



**STATEMENT OF ROBERT A. BURTON**

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**BEFORE THE**

**COMMITTEE ON SMALL BUSINESS**

**SMALL BUSINESS SUBCOMMITTEE ON CONTRACTING AND WORKFORCE**

**UNITED STATES HOUSE OF REPRESENTATIVES**

**OCTOBER 10, 2013**

Chairman Hanna, Ranking Member Meng, and members of the Subcommittee, my name is Robert Burton, and I am a partner at the Venable law firm in Washington, DC, where I have represented government contractors since 2008, including many small businesses. Previously, I served as the Deputy Administrator of the Office of Federal Procurement Policy (“OFPP”). In that capacity, I was responsible for the federal government’s acquisition policy and procurement guidance to all Executive Branch agencies including preparing the Administration’s policy position and testimony on proposed acquisition legislation; working with House and Senate committees on the development of acquisition reform proposals; and serving as a principal spokesperson for government-wide acquisition initiatives. Thank you for the opportunity to testify today to discuss how contract bundling and consolidation remain challenges to small business success.

My testimony will address how since the 1997 amendments to the Small Business Act, Congress has implemented increasingly stringent laws to curb the effects of bundling and consolidation – two procurement strategies that agencies have touted as increasing government savings and administrative efficiency, but at the same time have shifted federal contracting opportunities away from small businesses. Though the laws on their face establish a comprehensive means of protecting small businesses from such adverse effects, several factors have hampered their effectiveness in practice including the lack of reliable data detailing the effects of bundling and consolidation on small businesses’ participation in federal procurements, agencies’ failure to adhere to the regulations, and the lack of an enforcement mechanism to police such failures. But first, I would like to discuss the difference between bundling and consolidation.

### **BUNDLING: A UNIQUE TYPE OF CONSOLIDATED CONTRACT**

The Small Business Act defines bundling as

[C]onsolidating 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 [above] factors....<sup>1</sup>

Simply put, “[b]undling is the Federal government’s practice of consolidating smaller contracts into very large contracts” that often result “in contracts of a size or geographic dispersion that small businesses cannot compete for or obtain.”<sup>2</sup>

Consolidation, on the other hand is the

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<sup>1</sup> 15 U.S.C. § 632(o)(2) (emphasis added).

<sup>2</sup> S. REP. NO. 105-62, at 21 (1997) (hereinafter “1997 Senate Report”).

[U]se of a solicitation to obtain offers for a single contract or a multiple award contract—

- (A) to satisfy 2 or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under 2 or more separate contract lower in cost than the total cost of the contract for which the offers are solicited; or
- (B) to satisfy requirements of the Federal agency for construction projects to be performed at 2 or more discrete sites.<sup>3</sup>

Stated otherwise, consolidated contracts are essentially the same as bundled contracts, except consolidated contracts do not have to be unsuitable for small businesses in order to be considered consolidated. As such, bundled contracts simply are a subset of consolidated contracts.

**IN RESPONSE TO AGENCIES’ INCREASED USE OF BUNDLING AND CONSOLIDATION, CONGRESS HAS PASSED PROGRESSIVELY STRINGENT LAWS TO CURTAIL THE EFFECT OF SUCH CONTRACTING STRATEGIES ON SMALL BUSINESS PARTICIPATION IN FEDERAL PROCUREMENTS.**

For more than twenty years, the Government has used contract bundling as a means to create efficiencies in its acquisition processes and reduce short-term administrative costs.<sup>4</sup> However, for almost just as long, it has been recognized that contract bundling “oftentimes makes it more difficult for small businesses to enter into prime contracts with the Federal government,”<sup>5</sup> and thus, “can result in a monopolistic environment with a few large businesses controlling the market supply.”<sup>6</sup> Indeed, a 1997 House Committee on Small Business Report recognized that a reduction in small business participation in federal procurements was the result of the prevalence of anti-competitive procurement practices, most notably “the practice of contract bundling, which the Office of Federal Procurement Policy freely admits has significantly reduced the procurement opportunities available to small businesses.”<sup>7</sup> For this reason, over the past fifteen or more years, Congress has introduced increasingly stringent rounds of legislation to stem the increase in, and effects of, contract bundling. The following pages discuss how Congress has attempted to temper the effect of agencies’ increased use of bundling and consolidation on small businesses through the 1997 Small Business Acts amendments, the 2002 OFPP Report on Contract Bundling and corresponding FAR and SBAR amendments, the FY2004 National Defense Authorization Act, and the 2010 Small Business Act amendments.

