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Statement of

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Before the

Subcommittee on Contracting and Workforce

of the

House Committee on Small Business

Subject:

Examining the Barriers for Small Business Contractors at the DOD

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Chairman Mulvaney, thank you for the opportunity to testify before you and your constituents today on use of a Project Labor Agreement (PLA) on the construction contract for the Third Army Headquarters Complex at Shaw Air Force Base in Sumter, South Carolina, the process by which the federal government awards contracts and specifically to discuss the contract for construction of the Third Army Headquarters.

Project Labor Agreement

The Executive Order (EO) 13502 issued on February 6, 2009 encourages executive agencies to consider requiring the use of project labor agreements in connection with large-scale (projects of \$25 million or more) construction projects in order to promote economy and efficiency in Federal procurement. Agencies may, on a project-by-project basis, require the use of a PLA by a contractor where use of such an agreement will advance the Federal Government's interest in achieving economy and efficiency in Federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards and other matters, and be consistent with law.

The EO does not require an executive agency to use a PLA on any construction project nor does it preclude the use of a PLA in circumstances not covered by this order. This EO does not require contractors or subcontractors to enter into a PLA with any particular labor organization.

Federal Acquisition Regulation (FAR) Part 22.5 states that PLAs are a tool that agencies may use to promote economy and efficiency in Federal procurement, and that agencies may also consider the following factors in deciding whether the use of PLAs is appropriate for the construction project (FAR 22.503(c)):

- 1) The project will require multiple construction contractors and/or subcontractors employing workers in multiple crafts or trades.
- 2) There is a shortage of skilled labor in the region in which the construction project will be sited.
- 3) Completion of the project will require an extended period of time.
- 4) PLAs have been used on comparable projects undertaken by Federal, State, municipal, or private entities in the geographic area of the project.
- 5) A PLA will promote the agency's long term program interests, such as facilitating the training of a skilled workforce to meet the agency's future construction needs.
- 6) Any other factors that the agency decides are appropriate.

Naval Facilities Engineering Command (NAVFAC) policy requires the Contracting Officer (KO) prepare a decision memorandum for all construction projects \$25M and above. The KO's memorandum will address whether or not the particular project satisfies the criteria set forth in the EO. In addition, during the acquisition planning stages, the policy encourages soliciting the perspectives of stakeholders/offices with particular expertise and including those views in the KO's memo.

When the Third Army Headquarters construction acquisition was solicited on December 3, 2008, this policy was not in effect and the EO 13202 dated February 17, 2001 prohibited the use of project labor agreements.

The Federal Acquisition Process

I would like to provide a brief overview of the Federal Acquisition Process using information from the FAR and from one source cited at the end of this testimony.

Several statutes govern federal acquisitions. The Armed Services Procurement Act of 1947 (ASPA) governs the acquisition of all property (except land), construction, and services by defense agencies. The Competition in Contracting Act (CICA) requires federal agencies to seek and obtain full and open competition wherever possible in the contract award process.

The FAR contains standard policies and procedures for acquisitions by all federal agencies. Numerous agency-specific supplements have been implemented after promulgation of the FAR. These supplements, however, may not conflict with or supersede relevant FAR provisions.

FAR Part 1.102, Statement of guiding principles for the FAR, gives clear vision for Federal Acquisition when it states:

“(a) The vision for the Federal Acquisition System is to deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives...

(b) The Federal Acquisition System will—

(1) Satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service by, for example—

- (i) Maximizing the use of commercial products and services;
- (ii) Using contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform; and
- (iii) Promoting competition; ...”

Acquisition Methods

Now I will discuss acquisition methods for federal government contracts. Federal statutes establish two basic methods of obtaining full and open competition. These are 1) sealed bidding and 2) competitive negotiation. In either acquisition method, the KO performs a small business coordination process to determine prime and subcontracting opportunities for small business concerns.

Sealed Bidding

Sealed bidding is characterized by formal, specific procedures. These procedures aim to provide all bidders an opportunity to compete for a contract on an equal footing. See FAR Part 14.

Once a federal agency identifies a need, and decides to proceed with an acquisition, it must solicit sealed bids when the following four conditions exist per FAR 6.401(a): (1) time permits the solicitation, submission and evaluation of sealed bids; (2) the award will be made on the basis of price and other price-related factors; (3) it is not necessary to conduct discussions with the responding offerors about their bids; and (4) there is a reasonable expectation of receiving more than one sealed bid.

Sealed bidding is initiated by issuance of an Invitation for Bids (IFB) through display in a public place, announcement in newspapers or trade journals, publication in such internet-based venues at FedBizOps, and by mailing the IFB to those contractors on the agency's solicitation mailing list.

All bids received by the time and at the place set for opening are publicly opened and read aloud by the contracting officer. The contracting officer awards the contract to the bidder found to be responsible and who submitted the lowest responsive bid.

Negotiation

If one of the four conditions for use of sealed bidding is not present, the contracting officer may award a contract using competitive negotiation. In contrast to sealed bidding, competitive negotiation is a more flexible process that enables an agency to conduct discussions and evaluate offers using price and other factors as well. The contracting officer may engage in

discussions with offerors and, in evaluating proposals, may consider factors other than cost, such as management experience, technical approach, and/or past performance. See FAR Part 15.

