GSA

GSA Office of Governmentwide Policy

MEMORANDUM FOR RONALD POUSSARD
DIRECTOR
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: RODNEY P. LANTIER, DIRECTOR Rodney P. Lantier
REGULATORY AND FEDERAL ASSISTANCE
PUBLICATIONS DIVISION

SUBJECT: FAR Case 2002-029, Contract Bundling

Attached are comments received on the subject FAR case published at 68 FR 5138; January 31, 2003.

Response Number	Date Received	Comment Date	Commenter
2002-029-1	02/04/03	02/04/03	Leon McCray
2002-029-2	02/04/03	02/04/03	Don Watkins
2002-029-3	02/07/03	02/07/03	Brian Scott
2002-029-4	02/20/03	02/20/03	Jay N. Bassin
2002-029-5	02/20/03	02/20/03	Robb Wieczorek
2002-029-6	02/24/03	02/24/03	Arthur L. Fanter
2002-029-7	02/27/03	02/27/03	GEM/Laser Express Inc.
2002-029-8	03/04/03	03/04/03	Robb Wieczorek
2002-029-9	03/08/03	03/08/03	Colonel Max E. Newman

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
www.gsa.gov

Response Number	Date Received	Comment Date	Commenter
2002-029-10	03/18/03	03/18/03	Edward L. Allen
2002-029-11	03/20/03	03/20/03	William Tate
2002-029-12	03/24/03	03/24/03	Bob Bowe
2002-029-13	03/24/03	04/24/03	Olga Grkavac
2002-029-14	03/25/03	03/25/03	Johnson & Johnson
2002-029-15	03/25/03	03/25/03	SSA / Dan Cronin
2002-029-16	04/01/03	04/01/03	Wendy S. Saigh
2002-029-17	03/27/03	03/27/03	Jack Townsend
2002-029-18	03/28/03	03/28/03	SHUBNUM
2002-029-19	03/28/03	03/28/03	NDIA
2002-029-20	03/28/03	03/218/03	Alan Schoenberg
2002-029-21	03/28/03	03/28/03	Boise
2002-029-22	03/31/03	03/31/03	MAPPS
2002-029-23	03/31/03	03/31/03	COFPAES
2002-029-24	03/31/03	03/31/03	Eagle Eye
2002-029-25	04/01/03	04/01/03	EPA/OSDBU Jeanette L. Brown
2002-029-26	04/01/03	04/01/03	House of Representatives Nydia Velazquez
2002-029-27	04/01/03	04/01/03	PSC
2002-029-28	04/01/03	04/01/03	ITAA
2002-029-29	04/01/03	04/01/03	ITI

Response Number	Date Received	Comment Date	Commenter
2002-029-30	04/01/03	04/01/03	ABA
2002-029-31	04/01/03	04/01/03	Patrick Murphy
2002-029-32	04/01/03	04/01/03	CSA
2002-029-33	04/01/03	04/01/03	DLA/Mary Massaro
2002-029-34	04/01/03	04/01/03	Venn Strategies
2002-029-35	04/01/03	04/01/03	Design Professionals Coalition
2002-029-36	04/02/03	04/02/03	DoD/Air Force
2002-029-37	04/02/03	04/02/03	OSDBU Ralph C. Thomas III
2002-029-38	04/02/03	04/02/03	DoD/Army
2002-029-39	04/02/03	04/02/03	DOE
2002-029-40	03/28/03	03/28/03	Anteon Corporation
2002-029-41	No Date	No Date	Department of Transportation

Attachments

2002-029-1

"McCray, Leon - ACA ITEC4" <Leon.McCray@itec4.army.mil>

02/04/2003 12:09 PM

To: farcase.2002-029@gsa.gov
cc: "Adams, Robert Mr ACA" <robert.adams@saalt.army.mil>, "Pinson, Tracey L Ms SADBU" <Tracey.Pinson@hqda.army.mil>
Subject: FAR councils propose change to contract-bundling rule

The FAR council's proposed changes to the contract-bundling rule does not go far enough. I recommend the proposed changes include consolidated contract procurements on IDIQ multiple award vehicles. These contracts have the same effects as contract bundling - unlikely to be won by a small business, decrease in contract dollars awarded to small businesses (SB), forces small businesses to compete head-to-head with large businesses that have the capitol, personnel and proposal teams larger than many small businesses. DoD orders for services valued at greater than $100,000 under MACs, as that term is defined in Section 803 and the DFARS implementation of the law at 216.505.70, must be issued on a competitive basis, meaning that "all contractors offering the required services under the multiple contract" must be afforded an opportunity to compete, or a waiver must be issued. DFARS 216.505-70 (b) and (c) (1). Special provisions are necessary and must be implemented to improve SB performance under the small business program - thus, assuring SBs get their fair share Government contract dollars, particularly in this era of consolidating, combining, and bundling contract requirements. Thank you.

Leon

2002-029-2

"Don Watkins/SEI" <DWatkins@seiofva.com>

To: 'gsa' <farcase.2002-029@gsa.gov>
cc:
Subject: RE: FAR proposed rule Jan. 31 to help small businesses

02/04/2003 10:29 AM

Regarding the proposed amendment to the FAR to reduce bundling of federal contracts to support small business, I most wholeheartedly endorse.

Bundling has had a profound and significant negative effect on the ability of small business to compete for federal business. Though it has enabled small business to team more often with large businesses, the large businesses have provided little to no work from the resultant awards. In many cases they have required the small businesses to reduce their labor rates to the point of non-profitability, prior to proposal submission, then have demanded further reductions after task awards, so that they can increase their own margins.

It is a well-known fact, that for every dollar going to small business, more jobs are created. If the federal government is interested in creating more jobs, this is well-founded initiative.

Sincerely,
Don Watkins
Vice President
Superior Electronics, Inc.
SBA 8(a) Certified

attwijqd.dat

2002-029-3

"Brian X Scott"
<bxscott@usgs.gov>
02/07/2003 06:12 PM

To: farcase.2002-029@gsa.gov
cc:
Subject: one way to increase small business participation in federal contracts

I have a suggestion to increase small business participation in federal contracts:

Correct the error that the GSA made in misinterpreting the provisions of FAR 19.502-1. It is GSA doctrine that the requirement in this provision to set aside suitable acquisitions for Small Business does not apply to orders against GSA Federal Supply Schedules. That interpretation is not consistent with what is stated in the provision, nor with the underlying law.

FAR 19.502-1(b) says, in part,

> This [SBSA] requirement does not apply to purchases of $2,500 or less, ? or purchases from required sources of supply under Part 8 (e.g., Federal Prison Industries, Committee for Purchase from People Who are Blind or Severely Disabled, and Federal Supply Schedule contracts).

GSA's misinterpretation is that this statement says that the requirement does not apply to purchases from Federal Supply Schedule contracts.

In fact, this statement says that the requirement does not apply to purchases from required source Federal Supply Schedule contracts.

FAR Part 8, Required Sources, clearly distinguishes between Mandatory Federal Supply Schedules [8.002 (a)(1)(vi) & 8.002 (a)(2)(ii)] and Optional use Federal Supply Schedules [8.002 (a)(1)(vii) & 8.002 (a)(2)(iii)]. An "Optional use" FSS is not a "Required Source." "Optional" contradicts "required." Just being enumerated in the lists in FAR 8.002 does not make a source a required source. To support this interpretation, note that the type of source listed at 8.002 (a)(1)(viii) is "Commercial sources" and 8.002(a)(2)(iv) also includes "commercial sources," and that 8.002 (b) discusses all other sources. If being enumerated in 8.002 made a source a required source, then all sources would be required, making the SBSA requirement inapplicable to all purchases.

Brian X Scott
Business Utilization and Development Specialist
US Geological Survey
Acquisition and Grants Branch
Office of Central Regional Services, Denver
Tel (303) 236-9331
Fax (303) 236-2710

2002-029-4

Jay.Bassin@emsus.com

02/20/2003 10:39 AM

To: farcase.2002-029@gsa.gov
cc:
Subject: FAR Case 2002-029

There is an inconsistency (or at least confusion) between FAR and SBA's regulations on bundling.

FAR 52.219-14 (Limitations on Subcontracting) states that for service contracts (other than for construction), "At least 50 percent of the cost of contract erformance incurred for personnel shall be expended for employees of the concern." This language comes from 13 CFR 125.6(a)(1).

However, 13 CFR 121.103(3) indicates that two or more small businesses may team together on a procurement and be treated as a small business as long as they're not affiliated and their size falls within the SBA size standards. In this situation, SBA's regs at 13 CFR 125.6(g) indicate that the "performance requirements under (a)(1) apply to the cooperative effort of the small businesses, not to the individual members."

Because Contracting Officers tend only to read FAR, this provision in 13 CFR is not generally recognized. FAR 52.219-14 should be revised to make it explicit that the performance requirements of the "concern" apply to the cooperative effort of the small businesses, not to small-business prime contractor alone.

N. Jay Bassin
Environmental Management Support, Inc.
8601 Georgia Avenue, Suite 500
Silver Spring, MD 20910
301-589-5318, ext. 31
301-589-8487 (fax)
jay.bassin@emsus.com

2002-029-5

"Robb Wieczorek" <rwieczorek@lmr-inc.com>

02/20/2003 04:16 PM

To: farcase.2002-029@gsa.gov
cc:
Subject: Contract Bundling

Dear Sir. I read with interest the Federal Register/Volume 68, No. 21/ dated January 31, 2002 concerning the proposed amendment of the Federal Acquisition Regulations concerning contract bundling. As a small veteran-owned business, Logistics Management Resources, Inc. (LMR) is interested in any changes that allow small businesses to have the opportunity to successfully compete for Federal contracts. I also read the Office of Management and Budget report to the President on Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business. In discussions with other individuals and companies familiar with this ongoing effort, there is some indication that the results of this effort will also raise the revenue ceiling for determining small business size - from $21 million to $30 million, an action we would wholeheartedly support and encourage. In all my readings I have not been able to verify that this potential increase is being considered. Can you shed any light on this aspect either as it relates to the Contract Bundling effort or any other ongoing effort? Any information you can provide me in this area would be greatly appreciated.

Regards

Robb Wieczorek
Logistics Management Resources, Inc. (LMR)

2002-029-6

"Fanter, Arthur L"
<FanterA@osc.army.mil>

02/24/2003 02:29 PM

To: "'farcase.2002-029@gsa.gov'" <farcase.2002-029@gsa.gov>
cc:
Subject: Bundling

The large majority of "bundled" service contracts STILL do not necessarily preclude the capability of small businesses to compete! As usual, we will have the few huge anecdotal instances to sustain the position, but I have been writing service contracts for years using all of the tools mentioned and have yet to have anything even close to being outside the range of any small business other than the "mom and pop" shop!
Your data on the magnitude of the problem comes from the SBA whom I will contend are not "objective and disinterested" suppliers of data. With the best of intentions, we will then add another layer of "paper" for a problem that is only suspected and is largely undocumented. I realize this is politically popular whether it is realistic or not, but I would hope for more substantiation before we fix a problem that I contend largely does not exist.

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Suite 180
Dulles, VA 20166
703-709-7140
Fax: 703-709-7139
www.gemlaser.com

2002-029-7

GEM/LASER *EXPRESS INC.*

February 27, 2003

SMALL BUSINESS CONCERNS
Regarding contract bundling

GEM/LASER Express is a ten-year old disabled veteran owned small business. We are a Hewlett Packard Partner and an authorized warranty/service center for Xerox, Tektronix, Samsung and OKI Data. We occupy a 10,000 square foot facility in Dulles, VA and service most all brands of printers, plotters, and facsimile machines throughout the Washington, DC area. Additionally, we have been remanufacturing toner cartridges on-site for the past ten years.

Our business to the federal government has been steadily declining for the past few years, in spite of our increased efforts for growth in this area. We have reviewed some of the government contracting issues that have reduced our opportunity to compete. We have attempted to identify the problems we have encountered, not to criticize, but rather to seek improvement.

Clearly the federal government has encouraged increased opportunities for small and disadvantaged businesses, yet the facts reveal that from 1991 to 2001, the number of federal contracts as well as the actual dollars awarded to small business has progressively declined by over 50% during this period. Despite the government's good intentions directed toward small business development, the dismal results demonstrate that too many awards escape any purchasing review process.

- **Contract bundling** is perhaps the single most flagrant example. It is easily understood that purchasing officials strive to reduce their workload by combining multiple requirements into a single purchase requirement. However, this often eliminates vast numbers of potential competitors and most often excludes small and disadvantaged businesses.

2002-029-7

- **Government-Wide Acquisition Contracts (GWAC)** are not subject to reviews for contract bundling issues. Individual agencies are also issuing GWAC nationwide contracts exclusively for their agency. These contracts are rapidly gaining popularity and are generally issued only to large businesses. Even when prime contracts are issued to large businesses with percentage goals for small business participation, goals are often ignored without implementing penalties. Even when specific goals are mandated, meaningful enforcement frequently falls between the cracks and is often overlooked. The SBA has been increasingly helpful, but we question their effectiveness without sufficient resources or authority in their program to affect change.

- **Multiple Award (MAS) contracts and even the credit card system effectively evade any bundling reviews; neither does it address any small business issues.**

- **JWOD Contracts** are one the fastest growing buying vehicles. Probably with every good intention these are properly issued to small and disadvantaged businesses. However, all too often the prime contractor issues subcontracts only to large businesses. Therefore, this type of abuse can and does actually produce the opposite result as originally intended, i.e., an actual reduction to the small business contingent.

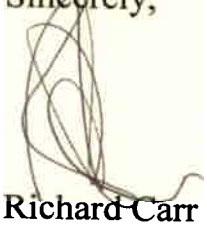
- **Specific examples of how both the government's and small business interests have not been served.**
    1. Our company previously sold remanufactured toner cartridges to the USPS until a GWAC contract was issued to Boise Cascade. Now the Post Office pays a higher price and buys only new toner cartridges.
    2. DOD issued $100+ million dollar contracts in FY 2001 to two fortune corporations with mandatory small/disadvantaged spending requirements. Both of these, McKesson and AmeriSource, tabulated actual spending results at near zero percent for all small/disadvantaged categories.

2002-029-7

3. Our company performed printer/facsimile repair service for the Navy and Marine Corps in the Pentagon and elsewhere for years. We lost the opportunity to compete when a bundled contract was issued to EDS. We performed service within one day to the Navy/Marine Corps. Our previous customers have called us and complained about their poor response time on the EDS contract, which is stated to be never less than two days and sometimes more than four days. Down time produces reduced productivity.
4. The Dept. of Commerce store on government property is selling supplies issued on a JWOD contract at 10+% over commercial prices.

- **Recommendations for improvement**
  1. When large geographic contracts are issued with significant small business subcontracting goals; we recommend utilizing individual small businesses by standard metro statistical areas (MSA's). This would benefit small business in the communities where the services are being performed. This would also preclude one small sub-contractor from profiting by simply issuing another sub-contract to a large national vendor.
  2. Ensure the OSDBU office in all agencies have the necessary authority, resources and independence to perform their function. Require written notification to agency OSDBU early in the requisition stage of all GWAC and Bundled contract proposals. Provide second OSDBU notification prior to final approval.
  3. Include GWAC, MAC, and GSA MAS schedules in the bundling contract reviews. Make it a requirement that these contract vehicles capture small and disadvantaged category totals and require percentage goals to them, as other types of contracts specify.

Sincerely,



Richard Carr
President

2002-029-8

"Robb Wieczorek" <rwieczorek@lmr-inc.com>

03/04/2003 10:47 AM

To: farcase.2002-029@gsa.gov, answerdesk@sba.gov
cc:
Subject: Small Business Criteria

Dear Sir. Is there any move to increase the revenue ceiling for the determination of small business size? In discussions with other small businesses personnel, I have heard that there may be an increase in the revenue ceiling from $21 million to $30 million. I understand that small business determination is based on revenue ceilings and number of employees as determined by applicable North American Industry Classification System (NAICS) codes. I have been unable to verify that this type of initiative is being considered. Is it part of the ongoing effort to amend the Federal Acquisition Regulation (FAR) as it relates to contract bundling? Any information you can provide me on this idea of increasing the revenue ceiling in determining business size would be greatly appreciated.

Regards

Robb Wieczorek
Proposal Manager
Logistics Management Resources, Inc.
(804) 415-1562

2002-029-9

RE: FAR Case 2002-029

Good Morning Ms. Cundiff,

My understanding is that President Bush's small business agenda is prepared to make some changes with contract bundling and reexamine certain departments of Defense and Energy contracts under a GSA implementation proposal.

Myself and Dr. Dugger, President of UXB International have been strongly suggesting for some time that re small business in our industry we have been at an unacceptable disadvantage because of contract bundling. As a small business UXB's our goals are to eliminate the hazards associated with ordnance and explosives, chemical weapons, landmines, reactive materials, and range residues and help make the world a safer place.

As I also understand the OMB is preparing a strategy for unbundling contracts. I believe the GSA has commented that the number and size of bundled federal contracts have "increased sharply and resulted in a dramatic decline for small businesses" over the past decade. I would comment here that we have found this to be true and like others have suffered because of bundling that puts small businesses at the mercy of large corporations or consortiums of large corporations. In those segments of our core business, Unexploded Ordnance (UXO) and Explosive Ordnance (OE), range residues and range sustainment the significant bundled contracts have been assigned. **From our perspective this begs the question as to the remedy for this past unacceptable business practice beyond just "unbundling" contracts for the future.**

Re the small businesses in our industry "unbundling" requires solicitations for UXO cleanup separated into two distinct solicitations: 1. UXO cleanup that includes, detection, location, removal, disposal/demilitarization and 2. Cleanup of explosives contaminated soil and ground water. This may well be out of the focus of the tier acquisition threshold being proposed but goes to the heart of our interests in seeing the agencies in DoD change their way of doing business.

I have discussed the issue of "unbundling" contracts with various agencies in DoD and found there is resistance to change and most certainly to any undoing of now bundled contracts. I suggest that instead of any tier acquisition threshold all DoD contracts be "unbundled" without any threshold.

Best regards,
Colonel Max E. Newman USA ret
Executive Consultant
UXB International, Inc.

2002-029-9

ColonelBlueMax@aol.com

03/08/2003 11:19 AM

To: farcase.2002-029@gsa.gov
cc:
Subject: Fwd: Bush Set to Move on Contract Bundling

Good Morning Rhonda,

Try try and try again and I have it right after missing the "farcase."

Best regards,
The Blue Max

Subj:**Fwd: Bush Set to Move on Contract Bundling**
Date:3/7/03 12:10:23 PM US Mountain Standard Time
From:ColonelBlueMax
To:2002-029@gsa.gov

In a message dated 3/7/03 12:00:31 PM US Mountain Standard Time, ColonelBlueMax writes:

I will get it right this time.

Subj:**Fwd: Bush Set to Move on Contract Bundling**
Date:3/7/03 12:00:31 PM US Mountain Standard Time
From:ColonelBlueMax
To:2002.029@gsa.gov

In a message dated 2/26/03 9:40:04 PM US Mountain Standard Time, ColonelBlueMax writes:

Subj:**Fwd: Bush Set to Move on Contract Bundling**
Date:2/26/03 9:40:04 PM US Mountain Standard Time
From:ColonelBlueMax
To:029@gsa.gov

Forwarded Message:
Subj:**Bush Set to Move on Contract Bundling**
Date:2/26/03 10:25:36 AM US Mountain Standard Time
From:ColonelBlueMax
To:029@gsa.gov
BCC:drdugger@uxb.com, slwright@uxb.com

Rhonda Cundiff
GSA

RE: CONTRACT UNBUNDLING?

RE: FAR Case 2002-029

Good Morning Ms. Cundiff,

2002-029-10

(e-mail: farcase.2002-029@gsa.gov)

March 18, 2003

General Services Administration
FAR Secretariat, Room 4035
18th and F Streets, NW
Washington, D.C. 20405
ATTN: Laurie Duarte

RE: Far Case 2002-029

Dear Ms. Duarte:

The Coalition for Government Procurement is pleased to have the opportunity to comment on the proposed anti-bundling rule. We have serious concerns with this rule as written, the negative impact it would have on the federal government and companies of all sizes that sell commercial services and products to it.

The Coalition is a multi-industry association of over 330 companies selling commercial services and products to the federal government. Our association is comprised of firms of all sizes, with small businesses being the single largest group of Coalition members. Collectively, Coalition members account for approximately half of the commercial item sales made to the federal government each year and over 70% of the sales made through the General Services Administration's Multiple Award Schedules program. The Coalition has worked with government decision-makers for nearly 25 years to ensure a common sense procurement environment.

Not the Time For New Rules

At the outset, the Coalition believes that now is not the time for new acquisition rules that will hamper the government's ability to meet its critical homeland security or national defense needs. As the government prepares for a potential war overseas and attempts to fend of terrorist activities here, it will need access to a streamlined, efficient government procurement system. A responsive logistics system is essential to the success of each of these missions. Placing new obstacles in the way of war fighters, first responders, and others involved in protecting our most critical national interests is not an appropriate step at this time.

We believe strongly that the proposed anti-bundling rules will do just that. They will significantly increase acquisition time cycles, making it difficult to get essential equipment to those who need it fast. They will add new expenses to government contractors that will inevitably be passed along to federal agencies meaning that they will be able to get less of what they need or spend more than they would have to for the

quantities desired. They will hinder some of the small firms they are supposed to help, weakening an already sluggish domestic economy.

The Coalition recommends, therefore, that this proposed rule be shelved at least until such time as our national and international situation is more stable.

Current Measurement Systems Flawed

The Coalition feels that the basic premise behind the proposed anti-bundling rule is that small firms do not currently get a "fair share" of federal business. We believe that this assessment is fundamentally flawed and is based on the federal government's inability to accurately capture the true amount of business that flows to small firms. We recommend that the government adopt more comprehensive methods to measure the participation of all sizes of businesses currently doing business with the government today before new rules are added.

Even using the current incomplete measurement tools available, however, a prima facie case cannot be made for the need of new rules such as those proposed here. Most federal agencies either meet, or come statistically close to meeting, their small business use goals. Each agency has an extensive small business use program. The Multiple Award Schedules program provided over $7 billion in business directly to small firms last year, nearly one-third of total schedule sales. These figures show that small businesses can and do compete effectively for federal business today, even before subcontracting and other business relationships are counted.

As such, the rules proposed will actually harm as many small firms as they would purport to help, if not more.

The Coalition has previously offered to work with officials at the Office of Management and Budget as well as Congressional leaders to develop a more comprehensive measurement system to get a better picture of total small, large and medium size business federal market participation. We offer this assistance officially in writing via these comments. Absent a clear and accurate picture of the total business community that benefits from participation in federal procurement today, we recommend strongly that the proposed rule be withdrawn and that further action on this issue be suspended.

The federal government today judges small and large business participation based solely upon the size of the firm that receives a federal prime contract. This evaluation system completely misses the thousands of small firms that benefit from government business as subcontractors or teaming partners. Yet, each federal contract awarded to a large business worth $500,000 or more must have a small business subcontracting program. Many of these are quite robust and bring real benefits to small firms. There can also be substantial penalties, including liquidated damages, for large firms that fail to meet their small business subcontracting goals. These steps are in place to ensure that small business federal market opportunity is maximized, yet no accurate measurement tool exists to capture it.

Similarly, large businesses that have striven to maintain effective small business usage plans will see both themselves and the small businesses they partner with, harmed by the proposed rule. Many ask why they must maintain small business usage programs if the benefits they bring to small firms are not recognized by the government that requires them.

In fact, it appears that the Office of Federal Procurement Policy (OFPP) did not take the millions of dollars that flows to small firms annually through these arrangements into account when crafting the anti-bundling proposed rule. By basing the premise of the proposed rule that only prime contract awards should be counted, OFPP is essentially favoring one set of small firms over another. The result is that many small firms that today enjoy robust federal business as subcontractors or team members will be devastated if the proposed rules go into effect. The proposed rule, therefore, "Robs Peter to pay Paul" and treats the thousands of diverse small firms across the country as one, monolithic entity.

The Coalition's experience shows that small businesses are anything but monolithic. We have small business members that are prime contractors that compete successfully everyday against larger firms. We also have small firms that participate on contracts held by large businesses. We have some small firms that have sold to the government through other's contracts for years, who now hold their own GSA Multiple Award Schedules. The small business community is a diverse and creative force in today's federal market.

Creating a new set of rules based only on the views of a few firms with special political access will inevitably be flawed and incomplete. Worse, it will harm more firms than it helps. We recommend that the proposed rule be shelved until international tensions ease and, before it is brought back for further consideration, that a better system for capturing the amount of business that goes to small firms already be developed. Only in this way will the government and its contractors be able to collaborate on small business use rules that make sense.

We offer the remainder of our comments on the proposed rule within the scope of our remarks above.

Dollar Volume Benchmarks Confusing

The Coalition has concerns with language in the proposed rule that would automatically classify a procurement as bundled based solely on a series of varying contract dollar volumes. We are concerned with this approach for several reasons.

First, the government has spent the last decade incorporating the concept of "best value" into government acquisition. This practice allows the government to take factors other than price into account when making a purchase. The benefits of best value acquisition are numerous and have clearly benefited the operations of virtually every federal agency. By making contract dollar volume the sole benchmark for classifying a procurement as

bundled, OFPP ignores other factors that could be legitimate reasons for a procurement to be of a certain size. Not the least of these is the government's mandate to leverage its combined buy power wherever possible in order to ensure that taxpayer dollars are wisely spent.

Further, basing bundling on price alone encourages government contracting officers to make acquisition decisions solely on price. Knowing that an offer at a certain dollar volume will trigger an automatic bundling review, contracting officers will make awards to companies whose price is just below the bundling review benchmark. This encourages contracting officers to ignore such acquisition hallmarks as life-cycle cost analysis, technical expertise, or other non-price related factors. The government could end up with inadequate equipment or substandard service solutions because contracting officers did not want to face the lengthy delays that will result from a bundling review.

We recommend that, should the proposed rule be revised at a point when international hostilities are not inevitable, that a clearer and more comprehensive definition of bundling be adopted. Such a definition would be based on a variety of factors, instead of just price. We would be pleased to work with government officials to devise such a definition.

The multiple dollar volumes in the proposed rule are also confusing in that they differ from agency to agency and are at levels different from existing procurement-related benchmarks. A very real burden will accrue to contractors that would have to keep track of which of their proposals could be considered bundled depending on the agency to which they are making an offer. This will add to their overhead and result in any increased tracking costs being passed along to the government.

Similarly, both contractors and government contracting officers would now have to contend with an entirely new set of dollar-based benchmarks that are in no way tied to existing procurement benchmarks or even small business size standards. Again, re-regulating government procurement will serve to increase procurement lead times and costs.

The Coalition believes that these concerns make it all the more imperative that any bundling definition be based on factors other than price alone and be consistent with existing benchmarks.

The Role of Small Business Advocates

The Coalition is concerned that the proposed rule places the responsibility of determining whether a contract is bundled in the hands of government professionals who lack the proper training or skills to make the types of determinations the proposed rule asks of them. Small business advocates and agency small and disadvantaged business units are generally trained to promote the use of small businesses within an agency and in identifying small firms that could meet agency needs. Such professionals, however, are not part of an agency's requirements development function, nor are they trained as

contracting officials. Requiring such personnel to evaluate whether procurements are bundled places a burden upon them that is well outside the scope of their training.

As a result, procurements will be delayed as those unfamiliar with core procurement functions attempt to evaluate contracting actions without having the tools to do so. Such delays will return the government to the days when it received outdated technology or had to re-compete entire procurements in order to obtain critical items. Industry and government leaders came together to change the government's procurement rules in the 1990's to ensure that government users had access to the same technology their commercial counterparts used.

The Coalition urges OFPP not to abandon the very real benefits today's procurement policies put in place. We recommend that contracting professionals be the ones to conduct any bundling review, not small business advocates trained to perform a different job. This recommendation creates a "peer review" system where trained contracting professionals can evaluate whether a specific procurement has been bundled. Again, this would be based on a variety of factors, all of which would be familiar to contracting professionals. This places a bundling determination in the hands of those who possess the skills necessary to make such a determination and make it quickly.

Proliferation of Protests and Delays

The Coalition is especially concerned that the vagueness of the proposed rule will result in a significant increase in contract protest activity. Under the proposed rule, small business advocates and/or agency small and disadvantaged business units may classify a procurement as bundled. They do not, however, have the ability to stop such procurements from going forward. While in some cases, a specific procurement may be referred to the Small Business Administration which can delay a procurement, the great majority of cases will be handled inside each agency. Procurement professionals may elect to break the original procurement into smaller pieces or move ahead with the procurement.

Effectively, however, once a procurement has been branded as bundled, significant delays will result that will cost all involved time and money.

Should the procurement be broken into smaller pieces, a series of new procurement action would have to be executed. This will necessarily increase the government's acquisition lead-time and, if the items being procured separately must be used together, significant interoperability and implementation questions will almost certainly arise. In addition, the government will have lost the advantage its collective buying power brings to any situation, meaning that the overall cost of the now-delayed separate procurements will likely be significantly higher than that of one, unified, procurement action. In the end, the government may end up with a "solution" that cannot work as a whole unit.

We feel that this scenario is not in the best interests of efficient and effective government operation, or in the interests of taxpayers who desire to have the government make the best use of public funds.

Should contracting officials elect to move ahead with a procurement branded as bundled, any subsequent award to a firm that is other than small is certain to result in a protest. Here again, the government and its taxpayers are losers.

Protests were a major part of the federal procurement landscape until the mid-1990's. The proposed rule would make them so again. It is worth remembering, however, why no fewer than two pieces of legislation and each subsequent comprehensive rule-making, sought to diminish protests as an undesirable part of routine government business.

Protests stop a procurement action cold until they can be resolved. This lengthens procurement cycles dramatically and is a prime reason why the government was forced to make do with outdated equipment until reforms were passed. On top of this, the government paid a premium for this obsolescence as contractors routinely built the costs of filing or defending against a protest into the prices they offered the government.

The specter of protests also kept many of today's important government contractor partners from participating in the government market. This limited competition as well as the government's ability to access the full range of commercially available solutions. Anytime the government imposes non-commercial practices or rules on commercial item suppliers, cost goes up and participants look closely at whether a continued government business relationship is in the interest of their firm.

By remaining silent on what happens when small business advocates brand a procurement as bundled and the agency decides to move ahead, the proposed rule will reduce competition, dramatically increase costs, and significantly lengthen procurement lead times through the re-introduction of protests.

The Coalition recommends that the proposed rule make it clear that, after a procurement has received peer review and passed, it no longer be considered bundled and the agency can move ahead. In this way, important procurements are reviewed by two sets of contracting professionals and the government is assured of a reasonably efficient procurement process.

