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Part II

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Chapter 1

Federal Acquisition Regulations--Contract Bundling and Small Entity
Compliance Guide; Final Rules

Small Business Administration

13 CFR Part 125

Small Business Government Contracting Programs; Final Rule and Proposed
Rule

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 7, 8, 10, 16, 19, and 42

[FAC 2001-17; FAR Case 2002-029]
RIN 9000-AJ58

Federal Acquisition Regulation; Contract Bundling

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

ACTION: 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) governing contract bundling. Specifically, this final rule: Revises the definition of contract bundling to expressly include multiple award contract vehicles and task and delivery orders under such contract vehicles; mandates that procuring activities coordinate with the Small Business Specialist (SBS) proposed acquisition strategies or plans contemplating awards above specified dollar thresholds, and that the SBS notify the agency Office of Small and Disadvantaged Business Utilization (OSDBU) when those strategies include contract bundling that is unnecessary or unjustified; revises the threshold and documentation required for substantial bundling; and requires agency OSDBUs to perform certain oversight functions. These amendments are intended to implement a number of the recommendations included in an October 2002, Office of Management and Budget (OMB) report on contract bundling.

DATES: Effective Date: October 20, 2003.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Rhonda Cundiff, Procurement Analyst, at (202) 501-0044. Please cite FAC 2001-17, FAR case 2002-029.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the Federal Register at 68 FR 5138, January 31, 2003, to solicit comments on its proposal to implement several recommendations included in OMB's October 2002 report, entitled "Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business." (See <http://www.fac.gov>).

Contract bundling is defined in the Small Business Act as the consolidation of two or more procurement requirements for goods and services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is "unlikely to be suitable for award to a small business concern", 15 U.S.C. 632(o). The President's Small Business Agenda directed OMB to develop a strategy for unbundling contracts, as a means of expanding small business access to Federal procurements.

In response, the Office of Federal Procurement Policy (OFPP), within OMB, issued the October 2002 bundling report, providing a nine-point action plan to hold agencies accountable for eliminating unnecessary contract bundling and for mitigating the effects of necessary contract bundling.

The proposed rule detailed the changes to the FAR that would implement the five action items requiring regulatory amendments. In particular, the rule proposed to: (1) Revise the definition of bundling to expressly include multiple award contract vehicles and task and delivery orders under such contracts; (2) require procuring activities to coordinate with their SBS proposed acquisition strategies or plans contemplating awards above specified dollar thresholds and require the SBS to notify the agency OSDBU when those strategies include unnecessary and unjustified contract bundling; (3) reduce the threshold and revise the documentation required for substantial bundling; and (4) require agency OSDBUs to perform periodic oversight reviews of agency bundling activities.

The proposed rule invited the public to submit comments on the proposed amendments by April 1, 2003. In response to the proposed rule, 43 comment letters were received. Some respondents complained that a few of the proposed changes did not go far enough to curb contract bundling. Others, on the other hand, criticized some of the proposed changes for going too far with the bundling regulations.

The Councils considered all of the comments and recommendations in developing this final rule. The specific comments to each proposed amendment and the Councils' corresponding response are summarized as set forth below.

1. Comments on Clarification of Bundling Definition. Eleven

comments were received on the proposal to implement the OMB bundling report recommendation to require bundling reviews for task and delivery order awards under multiple award contract vehicles. The proposed regulation adds new language (paragraph (3)) to the FAR part 2 definition of "bundling" that defines a "single contract" to include: (1) multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources; and (2) an order placed against an indefinite quantity contract under a Federal Supply Schedule contract; or task-order contract or delivery-order contract awarded by another agency (i.e., Governmentwide acquisition contract or multiagency contract).

Some respondents suggested that any change in the definition of bundling (e.g., to specifically include multiple award contracts and orders under multiple award contracts) is questionable. Another respondent wants expansion of the FAR case to include "consolidated contract procurements on IDIQ multiple award vehicles" so that small businesses will have more opportunities to compete.

