



**DEPARTMENT OF THE NAVY  
SMALL AND DISADVANTAGED BUSINESS UTILIZATION  
WASHINGTON NAVY YARD  
720 KENNON STREET, SE  
WASHINGTON, DC 20374-5015**

July 6, 2000

**MEMORANDUM FOR COMMANDER, NAVAL AIR SYSTEMS COMMAND  
COMMANDER, NAVAL FACILITIES ENGINEERING COMMAND  
COMMANDER, NAVAL SEA SYSTEMS COMMAND  
COMMANDER, NAVAL SUPPLY SYSTEMS COMMAND  
COMMANDER, SPACE AND NAVAL WARFARE SYSTEMS  
COMMAND  
COMMANDER, MARINE CORPS SYSTEMS COMMAND  
COMMANDANT, HEADQUARTERS, U.S. MARINE CORPS  
COMMANDER, MILITARY SEALIFT COMMAND  
CHIEF OF NAVAL RESEARCH  
COMMANDER, STRATEGIC SYSTEMS PROGRAMS**

**Subj: REVIEW OF SMALL BUSINESS PARTICIPATION IN BUNDLING  
CONTRACT REQUIREMENTS**

**Ref: (a) DEPSECDEF Memo of 28 Oct 1996, Consolidation of Contract Requirements  
(b) ASN (RDA) Memo of 18 Feb 1994, Consolidation of Contract Requirement  
(c) SBA's Interim Rule of 27 Dec 1999, Contract Bundling**

**Encl: (1) USD Memo of 7 Jun 2000, Review of Small Business Participation in Bundled  
Contract Requirements**

References (a) and (b) emphasize the need to consider the impact of requirements consolidations on the small business community and outlines necessary steps to be taken to maintain the Navy's commitment to foster small business participation in our acquisition program.

The Small Business Reauthorization Act of 1997 (P.L. 105-135) restated the Small Business Administration's (SBA's) authority to appeal procuring agency decisions that adversely affect small businesses. Reference (c), published in the *Federal Register* on 25 October 1999 with an effective date of 27 December 1999, reemphasizes the need for consideration of small business participation in acquisition planning. The interim rule also establishes detailed procedures involving bundled requirements.

Concerned with increased contract consolidations and continuing congressional interest with contract bundling, enclosure (1) was issued. The DOD Office of Small and Disadvantaged Business Utilization is working with the Director of Defense Procurement to establish necessary policy and procedures to comply with enclosure (1). In the meantime, it is recommended that acquisition activities ensure that small business specialists are involved in all acquisition planning; especially those acquisitions involving contract consolidations or contract bundling.

**Subj: REVIEW OF SMALL BUSINESS PARTICIPATION IN BUNDLING  
CONTRACT REQUIREMENTS**

Questions may be directed to Mr. Glenn Delgado of this office at (202) 685-6485.

**NANCY TARRANT**  
Director

Copy to:

**NAVAIRSYSCOM (Code AIR-09C/2.0C)**  
**NAVFACENCOM (Linda Wright)**  
**COMNAVSEASYSYSCOM (Code SEA-00K)**  
**COMNAVSUPSYSCOM (Mark Opilla)**  
**COMSPAWARSYSYSCOM Code SPAWAR 00K)**  
**HQ USMC (Code L-2)**  
**COMMARCORPSSYSYSCOM (Code SBS)**  
**ONR (Code OOSB)**  
**SSPO (Code SP-01G1)**



ACQUISITION AND  
TECHNOLOGY

**THE UNDER SECRETARY OF DEFENSE**

**3010 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3010**

**JUN 7 2000**

**MEMORANDUM FOR SECRETARY OF THE ARMY  
SECRETARY OF THE NAVY  
SECRETARY OF THE AIR FORCE  
DIRECTOR, DEFENSE LOGISTICS AGENCY  
DEPUTY UNDER SECRETARY OF DEFENSE,  
INSTALLATIONS  
DEPUTY UNDER SECRETARY OF DEFENSE,  
ACQUISITION REFORM  
DEPUTY UNDER SECRETARY OF DEFENSE,  
INDUSTRIAL AFFAIRS  
DIRECTOR, SMALL AND DISADVANTAGED  
BUSINESS UTILIZATION  
DIRECTOR, ACQUISITION RESOURCES AND  
ANALYSIS  
DIRECTOR, DEFENSE PROCUREMENT**

**SUBJECT: Review of Small Business Participation in Bundled Contract Requirements**

Bundling of contract requirements may, in some instances, provide substantial benefits to the Department of Defense. However, the potential impact of bundling on small business participation in our acquisitions and the possible deleterious long term effects on the Defense Industrial Base require special emphasis on ensuring that small businesses are provided the maximum practicable opportunity to participate in bundled contracts at both the prime and subcontract levels. Accordingly, the Director of the Office of Small and Disadvantaged Business Utilization (OSADBU) is directed to brief me periodically on the impact of bundling contract requirements on small business participation in our acquisitions.