Need For Better Subcontracting Plan Evaluation Standards

The proposed rule's addition of language outlining the need to ensure compliance with small business subcontracting plans is a positive step. Further guidance is needed, however, on the standards against which performance is to be evaluated. The proposed rule adds the following sentence to FAR § 42.1502's guidance concerning past performance evaluations:

> 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.

While the Coalition understands the desire to ensure contractor compliance with small business subcontractor plans, because these evaluations will be available to government agencies making award decisions, measures should be implemented to ensure that government agencies evaluate large businesses on a standard measurement basis before this step is formalized. FAR Part 19 as currently written does not provide sufficient guidance on the application of the small business subcontracting regulations to the plans submitted by commercial companies. There are numerous examples of FAR Part 19 being difficult to apply in the context of a commercial plan. For instance, the terms "subcontract" and "Total Annual Sales" are subject to varying interpretations when applied to a commercial plan. Yet, these interpretations are of great importance in calculating a company's total subcontracting dollars, which in turn is necessary for calculation of the percentage goals. The answers to these questions and other questions often depend on the opinion of the government official supplying the answer. For the proposed rule to be effective in achieving "greater consistency in agency oversight in the future", additional guidance is needed to address the application of the small business regulations to commercial plans.

The "good faith" requirement is also highly subjective and, therefore, risks creation of inconsistent contractor performance evaluations. Pursuant to FAR Parts §§ 19.705-4(c) and 19.705-7(d), contracting officers are instructed to take into account external factors and the "totality" of the contractor's actions in connection with its small business subcontracting plan when evaluating their performance against goals. FAR § 19.705-7(d) lays out some indicators of a failure to demonstrate good faith for purposes of assessing liquidated damages, yet *no* standard appears in the proposed addition to FAR § 42.1502 for purposes of assessing a contractor's performance against its goals. A contracting officer writing a performance evaluation at the conclusion of a single contract, as the proposed regulation suggests, may not be aware of the "totality" of the contractor's actions as they relate to a commercial subcontracting plan. Likewise, the "good faith" standard itself is highly subjective and dependent on individual contracting officer's understanding, interpretation, and application of the term. This omission from the proposed rule is likely to defeat entirely the proposed addition's aim of achieving a systematic and consistent review of contractor compliance with small business subcontracting plans.

To address the lack of consistency that is likely to result under the current rules, we suggest the following:

- Initiate a review of FAR Part 19.700 to clarify how to prepare, negotiate, implement, and measure performance of commercial plans;

- Expansion of the "good faith" standard, to include: (i) express recognition of reasonable commercial practices and behavior; (ii) development of more standards for measurement of "good faith," for example, an illustrative list of "mitigating" factors, such as purchases of regulated or

patented items or pre-existing long-term contracts, that a contracting officer could apply in measuring a contractor's ability to achieve its goals in a given years; and (iii) narrative examples of what types of conduct are considered good faith.

- Clarification of FAR § 42.1502 to (i) require a contracting officer preparing a performance evaluation on an individual contract to consult with the contracting officer with overall responsibility for the contractor's commercial plan; and (ii) identify standards to be used in measuring a contractor's performance with respect to its small business subcontracting plan.

In addition to the above, there are systematic impediments to achievement of the government's goals for small and disadvantaged business subcontract participation. These system failures produce two interrelated problems: (1) the bureaucratic maze of differing qualification criteria discourages small and disadvantaged businesses from participation in the government's programs ; and (2) large federal contractors seeking to comply are similarly discouraged by the lack of access to reliable, government-sanctioned databases that provide access to the small and disadvantaged business community. Because these impediments make it more difficult to achieve the government's subcontracting goals, they must be addressed if compliance is to be used as a performance indicator.

There are solutions to these impediments. SBA could outsource some of its certification functions to the private sector, as well as maintenance of the databases used to determine a company's status. Another approach would be to utilize databases already used by the contracting community that have the confidence of business. In addition, we would recommend that the SBA expand its approved certifying bodies to include organizations such as the National Minority Supplier Development Council, an organization with forty affiliates in geographical areas across the country.

Conclusion

The Coalition would be pleased to meet with OFPP or other government officials to discuss the issues covered in these comments. We believe there are significant concerns in the proposed rule that merit its retraction and that the government must take steps to more accurately assess small business participation before a new rule is reintroduced.

We appreciate the opportunity to submit comments and look forward to working with you on this issue.

Sincerely,

Edward L. Allen
Executive Vice President

2002-029-11

Date: March 20, 2003

From: William Tate
Director, Division of Acquisition Support and Policy
Acquisition and Grants Group
Centers for Medicare and Medicaid Services, HHS

To: General Services Administration
FAR Secretariat
farcase.2002-029@gsa.gov

Subject: FAR case 2002-029

With a $2M threshold, it is our opinion that the proposed rule would require a substantial increase in the number of proposed requirements that would need review by Agency Small Business Representatives as well as SBA's Procurement Center Representatives. In addition, it would increase the number of full and open competitive actions that would have been awarded under existing streamlined acquisition vehicles.

Even though additional requirements would be subject to review, we believe that the increased reviews would not realize a significant number of additional viable opportunities for small business awards within the $2M threshold.

From a resource perspective, that streamlined acquisition vehicles would not be utilized to the best interest of agencies, and that there would not be an appreciable increase in the number of opportunities (at the $2M threshold) for small businesses; we recommend that the threshold be increased to $5M.

2002-029-12

"Bob Bowe"
<bob.bowe@ctsc.net>

03/24/2003 03:17 PM

To: "'farcase.2002-029@gsa.gov'" <farcase.2002-029@gsa.gov>
cc:
Subject: Contract Bundling: FAR Case 2002-029

> Thank you for the opportunity to provide an input to the proposed rule
> changes. As a small business, Chenega Technology Services Corporation
> fully supports the intent of the proposed rule change. The following is
> for your consideration.
>
> Reference is made to Federal Register announcement, January 31, 2003,
> (Volume 68, Number 21), Proposed Rules, (FAR): Contract Bundling: Para B.
> Section-by-Section Analysis of the Federal Acquisiton Regulation,
> specifically as it pertains to the proposed amendment to FAR 19.201,
> 19.202 and 42.1502. The proposed changes are attempts to strengthen
> agency OSDBUs and SBA Procurement Center Representatives (PCRs) oversight
> responsibilities for assessing prime contractor compliance with small
> business subcontracting goals. Although the proposed changes are a
> significant improvement in the current process for assisting small
> buinesses to obtain their "fair share" of subcontracting opportunities,
> especially under contract bundling, they do not provide sufficient
> enforcement authority that is required if the President's Small Business
> Agenda is to be realized. As a small business CEO, it is my contention
> that unless the strengthened SBA and Agency OSADBUs oversight of the
> achievement of subcontracting goals within contract bundling actions is
> accompanied by the authority to enforce compliance with subcontracting
> goals the problem will not be fixed. Specifically, I would add the
> following language to the FAR, where appropriate (e.g., FAR 19.201,
> 19.202 and 42.1502):
>
> * When establishing small business subcontracting goals for
contracts
> that have been approved for bundling, contracting officers will determine
> if the small business subcontracting goals can, in fact, be reasonably
> established as mandatory subcontracting requirements. Contracting officers
> will include this assessment in their report to the Agency Head and the
> SBA Administrator as part of the Agency's justification for contract
> bundling.
> * PCRs and OSDBUs will monitor, on at least a semi-annual basis,
the
> achievement of small business subcontracting goals for all bundled
> contracts that are awarded to prime contractors. The results of this
> monitoring will be reported to the appropriate agency contracting officers
> and the results will be forwarded to the Agency Head and SBA
> Administrator.
> * Prime contractors are required to report on a semi-annual basis,
the
> results of their effort to achieve their small business subcontracting
> goals and, if they have failed to achieve these goals, to provide the
> reasons why they have failed and their plan on how they will achieve these
> goals in the future.
> * Failure by prime contractors to meet these goals on a yearly
basis
> may result in contract default by the prime contractor and, as a minimum,
> the failure to meet these goals will be kept as a matter of record by the
> contracting agency as part of the contractor's past performance history
> with that agency.
>
> Rationale for the proposed changes, above.

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>
> The language in the proposed amendments to the FAR on this subject are
> extremely weak in stating specifically how the small business program
> objectives under contract bundling will be assessed by either the
> contracting agency, the OSDBUs, or the SBA PCRs. For example, the
> proposed language for FAR 19.201 (d) (11), states that "OSDBUs would be
> required to conduct periodic reviews to asses," the extend that small
> businesses are receiving their fair share of Federal procurements. Merely
> requiring the OSDBUs to conduct periodic reviews (with no indication as to
> whether all contracts will be assessed or simply a survey of some
> contracts) will achieve little towards achieving the President's Small
> Business Agenda. The proposed changes offer no specific corrective actions
> to be taken should the OSDBU's assessment conclude that prime contractors
> are not living up to their small business subcontracting goals.
>
> Without stronger language, as proposed above, the entire program is left
> without any enforcement teeth. All that will have be achieved is that we
> may have better controls - better justification - over what is to be
> bundled. Bundling will continue regardless of these new regulations.
> What is needed is an assurance that, given that bundling will continue,
> small businesses will be guaranteed that they will receive their fair
> share of the work.
>
> Bob
> Robert M. Bowe
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> Alexandria, VA 22315
> 703-822-2872, ext. 204
> www.ctsc.net
>
>

2002-029-13

"Olga Grkavac"
<ogrkavac@itaa.org>
03/24/2003 05:39 PM

To: farcase.2002-029@gsa.gov
cc:
Subject: ITAA/PSC's Cooperative Purchasing Comments

Ms. Duarte: On behalf of ITAA and PSC, I am pleased to submit our comments on this proposed rulemaking. Should you have any problem opening our comments, please contact me immediately. Thank you.

Olga Grkavac
Executive Vice President
Enterprise Solutions Division
Information Technology Association of America

703/284-5311
703/525-2279 fax
www.itaa.org

1706682_1.DOC

Comments refer to GSAR Case 2002 G505

Johnson & Johnson

2002-029-14

OFFICE OF
GENERAL COUNSEL

ONE JOHNSON & JOHNSON PLAZA
NEW BRUNSWICK, N.J. 08933-7002

March 25, 2003

General Services Administration
FAR Secretariat (MVA)
1800 F Street, N.W.
Room 4035
Washington, D.C. 20405

Attn: Laurie Duarte

VIA FACSIMILE

Re: Comments on January 31, 2003 Proposed Amendments to the Federal Acquisition Regulation; FAR Case 2002-29.

Dear Ms. Duarte:

Johnson & Johnson appreciates the opportunity to comment on the January 31, 2003 proposed amendments to the Federal Acquisition Regulation ("FAR") and Small Business Administration ("SBA") regulations implementing the nine-point action plan described in the Office of Management and Budget's ("OMB") October 2002 Contract Bundling Report.

1. The Proposal's Addition of Compliance With Small Business Subcontracting Plans to Past Performance Evaluations is a Positive Step; However, Further Guidance as to the Standards Against Which Performance is to be Evaluated is Necessary.

The January 31, 2003 proposal adds the following sentence to FAR § 42.1502's guidance concerning past performance evaluations:

> 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.

According to the section-by-section analysis accompanying the proposed rule, this change addresses a General Accounting Office ("GAO") report which concluded that agency oversight

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of subcontracting plan compliance has been inconsistent. The change therefore "[c]ontemplates a more systematic 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."

We support the addition of small business subcontractor plan compliance to agency performance evaluations. Because these evaluations will be available to government agencies making award decisions, the added requirement is of competitive significance. It follows that measures should be implemented to ensure that government agencies evaluate large businesses on the same basis and understanding of the small business subcontracting plan regulations.

a. FAR Part 19 is written for individual plans; companies submitting commercial plans receive conflicting advice from the government.

FAR Part 19 describes three types of small business subcontracting plans: individual, commercial, and master plans. However, the definitions, procedures, and requirements contained in the regulations relate primarily to individual plans. This creates uncertainty and ambiguity in the application of the regulatory requirements to commercial plans submitted by large businesses. For example, the regulations define "subcontract" as any agreement "[e]ntered into by a Government prime contractor or subcontractor calling for supplies and/or services *required for performance of the contract, contract modification, or subcontract."* FAR § 19.701 [emphasis added]. This definition is difficult to apply in the context of a commercial plan, which is supposed to cover a commercial contractor's entire fiscal year and commercial production: Are supplies or services purchased on a company-wide basis for general business operations "*required for performance*" of a *particular* federal government contract, modification or subcontract? The answer to this question is of great importance in calculating a company's total subcontracting dollars (*see* FAR § 19.704(a)(2)), which in turn is necessary for calculation of the percentage goals. Yet the answer is often dependent on the opinion of the government official supplying the answer. In the absence of further guidance, performance reviews of large businesses are likely to be conducted using different standards, thereby defeating the proposed regulation's goal of achieving "greater consistency in agency oversight in the future."

Similarly, the standard template for a small business subcontracting plan calls for the plan to express total planned subcontracting as a percentage of "Total Annual Sales." Application of this term to commercial plans is open to different interpretations by different government agencies. Total annual sales in the commercial plan context could mean the company's overall total annual sales, or it could refer to the company's total sales to the government. It is also unclear whether the total annual sales requested is intended to refer to the contractor's upcoming fiscal year, which would require the disclosure of highly confidential business information that should not be made publicly available, or the prior year's estimated annual sales.

There are other examples of the ambiguous interplay between application of regulations written for individual plans to commercial plans. A company with a commercial plan is likely to

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submit that plan in response to new solicitations during the fiscal year covered by the commercial plan. Yet, the regulations call for a procurement-by-procurement review of the plan in negotiated acquisitions, again risking inconsistent interpretation and application of the regulations to the same plan and to implementation of the plan. *See* FAR 19.705-4.

These issues are not fatal to the notion of including subcontracting plan compliance in contractor performance evaluations. They do, however, call for issuance of some form of guidance to contracting officers and their contractors to clarify FAR Part 19.700 as it relates to commercial plans.

b. The "good faith" requirement is highly subjective, and therefore risks creation of inconsistent contractor performance evaluations.

For purposes of both setting the goals contained in a contractor's plan and evaluating whether the contractor has exercised "good faith" in attempting to meet the plan's goals, contracting officers are instructed to take into account external factors and the "totality" of the contractor's actions in connection with its small business subcontracting plan. *See* FAR §§ 19.705-4(c) and 19.705-7(d). Yet, a contracting officer writing a performance evaluation at the conclusion of a single contract may not be aware of the "totality" of the contractor's actions as they relate to a commercial subcontracting plan. By way of example, assume a contractor has a commercial plan for 2003 that has been submitted to and negotiated with a contracting officer for DoD in accordance with FAR § 19.704(d)(1). It bids on, and receives a contract with GSA. The commercial plan approved by DoD is incorporated into the GSA contract. Under the proposed new section of FAR § 42.1502, is the GSA contracting officer responsible for evaluating the contractor's performance against the DoD-negotiated small business subcontracting plan's goals? If so, what if the GSA contracting officer disagrees with the goals or the manner in which the DoD contracting officer has interpreted and applied the requirements of FAR § 19.700? How will the GSA contracting officer be made aware of the "totality" of the contractor's actions as they relate to a commercial plan? All of these questions will impact the criteria against which performance evaluations of small business subcontracting plan compliance will be based.

Even more generally, the "good faith" standard itself is highly subjective and dependent on individual contracting officer's understanding, interpretation, and application of the term. FAR § 19.705-7(d) instructs that the failure to attain a plan's goals is not in and of itself sufficient cause to determine that a contractor has not made a good faith effort to meet the goals, but offers only limited guidance as to how to assess good faith. It sets out "indicators" of a failure to demonstrate good faith, which are (i) a failure to attempt to identify small and disadvantaged business concerns; (ii) a failure to designate a company official charged with responsibility for the plan; (iii) a failure to submit the required reporting forms; (iv) a failure to maintain required records; or (v) the adoption of company policies and procedures the objective of which is to frustrate the plan. If contractors are to be fairly assessed on their compliance with their small business subcontracting plans, then these factors need to be expanded.

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c. There are no standards set forth in the proposed addition to FAR § 42.1502.

While "good faith" is the effort against which contractors are to be measured in terms of assessing liquidated damages, *no* standard appears in the proposed addition to FAR § 42.1502.

This omission is likely to defeat entirely the proposed addition's aim of achieving a systematic and consistent review of contractor compliance with small business subcontracting plans.

d. Proposed standardization measures.

To address these issues, we suggest the following:

- Initiate a review of FAR Part 19.700 to clarify how to prepare, negotiate, implement, and measure performance of commercial plans, i.e., how to define "total spending" in the context of commercial plans;

- Expansion of the "good faith" standard, to include: (i) express recognition of reasonable commercial practices and behavior; (ii) development of more standards for measurement of "good faith," for example, an illustrative list of "mitigating" factors, such as purchases of regulated or patented items or pre-existing long-term contracts, that a contracting officer could apply in measuring a contractor's ability to achieve its goals in a given years; and (iii) narrative examples of what types of conduct are considered good faith.

- Clarification of FAR § 42.1502 to (i) require a contracting officer preparing a performance evaluation on an individual contract to consult with the contracting officer with overall responsibility for the contractor's commercial plan; and (ii) identify standards to be used in measuring a contractor's performance with respect to its small business subcontracting plan.

2. The Proposed Addition to FAR § 42.1502 Risks Mechanical Application of the Goals Set Forth in a Small Business Subcontracting Plan, Without Consideration of Mitigating Circumstances.

The new language proposed for FAR § 42.1502 requires an assessment of contractor compliance with the goals set forth in its small business subcontracting plan. There are, however, systematic impediments to achievement of the government's goals for small and disadvantaged business subcontract participation. These system failures produce two, interrelated problems: (1) the bureaucratic maze of differing qualification criteria discourages small and disadvantaged businesses from participation in the government's programs ; and (2) large federal contractors seeking to comply are similarly discouraged by the lack of access to reliable, government-sanctioned databases that provide access to the small and disadvantaged business community.

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Because these impediments make it more difficult to achieve the government's subcontracting goals, they must be addressed if compliance is to be used as a performance indicator.

a. Perceived qualification difficulties keep small businesses out of the federal marketplace

In order to qualify as a small business under the federal government's definition and so "count" towards a company's small business subcontracting goals, a company must meet the SBA's size criteria, defined either by annual receipts or number of employees. The size standards are set according to the North American Industry Classification System ("NAICS"). While a small business can "self certify" its status as small, determination of the appropriate NAICS category is often a daunting task for a small business new to the federal marketplace. By way of example, NAICS Code 325411 is "Medicinal and Botanical Manufacturing," with an associated size standard of 750 employees. NAICS Code 325414 is "Biological Product (except Diagnostics) Manufacturing," with an associated size standard of 500 employees. Clearly, the choice of one classification over the other impacts a company's ability to qualify as a small business, yet there is no guidance for making the choice. In addition, classification into one code over the other could affect the company's eligibility to bid on a particular procurement (which are often defined by NAICS Code) or its categorization for purposes of SBA's database. Lack of familiarity with the NAICS system is not a problem limited to small businesses. It is probably fair to say that most commercial-sector purchasing professionals are themselves unfamiliar with the NAICS codes and commercial company supplier databases use other than NAICS codes to identify supplier types. This situation was not helped by the fact that the NAICS codes were revised in late 2002.

The qualification process for small, disadvantaged businesses ("SDBs") and HUBZone businesses is even more intimidating than that for small businesses. An SDB must be certified by the Small Business Administration ("SBA"), or by an SBA-designated certifying company, and it must be listed on SBA's PRO-Net database in order to be counted towards a prime contractor's SDB spending dollars. Horror stories – whether true or legend — about the complexity and duration of the certification process abound in the small business community. For example, the perception in the small business community is that the application process can take as long as a year. This perception keeps many otherwise-qualified small businesses from seeking certification.

b. Database issues impede companies from identifying small businesses

Small, women-owned, and veteran-owned businesses can "self-certify" their status to prime contractors, and FAR Part 19 permits the prime contractor to rely in good faith on these self-certifications. In contrast, because SDB and HUBZone businesses undergo a formal certification process, their prime contractors cannot rely on their statements, but must independently verify the status of SDB and HUBZone vendors. The primary, existing means of verification of SDBs and HUBZone businesses is resort to PRO-Net, which is a database

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maintained by the SBA. PRO-Net contains information on approximately 195,000 small, disadvantaged, 8(a), women-owned, and HUBZone firms. PRO-Net can be searched by NAICS Code, location, or other criteria. However, the data contained on PRO-Net is not as timely as one would wish. Accordingly, a company searching PRO-Net may miss an otherwise-qualified SDB whose certification approval has not yet been entered into the PRO-Net database.

Anecdotal evidence also suggests that small businesses can be dissuaded from listing their businesses on PRO-Net. To register on PRO-Net, a company must now also register with the Central Contractor Registration ("CCR") system, which is DOD's primary vendor database. CCR collects information necessary for payment through electronic funds transfer, so the registration process entails providing information relating to electronic funds transfer processes, obtaining a DUNS number through Dun & Bradstreet, detailing firm demographic information, and describing firm marketing information. We have heard from small companies that the CCR registration process is perceived as a burden. If they further perceive PRO-Net as untimely and incomplete, the incentive for a small business to undertake this burdensome process dissipates.

As a result, PRO-Net is by no means a comprehensive listing of small and disadvantaged businesses. This fact is illustrated by the 1997 Miliken Institute study which estimated the number of minority-owned businesses in the United States to be over 3,000,000. The average sales volume of these businesses was $197,000, indicating that most of them would also qualify as small businesses under SBA's size standards. Yet, there are less than 200,000 companies listed on PRO-Net.

The unfortunate results of the perceived difficulties plaguing the government's information tools are that many otherwise-qualifying small and disadvantaged businesses let pass the opportunity to participate in the federal government's programs, while at the same time, the efforts of large businesses seeking qualified small and disadvantaged firms are frustrated. These factors in turn make it more difficult for government contractors to meet the goals set forth in their plans

c. A proposed solution

There is a relatively straightforward "fix" for this issue. SBA has already outsourced some of its certification functions to the private sector, and we urge it to take the same approach with respect to maintenance of the databases used to determine a company's status. Using a commercial database has many advantages. Some of these databases are already utilized by the contracting community, and have the confidence of business. A commercial database potentially will save money for the federal government. It is also consistent with existing government policy. SBA already has privatized some of its functions, permitting SDBs to use SBA-approved private certifying companies. Outsourcing the data collection and maintenance activities simply continues this trend, and is also entirely consistent with the federal government's proposed November 2002 revisions to the A-76 process, which encourage increased outsourcing of agency activities.

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Secondly, we recommend that the SBA expand its approved certifying bodies to include the National Minority Supplier Development Council, an organization with forty affiliates in geographical areas across the country.

3. Conclusion

We very much appreciate the opportunity to comment on the proposed regulations, and are available to respond to questions or to provide additional information, if required.

Please contact me directly at (202) 589-1024 or by e-mail at sgilson@corus.jnj.com if you should require additional information.

Respectfully submitted,

Stephanie P. Gilson

2002-029-15

"Cronin, Dan"
<Dan.Cronin@ssa.gov
>

03/25/2003 10:14 AM

To: "farcase.2002-029@gsa.gov" <farcase.2002-029@gsa.gov>
cc:
Subject: Proposed Rule - FAR Case 2002-029; Contract Bundling

The Social Security Administration offers one comment on the proposed rule.

We suggest revising the new section 19.201(d)(11) to clarify "periodic." (e.g. "Conduct periodic - at least annual - reviews to assess the ...")

Thanks for your consideration.

Dan Cronin, Director
Division of Policy and Information Management
Office of Acquisition and Grants
410-965-9540
dan.cronin@ssa.gov

2002-029-16

FOR: General Services Administration, FAR Secretariat (MVA)
ATTN: Laurie Duarte

FROM: Wendy S. Saigh, U.S. Army Tank-automotive and Armaments Command (TACOM), Attorney-Advisor

DATE: 1 April 2003

SUBJECT: FAR case 2002-029, Proposed rules on contract bundling

1. FAR SECTION 2.101 PROPOSED CHANGES.

The decision to clarify the definition of bundling, under FAR 2.101, is a good one. It currently is not clear whether the definition of a "single contract" within the context of bundling includes multiple award contracts, Federal Supply Schedule contracts, and Governmentwide/multi-agency contracts.

2. FAR SECTION 7.104 PROPOSED CHANGES.

Adding the requirement to FAR 7.104(d)(1), for coordination of specified contracts with the cognizant small business specialist, is an effective means of gaining the small business community oversight needed to protect against improper bundling. However, reconsider the proposed dollar thresholds referenced in proposed FAR 7.104(d)(1) and set forth at FAR 7.104(d)(2).

For simplicity and consistency between proposed FAR rule 7.104(d) and FAR 7.107(e), consider keeping the threshold already provided in FAR 7.107(e) for documenting "substantial bundling," which is any contract with an average annual value of $10 million. Government and industry are already used to the $10 million threshold and it makes sense keep it that way for application of these proposed rules. The stated objective behind these proposed rules is to increase federal contracting opportunities for small businesses by reducing the amount of bundling in federal contracts. To satisfy this objective, the rules require coordination between the acquisition planner and small business specialist for those actions most like to involve contract bundling, while minimizing the disruption of the procurement process. Raising the threshold to an average annual value of $10 million, for all agencies, will still promote the oversight envisioned by this proposed rule but will more effectively minimize the almost certain, yet necessary, disruption in the procurement process. OSDBU will still have oversight capability under the proposed rule FAR 19.201(d)(11), which should sufficiently satisfy the objective, while minimizing the disruption to the procurement process.

In short, consider increasing the dollar thresholds to an average annual estimated value of $10 million. This threshold should apply to all contracts, regardless of agency. All contracts meeting this threshold would have to be coordinated with the small business specialist. Then, of those contracts, if the small business specialist finds contract bundling that is unnecessary, unjustified, or not identified as bundled by the agency, then the small business specialist should notify the agency OSDBU. (See proposed FAR rule 7.104(d)). Likewise, of those contracts, if "substantial bundling" is found then supporting documentation is required per FAR 7.107(e).

Adding a requirement to identify alternative strategies to reduce or minimize the scope of the bundling and the rationale for not choosing those alternatives, is unnecessary. (See proposed FAR rule FAR 7.107(e)(6)). Agencies are entitled to select the most advantageous method of contracting, provided it is consistent with law and regulation. The presumption is that the Government considers all appropriate alternatives when deciding its contracting strategy. Requiring acquisition planners to undergo an exercise of documenting possible acquisition alternatives and the rationale for not choosing these alternatives is overly cumbersome. Furthermore, the small business specialist will have been involved in these actions, so they should bear the responsibility of addressing any alternatives that have, or should have been, addressed.

3. FAR SECTION 8.404 PROPOSED CHANGES.

Clarifying the fact that Federal Supply Schedule contracts must comply with the FAR requirements for a bundled contract, at proposed FAR rule 8.404(a)(2)(ii), is helpful. However, as will be addressed below, the proposed requirement at 19.202-1(e)(1)(iii), which is cited in proposed FAR rule 8.404(a)(1), is unnecessary.

4. FAR SECTION 16.505 PROPOSED CHANGES.

Clarifying the fact that orders placed under a task-order or delivery-order contract awarded by another agency must comply with the FAR requirements for a bundled contract, at proposed FAR rule 16.505(a)(7)(iii), is helpful.

5. FAR SECTION 19.202-1 PROPOSED CHANGES.

Adding a statement requiring a contracting officer to "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), is inappropriate. Release of information must be decided upon on a case-by-case basis and in accordance with already existing laws and regulations (i.e. Procurement Integrity Act, the Freedom of Information Act, and the Federal Acquisition Regulation.) The way this requirement is currently stated at proposed FAR rule 19.202-1 it leaves the contracting officer with no discretion and may be in conflict with existing laws and regulations.

6. FAR SECTION 42.1502 PROPOSED CHANGES.

The additional requirement that agencies assess contractor compliance with goals identified in their subcontracting plan should provide agencies with useful information for consideration in future acquisitions.

Wendy S. Saigh
Attorney-Advisor

2002-029-17

"Townsend, Jack/National" <JTownsend@nish.org>

03/27/2003 10:00 AM

To: farcase.2002-029@gsa.gov
cc: "Salter, Curtis/National" <CuSalter@nish.org>, "Plattner, Paul/National" <pplattner@nish.org>
Subject: Case comments

GSA

FAR Secretariat

1800 F. Street NW

Attn: Laurie Duarte

Washington, D.C.

Via e-mail to farcase.2002-029@gsa.gov

Comment on FAR Case 2002-029, Contract Bundling

We have reviewed the subject case and would recommend one additional change. NISH is the Federally designated Central Nonprofit Agency (41 CFR Part 51) that, along with NIB, implements the Javits-Wagner O'Day Act (JWOD) Program.

The proposed regulation assumes that the Federal procurement world is divided into either small business or big business, and provides for coordination with the Office of Small and Disadvantaged Business Utilization if a strategy involves apparently unwarranted bundling. While the nonprofit procurement world is not as large, bundling is also of vital interest to us, because many of our service contracts involve base operating support, a prime area for contract bundling.

We believe, although this is not made clear in the proposed regulation, that once such contacts are on the procurement list (FAR 8.703), they may not be bundled, or if for reasons of economy, a overall base operating contract is desired, we would remain a mandatory subcontractor for that service. This has been the de facto implementation, but it should be stated in an explanatory note to the regulation. We would recommend that the regulation should also include a reminder to agencies that the JWOD option also exists before services are bundled.

This can be accomplished by modifying the proposed regulation by adding an additional phrase:

General Procedures

2002-029-17

7.104(d)(1) The planner shall coordinate the acquisition plan or strategy with the small business specialist when the strategy contemplates award of a contact 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 planner shall also consider other factors, such as the use of the JWOD program, FAR 8.7.** The small business specialist shall...."

While this change is small, the effect on our program may be large, since once services are bundled to a large business, it will be many years before they become available to either small business or the JWOD community, and, of course, other socio-economic programs.

We appreciate your consideration.

Jack Townsend

Contracts Manager

NISH Services Department

2002-029-18

SHUBNUM
Strategic Management Services
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Voice (916) 638-4794
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March 28, 2003

General Services Administration
FAR Secretariat (MVA),
1800 F Street, NW., Room 4035
Washington DC 20405
(202) 501-4755

Attn: Laurie Duarte

Re: FAR Case 2002-029
Implementation of New Rules to FAR: OMB's Report of October 2002 – Contract Bundling; A strategy for Increasing Federal Contracting Opportunities for Small Business
5 U.S.C 601 *et seq.*
Federal Register/ Vol. 68, No. 21/ Friday, January 31, 2003/ page 5141/ Proposed Rules
Public Comments: Proposed additions to FAR 7.105(b) during comment period of February 1, 2003 to March 30, 2003

Cc: David Drabkin Esq., U.S. General Services Administration
Ms. Laura Smith, Acquisition Policy Division

In reference to the publication we wish to submit two comments for your consideration.

