



# Contract “Bundling” Under the Small Business Act: Existing Law and Proposed Amendments

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## Summary

"Bundling" refers to the consolidation of two or more requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation for a single contract that is likely to be unsuitable for award to a small business because of its size or scope. Although bundling can potentially reduce costs or improve performance for federal agencies, it can also limit opportunities for small businesses to receive federal prime contracts. For this reason, Congress amended the Small Business Act in 1997 to require that procuring activities comply with certain procedures before issuing a bundled solicitation. Specifically, the 1997 amendments require that procuring activities (1) conduct market research to justify acquisition strategies that could lead to bundled contracts, (2) provide advance notice of bundled solicitations to the Small Business Administration (SBA) and incumbent small business contractors, and (3) implement certain procurement strategies when solicitations involve "substantial bundling." These steps are intended to ensure that any bundling is "necessary and justified." Only "unnecessary and unjustified" bundling is prohibited under the 1997 and subsequent amendments.

The 111<sup>th</sup> Congress further amended the Small Business Act in 2010 to address concerns about bundling. Among other things, the Small Business Jobs Act (P.L. 111-240) requires that (1) agencies include in each solicitation above the "substantial bundling threshold" provisions inviting bids from teams or joint ventures of small businesses; (2) SBA promulgate regulations establishing a government-wide policy on contract bundling to be posted on each agency's website; (3) agencies publish listings of and rationales for bundled contracts on their websites; and (4) SBA report periodically on the activities performed by its procurement center representatives (PCRs) and commercial market representatives (CMRs). PCRs and CMRs are SBA employees that work with procuring activities and private firms, respectively, to promote contracting with small businesses.

P.L. 111-240 also amended the Small Business Act to subject all federal agencies to limitations upon the "consolidation" of contract requirements similar to those that the National Defense Authorization Act for FY2004 imposed upon defense agencies. The definition of "consolidation" is much like the definition of "bundling," encompassing the use of a solicitation to obtain offers for a single contract that satisfies two or more requirements previously provided or performed under two or more separate contracts that were lower in cost than the contract for which offers are solicited. Specifically, P.L. 111-240 prohibits agencies from carrying out an acquisition strategy that includes consolidation of contract requirements valued in excess of \$2 million unless the agency makes a written determination that consolidation of the contract requirements is necessary and justified, among other things. It is presently unclear whether or how the new provisions on consolidation will be integrated with the existing provisions regarding bundling, especially in the SBA regulations and the Federal Acquisition Regulation (FAR).

Members of the 112<sup>th</sup> Congress have introduced several bills addressing contract bundling, including legislation that would expand the definition of "bundling" to include new requirements and construction, as well as strengthen the authority of the Administrator of Small Business in working with contracting agencies to restructure bundled procurements (e.g., H.R. 2424, H.R. 4081, H.R. 4310, S. 1334). Other legislation would require reporting on bundled procurements issued by particular agencies (e.g., H.R. 2000).

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## Introduction

“Bundling” refers to the consolidation of two or more requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation for a single contract that is likely to be unsuitable for award to a small business because of its size or scope.<sup>1</sup> Although bundling can potentially reduce costs or improve performance for federal agencies,<sup>2</sup> it can also limit opportunities for small businesses to receive federal prime contracts. For this reason, Congress amended the Small Business Act in 1997 to require that procuring activities comply with certain procedures before issuing a bundled solicitation.<sup>3</sup> Among other things, the 1997 amendments require that procuring activities (1) conduct market research to justify acquisition strategies that could lead to bundled contracts, (2) provide advance notice of bundled solicitations to the Small Business Administration (SBA) and incumbent small business contractors, and (3) implement certain procurement strategies when solicitations involve “substantial bundling.”

The 111<sup>th</sup> Congress further amended the Small Business Act to require the development of a government-wide policy regarding bundling; listings of and justifications for bundled contracts; and periodic reports on the performance of agency officials who are tasked with minimizing bundling and promoting contracting with small businesses.<sup>4</sup> The 111<sup>th</sup> Congress also amended the Small Business Act to subject all federal agencies to limitations upon the “consolidation” of contract requirements similar to those that the National Defense Authorization Act (NDAA) for FY2004 imposed upon defense agencies.<sup>5</sup> The definition of “consolidation” is similar to that of “bundling,” and the Small Business Jobs Act prohibits agencies from pursuing an acquisition strategy that involves consolidation of requirements valued in excess of \$2 million unless they make a written determination that consolidation is necessary and justified, among other things.<sup>6</sup> However, it is presently unclear whether or how the new provisions on consolidation will be integrated with the existing provisions regarding bundling, especially in the SBA regulations and the Federal Acquisition Regulation (FAR).<sup>7</sup>

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<sup>1</sup> 15 U.S.C. §632(o)(2); 48 C.F.R. §2.101; 13 C.F.R. §125.2(d)(1)(i).

<sup>2</sup> 48 C.F.R. §7.107(a).

<sup>3</sup> A “procuring activity” is any component of an executive agency with significant acquisition functions that is designated as such by the head of the agency. 48 C.F.R. §2.101. Both this term and the more general term “agency” are used here in reference to contracting activities. “Procuring activity” is specifically used to distinguish obligations arising at lower levels within an agency from higher-level agency obligations.

<sup>4</sup> Small Business Jobs Act, P.L. 111-240, §1312(a) & (c), 124 Stat. 2537-38 (September 27, 2010).

<sup>5</sup> Compare *id.* at §1313, 124 Stat. 2538-39 with P.L. 108-136, div. A, tit. VIII, §801(a)(1), 117 Stat. 1538 (November 24, 2003) (codified, as amended, in 10 U.S.C. §2382). Under the NDAA for FY2004, defense agencies may not “execut[e] an acquisition strategy that involves a consolidation of contract requirements” valued in excess of \$6 million without first (1) conducting market research; (2) identifying any alternative approaches that would involve a lesser degree of consolidation of contract requirements; and (3) determining that the consolidation is necessary and justified. *Id.*

<sup>6</sup> P.L. 111-240, at §1313, 124 Stat. 2538-39. The “bundling” provisions of P.L. 111-240 also establish a Small Business Teaming Pilot Program and give the Administrator of Small Business temporary authority to make grants to eligible organizations to provide assistance and guidance to teams of small businesses competing for larger procurement contracts. *Id.* at §1314, 124 Stat. 2540.

<sup>7</sup> SBA recently proposed amending its regulations, including those on bundling, to address the Small Business Jobs Act’s restrictions on consolidation. See U.S. Small Bus. Admin., Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation: Notice of Proposed Rulemaking, 77 Fed. Reg. 29130 (May 16, 2012). In so doing, (continued...)

Members of the 112<sup>th</sup> Congress have introduced several bills addressing contract bundling, including legislation that would expand the definition of “bundling” to include new requirements and construction, as well as strengthen the authority of the Administrator of Small Business in working with contracting agencies to restructure bundled procurements (e.g., H.R. 2424, H.R. 4081, H.R. 4310, S. 1334). Other legislation would require reporting on bundled procurements issued by particular agencies (e.g., H.R. 2000).

This report provides an overview of the existing law regarding bundling and consolidation of requirements under the Small Business Act, as well as proposed amendments thereto. It does not address limitations that the Competition in Contracting Act (CICA) of 1984 or other legislation imposes on “consolidation” of requirements.<sup>8</sup> Agency actions that constitute improper bundling under the Small Business Act can constitute improper consolidation under CICA or other provisions of law.<sup>9</sup>

## Existing Law

The Small Business Act of 1958 articulates the “declared policy of the Congress” that:

the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise ... [and] insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises.<sup>10</sup>

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(...continued)

SBA suggested that the Federal Acquisition Regulation (FAR) may need to be revised in light of its proposed changes. *See id.* at 29149 (“This proposed rule may conflict with current FAR and General Services Administration regulations. As a result, those regulations will need to be amended once this rule is issued as final.”). Previously, SBA had promulgated regulations regarding those provisions of P.L. 111-240 that call for the publication on agency websites of lists of and rationales for bundled contracts. *See* U.S. Small Bus. Admin., Small Business Jobs Act: Implementation of Conforming and Technical Amendments, 76 Fed. Reg. 63542, 63547 (October 13, 2011) (codified at 13 C.F.R. §125.2(d)(9)).

