

(1) Is wholly the growth, product, or manufacture of a sanctioned European Union (EU) member state; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a sanctioned EU member state into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

*Sanctioned European Union member state* means Austria, Belgium, Denmark, Finland, France, Ireland, Italy, Luxembourg, the Netherlands, Sweden, or the United Kingdom.

(b) The Contractor shall not deliver any sanctioned European Union country end products under this contract.  
(End of clause)

#### 52.225-16 Sanctioned European Union Country Services.

As prescribed in 25.1103(c), insert the following clause:

##### Sanctioned European Union Country Services (Feb 2000)

(a) *Definition. Sanctioned European Union member state*, as used in this clause, means Austria, Belgium, Denmark, Finland, France, Ireland, Italy, Luxembourg, the Netherlands, Sweden, or the United Kingdom.

(b) The Contractor shall not perform services under this contract in a sanctioned European Union member state. This prohibition does not apply to subcontracts.  
(End of clause)

#### 52.225-17 Evaluation of Foreign Currency Offers.

As prescribed in 25.1103(d), insert the following provision:

##### Evaluation of Foreign Currency Offers (Feb 2000)

If the Government receives offers in more than one currency, the Government will evaluate offers by converting the foreign currency to United States currency using [Contracting Officer to insert source of rate] in effect as follows:

(a) For acquisitions conducted using sealed bidding procedures, on the date of bid opening.

(b) For acquisitions conducted using negotiation procedures—

(1) On the date specified for receipt of offers, if award is based on initial offers; otherwise

(2) On the date specified for receipt of proposal revisions.

(End of provision)

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

#### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 2, 4, 5, 7, 10, 15, and 19

[FAC 97-15; FAR Case 1997-306 (97-306); Item III]

RIN 9000-A155

#### Federal Acquisition Regulation; Contract Bundling

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

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement sections of the Small Business Reauthorization Act of 1997. The sections of the Act define "contract bundling," and require agencies to avoid unnecessary bundling that precludes small business participation in the performance of Federal contracts.

**DATES:** *Effective Date:* December 27, 1999.

*Applicability Date:* The FAR, as amended by this rule, is applicable to solicitations issued on or after December 27, 1999.

*Comment Date:* Interested parties should submit comments to the FAR Secretariat at the address shown below on or before February 25, 2000 to be considered in the formulation of a final rule.

**ADDRESSES:** Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVRS), 1800 F Street, NW, Room 4035, Attn: Ms. Laurie Duarte, Washington, DC 20405.

Address e-mail comments submitted via the Internet to: farcase.1997-306@gsa.gov.

Please submit comments only and cite FAC 97-15, FAR case 1997-306 (97-306) in all correspondence related to this case.

**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 97-15, FAR case 1997-306 (97-306).

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This interim 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, and the Small Business Administration (SBA) interim rule published in the **Federal Register** at 64 FR 57366, October 25, 1999. Sections 411-417 amend Title 15 of the United States Code to define "contract bundling," and require agencies to avoid unnecessary bundling that precludes small business participation in the performance of Federal contracts.

This rule was not subject to Office of Management and Budget 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 changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because opportunities for participation by small entities in acquisitions involving bundling may increase. An Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

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

- Perform market research when bundled requirements are anticipated;
- Justify bundling in acquisition strategies;
- Meet specific estimated benefit thresholds before bundling requirements;
- Assess the impact of bundling on small businesses;
- Submit solicitations containing bundled requirements to the SBA procurement center representatives for review; and
- 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.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR subparts in accordance with 5 U.S.C. 610. Interested parties

must submit such comments separately and should cite 5 U.S.C 601, *et seq.* (FAC 97-15, FAR Case 1997-306 (97-306)), in correspondence.

**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.*

**D. Determination to Issue an Interim Rule**

The Councils have made a determination under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because this interim rule implements 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 require agencies to avoid unnecessary bundling that precludes small business participation in the performance of Federal contracts. The SBA published an interim rule in the **Federal Register** at 64 FR 57372, October 25, 1999, with an effective date of December 27, 1999, to implement Sections 411-417 of Pub. L. 105-135. It is necessary to have a December 27, 1999, effective date for this rule to provide contracting regulations that conform with SBA's regulations.

