know. We are very much interested in protecting businesses from that sort of intimidation, so please feel comfortable to let us know what is happening and offering suggestions as to how we can be helpful in providing the type of protection to small businesses so that they can voice their concerns and be prepared to enter into direct business relations with government agencies, which I think they need to be able to do. So we would welcome that type of thought.

Let me just thank all of our witnesses. As I said at the beginning of the hearing, this record will be made part of our committee record and part of the record we are using in order to carry out our responsibilities that I have already said a couple times.

I want to, if you would just indulge me, to thank the staff from the Small Business Committee for allowing us to have this hearing.

[Applause.]

Senator CARDIN. It takes a lot of work to put on these hearings, a lot of work, particularly when they are not in the Capitol itself. I sort of just show up and can ask the questions and preside over it, but it is the staff that really puts together all the work to make sure this happens, so from the hearing clerk to our staff on Committee to my personal staff, I want to thank them.

This has been an incredible set of witnesses, but also the people that have been here participating in attendance. We thank you for making this an important moment, I hope, in trying to move forward with our commitment to help the small businesses and minority businesses, women-owned businesses in our community to carry out the mission of our country and the economic equality which has been for too long not met by policies in America.

Thank you all very much. Our hearing will be adjourned.

[Whereupon, at 3:34 p.m., the Committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

RESPONSES BY CALVIN JENKINS TO QUESTIONS FROM SENATOR CARDIN

Question 1. The following is a question you were unable to answer during the field hearing of October 29. I would appreciate a response from you or an appropriate individual with knowledge in this area.

You were asked to provide the rationale and procedures involved in allocating Procurement Center Representatives (PCR) by locality as well as the dollar amounts in allocating such PCR. At the time of your response, you could not provide a complete answer as to how such distributions were determined. Please provide that information.

Response. While SBA tries to place its PCRs in buying activities with the greatest dollar volume (at least $1 billion in federal contracting dollars), there are other considerations that come into play, such as the need to have at least one employee with expertise in Government contracting in as many states and regions of the country as possible. For example, we recently hired a PCR for Hawaii, and we are currently recruiting a PCR for Alaska. The buying activities in those states do not have as large a dollar volume as many of the buying activities in the Washington Metropolitan Area, but this approach ensures that we have an employee in each of those states who can handle Government contracting matters that may require SBA's involvement—not only those matters related to a PCR's duties but also those related to Certificates of Competency, Size Determinations, and subcontracting assistance.

SBA currently has three (3) PCRs stationed in Maryland. They are located at Goddard Space Flight Center, National Institutes of Health, and the Naval Air Command in Patuxent River.

RESPONSES BY ANTHONY MARTOCCIA TO QUESTIONS FROM SENATOR CARDIN

Question 1. I have been informed that DOD's security clearance process is too cumbersome and drawn-out and that contracts are generally awarded before a small business can even begin to obtain its clearance. NSA, on the other hand, has developed a fast-track system, to obtain security clearance for small contractors. Under "fast-track," the contractor comes in without a contract, obtains clearance and can then bid on subsequent contracts. Has DOD given any thought to developing a similar certification process based on the NSA "fast-track" model? If so, please elaborate. If no, please explain why DOD would not create such a system given the problems it has had in meeting its small business goals?

Response. Based on your description, it appears that you are referring to NSA's Provisional Industrial Security Approval (PISA) Sponsorship Program. The PISA Program is designed to assist small businesses in gaining personnel clearances for the express purpose of conducting classified discussions with NSA personnel. As the Defense Security Service (DSS) understands the PISA Program, NSA arranges for the underlying investigations, determines eligibility and holds the personnel clearances for those individuals cleared under the PISA Program. If NSA decides to issue a contract requiring access to classified information, the steps described above allow DSS to expeditiously issue a facility clearance.

DSS has not recommended implementing the NSA Provisional Industrial Security Approval (PISA) Sponsorship Program across the Department for the following reasons:

- Prohibition Against Granting Personnel Clearances in the Absence of a Requirement: As stated in Executive Order 12968, Access to Classified Information, ". . . eligibility for access to classified information shall only be requested or granted based on a demonstrated, foreseeable need for access. Requesting or approving eligibility in excess of actual requirements is prohibited."
- Scalability of NSA Program: The NSA Program is founded on the unique needs of NSA. A "fast track" system to issue security clearances for contractors with no existing requirement for access to classified information across the Department would appear to provide an unfair advantage to certain contractors. It would also exacerbate cost considerations for personnel security investigations and adjudications without the concomitant need for access.
- Availability of Alternatives: In the event a DoD contracting activity wishes to issue a contract requiring access to classified information to an uncleared company, DSS is able to issue an interim facility clearance and associated interim personnel clearances to eligible U.S. owned companies and their employees within days of receiving required forms (e.g. Electronic Questionnaire for Investigations Processing).

Question 2. Currently many small businesses are unable to bid on DOD construction contracts because they cannot obtain conventional surety bonds. However, these same contractors can and do utilize "individual surety bonds" in state and local con-

tract bids—Maryland is such an example. Why has DOD not adopted a similar surety vehicle to increase the number of businesses owned by minorities, women and disabled veterans?

Response. The Department of Defense does accept individual sureties for all types of bonds, with the exception of position schedule bonds. The use of individual surety bonds is prescribed at section 28.203 of the Federal Acquisition Regulation.

RESPONSES BY MICHAEL J. RIGAS TO QUESTIONS FROM SENATOR CARDIN

Question 1. Currently, many small businesses are unable to bid on GSA construction contracts because they cannot obtain conventional surety bonds. However, these same contractors can and do utilize "independent surety bonds" in state and local contract bids—Maryland is such an example. Why has GSA not adopted a similar surety vehicle to increase the numbers of businesses owned by minorities, women and disabled veterans?"

Response. The use of bonds and surety vehicles for General Services Administration (GSA) construction contracts is governed by the Miller Act, 40 U.S.C. § 3131, et seq. The Miller Act and its underlying regulations do not provide for the use "independent surety bonds". The Miller Act does, however, permit the use of bonds provided by both corporate and individual sureties, as well as bonds supported by a wide variety of other forms of security.

Small Contractors that seek public or private contracts for which bonding is required may benefit from the Small Business Administration's Surety Bond Guarantee Program, which makes available SBA guarantees for bid, performance, payment, and ancillary bonds that may be issued on their behalf by participating corporate sureties.

The mission of the SBA's Office of Surety Guarantees is to provide and manage surety bond guarantees for qualified small and emerging businesses, in direct partnership with surety companies and their agents, utilizing the most efficient and effective operational policies and procedures. Further information about the program is found at: http://www.sba.gov/aboutsba/sbaprograms/osg/index.html

Where the size of GSA construction contracts make it difficult for small businesses to obtain either corporate or individual surety bonds in the amounts required under the Miller Act, GSA has an aggressive small business subcontracting program to help further the contracting opportunities available to small businesses.

GSA is committed to supporting small businesses by maximizing the flexibility afforded to us under the law provided that the financial interest of the U.S. Government is adequately protected.

Question 2. You were asked during the field hearing to review your records and provide information on the numbers and percentages of women, minorities, and disabled veterans small businesses participating in the GSA Schedule as well as dollar amounts associated with each of the categories cited above. Please provide that information.

Response. Please see below a breakdown of the total number of GSA Schedules contract holders. This breakdown shows the number of small business contract holders and further breaks down the small business categories to show the various socioeconomic groups you requested and the dollars spent via GSA Schedules related to each category.

Summary of overall GSA Contract holders		
Overall Numbers	**Number**	**Percentage**
Small Business	14,307	80.8%
Other Than Small	3,409	19.2%
Total	17,716	

Breakdown of Small Business contract holders on GSA Schedules		
Socio-Economic Sub-Category	**Number**	**Percentage**
Woman Owned	3,689	20.8%
Veteran Owned	2,451	13.8%
SBA Certified Small Disadvantaged	1,689	9.5%
SBA Certified 8A	1,557	8.8%
Service Disabled Veteran Owned	838	4.7%
SBA Certified Hub Zone	506	2.9%

Note: The combined socio-economic subcategory values do not add up to the total small business number because some small businesses do not fall into any socio-economic category, while others fall into more than one category.
The Percentage is calculated by dividing the number of contracts in each category by the total number of GSA contracts 17,716.

Dollars spent on Small Business contract holders on GSA Schedules		
SocioEconomic Sub-Category	**FY 2007 Dollars**	**FY 2007 Percentage**
Woman Owned	$ 2,435,877,075	6.78%
Veteran Owned	$ 1,005,948,266	2.80%
SBA Certified Small Disadvantaged	$ 2,221,996,215	6.18%
SBA Certified 8A	$ 2,199,839,802	6.12%
Service Disabled Veteran Owned	$ 789,785,208	2.20%
SBA Certified Hub Zone	$ 15,891,598	0.04%
All Other Small	$ 8,952,609,384	24.92%
Total Small Business	$ 13,410,954,895	37.33%
Total GSA Schedules	$ 35,926,627,857	

Note: The combined socio-economic subcategory values do not add up to the total small business value since some contracts fall into more than one category.
The Percentage is calculated by dividing the number of dollars in each category by the total number of dollars spent on GSA Schedule for FY 2007, $35,926,627,857.

COMMENTS FOR THE RECORD

Joe Aguinaldo, Owner
J. Aguinaldo Group, Inc. (JAG)

Testimony - Access to Federal Contracts: How to Level the Playing Field

Dear Honorable Senator Cardin:

As a small disadvantaged, minority owner business in the tri-County area for the past seven years, I wanted to submit past experience information to assist in defining and confirming some of the current problems that I, along with other small businesses that in our area are experiencing related to meeting adequate competition requirements while still engaging the small business community in work on federal contracts. The task of leveling this playing field, while much needed, is a very complex task and one that will require not only strict guidelines to be followed by procuring activities in the consideration of small business initiatives, but even more so, the follow-through on compliance. Just making rules will not suffice, strictly enforcing the role of both contractor and government will be necessary.

- **Issuance of Restricted/Unrestricted and Sole Source Contracts:**

A recent Small Business Roundtable meeting in Patuxent River, MD hit on one of the larger problems that relate to the review that the contracting organizations perform prior to issuance of a restricted/unrestricted RFP or sole-source contract. In the decision-making process, small business is typically not afforded the realistic possibility that should be given especially on smaller tasks to commit the contracts office to a restricted or sole source issue even when the capabilities are clearly present. Although the local small business office is to be engaged to ensure that these problems do not exist, it has not been effective in allowing the release of contracts that could meet capabilities through a small business to the small business community.

A recent example of this problem should define this concern better. An upcoming expiring contract is in the pre-solicitation stages for re-award with the Navy. Upon reviewing the current contract in place, it has been determined that this contract now held by a large business has performed less than 2% of the funding spent for the entire contract. The 98% performed, and performed very successfully, has been provided by small business. During pre-solicitation discussions with the procuring agency and their contracting office for the upcoming re-award, (and with the small business advocate present), this small business asked for the consideration of releasing the next iteration of this work as a restricted contract for small business to compete. The contracting office and agency balked even though clear metrics provided by the performing small business showed that the Government was paying an extremely hefty pass-through to large business for the past five years with little to no work performed by that company. These types of metrics should clearly show the contracting office that a small business opportunity exists.

Setting strict processes and controls upon responses of capable resources to small business sources sought should keep these kinds of solicitations available to only small business as they were intended with mandatory percentages for 51%+ performance by the prime.

- **Lack of Resources to Compete Against Large Business**

Financially, small businesses need to be resourceful in how they spend not only their time but their talent. In competing for federal procurements, the roles of political lobbying and contributions, hiring of high-level military (0-6 and above) and executive level civilians to influence future opportunities are not easily afforded by small business and as such, the "inside edge" that these types of resources offer is not readily available.

- **Enforcement of Small Business Quotas**

One of the biggest problem areas and the area where your support could probably best is felt in the area of leveling the big business playing field is with the enforcement of small business quotas. Whether contracting directly through the Federal Government or through subcontracting from large business, it is inherently necessary for a penalty to be in place in order for both sources of business to meet quotas to small business. While I am not in support of awarding work to companies that are not capable of taking on the tasks required at risk to either the Government or the prime contractor, this is most often not the case. From another angle, it is necessary for contracting activities to be concise in the requirements defined. Many times, work that can more efficiently, effectively and economically be done by small business needs to be considered.

Failure to seriously consider the problems faced daily by small businesses such as described will not adequately paint a true picture of what needs to be done to right the current and growing problems.

Very respectfully,

Joe Aguinaldo
240-725-0300

Terry Bowie
Managing Partner
Ingalls Lumber & Supply, LLC

To: Hearing Clerk

Re: Small Business Committee Hearing

Date: October 29, 2007

I apologize for this statement finding you at the last minute, but I did want to go on record for the purposes of this hearing. Ingalls Lumber & Supply is a well established, qualified Service-Disabled Veteran Owned building material supplier located in Middletown, Maryland with over 60 years of service.

We have been told on several occasions that General Contractors (GC, our primary customer on large federal construction projects) doesn't receive small business credits if their selected subcontractor buys building materials from us. In that case the GC (prime contractor) has no incentive to direct his subcontractor to buy building materials from Ingalls. In most cases, these prime contractors do not self-perform tasks under the contract and subcontractor a major portion of work. This scenario leaves us out of the loop to provide the federal government with quality products from a well established, qualified Service-Disabled Veteran company.

I don't believe the FAR addresses this particular issue of 2nd tier contracting and it is most likely being used against Ingalls as a supplier and many other qualified small businesses.

EAGLE TECHNOLOGIES, INC.

"CONSTANT PURSUIT OF EXCELLENCE"

United States Senate Small Business Committee Field Hearing
Prince George's County, Maryland

"Access to Federal Contracts: How to Level the Playing Field"

Monday, October 29, 2007

Written Testimony

Nicholas V. Christiansen, Sr.
President & CEO
Eagle Technologies, Inc.

Mailing Address:
9301 Annapolis Road, Suite 200, Lanham, MD 20706-3130
Web Page: ETISecurity.com VA DCJS Lic. # 11-3126
Tel: 301/306-9110
Fax: 301/306-9166
Email: nchristiansen@etisecurity.com

October 29, 2007

The Honorable John F. Kerry, Chairman
United States Committee on
Small Business and Entrepreneurship
428A Russell Senate Office Building
Washington, DC 20510

Re: Written Testimony for the "Access to Federal Contracts: How to Level the Playing Field" Hearing

Mr. Chairman:

INTRODUCTION: Eagle Technologies, Inc. (ETI) is a Maryland based Security Guard Services firm certified by the US Small Business Administration (SBA) to participate in the 8(a) program. The firm has been located in Prince George's County, Maryland since April 2000. The company started in August 1999 with two employees and now has over 700 with projected annual revenues for 2007 of $22 million. Due to the superior level of performance provided to its clients, ETI has been the recipient of the following awards and accolades.

- In April 2007, ETI was awarded the FY2006 Small Business Achievement Award from the US Department of Homeland Security (DHS) for our exemplary services provided to the US Coast Guard over the last three years.
- ETI's President and CEO, Nicholas V. Christiansen, Sr. was awarded the 2007 Small Business Person of the Year by the US Small Business Administration (SBA) Washington, DC District Office in May of this year.
- The Minority Enterprise Executive Council (MEEC) named ETI President and CEO Nicholas V. Christiansen, Sr. to its 2007 list of "Fifty Influential Entrepreneurs in Business" National Awardees in July 2007.
- The Washington Business Journal ranked Eagle Technologies, Inc. as the eighth largest security provider in the Greater Washington, DC metropolitan area in its September 2007 issue.

Other facts about ETI:

- ETI is the premier provider of security guard services to:

  1. The US Department of Homeland Security, US Coast Guard
     - San Juan, Bayamon and Aguadilla, Puerto Rico
     - Miami and Opa Locka, FL
     - Yorktown, VA
     - Elizabeth City, NC

- Cape May, NJ

2. US Department of Transportation, Federal Aviation Administration
   - Boonsboro, MD
   - Leesburg, VA
   - Arlington, VA
   - Chantilly, VA
   - Warrenton, VA
   - Daytona Beach, FL
   - Atlanta, GA
   - Jacksonville, FL
   - Miami, FL
   - Tampa, FL
   - Covington, KY

3. US Environmental Protection Agency
   - Research Triangle Park, NC
   - Chapel Hill, NC
   - Washington, DC

❖ ETI is the premier provider of security guard services to federal and military healthcare institutions and research facilities in the National Capital Region to include:

- National Naval Medical Center (NNMC), Bethesda, MD – Access Control
- Walter Reed Army Medical Center (WRAMC), Washington, DC – Unarmed Security
- NIH, National Institutes on Aging, Gerontology Research Center (GRC), Baltimore, MD – Unarmed Security
- Uniformed Services University of Health Science (USUHS), Bethesda, MD – Unarmed Security
- US Department of Agriculture, National Plant Germplasm Quarantine Center, Beltsville, MD – Armed Security
- National Naval Medical Center (NNMC), Bethesda, MD – First Responders

❖ ETI received a call at approximately 0900 from the Department of Transportation, Federal Aviation Administration (FAA) requesting ETI to start an armed, cleared security contract at the Ronald Reagan National Airport on October 4, 2001 at the Air Traffic Control Tower with less than 24 hours notice. This request was truly an emergency request in that this was the first reopening of Reagan National after the September 11, 2001 attacks. ETI met the challenge and still is the provider of security services to this day at that location.

❖ ETI received numerous commendations from the tenants of the National Naval Medical Center in Bethesda, MD including two (2) citations directly from the base Rear Admiral A. M. Robinson for superior performance. This facility serves the President of the United States and many high ranking dignitaries and our nation's military.

- ETI has an outstanding in-house Training Academy headed by Mr. Nicholas V. Christiansen, Sr., President/CEO. Several corporate officers and directors are certified and/or qualified instructors by the National Rifle Association (NRA); the Maryland State Police (MPS); Georgia State Board of Private Security; South Carolina Law Enforcement Division (SLED) General Services Administration (GSA); Federal Law Enforcement Training Center (FLETC); American Red Cross; and many other organizations. Our in-house instructors and mobile training teams are capable of providing the field training curriculum to include, but not limited to; Basic Training, Supervisory Training, Firearms Training, Specialized Training, and Training/Certification for CPR/First Aid/AED.

The above only highlights a few of ETI's major accomplishments. There are too many notable circumstances to mention in this testimony.

PROTEST OF DHS, FLETC CONTRACT: ETI is the incumbent security guard contractor at the DHS, Federal Law Enforcement Training Center (FLETC) located in Cheltenham, Maryland adjacent to Andrews Air Force Base. ETI initially won the contract through an 8(a) sole source procurement in February 2004. The contract was re-competed as an 8(a) competitive solicitation and ETI won the contract in November 2005 for a base period and one option year. In April of 2007 FLETC issued solicitation #LGL07R00006 for Consolidated Security Guard Services as an 8(a) competitive requirement for all four of the FLETC locations nationwide (Glynco, GA; Charleston, SC; Artesia, NM and Cheltenham, MD). FLETC indicated the reasons for the agency to combine the locations and issue a consolidated solicitation was to accomplish the following:

- ✓ Uniformity
- ✓ Consistency
- ✓ Continuity
- ✓ Overall Cost Savings to the Government

ETI participated in the entire procurement process and was notified on September 26, 2007 that the Consolidated Security Guard contract was awarded to Chenega Security and Protection Services (CSPS), LLC, an Alaskan Native Corporation (ANC) located at 19980 Highland Vista Dr. Suite 100 Ashburn, VA 20147 in the aggregate amount of $88,069,352.01 more than $10 million higher than ETI's price.

ETI has filed a protest with the General Accountability Office (GAO) Case #B-310529.001 based upon the following assertions:

a) FLETC's evaluation of ETI's proposal was unreasonable.
   - the four salient weaknesses mentioned during the debriefing were not substantiated by the ETI Technical Proposal,
   - ETI is the current incumbent contractor at the FLETC Cheltenham, MD facility. ETI has received "Excellent" past performance ratings from this facility and is the recipient of the US DHS 2007 Small Business

Achievement Award. CSPS has not provided any of these services to FLETC. Based upon these facts, how does CSPS receive a higher Past Performance relevancy rating than ETI.

b) FLETC failed to conduct meaningful discussions with ETI.

- None of the salient weaknesses mentioned during the debriefing were brought to ETI's attention during the Final Proposal Revision (FPR).
- It is ETI's contention that the evaluation factors mentioned in our debriefing on 09/28/07 were minor and could have been addressed to FLETC's satisfaction with "meaningful discussions" during the Final Proposal Revision process that was conducted by way of solicitation Amendment #09. Since FLETC failed to raise these "salient, important, and significant" weaknesses during the FPR process, how could they be considered salient later as identified during the debriefing?

c) FLETC's evaluation of Chenega's final proposal revision with respect to licensing requirements was unreasonable.

- It was determined that Chenega did not meet the state (MD, GA, SC) licensing provisions of the FPR.
- Amendment #09 to the solicitation required that offerors respond to "Discussion Clarification Questions dated August 9, 2007' and that... ..."The contractor shall include in the FPR [due by August 17, 2007], proof of applying for licenses in each required state for which performance will take place. A copy of each state license shall be submitted to the Contracting Officer within thirty (30) calendar days after contract award date." ETI had complied with this provision by being licensed in all four states prior to the submission of our proposal. This fact was considered a strength of ETI during the debriefing.

  During the 09/28/07 debriefing, ETI asked FLETC if the awardee (CSPS) was licensed to perform these services in all of the states and the FLETC response was CSPS had complied with the provision of Amendment #09. According to the applicable state laws for each site a subsidiary company cannot utilize the license of the parent company to perform security services. Since the date of the debriefing, ETI has uncovered the following facts:

  - State of Maryland – ETI received a letter dated October 11, 2007 from the Maryland State Police licensing division indicating that based upon a search of their records Chenega did not have a license nor applied in the state of MD. Subsequent to receiving that letter, ETI was informed that Chenega did apply for a license under the acronym CSPS on August 24, 2007, which still places CSPS beyond the FLETC Amd. #09 FPR closing date of August 17th to be in compliance with the solicitation requirements.
  - State of Georgia – ETI received a letter dated October 15, 2007 from the Georgia State Board of Private Detective and Security Agencies

Professional Licensing Board that Chenega is not licensed in the state nor are there any public records for an application by this firm.