Effective immediately, thirty days prior to the release of any solicitation or draft solicitation involving bundled contract requirements as defined by the Federal Acquisition Regulation, the following documents will be provided to the OUSD (A,T&L), OSADBU for review:

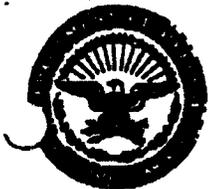
- a. acquisition strategy/ acquisition plan,
- b. bundling justification,
- c. solicitation (draft or actual).

The Director, OSADBU will provide the mailing address and other information necessary to forward documents for review.

Your support of this effort is appreciated.

**Dave Oliver**



**DEPARTMENT OF THE NAVY**

NAVAL FACILITIES ENGINEERING COMMAND

200 STOVALL STREET

ALEXANDRIA, VA 22302-2200

4380

Ser 111C/94-111-49

MAR 29 1994

**From:** Commander, Naval Facilities Engineering Command

**Subj:** CONSOLIDATION OF CONTRACT REQUIREMENTS (11-94)

**Encl:** (1) ASN (RD&A) ltr of 19 Feb 94

1. Enclosure (1) recognizes that, against the background of decreasing resources, consolidations will be considered as a method for improving management of our procurement needs. Particular concern must be shown to those consolidations which eliminate or threaten to eliminate previously unconsolidated contract requirements in which small and small disadvantaged businesses participated. Two typical situations come to mind: first, where a consolidation significantly expands the scope of work of the basic contract; and, second, where contracting is done in broad functional terms which go beyond the individual disciplines of small firms. In either case, the likely result is a reduction in contract awards to small and small disadvantaged businesses.

2. FAR 19.202-1 provides guidance to the contracting officer concerning certain actions which will encourage small business participation in acquisition. Consistent with this guidance, the guiding principle for the contracting officer is to avoid, where possible, the consolidation of requirements previously acquired under small or small disadvantaged business preference programs. If circumstances still point to consolidation, we should still keep the procurement in a preference program. Further, the program manager or technical requirements representative must provide written justification for the consolidation to the contracting officer. If it is determined that the procurement is not suitable for a preference program, the consolidation must be approved by the HCA prior to release of the solicitation.

GARY L. GARRISON  
By direction

[Federal Register: July 26, 2000 (Volume 65, Number 144)]  
[Rules and **Regulations**]  
[Page 45831-45835]  
From the Federal Register Online via GPO Access [wais.access.gpo.gov]  
[DOCID:fr26jy00-1]

---

---

Rules and **Regulations**

Federal Register

---

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal **Regulations**, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal **Regulations** is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

---

---

[[Page 45831]]

**SMALL BUSINESS ADMINISTRATION**

13 CFR Parts 121 and 125

Government Contracting Programs

AGENCY: **Small Business** Administration.

ACTION: Final rule.

---

SUMMARY: The **Small Business** Administration (SBA) is finalizing its **regulations** to address contract bundling due to changes set forth in the **Small Business** Reauthorization Act of 1997. This rule implements the statutory amendments that recognize that the consolidation of contract requirements may be necessary and justified, in some cases. It also implements the statutory requirement that each Federal agency, to the maximum extent practicable, take steps to avoid unnecessary and unjustified bundling of contract requirements that precludes **small business** participation as prime contractors as well as to eliminate obstacles to **small business** participation as prime contractors. In addition, this rule restates SBA's current authority to appeal to the head of a procuring agency decisions made by the agency that SBA believes to adversely affect **small businesses**.

DATES: This rule is effective July 26, 2000.

FOR FURTHER INFORMATION CONTACT: Anthony Robinson, Office of Government Contracting, (202) 205-6465.

