

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6515

To: Members, Subcommittee on Contracting and the Workforce, Committee on Small Business
From: Committee Staff
Date: October 7, 2013
Re: Hearing: “Bungling Bundling: How Contract Bundling and Consolidation Remain Challenges to Small Business Success”

On Thursday, October 10, 2013 at 10:00 am in Room 2360 of the Rayburn House Office Building, the Small Business Committee’s Subcommittee on Contracting and Workforce will meet for the purpose of receiving testimony on the ongoing problems of unjustified contract bundling and consolidation for small businesses.

Unjustified contract bundling and consolidation remain among the greatest challenges for small businesses wishing to compete in the federal marketplace. When several separate, smaller contracts are combined into one unnecessarily large contract, it keeps small businesses from even submitting an offer, which limits competition. While in some cases the benefits of bundling and consolidation justify this procurement strategy, in others it simply limits competition to the detriment of small firms.

The Committee has a long history of oversight with respect to contract bundling. Throughout several Congresses, the Committee has held a number of hearings on contract bundling, submitted letters objecting to various procurement strategies that bundle contracts, and met with procurement officials to express concerns over these contracting strategies and how they may interfere with objectives to expand procurement opportunities for small businesses. In addition, during the 112th Congress, the Committee successfully reported H.R. 4081, the Contractor Opportunity Protection Act of 2012 (COP Act), which would have improved the definition of bundling, combined the provisions on consolidation and bundling into one streamlined process, and created greater accountability for bundled contracts.¹

This hearing is an extension of these previous efforts and will examine agency compliance with the current laws on contract bundling and consolidation. It will also investigate the extent to which bundling and consolidation continue to pose challenges for small firms, and whether additional legislation is necessary.

I. Introduction

¹ A version of H.R. 4081 passed the House as section of H.R. 4310, the National Defense Authorization Act for Fiscal Year 2013 (NDAA). However, most of the bundling provisions were dropped in conference before the NDAA was signed into law as Pub. L. No. 112-239.

In order to discuss the impediments contract bundling and consolidation create for small businesses attempting to compete for federal contracts, it is first necessary to understand the difference between the two, the requirements that they impose on the contracting process, and the challenges faced by small firms as a result. This memorandum will begin with a brief explanation of the two.

a. **Definitions**

The Small Business Act (the Act) defines contract bundling as “consolidating 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,” but it defines a consolidated contract as one that satisfies “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 new contract.² Under bundling, a contract may be unsuitable for award to a small business due to the “the diversity, size, or specialized nature of the elements of the performance specified;” the value of the contract, places of performance, or a combination of these factors.³ The key distinction between contract bundling and contract consolidation is that consolidation does not require a finding that a contract will not be suitable for award to small business. Therefore, a contract may be consolidated but not bundled, but all bundled contracts are consolidated.

b. **Process Triggered**

When an agency or SBA identifies a contract as bundled, or the agency determines that it is consolidated, additional analysis is required. If the contract is bundled and exceeds the substantial bundling threshold, which is currently \$8 million for the Department of Defense (DoD), \$6 million for the National Aeronautics and Space Administration (NASA), the General Services Administration (GSA) or the Department of Energy (DOE), or \$2.5 million for any other agency, the contracting agency is required to provide the SBA’s Procurement Center Representative (PCR) and the agency’s own Office of Small and Disadvantaged Business Utilization (OSDBU) with a statement explaining why the underlying requirements cannot be met without bundling the contract, and “why the agency has determined that the bundled contract [is] necessary and justified.”⁴ This criteria may include: (1) measurable cost savings; (2) quality improvements; (3) reduction in acquisition cycle times; (4) better terms and conditions; or (5) other benefits.⁵ However, achieving reductions in “administrative or personnel costs alone shall not be a justification for bundling of contract requirements unless the cost savings are expected to be substantial in relation to the dollar value of the procurement requirements to be consolidated.”⁶

If an agency has determined that it needs to bundle a contract, the head of the contracting activity (HCA)⁷ is responsible for identifying the specific benefits, assessing the impediments the procurement strategy poses to small business participation as a prime contractor, identifying ways to mitigate these impediments, and

² 15 U.S.C. § 632(o)(2); 15 U.S.C. § 657q(a)(2). H.R. 4081 attempted to reconcile these provisions and improve the definition of bundling.

³ 15 U.S.C. § 632(o)(2).