- State of South Carolina – ETI received a letter dated October 10, 2007 from the South Carolina Law Enforcement Division that CSPS received a license on October 9, 2007 but that there application was received on August 23, 2007 which is after the August 17th due date for the FPR.

Based upon the above facts, CSPS was in violation of the provision of Amendment #09 in three of the four states and should not have received any further consideration for award and should have been determined as non-responsive to the Amendment provisions.

d) FLETC conducted an improper cost-technical tradeoff analysis in determining to make an award to Chenega at a price that was significantly higher than ETI's price.

- Chenega's aggregate price was more than $10 million higher than ETI's price. It was stated to ETI at the start of the debriefing on 09/28/07 that one of the primary goals of FLETC to issued the consolidated security guard services requirement was to achieve an overall cost savings to the government and to provide continuity and consistency. ETI asked the question during the debriefing, "Did the government/FLETC abandon the idea of saving money?". FLETC's response to the question was "no". With this being said, it is ETI's contention that this goal could have been better achieved with ETI since our price was over $10 million lower and the government evaluated our price as reasonable.

While it is yet to be determined as to the specific reasons why Chenega has been give preferential treatment towards the award of this contract, it would not be the first time that ETI has been impacted by the Government's insistence in awarding contracts to an ANC firm with significantly higher prices and less than equal experience.

In 2006 ETI unsuccessfully protested (GAO Case #B-299286) the award by the US Department of the Navy to another ANC, Frontier Integrated Systems, under Solicitation No. N40080-06-R-0456. At the debriefing the government indicated that ETI received the highest past performance evaluation rating and the absolute lowest price. But despite the evaluation factors set forth in the solicitation, ETI was not awarded the contract. ETI contends when the company with the best evaluated past performance rating and a reasonable price is not awarded the contract it is an unfair and unreasonable conclusion by the agency.

Other instances of GAO protests filed against ANC's performing security guard services include:

- GAO Decision 02/06/07 #B-299088 and #B-299088.2 Alutiiq Global Solutions
- GAO Decision 02/28/07 #B-298872.3 Frontier Systems Integrators, LLC
- GAO Decision 12/29/05 #B-297320.2 and #B-297320.3 Spectrum Security Services

- GAO Report #06-399 to Congress April 2006 Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight
- GAO Report #06-874TJune 2006 ANC Increased Use

ETI and other legitimately disadvantaged businesses are not on a 'level playing field' when competing in the SBA 8(a) arena against ANC firms. ANC's are inherently larger in size and more significantly funded. ANC legislation unfairly allows the resources and experience of the affiliated parent company to be included in the evaluation of the proposal but disregards and does not consider its superior financial capability. Another hardship faced by the 8(a) contractor community is that Federal agencies also receive added incentives to award contracts to ANC's to fulfill their mandated procurement goals.

The ANC legislation as it stands consistently makes the government procurement process bias and it disproportionately favors the awards on an uncompetitive basis.

Senator Cardin, ETI requests the assistance of your office to look into this on-going issue that prejudices small disadvantaged businesses competing for federal contracts. Your assistance is greatly appreciated. Should you require any further information, please feel free to contact me directly at 301/306-9110 office or 703/675-0140 cell.

Sincerely,

Nicholas V. Christiansen, Sr.

Nicholas V. Christiansen, Sr.
President & CEO
Eagle Technologies, Inc.

Creative Investment Research, Inc.
PO Box 15385
Washington, DC 20003-0385
866-867-3795 phone/fax
http://www.minorityfinance.com
www.minoritybank.com
http://www.creativeinvest.com

STATEMENT FOR THE RECORD
by
WILLIAM MICHAEL CUNNINGHAM
and
CREATIVE INVESTMENT RESEARCH, INC.
Submitted to the
U.S. Senate Small Business Committee Field Hearing in Prince George's County

William Michael Cunningham and Creative Investment Research, Inc. (CIR) submit the following statement for the record of the *U.S. Senate Small Business Committee Field Hearing in Prince George's County.*

We thank U.S. Senator Benjamin L. Cardin for this opportunity and for investigating "the problems that small and minority businesses encounter when attempting to contract with the federal government." We urge the Committee to continue to get opinions on this matter from a culturally and economically diverse set of persons.

We support the Committee's efforts to modernize policies and procedures concerning minority business contracting. We believe the hearing is a proper first step.

Background

William Michael Cunningham registered with the U.S. Securities and Exchange Commission as an Investment Advisor on February 2, 1990. He registered with the D.C. Public Service Commission as an Investment Advisor on January 28, 1994. Mr. Cunningham manages an investment advisory and research firm, Creative Investment Research, Inc.

Creative Investment Research, Incorporated, a Delaware corporation, was founded in 1989 to expand the capacity of capital markets to provide capital, credit and financial services in minority and underserved areas and markets. We have done so by creating new financial instruments and by applying

Copyright, 2005, by William Michael Cunningham and Creative Investment Research, Inc.
All rights reserved.

existing financial market technology to underserved areas. The Community Development Financial Institution Fund of the US Department of the Treasury certified the firm as a Community Development Entity on August 29, 2003. The Small Business Administration certified the firm as an 8(a) program participant on October 19, 2005. We have not received any revenue due to our participation in the 8(a) program.

In 1991, Mr. Cunningham created the first systematic bank analysis system using social and financial data, the Fully Adjusted Return® methodology. In 1992, he developed the first CRA securitization, a Fannie Mae MBS security backed by home mortgage loans originated by minority banks and thrifts. .

In 2001, he helped create the first predatory lending remediation/repair MBS security. [1]

Mr. Cunningham also served as Director of Investor Relations for a New York Stock Exchange-traded firm. On November 16, 1995, his firm launched one of the first investment advisor websites. He is a member of the CFA Institute

---

1

Pool	Client	Originator	Social Characteristics
FN374870	Faith-based Pension Fund	National Mortgage Broker	Mortgages originated by minority and women-owned financial institutions serving areas of high social need.
FN296479			
FN300249			
GN440280	Utility Company Pension Fund		
FN374869		Minority-owned financial institutions	
FN376162			
FN254066	Faith-based Pension Fund	Local bank	Predatory lending remediation

Copyright, 2006, 2007, by William Michael Cunningham and Creative Investment Research, Inc.
All rights reserved.

and of the Twin Cities Society of Security Analysts, Inc.

The firm and Mr. Cunningham have long been concerned with the integrity of the securities markets. We note the following:

- On Monday, April 11, 2005, Mr. Cunningham spoke on behalf of investors at a fairness hearing regarding the $1.4 billion dollar Global Research Analyst Settlement. The hearing was held in Courtroom 11D of the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York. *No other investment advisor testified at the hearing.*

The firm and Mr. Cunningham have long been familiar with "the problems that small and minority businesses encounter when attempting to contract with the federal government." We note a few of our experiences below:

- On 6/15/98, the Government National Mortgage Association (GNMA), part of the Department of Housing and Urban Development, issued RFP GNMA 98-PP-02. The RFP solicited various business advisory services, market research, issuer training sessions, job performance enhancement sessions on industry issues, and survey development and analysis. The RFP indicated that the bids would be evaluated awarded in accordance with FAR contracting rules and regulations. Creative Investment Research, Inc. was notified on 8/12/98 that we were an "unsuccessful offeror under the subject solicitation." We were further notified that "While an award has not yet been made, your firm has been eliminated from any further consideration for award based upon a comprehensive review and analysis of all proposals received." In short, we would not be allowed to bid on this contract, although we complied fully with published RFP selection criteria. The contract award was motivated by factors not indicated in the RFP, evaluation factors that changed after the RFP was issued.

- The U.S. Department of Transportation issued RFQ DTTS 59-98-Q-00011 on June 17, 1998 requesting a contractor to:

Copyright, 2006, 2007, by William Michael Cunningham and Creative Investment Research, Inc.
All rights reserved.

1) Provide an independent analysis to OSDBU in the review of the financial condition/performance of the commercial banks participating in the STLP;2) Develop criteria for use in the selection of additional lead/participating banks if the program is expanded or replacement banks are required;3) Provide independent banking/loan review of STLP recommendations provided by the participating banks;4) Participate in the program review of the OSDBU financial assistance programs; 5) Consult and provide advise to the Director, OSDBU.

The RFQ indicated that the bids would be evaluated awarded in accordance with FAR contracting rules and regulations. The contract was awarded on 6/23/98 to another firm using undisclosed contract award criteria.

- On October 7, 2005, the House Financial Services Committee requested that the Government Accountability Office (GAO) "examine the federal banking agencies' current efforts to promote and preserve minority-owned financial institutions and the views of the minority financial services community on the effectiveness of these efforts." This involves reviewing federal banking agencies' implementation of section 308 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). As an 8(a) firm, on December 14, 2005, we submitted a proposal to the General Accountability Office to assist the agency in the completion of this study. We have unique and detailed ratings and information on minority banks dating back to 1991. GAO replied that the agency did not wish to contract with an outside firm concerning this matter. Less than a month later, the Agency contracted with a non minority professional to obtain, at greater cost, the information and services we offered to provide.

- Rather than support and engage in the types of predatory subprime lending practices that have negatively impacted the mortgage market and the country as a whole, we proposed to develop alternative, socially responsible methods to enhance homeownership opportunities for minorities and women. As an

Copyright, 2006, 2007, by William Michael Cunningham and Creative Investment Research, Inc.
All rights reserved.

> 8(a) firm, we submitted an unsolicited proposal to Department of Housing and Urban Development (HUD) on April 7, 2006. In our proposal, we offered to research and create a collaborative, market-based approach to increase market participation in a HUD-based socially responsible mortgage lending program. HUD replied that the "Office of Policy Development and Research (to whom we submitted the proposal) is not in a position to support this activity."

It is our belief that federal government contracting and capital market practices, in general, are deeply flawed. It is our hope that the Committee will begin to review market practices from a systemic, global perspective, since defective practices in one sector have been linked to faulty practices in other capital market sectors:

- In multiple cases, corporate management used fraud and deceptive practices to unfairly transferred value from outsider to insider shareholders.

- Investment analysts issue biased research reports to curry favor with management.

- Rating agencies issue defective research reports. These institutions are supposed to "base their ratings largely on statistical calculations of a borrower's likelihood of default," but one news report noted that:

  > "Dozens of current and former rating officials, financial advisers and Wall Street traders and investors interviewed by The Washington Post say the (NRSRO) rating system has proved vulnerable to subjective judgment, manipulation and pressure from borrowers. They say the big three are so dominant they can keep their rating processes secret, force clients to pay higher fees and fend off complaints about their mistakes."[2]

- Pension consultants are, also, conflicted and compromised. "Many pension plans rely heavily on the expertise and guidance

---

[2] "Borrowers Find System Open to Conflicts, Manipulation" by Alec Klein, The Washington Post, Monday, November 22, 2004; Page A1.

Copyright, 2006, 2007, by William Michael Cunningham and Creative Investment Research, Inc.
All rights reserved.

of pension consultants in helping them to manage pension plan assets," but, according to an SEC report[3],

> "Concerns exist that pension consultants may steer clients to hire certain money managers and other vendors based on the pension consultant's (or an affiliate's) other business relationships and receipt of fees from these firms, rather than because the money manager is best-suited to the clients' needs."

Envy, hatred, and greed continue to flourish in certain capital market institutions, propelling ethical standards of behavior downward. Statistical models created by the firm show the probability of system-wide market failure has increased over the past eight years. Without meaningful reform there is a small, but significant and growing, risk that our economic system will simply cease functioning.[4]

Fully identifiable entities engaged in illegal activities. They have, for the most part, evaded prosecution of any consequence. We note that the Goldman Sachs, fined $159.3 million by the U.S. Securities and Exchange Commission for various efforts to defraud investors, subsequently received $75 million in Federal Government tax credits.[5]

We also note that Alliance Capital Management, fined $250 million by the Commission for defrauding mutual fund investors, received a contract[6] in August, 2004 from the U.S Department of the Interior (DOI) Office of the Special Trustee for American Indians, to manage $404 million in Federal Government trust funds.[7]

---

[3] *Staff Report Concerning Examinations of Select Pension Consultants*. The Office of Compliance Inspections and Examinations, U.S. Securities and Exchange Commission. May 16, 2005.

[4] Proportional hazard models created by the firm and reflecting the probability of system wide market failure first spiked in September, 1998. The models spiked again in January and August, 2001. They have continued, in general, to trend upward, indicating a heightened risk of catastrophic market failure due to corporate fraud and malfeasance.

[5] The tax credits were awarded under the U.S. Department of the Treasury New Markets Tax Credit (NMTC) Program. (See: http://www.cdfifund.gov/programs/nmtc/).

[6] Contract number NBCTC040039.

[7] The contract was awarded despite the fact that placing Alliance Capital Management in a position of trust is, given the Commission's enforcement action, inconsistent with common sense, with the interests of justice and efficiency and with the interests of Indian beneficiaries. Alliance is also in violation of DOI Contractor Personnel Security & Suitability Requirements.

Copyright, 2006, 2007, by William Michael Cunningham and Creative Investment Research, Inc.
All rights reserved.

Recently, we have observed several cases where corporate management unfairly transferred value from outsider to insider shareholders.[8] These abuses have been linked to the abandonment of ethical principles noted earlier. Faulty market practices mask a company's true value and misallocate capital by moving investment dollars from deserving companies to unworthy companies.

Together these practices threaten the integrity of securities markets. Individuals and market institutions with the power to safeguard the system, including investment analysts and rating agencies, have been compromised. Few efficient, effective and just safeguards are in place.

Investors and the public are at risk.

We understand that, given any proposed legislation, crimes will continue to be committed.[9] These facts lead some to suggest that regulatory authorities may have been "captured" by the entities they regulate.[10] We note that under the "regulatory capture" market structure regime, the public interest is not protected.

We favor efforts to increase fairness in our capital markets while opposing

---

[8] Including, but not limited to, Adlephia Communications, the aforementioned Alliance Capital Management, American Express Financial, American Funds, AXA Advisors, Bank of America's Nations Funds, Bank One, Canadian Imperial Bank of Commerce, Canary Capital, Charles Schwab, Cresap, Inc., Empire Financial Holdings, Enron, Federated Investors, FleetBoston, Franklin Templeton, Fred Alger Management, Freemont Investment Advisors, Gateway, Inc., Global Crossing, H.D. Vest Investment Securities, Heartland Advisors, Homestore, Inc., ImClone, Interactive Data Corp., Invesco Funds Group Inc., Janus Capital Group Inc., Legg Mason, Limsco Private Ledger, Massachusetts Financial Services Co., Millennium Partners, Mutuals.com, PBHG Funds, Pilgrim Baxter, PIMCO, Prudential Securities, Putnam Investment Management LLC, Raymond James Financial, Samaritan Asset Management, Security Trust Company, N.A., State Street Research, Strong Mutual Funds, Tyco, UBS AG, Veras Investment Partners, Wachovia Corp., and WorldCom. Accounting firms, including Arthur Andersen and Ernst & Young aided and abetted efforts to do so. We believe there are hundreds of other cases.

[9] We assume that "employees are 'rational cheaters,' who anticipate the consequences of their actions and (engage in illegal behavior) when the marginal benefits exceed costs." See Nagin, Daniel, James Rebitzer, Seth Sanders and Lowell Taylor, "Monitoring, Motivation, and Management: The Determinants of Opportunistic Behavior in a Field Experiment, *The American Economic Review*, vol. 92 (September, 2002), pp 850-873.

[10] See George J. Stigler, "The Theory of Economic Regulation," in *The Bell Journal of Economics and Management Science*, vol. II (Spring 1971), pp. 3-21.

Copyright, 2006, 2007, by William Michael Cunningham and Creative Investment Research, Inc.
All rights reserved.

reform for reform's sake.

We cite the following:

"Falsification and fraud are highly destructive to free-market capitalism and, more broadly, to the underpinnings of our society. Above all, we must bear in mind that the critical issue should be how to strengthen the legal base of free market capitalism: the property rights of shareholders and other owners of capital. Fraud and deception are thefts of property. In my judgment, more generally, unless the laws governing how markets and corporations function are perceived as fair, our economic system cannot achieve its full potential. "

> Testimony of Mr. Alan Greenspan, Chairman of the Federal Reserve Board, Federal Reserve Board's semiannual monetary policy report to the Congress. Before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate. July 16, 2002.

We agree.

Summary Comments

The hearing will give minority businesses an opportunity to meaningfully comment on "the problems that small and minority businesses encounter when attempting to contract with the federal government." Capital is the issue of highest importance to minority businesses. Below, we outline a strategy to move capital into minority businesses.

Microcredit Stock Exchange

On Tuesday, October 17, 2006, Chicago's two major futures exchanges, the Chicago Mercantile Exchange and the Chicago Board of Trade, announced an $8 billion merger. The NYSE and other exchanges are in the throes of mergers. We think the U.S. Congress should impose specific community development goals on stock and commodity exchanges, much like those that the Community Reinvestment Act (CRA) imposes on banks. (When banks merge, CRA regulations require banking authorities to certify that the banks involved do not have a history of discriminating against persons of color or low income persons.)

CRA has stimulated billions of dollars of profitable, high social impact lending, provided to underserved communities nationwide. In this way, the

Copyright, 2006, 2007, by William Michael Cunningham and Creative Investment Research, Inc.
All rights reserved.

Act encourages depository institutions (banks and thrifts) to help meet the credit needs of the communities in which they operate.

Given this, exchanges should be required to help meet the capital needs of small, disadvantaged businesses. To do this, we suggest the Congress mandate the creation of a Minority Business Micro Stock Exchange, modeled on the work pioneered by the 2006 winner of the Nobel Peace Prize, Muhammad Yunus and the Grameen Bank. Equity capital, or shares in very small (micro) minority businesses would be traded on a Micro Business Stock Exchange.

The Exchange would provide the framework for the provision of small amounts of equity capital. To make things easier and to enhance the probability of success, we suggest the initiative focus specifically on disadvantaged businesses operating in Prince Georges County.

The mechanics are simple: small businesses with capital needs prepare business ready financing proposals that are put before investors on a trading floor managed by the Exchange. Investors review the businesses and their plans and decide whether or not to invest. The plans and the businesses themselves would be authenticated by a set of independent third parties, say, the County Treasurers' Office, and representatives from the local Minority Business Opportunity Center. Terms of any investment would be determined by a standardized micro business investment contract, much like a small business futures contract. The contract would allow for off exchange, "on the curb" modification and tailoring.

Our suggestions are specific and fit well within the business activities and framework of the exchanges.

This is just a very rough idea, in need of refinement. Perhaps the free market economists at my alma mater, the University of Chicago, could be persuaded to help. After all, this Exchange puts free market theories to their ultimate test: if legitimate, legal free market institutions don't work in Prince Georges County, why would they work in, say, Iraq?

In summary, we believe the use of new capital access tools will significantly reduce costs and increase the flow of capital to all sectors in society. This

Copyright, 2006, 2007, by William Michael Cunningham and Creative Investment Research, Inc.
All rights reserved.

increase in capital access will, in turn, result in significantly increased general economic activity. We estimate, using proprietary economic models, this increased economic activity at $6 trillion dollars over ten years. (This assumes an internet based capital access system that is gender and racially neutral, operating without significant falsification and fraud.)

The internet is a powerful tool. We understand both the potential benefits and the potentially disruptive nature of this technology better than most.[11]

Capital market regulators in other regions of the world will, at some point, enhance their ability to access capital using internet-based tools. Thus, competitive advantage with respect to capital access is available to any country with significant economic potential and a modest communications infrastructure.

We do not know which countries will be winners over the long term. We know with certainty, however, that unless small and minority businesses encounter fewer problems when attempting to contract with the federal government, given the corporate fraud and malfeasance cited, it is unlikely that the United States will long maintain and enjoy its current advantage. The hearings are an important first step.

We look forward to reviewing the Committee's continuing efforts to carry out its mission. We appreciate the time and effort the Committee and the Chairman have devoted to this task. Thank you for your leadership.

---

[11] Our first website, www.ari.net/cirm, went live on November 16, 1995. We appreciate the nature of the task facing legislators. Implementing the proposed modification is very much like performing surgery on a marathon runner - during a race. Corporate fraud and malfeasance threaten the entire system, just as cholesterol clogged arteries threaten the health of the aforementioned runner. To make matters worse, (and to extend this analogy far too long) the nature of the technology is such that it significantly improves the performance of every runner in the race.

Copyright, 2006, 2007, by William Michael Cunningham and Creative Investment Research, Inc.
All rights reserved.

U.S. Senate Small Business Committee Field Hearing
Monday, October 29, 2007
1:00 PM at Bowie State University
Hosted by Senator Benjamin L. Cardin.

"Access to Federal Contracts: How to Level the Playing Field"

Testimony for the Record Submitted by Tim Fay, Fay Communications, Inc.

INTRODUCTION: To answer the question posed in the title of this hearing, the best way to level the playing field in federal contracting is to obtain the best value for the taxpayers' government contract dollars by seeking out firms with the best ability to produce the best product or service at the best price regardless of the race, gender, or ethnicity of the contractor.

Fay Communications, Inc. fully supports programs which assist truly small businesses compete for government contracts as long as that assistance is completely neutral regarding the race, gender or ethnicity of the contractor. As I will graphically illustrate later in my testimony, so-called race-sensitive assistance efforts in this regard have had a devastating impact upon my business and, by definition, upon many other small businesses which happen to be owned by non-preferred groups such as white males. Such programs are racially exclusionary by definition: a benefit or preference offered exclusively to one racial group necessarily excludes another, non-included racial group from that benefit.

STRICT SCRUTINY and DISPARITY STUDIES: Under applicable case law federal contracting preferences based in any part upon race or gender are legally suspect. Upon close examination all such programs fail one or more of the three prongs of "strict scrutiny" laid out by the U.S. Supreme Court in a series of rulings on this issue. And, according to expert testimony before the U.S. Commission on Civil Rights, virtually none of the "disparity studies" which are used to justify these race-based programs are based upon a statistically valid, independently reproducible finding of systemic discrimination. (See: U.S. Commission on Civil Rights May 2007 Briefing Report "Disparity Studies as Evidence of Discrimination in Federal Contracting", particularly the testimony of Roger Clegg and George LaNoue.)

