

section to the Agency Head and SBA Administrator.

\* \* \* \* \*

■ 10. 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. \* \* \*

■ 11. 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.

\* \* \* \* \*

### PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 12. 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 performance against, and efforts to achieve, the goals identified in the small business subcontracting plan when the contract includes the clause at 52.219-9, Small Business Subcontracting Plan.

\* \* \* \* \*

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Chapter 1

#### Federal Acquisition Regulation; Small Entity Compliance Guide

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

**ACTION:** Small Entity Compliance Guide.

**SUMMARY:** This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121). It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2001-17 which amends the FAR. An asterisk (\*) next to a rule indicates that a regulatory flexibility analysis has been prepared in accordance with 5 U.S.C. 604. Interested parties may obtain further information regarding these rules by referring to FAC 2001-17, which precedes this document. These documents are also available via the Internet at <http://www.arnet.gov/far>.

**FOR FURTHER INFORMATION CONTACT:** Laurie Duarte, FAR Secretariat, (202) 501-4225. For clarification of content, contact Ms. Rhonda Cundiff, Procurement Analyst, General Services Administration, at (202) 501-0044.

#### \* Contract Bundling (FAR Case 2002-029)

This final rule implements the Office of Management and Budget's October 2002 report, entitled "Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business" which requires amendments to the Federal Acquisition Regulation (FAR) to implement the following action items: (1) Revise the definition of bundling to expressly include multiple award contract vehicles and task and delivery orders under such contracts; (2) require procuring activities to coordinate with their small business specialist (SBS) proposed acquisition strategies or plans contemplating awards above specified dollar thresholds and require the SBS to

notify the agency Office of Small and Disadvantaged Utilization (OSDBU) when those strategies include unnecessary and unjustified contract bundling; (3) reduce the threshold and revise the documentation required for substantial bundling; and (4) require agency OSDBUs to perform periodic oversight reviews of agency bundling activities. To implement the action items, this final rule amends FAR Parts 2, 7, 8, 10, 16, 19, and 42.

Dated: October 16, 2003.

**Laura Auletta,**

*Director, Acquisition Policy Division.*

[FR Doc. 03-26464 Filed 10-17-03; 8:45 am]

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## SMALL BUSINESS ADMINISTRATION

### 13 CFR Part 125

#### RIN 3245-AF07

#### Small Business Government Contracting Programs

**AGENCY:** Small Business Administration.  
**ACTION:** Final rule.

**SUMMARY:** This final rule amends the U.S. Small Business Administration (SBA) regulations governing small business prime contracting assistance. Specifically, this final rule: revises the definition of contract bundling to expressly include multiple award contract vehicles and task and delivery orders under such contracting vehicles; mandates that procuring activities coordinate with the Small Business Specialist (SBS) on proposed acquisition strategies or plans contemplating awards above specified dollar thresholds, and that the SBS notify the agency's Office of Small and Disadvantaged Business Utilization (OSDBU) when those strategies include contract bundling that is unnecessary or unjustified; revises the threshold and documentation required for substantial bundling; and requires the agency's OSDBU to perform certain oversight functions. These amendments are intended to implement a number of the recommendations included in the October 2002 Office of Management and Budget (OMB) report entitled "Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business."

**DATES:** This rule is effective November 19, 2003.

**FOR FURTHER INFORMATION CONTACT:** Dean Koppel, Assistant Administrator, Office of Policy and Research, (202) 401-8150 or [dean.koppel@sba.gov](mailto:dean.koppel@sba.gov).

**SUPPLEMENTARY INFORMATION:**

## A. Background

On January 31, 2003, SBA published a proposed rule in the **Federal Register**, 68 FR 5134, to solicit comments on its proposal to implement several recommendations included in OMB's October 2002 report, 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/>.

Contract bundling is defined in the Small Business Act as the consolidation of two or more requirements for goods and services into a single procurement that is "unlikely to be suitable for award to a small business concern." 15 U.S.C. 632(o). The dramatic increase in the size of contracts in recent years has resulted in a significant reduction in the number of Federal contracting opportunities for small businesses. As a result, the President's Small Business Agenda directed OMB to develop a strategy for unbundling contracts as a means of expanding small business access to Federal procurements.

In response, the Office of Federal Procurement Policy (OFPP), within OMB, issued the October 2002 bundling report, providing a nine-point action plan to hold agencies accountable for eliminating unnecessary contract bundling and for mitigating the effects of necessary contract bundling. Five of the nine action items specifically called for regulatory implementation, while the remaining four contemplated other administrative initiatives involving OMB, SBA and agency OSDBUs. The specific action items necessitating regulatory implementation are: Action Item 3, which requires a clarification of the definition of contract bundling to require bundling reviews of task and delivery orders under multiple award contract vehicles; Action Item 4, which dictates bundling reviews of agency acquisitions above specific dollar thresholds; Action Item 5, which mandates the identification of alternative acquisition strategies and justification for bundled procurements above established thresholds; Action Item 6; which requires measures to strengthen compliance with subcontracting plans of large business prime contractors; and Action Item 7, which demands measures to facilitate small business teaming arrangements.