SUPPLEMENTARY INFORMATION: Section 15(a) of the **Small Business Act**, 15 U.S.C. 644(a), authorizes SBA to appeal to the head of a procuring agency certain decisions made by the agency that SBA believes adversely affects **small businesses**, including proposed procurements that include ``goods or services currently being performed by a **small business**'' and which are in a ``quantity or estimated dollar value the magnitude of which renders **small business** prime contract participation unlikely.'' Section 413(b) (1) of Public Law 105-135 added an appeal right to section 15(a) of the **Small Business Act** for ``an unnecessary or unjustified bundling of contract requirements.'' It left intact, however, SBA's current appeal rights. In this regard, the Joint Explanatory Statement of the bundling provisions contained in Public Law 105-135 as set forth in the Congressional Record specifically provided that ``[n]othing in [the bundling amendments] is intended to amend or change in any way the existing obligations imposed on a procuring activity or the authority granted to the **Small Business Administration** under section 15(a) of the **Small Business Act**.'' 143 Cong. Rec. S11522, S11526 (daily ed. Oct. 31, 1997).

On October 25, 1999, SBA published an interim rule with request for comments in the Federal Register requesting public comments on implementation of Sections 411-417 of the **Small Business Reauthorization Act of 1997** (Public Law 105-135, 111 Stat. 2617). See 64 FR 57366, October 25, 1999. The statutory amendments recognize that the consolidation of contract requirements may be necessary and justified, in some cases. The rule requires that each Federal agency, to the maximum extent practicable, take steps to avoid unnecessary and unjustified bundling of contract requirements that preclude **small business** participation as prime contractors. The rule also requires each agency to eliminate obstacles to **small business** participation as prime contractors.

The comment period for the interim rule (64 FR 57366) closed on December 27, 1999. Consistent with the statutory amendments, the interim rule defined ``bundling,'' identified the circumstances under which such ``bundling'' may be necessary and justified, and permitted SBA to appeal bundling actions that it believes to be unnecessary and unjustified to the head of the procuring agency. The rule also restated SBA's current authority to appeal to the head of an agency other procurement decisions made by procuring activities that SBA believes will adversely affect **small business**. SBA received 19 comments in response to the interim rule. The comments are comprised of three from Government agencies, four from trade associations, ten from **small businesses**, and two from members of Congress.

Most of the comments, particularly those from **small business**, did not offer specific changes to the rule, but rather strongly endorsed the government taking action against contract bundling. Since these comments offered no specific changes, SBA responds by noting the strong opposition to contract bundling by the **small business** community.

The four comments from trade associations focused on the impact of bundling requirements on the architect and engineering industry. Specifically, these comments were concerned with the consolidation of architect and engineering services with requirements from other

industries. The bundling statute and SBA's rule permit various contract requirements to be consolidated provided that the consolidation results in substantial benefits. The statute does not limit the scope and diversity of consolidated contracts. As long as there are measurably substantial benefits, a procuring agency is authorized to consolidate or bundle contract requirements. Thus, this rule also does not limit the scope and diversity of consolidated contracts.

When a procuring activity intends to proceed with a ``bundled'' requirement, it must document that the bundling is necessary and justified. If it cannot do so, the procuring activity cannot go forward with the intended consolidation. In order for bundling to be necessary and justified, the consolidation must achieve ``measurably substantial benefits.'' In finalizing this rule, SBA again examined the interim rule's two-tier approach to determining what constitutes measurably substantial benefits. SBA continues to believe that the two-tier approach represents a reasonable application of determining what ``measurably substantial benefits'' means. Pursuant to the statutory language, benefits must be ``substantial.'' SBA believes that benefits equivalent to 10% of the contract value (including options) is a substantial benefit relative to the amount of the contract where the contract value is \$75 million or less. Similarly, SBA believes that benefits equivalent to at least \$7.5

[[Page 45832]]

million or 5% of the contract value (including options) is a substantial benefit in absolute dollars where the contract value exceeds \$75 million. SBA notes that most bundled requirements that SBA has reviewed over the past four years have had a contract value (including options) that was less than \$75 million. Thus, most bundled contracts will be subject to a 10% savings test. The remainder of the contracts will be subject to a minimum absolute savings of \$7.5 million.

This final rule clarifies the two-tier approach to achieve this result of a minimum savings for contracts having a value (including options) between \$75 million and \$150 million. The interim rule required agencies to achieve a benefit equivalent to at least 5% of the contract value (including options) for any contract having a value exceeding \$75 million, but without specifying a minimum savings of \$7.5 million. Under the interim rule, for contracts having a value between \$75 million and \$150 million, the required benefits could have ranged from \$3.25 million to \$7.5 million. Thus, contracts having a value between \$75 million and \$150 million required less of a benefit than contracts having a value between \$32.5 million and \$75 million. For example, an agency needed to demonstrate a \$6 million benefit for a contract having a \$60 million value, while it had to show only a \$4 million benefit for a contract having a value of \$80 million. SBA believes that this result would have been illogical. As such, SBA has amended this provision to require that an agency must show a benefit of 5% or \$7.5 million, whichever is greater, for any bundled contract having a value that exceeds \$75 million. Contracts awarded in reliance on the interim rule which met the 5% benefits test but would not satisfy this minimum savings test will be unaffected by this final rule.

