Congress of the United States
Washington, DC 20515

April 15, 2005

VIA FACSIMILE (202)395-3888
ORIGINAL BY US. MAIL
The Honorable Joshua B. Bolten
Director
Office of Management and Budget
The White House
1600 Pennsylvania Avenue, N.W.
Washington D.C. 20500

Dear Mr. Bolten:

As the bipartisan leadership of the Congressional small business committees, we are writing to bring to your immediate attention our strong objections to the anti-small business legislation currently under consideration by the Senate as part of H.R. 1268, the Iraq/Afghanistan Emergency Supplemental Appropriations Act for Fiscal Year 2005. Section 6023 of this Act, as reported by the Senate Appropriations Committee, contains language that would amend the Small Business Act to permit the Department of Energy (DOE) to count subcontracts awarded by its Management and Operations (M&O) contractors and other large prime contractors towards their small business prime contracting goal. Furthermore, Section 6023 would cap the total agency small business prime contracting and subcontracting goals at 23 percent. This provision would not only drastically reduce opportunities for small business at the DOE, but would also set the precedent that would seriously jeopardize the future ability of the small businesses to receive prime contracts across the Federal Government.

Small business prime contracts are a strong job-creation vehicle which this country desperately needs in order to maintain our economic recovery and growth. According to the Small Business Administration (SBA), small business prime contractors generated about 490,000 jobs in Fiscal Year 2003. Prime contracts also have a truly unique importance for small business. In particular, prime contracts give small firms numerous advantages under Federal law that subcontracts do not, such as: rights to be treated fairly and in a transparent manner, rights to protest and challenge improper contract administration, rights to earn past performance ratings required by the recent acquisition reforms for future government work, and rights to receive prompt payments. Prime contracts enable small business owners to receive better access to credit and to realize much higher market value when they decide to reap rewards for their labor by selling their small businesses. Prime contracts give small business owners the economic independence, the respect, and the ability to control their own destinies.

Small business prime contracts also provide substantial benefits for government agencies. This is not surprising, since small firms are typically much more agile and charge much less overhead expenses than large firms. According to research by the SBA Office of Advocacy,

PRINTED ON RECYCLED PAPER

small businesses produce 13 to 14 times more patents than large firms, and small business patents are twice as likely to be cited in future patented innovations. The research activities of the DOE stand to receive great advantages from engaging a larger pool of small innovative firms into the DOE's procurement market. As prime contractors, small firms are better able to manage performance and financial risks, which benefits the government. In addition, small business prime contracts provide important competitive offsets to the ongoing consolidation in the government contracting industry. With regards to the DOE, these benefits have been extensively discussed in testimony submitted by the Government Accountability Office and by the small business organizations to the Senate Committee on Energy and Natural Resources last May. According to that testimony, DOE prime contractors had mark-ups as high as 40 percent over the cost of their small business subcontracts and have banded together to restrict competition. When the DOE allowed small businesses to compete, costs to the government came down substantially. This, too, is not surprising, since a number of DOE prime contractors maintained their awards for over 40 years.

The recognition of importance of prime contracts cuts across party lines and across the branches of Federal government. Since the passage of the Small Business Act in 1953, it has been the policy of Congress to ensure that small businesses receive a fair portion of Federal prime contracting dollars as consistent with the maximum practicable utilization of small firms. The Small Business Act implements this objective by imposing a small business prime contracting goal of no less than 23 percent on all federal agencies, and requires each agency to negotiate with the SBA for additional subcontracting goals. On numerous occasions, President Bush has called for expanded access of small businesses to prime contracts as part of his Small Business Agenda, of his Anti-Bundling Initiative, and of his campaign to promote the "Ownership Society" in America. As recently as October 2004, the President stated: " I believe that the best way to help our small businesses is . . . to unbundle government contracts so people have a chance to be able to bid and receive a contract to help get their business going." We support all efforts to increase small business prime contracting opportunities. In contrast, bundled contracts like the M & O contracts at the DOE cause direct economic losses to small firms notwithstanding potential subcontracting. According to the October 29, 2002 report of the Office of Federal Procurement Policy, small businesses lose $33 for every $100 that the agencies award in bundled contracts. Section 6023, however, would run directly counter to the President's stated policies and to the long-standing policies of Congress both on prime contracting and on subcontracting. Further, Section 6023 will set a dangerous precedent that would encourage other agencies to knock on the doors of the Legislative Branch in order to obtain relief from government-wide contracting laws. Both small business and good government would be the losers.

