



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

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Chairman Hanna, Ranking Member Meng, 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 the effects of strategic sourcing initiatives on small businesses.

My testimony will address how strategic sourcing initiatives, particularly the Office of Management and Budget’s (“OMB”) recent memorandum contemplating the mandatory use of strategically sourced contracts will impact small businesses. Specifically, the existing strategically sourced contracts, although well-intentioned, demonstrate that the application of strategic sourcing has, in some instances, negatively impacted small businesses. I also will discuss how the proposed strategic sourcing initiatives for FY13 and FY14 continue to negatively impact small businesses in the same manner as their existing counterparts, but in some ways, are actually more problematic. During the course of discussing the aforementioned points, I also will highlight that while the use of strategic sourcing has provided the government with short-term savings, the impact of strategic sourcing on small businesses could have long-term consequences that negate the short-term savings, and perhaps, generate significant losses for the government. But first, I would like to provide a brief history of the government’s use of strategic sourcing.

STRATEGIC SOURCING, AMONG OTHER THINGS, FOCUSES ON INCREASED SOCIOECONOMIC PARTICIPATION AND MAXIMIZING THE VALUE OF EACH DOLLAR SPENT.

Strategic sourcing is a concept that the government has been exploring since at least 2002 when the Government Accountability Office (“GAO”), at Congress’s behest, examined how the private sector’s strategic approach to purchasing services could be used by the Department of Defense (“DoD”), the government’s largest purchaser of services, to more efficiently manage spending.¹ 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 2005.² This memorandum defined strategic sourcing as a “collaborative and structured process of critically analyzing an organization’s spending and using this information to make business decisions about acquiring commodities and services more effectively and efficiently.”³ Stated otherwise, 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

¹ 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>.

² 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.

³ *Id.* at 1.

extent possible, thereby reducing cost and improving overall performance.⁴ 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.”⁵ Accordingly, OMB directed agencies to identify commodities the government could efficiently purchase through strategic sourcing in an effort to save taxpayers’ money.⁶ 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, established the Federal Strategic Sourcing Initiative (FSSI),⁷ which aimed to (1) strategically source across federal agencies; (2) establish mechanisms to increase total cost savings, value and socioeconomic participation (i.e. maximize small/disadvantaged business participation); (3) collaborate with industry to develop optimal solutions; (4) share best practices; and (5) create a strategic sourcing community of practice.⁸

Over the years, to achieve the aforementioned goals, GSA has created teams to purchase various commodities including express and domestic delivery services, wireless telecommunications expense management services, office supplies (now in its second generation known as OS2), and print management.⁹ Within each of these teams, GSA created blanket purchase agreements (BPAs) against GSA’s Multiple Award Schedules (“MAS”).¹⁰ Though GSA and OMB advocated that agencies use these FSSI BPAs, they did not mandate their usage because, according to then-OFPP Administrator Dan Gordon, OFPP wanted agencies “to make the decision on what worked best for them.”¹¹ Notwithstanding their non-mandatory use, through 2012, more than 60 federal agencies, boards and commissions have participated in the use of

⁴ 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”).

⁵ See 2005 OMB Memo, *supra* note 2.

⁶ See *id.*

⁷ “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).

⁸ GSA FEDERAL STRATEGIC SOURCING INITIATIVE (FSSI) OVERVIEW, <http://www.gsa.gov/portal/category/25623> (last visited June 5, 2013).

⁹ See GSA FEDERAL STRATEGIC SOURCING: ABOUT STRATEGIC SOURCING, <https://strategicsourcing.gov/about-strategic-sourcing> (last visited June 5, 2013).

¹⁰ 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 4 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.

