

**CONTRACTING AND THE INDUSTRIAL BASE III:
REVERSE AUCTIONS, VERIFICATION AND THE
SBA'S ROLE IN RULEMAKING**

HEARING
BEFORE THE
SUBCOMMITTEE ON CONTRACTING AND
WORKFORCE
OF THE
COMMITTEE ON SMALL BUSINESS
UNITED STATES
HOUSE OF REPRESENTATIVES
ONE HUNDRED FOURTEENTH CONGRESS
FIRST SESSION

HEARING HELD
MARCH 19, 2015



Small Business Committee Document Number 114-007
Available via the GPO Website: www.fdsys.gov

U.S. GOVERNMENT PUBLISHING OFFICE

93-733

WASHINGTON : 2015

For sale by the Superintendent of Documents, U.S. Government Publishing 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

HOUSE COMMITTEE ON SMALL BUSINESS

STEVE CHABOT, Ohio, *Chairman*
STEVE KING, Iowa
BLAINE LUTKEMEYER, Missouri
RICHARD HANNA, New York
TIM HUELSKAMP, Kansas
TOM RICE, South Carolina
CHRIS GIBSON, New York
DAVE BRAT, Virginia
AUMUA AMATA COLEMAN RADEWAGEN, American Samoa
STEVE KNIGHT, California
CARLOS CURBELO, Florida
MIKE BOST, Illinois
CRESENT HARDY, Nevada
NYDIA VELÁZQUEZ, New York, *Ranking Member*
YVETTE CLARKE, New York
JUDY CHU, California
JANICE HAHN, California
DONALD PAYNE, JR., New Jersey
GRACE MENG, New York
BRENDA LAWRENCE, Michigan
ALMA ADAMS, North Carolina
SETH MOULTON, Massachusetts

KEVIN FITZPATRICK, *Staff Director*
STEPHEN DENNIS, *Deputy Staff Director for Policy*
JAN OLIVER, *Deputy Staff Director for Operation*
BARRY PINELES, *Chief Counsel*
MICHAEL DAY, *Minority Staff Director*

CONTENTS

OPENING STATEMENTS

Hon. Richard Hanna	Page 1
Hon. Nydia Velázquez	2

WITNESSES

Mr. Daniel I. Gordon, Senior Advisor, Government Procurement Law Program, The George Washington University Law School, Washington, DC	3
Ms. Amber Peebles, President, Athena Construction Group, Inc., Dumfries, VA, testifying on behalf of Women Impacting Public Policy	5
Mr. Davy G. Leghorn, Assistant Director, National Veterans Employment & Education Division, The American Legion, Washington, DC	7
Ms. Margot Dorfman, CEO, United States Women's Chamber of Commerce, Washington, DC	9

APPENDIX

Prepared Statements:

Mr. Daniel I. Gordon, Senior Advisor, Government Procurement Law Program, The George Washington University Law School, Washington, DC	19
Ms. Amber Peebles, President, Athena Construction Group, Inc., Dumfries, VA, testifying on behalf of Women Impacting Public Policy	25
Mr. Davy G. Leghorn, Assistant Director, National Veterans Employment & Education Division, The American Legion, Washington, DC	30
Ms. Margot Dorfman, CEO, United States Women's Chamber of Commerce, Washington, DC	39

Questions for the Record:

None.

Answers for the Record:

None.

Additional Material for the Record:

None.

CONTRACTING AND THE INDUSTRIAL BASE III: REVERSE AUCTIONS, VERIFICATION AND THE SBA'S ROLE IN RULEMAKING

THURSDAY, MARCH 19, 2015

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

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 2360, Rayburn House Office Building. Hon. Richard Hanna [chairman of the subcommittee] presiding.

Present: Representatives Hanna, Hardy, Velázquez, Chu, Clark, Meng, and Lawrence.

Chairman HANNA. I will call this hearing to order. Welcome to our third hearing looking at businesses and our industrial base. Today we are going to focus on three important issues. First, we will hear about ongoing issues with veterans and Service disabled veterans' contracting programs. Second, we will discuss reverse auctions. Last Congress, I introduced legislation addressing reverse auctions for construction service contractors.

However, today we are going to hear about the systemic issues in reverse auctions. Finally, we will hear about challenges to timely implementation of small business contracting and legislation.

Each of these issues is important to inclusion of small business in our industrial base. With a process for verifying as a Service disabled veteran owned small business being overly burdensome, legitimate veterans choose to be absent themselves from the federal marketplace.

For example, having two different definitions of Service disabled veterans' owned small businesses means we are forcing our veterans to resolve the tensions that lawmakers and regulators cannot solve or will not solve.

Likewise, when reverse auctions are used properly, they can save taxpayers dollars. Unfortunately, some agencies have used reverse auctions in a manner that evades vigorous competition in contractor professions.

Finally, the SBA and its Federal Acquisition Council, when they fail to act, it means contracting officers and small businesses have two conflicting sets of rules. Consequently, small businesses cannot plan and they often cannot compete for work.

While the rulemaking process takes time, there is simply no excuse for the fact that nearly five years after Congress passed the Small Business Jobs Act, small business is still waiting for regula-

tion. Given the bureaucratic delay, it is no surprise that many small businesses opt out.

I expect as a result of the testimony we receive today, the Subcommittee will accurately pursue ways to increase opportunities for small businesses to compete for contracts.

I look forward to hearing from each of you, and I want to welcome our witnesses. I now yield to Ranking Member Velázquez, for her opening statement.

Ms. VELAZQUEZ. Thank you, Mr. Chairman, for holding this hearing. Today's discussion continues our ongoing work to help more small businesses compete in the Federal marketplace.

Earlier this week, the Subcommittee examined small companies' participation in Federal procurement. Today's hearing examines another set of barriers that stop small and disadvantaged companies from winning their fair share of contracts.

One practice that this Committee had previously examined is so-called "reverse auctions," which are meant to pit potential contractors against one another to lower prices. Unfortunately, reverse auctions have in many cases failed to introduce or enhance competition.

The Government Accountability Office, for instance, found that in a single year, Federal agencies conducted 3,617 of reverse auctions where only one vendor participated and submitted bids. In this case, the Federal Government is spending money on a process that does not lower prices or increase the quality of goods and services.

Beyond reverse options, there are other areas that need close scrutiny by the Committee if we are to grow small business' role in the Federal marketplace. Congress has rightly created a program of targeting projects to veteran owned small businesses, especially those disabled during their time of service. In addition to SBA's program, the VA launched an initiative. However, there are serious concerns about how VA verifies small businesses operated by eligible veterans. It is important this program functions effectively.

With bad actors gaming the system, legitimate veteran owned businesses lose out on contracting opportunities.

More generally, the Committee must examine how well SBA's rulemaking process functions. Many of the rules the agency has formulated will boost small business' ability to compete for Federal contracts. Yet, previous acts of Congress and Executive Orders have largely hamstrung the SBA's rulemaking process.

Mr. Chairman, this Committee has a long track record of working in a bipartisan manner, particularly when it comes to procurement issues. It is my hope we can continue that tradition to further small business' role as Federal contractors.

I thank the witnesses for being here today, and I yield back the balance of my time.

Chairman HANNA. Thank you. Our first witness is Daniel Gordon, Senior Advisor to the Government Procurement Law Program at George Washington University Law School.

Mr. Gordon previously served as President Obama's Administrator for Federal Procurement Policy. Prior to serving at the Executive Branch, he worked 17 years in the Office of General Counsel for the Government Accountability Office.

Sitting next to him is Amber Peebles, President of Athena Construction Group, Inc. Athena Construction Group is a Service disabled veteran owned HUBZone and woman owned small business located in Dumfries, Virginia. She is a Marine Corps Service disabled veteran, and we thank you for your service. She testifies today on behalf of Women Impacting Public Policy.

Our third witness is Davy G. Leghorn, Assistant Director of the National Veterans Employment & Education Division, The American Legion. Mr. Leghorn served as a mortar infantryman in the Army, and then as a civil affairs specialist. Thank you for your service, sir.

I now yield to Ranking Member Velázquez to introduce our fourth witness.

Ms. VELAZQUEZ. Thank you, Mr. Chairman. It is my pleasure to introduce Ms. Margot Dorfman. Ms. Dorfman is the Founder and CEO of the United States Women's Chamber of Commerce. The Women's Chamber represents 500,000 members, three-quarters whom are small business owners and Federal contractors. Through her leadership, this organization has championed opportunities to increase women's business careers.

In addition, Ms. Dorfman has an extensive background in business, including over 10 years in executive positions with General Mills and other Fortune 500 firms.

Welcome, Ms. Dorfman.

Chairman HANNA. Thank you. Mr. Gordon, you may begin.

STATEMENTS OF DANIEL I. GORDON, SENIOR ADVISOR, GOVERNMENT PROCUREMENT LAW PROGRAM, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL; AMBER PEEBLES, PRESIDENT, ATHENA CONSTRUCTION GROUP, INC.; DAVY LEGHORN, ASSISTANT DIRECTOR, NATIONAL VETERANS EMPLOYMENT AND EDUCATION DIVISION, THE AMERICAN LEGION; MARGOT DORFMAN, CEO, UNITED STATES WOMEN'S CHAMBER OF COMMERCE

STATEMENT OF DANIEL I. GORDON

Mr. GORDON. Thank you, Mr. Chairman, and Ranking Member Velázquez, members of the Committee, very much. It is an honor to be here this morning.

My name is Daniel Gordon. I am the Senior Advisor to the Government Procurement Law Program at The George Washington University. As you probably know, G.W.'s Procurement Law Program has for more than 50 years been the premier institution granting degrees in procurement law.

I am going to talk about electronic reverse auctions this morning. I have had the benefit of learning about them both in the U.S. context and in a good number of countries overseas that use reverse auctions frequently, from Russia, to Brazil, to Bangladesh, to Macedonia.

In many ways, the best document about reverse auctions in the U.S. is the one you mentioned, Ranking Member Velázquez, and that is the December 2013 GAO report. The report is full of interesting information. For one, the report agrees that reverse auctions save us money, but points out that we do not really know how

much money, and the data about the savings is largely not in the hands of our Federal agencies.

Moreover, although small businesses win the majority of our reverse auctions, GAO points out rightly that it is not clear that the reverse auctions are increasing the amount of work going to small businesses. That is to say what would have happened if we had done it the old fashioned way, without reverse auctions.

GAO also points out some of the challenges about reverse auctions, and I would like to focus on them this morning, in the next couple of minutes.

In my experience, the more you are dealing with commodity, the more likely there is a good candidate for reverse auction, but the more you are dealing with something that is a service and not a commodity service, the more likely you are to be running into trouble.

Related to that is the way you are going to pick the winner. If all you care about is price, the reverse auction probably makes sense. If you are worried about other things, like performance, quality, staffing, a reverse auction can be a very problematic way to proceed.

Moreover, GAO gave us good data that shows us important and problematic developments. As Ranking Member Velázquez pointed out, in far too many cases that GAO found, there was no competition. There was either only one bidder or even if there was more than one bidder, each one of them submitted only one bid. The Government was paying a fee to a private vendor even though it really was not getting any benefit from the reverse auction.