One commenter suggested that the ``critical to the agency's mission success'' exemption (125.2(d)(3)(iii)(B)) could be subject to abuse. SBA does not agree. SBA believes that because these exemptions are made

at the agency's highest procurement levels, abuses of this authority are unlikely.

The interim final rule included a provision addressing the application of the regulation to procurements that are awarded in accordance with a cost comparison conducted under OMB Circular A-76 ('`Performance of Commercial Functions''). We did not receive any comments on this provision. The final rule retains the provision, with clarifying revisions.

Circular A-76 establishes a cost-comparison process for evaluating whether a commercial activity that is conducted by a Federal agency should be performed in-house or by contract. This process compares the estimated cost of in-house performance by the ``Most Efficient Organization'' (MEO) with the cost of contract performance as determined by offers that are submitted in response to an A-76 solicitation. Under the Circular, the simple fact that contract performance is found to be less costly than in-house performance by the MEO is not sufficient to justify a conversion from in-house to contract performance. Instead, an activity will not be converted to contract performance (i.e., it will be retained in-house) unless the savings will exceed 10 percent or \$10 million over the performance period, whichever is less.

Under the A-76 cost-comparison process, the required MEO (which is also required by statute at 10 U.S.C. 2461 for the Department of Defense) may include a mix of Federal employees and contract support. In other words, the scope of an A-76 cost comparison, the solicitation, and the in-house MEO may consist of a workload performed by Federal employees and one or more existing contractors. Thus, it is possible under an A-76 cost comparison process that activities that have been performed by Federal employees (along with activities performed under two or more **small business** contracts) will be converted to performance under one contract awarded to a large **business**. In such cases, the methodology of the A-76 process will have ensured that the Federal Government will derive ``measurably substantial benefits'' from the conversion. This occurs in two ways. First, through the agency's development of a management plan and the in-house MEO (which concludes in the MEO's written ``certification''), significant and measurable savings and performance enhancements can be achieved even before competing with any private offeror. Second, through the cost comparison itself, measurable savings and performance enhancements are quantified, and a decision to convert requires substantial savings (10 percent or \$10 million over the performance period, whichever is less).

SBA has added clarifying language to the rule so that it is clear that a bundling analysis is not required when an agency conducts a similar analysis under an A-76 study.

Compliance With Executive Orders 13132, 12988 and 12866, the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), and the Paperwork Reduction Act (44 U.S.C. Chapter 3501 et seq.)

The Office of Management and Budget reviewed this rule as a ``significant'' regulatory action under Executive Order 12866.

SBA has determined that this final rule may have a significant beneficial economic impact on a substantial number of **small** entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. SS 601-612. The rule can potentially apply to all **small** businesses that are performing or may want to perform on the prime contract opportunities of the Federal Government. While there is no precise estimate of the

number of **small** entities or the extent of the economic impact, SBA believes that a significant number of **small** businesses would be affected. SBA has submitted a complete Final Regulatory Flexibility Analysis of this final rule to the Chief Counsel for Advocacy of the **Small Business** Administration. For a copy of this analysis, please contact Anthony Robinson at (202) 205-6465.

For the purpose of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA certifies that this rule would not impose new reporting or record keeping requirements.

For purposes of Executive Order 13132, SBA certifies that this rule does not have any federalism implications warranting the preparation of a Federalism Assessment.

For purposes of Executive Order 12978, SBA certifies that this rule is drafted, to the extent practicable, in accordance with the standards set forth in section 2 of this order.

#### List of Subjects

##### 13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs--**business**, Individuals with disabilities, Loan programs--**business**, Reporting and recordkeeping requirements, **Small** businesses.

##### 13 CFR Part 125

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

For the reasons stated in the preamble, SBA adopts the interim rule amending 13 CFR parts 121 and 125 which was published at 64 FR 57366 on October 25, 1999, as final with the following changes:

[[Page 45833]]

#### PART 121--**SMALL BUSINESS SIZE REGULATIONS**

1. The authority citation for 13 CFR part 121 continues to read as follows:

Authority: 15 U.S.C. 632(a), 634(b)(6), 637(a), 644(c), and 662(5); and Sec. 304, Pub. L. 103-403, 108 Stat. 4175, 4188.

