Testimony of

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House Committee on Small Business

"Are Governmentwide Contracts Helping or Hurting Small Contractors?"

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Thank you for the opportunity to present the Committee with the following issues and concerns that we have seen over the past few years from our small business clients. My name is Isaias "Cy" Alba, IV, and I am a Partner at PilieroMazza PLLC.

PilieroMazza PLLC is a law firm with a strong national reputation. Located in Washington, DC, Annapolis, MD, and Boulder, CO, our clients operate throughout the United States and around the world spanning virtually all industries. Many of our clients are government contractors, while others are commercial businesses, tribal entities, nonprofit organizations, trade associations, and foreign companies. We work with both small organizations, for which we often function as a virtual in-house counsel, to major enterprises where we work hand-in-hand with the company's general counsel. Now in our fourth decade, PilieroMazza is committed to providing superior, responsive service that consistently exceeds our clients' expectations–because we believe nurturing your business is the key to our success. We accomplish this through sophisticated legal and business guidance in a diverse array of industries and subject matters. Examples of our services include procurement-related protests and litigation; establishing joint ventures, mentor/protégé arrangements, and other corporate transactions; mergers and acquisitions; employee training and handbooks; and internal compliance audits. We also help both experienced and new government contractors navigate the complex regulatory maze before various civilian and defense agencies.

In addition to government contracting, we provide our clients with a full range of legal services including corporate, labor and employment, and litigation matters. In these areas, we routinely assist clients with mergers and acquisitions, internal investigations, business and joint venture formation, employee training, agreements, and handbooks, Service Contract Act and other labor law compliance, and civil litigation, among many other matters. Our clients value their ability to obtain a diverse array of legal guidance from our experienced team of attorneys. We keep our clients abreast of the issues that matter most to them through *The Weekly Update*, *client alerts*, and frequent informational seminars and webinars. Several times a week, we update our blog, *The PM Legal Minute Blog*, which provides trending insights to small and mid-sized businesses. We provide this broad range of services with a focus on results, responsiveness, and cost efficiency. This sets us apart from other law firms and has allowed us to develop and cultivate many long-standing relationships. In fact, many of our clients have been with the firm since its inception. We are also proud members of the Montgomery County Chamber of Commerce GovConNet Council, serving as general counsel, and I am on the board of the Bowie Business Innovation Center – which provides the only 8(a) Accelerator program directly on the campus of a Historically Black College and University – Bowie State – and which recently received a $3M grant, spearheaded by Senator Cardin and Senator Van Hollen in order to replicate the program nationwide to support the growth of even more 8(a) small businesses.

I greatly appreciate the opportunity to and would be happy to work with the Committee in any way I can to support statutory changes that can better serve the small businesses who make up the foundation of our economy. This is especially true for small business federal contractors, as the federal contracting landscape is difficult to traverse and companies must invest a great deal of time and money into ensuring they are compliant with the myriad of laws and regulations that govern federal contracting and, as a nation, we do not want to lose the small businesses who are knowledgeable about federal contracting and who have already expended the resources to ensure

compliance. It is very difficult for new companies to enter the federal market and for that reason every small business federal contractor must be protected.

As the mandated use of Best-in-Class ("BiC") contracts and large Governmentwide Acquisition Contracts ("GWAC") has grown, so have the concerns of small business federal contractors who see their work swept up into these large vehicles where the incumbent small business may not even have a spot or where their work is consolidated with multiple other requirements taking it out of reach of the incumbent small business and forcing them to team with other companies or, worse, become a subcontractor where their fate is dictated by a prime contractor who they may have never worked with and do not trust.

In other cases, the incumbent small businesses feel forced in finding a mentor under the Small Business Administration's ("SBA") Mentor-Protégé Program ("MPP") to go after a specific BiC or GWAC even if the mentor has no interest in providing true support for their company outside of merely bidding on a few contracts. It should be noted that under current SBA regulations a small business is only allowed to have two mentors in the life of their company. Thus, if one of the mentor opportunities is thrust upon the small business because of necessity to get on one of the BiC or GWAC vehicles simply to keep their incumbent work, that "burns" one of their two mentor-protégé opportunities for the entire existence of that company. In these situations, the small business is often required to give up a good portion of their work share to have a mentor agree to team with them and, in addition, the mentors may also not provide overall company support the small business would need to grow and develop.