SBA's proposed rule published on January 31, 2003 (68 FR 5134) detailed the changes to the SBA's regulations that would implement the five action items requiring regulatory amendments. In particular, the rule proposed to:

(1) Revise the definition of bundling to expressly include multiple award contract vehicles and task and delivery orders under such contracts; (2) require procuring activities to coordinate with their SBS proposed acquisition strategies or plans contemplating awards above specified dollar thresholds and require the SBS to notify the agency OSDBU when those strategies include unnecessary and unjustified contract bundling; (3) reduce the threshold and revise the documentation required for substantial bundling; and (4) require the agency's OSDBU to perform periodic oversight reviews of agency bundling activities.

The proposed rule invited the public to submit comments on the proposed amendments by April 1, 2003. By the end of the comment period, SBA had received a total of 26 timely comment letters from a variety of sources, consisting of one member of Congress; the Public Contract Law Section of the American Bar Association; two national women's organizations; five national trade organizations; six Federal agencies; and 11 firms and individuals from numerous industries.

The overwhelming majority of the 26 commenters supported the Administration's effort to address the problem of contract bundling. Some of the commenters, however, complained that a few of the proposed changes did not go far enough to curb contract bundling. Others, on the other hand, criticized some of the proposed changes for going too far to unbundle contracts.

SBA considered all of the comments and recommendations in developing this final rule. The specific comments to each proposed amendment and SBA's corresponding responses are set forth below.

## B. Section-by-Section Analysis of Comments

### 1. Comments on Requirement for Bundling Reviews

SBA received six comments concerning its proposal to add a new § 125.2(b)(2), requiring bundling reviews of proposed acquisition strategies or plans. As proposed, that section requires an agency to coordinate its acquisition strategy or plan with its SBS whenever the agency's contemplated strategy or plan exceeds the applicable agency threshold established in the proposed § 125.2(b)(2)(i) (discussed below) and is not set-aside for small businesses. The proposed § 125.2(b)(2) provides a minimum period of no later than 30 days before the issuance of the solicitation, for the agency to coordinate

its plan with the SBS. In addition, under the proposed § 125.2(b)(2), the SBS is required to notify the agency OSDBU if the proposed acquisition strategy or plan includes bundled requirements that the agency has not identified as bundled or includes unnecessary or unjustified bundling of requirements.

All six comments on the proposed § 125.2(b)(2) expressed support for the requirement for SBS bundling reviews. Three of those six comments recommended allowing the SBS more time to complete the bundling reviews. These three commenters believed that a notification timeframe of no later than 30 days prior to the issuance of the solicitation may be too late in the process for the SBS to influence the structure of the acquisition and assist in identifying small business sources. As an alternative, one of these three commenters recommended official SBS notification at the time the contracting officer is first notified of the requirement; the second suggested a provision precluding the contracting officer from finalizing the acquisition plan until the SBS completed the bundling review within a "limited number of days"; and the third recommended a minimum 40-day review period.

SBA has declined to adopt any of these recommendations because they would unduly burden the procurement process. The requirement for bundling reviews under the proposed § 125.2(b)(2) implicitly recognizes the need for SBS and OSDBU involvement in the acquisition process to facilitate greater participation of small businesses in Federal contracts. The necessity for their involvement in the process, however, must be balanced against the practical imperative for an operationally efficient Federal acquisition system. SBA does not believe that mandating a specific time that SBSs must receive the acquisition plan or strategy accommodates the unique planning processes of individual agencies and procurements. The proposed language in § 125.2(b)(2) for coordination "as early in the planning process as practicable, but no later than 30 days," affords the flexibility that the process dictates and also emphasizes the agency's obligation for early coordination.

The other commenters on the proposed § 125.2(b)(2) urged for a more stringent provision. Two commenters recommended that the section authorize OSDBUs to stop an acquisition if the OSDBU determines that it includes unnecessary or unjustified bundling. Still another commenter urged for a provision precluding all contract

bundling, asserting that this was the only acquisition strategy that would benefit small businesses.

Like the other suggestions concerning this section, SBA believes that these recommendations also would unduly interfere with the operational efficiencies of the procurement process. Both governing law and OMB's October 2002 bundling report acknowledge that necessary and justified contract bundling may serve a useful purpose. SBA therefore has no authority to prohibit all bundled contracts, including those that are determined to be both necessary and justified.

In addition, the comment that OSDBUs should have authority to block an acquisition ignores existing regulations that would operate in tandem with proposed § 125.2(b)(2). Specifically, existing § 125.2(b)(6) already provides a mechanism for resolving disagreements with agencies concerning contract bundling and small business participation in procurements. Section 125.2(b)(6) authorizes Procurement Center Representatives (PCRs) to initiate an appeal to the head of the contracting activity when there is a disagreement concerning the bundling of a requirement or the suitability of an acquisition to be set aside for small business competition. The proposed rule, specifically § 125.2(b)(8) and § 125.2(d)(7)(ii), encouraged SBSs and OSDBUs to cooperate with PCRs in reviewing procurements and in identifying possible small business contracting opportunities. SBSs and OSDBUs therefore can work with PCRs in using the PCR appeal mechanism to challenge unnecessary and unjustified contract bundling.

