



**Congressional
Research Service**

Informing the legislative debate since 1914

Bundling and Consolidation of Contract Requirements Under the Small Business Act: Legal Overview

,name redacted,
Legislative Attorney

August 20, 2015

Congressional Research Service

7-....

www.crs.gov

R41133

Summary

When used in reference to federal procurement contracts, “bundling” and “consolidation” are technical terms, whose meaning is prescribed by statute. Specifically, “bundling” denotes “consolidating 2 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 due to its size or scope. “Consolidation” is similarly defined to mean soliciting a single contract to satisfy two or more requirements for goods or services valued in excess of \$2 million that have been obtained under two or more separate contracts lower in cost than the contract for which offers are solicited, or to satisfy requirements for construction to be performed at two or more discrete sites.

Bundling and consolidation are alike in that each entails the incorporation of multiple procurement “requirements”—that is, goods or services needed by a federal agency—into a single solicitation. Each can reduce costs or improve performance for procuring activities, but can also diminish competition by effectively excluding firms that can perform only a portion of the proposed requirements. However, bundling and consolidation are not synonymous as defined in federal statute, and the definition of “bundling” uses the word “consolidating” in its customary sense of grouping, rather than its technical sense.

Since 1997, Congress has enacted several measures—generally (but not universally) amending the Small Business Act—that restrict bundling and consolidation because of concerns about their effects on small businesses. As a result of these measures, procuring activities are required to comply with certain procedures before proceeding with an acquisition that involves bundled or consolidated requirements. Neither bundling nor consolidation is absolutely prohibited, however.

Bundling: Procuring activities generally cannot proceed with an acquisition that involves bundled requirements unless they have conducted market research and determined that bundling is “necessary and justified.” Bundling is generally seen to be necessary and justified when the benefits that the procuring activity would derive from bundling the requirements are “measurably substantial” in terms of price, quality, or other factors as compared to the benefits that would be derived from meeting the requirements through separate smaller contracts. Procuring activities are also required to provide certain notices regarding bundled requirements to the public, incumbent small business contractors, and agency and Small Business Administration (SBA) officials who are tasked with assisting in identifying and restructuring bundled requirements.

Substantial bundling: In addition, procuring activities whose acquisitions involve “substantially bundled” requirements are required to meet other procedural requirements. These include assessing the impediments to small business participation as prime contractors that will result from the bundling, and specifying actions to maximize small business participation as prime contractors and subcontractors. “Substantial bundling” is bundling of requirements that are valued at or above \$2.5 million to \$8 million, depending upon the procuring agency.

Consolidation: Similarly, procuring activities generally cannot conduct an acquisition that involves a consolidation of contract requirements without conducting market research; identifying any alternative contracting approaches that would involve a lesser degree of consolidation; determining that consolidation is “necessary and justified”; identifying any negative impact the acquisition strategy will have on contracting with small businesses; and ensuring that steps are taken to include small businesses in the acquisition strategy. In addition, procuring activities are required to give agency and SBA officials notice of any consolidated requirements, as with bundled requirements.

Contents

Bundling of Contract Requirements	5
Definition of “Bundling”	5
Restrictions on the Conduct of Bundled Acquisitions.....	7
Market Research When There Is the Potential for Bundling	7
Determining and Documenting That Bundling Is “Necessary and Justified”	8
Further Documentation Required in the Case of “Substantial Bundling”	10
Notice to the Public, Incumbent Small Businesses, and Agency and SBA Officials.....	11
Other Obligations	14
Consolidation of Requirements	16
Definition of “Consolidation”	17
Restrictions on the Conduct of Consolidated Acquisitions	17

Tables

Table 1. “Measurably Substantial Benefits”: Benefits as a Percentage of the Value of the Bundled Requirements	8
Table 2. “Substantial Bundling”: Price Thresholds by Agency	10
Table 3. Required Terms as to Bundled Contracts.....	15
Table 4. Comparison of Agencies’ Obligations as to Bundling and Consolidation.....	18

Contacts

Author Contact Information	19
----------------------------------	----

When used in reference to federal procurement contracts, “bundling” and “consolidation” are technical terms, whose meaning is prescribed by statute. Specifically, “bundling” denotes “consolidating 2 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 due to its size or scope.¹ “Consolidation” is similarly defined to mean soliciting a single contract to satisfy two or more requirements for goods or services valued in excess of \$2 million that have been obtained under two or more separate contracts lower in cost than the contract for which offers are solicited, or to satisfy requirements for construction to be performed at two or more discrete sites.²

Bundling and consolidation are alike in that each entails the incorporation of multiple procurement “requirements”—or goods or services needed by a federal agency—into a single solicitation. Each can reduce costs or improve performance for procuring activities,³ but can also diminish competition by effectively excluding firms which can perform only a portion of the procuring activity’s requirements.⁴ However, bundling and consolidation are not synonymous as defined in federal statute,⁵ and the

What Is a Small Business?

The Small Business Act defines a small business as one that is “independently owned and operated”; is “not dominant in its field of operation”; and meets any size standards established by the Administrator of Small Business. The Administrator has established standards which specify firm size by North American Industrial Classification System (NAICS) code and provide, for example, that recreational vehicle dealers are small if their annual receipts (averaged over three years) are less than \$32.5 million, while line-haul railroads are small if they have fewer than 1,500 employees.

15 U.S.C. §632(a)(1)-(2); 13 C.F.R. §§121.101-121.201.

¹ 15 U.S.C. §632(o)(2). *See also* 13 C.F.R. §125.1(e); 48 C.F.R. §2.101. “Separate smaller contract” is further defined, for purposes of bundling, to mean a “contract that has been performed by one or more small business concerns or is suitable for award to 1 or more small business concerns.” 15 U.S.C. §632(o)(3). *See also* 13 C.F.R. §125.1(s); 48 C.F.R. §2.101. Both the Federal Acquisition Regulation (FAR) and Small Business Administration (SBA) regulations implement the bundling- and consolidation-related provisions of the Small Business Act discussed in this report. The FAR and SBA regulations generally correspond, although there may sometimes be slight differences between them. *Compare* 48 C.F.R. §7.107(b)(1)-(c) (2012) (giving the monetary thresholds used in determining whether bundling is necessary and justified as \$9.4 million and \$94 million) *with* 13 C.F.R. §125.2(d)(5)(i)(A)-(B) (2012) (giving those same thresholds as \$8.6 million and \$86 million). 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.

² 13 C.F.R. §125.1(c). The definition of “consolidation” given in the Small Business Act does not incorporate the provisions regarding the monetary value of the requirements included in the SBA regulations (i.e., requirements valued in excess of \$2 million). *See* 15 U.S.C. §657q(a)(2). However, the Small Business Act provides that its limitations on consolidation apply only to requirements “with a total value of more than \$2,000,000.” 15 U.S.C. §657q(c)(1). Consolidation is not currently defined in the FAR, but proposed amendments to the FAR would add such a definition. *See generally* Dep’t of Defense, Gen. Servs. Admin. & Nat’l Aeronautics & Space Admin., Federal Acquisition Regulation; Consolidation and Bundling of Contract Requirements: Proposed Rule, 80 Fed. Reg. 31561 (June 3, 2015).

³ *See, e.g.*, 2B Brokers et al., B-298651 (Nov. 27, 2006) (“We have recognized that bundling may serve to meet an agency’s needs where the agency reasonably determines that consolidation will result in significant cost savings or operational efficiencies.”); Teximara, Inc., B-293221.2 (July 9, 2004) (similar).