However, pursuant to Pub. L. 98-577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

**List of Subjects in 48 CFR Parts 2, 4, 5, 7, 10, 15, and 19**

Government procurement.  
Dated: December 20, 1999.

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

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 4, 5, 7, 10, 15, and 19 as set forth below:

1. The authority citation for 48 CFR parts 2, 4, 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. In section 2.101, add, in alphabetical order, the definitions "bundled contract" and "bundling" to read as follows:

**2.101 Definitions.**

\* \* \* \* \*

*Bundled contract* means a contract that is entered into to meet requirements that are consolidated by bundling, excluding a contract awarded and performed entirely outside the United States.

*Bundling* means—

(1) Consolidating two or more requirements for supplies or services, previously provided or performed under separate smaller contracts, into a solicitation for a single contract that is likely to be unsuitable for award to a small business concern due to—

- (i) The diversity, size, or specialized nature of the elements of the performance specified;
- (ii) The aggregate dollar value of the anticipated award;
- (iii) The geographical dispersion of the contract performance sites; or
- (iv) Any combination of the factors described in paragraphs (1)(i), (ii), and (iii) of this definition.

(2) *Separate smaller contract*, as used in this definition, means a contract that has been performed by one or more small business concerns or that was suitable for award to one or more small business concerns.

(3) This definition does not apply to a contract that will be awarded and performed entirely outside of the United States.

\* \* \* \* \*

**PART 4—ADMINISTRATIVE MATTERS**

3. In section 4.601, redesignate paragraph (e) as paragraph (f); add new paragraph (e); and revise the redesignated paragraph (f) to read as follows:

**4.601 Record requirements.**

\* \* \* \* \*

(e) In addition to the information described in paragraphs (b), (c), and (d) of this section, agencies must be able to access information from the computer file to identify bundled contracts with a total contract value, including all options, exceeding \$5,000,000.

(f) Agencies must transmit this information to the Federal Procurement Data System in accordance with its procedures.

**PART 5—PUBLICIZING CONTRACT ACTIONS**

4. Revise the section heading and text of 5.206 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 small, small disadvantaged, and women-owned small business firms, and to meet established subcontracting plan goals:

(1) A contractor awarded a contract exceeding \$100,000 that is likely to result in the award of any subcontracts.

(2) A subcontractor or supplier, at any tier, under a contract exceeding \$100,000, that has a subcontracting opportunity exceeding \$10,000.

(b) The notices must describe—

- (1) The business opportunity, following the standard CDB format for items 7, 10, 11, and 17 in 5.207(b)(4);
- (2) Any prequalification requirements; and
- (3) Where to obtain technical data needed to respond to the requirement.

**PART 7—ACQUISITION PLANNING**

5. In section 7.103, add paragraph (r) to read as follows:

**7.103 Agency-head responsibilities.**

\* \* \* \* \*

(r) Ensuring that acquisition planners, to the maximum extent practicable

(1) Structure contract requirements to facilitate competition by and among small business concerns; and

(2) Avoid unnecessary and unjustified bundling that precludes small business participation as contractors (see 7.107) (15 U.S.C. 631(j)).

6. Revise paragraph (b)(1) of section 7.105 to read as follows:

**7.105 Contents of written acquisition plans.**

\* \* \* \* \*

(b) *Plan of action—(1) Sources.* Indicate the prospective sources of supplies or services that can meet the need. Consider required sources of supplies or services (see part 8). Include consideration of small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns (see part 19), and the impact of any bundling that might affect their participation in the acquisition (see 7.107) (15 U.S.C. 644(e)). Address the extent and results of the market research and indicate their impact on the various elements of the plan (see part 10).

\* \* \* \* \*

7. Add section 7.107 to read as follows:

**7.107 Additional requirements for acquisitions involving bundling of contract requirements.**

(a) Bundling may provide substantial benefits to the Government. However, because of the potential impact on small business participation, the head of the agency must conduct market research to determine whether bundling is necessary and justified (15 U.S.C. 644(e)(2)). Market research may indicate that bundling is necessary and justified if an agency would derive measurably substantial benefits (see 10.001(a)(2)(iv) and (a)(3)(vi)).

