

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 2, 7, 8, 10, 16, 19, and 42****[FAC 2001-17; FAR Case 2002-029]****RIN 9000-AJ58****Federal Acquisition Regulation;
Contract Bundling**

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

ACTION: Final rule.

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

DATES: *Effective Date:* October 20, 2003.

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

SUPPLEMENTARY INFORMATION:**A. Background**

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 68 FR 5138, January 31, 2003, to solicit comments on its proposal to implement

several recommendations included in OMB's October 2002 report, entitled "Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business." (See <http://www.fac.gov>).

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

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

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

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

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

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

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

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

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