To be sure, the federal government; the State of Maryland; Montgomery County, Maryland; and Prince Georges County, Maryland all have so-called disparity studies which they use to justify their use of race, gender and ethnicity in contract awards. At their best, these studies offer a smorgasbord of anecdotal reports and very simple statistics which merely show that some minority groups are "underrepresented" in federal, state and local contracting. The type of "evidence" presented in these disparity studies proves neither (1) that racial discrimination is the reason for this

underrepresentation; nor (2) that race based measures to correct the underrepresentation constitute a narrowly tailored remedy which passes all three prongs of strict scrutiny.

WHITE MALES NEED NOT APPLY: The federal government administers a number of race, gender and ethnicity-based preference programs for contractors including the 8(a) program as well as the SDB (Small Disdadvantaged Business) and WBE (Woman-Owned Business Enterprise) programs. I note in passing that in 1997 the federal government set aside $21.8 billion dollars for contracts to businesses not owned by white males. By FY2005 the total of all 8(a), SDB and WBE contract set asides had ballooned to $32.3 billion. (See SBA's FY2005 "Small Business Goaling Report" at page 1.)

I should also note that the U.S. SBA has nominally, and purely symbolically, begun to allow white males to avail themselves of the 8(a) set aside program. This is truly an empty gesture because, according to the SBA's own official report, less than ½ of 1 per cent of 8(a) businesses are owned by white males. (See "SBA Report to Congress: Office of Business Development, Minority Small Business and Capital Ownership Development" FY 2005, "Table IV: Ethnic Heritage of 8(a) Business Development Participants".)

Furthermore, the 8(a) certification process for white males is inherently racially biased against them. The application places an extraordinary burden of proof upon white male applicants which it does not impose upon selected minority applicants. A white male applicant must provide copious documentation (against extremely vague, ill-defined criteria) proving that he has experienced historic disadvantage. Black applicants and selected other minorities are allowed to completely skip that section of the 8(a) application.

FayComm Experiences with Racial Set Asides and Preferences

My business, Fay Communications, Inc., had been quite successful as a federal contractor. But for the past 20 years -- beginning in 1987 and continuing through today -- we have been repeatedly and explicitly told by federal agencies, as well as by state and local agencies, that because of my race and gender my firm is not allowed to bid on government business for which we are extremely well qualified.

FEMA and FAYCOMM: In the summer of 1987, for example, my company had been performing contract work for FEMA during the previous three years. FEMA was quite happy with our work.

During the week of July 6, 1987 our FEMA program officers met with me and told me that Fay Communications would no longer be allowed to bid on the FEMA contracts because FEMA, with strong encouragement from the SBA, had elected to give --

without competition -- future contracts to a supposedly "historically disadvantaged" firm owned by an Asian American. The "historically disadvantaged" firm was Technical Resources, Inc. (TRI).

Somewhat apologetically, the FEMA program officers explained to me that federal set aside rules gave them a huge incentive to sole source the contract to TRI without competition. By doing so FEMA was able to bypass the tedious, labor intensive and lengthy process of soliciting and evaluating competitive bids. This was a big incentive for government agencies to set aside contracts for non-whites in 1987 and it remains so in 2007.

During my ensuing lawsuit (and what civic minded American wouldn't sue over such blatant racism?) the following facts surfaced during pretrial discovery:

- The "disadvantaged" firm (TRI) had 100 employees vs. my "privileged" firm's 4 employees.

- The "disadvantaged" firm (TRI) had $10 million in annual revenue ALL of which was from non-competed 8(a) set asides. My "privileged" firm had a measly $640,000 in annual revenue none of which was from the 8(a) program nor from any other set aside or preference program.

Which firm was truly disadvantaged?

Following my lawsuit (which I predictably lost) Fay Communications' federal revenue rapidly declined to zero. We did continue to receive enthusiastic phone calls from government agencies requesting our services (we had an excellent reputation within the federal government), but ALL of these phone calls ended abruptly when the federal agencies learned that Fay Communications was not a minority owned firm.

For the next ten years -- from 1987 to 1997 -- I continued making a very modest living by contracting with those few, remaining private companies and organizations which had not yet implemented racially preferential supplier diversity programs in their contracting operations. Since 1987 I have not been allowed to bid as a prime contractor for any federal contract.

U.S. DOT and FAYCOMM: However, ten years later, in October 1997, I did come tantalizingly close to winning a lucrative federal contract worth almost ½ million dollars for which I was eminently well-qualified. A program officer from the U.S. Department of Transportation telephoned me at that time about a contracting opportunity.

I had made an interactive instructional CD-ROM for a trucking association (which industry is regulated by DOT). DOT had independently obtained a copy of my interactive CD and they loved it.

In our October 1997 phone conversation, DOT enthusiastically praised my work and indicated they were anxious to get my firm on board to perform similar work for them. Was I available? Yes. Was I interested? You bet.

Then the nice DOT program officer lady asked the fateful question: "Are you a minority-owned firm?" Damn! The DOT contract had been set aside for a minority owned firm. I was devastated. End of conversation.

But, being a businessman, I called the DOT back and said "Hey, I work with a guy who is black and who is certified, so let's have a meeting."

Within six weeks of our meeting with DOT the black business owner received the initial contract, and subsequent related contracts, totaling $490,600. There was no competitive bidding. White owned firms were not even considered for this work. This was a sole source award to an 8(a) firm.

The deal with the devil that I was forced to strike on these DOT contracts was this: I had to give away 51% of the contract to my new "partner" (the black owned business) because the 8(a) program prohibits white subcontractors from earning more than 49% of an 8(a) contract. But I actually earned far less -- only 14.9% of the total contract awards -- when my black partner, the 8(a) firm, terminated its relationship with me in order to retain more of the contract funds. Final score: white guy (FayComm) $73,183; black guy $417,417.

This in spite of the fact that it was my qualifications and experience which DOT had initially sought out. My 8(a) "partner" firm had no prior experience in the production of interactive, instructional CD-ROMs.

See particularly http://www.adversity.net/c24_tbd.htm for additional details and contracting specifics.

WSSC, MONTGOMERY COUNTY, and FAYCOMM: Even though the topic of this hearing is federal contracting, since Senator Cardin represents the State of Maryland, I think it is relevant to briefly discuss the racially preferential contracting programs being operated in Montgomery County, Maryland where both I and my business are located.

For example, I am registered with the Washington Suburban Sanitary Commission (WSSC) under their contractor program "Small, Local Business Enterprise" (SLBE). While this program allegedly benefits all small vendors regardless of race, unfortunately for people like me, the SLBE program is actually administered by WSSC's SLMBE (Small, Local, and Minority Business Enterprise) office. And WSSC's SLMBE program is virtually indistinguishable from their MBE (Minority Business Enterprise) program. In both appearance and in practice WSSC's emphasis on "small businesses" is clearly superseded by their interest in "minority owned" firms.

This month (October 2007) I received a request for proposal from WSSC to submit a bid on A/V work at their headquarters. Included in the WSSC request for proposals is the following requirement: Non-minority bidders (such as Fay Communications) are required to certify to WSSC that at least 28% of the total amount of the contract will be spent on subcontract and supply business from minority-owned businesses -- even if we don't need the subcontractors. In other words, this is race-based "make work". Besides being openly discriminatory, WSSC's requirement is a bad deal for their rate payers who have to pay the additional cost of this wasteful and inefficient practice.

Also this month I received a request for proposal from Montgomery County's Public Information Office to produce a pedestrian safety video. When I called the Montgomery County PIO to inquire about the evaluation criteria I was informed that there is a committee which will evaluate all of the submitted proposals for the race, gender, and ethnicity of the bidders as well as the race, gender, and ethnicity of the bidders' subcontractors.

RACIAL SET ASIDES and PREFERENCES DON'T WORK: In any objective sense the reader must conclude that these programs represent nothing short of systemic, structural discrimination against businesses owned by whites in general and by white males in particular. And, far from helping minority-owned firms gain experience to compete for business, these racially preferential programs are a failure at many levels.

First, they are a failure because, according to SBA's own published figures, almost 50% of the 8(a) firms which survive to the end of their maximum nine year term in the program simply disappear after the end of the program. And a large percentage of 8(a) firms don't survive long enough to reach their nine year maximum in the program.

Between FY 2003 and FY 2005 the SBA reported that 629 of their 8(a) firms exited the program. Of that 629 only 1 firm actually completed its full 9 year term (which SBA calls "graduating"). 370 firms (58.8%) were terminated from the program by SBA for cause (for failing to meet various requirements); 258 (41.0%) withdrew from the program on their own; and NO firm which left the program did so because of "early graduation", i.e., not one firm out of the 629 that exited the program during this period did so because it was financially successful enough to exceed the size and revenue caps required to be a participant in the 8(a) program. (See SBA's "Report to Congress; Office of Business Development, Minority Small Business and Capital Ownership Development", FY 2005, Table III.)

Second, they are a failure because the SBA's Business Opportunity Specialists (BOS's) who are supposed to manage and nurture 8(a) participants primarily teach them only two things: (1) How to identify and obtain as many non-competitive 8(a) set aside contracts as possible; and (2) How to identify competitive, non-8(a) contracts and

then how to get the SBA to "encourage" the contracting agency to set that contract aside for the 8(a) company. According to memoranda obtained during our pretrial discovery, the latter is precisely how TRI arranged to have the FEMA contracts designated as 8(a) set asides to TRI. SBA refers to this malodorous practice as "marketing your 8(a) firm to other government agencies."

Third, these programs are a failure because they enrich a few, very large minority-owned business opportunists which did not need the assistance in the first place. By way of specific example, the 8(a) business with whom I was forced to partner on the DOT project was not economically disadvantaged by any rational measure. Prior to becoming certified as an 8(a) he had been in business for as many years as my firm. He told me that he decided to become certified as an 8(a) firm so he could take advantage of the set aside gravy train. Furthermore, he is a wealthy land owner who lives on over 40 acres of prime real estate in suburban Washington DC.

By way of further example, the U.S. GAO reported that, in one year alone, of the 5,400 minority and women-owned firms participating in these programs, only 209 of these firms (3.9%) sucked up 50% of the set aside contract dollars. The total set aside pie that year was $21 billion for minority and women owned businesses. Therefore each of the 209 largest minority/women owned firms earned an average of $50.2 million in set aside contract revenue, while the remaining 5,191 minority/women owned firms earned an average of a mere $2 million. This obviously begs the question: "How disadvantaged can one be if one is earning between $2 million and $50 million per year?" I would give my right arm for an opportunity like that, even at the low end of the scale! But I cannot have that opportunity -- even if I donate my right arm -- because I have the wrong plumbing and pigmentation.

In another report issued in 2000, the GAO found that the SBA 8(a) program does not collect information which would allow them to "...assess whether its efforts have an impact on the ultimate performance goal of creating commercially viable and stable firms." In other words, by design or by neglect, SBA is not able to evaluate whether the 8(a) program actually produces viable businesses. (GAO "Report to the Chairman, Committee on Small Business, U.S. Senate", July 2000, GAO/RCED-00-197.)

FEDERAL SMALL BUSINESS SET ASIDE PROGRAM: Having said all of that, I wish to address a supposedly race-neutral federal contracting reserve or set aside program which is exclusively for Small Business. For those of us who are excluded from the lucrative 8(a), SDB and MBE programs, the Small Business set aside program does not in any way compensate for the racial bias and exclusionary nature of those other programs nor does it necessarily represent a great business opportunity for truly small firms. There are several reasons why this is true:

First, it is true that firms owned by all races may bid on these contracts, including firms belonging to the 8(a), MBE, SDB and WBE programs. White male owned firms

are, of course, still excluded from the $30 billion plus in contracts reserved for various race-based programs.

Second, the number of firms competing for the Small Business set asides is orders of magnitude larger than the pool of 8(a), SDB and MBE participants in the limited-competition race-based programs. For the truly small firm this arrangement is not much better than simply going up against all of the mega-contractors in the total federal contract pool.

Third, the firms competing for Small Business set asides are neither small nor disadvantaged in any meaningful sense. Depending upon the industry category, the Small Business set aside program allows participants to have annual revenues of as much as $32.5 million and as many as 1,500 employees. This hardly represents a level playing field for truly small firms such as Fay Communications.

CONCLUSION: In conclusion, there can be no level playing field in federal contracting (nor in state or local government contracting) as long as the government continues its divisive, counterproductive, noncompetitive, and discriminatory emphasis on the bidders' pigmentation, country of origin, or personal plumbing. After almost 40 years of racial set aside programs and racial preference programs, minority-owned businesses are still not proportionally represented in federal contracting. One must conclude that the set aside program, and its racially preferential progeny, have not worked. These programs have failed to achieve the legally, constitutionally and economically dubious goal of proportional representation for selected races AND these programs have demonstrably failed to produce viable businesses.

The government should get back to the contracting basics: obtain the best value for the taxpayers' government contract dollars by seeking out firms with the best ability to produce the best product or service at the best price regardless of the race, gender, or ethnicity of the contractor.

Respectfully Submitted by:

Tim Fay
Fay Communications, Inc.
802 Argyle Road
Silver Spring, MD 20901

Phone (301) 588-0778
Email: tim@faycomm.com
Web site: http://www.faycomm.com

cc: Members of the Senate Small Business Committee

Melvin Genwright, President; Small Business Owner (Power Cleaning Services, Inc.)

To the Honorable U.S. Senator Benjamin Cardin

I operate a small janitorial business, Power Cleaning Services, Inc., which is located in Bowie, Maryland. I have been in business for 11 years.

My company is categorized as a small disadvantaged business and I am a contractor at a U.S. Federal Government facility on Andrews Air Force Base, Maryland; the Air National Guard Bureau; Readiness Center (ANGB/RC). I am writing to you today to explain a horrible situation that the U. S. Federal Government has placed my company in. This agency, the ANGB/RC, has not paid us in the past three months. For some this may not seem like a big deal. Although, we have been able to cover our expenses for the past several months without getting paid; the amount now due to us has exceeded our available funds to cover our expenses and payroll. We have been left in a position whereas we will not be able to pay our employees next pay period; we have no more money. ANGB/RC's nonpayment has long term affects; it has now affected our credit, for we have not been able to pay most of our operating expenses over the past several months so that we could pay our payrolls.

We have been placed in an awful position due to no fault of our own; this agency has caused us a horrible hardship. We have called and talked with the contract specialist often and have sent letters. Their only response has been that they'll do whatever they can and if we have a problem to contact our congressman. We have no place to turn and they are running a small business out of business.

To add insult to injury, we are currently working this contract which expired on September 30, 2007 and have been promised to receive a modification to ensure payment for the extension. We have reminded them many times of this modification and have yet to receive this document.

I trusted the Federal Government and have since been betrayed. I knew I would not get rich working with the Federal Government but I never thought they would work against me and run me out of business. I am really at a lost for words and do not know what else to say to appeal to you to help us out. I hope that you understand and will help us in this time of need.

Sincerely,

Melvin Genwright
President

GOVERNOR'S OFFICE OF MINORITY AFFAIRS

MARTIN O'MALLEY
Governor

ANTHONY G. BROWN
Lieutenant Governor

LUWANDA W. JENKINS
Special Secretary

Luwanda W. Jenkins, Special Secretary
Written Testimony
US Senate Committee on Small Business and Entrepreneurship
"Access to Federal Contracts: How to Level the Playing Field"

Greetings, Chairman Kerry, Ranking Member Snowe, Senator Cardin and distinguished members of the US Senate Committee on Small Business and Entrepreneurship. My name is Luwanda Jenkins and I am the Special Secretary of the Governor's Office of Minority Affairs. Thank you for the opportunity to provide input on this very important matter, and thank you for holding today's hearing.

We are the primary advocate for the state of Maryland's more than 450,000 small, minority and women-owned businesses. The Governor's Office of Minority Affairs oversees the State's Minority Business Enterprise (MBE) Program and Small Business Reserve Program, but our mission goes far beyond solely addressing the needs of certified MBEs. Maryland's continued economic success is tied to the success of all of its minority owned businesses, not just those that are certified.

These programs impact roughly $5 billion in state procurements and +70 participating state agencies and departments. Additionally, our website, www.MDminoritybusiness.com is a one-stop-shop for small, minority and woman-owned businesses.

Small and minority business success is paramount to the success of the State's economy. According to US Census projections Maryland will be the next state where the minority becomes the majority and firms with 50 or fewer employees employ over 50% of Marylanders.

Maryland's close proximity to the District of Columbia also means that many Maryland businesses do business with both the Federal and State governments. Hence, the most recent Base Realignment and Closure (BRAC) will create significant new opportunities for Maryland firms between now and 2011.

Additionally, the BRAC opportunity for small and minority business has highlighted specific challenges faced by small and minority business in today's business environment.

I am here today to share some of these specific challenges with you:

- ✓ Small and minority businesses find it difficult to quickly identify new Federal procurement opportunities in Maryland.
- ✓ Many of the BRAC procurement opportunities require security clearances that small and minority businesses need, but do not currently have.
- ✓ Enhanced Used Leases (EULs) bring perhaps the largest challenge to small and minority businesses since bundling of State and Federal and private sector contracts. More specifically, they eliminate the Federal small and disadvantaged business programs. Instead what is left is a dependence on voluntary compliance whose previous failure is the very reason those Federal programs exist.
- ✓ Small and minority businesses need more opportunities to build relationships with businesses that might have subcontracting opportunity.

The present and future prosperity of the State's economy is dependent on the success of small and minority business. Small business provide living wage opportunities and access to wealth that is

William Donald Schaefer Tower
6 Saint Paul Street, Suite 1502 • Baltimore, MD 21202
Tel: (410) 767-8232 • Fax: (410) 333-7568 • Toll Free: 1 (877) 558-0998
http://www.mdminoritybusiness.com

essential to keep and build the vibrant communities that are the back bone of this great State and America.

With this goal in mind, we respectfully request your assistance with important legislative, policy, and advocacy initiatives that include but are not limited to:

- Ensuring that federal procurement laws and regulations such as the Federal Acquisition Regulation (FAR) and the Federal Disadvantaged Business Enterprise (DBE) laws are applied to all federal BRAC contracting activity including Enhanced Use Leases (EULs) with private developers which are managed by the Army Corps of Engineers on behalf of military bases in Maryland;

- Encouraging Maryland military bases to conduct continuous outreach to local small and minority businesses for the purpose of achieving greater inclusion in base-controlled purchasing and contract activity with both base purchasing representatives and private contractors that work on base; and

- Sponsoring and supporting supplemental funding requests for Maryland's Small Business Development Centers for the continuation and expansion of their BRAC and the Bottom Line technical assistance programs designed to assist your constituent businesses to better understand and access BRAC business opportunities.

Thank you for your time and attention. We look forward to continuing to work with our Federal counterparts to address these and other challenges facing small and minority businesses.

William Donald Schaefer Tower
6 Saint Paul Street, Suite 1502 • Baltimore, MD 21202
Tel: (410) 767-8232 • Fax: (410) 333-7568 • Toll Free: 1 (877) 558-0998
http://www.mdminoritybusiness.com

Chris Lawson
President
Insuraty Inc.
802 Palatine Place
Bowie MD 20716

Attention: Hearing Clerk

I am submitting the following testimony with regards to small and minority participation in federal contracts for employee insurance programs.

Over the years, I have taken the initiative to "certify" my firm under the Maryland Department of Transportation and Virginia Department of Transportation, MDOT and VDOT respectively. I must say that the process was rigorous to say the least, leaving me with the initial impression that this must be the real deal.

My firm was awarded the certification status from both state agencies. The agencies have done a good job of notifying us of employee insurance program opportunities. Being a part of these programs have not however notified us of any federal opportunities.,

We have taken the initiative to locate federal opportunities on our own. We understand that the federal agencies recognize the certification from the state agencies, and felt that this was sufficient to do business on the federal level.

My biggest concern is how the criteria is written for minority participation in employee insurance request for proposals. Most often the request for proposals are written to favor large insurance companies on a direct basis, eliminating the agent and broker channels, which are the heart of large insurance companys revenues. Not to mention that many minority owned firms related to insurance are agencies, brokerages and TPA's. I believe that if these contracts are to award a minority interest, that they speak specifically to the interest being related to insurance, to include minority owned agencies and brokerages.

My firm has lost opportunities to participate with the very industry that we serve, to minority firms from other industries helping the large insurance company meet the requirements. In other words, a large insurance company being rewarded a contract will most likely eliminate the idea of using a minority agency or brokerage, in fear that it will have to pay a commission. I believe that the request for proposal should specifically state that the minority interest be associated with the industry, insurance in the case. Large insurance companies don't have to pay a commission to the minority owned firm, but could be creative and pay a fee for enrollment, consulting, or after market client service.

However, this will not happen if the request for proposal doesn't state specifically that this must happen.

Thank you for your time and consideration to this matter.

I believe that all industries should get a chance, but I believe that insurance is one of the most under rewarded industries in the country for minority participation in federal contracts.

Nancie Lumpkins
CEO/President
Imagine One Technology & Management, Ltd.

HUBZone Program Problems

There are significant issues with the Historically Underutilized Business Zone (HUBZone) Program. Elected officials need to be aware of and assist with enforcement of existing laws, rules, and regulations in order that the Program survives and receives a chance to thrive in the manner in which it was intended.

This paper is submitted in response to U.S. Senator Benjamin L. Cardin's invitation for his Senate Committee on Small Business and Entrepreneurship field hearing on 29 October 2007. Senator Cardin asked industry to state problems that small and minority businesses encounter when attempting to contract with the federal government and address what legislative remedies or approaches are needed.

HUBZone Program Background

The HUBZone Act of 1997, Title VI of Public Law 105-135, created the HUBZone Program. This program provides federal contracting opportunities for certain qualified small business concerns located in economically distressed communities. The goal of the HUBZone Program is to provide federal contracting assistance for qualified small business concerns located in HUBZone areas in order to increase employment opportunities, stimulate capital investments in those areas, and empower communities through economic leveraging. HUBZone areas are determined by census tracks data including income levels, unemployment rates, and Native American reservation boundaries. In order to qualify as a HUBZone business, the business must be small; owned by a US citizen; the principal office must be located in a HUBZone; and at least 35% of the employees must reside in a HUBZone. The SBA formally certifies firms as HUBZone businesses. HUBZone businesses can receive sole-source or set-aside federal contracts or receive a price preference up to 10% when competing for full and open competition procurements.