One respondent believes that the scope of bundling is unclear and that a consistent definition must be agreed upon and supported by a cost-benefit analysis before proceeding. The Councils believe that a cost-benefit analysis is unnecessary and that the definition is clear and consistent by defining the type of contract actions that fall under the revised bundling definition. Two respondents oppose the definition of "single contract" particularly as it applies to Indefinite Delivery/Indefinite Quantity (ID/IQ) contracts for A-E services and recommends limiting the definition to those instances in which bundling under ID/IQ contracts for A-E services would replace two or more previous contracts with small business primes with one bundled contract on which it is unlikely that small businesses could be competitive as a prime contractor. The strategy of the proposed definition is intended to close loopholes that otherwise would allow certain types of acquisitions to escape effective review.

A number of respondents commented on the proposed definition of "single contract" and "order." One respondent commented that the definition did not fully implement OMB's bundling recommendation to close the loophole of bundling task and delivery order awards because it does not cover the orders an agency issues against its own

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multiple award contracts. This commenter pointed out that the new definition only covers the orders placed against GSA's Federal Supply Schedules, or against an indefinite quantity contract awarded by another agency and urged that the definition of contract bundling include orders placed against indefinite quantity, multiple award contracts awarded by any agency. The Councils do not agree that an

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

Another respondent noted that the proposed definition of bundling is deficient because it does not cover "new work." New work is work that was never performed by contract before. Therefore, it was never part of a separate smaller contract, and so it is not bundled, by definition. Bundling is a concept which describes consolidation of prior contracts.

Two respondents believe that the definition should be broader to include "accretive bundling," which occurs when dissimilar tasks are added onto GWACs, ID/IQs, Schedules, and multiple award type contracts. The Councils disagree. FAR Subpart 19.2 requires that the Offices of Small and Disadvantaged Business Utilization (OSDBUs) work with the Small Business Administration's PCR to identify proposed solicitations that involve bundling. Further, FAR 19.202-1(e) requires the contracting officer to provide a copy of the proposed acquisition package to the PCR at least 30 days prior to the issuance of the solicitation if the proposed acquisition is for a bundled requirement. In particular, since FAR 19.202-1 requires procuring activities to submit acquisitions strategies above the established threshold to PCRs, strategies that contemplate orders that are above the threshold and that are not against an agency's own multiple award contract, would be subject to PCR review for bundling. Second, FAR 19.202-1 requires a procuring activity to submit a copy of a proposed acquisition strategy to the PCR, whenever that strategy involves a bundled requirement. Because the proposed definition in FAR Part 2 defines a bundled requirement to include certain task and delivery orders under another agency's contract, agencies would be required to submit such orders to PCRs for review, when the orders include bundling.

For the purposes of bundling, the proposed rule now defines a single contract to include orders placed against an indefinite quantity contract under a Federal Supply Schedule or a task-order contract or delivery-order contract awarded by another agency and requires strategy review when the estimated contract or order value reaches or exceeds

the thresholds. After considering all of the comments on the proposed single contract definition within the meaning of bundling, the Councils believe that the amendment effectively implements OMB's recommendation to compel bundling reviews of task and delivery orders. The Councils are therefore adopting it as proposed.

2. Comments on Requirement for Bundling Reviews. The Councils received several comments concerning its proposal to add FAR 7.104(d)(1), requiring bundling reviews of proposed acquisition strategies or plans. As proposed, that section requires an agency to coordinate its acquisition strategy or plan with its SBS whenever the agency's contemplated strategy or plan contemplates award of a contract or order that exceeds the applicable agency threshold established and is not set-aside for small businesses. As previously stated, FAR 19.202-1(e) provides a minimum period of no later than 30 days before the issuance of the solicitation for the agency to coordinate its plan with the SBS. In addition, under FAR 7.104(d)(1), the SBS is required to notify the agency OSDBU if the proposed acquisition strategy or plan includes bundled requirements that the agency has not identified as bundled or includes unnecessary or unjustified bundling of requirements. Several commenters proposed exemptions for certain types of contracts (A-E services, Federal Supply Schedules). One commenter disagreed with applying contract bundling reviews to contracts (not orders) under GSA's Multiple Award Schedules (MAS) Program. The Councils disagree. Contract bundling has been applicable to GSA's Multiple Award Schedules Program since the FAR and SBA bundling regulations first became effective. This final rule specifically covers agency orders under the MAS program and provides more detailed review of various contract actions at agency-specific thresholds. The strategy is intended to close loopholes that otherwise would allow certain types of acquisitions to escape effective review.