⁴ 48 C.F.R. § 7.105; 15 U.S.C. § 644(a). A PCR is a SBA employee charged with overseeing another agency’s procurement process to ensure adherence to the Act.

⁵ 15 U.S.C. § 644(e). Measurable cost savings has been regulatorily defined as “(A) Benefits equivalent to 10 percent of the contract or order value (including options), where the contract or order value is \$94 million or less; or (B) Benefits equivalent to 5 percent of the contract or order value (including options) or \$9.4 million, whichever is greater, where the contract or order value exceeds \$94 million;” however, administrative or personnel savings must exceed 10 percent of the value of the contract. SBA, Final Rule: Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation, 78 Fed. Reg. 61,114, 61,139 (Oct. 2, 2013).

⁶ 15 U.S.C. § 644(e).

⁷ The HCA is usually the head of a regional office, so an agency will have multiple HCAs.

making a determination that “the anticipated benefits of the proposed bundled contract justify its use.”⁸ If the PCR determines that a contract was bundled but not identified as such, or objects to justification or mitigation strategy, the PCR can delay the procurement while SBA and the agency negotiate, although the agency ultimately will make the decision regarding the award.⁹

The process of consolidating contracts involves its own process and set of criteria. Before an agency can issue a consolidated contract for more than \$2 million, the Chief Acquisition Officer (CAO) or Senior Procurement Executive (SPE) must certify that the agency has conducted market research; identified “alternative contracting approaches that would involve a lesser degree of consolidation of contract requirements;” determined, in writing, that the consolidation is “necessary and justified;” identified any negative effects on small businesses due to the acquisition strategy and ensure “that steps will be taken to include small business concerns in the acquisition strategy.”¹⁰ In contrast to the bundling requirements, this requires that a more senior agency official make the certification, and applies to contracts above \$2 million – smaller contracts than those covered by bundling rules¹¹. However, the agency is not required to provide this document to SBA, but must coordinate it with their OSDDBU.¹²

Further, under contract consolidation, the justification requirements are different. The determination made by the CAO or SPE can find that the consolidation is “necessary and justified” if the “benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches.”¹³ The benefits to be considered are quality, acquisition cycle, terms and conditions, or any other benefit. However, the benefits of consolidation, unlike those of bundling, need not be “quantifiable in dollar amounts.”¹⁴ Thus, it is much more difficult to assess the value of anticipated benefits of consolidation versus bundling. Perhaps this explains why the Committee is unaware of any PCR challenges to consolidation actions, despite explicit statutory authorization for the PCRs to pursue this course of action.¹⁵

c. Reporting and Notifications

Since the passage of the original bundling provisions in 1997, there have been reporting requirements associated with contract bundling, but they have been largely ignored. The Small Business Jobs Act of 2010 (Jobs Act) built up these reporting requirements, but it is only new regulations that are adding prospective notification requirements.¹⁶ For the past 16 years, SBA has been required to develop and maintain a database tracking the bundling of contracts. Specifically, the database was to record each contract bundled and each small business displaced due to contract bundling.¹⁷ Unfortunately, SBA has never collected the information on displaced businesses, and, as will be discussed later, the database of bundled contracts relies on self reporting by agencies to the detriment of data quality. Additionally, SBA was to use this information to track whether an agency complied with its mitigation plan and to revisit each bundled contract being considered for a recompete, in order to see whether the bundled contract achieved the benefits included in the initial bundling justification.¹⁸ All of this information was to be included in an annual report to Congress – a report that has not been submitted in over two years. Further, the underlying

⁸ *Id.* at § 644(e)(3).

⁹ *Id.* at § 644(a).

¹⁰ 15 U.S.C. § 657q(c)(1).

¹¹ *Id.*

¹² *Id.* at § 644(k).

¹³ *Id.* at § 657q(c)(2).

¹⁴ *Id.*

¹⁵ *Id.* at § 644(l).

¹⁶ Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 1312, 124 STAT. 2504, 2537 (2010).

¹⁷ 15 U.S.C. § 644(p).

