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CONTRACTING AND THE INDUSTRIAL BASE II: BUNDLING, GOALING AND THE OFFICE OF HEARINGS AND APPEALS

HEARING

BEFORE THE

SUBCOMMITTEE ON CONTRACTING AND WORKFORCE

OF THE

COMMITTEE ON SMALL BUSINESS
UNITED STATES
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

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CONTRACTING AND THE INDUSTRIAL BASE II: BUNDLING, GOALING AND THE OFFICE OF HEARINGS AND APPEALS

TUESDAY, MARCH 17, 2015

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
SUBCOMMITTEE ON CONTRACTING AND WORKFORCE,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 2360, Rayburn House Office Building. Hon. Richard Hanna [chairman of the subcommittee] presiding.

Present: Representatives Hanna, Knight, Curbelo, Hardy, Velázquez, Chu, Meng, and Lawrence.

Chairman HANNA. Good morning, everyone. I call this hearing to order. Happy St. Patrick's Day.

This is our first Subcommittee on Contracting and Workforce of the 114th Congress. I am happy to welcome Ranking Member Nydia Velázquez. I am sure we are going to do important work together in the next couple of years.

As Chairman Chabot stated in his hearing of February 12, 2015, having a healthy small business and industrial base means that taxpayers benefit from increased competition, innovation, and job creation. However, the testimony received by the Committee last month indicates that our small business technological and industrial base is at risk. With the percentage of prime contracting dollars awarded to small businesses is increasing, the number of small businesses seeking contracts with the Federal Government has fallen by over 100,000 since 2012. In the past four years, the number of contract actions with small businesses has fallen by 60 percent, and at the Department of Defense, the number of contract actions fell by almost 70 percent. The size and average of individual small contract actions increased by 230 percent during that same period and nearly 290 percent at the DoD. The percentage of subcontracted work going to small businesses has also fallen by nearly 2.5 percent. All of this data indicates that small businesses are at risk; yet the Small Business Administration gave the Federal Government—and this is a mystery—an A on its latest small business procurement scorecard.

Today, we will examine how the government can be receiving a superlative grade when half of the dollar-base goals are not met, bundling and consolidation are increasing, small business subcontracting is decreasing, and size standards are being manipulated.

Today's witnesses are going to address specific recommendations to improve the competitive viability of our small business contractors. This is the second of a series of hearings we will be having on this topic—we will be back here in a couple of days, on Thursday. I expect that as a result of the testimony received today, the Subcommittee will actively pursue ways to increase opportunities for small businesses to compete for contracts.

I look forward to working with each of you and hearing your testimony. I now yield to Ranking Member Velázquez.

Ms. VELAZQUEZ. Thank you, Mr. Chairman, for holding this valuable hearing.

As this committee seeks ways to foster small business growth and expansion, we must always carefully consider what is being done to maximize entrepreneurs' participation in the federal marketplace. As we all know, when small companies are awarded federal contracts, the result is a win-win. Small businesses provide quality goods and services at affordable prices, meaning a better deal for the government and the taxpayer. At the same time, it can mean significant growth opportunity for small businesses and even the need to hire new employees. With these benefits in mind, Congress, and this committee in particular, have long worked to ensure small businesses receive their fair share of federal contracts.

There has been some progress in this regard. In Fiscal Year 2013, the federal government finally met its statutory goal of providing 23 percent of federal contracting dollars to small enterprises. For Fiscal Year 2014, it appears as much as 25 percent of federal contracting dollars may flow to small companies.

While this represents an improvement over previous years when these goals were not met, much work remains. For example, there continue to be reports of ineligible businesses receiving small business contracting dollars. Additionally, the scorecards issued by the Small Business Administration have been questioned as agencies continue to receive high grades despite failing to meet all of their small business goals.

With budgets, time, and spending reduced due to the ill-advised policy of sequestration, there are simply fewer procurement actions to go around. This means it is more important than ever that agencies are doing everything possible to ensure legitimate small companies can tap into suitable federal business opportunities.

One longstanding barrier to small business participation in the federal marketplace has been the practice of contract bundling. When federal agencies group smaller procurement actions together, they reduce competition by making projects too large for small companies to bid on. Publicly available data suggests that for every $100 worth of federal work that is bundled, small firms lose $33 in revenue.

Unfortunately, this practice is widespread. In Fiscal Year 2013, it was estimated that over $107 billion was awarded through consolidated or bundled contracts. That means small companies missed out on $35 billion worth of contracting opportunity.

Considering the prevalence of this problem, it is vital we ensure the SBA is doing everything possible to prevent unnecessary bundling. This raises a number of important oversight questions for the committee, including whether the SBA has sufficient staff to

monitor contracting actions and whether the agency is aggressive enough in challenging bundled contracts. Given how few contracts have been unbundled, the answer to both these questions would appear to be no.

Today's hearing will also touch on the jurisdiction of the SBA's Office of Hearing and Appeals. This office has been integral to ensuring only legitimate firms receive small business contracts. However, the office, like many other parts of the agency, remains understaffed, and it is unclear how this will affect their caseload.

Mr. Chairman, with overall government expenditures declining, the pool of contracts for small businesses to bid on will only further shrink in coming years. Given this phenomenon, it is all the more critical that this committee and the SBA work to remove barriers that prevent small firms from bidding on federal contracts.

I look forward to hearing the witnesses' perspectives on how we can best accomplish that task. I yield back the balance of my time, but first I would like to take a moment to say to all of you, thank you for being here.

Chairman HANNA. Our first witness today is Joe Wynn, the president of VETS Group, a nonprofit organization that provides entrepreneurial education, federal procurement training, employment assistance, and other supportive services primarily for veterans, people with disabilities, and people with limited means. He is testifying on behalf of the Veterans Entrepreneurs Task Force, also known as VET-Force, which is composed of over 200 organizations and affiliates representing thousands of veterans throughout the United States and which monitor the impact of legislation on the veterans' procurement programs.

Sitting next to him is Rob Burton, a partner with Venable, LLP. Mr. Burton is a former deputy administrator for federal procurement property policy. He has also spent over 20 years as senior acquisition attorney with the Department of Defense.

Our third witness is Alan Chvotkin, executive vice president and counsel for the Professional Services Council. Mr. Chvotkin previously served as counsel and staff director to the Senate Small Business Committee and counsel to the Senate Armed Services Committee.

I yield to Ranking Member Velázquez to introduce our fourth witness.

Ms. VELÁZQUEZ. Thank you, Mr. Chairman.

It is my pleasure to introduce to the committee Mr. Damien Specht. He is a partner at Jenner and Block, LLP, here in Washington, D.C., where he represents clients in all facets of government contracting matters and is the co-chair of the firm's Government Contracts Corporate Transactions Group. Additionally, he serves as a co-chair of the ABA's Small Business and Other Social Economic Programs Committee and has been a speaker and an author on numerous small business topics. He was also named a Washington, D.C. Super Lawyer Rising Star for Government Contracts in 2014. Thank you for being here.

Chairman HANNA. Mr. Wynn, five minutes. We want to hear what you have to say, so we will be lenient, but you know how it works, so go ahead. Thank you.

STATEMENTS OF JOE WYNN, PRESIDENT, VETS GROUP, INC.; ROBERT BURTON, PARTNER, VENABLE, LLP; ALAN CHVOTKIN, EXECUTIVE VICE PRESIDENT AND COUNSEL, PROFESSIONAL SERVICES COUNCIL; DAMIEN SPECHT, PARTNER, JENNER & BLOCK

STATEMENT OF JOE WYNN

Mr. WYNN. Thank you. Good morning, Chairman Hanna, Ranking Member Velázquez. On behalf of VET-Force, VVA, and myself as an Air Force veteran, I want to thank you for the opportunity to appear before you here today.

Over the years, VET-Force has been voluntarily conducting oversight of the legislation regulations policies programs intended to improve and increase the contract opportunities for veteran-owned businesses. When we come to know what is not working, we do not hesitate to bring that to the attention of the military departments, federal agencies, or to you, the members of Congress. Through VET-Force, we have also come to know that the federal small business procurement process is not only unkind to businesses owned by veterans, but is negatively impacting all small business groups—8(a), HUBZone, women-owned as well.

In my testimony here today, I will highlight the impact of federal contract bundling and consolidation through the use of federal strategic sourcing initiatives on veteran and other small businesses.

Many small businesses are struggling in the federal marketplace. New U.S. trade policies and changes in how contracts are competed and awarded have made it more difficult for small businesses to compete against and work with large prime contractors. In recent years, the government has been actively promoting the use of federal strategic sourcing initiatives in an effort to consolidate procurements. However, to us, the small business owner, federal strategic sourcing initiatives is just a more clever way of contracted bundling.

VET-Force is concerned that by relying so heavily on a few large prime contractors, our country makes itself vulnerable to a catastrophic interruption in services and a lack of competitiveness, innovation, and imagination that small businesses provide. All federal agencies are supposed to identify if a contract is bundled or consolidated. There is a dollar threshold per agency, and certain criteria used to make this determination, and achieving reductions in administrative or personnel costs alone is not enough.

In addition, there should be an assessment done to determine the impact on small businesses, but who within the procurement process actually makes this determination, and once determined, what happens? Agencies are required to provide the SBA's procurement center representative (PCR) and the agencies' own OSDBU with a statement explaining why the procurement has to be bundled. If the PCR objects to the agency's rationale, the PCR can delay the procurement while SBA and the agency negotiate, although the agency will ultimately make the decision whether to move forward with the procurement as is or change the requirements. This process of checking the requirements by the PCR is not only flawed but by the mere fact that SBA has decreased the number of PCRs to about 50, it is highly unlikely that these few persons will be able

to review thousands of procurements throughout the entire federal government.

For years, administrations have attempted to streamline its policies in an effort to reduce costs and save taxpayer dollars. Reducing government employees has been one method that has been used a lot. In the 1990s, an estimated 15,000 government procurement positions were eliminated.

So where then are we headed with federal strategic sourcing initiatives? While the policy may be endorsed and promoted by OMB and this and previous administrations, what has been and will continue to be the adverse impact on small businesses?

GSA, for example, has several strategic sourcing vehicles that it uses. It awarded in one the janitorial sanitation supply vehicle, 18 companies, 15 of which were very small businesses. However, these services were previously provided by 609 companies, 540 of which were small businesses. So that means that 525 small businesses will no longer be allowed to compete for federal contracts for janitorial services and supplies. They have other contracts that work similarly in fashion and are displacing many, many small businesses.

Finally, small business competing for government contracts find themselves at a disadvantage in the federal marketplace and appear to be losing ground all the time. Large contractors have been awarded most of the bundled contracts with little to no repercussions for not including small companies in their subcontracting plans, and under federal strategic sourcing initiatives, yeah, a few small businesses will no doubt grow and prosper if they are one of the lucky few selected, but it is clear to see just from the math that there is definitely an adverse impact to far more small businesses. What about really cutting costs and boosting growth among the majority of our nation's small business taxpayers and their families and not just for a few in this entity called the government. Let us secure our industrial base and the future of America.

This concludes my statement, and I hope that I can answer any questions that you may have.

Chairman HANNA. Thank you, Mr. Wynn.

Mr. Burton, you may begin.

STATEMENT OF ROBERT BURTON

Mr. BURTON. Chairman Hanna, Ranking Member Velázquez, and members of the Subcommittee, I appreciate the opportunity to testify today and discuss the growing decline of small business participation and federal procurements. Specifically, I would like to address the need to strengthen the federal contract consolidation and bundling regulations and provide several other recommendations for protecting small business interests and federal procurements.

First, let me turn to the consolidation and bundling regulations. These regulations were designed to protect small businesses, but in practice, agencies have failed to fully implement and comply with these important regulations. For example, agencies are required to (1) provide a written determination that the use of a bundled or consolidated contract is justified, (2) report to SBA on the usage of bundled contracts, and (3) publicize or post the justifications for bundled procurements in a timely fashion.

Unfortunately, in the wake of a significant increase in consolidated and bundled contracts in the U.S. government, agencies have routinely failed to follow these basic requirements. Moreover, there are currently no regulatory requirements to post the written justifications for consolidated contracts or report data on consolidated contracts. The posting and reporting requirements are limited to only bundled contracts.

Consequently, in my opinion, agencies are inclined to use consolidated contracts and are reluctant to ever categorize a consolidated procurement as a bundled contract, which is defined by the Small Business Act as a type of consolidated contract that is likely to be unsuitable for award to a small business. Consolidated contracts are generally suitable for award to small businesses, but there is little transparency into the growing number of these procurements. For example, on several occasions, I have submitted a Freedom of Information Act request on behalf of small business clients for the written justification supporting the use of consolidated contracts, only to find that the justifications do not exist. It is imperative that agencies comply with the requirement for written justifications, and that the justifications be publicized and posted on agency websites. Offerors, including small businesses, need advance notice of a contract that will be bundled or consolidated. This is critical because an offeror may only challenge and justify bundling and consolidation at the GAO prior to contract award. Therefore, agencies should post their justifications for both bundled and consolidated contracts concurrent with or prior to the release of the solicitations. Simply put, an agency's failure to timely publicize the written justifications preclude small businesses from challenging consolidated procurements.

To further strengthen small business participation in federal procurements, I recommend that SBA reports more thoroughly on the impact bundling and consolidation on the small business industrial base by aligning SBA's scorecard methodology with the types of goaling provided for in the Small Business Act. Thus, instead of just reporting on agency procurement dollars going to small businesses, SBA should report on agency success in meeting: (1) industrial goals, which ensure the participation of small businesses from each industry category in agency contracts and subcontracts, and (2) utilization goals, which ensure that each type of small business, such as a woman-owned or service-disabled veteran-owned small business has the maximum practical opportunity to participate in the performance of agency contracts and subcontracts. These two small business goals—the industrial and utilization goals—recognize that simply looking at the dollars awarded to small businesses does not by itself ensure that small businesses are fairly represented in federal procurement.

Turning now to organizational changes that could strengthen small business participation, I recommend that Congress consider establishing the Small Business Administration Office of Hearings and Appeals (OHA) in statute and giving it total independence from SBA. Currently, OHA reviews certain SBA program decisions, such as 8(a) and size determinations; however, if Congress established OHA as a totally independent body, it could also give it review authority over SBA's establishment and modification of size

standards. Such authority for OHA would be particularly beneficial for small businesses who are currently unable to challenge the size standards except by filing a lawsuit in federal court, which is extraordinarily expensive and simply an unrealistic option.

Finally, I recommend that Congress consider adding the Small Business Administration to the Federal Acquisition Regulatory Council, referred to as the FAR Council. The FAR Council has yet to implement several provisions of the Small Business Jobs Act of 2010, which are designed to increase small business participation. I think the addition of SBA to the FAR Council could streamline and expedite the implementation process, allow for better coordination between SBA and the current agency members of the FAR Council, and perhaps facilitate concurrent rulemaking.

I recall when I chaired the FAR Council, it was extremely difficult to coordinate the FAR and SBA rulemaking processes. In many cases, the FAR and SBA regulations cover the same procurement topics and have government-wide impact. Consequently, the need for close coordination and communication between the two rule-making bodies is critical, and SBA's membership on the FAR Council would certainly facilitate the needed communication.

In summary, it is critical for Congress to strengthen the consolidation and bundling regulations and ensure agency compliance with these regulations. In addition, Congress can expand the role of OHA and develop more meaningful and robust small business goals for the federal agencies. These legislative actions will undoubtedly protect small business interests and the future of the small business industrial base.

Mr. Chairman, that concludes my statement. I will be pleased to answer any questions that you or the members of the Subcommittee may have.

Chairman HANNA. Thank you very much, Mr. Burton.

Just by way of information, Grace Meng had an amendment to the NDAA that passed the House last year that did at least part of what you are requesting. It requires agencies to publish justification with the solicitation. So those are the kinds of things we are talking about going forward with.

Mr. Chvotkin, you may begin.

STATEMENET OF ALAN CHVOTKIN

Mr. CHVOTKIN. Chairman Hanna, Ms. Velázquez, members of the Subcommittee, thank you for the invitation to appear today.

PSC is a strong supporter of a balanced federal policy on small business. In my testimony, I address four important issues. First, on strategic sourcing.

Strategic sourcing is not suitable for all of the government's acquisitions. Our association is a strong proponent of well-designed strategic sourcing programs, as well as establishing and maintaining a strong industrial base, not just for small businesses but for businesses of all size. When considering the Federal Government's move towards strategic sourcing and its interrelationship with small business contracting goals, it is clear that there are disconnects driven largely by how the Federal Government measures small business performance in the federal market, and the desire to foster a strong industrial base.

In 2013, PSA president and CEO Stan Soloway testified before this Subcommittee about strategic sourcing and its impact on the industrial base. Then, as now, our view of strategic sourcing is centered on supporting an environment of robust competition, high performance, agility, innovation, and balanced opportunities for companies of all sizes. We recommended then and again today that the Federal Government must better align the number of small business providers and the total dollar value expended via small businesses as part of its overall strategic sourcing strategy. But it is also clear that improved data collection and analysis is necessary to improve future decision-making. The data today fails to consider whether there is an equitable distribution among small businesses and a balanced reliance on small business for certain categories of work.

With respect to the imbalance in goal setting and small business attainment, as you well know, the SBA negotiates biannually with the federal agencies on their small business attainment goals for both prime contract awards from the federal agencies and for subcontracting goals to be achieved by federal prime contractors.

While SBA is agnostic on how an agency achieves its goals, we have seen how agencies have skewered their performance to focus on some of the low-hanging fruit within their business opportunities and not looked across their entire enterprise for meaningful small business participation. As a result, agencies are in effect picking winners and losers in the small business market and in the agency's larger industrial-based market through the small business goal-attainment decisions.