Some respondents commented that the proposed rule adds additional burdens and would require additional resources or a reallocation of existing resources. Although agency reallocation of resources may be necessary, the Councils believe that this rule is in response to the President's Small Business Agenda and OMB's strategy for unbundling Federal contracts to increase Federal contracting opportunities for small businesses. The proposed rule provides for eliminating unnecessary contract bundling and mitigating the effects of necessary contract bundling and ensuring maximum compliance with current contract bundling laws by fully using the resources of the Small Business Administration and agency OSDBUs.

Some commenters suggested that OSDBUs should have authority to block an acquisition. That comment ignores existing regulations that would operate in tandem with proposed FAR 7.104(d)(2). The Councils believe this recommended change is unnecessary. Specifically, FAR 19.202-1(e)(4) and FAR 19.505 already provide the mechanism for

resolving disagreements with agencies concerning contract bundling and small business participation in procurements. FAR 19.202-1(e)(4) requires the contracting officer to document the basis for the rejection and notify the PCR in accordance with 19.505 if the contracting officer rejects the PCR's recommendation, made in accordance with 19.402(c)(2). FAR 19.505 allows the PCR to appeal the contracting officer's rejection to the head of the contracting activity (or designee).

The proposed rule, specifically FAR 19.201 and FAR Subpart 19.4, encourages SBSs and OSDBUs to cooperate with PCRs in reviewing procurements and in identifying possible small business contracting opportunities. SBSs and OSDBUs therefore can work with PCRs in using the PCR appeal mechanism to challenge unnecessary and unjustified contract bundling.

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Accordingly, the Councils believe that the proposed FAR 7.104(d)(2) properly balances the need for SBS reviews of acquisition strategies with the need for operational efficiency in the procurement process. In adopting FAR 7.104(d)(2), the Councils have made minor revisions. The first is a technical change to clarify that the proposed strategies include "acquisitions" meeting the dollar threshold. The second is the inclusion of additional language reinforcing the SBS's responsibility to assist in identifying alternative strategies when an acquisition plan involves substantial bundling.

3. Comments on Acquisition Dollar Thresholds. FAR 7.104(d)(2) establishes three agency-specific dollar thresholds that would trigger the bundling reviews required under FAR 7.104(d)(1). The three-tiered dollar threshold proposed is: \$7 million or more for the Department of Defense (DoD); \$5 million or more for the National Aeronautics and Space Administration (NASA), the Department of Energy (DoE) and the General Services Administration (GSA); and \$2 million or more for all other agencies.

The Councils received numerous comments on FAR 7.104(d)(2). Several respondents suggested increasing the agency review thresholds by doubling or tripling them or raising the threshold as applied to a particular agency. A few respondents recommended lowering the thresholds, either for review of Federal Supply Schedule orders or as applied to a particular agency. Of these respondents, some believed that adopting different thresholds for different agencies would unnecessarily complicate the acquisition process. They recommended adoption of a single Governmentwide threshold that would apply to all agencies equally. One of these respondents suggested that the Councils consider keeping the threshold already provided in FAR 7.107(e) for documenting substantial bundling (\$10 million). Another respondent

indicated that close monitoring of DOD's procurement is essential to limiting the adverse impact of contract bundling on small businesses. Another commenter also believed that the three-tiered approach is too complicated. This commenter suggested one threshold of \$1 million. The proposed dollar amounts of the thresholds are based on a comparative analysis of the number and size of the contracting actions of the major procuring activities. The objective of the tiered approach is two-fold: (1) to target those contracting actions for individual agencies that would most likely involve significant contract bundling as well as opportunities for small business contracting; and (2) to minimize the extent to which the bundling reviews would disrupt the procurement process of individual agencies. The Councils continue to believe that the proposed three-tiered threshold will best achieve those objectives. The Councils therefore decline to adopt the recommendations for a single Governmentwide threshold to trigger bundling reviews. The respondents' expressed diverse opinions as to the appropriate structure and amount of the thresholds were not persuasive enough to divert from the proposed range in the strategy (i.e., \$2 million, \$5 million, and \$7 million) or the proposed regulatory approach (three thresholds). The Councils are instead adopting the proposed threshold of \$7 million for DoD, \$5 million for NASA, DoE and GSA, and \$2 million for all other agencies. These agency-specific levels will capture those procurements that would most likely involve contract bundling for individual agencies, will minimize the disruption to the procurement process, and will properly account for the limited resources and contracting personnel to conduct the bundling reviews.

