

112TH CONGRESS
2^D SESSION

H. R. 4081

To amend the Small Business Act to consolidate and revise provisions relating to contract bundling, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 17, 2012

Mr. GRAVES of Missouri (for himself and Mr. WEST) introduced the following bill; which was referred to the Committee on Small Business

A BILL

To amend the Small Business Act to consolidate and revise provisions relating to contract bundling, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Contractor Oppor-
5 tunity Protection Act of 2012”.

6 **SEC. 2. CONSOLIDATION OF PROVISIONS RELATING TO**
7 **CONTRACT BUNDLING.**

8 Section 44 of the Small Business Act (15 U.S.C.
9 657q) is amended to read as follows:

1 **“SEC. 44. CONTRACT BUNDLING.**

2 “(a) DEFINITIONS.—In this Act:

3 “(1) BUNDLED CONTRACT.—The term ‘bundled
4 contract’—

5 “(A) means a contract that is entered into
6 to meet procurement requirements that are
7 combined in a bundling of contract require-
8 ments, without regard to whether a study of the
9 effects of the solicitation on Federal officers or
10 employees has been made; and

11 “(B) does not include—

12 “(i) a contract with an aggregate dol-
13 lar value below the dollar threshold; or

14 “(ii) a single award contract for the
15 acquisition of a weapons system acquired
16 through a major defense acquisition.

17 “(2) BUNDLING METHODOLOGY.—The term
18 ‘bundling methodology’ means—

19 “(A) a solicitation to obtain offers for a
20 single contract or a multiple award contract;

21 “(B) a solicitation of offers for the
22 issuance of a task or a delivery order under an
23 existing single or multiple award contract; or

24 “(C) the creation of any new procurement
25 requirements that permits a combination of
26 contract requirements, including any combina-

1 tion of contract requirements or order require-
2 ments.

3 “(3) BUNDLING OF CONTRACT REQUIRE-
4 MENTS.—The term ‘bundling of contract require-
5 ments’, with respect to the contract requirements of
6 a Federal agency—

7 “(A) means the use of any bundling meth-
8 odology to satisfy 2 or more procurement re-
9 quirements for new or existing goods or services
10 provided to or performed for the Federal agen-
11 cy, including any construction services, that is
12 likely to be unsuitable for award to a small-
13 business concern due to—

14 “(i) the diversity, size, or specialized
15 nature of the elements of the performance
16 specified;

17 “(ii) the aggregate dollar value of the
18 anticipated award;

19 “(iii) the geographical dispersion of
20 the contract performance sites; or

21 “(iv) any combination of the factors
22 described in clauses (i), (ii), and (iii); and

23 “(B) does not include the use of a bun-
24 dling methodology for an anticipated award

1 with an aggregate dollar value below the dollar
2 threshold.

3 “(4) CHIEF ACQUISITION OFFICER.—The term
4 ‘Chief Acquisition Officer’ means the employee of a
5 Federal agency designated as the Chief Acquisition
6 Officer for the Federal agency under section 16(a)
7 of the Office of Federal Procurement Policy Act (41
8 U.S.C. 1702(a)).

9 “(5) CONTRACT.—The term ‘contract’ includes,
10 for purposes of this section, any task order made
11 pursuant to an indefinite quantity, indefinite deliv-
12 ery contract.

13 “(6) DOLLAR THRESHOLD.—The term ‘dollar
14 threshold’ means—

15 “(A) in the case of a contract for construc-
16 tion, \$5,000,000; and

17 “(B) in any other case, \$2,000,000.

18 “(7) MAJOR DEFENSE ACQUISITION PRO-
19 GRAM.—The term ‘major defense acquisition pro-
20 gram’ has the meaning given in section 2430(a) of
21 title 10, United States Code.

22 “(8) PROCUREMENT REQUIREMENT.—The term
23 ‘procurement requirement’ means a determination
24 by an agency that a specified good or service is
25 needed to satisfy the mission of the agency.

