

Bundling and Consolidation: Making Sense of It All

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I. Introduction

Bundling and consolidating requirements¹ impact competition; however, there is no absolute prohibition against either approach. When considering bundling or consolidation, agencies should, first and foremost, analyze three provisions: (1) the Small Business Reauthorization Act of 1997² (SBRA Bundling) as implemented in the Federal Acquisition Regulation (FAR) § 7.107;³ (2) the

National Defense Authorization Act of 2004⁴ (Section 801 Consolidation) as implemented in the Defense Federal Acquisition Regulation Supplement (DFARS) § 207.170-3;⁵ and (3) the Competition in Contracting Act of 1984 (CICA)⁶ (CICA Bundling). The CICA Bundling doctrine is the most overlooked and raises the most questions because, unlike the SBRA Bundling and Section 801 Consolidation provisions, the CICA Bundling doctrine is not circulated in any statute or regulation. Over the years, the Government Accountability Office (GAO) has defined and developed the CICA Bundling doctrine through a series of decisions that may impact an acquisition strategy or plan.⁷

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¹ The practice of pooling potentially smaller purchases to leverage the Government's purchasing power and obtain the benefits of economies of scale or reduce the Government's administrative cost. Also known as aggregation or packaging, the term refers to the practice of consolidating into a single larger contract solicitation of multiple procurement requirements. NASH, SCHOONER, & O'BRIEN, *THE GOVERNMENT CONTRACTS: A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT* (2d ed. 1998).

² Small Business Reauthorization Act, Pub. L. No. 105-135, § 411–414, 111 Stat. 2592 (1997); 15 U.S.C. §§ 631(j), 644(e) (2006).

³ GEN. SERVS. ADMIN. ET AL., *FEDERAL ACQUISITION REG.* § 2.101 (July 2010) [hereinafter FAR].

“Bundling” means—

(1) Consolidating two or more requirements for supplies or services, previously provided or performed under separate smaller contracts, into a solicitation for a single contract that is likely to be unsuitable for award to a small business concern due to—

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

(2) “Separate smaller contract” as used in this definition, means a contract that has been performed by one or more small business concerns or that was suitable for award to one or more small business concerns.

(3) “Single contract” as used in this definition, includes—

(i) Multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources (see FAR 16.504(c)); and

(ii) An order placed against an indefinite quantity contract under a—

(A) Federal Supply Schedule contract; or

(B) Task-order contract or delivery-order contract awarded by another agency (i.e., Government wide acquisition contract or multi-agency contract). (4) This definition does not apply to

a contract that will be awarded and performed entirely outside of the United States.

Id.

⁴ National Defense Authorization Act, Pub. L. No. 108-136, § 801, 117 Stat. 1392 (2003); 10 U.S.C. § 2382 (2006).

⁵ U.S. DEP'T OF DEF., *DEFENSE FEDERAL ACQUISITION REG. SUPP.* § 207.170 (Jan. 1, 2010) [hereinafter DFARS]. “Consolidation of contract requirements” means the use of a solicitation to obtain offers for a single contract or a multiple award contract to satisfy two or more requirements of a department, agency, or activity for supplies or services that previously have been provided to, or performed for, that department, agency, or activity under two or more separate contracts.” *Id.* § 207.170-2. “Multiple award contract” means—(1) Orders placed using a multiple award schedule issued by the General Services Administration as described in FAR Subpart 8.4; (2) A multiple award task order or delivery order contract issued in accordance with FAR Subpart 16.5; or (3) Any other indefinite-delivery, indefinite-quantity contract that an agency enters into with two or more sources for the same line item under the same solicitation.” *Id.*

⁶ Competition in Contracting Act, Pub. L. No. 98-369 § 2701, 98 Stat. 494 (1984); 41 U.S.C. § 253 (2006).

