

**STATEMENT OF ROBERT A. BURTON**

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**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....<sup>1</sup>

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.”<sup>2</sup>

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<sup>1</sup> 15 U.S.C. § 657q(a)(2).

<sup>2</sup> *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.<sup>3</sup> The benefits to be considered may include cost, quality, acquisition cycles, terms and conditions, and any other benefit;<sup>4</sup> 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.”<sup>5</sup>

## **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....<sup>6</sup>

Simply put, “[b]undling is the Federal government’s practice of consolidating smaller contracts into very large contracts....”<sup>7</sup>

Prior to bundling any contracts, an agency must “conduct market research to determine whether consolidation of the requirements is necessary and justified[.]”<sup>8</sup> *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).<sup>9</sup> 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.”<sup>10</sup> 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.”

<sup>3</sup> 15 U.S.C. § 657q(c)(2)(A).

<sup>4</sup> *Id.* § 657q(c)(3).

<sup>5</sup> *Id.* § 657q(c)(2)(B).

<sup>6</sup> *Id.* § 632(o)(2) (emphasis added).

<sup>7</sup> S. REP. NO. 105-62, at 21 (1997).

<sup>8</sup> 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)).

<sup>9</sup> *See id.* (codified at 15 U.S.C. § 644(e)(2)(B)).

<sup>10</sup> *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,”<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup> 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.”<sup>15</sup>

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.<sup>16</sup> 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).

<sup>11</sup> 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).

<sup>12</sup> *Id.* (codified at 15 U.S.C. § 644(e)(3)).

<sup>13</sup> 15 U.S.C. § 644(q)(2)(B).

<sup>14</sup> *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)).

<sup>15</sup> *See* 15 U.S.C. § 644(p)(4).

<sup>16</sup> *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..."<sup>17</sup> 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

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<sup>17</sup> 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 re-competed 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.<sup>18</sup>

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.<sup>19</sup> 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.”<sup>20</sup> 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);<sup>21</sup> (2) industrial goals (*i.e.*, ensuring the participation of small businesses “from each industry category in procurement contracts and subcontracts of such agency”);<sup>22</sup> 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”).<sup>23</sup> 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;

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<sup>18</sup> GAO, SMALL BUSINESS CONTRACTING: UPDATED GUIDANCE NEEDED TO CONSOLIDATED CONTRACTS 17 GAO-14-36 (2013).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 19.

<sup>21</sup> 15 U.S.C. § 644(g)(1)(A).

<sup>22</sup> *Id.* § 644(g)(2)(D).

<sup>23</sup> *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.<sup>24</sup>

SBA, in turn, not only “negotiates with agencies to establish individual agency goals[,]”<sup>25</sup> 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<sup>26</sup> calculating the prime and subcontract statistical achievements for each agency and the government-wide accomplishments.”<sup>27</sup> 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%).<sup>28</sup> 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.<sup>29</sup>

Using this methodology, SBA concluded that, for fiscal year 2013, the federal government deserved an “A,”<sup>30</sup> 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.<sup>31</sup> 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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<sup>24</sup> 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).

<sup>25</sup> Statutory Goals, *supra* note 24; *see also* 15 U.S.C. § 644(g)(2).

<sup>26</sup> 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).

<sup>27</sup> *Id.*

<sup>28</sup> 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](https://www.sba.gov/sites/default/files/files/Scorecard-Grade-Calculation-Methodology-FY13_FINAL_2014-06-04.pdf).

<sup>29</sup> *Id.*

<sup>30</sup> 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](https://www.sba.gov/sites/default/files/files/FY13_Government-Wide_SB_Procurement_Scorecard_Public_View_2014-04-28.pdf) (hereinafter “FY13 Scorecard”).

<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> 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).<sup>34</sup> 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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<sup>32</sup> 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").

<sup>33</sup> *Id.*

<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.”<sup>38</sup> Thus, OMB directed agencies to identify commodities the government could efficiently purchase through strategic sourcing in an effort to save taxpayers’ money.<sup>39</sup> 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)<sup>40</sup> to, among other things, establish mechanisms to increase total cost savings, value and socioeconomic participation (*i.e.*, maximize small/disadvantaged business participation).<sup>41</sup> 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.<sup>42</sup>

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<sup>35</sup> 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”).