Accordingly, SBA believes that the proposed § 125.2(b)(2) properly balances the need for SBS reviews of acquisition strategies, with the need for operational efficiency in the procurement process. In adopting § 125.2(b)(2), SBA has made three minor revisions. The first clarifies that the proposed strategies are for "acquisitions" that meet the applicable dollar threshold. The second revision adds language to reinforce the SBS's responsibility to assist in identifying alternative strategies when an acquisition plan involves substantial bundling. The third revision adds a new § 125.2(b)(2)(ii) to explain the application of the dollar thresholds to multiple award contracts and orders. The new § 125.2(b)(2)(ii) indicates that the thresholds provided in § 125.2(b)(2)(i) apply to the cumulative value of an acquisition strategy that contemplates multiple award contracts or orders, including options.

## *2. Comments on Acquisition Dollar Thresholds*

SBA specifically requested comments on the proposed § 125.2(b)(2)(i). That section establishes three separate agency-specific dollar thresholds that would trigger the bundling reviews required under § 125.2(b)(2) and the additional documentation and justification required for substantial bundling under § 125.2(d)(1)(v) (discussed below). The three-tier dollar threshold proposed was \$7 million or more for the Department of Defense (DOD); \$5 million or more for the National Aeronautics and Space Administration (NASA), the Department of Energy (DOE) and the General Services Administration (GSA); and \$2 million or more for all other agencies.

SBA received nine comments on this proposal. Only one of the nine commenters objected to the adoption of any dollar threshold. That one objecting commenter believed that the imposition of thresholds for SBS bundling reviews would mean that contract bundling could occur below the established thresholds without review. This commenter asserted that focusing review on contracts above the threshold would somehow eliminate bundling reviews of smaller contracts and thereby reduce rather than increase contracting opportunities for small businesses.

This commenter misunderstands the purpose and application of the proposed thresholds under § 125.2(b)(2)(i). The proposed thresholds are not intended to relieve procuring officials of their existing responsibilities to justify contract bundling at any dollar threshold, and to mitigate the effects of necessary bundling. The existing § 125.2(b)(3), which implements 15 U.S.C. 644(a), requires procuring activities to provide a copy of all proposed bundled procurements, irrespective of amount, to the activity's PCR at least 30 days before the solicitation is issued. The proposed § 125.2(b)(2)(i) leaves that requirement in place, and focuses additional resources instead on reviewing higher-dollar valued procurements that will likely have an even greater adverse impact by foreclosing small business prime contract participation.

Proposed § 125.2(b)(2)(i) is intended to supplement and not replace current PCR reviews of procurement strategies. As a result, instead of reducing small business contracting opportunities as the objecting commenter asserts, proposed § 125.2(b)(2)(i) and related provisions will serve to expand small business access to Federal contracts by providing more reviews of those

bundled procurements that possess the greatest potential to harm small businesses.

With the exception of that one objecting commenter, the remaining eight commenters on § 125.2(b)(2)(i) supported the adoption of dollar thresholds for SBS reviews, but expressed diverse opinions as to the appropriate structure and amount of the thresholds. One commented that the proposed three-tier approach and dollar amounts are reasonable, but further indicated that the Agency should be aware that substantial bundling may occur at levels below the threshold.

Two commenters recommended that SBA reduce the dollar amounts—one of these commenters failed to specify any alternative amount, while the other recommended the adoption of thresholds between \$1 and \$2 million.

Two other commenters recommend increasing the thresholds to an unspecified amount. Both of these commenters believed that higher thresholds would better accommodate the limited agency resources available to conduct bundling reviews and provide the additional justifications required for substantial bundling.

Two additional commenters believed that adopting different thresholds for different agencies would unnecessarily complicate the acquisition process. They recommended that SBA adopt a single government-wide threshold that would apply to all agencies equally. One of these two commenters suggested that SBA establish the government-wide threshold at \$7 million. The other commenter urged that DOD be subject to the same dollar threshold as the other agencies. This commenter asserted that it is just as important for DOD to sustain its small business industrial base as it is for civilian agencies. This commenter further indicated that close monitoring of DOD's procurement is essential to limiting the adverse impact of contract bundling on small businesses.

Another commenter also believed that the three-tier approach is too complicated. This commenter suggested that SBA adopt one threshold of either \$2 or \$5 million for all agencies and a second threshold of greater than \$5 million to trigger "additional requirements" for all agencies procurements above that amount.

As SBA explained in its preamble to the proposed rule published on January 31, 2003, the proposed dollar amounts of the thresholds are based on a comparative analysis of the number and size of the contracting actions of the major procuring activities. The objective of the tier approach is two-fold: (1) To target those contracting actions for

individual agencies that would most likely involve contract bundling; and (2) to minimize the extent to which the bundling reviews would disrupt the procurement process of individual agencies.

SBA continues to believe that the proposed three-tier threshold will best achieve those objectives. SBA therefore declines to adopt the recommendations for a single government-wide threshold to trigger bundling reviews and the additional documentation requirements for substantial bundling (discussed below). SBA is instead adopting the proposed threshold of \$7 million for DOD, \$5 million for NASA, DOE and GSA, and \$2 million for all other agencies. These agency-specific levels will capture those procurements that would most likely involve contract bundling for individual agencies, will minimize the disruption to the procurement process, and will properly account for the limited resources and contracting personnel to conduct the bundling reviews.