⁴ *See, e.g.*, The Urban Group, Inc.; McSwain & Assocs., Inc., B-281352, B-281353 (Jan. 28, 1999) (noting that bundling and consolidation—the latter of which was, at that time, restricted only by the Competition in Contracting Act, and not the Small Business Act—“have the potential for restricting competition by excluding firms that can furnish only a portion of the requirement”). 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 in this report in referring to components of the federal government that are buying goods or services. However, “procuring activity” is specifically used to distinguish obligations arising at lower levels within an agency from higher-level agency obligations.

⁵ For example, requirements could be consolidated without being bundled if they involve construction projects (continued...)

definition of “bundling” uses the word “consolidating” in its customary sense of grouping, rather than in its technical sense.⁶

Since 1997, Congress has enacted several measures—generally (but not universally) amending the Small Business Act—that restrict bundling and consolidation because of concerns about their effects on small businesses, as the **Chronology** below illustrates. As a result of these measures, procuring activities are generally required to comply with certain procedures before proceeding with an acquisition that involves bundled or consolidated requirements. Neither bundling nor consolidation is absolutely prohibited, however.

This report discusses the limitations on bundling and consolidation that the Small Business Act imposes on procuring activities in order to help ensure that small businesses receive a “fair proportion” of federal contract dollars.⁷ It does not address the limitations that the Competition in Contracting Act (CICA) of 1984 imposes on the consolidation of requirements in order to promote “full and open competition” among prospective vendors.⁸ Agency actions that constitute improper bundling under the Small Business Act could constitute improper consolidation under CICA.⁹ However, CICA is not specifically concerned with consolidation’s effects on small businesses, and its restrictions on the grouping of requirements are otherwise “broader” in scope than those of the Small Business Act.¹⁰

(...continued)

performed at two or more sites. Construction requirements have generally been seen as new requirements and, as such, not encompassed within the definition of “bundling.” See Definition of “Bundling” However, the definition of “consolidation” expressly encompasses certain construction requirements.

⁶ See, e.g., Merriam-Webster, “Bundle,” available at <http://www.merriam-webster.com/dictionary/bundle> (last accessed: July 23, 2015).

⁷ See 15 U.S.C. §631(a) (“It is 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 ... insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government ... be placed with small-business enterprises....”).

⁸ 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 the procurements of defense agencies, and Title 41, for the 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 furnish only a portion of the requirements are excluded. For this reason, the Government Accountability Office (GAO) and other bid 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 (Feb. 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 (Nov. 18, 1997); P.L. 107-314, §333, 116 Stat. 2514 (Dec. 2, 2002); *Nat’l Airmotive Corp. v. Cohen*, No. C 98-4381 SC, 1999 U.S. Dist. LEXIS 2150 (N.D. Cal., Feb. 25, 1999).

⁹ 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).

¹⁰ See, e.g., *Phoenix Scientific Corp.*, B-286817 (Feb. 22, 2001) (“The reach of the restrictions against bundled procurements in CICA is clearly broader than the reach of restrictions against bundling under the Small Business Act. For example, unlike CICA’s restrictions, the Small Business Act’s bundling provisions have no application to arguments by large businesses that discrete portions of consolidated procurements should be broken out for competition. ... [T]here is also a difference in the showing required to justify bundling. The Small Business Act requires that agencies demonstrate “measurably substantial benefits” in order to justify a bundled procurement. ... In (continued...)

Chronology

Small Business Reauthorization Act of 1997, P.L. 105-135, §§411-415 & 417, 111 Stat. 2617-20 (Dec. 2, 1997) (codified, as amended, in 15 U.S.C. §631(j), §632(o), and §644(e))

Bundling only; applicable to all federal agencies

Defined “bundling” to mean “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” due to its size or scope.

Required agencies to conduct market research to determine whether the bundling of requirements is “necessary and justified” before proceeding with an acquisition strategy that could lead to a contract containing bundled requirements, and prescribed what factors are to be considered in determining whether bundling is necessary and justified.

Also required procuring activities to take additional steps when the procurement involves “substantial bundling.” These steps include assessing the impediments to small businesses’ participation as prime contractors that result from bundling, and specifying actions designed to maximize small business participation as subcontractors or suppliers.

Provided that small businesses may submit offers in response to bundled solicitations that propose the use of a particular team of subcontractors, and required agencies to evaluate the offer “in the same manner as other offers, with due consideration to the capabilities of all the proposed subcontractors.”

Tasked SBA with certain responsibilities for reviewing bundled contracts.

Required that the Federal Procurement Data System (FPDS) be “modified” to collect data regarding bundling of contract requirements valued in excess of \$5 million.

National Defense Authorization Act for FY2004, P.L. 108-136, div. A, tit. VIII, §§801, 117 Stat. 1538-40 (Nov. 24, 2003) (formerly codified in 10 U.S.C. §2382)

Consolidation only; applicable only to defense agencies

Defined “consolidation” to mean the “use of a solicitation to obtain offers for a single contract or a multiple award contract to satisfy two or more requirements of that department, agency, or activity for goods or services that have previously been provided ... or performed ... under two or more separate contracts smaller in cost than the total cost of the contract for which the offers are solicited.”

Barred procuring activities from carrying out an acquisition strategy that includes a consolidation of contract requirements valued in excess of \$5 million¹¹ without (1) conducting market research; (2) identifying any alternative contracting approaches that would involve a lesser degree of consolidation of contract requirements; and (3) determining that the consolidation is necessary and justified, as well as prescribed factors to be considered in determining whether consolidation is “necessary and justified.”

Required the Secretary of Defense to revise the Department’s data collection systems to ensure that they are capable of identifying all procurements that involve a consolidation of contract requirements with a total value in excess of \$5 million, among other things.

Small Business Jobs Act, P.L. 111-240, §§1312-1313, 124 Stat. 2538-39 (Sept. 27, 2010) (codified in 15 U.S.C. §§644(q), 657q)

Imposed restrictions on the consolidation of contract requirements valued in excess of \$2 million by civilian agencies similar to those imposed on the defense agencies by P.L. 108-136, and required the defense agencies to comply with these civilian agency requirements until

(...continued)

contrast, CICA permits solicitations to contain restrictive provisions and conditions only to the extent necessary to satisfy the needs of the agency.”).

¹¹ This amount was subsequently adjusted for inflation to \$6 million, as provided by the Ronald W. Reagan National Defense Authorization Act for FY2005. *See* P.L. 108-375, §807, 118 Stat. 2010-11 (Oct. 28, 2004); 48 C.F.R. §207.170-3(a).

Both bundling and consolidation; applicable to all federal agencies

the SBA determined that they were “in compliance with the ... contracting goals under section 15” of the Small Business Act.¹² Specifically, under the Act, procuring activities were barred from carrying out an acquisition strategy that involved consolidation of contract requirements valued in excess of \$2 million unless they (1) conducted market research; (2) identified any alternative contracting approaches that would involve a lesser degree of consolidation; (3) made a written determination that consolidation was necessary and justified; (4) identified any negative impact that the acquisition strategy would have on small businesses; and (5) certified that steps would be taken to include small businesses in the acquisition strategy.

Also required procuring activities to include in each solicitation for a “multiple award contract”¹³ valued above the substantial bundling threshold (which currently ranges from \$2.5 million to \$8 million, depending upon the agency involved) a provision soliciting bids from teams or joint ventures of small businesses. Agencies are also required to post on their Websites (1) a copy of the government-wide policy regarding contract bundling, and (2) lists of and rationales for any bundled contracts for which they solicited bids or made awards.