That brings me to my final significant point, which I wrote about quite a bit in my written testimony, and that is the cost and benefits of relying on a private sector company to run electronic reverse auctions.

In fact, GAO said that one company, FedBid, ran more than 99 percent of the reverse auctions that GAO found on FedBizOpps, the Government-wide portal. That is pretty darn close to a monopoly, and it raises some questions. Not that FedBid has not done a good job.

I have to tell you in my experience, FedBid has done an excellent job. They have been efficient. They have been helpful. They helped the Government get savings. They provided a good platform that works well. They provided administrative training support. FedBid has done an excellent job.

It is performing a function which is closely associated to the inherently governmental one, that is to say award of Federal contracts, and that raises issues. Not only that, in my experience, FedBid has something of an organizational conflict of interest. They control the data. They control the information. They have a financial interest in having as many reverse auctions as possible, regardless of whether the procurement is suitable, regardless of whether there is real competition. They get their fee. It is actually not a high fee, and as I point out in my testimony, they sometimes waive the fee.

It is still troubling that Federal agencies, according to GAO, often do not know they are paying FedBid. That is not a healthy situation. In my experience, we need to ensure that these functions

are under the control of Federal officials. We need to have contracting officers with training in running reverse auctions before they conduct one. They need to be trained on what we need in reverse auctions, how to conduct a reverse auction.

As I explained in my testimony, I am not sure that statutory guidance is always necessary, but at the very least, we need Government-like guidance, as GAO points out, so that these reverse auctions, which can be an useful tool, are used properly.

I would note that GSA now has a reverse auction at no fee to the users. We need to explore that.

I want to thank you very much for your time this morning. Obviously, if we have time, I will be delighted to answer questions.

Chairman HANNA. Thank you very much. Ms. Peebles?

STATEMENT OF AMBER PEEBLES

Ms. PEEBLES. Good morning, Chairman Hanna, Ranking Member Velázquez, and distinguished members of the Subcommittee. Thank you the opportunity to testify today.

My name is Amber Peebles. I am President of Athena Construction Group, a Service disabled veteran/woman owned, HUBZone, construction company based in Northern Virginia, founded in 2003. I served eight years in the Marine Corps.

Last year, Federal contracts accounted for more than half of Athena Construction Group's revenues. Currently, we have 42 employees.

I am also here today representing Women Impacting Public Policy, where I serve on its Executive Advisory Board.

First, let me say thank you to the Subcommittee and staff for improving the contracting rules and regulations pertaining to small businesses. Under your leadership, the Congress has enacted much needed changes, increasing access to Federal contracts for all small businesses, but especially women.

Nonetheless, these hearings make clear more can be done, including changes to help women meet their contracting goals for the first time.

While construction related reverse auctions were the subject of a previous hearing, I would like to briefly share two experiences Athena Construction Group had with this procurement process that raises concerns.

In one instance, after significant and costly preparation, an auction was closed with only seconds remaining. The contracting officer simply withdrew the requirement. While this happens occasionally in normal procurements, the additional costs of preparation for a reverse auction meant the loss was greater for my company.

In another instance, several rounds of pricing for metals were required. Not to be overly technical, but a formula is used to address different price points for different times. This is standard in the industry. The Web site could not process the pricing structure accurately. Had this gone through a normal procurement, the opportunity would not have been wasted.

We have previously submitted concerns on reverse auctions in testimony before this Committee, well cited in the GAO report. We support additional requirements to prevent the inappropriate use

of reverse auctions. In fact, we believe small business set-asides should not be eligible for reverse auctions.

Legislation in the last Congress sponsored by Chairman Hanna and Congresswoman Meng made these changes. We were disappointed the changes did not make it into law. We encourage you to reintroduce the bill and persist in its passage.

Many of WIPP's members, including myself, are veterans running Service disabled veteran owned businesses. WIPP supports the Federal contracting programs that assist veterans in engaging in the Federal marketplace.

Given the strong presence of veterans' advocates here today, WIPP defers to them on the specifics of improving contracting opportunities for SDVOSBs and veteran owned small businesses. WIPP encourages this Committee to work with them to improve the contracting environment for veterans.

Let me take a few minutes to address an issue that frustrates many WIPP members, the time that lapses between a law passing and the FAR Council adopting the change in many instances is too long. While we know the rulemaking process takes time, it is just common sense that it should not take years to put a contracting change in place. We should know. WIPP spent 11 years getting the WOSB program implemented.

Another example is SBA's recent proposed rule on subcontracting, which took two years to reach a proposed rule stage. Many women contractors have been waiting for those changes passed by this Committee because it would result in additional subcontracting opportunities.

Even after final rules are promulgated by the agency, the wait for FAR Council adoption could take months if not years. While we are grateful the implementation of legislation to remove dollar caps on awards in the Women Owned Small Business Federal Contract Program was done quickly, it is not always the case. Currently, women entrepreneurs stand to gain with a speedy implementation of sole source authority in the WOSB Program. Every day this policy cannot be utilized is another day women business owners are disadvantaged by the contracting process.

Members of Congress, along with the women's business community have asked SBA to move expeditiously. It is our hope that when the time comes, the FAR Council will do so as well.

WIPP has two recommendations. One, in our view, it is logical that FAR Council adoption of a change should happen concurrently with the promulgation of the SBA's final rule implementing that change.

Two, SBA should be added to the FAR Council. It seems to us appropriate that SBA charged with looking after small business procurements be included in the Council.

Expanding beyond the scope of this contracting hearing, I want to close with a contracting concern of WIPP. The increased Federal strategic sourcing efforts in our view represents a serious threat to the small business contracting community. In a name, strategic sourcing sounds like a good idea, akin to good governance. For small businesses, including WOSBs, however, the trend is eroding the industrial base.

The efforts to maximize short term savings through large, limited competition contract vehicles have pushed small businesses out of competition and picked a select group of winners.

One solution may be to revise how small business participation is measured by the agencies. Currently, small business goals only measure the dollars awarded to small businesses. Equally important is how those dollars are distributed among small businesses. SBA should consider expanding its goal criteria to include a participation rate. In doing so, it will help ensure that a diverse group of businesses, including women, are engaged in the Federal marketplace.

Thank you for holding this hearing today, and for making the contracting environment better for women owned businesses. I am happy to answer any questions.

Chairman HANNA. Thank you. As you can see, we have votes. We will just adjourn for about 20 minutes. There are two votes. Relax, and we will be right back. Thank you.

[Recess]

Chairman HANNA. Thank you. Mr. Leghorn?

STATEMENT OF DAVY LEGHORN

Mr. LEGHORN. Good morning, Chairman Hanna, Ranking Member Velasquez, and members of the Subcommittee, on behalf of our National Commander, Michael D. Helm, and the 2.3 million members of The American Legion, we thank you for this opportunity to testify today.

The American Legion identifies three main issues that pose obstacles for veteran owned small businesses: reverse auctions, differences between Small Business Administration and Department of Veterans Affairs standards, and exclusion of veterans from Disadvantaged Business Enterprise Programs in the Department of Transportation.

On reverse auctions, the Government has a fiduciary responsibility to treat small businesses fairly and not take advantage of its buying power and become predatory.

The American Legion appreciates the goal of lowering Federal expenditures through competitive contracting initiatives, but we are concerned that misuse of non-governmental platforms could put veteran small businesses at risk and limit job creation.

The American Legion is also concerned that reverse auctions will lead to decreased quality because these platforms encourage vendors to provide the cheapest product and services and only to maintain the smallest profit margins to stay competitive.

The Government is therefore purchasing substandard products and services because reverse auctions steer agencies to shop for lowest pricing and not for best value.

These business models favor home based businesses that primarily operate online with no customer support. Businesses like these rely on Federal procurement as their sole source of income and their tight profit margins do not incentivize job creation.

When something is bad for small business, The American Legion recommends simply doing away with it. The Federal dollars spent in purchasing reverse auction services are better utilized in hiring more contracting officers to do market research to ensure that pro-

curements are made at fair market value. A reverse auction is a shortcut contracting officers resort to because there simply are not enough of them.

On VA verification, the American Legion supports verification. Contracting officers are risk adverse and they prefer giving contracts to firms that have undergone third party vetting, so we understand why contracting officers have started asking SDVOSBs if they are CVE certified.

However, this has added to the confusion of having two vetting processes for two agencies for relatively the same purpose. To cut down on the confusion, we ask the Committee to consider a single set of standards for all SDVOSBs who contract with the Federal Government. We would defer to the Committee's expertise in selecting the agency most capable of undertaking this task.

The American Legion also believes that SBA and VA need to work together to minimize inconsistencies in decisions being made. The main challenge with VA verification is striking the balance between the amount of intrusion necessary to substantiate size, ownership, and control, and the requisite amount of oversight to protect the integrity of the program.

Including SBA in the appeals process would ensure consistency in the final decisions being made and provide impartiality in not having the agency of original jurisdiction review their previously denied applications.

Further, SBA has the legal expertise, experience, and ample base of precedential case law that can be applied to a formalized appeals process.

Lastly, regarding the Department of Transportation's DBE Program. By law, the Federal Government is mandated to award no less than three percent of all Federal contracts to SDVOSBs. For a number of reasons, a few agencies have not met this goal.

One of the most egregious exclusions of veteran owned small businesses occurs in the Department of Transportation's Disadvantaged Business Enterprise Program, which mandates that states receiving Federal dollars for infrastructure repairs have to set aside 10 percent for preferred groups of small businesses.

It is a misconception that this 10 percent is solely relegated to road and infrastructure construction firms, and there are a variety of industries involved, such as engineering, landscaping, remediation, utilities, and information technology. This is an issue that affects all veteran owned small businesses.

The American Legion worked closely with Congressman Mike Fitzpatrick from Pennsylvania to amend the current legislation to add "veteran owned small business concerns" as a separate line to the list of candidates eligible in the program, and such an addition would not presume that veterans are socially and economically disadvantaged, instead, VOSBs would be considered independently eligible for participation in the DBE Program.

In previous Congresses, Congressman Fitzpatrick has introduced the Fairness to Veterans for Infrastructure Investment Act that makes this change. The American Legion and numerous other veteran service organizations support this bill and will ask again for this Committee's support when Congress reauthorizes the Federal Highway bill.

Thank you, and I look forward to any questions you may have. Chairman HANNA. Thank you. Ms. Dorfman?

STATEMENT OF MARGOT DORFMAN

Ms. DORFMAN. Chairman Hanna, Ranking Member Velázquez, and members of the Subcommittee, thank you for the opportunity to provide testimony on behalf of our over 500,000 members of the U.S. Women's Chamber of Commerce.

While reverse auctions have the potential to deliver savings for the Government, we have concerns with the process and outcomes.

Small business owners may be pushed to lower bids to their own detriment. The complexity and risks involved in an auction may drive down competition by causing potential bidders to not participate. There is a risk of circumventing regulations related to the small business requirements. In many instances, it may be more efficient and cost effective to simply purchase off a schedule.

