



*Computer &
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Comments on Competition in Contracting Review: Contract Bundling

**Office of Management and Budget
Executive Office of the President**

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The Computer & Communications Industry Association (CCIA) was founded on the belief that competition and vibrant markets are critical factors in the success of our economy and in our ability to lead the world in innovation and technology. We are the leading industry advocate in promoting open, barrier-free competition in the offering of computer and communications products and services worldwide, and our motto is “open markets, open systems, open networks, and full, fair and open competition.”

CCIA is an association of computer, communications, Internet and technology companies that range from small entrepreneurial firms to some of the largest members of the industry. CCIA’s members include equipment manufacturers, software developers, providers of electronic commerce, networking, telecommunications and online services, resellers, systems integrators, and third-party vendors. Our member companies employ nearly one million people and generate annual revenues exceeding \$300 billion.

For nearly 30 years, CCIA has supported policies that ensure competition and a level playing field in the computer and communications industries. CCIA has been effective in advocating our mission in Congress, in the Executive Branch, and in the courts. Notably, we have taken a keen interest in antitrust enforcement, participating in the cases against IBM, AT&T, and most recently Microsoft. Additionally, CCIA has taken a lead role in advocating that the government should not compete against private sector enterprises, such as current competitive activities undertaken by the United States Postal Service, the Office of Personnel Management, and plans by the Internal Revenue Service.

It is with this strong belief in full, fair and open competition that CCIA was extremely pleased by President Bush's recent announcement:

government contracting must be more open and more fair to small businesses ... I know government contracting, if wisely done, can help us achieve a grand national goal ... But you know as well as I do that there are some large hurdles for small businesses ... and the main one is ... that agencies sometime, many times, only let huge contracts with massive requirements ... called bundling. It effectively excludes small businesses. And we need to do something about that.¹

CCIA wholeheartedly endorses President Bush's vision, and is pleased to provide our comments on how contract bundling often fails to achieve the rule of "full and open" competition that "remains the general rule when agencies acquire goods and services."²

In short, most contract bundling is a huge impediment to full and open competition in Federal procurement. Bundling is defined as "the consolidation of two or more smaller contracts into one very large contract."³ Invariably, these are contracts that could have been separately bid on by a variety of vendors, achieving the same outcome but with a more cost-effective solution for the government and U.S. taxpayer. The practice of contract bundling deprives small vendors of the ability to compete for many Federal sales, as many compete in niche areas and are not able to fulfill contracts that reach beyond their business specialty. The numbers make this fact clear: for every

¹ President George W. Bush, Address at the Women's Entrepreneurship Summit (March 19, 2002) (transcript available at <http://www.whitehouse.gov/news/releases/2002/03/20020319-2.html>).

² Competition in Contracting; Contract Bundling; Notice of Public Meeting and Request for Comments, 67 Fed. Reg. 87, 30403 (May 6, 2002).

³ *Procurement Policies of the Pentagon with Respect to Small Businesses and the New Administration: Hearing Before the House Comm. on Small Bus.*, 107th Cong. 51 (2001) (Statement of Susan M. Walthall, Acting Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Bus. Admin.).

additional 100 bundled contracts, there is a corresponding decrease of 106 contracts awarded to small firms.⁴

Contract bundling was also cited by the House Small Business Committee Democrats as a major impediment for Federal agency contracting with small businesses. In a recently released report, Ranking Democrat Nydia Velázquez (D-New York) emphasized the woeful performance of the Federal Government's track record in accomplishing its statutorily defined small business goals.⁵ In grading 21 agencies, only one received a grade of A; one received a grade of B; seven received a grade of C; 10 received a grade of D; and two received failing grades.⁶ Senator Christopher "Kit" Bond (R-Missouri) has also faulted contract bundling as anticompetitive, resulting in contracts that small businesses are unable to perform "due to its complexity or its obligation to do work in widely disparate geographic location[s]."⁷ Senator Bond further stated that contract bundling "eliminates small businesses from competing for contracts to sell the government some of the \$200 billion in goods and services it buys every year."⁸

Clearly, contract bundling is a device that locks out many qualified vendors and strikes at the heart of fair and open competition. In addition to costing taxpayers valuable resources, the restrictions in availability of these contracts will hurt these vendors' ability

⁴ *The Impact of Contract Bundling on Small Business: FY 1992 – FY 1999*, Report by Eagle Eye Publishers, Inc. to the U.S. Small Bus. Admin. Office of Advocacy, (September 2000).

⁵ *See generally 2002 Scorecard III: Small Bus.: Opportunity Denied*, Report by the House Small Bus. Comm. Democrats, (May 15, 2002).

⁶ *Id.* at 8.