In addition, SBA was required to report to Congress periodically on the activities of its procurement center representatives (PCRs), officials who are tasked, among other things, with limiting bundling by the procuring activities and mitigating its effects. The Government Accountability Office (GAO) was also required to submit a report on the PCR program.¹⁴

National Defense Authorization Act for FY2013, P.L. 112-239, §1613, §1621, & §1671, 126 Stat. 2065, 2068, 2084-85 (codified at 15 U.S.C. §§644(f) & 657q) (Jan. 2, 2013)

Both bundling and consolidation; applicable to all federal agencies

Repealed the provisions of P.L. 108-136 regarding the consolidation of contract requirements that applied only to defense agencies and subjected defense agencies to the same requirements as civilian agencies under P.L. 111-240. Also amended the definition of “consolidation” to include “requirements ... for construction projects to be performed at two or more discrete sites.”

Required GAO to conduct a review of the data and information regarding consolidated contracts that includes, among other things, the extent to which written determinations that consolidation is necessary and justified comply with existing law.¹⁵

Expressly included, among the responsibilities of SBA PCRs, advocating for the maximum practicable utilization of small businesses in federal contracting, including by advocating against the unjustified bundling or consolidation of contract requirements.

In addition, the Department of Defense was required to obtain an “independent assessment” of its “procurement performance ... related to

¹² 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 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 groups; and 5% to women-owned small businesses. 15 U.S.C. §644(g)(1). Section 15 also requires that agencies set and meet 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).

¹³ A “multiple award contract” is a single contract that is awarded to multiple vendors, rather than to a single vendor. Each vendor awarded the contract is generally eligible to be awarded any task or delivery orders issued under the contract. In contrast, vendors not awarded the contract are generally ineligible for such orders.

¹⁴ 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>.

¹⁵ GAO issued a report on this topic in November 2013. See “Small Business Contracting: Updated Guidance and Reporting Needed for Consolidated Contracts,” GAO-14-36, *available at* <http://www.gao.gov/assets/660/659254.pdf>.

	small businesses” which covers, among other things, the extent to which DOD bundles, consolidates, or otherwise groups requirements into contracts that are “unsuitable” for award to small business concerns.
Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, P.L. 113-291, §822, 128 Stat. 3435-36 (Dec. 19, 2014) (codified at 15 U.S.C. §644(s))	Required the Administrator of Small Business, in consultation with the Small Business Procurement Advisory Council, the Administrator for Federal Procurement Policy, and the Administrator of General Services, to develop a plan to improve the quality of data reported on bundled or consolidated contracts in FPDS. This plan is to describe the roles of specified officials in improving the quality of data reported on bundled and consolidated contracts, among other things.
<i>Both bundling and consolidation; applicable to specified agencies</i>	

Source: Congressional Research Service, based on various sources cited in the **Chronology**.

Bundling of Contract Requirements

As previously noted, since 1997, Congress has enacted several measures—generally (but not universally) amending the Small Business Act—that limit the bundling of contract requirements because of concerns about bundling’s effects on small businesses. These measures apply only to procurements that are covered by the statutory definition of “bundling,” and obligate procuring activities to take certain steps prior to proceeding with an acquisition that involves bundled requirements. The specified steps are intended to ensure that any bundling is necessary and justified. Provided the requisite steps are taken, the procuring activity may generally proceed with the bundled acquisition. Only “‘unnecessary and unjustified’ bundling is prohibited.”¹⁶

Definition of “Bundling”

The Small Business Act’s restrictions on bundling apply only to acquisitions encompassed within the Act’s definition of this term. This definition specifies that

The term “bundling of contract requirements” means 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 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).¹⁷

The incorporation of multiple requirements into a single solicitation is implicated in any bundling under this definition. However, as defined here, “bundling” denotes more than just the inclusion

¹⁶ 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.”). See also Phoenix Scientific Corp., B-286817 (Feb. 22, 2001) (“The Small Business Act’s statutory prohibition against bundling requirements is not absolute ... as an agency may determine that [bundling] of requirements is ‘necessary and justified....’”).

¹⁷ 15 U.S.C. §632(o)(2). The Small Business Act also defines “separate smaller contract” as a “contract that has been performed by one or more small business concerns or was suitable for award to 1 or more small business concerns,” as previously noted. See *supra* note 1. 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 Schedules contract, government-wide acquisition contract (GWAC), or interagency contract with one or more awardees. 13 C.F.R. §125.1(t); 48 C.F.R. §2.101.

of two or more requirements in one solicitation. Such requirements must also have been previously provided or performed under separate smaller contracts, *and* the resulting solicitation must be “unsuitable” for award to a small business due to its size or scope.

When the requirements were not previously provided or performed under separate smaller contracts, or when the resulting solicitation is not “unsuitable” for award to a small business, there is no bundling—and the restrictions on bundling, discussed below, are inapplicable. Such a situation could arise when the procuring activity’s requirements are new ones that have not been previously provided or performed under a government contract,¹⁸ or are “radically different” from previously contracted work.¹⁹ It could also arise if the allegedly bundled requirements have, in fact, been previously provided or performed under a single contract.²⁰ Requirements that, when combined, could be performed by small businesses similarly do not qualify as bundled, regardless of whether breaking up the requirements into separate procurements could facilitate more participation by small business prime contractors than would be obtained given the procurement’s current structure.²¹ Examples of requirements that could be performed by small businesses include requirements that have been

Contracts Reserved or Set-Aside for Small Businesses

Contracts whose value is between \$3,000 and \$150,000 are generally “reserved” for small businesses. This means that, if the contracting officer is able to obtain offers from at least two small businesses that are competitive as to price and other terms, the contract may only be awarded to a small business. Such contracts are awarded using “simplified acquisition procedures,” such as government-wide commercial purchase cards, purchase orders, blanket purchase agreements, imprest funds, and Standard Form 44.

A “set-aside” is a competition in which only small businesses may generally compete. The Federal Acquisition Regulation (FAR) requires agencies to set aside contracts valued in excess of \$150,000 for small businesses if the contracting officer reasonably expects offers from at least two small businesses, and the award can be made at a fair market price. Such contracts are awarded using sealed bidding or contracting by negotiation.

See generally 15 U.S.C. §644(j)(1); 48 C.F.R. §19.502-2(b).

¹⁸ See, e.g., *Nat’l Airmotive Corp. v. Cohen*, 1999 U.S. Dist. LEXIS 2150, at *17-*18.

¹⁹ 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 (Jan. 28, 1999) (similar). Combining new requirements could, however, potentially constitute consolidation in violation of CICA. See *supra* notes 9-10 and accompanying text. Procuring activities have sometimes asserted that requirements for construction are, *per se*, new requirements, or that adding a new requirement to requirements previously performed means there is no bundling. See, e.g., *Tyler Constr. Group*, 83 Fed. Cl. at 100-101 (agency asserting that requirements for construction are new requirements); *Nautical Eng’g, Inc.*, B-309955 (Nov. 7, 2007) (agency asserting that there was no bundling because of the addition of a new requirement, planning services, to requirements for drydock and dockside maintenance and repair that the agency admitted were bundled). However, no judicial or administrative tribunal appears to have validated these proposed constructions of “bundling.” In *Tyler Construction*, the court found that even if bundling had occurred, it would have been necessary and justified. 83 Fed. Cl. at 103. Similarly, in *Nautical Engineering*, GAO found that any bundling was justified because the government would receive measurably substantial benefits from the bundled solicitation.

²⁰ See, e.g., *BlueStar Energy Solutions*, B-405690 (Dec. 12, 2011) (denying the protest where the record showed that all the requirements covered by the solicitation were already being procured as a single procurement); *Outdoor Venture Corp., Allied Cos.*, B-299675, B-299676 (July 19, 2007) (denying a protest alleging bundling because the record showed that all the requirements covered by the solicitation had already been procured as a single system); *USA Info. Sys., Inc.*, B-291417 (Dec. 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).

²¹ See, e.g., *Phoenix Scientific Corp.*, B-286817 (Feb. 22, 2001); *S&K Elec.*, B-282167 (June 10, 1999).