1 “(9) SENIOR PROCUREMENT EXECUTIVE.—The
2 term ‘senior procurement executive’ means an offi-
3 cial designated under section 16(c) of the Office of
4 Federal Procurement Policy Act (41 U.S.C.
5 1702(c)) as the senior procurement executive for a
6 Federal agency.

7 “(b) POLICY.—The head of each Federal agency shall
8 ensure that the decisions made by the Federal agency re-
9 garding bundling of contract requirements of the Federal
10 agency are made with a view to providing small business
11 concerns with appropriate opportunities to participate as
12 prime contractors and subcontractors in the procurements
13 of the Federal agency.

14 “(c) CONTRACT BUNDLING.—

15 “(1) PROPOSED PROCUREMENTS.—Paragraphs
16 (2) through (4) shall apply to to a proposed procure-
17 ment if the proposed procurement—

18 “(A) would adversely affect one or more
19 small business concerns, including the potential
20 loss of an existing contract;

21 “(B) includes, in its statement of work,
22 goods or services—

23 “(i)(I) currently being performed by a
24 small business; and

1 “(II) if the proposed procurement is
2 in a quantity or estimated dollar value the
3 magnitude of which renders small business
4 prime contract participation unlikely; or

5 “(ii)(I) that are of a type that the Ad-
6 ministrator through market research can
7 demonstrate that two or more small busi-
8 nesses are capable of performing; and

9 “(II) if the proposed procurement
10 would be combined with other require-
11 ments for goods and services;

12 “(C) is for construction and—

13 “(i) seeks to package or combine dis-
14 crete construction projects; or

15 “(ii) the value of the goods or services
16 subject to the contract exceeds the dollar
17 threshold; or

18 “(D) is determined by the Administrator
19 to have a solicitation that involves an unneces-
20 sary or unjustified bundling of contract require-
21 ments.

22 “(2) RESPONSIBILITY OF THE PROCUREMENT
23 ACTIVITY.—At least 45 days prior to the issuance of
24 a solicitation, the Procurement Activity shall notify
25 and provide a copy of the proposed procurement to

1 the procurement center representative assigned to
2 the Procurement Activity. The 45-day notification
3 process under this paragraph shall occur concu-
4 rrently with other processing steps required prior to
5 issuance of the solicitation. The notice shall include
6 a statement setting forth the proposed procurement
7 strategy required by subsection (e), and explaining—

8 “(A) why the proposed acquisition cannot
9 be divided into reasonably small lots (not less
10 than economic production runs) to permit offers
11 on quantities less than the total requirement;

12 “(B) if applicable, a list of the incumbent
13 contractors disaggregated by and including
14 names, addresses, and whether or not the con-
15 tractor is a small business concern;

16 “(C) a description of the industries that
17 might be interested in bidding on the contract
18 requirements;

19 “(D) the number of small businesses listed
20 in the industry categories that could be ex-
21 cluded from future bidding if the contract is a
22 bundled contract, including any small business
23 bidders that had bid on previous procurement
24 requirements that are included in the bundling
25 of contract requirements;

1 “(E) why the delivery schedules cannot be
2 established on a realistic basis that will encour-
3 age small business participation to the extent
4 consistent with the actual requirements of the
5 Government;

6 “(F) why the proposed acquisition cannot
7 be offered so as to make small business partici-
8 pation likely;

9 “(G) why construction cannot be procured
10 as separate discrete projects; and

11 “(H) why the agency has determined that
12 the bundled contract is necessary and justified.

13 “(3) PUBLICATION OF NOTICE STATEMENT.—
14 Concurrently, the statement required in paragraph
15 (2) shall be published in the Federal contracting op-
16 portunities database.