HUBZone "Rule of 2" Not Being Enforced

Public Law 105-135 contains this language, known as the "Rule of 2":

*"Notwithstanding any other provision of law, a contract opportunity **shall be awarded** ...on the basis of competition restricted to qualified HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made as a fair market price."*

Federal government-wide HUBZone contracting awards over the last three fiscal years fall significantly short of statutory goals:

GFY	Goal	Actual
2004	3%	$4.8B (1.59%)
2005	3%	$6.1B (1.94%)
2006	3%	$7.1B (2.1%)

Federal agencies are defacto permitted to significantly miss their goals because they are not held accountable. Moreover, the "Rule of 2" is not being enforced.

Other Recent HUBZone Program Developments

Besides the "Rule of 2" non-enforcement, which is having a significant negative impact on the Program, House of Representatives bill, HR 3867, contains a number of provisions that will do further harm to the HUBZone Program (i.e., effectively would eliminate the Rule of 2). During the week of 15 October 2007, HR 3867 passed the House Small Business Committee.

HUBZone Program Participation and Benefits to Community

According to the federal government's Central Contractor Registration (CCR) as of 18 May 2007 and information from the HUBZone Council's 2007 Conference, there were 13,783 registered/certified HUBZone companies. This number of HUBZone firms exceeds registered/certified Small Disadvantaged Businesses by roughly 1,100. With 36.5 million Americans (12.3% of population) living at or below the poverty level, there is a need for HUBZone participation to increase, not decrease. Increasing participation from its current annual goal of 3% of federal contracting dollars up to 8% would create up to 500,000 jobs for America's poorest HUBZone residents. The Small Business Administration's HUBZone Program site shows that in Maryland alone, there are five complete counties and over 150 Census Tract areas designated as HUBZones based on both income and unemployment levels making the impact and benefits of the HUBZone Program quite significant in the very State that Senator Cardin represents.

What Can Senator Cardin's Committee Do?

We ask that Senator Cardin's Committee on Small Business and Entrepreneurship look into the "Rule of 2" enforcement and the HUBZone program in general to assist with reversing the trend of declining participation by HUBZone firms (due to the lack of awarding HUBZone set-aside contracts). We also ask the Committee to work to increase enforcement, accountability, and participation by federal agencies in HUBZone statutory goals.

What More Can *Imagine One Technology & Management, Ltd.* Do?

Since our founding in 1998 we have had a significant positive impact on both the communities where our offices are located and on our HUBZone employees. What we can offer further to Senator Cardin's Committee on Small Business and Entrepreneurship is individual personal testimony from some of our ***Imagine One Technology & Management, Ltd.*** employees who are more than willing to share their experiences and positive impacts that the HUBZone Program has meant to them. We would sincerely welcome the opportunity to arrange for such a session. For your convenience, we offer our contact information below:

Nancie Lumpkins
CEO/President

Imagine One Technology & Management, Ltd.
907 McKinney Blvd
Colonial Beach, VA 22443

804-224-1555 (office)
301-904-9707 (cell)

Imagine One Technology & Management, Ltd. is a Woman Owned, 8(a) & HUBZone Certified company headquartered in Colonial Beach, Virginia with additional offices in Shirlington, Virginia, Patuxent River, Maryland, and Charleston, South Carolina. We are a leading provider of program management, logistic, and technical support. Please see **www.imagine-one.com** to learn more about our company.

U.S. SENATE, COMMITTEE ON SMALL BUSINESS, HEARING HELD ON OCTOBER 29, 2007 AT BOWIE STATE UNIVERSITY--TESTIMONY BY RANDY McRAE, CENTRAL PRINCE GEORGES, CDC

THE WELL KNOWN PROBLEM. Annually the Federal government spends over $53 Billion on construction and construction related (highways, bridges, buildings, etc), generally with an optimistic and well-intentioned minority participation in contracting opportunities goals. For years, bonding has been a cruel Catch-22 for the owners of many disadvantaged businesses. These struggling firms either can't afford a bond or can't persuade bonding companies to guarantee their performance. But without a bond, they can't bid on many jobs in the public or private sector, limiting their growth and the effectiveness of disadvantaged business enterprise programs. Many disadvantaged business enterprises, or DBEs, joined the various state and federal bond guarantee programs with the expectation that the local public agencies running them would provide bonding assistance. They've been sorely disappointed. Shamefully, the bond guarantee does not exceed $3 million per job.

Despite internal and external recommendations to make bonding easier, local agencies that run programs to help disadvantaged businesses offer no assistance where bonding is concerned. Many states and cities provide grants to nonprofit corporations to provide assistance to DBEs in finding bonding and loans. Bonding is a form of insurance that protects the developer of a construction project by guaranteeing the satisfactory completion of the job by a contractor. The contractor must have a bond -- which it buys from a bonding agent -- to insure its work, and if it fails to finish the job satisfactorily, the bonding agent covers the cost to the developer. Bonding agents prefer to insure a company with a solid balance sheet, a good track record and the cash flow to handle the work. The bonding company charges a premium to issue the bond, often 1 percent or 2 percent of the contract price. As in banking, established companies with better credit get better deals, and disadvantaged businesses say they face higher premiums that limit them to smaller projects. For example, a 2 percent premium on a $5 million job would cost $100,000, well above the financial capacity of many DBEs.

Creating a bonding source -- the usual suspects. In theory, as repeatedly attempted, a public or private assistance program would make it cheaper for a DBE to get bonded, perhaps by loosening the credit requirements or providing a subsidy or guarantee. The program could be designed specifically for government DBE contracts, or to help disadvantaged businesses get regular work in the private sector.

But none of the federal agencies with DBE programs offers in-house bonding assistance via actually issuing the bond. In fact, only one state, thru the Maryland Small Business Funding Authority, has ever had an in-house bonding assistance and issuance program. For a variety of reasons, MSBDFA has only issued or guaranteed a small number of smaller bonds. Despite politically motivated executive and judicial orders banning affirmative action and set-asides for minorities and women on state projects, the State of Maryland maintains its program with funds appropriated by the Legislature, which created a pool of money used as collateral to back bonds for small companies that private insurance companies might otherwise be reluctant to serve. The general federal or state bonding program targets small firms with little capital, but good track records for completing projects. A company often times has to also prove it is socially or economically disadvantaged. Contractors in most programs must attend classes to learn basic business skills.

WE MUST MOVE FROM VISION TO REALITY -- OTHERWISE WE HAVE FAILED. The economic impact of a DBE/Public Partnership in the area of construction contracting, for us to grow as a community and nation, must be implemented "by any means necessary". Importantly, there are no minority owned Property and Casualty insurance companies currently in the United States. In fact, according to the Surety Association of America, the top ten (10) companies exclusively control 60% of the surety market. FY' 2005 revenue for these companies is $2.5 Billion, and for the total industry was $4.5 Billion, ironically with no minority owned firms. No wonder its' tough for DBE's to get bonding.

Listed below, are contracting dollars results achieved by the State and Maryland in 1997, and more recently, at the Woodrow Wilson Bridge Project, a (2004-2009) federal project jointly involving Maryland, Virginia and the District of Columbia. Looking at the bottom line for the Woodrow Wilson Bridge Project, out of total of $1.4 Billion spent as of 6/30/2005, only $184 million (approx. 13.14%) went to DBE's.

At present, the standard federal or local goal for minority participation is twenty (20 %) percent- what must be done to increase the possibility of meeting the 20% goal. **(Remember, not all states are as interested in minority contract participation as Maryland). See State of Maryland 1997 Construction by Sub-sector: Source – U.S. Census.** See the supporting exhibits attached hereto.

NAICS code	Description	Business	Dollar value of business done ($1,000)	Annual payroll ($1,000)	Paid employees
23	**Construction**	**14,525**	**21,100,484**	**4,367,541**	**141,469**
233	Building, developing, general contracting	4,898	9,945,081	1,118,994	33,935
234	Heavy construction	645	2,207,595	520,055	16,583
235	Special trade contractors	8,982	8,947,808	2,728,493	90,951

Wilson Bridge As of 6/30/05	PRIME CONTRACTOR	APPROXIMATE CONTRACT AMOUNT	DBE GOAL	DBE (SUB) CONTRACTS AWARDED	DESCRIPTION OF DBE CONTRACTS	APPROXIMATE VALUE OF DBE CONTRACTS
VA JJP	P&J Contracting Baltimore, MD	$110,000 7/00	1%	100% DBE	Demolition of Buildings	$110,000.00
VA US 1 Telegraph	Cherry Hill Construction Jessup, MD	$562,000 8/00	12%	Duffield Hauling Lorton, VA	Transport of Materials	$56,570.00
				Kalen Corp of Gaithrsbg, MD	Erosion Control	$3,899.00
MD	Weeks Maine St. Rose, LA	$15.6 M	2%	Waived		
TOTAL		$1.4 Billion				$184 Million

Building real opportunities today for tomorrow—the desperate need for intervention. Building from the latest economic development partnerships called "Subcontracting Arrangements", and based on GAO Congressional Report #B-261207, Committee on Small Business – Surety Bonding, the U.S. Senate/House is introducing a program to stimulate surety bonding relationships between local businesses and all parties involved in economic development in our communities. The two alternatives to traditional surety bonding are 1. Subguard Default Insurance or 2. Directed Surety. The newly legislated program consists of further developing the following components:

Providing surety thru Subguard

Cost much less than traditional surety bonds
Directly indemnifies an insured for any cost
Requires amendment of Miller Act of 1935
Reduces the time to catch and cure defaults

Providing surety thru Directed Sureties

Directs bonds be secured from a specific company
Remove control of surety industry by traditional few
Allows for market competition and assists DBE's
Expands the number of subcontractors with work

THE POINT: Amendment of 40 USCS § 3131 (a) to insert the phrase **"bonds or insurance"** and/or amendment of 40 USCS § 3132 (a)(alternatives to payment bonds under the FAR); to assert, more than **"$25,000, but not more than $10,000,000"**; **"for companies certified by the Small Business Administration, under Section 8(a)"**. It should be noted, but not surprising, that at its recent convention in Seattle, the Association of General Contractors, American Insurance Association, Surety Association of America, and National Association of Surety Bond Producers issued a policy statement opposing the use of Subguard Default Insurance or Directed Surety.

RESULTS: Failure to amend the Miller Act, will only serve to continue the clear lack of capital, lack of number of contracts awarded, and lack of creation of wealth in the DBE community, regardless of political speeches to the contrary. Fact- if we allow an SBA 8a firm to issue Subguard, it will bring about the creation of at least one DBE owned P & C Insurance company, and will directly increase the number of DBE contractors receiving construction bonds and work. **WE MUST DO THIS!!!**

GAO

United States
General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

B-261207

June 26, 1995

The Honorable Christopher S. Bond
Chairman
The Honorable Dale Bumpers
Ranking Minority Member
Committee on Small Business
United States Senate

The Honorable Jan Meyers
Chair
The Honorable John J. LaFalce
Ranking Minority Member
Committee on Small Business
House of Representatives

Federal law currently requires contractors to provide certain types of surety bonds on all federal construction contracts worth over $25,000.[1] Surety bonds ensure that should a bonded contractor default, a construction project will be completed and the contractor's employees and material suppliers will be paid. Most state and local governments and some private-sector lenders also require construction firms to be bonded. Surety companies, or the entities that issue surety bonds, decide whether firms have the necessary experience and financial capability to perform a given job and thus to qualify for a bond.

It is not unusual for a small construction company to have some difficulty in obtaining a surety bond. In approving bonds, the surety companies seek to reduce their risk by examining, among other factors, a firm's experience in construction; specialization and record in doing the same type of work; and financial viability, corporate tax returns, and bank lines of credit. Some of the documents the firms must provide are readily available to them; others, such as a review or audit by a certified public accountant, may result in additional costs. Those firms that the surety companies consider more risky may be asked to provide collateral or meet other conditions to obtain a bond. According to the surety companies, decisions on approving bonds are made on a case-by-case basis and may take some time while the contractor assembles the required information and answers the surety company's questions and the surety company verifies the

[1]The Federal Acquisition Streamlining Act of 1994 increased this amount to $100,000, effective Oct. 1, 1995.

information. If the processing time for the bond is long, the firm may lose the opportunity to bid on a job.

Some small construction firms have contended that surety companies' decisions to approve or deny bonds can seem arbitrary. As a result, they have asserted that such decisions can impede the development of small firms, especially those owned by minorities and women. Because limited data existed on this issue, the Small Business Access to Surety Bonding Survey Act of 1992[2] directed us to survey small construction firms for information on their experiences in obtaining bonds from surety companies from 1990 through 1993 and to report to the House and Senate Committees on Small Business. The act directed us to examine in particular the experiences of firms owned by minorities and women.[3]

Our survey—a random sample of 12,000 construction firms, of which about 98 percent were small enough to be eligible for the Small Business Administration's (SBA) programs[4]—focused on (1) the firms' overall rate of obtaining bonds; (2) the characteristics of the small firms that performed bonded work; (3) the recent experiences of these firms in obtaining bonds, including how they obtained bonds, whether they lost opportunities to bid because of the length of time it took to get a bond, what documentation they had to provide to obtain a bond, how often they were denied a bond, how much they paid in fees for bonds, how much bonded work they performed, and whether the amount of bonding they received had increased; and (4) the characteristics of those firms that did not perform bonded work, including their reasons for not doing such work.

The results of our survey generalize to about half of the firms currently in business, primarily in construction, that meet the eligibility criteria for SBA's programs. Our results do not generalize to firms that would not have responded to our survey, which are more likely to be smaller. Details of the limitations on our survey data are presented in appendix I.

[2]This act is contained in the Small Business Credit and Business Opportunity Enhancement Act of 1992.

[3]In our survey, we defined a minority-owned firm as one in which at least 51 percent of the firm was owned by individuals from one or more of the following groups: African American, Hispanic, Asian American, Native American, or Pacific Islander. We defined a women-owned firm as one in which at least 51 percent of the firm was owned by women.

[4]To be eligible for SBA's programs, firms must have average annual revenues, over a 3-year period, not exceeding $17 million if the firms are in general building construction (e.g., commercial and industrial construction) and heavy construction (e.g., roads and bridges) and $7 million if the firms are special trade contractors (e.g., plumbers, painters, electrical contractors, and concrete masons).

Summary

Our survey showed the following.

Overall Rate of Obtaining Bonds

- At least 23 percent of the small construction firms had obtained bonds, and a maximum of 77 percent had never obtained bonds.

Section 1 of this report gives more details on this estimate.

Characteristics of Firms That Had Obtained Bonds

- About 4 out of 10 firms that had obtained bonds had annual revenues less than or equal to $500,000, had an average of 20 years of experience in construction, and had likely first obtained bonds before 1990.
- The minority-owned firms, which made up 7.2 percent of the firms that had obtained bonds, tended to be smaller, had less construction experience, and were more likely than the firms not owned by minorities to have obtained their first bond since 1990.
- The women-owned firms, which made up 11.1 percent of the firms that had obtained bonds, had less construction experience, and had likely obtained their first bond more recently than the firms not owned by women.

Section 2 of this report gives more details about the characteristics of these firms.

Firms' Recent Experience With Bonding

- Of the firms with recent experience with bonding (1990-93), about 1 out of 10 had used federal, state, or local bonding assistance programs to obtain bonds. The firms that used government assistance tended to be smaller, more likely to have been previously denied a bond, and more likely to have obtained their first bond since 1985.
- The firms reported that they were routinely asked to provide financial statements and other documents to obtain a bond. About one out of four firms reported that they were also required to provide collateral, and a similar proportion of firms said they were required to meet other conditions (such as establishing an escrow account controlled by the surety company) to obtain a bond. The minority and women-owned firms were more likely to be asked for certain types of financial documentation. The minority-owned firms were also more likely to be asked to provide collateral and meet other conditions than the firms not owned by minorities.
- Nearly one out of five firms that had obtained bonds in 1990-93 had also been denied a bond in that period. The minority-owned firms were more

likely to have been denied a bond. The minority-owned firms were also more likely to say they had lost an opportunity to bid because of the length of time it took to obtain a bond.

- The fees paid for bonds varied depending on the size of the firm. In addition, the women-owned firms paid a lower fee than other firms for the first $100,000 of their bonds. We did not detect differences in the fees paid by the minority-owned firms compared with those paid by the firms not owned by minorities.
- About a quarter of the firms with recent bonding experience had only obtained bonds valued under $100,000. Because of the new bonding thresholds set out by the Federal Acquisition Streamlining Act of 1994, which increased the minimum federal contract amount for which a bond is required from $25,000 to $100,000, it is likely that fewer firms will require bonds in the future.

Section 3 describes in more detail the experiences of the firms that had obtained bonds from 1990 through 1993.

Firms That Had Not Obtained Bonds

- Four out of five small construction firms had not obtained bonds because they were not asked to get them or did not bid on projects that required bonding. The minority- and women-owned firms that did not obtain bonds said they were not required to have bonds or did not bid on projects that required bonding.

Section 4 describes in more detail the characteristics of these firms and their reasons for not obtaining bonds.

Scope and Methodology

We surveyed 12,000 firms randomly selected from a list of special trade contractors, general building contractors, and heavy construction contractors maintained by Dun & Bradstreet.[5] The survey focused primarily on small firms; that is, those meeting the size standards for SBA's programs.

In describing differences in bonding experience by size or ownership (the ethnicity or gender of the owner), we discuss only those differences that

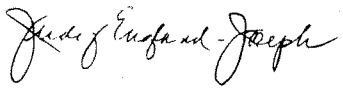
[5]General contractors for and builders/developers of single-family residences were not included in our survey.

are statistically significant.[6] It should be noted that the absence of a statistically significant difference does not mean that a difference does not exist—the sample size or number of respondents to a question may not have been sufficient to allow us to detect a difference. This report does not identify causes of significant differences. It is also important to note that we are only presenting the information reported to us by the firms. We did not verify this information. Details of our scope and methodology are presented in appendix I. A supplement to this report gives the detailed responses to our survey questions broken down by the size of the firm and the gender and ethnicity of the owner.[7]

We conducted our work between June 1993 and May 1995. We discussed the information in this report with representatives of the surety industry and small business, including SBA's Associate Administrator for Surety Guarantees; the President, Surety Association of America; and the executive directors of the American Subcontractors Association, National Association of Minority Contractors, and Women Construction Owners and Executives. These representatives generally agreed that we had used a reasonable approach for the survey.

We are sending copies of this report to the Administrator, SBA, and the Director, Office of Management and Budget. We will also make copies available to others on request.

Please call me at (202) 512-7631 if you or your staff have any questions. Major contributors to this report are listed in appendix II.



Judy A. England-Joseph
Director, Housing and Community
Development Issues

[6]Statistical significance means that observed differences between the subgroups are larger than would be expected from sampling error. Sampling error is the maximum amount by which results obtained from a statistical sample can be expected to differ from the statistic we are estimating.

[7]Small Business: Responses to Survey on Construction Firms' Access to Surety Bonds (GAO/RCED-95-173S). For a copy of this supplement, return the postcard included in this report. If the postcard is missing, please address your request to: U.S. General Accounting Office, P.O. Box 6015, Gaithersburg, MD 20884-9965. The figures in this report are cross-referenced to information in that report.

Robertson GROUP
Experience is the difference!
Construction Law | Trial Practice
Call toll-free 1-888-339-9031 or 352-373-

Construction Industry Notes

SUBCONTRACTOR DEFAULT INSURANCE:
A NEW ALTERNATIVE TO AN OLD STANDARD

Subcontractor Default Insurance, or "Subguard" Insurance, as it is more commonly known, may be an alternative to traditional suretyship. "Subguard" is a product of Zurich Insurance, which introduced it a few years ago. Mostly utilized by large contractors and sophisticated project owners, Subguard Insurance attracts customers who do not want to wait for a surety response to a default. This is an insurance product, not a bond. The insurance coverage provided applies to all subcontracts and purchase orders signed as well as new projects begun after the policy inception date. Typically, once the insured gives notice of default by one of the subs, etc., all costs associated directly or indirectly with the breach are covered. The advantage lies in the fact that the insured does not have to wait for the bonding company to come in, investigate the matter, make plans, and in short, slow down the progress on the job.

Because this is a specialized product, it is not priced as a general item, like a bond. In other words, it is not always "x dollars per $1000 of contract amount," The usual cost of Subguard insurance varies according to the volume of work, and the general contractor's individual profile. The policy contains a minimum and maximum premium, the difference between the two being the "experience premium", or the amount for which the insured is "at risk" depending upon claims payment history. The purchaser initially pays the maximum premium, which is usually just a little less than 1% of total subcontract values. The policies usually have a per-loss deductible and a limited co-payment provision.

Subguard-type insurance has many advantages over traditional suretyship, the most positive being the insured's ability to take control of the situation when a default occurs. The insured contractor does not need anyone's permission to act and can immediately step in and begin corrective action rather than having to depend upon a surety company. Payment benefits under Subguard are much broader, because it is not restricted to the subcontract amount. There may also be other cost savings. The insured contractor has the potential to realize large financial benefits from careful subcontractors pre-qualification. If a project is loss-free, the General Contractor may save up to 50% of the traditional surety bond cost.

Be aware, there are some down sides to Subguard insurance: (1) the fact that it has not yet been tested in court, so contractors and their lawyers can only guess about court reaction and interpretation, (2) it is not available for federally funded projects, because the Miller Act of 1935 requires federally funded projects to be bonded and (3) it is strictly a policy if indemnification and the insurance company does nothing to resolve or settle losses.

Subcontractor Default Insurance is not for everyone. The traditional approach of bonding subcontractors may be better suited to the needs of most general contractors, but in other situations, it may be a very reasonable alternative.

New York Law Journal
Real Estate Update
Wednesday, July 20, 2005
ALM

Construction Lending

Default Insurance or Performance Bond?

BY KENNETH M. BLOCK AND JEFFREY B. STEINER

Construction lenders generally require borrowers on major projects to obtain performance bonds from their contractors. For the past several years, however, an alternative to performance bonds has been available in the form of contractor default insurance, marketed under the name "Subguard" by Zurich North America Insurance Company. This article will discuss the basics of Subguard and compare it with a traditional performance bond.

Subguard Basics

Subguard directly indemnifies the insured for any costs which result from the default in performance of any unbonded contractor or subcontractor.[1] The product is available to owners, but it has been primarily purchased by general contractors who seek to protect themselves against defaulting subcontractors.[2] The policy involves large deductibles and upper-tier coverage that provides insurance in the event of a catastrophe. The insurance policy and the premiums are written and calculated in the anticipation of losses.[3] Pricing is determined based on the general contractor's profile and the amount of subcontracted work, and is generally less than for a performance bond. Most policies have a per-loss deductible and a limited co-payment provision.

