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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10
11 AMERICAN SMALL BUSINESS LEAGUE

12 Plaintiff,

13 v.

14
15 Martha N. Johnson, in Her Capacity as
Administrator of the General Services
16 Administration, and The General Services
Administration

17 Defendants.
18

CASE NO.C 10-00986 WHA

**Notice of Motion for Preliminary
Injunction; Memorandum of Points and
Authorities in Support of Motion for
Preliminary Injunction**

Time: 8:00 A.M.

Date: May 13, 2010

Department: Court Room 9

Hon. William Alsup

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20 **NOTICE OF MOTION**

21 To Defendants and their Attorney of Record: Please take notice that on May 13, 2010, in
22 Court Room 9 of the United States District Court for the Northern District of California,
23 Plaintiff American Small Business League will move this court for an order for a Preliminary
24 Injunction requiring that the General Services Administration restore to the Federal Procurement
25 Data System the fields identifying small business status (formerly "isSmallBuisness") and
26 contractor name (formerly "ContracterName") and all data associated with those fields.
27
28

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1 This motion is based upon this Notice, the attached Memorandum of Points and
2 Authorities, The First Amended Complaint on file in this action, The Declaration of Christopher
3 Gunn in Support of Motion for Preliminary Injunction, and such other evidence as may be
4 presented prior to the hearing.

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6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7
8 **I. Introduction**

9 The American Small Business League (“ASBL”) brings this action to data removed by
10 the General Services Administration from the Federal Procurement Data System--Next
11 Generation. The Federal Procurement Data System – Next Generation (FPDS-NG) is the Federal
12 Government’s electronic repository of federal contracting data. All Federal agencies are
13 required to report contract actions to FPDS-NG as a means of monitoring and maintaining
14 historical data on the Federal Government’s purchasing practices. The FPDS-NG is accessible
15 on the internet and provides the general public, Congress, watchdog groups and even federal
16 agencies with the ability to police the Government’s purchasing practices and the achievement
17 of its Congressionally mandated small business goals.

18 The General Services Administration (GSA) made significant changes in the FPDS-NG
19 on March 12, 2010. The GSA removed the small business identifying field (formerly titled
20 “isSmallBusiness”) entirely. It also eliminated the “ContractorName” field which formerly
21 identified the recipient of a federal contract award by name and has been used in the past to
22 identify instances where contracts set aside for small businesses were awarded to large Fortune
23 500 corporations. This action is brought to restore transparency in government contracting
24 practices by compelling the GSA to reverse the changes it made in the FPDS and permit
25 continued public access to the information it deleted from the FDDS-NG database.

26 **II. Statement of Facts**

27 Plaintiff and moving party American Small Business League (ASBL) is a national
28 organization established to research and focus public attention on emerging small business

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1 issues and to otherwise promote the interests of small businesses. Defendant U.S. General
 2 Services Administration (hereinafter “GSA”) is an agency of the United States government.
 3 Defendant Martha N. Johnson is sue herein solely in her Capacity as Administrator of the
 4 General Services Administration. The GSA maintains and operates the Federal Procurement
 5 Data System – Next Generation (FPDS-NG).

6 The FPDS-NG is the federal government’s electronic repository of federal contracting
 7 data. Its creation was mandated by Congress as part of Federal Procurement Policy Act of 1974
 8 at 41 U.S.C. § (d)(4)(a). All federal agencies are required to report contract actions to FPDS-
 9 NG as a means of monitoring and maintaining historical data on the federal government’s
 10 purchasing practices and monitoring compliance with federal laws concerning such practices.
 11 Agencies are required to report all contracts whose estimated value is \$3,000 or more, and every
 12 subsequent modification to such contracts, regardless of dollar value, through the FPDS-NG
 13 database. *See*, FPDS.gov.