A negotiated procurement begins when the contracting officer issues a Request for Proposals (RFP). As in sealed bidding, if the procurement is over \$25,000, the contracting officer will synopsise a notice of the proposed contract action in FedBizOps.

Evaluation of the proposals is in accordance with the factors specified in the solicitation. A source selection authority is designated to lead an evaluation team with the appropriate expertise to review and evaluate all proposals. As noted earlier, typical factors that are evaluated include (a) cost or price; (b) past performance on government contracts; and (c) technical approach.

A negotiated procurement may include negotiation called "discussions," but such is not required. If discussions are necessary, the contracting officer must identify the offerors that fall within what is called the competitive range. The competitive range is comprised of all the most highly rated proposals. To assist in determining the competitive range, the contracting officer may engage in limited communications with all offerors. After establishing the competitive range, the contracting officer will notify each excluded offeror and proceed to conduct discussions with the remaining offerors.

According to the FAR, the primary objective of discussions is to maximize the agency's ability "to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation." After closing discussions, the evaluation team will review and evaluate the final offers according to the evaluation criteria set forth in the RFP, and recommend to the source selection authority the offeror whose proposal is most advantageous to the government. The documented award decision will contain an analysis of any trade-offs accomplished by

negotiations and the reasons why the awardee's proposal represents the best value to the government. There are a number of review levels within the organization to ensure the integrity of the process. If requested by an unsuccessful offeror, the contracting officer will conduct a pre- or post-award debriefing during which strengths and weaknesses of the offeror's proposal will be explained.

The Contract

Having discussed the general context within which federal contracts are awarded, I will now shift to a discussion of specifics regarding the Navy's acquisition of construction for the Third Army Headquarters Complex at Shaw Air Force Base. The Navy is the official execution agent for all Military Construction projects executed at Shaw Air Force base and several other Air Force Bases throughout the southeast. The Navy does not exercise Government Contracting Officer warrant authority on other types of contracts such as services at this location.

The contract for construction of the Third Army Headquarters Complex at Shaw Air Force Base is a negotiated, firm fixed price, design build construction contract. It was procured via full and open competition, with the concurrence of the Small Business Administration on September 16, 2008, and awarded by the Navy on May 29, 2009 to Caddell Construction Company, Inc., of 2700 Lagoon Park Drive, Montgomery, Al. The price at time of award was \$91,600,000. The completion date is November 14, 2011, which conforms to the contract duration of 899 days.

The Solicitation

Prior to issuance of the solicitation, a market survey was conducted to determine if a sufficient number of capable small businesses existed to compete this procurement among small business prime contractors; however, no small businesses capable of completing this

procurement were identified. The procurement was solicited on December 3, 2008 and specified a two phase evaluation process. Interested offerors were asked to submit a first phase proposal which was evaluated solely on technical factors, and those offerors whose proposals were rated highest during the first phase were invited to submit a second phase proposal evaluated based on price and further technical factors, with all technical factors combined and price considered to be of approximately equal importance. Eighteen offerors responded to the first phase of the solicitation. Those offerors' proposals were evaluated on the following factors listed in the solicitation and all of equal importance: 1) relevant experience and capability of key personnel, 2) past performance, and 3) past small business subcontracting effort and small disadvantaged business participation. Of those 18 offerors who submitted phase one proposals, one was from South Carolina, but this firm was not invited to submit a second phase proposal because they were not considered one of the highly rated proposes in phase one. Also, one was classified as a Historically Underutilized Business Zone (HUBZone) business and the remaining were other than small business. Of those 18 offerors, four proposals were evaluated as "good" and fourteen as "marginal" based on the evaluation factors. The offerors with proposals rated as good were invited to submit proposals for the second phase of the solicitation. The second phase required the offerors to submit a price proposal and a separate technical proposal. The offerors' phase two technical proposals were evaluated based on the following factors listed in the solicitation and all of equal importance: 1) small business subcontracting plan, 2) management approach, and 3) technical solution. At the end of the phase two review, three proposals remained at an overall technical rating of "good", while one had dropped to "poor". The price proposals were evaluated and all offerors were considered to be responsive and responsible. Discussions with the offerors were not necessary. The Caddell Construction Company, Inc. proposal was found to

represent the best value to the Government because their proposal was the number one technically ranked offer and their price proposal was the lowest price. No protests were received after award. Offerors who requested debriefings from the Navy were provided such. A Davis Bacon Act wage determination was included in the solicitation and labor interviews were performed by the Navy during construction.

Subcontracting

Now I will discuss details of the prime contractor's subcontracts for the Third Army Headquarters contract. It is important to recognize the lack of privity between the Federal Government and subcontractors. The Federal Acquisition Regulation, in part 42, refers to the lack of privity between the Federal Government and subcontractors. The Federal government has privity with its prime contractors, but not with their subcontractors. Therefore, the Federal government has limited influence over the relationships that prime contractors establish with subcontractors.

