



# CONTRACT LAW DIVISION

Office of Assistant General Counsel for Finance and Litigation



## A Lawyer's View of "Contract Bundling"

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### CONTRACT BUNDLING

By

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#### I. INTRODUCTION

This Lawyer's View article examines contract bundling by providing an overview of statutes, regulations, and case law that govern the practice of aggregating procurements and procurement requirements.

Contract bundling generally refers to the concept of aggregating procurements and procurement requirements. Traditionally, challenges to bundling have been made under the Competition in Contracting Act of 1984, 10 U.S.C. § 2304 and 41 U.S.C. § 253 (CICA). Under CICA, requirements may be determined to be bundled whenever aggregated requirements are found to be unduly restrictive of competition.

In addition to CICA, changes to the Small Business Act (in pertinent part, 15 U.S.C. § 631 Et seq.), (SBA) and the Federal Acquisition Regulation, 48 C.F.R. Ch. 1 (FAR), provide another route for certain bundling challenges. The SBA and the FAR specifically define bundling and impose certain requirements on an Agency considering bundling requirements. A failure to follow those requirements may result in improper bundling within the meaning of SBA and FAR, and is protestable.

#### II. CHANGES TO THE SBA AND THE FAR

On October 1, 1997, the Small Business Reauthorization Act of 1997, Pub. L. No.105-135, 111 Stat. 2592, 2617-20 (1997) (SBRA), amended

SBA to provide more specific restrictions against bundling. References to the SBA in this article refer to the SBA as amended by the SBRA.

The SBA regulations, 13 CFR Parts 121 and 125, 65 FR 45831, implementing the SBA were effective July 26, 2000. Also on July 26, 2000, Federal Acquisition Circular 97-19, FAR Case 1997-306, amended the FAR to implement the SBRA. The FAR and the SBA define the term "bundling" the same, and the terms are used interchangeably throughout this article.

#### III. CICA

CICA generally requires that solicitations permit full and open competition. Under CICA, Agencies may issue solicitations with restrictive conditions only to the extent necessary to satisfy the minimum needs of the Agency. CICA has provided a general statutory basis for challenging solicitations which "aggregate procurements and procurement requirements that over the years have been labeled as bundled, consolidated, or total-package procurements. These types of procurements have the potential for restricting competition by excluding firms which can furnish only a portion of the requirement."<sup>2</sup> Under CICA, the General Accounting Office (GAO) reviews bundling challenges to determine whether the Agency has a reasonable basis for its decision to combine requirements.

CICA continues to provide relief for bundling challenges in addition to the new route available for certain bundling challenges under the SBA and FAR. GAO has stated that the "reach of the restrictions against bundled procurements under CICA is clearly broader than the reach of

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<sup>2</sup> See *Phoenix Scientific Corporation*, Comp. Gen. Dec. B-286817, 2001 CPD ¶ 24, at 5.



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restrictions against bundling under the [SBA]. There are other circumstances where the [SBA] offers no relief, yet CICA may.”<sup>3</sup>

#### IV. BUNDLING UNDER THE SBA AND THE FAR

This section will address: (A) The definition of bundling under the FAR and SBA; (B) The highlights of the SBA and FAR bundling rules, and (C) The concept of measurably substantial benefits.

##### A. Definition of Bundling under the SBA and the FAR

Both FAR § 2.101, and the SBA at 15 U.S.C. § 632 (o) define bundling, in pertinent part, as:

(1) Consolidating two or more requirements for supplies 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 concern due to:

- (i) The diversity, size, or specialized nature of the elements of the performance specified;
- (ii) The aggregate dollar value of the anticipated award;
- (iii) The geographical dispersion of the contract performance sites; or
- (iv) Any combination of the factors described in paragraphs (1)(i), (ii), and (iii) of this definition.

This definition refers to consolidating requirements which have been previously provided under separate smaller contracts. A separate smaller

contract is defined under FAR § 2.101 and 15 U.S.C. § 632 (o) as a contract that has been performed by one or more small business concerns or, that was suitable for award to one or more small business concerns.

##### B. Highlights

In addition to providing a specific definition of bundling, highlights of changes to the SBA and FAR include:

To the maximum extent practicable, each Agency shall avoid unnecessary and unjustified bundling of contract requirement that precludes small business participation in procurements as prime contractors. 15 U.S.C. § 631(a)(j)(3).

An Agency may determine that consolidation of requirements is necessary and justified, if the Agency would derive certain measurably substantial benefits from the consolidation, as compared to the benefits it would derive if the requirements were not bundled. 15 U.S.C. § 644(e)(2), FAR §§ 7.107(a) and (b), and FAR §§ 10.00(1)(a)(2) and (a)(3).

Agencies are required to assess the impact of bundling on small businesses. FAR § 7.107(a).