<sup>8</sup> CICA was enacted as part of the Deficit Reduction Act of 1984, P.L. 98-369, §§2701-2753, 98 Stat. 1175 (1984), and is codified in multiple titles of the United States Code, including Title 10, for procurements of defense agencies, and Title 41, for procurements of civilian agencies. CICA generally requires that solicitations contain restrictive provisions and conditions only to the extent “necessary to satisfy the needs of the executive agency.” 10 U.S.C. §2305(a)(1)(B)(2); 41 U.S.C. §3306(a)(2)(B). When separate requirements are combined into one solicitation, competition can be restricted because firms that can only furnish a portion of the requirements are excluded. For this reason, the Government Accountability Office (GAO) and other protest forums require procuring activities to have a “reasonable basis” for any bundling. *See, e.g.,* Teximara, Inc., B-293221.2 (July 9, 2004); Phoenix Scientific Corp., B-286817 (February 22, 2001). Provisions of the National Defense Authorization Act for FY1998 once similarly limited “combination” of certain requirements for depot-level maintenance and repair, but were repealed in 2002. *See* P.L. 105-85, §359, 111 Stat. 1696-1700 (November 18, 1997) (codified at 10 U.S.C. §2469a); P.L. 107-314, §333, 116 Stat. 2514 (December 2, 2002); Nat’l Airmotive Corp. v. Cohen, 1999 U.S. Dist. LEXIS 2150 (N.D. Cal. 1999).

<sup>9</sup> *See, e.g.,* JXM, Inc., B-402643 (June 25, 2010) (alleging that the Army’s consolidation of requirements for hospital housekeeping services at various medical treatment facilities in Texas constituted improper bundling under the Small Business Act and improper consolidation under CICA); B.H. Aircraft Co., Inc., B-295399.2 (July 25, 2005) (alleging that the Defense Logistics Agency’s consolidation of requirements for consumable parts for the F404 engine into a single performance-based logistics supply chain management contract encompassing over 2,000 national stock numbers constituted improper bundling under the Small Business Act and improper consolidation under CICA).

<sup>10</sup> 15 U.S.C. §631(a).

In keeping with this policy, Congress imposed certain restrictions on agencies’ use of bundling when it enacted the Small Business Reauthorization Act of 1997<sup>11</sup> and the Small Business Jobs Act of 2010.<sup>12</sup> The 1997 act and regulations promulgated under its authority define “bundling” and related terms, and require procuring activities and agencies to take certain steps and work with certain agency or SBA officials, who are charged with protecting the interests of small businesses, whenever there is the possibility or existence of bundling.<sup>13</sup> The 2010 act expanded upon these requirements, as well as created new requirements pertaining to the consolidation of requirements valued in excess of \$2 million.<sup>14</sup> SBA recently proposed regulations implementing these provisions of the 2010 act, but its proposed changes have not been finalized. Changes to the FAR have yet to be proposed.<sup>15</sup>

## Definition of “Bundling”

Procuring activities need only comply with the procedures established by the 1997 act and its implementing regulations when they engage in “bundling of contract requirements,” as defined under the act. This means:

consolidat[ing] 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 due to—

- (A) the diversity, size, or specialized nature of the elements of the performance specified;
- (B) the aggregate dollar value of the anticipated award;
- (C) the geographical dispersion of the contract performance sites; or
- (D) any combination of the factors described in subparagraphs (A), (B), and (C).<sup>16</sup>

Under this definition, it is not bundling when a procuring activity combines into a single solicitation “new” requirements, or requirements not previously provided or performed under a

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<sup>11</sup> P.L. 105-135, §§411-417, 111 Stat. 2617-2620 (December 2, 1997). *See particularly id.* at §411, 111 Stat. 2617 (codified at 15 U.S.C. §631(j)(1)-(3)) (“[E]ach Federal agency, to the maximum extent practicable, shall—(1) comply with congressional intent to foster the participation of small business concerns as prime contractors, subcontractors, and suppliers; (2) structure its contracting requirements to facilitate competition by and among small business concerns, taking all reasonable steps to eliminate obstacles to their participation; and (3) avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors.”).

<sup>12</sup> P.L. 111-240, §1311-1314, 124 Stat. 2536-40.

<sup>13</sup> Both the Federal Acquisition Regulation (FAR) and Small Business Administration (SBA) regulations implement the bundling-related provisions of the Small Business Act. The FAR and SBA regulations generally correspond, but there are some divergences noted in this report. References to Title 13 of the *Code of Federal Regulations* are to the SBA regulations. References to Title 48 of the *Code of Federal Regulations* are to the FAR.

<sup>14</sup> *See supra* notes 4 to 6 and accompanying text.

<sup>15</sup> *See supra* note 7.

<sup>16</sup> 15 U.S.C. §632(o)(2) (emphasis added). *See also* 13 C.F.R. §125.2(d)(1)(A)-(D); 48 C.F.R. §2.101. The 1997 act also defines “bundled contract” and “separate smaller contract.” *See* P.L. 105-135, §412, 111 Stat. 2617-18 (codified at 15 U.S.C. §632(o)(1) & (3)). Regulations promulgated under the authority of this act further define what a “single contract” means for purposes of the definition of “separate smaller contract.” This definition of a “single contract” includes orders placed under a Federal Supply Schedule contract, government-wide acquisition contract (GWAC), or interagency contract. 13 C.F.R. §125.2(d)(iii)(A)-(B); 48 C.F.R. §2.101.

government contract<sup>17</sup> or "radically different" from previously performed work.<sup>18</sup> Procuring activities have sometimes asserted that requirements for construction are, per se, new requirements,<sup>19</sup> or that adding a new requirement to requirements previously performed means there is no bundling.<sup>20</sup> However, no judicial or administrative tribunal appears to have validated these proposed interpretations of "bundling of requirements."<sup>21</sup> It is also not "bundling" under the 1997 act if the consolidated requirements were previously performed under a single contract.<sup>22</sup> The requirements must have been performed under "separate smaller contracts" for bundling to occur. At least one procuring activity has also asserted that a procurement is not bundled so long as at least one small business could perform it because the definition of "bundling" includes only solicitations that are "unsuitable for award to a small business," and a solicitation is not unsuitable for award to a small business if one small business could perform it.<sup>23</sup> The Government Accountability Office (GAO) did not reach the merits of this argument, but other GAO decisions may suggest that it is unlikely to succeed.<sup>24</sup>

Regulations promulgated under the authority of the 1997 act also exempt contracts awarded or performed entirely outside the United States<sup>25</sup> from the bundling requirements by excluding them from the definition of "bundling."<sup>26</sup>

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<sup>17</sup> See, e.g., National Airmotive Corp., 1999 U.S. Dist. LEXIS 2150, at \*17-\*18.

<sup>18</sup> See, e.g., JXM, Inc., B-402643 (June 25, 2010) ("[The protester] has not identified two or more separate smaller contracts that have been combined, nor has [it] shown that the resulting scope is unsuitable for award to a small business."); The Urban Group, Inc., B-281352, B-281353 (January 28, 1999). Agencies' combining new requirements could, however, potentially constitute consolidation in violation of CICA. See *supra* note 8.

<sup>19</sup> See, e.g., Tyler Construction Group v. United States, 83 Fed. Cl. 94, 100-101 (2008). There appears to be some precedent for this argument in SBA regulations treating construction requirements as new for purposes of statutory and regulatory provisions that preclude agencies from procuring requirements previously performed by or accepted for the 8(a) Minority Business Development Program from non-8(a) firms unless the SBA releases these requirements. See 13 C.F.R. §124.504(c)(1)(ii)(B) ("Construction contracts, by their very nature (e.g., the building of a specific structure), are deemed new requirements.").

