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DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 2, 5, 7, 8, 10, 12, 15, 16,
19, and 52****[FAC 2005-91; FAR Case 2014-015; Item
VI; Docket No. 2014-0015, Sequence No.
1]****RIN 9000-AM92****Federal Acquisition Regulation;
Consolidation and Bundling****AGENCY:** Department of Defense (DoD),
General Services Administration (GSA),
and National Aeronautics and Space
Administration (NASA).**ACTION:** Final rule.**SUMMARY:** DoD, GSA, and NASA are
issuing a final rule to amend the Federal
Acquisition Regulation (FAR) to
implement sections of the Small
Business Jobs Act of 2010 and
regulatory changes made by the Small
Business Administration, which provide
for a Governmentwide policy on
consolidation and bundling.**DATES:** *Effective:* October 31, 2016.**FOR FURTHER INFORMATION CONTACT:** Ms.
Mahruba Uddowla, Procurement
Analyst, at 703-605-2868, for
clarification of content. For information
pertaining to status or publication
schedules, contact the Regulatory
Secretariat at 202-501-4755. Please cite
FAC 2005-91, FAR Case 2014-015.**SUPPLEMENTARY INFORMATION:****I. Background**

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 80 FR 31561 on June 3, 2015, to revise the FAR to provide for a Governmentwide policy on consolidation and bundling. The proposed rule incorporated regulatory changes made by the Small Business Administration (SBA) in its final rule which published in the **Federal Register** at 78 FR 61113 on October 2, 2013, concerning contract consolidation and bundling.

SBA's final rule implements the statutory requirements related to bundling and consolidation as set forth in sections 1312 and 1313 of the Small Business Jobs Act of 2010 (Pub. L. 111-240), as well as section 1671 of the

National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239). Eight respondents submitted comments on the FAR proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes

This final rule makes the following significant changes from the proposed rule:

- FAR 2.101—Amends the definition of “Small Business Teaming Arrangement” to note the differences applicable to DoD because of the DoD Pilot Mentor-Protégé Program. A similar change is made at FAR 52.207-6.
- FAR 7.104(d)—Amends the conditions under which the small business specialist must notify the agency Office of Small and Disadvantaged Business Utilization or the Office of Small Business Programs to be consistent with 13 CFR 125.2(c)(4)(ii).
- FAR 7.105(b)(1)(iv)—The second sentence no longer mentions consolidation since SBA's implementing rule does not require the identification of incumbent contractors and contracts affected by the consolidation.
- FAR 7.107-1(b)—Adds an exception for acquisitions from a mandatory source to the requirements at FAR 7.107 for acquisitions involving consolidation, bundling, or substantial bundling.
- FAR 7.107-1—The coverage formerly at FAR 7.107-1 on necessary and justified bundling for consolidation and bundling has been separated and moved to 7.107-2 and 7.107-3, due to differences in the statutory and regulatory requirements.
- FAR 7.107-2(e)—Provides procedures for consolidation corresponding to those for bundling at FAR 7.107-3(c) (now at 7.107-3(f)), to address the determination that consolidation is necessary and justified when the expected benefits do not meet the quantifiable dollar thresholds for a substantial benefit but are critical to the agency's mission success.
- FAR 7.107-5(c)—Removes the phrase “(even if additional requirements have been added or some have been deleted)” and adds a subparagraph (4) which requires that the notice to SBA

include a list of requirements that have been added or deleted for the follow-on bundled or consolidated procurement. The changes will facilitate a more accurate comparison of savings and benefits from the prior procurement.

- FAR 15.304(c)(3) and (4)—Excludes solicitations that are set aside for small business from the requirements relating to small business subcontracting-related evaluation factors for solicitations involving consolidation.

B. Analysis of Public Comments**1. General****a. Support for the Rule**

Comment: One respondent expressed general support for the rule and that the proposed changes are positive which will provide much needed transparency and ensure that unnecessary and unjustified bundling do not become the contracting standard.

Response: Noted.

b. Experiences With Consolidation

Comment: Two respondents commented on their experience with consolidation and/or bundling; the adverse impact on small businesses' ability to compete in this environment; and expressed, had this rule been in effect, their experience very likely could have been different.

Response: Noted.

c. Need for Table of Thresholds

Comment: One respondent requested that a table of dollar thresholds may be useful to clarify the differences between consolidation and bundling.

Response: With regard to the use of a table to clarify the differing dollar thresholds associated with these terms, the preferred approach is to provide the guidance for processing a consolidated or bundled requirement in the area of the FAR where the respective subject matter is addressed. For example, the dollar threshold for triggering the Senior Procurement Executive's or Chief Acquisition Officer's determination of necessary and justified consolidation is discussed in the area of the FAR, 7.107-2, which addresses consolidation. Similarly, the dollar thresholds for substantial bundling and the attendant requirements for processing these acquisitions are provided at FAR 7.107-4. The FAR is arranged in this manner to allow contracting officers to quickly turn to the area of the FAR where the requisite guidance needed for their given situation is provided.

d. Mixing of Consolidation and Bundling

Comment: Three respondents commented that the rule appeared to incorrectly or unnecessarily use the terms consolidation and bundling synonymously, by applying the same requirements to both. The respondents identified the following areas in the rule where they believed that this occurred:

- *FAR 7.103(u)(2)*. This paragraph currently urges acquisition planners to avoid unnecessary and unjustified bundling that precludes participation of small business as prime contractors. The rule proposes that planners also avoid unnecessary and unjustified consolidation. One respondent believes that a consolidation that precludes participation of small business as the prime would automatically be bundling and as such, the rule is proposing an unnecessary change.

- *FAR 7.104(d)*. This paragraph currently requires coordination with the small business specialist when an acquisition meets the dollar thresholds for substantial bundling, unless the acquisition is set aside for small business. The small business specialist is required to notify the agency's small business office (e.g., Office of Small and Disadvantaged Business Utilization) when the acquisition involves unjustified or unnecessary bundling or is not identified as bundling. The rule proposes to also require notification when the acquisition involves unjustified or unnecessary consolidation or is not identified as consolidation. It was pointed out that the coordination exemption for set-asides conflicts with the proposed notification requirement in cases where consolidation results in a small business set-aside because the small business specialist would not be coordinated with in such cases so they would not be able to provide the notification.

- *FAR 7.105(b)(1)(iv)*. The rule proposes to require that for consolidated contract requirements, the acquisition plan identify the incumbent contractors and contracts affected by the consolidation. The FAR currently only requires this for bundled contract requirements. One respondent stated the proposed additional burden could result in listing thousands of contracts for a strategic sourcing acquisition and that there is no statutory requirement for said identification.

- *FAR 7.107-1*. This subsection provides guidance on how consolidation and bundling could be determined necessary and justified. One respondent asked why the same

requirements have to be met for both consolidation and bundling.

- *FAR 7.107-2(a)*. One respondent asked why there is a requirement for coordination with the Office of Small and Disadvantaged Business Utilization (OSDBU) and/or a negative impact analysis on small businesses for consolidation if the consolidation results in a small business set-aside. The respondent believes that if the acquisition is not set aside then it would automatically be bundling and that bundling has the same justification process as consolidation.