For solicitations involving bundling that offer a significant opportunity for subcontracting, the Contracting Officer must include a factor to evaluate past performance indicating the extent to which the offeror attained applicable goals for small business participation under contracts that required subcontracting plans. 15 U.S.C. § 637(d)(4)(G)(ii), FAR § 5.304(c)(3)(iii).

For solicitations involving bundling that offer a significant opportunity for subcontracting, the Contracting Officer must include proposed small business subcontracting participation in the

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<sup>3</sup> *Id.* at 9.



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subcontracting plan as an evaluation factor. 15 U.S.C. § 637(d)(4)(G)(i), FAR § 15.304(c)(5).

In certain circumstances, teaming is permitted among two or more small firms, who may then submit an offer on a bundled contract without affecting its status as a small business concern. 13 CFR Part 121.103(f)(3).

At least 30 days before release of the solicitation, the agency must notify any affected incumbent small business concerns of the Government's intent to bundle the requirement. Also, the Government should notify any affected incumbent small business concern how to contact the appropriate Small Business representative. FAR § 10.001(c).

The CO shall provide a copy of the proposed acquisition package to the Small Business Administration's Procurement Center Representative (PCR) at least 30 days before issuing the solicitation if the proposed acquisition is for a bundled requirement. FAR § 19.202-1(e)(1). The CO also must provide the PCR the statement described in FAR § 19.202-1(e)(2).

In reviewing the package submitted by the CO pursuant to FAR § 19.202-1(e)(1), the SBA PCR shall recommend any alternate contracting method that the PCR reasonably will increase small business prime contracting opportunities—if the PCR believes the acquisition as proposed makes it unlikely that small business can compete for the prime contract. The PCR must make this recommendation within 15 days after receipt of the CO's acquisition package. FAR § 19.402-1 (c)(2).

If the CO rejects a recommendation of the PCR, written notice shall be furnished to the PCR within 5 working days of the CO's receipt of the recommendation. FAR § 19.505. Note that FAR § 19.505 also sets forth an appeal process which may occur if the CO rejects the PCR's recommendation.

The Small Business Administration has established a web site with a stated purpose of "providing a system to alert the Small Business Administration's Office of Government Contracting of contract bundling practices on the part of federal agencies that preclude a small business from successfully competing for a contract."

<http://www.sba.gov/GC/indexprograms-bundlingreport.html>.

### C. Measurably Substantial Benefits

An Agency may determine that consolidation of requirements is necessary and justified, if the Agency would derive certain measurably substantial benefits from the consolidation, as compared to the benefits it would derive if the requirements were not bundled. 15 U.S.C. § 644(e)(2), and FAR § 7.107(a).

Some of the new rules relating to measurably substantial benefits requirements include:

Agencies are required to perform market research when bundling is anticipated to determine whether bundling is necessary and justified. FAR §§ 7.107(a), and 10.001.

Contracting Officers must justify bundling in acquisition strategies. FAR § 7.107(f).

Measurably substantial benefits referred to in FAR § 7.107 (a) may include individually or in any combination or aggregate: cost savings or price reduction, quality improvements that will save time or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions, and any other benefits. FAR § 7.107 (b)

Reduction of administrative or personnel costs alone is not sufficient justification for bundling unless the cost savings are expected to be at least 10 % of the estimated contract value (including



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options) of the bundled requirements. FAR § 7.107(d).

The FAR establishes in detail the benefit threshold that must be met to show a measurably substantial benefit depending on the dollar value of the contract, and requires Agencies to quantify the identified benefit and explain how their impact would be measurably substantial. FAR § 7.107(b).

A very limited number of Agency officials may justify a consolidated procurement, even if the benefit thresholds are not met, when consolidation is critical to the Agency's mission success and steps have been taken to provide for the maximum practicable participation by small businesses. FAR § 7.107(c).

An Agency must provide certain additional justifications in acquisition strategy documentation whenever the proposed acquisition strategy involves substantial bundling. FAR § 7.107 (e). Substantial bundling is bundling resulting in a contract with an average annual value of \$10 million or more. The additional justifications required are listed in FAR § 7.107(e).

In assessing whether cost savings would be achieved through bundling, the contracting officer must consider the cost that has been charged or, where data is available, could be charged by small business concerns for the same or similar work. FAR § 7.107(g).

The requirements of this section, except for paragraph (e), do not apply if a cost comparison analysis will be performed in accordance with OMB Circular A-76.

FAR § 7.107(h).

### V. GAO DECISIONS ON BUNDLING

The majority of GAO decisions addressing bundling have been decided under CICA.