Therefore, in the goal-setting process, SBA and the agencies must evaluate not only top-line small business goals, but also analyze and comment on changes in the agency's business base and addressable market. Consideration should be given to setting goals for services and commodities to be sure that one segment of an agency's market is not drawing a disproportionate share of the agency's attainment efforts.

With respect to data quality, in order to make informed decisions about federal small business contracting, better data that captures the full participation across the federal marketplace is necessary. While federal small business prime contracting expenditures in the aggregate are fairly accurate to the same level that any other data is accurate in the federal marketplace, there is significantly less visibility in the small business participation at the subcontracting level. PSA strongly believes that without meaningful data that can be used to provide an accurate picture of total small business participation, government risks making ill-informed small business contracting decisions that could place significant risk on small business contractors and could damage the larger industrial base.

Finally, it has been a challenge to understand the impact of all of the regulatory actions on federal acquisition and on small businesses when the private sector is forced to comment on rules in piecemeal fashion. These rules and regulatory issuances create a challenge for analysis and commentary on the impact of any single rule on the overall regulatory scheme and how they will affect the market. Notwithstanding congressional interest and sometimes direction that implementing rules be issued within a reasonable pe-

riod of time. As Mr. Burton said, we are still waiting for some final rules for key provisions of the 2010 Small Business Jobs Act, and that is unacceptable.

We therefore make the following recommendations. First, more needs to be done to improve the data reporting to track federal prime and subcontract data. This is a significant challenge that will require close coordination between industry and government.

Second, in the goal-setting process, SBA and the agencies must evaluate not only top-line small business goals but also analyze and comment on changes in the agency's business base and addressable market. Consideration should be given to setting target goals for services and commodities to be sure that no one segment of an agency's market is drawing a disproportionate share of the agency's attainment.

Third, agencies must fully implement and then comply with both the bundling and the consolidation reporting requirements that have been enacted.

And finally, the viability of conducting past-performance assessments of first-year subcontractors should be thoroughly explored.

Thank you again for the invitation. We look forward to continuing our longstanding work with this Committee, and I would be pleased to answer any questions you may have.

Chairman HANNA. Thank you.

Mr. Specht?

STATEMENT OF DAMIEN SPECHT

Mr. SPECHT. Chairman Hanna, Ranking Member Velázquez, members of the Subcommittee, thank you for the invitation to appear today. In my testimony, I will address how consolidated contracting necessarily limits the number of small businesses in the federal marketplace. I will also briefly discuss the SBA's rating methodology, and as a litigator who appears before the SBA Office of Hearings and Appeals, share some thoughts on that forum.

From tool manufacturers to those working in support of our intelligence agencies, I have heard that bundling is a problem. However, because we largely rely on self-reporting, the government has little reliable data on where bundling is occurring and how many small businesses are being hurt by this practice. As a result, I join Mr. Burton in encouraging this Committee to require agencies to require bundling justifications along with solicitations. This will allow small businesses to understand the agency's rationale and, if necessary, timely protest the bundled requirement.

I will note, however, that bundling protests are rarely successful. In fact, it appears the primary way for an agency to lose a bundling protest is to fail to perform any analysis at all. As a result, in addition to increasing transparency, this Committee should consider raising the bar for justifying these decisions, which can currently be based on as little as 5 percent cost savings.

In addition to bundling, this Committee should be highly skeptical of strategic sourcing initiatives. Strategic sourcing proponents have worked to maximize small business participation. That effort is commendable, but the problem is not one of intent or lack of effort. The problem is that strategic sourcing, at least when accom-

plished through large contract vehicles, is necessarily bad for the diversity of small contractors in the industrial base.

This is the case for a few reasons. First, the large number of items be provided on each of these contracts makes it impossible for many businesses to bid. As demonstrated by the FFSI office supplies contract, it is often necessary for hundreds of small businesses to team together to fulfill the requirements of a single contract.

A second negative consequence of strategic sourcing is that those businesses that do not receive awards will receive other contract opportunities disappear. To drive volume discounts, purchasing from strategic sourcing vehicles must be highly encouraged. That means that sales that would have gone to hundreds of small businesses are now focused on a dozen. This concentration of awards has a real impact. In fact, one of my small business clients recently told me that their sales volume has decreased by two-thirds since they were not chosen for a strategic sourcing award.

A third problem with strategic sourcing is that it reduces the importance of federal supply schedule contracts. Traditionally, GSA's FFS programs provided an access point for aspiring contractors. If we choose to shift the government's purchases to strategic sourcing contracts and away from the remaining FFS holders, this entry point will be less attractive and we would lose a significant number of future contractors.

Ironically, the award of a strategic sourcing contract is not always a benefit to the winners. This is the case because large awards can set up a hill and valley problem. A small business that receives millions in strategic sourcing awards is likely to expand its infrastructure to meet those needs. However, that firm's dependence on a single contract will backfire if it loses the next competition. In the past, this concern was mitigated because businesses received more regular, but smaller, awards.

In summary, there is nothing wrong with strategic sourcing; however, this Committee needs to look beneath the surface to judge whether these actions are consistent with building a diverse small business base.

Despite the impact of bundling and consolidation, the Federal Government met its overall small business goals in 2013, and apparently, 2014. These are not minor achievements. This accomplishment is tempered by concerns that large contractors are being counted toward small business goals. Although this may be the result of honest mistakes, continued training of contracting officers and explanation of the complicated small business rules to the contracting community will be helpful in confirming that the proper numbers are being reported.

Further, this Committee should be concerned that SBA assigned an A or A+ rating to 20 agencies when none met all their small business goals. One of those agencies, the Department of the Treasury, was assigned an A rating, despite a small business subcontracting rate of 6.8 percent. As this grade inflation demonstrates, this Committee should continue to closely examine the basis for SBA's grades to determine where agency performance can be improved.

Shifting to my role as a small business litigator, I would like to address some of the issues related to SBA's Office of Hearings and Appeals (OHA). Although I do not agree with every OHA decision, it has proven to be an efficient alternative to federal court. As a result, I support making OHA permanent through statute. Any such statute should, of course, recognize that small businesses may appeal OHA decisions to federal court if they so choose.

This Committee should also act to eliminate the redundancy in the Small Business Act. Specifically, although OHA's administrative judges have significant expertise, the Small Business Act assigns certain appeals to administrative law judges, of which OHA has none. This has led ALJs at other agencies to hear small business cases on behalf of OHA. Although I have no doubt this arrangement is effective, it makes more sense to centralize small business decisions in OHA as a statutory entity.

Thank you for the opportunity to appear today, and I look forward to your questions.

Chairman HANNA. Thank you.

And I yield to Ranking Member Velázquez for the first question.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

Mr. Wynn, despite the numerous safeguards in place, we continue to see the bundling and consolidation of contracts. In your opinion, what is it going to take to let these agencies know that the consolidation or bundling of contracts is not to be used to ease administrative burden?

Mr. WYNN. Thank you for that question.

As was noted and mentioned in my comments, one of the mechanisms that is being used right now through SBA is use of the PCR. Over the years, we have previously testified and made recommendations as for SBA to increase their budget to be able to employ more persons in this position. Yet, over the years, the number of people in this position has decreased. So we cannot quite understand how in the world they are going to possibly police all of these types of transactions and make recommendations to stop the procurement before it goes through.

The other part of that is, as I understand it, once they are able to identify a procurement as being bundled and they want to question it, that discussion is had with the agency's senior official or the acquisition chief of that agency, there seems to be still no real power from the PCR to actually stop the procurement completely. If the agency negotiates, has a discussion and justifies in their view why they feel it should go forward, it seems to continue to go forward. I think that, you know, more—there needs to be more teeth in the legislation to provide SBA more authority to actually stop these types of procurements. And also, they have got to increase the number of persons or we create some additional, some new position or persons to police these actions.

Ms. VELAZQUEZ. Sure. Well, you know, sequestration and budget cuts come to mind. And both of them have consequences.

I would like to ask the rest of the panel to comment. We have seen that enforcement actions are rare, and there is a need for defining realistic enforcement triggers. What would you recommend to be a sufficient trigger? Any of you.

Mr. CHVOTKIN. May I ask, enforcement actions regarding unbundling and consolidation?

Ms. VELÁZQUEZ. Yes.

Mr. CHVOTKIN. I will start, Ms. Velázquez.

I think we start with a clear set of standards, and right now agencies have a lot of flexibility in determining—in making those determinations. Secondly, transparency will go a long way towards accountability. Without the real understanding, the marketplace will substantially police the federal agencies' behaviors if they know what is going on in that marketplace, and today, most companies do not have that visibility. And so the competitive marketplace, particularly as contract spending is declining, will be a very powerful force. That competition drive will be a very powerful force in helping to police the agencies.

Finally, I would suggest that we need a dependable and reliable place to challenge those actions, and OHA may very well be a good place to do that.

Ms. VELÁZQUEZ. Okay. Thank you.

Mr. Specht, we have heard from numerous small businesses about the problem of contract bundling, and each one of you made reference. As a result of that practice, subcontracting and teaming has become the best option for small businesses that are unable to perform the entirety of these massive contracts. Yet, we also heard that this process is fraught with additional costs and dangers to all parties involved. I would like to ask you, do you believe that this is fair, that small businesses should be relegated to dispositions as a result of bundling?

Mr. SPECHT. Thank you for the question.

No, it is not fair, and it is not ideal for the federal marketplace. It is okay for small businesses to start out as subcontractors and start getting work that way because they can learn from the prime. But at some point, for their growth, it is necessary that they have direct customer contact and that they be doing work directly with the customer agency so that they can expand and learn and grow.

Ms. VELÁZQUEZ. So do you think that there is a fear that these contracts will get so large that even the subcontracts will be out of reach to small businesses?

Mr. SPECHT. Absolutely. I think that these contracts get large and the items required get so diverse that you may have small businesses that are now second or third tier subcontractors. And it is just the truth of the matter that the further away you are from the federal customer, the less accountability there is and the easier it is to squeeze those small businesses when you are at a higher tier level.

Ms. VELÁZQUEZ. Thank you.

Thank you, Mr. Chairman. I will have some other questions in the second round. Thank you.

Chairman HANNA. Mr. Burton, Mr. Specht, there are two tracks here that I see both of them mildly conflicting but interesting to me in terms of you wanting to keep a viable supply chain, and when we want to multiply or add more small businesses and do less bundling, and how do you maintain a viable supply chain, and things that we regard as necessary, say to the national defense, and under these circumstances we are eliminating a lot of that.

And also, we are not doing what we are supposed to be doing, which is promoting small businesses, inviting them, helping them grow, helping them diversify, and we are allowing bundling to happen which probably sends more profit to the prime ultimately, and putting them in a position where they get beat up frankly for lack of a better term. My question is, how do you maintain a viable supply chain without some kind of rules, and what kind of danger does that present? If that is a fair question.

Mr. Burton?

Mr. BURTON. Well, I think the rules are very important. I mean, the government operates on a whole collection of rules. And that is why I think Congress has an opportunity here to actually improve those rules with respect to consolidated contracts in particular. There is no transparency. There is no compliance. And until that is seriously taken by the agencies, I think that the industrial basis is going to be weakened. As a matter of fact, we already see that happening right now with respect to janitorial services. Hundreds of companies have disappeared off the federal marketplace and more to come. And so it is a serious threat, and I am not sure the public fully understands how serious this is. And you do not hear much about these small businesses that are actually going out of business because of the consolidated procurements and strategic sourcing, which on its face sounds so good, and yet it is clearly putting small businesses——

Chairman HANNA. It is almost antithetical, is it not?

Mr. BURTON. Absolutely. Absolutely.

Chairman HANNA. Mr. Specht?

Mr. SPECHT. So I agree with those comments. I think one of the interesting things about strategic sourcing is that we see headlines that, you know, 14 of 15 awardees are small businesses, or 86 percent of orders go to small businesses and are some of these FFSI strategic sourcing contracts. But what we are not focused on is exactly as you said or Mr. Burton said, that you are focusing your industrial base on those 14 or 15 winners. And everybody else gets nothing. And so I think we need to understand that strategic sourcing can be part of the solution, but we need to have diverse orders through the supply schedules or through other ordering means that are smaller orders that can go to small businesses, that can maintain these businesses, even if they do not get a strategic sourcing award.

Chairman HANNA. Mr. Wynn?

Mr. WYNN. Thank you.

You know, we continue to hear that I guess the rationale for strategic sourcing, bundling, is supposed to save the government money. Save ultimately us, the taxpayer, money. Make our, you know, efficiencies, you know, make the procurement process more efficient. But when you have hundreds of small businesses who are factored out of the process, who is measuring the total loss to those businesses, their families, and the community who they, themselves, are the taxpayers. So who is it that we are really trying to support here? Is it this government entity? Is it this large corporation? Or are we really about, you know, the benefit of the people?

Now, it sounds like, you know, in essence, you know, from the outside looking in, the government continues to function. The most

we are hearing in days now is that, you know, need for budget cuts, sequestration, you know, this kind of thing. And so some folks probably will feel that if there is a consolidation of services, that this is a practical use of the government's time and efforts. But I do not, just like the gentleman Mr. Specht just said, I do not think we are emphasizing and letting the public know how many businesses are being negatively impacted by this type of process.

The other thing, too, is the rules and regulations that govern these actions need to be strengthened in such a way that there is a stronger mechanism to review this process prior to the contract being awarded.

Chairman HANNA. I take it everyone would agree with that.

I am going to yield to Grace Meng for questions. Thank you.

Ms. MENG. Thank you for being with us today. We appreciate all your expert insight on these issues important to our small businesses.

Over the last decade, in Queens, New York, nearly 65.6 percent of the borough's new business growth was from companies with less than five employees. In 2013, there were over 32,000 businesses with less than five employees. These small businesses, especially the ones recently created, have the potential for growth, and I want to ensure that we have policies in place to help these businesses that want to grow to reach their potential and continue contributing to our economies.

In my district especially, to be blunt, goaling is very important. These goals have afforded businesses in my district opportunities that they may otherwise have not received. Although goals are usually unenforceable targets, do you have any insight into how we can hold the SBA and other agencies more accountable to their goals?

Mr. BURTON. I do think that the goals are extraordinarily important, and there is too much emphasis on dollars to small businesses. This, I think, is a serious problem, and the government needs to deemphasize the dollars and start looking at the participation rate. You know, the objective of the Small Business Act was not just to get dollars to a few small businesses; it was to ensure maximum participation of the small businesses in the federal procurement system. That is simply in jeopardy now because of strategic sourcing and budget cuts and a ray of factors. But until the OMB, my former home, until OMB really at that level indicates how important it is for SBA and the other agencies to really look at more than just dollars, I think we are going to be handicapped. And I think that this is where Congress can really play a beneficial role in getting agencies to focus on different goals besides just dollars. The participation rate in my view is key; how many small businesses are participating in federal procurement.

Mr. SPECHT. I would second all of that and add that pressure from this Committee is obviously important in focusing higher-level folk at the agencies on these small business goals. And I also think that the SBA ratings, when an agency gets an A and does not hit all of its small business goals, that is sending the wrong message. The message here is hit your goals, get the A. Do not hit your goals, you do not get the A and you are going to get additional pressure. I think that that makes a lot of sense.

Mr. BURTON. Just as a follow-up, I think that is one reason probably for the A, is that SBA was so pleased that the government as a whole made the 23 percent with respect to the dollars going to small businesses and said, "This is fantastic. We are going to give everybody an A across the board, even to the folk that are not doing so well." So, again, that strengthens my point that there is too much emphasis on the dollar goal.

Ms. MENG. And although not the specific topic of this hearing, I am also interested in your views on increasing the current 20 percent goal at the Export-Import Bank. Do you believe that an increase in this goal would help small businesses? Also, do you believe including indirect support in the 20 percent goal would be detrimental to small businesses that are already receiving assistance?

Mr. CHVOTKIN. I do not have enough experience with the Ex-Im Bank to have an answer for you, Ms. Meng.

Mr. WYNN. I do not have a lot of experience on the specifics regarding the Export Bank, but increasing the goals, whether it is for exports or just the goals in general, we have made recommendations previously to increase the small business goals beyond the 23 percent level. And also, to emphasize that that is a floor. That percentage goal is a floor and not a ceiling. A lot of agencies tend to have the view that once we hit that 23 percent, we are there. We are great. And again, SBA then gives the agency a rating of an A. But perhaps that should be a C rating when you hit the 23 percent, and an A would be 50 percent, you know, where you have really shown and demonstrated that you have exceeded the floor of the goal. Thank you.

Ms. MENG. Thank you. I yield back.

Chairman HANNA. Mr. Curbelo?

Mr. CURBELO. Thank you very much, Mr. Chairman. And I thank the witnesses for their testimony here today.

My question has to do with subcontracting. The 36 percent goal for subcontracts set in 2009 has continuously failed to be met. In fact, over the past several years, it has declined from 35.4 percent in Fiscal Year 2010 to 34 percent in Fiscal Year 2013.

Mr. Chvotkin, I am concerned that the percentage of dollars subcontracted to small business has dropped by about 3 percent since 2010. I am also concerned that by holding only senior executive accountable for prime contracting goals we have sent the message that subcontracting perhaps is not all that important. What are your thoughts on this issue?

Mr. CHVOTKIN. Mr. Curbelo, thank you.

Our view is subcontracting matters, and it is very important. It is a good business strategy for small businesses. We talked about that today. Along with finding prime contracting opportunities. But the data and the collective insight into that small business subcontracting is sorely lacking as well. That is an area that we have to work on before we can—we need to be cautious in looking at root causes and then designing solutions.

