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BUNGLING BUNDLING: HOW CONTRACT BUNDLING AND CONSOLIDATION REMAIN CHALLENGES TO SMALL BUSINESS SUCCESS

HEARING

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SUBCOMMITTEE ON CONTRACTING AND TECHNOLOGY

OF THE

COMMITTEE ON SMALL BUSINESS
UNITED STATES
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BUNGLING BUNDLING: HOW CONTRACT BUNDLING AND CONSOLIDATION REMAIN CHALLENGES TO SMALL BUSINESS SUCCESS

THURSDAY, OCTOBER 10, 2013

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
SUBCOMMITTEE ON CONTRACTING AND TECHNOLOGY,
Washington, DC.

The Subcommittee met, pursuant to call, at 11:31 a.m., in Room 2360, Rayburn House Office Building, Hon. Richard Hanna [chairman of the Subcommittee] presiding.

Present: Representatives Hanna, Bentivolio, Meng, Chu, and Clarke.

Chairman HANNA. Thank you, everyone, for being here. This morning we are here to talk about contract bundling and what consolidation means for small business, specifically what unjustified consolidation means for small business. In this Subcommittee we look at a lot of different procurement tools and have always been careful to say that no one type of contracting methodology is inherently good or bad. But that it is how government uses a tool that matters. In no case is it truer than in bundling and in consolidation.

In the Small Business Act, Congress tells agencies how to determine whether bundling and consolidation—whether or not they are being appropriately used. The law provides definitions of the methodologies, explains what benefits would justify the use of the strategy, and requires agencies to mitigate justified bundling and consolidation and prohibits unjustified bundling and consolidation.

When bundling and consolidation are justified, they deliver real benefits for the taxpayer. However, unjustified bundling unnecessarily excludes small businesses from competing for Federal contracts, which results in higher prices for taxpayers. Thus, this system only works if agencies correctly identified contracts as bundled and consolidated.

While we don't have all of the data yet, agencies are reporting bundling of 38 contracts, worth $2.8 billion in fiscal year 2013, and consolidating another 98 contracts worth $29 billion. This would mean that about 6 percent of the dollars we spend are bundled or consolidated, and that amounts to 136 of 10 million-plus contracts awarded that were actually bundled.

Unfortunately, we know this number is significantly underreported. For example, during our June hearing on strategic

sourcing we heard that agencies are turning more and more to consolidating and bundling contracts for goods and services normally procured from small businesses. However, the strategic sourcing contracts are not being reported as bundled or consolidated.

Likewise, while agencies did not award all of the top 20 contracts predicted for fiscal year 2013, of those awarded none included a bundling or consolidation. None included a bundling or consolidation justification, even though these contracts were expected to exceed $105 billion.

While it is easy to point out large omissions, it is often the smaller contracts, those in tens or hundreds of millions of dollars that represent the greatest loss of opportunity for small business. I hope to hear from our witnesses today on how large this problem is, what we can do about it, and frankly, at this time to see what consequences we might apply to the agencies and how we can correct this circumstance.

Further, I am concerned other aspects of the law are not being enforced. For example, after a bundling contract is awarded, the government is supposed to report back on the anticipated savings or benefits that justified the bundling and explains what those benefits were. To date, not one, not one such report has been completed.

I am hoping our witnesses today will help us understand the scope of the problem, what we need to do to get reliable data on bundling and consolidation. I am also looking for their ideas to hold agencies accountable for unjustified bundling and consolidation since the current statutory provisions are being observed in the breach. Finally, I am seeking their opinions on other ways we can improve the law to ensure that small businesses have a piece of this pie.

At a time when we are focused on the financial health of the country, I believe that part of the solution is to find ways to improve competition, and thereby reduce prices. Small businesses are a critical part of that solution since their participation in competition creates jobs and encourages innovation. I look forward to your testimony, and thank you all again for being here today.

I turn to my friend, Ms. Meng, Grace Meng, ranking member for her opening comments.

Ms. MENG. Thank you, Mr. Chairman. Thank you to our witnesses for being here today.

Today small businesses are looking for opportunities to expand and to grow stronger. As the catalyst for nearly two-thirds of employment gains, small business expansion is essential for the economy.

One way Congress can increase the job-creating power of small firms is through the Federal procurement marketplace. In fact, during the last decade the government has doubled its contracting efforts to more than $500 billion per year. This makes the U.S. Government one of the largest single buyers of goods and services in the world.

In order to ensure that small firms successfully compete for these Federal contracts, several tools and resources have been put in place. This includes the 23 percent small business procurement

goal, as well as protections that help level the playing field for smaller enterprises.

Programs at the Small Business Administration provide a foundation for many entrepreneurs to enter the Federal marketplace and provide a springboard for growth. Together, these goals, policies, and programs have encouraged agencies to recognize that small businesses can provide high-quality goods and services at a competitive price to the taxpayer.

For many small firms, however, these resources are simply not enough to overcome one of the biggest hurdles they face: contract bundling. Although we must be cognizant of the cost to Federal agencies, we must ensure that bundling does not limit the accessibility of small businesses to Federal contracts, especially while the government is falling short of its 23 percent goal.

Last year, more than $50 billion or 10 percent of total contracting dollars was awarded through bundled or consolidated contracts. As a result of bundling, small businesses missed out on contracting opportunities worth more than $15 billion. By bundling large contracts such as these, the government effectively shuts out many smaller companies from competing for work that they have the skills and the expertise to perform.

Splitting these megacontracts into smaller pieces would enable more small businesses to compete for Federal agency work. By doing so, the government would be able to increase competition, accessing qualified companies and the high-quality service they bring to the table.

At the forefront of this battle are procurement center representatives, small business specialists, and procurement technical assistance centers, whose already depleted ranks have been further reduced by sequestration. Unfortunately, they are fighting an uphill battle. Last year, SBA's CCR challenged just 28 bundled contracts out of more than 17 million contracting actions and only 6 were actually unbundled. This is simply not enough oversight to make a difference. Ensuring that these bundled and consolidated contracts are more thoroughly examined is critical to giving small businesses an equal opportunity in this marketplace.

These challenges, while significant, pale in comparison to the impact that the shutdown is having on small business contractors. With the government typically spending $1.4 billion on contracts per day, the shutdown is causing severe disruption and confusion for small businesses. For many firms it is unclear when they will be paid for their work, which in turn is causing uncertainty for their employees.

In 2012, my district received an average of $117,000 a day, or $2 million a month, in loans from the SBA. These loans are not being processed. As a result, small businesses are left without access to the opportunities and resources they have come to depend on for their livelihood.

Given the shutdown, I am not only looking forward to testimony about contract bundling today, but also concerning the impact that the government's closure is having on our small firms. I am hopeful that we can reopen the government and in the future take steps to reduce the prevalence of bundling across Federal agencies.

With that said, I want to thank all of the witnesses in advance of their testimony again and their input on these important issues. Thank you Mr. Chairman. I yield back.

Chairman HANNA. Thank you.

It is my job to explain the lights. It is a little like your stewardess explaining how the seat belts work. So red is bad, green is good. We are pretty flexible, so we want to hear what have you to say.

In any event, our first witness today is Juanita Beauford, president, Association of Procurement and Technical Assistance Centers, called PTACs, and director of the University of Delaware PTAC program. There are currently 94 PTAC programs across the country operating at 300 locations, and these individuals assist small businesses with Federal contracting as Ms. Beauford is uniquely situated to speak to the experience of small contract bundling and small businesses and consolidation.

Ms. Beauford, thanks for being here, and you may begin.

STATEMENTS OF JUANITA BEAUFORD, PRESIDENT, ASSOCIATION OF PROCUREMENT TECHNICAL ASSISTANCE CENTERS, NEWARK, DE; ROBERT A. BURTON, SENIOR PARTNER, VENABLE LLP, WASHINGTON, DC; GLORIA LARKIN, PRESIDENT, TARGETGOV, BALTIMORE, MD, TESTIFYING ON BEHALF OF WOMEN IMPACTING PUBLIC POLICY; AND MARGOT DORFMAN, CEO, U.S. WOMEN'S CHAMBER OF COMMERCE, WASHINGTON, DC

STATEMENT OF JUANITA BEAUFORD

Ms. BEAUFORD. Thank you, Chairman Hanna, Ranking Member Meng, and distinguished members of the Subcommittee. Thank you for the opportunity to testify here today. I am honored to speak before you on behalf of the Association of Procurement Technical Assistance Centers, APTAC, and the small businesses we serve, and to express our gratitude for your leadership on their behalf. As you said, my name is Juanita Beauford, president of APTAC and the professional organization of now 97 procurement centers nationwide.

Created by Congress in 1985, PTACs assist local businesses at little or no cost by preparing them to become capable government contractors, believing that a broad base of small business suppliers provide the highest quality and best value to our government while creating a strong and vibrant economic base for our communities. Last year we helped over 70,000 small businesses win more than 112,000 government contracts, valued at over $14.1 billion.

We applaud your efforts to reexamine the issue of bundling and consolidation. Many of our members report frustration about dwindling bid opportunities as agencies increasingly rely on large acquisition mechanism such as strategic sourcing, government-wide acquisition contracts, multi-agency contracts, omnibus "single solution" contracts, and multiple year indefinite delivery indefinite quantity contracts, as well as bundling and consolidation.

There is a clear perception that the number of solicitations appropriate for small businesses is shrinking significantly, while small businesses are additionally disadvantaged by the lack of ac-

cess to contracting officers and the trend away from Best Value tradeoffs and towards lowest price technically acceptable.

We cannot quantify the extent to which perceptions are accurate. As you know, the data is incomplete and difficult to find. And we hear little about efforts to challenge or mitigate consolidation practices. Agencies strive to be good stewards over tax dollars, often with underfunded acquisition offices. Streamlined vehicles are attractive because they are easy and promise cost savings.

I suspect there is confusion both about what constitutes bundling and that there are requirements to make solicitations accessible to small businesses. Enforcement of such requirements is simply not happening in many cases. Simplifying definitions could be an important place to start. Having different definitions for bundling and consolidation is itself difficult. Select one term and define it simply; for example, two or more requirements that would reasonably be provided or performed under two or more separate contracts.

To bring this under the umbrella, all vehicles that present barriers to small businesses while making communication about and measurement of the issue easier, then define the criteria under which consolidated contracts may be appropriate or require review or justification. This would make clear the newer mechanisms, such as Strategic Sourcing, GWACs, et cetera, indeed constitute consolidated solicitation, which is the first step in determining their prevalence and impact. Simplifying the reporting process and identifying a better platform for making the information available to TCRs and the public could also be helpful, and we have included an example in our addendum to our written testimony.

Also intended to provide accountability, it appears that requirements are often sidestepped. This information must be tracked and analyzed so that effective strategies for protecting the ability of small businesses to participate in the Federal marketplace can be developed and implemented. But finding realistic enforcement triggers and providing adequate resources to implement them is also critical. The fact that enforcement actions are rare undermines existing regulations.

But the real challenge is to convince government buyers that their interests can be well served by small businesses. To this extent, we encourage the Subcommittee to consider initiatives to educate agency acquisition staff about statutory and regulatory provisions with regards to bundling and consolidation, while emphasizing the importance of a robust base of small business suppliers and the specific benefits small businesses can bring to agency requirements.

Contracting officers may not be aware of these benefits, much less best practices for accessible contract vehicles and small business outreach. There are success stories out here. Highlighting them while training contracting officers on how and why to contract with small businesses could be critical to overcoming the trend towards consolidation. Buying from small businesses must be seen as an appealing option.

To the extent that APTAC or the PTACs can help, please call upon us. PTACs are proud to collaborate with local Federal offices, and APTAC has partnered with agencies for national outreach. We

would gladly work with additional agencies to open more opportunities to small businesses. Thank you.

Chairman HANNA. Thank you.

Our second witness is Robert A. Burton. Mr. Burton is a senior partner in Venable LLP in Washington, D.C., where he is a nationally recognized Federal procurement attorney. Prior to joining Venable, Mr. Burton spent 7 years at the Office of Federal Procurement serving as Deputy Administrator, as well as Acting Administrator for 2 years.

Mr. Burton, thank you for being here.

STATEMENT OF ROBERT A. BURTON

Mr. BURTON. Chairman Hanna, Ranking Member Meng, and members of the Subcommittee, I very much appreciate the opportunity to testify today and discuss how contract bundling and consolidation remain difficult challenges for small businesses and why increased congressional oversight is needed.

Prior to joining the Venable law firm in 2008, I did serve as the Deputy Administrator of the Office of Federal Procurement Policy, oftentimes referred to as OFPP. While serving in this capacity I worked on initiatives to increase contracting opportunities for small businesses and assisted with the development of the 2002 Office of Management and Budget report on contract bundling, which ultimately resulted in amendments to the Federal Acquisition Regulation and the regulations issued by the Small Business Administration.

The bundling report was part of the President's small business agenda and focused on increasing agency reporting on bundled contracts and mitigating the negative effects of justified bundling on small businesses.

The 2002 report also resulted in the regulatory requirement for bundling reviews of task orders under the GSA schedules and other multiple award contract vehicles, which was a significant step forward because the majority of our Federal procurement dollars are actually awarded through task orders under umbrella contracts.

In my testimony today, Mr. Chairman, I would like to focus on three factors that in my view have undermined the effectiveness of the regulations and the laws passed by Congress that were intended to mitigate the effects of contract bundling and contract consolidation. And these three factors are, one, the lack of accurate and reliable data on bundled and consolidated contracts; two, the lack of agency accountability for not following applicable laws and regulations on this subject; and three, the lack of recourse for small businesses harmed by unjustified contract bundling or consolidation.