<sup>20</sup> See, e.g., Nautical Engineering, Inc., B-309955 (November 7, 2007) (agency asserting that there was no bundling because of the addition of a new requirement, planning services, to the admittedly consolidated requirements pertaining to drydock and dockside maintenance and repair). GAO did not address this argument because it found that any bundling was justified because the government would receive measurably substantial benefits from the consolidated solicitation. *Id.*

<sup>21</sup> For example, in *Tyler Construction Group v. United States*, the court found that even if bundling had occurred, it would have been necessary and justified. 83 Fed. Cl. at 103.

<sup>22</sup> See, e.g., USA Information Sys., Inc., B-291417 (December 30, 2002) (finding that the provisions regarding bundling were inapplicable because all the services covered by the solicitation had been performed under one predecessor contract).

<sup>23</sup> See, e.g., Encompass Group LLC, B-405688 (December 9, 2011) (finding that there was no bundling when the agency structured the procurement as a small business set-aside and received offers from two small businesses); Nautical Engineering, Inc., B-309955 (November 7, 2007).

<sup>24</sup> See, e.g., TRS Research, B-290644 (September 13, 2002) (finding that the solicitation was bundled, in part, because it was unsuitable for award to small businesses even though the procuring activity received one offer from a small business in response to the solicitation). See also *Benchmark Knife Co. v. United States*, 79 Fed. Cl. 731, 740 (2007) (procurement history can show a requirement's suitability for small businesses).

<sup>25</sup> When used in a geographic sense in the context of procurement, "United States" generally means the 50 states and the District of Columbia, although its meaning can vary somewhat for purposes of affirmative action requirements, the Service Contract Act, and other provisions of law. 48 C.F.R. §2.101.

<sup>26</sup> *Id.*

## Market Research When There Is the Potential for Bundling

Before proceeding with any acquisition strategy that could lead to a bundled contract, procuring activities must conduct market research.<sup>27</sup> Market research involves collecting and analyzing information about capabilities within the market to satisfy agency needs,<sup>28</sup> and procuring activities are generally required to conduct market research to arrive at the "most suitable approach" for acquiring, distributing, and supporting supplies and services regardless of whether there is any possibility of bundling.<sup>29</sup>

When bundling is possible, procuring activities' market research is designed to ensure that any bundling is "necessary and justified."<sup>30</sup> For a procuring activity to reasonably determine that bundling is necessary and justified, market research must show that the benefits to be realized from conducting the procurement with consolidated requirements are "measurably substantial" as compared to the benefits to be realized from conducting separate procurements for the requirements.<sup>31</sup> Potential benefits may generally include cost savings, quality improvements, reductions in acquisition cycle times, better terms and conditions, and "any other benefits."<sup>32</sup> Savings in agency administrative or personnel costs alone, however, cannot justify bundling unless they represent at least 10% of the estimated value of the consolidated requirements.<sup>33</sup> Procuring activities must quantify these benefits, in part, because the 1997 act requires that benefits be "measurably substantial."<sup>34</sup> However, agencies may presume that benefits equal to or exceeding certain percentages of the value of the bundled requirements are substantial, as **Table 1** illustrates.<sup>35</sup> When the expected benefits do not reach these thresholds, bundling can still be determined to be necessary and justified, but only under narrow circumstances. In these cases, the service acquisition executive for the military departments, the Under Secretary of Defense for Acquisition, Technology and Logistics for the defense agencies, or the Deputy Secretary or equivalent for the civilian agencies, without the power of delegation, must determine that (1) the expected benefits of bundling are "critical to the agency's mission success" and (2) the

<sup>27</sup> 13 C.F.R. §125.2(d)(5); 48 C.F.R. §10.001(a)(1)(4).

<sup>28</sup> 48 C.F.R. §2.101.

<sup>29</sup> 48 C.F.R. §10.000; 48 C.F.R. §7.102 ("Agencies shall perform acquisitions planning and conduct market research for all acquisitions.") (emphasis added).

<sup>30</sup> 15 U.S.C. §644(e)(2)(A); 48 C.F.R. §10.001(a)(3)(vi).

<sup>31</sup> 15 U.S.C. §644(e)(2)(B); 13 C.F.R. §125.2(d)(5)(i); 48 C.F.R. §7.107(a). In assessing the cost savings possible through consolidation, agencies must include in their comparisons the prices that small businesses (1) have charged for work they have performed or (2) could have charged or could charge for work they have not previously performed. 13 C.F.R. §125.2(d)(5)(iv); 48 C.F.R. §7.107(g).

<sup>32</sup> 15 U.S.C. §644(e)(2)(B); 13 C.F.R. §125.2(d)(5)(i); 48 C.F.R. §7.107(b); Nautical Engineering, Inc., B-309955 (November 7, 2007) (recognizing sufficient benefits in the form of decreased maintenance and repair costs and increased availability of repaired ships to perform their duties); Aalco Forwarding, Inc., B-277241.12; B-277241.13 (December 29, 1997) (recognizing sufficient benefits in the form of superior service, reduced administrative burdens, and adoption of better business practices). In the latter case, GAO suggested that administrative convenience alone would probably not have provided sufficient benefits, but did not decide the protest on this basis.

<sup>33</sup> 15 U.S.C. §644(e)(2)(C); 13 C.F.R. §125.2(d)(5)(iii); 48 C.F.R. §7.107(d).

<sup>34</sup> 13 C.F.R. §125.2(d)(5)(iii); 48 C.F.R. §7.107(b).

<sup>35</sup> 13 C.F.R. §125.2(d)(5)(i)(A)-(B); 48 C.F.R. §7.107(b)(1)-(c). Additionally, agencies generally do not need to determine whether there are substantial benefits when the requirements are subject to cost comparison analysis under OMB Circular A-76. 13 C.F.R. §125.2(d)(6); 48 C.F.R. §7.107(h). The A-76 process is designed to determine whether commercial functions can more efficiently be performed by government employees or the private sector. *See generally* CRS Report RL32079, *Federal Contracting of Commercial Activities: Competitive Sourcing Targets*, by L. Elaine Halchin.



acquisition strategy provides for the “maximum practicable participation” by small business concerns.<sup>36</sup> Any determination that bundling is necessary and justified must be in writing and included among the materials otherwise documenting the procuring activity’s acquisition strategy.<sup>37</sup>

**Table I. “Substantial Benefits”: Savings as a Percentage of the Value of Consolidated Requirements**

Contract Value	Savings Qualifying as “Substantial Benefits”
\$94 million or less <sup>a</sup>	10% of the estimated value of contracts or orders, including options
Over \$94 million <sup>a</sup>	The greater of \$9.4 <sup>a</sup> million or 5% of the estimated value of contracts or orders, including options

**Source:** Congressional Research Service, based on 48 C.F.R. §7.107(b)(1)-(c).

- a. The SBA regulations give lower numbers here (\$8.6 million and \$86 million, respectively). 13 C.F.R. §125.2(d)(5)(i)(A)-(B) (2011). However, these regulations appear not to have been updated to reflect inflation-related changes made to the FAR under the Ronald W. Reagan National Defense Authorization Act for FY2005. See P.L. 108-375, §807, 118 Stat. 2010-11 (October 28, 2004) (codified at 41 U.S.C. §1908).

Because market research is part of the acquisition planning process, the procuring activity must “coordinate” its activities with its small business specialist “[a]s early ... as practicable,” and no later than 30 days before issuing the solicitation or placing an order without a solicitation, if the requirements are valued above \$2.5 million (\$6 million for the National Aeronautics and Space Administration, the General Services Administration, and the Department of Energy; \$8 million for the Department of Defense).<sup>38</sup> The involvement of small business specialists is required whenever requirements valued above these thresholds are not totally set aside for small businesses, not because of potential bundling.<sup>39</sup> Nonetheless, the small business specialists scrutinize the proposed acquisition strategy for bundling and must notify the agency Office of

<sup>36</sup> 13 C.F.R. §125.2(d)(5)(ii)(A)-(B); 48 C.F.R. §7.106(c)(1)-(2).

<sup>37</sup> 13 C.F.R. §125.2(d)(5); 48 C.F.R. §7.105; 48 C.F.R. §7.107(f).