17 “(4) RECOMPETITION OF A PREVIOUSLY BUN-
18 DLED CONTRACT.—If the proposed procurement is a
19 previously bundled contract that is to be recompeted
20 as a bundled contract, the Administrator shall deter-
21 mine, with the assistance of the agency proposing
22 the procurement—

23 “(A) the amount of savings and benefits
24 (in accordance with subsection (d)) achieved
25 under the bundling of contract requirements;

1 “(B) whether such savings and benefits
2 will continue to be realized if the contract re-
3 mains bundled, and whether such savings and
4 benefits would be greater if the procurement re-
5 quirements were divided into separate solicita-
6 tions suitable for award to small business con-
7 cerns;

8 “(C) the dollar value of subcontracts
9 awarded to small business concerns under the
10 bundled contract, disaggregated by North
11 American Industrial Classification Code;

12 “(D) the percentage of subcontract dollars
13 awarded to small businesses under the bundled
14 contract, disaggregated by North American In-
15 dustrial Classification Code; and

16 “(E) the dollar amount and percentage of
17 prime contract dollars awarded to small busi-
18 nesses in the primary North American Indus-
19 trial Classification Code for that bundled con-
20 tract during each of the two fiscal years pre-
21 ceding the award of the bundled contract and
22 during each fiscal year of the performance of
23 the bundled contract.

24 “(5) FAILURE TO PROVIDE NOTICE.—If no no-
25 tification of the proposed procurement or accom-

1 panying statement is received, but the Administrator
2 determines that the proposed procurement is a pro-
3 posed procurement described in paragraph (1), then
4 the Administrator shall require that such a state-
5 ment of work be completed by the Procurement Ac-
6 tivity and sent to the procurement center representa-
7 tive and postpone the solicitation process for at least
8 10 days but not more than 45 days to allow the Ad-
9 ministrator to review the statement and make rec-
10 ommendations as described in this section before the
11 procurement process is continued.

12 “(6) RESPONSIBILITY OF THE PROCUREMENT
13 CENTER REPRESENTATIVE.—Within 15 days after
14 receipt of the proposed procurement and accom-
15 panying statement, if the procurement center rep-
16 resentative believes that the procurement as pro-
17 posed will render small business prime contract par-
18 ticipation unlikely, the representative shall rec-
19 ommend to the Procurement Activity alternative pro-
20 curement methods which would increase small busi-
21 ness prime contracting opportunities.

22 “(7) DISAGREEMENT BETWEEN THE ADMINIS-
23 TRATION AND THE PROCUREMENT ACTIVITY.—

24 “(A) IN GENERAL.—If a small business
25 concern would be adversely affected, directly or

1 indirectly, by the proposed procurement, and
2 that small business concern or a trade associa-
3 tion of which that small business concern is a
4 member so requests, the Administrator may
5 take action under this paragraph to further the
6 interests of small businesses.

7 “(B) APPEAL TO AGENCY HEAD.—First,
8 the proposed procurement shall be submitted
9 for determination to the head of the contracting
10 agency by the Administrator.

11 “(C) FAILURE TO AGREE.—Whenever the
12 Administrator and the head of the contracting
13 agency fail to agree—

14 “(i) the Administrator, within ten
15 days after such decision, may file an ap-
16 peal with the appropriate agency board of
17 contract appeals;

18 “(ii) the board shall provide the Ad-
19 ministrator and the head of the con-
20 tracting agency the opportunity to provide
21 their views on the disputed contract, except
22 that no oral testimony or oral argument
23 shall be permitted; and

24 “(iii) the board shall render its deci-
25 sion, which shall be final agency action for

1 purposes of chapter 7 of title 5, United
2 States Code, within 30 days after the ap-
3 peal has been filed.