Relatively few cases apply the new bundling rules under the FAR and SBA. A recent GAO decision *Phoenix Scientific Corporation*, illustrates how a bundling challenge may be made under CICA and the SBA (and the FAR as it implements the SBA).<sup>4</sup>

In *Phoenix*, GAO stated that the SBA "requires that agencies demonstrate 'measurably substantial benefits' in order to justify a bundled procurement. . . . In contrast, CICA permits solicitations to contain restrictive provisions and conditions only to the extent necessary to satisfy the needs of the agency. . . . In interpreting CICA, we have looked to see that an agency has a reasonable basis for its contention that bundling is necessary, and we have sustained protests where no reasonable basis was shown."<sup>5</sup>

In *Phoenix* GAO denied a protest alleging that the Air Force had improperly bundled a solicitation for multiple award task order contracts for unplanned weapons systems' maintenance. Protester sought relief under the SBA as well as under CICA.

GAO indicated that by proceeding under the SBA, the protester thereby contended that the challenged procurement met the SBA definition of bundling. The Agency argued it did not meet the SBA definition; thus, the procurement would not fall under the SBA for purposes of bundling restrictions. GAO ultimately agreed with the Agency and found that the procurement was not a consolidation that would result in a contract unsuitable for award to a small business concern. In making this determination, GAO considered that the Agency had reserved two of six anticipated awards under the solicitation for small businesses, and that the Agency planned for at least 15% of the total value of all task orders to be awarded to small business prime contractors. GAO also considered that the

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<sup>4</sup> See, id.

<sup>5</sup> Id. at 10.



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Agency had received expressions of interest (and resulting offers) from bona fide small businesses.<sup>6</sup>

The Agency also asserted that since it was making multiple awards, the procurement was not a consolidation of contracts into a single contract. The agency argued that, as a result, the requirements were not bundled within the meaning of the SBA. Without reaching a decision on this argument, GAO indicated that it would be unreasonable to exclude multiple-award contracts from the SBA.

Regarding bundling claims asserted under CICA, the Agency attempted, in part, to justify its decision to bundle by showing it derived the measurably substantial benefit required to bundle under the SBA. The Agency contended, in part, that the cost savings exceeded the benefit threshold set forth at FAR § 7.107(b) required to justify bundling. While not disagreeing with the amount of the cost savings, GAO indicated that there was no logical connection between the savings claimed and the decision to bundle. GAO rejected the Agency's assertion that these savings arise from the decision to bundle. The measurably substantial benefit—in this case—could not be used to defend a bundling challenge under CICA.

Fortunately for the Agency, GAO stated that under a CICA analysis, the Agency is "not limited to the cost figures it developed in response to the 'measurably substantial savings' requirement of the"<sup>7</sup> SBA. Certain other benefits the Agency receives from bundling may justify its use. The Agency advanced other reasons for its bundling decision. GAO found that the Agency had a reasonable basis for its bundling decision and that the procurement was not unduly restrictive of competition under CICA.

### VI. RECENT GUIDANCE FROM DOD

The Under Secretary of Defense, Acquisition, Technology and Logistics, E.C. Aldridge, issued a memorandum dated January 17, 2002, addressing small business participation in consolidated contracts. The memorandum expresses a commitment to provide small business concerns with the "maximum practicable opportunity to participate" in contracting. It explains that the FAR implements statutory requirements applicable when a contract consolidation meets the definition of bundling under the FAR. It explains that to bundle a contract, the agency must determine that there are measurably substantial benefits as defined in the FAR. It advises that the agency must "quantify the benefits and explain how they would be measurably substantial. A DoD Benefit Analysis Guidebook has been developed for use in completing the analysis required for each bundled contract."

The memorandum also states that the "sole fact that one solicitation results in award of multiple contracts, especially indefinite-delivery, indefinite-quantity contracts, does not guarantee that the resulting consolidated contracts are not bundled contracts. Each proposed contract award must be evaluated against the FAR criteria for bundled requirements."

Both the memorandum and the DoD Benefit Analysis Guidebook are available by accessing the following web site:

<http://www.acq.osd.mil/sadbu/news/guidebook.htm>

The guidebook provides detailed instructions on bundling requirements under the FAR. As a precaution, note that the DoD Benefit Analysis Guidebook is intended to instruct DoD, and it primarily addresses bundling under the FAR—not under CICA.

<sup>6</sup> See, *id.* for support of the foregoing paragraph.

<sup>7</sup> *Id.* at 12.



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### **VII. PUBLIC MEETING, Competition In Contracting And Contract Bundling, (67 FR 30403, May 6, 2002)**

On June 14, 2002, The Office of Management and Budget will hold a public meeting to review federal agencies' use of competition in their contracting activities in conjunction with an initiative to address contract bundling.

For additional information on the June 14<sup>th</sup> public meeting, please see the Contract Law Division's web site at:

<http://www.contracts.ogc.doc.gov/cld/othernews.html>