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**OPINION ON: Proposed Regulations Illegally Authorize
“Strategic Sourcing” to Massively Reduce the Breadth of
Contracting With Small Business**

Thank you for the opportunity to express my opinion on proposed regulations that illegally authorize “Strategic Sourcing” to massively reduce the breadth of contracting with small business. I am Professor of Government Contracts at the University of Baltimore Law School and the co-author of *GOVERNMENT CONTRACT LAW IN THE TWENTY-FIRST CENTURY* (Carolina Academic Press 2012). I was Commissioner in 2008-2011 on the Congressionally chartered, independent Commission on Wartime Contracting in Iraq and Afghanistan. My opinion is my own and not an opinion of my school or any other entity.

The proposed regulations would reduce the breadth of small business contracting by up to 80% or even 90% in lines of business where small business contracting is currently common. This proposal is blatant and undeniably illegal; indeed, the proposal impliedly admits the key facts underlying the illegality. To summarize: (1) both Congress and the Supreme Court instruct agencies to provide small business with “the maximum practicable

opportunity” for federal contracting; (2) numerous highly respected figures at recent Congressional hearings presented a compelling case that full-scale “Strategic Sourcing” will greatly reduce the breadth of small businesses; (3) the rule proposers illegally failed to consider any alternatives to inordinate Strategic Sourcing, as they legally must do; (4) the rule proposers provided little or no justification to put undue “Strategic Sourcing” ahead of small business contracts; and (5) the rule proposers failed to conduct the vital Regulatory Flexibility inquiry.

(1) The Proposed “Strategic Sourcing” Rules Must, But Do Not, Provide Small Business with “the Maximum Practicable Opportunity” for Federal Contracting.

The federal government uses vague and abstract definitions of strategic sourcing. To understand it in a practical way, the “sourcing” part consists of buying specific goods and services on a large scale from a narrowed list of specially selected providers. The “strategic” part consists of planning this purchasing in a way that pools the needs and experience of multiple federal agencies, replacing their currently doing their own procurement using their own access to the current market, including a market of large numbers of small businesses. This large-scale buying from a narrowed list is done with the goal to save money.

As discussed below, the House Small Business Committee has held, in recent years, a number of hearings on how strategic sourcing would affect small businesses, with impressive witnesses warning against letting it injure small business contracting. The witnesses warned the unmanaged strategic sourcing may push large numbers of small businesses out of the federal procurement market and possible even out of business, especially when done as these proposed rules would.

A brief provision for strategic sourcing was including in the defense authorization for FY2015. It included no language whatsoever suggesting to implement it in ways injuring small business. Here is the provision, section 836 of Pub. L. 113-291, 128 Stat. 3450:

SEC. 836. <<NOTE: 41 USC 3301 note.>>
MAXIMIZING THE BENEFIT OF
THE FEDERAL STRATEGIC SOURCING INITIATIVE.

Not later than 180 days after the date of the enactment of this Act, the Administrator for Federal Procurement Policy shall prescribe regulations providing that when the Federal Government makes a purchase of services and supplies offered under the Federal Strategic Sourcing Initiative (managed by the Office of Federal Procurement Policy) but such Initiative is not used, the contract file for the purchase shall include a brief analysis of the comparative value, including price and nonprice factors, between the services and supplies offered under such Initiative and services and supplies offered under the source or sources used for the purchase.

[[Page 128 STAT. 3450]]

The bare terse one-sentence provision to the defense spending bill did relate to the federal Strategic Sourcing administrative initiative --- in fact, that was in the title of the provision, as well as named in the texts. But, the provision is most remarkable in how little it said against small business, in contrast to the proposed regulations. That is, section 836 did not say anything to repeal or reduce the powerful intent of the pro-small business statutes, like the Small Business Jobs Act of 2010.

Section 836 did not preclude distinctions as to specific contracting contexts intended for small business, such as contracts with thousands, perhaps tens of thousands, of small businesses for federal supply schedules or for simplified acquisition procedures. Nor did the provision say anything against adapting it with distinctions as to particular sectors with different aspects of small businesses, such as the difference between

commodities that are the starting sector for the Strategic Sourcing vis-à-vis the natural sectors to stay with small businesses such as information technology; and so on. The defense provision was a short bare undetailed statement left to be filled out by regulations against the background of small business statutes.