4 “(D) APPEAL BY AFFECTED SMALL BUSI-
5 NESS CONCERN TO GAO.—Should the Adminis-
6 trator choose not to pursue an appeal the ap-
7 propriate board of contract appeals, a small
8 business concern that would be adversely af-
9 fected, directly or indirectly, by the procure-
10 ment as proposed, or a trade association that
11 includes such a small business concern as a
12 member, may bring a protest to the Govern-
13 ment Accountability Office. If the protest is
14 brought by a trade association, the trade asso-
15 ciation shall not be required to identify a spe-
16 cific member in connection with the protest.

17 “(d) MARKET RESEARCH.—

18 “(1) IN GENERAL.—Before proceeding with an
19 acquisition strategy that could lead to a contract
20 containing bundling of contract requirements, the
21 head of an agency shall conduct market research to
22 determine whether bundling of the requirements is
23 necessary and justified.

24 “(2) FACTORS.—For purposes of subsection
25 (c)(1), bundling of contract requirements may be de-

1 terminated as being necessary and justified if, as com-
2 pared to the benefits that would be derived from
3 contracting to meet those requirements if not bun-
4 dled, the Federal Government would derive from the
5 bundling of contract requirements measurably sub-
6 stantial benefits, including any combination of bene-
7 fits that, in combination, are measurably substantial.

8 “(3) BENEFITS.—For the purposes of bundling
9 of contract requirements, benefits described in para-
10 graph (2) may include the following:

11 “(A) Cost savings.

12 “(B) Quality improvements.

13 “(C) Reduction in acquisition cycle times.

14 “(D) Better terms and conditions.

15 “(E) Any other benefits.

16 “(4) REDUCTION OF COSTS NOT DETERMINA-
17 TIVE.—For purposes of this subsection:

18 “(A) Cost savings shall not include any re-
19 duction in the use of military interdepartmental
20 purchase requests or any similar transfer funds
21 among Federal agencies for the use of a con-
22 tract issued by another Federal agency.

23 “(B) The reduction of administrative or
24 personnel costs alone shall not be a justification
25 for bundling of contract requirements unless

1 the cost savings are expected to be substantial
2 in relation to the dollar value of the procure-
3 ment requirements to be bundled.

4 “(5) LIMITATION ON ACQUISITION STRATEGY.—

5 The head of a Federal agency may not carry out an
6 acquisition strategy that includes a bundling of con-
7 tract requirements valued in excess of the dollar
8 threshold, unless the senior procurement executive
9 or, if applicable, Chief Acquisition Officer for the
10 Federal agency, before carrying out the acquisition
11 strategy certifies to the head of the Federal agency
12 that steps will be taken to include small business
13 concerns in the acquisition strategy.

14 “(e) STRATEGY SPECIFICATIONS.—If the head of a
15 contracting agency determines that an acquisition plan or
16 proposed procurement strategy for a procurement involves
17 a bundling of contract requirements, the proposed acquisi-
18 tion plan or procurement strategy shall—

19 “(1) identify specifically the benefits anticipated
20 to be derived from the bundling of contract require-
21 ments;

22 “(2) set forth an assessment of the specific im-
23 pediments to participation by small business con-
24 cerns as prime contractors that result from the bun-
25 dling of contract requirements and specify actions

1 designed to maximize small business participation as
2 subcontractors (including suppliers) at various tiers
3 under the contract or contracts that are awarded to
4 meet the requirements; and

5 “(3) include a specific determination that the
6 anticipated measurable benefits of the proposed bun-
7 dled contract justify its use.

8 “(f) CONTRACT TEAMING.—In the case of a solicita-
9 tion of offers for a bundled contract that is issued by the
10 head of an agency, a small-business concern may submit
11 an offer that provides for use of a particular team of sub-
12 contractors for the performance of the contract. The head
13 of the agency shall evaluate the offer in the same manner
14 as other offers, with due consideration to the capabilities
15 of all of the proposed subcontractors. If a small business
16 concern teams under this paragraph, it shall not affect
17 its status as a small business concern for any other pur-
18 pose.