- *FAR 7.107-5*. One respondent pointed out that this subsection starts out talking about bundling then in paragraph (c) mixes in consolidated requirements, which the respondent believes is mixing two completely different situations that are not synonymous.

- *FAR 15.304(c)*. The rule proposes to require that there be evaluation factors related to a small business subcontracting plan for consolidated requirements. Currently, the FAR only requires this for bundling. Two respondents pointed out that if a consolidated requirement is set aside for small business, a small business subcontracting plan would not be required.

- *FAR 19.202-1*. One respondent asked why the rule is proposing to apply the requirement for 30-day notification to incumbent small businesses for consolidated requirements. The respondent also stated that paragraph (e)(2)(v) is confusing because the requirements of that paragraph would not apply if consolidation results in a small business set-aside.

Response: The Councils reviewed the areas of the rule identified by the respondents to ensure that the appropriate requirements were being applied to consolidation. The final rule has been revised at—

- *FAR 7.104(d)* to remove “consolidation” in several places from the conditions under which the small business specialist must notify the agency Office of Small and Disadvantaged Business Utilization or the Office of Small Business Programs to be consistent with 13 CFR 125.2(c)(4)(ii); and

- *FAR 7.105(b)(1)(iv)* to no longer mention consolidation in the second sentence, since sections 1312 and 1313 of the Small Business Jobs Act and SBA's implementing regulations at 13 CFR 125.2 do not require the small business identification of incumbent contractors for consolidated requirements.

The final rule has also been revised at FAR 15.304(c) to clarify that consolidated requirements which are set aside for small business will not be required to use the small business subcontracting-related evaluation factors. While SBA's regulations at 13 CFR 125.2(d)(4) require small business subcontracting plan-related evaluation factors be used for all consolidated acquisitions, implementing this requirement in the FAR would be problematic. Because FAR 15.305(a)(5) requires that small business offerors get the highest rating for these factors, every offeror would receive the same rating for such factors in the scenario where a consolidated acquisition is set aside for small business, which would make use of such evaluation factors conflict with FAR 15.304(b)(2), which requires that evaluation factors support meaningful comparison and discrimination between and among competing proposals.

The final rule retains the proposed changes (with some further edits) to FAR 7.103(u)(2), 7.104(d), 7.107-1, 7.107-2, 7.107-5, and 19.202-1 as those changes are consistent with sections 1312 and 1313 of the Small Business Jobs Act and SBA's implementing regulations at 13 CFR 125.2. The Councils note that the rule does not have a requirement for a 30-day notification to incumbent small business contractors for consolidated requirements, as one respondent stated, nor does the rule automatically define a consolidated requirement that is not set aside for small business as bundling.

2. Applicability

a. AbilityOne

Comment: One respondent asked whether the requirements for consolidation are necessary for acquisition of services from the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (also known as the AbilityOne Commission), which is considered a mandatory source in accordance with FAR 8.002. The respondent requested the rule clarify how the mandatory sources relate to the consolidation requirements at FAR 7.107-2.

Response: For requirements that are on the Procurement List, the required source(s) to fulfill that work are already designated by the U.S. AbilityOne Commission. There would be no potential impact on small business participation or even on AbilityOne nonprofit agency participation if multiple Procurement List requirements are consolidated, because the sources will remain the same in accordance

with those listed on the Procurement List. For that reason, it would not be necessary to engage in the market research or analysis required in FAR 7.107–1 and 7.107–2 if the potential consolidation only involves required sources of supply and services such as requirements on the Procurement List.

This same rationale applies to acquisitions from other mandatory sources. Therefore, the final rule has been revised at 7.107–1 to clarify that the consolidation and bundling requirements at 7.107 do not apply to acquisitions for which there are mandatory sources pursuant to FAR 8.002, “Priorities for use of mandatory Government sources,” or FAR 8.003, “Use of other mandatory sources.” The purpose of section 1313 of the Small Business Jobs Act was to limit the use of contract consolidation because of the anticipated negative impact of such an acquisition strategy on small business. However, requirements for which there is a mandatory source are not available to small business and as such, consolidation would result in no impact to small business, negative or positive. Further, neither 41 U.S.C. 8504 (the statutory authority behind the AbilityOne Program) nor 18 U.S.C. 4124(a) (another mandatory source—Federal Prison Industries) requires consolidation analyses for acquisitions done under their programs. Since application of the consolidation requirements would only create burden for the acquisition process and no benefit to small business, the Councils have determined, as a way of harmonizing different statutes, to exempt those consolidated contracts that can be met through one of the mandatory sources identified in FAR 8.002 or 8.003.

b. Blanket Purchase Agreements (BPAs)

Comment: One respondent recommended changes to multiple parts of the FAR in order to apply the bundling and consolidation analysis requirements to BPAs, especially Federal Supply Schedule (FSS) BPAs. The recommendation was based on the respondent’s assumption that the Councils did not intend to exclude BPAs from bundling or consolidation analysis. The respondent requested that if the recommended changes were not made, that the final rule should address the applicability of bundling and consolidation requirements to BPAs.

Response: The statutory definition of “bundling of contract requirements” at paragraph (o) of 15 U.S.C. 632, Definitions, and of “consolidation of contract requirements” at 15 U.S.C. 657q, Consolidation of contract

requirements, and SBA’s implementing regulations at 13 CFR 125.1(c) and (e), only mention “contract” in terms of bundling and consolidation. BPAs are not contracts and therefore neither statute nor the implementing regulations apply the consolidation and bundling analysis requirements to them; however, orders under BPAs are treated as contracts in SBA’s regulations at 13 CFR 125.1(d). The FAR definitions of “consolidation” and “bundling” apply to task or delivery orders, including those issued under BPAs.

c. 8(a)

Comment: One respondent requested that the requirement for a consolidation determination and findings (D&F) be waived for consolidation affecting or relating to sole source awards under the 8(a) program, due to concerns over potentially longer procurement lead times. Moreover, the respondent suggested that the requirement for a consolidation D&F contradicts FAR 6.302–5(b)(4) and the intent of paragraph 8(a) of the Small Business Act.

Response: Neither the statute nor SBA’s final rule waived or exempted consolidations under or relating to the 8(a) Program; therefore, the new requirement is, in fact, applicable to all consolidations with an estimated total dollar value exceeding \$2 million, even those where the new consolidated award will be made via sole source contract under the 8(a) Program.

3. Definitions

a. “Acquisition Planning Team” and “Planner”

Comment: One respondent requested definitions of “acquisition planning team” and “planner,” in relation to the requirement at FAR 7.104 that small business is to be a discipline that is represented on the acquisition planning team.

Response: These are not new terms introduced to the FAR by this rule. “Planner” is currently defined at FAR 7.101 to mean the designated person or the office responsible for developing and maintaining a written plan, or for the planning function in those acquisitions not requiring a written plan.