With respect to the first issue, the unavailability of accurate data, it appears that agencies simply have failed to report their use of bundled requirements as required under the procurement regulations. Indeed, the SBA Web site that tracks agencies' bundling reports which must be filed on an annual basis does not provide any reports for fiscal year 2010. Further, many agency Web sites do not maintain a list of bundled procurements as required under the 2010 Small Business Act amendments.

And finally, by statute, the Federal Procurement Data System, otherwise known as FPDS, must collect data regarding bundling of contract requirements when the contract price exceeds $5 million, including all options. However, the FPDS data is unreliable and incomplete, primarily because of lack of agency reporting and differing agency interpretations and applications of the word bundling.

The second factor is the agency's failure to comply with the bundling and consolidation regulations. This failure is nowhere more apparent than in agencies' failure to prepare the required written justification for both contract bundling and consolidation as mandated by law.

For example, just recently I had a client who was one of five small businesses that provided a specific set of services to a Federal agency. The agency decided to recompete their contract and converted a multiple-award contract into a single-award contract. All five incumbents lost the recompete, which has had a significant negative impact on their financial health.

The agency's justification for the single-award consolidated contract was requested, but my understanding is the agency never prepared a justification analyzing the potential negative impact the consolidation might have on small businesses. In similar consolidation cases that I have personally worked on, the agencies have simply been unable to provide the required written justification for the bundling or consolidated procurement.

Finally, I would like to address the third factor that in my opinion has hindered the implementation of the bundling and consolidation regulations. This is the lack of recourse for small businesses that have been negatively impacted by agency noncompliance with the applicable regulations. In this regard, I recommend that Congress provide for an independent review of agency contract bundling and consolidation actions. This review should be conducted by an independent review board or office within the government which does not have any incentive to justify unsupported agency contract consolidations.

Arguably, the Government Accountability Office, GAO, may be in the best position to provide this type of unbiased and independent review. This administrative review should be separate from the formal bid protest reviews currently conducted by GAO, and should be housed in a different GAO office. At a minimum, third-party independent reviews will highlight the fact that most agencies are not preparing the required justifications for bundled or consolidated procurements. Moreover, this type of review is critical in the face of the growing trend toward consolidation through new government-wide strategic sourcing contracts and related initiatives.

In conclusion, I think it is evident that agency noncompliance with the bundling and consolidation laws and regulations will simply require increased congressional oversight. This is critical to ensure that small business participation in the Federal procurement process is protected and that agencies justify the growing number of contract consolidations.

Mr. Chairman, this concludes my statement, and I will be pleased to answer any questions that you or members of the Subcommittee may have. Thank you.

Chairman HANNA. Thank you, thank you.

Our third witness today is Ms. Gloria Berthold Larkin, testifying on behalf of Women Impacting Public Policy, or WIPP, where she serves as Educational Foundation vice chair. WIPP is a nationally nonpartisan public policy organization advocating on behalf of its coalition of 4.7 million businesswomen. Ms. Larkin is also president of TargetGov, a company that helps small businesses sell to government customers.

Ms. Larkin, thanks for being here and you may begin.

STATEMENT OF GLORIA LARKIN

Ms. LARKIN. Thank you, Chairman Hanna and Ranking Member Meng and distinguished members of the Subcommittee. I appreciate this opportunity to testify this morning. My name is Gloria Larkin, and I am president of TargetGov. And I also serve as the vice chair of the Educational Foundation of Women Impacting Public Policy.

I have been in business since 1997, and my firm helps companies of all types pursue, propose, and win Federal Government contracts. As a result, we do have specific experience in the challenging world of bundled and consolidated contracts.

I am here today representing Women Impacting Public Policy, or WIPP, a national, nonpartisan public policy organization advocating on behalf of its coalition of 4.7 million businesswomen nationwide, including 75 business organizations. WIPP plays a key role in developing women-owned businesses into successful government contractors through our Give Me 5 and ChallengeHER programs.

In our view, bundling and consolidation continues to hamper small business in the Federal marketplace. We believe that contracts that can be serviced by small business should not be subject to any form of consolidation.

It is our recommendation the following actions be taken to minimize unnecessary and unjustified consolidation. First, we would like to improve the collection of statutorily required data on consolidation. Second, complete the related regulatory actions. And three, increase training and outreach to small business vendors.

What are these actual barriers to success? According to WIPP members, these are the key reasons that they are wary of pursuing these large contracts.

First, it is the time and cost required. It is not unusual for large businesses to invest nearly $250,000 in preparation to win these government contracts. The timeline is equally large. Vendors must enter the market 12 to 18 months ahead of time before the contract is actually competed. At that same time, small businesses must choose between going to vendor outreach or industry days or making money on their existing contracts so that they can simply pay their employees.

Second, size and bonding questions are major concerns. As an example, let's take an engineering firm with a size standard of under $14 million in annual revenue. Let's say they are pursuing a consolidated contract worth $100 million as a prime contractor. They are unlikely to win because the Federal Government requires that

they show past performance of a similar size contract. If they could do a $100 million contract, they would not be small business.

Bonding requirements present similar barriers. As these consolidated contracts increase in size, far exceeding the size standard for small business, there is only one real alternative to competition, and that is teaming. But teaming itself is fraught with cost, risk, and dangers to all parties. The costs involved in teaming must be borne directly by the small business, and those costs are not allowable in the contract accounting process.

And third, winning does not mean that you have actually won anything. Should a business or a team be successful and actually win a bundled contract, it is only the first step. No money is actually paid on products or services until each awardee further pursues individual task orders on a competitive basis. Therefore, the winners have simply won the right to compete over and over and over again with other winners.

The growth of consolidated contracts essentially force small businesses to form complicated teaming agreements with a wide variety of partners. All told, these enormous bundled contracts inherently limit small business from competing.

I will wrap up with WIPP's following recommendations to the Committee. Number one, improve the collection and sharing of bundled data. It seems to be a common thread here. To be the honest, I don't think we actually know how much bundling and consolidation is really happening, and that can't be good for anyone.

Let's complete the regulatory process for bundling regulation. We do applaud SBA's recent October 2nd final rule, but my understanding is that it could take years to implement even after FAR Council adoption.

And number three, let's increase education efforts of small business vendors regarding the consolidation and bundling process. More partnerships are needed between agencies and our business community. As new rules and regulations are released, small businesses need to understand the consolidation process, as well as the appeal and protest processes for possibly unjustified or unnecessary consolidation or bundling.

It is our hope that our identification of these barriers and recommendations are helpful to your efforts to assist small businesses to become successful Federal contractors, thereby supporting the economy with the jobs across the Nation that we desperately need right now. Thank you, and I am very happy to answer questions.

Chairman HANNA. Thank you.

I will now yield to Ranking Member Meng to introduce the minority witness.

Ms. MENG. Thank you. It is my pleasure to introduce Ms. Margot Dorfman. Ms. Dorfman is the founder and CEO of the U.S. Women's Chamber of Commerce. The Women's Chamber represents 500,000 members, three-quarters of whom are small business owners and Federal contractors. Through her leadership this organization has championed opportunities to increase women's business, career, and leadership advancement. Additionally, Ms. Dorfman has extensive background in business, including over 10 years in executive positions with General Mills and other Fortune 500 firms.

Welcome, Ms. Dorfman.

STATEMENT OF MARGOT DORFMAN

Ms. DORFMAN. Thank you. And Chairman Hanna, Ranking Member Meng, and members of the Subcommittee, I greatly appreciate being here today, and I am here to testify on behalf of the U.S. Women's Chamber of Commerce and of the millions of women that we represent across the United States, along with our 500,000 members, three-quarters of whom are American small business owners and Federal contractors.

Whenever I am asked to provide testimony on key issues impacting business, I first go directly to our members to receive boots-on-the-ground input. Here is what I heard this week. From Eileen Pannetier, Comprehensive Environmental: The Air Force periodically puts out worldwide environmental contracts encompassing almost all of their environmental work. Given the size of these bundled solicitation they are unattainable for small business.

Jennifer Dickerson of EnRep: The Department of Energy continues to bundle scopes of work stating they do not have the resources to manage smaller contracts and that the risk is too great. If smaller scope of work is not segregated out DOE will continue to receive an F grade from the SBA in meeting their small business goals. There is not accountability by the SBA, the DOE, the primes, and unfortunately, the small business contractors suffer.

Cheryl London with Cherco: Because of bundling we have been precluded from any profitable business that the government has for our type of work. The jobs are contracted out by agency and facility and cover any aspects of construction at those facilities, often for years.

Lynn Sutton of Advantage Building Contractors: The project we choose to pursue is the most important decision we can make for our business. This economy has left few standing. Bundling contracts is an extreme hardship, especially for the construction industry.

And I have another member: Contract bundling is more expensive than direct contracting. Fee, G&A, and engineering hours are added to the prime's contract to, quote/unquote, "manage the sub." The sub was working independently and directly with the government prior to the bundling at a lower total cost.

While this Committee has been active in seeking to eradicate bundling and consolidation of Federal contracts, our members make it clear. The issues of bundling, consolidation, and the ever-popular euphemism strategic sourcing are alive and well in the Federal marketplace due in part to the following.

One, there was a systematic lack of accountability in Federal contracting. Year after year, the Federal Government misses the required 23 percent mark and also the paltry 5 percent goal for women-owned firms and does nothing to end the charade of what acquisitions get counted as eligible for small business target, underfunds the procurement center representatives, and fails to hold senior acquisition and agency leaders accountable for the systemic failures.

Two, congressional leaders fail to understand that bundling and consolidation actually represent decreased competition as many

competitive vendors are left out due to the size and scope of single competition.

Three, now we have legislation and rulemaking that claims to be the solution for ending bundling and consolidation, but when we look at it from our view, these rules simply detail the basis for providing a legal paper trail to justify bundling and consolidation.

And four, posting an agency's intent to bundle or consolidate 30 days ahead of publishing the offer may look like transparency and may make for a nice rebuttal to complaints, but if you are trying to be a small business keeping up with yet another Federal Web site, taking on an agency at the last minute, potentially incurring legal fees and potentially running agency-level relationships—or ruining them—then when agency acquisition leaders have made their strategic plans long, long ago, this is simply just not feasible.

If you truly want to prevent bundling and consolidation, then just say no rather than provide the blueprint for how to justify it. Increase the number of and clout of the procurement center representatives, get more influence at the agency's strategic planning stage, require the SBA to provide annual reporting that goes much further than the woefully inadequate small business goaling reports, and last but certainly not least, stop shutting down the government.

I guarantee you the sudden stops and starts, the lack of certainty in agency funding, and the lack of accountability that follows this sort of mess will absolutely lead acquisition professionals to do whatever they can to just let out contracts as fast as possible to all the big businesses lined up at their doors ready to take our tax dollars as fast as possible.

And while I am on the subject of shutdowns, you need to stop this nonsense. You are killing our businesses. Our members were just getting their feet on the ground, and you pulled the rug out again. My members have started laying off employees already. They have no way to recover the cost of the lost revenues from the shutdown. You are hurting their businesses. You are hurting their families. You are hurting their employees, their employees' families, and you are hurting ultimately their local economies. I ask that you stand down and open the government today. Thank you.

Chairman HANNA. Thank you, and I appreciate your frankness.

Now, we have almost unanimity here, so that is also nice. I am going to give Mr. Bentivolio first crack at this, and you may begin.

Mr. BENTIVOLIO. Thank you very much, Mr. Chairman.

And thank you all for being here today. This is very important, specifically since I went back to my district not long ago and talked to some businessmen who—business folks—who said that the government gave a big contract to an organization and they couldn't bid on that even though they originally were part of the bidding process, but they were shut out. And then they had a product that they could make cheaper, better quality, but they weren't authorized because the general contractor didn't—I guess they didn't meet those qualifications for that general contractor.

And my question is, I guess, does the general contractor get to pick and choose who he wants basically? I mean, we like to think they go to the lowest bidder, but that is not always the case. It would naive to think so, right?

So what I am asking I guess is, the government has protocols for giving minorities preference, veterans preference, those kinds of things, but when it goes to a general contractor are they still obligated or can they follow their own rules, make up their own rules? Anybody?

Ms. DORFMAN. I could speak to our members and their experience in this. Essentially what often happens is the prime contractor has to come up with a subcontracting plan to include the women, minorities, whatever the goals are. Once they go get the contract, they come back, they often take that work in-house and do not use the firms that they had go through a very expensive process of providing them a quote of how much the work would go.

Mr. BENTIVOLIO. Wow, I can see your point. I can see your point. It is pretty unfair.

Mr. Burton, I had a question for you, but I can't remember exactly what it is, but I got the impression, somebody said something about strategic sourcing, and, Mr. Burton, have you noticed anything in the process where a government bureaucrat, for instance, you know, likes to pick and choose winners and losers, or something along those lines? I am trying to think something you said. I made a note here, but I can't remember exactly the rest of the note.

Mr. BURTON. Well, strategic sourcing is clearly a very popular initiative right now, and there is nothing wrong with strategic sourcing. When I was in the government I led an initiative on strategic sourcing back in the 2005 timeframe.

The problem is, I think the government is pressing rather aggressively to do everything in a consolidated fashion. It may have short-term savings, and that is appealing, but I am convinced that strategic sourcing, if it is not done correctly, will actually result in higher prices for the taxpayers in the long run.

For example, there are many vehicles that are being used right now where the small business participation rate will decrease dramatically once the contracts are consolidated. In the long run, I think there will be fewer small business participants and less competition when these contracts are recompeted, say 5 years from now. And I think, as you know, less competition usually results in higher prices.