“reserved” or “set aside” for small businesses,²² as well as other requirements in which small businesses have expressed interest, or for which they have submitted offers.²³

In addition, the Federal Acquisition Regulation (FAR) exempts contracts awarded or performed entirely outside the United States from the limitations on bundling by excluding such contracts from its definition of “bundling.”²⁴

Restrictions on the Conduct of Bundled Acquisitions

When the incorporation of multiple requirements into a single solicitation *could* result in bundling under the previous definition, procuring activities are required to take certain steps before proceeding with the acquisition.²⁵ These steps include (1) conducting market research; (2) documenting that the bundling is “necessary and justified;” (3) determining that the anticipated benefits of the proposed bundled contract justify its use, in the case of “substantial bundling;” and (4) notifying the public, incumbent small business contractors, and agency and Small Business Administration (SBA) officials who are tasked with assisting in identifying and restructuring bundled requirements.

Market Research When There Is the Potential for Bundling

The FAR generally requires that agencies “perform acquisitions planning and conduct market research ... for *all* acquisitions.”²⁶ (Market research involves collecting and analyzing information about capabilities within the market to satisfy agency needs.²⁷) However, SBA regulations impose additional obligations as to market research—separate and apart from those of the FAR—that are specifically concerned with the availability of potential small businesses to perform agency requirements. One such obligation involves conducting market research to determine the “type and extent of foreseeable small business participation in the acquisition” as part of the agency’s acquisition planning.²⁸ A second obligation involves conducting market research before proceeding with an acquisition strategy that “could lead to a bundled, substantially bundled, or

²² See, e.g., Encompass Group, LLC, B-410726 (Feb. 2, 2015) (finding no bundling where the acquisition was reserved for small businesses); Homecare Prods., Inc., B-408898.2 (Mar. 12, 2014) (finding no bundling where the procurement had been set-aside for small businesses).

²³ See, e.g., Star Food Serv., Inc., B-408535 (Nov. 1, 2013) (noting that the agency had received multiple offers from small businesses to meet the allegedly bundled requirements); Phoenix Scientific Corp., B-286817 (Feb. 22, 2001) (noting expressions of interest and offers from several small businesses). At least one procuring activity has also asserted that a procurement is not bundled if at least one small business could perform the requirements, on the theory that 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. See Nautical Eng’g, Inc., B-309955 (Nov. 7, 2007). GAO did not reach the merits of this argument, but other GAO decisions raise questions about its likelihood of success. See, e.g., TRS Research, B-290644 (Sept. 13, 2002) (finding that the solicitation was bundled, in part, because it was unsuitable for award to small businesses, notwithstanding the fact that the procuring activity received one offer from a small business in response to the solicitation).

²⁴ 48 C.F.R. §2.101. 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 procurement law. *Id.*

²⁵ See, e.g., 48 C.F.R. §125.2(c)(2) (“In addition, each agency must conduct market research and any required analysis and justifications before proceeding with an acquisition strategy that *could* lead to a bundled, substantially bundled, or consolidated contract.”) (emphasis added).

²⁶ 48 C.F.R. §7.102(a) (emphasis added). See also 48 C.F.R. Part 10 (Market Research).

²⁷ 48 C.F.R. §2.101.

²⁸ 13 C.F.R. §125.2(c)(2).

consolidated contract” in order to determine whether (1) the bundling or consolidation of requirements is necessary and justified, as discussed below, and (2) all statutory conditions for such an acquisition strategy have been satisfied.²⁹

Determining and Documenting That Bundling Is “Necessary and Justified”

The “purpose” of the agency’s market research is to determine and document that the bundling is necessary and justified³⁰—something which occurs only when the procuring activity would derive “measurably substantial benefits” from the bundled requirements as compared to the benefits to be derived from meeting the requirements in an unbundled acquisition.³¹ Individual benefits are to be “quantified,” and benefits are generally seen to be measurably substantial only if their value, “individually, in combination, or in the aggregate,” meets or exceeds certain monetary thresholds specified in **Table 1**.³² However, benefits that do not reach the requisite thresholds can be determined to be necessary and justified if certain high-ranking officials in the procuring agency determine, without the power of delegation, that (1) the benefits of the bundling are “critical to the agency’s mission success,” and (2) the procurement strategy provides for “maximum practicable participation” by small businesses.³³

Table 1. “Measurably Substantial Benefits”: Benefits as a Percentage of the Value of the Bundled Requirements

Contract Value	Benefits Qualifying as “Measurably Substantial”
\$94 million or less	10% of the estimated value of contract or order (including options)
More than \$94 million	The greater of \$9.4 million, or 5% of the estimated value of the contract or order (including options)

Source: Congressional Research Service, based on 13 C.F.R. §125.2(d)(2)(ii)(A)-(B).

A range of benefits may generally be considered in determining whether bundling is necessary and justified, including cost savings, quality improvements, reductions in acquisition cycle times, better contract terms and conditions, and “any other benefits.”³⁴ The wide-ranging nature of potentially cognizable benefits is illustrated by the Government Accountability Office’s (GAO’s) 2001 decision in *Phoenix Scientific Corporation*.³⁵ There, GAO upheld the Air Force’s bundling of certain requirements for weapons system management in the face of a challenge alleging, in part, that the savings on the bundled contract were below the requisite monetary threshold. GAO

²⁹ *Id.*

³⁰ 13 C.F.R. §125.2(d)(2)(i).

³¹ 13 C.F.R. §125.2(d)(2)(ii).

³² 13 C.F.R. §125.2(d)(2)(ii)(A)-(B).

³³ 13 C.F.R. §125.2(d)(2)(iii)(A)-(B). The designated officials are the “Senior Procurement Executives or the Under Secretary of Defense for Acquisition and Technology (for other Defense Agencies) in the Department of Defense and the Deputy Secretary or equivalent in civilian agencies.” 13 C.F.R. §125.2(d)(2)(iii).

³⁴ 13 C.F.R. §125.2(d)(2)(ii). Note, however, that savings in agency administrative or personnel costs alone cannot justify bundling unless they represent at least 10% of the estimated value of the bundled requirements. 13 C.F.R. §125.2(d)(2)(iv). Also, in assessing whether cost savings would be achieved, the contracting officer is required to consider the costs that have been charged or could be charged by small businesses for the same or similar work. *See* 48 C.F.R. §7.107(g).

³⁵ B-286817 (Feb. 22, 2001).

agreed with the protester on this point.³⁶ However, it noted that the Air Force had cited a number of other benefits beyond these savings, including (1) addressing “unique, nonrecurring, and generally unforeseeable requirements, that arise practically anywhere the Air Force has a weapons system;” (2) coordinating and integrating multiple tasks “with limited resources;” (3) significantly reducing the acquisition cycle time for addressing “unforeseeable maintenance and modifications associated with the use of aging aircraft for expanding requirements;” (4) quickly integrating related tasks, including “design engineering, fabrication and testing, technical documentation, installation and kit proofing, spares, and interim contractor support;” and (5) improving the readiness and availability of its aircraft fleet.³⁷ According to GAO, all these benefits, in combination, “provide[d] a reasonable basis to justify the use of a [bundled] contract here.”³⁸ Subsequently, in its 2007 decision in *Nautical Engineering, Inc.*, GAO similarly upheld a bundled solicitation where the Coast Guard had identified “two different benefits to the government: decreased maintenance and repair costs (quantified as a savings of 5.29 percent), and increased time that the ... cutters will be performing their duties (18 percent more time).”³⁹ GAO found that these benefits, when combined, were measurably substantial.⁴⁰

Any bundling whose benefits are not measurably substantial, or which has not been approved by the designated agency official, is “unnecessary and unjustified” and, as such, technically prohibited under the Small Business Act.⁴¹ In practice, however, bid protests challenging the bundling of requirements seldom prevail, in part because the protester has the burden of showing that the benefits claimed by the procuring agency are not reasonable.⁴² Published decisions in bid protests involving allegedly bundled requirements are likely unrepresentative in that they are

³⁶ *Id.* (“Both Phoenix and the SBA argue that the Air Force’s claimed savings do not adequately justify the bundling here. We agree.”).