Regarding verifications, our members are concerned about the failure of the SBA to verify firms claiming to be small and meeting the socioeconomic requirements. Congress established programs to support our nation's efforts to reach full productive capacity and assure a fair portion of Federal contracts are placed with the full spectrum of small businesses.

The SBA is charged with accurately identifying and verifying eligible firms as small, veteran owned, women owned, et cetera. Unfortunately, the Small Business Administration has failed at the most basic requirement. For the last decade, the Inspector General's annual report, Report on the Most Serious Management and Performance Challenges, listed the top challenge of the SBA as allowing large firms to obtain small business contracts and allowing agencies to count these contracts toward their small business goals.

The SBA's failure to verify small business and socioeconomic claims became a major issue when the Service Disabled Veteran Owned Small Business Set-Aside was created. The SBA did not establish any eligibility verification for the program, creating fraud and abuse as contracts went to ineligible firms.

This issue became more complicated when the VA began their own Vets First Contracting Program with its own certification. The Vets First Contracting Program is only for specific contracting opportunities within the VA, and has different eligibility requirements from the SBA's SDVOSB Program.

Some members of Congress have suggested the VA's verification for the Vets First Program should be moved to the SBA and paid for by the VA. The idea stems from a lack of understanding that the SDVOSB Program, which is under the SBA's management and enforcement, has a different purpose and different requirements from the VA's Vet First Program.

Since the SBA failed to create the verification process for the SDVOSB, businesses and agencies are confused, and legitimate Service disabled veteran owned firms have lost hundreds of millions of dollars.

More recently due to the SBA's poor regulatory implementation and enforcement of the Women Owned Set-Aside Program, the Government Accountability Office found that more than 40 percent of businesses securing women owned set-asides were ineligible.

Thankfully, Congress and the President acted through recent passage of the National Defense Authorization Act to remove self certification from the Women Owned Set-Aside Program, which when implemented, will elevate the verification for this program.

We appreciate Congress stepping up to force the SBA to do what it should have done all along, and ask this Committee to hold the SBA accountable for the expedient creation of strong regulations to improve verification.

As Congress passes legislation to achieve these goals, we rely on the SBA to prepare and enforce regulations that successfully fulfill your intent. In this area, the SBA has failed woefully.

The regulations developed and enforced by the SBA for the Women Owned Set-Aside Program were flawed from the start. The SBA ignored stakeholder input on the inability of the processes to ensure that only qualified women owned firms received set-asides, created a grossly complex document management process, and turned contracting officers into de facto certifiers, driving down their desire to use the program.

We ask that the House Small Business Committee hold a full Committee hearing with the SBA to understand how this plan will be implemented.

The SBA failed to establish verification for the SDVOSB Program, causing hundreds of millions of dollars to be lost, fraud and abuse, and setting up confusion between SBA's program and the VA's program.

The SBA has also failed to staff an appropriate number of procurement center representatives, PCRs, to enforce the requirement for small business set-asides in their regions, the most crucial front line team to assure that a fair portion of purchases are placed with small business concerns. It is not a regulatory enforcement priority for the SBA.

We agree with the budget views of the Committee, the SBA must allocate greater use of their funds to core congressionally mandated activities, rather than funding the SBA's extra layers of non-essential management and non-mandated programs. We recommend funds be directed to regulatory enforcement and direct small business services.

Thank you.

Chairman HANNA. Thank you. I will yield to Ranking Member Velázquez for our first questions.

Ms. VELAZQUEZ. Thank you, Mr. Chairman. Ms. Dorfman, some of the issues with self verification of veterans are also present in the Women's Program due to the ability to self certify. However, due to legislation I offered last year, businesses would no longer be able to self certify their eligibility for the Women's Program.

Yet, we know some damage has already been done. Can you discuss some of the ramifications that the allowance of self verification has done to these programs, the Women's Program, in particular?

Ms. DORFMAN. Certainly. Thank you. As the GAO report mentioned, it was 2012 or 2013, for both years, 40 percent of the contracts awarded to "women owned firms" actually went to ineligible firms. That is billions of dollars of lost opportunities.

The U.S. Women's Chamber of Commerce is a third party certifier. We did a similar quick review probably a year ago where we found that out of all those applications that had come in, we had denied 39 percent, and 53 percent of those ended up self certifying, so they are receiving contracts, and there is no way the SBA has been trying to—the SBA has not followed up at this point to mitigate that situation.

Ms. VELAZQUEZ. Thank you. Ms. Peebles?

Ms. PEEBLES. Speaking on behalf of WIPP, we are absolutely against any fraud in any of these small business programs. I do think a concern or a focus of ours would be to ensure the sole source authority moves along, but not at the expense of the certification process intervening with that.

Ms. VELAZQUEZ. Thank you. As the SBA develops its own verification process, what are some key factors you think the agency should be focusing on to reduce instances of fraud in the program? Ms. Dorfman?

Ms. DORFMAN. There certainly needs to be much more follow up when they are actually doing the process to be able to identify those that are truly women owned firms versus those that are masquerading as women owned firms, and I think they need to make sure that their regulations and their processes are in compliance with their own regulations.

Ms. VELAZQUEZ. Thank you. Mr. Gordon, since the use of reverse auctions, they have been calls from various stakeholders to ensure regulations and guidelines as to how and when the reverse auctions should be used.

However, while there have been several rounds of data collection, we have yet to see the issuance of any policies. Why do you believe there is such hesitation to publish this much needed guidance on regulations?

Mr. GORDON. As a former administrator, I would have some sympathy for the workload that very small office has, they have very few people, and they have an enormous responsibility.

I would say we need Government-wide guidance. I am not sure we need statutes that go into any detail. I am not sure we need an amendment to the Federal Acquisition Regulations. I worry that technology changes very quickly, so I would say whatever goes into a statute or the FAR should be at a very high level, but you have basic principles, that you need training, et cetera.

We absolutely need to get Government-wide guidance. Our contracting officers across the Government do not know what procurements are suitable for these. The training is critical.

Ms. VELAZQUEZ. Training. Thank you, Mr. Gordon. Mr. Leghorn, I am really happy to hear in your testimony that you are stating there have been some improvements to VA's verification process, including they have decreased the time it takes for a business to receive its initial decision.

Also, you noted you have seen fewer requests for counseling services in the verification process. Do you think this means the VA has finally turned some things around for the certification process?

Mr. LEGHORN. Thank you for your question. VA, yes, they are coming around. I do not think they have completely turned the corner yet. There is still some discrepancies in the quality of the deci-

sions that are being made, but by far, when it comes to time alone, it has had success and done a really good job.

Ms. VELAZQUEZ. How do you feel about a call made by some to move the VA process to SBA completely?

Mr. LEGHORN. Again, as in our testimony, we do not have a preference. We believe there needs to be certification agency-wide, and we would rely on this Committee's expertise to tell us whether that is going to be an agency or third party.

Ms. VELAZQUEZ. Thank you. My time has expired. Thank you, Mr. Chairman.

Chairman HANNA. Mr. Gordon, if you had the opportunity to eliminate in its entirety reverse auctions except for commodities versus us trying to figure out all the nuances and dynamics of the different types of businesses, where would you go?

Mr. GORDON. Mr. Chairman, I want to make sure I understand the question. Eliminate reverse auctions for commodities?

Chairman HANNA. For everything but commodities. Would that produce an outcome that is more desirable than trying to work through what we have in front of us?

Mr. GORDON. It might make sense. Of course, defining "commodities" is not just a simple thing. I am very concerned that (a) our people across the Government do not know how problematic it is to do a reverse auction when you are focused on quality and past performance, et cetera, and they do not realize that buying services, especially professional services, you do not want to be doing a reverse auction.

What happens, sir, is you can have situations where a company wins the auction but does not get the contract. You are driving down price even though price is not really your focus.

I often tell people if you want to do a reverse auction to buy surgery services, make sure you do not particularly like the patient, because you are going to be driving down the price on something where you should be focused on other than price.

I think it would be a step forward, at least as a cautionary move, to say do not use reverse auctions for non-commodities.

Chairman HANNA. Take the time to define what we mean by "commodities" and throw the rest. What do you think, Ms. Peebles?

Ms. PEEBLES. I think the Professor is fascinating. My knowledge of reverse auctions is not as in-depth as the Professor's. There are concerns that I as a private citizen and as a business owner who has attempted to use FedBid have about the process, and one of my concerns is the lag feature, which if I am not mistaken, according to the GAO report, is an arbitrary feature, meaning when you submit a price, it will immediately show that you are lagging, indicating somebody else is bidding against you.

Chairman HANNA. Which may not be the reality.

Ms. PEEBLES. Which may not be the case. If I may just speak as a private citizen, as a taxpayer, and as a business owner, if I used this feature and responded to that lag feature, I have concerns because every time my company receives a prime contract, I, as President, sign a document, Truth in Negotiations Act, which has penalties if I have done that in bad faith.

I, frankly, think we are a better country than that, to use deception in a Federal procurement.

Chairman HANNA. Does anyone else want to weigh in?

I kind of agree with you. Weaving through this, what is obvious is the very, very subjective nature and the complexity of so many different types of products and outcomes we are looking for, it defies reason that we would even use reverse auctions.

I appreciate that, and I am going to yield to Ms. Chu for five minutes. Thank you.

Ms. CHU. Mr. Leghorn, you testified that the American Legion has found that instead of fostering positive partnership relationships between Government and industry, the use of reverse auctions has actually cultivated resentment between buyers and sellers, ruining any potential for a constructive relationship to be had.

Can you give us an example of a time when you have seen this partnership deteriorate?

Mr. LEGHORN. I am not an expert on reverse auctions for the American Legion. Can I take that one for the record and get a specific example back to you at a later date?

Ms. CHU. Sure.

Mr. LEGHORN. Thanks.

Ms. CHU. Mr. Gordon, you brought up many points about problems with reverse auctions, including something that I had not heard of before, the use of a private company, FedBid, to administer the data which could be a conflict of interest.

Can a reverse auction be fair, and if so, what would an ideal reverse auction look like?

Mr. GORDON. Thank you for the question. Again, I want to emphasize that FedBid does a very good job. The problem is their situation creates, as you said, a conflict of interest.

If I can give you an example. If a company is bidding and they bid \$100 in a reverse auction, what shows up on the screen for everybody, including the agency, is not the \$100, it is \$103, because FedBid adds its bid automatically, and people do not realize that the figure they are seeing on the screen is not what the company is bidding. It is what they are bidding plus the private company's fee.

What GAO found was when GAO asked the agencies are you paying a fee to FedBid, there were agency personnel that said no, we do not pay any fee to FedBid. It is extraordinary that the data is completely under the control of FedBid.

I worked at GAO for 17 years. I do not recall ever seeing a GAO report or when you go through it, every charge, every graph, where they list a source, FedBid data, FedBid data. GAO did not have access to agency data because the agencies do not have the data.