This is further exacerbated by the fact that many of the GWACs and BiC vehicles use a form of "self-scoring," which was established by the General Services Administration ("GSA") as a means to attempt to reduce bid protests, not by making a more fair and equitable procurement but, instead, by trying to game the legal system to make it more difficult for protesters simply trying to protect their rights and require the federal government to follow the law, from having standing under the bid protest rules of the Government Accountability Office ("GAO"). The irony is not lost on many small businesses that the Government "Accountability" Office's own rules are being manipulated by GSA in order to avoid scrutiny or review (i.e., "Accountability") by the agency specifically created to provide oversight of these exact situations through the bid protest process. Even in that task, however, GSA's "self scoring" strategy has failed. These GWACS and BiC contracts are still being protested because the stakes are so incredibly high. I have had clients note that if they miss the opportunity for one of these major vehicles, their entire pipeline could dry up and that it is not unlikely their businesses could cease to exist in a few years. This risk is increased as more agencies terminate current contracts for convenience or refuse to exercise options despite the fact that the contractors are currently performing well, just so they can move their spend to BiCs per their agencys' directives.

These, along with a few other issues noted below, are the key concerns that our small business clients have expressed on numerous occasions—all surrounding the short-sighted decision by agencies to force Category Management and the theoretical cost savings it may bring, without thinking about the serious negative consequences on small businesses and, as a result, our entire industrial base. That said, as also noted below, GWACS and BiC contracts, or really any Indefinite Delivery, Indefinite Quantity ("IDIQ") contract, can be beneficial to small businesses or graduate

to help bridge the gap between small business set-asides and the cutthroat full-and-open procurement space.

I. GWACS and IDIQ Contract Vehicles Are an Important Tool for Small Business to Survive Growth into Midsize

It is well established that small business federal contractors face serious challenges after they "graduate" from their small business status. Under SBA's rules, however, if a firm secures a spot on a multi-year IDIQ or standard contract, the company remains eligible to receive options and orders under such contracts until the company is required to recertify its size and status as the end of each five-year term under a contract with more than a five-year period of performance. Thus, by way of example, if a small business organically (meaning through growth of its own revenues through its own efforts, not via acquisition of other firms) outgrows its size standard one year after securing a spot on a BiC contract, that firm can continue to perform on that contract, and bid and win new task orders, for four more years (until the end of the five-year period under the contract).

This is a critical component of many small businesses' growth strategies and how they plan to bridge the gap between competing only with small businesses and having to go "cold turkey" and start competing with firms multiple times their size. For instance, the size standard attached to some North American Industry Classification System ("NAICS") codes could be $8M. Once that company's five-year average revenues reaches $8,000,000.01, they are no longer considered a small business the following year. This means that they are then forced to compete with firms that may have revenues of $10M, $10B, or $100B. There is no differentiation. This obviously creates serious pressures on such firms because they do not have the same economies of scale as larger firms, they cannot afford to lose millions to secure a new customer, they do not have the same level of bid and proposal support, and they simply lack the resources to bid and win the same level of prime contracting opportunities. However, small business GWACS and IDIQ contracts can serve as a bridge to help these firms survive.

Specifically, as noted above, the small businesses who organically grow can still bid and win small business task orders under GWACS and other IDIQ contracts they were awarded until the next recertification period. This means that companies who outgrow their size standards with a few years left on such vehicles, can use that time to invest in management teams, proposal teams, and other resources to give them a fighting chance at survival as they cross into the "Valley of the Shadow of Death" known as the mid-tier. While GWACS and BiC contracts do have major downsides to those on the outside, they can be very beneficial to successful small businesses to ensure they survive to become true competitors in the full-and-open environment where they can continue to contribute to the broadening of the industrial base—the exact purpose of the Small Business Act.

