Testimony of:

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U.S. House Committee on Small Business Hearing:

"Burdensome Regulations: Examining the Effects of DOL Rulemaking on America's Job Creators"

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Chairman Williams, Ranking Member Velazquez and Members of the U.S. House Committee on Small Business:

Thank you for the invitation to testify this morning on the impact the U.S. Department of Labor's rulemaking is having on job creators across the country and the concerns that recent federal regulations have raised during my small business journey.

My name is Mario Burgos, and until July of this year, I was the president and CEO of Burgos Group, headquartered in New Mexico. This is a company I founded in 2006 and grew along with my brother as a small business federal contractor, primarily focused on general and electrical construction. In July, we made the decision to sell our company to Prairie Band LLC, a company that was founded in 2010 to contribute to the long-term economic stability of the Prairie Band Potawatomi Nation located in the state of Kansas.

I now serve as the chief strategy officer of Prairie Band LLC.

To understand why we chose to exit the business that we labored to build for over 15 years, I think it is important to share more background. In 2009, at the height of the Great Recession, our family business pivoted to focus on federal construction opportunities made possible under the American Recovery and Reinvestment Act, signed into law by President Barack Obama. Burgos Group became a vehicle for realizing the American dream of two brothers who are first-generation Americans—our father emigrated from Ecuador.

Under the Obama and Trump administrations, our company grew from two to 195 employees with a track record of completing more than 100 sustainability, renovation and modernization projects for 13 different federal agencies from coast to coast. Our growth landed us on the Inc. 5,000 Fastest-Growing Private Companies list six years in a row—something achieved by only 3% of the companies on that list. We were recognized in 2015 as the Small Business Administration's Region VI Contractor of the Year and, in 2017, I was honored to be the SBA Small Business Person of the Year for New Mexico.

Unfortunately, the number of rapidly changing and ever-increasing federal and state regulatory requirements affecting the construction industry led us to conclude that the most prudent action would be to exit the business. The recent DOL updates to regulations implementing the Davis-Bacon and Related Acts is just the latest example of additional burdens and barriers erected, which make it more difficult for small businesses to participate in the economic investments of the bipartisan Infrastructure Investment and Jobs Act or to support our nation's defense missions.

To that latter point, Secretary of Defense Lloyd J. Austin III noted in the U.S. Department of Defense Small Business Strategy released in January of this year:

"[Small Businesses] account for over ninety nine percent of all employer firms and generate over forty-four percent of our Nation's economic activity." He went on to say, "Contracting, participation of small business in the defense industrial base has declined by over forty percent in the past decade. Small businesses comprise more than seventy percent of the companies that do business with the Department. If the Department does not work to reverse the decline of small business contracting, then the industrial base that equips our military will weaken."

When I first learned that the DOL was going to do a comprehensive regulatory review and revise regulations to promote compliance, provide appropriate and updated guidance and enhance their usefulness in the modern economy, I was cautiously optimistic. This was particularly since President Joe Biden's Day One Executive Order 13985 had directed agencies to work to make contracting opportunities more readily available to all eligible firms and to remove barriers faced by underserved individuals and communities.

What the DOL has done with its updates to regulations issued under the DBA is the direct opposite of what I had hoped.

Based on personal experience with the DOL, there were two critical areas that I had hoped these revisions would address that would make it easier for small, disadvantaged businesses to successfully participate as federal contractors:

1. Reduction of administrative and paperwork burden; and
2. Elimination of the subjective nature of DBA compliance.

The DOL acknowledged the first of these very real concerns were shared by others in the following statement: "Finally, some commenters [including the SBA Office of Advocacy] raised concerns about the administrative or paperwork burdens contractors might face while adjusting to, and under, the Department's final rule. The Department considered such concerns in its economic analyses and concluded that the paperwork burdens associated with the rule are limited and are outweighed by the benefits of the regulation."