⁷ See *Vantex Serv. Corp.*, B-290415, Aug. 8, 2002. The Department of the Army issued an Invitation for Bid (IFB) for a total small business set-aside at Fort Bragg for rental and servicing portable latrines. Vantex, a small business concern, challenged the IFB arguing that bundling of portable latrine rental and servicing with the other waste removal services unduly restricted competition. Vantex could perform the portable latrine portion of the requirement but not the waste removal portion. The agency responded by stating that combining such requirements reduced the administrative burden; the requirement had a long history of being successfully fulfilled in this fashion; and that the requirement still generated adequate small business competition. The GAO sustained the protest and held the fact that the agency may find that combining the requirements is more convenient administratively is not a legal basis to justify combining the requirements, if the combining of requirements restricts competition. The CICA and its implementing regulations require that the scales be tipped in favor of ensuring full and open competition. The record did not support the agency determination that combining portable latrine and services with the other waste removal services was necessary to satisfy the needs of the agency. An agency may take from Vantex that (1) even though an acquisition strategy may not violate the tenets of the FAR 2.101 “bundling” or DFARS 207.170-2 definitions of “consolidation,” the GAO may find that (1) the procurement violates the tenets of the “CICA bundling” doctrine and (2) administrative convenience alone will not provide a reasonable basis for combining requirements. See also Roger Neds, *Bundling Contract Requirements: Where the Whole Must be Less than the Sum of its Parts*, ARMY LOGISTICS & TRAINING, Sept.–Oct. 2005, at 70–71.

Acquisition planning is critical when determining whether a requirement is being bundled or consolidated. With solid planning, contracting professionals can develop a realistic strategy and be prepared to successfully defend any potential litigation that may result from combining requirements into one solicitation. The purpose of this article is to help practitioners make sense of it all by examining the differences between the SBRA Bundling provision, Section 801 Consolidation provision, and the CICA Bundling doctrine.⁸

II. Small Business Reauthorization Act (SBRA Bundling)

The SBRA Bundling provision, as defined and implemented in the FAR, is not an absolute prohibition.⁹ The provision focuses on consolidating two or more requirements for supplies or services, previously performed under separate smaller contracts, into a solicitation for a single contract.¹⁰ An agency must conduct market research to determine whether bundling is necessary and justified.¹¹ The key here is to examine market research along with other supporting data to substantiate that bundling will produce some measurable benefits to the Government, thereby justifying such an approach.¹²

Agencies may overcome the SBRA Bundling provision by demonstrating cost savings, quality improvements, reduction in acquisition cycle times, better terms and conditions, and any other data to produce measurably substantial benefits.¹³ Any cost savings identified by the agency must be *quantifiable*.¹⁴ For example, in *B.H.*

Aircraft Co., Inc., an agency consolidated a consumable parts requirement for the F404 engine into a single performance-based logistics (PBL) contract covering more than two thousand national stock numbers under one request for proposal (RFP).¹⁵ B.H. Aircraft Co. (BHA), a small business, held a contract to supply parts that would be part of the consolidation effort under the single RFP.¹⁶ BHA contended that the bundling involved in the PBL violated the CICA and the Small Business Act.¹⁷ The GAO did not dispute that the agency's actions constituted bundling of requirements that would affect many small businesses, including BHA.¹⁸ As required by statute, an agency must demonstrate that such bundling of requirements will provide substantial benefits to the Government.¹⁹ In this case, the anticipated contract value was \$300 million, which required the agency to show a savings of at least \$15 million.²⁰ As part of the acquisition planning specified in FAR § 7.107, the agency prepared a business case analysis (BCA) comparing the status quo to a PBL contract.²¹ The agency's BCA demonstrated a measurably substantial benefit of \$28.3 million over five years, an amount well above the amount required to justify bundling the parts under a single contract.²² In this case, the GAO denied BHA's protest on the basis that the agency satisfied the requirements of the SBRA statute and FAR to permit bundling.²³

If, however, an agency fails to demonstrate measurably substantial benefits, the GAO will not hesitate to sustain a protest. For instance, in *Sigmattech, Inc.*, the GAO sustained a protest by Sigmattech, a small business, challenging the agency's bundling of system engineering and support services with other requirements under a single-award blanket purchase agreement issued under the awardee's Federal Supply Schedule (FSS).²⁴ Sigmattech argued that the agency failed to perform bundling analysis or satisfy the requirements of FAR §§ 7.107(a)(b), 10.001(c)(2), and 19.202-1.²⁵ The agency argued that FAR §§ 7.107(a) and (b), 10.001(c)(2), and 19.202-1 did not apply to the task orders or the BPA issued under the awardee's FSS contract.²⁶ The GAO disagreed.²⁷ The GAO concluded that

⁸ D. DiPaola, Consolidation and Bundling Summary Chart (2010) (App.).

⁹ FAR, *supra* note 3, § 7.107.

¹⁰ *Id.* § 2.101(1).