It was just one of those undetailed provisions often slipped into defense spending bills, which must be fit into the large body of codified legislation, such as the small business laws like the Small Business Jobs Act of 2010. Certainly, it said nothing that it would apply “notwithstanding all other laws” or “notwithstanding small business laws.” This one-sentence provision certainly did not say it set at naught either the established statutory and regulatory policies favoring small business contracting, or the record developed by the House Small Business Committee in volume after volume.

In a nutshell, the government’s strong policy favoring procurement from small business goes back to 1953, and was reemphasized in the Small Business Jobs Act of 2010. The Small Business Act requires that agencies provide the “maximum practicable opportunity” for contracting with small businesses. 15 U.S.C. 644(g)(1)(B). In a 2016 case, a unanimous Supreme Court quoted this requirement with approval. “In an effort to encourage small businesses, Congress has mandated that federal agencies restrict competition for some federal contracts. . . . The Act requires each agency to set ‘an annual goal that presents, for that agency, the maximum practicable opportunity’ for contracting with small businesses. . . .” *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1973 (2016).

Congress enacted the broad Small Business Jobs Act of 2010 to strengthen the small business laws. The Act had a particular section against bundling, which, in

practice, resembles strategic sourcing because of how they use large contract vehicles unfriendly to tens of thousands of small businesses. For both bundling and Strategic Sourcing, the government takes relatively smaller contracts, which would have suited awards to large numbers of small businesses, and consolidates them, for the stated reason to ease handling by limited federal contracting personnel numbers, or to make short-term savings. In bundling, the consolidation may include very diverse requirements from a single agency, like many different Defense Department requirements. In strategic sourcing, the consolidation may include less diverse requirements but coming from many agencies, sometimes government-wide, like all similar janitorial work for offices throughout the government.

Such consolidation arouses fears for small business. So Section 1313, “Consolidation of Contract Requirements” (15 U.S.C. 631 note) of the 2010 Jobs Act made it much harder to bundle, protecting the availability of smaller contracts for many small businesses. The 2010 Jobs Act took a series of steps against bundling that would harm small businesses, with proposed regulations requiring alternatives, determinations, and inclusion of small business concerns in the acquisition strategy.

A House Small Business Committee hearing just this last year, fleshed out how the anti-bundling provisions should give pause to Strategic Sourcing regulations like the ones proposed. Joe Wynn, a special advisor to Vietnam Veterans of America, testified:

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. . . . 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.**

Subcomm. on Contracting and Workforce, House Comm. on Small Business, Hearing on Contracting & Industrial Base II: Bundling, Goaling, and the Office of Hearings and Appeals, March 17, 2015 (bold and underline added). Note that the testimony warns that “FSSI is just a more clever way of contract bundling.” Another witness put it even more bluntly, lumping together “[t]he contract bundling through FSSI, reverse auctions and large Indefinite Delivery, Indefinite Quantity contracts” Statement of Davy Leghorn, Assistant Director of the American Legion, House Small Business Subcommittee on Contracting and Workforce, Hearing on Empowering Small Business Advocates, Dec. 9, 2015.

Nothing could more strongly remind that the proposed regulations on SSI must heed the intent of the anti-bundling provisions of the Small Business Jobs Act.

(2) Numerous Highly Respected Figures at Recent Congressional Hearings Presented a Compelling Case that “Strategic Sourcing” Will Greatly Reduce the Breadth of Small Business Contracting.

The House Small Business Committee developed a full record against the aspects of undue strategic sourcing that hurt small businesses. Start with the witness from the ABA, namely, Damien Specht, chair of the ABA's Committee on Small Business & Other Socioeconomic Programs (of the Section on Public Contract Law), in Subcomm. on Contracting and Workforce, House Comm. on Small Business, Hearing on Contracting & Industrial Base II: Bundling, Goaling, and the Office of Hearings and Appeals, March 17, 2015. Specht starts by a pithy statement of the problem, entitled (this is Specht's own title; underlining added) "The Downside of Strategic Sourcing":

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 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:

Note that Specht, the ABA witness, makes the key connection with bundling: strategic sourcing has "the same effect of weakening the small business government contracting base" as bundling. This brings in, as to strategic sourcing, the intent of the Small Business Jobs Act of 2010 to protect small business opportunities against excessive and destructive resort to large contract vehicles. And, "strategic sourcing" harms small business because "the problem is that strategic sourcing, at least when accomplished through large contract vehicles, is necessarily bad" for small business.