You may be aware, the new executive branch subcontract reporting system could launch next quarter, and I am hopeful that it will be an improvement over the current one; it has to be, although more may need to be done there. But while agencies often dictate

subcontracting percentages to prime contractors, the prime contractors' choices of implementation are really part of its own technical solution that the agencies evaluate, and its business decision-making is outside the purview of federal agencies and senior executives. So I am concerned about imposing requirements that either cannot be effectively influenced, or that if they can be influenced, that influence risk politicizing the acquisition process. So I would welcome the opportunity to discuss that with you further after this hearing. But subcontracts matter, and we have to find a better way of identifying the right data across all of the tiers of small businesses and making sure that we are capturing that data and holding both the agencies, as well as the prime contractors accountable.

Mr. CURBELO. Thank you.

Mr. Burton, maybe you want to weigh in, too. In 2010, $74 billion in subcontracted dollars went to small businesses, a substantial amount of money. What can we do to make sure that our agencies pay attention to this issue?

Mr. BURTON. Well, I think what you are suggesting is that agencies comply with the current rules, and I think that is absolutely critical. We are going to see more dollars going through subcontracts than previously to small businesses because of the nature of things, because of the fact that the prime contracting base is going to shrink and more small businesses are going to be eager to get subcontracting opportunities. The government is encouraging joint ventures, teaming. You are going to see more of this. And so therefore, I think it is absolutely imperative for agencies—SBA and OMB in particular—to start emphasizing compliance with the subcontracting goals. Not just meeting the subcontracting goals but the subcontracting goals as well. There has been virtually no emphasis on meeting subcontracting goals under the theory that small businesses would prefer to have prime contracts. But the reality is they also like to have subcontracts. And in this environment, it is critical for them to get subcontracts.

I think in short answer to your question, agency senior executives have to be held accountable for both achievement of prime contracting goals and subcontracting goals. Quite frankly, some senior folks in the government do not even know that there are subcontracting goals that they have to comply with, and so this is very important to have from the top leadership down, emphasis on agencies meeting subcontracting goals.

Mr. CURBELO. Thank you.

I have about a minute left. Does anyone else want to weigh in on this issue?

Mr. WYNN. I would like to make a quick comment. On subcontracting, you know, there are some obvious conflicts with regard to the process and the evaluation. It looks like, you know, even when we talked about the scorecard process, more emphasis is placed on the prime contracting than on the subcontracting. And what happens to an agency if they do not meet their subcontracting goals? We will just not meet them again next year, perhaps.

The other thing, too, though, is that with the more and more bundling and consolidation, there are fewer opportunities that are going to be had by small businesses to subcontract if more and more agencies are encouraged to use these contract vehicles. So we

would like to see more subcontracting businesses. Small businesses want to make money. And it is the only way they are going to be able to grow and expand is that they get a contract, whether it is a subcontract or a prime. So more of that needs to be had, but the rules need to be strengthened to give them the opportunity to do so.

Mr. CURBELO. Thank you. My time has expired.

Thank you, Mr. Chairman.

Chairman HANNA. Thank you.

Ms. Chu?

Ms. CHU. Yes.

Mr. Wynn, as I understand, federal agencies are required to provide the SBA's statement explaining why contract bundling is necessary if it knowingly proposes a bundled acquisition. These explanations are reviewed by SBA procurement center representatives and can be appealed if the PCR believes that bundling is not justified. However, data shows that only 28 appeals were filed in 2012, and only six resulted in the unbundling of contracts.

Can you explain why these numbers are so low considering that there are millions of contracting actions that take place in a year and that many of them are bundled?

Mr. WYNN. Well, I think it is partially due to the fact that it is such a few number of persons as I mentioned that are responsible or designated to intervene into these particular contract actions. Of the ones that I do again, it is my understanding that negotiations, discussions take place within the agency, and a decision is made on some cases. The contract may be pulled back. It may be changed in some way and then relet. And so you have fewer people challenging the award later on. But again, I just think it needs to be more people. The process needs to be strengthened for reviewing these type of actions.

Ms. CHU. Thank you.

Mr. Burton, you state in your testimony that it is common for agencies not to publish timely justifications for why they are choosing to consolidate or bundle a contract, and you attribute this to the lack of regulations requiring justifications to be released on a specific timetable. And you said that SBA therefore has no recourse to protest a bundled contract after the contract is awarded. How does this lack of authority impact the bundling review process?

Mr. BURTON. Well, you know, terminology here is so very important, and we tend to speak in terms of bundled procurements. But in fact, most of the procurements that we are seeing are consolidated procurements. And the distinction is that a bundled procurement, there has to be a determination that it is unsuitable for small businesses. Well, quite frankly, small businesses can perform almost everything, especially in today's world where what the government is procuring are primarily services, not big weapon systems. And so more than likely, most procurements are suitable for small businesses, which means there is not going to be a bundled procurement. Which I think goes to your question, why are we seeing so few bundled procurements be challenged? Because there are not that many bundled procurements. They are consolidated procurements, which is simply the combination of contracts, which small businesses can compete for. There is no transparency. There

is no requirement, except for a written justification that is stuck in the file somewhere. There is no requirement for any posting of justifications for consolidated procurements. There is no reporting requirement for consolidated procurements.

So if you are an agency official, you are going to want to make sure that we are doing consolidated procurements. I mean, it is somewhat of a cynical view, but I think it is true that if you decide that it is a bundled procurement, there is more regulation and more red tape. And I think quite frankly, most procurements are consolidated. I think they are justifiably categorized as such. That is why I think it is so important for Congress to start having those transparency requirements imposed on consolidated contracts. And maybe we should even quit using the word "bundled," because there is just not much in that category. It is consolidated procurements, and there is no transparency or regulatory requirements except for a mere written justification, and which I testified that when we have submitted FOIA requests to agencies to take a look at those written justifications, they are not to be found, and in my view, they were never done. And so I think it is absolutely critical that Congress, OMB, SBA, start saying it is very important that we have transparency and to consolidate the procurements.

Ms. CHU. Such a good point.

Mr. Specht, the SBA weighs 80 percent of its scorecard grade on prime contracting dollars, yet only 10 percent on subcontracting achievements. Do you believe the disparity between the weight of these two types of contracts should be this drastic?

Mr. SPECHT. Absolutely not. As Mr. Wynn pointed out, small businesses want to make money. And it is probably for the best that they be prime contractors. It is probably the best circumstance for them, but it is not eight times better than being a subcontractor. And so, no, I do not think that that weighting makes sense. I think that more weight should be placed on subcontracting. And in addition, I think this point has been made that our transparency into the actual percentages that get subcontracted to small businesses is not very good, so we should put those two together. More weight in the scorecard on small business subcontracting, but also more transparency so we know that it is actually getting done.

Ms. CHU. Thank you. I yield back.

Chairman HANNA. Ms. Lawrence?

Ms. LAWRENCE. Thank you, Chair, for holding this hearing.

In Michigan, the state of Michigan, we are home to over 800 and 500 small businesses and we employ over 1.7 million. In the first quarter of 2014 alone, over 11,000 small new businesses were established, and it is my sincere hope that all of them stay in business and grow.

I hear a lot from the panel today about transparency and that there is a need for transparency. So I have two questions. What are some of the major challenges that these new small businesses will face when they compete against the more established small businesses with a history of consolidating and bundling? And then I want to hear from you as experts, what does transparency look like? You use that word as if it defines something, and I would just like for you to state what would transparency and what would the

areas be that would give us the transparency that you feel we would need?

And Mr. Burton, if you could start.

Mr. BURTON. Well, small businesses do have an opportunity to challenge certain actions. They can challenge certain things before OHA, for example. They can challenge at the GAO. They do have recourse. But they simply have no recourse if there is no transparency or view into the government decision-making process.

A perfect example was recently I had a small business client who felt like they should have won an award, and we had a debriefing by the agency and the debriefing said, "You were great. There was no deficiencies. Your price was reasonable, realistic." And so they thought, "Well, I guess I should have gotten the award." So they filed a protest, only to find out when we looked behind the curtain and looked at the government decision-making process, we find out that that particular contractor's price was way high. It was off the charts. Had the agency communicated that basic fact that your price was not really reasonable or realistic, there would not have been a big protest. Small businesses have thirst for information, and that is just one example where the agency, for whatever reason, just does not want to share that information.

With respect to the decision-making process on why an agency consolidates a procurement, when they consolidate a procurement, they are supposed to go through a decision-making process. Will this negatively impact small business if I consolidate this procurement? In many instances, it will. But there is no analysis. Even though it is required, there is no analysis, no documentation regarding that. If there is not even documentation regarding it, we never get to transparency because there is nothing to look at. But transparency into the decision-making process, there has to be a document that we can take a look at and small businesses can actually challenge. That is so critical for the health of the small business industrial base.

Ms. LAWRENCE. Other panelists? Mr. Chvotkin?

Mr. CHVOTKIN. Thank you, Ms. Lawrence.

First of all, I say all too often that the only thing worse than not having a government contract is having a government contract, because the compliance burdens, particularly for small businesses, are significant, and very, very different than what they experience in the commercial marketplace. And for many, it is a real wake-up call and a real business risk because the government does look at and challenge the compliance capabilities of firms. So even for small businesses, even selling commercial items, even on a fixed-price basis, the rules that are imposed on prime contractors and often flow down to subcontractors can be significant and very atypical for what they are used to in the normal marketplace.

And I think on the question of transparency, what does it look like? I think it looks like three things. First of all, clear documentation about what an agency's decision-making is. Secondly, compliance with the existing rules. Many times we find that the agencies are ignoring or skirting those existing rules, so as Mr. Burton said, they never get to the documentation. And finally, senior level accountability for those activities. I think with those three piece parts together, there will be lots of attention in the marketplace, and the

competitive marketplace will help drive compliance because the companies themselves or advocates on their behalf will be watching how agencies are performing.

Mr. SPECHT. And I will just add, as someone who represents small businesses in your state, that one of the primary challenges those businesses face is knowing about these opportunities, knowing how to get into the government contracting marketplace, and finding contracts of the size that they can handle at an early stage so that they can grow and they can build up the compliance regime and all the rest.

Mr. WYNN. And just a quick follow-up on the transparency and small businesses succeeding in the federal marketplace, the transparency needs to be readily available for those of us out here to be able to see it. So whatever the decision-making process that they use, if they would make it readily available so that we can see it.

There was an executive order at one time with regard to the increased opportunities for service-disabled vets that every agency would post on its website what the opportunities were, what the plan was to how they were going to increase opportunities for this group of businesses. That went well for a couple of years and then we ended up into the scorecard thing where now it is less transparent. So, thank you.

Ms. LAWRENCE. Thank you. I yield my time.

Chairman HANNA. Thank you.

I am going to open another round of questioning if no one minds. I will start myself with some interesting and bad news. The SBA gave a buy-out to many of its procurement center representatives, which tells us that they are moving away from what we want, not towards it; right? The other thing is I think all of you are much kinder than you need to be over this. What is obvious from listening to you is that what we have here is a small war or maybe a large war of attrition that the difficulty associated with doing what we want people to do is high. And the ease of bundling and consolidation is just that, easy, in that it requires a great deal of effort to do what we are asking and expecting and have a right to expect some of these agencies to do. And they act with impunity. There are no consequences. Apparently, the appeal process is all but nonexistent. Our ability to monitor and understand is obfuscated by the fact that there are no reporting requirements, which my friend, Grace Meng, is trying to address. So knowing some contracting officers as I do in my past life, it does not necessarily have to be insidious, but the outcome is the same.

Do you agree with that? I am making kind of a blanket statement about the agencies and the personalities and the people that run them, but I welcome you pushing back or just your kind of personal opinion. A lot of this boils down to personalities and people and the workload they have or do not have and their willingness to look at something like this and say, "Oh, this is a bunch of baloney. I am not going to go through with it. And by the way, nobody is going to do anything to me for doing it."

You are shaking your head there, Mr. Chvotkin. Go ahead.

Mr. CHVOTKIN. Well, I have a couple of comments, Mr. Chairman.

First of all, I think it is important to understand that the primary goal for the acquisition professionals at the agency is to acquire the goods and services they need to fulfill their agency mission. The acquisition system, the procurement process is an enabler. It is not an end-state in and of itself. So many of these requirements, in fact, inhibit from the agency's view, their ability to in a timely manner get the goods and services they need. When you couple that with little clear regulations and little oversight, it is very easy to divert attention from these set of compliance rules and focus attention on——

Chairman HANNA. Yeah, but you have to agree that the loss of 100,000 businesses in such a small period of time suggests that it is a crisis, not just——

Mr. CHVOTKIN. Except that the agencies are still, by and large, still getting what they need from the marketplace, but not from those small businesses. That is why the comment earlier from all of us was it is important to focus not just on the dollars but on the whole industrial base. The repetitive ability of the agencies to get goods and services from a diverse capability, rather than just from a limited number that are achieving the dollars. Couple that with workforce challenges in the federal marketplace, the skills of the current acquisition workforce, and the drive towards low price, all of these things end up having an impact on who is able to be a supplier to the Federal Government and how the government approaches that marketplace.

Chairman HANNA. So you think there is some basic flaw in the process that could be dealt with? I mean, what you are saying is they are trying to do their job and all these requirements, quotas, goals, of the small business SBA are actually kind of counterintuitive to them.

Mr. CHVOTKIN. No, that is not my point. I think these goals have a value to the agencies. They draw attention, and there is every reason to continue to support a robust small business program. Unfortunately, I think as we alluded to in my testimony, and maybe I said it more explicitly in my written testimony, the focus has been only on dollar achievement, and many agencies are using those goals as a way of establishing an industrial policy, picking winners and losers in the marketplace without regard to long-term impact of the industrial base. Reporting will help. Greater visibility into the entire supply chain as you suggested will be a help. But we just need to remember that the purpose of the acquisition system is to acquire those goods and services for the agencies.

Chairman HANNA. But it is not the only purpose.

Mr. CHVOTKIN. It is not the only purpose.

Chairman HANNA. Anyone else?

Mr. SPECHT. Well, I guess my perspective on it is that, you know, we are all talking about the stick, but maybe there is some carrot to be had, which is to say that what you could do is make sure that small business participation is one of the most important factors in a best value tradeoff in procurements going forward so that you incentivize large contractors to go out and find small businesses and find diverse small businesses to meet those needs. And so that is not a perfect solution, but it is a way to sort of push them to incentivize them to do that.

I think the other perspective is that I think many in the agency see the small business goals as a hassle, as something that is extraneous to their day job, which is buying things for the Federal Government. And the solution to that is to continue to evangelize about how small businesses not only add jobs and add value to the country, but also can offer unique needs, can offer better customer service, and can be a great asset for a buyer.

Mr. WYNN. I would just add that let us not overlook the realities of the everyday working citizen, particularly within the federal marketplace, and that is that I want to do not as much as I can do, but only what I am required or have to do for real. And that means that if we have got fewer and fewer procurement officials, contracting officers, and where now the workload on me to get the same amount of goods and services requirements done for my agency still exists but there are fewer people to do them, if there is a way that I can consolidate these requirements and do fewer actions, I mean, for real. That is what the office is going to do. But, see, they are only doing that because they are allowed to do it. It is justified under the current state regulations. If the regulations, the laws, rules change, then they could not do that because they would be in violation.

So it is incumbent upon you, upon Congress, that we really look at ways to change the way that they actually do what they do.

Chairman HANNA. The appeal process that we are talking about here today, and transparency that we are talking about, and the requirement of explanations in advance in concurrent with awards and decisions and procurement, just those two items alone would go a long way.

Mr. WYNN. Would go a long way.

Mr. BURTON. And Mr. Chairman, I think it is important to note that priorities are important. The workforce is overburdened. It is shrinking. Forty percent of the federal workforce has less than five years experience. There is no question that there is huge challenges that may never be overcome in that area. But that is even why it is more important for Congress and others in leadership positions to clarify what is most important. And I do believe with respect to the goaling that we have a misplaced emphasis really on the dollars going to small business and a greater emphasis should be placed on actually how many small businesses are participating in the federal procurement process, and how strong is our small business industrial base? I think the emphasis needs to be more now on participation rate than actual dollars.

And I know when I worked at the Office of Federal Procurement Policy, we were very focused on the dollars because we thought that was what was important to Congress and to the administration. And so consequently, that is the message that we sent to the agencies, to focus on the dollars. That message can change and the emphasis can change through leadership and through rules.

Chairman HANNA. Sure. But that is so subjective. I mean, what supply chain is more important than another supply chain? Who makes that decision, and how do you talk about it? And how do you protect it and how do you justify spending more when maybe you could spend less? Because a dollar is the only thing that is truly measurable for most of us.

Mr. BURTON. Well, and the number of small businesses participating. I mean, I think that is measurable as well.

Chairman HANNA. That would be one thing. Certainly.

Anyone else? I took a little liberty. I am the last guy here.

Go ahead.

Mr. SPECHT. Well, I will just second Mr. Burton's point in terms of diversity. And I do think that is measurable in terms of not only the subcategory goals but the numbers of businesses because eventually what is going to happen, if we keep consolidating contracts like this, is that only the large smalls will survive. They will be acquired by large businesses that want access to those contracts, and you are going to see an even more steep drop off in the number of small businesses participants. And those that you have will be stuck in second, third tier subcontract roles, and that is a significant problem that I think partially can be addressed by forcing justifications to be published, not only for bundling, but I think, as Mr. Burton said, for consolidated contracts, because consolidated contracts do not require the same justifications, and they are just easier. You have one small business that gets the work now on a multiple award contract as opposed to the dozens that used to have them, and you do not have to publish justification. And the publication will allow, to some extent, the private bar to step in and try to be private attorneys general, right, and try to enforce these things. The downside of that is, as I mentioned in my testimony, that those protests do not go anywhere. And I think one of the reasons why you see so few bundling appeals, even internally, is that the bundling standards are not very high. If I can demonstrate a 5 percent savings, I can bundle. Well, the Congress needs to decide is 5 percent the right number? At what cost are industrial based? And if the number is 5 percent, that is great. But if it is not, we need to increase that. We may need to increase the cost of bundling contracts.