¹¹ *Id.* § 7.107(a) ("Bundling may provide substantial benefits to the Government.") The head of the agency, however, must conduct market research to determine whether bundling is necessary and justified because of the potential impact on small business participation. *Id.*; see 15 U.S.C. § 644(e)(2) (2006). Market research may indicate that bundling is necessary and justified if an agency or the Government would derive measurably substantial benefits. See FAR, *supra* note 3, § 10.001(a)(2)(iv) and (a)(3)(vi). Measurably substantial benefits may include individually or in any combination or aggregate cost savings or price reduction, quality improvements that will save time or improve or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions, and any other benefits. *Id.* § 7.107(b). The agency must quantify the identified benefits and explain how their impact would be measurably substantial. Except as provided in FAR § 7.107(d), the agency may determine bundling to be necessary and justified if, as compared to the benefits that it would derive from contracting to meet those requirements if not bundled, it would derive measurably substantial benefits equivalent to— (1) Ten percent of the estimated contract or order value (including options) if the value is \$86 million or less; or (2) Five percent of the estimated contract or order value (including options) or \$8.6 million, whichever is greater, if the value exceeds \$86 million

¹² FAR, *supra* note 3, § 7.107(b).

¹³ *Id.*

¹⁴ *Id.* § 7.107(d).

¹⁵ *In re B.H. Aircraft Co., Inc.*, B-295399.2, July 25, 2005.

¹⁶ *Id.* at 1.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* See also FAR, *supra* note 3, § 7.107(b)(2).

²¹ *Id.* at 3.

²² *Id.*

²³ *Id.* at 7.

²⁴ *In re Sigmattech, Inc.*, B-296401, Aug. 10, 2005.

²⁵ *Id.*

²⁶ *Id.* at 6.

under the circumstances, the consolidation of the services met the definition of bundling under the Small Business Act.²⁸ The record, however, showed that the Army failed to perform a bundling analysis as required by FAR § 7.107(a) and (b), or to comply with the requirements of FAR § 19.202-1 in providing notice of bundling to the SBA.²⁹ The GAO recommended to the Army that it conduct an analysis in accordance with the regulation to determine whether it was necessary and justified for the services to be bundled or whether these services should remain reserved for small businesses.³⁰

Even though the SBRA Bundling and Section 801 Consolidation provisions are similar in nature (i.e., statutorily based, focused on previously procured requirements), Section 801 Consolidation requires agencies to apply a different analysis to justify consolidation.³¹ The Section 801 Consolidation provision is different in its definition, application, and analysis.³²

III. The National Defense Authorization Act (Section 801 Consolidation)

The Section 801 Consolidation provision, as implemented in the DFARS, is not an absolute prohibition.³³ The primary distinction between SBRA Bundling and Section 801 Consolidation is that, as defined, Section 801 Consolidation is not limited to impacts on small businesses that have previously performed requirements under separate smaller contracts.³⁴ The Section 801 Consolidation provision applies to all combinations of requirements that were previously performed separately by businesses of any size.³⁵ For acquisitions with an estimated value of \$5.5 million, the Section 801 Consolidation analysis will include the results of market research; identification of any alternative contracting approaches that would involve a lesser degree of consolidation; and a determination by the

senior procurement executive that the consolidation is necessary and justified.³⁶ If an agency contemplates consolidating previously separate requirements into a single solicitation with the possibility of being awarded as a single or multiple-award, the agency must demonstrate that benefits received by the consolidation substantially exceed those of the other contracting alternatives.³⁷

In 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. For instance, recently, the U.S. Court of Appeals for the Federal Circuit contemplated this issue and upheld a lower court's ruling that the U.S. Army Corps of Engineers (Corps) neither violated 15 U.S.C. § 631(j)(3) nor 10 U.S.C. § 2382 when the Corps, in part, included several construction projects to be performed under one solicitation.³⁸ In this case, the Corps's scope of work included construction for training barracks (Fort Benning, Georgia), an estimated five basic training barracks (consisting of barracks, dining facilities, support facilities, and outdoor facilities), and an unspecified number of warrior-in-transition complexes throughout an eight-state area.³⁹ The plaintiff challenged the Corps's solicitation by arguing the agency violated statutory and regulatory provisions designed to aid and protect small businesses and to insure that they receive a fair and adequate share of government contracts and business.⁴⁰ The Corps countered by arguing that a contract to design and construct a building is a *new* requirement rather than an existing one (i.e., previously performed) and therefore, falls outside 15 U.S.C. § 631(j)(3) and 10 U.S.C. § 2382.⁴¹ The Corps took the position that bundling and consolidation provisions do not apply to new construction projects.⁴² The court did not take exception to the Corps' position partly because pending legislation seems to support the notion that construction requirements (i.e., the building of specific structures) by

