



Statement for the Record for Associated Builders and Contractors

Testimony of
Kirby Wu, AIA, LEED AP
President of Wu & Associates, Inc.

Before the
House Oversight and Government Reform Committee
Technology, Information Policy, Intergovernmental Relations and
Procurement Reform Subcommittee

On
“H.R. 735 and Project Labor Agreements: Restoring Competition and
Neutrality to Government Construction Projects”

June 3, 2011

The Voice of the Merit Shop®

TESTIMONY OF KIRBY WU, AIA, LEED AP
BEFORE THE HOUSE SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY,
INTERGOVERNMENTAL RELATIONS AND PROCUREMENT REFORM

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Good morning Chairman Lankford, Ranking Member Connolly and members of the subcommittee.

My name is Kirby Wu and I am the president of Wu & Associates, located in Cherry Hill, New Jersey.

On behalf of Associated Builders and Contractors (ABC) and the merit shop contracting community, I would like to thank you for the opportunity to testify before you today in support of the Government Neutrality in Contracting Act (H.R. 735).

I hope my testimony sheds some light on how government-mandated project labor agreements (PLAs) harm qualified contractors and employees that want nothing more than to compete on a level playing field to build on-time and on-budget construction projects at the best possible price.

Unfortunately, as my testimony will demonstrate, PLAs mandated by federal agencies result in increased costs for contractors and unnecessary procurement delays, and inject uncertainty and favoritism in the federal procurement process. These unnecessary PLA mandates stand as a barrier to growth for businesses and job creation in an industry suffering from a national unemployment rate at 17.8 percent.¹

Wu & Associates Is a Quality Merit Shop Contractor and a Success Story

Incorporated in 1990, Wu & Associates acquired 8(a) certification through the U.S. Small Business Administration in the early 1990s and has since grown into an industry-leading, award-winning general contractor specializing in design-build projects, LEED sustainable design and historic preservation. Wu & Associates is considered a small business under the U.S. Small Business Administration's small

¹ U.S. Bureau of Labor Statistics, *Industries at a Glance: Construction: NAICS 23* <http://www.bls.gov/iag/tgs/iag23.htm>, accessed 5/26/11

business size standards.²

Wu & Associates is not signatory to any union collective bargaining agreements for the work we self-perform. We are a merit shop contractor, meaning we have a history of hiring skilled tradesmen and we subcontract work to qualified and experienced open shop and union subcontractors. Our firm's success depends on the principles of free enterprise and attracting the most qualified and talented personnel and companies for a job, regardless of their labor affiliation. We have successfully performed millions of dollars worth of federal, state, local and private construction projects without the need to enter into a PLA.

My company's commitment to excellence in safety is reflected in our EMR workers' comp rate, which is consistently below industry average³, and our employees' participation in OSHA 10 and OSHA 30 safety training programs offered by various industry entities.

Wu & Associates' portfolio of clients includes the U.S. Army Corps of Engineers; U.S. Navy; U.S. Department of Interior; U.S. Department of Labor; federal, state and local governments; schools; historic agencies; and private corporations.⁴

In 2010, we performed just under \$12 million worth of construction projects as a general contractor and 96 percent of that work was for the federal and state governments.

The Impact of PLA Mandates in Federal Contracting

The contracting policies of the federal government influence the growth and success of small businesses like Wu & Associates, as well as the economic well being of our employees and their families.

Unfortunately, the federal government has been mandating anti-competitive and costly PLAs and instituting discriminatory PLA preferences on federal contracts as a result of President Obama's February 2009 Executive Order 13502 and related regulations. These new rules strongly encourage

² The U.S. Small Business Administration's small business size standard defines a general building and heavy construction contractors as a firm with annual revenue below \$33.5 million, <http://www.sba.gov/content/summary-size-standards-industry>, accessed 5/31/11. Wu & Associates is considered a small business by the SBA as we typically have annual revenues below this threshold.

³ EMR (Workers' Comp) Rates in NJ: 0.842 (2010), 0.842 (2009), 0.917 (2008). PA: 0.839 (2010), 0.843 (2009), 0.846 (2008). Our OSHA Recordable Incident Rate is 0 for years 2010, 2009 and 2008.

⁴ Please see attached "Project Snapshot" document and biography to learn more about Wu & Associates.

federal agencies to *mandate* PLAs on federal construction projects exceeding \$25 million in total cost.⁵

Although the order does not mandate PLAs on *every* federal construction project, the executive order was widely opposed and criticized by the contracting community as a handout to union special interests favored by this administration.

Executive Order 13502 has exposed federal procurement officials to intense political pressure from special interest groups, the Obama administration, agency political appointees and members of Congress to mandate PLAs on federal projects even when they are not appropriate.