Chairman HANNA. But also the 5 percent has to be justified by itself, so that would help. Just having the ability to look at that number and question the veracity of it would go a long way, which we do not have, as everyone has pointed out.

I would ask that you watch the work of this Committee over the next few weeks, couple of weeks. These are the issues that we are dealing with. We have work that we are proposing that we would ask, if you can, to take a look at, give us some feedback. Some of it has already been written.

I want to thank you for being here. You have all done a great job of explaining your case.

I ask unanimous consent that members have five legislative days to submit their supporting materials for the record. Without objection, so ordered.

This hearing is now adjourned. And again, thank you.

[Whereupon, at 11:18 a.m., the Subcommittee was adjourned.]

A P P E N D I X

Statement
of
Vietnam Veterans of America

Presented by

Joe Wynn
Special Advisor

Before the

House Small Business Subcommittee on Contracting and the Workforce

Regarding

"Contracting and the Industrial Base II: Bundling, Goaling, and the Office of Hearings and Appeals"

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Rayburn House Office Building
Room 2360

Good morning, Chairman Hanna, Ranking member and other members of this subcommittee. On behalf of VET-Force, VVA National President John Rowan and all of our officers and members we thank you for the opportunity for Vietnam Veterans of America (VVA) to appear before you today to share our views on the **"Contracting & Industrial Base II: Bundling, Goaling, and the Office of Hearings and Appeals."** I ask that you enter our full statement in the record, and I will briefly summarize the most important points of our statement.

Though my time of service was many years ago, as a veteran of the US Air Force with the 66th Strategic Missile Squadron, I still have very vivid memories of my military experience. I've served on the Executive Committee of the Veterans Entrepreneurship Task Force (VET-Force) since the passage of PL 106–50, the Veterans Entrepreneurship & Small Business Development Act of 1999. And having served as an Advisor to the Vietnam Veterans of America and Legislative Liaison for the National Association for Black Veterans also during that time, I am well aware of the challenges faced by many Veterans and especially Veteran Business Owners trying to do business in the federal marketplace.

VET-Force members are of military service from all across the United States. They own businesses in every industrial sector. The members reflect the ethnic diversity of the country itself. The members are concerned for our free market system and believe that there hasn't been a more important time to stand up for it and all it represents. We want the American military to successfully complete the missions that the Congress may ask of them and to make sure the American men and women in the service of our country are well trained and equipped and are able to come home safe when the mission is finished.

Over the years, our organization, VET-Force, has been voluntarily conducting oversight of the legislation, regulations, policies, and programs intended to improve and increase the contracting opportunities for veteran and service disabled veteran owned businesses. When we come to know what's not working, we do not hesitate to bring that to the attention of the Military Departments, Federal Agencies, or to you, the members of Congress. Just last year, I testified before this Committee about the VA's overly burdensome verification process by the Center for Veterans Enterprise of veteran business owners who are seeking to participate in the VA's Veterans First Contracting Program. For that issue, we supported the recommendation to move that process to the SBA, who we know is more uniquely qualified for such tasks.

Through VET-Force, we've also come to know that the Federal small business procurement process is not only unkind to businesses owned by veterans but is negatively impacting all small business groups—8a, Hubzone, Women owned, as well. A few years ago, we conducted research and prepared a report entitled: 'Breakdown! National Security Crisis in a Small Business World' which basically showed that the Federal small business procurement process is in a state of breakdown and collapse, in conflict with U.S. law and policy.

In my testimony here today, I will draw from that report and evidence of federal policies and practices being used today, to highlight the impact of federal contract bundling and consolidation through the use of Federal Strategic Sourcing Initiatives on veteran and other small businesses.

Many Small Businesses are struggling in the federal marketplace. New U.S. trade policies and changes in how contracts are competed and awarded have made it much more difficult for small businesses to compete against and work with large prime contractors. For example, many government requirements that could be set aside for small businesses are bundled together with other contract requirements and awarded to large companies. Only large companies can hope to win these contracts as the prime contractor due to the increased amount and varied scope of the work. As a result, small companies must work within the contract environment almost entirely at the discretion and advantage of the large corporation.

In recent years, the government has been actively promoting the use of Federal Strategic Sourcing Initiatives (FSSI) among federal agencies in an effort to consolidate procurements in such a manner that reduces the costs of goods and services. However, to us, the small business owner, FSSI is just a more clever way of contract bundling.

Under the Small Business Act, contract bundling is defined as consolidating 2 or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into one large contract. This often results in the contract not being eligible for any one small business due to the size, scope and specialized requirements of the contract. While consolidation is defined a little differently, it still amounts to 2 or more contracts being combined into one new contract which may or may not be suitable for a small business.

We know that the House Small Business Committee has heard the issue of contract bundling from small business owners before. And many legislators have agreed that there have been many instances wherein these policies and practices have limited the opportunities for many small businesses. But things aren't getting any better, many small businesses find they are shut out of the contract process and eventually stop wasting time and money in the Department of Defense (DOD) procurement market and the country is the weaker for it. In a world crying out for a new diplomatic formula, Small Businesses are once again being left out. Real security begins in the grassroots with the kind of economic and political sanctuary provided by small business development.

VET-Force is concerned that by relying so heavily on a few large prime contractors, our country makes itself vulnerable to a catastrophic interruption in services and a lack of competitiveness, innovation and imagination for our military that small businesses provide. New technologies combined with new trade laws create new supply chains and new models of efficiency to meet customer expectations for quality and 'on time' deliveries. Innovative ideas to produce cost efficiencies in government can conflict with valid eco-

nomic and national security policies. Sometimes these efficiencies, as in bundled contracts, work better on paper than in actual practice.

All federal agencies are supposed to identify if a contract is bundled or consolidated. There is a dollar threshold per agency and certain criteria used to make this determination; and achieving reductions in administrative or personnel costs alone is not enough. Measurable cost savings; quality improvements; reduction in acquisition cycle times; better terms and conditions; and other benefits must evident to justify the need to bundle or consolidate a procurement. In addition, there should be an assessment done to determine the impact on small businesses. But who within the procurement process actually makes this determination. And once determined, then what happens.

As agencies continue to increase the use of these practices, it becomes more challenging to get an outside objective analysis of these types of procurements in a timely manner. Agencies are required to provide the SBA's Procurement Center Representative (PCR) and the agency's own Office of Small and Disadvantaged Business Utilization (OSDBU) with a statement explaining why the procurement has to be bundled. If the PCR objects to the agency's rationale, the PCR can delay the procurement while SBA and the agency negotiate, although the agency will ultimately make the decision whether to move forward with the procurement as is or change the requirements.

This process of checking the requirements by the PCR is not only flawed, but by the mere fact that SBA has decreased the number of PCRs to about 50, its highly unlikely that these few persons will be able to review 1000s of procurements throughout the entire federal government. In recent years, SBA has reported that they will collect more data on the number of contracts bundled and measure the impact on small businesses. However, without be directed by a specific legal requirement, their efforts to do so have been less than adequate. VET-Force has previously recommended that SBA increase its budget to include the hiring of more persons to serve as PCRs. We ask now that Congress approve legislation to ensure that SBA carries out these vital functions.

The enduring policy of the United States has been to support the small business sector of the American economy for important economic and national security reasons. The Congressional goal is to ensure a high quality, competitive, innovative, efficient and diversified sources of goods and services in the marketplace, public and private. The Congress also has an interest in a geographically diverse marketplace, one that doesn't concentrate economic and political power in any one region of the United States.

For years Administrations have attempted to streamline its policies in an effort to reduce costs and save the tax payer dollars. Reducing government employees as been one method that has been used a lot. In the 1990's, an estimated 15,000 government procurement positions were eliminated over a decade. One of the negative results has been contract bundling. Bundling many small contracts into one contract vehicle may have been designed as well-meaning

way to make government contracting more efficient and cost effective. Instead, contract bundling has proven to be inefficient and in direct conflict with U.S. policy for small business and national security.

So where then are we headed with Federal Strategic Sourcing Initiatives? While the policy may be endorsed and promoted by OMB in this and previous Administrations, what has been and will continue to be the adverse impact on small businesses. The government claims that there is a definite improvement in procurement efficiencies and cost savings by using strategic sourcing procurement vehicles. However, it appears that the more these types of procurement vehicles are used, the larger the number of small businesses that are not used.

GSA uses a number of strategic sourcing vehicles. Under the Janitorial-Sanitation Supply contract vehicle (JanSan), GSA awarded blanket purchase agreements (BPAs) to 18 companies, 15 of which were small businesses. However, these services were previously being provided by 609 companies, 540 of which were small businesses. So that means that 525 small businesses will no longer be allowed to compete for federal contracts for janitorial services and supplies. Under GSA's Maintenance, Repair and Operations (MRO) contract vehicle, 418 small businesses and 39 service disabled veteran owned small businesses were displaced. And yes 10 of the 11 BPAs awarded were to small businesses. And while GSA projects that there will be a 12% savings by using this method of contracting, there are no projections on the percentage loss by the 418 small businesses that were displaced.

GSA has other contract vehicles of these types that are having the same consequences on hundreds of small businesses—Oasis and Oasis SB, intended to provide integrated, multidisciplinary professional services and ancillary services; and MOBIS, Mission Oriented Business Integrated Services. In 2014, under this contract vehicle, 1270 small businesses were not allowed to compete on various task orders.

And there is another issue. If a company is awarded a GSA contract while that company is a small business, and that company subsequently becomes a large business, that company may still compete (via their GSA contract) as a small business for the remaining life of their GSA contract. VET-Force learned of a recent contract where, a New England business, lost to a large business on a small business set aside contract solicitation under these exact circumstances.

Finally, small businesses competing for government contracts find themselves at a disadvantage in the federal marketplace and appear to be losing ground all the time. The large Prime contractors have been awarded most of the bundled contracts with little to no repercussions for not including small companies in their subcontracting plans. However, under FSSI that use consolidation strategies, a few small businesses will no doubt grow and prosper if they are one of the lucky few selected, but it's clear to see just from the math that there is definitely an adverse impact to far more small businesses.

VIETMAN VETERANS OF AMERICA

Funding Statement

March 16, 2015

The national organization Vietnam Veterans of America (VVA) is a non-profit veterans' membership organization registered as a 501(c)(19) with the Internal Revenue Service. VVA is also appropriately registered with the Secretary of the Senate and the Clerk of the House of Representatives in compliance with the Lobbying Disclosure Act of 1995.

VVA is not currently in receipt of any federal grant or contract, other than the routine allocation of office space and associated resources in VA Regional Offices for outreach and direct services through its Veterans Benefits Program (Service Representatives). This is also true of the previous two fiscal years.

For Further Information Contact:

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Joe Wynn
Special Advisor Vietnam Veterans of America
NABVETS Legislative Liaison



Joe serves as Special Advisor to the Director of Government Relations for the Vietnam Veterans of America (VVA) on projects relating to Veterans Employment, Vocational Rehabilitation, and Small Business. He is a lifetime member and Legislative Liaison for the National Association for Black Veterans (NABVETS), and Treasurer for the Veterans Entrepreneurship Task Force (VET-Force) which is composed of over 200 organizations and affiliates representing thousands of veterans throughout the U.S.

Joe, a Vietnam-era Veteran, received an Honorable Discharge from the U.S. Air Force and has been an advocate for veterans for more than 20 years. Joe entered the military in 1971 and served with the 66th Strategic Missile Squadron, Ellsworth AFB, SD.

In 2004, Joe founded the VETS Group, a non-profit organization that provides entrepreneurial education, federal procurement training, employment assistance and other supportive services primarily for veterans, people with disabilities and persons of limited means. Over the past few years, Joe has participated in conferences for federal, state, and local governments to heighten the level of awareness regarding the needs of veterans.

Through the VETS Group, Joe manages a program to recruit eligible veterans seeking employment and identifies employers who are committed to hiring veterans first. He is developing an initiative to increase the number of procurement and employment opportunities for veteran owned businesses in the private-sector. Partnerships are being formed with large corporate enterprises to offer veterans employment opportunities, business education, mentoring, technical assistance, growth capital, and access to international markets.

The Honorable Leader Nancy Pelosi appointed Joe to serve as a Commissioner on the Veterans Disability Benefits Commission that completed its work in early 2008. Joe just recently served on the VA Secretary's Veterans Advisory Committee for Minority Vets.

Educational Attainment: Under the G.I. Bill, Joe attended the Universities of DC and Howard and completed a Bachelor's degree in Computer Information Systems, a Master's degree in Business, and two years toward a doctorate in Organizational Communications. He served as Director of Education at PTC Career Institute, a business school in Wash., D.C.

Awards: SBA's Veteran Small Business Champion Award. NAACP's Julius E. Williams Distinguished Community Service Award. Thomas H. Wynn Veteran of the Year Award.

VENABLE LLP

STATEMENT OF ROBERT A. BURTON

PARTNER, VENABLE LLP

BEFORE THE

COMMITTEE ON SMALL BUSINESS

SMALL BUSINESS SUBCOMMITTEE ON CONTRACTING AND WORKFORCE

UNITED STATES HOUSE OF REPRESENTATIVES

MARCH 17, 2015

Chairman Hanna, Ranking Member Velazquez, and members of the Subcommittee, my name is Robert Burton, and I am a partner at the Venable law firm in Washington, DC, where I have represented government contractors since 2008, including many small businesses. Previously, I served as the Deputy Administrator of the Office of Federal Procurement Policy ("OFPP"). In that capacity, I was responsible for the federal government's acquisition policy and procurement guidance to all Executive Branch agencies including preparing the Administration's policy position and testimony on proposed acquisition legislation; working with House and Senate committees on the development of acquisition reform proposals; and serving as a principal spokesperson for government-wide acquisition initiatives. Thank you for the opportunity to testify today to discuss challenges to the small business industrial base.

My testimony will address three of these challenges. Specifically, while consolidation and bundling regulations establish a comprehensive means of protecting small business, a number of factors have diminished the effective implementation of such regulations in practice, which, in turn, has reduced the overall small business participation rate in federal procurements – a result, which only has been hastened by the government's latest iterations of strategic sourcing. I also will discuss how the lack of statutory authority for the SBA Office of Hearings and Appeals' ("OHA") existence is particularly problematic for small businesses given that it essentially reduces OHA's independence from SBA. Finally, I will highlight how SBA's absence from the FAR Council has been detrimental to small businesses. But first, I would like provide some brief background information about consolidation and bundling.

IN A PERFECT WORLD, CONSOLIDATION AND BUNDLING REGULATIONS SEEK TO PROTECT SMALL BUSINESSES

Consolidation

The Small Business Jobs Act formally defines consolidation and limits its use. Specifically, consolidation:

> [M]eans a use of a solicitation to obtain offers for a single contract or a multiple award contract—(A) to satisfy 2 or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under 2 or more separate contracts lower in cost than the total cost of the contract for which the offers are solicited; or (B) to satisfy requirements of the Federal agency for construction projects to be performed at 2 or more discrete sites....[1]

Where an acquisition strategy includes a consolidation of contract requirements and exceeds two million dollars, an agency may not carry out that strategy until it (1) "conducts market research;" (2) "identifies any alternative contracting approaches that would involve a lesser degree of consolidation of contract requirements;" (3) "***makes a written determination that the consolidation of contract requirements is necessary and justified;***" (4) "identifies any negative impact by the acquisition strategy on contracting with small business concerns;" and (5) "ensures that steps will be taken to include small business concerns in the acquisition strategy."[2]

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[1] 15 U.S.C. § 657q(a)(2).

[2] *Id.* § 657q(c)(1) (emphasis added). With respect to the fifth prong, it is worth noting that original language required a senior procurement executive or the Chief Acquisition Officer for the Federal agency to certify to the

Regarding the third requirement, consolidation is necessary and justified where the benefits of the acquisition strategy *substantially* exceed the benefits of each of the possible alternatives identified in the second element.[3] The benefits to be considered may include cost, quality, acquisition cycles, terms and conditions, and any other benefit;[4] however, "[s]avings in administrative or personnel costs alone do not constitute a sufficient justification for a consolidation of contract requirements in a procurement" except where "the expected total amount of the cost savings, as determined by the senior procurement executive or Chief Acquisition Officer, is expected to be substantial in relation to the total cost of the procurement."[5]

Bundling

One particular type of consolidated contract is a bundled contract. The Small Business Act defines bundling as

> [C]onsolidating 2 or more procurement requirements for goods or service previously provided or performed under separate smaller contracts into a solicitation of offers for a *single contract that is likely to be unsuitable for award to a small-business concern* due to (A) the diversity, size, or specialized nature of the elements of the performance specified; (B) the aggregate dollar value of the anticipated award; (C) the geographical dispersion of the contract performance sites; or (D) any combination of the [above] factors....[6]

Simply put, "[b]undling is the Federal government's practice of consolidating smaller contracts into very large contracts...."[7]

Prior to bundling any contracts, an agency must "conduct market research to determine whether consolidation of the requirements is necessary and justified[,]"[8] *i.e.*, whether the federal government will derive "measurably substantial benefits, including any combination of benefits that, in combination, are measurably substantial" (e.g. cost savings, quality improvements, reduction in acquisition cycle times, better terms and conditions, or any other benefits).[9] As with consolidation, the reduction of administrative or personnel costs alone cannot justify bundling "unless the cost savings are expected to be substantial in relation to the dollar value of the procurement requirements to be consolidated."[10] Further, to the extent a proposed procurement

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head of the Agency that steps would be taken to include small business concerns in the acquisition strategy. *See* Pub. L. No. 111-240 1313, 124 Stat. 2504, 2538. As illustrated above, the current version now merely requires the same Agency official to "ensure" that "steps will be taken to include small business concerns in the acquisition strategy."