¹¹ Jason Miller, *Strategic sourcing: Pennywise but pound foolish*, FEDERALNEWSRADIO.COM, <http://www.federalnewsradio.com/index.php?nid=851&sid=2898039> (last visited June 5, 2013).

strategically sourced contracts for the aforementioned commodities, which has generated approximately \$100 million in savings for the government.¹²

Even with such savings though, in September 2012, GAO reported that the government “[wa]s not fully leveraging its aggregate buying power to obtain the most advantageous terms and conditions for its procurements.”¹³ Thus, the government has continued to pursue other ways to improve and quicken the pace of acquisition through strategically sourced contracts. To this end, OMB recently 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.”¹⁴ SSLC was required to provide OMB “a set of recommendations for management strategies for specific goods and services . . . to ensure the Federal government receives the most favorable offer possible.”¹⁵ At a minimum, the SSLC must, among other things, “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[.]”¹⁶ It is worth noting that this suggested mandatory use of FSSI vehicles represents a departure from prior OMB policies.

GSA is currently working with OMB to expand strategic sourcing in FY13 to encompass five additional first-generation solutions recommended by SSLC including Janitorial and Sanitation Supplies (JanSan) and Maintenance, Repair and Operations Supplies (MRO) with another five solutions scheduled to be established in 2014.¹⁷ GSA also has sought to expand the use of strategic sourcing beyond commodities to services with its development of One Acquisition Solution for Integrated Services, more commonly known as OASIS.¹⁸

¹² *FSSI JanSan & MRO Initiatives* at the Coalition for Government Procurement Spring Conference (Apr. 17, 2013), available at https://interact.gsa.gov/sites/default/files/mro_jansan_conference_briefing_package_04-17-13_-_gsa.pdf.

¹³ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-919, STRATEGIC SOURCING: IMPROVED AND EXPANDED USE COULD SAVE BILLIONS IN ANNUAL PROCUREMENT COSTS 3, available at <http://www.gao.gov/products/GAO-12-919>.

¹⁴ *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 (currently Joe Jordan) 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.*

¹⁵ *Id.* at 3.

¹⁶ *Id.*

¹⁷ *See* Transcript of FSSI JanSan & MRO Pre-Solicitation Meeting at 16-17 (hereinafter “FSSI Meeting Transcript”).

¹⁸ GSA touts OASIS as the “next generation contract vehicle for complex professional services.” GSA ONE ACQUISITIONS SOLUTION FOR INTEGRATED SERVICES (OASIS), <http://www.gsa.gov/portal/content/127027> (last visited June 5, 2013). According to GSA, OASIS will be designed to address agencies’ needs for professional service requirements that: (1) span multiple professional service disciplines; (2) contain significant IT components, but are not IT requirements in and of themselves; (3) contain Ancillary Support components (ODCs); (4) require flexibility for all contract types at the task order level including cost reimbursement; and (5) any one or combination of all of the above. *Id.*

Throughout the rollout of the Administration’s most recent strategic sourcing policies, 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,¹⁹ setting aside a designated number of awards for small businesses (e.g. GSA plans to set aside eight JanSan BPAs for small businesses),²⁰ and creating a separate contracting vehicle for small businesses (GSA intends to issue two contracts for OASIS – a full and open unrestricted contract, and a 100% small business set aside).²¹ Despite these well-meaning efforts, however, implementation of such policies has been difficult as the private sector well knows, and 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. Unfortunately, the proposed strategic sourcing initiatives do not appear to address these concerns as they indicate a continuation and expansion of existing policies. As discussed in more detail below, if the government proceeds with its proposed initiatives, the number of small business opportunities will decrease, causing a reduction in the pool of available small business contractors. Consequently, not only do these initiatives fail to support a cornerstone of strategic sourcing, but they also eliminate any potential short-term savings from strategic sourcing as the total number of small business government contractors will decrease, thereby reducing competition, which will increase prices, and cost the government more money in the long run. As such, the proposed strategic sourcing initiatives and OMB’s mandatory policy warrant further analysis.

EXISTING STRATEGIC SOURCING INITIATIVES HIGHLIGHT THE DETRIMENTAL EFFECTS OF STRATEGIC SOURCING ON SMALL BUSINESSES.

It is estimated that there are currently 19,000 federal government contractors holding MAS contracts, the vast majority of which are small and/or socio-economic disadvantaged businesses.²² An increase in the use of FSSI BPAs and a policy mandating their usage could drastically reduce this number,²³ which would not only detrimentally affect the viability of small and/or disadvantaged businesses, but also jeopardize the government’s pursuit of savings. Indeed, while strategic sourcing may result in short-term savings, the resulting reduction in the pool of available contractors would decrease competition, thereby increasing prices, which would eventually negate any short-term savings. Nowhere is this principle more salient than the OS2 FSSI BPA, which illustrates the effects strategic sourcing currently has on small businesses.