We are a small business located in Rancho Cordova, California, that provides products and services for strategic management of organizations conducting business in the private and public sectors. We bring twenty-two years of background experience in providing and receiving goods and services to and from other small and large businesses.

For the public sector, we provide products and services designed to meet and exceed the goals of the Program and/or Project for cost, schedule, and technical-performance as well as the socioeconomic goals of the nation. We create 'Value' for our customers within the overarching umbrella of a Program.

The proposed rules are well written and they will assist in meeting the President's goals and that of this nation. However, you may wish to consider two additional modifications to the FAR Subpart 7.105(b); *Plan of Action-Contents of written acquisition plans;* so as to make it more useful in the context of the proposed rules and those that are already mentioned in other parts of the FAR's. We are submitting two comments for your consideration. They are outlined on the next two pages, each followed with a discussion and a proposed amendment.

Rec'd 3/28/03

2002-029-18

Comment 1- Reference to the existence of practical alternatives to the proposed rules

Summary
In reference to the above referenced Federal Register, page 5141: Analysis provided by Mr. Al Matera, Director, Acquisition Policy Division.

Item C. Regulatory Flexibility Act

> *6. Description of any significant alternatives to the Proposed Rules Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize the Rule's economic impact on small Entities.*
> Response:
> *Currently there are no practical alternatives that will accomplish the objectives of this proposed rule.*

Comment to the above response:

We respectfully disagree with the above response. There does exist currently, a practical solution to achieve the objectives of the proposed rules as required by the President. These objectives are met using our products and services which are relatively new and innovative.

Discussion
Through innovative products and services, our firm provides value to organizations in the public and private sector, both in acquisition and sales.

We use strategies that provide value which include concurrently, the ***benefits of contract bundling as well as the benefits of unbundling of contracts.***

We will be glad to discuss this in more detail at your office in Washington D.C. if this is of further interest to you.

Suggested Action
Refer FAR 7.105 Contents of written acquisition plans.
We suggest that the concept of attaining value should be an important criteria in the overall acquisition and should be identified and tracked as the first item in an 'Acquisition Plan of Action' during the planning stage of an acquisition.
We propose to modify FAR 7.105(b) to include as the first itemized line item (1) as follows:

(b) *Plan of Action*
(1) *Best Value.* Indicate the anticipated means, methods, products and procedures used to achieve the best value to the government, as it relates to meeting the objectives of this specific acquisition.
(2) *Sources.* .....
(3) *Competition.* .....
Etcetera.

Renumber other items appropriately as noted on page 4.

2002-029-18

Comment 2- Action Item 8, from the Report of 2002 to the President; needs to be incorporated in the FAR during the early acquisition stage

Summary
Refer to "Action item 8". OMB's report of October 2002 to the President, proposes:

Identify best practices for maximizing small business opportunities

The present plan regarding implementation of Action Item 8, contemplates in a **"reactive manner"** the role of SBA and OSDBU to broadcast best practices to governmental agencies as they are gleaned from various examples within various agencies. At best, this is a hit and miss approach: It involves the successful completion of several variables before the best practice of one agency becomes known and can be repeated by other agencies.
While this approach has value and should be included as proposed; we need to act in a more **"proactive manner"**, and at the early acquisition planning stage, through an amendment to the existing FAR 7.105(b).

Discussion
There is a time lag from when an acquisition is planned to when the intervening steps are executed, to the final implementation of the acquisition. This could stretch from 12 to 24 months. There is an increased chance of success of incorporating best practices for maximizing small business opportunities, if this effort is incorporated as a part of the "Acquisition Action Plan" (described in FAR 7.105) during the early and formative stages of an acquisition. A proactive approach will bring awareness and accountability from an early stage as the acquisition moves forward.

Suggested Action
Refer FAR 7.105 Contents of written acquisition plans.
We propose to modify FAR 7.105(b) to include as the eleventh itemized line item (11) as follows:

(b) *Plan of Action*

(11) *Best Practices for maximizing small business opportunities.* Indicate the anticipated means, methods, products and procedures used to incorporate the best practices for maximizing small business opportunities; as it relates to meeting the objectives of this specific acquisition.
(12) *Make or Buy.* .....
(13) *Test and Evaluation.* .....
Etcetera.

Renumbering of FAR 7.105(b)
We suggest renumbering the action items appropriately. When renumbering, please keep the 'theme' of the steps in the Action Plan from a Program Manager's viewpoint, who is responsible to implement these actions. As such, it may be appropriate to bring closer, all attempts in 'resourcing' for an acquisition in one place such as (9), (10), (11) and (12).

2002-029-18

Hence the following sequence will appear for FAR 7.105 (b) Plan of Action; if both the above suggestions are incorporated in the itemized headings of a "Plan of Action." The highlighted articles reflect the suggested additional articles, so that they may be implemented, tracked and accounted for from an early stage of each specific acquisition.

Such suggestions meet the President's request, the OMB's intent to implement the President's request and the SBA's desire to increase participation of small and targeted businesses in governmental acquisitions.

FAR Part 7.105
(b) *Plan of Action*

(1) *Best Value. ....*
(2) *Sources. ....*
(3) *Competition. ....*
(4) *Source-selection procedures.*
(5) *Acquisition Considerations. ....*
(6) *Budgeting and funding. ....*
(7) *Product or service description. ....*
(8) *Priorities, allocations, and allotments. ....*
(9) *Contractor versus government performance. ....*
(10) *Inherently Governmental functions. ....*
(11) *Best Practices for maximizing small business opportunities. ....*
(12) *Make or Buy*
(13) *Test and evaluation. ....*
(14) *Logistics considerations. ....*
(15) *Government-furnished property. ....*
(16) *Government-furnished information. ....*
(17) *Environmental and energy conservation objectives. ....*
(18) *Security considerations. ....*
(19) *Contract Administration. ....*
(20) *Management information requirements. ....*
(21) *Other considerations. ....*
(22) *Milestones for the acquisition cycle. ....*
(23) *Identification of the participants in acquisition plan preparation. ....*

Thank you for the opportunity to provide these comments. As I mentioned in the context of comment 1, I shall be glad to explain the details of our strategies at your offices to other members of your team.

Sincerely yours,

Tariq Khalidi
Principal

2002-029-19

NATIONAL DEFENSE INDUSTRIAL ASSOCIATION
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The Voice of the Industrial Base

March 28, 2003

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

Subject: FAR Case 2002-029: Contract Bundling

Dear Ms Duarte:

The National Defense Industrial Association (NDIA) appreciates the opportunity to comment on a proposed rule to amend the Federal Acquisition Regulation (FAR) to limit bundling and expand the access of small businesses to federal contracting opportunities. This rule, which was published in the *Federal Register* on January 31, 2003, is designed 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."

NDIA is a non-partisan, non-profit organization with a membership that includes over 900 companies and more than 24,000 individuals. NDIA has a specific interest in government policies and practices concerning the government's acquisition of goods and services, including research and development, procurement, and logistics support. Our members, who provide a wide variety of goods and services to the government, include some of the nation's largest defense contractors.

We fully support the overarching objective of the rule to improve small business access to federal contracting opportunities. We particularly approve of efforts to enhance compliance with small business subcontracting plans and to consider such compliance when assessing a contractor's record of past performance. We further support the need for greater discipline in controlling unjustified contract bundling. However, we encourage the Civilian Agency Acquisition Council and Defense Acquisition Regulations Council to develop implementing regulations that balance the need to expand small business access with the impact such changes would have on the users of the goods and services being acquired and on other segments of the industrial base.

The proposed rule seeks to amend FAR Part 19.202 by requiring Office of Small Disadvantaged Business Utilization (OSDBU) Directors or their designees to review an acquisition not set aside for small business and identify alternate strategies to maximize

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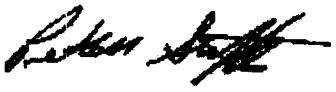
the use of small business in the procurement. We would like to respectfully suggest when OSDBU Directors undertake these new responsibilities that the regulations further require an assessment of the impact of such set asides or alternate strategy considerations on an expanded array of business issues. This additional assessment should specifically review cost to the program in terms of dollars of any such recommendations. The OSDBU Director should also review the impact of any such decision on effective competition and on proven technical capabilities available in the marketplace. The evaluation of these additional potential impacts would yield more balanced set asides or alternate strategy decisions.

The proposed amendment under FAR Part 19.201(d)(11) adds a review function for the OSDBU to assess the extent small businesses are receiving their fair share of federal procurements. To promote this provision, we recommend that the proposed amendment be revised to require: (1) the SBA and federal agencies to negotiate two-part goals for contracts awarded to the various types of small business concerns, with agency-specific goals set not only for prime contracts but also for subcontracts awarded to small business concerns, consistent with the specific provisions and goals of the Small Business Act; and (2) the OSDBU, in performing assessments of contracts awarded to small business concerns, to identify and track the number of federal contracting dollars going to Small and Small Disadvantaged Business, HBCU, Women-Owned, Veteran-Owned and HUBZones at the subcontract level through the third tier. It has long been recognized that a significant portion of federal procurement dollars that benefit these important small entities is realized at levels below the prime contract. The opportunity to capture and include these data in any assessment of small business utilization would be an important metric and would add balance to this issue.

The recommendations above are suggested in the interest of maintaining balance in the rulemaking process, by giving full consideration to all segments of the industrial base. The lack of such balance will continue to drive companies from the federal marketplace, thus limiting effective competition. NDIA would be pleased to assist in the development of equitable, clear and uniform coverage dealing with small business contracting assistance. For further information, please contact NDIA Procurement Director Ruth Franklin at (703) 247-2598, or at rfranklin@ndia.org.

Sincerely,



Peter M. Steffes
Vice President, Government Policy

2002-029-20

"Schoenberg, Alan (HHS/OS)" <Alan.Schoenberg@hhs.gov>

03/28/2003 02:20 PM

To: "'farcase.2002-029@gsa.gov'" <farcase.2002-029@gsa.gov>
cc: "Martin, Arthuretta (HHS/OS)" <Arthuretta.Martin@hhs.gov>, "Holtet, Niels (HHS/OS)" <Niels.Holtet@hhs.gov>, "Weisman, Marc (HHS/OS)" <Marc.Weisman@hhs.gov>, "Ridgely, Debbie (HHS/OS)" <Debbie.Ridgely@hhs.gov>
Subject: Comments on FAR Case 2002-029 (Contract Bundling)

Note to FAR Secretariat:

What follows are comments from the Department of Health & Human Services (HHS) concerning FAR Case 2002-029 (Contract Bundling). We hope that this input will assist the CAAC and DARC in formulating an effective and balanced final rule on the subject. The comments below represent an amalgamation of valued feedback that we elicited from HHS's acquisition and small business commmunities. The bottom line is that HHS agrees with the proposed rule's overall goal of increasing contracting opportunities for small businesses; however, we feel that without the necessary budget and resources, it will be difficult -- if not impossible -- to successfully implement the proposed regulatory requirements.

Alan Schoenberg
HHS CAAC Representative

Comments on Proposed FAR Rule: Contract Bundling

1) The proposed rule calls for more factors to consider and justify during the planning and conduct of acquisitions. It appears likely that the proposed requirements for OSDBU reviews would trigger the need for either significantly more resources or a reallocation of existing resources. Should additional resources not materialize, the key objectives of the rule may be in jeopardy and standard acquisition processing times may be adversely affected.

2) We believe that greater benefits would accrue to small businesses if program management were actively involved in the process. More emphasis should be placed on requiring program managers to bolster SBA goals/programs. For example, program managers' performance could be rated, in part, on the achievement of small business contract awards. Also, more time should be spent on sponsoring outreach programs for program management staff. This strategy would help to offset counter-productive program manager perceptions that adherence to small business rules will impede the fulfillment of program requirements. In short, implementation and enforcement of the proposed rule by acquisition staff and small business specialists alone, without program management support, will lead to less than optimum results.

3) Since there may be diminishing small business opportunities among procurements as low as $2 million and since the burden of reviewing all actions down to $2 million may actually detract from the worthwhile goal of expanding small business opportunities, you may wish to consider a modest, cost-effective increase in the review threshold.

4) It may be useful for the proposed rule to make more key provisions of FAR Part 19 applicable to GSA Schedules and GWACs -- such as the authority to appeal rejected recommendations; the authority to review non-bundled buys; and the establishment of small business set-asides within designated thresholds.

5) To further improve small business opportunities, please consider incorporating a requirement to: (a) establish subcontract goals for GSA Schedule orders over $500,000; and (b) use subcontract goal achievement to

3002-029-20

evaluate future opportunities for prime contractors.

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T 630 438 8601 F 630 438 2468
ChrisMilliken@BoiseOffice.com

2002-029-21

BOISE

Chris Milliken
Chief Executive Officer

VIA E-MAIL: farcase.2002-029@gsa.gov

March 28, 2003

GENERAL SERVICES ADMINISTRATION

Federal Acquisition Regulation; Contract Bundling

AGENCY: General Services Administration, FAR Secretariat

ACTION: Comments on proposed bundling rule; FAR case 2002-029

Thank you for considering the following comment on proposed bundling rule; FAR case 2002-029. Boise Office Solutions, a Chicago-based distributor of products for the office, participates in an industry that has undergone dramatic consolidation in the last decade. This is in response to customer demands for standardization, efficiency and lower administrative costs.

A 1997 study funded by the U.S. Small Business Administration suggests that a similar phenomenon has occurred in the federal government (Eagle Eye Publishers, 1997). Additionally, the study found that this "bundling" phenomenon behaved differently among the 13 industries studied, which included the office supply industry in which Boise Office Solutions participates. For example, the SBA-funded study found that "despite some unusual trends in the counts of contracts, the overall evidence does not suggest bundling is a strong factor in the office supplies market."

This multi-industry analysis suggests that the results of bundling may not be generalizable across industries, as some industries show a much higher potential incidence of bundling than others. Also, GAO (2000) questioned the "probative value" of a finding quoted in the proposed rule that "for every 100 'bundled' contracts, 106 individual contracts are no longer available to small businesses." The GAO report questioned this finding because the bundling definition involved in the calculation did not meet statutory definition. These and other similar methodological limitations in the studies referenced by OMB in the October 2002 study entitled, "Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business," suggest that the proposed rule requires more careful research if it is to achieve its goal of improving the competitive environment for small business in the federal government arena.

In particular, Boise Office Solutions notes that while the 1997 study (previously identified) evaluates 13 industries, the proposed rule does not provide for an industry-level analysis and differentiation. **Action Item 4**, for example, uses agency-specific dollar thresholds as a trigger for initiating bundling regulation instead of industry-level differentiation. This seems to assume that different industries can conform established supply chain management practices to the dollar thresholds of a particular agency. The diverse industry results in the 1997 SBA-funded study suggest otherwise. GSA is an example. One need only peruse GSA Advantage to understand the diversity of products and services included in GSA contracts. It is difficult to understand how a "one size fits all" dollar threshold can be effective, given this diversity.

This requires industry-level analysis to understand how businesses in an industry compete. The regulations need to respond to industry practice. It does not do that currently.

Action Item 5 requires an agency in certain situations to justify the rationale for selecting a particular strategy over another that would involve less bundling. The rationale needs to be specific and

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measurable. If a regulation is going to mandate identifying alternative strategies, a basis should also be provided for evaluating the rationale given. Specific types of rationale could involve hard dollar costs, social/agency costs for regulatory noncompliance and soft dollar costs.

Regarding hard dollar costs, in the office supply industry, many small businesses use wholesalers for sourcing most of their products. This involves an extra up charge to the government. What is the social benefit of supporting small business versus the hard dollar costs of paying more for the use of a wholesaler? This could be measured based on the actual number of jobs created per incremental dollars spent versus the baseline decision made by the agency originally.

If a small business does not stock product or utilize their own system, they may not be able to provide a high degree of regulatory compliance with the Javits Wagner O'Day Act requirement to use mandatory source items from NIB and NISH. What is the tradeoff value an agency should utilize to measure using a small business versus system-driven compliance with procurement law?

Additionally, in comparing a small business option, an agency would need to compute the soft dollar or transaction costs of utilizing multiple vendors in order to achieve less "contract bundling." How should the agency compute the additional transactional costs of procuring from multiple vendors? Activity based costing is available for this analysis. It would also be useful to identify the transaction costs of using multiple prime vendors versus a single prime vendor with a network of subcontractors, which are small business manufacturers.

Action Item 6 would include a factor to evaluate past performance of contractors based on their achievement of goals in their small business subcontracting plans. This seems to suggest that the prime contractor controls the acquisition behavior of federal agencies. If the intent is to make subcontracting goals prescriptive, then it is imperative that the regulations impose mandatory acquisition behavior on the agencies to utilize small business subcontractors. The current approach of identifying participation goals fails to meet desired results because it does not mandate that agencies buy available products from small business subcontractors.

Again, this issue needs to be evaluated with the industry as the unit of analysis. The generalized approach suggested in the proposed rule will not apply to some industries and will result in confusion.

Also, the definition of bundling is at question here. Whereas the current definition of bundling involves consolidating "two or more contracts into a single contract that is unlikely suitable for a small business concern", this proposed rule will modify "single" contract to include an indefinite contract award to "two or more sources under a single solicitation." So, not only is the scope of bundling unclear because of the lack of definitional clarity (and, as a result, accurate tracking), a new definition is proposed without identifying its impact or scope. **A consistent definition must be agreed upon, followed by detailed cost-benefit analysis, before proceeding.**

Boise Office Solutions appreciates this opportunity to respond to this proposed rule. We have options we would like to explore in terms of subcontractor initiatives. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

Chris Milliken
Chief Executive Officer
Boise Office Solutions

2002-029-21

References

Eagle Eye Publishers. "Bundled Contract Study FY91-FY95," U.S. Small Business Administration Contract #SBAHQ95C0020. June 20, 1997.

Executive Office of the President, Office of Management and Budget, Office of Federal Procurement Policy. "Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business." October 2002.

General Accounting Office. "Small Business: Limited Information Available on Contract Bundling's Extent and Effects," (GAO/GGD-00-82), March 20, 2000.

2002-029-22

Management Association
for Private
Photogrammetric Surveyors

March 31, 2003

General Services Administration
FAR Secretariat (MVA)
1800 F Street NW Room 4035
Washington DC 20405

Attention: Ms. Laurie Duarte

Subject: FAR Case 2002-029: Contract Bundling

Dear Ms Duarte:

MAPPS, the nation's oldest and largest association of private mapping and geospatial firms, appreciates the opportunity to comment on a proposed "bundling" rule to amend the Federal Acquisition Regulation (FAR). This rule, to limit bundling and expand the access of small businesses to federal contracting opportunities, was published in the *Federal Register* on January 31, 2003, and is designed 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."

MAPPS spoke at the OFPP public meeting on this matter, held at the GSA Auditorium. Our comments herein are consistent to the points we made at that meeting.

MAPPS commends the Administration for this effort to address the growing concern over contract bundling. The private mapping and geospatial community is deeply concerned about the affects of bundling on the ability of our members to provide professional services to the government. As you may know, our members services are defined in the law and FAR as "A/E" services, consistent with the Brooks Act qualifications based selection, or QBS, process, in which there is a statutory and regulatory emphasis on quality, competence and qualifications found in 40 USC 541, 10 USC 2855 and FAR part 36.

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2002-029-22

With that legal and regulatory framework in mind, MAPPS offers these specific comments and recommendations:

1. A/E services should be treated differently than other services in the bundling rule, particularly as it applies to indefinite quantity/indefinite quantity contracts due to the QBS process required by statute and regulation.
2. The rule in the new FAR 7.104(d) should not apply to A/E services, including surveying and mapping, due to the statutory requirements of 10 USC 2855(b) and the Small Business Competitiveness Demonstration Program Act of 1988 (P.L. 100-656), as amended, 15 USC 644 note.
3. MAPPS opposes, in the strongest possible terms, the introduction of the definition of "single contract" as it applies to ID/IQ contracts for A/E and surveying and mapping services, " in FAR 2.101 and the contract and task order requirement in 16.605(a)(7). MAPPS supports the use of ID/IQ contracts for surveying and mapping services, as do the agencies our member firms do business with. The single contract and task order requirement proposed in 16.605(a)(7) would be devastating to the government's procurement of surveying and mapping services. This would be disruptive to several extremely important Iraq war, homeland security and emergency response activities in several agency programs. This regulation would effectively make null and void the NIMA GGI contracts, the USGS CSC-2 contracts and the US Army Corps of Engineers Technical Center of expertise contracts its in St. Louis District. These contracts are being used for mapping in support of the war effort in Iraq, the war on terrorism worldwide, the new and ongoing homeland security efforts, as well as other, normal Federal responsibilities in infrastructure, environmental protection, and asset and resource management. Mapping, GIS and geospatial technology is advancing every day. The Federal workforce in these areas is declining. New application of our members firms' services are constantly being adopted by many agencies and programs that are beyond the traditional Federal surveying and mapping establishment. As a result, government wide ID/IQ contracts are used as an efficient and effective way to provide services to these new players. These agencies do not have the staff or expertise to contract for these professional services on their own. Use of the inherently governmental acquisition, selection and management functions of agencies such as NIMA, USACE and USGS by other agencies, through the use of these provider agencies' ID/IQ contracts, is critical to the government. Such as process is consistent with the current FAR, the FAIR Act, the Economy Act, OMB Circular A-76 and the President's management initiative. This proposed rule would be devastating to the government and to our members. It will result in the necessity for the government to hire hundreds of new Federal employees, just to handle the management work that would be created if this rule is implemented as proposed and the virtual prohibition on smaller, inexperienced agencies use of larger, more experienced agencies mapping and geospatial contracts. We urge that A/E services, as defined in FAR part 36, be exempt from these provisions.

2002-029-22

4. MAPPS supports the effort to limit, and we urge a rule to PROHIBIT, the use of the GSA Federal Supply Service Schedule (GSA-FSS) for A/E contracts in general and those for surveying, mapping, remote sensing and geographic information systems (GIS) in particular. We urge that the proposed regulations be amended to specifically prohibit the use of the GSA-FSS for any A/E service under 8.404. This would include the so-called "Professional Engineers Services" schedule, the Environmental Services schedule, the Information Technology Services schedule, or any other GSA FSS schedule. Use of these schedules for A/E services is not authorized by statute, and indeed is a violation of the Brooks A/E Act. This should be made clear in the FAR.
5. MAPPS urges that the rule be modified to specifically prohibit to bundling of A/E services and non-A/E services, particularly if the end result is to make a selection and award via a procurement methodology other than the QBS process pursuant to 40 USC 541 and FAR part 36. We believe the bundling of disparate non-mapping services with other services, including but not limited to construction, IT, or other services is anti-competitive, anti-small business and anti-QBS. This issue was addressed on the floor of the U.S. Senate more than a decade ago, when Congress amended the Brooks Act to clarify its definition to include surveying and mapping. Senator Breaux of Louisiana said, "The government should negotiate contracts for these (surveying and mapping) services independent of other professional design or construction services to ensure that specialized surveying and mapping skills and techniques are evaluated and not overlooked. In this manner, the Government will benefit from direct control of both the quality of the services and the survey or map's development." (Cong. Rec. Daily Edition, October 18, 1988, p. S16672-3)
6. MAPPS urges a limit in the definition in 2.101 to those instances in which the bundling under an ID/IQ contract for A/E services would replace two or more previous contracts with small business primes with one bundled contract on which it is not likely that small businesses could be competitive as a prime contractor.
7. MAPPS strongly supports the proposed emphasis on contractor compliance with small business subcontracting plans and use of such compliance as a past performance evaluation factor. MAPPS also strongly supports the proposal's recognition of the important role small business subcontractors play in Federal procurement. Section 714(b) of P.L. 100-656, required OFPP to develop a simplified data collection system to collect data on the participation of small business concerns as subcontractors under prime contracts for A/E services. However, that provision expired on September 30, 1997 without OFPP or SBA implementing such a program. Many MAPPS member firms, particularly truly small businesses, prefer NOT to be Federal prime contractors due to the paperwork, management, administration and slow pay issues involved. These firms much rather being subcontractor members of teams headed by larger firms. MAPPS supports the implementation of such a subcontracting reporting and monitoring system in the context of the bundling regulation. We believe this can be a significant contribution toward establishing a meaningful government-wide subcontracting measurement system. It is our view that given the past expression of support from Congress for such a system for A/E services, and the fact that there was a failure on the part of OFPP and SBA to implement this statutory requirement.

2002-029-22

We believe that using the "testing" authority for new and innovative procedures that is provided in the OFPP Act, a system such as that outlined in section 714(b) of P.L. 100-656 can and should be implemented in the FAR bundling regulations.

We deeply appreciate this opportunity to comment. MAPPS would welcome any questions or any discussion about our recommendations.

Sincerely,

John M. Palatiello
Executive Director

2002-029-23

COFPAES

Council On Federal Procurement of Architectural & Engineering Services

March 31, 2003

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

Subject: FAR Case 2002-029: Contract Bundling

Dear Ms Duarte:

The Council on Federal Procurement of Architecture & Engineering Services (COFPAES) appreciates the opportunity to comment on a proposed rule to amend the Federal Acquisition Regulation (FAR) to limit bundling and expand the access of small businesses to federal contracting opportunities. This rule, which was published in the *Federal Register* on January 31, 2003, is designed 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."

COFPAES is a coalition of the nation's four leading professional societies in the architecture/engineering (A/E) community. Our member organizations are the American Congress on Surveying and Mapping, the American Institute of Architect, the American Society of Professional Engineers, and the National Society of Professional Engineers.

COFPAES commends the Administration for its efforts to address the growing concern for contract bundling. The A/E community is deeply concerned about the affects of bundling on the ability of our members to provide professional services to the government consistent with the statutory and regulatory emphasis on quality, competence and qualifications found in 40 USC 541, 10 USC 2855 and FAR part 36. These are the citations to the "Brooks Act" qualifications based selection (QBS) process for A/E services.

Given this statutory requirement, as implemented in the FAR, we offer the following comments on the proposed bundling rule as it applies to A/E services –

1. Some exception, clarification or separate process should be established for A/E services. This distinction is justified due to the QBS process required by statute and regulation. The rationale for this special treatment is provided below.

2. The new FAR 7.104(d) cannot apply to A/E services due to the statutory requirements of 10 USC 2855(b) and the Small Business Competitiveness Demonstration Program Act of 1988 (P.L. 100-656), as amended, 15 USC 644 note.

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2002-029-23

3. COFPAES opposes the introduction of the definition of "single contract" to FAR 2.101, particularly as it applies to ID/IQ contracts for A/E services. This definition is harmful to the A/E community, including the Federal clients that private A/E firms serve. When used properly, ID/IQ contracts awarded via the FAR part 36 QBS process can be a highly competitive and efficient contracting strategy. Such as process also affords small firms considerable Federal prime and sub contracting opportunities. However, we do support the effort to limit, or indeed eliminate, the use of the GSA Federal Supply Service Schedule (GSA-FSS) for A/E contracts (including those for such A/E services as mapping, remote sensing and geographic information systems (GIS)). We urge that the proposed regulations be amended to:

    a. Specifically prohibit the use of the GSA-FSS for any A/E service under 8.404. This would include the so-called "Professional Engineers Services" schedule, the Environmental Services schedule, the Information Technology Services schedule, or any other GSA FSS schedule. Use of these schedules for A/E services is not authorized by statute, and indeed is a violation of the Brooks A/E Act. This should be made clear in the FAR.
    b. Specifically prohibit to bundling of A/E services and non-A/E services, particularly if the end result is to make a selection and award via a procurement methodology other than the QBS process pursuant to 40 USC 541 and FAR part 36. The only exception should be the design-build process authorized under FAR part 36.300 and 10 USC 2305a and 41 USC 253m.
    c. Limit the definition in 2.101 to those instances in which the bundling under an ID/IQ contract for A/E services would replace two or more previous contracts with small business primes with one bundled contract on which it is not likely that small businesses could be competitive as a prime contractor.

4. COFPAES strongly supports the proposed emphasis on contractor compliance with small business subcontracting plans and use of such compliance as a past performance evaluation factor. COFPAES also strongly supports the proposal's recognition of the important role small business subcontractors play in Federal procurement. Section 714(b) of P.L. 100-656, required OFPP to develop a simplified data collection system to collect data on the participation of small business concerns as subcontractors under prime contracts for A/E services. However, that provision expired on September 30, 1997 without OFPP or SBA implementing such a program. COFPAES strongly supports the implementation of such a subcontracting reporting and monitoring system in the context of the bundling regulation. We believe this can be a significant contribution toward establishing a meaningful government-wide subcontracting measurement system. It is our view that given the past expression of support from Congress for such a system for A/E services, and the fact that there was a failure on the part of OFPP and SBA to implement this statutory requirement. We believe that using the "testing" authority for new and innovative procedures that is provided in the OFPP Act, a system such as

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that outlined in section 714(b) of P.L. 100-656 can and should be implemented in the FAR bundling regulations.

We deeply appreciate this opportunity to comment and would welcome any discussion on our recommendations.

Sincerely,

Thomas W. Brooks, Jr., PLS
COFPAES Chairman

EAGLE EYE
PUBLISHERS INCORPORATED

2002-029-24

March 31, 2003

Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVA)
1800 F St. NW, Room 4035
Washington, DC 20405

Dear Ms. Duarte,

I am responding to the request for comments on Far Case 2002-029. This concerns proposed changes to the FAR to implement anti-bundling measures that will enhance the competitive stance of small businesses bidding on government contracts. These proposed changes are contained in the OMB's October 2002 report titled, *Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business.*

As the author of the SBA's recent study, *The Impact of Contract Bundling on Small Business FY 1992 – FY 2001* I strongly favor efforts by the federal government to mitigate the negative impacts of contract bundling on small firms. However I generally find the proposed changes to the FAR don't go far enough to ensure adequate levels of small business contracting.

Contract bundling is a symptom of a bigger problem: overall, government agencies do not meet their established small business prime contracting goals. In my opinion, small firms might tolerate a certain level of bundling if small firms were receiving their fair share of bundled and unbundled prime and sub-contracts.

However, as my recent bundling study shows, bundled contracts harm the competitive position of small firms in the marketplace. The main culprit is the phenomenon I call "accretive bundling." This occurs when dissimilar tasks are added onto GWACs, IDIQs, Schedules, and Multiple Award-type contracts, making them so large and complex that small firms are precluded from bidding or forced into a sub-contractor role.