“Acquisition planning” is defined in FAR 2.101. FAR 7.104 addresses the composition of the acquisition planning team, *i.e.*, the planner shall form a team consisting of all those who will be responsible for significant aspects of the acquisition, such as contracting, fiscal, legal, and technical personnel. This rule adds small business personnel to this

list of functional experts that comprise the acquisition planning team.

b. “Bundling” and “Consolidation”

Comment: One respondent finds the definitions of “bundling” and “consolidation” useful to clearly set forth the requirements.

Response: Noted.

Comment: One respondent was concerned whether the statement in the definition of “bundling or bundled contract” that “this definition does not apply to contracts that will be awarded and performed entirely outside the United States” was intended to limit the applicability of the rule based on where the contract will be awarded and performed. The respondent further noted a potential inconsistency between that statement and the statement in the SBA regulations at 13 CFR 125.2(c) that the Small Business Act requires each Federal agency to foster the participation of small business concerns as prime contractors and subcontractors in the contracting opportunities of the Government, regardless of the place of performance of the contract. According to the respondent, the Court of Federal Claims has concluded that SBA’s implementation of a provision of the Small Business Act via regulation must be viewed as controlling where there is an inconsistent FAR rule (C&G *Excavating, Inc. v. U.S.*, 32 Fed. Cl. 231 (Fed. Cl. 1994)).

Response: This issue will be considered under FAR case 2016–002, Applicability of Small Business Regulations Outside the United States.

4. Acquisition Planning (FAR 7.104 and 7.105)

Comment: With regard to the clarification at FAR 7.104(a) that small business is to be a discipline that is represented in the acquisition planning team, one respondent stated that SBA will be working with at least a DD Form 2579 on most actions, so depending on the dollar amount is that sufficient? The respondent questioned the formality of the SBA involvement.

Response: The small business specialist on the acquisition planning team will probably be a representative of the agency small business office, not the SBA. The SBA will be working with, at a minimum, a DoD Form 2579, Small Business Coordination Record, or equivalent when reviewing acquisitions for consolidation or bundling. Currently, SBA’s regulations at 13 CFR 125.2(c)(1)(v) require that an agency must notify the SBA within 30 days prior to the issuance of a solicitation for a bundled or consolidated contract and also requires that the DoD Form 2579 or

equivalent must be sent to the SBA procurement center representative.

The formality of SBA's involvement is expanded upon by FAR 19.202–1(e)(1)(iii), which further requires agencies to provide a copy of the acquisition package to the SBA procurement center representation if the proposed requirement is for a bundled requirement. This acquisition package includes “all information relative to the justification of contract bundling, including the acquisition plan or strategy.” This rule also requires this information for consolidation. If the acquisition involves substantial bundling, the agency must provide the requirements listed at FAR 7.107(e), moved in the final rule to 7.107–4.

Comment: One respondent commented that the thresholds proposed in FAR 7.104(d) for consultation with the cognizant small business specialist should be compared to current FAR or Defense Federal Acquisition Regulation Supplement (DFARS) thresholds for such review. The respondent was concerned that these thresholds would likely result in a much larger workload that should be coordinated with SBA.

Response: The requirements to coordinate with the small business specialist when a requirement meets the threshold for substantial bundling already exist in the current FAR at 7.104(d)(1). The thresholds currently listed in FAR 7.104(d)(2)(i) still exist and are the thresholds used to differentiate “bundling” from “substantial bundling”. However, FAR 7.104 is being amended to remove the substantial bundling thresholds, which will be relocated in a new section, FAR 7.107–4 for clarity and consistency purposes. Therefore, there is no increase in workload for the small business specialists due to the threshold.

Comment: One respondent stated that most FAR/DFARS language speaks to acquisition planning and not strategies.

Response: Acquisition strategies are heavily considered in both the FAR and DFARS. As stated in the acquisition planning definition at FAR 2.101, acquisition planning includes developing the overall strategy for managing the acquisition. FAR 7.107–3(f)(2) in the final rule (formerly FAR 7.107(c)(2)) indicates that the acquisition strategy must provide for maximum practicable participation by small business concerns. FAR 7.107–4(b) in the final rule (formerly FAR 7.107(e)) goes further and describes additional elements for the acquisition strategy when there is substantial bundling.

5. Additional Requirements—Consolidation, Bundling, or Substantial Bundling (FAR 7.107)

a. General Requirements (FAR 7.107–1)

Comment: One respondent acknowledged numerous benefits to the rule and how it will standardize the management of requirements bundling across Government agencies. This standardized approach was noted to provide more visibility into Government contracting. The respondent additionally lauded FAR 7.107–1(b) for its identification of the possible benefits that may be attained from bundling or consolidation such as cost savings; price-reduction; quality improvements, etc. Furthermore, the respondent supported the thresholds in the rule for the Government to use to substantiate the benefits of bundling or consolidation including the threshold in FAR 7.107–1(e) requiring cost savings based on administrative or personnel costs must be at least 10 percent to prevent potential misleading justifications about administrative costs.

Response: Noted.

Comment: One respondent commented on the appropriateness of the Senior Procurement Executive (SPE) or Chief Acquisition Officer (CAO) making the determination of cost savings of consolidated requirements. Of particular concern, the respondent felt the determination should be the responsibility of the customer/requirements owner.

Response: Generally, FAR determinations that pertain to the acquisition process are made by acquisition professionals (e.g., CAO, SPE, contracting officer, etc.). Paragraph (c)(2)(B) of 15 U.S.C. 657q, Consolidation of contract requirements, requires the determination of cost savings under a consolidated requirement be made by the SPE or CAO. The language used in the rule provides flexibility as to who would actually write or provide any supporting document as the SPE or CAO are only required to make the determination.

Comment: One respondent commented that Government agencies are required to meet 10 percent savings requirement for consolidation, even though they are potentially still setting aside for small businesses. If they cannot meet that savings objective then they cannot consolidate requirements and therefore cannot save the taxpayer money. This requirement will also cause the Government to expand its needed resources in order to ensure enough personnel to provide proper oversight of multiple orders.

Response: The Councils reviewed the comment and have included in FAR 7.107–2(e) the similar authority contained in the final rule for FAR 7.107–3(f), which allows specific senior officials under certain circumstances to determine that consolidation is necessary and justified, even though expected benefits do not meet the quantifiable dollar thresholds for a substantial benefit. Section 1313 provides that a SPE or CAO may determine that an acquisition strategy involving consolidation is necessary and justified if the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches identified that would involve a lesser degree of consolidation. In the preamble to the SBA final rule, SBA indicated (published in the **Federal Register** at 78 FR 61120) that since the Small Business Jobs Act does not define the terms “substantially exceed” or “benefits” for contractual consolidation, SBA used the definitions for those terms currently set forth in the bundling regulations in 13 CFR 125. Therefore, it is reasonable, in implementation of these thresholds in the FAR, to provide the same procedures set forth at 13 CFR 125.2(d)(2)(iii) with regard to the authority to make a determination that consolidation is necessary and justified even though the benefits do not meet the thresholds for substantial benefits, but in the aggregate are critical to the agency's mission success.

b. Consolidation (FAR 7.107–2)

Comment: One respondent discussed the consolidation of contract requirements specified at FAR 7.107–2 and expressed that the \$2 million dollar threshold which would require a justification is adequate, without being overly burdensome. Additionally, the respondent commented that the review process and the impact analysis on small businesses when contract consolidation is being contemplated are preventive measures to ensure consolidation is justified.