<sup>38</sup> 13 C.F.R. §125.2(b)(2)(i)(A)-(C); 48 C.F.R. §7.104(d)(2)(i)(A)-(C). The values are the same regardless of whether a contract or an order is proposed. Additionally, if the procurement strategy contemplates a multiple-award contract, multiple-award orders under the Federal Supply Schedules, or task or delivery orders under a contract awarded by another agency, the value of requirements is measured in terms of the cumulative estimated value of the contracts or orders, including any options. 13 C.F.R. §125.2(b)(2)(ii); 48 C.F.R. §7.104(d)(2)(ii). Small business specialists are technical advisers assigned by the agency Office of Small and Disadvantaged Business Utilization to work with each contracting activity to which the SBA has assigned a procurement center representative. 48 C.F.R. §19.201(d)(8). The Small Business Act requires that each agency with contracting authority establish an Office of Small and Disadvantaged Business Utilization, which generally looks out for small businesses in their dealings with the agency (e.g., assists small businesses in obtaining payments under their contracts, late payment, interest penalties, or information on contractual payment provisions). 48 C.F.R. §19.201(d)(5)(i)-(iii). Procurement center representatives are SBA employees located at federal agencies and procuring activities that have “major contracting programs,” where they are responsible for reviewing all acquisitions not set aside for small businesses to determine whether a set-aside is appropriate and identify alternate strategies to maximize small businesses’ participation in government procurement. 13 C.F.R. §125.2(b). When there is no procurement center representative assigned to a procuring activity, the activity works with the SBA Office of Government Contracting area office serving that location. See 48 C.F.R. §19.402(a).

<sup>39</sup> 13 C.F.R. §125.2(b)(2).

Small and Disadvantaged Business Utilization if the strategy includes (1) bundled requirements that the procuring activity has not identified as such or (2) unnecessary and unjustified bundling of requirements.<sup>40</sup> Additionally, if the strategy involves "substantial bundling," as defined below, small business specialists must assist in identifying alternative strategies that would reduce or minimize the scope of the bundling.<sup>41</sup> Procuring activities that contemplate awarding bundled contracts are also encouraged to consult with the local SBA procurement center representative or Office of Government Contracting area office.<sup>42</sup> However, they are not required to notify the procurement center representative or Office of Government Contracting area office until they have determined whether consolidation is necessary and justified, as discussed below.

## Notifications Regarding Bundled Contracts

Whenever they propose to conduct a bundled acquisition, procuring activities are required to provide (1) a copy of the proposed acquisition package and (2) a statement explaining why bundling is necessary and justified, in light of the criteria previously discussed, to the SBA procurement center representative or Office of Government Contracting area office at least 30 days before issuing the solicitation.<sup>43</sup> What happens next depends upon whether the procurement center representative agrees with the procuring activity's determination that the bundling is necessary and justified. If the procurement center representative agrees that the bundling is necessary and justified, he or she works with the procuring activity to "tailor a strategy that preserves small business prime contract participation to the maximum extent practicable."<sup>44</sup> This can include promoting teaming arrangements and subcontracting opportunities<sup>45</sup> by

- recommending that the solicitation and resultant contract specifically state the small business subcontracting goals expected of the awardee;<sup>46</sup>
- recommending that small business subcontracting goals be based on total contract dollars instead of subcontract dollars;<sup>47</sup>

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<sup>40</sup> 13 C.F.R. §125.2(b)(2); 48 C.F.R. §7.104(d)(2).

<sup>41</sup> *Id.*

<sup>42</sup> 13 C.F.R. §125.2(d)(3); 48 C.F.R. §10.001(c)(1).

<sup>43</sup> 13 C.F.R. §125.2(b)(3); 48 C.F.R. §19.202-1(e)(1)(iii) & (2)(v). The FAR further requires that the proposed acquisition package include "all information relative to the justification of contract bundling, including the acquisition plan or strategy." 48 C.F.R. §19.202-1(e)(1)(iii). The SBA regulations do not include a similar requirement.

<sup>44</sup> 13 C.F.R. §125.2(b)(6)(ii).

<sup>45</sup> 13 C.F.R. §125.2(b)(5).

<sup>46</sup> Section 8(d) of the Small Business Act requires agencies to negotiate "subcontracting plans" with the apparently successful bidder or offeror on eligible prime contracts prior to awarding the contract. 15 U.S.C. §637(d)(4) & (5). Eligible contracts are those exceeding \$650,000 (\$1.5 million in the case of contracts to construct public facilities) and offering subcontracting possibilities. *Id.* Agencies may not find a contractor affirmatively "responsible" for purposes of the award of a federal contract unless it agrees to any required subcontracting plan. *Id.* Subcontracting plans set goals for the percentage of subcontract dollars to be awarded to small businesses and describe efforts that will be made to ensure that small businesses "have an equitable opportunity to compete for subcontracts." 15 U.S.C. §637(d)(6). Failure to make a good faith effort to comply with the subcontracting plan constitutes a material breach of the contract, potentially allowing the agency to terminate the contract for default and subjecting the contractor to liquidated damages. 15 U.S.C. §637(d)(8); 48 C.F.R. §19.705-7. Liquidated damages are damages whose amount was agreed upon, as compensation for specific breaches, by the parties during the contract's formation.

<sup>47</sup> Under 2003 guidance from SBA, goals were generally based on subcontract dollars, not total contract dollars. *See* Goaling Guidelines for the Small Business Preference Programs: For Prime and Subcontract Federal Procurement Goals and Achievements (Washington, D.C.: July 3, 2003). However, in October 2011, SBA proposed regulations that (continued...)

- reviewing an agency’s oversight of its subcontracting program, including its overall and individual assessments of contractors’ compliance with any small business subcontracting plans; and
- recommending that contractors’ performance in meeting prior subcontracting goals constitute a separate evaluation factor carrying “significant weight” in the award of the contract.<sup>48</sup>

In contrast, if the procurement center representative does not agree with the procuring activity that the bundling is necessary and justified, he or she is to recommend “alternative procurement methods which would increase small business prime contract participation,” such as (1) breaking up the procurement into smaller discrete procurements; (2) breaking out one or more discrete components for a small business set-aside; or (3) reserving one or more awards for small companies when issuing multiple awards under a task- or delivery-order contract.<sup>49</sup> When the procurement center representative and the contracting officer disagree over whether an acquisition is bundled or substantially bundled, the procurement center representative may appeal to the head of the contracting activity.<sup>50</sup> If the head of the contracting activity agrees with the contracting officer, the procurement center representative may notify the SBA, which may then appeal to the secretary of the department or the head of the agency,<sup>51</sup> whose determination is final.<sup>52</sup> Procurement center representatives have 2 business days to appeal,<sup>53</sup> while SBA has 15 business days.<sup>54</sup> The procuring activity generally must suspend action on the proposed award until these appeals are resolved.<sup>55</sup>

Procuring activities are also required to notify any small businesses currently performing the requirements of their intention to bundle the requirements at least 30 days before releasing the solicitation or placing an order without a solicitation.<sup>56</sup> They are also encouraged, but not

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(...continued)

would authorize—but not require—contracting officers to establish subcontracting goals reported as a percentage of total contract dollars. *See* U.S. Small Bus. Admin., Small Business Subcontracting: Proposed Rule, 76 Fed. Reg. 61626, 61628 (October 5, 2011).

<sup>48</sup> 13 C.F.R. §125.2(b)(6)(iii)(A)-(D).

<sup>49</sup> 13 C.F.R. §125.2(b)(6)(i)(A)-(C).

<sup>50</sup> 15 U.S.C. §644(a); 13 C.F.R. §125.2(b)(7).

<sup>51</sup> *Id.*

<sup>52</sup> 48 C.F.R. §19.505(e). Executive Order 13170 requires that heads of agencies “carefully review” and “give[] due consideration” to SBA’s views. It also authorizes SBA or the procuring agency to “seek assistance” from the Office of Management and Budget (OMB’s) in disputed procurements. Executive Order 13170, Increasing Opportunities and Access for Disadvantaged Businesses, 65 Fed. Reg. 60827, 60829 (October 12, 2000). However, it does not require the agency to comply with OMB’s recommendations or advice.

<sup>53</sup> 48 C.F.R. §19.505(b).