Some people argue that sub-contracting is the answer to small firms' bidding problems, but nothing could be further from the truth. Ask any small business owner. When a small firm is forced into a secondary role, small firms lose control over key decisions about what rates get charged and how work gets divided. It is commonly understood in the small business community that small firms are regularly used as "window dressing" to help large firms win contracts and then don't receive the proposed level of work once the contract is awarded. All large firms have strategies to maximize their "take" from

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each contract they win, often to the disadvantage of their teaming and subcontracting partners.

So, the proposed FAR changes requiring more levels of agency bundling reviews and threshold monitoring don't address the real money problem head-on. As a whole they are simply too passive and too bureaucratic. The recommendation with the most promise in my opinion is Recommendation 6 to strengthen compliance with and monitoring of subcontracting plans. However, the Form 295 submission process is a disaster despite current reporting requirements and I don't see how it will change anything as written..

The OMB needs to take a more pro-active, Jerry McGuire-like "show me the money" approach to improving the competitive stature of small firms. Here are my suggestions:

1. Broaden the official definition of bundling to include "accretive bundling" that occurs on GWACs, IDIQs, Schedules and other Multiple Award-type contracts.
2. Allocate contracts to small firms as part of each agency's annual budgeting process. Implement stiff procedures and/or penalties for deviation from the plan. Require OSDBU participation in this budgeting process and require the OSDBUs to sign off on the annual plan. Require that any changes in the small business plan over the course of the year be offsetting -- if something has to come out of the plan, something else has to be inserted. Contracts that are allocated to small businesses can be competed or set-aside as needed to meet each agency's SDB, OSB, WOB and Veteran-owned business goals.
3. Insert a clause in each contract *requiring* a prime contractor to prove it has met its original subcontracting plan and require a prime's subcontracting partners to sign off on a joint statement of compliance *before* the prime gets paid.
4. Insure timely delivery of contract opportunity information to OSDBUs so that they can do their job. Contract officers and OSDBU offices often find themselves competing rather than cooperating. If OSDBUs had a clear understanding what was and was not being considered for small business allocation they could advocate better and get better small firm participation in the agency bidding process.
5. Strictly enforce full and timely Form 295 reporting by companies. The subcontract reports as they are currently submitted are next to worthless. They are often not submitted and, when they are, they are often incomplete. Require 295 report submission for payment.
6. Do not raise the $2,500 open market threshold.
7. Require strict compliance with the Form 1057 reporting (with full socioeconomic business detail) for all purchase card buys. Current small business purchase card statistics are virtually non-existent. $14 billion is being spent annually with little or no accountability for agency small business utilization.
8. Strictly enforce provisions calling for all contracts worth between $2,500 and $100,000 be set aside for small firms. Currently, billions of dollars of contracts in this range are being awarded to large firms.

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9. Strictly enforce small business size standards. Require annual re-certification of small firms, along with annual agency reviews and stiff penalties for noncompliance and fraud.
10. Study how much money is truly saved by bundled contracts. My sources tell me that prime contractor mark-ups of sub-contractor rates vastly outweigh any savings in the procurement and administration of bundled contracts. Just because bundled contracts involve less administration on the government side doesn't mean the work is being performed more efficiently or cost-effectively.

In short, small businesses will be better served in the long run if agencies take aggressive, pro-active steps to insure that money goes to small businesses and that agencies achieve their small business contracting goals. The proposed OMB rule changes will require more meetings, reviews and reports and may well wind up not changing anything.

Please call or write me with questions.

Sincerely,

Paul J. Murphy

Paul Murphy, President
Eagle Eye Publishers, Inc.

2002-029-25

4/1/2003

Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVA)
1800 F Street, N.W., Rm. 4035
Washington, D.C. 20405

Re: Comments on Proposed Rule on Contract Bundling - Reference FAR case 2002-029

Dear Ms. Duarte:

The EPA Office of Small and Disadvantaged Business Utilization (OSDBU) fully supports the proposed rule, and looks forward to the codification of proposed changes in the FAR. The proposed rule, once implemented should help increase Federal Procurement Opportunities for small businesses consistent with the President's Small Business Agenda. In particular, EPA OSDBU is in favor of the proposed review of GSA schedule buys. The proposed regulations provide more authority for OSDBUs and PCRs to review GSA Schedule buys than in the past. However, to completely close the GSA Schedule "loophole" regarding bundling, the regulations should make more provisions in Part 19 applicable to GSA Schedule buys and orders from other pre-existing contract schedules.

Please consider the following EPA OSDBU comments:

1. <u>Agency Threshold</u>

EPA OSDBU recommends that the review threshold for EPA be established at $1 million. A $1 million threshold would ensure that the fullest intent of the proposed rule would be met. Based on a review of historical data on some of the agency's major program offices, a threshold higher than $1 million would not meet the intent of the mandatory requirements and contract bundling reviews would be minimal.

In cases where an Agency has already reviewed a contract for bundling, the Agency should not have to review task and delivery orders under that contract for bundling. However, if the task and delivery orders are for another Agency's contract, e.g. a GSA Schedule contract, EPA should perform the review–especially when the other Agency's review threshold is higher than EPA's.

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2. OSDBU/PCR Ability to Appeal Rejected Recommendations

Although the proposed regulations provide for OSDBU and PCR review of bundled procurements, including those done via GSA Schedule, the proposed regulations provide no authority for OSDBUs/PCRs to appeal rejected recommendations pertaining to GSA Schedule buys as they can open market buys under FAR 19.505. The regulations at FAR 8.404(a)(1), which exempt GSA Schedule buys from the provisions of FAR Part 19, are modified by the proposed regulations only to provide for the PCR review of bundled procurements (FAR 202-1(e)(1)iii, and not for the applicability of any other provisions of Part 19. The ability to appeal a rejection of an OSDBU/PCR recommendation is a powerful practical and political tool in stimulating small business utilization and we recommend that it be included in these regulations to curb the effects of bundling.

3. Non-bundled GSA Scheduled Buys

In addition to lacking authorization to use the above tool re GSA Schedule buys, the current and proposed regulations do not provide the OSDBUs/PCRs any authority to influence non-bundled GSA Schedule buys. Nor do the propose regulations require consideration of small business or subcontracting plans in such buys.

- OSDBU/PCR Review of Non-bundled GSA Schedule Buys

  OSDBUs cannot directly influence small business utilization in procurements they do not review. Current regulations do not afford OSDBUs/PCRs authority to review non-bundled GSA Schedule buys (or any other orders from pre-existing contract vehicles) for purposes of stimulating small business utilization as they can open market buys - FAR 19.402(C)(1)(i).

- Apply Small Business Utilization Requirements to GSA Schedule Buys

  Under the current regulations, the provisions in FAR 19.502-2 for setting aside for small businesses: 1. all procurements exceeding $2,500 but not over $100,000; and 2. all procurements where a reasonable expectation exists of receiving offers from at least two responsible small businesses at fair market prices, do not apply to GSA Schedule buys.

- Enable Subcontracting Plans for GSA Schedule Buys

  Under current regulations specific subcontracting plans are not required from GSA Schedule buys (FAR 19.7). Review of such procurements would enable OSDBUs/PCRs to require subcontracting plans specific to GSA Schedule buys over $500,000 from a large business.

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Application of FAR Part 19 small business utilization, OSDBU/PCR review and appeal, and subcontracting rules to GSA Schedule, and other pre-existing contract vehicle, orders would significantly increase small business utilization. We recommend that regulations be generated to close the GSA Schedule loophole regarding small business utilization, OSDBU/PCR review and appeal, and small business subcontracting as well as bundling.

4. Additional Recommendations Regarding GSA Schedule

The following are additional recommendations to make orders from GSA Schedule and other pre-existing contract vehicles more small business friendly:

- Restrict orders from GSA Schedule (and other pre-existing contract vehicles) that are over $2,500 and under $100,000 to small businesses.

- Create separate GSA Schedule websites for small businesses and/or for placement of orders under $100,000.

- Require a market survey such as a sources sought notice to small businesses (possibly via a GSA Schedule small business website) prior to placement of a GSA Schedule order to a large business.

- Apply the "rule of two" to GSA Schedule buys - if there are two small businesses on GSA Schedule that can reasonably be expected to perform the requirement, then the requirement must be set aside for small business.

- Enable sole source contracting from 8(a) contractors on GSA Schedule up to the $3M limit.

- Enable HUBZone sole source contracting via GSA Schedule if there is only one HUBZone source able to perform the requirement on GSA Schedule.

- Actively ensure that all small business designations on GSA Schedule contractors are up to date (e.g.- update existing GSA Schedule records to reflect new HUBZone or service disabled veteran-owned status). This would eliminate a five year lag between the invention of new small business categories (and associated goals) and being able to obtain credit for their utilization via GSA Schedule. Comparisons could periodically be made between GSA Schedule holder record status and the ProNet or the Central Contractor Registration database.

5. Clear and Precise Statements of Work

It is also important that statements of work be clear and precise to facilitate reviews and identify whether contract bundling has occurred. Statements of work will be one of the key elements reviewed to determine whether a new requirement is made up of requirements that were

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once in separate contracts. If statements of work are not clear and precise, it will be more difficult for OSDBU to make the bundling determination.

6. Access to Data

Access to required data is also critical to the review process. Quite often, historical data is not housed in the OSDBU, but rather in the contracting office or in program offices. To ensure that bundling reviews are effective, OSDBUs need access to all required data.
Clear and precise statements of work and assess to required data should also be addressed in the proposed bundling rule.

Please contact Patricia Durrant of my staff on (202) 564-4738 if you have questions.

Sincerely,

//s// (April 1, 2003)
Jeanette L. Brown, Director
Office of Small and Disadvantaged
Business Utilization

cc: Judy Davis, Director, OAM
Patrick Murphy, OAM

2002-029-26

"Delaney, LeAnn"
<LeAnn.Delaney@mail.house.gov>
04/01/2003 07:28 PM

To: "'farcase.2002-029@gsa.gov'" <farcase.2002-029@gsa.gov>
cc:
Subject: FAR Case 2002-029

I am enclosing comments from Congresswoman Nydia M. Velázquez, Ranking Democratic Member of the House Committee on Small Business, to FAR Case 2002-029.

<<comments040103.pdf>>

LeAnn Delaney

Democratic Staff

Committee on Small Business

Phone: 202-225-4038

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comments040103.pdf

DONALD A. MANZULLO, ILLINOIS
CHAIRMAN

NYDIA M. VELÁZQUEZ, NEW YORK

2002-029-26

Congress of the United States

House of Representatives

108th Congress

Committee on Small Business

2361 Rayburn House Office Building

Washington, DC 20515-6315

April 1, 2003

Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVA)
1800 F Street, N.W., Room 4035
Washington, DC 20405

Re: FAR Case 2002-029

Dear Ms. Duarte:

Combining small business contracts into giant contracts that are too large for small business participation is a significant problem for our nation's small firms. According to OMB's own report released on October 31, 2002, from fiscal year 1991 to fiscal year 2000, the number of new prime contracts awarded to small businesses decreased from 26,506 to 11,651 - a 56 percent decrease in the number of small business government prime contractors in 9 years. The OMB attributes this decrease in small business prime contracting to "contract bundling." Over the past ten years, the Committee on Small Business has held eight hearings on this important issue.

There is a direct correlation between contract bundling and an agency's ability to achieve its small business goals. Obviously, when agencies create contracts that are too large for small businesses to perform as prime contractors, agencies are less likely to achieve their statutory small business goals. In fact, over the past two fiscal years, the Bush Administration has not achieved any of its small business goals.

Clearly, something must be done about the rampant contract bundling that is driving small businesses out of the federal marketplace. In March of 2001, the President introduced his small business agenda. And now, nearly a year later, proposed regulations have been published.

As the Ranking Democratic Member of the Committee on Small Business, I share the President's commitment to increasing opportunities for small businesses in the federal contracting arena. And, in this pursuit, I am submitting comments on the proposed rule published in the *Federal Register* on January 31, 2003.

Unfortunately, the proposed rule falls far short, and will ultimately exacerbate the problem of contract bundling. Additional comments on the proposed rule will cover five primary areas: imposition of dollar thresholds, involvement of OSDBUs, definition changes, subcontracting plan reviews, and Procurement Center Representatives. It is important to note that any advances the rule might make will not be realized because the administration has failed to provide adequate funding or resources.

Imposition of Dollar Thresholds

It is very confusing that in the *Federal Register* preamble one of the stated goals of the President's small business agenda, and therefore the proposed regulation, was to "improve the access of small business to Federal contracting opportunities." However, one of the proposals contained in the rule does not increase opportunities, it actually reduces them for small businesses.

Current law requires the review of any contract bundle that meets the definition, and results in the consolidation of two or more contracts. The law also requires that market research is done - on any contract that meets the definition of bundling - to determine whether the bundling is justified.

The current statutory definition of "bundling" does not include any reference to specific dollar figures. The intent of the statute was to ensure that "to the maximum extent practicable, procurement strategies used by the various agencies having contracting authority shall facilitate the maximum participation of small business concerns as prime contractors, subcontractors, and suppliers." The statue lays out additional requirements for those procurements that involve "substantial bundling of contract requirements." It was clearly not the intent of the statute to establish specific dollar thresholds below which contract bundling could occur without review, which will be the result if the proposed regulations are implemented.

The proposed change establishes the first ever dollar thresholds for evaluation. The rule establishes these thresholds at $7 million or more for the Department of Defense; $5 million or more for NASA, the Department of Energy and GSA; and $2 million or more for all other agencies.

In fact, there is a statutory requirement that small businesses are the primary source on contracts valued greater than $2,500 and less than $100,000. These are the types of contracts that a small business new to the procurement arena would usually win. However, the proposed regulation would have the result of eliminating these smaller contracts, thereby precluding the next generation of small business federal contractors. These small companies will be unable to bid on these large contracts which require a higher degree of sophistication, as well as greater financing ability.

In this case, the proposed rule reduces the current reviews required and will impact numerous small businesses who perform contracts below the dollar thresholds specified. If the goal of the proposed regulation is to increase small business opportunities, this proposal is in direct contradiction to this goal.

Involvement of Offices of Small and Disadvantaged Business Utilization (OSDBUs)

A significant issue with contract bundling is the perception that bundling decisions are made behind closed doors. Transparency is greatly needed in this process. In order to provide this transparency, the proposed rule appears to attempt to involve agency OSDBUs in the contract bundling review process.

The proposed rule requires that the contract planning office notify the agency's small business specialist of acquisition strategies that exceed the dollar thresholds previously addressed. The small business specialist will then be required to notify the agency OSDBU if the contract "strategy involves contract bundling that is unnecessary, unjustified, or not identified as bundled by the agency."

However, increasing the role of OSDBUs without providing them the authority to stop an acquisition or to be the final say in determining an acquisition strategy does nothing. As "unnecessary" and "unjustified" bundling are already prohibited by statute, the most the OSDBU would be able to accomplish under the proposed rule would be to notify the contracting activity, possibly through the agency head, that the acquisition as planned was unlawful.

This proposal will, in no way, lead to stopping contracts from being bundled. And, it does nothing to increase the access of small businesses to federal contracts, which is the goal of the proposed regulations.

Definition Changes

The interpretation of the definition of "contract bundling" has been a significant obstacle to the access of small businesses to the federal market. Agencies have searched for and found loopholes to bypass the definition and refer to bundling in other terms, e.g., prime-vendor, virtual prime-vendor, third party logistics. By using these other terms to describe their contracts, agencies have been successful in by-passing statutes designed to increase small business access to the federal contracting arena.

"Contract bundling" is statutorily defined in Section 3(o) of the Small Business Act (P.L. 85-536, as amended) as "consolidating two or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern due to: a) the diversity, size, or specialized nature of the elements of the performance specified; b) the aggregate dollar value of the anticipated award; c) the geographical dispersion of the contract performance sites; or d) any combination of the factors described in subparagraphs (a), (b), and (c)."

The administration has recognized that the current "contract bundling" definition is flawed, yet the proposed rule makes only minor modifications to the "bundling" definition. These cosmetic changes do not address the most glaring problems with the definition.

It is clear from reports prepared for the SBA's Office of Advocacy, that most contract bundling is accomplished through "accretive bundling, where diverse, but related, tasks are added to existing contracts."[1] The proposed rule 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 dollar thresholds will be reviewed.

Lastly, the proposed definition change does not address those contracts that could be, but currently are not being, performed by small businesses. Evaluating the impact of a contract bundle on small companies without considering the capabilities of other small firms is only half of the evaluation. One of the most egregious examples of this is the numerous construction contracts that have been consolidated. These contracts have historically not been included in the definition because construction is always considered "new work" and not a contract previously performed by small businesses. However, it is important that construction contracts are included in the definition. Without addressing all aspects of the definition of "bundling" that has allowed agencies to short-circuit statutory requirements, this proposed change will be ineffective.

Subcontracting Plan Reviews

With prime contracting opportunities for small businesses decreasing so significantly, more and more small businesses are being forced into the role of subcontractors from prime contractors. As subcontractors, small firms have fewer protections than as prime contractors. There is clearly a lack of monitoring to ensure that small businesses receive the maximum opportunity to participate in large federal prime contracts.

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[1] "The Impact of Contract Bundling on Small Business, FY 1992 - FY 2001," prepared by Eagle Eye Publishers for the SBA's Office of Advocacy, October 2002.

2002-029-26

Current regulations require the review of large business prime contractor's subcontracting plans to establish whether the small business subcontracting goals have been achieved. These reviews are performed by the SBA's Commercial Marketing Representatives and by agency small business specialists.

The proposed regulation requires that the inclusion of subcontracting plan achievements in agency performance evaluations of prime contractors. The evaluations have never proven adequate and the penalty provisions for liquidated damages have never been assessed. Therefore, the proposed change does nothing because there is no linkage between the review and the penalty.

Procurement Center Representatives

The proposed regulations contain numerous examples of additional duties provided to the SBA's Procurement Center Representatives (PCRs). The rule requires PCRs to: 1) review contracts not set-aside for small businesses and identify alternate strategies to increase small business participation; 2) review acquisitions within 30 days of the agency issuing the solicitation; 3) work with agency small business specialists; 4) review agency acquisition strategies and analyses; 5) review agency's oversight of agency subcontracting programs; 6) review agency assessments of contractor compliance with subcontracting plans; and 7) revise agency acquisition strategies to increase small business teaming. These additional duties will not only require additional PCR time, but also additional resources in the form of travel dollars. The rule does not address the role of Commercial Marketing Representatives (CMRs) - the employees of the SBA tasked with the responsibility of ensuring prime contractor compliance with subcontracting plans - but adds on CMR duties to existing PCRs.

There is substantial concern that the administration has provided no funding specifically for hiring additional Procurement Center Representatives (PCRs) and Commercial Marketing Representatives (CMRs). There are currently 47 PCRs, and many of these PCRs already perform double-duty as CMRs. There are currently only four full-time CMRs. Four employees nationwide can in no way provide the proper assurance that prime contractors are complying with small firm subcontracting requirements.

It is a matter of resources. The fact is, there is not currently even one PCR per state, and certainly not enough to perform increased enforcement duties on contract consolidations. The administration has proposed no additional resources to either hire additional PCRs or CMRs, or even to ensure adequate travel dollars for existing personnel. These actions doom this effort to failure.

2002-029-26

In addition to concerns regarding the substantive provisions contained in the regulation, the FAR Council has skirted its responsibilities in complying with the Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA).

The RFA imposes both analytical and procedural requirements on Federal agencies to ensure that they carefully consider the effect of their regulations on small businesses. The January 31st proposed regulation clearly states that this regulation may have a significant economic impact on a substantial number of small businesses. Therefore, the rule is subject to particular attention regarding its impact on small businesses and a full analysis under the RFA. The RFA specifically requires Federal agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure such proposals are given serious consideration. However, in this proposed regulation, the FAR Council only actually proposes one approach to implementing OMB's recommendations. In order to fully comply with the RFA, you are encouraged to develop and propose regulatory alternatives that will minimize the impact of this regulation on small firms.

There is also concern about the FAR Council's compliance with section 609(a) of the Regulatory Flexibility Act. This requires agencies to assure that small businesses have an opportunity to participate in rulemakings that will considerably impact them. The success of the FAR Council in carrying out the obligations under the RFA requires early and continuing interaction with small businesses throughout the regulatory development process. The interactions with small businesses should be a genuine dialogue with meaningful engagement and exchange of ideas and information. This required interaction has not occurred in the formulation of this rule.

The proposed regulations published in the *Federal Register* on January 31st, can be characterized as assigning additional duties to individuals who have no real authority and insufficient resources to perform their current functions. In fact, the proposed regulations are so weak, it is unlikely that any small business will see increased federal contract opportunities when these regulations are finalized.

Sincerely,

NYDIA M. VELAZQUEZ
Ranking Democratic Member

2002-029-27

PROFESSIONAL SERVICES COUNCIL

April 1, 2003

General Services Administration
FAR Secretariat (MVA)
Room 4035
1800 F Street, N.W.
Washington, D.C. 20405

Attn: Laurie Duarte

Ref: FAR Case 2002-029
Contract Bundling

By e-mail: farcase.2002-029@gsa.gov

Dear Ms. Duarte:

The Professional Services Council (PSC) is pleased to submit the following comments on the January 31, 2003 Federal Register notice (68 F.R. 5138) of the proposed FAR rule to implement the recommendations of the Office of Management and Budget in its October report entitled "A Strategy for Increasing Federal Contracting Opportunities for Small Business." This proposed FAR rule is one portion of the regulatory implementation action of that October report; the other is a proposed rule also published in the Federal Register on January 31, 2003 (68 F.R. 5134) amending the Small Business Administration's regulations governing small business prime contract assistance. Since both rules operate in tandem, we have attached here our comments on the SBA proposed rule. Additional elements of the OMB Contract Bundling Strategy will be implemented administratively within the federal agencies.

INTRODUCTION

PSC is the leading national trade association representing the professional and technical services industry doing business with the federal government. PSC's approximately 140 member companies perform billions in services contracts annually with the federal government, from information technology to high-end consulting, engineering, scientific and environmental services. More than twenty-five percent of the PSC members qualify as small business under the SBA size standards; fully half of the membership is considered mid-sized firms. One of the most difficult issues facing our government customers and our industry revolves around preserving the multi-layered "services industrial base" that is available to meet the federal government's many and diverse requirements.

We all agree on the need for strong small business policies and goals, for the government to be able to consolidate requirements appropriately and to ensure the continued, robust access to the market for mid-sized companies. It is entirely appropriate to set goals to support and foster small business growth. It is also appropriate for the Administration and Congress to pay close attention to how procurement practices impact those goals. Bundling rules and socio-economic goals are important, but they are only pieces of a larger governmental policy. At some agencies, virtually all requirements are being set-aside, while at other agencies entire categories of work are being reserved.

Balancing these policy goals is often difficult, but achieving that balance is important for the mission success of our government customers and the future of the services industry. Simply put, our collective interests lie in balanced federal government procurement polices and practices that will best preserve the long-term diversity and strength of the federal government's professional and technical services market.

Any final regulations or administrative actions must maintain this balance.

SUMMARY OF COMMENTS

We concur that the current law on contract bundling (Section 3(o) of the Small Business Act, as amended, 15 U.S.C. 632(o)), as enacted in the 1997 Small Business Reauthorization Act, is sufficiently clear and explicit so as to not require any further legislative change. By focusing on the implementation plan for increasing federal contracting opportunities for small business, the OFPP October Strategy supports that conclusion.

Regrettably, it took almost two years after the law was enacted before the FAR regulatory framework was put into effect. Again, the October strategy notes that the regulations are also a fair implementation of the statute, but that more can be done to increase federal contracting opportunities for small business. The Defense Department issued its own guidance to explain the FAR rule in January 2002; to the best of our knowledge, no other federal agency has issued guidance or training to their contracting officials or requirements staff. Thus, it is not surprising that execution of the 1997 statute and 2000 implementing regulations has been slow in the Defense Department and very slow in the civilian agencies.

We complimented the Office of Federal Procurement Policy for soliciting public comments on the issue of contract bundling and competition, and conducting a June 14, 2002 public meeting to hear presentations from the public. PSC was pleased to make a presentation at that meeting. A copy of our presentation is attached.

At the March 18, 2003 Senate Small Business and Entrepreneurship Committee hearing, a representative of the Department of Defense testified that the absolute dollar value of awards to small business has **increased** year over year for the past several years, reaching $59 billion in fiscal year 2002; since the total value of all procurements in the Defense Department has increased significantly, the Department's percentage of awards to small business reached an impressive 21.2 percent, just short of the government-wide goal for prime contract awards. For fiscal year 2002, the Department reported $26 billion in subcontract awards, equally 34.1 percent

of subcontract dollars.[1] On a government-wide basis, total dollars awarded to small businesses **increased** from fiscal year 1998 through 2001; furthermore, while the total federal purchases increased year over year during that same period of time, the percentage of dollar awards to small business was 22.26 percent in fiscal year 2000 and 22.81 percent in 2001![2]
We are also concerned about provisions relating to subcontracting plans and the extension of the provisions of the regulations to all task orders under multiple award contracts.

The new three-tiered threshold for the mandatory SBA review of an agency acquisition strategy for assessing the impact on bundling are too low and not flexible enough to accommodate agency acquisition needs or resources. Further, we do not support revising the current definition of "substantial bundling" and replacing it with the same thresholds that are used for triggering an SBA review of an agency's acquisition strategy for bundling.

The current procurement reporting system is inadequate and should be significantly improved before major changes to the SBA rules based on the current inadequacies are made.

Agency leaders should implement small business and other goals agency-wide to the maximum extent possible and not limit execution to selected business areas.

Since acquisition strategies play a critical role in shaping the services industrial base, government acquisition professionals need additional support and training to help them better understand how their behaviors affect that base.

The proposed FAR rules will increase the workload for government contracting officers, agency acquisition staff, and SBA government contracting staff, and likely raise the price of these smaller contracts because of higher bid and proposal costs.

However, even with all of the process changes, neither the FAR rule nor the SBA rule provide the types of meaningful assistance to the requirements or acquisition communities: no better guidance on how to address the multiple challenges procuring agencies face, no description of best practices and no training. In many respects, these actions, not rules changes, will have a better chance of increasing small business participation in federal contracting. None of these were addressed in the OFPP October Strategy or agency initiatives.

We also recommend that the FAR agencies release the public comments received by the close of the comment period and, after a reasonable period of time, conduct a public meeting for interested participants to address any of the comments submitted. The FAR agencies should extend the comment period on the proposed rule only for this purpose. This action will help the agency understand the comments received and obtain the benefits from the exchange of views among commentators without unduly extending the internal agency review process.

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[1] Prepared testimony of Deidre Lee, Department of Defense, before the United States Senate Small Business and Entrepreneurship Committee, March 18, 2003, at page 3.
[2]Report of the United States Senate Small Business Committee (S. Rept 107-251), September 3, 2002, at 2.

SPECIFIC COMMENTS

Revisions to Part 2 –Definitions

The FAR proposed rule would add a new definition of the term "single contract" to the term "bundling" to include (a) an indefinite contract awarded to two or more sources under a single solicitation for the same or similar supplies or services or (2) an order under the Federal Supply Schedule or task or delivery order contract awarded by another agency. As the section-by-section Analysis of the proposed rule notes, "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 justification."

While the inclusion of these contract actions opens up a significant universe of actions for the potential application of the bundling reviews and justification, neither the proposed regulations nor the section-by-section analysis recognize key elements of the current acquisition law and regulations.

For example, it was by design that the GSA Schedules contracts awarded under FAR Part 8 are explicitly exempt from the provisions of FAR Part 19. Opening up the Schedules to all Part 19 requirements should be done only after careful analysis. Under Section 803 of the Fiscal Year 2002 National Defense Authorization Act, as implemented in recent DFARS provisions, the Defense Department is required to adhere to specialized rules when seeking to acquire services in excess of $100,000 through a task order under an existing multi-agency contract or from the GSA Schedules.

At a minimum, the regulations must acknowledge that certain federal agencies have specialized statutory provisions that also govern the application of the bundling definitions proposed to be added by this revision.

Revisions to Part 7 – Acquisition Planning

The FAR proposed rule would amend Part 7.104 to add a new provision to require the acquisition planner to coordinate the acquisition plan or strategies with the cognizant small business specialist when award of a contract or order meets the specific agency threshold unless the contract or order is entirely reserved or set aside for small business under Part 19. As a matter of policy, this revision makes sense. As a matter of practical application, the rule imposes an un-executable burden on the contracting officer, on the small business specialist and on the procurement system.

The section-by-section analysis notes that the three tier acquisition threshold is based on a comparative analysis of the number of and size of the contracting actions of 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 bundling reviews would disrupt the procurement process of the individual agency.

We believe the combination of expanding the scope of SBA's reviews and the low dollar thresholds will put a significant strain on the limited SBA resources and cover numerous acquisitions regardless of the opportunity for increasing small business participation. Without the authority for a procuring agency to waive the mandatory SBA review under any circumstances, or shorten the review cycle with SBA concurrence, such reviews could unreasonably delay the procuring agency's acquisition process.

Furthermore, the thresholds themselves are too low. The section-by-section analysis of the proposed rule notes that these proposed levels are "intended to target contract actions that would most likely involve contracting bundling." However, there is no data that is capable of predicting those contracts that are "likely to involve contract bundling." In fact, these thresholds fail to take into account the volume of work being imposed on the procuring agency's offices (including the requirements generation organization, the contracting office, and the small business office) and on the Small Business Administration. Further, the average value of contracts and the common period of performance for agency actions should also be taken into account in establishing these thresholds. Thus, we recommend that each of the three levels established in this rule be at least doubled, with authority for any agency to apply the standards on a case-by-case basis to a lower dollar threshold for individual contract actions or categories of procurement actions. Similarly, the rule should have a clear, simple and meaningful waiver provision that would permit any federal agency to make a determination at the contracting officer level (or not more than one level above the contracting officer) that conducting the analysis is not appropriate for the instant acquisition.

As noted above, both the GSA Schedules and certain Defense Department awards of services over $100,000 are currently not subject to the provisions of FAR Part 19. With the revisions made by this rule to FAR Part 8, virtually every contract or order exceeding the low dollar value threshold will be required to comply with the coordination provisions of the regulation. However, SBA lacks the resources to make a meaningful review.

The regulations also add new provisions to Part 7.107 that addresses additional requirements for acquisitions involving bundling. Under current regulations, the term "substantial bundling" is defined as a bundled contract with an average annual value of $10 million or more.[3] The rule improperly redefines and expands the term "substantial bundling" to now include any "bundling" that meets the various dollar thresholds in new paragraph 7.104(d)(2). While the effort to simplify and streamline the requirements for reviewing and justifying bundled requirements is admirable, as noted in the section-by-section, such a change significantly alters the current regulatory scheme and the rationale for distinguishing between "bundling" and "substantial bundling" without any perceived benefit to the procuring activity or the small business community.

