



THE ROAD TO RESPONSIBLE CONTRACTING

**Lessons from States and Cities for Ensuring
That Federal Contracting Delivers Good Jobs
and Quality Services**

About NELP

For forty years, the National Employment Law Project (NELP) has worked to restore the promise of economic opportunity for working families across America. In partnership with grassroots and national allies, NELP promotes policies to create good jobs, enforce hard-won workplace rights, and help unemployed workers regain their economic footing.

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Acknowledgements

The authors would like to thank Meghana Reddy, Rachel Deutsch and Rachel Osterman for their invaluable research assistance; Phillis Payne for her expert advice and feedback; and the many public officials who gave generously of their time to share their experiences with state and local contracting policies. This report was made possible by the generous support of the Annie E. Casey Foundation, the Arca Foundation, the Ford Foundation, the Panta Rhea Foundation, the Public Welfare Foundation, and the Solidago Foundation. The views expressed in this report are solely those of the authors.

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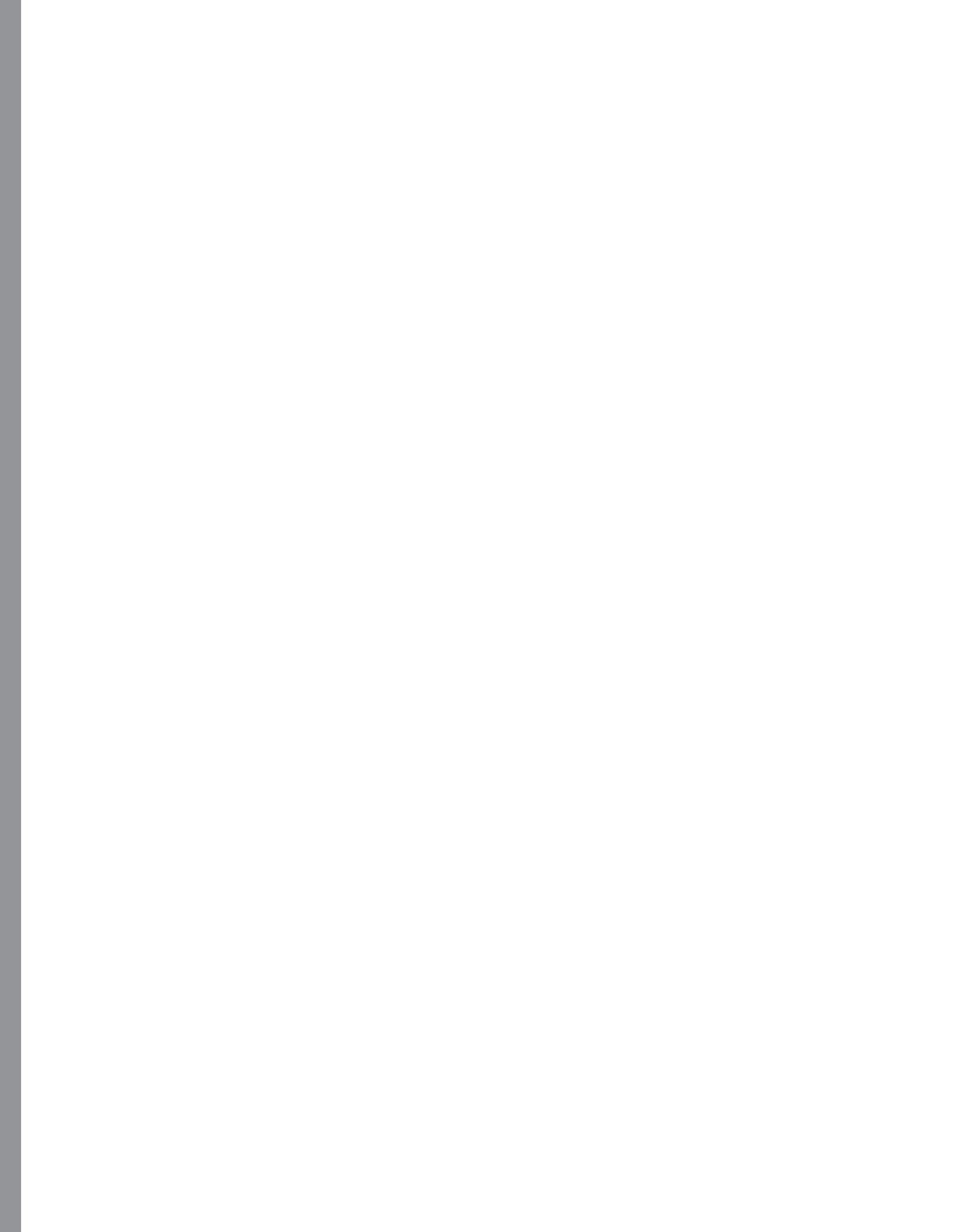
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The Road to Responsible Contracting: Lessons from States and Cities for Ensuring That Federal Contracting Delivers Good Jobs and Quality Services

By Paul K. Sonn and Tsedeye Gebreselassie

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Executive Summary

Contracting by federal government agencies to purchase goods and services totals more than \$500 billion annually and finances millions of jobs across our economy. Following years of concern about unaccountable federal contractors wasting taxpayer dollars, President Barack Obama has launched a badly needed initiative to modernize the federal procurement system. But as the federal government works to improve oversight and performance by federal contractors, an equally pressing problem needs attention as well: the fact that federal contracting is financing millions of poverty wage jobs across our economy, and supporting employers that are significant or repeat violators of workplace, tax and other laws.

These employment practices—in addition to hurting families and communities—undermine the quality of services that government agencies receive, and impose substantial costs on the taxpayers as contractors' employees turn to publicly funded safety net programs for support. Despite longstanding requirements that federal agencies contract only with "responsible" vendors, and growing awareness of the consequences of failing to do so, the past administration put the brakes on efforts to address this problem.

The Obama Administration's contracting reform initiative provides an important opportunity to reverse the role that federal procurement is playing in creating bad jobs, and use it instead to address one of the most pressing needs facing the nation: rebuilding a base of middle-class jobs across our economy.

The experiences of cities and states over the past decade with a range of "responsible contracting" policies offer a roadmap for how the administration can ensure that federal contracting promotes the creation of good jobs by prioritizing businesses that engage in responsible employment practices. This report surveys responsible contracting policies developed and tested by states and cities across the country, and recommends the following key reforms in the federal contracting system:

1. Institute **more rigorous responsibility screening** of prospective bidders to ensure that federal contracts are not awarded to employers that are **significant or repeat violators of workplace, tax or other laws**.
2. Establish a **preference for employers that provide good jobs** in the contractor selection process, prioritizing firms that provide **living wages, health benefits and paid sick days**.
3. Quickly bring on-line, expand and improve the newly authorized **national contractor misconduct database** mandated by the 2008 National Defense Authorization Act.
4. **Strengthen monitoring and enforcement** of contractors' compliance with existing and new workplace standards.

By incorporating these approaches into the federal contracting system, the government can ensure that contracting delivers the best value for the taxpayers by rewarding employers that invest in their workforces with quality jobs.

Background

Federal Contracting Is Creating Millions of Substandard Jobs

Wages Are Low, Benefits Are Minimal and Violations Are Common in Much of the Federally Contracted Workforce

The federally contracted workforce is large and has been growing rapidly. But while federal agency purchasing has become a key source of employment in communities across the country, the federally contracted workforce includes millions of substandard jobs with employers that pay poverty wages, provide meager benefits and violate workplace, tax and other laws.

The scale of federal contracting more than doubled during the Bush Administration, fueled both by the Iraq War and political opposition to growth in the federal workforce. That opposition often led to use of contractors for functions that could more accountably and efficiently be performed by federal employees. The government should therefore reevaluate the scale of past outsourcing and bring back “in house” many functions that today are performed by federal contractors.