<sup>54</sup> 48 C.F.R. §19.505(c)(2).

<sup>55</sup> 48 C.F.R. §19.505(b)-(c). This suspension could last up to 61 days. The contracting officer has 5 days in which to reject the recommendations of the procurement center representative or equivalent. The procurement center representative has 2 days to appeal that rejection to the head of the contracting activity. The head of the contracting activity has 7 days to respond. After getting that response, the procurement center representative or equivalent has 2 days to notify SBA. SBA then has 15 days to make a written appeal to the secretary or agency head, who has 30 days to respond. The disputed acquisition generally does not proceed during this period. However, procuring activities may proceed with the disputed acquisition if the contracting officer determines that proceeding to contract award and performance is “in the public interest.” 48 C.F.R. §19.505(d).

<sup>56</sup> 48 C.F.R. §10.001(c)(2). SBA regulations on this issue require notice only before issuing a solicitation, not before placing an order without issuing a solicitation. 13 C.F.R. §125.2(d)(4).

required, to inform any incumbent small business of how to contact the “appropriate [SBA] representative.”<sup>57</sup> The regulations do not otherwise prescribe the form or content of these notifications, but GAO has found that small businesses receive sufficient notification of agencies’ intent to consolidate requirements from “sources sought and pre-solicitation notices,” at least when such notices indicate that “the agency anticipate[s] that the solicitation will create a ‘complete paradigm shift.’”<sup>58</sup>

Once an incumbent small business has notice of proposed bundling, it could potentially file a bid protest with GAO, the procuring agency, or the Court of Federal Claims<sup>59</sup> challenging any noncompliance with the bundling requirements or any unreasonable determination that bundling is necessary and justified. However, in any given case, small businesses’ ability to obtain relief from improper agency actions or unreasonable determinations could be limited because of their inability to demonstrate standing,<sup>60</sup> their failure to protest in a timely fashion,<sup>61</sup> or lack of jurisdiction on the part of the protest forum.<sup>62</sup>

## Independent Identification of Solicitations with “Significant Bundling”

Independent of the requirements that it imposes on procuring activities, the Small Business Act also requires the heads of agency Offices of Small and Disadvantaged Business Utilization to identify proposed solicitations that involve “significant bundling” and:

work with the agency acquisition officials and the [SBA] to revise the procurement strategies for such proposed solicitations where appropriate to increase the probability of participation by small businesses as prime contractors, or to facilitate small business participation as subcontractors and suppliers, if a solicitation for a bundled contract is to be issued.<sup>63</sup>

<sup>57</sup> 13 C.F.R. §125.2(d)(4); 48 C.F.R. §10.001(c)(3).

<sup>58</sup> *Nautical Engineering, Inc.*, B-309955 (November 7, 2007).

<sup>59</sup> These three are generally the only bid protest forums. *See* 31 U.S.C. §3551. However, certain specific issues relating to the award of federal contracts are protested to other agencies, rather than the bid-protest forums. *See* 13 C.F.R. §121.1001 (size determinations for small businesses protested to SBA).

<sup>60</sup> *See, e.g.*, *RELM Wireless Corp.*, B-405358 (October 7, 2011) (finding that a protester challenging allegedly bundled requirements lacked standing because, even if the protest were sustained, the protester would remain ineligible for the award under the remaining terms of the solicitation); *Future Solutions, Inc.*, B-293194 (February 11, 2004) (denying the protest, in part, because the protester had not demonstrated a reasonable possibility that it was prejudiced by the bundling.) “Competitive prejudice is an essential element of every viable protest and where no prejudice is evident from the record, we will not sustain a protest.” *Id.*

<sup>61</sup> *See, e.g.*, *Specialty Marine, Inc.*, B-293871; B-293871.2 (June 17, 2004) (denying the protest, in part, because it was untimely given that the bundling was apparent from the solicitation but the protest was not filed until after the contract had been awarded).

<sup>62</sup> *See, e.g.*, *Global Computer Enterprises, Inc.*, B-310823; B-310823.2; B-310823.4 (January 31, 2008) (dismissing the protest on the grounds that it was outside GAO’s jurisdiction because it involved modification of a task order and did not allege that the order increased the scope, period, or maximum value of the contract under which it was issued). At the time, GAO had jurisdiction over protests involving task or delivery orders only when the protest alleged that the order increased the scope, period, or maximum value of the underlying contract. 10 U.S.C. §2304c(e)(1)(A) (procurements of defense agencies); 41 U.S.C. §4106(f)(2) (procurements of civilian agencies).

<sup>63</sup> 15 U.S.C. §644(k)(5).

However, neither the act nor the regulations promulgated under its authority define “significant bundling,” and the procurement and small business regulations implementing this statutory provision do not expand on its requirements (e.g., spelling out how the Office of Small and Disadvantaged Business Utilization is to work with procuring activities).<sup>64</sup>

## Procurement Strategies for “Substantial Bundling”

When the value of consolidated requirements reaches certain amounts, which vary by agency as illustrated in **Table 2**, “substantial bundling” occurs. When a proposed acquisition strategy involves substantial bundling, the agency’s written documentation of its acquisition strategy must also:

- (1) Identify the specific benefits anticipated to be derived from bundling;
- (2) Include an assessment of the specific impediments to participation by small business concerns as contractors that result from bundling;
- (3) Specify actions designed to maximize small business participation as contractors, including provisions that encourage small business teaming;
- (4) Specify actions designed to maximize small business participation as subcontractors (including suppliers) at any tier under the contract, or order, that may be awarded to meet the requirements;
- (5) Include a specific determination that the anticipated benefits of the proposed bundled contract or order justify its use; and
- (6) Identify alternative strategies that would reduce or minimize the scope of the bundling, and the rationale for not choosing those alternatives.<sup>65</sup>

The procuring activity must give 30 days advance notice of substantially bundled requirements to the SBA procurement center representative or Office of Government Contracting area office and to the agency Office of Small and Disadvantaged Business Utilization so that these entities may work with the procuring activity to develop alternative acquisition methods like those previously discussed (i.e., breaking the procurement into smaller discrete procurements; breaking out one or more discrete components for a small business set-aside; or reserving one or more awards for small businesses when issuing multiple awards under a task- or delivery-order contract).<sup>66</sup> Procuring activities generally have wide latitude in implementing procurement strategies that mitigate the effects of substantial bundling, and protests alleging that agencies could *better* mitigate these effects by taking specific steps are generally denied.<sup>67</sup>

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<sup>64</sup> See 13 C.F.R. §125.2(b)(8); 48 C.F.R. §19.201(d).

<sup>65</sup> 48 C.F.R. §7.107(d)(1)-(6). These requirements are stated somewhat differently, but are essentially the same, in the Small Business Act and the SBA regulations. See 15 U.S.C. §644(e)(3)(A)-(C); 13 C.F.R. §125.2(d)(7)(i)(A)-(E).

<sup>66</sup> 13 C.F.R. §125.2(d)(7)(ii).

<sup>67</sup> See, e.g., B.H. Aircraft Co., Inc., B-295399.2 (July 2, 2005) (procuring activity sufficiently accommodated small businesses by retaining sourcing of some small business-suitable parts and requiring the prime contractor to meet higher goals for small business contracting than had historically been met). The protester argued, in part, that the agency failed to comply with 48 C.F.R. §7.107(e) because the subcontracting goal for the bundled contract was lower than the agency’s overall goal and the agency could have had a large company provide logistics support while (continued...)