¹⁹ See 2012 OMB Memo, *supra* note 14 at 2.

²⁰ *FSSI JanSan & MRO Acquisition Strategies* at the Pre-Solicitation Meeting (May 15, 2013) (hereinafter “JanSan/MRO Pre-Solicitation Presentation”).

²¹ 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>.

²² See June 2012 SBC Hearing Memo, *supra* note 4 at 1.

²³ See Ruben Gomez, *OMB’s Zients hints at making strategic sourcing mandatory*, FEDERALNEWSRADIO.COM, <http://www.federalnewsradio.com/552/3029477/OMBs-Zients-hints-at-making-strategic-sourcing-mandatory> (last visited June 5, 2013) (“[Small businesses] will be closing their doors and laying people off in significant fashion.”); see also Miller, *supra* note 11 (“[A] growing number” of small businesses “say they are in grave danger of losing their businesses, and thousands more could be right behind them.”).

In June 2010, GSA awarded FSSI BPAs to 15 of the 527 Schedule 75²⁴ vendors – 13, or approximately 87%, were small businesses.²⁵ However, at the time of the OS2 BPA, there were 527 Schedule 75 vendors, of which over 90 percent were small businesses.²⁶ Consequently, more than 400 small business Schedule 75 vendors were not chosen, and therefore, were ineligible to provide office supplies through the OS2 BPA. Despite this overwhelming loss of business opportunities for small businesses, a GSA official noted that such an outcome was a victory for small businesses as a larger percentage of sales went to small businesses under the OS2 BPA (74%) than under Schedule 75 (67%).²⁷ Moreover, an OFPP staff member explained that since the use of such BPAs was not mandated or implemented government-wide, “many of the complaints could easily be seen as sour grapes by those unsuccessful vendors”²⁸ who still could contract elsewhere through Schedule 75 or open market competition.

Neither statement conveys the actual effects of such policies. As to the former statement, while small businesses may have received a larger percentage of sales under the OS2 BPA, the number of small businesses eligible to compete for office supply contracts has dramatically decreased. Such a reduction neither supports the strategic sourcing initiative’s goal of increased small business participation nor does it promote long-term savings. Indeed, because the BPA has reduced the level of competition, the basic principles of economics dictate that the federal government should anticipate a rise in commodity prices in the near future. As to the latter statement, small businesses understand that strategic sourcing results in winners and losers,²⁹ however, in the case of strategic sourcing under OS2, the small businesses not selected for a BPA are not simply losing a contract, but rather, are losing the ability to compete for government contracts. Indeed, as a result of the OS2 FSSI BPA, small businesses have not just lost, but have done so on a devastating scale with hundreds of companies experiencing a decrease in revenue between 2010 and 2011 from as much as \$19 million to \$20,000, while others have had to lay off a number of people to adjust to the decrease in revenue.³⁰

OMB’s intended mandatory use of such strategically sourced contracts only would exacerbate these effects. As mentioned above, at the time GSA awarded the OS2 BPA, the use of government-wide strategic sourcing contract vehicles was not mandated, and thus, small businesses not selected for OS2 could potentially maintain their businesses through Schedule 75 contracts or open competition until the next round of OS2 contracts, which likely would not occur for another five years (the initial one year contract plus four one-year option periods). In fact, it appears that many small businesses have been able to do so as agencies continue to procure the majority of office supplies sales through the use of Schedule 75 contracts.³¹ However, with the implementation of the mandatory use of strategic sourcing contract vehicles, this “safety net” would cease to exist. Empirical evidence supports this result. In FY12 the

²⁴ As mentioned previously, GSA assigns various numbers to its Schedules. Schedule75 represents the schedule for office supplies.

²⁵ Jeff Koses, *OS3 Draft Approach* (May 2013) at 8.