The DOL provided a theoretical example of their approach to analysis which determined, "On a per firm basis, direct employer costs are estimated to be $224.73 in Year 1. These costs are somewhat higher than the costs presented in the NPRM because the Department increased the time for regulatory familiarization in response to comments."

According to the rulemaking's regulatory familiarization cost estimate, "The Department assumed that on average, 4 hours of a human resources staff member's time [at $49.94 per hour] will be spent reviewing the rulemaking. This was increased from 1 hour in the NPRM per comments."

The DOL's assumption that it costs every business roughly $225 for only one person to read and familiarize itself with the new 800-plus page final rule is shockingly out of touch. The rule is nearly 250,000 words, which would take almost 18 hours for the average American reader, at 238 words per minute, to finish. In addition, the new rule is likely to require many small businesses to hire costly labor lawyers, at significantly more than $50 an hour, to review and provide compliance recommendations. Likewise, the rulemaking doesn't account for the time it takes small businesses to understand and operationalize the new rule.

Of note, the regulation is just as time-consuming and onerous for larger contractors, as the rule doesn't estimate costs to familiarize and operationalize changes companywide, which requires HR, payroll, estimators, managers and forepersons to understand the changes as well. It is clear that the DOL regulators are vastly underestimating the regulatory costs of this new rulemaking.

Unfortunately, the DOL has also failed to alleviate existing burdens caused by the Davis-Bacon Act. I would like to provide a very real example of the true cost of the administrative and paperwork burden of compliance as well as the subjective nature of compliance.

On Dec. 22, 2020, Burgos Group received a letter from the DOL notifying us that we had been "scheduled for a compliance review to determine compliance with the provisions of the Fair Labor Standards Act (FLSA) of 1938, as amended, the Davis Bacon Act, and other related Federal labor laws for work that your company performed as a subcontractor to Southwest Valley Constructors Co under Contract No. W912PL19C0015: 'Tucson Sector Barrier Wall Replacement Project' let by Department of Defense, Department of Army."

In future conversations, the DOL informed us that this compliance review was not the result of a complaint filed by an employee but was a "directed audit of all border wall contractors and subcontractors."

We were requested to provide a list of documents to support this compliance review and upload the documents on or before Jan. 8, 2021, giving us a short amount of time to comply with the request. A team, including myself, our COO, our vice president of operations, our controller, our staff accountant and our office manager spent the holidays organizing and uploading the over 800 pages of supporting documentation required to comply with the DOL's request for "15 items" needed for their review.

This compliance review would not conclude until we settled with the DOL in April 2022. We had many interesting conversations with the DOL during this period of time. For example, they congratulated us on being a good contractor and providing the documents they requested in a timely and organized manner, which made it easy for them to review as opposed to doing a data dump.

They asked interesting questions such as, "When you decided to pay all laborers the higher Laborer: Pipelayer wage of $20 per hour instead of the lower wage of $15.65 for Laborer: Common or General did you contact any union to get their input or direction?" I was puzzled by this question since I was not aware of any DBA requirements that mandate contacting the unions for the direction when complying with the DBA.

It was not until July 9, 2021, that we had a call with the DOL in which they informed us that we had misclassified 84 employees as laborers (pipelayers) who should have been paid as electricians because IBEW Local Union 570 claimed the work, even though we had already provided them a link to the Arizona Laborers' Agreement on the DOL website.

This agreement was annotated as "covering all highway, heavy, industrial, building and residential work within the State of Arizona." On page 17 of the document, it stated, "Pipe Layer including, but not limited to water pipe, sewer pipe, drain pipe, and underground tile pipe and conduit."

We were laying conduit, and we paid all laborers a wage rate of $20 per hour. This matched the DBA wage determination rate provided by the government for the project.

The DOL explained that the electrical union had prevailed over the laborers' union, so it was the DOL's calculation that we had made an underpayment of $685,914.28 in wages. When I asked them to provide written notice of when the IBEW prevailed since we were not notified by USACE or the general contractor of this being the case, the DOL told me they could not provide that information, but I should call the IBEW. They also told me that the responsibility to call the union before doing the work is covered under the Fry Brothers decision. They suggested that I Google that decision from the 1970s.

