



AND

**SEIDMAN & ASSOCIATES, P.C.**

**ATTORNEYS AT LAW**

**PRESENT**

# **HOW TO CHALLENGE CONTRACT BUNDLING**

**PRESENTATION BY PAUL J. SEIDMAN**

**TO**



***FEDERAL CONTRACTING 06 – 07 CONFERENCE***

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**WASHINGTON MARRIOTT**

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# BACKGROUND

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- **COMPETING POLICY CONSIDERATIONS**
  - **PROCUREMENT EFFICIENCY V. COMPETITION**
- **COMPETITION IN CONTACTING (“CICA”), P.L. 98-369 (1984)**
  - **NO MENTION OF “BUNDLING”**
  - **REAFFIRMS MINIMUM NEEDS RULE**
- **TWO EARLY CASES**
  - ***PACIFIC SKY SUPPLY*, B-228049, 87-2 CPD ¶ 504 (1987)**
    - **“ADMINISTRATIVE CONVENIENCE” NOT JUSTIFICATION FOR \$2.5 BILLION, 5 YR SOLE SOURCE REQUIREMENTS CONTRACT FOR ALL PARTS FOR A JET ENGINE**
  - ***ELECTRO-METHODS, INC.*, B-239141.2, 90-2 CPD ¶ 363 (1990)**
    - **“CONFIGURATION CONTROL” JUSTIFIED BUNDLING KITS FOR MODIFYING JET ENGINE WITH RELATED ENGINEERING SERVICES**

# SMALL BUSINESS REAUTHORIZATION ACT OF 1997, P.L. 105-135

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- ❑ DEFINES BUNDLING
- ❑ **“MEASURABLY SUBSTANTIAL BENEFITS” REQUIRED FOR BUNDLING**
- ❑ **IF BUNDLING PERMITTED**
  - TEAMING W/O AFFECTING SIZE STATUS
  - SMALL BUSINESS SUBCONTRACTING AN EVALUATION FACTOR

# BASES FOR CHALLENGING BUNDLING

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- ❑ COMPETITION IN CONTRACTING ACT
  - IMPLEMENTED BY FAR PART 6
- ❑ SMALL BUSINESS ACT
  - IMPLEMENTED BY ANTI-BUNDLING REGULATIONS
    - ❑ SBA Regulations
      - 13 CFR 125.2 Prime Contract Assistance
    - ❑ FAR
      - Most Important FAR Provisions
        - FAR 2.101 Definition
        - FAR 7.107 Additional Requirements for Acquisitions Involving Bundling
        - FAR 8.404 Use of Federal Supply Schedules

# BUNDLING DEFINITION

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- ❑ **COMPETITION IN CONTRACTING ACT**
  - “BUNDLING” NOT DEFINED
- ❑ **SMALL BUSINESS ACT/ANTI-BUNDLING REGULATIONS**
- ❑ **FOUR REQUIREMENTS:**
  - Consolidates work previously provided under separate contracts
  - That could be performed by small business
  - in a new solicitation for a single contract
  - unsuitable for award to small business
- ❑ **FAR 2.101 RECENTLY AMENDED TO INCLUDE**
  - multiple awards of indefinite qty contracts under the same solicitation;
  - An order placed against an indefinite qty contract under:
    - ❑ A Federal Supply Schedule Contract; or
    - ❑ Task or delivery order contract awarded by another agency.

# BASIS FOR CAUSE OF ACTION

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## □ COMPETITION IN CONTRACTING ACT

- FULL AND OPEN COMPETITION REQUIREMENT
- MINIMUM NEEDS RULE
- *REASONABLE BASIS* JUSTIFICATION REQUIRED

## □ CAUSE OF ACTION

- "BUNDLING" NOT NECESSARY TO MEET MEET MINIMUM NEEDS

## □ SMALL BUSINESS ACT/ ANTIBUNDLING REGS

- *MEASURABLY SUBSTANTIAL BENEFITS* JUSTIFICATION REQUIRED

## □ CAUSE OF ACTION

- FAILURE TO MEET JUSTIFICATION REQUIREMENTS

# SMALL BUSINESS ACT REQUIREMENTS MARKET RESEARCH

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## MARKET RESEARCH

- REQUIRED TO DETERMINE IF BUNDLING JUSTIFIED

## "MEASURABLY SUBSTANTIAL BENEFITS"

- REQUIRED TO JUSTIFY BUNDLING [FAR 7.107]
- AGENCY MUST -
  - QUANTIFY
  - EXPLAIN WHY "MEASURABLY SUBSTANTIAL"

# SMALL BUSINESS ACT REQUIREMENTS COORDINATION

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- ❑ **BUNDLING STRATEGY MUST BE COORDINATED WITH SBS IF ESTIMATED CONTRACT VALUE**
  - \$7 MILLION OR MORE FOR DOD
  - \$5 MILLION OR MORE FOR NASA, GSA OR DOE
  - \$2 MILLION OR MORE FOR OTHER AGENCIES
- ❑ **SBS TO ASSIST IN STRATEGIES TO REDUCE OR MINIMIZE SCOPE OF BUNDLING**
- ❑ **SBS TO NOTIFY OSDBU IF BUNDLING UNNECESSARY OR NOT IDENTIFIED AS BUNDLING**