Revisions to Part 8 – GSA Schedules

The regulations modify FAR 8.404 to add the requirement that orders under the Schedules comply with the FAR rules for a "bundled contract" when the order meets the definition added by this rule. As noted above, today the GSA schedules program is exempt from the provisions of

[3] FAR 7.107.

FAR Part 19. We recognize the concerns that have been raised that orders placed under GSA are exempt from the bundling reviews. However, we strongly recommend caution in simply opening the Schedules program to mandatory compliance with the bundling rules without taking into account the impact such coordination and alternative strategies may have on the use of the Schedules for meeting agency needs.

Revision to Part 16 – Types of Contracts

The regulations modify FAR Part 16.505 to add a requirement 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." While we have no policy objection to such a provision, we noted above the individual agencies have statutory provisions that may conflict with the FAR requirements for bundled contracts. The amendment to FAR 16.505(a)(7)(iii) should begin "Unless otherwise provided for by law, must."

Revisions to Part 19 – Small Business Programs

One aspect of the revision to Part 19 imposes a new oversight function on each agency Office of Small and Disadvantaged Business Utilization (OSDBU) official. Under new 19.201(d)(11), each OSDBU is required to conduct periodic reviews to assess (1) the extent to which small business are receiving their fair share of federal procurements under SBA programs; (2) the adequacy of contract bundling documentation and justification; and (3) the actions taken to mitigate the effects of unnecessary bundling on small business.

FAR 19.202 is further amended to add additional responsibilities to the SBA Procurement Center Representatives (PCR) and procuring activities by requiring the contracting officer to provide all information relative to the justification for contract bundling, and the additional justification for "substantial bundling."

Revision to Part 42 – Contract Administration

To mitigate the effects of contract bundling, the proposed rule amends Part 42 to require an assessment of contractor compliance with the goals identified in the small business subcontracting plan that is included in contracts. As the section-by-section analysis to the rule notes, this proposed change "contemplates a more systemic review of an agency's general oversight as well as its individual assessment of contract subcontractor plan compliance..."

We generally concur with the systemic review of agency oversight. There should also be a systemic review of contractor subcontract plan compliance – in conjunction with the contracting officer and the contractor. The subcontracting plans are goals, and require the prime contractor to use "good faith efforts" to achieve those goals. However, post-award government actions or changes in circumstances may affect a contractor's actual achievement against the planned performance. Those circumstances should be discussed with the contracting officer and the contractor – the two organizations in the best position to understand the factors that affect achievement of the plan.

Effective Dates
Any final rule should have a reasonable effective date to apply to new solicitations under consideration. Agencies must also be given a reasonable opportunity to develop their internal guidance, systems and reporting mechanisms.

CONCLUSION

We acknowledge the impact that bundling (as defined in law) has on incumbent small businesses, and that some small businesses may be adversely affected by continued contract bundling. However, in our view, more administrative action should be taken, such as improved data collection and reporting, and improved education and training, before significant changes are made to the FAR. Further, we strongly recommend that written guidance be provided to the entire acquisition community (including program managers and requirements staff, in addition to the contracting officers) and training on new policies be developed and provided.

We appreciate the opportunity to provide these comments. If you have any questions or need any additional information, please do not hesitate to contact me at (703) 875-8059 or at Chvotkin@pscouncil.org.

Sincerely,

Alan Chvotkin
Senior Vice President and Counsel

Attachments

PROFESSIONAL SERVICES COUNCIL

2002-029-27

STATEMENT BY

ALAN CHVOTKIN, ESQ.
SENIOR VICE PRESIDENT
PROFESSIONAL SERVICES COUNCIL

TO THE

OMB PUBLIC MEETING

COMPETITION IN CONTRACTING; CONTRACT BUNDLING

JUNE 14, 2002

2101 Wilson Blvd., Suite 750 ▪ Arlington, VA 22202 ▪ 703/875-8059 ▪ FAX: 703/875-8922 ▪ www.pscouncil.org

2002-029-27

My name is Alan Chvotkin, and I am the senior vice president of the Professional Services Council (PSC). PSC is the principle national trade association representing professional and technical services firms of all types and sizes that do business with the federal government. Our members provide information technology, engineering, scientific and environmental studies, and high-end consulting. PSC serves as a leading policy advocate for our industry, commenting on the impact of legislation and regulation on both our industry as a whole and the PSC membership.

Our membership includes many small and mid-sized firms, including woman-owned and minority-owned businesses. They do business as prime contractors and subcontractors. More than seventy percent of PSC member companies have contracts with the Defense Department, although fully half of PSC member companies cite the civilian agencies as their principle clients.

Today the federal government purchases over $80 billion in services, ranging from information technology, base operations and engineering services to high-end consulting and program management. The acquisition of services is the fastest growing area of federal procurement spending.

Some of our firms prefer to be prime contractors; others prefer to be subcontractors; still others just prefer to get business. Prime contractors are becoming subcontractors, and new team relationships are replacing the historic prime-sub relationship. Services companies and integrators are offering increasingly complex technological solutions in response to complex agency-created performance statements of work. Small business is getting a significant share of the federal procurement market, although it is unclear whether they are getting a "fair" share.

The federal procurement process is complex and constantly changing. The federal procurement system is replete with intersecting and counter-balancing policies and provisions. Changes focusing on only one element of the procurement system often have unintended consequences in other areas. Therefore, it is appropriate that the President has tasked OFPP and other specialists in the federal procurement process to review federal agencies' use of competition in their contracting activities and to develop a strategy for "unbundling" contracts whenever practicable. PSC complements OFPP for its broad outreach in conducting this public meeting and soliciting input in response to the May 6 Federal Register notice. We hope that this dialogue continues throughout your study period.

Today, competition is taking place in different places and in different ways based on the acquisition reform statutes enacted in the 1990s than had been the case under the 1984 Competition in Contracting Act. PSC was a strong supporter of many of the 1990s legislative changes. In our view, the results, while not perfect, have created a federal procurement system that does work better and provides better value to the taxpayer and results for the agencies. More can be done with further mid-course corrections, but no substantial overhaul is necessary.

On the one hand, our laws, regulations and polices seek to attract commercial firms and small business into the federal marketplace, while on the other hand retain or create requirements that repel these firms from the market. The unique nature of the federal acquisition system is itself a barrier to greater business participation in the federal marketplace.

It is important to realize that the federal acquisition system has one primary role: to support the mission and needs of the federal agencies – and then to obtain at a fair price quality goods and services needed in the most effective and efficient manner possible, whether that mission is national security, homeland defense, bio-medical research or agency program management. The federal acquisition system is a tool and a technique; it is not an end unto itself. Competition, particularly "full and open competition" is the preferred methodology, but is not the only appropriate methodology. Small businesses are an excellent source of quality goods and services to be relied on, but not the only source.

WHO ARE SMALL BUSINESSES

A significant threshold question in addressing the bundling issue, or in assessing the extent to which small businesses are provided opportunities to fully participate in the federal procurement process, is to look at how we define the term "small business" and who may be eligible. The Small Business Administration is responsible for determining what constitutes a small business under the various North American Industrial Classification System (NAICS) categories. While the specific size standard for a particular NAICS category varies, for many services industry firms, the SBA size standard is based on annual sales as the determining factor – and it is now $6 million, increased from $5 million just this past January! In our view, the nature and complexity of the work federal agencies require compel capabilities well in excess of this level. It is important to understand how these small business size standards impact the twin issues of competition (particularly at the prime contract level) and "bundling."

RESPONSIBILITIES OF FEDERAL AGENCIES

In our view, there probably is no need for any additional laws or major regulatory changes. Rather, agencies must use all of the tools and techniques that are already available and required. There needs to be a renewed effort at complying with the existing regulations and enforcing the existing policies. There have been too many recent GAO, inspectors general, and other reports indicating gaps in compliance with the current laws and regulations. Again, improving this accountability is not meant to divert attention from other challenges, but will help policy-makers focus on appropriate matters.

There must be realistic acquisition planning of requirements; there should be aggressive and comprehensive market research to identify alternative solutions to meet agency needs and multiple vendors to fulfill agency requirements. There should be broad disclosures of procurement opportunities and outreach. Support organizations, such as the small business utilization offices, small business development centers, and the small business procurement technical assistance centers, should be an integral part of the entire acquisition process – not just brought in when a specific procurement is ready to be, or already has been, issued.

Federal agencies also need to do a better job of counting the prime contract and subcontract awards made to business. We know that the federal procurement data system does not adequately capture all of the dollars awarded to the various categories of small business recipients. Improving accountability is not meant to divert attention from any other challenges facing greater small business participation, but better statistical information will help policy-makers make more informed decisions.

FULL AND OPEN COMPETITION

Full and open competition is, and should be, the standard for conducting federal acquisitions. To be sure, there has been significant growth in the use of large multiple award contracts, task orders and blanket purchase agreements. These are often replacing the more traditional request for proposal (RFP) process. These contracts have significantly higher contract values than previously issued RFPs; in some instances the contract values are measured in billions, rather than millions of dollars.

If there is to be full and open competition, it has to be available for all. For example, under the law and regulations (FAR 19.502-2), a purchase with an anticipated dollar value exceeding $2,500 but not over $100,000 is automatically reserved exclusively for small business unless the contracting officer determinations that there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality and delivery. This standard is frequently referred to as the "rule of two."

BARRIERS TO SMALL BUSINESS PARTICIPATION

Small businesses provide quality goods and services to federal agencies. In fact, federal spending with small business is in the billions of dollars annually. However, there are numerous barriers to greater small business participation in the federal marketplace. Some of those barriers clearly relate to the nature of the requirements that the federal government is acquiring; others relate to the nature of the contracting process. Except for micro-purchases, even the most streamlined of the acquisition processes have specialized contract terms and conditions applicable to these purchases. The more significant the dollar value of the procurement or the complexity of the requirement, the more complex the business relationship and the more challenging it is to attract and retain small businesses who are not already focused on the federal market.

It is not surprising that many agencies (FAA, TSA, portions of the VA) have obtained total or partial exemptions from the general procurement statutes, or use non-procurement transactions to obtain needed goods and services. It is not surprising that Congress and the agencies have sought to simplify and streamline the acquisitions process to mirror better commercial practices and to reduce acquisition lead-time. It is not surprising that, as the acquisition workforce shrinks agencies have been using contracting vehicles such as the GSA schedules and the multiple award contracts to meet agency needs.

When used properly, each of these techniques has an appropriate place in the federal acquisition system. Again and again, the evidence is that many of the acquisition professionals do not have the necessary tools or training to accomplish the jobs they are asked to do. PSC is a strong supporter of a well-compensated, well-trained federal acquisition workforce.

BUNDLING

There has been a continuing debate concerning contract bundling – those situations in which requirements previously suitable for award to small business are consolidated, resulting in a set of requirements that is unsuitable for award to small business. Factual data on the extent of bundling is difficult to come by, but there is no question that small businesses are deeply concerned about the impact of contract bundling on their prime contract opportunities.

The current law on contract bundling was set out in the Small Business Reauthorization Act of 1997 (P.L. 105-135), enacted in October 1997, and codified in Section 15(e) of the Small

Business Act [15 U.S.C., 644(e)]. Congress authorized contract bundling only if it is necessary and justified based on a "substantial benefits" analysis. PSC believes that Congress has properly established a fair and balanced policy standard for addressing contract bundling.

However, more than four and one-half years after that law was passed, PSC is concerned that precious little guidance or training has been provided to the acquisition workforce to enable them to understand and follow the bundling rules. Therein lies what we believe to be one of the most important issues regarding the implementation of that statute – the need for more aggressive and focused guidance and training so that the sensible statutes that have been developed are actually put into practice. The problem is not the law; it is that too few members of the acquisition workforce understand them.

It took two years for the Small Business Administration to issue (October 19, 1999) and publish in the Federal Register (October 25, 1999) an interim rule to implement the statutory changes in its government contracting regulations. It also took two years, until late in 1999, for the FAR Council to issue an interim rule to address these mattes in the FAR (64 Fed. Reg. 72441). Neither of these rules has yet been finalized!

In a December 2000 case study of DoD contract consolidations conducted under contract to the DoD Office of Small and Disadvantaged Business Utilization, the Logistics Management Institute concluded that "(w)e found no uniform methodology or guidelines for performing a benefit analysis to support consolidation decision-making or to validate realized consolidation savings." (LMI AQ001R1, December 2000, at viii.) A similar call for implementing the interim rule was included in an article reviewing bundling policy in the Fall 2000 edition of the American Bar Association's Public Contract Law Section's Public Contract Law Journal.

To the best of our knowledge, the most comprehensive effort to provide meaningful guidance to the acquisition community was provided on January 17, 2002 by the Under Secretary of Defense for Acquisition, Technology and Logistics in his memo to Service Acquisition Executives entitled "Small Business Participation in Consolidated Contracts." Accompanying that memo was a detailed "Benefit Analysis Handbook" prepared by the DoD Office of Small and Disadvantaged Business Utilization, that provides a "reference to assist DoD acquisition strategy teams in performing a benefit analysis before bundling contract requirements."

We compliment DoD, and the Small Business Office for this guidebook. Overall, the guide is reasonable and is useful to procurement officials. I am not aware of any endorsement or use of this guide by agencies outside the Department of Defense.

RULEMAKING AND OPPORTUNITY TRANSPARENCY

Consistent with the President's management agenda, PSC encourages OMB and all of the federal agencies to broadly engage the entire acquisition community in the acquisition policy debate in advance of significant decision-making. Transparency and simplicity of the acquisition system will make it more likely that businesses who are not specialists in this market, and who do not have legions of lawyers and other experts, will have a chance to enter the marketplace and succeed. Significant procurement policy items must be published for notice and comments by the federal agencies and OMB.

This same transparency and simplicity is required of procurement opportunities. In the past year, the FAR Council has published two significant proposed rules that would help all businesses, but particularly small business, to learn of opportunities and to have a reasonable chance to compete.

The first was published in August 2001, and addressed documentation requirements for multiple award contract task order opportunities. The second was published in February 2002, and would require all federal agencies to publish on a centralized government web-site an identification of multiple award contracts they have in place, a description of the scope of work available under these contracts, who holds those contracts, and other basic information about the award and the task and delivery orders that are issued under each of the multiple award contracts. Both of these rules should be finalized as quickly as possible.

CONCLUSION

The issues of "competition" and "bundling" are complicated and inter-related. There are no easy answers and care should be taken in adopting policy changes so as to not jeopardize the primary goal of the federal acquisition system – to meet an agency's mission needs.

PSC appreciates the opportunity to present this statement. We look forward to assisting OMB as it continues with the review of these important issues.

2002-029-58

April 1, 2003

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

Dear Ms. Duarte:

Re. FAR Case 2002-029; Proposed Revision to Federal Acquisition Regulation Regarding "Bundling".

The Information Technology Association of America ("ITAA") submits these comments in response to the January 31, 2003 proposed rule issued by the Civilian Agency Acquisition Council and the Defense Acquisitions Regulations Council (the "Councils") regarding the proposed application of the Federal Acquisition Regulation's ("FAR's") "bundling" procedures to acquisitions under the General Services Administration's ("GSA's") Federal Supply Schedules (the "Schedules") and Governmentwide task- and delivery-order contracts. As discussed in more detail below, the ITAA has significant concerns regarding the proposed rule. In particular, we believe the proposed rule is contrary to statute, will adversely impact the utility of the Schedules and task- and delivery-order contracts to Government agencies while providing very little benefit to small businesses, and will negatively affect the ability of small businesses to obtain Government contracts and orders. For that reason, we request that the proposed rule be withdrawn or significantly revised so that orders placed under the Schedules and task- and delivery-order contracts are not subject to an additional bureaucratic layer of scrutiny as currently proposed.

The ITAA's members range from the smallest IT start-ups to industry leaders in the Internet, software, IT services, ASP, digital content, systems integration, telecommunications, and enterprise solution fields. We provide global public policy, business networking, and national leadership to promote the continued rapid growth of the IT industry. The ITAA consists of over 500 corporate members throughout the U.S., and a global network of 47 countries' IT associations. The ITAA plays a leading role in issues of IT industry concern including information security, taxes and finance policy, digital intellectual property protection, telecommunications competition, workforce and education, immigration, online privacy and consumer protection, government IT procurement, human resources and e-commerce policy. Please visit www.ITAA.org for more information on the ITAA's activities.

The ITAA appreciates this opportunity to provide our comments.

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COMMENTS.

A. Application of Bundling Procedures to the Federal Supply Schedules Is Inconsistent with Applicable Statutes.

The Councils' proposal to apply the FAR's bundling procedures to the Schedules program is contrary to the statutory authority underlying the program. Federal statutes specifically provide that task and delivery orders issued under a Schedules contract in accordance with the procedures established by the GSA Administrator satisfy statutory competition requirements. See 41 U.S.C. § 259 and 10 U.S.C. § 2302(2)(c). Under the proposed rule, however, the procuring office will often be required to subject proposed acquisitions to the scrutiny of agency small business specialists, personnel from the Office of Small and Disadvantaged Business Utilization ("OSDBU"), and/or Small Business Administration Procurement Center Representatives. (We will hereinafter refer to these required reviews as the "bundling procedures.") We believe that the Councils' proposed imposition of this additional layer of scrutiny to acquisitions conducted through the Schedules is inconsistent with the purpose of the Schedules program and is otherwise unjustified. Neither the relevant statutes nor the Schedules' procedures established by the GSA Administrator require these additional reviews. Indeed, until now, the relevant statutes consistently have been interpreted to exempt the Schedules from rules that interfere with the ordering agency's discretion to purchase the best commercial solution that results in the "lowest overall cost alternative" for meeting Government's needs.

B. Application of the Bundling Procedures to Orders Placed Under the Schedules and Task- and Delivery-Order Contracts Will Unduly Delay Procurements and Harm the Competitiveness of Small Businesses.

The proposed application of the FAR's bundling procedures to orders placed under the Schedules and Governmentwide task- and delivery-order contracts will result in acquisition delays while providing the Government with very little, if any, benefits. Neither the Councils nor OMB has presented any data that even remotely suggests that the proposed rule might provide significant benefits either to small businesses or the Government. Rather, the Government's own data indicates that the proposed rule will have very little positive impact on "unbundling" procurements. Yet, the Councils intend to subject billions of dollars in task and delivery orders to an additional layer of bureaucratic review. In the ITAA's view, the proposed rule lacks a rational basis.

The proposed rule would require ordering activities to coordinate each acquisition plan or strategy with the cognizant small business specialist ("SBS") for task or delivery orders exceeding the thresholds set out in proposed FAR 7.104(d)(2). The SBS, in turn, would be required to notify the OSDBU whenever the SBS deems that the acquisition

involves unnecessary or unjustified bundling. In addition, the proposed rule would require the contracting officer to provide a copy of the proposed acquisition package to the SBA Procurement Center Representative at least 30 days prior to the issuance of a solicitation" whenever a proposed acquisition involves bundling, regardless of dollar amounts. See FAR 19.202-1(e)(1)(iii). In our experience, agency small business specialists, the OSDBU, and Procurement Center Representatives appropriately advocate the interests of small businesses and expend considerable effort attempting to re-focus acquisitions toward small business and HUB-Zone set-asides. These reviews and efforts often involve a significant amount of time. These reviews and efforts often do not result in delays to traditional FAR Part 15 procurements because these acquisitions are subject to a mandatory 15-day synopsis notice, a minimum 30-day response time for solicitations, and generally much longer acquisition lead times. In other words, there is adequate time to provide for such reviews under traditional Government procurements.

Commercial item acquisitions conducted under the Schedules and task- and delivery-order contracts, however, are not subject to these Government-unique requirements and are intended to provide agencies with timely access to the best solutions existing in the commercial market. The additional layer of review and scrutiny required by the proposed rule will most likely result in task and delivery orders being delayed while the contracting officer awaits feedback from the small business specialist, OSDBU, and/or Procurement Center Representative. Our fear is that this delay will adversely affect the utility of the Schedules and task- and delivery-order contracts and result in a material decrease in the use of these vehicles by Government agencies.

Also, although the proposed rule will create substantially more work for agency small business specialists, there is no indication that the Government has determined, or even attempted to determine, whether there are a sufficient number of small business specialists to handle the additional workload. There also is no indication whether the small business specialists and contracting officers will need additional training so that they can satisfy the proposed requirements in a timely manner.

Regarding the potential benefits of the rule, the Government's own data indicates that the proposed rule will provide very little benefit in terms of "unbundling" acquisitions. In this regard, the Government's Initial Regulatory Flexibility Analysis indicates that the proposed rule may result in an additional $3 billion in orders being subject to scrutiny by small business specialists. (As indicated above, though, there is no indication whether small business specialists can handle this significant increase in workload.) See 68 Fed. Reg. 5138, 5141. Based on these reviews, however, the Government expects that only $1 million of orders ultimately will be identified as "bundled." Id. 1/ These estimates apparently are based on SBA's own data that suggests a "bundling rate" of only .0004%.

1/ The $1 million figure for "bundled" acquisitions apparently includes all bundled acquisitions, regardless of whether such bundling was justified.

In other words, approximately $3 billion in orders would be scrutinized to identify only $1 million in bundled orders (which may turn out to be bundled for good reason).

In addition, while we are aware of no Government reports or data indicating that either the Schedules or task- and delivery-order contracts have adversely affected the ability of small businesses to compete, we do know of data and Government reports that unequivocally indicate that small businesses are faring very well under the current rules governing the Schedules program and Governmentwide task- and delivery-order contracts. Indeed, available data demonstrates that small businesses fare much better under the Schedules and task- and delivery-order contracts than under other contract vehicles. For example, for fiscal year 2002, small businesses received $7.226 billion (34.2%) of total Schedules sales of $21.1 billion. These sales figures are up from $5.535 billion (33.6%) of the Fiscal Year 2001 total sales. Importantly, these rates are substantially higher than those achieved by small businesses under other contract vehicles.

The effectiveness of the Schedules in relation to small businesses was explicitly acknowledged by the Councils in a final FAR rule dated June 6, 2002, in which the Councils stated:

> In fiscal year 1999, small business schedule contractors received approximately $3.2 billion or 31 percent of total schedule sales. This exceeds the current Governmentwide goal. During fiscal year 1998, 4,900 small businesses held contracts out of a total of 7,000 national scope schedule contracts. Small business sales in 1998 were $2.5 billion or 33 percent of total schedule sales. Between fiscal year 1998 and fiscal year 1999, the number of small businesses holding FSS contracts increased 6 percent and small businesses sales increased 28 percent. . . . Clearly, small businesses are receiving a greater market share under he schedules.

65 Fed. Reg. 36,023, 36,024 (June 6, 2002) (emphasis added).

Ironically, during the 2002 rulemaking the Small Business Administration had expressed concern to the Councils that "small Federal Supply Schedule contractors could not adequately compete with large Federal Supply Schedule contractors." The Councils expressed its disagreement with that position as follows:

> In response, it is important to note that while sales under the program have increased to large businesses, sales to small businesses have increased as well. The Federal Supply Schedule program recognizes that in certain instances small business may not have the capability to meet some

> requirements of Federal agencies. However, the program permits schedule contractors to team with other schedule contractors to provide a solution to meet agency needs. A team can be any combination of large and small businesses. Therefore, small businesses can compete against large businesses by forming teams that can provide supplies and services tailored to address agency needs. The Federal Supply Schedules program is one of the most successful Government procurement programs; a program where small businesses can experience continuous growth.

Id. (emphasis added). There have been no changes in circumstances or data that would dictate a different conclusion today.

Finally, we draw the Councils attention to a General Accounting Office report setting out the results of a study regarding the effect that the Federal procurement trends of the 1990s had on small businesses. See GAO, Small Business: Trends in Federal Procurement in the 1990s (GAO-01-119, Jan. 2001). Far from suggesting that there might be a problem with bundled procurements under the Schedules, Governmentwide contracts, and multiple award contracts, the data reported by GAO indicated that these contract vehicles represented increasingly useful means for small businesses to gain Federal Government business:

> Expenditures for the four types of contract vehicles we analyzed represented 25 percent of federal procurement expenditures on contracts over $25,000 in fiscal year 1999, compared with 16 percent in fiscal year 1994. Small businesses received 32 percent of expenditures for these contract vehicles in fiscal year 1999 compared with 24 percent in fiscal year 1994.
>
> For each of the four types of contract vehicles in our analysis, the share of expenditures going to small businesses was between 26 and 55 percent in fiscal year 1999, depending on the type of contract vehicle. For example, expenditures going to small businesses for MACs [i.e., multiple award contracts] increased from $524 million in fiscal year 1994, or 8 percent of all expenditures for MACs, to $2 billion in fiscal year 1999, or 26 percent of all expenditures for MACs. Expenditures going to small businesses for IDIQs from fiscal years 1994 to 1999 remained relatively stable, near $7 billion. The percentage of total expenditures for IDIQs going to small businesses increased from 24 percent of total expenditures for IDIQs in fiscal year 1994 to 28 percent in 1999. The small business share of GSA schedules increased from 27 percent

> in fiscal year 1994 to 36 percent in fiscal year 1999, from $523 million to $3 billion.

Id. at 20.

In sum, the available relevant data demonstrates that the Schedules and task- and delivery-order contracts are having a positive impact on small businesses. The proposed rule, however, in attempting to address a problem that the Councils' own data strongly suggests simply does not exist, would adversely affect key benefits associated with these contract vehicles, which, in turn, will negatively impact the ability of small businesses to use these vehicles to their advantage.

C. If the Councils Remain Inclined To Finalize the Proposed Rule, at the Very Least the Rule Should Be Revised (1) To Impose Reasonable Time Limits on the Bundling-Related Reviews, and (2) To Clarify that the Rule Applies only to the Acquisition of Services.

As indicated above, we believe that the proposed rule lacks a rational basis and should be abandoned. If the Councils' disagree, the ITAA requests for purposes of mitigating the harm caused by the rule, that the following changes be instituted.

1. Reasonable Time Limits Should Be Imposed on the "Bundling Reviews."

As indicated above, the Initial Regulatory Flexibility Analysis indicates that there is very little expectation of unjustified or unnecessary bundling with respect to orders placed under the Schedules and task and delivery-order contracts. As such, and in considering that Congress had intended that these contract vehicles provide an efficient mechanism for agencies to meet their needs through commercial items, we believe that the time permitted SBA procurement center representatives (thirty days) to review the "proposed acquisition package" under FAR 19.202-1(e)(1) should be reduced to a period lasting no longer than five days. Moreover, we request that the Councils clarify that there is no obligation on the part of program officials or contracting officers to delay procurements while awaiting the comments of small business specialists or persons within the OSDBU.

2. The Proposed Rule Should Be Clarified to Provide that It Applies only to the Acquisition of Services.

Consistent with the Initial Regulatory Flexibility Analysis, we ask that the proposed rule be clarified to state that it applies only to the acquisition of services. The Initial Regulatory Flexibility Analysis specifically states that the "proposed rule will indirectly apply to all large and small entities that seek award of Federal service contracts." See 68 Fed. Reg. 5138, 5141. The language of the proposed rule, however,

is not limited to service contracts. By its terms, the proposed rule's review requirements would also apply to acquisitions including products (e.g., IT hardware components). In order to be consistent with the Councils' stated intent and to avoid confusion over whether hardware components appropriately constitute a "single requirement," we ask that the proposed rule be clarified to read that it applies only to the acquisition of services. This can easily be accomplished by changing the proposed revision to the definition of "bundling" to read that it applies to "orders for services placed against an indefinite quantity . . ."

CONCLUSION.

The ITAA is concerned that the proposed rule will negatively impact the Government's use of the Schedules and Governmentwide task- and delivery-order contracts. Moreover, the data presented to justify the rule indicates that its application will provide very little benefit to small businesses. Indeed, the proposed rule will likely decrease the share of Federal procurements held by small businesses because the proposed rule will likely result in decreased use of the Schedules and Governmentwide task- and delivery-order contracts by Government agencies. As indicated by the data provided by GSA and GAO, small businesses have greatly benefited from these acquisition vehicles far more so than from the so-called "traditional" vehicles. For these reasons, the ITAA requests that the Councils withdraw the proposed rule or revise it accordingly.

The ITAA appreciates this opportunity to comment on the Councils' proposed rule. We look forward to continuing our dialogue with the Councils on this and other issues important to Federal procurement.

Respectfully submitted,

Harris N. Miller
President
Information Technology Association of America

2002-029-29

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April 1, 2003

General Services Administration
FAR Secretariat (MVA)
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Attn: Laurie Duarte
Washington, DC 20405
(Submitted electronically)

Ref: FAR Case 2002-029

Dear Ms. Duarte:

I am pleased to submit comments on behalf of ITI, the Information Technology Industry Council, in response to the Federal Acquisition Regulation (FAR) Council's Proposed Rule on contract bundling, published in the January 31, 2003 edition of the Federal Register (68 FR 5138). We believe that this rule is premature and potentially unnecessary, and urge the Council to consider withdrawing it.

In the text of the Proposed Rule, the FAR Council cites an October 2002 report by the Office of Management and Budget (OMB)[1] as one of its primary sources of "available data and information" on the impact of contract bundling on small businesses. According to the Council, "(t)he report cites data indicating that for every 100 'bundled' contracts, 106 individual contracts are no longer available to small businesses." Further, "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."[2] What the Proposed Rule fails to indicate, however, is that the data were drawn from the same SBA-commissioned reports. It also fails to acknowledge that OMB characterized this alleged evidence of "the harmful effects of

[1] Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business, Office of Budget and Management, Office of Federal Procurement Policy, October 2002.
[2] OMB, p. 3.

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contract bundling" as "anecdotal;"[3] in part because the author of the SBA reports used a definition of contract bundling that "did not correspond with the statutory definition" (i.e., 15 U.S.C. 632(o)).

The U.S. General Accounting Office (GAO) was less amorphous in its assessment. Questioning the probative value of the SBA-sponsored research, GAO concluded that the reports "did not clearly demonstrate that an increase in the number of bundled contracts took place [during the years studied, FY1991-99] or convincingly show that contract bundling caused a decline in the small business participation in federal contracts."[4] Nevertheless, the Council still chose to cite the findings as part of its justification for promulgating a sweeping rule on contract bundling. We find this troubling.