(b) Measurably substantial benefits may include, individually or in any combination or aggregate, cost savings 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. The agency must quantify the identified benefits and explain how their impact would be measurably substantial. Except as provided in paragraph (d) of this section, the agency may determine bundling to be necessary and justified if, as compared to the benefits that it would derive from contracting to meet those requirements if not bundled, it would derive measurably substantial benefits equivalent to—

(1) Ten percent of the estimated contract value (including options) if the value is \$75 million or less; or

(2) Five percent of the estimated contract value (including options) if the value exceeds \$75 million.

(c) Without power of delegation, the service acquisition executive for the military departments, the Under Secretary of Defense for Acquisition, Technology and Logistics for the defense agencies, or the Deputy Secretary or equivalent for the civilian agencies may determine that bundling is necessary and justified when

(1) The expected benefits do not meet the thresholds in paragraphs (b)(1) and (b)(2) of this section but are critical to the agency's mission success; and

(2) The acquisition strategy provides for maximum practicable participation by small business concerns.

(d) Reduction of administrative or personnel costs alone is not sufficient justification for bundling unless the cost savings are expected to be at least 10 percent of the estimated contract value (including options) of the bundled requirements.

(e) Substantial bundling is any bundling that results in a contract with

an average annual value of \$10 million or more. When the proposed acquisition strategy involves substantial bundling, the acquisition strategy must—

(1) Identify the specific benefits anticipated to be derived from bundling;

(2) Include an assessment of the specific impediments to participation by small business concerns as contractors that result from bundling;

(3) Specify actions designed to maximize small business participation as contractors, including provisions that encourage small business teaming;

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

(5) Include a specific determination that the anticipated benefits of the proposed bundled contract justify its use.

(f) The contracting officer must justify bundling in acquisition strategy documentation.

(g) In assessing whether cost savings would be achieved through bundling, the contracting officer must consider the cost that has been charged or, where data is available, could be charged by small business concerns for the same or similar work.

(h) The requirements of this section do not apply to bundled contracts that are awarded in accordance with OMB Circular A-76 if a cost comparison has been performed under OMB Circular A-76 procedures. However, agencies must comply with the requirements of this section if they have not been met under A-76 procedures.

**PART 10—MARKET RESEARCH**

8. Amend section 10.001 as follows:

a. In paragraph (a) introductory text, remove “shall” and add “must” in its place;

b. In paragraph (a)(1) remove “which” and add “that” in its place;

c. At the end of paragraph (a)(2)(ii) remove “and”;

d. Add paragraph (a)(2)(iv);

e. At the end of paragraph (a)(3)(iv) remove “and”;

f. In paragraph (a)(3)(v) remove the period and add “; and”;

g. Add paragraph (a)(3)(vi); and

h. Add paragraph (c).

The revised and added text reads as follows:

**10.001 Policy.**

\* \* \* \* \*

(a) \* \* \*

(2) \* \* \*

(iv) Before soliciting offers for acquisitions that could lead to a

bundled contract (15 U.S.C. 644(e)(2)(A)); and

(3) \* \* \*

(vi) Determine whether bundling is necessary and justified (see 7.107) (15 U.S.C. 644(e)(2)(A)).

\* \* \* \* \*

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

(1) When performing market research, 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, notify any affected incumbent small business concerns of—

(i) The Government's intention to bundle the requirement; and

(ii) How the concerns may contact the appropriate Small Business Administration representative.

**PART 15—CONTRACTING BY NEGOTIATION**

**15.101-2 [Amended]**

8a. In section 15.101-2, amend paragraph (b)(1) by removing “15.304(c)(3)(iii)” and adding “15.304(c)(3)(iv)” in its place.

9. In section 15.304, amend paragraphs (c)(3)(i) and (c)(3)(ii) by removing “(iii)” and adding “(iv)” in their places; redesignate paragraph (c)(3)(iii) as (c)(3)(iv); and add new paragraphs (c)(3)(iii) and (c)(3)(5) to read as follows:

**15.304 Evaluation factors and significant subfactors.**

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(iii) For solicitations involving bundling that offer a significant opportunity for subcontracting, the contracting officer must include a factor to evaluate past performance indicating the extent to which the offeror attained applicable goals for small business participation under contracts that required subcontracting plans (15 U.S.C. 637(d)(4)(G)(ii)).

