



IMPROPER CONTRACT BUNDLING HAMPERS GROWTH AND VIABILITY OF SMALL CONSTRUCTION FIRMS

By Lawrence LeClair

Small construction firms face many challenges when attempting to expand their businesses. These challenges may include the ability to secure work, maintain an adequately skilled workforce, or obtain the appropriate lines of credit. Even if contractors meet all of these challenges and have the capacity to compete for a federal contract, their greatest obstacle may be the increasing practice by federal contracting agencies of bundling contracts together. This practice, known as contract bundling, is defined 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 concern.”¹

Particularly in view of congressional proposals to make a substantial investment in the nation’s infrastructure, immediate reforms are needed in the federal procurement environment to curb improper contract bundling, so small construction firms can participate as prime contractors on many federal construction projects. Improper contract bundling may engender a number of deleterious impacts to construction firms and to the government, including the following:

- Bundled contracts may place many projects out of the reach of the capabilities of small construction firms.
- Bundled contracts may be of such magnitude that only the largest contractors can compete and the contract amount is so large that the contract may be partially left unbonded, depriving the government, and subcontractors, and suppliers with performance and payment guarantees covering 100 percent of the project.
- Contract bundling may reduce or eliminate bidder interest and the level of competition for the procurement.
- Contract bundling may reduce or eliminate the federal government’s pricing benefits due to limited competition.

THE SMALL BUSINESS ACT OF 1997 AND FACTORS THAT LED TO CONTRACT BUNDLING

To justify contract bundling, federal government agencies must demonstrate “measurably substantial” benefits, such as cost savings, quality improvements, reduction in acquisition cycle times, or better terms and conditions.² The Small Business Act of 1997 requires each federal department and agency to do the following:

- Structure contracting requirements to facilitate competition by and among small business concerns, taking all reasonable steps to eliminate obstacles to their participation
- Avoid unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors

Even though contracting agencies are required to conduct a thorough analysis before consolidating contracts, several factors have driven acquisition managers to bundle federal construction contracts at the expense of small contractor participation. Most noticeably, during the course of this decade, the overall federal acquisition workforce has experienced unprecedented attrition and has not kept pace with the procurement needs of the country. In fact, according to a May 12, 2008, article appearing in the *Federal Times*, the government’s contracting workforce is in turmoil. About one in eight people changed jobs, changed agencies, retired, or left the government last year, and approximately one-third of those left the government before they were eligible to retire.

Furthermore, the most current data from The Office of Personnel Management (OPM) revealed that the number of procurement professionals in government rose less than 1 percent in fiscal 2006, to 59,997 from 59,477 in fiscal 2005.³ According to the data, one federal acquisition professional in eight already is eligible to retire, and that will rise to more than half the workforce by 2016. Without a sufficient federal acquisition workforce, contracting agencies cannot achieve their procurement missions adequately. Rather, they are incentivized to cut corners on their analyses and consolidate construction contracts, so contracting officers can simply get projects “off their desks.”

CURBING IMPROPER CONTRACT BUNDLING

Recently, the U.S. Army Corps of Engineers called into question whether antibundling rules even apply to construction procurements. In *Tyler Construction Group v. United States*, 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.”

The Tyler case clearly suggests congressional action is needed. In fact, legislative fixes have been proposed before. During the 110th Congress, the House of Representatives approved H.R. 1873, the “Small Business Fairness in Contracting Act.” This

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bill would have amended the definition of contract bundling to specifically include procurements for construction, so that small construction businesses can more fully participate as prime contractors on federal construction projects. While H.R. 1873 passed the House, it was not acted on in the Senate. Similar legislation needs introduction in the 111th Congress.

Congress can do more to solve this problem. Congress must recognize the profound impact contract bundling is having on competition on federal construction projects, inhibiting the ability of smaller construction firms to obtain contract awards as prime contractors. The following actions are among those Congress might consider:

- Providing the U.S. Small Business Agency (SBA) with greater regulatory authority to enforce antibundling rules and scrutinize contracting agencies that are consolidating contracts
- Providing the SBA with the resources it needs to train its workforce devoted to this effort
- Funding the recruitment, retention, and training of federal contracting officers for key contracting agencies

The 111th Congress passed a stimulus package to boost the economy, including funding dedicated to improve the nation's aging infrastructure. These needed and overdue construction projects will benefit taxpayers' quality of life, create good-paying jobs, and grow the nation's economy. This opportunity, however, should not be undertaken without due regard for the interests of the small construction firm community, which should have the expectation and the right to compete for federal construction contracts as prime contractors. By curbing the improper bundling of federal construction contracts, small construction firms will be given a fair opportunity to compete for these critical projects. One way to ensure that this is possible is to augment the federal acquisition workforce. ♦

¹ The statutory definition of bundled contracts Small Business Act (15 U.S.C. § 632(o)).

² The statutory requirements to determine if bundling contracts are necessary. Refer to Section 15(e) of the Small Business Act (15 U.S.C. § 644(e)). Also see FAR 7.107 (b).

³ J. Mandel (2007, June 4). "Size of the Contracting Workforce Holds Steady." Retrieved December 12, 2008, from www.govexec.com/story_page.cfm?articleid=37104&ref=rellink.

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