**The 1997 Small Business Act amendments formally defined bundling and imposed justification as well as reporting requirements on procuring activities.**

In 1997, the Committee on Small Business recognized that “[l]egislation adopted in 1990 to address the bundling issue ha[d] not been successful in stemming the increase in contract

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<sup>3</sup> 15 U.S.C. § 657q(a)(2)

<sup>4</sup> See 1997 Senate Report, *supra* note 2 at 21.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.* at 21.

<sup>7</sup> H.R. REP. NO. 105-246, at 33 (1997) (hereinafter “1997 House Report”).

bundling[.]”<sup>8</sup> a procurement strategy, which according to the Committee, resulted in “contracts of a size or geographic dispersion that small businesses cannot compete for or obtain.”<sup>9</sup> Accordingly, the Committee adopted new bundling regulations “designed to help SBA work with Federal agencies to minimize the impact contract bundling is having on small businesses.”<sup>10</sup> In other words, the Committee sought to ensure that agencies did not arbitrarily act in a manner that would shift “Federal contracting out of the reach of many small businesses that ha[d] previously contracted with the government or who wish to bid on Federal contracts.”<sup>11</sup> To this end, under the 1997 amendments, each Federal agency, to the maximum extent practicable, must (1) “structure its contracting requirements to facilitate competition by and among small business concerns, taking all reasonable steps to eliminate obstacles to their participation;” and (2) “avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors.”<sup>12</sup>

Specifically, prior to bundling any contracts, procuring activities must conduct market research to determine whether consolidation of the requirements is necessary and justified.<sup>13</sup> According to the amendments, bundling may be “necessary and justified” where the Federal Government will derive “measurably substantial” benefits, including any combination of benefits that, in combination are measurably substantial.<sup>14</sup> Such benefits may include cost savings, quality improvements, reduction in acquisition cycle times, better terms and conditions, or any other benefits.<sup>15</sup> However, the reduction of administrative or personnel costs alone are not a justification for bundling “unless the cost savings are expected to be substantial in relation to the dollar value of the procurement requirements to be consolidated.”<sup>16</sup> Further, if a proposed procurement strategy involves “substantial bundling”<sup>17</sup> of contract requirements, the procuring agency must (1) identify the benefits anticipated to be derived from the bundling of contract requirements; (2) set forth an assessment of the specific impediments to participation by small businesses concerns as prime contractors that result from the bundling of contract requirements and specify actions designed to maximize small business participation as subcontractors; and (3) include a specific determination that the anticipated benefits of the proposed bundling contract

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<sup>8</sup> 1997 Senate Report, *supra* note 2 at 3.

<sup>9</sup> *Id.* at 21.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.* at 21.

<sup>12</sup> See Small Business Reauthorization Act of 1997, PUB. L. NO. 105-135, § 411, 111 Stat. 2592, 2617 (1997) (codified at 15 U.S.C. § 631(j)).

<sup>13</sup> See *id.* at § 413, 111 Stat. at 2618 (codified at 15 U.S.C. § 644(e)(2)(A)).

<sup>14</sup> See *id.* (codified at 15 U.S.C. § 644(e)(2)(B)).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (codified at 15 U.S.C. § 644(e)(2)(C)). The FAR later clarified that cost savings are measurably substantial if the benefits are equivalent to (1) ten percent of the estimated contract or order value (including options) if the value is \$94 million or less; or (2) five percent of the estimated contract or order value (including options) or \$9.4 million, whichever is greater, if the value exceeds \$94 million. 48 C.F.R. § 7.107(b).