By all indications, a substantial and increasing number of jobs with federal contractors are substandard, paying low wages and providing limited benefits.

However, even once a more appropriate balance between federal employment and outsourcing is restored, the federally contracted workforce will undoubtedly remain large. Federal contracting for goods and services today totals more than \$500 billion.¹ Because the government does not collect

data on federal contract workers, estimates of the number of workers employed by federal contractors vary widely. The Economic Policy Institute (EPI) has conservatively estimated that between 2000 and 2006, the number of federal contract workers increased from 1.4 million to 2 million, representing 43 percent of all employees who do work for the government.²

By all indications, a substantial and increasing number of jobs with federal contractors are substandard, paying low wages and providing limited benefits. According to the EPI analysis, nearly 20 percent of all federal contract workers in 2006 earned less than the federal poverty level of \$9.91 an hour. And fully 40 percent earned less than a living wage.³ Moreover, many of these workers do not receive employer-provided health benefits.⁴

Contributing to this problem is the fact that federal contracting in low-wage industries has grown significantly over the past eight years. For example, the Center for American Progress found that spending on federal contracts in four major low-wage industries—utilities and housekeeping, property maintenance and repair, clothing and apparel, and food preparation—nearly doubled between 2000 and 2007.⁵

Similarly, because the federal contracting system does not provide for rigorous responsibility screening of potential contractors, federal agencies continue to award contracts to firms that are significant or repeat violators of workplace, tax and other laws. As documented by the Center for American Progress, during the Bush Administration, firms that had repeated

violations of labor, employment and tax laws, and that had overbilled taxpayers for their work, were awarded new federal contracts despite long histories of noncompliance.⁶

Federal Contractors Providing Substandard Jobs Impose Significant Public Costs on Taxpayers and Undermine the Quality of Services Received by Government Agencies

Federal contractors providing poverty wages and limited benefits impose significant costs on taxpayers because their employees must rely on public safety net programs to make ends meet. Conversely, studies of government contracting show that employers that pay good wages and comply with workplace, tax and other laws frequently offer quality and reliability advantages over those that do not. But the contract pricing and evaluation process used by federal agencies currently ignores these costs and benefits, thus distorting the selection process.

Recent studies have documented the heavy burden on public safety net programs—and resulting costs for the taxpayers—caused by workers whose employers pay low wages and do not provide health care and other benefits. These studies measure the direct cost to taxpayers in Earned Income Tax Credit payments, health benefits under the Medicaid program, and other benefits and income supports when workers are paid poverty wages and do not receive employer-provided health benefits.

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For example, an analysis by the University of California found that \$10.1 billion of the \$21.2 billion that federal and state taxpayers spent in 2002 on public assistance programs in California went to families of low-wage workers.⁷ The \$10.1 billion included \$3.6 billion in Medicaid costs and \$2.7 billion for the Earned Income Tax Credit. The \$10.1 billion cost would have been reduced to \$3.2 billion if employees in those families had earned a wage of at least \$14.00 an hour and had received employer-provided health benefits.⁸ Similar analyses have demonstrated corresponding public costs attributable to low-wage employers in New York, Wisconsin and Illinois.⁹

The bulk of the costs to the taxpayers identified in these analyses are paid by the federal government through the Medicaid program and the federal Earned Income Tax Credit.¹⁰ These hidden public costs to the federal government partially offset the savings that low-wage contractors may appear to offer federal agencies. However, the contract pricing and evaluation systems currently used by federal agencies do not take into account these indirect costs.

Furthermore, a growing body of research demonstrates that in many industries, contractors that provide good wages and benefits and respect workplace laws deliver higher quality services for government agencies and the taxpayers. For example, as discussed in greater detail below, studies of local living wage policies have found that better paid workforces typically enjoy decreased employee turnover (with corresponding savings in re-staffing costs), increased productivity, and improvements in the quality and reliability of the services that they provide.¹¹ In a leading case study, the San Francisco airport saw annual turnover for security screeners plummet from 94.7 percent to 18.7 percent after it instituted a living wage policy. As a result,

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In construction contracting in particular, research has indicated that high road contractors that comply with workplace laws and provide quality training, wages and benefits typically have better skilled and more productive workforces that increase the quality of public construction work, with resulting savings for the taxpayers. As early as the 1980's, an audit by the U.S. Department of Housing and Urban Development

(HUD) of seventeen HUD sites found a "direct correlation between labor law violations and poor quality construction" on HUD projects, and found that the quality defects on these sites contributed to excessive maintenance costs. The HUD Inspector General concluded that "[T]his systematic cheating costs the public treasury hundreds of millions of dollars, reducing workers' earnings, and driving the honest contractor out of business or underground."¹³

More recently, a survey of New York City construction contractors by New York's Fiscal Policy Institute found that contractors with workplace law violations were more than five times as likely to have a low performance rating than contractors with no workplace law violations.¹⁴

Other studies have found that construction workers who receive higher wages and quality

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training are at least 20 percent more productive than less skilled and lower paid workers.¹⁵ Conversely, a study examining the impact of repealing prevailing wage laws in nine states found that the resulting drop in construction worker wages correlated with significant increases in cost overruns and delays on construction projects, and led to a workforce that was less skilled and less productive.¹⁶

Yet despite the recognized quality advantages and offsetting savings generated by better paid

workforces, the federal contracting system does not currently provide any systematic way to factor them in during the contract pricing and evaluation process. As a result, they remain largely ignored, skewing the selection process towards low road contractors.

The Federal Contracting System Does Not Do Enough to Promote Responsible Contractors That Offer the Best Value for the Government

The Federal Contracting System Is Intended to Promote Purchasing from Responsible Contractors That Offer the Best Value for the Government, But It Does Not Do So in Practice

The federal contracting system currently does little to factor into the contractor selection process the advantages for taxpayers and workers alike of employers that provide good jobs. However, authority to do so already exists under the federal procurement statutes, which in fact are intended to promote purchasing from responsible contractors that offer the best value for the government.

Federal contracting statutes and the Federal Acquisition Regulation (FAR) require that the government do business with “responsible” contractors.¹⁷ Only employers with “a satisfactory record of integrity and business ethics” (among other things)—a standard that should encompass an employer’s record of compliance with workplace, tax and other laws—may be deemed “responsible.”¹⁸ Contracting agencies have broad authority to take into account a range of other factors in defining responsibility.¹⁹ And for some categories of contracts, federal agencies are already authorized to use “prequalification”—a key responsible contracting approach that, as discussed below, allows agencies to limit competition to a list of approved bidders that have shown they meet certain basic eligibility criteria.²⁰

In practice, however, the government does a poor job of ensuring that it does business only with responsible firms. The government has never systematically collected information about prospective contractors’ compliance with workplace, tax and other laws. Only very general information about the firms that are awarded government contracts is available to the public and there has been no central government database with federal contractor responsibility information. Moreover, as the U.S. Government Accountability Office (GAO) found in 2005, federal agencies do not even have access to accurate listings of previously debarred or suspended contractors in order to ensure that they do not award new contracts to such firms.²¹ As a result, the government continues to award billions of dollars in contracts to firms with histories of fraud, workplace violations and criminal misconduct.²² A 2009 GAO study reported little improvement, finding that businesses that had been suspended or debarred for “egregious offenses ranging from national security violations to tax fraud [continued to] improperly receiv[e] federal contracts.”²³

Federal contracting statutes and the Federal Acquisition Regulation (FAR) require that the government do business with “responsible” contractors.