Response: Noted.

c. Bundling (FAR 7.107–3)

Comment: One respondent recommended additional guidance to be provided to clarify the term “measurably substantial” when agencies are quantifying specific benefits to be achieved from bundling. FAR 7.107–3(b) requires an agency to quantify the specific benefits identified through market research and other techniques to explain how their impact would be measurably substantial (see 10.001(a)(2)(iv) and (a)(3)(vii)).

The respondent is also concerned that after market analysis and cost analysis is complete, if the benefits do not meet the thresholds for a substantial benefit, the military service acquisition executive, Deputy Secretary, or equivalent position may still determine that bundling is necessary and justified. The respondent is concerned that this section could convert itself to a catch-all for any acquisition that does not meet the requirements but the Agency still feels compelled to bundle.

Response: The SBA regulations at 13 CFR 125.2(d)(2)(ii) require the benefits to be measurably substantial in order for the bundling to be necessary and justified. This requirement is implemented at FAR 7.107–3(a).

Benefits of bundling are measurably substantial if individually, in combination, or in the aggregate the anticipated financial benefits are equivalent to—

(1) Ten percent of the estimated contract or order value (including options) if the value is \$94 million or less; or

(2) Five percent of the estimated contract or order value (including options) or \$9.4 million, whichever is greater, if the value exceeds \$94 million.

The final rule now incorporates at FAR 7.107–3(d) the discussion of substantial benefits that was located at FAR 7.107–1(d). The benefits are measurably substantial when the agency can quantify the specific benefits identified through the use of market research and other techniques.

If the thresholds are not met, FAR 7.107–3(f) requires a high level of determination, without power of delegation, that the expected benefits are critical for the agency's mission success, and that the acquisition strategy provides for maximum practicable participation by small business concerns. These protections are sufficient to ensure that agencies are not able to use this exception as a catch-all for acquisitions that do not meet the requirements.

d. Substantial Bundling (FAR 7.107–4)

Comment: One respondent found the separate definition and discussion on substantial bundling at FAR 7.107–4 to be helpful as it sets forth and distinguishes the requirements of substantial bundling from consolidation and bundling (FAR 7.107–2 and 7.107–3, respectively). The respondent further commented that the documentation requirements of specific benefits to be derived from substantial bundling are a positive protection for small businesses.

Response: Noted.

6. Notification (FAR 7.107–5)

a. Notification to Small Businesses

Comment: Two respondents commented on the requirements at FAR 7.107–5(a) to notify each small business performing a contract that it intends to bundle the requirement with one or more other requirements at least 30 days prior to the issuance of the solicitation for the bundled requirement. Both respondents considered that the 30 day time period was insufficient. One respondent stated that the Government must know this far in advance of 30 days. The other respondent noted that 30 days does not provide adequate time for the small business to coordinate with the designated SBA Procurement Center representative or designated contact. The respondent suggested at least 45 calendar days.

One respondent asked what the documentation requirements are for this in the contract file.

Response: This final rule implements the SBA regulations (see 13 CFR 125.2(d)(5)), which specify a time period of least 30 days prior to the issuance of the solicitation. Those regulations and FAR 7.107–5(a)(3) require documentation of the notification in the contract file. The contracting officer has discretion on how best to document the contract file.

b. Notification to the Public

Two respondents commented on the requirement at FAR 7.107–5(b) that the agency notify the public of the rationale for a bundled requirement, via the agency's Web site.

Comment: One respondent asked whether this reporting duty can be delegated to the chief acquisition executive/senior procurement executive or head of the contracting activity.

Response: The statute requires the head of the agency to post this information to the agency Web site, but does not prohibit redelegation. FAR 1.108(b) states that each authority is delegable unless specifically stated otherwise. Therefore, the actual posting can be delegated to an appropriate level within the agency.

Comment: Another respondent supported the proposed amendments to require publication on the Web site but noted that the requirement was only mandatory for any bundled requirements for which the agency has solicited offers or issued an award, whereas the agency is only encouraged to provide notification to FedBizOpps before the issuance of the solicitation. The respondent recommended that this presolicitation notification to the public should be mandatory.

Response: This FAR rule is implementing the SBA regulations at 13 CFR 125.2(d)(6) and the statute, which mandate publication of bundled requirements on agency Web sites on an annual basis. The SBA regulations only encourage providing such notification before issuance of the solicitation, and do not specify FedBizOpps or any particular Web site as the location of such posting.

c. Notification to SBA

Comment: One respondent commented that the requirement to notify SBA of each follow-on bundled or consolidated contract will provide more complete data regarding whether consolidation or bundling actually was a positive outcome for the agency. According to the respondent, including the historical data of the amount of savings and benefits that resulted from the consolidation or bundling and then comparing it to whether such benefits will continue in a follow-on contract will provide an excellent opportunity for analysis.

Response: Noted.

7. Provision (FAR 52.207–6)

Comment: One respondent requested information on the provision in the proposed rule to be included in each solicitation for any multiple-award contract above the substantial bundling threshold. The respondent had concerns that this rule appeared to indicate that the normal requirement is to set up multiple-award contracts only for large business and overlooks the process for set-aside contracts. This respondent suggested that the provision should provide for a higher evaluation of a large business teaming with a small business, or if it has a substantial small business subcontracting plan.

Response: The provision at FAR 52.207–6 is required by section 1312(a) of the Small Business Jobs Act of 2010 and the SBA regulations. The statute requires “a provision soliciting bids from any responsible source, including responsible small business concerns and teams or joint ventures of small business concerns.”

C. Other Changes

At FAR 2.101 and in the clause at 52.207–6, the definition of “Small Business Teaming Arrangement” has been amended to add a subparagraph in paragraph (2) to explain that for DoD, a Small Business Teaming Arrangement may include two business concerns in a mentor-protégé relationship in the Department of Defense Pilot Mentor-Protégé Program (see section 831 of the National Defense Authorization Act for

Fiscal Year 1991 (Pub. L. 101–510; 10 U.S.C. 2302 note) only so long as both the mentor and the protégé are small. There is no exception to joint venture size affiliation for offers received from Small Business Teaming Arrangements under the Department of Defense Pilot Mentor-Protégé Program. In addition, a clarification is added in paragraph (3) of the definition, that this exception to affiliation applies in the case of a solicitation of offers for a bundled contract with a reserve (as stated at 13 CFR 121.103(b)(9)).

The definition of “Bundling” at FAR 2.101 has been amended for clarity and to remove the proposed reference to the description of substantial bundling in part 7. The definition of “Consolidation” has been amended to remove redundant terms. The phrase “contract requirements” is removed for clarity wherever it is associated with bundling and consolidation in the final rule, since bundling and consolidation apply to orders as well as contracts.