<sup>17</sup> The FAR specifies that substantial bundling is any bundling that results in a contract or order that meets certain dollar thresholds – \$8 million or more for the Department of Defense, \$6 million or more for NASA, GSA and DoE, and \$2.5 million or more for all other agencies. See *id.* at § 7.107(e).

justify its use.<sup>18</sup> Finally, the Federal Procurement Data System (FPDS) must collect data regarding bundling of contract requirements when a contracting officer anticipates the resulting contracting price will exceed \$5,000,000 (including all options).<sup>19</sup>

In sum, the 1997 amendments to the Small Business Act attempted to limit the effect of bundling on small businesses by requiring agencies to (1) conduct market research to determine whether consolidation is necessary and justified where a procurement strategy could lead to a contract containing consolidated procurement requirements, (2) take additional measures to protect small businesses where substantial bundling is involved, and (3) collect data regarding the bundling of contracts in excess of five million dollars.

**The 2002 OMB Report on Contract Bundling delineated nine action items to help agencies eliminate unnecessary contract bundling, which ultimately resulted in amendments to the FAR and SBA Regulations.**

As the number and size of bundled contracts continued to grow in the executive branch,<sup>20</sup> in March 2002, then President Bush unveiled a Small Business Agenda that called for an examination of “the federal government’s contracting policies, to make sure that they encourage competition as opposed to exclude competition.”<sup>21</sup> President Bush also declared that “wherever possible we’re going to insist we break down large federal contracts so that small business owners have got a fair shot at federal contracting.”<sup>22</sup> To this end, President Bush asked the Office of Management and Budget (OMB) Office of Federal Procurement Policy (OFPP) to prepare a strategy for the unbundling federal contracts. The resulting OFPP report, entitled “Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business,” outlined an aggressive strategy for “eliminating unnecessary contract bundling and mitigating the effects of necessary contract bundling.”<sup>23</sup> Specifically, this strategy consists of nine actions that would be taken to ensure maximum compliance with contract bundling laws:

- Ensure accountability of senior agency management for improving contracting opportunities for small business by requiring quarterly reports from January 31, 2003 through October 31, 2003.
- Ensure timely and accurate reporting of contract bundling information through the President’s Management Council.

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<sup>18</sup> *Id.* (codified at 15 U.S.C. § 644(e)(3)).

<sup>19</sup> § 414, 111 Stat. at 2619 (codified at 41 U.S.C. § 405 note).

<sup>20</sup> Indeed, it appears that agencies’ use of bundling at the time had reached a ten-year high – marking a 20% increase in the past decade. See Eileen Brill Wagner, *SBA Advocacy Office Addresses Bundling Issue*, PHX. BUS. J., <http://www.bizjournals.com/phoenix/stories/2002/10/14/smallb5.html> (last visited Oct. 7, 2013).

<sup>21</sup> H.R. REP. NO. 107-432, at 2 (2002).

<sup>22</sup> *Id.*

<sup>23</sup> See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-03-559T, CONCERNS ABOUT THE ADMINISTRATION’S PLAN TO ADDRESS CONTRACT BUNDLING ISSUES – STATEMENT OF DAVID E. COOPER 1, *available at* <http://www.gao.gov/assets/110/109720.pdf> (Mar. 18, 2003).