Certainty of Performance

Under a performance bond, a premium is paid to the surety to guarantee that the construction contract will be performed in the event of a contractor default. In the case of a default, the surety may forfeit the bond's penal sum, finance the principal's completion of the project, tender a new contractor to complete the project, or allow the obligee to proceed at its discretion and at the surety's expense. The obligee may recover from the surety the reasonable cost of completing the work, including payments to subcontractors, material suppliers and labor claimants; rental income lost by delay in completion; attorney's fees incurred in defending suits by lien claimants; the reasonable cost of correcting workmanship or replacing defective materials; lost profits; attorney's fees (if called for by statute or contract); and liquidated damages provided for by the contract.

FINANCING

KENNETH M. BLOCK

JEFFREY B. STEINER

Under Subguard, the insured is only entitled to damages in the form of monetary compensation (i. e., insurance proceeds) when a default occurs. The amount of damages available to the insured is contingent upon the limit of liability specified in the policy and, as noted above, is subject to deductibles and co-payments proportional to the limit of liability. Additionally, the insured may be required to advance funds to replacement contractors while it awaits insurance proceeds. Thus, Subguard, unlike a performance bond, does not necessarily insure project completion. Of course, under a performance bond, the cooperation of the surety is required and, as is often the case, the surety may be unwilling to complete the project, especially where its principal challenges the alleged default.

Delays In Completion

Because of challenges to alleged defaults, under the performance bond scheme the need for the surety to step in and complete the project can cause further delays. In large construction projects there are frequent disagreements over the assignment of blame for problems that have occurred. Once a default is declared the surety must investigate the claim and determine if there has, in fact, been a default by its principals. This process is often lengthy and, even after the surety has determined there has been a default, there is the risk that the surety will not adequately respond.[4]

Subguard functions differently. The insured determines when the contractor

Kenneth M. Block *and* **Jeffrey B. Steiner** *are members of Brown Raysman Millstein Felder & Steiner.* **Kacey Wolmer**, *a summer associate of the firm, assisted with the preparation of this article.*

has defaulted and remedies the default itself, later to be reimbursed for whatever damages it suffers. It is generally believed that the reimbursement payments have been easier to recover than surety payments.[5]

Filing of Claims

To receive payment on a claim under Subguard, the insured must document the defaults by providing a description of the events of the alleged default and attaching relevant subcontractor or purchase order agreements to substantiate that a loss has occurred. Under the policy, payment is made within 30 days. Defenses to the payment of the claim can include misrepresentation by the insured; fraud by the insured; defaults occurring prior to the policy period; material breach of policy warranties by the insured; and failure to cease awarding contracts to a subcontractor or supplier who is in default of performance.

A performance bond covers construction defaults for the time specified by the contract, bond, or until the statute of limitations expires. This time period is frequently longer than the time it takes to complete the actual construction project. Subguard, on the other hand, is purchased for three- to five-year terms and all claims must be made during the term; that is, Subguard is a claims made form of insurance. Thus, if the default or defect occurs during the time of policy coverage, but there is a delay in discovery beyond the term, recovery is precluded. Subguard places a heavier burden on the insured to supervise the construction site carefully and foresee potential defaults or defects not easily apparent at the time of construction.

Contractor Selection

A major difference between Subguard and performance bonds is the level of control over the selection of contractors. Under a performance bond, the surety performs the underwriting and prequalifies contractors and subcontractors.[6] The surety, not the insured (owner or contractor), is able to control which contractors and subcontractors are hired by declaring which contractors are "bondable." Under Subguard, the insured is responsible for selecting suitable contractors and subcontractors and the ability to select contractors and subcontractors can make Subguard a preferred means of insuring a construction project.

Deciding which product to use requires careful consideration of several relevant elements.

Market Implementation

Subguard has been advertised as a means of enabling unbondable minority and disadvantaged contractors to participate in projects on which performance bonds were required.[7] One contractor has expressed the view that Subguard (among other things) has allowed it to increase minority-owned business representation in construction projects due to decreased costs associated with Subguard. Zurich itself advertises that it is easier for disadvantaged and small businesses to qualify for Subguard than for performance bonds.[8] These benefits have expanded the number of subcontractors who can compete in the construction market.

Subguard Projects

While Subguard can be less expensive than a surety bond, it is subject to substantial deductibles. This makes Subguard more suitable for large construction projects. Zurich advertises the product as being "designed to address the needs of large general contractors, construction managers and design-build firms with annual subcontractor/supplier expenditures of $50 million or more."[9] If a project occurs without a default, the general contractor or owner can save close to 50 percent of the cost of a surety bond. Thus, the high cost of deductibles can be balanced by careful selection of subcontractors with proven trade records.[10]

It must also be noted that Subguard cannot be used for federally funded projects, because the Miller Act of 1935 requires that all such projects be bonded. There also exist many state and local ordinances that mandate bonding for construction projects. In these cases Subguard cannot substitute for performance bonds.

Conclusion

Subguard can be a worthwhile alternative to performance bonds through cost savings and the elimination of delays associated with performance bonds. The typical Subguard user is one who is insuring a large construction project and is willing to carefully prequalify subcontractors. However, while Subguard can be less expensive than performance bonds, it does not ensure the completion of a project and may result in unreimbursed costs. Deciding which product to use requires the consideration of all elements discussed in this article.

1. Such costs include completion costs created by defaulting contractors, correction costs for defective and/or non-conforming work product, legal costs resulting from default, investigation and adjustment costs, indirect default costs including extended overhead, job acceleration and liquidated damages proximately flowing from the default (subject to limitation).
Zurich In North America, at http://www.zurichna.com/zna/rsource.naf/display?openform&id=98 (last modified 2005).
2. Lowell J.Noteboom, 'Subguard' Subcontractor Insurance-What Is It? Is It an Appropriate Alternative to Surety Bonds?, Construction Law Update (March 2002), at http://www.legalist.com/mnlawyers/support/noteboomarticle.pdf.
3. Id.
4. See note 2, supra.
5. Id.
6. Id.
7. Minority Businesses, Global Risk Managers, Inc., at http://www.globalriskmanagers.com/minority.html (last modified 2003).
8. See note 1, supra.
9. Id.
10. See note 2, supra.

This article is reprinted with permission from the July 20, 2005 edition of the NEW YORK LAW JOURNAL. © 2005 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact ALM, Reprint Department at 800-888-8300 x6111. #070-07-05-0029

AGC of America
Building Your Quality of Life

AGC Adopts Position Statements on Directed Surety and Contractor Default Insurance in Public Sector

AGC Adopts Position Statements on Directed Surety and Contractor Default Insurance in Public Sector

At its recent convention in Seattle, the AGC Board of Directors adopted position statements concerning the practice of directed surety and the use by public owners of prime contractor default insurance. The position statements originally were drafted by the AGC Surety Bonding Committee at its meeting in Scottsdale, Arizona in response to recent industry events where public owners had attempted to employ directed surety and prime contractor default insurance programs in contravention of local and state procurement laws. Representatives of the American Insurance Association, the Surety Association of America and the National Association of Surety Bond Producers assisted the AGC Surety Bonding Committee in drafting the statements.

On the practice of directed surety, AGC policy states:

"The Associated General Contractors of America reaffirms its longstanding policy in opposition to any departure from the traditional freedom of a prime contractor to secure performance and payment bonds from the bond producer and surety of its choice. To direct that such bonds be secured from a particular producer or surety reduces competition, invites favoritism and abuse, and interferes with the established, confidential relationship between the prime contractor and its chosen surety and producer."

On the use by public owners of prime contractor default insurance, AGC policy states:

"The Associated General Contractors of America opposes the use by public owners of prime contractor default insurance on public works projects in place of, or in addition to, performance and payment bonds required by applicable law. Surety bonds are a proven means of assurance that protect the integrity of the public procurement process by maximizing the pool of qualified contractors, assuring payment to persons who furnish labor and material for use on the project, and ensuring timely completion of the project. Prime contractor default insurance fails to provide the same level of assurance. The public owner should not interfere with a prime contractor's exercise of its business discretion in securing payment or performance assurances in addition to any assurances required by law."

Both policies are intended to address the concerns of general contractors over public owners' interference with their business discretion.

ZURICH Zurich in North America

Home Products & Services Online Services Claims Careers About Zurich Login

Construction - Subguard ®

Attachments

marketing materials

Search by keywords

Search results with all of these words

Contact a specialist

Select a state --Select--

email this page printer-friendly version

overview | customer profile | coverages | coverage options | limit of capacity

Overview

In today's competitive construction marketplace general contractors need every advantage to boost margins and keep projects on budget and on schedule. Zurich North America Construction can help, with Subguard®.

Subguard directly indemnifies you for direct and indirect costs resulting from default in performance of any unbonded contractor or subcontractor. It gives you more control over the prequalification process and allows you to drive the claims process without third-party intervention.

Customer Profile

Subguard® was designed to address the needs of large general contractors, construction managers and design-build firms with annual subcontractor/supplier expenditures of $50 million or more.

Coverages

- Costs of completing any unfulfilled subcontractor or supplier obligations – including costs related to contractor replacement, job acceleration, extended overhead, liquidated damages and legal expenses – are covered
- Broad coverage for all subcontractors and suppliers
- Coverage for disadvantaged or small business enterprises that may have difficulty qualifying for standard performance and payment bonds
- Coverage for local and other business enterprises that may have difficulty qualifying for standard performance and payment bonds

Coverage Options

- Multiyear policies, noncancelable (except for nonpayment of premium), with guaranteed rates
- Flexible deductibles and co-payments
- Various risk financing options
- Loss control services

Limit of Capacity

- Up to $50 million per occurrence and $100 million aggregate policy limits.

Product Information Last Updated: 02/04/2004

2004 Top 10 Writers of Surety Bonds

	Group/Company Name	Direct Premiums Written	Direct Premiums Earned	Direct Losses Incurred	Direct Loss Ratio
1	ST. PAUL TRAVELERS GROUP	$919,353,366	949,777,891	1,350,899,525	142.2%
2	CNA INSURANCE GROUP	353,464,649	350,473,996	100,923,310	28.8%
3	ZURICH INSURANCE GROUP	324,215,866	284,553,964	139,802,365	49.1%
4	SAFECO INSURANCE GROUP	261,954,725	232,769,336	28,434,755	12.2%
5	CHUBB & SON INC.	210,520,256	200,130,683	8,555,586	4.3%
6	LIBERTY MUTUAL INSURANCE GROUP	173,838,024	166,483,824	41,432,797	24.9%
7	HARTFORD FIRE & CASUALTY GROUP	163,506,946	153,540,351	43,448,173	28.3%
8	HICA GROUP	147,989,551	48,460,880	23,354,078	48.2%
9	X L AMERICA	88,598,318	80,765,747	43,118,748	53.4%
10	ARCH CAPITAL GROUP	87,507,969	58,168,965	18,299,934	31.5%
	TOP 10 TOTAL	**$2,730,949,670**	**$2,525,125,637**	**$1,798,269,267**	**71.2**
	GRAND TOTAL OF ALL WRITERS	**4,265,934,319**	**4,061,720,567**	**2,432,747,953**	**59.8%**

* *Source: Surety Association of America*
April, 2005

14

Surety Industry - Volatile Times

- Companies that have left the business since 1995
  - Reliance (acquired by Travelers)
  - Aetna (acquired by Travelers)
  - USF&G (acquired by St. Paul)
  - Frontier (out of business)
  - Amwest (out of business)
  - Firemen's Fund (acquired by St. Paul)
  - Kemper (out of business)
  - Gulf (acquired by Travelers)
  - Western Surety (acquired by CNA Surety)
  - Atlantic Mutual (out of business)
- Companies that have left in 2005
  - Crum & Forster, XL, Harleysville, Avalon

15

condemnation proceedings as provided by section 3114 of this title is in addition to any right, power, or authority conferred by the laws of the United States or of a State, territory, or possession of the United States under which the proceeding may be conducted, and does not abrogate, limit, or modify that right, power, or authority.

(Aug. 21, 2002, P. L. 107-217, § 1, 116 Stat. 1147.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
3118	40:258d.	Feb. 26, 1931, ch. 307, § 4, 46 Stat. 1422.

The words "State, territory, or possession of the United States" are substituted for "State or Territory" for consistency in the revised title and with other titles of the United States Code.

CROSS REFERENCES

Procedure in condemnation proceedings, Rule 71A, Federal Rules of Civil Procedure, USCS Court Rules.

This section is referred to in 10 USCS § 7422; 39 USCS § 410.

RESEARCH GUIDE

Federal Procedure:

7 Fed Proc L Ed, Condemnation of Property §§ 14:157, 159.

Am Jur:

26 Am Jur 2d, Eminent Domain § 291.

27 Am Jur 2d, Eminent Domain §§ 772, 774, 776.

INTERPRETIVE NOTES AND DECISIONS

1. Generally
2. Purpose
3. Nature and scope
4. Relationship with other provisions

1. Generally

Former 40 USCS §§ 258a et seq. was prompted by necessity for punctuality in initiation of public works in relief of economic depression during which it was passed. United States v 17280 Acres of Land (1942, DC Neb) 47 F Supp 267.

2. Purpose

Chief purpose of Declaration of Taking Act (former 40 USCS §§ 258a et seq.) was to let United States promptly acquire title pending proceedings upon deposit into court of sum of money by acquiring authority estimated to be just compensation for property taken, and not await delays incident to litigation. United States v 76,800 Acres of Land (1942, DC Ga) 44 F Supp 653.

3. Nature and scope

Declaration of Taking Act (former 40 USCS §§ 258a et seq.) was only supplementary statute, permissive in its nature, and by its express terms it could be invoked only in proceeding which had been or might be instituted by and in name of and under authority of United States for acquisition of land, etc., for public use. United States v 76,800 Acres of Land (1942, DC Ga) 44 F Supp 653.

Former 40 USCS §§ 258a et seq., enacted in 1931, was not complete condemnation statute, but merely supplemented theretofore existing legislation by allowing to United States as condemning petitioner newly devised option to secure immediate title to and possession of lands upon deposit in court of sum of money estimated by petitioner to be just compensation for lands taken. United States v 17280 Acres of Land (1942, DC Neb) 47 F Supp 267.

4. Relationship with other provisions

Declaration of Taking Act (former 40 USCS §§ 258a et seq) was complementary to and congenial with Rule 71A of Federal Rules of Civil Procedure inasmuch as § 258d permitted prompt acquisition of title prior to suit, whereas Rule 71A provided condemnation proceedings for acquiring land in connection with suit; provision which required conformity to state practice in condemnation proceedings (former 40 USCS § 258) necessarily fell by wayside and was superseded by Rule 71A. West, Inc. v United States (1967, CA5 Miss) 374 F2d 218, 10 FR Serv 2d 1534.

SUBCHAPTER III. BONDS

§ 3131. Bonds of contractors of public buildings or works

(a) Definition. In this subchapter [40 USCS §§ 3131 et seq.], the term "contractor" means a person awarded a contract described in subsection (b).

(b) Type of bonds required. Before any contract of more than $100,000 is awarded for the construction, alteration, or repair of any public building or public work of the Federal Government, a person must furnish to the Government the following bonds, which become binding when the contract is awarded:

(1) Performance bond. A performance bond with a surety satisfactory to the officer awarding the contract, and in an amount the officer considers adequate, for the protection of the Government.

(2) Payment bond. A payment bond with a surety satisfactory to the officer for the protection of all persons supplying labor and material in carrying out the work provided for in the contract for the use of each person. The amount of the payment bond shall equal the total amount payable by the terms of the contract unless the officer awarding the contract determines, in a writing supported by specific findings, that a payment bond in that amount is impractical, in which case the contracting officer shall set the amount of the payment bond. The amount of the payment bond shall not be less than the amount of the performance bond.

(c) Coverage for taxes in performance bond. (1) In general. Every performance bond required under this section specifically shall provide coverage for taxes the Government imposes which are collected, deducted, or withheld from wages the contractor pays in carrying out the contract with respect to which the bond is furnished.

(2) Notice. The Government shall give the surety on the bond written notice, with respect to any unpaid taxes attributable to any period, within 90 days after the date when the contractor files a return for the period, except that notice must be given no later than 180 days from the date when a return for the period was required to be filed under the Internal Revenue Code of 1986 (26 U.S.C. 1 et seq.).

(3) Civil action. The Government may not bring a civil action on the bond for the taxes—

(A) unless notice is given as provided in this subsection; and

(B) more than one year after the day on which notice is given.

(d) Waiver of bonds for contracts performed in foreign countries. A contracting officer may waive the requirement of a performance bond and payment bond for work under a contract that is to be performed in a foreign country if the officer finds that it is impracticable for the contractor to furnish the bonds.

(e) Authority to require additional bonds. This section does not limit the authority of a contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases, specified in subsection (b).

(Aug. 21, 2002, P. L. 107-217, § 1, 116 Stat. 1147.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
3131(a)	40:270a(a) (words before cl. (1) related to definition).	Aug. 24, 1935, ch. 642, 1(a)–(c), 49 Stat. 793; Pub. L. 95-585, Nov. 2, 1978, 92 Stat. 2484; Pub. L. 103-355, title IV, § 4104(b)(1)(B), Oct. 13, 1994, 108 Stat. 3342; Pub. L. 106-49, § 2(a), Aug. 17, 1999, 113 Stat. 231.
	40:270d.	Aug. 24, 1935, ch. 642, § 4, 49 Stat. 794.
3131(b)	40:270a(a) (words before cl. (1) related to furnishing bond), (1), (2).	
	40:270d-1.	Aug. 24, 1935, ch. 642, § 5, as added Pub. L. 103-355, title IV, § 4104(b)(1)(A), Oct. 13, 1994, 108 Stat. 3341.
3131(c)	40:270a(d).	Aug. 24, 1935, ch. 642, § 1(d), as added Pub. L. 89-719, title I, § 105(b), Nov. 2, 1966, 80 Stat. 1139.
3131(d)	40:270a(b).	
3131(e)	40:270a(c).	

In subsection (a), the text of 40:270d is omitted because of 1:1.

In subsections (b) and (c), the words "or sureties" are omitted because of 1:1.

CROSS REFERENCES

Definition of "person", generally, 1 USCS § 1.

This section is referred to in 10 USCS § 2761; 31 USCS § 9303; 39 USCS § 410; 40 USCS §§ 3132, 3133.

RESEARCH GUIDE

Federal Procedure:

1 Moore's Federal Practice (Matthew Bender 3d ed.), Time § 6.04.

3 Moore's Federal Practice (Matthew Bender 3d ed.), Counterclaim and Cross-Claim §§ 13.14, 16.

10 Moore's Federal Practice (Matthew Bender 3d ed.), Judgments; Costs § 54.171.

15A Fed Proc L Ed, Government Contracts §§ 39:491, 1115, 1187, 1200–1204, 1216, 1259, 1265, 1269, 1276, 1285, 1286, 1288.

21 Fed Proc L Ed, Interpleader § 49:44.

Am Jur:

12 Am Jur 2d, Bonds §§ 25, 36.

35A Am Jur 2d, Federal Tort Claims Act § 29.

45 Am Jur 2d, Interpleader § 16.

64 Am Jur 2d, Public Works and Contracts §§ 3, 9, 17, 96.

Am Jur Trials:

7 Am Jur Trials, Miller Act Litigation, p. 279.

8 Am Jur Trials, Federal Tort Claims Act Proceedings, p. 635.

14 Am Jur Trials, Representing the Government Contractor, p. 437.

Forms:

10A Fed Procedural Forms L Ed, Government Contracts §§ 34:476–484, 486–490.

15A Am Jur Legal Forms 2d, Public Works and Contracts §§ 216:72–76.

Annotations:

Recovery of attorneys' fees in Miller Act (40 USCS §§ 270a–270e) litigation, 4 ALR Fed 685.

Quantum meruit recovery by subcontractor under Miller Act (40 USCS §§ 270a et seq.), 26 ALR Fed 746.

Right of labor union to sue on bond under Miller Act (40 USCS §§ 270a et seq.), 37 ALR Fed 243.

Award of prejudgment interest under Miller Act (40 USCS §§ 270a et seq.), 66 ALR Fed 901.

Law Review Articles:

Bonds of Contractors on Federal Public Works, 36 Boston U L Rev 499.

SHEPARD'S® Citations Service. For further research of authorities referenced here, use SHEPARD'S to be sure your case or statute is still good law and to find additional authorities that support your position. SHEPARD'S is available exclusively from LexisNexis™.

INTERPRETIVE NOTES AND DECISIONS

I. IN GENERAL (notes 1, 2)
II. CONSTRUCTION AND APPLICATION, GENERALLY
A. In General (notes 3–8)
B. Particular Terms and Contract Provisions (notes 9–18)
C. Remedies (notes 19–21)
III. BONDS
A. In General (notes 22–26)
B. Performance Bonds (notes 27–29)
C. Payment Bonds
1. In General (notes 30, 31)
2. Coverage of Particular Items
a. Labor (notes 32–36)
b. Material (notes 37–46)
c. Other Items (notes 47–52)

against contractors for amount found in favor of subcontractors and against bonding company in action under former 40 USCS § 270a to recover for work and labor under subcontracts, where contractors agreed to indemnify and hold harmless bonding company, which was surety on payment bond, against all loss, damages, claims, suits, costs, and attorney's fees, and expenses whatsoever and any and all liability therefor which said bonding company might sustain or incur by reason of executing such payment bond. United States use of W. A. Rushlight Co. v Davidson (1947, DC Idaho) 71 F Supp 401.

Army, although mere stakeholder, became liable to Miller Act surety where surety notified Army of unpaid claims against contractor and asserted its prior rights to contract retainages, but where through clerical error, Army mailed final payments to contractor rather than to surety as agreed by all parties; surety could be paid upon submission of evidence that all outstanding claims had been paid and surety assigned to government any right it might have to recoup erroneous payments made to contractor. (1978) 58 Op Comp Gen 64.

As between surety on contractor's bond (given under predecessor to former 40 USCS § 270a), who had paid out on its obligation thereunder more than sum finally owed to contractor by government, and bank, which had advanced to contractor sum of money with which to pay for material and labor used in work and had taken from him assignment of whatever might be due him from government, surety had priority. Moran v Guardian Casualty Co. (1935, Dist Col App) 64 App DC 188, 76 F2d 438.