For consistency, the final rule amends the text at FAR 5.205(g) to reflect the specific text at FAR 7.107–5(b)(2), instead of paraphrasing.

The final rule contains a minor editorial correction to the cross-reference at FAR 7.107–3(b).

At FAR 7.107–3(f), the identification of officials authorized to make the determination in the Department of Defense that bundling is necessary and justified, even if the anticipated savings do not meet the specified thresholds, has been amended to more closely reflect the SBA regulation at 13 CFR 125.2(d)(2)(iii).

At FAR 7.107–4(a)(1), the final rule adds language which conforms to other proposed changes for subpart 7.1, which consists of spelling out “task order or delivery order” whenever talking about requirements associated with bundling or consolidation. The use of this distinct terminology is due to FAR subpart 7.1 already having a definition for “order” which does not accurately describe the orders to which bundling and consolidation requirements apply. Consequently, because there is no conflicting definition of “order” in FAR subparts 8.4 or 16.5, the final rule has been amended to remove the proposed use of the distinct terminology in those subparts.

The final rule contains a number of editorial changes such as the addition of cross-references in FAR 7.107–2, 7.107–3, and 7.107–6, removal of redundant text in 7.107–5(a), and the deletion of “significant” from 19.201(c)(5)(i) as there is no definition for “significant bundling”.

III. Applicability to Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule creates provision FAR 52.207–6, Solicitation of Offers from Small Business Concerns and Small Business Teaming Arrangements or Joint Ventures (Multiple-Award Contracts), in order to implement paragraph (a) of section 1312 of the Small Business Jobs Act of 2010. This paragraph concerns 15 U.S.C. 644, Awards or Contracts, and therefore applies as a matter of law to COTS items. The Federal Acquisition Regulatory Council, pursuant to the authority granted in 41 U.S.C. 1906, List of laws inapplicable to procurements of commercial items, and the Administrator for Federal Procurement Policy, pursuant to the authority granted in 41 U.S.C. 1907, List of laws inapplicable to procurements of commercially available off-the-shelf items, have determined that it would not be in the best interest of the Federal Government to exempt solicitations for the acquisition of commercial items from the applicability of paragraph (a) of section 1312, entitled “Leadership and Oversight,” of the Small Business Jobs Act, or to exempt solicitations for the acquisition of commercial items or for COTS from the applicability of paragraph (a) of section 1313, entitled “Consolidation of Contract Requirements”. The FAR provision 52.207–6, Solicitation of Offers from Small Business Concerns and Small Business Teaming Arrangements or Joint Ventures (Multiple-Award Contracts), has been written so that the application of the provision is carefully tailored, consistent with the statute. The provision is a notice to offerors that imposes no burdens, but simply encourages small business concerns and small business teaming arrangements or joint ventures of small business concerns to submit offers on multiple-award contracts above the substantial bundling threshold of the Federal agency. Therefore, the potential benefits to small business entities outweigh any potential drawback of application to acquisitions of commercial items.

The consolidation requirements of section 1313 should apply to all contracts and subcontracts above the threshold(s) specified in the statute, including contracts and subcontracts for the acquisition of commercial items and COTS. The statute requires agencies to ensure increased consideration of small businesses in connection with the establishment of multiple award contracts and acquisitions that consolidate contracts. Not applying

these requirements to the maximum extent possible would exclude a significant number of acquisitions which would not help to protect the interests of small businesses and boost their opportunities in the Federal marketplace. Not applying the consolidation requirements to the acquisition of commercial items or COTS would limit the full implementation of the Small Business Jobs Act of 2010. For all of these reasons, it is in the best interest of the Federal Government to apply the consolidation requirements to all contracts and subcontracts above the threshold(s) specified in the statute.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

The final rule amends the FAR to provide uniform guidance on consolidation and bundling consistent with SBA’s final rule which was published in the **Federal Register** at 78 FR 61113 on October 2, 2013, which implements Sections 1312 and 1313 of the Small Business Jobs Act of 2010 (Pub. L. 111–240) and section 1671 of Pub. L. 112–239.

The rule requires the head of the agency to publish on the agency Web site a list and rationale for bundled contracts; requires solicitation for multiple-award contracts above the substantial bundling threshold to include a provision soliciting bids from any responsible source; requires agencies to publish bundling policy on agency Web site; provides for a definition of “consolidation;” and, prohibits an agency from carrying out consolidation of requirements over \$2 million until certain actions are taken.

The objective of this rule is to alleviate the adverse effects of contract bundling and consolidation on small business concerns competing for Federal contracts. This rule

provides a balance between the benefits of bundling and consolidation and the obstacles they create for small businesses.

There were no significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis provided in the proposed rule.

This rule may have a positive economic impact on any small business entity that wishes to participate in the Federal procurement arena. Analysis of the SAM database indicates there are currently approximately 307,846 small business registrants that can potentially benefit from the implementation of this rule. This rule does not impose any new reporting, recordkeeping or other compliance requirements.

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

VI. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 2, 5, 7, 8, 10, 12, 15, 16, 19, and 52

Government procurement.

Dated: September 19, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 5, 7, 8, 10, 12, 15, 16, 19, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 5, 7, 8, 10, 12, 15, 16, 19, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101, in paragraph (b)(2) by—

- a. Removing the definition “Bundled contract”;
- b. Revising the definition “Bundling”;
- c. Adding, in alphabetical order, the definitions “Consolidation, or consolidated requirement” and “Small Business Teaming Arrangement”.

The revision and additions read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Bundling—

(1) Means a subset of consolidation that combines two or more requirements for supplies or services, previously provided or performed under separate smaller contracts (see paragraph (2) of this definition), into a solicitation for a single contract, a multiple-award contract, or a task or delivery order that is likely to be unsuitable for award to a small business concern (even if it is suitable for award to a small business with a Small Business Teaming Arrangement) 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.

* * * * *

Consolidation or consolidated requirement—

(1) Means a solicitation for a single contract, a multiple-award contract, a task order, or a delivery order to satisfy—

- (i) Two or more requirements of the Federal agency for supplies or services that have been provided to or performed for the Federal agency under two or more separate contracts, each of which was lower in cost than the total cost of the contract for which offers are solicited; or
- (ii) Requirements of the Federal agency for construction projects to be performed at two or more discrete sites.

(2) *Separate contract* as used in this definition, means a contract that has been performed by any business, including small and other than small business concerns.

* * * * *

Small Business Teaming Arrangement—

(1) Means an arrangement where—

- (i) Two or more small business concerns have formed a joint venture; or
- (ii) A small business offeror agrees with one or more other small business concerns to have them act as its subcontractors under a specified Government contract. A Small Business

Teaming Arrangement between the offeror and its small business subcontractor(s) exists through a written agreement between the parties that—

(A) Is specifically referred to as a “Small Business Teaming Arrangement”; and

(B) Sets forth the different responsibilities, roles, and percentages (or other allocations) of work as it relates to the acquisition;

(2)(i) For civilian agencies, may include two business concerns in a mentor-protégé relationship when both the mentor and the protégé are small and the concerns have received an exception to affiliation pursuant to 13 CFR 121.103(h)(3)(ii) or (iii).

