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SMALL BUSINESS FEDERAL CONTRACTOR SAFEGUARD ACT

OCTOBER 8, 2002.—Ordered to be printed

Mr. KERRY, from the Committee on Small Business and
Entrepreneurship, submitted the following

R E P O R T

[To accompany S. 2466]

The Committee on Small Business and Entrepreneurship, to which was referred the bill (S. 2466) having considered the same, reports favorably thereon with amendments and recommends that the bill (as amended) do pass.

On July 24, 2002, the Committee on Small Business and Entrepreneurship considered S. 2466, the “Small Business Federal Contractor Safeguard Act.” S. 2466 seeks to change the term “bundled contract” to “consolidated contract,” and strengthen the definition of the term to close the current loopholes whereby Federal agencies circumvent statutory safeguards intended to ensure that separate contracts are consolidated only after the conscious consideration of economic impact. The legislation also establishes a two-tiered system whereby Federal agencies are required to conduct a threshold level of economic analysis on consolidated contracts over \$2 million and more in-depth economic research for contracts over \$5 million. Having considered S. 2466, the Committee reports favorably thereon without further amendment and recommends that the bill do pass.

I. INTRODUCTION

Few issues have so strongly galvanized the anger of the small business contracting community as the practice of contract bundling, which occurs when separate, smaller contracts are combined to form mega-contracts, often spread over large geographic areas, resulting in minimal or no small business participation.

Many supporters of the practice of contract bundling point to its cost-saving potential as reason for its use. Unfortunately, little evidence supports this claim, and too many contracts are bundled

without the required economic research designed to determine if a bundled contract will actually result in real cost savings.

The Small Business Administration's (SBA) Office of Advocacy, an independent body within the SBA, estimated that for every increase of 100 bundled contracts, there was a decrease of over 106 individual contracts issued to small firms. Additionally, for every \$100 awarded on a bundled contract, there was a decrease of \$33 to small business. The Office of Advocacy arrived at these conclusions using a conservative definition of what constitutes a bundled contract. Therefore, the negative impact on small businesses from contract bundling is likely more severe.

While seemingly an efficient and cost-effective means for Federal agencies to conduct business, bundled contracts tend to be anti-competitive. When a Federal agency bundles contracts, it limits small businesses' ability to bid for the new bundled contract, thus limiting competition. Small businesses are consistently touted as more innovative, providing better and cheaper services than their larger counterparts. But when forced to bid for mega-contracts, at times across large geographic areas, few, if any, small businesses can be expected to compete. By driving small business from the Federal marketplace, contract bundling will actually drive up the costs of goods and services purchased by the Federal government because competition will be limited and our economy will be deprived of possible cost-saving and other innovations brought about by small businesses.

Public Law 105-135, the "Small Business Reauthorization Act of 1997" established a definition of a bundled contract and procedures to force agencies to examine their decisions to pursue bundled contracts. The law also set forth procedures requiring Federal agencies to conduct market research on all acquisition strategies that could result in a bundled contract to ensure any bundling is necessary and justified.

Although this law was intended to require Federal agencies to conduct market research before proceeding with a bundled contract, loopholes in the current definition of a bundled contract have allowed Federal agencies to skirt the law and bundle contracts without a conscious and deliberative review. Some Federal agencies have also used the term "consolidated contract" to create an artificial distinction to differentiate their actions from bundled contracts. There has been a means of avoiding the economic research required under the Small Business Act and proceeding with a bundled contract even though it may not be necessary and justified.

The Committee believes that the current definition has had implementation problems because it does not account for all circumstances in which contracts can be bundled together. Furthermore, the current law definition of "bundled contract", by stating that a bundled contract must be unsuitable for award to a small business concern, has provided a ready means for Federal agencies to avoid the economic research by claiming that as long as a small business can bid on a contract, it is suitable for award to a small business. Although the Committee does not believe Federal agencies should be seeking loopholes to avoid complying with the intent of the Congress, it has become apparent that the definition of a bundled contract needs to be strengthened if the statute is to

achieve its intended purpose of ensuring small businesses are protected from unnecessary and unjustified contract bundling.