You want to have a system where there is not a conflict of interest, where the decision about whether to use a reverse auction is based on what makes sense for the Government in that procurement, unencumbered by some private company's corporate interest, where they get a fee, regardless of whether it makes sense to use a reverse auction, regardless of whether you have competition, even if you only get one bid, they are going to get their fee. You want to avoid any sort of conflict of interest.

Ms. CHU. You are saying that our Federal Government does not even have the data with which to make a sensible decision?

Mr. GORDON. As GAO pointed out, and I think they are right, agencies cannot decide whether it makes sense to use a reverse auction because they do not have the data. At the very least, agencies need to be in control of the data, they need to have the training, they need to realize they cannot advocate their responsibility.

I think the reasons agencies let FedBid make the decisions is because it is easier. It is not because FedBid is doing anything wrong, on the contrary, they are so good that the agencies say okay, FedBid says this is a good procurement for a reverse auction, let's go for it.

That is our Federal officials advocating their responsibility, and we need to avoid that.

Ms. CHU. Thank you for that. Switching gears, Ms. Peebles and Ms. Dorfman, I have consternation constantly about the fact that we never met the five percent goal for women owned businesses, and in fact last year it was 3.6 percent. Once again, we did not make it.

Finally, women owned businesses will get the designation they deserve through the sole sourcing provision passed in last year's NDAA. Do you believe that implementing this provision for women owned small businesses is enough to rectify the lack of access that female entrepreneurs have to Government contracts?

Ms. DORFMAN. First off, it is actually the removal of the self certification that will make it better for women owned firms so they are competing against women owned firms. The sole source is something the contracting officers need because in some industries, there is only one woman owned firm that can perform that work, so they need to have that.

I think that impacts the program a far less percentage than the women owned small business certification being the SBA having to do it or making sure it is done properly with a follow up, however they are planning to implement it.

I am hoping that gets implemented very quickly. I do not know that it will. I am looking toward this Committee to help hold them accountable, to make sure that they do implement it fairly speedily. Thank you.

Ms. CHU. Ms. Peebles?

Ms. PEEBLES. Thank you. We are very optimistic that the five percent set-aside will certainly go a long way in helping to eliminate these gaps in the percentages of meeting procurement goals. Having said that, I think the additional impact is that now, women owned businesses plan strategically for their marketing and their procurement strategy now that this is in place.

The way to make it most impactful is to get the regulations in place quickly so that women owned businesses can start utilizing it and taking advantage of it now.

Ms. CHU. Thank you. I yield back.

Chairman HANNA. Ms. Lawrence?

Ms. LAWRENCE. Thank you, Chairman, and Ranking Member, for calling this hearing. The 2013 goals for awarding contracts to Service disabled veteran owned businesses has surpassed the three percent statutory goal. This is a positive development, but the unemployment rate for veterans who served since 2001 currently is at nine percent. We have a long way to go.

Mr. Leghorn, the disparity in the verification systems for veteran owned businesses at the SBA and the Department of Veterans, the VA, I am concerned that it may lead to awarding of contracts to some fraudulent parties. Do you believe veteran owned businesses may have lost out on contracts that normally would have been received, and this would be due to the lack of clarity in the verification system? Answer that and then tell me what do you recommend we do to correct it?

Mr. LEGHORN. Thank you for the question. With there being two procurement policies in terms of how SDVOSBs participate in Federal procurements, on the self certification side, you are always going to find fraud, and on the verification side, if you are a bad actor and you want to defraud the Government, there is still a way around it because it is a very document driven process.

My answer to the first part of the question is the Government can only do so much to check up on people. If you were somebody that is out there purposely trying to defraud the Government, you are going to know the way around the system.

What can we do about it? SBA or VA, they need the resources to do more onsite visits, that is one way to catch people in the act. It is about moving the agencies to take reporting or allegations when somebody is trying to defraud the Government, to take those allegations seriously and look into it, in a prompt manner.

Ms. LAWRENCE. I want to thank the Committee and those of you who are testifying. The women owned and veteran owned businesses and our commitment through the SBA is something that I am very committed to, but we must find ways to validate and eliminate as much fraud as we can. Unfortunately, enforcing the research and the processes so we can identify fraud is the first step, but also to have our systems and verifications in a way that it rises to the top for the women's and veterans' businesses.

I thank you for your expertise in this. I yield my time.

Chairman HANNA. Ms. Meng?

Ms. MENG. Thank you all for being here and for sharing your experiences with us. First, I want to thank Congressman Hanna for introducing his legislation to ban reverse auctions in certain areas. I believe the legislation is a good step forward, and I hope there will be even more we can do to protect small businesses from the use of reverse auctions.

Although some will argue that reverse auctions benefit the Government by offering lower prices, we have often been left with junk bidders who provide subpar service.

My question is as a follow up to something that was mentioned at Tuesday's Subcommittee hearing. Where do you see contracting goals headed? Do you believe there has been too much emphasis on dollars for our prime and subcontracting goals, and not enough emphasis on the diversity and quantity of businesses receiving these opportunities? Of course, any recommendations. For anyone who wishes to answer.

Ms. DORFMAN. I will jump in. It has been a frustration that there continues to be double counting within the socioeconomic categories because what that does is the person with the most certifications gets the contracts. It would be far better to make sure that as the agencies are counting their goals, that they are saying okay,

if you are 8(a), HUBZone, Service disabled veteran, woman owned, which one is that going to, so that more small businesses have access to those contracts. Thank you.

Chairman HANNA. Thank you. We are going to open it up for another round of questions for anyone who may have any.

This is a screen shot from FedBizOpps, from the Federal Web site where all Federal contracts are advertised. I am sure you all have seen it. This lets you search by contracting office, so if you wanted to do business with GSA in D.C., you can choose that option.

However, what this screen shot does is show that the Federal Government has classified FedBid—a private company—as a contracting office of the Federal Government. I am just curious if anyone thinks that is appropriate or inappropriate, and if you think it leads to confusion.

Go ahead, Mr. Gordon.

Mr. GORDON. Mr. Chairman, it is a real problem. Again, it is not that FedBid does not do a good job, they do a great job. They are doing work that is closely associated with inherently governmental work, and the line is getting blurred. You are seeing mission creep. When you are looking on FedBizOpps, which is a Federal Web site, you are looking for a Government office. There is FedBid.

I think we need to think long and hard if we are going to have a private company running these auctions, we have to have adequate Federal supervision so you do not have this sort of confusion.

If I can tell you one quick anecdote, other people when they have a spring break at a law school go to like Florida, Ft. Lauderdale or whatever, I spent my spring break a couple of weeks ago in Macedonia, in Southeast Europe, learning about procurement and speaking about procurement to government officials there.

They do electronic reverse auctions in Macedonia, a small country, not a rich or sophisticated one. I said to them do you have a private company running your reverse auctions. They looked at me like I was crazy. They said of course not, we have our government officials who run the reverse auctions.

I thought a little point about maybe what the country of Macedonia could do is maybe something the Committee may want to reflect on.

Chairman HANNA. Who bids against FedBid?

Mr. GORDON. In theory, there are other sources of reverse auctions, but I was not at all surprised when I saw in the GAO report that more than 99 percent of the reverse auctions on FedBizOpps that GAO found were done by FedBid.

Chairman HANNA. Do you happen to know anything about the probability that a particular company that is listed is part of the Army, incidentally?

Mr. GORDON. No.

Chairman HANNA. Thank you very much. Anything else? Ms. Velázquez?

Ms. VELÁZQUEZ. Yes. I just would like to ask the panel about the reverse auction process. We have to be so very careful that we do not cause harm and make the programs whole and be effective, but we have found that the reverse auction process may move too

quickly for competitors to accurately reassess their costs or the way they will actually do the work.

There have been reports where the buyer has to step in to prevent a supplier from submitting a price that will harm the company.

Do you believe contractors are actually able to perform the contract at the price they bid or are some putting the viability of the company at risk? Ms. Peebles?

Ms. PEEBLES. Thank you, Congresswoman Velázquez. If I understand the question correctly, it is basically how is a company going to respond to this purchasing mechanism, and I will speak as a business owner in this regard, for myself, and not on behalf of WIPP with regard to this particular issue.

There are so many unknown's when submitting pricing to FedBid as compared to a standard procurement process, that it leads basically to a bifurcated decision.

One, if you are somewhat unsophisticated with the process and you see the lag time hit, and you are like I want to win a Federal contract, you see someone is competing against you, you think okay, well, I can do it for less, because apparently that is what the market will bear, without knowing everything involved, you can bid so low and make a commitment, that you are causing damage to your company financially.

The flip side is because there are so many unknown's, you can inflate the price to cover against what you do not know, and if you are the only bidder, you have not given the Government a good price that you would have given under normal channels.

Ms. VELAZQUEZ. Mr. Gordon?

Mr. GORDON. It is interesting. I think it may be worth pursuing this area one way or the other, and with some hesitation because of the workload of GAO, that GAO might be able to do a study about the impact of this low pricing on small businesses.

That said, I have a lot of confidence in our small businesses and their sophistication. I am a little bit skeptical when people tell me companies are bidding so low that they are putting their company at risk.

I understand that in an auction, people in a normal auction, people sometimes bid higher than they should. I appreciate that. I have actually gone down that path personally without disclosing any details here.

I trust our companies, the fact is in a Federal procurement of any sort—we had sealed bids in the procurements we have been doing for more than 100 years, companies submit bids. Do they sometimes submit bids that are foolishly low? Yes. I trust their judgment. They are business people. I think we can trust them to make judgments about how low they should or should not bid.

Ms. VELAZQUEZ. Thank you.

Chairman HANNA. What you are really describing is a race to the bottom, an opportunity to bid virtually against yourself, taking a risk that may be inappropriate in the moment. Everybody wants to work. Contracting companies have overhead they need to cover. Sometimes they do work below their costs, they do not always do it on purpose. The other side is people can actually bid at a much higher price, just randomly, taking an opportunity.

To your point, I personally probably have bid on over 3,000 jobs, big and small, in my life, and believe me it is often the case in a very competitive market that the low bidder is the guy that never finishes the job, which is another issue having to do with a lot of other things.

The goal is to get the product we want at a reasonable price and let companies make money, and thrive, and take advantage of all the opportunities the Government has for small businesses.

It seems to me that a reverse auction is often antithetical to the outcome, the pricing, and to competition.

With that, we have a couple of minutes if anyone wants to say anything else that has not been said or that we have not heard, go ahead. Anyone?

Ms. PEEBLES. Previously, I was asked a question regarding meeting the woman owned small business goals, and if I could just take a moment and elaborate on the answer. This is my first time to testify, so I wanted to get my thoughts together.

Two points that I wanted to make and then I am done. Sole source was a phenomenally good law for women owned businesses. It allows access to contracts for women in business and it is a very good vehicle for contracting officers.

We do not want to raise the WOSB goal. We want to meet it first. Thank you.

Ms. VELAZQUEZ. If I can make a comment about that, it has always been my position that the Federal Government struggled for so many years, and this is why I initiated a Government-wide report that I issued for almost 14 years, measuring contracting goals and achievements for all the Federal agencies, Government-wide.