²⁷ *Id.* at 7. The requirements that agencies perform a bundling analysis and notify the SBA when requirements are bundled were specifically made applicable to BPAs and orders placed against FSS contracts by a *Federal Register* notice published October 20, 2003, with an "effective date" of 20 Oct. 2003. 68 Fed. Reg. 60,000 (Oct. 20, 2003); FAR, *supra* note 3, § 8.404.

²⁸ FAR, *supra* note 3, § 7.107(a).

²⁹ *In re Sigmatech, Inc.*, B-296401, at 8.

³⁰ *Id.* The GAO further recommended that the Army, once the analysis was complete, provide its acquisition package to the SBA procurement representatives as required by FAR § 19.202-1. Finally, the GAO recommended that the protester be reimbursed its reasonable costs for filing and pursuing its successful protest.

³¹ *See supra* note 5.

³² *See* DFARS, *supra* note 5 § 207.170-3.

³³ *Id.*

³⁴ *Id.* § 207.170-2.

³⁵ *Id.*

³⁶ *Id.* § 207.170-3(a).

³⁷ *Id.* § 207.170-3(a)(3)(i).

³⁸ *Tyler Constr. Group v. United States*, 83 Fed. Cl. 94 (2008). The court noted that the plaintiff's argument drew on the requirements of two essentially similar statutes—the Small Business Act, 15 U.S.C. §§ 631(j) and 644, and 10 U.S.C. § 2382(a) (2006)—each of which addresses the importance of safeguarding the opportunity for small businesses to participate in government procurements and the need to confine the use of contracts that involve so-called bundling or consolidation of requirements to instances in which the benefits of such an acquisition strategy "substantially exceed" alternative contracting approaches.

³⁹ *Id.* at 4. The plaintiff also challenged the use of an ID/IQ type contract for construction requirements.

⁴⁰ *Id.*

⁴¹ *Id.* (emphasis added).

⁴² *Id.*

their very nature, are deemed new requirements.⁴³ The court, however, did not go as far to decide that the bundling provisions of 15 U.S.C. § 631(j) and 10 U.S.C. § 2382 were inapplicable to acquisitions of new construction and left the question for Congress to decide.⁴⁴

The court, nonetheless, decided the bundling and consolidation issues by “assuming (without deciding) if the provisions do in fact apply, the Corps has demonstrated that the consolidation of the contract requirements was necessary and justified within the meaning of the relevant statutes.”⁴⁵ To justify consolidation, the Corps identified several benefits expected to result from a continuous build program, which included: (1) a reduction in project award time; (2) an elimination of subsequent facility design costs; (3) an increased stability of the labor pool; (4) a gain in labor efficiency resulting in a reduction in construction time and corresponding improvement in product quality; (5) a reduction in material costs; and (6) an improvement in the working relationships between the Government and the contractor.⁴⁶ Furthermore, the benefits enabled the Corps to demonstrate a “minimum of 20% reduction in cost and minimum of 30% reduction in time to occupancy.”⁴⁷ Even though the court did not answer the question as to whether new construction was within the scope of the bundling or consolidation statutes, it was clear to the court that if new construction was within the scope of either statute, the Corps met the standard to justify bundling and consolidation.⁴⁸

IV. Competition in Contracting Act (CICA Bundling)

Unlike the SBRA Bundling and Section 801 Consolidation provisions, the CICA Bundling doctrine arose strictly from a myriad of GAO bid protest decisions and is considered much broader than both provisions.⁴⁹ Specifically, the CICA Bundling doctrine does not simply apply to requirements that were previously provided or performed under separate smaller contracts but comes into play anytime an agency contemplates combining requirements into a single solicitation that creates the

potential for restricting competition.⁵⁰ As a result, the GAO will require that an agency demonstrate a reasonable basis for why the bundling is necessary to satisfy the needs of the agency.⁵¹ The CICA Bundling doctrine presents an interesting dilemma and is often misunderstood because it may apply to new requirements when both the SBRA Bundling and Section 801 Consolidation provisions would not.⁵² As noted above, the SBRA Bundling and Section 801 Consolidation provisions focus on consolidating two or more requirements for supplies or services, previously performed under separate smaller contracts.⁵³ During acquisition planning, if the SBRA Bundling and Section 801 Consolidation provisions do not apply, an agency must consider the requirement’s impact on the CICA.