The Committee believes S. 2466 contains the necessary changes to strengthen the definition of a bundled contract, referred to as a consolidated contract under this legislation, and to compel Federal agencies to perform the required economic research with respect to whether a proposed consolidated contract is necessary and justified, if the dollar value of the consolidation exceeds certain thresholds.

II. LEGISLATIVE HISTORY

S. 2466, the “Small Business Federal Contractor Safeguard Act,” was introduced by Senator John F. Kerry on May 7, 2002. Senators Christopher S. Bond, Jean Carnahan, Susan Collins, Max Cleland and Mary L. Landrieu are cosponsors. The Committee held a roundtable on June 19, 2002, titled, “Are Government Purchasing Policies Hurting Small Business?” During the roundtable, S. 2466 was a topic of discussion. The Committee also held roundtables on the topic of contract bundling in Federal procurement during the 106th Congress on May 20, 1999, titled “Small Business Procurement” and on September 13, 2000 titled, “What is Contract Bundling?”

Small business advocates that participated in the June 19, 2002, roundtable strongly supported S. 2466 and the concept of strengthening the definition of a bundled contract.

Language similar to S. 2466 was included in the National Defense Authorization as reported by the Senate Armed Services Committee during the first session of the 107th Congress. The Senate Armed Services Committee legislation applied only to the Department of Defense. Negotiation to create a uniform Government-wide standard failed in conference when jurisdictional objections were raised by the House Committee on Small Business.

During consideration of S. 2466, the Committee considered no amendments to the legislation.

III. ANALYSIS OF S. 2466, THE “SMALL BUSINESS FEDERAL CONTRACTOR SAFEGUARD ACT”

Purpose

S. 2466, the “Small Business Federal Contractor Safeguard Act,” seeks to change the term “bundled contract” to “consolidated contract,” and to strengthen the definition of the term to close the current loopholes whereby Federal agencies circumvent statutory safeguards intended to ensure that separate contracts are consolidated only after conscious consideration of economic impact. The legislation also establishes a two-tiered system whereby Federal agencies are required to conduct a threshold level of economic analysis on consolidated contracts over \$2 million and more in-depth economic research for contracts over \$5 million.

New definition of a bundled/consolidated contract

Under S. 2466, the term “bundled contract” and its definition would be eliminated. A new term, “consolidated contract”, and accompanying definition would take its place.

Under this legislation, the term “consolidated contract” means a multiple award contract or a contract for goods or services with a Federal agency that:

(A) Combines discrete procurement requirements from not less than 2 existing contracts;

(B) Adds new, discrete procurement requirements to an existing contract; or

(C) Includes 2 or more discrete procurement requirements. The Committee believes this definition clarifies the previous definition, which left room for interpretation by the Federal agencies, and closes the loopholes in the current definition pertaining to new contract requirements and multiple award contracts.

Procurement strategies

The procurement strategies section of the Small Business Act would now require a statement of benefits and a justification for any consolidated contract over \$2 million and a more extensive analysis, corresponding to current requirements for any consolidated contract, for consolidations over \$5 million.

Consolidated contracts over \$2 million

Under the legislation, in order for a Federal agency to move forward with a consolidated contract over \$2 million, the agency must describe in writing the benefits anticipated from the consolidated contract, identify alternatives that would involve a lesser degree of consolidation and include a specific determination that the consolidation is necessary and justified. The determination that a consolidation is necessary and justified may be determined through administrative and personnel savings alone.

Consolidated contracts over \$5 million

Under the legislation, in order for a Federal agency to move forward with a consolidated contract over \$5 million, an agency must, in addition to requirements above, conduct current market research to demonstrate that the consolidation will result in cost savings, quality improvements, reduction in acquisition times or better terms and conditions; include an assessment of the specific impediments to small business participation resulting from the consolidation; and specify actions designed to maximize small business participation as subcontractors and suppliers for the consolidated contract.

Unlike consolidations between \$2 million and \$5 million, the determination that a consolidation is necessary and justified may not be determined through administrative and personnel savings alone, unless those savings will be substantial.

Conforming amendments

The legislation also makes the necessary conforming amendments to the Small Business Reauthorization Act of 1997 and the Small Business Act, striking “bundled contract” and inserting “consolidated contract” where necessary.