2. In 121.103 currently in effect, revise paragraph (f)(3)(i).

Sec. 121.103 What is affiliation?

\* \* \* \* \*

(f) \* \* \*

(3) \* \* \* (i) A joint venture or teaming arrangement of two or more **business** concerns may submit an offer as a **small business** for a Federal procurement without regard to affiliation under this paragraph (f) so long as each concern is **small** under the size standard corresponding to the SIC code assigned to the contract, provided:

(A) The procurement qualifies as a ``bundled'' requirement, at any

dollar value, within the meaning of Sec. 125.2(d)(1)(i) of this chapter; or

(B) The procurement is other than a ``bundled'' requirement within the meaning of Sec. 125.2(d)(1)(i) of this chapter, and:

(1) For a procurement having a revenue-based size standard, the dollar value of the procurement, including options, exceeds half the size standard corresponding to the SIC code assigned to the contract; or

(2) For a procurement having an employee-based size standard, the dollar value of the procurement, including options, exceeds \$10 million.

\* \* \* \* \*

#### PART 125--GOVERNMENT CONTRACTING PROGRAMS

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

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

2. In Sec. 125.2, revise paragraphs (a), (b) and (d) to read as follows:

Sec. 125.2 Prime contracting assistance.

(a) General. **Small business** concerns must receive any award or contract, or any contract for the sale of Government property, that SBA and the procuring or disposal agency determine to be in the interest of:

(1) Maintaining or mobilizing the Nation's full productive capacity;

(2) War or national defense programs;

(3) Assuring that a fair proportion of the total purchases and contracts for property, services and construction for the Government in each industry category are placed with **small business** concerns; or

(4) Assuring that a fair proportion of the total sales of Government property is made to **small business** concerns.

(b) PCR and procuring activity responsibilities. (1) SBA Procurement Center Representatives (PCRs) are generally located at Federal agencies and buying activities which have major contracting programs. PCRs review all acquisitions not set-aside for **small** businesses to determine whether a set-aside is appropriate.

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

(i) Includes in its description goods or services currently being performed by a **small business** and the magnitude of the quantity or estimated dollar value of the proposed procurement would render **small business** prime contract participation unlikely;

(ii) Seeks to package or consolidate discrete construction

projects; or

(iii) Meets the definition of a bundled requirement as defined in paragraph (d)(1)(i) of this section.

(3) Whenever any of the circumstances identified in paragraph (b)(2) of this section exist, the procuring activity must also submit to the applicable PCR (or to the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located if a PCR is not assigned to the procuring activity) a written statement explaining why:

(i) If the proposed acquisition strategy involves a bundled requirement, the procuring activity believes that the bundled requirement is necessary and justified under the analysis required by paragraph (d)(3)(iii) of this section; or

(ii) If the description of the requirement includes goods or services currently being performed by a **small business** and the magnitude of the quantity or estimated dollar value of the proposed procurement would render **small business** prime contract participation unlikely, or if a proposed procurement for construction seeks to package or consolidate discrete construction projects:

(A) The proposed acquisition cannot be divided into reasonably **small** lots to permit offers on quantities less than the total requirement;

(B) Delivery schedules cannot be established on a basis that will encourage **small business** participation;

(C) The proposed acquisition cannot be offered so as to make **small business** participation likely; or

(D) Construction cannot be procured as separate discrete projects.

(4) In conjunction with their duties to promote the set-aside of procurements for **small business**, PCRs will identify **small** businesses that are capable of performing particular requirements, including teams of **small business** concerns for larger or bundled requirements (see Sec. 121.103(f)(3) of this chapter).

(5)(i) If a PCR believes that a proposed procurement will render **small business** prime contract participation unlikely, or if a PCR does not believe a bundled requirement to be necessary and justified, the PCR shall recommend to the procurement activity alternative procurement methods which would increase **small business** prime contract participation. Such alternatives may include:

(A) Breaking up the procurement into smaller discrete procurements;

(B) Breaking out one or more discrete components, for which a **small business** set-aside may be appropriate; and

(C) Reserving one or more awards for **small** companies when issuing multiple awards under task order contracts.

(ii) Where bundling is necessary and justified, the PCR will work with the procuring activity to tailor a strategy that preserves **small business** prime contract participation to the maximum extent practicable.