The CICA Bundling doctrine is examined in the *Nautical Engineering, Inc.*, case.⁵⁴ In this case, Nautical Engineering, Inc. (NEI), a small business, challenged the Department of Homeland Security’s solicitation combining dry dock and dockside services as violating both SBRA Bundling and CICA Bundling.⁵⁵ The Department of Homeland Security (DHS) originally took the position that the solicitation did not constitute bundling because the procurement was for a new requirement, but it nonetheless prepared a justification for bundling on the basis that the consolidation of the drydock and dockside services would provide measurably substantial benefits to the Government.⁵⁶ NEI sought to challenge DHS’s solicitation on both fronts knowing that if the agency succeeded in classifying the requirements as new, the new requirement would fall outside the scope of the SBRA Bundling provision making its challenge moot.⁵⁷ Even if it fell outside the scope of the SBRA Bundling provision, however, the CICA Bundling doctrine would still require the agency to perform a reasonable basis analysis to justify why bundling was necessary to satisfy the needs of the agency.⁵⁸

⁴³ *Id.*

⁴⁴ *Id.* at 10.

⁴⁵ *Id.*

⁴⁶ *Id.* at 3. In developing the acquisition strategy, the Corps conducted market research that included industry participation, sponsorship of a nationwide forum, four regional forums, and a specialized forum with representatives of the pre-fabricated/pre-engineered/modular construction industry, as well as the implementation of an Internet-based research questionnaire.

⁴⁷ *Id.* (internal quotation marks omitted).

⁴⁸ *Id.* at 10.

⁴⁹ *See supra* note 7.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *See supra* notes 3 and 5.

⁵³ *Id.*

⁵⁴ *In re Nautical Eng’g, Inc.*, B-309955, Nov. 7, 2007.

⁵⁵ *Id.* at 1.

⁵⁶ *Id.* *See also supra* note 38 (Where in Tyler the Corps took a similar approach in that the Corps argues “new” construction did not fall under the SBRA Bundling and Section 801 Consolidation statutes, but nonetheless prepared a BCA that demonstrated measurably substantial benefit savings.)

⁷ *In re Nautical Eng’g, Inc.*, B-309955, at 13. NEI argued that even if the Coast Guard’s approach of consolidating the maintenance and repair services did not violate the Small Business Act’s prohibitions on bundling, the solicitation violated the CICA’s prohibition on improperly consolidating requirements.

⁵⁸ *Id.* *See also* 41 U.S.C. § 253a(2)(b) (2006).

In addressing NEI's argument concerning the CICA Bundling violation, the GAO held that the CICA generally requires that solicitations permit full and open competition and contain restrictive provisions and conditions only to the extent "necessary to satisfy the needs of the executive agency."⁵⁹ Clearly, the GAO was speaking to competition as a whole and not simply previously performed contracts or competition among or for small business concerns.⁶⁰ In developing the CICA Bundling doctrine, the GAO has looked to see whether an agency has a reasonable basis to argue that bundling is required and has sustained protests only where no reasonable basis has been demonstrated.⁶¹ A final point made by the GAO in this case was that the agency's analysis to justify bundling under the Small Business Act was met.⁶² More importantly, in the GAO's view, the benefits offered by the agency also provided a reasonable basis to justify the consolidation of the two requirements for purposes of the CICA.⁶³

In its development⁶⁴ of the CICA Bundling doctrine, the GAO has also discussed whether an agency's reasonable basis approach offers some logical connection between the services being sought under one solicitation.⁶⁵ For instance, in *American College of Physicians Services Inc.*, the protesters argued that the agency's bundled purchase of accreditation services and proficiency testing services in the same RFP unduly restricted competition in violation of the CICA.⁶⁶ In answering the protesters' challenge, the agency argued that using separate contracts would create logistical problems in its management of laboratories since using separate contracts would require the agency to act as a "go between" to coordinate the actions of the accreditation organizations and the proficiency testing organizations.⁶⁷ The agency also pointed out that by having a single contractor responsible for both functions, obtaining the immediate review and monitoring of testing results needed to continue a laboratory's accredited status would be more likely.⁶⁸

⁵⁹ *In re Nautical Eng'g Inc.*, B-309955, at 3. See also *Phoenix Scientific Corp.*, B-286817, Feb. 22, 2001).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* See also *Teximara, Inc.*, B-293221.2, July 9, 2004).