One respondent recommended 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 and recommends that the specific agency threshold apply to that agency regardless of whether another agency's contract is used. An agency's threshold applies to that agency regardless of whether another agency's contract is being used.

4. Comments on Additional Requirements for Acquisitions Involving Bundling. Two respondents disagreed with the proposed requirement to identify alternative strategies and recommended deleting that requirement. The Councils disagree. The proposed language is intended to require agencies to fully investigate all alternatives to bundling during the acquisition planning stage.

Several respondents did not agree with thresholds proposed for substantial bundling. However, these comments were not persuasive enough to divert from the proposed thresholds. The Councils recognize that lowering the threshold for "substantial bundling" would mean enlarging the number of procurements that would require the additional written justification under FAR 7.107. However, the Councils continue to believe that this change will simplify the application by using the

same three-tiered dollar threshold to trigger the bundling reviews and the required supporting analysis for substantial bundling. Also, the changes in the requirement for written justifications are consistent with OMB's report recommendations relating to the identification of alternative acquisition strategies.

Finally, one respondent recommended that FAR 7.105 be changed to require any requirement 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 contract or order. The Councils agree and have added the following language: "When the proposed acquisition strategy involves bundling, identify the incumbent contractors and contracts affected by the bundling".

5. Comments on Part 8--Required Sources of Supplies and Services. Three comments were received for this part. The first respondent believes that clarifying that FSS contracts must comply with bundled contracts is helpful but the proposed requirement at 19.202-1(e)(1)(iii) cited in 8.404(a)(1) is unnecessary. The Councils believe that this reference is appropriately placed and is necessary in Part 8 in order to advise those contracting officers utilizing Part 8 to know what is applicable and not applicable to orders placed against Federal Supply Schedules. The second respondent recommends caution in opening the Schedules program to mandatory compliance without considering the impact on meeting agency needs. The strategy of the definition is intended to include orders placed against the Schedules program in order to close loopholes that otherwise would allow acquisitions to escape effective review. Finally, the third respondent believes that federal statutes specifically provide that task and delivery orders issued under a Schedules contract satisfy statutory competition requirements. While FSS contracts meet the statutory competition requirements, the bundling statute is silent on orders placed against these contracts. Including Schedule orders in the definition of bundling will close loopholes that currently allow those orders to escape effective review.

6. Comments on Part 16--Types of Contracts. Two comments were received. The first respondent opposes the requirement in FAR 2.101 whereby the definition affects the contract and task order requirements in 16.505(a)(7) and believes it would be devastating to the Government's procurement of surveying and mapping services, disruptive to emergency response activities (e.g., war efforts), and urges

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that A-E services as defined in FAR Part 36 be exempt from these provisions. The Councils disagree. As previously stated, the strategy of the definition is intended to include orders to close loopholes that otherwise would escape effective review. The second respondent believes

that the addition of FAR 16.505(a)(7)(iii) may conflict with statutory provisions. The Councils do not believe that this rule conflicts with statutory provisions but merely is intended as strategy to close loopholes that otherwise would allow certain types of acquisitions to escape effective review.

7. Comments on Part 19--Small Business Programs, Subpart 19.2, Policies. Two comments were received for FAR 19.201 General policy. Both respondents recommended including a timeframe for periodic reviews. The Councils adopted the recommendation and amended the language to require annual reviews rather than periodic reviews.

Three comments were received for FAR 19.202, Specific policies. The first respondent wants to ensure that OSDBU offices in all agencies have the necessary authority, resources, and independence to perform their function and wants to require written notification to agency OSDBUs early in the requisition stage of all GWAC and bundled proposals.

The second respondent recommends revisions to require the negotiation of two-part goals for contracts awarded to the various types of small business concerns, with agency specific goals set for prime contracts and subcontracts awarded to small business concerns and for the OSDBU, in performing assessments of contracts awarded to small business concerns, to identify and track the number of Federal contracting dollars going to the various small business categories. The Councils believe that this comment is outside the scope of this rule.