(ii) For DoD, may include two business concerns in a mentor-protégé relationship in the Department of Defense Pilot Mentor-Protégé Program (see section 831 of the National Defense Authorization Act for Fiscal Year 1991 (Pub. L. 101–510; 10 U.S.C. 2302 note)) when both the mentor and the protégé are small. There is no exception to joint venture size affiliation for offers received from teaming arrangements under the Department of Defense Pilot Mentor-Protégé Program; and

(3) See 13 CFR 121.103(b)(9) regarding the exception to affiliation for offers received from Small Business Teaming Arrangements in the case of a solicitation of offers for a bundled contract with a reserve.

* * * * *

PART 5—PUBLICIZING CONTRACT ACTIONS

■ 3. Amend section 5.205 by adding paragraph (g) to read as follows.

5.205 Special situations.

* * * * *

(g) *Notification to the public of rationale for bundled requirement.* The agency is encouraged to provide notification of the rationale for any bundled requirement to the GPE before issuing the solicitation of any bundled requirement (see 7.107–5(b)(2)).

PART 7—ACQUISITION PLANNING

■ 4. Amend section 7.103 by revising paragraph (u)(2) to read as follows:

7.103 Agency-head responsibilities.

* * * * *

(u) * * *

(2) Avoid unnecessary and unjustified consolidation or bundling (see 7.107) (15 U.S.C. 631(j) and 15 U.S.C. 657q).

* * * * *

■ 5. Amend section 7.104 by removing from paragraph (a) “contracting,” and

adding “contracting, small business,” in its place; and revising paragraph (d) to read as follows:

7.104 General procedures.

* * * * *

(d) The planner shall coordinate the acquisition plan or strategy with the cognizant small business specialist when the strategy contemplates an acquisition meeting the thresholds in 7.107–4 for substantial bundling unless the contract or task order or delivery 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 or the Office of Small Business Programs if the strategy involves—

(1) Bundling that is unnecessary or unjustified; or

(2) Bundled or consolidated requirements not identified as such by the agency (see 7.107).

* * * * *

■ 6. Amend section 7.105 by revising paragraph (b)(1) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) *Plan of action*—(1) *Sources*. (i) Indicate the prospective sources of supplies or services that can meet the need.

(ii) Consider required sources of supplies or services (see part 8) and sources identifiable through databases including the Governmentwide database of contracts and other procurement instruments intended for use by multiple agencies available at <https://www.contractdirectory.gov/contractdirectory/>.

(iii) Include consideration of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns (see part 19).

(iv) Consider the impact of any consolidation or bundling that might affect participation of small businesses in the acquisition (see 7.107) (15 U.S.C. 644(e) and 15 U.S.C. 657q). When the proposed acquisition strategy involves bundling, identify the incumbent contractors and contracts affected by the bundling.

(v) Address the extent and results of the market research and indicate their impact on the various elements of the plan (see part 10).

* * * * *

■ 7. Revise section 7.107 to read as follows:

7.107 Additional requirements for acquisitions involving consolidation, bundling, or substantial bundling.

■ 8. Add sections 7.107–1 through 7.107–6 to read as follows:

7.107–1 General.

(a) If the requirement is considered both consolidated and bundled, the agency shall follow the guidance regarding bundling in 7.107–3 and 7.107–4.

(b) The requirements of this section 7.107 do not apply—

(1) If a cost comparison analysis will be performed in accordance with OMB Circular A–76 (except 7.107–4 still applies);

(2) To orders placed under single-agency task-order contracts or delivery-order contracts, when the requirement was considered in determining that the consolidation or bundling of the underlying contract was necessary and justified; or

(3) To requirements for which there is a mandatory source (see 8.002 or 8.003), including supplies and services that are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled or the Schedule of Products issued by Federal Prison Industries, Inc. This exception does not apply—

(i) When the requiring agency obtains a waiver in accordance with 8.604 or an exception in accordance with 8.605 or 8.706; or

(ii) When optional acquisitions of supplies and services permitted under 8.713 are included.

7.107–2 Consolidation.

(a) Consolidation may provide substantial benefits to the Government. However, because of the potential impact on small business participation, before conducting an acquisition that is a consolidation of requirements with an estimated total dollar value exceeding \$2 million, the senior procurement executive or chief acquisition officer shall make a written determination that the consolidation is necessary and justified in accordance with 15 U.S.C. 657q, after ensuring that—

(1) Market research has been conducted;

(2) Any alternative contracting approaches that would involve a lesser degree of consolidation have been identified;

(3) The determination is coordinated with the agency’s Office of Small Disadvantaged Business Utilization or the Office of Small Business Programs;

(4) Any negative impact by the acquisition strategy on contracting with small business concerns has been identified; and

(5) Steps are taken to include small business concerns in the acquisition strategy.

(b) The senior procurement executive or chief acquisition officer may determine that the consolidation is necessary and justified if the benefits of the acquisition would substantially exceed the benefits that would be derived from each of the alternative contracting approaches identified under paragraph (a)(2) of this subsection, including benefits that are quantifiable in dollar amounts as well as any other specifically identified benefits.

(c) Such benefits may include cost savings or price reduction and, regardless of whether quantifiable in dollar amounts—

(1) Quality improvements that will save time or improve or enhance performance or efficiency;

(2) Reduction in acquisition cycle times;

(3) Better terms and conditions; or

(4) Any other benefit.

(d) *Benefits*. (1) Benefits that are quantifiable in dollar amounts are substantial if individually, in combination, or in the aggregate the anticipated financial benefits are equivalent to—

(i) Ten percent of the estimated contract or order value (including options) if the value is \$94 million or less; or

(ii) Five percent of the estimated contract or order value (including options) or \$9.4 million, whichever is greater, if the value exceeds \$94 million.

(2) Benefits that are not quantifiable in dollar amounts shall be specifically identified and otherwise quantified to the extent feasible.

(3) Reduction of administrative or personnel costs alone is not sufficient justification for consolidation unless the cost savings are expected to be at least 10 percent of the estimated contract or order value (including options) of the consolidated requirements, as determined by the senior procurement executive or chief acquisition officer (15 U.S.C. 657q(c)(2)(B)).

(e)(1) Notwithstanding paragraphs (a) through (d) of this subsection, the approving authority identified in paragraph (e)(2) of this subsection may determine that consolidation is necessary and justified when—

(i) The expected benefits do not meet the thresholds for a substantial benefit at paragraph (d)(1) of this subsection but are critical to the agency’s mission success; and

(ii) The procurement strategy provides for maximum practicable participation by small business.

(2) The approving authority is—

(i) For the Department of Defense, the senior procurement executive; or
 (ii) For the civilian agencies, the Deputy Secretary or equivalent.

(f) If a determination is made that consolidation is necessary and justified, the contracting officer shall include it in the acquisition strategy documentation and provide it to the Small Business Administration (SBA) upon request.