The National Defense Authorization Act of 2008, which mandates the creation of a federal contractor responsibility database by late 2009, represents an important first step toward addressing this problem.²⁴ The new database will require all contractors awarded federal contracts or grants over \$500,000 to disclose a wide range of past violations—including criminal convictions and findings of liability, as well as past suspensions, debarments, and non-responsibility determinations.²⁵

However, this new database will need significant improvements in order to provide federal agencies with all of the information they will need to institute more rigorous contractor responsibility review. First, the database should be expanded to include all violations of federal statutes, especially those relating to the workplace, and to include pending litigation and settlements. Second, the database should be made available to the public, so that taxpayers and stakeholders can scrutinize the compliance histories of firms receiving taxpayer funds and submit information about violations that contractors have erroneously failed to disclose. Third, the database should include information on the performance of contractors on federally-assisted state and local contracts, which the authorizing legislation instructs the government to do “to the maximum extent practicable.”²⁶ As the government taskforce that recommended the creation of the database noted in calling for state and local procurement data to be included, contractor fraud, law-breaking and non-responsibility are of equal concern for state and local governments, as “[m]obility permits fraudulent contractors and service providers to move between levels of government and across jurisdictions with little fear of detection.”²⁷

Beyond more effective responsibility screening, under the federal procurement system contractor selections are supposed to be based on an evaluation of which contractor would offer the “best value” for the government and the taxpayers.²⁸ Under this approach, agencies are instructed to balance bid price with other relevant cost and non-cost factors including business history, staff reliability and expertise, and cost considerations that may not be reflected in the bid.²⁹ In fact, a 1994 presidential executive order directs agencies to “place more emphasis on past contractor performance, and promote best value rather than simply low cost in selecting sources for supplies and services.”³⁰

As part of their best value assessment, agencies may consider quality and reliability factors, such as a bidder’s history of complying with workplace laws, or whether it provides wages and benefits sufficient to attract and retain a stable, qualified workforce. And agencies may similarly take into account the indirect and hidden costs that result from low wages when they assess best value.

Some agencies have begun to do this—for example, by including prospective contractors’ compliance with workplace and safety standards as evaluation factors³¹ or by recognizing that the provision of fringe benefits generally improves staff retention.³² However, such considerations have not been broadly or systematically included by agencies in the evaluation process. Nor have agencies established systems to facilitate efficient gathering and evaluation of such information by procurement staff. As a result, many agencies’ contracting decisions are still made chiefly based on price. And especially in labor intensive, low-wage industries, low price correlates closely with low wages and benefits.

Because the federal contracting process is meant to prioritize purchasing from responsible vendors that offer best value for the government and taxpayers, adopting new safeguards to promote these goals more effectively—especially for contracting in low-wage industries—does not require new statutory authority.

Existing Labor Standards Are Not Enough

While existing federal contracting rules include important labor standards, by themselves they are not enough to ensure that the advantages offered by contractors that provide quality jobs

are factored into the contractor selection process. The current system should be supplemented with responsible contracting reforms to ensure that high road employers receive priority in the federal contracting process.

The Davis-Bacon Act requires payment of prevailing wages and benefits to employees performing construction-related work on federally funded projects.³³ The Service Contract Act requires the same for federally contracted service workers such as janitors, security guards and cafeteria workers.³⁴ The purpose of these prevailing wage laws is to ensure that federally financed purchasing does not drive down wages and benefits in the private sector.³⁵ Accordingly, these laws require contractors on federally funded projects to provide wages and benefits that mirror those paid by other employers in their locality and industry, as determined by U.S. Department of Labor (DOL) wage surveys. As a result, the wages and benefits guaranteed under these prevailing wage laws vary widely. In industries that are largely low-wage and in regions of the country where there is little union presence, the prevailing wage can be barely above the minimum wage—for example, \$6.55 an hour for a laborer or carpenter in Orlando, Florida, or \$8.96 an hour for a laundry worker in Dallas, Texas.³⁶

Reforming DOL's methodology for determining construction industry prevailing wages—which was weakened substantially by the Reagan Administration in the early 1980's—can help ensure more adequate wages on federally funded construction projects.

Reforming DOL's methodology for determining construction industry prevailing wages—which was weakened substantially by the Reagan Administration in the early 1980's—can help ensure more adequate wages on federally funded construction projects. But even with such improvements, the prevailing wage laws are just one tool for promoting responsible employment practices on federally funded projects. Because prevailing wages mirror local industry standards, they will never consistently guarantee living wages and adequate benefits in all regions and occupations. Moreover, they do not address contractors' records of violating workplace, tax and other laws. They should therefore be supplemented with responsible contracting reforms to ensure that federal spending creates good jobs for communities and provides quality services for the taxpayers.

Past Initiatives to Promote Responsible Contracting Were Halted by the Bush Administration

The federal contracting system's failure to promote purchasing from responsible contractors has been recognized for many years. During the Clinton Administration, the Federal Acquisition Regulation Council explored options for more effectively promoting responsible employers in the federal contracting process. Regulations to begin that process by requiring more rigorous responsibility review were published in December 2000.³⁷ However, the Bush Administration halted those reforms when it took office in 2001, and took no action in the following years to address the problem. This retreat from reform together with the unprecedented growth in federal contracting during the Bush years has exacerbated the extent to which federal spending today supports low road employers that deliver poor value for the taxpayers and substandard jobs for their workforces.

Lessons from the States and Cities:

Responsible Contracting Reforms Deliver Good Jobs and Quality Services

As the Obama Administration undertakes reform of the federal contracting process to improve accountability and results, the experiences of states and cities with responsible contracting policies offer key lessons. Over the past decade or more, state and local governments have developed a range of new responsible contracting policies to promote public purchasing from

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employers that create quality jobs, minimize hidden public costs, and deliver more reliable services to the taxpayers. These successful experiences point the way for federal reform.

This section highlights some of the key responsible contracting strategies that cities and states are finding effective in reorienting their public contracting programs to promote high road employment practices and deliver better services for the taxpayers.

1. Responsibility Standards and Review

The most basic contracting reform that has been instituted by states and cities has been more rigorous responsibility review of prospective contractors to ensure that public contracts are not awarded to employers with records of significant or repeated violations of workplace, tax and other laws. Like the federal system, most state and local public contracting laws instruct government agencies to purchase only from responsible contractors. But until recently, most public bodies did not have systems for ensuring thorough review, nor did they examine in particular potential contractors' records of compliance with workplace, tax and other laws. The cities and states that have adopted more rigorous systems of responsibility review have found that they offer key advantages for the government, workers and contractors alike.

The move towards more rigorous responsibility screening has reflected a growing recognition that employers with poor compliance records are generally bad business risks that provide unreliable services and present hazards for both workers and taxpayers. Illustrative was the picture revealed by an investigation into the construction program of Florida's Miami-Dade County Public School District. Seventy-seven recently built schools in the county were found to have water leaks, and nearly forty had developed mold and mildew. In at least fourteen cases, county engineers determined that shoddy construction was directly at fault.³⁸ The district also had to pay more than \$7.8 million to finish abandoned projects even after contractors had been paid in full.³⁹ An audit found that a key practice contributing to these results was the district's failure to adequately evaluate contractors before they were retained, giving "more than \$228 million in repeat business to at least twenty-one contractors who had delayed jobs, turned in bad work, or failed to finish projects."⁴⁰

Key State and Local Responsible Contracting Strategies

Strategy	Description	Advantages for the Government and the Taxpayers	Advantages for Workers
Responsibility Standards and Review	<p>Screen out repeat violators of workplace, tax and other laws. Specifically:</p> <ul style="list-style-type: none"> • Make responsibility review the first step in the bidder evaluation process, where appropriate through a “prequalification” phase • Use a standardized responsibility questionnaire and quantified point system • Publish the names of firms seeking to bid or prequalify, in order to allow the public to report relevant information 	<p>Higher quality and more reliable services</p> <p>Increased competition among responsible contractors</p> <p>Reduced project delays and cost overruns</p> <p>Reduced monitoring, compliance and litigation costs</p> <p>Stronger incentives for compliance</p>	Better jobs
Living Wages	Favor contractors that pay living wages	<p>Reduced staff turnover and recruitment costs</p> <p>Higher quality and more reliable services</p> <p>A means of factoring the public costs of low wages into contractor selection</p>	Better wages
Health Benefits	Favor contractors that provide quality, affordable health benefits	<p>Reduced staff turnover and recruitment costs</p> <p>Higher quality and more reliable services</p> <p>A means of factoring the public costs of uninsured workers into contractor selection</p>	Quality, affordable health benefits
Paid Sick Days	Favor contractors that provide paid sick days	<p>Reduced staff turnover and recruitment costs</p> <p>Higher quality and more reliable services</p> <p>Savings from reduced workplace illness</p>	<p>Paid sick days</p> <p>Reduced risk of workplace illness</p>
Proper Employee Classification	Certification by contractors that all workers are properly classified and are covered by workers compensation and unemployment insurance	<p>Leveled playing field for all contractors</p> <p>Improved tax compliance resulting in increased state and federal revenue</p> <p>Savings from reducing the ranks of the uninsured</p>	Workers’ compensation and unemployment insurance coverage for injured and unemployed workers