19 “(g) DATABASE, ANALYSIS, AND ANNUAL REPORT
20 REGARDING CONTRACT BUNDLING.—

21 “(1) DATABASE.—Not later than 180 days
22 after the date of the enactment of this subsection,
23 the Administrator shall develop and shall thereafter
24 maintain a database containing data and informa-
25 tion regarding—

1 “(A) each bundled contract awarded by a
2 Federal agency; and

3 “(B) each small business concern that has
4 been displaced as a prime contractor as a result
5 of the award of such a contract.

6 “(2) ANALYSIS.—For each bundled contract
7 that is to be recompeted as a bundled contract, the
8 Administrator shall determine—

9 “(A) the amount of savings and benefits
10 (in accordance with subsection (d)) achieved
11 under the bundling of contract requirements;
12 and

13 “(B) whether such savings and benefits
14 will continue to be realized if the contract re-
15 mains bundled, and whether such savings and
16 benefits would be greater if the procurement re-
17 quirements were divided into separate solicita-
18 tions suitable for award to small business con-
19 cerns.

20 “(3) ANNUAL REPORT ON CONTRACT BUN-
21 DLING.—

22 “(A) IN GENERAL.—Not later than 1 year
23 after the date of the enactment of this para-
24 graph, and annually in March thereafter, the
25 Administrator shall transmit a report on con-

1 tract bundling to the Committee on Small Busi-
2 ness of the House of Representatives and the
3 Committee on Small Business and Entrepre-
4 neurship of the Senate.

5 “(B) CONTENTS.—Each report trans-
6 mitted under subparagraph (A) shall include—

7 “(i) data on the number, arranged by
8 industrial classification, of small business
9 concerns displaced as prime contractors as
10 a result of the award of bundled contracts
11 by Federal agencies; and

12 “(ii) a description of the activities
13 with respect to previously bundled con-
14 tracts of each Federal agency during the
15 preceding year, including—

16 “(I) data on the number and
17 total dollar amount of all contract re-
18 quirements that were bundled; and

19 “(II) with respect to each bun-
20 dled contract, data or information
21 on—

22 “(aa) the justification for
23 the bundling of contract require-
24 ments;

1 “(bb) the cost savings real-
2 ized by bundling the contract re-
3 quirements over the life of the
4 contract;

5 “(cc) the extent to which
6 maintaining the bundled status
7 of contract requirements is pro-
8 jected to result in continued cost
9 savings;

10 “(dd) the extent to which
11 the bundling of contract require-
12 ments complied with the con-
13 tracting agency’s small business
14 subcontracting plan, including
15 the total dollar value awarded to
16 small business concerns as sub-
17 contractors and the total dollar
18 value previously awarded to small
19 business concerns as prime con-
20 tractors; and

21 “(ee) the impact of the bun-
22 dling of contract requirements on
23 small business concerns unable to
24 compete as prime contractors for
25 the consolidated requirements

1 and on the industries of such
2 small business concerns, includ-
3 ing a description of any changes
4 to the proportion of any such in-
5 dustry that is composed of small
6 business concerns.

7 “(h) BUNDLING ACCOUNTABILITY MEASURES.—

8 “(1) TEAMING REQUIREMENTS.—Each Federal
9 agency shall include in each solicitation for any mul-
10 tiple award contract above the dollar threshold a
11 provision soliciting bids from any responsible source,
12 including responsible small business concerns and
13 teams or joint ventures of small business concerns.

14 “(2) POLICIES ON REDUCTION OF CONTRACT
15 BUNDLING.—

16 “(A) IN GENERAL.—Not later than 270
17 days after the date of enactment of this sub-
18 paragraph, the Federal Acquisition Regulatory
19 Council, established under section 25(a) of the
20 Office of Federal Procurement Policy Act (41
21 U.S.C. 1302(a)), shall amend the Federal Ac-
22 quisition Regulation issued under section 25 of
23 such Act to—

24 “(i) establish a Government-wide pol-
25 icy regarding contract bundling, including

1 regarding the solicitation of teaming and
2 joint ventures; and

3 “(ii) require that the policy estab-
4 lished under clause (i) be published on the
5 website of each Federal agency.