⁶⁴ See *In re Nautical Eng'g Inc.*, B-309955.

⁶⁵ *Id.*

⁶⁶ *Am. Coll. of Physicians Servs. (ACPS), Inc.; COLA*, B-294881; B-294881.2, Jan. 3, 2005. Neither ACPS nor COLA argued that the RFP violated the SBA Bundling restrictions, as amended. See 15 U.S.C. § 631(j)(3) (2006). As a result, the GAO did not consider whether SBA Bundling restrictions provided a remedy to this procurement.

⁶⁷ *Am. Coll. of Physicians Servs. (ACPS), Inc.; COLA*, B-294881; B-294881.2, at 3 (emphasis added)

⁶⁸ *Id.*

⁶⁹ *Id.* at 4.

The protesters did not offer any specific response to establish that the agency's position to combine the requirements was, in fact, unreasonable.⁶⁹ In this case, the GAO was clear in that while the protesters' contention that the joint purchase of accreditation services and proficiency testing services with one contract would restrict competition, the question at issue was whether the agency provided a reasonable basis to conclude that bundling was necessary to satisfy the needs of the agency.⁷⁰ The GAO concluded that the agency did offer a reasonable basis for procuring these services jointly.⁷¹ The GAO also noted that "unlike its decision in an earlier case (where it sustained a protest after finding that the agency had offered no reasonable basis for bundling food services with other logistical services), there [was] no dispute here that there [was] a logical connection between the two services sought by this solicitation."⁷² Even though the *American* case does not appear to expand the reasonable basis analysis to include a logical connection to demonstrate why bundling is necessary to satisfy agency needs, the mere fact that the GAO used the term is significant because it may lead to an expansion of the CICA Bundling doctrine.⁷³

V. Practice Tips

Bundling and consolidation issues are at the forefront of acquisition planning because contracting professionals are looking for ways to simplify the entire acquisition continuum. For contracting professionals, if it is possible to bundle or consolidate individual requirements into one

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See *EDP Enters*, B-284553.6, May 19, 2003. The logical connection concept is briefly addressed in this case by the GAO when it sustained a challenge from a protester alleging the agency unduly restricted competition when it combined food services with other logistics support functions including facility operations, warehouse functions, oil analysis laboratory operations, storage, motor pool services, aircraft maintenance, and other logistical functions. In its defense, the agency argued that it was not in violation of the CICA because Army doctrine is predicated on these services being integrated within its overall logistical functions. The GAO did not question the agency's decision to classify food services as logistics support functions to be administered by the Directorate of Logistics, rather the GAO's concern was whether the agency provided a reasonable justification of its needs in terms of including food services in the same RFP with base, vehicle, and aircraft maintenance services. The fact that the agency is organized in a manner that results in the administration of the performance of all of these functions by one particular office (which may itself be reasonable), did not provide a basis for insisting that all of these varied services be procured from one source. The GAO held that beyond the question of whether all of the services are part of logistics and relate to supporting the troops, the agency's reason for bundling them all in a solicitation seems to merely reflect the belief that it is administratively more convenient to manage one entity performing all of the requirements. The GAO was very clear that there must be (1) a reasonable justification provided and, more importantly, (2) bundling requirements because mere administrative convenience alone will be legally insufficient.

⁷³ *Id.*

solicitation that will produce substantial savings and enable commanders and customers to meet their needs in an expeditious manner, why not take this acquisition approach? To take this approach is not legally objectionable because the SBRA Bundling provision, Section 801 Consolidation provision, and the CICA Bundling doctrine do not prohibit bundling or consolidation of requirements. The provisions, however, will require an agency to recognize and understand what is needed to justify any bundled or consolidated procurement. Agencies must keep the Small Business Administration (i.e., SBA Representatives) fully engaged in the acquisition planning process; however, when the acquisition involves SBRA Bundling, Section 801 Consolidation, or CICA Bundling issues, SBA involvement up front is critical.