So I think in the long run, the strategic sourcing effort taken to the degree it is being taken will actually increase costs for the American taxpayers and less opportunities for small businesses.

Mr. BENTIVOLIO. Okay. And I do remember now. You found some abuses in the program. And there are protocols to remedy when somebody hollers foul, there was something you said about a limit on finding justice in the system, I guess.

Mr. BURTON. Well, small businesses really have no recourse. And yes, agencies are simply not following the rules. I was actually, when I moved to the private sector, rather startled by how much noncompliance there is. And when I asked for written justifications from agencies that they need to do by law to support their consolidated procurements, they were unable to provide those justifications. They don't exist. And I think this is rampant throughout all of the agencies. That is disturbing.

Second, small businesses when confronted with that type of situation really have no choice but perhaps to file a pre-award bid protest, which is very expensive, and oftentimes they don't want to do it. They feel like it is going to irritate the agency. They probably, if they irritate the agency, won't get the award in the final analysis. So they don't really want to do a pre-award bid protest.

That leaves them without any recourse. And I do think there needs to be some type of more informal independent review available just to look at whether or not the consolidated procurement is justified and whether or not it has a negative and unjustifiable impact on small businesses.

That review could be limited, fairly narrow in scope, where the GAO bid protests usually get involved in a number of different issues. And quite frankly, the pre-award bid protest usually results in a negative finding for contractors in situations such as this.

Mr. BENTIVOLIO. Thank you very much.

I see my time has expired, Mr. Chairman. Thank you.

Chairman HANNA. Ms. Chu.

Ms. CHU. Thank you, Mr. Chair.

I want to commend all of the panelists because you gave a very clear picture of a system that seems to have broken down.

And, Mr. Burton, I wanted to follow up on some of the things that you said about lack of reliable data and lack of an enforcement mechanism. You said that there was a lack of reliable data on how much bundling and consolidation is going on and that the agencies are not even giving their justification for bundling, and it is hard to even fix the problem when we don't even know how much of it is going on.

So moving forward, how can we incentivize agencies to accurately report the data? Is self-reporting the best way to do it? How can we accurately measure the extent of bundling and consolidation that has occurred in the last 15 years?

Mr. BURTON. I think it is a very difficult challenge. The data in FPDS has always not been terribly accurate. What strikes me on this topic is that there is in many cases no data, and I think as far as data is concerned, this area has some of the worst data of anything in the Federal Procurement Data System. So we are dealing with a very significant problem. FPDS probably will never have 100 percent accurate data, but the problem here is the total disregard for the requirements to report bundling.

And I think, first, we need to have the responsibility and accountability in agencies centralized in one office. I would recommend that be the senior procurement executive. Right now, there are different people in the agencies responsible for bundling versus consolidated procurements. It makes no sense whatsoever.

So I would recommend, A, just one definition. I don't think we need two definitions of bundling and consolidated procurement. And then I think that you need to centralize within the agency somebody to be accountable. And what we did in some instances was actually hold their feet to the fire and have this as an element of their performance appraisal. In some instances that did get attention.

And I think this is serious enough that I would actually be that prescriptive if I were Congress, I would be that prescriptive with

respect to holding accountable officials. First of all, having someone that is a single point of contact, and if it is not the senior procurement executive, it still should be a very high-level official within the government. And then to have that official responsible to report to Congress, to have that official maybe judged by their performance in this area for purposes of their performance appraisal.

I think that is certainly a place to start. I will say that I think this is going to be a very difficult problem to correct, though, no matter what oversight Congress exercises. But the need for oversight I think is very clear.

Ms. CHU. And what is really evident is that there is really no enforcement mechanism whatsoever at this point. That is what I understand, right? And what kind of enforcement mechanism would there be to ensure that agencies comply on this?

Mr. BURTON. You know, one thing I think is a real challenge, and I noticed this when I was in the government. Certain agencies don't necessarily like to say that other agencies are doing a poor job. And I found that true with the Small Business Administration, which is actually, as you know, headed by a political appointee, and the other agencies in the Federal Government are headed by political appointees. And one thing I found that was very difficult was to get agency political appointees to criticize agencies headed by other political appointees.

That is why I am recommending that the review and the identification of problems in this area be housed somewhere else. And I think you need to get it out of SBA in the final analysis, and I think it needs to go, and I can't think of any other organization that is viewed as independent and as objective as GAO. And that is why I think GAO needs to set up a separate office to actually conduct these reviews and in appropriate cases hold the agencies accountable. They do a pretty good job on them.

Ms. CHU. And I was also shocked by the fact that small businesses have so little ability to appeal these actions or to challenge any decision; that they have to demonstrate. It is hard to demonstrate standing or protest in a timely fashion or have a lack of jurisdiction on the part of the protest. Could you expand on that, on how we could fix this?

Mr. BURTON. That is very true. Your points are very well taken. And really the only recourse that is available to a small business would be what is called a pre-award bid protest. But oftentimes in that situation the small business does not have a lot of information necessarily to challenge the agency decision to consolidate the procurement. Some people will tell you, though, well, they do have recourse. They can take it to GAO in a pre-award bid protest. These tend to be very expensive. As I mentioned, small businesses are reluctant that, you know, they are worried that there might be some type of retribution if they did file such a formal procedure, which is very public. And it is very expensive.

And what is really disturbing is that the cases that I am familiar with have resulted in negative decisions for small businesses because an extraordinary amount of discretion is afforded the agencies in making these determinations whether to consolidate or not. And even if the agency can show savings, and they might be able to show savings, I don't think the savings are significant in many

cases, and I think that the interests of small businesses should be paramount and should be actually weighted heavier than any secondary savings that might be realized by the agency.

Ms. CHU. Thank you. I yield back.

Chairman HANNA. Ms. Clarke.

Ms. CLARKE. I thank you, Chairman Hanna and Ranking Member Meng.

And I would like to thank our witnesses today for sharing your expertise and your testimony.

I would like to take a moment to say that I understand the significance and the gravity of this extremely important issue facing our small business community and have myself been very vocal on the need to address the inherent disregard for small business opportunities in bundling, especially on minority and women-owned, veteran-owned small businesses. Given the seriousness of this issue, I truly wish this hearing were occurring under normal circumstances, however, with our Federal contracting and procurement agencies present here today to hear your testimony.

However, the current congressional climate we are confronted with could not be any less ideal, indeed harmful for our small business community and our Nation. With all due respect, Mr. Chairman, we are now in the 10th day of a Republican-forced government shutdown, which has already cost our still recovering economy $1.6 billion to date at a rate of $160 million daily.

In my district alone, the Republican-forced shutdown has cost my small business constituents nearly $800,000 in SBA approved 7(a) loans and 504 real estate and equipment loans. These are loans that are needed to sustain and grow small businesses that are the engines of our local, State, and national economy.

So I find it ironic that we are having a hearing regarding issues in the bundling process when the very Federal Government that is at the heart of this discussion is essentially nonoperational. Bids that have been submitted are not being processed; payments for completed work are not being processed; and smaller contractors who don't have the cushion to survive a prolonged shutdown are laying off workers and dipping into lines of credit just to survive.

So again, while I understand that this is a very important issue, I am having a bit of trouble concentrating on the trees for the forest. So perhaps you are prepared to discuss this today, but I have a question, a very simple one. Given the current environment, it is critical that we hear and understand what you are hearing regarding the impact of this shutdown on your membership and the damage that it is doing to our small business community.

And I thank you, Ms. Dorfman, for including at least your understanding in your comments. But I am open for our other folks who have testified here today to just share with us, because I think it is critical we put this in context.

Ms. LARKIN. May I? Gloria Larkin, representing WIPP. We are in our conference, our annual conference right now, so yesterday we had the advantage of having a room full of businesswomen raise their hands and indicate how many companies had received stop-work orders, putting their staff, their employees out of work.

We are living it right now. I have a client in Tennessee who has an $8 million payment that they are waiting on from the govern-

ment. They have to lay off their staff because they don't have cash flow to run.

So this is hitting us deeper than anyone imagined. My staff, my personal staff in my business, their spouses are employed by the government, and they are wondering if they are going to be able to make house payments now.

Ms. CLARKE. Thank you.

Ms. DORFMAN. If I could just add, I have a member here today who her subcontract was absorbed into the prime because it would, quote/unquote, "be cheaper." And the other issue that really impacts women especially is that we don't have access to capital. We talk about lines of credit, but a lot of my members can't get lines of credit or loans for their business without the husband's signature, and so they don't have that cushion at all. They can't plan.

When you have a shutdown and you need to fill in the gaps, you can't do that if you don't have access to the capital you need. So there is just levels and layers of challenges with this whole shutdown. Thank you.

Ms. BEAUFORD. Juanita Beauford, PTAC of Delaware. And I think that I speak for all the PTACs across the country, but in my State of Delaware we are seeing similar things, termination for convenience. We are seeing delay in contract, no task orders issued on contracts that have been awarded; layoffs of staff people by our small businesses. So I don't think that is much different than any other program or PTAC across the country, and we assume it is going to just get worse as it goes on.

Ms. CLARKE. I thank you. And I yield back.

Chairman HANNA. Thank you.

Ms. Dorfman, you said something I found interesting, and that is that in your written, and in your testimony here today, you mentioned that you thought that the whole idea of bundling was somehow misguided, that it might just be let go away. And if I have that correct, maybe I do not, but I found it interesting, there is almost unanimity in terms of how people feel about the way this is handled. Is it the case that if the rules were actually followed that there are enough rules in place to do what it is we all want to see done? Anybody can answer that. Or is it an enforcement issue?

Ms. DORFMAN. Well, I believe a lot of it is an enforcement issue and there could be improvements upon the language to strengthen the enforcement. What I don't see is a top level-down commitment. Where are the heads of the agencies? Why aren't they saying to their people down below, you must make your small business goals, you must make sure there is due access to small businesses to gather these contracts and perform on them. What people don't really think about is, they are thinking, oh, we are going to save money this way, but the reality is if you cut out competition, you know, fair market trade, then the taxpayer is going to pay more.

Chairman HANNA. Right. And the word was used task orders, by Mr. Burton, I think. Was that you?

Ms. LARKIN. Me.

Chairman HANNA. Oh, thank you. That is just a different word for change order. But it is different for you?

Ms. LARKIN. No.

Ms. BEAUFORD. No.

Chairman HANNA. What we are really describing here is a way for contract officers—this may be overly simplistic—but to make their life easier and actually limit competition by simply giving work to the people that are already in front of them, people that they have experience with, people they know are large enough, therefore providing the least opportunity for problems in terms of the work, or maybe in their workload. Is that somehow fair?

Ms. LARKIN. I would like to answer that. Gloria Larkin. About 10 years ago, we were spending about $220 billion and we had over 100,000 people employed in contracting and acquisition handling that workload. Today we are spending over $500 billion and we have fewer, I believe, than 40,000 people in the contracting and acquisition workforce. It is simple math. They have to have larger contracts managed by fewer people.

It is not a fact that these folks aren't doing their job. It is a fact that they have too much to do with too large of contracts. So one of the solutions to this is to take a look at our professional contracting and acquisition staff—who are not contractors, by the way. We have gone that route and we have contractors making decisions about what other contractors are going to get the contracts. Sounds a little crazy in the government contracting market.

So it is a matter of having enough professional contracting and acquisition staff employed by the government to manage these unbundled contracts.

Chairman HANNA. Mr. Burton, would you like to speak to that? You get the allegation. I don't need to repeat it. And I am sure you are right. I just would like your opinion, Mr. Burton.

Mr. BURTON. Let me address the task order issue because I think this is a very significant issue. Task orders are actual contracts, in effect, that are awarded under an umbrella contract. We see many, many more of these types of multiple award contract vehicles where there is a contract in place and agencies then submit task orders for products or services under those big umbrella contracts. The GSA schedules are the best example of where you have an umbrella contract, and then many task orders are submitted by various agencies under that.

The accountability for task orders is something I am very concerned about. In 2010, Congress did address this issue in amendments to the Small Business Act, and they made it very clear that written determinations for consolidation are required. What is not clear is whether written justifications are required for task orders under that larger contract.

And I think that clarity is very important here, because some agencies I think are playing games with respect to these definitions, contract versus task order, and they are saying, well, we can consolidate task orders underneath the umbrella contracts.

Chairman HANNA. What you are saying is that we are basically hurting ourselves by eliminating competition and in fact even allowing opportunities for corruption, perhaps.

Mr. BURTON. Well, I don't know. But, I mean, I think this is something that can be——

Chairman HANNA. Sure. As an aside, I was in construction for 30 years, did over 3,000 projects, and I have seen this many, many times. So it is a combination of things, then; it is not just under-

staffing. Lack of accountability. The idea that we actually let this happen and there is nobody watching over people in a way that makes them accountable for what are billions of dollars worth of expenditures.

I am going to yield to Ranking Member Meng.

Ms. MENG. This question is for Ms. Beauford, but anyone is welcome to answer.

Your association has staff that works continuously with small businesses trying to enter the Federal marketplace. What is their experience regarding how bundling affects a business' ability to compete for contracts? And if there is a belief that a contract has been improperly bundled, what guidance or advice do you give them?

Ms. BEAUFORD. I will give you an example. Aberdeen Proving Ground consolidated four commands, their IT, which ended up being over $5 billion, something like that. We put a team of six small businesses together to go after the small business suite under that consolidated contract. We spent 18 months. When the contract was finally awarded, it was awarded to the large companies, and as of July they had still not awarded the small business suites.

Now, this has been over 2 years for that. What we found is that as we went further and further in the process, modifications kept coming out on this contract, and it was pushing the small business owner further and further away from competing for it, making it more and more difficult.

