

**STATEMENT OF SENATOR JOHN KERRY, RANKING MEMBER
OF THE SENATE COMMITTEE ON SMALL BUSINESS AND
ENTREPRENEURSHIP,
ON THE HEARING OF THE SENATE COMMITTEE ON ENERGY
AND NATURAL RESOURCES ON THE DEPARTMENT OF
ENERGY'S ALLOCATION OF FEDERAL CONTRACTS TO
SMALL BUSINESSES**

May 18, 2004

Mr. Chairman, I would like to thank you for the opportunity to address the issue raised today before the Senate Committee on Energy and Natural Resources, the allocation of Federal prime contracts to small businesses by the U.S. Department of Energy. As the Ranking Member of the Senate Committee on Small Business and Entrepreneurship, I have heard from many small businesses about the importance of reserving prime contracts for small business participation and limiting the practice of contract bundling. Contract bundling and the use of super-sized contracts, such as those utilized in the Department of Energy's maintenance and operation (M&O) contracts, have precluded many small businesses from bidding on Federal contracts. This anti-competitive structure cost this nation's small businesses approximately \$4 billion in contracts in FY2003.

Mr. Chairman, these are not "mom and pop shops" or corner stores. These are successful businesses that have anywhere from 10 to 499 employees. These are businesses that create jobs, are more likely to make new hires, more likely to invest in new technologies and capital improvements, exactly what our nation's economy demands in order to recover from our current downturn.

Lack of small business participation not only adversely affects the success of those excluded small businesses, but eliminates the diversity among suppliers of goods and services needed by the Federal government. This increases long-term costs for the government, and limits innovation and limits the development of new technologies. Further, limiting the availability of competitive contracts to small business is contrary to public law and the policies of the Federal government.

The Small Business Act, 15 U.S.C. 631, et seq., states policy of Federal government is to *"aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the*

Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises..." To ensure that small firms receive their fair share of Federal contracts, the law creates specific goals for small business utilization. Section 15(g) of the Small Business Act, 15 U.S.C. 644, states, "*The Government-wide goal for participation by small business concerns shall be established at not less than 23 percent of the total value of all [prime contract] awards for each fiscal year.*"

According to the most recent Small Business Administration annual report on Small Business Utilization, the Department of Energy reported that only 4.08 percent of all of its contracts were allocated to small businesses as prime contractors in FY 2003, the lowest level of all fifteen Executive Departments. This poor performance is greatly due to the contracting structure in which multiple and diverse tasks and duties are essentially bundled into one contract that is too large for small businesses to bid on. According to recent GAO report, more than 80 percent, approximately \$18.2 billion of the total \$21.6 billion of Department of Energy contract dollars, are spent on 37 large contracts for the Management and Operation of DoE research facilities.

I applaud DoE Secretary Spencer Abraham, my former colleague on the Senate Committee on Small Business and Entrepreneurship, for implementing higher small business goals and for his leadership in urging Offices within the Department to "break-out" portions of their contracts capable of being performed by small firms. However, more work still needs to be done to ensure that the Department of Energy makes consistent progress towards full compliance with the Small Business Act requirements.

In 1999, during the debate on the DoE's compliance with the 23 percent government-wide goal for small business contracting, then-Chairman Kit Bond and I sent a letter to the Office of Federal Procurement Policy encouraging the prime and subcontracting achievement numbers to remain separate. I have enclosed a copy of this letter for your review. In 1999, the Office of Federal Procurement Policy decided that the Department of Energy's M&O, M&I and ERMC contractors should be counted toward the Agency's small business subcontractor goals, not their prime contracting goal. Mr. Chairman, I continue to believe that that approach is best for small businesses and for the country and urge the Department of Energy to continue and expand their efforts to fully utilize small businesses as prime contractors.

The Department claims that its mission contains four main elements: energy, nuclear weapons stockpile, environmental management and science. In testimony before this Committee Dr. Martha Krebs, former Director of the Office of Science at the Department of Energy stated, "*contractors for these Laboratories must have the capacity to attract and lead the best scientific and engineering talent our nation can muster.*" Mr. Chairman, that is why I urge the Department of Energy to redouble its efforts to increase the number and dollar amount of prime contracts made available for competition to small businesses. Mr. Chairman, let us not lose sight of the fact that although the Department does manage a great deal of sensitive research with nuclear and national security

implications, it is the second largest Agency in the Federal government and requires the same support services needed by all agencies to maintain day-to-day activities. There is no reason these contracts should not be made available for small businesses to compete.

In addition to the traditional goods and services provided by small firms and utilized by every government body such as office supplies, IT and telephony services, building maintenance, and landscaping, successful programs such as the Small Business Innovation Research (SBIR) and Small Business Technology Transfer programs have demonstrated that small firms are important contributors of innovative science research and technology, as well as environmental remediation.

According to the Science and Engineering Indicators released by the National Science Foundation in 2004, the private, for-profit sector is by far the largest provider of Science and Engineering employment. In 1999, approximately 73 percent of individuals working as scientists and engineers who had bachelor's degrees and 62 percent of persons who had master's degrees worked for private, for-profit companies. Approximately one third of these individuals are employed in sectors other than large firms or academics. The current M&O contracting structure places a great emphasis on the relationship between research institutions housed at prominent Universities and large corporations responsible for the DoE's 37 laboratories, essentially ignoring one third of the scientists and researchers that are housed in the nation's innovative small firms.

The National Science Foundation has also reported that many of the new technologies and industries seen as critical to the Nation's future economical growth are closely identified with small business. The Foundation describes biotechnology and computer software as industries built around new technologies that were largely commercialized by small business. The report on Science and Engineering Indicators specifically states that *"small business retains certain advantages over large businesses in commercial environments characterized by fast-moving technologies and rapidly changing consumer needs."* Among the advantages that small businesses offer to the Federal government, and specifically to the Department of Energy, are the kind of speedy, innovative research, use of new technologies and cost savings that are essential to ensure that this country remains at the forefront of science and technology.