The third respondent questions the language "Agencies shall establish procedures including dollar thresholds for review of acquisitions" and questions who will decide the agency thresholds for review. These agency procedures would be issued as other agency regulations, orders, and procedures are, by the agency head or his designee. That person would decide what the agency review thresholds are. The FAR Council is adopting the proposed rule as final.

Three comments were received for FAR 19.202-1, Encouraging small business participation in acquisitions. The first respondent believes that additional language requiring the contracting officer to provide all information relative to the justification of contract bundling is inappropriate because release of information must be decided on a case-by-case basis in accordance with existing laws and regulations (i.e., Procurement Integrity, FOIA, and the FAR) and may be in conflict with existing laws. The Councils believe that this requirement complies with the Procurement Integrity Act.

The second respondent comments that when the OSDBU directors undertake new responsibilities that the regulations further require an assessment of the impact and that they should also review the impact of any such decision on effective competition and on proven technical capabilities available in the marketplace. The final respondent suggests that the OSDBUs review and consider alternative strategies

that maximize the use of small and mid-size firms in procurements. The Councils believe that with the additional responsibilities placed on OSDBUs with this rule, no additional responsibilities are necessary at this time.

8. Comments on Subpart 42.15, Contractor Performance Information. Eighteen respondents commented on the proposed revision to FAR 42.1502 that requires an assessment of agency contractor compliance with the goals identified in the small business subcontracting plan when the contract includes the clause at FAR 52.219-9, Small Business Subcontracting Plan. Although the comments applauded the intent of the proposed language added to FAR 42.1502, the majority of the comments indicated that it is insufficient to monitor and ensure compliance with subcontracting plans. The primary issues of the respondents were general comments pertaining to subcontracting plans and performance evaluations both of which are addressed as follows:

(a) Comments on the Subcontracting Plans. Four general comments were received regarding subcontracting plans. Two of the three respondents recommended that subcontracting plans include other information, such as a description of the nature of the work to be subcontracted and the efforts the offeror will make to ensure that small businesses have an equitable opportunity to compete for subcontracts. These requirements are already in FAR 19.704(a) and no further change is necessary. The third respondent recommended that the regulations mandate that PCRs share their compliance assessments with SBA's breakout PCRs, who are assigned to major contracting centers. This commenter also recommended that SBA develop a system to enable PCRs and breakout PCRs to submit their assessments to the cognizant contracting office. The fourth respondent recommended inserting a clause in each contract requiring a prime contractor to prove it has met its original subcontracting plan and requiring a prime's subcontracting partners to sign off on a joint statement of compliance before the prime gets paid.

(b) Comments on Performance Evaluations. Two respondents expressed the need for further guidance on evaluating compliance with subcontracting plans and a contractor's "good faith" efforts to achieve its small business goals. One of these two respondents further indicated that Government agencies should be required to "evaluate large businesses on the same basis and understanding of the small business subcontracting plan regulations." This respondent also complained that large businesses need additional guidance in completing commercial plans, which cover a commercial contractor's entire fiscal year and commercial production.

One respondent commented that performance evaluations are inadequate, penalties have never been assessed, and the proposed change does not link performance evaluations to the penalty. The FAR already provides for liquidated damages for noncompliance with subcontracting

plans. Under FAR 19.705-7, a prime contractor is liable for such damages for failing to make a "good faith effort" to comply with its subcontracting plans. Since governing regulations already provide monetary consequences for noncompliance with subcontracting plans, the Councils are not adopting this recommendation. Another commenter recommended that large businesses that are awarded task and delivery orders under the Federal Supply Schedules should be subject to the requirement for subcontracting plans under 8(d) of the Small Business Act, 15 U.S.C. 637(d). The Councils agree that effective procedures to mitigate the effects of contract bundling on small businesses necessitates more stringent requirements for monitoring compliance with subcontracting plans to ensure that small businesses receive the maximum practical opportunity to participate as subcontractors in large Federal contracts. Many of the commenters recommended amendments that require further consideration to evaluate their likely effectiveness and impact on the procurement process. As a result, concurrent with publication of this FAR final rule, the Small Business Administration (SBA) is issuing a final

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rule to incorporate parallel changes in 13 CFR part 125. At the same time, SBA is issuing a proposed rule to provide more guidance on subcontracting, including guidelines for evaluating a company's good faith efforts to comply with subcontracting plan requirements. When the SBA proposed rule becomes final, the Councils will consider incorporating appropriate provisions in the FAR.