²⁶ June 2012 SBC Hearing Memo, *supra* note 4 at 6.

²⁷ See Miller, *supra* note 11.

²⁸ *Id.*

²⁹ Subcommittee on Contracting and the Workforce, Committee on Small Business, Hearing: “Putting the Strategy in Sourcing: Challenges and Opportunities for Small Business Contractors” 4 (June 10, 2013).

³⁰ See Miller, *supra* note 11.

³¹ See FY12 Office Supplies Market Graph at 1.

government spent nearly \$270 million on office supplies using OS2.³² Of the total number of agencies using OS2 to acquire office supplies, 19 agencies had a mandatory OS2 use policy.³³ These 19 agencies represented 79% of the total amount of money spent on purchasing office supplies through OS2.³⁴ Based on this data, it stands to reason that where OS2 use is mandatory, agencies strictly adhere to such a policy, and are seemingly unwilling to explore additional procurement vehicles for obtaining office supplies even if such supplies could be obtained cheaper elsewhere. As such, if the OS2 procurement occurred in the context of mandatory strategic sourcing, the majority of the 436 small businesses contractors might be forced out of business as agencies would be required only to purchase products from vendors receiving an OS2 FSSI BPA, thereby foreclosing Schedule 75 and open market competition options.

The impact of the OS2 BPA on small businesses is a small scale version of what could occur if the government expands mandatory strategic sourcing to additional commodities and services. Indeed, the proposed program theoretically could drastically reduce the MAS contractor pool of 19,000, the vast majority of which are small/disadvantaged businesses. This is not to suggest that the federal government has the responsibility to support every small business or disadvantaged contractor, but a decrease in small business contractor support from over 10,000 to several hundred seems antithetical to the government's goal and strategic sourcing's cornerstone of increased small business participation.³⁵

Moreover, with such a small pool of available contractors, the surviving businesses will encounter fewer competitors during subsequent rounds of competition, and the prices correspondingly will increase. Consequently, though the government may be able to obtain more advantageous pricing in the first round of mandatory strategic sourcing contracts, the long-term consequences indicate that the government's short-term savings could be erased by the next round of contractors who are markedly fewer, and therefore, able to increase their prices.

GSA'S PROPOSED STRATEGIC SOURCING INITIATIVES ARE ANTITHETICAL TO STRATEGIC SOURCING'S GOAL OF INCREASED SMALL BUSINESS PARTICIPATION, MORE HARMFUL TO SMALL BUSINESSES THAN THE CURRENT STRATEGICALLY SOURCED CONTRACTS, AND COUNTERPRODUCTIVE TO STRATEGIC SOURCING'S EMPHASIS ON VALUE.

The proposed strategic sourcing initiatives, while well-intentioned, indicate that the government has not rectified the deficiencies present in OS2, and that the concerns of small businesses discussed above likely will become a reality if the government pursues its strategic sourcing initiatives as planned. Indeed, the most recently proposed initiatives appear to be more harmful

³² See *id.* at 2.

³³ See *id.*

³⁴ See *id.*

³⁵ See Miller, *supra* note 11, for a similar perspective. Notably, it is also antithetical to the government's assertion that it is "not looking for long-term relationships with a few strategic partners." FSSI Meeting Transcript, *supra* note 17 at 5. Though the majority of the contractors selected for the OS2 FSSI BPA currently are small businesses, strategic sourcing's reduction in the number of available contractors could affect their ability to maintain their small business status. After all, it stands to reason that with fewer contractors and the same amount of awards, the selected few will receive a greater proportion of award money, thereby increasing small businesses' overall revenue. Thus, with some small businesses being forced out of business because of their non-selection to an FSSI BPA and with other small businesses losing their small business status as a result of their FSSI BPA award, the government will be forced to enter into long-term relationships with a limited number of strategic partners.

than their OS2 predecessor as they focus on commodities and services and incorporate technical requirements that seemingly preclude small business participation. In many ways, this new generation of strategically sourced contracts also appears to be consolidated, despite the fact that GSA has not provided underlying data warranting consolidation. To make matters worse, the newly proposed initiatives also appear to contradict strategic sourcing's mandate to "increase the value of each dollar spent." The recently proposed RFQ for Janitorial and Sanitation supplies (generally Schedule 73), an initiative more commonly known as JanSan, manifests these concerns.³⁶

Proposed Strategic Sourcing Initiatives Do Not Support Increased Participation by Small Businesses, and May Be More Harmful Than the Current Initiatives.