It has resulted in increased contracting costs, red tape and delays in the procurement process.

PLA Mandates Discourage Competition, Increase Costs and Cater to Special Interests

As members of the subcommittee will hear from testimony, PLAs mandated by government entities have a reputation in the construction industry as anti-competitive schemes designed to give contractors signatory to specific construction trade unions promoting PLAs an unfair competitive advantage against merit shop competitors like myself.

PLAs also have the practical effect of creating jobs exclusively for unionized construction tradespeople by forcing union representation or compulsory union membership, inefficient and archaic union work rules, payment of union dues, forced contributions to union pension and benefit plans, and a host of other problems on merit shop employees that have freely decided not to join a union. It is needless discrimination based on labor affiliation and it hurts merit shop employees as much as it hurts their general contractor and subcontractor employers.

PLA mandates also curtail effective and tested business practices and construction techniques that help contractors deliver superior construction projects.

⁵ [President Obama's pro-PLA Executive Order 13502](#), *Use of Project Labor Agreements for Federal Construction Projects*, was issued Feb. 6, 2009, just a few weeks after he took office. The order immediately repealed President Bush's Executive Orders 13202 and 13208, which prohibited government-mandated PLAs on federal and federally assisted construction projects going back to 2001. The [Federal Acquisition Regulatory](#) (FAR) Council issued a [proposed rule](#) July 14, 2009 (FAR Case 2009-005, Use of Project Labor Agreements for Federal Construction Projects) implementing the Obama order. The contentious proposed rule was subject to two 30-day public [comment periods](#). The first comment period closed Aug. 14, 2009; it was [reopened on Aug. 24, 2009](#), and closed again on [Sept. 23, 2009](#). On April 13, 2010, the FAR Council issued a [final rule](#), effective May 13, 2010.

Injecting PLA mandates into the federal procurement process discourages competition from qualified contractors like my company and harms merit shop employees, who compose 87 percent of the U.S. construction workforce.⁶ Basic economic theory suggests that less competition from a pool of qualified bidders leads to increased costs to the government and taxpayers.

If members of this subcommittee think PLA mandates somehow advance the economy and efficiency in government contracting, let me share with you my unfortunate experience with a PLA mandated by the U.S. Army Corps of Engineers (USACE) on a project in Camden, New Jersey, that resulted in procurement delays, red tape and needless litigation costs.

Wu & Associates' Negative Experience with a Federal PLA Mandate

In July 2009, the USACE Louisville District issued a prequalification solicitation for general contractors interested in building an Armed Forces Reserve Center in Camden, New Jersey.⁷

Wu & Associates followed appropriate procurement procedures and the USACE prequalified our firm to bid on this project, meaning the USACE contracting officers certified we possess the experience and track record to act as a general contractor on this job, so they invited us to compete for this contract in Phase 2 of this solicitation under standard procurement procedures.⁸

However, the solicitation was cancelled in February 2010.⁹

On May 14, the day after the pro-PLA Executive Order 13502 regulations were implemented, the USACE issued a pre-solicitation¹⁰ indicating a new solicitation for the Camden, New Jersey, project would be re-issued June 1. But the procurement moved forward without a prequalification process and as a single phase best value procurement, meaning all of the hard work we put into complying with USACE's prequalification procedures in the initial solicitation was a waste.

⁶ See U.S. Department of Labor Bureau of Labor Statistics "[Union Members Summary](#)" (Jan. 2011), where 86.9 percent of the 2010 U.S. private construction workforce does not belong to a union.

⁷ Solicitation Number: W912QR-09-R-0076 issued on July 8, 2009. The pre-solicitation was issued on June 24, 2009.

⁸ Wu & Associates received a letter dated Nov. 23, 2009, inviting us to proceed to Step 2 of the solicitation, as we had passed the Step 1 prequalification.

⁹ Wu & Associates received a letter dated Feb. 23, 2010, notifying us that "the decision was made to cancel this solicitation as of 23 February 2010 due to a site relocation which would change the requirements for this project. Please continue to monitor Federal Business Opportunities website for this project to be re-advertised in the near future."

¹⁰ Solicitation Number: W912QR-10-R-0027, Y--Construction of an Armed Forces Reserve Center (AFRC), Camden, New Jersey, available on FBO.gov [here](#).

Once the new solicitation was issued June 1, Wu & Associates, along with many other prime and subcontractors, spent countless hours and resources preparing bids to be submitted by the July 1 deadline.¹¹

The submission deadline was again extended, and on July 1, the USACE issued an amendment mandating contractors to submit a PLA with their offer as a condition of being awarded the contract.¹² The PLA mandate was problematic for merit shop general contractors, subcontractors and their employees for a variety of reasons mentioned earlier in my testimony.

