

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 7, 8, 16, 19, and 42

[FAR Case 2002-029]

RIN: 9000-AJ58

Federal Acquisition Regulation; Contract Bundling

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to implement the recommendations of the Office of Management and Budget (OMB) in its report entitled "A Strategy for Increasing Federal Contracting Opportunities for Small Business."

DATES: Interested parties should submit comments in writing on or before [**Insert 60 days after Federal Register publication date**] to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to—

General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW, Room 4035
ATTN: Laurie Duarte
Washington, DC 20405

Submit electronic comments via the Internet to—

farcase.2002-029@gsa.gov

Please submit comments only and cite FAR case 2002-029 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Rhonda Cundiff, Procurement Analyst, at (202) 501-0044. Please cite FAR case 2002-029. The TTY Federal Relay Number for further information is 1-800-877-8973.

SUPPLEMENTARY INFORMATION:

A. Background

On March 19, 2002, the President unveiled a Small Business Agenda that proposed several substantive steps toward creating a dynamic environment where small businesses and entrepreneurs can flourish. The plan included new tax incentives, health care options, and a reduction in regulatory barriers. For those small businesses seeking to do business with the Federal Government, the President announced several proposals to improve the access of small businesses to Federal contracting opportunities. Specifically, the President called upon the Office of Management and Budget (OMB) to prepare a strategy for unbundling contracts. Contract bundling is defined in Section 3(o) of the Small Business Act to mean the consolidation of two or more requirements for goods or

services previously provided or performed under separate smaller contracts into a solicitation of offers for a single award contract that is "unlikely to be suitable for award to a small business concern." 15 U.S.C. 632(o). Over the past decade, the number and size of bundled contracts have increased sharply and have resulted in a dramatic decline in small business Federal contracting opportunities.

In response to the President's call for a strategy to unbundled contracts, the Office of Federal Procurement Policy (OFPP), within OMB, created an interagency working group to develop a plan for increasing contracting opportunities for small businesses. As part of the working group's efforts, OFPP published a notice in the Federal Register soliciting public comments and held a public meeting on June 14, 2002, to provide interested parties an opportunity to express their views on contract bundling. By the end of the comment period, OFPP received 27 public comments and 14 individual presentations at the June 14 public meeting.

Based on the working group's analysis of available data and information, including the public comments received in writing and at the June 14 public meeting, OMB issued a report in October 2002 entitled "Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business." See <http://www.acqnet.gov/Notes/contractbundlingreport.pdf> or <http://www.acqnet.gov/>. The report cites data indicating that for every 100 "bundled"

contracts, 106 individual contracts are no longer available to small businesses. The report also notes that according to a report prepared for the Small Business Administration (SBA) Office of Advocacy, for every \$100 awarded on a "bundled" contract, there is a \$33 decrease to small businesses.

To address the harmful effects of contract bundling on the nation's small businesses, OMB's report offers a nine-point action plan designed to hold agencies accountable for eliminating unnecessary contract bundling and mitigating the effects of necessary contract bundling. Several of these Action Items, such as the Action Items calling for greater accountability of senior agency management, the collection and dissemination of best practices for maximizing prime and subcontracting opportunities for small businesses and facilitating development of the teams of small business contractors, will be implemented through initiatives conducted by OMB, SBA, and procuring agencies.

Other Action Items, however, require a series of amendments to SBA's regulations and applicable provisions of the Federal Acquisition Regulation (FAR). Action Item 3 recommends regulatory changes to expressly require bundling reviews of multiple award contract vehicles and task and delivery orders under such procurements. OMB's report notes that there has been a significant increase in the use of such contracting vehicles. Since neither the FAR nor SBA's regulations specifically require bundling reviews of orders

under multiple award contracts, multi-agency contracts, Governmentwide acquisition contracts and the General Services Administration (GSA) Multiple Award Schedule Program, an explicit regulatory amendment mandating such reviews is necessary.

Action Item 4 proposes the establishment of agency-specific acquisition dollar thresholds, within the range of \$2 million and \$7 million, that would trigger bundling reviews by the agency Office of Small and Disadvantaged Business Utilization (OSDBU). In addition, to ensure that agencies explore alternative acquisition strategies, Action Item 5 recommends that when an agency contemplates a bundled procurement above the established threshold, the agency must identify alternative acquisition strategies and justify the rationale for selecting a particular strategy over another that would involve less bundling.