What good does it do if we increase it if for the first time this year, this year and last year, for the first time Government-wide, yet there are those that claim that ineligible firms were qualified as small businesses.

Let's do this right. Let's achieve those goals, and then we will move from there to increase those goals. I agree with you.

Chairman HANNA. Thank you. I want to thank you all for being here. You have done a marvelous job. These are not easy questions, they are complicated, but you have helped us and given us a lot of opportunity for direction, and I would ask you to watch this Committee if you can and see what comes out in some legislation shortly.

I will recommend to Chairman Chabot a full Committee markup on legislation addressing verification and reverse auctions and the process for implementing small business contracting reforms.

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

This hearing is now adjourned. Thank you very much.

[Whereupon, at 10:55 a.m., the Subcommittee was adjourned.]

A P P E N D I X

**STATEMENT OF THE HONORABLE DANIEL I. GORDON
SENIOR ADVISOR, GOVERNMENT PROCUREMENT LAW
PROGRAM,
THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

BEFORE THE HOUSE SMALL BUSINESS COMMITTEE
SUBCOMMITTEE ON CONTRACTING AND WORKFORCE**

March 19, 2015

Chairman Hanna, Ranking Member Velázquez, Chairman Chabot, Members of the Committee, good morning. I am grateful for the honor of being invited to testify before you today about electronic reverse auctions and other important procurement issues. I am the Senior Advisor to the Government Procurement Law Program at the George Washington University Law School, which has, for more than 50 years, been the premier venue for the studying and teaching of procurement law in this country.

Let me begin by commending you for focusing on the important topic of electronic reverse auctions, which are essentially auctions run through the Internet in which bidders offer successively lower prices. I have seen the importance of these reverse auctions in both the U.S. acquisition system and in procurement systems around the world in recent years, including in countries as diverse as Bangladesh, Macedonia, Brazil, and Russia.

In the U.S., perhaps the best report on the subject is the Government Accountability Office's December 2013 report, *Reverse Auctions: Guidance Is Needed to Maximize Competition and Achieve Cost Savings*, GAO-14-108. In that report, GAO looked at the use of reverse auctions in fiscal year 2012, and found that more than \$1 billion had been awarded in contracts through use of reverse auctions during that year. GAO focused on the five federal agencies that together used about 70 percent of the auctions in 2012: the Departments of the Army, Homeland Security, Interior, and Veterans Affairs, and the Defense Logistics Agency (DLA). Of those five, the first four all used the same vendor to run the auctions, and GAO was able to obtain detailed information on their use of auctions from that vendor; the fifth agency, DLA, bought a license to run its auctions without reliance on a vendor, but it lacked detailed data for GAO to review.

Both from my review of the GAO report and from what I have seen and heard, in the U.S. and abroad, I would suggest that use

of electronic reverse auctions has brought benefits in three areas: savings, speed, and small businesses.

Savings: While GAO expressed concern that the exact amount of savings obtained is uncertain, there is no doubt that reverse auctions have led to a reduction in the amount of taxpayer funds spent on the commodity goods and services for which auctions were used. I have seen estimates of savings on the order of 10 to 20 percent, and sometimes higher, though GAO is right to point out that the way savings are measured can be problematic.

Speed: Reverse auctions can be conducted quickly, and they have contributed to a substantial improvement in efficiency in government procurement systems over the past 10 years, both in the U.S. and abroad.

Small businesses: GAO reported that 86% of the procurements in which reverse auctions were conducted were won by U.S. small businesses, which translated to 80% of the dollar value of the procurements. In its report, GAO notes this is consistent with the presumptive set-aside for U.S. small businesses under federal law for procurements under \$150,000. While it is thus not clear that use of reverse auctions increased the percentage of these procurements that would have otherwise been won by small businesses, the fact is that the great majority of the procurements went to U.S. small businesses.

In its report, GAO identified some challenges associated with use of electronic reverse auctions, and my experience, both in the U.S. and overseas, confirms that many users, or potential users, of auctions have wrestled with these issues. While I do not think that amending the Federal Acquisition Regulation is needed (in part because technology moves faster than the regulatory process), I very much concur with GAO's recommendation that the Office of Management and Budget issue guidance related to the issues discussed below (and in the GAO report).

Identifying procurements suitable for use of reverse auctions: Some users are tempted to conduct reverse auctions in almost every procurement; most recognize, however, that some procurements are suitable for auctions, while others are not. In terms of *what* is being bought, most people agree that auctions make the most sense when the government is buying commodities. Thus, GAO found that reverse auctions were used largely for commodity goods, in particular, information technology (IT) and medical equipment and supplies. Use of reverse auctions for the purchase of services is more controversial. While GAO was told that their use for buying services was increasing, in my view, auctions may not be a sensible way to conduct a procurement for services unless the services being bought are commodities, such as overnight delivery of packages.

Another metric, in terms of which procurements are suitable for auctions, is the dollar value of the procurement, but here the picture is somewhat complicated. GAO found that the four agencies for which it obtained detailed data were using auctions primarily for procurements valued below \$150,000—while the guidance of the

fifth agency, DLA, was to use auctions for purchases above that level. My sense is, in terms of whether a reverse auction is appropriate, that the question of what is being bought is more important than the value of the procurement.

Another metric, though, also needs to be considered. Some people believe that electronic reverse auctions can be used regardless of whether the government is focused on buying the lowest-price acceptable good or service, or whether, instead, the government wants to be able to conduct a tradeoff between multiple award criteria, including price and another factor, such as the bidder's past performance or the quality of its product. In my experience, auctions make the most sense when the government is focused on obtaining the lowest price—that is why commodities are the best candidates. As soon as the government is considering doing a tradeoff with a non-price factors, such as quality or past performance, I believe that the auction risks causing mischief. Where the government is concerned about quality, rather than simply buying a commodity, the auction's focus on price may run counter to the government's goals. Especially when the government is buying professional services, the auction's focus on low price may be inconsistent with the government's interest. Moreover, if the company that wins the price auction may lose the competition for the contract, one needs to ask what the point of an auction is.

Addressing limited competition in the auctions: In the auctions that GAO reviewed for its report, and in procurement systems that I have looked at overseas, concerns have arisen due to limited competition in the auctions, which can call into question the value of the auctions. GAO found that in more than a third of the auctions it studied no competitive bidding took place at all: in 27 percent of the auctions, there was only one bidder, and in another 8 percent, while there was more than one bidder, none of them submitted more than one bid. In all of those cases, use of the Internet-based auction technique seems to have provided no benefit beyond that of the "sealed bidding" competition that the federal government has used for more than 100 years. Similarly, I learned that in one European country that I visited recently to discuss its procurement system, a high percentage of reverse auctions obtain only one bid. In my opinion, any competition for a government contract, whether run electronically or "the old fashioned way," that gets only one bid should be considered a failure. If the government is paying a fee to use an electronic reverse auction and only one bid is received, the government is paying a fee for that failed procurement. In that regard, GAO found that agencies had paid \$3.9 million in fees for reverse auctions in which there was no competitive bidding.

Considering the costs and benefits of using a private firm to run the auctions: Many U.S. agencies rely on a single private firm to conduct electronic reverse auctions for them. While in theory more than one company could provide that service, my experience is consistent with what GAO found, which is that one firm—FedBid, Inc.—conducted more than 99 percent of the reverse auctions listed in the government-wide database, FedBizOpps. FedBid has clearly brought benefits to the federal government: not only

does it provide a good, ready-to-use platform for reverse auctions, but, as GAO notes, FedBid also relieves agencies of various administrative duties and it offers training and technical support. Overall, FedBid has played a key role in helping agencies obtain the cost and efficiency savings that reverse auctions can bring. Moreover, the fee that FedBid charges for its services may be viewed as quite reasonable: they are capped at three percent of the contract value, and the company waives its fee entirely in various situations.

The benefits that FedBid brings, however, need to be compared to the risks of use of a private-sector company playing a central role in a function that is closely associated with an inherently governmental function, the award of federal contracts. See Office of Federal Procurement Policy, *Performance of Inherently Governmental and Critical Functions*, Policy Letter 11-01 (Oct. 2011). As is often the case in situations where contractors perform functions closely associated with inherently governmental ones, the risks do not arise because of any defect or flaw in the company. On the contrary, the contractor—FedBid, in this case—may perform so well that agencies tend to defer to it even when they should not. Thus, FedBid correctly makes clear that the contracting agencies make all key acquisition decisions, from whether to use a reverse auction at all to what the award criteria are to which company actually wins the contract. Yet that deference, which is completely appropriate, is eroded when the company is plainly the expert in this areas, and agency personnel are inclined to defer to the company—indeed, I suspect that many federal contracting officials consider that letting FedBid take the lead is the whole point of using the company's services. Put another way, FedBid does its job so well that federal officials allow its role to expand into areas that should be the federal officials' responsibility.

Examples of this pattern are identified in GAO's report. For example, GAO found that agencies rely on FedBid to maintain data related to their reverse auctions, so that even GAO had to turn to FedBid to obtain the data that it needed for its report. Similarly, while FedBid clearly knows how much it is charging and who pays its fees, GAO found that agencies using FedBid's services often did not know how much they were paying, nor did they know, in some cases, that the agencies were paying FedBid at all. GAO also identified situations where agencies are paying two fees (one to FedBid, another to the agency that awarded the overarching contract being used), but the agencies were unaware of this.

These matters are not simply questions of confusion. Instead, they raise concern that any private-sector vendor fulfilling a function so closely associated with an inherently governmental one may have an organizational conflict of interest. FedBid, for example, has not corporate interest in clarifying confusion about whether agencies or vendors are paying its fees. Similarly, FedBid has a corporate interest in claiming that its services lead to large savings—but GAO questioned the accuracy of those claims. With regard to the important questions, explained above, of deciding whether a particular procurement is a good candidate for a reverse auction, a company that obtains a fee only if a reverse auction is conducted

obviously has an interest in encouraging the use of auctions. Moreover, while an auction that obtains only one bid may be a failure for the competitive procurement system, it may not be a failure for a private-sector auction provider that obtains its fee, even in that flawed competition.

Regarding the reasonableness of FedBid's fee, agency personnel's misunderstanding of the fee and fee structure impedes their ability to judge whether the fee is reasonable. In the language of GAO's report, agencies "are not able to independently assess the cost effectiveness of reverse auctions." In this regard, I would point out that, while a fee capped at 3 percent may seem very reasonable for an auction that can lead to savings of 20 percent, those large savings are for the first time the auction is conducted. Obviously, the second time an auction is conducted for a particular item, it is unlikely that the price paid will drop an additional 20 percent, so that the savings will drop—but FedBid's fee will not, and paying 3 percent to obtain a much smaller amount of savings may seem less reasonable.

