



**Testimony of Rosana Privitera Biondo
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On Behalf of Women Construction Owners and Executives**

**Before the
Committee on Small Business
Subcommittee on Contracting and Workforce
United States House of Representatives**

**On
“Construction Contracting: Barriers to Small Business Participation”**

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Mr. Chairman and Members of the Subcommittee, good morning. My name is Rosana Privitera Biondo. I am the President of Mark One Electric, headquartered in Kansas City, Missouri. I am testifying today in my capacity as President of the Board of Directors of Women Construction Owners & Executives (WCOE), a 28 year old organization whose mission is to create contracting opportunities for our members – women who have chosen to build a business in the non-traditional industry of construction.

Thank you for giving me the opportunity to testify before you today in this very important hearing. WCOE has just completed our Annual Leadership Meeting here in Washington, DC where we gathered our organization's leaders from across the country to discuss issues of importance to them and their businesses. As you know, the lingering economic recession has hit the construction industry particularly hard, and many small businesses in our industry seem to have been hit disproportionately hard. Yet, our members are energized about the future and particularly about new efforts in Congress to intelligently address the problems with federal construction contracting and the various programs intended to promote utilization of small, disadvantaged or woman-owned businesses. As you know, the construction industry is unique and many of our challenges differ from other small businesses. Our testimony will concentrate on construction projects at the federal level, although it is impossible to address federal projects without mentioning the state and local components of the process.

The first important principle is the structure of our contracting work. Both public and private construction projects are awarded to a prime contractor who is then responsible for subcontracting out the majority of the work to specialty contractors. Federal construction projects are usually much larger than privately funded projects. According to a search on USASpending.gov, the top five prime contractors performing construction related work received between \$712 million and \$1.2 billion in FY2010.

WCOE is intent on ensuring that our women-owned construction companies receive their fair share of subcontracts on these major federal construction projects. While the prime contractors will solicit bids from us and will include us as subcontractors in the final bid submittal, once the government has issued the contract the prime contractor will often "bid-shop" the subcontractor bids. It is not uncommon for the prime contractor to make a last minute substitution of a lower bid subcontractor and keeping the difference. WCOE would prefer that the agency's contracting officer be informed of and responsible for subcontracting substitutions, which often eliminate women-owned small businesses that were included in the initial bid submittal.

Many federal construction projects are awarded through grants to states, particularly for Department of Transportation projects. The Department of Transportation issues guidelines to states, which include recommendations for utilization of small or minority owned businesses. However states are not compelled to comply, even though they are using federal dollars for the project. We understand the complexities presented by the Adarand Constructors, Inc. v. Pena, 515 US 200 (1995) but we believe a uniform standard could be implemented and no state should be permitted to have goals below the federal standard.

We realize this is a complicated area and affects other Congressional Committees, but we felt it was important to bring this issue to this Committee's attention because it has a direct effect on the health of small construction businesses and their ability to create jobs.

The \$46 billion in transportation project funding included within the stimulus package could have been a much-needed stimulus to women-owned small construction businesses – and indeed we thought it would be. However, many states that received the funding have refused to incorporate provisions for small or woman-owned business participation. We know the Congressional intent was there, but the implementation on the state level did not happen.

Let me just take a few minutes to highlight two issues where the well-intentioned federal small business programs do not apply to small construction companies.

First, the women owned small business (WOSB) procurement program. It took the efforts of thousands of women owned businesses and dozens of organizations that represented them to persuade the SBA to implement the program enacted by Congress 11 years ago. This program allows for restricted competition for women owned companies that seek prime contracts. While this program will benefit many women owned businesses, WOSBs in the construction industry fear it will be of limited benefit, even though 61 six-digit NAICS codes connected with WCOE members are included in the program

The WOSB program has a contract award limit of \$4 million for construction NAICS codes. This contract limit confines women-owned small businesses to compete for very small federal construction contracts. Let me explain. In FY2010, the federal government awarded 165,269 construction-related contracts with a dollar value less than \$4 million for a total of \$19.5 billion. The average contract award was \$118,085. When you look at the complexity of the paperwork required on bid submittals and progress payments compared to the small profit percentage allowed on federal projects, it is extremely difficult to net out at anything other than a break-even on these small projects. Yes, the quantity of projects were there – but the quality of the projects is seriously lacking.

On the other hand, construction related contracts worth more than \$4 million are a different story. In FY2010, 2,125 contracts were awarded with a total value of \$35.2 billion. The average contract value was \$16.6 million. This demonstrates the vast difference between the size of the awards at the \$4 million threshold that the WOSB program stipulates and the size of awards above that total. Women-owned small businesses – especially women in the construction industry – will continue to be at a disadvantage, so long as the size limits for awards remain in place. The WOSB program simply will not work unless the dollar limits for awards are removed. This really will take an Act of Congress, since Congress put the limits in place. Thankfully, we understand that legislation will be introduced shortly in this Committee to remove those caps. We will work diligently to gather support from the community and Congress to pass this legislation because it is the only way this program can assist the women that we represent in securing federal work. Other small business programs which restrict competition, such as the 8(a), Veterans, HUBZone, etc. do not have award caps. We believe it is only equitable that the women construction owners in this country are afforded the same opportunity to contract with the federal government.

