

that A–E services as defined in FAR Part 36 be exempt from these provisions. The Councils disagree. As previously stated, the strategy of the definition is intended to include orders to close loopholes that otherwise would escape effective review. The second respondent believes that the addition of FAR 16.505(a)(7)(iii) may conflict with statutory provisions. The Councils do not believe that this rule conflicts with statutory provisions but merely is intended as strategy to close loopholes that otherwise would allow certain types of acquisitions to escape effective review.

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

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

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

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

Three comments were received for FAR 19.202–1, Encouraging small business participation in acquisitions. The first respondent believes that additional language requiring the contracting officer to provide all

information relative to the justification of contract bundling is inappropriate because release of information must be decided on a case-by-case basis in accordance with existing laws and regulations (*i.e.*, Procurement Integrity, FOIA, and the FAR) and may be in conflict with existing laws. The Councils believe that this requirement complies with the Procurement Integrity Act.

The second respondent comments that when the OSDBU directors undertake new responsibilities that the regulations further require an assessment of the impact and that they should also review the impact of any such decision on effective competition and on proven technical capabilities available in the marketplace. The final respondent suggests that the OSDBUs review and consider alternative strategies that maximize the use of small and mid-size firms in procurements. The Councils believe that with the additional responsibilities placed on OSDBUs with this rule, no additional responsibilities are necessary at this time.

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

(a) *Comments on the Subcontracting Plans.* Four general comments were received regarding subcontracting plans. Two of the three respondents recommended that subcontracting plans include other information, such as a description of the nature of the work to be subcontracted and the efforts the offeror will make to ensure that small businesses have an equitable opportunity to compete for subcontracts. These requirements are already in FAR 19.704(a) and no further change is necessary. The third respondent recommended that the regulations mandate that PCRs share their compliance assessments with SBA’s breakout PCRs, who are assigned to major contracting centers. This

commenter also recommended that SBA develop a system to enable PCRs and breakout PCRs to submit their assessments to the cognizant contracting office. The fourth respondent recommended inserting a clause in each contract requiring a prime contractor to prove it has met its original subcontracting plan and requiring a prime’s subcontracting partners to sign off on a joint statement of compliance before the prime gets paid.

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

One respondent commented that performance evaluations are inadequate, penalties have never been assessed, and the proposed change does not link performance evaluations to the penalty. The FAR already provides for liquidated damages for noncompliance with subcontracting plans. Under FAR 19.705–7, a prime contractor is liable for such damages for failing to make a “good faith effort” to comply with its subcontracting plans. Since governing regulations already provide monetary consequences for noncompliance with subcontracting plans, the Councils are not adopting this recommendation. Another commenter recommended that large businesses that are awarded task and delivery orders under the Federal Supply Schedules should be subject to the requirement for subcontracting plans under 8(d) of the Small Business Act, 15 U.S.C. 637(d). The Councils agree that effective procedures to mitigate the effects of contract bundling on small businesses necessitates more stringent requirements for monitoring compliance with subcontracting plans to ensure that small businesses receive the maximum practical opportunity to participate as subcontractors in large Federal contracts. Many of the commenters recommended amendments that require further consideration to evaluate their likely effectiveness and impact on the procurement process. As a result, concurrent with publication of this FAR final rule, the Small Business Administration (SBA) is issuing a final