As previously mentioned, GSA is in the process of establishing five new strategic sourcing solutions for FY13, one of which is JanSan. Under JanSan, GSA has divided the janitorial commodities into five core areas of concentration, or pools: (1) cleaning compounds and related dispensers, (2) non-motorized cleaning equipment & waste collection supplies, (3) paper products & related dispensers, (4) motorized floor cleaning equipment, and (5) motorized laundry cleaning equipment.³⁷ Within each of these five pools, GSA intends to establish three BPAs, and set aside a total of eight BPAs for small businesses, of which three will be set aside for service disabled veteran owned small businesses (SDVOSB).³⁸ Additionally, the proposed JanSan FSSI RFQ covers two government channels – purchasing and requisition.³⁹ At this time, GSA has not determined the number of BPAs it will issue for the requisition channel, but if GSA awards a BPA for each pool to different vendors for the purchasing channel, GSA could issue a maximum of 15 BPAs.⁴⁰ In constructing the JanSan RFQ in this manner, GSA attempted to "increase the percent of dollars going to small businesses."⁴¹ However, nothing in the RFQ guarantees small businesses will receive any funds even if awarded a BPA, and try as it might, GSA will not be able to translate any potential increase in dollars into an increase in socioeconomic participation, a cornerstone of strategic sourcing, for the same reasons OS2 has failed to increase small business participation. In fact, initiatives like JanSan are likely to be even more detrimental to small business interests than their OS2 counterpart for several reasons.

JanSan Will Reduce the Pool of Small Business Contractors.

First, the government currently contracts with more than 1,300 vendors for janitorial supplies and services.⁴² Yet, as previously mentioned, at most, GSA will award 15 BPAs under JanSan. Consequently, as Mr. Koses, the Director of Acquisition at GSA FAS, has acknowledged, "there

³⁶ It is worth noting that the proposed strategic sourcing initiative for Maintenance, Repair and Operations Supplies (MRO) is virtually identical to JanSan and, as such, presents similar concerns.

³⁷ JanSan/MRO Pre-Solicitation Presentation, *supra* note 23 at 6.

³⁸ *Id.* at 7. For Pools 1, 2 and 3, two BPAs will be set aside for small businesses, one of which must be a SDOVOSB. For Pools 4 and 5, GSA will set aside one BPA each for small businesses.

³⁹ Requisition "covers mainly DoD orders that are fulfilled through GSA Global Supply services." See FSSI Meeting Transcript, *supra* note 17 at 37. Such orders require "advanced e-commerce capabilities and seamless integration with GSA IT systems." *Id.*

⁴⁰ However, if the same bidder wins all five categories and the requisition channel, GSA only would issue one BPA to that awardee. See *id.* at 21-22.

⁴¹ See *id.* at 22.

⁴² *Id.* at 45.

will definitely be fewer suppliers,”⁴³ meaning hundreds of current JanSan vendors will be foreclosed from contracting with the government for janitorial and sanitation supplies. Like the OS2 suppliers, these JanSan contractors only will be able to maintain their businesses by competing for schedule contracts, or participating in other forms of open competition. While such alternatives have helped sustain some small businesses in the OS2 arena, the outcome for JanSan vendors not receiving a JanSan BPA likely will not be as favorable since the agencies covered by the JanSan RFQ represent 90 percent of money spent by the federal government.⁴⁴ As such, the hundreds of vendors not receiving a JanSan BPA will face almost certain market exclusion as they are forced to compete for an increasingly small portion of federal spending. If the government continues to pursue mandatory strategic sourcing, these alternatives would be foreclosed completely. In both cases, a large number of small businesses likely will be forced out of business as the BPA will foreclose virtually all other opportunities for government contracting. As such, while the number of dollars to small businesses may increase under the proposed JanSan RFQ, the overall effect will be a decrease in the number of small business contractors available to compete – a result that contradicts one of the strategic sourcing initiative’s cornerstones.