**Table 2. “Substantial Bundling”: Price Thresholds by Agency**

Agency	Price Threshold
Department of Defense	\$8 million or higher
NASA, General Services Administration, Department of Energy	\$6 million or higher
Other agencies	\$2.5 million

**Source:** Congressional Research Service, based on 48 C.F.R. §7.107(e).

### “Unnecessary or Unjustified Bundling”

Only “unnecessary or unjustified bundling” is prohibited under the Small Business Act.<sup>68</sup> This generally means bundling that resulted from agencies’ failure to comply with the statutory and regulatory provisions governing bundling, or was unreasonably determined to be necessary and justified. For example, in *TRS Research*, the Department of the Army, Military Traffic Management Command, was found to have engaged in unnecessary and unjustified bundling when it consolidated requirements to provide certain leased equipment worldwide, manage the leasing program, and develop and maintain a web-based information system for ordering and performance management information.<sup>69</sup> In part because the Military Traffic Management Command incorrectly determined that the acquisition was not bundled, it failed to make a written determination quantifying the benefits of bundling, among other things, and it failed to notify SBA prior to issuing the solicitation.<sup>70</sup> In *Nautical Engineering, Inc.*, in contrast, GAO found that the U.S. Coast Guard had complied with the statutory and regulatory requirements for bundled solicitations and reasonably determined that it would receive substantial benefits from consolidating maintenance and repair services for its cutters based in Alameda, CA.<sup>71</sup> Although the protester alleged, among other things, that the agency failed to comply with the bundling procedures because its justification for bundling was not approved by a Deputy Secretary for Homeland Security, GAO disagreed.<sup>72</sup> GAO noted that the allegedly missing approval was not, in fact, required because the Coast Guard had reasonably determined that the benefits of the proposed bundling exceeded 10% of the anticipated value of the bundled requirements.<sup>73</sup> GAO also found that the Coast Guard had reasonably determined that the benefits in decreased maintenance and repair costs and increased operational capacities were such that the bundling was necessary and justified.<sup>74</sup>

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procuring parts from small businesses in order to promote more small business participation. *Id.*

<sup>68</sup> *See, e.g.*, *Tyler Construction Group v. United States*, 570 F.3d 1329, 1335 (Fed. Cir. 2009) (“The statute does not prohibit all bundling of contract requirements, but only ‘unnecessary and unjustified’ bundling.”).

<sup>69</sup> B-290644 (September 13, 2002).

<sup>70</sup> *Id.*

<sup>71</sup> B-309955 (November 7, 2007).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* The protester generally has the burden of showing that the agency’s determination that consolidation would result in measurably substantial benefits is unreasonable. *See, e.g.*, *U.S. Electroynamics, Inc.*, B-403516; B-403516.2 (November 12, 2010).

## Other Requirements

The Small Business Act also includes several other provisions designed to protect small businesses from the effects of bundling. Among other things, the act requires agencies to include certain terms intended to promote contracting and subcontracting with small businesses in solicitations for bundled contracts generally,<sup>75</sup> or for bundled contracts that offer "significant opportunities" for subcontracting particularly.<sup>76</sup> The act also permits small businesses to submit offers that provide for the use of a particular team of subcontractors to perform the contract whenever a solicitation for a bundled contract is issued,<sup>77</sup> and it directs agencies to evaluate such offers in the same manner as other offers, "with due consideration to the capabilities of all of the proposed subcontractors."<sup>78</sup> In addition, SBA is required to develop a government-wide policy on contract bundling, which is to be posted on each agency's website.<sup>79</sup> Agencies are also required to post notices of and justifications for bundled solicitations on their websites.<sup>80</sup>

Finally, the Small Business Act requires that the SBA and agency Offices of Small and Disadvantaged Business Utilization engage in certain recordkeeping and/or reporting regarding bundled contracts. Among other things, the SBA must

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<sup>75</sup> P.L. 111-240, §1312(a), 124 Stat. 2537 (codified in 15 U.S.C. §644(q)(1)) (requiring each federal agency to include in each solicitation for a multiple award contract above the "substantial bundling threshold" provisions soliciting bids from teams or joint ventures of small businesses).

<sup>76</sup> Solicitations that offer "significant opportunities" for subcontracting must include evaluation factors assessing (1) the potential for subcontracting with small businesses on the proposed contract and (2) the potential contractor's past performance in subcontracting with small businesses. 13 C.F.R. §125.2(d)(8)(i)(A)-(B). *See also* 48 C.F.R. §15.304(c)(3)(ii) (requiring only an evaluation factor measuring past performance in subcontracting with small businesses). SBA regulations further require that when an offeror for a bundled contract qualifies as a small business, the agency must give it the highest score possible on these evaluation factors. 13 C.F.R. §125.2(d)(8)(ii). The FAR lacks similar provisions. Past performance must generally be considered in all negotiated procurements whose anticipated value exceeds \$150,000. 48 C.F.R. §15.304(c)(3)(ii). However, it need not be considered if the contracting officer documents in writing the "reason past performance is not an appropriate evaluation factor for the acquisition." 48 C.F.R. §15.304(c)(3)(iii).

<sup>77</sup> 15 U.S.C. §644(e)(4). "Teaming" generally arises when two or more contractors form a joint venture or partnership to act as a potential prime contractor, or a potential prime contractor agrees with one or more other contractors to have them act as its subcontractors for a particular contract. *See* 48 C.F.R. §9.601.

<sup>78</sup> 15 U.S.C. §644(e)(4). The Small Business Act further provides that "teaming" in response to bundled solicitations does not constitute affiliation such as could cause a firm to be found other than "small" for purposes of SBA programs. *Id.* Affiliations between businesses, or relationships allowing one party control or the power of control over another, generally count in size determinations, with the SBA considering "the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit." 13 C.F.R. §121.201; 13 C.F.R. §121.103(a)(1) & (6). Businesses can thus be determined to be other than small because of their involvement in joint ventures, subcontracting arrangements, or franchise or license agreements, among other things, provided that their personnel numbers or income, plus those of their affiliate(s), are over the pertinent size threshold. 13 C.F.R. §121.103(h)-(i).

<sup>79</sup> P.L. 111-240, §1312, 124 Stat. 2537 (codified at 15 U.S.C. §644(q)(2)(A)).

<sup>80</sup> *Id.* (codified at 15 U.S.C. §644(q)(2)(B)). Prior to enacting P.L. 111-240, whose notice requirements apply to all agencies, the 111<sup>th</sup> Congress had imposed similar requirements on the Department of Defense (DOD) specifically. *See* National Defense Authorization Act for FY2010, P.L. 111-84, §820, 123 Stat. 2410-11 (October 28, 2009). P.L. 111-84 required DOD to post (1) notices of bundled requirements like those provided to incumbent small contractors and (2) brief descriptions of the benefits of bundling on FedBizOpps.gov (<https://www.fbo.gov>) at least 30 days before issuing a bundled solicitation. Both the provisions of P.L. 111-84 and those of P.L. 111-240 are designed to ensure that all small business have access to information about proposed bundling that could affect them. Some agencies had apparently been relying on notification strategies for incumbent contractors, such as pre-solicitation and "sources sought" notices, that would also provide notices to other small businesses. *See supra* note 58. However, none was required to do so prior to the 111<sup>th</sup> Congress.

- maintain a database with information on each bundled contract awarded by a federal agency and each small business displaced as a prime contractor as a result of that bundling;<sup>81</sup>
- determine, for each bundled contract that is to be re-competed as a bundled contract, the amount of savings and benefits achieved by bundling; whether such savings and benefits will continue to be realized if the contract remains bundled; and whether such savings and benefits would be greater if the procurement requirements were divided into separate solicitations suitable for award to small business;<sup>82</sup>
- produce an annual report on contract bundling for the House Committee on Small Business and the Senate Committee on Small Business and Entrepreneurship that includes agencies' justifications for bundling; the cost savings realized from bundling; the total dollar amount of bundled requirements; the number of small businesses displaced as a result of the award of bundled contracts; and an assessment of agencies' compliance with small business subcontracting plans, among other things,<sup>83</sup> and
- report every three years to the House Committee on Small Business and the Senate Committee on Small Business and Entrepreneurship on the activities performed by procurement center representatives and commercial market representatives.<sup>84</sup>

The agency Offices of Small and Disadvantaged Business Utilization must similarly produce annual reports for the agency head and SBA Administrator assessing the extent to which small businesses received their "fair share" of federal procurement dollars; the adequacy of agencies' bundling documentation; and the adequacy of actions taken to mitigate the effects of necessary and justified bundling on small businesses.<sup>85</sup>

## **Consolidation**

The Small Business Jobs Act imposed limitations like those currently applicable to bundling, and to the "consolidation" of defense contracts, upon the consolidation of contract requirements by any federal agency.<sup>86</sup> The act's definition of "consolidation" resembles the existing definition of "bundling" and encompasses any

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<sup>81</sup> 15 U.S.C. §644(p)(2)(A)(i)-(ii).