[3] 15 U.S.C. § 657q(c)(2)(A).

[4] *Id.* § 657q(c)(3).

[5] *Id.* § 657q(c)(2)(B).

[6] *Id.* § 632(o)(2) (emphasis added).

[7] S. REP. NO. 105-62, at 21 (1997).

[8] Small Business Reauthorization Act of 1997. PUB. L. NO. 105-135 § 413, 111 Stat. 2592, 2618 (codified at 15 U.S.C. § 644(e)(2)(A)).

[9] *See id.* (codified at 15 U.S.C. § 644(e)(2)(B)).

[10] *Id.* (codified at 15 U.S.C. § 644(e)(2)(C)). The FAR later clarified that cost savings are measurably substantial if the benefits are equivalent to (1) ten percent of the estimated contract or order value (including options) if the value

strategy involves "substantial bundling,"[11] the procuring agency must (1) identify specifically the benefits anticipated to be derived from the bundling of contract requirements; (2) set forth an assessment of the specific impediments to participation by small businesses concerns as prime contractors that result from the bundling of contract requirements and specify actions designed to maximize small business participation as subcontractors; and (3) include a specific determination that the anticipated benefits of the proposed bundling contract justify its use.[12]

To the extent an agency ultimately solicits bids for, or awards, a bundled contract, the head of such agency must, within 30 days of submitting data certifications to the Administrator for Federal Procurement Policy, post on the agency's website a list of reasons for any such contract.[13] Moreover, the SBA Administrator is required to submit to the House and Senate Small Business Committees a report, every three years, regarding procurement center representatives and commercial market representatives.[14] SBA also must submit, on an annual basis, "a report on contract bundling to the Committees on Small Business of the House of Representatives and the Senate."[15]

Though bundled contracts are a subset of consolidated contracts, the bundling regulations differ from their consolidated counterparts in three key areas: required findings, justification requirements and corresponding monetary thresholds, and reporting requirements. First, the bundling regulations direct agencies to determine whether a bundled contract is likely to be unsuitable for award to a small business concern while the regulations for consolidated contracts do not require such a finding. Second, though agencies must provide justifications when using either type of contract, the benefits from bundling must be *measurably* substantial, *i.e.* quantifiable, while the benefits from consolidation only have to substantially exceed the benefits of each of the possible identified alternatives, *i.e.* do not have to be quantifiable.[16] Additionally, the monetary threshold triggering the justification requirements for consolidated contracts – $2 million dollars – is less than the thresholds for its bundled counterpart, which range anywhere from $2.5 million dollars to $8 million depending on the agency. Finally, the rules governing consolidation do not provide a reporting requirement like the bundling rules.

TWO SIGNIFICANT FACTORS UNDERMINE THE IMPLEMENTATION OF EFFECTIVE BUNDLING AND CONSOLIDATION REGULATIONS

Despite such differences, Congress generally has structured the bundling and consolidation regulations to protect small business participation in federal procurements. Indeed, as mentioned above, among other things, procuring activities must provide a written determination that use of

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is $94 million or less; or (2) five percent of the estimated contract or order value (including options) or $9.4 million, whichever is greater, if the value exceeds $94 million. 48 C.F.R. § 7.107(b).

[11] The FAR specifies that substantial bundling is any bundling that results in a contract or order that meets certain dollar thresholds – $8 million or more for the Department of Defense, $6 million or more for NASA, GSA and DoE, and $2.5 million or more for all other agencies. *See id.* at §§ 7.107(e), 7.104(d)(2).

[12] *Id.* (codified at 15 U.S.C. § 644(e)(3)).

[13] 15 U.S.C. § 644(q)(2)(B).

[14] *See* Small Business Jobs Act of 2010, PUB. L. NO. 111-240, § 1312, 124 Stat. 2504, 2537 (2010) (codified at 15 U.S.C. § 644(q)(3)).

[15] *See* 15 U.S.C. § 644(p)(4).

[16] *See* 15 U.S.C. § 657q(c)(3).

a bundled or consolidated contract is necessary and justified, report the usage of bundled contracts to the SBA, and post justifications for bundled contracts on their respective websites. However, the implementation of a robust regulatory structure on paper has proven to be difficult and, therefore, less effective in ensuring small business participation in federal procurements in an age of increased consolidated and bundled contracts given, among other things: (1) the agencies' failure to consistently post justifications for consolidated and bundled procurements in a timely fashion; and (2) the lack of data reporting as well as a complete analysis of available data that effectively examines the impact of bundling and consolidation on small business participation in federal procurements.

The agencies do not timely publish justifications and there is no requirement for them to do so.

As mentioned above, the regulations explicitly require agencies to provide a written justification if a contract is consolidated or bundled; however, the regulations are virtually silent regarding the timing of such publication. In fact, the consolidation regulations do not address the publication of justifications at all, and the bundling regulations merely indicate that such publication must occur within 30 days of the agency's submission of data certifications to the Administrator for Federal Procurement Policy. In other words, the regulations do not require agencies to provide offerors, including small businesses, advance notice that a contract will be bundled or consolidated. This is particularly problematic because offerors may only challenge unjustified bundling and consolidation at the Government Accountability Office ("GAO") prior to contract award as bundling and consolidation should be apparent on the face of the solicitation and, therefore, under bid protest rules, must be filed prior to contract award. Indeed, the SBA OIG has noted that "[t]here are no regulations that would allow SBA to protest a bundling after the contract is awarded...."[17] Simply put, an agency's failure to timely publish a bundling or consolidation justification may deny an offeror the opportunity to amass sufficient information to successfully argue that the justification is flawed (e.g. when the agency issues a justification just prior to contract award) or, worse, preclude any challenge to the justification at all (e.g. when the agency issues the justification post-award). This preclusion, in turn, may frustrate small businesses' participation in procurements. Accordingly, I recommend that Congress mandate the publication of justifications for both consolidated and bundled contracts concurrent with, or prior to the release of, the solicitations.

Data has not been reported as required and SBA's current analysis of existing data does not reveal the true effects of bundling and consolidation on small business participation in federal procurements.

Data and, in particular, accurate data, is essential to understanding the effects that bundling and consolidation have had on small business participation in the federal procurement system as it essentially proves whether or not the regulations have limited the effects of bundling and consolidation on the small business industrial base as intended. Perhaps for this reason, for almost twenty years, regulations have required the collection of data regarding bundled contracts. Specifically, SBA is required to (1) "[m]aintain a database containing data and information

[17] U.S. SMALL BUSINESS ADMINISTRATION OFFICE OF INSPECTOR GENERAL, No. 5-20, AUDIT OF THE CONTRACT BUNDLING PROCESS 6, *available at* http://www.asbl.com/documents/05-20.pdf.

regarding each bundled contract awarded by a federal agency and each small business concern displaced as a prime contractor as a result of such bundling[;]" (2) make specific findings with respect to savings for bundled contracts that are recompeted as a bundled contract; and (3) report annually to Congress on the number of small business concerns displaced as prime contractors as a result of the award of bundled contracts and provide information related to those contracts such as the cost savings realized and the extent to which they complied with the contracting agency's small business subcontracting plan.[18]

Despite such requirements, the true impact of consolidation and bundling on small business contractors has not been documented for at least two significant reasons. First, in some cases, the data has not been collected or reported at all. Indeed, while the regulations require SBA to report several data points regarding bundled contracts to Congress on an annual basis, a November 2013 GAO Report to Congress indicated that SBA had not submitted this report to Congress since fiscal year 2010.[19] In fact, as of the date of my written testimony, SBA still had not submitted this report. As the GAO has recognized, "[u]ntil SBA carries out these reporting responsibilities, Congressional oversight intended to protect small businesses may not function as intended by lawmakers."[20] Further, there is no regulation requiring any reporting with respect to consolidation. Second, and perhaps more problematic, it appears that SBA's analysis of the data agencies have collected with respect to small business participation in federal procurements, as well as the subsequent analysis of such data, does not reflect the true impact of consolidation and bundling on small businesses. Nowhere is this more evident than in the area of goaling.

SBA's goaling analysis

To ensure the participation of small businesses in government procurement, Congress, through the Small Business Act, has established three types of small business goals: (1) numerical goals (*i.e.*, the provision of a certain percentage of prime contract and subcontract dollars to small businesses);[21] (2) industrial goals (*i.e.*, ensuring the participation of small businesses "from each industry category in procurement contracts and subcontracts of such agency");[22] and (3) maximum practicable utilization (*i.e.*, the establishment of an agency goal that represents "the maximum practicable opportunity" for each type of small business concern "to participate in the performance of contracts let by such agency").[23] The latter two are particularly important as they recognize that simply looking at the dollars awarded to small businesses does not, by itself, ensure that small businesses are fairly represented in federal procurement.

With respect to numerical goals, the Small Business Act has established various government-wide statutory goals for small business procurement, specifically:

- For small businesses, 23% of the total value of all prime contract awards for each fiscal year;

[18] GAO, SMALL BUSINESS CONTRACTING: UPDATED GUIDANCE NEEDED TO CONSOLIDATED CONTRACTS 17 GAO-14-36 (2013).
[19] *Id.*
[20] *Id.* at 19.
[21] 15 U.S.C. § 644(g)(1)(A).
[22] *Id.* § 644(g)(2)(D).
[23] *Id.* § 644(g)(1)(B).

- For women-owned small businesses ("WOSB"), 5% of the total value of all prime and subcontract awards for each fiscal year;
- For small disadvantaged businesses ("SDB"), 5% of the total value of all prime and subcontract awards for each fiscal year;
- For service-disabled veteran-owned small businesses ("SDVOSB"), 3% of the total value of all prime and subcontract awards for each fiscal year; and
- For HUBZone certified small businesses ("HUBZone"), 3% of the total value of all prime and subcontract awards for each fiscal year.[24]

SBA, in turn, not only "negotiates with agencies to establish individual agency goals[,]"[25] but also assesses (*i.e.*, grades) the degree to which each agency meets such goals. To this end, "[a]t the end of each fiscal year, SBA requests a report from the Federal Procurement Data Center[26] calculating the prime and subcontract statistical achievements for each agency and the government-wide accomplishments."[27] In determining whether the agencies and the government as a whole have met the established goals, SBA evaluates this data using a scorecard system, which is comprised of three components: (1) prime contracting achievements (80%); (2) subcontracting achievements (10%); and (3) plan progress (10%).[28] Both the prime contracting and subcontracting achievement categories are further divided into five components: small business concerns generally and the four subsets of small businesses (*i.e.*, WOSB, SDB, SDVOSB and HUBZone) with the category of general small businesses constituting 60% of the component weight and the four more specific types of small businesses constituting 10% each.[29]

Using this methodology, SBA concluded that, for fiscal year 2013, the federal government deserved an "A,"[30] meaning that the government met or exceeded between 100 percent and 119 percent of its goals (the actual percentage was 100.60%), despite the fact that it did not meet two of its prime contracting goals, specifically WOSBs and HUBZones.[31] Despite the shortcomings with respect to WOSBs and HUBZones, the grade that SBA awarded the government for FY13 suggests not only that small businesses are receiving a healthy share of federal procurement

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[24] STATUTORY GOALS ESTABLISHED BY FEDERAL EXECUTIVE AGENCIES, https://www.sba.gov/content/statutory-guidelines-0 (last visited Mar. 12, 2015) (hereinafter "Statutory Goals"); *see also* 15 U.S.C. § 644(g)(1)(A).

[25] Statutory Goals, *supra* note 24; *see also* 15 U.S.C. § 644(g)(2).

[26] Agencies are supposed to report each award over $25,000, including details such as industry, place of performance, type of contractor, whether the contractor meets SBA's size standards and amount. GOALING, https://www.sba.gov/content/small-business-goaling (last visited Mar. 12, 2015).

[27] *Id.*

[28] SBA, Fiscal Year 2013 Small Business Procurement Scorecard, *available at* https://www.sba.gov/sites/default/files/files/Scorecard-Grade-Calculation-Methodology-FY13_FINAL_2014-06-04.pdf.

[29] *Id.*

[30] SBA, Government-Wide Performance: FY2013 Small Business Procurement Scorecard, *available at* https://www.sba.gov/sites/default/files/files/FY13_Government-Wide_SB_Procurement_Scorecard_Public_View_2014-04-28.pdf (hereinafter "FY13 Scorecard").

[31] SMALL BUSINESS PROCUREMENT SCORECARDS, https://www.sba.gov/content/small-business-procurement-scorecards-0 (last visited Mar. 12, 2015). Despite the fact that the government as a whole received an "A," it did not meet its prime contracting goals with respect to WOSB or HUBZone, or its subcontracting goals for small businesses generally, SDVO and HUBZone. *See* FY13 Scorecard, *supra* note 30.

dollars, but also that there is robust small business participation in federal procurements.[32] Yet, a broader data analysis indicates that the small business industrial base's participation level is not as robust as SBA's Scorecard grade suggests and may even be shrinking (as discussed in more detail below). Indeed, despite the fact that the federal government continues to channel procurement dollars (and perhaps even an increasing amount) to small businesses, the use of small businesses and the number of small business contract actions actually have declined.[33] Consequently, it appears that federal procurement dollars are increasingly concentrated in a smaller number of small businesses.

This apparent dichotomy between SBA's Scorecard methodology and the true state of the small business industrial base exposes at least two flaws with respect to the current data analysis method. First, an assessment of small business contracting based purely on the number of procurement dollars awarded to small businesses does not accurately reflect or assess the well-being of small business participation in federal procurements. For this reason, the Small Business Act established industrial goals and maximum practicable utilization goals, and SBA should consider incorporating such metrics into its Scorecard analysis. Second, the SBA Scorecard is structured in such a way that prime contracting dollars are significantly more important than subcontracting dollars, meaning each agency and the government as a whole are less incentivized to meet the established level of subcontracting opportunities. Indeed, the government received an "A" despite the fact that it did not meet three of the five subcontracting goals (namely, small businesses generally, SDVOSBs and HUBZones).[34] Consequently, the true health of the small business industrial base cannot be ascertained so long as the metrics are skewed in favor of prime contracting opportunities.

In sum, SBA's lack of reporting and incomplete analysis of small business participation in federal procurements has severely undermined the implementation of effective bundling and consolidation regulations. To reconcile these issues, SBA should not only resume its annual bundling report to Congress, but also, incorporate the Small Business Act's two other types of goals into its Scorecard analysis in order to generate a more fulsome and accurate depiction of the effect of bundling on small business participation in federal procurements.

The new generation of strategic sourcing only has exacerbated the aforementioned problems, which only increases the urgency with which such problems must be fixed.

Rectification of the aforementioned shortcomings is particularly important in light of the government's new generation of strategic sourcing initiatives, which appear to be antithetical to strategic sourcing's original goal of increased small business participation. The following paragraphs provide a brief background on strategic sourcing, as well as a few examples of how the new generation of strategic sourcing initiatives have reduced the small business industrial base.

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[32] *See* Subcommittee on Contracting and the Workforce, Committee on Small Business, Hearing: "Contracting and the Industrial Base II: Bundling, Goaling, and the Office of Hearings and Appeals" 21 (Mar. 17, 2015) (hereinafter "March 2015 SBC Hearing Memo").
[33] *Id.*
[34] *See* FY13 Scorecard, *supra* note 30.

Strategic sourcing is "an effort by the government to understand how it buys what it buys, so that it may better leverage its purchasing power" to the maximum extent possible, thereby reducing cost and improving overall performance.[35] The government has been exploring this concept since at least 2002 when GAO, at Congress's behest, examined how the Department of Defense ("DoD"), the government's largest purchaser of services, could use the private sector's strategic approach to purchasing services to more efficiently manage spending.[36] At the time, the government did not direct federal agencies to develop and implement a strategic sourcing effort, and indeed, did not do so until OMB issued a memorandum on the subject in May 2005.[37] According to the OMB memorandum, strategic sourcing would help "agencies optimize performance, minimize price, increase achievement of socio-economic acquisition goals, evaluate total life cycle management costs, improve vendor access to business opportunity, and otherwise increase the value of each dollar spent."[38] Thus, OMB directed agencies to identify commodities the government could efficiently purchase through strategic sourcing in an effort to save taxpayers' money.[39] Notably, OMB did not mandate the application of strategic sourcing to any procurement.

To supplement the individual agencies' efforts and further OMB's directive, in November 2005, the General Services Administration ("GSA"), in partnership with the Department of Treasury, created the Federal Strategic Sourcing Initiative (FSSI)[40] to, among other things, establish mechanisms to increase total cost savings, value and socioeconomic participation (*i.e.*, maximize small/disadvantaged business participation).[41] Over the years, to achieve FSSI's goals, GSA has created teams to purchase various commodities and, within each of these teams, blanket purchase agreements (BPAs) against GSA's Multiple Award Schedules.[42]

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[35] Subcommittee on Contracting and the Workforce, Committee on Small Business, Hearing: "Scheduling Success? Issues and Opportunities for Small Businesses on the GSA Schedules" 5 (June 4, 2012) (hereinafter "June 2012 SBC Hearing Memo").

[36] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-230, BEST PRACTICES: TAKING A STRATEGIC APPROACH COULD IMPROVE DOD'S ACQUISITION OF SERVICES 1, *available at* http://www.gao.gov/assets/240/233467.pdf.

[37] *See* Office of Management and Budget, *Memorandum for Chief Acquisition Officers, Chief Financial Officers, and Chief Information Officers on Implementing Strategic Sourcing* (May 20, 2005) (hereinafter "2005 OMB Memo"), *available at* http://www.whitehouse.gov/sites/default/files/omb/procurement/comp_src/implementing_strategic_sourcing.pdf.