So they are very aware of the consolidation. I understand that Ms. Larkin has spoken about teaming. That is not the optimal way we would like to go, but in this environment we try to counsel a business more on teaming because it is better to get a piece of the pie than none at all.

And if I can go back and mention what Mr. Burton said, I also find that as we are having a mass exodus of contracting officers from the Federal Government, we are also having an influx of very, very young people taking their place. And contracting takes sometimes decades to master, so you are going to find an increase in protests because people really don't know what they are doing, and with no recourse, as Mr. Burton said, for the small business. When they do try to complain, you know, it is just a big, if I may say, mess on their part. That is an example of what we have dealt with, with consolidation.

Ms. MENG. A question to Ms. Dorfman. There are various factors that are taken into account when determining when bundling and consolidation are allowed. However, an agency can still bundle or consolidate goods or services if they find that it is necessary and justified. While there are still requirements to procure goods through these methods, have you found that agencies are overusing this tool to circumvent the safeguards that exist to prevent abuses?

Ms. DORFMAN. Absolutely. It appears that it has become quite textbook to go ahead and set it aside for the big firm without consideration for small firms, and so there is definite overusage of that.

Ms. MENG. I yield back.

Chairman HANNA. Mr. Bentivolio.

Mr. BENTIVOLIO. Thank you very much, Mr. Chairman.

You have given me a really good overview of the problem and the situation. I have two questions. Once a contract is bundled, is there any way to unbundle it? No? Ms. Dorfman?

Ms. DORFMAN. The PCRs are supposed to be looking out for those contracts that are coming off that their intention is to bundle and pull them down and pick them apart and set aside parts of that for small businesses. The challenge that there is, there are not enough PCRs for the country, and it is not funded well, so if we don't have the right kind of staffing—I think part of the conversation here has been we need more staff, but we need the funding to go with it. And when you look at the IDIQs, that is part of the issue as well, that there will be some contracts that are set aside and then suddenly there is no funding for that portion of the IDIQ and the small business is out contracts. So I definitely see some issues.

Mr. BENTIVOLIO. Mr. Burton?

Mr. BURTON. Early in the process you can definitely unbundle, and that is the whole idea of having the review and the justification done upfront. And that is the remedy to, if the agency feels there has been unjustified bundling, then it needs to unbundle it and uncouple it before the solicitation actually goes on the street.

Mr. BENTIVOLIO. And you need a mediator, it sounds like, when a small business is unjustly discriminated against in a bidding process, correct?

Mr. BURTON. Well, I think that it would be helpful to have an independent reviewer, and I think you could use that word mediator, somebody outside of the agency process that does not have a vested interest in the procurement process——

Mr. BENTIVOLIO. Do you have any recommendations for who would do that?

Mr. BURTON. Well, I have struggled with that, and the General Accountability Office, the Government Accountability Office is the one that occurs to me probably is best positioned to do that. I am sure there will be some resource issues in that regard that will be raised as an obstacle. But I think a separate office from the bid protest group at GAO. And there are teams within GAO, and I think the acquisition team might be a very good one to actually conduct this type of independent review.

Mr. BENTIVOLIO. Okay. Do you think this committee should pursue legislation on bundling and consolidation, and what should that legislation look like or incorporate?

Mr. BURTON. I think that the answer is yes. I think that legislation is required. One thing I found when I was in the government, it did seem that agencies paid attention to actual statute more so than other memos and regulations even.

So I do think legislation is required. I think the legislation should actually specify the independent review board or office that will conduct reviews of bundling and consolidation. I think that to simplify things there should be just one definition. I would use the word consolidation because I think it is broader than bundled. And I think I would just have one definition.

And actually, you know, the definitions are not that complicated. They are fairly clear. But to simplify things even more, maybe we

should just have one definition, and I think consolidated procurement is what I would go with. Because agencies are trying to argue that this isn't bundling, and so therefore we don't need to have a lot of these protections and justifications and so forth, this is mere contract consolidation, not technically bundling. I think we need to do away with that whole distinction because consolidated procurements alone are hurting small businesses dramatically. It doesn't have to necessarily be a bundled procurement where the agency has to show that it is actually unsuitable work for small businesses. In most instances work is suitable for small businesses.

Mr. BENTIVOLIO. Would you incorporate in that legislation a process where we have that mediator step then in case of a protest?

Mr. BURTON. Yes.

Mr. BENTIVOLIO. Because I am not interested in making the government any bigger and putting watchers over watchers, you know. I am not interested in doing that. It just costs taxpayers money for a job they should be doing anyway, right? They should be objective in the way they pursue, and if it is—well, anyway, would you put that in there?

Mr. BURTON. Yes, sir, I would.

Mr. BENTIVOLIO. Streamlining that process, make it easier for veterans and women and anybody else that wants to protest?

Mr. BURTON. And I would use the word challenge.

Mr. BENTIVOLIO. Challenge.

Mr. BURTON. I don't think I would use the word protest because it immediately brings up the formal process at GAO. I think you want this to be much more simplistic. It is just a challenge with respect to the agency decision to consolidate and reduce opportunities for small businesses. I don't think you have to hire a lot of staff in order to do this simple review, but I do think it needs to be somewhat independent of the actual agency, because my experience is the agency will support the contracting official's decision to consolidate.

Mr. BENTIVOLIO. Great. Thank you very much, sir, and I appreciate your time here today, all of you. Thank you very much.

Mr. BURTON. Thank you.

Chairman HANNA. A couple things. You used the word vested interest, which opens up a whole number of issues in my mind in terms of contracting. And Ms. Larkin, they are understaffed, right?

Ms. LARKIN. Uh-huh.

Chairman HANNA. But yet even though they are understaffed, that doesn't necessarily solve the problem if it is a fundamental problem in terms of how they view their job and perceive the opportunity they have to make their job easier rather than harder, so that I don't think you can lay it all on that. The numbers suggest that it is a policy that is avoided at all costs, that there is no incentive for them to pursue unbundling or simpler, easier, more competitive numbers of contracts, if that were the case. You don't have to agree with me.

What do you mean, Mr. Burton, by vested interest? Because one would assume that somebody awarding a contract would have no vested interest, although I personally think that—I want to hear your version or anyone's version of why the process is naturally

going towards this, something other than just a lack of number of people to do it. Mr. Burton, am I clear in my question?

Mr. BURTON. Yes, sir. I think that the acquisition workforce issue is significant. I do think that that is certainly a major issue here with respect to having fewer contracts to award, having fewer contracts to manage. There is enormous pressure on the acquisition workforce to do things quickly. Strategic sourcing is something that has been embraced by the administration as the number one acquisition reform agenda item, and there is a lot of pressure to produce with respect to strategic sourcing. That equals consolidated procurements.

And all of this combined is giving contracting officers great motivation to justify the consolidation. It is usually done on the basis of cost savings, and in some instances there may even be some short-term cost savings.

What is happening, sir, is that agencies, agency officials within the procurement community do not necessarily want to challenge a contracting officer's determination. They are very deferent to the contracting officer. But in most instances I do not think there is supporting data, I do not think there is actual cost analysis available, and just asking for that information to be produced I think will show the seriousness of this problem.

But you are in an environment right now, for a number of factors, as you point out, separate and apart, just related to the lack of acquisition personnel, but there is a number of factors pressing for consolidation, and that is clearly hurting small businesses. That is why I think Congress will have to be very aggressive on this subject and will have to exercise increased oversight.

Chairman HANNA. Interesting.

Ms. DORFMAN. If I may, I do think there is a challenge with the lack of workforce, especially now where we are losing so many seasoned professionals. But I would like to remind everybody here that an investment in small business, which would mean putting funds into some of these mechanisms to protect small business and ensure small business growth, you know, the SBA, any of the small business, it is an investment. When you grow small business, you are going to grow employment, you are going to grow your tax base, and it just becomes a win-win-win.

So instead of looking at this is going to cost the country, I think this is really key that we invest in small businesses so that we can grow our tax base, we can ensure that we have growth in jobs, and that, I believe, will turn the country around from an economic standpoint just alone.

Chairman HANNA. Sure. So there is a momentum, an inertia involved in this that is moving towards the larger, moving towards less work for the procurement officer for a whole host of reasons that by definition, and we don't have to, I don't think anyone would argue this, but we eliminate or reduce competition just by tasking. You are actually saying that someone gets a project but doesn't have to necessarily have competition, and that is a great benefit to the particular contractor, but everybody else who might do it cheaper, better, faster, or who is smaller, would have that opportunity if we just bundled it.

So in terms of the people it might take or the outside board to look at this, people it might take to do this work that we would all be happier with if it were unbundled, I would suggest that there might be opportunities with the tens or hundreds of billions of dollars we spend that just the increased competition alone may help pay for an enormous portion of that. That is a conjecture, but what do you think of that?

Ms. DORFMAN. I agree.

Ms. LARKIN. Increased competition would be a wonderful thing. In the SeaPort-e contract, which is the Navy contract, largest bundled contract in the history of the United States, $50 billion since its inception in 2004, do you realize that 20 companies have shared $29 billion of that contract? There is no competition there.

Chairman HANNA. I think Juanita mentioned that in her testimony, too, or in her written testimony.

Ms. LARKIN. Thank you.

Chairman HANNA. I could keep you here a lot longer, but, I mean, we have kind of run through this. Since we do have a couple minutes, would anyone like to say anything else that may be a question that I haven't asked or someone else hasn't asked that you find germane and would like to get out there?

Mr. BENTIVOLIO. Mr. Chairman, yeah, may I?

Chairman HANNA. Yes.

Mr. BENTIVOLIO. Ms. Dorfman, you said earlier that enforcement of subcontracting from a general contractor, they had certain protocols that they had to follow, they put a plan in on how they are going to fulfill that contract, right, like an operational plan or a build plan, a business plan, if you will? All right. And they don't follow it. Is there any penalties for that, would you suggest?

Ms. DORFMAN. There is no teeth right now in that, so they can do that.

Mr. BENTIVOLIO. Okay. So Mr. Burton suggested legislation, some things we should put in some legislation. Would you recommend putting some teeth in it to force, what, to force the——

Ms. DORFMAN. To ensure that they are following the subcontracting plan, that when they have engaged with a small business to be part of the contract, and when the contract is awarded that they do use that small business for that contract.

Mr. BENTIVOLIO. Okay. I am on another committee, Oversight and Government Reform, and we are investigating government agencies for some abuses of their power. Now, it really comes down to, though, if a contractor is not fulfilling or following his business plan for that particular contract and the government agency is not enforcing it, don't you think we should have some teeth for that government agency? I mean, it makes sense to me, right? I mean, if they look the other way and choose not to enforce it, which is happening so often in this—well, that has come to light in the last several months—wouldn't you think that, you know, we should have some recourse? Because right now all they do is retire and say, thank you, Fifth Amendment.

Ms. DORFMAN. There definitely has to be a mechanism to ensure that the small businesses are getting their portion of that contract. So I would agree.

Mr. BENTIVOLIO. So you would recommend that we put some teeth into forcing the government agencies to provide proper oversight, which is their responsibility to our taxpayers, correct, as well as the contractor that took that bid?

Ms. DORFMAN. We do need mechanisms in there that would ensure that the agency is doing their due diligence as well as the prime contractor living within the plan, keeping the plan, the contracting plan.

Mr. BENTIVOLIO. But there could be changes and, you know, they may find maybe that subcontractor didn't, you know, isn't going to fulfill, they found out something new, and they have to change it, but there should be some protocol for change, right, correct? I mean, legitimate reasons. They could say, well, in this particular case we can't use this subcontractor, things change.

Ms. DORFMAN. Things may change, but unfortunately this is a systemic issue where it happens frequently where our small businesses, they fulfill a piece of the precontract, the pre-award. I mean, they have to go and put together a proposal for the prime contractor. The prime contractor wins the award and then systematically does not use the small business that took the time and money from, you know, from their pockets. I mean, they are basically robbing the small business because the small business has paid, has invested lots of money in preparing this, and then they get nothing at the end of it.

Mr. BENTIVOLIO. So we need——

Ms. DORFMAN. There needs to be some mechanism in there to ensure that the small business is getting the part of the contract that originally was put there. But so often they just take it in-house.

Mr. BENTIVOLIO. For small business we should write some legislation that opens the door for small business and keeps the door open, right?

Ms. DORFMAN. [Nonverbal response.]

Mr. BENTIVOLIO. Great. Thank you very much. I appreciate your time today.

Ms. BEAUFORD. Can I speak to that for a minute?

Mr. BENTIVOLIO. Sure.

Ms. BEAUFORD. There is some regulations right now for prime contractors to use the subcontractors that are written into their subcontracting plan, and if they don't, they have to give justification as to why they are changing. They can change, but it is already regulations out there supporting that.

What I find is that, even with the PCRs, who should have oversight over these contracts, they have a grieving process with the agency. However, in the final analysis the agency will make the final decision. If we are going to have the PCRs review an agency, we need to give them authority to have final decision on that. But if the contracting officer has the final decision on whether or not this contract is going to go to this company or not, even though I come in as a PCR and tell you that this is really not the way this should go, it doesn't matter. They don't have any authority, the PCRs, over the agency.

Mr. BENTIVOLIO. And improve the challenge process. Thank you.

Chairman HANNA. Thank you, everyone. I want to thank Emily Murphy, our chief counsel. She does a great job.

Chairman HANNA. If there are no further questions for the witnesses, I want to thank you for being here today.