The total number of workers, including those of the subcontractors, utilized by Caddell Construction Company, Inc. during construction of the Third Army Headquarters was approximately 1,800. Following award of the contract, Caddell held a small business job fair to solicit small businesses subcontractors. Certified payrolls provided to the Navy during construction indicate that Caddell employed 45 subcontractors, including 23 from South Carolina, of which 21 are small businesses. According to the Electronic Subcontracting Reporting System (eSRS) database, Caddell subcontracted approximately 77% of the contract value or about \$81.5 million. Of those subcontracts, about \$37.5 million, or about 46%, was awarded by Caddell to small businesses. Caddell also purchased office and building supplies from 30 companies in South Carolina.

Naval Facilities Engineering Command Southeast Contracts

Now I will provide some award statistics for Navy contracts across the southeastern United States. The Navy command responsible for award of the Third Army Headquarters contract is NAVFAC Southeast, based in Jacksonville, FL. NAVFAC Southeast is a regional subordinate command of the Naval Facilities Engineering Command (NAVFAC). NAVFAC Southeast is responsible for procuring and administering construction contracts and other facilities services to Navy, Marine Corps, Air Force and Joint Service bases across a seven-state area of the southeast and portions of the Caribbean. NAVFAC Southeast awarded over \$3.5 billion in contracts in fiscal years 2009-2011. NAVFAC negotiates with the Department of the Navy Office of Small Business Programs, annual small business targets that are consistently met or exceeded. As noted in Figure 1 below, NAVFAC Southeast has exceeded small business prime contracting targets for all categories of small businesses for the last three years.

FY 11 NAVFAC SE Small Business Targets and Achievements

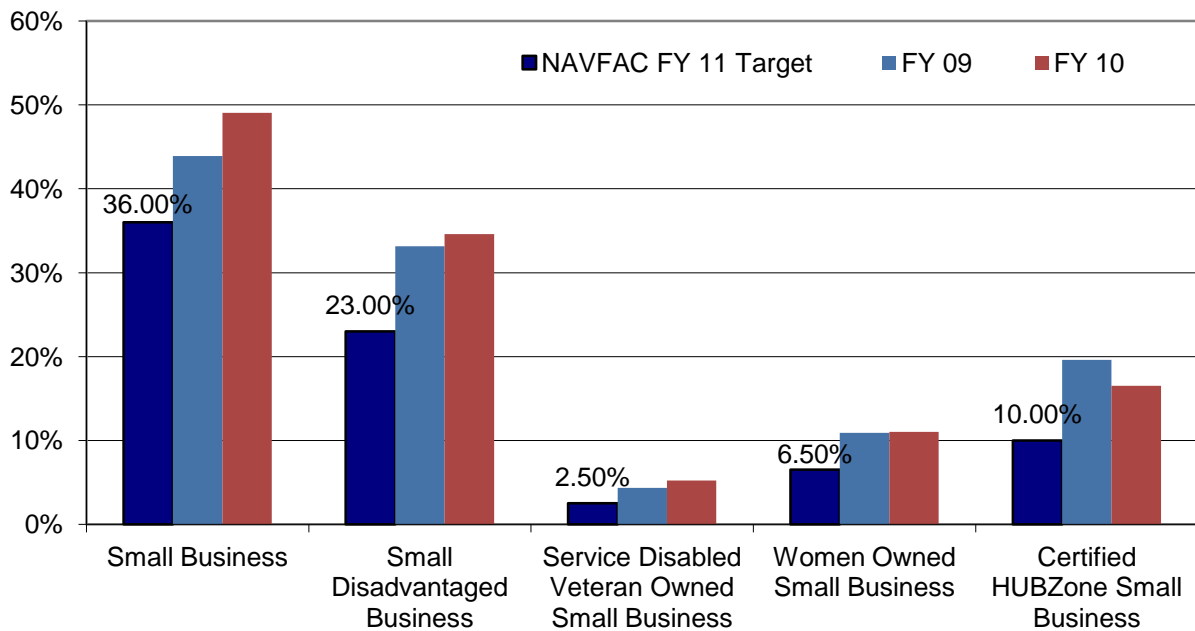


Figure 1 NAVFAC Southeast Small Business Targets and Achievements

All NAVFAC Commands hold and/or participate in Outreach Events throughout our regional footprints, which are also designed to provide training, information, and guidance to enhance the ability of small businesses to compete for NAVFAC contracts. Examples of such events attended by NAVFAC Southeast personnel are the South Carolina State Chamber and SBA Salute to Small Business and Match Maker Event held May 4, 2011 and sponsored by the South Carolina Small Business Administration representatives in Columbia, and a conference entitled “Doing Business with NAVFAC” hosted by the Beaufort Chamber of Commerce on April 6, 2011. NAVFAC provided conference attendees the opportunity to meet and talk to the NAVFAC Director, Office of Small Business Programs who provided information on contracting with the Navy and NAVFAC, and other useful tools to help local businesses in attendance understand the Federal procurement process and NAVFAC’s opportunities.

Thank you again for the opportunity to testify before you today on the process by which the Federal government awards contracts and the Third Army Headquarters Complex construction.