As between creditor and surety, where part of creditor's claims were within provision of bond (given under predecessor to former 40 USCS § 270a) and part were not, payments made generally by contractor without appropriation to any particular items or class of items applied to payment of materials furnished and charged prior to dates of payments. United States use of Thomas Laughlin Co. v Morgan (1900, CCD Me) 111 F 474.

Surety, having assumed obligations of depository of funds, could not avoid it by removal of funds to another jurisdiction; surety, however, was entitled to protection against the possibility of double payment. Adelson v Dreyman (1946, Sup) 61 NYS2d 87.

§ 3132. Alternatives to payment bonds provided by Federal Acquisition Regulation

(a) In general. The Federal Acquisition Regulation shall provide alternatives to payment bonds as payment protections for suppliers of labor and materials under contracts referred to in section 3131(a) of this title that are more than $25,000 and not more than $100,000.

(b) Responsibilities of contracting officer. The contracting officer for a contract shall—

(1) select, from among the payment protections provided for in the Federal Acquisition Regulation pursuant to subsection (a), one or more payment protections which the offeror awarded the contract is to submit to the Federal Government for the protection of suppliers of labor and materials for the contract; and

(2) specify in the solicitation of offers for the contract the payment protections selected.

(Aug. 21, 2002, P. L. 107-217, § 1, 116 Stat. 1148.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
3132	40:270a note.	Pub. L. 103-355, title IV, § 4104(b)(2), Oct. 13, 1994, 108 Stat. 3342.

§ 3133. Rights of persons furnishing labor or material

(a) Right of person furnishing labor or material to copy of bond. The

department secretary or agency head of the contracting agency shall furn certified copy of a payment bond and the contract for which it was given to person applying for a copy who submits an affidavit that the person has plied labor or material for work described in the contract and payment fo work has not been made or that the person is being sued on the bond. The is prima facie evidence of the contents, execution, and delivery of the orig Applicants shall pay any fees the department secretary or agency head o contracting agency fixes to cover the cost of preparing the certified copy.

(b) Right to bring a civil action. (1) In general. Every person tha furnished labor or material in carrying out work provided for in a co for which a payment bond is furnished under section 3131 of this titl that has not been paid in full within 90 days after the day on whic person did or performed the last of the labor or furnished or supplie material for which the claim is made may bring a civil action on the ment bond for the amount unpaid at the time the civil action is brough may prosecute the action to final execution and judgment for the am due.

(2) Person having direct contractual relationship with a subcontract person having a direct contractual relationship with a subcontractor b contractual relationship, express or implied, with the contractor furni the payment bond may bring a civil action on the payment bond on g written notice to the contractor within 90 days from the date on whic person did or performed the last of the labor or furnished or supplied th of the material for which the claim is made. The action must state substantial accuracy the amount claimed and the name of the party to the material was furnished or supplied or for whom the labor was do performed. The notice shall be served—

(A) by any means that provides written, third-party verification of de to the contractor at any place the contractor maintains an offi conducts business or at the contractor's residence; or

(B) in any manner in which the United States marshal of the dist which the public improvement is situated by law may serve summ

(3) Venue. A civil action brought under this subsection must be brou

(A) in the name of the United States for the use of the person br the action; and

(B) in the United States District Court for any district in whi contract was to be performed and executed, regardless of the amo controversy.

(4) Period in which action must be brought. An action brought und subsection must be brought no later than one year after the day on wh last of the labor was performed or material was supplied by the person ing the action.

(5) Liability of federal government. The Government is not liable payment of any costs or expenses of any civil action brought und subsection.

(c) A waiver of the right to bring a civil action on a payment bond r under this subchapter [40 USCS §§ 3131 et seq.] is void unless the waiv

Research References

West's Digest References
United States ⚷67(1), (4), (7.1)

Annotation References
A.L.R. Digest: Bonds §§ 21 to 37.5
A.L.R. Index: Contractors' Bonds; Miller Act

Trial Strategy References
Miller Act Litigation, 7 Am. Jur. Trials 279

§ 73 Miller Act; performance and payment bonds required

Research References

West's Key Number Digest, United States ⚷67(1)

Under the Federal Miller Act,[1] before any contract of more than $100,000 for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person is required to furnish to the United States both a performance bond and a payment bond.[2] Additionally, the Miller Act does not apply to construction projects owned and directed by Indian housing authorities acting with the autonomy conferred under the Self-Determination Act.[3]

The performance bond must be with a surety satisfactory to the officer awarding the contract and in an amount the officer considers adequate for the protection of the Federal Government.[4] Every performance bond so required must specifically provide coverage for taxes the Federal Government imposes which are collected, deducted, or withheld from wages the contractor pays in carrying out the contract with respect to which the bond is furnished.[5]

The payment bond must be with a surety satisfactory to the officer for the protection of all persons supplying labor and material in carrying out the work provided for in the contract for the use of each person.[6] The amount of the payment bond is determined in accordance with the requirements set out in the Miller Act.[7] Both the performance and payment bond becomes binding on the award of the contract to such person.[8]

Rights against the surety on bonds furnished by a contractor pursuant to requirements of the Miller Act depend on and are to be measured by the requirements of the Act, where it appears that the bond was furnished for the purpose of meeting the requirements of the Act and that it complies with and does not exceed those requirements.[9]

[Section 73]

[1] 40 U.S.C.A. §§ 3131, 3133.

[2] 40 U.S.C.A. § 3131(b).

[3] U.S. for Use and Benefit of General Rock & Sand Corp. v. Chuska Development Corp., 55 F.3d 1491 (10th Cir. 1995) (applying 25 U.S.C.A. § 450j).

[4] 40 U.S.C.A. § 3131(b)(1).

[5] 40 U.S.C.A. § 3131(c)(1).

[6] 40 U.S.C.A. § 3131(b)(2).

[7] 40 U.S.C.A. § 3131(b)(2).

[8] 40 U.S.C.A. § 3131(b).

[9] U.S. for Benefit and on Behalf of Sherman

Nothing in the section of the Miller Act requiring performance and payment bonds is to be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those specified or in cases other than the cases specified.[10]

§ 74 Purpose of payment-bond requirement

Research References

West's Key Number Digest, United States ⚷67(4)

The purpose of the Miller Act payment-bond provisions is to protect persons supplying labor and material for the construction of federal projects who would otherwise be unprotected since the mechanic's-lien remedy generally available under state law for private construction projects is not available for the construction of federal property.[1]

The Miller Act payment-bond provisions were not designed to protect the prime contractors themselves.[2]

§ 75 Construction of Miller Act

Research References

West's Key Number Digest, United States ⚷67(4)

The Miller Act is highly remedial and is entitled to liberal construction and application to properly effectuate the congressional intent to protect those whose labor and materials go into federal projects.[1] The requirement of

---

v. Carter, 353 U.S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776 (1957).

[10] 40 U.S.C.A. § 3131(e).

[Section 74]

[1] F. D. Rich Co., Inc. v. U. S. for Use of Industr. Lumber Co., Inc., 417 U.S. 116, 94 S. Ct. 2157, 40 L. Ed. 2d 703 (1974); U.S. for the Use of Sunbelt Pipe Corp. v. U.S. Fidelity and Guar. Co., 785 F.2d 468 (4th Cir. 1986); Skip Kirkbdorfer, Inc. v. U.S., 6 F.3d 1573 (Fed. Cir. 1993); U.S. for Use of DDC Interiors, Inc. v. Dawson Const. Co., Inc., 895 F. Supp. 270 (D. Colo. 1995), aff'd, 82 F.3d 427 (10th Cir. 1996); U.S. for Use of Modern Elec., Inc. v. Ideal Electronic Sec. Co., Inc., 868 F. Supp. 10 (D.D.C. 1994); Goldman Services Mechanical Contracting, Inc. v. Citizens Bank & Trust Co. of Paducah, 812 F. Supp. 738 (W.D. Ky. 1992), aff'd, 9 F.3d 107 (6th Cir. 1993); FMI Contracting Corp. v. Federal Ins. Co., 829 S.W.2d 907 (Tex. App. Fort Worth 1992), writ dismissed w.o.j., (Sept. 16, 1992).

[2] Panderlik-Locke Co. v. U.S. for Use of Morgan, 285 F.2d 939 (10th Cir. 1960); St. Paul-Mercury Indem. Co. v. U.S. for Use of Jones, 238 F.2d 917 (10th Cir. 1956); U.S. for Use of DDC Interiors, Inc. v. Dawson Const. Co., Inc., 895 F. Supp. 270 (D. Colo. 1995), aff'd, 82 F.3d 427 (10th Cir. 1996).

[Section 75]

[1] J. W. Bateson Co., Inc. v. U.S. ex rel. Bd. of Trustees of Nat. Automatic Sprinkler Industry Pension Fund, 434 U.S. 586, 98 S. Ct. 873, 55 L. Ed. 2d 50 (1978); U.S. ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co., 86 F.3d 332 (4th Cir. 1996); U.S. for Use and Benefit of Martin Steel Constructors, Inc. v. Avanti Constructors, Inc., 750 F.2d 759 (9th Cir. 1984); U.S. for Use of DDC Interiors, Inc. v. Dawson Const. Co., Inc., 895 F. Supp. 270 (D. Colo. 1995), aff'd, 82 F.3d 427 (10th Cir. 1996); U.S. for Use and Benefit of Intern. Broth. of Elec. Workers, Local Union 692 v. Hartford Fire Ins. Co., 809 F. Supp. 523 (E.D. Mich. 1992); U.S. Dept. of Navy for Benefit of Andrews v. Delta Contractors Corp., 893 F. Supp. 125 (D.P.R. 1995); FMI Contracting Corp. v. Federal Ins. Co., 829 S.W.2d 907 (Tex. App. Fort Worth 1992), writ dismissed w.o.j., (Sept. 16, 1992).

liberal construction, however, does not justify ignoring plain words of limitation and imposing wholesale liability on Miller Act bonds.[2]

§ 76 Projects requiring Miller Act bonds

Research References

West's Key Number Digest, United States ⇐67(1)
What constitutes "public work" within statute relating to contractor's bond, 48 A.L.R. 4th 1170
Miller Act Litigation, 7 Am. Jur. Trials 279 §§ 4, 5

A prime contractor is required to post Miller Act performance and payment bonds before being awarded a contract for "the construction, alteration, or repair of any public building or public work of the Federal Government."[1] "Public work" within the Miller Act has been defined as "projects carried on either directly by public authority or with public aid to serve the interests of the general public."[2]

Factors indicating that a contract is within the bonding provisions of the Miller Act include—

- — vesting of the title to the property involved in the United States,[3] although the mere fact that title is intended eventually to vest in the United States does not necessarily mean that the work involved was "public" under the Miller Act when such vesting did not take place during the course of the work,[4] or where the work was performed under contract to an independent public authority.[5]
- — status of the United States or its instrumentality as a party to the contract.[6]
- — status of the subcontractor or prime contractor as acting as an agent of the United States.[7]
- — contract work consisting of building, construction, or repair of the building or structure.[8]

[2]J. W. Bateson Co., Inc. v. U.S. ex rel. Bd. of Trustees of Nat. Automatic Sprinkler Industry Pension Fund, 434 U.S. 586, 98 S. Ct. 873, 55 L. Ed. 2d 50 (1978); U. S. for Use and Benefit of Naberhaus-Burke, Inc. v. Butt & Head, Inc., 535 F. Supp. 1155 (S.D. Ohio 1982).

[Section 76]

[1]40 U.S.C.A. § 3131(b).

[2]U.S., to Use of Noland Co., v. Irwin, 316 U.S. 23, 62 S. Ct. 899, 86 L. Ed. 1241 (1942); U. S. for Use of Hillsdale Rock Co., Inc. v. Cortelyou & Cole, Inc., 581 F.2d 239 (9th Cir. 1978).

[3]U.S. for Use of General Elec. Supply Co., a Div. of General Elec. Co. v. U.S. Fidelity & Guar. Co., 11 F.3d 577 (6th Cir. 1993) (finding that a local project was not a "public work"); FMI Contracting Corp. v. Federal Ins. Co., 829 S.W.2d 907 (Tex. App. Fort Worth 1992), writ dismissed w.o.j., (Sept. 16, 1992).

[4]Armstrong v. United States, 364 U.S. 40, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960).

[5]U.S. ex rel Blumenthal-Kahn Elec. Ltd. Partnership v. American Home Assur. Co., 219 F. Supp. 2d 710 (E.D. Va. 2002) (contracting party was Metropolitan Washington Airports Authority (MWAA), which was described in statute as political subdivision independent of Virginia and its local governments, District of Columbia and United States government).

[6]U.S. for Use of General Elec. Supply Co., a Div. of General Elec. Co. v. U.S. Fidelity & Guar. Co., 11 F.3d 577 (6th Cir. 1993).

[7]U.S. v. U.S. Fidelity & Guar. Co., 959 F. Supp. 345 (E.D. La. 1996).

[8]U. S. for Use and Benefit of Warren v. Kimrey, 489 F.2d 339 (8th Cir. 1974).

- — use of federal funding for the project,[9] even if such funding was unappropriated,[10] although there is authority indicating that the mere existence of federal funding will not of itself establish the applicability of the Miller Act.[11]
- — recognition of the requirement of such a bond in the terms of the contract itself.[12]
- — use of the form and content provided by the statute for such bond.[13]
- — unavailability of a mechanic's lien for use against the property by subcontractors or materialmen.[14]

A bond which is issued on a contract between a subcontractor and a prime contractor for a construction project is not a Miller Act bond, where the bond was furnished to the prime contractor, not to the United States.[15]

§ 77 —Military projects or contracts

Research References

West's Key Number Digest, United States ⇐67(1)
What constitutes "public work" within statute relating to contractor's bond, 48 A.L.R. 4th 1170

Military projects viewed as the performance of public works of the United States within the meaning of the Miller Act bonding requirement include contracts for the repair of ships owned by the United States to allow the ships to remain in or return to public service,[1] the construction or repair of facilities on military bases for use by nonappropriated fund activities of Armed Forces personnel,[2] and the construction of base housing for the

[9]U.S., to Use of Noland Co., v. Irwin, 316 U.S. 23, 62 S. Ct. 899, 86 L. Ed. 1241 (1942); U. S. for Use and Benefit of Miles Lumber Co. v. Harrison & Grimshaw Const. Co., 305 F.2d 363 (10th Cir. 1962).

As to federal funding of nonfederal projects, see § 78.

[10]U. S. for Use of Gamerston & Green Lumber Co. v. Phoenix Assur. Co. of N. Y., 163 F. Supp. 713 (N.D. Cal. 1958).

[11]U.S. for Use of General Elec. Supply Co., a Div. of General Elec. Co. v. U.S. Fidelity & Guar. Co., 11 F.3d 577 (6th Cir. 1993); Consolidated Elec. Supply, Inc. v. Bishop Contracting Co., Inc., 205 Ga. App. 674, 423 S.E.2d 415 (1992) (applying federal and Georgia law).

[12]U.S., to Use of Noland Co., v. Irwin, 316 U.S. 23, 62 S. Ct. 899, 86 L. Ed. 1241 (1942); U. S. for Use and Benefit of Warren v. Kimrey, 489 F.2d 339 (8th Cir. 1974).

[13]U. S. for Use and Benefit of Miles Lumber Co. v. Harrison & Grimshaw Const. Co., 305 F.2d 363 (10th Cir. 1962).

[14]U. S. for Use and Benefit of Miles Lumber Co. v. Harrison & Grimshaw Const. Co., 305 F.2d 363 (10th Cir. 1962).

[15]U.S. v. U.S. Fidelity & Guar. Co., 959 F. Supp. 345 (E.D. La. 1996).

[Section 77]

[1]U.S. for Use and Benefit of Owens v. Olympic Marine Services, Inc., 827 F. Supp. 1232 (E.D. Va. 1993).

[2]U. S. for Use and Benefit of Empire Plastics Corp. v. Western Cas. & Sur. Co., 429 F.2d 905 (10th Cir. 1970); U. S. for Use of Gamerston & Green Lumber Co. v. Phoenix Assur. Co. of N. Y., 163 F. Supp. 713 (N.D. Cal. 1958).

FR Doc 03-15654
[Federal Register: June 20, 2003 (Volume 68, Number 119)]
[Rules and Regulations]
[Page 36944-36945]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr20jn03-29]

DEPARTMENT OF DEFENSE

48 CFR Part 228

[DFARS Case 2002-D030]

Defense Federal Acquisition Regulation Supplement; Payment Bonds on Cost-Reimbursement Contracts

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to permit the use of alternative payment protections for fixed-price construction subcontracts between $25,000 and $100,000 issued under

[[Page 36945]]

cost-reimbursement contracts. This change is consistent with the corresponding Federal Acquisition Regulation (FAR) policy applicable to fixed-price construction contracts.

EFFECTIVE DATE: June 20, 2003.

FOR FURTHER INFORMATION CONTACT: Mr. Euclides Barrera, Defense Acquisition Regulations Council, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0296; facsimile (703) 602-0350. Please cite DFARS Case 2002-D030.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule updates DFARS policy on performance and payment bonds for construction contracts. In accordance with the Miller Act (40 U.S.C. 270a-270f), FAR 28.102-1(a) requires performance and payment bonds for construction contracts exceeding $100,000. In accordance with Section 4104(b)(2) of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355), FAR 28.102-1(b) permits alternative payment protections for construction contracts between $25,000 and $100,000. DFARS 228.102-1 waives the requirement for performance and payment bonds for cost-reimbursement contracts, but requires the prime contractor to obtain bonds for its fixed-price subcontracts exceeding $25,000. This DFARS rule authorizes the use of alternative payment protections for subcontracts between $25,000 and $100,000, for consistency with the corresponding FAR policy applicable to prime

contracts.

In addition, this rule updates text implementing 10 U.S.C. 2701(h) and (i), pertaining to bonds under Defense Environmental Restoration Program contracts. 10 U.S.C. 2701(h) and (i) were to expire on December 31, 1999; however, Section 314 of the National Defense Authorization Act for Fiscal Year 2002 (Public Law 107-107) removed this expiration date. Therefore, the corresponding DFARS text has been amended to remove the expiration date. Additionally, the text has been relocated from 228.102-1 to a new section at 228.102-70, to identify the subject matter as DoD-unique.

DoD published a proposed rule at 68 FR 7490 on February 14, 2003. DoD received no comments on the proposed rule. Therefore, DoD has adopted the proposed rule as a final rule without change.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule still requires payment protections for fixed-price construction subcontracts exceeding $25,000, while providing flexibility for subcontractors to chose the type of protection to be provided for subcontracts between $25,000 and $100,000.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

List of Subjects in 48 CFR Part 228

Government procurement.

Michele P. Peterson,
Executive Editor, Defense Acquisition Regulations Council.

0
Therefore, 48 CFR part 228 is amended as follows:
0
1. The authority citation for 48 CFR part 228 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR chapter 1.

PART 228--BONDS AND INSURANCE

0
2. Section 228.102-1 is revised to read as follows:

228.102-1 General.

The requirement for performance and payment bonds is waived for cost-reimbursement contracts. However, for cost-type contracts with fixed-price construction subcontracts over $25,000, require the prime contractor to obtain from each of its construction subcontractors

performance and payment protections in favor of the prime contractor as follows:

(1) For fixed-price construction subcontracts over $25,000, but not exceeding $100,000, payment protection sufficient to pay labor and material costs, using any of the alternatives listed at FAR 28.102-1(b)(1).

(2) For fixed-price construction subcontracts over $100,000--

(i) A payment bond sufficient to pay labor and material costs; and

(ii) A performance bond in an equal amount if available at no additional cost.

0

3. Section 228.102-70 is added to read as follows:

228.102-70 Defense Environmental Restoration Program construction contracts.

For Defense Environmental Restoration Program construction contracts entered into pursuant to 10 U.S.C. 2701-

(a) Any rights of action under the performance bond shall only accrue to, and be for the exclusive use of, the obligee named in the bond;

(b) In the event of default, the surety's liability on the performance bond is limited to the cost of completion of the contract work, less the balance of unexpended funds. Under no circumstances shall the liability exceed the penal sum of the bond;

(c) The surety shall not be liable for indemnification or compensation of the obligee for loss or liability arising from personal injury or property damage, even if the injury or damage was caused by a breach of the bonded contract; and

(d) Once it has taken action to meet its obligations under the bond, the surety is entitled to any indemnification and identical standard of liability to which the contractor was entitled under the contract or applicable laws and regulations.

[FR Doc. 03-15654 Filed 6-19-03; 8:45 am]

BILLING CODE 5001-08-P

DFARS Part 28

228.370 Contract clauses.

DAC 91-10

Defense Federal Acquisition Regulation Supplement

Part 228--Bonds and Insurance

SUBPART 228.1--BONDS

{228.102} Performance and payment bonds for construction contracts.

{228.102-1} General.

For Defense Environmental Restoration Program construction contracts entered into pursuant to 10 U.S.C. 2701 and executed between December 5, 1991, and December 31, 1999--

(1)Any rights of action under the performance bond shall only accrue to, and be for the exclusive use of, the obligee named in the bond.

(2)In the event of default, the surety's liability on the performance bond is limited to the cost of completion of the contract work, less the balance of unexpended funds. Under no circumstances shall the liability exceed the penal sum of the bond.

(3)The surety shall not be liable for indemnification or compensation of the obligee for loss or liability arising from personal injury or property damage, even if the injury or damage was caused by a breach of the bonded contract.

(4)Once it has taken action to meet its obligations under the bond, the surety is entitled to any indemnification and identical standard of liability to which the contractor was entitled under the contract or applicable laws and regulations.

(a)The requirement for performance and payment bonds is waived for cost-reimbursement contracts. However, for cost type contracts with fixed-price construction subcontracts over $25,000, require the prime contractor to obtain from each of its construction subcontractors--

(i)A payment bond in favor of the prime contractor sufficient to pay labor and material costs; and

(ii)A performance bond in an equal amount if available at no additional cost.

{228.105} Other types of bonds.

Fidelity and forgery bonds generally are not required but may be used when--

(1)Necessary for the protection of the Government or the contractor; or

(2)The investigative and claims services of a surety company are desired.

{228.106} Administration.

DFARS Part 28

{228.106-7} Withholding contract payments.

(a)Withholding may be appropriate in other than construction contacts (see 232.970-1(b)).

[See AFAC 92-51,B1]

{228.170} Solicitation provision.