II. Mentor-Protégé Relationships Can Be Helpful, But Can Present Challenges when Competing Against Lone Small Businesses

In addition to the ability for small businesses to survive the struggles of graduation into the mid-tier through strategic use of GWACS and other IDIQ contracts, the SBA's MPP is also an extremely important tool. The SBA's MPP allows mentor firms to work with small business

protégés to help the protégés grow and develop while allowing the mentor firms' protection from being found affiliated with the protégés (which would, in turn, potentially make the protégé a large business and no longer eligible for set-aside procurements or assistance). For the mentor, it also provides additional access to small business contracts in the form of joint ventures ("JV") to perform the work. JVs are usually reserved for only a group of small businesses, but through the SBA's MPP, large business mentors can be members of JVs and perform up to 60% of the work performed by the JV members themselves.

While, at first, this may seem problematic, this allows for newly "graduated" small businesses to become mentors to nascent small business and still hang on to some of the revenues for their incumbent work. Without this opportunity newly "graduated" small businesses whose incumbent work was up for recompete could lose the opportunity to bid entirely, or be relegated to the role of a subcontractor, which also creates a risk of loss of the work to prime contractors seeking to capture more and work of the workshare over time. So long as the mentors are truly providing the support to the protégé firms that was promised in the Mentor-Protégé Agreement ("MPA"), this helps both the protégé firm to grow and the mentor firms from disintegrating. Again, this helps ensure that "graduating" small businesses are not simply replaced by new small businesses as they die on the vine, while also ensuring that the next generation is able to get a leg up. Both of these goals further broaden and solidify the industrial base, exactly the purpose of the Small Business Act.

That said, the MPP is not without its faults. As the Committee has undoubtedly heard, many small businesses who do not wish to be forced in mentor-protégé relationship may feel the need to do so to compete. This is especially the case when it comes to large IDIQ contracts like GWACS and BiC contracts. In cases where Mentor-Protégé Joint Ventures ("MPJV") are made up of brand-new protégés and very large mentors, that may be the best example of where the non-mentor-protégé small business' frustration is derived. In such cases, the protégé itself may have no experience at all and so it relies entirely on the mega-mentor (say billion-dollar entities). Further the MPJV in this case can use the experience of the mentor performing massive projects that no small business could ever perform, the mentor likely has an approved purchasing system – another item that few, if any, small business could secure, and it provides a host of other advantages. In such cases I can understand the frustration from small businesses but there could be solutions, such as requiring the protégé firm to provide at least one past performance and corporate experience reference, or some percentage of the references, for every GWAC or BiC proposal. That way the protégé must show that it is bringing something to the table other than its status.

Further, perhaps you could have some differentiation between mentor-protégé teams or MPJVs with newly graduated small businesses, or those under a certain size threshold versus mentor-protégé teams with mentors above the threshold. A certain number of awards or a certain percentage could go to the teams with very large mentors versus those with mid-tier mentors. You could also have a specific number of contracts that are reserved for all-small business teams. This way the small businesses who wish to avoid the mentor-protégé relationships could still secure a spot on the GWAC or BiC contract. There are likely many other options or a revamping of the mentor-protégé rules, and this very question may benefit from a Committee being established to evaluate the matter in more detail and make recommendations to SBA about regulatory changes or direct legislative changes to tackle the complex issue.

III. Self-Scoring Systems Fail to Identify the Best Small Businesses Capable of Performing Work on Any Specific Task Order

Moving into the key problems with GWACS and BiC contracts, the Self-Scoring systems used by many of these procurements is seriously flawed and fails to meaningfully identify the best small businesses to perform work on any given task order to be issued under the contract vehicle.

As an initial matter, the fact awardees are selected by who has the highest number points across the broad spectrum of requirements encourages firms to cobble together vast teams to simply check the boxes without regard for whether or not the end users—the procuring agencies themselves, will actually get the best contractor to perform the specific, and far more narrow, task order for which they are soliciting to meet the agencies' needs. By way of example, if you created a GWAC or BiC vehicle for "construction services," this may include carpentry, painting, electrical work, plumbing, concrete work, etc. The awardees of this GWAC will be those firms who can satisfactorily show some level of skill or experience in all of these areas. Then, when an agency needs a painter, and due to policies requiring or heavily suggesting the use of BiC contracts, the agency Contracting Officer ("KO") is compelled to issue a task order for paining from only the GWAC holders—essentially general contracting companies. When the award is made it goes to a government contractor who may be "satisfactory" when it comes to painting but may be using builder-grade materials to just get the job done. All the while, the perfect small business who focuses primarily on painting never had a prayer at securing a spot on the GWAC as they just want to be the best painting firm.