IV. COMMITTEE VOTE

In compliance with rule XXVI(7)(b) of the Standing Rules of the Senate, the following votes were recorded on July 24, 2002. A motion by Senator Kerry to adopt S. 2466, the “Small Business Federal Contractor Safeguard Act,” was approved by a 19–0 recorded vote, with the following Senators voting in the affirmative: Kerry, Bond, Levin, Harkin, Lieberman, Wellstone, Cleland, Landrieu, Edwards, Cantwell, Carnahan, Burns, Bennett, Snowe, Enzi, Fitzgerald, Crapo, Allen and Ensign. No Senator voted in the negative.

V. EVALUATION OF REGULATORY IMPACT

In compliance with rule XXVI(11)(b) of the Standing Rules of the Senate, it is the opinion of the Committee that no significant additional regulatory impact will be incurred in carrying out the provisions of this legislation. There will be no additional impact on the personal privacy of companies or individuals who make use of the services provided.

VI. CHANGES IN EXISTING LAW

In the opinion of the Committee, it is necessary to dispense with the requirement of rule XXVI (12) of the Standing Rules of the Senate in order to expedite the business of the Senate.

VII. COST ESTIMATE

In compliance with rule XXVI(11)(a)(1) of the Standing Rules of the Senate, the Committee estimates the cost of the legislation will be equal to the amounts indicated by the Congressional Budget Office in the following letter.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 17, 2002.

Hon. JOHN F. KERRY,
*Chairman, Committee on Small Business and Entrepreneurship,
U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2466, the Small Business Federal Contractor Safeguard Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

S. 2466—Small Business Federal Contractor Safeguard Act

S. 2466 would restrict the ability of agencies to combine different procurement contracts for goods and services. Under current law, federal agencies may combine small procurement contracts into larger, “bundled contracts” under certain conditions. S. 2466 would limit the circumstances when small contracts maybe combined. Instead of “bundled” contracts, the bill would allow “consolidated” contracts that combine small procurement contracts for economic

reasons. The bill would require agencies to prepare a written justification for any consolidated contract valued at over \$2 million and conduct a more extensive analysis of the benefits of any consolidated of contracts valued at over \$5 million.

CBO estimates that implementing S. 2466 would cost about \$500,000 a year, subject to the availability of appropriated funds. The bill would not affect direct spending or receipts, so pay-as-you-go procedures would not apply. S. 2466 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

Based on information from the Small Business Administration and the Office of Federal Procurement Policy, CBO does not expect that the change in the requirements to combine contracts would lead to significant increased costs for procuring agencies. However, agencies could incur additional costs to implement the bill's new reporting requirements. CBO estimates that the additional workload associated with the analyses of consolidated contracts valued at over \$2 million would cost about \$500,000 a year, assuming the appropriation of the necessary amounts.

The CBO staff contact for this estimate is Matthew Pickford. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

VIII. SECTION-BY-SECTION ANALYSIS, S. 2466

Section 1. Short Title

This Act is titled the "Small Business Federal Contractor Safe-guard Act."

Section 2.

(a) Amends Section 3(o) of the Small Business Act to insert the definition of "consolidated contract" and a "multiple award contract".

(b) Amends Section 15(e) of the Small Business Act to establish the two-tiered system for determining if a consolidated contract is necessary and justified.

(c) Makes Conforming Amendments by Amending the Small Business Act in the following sections:

(1) In Section 2(j)(3), strikes the subsection heading and inserts "(j) CONTRACT CONSOLIDATION.—" and in paragraph (3) strikes "bundling of contract requirements" and inserts "contract consolidation";

(2) In Section 8(d)(4)(G), strikes "bundled contract" and inserts "consolidated contract";

(3) In Section 15(a), strikes "bundling of contract requirements" and inserts "contract consolidation" and strikes "bundled contract" and inserts "the consolidated contract"; and

(4) In Section 15(k)(5), strikes "significant bundling of contract requirements" and inserts "consolidated contracts valued at more than \$2,000,000" and strikes "bundled contract" and inserts "consolidated contract".