The second example is also about size and related to the WOSB program. The program, as well as all of the good work that this Committee has done and will continue to do, is only applicable to businesses that are defined as small. That determination is made by SBA's Office of Size Standards. SBA size standards are based on either revenue or number of employees. Currently, the SBA size standard for construction is based on a revenue standard of \$7.0 to \$14.0 million for specialty subcontractors to \$33.5 million for

prime contractors. That severely limits the amount of available construction projects in the Federal sector that will be eligible for the “small” designation. WCOE believes that gross annual revenue is no longer a relevant determinant of whether a business is small or not in the construction industry. In today’s construction industry, over 50% of a project cost is in materials and every business publication provides monthly reports about the steadily increasing costs of building materials.

WCOE believes a more accurate determinant for size standards in the construction industry (NAICS section 23) would be employee based (FTE) as it is for the majority of other NAICS sections. The SBA has a complicated economic formula for calculating its revenue based size standards and WCOE has neither the resources nor the Masters in Economics to defeat SBA’s arcane mathematical formula. However, we do have on-the-ground experience and we can tell you that the revenue-based size standard severely restricts our ability to take advantage of programs Congress has put into place to assist us growing our businesses and creating jobs.

We would like to offer a suggestion that an alternative way of calculating the employee standard by a relatively simple formula that OSHA uses. All of our members have to file an OSHA 300 form which contains a formula to calculate full time employees (FTE). The formula takes the number of employees paid and divides it by the number of pay periods to arrive at the FTE number.

Given the importance of subcontracting to members of our organization, we applaud Chairman Graves for introducing the Government Efficiency through Small Business Contracting Act of 2012 (GET Act). While we certainly support raising the overall small business goal from 23 to 25 percent, raising the subcontracting goal from 35.9 percent to 40 percent of the total value of all subcontracting awards is one of the keys to our members’ success. We also believe that senior officials of agencies should be held accountable for meeting Congressionally mandated goals, so we support the provision that prohibits them from receiving bonuses if the agency has not met its small business contracting goals.

We also support the legislation introduced by Representative Mulvaney, H.R. 3893, which further strengthens the subcontracting law by imposing substantial penalties to primes that do not file their subcontracting plans. Although the Small Business Jobs Act prohibits the practice of switching subcontractors upon an award, this bill puts additional teeth into the law.

WCOE also believes there is room for a mid-tier contracting program. In order to be a successful federal construction contractor, it is necessary to have considerable financial assets available because of bonding requirements. Although our members are small compared to our competition that secure the bulk of federal construction dollars, many WCOE members do not fit within the small business size standards. So, we are in limbo. Not big and not small. Anyone who is knowledgeable about federal contracting knows that this not an enviable position to be in. Mid-size companies would be in a much better position to identify small businesses with whom to subcontract, thereby assisting them in growing their businesses and creating jobs. Legislation pending in Congress calls for a mid-tier pilot program and we urge the Committee to take a close look at structuring a program for the construction industry. Lastly, there are two access to capital issues that we would like to address—retention and bonding. We refer to these issues as access to capital issues

rather than contracting issues for a reason. The policy surrounding retention and bonding have a direct effect on the success of our businesses to compete on federal projects.

Retention is the process of holding back a portion of the contract until the work is completed. While that is an accepted practice in construction, it can tie up capital for smaller firms unnecessarily. We would ask that on federal projects, the amount a prime can hold back from a sub should not be a percentage, but rather the amount necessary to cover the work in question. Here's what the FAR 32.103 says about retainage:

32.103 Progress payments under construction contracts.

When satisfactory progress has not been achieved by a contractor during any period for which a progress payment is to be made, a percentage of the progress payment may be retained. Retainage should not be used as a substitute for good contract management, and the contracting officer should not withhold funds without cause. Determinations to retain and the specific amount to be withheld shall be made by the contracting officers on a case-by-case basis. Such decisions will be based on the contracting officer's assessment of past performance and the likelihood that such performance will continue. The amount of retainage withheld shall not exceed 10 percent of the approved estimated amount in accordance with the terms of the contract and may be adjusted as the contract approaches completion to recognize better than expected performance, the ability to rely on alternative safeguards, and other factors. Upon completion of all contract requirements, retained amounts shall be paid promptly.

In other words, federal contracts do not require a set percentage of retention and contracting officers should only withhold funds for cause. Subcontractors should not have funds withheld as retention unless the work for which they are responsible is not accepted as complete. WCOE recommends that the amount withheld in such an instance should not exceed the value of the work remaining to be done and should not be set at an arbitrary percentage of the contract. It is important to note that surety bonds cannot be released unless the retention is released, so a contractor's ability to begin a new project is restricted until her assets are released when the bonded work is accepted as complete and she can bond a new project.

Bonding requirements for subcontractors, or dare we say, over-bonding, ties up capital for our members as well. Bonding, unique to the construction industry, is a guarantee of performance on a project which the owner of the construction company must collateralize with business and personal assets—thus tying up precious capital. We urge federal agencies to eliminate the requirement for subcontractors to provide a bond unless it is required of the prime contractor.

In summary, these last few years have been difficult for our industry. Federally funded projects and contracts have been instrumental in keeping our firms viable. We are encouraged by this Subcommittee's commitment to the women owned firms who seek to rebuild their communities by growing their businesses and creating jobs. We look forward

to working with you to address some of the barriers we have identified today. I would be happy to answer any questions.