In this case, the government agency is forced to work with, potentially, sub-par painters because they were part of an amalgamated team to be able to do everything, at some level, but perhaps not excelling at anything. So by merely focusing on who can amass the most points across a broad spectrum of requirements the self-scoring has the propensity to exclude those firms who are highly specialized and may not want to form JVs or serve as merely subcontractors to more general companies. This does not seem to be the most beneficial use of taxpayer funds. I understand that the self-scoring system may reduce some administrative burden on KOs, reduce the number of proposals, allow for thoughtless exclusion of companies simply by simple mathematical equations, but is that truly how one should be choosing the best painter?

I would submit that in focusing so heavily on reducing administrative burden, the GWAC and BiC self-score protocols have lost sight of making sure that taxpayer dollars are spent not only efficiently, but effectively—to secure the best value for the public. Instead, we now have very large contracts where the government can go and buy a huge variety of goods and services, perhaps with less administrative headache and without having to worry about pesky competition—as Congress supposedly mandated under the Competition in Contracting Act—but at what cost?

GWACS and BiC Contracts should arguably have pools for each and every specific good and service required. Companies should be allowed to bid all or some of the pools, depending on their specific skill sets. Indeed, this is exactly how the GSA Schedule programs already work, so we already have a templated program in place to access both the best company in any given area and reduce burden without having to resort to mindless exclusion of qualified firms using nothing but elementary school math to determine how best to use taxpayer resources.

IV. Other Possible Solutions and Suggestions to Bolster Small Business Participation in Federal Procurements

Given that GWACS and BiC contracts are not inherently problematic, there are some options that could be employed to have them work better for small businesses:

First, the GWACS and BiC contracts could have more frequent on-ramps, perhaps every year or two. This would allow more small businesses to participate and not lose out on a full five or ten-year vehicle. This would greatly reduce the stress on companies to secure a spot on these large contracts and reduce protests, bid costs for small businesses, and avoid locking-out firms who come into existence mid-period before any on-ramp. It would increase competition on the vehicle, which would increase the value received by the government, and be far more consistent with the mandates in the Competition in Contracting Act. As noted above, protests would likely decrease at the vehicle stage because it would not be as critical to secure a spot at any given time, and the contracts could be perpetual. So instead of having SEWP I, II, III, IV, V, VI, etc. you would only have SEWP, and it would last as long as the government continues to need the goods and services thereunder. Each category could have a specific GWAC, you could still require recertification of size and status every five years, and the companies could easily come on and off of the vehicle ad dictated by the market not arbitrary dates.

Second, prohibit moving requirements that have been set-aside for small businesses outside of a GWAC / BiC / IDIQ contract onto such a contract without performing an impact assessment of how the incumbent contractor and the small business community, generally, would be impacted by the move. Just like when an agency is attempting to remove an 8(a) contract from the 8(a) program, so too should some impact assessment be made when an agency decides to move something out of the general small business competition area and onto a specific vehicle. I cannot count the number of times I have had small business owners beg for help when requirements their companies have performed for sometimes 20 years are suddenly moved onto some IDIQ vehicle that the incumbent contractor does not possess. KOs then tell the small business to "just find someone to team with," ignoring the fact that that may mean giving up 50% or more of the workshare and the employees that company may have employed for decades. Unfortunately, in most cases, little can be done as such a decision is left to the broad discretion of a single person—the KO—without care for how it will impact the incumbent, their employees, or the quality of the work. Instead, it is all about minimizing administrative burden for that one person.

Third, it should be made clear that the "Rule of Two" applies to task orders issued under IDIQ contracts under Federal Acquisition Regulation ("FAR") Part 16 as well GSA Schedule Contract task orders under FAR 8.4. Currently, it is the position of most agencies that the "Rule of Two"—the rule requiring that anytime two or more small businesses are capable of performing the work at a fair and reasonable price that the requirement must be set-aside for small business participation—does not apply to the decision to issue a task order under IDIQ contracts or GSA Schedules. Thus, I have had cases where a KO has decided to arbitrarily remove a requirement from an incumbent small business and place it on a large business IDIQ (specifically Alliant II Large Business). When we protested that decision the GAO ruled against us stating that the "Rule of Two" does not apply to IDIQ task orders issued under FAR Part 16. Weeks before GAO made

this ruling, the U.S. Court of Federal Claims ruled exactly the opposite. Frustrated and without the desire or capability to spend more resources taking the protest to the COFC, the small business lost a multi-million dollar task order to a large business merely due to "Category Management."