Of his reasons, the first is that thousands of small businesses face a barrier for entry with strategic sourcing because of strategic sourcing means those “large contract vehicles”

it is often necessary for hundreds of small businesses to team together to fulfill the requirements of these [strategic sourcing] large contracts. As you might imagine, these broad coalitions among 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.

This indicates what must be considered in this proposed rulemaking as to alternatives – further discussed below – to Strategic Sourcing’s heavy reliance on “large contracts” for which there “is a real barrier to entry for small businesses.”

Second, Specht gets quite concrete, with powerful statistics, about how Strategic Sourcing has already deprived many hundreds of small businesses of essential contracts (underlining added):

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 solicited 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.

Note the astonishingly extensive hit on small businesses, that “569 holders of GSA Schedule for Office Solutions” have had their opportunity rendered “essentially useless” by this one Strategic Sourcing large contract.

Further concrete discussion, of what undue Strategic Sourcing can do, came from a very impressive witness. Talking about small business’s woes at length at a hearing entitled “Federal Strategic Sourcing Initiatives,” was Robert A. Burton, who was Deputy Administrator of the Office of Federal Procurement Policy; he was at OFPP for seven years, including two years as Administrator (Acting) of OFPP, effectively the nation’s highest procurement policy figure. So Burton speaks with authority on this. Burton gave full and powerful testimony under the heading “Existing Strategic Sourcing Initiatives Highlight the Detrimental Effects of Strategic Sourcing on Small Businesses.” He talked of a recent Strategic Sourcing initiative for Office Supplies called OS2 – a blanket purchase agreement (BPA) which took the place of contracting with small businesses through Federal Supply Schedule 75 for office supplies (underlining added):

Nowhere is this principle more salient than the OS2 FSSI BPA, which illustrates the effects strategic sourcing currently has on small businesses.

In June 2010, GSA awarded FSSI BP. As to 15 . . . Schedule 75 vendors – 13 . . . were small businesses. However, at the time of the OS2 BPA, there were 527 Schedule 75 vendors, of which over 90 percent were small businesses. Consequently, more than 400 small business Schedule 75 vendors were not chosen, and therefore, were ineligible to provide office supplies through the OS2 BPA.

. . . . 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. . . .

. . . . small businesses understand that strategic sourcing results in winners and losers, 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.

Burton's testimony is that from this one Strategic Sourcing effort, "small businesses have not just lost, but have done so on a devastating scale." Robert A. Burton, Federal Strategic Sourcing Initiatives, Subcomm. on Contracting and Workforce of the House Small Business Comm. June 13, 2013. And, that is just from one single such effort. Multiply Burton's analysis by all the Strategic Sourcing exclusions of the vast majority of small businesses that will occur under the proposed rules each time, and the result is what he concludes is a "devastating scale" of such lost "small businesses" will occur over, and over, and over again.

The ABA witness, Specht, goes on to a third reason, namely, going forward, inordinate Strategic Sourcing will shrink the vital "small business entry point":

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.

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, even for the small businesses that receive strategic sourcing awards," it becomes "unable to win the next iteration of that contract" because it has become too

large to be eligible and “today’s winners will face significant difficulties in a few years when these large awards have expired.”

Other witnesses have refined these factors. One is a consultant who aids businesses entering the federal market. He identified “threats” to “small business participation” from Strategic Sourcing in the high “initial costs” in “resources and time.”:

Small Business Impact of Category Management

[W]e are concerned about the impact of larger acquisition reforms on the small business community. What was formerly known as "strategic sourcing" has now morphed into the term "category management," and poses threats to a diverse industrial base complete with small business participation.

While there are certainly benefits to procurement vehicles, including federal supply schedules, GWACS and IDIQs, they all constrain small business participation. . . . they limit competition - inhibiting the ability of small businesses in particular to pursue certain opportunities. The initial costs of these contract vehicles are much harder for small businesses to bear than their larger counterparts, both in terms of resources and time

Testimony by John Stanford, Subcomm. On Contracting and Workforce, House Small Business Comm., GSA Proposed Transactional Data Rule, June 25, 2015.

(3) The Rule Proposers Illegally Failed to Consider Any Alternatives to Inordinate Strategic Sourcing, As They Legally Must Do.