<sup>82</sup> 15 U.S.C. §644(p)(3)(A)-(B).

<sup>83</sup> 15 U.S.C. §644(p)(4)(A)-(B).

<sup>84</sup> P.L. 111-240, §1312(a) (codified at 15 U.S.C. §644(q)(3)(A)-(C)). In addition, P.L. 111-240 required GAO to report to Congress within 180 days on the SBA's procurement center representative program, evaluating the effectiveness of procurement center representatives and commercial market representatives and addressing ways to improve the program. GAO responded to this requirement by issuing a report on June 15, 2011, on "Improvements Needed to Help Ensure Reliability of SBA's Data on Procurement Center Representatives." See GAO-11-549R, *available at* <http://www.gao.gov/new.items/d11549r.pdf>.

<sup>85</sup> 13 C.F.R. §125.2(e)(1); 48 C.F.R. §19.201(d)(11).

<sup>86</sup> The requirements of the Small Business Jobs Act apply to defense agencies until the Small Business Administration determines that they are "in compliance with the ... contracting goals under section 15" of the Small Business Act. P.L. 111-240, §1313(a), 124 Stat. 2537. Section 15 of the Small Business Act establishes as a government-wide goal that no less than 23% of federal contract dollars be awarded to small businesses, including 3% of contract and subcontract (continued...)



use of a solicitation to obtain offers for a single contract or a multiple award contract to satisfy 2 or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under 2 or more separate contracts lower in costs than the total cost of the contract for which the offers are solicited.<sup>87</sup>

In addition, the act requires that agency decisions regarding consolidation of contract requirements “[be] made with a view to providing small business concerns with appropriate opportunities to participate as prime contractors and subcontractors,”<sup>88</sup> and prohibits agencies from carrying out an acquisition strategy that involves consolidation of contract requirements valued at more than \$2 million unless the agency determines that consolidation is “necessary and justified.”<sup>89</sup> The act further provides that agencies may generally consider cost, quality, acquisition cycle, terms and conditions, and “any other benefit” in determining whether consolidation is justified, although “savings in administrative and personnel costs alone” cannot justify consolidation unless the anticipated savings are “expected to be substantial” in relation to the procurement.<sup>90</sup> These requirements are much like the requirements currently pertaining to bundling. However, it remains to be seen whether and how the new requirements regarding consolidation will be integrated with the existing requirements regarding bundling in SBA regulations and the FAR.<sup>91</sup>

## Proposed Amendments

Members of the 112<sup>th</sup> Congress have introduced several bills addressing contract bundling. The Expanding Opportunities for Main Street Act of 2011, introduced in identical versions in the House and Senate (H.R. 2424/S. 1334), would amend the definition of “bundling of contract requirements” so that it includes the “use of any bundling methodology ... to satisfy 2 or more procurement requirements of *construction services of a type historically performed under separate smaller contracts or orders.*”<sup>92</sup> This proposed language explicitly includes (1)

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dollars to Historically Underutilized Business Zone (HUBZone) small businesses; 3% to service-disabled veteran-owned small businesses; 5% to small businesses owned and controlled by socially and economically disadvantaged individuals; and 5% to women-owned small businesses. 15 U.S.C. §644(g)(1). It also requires that agencies set and meet additional, agency-specific goals for the percentage of contract and subcontract dollars awarded to these categories of small businesses. 15 U.S.C. §644(g)(2).

<sup>87</sup> P.L. 111-240, §1313(a) (codified at 15 U.S.C. §657q(a)(2)).

<sup>88</sup> *Id.* (codified at 15 U.S.C. §657q(b)).

<sup>89</sup> *Id.* (codified at 15 U.S.C. §657q(c)). Agencies are also required to conduct market research; identify alternative contracting approaches that involve a lesser degree of consolidation; identify any negative affects of the contracting strategy on small businesses; and certify that steps will be taken to include small businesses in the acquisition strategy.

<sup>90</sup> *Id.* (codified at 15 U.S.C. §657q(c)(1)-(3)).

<sup>91</sup> *See supra* note 7.

<sup>92</sup> H.R. 2424/S. 1334, §104 (emphasis added). H.R. 2424/S. 1334 would also amend the definition of “bundled contract” to mean “a contract or order that is entered into to meet procurement requirements that are consolidated in a bundling of contract requirements, without regard to its designation by the procuring agency or whether a study of the effects of the solicitation on civilian or military personnel has been made.” *Id.* The phrase “bundling methodology” used within this proposed definition would itself be added to the Small Business Act by H.R. 2424/S. 1334. *Id.* This definition of “bundling methodology” appears to be intended, in part, to provide a statutory basis for subjecting task and delivery orders to the bundling requirements. However, such orders are arguably already subject to the bundling requirements under the FAR and SBA regulations because of the definition of “single contract” included there. *See supra* note 16.

construction requirements, which some agencies have asserted are exempt under the current definition, and (2) requirements that are "of a type ... performed" under prior contracts, even if they were not actually performed under previous contracts. H.R. 2424/S. 1334 would also add a subsection to 15 U.S.C. Section 632(o) that would limit procuring activities' ability to assert that the inclusion of new features or functions means that requirements are not bundled. Titled "inclusion of new features or functions," this subsection would provide that

[a] combination of contract requirements that would meet the definition of a bundling of contract requirements but for the addition of a procurement requirement with at least one new good or service shall be considered to be a bundling of contract requirements unless the new features or functions substantially transform the goods or services and will provide measurably substantial benefits to the government in terms of quality, performance, or price.<sup>93</sup>

Further, H.R. 2424/S. 1334 would require that procuring activities include in the notifications regarding bundled contracts that they provide the SBA procurement center representatives or Office of Government Contracting area offices:

identifying information on the incumbent contract holders, a description of the industries which might be interested in bidding on the contract requirements, and the number of small businesses listed in the industry categories that could be excluded from future bidding if the contract is combined or packaged.<sup>94</sup>

Such information could assist the SBA in protecting the interests of small businesses in the proposed procurement. The bill would also authorize the Administrator of the SBA to delay the issuance of a solicitation for up to 10 days in order to make recommendations whenever the SBA and the procuring agency fail to agree on the existence or degree of bundling, and it would require that the matter be submitted to the Director of the Office of Management and Budget (OMB) "to mediate the disagreement."<sup>95</sup> While the proposed delay is shorter than that currently provided for in the FAR, at least for appeals raised by the SBA to the agency head,<sup>96</sup> and agencies are already generally required to suspend procurements pending procurement center representative and SBA appeals,<sup>97</sup> the SBA administrator currently does not control whether issuance of a solicitation is delayed,<sup>98</sup> and the determination of the agency head is final.<sup>99</sup>

The House-passed National Defense Authorization Act (NDAA) for FY2013 also includes provisions that would expand the definition of "bundling of contract requirements" and further restrict agencies' ability to bundle contracts, among other things.<sup>100</sup> Like the Expanding Opportunities for Main Street Act, the NDAA for FY2013 would expressly include new requirements and requirements for construction within its definition of "bundling," although it

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<sup>93</sup> H.R. 2424/S. 1334 §104.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> 48 C.F.R. §19.505.

<sup>97</sup> 48 C.F.R. §19.505(b)-(c).

<sup>98</sup> *See generally* 48 C.F.R. §19.505(e).

<sup>99</sup> 48 C.F.R. §19.505(e).