14 In addition to the FPDS-NG, The Federal Procurement Policy Act of 1974 also created
 15 the Office of Federal Procurement Policy. The Office of Federal Procurement Policy is
 16 authorized and directed, pursuant to the authority conferred 41 U.S.C. 401 *et seq.* to promulgate
 17 a single, simplified, uniform Federal procurement regulation and to establish procedures for
 18 insuring compliance with such provisions by all Federal agencies. “In formulating such
 19 regulations and procedures the Administrator of the Office of Federal Procurement Policy shall,
 20 in consultation with the Small Business Administration, conduct analyses of the impact on small
 21 business concerns resulting from revised procurement regulations, and incorporate into revised
 22 procurement regulations simplified bidding, contract performance, and contract administration
 23 procedures for small business concerns”. 41 U.S.C. § 405)(a)

24 To assist the Office of Federal Procurement Policy, the Federal Procurement Policy Act
 25 also authorized the creation of the Federal Acquisition Regulatory Council, consisting of the
 26 Administrator of the Office of Federal Procurement Policy, the Secretary of Defense, the
 27 Administrator of General Services, and the Administrator, National Aeronautics and Space
 28

1 Administration. 41 U.S.C. § 421. The Council is responsible for promulgating the Federal
2 Acquisition Regulation:

3 Subject to the provisions of section 405 of this title, the
4 General Services Administration, the Department of Defense, and the
5 National Aeronautics and Space Administration, pursuant to their
6 respective authorities under title III of the Federal Property and
7 Administrative Services Act of 1949 (41 U.S.C. 251, et seq.),
8 chapters 4 and 137 of title 10, and the National Aeronautics and
9 Space Act of 1958 (42 U.S.C. 2451, et seq.), shall jointly issue
10 and maintain in accordance with subsection (f) of this section a
11 single Government-wide procurement regulation, to be known as the
12 "Federal Acquisition Regulation". 41 U.S.C. §421(c)(1)

13 The Federal Acquisition Regulation (FAR) is the principal set of rules in the Federal
14 Acquisition Regulation System. The FAR is codified in Title 48 of the United States Code of
15 Federal Regulations pursuant to the Office of Federal Procurement Policy Act of 1974 .The FAR
16 and its agency supplements thus have "the force and effect of law," see *Davies Precision*
17 *Machining, Inc. v. U.S.*, 35 Fed. Cl. 651 (1995). Nearly all government agencies are required to
18 comply with the FAR.

19 FAR recognizes and identifies the legislative purpose of the Federal Procurement Data
20 System at 48 CFR (1)(A)(4.602):

21 (a) The FPDS provides a comprehensive mechanism for assembling,
22 organizing, and presenting contract placement data for the Federal Government.
23 Federal agencies will now report data directly to the Federal Procurement Data
24 System Next Generation (FPDS-NG), which collects, processes, and disseminates
25 official statistical data on Federal contracting. The data provides (1) A basis for
26 recurring and special reports to the President, the Congress, the General
27 Accounting Office, Federal executive agencies, *and the general public*; (2) A
28 means of measuring and assessing the impact of Federal contracting on the
Nation's economy and *the extent to which small, veteran-owned small, service-*
disabled veteran-owned small, HUBZone small, small disadvantaged, and women-
owned small business concerns are sharing in Federal contracts; and (3)
Information for other policy and management control purposes, *and for public*
access.

Id., italics added

1 FAR also sets forth the basic policy underlying the creation and purpose of the FPDS:

2 (a) In accordance with the Federal Funding Accountability and Transparency Act
3 of 2006 (Pub. L. No. 109-282), *all Federal award data must be publicly*
4 *accessible.*

5 (b) Except as provided in 4.606(a)(2), executive agencies shall use FPDS to
6 maintain publicly available information about all contract actions exceeding the
7 micro-purchase threshold, and any modifications to those actions that change
8 previously reported contract action report data, regardless of dollar value.

9 48 C.F.R. 4.603

10 The FPDS-NG is thus intended to be used by the general public, government agencies
11 and watchdog groups like plaintiff ASBL to review and provide oversight over the federal
12 government's purchasing of goods and services, and specifically, to monitor the extent in which
13 small, veteran, and minority owned businesses are sharing in Federal contracts.

14 Prior to March 12, 2010, the information fields available in the FPDS-NG served that
15 function by providing the general public with the ability to police the government's purchasing
16 practices and the achievement of its congressionally- mandated small business participation
17 goals. Specifically, the data allowed independent audits of government purchases as a means of
18 identifying large businesses masquerading as small businesses in the federal government's
19 contracting programs. In fact, it served as the only means by which compliance with the
20 mandatory small business set aside regulations could be policed.