- Require contract bundling review for task and delivery orders under multiple award contract vehicles.
- Require agency review of proposed acquisitions above specified thresholds for unnecessary and unjustified contract bundling.
- Require identification of alternative acquisition strategies for the proposed bundling of contracts above specified thresholds and written justification when alternatives involving less bundling are not used.
- Mitigate the effects of contract bundling by strengthening compliance with subcontracting plans.
- Mitigate the effects of contracting bundling by facilitating the development of small business teams and joint ventures.
- Identify best practices for maximizing small business opportunities.
- Dedicate agency Offices of Small and Disadvantaged Business Utilization (OSDBUs) to the President's Small Business Agenda.<sup>24</sup>

On October 20, 2003, most of the aforementioned action items were incorporated into the Federal Acquisition Regulation (FAR) and SBA regulations (SBAR).<sup>25</sup> Specifically, the FAR and SBAR incorporated action items three through six while the SBAR also incorporated action item seven.<sup>26</sup> The quarterly reports, required under action item one, no longer are required, but OSDBUs must submit annual bundling justification reports to their agency head and the SBA administrator under action item number nine.<sup>27</sup>

In sum, to more effectively protect small business opportunities from the effects of the increased use of bundling, in 2002, Congress updated the preexisting bundling regulations to (1) expand the definition of bundling to cover federal supply schedules, GWACs and multi-agency contracts; (2) require the SBS to coordinate agency acquisition strategies at specified dollar thresholds and notify the agency Office OSDBU when those strategies include unidentified or unjustified bundling; (3) reduce the threshold and revise the documentation required for "substantial bundling;" (4) require contracting officers to provide bundling justification documentation to the agency OSDBU when substantial bundling is involved; and (5) require agency OSDBUs to conduct annual reviews of agency efforts to maximize small business participation in procurements.<sup>28</sup>

### **The FY2004 National Defense Authorization Act extended bundling regulations to the Department of Defense.**

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<sup>24</sup> OFFICE OF MANAGEMENT AND BUDGET OFFICE OF FEDERAL PROCUREMENT POLICY, CONTRACT BUNDLING: A STRATEGY FOR INCREASING FEDERAL CONTRACTING OPPORTUNITIES FOR SMALL BUSINESS 8-10 (2002), *available at* [http://www.ago.noaa.gov/acquisition/docs/contract\\_bundling.pdf](http://www.ago.noaa.gov/acquisition/docs/contract_bundling.pdf) (hereinafter "2002 OFPP Report").

<sup>25</sup> See 68 Fed. Reg. 60005, 60012 (amending 13 C.F.R. § 125.2, 48 C.F.R. § 7.107).

<sup>26</sup> U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-04-454, IMPACT OF STRATEGY TO MITIGATE EFFECTS OF CONTRACT BUNDLING ON SMALL BUSINESS IS UNCERTAIN, Appendix I, *available at* <http://www.gao.gov/new.items/d04454.pdf> (hereinafter "2004 GAO Report").

<sup>27</sup> *Id.*

<sup>28</sup> 68 Fed. Reg. 60012 (amending 13 C.F.R. § 125.2).

In 2003, Congress passed the FY2004 Defense Authorization Act, which included a provision to update the Defense Federal Acquisition Regulation (DFARS) to align with its FAR and SBAR counterparts. In doing so, Congress “ensure[d] that decisions regarding consolidation of contract requirements [we]re made with a view toward providing small business concerns with appropriate opportunities to participate in DoD procurements as prime contractors and subcontractors.”<sup>29</sup>

**The 2010 amendments to the Small Business Act defined consolidation and imposed reporting requirements for consolidation that are similar to those for bundling.**

Finally, in 2010, Congress amended the Small Business Act by implementing additional bundling accountability measures as well as consolidation contract requirements. With respect to the former, the 2010 amendments require (1) federal agencies to include in each solicitation for any multiple award contract exceeding the simplified acquisition threshold, a provision inviting bids from small businesses and teams or joint ventures comprised of small business concerns; (2) the FAR council to establish a Government-wide policy regarding contract bundling that must be published each federal agency’s website; (3) agencies to post on their websites a list and rationale for any bundled contract for which the agency solicited bids or pursuant to which the agency awarded a contract; and (4) the SBA Administrator to submit to the House and Senate Small Business Committees a report, every three years, regarding procurement center representatives and commercial market representatives.<sup>30</sup>