<sup>100</sup> *See* H.Amdt. 1100 to H.R. 4310, at §1671. These provisions are similar, but not identical, to those in the Contractor Opportunity Protection Act of 2012, H.R. 4081, which the House Committee on Small Business ordered to be reported on March 21, 2012.

would exclude contracts valued below \$2 million (\$5 million for construction contracts) from this definition.<sup>101</sup> It would also establish a policy that agencies are to ensure that decisions regarding bundling are made with a view to providing small businesses with the "maximum practicable opportunity" to participate as contractors and subcontractors in federal procurement,<sup>102</sup> as well as impose numerous restrictions upon agencies' procurement processes that are intended to minimize bundling. Specifically, the House-passed NDAA for FY2013 would require that procuring activities provide their procurement center representatives with a copy of the proposed procurement and a statement justifying any bundling at least 45 days before issuing a solicitation,<sup>103</sup> and publish this information on FedBizOpps (<https://www.fbo.gov>). It would also require SBA to determine the savings and benefits, among other things, associated with any previously bundled contracts that are to be re-competed as bundled contracts.<sup>104</sup> Agencies would have to comply with these requirements whenever certain conditions are met, such as when the proposed procurement would cause one or more small businesses to "suffer economic harm or disruption of ... business operations, including the potential loss of an existing contract."<sup>105</sup> If a

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<sup>101</sup> H.Amdt. 1100 to H.R. 4310, at §1671 (proposing to amend the definition of "bundling of requirements" to include "the use of any bundling methodology to satisfy 2 or more procurement requirements for new or existing goods or services provided or performed for the Federal agency, including any construction services, that is likely to be unsuitable for award to a small-business"). Like the Expanding Opportunities for Main Street Act, the House-passed NDAA for FY2013 would also establish a new definition of "bundling methodology," which would include "the creation of any new procurement requirements that permits a combination of contract requirements, including any combination of contract requirements or order requirements." It would also establish a new definition of "previously bundled contract," which would encompass contracts that are successors to contracts that required a bundling analysis, whose predecessors were designated as bundled or consolidated in the Federal Procurement Data System, or which SBA has designated as bundled.

<sup>102</sup> The proposed policy is arguably somewhat different from the current policy as to bundling, which is that:

each Federal agency, to the maximum extent practicable, shall - (1) comply with congressional intent to foster the participation of small business concerns as prime contractors, subcontractors, and suppliers; (2) structure its contracting requirements to facilitate competition by and among small business concerns, taking all reasonable steps to eliminate obstacles to their participation; and (3) avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors.

15 U.S.C. §631(j). There is presently a separate policy as to consolidation. *See* 15 U.S.C. §657q(b) ("The head of each Federal agency shall ensure that the decisions made by the Federal agency regarding consolidation of contract requirements of the Federal agency are made with a view to providing small business concerns with appropriate opportunities to participate as prime contractors and subcontractors in the procurements of the Federal agency.")

<sup>103</sup> H.Amdt. 1100 to H.R. 4310, at §1671. This statement must include: (1) an explanation of why the proposed acquisition cannot be further divided into reasonably small lots or discrete tasks to permit offers by small businesses; (2) a listing of incumbent contractors by size; (3) a description of industries that might be interested in bidding on the contract; (4) an assessment of the proposed acquisition's impact on small businesses that had previously bid on requirements included among the bundled requirements; (5) the number of small businesses whose "contracts will cease" if the bundling proceeds; (6) an explanation of why a delivery schedule could not be developed that would encourage small business participation, if delivery schedule was a factor in the decision; and (7) an explanation of why construction cannot be procured as separate discrete projects, in the case of construction contracts. The PCRs, in turn, would be tasked with recommending alternative procurement options that would increase opportunities for small business contractors within 15 days of receipt of the proposed solicitation and accompanying statement if they believe that the proposed procurement would render participation by small business contractors "unlikely." *Id.*

<sup>104</sup> *Id.* In addition, SBA must determine (1) whether such savings and benefits will continue to be realized if the contract remains bundled, and if such savings and benefits would be greater if the requirements were divided into separate solicitations suitable for award to small businesses; (2) the dollar value and percentage of subcontracts awarded to small businesses in that industry; and (3) the dollar value and percentage of prime contracts awarded to small businesses in that industry during each fiscal year of contract performance, and for two years prior to performance.

<sup>105</sup> *Id.* Agencies would also have to comply with these requirements when (1) the procuring activity includes in its statement of work goods or services currently performed by small businesses, and the proposed procurement is of a quantity or value that renders small business participation as prime contractors "unlikely," or if the requirements are of (continued...)

procuring activity fails to provide the requisite advance copy of the solicitation and accompanying statement, SBA would be authorized to postpone the solicitation process for anywhere from 10 to 45 days.<sup>106</sup> SBA, in turn, would be expressly authorized to "take action to further the interests of small businesses" whenever it determines that a proposed procurement would adversely affect a small business, or a small business (or trade association of which that small business is a member) requests it to do so.<sup>107</sup> Disagreements between SBA and the procuring activity would be resolved by appeal to the head of the procuring agency.<sup>108</sup>

The House-passed NDAA for FY2013 would also amend the definition of "interested party" in Title 31 of the United States Code to authorize "trade associations" to file protests challenging agencies' compliance with these bundling-related requirements with the Government Accountability Office (GAO).<sup>109</sup> In addition, it would amend Section 44 of the Small Business Act, which currently addresses consolidation of contract requirements, by repealing these provisions and replacing them with bundling-related provisions. The bundling provisions currently in Sections 3 and 15 of the act would also be repealed,<sup>110</sup> but the provisions regarding the consolidation of requirements by defense agencies codified in 10 U.S.C. § 2382 would apparently remain in effect.

Yet other legislation would require reporting on bundled procurements issued by particular agencies. For example, the Secure America through Verification and Enforcement (SAVE) Act of 2011 (H.R. 2000) would require the Comptroller General to report to Congress and the

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(...continued)

a type that SBA can demonstrate small businesses can perform, and the statement of work proposes combining these goods and services with other requirements; (2) the proposed procurement is for construction and seeks to package or combine discrete construction projects, the value of which exceeds \$5 million; or (3) SBA determines that the solicitation involves an unnecessary and unjustified bundling of contract requirements.

<sup>106</sup> If SBA indicates that the requisite information has not been supplied, procuring activities would be prohibited by law from "continu[ing] with the procurement" until they supply the information.

<sup>107</sup> H.R. 4081 differs from H.Amdt. 1100 here, and would authorize SBA to file an appeal with the agency board of contract appeals whenever SBA and the agency head disagree. It would also authorize small businesses, or trade associations including small businesses as their members, to protest with GAO if SBA opts not to appeal to the agency board of contract appeals. The boards of contract appeals are administrative boards established in procuring agencies to hear and decide disputes under the Contract Disputes Act of 1978. *See* 41 U.S.C. §7105. There are currently four such boards: the Armed Services Board of Contract Appeals; the Civilian Agency Board of Contract Appeals; the Postal Service board; and the Tennessee Valley Authority board.

<sup>108</sup> H.R. 4081 would also provide that if a protest were brought by a trade association, the association could not be required to "identify a specific member in association with the protest." Similar provisions were not included in H.Amdt. 1100.

<sup>109</sup> H.Amdt. 1100 to H.R. 4310, at §1671. As used here, the phrase "trade association" would include any entity described in Sections 501(c)(3), (6), (12), or (19) of the Internal Revenue Code that is exempt from taxes under Section 501(a).

<sup>110</sup> *Id.*, at §1672. Provisions similar, if not identical, to those provisions currently in Sections 3 and 15 that would be repealed if the House-passed NDAA for FY2013 were enacted would be included in the amended Section 44. For example, as amended, Section 44 would include: (1) a requirement that agencies conduct market research to determine whether bundling is necessary and justified before proceeding with an acquisition strategy that could lead to a bundling of requirements; (2) a prohibition upon carrying out an acquisition strategy that involves bundling unless agency officials certify that steps have been taken to include small businesses; (3) policies designed to promote bids or offers from teams or joint ventures of small businesses; (4) a requirement that SBA develop a database with information on bundled contracts awarded by federal agencies and any small businesses "displaced" as a result of these contracts, as well as report annually to Congress on agencies' bundling of requirements; and (5) a requirement that a government-wide policy on bundling be developed and posted on agency websites, along with a listing of and rationale for each bundled contract proposed or awarded.

Department of Homeland Security on “any improper conduct or wrongdoing” discovered in his review of contracts for the Secure Border Initiative. The report is to include any “bundling that limits the ability of small business to compete,” among other things.<sup>111</sup>

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<sup>111</sup> H.R. 2000, §112.