³⁷ *Id.*

³⁸ *Id.*

³⁹ B-309955 (Nov. 7, 2007).

⁴⁰ *Id.* See also *Tyler Constr. Group*, 83 Fed. Cl. at 94 *et seq.* (agency noting reductions in construction costs and time savings); *CYIOS, Inc.*, B-402728.3 (July 13, 2012) (agency noting savings of \$5 million over the life of the contract, as well as better accountability and more efficient task coordination); *U.S. Electroynamics, Inc.*, B-403516, B-403516.2 (Nov. 12, 2010) (agency noting better quality services, reduction in overall costs, volume discounts, reduced contractor overhead, and mitigation of market volatility); *B2 Brokers et al.*, B-298651 (Nov. 27, 2006) (agency noting savings on the contract, as well as increased on-time delivery and improved in-transit visibility); *S&K Elec.*, B-282167 (June 10, 1999) (agency noting “substantial technical benefits,” as well as savings); *The Urban Group, Inc.; McSwain & Assoc., Inc.*, B-281352, B-281353 (Jan. 28, 1999) (agency noting cost savings and quality improvements); *Aalco Forwarding, Inc.*, B-277241.12; B-277241.13 (Dec. 29, 1997) (agency noting superior service, reduced administrative burdens, and the adoption of better business practices).

⁴¹ See *supra* note 16 and accompanying text.

⁴² See, e.g., *CYIOS, Inc.*, B-402728.3 (July 13, 2012) (“In its comments responding to the agency report, CYIOS has not meaningfully challenged any aspect of the agency’s analysis.”); *U.S. Electroynamics, Inc.*, B-403516, B-403516.2 (Nov. 12, 2010) (“[A]lthough the protester disagrees with the agency’s conclusions, it has not shown that the agency’s assumptions were unreasonable or provided a persuasive basis to challenge the agency’s belief that a consolidated approach would be operationally efficient.”); *B2 Brokers et al.*, B-298651 (Nov. 27, 2006) (“We find that both the contemporaneous record and the testimony received at the hearing supports the agency’s conclusion that the estimated savings to be derived from optimizing freight shipments can only be achieved from an approach that provides for consolidating the coordination and transportation functions, including a centralized information technology and freight management system.”); *S&K Elec.*, B-282167 (June 10, 1999) (“SKE has not rebutted the basis for Treasury’s determination to procure the services in question under the Seat Management contract; it has made no showing that Treasury in fact had no reasonable expectation of achieving substantial technical benefits from consolidating these IT requirements under the Seat Management contract.”); *The Urban Group, Inc.; McSwain & Assoc., Inc.*, B-281352, B-281353 (Jan. 28, 1999) (“[T]he protester has not established that the bundling was unnecessary or unjustified. ... [T]he record supports the finding that substantial benefits of cost savings and quality improvements will likely result.”).

issued in only some cases wherein vendors challenge such requirements.⁴³ Nonetheless, those decisions that are published suggest that bundling will generally be found permissible so long as the procuring activity conducted and adequately documented the requisite analyses of bundling’s benefits. Only if the procuring activity erroneously determined that the requirements were not bundled—and thus failed to analyze the benefits of the proposed bundling or obtain approval from the designated agency official—are protesters apparently likely to prevail.⁴⁴

Further Documentation Required in the Case of “Substantial Bundling”

Procuring activities are required to provide additional documentation in cases that involve “substantial bundling,” or bundling of requirements valued in excess of \$2.5 to \$8 million, depending upon the identity of the procuring agency. See **Table 2** below.

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 13 C.F.R. §125.1(w)(1)-(3).

This documentation is to include a determination that the “anticipated benefits of the proposed bundled contract justify its use,” as well as:

- the procuring activity’s analysis of why the bundling is necessary and justified, (see Determining and Documenting That Bundling Is “Necessary and Justified”);
- an assessment of the specific impediments to small businesses participation as prime contractors that will result from the bundling;
- actions intended to maximize small business participation as prime contractors, including provisions that encourage small business “teaming;”⁴⁵
- actions intended to maximize small business participation as subcontractors and suppliers at any tier under the contracts awarded to meet the requirements; and

⁴³ Decisions in protests with the procurement agency—which is one of the three forums for bid protests—are not published. Also, decisions are not published by GAO—another of the protest forums—in cases where the agency opts to take corrective action prior to the issuance of a decision on the merits. Note also that timeliness, standing, and other issues may affect a protester’s ability to maintain a challenge to allegedly bundled requirements. *See infra* notes 66-68 and accompanying text.

⁴⁴ *See* TRS Research, B-290644 (Sept. 13, 2002) (noting that, 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, or to notify SBA prior to issuing the solicitation).

⁴⁵ “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. The proposed amendments to the FAR regarding bundling and consolidation would define “small business teaming arrangement” to mean: “(1) ... an arrangement where (i) [t]wo or more small business concerns have formed a joint venture; or (ii) [a] potential small business prime contractor ... agrees with one or more other small business concerns to have them act as its subcontractors under a specified Government contract.” 80 Fed. Reg. at 31564.

- any alternative strategies that would reduce or minimize the scope of the bundling, and the rationale for not choosing these alternatives.⁴⁶

The alternative strategies generally involve breaking up the procurement into smaller “pieces,” which are suitable for award to a small business as separate contracts (awarded either on an unrestricted basis or via a set-aside); as orders under a multiple-award contract (either reserved or set-aside); or as partial set-asides.⁴⁷ However, potential alternatives can also include developing a strategy that preserves small business contract participation “to the maximum extent practicable” in cases where bundling is necessary and justified.⁴⁸

Notice to the Public, Incumbent Small Businesses, and Agency and SBA Officials

In addition to taking the foregoing steps, procuring activities are also required to provide certain notices of bundled (and, in some cases, consolidated) requirements to the public, incumbent small businesses, and agency and SBA officials who are tasked with assisting in identifying and restructuring bundled requirements. The required notices are generally to be provided at least 30 days before the issuance of the solicitation, and are intended to permit review of and legal challenges to agency actions by those most likely to be concerned about any bundling. Note, however, that the notices provided to different parties differ somewhat in their content, as discussed below.

Notice to Agency Small Business Specialists and Other Officials; Assistance in Restructuring the Procurement

SBSs, OSDBUs, and PCRs

Small business specialists (SBSs) are technical advisers assigned by agency Offices of Small and Disadvantaged Business Utilization (OSDBUs) or Offices of Small Business Programs (OSBPs) to work with each procuring activity to which the SBA has assigned a PCR. Among other things, SBSs are tasked with reviewing agency proposals to modify or dissolve any small business set-aside; providing advice and recommendations on proposed subcontracting plans; and consulting on potential default terminations involving small businesses.

Agency OSDBUs and OSBPs are tasked with generally looking out for small business contractors and subcontractors in their dealings with the agency. This includes (1) facilitating small business participation as contractors and subcontractors; (2) assisting small businesses in obtaining payments under their contracts, late payment, interest penalties, or information on contractual payment provisions; and (3) cooperating and consulting with the SBA in setting aside contracts for small businesses.

PCRs 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 to identify alternate strategies to maximize small businesses’ participation in government procurement. When no PCR is assigned to a procuring activity, that activity works with the SBA Office of Government Contracting area office serving the procuring activity’s location.