To simply have the local SBA Representative sign the DD Form 2579⁷⁴ without fully understanding the acquisition history is not a good business practice. A good approach here is to educate SBA Representatives up and down the chain about the benefits of bundling or consolidation. If the acquisition strategy requires Department of Defense (DoD)-level approvals, having thoroughly engaged all parties prior to any DoD Peer Review Boards or briefings will pay maximum dividends. The last thing any agency needs late in the acquisition continuum is to have its market research and acquisition strategy invalidated for a lack of prior planning.

If an agency elects to use one solicitation to satisfy multiple requirements that were previously achieved by two or more smaller contracts, performed by or suitable for small businesses, which when combined are now unsuitable for small businesses, it must perform an SBRA Bundling analysis to justify the action.⁷⁵ This analysis will require an agency to quantify any savings and demonstrate that the benefits received from the bundling, as compared to not bundling, would be “measurably substantial” as defined by FAR § 7.107(b).⁷⁶ For example, a measurably substantial benefit for a procurement estimated at \$300 million will reflect a savings of \$15 million or more.⁷⁷

The estimated value of each bundled requirement will determine the percentage of savings required to meet the SBRA standard.⁷⁸ For some agencies, trying to demonstrate the measurably substantial savings is problematic because

they may lack the time and expertise needed to conduct an analysis. The sheer complexity of the acquisition itself may require months of effort to analyze. To assist an agency with acquisition planning for which cost analysis is routinely required, it may be extremely beneficial to establish a master (e.g., multiple award or signal award) indefinite delivery–indefinite quantity or requirements contract to meet this need. In such a case, a contracting officer may issue a task order against the master contract, and a qualified contractor will perform the proper cost analysis for the agency. Having a qualified contractor conduct the cost analysis may reduce the level of risk for a successful SBRA protest challenge.

If an agency elects to use one solicitation to satisfy multiple requirements that were previously achieved by two or more smaller contracts, the agency must demonstrate that consolidation of contract requirements is necessary and justified.⁷⁹ The justification *may* include a cost analysis, although it is not required as it is under the SBRA Bundling analysis.⁸⁰ The focus of the analysis is often on quality, acquisition cycle, terms and conditions, and any other benefits derived.⁸¹ The agency must show that consolidating contract requirements will offer benefits that substantially exceed any alternative approaches.⁸² For example, will consolidating requirements in a single solicitation offer more benefits than having multiple solicitations (i.e., separating each requirement)? Even though a cost analysis is not required, some economic benefit may be demonstrated to support the justification.⁸³ Unlike the SBRA Bundling requirement to quantify cost and show a mandatory percentage savings, Section 801 Consolidation does not impose such a restriction.⁸⁴ The provision, however, does say that savings in administrative or personnel costs alone do not constitute sufficient justification unless the total amount of the cost savings is expected to be substantial in relation to the total cost of the procurement.⁸⁵ Unlike the SBRA Bundling provision where a percentage is required, a good rule of thumb for your Section 801 Consolidation analysis may be to mirror the SBRA Bundling percentages or at least come as close as possible.⁸⁶ In the end, however, the Section 801 Consolidation analysis should cover more than savings in administrative or personnel costs alone.

If the SBRA Bundling and Section 801 Consolidation provisions are non-factors, the CICA Bundling doctrine may still factor, and must be addressed, in the acquisition

⁷⁴ U.S. Dep’t of Def., DD Form 2579, Small Business Coordination Record (Dec. 2000).

⁷⁵ See *supra* note 11. Measurably substantial benefits may include individually or in any combination or aggregate cost savings or price reduction, quality improvements that will save time or improve or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions, and other benefits.

⁷⁶ See FAR, *supra* note 3, § 7.107(b). In my example, \$15 million is 5% of the \$300 million estimated contract value (including options).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Supra* note 5.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Supra* note 5

⁸⁶ *Supra* note 11.