Finally, as a means of mitigating contract bundling determined to be necessary and justified, Action Item 6 calls for measures to strengthen compliance with the plans of large business prime contractors for subcontracting with small businesses. In addition, Action Item 7 further requires measures to facilitate small business teams including joint ventures to effectively compete for bundled contracts. In connection with Action Item 7, the report requires that SBA determine whether regulatory changes are appropriate to encourage the development of such small business teaming arrangements.

This rule proposes to amend the FAR to implement these specific Action Items. The proposed amendments were drafted in conjunction with a companion proposal to amend applicable provisions of the SBA regulations which is also published for comment in the Federal Register as a separate rulemaking action.

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Section-by-Section Analysis of the Federal Acquisition Regulation

To implement OMB's Action Item 3 requirement for bundling reviews of task and delivery orders under multiple award contract vehicles, the proposed rule would add to the bundling definition in FAR 2.101 the definition of a "single contract" to include (1) an indefinite quantity contract awarded to two or more sources under a single solicitation for the same or similar supplies and services, and (2) include an order under a Federal Supply Schedule contract or a task- or delivery-order contract awarded by another agency (i.e., Governmentwide acquisition contract or multi-agency contract). By adding the definition of a "single contract", the regulations would make clear that some orders may fall within the scope of the definition of contract bundling and are, therefore, subject to the applicable requirements for bundling reviews and justifications.

As required in connection with Action Items 4 and 5 of OMB's report, the proposed rule would add FAR 7.104(d)(1) to require the planner to coordinate the acquisition plan or strategies with the cognizant small business specialist (SBS) when the strategy contemplates award of a contract or order meeting the agency dollar amounts as indicated in proposed new FAR 7.104(d)(2), unless the contract or order is entirely reserved or set-aside for small business under FAR Part 19. As proposed in FAR 7.104(d), the SBS shall notify the agency OSDBU if the proposed acquisition strategy involves contract bundling that the agency has not identified as bundled or includes unnecessary or unjustified bundling of requirements. In addition, as required in proposed FAR 7.104(d)(2), the acquisition strategy shall be coordinated with the cognizant small business specialist in accordance with FAR 7.104(d)(1) if the estimated contract or order value dollar thresholds established in the proposed three separate agency-specific dollar thresholds: \$7 million or more for the Department of Defense; \$5 million or more for the National Aeronautics and Space Administration, the Department of Energy and GSA; and \$2 million or more for all other agencies. The dollar amounts of the three-tier acquisition threshold are based on a comparative analysis of the number and size of the contracting actions of the major procuring activities and are intended to target contracting actions that would most likely involve contract bundling, while at the same time minimize the extent to which the bundling reviews would disrupt the

procurement process of the individual agency. GSA specifically invites public comment on the proposed three-tier acquisition threshold and on alternatives that would best achieve the intended purposes of Action Items 4 and 5.

As part of Action Item 3, FAR 7.107(b)(1), 7.107(b)(2), 7.107(d), and 7.107(e) would be revised to add the word "order" to the additional requirements for acquisitions involving contract bundling. In an effort to streamline the requirements for reviewing and justifying bundled requirements, the proposed rule would revise the existing FAR 7.107(e) to define "substantial bundling" as any bundling that results in a contract or order that meets agency dollar amounts specified in the proposed FAR 7.104(d)(2). This change will simplify the application of FAR 7.107(e) by using the same dollar thresholds to trigger SBS notification to the agency OSDBU under the proposed FAR 7.104(d)(1), and to require supporting documentation for substantial bundling under 7.107(e). Consistent with OMB's Action Item 5, the FAR would be revised to add 7.107(e)(6) to require the identification of alternative strategies that would reduce or minimize the scope of the bundling, and the rationale for not choosing those alternatives.