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

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

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

(6) In cases where there is disagreement between a PCR and the contracting officer over the suitability of a particular acquisition

for a **small business** set-aside, whether or not the acquisition is a bundled or substantially bundled requirement within the meaning of paragraph (d) of this section, the PCR may initiate an appeal to the head of the contracting activity. If the head of the contracting activity agrees with the contracting officer, SBA may appeal the matter to the secretary of the department or head of the agency. The

[[Page 45834]]

time limits for such appeals are set forth in 19.505 of the Federal Acquisition Regulation (FAR) (48 CFR 19.505).

(7) PCRs will work with a procuring activity's **Small Business Specialist (SBS)** to identify proposed solicitations that involve bundling, and with the agency acquisition officials to revise the acquisition strategies for such proposed solicitations, where appropriate, to increase the probability of participation by **small businesses**, including **small business** contract teams, as prime contractors. If **small business** participation as prime contractors appears unlikely, the SBS and PCR will facilitate **small business** participation as subcontractors or suppliers.

\* \* \* \* \*

(d) Contract bundling--(1) Definitions--(i) Bundled requirement or bundling. The term bundled requirement or bundling refers to the consolidation of 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 paragraphs

(d)(1)(i) (A), (B), and (C) of this section.

(ii) Separate smaller contract. A separate smaller contract is a contract that has previously been performed by one or more **small business** concerns or was suitable for award to one or more **small business** concerns.

(iii) Substantial bundling. Substantial bundling is any contract consolidation, which results in an award whose average annual value is \$10 million or more.

(2) Requirement to foster **small business** participation. The **Small Business Act** requires each Federal agency to foster the participation of **small business** concerns as prime contractors, subcontractors, and suppliers in the contracting opportunities of the Government. To comply with this requirement, agency acquisition planners must:

(i) Structure procurement requirements to facilitate competition by and among **small business** concerns, including **small** disadvantaged, 8(a) and women-owned **business** concerns; and

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

(3) Requirement for market research. In addition to the requirements of paragraph (b)(2) of this section and before proceeding with an acquisition strategy that could lead to a contract containing bundled or substantially bundled requirements, an agency must conduct market research to determine whether bundling of the requirements is

necessary and justified. During the market research phase, the acquisition team should consult with the applicable PCR (or if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located).

(4) Requirement to notify current **small business** contractors of intent to bundle. The procuring activity must notify each **small business** which is performing a contract that it intends to bundle that requirement with one or more other requirements at least 30 days prior to the issuance of the solicitation for the bundled or substantially bundled requirement. The procuring activity, at that time, should also provide to the **small business** the name, phone number and address of the applicable SBA PCR (or if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located).

(5) Determining requirements to be necessary and justified. When the procuring activity intends to proceed with an acquisition involving bundled or substantially bundled procurement requirements, it must document the acquisition strategy to include a determination that the bundling is necessary and justified, when compared to the benefits that could be derived from meeting the agency's requirements through separate smaller contracts.

(i) The procuring activity may determine a consolidated requirement to be necessary and justified if, as compared to the benefits that it would derive from contracting to meet those requirements if not consolidated, it would derive measurably substantial benefits. The procuring activity must quantify the identified benefits and explain how their impact would be measurably substantial. The benefits may include cost savings and/or price reduction, quality improvements that will save time or improve or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions, and any other benefits that individually, in combination, or in the aggregate would lead to:

- (A) Benefits equivalent to 10 percent of the contract value (including options) where the contract value is \$75 million or less; or
- (B) Benefits equivalent to 5 percent of the contract value (including options) or \$7.5 million, whichever is greater, where the contract value exceeds \$75 million.

(ii) Notwithstanding paragraph (d)(5)(i) of this section, the Assistant Secretaries with responsibility for acquisition matters (Service Acquisition Executives) or the Under Secretary of Defense for Acquisition and Technology (for other Defense Agencies) in the Department of Defense and the Deputy Secretary or equivalent in civilian agencies may, on a non-delegable basis determine that a consolidated requirement is necessary and justified when:

(A) There are benefits that do not meet the thresholds set forth in paragraph (d)(5)(i) of this section but, in the aggregate, are critical to the agency's mission success; and

(B) Procurement strategy provides for maximum practicable participation by **small business**.

(iii) The reduction of administrative or personnel costs alone shall not be a justification for bundling of contract requirements unless the administrative or personnel cost savings are expected to be substantial, in relation to the dollar value of the procurement to be consolidated (including options). To be substantial, such cost savings must be at least 10 percent of the contract value (including options).