ITI is not arguing that "contract bundling" has had no impact on the ability of small businesses to win government business. That may well be the case. We question, however, the extent of the economic impact on small business, particularly in light of other government contract data that suggests that small businesses have been highly successful in attracting federal contract dollars. For example, the same OMB report indicates that, of the $234.9 billion awarded in FY2001, "(f)ederal agencies state that they generally award nearly 23 percent of the total dollars spent on federal procurements each year to small businesses." This is consistent with the annual government-wide goal established by the Small Business Reauthorization Act of 1997. In addition, OMB estimates that "large businesses subcontracted approximately $35.5 billion in federal work to small businesses."[5] Together, that amounts to roughly $89 billion or nearly 38 percent of all FY2001 federal contract dollars. The actual value is probably even higher, according to senior government procurement officials, because information on subcontracting is recorded manually and often is kept in federal offices rather than keyed into the Federal Procurement Data Systems, the official repository of government contract information.

A common theme runs through all of these reports: the federal government lacks sufficient data on contract bundling to enable an informed assessment of its impact on small business contractors. Accordingly, we would assume that the first order of business would be to improve government contract data collection and reporting. In this regard, we applaud the Council's embrace of "Action Item 2" from the OMB contract bundling report, which addresses the need for "(r)ecording and distribution of timely and accurate information."[6] We are concerned, however, that some of the proposed actions will add undue stress to a system that is already struggling to fulfill its other small business obligations.

OMB Action Item 3, for example, requires federal agency Offices of Small and Disadvantaged Business Utilization (OSDBU) to review every task and delivery order placed against multiple

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[3] OMB, footnote 6.
[4] Small Businesses: Limited Information Available on Contract Bundling's Extent and Effects, Report to the Chairman on Small Business, U.S. Senate. U.S. General Accounting Office, March 2000, page 14.
[5] OMB, pp. 2-3.
[6] OMB, p. 8.

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award contract vehicles. This could involve literally thousands of contract actions. It would overwhelm OSDBU and other contract personnel, and create significant delays in the processing of orders from, for example, General Services Administration Multiple Award Schedule contracts. This would be ironic, since roughly 77 percent of schedule contracts are held by small businesses.

We believe that the lack of sufficient information on contract bundling; the relative success of small businesses in the federal contract arena; and the likely inability of federal agencies to effectively manage more small business mandates all argue against the need for this regulation. For these and other reasons, we urge the FAR Council to withdraw the Proposed Rule.

ITI would welcome the opportunity to assist the Council in exploring alternative, less sweeping ways to address legitimate issues regarding contract bundling.

Sincerely,

Rhett B. Dawson
President & CEO

2002-029-30

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Pursuing Justice

AMERICAN BAR ASSOCIATION

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April 1, 2003

VIA HAND DELIVERY
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Attn: Ms. Laurie Duarte
Washington, DC 20405

Ms. Linda G. Williams
Associate Administrator for Government Contracting
U.S. Small Business Administration
409 Third Street, S.W.
Mail Code 6530
Washington, DC 20416

Re: FAR Case No. 2002-029;
Proposed Rule: Contract Bundling
68 Fed. Reg. 5138 (January 31, 2003)

- and -

Proposed Rule: Small Business Government Contracting Programs
68 Fed. Reg. 5134 (January 31, 2003)

Dear Ms. Duarte and Ms. Williams:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced

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matter.[1] The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section's governing Council and substantive committees contain members representing these three segments to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

The Section is concerned that the proposed rules will not address the effects of contract bundling in a meaningful manner because they do not implement fully the recommendations of the Office of Management and Budget ("OMB") in its October 2002 report, "Contract Bundling – A Strategy for Increasing Federal Contracting Opportunities for Small Business" (hereinafter the "OMB Report"). The OMB Report stated that several specific changes to the Federal Acquisition Regulation ("FAR") and the Small Business Administration ("SBA") regulations would be prepared to reduce the adverse impact of contract bundling on small businesses. The Section respectfully suggests that the proposed rules fall short of this objective.

Accordingly, we recommend that the proposed rules be modified in the manner set forth below. In addition, because the changes identified herein are significant, we recommend that any further changes be implemented as part of an interim rule to ensure another opportunity for public comment. For ease of reference between the two proposed rules, our comments are organized according to the action items identified in the OMB Report.

1. **OMB Item #3: Definition of Contract Bundling**

The OMB Report recommended that the definition of "contract bundling" be expanded to include task and delivery orders issued under multiple award contracts, as follows:

> "3. Require contract bundling reviews for task and delivery orders under multiple award contract vehicles.

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[1] The Honorable Mary Ellen Coster Williams, Chair of the ABA Section of Public Contract Law, has recused herself on this matter, did not participate in the Section's consideration of these comments, and abstained from voting to approve and send this letter. Similarly, Council Member Daniel I. Gordon recused himself on this matter and did not participate in either the preparation or approval of these comments.

> The definition of contract bundling in the FAR and SBA regulations will be clarified to require contract bundling reviews by the agency OSDBU for task and delivery orders under multiple award contract vehicles. Because contract bundling reviews are not specifically required by the FAR or SBA regulations for agency multiple award contracts (MACs), multi-agency contracts, Government-Wide Acquisition Contracts (GWACs), or GSA's Multiple Award Schedule Program, these contracts and the orders placed under these contracts effectively escape review. Recent and significant increases in this type of contracting make contract bundling review essential. Proposed regulatory changes will be prepared by January 31, 2003."

The proposed change to the definition of contract bundling falls short of fully implementing this recommendation, because the proposed definition fails to cover task or delivery orders issued by an agency under the agency's own multiple award contracts. The proposed change would cover only "[a]n indefinite quantity contract awarded to two or more sources under a single solicitation for the same or similar supplies and services" and "[a]n 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.*, Government-wide acquisition contract or multi-agency contract)" (emphasis added).

If it makes sense for an agency to perform a bundling review of an order placed against a contract awarded by another agency, it makes equal sense for an agency to perform the same review for an order placed against the agency's own contract. Indeed, the OMB Report draws no distinction between orders placed against an agency's own multiple award contracts and those placed against another agency's contracts. Thus, the definition of contract bundling should include orders placed against indefinite quantity, multiple award contracts awarded by any agency.

2. OMB Item #4: OSDBU Reviews Above Thresholds

The OMB Report recommended that agency Offices of Small and Disadvantaged Business Utilization ("OSDBUs") review all proposed acquisitions above agency-specific dollar thresholds, as follows:

> "4. Require agency review of proposed acquisitions above specified thresholds for unnecessary and unjustified contract bundling.
>
> SBA regulations and the FAR will be modified to require contract bundling reviews of proposed acquisitions above agency-specific dollar thresholds. Individual agency review thresholds for acquisitions between $2 million and $7 million should be established based on an

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> agency's volume of contracts and in consultation with the SBA and agency OSDBU. The review will be conducted by the agency OSDBU under guidelines established by the SBA before an agency finalizes a specific acquisition plan. However, appropriate time limits will be established to ensure expeditious consideration. Proposed regulatory changes will be prepared by January 31, 2003."

The proposed regulatory changes fall well short of implementing such a system of review because they do not require that the OSDBU review a proposed acquisition plan, be afforded an opportunity to review and react to that proposed acquisition plan before it is finalized, and do so within specified time limits. The proposed change to the FAR would merely create the extremely general obligation of the agency "to coordinate the acquisition plan" with the cognizant small business specialist. The proposed SBA regulations are just marginally better; they would require that the agency coordinate the acquisition plan with the small business specialist "[a]s early as practicable, but no later than 30 days before the issuance of a solicitation."

By contrast, the underlying recommendations were that (a) the OSDBU review "proposed" acquisitions, (b) the review occur "before an agency finalizes a specific acquisition plan," and (c) "appropriate time limits ... be established to ensure expeditious consideration" by the OSDBU. Because the proposed rules contain none of these significant features, we recommend that they be expanded accordingly to require agencies to submit a proposed acquisition plan to the small business specialist/OSDBU, that the plan not be finalized until the small business specialist/OSDBU completes its bundling review, and that the small business specialist/OSDBU be given a limited number of days within which to complete its task.

Additionally, the Section is concerned by the proposed establishment of different dollar thresholds for bundling reviews at different agencies. The proposed rule would create a $7-million threshold for the Department of Defense ("DoD"), a $5-million threshold for three other agencies, and a $2-million threshold for all other agencies. A multi-tier system unduly complicates the regulations. Moreover, sustainment of the small business base at DoD is no less important than sustainment of the small business base at the civilian agencies and should not be subject to less attention. Indeed, statistics cited in the OMB Report reveal that DoD awarded 77.3% of federal bundled contract dollars in 2001. Thus, to achieve the goal of reducing the adverse impact of contract bundling on small businesses, effective monitoring of DoD procurements is essential.

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3. OMB Item #6: Strengthening Compliance With Subcontracting Plans

The OMB Report recommended that agencies mitigate the effects of contract bundling by strengthening compliance with subcontracting plans and, in particular, that agencies use contractor compliance with subcontracting plans as an evaluation factor for future contract awards, as follows:

> "6. Mitigate the effects of contract bundling by strengthening compliance with subcontracting plans.
>
> In acquisitions where contract bundling is determined to be necessary and justified, actions will be taken to mitigate the effects of bundling by increasing subcontracting opportunities for small businesses. Federal contractors that receive contracts of $500,000 for products or services or $1 million for construction are generally required to prepare plans for subcontracting with small businesses. Compliance with these subcontracting plans and agency oversight of contractor compliance with the plans has been inconsistent. To encourage greater small business participation as subcontractors in bundled acquisitions, the FAR will be amended to require agencies to use contractor compliance with subcontracting plans as an evaluation factor for future contract awards. . . . Proposed regulatory changes will be prepared by January 31, 2003" (footnotes omitted).

The proposed change to the FAR falls short of implementing this objective because there would be no change to FAR 15.304, which is the section of the FAR that addresses evaluation factors to be used in making contract award decisions. The proposed regulations would only change FAR 42.1502 to require that an agency assess a contractor's compliance with subcontracting plan goals as part of the agency's broad evaluation of contract performance.

As the law currently stands, for solicitations involving bundling that offer 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 required subcontracting plans. 15 U.S.C. § 637(d)(4)(G)(ii); FAR 15.304(c)(3)(iii). The recommendation that the FAR be amended "to require that agencies use contractor compliance with subcontracting plans as an evaluation factor for future contract awards" logically means that the current regulation should be extended to require evaluation of subcontracting plan compliance in all solicitations, not just in those involving bundling. This interpretation promotes the recommendation's stated purpose, which is "[t]o encourage greater small business participation as subcontractors in bundled acquisitions." Consideration of subcontracting plan compliance in a source selection

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should, in fact, encourage greater small business subcontract participation in bundled and non-bundled acquisitions alike.

Our view is that it would be most effective to change the FAR provision noted above, FAR 15.304(c)(3)(iii), to require the evaluation of subcontracting plan compliance not just in bundled procurements, but in procurements generally. Changing FAR 15.304 would be a straightforward implementation of the recommendation that the FAR be amended to make subcontracting plan compliance "an evaluation factor."[2] This change also would have the benefit of simplifying the regulatory scheme.

Given the current extensive use of task and delivery orders under multiple award contracts, it also would be appropriate to modify FAR 8.404(b)(2) and FAR 16.505(b)(1)(iii)(A) to include subcontracting plan compliance as a suggested evaluation criterion in the award of task and delivery orders.

Finally, the proposed addition to FAR 42.1502 is too narrow in one other respect. The OMB Report sought greater compliance with subcontracting plans. Although goals are an important component of subcontracting plans, plans have other important components as well. For example, a plan must include a description of the principal types of supplies and services to be subcontracted. *See* FAR 52.219-9(d)(3). The degree to which subcontractors actually perform commercially useful functions under the contract can be an important aspect of subcontracting plan compliance and should be considered as part of the past performance assessment under FAR 42.1502. A plan also must contain a description of the efforts the offeror will make to ensure that small businesses have an equitable opportunity to compete for subcontracts and a description of the types of records that will be maintained to document efforts to comply with the plan's requirements. *See* FAR 52.219-9(d)(8), (11). In order to promote greater subcontracting plan compliance, the change to FAR 42.1502 should reflect this broader scope.

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[2] We acknowledge that there is an argument that inclusion of subcontracting plan compliance as one element of past performance, per a change to FAR 42.1502, could affect the evaluation of proposals in a tangential way because past performance is a mandatory evaluation criterion per FAR 15.304(c)(3)(ii). However, that approach falls far short of using contractor compliance with subcontracting plans as an evaluation factor for contract awards. Having subcontracting plan compliance listed in FAR 15.304, along with price and past performance, as a mandatory evaluation factor could make subcontracting plan compliance a meaningful discriminator in award decisions and, therefore, would cause contractors to devote greater attention to subcontracting plan compliance. By contrast, merely considering subcontracting plan compliance as an element in past performance assessments would have an indirect and attenuated effect on the source selection process and, therefore, would do little to address the effects of bundling. The proposed change to FAR 42.1502 should be merely a compliment to a change to FAR 15.304(c)(3)(iii).

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The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Hubert J. Bell, Jr./HL

Hubert J. Bell, Jr.
Chair-Elect, Section of Public Contract Law

cc: Mary Ellen Coster Williams
Patricia H. Wittie
Robert L. Schaeffer
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Richard P. Rector

2002-029-31

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cc:
Subject: Proposed Rule on Contact Bundling

April 1, 2003

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FAR Secretariat (MVA)
Attn: Ms. Laurie Duarte
1800 F Street NW, Room 4035
Washington, D.C. 20405

Dear Ms. Duarte:

The U.S. Environmental Protection Agency (EPA) appreciates the opportunity to provide the following comments on Federal Acquisition Regulation (FAR) Case 2002-029. The proposed rule implements action items as described in the Office of Management and Budget*s (OMB) report entitled "Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business." EPA supports the Administration*s efforts to increase opportunities for small businesses by creating a Government-wide strategy to unbundle Federal contracts.

EPA has three comments regarding the thresholds set forth in the proposed rule. The proposed rule would add FAR 7.104(d)(2) to establish a three-tier, agency-specific acquisition threshold for bundling review and justification requirements at $7M or more for the Department of Defense (DOD), $5M or more for the General Services Administration (GSA), the National Aeronautics and Space Administration (NASA), and the Department of Energy (DOE), and $2M or more for all other agencies. While we recognize that these proposed thresholds are based upon an analysis of Agency contracting actions which indicates the greatest opportunity to realize benefits of a bundling review with the least burdensome administrative requirements, the three-tier system is, nonetheless, problematic.

1. We recommend that the rule clearly state the basis for determining review levels on orders placed against GSA, NASA, and DOE contracts, by other Agencies with lower thresholds. The proposed rule is ambiguous on this point. We suggest that the specific Agency threshold apply to that Agency regardless of whether another Agency's contract is used. Otherwise, there is a danger that bundling reviews and justifications will be avoided by using another Agency's contracts.

2. EPA suggests that the $2 million threshold established for this Agency may be set too low. The proposed rule establishes the thresholds based upon total dollar value of a procurement. The current language at FAR 7.107(e), defines substantial bundling on an 'average annual basis'. We believe that 'average annual basis' is a more appropriate measure to achieve the ultimate goal of increasing opportunities for small businesses. EPA's mission needs require the routine use of contract vehicles that provide for performance in multiple years. In terms of the ability of small business firms to compete for Agency contracts, there is no difference between a one year, $2 million dollar contract and a three year, $6 million dollar contract. Measured on an average annual basis, they are identical, and small business firms would

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be expected to be competitive in both scenarios. The proposal to establish thresholds based on total dollar value fails to consider that the length of the contract does not generally impede small business participation.

3. The thresholds proposed in the rule invoke substantial administrative actions including the documentation of alternative procurement strategies and coordination with the Small Business Administration's (SBA) Small Business Specialist (SBS). We suggest that the proposed language in FAR 7.104(d)(1), which exempts procurements totally reserved for small business set-asides, could be more flexible in extending the exemption to procurements partially set-aside for small businesses. A broadening of the exemption would decrease the administrative effort required, while remaining consistent with the intent of the rule which is to open bundled procurements for small business. A partial set-aside, by definition, has ensured small business participation.

In addition to our comments on the thresholds, as a point of clarification, EPA understands the bundling review and justification requirements to apply to orders issued under pre-existing contracts only when the pre-existing contract has been issued by another Agency. Agencies would be expected to perform bundling reviews on their own contracts when the basic contract is awarded, and not each time an order is placed. We draw this conclusion from the proposed rule which would include a definition of a single contract in the definition of bundling at FAR 2.101, as follows: (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 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.)

If our interpretation is correct, we fully support this proposed level of review for orders under Federal contracts. Federal Supply Schedule contracts and multi-agency contracts are awarded without a bundling review of other Agency requirements, so it is appropriate to perform that bundling review at the order level. But, contracts issued by an individual Agency for its own use are reviewed at the contract level for bundling issues. It is, therefore, inappropriate to reexamine the same requirements again at the order level.

Our final comment regards training. Once the rule is implemented, EPA would welcome Government-wide training by the SBA. Recently SBA provided such training on the HUBZone requirements which was invaluable. SBA is in a unique position to have first hand knowledge on the application of the bundling reviews and justification requirements on a Government-wide basis. SBA training would improve the consistency across agencies and the speed of implementation. It would also be beneficial for SBA to work with the Offices of Small and Disadvantaged Business Utilization (OSDBU) at individual Agencies to identify and share best practice examples of unbundled requirements.

EPA is fully committed to examining our contract bundling practices and to increasing opportunities for small business. If you have any questions or concerns, you may contact me on (202) 564-4310 or have you staff members contact Patrick Murphy in our Policy and Oversight Service Center on (202) 564-4382.

Sincerely,

//s// (April 1, 2003)

2002-029-31

Judy S. Davis, Director
Office of Acquisition

Management

2002-029-32

April 1, 2003

General Services Administration
FAR Secretariat (MVA)
1800 F Street, N.W.
Room 4305
Washington, D.C. 20405

Attn: Ms. Laurie Duarte

Re: FAR CASE 2002-029; Proposed Rule with request for comments on Contract Bundling

Dear Ms. Duarte:

On behalf of the member companies of the Contract Service Association of America (CSA), thank you for the opportunity to comment on the proposed rule on contract bundling, with request for comment, that was published on January 31, 2003 (FAR Case 2002-029; 68 Fed. Reg.5138-5142).

CSA is the nation's oldest and largest association of service contractors, representing more than 300 companies that provide a wide array of services to Federal, state, and local governments. Our members are involved in everything from maintenance contracts at military bases and within civilian agencies to high technology services, such as scientific research and engineering studies. Many of our members are small businesses, including 8(a)-certified companies, small disadvantaged businesses, women-owned and Native American owned firms. Our goal is to put the private sector to work for the public good.

Background

As noted in the "Background" section to the proposed rule, the Office of Federal Procurement Policy (OFPP) held a public meeting on "Competition and Contract Bundling" in June 2002. CSA provided extensive written comments outlining our suggestions to approaching contract consolidation.

At the outset, it should be understood that within the CSA membership, the views are split even among our small business members, as to the benefits or detriments of contact bundling to small firms. Our small firm members are more concerned with earning revenue than they are with being a Government prime contractor. Some CSA small business members have indicated that contract consolidation is an opportunity to obtain more Federal contract work – albeit at the subcontract level – because of the wider variety of contracts involved and because of the prime contractor's focus on performance. Our small business member companies do not oppose contract bundling or consolidation in concept or in practice. Our small business members recognize that today's fiscal and budgetary realities often require the consolidation of limited or specific tasks into larger contracts in order to permit the agency or prime contractor to integrate or coordinate specific performance of specific tasks with the overall prime contract requirement and agency objective. Their focus in those instances is to obtain a portion of the work as subcontractors that is consistent with their individual financial reserves and constraints as well as their specific performance capabilities.

CSA's specific comments on the exact wording of the proposed rule appear after our several general observations on the proposed amendments to the Federal Acquisition Regulation (FAR).

Observation: Part 7 – Acquisition Planning

Faced with the increasing need to perform a wide variety of Government services with less and less resources (both funding and acquisition personnel), the Government must employ procurement methods that are efficient to implement, enhance individual Government personnel productivity and reduce the administrative time and costs associated with required "bundling" reviews. Contract consolidation or "bundling" is just one method for accomplishing these ends. "Unbundling" contracts can be expensive in terms of efficiency, productivity and expense. CSA is concerned that the SBA is so focused on regulating contract consolidation (*see* "Description," 68 Fed. Reg. 5141) that it is forcing acquisition planners to veer from the small business statutory requirements.[1] Since 1958, the Congressional policy has been

> to insure that a *fair proportion* of the *total* purchases and contracts or *subcontracts* for *property and services* for the Government (including but not limited to contracts or *subcontracts* for maintenance, repair, and construction)be placed with small-business enterprises

15 U.S.C. § 631(a)) Emphasis supplied. In 1997, in response to concerns about "unjustified" contract consolidations that jeopardized its basic policy, Congress further stated in the Small Business Reauthorization Act that "a fair proportion of the total purchases and contracts for property and services in each industry category are placed with small-business concerns." 15 U.S.C. §644(a). Unlike its 1958 counterpart, the 1997 statute specifically stated: "A contract may *not* be awarded under this subsection if the award of the contract would result in a cost to the awarding agency which *exceeds* a fair market price." 15 U.S.C. § 644(a).

Such conflicts are best solved with a balanced approach that permits bundling when it is truly a source of significant and continuous savings (i.e., awarded at least at a "fair market price") and yet preserves opportunities for small businesses to participate and grow with the rest of the industry. To that end, we should not add administrative burdens (*e.g.*, unnecessary layers of oversight) or artificial and confusing FAR guidance that could impede an efficient and productive acquisition process and add unnecessary Government overhead costs. A poorly implemented acquisition process is not beneficial to small businesses, the Federal budget, or the U.S. taxpayer.

Contract bundling is not a difficult concept to define – it is a method very familiar to service contractors who often address in their proposals the consolidation of requirements when base operations contracts, aircraft maintenance contracts, or general building maintenance contracts are solicited. Contract consolidation is designed to enhance the efficiency of the acquisition process and ensure responsibility for the timely and efficient performance of a contract awarded on a best value basis. By consolidating workloads into a single contract, the Government seeks to reduce its internal costs and the manpower that would otherwise be involved in procuring those same requirements on a multiple contract basis. Most procurement experts agree that when generally similar or related requirements (*i.e.*, general base operating support services, construction services or information technology services) are included in a consolidated requirement, the Government is able to achieve its internal cost-saving goals and do so within its budgetary constraints.

There is a more reasonable debate over whether or not significant Government efficiencies are achieved when the consolidated contract includes a large number of widely disparate requirements, or if the contract is consolidated on a regional or nationwide basis. In these circumstances, the detrimental impact on small businesses is clear. Small businesses simply cannot bid when contract requirements are consolidated on a nationwide basis. Small businesses do not have the infrastructure in place to simultaneously perform the requirements of a consolidated contract at various places throughout the country since their offices are usually located in a limited geographical region. The costs of traveling and setting up new offices in various locations is often prohibitive and puts them at a competitive disadvantage

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[1] CSA's perception is based on the use of the phrase "required in connection with Action Items 4 and 5 of OMB's report" when explaining one aspect of the proposed rules regarding acquisition planning. *See* B. Section-by-Section Analysis of the Federal Acquisition Regulation, 68 Fed. Reg. 5139, 3rd column. By comparison, other references to the OMB report more accurately refer to the report as "recommendations." *See* 68 Fed. Reg. 5140, 2nd and 3rd columns.

with large businesses which generally have a presence throughout the United States. And bundling disparate types of functions into one large contract hinders the ability of small businesses to bid on such contracts – although there may be opportunities for small businesses to team or joint venture on such contracts (which would foster another objective of the proposed rule).

An example of such bundling is occurring on some projects in the military privatization initiative. Certainly, CSA and its members support privatization – and improving the quality of housing for our military forces. However, in at least one instance, a small 8(a) certified company (and CSA member) is in the position of having its housing maintenance contract terminated early, despite excellent performance ratings, in favor of a long-term, multi-million dollar housing development project, which will include development as well as maintenance. The impact on the incumbent small business which suddenly faces early contract termination is significant. The scope and size of this project essentially excludes small businesses from bidding – although there will be subcontracting opportunities available.

Another example of questionable contract consolidation was brought to CSA's attention. A CSA small woman-owned business member was terminated for convenience by the Defense Logistics Agency (DLA) after Andrews Air Force base was converted to a private contractor operation following an A-76 competition. Despite DLA's objection (due to our member's excellent performance), the Air Force insisted that the small refueling contract being performed by our member be consolidated in the Air Force requirement. Our company was terminated for convenience, and dutifully filed its termination settlement proposal. After a full calendar year, our small business member has yet to recover any of its termination costs. In this instance, contract consolidation caused a small business the loss of a profitable and well performed contract.

Goals: Where small businesses are likely to be effected by a decision to bundle requirements, the small business subcontract participation requirements associated with that consolidated solicitation should increase over the norm. In other words, the larger the bundle, the higher the level of consideration should be given to small business subcontracting participation. In addition to requiring specific plans for dollar flow, it is also important that the small business subcontracting opportunities not be limited only to the lowest end functions.

Thresholds: While views varied among CSA members as to the appropriate level (either too high or tool low), one common concern voiced was that the three tier acquisition threshold was confusing. CSA's counsel noted that the threshold guidance also overlooked the statutory requirements related to fair market prices. Specific guidance along the lines we suggest appears necessary in order to avoid any misunderstanding regarding the intent – and implementation – of the rule regarding threshold levels for review.

Joint Ventures and Teaming Arrangements: Teaming arrangements between small firms and medium-large sized firms should be encouraged; and small business should be able to form joint ventures without losing their definition as a small business for the procurement involved. The proposed regulations require the Procurement Center Representative (PCR), and the agency small business office to recommend restructuring of acquisitions as appropriate to increase small business prime contract participation through small business "teams." The proposed regulation, however, does not appear to mention "joint venture arrangements." Significantly, under the Small Business Administration's (SB) proposed affiliation regulations, small businesses cannot form a team to enter into a prime/subcontractor relationship to benefit from the affiliation exemption on large contracts set-aside for small business or bundled contracts. There is a distinction between joint ventures and teaming arrangements, which should be addressed in the development of the final so that such arrangements are recognized and encouraged under both regulatory schemes (*i.e.,* affiliation and bundling purposes).

In addition, CSA staff receives calls on a regular basis regarding "joint ventures." In addition to referring them to FAR 9.6, we also inform them that every state has its own corporate laws regarding the definition of a "joint venture." Under state law generally, "joint ventures" means that the joint venture partners must

share profits and liabilities in order to be considered a joint venture. These state law requirements are not mentioned in the SBA regulations or in the FAR regulations under FAR 9.6 or 7.104.

Observation: Part 19 – Small Business Programs

As indicated above, consideration should be given to specific small business involvement for specific tasks whenever consolidation is an optimum solution. In reviewing the size and scope of potential consolidation, contracting officers should consider grouping the rest of the contracts into central themes – such as environmental or certain specialty areas (*e.g.*, elevator and escalator maintenance, alarm systems installation and maintenance, guard service, or fire response systems). These types of tasks could then be "set-aside" by the (large business) prime contractor as would be consistent with the solicitation requirements and evaluation factors. Small businesses, either independently or as part of a joint venture or team member, have a viable chance of winning a subcontract award under such a solicitation scheme.

Another method to address the issue of small business involvement is with mandatory "Partnering" clauses in every contract that is signed under the overall initiative. Under this concept, an organization would be formed of representatives from the Government and the contractors who will come together to coordinate the work requirements in terms of small business participation.

Observation: Part 42 – Contract Administration and Audit Services

CSA agrees that FAR 15.304(c)(3)(iii) is an appropriate evaluation factor when the consolidated requirements offer significant opportunities for small business subcontracting. Consistent with this approach, CSA believes it would encourage the buying activity to accurately assess both whether the offeror is likely to meet the small business participation requirements and whether the offeror will be sharing with the small business community a portion of the higher end, more sophisticated contract requirements.

Taking this a step further, at the recent CSA Annual Meeting, our small business members supported a proposal that would allow agencies to get credit toward their small business goals for small business subcontracts. Prime contractors are required to keep data on their subcontracts (but only those awarded at the first tier). However, this data is often not counted toward achievement of subcontracting goals (either for the contractor or the procuring agency). This proposal would help better track small business involvement in overall government contracting.

It also would serve as a valuable tool in measuring and evaluating a contractor's past performance in meeting its stated subcontracting goals, and would further encourage larger prime contractors to do business with small firms and sticking to their subcontracting plans. Small businesses also have expressed interest in being able to "rate" their prime contractors.

The *Small Business Reauthorization Act of 1997* (P.L. 105-135), which recognized that contract consolidation may be necessary and justified, laid out a balanced approach. When contract requirements are justifiably consolidated, a commensurate and appropriate requirement for sophisticated subcontracting plans should be included in the solicitation requirements. If fully implemented by Federal agencies, small businesses would be getting their fair proportionate share of the relevant industry market (at either the prime or subcontract level). However, implementation of the 1997 Act has been lukewarm and inconsistent among the Federal agencies. CSA has been informally advised that many Federal agencies view ~~see~~ the January 31 proposed rule as simply making cosmetic changes, without any enforcement mechanism.

Much of the problems with implementation – whether it be with existing contract bundling regulations or with other procurement measures – is the result of inadequate training. CSA emphasizes the importance of proper training of the acquisition workforce, including small business specialists. We consider training particularly urgent and necessary as the Government moves toward greater use of performance-based services acquisitions. Without a serious augmentation and reallocation of agency resources to education

and training, we will never fully realize the benefits from initiatives aimed at assisting small businesses.

Specific Comments Regarding the **Proposed Regulations**

1. FAR 7.104, Acquisition Planning.

This proposed language is confusing because it omits specific reference to service contracts and fails to distinguish between acquisition planning for a "contract" versus a potential consolidated requirement versus a "requirement." Moreover, when this proposed language is read with the proposed 7.107(e) (as required), then the dollar thresholds are much too low and the potential for confusion becomes more evident.

Under proposed 7.107, the SBA makes clear that a requirement estimated to exceed the dollar thresholds is by definition "substantial bundling." CSA cannot agree with these extremely low dollar thresholds for several reasons. First, the proposed language makes no distinction whatsoever between multiple year contracts (*e.g.*, contracts with a base year and 3-7 option years), multi-year contracts or straightforward contracts with option provisions. Second, the estimated value of a consolidated contract will be in the tens of millions, not "single digit" millions. Third, consolidated service requirement necessarily involve more than one year of performance. The proposed regulations appear to have overlooked these actual characteristics of a consolidated contract.

Consistent with the above concerns and the definition of "bundling" (which focuses on "requirements"), we suggest the following:

> (d)(2) The acquisition strategy, when consolidation of requirements is under consideration, shall be coordinated with the cognizant ... if the estimated fair market value of the single contract or functionally separate services ~~contract~~ requirement or order or the total value of the consolidated requirement ~~value~~ is
>
> > (i) $7 million or more as a single contract or $60 million total or more if consolidated for the Department of Defense;
> >
> > (ii) $5 million or more as a single contract or $45 million total or more if consolidated for the National Aeronautics and Space Administration, the General Services Administration, the Department of Energy, and the Department of Veterans Affairs; and
> >
> > (iii) $2 million or more as a single contract or $30 million total or more if consolidated for all other agencies.