¹⁸ *Id.*

analysis that was to be included in the report has never been completed, although new SBA regulations anticipate beginning to collect the data necessary for such an analysis, possibly as early as January 2014.¹⁹

Under the Jobs Act, the Federal Acquisition Regulatory Council was to issue regulations requiring that all bundling justifications be published on the agency website annually.²⁰ While this rule has not been published, SBA published a companion rule on October 2, 2013. Further, as part of the same regulation, SBA embraced an idea supported by the Committee as part of the COP Act. Specifically, if an acquisition strategy proposes bundling a procurement currently performed by a small business, the agency will be required to notify that business “at least 30 days prior to the issuance of the solicitation for the bundled or substantially bundled requirement” and provide to business the PCR’s contact information.²¹ The COP Act went further, requiring that notification of the businesses that had submitted offers on the prior contract, but this is a prospective action gives some small businesses advanced notice of threats to their contracts.

II. Issues with Implementation

Having explained how the laws preventing unjustified bundling and consolidation are intended to work, this memorandum will now turn to challenges with implementation. These are threefold: (1) data quality; (2) accountability; and (3) scope issues.

a. Data Quality

In order to understand the problems associated with bundling and consolidation, it is necessary to know how prevalent these practices are within the procurement system. Unfortunately, the data available to analyze bundling and consolidation is severely compromised. To prepare this memorandum, Committee staff requested the FY 2011 and FY 2012 Bundling Reports required by statute. While the reports were not available, SBA did provide draft text explaining bundling in those years. However, that data varied significantly from the Federal Procurement Data System’s (FPDS) bundling and consolidation report, with SBA in each case underreporting bundling and providing no data on consolidation.²²

The FPDS data also to be appears significantly flawed. For example, contracts challenged as bundled or consolidated at the Government Accountability Office (GAO) under a bid protest cannot be found in the reports.²³ Likewise, in FY 2012, FPDS states that only four agencies bundled contracts during FY 2012 – DoD, Agency for International Development, the Peace Corps, and the Department of the Treasury.²⁴ Further, these agencies combined only bundled 11 contracts, albeit contracts worth over \$2.2 billion.²⁵ Likewise, only DoD reported consolidated contracts, and in that case they stated that the 144 contracts were worth a total of over \$265.9 billion – more than half the total dollars spent that year.²⁶ Further research showed that \$240 billion of those dollars should have been only entered as \$48 billion, reducing the number to nearly \$74 billion.²⁷ However, given that in FY 2012, draft RFPs were issued for ten civilian agency contracts worth a total of \$39.2 billion, it seems incredible then none of the ten agencies responsible for those contracts reported any bundled contracts or consolidation.²⁸ Indeed, some of these contracts, such as GSA’s \$12 billion OASIS contract, have been discussed as bundles and consolidations in prior

¹⁹ 78 Fed. Reg. at 61,140.

²⁰ 15 U.S.C. § 644(q).

²¹ 78 Fed. Reg. at 61,139; *see also* 48 C.F.R. 10.001(c)(2).

²² Email from SBA to Committee Staff, September 30, 2013 (on file with the Committee).

²³ *See, e.g.*, CYIOS, Inc., B-402728.3 (2012) (bundling not unjustified since SBA did not challenge bundle).

²⁴ FPDS Report, October 1, 2013 (on file with the Committee).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Deltek, Top Ten Civilian Opportunities for FY 2013 (2012) (on file with the Committee).

Subcommittee hearings, although no bundling or consolidation justification has ever been provided.²⁹ Likewise, strategic sourcing vehicles should at least account for consolidation, if not bundling, dollars in FPDS, but most agencies conducting strategic sourcing have not entered any consolidated contracts into FPDS.

The Committee staff also requested copies of SBA's Form 70s from the prior two years, since these forms will indicate what contracts SBA's PCR considered bundled. Unfortunately, SBA was not able to provide all of the requested documents, and the documents provided were often incomplete, used the terms bundling, breakout and partial set-aside interchangeably, and bore no relationship to the data in FPDS.³⁰ The FY 2012 forms provided identified over \$2 billion in contracts the Committee considers bundled. None of these procurements are listed in FPDS, including a \$1.2 billion bundle at the Department of Veterans Affairs. While it is possible that SBA intervened and stopped this bundle, it is impossible to know. More disturbing are GAO's findings that the PCRs failed to review the majority of bundled contracts, and that information on the Form 70s and otherwise maintained by SBA was unreliable.³¹

Thus, the Subcommittee is left without any definitive data on contract bundling and consolidation. Anecdotal evidence and complaints from small businesses indicate that it remains prevalent, as many of our witnesses will attest. During the hearing, the Subcommittee will seek testimony on how to improve data quality.