### *3. Comments on Compliance With Subcontracting Plans*

The redesignated § 125.2(b)(6)(iii)(C) under the proposed rule clarifies the language of the former § 125.2(b)(5)(iii)(C) to make clear that as part of the responsibilities of PCRs to ensure that small business participation is maximized through subcontracting opportunities, PCRs may review an agency's oversight of its subcontracting programs, including the agency's overall and individual assessment of contractor compliance. The proposed § 125.2(b)(6)(iii)(C) contemplates a systemic review of an agency's general assessment of subcontracting plan compliance to facilitate greater consistency in agency oversight in the future.

SBA received 11 comments on this proposed clarification. Although the comments applauded the intent of proposed § 125.2(b)(6)(iii)(C), the majority of the comments indicated that it is insufficient to monitor and ensure compliance with subcontracting plans. Three commenters recommended the imposition of penalties or sanctions on large prime contractors for noncompliance with their small business subcontracting plans. The Federal Acquisition Regulation (FAR) already provides for liquidated damages for noncompliance with subcontracting plans. Under FAR section 19.750-7, a prime contractor is liable for such damages for failing to make a "good faith effort" to comply with its subcontracting plans. Since governing regulations already provide monetary

consequences for noncompliance with subcontracting plans, SBA is not adopting this recommendation.

Continuing on the issue of compliance with subcontracting plans, one commenter suggested that SBA explore incentives that would reward large prime contractors that achieve their subcontracting goals. Along those lines, another commenter similarly recommended reinforcing prime contractor compliance with subcontracting plans by requiring the inclusion in all solicitations a past performance evaluation factor assessing subcontracting plan compliance. This commenter believed that such a mandatory source selection factor, in both bundled and non-bundled acquisitions alike, would encourage greater small business subcontracting awards. Additionally, because of the increase in task and delivery orders under multiple award contracts, the commenter also suggested that the regulations encourage the inclusion of a similar evaluation source selection criterion for task and delivery order awards.

Another commenter recommended that large businesses that are awarded task and delivery orders under GSA's Federal Supply Schedule (FSS) should be subject to the requirement for subcontracting plans under section 8(d) of the Small Business Act, 15 U.S.C. 637(d).

SBA agrees that a subcontracting plan compliance evaluation factor may serve as an effective incentive to encourage greater compliance with the plans. SBA is therefore adopting the proposed § 125.2(b)(6)(iii), with a new paragraph (D), recommending a separate evaluation factor of "significant weight" for achievements of subcontracting goals on previous contracts. SBA declines to make that evaluation factor mandatory or to extend it to task and delivery order awards at this time, since it has not yet determined the potential impact of such requirements.

Also, regarding the issue of SBA's review of subcontracting compliance, one commenter suggested that the regulations mandate that PCRs share their compliance assessments with SBA's breakout PCRs, who are assigned to major contracting centers. This commenter also recommended that SBA develop a system to enable PCRs and breakout PCRs to submit their assessments to the cognizant contracting officer.

Two commenters expressed the need for further guidance on evaluating compliance with subcontracting plans and a contractor's "good faith" efforts to achieve its small business goals. One of

these two commenters further indicated that government agencies should be required to "evaluate large businesses on the same basis and understanding of the small business subcontracting plan regulations." This commenter also complained that large businesses need additional guidance in completing commercial plans, which cover a commercial contractor's entire fiscal year and commercial production.

Two additional commenters recommended that in addition to goals, subcontracting plans should include other information, such as a description of the nature of the work to be subcontracted and the efforts the offeror will make to ensure that small businesses have an equitable opportunity to compete for subcontracts.

Likewise, another commenter suggested that prime contractor subcontracting plans should be reviewed not only for the extent of small business participation, but also for the extent to which they generate "reasonable profit margins" for small businesses. This commenter explained that review of the small business profit margins is necessary because prime contractors often give the low margin, high revenue producing products to small businesses, and thereby achieve their percentage of participation but leave the small business with little profit. This commenter also recommended the collection and dissemination of best practices and strategies for maximizing small business prime and subcontract opportunities.

SBA agrees that effective procedures to mitigate the effects of contract bundling on small businesses necessitates more stringent requirements for monitoring compliance with subcontracting plans to ensure that small businesses receive the maximum practical opportunity to participate as subcontractors in large Federal contracts. Many of the commenters recommended amendments that require further consideration to evaluate their likely effectiveness and impact on the procurement process. As a result, SBA is proposing a separate rule, published elsewhere in this issue of the **Federal Register**, to address many of these comments and suggestions, including the suggestion for more guidance in determining good faith compliance.

Although published separately, that proposed rule addressing the comments on § 125.2(b)(6)(iii)(C), remains part of the Administration's initiative to implement OMB's October 2002 report on contract bundling. However, because the rule proposes additional changes to SBA's regulations that were not

published for public comment as part of SBA's earlier January 31, 2003, proposed rule, SBA is publishing these proposed changes separately to solicit public comment before they become final.

#### *4. Comments on Requirement for PCR, SBS and OSDBU Cooperation*

SBA received four comments addressing proposed § 125.2(b)(8). This section reiterates the requirement for PCRs to work with SBSs and agency OSDBUs as early in the acquisition process as practicable, to identify acquisitions involving bundling and to increase small business prime contract participation. Several of the commenters requested additional language and guidance for developing and monitoring the utilization of small business teams.

Additionally, two of the commenters did not believe that the amendment sufficiently referenced joint ventures, teaming and mentor-protégé relationships as effective mechanisms for increasing small business access to Federal procurements. One of these commenters maintained that small business involvement in Federal procurements through subcontracting should be the exception rather than the rule. Another commenter suggested that small business teams should be based on "market driven strategies to develop the competitiveness of small firms in non-traditional areas of weakness."