GAO also found that other companies had concerns related to FedBid's role in the federal acquisition process. Specifically, GAO heard complaints from vendors that FedBid "creates an additional layer between the vendor and the end user that can inhibit [vendors'] efforts to clarify detailed in the solicitation." Moreover, FedBid requires vendors that want to participate in a reverse auction to register with FedBid, and GAO heard that some vendors did not want to register with another vendor. GAO noted that this issue could reduce competition for federal contracts.

In my judgment, we would be well advised to re-visit the role that a private-sector company should play in the conduct of federal reverse auctions. I say that with full appreciation for the excellent work that FedBid has performed for the federal government for many years. The Committee may be interested to know that in many other countries, large and small, electronic reverse auctions for government contracts are successfully conducted without reliance on a private-sector company to run them. For example, I learned recently that the small nation of Macedonia routinely conducts a large number of reverse auctions each year, run solely by government staff. Closer to home, I am pleased to see that GSA has now launched its own reverse auctions program, within the context of the Federal Supply Schedule. Notably, GSA has announced that user agencies will not pay any additional fee for use of the reverse auction platform.

If a private-sector company continues to conduct reverse auctions for federal agencies, I believe that it is critical that agencies ensure that their staff are properly trained and equipped to supervise the private-sector provider. That training must ensure that agency personnel do not abdicate their responsibility for key decisions, such as deciding which procurements are appropriate candidates for reverse auctions and what the award criteria should be, as well as for collecting and maintaining data. Agency personnel must also ensure that they have the information needed to make informed decisions about the cost and benefits of conducting reverse auctions.

In conclusion, I would again commend the Committee for your work in this important, but challenging area, and thank you for the opportunity to appear before you today. I would be pleased to respond to any questions you may have.



Testimony of Amber Peebles

On behalf of

Women Impacting Public Policy

Submitted to the

House Small Business Committee
Subcommittee on Contracting and Workforce

*"Contracting and the Industrial Base III: Reverse Auctions,
Verification and the SBA's Role in Rulemaking"*

March 19, 2015

Good morning. Chairman Hanna, Ranking Member Meng and distinguished Members of the Subcommittee, thank you for the opportunity to testify.

My name is Amber Peebles. I am President of Athena Construction Group, Inc. a service-disabled veteran-owned, HUBZone, and woman-owned small business based in northern Virginia founded in 2003. I am a service-disabled veteran, serving eight years in the United States Marine Corps. Last year, federal contracts accounted for more than half of Athena Construction Group's revenues. Currently, we have forty-two employees.

I am also here today representing Women Impacting Public Policy (WIPP) where I serve on its Executive Advisory Board. WIPP is a national nonpartisan public policy organization advocating on behalf of its coalition of 4.7 million business women including 78 business organizations. WIPP plays a key role in developing women-owned businesses into successful federal government contractors through its Give Me 5 and ChallengeHER programs.

First, let me say thank you to the Subcommittee and staff for improving the contracting rules and regulations pertaining to small businesses. Under your leadership, the Congress has enacted much needed changes, increasing access to federal contracts for all small businesses, but especially women. Nonetheless, these hearings make clear more can be done. This is underscored by the fact that twenty years after establishing a five percent contracting goal for women-owned small businesses, that goal has never been met. As this discussion begins, we value the Congressional direction already given on this issue in the Small Business Act (P.L. 85-536), which notes that the government should:

Insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government be placed with small-business enterprises...to the maximum extent practicable.¹

Reverse Auctions

1. *Withdrawal at close of auction.* In one instance, after significant and costly preparation, an auction was closed with only seconds remaining. The contracting officer simply withdrew the requirement. While this happens occasionally in normal procurements, the additional costs for my business of a reverse auction meant that additional resources were wasted.

2. *Auction site not suitable for complex bidding.* In another instance, several rounds of pricing for metals were required. Not to be overly technical - but a formula is used to address different price points for different times. This is standard in our industry. The website could not process the pricing structure. This became a wasted opportunity that is normally handled effectively through other procurement methods.

Beyond my experiences, WIPP has testified before this Committee with concerns on reverse auctions that were well cited in

¹ 15 U.S.C. § 631

the GAO report.² Additional requirements should be added to prevent the inappropriate use of reverse auctions. Similarly, as these auctions require resources from competing companies, we believe small business set-asides, including set-asides made through all the disadvantaged small business contracting programs, should not be eligible for reverse auctions.

Legislation in the last Congress, the *Commonsense Contracting Act of 2013*, sponsored by Chair Hanna and Ranking Member Meng, made these changes. While WIPP was excited to see reverse auction education requirements added to the FY15 NDAA, the removal of certain sections passed by the House means the need for such legislation remains. We encourage you to reintroduce the bill.

SDVOSB Verification

Many of WIPP's members, including myself, are veterans running service-disabled veteran-owned small businesses (SDVOSBs). WIPP supports the federal contracting programs that assist veterans in engaging the federal marketplace. Moreover, as with many procurement issues, the procurement process should be streamlined to ensure that companies could access the federal market easily and effectively.

Given the strong presence of veterans' advocates nationwide, and even at this hearing, WIPP defers to them on the specifics of improving contracting opportunities for SDVOSBs and veteran-owned small businesses. WIPP encourages this Committee to work with them to improve the contracting environment for veterans.

SBA's Role in Rulemaking

Turning to the largest focus of this testimony, WIPP believes the delay in implementation of important small business contracting provisions is an ongoing frustration of women business owners. While we understand the rulemaking process and do not expect implementation overnight, many of the changes we seek are fixes that WIPP members who are contractors have asked us to fix.

The timeline for implementing these changes can be lengthy. For example, SBA's recent proposed rule on subcontracting limitations took two years to reach a proposed rule stage.

The needed changes proposed in those rules - implementing provisions authored, debated, and passed by this Committee - should not require years of missed opportunities for small businesses. That is simply unfair to the businesses burdened by outdated, ineffective, or damaging policies Congress saw fit to change.

Even after final rules are promulgated, the wait for actual implementation may continue for months, if not years. That is because of additional time required for Federal Acquisition Regulation (FAR) adoption by the FAR Council. While the recent implementation of legislation to remove dollar caps on awards in the Women-Owned Small Business (WOSB) Federal Contract Program is a

² GAO-14-108.

good example of how SBA and the FAR Council can move quickly, that is not always the case.

Currently, women entrepreneurs stand to gain with a speedy implementation of sole source authority in the WOSB program. Every day this policy cannot be utilized is another day women business owners are disadvantaged by the contracting process. Members of Congress, along with the women's business community have asked SBA to move expeditiously. It is our hope that when the time comes, the FAR Council will move in a similar manner.

WIPP has two recommendations with regards to the timeline of SBA rule promulgation and FAR adoption. In our view, there is no reason these cannot be done concurrently. Any diversions between the proposed rules could be best addressed through increased cooperation between SBA and the FAR Council. One solution could be adding SBA to the FAR Council. WIPP supports this option because it would also give small businesses an advocate on the Council charged with maintaining acquisition procedures.

Additional Recommendations to the Committee

Expanding beyond the scope of this contracting hearing, I want to take this opportunity to raise a related concern of WIPP. The increased federal "strategic sourcing" efforts, in our view, represent a serious threat to the small business contracting community. In a name, strategic sourcing sounds like a good idea - akin to good governance. For small businesses, included WOSBs, however, the trend is eroding the industrial base this Committee seeks to protect.

These efforts to maximize short-term savings through large, limited-competition contract vehicles have pushed small businesses out of competition and picked a small group of "winners." These efforts are happening across all agencies and all industries and come at the direction of the Office of Management and Budget (OMB).

This movement does not align with Congressional directives to keep a diverse set of businesses in the procurement community nor does it mirror the private sector strategic sourcing practices. Examples include the increased, and at times mandated use of IDIQ vehicles (e.g. EAGLE II), GWACs, FSSI contracts, and recent GSA awards (e.g. OS3). Many industries, including office products, technology, janitorial and sanitation products, building maintenance and operations and furniture, have already been subject to strategic sourcing and face fewer awards and increased barriers to federal business—ultimately hurting their bottom line.

To be sure, some small businesses will benefit in the short-term. Many, however, at the end of these five-year contracts will exceed their small business size, and no longer be able to compete for small business contracts. They may not have a separate revenue stream to continue at their size let alone continue to grow. Instead they may collapse over the longer term, to their detriment. Equally important, the limited competition for these goods and services will, over time, diminish any realized savings by the government.

One solution may be to revise how small business participation is measured by the agencies. Currently small business goals measure the dollars awarded to small businesses. By adding a participation rate, i.e. the number of businesses awarded prime contracts, will ensure that a diverse group of businesses are engaged in the federal marketplace.

Thank you for holding this hearing today and for making the contracting environment better for women-owned businesses. It is our hope that our recommendations are helpful. I am happy to answer any questions.

STATEMENT OF
DAVY LEGHORN, ASSISTANT DIRECTOR, VETERANS'
EMPLOYMENT AND
EDUCATION DIVISION OF
THE AMERICAN LEGION
BEFORE THE
SUBCOMMITTEE ON CONTRACTING AND WORKFORCE
COMMITTEE ON SMALL BUSINESS
UNITED STATES HOUSE OF REPRESENTATIVES

MARCH 19, 2015

Good morning Chairman Hanna, Ranking Member Velazquez and members of the subcommittee. On behalf of our National Commander, Michael D. Helm, and the 2.3 million members of The American Legion, we thank you for this opportunity to testify at this hearing on the challenges facing veteran owned small businesses seeking federal contracts.

The American Legion identifies three main issues that poses obstacles for veteran owned small businesses and service-disabled veterans seeking federal contracts: reverse auctions, differences between Small Business Administration (SBA) and Department of Veterans Affairs (VA) procurement policy standards, and exclusion of veterans from Disadvantaged Business Enterprise (DBE) programs.

Reverse Auctions Reduce Quality:

The Small Business Act applies government wide, not just to the Small Business Administration (SBA). Government has a fiduciary responsibility and legal obligation to treat small business fairly, and to not take advantage of its buying power and become predatory.

The American Legion appreciates the goal of the government contracting community to lower federal expenditure through competitive contracting initiatives, but we are concerned that misuse of non-governmental platforms that have not suffered the scrutiny of the appropriations process, are putting veteran owned small businesses at risk and could also be serving to undermine the entire procurement process.

Reverse auctions end up giving a false valuation of fair market product pricing, and will eventually create a disparity between a thorough procurement vehicle processes, where value is made part of the decision matrix, versus the reverse auction - where value or

added value is often omitted from bid consideration. Further, reverse auctions appear to undermine the Government Services Administration's (GSA) application process that requires the government be offered the best possible in the first place. If that is true, then how can GSA contract holders consistently compete in the reverse auction process at offers lower than their established GSA contract?

An example of added value would be a printer and copier vendor that, through their negotiated license agreement with the manufacturer, is required to provide training and technical support on the products they sell. This added value increases the market price of the product, but may not be reflected in the automated environment of the reverse auction bid process. Reverse auctions create a disproportionate disparity in the federal procurement industry while American Legion resolution 321¹ specifically calls for equal parity in federal procurement, and according to the Federal Acquisition Regulation (FAR); "Fair market price" means a price based on reasonable costs under normal competitive conditions and not on lowest possible cost".² Further, Fair Market Price is mentioned in nearly every part of the FAR and that exact term can be found more than 30 times.