In connection with OMB's Action Item 3, FAR 8.404(a)(1) would be revised to add that the requirement at FAR 19.202-1(e)(1)(iii) applies to orders placed against Federal Supply Schedules. Further, FAR 8.404(a)(2) would be revised to add that orders placed under a Federal Supply Schedule contract

must comply with all FAR requirements for a bundled contract when the order meets the proposed FAR definition of "bundled contract".

In connection with OMB's Action Item 3, the proposed rule would add to FAR 16.505(a)(7) that orders placed under a task-order or delivery-order contract awarded by another agency must comply with all FAR requirements for a bundled contract when the order meets the proposed FAR definition of "bundled contract."

In connection with OMB's general call for strengthening OSDBU oversight and greater utilization of their resources, the proposed rule would add FAR 19.201(d)(11) to impose a new OSDBU oversight function. Under this proposed FAR 19.201(d)(11), OSDBUs would be required to conduct periodic reviews to assess: (1) the extent to which small businesses are receiving their fair share of Federal procurements under the programs administered under the Small Business Act; (2) the adequacy of contract bundling documentation and justification; and (3) the actions taken to mitigate the effects of necessary and justified contracting bundling on small businesses. Under this proposed rule, FAR 19.201(d)(12) would require OSDBUs to submit a copy of their assessment to the Agency Head and SBA Administrator.

FAR 19.202 would add a requirement that agencies shall establish procedures including dollar thresholds for review of acquisitions by the OSDBU Director, or the Director's designee, as to whether a particular acquisition should be

awarded under FAR Subpart 19.5, 19.8, or 19.13. This proposed change would further OMB's general recommendation for the identification of alternative acquisition strategies to increase small business participation in procurements.

We propose to amend FAR 19.202(1)(e)(1)(iii) to assign additional responsibilities to the SBA Procurement Center Representatives (PCRs) and procuring activities in the acquisition planning process by adding the requirement that the contracting officer provide all information relative to the justification of contract bundling when the acquisition involves substantial bundling, including the acquisition plan or strategy, and if the acquisition involves substantial bundling, the information identified in 7.107(e). Further, 19.202(1)(e)(iii) will require the contracting officer to provide this same information to the agency OSDBU when the acquisition involves substantial bundling.

Consistent with OMB's Action Item 6 proposal to mitigate the effects of contract bundling by strengthening compliance with small business subcontracting plans, the proposed rule would add language in FAR 42.1502 to require an assessment of contractor compliance with the goals identified in the small business subcontracting plan in contracts that require a subcontracting plan. As currently written, FAR 15.304(c)(3)(iii) requires that only in solicitations involving bundling that offer a significant opportunity for subcontracting, the contracting officer must include a factor to evaluate past performance indicating the extent to which

the offeror attained applicable goals for small business participation under contracts that required subcontracting plans. Based on the findings of the General Accounting Office (GAO) that agency oversight of large business compliance with subcontracting plans has been inconsistent, this proposed change contemplates a more systemic review of an agency's general oversight as well as its individual assessment of contractor subcontracting plan compliance to facilitate greater consistency in agency oversight in the future. See GAO Report, "Small Business Subcontracting Report Validation Can Be Improved", GAO-02-166R Subcontracting Data, December 13, 2001.

C. Regulatory Flexibility Act

The changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because it proposes to increase small business contracting opportunities. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and will be provided to the Chief Counsel for Advocacy for the Small Business Administration. The analysis reads as follows:

1. Reasons for proposed rule:

This rule proposes to amend the Federal Acquisition Regulation (FAR) to implement the recommendations of the Office of Management and Budget (OMB) in its report entitled "A Strategy for Increasing Opportunities for Small Business." The proposed FAR changes will: (1) clarify the definition of "bundling" to indicate it applies to orders placed against Federal Supply Schedules and another agency's

Governmentwide Acquisition contracts or Multi-agency contracts when those orders otherwise meet the parameters of the definition; (2) require the small business specialist to coordinate on agency acquisition strategies at specified dollar thresholds and notify the agency Office of Small and Disadvantaged Business Utilization (OSDBU) when those strategies include contract bundling that is unnecessary, unjustified, or not identified as such by the agency; (3) reduce the threshold for "substantial bundling"; (4) revise the documentation requirements for substantial bundling to include identification of alternative acquisition strategies that would result in the bundling of fewer requirements, along with justification for not choosing those alternatives; (5) require contracting officers to provide bundling justification documentation to the agency OSDBU when substantial bundling is involved; (6) require performance evaluations to include an assessment of contractor compliance with small business subcontracting goals; and (7) require the OSDBU to be responsible for conducting periodic reviews to assess agency contract bundling requirements and the extent to which small businesses are receiving a fair share of Federal procurements.