Seventeen years after the committee passed the first law addressing contract bundling it is simply inconceivable that these agencies are not correctly identifying bundling and consolidating. Bundling and consolidation pose threats to competition and the viability of small business, our small business and our industrial base. So we owe it to the taxpayers to make sure that any contract bundling is justified and mitigated. I look forward to working with Chairman Graves and other members of this committee to address these problems that we learned about today.

Thank you very much, everyone, for being here.

I ask unanimous consent that members have 5 legislative days to submit statements and supporting materials for the record. Without objection, so ordered.

This hearing is now adjourned. Thank you.

[Whereupon, at 12:55 p.m., the subcommittee was adjourned.]

APPENDIX

Testimony of

Juanita H. Beauford, President

Association of Procurement Technical

Assistance Centers (APTAC) and

Program Manager of the University of Delaware PTAC

To a Hearing of the U.S. House of Representatives' Small Business Committee's

Subcommittee on Contracting and the Workforce

Chairman Hanna, Ranking Member Meng, and distinguished Members of the Subcommittee, thank you for the opportunity to testify today. I am honored to speak before you on behalf of the Association of Procurement Technical Assistance Centers and the small businesses we serve across the country.

First, I would like to express my gratitude for your leadership and efforts on behalf of small businesses.

My name is Juanita Beauford. I am President of the Association of Procurement Technical Assistance Centers—APTAC—which is the professional organization of the 98 PTACs nationwide. I am also Program Manager of the University of Delaware PTAC. As you may know, the Procurement Technical Assistance Program was created by Congress in 1985 to help small businesses compete for federal, state and local government contracts. It is funded and administered through the Defense Logistics Agency and supported by state or local governments, educational institutions, or non-profits which must provide a non-federal funding match of up to 50%. Our purpose is to assist local small businesses at little or no cost by preparing them to become capable government contractors, on the belief that a broad base of small business suppliers provides the highest quality and best value to our government agencies and at the same time creates a strong and vibrant economic base for our communities. Last year we helped over 70,000 small businesses win more than 112,000 government contracts valued at over $14.1 billion.

We applaud your efforts to re-examine the issue of "bundling" and "consolidation" of federal contract opportunities. Many of our members—procurement counselors across the country—report frustration and concern among their small business clients about dwindling bid opportunities as agencies increasingly rely upon larger acquisition mechanisms such as Strategic Sourcing, Government-wide Acquisition Contracts (GWACs), Multi-Agency Contracts (MACs), Omnibus "Single Solution" contracts, and multiple year Indefinite

Delivery Indefinite Quantity (IDIQ) contracts in addition to more traditional bundling and consolidation. There is a clear perception that—as agencies prioritize strategies to streamline acquisitions and achieve price reductions—the number of solicitations appropriate for small businesses is shrinking significantly, and small businesses are disadvantaged generally by lack of access to contracting officers and a trend away from Best Value trade-offs and toward Lowest Price Technically Acceptable.

We cannot quantify the extent to which these perceptions are accurate or the degree to which change is occurring—either for better or worse. We have anecdotal evidence and the observation of procurement counselors with many years of experience that small businesses are losing opportunities and concerned the environment worsening. But as you know, hard data about bundled or consolidated contracts is incomplete and hard to find. Likewise, we hear little about efforts to challenge or mitigate consolidation practices, despite statutory and regulatory provisions to do so.

It is a difficult problem. Agencies strive to be good stewards of tax dollars, often with understaffed and under-funded acquisition offices. Streamlined acquisition tools are attractive because of their ease of use and promise of cost savings. I suspect that there is confusion about—or even ignorance of—what constitutes bundling or consolidation, not to mention the fact that there are requirements that solicitations be accessible to small business wherever possible. And it is clear that enforcement of such requirements is simply not happening in many cases.

Simplifying the definition could be an important place to start. As new types of contract vehicles evolve, the complexity of the current definitions makes it easier for agencies to find loopholes or work-arounds—or simply believe that these definitions do not apply to their contracting vehicle. Having different definitions for "bundling" and "consolidation" is itself difficult. Whatever utility was once served by the distinction is—I believe—outweighed by the confusion caused. Selecting one team—perhaps "consolidation"—and defining it simply—ie: "2 or more requirements of the federal agency for goods or services that could reasonably be provided to or performed for the federal agency under 2 or more separate contracts" would bring under the umbrella all of the vehicles which present barriers to small business. It would also make communications about—and measurement of—the issue much easier.

From there, criteria under which consolidated contracts may be considered appropriate and/or require review or justification can be determined. Certainly, there are many circumstances in which consolidated procurements may be the best option. But it would at least make clear that newer mechanisms like strategic sourcing. GWACs, MACs, IDIQs, etc. indeed constitute consolidated solicitations, which is the first step in determining the prevalence—and impact—of these practices.

Simplifying the reporting process—and identifying a better platform for making the information available to SBA's Procurement Center Representatives (PCRs) *and the public*—could be helpful as well. We've included just one example of a possible simplified for-

mat as an addendum to our written testimony. While the reporting requirements in the Small Business Act and Jobs Act may have been intended to provide accountability, it appears that they are often side-stepped, perhaps because they are so rigorous. Those "Justification for Fair Opportunity Exception" notices that *are* posted to FedBizOpps are difficult to find. It is critical that there be an ability to track and analyze this information if effective strategies for protecting the ability of small business to participate in the federal marketplace are to be developed and implemented.

Defining realistic enforcement triggers, and providing adequate resources to implement them, is also critical. The current situation in which enforcement actions are rare—and successful actions rarer still—only undermines the current regulations.

At the end of the day, the real answer—and challenge—is to convince government buyers that their interests can be well served by contracting with small business. I don't believe this problem can be solved by case-by-case challenges from PCRs, small businesses or trade associations.

To this end, we encourage the Subcommittee to consider initiatives that could educate agency acquisition staff at all levels about statutory and regulatory provisions with regard to bundling/consolidation, including circumstances in which justification are required and provisions allowing small business set-asides, reserves and other tools that foster small business inclusion. This would also provide an opportunity to emphasize the importance of maintaining a robust base of small business suppliers generally as well as the specific benefits that small business contractors can bring to individual agency requirements. You understand—as we do—that it is false to believe that striving for the lowest possible price or the most streamlined contract vehicle necessarily delivers the best value to the taxpayer. But contracting officers may not be aware of all the benefits that working with small business vendors offers, much less best practices for crafting accessible contract vehicles and reaching out to the small business community. There are success stories out there—buying activities with strong local relationships (or relationships with local PTACs), and agencies like DLA's Land and Maritime which have energetic small business outreach programs. Collecting and highlighting these examples to share government-wide might be helpful. Substantial and widespread training of Contracting Officers on how and why to contract with small businesses could be critical to overcoming the current cultural trend toward consolidation; buying from small businesses must be seen as an easy and appealing option.

To the extent that APTAC or the PTACs can help on any of these fronts, we hope you will call upon us. PTACs around the country are proud to collaborate with local federal offices to sponsor outreach events, identify potential vendors for specific requirements and support small businesses in their efforts to market and bid. APTAC has partnered with DLA Land and Maritime to promote their Training, Knowledge and Opportunity (TKO) events and facilitate and distribute recorded webinars on DIBBS and their First Destination Transportation and Packaging Initiative (FDTPI). We

would gladly work with other agencies to help them open more opportunities to small business.

Thank you again for the opportunity to appear before you today. I hope my testimony has been helpful. I know I speak for all of the PTACs when I say that it is a privilege for us to assist small business in the government marketplace, and we are eager to support this Subcommittee, the full Committee and the agencies in endeavors that will better utilize this invaluable national resource.

Addendum to the Testimony of Juanita Beauford, President

Association of Procurement Technical Assistance Centers

Possible reporting format to facilitate tracking of consolidated contracts:

Require the Contracting Officer (CO) to stipulate up front whether or not his/her requirement constitutes a bundled or consolidated contract, and if so, what is the justification. This could be accomplished via a simple yes/no drop-down field in the system used to submit solicitations to FBO or in another acquisition tracking vehicle if more appropriate. Language with the relevant definition(s) could be included on the form itself as an aid. A second drop-down field with the various categories of justification for bundling could follow immediately thereafter and be required for any "yes" answer to the bundled/consolidated question.

At the very least, such a mechanism would remove the ability for a CO to "duck the question" with regard to consolidation and would improve tracking. Regularly publishing a listing of bundled/consolidated contracts—or ensuring that the reporting vehicle is easily accessible and searchable so that others can publish such a report—will also increase transparency, allowing small business contractors and their supporters to better assess the degree to which they are being excluded from potentially appropriate opportunities.

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STATEMENT OF ROBERT A. BURTON

PARTNER, VENABLE LLP

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....[1]

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."[2]

Consolidation, on the other hand is the

[1] 15 U.S.C. § 632(o)(2) (emphasis added).
[2] 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.[3]

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.[4] 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,"[5] and thus, "can result in a monopolistic environment with a few large businesses controlling the market supply."[6] 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."[7] 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 SBA regulation 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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[3] 15 U.S.C. § 657q(a)(2)
[4] *See* 1997 Senate Report, *supra* note 2 at 21.
[5] *Id.* at 3.
[6] *Id.* at 21.
[7] H.R. REP. NO. 105-246, at 33 (1997) (hereinafter "1997 House Report").

bundling[,]"[8] 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."[9] 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."[10] 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."[11] 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."[12]

Specifically, prior to bundling any contracts, procuring activities must conduct market research to determine whether consolidation of the requirements is necessary and justified.[13] 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.[14] Such benefits may include cost savings, quality improvements, reduction in acquisition cycle times, better terms and conditions, or any other benefits.[15] 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."[16] Further, if a proposed procurement strategy involves "substantial bundling"[17] 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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[8] 1997 Senate Report, *supra* note 2 at 3.
[9] *Id.* at 21.
[10] *Id.* at 3.
[11] *Id.* at 21.
[12] *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)).
[13] *See id. at* § 413, 111 Stat. at 2618 (codified at 15 U.S.C. § 644(e)(2)(A)).
[14] *See id.* (codified at 15 U.S.C. § 644(e)(2)(B)).
[15] *Id.*
[16] *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).
[17] 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.[18] 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).[19]

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,[20] 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."[21] 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."[22] 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."[23] 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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[18] *Id.* (codified at 15 U.S.C. § 644(e)(3)).
[19] § 414, 111 Stat. at 2619 (codified at 41 U.S.C. § 405 note).
[20] 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).
[21] H.R. REP. NO. 107-432, at 2 (2002).
[22] *Id.*
[23] *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.[24]

On October 20, 2003, most of the aforementioned action items were incorporated into the Federal Acquisition Regulation (FAR) and SBA regulations (SBAR).[25] Specifically, the FAR and SBAR incorporated action items three through six while the SBAR also incorporated action item seven.[26] 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.[27]

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 Small Business Specialist to coordinate agency acquisition strategies at specified dollar thresholds and notify the agency 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.[28]

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[24] 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 (hereinafter "2002 OFPP Report").
[25] *See* 68 Fed. Reg. 60005, 60012 (amending 13 C.F.R. § 125.2, 48 C.F.R. § 7.107).
[26] 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").
[27] *Id.*
[28] 68 Fed. Reg. 60012 (amending 13 C.F.R. § 125.2).

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

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."[29]

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.[30]

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 requirements 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.[31] 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.[32] The benefits to be considered may include cost, quality, acquisition cycles,

[29] 69 Fed. Reg. 55987 (amending 48 C.F.R. Part 207).
[30] *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)).
[31] *Id.* at § 1313, 124 Stat. at 2538-39 (codified at 15 U.S.C. § 657q(c)).
[32] *Id.*, 124 Stat. at 2539 (codified at 15 U.S.C. § 657q(c)(2)).

terms and conditions, and any other benefit.[33] In this manner, the justification requirements for 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 . . . ."[34]

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[33] *Id.* (codified at 15 U.S.C. § 657q(c)(3)).
[34] 2004 GAO Report, *supra* note 26 at 7.

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 provide any reports after FY 2010[35] (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."[36] 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."[37] 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.[38] 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.[39] GAO subsequently concluded that "the inaccuracies in FPDS were coding errors made as the result of confusion about the statutory definition of contract bundling."[40]

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."[41] However, as of the date of my testimony, it still appears that

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[35] *See* Subcommittee on Contracting and the Workforce, Committee on Small Business, Hearing: Bungling Bundling: How Contract Bundling and Consolidation Remain Challenges to Small Business Success" 4 (Oct. 10, 2013) (hereinafter "October 2013 Hearing Memo").
[36] 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").
[37] *Id.* at 2.
[38] 2002 OFPP Report, *supra* note 24 at 3 n.6.
[39] 2004 GAO Report, *supra* note 26 at 6.
[40] *Id.*
[41] *Id.* at 4.

OMB has not corrected this issue as data – and in particular, accurate data – still appears to be lacking.[42] 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 recompete, 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 recompete 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.[43] To date, it does not appear that GSA has provided this required information. Thus, it

[42] *See* October 2013 Hearing Memo, *supra* note 35 at 4.
[43] *See* 15 U.S.C. at § 657q(c).

appears, on the whole, that agencies are not providing the written justifications required for both consolidated and bundled contracts.

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 prepare 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."[44] Ultimately, the OIG found "significant problems with the SBA's ability to obtain and track bundlings."[45] More specifically, the OIG found that "SBA was not reviewing the majority of procurements reported by agencies as bundled."[46] 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."[47] As such, SBA had not fully complied "with bundling regulations, an agreed upon OMB recommendation, and its own requirements."[48] A more recent GAO report on this same issue has revealed that this problem still persists.[49]

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.[50] 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

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[44] SBA OIG Report, *supra* note 36 at 1.
[45] *Id.*
[46] *Id.* at 4.
[47] *Id.*
[48] *Id.*
[49] *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.
[50] 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.