It was especially frustrating because the USACE had already acknowledged that Wu & Associates was capable of building a project of this size and scope in the earlier solicitation that had been cancelled, but now it was telling our firm that we were not qualified unless we agreed to a PLA. In addition, the “target ceiling” for the contract was stated as \$16.5 million; well below the \$25 million threshold established by President Obama’s discriminatory pro-PLA regulations.¹³

After weeks of wasted time and money, uncertainty and unsuccessful attempts by contractors and construction associations to convince USACE contracting officers to remove the PLA mandate, legal recourse was the only option. With the assistance of Mr. Baskin and ABC National, I filed a bid protest with the Government Accountability Office (GAO) against the USACE’s illegal and discriminatory PLA mandate on July 20.

In response to the GAO bid protest, the USACE extended the bid submission deadline a number of times¹⁴ and eventually removed the PLA mandate.¹⁵

However, the ordeal was not over. The USACE’s amendment contained language giving illegal and discriminatory preferences and an unfair, unclear bonus to contractors “voluntarily” submitting a PLA

¹¹ Amendment #1, issued June 22, 2010, extended the bid due date to July 8, 2010.

¹² Amendment #2, part D, issued July 1, 2010. It also extended the bid due date to July 28 2010.

¹³ Amendment #2, section 2.4, “2.4. The target ceiling for contract award is \$16,500,000 (excluding OMAR line items) based on funds made available for this project.”

¹⁴ Amendment #5, issued July 27, extended the solicitation deadline to Aug. 18. Amendment #6, issued Aug. 12, extended the solicitation deadline to Sept. 8.

¹⁵ The PLA mandate was removed via Amendment #7 issued Aug. 20, and replaced with PLA preference language.

offer.¹⁶

We did not pursue the contract further because we felt it was not worth the investment of additional company resources. It was a difficult decision, but we felt it would require too much investment from the company to prepare the bid and compete against contractors submitting PLA offers in this distorted playing field. It felt like the government was doing everything possible to steer this work to PLA offerors.

This entire exercise resulted in lost time and money that would have been better spent pursuing other work, buying new construction equipment, hiring more employees and contributing to the growth of the economy. It also resulted in needless procurement delays exceeding two months, as the USACE's bid submission deadline, originally scheduled for July 1, was extended a number of times to Sept. 8.

What is especially remarkable, and frankly proves that a PLA mandate is unnecessary, is that the contract was eventually awarded to a merit shop general contractor at a price of \$14.07 million (14.72 percent below the \$16.5 million estimate) without a PLA offer.¹⁷ The winning contractor would have been discouraged or eliminated from competing, if not for our efforts to fight the PLA mandate. In the absence of a PLA mandate, today that project is on time and on budget, and has not experienced any strikes, delays, shoddy workmanship or any of the other problems PLA mandates allegedly prevent according to Executive Order 13502 and the standard rhetoric PLA proponents offer to justify these schemes.

Concerns About Expansion of Executive Order 13502 to Federally Assisted Construction

Unfortunately, my story is not uncommon in today's local, state and federal construction marketplace because of the implementation of anti-competitive and costly government-mandated PLAs through political connections instead of sound public policy.

The contracting community is concerned this systematic PLA favoritism could get worse, as Section 7¹⁸

¹⁶ From the Aug. 20 Amendment #7, "Offerors submitting a price proposal subject to the PLA requirements in the solicitation shall receive the maximum consideration under the adjectival scale used for this factor. Offerors not submitting a price proposal subject to the PLA requirements in the solicitation shall be considered to meet the minimum requirements and shall receive an evaluation rating of acceptable for this factor."

¹⁷ Project award number W912QR-11-C-0002 for \$14,070,917, Nov. 5, 2009.

¹⁸ Section 7 of Executive Order 13502: "The Director of the OMB, in consultation with the Secretary of Labor and with other officials as appropriate, shall

of Executive Order 13502 hints at the expansion of the order to federally assisted construction projects. This would inject favoritism and waste into a much larger segment of the construction marketplace¹⁹ and possibly bust already strained state and local budgets. It is possible that private, local and state construction projects receiving just one dollar of federal assistance could be forced to consider or mandate a PLA or discriminatory PLA preference policy as a condition of receiving federal assistance.

As a taxpayer, it is outrageous that governments are wasting tax dollars and denying opportunities to quality businesses and their skilled workforces to cater to just 13.1 percent of the U.S. construction workforce.²⁰

Our company and other quality small businesses, general contractors, subcontractors and their skilled employees deserve a fair opportunity to provide the public with the best construction product at the best price.

Restore Fairness and Accountability in Government Contracting with H.R. 735

I ask that the members of this subcommittee support the Government Neutrality in Contracting Act (H.R. 735), introduced by Congressman John Sullivan (R-Okla.), which will prohibit the federal government once and for all from requiring contractors to execute a PLA as a condition of winning federal or federally assisted construction projects.