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

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601, et seq., applies to this final rule. A Final Regulatory Flexibility Analysis (FRFA) has been prepared and is as follows:

Final Regulatory Flexibility Analysis

FAR Case 2002-029, Contract Bundling

This Final Regulatory Flexibility Analysis has been prepared consistent with the criteria of 5 U.S.C. 604.

1. Reasons for the final rule:

This rule amends the Federal Acquisition Regulation (FAR) to

implement the recommendations of the Office of Management and Budget (OMB) in its report entitled "A Strategy for Increasing Opportunities for Small Business." The FAR changes will: (1) Clarify the definition of "bundling" to indicate it applies to orders placed against Federal Supply Schedules and another agency's Governmentwide Acquisition Contracts or Multi-agency Contracts when those orders otherwise meet the parameters of the definition; (2) require the small business specialist to coordinate on agency acquisition strategies at specified dollar thresholds and notify the agency Office of Small and Disadvantaged Business Utilization when those strategies include contract bundling that is unnecessary, unjustified, or not identified as such by the agency; (3) reduce the threshold for "substantial bundling"; (4) revise the documentation requirements for substantial bundling to include identification of alternative acquisition strategies that would result in the bundling of fewer requirements, along with justification for not choosing those alternatives; (5) require contracting officers to provide bundling justification documentation to the agency Office of Small and Disadvantaged Business Utilization when substantial bundling is involved; (6) require contractor performance evaluations to include an assessment of contractor compliance with small business subcontracting goals; and (7) require the Office of Small and Disadvantaged Utilization to be responsible for conducting annual reviews to assess agency contract bundling requirements and the extent to which small businesses are receiving a fair share of Federal procurements.

2. Objectives of and legal basis for this rule:

The objective of this final rule is to further the Administration's commitment of creating a Government strategy to increase Federal contracting opportunities for small business. In order to accomplish this commitment this final rule provides FAR coverage that implements the recommendations of the Office of Management and Budget (OMB) in its report entitled "A Strategy for Increasing Opportunities for Small Business."

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

The final rule will indirectly apply to all large and small entities that seek award of Federal contracts. The rule should have a positive economic impact on small prime contractors and subcontractors by providing more Federal contracting opportunities for small businesses. In the SBA's 2001 State of Small Business Report filed with the House and Senate Small Business Committees, SBA identified only four material bundling cases with a total value of \$60 million for the first three quarters of Fiscal Year (FY) 2001. This represents 0.0004% of Federal contract dollar activity

(\$60 million divided by \$150 billion for the first three quarters of the fiscal year). Based on FY 2001 data, the final rule will impact approximately \$3 billion in orders placed against FSS contracts, Governmentwide acquisition contracts, and multiagency contracts. Applying the contract bundling estimate of 0.0004% to these unreviewed orders, SBA expects approximately \$1 million will be identified as bundled. This rule establishes a three-tiered dollar threshold of \$7 million for DOD, \$5 million for NASA, DOE and GSA, and \$2 million for all other civilian agencies. The dollar amount is based on a comparative analysis of the number and size of the contracting actions of the major procuring activities and is intended to target reviews of the contracting actions that would most likely involve contract bundling, without undue disruption to the acquisition process.

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

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

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

Simultaneously with the publication of this final rule, SBA is publishing its final rule on contract bundling to implement the required action items in OMB's October 2002 report, entitled "Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business." In some instances, SBA's final rule duplicates language in the FAR final rule.

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

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

Interested parties may obtain a copy of the FRFA from the FAR Secretariat. The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

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, 7, 8, 10, 16, 19, and 42

Government procurement.

Dated: October 16, 2003.

Laura Auletta,
Director, Acquisition Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2001-17 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2001-17 is effective October 20, 2003.

Dated: October 9, 2003.

Deidre A. Lee,

Director, Defense Procurement and Acquisition Policy.

Dated: October 2, 2003.

David A. Drabkin,

Deputy Associate Administrator, Office of Acquisition Policy,
General Services Administration.