SBA agrees that additional guidance on identifying and developing small business teams is necessary. Nonetheless, proposed § 125.2(b)(8) was not intended to provide such detailed guidance. The efforts to develop additional guidance are part of a separate administrative initiative to implement one of OMB's non-regulatory recommendations under Action Item 8 of its October 2002 bundling report. That item requires SBA to collect and disseminate best practices for maximizing small business opportunities. In implementing that recommendation, on January 23, 2003, SBA issued a memorandum to Senior Procurement Executives and OSDBU Directors, requesting proven strategies for increasing opportunities for small businesses. The memorandum invited the officials to submit to SBA's Office of Government Contracting no later than February 28, 2003, best practices for maximizing small business opportunities.

Once SBA completes its review of the agency submissions, it will publish a compilation of best practices, strategies and guidance for maximizing prime and subcontracting opportunities for small businesses. Since SBA will provide

additional guidance on small business teams as part of this separate initiative, it will not include such guidance in this rulemaking action and is therefore adopting § 125.2(b)(8) as proposed.

#### *5. Comments on Clarification of Bundling Definition*

SBA received seven comments on its proposal to implement the OMB bundling report recommendation to require bundling reviews for task and delivery order awards under multiple award contract vehicles. The proposed regulations add new § 125.2(d)(1)(iii) to define 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) an order under a FSS contract or a task or delivery order contract awarded by another agency. The proposed rule also adds new § 125.2(d)(1)(iv) defining an "order" as an order placed under a FSS contract or a task or delivery order contract awarded by another agency. The purpose of providing definitions of a "single contract" and an "order" is to clarify that task and delivery orders under multiple award contract vehicles are subject to the applicable requirements for bundling reviews and justifications.

The majority of the seven commenters expressed support for the proposed clarification. One commenter suggested that SBA clarify that the § 125.2(d)(1)(iii) definition of "single contract" is "for purposes of this subpart 125.2 only." Section 125.2(d)(1)(iii) already contains the qualifying statement "as used in this definition." SBA believes that language sufficiently clarifies that the definition of "single contract" is provided as part of the overall definition of contracting bundling. There is therefore no need for further clarifying language.

By far, the most common issue the commenters raised on the proposed definition of "single contract" and "order" was the type of multiple award contracts encompassed under the proposed definition. One commenter complained that the definition did not fully implement OMB's bundling recommendation to close the loophole of bundling task and delivery order awards because it does not cover the orders an agency issues against its own multiple award contracts. This commenter pointed out that the new definition only covers the orders placed against GSA's FSS, or against an indefinite quantity contract awarded by another agency. This commenter urged that the definition of contract bundling should include orders placed against

indefinite quantity, multiple award contracts awarded by any agency.

Also on this issue, two other commenters indicated that the regulations should not exempt an agency's order against its own multiple award contract, since agencies may also bundle requirements when ordering against their own multiple award contracts.

SBA does not agree that an agency's orders against its own contract should be subject to bundling reviews. The underlying multiple award contract of an agency is subject to the requirements for SBS and PCR review for contract bundling and small business participation. Unlike FSS orders, theoretically, the SBS and PCR reviews of an agency's proposed acquisition strategy or plan for its multiple award contract should encompass that agency's anticipated orders under that contract. Consequently, the agency's own orders presumably were part of the underlying PCR and SBS review. It would therefore be duplicative to require yet another bundling review of each individual order the agency places against its already reviewed multiple award contract. As a result, SBA is not adopting this recommendation, particularly in light of the limited resources available to conduct the reviews.

Another commenter asserted that the proposed clarification under §§ 125.2(d)(1)(iii) and (iv) is "vague as to whether task or delivery orders added to existing contracts will be covered by the definition and reviewed, or whether only task or delivery orders over certain thresholds will be reviewed." Under the proposed definitions, task and delivery order awards under any indefinite quantity contract other than an agency's own multiple award contract, would be subject to SBS review under § 125.2(b)(2), if it is above the established threshold, and would be subject to review by the cognizant PCR under § 125.2(b)(3), if it involves bundling.

In particular, since § 125.2(b)(2) requires procuring activities to submit acquisitions strategies above the established threshold to SBSs, strategies that contemplate orders that are above the threshold and that are not against an agency's own multiple award contract, would be subject to SBS review for bundling. Second, § 125.2(b)(3) requires a procuring activity to submit a copy of a proposed acquisition strategy to the PCR, whenever that strategy involves a bundled requirement. Because §§ 125.2(d)(1)(iii) and (iv) define a bundled requirement to include certain task and delivery orders under another

agency's contract, agencies would be required to submit such orders to PCRs for review, when the orders include bundling.

The final comment on proposed §§ 125.2(d)(1)(iii) and (iv) noted that the proposed definition of bundling is deficient because it does not cover "new work." Contrary to that commenter's assertion, nothing in the regulations exempts a new requirement from falling within the scope of the definition of contract bundling. The regulatory definition of "separate smaller contract" is based on the definition of that term under Section 3(o)(3) of the Small Business Act, 15 U.S.C. 632(o)(3). Like the statutory definition, § 125.2(d)(1)(ii) defines a "separate smaller contract" for purposes of a bundled contract, as one that "has previously been performed by one or more small business concerns or was suitable for award to one or more small business concerns." This definition does not mean that none of the individual requirements comprising the bundled acquisition can qualify as "new work." Instead, it requires that some portion of the bundled procurement must have been either performed or suitable for performance by a small business.