Similarly, in the area of environmental remediation, Mr. Chairman, there are a number of small firms with a long history of successfully performing such work for other Federal agencies, such as the Army Corps of Engineers. These small firms should be afforded the opportunity to compete for environmental management contracts at the DoE's 37 research facilities.

One such example is a company located in California and working in my home state of Massachusetts, Environmental Chemical Corporation (ECC), the lead management contractor for the Massachusetts Military Reservation on Cape Cod, one of the Army's highest profile and most sensitive sites. ECC is a small firm that has been awarded repeat business based on excellent performance. Small businesses also perform challenging and high hazard work in D&D of Army ammunition plants cheaper and faster than large

business. The Army's largest environmental contracts (the Total Environmental Restoration Contracts) and the Navy's largest environmental contracts (Comprehensive Long Term Environmental Actions-Navy) have been performed by small businesses. The Army is not the only Federal agency that has confidence in the abilities of small firms to perform sophisticated environmental remediation projects. The Environmental Protection Agency allocated approximately \$155.5 million, over 13 percent of its overall prime contracting dollars, to small businesses in FY 2003 environmental consulting contracts. The DoE itself has sought competent environmental remediation (ER) contractors over the past 18 months and has found that there were highly qualified small business teams for each one: Los Alamos ER, Portsmouth ER, Paducah ER, Portsmouth Site Services, Paducah Site Services, Fast Flux Test Facility, Columbus Closure, and Nationwide ER and Demolition and Decontamination (D&D). The expansion of this effort throughout the Agency will dramatically increase the share of contracts being made available for small firms as prime contractors and help DoE attain their increasing small business goals.

Mr. Chairman, the Department also claims that allowing them to count subcontracts allocated through a M&O contract toward their prime contracting goal would simply return their practice to that permitted by the Office of Federal Procurement Policy prior to its 1999 decision. What gets lost in this argument, however, is the fact that this reporting structure was implemented in 1991 on the grounds that M&O contractors had a close relationship with the Department and were subject to the protections and requirements described in the Federal Acquisition Regulations (FAR). However, as the relationship between the M&O contractors and DoE changed, the 1999 decision changing the policy governing the counting of small business utilization became necessary. M&O contractors are simply not that closely aligned with the policies and procedural guarantees of the Department any more. While the Department allows GAO protests by prime contractors, it does not allow such protests to be made against an M&O contractor by a subcontractor. While there are dispute resolution procedures available for prime contractors, none exist within the DoE for disputes between M&O contractors and their subcontractors. The DoE accepts no liability for actions taken by an M&O contractor. Clearly, DoE and the M&O contractors have not returned to their close, pre-1999 relationship, so why should the small business utilization policy based upon that relationship?

Mr. Chairman, I have been asked by many of my colleagues, "why does it matter if a small business receives a prime contract or a subcontract? If the small firm gets the work, that is all that matters, right?" The answer to this question is no. There are three major differences between prime contracts and subcontracts.

First, prime contractors maintain a greater level of oversight and control over the performance of the contract, and therefore of their own business. The harsh reality of today's subcontracting arena is that the prime contractor makes the rules, and because the subcontractor does not have a direct contract with the Agency, they are beholden to the prime contracts. In the Senate-passed SBA Reauthorization legislation, S. 1375, the Committee on Small Business and Entrepreneurship addressed many of the issues affecting small business subcontractors, including the practice of bait and switch and the

failure of prime contractors to promptly pay their subcontractors. Even with these attempts to resolve the inequities faced by subcontractors, it is clear that there is no substitute to being the prime contractor and being in control of the performance of the contract.

Second, more often than not, Federal agencies receive a better value by allowing small businesses to compete for prime contracts. When a large business receives a contract and simply turns around and awards subcontracts to small businesses to perform the tasks, they are essentially charging a premium on top of the actual cost of performance. As Federal contracts get larger and larger, fewer businesses are able to compete for these contracts. This stifling of competition eventually leads to higher prices and inadequate supplies.

Third, prime contractors receive a record of "past performance" with the agency with which it is doing business. This past performance provides a record of the quality and timeliness of work performed under a contract that is used to leverage other similar contracts with the Federal government. When performing a subcontract, small businesses do not receive this past performance record from the Federal government, and regardless of the quality and timeliness of the service, a subcontractor cannot leverage that service into additional contracts.

Mr. Chairman, I thank you for the opportunity to express my support for small businesses and their desire that the Federal government use them as prime contractors to the maximum extent possible. As Senator Bond and I have expressed five years ago, the Department should fully comply with the Small Business Act and therefore, should report its contracting goals and achievements in the same manner and on the same basis as all other agencies of the Government: prime contracts as prime contracts and subcontracts as subcontracts. Enacting a policy contrary to this would undermine the validity of the Government-wide statistics used to monitor the Federal government's progress in small business utilization. This would jeopardize the government's efforts to expand its supplier base, to promote economic growth and innovation, and to create jobs by fostering competition by small businesses.

Secretary Abraham has made some steps in the right direction on these issues and I urge him to stay the course, and if possible, speed up the projected twenty-year effort to reach the 23 percent goal. As Ranking Member of the Senate Committee on Small Business and Entrepreneurship, I offer the Secretary our Committee's support and assistance in that effort, and I request that the Senate Committee on Energy and Natural Resources do the same. By doing so, we will simultaneously help DOE achieve its mission, encourage cost-effectiveness and innovation, and foster the growth and success of high-performing small businesses, our nation's biggest job creators.

Thank you.