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 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 years or so, GAO has sustained such protests only a handful of times,[51] 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. Also agencies should centralize accountability for written justifications and reporting with the senior procurement executive or a similar, high-level agency official.[52] I also

[51] 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.

[52] 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.

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 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 and 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.

Testimony of Gloria Larkin

On behalf of

Women Impacting Public Policy

Submitted to the

House Small Business Committee
Subcommittee on Contracting and Workforce

"Bungling Bundling: How Contract Bundling and Consolidation Remain Challenges to Small Business Success"

October 10, 2013

Bungling Bundling: How Contract Bundling and Consolidation Remain Challenges to Small Businesses Success

Chairman Hanna, Ranking Member Meng, and distinguished Members of the Subcommittee, thank you for the opportunity to testify this morning.

My name is Gloria Larkin and I am President of TargetGov at Marketing Outsource Associates, Inc., and serve as Vice-Chair of the Educational Foundation of Women Impacting Public Policy (WIPP). I have been in business since 1997 and my firm helps companies of all types pursue, propose, and win federal contracts. As a result, we have specific experience in the challenging world of bundled and consolidated contracts.

I am also here today representing Women Impacting Public Policy (WIPP). WIPP is a national nonpartisan public policy organization advocating on behalf of its coalition of 4.7 million business women including 75 business organizations. WIPP plays a key role in developing women-owned businesses into successful federal government contractors through its Give Me 5 and ChallengeHER programs.

In our view, bundling and consolidation continues to hamper small businesses in the federal marketplace. We believe that contracts that can be serviced by small businesses should not be subject to any form of consolidation.[1] It is our recommendation the following actions be taken to minimize unnecessary and unjustified consolidation: 1) improve the collection of statutorily required data from agencies to measure the impact of bundling and consolidation on small businesses; 2) complete the regulatory actions required in the National Defense Authorization Act for FY2013 (P.L. 112–239) and the Small Business Jobs Act of 2010 ("Jobs Act" P.L. 111–240); and 3) increase outreach to small business vendors regarding the consolidation and bundling processes.

As this discussion begins, we value the Congressional direction already given on this issue in the Small Business Act (P.L. 85–536), which notes that the government should:

> Aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, 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...[in order] to maintain and strengthen the overall economy of the Nation.[2]

This is our guiding principle to improve small business access to government contracts. We concur that small businesses play a vital and irreplaceable role in growing and strengthening the national economy and deserve broad access to government contracts.

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[1] For the purposes of this testimony, consolidation and bundling will both be used to refer to the contracting practice of merging smaller contracts into a single larger contract, through *bundling* will be specifically used when considering the practice of consolidation with a finding that the new contract is not longer suitable for small business concerns.

[2] 15 U.S.C. § 631

Changes To Contracting Over the Last Decade

Federal government purchasing has grown significantly over the last decade. According to USAspending.gov, federal spending increased from $220 billion in 2000 to over $500 billion in FY2013. Amid this tremendous rise in spending, agencies are consistently failing to meet the small business contracting goal of 23%. The last time the goal was met was FY2005. On that note, the data for women-owned small businesses are equally disappointing. Despite a new contracting program and the removal of the dollar caps on contracts in that program, as well as WIPP efforts to register more than 20,000 women-owned businesses in the SAM database, FY2012 marked another year in which the government failed to meet the 5% percent goal for purchases from women-owned small businesses—a goal it is yet to meet.

More awarded dollars in federal contracting does not mean more money to small businesses, largely because the number of contracts awarded has been declining since FY2008. Thus the average contract size is increasing—due in some part to policies like contract consolidation and bundling—which limits the number of businesses that can compete. This practice harms small businesses and this trend, while not surprising, is certainly threatening women-owned small businesses, the small business community in general, and their long term prospects in the federal market.

The last decade has not been all bad news. Indeed, there are many areas where contracting opportunities and education have been improved significantly. For example, WIPP applauds the government's success in making positive changes in the market research process. We have seen the Sources Sought Notice and Request for Information (RFI) processes improve and grow in just the last two years, especially since the Office of Management and Budget (OMB) "Myth-busters" memorandums of 2011 and 2012.[3] Sources Sought Notices grew from 50 to 70 in a typical month in 2011 to approximately 1,100 to 1,300 per month in 2013. This increase is indicative of the acquisition community's efforts to perform mandated market research. Similarly, WIPP has stepped up to educate women-owned businesses in the importance of responding to these Notices and RFIs.

Reports on and Examples in Contract Bundling and Consolidation

Congressional Research Service (CRS) reports prepared in the last few years detail consolidation and bundling with regard to fed-

[3] Daniel Gordon, Office of Federal Procurement Policy. "Myth-Busting": Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process." Feb. 2, 2011. http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/Myth-Busting.pdf Lesley Field. Office of Federal Procurement Policy. "Myth-Busting 2": Addressing Misconceptions and Further Improving Communication During the Acquisition Process." May 7, 2012. http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/myth-busing-2-addressing-misconceptions-and-further-improving-communication-during-the-acquisition-process.pdf

eral contracting as well as legislative and regulatory changes to the underlying law. Key points from these reports include:[4]

1. Congress recognizes that bundling and consolidating can limit opportunities for small business to receive prime contracts.

2. To combat this limitation, statutory requirements mandate that agencies must: a) conduct market research to justify possible bundling; b) provide advance note to incumbent small businesses holding contracts that possibly may be bundled; and c) use certain procurement strategies for "substantial bundling."

3. Consolidation has separate but similar requirements also aimed at ensuring all consolidated/bundled contracts are "necessary and justified."

4. Protections exist that, if enforced government-wide, would keep small businesses from losing access to government contracts.

5. Legislative action aimed at improving these protections has existed in recent Congresses with varied levels of success and some regulations from previously enacted legislation are still awaiting promulgation.

Examples of these consolidated contracts (with contract ceiling value) in use today include: Department of the Navy SeaPort-e ($50 billion), Department of Homeland Security FirstSource II ($3.1 billion), NASA SEWP IV ($5.6 billion), and Department of Health and Human Services CIO-SP3 ($20 billion). These multi-billion dollar contracts are either agency-specific or government-wide contracts. Examining the largest, Navy's SeaPort-e contract, shows that small businesses are not getting access to the bulk of the contracts.

Bloomberg Government reports that the Navy's Seaport-e vehicle expects to award $8 billion via task orders in FY2013.[5] SeaPort-e, which provides professional services, is the largest multiple-award contract (MAC) in the federal government, with almost $50 billion in orders since its creation in FY2004.[6] Annually, the contract averages nearly $6 billion, more than any other MAC outside the General Services Administration and Veterans Affairs Federal Supply Schedule. SeaPort-e reflects a larger trend toward consolidation in professional services government-wide.

With nearly 3,000 prime contractors on the contract, with "hunting licenses" to pursue individual task orders, the competition for

[4] See multiple reports by Kate Manuel all filed under CRS Report Number: R41133. These include "Contract "Bundling" Under the Small Business Act: A Legal Overview" and multiple updates of "Contract 'Bundling' Under the Small Business Act: Existing Law and Proposed Amendment."

[5] Brian Friel, Paul Murphy, et al. "8 Billion in 2013 Opportunities On SeaPort-e Multiple Award Contract." Bloomberg Government. Nov. 14, 2013. http://www.bgov.com/news_item/BGflu73ZpTBruuiAEiZ9tQ. NB: All following data on SeaPort-e contract vehicle comes from this report.

[6] Professional Services is the largest category of government spending. Overall, federal agencies spent $77.6 billion on professional services in FY2011, $20 billion more than the next category, research and development, with $57.7 billion. Professional services include financial management services, engineering support, logistics management and office support.

task orders is fierce. But structural problems within the contract make that competition unfair.

SeaPort-e, as a cost-plus-fee contract, caps profit to 8% of the order's value, two percentage points lower than the cap for services contracts set by federal acquisition regulations. Many companies that "win the contract" never bid on task orders because they cannot run and grow a company on such slim margins. Companies who can accept lower margins are taking over more contracts as smaller companies who cannot operate on such margins are leaving. Moreover, the SeaPort-e bid and proposal costs are rising, as task orders grow shorter, forcing them to compete more often. Limited profit margins, increasing competition issues, shorter contract awards, and consolidation are ultimately forcing many small businesses to leave what should be a lucrative market for all businesses.

Furthermore, in FY2012, 90% of small business awards on SeaPort-e came through set-asides—task order competitions limited only to small businesses. Set-asides accounted for 83% of small business wins by value on SeaPort-e from FY2004 through FY2012. Small businesses rarely win full-and-open task order competitions on Seaport-e, even for orders worth less than $1 million. Only 20% of primes won orders, meaning 80% of companies have never actually secured work through SeaPort-e. The top 20 primes alone won over $29 billion of the $50 billion in SeaPort-e orders. The result is big companies getting bigger and small businesses struggling to compete.

Lastly, Navy buyers are mandated to consider using SeaPort-e before creating new contracts for professional services such as engineering and project management support. SeaPort-e is an example of a broader trend to increase the mandatory use of MACs government-wide as part of the "Strategic Sourcing" initiative being advanced by the White House.[7] Increased mandatory MAC usage will force agencies to rely on a small pool of participating contractors, which further limits competition. WIPP opposes the implementation of Strategic Sourcing methods without adequate consideration and protection of small business concerns. We recognize that increased consolidation and bundling of contracts are symptomatic of this Strategic Sourcing initiative.

Burdens on Small Businesses Caused by Contract Bundling and Consolidation

According to WIPP members, the key reasons they are wary of entering the federal market include:

Costs Involved: The costs involved in pursuing a consolidated contract are astronomical. It is not unusual for large businesses to invest $100,000 or even over $250,000 in pursuing these large contracts through the entire proposal pursuit and writing effort. Small businesses invest $20,000, $30,000 or more in valuable, non-billable time to simply write a proposal, not taking into account the

[7] An effort to increase strategic sourcing was highlighted in an OMB memorandum cited below and has been a topic of consideration before in this Committee (June 13, 2013). Jeffrey Zients. Office of Management and Budget. "Improving Acquisition through Strategic Sourcing." Dec. 5, 2012. http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-02_0.pdf

business development and marketing efforts that go into planning, positioning, pursuing, proposing and possibly winning a hunting license.

Time & Effort: In order to be considered as a viable competitor in these large contracts, vendors must enter the market 12 to 18 months before the contract is competed. They must spend time and money marketing their business to the multiple layers of decision-makers. This is difficult because for most small businesses, every person must be billable. Marketing and sales costs, however, cannot be billed and therefore, many times are eliminated from daily activities. Small business must choose between going to vendor outreach days, attending industry days where specific procurements are discussed, and making money on existing contracts.

Size: Seemingly, an engineering firm, with a size standard of $14 million in annual revenue, pursuing a consolidated contract worth $100 million cannot possibly win as a prime contractor. The government is prohibited from taking a risk in awarding contracts and requires that past performance show work on a similar sized contract. An engineering firm, with revenues of $14 million, cannot show proof of performing a $100 million contract. If they could, they would not be small. As these consolidated contracts increase in size, far exceeding the size standard for the small business, the burden to respond and win becomes an exercise in expensive teaming.

Bonding: Two US Army Corps of Engineers consolidated contracts are coming up this year (FY2014), one for $200 million and the other for $300 million. One is set-aside for small business and the other is set-aside for service disabled veteran owned small business. On the surface this is an excellent opportunity—$500 million for small businesses. It seems hard to imagine that a small construction business with a size standards ranging from $7 million to $33.5 million could receive bonding for a contract valued at $200 or $300 million.

Teaming: One viable way a small company can pursue and win these large consolidated contracts is to team with other small and/or large businesses. This is fraught with costs, risks and dangers to all parties. If one business pursues a $200 million dollar contract and each company only has a ten million dollar maximum bonding capacity, at least 20 or more companies would have to team together. These teaming contracts are intricate.[8] The costs involved in teaming are unallowable in the federal cost accounting process and must be borne by the small business directly.

Winners and Task Orders: When a small business is successful and actually wins a bundled contract, it is often only a first step. No money is actually paid for products or services until each awardee further pursues individual task orders on a competitive basis. The winners have simply won the right to limited competi-

[8] At a minimum teaming requires companies to: develop trusting relationships, share delicate financial information, develop legal documentation as to who is responsible for what, who manages the federal reporting and DCAA accounting and compliance requirements, who manages the contract, how each teaming partner gets paid and how/when payments are distributed, what happens in the cases of default or substandard performance and a myriad other contract requirements.

tion in the pool of other winners. As we have seen, in the case of Seaport-e, 80% of companies are yet to be successful in that second effort.

Protests: As is the case with FirstSource II, the bundled/consolidated contract at Homeland Security, 29 small business awardees celebrated the win for this multi-year 3.1 billion dollar contract. However, protests were filed and despite investing all of the effort, time and tens of thousands of dollars in overhead and RFP response costs required to win, most awardees have been stopped dead in their tracks and prohibited from conducting business on this contract because other companies have protested parts of the acquisition process.

These burdens listed above negatively impact small businesses that already work in the federal sector as well as those wishing to enter the marketplace. We appreciate this Committee's efforts to improve the contracting environment through hearings and legislation over the past three years.

Recommendations to the Committee

WIPP offers the Committee these suggestions on removing some of the barriers consolidating contracts have created.