strategy, acquisition plan, or formal determination and findings memorandum (as noted with Section 801 Consolidation requirements).⁸⁷ Remember, with CICA Bundling, the GAO's focus is not on determining whether a requirement was previously procured or performed by a particular business, but whether the agency has combined functions in a single solicitation that would limit competition by precluding one or more firms from participation.⁸⁸ In essence, if an agency is combining ten "new" requirements into one solicitation, the SBRA Bundling and Section 801 Consolidation provisions may not apply given the strict reading of the statutes.⁸⁹ Under the CICA Bundling doctrine, however, the agency will be required to justify such a combining of requirements because of the impact on competition.⁹⁰ With CICA Bundling, the GAO will examine whether the agency has a "reasonable basis" for restricting competition.⁹¹ In developing the acquisition strategy and/or plans when CICA Bundling is a factor, agencies should provide analysis similar to what is being required for Section 801 Consolidation.⁹² Remember that even though no quantifiable cost analysis is required with either the CICA Bundling or Section 801 Consolidation analysis (except for demonstrating savings in administrative or personnel costs),⁹³ it is highly recommended to show such cost savings (no matter what the percentage), if available. Finally, although, the GAO has not expanded the law to include showing a logical nexus between the requirements to establish a reasonable basis for consolidation, an agency should consider making this argument. For example, if an agency is procuring a supply contract for ice that includes other functions such as transportation, storage,

administration, refrigeration, and other requirements, the agency should make an argument that there is a logical connection to procure ice, transportation, storage, refrigeration, and administration under one solicitation. Even though market research may show that these requirements may be procured separately under individual contracts or orders (e.g., task and delivery order contracts), it is imperative that the agency establish that bundling is necessary (e.g., benefits will be realized in overall quality of services, terms and conditions, and other measures) to satisfy the needs of the agency.

VI. Conclusion

There is no absolute prohibition against bundling and/or consolidating requirements to the benefit of an agency. The statutes and regulations, however, will require an agency to demonstrate in its acquisition strategy, acquisition plan, and determination and finding's memorandum why such a restriction on competition is in fact necessary to satisfy the agency's needs. Trying to *make sense of it all* can be a daunting task, but agencies may mitigate this task by understanding the requirement's history and building in sufficient lead time in the acquisition continuum to adequately address all issues raised by the SBRA Bundling provision, Section 801 Consolidation provision, and the CICA Bundling doctrine.

⁸⁷ *Supra* note 6.

⁸⁸ *Supra* note 57.

⁸⁹ *Supra* notes 3 and 5.

⁹⁰ *Supra* note 5.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

Appendix

	SECTION 801 CONSOLIDATION (DFARS 207.170)	SBRA BUNDLING (FAR 7.107) (FAR 2.101)	CICA BUNDLING (GAO Case Law)
Definition	Use of one solicitation to satisfy multiple requirements <i>that were previously achieved by two or more smaller contracts</i>	Use of one solicitation to satisfy multiple requirements <i>that were previously achieved by two or more smaller contracts</i> , performed by or suitable for small businesses, which when combined are now unsuitable for small business	Use of one solicitation to satisfy multiple requirements, <i>which creates the potential for restricting competition</i>
Dollar Threshold	> \$5.5M	None, but . . . > \$7.5M triggers additional “substantial bundling” analysis (see FAR 7.107(e))	None
Justification May Address	<ul style="list-style-type: none"> • Cost Savings; • Quality; • Acquisition Cycle; • Terms & Conditions; • Any Other Benefit (Mission Critical) 	<ul style="list-style-type: none"> • Cost Savings; • Quality; • Acquisition Cycle; • Terms & Conditions; • Any Other Benefit (Mission Critical) 	Must show a reasonable basis for why the bundling is necessary to meet the agency need (see <i>Vantex Serv., Inc.</i> , B-290415, Aug. 8, 2002)
Standard	Consolidation benefits must substantially exceed those of the other alternatives	<ul style="list-style-type: none"> • ≤ \$86M = 10% of total • > \$86M = 5% of total, or • \$8.6M, whichever is greater • Mission Critical Exception (see “Approval Level” below) 	<ul style="list-style-type: none"> • Reasonable Basis • Deference for national security & safety (see <i>Outdoor Venture, Corp.</i>, B 299675; B-299676, Jul. 19, 2007)
Requirement to Quantify in Dollar Amount	No, except for cost savings	Yes	No
Administrative / Personnel Savings or Convenience	Must be substantial in relation to the total cost of the procurement	Must exceed 10% of total	Insufficient justification
Approval Level	<ul style="list-style-type: none"> • < \$100M = PARC • < \$500M = HCA • ≥ \$500M = DASA(P) • (see AFARS 5107.170-3) 	<ul style="list-style-type: none"> • HCA approval for any consolidated program that cannot be placed under a preference program (see AFARS 5119.202-1) • USD (AT&L) approval for Mission Critical Exception (non delegable) (see FAR 7.107(c)) 	N/A
Location	Acquisition Strategy	Acquisition Strategy	Acquisition Strategy