Dated: October 2, 2003.

Tom Luedtke,

Assistant Administrator for Procurement, National Aeronautics and
Space Administration.

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Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 7, 8, 10, 16, 19,
and 42 as set forth below:

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1. The authority citation for 48 CFR parts 2, 7, 8, 10, 16, 19, and 42
is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42

U.S.C. 2473(c).

PART 2--DEFINITIONS OF WORDS AND TERMS

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2. Amend section 2.101(b)(2) in the definition ``Bundling" by redesignating paragraph (3) as paragraph (4) and

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adding a new paragraph (3) to read as follows:

2.101 Definitions.

* * * * *

Bundling means--

* * * * *

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

(i) Multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources (see FAR 16.504(c)); and

(ii) An order placed against an indefinite quantity contract under a--

(A) Federal Supply Schedule contract; or

(B) Task-order contract or delivery-order contract awarded by another agency (i.e., Governmentwide acquisition contract or multi-agency contract).

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PART 7--ACQUISITION PLANNING

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

7.104 General procedures.

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(d)(1) The planner shall coordinate the acquisition plan or strategy with the cognizant small business specialist when the strategy contemplates an acquisition meeting the dollar amounts in paragraph (d)(2) of this section unless the contract or order is entirely reserved or set-aside for small business under part 19. The small business specialist shall notify the agency Office of Small and Disadvantaged Business Utilization if the strategy involves contract

bundling that is unnecessary, unjustified, or not identified as bundled by the agency. If the strategy involves substantial bundling, the small business specialist shall assist in identifying alternative strategies that would reduce or minimize the scope of the bundling.

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

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

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

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

(ii) If the strategy contemplates the award of multiple contracts or orders, the thresholds in paragraph (d)(2)(i) of this section apply to the cumulative maximum potential value, including options, of the contracts and orders.

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4. Amend section 7.105 in paragraph (b)(1) by adding a sentence after the third sentence to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b)(1) * * * When the proposed acquisition strategy involves bundling, identify the incumbent contractors and contracts affected by the bundling. * * *

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5. Amend section 7.107 in the third sentence of paragraph (a) by removing ``an agency" and adding ``an agency or the Government" in its place; in paragraphs (b)(1), (b)(2), and (d) by removing the word ``contract" and adding ``contract or order" in its place; by revising the introductory text of paragraph (e), paragraphs (e)(4) and (e)(5); and by adding paragraph (e)(6) to read as follows:

7.107 Additional requirements for acquisitions involving bundling.

* * * * *

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

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

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

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

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PART 8--REQUIRED SOURCES OF SUPPLIES AND CONTRACTS

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6. Amend section 8.404 in the introductory text of paragraph (a)(1) by removing the period at the end of the first sentence and adding ``and the requirement at 19.202-1(e)(1)(iii).'' in its place; and revising paragraph (a)(2) to read as follows:

8.404 Using schedules.

(a) * * *

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

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

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

PART 10--MARKET RESEARCH

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7. Amend section 10.001 by revising the introductory text of paragraph (c)(2) to read as follows:

10.001 Policy.

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(c) * * *

(2) At least 30 days before release of the solicitation or 30 days prior to placing an order without a solicitation--

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PART 16--TYPES OF CONTRACTS

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

16.505 Ordering.

(a) * * *

(7) * * *

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

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PART 19--SMALL BUSINESS PROGRAMS

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

19.201 General policy.

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(d) * * *

(11) Conduct annual reviews to assess the--

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

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

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

(12) Provide a copy of the assessment made under paragraph (d)(11) of this

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section to the Agency Head and SBA Administrator.

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

19.202 Specific policies.

* * * Agencies shall establish procedures including dollar thresholds for review of acquisitions by the Director or the Director's designee for the purpose of making these recommendations. * * *

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

19.202-1 Encouraging small business participation in acquisitions.

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(e)(1) * * *

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

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PART 42--CONTRACT ADMINISTRATION AND AUDIT SERVICES

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

42.1502 Policy.

(a) * * * These procedures shall require an assessment of contractor performance against, and efforts to achieve, the goals identified in the small business subcontracting plan when the contract includes the clause at 52.219-9, Small Business Subcontracting Plan.

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