After considering all of the comments on proposed §§ 125.2(d)(1)(iii) and (iv), SBA believes that the amendment effectively implements OMB's recommendation to compel bundling reviews of task and delivery orders. SBA is therefore adopting the definition of "single contract" as proposed in § 125.2(d)(1)(iii), but is deleting the proposed definition of "order" under § 125.2(d)(1)(iv), as unnecessary.

#### 6. Comments on Amendments Concerning "Substantial Bundling"

In an effort to streamline the requirements for reviewing and justifying bundled requirements, this proposed rule provides new § 125.2(d)(1)(v) to replace the existing § 125.2(d)(1)(iii). This new section defines "substantial bundling" as any bundling that meets the dollar amounts specified in proposed § 125.2(b)(2)(i). The proposed rule also adds new § 125.2(d)(7)(i)(E), requiring that in the event of substantial bundling, the agency must identify the alternative strategies that would reduce or minimize the scope of the bundling and the rationale for not selecting those alternatives. The rule further proposed new § 125.2(d)(7)(ii), directing the procuring agency to provide the PCR and agency OSDBU a copy of the proposed acquisition strategy containing substantial bundling and the required

analysis, at least 30 days prior to the release of a solicitation.

SBA received one comment on this proposal. This commenter objected to the amendments because the commenter believes that government acquisition professionals need additional training and support and because the change will increase the workload of contracting officers.

SBA recognizes that lowering the threshold for "substantial bundling" would mean enlarging the number of procurements that would require the additional written justification under § 125.2(d)(7). However, SBA continues to believe that this change will simplify the application of § 125.2(b)(2)(i) and § 125.2(d)(7), by using the same three-tier dollar threshold to trigger the bundling reviews and the required supporting analysis for substantial bundling. Also, the changes in the requirement for written justifications are consistent with OMB's report recommendations relating to the identification of alternative acquisition strategies. As a result, SBA is adopting these proposed amendments with one change. SBA renumbered § 125.2(d)(1)(v) as § 125.2(d)(1)(iv).

#### 7. Comments on Requirement for Contract Bundling Report

SBA received three comments on its proposal to add new § 125.2(e) to impose a new OSDBU oversight function. The proposed § 125.2(e) dictates that OSDBUGs conduct periodic reviews to assess: (1) The extent to which small businesses are receiving their fair share of Federal procurements; (2) the adequacy of bundling documentation and justification; and (3) the adequacy of actions taken to mitigate the effects of necessary and justified contract bundling, including the agency's oversight of compliance with subcontracting plans. OSDBUGs also would be required to submit a copy of their assessment to the Agency Head and SBA Administrator.

One commenter recommended that this section be amended to require that Federal agencies negotiate with SBA two-part goals for prime and subcontract awards to the various types of small businesses and that OSDBUGs assess and track the awards to the various categories of small business concerns.

SBA declines to adopt this recommendation because there is already a process in place for negotiating small business goals. Section 15(j) of the Small Business Act, 15 U.S.C. 644(j), charges SBA with responsibility for negotiating small business goals with Federal agencies. Pursuant to those responsibilities, the

SBA has issued Goaling Guidelines that provide policy direction for establishing annual goals, reporting procurement activity and submitting corrective action plans when the goals are not satisfied. See <http://sba.gov/GC>. Most recently, on July 23, 2003, SBA published a notice in the **Federal Register**, soliciting comments on proposed revisions to its Goaling Guidelines. 68 FR 43566. The proposed revisions clarify SBA's goaling policies and are designed to ensure that the process is transparent. The proposed Goaling Guidelines are posted on SBA's Web site at <http://www.sba.gov/GC/goals>. Accordingly, there is no need for SBA to revise § 125.2(e) to address SBA procedures for negotiating and monitoring goal achievements.

Another commenter suggested that SBA require annual OSDBUG reviews rather than "periodic" reviews. This commenter also suggested that the OSDBUG reviews encompass agency performance in the area of contracting with women and minority-owned small businesses.

SBA agrees that a requirement for "annual" reviews is much clearer than one for merely "periodic" reviews. Thus, SBA has incorporated that suggestion. SBA is not, however, adopting the second recommendation regarding the contents of the OSDBUG reviews. The proposed § 125.2(e) already provides that the OSDBUG review should address the extent to which small businesses are receiving their fair share of Federal procurement, which includes contracting with women and minority-owned small businesses. There is, therefore, no need to single out these two categories of small businesses in the section. For this reason, SBA has adopted § 125.2(e) as proposed, with the exception of changing the requirement for periodic review to reviews on an annual basis.

#### C. Compliance With Executive Orders 12866, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612)

OMB has determined that this final rule is a significant regulatory action under Executive Order 12866. The rule implements the recommendations of the OMB report entitled "Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business." This rule is part of the President's initiative for small business growth.

For purposes of Executive Order 12988, SBA has drafted this proposed rule, to the extent practicable, in accordance with the standards set forth in section 3 of that Order.