(iv) In assessing whether cost savings and/or a price reduction

would be achieved through bundling, the procuring activity and SBA must compare the price that has been charged by **small businesses** for the work that they have performed and, where available, the price that could have been or could be charged by **small businesses** for the work not previously performed by **small business**.

(6) OMB Circular A-76 Cost Comparison Analysis. The substantial benefit analysis set forth in paragraph (d)(5)(i) of this section is not required where a requirement is subject to a Cost Comparison Analysis under OMB Circular A-76 (See 5 CFR 1310.3 for availability).

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

[[Page 45835]]

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

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

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

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

(8) Significant subcontracting opportunity. (i) Where a bundled or substantially bundled requirement offers a significant opportunity for subcontracting, the procuring agency must designate the following factors as significant factors in evaluating offers:

(A) A factor that is based on the rate of participation provided under the subcontracting plan for **small business** in the performance of the contract; and

(B) For the evaluation of past performance of an offeror, a factor that is based on the extent to which the offeror attained applicable goals for **small business** participation in the performance of contracts.

(ii) Where the offeror for such a bundled contract qualifies as a **small business** concern, the procuring agency must give to the offeror the highest score possible for the evaluation factors identified in paragraph (d)(5)(i) of this section.

5. In Sec. 125.6, revise paragraph (g) to read as follows:

Sec. 125.6 Prime contractor performance requirements (limitations on subcontracting).

\* \* \* \* \*

(g) Where an offeror is exempt from affiliation under Sec. 121.103(f)(3) of this chapter and qualifies as a **small business** concern, the performance of work requirements set forth in this section apply to the cooperative effort of the team or joint venture, not its individual members.

Dated: June 20, 2000.  
Aida Alvarez,

Administrator.

[FR Doc. 00-18795 Filed 7-25-00; 8:45 am]

BILLING CODE 8025-01-U

[Federal Register: July 26, 2000 (Volume 65, Number 144)]  
[Rules and **Regulations**]  
[Page 46053-46055]  
From the Federal Register Online via GPO Access [wais.access.gpo.gov]  
[DOCID:fr26jy00-42]

---

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 5, 7, 10, 15, and 19

[FAC 97-19; FAR Case 1997-306 (97-306); Item I]  
RIN 9000-AI55

Federal Acquisition Regulation; Contract Bundling

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

ACTION: Final rule.

---

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition **Regulations** Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement Sections 411-417 of the **Small Business** Reauthorization Act of 1997. Sections 411-417 amend Title 15 of the United States Code to define "contract bundling," and to require agencies to avoid unnecessary bundling that precludes **small business** participation in the performance of Federal contracts.

DATES: Effective Date: July 26, 2000.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ralph De Stefano, Procurement Analyst, at (202) 501-1758. Please cite FAC 97-19, FAR case 1997-306.

[[Page 46054]]

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published an interim rule in the Federal Register at 64 FR 72441, December 27, 1999. The interim rule is

converted to a final rule, with changes, and amends FAR Parts 2, 4, 5, 7, 10, 15, and 19 to implement Sections 411-417 of the **Small Business** Reauthorization Act of 1997, Pub. L. 105-135, and the **Small Business** Administration (SBA) interim rule published in the Federal Register at 64 FR 57366, October 25, 1999.

We received comments from six respondents in response to the interim rule and considered them in drafting the final rule.

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

#### B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601, et seq., applies to this final rule. The Councils prepared a Final Regulatory Flexibility Analysis (FRFA). The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the **Small Business** Administration. The FRFA is summarized as follows:

This rule amends FAR Parts 2, 4, 5, 7, 10, 15, and 19 to implement Sections 411-417 of the **Small Business** Reauthorization Act of 1997, Pub. L. 105-135. Sections 411-417 amend Title 15 of the United States Code to define ``contract bundling,`` and to require agencies to avoid unnecessary bundling that precludes **small business** participation in the performance of Federal contracts.

The objective of the rule is to establish agency procedures for processing bundled requirements and to ensure maximum **small business** participation in bundled acquisitions. Agencies must--

- <bullet> Perform market research when bundled requirements are anticipated;
- <bullet> Justify bundling in acquisition strategies;
- <bullet> Meet specific estimated benefit thresholds before bundling requirements;
- <bullet> Assess the impact of bundling on **small** businesses;
- <bullet> Submit solicitations containing bundled requirements to the **Small Business** Administration (SBA) procurement center representatives for review; and
- <bullet> Include, in negotiated competitions for bundled requirements, a source selection factor for the offerors' proposed use of **small** businesses as subcontractors and their past performance in meeting subcontracting goals.