Similar experiences can be found in jurisdictions across the country. As noted earlier, a past HUD audit found a direct correlation between workplace law violations and poor quality construction. And a survey in New York City found that contractors with workplace law violations were more than five times as likely to have a low performance rating than contractors with clean records of workplace law compliance.⁴¹

In response to these problems, state and local agencies have adopted more rigorous systems for assessing contractor responsibility and screening out firms with poor compliance records. The key components of these reforms have included:

- Making responsibility review the first step in the bidder evaluation process, not the last, often by establishing a preliminary “prequalification” phase
- Using a model questionnaire and quantified point system for weighing responsibility factors
- Requiring disclosure of firms seeking to bid or prequalify to bid, in order to allow the public to provide information relevant to their record of responsibility

In the past, many public agencies conducted responsibility reviews only as the last step in the contractor selection process after proposals had been submitted and evaluated and a presumptive finalist had been chosen. Conducting the review at the end is widely recognized as discouraging rigorous scrutiny. Often by that point the agency has decided that the finalist firm is the best candidate and accordingly is reluctant to deem it ineligible. Moreover, the finalist firm will frequently have invested substantial resources in preparing its bid, making it more likely to contest or litigate a finding that it is not responsible. These factors and the reality that a finding of non-responsibility at the end of the process can result in substantial delay all serve to discourage rigorous review.

Making the responsibility evaluation the first step in the process, rather than the last, removes these disincentives to thorough screening. The most common approach that states and cities have used to do this has been establishing a preliminary “prequalification” phase through which firms apply for eligibility to bid on contracts with a public agency. During prequalification, firms are evaluated to determine whether they meet the agency’s responsibility standards so that they may be placed on its approved bidders list. Typically, the names of firms applying for prequalification are published in order to allow the public the opportunity to provide relevant information for consideration during the prequalification process.

Responsibility review is generally based on a variety of factors—including the company’s record of legal compliance, financial stability, experience and references—that are weighed together in order to evaluate the candidate firm. The best responsible contracting systems use model questionnaires and publicly announced weighting formulas, developed with input from all relevant stakeholders, to put prospective bidders on notice of the process and provide a fair means of evaluating individual firms’ information.

One of the first states to adopt this type of responsible contracting reform was **California**, which in 1999 began promoting improved responsibility review and prequalification for public works projects contracted by state agencies.⁴² The California Department of Industrial Relations (DIR) has developed a model questionnaire that is used by many of the state’s agencies. The questionnaire inquires into applicant firms’ violations of laws and regulations,

history of suspensions and debarments, past contract performance, financial history and capitalization.⁴³ Although questionnaire responses and financial statements submitted by contractors are not open to public inspection, the names of contractors applying for prequalification are public records, allowing the public to supplement the process by providing relevant information that applicants may have failed to volunteer.

In addition to the questionnaire, California agencies electing to use prequalification are instructed to use a uniform and objective system for rating bidders, typically based on a composite numerical score derived from the candidate's answers on the questionnaire and its financial disclosure statements. The DIR provides agencies with a model scoring system, which evaluates potential bidders on a point system and recommends a "passing score."⁴⁴ For example, a passing score on a bidder's "compliance with occupational safety and health laws, workers' compensation and other labor legislation" is 38 points, out of a possible maximum score of 53 points. Participation in a state-approved apprenticeship program yields five points, while bidders that do not maintain apprenticeship programs receive zero points. A bidder with four or more Davis-Bacon violations receives zero points, one with three violations receives three points, and one with two or fewer violations receives five points.⁴⁵ Thus, the better a bidder's history of workplace law compliance, the better its prequalification score.

Enhanced contractor responsibility review using a quantified point system and prequalification has become an increasingly common best practice in recent years. In 2004, **Massachusetts** adopted a similar system (mandatory for public works projects over \$10 million, optional for those between \$100,000 and \$10 million) that requires firms to achieve a threshold prequalification score before they are eligible to bid on public works projects.⁴⁶ Points are allocated based upon an evaluation of the following prequalification criteria: management experience (50 points); references (30 points); and capacity to complete (20 points).⁴⁷ Management experience includes consideration of the firm's safety record, past legal proceedings, including compliance with workplace, tax and other laws, past terminations, and compliance with equal employment opportunity goals. To prequalify, contractors must satisfy certain mandatory requirements, and then receive a score of at least half of the available points in each category, and of at least 70 points overall.⁴⁸

Connecticut also adopted improved responsibility review and a prequalification system in 2004 for bidders on public works projects larger than \$500,000.⁴⁹ It evaluates prospective bidders based on their integrity, work history, experience, financial condition, and record of legal compliance.⁵⁰ The **Illinois** Department of Transportation uses a similar system to evaluate prospective bidders' capacity to perform public contracts based on a range of factors that includes past compliance with labor and equal employment opportunity laws.⁵¹ And the **Ohio** School Facilities Commission has adopted model responsibility criteria that local school boards are encouraged to use for school construction contracting. The policy includes required certifications by contractors that they meet certain minimum workplace standards and have not been penalized or debarred for minimum wage or prevailing wage law violations.⁵²

The same approach has increasingly been used at the municipal level. The city of **Oregon, Ohio**, for example, requires potential bidders to disclose past legal violations or litigation, especially concerning workplace laws, as part of prequalifying to bid on municipal public works projects.⁵³ **Los Angeles** adopted a comprehensive "responsible contractor policy" in 2000. Like the state policies discussed, it directs city agencies to review potential bidders' history of labor,

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—Russell Strazzella, City of Los Angeles

employment, environmental and workplace safety violations,⁵⁴ and uses a detailed questionnaire asking bidders to disclose and explain past and pending litigation, past contract suspensions, and outstanding judgments.⁵⁵ Full transparency is a key feature of the Los Angeles policy, which makes bidders’ responses to the questionnaire subject to public review.⁵⁶ This allows the public to assist the agency in its review process by providing relevant information that the applicants may not have volunteered. A catalog of responsible contractor and prequalification laws from across the nation is available from the National Alliance for Fair Contracting.⁵⁷

As Russell Strazzella, a chief construction inspector for the Los Angeles Bureau of Contract Administration explained, “[front end responsibility screening] is more effective and more beneficial to the public than a reactionary system. When you

get a bad contractor on the back end, they’ve already done the damage, and then it’s a costly process of kicking them out. On the other hand, if you have a very strong prequalification system that can be vigorously enforced and a uniform system of rating bidders that is published—so everyone knows where they stand before they compete—then you get a level playing field and a pool of good contractors.”⁵⁸

As a result of these reforms, the combination of improved responsibility screening and prequalification have come to be viewed in the public contracting field as a best practice and a key management strategy. As Daniel McMillan and Erich Luschei wrote recently in the *Construction Lawyer*, “Public owners in numerous states now view prequalification as a useful, if not essential, element to ensure successful completion of construction projects.