With respect to consolidation, the 2010 Amendments formally define consolidation and limit its use. Specifically, an agency may not carry out an acquisition strategy that includes a consolidation of contract requirements and exceeds two million dollars unless the agency, before carrying out the acquisition strategy (1) conducts market research; (2) identifies any alternative contracting approaches that would involve a lesser degree of consolidation of contract requirements; (3) makes a written determination that the consolidation of contract requirement is necessary and justified; (4) identifies any negative impact by the acquisition strategy on contracting with small business concerns; and (5) certifies to the head of the Federal agency that steps will be taken to include small business concerns in the acquisitions strategy.<sup>31</sup> Regarding third requirement, consolidation is necessary and justified where the benefits of the acquisition strategy *substantially* exceed the benefits of each of the possible alternatives identified in the second element.<sup>32</sup> The benefits to be considered may include cost, quality, acquisition cycles, terms and conditions, and any other benefit.<sup>33</sup> In this manner, the justification requirements for

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<sup>29</sup> 69 Fed. Reg. 55987 (amending 48 C.F.R. Part 207).

<sup>30</sup> See Small Business Jobs Act of 2010, PUB. L. NO. 111-240, § 1312, 124 Stat. 2504, 2537 (2010) (codified at 15 U.S.C. § 644(q)).

<sup>31</sup> *Id.* at § 1313, 124 Stat. at 2538-39 (codified at 15 U.S.C. § 657q(c)).

<sup>32</sup> *Id.*, 124 Stat. at 2539 (codified at 15 U.S.C. § 657q(c)(2)).

<sup>33</sup> *Id.* (codified at 15 U.S.C. § 657q(c)(3)).

consolidation are akin to those for bundling. However, the rules governing consolidation do not provide a reporting requirement.

In sum, over the past sixteen years, Congress has passed a series of legislation designed to protect small business participation in federal procurements from the increasingly prevalent use of bundled and consolidated contracts. Indeed, among other things, procuring activities must provide a written determination that use of a bundled or consolidated contract is necessary and justified, report the usage of bundled contracts to the SBA, and post justifications for bundled contracts on their respective websites. However, for the reasons discussed below, the implementation of a robust regulatory structure on paper has proven to be difficult, and therefore, less effective in ensuring small business participation in federal procurements in an age of increased consolidated and bundled contracts.

**DESPITE CONGRESS' ROBUST LEGISLATION ATTEMPTING TO CURB THE EFFECTS OF BUNDLING AND CONSOLIDATION ON SMALL BUSINESSES, SEVERAL FACTORS HAVE UNDERMINED THE IMPLEMENTATION, AND THEREFORE, EFFECTIVENESS OF SUCH REGULATIONS.**

On paper, the aforementioned bundling and consolidation regulations discussed above appear to be sufficiently clear and detailed to effectuate their purpose of limiting the effects of bundling and consolidation on the participation of small businesses in federal procurement opportunities. Yet despite these clear and apparent concepts, the reality provides a stark contrast and demonstrates that the implementation of bundling and consolidation regulations has been difficult for at least three reasons: (1) the lack of quality data (which is directly linked to the definition of bundling), (2) the failure of agencies including the SBA to comply with the regulations, and (3) the lack of recourse for aggrieved businesses. Each of the aforementioned issues will be addressed, in turn.

**The lack of quality data with respect to bundled and consolidated contracts has hindered the implementation of bundling and consolidation regulations.**

Accurate data is essential to understanding the effects that bundling and consolidation have had on small business participation in the federal procurement system. Stated otherwise, data essentially proves whether or not the regulations discussed above have limited the effects of bundling and consolidation on small businesses. Unfortunately, it appears that for at least ten years, such data has been unavailable and/or difficult to obtain, or has been inaccurate when obtained. Indeed, a 2004 GAO Report noted that “[i]naccuracies in FPDS data are a long-standing problem, which we have previously reported on . . . .”<sup>34</sup>