It is not a mere accusation that the proposal failed to consider any alternatives to Strategic Sourcing. It is not merely an accusation, because it is not merely that a reader does not come across any section or paragraph entitled or addressing alternatives. In fact, the proposal goes far beyond merely leaving alternatives unaddressed and does more even than just concede the point. Rather, the proposal comes forth and boldly and bluntly trumpets it. Section V of the proposed rulemaking is entitled “Regulatory Flexibility

Act.” (The regulatory flexibility requirement itself will be discussed in a section below.)

Starting with the seventh paragraph, the proposal ticks off things it does not have to do:

There is no reporting required by Government contractors, all action on the rule is internal to the Government.

The rule does not duplicate, overlap, or conflict with any other Federal rules

No viable alternatives were determined at this rulemaking stage.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration.

So the rulemaking proposal did not discuss alternatives because the proposal just concluded: “No viable alternatives were determined.” The proposal expressly and vocally rejects the idea of there being any “viable alternatives” to discuss.

In saying this, the proposal blindly eschews even a single glance at the various ways to go about this. Alternatives would have taken into account the strong policy in favor of small businesses in the small business statutes in general, and in the Small Business Jobs Act of 2010, especially the anti-bundling section.

Here are just some of the alternatives.

The proposal could consider ways to implement strategic sourcing that mitigate the impact on small businesses. One sphere is, of course, either small business set-asides, or some subset of small business set-asides. These occur under their own separate statutory and regulatory system and that system could have been left undisturbed or at least dealt with constructively. An even more powerful separate set of systems is for the specific socioeconomic categories, such as small disadvantaged business, women, service

disabled veterans, and HUBZONES. Leaving that system undisturbed would have protected a sphere of enormous policy importance to Congress and the established laws.

As many witnesses have discussed, Strategic Sourcing has a particularly destructive impact on the hundreds of small businesses that offer services on the Federal Supply Schedules. The proposed regulations could have considered whether to focus Strategic Sourcing toward goods and services not on Federal Supply Schedules, or at least to set the Strategic Sourcing up not to drain inordinate contracting away from Federal Supply Schedules. The high stakes in this regard received testimony from Alan Chvotkin of the important group, the Professional Services Council:

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. . . . 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

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.

Alan Chvotkin, Subcomm. on Contracting and Workforce, House Comm. on Small Business, Hearing on Contracting & Industrial Base, March 17, 2015 (bold added).
Keeping Strategic Sourcing from draining the contracting from the Federal Supply Schedules is thus of the greatest importance and a very significant alternative to consider.

Another type of alternatives follows from the strong linkage by many distinguished witnesses between bundling – the common name for “consolidation of

contract requirements” – and Strategic Sourcing. Moreover, Congress took specific anti-bundling steps in the Small Business Jobs Act of 2010. Accordingly, the rule proposers could have considered the alternative of a set of provisions akin to the FAR for bundling:

207.170 Consolidation of Contract Requirements. (Refs & Annos)

Effective: October 1, 2010

48 C.F.R. 207.170–3

207.170–3 Policy and procedures.

Currentness

(a) Agencies shall not consolidate contract requirements with an estimated total value exceeding \$6 million unless the acquisition strategy includes—

- (1) The results of market research;
- (2) Identification of any alternative contracting approaches that would involve a lesser degree of **consolidation**; and
- (3) A determination by the senior procurement executive that the **consolidation** is necessary and justified.

(i) Market research may indicate that **consolidation** of contract requirements is necessary and justified if the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches. Benefits may include costs and, regardless of whether quantifiable in dollar amounts—

- (A) Quality;
- (B) Acquisition cycle;
- (C) Terms and conditions; and
- (D) Any other benefit.

(ii) Savings in administrative or personnel costs alone do not constitute a sufficient justification for a **consolidation** of contract requirements unless the total amount of the cost savings is expected to be substantial in relation to the total cost of the procurement.

(Bold added.) After all, bundling and Strategic Sourcing have, in common, the same major problem for small business – the resort to large contract vehicles. So the same type of rules warrant consideration.