# SMALL BUSINESS ACT REQUIRMENTS "MEASURABLY SUBSTANTIAL BENEFITS"

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## **BENEFITS REQUIRED TO JUSTIFY BUNDLING**

### **ESTIMATED VALUE $\leq$ \$75 MILLION**

10% OF ESTIMATED VALUE

### **ESTIMATED VALUE $>$ \$75 MILLION**

LARGER OF

5% OF ESTIMATED VALUE; OR

\$7.5 MILLION, WHICHEVER IS GREATER

### **ESTIMATED VALUE INCLUDES OPTIONS**

# ANALYSIS OF CASES

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- CICA
  - SOME SUCCESS ON MERITS
    - **Not Justification**
      - Administrative Convenience
    - **Adequate Justification**
      - Lack of Manpower
      - Need to Integrate Work
- SMALL BUSINESS ACT/ANTIBUNDLING REGS
  - DISMISSED ON PROCEDURAL GROUNDS
    - UNTIMELY
    - NO SHOWING OF PREJUDICE
    - NOT "BUNDLING"
  - SUSTAINED BASED ON AGENCY FAILURE TO FOLLOW REQUIRED PROCEDURES

# ANALYSIS OF CASES (continued)

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- 15% - 20% SUCCESS RATE
  - LIMITED SCOPE OF REVIEW – RATIONALE BASIS TEST
  - DISMISSALS ON GAO PROCEDURAL RULES

# COMPARISON

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<b>ACT/REGS</b>	<b>CICA</b>	<b>SB</b>
BUNDLING DEFINED	NO	YES
ADV PLANNING REQUIRED	YES	YES
MARKET RESEARCH REQUIRED	YES	YES
DOLLAR THRESHHOLDS	NO	YES
REQUIRES COMBINING PRIOR BUYS	NO	YES
ADVANCE NOTICE TO SBA REQUIRED	NO	YES
DEMONSTRABLE SAVINGS REQUIRED	NO	YES
LACK OF MANPOWER JUSTIFICATION	YES	NO
ONLY SMALL BUSINESS CAN CHALLENGE	NO	YES
BID PROTEST REMEDY	YES	YES

# GAO BID PROTEST PROCEDURES

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## **TIMELINESS**

### **SOLICITATION DEFECT**

PRIOR TO TIME FOR RECEIPT OF BIDS OR PROPOSALS

"BUNDLING" A SOLICITATION DEFECT

### **OTHER PROTEST GROUNDS**

WITHIN 10 DAYS AFTER BASIS KNOWN OR SHOULD HAVE BEEN KNOWN

APPLIES TO "BUNDLING" GROUNDS LEARNED FROM AGENCY REPORT/DISCOVERY

## **PRIOR TIMELY AGENCY PROTEST**

WITHIN 10 DAYS OF ACTUAL OR CONSTRUCTIVE NOTICE OF ADVERSE AGENCY ACTION

# GAO BID PROTEST PROCEDURES

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- STATUTORY STAY IF FILED**
  - BEFORE AWARD
  - AFTER AWARD IF GAO NOTIFIES AGENCY-
    - WITHIN 10 DAYS OF AWARD; OR
    - 5 DAYS AFTER A REQUIRED DEBRIEFING
- INTERESTED PARTY REQUIREMENT
- DOCUMENT REQUEST
- PROTECTIVE ORDERS
- AGENCY REPORT
  - DUE 30 DAYS AFTER GAO NOTIFICATION
- CONTRACTOR COMMENTS
  - 10 DAYS AFTER RECEIPT OF AGENCY REPORT
- DECISION
  - WITHIN 100 DAYS OF FILING

# GAO REMEDIES

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## □ REMEDIES

- RECOMMEND AGENCY REMOVE IMPROPER BUNDLING REQUIREMENT FROM SOLICITATION
- ATTORNEYS FEES
  - IF PROTESTOR FILES COMMENTS ON AGENCY REPORT
  - REDUCED RATES FOR LARGE BUSINESS

# FAR 19.505 REJECTING SBA RECOMMENDATIONS

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- CO NOTICE OF REJECTION TO PCR
  - 5 WORKING DAYS OF RECEIPT
- PCR APPEAL TO HEAD OF PROCURING ACTIVITY
  - 2 WORKING DAYS OF RECEIPT
- HEAD OF PROCURING ACTIVITY
  - 7 WORKING DAYS FOR DECISION
- SBA ADMINISTRATOR APPEAL TO AGENCY SECRETARY
  - 15 WORKING DAYS



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THANK YOU  
ANY QUESTIONS:

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