For purposes of Executive Order 13132, SBA has determined that this proposed rule has no federalism implications warranting the preparation of a Federalism Assessment.

For purposes of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA has determined that this proposed rule imposes no new reporting or recordkeeping requirements.

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, *et seq.*, requires that SBA publish a final regulatory flexibility analysis. According to the RFA, the analysis must include: (1) A statement of need for and objective of the rule; (2) a summary of significant issues raised by public comments in response to SBA's Initial Regulatory Flexibility Act (IRFA) and an assessment of issues and changes made as a result; (3) a description of and estimate of the number of small entities to which the rule applies; (4) a description of the reporting, recordkeeping and other compliance requirements and an estimate of the classes of small entities subject to the requirements and type of professional skill necessary for the preparation of the report or record; and (5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the objectives of applicable statutes and of the reasons the agency selected the alternative adopted in the rule.

#### 1. Reason for and Objective of the Rule

The objective of this rule is to further the Administration's commitment to create a government strategy for unbundling Federal contracts to increase Federal contracting opportunities for small business. The rule will: (1) Revise the definition of "bundling" to apply to orders placed against Federal Supply Schedules, Government-wide Acquisition Contracts, and Multi-agency Contracts when those orders meet the definition; (2) require the SBS to coordinate agency acquisition strategies at specified dollar thresholds and notify the agency Office OSDBU when those strategies include unidentified or unjustified bundling; (3) reduce the threshold and revise the documentation required for "substantial bundling;" (4) require contracting officers to provide bundling justification documentation to the agency OSDBU when substantial bundling is involved; and (5) require agency OSDBUs to conduct annual reviews of agency efforts to maximize small business participation in procurements.

#### 2. Summary of Public Comments in Response to IRFA

SBA received no comments on its IRFA.

#### 3. Estimate of the Number of Small Entities To Which Rule Applies

This final rule will apply indirectly to all large and small entities that seek award of Federal contracts. The rule is expected to have a positive economic impact on small prime contractors and subcontractors by providing more Federal contracting opportunities for small businesses. In the SBA's 2001 State of Small Business Report filed with the House and Senate Small Business Committees, SBA identified only four material bundling cases with a total value of \$60 million for the first three quarters of Fiscal Year (FY) 2001. This represents 0.0004% of Federal contract dollar activity (\$60 million divided by \$150 billion for the first three quarters of the fiscal year). Based on FY 2001 data, the final rule will impact approximately \$3 billion in orders placed against FSS contracts, government-wide acquisition contracts, and multi-agency contracts. Applying the contract bundling estimate of 0.0004% to these un-reviewed orders, SBA expects approximately \$1 million will be identified as bundled. This rule establishes a three-tier dollar threshold of \$7 million for DOD, \$5 million for NASA, DOE and GSA, and \$2 million for all other civilian agencies. The dollar amount is based on a comparative analysis of the number and size of the contracting actions of the major procuring activities and is intended to target reviews of the contracting actions that would most likely involve contract bundling, without undue disruption to the acquisition process.

#### 4. Description of Reporting and Other Compliance Requirements

This rule imposes no new reporting or recordkeeping requirements.

#### 5. Summary of Efforts to Minimize Significant Economic Impact

In the preamble to this rule, SBA addressed the steps the Agency has taken to minimize significant adverse economic impact on small entities consistent with the objectives of applicable statutes and the reasons the Agency selected the alternatives adopted in this rule.

#### List of Subjects in 13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small business, Technical assistance.

■ For the reasons set forth in the preamble, SBA amends 13 CFR part 125 as follows:

### PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 1. The authority citation for 13 CFR part 125 continues to read as follows:

**Authority:** 15 U.S.C. 634(b)(6), 637 and 644; 31 U.S.C. 9701 and 9702.

■ 2. Amend § 125.2 as follows:

■ a. By revising the heading of paragraph (b);

■ b. By revising paragraph (b)(1);

■ c. By redesignating paragraphs (b)(2) through (b)(7) as paragraphs (b)(3) through (b)(8);

■ d. By adding new paragraph (b)(2);

■ e. By revising redesignated paragraph (b)(3), introductory text, (b)(6)(iii), and (b)(8);

■ f. By revising paragraphs (d)(1)(iii), (d)(2)(i) and (ii), (d)(5)(i)(A) and (B) and (d)(7), and adding paragraph (d)(1)(iv); and

■ g. By adding paragraph (e).

The revisions and additions to § 125.2 read as follows:

#### § 125.2 Prime contracting assistance.

\* \* \* \* \*

(b) *Responsibilities in the acquisition planning process.* (1) SBA Procurement Center Representatives (PCRs) are generally located at Federal agencies and buying activities which have major contracting programs. PCRs are responsible for reviewing all acquisitions not set-aside for small businesses to determine whether a set-aside is appropriate and to identify alternative strategies to maximize the participation of small businesses in the procurement.

(2) As early in the acquisition planning process as practicable, but no later than 30 days before the issuance of a solicitation, or prior to placing an order without a solicitation, the procuring activity must coordinate with the procuring activity's Small Business Specialist (SBS) when the acquisition strategy contemplates an acquisition meeting the dollar amounts in paragraph (b)(2)(i) of this section, unless the contract or order is entirely reserved or set-aside for small business concerns as authorized under the Small Business Act. The SBS must notify the agency Office of Small and Disadvantaged Business Utilization (OSDBU) if the strategy or plan includes bundled requirements that the agency has not identified as bundled or includes unnecessary or unjustified bundling of requirements. If the strategy involves substantial bundling, the SBS shall assist in identifying alternative



strategies that would reduce or minimize the scope of the bundling.