2. Objectives of and legal basis for this rule:

The objective of this proposed rule is to further the Administration's commitment of creating a Government strategy for unbundling Federal contracts to increase Federal contracting opportunities for small business. In order to accomplish this commitment, this proposed rule provides FAR coverage that implements the recommendations of OMB in its report entitled "Contract Bundling: A Strategy for Increasing Opportunities for Small Business."

3. Description of and estimate of the number of small entities to which the rule will apply, or an explanation if such estimate is not available:

The proposed rule will indirectly apply to all large and small entities that seek award of Federal service contracts. The rule should have a positive economic impact on small prime contractors and subcontractors by providing more Federal contracting opportunities for small businesses. In a report filed last year with the House and Senate Small Business Committee, the U.S. Small Business Administration identified from the Federal Procurement Data Center (FPDS) only four material bundling cases with a total value of \$60 million for the first three quarters of FY 2001. This represents 0.0004% of Federal contract dollar activity (contract bundling estimate rate which is \$60 million divided by \$150 billion for three-fourths of a year). The new rule now encompasses reviews of high dollar value orders. At most, this is expected to be \$3 billion. For example, using the data from table 1 for FY 2001 at DOD FFS-GWAC-MACS \$7 million or more 659 and FSS+585 = \$1.244 billion or for FY 2002 857+717 = \$1.574 billion orders to be reviewed. Applying the contract bundling estimate rate

SBA's .0004% to these previously un-reviewed contract order dollars of \$3 billion, we expect that approximately \$1 million dollars of orders will be identified as bundled.

4. Description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

The proposed rule imposes no reporting, recordkeeping, or other compliance requirements.

5. Relevant Federal rules that may duplicate, overlap, or conflict with the rule:

The companion proposed rule being published by the Small Business Administration at the same time as the FAR proposed rule.

6. Description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize the rule's economic impact on small entities.

Currently, there are no practical alternatives that will accomplish the objectives of this proposed rule.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR parts 2, 7, 8, 16, 19, and 42 in accordance with 5 U.S.C. 610. Comments must be submitted separately and should cite 5 U.S.C 601, et seq. (FAR case 2002-029), in correspondence.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

List of Subjects in 48 CFR Parts 2, 7, 8, 16, 19, and 42

Government procurement.

Dated: January 24, 2003

AL MATERA,
Director,
Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 2, 7, 8, 16, 19, and 42 as set forth below:

1. The authority citation for 48 CFR parts 2, 7, 8, 16, 19, and 42 continues to read as follows:

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 in the definition "Bundling" by redesignating paragraph (3) as (4) and adding a new paragraph (3) to read as follows:

2.101 Definitions.

* * * * *

Bundling means—

* * * * *

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

(i) An indefinite quantity contract awarded to two or more sources under a single solicitation for the same or similar supplies and services (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., Governmentwide acquisition contract or multi-agency contract).

* * * * *

PART 7—ACQUISITION PLANNING

3. Amend section 7.104 by adding paragraph (d) to read as follows:

7.104 General procedures.

* * * * *

(d)(1) The planner shall coordinate the acquisition plan or strategy with the cognizant small business specialist when the strategy contemplates award of a contract or order meeting the dollar amounts in paragraph (d)(2) of this section unless the contract or order is entirely reserved or set-aside for small business under Part 19. The small business specialist shall notify the agency Office of Small and Disadvantaged Business Utilization if the strategy involves contract bundling that is unnecessary, unjustified, or not identified as bundled by the agency.

(2) The strategy shall be coordinated with the cognizant small business specialist in accordance with paragraph (d)(1) of this section if the estimated contract or order value is—

(i) \$7 million or more for the Department of Defense;

(ii) \$5 million or more for the National Aeronautics and Space Administration, the General Services Administration, and the Department of Energy; and

(iii) \$2 million or more for all other agencies.