\* \* \* \* \*

(5) For solicitations involving bundling that offer a significant opportunity for subcontracting, the contracting officer must include proposed small business subcontracting participation in the subcontracting plan as an evaluation factor (15 U.S.C. 637(d)(4)(G)(i)).

\* \* \* \* \*

10. In section 15.305, add paragraph (a)(5) to read as follows:

15.305 Proposal evaluation.

(a) \* \* \*
(5) Small business subcontracting evaluation. Structure solicitations to give offers from small business concerns the highest rating for the evaluation factors in 15.304(c)(3)(iii) and (c)(5).
\* \* \* \* \*

PART 19—SMALL BUSINESS PROGRAMS

11. In section 19.101, revise paragraph (g)(1) to read as follows:

19.101 Explanation of terms.

(g) Control through contractual relationships—(1) Definition of a joint venture for size determination purposes. A joint venture for size determination purposes is an association of persons or concerns with interests in any degree or proportion by way of contract, express or implied, consorting to engage in and carry out a single specific business venture for joint profit, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. A joint venture is viewed as a business entity in determining power to control its management.

(i) For bundled requirements, apply size standards for the requirement to individual persons or concerns, not to the combined assets, of the joint venture.

(ii) For other than bundled requirements, apply size standards for the requirement to individual persons or concerns, not to the combined assets, of the joint venture, if—

(A) A revenue-based size standard applies to the requirement and the estimated contract value, including options, exceeds one-half the applicable size standard; or

(B) An employee-based size standard applies to the requirement and the estimated contract value, including options, exceeds \$10 million.

12. In section 19.201, redesignate paragraphs (d)(5) through (d)(9) as (d)(6) through (d)(10) respectively; add a new paragraph (d)(5); and amend paragraph (e) by removing “shall” and adding “must” in its place. The added text reads as follows:

19.201 General policy.

(d) \* \* \*
(5) Work with the SBA procurement center representative to—
(i) Identify proposed solicitations that involve bundling;

(ii) Facilitate small business participation as contractors including small business contract teams, where appropriate; and

(iii) Facilitate small business participation as subcontractors and suppliers where participation by small business concerns as contractors is unlikely;

13. Amend section 19.202–1 as follows:

a. At the end of paragraph (e)(1)(i) remove “, or” and add “;” in its place;

b. In paragraph (e)(1)(ii) remove the period and add “; or” in its place;

c. Add paragraph (e)(1)(iii);

d. In the introductory text of paragraph (e)(2) remove “shall also” and add “also must” in its place;

e. At the end of paragraph (e)(2)(iii) remove “or;”

f. In paragraph (e)(2)(iv) remove the period and add “; or” in its place; and

g. Add paragraph (e)(2)(v).

The added text reads as follows:

19.202–1 Encouraging small business participation in acquisitions.

(e) \* \* \*
(1) \* \* \*
(iii) The proposed acquisition is for a bundled requirement.

(2) \* \* \*
(v) Bundling is necessary and justified.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4 and 42

[FAC 97–15; FAR Case 99–015; Item IV]

RIN 9000–AI56

Federal Acquisition Regulation; Deobligation Authority

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 establish deobligation of excess funds as one of the contract administration functions normally delegated to the contract administration office.

DATES: Effective Date: February 25, 2000.

Applicability Date: The FAR, as amended by this rule, is applicable to solicitations issued on or after February 25, 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 Ms. Linda Klein, Procurement Analyst, at (202) 501–3775. Please cite FAC 97–15, FAR case 99–015.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule implements a recommendation of the Contract Closeout Working Integrated Process Team chartered by the Deputy Secretary of Defense under the Defense Reform Initiative Directive #32.

The rule revises FAR 4.804–5 and 42.302 to establish deobligation of excess funds as one of the contract administration functions normally delegated to the contract administration office. In addition, the rule includes editorial revisions for plain language purposes.

This rule was not subject to Office of Management and Budget 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 final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98–577, and publication for public comments is not required. However, the Councils will consider comments from small entities concerning the affected FAR subparts in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, et seq. (FAC 97–15, FAR case 99–015), in correspondence.

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.