As was the case during the Bush era of government neutrality in federal contracting, H.R. 735 permits contractors to voluntarily enter into PLAs if they feel such an agreement can make their business competitive and deliver the best product to the government.

More importantly, this legislation will result in more construction jobs, more infrastructure projects, less red tape and an accountable federal government.

provide the President within 180 days of this order, recommendations about whether broader use of PLAs, with respect to both construction projects undertaken under Federal contracts and construction projects receiving Federal financial assistance, would help to promote the economical, efficient, and timely completion of such projects.” Note: To date, there has been no movement on this expansion issue.

¹⁹ In 2010, the federal government put in place \$30.8 billion worth of construction projects in contrast to \$275.493 billion in state and local construction and \$508.24 billion in private construction, according to <http://www.census.gov/const/C30/public.pdf>

²⁰ See U.S. Department of Labor Bureau of Labor Statistics “[Union Members Summary](#)” (Jan. 2011), where 13.1 percent of the 2010 U.S. construction workforce belongs to a union and 13.7 percent are represented by a construction union.

Wu & Associates applauds the Oversight and Government Reform Committee for its continued interest in the issue of government-mandated PLAs. Thank you for the opportunity to testify on behalf of small business and the merit shop contracting community.



Kirby Wu, AIA, LEED® AP President

A licensed architect in six states with over fifteen years of general contracting experience, Kirby Wu brings a unique blend of design and construction knowledge to the Wu & Associates design-build practice.

After graduating with honors from Carnegie Mellon University with a Bachelor of Arts degree in Architecture and Industrial Management, Mr. Wu worked as a Project Architect for prominent New Jersey design firm Kitchen & Associates in Collingswood. In 1996, Mr. Wu moved on to Wu & Associates and was promoted to Vice President after attaining a Master of Business Administration degree from Cornell University. In 2010, Mr. Wu became President of Wu & Associates.

Mr. Wu has managed complex projects for a wide portfolio of clients including the United States Navy; the Army Corps of Engineers; the Department of Interior; state and local governments; schools and universities; and private corporations. His breadth of award-winning experience has ranged from the LEED® design-build of a \$23 million military facility to the restoration of a world-famous historic resource.

Outside of Wu & Associates, Mr. Wu serves as a founding member and President of the New Jersey design firm Arch Design Architects. He is also the current Chairman of the Associated Builders & Contractors New Jersey chapter, after having served on the merit shop association's executive board for seven years.

Wu & Associates, Inc.

Incorporated in 1990, the company was built on the successful bidding of general contracting opportunities in the public sector. Founded by internationally educated licensed engineer Raymond Wu, the company acquired 8(a) certification through the U.S. Small Business Administration in the early 1990's and has since grown to become an industry-leading award-winning design-build practice.

The firm's impressive portfolio of clients includes the United States military; federal, state, and local government; schools; historic agencies; and private corporations. The company is bondable to \$50 million aggregate and specializes in design-build projects, LEED® sustainable design, and historic preservation.



Credentials

- President of design-build firm Wu & Associates
- Cornell University, Master of Business Administration
- Carnegie Mellon University, BA in Architecture & Industrial Management
- Licensed Architect in NJ, PA, DE, NY, MD, VA
- Member of American Institute of Architects
- U.S. Green Building Council LEED Accredited Professional
- President & Founder of Arch Design Architects

Client List

- U.S. Navy
- U.S. Army Corps of Engineers
- U.S. Department of Interior
- U.S. Department of Labor
- State Government
- Municipal Government
- Schools and Universities
- Private Corporations



Committee on Oversight and Government Reform
Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)(5)

Name:

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2008. Include the source and amount of each grant or contract.

N40085-10-D-9541 TO#02 Whole Center Repairs Ebensburg, PA

Source: NAVFAC MidAtlantic Amount: \$3,884,000

N40085-10-D-9541 TO#03 P952 Install HVAC System Avoca, PA

Source: NAVFAC MidAtlantic Amount: \$2,597,800

P11PD00341 Replace Underground Storage Tanks at Sandy Hook

Source: National Park Service Amount: \$268,700

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

Mr. Wu is testifying on behalf of Associated Builders and Contractors, Inc. (a 501 c (6) organization) as an association member.

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2008, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

Source: U.S. Department of Labor

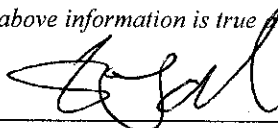
Amount: \$624,300.00

Grant Name: "Advancing Registered Apprenticeship into the 21st Century"

Date: August 12, 2009

I certify that the above information is true and correct.

Signature:



Date:

5-27-11