For another alternative, the rule proposers should have considered phasing in Strategic Sourcing by industrial sectors. The existing FSSI does purport to proceed by sectors, but it is doubtful that its phasing, occurs with the fate of small business considered enough. The existing FSSI may well consider administrative convenience as much more important than small business. For example, the FSSI may move prematurely on Information Technology, even though this is an excellent sector for small business contracting. Information Technology is a service that may best fits having many small businesses, in particular localities or adapted to particular needs, serving the specific needs of different federal offices. By moving prematurely on it, the enthusiasts for Strategic Services would adopt the straitjacket of having a relatively limited number of nationwide businesses provide all the services.

Testimony by another witness at House Small Business Committee hearings addressed the problem of “shoehorning” IT into Strategic Sourcing:

For small businesses, we see two direct and immediate challenges under the **strategic sourcing** initiative. Many of these companies - particularly the thousands of companies selling information technology goods and services as resellers on GSA schedules - will face diminished access to the Federal government market because under FSSI, there will be less award winners and more losers. The second challenge impacts those small businesses that are the most innovative providers of IT goods and services which are frequently offered in response to narrow, unique mission requirements or as a specialized component of a broader prime contractor activity.

The offerings of these companies simply do not fit into the commoditized labor categories envisioned under **strategic sourcing** and these companies will face increased market pressures, given requirements to drive more and more acquisitions into **strategic sourcing**. Many of the products and services in the ICT space do not lend themselves well to **strategic sourcing**.

A.R. Hodgkins, Federal Strategic Sourcing Initiatives, Subcomm. on Contracting and Workforce of the House Small Business Comm. June 13, 2013 (bold added).

(4) The Rule Proposers Provided Little or No Justification for Newly Proposed Regulations that Would Put Undue “Strategic Sourcing” Ahead of Small Business

Contracts:

The Strategic Sourcing Initiative, and hence these proposed regulations, set an important standard for themselves that are not met, namely, to increase socioeconomic participation, of which the largest part is for small businesses. The Frequently Asked Questions on the GAO website for FSSI says its objectives include:

- Improved Achievement of Socio-economic Goals

1. Maximized value of small/disadvantaged business opportunities

<https://strategicsourcing.gov/faq#cid8>. The proposed regulations note this: “The primary goals of FSSI are to-- . . . Establish mechanisms to increase . . . socioeconomic participation.” The proposed rules go on to say: “Specific benefits of Strategic Sourcing include-- . . . Assist with socioeconomic goals.” And in section V, the rule proposal says: “An explicit goal of Federal strategic sourcing is to maintain and/or enhance socioeconomic goals.”

Yet, without repeating it, it is clear that overwhelming testimony describes the harm to the breadth of small business opportunities from Strategic Sourcing. Before SSI comes along, typically, in one sector there is contracting with over 400 small businesses; when it comes along, there are thirteen. These statistics are not contested.

The argument of the proposal emphasizes that the dollar value of the contracting (that goes to the few small businesses that are admitted to participation) is greater than the dollar value that had gone to the very large numbers of small businesses that used to

receive that contracting. The proposers then leap to the conclusion that this is better for small business contracting. Here is the explanation stated in the rule proposal's own words:

There are currently 137 entities awarded under the FSSI, of which 78 (57 percent) are small entities. The required consideration of FSSI offerings does not directly have a negative effect on entities not awarded an FSSI contract, but the required contracting officer consideration and documentation requirement could indirectly lead to more purchases going to those vendors involved in the FSSI.

An explicit goal of Federal strategic sourcing is to maintain and/or enhance socio-economic goals. Partnering with small businesses during key stages of the strategic sourcing process will enable the FSSI to meet or exceed socio-economic goals.

This tortured formulation requires translation. The rule proposal admits, as it must, that “An explicit goal of Federal strategic sourcing is to maintain and/or enhance socio-economic goals.” This rule proposers’ formulation says that there is no direct negative effect on the 400, yet, has an indirect positive effect on the 13. Reword the formulation straightforwardly, and it admits there is positive effect on the 13 and a negative effect on the 400. That is a huge net negative effect on broad distribution of small business contracts.