(i) The procuring activity must coordinate the acquisition strategy with the cognizant SBS in accordance with paragraph (b)(2) of this section if the estimated acquisition, contract or order value is:

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

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

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

(ii) If the strategy contemplates multiple award contracts or multiple award orders under the Federal Supply Schedule or a task or delivery order contract awarded by another agency, the thresholds in paragraph (b)(2)(i) of this section apply to the cumulative estimated value of the multiple award contracts or orders, including options.

(3) A procuring activity must provide a copy of a proposed acquisition strategy (e.g., Department of Defense Form 2579, or equivalent) to the applicable PCR (or to the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located if a PCR is not assigned to the procuring activity) at least 30 days prior to a solicitation's issuance whenever a proposed acquisition strategy:

\* \* \* \* \*

(6) \* \* \*

(iii) The PCR will also work to ensure that small business participation is maximized through teaming arrangements and subcontracting opportunities. This may include:

(A) Recommending that the solicitation and resultant contract specifically state the small business subcontracting goals, which are expected of the contractor awardee;

(B) Recommending that the small business subcontracting goals be based on total contract dollars instead of subcontract dollars;

(C) Reviewing an agency's oversight of its subcontracting program, including its overall and individual assessment of a contractor's compliance with its small business subcontracting plans. The PCR will furnish a copy of the information to the SBA Commercial Market Representative (CMR) servicing the contractor; and

(D) Recommending that a separate evaluation factor with significant weight is established for the extent to which offerors attained their subcontracting goals on previous contracts.

\* \* \* \* \*

(8) PCRs will work with the cognizant SBS and agency OSDBU as early in the acquisition process as practicable to identify proposed solicitations that involve bundling, and with the agency acquisition officials to revise the acquisition strategies for such proposed solicitations, where appropriate, to increase the probability of participation by small businesses, including small business contract teams, as prime contractors. If small business participation as prime contractors appears unlikely, the SBS and PCR will facilitate small business participation as subcontractors or suppliers.

\* \* \* \* \*

(d) \* \* \*

(1) \* \* \*

(iii) Single contract, as used in this definition, includes:

(A) Multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources; and

(B) An order placed against an indefinite quantity contract under a Federal Supply Schedule contract or a task or delivery order contract awarded by another agency (i.e., Government-wide acquisition contract or multi-agency contract).

(iv) Substantial bundling means any bundling that meets the dollar amounts specified in paragraph (b)(2)(i) of this section.

(2) \* \* \*

(i) Structure procurement requirements to facilitate competition by and among small business concerns, including small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals and small business concerns owned and controlled by women; and

(ii) Avoid unnecessary and unjustified bundling of contract requirements that inhibits or precludes small business participation in procurements as prime contractors.

\* \* \* \* \*

(5) \* \* \*

(i) \* \* \*

(A) Benefits equivalent to 10 percent of the contract or order value (including options) where the contract or order value is \$75 million or less; or

(B) Benefits equivalent to 5 percent of the contract or order value (including options) or \$7.5 million, whichever is greater, where the contract or order value exceeds \$75 million.

\* \* \* \* \*

(7) Substantial bundling. (i) Where a proposed procurement strategy involves a substantial bundling of contract requirements, the procuring agency must, in the documentation of that strategy, include a determination that the anticipated benefits of the proposed bundled contract justify its use, and must include, at a minimum:

(A) The analysis for bundled requirements set forth in paragraph (d)(5)(i) of this section;

(B) An assessment of the specific impediments to participation by small business concerns as prime contractors that will result from the substantial bundling;

(C) Actions designed to maximize small business participation as prime contractors, including provisions that encourage small business teaming for the substantially bundled requirement;

(D) Actions designed to maximize small business participation as subcontractors (including suppliers) at any tier under the contract or contracts that may be awarded to meet the requirements; and

(E) The identification of the alternative strategies that would reduce or minimize the scope of the bundling, and the rationale for not choosing those alternatives (i.e., consider the strategies under paragraphs (b)(6) (i) and (d) of this section).

(ii) At least 30 days prior to the solicitation release, the procuring activity shall provide the PCR and the agency OSDBU a copy of the proposed acquisition, including the analysis required by paragraph (d)(7) of this section, the acquisition plan, any bundling information required under paragraph (b)(3) of this section, and any other relevant information. The PCR and agency OSDBU or SBS, as applicable, shall work together to develop alternative acquisition strategies identified in paragraph (b)(6) of this section to enhance small business participation.

\* \* \* \* \*

(e) *OSDBU Oversight Functions.* The Agency OSDBU must:

(1) Conduct annual reviews to assess the:

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

(ii) Adequacy of the bundling documentation and justification; and

(iii) Adequacy of actions taken to mitigate the effects of necessary and justified contract bundling on small businesses (e.g., review agency oversight



of prime contractor subcontracting plan compliance under the subcontracting program).

(2) Provide a copy of the assessment under paragraph (e)(1) of this section to the Agency Head and SBA Administrator.

Dated: October 3, 2003.

**Hector V. Barreto,**  
*Administrator.*

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