See generally 13 C.F.R. §125.2(b)(1); 48 C.F.R. §19.201; 48 C.F.R. §19.402(a)(1)-(2); 48 C.F.R. §19.506(b); 48 C.F.R. §19.705-4(d)(7); 48 C.F.R. §49.402-3(e)(4).

“[A]s early in the acquisition process as practicable,” but no later than 30 days before the issuance of a solicitation, the contracting officer responsible for a particular acquisition is to “coordinate” with the procuring agency’s small business specialist (SBS) if the acquisition strategy contemplates an acquisition valued at or above \$2.5-\$8 million, depending upon the

⁴⁶ 13 C.F.R. §125.2(d)(3)(i)-(v).

⁴⁷ 13 C.F.R. §125.2(b)(1)(ii)(A)-(E). A “partial set-aside” involves the reservation of certain requirements under the contract for a competition in which only small businesses may participate.

⁴⁸ 13 C.F.R. §125.2(b)(1)(ii)(F).

identity of the procuring agency.⁴⁹ See **Table 2**. This requirement applies to all requirements that are not “entirely set-aside” for small businesses pursuant to one of the set-aside programs authorized under the Small Business Act.⁵⁰ It does not apply only to requirements that are seen to be bundled (or consolidated, as discussed below).

The SBS is then tasked with coordinating with the procuring activity and the PCR on all required determinations and findings for bundling (and consolidation, discussed below), as well as assisting the procuring activity in identifying alternative strategies that would reduce or minimize the scope of the bundling if the procurement strategy involves “substantial bundling.”⁵¹ The SBS is also to notify the agency Office of Small and Disadvantaged Business Utilization (OSDBU) or Office of Small Business Policy (OSBP) if the proposed acquisition strategy includes bundled or consolidated requirements that the agency has not identified as such, or unnecessary or unjustified bundling.⁵²

Agency OSDBUs and OSBPs are, in turn, tasked with identifying proposed solicitations that involve “significant bundling,”⁵³ and working with agency officials and the SBA to revise the procurement strategy to increase the probability of small business prime contractors through small business teaming arrangements.⁵⁴ They are also to facilitate small business participation as subcontractors or suppliers if a solicitation for a substantially bundled contract is to be issued.⁵⁵

Notice to Procurement Center Representatives; Possible Appeal by SBA

Separate and apart from this coordination with agency SBSs, at least 30 days prior to the issuance of a solicitation, procuring activities are also required to provide their PCR with a copy of the proposed acquisition strategy, as well as certain other information, if the strategy (1) includes a description of goods or services of a magnitude that likely could not be performed by small businesses; (2) seeks to package or consolidate discrete construction projects; (3) is bundled or substantially bundled; or (4) entails the consolidation of contract requirements (discussed below).⁵⁶

⁴⁹ 13 C.F.R. §125.2(c)(4)(i).

⁵⁰ *Id.* (“The procuring activity is not required to coordinate with its SBS if the contract or order is entirely set-aside for small business concerns, or small businesses under one of SBA’s small business programs, as authorized under the Small Business Act.”). For more on the set-aside programs, see generally CRS Report R42981, *Set-Asides for Small Businesses: Legal Requirements and Issues*, by (name redacted) and (name redacted) .

⁵¹ 13 C.F.R. §125.2(c)(4)(ii)-(iii).

⁵² *Id.*

⁵³ Neither the act nor its implementing regulations define “significant bundling.” Note that the FAR requires agencies to provide the “same information” that they provide to the PCRs, discussed below, to the OSDBUs or OSBPs. See 48 C.F.R. §19.202-1(e)(1)(iii).

⁵⁴ 13 C.F.R. §125.2(c)(5)(iii).

⁵⁵ 13 C.F.R. §125.2(c)(5)(iv). OSDBUs and OSBPs are also responsible for “coordinating” on acquisition planning and strategy development, including bundling determinations, at the agency level. 13 C.F.R. §125.2(c)(5)(viii).

⁵⁶ 13 C.F.R. §125.2(c)(3)(i)(A)-(D). Other information to be provided includes (1) a written statement explaining why the procuring activity believes any bundled or consolidated requirements are necessary and justified, among other things; (2) all required clearances for the bundled, substantially bundled, or consolidated requirement; and (3) a written statement explaining why the acquisition cannot be structured in certain ways to facilitate small business participation, in cases where the description of the proposed requirements makes small business participation likely, or if a proposed procurement for construction seeks to package or consolidate discrete construction projects. See 13 C.F.R. §125.2(c)(3)(iii)-(iv)(A)-(D). See also TRS Research, B-290644 (Sept. 13, 2002) (noting a “statutory violation” in the agency’s failure to provide notice of a bundled procurement to the SBA).

What happens next depends upon whether the PCR agrees with the procuring activity's determination that the bundling is necessary and justified. If the PCR agrees that the bundling is necessary and justified, the PCR is to work with the procuring activity to "tailor a strategy that preserves small business prime contract participation to the maximum extent practicable."⁵⁷ In contrast, if the PCR does not agree with the procuring activity that the bundling is necessary and justified, the PCR is to recommend "alternative procurement methods which would increase small business prime contract participation."⁵⁸ These methods are basically the same as the "alternative strategies" that agencies are to document in any substantially bundled acquisition, and can include "breaking up" the procurements into smaller components and setting-aside or reserving requirements for small businesses. See Further Documentation Required in the Case of "Substantial Bundling"

If the PCR and the contracting officer disagree over whether an acquisition is bundled or substantially bundled, the PCR may appeal to the head of the procuring activity within 2 business days of receiving notice that the contracting officer has rejected his or her recommendation(s).⁵⁹ If the head of the procuring activity agrees with the contracting officer, the PCR may notify the SBA, which may then appeal to the secretary of the department or the head of the agency within 15 business days.⁶⁰ The agency head's determination is final.⁶¹ The procuring activity is generally required to suspend action on the proposed award until any appeals are resolved.⁶²

Notice to Incumbent Small Businesses; Potential Bid Protests

In addition, at least 30 days before issuing a bundled solicitation or placing an order without a solicitation, the procuring activity is to notify any small businesses currently performing the requirements of its intention to bundle the requirements.⁶³ The regulations do not otherwise

⁵⁷ 13 C.F.R. §125.2(b)(1)(ii)(F). 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. *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 in *B.H. Aircraft* argued, in part, that the agency failed to comply with the FAR 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 procuring parts from small businesses in order to promote more small business participation. *Id.*

⁵⁸ 13 C.F.R. §125.2(b)(1)(ii).

⁵⁹ 15 U.S.C. §644(a); 13 C.F.R. §125.2(b)(3); 48 C.F.R. §19.505(b).

⁶⁰ 13 C.F.R. §125.2(b)(3); 48 C.F.R. §19.505(c)(2). *See also* Phoenix Scientific Corp., B-286817 (Feb. 22, 2001) (discussing an agency appeal by the SBA).

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

⁶² 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 PCR. The PCR has 2 days to appeal that rejection to the head of the procuring activity. The head of the procuring activity has 7 days to respond. After getting that response, the PCR has 2 days to notify the SBA. The 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(f).