<sup>36</sup> 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>.

<sup>37</sup> 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](http://www.whitehouse.gov/sites/default/files/omb/procurement/comp_src/implementing_strategic_sourcing.pdf).

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> “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](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).

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

<sup>42</sup> 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.”<sup>43</sup> 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[.]”<sup>44</sup> 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,<sup>45</sup> setting aside a designated number of awards for small businesses,<sup>46</sup> and creating a separate contracting vehicle for small businesses (e.g. OASIS small business).<sup>47</sup> 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<sup>48</sup> vendors – 13, or approximately 87%, were small businesses.<sup>49</sup> However, at the time of the OS2 BPA, there were 527 Schedule 75 vendors, of which over 90 percent were small businesses.<sup>50</sup> 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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<sup>43</sup> *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](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.*

<sup>44</sup> *Id.*

<sup>45</sup> *See id.* at 2.

<sup>46</sup> *FSSI JanSan & MRO Acquisition Strategies* at the Pre-Solicitation Meeting (May 15, 2013) (hereinafter “JanSan/MRO Pre-Solicitation Presentation”).

<sup>47</sup> *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%202013.pdf>.

<sup>48</sup> As mentioned previously, GSA assigns various numbers to its Schedules. Schedule 75 represents the schedule for office supplies.

<sup>49</sup> Jeff Koses, *OS3 Draft Approach* (May 2013) at 8.

<sup>50</sup> June 2012 SBC Hearing Memo, *supra* note 35 at 6.

contract to a large business.<sup>51</sup> 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.<sup>52</sup>

### *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.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> 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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<sup>51</sup> THIRD GENERATION OFFICE SUPPLY SOLUTION, <http://www.gsa.gov/portal/content/195439> (last visited Mar. 15, 2015).

<sup>52</sup> March 2015 SBC Hearing Memo, *supra* note 32 at 14.

<sup>53</sup> AWARDED VENDORS AND SOLUTION PORTALS (FSSI JANSAN), <http://www.gsa.gov/portal/content/206651> (last visited Mar. 15, 2015).

<sup>54</sup> March 2015 SBC Hearing Memo, *supra* note 32 at 10.

<sup>55</sup> *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[.]"<sup>56</sup> 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."<sup>57</sup> 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.<sup>58</sup> 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..."<sup>59</sup> Perhaps most importantly, "[t]he Council coordinates controls and monitors the maintenance and issuance of changes in the FAR."<sup>60</sup> Since its creation, only three agencies have been represented on the Council – DoD, NASA and GSA.

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<sup>56</sup> SBA- ABOUT US, <https://www.sba.gov/oha/about-us> (last visited Mar. 15, 2015).

<sup>57</sup> 13 C.F.R. § 134.102.

<sup>58</sup> March 2015 SBC Hearing Memo, *supra* note 32 at 29.

<sup>59</sup> FEDERAL ACQUISITION REGULATORY COUNCIL, [https://www.whitehouse.gov/omb/procurement\\_far\\_council](https://www.whitehouse.gov/omb/procurement_far_council) (last visited Mar. 16, 2015).

<sup>60</sup> *Id.*

Currently, FAR rulemaking is “a long established process following the direction of the Congress, the President, or suggestions from agencies or the public.”<sup>61</sup> 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.”<sup>62</sup> 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.<sup>63</sup> The final step in the rulemaking process is publication in the Federal Register.<sup>64</sup>

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,<sup>65</sup> 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.”<sup>66</sup> 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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<sup>61</sup> FAR RULEMAKING: CONTRACTOR COMPLIANCE PROGRAM AND INTEGRITY REPORTING – STATEMENT OF DAVID DRABKIN, available at <http://www.gsa.gov/portal/content/103008> (Apr. 15, 2008).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See Open FAR Cases, available at <http://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf>.

<sup>66</sup> *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.