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—Daniel McMillan and Erich Luschei,
The Construction Lawyer

Public officials today often point to newly adopted prequalification programs to assure the public that problems encountered on prior projects will not be repeated, including problems of poor workmanship, delays, and cost overruns.”⁵⁹

In fact, many contractors prefer prequalification, and procurement professionals have found that it can improve competition by encouraging more qualified

bidders to submit proposals. According to Carol Isen, Director of Labor Relations for the San Francisco Public Utilities Commission’s Infrastructure Division, enacting a prequalification requirement for that agency was partly a response to concerns voiced by the construction industry. “In order to encourage bidders possessing the requisite experience to spend the resources necessary to prepare bids for a large public works construction project,” she explained, “it is paramount to eliminate the prospect of low bids from contractors whose qualifications to perform the work have not been examined by the owner.”⁶⁰

Recommendation for Federal Reform:

To ensure that the government does not contract with significant or repeat violators of workplace, tax and other key laws, the federal contracting system should **incorporate more rigorous responsibility review at the front end of the selection process and should encourage expanded use of prequalification where appropriate.**

2. Living Wages

Another major focus of local and state responsible contracting policies has been promoting public purchasing from firms that pay their employees a living wage. The recognition driving these policies is that high road employers that pay living wages not only create the types of good jobs that communities need, but also have more stable workforces that deliver better services for the taxpayers and minimize the hidden public costs of low wages. Studies of the effects of local living wage policies have confirmed these results, finding that higher wages have led to decreased employee turnover and increased productivity, improving the quality and reliability of contracted services.⁶¹

More than **140 cities** and one state, **Maryland**, have adopted living wage laws for their contracting programs over the past fifteen years.⁶² They generally mandate a wage floor above the state or federal minimum wage for businesses that receive contracts—and in some cases, economic development subsidies—from state or local governments.

Typically the wage floor is based on the hourly wage that a full-time worker would need to support her family at some multiple of the federal poverty guidelines. Representative of this approach is St. Louis, which defines its living wage as 130 percent of the federal poverty guidelines for a family of three,⁶³ translating to \$14.57 per hour as of 2009.⁶⁴

A central policy goal for cities and states in adopting living wage standards for procurement has been ensuring that taxpayer dollars create better quality jobs for communities. But governments have equally found that living wage benchmarks have improved the contracting process both by reducing the hidden public costs of the procurement system, and by shifting purchasing towards more reliable, high road contractors.

For example, when Maryland became the first state to enact a living wage law for service contractors in 2007, it did so in part to respond to the rising costs for taxpayers of low-wage jobs in the state and the distorting effect those costs were having on the state's procurement system. "Before the passage of the living wage law, we effectively had a policy of subsidizing low road employers. This distorted the state's contracting and budgeting processes," explained Maryland Delegate Tom Hucker, the measure's sponsor. "Now under the living wage system, contract bids and prices more accurately reflect the true price to taxpayers of the services being purchased."⁶⁵

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—Maryland Delegate Tom Hucker

In addition to reducing the hidden costs of low-wage employment, municipalities have found that shifting their purchasing to living wage contractors has often improved the quality and reliability of contracted services. A substantial body of research demonstrates that higher wages substantially reduce employee turnover, yielding a more stable workforce and reducing new employee recruitment and training costs.

For example, a University of California study using statewide data found that among workers earning less than \$11.00 an hour, a \$1.00 increase in wages is associated with a 7 percent decrease in turnover.⁶⁶ The effect of wage rates on turnover has also been demonstrated by a series of studies of living wage policies. The San Francisco airport found that annual turnover among security screeners plummeted from 94.7 percent to 18.7 percent when their hourly wage rose from \$6.45 to \$10.00 an hour under a living wage policy.⁶⁷ The reduced turnover saved employers about \$4,275 per employee per year in restaffing costs—a savings that offset a substantial portion of the higher wages.⁶⁸ Similarly, a study of home care workers in San Francisco found that turnover fell by 57 percent following implementation of a living wage policy.⁶⁹ And a study of the Los Angeles living wage law found that staff turnover rates at firms affected by the law averaged 17 percent lower than those at firms that were not,⁷⁰ and that the decrease in turnover offset 16 percent of the cost of the higher wages.⁷¹

Research on the effects of living wage policies has also found that they generally improve worker performance, productivity and morale. In a survey of San Francisco airport employers affected by the agency's living wage policy, 35 percent reported improvements in work performance, 47 percent reported better employee morale, 44 percent reported fewer disciplinary issues, and 45 percent reported that customer service had improved.⁷² In each case, only a very small percentage reported any worsening of these factors.⁷³ In Boston, firms affected by the city's living wage policy also reported improved morale and increased work effort among their employees.⁷⁴

Studies of living wage policies have generally shown only a modest impact on costs, if any. In Baltimore—which passed the first living wage ordinance in the country in 1994—researchers compared pre and post-living wage contracts and found that contract costs for the city rose just 1.2 percent, which was lower than the rate of inflation.⁷⁵ And a survey of 20 cities that had passed living wage ordinances found that in most municipalities, contract costs increased by less than one-tenth of 1 percent of the overall city operating budget.⁷⁶

Maryland found that the average number of bidders for state service contracts increased once its living wage policy took effect—from an average of 3.7 bidders to 4.7 bidders.

Finally, by increasing the ability of firms that pay their workers more than the minimum wage to compete for public service contracts, living wage laws can increase the competitiveness of the procurement process as a whole. In a 2008 assessment of Maryland's living wage law after its first year in operation, almost half of bidders interviewed reported

that the living wage requirement encouraged them to bid on state contracts because it meant that contractors that paid very low wages would not automatically be able to underbid them. Maryland found that the average number of bidders for state service contracts increased once its living wage policy took effect—from an average of 3.7 bidders to 4.7 bidders. As one current contractor explained, "I would rather our employees work with a good wage. If a living wage is not mandated, the bids are a race to the bottom. That's not the relationship that we want to have with our employees. [The living wage] puts all bidders on the same footing."⁷⁷

Recommendation for Federal Reform:

In order to take into account the quality advantages of contractors that pay living wages and the hidden public costs generated by those that do not, the federal contractor selection process should **establish a preference for employers that pay a living wage.**

3. Health Benefits

City and state responsible contracting reforms have also responded to the impact on their governments of employers that do not provide health benefits. Many have found that contractors that do not provide quality, affordable health benefits to their workforces impose a substantial burden on the public health care system, as their uninsured workers turn to emergency rooms and the Medicaid program for care. To address this problem, growing numbers of cities and states have reformed their contracting systems to ensure that these public costs are taken into account during the contract pricing and award process.

These reforms have taken a variety of approaches. **El Paso**, Texas gives contractors that provide their employees health benefits a preference in the contracting process by making provision of health benefits a positive evaluation factor—along with price, reputation, technical qualifications, and past performance—that is weighed by city agencies in making their contract award decisions. The health benefits that bidders provide are rated on a scale of 0 to 10, and the resulting score then represents 10 percent of the overall best value score for the bid. Price remains the most significant factor accounting for between 40 and 70 percent.