FAR part 19 § 807 gives a definition of Estimating Fair Market Price;

"(c) In estimating a fair market price for a repeat purchase, the contracting officer shall consider recent award prices for the same items or work if there is comparability in quantities, conditions, terms, and performance times. The estimated price should be adjusted to reflect differences in specifications, plans, transportation costs, packaging and packing costs, and other circumstances. Price indices may be used as guides to determine the changes in labor and material costs. Comparison of commercial prices for similar items may also be used.

FAR part 15 § 404-1 discusses proper Proposal Analysis Technique:

"(a) General. The objective of proposal analysis is to ensure that the final agreed-to price is fair and reasonable."³

Finally FAR part 19.1405 outlines Service-Disabled Veteran-Owned Small Business Set-Aside Procedures;

"(b)(2) Award will be made at a fair market price."⁴

While reverse auctions may have a limited capacity place in federal procurement, The American Legion believes that the federal contracting office has the primary responsibility to ensure that every product that the government spends tax payer dollars on, is purchased at fair market value. This assurance protects the tax payer, the small business, and the market.

¹Resolution No. 321: Support reasonable set-aside of federal governments and contracts for business owned and operated by veterans, American Legion. National Convention August 2012 <http://archive.legion.org/handle/123456789/2190>

²Federal Acquisition Regulation, March 2005, <http://www.acquisition.gov/far/current/pdf/FAR.pdf>

³Ibid

⁴Ibid

The American Legion is concerned that reverse auctions will lead to decreased quality and decreased employment opportunities for veterans, which is in direct violation of American Legion resolution number 50 that supports more hiring opportunities for veterans.⁵ Reverse auctions encourage vendors to provide the cheapest products and services in order to maintain the smallest possible profit margins in order to maintain a competitive edge. Government will then be stuck purchasing poor-quality products and services because reverse auction platforms do not provide the ability for an agency to shop for best value and relegate their decision solely on a best price basis. These types of business models favor home-based businesses that primarily operate online and have no employees, aside from the owner, and no customer support. Businesses of this type end up relying solely on federal procurement as their only source of income. This type of business model severely disadvantages other small businesses and do not create jobs, because with employees there comes increased overhead expenses.

An article in *Contract Management* magazine points out a case study, conducted by the Department of State, reveals reverse auctions are already losing market share and have dropped 30 percent between 2007 and 2010, despite an increase in bid notifications of more than 225 percent.⁶

There is a belief that use of reverse auctions by government contracting officers will save billions of dollars. However, The American Legion has not been able to find evidence that this process contributes to business innovation, economic growth, or positive partner relationships between government and industry. Instead, we have found that reverse auctions foster resentment between sellers and buyers and leave the seller with an attitude counter to providing anything more than exactly what was paid for, thus obliterating any harmonious relationship that should be developed between buyer and seller.

The American Legion also learned that businesses answering solicitations for services find that customers rarely, if ever, include all necessary requirements in the original solicitation. What is wanted versus what was asked for continues to be a source of frustration between contractors and vendors. The American Legion has received numerous complaints from veteran business owners who routinely argue that their customers are dissatisfied based not on the work that was performed, but more importantly, based on the work that wasn't performed because it wasn't specified in the original solicitation.

When something is bad for small business, The American Legion recommends simply doing away with it. The federal dollars spent in purchasing this reverse auction services are better utilized in hiring more contracting officers to do market research to ensure that goods and services are purchased at the fair market value. A

⁵Resolution No. 50: Support legislation that bolsters the hiring of veterans in the public and private sectors, American Legion, National Convention, August 2012 <http://archive.legion.org/bitstream/handle/123456789/2212/2012N050.pdf?sequence=1>

⁶Contract management Magazine, Reverse Auctions: Turning Winners into Losers, October 2012 http://www.nxtbook.com/nxtbooks/nema/cm_201210/index.php#4

reverse auction is a shortcut contracting officers resort to because there simply aren't enough of them.

However, if federal contracting officers are allowed the continued use of reverse auctions, The American Legion reiterates the recommendations we have provided in the past:

1. More outreach training for small veteran owned businesses.
2. Eliminate the LEAD or LAG indicators. This creates an unrealistic stressor for the seller and can be extremely detrimental for the nascent business.
3. Collect fees directly from customer (buyer).
4. Build a fair market price list into the process for commonly purchased items, and prevent sellers from going below the established fair market price.
5. Make buyers attest that they have conducted proper and adequate market research to determine fair market price.
6. Eliminate the ability of the buyer to set a minimally acceptable price, or clearly state to the seller what the starting price is.
7. Requests for debrief, protests, and any other dispute resulting between the seller and the federal government needs to be handled directly by the federal government, not handled through a civilian commercial company who has no authority to represent the federal government.
8. Exact match bids need to be more interactive. Government has unique needs and requirements, and even items under the same National Stock Numbers provide variation that can cause end user difficulties.
9. Limit contracting officers' use reverse auctions to contracts over \$150,000 for supply contracts that excluding services.

VA Center for Verification and Examination (CVE) Verification:

Many veterans find VA's Veterans First Contracting Program verification process to be overly burdensome, which is why The American Legion passed a resolution titled: *Support Verification Improvements for Veterans' Businesses within the Department of Veterans Affairs*.⁷

The American Legion believes that Public Law 106-50 made all federal agencies stakeholders in supporting veterans' entrepreneurship.⁸ A subsequent law passed in 2006 provides VA with the authority in setting higher agency standards for SDVOSB and VOSB set-asides.⁹ A new procurement hierarchy within VA was created, which places the highest priority with SDVOSBs followed by VOSBs. VA refers to this program as the Veterans First Contracting Program (Veterans First).

⁷American Legion Resolution No. 108.

⁸The Veterans Entrepreneurship and Small Business Development Act of 1999.

⁹The Veterans Health Care, Benefits and Information Technology Act of 2006; PL 109-461.

The process of verification involves a review of a business' governance documentation and a determination as to whether the documentation is in compliance with VA's Center for Verification and Examination's (CVE) legal requirements for admittance into the Veterans First Contracting Program.¹⁰ The main challenge with the program is striking the appropriate balance between the amount of government intrusion necessary to verify a business and the amount of government oversight necessary to protect the integrity of the program. This is not an easy task and VA is still trying to find that balance.

The American Legion has been involved with VA verification since the program's inception. Most notably, The American Legion is a participant in the Verification Assistance Counseling Program and for the last two years, we have worked with numerous small business owners who have received verification status. The American Legion would be remiss if we did not mention that CVE has significantly cut down the time it takes for a small business owner to receive an initial decision to less than 30 days. This is a stark contrast to the situation in October 2012, when it took approximately 85 days for CVE to make a determination on an initial application.

In 2012 and 2013, The American Legion counseled nearly 50 small business owners with questions about the verification process. In 2014 that number was halved, as less small business owners sought counseling services. This could be an indicator that CVE has implemented changes that have improved the process and cut down on wait time. This trend could also be the product of a combination of VA diminishing the backlog of applications in the queue and extended the time a small business can remain on verified status from one to two years.

SBA Involvement in Appeals:

The American Legion believes that SBA and VA need to work closer together to minimize the inconsistencies in the decisions being made. Currently, VA's Office of General Counsel (OGC) makes the final determinations; OGC does not utilize SBA's case laws in their decisions nor do they publish their decision. SBA has the legal expertise, 60 years of long-standing experience, and an ample base of precedential case law that can be applied to future rulings. VA does not. Further, SBA's Office of Hearings and Appeals (OHA) has a 15 day turnover rate for final decisions on appellate claims and OHA does so with substantially less resources. The American Legion believes there is added value for VA to fall back on SBA's expertise and case law.

Last year, VA submitted changes to 38 CFR § 74 to make it so that their case reviewers could reconcile requirements for the growth of small businesses with the requirements for proof of ownership and control. Having taken part in the discussion of the final proposal of changes that went to VA Office of General Counsel, The American Legion can attest that these changes drastically differ

¹⁰ 38 CFR § 74.

from SBA's 13 CFR § 125. If these changes are adopted, it would defeat the purpose of having appellate hearings conducted at SBA OHA as OHA judges would then have to make adjudications based off a new set of standards.

Further, the current funding mechanism proposed for the appeals to be heard at SBA OHA should not be seen as one agency funding a new program within another. Instead, it is a funding mechanism that incentivizes VA to minimize their appeals and make correct initial decisions. Under the proposed funding mechanism, VA would pay SBA by the case load; therefore, VA could potentially stop having to pay for appeals that go to SBA OHA, when VOSB and SDVOSBs no longer have reasons to appeal.

There has been push-back for moving of appellate hearings of VOSB and SDVOSB statuses to SBA out of concerns that this would add VOSBs as a new set-aside program government wide. The American Legion wants to be clear that this is absolutely not the case and not our intention when we supported the bill last year that proposed moving the appeals process from VA to SBA. We believe that the language was clear that VOSB appellate claims are merely being heard by SBA OHA as they pertain to contracting within VA's Veterans First Contracting Program and nowhere else.

The American Legion impresses upon the Committee that (1) including SBA in the appellate process would ensure more consistency in the final decisions being made and ensure impartiality in not having the agency of original adjudication review their previously denied claim and (2) moving appeals to SBA does not create a new preference group within the federal small business set-aside program.

Differences between Self Certification and CVE Verification:

The American Legion supports verification. Government contracting officers are busy, risk averse and they prefer certifications. This is why within the realm of set-aside procurement; there is a preference for 8(a) and women-owned small businesses. When a contract is awarded, a contracting officer can rest-assured knowing that the recipient of the award has been vetted for ownership and control.

SBA's model and VA's model for verifying a small business currently follows similar regulations, except where SBA allows firms to self certify as SDVOSBs and VA does not. VA requires a firm to enter a rigorous process on the front end, where every issue that may arise from the present and the future would have to be resolved before a firm is verified. SBA's process of self certification policies itself through status protests from the small business community once a contract has been awarded. SBA would then subject the protested firm to rigorous scrutiny. Whereas VA's rigorous verification is necessary for entry into the Veterans First Contracting Program within VA, SBA's self certification process is government wide.

The American Legion understands why contracting officers, agency-wide, have started asking SDVOSBs if they are CVE verified. However, this has added to the confusion of having two types of vetting processes for two agencies for relatively the same purpose. To cut down on the confusion, the Committee should consider a single set of standards for all SDVOSBs to contract with the federal government. The American Legion recognizes the importance of having a single set of standards and vetting practices, but we would defer to the Committee's expertise in selecting the agency most capable of undertaking this task. The American Legion asks the Committee to weigh past performance, expertise and resources in determination which verifying body would be best suited for this job.

Exclusion of Veterans from DOT DBE Program:

By law, the federal government is mandated to award no less than three percent of all federal contracts to SDVOSBs. For a number of reasons a few agencies have not met this goal. One major reason is because some contract funding streams exist outside the realm of regular appropriations and therefore are not susceptible to SBA's small business goal tracking.