The intent of the above is to insure that acquisition planners notify the local small business specialist when consolidation is under consideration and single requirements reach a specified estimated threshold amount or consolidated requirements reach another specified estimated threshold amount.

The above emphasizes CSA's clarification between single and consolidated requirements. As noted earlier, many of our members were confused by the notion of three "tiers" of contracts. With their confusion and concerns in mind, CSA recommends a single government-wide threshold of $7 million or more as a single contract or $ 60 million total or more for consolidated requirements.

We also noted that the proposed regulations appear to overlook the largest civilian agency budget that also buys the most services – the Department of Veterans Affairs. We believe that the VA should be listed in proposed (d)(2)(ii) as coming under the $5 million threshold rather than be lumped together with "all other agencies."

2. 7.107 Additional Requirements for acquisitions involving bundling.

As explained above, CSA believes that SBA has lowered the dollar thresholds to an administratively burdensome level. Therefore, we believe that proposed 7.107(e) must be changed accordingly. We also believe that SBA has gone beyond its statutory authority and Congressional policy in proposed FAR 7.107(e)(4). We suggest the following language to address both CSA concerns:

> 7.107(e) Substantial bundling is any ~~bundling~~ consolidation of requirements that results in a ~~contract or order~~ solicitation or order that ~~meets the~~ exceeds, or may exceed, the total dollar amounts for consolidated requirements specified in 7.104(d)(2).
>
> * * *
>
> 7.104(e)(4) Specify actions designed to ~~maximize small business participation~~ insure that a fair proportion of the service contracts in each industry category are placed with small-business concerns as subcontractors (including suppliers) at any tier under the contract, or order, that may be awarded to meet the consolidated requirements;

Conclusion

CSA agrees that Federal agencies must take steps to promote small business participation in performing their service contract requirements. Even with the proposed regulations, Federal agencies will need to bundle contracts to achieve efficiencies and improve performance. What is needed, therefore, is an assurance that small businesses will receive their fair proportion of the work – through either the elimination of *unjustified* bundling or by providing evaluation factors in solicitations for consolidated requirements for small business participation through subcontracting opportunities (on appropriately bundled contracts).

Sincerely,

Gary Engebretson
President
Contract Services Association of America

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Arlington, VA 2220
703-243-2020

2002-029-33

"Massaro, Mary"
<Mary.Massaro@dla.mil>

To: "'farcase.2002-029@gsa.gov'" <farcase.2002-029@gsa.gov>
cc:
Subject: FAR Case 2002-029, Contract Bundling

04/01/2003 03:57 PM

Dear Ms. Duarte:

The Defense Logistics Agency (DLA) submits the following comments with regard to FAR Case 2002-029, Contract Bundling.

In order to clarify that the bundling coverage pertains to multiple awards, and not to split awards, recommend that the following or similar coverage be added to the definition of bundling at FAR 2.101:

Bundling means- -

****

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

****

(iii) Single contract does not include "split awards," whereby a number of related requirements are set forth in a single solicitation for administrative convenience, but which are intended to be evaluated individually, and to result in more than one award. For example, when similar requirements for items or services are to be fulfilled (that is, when performance is intended to take place) in several different regions of the country, these requirements may be described in a single solicitation, but individual awards will be made for each geographic region addressed therein. Split awards are different from multiple award contracts.

DLA proposes this change because the intent of the coverage is to make it clear that the contracting officer cannot ignore performing a bundling analysis merely because several awards may ultimately be made from an unnecessarily bundled requirement (thereby "unbundling" it). Split awards are not designed to aggregate requirements unnecessarily; they are merely a way to use a single solicitation for separate requirements for which several individual awards are contemplated. Without some clarification to the language at 2.101 (or, alternatively, to 16.504), there may be some question as to whether split awards could (erroneously) be considered bundled requirements.

We also recommend that a small revision to the last sentence of 7.107(a) be included in this rule for the sake of precision. Suggest either that the words "an agency" be changed to "the Government," or that "and/or its supported customers" be added after "agency." This would make clear that the benefits to be derived from necessary bundling do not always accrue directly

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to the contracting activity.

Thank you for your consideration of these matters.

Mary Massaro

Defense Logistics

Agency/Acquisition Policy Branch

(703) 767-1366

2002-029-34

Venn Strategies

GOVERNMENT RELATIONS PUBLIC AFFAIRS MARKET SOLUTIONS

April 1, 2003

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

Re: Proposed Rule Implementing OMB Report, "A Strategy for Increasing Federal Contracting Opportunities for Small Business." FAR Case 2002-029

Dear Ms. Duarte,

The mid-sized government contractors listed below appreciate this opportunity to comment on the proposed rule to amend the FAR to limit bundling and expand the access of small businesses in the federal marketplace.

Ours are companies that once benefited from small business initiatives and are now among the contractor pool's small business "success stories." As such, we support the Administration's desire to improve the access of small businesses to federal contracting opportunities, through enforcement of small business subcontracting plans, assessments of contractors' performance based on plan compliance, and reviews of inappropriate and unjustified contract bundling.

However, we are concerned that elements of the OMB's proposed plan could inadvertently harm America's mid-size contractors, which are a critical element of the national procurement landscape. This concern is what prompts our submission. We therefore encourage the Civilian Agency Acquisition Council and Defense Acquisition Regulations Council to develop implementing rules that balance the Administration's interest in expanding small business access on the one hand with ensuring that such efforts do not further damage the business middle class of the federal contractor pool.

The fact that the absolute numbers of mid-size businesses across the nation are relatively few tells us that *small firms are not succeeding and growing at the rates that policymakers and the business community would deem adequate.* Even so, our mid-size firms and others across the nation account for one-fifth of all private sector jobs, and an even larger portion of the private sector payroll. There is little doubt that America's business middle class is central to the strength and future of the job base. With small firms failing at a rate of 71percent[1], more stable mid-size firms (the small

[1] The period over which this failure rate occurs is eight years, according to *The State of Small Business: A Report to the President, 1997* (Washington, D.C.: U.S. GPO. 1998), p. 227.

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business success stories) are especially important to U.S. prospects for economic growth.

Mid-size firms like ours are also key to the contractor pool. With dozens of years of experience, investment in systems and capabilities, and track records behind us, our companies are a critical element of the procurement regime. While we, like small businesses, still receive a relatively small portion of total contracting dollars, we are forced by current size classifications to compete against the largest contractors in the world. At the same time, we are being excluded from many opportunities by the government's increasing use of "set-aside" contracts. To illustrate this point, a recent GAO study of federal information technology (IT) procurement spending found that mid-size businesses received about 21 percent of all IT contracting dollars for FY'01. Small business received about 14 percent of those funds, while just a handful of large businesses received 62 percent.[2]

As mentors and a channel of substantial subcontract dollars to small firms, mid-size contractors are essential to the ability of small contractors to survive and thrive in this challenging environment. While we are extremely proud of our accomplishments, the jobs we provide and the quality of the goods and services we offer to our federal customers, we are not "large businesses," and should not be treated as such. But because neither federal policy nor statute recognize and distinguish mid-size companies as a business class whose growth and survival is important to federal procurement and national economic goals, we find that an increasing portion of federal procurement policy reforms threaten the vitality and capabilities of our businesses.

Broadly speaking, what our companies seek is for OFPP and other relevant agencies to take these important facts into account as efforts to promote small business opportunity are shaped and implemented. That is, we would like to see OMB and individual agencies pursue a more balanced approach to procurement policy. In practical terms, this would mean

- Formally and informally recognizing mid-size businesses as an important class of firms as a distinct subgroup of the enormous, diverse array of companies that are, simply put, not small;
- Finding opportunities to enunciate as a policy objective the importance of cultivating programs that (a) help to sustain the contractor "middle class", and (b) seek to provide opportunity to small firms while protecting, to the extent possible, against resulting, adverse impacts on mid-size businesses;
- Tracking data that support the role of mid-size contractors – data that reflect subcontracts we issue to small contractors as well as total prime contracting dollars awarded to mid-size firms, among other activities; and
- Carefully rethinking efforts to expand SBA's set-aside goals insofar as such actions may harm mid-size contractors.

[2] *Contracting for Information Technology Services,* Letter to The Honorable Tom Davis, William T. Woods, Director, Acquisition Sourcing and Management, United States General Accounting Office, February 14, 2003 (Washington, D.C.).

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Reflecting on the more specific elements of the proposed rule, we respectfully offer the following additional comments and suggestions:

- The proposed rule would amend FAR Part 19.202 to require that, when the Office of Small Disadvantage Business Utilization (OSDBU) directors review an acquisition not set-aside for small business, they account for or identify alternate strategies to maximize the use of small business in the procurement. We would respectfully request that such an assessment require the OSDBU to review and consider alternative strategies that maximize the use of small and mid-size firms in procurement. Where small firms are concerned, alternative strategies should take into account the likely impact on mid-size businesses that are prime or subcontractors for that acquisition, as well as the total additional cost to the acquisition of introducing the new set-asides or alternatives. We would further ask that the OSDBU review the impacts of any such decision on the technical capability available in the marketplace. The evaluation of these additional considerations would, we believe, yield a more balanced set-aside or alternate strategy decision.

- In addition, the proposed rule change under FAR Part 19.2101(d)(11) would require the OSDBU to assess the extent to which small businesses receive a fair share of federal procurements. As part of this assessment, we request that the OSDBU additionally identify and track the federal contracting dollars provided by mid-size contractors to Small/Small and Disadvantaged business, HBUC, Women-Owned, Veteran-owned and HubZones at the subcontract level through the third tier. It has long been recognized that a significant amount of federal procurement dollars that benefit these important small entities occur below the prime level. The opportunity to capture and include these data in any assessment of the small business utilization would be an important metric and add balance to this issue.

- We also believe the proposed agency-specific dollar thresholds that trigger a review of a bundled procurement – $7 million for DoD, $5 million for NASA and $2 million for all other agencies -- are too low and would unduly burden the procurement process. We respectfully propose that each of these limits be doubled or tripled. The section-by-section analysis of the proposed rule notes that the trigger levels identified are "intended to target contract actions that would most likely involve contract bundling." We believe better policy would be made with higher thresholds, while giving each agency the authority to apply the standards on a case-by-case basis for other, lesser procurement actions or categories of procurement actions.

While our companies and other mid-size contractors are strong supporters of effective small business programs, we face increasing shrinkage of our market as a direct result, we believe, of those set-aside and unbundling efforts that are inappropriate and potentially harmful – i.e., efforts that fail to take into account the impact of such

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decisions on the business middle class. The continuation of this trend, which has caused many of us to reduce our workforces and/or eliminate lines of business, could drive many mid-sized companies from the federal marketplace. This dangerous prospect would limit effective competition from this important segment of the industrial base and also diminish our role in facilitating the growth and success of other small firms.

We hope to work in partnership with this Administration to develop and promote a more balanced approach to procurement policy. Our objective in this regard is to ensure that the federal procurement regime recognizes and provides opportunity to small business but does so without imposing dangerous, artificial restraints on the ability of mid-size contractors to compete and survive. The companies most directly, and most disproportionately harmed by programs that do not reflect such a balance are, quite simply, America's mid-size federal contractors.

We appreciate this opportunity to share our interests and concerns, and we welcome questions and other comments. Thank you for your consideration.

Respectfully submitted,

Stephanie Silverman

Stephanie E. Silverman
Principal

On behalf of

Abt Associates
Cambridge, Massachusetts

Allied Technology Group
Rockville, Maryland

American Systems Corporation
Chantilly, Virginia

ARINC
Annapolis, Maryland

Aspen Systems
Rockville, Maryland

ICF Consulting
Fairfax, Virginia

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2002-029-35

DESIGN PROFESSIONALS COALITION

1250 H Street, N.W., Suite 575, Washington, D.C. 20005
TEL: 202/393-2426 FAX: 202/783-8410

April 1, 2003

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

Attention: Ms. Laurie Duarte

Subject: FAR Case 2002-029: Contract Bundling

Dear Ms. Duarte:

On behalf of the Design Professionals Coalition (DPC), I appreciate the opportunity to comment on the proposed rule amending the Federal Acquisition Regulation (FAR), implementing the recommendations of the Office of Management and Budget (OMB) to limit contract bundling and increase small business opportunities as published in the January 31, 2003 *Federal Register.*

DPC is a national organization founded in 1983. Its membership includes the nation's leading engineering, architectural, surveying and mapping firms. Member companies are multi-discipline, multi-practice and multi-office firms with domestic and international practices. They provide transportation, military construction, infrastructure, hazardous and nuclear waste, water and wastewater, and environmental services to the public and private sectors. DPC member firms, many of which began as very small businesses, employ over 100,000 professional and other employees around the nation.

DPC has long supported the principle that companies of all sizes should be able to fairly compete for Federal contracts. DPC also firmly supports efforts to enforce reasonable subcontracting goals for small businesses and to link compliance with performance assessments.

DPC is concerned that the proposed rule, which purports to deal with "contract bundling," however well-intentioned, may be too draconian and not accomplish its desired effect. DPC is concerned that the current emphasis on fixing the perceived detrimental effects of "contract bundling" will only further distort the Federal marketplace and in fact discriminate against large companies.

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The proposed rule would require reviews of consolidated contracts, multiple award contracts and task and delivery orders. While irrational contract bundling ought to be avoided, the use of large contracts is one of many legitimate tools for agencies to effectively fashion their acquisition strategies. In many instances, the greater operating efficiency created by these larger contracts benefits the taxpayer as well as ensuring that businesses of all sizes can compete. We are concerned that large businesses may be unfairly harmed by flawed attempts to increase small business participation in Federal contracting.

When the Department of Energy proposes to award a $100 million prime contract to a small business, that firm cannot perform the contract. It will inevitably subcontract most of the work to large businesses which have the needed management skills, financial strength, bonding capacity, liability insurance, and necessary experience for handling very large projects. Similarly, requiring too much small business participation in a contract, such as the Department of Defense requiring up to 65%, causes contracting officers concern about whether the large business prime contractor can perform it.

The rule would result in increased numbers of smaller-sized Federal contracts -- an additional burden on agencies that frequently cite lack of resources to award and oversee the existing number of contracts. This lack of qualified personnel could be partially addressed by hiring limited numbers of additional Federal contracting officers. These additional specialized employees would help prevent unwise or potentially abusive bundling while ensuring the ability to award greater numbers of various-sized contracts. This would permit small businesses to compete for prime contracts against their peers.

Finally, the proposed rule would require agencies to assess the level of small businesses participation in Federal procurements. We couldn't agree more about the need for full, accurate, and complete measurement. DPC suggests the following:

- **Small business utilization success should be measured by total contract dollars going to small businesses – "small business participation" -- rather than relying solely on the percentage of small business prime contracts.** The current practice of assessing small business utilization based on the percentage of prime contractor awards significantly underestimates the true share of Federal contract dollars won by small businesses. The value of many subcontracts, joint ventures with large firms, and small business joint ventures should also be taken into account in determining the true status of small business Federal contract participation. Including this data would provide a much more accurate baseline of small business participation which is actually better than current statistics show.

- **Small business participation should be calculated on an agency-by-agency or program-by-program basis.** The current method of evaluating

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small business participation government-wide should be revised to account for small business utilization on an agency-by-agency basis. Aggregate numbers fail to recognize outstanding achievement in some programs and agencies while concealing the lack of success in others and hides the fact that certain industries and types of contracts -- particularly architecture-engineering services and environmental cleanup -- are disproportionate targets for prime contract small business set-asides and mandatory subcontracting. The failures in other areas remain out of view.

Rather than focusing solely on the perceived problems of bundling, DPC urges a comprehensive review of programs which focus on small business contracting opportunities. Better, fairer, and more accurate data reporting, alternative contracting strategies, and the hiring of additional contracting officers will likely produce better results without distorting the Federal marketplace and denying companies of all sizes opportunities to compete. Large companies also need to compete for projects in order to enable their employees—many of which have good-paying jobs with full benefits—to have jobs.

Thank you for considering DPC's comments. Please feel free to contact me or Richard L. Corrigan, DPC's Vice Chairman at (202) 393-2426 if you have any questions or are interested in discussing further.

Sincerely,

James Suttle

James Suttle
Chairman

2002-029-36

DEPUTY ASSISTANT SECRETARY (DAS)
(CONTRACTING)

SAF/AQCP

Mail Address: **1060 Air Force Pentagon**
Washington DC 20330-1060

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SUBJECT OF MATERIAL SUBMITTED: AF Comments: FAR Case 2002-029	**DESTINATION MACHINE:** (202) 501-4067	
TO (Organization Office Symbol): GSA, FAR Secretariat	**NAME:** Ms. Laurie Duarte	**PHONE:** (202) 501-4755
FROM (Office Location): SAF/AQCP	**NAME:** Lt Col Alan Boykin	**PHONE:** (703) 588-7073

REMARKS:

Please find attached AF comments re: FAR Case 2002-029, Contract Bundling.

V/r

Alan J. Boykin

ALAN J. BOYKIN, Lt Col , USAFR
Deputy Chief, Contract Policy & Implementation Division
Office of the Deputy Assistant Secretary
of the Air Force for Acquisition (Contracting)
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DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

2002-029-36

Office of the Assistant Secretary

1 APR 2003

MEMORANDUM FOR GENERAL SERVICES ADMINISTRATION, FAR SECRETARIAT

FROM: SAF/AQC
1060 Air Force Pentagon
Washington DC 20330-1060

SUBJECT: FAR Case 2002-029, Proposed FAR Revision on Bundling

This memorandum is in response to proposed policy on the use of contract bundling. Please consider the following comments:

a. Reference paragraph 7.104(d). Comment: It is imperative that the small business specialist (SBS) provides appropriate coordination. For greater effectiveness, the SBS should be involved during the earliest stages of acquisition planning, even if the acquisition has already been determined a small business set aside. For example, in the event that the acquisition team is pursuing a small business set aside, the SBS may determine that the effort is more suitable as a HUBZone set aside. Seeking the advisement of the SBS at the earliest stage of the acquisition will ensure the appropriate consideration of all available sourcing opportunities.

b. Reference paragraph 2.101(3). Recommend "Single contract" be changed to "Single contract, or multi-award contract from a single solicitation".

c. Reference paragraph 7.104(d). Recommend clarification of whether the $7M, $5M, and $2M amounts are amounts of single contracts or the aggregate amount of multi-award contracts.

d. General comment concerning future interpretations of bundling definitions: When considering a Simplified Acquisition of Base Engineering Requirements (SABER) award by a construction contracting office, a future SABER award could be construed as a bundled contract (especially if it exceeds $7M), or a multi-award effort. This interpretation could have a negative impact by possibly forcing multiple awards versus the traditional SABER approach.

e. Reference paragraph 19.202, Specific Policies. Who will decide the agency dollar thresholds for review?

f. Reference FAR 42.1502(a). It states that these procedures shall require an "...assessment of contractor compliance with the goals identified in the small business subcontracting plan..." Goals, by definition, are not mandatory, so "compliance with goals" doesn't make sense. The Small Business Subcontracting Plan clause (FAR 52.219-9) does not

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require the Contractor to meet or exceed the goals, but rather to comply with FAR 52.219-8 and with the requirements of the agreed-to plan. Accordingly, suggest the proposed additional language for FAR 42.1502 be changed to read: "These procedures shall require an assessment of contractor compliance with the requirements identified in the clause at 52.219-9, Small Business Subcontracting Plan, when that clause is included in the contract."

g. General comment: The proposed rule does not address what methods should be utilized to coordinate the planned strategy with the cognizant small business office. The assumption is that the current procedures of utilizing the small business coordination sheet will be sufficient on acquisitions when an acquisition plan is not required.

Should your staff have any questions, please contact my POC, Lt Col Alan J. Boykin, (703) 588-7073, alan.boykin@pentagon.af.mil.

Maureen M. Clay

MAUREEN M. CLAY, Col, USAF
Associate Deputy Assistant
Secretary (Contracting)
Assistant Secretary (Acquisition)

2002-029-37

Comments of the Federal OSDBU Directors Interagency Council
on Proposed Bundling Regulations
13 CFR Part 125 and 48 CFR Parts 2, 7, et al
Published in the Federal Register January 31, 2003 - FAR Case 2002-029

INTRODUCTION

The Federal OSDBU Directors Interagency Council consists of the heads of the Offices of Small and Disadvantaged Business Utilization which exists in every Federal agency having contracting authority pursuant to Pub.L.No. 95-507 (1978). The Council has existed since 1980 and meets on a monthly basis to share best practices and to stay informed on the latest developments in the small business program administration field. It carries out its mission through a number of working groups designed to focus expert attention on a number of special areas within the field and then reports its findings and recommendations to the full body. One important part of the Council's charter is to gather the collective views of all OSDBU's that wish to comment on relevant issues in which regulatory bodies request public comment.

A first draft of these comments was circulated among all OSDBU's for any amendments, supplements, deletions or revisions. All of the views provided from those OSDBU's which submitted such input are incorporated in the comments herein.

PREFACE

The proposed regulations provide more authority for OSDBUs and PRCs to review GSA Schedule orders, and orders from other pre-existing contract vehicles, than they have previously had. However, to completely close the GSA Schedule "loophole" regarding bundling, the regulations should make more provisions in Part 19 applicable to GSA Schedule orders and orders from other pre-existing contract vehicles.

1. <u>OSDBU/PCR Ability to Appeal Rejected Recommendations</u>

Although the proposed regulations provide for OSDBU and PCR review of bundled procurements, including those done via GSA Schedule, the proposed regulations do not appear to provide specific authority for OSDBUs/PCRs to appeal rejected recommendations pertaining to GSA Schedule orders as they can open market buys under FAR 19.505. The regulations at FAR 8.404(a)(1), which exempt GSA Schedule orders from the provisions of FAR Part 19, are modified by the proposed regulations only to provide for the PCR review of bundled procurements (FAR 202-1(e)(1)iii), and not for the applicability of any other provisions of Part 19. The ability to appeal a rejection of an OSDBU/PCR recommendation is a powerful practical and influential tool in stimulating small business utilization and we recommend that it be included in these regulations to mitigate the effects of bundling.

2. Non-bundled GSA Schedule and Other Pre-existing Contract Orders

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In addition to lacking authorization to use the above tool re GSA Schedule and other pre-existing contract orders, the current and proposed regulations do not provide the OSDBUs/PCRs any authority to influence non-bundled GSA Schedule and other pre-existing contract orders. Nor do the proposed regulations require consideration of small business or subcontracting plans in such orders.

- OSDBU/PCR Review of Non-bundled GSA Schedule and Other Pre-existing Contract Orders

  OSDBUs cannot directly influence small business utilization in procurements they do not review. Current regulations do not afford OSDBUs/PCRs authority to review non-bundled GSA Schedule and other pre-existing contract orders for purposes of stimulating small business utilization as they can open market buys - FAR 19.402(C)(1)(i).

- Apply Small Business Utilization Requirements to GSA Schedule and Other Pre-existing Contract Orders

  Under the current regulations, the provisions in FAR 19.502-2 for setting aside for small businesses: 1. all procurements exceeding $2,500 but not over $100,000; and 2. all procurements where a reasonable expectation exists of receiving offers from at least two

  responsible small businesses at fair market prices, do not apply to GSA Schedule orders.

- Enable Subcontracting Plans for GSA Schedule Orders

  Under current regulations specific subcontracting plans are not required for GSA Schedule orders (FAR 19.7). Review of such procurements would enable OSDBUs/PCRs to require subcontracting plans specific to GSA Schedule orders over $500,000 from large businesses.

Application of FAR Part 19 small business utilization, OSDBU/PCR review and appeal, and subcontracting rules to GSA Schedule and other pre-existing contract vehicle orders would significantly increase small business utilization. We recommend that regulations be generated to close the GSA Schedule and other pre-existing contract order loopholes regarding small business utilization, OSDBU/PCR review and appeal, and small business subcontracting as well as bundling.

3. Additional Recommendations Regarding GSA Schedule

The following are additional recommendations to make orders from GSA Schedule and other pre-existing contract vehicles more small business friendly:

- Restrict orders from GSA Schedule (and other pre-existing contract vehicles) that are over $2,500 and under $100,000 to small businesses.

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- Create separate GSA Schedule websites for small businesses and/or for placement of orders under $100,000.

- Require a documented market survey such as a sources sought notice to small businesses (possibly via a GSA Schedule small business website) prior to placement of a GSA Schedule order to a large business.

- Apply the "rule of two" to GSA Schedule and other pre-existing contract orders - if there are two small businesses on GSA Schedule or other pre-existing contract vehicles that can reasonably be expected to responsibly perform the requirement, then the requirement should be set aside for small business.

- Enable sole source contracting from all 8(a) contractors on GSA Schedule (this is currently permitted for 150 8(a) IT contractors via GSA FAST).

- Enable HUBZone sole source contracting via GSA Schedule if there is only one HUBZone source able to perform the requirement on GSA Schedule.

- Actively ensure that all small business designations on GSA Schedule contractors are u to date (e.g. update existing GSA Schedule records to reflect new HUBZone or service disabled veteran-owned status). This would eliminate a five year lag between the invention of new small business categories (and associated goals) and being able to obtain credit for their utilization via GSA Schedule. Comparisons should periodically be made between GSA Schedule holder record status and the ProNet or the Central Contractor Registration database.

Respectfully submitted,

(Signed)

_____

Ralph C. Thomas III
Chair, Federal OSDBU Directors
Interagency Council
Washington, D.C.

2002-029-38

DEPARTMENT OF THE ARMY
OFFICE OF THE SECRETARY OF THE ARMY
OFFICE OF SMALL AND DISADVANTAGED BUSINESS UTILIZATION
106 ARMY PENTAGON
WASHINGTON DC 20310-0106

02 April 03

GSA
FAR Secretariat (MVA)
1800 F St. N.W., Room 4035
Washington, DC 20405
Attn: Laurie Duarte

Ms. Duarte:

We have reviewed the proposed changes to 13 CFR Part 125 implementing the recommendations of the Office of Management and Budget (OMB) in its report entitled, "Contract Bundling, A Strategy for Increasing Federal Contracting Opportunities for Small Businesses" and would like to provide a few comments that we think will enhance and improve the intent of providing more opportunities for small businesses and hold senior management accountable for results.

Regarding the proposed changes for 125.2(b)(2). A notification timeframe of no later than 30 days prior to the issuance of a solicitation is too late in the process to adequately influence an acquisition without adversely affecting unit readiness or support for soldiers. We recommend changing the language to require an official notification of the Small Business Specialist (SBS) at the same time the agency contracting office is notified of the requirement. In this way the SBS can participate in the marketing and planning effort to identify small business sources or perhaps allow the industry itself to assist in providing a small business solution through teaming. It would also serve to hold the requiring activity more accountable for proposed acquisition strategies.

Regarding the thresholds, $7 million is high for orders under GWACs and IDIQ contracts, recommend a lower threshold somewhere between $1-2 million for individual orders.

The proposed regulations do not address acquisition planning under A-76. This is an area that will adversely impact small businesses, particularly as it pertains to military installations where we are looking contracting out for the operations of a whole military base. The coverage should apply to A-76 reviews as well.

I thank you for your consideration of these comments.

Sincerely,

Tracey L. Pinson
Director

2002-029-39

General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW
Room #4035
Washington, DC 20405

Dear Mrs. Duarte:

Subject: Comments on Proposed Federal Acquisition Regulation (FAR) Rule (FAR Case 2002-29)

Thank you for this opportunity to review and provide comments on SBA's proposed rule on Small Business Government Contracting Programs as published in the January 31, 2003 issue of the Federal Register.

DOE generally supports the objectives of incoming small business partnerships in government contracting by minimizing and mitigating any adverse consequences of contract bundling. DOE, as a matter of internal policy, already 1) directs the program and contracting components to consolidate contract requirements with small businesses when consolidation otherwise makes good sense; 2) requires review of all procurement actions that could result in "bundling" regardless of the method of acquisition {to include task orders under Federal Supply Schedules (FSS), Government-wide acquisition contracts (GWACs), etc.}; and 3) directs contracting officers to target small businesses when ordering under multiple award contracts (MACs), including limiting schedule competitions to three or more small businesses.

Notwithstanding the foregoing, DOE objects to one element of the proposed changes to FAR 42.1502, which would require agencies to assess contractor "compliance with the goals identified in the small business subcontract plan." This language appears to require the agency to perform an assessment of compliance which is inconsistent with the performance standard established by the clause contained at FAR 52.219-9. Paragraph (i) of this clause establishes the standard of "failure to comply in good faith" with an approved subcontracting plan. We note that the companion proposed rule issued by SBA at 13 CFR 125.2 (b)(6)(C) which is language different than that proposed for the FAR in this regard.

If you have any additional questions, please contact Mr. Stephen Zvolensky in the Office of Procurement and Assistance Policy at (202) 586-5936.

Robert M. Webb, Acting Director
Office of Procurement
and Assistance Policy

2002-029-40

Anteon corporation

March 28, 2003

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

Subject: Public Comments on FAR Case 2002-029, Proposed Rule "Contract Bundling"

Ms. Duarte,

Anteon Corporation appreciates the opportunity to comment on the proposed changes under the subject FAR Case.

In October 2002, OMB recommended a 9 step program via their report "Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business" to attempt to mitigate alleged negative effects of a practice called contract bundling on small businesses. The practice of contract bundling is defined as 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. It is proposed by this regulation to place the burden on buying activities to 1) abide by newly established review thresholds (individualized by DOD, DOE and other Federal agencies), and to have their respective Office of Small Disadvantaged Business Utilization (OSDBU) review bundled contracts of multiple award and related task and delivery orders, 2) require the contracting agency to provide justification to acquisition management for the associated acquisition strategy when bundling is appropriate, 3) strengthen compliance with the small business subcontracting plans developed and implemented by large businesses, and 4) encourage plans for small business JV's and similar teaming arrangements. Agency senior management will also be held to greater accountability and dissemination of best practices for large and small business teaming.

The basis for the report is that fewer small businesses are receiving federal contracts even though the report adds that "federal agencies state that they generally award nearly 23 percent of the total dollars spent on federal procurements each year to small business".

It is our position that the proposed regulatory changes are generally unsupported and will place a greater burden on a diminishing acquisition and OSDBU workforce who already have the tools to encourage the use of small businesses in both its prime and subcontract awards.