Former El Paso Mayor Raymond Caballero, who instituted the policy, reports that while the bids that the city receives from contractors that provide health benefits may tend to be a little higher, the net impact on the taxpayer is about the same because of offsetting public health care system savings.⁷⁸ As El Paso city representative Suzy Byrd explains, “[F]or [El Paso], with our high rate of uninsured, it costs much more money to have people not insured than it does to have people insured. It is a huge drain on our economy and on our tax base. It is important to factor those costs into the contracting process. Where an employer is providing health benefits and saving our health system money, those savings should be weighed when evaluating the bids. Our philosophy is that for these types of things we have to pay a little bit up front or a whole lot at the back end.”⁷⁹

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—Suzy Byrd, El Paso City Representative

Houston and **San Francisco** have used a related approach for addressing the indirect public costs of contractors’ health benefits practices. They require contractors to either provide health benefits to their employees, or pay into a fund to offset the cost of services for uninsured workers. San Francisco’s Health Care Accountability Ordinance (HCAO), which has been in effect since 2001, requires city service contractors to either provide health benefits at no

cost to covered employees or make payments of \$2.00 per employee per hour worked to the city Department of Public Health (DPH) in order to partially offset the costs of services for uninsured workers.⁸⁰ As of December 2008, the DPH had collected nearly \$2.5 million to offset such costs from contractors who did not provide health coverage.⁸¹

Similarly, under Houston's "Pay or Play" (POP) program, contractors must offer health benefits to covered employees ("play") or contribute \$1.00 per hour worked by these employees to offset the costs of providing health care to uninsured Houston residents ("pay"). A contractor that decides to "play" must contribute a minimum of \$150 toward the employee's monthly health benefits premium, and the employee cannot be required to pay more than half of the monthly cost.⁸² As explained in Houston Mayor Bill White's executive order and the city ordinance establishing the POP program, contractors that did not provide health insurance benefits were increasing the ranks of uninsured Houston residents and contributing to escalating costs facing public health care programs.⁸³ In response, the POP program aimed to level the playing field for responsible bidders that already provided health benefits to their employees.⁸⁴

Orlando requires bidders seeking construction contracts of \$100,000 or more to provide their workers with health benefits or increase hourly wages by 20 percent.⁸⁵ According to Orlando's public works director, this policy is especially important at times of high unemployment, when employers may be less likely to provide health benefits because the pool of prospective job seekers is large.⁸⁶

Other states and cities have created incentives for contractors to provide health benefits as part of living wage policies. **Maryland**, for example, under its state living wage law for service contractors, provides a credit towards the required living wage for the prorated hourly value of contractors' health benefits contributions.⁸⁷ As the law's sponsor, Maryland State Delegate Tom Hucker explained, "By factoring health care contributions into its living wage requirement, the Maryland law levels the playing field for contractors that provide health benefits and brings the costs of the uninsured into the open during the contracting process."⁸⁸

The Maryland law follows the approach used by many of the more than 140 cities that have enacted municipal living wage laws. These city ordinances typically require contractors that do not provide health benefits to pay their employees an additional hourly wage supplement to help them purchase health insurance. The supplement also ensures that contractors that provide benefits are not placed at a disadvantage.

Finally, other states and cities have gone further and simply mandated that all public contractors provide health benefits to their employees. **New Mexico**, for example, under a 2008 executive order, has instructed state agencies to include in bidding documents a requirement that prospective contractors provide health benefits to their New Mexico employees, and requires contractors to maintain a record of the number of employees who have accepted coverage.⁸⁹

Health benefits requirements have become especially common for public construction contracting—an area where the hidden public costs of contractors that do not provide health benefits are believed to be especially significant. Nearly **two dozen Massachusetts cities and towns** have adopted such health benefits requirements as conditions for prequalifying to bid on city construction projects.⁹⁰

Recommendation for Federal Reform:

The federal contractor selection process should **establish a preference for employers that provide quality, affordable health benefits.**

4. Paid Sick Days

Local governments have increasingly recognized that employers that provide their employees with paid sick days enjoy more stable and productive workforces. In response, they have begun to adopt new policies to encourage employers to do so—both within the public contracting process and more broadly.

When employers do not provide paid days off when staff members are ill, employees must choose between going to work sick or losing a day of pay—something many low-wage workers cannot afford. Many inevitably go to work sick, spreading illness to others and hurting productivity.

The first local sick days requirements were enacted as part of living wage laws, many of which require businesses performing city contracts to provide their employees a specified minimum number of paid sick days—often together with paid holidays and vacation days.⁹¹ More recently, cities such as San Francisco and Washington, D.C. have gone farther by requiring that most or all employers in those cities provide these protections.⁹²

As with other high road employment practices, evidence suggests that providing paid sick days helps employers retain a motivated and skilled workforce and reduces hidden public costs. Analyses have found that the modest costs of paid sick days are more than compensated for by the savings from increased productivity, reduced turnover, and reduced public health costs. For

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example, a report by the Institute of Women’s Policy Research estimating the likely costs and savings from the Health Families Act, a proposed federal paid sick leave law, projected a net savings of at least \$8 billion to employers and taxpayers as a result of reduced turnover, higher productivity and cost savings to the public health care system.⁹³ As Donna Levitt, manager of San Francisco’s Office of Labor Standards Enforcement explained, “We found that requiring city contractors to provide paid time off that employees may use when they are sick results in a healthier, more stable and more productive workforce.”⁹⁴

Recommendation for Federal Reform:

The federal contractor selection process should **establish a preference for employers that provide paid sick days to their employees.**

5. Proper Employee Classification

A significant workplace abuse that has become a special focus of state and local responsible contracting policies involves employers illegally “misclassifying” their workers as independent contractors—a problem that has become widespread in construction and low-wage industries. While the chief responses to this problem extend far beyond public contracting, protection against misclassification can and should be a part of responsible contracting reform, since misclassification can distort the public contracting process.⁹⁵

Under employment laws, workers in construction and low-wage industries seldom qualify as bona fide “independent contractors”—essentially, a form of entrepreneur who is in business for him or herself. Many employers nonetheless attempt to treat their workers as independent contractors in order to evade payroll, workers’ compensation, and unemployment insurance taxes, workplace law obligations, and provision of employer-provided health benefits. According to a 2000 study commissioned by the U.S. Department of Labor, as many as 30 percent of firms illegally misclassify their employees as independent contractors.⁹⁶

In addition to harming workers, independent contractor misclassification costs the government billions each year in lost tax revenue. For example, the Fiscal Policy Institute estimated that independent contractor misclassification in New York State results in an annual loss of \$500 million to \$1 billion in evaded workers’ compensation premiums.⁹⁷ In Illinois, estimates are that in 2005, the state lost \$53.7 million in unemployment insurance taxes, \$149 million to \$250 million in income taxes, and \$97.9 million in workers’ compensation premiums as a result of independent contractor misclassification.⁹⁸

Independent contractor misclassification has serious potential to distort the contracting process, since employers that engage in this misclassification enjoy a substantial—and illegal—cost advantage over law-abiding employers. To respond to this problem, many municipal level responsible contracting laws now require review of contractors’ records of worker classification, both during the performance of public contracts and in determining a firm’s eligibility to bid for such work. Representative of this approach are ordinances in **Worcester** and **Somerville**, Massachusetts, which require contractors to certify on a weekly basis that they are properly classifying their workers as employees and are complying with all workers, compensation and unemployment tax laws. Contractors that fail to comply face sanctions that include payment of liquidated damages and removal from the project until compliance is secured. Contractors with three or more violations are permanently barred from receiving municipal contracts.⁹⁹

By screening out employers that engage in misclassification, these responsible contracting policies strengthen incentives for complying with the law, minimize the loss of tax revenue as a result of misclassification, and prevent law abiding employers from being unfairly undercut in the bidding process.

Recommendation for Federal Reform:

Improved responsibility review for federal contractors should **require employers to certify that they have not misclassified employees as independent contractors and have paid employment taxes for all of their workers.**

Conclusion and Recommendations

These experiences of states and cities with a variety of responsible contracting strategies provide a roadmap for how federal procurement should be reformed. States and cities have found that rewarding employers that invest in their workforces with quality jobs not only benefits communities, but can also reduce hidden public costs and deliver more reliable contract services for the taxpayers.