6 “(B) RATIONALE FOR CONTRACT BUN-
7 DLING.—Not later than 30 days after the date
8 on which the head of a Federal agency submits
9 the report required under section 15(h), the
10 head of the Federal agency shall publish on the
11 website of the Federal agency a list and ration-
12 ale for any bundled contract for which the Fed-
13 eral agency solicited bids or that was awarded
14 by the Federal agency.”.

15 **SEC. 3. REPEAL OF REDUNDANT PROVISIONS.**

16 (a) CERTAIN PROVISIONS REGARDING CONTRACT
17 BUNDLING REPEALED.—Section 15(a) of the Small Busi-
18 ness Act (15 U.S.C. 644(a)), is amended by striking “If
19 a proposed procurement includes” and all that follows
20 through “the matter shall be submitted for determination
21 to the Secretary or the head of the appropriate depart-
22 ment or agency by the Administrator.”. All references in
23 law to such sentences as they were in effect on the date
24 that is 1 day prior to the effective date of this Act shall

1 be deemed to be references to section 44(d), as added by
2 this Act.

3 (b) CERTAIN PROVISIONS REGARDING MARKET RE-
4 SEARCH REPEALED.—Paragraphs (2) through (4) of sec-
5 tion 15(e) of the Small Business Act (15 U.S.C. 644(e))
6 are repealed. All references in law to such paragraphs, as
7 in effect on the date that is one day prior to the effective
8 date of this Act, shall be deemed to be references to sub-
9 sections (d) through (f), respectively, of section 44 of the
10 Small Business Act, as added by this section.

11 (c) CERTAIN PROVISIONS REGARDING CONTRACT
12 BUNDLING DATABASE REPEALED.—

13 (1) Paragraph (1) of section 15(p) of the Small
14 Business Act (15 U.S.C. 644(p)) is repealed.

15 (2) Paragraphs (2) through (4) of section 15(p)
16 of the Small Business Act (15 U.S.C. 644(p)) are re-
17 pealed. All references in law to such paragraphs, as
18 in effect on the date that is one day prior to the ef-
19 fective date of this Act, shall be deemed to be ref-
20 erences to paragraphs (1) through (3), respectively,
21 of section 44(h) of the Small Business Act, as added
22 by this Act.

23 (d) CERTAIN PROVISIONS REGARDING BUNDLING
24 ACCOUNTABILITY MEASURES REPEALED.—Paragraphs
25 (1) and (2) of section 15(q) of the Small Business Act

1 (15 U.S.C 644(q)) are repealed. All references in law to
2 such paragraphs, as in effect on the date that is one day
3 prior to the effective date of this Act, shall be deemed to
4 be references to paragraphs (1) and (2), respectively, of
5 section 44(i) of the Small Business Act, as added by this
6 Act.

7 (e) CERTAIN PROVISIONS REGARDING.—Subsection
8 (o) of section 3 of the Small Business Act (15 U.S.C.)
9 is repealed.

10 **SEC. 4. TECHNICAL AMENDMENTS.**

11 Section 15 of the Small Business Act (15 U.S.C. 644)
12 is amended—

13 (1) in the subsection heading of subsection (p),
14 to read as follows: “ACCESS TO DATA.”; and

15 (2) in the subsection heading of subsection (p),
16 to read as follows: “REPORTS RELATED TO PRO-
17 CUREMENT CENTER REPRESENTATIVES.”.

18 **SEC. 5. EXPANSION OF AGENCY’S RESPONSIBILITY.**

19 Section 44(b) of the Small Business Act (15 U.S.C.
20 657q(b)) is amended by striking “appropriate” and insert-
21 ing “the maximum practicable”.

○