b. **Accountability**

Potential issues with the poor quality of data on contract bundling and consolidation may be caused by gaps or loopholes in the way in which that data is collected. For example, while SBA may independently identify contracts as bundled or consolidated, other contracts may escape detection if an agency fails to certify its contracts as bundled or consolidated. Since identifying contracts as bundled or consolidated imposes upon the agency additional reporting requirements and can reduce the agency's grade on its annual SBA report card, agencies have little incentive to make that identification. Further, many agencies misunderstand the rules associated with bundling as consolidation.³² Many OSDBU do not believe that they play a significant role in the review of contracts for bundling or consolidation.³³ Agencies questioned by the Committee claim that it is unnecessary to report contracts as bundled or consolidated if the bundling or consolidation has been mitigated. Contracting officers often cannot explain the difference between bundling and consolidation.

Unfortunately, agencies face few consequences for failing to properly identify bundled and consolidated contracts. While a small business can challenge a bundle or consolidation at GAO, they rarely succeed – in some cases because SBA has not itself challenged the bundle.³⁴ The Committee has struggled to identify and implement solutions to improving small business challenges to the bundling process, in no small part due to the Committee's recognition that SBA lacks the capacity to monitor the nearly 18 million unique contract actions entered into each year, and that small businesses often lack the resources or fear repercussions for challenging an acquisition. Thus, the COP Act proposed allowing trade associations representing small businesses to bring a challenge on behalf of its members, but this was opposed by GAO

²⁹Committee Memorandum, "Putting the Strategy in Sourcing: Challenge and Opportunities for Small Business Contractors" (June 10, 2013) available at http://smallbusiness.house.gov/uploadedfiles/6_13_2013_hearing_memo.pdf.

³⁰ Documents on file with the Committee.

³¹ GAO, IMPROVEMENTS NEEDED TO HELP ENSURE RELIABILITY OF SBA'S PERFORMANCE DATA ON PCRS 2 (2011) (GAO-11-549R).

³²SBA Procurement Scorecard Methodology (2012) available at http://www.sba.gov/sites/default/files/files/Scorecard_Grade_Calculation_Methodology_FY12_FINAL_2013-06-24.pdf.

³³ GAO, SMALL BUSINESS CONTRACT: ACTION NEEDED BY THOSE WHOSE ADVOCATES DO NOT REPORT TO AGENCY HEADS AND REQUIRED 17 (2011) (GAO-11-418).

³⁴ See *supra*, note 20.

out of fear that it would overburden their bid protest process. Therefore, the Subcommittee will seek testimony on ways to improve this process.

c. **Scope**

The final implementation issue before the Subcommittee is whether the current definitions of bundling and consolidation adequately capture the behavior the Act seeks to address. For example, some agencies have argued that if contractors are paid by sources other than the agency, the bundling and consolidation rules do not apply.³⁵ Further, since bundling applies only to a “separate smaller contract,” which it defines as “a contract that has been performed by one or more small business concerns or was suitable for award to one or more small business concerns,” some agencies have interpreted it as not applying to new construction, since new construction, by definition, has not previously been performed by small businesses.³⁶ Likewise, since bundling is analyzed at the contract level, small businesses have complained that task orders are themselves bundled, leaving the small businesses holding meaningless multiple award contracts or blanket purchase agreements if they cannot bid on the task orders.³⁷ This is of particular concern given the new SBA regulations on set asides on multiple award contracts. Therefore, the Subcommittee seeks testimony on possible improvements to the Act.

III. Conclusion

Unjustified bundling and consolidation unfairly restrict competition to the detriment of the long term health of the industrial base. Therefore, it is important that Congress and the Executive Branch have reliable data on the preponderance of these acquisition practices and their effects on small firms. If necessary, the Small Business Act should be amended to provide for accountability and a comprehensive definition of these practices.

³⁵ See GSA’s National Broker Contract.

³⁶ 15 U.S.C. § 632(o)(3).

³⁷ A contracting officer explained to Committee staff this year that if he reserved a seat on a contract for a small business, that the contract would not be considered bundled even if the small business received no awards. For an explanation of multiple award contracting, please see the Committee memorandum “Scheduling Success” 1-2 (2012) available at http://smallbusiness.house.gov/uploadedfiles/6-7_hearing_memo.pdf.