Drawing on these best practices, **the federal government should adopt responsible contracting reforms** as it modernizes the federal contracting system. Specifically, the government should **make serious law-breakers ineligible** for federal contracts and **establish a preference for employers that provide good jobs**. To do this, the government should:

1. Institute **more rigorous responsibility screening** of prospective bidders to ensure that federal contracts are not awarded to employers that are **significant or repeat violators of workplace, tax or other laws**. This enhanced screening should incorporate:
 - **Front end review** of prospective bidders before bids are evaluated—the approach that has been found more reliable than review conducted later in the selection process. Where appropriate, such front end review should take the form of **prequalification**, which states and cities have found to be especially effective and is preferred by many responsible contractors.
 - **Disclosure of names** of companies undergoing responsibility review in order to allow the public the opportunity to provide relevant information about firms' compliance records.
 - Review of prospective bidders' records of **misclassifying employees as independent contractors**—a widespread abuse that hurts workers and constitutes a form of tax evasion.
2. Establish a **preference for employers that provide good jobs** in the contractor selection process. A preference provides a way to factor into contractor selection the benefits these employers afford not just workers, but also the taxpayers through reduced **hidden public costs** and **performance improvements** associated with high road employment practices. Specifically, preference should be given in the contractor selection process to employers that:
 - Pay a **living wage** to their employees.
 - Provide **quality, affordable health benefits** to their employees and their families.
 - Provide **paid sick days** to their employees.

3. Quickly bring on-line the newly authorized **national contractor misconduct database** mandated by the 2008 National Defense Authorization Act, and continue improving it to make it a more powerful tool for responsible contracting. Specifically, the administration should:
 - **Expand the database** to include **all violations** of federal statutes, especially those relating to the workplace, and to include **pending litigation and settlements**.
 - **Expand the database** to cover contractor misconduct reported by **state and local agencies**, including misconduct on **federally assisted contracts and grants**.
 - **Make the database transparent** by allowing access by the public.

4. **Strengthen monitoring and enforcement** of contractors' compliance with existing and new workplace standards through:
 - **Expanded hiring and training** of contracting officers and staff within the U.S. Department of Labor's Wage and Hour Division and Office of Federal Contract Compliance Programs.
 - **Reporting** of contractor and subcontractor **wages and benefits**.
 - **Targeted enforcement** focusing on industries and regions known for pervasive violations of prevailing wage and other laws.
 - **Improved monitoring** of existing contracts.
 - Greater use of the **suspension and debarment** process to screen out unqualified contractors.

The vast majority of these reforms would require **no new legislation**. They can and should be implemented under the federal procurement system's mandate that agencies purchase from responsible contractors that offer the best value for the government.

By drawing on these best practices that have proven effective in states and cities, the federal government can deliver improved accountability and results for the taxpayers, while promoting the quality jobs that our communities need.

Endnotes

- 1 Federal contract spending in fiscal year 2008 totaled nearly \$518 billion. See <http://www.usaspending.gov>.
- 2 Kathryn Edwards and Kai Filion, *Outsourcing Poverty: Federal contracting pushes down wages and benefits* (Washington D.C.: Economic Policy Institute, Feb. 2009), p. 1, available at http://epi.3cdn.net/10d36747ba0e683ef9_hwm6bxwnl.pdf.
- 3 Analysis by the Economic Policy Institute (on file with the National Employment Law Project). The EPI analysis defines a living wage using the U.S. Department of Labor's Lower Living Standard Income Level (LLSIL) for a family of four.
- 4 Edwards and Filion, p. 3.
- 5 David Madland and Michael Paarlberg, *Making Contracting Work for the United States: Government Spending Must Lead to Good Jobs* (Washington D.C.: Center for American Progress, Dec. 2008), p. 4, available at http://www.americanprogressaction.org/issues/2008/pdf/contracting_reform.pdf.
- 6 *Id.*, p. 20.
- 7 Carol Zabin, Arindrajit Dube and Ken Jacobs, *The Hidden Public Costs of Low-Wage Jobs in California* (Berkeley, CA: University of California Institute for Labor and Employment, Nov. 2004), p. 13, available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1037&context=ile>.
- 8 *Id.*, p. 32.
- 9 Annette Bernhardt, Anmol Chaddha and Siobhán McGrath, *When Work Doesn't Pay: The Public Cost of Low-Wage Jobs in New York State* (New York, NY: National Employment Law Project, Dec. 2008), p. 18, available at <http://www.nelp.org/page/-/EJP/PublicCostReport08.pdf?nocdn=1>; Laura Dresser, *When Work Doesn't Pay: The Hidden Costs of Low-Wage Jobs in Wisconsin* (Madison, WI: Center on Wisconsin Strategy, Dec. 2006), available at <http://www.cows.org/pdf/rp-low-wage-jobs.pdf>; Nik Theodore and Marc Doussard, *The Hidden Public Cost of Low-Wage Work in Illinois* (Chicago, IL: Center for Urban Economic Development at the University of Illinois, Sept. 2006), available at <http://www.uic.edu/cuppa/uicued/Publications/RECENT/HiddenPublicCostMain.pdf>.
- 10 For Medicaid, federal taxpayers pay between 50 and 77 percent of the cost, depending on the state. In the coming years, the federal government's share of Medicaid costs will be even greater, as it has been temporarily increased during the recession to provide budget relief to the states. See Henry J. Kaiser Commission, *Medicaid's Federal-State Partnership: Alternatives for Improving Financial Integrity* (Feb. 2004), available at <http://www.kff.org/medicaid/upload/Medicaid-s-Federal-State-Partnership-Alternatives-for-Improving-Financial-Integrity.pdf>; Henry J. Kaiser Commission, *American Recovery and Reinvestment Act (ARRA): Medicaid and Health Care Provisions* (March 2009), available at <http://www.kff.org/medicaid/upload/7872.pdf>.
- 11 See *infra* p. 14.
- 12 Michael Reich, Peter Hall, and Ken Jacobs, *Living Wages and Economic Performance: The San Francisco Airport Model* (Berkeley, CA: Institute of Industrial Relations at the University of California, Berkeley, 2003), pp. 10, 58, 60, available at http://www.irle.berkeley.edu/research/livingwage/sfo_mar03.pdf.
- 13 The HUD Inspector General found that "Poor workmanship quality, in our opinion, results from the use of inexperienced or unskilled workers and shortcut construction methods... Poor quality work led to excessive maintenance costs and increased risk of defaults and foreclosures..." U.S. Department of Housing and Urban Development, Office of Inspector General, *Audit Report on Monitoring and Enforcing Labor Standards* (1983) (on file with the National Employment Law Project), cited in Dale Belman and Paula Voos, *Prevailing Wage Laws in Construction: The Costs of Repeal to Wisconsin* (Madison, WI: University of Wisconsin, Jan. 1996), p. 5, available at <http://www.faircontracting.org/NAFCnewsite/prevailingwage/Prevailing%20Wage%20Studies/PrevailingWage%20Laws%20in%20Construction,%20Cost%20of%20Repeal%20to%20Wisconsin.pdf>.
- 14 Moshe Adler, *Prequalification of Contractors: The Importance of Responsible Contracting on Public Works Projects* (New York, NY: Fiscal Policy Institute, May 2003), p. 5, available at <http://www.columbia.edu/~ma820/prequalification.doc>.
- 15 "The Economic Development Benefits of Prevailing Wage" (New York, NY: Fiscal Policy Institute, May 2006), p. 2 (citing studies), available at http://www.faircontracting.org/pdf/FPIbrief_May06.pdf. See also Harley Shaiken, *The High Road to a Competitive Economy: A Labor Law Strategy* (Washington D.C.: Center for American Progress, June 2004), pp. 7-8 (surveying earlier research finding that unionization, by decreasing turnover and increasing wages, increases productivity), available at <http://www.americanprogress.org/kf/unionpaper.pdf>.
- 16 Peter Philips, Garth Mangum, Norm Waitzman, and Anne Yeagle, *Losing Ground: Lessons from the Repeal of Nine "Little Davis-Bacon" Acts* (Salt Lake City, UT: University of Utah Economics Department, Feb. 1995), p. iii, available at <http://www.faircontracting.org/NAFCnewsite/prevailingwage/new/losingground.pdf>. The study also found that injuries increased by 15 percent, wages fell by 22 percent, and construction training fell by 40 percent where state prevailing wage laws were repealed.
- 17 41 U.S.C. § 403(7); 48 C.F.R. § 9.103.
- 18 41 U.S.C. § 403(7); 48 C.F.R. § 9.104-1.
- 19 *Id.*
- 20 48 C.F.R. § 236.272.
- 21 U.S. Government Accountability Office, *Federal Procurement: Additional Data Reporting Could Improve the Suspension and Debarment Process*, GAO-05-479 (July 2005), available at <http://www.gao.gov/new.items/d05479.pdf>.
- 22 Madland and Paarlberg, p. 20.
- 23 U.S. Government Accountability Office, *Excluded Parties List System: Suspended and Debarred Businesses and Individuals Improperly Receive Federal Funds*, GAO-09-174 (Feb. 2009), available at <http://www.gao.gov/new.items/d09174.pdf>.
- 24 Pub. L. 110-417 § 872, 112 Stat. 4356 (2008); Project on Government Oversight, *Myths about a Federal Contractor Responsibility Database*, Oct. 15, 2008, <http://pogoarchives.org/m/co/fcmd/database-myths.pdf>.
- 25 Pub. L. 110-417 § 872(c), 112 Stat. 4356 (2008).
- 26 Pub. L. 110-417 § 872(c)(7), 112 Stat. 4356 (2008) (providing that the "[t]o the maximum extent practical, [the database should include] information similar to [the information required of federal contractors] in connection with the award or performance of a contract or grant with a State government").
- 27 National Procurement Taskforce Legislation Committee, *Procurement Fraud: Legislative and Regulatory Reform Proposals* (June 9, 2008), p. 19, available at <http://pogoarchives.org/m/co/npftflc-white-paper-20080609.pdf>.
- 28 For example, under the competitive negotiated acquisition procurement approach, agencies are instructed that "[t]he objective of source selection is to select the proposal that represents the best value." See 48 C.F.R. § 15.302.
- 29 48 C.F.R. § 15.304; 41 U.S.C. § 253b.
- 30 Exec. Order No. 12,931, 59 Fed. Reg. 52387 (1994).
- 31 See, e.g. *Matter of Morgan-Keller, Inc.*, B-298076.2, 2006 WL 2136651 (Comp. Gen. Aug. 1, 2006).