4. Amend section 7.107 in paragraphs (b)(1), (b)(2), and (d) by adding the words "or order" after the word

"contract"; revising the introductory text of paragraph (e), paragraphs (e)(4) and (e)(5); and adding (e)(6) to read as follows:

7.107 Additional requirements for acquisitions involving bundling.

* * * * *

(e) Substantial bundling is any bundling that results in a contract or order that meets the dollar amounts specified in 7.104(d)(2). When the proposed acquisition strategy involves substantial bundling, the acquisition strategy must additionally—

* * * * *

(4) Specify actions designed to maximize small business participation as subcontractors (including suppliers) at any tier under the contracts, or order, that may be awarded to meet the requirements;

(5) Include a specific determination that the anticipated benefits of the proposed bundled contract or order justify its use; and

(6) Identify alternative strategies that would reduce or minimize the scope of the bundling, and the rationale for not choosing those alternatives.

* * * * *

PART 8—REQUIRED SOURCES OF SUPPLIES AND CONTRACTS

5. Amend section 8.404 in the introductory text of paragraph (a)(1) by removing the period at the end of the first sentence and adding "and the requirement at 19.202-

1(e)(1)(iii)." in its place; and revising paragraph (a)(2) to read as follows:

8.404 Using schedules.

(a) * * *

(2) Orders placed under a Federal Supply Schedule contract—

(i) Are not exempt from the development of acquisition plans (see Subpart 7.1), and an information technology acquisition strategy (see Part 39); and

(ii) Must comply with all FAR requirements for a bundled contract when the order meets the definition of "bundled contract" (see 2.101(b)).

* * * * *

PART 16—TYPES OF CONTRACTS

6. Amend section 16.505 by removing the word "and" from the end of paragraph (a)(7)(i); removing the period at the end of paragraph (a)(7)(ii) and adding "; and" in its place; and adding paragraph (a)(7)(iii) to read as follows:

16.505 Ordering.

(a) * * *

(7) * * *

(iii) Must comply with all FAR requirements for a bundled contract when the order meets the definition of "bundled contract" (see 2.101(b)).

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

7. Amend section 19.201 by removing the period at the end of paragraph (d)(10) and adding a semicolon in its place; and adding paragraphs (d)(11) and (d)(12) to read as follows:

19.201 General policy.

* * * * *

(d) * * *

(11) Conduct periodic reviews to assess the—

(i) Extent to which small businesses are receiving a fair share of Federal procurements, including contract opportunities under the programs administered under the Small Business Act;

(ii) Adequacy of contract bundling documentation and justifications; and

(iii) Actions taken to mitigate the effects of necessary and justified contract bundling on small businesses; and

(12) Provide a copy of the assessment made under paragraph (d)(11) of this section to the Agency Head and SBA Administrator.

* * * * *

8. Amend section 19.202 by adding a new sentence after the first sentence to read as follows:

19.202 Specific policies.

* * * Agencies shall establish procedures including dollar thresholds for review of acquisitions by the Director

or the Director's designee for the purpose of making these recommendations. * * *

9. Amend section 19.202-1 by revising paragraph (e)(1)(iii) to read as follows:

19.202-1 Encouraging small business participation in acquisitions.

* * * * *

(e)(1) * * *

(iii) The proposed acquisition is for a bundled requirement. (See 10.001(c)(2)(i) for mandatory 30-day notice requirement to incumbent small business concerns.) The contracting officer shall provide all information relative to the justification of contract bundling, including the acquisition plan or strategy and, if the acquisition involves substantial bundling, the information identified in 7.107(e). When the acquisition involves substantial bundling, the contracting officer shall also provide the same information to the agency Office of Small and Disadvantaged Business Utilization.

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PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

10. Amend section 42.1502 by adding a new sentence to the end of paragraph (a) to read as follows:

42.1502 Policy.

(a) * * * These procedures shall require an assessment of contractor compliance with the goals identified in the small business subcontracting plan when the contract

includes the clause at 52.219-9, Small Business
Subcontracting Plan.

* * * * *

[BILLING CODE 6820-EP]