When a requirement for a performance bond or other security is included in a solicitation for dismantling, demolition, or removal of improvements (see FAR 37.300), use the provision at 252.228-7004, Bonds or Other Security. Set a period of time (normally ten days) for return of executed bonds.

DAC 91-10 228.1-1

Defense Federal Acquisition Regulation Supplement

Part 228--Bonds and Insurance

{228.171} Alternative payment protections in construction contracts between $25,000 and $100,000.

[Ref D.L.96-001. DFARS case 95-D305]

{228.171-1} General.

(a)For construction contracts greater than $25,000, but not greater than $100,000, the contracting officer shall select two or more of the following payment protections giving particular consideration to inclusion of an irrevocable letter of credit as one of the selected alternatives:

(1) A payment bond.

(2) An irrevocable letter of credit.

(3)A tripartite escrow agreement. The prime contractor establishes an escrow account in a Federally insured financial institution and enters into a tripartite escrow agreement with the financial institution, as escrow agent, and all of the suppliers of labor and material. The escrow agreement shall establish the terms of payment under the contract and of resolution of disputes among the parties. The Government makes payments to the contractor's escrow account, and the escrow agent distributes the payments in accordance with the agreement, or triggers the disputes resolution procedures if required.

[Ref D.L.96-001. DFARS case 95-D305]

(4)Certificates of deposit. The contractor deposits certificates of deposit from a Federally insured financial institution with the contracting officer, in an acceptable form, executable by the contracting officer.

(5)A deposit of the types of security listed in FAR 28.204.

(b)The contractor shall submit to the Government one of the payment protections selected by the contracting officer.

{228.171-2} Amount required.

[Ref D.L.96-001. DFARS case 95-D305]

(a)The requirements at FAR 28.102-2(b), for the amount of payment bonds, also apply to the alternative payment protections described in 228.171-1.

(b)The requirements at FAR 28.102-2(c), for the penal sum of bonds for requirements and indefinite-quantity contracts, also apply to the alternative payment protections described in 228.171-1.

[Ref D.L.96-001. DFARS case 95-D305]

{228.171-3} Contract clause.

Use the clause at 252.228-7007, Alternative Payment Protections, in solicitations and contracts for construction, when the estimated or actual value exceeds $25,000 but does not exceed $100,000. Complete the clause by specifying the payment protections selected (see 228.171-1(a)), the penal amount required, and the deadline for submission.

DAC 91-10 228.1-3

Defense Federal Acquisition Regulation Supplement

Part 228--Bonds and Insurance

SUBPART 228.3--INSURANCE

{228.304} Risk-pooling arrangements.

The DoD has established the National Defense Projects Rating Plan, also known as the Special Casualty Insurance Rating Plan, as a riskpooling arrangement to minimize the cost to the Government of purchasing the liability insurance listed in FAR 28.307-2. Use the plan in accordance with the following guidelines when it provides the necessary coverage more advantageously than commercially available coverage.

(1) The plan--

(i)Is implemented by attaching an endorsement to standard insurance policy forms for workers' compensation, employer's liability, comprehensive general, and automobile liability. The endorsement states that the instant policy is subject to the National Defense Projects Rating Plan.

(ii)Applies to eligible defense projects of one or more departments/agencies. For purposes of this section, a defense project is any eligible contract or group of contracts with the same contractor.

(A) A defense project is eligible when--

(1)Eligible contracts represent, at the inception of the plan, at least 90 percent of the payroll for the total operations at project locations; and

(2)The annual insurance premium is estimated to be at least $10,000.

FindLaw
For Legal Professionals

FindLaw | For Legal Professionals | For Corporate Counsel | For Law Students
Register/login to My FindLaw
My current location: Baltimore, MD | Change Location

Home | Practice Areas | Jurisdictions | Cases & Codes | News | CLE | Market Center | Research a Lawyer

Federal Law | State Law | Case Summaries Search | U.S. Code | Newsletters

SunTrust Legal Specialty Group
Specializing in the financial needs of attorneys and their firms.
Learn more »
SUNTRUST
SunTrust Bank, Member FDIC

View enhanced case on Westlaw
KeyCite this case on Westlaw

Click for Printable version Email this case
http://lawe.findlaw.com/us/353/210.html

Cases citing this case: Supreme Court
Cases citing this case: Circuit Courts

U.S. Supreme Court

UNITED STATES v. CARTER, 353 U.S. 210 (1957)

353 U.S. 210
UNITED STATES FOR THE BENEFIT OF SHERMAN ET AL., TRUSTEES, v. CARTER ET AL., DOING BUSINESS AS CARTER CONSTRUCTION CO., ET AL.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. No. 48.
Argued December 5, 1956.
Decided April 29, 1957.

As required by the Miller Act, a contractor who had a contract with the United States for the construction of federal buildings furnished a payment bond with a surety. The collective-bargaining contract under which employees of the contractor were hired obligated the contractor to pay them wages at specified rates and, in addition, to pay 7 1/2 cents per hour of their labor to the trustees of a health and welfare fund established for their benefit and that of other construction workers. When the contractor failed to pay in full the required contributions to the health and welfare fund, the trustees of the fund sued (in the name of the United States) the surety to recover the balance due the fund, plus liquidated damages, attorney's fees, court costs and expenses. Held: The surety was liable under 2 (a) of the Miller Act, 40 U.S.C. 270a. Pp. 211-221.

(a) The surety's liability on a Miller Act bond must be at least coextensive with the obligations imposed by the Act if the bond is to have its intended effect. Pp. 215-216.

(b) In this case, the trustees' rights against the surety depend upon, and are to be measured by, the applicable provisions of 2 (a) of the Act. P. 216.

(c) The Miller Act is to be given a liberal construction to effectuate its protective purposes. P. 216.

(d) The essence of the policy of the Miller Act is to provide a surety who, by force of the Act, must make good the obligations of a defaulting contractor to his suppliers of labor and material. Pp. 216-217.

(e) The Miller Act does not limit recovery on the statutory bond to "wages." P. 217.

(f) The contractor's employees will not have been "paid in full" for their labor in accordance with the collective-bargaining agreements until the required contributions to the health and welfare fund have been made. Pp. 217-218.

(g) The contractor's obligation to contribute to the fund was covered by the statutory bond, even though that obligation was not [353 U.S. 210, 211] set forth in the construction contract with the United States but appeared only in the master labor agreements. P. 218.

(h) In the circumstances here, the trustees stand in the shoes of the employees and are entitled to enforce their rights. Pp. 218-220.

(i) The trustees of the fund have an even better right to sue on the bond than does the usual assignee, since they are claiming recovery for the sole benefit of beneficiaries of the fund, and those beneficiaries are the very ones who have performed the labor. P. 220.

(j) For purposes of the Miller Act, contributions to the fund are in substance as much "justly due" to the employees who have earned them as are the wages paid to them directly in cash. P. 220.

(k) The trustees are also entitled, under the Act, to recover liquidated damages, attorneys' fees, court costs, and other related expenses of this litigation, since these items must be included if the employees are to be "paid in full" the "sums justly due" them. P. 220.

SunTrust Legal Specialty Group
Specializing in the financial needs of attorneys and their firms
Learn more »
SUNTRUST
SunTrust Bank, Member FDIC

229 F.2d 645, reversed and remanded.
Thomas E. Stanton, Jr. argued the cause for petitioners. With him on the brief were Gardiner Johnson and Charles P. Scully.

Richard C. Dinkelspiel argued the cause for respondents. With him on the brief was John W. Dinkelspiel.

MR. JUSTICE BURTON delivered the opinion of the Court.

This case concerns the extent of the liability of the surety on a payment bond furnished by a contractor, as required by the Miller Act, for the protection of persons supplying labor for the construction of federal public buildings. 1 The collective-bargaining contract under [353 U.S. 210, 212] which the laborers were hired obligated the contractor to pay them wages at specified rates and, in addition, to pay 7 1/2 cents per hour of their labor to the trustees of a health and welfare fund established for their benefit and that of other construction workers. When the contractor failed [353 U.S. 210, 213] to pay in full the required contributions to the health and welfare fund, the trustees of the fund sued the surety on the contractor's payment bond to recover the balance due the fund, plus liquidated damages, attorneys' fees, court costs and expenses. For the reasons hereafter stated, we hold that 2 (a) of the Miller Act imposes liability on the surety.

In November 1952, the respondent contractor, Donald G. Carter, contracted with the United States to construct certain public buildings at Air Force bases in California. As required by the Miller Act, he filed performance and payment bonds executed by the respondent, Hartford Accident and Indemnity Company, as surety. The payment bond was in the penal sum of $52,434.30, and provided that the obligation of the surety shall be void "if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract . . . otherwise to remain in full force . . . ."

The terms under which Carter employed laborers for the prosecution of the work were prescribed in master labor agreements governing the conditions of employment in the construction industry in 46 counties of northern California. Those agreements had been negotiated in June 1952 through collective bargaining between the local council of a labor union representing construction workers and several associations of employers, one of which acted as an agent for Carter. The agreements obligated Carter to pay wages to his employees at specified rates which were to be not less than the prevailing rates determined by the Government. The agreements required also that, beginning February 1, 1953, Carter was to pay to the trustees of a health and welfare fund 7 1/2 cents for each hour worked by his construction employees.

The specified fund was established by a trust agreement dated March 4, 1953, and negotiated by the parties [353 U.S. 210, 214] to the master labor agreements. Its pertinent provisions were as follows: The fund was to be administered by a board of trustees representing employers and employees. The trustees were authorized to use employer contributions to purchase various types of insurance, such as life, accidental death, hospitalization and surgical benefit policies, with eligible employees and their dependents as the beneficiaries. 2 The employees had no rights to the insurance benefits except as provided in the policies. Also, they had no right, title or interest in the contributions, and it was expressly stated that the contributions "shall not constitute or be deemed to be wages" due the employees.

The trustees had the sole power to demand and enforce prompt payment of employer contributions. Those contributions were payable in monthly installments. Any installment not paid by the 25th of the month in which it came due was delinquent, and the sum of $20 per delinquency or 10% of the amount due, whichever was greater, was owed by the delinquent employer as liquidated damages and not as a penalty. If the trustees filed suit to secure payment of any installments, the defaulting employer was to pay the reasonable attorneys' fees, court costs and all other reasonable expenses of the trustees incurred in the litigation.

Carter became insolvent after completing the construction work and paying his employees the wages payable [353 U.S. 210, 215] directly to them. However, he failed to make his required contributions to the fund for February, March and April 1953. Pursuant to 2 (b) of the Miller Act, the trustees of the fund, in the name of the United States, instituted this action on the payment bond against Carter and his surety in the United States District Court for the Northern District of California. The complaint sought recovery of the unpaid contributions and the prescribed liquidated damages, attorneys' fees, court costs and expenses, in the total amount of about $500. The facts were stipulated and the court, after hearing, granted the surety's motion for summary judgment. The Court of Appeals affirmed, holding that the trustees had no right to sue on the bond under 2 (a) of the Act, since they were neither persons who had furnished labor or material, nor were they seeking sums "justly due" such persons. 229 F.2d 645. We granted certiorari to resolve the questions of statutory construction which are at issue. 351 U.S. 917 .

Section 1 (a) (2) of the Miller Act provides that before any contract exceeding $2,000 for the construction of any public work of the United States is awarded to any person, such person shall furnish to the United States a payment bond with a satisfactory surety "for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract . . . ." 49 Stat. 793, 40 U.S.C. 270a (2). Section 2 (a), which is at issue here, provides that "Every person who has furnished labor or material in the prosecution of the work provided for in such contract . . . and who has not been paid in full therefor . . . shall have the right to sue on such payment bond . . . for the sum or sums justly due him . . . ." (Emphasis supplied.) 49 Stat. 794, 40 U.S.C. 270b (a).

The surety's liability on a Miller Act bond must be at least coextensive with the obligations imposed by the [353 U.S. 210, 216] Act if the bond is to have its intended effect. The bond involved here was furnished to meet the statutory requirements of the Act and appears, on its face, to comply with these requirements. There is no indication that the coverage of the bond was intended to exceed them. The bond insures prompt payment "to all persons supplying labor and material in the prosecution of the work provided for in said contract . . . ." The trustees' rights against the surety depend upon, and are to be measured by, the applicable provisions of 2 (a) of the Act.

While the precise questions of statutory construction now presented are ones of first impression, prior decisions of this Court construing the Miller Act of 1935 and its predecessor, the Heard Act of 1894, 3 indicate that the Miller Act should receive a liberal construction to effectuate its protective purposes.

"The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects. Fleisher Engineering Co. v. United States, 311 U.S. 15, 17, 18; cf. United States v. Irwin, 316 U.S. 23, 28

30. But such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds." Clifford F. MacEvoy Co. v. United States, 322 U.S. 102, 107 .

The Miller Act represents a congressional effort to protect persons supplying labor and material for the construction of federal public buildings in lieu of the protection they might receive under state statutes with respect to the construction of nonfederal buildings. The [353 U.S. 210, 217] essence of its policy is to provide a surety who, by force of the Act, must make good the obligations of a defaulting contractor to his suppliers of labor and material. Thus the Act provides a broad but not unlimited protection. 4

It is undisputed that if the collective-bargaining agreement had required the contractor to pay each employee 7 1/2 cents per hour above the prevailing wage rate, and the employee had, by contract with his bargaining representative, agreed to contribute that sum to the fund, the surety would have been obligated to make good any default in the contractor's payment of that extra 7 1/2 cents per hour. The surety argues that employer contributions made directly to a health and welfare fund should be treated differently. It contends that, under the provisions of the trust agreement, the unpaid contributions are not "wages" due to Carter's employees, and that the employees, having received all the "wages" owed to them, have been "paid in full" as that term is used in 2 (a) of the Act. The Act, however, does not limit recovery on the statutory bond to "wages." The parties have stipulated that contributions to the fund were part of the consideration Carter agreed to pay for the services of laborers on his construction jobs. The unpaid contributions were a part of the compensation for the work to be done by [353 U.S. 210, 218] Carter's employees. The relation of the contributions to the work done is emphasized by the fact that their amount was measured by the exact number of hours each employee performed services for Carter. Not until the required contributions have been made will Carter's employees have been "paid in full" for their labor in accordance with the collective-bargaining agreements.

The surety suggests that Carter's obligation to contribute to the fund was not covered by the statutory bond because that obligation was not set forth in his construction contract with the United States, but appeared only in the master labor agreements. Those labor agreements were also the source of Carter's obligation to pay the "wages" payable directly to his employees, an obligation concededly guaranteed by the bond. Nothing in the Miller Act restricted the obligations of the surety to what was set forth specifically in Carter's agreement with the United States. In fact, the surety's obligations extended to some persons who had no contractual relationship with Carter. For example, persons who contributed labor and material to Carter's subcontractors were entitled to the Act's protection. See the MacEvoy Co. case, supra, at 105, 107-108. As long as Carter's obligations relating to compensation for labor have not been satisfied, his employees will not have been "paid in full" and the Miller Act will not have served its purpose.

The surety also argues that the trustees are not entitled to recover the promised contributions under 2 (a) of the Miller Act, since they are neither persons who have furnished labor or material, nor are they seeking "sums justly due" to persons who have furnished labor or material. An answer to this contention is found in cases arising under the Heard Act involving suits by assignees of the claims of persons furnishing labor or material. Such assignees were not the persons who had furnished the [353 U.S. 210, 219] labor or material for which the claims were made. They did not seek "sums justly due" to persons who had themselves furnished labor or material, since the assignments had extinguished the right which those persons had to the performance of the contractors' obligation. 5 Yet these cases established that assignees of the claims of persons furnishing labor or material came within the protection of the statutory bond. 6 It was pointed out that a denial of an assignee's right to sue on the bond might deprive those for whom the security was intended of a fair chance to realize upon their claims by assignment. 7 There is nothing in the language, legislative history, or related decisions to indicate that Congress intended to overturn these cases when it replaced the Heard Act with the broader and more liberal provisions of the Miller Act. 8

If the assignee of an employee can sue on the bond, the trustees of the employees' fund should be able to do so. Whether the trustees of the fund are, in a technical sense, [353 U.S. 210, 220] assignees of the employees' rights to the contributions need not be decided. Suffice it to say that the trustees' relationship to the employees, as established by the master labor agreements and the trust agreement, is closely analogous to that of an assignment. The master labor agreements not only created Carter's obligation to make the specified contributions, but simultaneously created the right of the trustees to collect those contributions on behalf of the employees. The trust agreement gave the trustees the exclusive right to enforce payment. The trustees stand in the shoes of the employees and are entitled to enforce their rights.

Moreover, the trustees of the fund have an even better right to sue on the bond than does the usual assignee since they are not seeking to recover on their own account. The trustees are claiming recovery for the sole benefit of the beneficiaries of the fund, and those beneficiaries are the very ones who have performed the labor. The contributions are the means by which the fund is maintained for the benefit of the employees and of other construction workers. For purposes of the Miller Act, these contributions are in substance as much "justly due" to the employees who have earned them as are the wages payable directly to them in cash.

The trustees' claim for liquidated damages, attorneys' fees, court costs and other related expenses of this litigation has equal merit. The contractor's obligation to pay these items is set forth in the trust agreement. It is stipulated that they form a part of the consideration which Carter agreed to pay for services performed by his employees. If the employees are to be "paid in full" the "sums justly due" to them, these items must be included. Their amount, however, remains to be determined.

We hold that the Miller Act makes the surety liable on its payment bond for the delinquent contributions to the [353 U.S. 210, 221] fund, together with the additional items above described. The judgment of the Court of Appeals, therefore, is reversed and the cause is remanded to the District Court for further action consistent with this opinion.

Reversed and remanded.

MR. JUSTICE WHITTAKER took no part in the consideration or decision of this case.

Footnotes

[Footnote 1] ". . . (a) before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as 'contractor':

"(1) A performance bond with a surety or sureties satisfactory [353 U.S. 210, 212] to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

"(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. . . .

. . . . .

"SEC. 2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. . . .

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit." 49 Stat. 793, 794, 40 U.S.C. 270a (1) (2), 270b.

[Footnote 2] The trustees established by regulation the requirements for eligibility for insurance benefits. Any employee in the bargaining unit, whether or not a member of the laborers' union, could become eligible. Each employee was given a credit for every hour he worked for an employer obligated to contribute to the fund. Any employee who received credits for at least 400 hours in a designated six-month period was entitled to the benefits of the plan for the succeeding six months. His eligibility during that period did not depend on his further employment in the construction industry.

[Footnote 3] Act of August 13, 1894, 28 Stat. 278, as amended, 33 Stat. 811, 36 Stat. 1167. See 40 U.S.C. (1934 ed.) 270.

[Footnote 4] One limitation, inapplicable here, comes from the proviso in 2 (a). See n. 1, supra. In the MacEvoy Co. case, supra, this Court concluded that the effect of the proviso was to limit the right to bring suit on the bond to "(1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and sub-subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who give the statutory notice of their claims to the prime contractor." 322 U.S., at 107 -108. Here the trustees of the fund are claiming sums on behalf of workmen who supplied labor for the project directly to the contractor under an express contractual relationship with him.

[Footnote 5] 4 Corbin, Contracts (1951 ed.), 891; Restatement, Contracts, 150. See also, Looney v. District of Columbia, 113 U.S. 258 ; Blair v. Commissioner, 300 U.S. 5 .

[Footnote 6] Title Guaranty & Trust Co. v. Crane Co., 219 U.S. 24, 35 ; U.S. Fidelity & Guaranty Co. v. Bartlett, 231 U.S. 237, 243 ; United States v. Rundle, 100 F. 400, 403; United States v. Brent, 236 F. 771, 777; Bartlett & Kling v. Dings, 249 F. 322, 325.

[Footnote 7] See United States v. Rundle, supra.

[Footnote 8] See United States v. Conn, 19 F. R. D. 274, 277. In Clifford F. MacEvoy Co. v. United States, 322 U.S. 102, 105 -106, this Court concluded that -

"The Miller Act, while it repealed the Heard Act, reinstated its basic provisions and was designed primarily to eliminate certain procedural limitations on its beneficiaries. There was no expressed purpose in the legislative history to restrict in any way the coverage of the Heard Act; the intent rather was to remove the procedural difficulties found to exist under the earlier measure and thereby make it easier for unpaid creditors to realize the benefits of the bond." [353 U.S. 210, 222]

Testimony for Senator Ben Cardin's Small Business Committee Field Hearing 10/29/2007

By: J. Robert Pence, President, Lakota Technical Services, Inc. established 11/27/1997
Shirley D. Collier, C.E.O., Optemax, LLC, established 8/23/2003
Maryland based small business federal contractors

The following summarizes our experiences and recommendations as small businesses attempting to provide innovative technology solutions to the Department of Defense for fighting the Global War on Terrorism:

- **No 'real' opportunities for small businesses to be prime providers of technology**
  - Most small business set asides or contracting objectives are for non-technical services or products and not technology providers.
  - Contract Bundling – For economies of scale, a lot of technology related procurements are bundled under large omnibus contracts that due to their size are not feasible to have a small business lead the procurement
  - Contractual vehicles such as the Navy Seaport and Seaport-e are structured such that the small business must decide if they want to be a technology "body shop" or a product developer due to the highly restrictive nature of the Organizational Conflict of Interest clause that all blanket agreements must have. Many small technology companies provide engineering personnel on an hourly basis to the government AND have developed unique products for procurement. These firms would be disqualified from participating in these large blanket agreements.

Recommended Solution:

1. **Clearly identify NAICS codes to be used for the small business contracting objectives. This would ensure small business technology providers as well as non-technology service provider are being sought to meet the needs of the Department of Defense.**
2. **Increase the small business contract objectives for all technology related service contracts in excess of $25M. Penalize prime contractors that fail to meet these objectives through measurable reductions to the award fees associated with these technology related service contracts.**
3. **As cost savings are the primary reason given for the need to bundle technology related procurements, establish clear metrics that outline the required cost savings that must be achieved through contract bundling. If the metrics cannot be achieved, the size and scope of the procurement must be altered by breaking the procurement up into smaller pieces or increasing the small business portion of the contract to be awarded.**

- **No clear transition process or funding is available for utilizing innovative technology developed by small businesses for national defense or homeland security via the congressionally established Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs .** Existing entrenched large prime contractor relationships (i.e."old boys network") are the only transition avenues into existing acquisition programs. Many of these prime contractors are threatened by the disruptive technology supplied by small businesses. Most innovative solutions that could help our troops, are not utilized because of the threat to the cash flow of existing prime contractors.