These objectives are stated in Sections 411-417 of Pub. L. 105-135 and in SBA's implementing **regulations**, published in the Federal Register at 64 FR 57366, October 25, 1999. We published an interim rule in the Federal Register at 64 FR 72441, December 27, 1999. Six respondents provided public comments. There are no practical alternatives that will accomplish the objective of this rule (i.e., to ensure maximum participation of **small** businesses in Federal contracting as agencies combine requirements in the face of downsizing and other cost-saving measures). No viable alternatives were proposed during the public comment period.

Interested parties may obtain a copy of the FRFA from the FAR Secretariat.

#### C. Paperwork Reduction Act

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

List of Subjects in 48 CFR parts 2, 5, 7, 10, 15, and 19

Government procurement.

Dated: July 19, 2000.

Edward C. Loeb,  
Director, Federal Acquisition Policy Division.

Interim Rule Adopted as Final With Changes

Accordingly, DoD, GSA, and NASA adopt the interim rule amending 48 CFR parts 2, 4, 5, 7, 10, 15, and 19 which was published in the Federal Register at 64 FR 72441, December 27, 1999, as a final rule with the following changes:

1. The authority citation for 48 CFR parts 2, 5, 7, 10, 15, and 19 continues to read as follows:

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

#### PART 2--DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 by revising the definition ``Bundled contract'' to read as follows:

##### 2.101 Definitions.

\* \* \* \* \*

Bundled contract means a contract where the requirements have been consolidated by bundling. (See the definition of bundling.)

\* \* \* \* \*

#### PART 5--PUBLICIZING CONTRACT ACTIONS

3. In section 5.206, revise the introductory text of paragraph (a) to read as follows:

##### 5.206 Notices of subcontracting opportunities.

(a) The following entities may use a CBD notice to seek competition for subcontracts, to increase participation by qualified HUBZone **small business, small, small** disadvantaged, and **small** women-owned **business** concerns, and to meet established subcontracting plan goals:

\* \* \* \* \*

#### PART 7--ACQUISITION PLANNING

4. Amend section 7.107 by revising the section heading and paragraphs (b)(2) and (h) to read as follows:

7.107 Additional requirements for acquisitions involving bundling.

\* \* \* \* \*

(b) \* \* \*

(2) Five percent of the estimated contract value (including options) or \$7.5 million, whichever is greater, if the value exceeds \$75 million.

\* \* \* \* \*

(h) The requirements of this section, except for paragraph (e), do not apply if a cost comparison analysis will be performed in accordance with OMB Circular A-76.

#### PART 10--MARKET RESEARCH

5. In section 10.001, revise paragraph (c) to read as follows:

10.001 Policy.

\* \* \* \* \*

(c) If an agency contemplates awarding a bundled contract, the agency--

(1) When performing market research, should consult with the local **Small Business** Administration procurement center representative (PCR) or, if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the procuring activity is located; and

(2) At least 30 days before release of the solicitation--

(i) Must notify any affected incumbent **small business** concerns of the Government's intention to bundle the requirement; and

(ii) Should notify any affected incumbent **small business** concerns of how the concerns may contact the appropriate **Small Business** Administration representative.

#### PART 15--CONTRACTING BY NEGOTIATION

6. Amend section 15.305 by revising paragraph (a) (5) to read as follows:

15.305 Proposal evaluation.

(a) \* \* \*

(5) **Small business** subcontracting evaluation. Solicitations must be structured to give offers from **small**

[[Page 46055]]

**business** concerns the highest rating for the evaluation factors in 15.304(c) (3) (iii) and (c) (5).

\* \* \* \* \*

#### PART 19--SMALL BUSINESS PROGRAMS

7. Amend section 19.101 by adding paragraph (g) (5) to read as

follows:

19.101 Explanation of terms.

\* \* \* \* \*

(g) \* \* \*

(5) Size determination for teaming arrangements. For size determination purposes, apply the size standard tests in (g)(1)(i) and (ii) of this section when a teaming arrangement of two or more **business** concerns submits an offer, as appropriate.

\* \* \* \* \*

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

19.202-1 Encouraging **small business** participation in acquisitions.

\* \* \* \* \*

(e) \* \* \*

(1) \* \* \*

(iii) The proposed acquisition is for a bundled requirement. (See 10.001(c)(2)(i) for mandatory 30-day notice requirement to incumbent **small business** concerns.)

\* \* \* \* \*

[FR Doc. 00-18668 Filed 7-25-00; 8:45 am]

BILLING CODE 6820-EP-P