I submit that Congress should act to codify the "Rule of Two" and mandate that for any procurement, of any kind, under any authority, agencies must follow the "Rule of Two" and determine whether the procurement should be set-aside for small businesses. Otherwise, KOs will continue to exploit this loophole and harm small businesses while enriching the largest companies.

Fourth, remove KO discretion to seek recertification of small business size or status at the task order level on IDIQ contracts—there should be a single rule governing small business status so that companies bidding on IDIQ contracts can plan and fully evaluate the long-term value of the contract prior to expending hundreds of thousands of dollars on proposal efforts.

Under SBA regulations, small businesses are required to recertify, primarily, any time there is a merger or acquisition, or within 120 days of the end of the fifth year of any long-term contract that lasts longer than five years. This is the general recertification rule. However, the rule has left open the possibility that a KO, at any time and for any reason, can require companies to recertify their size or status for any task order issued under an IDIQ contract. In theory then, a small business could spend hundreds of thousands of dollars on a proposal for a large IDIQ contract, knowing that it will be a small business at time of proposal (the time size is generally determined). This allows a small business to plan when and how to spend its bid and proposal dollars. If a KO is allowed to use their discretion to demand recertification for any or all task orders under an IDIQ contract, that completely upends the cost-benefit analysis the small business offerors perform before bidding on small business IDIQ contracts. This wastes scarce small business resources on worthless procurements all due to the whims of a single individual. This is like having a speed limit which says 65 MPH and then in the fine print notes "unless otherwise determined by a police officer who pulls you over." This type of system is entirely arbitrary and, I submit, flies in the face of the purpose of all good laws and regulations—which is to allow businesses and individuals to understand the bounds of the law and to predict how their behavior will be treated by the law before they take action or spend resources.

To allow KOs to make this determine on a task order-by-task order basis, is simply unreasonable and, in the worst cases, can be used by a KO to pick favorites or knowingly request recertification to disqualify contractors who they may have some personal animus towards without any recourse from the otherwise eligible small businesses. For these reasons, Congress should eliminate this discretion by statue.

Fifth, there could be floors to any task order planned to be issued under a GWAC or BiC contract. For instance, perhaps any procurement with a total anticipated value of less than $5 or $10M cannot be solicited using an IDIQ contract vehicle. This would force the government to open the procurement up to additional competition and, at this size, would also make it more likely that the "Rule of Two" would be met and the procurement would be solicited as a small business set-aside.

Sixth, the HUBZone price evaluation preference helps level the playing field for HUBZone firms in full-and-open competition, as well as affords federal agencies greater opportunity to devote

federal spending to HUBZone firms. Regrettably, federal agencies have interpreted FAR 19.1304 as prohibiting the price evaluation preference to task orders. Federal agencies should amend their interpretation to follow the law as Congress intended. As the federal government increasingly drives its spending through governmentwide IDIQ contracts, a significant opportunity for HUBZone spending is being lost because the HUBZone price evaluation is not being applied in the award of task orders. Recent House passage of this Committee's bill applying the price preference, H.R. 5879: *HUBZone Price Evaluation Preference Clarification Act of* 2021, would significantly benefit the SBA, federal agencies, HUBZone firms and the communities they serve.

Lastly, and perhaps the most substantial change, would be to make the GWAC or BiC contracts work more like GSA Schedules—where the "open enrollment" for the contract is constant. New companies are always welcome to submit proposals to get onto the vehicles and those proposals are evaluated by a team of personnel on a rolling basis. The task orders themselves would still be solicitated in the same manner under FAR Part 16, but securing a spot on the vehicle itself would not require a mad dash by small business as they only have one opportunity, perhaps for the next 10 years, to secure a spot on a contract that may swallow all of their incumbent work and work they have been tracking for some time. This will lessen the criticality of the initial bidding period, which will reduce protests at the initial award stage of the IDIQ Contract itself to avoid having to deal with problems like GSA faced with Alliant II Small Business.