  - Congressionally mandated programs like the Defense Acquisition Challenge and Commercialization Pilot Program have not been effective in facilitating this transition. These programs although well intentioned, do not put innovative solutions in front of government decision makers. Require DoD, DHS etc to better utilize the SBIR, STTR and other programs generated by Science &Technology activities rather than establishing alternatives that do not benefit the US technology base, and may be more costly to the

U.S. taxpayer. For example the US Army is establishing a Venture Capital (VC) operation to do what the SBIR/STTR transition team could be doing, without the added cost of a large VC management fee. (see enclosed document). Venture capitalists have a singular motive: to make 20 – 30 times their investment in a short period of time. Some innovative technologies have potential high payoffs to the military but are not big money makers for businesses. Small businesses are willing to take on these risks, keep overhead low, be creative and patient, and produce solutions in relatively low quantities that can save a large number of American lives. Neither large prime contractors NOR Venture Capitalists are interested in this business model, but it is critically important to our military.

Recommended Solutions:

1. **Appoint an independent Department of Defense/Homeland Security technology "czar" who has the best interests of our country in mind, to evaluate, fund and accelerate the integration of innovative technologies developed by small businesses into our military systems, despite protests from the purveyors of existing solutions.**

2. **Require DoD, DHS and other RDT&E activities that have SBIR funds to submit topics, select vendors, fund research and mentor small businesses developing innovative technology through the research/product development continuum. Many program offices claim to be "too busy" to spend their SBIR funds, therefore they lie idle. Even when they do spend the allocated SBIR dollars, often the government employees selected to manage the SBIR effort are entry level personnel with no experience, training or authority to transition the technology developed by the small business into an acquisition program that will allow a warfighter capability gap to be resolved. Thus, it is recommended that a portion of the existing SBIR funds be used to incentivize and empower more government based project managers (not SBIR office administrative employees) to transition the SBIR derived innovative technology to an active program of record.**

3. **Provide more authority to the Transition Assistance Program (TAP) such as the one established by the Department of Navy SBIR program, to require early, active involvement in the transition process by government technology decision makers.**

4. **Oppose the enactment of H.R. 3567: Small Business Investment Expansion Act of 2007. Prohibit small businesses owned more than 25% (preferred or common stock) by Venture Capital firms or whose Operating Agreement gives VC's control over management decisions, from gaining access to Small Business Innovation Research (SBIR) dollars. We encourage risk sharing by VC's of the small business model where the business is truly operated by entrepreneurs. However, we oppose allocating SBIR funding to firms that are in essence owned and controlled by VC's or institutions with deep pockets and extensive resources, but who are competing with the real, risk taking, innovative small businesses with limited resources that are the foundation of our national economy. It is these tens of thousands of small independently operated technology businesses around the country developing early state technologies that make America competitive, not those few with later stage technologies that are cherry picked by VC's for a fast return on investment.**

Respectfully Submitted,

J. Robert Pence
(301) 725-1700 EXT223

Shirley D. Collier
(410) 442-3773 ext. 13

Venture Fund Raises Concerns in Congress

By WILLIAM MATTHEWS

OnPoint Technologies probably won't be getting $10 million from the U.S. Army in 2008. Instead, the small venture capital firm will likely get a close examination by Congress.

The House of Representatives voted May 16 to remove money for OnPoint from the 2008 Defense Authorization Act.

The House acted after Rep. Jim Cooper, a former investment banker, questioned an arrangement that he said automatically sweeps Army money into OnPoint with little oversight and no assurance of any return.

OnPoint was created in 2002 and received $25 million from the Army to invest in companies working on innovative technologies that might prove useful to the service.

"Originally, it was to be a $25 million deal," Cooper said May 17. But later, "somebody set up a sweep arrangement" that automatically transferred unexpended Army research and development funds to OnPoint. By 2006, OnPoint had collected almost $62 million.

"From the taxpayers' perspective, this is the worst investment ever," Cooper, D-Tenn., told *Defense News*. The arrangement carries "one guarantee: that the Pentagon and the taxpayers will never see another penny of that money. It's very unusual and, to me, disturbing."

Cooper said that, while reviewing items in the authorization act, the venture capital fund caught his eye. "The more I looked into it, the more defensive people got."

Cooper said he discovered a nonprofit investment firm, OnPoint, that is managed by a for-profit company, Milcom Technologies, Maitland, Fla.

Under the agreement between the Army and OnPoint, once the money is turned over, the Army loses any control over it and any claim to it. "The principal never, ever returns to the military," Cooper said. "That's truly remarkable if you understand venture capital."

So far, $7.7 million of the $62 million has gone to Milcom as management fees, according to an Army report. Another $16.7 million has been invested in technology companies, $20 million has been reserved for follow-on investments in those firms and $18.5 million remains to be invested.

During an Armed Services Committee bill markup May 9, Cooper called the $7.7 million in management fees "extraordinarily high" for the amount invested.

"This is one of the loosest arrangements I have ever seen," he said.

Rep. Adam Smith doesn't see it the same way. It was Smith, D-Wash., who proposed giving OnPoint another $10 million. He said he did so at the Army's request. But Smith acknowledged during the markup that he did not realize that once money was handed over, the Army lost all control of it.

"Jim and I agree on one thing," Smith said May 17. "Certainly, we need oversight of this fund. We disagree in that Jim sees no value in it, and I, clearly, see value in it."

The value is that with money from the Army, OnPoint can coax companies to develop technology for the

military that they otherwise would not, he said.

Often, potential sales to the military are too small to make product development worthwhile for companies. OnPoint's biggest success so far is developing a reliable indicator that tells soldiers precisely how much charge is left in batteries.

Cooper argues that battery-maker Duracell had already developed such a meter without spending taxpayers' money.

Not so, says James Rottenberg, OnPoint's managing director. The Duracell battery meter is simple, not very reliable and not suited for the kind of batteries the Army uses, he said.

Why is a battery charge meter important?

For soldiers, it can be a matter of life or death, Smith said. "If they're uncertain how much charge is left in their batteries, they'll toss them and take a new one."

According to one study, soldiers typically discard batteries with half their charge left, a costly waste. The Army says that with the new meter, soldiers will need only three batteries for every four they use now, which could save the service $75 million a year.

Money given to OnPoint also helped develop a flexible plastic solar cell used for recharging batteries in the field, Smith said.

The firm works much the way that In-Q-Tel does as the CIA's venture capital branch, Smith said.

The Army's not complaining.

"We're very satisfied at the way OnPoint has proceeded in terms of the investments it has made and products that have come out," said John Parmentola, the Army's director for research and laboratory management.

In addition to the battery-charge indicator and the solar battery recharger, OnPoint funding has led to some prototype batteries that are now being tested in Iraq, he said.

"Jim thinks everybody wants to sell to the military, and many do, but they want to sell the products they make, not necessarily the products the military needs," Smith said.

But based on the questions Cooper raised, Smith agreed that the Armed Services Committee should examine OnPoint. "We need to look at how the fund is set up, how the money is controlled and how we pay the company that manages the fund," he said.

Rottenberg said it is true that when the Army turns money over to OnPoint, the Army can't get it back. But he said that "was stipulated by Congress and the Army. I can't tell you why they wanted it that way. We're very focused on running OnPoint according to best practices for a nonprofit, and we work hard to be in compliance with Army regulations."

As for the management fees Cooper finds excessive, Rottenberg said they are "market rate." Parmentola agreed that the fees are "appropriate, given industry standards."

Smith said the venture capital fund was never intended to generate financial returns for the Army or the Defense Department.

"It's not like the government decided we're going to make money in the venture world," he said. "The government wanted to see if we can use the venture world to produce products that the military needs."

But Cooper, the former investment banker, is unconvinced.

"I don't think most taxpayers expect us to appropriate money to be turned over to a private-sector nonprofit," that is unaccountable to the Army or Congress, he said. "I'm not sure what's next, but I do hope more committee members will ask more questions. We've had no oversight on this sort of thing for more than a decade." •

E-mail: bmatthews@defensenews.com.

Testimony in support of Senator Cardin's Committee Hearings exploring the needs to provide a more appropriate system and methodology in support of the Small businessperson seeking Federal Government revenue

My name is Darryl D. Rekemeyer and I am the Director of the Fort Detrick Business Development Office (FDBDO) located at 201 Thomas Johnson Drive Suite 208, Frederick Maryland 21702. I am providing the following information in support of the concept that led to the development and subsequent growth of the FDBDO as an important combination of publicly funded assets for the small and diversity business person to utilize free of charge in their quest for Federal revenues for their respective enterprises.

The FDBDO was a concept that was developed in response to public interest amongst the small and diversity business community to accomplish a bi-directional portal serving the business interests of the private sector and the market research needs of the Fort Detrick Garrison and its 42 Mission Partners. The concept of a "One Stop Shop" evolved through discussions between several Federal Government Agencies; public interest groups including the Fort Detrick Alliance and Fort Detrick Garrison and Mission Partner interested parties.

It was decided that a bi-directional focus for the FDBDO would promote business development in the private sector and conversely be a conduit for use by the contracting facilities within Fort Detrick. Therefore, it was further decided that a solicitation would be fielded to be competed between interested 8(a) firms holding GSA Schedule Contracts. This occurred in late fall 2004.

The contract was subsequently awarded to DST, Incorporated, a Lanham Maryland based firm that is female owned, and veteran-owned firm possessing 8(a) status. The FDBDO was "built out" operating from temporary quarters in downtown Frederick and began operations in February 2005 with a formal dedication on March 22, 2005.

As a "One Stop Shop" the office includes 3 individuals from DST, Incorporated responsible for providing on-time and on budget deliverables including:

- Training
  - GSA
  - Branding
  - Federal Marketing
  - Contract Formation
  - DCAA Audit procedures
  - Strategic Marketing
  - Other topics on subjects suggested by the FDBDO database of over 2700 private sector enterprises
  - Sales and Marketing Training
  - Business Development Training
  - Market Intelligence

- Lead Generation

- Advanced Acquisition Forecast
  - Comprised of entries obtained from the various programs and Mission Partners at the Garrison as to what these entities intend to purchase during subsequent fiscal periods
  - Use of an encyclopedic resource providing pending procurement information from a variety of regional sources
  - Unlike PTAP/PTAC and the Office of Small Business Programs the FDBDO "pushes" opportunities to its database rather than reactively awaiting the approach of the private sector asking for assistance

- Maryland Technology Development Corporation (TEDCO)
  - Responsible for FDTTI

- Frederick County Office of Economic Development (OECD)
  - Planning for the fledgling business – business planning
  - Coordinates access to the Frederick Innovative Technology Center (FITCI)

- US Army Medical Research and Materiel Command (USAMRMC) Fort Detrick Office of Small Business Programs (OSBP)
  - Assists with the qualification and certification process for small and disadvantaged businesses
  - Provides a venue where the small business community can take advantage of many Government programs; identifies business opportunities.
- Creation of an interactive database to be utilized by the Government for Market Research and the major primes looking for diversity in their private sector small business partners; teaming and partnering events

The FDBDO acts as advisor, matchmaker and facilitator in a proactive manner, using the many years of experience garnered by the staff in their careers as Federal Government employees and contractors. Having experienced working through the maze of "governmentese" that is represented by the Government agency when first viewed by the small business, the FDBDO can assist in the navigation through the maze of a mixed asset Garrison such as Fort Detrick; clients of the FDBDO can be assured that their core competencies are reviewed for use by the procuring agencies.

The FDBDO takes the small business from CCR and ORCA to partnerships, security clearances and contract formation. Although the FDBDO does not issue contracts, it can facilitate the preparation of the small and diverse business to win these lucrative contracts.

The FDBDO also improves partnership opportunities with major prime contractors and with teaming relationships. A major element of the FDBDO role is in the area of outreach to local organizations as a contributing member of:

- The Frederick Entrepreneurial Network (ESN)
- National Contract Management Association (NCMA)
- Armed Forces Communications Electronics Association (NCMA)
- Frederick Chamber of Commerce
- Maryland Hispanic Chamber of Commerce
- Jefferson School Advisory Council
- Women in Defense (WID)
- Society of American Military Engineers (SAME)
- And others

The FDBDO has entered into and is negotiating important memoranda of understanding (MOU) with major prime contractors for the use of the FDBDO database as they reach out to meet their small and diversity business requirements in fulfilling their Federal contracts. The FDBDO has rebranded itself as not just a "Bridge to Fort Detrick" but rather an entity that is interested in "developing business, building success."

Recently, the FDBDO offered SCORE space in its facility and SCORE has accepted. The FDBDO will also be home to the Fort Detrick Alliance as well. Changing with the needs of the business community is an unwritten credo of the FDBDO.

The FDBDO represents the clearest example of a Federal Government program "fielded" on behalf of the small and diverse business; performed by a small and diverse business with a full cadre of services to prepare and assist similar enterprises in their quest to obtain Federal revenue growth.

The FDBDO is a "one stop shop" but it is also a representation of the concept of "No wrong Door!" It is a complementary solution to providing direct, on-point information to the small business person to those offered by PTAP/PTAC; OSADBU and OSP. The linear information provided by these offices is in most cases geometrically infused in the skill set of the small business client by the FDBDO because as a contractor, under a performance based contract, we can truly say "we have been there, are there and do that!

When you come to the FDBDO you get assistance and answers – the right mix of resources aligning its assets with your stage of development to enhance the revenue win rations in Federal Contracts of all enterprises.

Respectfully submitted,

Darryl D. Rekemeyer
Director

Crystal Enterprises, Inc.

Facility Support Services

Saundra Thurman-Custis
Principal
Crystal Enterprises, Inc.
8A Service Management Firm

I. 8A firms are required to compete w/ Larger Firms Selected by State Agencies e.g. Ability One and other SLA. This is inherently unfair competition; since the SLA will align its agency with a larger more experienced firm.

See Solicitations: Fort Meade Full-Food Service
LeJuene Air Force Base Full-Food Service

II. Regionalizing or Bundling Contracts continues to give license to agencies to exclude the 8A vendor.

See Solicitation N62473-07-R-5011

III. Placing geographic criteria is an exclusionary practice prevalent in government agencies.

See Solicitations: Mountain Home Air Force Base Janitorial

POB 436 Glenn Dale, MD 20769
(301) 262-2947 – Toll Free 800-328-6390 – FAX 301-262-5818
www.SolutionsByCrystal.com

Statement of
Women Impacting Public Policy

Submitted to
Senate Small Business and Entrepreneurship Committee

"Access to Federal Contracts: How to Level the Playing Field"

October 29, 2007

Women Impacting Public Policy (WIPP) is pleased to provide testimony today to the Senate Small Business Committee. WIPP, a bipartisan nonprofit organization, represents well over half a million women in business nationwide and 45 small business associations.

The title of this hearing so adequately reflects our overall concerns on federal contracting—how to level the playing field in small business contracting. According to the Small Business Administration (SBA), FY 2006 federal contracting numbers show that Federal agencies failed to meet the 23 percent small business goal. Additionally, the government also failed to meet its five percent women-owned businesses contracting goal. In FY 2006, only 3.4 percent of all federal contracts were awarded to women-owned small businesses. This represents $11.6 billion spent on women-owned businesses out of a total $340 billion of federal contracting dollars.

We have said for as long as WIPP has been in existence that P.L. 106-554, the law authorizing the Women-Owned Small Business Federal Contract Assistance Program, must be implemented in order to meet the five percent goal for women-owned businesses passed by Congress. This is a critical tool to helping women-owned businesses grow and diversify into the federal marketplace. For seven long years, women have waited for the SBA to implement this program. For seven long years the SBA has studied and restudied this timely issue. We have waited long enough. We now look forward to the SBA's release of the proposed rule which is currently under review by the Office of Management and Budget (OMB).

Some of our members have been able to obtain 8(a) status as a way of becoming more competitive in the federal marketplace. WIPP notes that the 8(a) income thresholds

have not been updated since 1989. That presents a real problem for the program—the thresholds are so low in 2007 dollars that the program is really set up to fail. If a business owner does not have assets on which to draw, the business is less likely to succeed.

Furthermore, WIPP members believe that the contracting goal of five percent should be increased. We strongly agree with H.R. 1873, the Small Business Fairness in Contracting Act, passed by the House, which raises the overall small business goal from 23 percent to 30 percent and raises the women-owned goal from 5 percent to 8 percent. In addition, we support inclusion of overseas contracts in the small business goals, also included in H.R. 1873.

We look to Congress to reverse the trend toward contract bundling that still occurs despite the President's initiative in 2002 which clearly stated that unbundling of contracts was a priority of this Administration. When the President launched the initiative in 2002, the OMB reported that for every $100 awarded on a bundled contract, there is a $33 decrease to small businesses. They went on to say, that because these types of contracts "run longer and encompass a greater scope, competition is reduced in terms of frequency and the number of opportunities" for small business. Despite strong evidence that bundling is not good for small business or the government, a 2004 Government Accountability Office (GAO) Report No. 04-454 "Impact of Strategy to Mitigate Effect of Contract Bundling on Small Business Is Uncertain," shows that federal agencies are confused over what constitutes "contract bundling" which results in poor accountability and disparity in reporting. While 928 bundled contracts were captured in the Federal Procurement Data System (FPDS), only 24 of those contracts were reported by agencies to the GAO. We urge the Committee to clear up the confusion for the

agencies and continue its efforts to unbundle contracts. Additionally, WIPP believes construction services should also be included in the contract bundling definition, if the value of the construction contract is more than $65 million.

According to WIPP's 2007 Annual Issues Survey, one-half of the federal contractors who responded were primes contractors and one-half were subcontractors – so subcontracting is very important to our membership and all small business. As federal contracts get larger, subcontracting integrity becomes more important.

With regard to subcontracting, we continue to believe that "if you list us, use us" is an important principle. We were heartened by the language (Section 1102) included in the Senate SBA Reauthorization bill in the previous Congress that addressed this issue and urged the Committee to include it in this year's version. Small businesses spend thousands of dollars in staff resources to be a part of the subcontracting plan on a prime contractor's bid. Our membership tells us that all too often the prime, after winning the contract, takes their portion of the work "inside" or simply reverts to using the same old subcontractors they have used in other bids. The Committee language last year required the prime contractor to utilize the small businesses it included in its subcontracting plan unless the small business could no longer meet the requirements. It also included penalties for violating the subcontracting plans.

Prompt payment from the prime contractors to the subcontractors continues to be an issue for small businesses. The Prompt Payment Act addresses only the relationship between the prime contractor and the agency. The agency is required to pay its prime contractors with 30 days. Our members tell us that some agencies pay more quickly than other agencies. The larger problem, and one that the law does not address, is prompt

payment from a prime contractor to a subcontractor. Currently, the government does not have the authority to intervene because its relationship is with the prime contractor, not the subcontractor. The relationship between a prime and a subcontractor is considered to be a commercial relationship with its own set of terms. Nevertheless, we continue to hear stories from our members that this is an ongoing problem. It seems to us that the government should withhold further payments to prime contractors who are not paying their subcontractors in a timely manner. This would require a change in the law.

Another issue for small businesses is the current size standards administered by the SBA. WIPP members tell us that as government contracts get larger, the small business size standards must be adjusted to reflect that trend. In some cases, the size standard limit restricts an award to very small companies instead of small companies. This inhibits the ability of our small businesses to compete in the federal market, and has the effect of ensuring that women and minority-owned companies remain small.

In the construction industry, for example, the current size standards force a business out of the program before that company can compete on equal footing. So, the company ultimately fails; then, someone else starts a brand new company to fill the void – and the process starts all over again.

While we are not advocating a wholesale reworking of the size standards, we are suggesting that for those problematic ones, such as architecture, construction, and administrative services, to name a few, SBA should be willing to review them. This is critical not just for the federal government procurement, but also because states and cities look to the SBA size standards on which to base their own programs. This means that the

unintended consequences mentioned above continue to be propagated across the whole country, ultimately hurting the very businesses the program was intended to help.

A potential problem is the recertification rule, 13 CFR Parts 121 and 124, that recently was published by the SBA and which went into effect June 30, 2007. The rule, entitled, "Size for Purposes of Government-Wide Acquisition Contracts, Multiple Award Schedule Contracts and other Long-Term Contracts; 8(a) Business Development/Small Disadvantaged Businesses; Business Status Determinations," addresses size recertification to ensure that companies being awarded small business contracts are in fact small businesses and to ensure accurate reporting by federal agencies. While WIPP supports the underlying reasoning behind requiring recertification of small companies, WIPP will be carefully monitoring the implementation of the rule to ensure that there are not unintended consequences to small businesses and their ability to grow.

We look forward to working with the Committee to change contracting laws and regulations to ensure continued small business contracting in the federal sector.

Jerry Zhu, Ph.D.
President
UCSoft
www.UCSoft.biz
jerry.zhu@ucsoft.biz
703 823 4609

We are a small minority owned company specializing in software development methodology innovation. Our breakthrough research leads to radical results in software quality increase and cost reduction. In a 2002 report, NIST found that software errors cost U.S. economy $59.5 billion annually and software developers already spend approximately 80 percent of development costs on identifying and correcting defects, and yet few products of any type other than software are shipped with such high levels of errors.

Our research and experience find that Federal government wastes tens of billions of dollars a year on failed software projects for two main reasons: deficient software development methodology and ineffective ways of contracting professional services (bill by persons not by job).

Our research breakthrough business driven model based methodology will eliminate resource spent on identifying and correcting software errors and ensure project success. The new methodology requires new ways of doing software that implies new ways of interaction between government agencies and contractors. The economic impact could be saving Federal government billions of dollars a year.

We tried to bid for government contracts with frustrating experience. Government agencies know what they want. Because government does not know our innovative services, hence there is no way for our services to be utilized. Our purpose is to promote the adoption of our new methodology in software development for government agencies. We recommend breaking down software development projects into two separate projects: business modeling and technology implementation. We provide consulting services how to model business in such a way to secure a successful software implementation. It maybe a good idea to legislate it that any software development projects must be carried out after business model completes.

Suggestion is to pilot the new methodology by our company working with some agencies to create business model and then let other software firms to do the implementation. If a proved sustainable success, it can become legislated way of doing software development for Federal government.

Jerry Zhu, Ph.D.
President
UCSoft
2727 Duke Street, Suite 602
Alexandria, VA 22314

○