⁷ *Senator Kerry Introduces Legislation to Limit "Contract Bundling,"* 44 No. 19 GOV'T CONTRACTOR 189 (May 15, 2002).

⁸ *Id.*

to survive, thus reducing future competition.⁹ CCIA certainly does not believe that it is the Federal Government's responsibility to subsidize small business, or specifically use its purchasing power to buttress vendors who otherwise would not be in a position to provide goods or services on competitive terms. This also parallels President Bush's comments: "I do not believe the role of government is to create wealth....The role of government is to create an environment that facilitates the flow of capital, and an environment in which people can realize their dreams."¹⁰ However, there is a great difference between subsidizing small businesses that aren't competitive and placing onerous restrictions that unnecessarily foreclose viable businesses from bidding for Federal contracts. In CCIA's view, contract bundling, in its current excessive use, has operated to do the latter.

CCIA recognizes that there may be circumstances that warrant the use of bundled contracts but cautions that they should be used in only the most sparing cases. In general, Federal law appears to discourage bundling but allows it when there would be "measurably substantial benefits" including: cost savings; quality improvements; reduction in acquisition cycle times; better terms and condition; or *any other benefits*.¹¹ While the agency is required to conduct market analysis to determine if bundling is "necessary and justified,"¹² the language of "any other benefit" is troubling due to its vagueness. Further, it should be noted that there is no guarantee ensuring the independent quality of market research, and such research has recently come under attack

⁹ See Ishak Akyuz, *Bundling into the New Millenium: Analyzing the Current State of Contract Bundling*, 30 PUB. CONT. L.J. 123, 124 (2000).

¹⁰ President George W. Bush, Address at the Women's Entrepreneurship Summit (March 19, 2002).

¹¹ See 15 U.S.C. § 644(e)(2)(B) (2000).

¹² See 15 U.S.C. § 644(e)(2)(A) (2000).

for its less than objective reporting.¹³ Given the limitations of relying on questionable market research, CCIA believes that this data, used to justify *any other benefit*, creates too much leeway for vendors and agencies to game the system.

There are other particular circumstances when bundling is allowed, such as when the agency reasonably believes that de-aggregating tasks to separate contracts would be impracticable;¹⁴ when effective coordination of the tasks involved require a single contractor;¹⁵ when unbundling would create undue technical risks;¹⁶ when interoperability and compatibility would be hampered;¹⁷ when the agency has integrated the purchasing and installation on systems;¹⁸ and when the procurement results in a novel approach that will provide substantial benefits to the agency.¹⁹ While protests have demonstrated that contract bundling will be rejected when the agency's rationale for doing so is insufficient or unreasonable,²⁰ considering all the circumstances in which bundling is allowed, as described above, it appears that agencies have wide latitude and discretion in bundling contracts. In CCIA's view, this discretion often leads to unwise bundling, and as a result, the current structure is an ineffective one for ensuring fair and open competition.

¹³ See e.g. *Analyzing the Analysts: Hearing Before the House Subcomm. on Capital Mrkts., Ins. and Gov't Sponsored Enterprises*, 107th Cong. (2001).

¹⁴ Ishak Akyuz, *Bundling into the New Millenium: Analyzing the Current State of Contract Bundling*, 30 PUB. CONT. L.J. 123, 125-6 (2000) (citing EAI Corp., Comp. Gen. B-283129, Oct. 7, 1999, 99-2 CPD ¶ 69).

¹⁵ *Id.* (citing Electro-Methods, Inc., 70 Comp. Gen. 53, 90-2 CPD ¶ 363, at 5; LeBarge Prods., Inc., Comp. Gen. B-232201, Nov. 23, 1998, 98-2 CPD ¶ 510, at 3-4).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* (citing Tucson Mobile Phone, Inc., Comp. Gen. B-274684.2, Feb 1, 1994, 94-2 CPD ¶ 45).

¹⁹ *Id.* (citing S&K Elecs., Comp. Gen B-282167, June 10, 1999, 99-1 CPD ¶ 111, at 4).

²⁰ Ishak Akyuz, *Bundling into the New Millenium: Analyzing the Current State of Contract Bundling*, 30 PUB. CONT. L.J. 123, 125-6 (2000) (citing Better Serv., Comp. Gen B-265751.2, Jan 18, 1996, 96-1 CPD ¶ 90, at 3; Ralph C. Nash, *Contract Bundling: An Update*, 12 NASH & CIBINIC REP. ¶ 9 at 24-5 (1998)).