JanSan Does Not Guarantee Small Businesses Receive Any Funding, Even If Awarded a BPA.

Second, while GSA has set aside eight BPAs for small businesses, such set asides do not necessarily guarantee business success. Indeed, unlike IDIQ contracts, which at least guarantee a minimum, the BPAs do not appear to guarantee that awardees receive any funds.⁴⁵ Consequently, even small businesses that receive a JanSan BPA may fail to receive business from federal agencies. In such cases, like the small businesses who do not receive a BPA, the small business awardees could be forced to explore alternate options, which may be few or non-existent. Hence, despite the number of set asides for small businesses, small businesses may not see an increase in the percentage of small business contract dollars as GSA has promised.

The Implementation of JanSan as a Contract with Small Business Set Asides Avoids Bundling Concerns, but Not Consolidation.

The fact that small businesses are not guaranteed a minimum raises questions regarding whether RFQs such as JanSan represent bundling. The Small Business Act defines bundling as

[C]onsolidating 2 or more procurement requirements for goods or services 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 . . .*

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⁴³ *Id.* at 23.

⁴⁴ *See id.* at 6.

⁴⁵ To be fair, GSA maintains a required minimum of \$2,500; however, a recent Small Business Committee report has revealed that GSA has failed to pay this minimum amount to thousands of vendors. *See* J.D. Harrison, *GSA owes more than \$3 million to small businesses*, WASH. POST, May 15, 2013, available at http://articles.washingtonpost.com/2013-05-15/business/39294200_1_small-businesses-federal-agency-orders-clause. As such, these contracts arguably have no guaranteed minimum. Moreover, even if GSA pays the small business BPA awardees the \$2,500 minimum, such an amount is hardly capable of supporting a business.

⁴⁶ 15 U.S.C. § 632(o)(2) (emphasis added).

As GSA has noted, the JanSan RFQ does not represent bundling because it “set aside 50 percent of the awards”⁴⁷ for small businesses, and “expect[s] small businesses to be wildly successful under this program.”⁴⁸ On its face, this statement appears to be correct; however, it fails to account for the fact that, as discussed above, even though small businesses may receive JanSan BPAs, they may not receive any work, in which case, the contract would appear to be “unsuitable for award to a small business concern.” However, since bundling must be determined pre-award, this after-the-fact occurrence, which arguably demonstrates bundling, means that these RFQs cannot be labeled as bundling. But GSA has stated that even if the JanSan RFQ is bundling, GSA “fully meet[s] any bundling test”⁴⁹ as GSA’s projections “show that there is an 11 percent savings to be had through strategic sourcing,”⁵⁰ which is more than double “the FAR required savings to justify bundling.”⁵¹

Though the JanSan contract is not bundling, it is a consolidated contract, which is defined as a contract that

[S]atisf[ies] 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 [awarded].⁵²

Similar to bundling requirements, consolidation policies mandate that before GSA carries out the JanSan RFQ, it must conduct market research; identify any alternative contracting approaches that would involve a lesser degree of consolidation of contract requirements; make a written determination that consolidation is necessary and justified; identify any negative impact by the acquisition strategy on contracting with small business concerns; and certify to the head of the Federal agency that steps will be taken to include small business concerns in the acquisition strategy.⁵³ To date, it does not appear that GSA has provided this required information. Accordingly, at a minimum, GSA should release the data justifying a consolidation contract.

The Nature of the Commodity and JanSan’s Requirements Inherently Preclude Increased Small Business Participation.

Finally, the nature of the commodity covered by the JanSan RFQ and some of the RFQ’s requirements, namely shipping/delivery and AbilityOne, frustrate increased small business participation. Regional and local small businesses traditionally have provided the commodity of janitorial and sanitation supplies to the federal government. The regional nature of these businesses impacts their ability to compete for the JanSan RFQ in two ways. First, as small businesses are accustomed to serving federal agencies within a particular region, they likely do not maintain “advanced e-commerce capability and seamless integration with GSA IT systems” that are required for requisition orders. Accordingly, small businesses would be de facto excluded from competing for that BPA. Second, because these businesses generally do not have

⁴⁷ FSSI Meeting Transcript, *supra* note 17 at 31.