With respect to the first issue – the unavailability of data – it appears that agencies simply have failed to report their use of bundled contracts as required under procurement regulations. Indeed, the SBA website that tracks agencies’ bundling reports (which must be filed annually) does not

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<sup>34</sup> 2004 GAO Report, *supra* note 26 at 7.

provide any reports after FY 2010<sup>35</sup> (although possible, it is highly unlikely federal agencies have not bundled any contracts in the last three fiscal years), and agencies have admitted “that they did not always notify SBA of the bundlings.”<sup>36</sup> Further, many agencies’ websites do not maintain a list of bundled procurements as required under the 2010 Small Business Act amendments. And it does not appear that the SBA itself tracks such figures on a consistent basis. Indeed, in 2005 when the Office of Inspector General (OIG) audited SBA’s review of bundled procurements, “SBA’s Office of Government Contracting could not provide a bundling universe.”<sup>37</sup> Thus, in many instances, accurate bundling data from the sources most connected to bundling and consolidation issues – the agencies themselves or the SBA – is unavailable.

When agency reports and SBA data are not available, the only alternative is usage of the data that actually has been reported and/or collected (regardless of whether it is complete).

Unfortunately, it appears that even when agencies have reported bundling data, or the FPDS (now FPDS-NG) has collected such data, the results have been inaccurate or inconsistent because of differing interpretations of the word “bundling” – though such an outcome seems odd given the fact that bundling is clearly defined in the regulations. For example, in September 2000, the SBA through Eagle Eye Publishers drafted a report entitled “The Impact of Bundling on Small Business FY 1992 – FY 1999”. Despite the availability of a statutory definition of bundling, it appears Eagle Eye Publishers used a different definition, which later caused GAO to question “the probative value” of the aforementioned report as well as an earlier Eagle Eye Publisher report that relied on a similar definition.<sup>38</sup> As another example, in a 2004 GAO Report entitled “Contract Management – Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain,” GAO found that much of the FPDS bundling data was more numerous than, as well as inconsistent with, the bundled contracts and actions reported by the agencies to OFPP.<sup>39</sup> GAO subsequently concluded that “the inaccuracies in FPDS were coding errors made as the result of confusion about the statutory definition of contract bundling.”<sup>40</sup>

In the wake of this GAO Report, OMB concurred with GAO’s recommendation that OMB needed to “ensure that FPDS and agency reporting processes provide uniform and reliable contract bundling information.”<sup>41</sup> However, as of the date of my testimony, it still appears that OMB has not corrected this issue as data – and in particular, accurate data – still appears to be

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<sup>35</sup> See Subcommittee on Contracting and the Workforce, Committee on Small Business, Hearing: “Bundling and Consolidation: How Contract Bundling and Consolidation Remain Challenges to Small Business Success” 4 (Oct. 10, 2013) (hereinafter “October 2013 Hearing Memo”).

<sup>36</sup> U.S. SMALL BUSINESS ADMINISTRATION OFFICE OF INSPECTOR GENERAL, No. 5-20, AUDIT OF THE CONTRACT BUNDLING PROCESS 4, available at <http://www.asbl.com/documents/05-20.pdf> (hereinafter “SBA OIG Report”).

<sup>37</sup> *Id.* at 2.

<sup>38</sup> 2002 OFPP Report, *supra* note 24 at 3 n.6.

<sup>39</sup> 2004 GAO Report, *supra* note 26 at 6.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 4.

lacking.<sup>42</sup> As such, the true impact of bundling and consolidation on small businesses still appears to be difficult to obtain.

**Agencies' failure to adhere to bundling and consolidation regulations has stymied the implementation of bundling and consolidation regulations.**

The implementation of bundling and consolidation regulations also has been undermined by agencies' failure to adhere to such regulations. This failure is nowhere more apparent than in the areas of justification and reporting.