There are two notable legislative efforts to reform contract bundling and CCIA wholeheartedly endorses both. In the House, the bipartisan Small Business Opportunity Enhancement Act (H.R. 2867) has passed the Small Business Committee and is awaiting floor action. This bill would amend the Small Business Act to give the Director of the Office of Management and Budget (OMB), or a subordinate who is appointed by the President and approved by the Senate, the authority to resolve disagreements on bundled or “mega” contracts in addition to extending the time period from 30 to 60 days for a small business to respond to a solicitation for a bundled contract. By moving the appeal process from the affected agency to OMB, bundled contracts will likely face more rigorous scrutiny and not be rubber-stamped, an issue that the Small Business Committee identified as a major problem in bundled contract appeals.²¹

Senator John Kerry (D-Massachusetts) has introduced the bipartisan Small Business Federal Contractor Safeguard Act (S. 2466). This bill provides more stringent guidelines for allowing a bundled contract. It would require, for bundled contracts over \$2 million, a statement of benefits, a statement of alternative approaches, and a specific determination that the bundling is necessary and the anticipated benefits justifies bundling. The bill adds further requirements for contracts over \$5 million, including conducting market research, an assessment of impediments to small business participation, and specified actions to maximize small business participation. Additionally, these contracts will not be accepted if the “necessary and justified”

²¹ H.R. REP. NO. 107-432, at 3 (2002).

determination is based solely on administrative and personnel savings unless those savings will be substantial.

Taken in tandem, these two approaches would go far in ensuring more access by a wider array of vendors into the government procurement process. CCIA also recommends that protests be automatically available in the case of bundled contracts and that Congress should direct the Government Accounting Office (GAO) to shift the presumption away from the affected agency when determining if a bundled contract is necessary and justified. Anecdotally, CCIA has determined that in too many instances, Federal agencies give far too much deference to their procurement offices in determining the appropriate scope of bundling of contracts, and in turn GAO gives these agencies overly broad latitude. This trend needs to be reversed. CCIA believes that the aims of H.R. 2867, moving dispute resolution to OMB, would be an effective way to begin to overcome this hurdle.

CCIA believes contract bundling serves as a significant impediment to not only fair and open competition, but more importantly, fosters shortsighted decision-making resulting in limiting the value the government ultimately receives for their investments in technology.

A recent example can be found with the implementation of agency Financial Management Systems required under GAO's Joint Financial Management Information Program (JFMIP) where contract bundling is prevalent, resulting in unfair (or lack of)

competition and the elimination of both “best of breed” and Small Business as solution providers. Under the direction of the GAO, JFMIP documentation calls out for a "single integrated system". The document further explains that this does NOT mean one software solution yet this is exactly the path recently taken by such agencies as NASA, the Navy and programs such as the Army’s Wholesale Logistic Modernization Program (LOGMOD). In each case, a foreign based provider was selected to support the modernization of the agency financial system. Agencies have gone on to further justify the use of this solution for all encompassing agency requirements at what appears to be significant and elevated costs resulting in reduced value to the government.

Further contract bundling is frequently the precise hidden objective of the “so called independent” analysis from consultant firms who strive to benefit from their very same decisions. In our opinion, the government needs to have a far more critical review of "independent" analysis performed by consultants and organizations. Certainly, the top Fortune 100 companies are NOT moving towards a single or one software solution relying on a individual organization. They realize the risk is just too high to depend on "one" software provider, but instead move towards a strategic alliance with several software companies that meet a high degree of their critical needs (i.e. financial, HR- Human Resources, physical assets, IT assets). Consultant organizations will provide integration but allow the client company or agency to have the benefit of superior products which fit the specific needs of their organization.

In summary, bundled contracts greatly harm the competitive process. As the Federal Government spends over \$219 billion annually, making it the largest purchaser in the world,²² procuring the best solutions for government agencies in a fair, competitive and thus cost-effective way should be of paramount importance. The Federal Government has the ability to make winners and losers in the marketplace. As previously stated, CCIA does not advocate using this power to unduly help businesses that can't compete effectively in the marketplace; however, it should not use this system to lock out vendors who can compete, but for unnecessary, burdensome contracting requirements. While much discussion of bundling revolves around small businesses, CCIA's position is not that this is solely a small business issue. Rather this is one that affects vendors of all sizes, and more importantly, it affects all citizens in how much they pay for goods and services through their taxes, and what they will receive. CCIA appreciates the President's dedication to this issue, and welcomes the quick action on the part of OMB in assembling these written comments, and oral comments at the open meeting recently held. If you have any further questions, or if CCIA can be of more assistance, please do not hesitate to contact CCIA President & CEO, Ed Black.

²² *Federal Agencies Receive Poor Grades for Small Business Contracting*, 44 NO. 20 GOV'T CONTRACTOR 195 (May 22, 2002).