21 The additional changes which have been made to the FPDS-NG, labeled Version 1.4 and
22 implemented on March 12, 2010 resulted in the removal of the "small business" identifying field
23 (formerly labeled, "isSmallBusiness") Version 1.4 also eliminated the field "ContractorName"
24 which formerly identified the recipient of the contract award and has frequently been used to
25 identify instances where small business contracts were awarded to Fortune 100 Corporations. A
26 true and correct copy of the pertinent portions of the *XSD Specification Changes for Version 1.4*
27 setting forth the deletion of the small business and contractor name fields, and the Detailed
28 Release Notes identifying the implementation date of March 12, 2010, were attached as Exhibit
A to the Declaration of Christopher Gunn in Support of the Application for a TRO in this matter
filed on March 8, 2010 (Docket Document No. 8)

1 As a result of the changes made in the FPDS on March 12, 2010, the public has been
 2 stripped of the tools used to identify contractor fraud and misallocation of contracts which are by
 3 law earmarked for small businesses. The ASBL has, since that date, been unable to monitor or
 4 audit federal contract awards. See, Declaration of Chris Gunn in Support of Motion for
 5 Preliminary Injunction, para. 15. Moreover, federal agencies, watchdog groups, the general
 6 public and even Congress has been denied access to this formerly easily available information,
 7 information which is required to be made available to the public pursuant to the above cited
 8 authorities. Transparency in government contracting procedures can only be preserved with the
 9 intervention of this court.

10 III. Legal Discussion

11 A. *The Standard for Granting a Preliminary Injunction*

12 In the Ninth Circuit, when a party is seeking a preliminary injunction, he or she must
 13 show either (1) a combination of probable success on the merits and the possibility of irreparable
 14 injury, or (2) that serious questions are raised and the balance of hardships tips in favor of the
 15 moving party. These standards "are not separate tests but the outer reaches of a single
 16 continuum. " *Iconix, Inc. v. Tokuda*, 457 F. Supp. 2d 969, 975 (N. D. Cal. 2006), quoting
 17 *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839-40 (9th Cir. 2001)
 18 (citation omitted). "These two formulations represent two points on a sliding scale in which the
 19 required degree of irreparable harm increases as the probability of success decreases." *Id.*
 20 "Under the sliding scale theory, a party seeking an injunction `need not demonstrate that he will
 21 succeed on the merits, but must show that his cause presents serious questions of law worthy of
 22 litigation. " *Iconix, Inc.*, at 975, quoting *Topanga Press, Inc. v. City of LA*, 989 F.2d 1524, 1528
 23 (9th Cir. 1993). Serious questions are "substantial, difficult, and doubtful, as to make them fair
 24 ground for litigation and thus for more deliberative investigation." *Id.* Application of these
 25 principles to the present facts establishes that injunctive relief is necessary and appropriate in
 26 light of Plaintiffs' probable success on the merits and the obvious irreparable injury if relief is
 27 not granted, thereby tipping the balance of hardships strongly in Plaintiffs' favor.

1 B. *The General Public and ASBL Will Suffer Irreparable Harm if Access to the Data is Denied*

2 The removal of the contractor identity and small business identifier fields represents a
3 major move towards decreased transparency in federal contracting data. The GSA
4 implementation of Version 1.4 destroyed, or at the very least, eliminated access to ten years of
5 historical data which heretofore provided the public and watchdog groups with the ability to
6 identify those instances in which large firms misrepresented themselves as a small businesses to
7 obtain government contracts. In addition, the removal of the “SmallBusinessFlag” serves to
8 obscure the actual recipients of federal small business contracts and will also create a barrier in
9 the identification of large businesses receiving Federal small business contracts. As stated
10 above, one of the legislatively mandated purposes of the FDPS-NG is to provide a means of
11 measuring and assessing *the extent to which small, veteran-owned small, service-disabled*
12 *veteran-owned small, HUBZone small, small disadvantaged, and women-owned small business*
13 *concerns are sharing in Federal contracts.* 48 CFR 4.602. This is a function which cannot be
14 performed after the small business identifying fields have been stripped from the data base. The
15 ASBL and other public interest groups are currently unable to monitor the allotment of small
16 business set aside contracts to lawful recipients pursuant to the mandates of the Small Business
17 Act.