*Agencies have not conducted the proper justifications for bundling and consolidation as mandated by regulations.*

As explained above, assuming the requisite monetary thresholds are satisfied, agencies must provide justifications when using bundled or consolidated contracts. Yet, it appears that agencies rarely, if ever, actually document their justifications for using consolidated or bundled contracts despite the fact that such defiance violates the law. For example, in my own experience, I recently had a client who was one of five contractors that provided a specific set of services to an agency. All of these contractors, including my client, were small businesses. Recently, the agency, upon recompetes, transformed what previously had been a multiple award schedule contract into a single award contract. My client and the other incumbents offered what they believed was a fair price for the consolidated contract, but another company underbid all five incumbents including my client, and subsequently, received the single contract award. This consolidated recompetes had a significant impact on the financial health of the five incumbent small businesses including my client. Justification for the consolidated contract was requested, but my understanding is that the agency never drafted a consolidation justification for this procurement.

As another example, some of the recent strategic sourcing initiatives also demonstrate how agencies have failed to provide the requisite justifications for bundled contracts. For example, the Janitorial and Sanitation Supplies (JanSan) RFQ does not represent bundling, but is a consolidated contract. Per the 2010 amendments to the Small Business Act, before GSA carries out the JanSan RFQ, it must conduct market research; identify any alternative contracting approaches that would involve a lesser degree of consolidation of contract requirements; make a written determination that consolidation is necessary and justified; identify any negative impact by the acquisition strategy on contracting with small business concerns; and certify to the head of the Federal agency that steps will be taken to include small business concerns in the acquisition strategy.<sup>43</sup> To date, it does not appear that GSA has provided this required information. Thus, it appears, on the whole, that agencies are not providing the written justifications required for both consolidated and bundled contracts.

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<sup>42</sup> See October 2013 Hearing Memo, *supra* note 35 at 4.

<sup>43</sup> See 15 U.S.C. at § 657q(c).

*Agencies have not reported bundling and consolidated procurements, and the SBA has not consistently reviewed contracts reported as bundled or consolidated in accordance with the requisite regulations.*

Agencies have not only failed to conduct the requisite justifications for their procurements, but also have readily failed to comply with their reporting requirements. In the previous section, I discussed agencies' failure to report their bundled contracts to SBA. However, it also appears SBA has failed with respect to its duty to review contracts that agencies have reported as bundled or consolidated. In 2005, OIG conducted "an audit survey of the contract bundling process to determine whether the [SBA] [wa]s properly receiving and reviewing all bundled contracts."<sup>44</sup> Ultimately, the OIG found "significant problems with the SBA's ability to obtain and track bundlings."<sup>45</sup> More specifically, the OIG found that "SBA was not reviewing the majority of procurements reported by agencies as bundled."<sup>46</sup> Indeed, "[e]ighty seven percent of the reported potential bundlings (with a value of at least \$384 million) [that OIG] identified during the survey were not reviewed by SBA."<sup>47</sup> As such, SBA had not fully complied "with bundling regulations, an agreed upon OMB recommendation, and its own requirements."<sup>48</sup> A more recent GAO report on this same issue has revealed that this problem still persists.<sup>49</sup>

**Agency misconduct cannot be deterred where sufficient means do not exist to address procurement violations.**

Perhaps more bothersome than the agencies' violations of procurement regulations regarding bundling and contracting is the lack of recourse available to aggrieved contractors. It is true that contractors may protest bundled or consolidated solicitations as violations of the Small Business Act or the Competition in Contracting Act ("CICA"). However, such relief is minimal at best for at least three reasons. First, such complaints generally only can be brought before GAO or a respective agency prior to the award of a solicitation as bundling and consolidation should be apparent on the face of the solicitation, and therefore, under bid protest rules, must be filed prior to contract award.<sup>50</sup> In some cases, however, bundling or consolidation may be apparent only after the award of contract, in which case, the contractor could not remedy the harm. For example, an agency could set aside 50% of awards for small businesses under a strategic sourcing initiative. In this manner, bundling seemingly would not be present (as the set aside indicates the contract is not unsuitable for award to a small business concern). But because such contracting vehicles do not guarantee any minimums, it is possible that the small business

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<sup>44</sup> SBA OIG Report, *supra* note 36 at 1.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 4.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-11-549R, IMPROVEMENTS NEEDED TO HELP ENSURE RELIABILITY OF SBA'S PERFORMANCE DATA ON PROCUREMENT CENTER REPRESENTATIVES, *available at* <http://www.gao.gov/assets/100/97553.pdf>.