The next paragraph has a similar tortured formulation. The rule proposals say: “An explicit goal of Federal strategic sourcing is to maintain and/or enhance socio-economic goals. Partnering with small businesses during key stages of the strategic sourcing process will enable the FSSI to meet or exceed socio-economic goals.” The word “goals” is meant as the total dollar value of contracting (as measured for small contract dollar value goaling), not the breadth of distribution of small business contracts. Again take an outsized Strategic Sourcing contract which replaces a sector of prior

contracts with over 400 small businesses, with the new large vehicle goes to 13 small businesses (typically partnering with large businesses) in the FSSI. Before, the 400 receive 75% of the contracting dollars; after, the 13 small businesses, thanks to partnering, receive 87% of the dollars. So, the rule proposers say, the full-strength Strategic Sourcing “will enable the FSSI to meet or exceed socio-economic goals” because it has moved in terms of dollar-value goaling from 75% to 87%. Rephrase the formulation straightforwardly, and it says there is positive effect because the total dollar value has moved up a bit, even though the distribution of small business contracts has catastrophically shrunk, withered, and dwindled from 400 to 13. Again, that is a huge net negative effect on broad distribution of small business contracts.

This negative effect on broad distribution of small business contracts has fairly general recognition. As the witness for the Professional Services Council, Alan Chvotkin, testified in 2015:

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. . . . 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.

. . . . 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.

The American Bar Association witness thoroughly analyzed this issue:

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 solicited 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 business 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.

The testimony of Robert A. Burton, former Administrator (Acting) of the Office of Federal Procurement Policy, confirmed the other witnesses and contradicted the rule proposers on the impact on small business. In 2013, he testified about how Strategic Sourcing might displace over 10,000 small businesses, their place taken by just several hundred:

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.

GSA'S PROPOSED STRATEGIC SOURCING INITIATIVES ARE ANTITHETICAL TO STRATEGIC SOURCING'S GOAL OF INCREASED SMALL BUSINESS PARTICIPATION, [AND] MORE HARMFUL TO SMALL BUSINESSES THAN THE CURRENT STRATEGICALLY SOURCED CONTRACTS

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.

Testimony of Robert A. Burton, 2013, above (bold added).

In 2015, Burton testified about how implementation of Strategic Sourcing displaced two thousand small businesses for awards just to 123:

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. 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.

. . . . 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.

Testimony of Robert A. Burton, in Federal Strategic Sourcing Initiatives, Subcomm. on Contracting and Workforce of the House Comm. On Small Business, June 13, 2013 (bold and underline added).

Filling out the dismal picture of hundreds, sometimes thousands, of small businesses displaced by Strategic Sourcing, sometimes even driven out of business, for just a relative handful of awardees, was testimony by Joe Wynn, cited above:

GSA uses a number of **strategic sourcing** vehicles. Under its 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.

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. . . . 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.

Considering what all these high-level witnesses describe, there is little or no support for the notion that inordinate levels of Strategic Sourcing will actually lead to a broader distribution of small business participation in government contracting. Rather, the opposite is manifest.

(5) The Rule Proposers Failed to Conduct Any Regulatory Flexibility Inquiry, Which They Must Do.

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 et seq., requires proposed regulations to conduct an analysis of how to “minimize the significant economic impact of rules on small businesses” This includes an “estimate of the number of small entities to which

the proposed rule will apply,” and, that the proposal “shall also contain a description of any significant alternatives to the proposed rule . . . which minimize any significant economic impact of the proposed rule on small entities.” 5 U.S.C. 603 (b,c). As one commentator summarizes,

In short, the RFA represents a concerted effort to reduce administrative burdens by compelling federal agencies to take small firm concerns into account as part of the rulemaking process. The RFA requires, among other things, that an administrative agency promulgating a rule interests certify that a regulation will not significantly harm a substantial number of small businesses. If the agency cannot certify this, then it must conduct a deeper analysis examining the rule's negative impact on small businesses and possible methods of reducing that burden. The RFA's goal was meant to be nothing less than a culture shift in federal bureaucracy towards an appreciation of the value of small businesses. It was designed to instill a desire, or at least create an obligation, to accommodate their unique interests.

Robert C. Bird & Elizabeth Brown, *Interactive Regulation*, 13 U. Pa. J. Bus. L. 837, 838 (2011).

All that has previously been presented shows that this regulation will “significantly harm a substantial number of small businesses.” Look at the statistics previously cited. Each time a Strategic Sourcing initiative has gone forward, it displaces hundreds, if not thousands of small businesses that have been contracting with the federal government. Only a relative handful of small businesses share in the new large contract vehicle. Of the hundreds or thousands of displaced small businesses, a majority are hurt, and many may actually go completely out of business. All this has been testified to by testimony of many distinguished figures before the House Committee on Small Business.