[38] *See id.*

[39] *See id.*

[40] "FSSI operates through an established governance structure." Jeff Koses, *Federal Strategic Sourcing Initiative: What's the Scoop with Strategic Sourcing* at the Magic Conference (July 27, 2012), *available at* https://www.signup4.net/Upload/CONN13A/MAGI28E/MAGIC2012_FederalStrategicSourcingInitiative.pdf. While OFPP monitors the FSSI's activities, the FSSI Program Management Office (PMO) resides within GSA, and provides program management support to develop, implement and manage government-wide strategic sourcing solutions. *See* GSA FEDERAL STRATEGIC SOURCING OBJECTIVES, https://strategicsourcing.gov/current-objectives (last visited June 5, 2013).

[41] GSA FEDERAL STRATEGIC SOURCING INITIATIVE (FSSI) OVERVIEW, http://www.gsa.gov/portal/category/25623 (last visited June 5, 2013).

[42] GSA's Federal Acquisition Services (FAS) generally provides contracting assistance to other agencies by (1) establishing contracting vehicles that other federal agencies may use to purchase goods and services; or (2) contracting on behalf of other agencies. *See* June 2012 SBC Hearing Memo, *supra* note 35 at 1. The Multiple Award Schedules, or simply Schedules, fall within the former category, and are divided into 31 broad categories of goods and services. *See id.* at 1-2.

Finally, in late 2012, OMB created a Strategic Sourcing Leadership Council (SSLC), whose purpose is to "lead the government's efforts to increase the use of government-wide management and sourcing of goods and services."[43] At a minimum, the SSLC was required, among other things, to "identify at least five products and/or services for which new government-wide acquisition vehicles or management approaches should be developed and made mandatory, to the maximum extent practicable, for the SSLC agencies[.]"[44] This suggested mandatory use of FSSI vehicles represents a departure from prior OMB policies.

Over the past few years, notable strategic sourcing initiatives include, but are not limited to, the Janitorial-Sanitation Supply FSSI (JanSan); Maintenance, Repair and Operations (MRO) FSSI Initiative; One Acquisition Solution for Integrated Services (OASIS) and OASIS Small Business; an Office Supply FSSI (OS3); and Performance Management/Continuous Process Improvement (PM/CPI). Throughout the rollout of these initiatives, both GSA and OMB have worked to honor strategic sourcing's commitment to increase the participation of small businesses by, for example, consulting small business representatives in the development of strategic sourcing contracting vehicles,[45] setting aside a designated number of awards for small businesses,[46] and creating a separate contracting vehicle for small businesses (e.g. OASIS small business).[47] Despite these well-meaning efforts, however, the impact of OMB's and GSA's strategic sourcing policies on small businesses remains a growing concern as the existing policies have had a disproportionate and detrimental effect on small businesses as discussed in the examples below.

OS2/OS3

In June 2010, GSA awarded FSSI blanket purchase agreements ("BPAs") to 15 of the 527 Schedule 75[48] vendors – 13, or approximately 87%, were small businesses.[49] However, at the time of the OS2 BPA, there were 527 Schedule 75 vendors, of which over 90 percent were small businesses.[50] Consequently, more than 400 small business Schedule 75 vendors were not chosen, and therefore, were ineligible to provide office supplies through the OS2 BPA. More recently, GSA launched its third iteration of an office supply FSSI – OS3 – and awarded 23 of the 24 Indefinite Delivery-Indefinite Quantity ("IDIQ") contracts to small businesses and one

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[43] *Improving Acquisition Through Strategic Sourcing*, OMB Memorandum No. M-13-02 (Dec. 5, 2012) (hereinafter "2012 OMB Memo"), *available at* http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-02_0.pdf. The SSLC is chaired by the Administrator for Federal Procurement Policy and consists of representatives from DoD (including representatives from OSD, Army, Navy, Air Force, and DLA), Energy, Health and Human Services, Homeland Security, Veterans Affairs, GSA, NASA, and SBA. *See id.* at 2. This memo notes that the SSLC replaces the Strategic Sourcing Working Group (SSWG). *See id.*

[44] *Id.*

[45] *See id.* at 2.

[46] *FSSI JanSan & MRO Acquisition Strategies* at the Pre-Solicitation Meeting (May 15, 2013) (hereinafter "JanSan/MRO Pre-Solicitation Presentation").

[47] *See OASIS SB Industry Day* (May 13, 2013) (hereinafter "OASIS Presentation"), *available at* https://interact.gsa.gov/sites/default/files/OASIS%20SB%20Industry%20Day%20Presentation%20May%2013.pdf.

[48] As mentioned previously, GSA assigns various numbers to its Schedules. Schedule75 represents the schedule for office supplies.

[49] Jeff Koses, *OS3 Draft Approach* (May 2013) at 8.

[50] June 2012 SBC Hearing Memo, *supra* note 35 at 6.

contract to a large business.[51] Despite the proportionately large number of total awards to small business, GSA's decision to implement the OS3 FSSI effectively eliminated more than 400 small businesses from furnishing the government with office supplies.[52]

JanSan

The implementation of the JanSan FSSI has had similar results. In the fall of 2014, GSA awarded 18 BPAs under its JanSan FSSI, 15 of which were awarded to small businesses.[53] Once again, though small businesses received the majority of BPAs and likely will receive significant federal procurement dollars thereunder, a vast number of small business contractors previously involved in such efforts have been foreclosed from continuing to provide such work to the government. Indeed, prior to the establishment of the JanSan FSSI, more than 600 businesses competed for this work, including over 500 small business concerns.[54] As such, while it appears that the number of dollars to small businesses likely will increase under the JanSan FSSI, the overall effect will be a decrease in the number of participating small businesses.

OASIS and OASIS SB

Finally, while OS3 and JanSan demonstrate the government's application of strategic sourcing to the procurement of commodities, OASIS represents the government's incorporation of services into the FSSI. Like JanSan and OS3, OASIS severely limits the number of small business contracting opportunities even with a small business set-aside. Specifically, while the government announced 76 awards under the unrestricted portion of OASIS and 123 awards under the small business set-aside track, the OASIS FSSI has displaced more than two thousand small business vendors.[55] Moreover, the concept of a nationwide services contract serving multiple federal agencies ignores the reality that small businesses providing professional services generally offer highly specialized solutions within a limited geographical area. Consequently, small businesses may have difficulty assembling a team of professionals that competitively satisfies the RFP's requirements by taking advantage of economies of scale like large businesses.

In sum, as originally envisioned, strategic sourcing aimed to, among other things, increase small business participation and maximize the value of each dollar spent by federal agencies. As such, the focus was not simply on cost, but creating and implementing an overall strategy that would "optimize performance, minimize price, increase achievement of socio-economic acquisition goals, evaluate total life cycle management costs, improve vendor access to business opportunity, and otherwise increase the value of each dollar spent." However, as discussed above, the implementation of the most recent generation of strategic sourcing initiatives as well as OMB's desired mandatory usage of strategically sourced contracts diminish one of the strategic sourcing initiative's cornerstones – increase small business participation in federal procurements.

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[51] THIRD GENERATION OFFICE SUPPLY SOLUTION, http://www.gsa.gov/portal/content/195439 (last visited Mar. 15, 2015).
[52] March 2015 SBC Hearing Memo, *supra* note 32 at 14.
[53] AWARDED VENDORS AND SOLUTION PORTALS (FSSI JANSAN), http://www.gsa.gov/portal/content/206651 (last visited Mar. 15, 2015).
[54] March 2015 SBC Hearing Memo, *supra* note 32 at 10.
[55] *Id.* at 12.

OHA IS NOT A SUFFICIENTLY INDEPENDENT INSTITUTION

In addition to the inadequate implementation of bundling and consolidation regulations, the lack of statutory authority for OHA's existence jeopardizes the health of the small business industrial base. A brief background on OHA is helpful to understand this argument. In 1983, SBA created OHA "to provide an independent, quasi-judicial appeal of certain SBA program decisions[.]"[56] Specifically, "OHA has authority to conduct[,]" among other things, proceedings with respect to appeals from 8(a) and size determinations, NAICS code designations, appeals from the SDVO Small Business Concern program ownership and control status, and "certain matters involving debarments and suspensions."[57] However, given that OHA does not exist through statutory authority, OHA's continued jurisdiction over these matters and any other potential matters rests solely in SBA's discretion. In other words, despite its characterization as independent, OHA is not truly independent of SBA. As such, in an effort to maintain its jurisdiction over various issues, OHA may be reticent to render a decision that is contrary to SBA's position. This circumstance is problematic regarding federal contracts generally, but disproportionately affects small business contractors given the nature of OHA's mandate. Thus, I would recommend that Congress emphasize OHA's independence by establishing it pursuant to statutory authority.

The establishment of OHA as an independent statutory body not only would rectify any question as to OHA's impartiality, but also could assist small businesses with another challenge they currently encounter – the establishment and modification of size standards. Currently, the process for establishing size standards is rather opaque and does not include any provision for notice or comment rulemaking.[58] However, if Congress bestowed statutory authority upon OHA, it also could provide OHA with jurisdiction over the establishment of size standards. Such an option would be particularly beneficial for small businesses whose only current recourse is litigation in federal courts – an expensive and time-consuming option.

SBA IS NOT A MEMBER OF THE FAR COUNCIL

A final challenge currently impacting the well-being of the small business industrial base is the lack of SBA representation on the FAR Council. The FAR Council "was established to assist in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities in the Federal Government...."[59] Perhaps most importantly, "[t]he Council coordinates controls and monitors the maintenance and issuance of changes in the FAR."[60] Since its creation, only three agencies have been represented on the Council – DoD, NASA and GSA.

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[56] SBA- ABOUT US, https://www.sba.gov/oha/about-us (last visited Mar. 15, 2015).
[57] 13 C.F.R. § 134.102.
[58] March 2015 SBC Hearing Memo, *supra* note 32 at 29.
[59] FEDERAL ACQUISITION REGULATORY COUNCIL, https://www.whitehouse.gov/omb/procurement_far_council (last visited Mar. 16, 2015).
[60] *Id.*

Currently, FAR rulemaking is "a long established process following the direction of the Congress, the President, or suggestions from agencies or the public."[61] A proposed change to the FAR is assigned a case number, which, in turn, is assigned to a team that "develops the language they believe implements the suggested/directed changes based upon their specific expertise and knowledge of the procurement process."[62] After the team completes its assigned work, the Defense Acquisition Regulatory Council ("DARC") and the Civilian Agency Acquisition Council ("CAAC") review the case, whereupon the case is submitted to OMB's Office of Federal Procurement Policy ("OFPP") for review and approval. OFPP, in turn, submits the case to OMB's Office of Information and Regulatory Affairs ("OIRA") for its review and approval before ultimately sending the final rule to the FAR signatories for their review and approval.[63] The final step in the rulemaking process is publication in the Federal Register.[64]

Given this rather lengthy and bureaucratic process, it is not surprising that several provisions of the Small Business Jobs Act of 2010 (the "Jobs Act") still have not been implemented. In fact, as of February 23, 2015 (the last date that the Open FAR Cases report was published), there are at least four provisions from the Jobs Act currently pending as FAR cases,[65] while other provisions are still awaiting the opening of a FAR case. For example, one of the pending cases "[i]mplements Section 113 of the Job Act and SBA's final rule to ensure that" federal agencies make decisions "regarding consolidation of contract requirements...with a view to providing small businesses with appropriate opportunities to participate as prime and subcontractors."[66] Until the FAR Council completes implementation of this rule, small business contractors simply will have to hope that agencies properly make decisions regarding the consolidation of contracts, which seems unlikely given the previous discussion concerning the inadequate implementation of consolidation regulations thus far.

To rectify this deficiency, I would recommend the appointment of SBA to the FAR Council, which could streamline the implementation process, allow for better coordination between SBA and the current members of the FAR Council and facilitate concurrent rulemaking.

CONCLUSION

Small businesses currently face a plethora of challenges that threaten the health of the overall industrial base. In an era where there has been pressure on the government to reduce spending, bundling and consolidation have become increasingly attractive as many associate them with lower prices. Nevertheless, such procurement strategies often diminish small business opportunities to contract with the federal government. Consequently, it is more important than ever that bundling and consolidation regulations designed to protect small business participation are effectively implemented. Accordingly, I would recommend that Congress strongly consider a law that requires publication of bundling and consolidation justifications prior to, or concurrent with, the issuance of the solicitations. Additionally, Congress should ensure that SBA not only

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[61] FAR RULEMAKING: CONTRACTOR COMPLIANCE PROGRAM AND INTEGRITY REPORTING – STATEMENT OF DAVID DRABKIN, *available at* http://www.gsa.gov/portal/content/103008 (Apr. 15, 2008).
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *See* Open FAR Cases, *available at* http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf.
[66] *Id.* at 6.

reports annually to Congress, but also, more thoroughly analyzes the impact of bundling and consolidation on the small business industrial base by aligning the Scorecard methodology with the types of goaling provided for in the Small Business Act. To further ensure the health of the small business industrial base, I also would recommend that Congress consider creating OHA as a statutory body, which would increase OHA's independence and possibly provide small businesses a forum in which to challenge SBA's creation and modification of size standards, and adding the SBA to the FAR Council, which may expedite the implementation of small business regulations.

Again, thank you Chairman Hanna, Ranking Member Velazquez for the opportunity to testify at this important hearing. I will be pleased to answer any questions you or members of the Subcommittee may have.

PSC PROFESSIONAL SERVICES COUNCIL
The Voice of the
Government Services Industry

STATEMENT OF

ALAN CHVOTKIN, ESQ.
EXECUTIVE VICE PRESIDENT AND COUNSEL
PROFESSIONAL SERVICES COUNCIL

BEFORE THE

SUBCOMMITTEE ON CONTRACTING AND WORKFORCE
COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

"CONTRACTING AND INDUSTRIAL BASE II:
BUNDLING, GOALING AND THE OFFICE OF HEARING AND APPEALS"

MARCH 17, 2015

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Chairman Hanna, Ranking Member Meng, and members of the Subcommittee, thank you for the invitation to appear today and discuss the important relationship between federal contracting and the small business industrial base. The Professional Services Council (PSC) is the leading national trade association representing nearly 400 member companies and their hundreds of thousands of employees across the nation providing professional and technology services to the federal government.[1] Almost half of our members are smaller businesses with revenues below $60 million.

PSC and our members have significant expertise in the federal acquisition marketplace with a particular focus on the acquisition of professional and technology services. We are strong supporters of a balanced federal policy on small business. PSC has four policy objectives for 2015:

- Improve the federal acquisition and technology workforces
- Enhance the federal services market ("preserve, protect and defend" the market)
- Promote the "industrial base" for services (for small, mid-tier and large companies)
- Rationalize and incentivize the acquisition policy ecosystem (for contracting, compliance, audit and contract administration)

There are specific initiatives that directly touch on these policy objectives that are pending before this committee and PSC has specific recommendations to make. In my testimony I address four important issues in federal contracting for small business for your attention and consideration; they are (1) strategic sourcing; (2) the imbalance in small business goal setting and small business attainment; (3) the importance of improving the quality of existing data collections and what additional information would aid policy considerations; and (4) the challenges of evaluating how the significant changes to the law and regulations interrelate and have, and will continue to have, significant effects on the opportunities for small business participation in federal contracting.

Strategic Sourcing

Strategic sourcing is not suitable for all of the government's acquisitions. It may be more appropriate for certain commodity purchases but less appropriate for services purchases. When considering the federal government's move toward more strategic sourcing and its interrelationship with small business contracting goals, it is clear that there are disconnects driven largely by how the federal government measures small business performance in the federal market and the desire to foster a strong industrial base.

In 2013, PSC President and CEO Stan Soloway testified before this Contracting and Workforce Subcommittee about strategic sourcing and its impact on the industrial base. Then, as now, our view of strategic sourcing was centered on supporting an environment of robust competition, high performance, agility, innovation and balanced opportunities for companies of all sizes. In that testimony, we raised the important question of "what are the objectives of strategic sourcing?" and posited two potential answers. The first is "to optimize government operations" and the second is "to optimize

[1] For over 40 years, PSC has been the leading national trade association of the government technology and professional services industry. PSC's nearly 400 member companies represent small, medium, and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Together, the association's members employ hundreds of thousands of Americans in all 50 states. See www.pscouncil.org.

government operations without impacting current socioeconomic or other acquisition policy goals." In our view, the latter has emerged as the overarching objective, and the strategies adopted by the government have certainly had a mixed impact on the small business community. At the conclusion of that testimony, we recommended that the federal government better align the number of small business providers and the total dollars expended via small business as part of the overall strategic sourcing strategy. Today, that recommendation is still valid, but it is also clear that improved data collection and analysis is necessary to improve decision-making in the future.

Since we last testified, efforts to increase the use of strategic sourcing of the government's procurement of goods and services have become more expansive, and the metrics that are used to evaluate small business performance in the federal marketplace seem to demonstrate that small businesses continue to thrive in a "strategically sourced" environment. That data, however, fails to consider certain key factors that should be considered, such as whether there is an equitable distribution among small businesses and a balanced reliance on small businesses for certain categories of work. To that end, additional data analysis and oversight will be necessary to fully assess strategic sourcing's impact on the industrial base generally and on small business specifically.

The Pros and Cons of Strategic Sourcing

The merits of strategic sourcing are sound—buy in bulk quantities from a limited number of dedicated suppliers and benefit from the associated price discounts. Other benefits of strategic sourcing for the federal government include the ability to more rapidly access solutions via existing contracts in lieu of undertaking entirely separate acquisitions, lower acquisition management costs, decreased workload for the overburdened federal acquisition workforce, and simplified data collection and reporting of federal spending. Benefits for the private sector include greater clarity into federal project pipelines, improved opportunities for task order awards—at least for those "pre-approved" contractors—and lower overall bid and proposal costs as the number of multiple-award IDIQ contracts that industry may compete for declines.