7.107-3 Bundling.

(a) Bundling may provide substantial benefits to the Government. However, because of the potential impact on small business participation, before conducting an acquisition strategy that involves bundling, the agency shall make a written determination that the bundling is necessary and justified in accordance with 15 U.S.C. 644(e). A bundled requirement is considered necessary and justified if the agency would obtain measurably substantial benefits as compared to meeting its agency's requirements through separate smaller contracts or orders.

(b) The agency shall quantify the specific benefits identified through the use of market research and other techniques to explain how their impact would be measurably substantial (see 10.001(a)(2)(iv) and (a)(3)(vii)).

(c) Such benefits may include, but are not limited to—

- (1) Cost savings;
 - (2) Price reduction;
 - (3) Quality improvements that will save time or improve or enhance performance or efficiency;
 - (4) Reduction in acquisition cycle times, or
 - (5) Better terms and conditions.
- (d) Benefits are measurably substantial if individually, in combination, or in the aggregate the anticipated financial benefits are equivalent to—

- (1) Ten percent of the estimated contract or order value (including options) if the value is \$94 million or less; or
- (2) Five percent of the estimated contract or order value (including options) or \$9.4 million, whichever is greater, if the value exceeds \$94 million.

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

(f)(1) Notwithstanding paragraphs (a) through (e) of this subsection, the approving authority identified in paragraph (f)(2) of this subsection may determine that bundling is necessary and justified when—

(i) The expected benefits do not meet the thresholds for a substantial benefit but are critical to the agency's mission success; and

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

(2) The approving authority, without power of delegation, is—

(i) For the Department of Defense, the senior procurement executive; or
 (ii) For the civilian agencies is the Deputy Secretary or equivalent.

(g) In assessing whether cost savings and/or price reduction would be achieved through bundling, the agency and SBA shall—

(1) Compare the price that has been charged by small businesses for the work that they have performed; or

(2) Where previous prices are not available, compare the price, based on market research, that could have been or could be charged by small businesses for the work previously performed by other than a small business.

(h) If a determination is made that bundling is necessary and justified, the contracting officer shall include it in the acquisition strategy documentation and provide it to SBA upon request.

7.107-4 Substantial bundling.

(a)(1) Substantial bundling is any bundling that results in a contract task or delivery order with an estimated value of—

- (i) \$8 million or more for the Department of Defense;
- (ii) \$6 million or more for the National Aeronautics and Space Administration, the General Services Administration, and the Department of Energy; or
- (iii) \$2.5 million or more for all other agencies.

(2) These thresholds apply to the cumulative estimated dollar value (including options) of—

- (i) Multiple-award contracts;
- (ii) Task orders or delivery orders issued against a GSA Schedule contract; or
- (iii) Task orders or delivery orders issued against a task-order or delivery-order contract awarded by another agency.

(b) In addition to addressing the requirements for bundling (see 7.107-3), when the proposed acquisition strategy involves substantial bundling, the agency shall document in its strategy—

- (1) The specific benefits anticipated to be derived from substantial bundling;
- (2) An assessment of the specific impediments to participation by small business concerns as contractors that result from substantial bundling;
- (3) Actions designed to maximize small business participation as

contractors, including provisions that encourage small business teaming;

(4) 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) The determination that the anticipated benefits of the proposed bundled contract or order justify its use; and

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

7.107-5 Notifications.

(a) *Notifications to current small business contractors of agency's intent to bundle.* (1) The contracting officer shall notify each small business performing a contract that it intends to bundle the requirement at least 30 days prior to the issuance of the solicitation for the bundled requirement.

(2) The notification shall provide the name, phone number and address of the applicable SBA procurement center representative (PCR), or if an SBA 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.

(3) This notification shall be documented in the contract file.

(b) *Notification to public of rationale for bundled requirement.* (1) The agency shall publish on its Web site a list and rationale for any bundled requirement for which the agency solicited offers or issued an award. The notification shall be made within 30 days of the agency's data certification regarding the validity and verification of data entered in the Federal Procurement Data System to the Office of Federal Procurement Policy (see 4.604).

(2) In addition, the agency is encouraged to provide notification of the rationale for any bundled requirement to the GPE, before issuance of the solicitation (see 5.201).

(c) *Notification to SBA of follow-on bundled or consolidated requirements.* For each follow-on bundled or consolidated requirement, the contracting officer shall obtain the following from the requiring activity and notify the SBA PCR no later than 30 days prior to issuance of the solicitation:

- (1) The amount of savings and benefits achieved under the prior consolidation or bundling.
- (2) Whether such savings and benefits will continue to be realized if the contract remains consolidated or bundled.

(3) Whether such savings and benefits would be greater if the procurement requirements were divided into separate solicitations suitable for award to small business concerns.

(4) List of requirements that have been added or deleted for the follow-on.

(d) *Public notification of bundling policy.* In accordance with 15 U.S.C. 644(q)(2)(A)(ii), agencies shall publish the Governmentwide policy regarding contract bundling, including regarding the solicitation of teaming and joint ventures, on their agency Web site.

7.107–6 Solicitation provision.

The contracting officer shall insert the provision at 52.207–6, Solicitation of Offers from Small Business Concerns and Small Business Teaming Arrangements or Joint Ventures (Multiple-Award Contracts), in solicitations for multiple-award contracts above the substantial bundling threshold of the agency (see 7.107–4(a)).

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 9. Amend section 8.404 by revising paragraph (c)(2) to read as follows:

8.404 Use of Federal Supply Schedules.

* * * * *

(c) * * *

(2) Shall comply with all FAR requirements for a consolidated or bundled contract when the order meets the definition at 2.101(b) of “consolidation” or “bundling”; and

* * * * *

PART 10—MARKET RESEARCH

■ 10. Amend section 10.001 by—

■ a. Revising the introductory text of paragraph (a);

■ b. Revising paragraphs (a)(2)(iv) and (a)(2)(vi)(B);

■ c. Removing from the end of paragraph (a)(3)(v) “efficiency; and” and adding “efficiency;” in its place;

■ d. Redesignating paragraphs (a)(3)(vi) and (vii) as paragraphs (a)(3)(vii) and (viii), respectively;

■ e. Adding a new paragraph (a)(3)(vi);

■ f. Revising the newly designated paragraph (a)(3)(vii); and

■ g. Revising paragraph (c).

The revisions and addition reads as follows:

10.001 Policy.

(a) Agencies shall—

* * * * *

(2) * * *

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

consolidation or bundling (15 U.S.C. 644(e)(2)(A) and 15 U.S.C. 657q);

* * * * *

(vi) * * *

(B) Disaster relief to include debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities (see 26.205); and

(3) * * *

(vi) Determine whether consolidation is necessary and justified (see 7.107–2) (15 U.S.C. 657q);

(vii) Determine whether bundling is necessary and justified (see 7.107–3) (15 U.S.C. 644(e)(2)(A)); and

* * * * *

(c) If an agency contemplates consolidation or bundling, the agency—

(1) When performing market research, should consult with the agency small business specialist and the local Small Business Administration procurement center representative (PCR). If a PCR is not assigned, see 19.402(a); and

(2) Shall notify any affected incumbent small business concerns of the Government’s intention to bundle the requirement and how small business concerns may contact the appropriate Small Business Administration procurement center representative (see 7.107–5(a)).

* * * * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 11. Amend section 12.301 by redesignating paragraphs (d)(4) through (8) as paragraphs (d)(5) through (9), respectively; and adding a new paragraph (d)(4) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(d) * * *

(4) Insert the provision at 52.207–6, Solicitation of Offers from Small Business Concerns and Small Business Teaming Arrangements or Joint Ventures (Multiple-Award Contracts), as prescribed at 7.107–6.

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

■ 12. Amend section 15.304 by revising paragraphs (c)(3)(ii) and (c)(4) to read as follows:

15.304 Evaluation factors and significant subfactors.

* * * * *

(c) * * *

(3) * * *

(ii) For solicitations that are not set aside for small business concerns, involving consolidation or bundling, that offer a significant opportunity for subcontracting, the contracting officer shall 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)).

* * * * *

(4) For solicitations, that are not set aside for small business concerns, involving consolidation or bundling, that offer a significant opportunity for subcontracting, the contracting officer shall include proposed small business subcontracting participation in the subcontracting plan as an evaluation factor (15 U.S.C. 637(d)(4)(G)(i)).

* * * * *

PART 16—TYPES OF CONTRACTS

■ 13. Amend section 16.505 by revising paragraph (a)(8)(iii) to read as follows:

16.505 Ordering.

(a) * * *

(8) * * *

(iii) Shall comply with all FAR requirements for a consolidated or bundled contract when the order meets the definition at 2.101(b) of “consolidation” or “bundling”.

* * * * *

■ 14. Amend section 16.506 by adding paragraph (i) to read as follows:

16.506 Solicitation provisions and contract clauses.

* * * * *

(i) See 7.107–6 for use of 52.207–6, Solicitation of Offers from Small Business Concerns and Small Business Teaming Arrangement or Joint Ventures (Multiple-Award Contracts) in solicitations for multiple-award contracts above the substantial bundling threshold of the agency.

PART 19—SMALL BUSINESS PROGRAMS

■ 15. Amend section 19.201 by revising paragraphs (c)(5)(i), (c)(11)(ii), and (c)(11)(iii) to read as follows:

19.201 General policy.

* * * * *

(c) * * *

(5) * * *

(i) Identify proposed solicitations that involve bundling and work with the agency acquisition officials and SBA to revise the acquisition strategies for such

proposed solicitations to increase the probability of participation by small businesses as prime contractors through Small Business Teaming Arrangements;

* * * * *

(11) * * *

(ii) Adequacy of consolidated or bundled contract documentation and justifications; and

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

* * * * *

■ 16. Amend section 19.202–1 by revising paragraph (e)(1)(iii), the introductory text of paragraph (e)(2), and paragraphs (e)(2)(v), (e)(3), and (e)(4) to read as follows:

19.202–1 Encouraging small business participation in acquisitions.

* * * * *

(e)(1) * * *

(iii) The proposed acquisition is for a consolidated or bundled requirement. (See 7.107–5(a) for mandatory 30-day notice requirement to incumbent small business concerns.) The contracting officer shall provide all information relative to the justification for the consolidation or bundling, including the acquisition plan or strategy, and if the acquisition involves substantial bundling, the information identified in 7.107–4. The contracting officer shall also provide the same information to the agency Office of Small and Disadvantaged Business Utilization.

(2) Provide a statement explaining why the—

* * * * *

(v) Consolidation or bundling is necessary and justified.

(3) Process the 30-day notification concurrently with other processing steps required prior to the issuance of the solicitation.

(4) If the contracting officer rejects the SBA procurement center representative's recommendation made in accordance with 19.402(c)(2), document the basis for the rejection and notify the SBA procurement center representative in accordance with 19.505.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 17. Add section 52.207–6 to read as follows:

52.207–6 Solicitation of Offers from Small Business Concerns and Small Business Teaming Arrangements or Joint Ventures (Multiple-Award Contracts).

As prescribed in 7.107–6, insert the following provision:

Solicitation of Offers From Small Business Concerns and Small Business Teaming Arrangements or Joint Ventures (Multiple-Award Contracts) (Oct 2016)

(a) *Definition.* “Small Business Teaming Arrangement,” as used in this provision—

(1) Means an arrangement where—

(i) Two or more small business concerns have formed a joint venture; or

(ii) A small business offeror agrees with one or more other small business concerns to have them act as its subcontractors under a specified Government contract. A Small Business Teaming Arrangement between the offeror and its small business subcontractor(s) exists through a written agreement between the parties that—

(A) Is specifically referred to as a “Small Business Teaming Arrangement”; and

(B) Sets forth the different responsibilities, roles, and percentages (or other allocations) of work as it relates to the acquisition;

(2)(i) For civilian agencies, may include two business concerns in a mentor-protégé relationship when both the mentor and the protégé are small or the protégé is small and the concerns have received an exception to affiliation pursuant to 13 CFR 121.103(h)(3)(ii) or (iii).

(ii) For DoD, may include two business concerns in a mentor-protégé relationship in the Department of Defense Pilot Mentor-Protégé Program (see section 831 of the National Defense Authorization Act for Fiscal Year 1991 (Pub. L. 101–510; 10 U.S.C. 2302 note)) when both the mentor and the protégé are small. There is no exception to joint venture size affiliation for offers received from teaming arrangements under the Department of Defense Pilot Mentor-Protégé Program; and

(3) See 13 CFR 121.103(b)(9) regarding the exception to affiliation for offers received from Small Business Teaming Arrangements in the case of a solicitation of offers for a bundled contract with a reserve.

(b) The Government is soliciting and will consider offers from any responsible source, including responsible small business concerns and offers from Small Business Teaming Arrangements or joint ventures of small business concerns.

(End of provision)

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 17

[FAC 2005–91; FAR Case 2016–006; Item VII; Docket No. 2016–0006, Sequence No. 1]

RIN 9000–AN24

Federal Acquisition Regulation; Amendment Relating to Multi-Year Contract Authority for Acquisition of Property

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016, to require that “significant” savings would be achieved by entering into a multi-year contract.

DATES: *Effective:* October 31, 2016.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–91, FAR Case 2016–006.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are amending FAR subpart 17.1 to implement section 811 of the NDAA for FY 2016 (Pub. L. 114–92). Section 811 amended subsection (a)(1) of 10 U.S.C. 2306b by striking “substantial” and inserting “significant.” This rule makes conforming changes at FAR 17.105–1(b)(1) to state that the head of an agency may enter into a multi-year contract for supplies, if the use of such a contract will result in significant savings of the total estimated costs of carrying out the program through annual contracts. This change applies to the DoD, NASA, and the Coast Guard.

II. Publication of This Final Rule for Public Comment Is Not Required by Statute

Publication of proposed regulations, 41 U.S.C. 1707, is the statute which applies to the publication of the Federal