One of the most egregious exclusion of veterans owned small businesses occurs in the budget for the U.S. Department of Transportation's Disadvantaged Business Enterprise (DBE) program, which mandates that states receiving federal dollars for highway infrastructure repairs have to set aside 10 percent for preferred groups of small businesses through the *Moving Ahead for Progress in the 21st Century Act* (MAP-21). It is a misconception that this 10 percent is solely relegated to road and infrastructure construction firms. There are a variety of industries involved in infrastructure repairs, such as engineering, landscaping, remediation, utilities and information technology. This is an issue that affects all veteran owned small businesses and not just those in construction.

Section 1101(b) of MAP-21 currently provides that:

Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts made available for any program under divisions A and B of this Act and section 403 of title 23, United States Code, shall be expended through small business concerns owned and controlled by socially and economically disadvantaged individuals.

Section 1101(b) adopts the definition of *socially and economically disadvantaged individuals* given in Section 8(d) of the Small Business Act and its implementing regulations, which, in turn, establish a presumption that specific groups of minorities are socially and economically disadvantaged. Section 1101(b) also establishes a presumption that women are socially and economically disadvantaged individuals for purposes of the DBE program. Since veterans are not explicitly listed in Section 1101(b), they are excluded from the DEB program.

Recently, Congressman Mike Fitzpatrick from Pennsylvania has successfully added an amendment to rail infrastructure legislation

which passed the House on March 4, 2015. Fitzpatrick's amendment, passed as part of the *Passenger Rail Reform and Investment Act*,¹¹ directs the Secretary of Transportation to conduct "a nationwide disparity and availability study on the availability and use of certain classes of small businesses—including veteran-owned businesses."

The American Legion believes that this is a crucial step in leveling the playing field for our veteran small business owners that are not currently eligible to go after these set-asides.

The American Legion works closely with Congressman Fitzpatrick to advocate for the amending of Section 1101(b) to add "veteran-owned small business concerns" as a separate line to the list of entities eligible. Such an addition would not presume that veterans are "socially and economically disadvantaged." Instead, VOSBs would become independently eligible for the DBE program by establishing two categories of entities who count for purposes of the 10 percent goal: (1) small businesses owned and controlled by presumed socially disadvantaged individuals¹², and (2) VOSBs.

In previous Congresses, Fitzpatrick has introduced the bipartisan *Fairness to Veterans for Infrastructure Investment Act* which seeks to add veterans as a separate category of small businesses they can use to meet their 10 percent goal. The American Legion and numerous other Veteran Service Organizations support this bill and asks again for this Committee's support this summer when Congress reauthorizes the federal highway bill.

Conclusion:

The American Legion appreciates the opportunity to testify today. Thank you again to Chairman Hanna, Ranking Member Velazquez and members of the subcommittee for directing your attention to this critical issue facing veterans. For additional information regarding this testimony, please contact Mr. Larry Provost at The American Legion's Legislative Division, 202-263-5755 or lprovost@legion.org.

¹¹H.R. 749

¹²Includes Women Owned Small Businesses.

**BIOGRAPHY FOR
DAVY LEGHORN
ASSISTANT DIRECTOR
NATIONAL ECONOMIC COMMISSION
THE AMERICAN LEGION**

Davy Leghorn was appointed to the position of Assistant Director of the Economic Division of The American Legion in January, 2012. Mr. Leghorn oversees veterans' employment and small business issues and administers The American Legion's National Veterans Hiring Initiative. He also represents The American Legion on the Small Business Administration's Advisory Committee on Veterans Business Affairs.

He previously worked as a National Appeals Representative for The American Legion at the Department of Veterans Affairs' Board of Veterans' Appeals, where he provided representation to veterans, their spouses and dependents in appellate hearings before the Veterans Law Judges.

Mr. Leghorn served as a mortar infantryman in the Army with the 2/72 Armored Battalion, 4/7 Cavalry and 3/15 Infantry, then as a Civil Affairs Specialist with 450th Civil Affairs Battalion.

He currently serves as Second Vice Commander for George Washington Post #1 in The American Legion Department of the District of Columbia.



*U.S. Women's
Chamber of Commerce*

**Testimony of
Margot Dorfman
President & Chief Executive Officer
U.S. Women's Chamber of Commerce**

**Before the
U.S. House of Representatives
Committee on Small Business**

**Hearing on
*Contracting and the Industrial Base Part III:
Reverse Auctions, Verification and the SBA's Role in Rulemaking***

March 19, 2015

Chairman Hanna, Ranking Member Velázquez and Members of the Committee. Thank you for the opportunity to provide testimony this morning on behalf of the over 500,000 members of the U.S. Women's Chamber of Commerce, three-quarters of whom are American small business owners and federal contractors. Today, as the Committee discusses contracting and the industrial base, I will address our views on the use of reverse auctions, size and socio-economic verifications and the SBA's role in rulemaking and enforcement.

Reverse Auctions

While reverse auctions have the potential to deliver savings for the federal government when purchasing supplies, commodities and other services, we have a number of concerns with the reverse auction process and outcomes:

1. Given the complexity of pricing and delivery of supplies and commodities, small business owners may be pushed in the moment to lower bids to their own detriment.
2. Low bidders may try to win a contract and then seek to make up lost profits through price adjustments.
3. When procurements include a mix of products and/or services, the variables may be too complex to be adequately managed through the pressures of reverse auction.
4. The complexity and risks involved in an auction environment may actually drive down competition by causing potential bidders to not participate.
5. There is a risk of circumventing regulations related to the small business and socio-economic requirements.
6. Past performance is not given consideration.
7. Due to the extreme focus on lowering pricing, there is a risk that defective products or counterfeit parts may be provided.
8. With the 3% fee to the reverse auction provider, it may often be more efficient to simply purchase off a schedule.

Verifications

Our members are very concerned about the failure of the Small Business Administration to verify the veracity of firms claiming to be small and meeting certain socio-economic requirements for set-asides and other programs.

Congress has established a number of programs to assist small businesses competing for federal contracts. These programs support our nation's efforts to reach full productive capacity and assuring that a fair portion of the total purchases and contracts for property and services for Government in each industry category are placed with small business concerns. These focused programs require that the SBA accurately identify and verify eligible firms. This verification includes determining if the business is small, the business is veteran-owned, women-owned, disadvantaged-owned, in a HUBZone, etc.

Unfortunately, the SBA has failed at this most basic requirement for more than a decade. For the last decade, the SBA Inspector General's annual "Report on the Most Serious Management and Performance Challenges Facing the Small Business Administration," has listed as SBA management's top challenge - flaws in the procurement process allow large firms to obtain small business awards, and allow agencies to count contracts performed by large firms toward their small business goals. Yes, a decade.

The SBA's failure to verify small business and socio-economic claims became a major issue when the Service Disabled Veteran-Owned Small Business set-aside was created. During the process to create regulations, the SBA did not establish any eligibility verification for the SDVOSB program. This regulatory failure led to hundreds of millions of dollars in fraud and abuse as contract went to ineligible firms.

The veteran's contracting issue became more complicated when the U.S. Department of Veterans Affairs began their own Vets First Contracting Program with its own verification. The Vets First Contracting Program is only for specific contracting opportunities within the U.S. Department of Veterans Affairs. It is wholly separate from the SBA and has different eligibility requirements from the SBA's Service Disabled Veteran Small Business program which is used all across the federal government.

Now, we understand some members of Congress have suggested the VA's verification of veteran-owned firms for the Vets First Contracting Program should be moved to the SBA and paid for by the VA. This idea comes from a lack of understanding that the Service Disabled Veteran-Owned Small Business set-aside program, which is under the SBA's management and enforcement, has a different purpose and different requirements from the VA's Vets First Contracting Program. Since the SBA failed to create a verification program for the Service Disabled Veteran-Owned Small Business set-aside program, businesses and agencies are confused and hundreds of millions of dollars have been lost to legitimate SDVOSB firms due to fraud and abuse.

Additionally, if the SBA took on the VA's verification for the Vets First Contracting Program and the VA paid for this program, what would happen when the VA runs into budgetary challenges and doesn't want to pay for the services anymore?

More recently, due to the SBA's poor regulatory implementation of the Women-Owned Small Business set-aside program, the Government Accountability Office found that more than forty-percent of businesses (that previously received contracts) it examined for program eligibility should not have attested they were WOSBs or EDWOSBs at the time of review.

Thankfully, Congress and the President acted together through the recent passage of the FY15 National Defense Authorization Act to remove self-certification from the Women-Owned Small Business set-aside program which, when implemented, will certainly elevate the scrutiny of verification for this program. We appreciate Congress stepping up to force the SBA to do what it should have done all along. We strongly implore this committee to hold SBA account-

able for the creation of strong regulations to improve the verification and use of this program.

SBA's role in the Rule Making Process

The SBA's role in the rule making process includes the development and enforcement of regulations to enact federal laws. Both steps are vitally important to our nation's goal to reach full productive capacity and assure that a fair portion of the total purchases and contracts are placed with small business concerns.

So, as Congress passes legislation aiming to achieve these goals, we must rely upon the SBA to prepare and enforce regulations that successfully fulfill your intent. In this area, the SBA has failed woefully.

1. The regulations developed and enforced by the SBA for the implementation of the Women-Owned Small Business set-aside program were flawed from the very start. The SBA ignored the input from stakeholders on the inability of the processes brought about through the regulations to effectively insure that only qualified women-owned firms received access to set-asides. The SBA created a grossly complex method of managing the documents secured from firms seeking access to the program. The SBA turned contracting officers into de facto certifiers - driving down their desire to use the program. And, the SBA devoted very limited resources and funding to the implementation of the program, education of contracting officers and oversight/enforcement of the regulations.

2. The SBA failed to create a verification program for the Service Disabled Veteran-Owned Small Business set-aside program. The consequence has been that hundreds of millions of dollars have been lost to legitimate SDVOSB firms due to fraud and abuse and there is a great deal of confusion between the SBA's SDVOSB and the VA's Vets First program.

3. We also see the failings of the SBA in the failure of the agency to staff an appropriate number of Procurement Center Representatives. PCR's work all across the U.S. to enforce the requirement for small business set-asides in their regions. The most crucial, front-line teams that acts to assure that a fair portion of the total purchases and contracts are placed with small business concerns - is clearly not a regulatory enforcement priority of the Small Business Administration.

The U.S. Women's Chamber of Commerce agrees with the budget views of this committee: the SBA must allocate greater use of their funds to the core, Congressional mandated activities of the agency. And, this Committee must provide strong oversight and accountability. Rather than funding the SBA's extra layer of non-essential national and regional management and non-mandated programs - we recommend funds be directed to regulatory enforcement and services provided directly to assist and protect small business owners.

And, I ask you to help us assure that the SBA properly implements the provisions in the FY15 National Defense Authorization

Act that will bring greater verification and accountability to the Women-Owned Small Business set-aside program.

Thank you for the opportunity to provide this input.