⁶³ 13 C.F.R. §125.2(d)(5). They are also encouraged, but not required, to inform any incumbent small business of how to contact the "appropriate [SBA] representative." 13 C.F.R. §125.2(d)(5).

prescribe the form or content of these notifications, but GAO has found that small businesses receive sufficient notification of agencies' intent to bundle 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.'"⁶⁴

Once an incumbent small business has notice of proposed bundling, it could file a bid protest with GAO, the procuring agency, or the Court of Federal Claims⁶⁵ challenging the solicitation on the grounds that it would not result in measurably substantial benefits for the agency or, alternatively, has not been approved by the requisite agency personnel. However, any such protest must be timely,⁶⁶ and the protester must have standing.⁶⁷ Also, the protest forum must otherwise have jurisdiction over the challenge.⁶⁸

Notice to the Public; Promoting Transparency and Accountability

Finally, within 30 days of an agency's certification as to the validity and verification of the data it has entered into the Federal Procurement Data System (FPDS), which occurs after the end of a fiscal year, the agency head is required to publish on the agency's Website listings of and rationales for all bundled requirements for which the agency solicited offers or issued an award.⁶⁹ Agencies are also "encouraged" to provide such notices earlier—at the time of the solicitation—in order to promote transparency.⁷⁰ Particularly if provided at the time of the solicitation, these notices could alert small businesses who are not incumbent contractors of requirements that they could potentially perform.

Other Obligations

Procuring agencies and the SBA also have other obligations beyond those previously noted. However, unlike the earlier obligations, which are intended primarily to minimize bundling within the context of individual procurements, agencies' other obligations address bundling more generally. Some of the obligations pertain to all procuring agencies (including the SBA when it

⁶⁴ Nautical Engineering, Inc., B-309955 (Nov. 7, 2007).

⁶⁵ These three are generally the only bid protest forums. *See* 31 U.S.C. §3551. However, 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 the SBA).

⁶⁶ *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); Aalco Forwarding, Inc., B-277241.20, B-277241.21 (July 1, 1998) (similar).

⁶⁷ *See, e.g.,* RELM Wireless Corp., B-405358 (Oct. 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 (Feb. 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." Future Solutions, Inc., B-293194.

⁶⁸ *See, e.g.,* Global Computer Enterprises, Inc., B-310823; B-310823.2; B-310823.4 (Jan. 31, 2008) (dismissing the protest on the grounds that it was outside GAO's jurisdiction because it involved the issuance 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 and delivery orders only when the protest alleged that the order effectively modified the underlying contract. *See* archived CRS Report R42049, *Jurisdiction over Challenges to "Large" Orders Under Federal Contracts*, by (name redacted) and (name redacted).

⁶⁹ 13 C.F.R. §125.2(d)(6).

⁷⁰ *Id.*

acts as a purchaser of goods and services). Others pertain only to SBA, as the agency specifically tasked with protecting small businesses’ interests in the procurement process.

Key among agencies’ other obligations are incorporating certain terms in their solicitations, which form the basis for contract awards. The exact nature of the terms depends upon the facts and circumstances of the procurement, as **Table 3** below, illustrates.

Table 3. Required Terms as to Bundled Contracts

Circumstances of the Procurement	Required Terms
Justified bundled or consolidated requirements offer a “significant opportunity for subcontracting” ⁷¹	Factors that take into account the prospective contractor’s proposed subcontracting plan and past performance in subcontracting with small businesses ⁷²
Multiple-award contract whose value exceeds the substantial bundling threshold (see Table 2)	Provision soliciting bids from “any responsible source,” including “responsible small business concerns and teams or joint ventures of small business concerns”

Source: Congressional Research Service, based on 15 U.S.C. §644(q)(1); 13 C.F.R. §125.2(b)(1)(iii)(F)-(H); 13 C.F.R. §125.2(d)(4)(i)(A)-(B).

In addition, while not required to incorporate such terms expressly in their solicitations, procuring activities are required to accept offers that provide for the use of the team of subcontractors proposed by the offeror in response to a solicitation for a bundled contract.⁷³ They are also required to evaluate such offers “in the same manner as other offers, with due consideration to the capabilities of all of the proposed subcontractors.”⁷⁴

Other obligations involve reporting regarding bundling policies or practices. Specifically, agency OSDBUGs and OSPBs are to produce annual reports for the agency head and the 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.⁷⁵ The SBA is further tasked with:

⁷¹ The meaning of this term is not defined by statute or regulation.

⁷² Contracts in excess of \$650,000 (\$1.5 million for construction contracts) that offer subcontracting possibilities generally are required to also incorporate a subcontracting plan that includes, among other things, “[s]eparate percentage goals” for the dollar amount and percentage of work subcontracted to various types of small businesses. *See* 48 C.F.R. §19.704(a)(1)-(11). Past performance is generally required to be considered in all negotiated procurements whose anticipated value exceeds \$150,000. 48 C.F.R. §15.304(c)(3)(ii).

⁷³ 15 U.S.C. §644(e)(4). The SBA regulations note that PCRs are to “recommend” that procuring activities incorporate these provisions in their solicitations. 13 C.F.R. §125.2(b)(iii)(G). However, agencies are not required to do so.

⁷⁴ *Id.* Note also that if a small business teams under 15 U.S.C. §644(e)(4), its doing so “shall not affect its status as a small business concern for any other purpose.” *Id.* This provision is significant because 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).

⁷⁵ 13 C.F.R. §125.2(c)(5)(i)(A)-(C).

- developing a government-wide policy on contract bundling, which is to be posted on each agency’s website;⁷⁶
- maintaining 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;⁷⁷
- determining, 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;⁷⁸
- producing 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;⁷⁹ and
- reporting every three years to the House Committee on Small Business and the Senate Committee on Small Business and Entrepreneurship on the activities performed by the PCRs and other agency officials tasked with assisting small businesses in obtaining and performing federal contracts.⁸⁰

Consolidation of Requirements

The Small Business Act’s restrictions on the consolidation of requirements by procuring activities are akin to the Act’s restrictions on bundling, although of more recent origin. See **Chronology**. As defined under the Act, “consolidation” is a broader term than “bundling.” However, there are otherwise a number of similarities between the limitations on consolidation and those on bundling, as discussed below. Also, as is the case with bundling, “[t]he Small Business ... Act does not preclude agencies from consolidating requirements.”⁸¹ Rather, the Act “states ... that an agency may not use an acquisition strategy that consolidates contract requirements with a total value of more than \$2 million” (or involves construction at 2 or more sites) unless certain conditions are met.⁸²

⁷⁶ 15 U.S.C. §644(q)(2)(A).

⁷⁷ 15 U.S.C. §644(p)(2)(A)(i)-(ii).

⁷⁸ 15 U.S.C. §644(p)(3)(A)-(B).

⁷⁹ 15 U.S.C. §644(p)(4)(A)-(B).

⁸⁰ 15 U.S.C. §644(q)(3)(A)-(C).

⁸¹ Am. Toner & Ink; KPaul Properties, LLC; Dolphin Blue, Inc.; Capital Shredder Corp., B-409528.7, B-409528.11, B-409528.14, B-409528.18 (June 9, 2014).

⁸² *Id.* See also U.S. Small Business Admin., Response to B-409528, Apr. 3, 2014 (copy on file with the author) (“The [Small Business] Act does not preclude an agency from consolidating contracts although it limits when and how an agency may proceed with this type of work.”). B-409528 is the number of the protest in *American Toner & Ink*.