But strategic sourcing has a number of negative consequence that must be fully understood and considered. First, strategic sourcing could result in less competition at the task order level. While this is a benefit to those companies that have a "seat" on the master contract, the diminished competition could hamper the government's ability to quickly access innovative solutions. Second, strategic sourcing will affect the industrial base as fewer companies are awarded contracts and the rest are potentially shut out from competing for work under the contract for years. Third, as larger task orders are set aside for smaller firms, the performance risk for the companies and the government increases significantly. Finally, there is uncertainty regarding how the federal government manages its strategic sourcing initiatives in a way that recognizes and complies with existing contracting consolidation and bundling laws and regulations.

PSC is a strong proponent of well-designed strategic souring as well as establishing and maintaining a strong industrial base, not just for small businesses, but for businesses of all sizes. In recent years, we have witnessed a number of individual initiatives that increase the use of strategic sourcing and small business participation across the federal government. In many cases, these efforts actually complement each other. For example, as a result of statutory changes, the Federal Acquisition Regulation was amended in 2012 to clearly provide authority for contracting officers to reserve or set aside all, or parts, of multiple award IDIQ contracts for small businesses, overriding the previous standard of providing a fair opportunity for all contract holders. As a result of those legislative and regulatory changes, contracting officers now have greater flexibility to make set-aside decisions at the task order level.

Additionally, several contracts that have been dubbed as "strategic sourcing" vehicles have actually had two parallel contracts awarded—one that resulted from full and open competition among entities of all sizes, and another that restricted competition to small businesses. GSA's Alliant and Alliant Small Business and OASIS and OASIS Small Business are two examples.

It is important to note that even the unrestricted version of these contracts encouraged small business participation and that small businesses have received awards under them. It is also important to note that these contracts typically contain significant small business subcontracting requirements. Yet, as will be discussed later in this testimony, subcontracting data is woefully inaccurate. Hence, improved data collection and analysis will be critical in helping stakeholders understand the comprehensive, longer term effects of the government's small business and strategic sourcing contracting policies.

The Growth of Strategic Sourcing Vehicles and the Effect on the Federal Supply Schedules

Historically, GSA and many federal agencies have relied on the GSA Federal Supply Schedules (schedules) to provide a competitive market for vendors to offer their goods and services to the federal government. Small businesses have historically fared well under the schedules programs, receiving nearly 35 percent of the dollars awarded via the schedules. But the opportunities under the schedules is evolving and shrinking as spending through the schedules declines and as new Blanket Purchase Agreements established under specific schedules have further consolidated the number of companies that can compete for certain goods or services. Also of significance is that GSA has or is creating new multiple award IDIQ contracts that may further reduce the amount of work that flows through the schedules. GSA's OASIS contract, and the current GSA/OPM initiative to create the Human Capital and Training Services (HCaTS) contract, are two examples where GSA is creating new contract vehicles that will impact the market opportunities for companies to compete for work under the schedules program. As stated above, these vehicles offer small business opportunities, but only to a limited number of companies who successfully compete for both the base contract and then task orders under those contracts, compared to those firms that compete for orders placed under the schedules.

While PSC does not object to the creation of these contracts, their potential impacts should be more fully understood. For example, both OASIS and HCaTS will offer professional services that are already available under a number of existing GSA schedules, including MOBIS, PES, AIMS and FABS.[2] The stated intent of these new multiple-award IDIQ contracts is to provide a better and more flexible vehicle for government agencies to procure an integrated combination of services that would ordinarily have to be purchased individually via the schedules or through stand-alone awards. However, the oversight community will need to pay special attention to these vehicles to ensure that they are truly being used for integrated solutions, and not siphoning opportunities that are or should be more appropriately ordered from the individual schedules. If, in fact, individual services are procured via the OASIS or HCaTS awards in lieu of the schedules, then agencies will functionally be excluding many businesses, including small business, from competing for work they have previously been eligible to compete for.

OASIS is too new a vehicle for any meaningful analysis of its effect on small business, but anecdotally, the overall impact on small business does not appear to be negative. PSC shares this committee's concern that, while small businesses may be winning an appropriate dollar value of work under these

[2] GSA has announced that they are beginning to consolidate at least seven of the 10 stand-alone professional services schedules, including MOBIS, PES, AIMS and FABS, into a single schedule called "Professional Services Schedule" (PSS). GSA does not initially plan to integrate the existing IT Schedule (Schedule 70) into PSS. GSA's work is already well underway with a goal of completing the integration and the transition to PSS by the end of 2015.

vehicles, the number of small businesses winning such work may actually be in decline. We are also concerned that certain industries may be underrepresented in the federal marketplace while others enjoy the benefit of significant amounts of set-aside work. As such, it is important to collect information about the number of small businesses that are benefiting from the government's strategic sourcing initiative as well as how strategically sourced federal dollars are being awarded across the multitude of NAICS codes. In fact, it is important to examine this data and overall small business participation in the federal marketplace more broadly.

Imbalance in Small Business Goal Setting and Small Business Attainment

The Small Business Administration negotiates biennially with the federal agencies on their small business attainment goals. This negotiation includes prime contract award goals for the federal agencies and subcontracting goals to be achieved by federal prime contractors. It is understandable that, when SBA is negotiating with agencies, some departments and agencies have larger procurement budgets or greater opportunities for making prime contract and subcontract awards to small business than others. But what we have seen is that an agency's historical achievement is a good indicator of its future goals, without taking into account how an agency's buying actions might have changed or that what an agency is acquiring is changing. While SBA is agnostic about how an agency achieves its goals, we have seen how agencies have skewered their performance to focus on some of the "low hanging fruit" within their business opportunities and not looked across their entire enterprise for meaningful small business participation opportunities. As a result, agencies are, in effect, picking winners and losers in the small business market—and in the larger agency industrial base market—through these goal attainment decisions.

For example, several components of the Department of Defense spend a large amount of money on major weapons systems. While it is unlikely that small businesses are capable of acting as prime contractors on these opportunities, their participation in these markets is not, and should not be, zero or near zero. Yet, some defense agencies wall off these weapons systems procurements from their small business prime contracting achievement objectives and focus exclusively on other sectors of their business opportunities where there are large numbers of small business competitors to help them achieve their prime contracting goals. If you are a small business in this sector, you may benefit from the aggressive agency action to set aside awards for small businesses, but only so many small businesses can win this work. However, if you are "other than small" in this sector, an entire market may be shut off from you because of the amount of set-asides that are issued. Similarly, if you are a small business that works in one of the sectors that the agency has walled off, you may not see any set-asides in that walled off sector and find it difficult to compete in the full and open marketplace.

In the goal setting process, SBA and the agencies must evaluate not only top-line small business goals, but also analyze and comment on changes in the agency's business base and addressable market. In fact, consideration should be given to setting not only prime contracting and subcontracting goals, but also target goals for services and commodities to be sure that one segment of an agency's market is not drawing a disproportionate share of the agency's attainment efforts.

Data Quality Regarding Total Small Business Participation

In order to make informed decisions about federal contracting small business policies, better data that captures the full participation across the federal marketplace is necessary. While federal small business prime contracting expenditures in the aggregate are fairly accurate—at least to the same level of accuracy as any other contracting data generated—there is significantly less visibility into small business participation at the subcontracting level. This data is not insignificant since it is essential to have a clear

picture of how successful small businesses are at the subcontracting level in order to make appropriate decisions that could either expand or contract small business opportunities in the federal market.

To be clear up front, PSC is not recommending that federal agencies should receive credit against their small business prime contracting goals for any subcontracting that is performed by small businesses. However, increased pressure has been shifting from the federal agencies to prime contractors to offer substantial subcontracting opportunities to small business subcontractors. It is not uncommon for primes to have a 40 percent or greater small business subcontracting requirement on the awards they receive from the federal agencies.[3] In addition, prime contractor compliance with their small business subcontracting plans is part of the prime contractors' past performance record. As such, primes make a concerted effort to offer ample subcontracting opportunities for the work they are awarded from the federal government. The experience that small businesses receive through the performance of such work is also extremely helpful in preparing small businesses to serve the federal market as prime contractors.

This committee's past work has recognized the lack of accurate small business subcontracting data. In an effort to improve subcontracting data reporting, the committee worked closely with the House and Senate Armed Services Committees to enact legislation in the fiscal year 2013 National Defense Authorization Act that tasked the Office of Advocacy within the Small Business Administration to lead an independent assessment of the small business industrial base that includes an analysis of barriers to accurately capturing data on small business prime and subcontracting data. In June 2014, that report was published and it highlighted a number of challenges to collecting accurate subcontracting data via the government's eSRS and FSRS reporting systems.[4] Challenges included the inability to accurately identify the appropriate NAICS code assigned to subcontracts, not all contracts requiring the reporting of subcontracting information, and the inability to drill down into subcontracting that occurs beyond the first tier. Again, to this committee's credit, language was included in the fiscal year 2014 National Defense Authorization Act that would permit prime contractors to report subcontracting beyond the first tier, but that statutory language has not yet been implemented in regulations or contracts.[5]

PSC strongly believes that without meaningful data that can be used to provide an accurate picture of total small business participation, government risks making ill-informed small business contracting decisions that could place significant risks on small business contractors and could damage the broader industrial base. On the positive side, the enactment of the Digital Accountability and Transparency (DATA) Act could be a driver for better information, and PSC looks forward to working with this committee and the appropriate oversight committees as the implementation of the DATA Act continues.

Challenge of Fully Evaluating the Effect on Small Business of Laws and Regulations

There has been more small business legislation addressing federal procurement matters enacted in the past five years than at almost any time in the last two decades. Many of these proposals have been enacted to address specific problems that have been identified in the federal contracting marketplace while others have been adopted to level the playing field for small businesses in federal procurement. In

[3] Subcontracting requirements have been typically based on the percentage of total dollars subcontracted, not on the total value of the contract. That measure was changed by Congress but final rules have not yet been issued.
[4] Evaluation of the Small Business Procurement Goals Established in Section 15(g) of the Small Business Act, June 2014, available at https://www.sba.gov/sites/default/files/files/rs423tot.pdf.
[5] Section 1641 of the fiscal year 2014 National Defense Authorization Act, available at http://www.gpo.gov/fdsys/pkg/CPRT-113HPRT86280/pdf/CPRT-113HPRT86280.pdf.

the past, this committee has held hearings to address the slow pace of regulations to implement statutory changes, whether by SBA in amending its own regulations or by the Federal Acquisition Regulatory Council in amending the FAR. Occasionally, provisions have been enacted affecting only one agency, such as the Department of Defense or the Department of Homeland Security, and those agencies are responsible for issuing regulations to incorporate the changes within their agency-specific FAR supplements.

When forced to comment on rules in piecemeal fashion, it has been a challenge to understand the impact of all of the regulatory actions on the federal acquisition marketplace and on small business opportunities. For example, one recent rule on small business subcontracting encouraged the use of joint ventures that are "not populated." A separate regulation on HUBZones provides an advantage for HUBZones that use a "populated" joint venture. Neither rule would typically provide an opportunity to comment on the inconsistencies between these two rules. The Small Business Administration's contracting rules are typically finalized before the FAR rules are published, but occasionally the pattern is reversed or the FAR rules are issued on an interim basis and put into effect before the entire regulatory landscape is visible. These rolling regulatory issuances create a challenge for analysis and commentary on the impact of any single rule on the overall regulatory scheme and how they will affect the market. Notwithstanding congressional interest (and sometimes direction) that implementing rules be issued within a reasonable period of time, we are still waiting for some final rules for key provisions of the 2010 Small Business Jobs Act.

Recommendations

PSC offers the following recommendations. First, more needs to be done to improve the data reporting to track federal prime and subcontracting data. This is, without a doubt, a significant challenge that will require close coordination between industry and government. Second, careful attention must be paid to ensuring that opportunities of the appropriate size are being set aside. In the goal setting process, SBA and the agencies must evaluate not only top-line small business goals, but also analyze and comment on changes in the agencies' business base and addressable market. In fact, consideration should be given to setting not only prime contracting and subcontracting goals but also target goals for services and commodities to be sure that one segment of an agency's market is not drawing a disproportionate share of the agency's attainment efforts. Agencies must also take the steps necessary to fully implement and then comply with both the bundling and the consolidation reporting requirements that have been enacted in recent years. Finally, the viability of conducting past performance assessments of first-tier subcontractors should be thoroughly explored.

Thank you again for the invitation to provide PSC's views on these important issues. We look forward to continuing our long-standing work with this Committee on these issues. I would be pleased to answer any questions you may have.

Testimony of

Damien Specht

Partner

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Co-Chair, Government Contracts Corporate Transactions Practice Group

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON SMALL BUSINESS

SUBCOMMITTEE ON CONTRACTING AND WORKFORCE

Regarding "Contracting and Industrial Base II: Bundling, Goaling, and the Office of Hearings and Appeals"

March 17, 2015

Chairman Hanna, Ranking Member Velázquez and Members of the Subcommittee, thank you for the invitation to appear today. It is a privilege to share my views on the ways we can maintain a strong industrial base of small business government contractors. My name is Damien Specht, and I am a government contracts partner with the law firm of Jenner & Block here in Washington, D.C. Before I begin, let me state that my comments are my own, and I am not speaking on behalf of my law firm or any specific client.

I serve as Co-Chair of the firm's Government Contracts Corporate Transactions Practice Group and as a Co-Chair of the American Bar Association's Section of Public Contract Law Small Business & Other Socioeconomic Programs committee. In each of these roles, I work with small government contractors and entrepreneurs as they enter the federal market, navigate size protests, and, through hard work, develop thriving mid-size businesses. I also assist small businesses in corporate transactions with large contractors and investors.

In my testimony, I will address how consolidated contracting, whether through bundling or strategic sourcing, reduces competition and necessarily limits the number of small businesses in the federal marketplace. I would also like to briefly discuss the Small Business Administration's scorecard rating methodology and, as a litigator who regular appears before the Small Business Administration Office of Hearings and Appeals, share some thoughts on that forum.

Bundling Reform

Anecdotally, I have heard from many of my small business clients that bundling is a problem. For example, facilities operation contractors have complained that general maintenance services have been bundled with logistics and food services and hardware contractors have been excluded from competitions when a series of additional items were added to the contract requirements. However, because we largely rely on self-reporting, the government has little reliable data on where bundling is occurring, how many contractors are being affected by bundling, and the impact that bundling and consolidation are having on the small business community.

As a result, I support the efforts of this subcommittee to increase transparency and reporting of data related to bundling. In particular, I support the idea that agencies should be required to publish bundling justification along with issued solicitations. In other circumstances where agencies limit competition, such as sole-source awards, we require publication of a justification; bundled requirements, which can eliminate small business opportunities, should be no different. This added transparency will allow small businesses to understand the agency's rationale and, if necessary, to protest the consolidated requirement.

I will note, however, that bundling protests are rarely successful. I have reviewed dozens of protest decisions by the Government Ac-

countability Office that include bundling allegations and could only find a small handful that were sustained on that basis. This is the case because the GAO gives agencies significant deference and only requires "a reasonable basis for its contentions that bundling is necessary."[1] This is not a high bar and, as result, it appears that the primary way for an agency to lose a bundling protest is to fail to perform the statutorily required bundling analysis at all.[2] As a result, in addition to increasing transparency surrounding bundling, this committee should consider raising the bar for justifying these decisions, which can currently be based on as little as a five percent cost savings.[3]

The Downside of Strategic Sourcing

Although strategic sourcing is technically consolidation and not bundling, it can have the same effect of weakening the small business government contracting base.

Strategic sourcing means many things to many people, but the basic process includes identifying needs across government agencies and consolidating purchases through industry or item-focused contract vehicles to achieve cost savings. The public record is clear that proponents of strategic sourcing have worked with small business stakeholders to maximize small business participation on these contracts. In fact, most of the awardees under the GSA's Federal Strategic Sourcing Initiative (FSSI) program are small businesses. That effort is commendable, but the problem with strategic sourcing is not one of intent or lack of effort to include the small business industrial base. The problem is that strategic sourcing, at least when accomplished through large contract vehicles, is necessarily bad for enhancing the diversity of small government contractors in the industrial base. This is the case for a few reasons:

First, the number of offerors that can compete for strategic sourcing contracts is limited. As a result, it is not at all clear that the Government is getting the best pricing on each item or that it is honoring its commitment to full and open competition. When the government's solicitation requires offerors to provide hundreds of different items in significant bulk, as it must to gain the benefits of a strategic sourcing contract, that contract structure all but eliminates offerors who provide some of the required items but cannot deliver in the tremendous quantities required for a government-wide purchasing vehicle. As demonstrated by the FSSI Office Supplies contract, it is often necessary for hundreds of small businesses to team together to fulfill the requirements of these large contracts. As you might imagine, these broad coalitions among

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[1] *B.H. Aircraft Company, Inc.,* B–295399.2, July 25, 2005, 2005 CPD ¶ 138.

[2] *Sigmatech, Inc.,* B–296401 Aug. 10, 2005, 2005 CPD ¶ 156 (sustaining a protest "where agency failed to perform bundling analysis").

[3] Currently, FAR 7.107 provides that bundling may be permissible if it results in "cost savings or price reduction, quality improvements that will save time or improve or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions, and any other benefits." Cost savings must be substantially equivalent to "(1) Ten percent of the estimated contract or order value (including options) if the value is $94 million or less; or (2) Five percent of the estimated contract or order value (including options) or $9.4 million, whichever is greater, if the value exceeds $94 million." *Id.*

competitors are rare and result in significant administrative challenges. This is a real barrier to entry for small businesses that could provide some, but not all, items or lack the immediate infrastructure to deliver hundreds of thousands of items. These same small businesses could fulfill the government's needs if smaller, more focused contracts were opened for competition among the full breadth of the small business base.