<sup>50</sup> The SBA OIG also has noted that "[t]here are no regulations that would allow SBA to protest a bundling after the contract is awarded . . ." SBA OIG Report, *supra* note 36 at 6.

awardees never will receive an order under the contract – a situation that seemingly indicates the contract is, in fact, unsuitable for small businesses, and that therefore, bundling has occurred. Only at that point is the aggrieved small business capable of establishing facts evidencing that bundling has occurred. Yet in some instances, GAO may determine a protest filed after orders have been placed is untimely as bundling relates to the terms of the solicitation, and thus, must be filed prior to the award of a contract. In such instances, the small businesses in the aforementioned scenario essentially are without recourse despite the obvious harm experienced.

Second, the ability to protest also provides scant recourse for aggrieved contractors with respect to bundling and consolidation because such types of protests (at least at the GAO level) have been overwhelmingly unsuccessful. Indeed, over the past fifteen or so, GAO has sustained such protests only a handful of times,<sup>51</sup> with the most recent occurring in 2005.

Finally, the availability of pre-award protest provides little relief to aggrieved contractors, particularly small businesses, as the bid protest process is often lengthy and expensive. Simply put, small businesses neither have the time nor the money to challenge whether an agency's solicitation constitutes improper bundling or consolidation.

## CONCLUSION

In an era where there has been pressure on the government to reduce spending, bundling and consolidation have become increasingly attractive contracting vehicles as many equate consolidation or bundling with lower prices. At the same time, it has been recognized that such procurement strategies often make it more difficult for small businesses to contract with the federal government. Consequently, over the past sixteen years, Congress has attempted to shield small businesses from the negative effects of agencies' increased usage of bundling and consolidation. Though the regulations are robust on paper, their implementation has been stymied by various forces including a lack of accurate data, agency compliance and meaningful recourse. In other words, the regulations governing bundling and consolidation simply have no teeth. Accordingly, I would recommend that Congress strongly consider implementing an enforcement mechanism to ensure agency compliance with bundling and consolidation regulations (e.g. centralizing accountability for written justifications and reporting with the senior procurement executive in each agency).<sup>52</sup> I also would recommend that Congress consider establishing an independent third-party forum within the Government where contractors could bring disputes concerning agencies' failures to provide justification for bundled and

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<sup>51</sup> The cases where GAO found in the protester's favor include the following: *Pemco Aeroplex, Inc.*, B-280397, Sept. 25, 1998; *N&N Travel & Tours, Inc.*, *BCM Travel & Tours, Manassas Travel, Inc.*, B-285164.2 *et al.*, Aug. 31, 2000; *Vantax Service Corp.*, B-290415, Aug. 8, 2002; *TRS Research*, B-290644, Sept. 13, 2002; *EDP Enterprises, Inc.*, B-284533.6, May 19, 2003; *Sigmatech, Inc.*, B-296401, Aug. 10, 2005. In contrast, there are more than 15 cases where GAO decided in the Government's favor.

<sup>52</sup> The SBA OIG noted that "there are no negative repercussions, e.g., administrative actions, for procuring officials who do not report potential bundlings." SBA OIG Report, *supra* note 36 at 6.

consolidated contracts. Only then will small businesses be assured their participation in federal procurements is protected despite the growing trend toward consolidated and bundled contracts.

Again, thank you Chairman Hanna, Ranking Member Meng for the opportunity to testify at this important hearing. I will be pleased to answer any questions you or members of the Subcommittee may have.