18 C. *ASBL Will Prevail on the Merits*

19 As stated above, pursuant to regulations promulgated by the Federal Procurement Policy
20 Act, “*all Federal award data must be publicly accessible.*” 48 C.F.R 4.603. The database
21 deletions made by the GSA—without any opportunity for public comment eliminated significant
22 quantities of Federal award data from public access and is in clear violation of Federal Law.

23
24 The FAR provides at 48 C.F.R. 1.501 :

25 “Significant revisions,” as used in this subpart, means revisions that alter the
26 substantive meaning of any coverage in the FAR System having a significant cost
27 or administrative impact on contractors or offerors, *or significant effect beyond*
28 *the internal operating procedures of the issuing agency.* This expression, for
example, does not include editorial, stylistic, or other revisions that have no
impact on the basic meaning of the coverage being revised.

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(a) Views of agencies and nongovernmental parties or organizations will be considered in formulating acquisition policies and procedures.

(b) The opportunity to submit written comments on proposed significant revisions shall be provided by placing a notice in the *Federal Register*. Each of these notices shall include—

(1) The text of the revision or, if it is impracticable to publish the full text, a summary of the proposal;

(2) The address and telephone number of the individual from whom copies of the revision, in full text, can be requested and to whom comments thereon should be addressed; and

(3) When 1.501-3(b) is applicable, a statement that the revision is effective on a temporary basis pending completion of the public comment period.

(c) A minimum of 30 days and, normally, at least 60 days will be given for the receipt of comments.

48 CFR 1.501-1; 1.501-2

ASBL’s search of the Office of Federal Procurement Policy website has found no announcement of a proposed rule change since 2004, and on information and belief there was no announcement and invitation for public comment regarding the deletion of the small business data from the FPDS-NG server by the GSA on March 12, 2010.

The FAR also provides at 48 CFR 1.202. “Agency compliance with the FAR is the responsibility of the Secretary of Defense (for the military departments and defense agencies), the Administrator of General Services (for civilian agencies other than NASA), and the Administrator of NASA (for NASA activities). The Administrator of the GSA has failed to comply with the clear mandates of the FAR by unilaterally wiping from a public database information which the public is entitled to access. There is no doubt that ASBL will prevail on the merits of this litigation.

D. The Balance of the Equities Favors Injunctive Relief

Given the clear statements of public policy mandating full disclosure of government contracting data, there is simply no reason or possible justification for destroying, or significantly limiting access to data identifying the recipients of federal contracts or for decreasing transparency required for future contract oversight. As a result of GSA’s unilateral

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1 implementation of FDPS-NG 1.4 on March 12, 2010, ASBL’s efforts to oversee compliance
2 with the set aside requirements in the Small Business Act have been sharply curtailed due to
3 lack of access to the data required. In addition, the general public, other watchdog organizations
4 and even federal agencies have lost access to this important data. The result is completely
5 inconsistent with the oft-stated goals of transparency and open government.

6 There is no reason imaginable why the GSA or any other entity will be harmed by the
7 issuance of a temporary restraining order until such time as the issues presented here can be fully
8 resolved on the merits.

9 E. *An Injunction Serves the Public Interest*

10 The removal of small business and contractor identify data will make it significantly
11 more difficult, if not impossible for the general public, watchdog groups and Congress to
12 identify large businesses competing in the small business federal contracting space. It will
13 shield the identity and size of the recipients of government contracts from the general public and
14 expand the opportunity for fraud by large corporations seeking to unlawfully obtain contracts
15 which by law are required to be set aside for small- businesses, and /or minority, woman, and
16 veteran owned firms.

17 IV. Conclusion

18 Based on the foregoing, ASBL respectfully requests that this Court:

19 A. Issue preliminary injunction, ordering that the defendants restore the
20 “isSmallBusiness” and “ContractorName” identifier fields and all associated data to the
21 current version of the FPDS-NG database; and

22 B. Grant such other relief as the Court may deem just and proper.

23
24
25 Dated: March 30, 2010

GUTIERREZ & ASSOCIATES

26
27 By: _____/s/_____
ROBERT E. BELSHAW
Attorneys for Plaintiff ASBL