Second, those businesses that do not receive strategically sourced awards may find other contract opportunities disappear. To drive real volume discounts, purchasing from strategic sourcing vehicles, like the FSSI contracts, must be mandatory or, at least, highly encouraged. That means that there are a small number of significant winners and a far larger number of losers.

For example, in June 2010, GSA awarded the previous generation of its FSSI Office Supply blanket purchase agreement to 15 companies. Although there were 15 awardees, most of which were small businesses, those awardees must be balanced against the thousands of possible firms that could have met the Government's needs had these requirements been solicitated in less volume. This number includes 569 holders of GSA Schedule for Office Solutions that could have met the Government's needs through a simple Federal Supply Schedule order. All of those other businesses, large and small, became holders of an essentially useless supply schedule contract.

As this example demonstrates, small bushiness participation percentages reported as part of strategic sourcing do not report the whole story. For example, GSA has reported that small business participation on its office supply contracts increased from 67 percent to 76 percent of spending in fiscal year 2014. If the goal of small business programs were simply to achieve certain metrics, these numbers would show clear and convincing progress. However, I believe that the purpose of small business programs is to create a vibrant and diverse base of small businesses that can offer innovation and creativity to the federal marketplace while creating jobs in communities across the country. Judged by that standard, a higher percentage of spending that is isolated within a smaller number of firms is not a step in the right direction.

Third, because strategic sourcing contracts are likely to reduce the number of sales available to Federal Supply Schedule holders, these large contracts may also dissuade small business from becoming federal contractors. Traditionally, GSA's Federal Supply Schedule program has provided a low barrier to entry access point for aspiring government contractors. In fact, the overwhelming majority of my small business clients hold at least one Federal Supply Schedule contract. The appeal of these contracts is obvious: Instead of putting together RFP responses for specific procurements and expending significant bid and proposal costs, a small contractor looking to enter the federal space can put together a single schedule proposal and place its entire catalog online. If this low-cost entry is successful, the firm can then expand its offerings and compete for other federal contracts. If we choose to shift the Government's purchases to strategic sourcing contracts and away from the

rest of Federal Supply Schedule holders, as appears to be the case, this small business entry point will be less attractive, and we will lose a significant number of possible federal contractors.

Fourth, the award of a strategic sourcing contract is not always a benefit to the winners. This is the case because large awards can set up a "hill and valley" problem for small contractors. A small business that receives millions in strategic sourcing awards over the contract term is likely to expand its infrastructure and employee base to meet those needs. However, a firm that remains dependent on a single contract for a large portion of its revenue may be unable to maintain that infrastructure if it is unable to win the next iteration of that contract. As a result, there is the real risk that today's winners will face significant difficulties in a few years when these large awards have expired, while a business that receives regular, but smaller, awards under a traditional contracting model will not face the same challenges.

In summary, there is nothing inherently wrong with strategic sourcing or purchasing in bulk through large multiple-award contracts. However, this committee needs to look beneath the surface of overall small business participation numbers and judge whether these actions are consistent with stated small business policy goals, such as building a diverse small business base.

Agency Scorecards

Despite the impact of bundling and consolidation, the Federal Government met its overall small business goals (and many subcategory goals) in fiscal year 2013. It appears that feat was repeated in 2014. These are not minor achievements. For years, many of us in the private bar assumed that the failure to meet small business goals was going to be the status quo. Now, we are hopefully at the beginning of a new normal where these goals are achieved on a regular basis.

This accomplishment is tempered by persistent concerns that large contractors are receiving set-aside awards and being counted toward small business goals. In my time working in this area, I have seen instances where public records indicated a set-aside award to a contractor that may not have been a small business during the relevant period. Although these may have been honest mistakes or data entry errors, continued training of contracting officers and explanation of the complicated small business rules to the contracting community will be helpful in confirming that the proper numbers are being reported.

Further, although achievement of the overall small business goal is unquestionably good news, there is still room for improvement on an agency by agency basis. As a result, it is somewhat misleading for SBA to assign an "A" or "A+" rating to 20 of the 24 agencies reviewed. This is particularly troubling when no agency hit all of its goals. For example, eight agencies received an overall "A" grade while failing to meet their overall small business subcon-

tracting goal.[4] One of those agencies, the Department of the Treasury, was assigned an "A" rating despite subcontracting to small business at only a 6.8% rate. The SBA's underweighting of small business subcontracting goals is not a mistake. SBA's stated grading formula weights prime contract goals achievement as eight times more important than subcontracting goals. Although I agree that prime contract opportunities may be more beneficial to small businesses, it is not clear why the weighting disparity should be this significant.

Despite the details of SBA's weighting formula, agencies should be congratulated for their efforts in meeting the government's overall small business goal. However, this committee should continue to closely examine the basis for those grades to determine where this performance can be improved.

Office of Hearings and Appeals

Shifting to my role as a small business litigator, I would like to address a couple of issues related to SBA's Office of Hearings and Appeals (OHA) that are important to small contractors.

Although I certainly do not agree with every decision issued by OHA, there is no doubt that it has proven to be an efficient alternative to full-scale litigation in federal court. As a result, I support making OHA permanent through statute. Any such statute should, of course, recognize that small businesses may appeal OHA decisions to federal court if they so choose.

Action to formalize the existence of OHA should also eliminate an unnecessary redundancy in the Small Business Act. Specifically, although OHA's administrative judges have developed significant small business expertise, the Small Business Act assigns certain appeals, including those related to 8(a) program admission and termination, to Administrative Law Judges (ALJs), of which OHA currently has none.[5] This has led to a peculiar arrangement where, pursuant to tan Interagency Agreement in effect beginning October 1, 2012, ALJs at the U.S. Department of Housing and Urban Development hear these cases on behalf of SBA. Although I have no doubt that this arrangement is effective, it makes more sense to centralize small business decisions in OHA as a free-standing statutory entity.

I also understand that the committee is considering expanding OHA's jurisdiction to include pre-solicitation requests from the contracting officer that OHA assign an appropriate NAICS code. This would be a significant change from OHA's current rule, which allows NAICS code appeals only after a solicitation has been issued. An expansion of OHA's jurisdiction in this manner raises a number of concerns that should be addressed.

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[4] Each of the Department of Veterans Affairs, State Department, Department of Treasury, Small Business Administration, Department of Homeland Security, Agency for International Development, Department of Education and Department of Health and Human Services received an overall "A" grade while missing their overall small business subcontracting goal.

[5] *See* 15 U.S.C. § 637(a)(9)(A).

It is my belief that the contracting officer is in the best position to understand the nature of a given procurement beyond the text of the solicitation. As a result, the contracting officer should be charged with assigning the correct NAICS code to a solicitation in the first instance and should not be allowed to delegate that decision to OHA.

Further, allowing such a delegation could create a scenario where contracting officers may seek to "protest-proof" each solicitation by running it through OHA. This would, of course, overwhelm OHA with unnecessary cases.

Finally, I believe that the NAICS code appeal process benefits from the input of small business contractors. This process could be undercut by a pre-solicitation process initiated by the contracting officer. Whether they are protestors or intervenors, small businesses must be allowed to review the text of a final solicitation to raise different perspectives and applicable NAICS codes to OHA. In fact, it may be beneficial to expand the filing deadline for NAICS appeals, which currently stands at 10 days after issuance of a solicitation, to allow small businesses to become aware of and review the extensive solicitations that support modern procurements.

Conclusion

In conclusion, I would like to commend this committee for going beyond small business metrics to focus on the diversity of a healthy small business subcontracting base. I look forward to your questions.

National Office Products Alliance

Statement of Rod Manson, President, National Office Products Alliance

Committee on Small Business, Subcommittee on Contracting & Workforce
U.S. House of Representatives

Hearing on

Contracting and Industrial Base II: Bundling, Goaling, and the Office of Hearings and Appeals

Tuesday, March 17, 2015

Chairman Hanna, Ranking Member Velázquez, and members of the Subcommittee, I am Rod Manson, President of the National Office Products Alliance (NOPA), and owner of Office Advantage, a small office supply company located in Poway, California.

The National Office Products Alliance (NOPA) is a not-for-profit trade association established in 1904 that represents and serves more than 1,000 small independent commercial dealers throughout the United States, along with their key suppliers.

I appreciate the opportunity to offer this statement for the record today about the need to ensure that small businesses in our industry have fair, ongoing access to opportunities in the federal market. There have been a number of developments since 2010 with respect to management of the GSA Schedule 75 program in general, and implementation of the "third-generation" Federal Strategic Sourcing Initiative (FSSI) for office supplies in particular that have broadly impacted our members and what we consider to be the new contract bundling. I will highlight these developments in my statement today.

First and foremost, NOPA is greatly concerned about the abrupt and widespread impact on small businesses in our industry due to the General Services Administration's (GSA) implementation of the current FSSI program for office supplies. We acknowledge that the FSSI program has generated new opportunities for some small businesses in our industry, including some of our very capable members. At the same time, there are many other members who have invested with government encouragement in obtaining their own Schedule 75 contracts, only to see their current opportunities eliminated as a result of the near-mandatory, government-wide implementation of FSSI (or contract bundling 2.0).

Given the government-wide scope of this FSSI and the large number of small businesses that were participating in this market in FY2010, NOPA was surprised that GSA did not undertake a small business impact study before launching its second and third generation FSSI's for office supplies. It then went a step further and—without any such study as required under the Regulatory Flexibility Act—published a proposed rule in June 2011 that called for creation of a special preference for federal strategic sourcing initiatives within the FAR.

As an association, we have worked to find the "middle ground" within our membership on this issue. We do not wish to impair the new opportunities of members who competed for and were awarded FSSI blanket purchase agreements (BPAs). At the same time, we would be remiss if we did not highlight our concerns about how FSSI has been implemented.

After monitoring FSSI implementation of OS2 and seeing its far-ranging impacts, we agreed within the NOPA Board to urge GSA and the Administration as a whole to issue a Statement of Administration Policy (SAP) to clarify to federal agencies what our industry has been told by GSA and the Administration just prior to the bid process: that FSSI would be implemented on a non-mandatory basis, allowing non-awarded GSA Schedule 75 holders to continue to compete for federal business.

Since that time, it has become clear that FSSI volume and its share of total federal spending on office supplies would continue to grow as more and more major agencies issued guidance to buyers that FSSI use was mandatory except in unusual situations.

NOPA has maintained a dialogue with GSA and the Office of Federal Procurement Policy (OFPP) on FSSI implementation since 2010 and I am here today to urge this Committee, the full Congress and the Administration to acknowledge and address the im-

pact of strategic sourcing (or contract bundling 2.0) has had on our industry in a forthright way. The solution is simple and relies on allowing more competition and flexibility in purchasing as ways to achieve FSSI's goals and reduce job loss pressures in our industry.

First, the Administration needs to issue a very clear Statement of Administration Policy (SAP) that restores full competition within the federal market for our industry's products. This approach, if communicated and implemented broadly, will help ensure genuine ongoing choice of procurement vehicles for agencies and will help the Administration achieve the overall budgetary savings it hopes to achieve through the FSSI program.

Mandatory implementation of FSSI on a government-wide basis represents a massive form of "contract bundling" which has and will continue to reduce the opportunities and the ultimate level of small business participation and healthy, long-term competition in federal markets.

Second, there needs to be more flexibility to allow individual dealers with their own GSA Schedules to participate in FSSI as "Consortia". Consortia should be subject to reasonable ground rules, but this should not mean they must give up their rights to compete for non-FSSI federal business opportunities using their regular GSA schedule contracts. This is essential, since Consortia will need to bear significant administrative fees from GSA and their chosen FSSI BPA holder partners, as well as normal costs associated with properly servicing federal accounts.

NOPA had numerous meetings and conversations with GSA regarding the Consortia model and we ask this Committee to strongly encourage them to work toward an expeditious and balanced conclusion.

We hope that this Committee will reflect on the history of FSSI implementation in our industry and consider how the small business impacts can be mitigated in the future. At the end of FY 2010, there were 550, most small, companies and a few dealer-based organizations competing for federal business with one or more departments and agencies under the regular GSA Schedule 75 contract program and/or using individual agency blanket purchase agreements (BPAs). Today those numbers have and continue to shrink at an alarming rate.

However, with the rapid, GSA/OFPP-orchestrated push for use of FSSI on a government-wide basis using just 1 large (and I must point out that with the recent merger of Office Depot and Staples there will be only 1 large corporate company in this industry thus meaning they will almost automatically be given an FSSI award in the future if the past OS solutions are any indicators), 22 small vendors, and 1 Consortia, the economic fallout has been swift and dramatic for most of the remaining Schedule 75 contract holders.

With more competition, GSA and all Federal agencies can enjoy better pricing and faster, more customized service in local areas throughout the country where they operate. If additional qualified dealer consortia with experienced vendor members are able to participate in the next FSSI program, our industry will be able to pro-

vide more reasons for agencies to utilize the FSSI program on a broader scale, as well as improvements in overall program efficiencies. In short, there will be more qualified small businesses with a vested interest in the FSSI program's long-term success.

In today's budget-constrained and fast-paced environment, GSA and other federal agencies seek to minimize the number of separate prime contractors with which they work, while maximizing the quality and local responsiveness of delivery and other services received. NOPA believes that dealer consortia—consisting of small business dealers, many who meet defined socio-economic criteria—offer an ideal solution for many federal agencies, particularly those with facilities and employees operating in different parts of the country.

The industry needs a clear and concise statement from GSA that they do not plan to cancel or eliminate Schedule 75 as indicated by GSA to industry officials. In fact, GSA needs to reopen Schedule 75 so new small businesses can have access to the government market.

Early GSA communication and guidance to GSA Schedule 75 contractors and others in the industry with respect to the FSSI-OS3 bid process and required technical qualifications is an essential part of expanding qualified small business competition in the next-generation acquisition. GSA has maintained a moratorium on acceptance of new Schedule 75 offers since October 2010 and there are at least a few individual dealers and at least one major dealer consortia that NOPA believes are likely to apply for a Schedule 75 contract if the opportunity is provided.

Based on our industry's experience, the Schedule 75 application process has required several months to complete. For this reason, NOPA suggested to GSA that they provide advance notice as soon as possible of the expected timing and requirements of any planned lifting of the moratorium on acceptance of Schedule 75 applications. Advance notice of GSA's plans will allow non-schedule holders (whether individual companies or dealer consortia) to determine whether they are qualified to become Schedule 75 contractors and, if so, to begin the process of preparing and filing Schedule 75 contract applications.

To continue to grow the FSSI program's cost savings and federal agency participation, NOPA believes the most qualified small business participants should be in a position to bid. To ensure GSA and federal agencies have access to the most qualified, competitive and committed small businesses—many of which are now members of three established dealer consortia in the office products industry—it is appropriate to maintain a high standard of technical and performance requirements that broadly meet federal government agencies' needs. Those outlined for the FSSI-OS3 bid process offer a logical starting point, but we anticipate that GSA and OFPP also will review more recent experiences agencies have had during the first three years of the FSSI-OS3 BPA program and incorporate new ideas into the requirements.

To make this type of solution widely available and as competitive as possible, NOPA encourages GSA and OFPP to

consider establishment of a separate "bid pool" in which qualified dealer consortia could compete for multiple BPA awards in the FSSI acquisition process.

By NOPA's definition, a qualified "dealer consortia" has the following characteristics:

- The consortia is self-formed among small business members for the explicit purpose of providing national account services effectively to large and geographically dispersed customers, whether governmental, institutional and/or commercial;
- Provides a strong administrative and technical infrastructure, including a centralized, integrated customer-facing website and a comprehensive ordering, fulfillment, billing and customer service interface with national/regional customers; and
- Has a systematic training and compliance program in place to ensure its small business members consistently understand and meet all customer technical and service performance requirements.

This three-part profile and strong infrastructure distinguish a qualified "dealer consortia" from other small dealer groups that may not have all of those elements fully in place, and/or which may have been formed to pursue a single federal or other bidding opportunity. While such dealer groups may be competitive, they may lack the performance discipline and administrative/technical infrastructure of dealer consortia whose national account purpose is more broadly developed and/or whose members have long-standing relationships that foster positive operating synergies benefitting their customers.

Ironically, this situation is occurring in a commodity area where small businesses owned and operated by women, minorities, service-disabled veterans and second- and third-generations of entrepreneurial families have been well represented and highly successful against much larger national competitors.

GSA Should Not be in the Business of Dictating Price

As vendors we are asked by the government to provide them with our best prices. During the bid process we do just that. When deciding on awards we assume GSA looks at those vendors who are prepared to offer the government the best price. Once binds are awarded and contracts signed, GSA should be required to live up to the terms of those contracts. Under the current practice, GSA has been going back to vendors and requiring them to lower their price. Shouldn't GSA be asking that during the selection process and not after they award and sign contracts with vendors? We are concerned that GSA in a sense is fixing prices and not allowing for competition to dictate prices. GSA should not be in the business of using a generic formula to decide what is the average price of a product. That is what the market is for. If GSA doesn't like a vendors pricing it should not have selected that vendor and signed a contract with them. We are asked to give the government the best prices we offer our top commercial clients. When we do that and

GSA signs a contract to buy items at those prices they should not after the fact be able to pressure or threaten to take our contracts away if we do not lower our prices to a threshold they deem reasonable.

We do not believe that this result—a net economic loss for small business—is what Congress or the Administration intended or is what our Nation needs as our economy is showing uneven signs of recovery. More competition—not less—is the solution and can be readily restored in the federal market for office products by making the FSSI program truly one option, rather than a mandatory or quasi-mandatory option, among those that have been in place and working effectively for some time.

Thank you again for allowing me to submit this statement for the record on behalf of NOPA and our industry.