⁴⁸ *Id.*

⁴⁹ *Id.* at 32.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 15 U.S.C. § 657q(a)(2).

⁵³ *See id.* at § 657q(c).

an extensive and established network of offices from which they can draw upon to fulfill a nationwide contract such as the JanSan BPA, they likely will have difficulty fulfilling the delivery requirements in terms of delivery time and destination. As to delivery, the current JanSan RFQ mandates a timeframe of three to four days.⁵⁴ While most, if not all small businesses, likely would be able to fulfill this requirement where the destination is close to the business's location, many would not be able to deliver the product(s) within such a timeframe if the destination was on the other side of the country.⁵⁵ In such cases, small businesses likely would require a lead time of at least seven days, meaning they would be unable to fulfill the RFQ's delivery requirements. As to destinations, the RFQ requires small businesses to have the capacity to deliver the required goods outside the continental United States (OCONUS). While small businesses may have the capacity to meet these shipping requirements, they may be forced to pay additional shipping charges, which federal agencies likely will not be willing to pay, particularly if a large vendor can provide the same supplies without the additional cost.⁵⁶ Consequently, the number of small businesses eligible to compete for one of the purchasing channel BPAs or the acquisition channel will be reduced.

The JanSan RFQ's AbilityOne requirement will further reduce the number of small business contractors eligible to compete for a JanSan BPA. Under the current JanSan RFQ and pursuant to federal law, in order to be eligible to compete for a BPA, a bidder must be AbilityOne certified. This certification has the potential to drastically reduce the number of eligible small business competitors as only a small percentage of small business contractors are AbilityOne certified. For example, in the OS2 BPA procurement, only 40 of the more than 500 contractors were AbilityOne certified.⁵⁷ Proponents of the JanSan RFQ may argue that the solution is for small businesses to become certified,⁵⁸ but this argument assumes that the small business has the time and money to pursue AbilityOne certification.

In sum, though GSA purportedly has opened the JanSan solicitation to all small business vendors, the nature of the commodity and the RFQ requirements effectively reduce the number of eligible small business vendors by establishing technical requirements that small businesses cannot meet, or can only do so at an additional cost – a burden agencies likely are unwilling to shoulder when a large supplier can provide the same supplies without a surcharge.

Proposed Strategic Sourcing Initiatives such as JanSan Do Not Provide the Government with the Best Value.

⁵⁴ JanSan/MRO Pre-Solicitation Presentation, *supra* note 23 at 15.

⁵⁵ See FSSI Meeting Transcript, *supra* note 17 at 106 (small business contractor stating that if he had to ship a hammer from Massachusetts to California, he would need a seven-day lead time because “three to four days is just not realistic.”).

⁵⁶ Some agencies appear to have encountered this problem with the OS2 FSSI BPA. See USDA FSSI OFFICE SUPPLY BPA FREQUENTLY ASKED QUESTIONS (FAQs), http://www.dm.usda.gov/procurement/toolkit/docs/USDAFSSIOfficeSupplyBPAFrequentlyAskedQuestions_versio n4.pdf (last visited June 5, 2013) (Question 17 states: “Most of the vendors are in the Midwest or east coast. We are trying to be cost effective here in the Alaska region, but paying extra shipping costs, will not save the government money.” USDA responds that “there can be additional fees for OCONUS/International shipping,” however, “[a large office chain] has a retail store location in Alaska.”) Such a suggestion essentially diverts business to large businesses at the expense of small businesses.

⁵⁷ See FSSI Meeting Transcript, *supra* note 17 at 121.

⁵⁸ See *id.* at 125-26.