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2002-029-40

Over the past ten years the federal government has proposed and enacted several pieces of landmark acquisition legislation. These actions have encouraged streamlining of acquisition processes including the encouragement of contract bundling and greater use of GSA and multiple award GWAC type contracts. Associated regulatory changes have also encouraged acquisition managers to identify and enact processes and programs that will dramatically shorten the acquisition lead time, maintain a high level of competition, and accommodate the planned and enacted reductions of federal employees in all areas including the acquisition workforce and OSDBU offices. Creativity and innovation and the empowerment of each acquisition manager to do what they think is right is strongly encouraged. Great strides have been made. Program managers have more efficient tools at their disposal to acquire their goods and services more quickly and in a strong competitive environment.

The trend is continuing as the Federal Government continues to deal with their customer needs, with a smaller workforce in an efficient and streamlined manner. At this writing DOD has enacted a task force review to reduce the regulatory burden by 40 to 60 percent while allowing for reduced lead times and tailoring of the process to the needs to the customer (Federal Times March 10). Rep. Davis will be introducing the Services Acquisition Reform Act to ensure that the Government can quickly and efficiently purchase goods and services from the commercial marketplace.

During this time the federal government has also made it clear that it wants to continue the dramatic reduction of its workforce. The Bush administration established a goal of outsourcing a large portion of the 850,000 commercial federal jobs defined by the FY 2000 Federal Activities Inventory Reform Act. OMB quickly set a goal of outsourcing 425,000 federal jobs to competition. In furtherance of this effort, OMB has offered several dramatic changes to the current A-76 policy, which governs the competition of federal jobs between the public and private sector to allow for a more equitable and faster treatment of this process. These changes are currently being finalized and enactment is expected soon.

However, during this time the Government acquisition process is starting to retrench on many of these streamlining initiatives in the environment of a smaller workforce.

An example of this type of action was seen last fall when Section 803 of the 2002 National Defense Authorization Act was enacted that requires that DOD, when purchasing services under multiple award contracts including GSA schedules, obtain quotes from at least 3 vendors on all service actions over $100,000 and fairly consider all bids received. This creates a drag on fragile resources and contributes to an increase in the targeted procurement lead-time.

Another is this proposed subject action of adding significant oversight of acquiring services in a bundled environment, an environment that was partially designed to accommodate the growth of services acquisition and in direct recognition of fewer acquisition professionals to handle the greater workload.

The drive to reduce government jobs while continuing to heap significant acquisition changes on the remaining contracting and acquisition officials is straining the ability of the federal

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government to handle the acquisitions it has now within a reasonable period of time. To step backward and require additional significant oversight of these streamlining activities that have been encouraged over the past 10 years will have a significant negative effect on the acquisition of services. By 2005 approximately 71% of all federal service Senior Executive Service and 35% of all federal employees will be eligible for retirement. This has and will continue to have a negative effect on the acquisition and OSDBU workforce required to enact this new set of regulations.

We argue that the process already has the tools in hand to encourage the use of small businesses. There are legislated goals for the use of small businesses in the award of prime contracts to small businesses that are assigned to each of the federal agencies with associated annual report cards that are reported through OFPP, OMB and Congress. Moreover, the FAR subcontracting requirement for meeting legislated goals for large businesses to use small businesses in a subcontract role is empowered by a powerful liquidated damages clause. This already encourages and enables contracting officers to actively manage and guide large businesses in use of small business.

Further, the quantitative basis for the proposed changes is in question. Former OFPP Administrator, Dr Steven Kelman in a recent Federal Computer Week article (March 17,2003) stated that," except for an aberrant decline in fiscal 2000, percentages have been stable since 1992, just like the overall small business numbers. In 1992, small businesses received 60.4 percent of new contract actions and 29.7 percent of dollars- in 2001 the percentages were 60.5 and 33.1".

It is our position that the basis for proposed changes are questionable and that these new requirements will place a greater burden on a diminishing workforce who already have the tools to encourage the use of small businesses in both prime and subcontract awards. The current workforce is unable to handle the burden on resources and time that this policy will require. Procurement lead times will be increased and there is no evidence that these actions will increase the use of small businesses in a prime contract role for the federal government.

Again, we appreciate the opportunity to comment on these proposed changes and if you have any questions about this response please do not hesitate to contact me at 703-246-0712.

Sincerely,

William L. Gunst

William L. Gunst
Vice President,
Contracts and Administration

2002-029-41

Department of Transportation - Comments
FAR Case 02-029 – Contract Bundling Proposed Rule

General Comment: Although a change to 7.104(a) was not included in the proposed rule, we believe that the small business specialist (SBS) must be named as a team member to ensure early involvement of the acquisition planning. Early involvement in the acquisition process and dialogue with other acquisition team members, will alleviate any question as to the SBS' ability to make sound judgments when determining if a requirement is unjustified or unnecessarily bundled etc., as required at 7.104(d)(1).

1. **7.104 General procedures.**

   a. The information in paragraphs (d)(1) and (d)(2) should be reversed. Paragraph (d)(1) requires the planner to coordinate the acquisition plan or strategy with the cognizant SBS who will notify the OSDBU when the contemplated award amount meets the dollar thresholds in 7.104(d)(2) ….. Paragraph (d)(2) then provides the dollar thresholds.

      It is recommended that the coverage first inform the planner to coordinate the acquisition plan or strategy with the SBS if the contemplated award is within the stated dollar thresholds then require the SBS to notify the OSDBU as required.

   b. This coverage appears to say that the OSDBU is only notified when a decision has been made by the SBS that a bundled contract is unjustified, etc. Accordingly, if the SBS determined a bundled contract is justified, would notification to the OSDBU be required? We believe it is the intent of the proposed change that the OSDBU would see all proposed bundled contracts or orders over the $2 million dollar threshold.

   c. It is recommended that the coverage explain the expected actions or authority of the OSDBU when notified that a strategy involving bundling is unnecessary, unjustified or not identified as bundled. We believe that the language in the SBA proposed rule at 125.2(b)(8), requiring the PCR to work with the cognizant SBS and agency OSDBU to revise the acquisition strategy… should be mirrored in the FAR language.

2. **7.105 Contents of written acquisition plans.** It is recommended that FAR 7.105 be changed to require that any requirement that was previously procured be identified and an explanation given if it was satisfied by a separate smaller contract or order and is now planned for consolidation into one contract or order.

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This type of information will assist the SBS in identifying a planned bundled contract.

3. **7.107 Additional requirements for acquisitions involving bundling.** Paragraph (e)(6) requires the acquisition plan to identify alternative strategies to reduce or minimize the scope of bundling and the rationale for not choosing those alternatives. This requirement appears to contradict itself. If someone has identified strategies for minimizing or reducing bundling, why would they not use them?

4. **19.201 General policy.** Paragraph (d)(11) required periodic reviews of an agency's performance in various small business-related areas. What is the timeframe for conducting the periodic reviews?

2002-029-42

TO: LAURIE DUARTE
OFFICE OF ACQUISITION POLICY
FAR SECRETARIAT (MVA)

FROM: ROGER WALDRON
DIRECTOR
ACQUISITION MANAGEMENT CENTER (FCO)

SUBJECT: Federal Acquisition Regulation Case 2002-029,
Contract Bundling

Thank you for the opportunity to submit comments on the subject FAR Case.

We do not take exception to the proposed GSA threshold of $5 million, above which acquisition plans for contracts and orders must be internally coordinated to ensure that contract bundling is minimized and that small businesses have a fair opportunity to compete for Federal contracts and orders. Our additional comments on the subject FAR case are as follows:

1. The proposed FAR language is somewhat confusing and leaves open to question whether the contract bundling review that is required is applicable at the contract level for contracts awarded under the Multiple Award Schedule (MAS) Program. However, to the extent that it is applicable, the proposed FAR revision fails to take into account the unique model under which Schedule contracts are awarded. Under the Schedules program, the award of contracts mirrors what exists in the commercial marketplace. Furthermore, the program allows companies the choice of which services and products to market to the Federal Government and it provides Federal agencies with a convenient, efficient, and flexible ordering tool to satisfy their needs, at prices that compare very favorably to those available to a contractor's best commercial customers. All contractors are able to market their unique product lines and/or services under the MAS program, because the structure of the program and the broad SIN descriptions for Schedule products and services do not limit their ability to compete for Federal customer orders. All of these factors contribute to increased opportunities for participating small businesses to be an effective and competitive force in the MAS program.

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Because the structure of the MAS program allows contractors to choose the depth and breadth of their offering and the opportunity to be awarded an MAS contract is open to all, contract bundling is not an issue that affects the MAS contract award process. Therefore, to require that MAS contracts be subject to internal contract bundling reviews does not make good business sense, in our opinion.

The success of the MAS program and its importance to both Federal customers and contractors is supported by the following statistics. In fiscal year 2002, the MAS program contained approximately 10,000 individual contracts, with 78% of these contracts awarded to small businesses. Sales in the program have grown from $13.6 billion in 2000, to $16.7 billion in 2001, to $21.2 billion in 2002 and the percentage of sales going to small business has also risen from 33.6% in 2001 to 34.2% in 2002. These statistics demonstrate conclusively that the program benefits both the commercial marketplace and Federal agencies, who continue to utilize the Schedules program to fill their needs in ever-increasing numbers.

2. We object to the proposed language at FAR 2.101 and FAR 8.404(a)(2)(ii). FAR 2.101 modifies the definition of a single contract subject to a bundling review to include an order placed against a Federal Supply Schedule contract. FAR 8.404(a)(2)(ii) states that all orders placed under a Federal Supply Schedule contract must comply with all FAR requirements for a bundled contract, when the order meets the definition of "bundled contract" at FAR 2.101(b).

Taken together, it is our view that these two proposed changes to the FAR would require that any order placed against a Federal Supply Schedule contract be initially scrutinized to determine if bundling is an issue, before the order can be placed. This will place a tremendous burden on contracting officers, who would be required to review numerous, individual Federal Supply Schedule orders, regardless of the dollar value.

3. As an alternative to the above, we recommend a change to the proposed FAR language at 8.404(a)(2)(ii) that would establish a threshold of $100,000, above which all Federal Supply Schedule orders would be subject to internal review to ensure compliance with the FAR requirements for bundled contracts.

4. The Multiple Award Schedule program is a prime vehicle that agencies can use to either minimize or avoid the use of contract bundling to fill agency needs for services and supplies. The MAS program provides vendors with opportunities to market their goods and services to Federal customers under full and open competition procedures. Through the use of Schedule contracts, Federal agencies can reduce the administrative costs usually associated with soliciting and awarding on the open market, while allowing customers to select from a multitude of small businesses who offer a wide variety of services and products that meet their needs. The ease of ordering from Schedule contracts reduces

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the likelihood that agencies will bundle individual orders to the exclusion of small businesses.

Any proposed change to the FAR that places additional administrative burdens on Federal agencies may result in their decreased reliance on the Schedules program to fill their needs. This, in turn, would have a direct and negative impact on the many small businesses that benefit from the significant revenue generated from the receipt of Federal agency orders under the Schedules program.

5. Finally, the MAS program has been and continues to be a significant tool to maximize opportunities for small businesses to compete for Federal contracts. As noted above, approximately 78% of MAS contracts are currently awarded to small businesses, representing approximately 34% of contract sales. In fiscal year 2002, sales in all small business categories increased 31% over small business sales in fiscal year 2001. Significant percentages of sales were achieved by small disadvantaged businesses (9.7%), small women-owned businesses (4.6%) and other small businesses (21.5%).

We anticipate continued success for the MAS program as a prime vehicle by which Federal agencies can effectively increase the contract dollars awarded to small businesses and avoid the use of contract bundling.

GSA

GSA Office of Governmentwide Policy

APR 17 2003

MEMORANDUM FOR RONALD POUSSARD
DIRECTOR
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: RODNEY P. LANTIER, DIRECTOR
REGULATORY AND FEDERAL ASSISTANCE
PUBLICATIONS DIVISION

SUBJECT: FAR Case 2002-029, Contract Bundling

Attached are additional comments received on the subject FAR case published at 68 FR 5138; January 31, 2003.

Response Number	Date Received	Comment Date	Commenter
2002-029-42	04/14/03	04/01/03	Roger Waldron (FCO)
2002-029-43	04/17/03	03/28/03	WIPP

Attachments

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
www.gsa.gov

2002-029-42

GSA

GSA Federal Supply Service

APR 1 2003

TO: LAURIE DUARTE
OFFICE OF ACQUISITION POLICY
FAR SECRETARIAT (MVA)

FROM: ROGER WALDRON
DIRECTOR
ACQUISITION MANAGEMENT CENTER (FCO)

SUBJECT: Federal Acquisition Regulation Case 2002-029,
Contract Bundling

Thank you for the opportunity to submit comments on the subject FAR Case.

We do not take exception to the proposed GSA threshold of $5 million, above which acquisition plans for contracts and orders must be internally coordinated to ensure that contract bundling is minimized and that small businesses have a fair opportunity to compete for Federal contracts and orders. Our additional comments on the subject FAR case are as follows:

1. The proposed FAR language is somewhat confusing and leaves open to question whether the contract bundling review that is required is applicable at the contract level for contracts awarded under the Multiple Award Schedule (MAS) Program. However, to the extent that it is applicable, the proposed FAR revision fails to take into account the unique model under which Schedule contracts are awarded. Under the Schedules program, the award of contracts mirrors what exists in the commercial marketplace. Furthermore, the program allows companies the choice of which services and products to market to the Federal Government and it provides Federal agencies with a convenient, efficient, and flexible ordering tool to satisfy their needs, at prices that compare very favorably to those available to a contractor's best commercial customers. All contractors are able to market their unique product lines and/or services under the MAS program, because the structure of the program and the broad SIN descriptions for Schedule products and services do not limit their ability to compete for Federal customer orders. All of these factors contribute to increased opportunities for participating small businesses to be an effective and competitive force in the MAS program.

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2002-039-42

Because the structure of the MAS program allows contractors to choose the depth and breadth of their offering and the opportunity to be awarded an MAS contract is open to all, contract bundling is not an issue that affects the MAS contract award process. Therefore, to require that MAS contracts be subject to internal contract bundling reviews does not make good business sense, in our opinion.

The success of the MAS program and its importance to both Federal customers and contractors is supported by the following statistics. In fiscal year 2002, the MAS program contained approximately 10,000 individual contracts, with 78% of these contracts awarded to small businesses. Sales in the program have grown from $13.6 billion in 2000, to $16.7 billion in 2001, to $21.2 billion in 2002 and the percentage of sales going to small business has also risen from 33.6% in 2001 to 34.2% in 2002. These statistics demonstrate conclusively that the program benefits both the commercial marketplace and Federal agencies, who continue to utilize the Schedules program to fill their needs in ever-increasing numbers.

2. We object to the proposed language at FAR 2.101 and FAR 8.404(a)(2)(ii). FAR 2.101 modifies the definition of a single contract subject to a bundling review to include an order placed against a Federal Supply Schedule contract. FAR 8.404(a)(2)(ii) states that all orders placed under a Federal Supply Schedule contract must comply with all FAR requirements for a bundled contract, when the order meets the definition of "bundled contract" at FAR 2.101(b).

Taken together, it is our view that these two proposed changes to the FAR would require that any order placed against a Federal Supply Schedule contract be initially scrutinized to determine if bundling is an issue, before the order can be placed. This will place a tremendous burden on contracting officers, who would be required to review numerous, individual Federal Supply Schedule orders, regardless of the dollar value.

3. As an alternative to the above, we recommend a change to the proposed FAR language at 8.404(a)(2)(ii) that would establish a threshold of $100,000, above which all Federal Supply Schedule orders would be subject to internal review to ensure compliance with the FAR requirements for bundled contracts.

4. The Multiple Award Schedule program is a prime vehicle that agencies can use to either minimize or avoid the use of contract bundling to fill agency needs for services and supplies. The MAS program provides vendors with opportunities to market their goods and services to Federal customers under full and open competition procedures. Through the use of Schedule contracts, Federal agencies can reduce the administrative costs usually associated with soliciting and awarding on the open market, while allowing customers to select from a multitude of small businesses who offer a wide variety of services and products that meet their needs. The ease of ordering from Schedule contracts reduces the likelihood that agencies will bundle individual orders to the exclusion of small businesses.

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Any proposed change to the FAR that places additional administrative burdens on Federal agencies may result in their decreased reliance on the Schedules program to fill their needs. This, in turn, would have a direct and negative impact on the many small businesses that benefit from the significant revenue generated from the receipt of Federal agency orders under the Schedules program.

5. Finally, the MAS program has been and continues to be a significant tool to maximize opportunities for small businesses to compete for Federal contracts. As noted above, approximately 78% of MAS contracts are currently awarded to small businesses, representing approximately 34% of contract sales. In fiscal year 2002, sales in all small business categories increased 31% over small business sales in fiscal year 2001. Significant percentages of sales were achieved by small disadvantaged businesses (9.7%), small women-owned businesses (4.6%) and other small businesses (21.5%).

We anticipate continued success for the MAS program as a prime vehicle by which Federal agencies can effectively increase the contract dollars awarded to small businesses and avoid the use of contract bundling.

2002-029-43

WIPP
WOMEN IMPACTING PUBLIC POLICY

TERRY NEESE
PRESIDENT
BARBARA KASOFF
VICE PRESIDENT

March 28, 2003

General Services Administration
Regulatory Secretariat (MVA)
1800 F Street, NW
Room 4035
Attn: Ms. Laurie Duarte
Washington, DC 20405

Ms. Linda G. Williams
Associate Administrator for Government Contracting
U.S. Small Business Administration
409 Third Street, S.W.
Mail Code 6530
Washington, DC 20416

Re: FAR Case No. 2002-029: Federal Acquisition Regulation; Contract Bundling (68 Fed. Reg. No. 21, p. 5138 (January 31, 2003).)
- and -
Small Business Government Contracting Programs (68 Fed. Reg. No. 21, p. 5134 (January 31, 2003).)

Dear Ms. Duarte and Ms. Williams:

On behalf of Women Impacting Public Policy ("WIPP"), I am submitting comments on the above-referenced matter. WIPP represents over 430,000 women and minorities in business nationwide and employ over 27.5 million workers. Our members have identified that federal contracting as a top priority, as 94% of respondents to recent survey of members are ready and capable to bid on Federal contracts. Strikingly, the survey also revealed nearly a 95% gap between actual Federal government contracts awarded to women-owned businesses and those businesses willing to bid in the procurement arena. WIPP believes that confronting the escalating problem of contract bundling is one of the many necessary reforms if the Federal Government hopes to diminish this disparity.

WIPP appreciates the spirit of reform and the vision behind the October 2002 Office of Management and Budget ("OMB") report, "Contract Bundling – A Strategy for Increasing Federal Contracting Opportunities for Small Business" ("OMB Report"). However, WIPP believes that the proposed regulations to implement those recommendations can be strengthened. Consequently, we propose the following changes.

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WWW.WIPP.ORG E-MAIL ADDRESSES: TNEESE@WIPP.ORG BKASOFF@WIPP.ORG

1. OMB Item #3: Definition of Contract Bundling

The OMB report recommended that the definition of "contract bundling" be modified as follows:

> "3. Require contract bundling reviews for task and delivery orders under multiple award contract vehicles.
>
> The definition of contract bundling in the FAR and SBA regulations will be clarified to require contract bundling reviews by the agency OSDBU for task and delivery orders under multiple award contract vehicles. Because contract bundling reviews are not specifically required by the FAR or SBA regulations for agency multiple award contracts (MACs), multi-agency contracts, Government-Wide Acquisition Contracts (GWACs), or GSA's Multiple Award Schedule Program, these contracts and the orders placed under these contracts effectively escape review. Recent and significant increases in this type of contracting make contract bundling review essential. Proposed regulatory changes will be prepared by January 31, 2003."

This change would have encompassed task and delivery orders issued under multiple award contracts, while the proposed regulatory change limits the definition to the "indefinite quantity contract awarded to two or more sources under a single solicitation for the same or similar supplies and services" and "[a]n 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., Government-wide acquisition contract or multi-agency contract)."

WIPP supports regulatory changes to expressly require bundling reviews of multiple awards contracts, multi-agency contracts, Government-wide acquisition contracts, and the General Services Administration Multiple Award Schedule Program. However, WIPP does not understand why the proposed definition distinguishes between orders placed against one agency's multiple award contracts versus another agency's multiple award contracts. Conceivably, a contractor could have an award under both the agency's own multiple award contract and another agency's multiple award contract, with only minor differences in terms between the two contracts. Yet the same agency awarding to the same type of work to the same contractor would only trigger review in one circumstance.

2. OMB Item #4: OSDBU Reviews Above Thresholds

The OMB report recommended that the agency OSDBUs review all proposed acquisitions above agency-specific dollar thresholds, which would be based upon an agency's volume of contracts. However, WIPP is concerned that the proposed change to the FAR does not actually create any measurable or enforceable obligations on the agencies. In keeping with the spirit of the OMB report, WIPP recommends that the regulations require:

2002-029-43

(1) each agency be required to prepare and submit a proposed acquisition plan to the small business specialist/OSDBU;

(2) the small business specialist/OSDBU be given between thirty days to ninety days, depending on the complexity of the procurement, to complete its bundling review; and

(3) each agency only be permitted to finalize an acquisition plan after the bundling review is complete;

Reflecting the breadth of our membership, WIPP members have diverse opinions on proposed dollar thresholds included as part of Item #4. The proposed rule would create a $7 million threshold for the Department of Defense, a $5 million threshold for three other agencies, and a $2 million threshold for all other agencies.

Some members approve of the three tiers, but believe the thresholds should be increased to a $14 million threshold for the Department of Defense, a $10 million threshold for the National Aeronautics and Space Administration, the Department of Energy and GSA and a $5 million threshold for all other agencies. They believe these thresholds are more closely in line with current SBA guidelines and NAICS classifications. Additionally, these members have expressed concerns that if the thresholds are too low, it will only allow or encourage acquisition strategy for very small acquisition opportunities and further drain the limited resources of the Procurement Center Representatives (PCRs) , SBSs, and OSDBUs while diluting the SBA's mission to provide credible opportunity for small businesses.

Other WIPP members believe that only two agency-specific thresholds are required, and suggest that the thresholds be $3 million for civilian's agencies and $7 million for the Department of Defense. The $3 million threshold is the same threshold as that for non-competitive 8 (a) requirements and, as such, should automatically be reviewed by the Small Business Program Manager. WIPP emphasizes that adequate resources need to be allocated for PCR review of all actions, not only set-asides, and that if PCR review is not practicable a secondary review should be performed by the agency OSDBU prior to releasing the requirement. While some agencies already practice this, this policy should be replicated government-wide.

The third view held by WIPP members is that the multiple threshold system unduly complicates the regulations and is based upon two faulty premises. First, the underlying purpose for the existence of the SBA and small business programs is to ensure a diverse supplier base. Congress first recognized this need during World War II, when it realized that small businesses were essential to the war effort. Since that time, many of the technologies that support our Armed Services have been developed by small businesses. Therefore, sustaining the presence of small business at the Department of Defense should be equally, if not more, important than it is at civilian agencies. Secondly, it took Congress until 1997 to decide upon a definition of contract bundling, and Congress did not differentiate by agency. Creating a system where the same practice at different agencies will incur different consequences for contractors and contracting officers sends the wrong message to the procurement community – it teaches

2002-029-43

them to creatively structure deals and contract outside of their own agencies if it will permit contract bundling.

3. OMB Item #5: Alternative Acquisition Strategies Involving Less Bundling

WIPP supports utilizing a written justification to substantiate the absence of alternative strategies for less bundling of contracts above the specified thresholds.

4. OMB Item #6: Strengthening Compliance With Subcontracting Plans

WIPP fully supports the Administration's effort to strengthening compliance with small business subcontracting plans and welcomes the addition of an assessment requirement in small business subcontracting plans. WIPP would also like to suggest that the SBA Procurement Center Representative (PCR) and the Commercial Marketing Representative be required to share information to develop the assessment of the contractor compliance with its small business subcontracting plan. We also recommend that SBA establish the practice of submitting its findings to the responsible Contracting Officer for corrective action as called for in GAO Report 02-166R.

Further, WIPP believes that to effectively implement the proposed rule, FAR 15.304(c)(3)(iii) should be modified to require the evaluation of subcontracting goal compliance, not just in bundled procurements, but, per OMB's direction, in all procurements. This change would simplify the regulatory scheme, making it easy for contracting officers to understand. Changing FAR 15.304 would be a straightforward implementation of OMB's statement that the FAR be amended to make subcontracting plan compliance "an evaluation factor."

5. OMB Item #7: Facilitating the Development of Small Business Teams and Joint Ventures.

In theory, WIPP supports the concept of small businesses teaming to secure larger contracts. In reality, WIPP feels that the development, training and facilitation of the teaming concept can best be handled by the private sector. It would make sense if small business created these joint ventures/teaming arrangements with government assistance but based on market driven strategies to develop the competitiveness of small firms in non-traditional areas of weakness. WIPP would welcome the opportunity to assist in the creation of these teaming arrangements.

5. Technical Amendments

WIPP appreciates that the technical modification made to § 125.2(d)(5)(i) clarified that bundled contracts exceeding $75 million required savings in excess of $7.5 million, not in excess of $3.75 million as could have previously been argued. However, WIPP believes that the 10% benefit should continue to apply once the contract exceeds $75 million. The principle of contract bundling is that the contractor and government will save dollars due to economies of scale. It does not make sense that as the scale continues to increase, we demand smaller savings rather than greater values. Further,

2002-029-43

neither the authorizing statute nor Committee language reflect Congress' intent to authorize a two tier system for calculating benefits.

Due to the extent of additional changes to the proposed regulation that we consider warranted, we recommend that the changes be implemented as part of an interim rule in order to allow the public the opportunity to comment further.

WIPP appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Terry Neese
President & CEO
Women Impacting Public Policy

CC:
Mitch Daniels, Director, Office of Management and Budget
Angela Styles, Administrator, Office of OFPP
Senator Olympia Snowe
Senator John Kerry
Congressman Don Manzullo
Congresswoman Nydia Valezquez

2002-029-42

GSA

GSA Federal Supply Service

APR 1 2003

TO: LAURIE DUARTE
OFFICE OF ACQUISITION POLICY
FAR SECRETARIAT (MVA)

FROM: ROGER WALDRON
DIRECTOR
ACQUISITION MANAGEMENT CENTER (FCO)

SUBJECT: Federal Acquisition Regulation Case 2002-029, Contract Bundling

Thank you for the opportunity to submit comments on the subject FAR Case.

We do not take exception to the proposed GSA threshold of $5 million, above which acquisition plans for contracts and orders must be internally coordinated to ensure that contract bundling is minimized and that small businesses have a fair opportunity to compete for Federal contracts and orders. Our additional comments on the subject FAR case are as follows:

1. The proposed FAR language is somewhat confusing and leaves open to question whether the contract bundling review that is required is applicable at the contract level for contracts awarded under the Multiple Award Schedule (MAS) Program. However, to the extent that it is applicable, the proposed FAR revision fails to take into account the unique model under which Schedule contracts are awarded. Under the Schedules program, the award of contracts mirrors what exists in the commercial marketplace. Furthermore, the program allows companies the choice of which services and products to market to the Federal Government and it provides Federal agencies with a convenient, efficient, and flexible ordering tool to satisfy their needs, at prices that compare very favorably to those available to a contractor's best commercial customers. All contractors are able to market their unique product lines and/or services under the MAS program, because the structure of the program and the broad SIN descriptions for Schedule products and services do not limit their ability to compete for Federal customer orders. All of these factors contribute to increased opportunities for participating small businesses to be an effective and competitive force in the MAS program.

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2002-039-42

Because the structure of the MAS program allows contractors to choose the depth and breadth of their offering and the opportunity to be awarded an MAS contract is open to all, contract bundling is not an issue that affects the MAS contract award process. Therefore, to require that MAS contracts be subject to internal contract bundling reviews does not make good business sense, in our opinion.

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Taken together, it is our view that these two proposed changes to the FAR would require that any order placed against a Federal Supply Schedule contract be initially scrutinized to determine if bundling is an issue, before the order can be placed. This will place a tremendous burden on contracting officers, who would be required to review numerous, individual Federal Supply Schedule orders, regardless of the dollar value.

3. As an alternative to the above, we recommend a change to the proposed FAR language at 8.404(a)(2)(ii) that would establish a threshold of $100,000, above which all Federal Supply Schedule orders would be subject to internal review to ensure compliance with the FAR requirements for bundled contracts.

4. The Multiple Award Schedule program is a prime vehicle that agencies can use to either minimize or avoid the use of contract bundling to fill agency needs for services and supplies. The MAS program provides vendors with opportunities to market their goods and services to Federal customers under full and open competition procedures. Through the use of Schedule contracts, Federal agencies can reduce the administrative costs usually associated with soliciting and awarding on the open market, while allowing customers to select from a multitude of small businesses who offer a wide variety of services and products that meet their needs. The ease of ordering from Schedule contracts reduces the likelihood that agencies will bundle individual orders to the exclusion of small businesses.

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2002-029-43

TERRY NEESE
PRESIDENT
BARBARA KASOFF
VICE PRESIDENT

March 28, 2003

General Services Administration
Regulatory Secretariat (MVA)
1800 F Street, NW
Room 4035
Attn: Ms. Laurie Duarte
Washington, DC 20405

Ms. Linda G. Williams
Associate Administrator for Government Contracting
U.S. Small Business Administration
409 Third Street, S.W.
Mail Code 6530
Washington, DC 20416

Re: FAR Case No. 2002-029: Federal Acquisition Regulation; Contract Bundling (68 Fed. Reg. No. 21, p. 5138 (January 31, 2003).)
- and -
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2002029-43

1. OMB Item #3: Definition of Contract Bundling

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2002-029-43

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2002-029-43

them to creatively structure deals and contract outside of their own agencies if it will permit contract bundling.

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5. Technical Amendments

WIPP appreciates that the technical modification made to § 125.2(d)(5)(i) clarified that bundled contracts exceeding $75 million required savings in excess of $7.5 million, not in excess of $3.75 million as could have previously been argued. However, WIPP believes that the 10% benefit should continue to apply once the contract exceeds $75 million. The principle of contract bundling is that the contractor and government will save dollars due to economies of scale. It does not make sense that as the scale continues to increase, we demand smaller savings rather than greater values. Further,

2002-029-43

neither the authorizing statute nor Committee language reflect Congress' intent to authorize a two tier system for calculating benefits.

Due to the extent of additional changes to the proposed regulation that we consider warranted, we recommend that the changes be implemented as part of an interim rule in order to allow the public the opportunity to comment further.

WIPP appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Terry Neese
President & CEO
Women Impacting Public Policy

CC:
Mitch Daniels, Director, Office of Management and Budget
Angela Styles, Administrator, Office of OFPP
Senator Olympia Snowe
Senator John Kerry
Congressman Don Manzullo
Congresswoman Nydia Valezquez