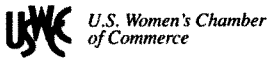
1. Improve the collection of statutorily required data from agencies to measure the impact of bundling and consolidation. Provisions in the Small Business Act as well as additional requirements in the 2010 Jobs Act require agencies and the Small Business Administration (SBA) to record and track consolidation and bundling via a database. At this point, that database does not appear accessible or complete. This data collection is vital, but our attempts at identifying this information through the Federal Procurement Data System (FPDS) have not been successful. Without adequate data from any source, we cannot entirely know how damaging unjustified consolidation is to women-owned small businesses.

2. Complete the regulatory actions required in the National Defense Authorization Act for FY2013 and the Small Business Jobs Act of 2010. These enacted pieces of legislation carry important provisions with regards to consolidation and should be promulgated by SBA and adopted by the Federal Acquisition Regulatory (FAR) Council. Regulations still in need of implementation include additions of bundling justifications to agency websites as well as procedural details on advance notice to small business vendors whose contracts may face consolidation.

3. Increase education efforts of small business vendors regarding the consolidation and bundling processes. As new rules and regulations are released, small businesses need to understand the consolidation process, as well as the appeal and protest processes for possibly unjustified or unnecessary consolidations or bundling.

Thank you to the Subcommittee holding this hearing today and for the efforts to make the contracting environment better for women-owned businesses. It is our hope that our identification of

barriers and recommendations are helpful to your efforts to assist small businesses to become successful federal contractors. I am happy to answer any questions.



Testimony of
Margot Dorfman, CEO
U.S. Women's Chamber of Commerce

Before the House Small Business Committee
for the Hearing
"Bungling Bundling: How Contract Bundling and Consolidation Remain Challenges to Small Business Success"
Thursday, October 10, 2013 at 10:00 a.m.
Rayburn House Office Building, Room 2360

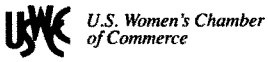
Chairman Hanna and Ranking Member Meng and members of the Committee, I am here today on behalf of the U.S. Women's Chamber of Commerce representing our 500,000 members, three-quarters of whom are American small business owners and federal contractors.

This Committee asks: How is the government complying with current contract bundling laws, the extent to which bundling and consolidation continue to pose challenges to small firms and whether legislation is necessary.

Whenever I am asked to provide testimony on issues impacting small business, I first go directly to my members to receive their, "boots on the ground" input. So, let me begin by providing you with input I received this week from a few members of the U.S. Women's Chamber of Commerce.

Eileen Pannetier, Comprehensive Environmental Inc. an Environmental Consulting and Civil Engineering firm reports: The "Air Force Center for Engineering and Environment" periodically puts out worldwide environmental contracts encompassing almost all of their environmental work. Given the size of these bundled solicitations they are unattainable for small businesses. These solicitations often indicate that they seek small business participation. This is expected to be in the form of small businesses teaming with a large business with the large business serving as prime. This is entirely unrealistic since most large businesses have multiple offices nationwide (often 100+) and Comprehensive Environmental Inc. will on a regular basis compete with these same large businesses on a regional level that we are expected to team with. Additionally, very few solicitations are being set aside for WOSB and EDWOSB businesses. For example: as of 10/8/2013 there were 26,844 solicitations listed on www.FedBizOpps.gov. Of these there were 49 set aside for WOSB and 29 set aside for EDWOSB businesses."

Jennifer Dickerson of EnRep, Inc. reports: "The Department of Energy, Office of Environmental Management continues to bundle scopes of work at radioactive cleanup sites, stating they do not have the resources to manage smaller contracts and that the risk is too great. 38 of EnRep's employees were recently hired by the Prime Contractor



(CHPRC) for the 5-year extension on the Hanford contract in Washington State. An additional 350 subcontractors were hired away from the existing subs (many of them small businesses) because the Prime indicated it would cost DOE less money. If smaller scope of work is not segregated out of these large bundled contracts, DOE will continue to receive an "F" grade from the SBA in meeting their small business goals. There is not accountability by the SBA, the DOE, or the Primes and unfortunately the small business subcontractors suffer."

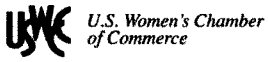
Cheryl London, Cherco Co, Inc. reports: "Because of bundling we have basically been precluded from any profitable business that the government has for our type of work. The jobs are contracted out by agency and facility and cover any aspects of construction at those facilities often for years. They may include different buildings, facilities and scopes. The General Contractor then bids and re bids the jobs again and again until there is no profit left in them. Even though the Contracting Officers and SBA officials are supposed to help small businesses get business, they have not been effective in getting anything unbundled. We keep hearing that this comes from "above". This is killing all small businesses that want to work with the Federal Government."

Lynn Sutton of Advantage Building Contractors references the Department of Air Force, specifically Shaw Air Force Base and reports: "The projects we choose to pursue is the most important decision we can make for our business. We've been fortunate to discover our creative side to gain access to capital, obtain required bonding, and manage cash flow to complete projects. This economy has left few standing. Bundling contracts is an extreme hardship especially for the construction industry. We can't win if we don't play. Smaller contracts are more assessable for small businesses. This allows a better chance to obtain the bonding and meet the past performance requirements. It has become necessary to team with other companies to pursue any contracts. The large contracts that bundling create make the attempt impossible."

Susan Wendt of Wendt Productions, Inc. reports: "Bundling of contracts, making them unattainable by small business. This hurts all certified small businesses. As an example, the last two years, the Department of Energy was rated an "F" with less than 1% contracting to WOSBs due to bundling of contracts, and awards to the same 5 large companies."

I realize that this committee has been active in seeking to eradicate bundling and consolidation of federal contracts, but – as our members make clear – the issues of bundling, consolidation and the ever popular euphemism, "strategic sourcing" are alive and well in the federal marketplace in part, due to the following:

1. There is a systemic lack of accountability in federal contracting. Year after year: the federal government misses the required 23% mark (and has never met the paltry 5% goal for contracting with women-owned small businesses), does nothing to end the charade of what acquisitions get counted as eligible for the small business target, underfunds the Procurement Center Representatives – the



backbone of small business acquisition accountability, and fails to hold senior acquisition and agency leaders accountable for their systemic failures.

2. Congressional leaders, and the American public fail to understand that bundling and consolidation actually represent decreased competition – as many competitive vendors are left out of the competitive process due to the size and scope of a single completion. This results and fewer and fewer large businesses and less and less competitive and active small businesses.
3. Now we have legislation and rulemaking that claims to be the solution for ending bundling and consolidation – but, when looked at from our view, these rules simply detail the basis for providing a legal paper trail to justify bundling and consolidation.
4. The notion of publically posting an agencies intent to bundle or consolidate 30 days ahead of publishing the offer may look like transparency and make for a nice rebuttal to complaints. But, you try being a small business keeping up with yet another federal website, taking on an agency at the last minute, potentially incurring legal fees, and potentially ruining agency-level relationships – when, agency acquisition leaders have made their strategic plans long, long ago.

Want to prevent bundling and consolidation?

1. Just say no – rather than provide the blueprint for how to justify it.
2. Increase the number of and clout of Procurement Center Representatives.
3. Get more influence at the agency strategic planning stage.
4. Require the SBA to provide annual reporting that goes much further than the woefully inadequate small business goaling reports.

And, last – but, certainly not least: Stop shutting down the government. I guarantee you, the sudden stops and starts, the lack of certainty in agency funding and the lack of accountability that follows this sort of mess will absolutely lead acquisition professionals to do whatever they can do just let out contracts as fast as possible to all of the big businesses lined up at their doors ready to take our tax dollars as fast as possible.

Thank you.

Statement Submitted for the Record of

The Associated General Contractors of America

to the

Subcommittee on Contracting and Workforce

Committee on Small Business

U.S. House of Representatives

For a hearing on

"Bungling Bundling: How Contract Bundling and Consolidation Remain Challenges to Small Business Success"

October 10, 2013

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.

The Associated General Contractors of America (AGC) is a membership organization dedicated to furthering the ever-changing agenda of commercial construction contractors, improving job site safety, expanding the use of cutting edge technologies and techniques and strengthening the dialogue between contractors and owners. AGC represents more than 25,000 firms including 6,500 of America's leading general contractors, nearly 8,800 specialty contractors and more than 10,400 service providers and suppliers. AGC members construct commercial and public buildings, airports, shopping centers, factories and industrial plants, schools, dams and flood control facilities, highways, roads and bridges, ports, public transit, underground facilities, water and wastewater treatment facilities, multifamily housing projects, military and defense related facilities, rail and transit facilities, tunnels, housing developments and mining operations.

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Statement for the Record of the
Associated General Contractors of America to the
Subcommittee on Contracting and Workforce
Committee on Small Business
United States House of Representatives
October 10, 2013

On behalf of the Associated General Contractors of America (AGC) and its over 25,000 construction company members,—80 percent of whose membership is small businesses of 20 or fewer employees—thank you for holding this hearing and for the opportunity to submit these comments for the record.

AGC strongly supports full and open competition for the many federal contracts necessary to construct improvements to real property. AGC works to foster a business climate that provides opportunities for all small businesses. To succeed, construction firms must focus on price, quality and reliability. Construction is an intensely competitive industry, and we believe that full and open competition properly penalizes any firm that discriminates based upon impermissible factors. Competition energizes and improves the construction industry, which benefits the economy as a whole. Full and open competition is especially important during these trying economic times.

Despite a recent, modest upturn in construction employment, payroll employment in August 2013 was nearly 2 million, or 25 percent, below the peak in 2006, and unemployment in the sector remains among the highest of all industry sectors. The industry's unemployment rate in August 2013 was 9.1 percent, not seasonally adjusted according to data the Bureau of Labor Statistics released on September 6, 2013. Although demand for private nonresidential and multifamily construction has revived modestly, federal construction spending is down 28 percent since August 2011 according to the U.S. Census Bureau. The outlook for public construction remains grim as agencies at all levels of government continue to cut construction spending.

AGC supports procurement reform to improve delivery of federal construction services. Reform of the federal procurement process should recognize construction's unique blending of diverse industry sectors. It should also recognize the limitations of what the market can provide, as well as consider the cost versus benefit to the public sector and taxpayers. The need for continued federal opportunities for all construction companies, including small businesses, in this difficult economic environment must make sense for the taxpayer as well as within the scope of the construction industry.

Bundling and Multiple Award Contracts in Construction

A major challenge for contractors over the past several years is how federal agencies have addressed the bundling of multiple construction contracts into a single contract. "Bundling" refers to the consolidation of two or more requirements for goods or services previously provided

or preformed under separate smaller contracts into a solicitation for a single contract that is likely to be unsuitable for award to a small business because of its size or scope.[1]

AGC is not opposed to federal agencies use of Multiple Award Task Order Contracts (MATOCs) used by the U.S. Army Corps of Engineers (USACE) or Multiple Award Construction Contracts (MACCs) by the Naval Facilities Engineering Command (NAVFAC) for the procurement of construction services. AGC is, however, concerned that these contracts can limit competition for federal construction projects and are not always structured and administered to make the best use of taxpayers' money.

AGC members have varying views about federal owners' use of these contract vehicles. Generally speaking, members who are a part of a MATOC/MACC prefer it, while members who are not part of these contracts do not. Industry has expressed concerns about the use of in-place MATOC/MACCs as not always being the appropriate contract vehicle for a project as well as the over-use of MATOC/MACCs restricting access to the federal construction market. These types of contracts may not meet the legal definition of "bundling" per se, but they have the practical effect of serving as de facto bundled contracts because these contracting vehicles include more than one "task" that can easily be contracted out under a separately procured solicitation.

Increasing USACE and NAVFAC Use of MATOCs/MACCs

Increasingly, NAVFAC and USACE are awarding ever-larger and more numerous multiple award contracts for public works projects. For example, in April 2013 NAVFAC forecasted more than 55 percent of its remaining FY 2013 military construction projects—37 projects valued at over $525 million—would be procured through MACCs.[2] Previously, in a November 2012 analysis, NAVFAC predicted 49 percent of remaining military construction projects for FY 2013 would be acquired through MACCs.[3] NAVFAC acquisitions—through either stand alone contracts or MACCs—varied by regional commands. For instance, 71 percent of NAVFAC Southwest military construction projects—17 out of 24 projects—were forecast to be procured through MACCs while just 22 percent of NAVFAC Europe/SW Asia military construction projects—5 out of 23 projects—were forecast to be procured through MACCs.

Similarly, USACE forecasted about 36 percent of all of its FY 2012 military construction projects—91 projects valued at over $1.5 billion—would be procured through MATOCs.[4] Again, like NAVFAC, the USACE military construction project acquisition method selected varied by local USACE District offices. For example, the USACE Louisville District was forecasted to undertake 14 projects, none of which were to be procured through MATOCs, but rather through full and open competition. Meanwhile, the USACE Mobile District was forecasted to procure 16 of 19 projects through MATOCs—84 percent of projects solicited through multiple award contracts. Because of the multiple year length of these awards,

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[1] Kate M. Manuel, Contract "Bundling" Under the Small Business Act: Existing Law and Proposed Amendments, Congressional Research Service, June 11, 2012 *citing* 15 U.S.C. §632(o)(2), 48 C.F.R. §2.101, 13 C.F.R. §125.2(d)(l)(i).
[2] See Appendix.
[3] Id.
[4] Id.

contractors who fail to win a MATOC in the Mobile District jurisdiction are essentially shut out from USACE work for years at a time. Such a scenario is particularly difficult for small businesses, which generally work in one region and not nationwide.