Though not unique to small businesses, I would like to make one last point with regard to the use of strategic sourcing vehicles such as the JanSan BPA. In addition to failing to increase socioeconomic participation, the BPA, as currently constructed, also appears to disregard another cornerstone of strategic sourcing – the emphasis on value. Though strategic sourcing certainly focuses on cost savings, and therefore, perceived benefits to taxpayers, savings are not its only focus; rather, as the 2005 OMB memorandum explained, the government wanted agencies to use strategic sourcing to “maximiz[e] the value of each dollar spent.”⁵⁹ Because GSA has constructed the JanSan RFQ as a lowest-priced technically acceptable procurement, the government appears to be emphasizing cost at the expense of overall value. For example, a 32-ounce bottle of multipurpose cleaner could cost anywhere from two dollars to fifteen dollars. As the JanSan RFQ currently is written, the two dollar bottle would “win” over the fifteen dollar bottle on price alone. Unfortunately, such an evaluation ignores the fact that the two dollar bottle is diluted whereas the fifteen dollar bottle is ultra-concentrated, and lasts ten times longer than its cheaper counterpart. Consequently, the JanSan RFQ, as currently constructed, essentially fails to provide the government with the best value, and in doing so, fails to meet another cornerstone of strategic sourcing.

STRATEGIC SOURCING AND PROFESSIONAL SERVICES

To this point, my discussion has focused on the use of strategically sourced contracts to procure commodities. However, as previously mentioned, GSA recently proposed a \$10 billion initiative known as OASIS that seeks to meet “the needs of customers with complex, integrated professional services with a support Information Technology (IT) component.”⁶⁰ Though GSA intends to award significantly more BPAs under OASIS than its commodities BPAs, the outcome with regard to the number of small businesses eligible to compete is similar.

To begin, like the JanSan RFQ, the proposed OASIS contracts (one will be full and open competition while the other will be a 100% small business set aside)⁶¹ will severely limit small business contracting opportunities as more than 1,000 contractors will compete for a maximum of 240 contracts (though GSA does not “feel there will be that many”).⁶² 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 satisfies the RFP’s requirements. Of course, this issue could be rectified by teaming agreements or joint ventures; however, GSA currently is prohibiting such arrangements unless the JV or team has “proven past experience and past performance as an entity,”⁶³ despite the fact that such a stance is contrary to federal law.⁶⁴ Finally, the OASIS RFP further disadvantages small businesses because, like the JanSan RFQ, the OASIS contracting model appears to focus heavily on cost, thereby converting what should be a best value analysis

⁵⁹ 2005 OMB Memo, *supra* note 2.

⁶⁰ OASIS INDUSTRY COMMUNITY, FREQUENTLY ASKED QUESTIONS (hereinafter “OASIS FAQs”), <https://interact.gsa.gov/blog/frequently-asked-questions> (last visited June 5, 2013).

⁶¹ *Id.* at 4.

⁶² OASIS Presentation, *supra* note 24.

⁶³ OASIS INDUSTRY COMMUNITY: UPDATE ON THE OASIS DRAFT RFP, <https://interact.gsa.gov/blog/update-oasis-draft-rfp-february-12-2013> (last visited June 7, 2013); *see also* OASIS FAQs, *supra* note 63.

⁶⁴ *See* 15 U.S.C. § 15(q)(1).

into a lowest-price, technically acceptable (“LPTA”) procurement. In the professional services industry, this type of procurement is particularly harmful for small businesses that, as mentioned above, likely specialize in certain areas. As such, they likely do not maintain large workforces from which they can draw upon to fulfill a nationwide contract, which means that they cannot take advantage of economies of scale like large businesses.

As a final note, I would like to highlight the fact that the OASIS RFP not only fails to increase small business participation, but because of its similarity to a LPTA procurement, also falls short with respect to strategic sourcing’s emphasis on value.

CONCLUSION

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. In other words, 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.” As discussed above, the existing and proposed strategic sourcing initiatives as well as OMB’s proposed mandatory usage of strategically sourced contracts subvert these goals. While taxpayer savings are important, the government should not pursue such savings at the expense of small businesses and value, particularly where such policies could eliminate any such savings in the long-term.

Again, thank you Chairman Hanna and Ranking Member Meng for the opportunity to testify. I will be pleased to answer any questions you or members of the Subcommittee may have.