Definition of “Consolidation”

Only procurements that are encompassed within the Small Business Act’s definition of “consolidation” are subject to its restrictions on the consolidation of requirements. This definition provides that

Consolidation of contract requirements, consolidated contract, or consolidated requirement means a solicitation for a single contract or a Multiple Award Contract to:

- (1) Satisfy two or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under two or more separate contracts each of which was lower in cost than the total cost of the contract for which the offers are solicited, the total cost of which exceeds \$2 million (including options); or
- (2) Satisfy requirements of the Federal agency for construction projects to be performed at two or more discrete sites.⁸³

This definition is broader than the definition of “bundling” in two notable ways. First, it encompasses requirements that were previously provided or performed by other than small businesses, and not just those previously provided or performed by small businesses (or suitable for award to small businesses). The definition of “consolidation” has this reach because it applies to requirements previously provided or performed under “two or more separate contracts,” and “separate contract” is defined to mean “a contract or order ... that has previously been performed by any business, including an other-than-small business or small business concern.”⁸⁴ The definition of “bundling,” in contrast, only applies to requirements previously provided or performed under “separate smaller contracts,” and “separate smaller contract” is defined to mean a “contract that has been performed by one or more *small business concerns* or was suitable for award to 1 or more *small business concerns*.”⁸⁵ Second, and relatedly, the definition of “consolidation” expressly encompasses requirements for construction projects “to be performed at two or more discrete sites.” It thus avoids the question of whether requirements for construction are to be seen as new requirements that has been raised in reference to bundling.⁸⁶

Certain requirements do, however, fall outside the definition of “consolidation.” Examples include (1) requirements (other than for construction projects to be performed at two or more discrete sites) whose value is below \$2 million; (2) requirements (other than for construction) that had previously been provided or performed under two or more contracts that were the same size as, or larger than, the proposed contract; and (3) requirements for construction to be performed at a single site.

Restrictions on the Conduct of Consolidated Acquisitions

When the incorporation of multiple requirements into a single solicitation *could* result in consolidation under the previous definition, procuring activities are required to take certain steps before proceeding with the acquisition.⁸⁷ These steps include (1) conducting market research; (2)

⁸³ 13 C.F.R. §125.1(c).

⁸⁴ 13 C.F.R. §125.1(r) (emphasis added).

⁸⁵ 15 U.S.C. §632(o)(3) (emphasis added). *See also* 13 C.F.R. §125.1(s); 48 C.F.R. §2.101.

⁸⁶ Note also that the proposed FAR amendments would not exclude contracts awarded or performed outside the United States from the definition of “consolidation,” although the FAR would retain this exclusion as to the definition of “bundling.” *See* 80 Fed. Reg. at 31564.

⁸⁷ *See, e.g.*, 48 C.F.R. §125.2(c)(2) (“In addition, each agency must conduct market research and any required analysis and justifications before proceeding with an acquisition strategy that *could* lead to a bundled, substantially bundled, or (continued...)”).

identifying any alternative contracting approaches that would involve a lesser degree of consolidation of contract requirements; (3) determining that consolidation is “necessary and justified;” (4) identifying any negative impact of the acquisition strategy on contracting with small business concerns; and (5) ensuring that steps will be taken to include small business concerns in the acquisition strategy.⁸⁸ These steps are generally the same as those to be taken as to bundled requirements, as **Table 4** below illustrates.⁸⁹ (The same is true as to agencies’ obligations to provide notice of consolidated requirements to agency and SBA officials, although not as to the notices to public and incumbent small business contractors; contract terms, or reporting on agency policies and practices. See Notice to the Public, Incumbent Small Businesses, and Agency and SBA Officials and Other Obligations.)

Table 4. Comparison of Agencies’ Obligations as to Bundling and Consolidation

X indicates that procuring agencies have the obligation in question

Requirement	Obligations as to Bundling	Obligations as to Consolidation
Conduct market research	X	X
Identify alternate contracting approaches	X (substantial bundling)	X
Determine that grouping is necessary and justified	X	X
Identify any negative impacts on small businesses		X
Ensure that steps are taken to include small businesses in the acquisition strategy	X (substantial bundling)	X

Source: Congressional Research Service, based on 13 C.F.R. §125.2(d)(1)-(3).

As **Table 4** illustrates, the requirement that procuring activities identify “any negative impact” that the acquisition strategy could have on contracting with small businesses is unique to consolidation—and has been the subject of the only litigation, to date, regarding the Small Business Act’s limitations on consolidation. Neither the Act nor the SBA regulations implementing the Act provide any guidance regarding how a procuring activity is to go about identifying an acquisition strategy’s impact on small businesses, or assessing whether such impact is “negative.” However, in a letter sent to GAO on April 3, 2014, the SBA asserted that the General Service Administration’s (GSA’s) proposed Office Supplies Third Generation (OS3) contract was improperly consolidated because the GSA had not adequately assessed the contract’s impact on small businesses.⁹⁰ In particular, the SBA faulted the GSA for having performed “no negative impact assessment” beyond that reflected in the following statement:

(...continued)

consolidated contract.”) (emphasis added).

⁸⁸ 13 C.F.R. §125.(d)(1)(i)(A)-(E).

⁸⁹ One further difference, not noted in **Table 4**, is that the agency’s Senior Procurement Executive (SPE) or Chief Acquisition Office (CAO) is required to make the determination that consolidation is necessary and justified, and may do so only if the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches identified by the agency. See 15 U.S.C. §657q(c)(2); 13 C.F.R. §125.2(d)(1)(i).

⁹⁰ Response to B-409528, Apr. 3, 2014 (copy on file with the author), *supra* note 82.

Another matter of interest is the impact of potential reduction in sales for small businesses not chosen as an OS3 CLIN [contract line item number] provider. GSA has considered this potential negative impact on small businesses but has determined the benefits to be gained through OS3 CLINs will outweigh this negative impact.⁹¹

According to the SBA, this statement—consisting of only “two sentences”—was not the “thoughtful and meaningful” analysis that Congress intended as a precursor to consolidation.⁹² In particular, the SBA argued, “Congress wanted some type of data analysis,” which was lacking with the OS3 procurement.⁹³

GAO, however, took a different view. Unlike the SBA, which had focused upon the legislative history of the restrictions on consolidation and what it viewed as the congressional intent, GAO focused on the text of the Small Business Act.⁹⁴ This text, GAO opined, does not require a “more detailed or quantified cost-benefit analysis to justify the agency’s solicitation approach.”⁹⁵ Instead, it requires only that the agency “identify negative impacts on small businesses,”⁹⁶ which GAO viewed the GSA to have adequately done when it prepared a consolidation analysis which “recognized that there was a potential for a reduction in sales for small business contractors who did not receive awards under the OS3 solicitation,” but nonetheless concluded “the benefits to be gained through OS3 outweigh the potential negative impact to small business concerns.”⁹⁷

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov7-....

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* In particular, the SBA cited the 2003 provisions regarding consolidation that applied only to defense agencies and a Senate report on the 2010 measure as supporting its view that “Congress wanted some type of data analysis.” *Id.*

⁹⁵ Am. Toner & Ink; KPaul Properties, LLC; Dolphin Blue, Inc.; Capital Shredder Corp., B-409528.7, B-409528.11, B-409528.14, B-409528.18 (June 9, 2014). The GSA also disputed whether OS3 was to be seen as consolidated, since it was a follow-on contract. However, this argument was rejected by both the SBA and GAO.

⁹⁶ *Id.*

⁹⁷ *Id.*

EveryCRSReport.com

The Congressional Research Service (CRS) is a federal legislative branch agency, housed inside the Library of Congress, charged with providing the United States Congress non-partisan advice on issues that may come before Congress.

EveryCRSReport.com republishes CRS reports that are available to all Congressional staff. The reports are not classified, and Members of Congress routinely make individual reports available to the public.

Prior to our republication, we redacted names, phone numbers and email addresses of analysts who produced the reports. We also added this page to the report. We have not intentionally made any other changes to any report published on EveryCRSReport.com.

CRS reports, as a work of the United States government, are not subject to copyright protection in the United States. Any CRS report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS report may include copyrighted images or material from a third party, you may need to obtain permission of the copyright holder if you wish to copy or otherwise use copyrighted material.

Information in a CRS report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to members of Congress in connection with CRS' institutional role.

EveryCRSReport.com is not a government website and is not affiliated with CRS. We do not claim copyright on any CRS report we have republished.