- 32 For example, in *Matter of Comprehensive Health Services, Inc.*, B-285048.3, 2001 CPD P 9 (Comp. Gen. Jan. 22, 2001), the Department of Veterans Affairs, seeking bidders to provide employee health services, issued a request for proposal (RFP) where past performance and technical factors combined were worth significantly more than price in the award decision. A protest was filed by an unsuccessful bidder whose price was lower than the successful bidder. The Comptroller General noted that the protestor's bid provided for reduced fringe benefits, which would increase the risk of losing current employees. In denying the protest, the Comptroller General found that the agency's decision to prioritize retention of qualified staff over price was reasonable.
- 33 40 U.S.C. § 276a.
- 34 41 U.S.C. § 351(a). A third federal prevailing wage law, the Walsh-Healey Public Contracts Act, provides for payment of prevailing wages to workers employed under federal contracts for the purchase of certain goods. 41 U.S.C. § 35(a). However, since 1963 when the federal court in *Wirtz v. Baldor Electric Co.*, 337 F.2d 518 (D.C. Cir. 1963) established procedural requirements that blocked U.S. Department of Labor wage determinations under Walsh-Healey, the agency has been unable to implement the act, leaving these workers without meaningful prevailing wage protection.
- 35 As Solicitor of Labor Charles Donahue testified, "There is the possibility also that under the pressure of bid competition an ordinarily fair contractor may reduce the wages of employees in order to improve the chances that his bid will be accepted. This action, of course, would further depress wage rates. When, as at present, a low bid award policy on service contracts is coupled with a policy of no labor standards protection, the trend may well be in certain areas for wage rates to spiral downward." *Service Contract Act of 1965: Hearing on H.R. 10238 Before the Special Subcomm. on Labor of the H. Comm. on Education and Labor*, 89th Cong. 1st Sess. 5 (1965).
- 36 U.S. Department of Labor Wage Determinations, available at <http://www.wdol.gov>.
- 37 65 Fed. Reg. 50,256 (2000).
- 38 Marcos Feldman, *Best Value in Publicly Funded Projects: Contractor Selection in Two County GOB Projects* (Miami, FL: Research Institute on Social and Economic Policy at Florida International University, Aug. 2006), p. 6, available at http://risep.artforstruggle.org/wp-content/uploads/2009/04/best_value_in_publicly_funded_projects.pdf, citing Debbie Cenziper, *Water Leaks Plague Schools*, Miami Herald, Apr. 13, 2003.
- 39 *Id.*, citing Charles Savage, *State Audit Shreds Dade Schools*, Miami Herald, June 29, 2002.
- 40 *Id.*, quoting Debbie Cenziper, *Water Leaks Plague Schools*, MIAMI HERALD, Apr. 13, 2003. See also William O. Monroe, *Operational Audit of Capital Construction Activities For Miami-Dade County District School Board, July 1, 2000 through Apr. 30, 2002*, Report No. 03-026 (State of Florida Auditor General, Sept. 2002), available at http://www.myflorida.com/audgen/pages/pdf_files/03-026.pdf. The audit recommended that MDCPS "enhance its contractor prequalification procedures to ensure that appropriate consideration is given to past performance of contractors."
- 41 See *infra* p. 4.
- 42 Cal. Pub. Cont. Code §20101.
- 43 California Department of Industrial Relations, *Prequalification of Contractors Seeking to Bid on Public Works Projects: The 1999 State Legislation and the Model Forms Created by the Department of Industrial Relations*, http://www.dir.ca.gov/od_pub/prequal/PubWksPreQualModel.doc.
- 44 *Id.*
- 45 This scoring formula applies for bidders with gross revenues less than \$50 million. For those with gross revenues above \$50 million, a bidder with up to four Davis-Bacon violations may still receive five points.
- 46 Mass. Gen. Laws ch. 149 § 44D 1/2; 810 Mass. Code Regs. § 9.00 et seq.
- 47 810 Mass. Code Regs. § 9.05(4) (listing prequalification criteria and subfactors); "Massachusetts Application for Prime General Contractor Certificate of Eligibility" (asking prequalification candidates to disclose whether, within the past five years, they have been involved in litigation relating to "a violation of any state or federal law regulating hours of labor, unemployment compensation, minimum wages, prevailing wages, overtime pay, equal pay, child labor or workers' compensation"), http://www.mass.gov/Eoaf/docs/dcam/dlforms/certification/prime_general_contractor_application_1_20_09.doc.
- 48 *Id.*; 810 Mass. Code Regs. § 9.08(9).
- 49 Conn. Gen. Stat. Ann. §§ 4a-100(c)(5), (f).
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- 79 Interview with El Paso City Representative Suzy Byrd (on file with the National Employment Law Project).
- 80 San Francisco, Cal. Admin Code ch. 12Q, available at <http://www.municode.com/content/4201/14131/HTML/ch012q.html>. In 2007, San Francisco enacted a related ordinance that effectively broadened this policy beyond city contractors to apply to all larger employers in the city. See San Francisco, Cal. Admin Code ch. 14, available at <http://www.municode.com/content/4201/14131/HTML/ch014.html>.
- 81 Analysis by the City of San Francisco Office of Labor Standards Enforcement (on file with the National Employment Law Project).
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- 83 *Id.*
- 84 *Id.* (providing that “contractors who do not provide health insurance benefits for their workforce impose a burden on... individuals and businesses whose health insurance premiums increase because of shifting costs onto those payers.”) See also Houston Affirmative Action and Contract Compliance Division, Pay or Play Program, Annual Report Fiscal Year 2008 (on file with the National Employment Law Project); Interview with Elena Marks, Director of Health and Environmental Policy for the City of Houston (on file with the National Employment Law Project).
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