These agencies generally cite decreasing procurement resources, i.e., reduced procurement workforce handling greater workloads, budget and funding uncertainty, time constraints associated with full and open competition in the best-value environment and increased pressures from Congress "to do more with less" as reasons for relying on such multiple award contracts. Although AGC and its members understand and are sympathetic to these agency positions, it holds that agency consideration of implementing, competition for and the procurement process under MATOC/MACCs need monitoring and reform to help ensure that taxpayer dollars are spent effectively and efficiently on construction services procurement, while maximizing industry participation opportunities.

Bundling Reforms for Consideration

One of the major reasons bundling on construction contracts has proliferated is that there is currently no provision in federal law that requires construction contracts be reviewed for a bundling determination. Consequently, agencies are able to avoid having to do any sort of economic impact analysis for a contract that would otherwise meet the definition for "bundling" simply by adding a component that small businesses are not performing to the contract. A revision to the definition would clarify that contract bundling rules apply to construction procurements and that these procurements must be reviewed for any impacts on small companies.

The federal government needs to find ways to unbundle extraordinarily large construction projects, so more contractors can compete for these projects. Reducing government contract bundling would increase competition on federal procurements and would enhance benefits to the government and provide added opportunities for small businesses to obtain government construction contracts. AGC is grateful for past legislative efforts undertaken by this committee to address this shortfall.

For further insight, AGC formed a task force of both small businesses and non-small businesses, which produced a report detailing the association's positions and recommendations on agency utilization of MATOCs/MACCs. We have included that document as an appendix to this testimony.

Conclusion

In sum, AGC does NOT support the abolishment of federal agency use of MATOC/MACCs. These contracting vehicles provide agencies with a useful means of construction services procurement and delivery. However, the reasons for using these procurement-contracting vehicles instead of letting individual contracts through full and open competition should be carefully evaluated by agencies and this committee.

By providing oversight and considering suitable reforms that make sense for taxpayers and agencies, this committee can help ensure adequate federal procurement opportunities for small construction businesses throughout the nation. Thank you again for the opportunity to provide the commercial construction industry's viewpoint on this important matter.

APPENDIX

AGC Policy Position on Federal Agency Use of MATOCs & MACCs

March 2013

Executive Summary

AGC is not opposed to federal agencies use of Multiple Award Task Order Contracts (MATOCs) and Multiple Award Construction Contracts (MACCs) for the procurement of construction services. AGC is, however, concerned that these contracts can limit competition for federal construction projects and are not always structured and administered to make the best use of taxpayers' money.

AGC recommends agency oversight along with several reforms and best practices to ensure the most appropriate use of MATOC/MACCs. These suggestions center on ensuring the federal government's efficient use of taxpayer dollars by maximizing competition and by improving and standardizing existing practices.

For more information, please contact Jimmy Christianson, Director of the AGC Federal & Heavy Construction Division at 703-837-5376 or christiansonj@agc.org.

Background

Federal agencies, including the U.S. Army Corps of Engineers and Naval Facilities Engineering Command have increasingly relied upon MATOC/MACCs, respectively, for the procurement of construction services. These agencies generally cite decreasing procurement resources, i.e., reduced procurement workforce handling greater workloads, budget and funding uncertainty, time constraints associated with full and open competition in the best-value environment and increased pressures from Congress "to do more with less" as reasons for relying on such multiple award contracts.

AGC members have varying views about federal owners' use of these contract vehicles. Generally speaking, members who are a part of a MATOC/MACC prefer it, while members who are not part of these contracts do not. Industry has expressed concerns about the use of in-place MATOC/MACCs as not always being the appropriate contract vehicle for a project as well as the over-use of MATOC/MACCs restricting access to the federal construction market.

AGC Policy Position

1. Although AGC and its members understand and are sympathetic to these agency positions, it holds that agency consideration of implementing, competition for and the procurement process under MATOC/MACCs need monitoring and reform to help ensure that taxpayer dollars are spent effectively and efficiently on construction services procurement, while maximizing industry participation opportunities.

2. AGC does NOT support the abolishment of federal agency use of MATOC/MACCs. These contracting vehicles provide agencies with a useful means of construction services procurement and delivery. However, the reasons for using these procurement-contracting vehicles instead of letting individual contracts through full and open competition should be carefully evaluated by agencies.

AGC Positions & Recommendations

A. Consideration of Using MATOC/MACCs versus Full and Open Competition

1. Federal agencies should carefully balance procurement through MATOC/MACCs with procurement through full and open, individual contract competition. AGC holds that agencies should annually determine the appropriate balance of available contracting funds and number of projects of various sizes to be procured through multiple award contracts versus full and open competition. This balance should be achieved in each region or local market served. Through determining this balance, agencies can institute acquisition programs using the various methods of construction services procurement and delivery and more precisely evaluate the value of the given procurement method for different types of construction projects. This will also enable contractors in an existing MATOC/MACC to better plan for the anticipated procurement workload.

2. AGC holds that federal agencies should limit MATOC/MACC contract lifespan to three years. As it stands, these contracts can extend for five years and, in effect, shut out other contractors from agency work for that same period. Five years is a particularly long span for federal construction contractors, especially small business contractors, to conceivably go without having federal work to bid on in their market area. AGC believes a three-year MATOC/MACC period would still allow federal agencies to reap the benefits of using these contracting vehicles while also allowing for increased and more regular competition. The three-year MATOC/MACC lifespan would also allow, in particular, firms in the various small businesses categories opportunity to more regularly compete in, or enter the federal market.

3. AGC contends that federal agencies should allow contractors to both leave and enter MATOC/MACCs at set times, i.e., once a year or once every six months. Contractors note that agencies can and have misused these contracting vehicles by allowing significant "scope creep" in soliciting construction services, which the selected contractors are not necessarily best equipped to handle. In such instances, agencies seek services that they did not delineate in the initial solicitation for the MATOC/MACC. AGC understands that the initial construction forecast may change as a result of a variety of factors, including policy and budgetary issues, project scope changes and so forth. By allowing contractors to leave—without reprisal—and others to enter at specified times, agencies would ensure they have the most qualified contractors to handle the work necessary to successfully and efficiently complete projects in a cost efficient manner. AGC suggests that a short list of alternate contractors be developed in the initial procurement for the MATOC/MACC.

4. AGC recommends that federal owners grant an existing official—i.e., head contracting officer at a division of USACE or a command in NAVFAC —supervisory responsibility and authority within each agencies' regions who could provide

B. Competition for Position on a MATOC/MACC

1. AGC holds that federal agencies must utilize consistent and uniform evaluation standards that are clearly stated in the solicitation to review contractor proposals for multiple award contracts.

2. Federal agencies should confine MATOC/MACCs to smaller, defined geographical regional areas. As it stands, federal agencies may award these contracts for geographical areas covering an entire coast span or the entire world, sometimes based on only one type of facility. Such large geographically covered areas make it difficult for smaller contractors to compete for these multiple award contracts, as most construction businesses are generally limited to certain state and regional boundaries. For instance, small construction businesses have fewer offices and fewer state contracting licenses and credentials than larger businesses have, which may be necessary for agency consideration of winning a MATOC/MACC. The government is also bypassing the benefit of using local contracting knowledge and experience in this approach.

C. Procurement Process in MATOC/MACCs

1. Federal agencies often point to the ability to quickly procure construction services from a small, qualified group of contractors as one of the values of using a MATOC/MACC. Where federal agencies use these contracting vehicles correctly—with a clearly defined scope of proposed projects—a reasonable, limited, smaller number of qualified contactors should be selected. This would enable federal agencies to use MATOC/MACCs correctly to preserve the objective of speedy, but effective and economical, procurement. However, AGC contractors have been party to these multiple award contracting vehicles where the group of contractors included as many as 25 qualified contractors. Twenty-five contractors could respond to every task order, prolonging the procurement process and running counter to agency arguments for their use.

2. AGC firmly believes that federal agencies should remain consistent in soliciting task orders for construction services explicitly detailed in the solicitation for the MATOC/MACC. AGC contractors often find themselves battling a process

commonly referred to as "scope creep." Scope creep refers to an agency's seeking construction services on a particular MATOC/MACC that were not initially included in the solicitation. As a result of scope creep, contractors on the MATOC/MACC, lacking significant expertise in the specified project, are not the best-suited contractors to complete the given project.

3. To further enhance competition and, in turn, provide agencies with the best contract prices, federal agencies should provide public notification of MATOC/MACC task orders for presolicitation and notice of award of all individual task orders. As it stands, federal agencies do not provide easily accessible notice to subcontractors and suppliers about solicited task orders or prime contractor awards. Such readily and easily accessible notice would provide more subcontractors and suppliers with an opportunity to submit bid proposals to prime contractors for work, resulting in greater competition. Federal owners previously instituted this presolicitation model as mandated under the American Recovery and Reinvestment Act of 2009.

4. AGC holds that federal owners should not utilize a MATOC/MACC having a maximum dollar award amount per contractor. Under such a model, one or two contractors bid high until their competition is maxed out, leaving a less competitive field for future orders which may increase the cost to taxpayers. Although this method of contracting is not common, it should not be considered.

5. Contractors in a MATOC/MACC should be considered as prequalified for the work being solicited. To first be awarded a MATOC/MACC, a federal owner requires contractors to compete a full "best-value proposal" that details the contractor's work experience and capabilities, among other things. The owner has this information before individual task orders are awarded. However, individual task order requests often still require a full "best-value proposal" response. The time contractors spend on these detailed proposals, containing similar information to what the owner initially requested at the onset of MATOC/MACC procurement, and the time government acquisition personnel spend further reviewing these details again only serves to increase construction costs to taxpayers. The proposal information required for a task order should be carefully minimized to only what is required for evaluation and award to save both contactors and the taxpayers' time and money. For design-build projects, this should be an abbreviated or simplified two-step task order response.

6. AGC members who specialize in USACE Civil Works projects generally hold that MATOCs are over-used, and often inappropriately utilized, on civil works projects. As previously stated, MATOCs need to be specifically tailored for the type of work expected to be procured. Like all construction services work, each individual civil works project is unique with its own specific set of challenges and required skills; these should be matched in the establishment of the acquisition method and the use of MATOCs. With the wider variety of civil works requirements, a larger number of contractors may be necessary in a Civil Works MATOC.

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October 11, 2013

The Honorable Richard Hanna
Chairman
U.S. House Small Business Subcommittee on
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2361 Rayburn House Office Building
Washington, DC 20515

The Honorable Grace Meng
Ranking Member
U.S. House Small Business Subcommittee on
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2361 Rayburn House Office Building
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Dear Chairman Hanna and Ranking Member Meng:

The National Association of Surety Bond Producers (NASBP) a national trade organization of professional surety bond producers, whose membership includes firms employing licensed surety bond producers placing bid, performance, and payment bonds throughout the United States and its territories. wishes to extend its appreciation to you for conducting a hearing on "How Contract Bundling and Consolidation Remain Challenges to Small Business Success." Our comments pertain to the use of contract bundling for construction procurements. In our opinion increased scrutiny of construction procurements for improper contract bundling will provide greater protection to and resources and opportunities for small construction firms.

Include New Construction in Contract Bundling Scrutiny

The Small Business Reauthorization Act of 1997 defines contract bundling as "consolidating two 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 unlikely to be suitable for award to a small business." In order to justify contract bundling, according to 15 U.S.C. §644(e), federal agencies must demonstrate "measurably substantial benefits," such as cost savings, quality improvements, reduction in acquisition cycle times, or better terms and conditions.

In *Tyler Construction Group v. U.S., 83 Fed. Ct. 94*, a federal contracting agency called into question whether anti-bundling rules apply to procurements for *new construction*. In deciding the case, the U.S. Court of Federal Claims stated, "whether the bundling provisions of 15 U.S.C. §631(j) should or do apply to acquisitions for new construction is a question we leave to Congress."

Clearly, the U.S. Court of Federal Claims opinion sends a message that, without legislative intervention, contracting agencies need not place procurements of new

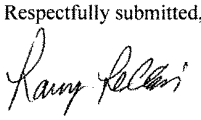
construction on the same footing for scrutiny of improper contract bundling as for other procurements. In "Bundling and Consolidation: Making Sense of It All," an article published in the October 2010 issue of the *Army Lawyer*, the author writes: "[i]n some cases, agencies may find it less problematic to simply state that the requirements being considered for consolidation are new and, therefore, fall outside the scope of either the SBRA Bundling or Section 801 Consolidation provisions." Thus, in the current procurement environment, contracting agencies may seek to lessen contract bundling scrutiny simply by casting a procurement bundling small contracts as one for new construction. Use of such tactics would impede or foreclose small business participation at the prime contract level and, ultimately, lessen competition on federal construction projects.

Legislative Solution

NASBP urges that Congress address this question of the applicability of anti-bundling rules to more construction procurements by introducing legislation that would amend the statutory definition of contract bundling to specifically include procurements *for new construction*, so that small construction businesses can more fully participate as prime contractors on federal construction projects. By undertaking this action, Congress would facilitate greater participation of small construction contractors at the prime level in the federal procurement arena; increase the likelihood that contracting agencies will meet or exceed their small business participation goals; and increase competition for federal procurements, thereby providing pricing benefits to the federal government. In short, small construction firms would be given more opportunities to compete for award of contracts which will be within their reach and resources and within their financial capabilities and surety credit.

NASBP appreciates the opportunity to provide comments to the Subcommittee on Contracting and Workforce and to raise awareness about important issues confronting small construction businesses wishing to perform or performing federal contracts or supplying labor and materials on such projects. NASBP hopes its comments proves beneficial and welcomes any inquiries from the Subcommittee on the matters raised in this letter or on other matters pertinent to small businesses and surety bonding.

Respectfully submitted,



Lawrence E. LeClair, Director, Government Relations

cc Mark McCallum, CEO, NASBP

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