On Sept. 1, 2021, we were required to consent to the DOL request that until we had resolved the matter by agreement—or determined that it cannot be resolved by agreement—the government may as if in trust hold back from payments due but not yet paid by the federal government on the project in an amount from those payments that will equal the amount in dispute: $685,914.28.

By Dec. 9, 2021, the DOL had requested more information, conducted further analysis and determined that our company now owed more funds and asked us to "agree to front the amount of $990,351.80 until an agreement or ruling is reached." Part of the DOL rationale for noncompliance with the DBA was that they had analyzed our subcontract language with the prime contractor and noted that it included switchgear, transformers, light poles and pulling wire. It was their determination that the language of the contract spelled out electrical work, but their analysis showed that, while 30% of our employees in the field were paid electrical wages, 70% were paid other wages (i.e., laborer, equipment operator, etc.)

When I pointed out during this discussion that the presidential proclamation suspending our contract was issued on Jan. 20, 2021, and we accepted the switchgear, transformers, etc., for storage in April 2021, the DOL agreed to reconsider their calculations.

Ultimately, on April 1, 2022, we agreed, without any admission of fault or wrongdoing, to pay $328,807.10 determined to be owed by the DOL. We agreed to settle for two reasons:

1. This would allow us to collect the larger amount being withheld by the DOL since September.
2. This would allow us to go back to focusing on operating our business and stop paying significant and mounting legal fees.

I do not believe that anyone at the DOL acted maliciously. Quite to the contrary, I believe that the subjective nature of the existing regulations created ambiguity, which puts a presumption of guilt on businesses and makes the enforcement and compliant responsibilities of DOL personnel more difficult.

Unfortunately, the DOL's new 800-plus page rule has made no effort to provide clarity to the regulated community related to the Fry Brothers problem, all concerning the adoption of union work rules when the union wage rate prevails. The DOL needs to publish union collective bargaining agreements publicly, or not apply this standard. Small businesses are hurt with cloak and dagger regulations.

My experience shows how difficult it can be to comply with DBA regulations when the correct wage determination is not easily determined.

The revisions of the DBA, which will go into effect Oct. 23, 2023, further compound this problem.

In my example, the DOL withheld an amount of money due that far exceeded a final settled amount just to agree to continue to have discussions. The new DOL regulations allow cross-withholding on multiple contracts, which could have devastating effects on small business prime contractors and their small business subcontractors. If the prime is not paid, they will not have the money to pay their subcontractors.

Even holding a prime general contractor liable for all their subcontractors is a significant additional barrier for the entry of new small businesses into the federal marketplace. If a prime contractor is going to be held liable for their subcontractors, they are unlikely to give an opportunity to small businesses new to federal government contracting—the risk is too great.

Moreover, the approach the DOL relies on for determining wage rates does not consider the realities of how America's small businesses operate, particularly the startups in minority communities that are job creators of tomorrow. According to the U.S. Bureau of Labor and Statistics, only 25% of new businesses make it to 15 years or more. Take it from a small business owner who made it to 17 years, we struggled day in and day out to beat the odds.

Small businesses do not have free time to complete voluntary wage surveys that the DOL's Wage and Hour Division uses to help them calculate the so-called prevailing wage. For decades, the DOL Office of Inspector General and Government Accountability Office have pointed to flaws in the DOL's wage determination process, yet the DOL's final rule does little to fix this problem. In fact, the new rule makes it worse by rescinding pro-taxpayer and commonsense policies that were enacted more than 40 years ago because they were not reliably producing a timely or local prevailing wage, as required by statute.

It is my sincere hope that this committee will consider this testimony and take actions that will remove barriers and simplify compliance for America's small businesses. Thank you again for the opportunity to serve as a witness for this hearing and I look forward to answering any questions you may have.