It is no secret that the DOE has been struggling to implement small business contracting policies for quite some time. Research by the SBA Office of Advocacy indicates that these problems go as far back as the 1980s. Recent data suggest that the DOE was able to give small

businesses only about 4 percent in prime contract awards, and the DOE's subcontracting numbers are considered unreliable by the Government Accountability Office. However, even if the subcontracting numbers are to be believed, Section 6023 would require the DOE to *reduce* its small business dollars by about half. By treating subcontracts as prime contracts, Section 6023 would make the DOE unaccountable for compliance with the Small Business Act. Without meaningful accountability, DOE officials would have no incentive to award prime contracts if they can receive credit from subcontracts. This is unsound management, and should be discouraged. These concerns have been voiced since the early 1990s by the bipartisan leadership of the Senate Small Business Committee as well as by the Administrations of Presidents George H.W. Bush and William J. Clinton.

Yet, many agencies are able to exceed both their prime contracting goals, and achieve substantial double-digit subcontracting achievements. The Departments of Defense (DoD) and Homeland Security (DHS) have security missions comparable to the DOE, but they still give substantial prime contracting and subcontracting awards to small businesses. In Fiscal Year 2003, the DHS gave about 40 percent of its prime contracts and 40 percent of its subcontracts to small firms. The DoD gave 22 percent of prime contracts and 37 percent of subcontracts to small businesses.

Indeed, no legitimate reasons exist to justify a special waiver for the DOE through the Iraq/Afghanistan Emergency Supplemental bill. There is no emergency here, since the Department of Energy is working on a 20-year plan to increase its small business prime contract awards. Rushing such a drastic policy reversal through a provision buried in an emergency funding measure is highly improper. In November 2004, leaders of the Small Business Committee and of the Energy Committee signed a letter agreeing to studying and improving the contracting practices at the DOE. Pursuant to that agreement, the GAO has been conducting an in-depth inquiry into the DOE procurement practices. Section 6023 contradicts this important agreement and undermines the evaluation process.

Some have argued that Section 6023 is needed to correct the problems associated with the DOE's efforts to increase its small business prime contracts, such as the practice of taking the work away from small firms around large DOE sites or the practice of making large non-competitive awards to Alaska Native Corporations. In reality, Section 6023 does nothing to keep work locally, and instead reduces total small business prime contracting and subcontracting opportunities available to small businesses everywhere. Section 6023 does nothing to require greater competition in contracting.

We note that, at one time, the DOE counted subcontracts as prime contracts when its large contractors had to award their subcontracts following the same "federal norm" in contracting as government agencies. However, large DOE prime contractors have been exempted from the "federal norm" standards by case law, which held that these contractors do

not act as agents for the government. Section 6023 would not reinstate these standards, but instead undermine longstanding small business procurement policy. Reduced accountability for large DOE prime contractors, many of which have not been competed in decades, is precisely the wrong policy prescription. According to reports from the Government Accountability Office and the DOE Inspector General, large prime contracts at the DOE have been known for ballooning project costs, substantial delays or even failures to perform at all, poor subcontracting practices, abuses of government purchase cards, security problems, and other management woes. We see no reason why these bundled contracts should continue to be sheltered from small business competition.

Our position is supported by the SBA Chief Counsel for Advocacy, an independent Federal advocate for small business, and by numerous organizations representing government contractors of all sizes. We ask that the Administration join with us in strongly and publicly opposing Section 6023, and reaffirm its often-stated commitment to America's small businesses.

Sincerely,

OLYMPIA J. SNOWE
Chair
Senate Committee on Small Business
and Entrepreneurship

JOHN F. KERRY
Ranking Member
Senate Committee on Small Business
and Entrepreneurship

DONALD A. MANZULLO
Chairman
House Committee on Small Business

NYDIA M. VELAZQUEZ
Ranking Member
House Committee on Small Business

cc: The Honorable David H. Safavian, Administrator for Federal Procurement Policy
The Honorable Allan Hubbard, Director of the National Economic Council
The Honorable Hector Barreto, SBA Administrator
The Honorable Thomas Sullivan, SBA Chief Counsel for Advocacy