Yet, the rule proposal plainly, definitely, and surely disputed that there the rule will “significantly harm a substantial number of small businesses.” Nor does the proposal say it has minimized such harm. And the proposal does not purport to consider alternatives.

To quote the proposal, “DOD, GSA, and NASA do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the

Regulatory Flexibility Act, 5 USC 601, *et seq.* because the proposed rule only affects the internal operating procedures of the government.” And, “The rule requires action by contracting officers when purchasing items available through FSSI and will not directly affect any small entities. It specifically requires the contracting officer to place certain documentation in the contract file if the Federal Government makes a purchase of supplies and services offered under the Federal Strategic Sourcing Initiative (FSSI), but the FSSI is not used.”

This is transparent nonsense. The rule imposes tough detailed justification requirements for any contracting officer who dares to award to small businesses instead of Strategic Sourcing large contracting vehicles. That proposal imposes this, not merely to generate internal paperwork, but to strong-arm contracting officers into denying awards to small businesses instead of Strategic Sourcing large contracting vehicles. By the logic that imagines there is no effect, a high-powered rule would not be deemed “to have a significant economic impact on a substantial number of small entities” even if that rule forbade any awards at all to any small businesses without a personally signed waiver from a Cabinet-level secretary, by the reasoning that this was still just internal paperwork and not a direct impact on small businesses.

In other words, a documentation obligation like this one, intended, calculated, and certain in effect, to shift contracting away from small businesses, affects small businesses. In reality, thousands of small businesses have already suffered, some grievously, from Strategic Sourcing, as described above, and under this rule, thousands more will.

As a federal court said in rejecting a Regulatory Flexibility defense of the Department of Homeland Security, “This Court’s ‘concern, however, is with the practical effect . . . of the rule, not its formal characteristics.’” *American Federation of Labor v. Chertoff*, 552 F.Supp. 2d 999,

2013 (D.D.C. 20007). Accordingly, there are serious questions whether DHS violated the RFA by refusing to conduct a final flexibility analysis.” *Id.*

The proposal says “No viable alternatives were determined at this rulemaking stage.” This has already been addressed. There are a number of ways to reduce the harmful impact on small businesses. Let the government spare small businesses from crushing immediately by undue Strategic Sourcing. Focus the strategic effort instead on affecting medium and large businesses without crushing small businesses.

Stripping away these bogus attempts to sidestep Regulatory Flexibility as just paperwork or lacking in alternatives, the real argument presented for the rule, in terms of Regulatory Flexibility, is as follows (underlining added):

According to the Federal Procurement Data System, in Fiscal Year 2014, the Federal Government made approximately 170,403 contract awards (not including modifications and orders), of which approximately 85,624 (50.25 percent) were awarded to about 43,545 unique small business entities. . . . The rule could indirectly affect small businesses that offer supplies or services under the FSSI as the rule will require contracting officers to consider FSSI vendors when they may not have done so in the past, and this could lead to more sales for those small businesses. There are currently 137 entities awarded under the FSSI, of which 78 (57 percent) are small entities. The required consideration of FSSI offerings does not directly have a negative effect on entities not awarded an FSSI contract, but the required contracting officer consideration and documentation requirement could indirectly lead to more purchases going to those vendors involved in the FSSI.

This is another version of the bogus argument previous quoted. The rule does not just affect the 78 small entities who are part of Strategic Sourcing, often by partnering with large businesses. Rather, it also hurts many thousands, perhaps tens of thousands, of what the rule itself acknowledges are the “43,545 unique small business entities.” That is because these small businesses have flocked to FSS Schedules, or Simplified Acquisition contracts, which the large contracting vehicles of Strategic Sourcing will displace. The proposal treats as nothing, that tens

of thousands of small businesses will be hurt or driven out of business, because, the proposal argues, more dollars will flow to the comparatively few small businesses that get awards under the FSSI. But, to the small business statutes, and to the nation, this harming of small businesses is real, and requires acknowledgment as to Regulatory Flexibility, in general, and as to alternatives, in particular. The Regulatory Flexibility duties of the proposal are just not done.

Conclusion

The proposal should be junked. It would have an overwhelmingly bad impact on the breadth of small business contracting, contrary to the intent of the small business laws. If the rule proponents start over, they should look for alternatives to minimize this impact. They should spare aspects and sectors like Federal Supply Schedules, Simplified Acquisition contracting, and IT contracting.