

## A. Background

On January 31, 2003, SBA published a proposed rule in the **Federal Register**, 68 FR 5134, 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.acqnet.gov/Notes/contractbundlingreport.pdf> or <http://www.acqnet.gov/>.

Contract bundling is defined in the Small Business Act as the consolidation of two or more requirements for goods and services into a single procurement that is "unlikely to be suitable for award to a small business concern." 15 U.S.C. 632(o). The dramatic increase in the size of contracts in recent years has resulted in a significant reduction in the number of Federal contracting opportunities for small businesses. As a result, 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. Five of the nine action items specifically called for regulatory implementation, while the remaining four contemplated other administrative initiatives involving OMB, SBA and agency OSDBUs. The specific action items necessitating regulatory implementation are: Action Item 3, which requires a clarification of the definition of contract bundling to require bundling reviews of task and delivery orders under multiple award contract vehicles; Action Item 4, which dictates bundling reviews of agency acquisitions above specific dollar thresholds; Action Item 5, which mandates the identification of alternative acquisition strategies and justification for bundled procurements above established thresholds; Action Item 6; which requires measures to strengthen compliance with subcontracting plans of large business prime contractors; and Action Item 7, which demands measures to facilitate small business teaming arrangements.

SBA's proposed rule published on January 31, 2003 (68 FR 5134) detailed the changes to the SBA's regulations 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 the agency's OSDBU 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. By the end of the comment period, SBA had received a total of 26 timely comment letters from a variety of sources, consisting of one member of Congress; the Public Contract Law Section of the American Bar Association; two national women's organizations; five national trade organizations; six Federal agencies; and 11 firms and individuals from numerous industries.

The overwhelming majority of the 26 commenters supported the Administration's effort to address the problem of contract bundling. Some of the commenters, however, 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 to unbundle contracts.

SBA considered all of the comments and recommendations in developing this final rule. The specific comments to each proposed amendment and SBA's corresponding responses are set forth below.

## B. Section-by-Section Analysis of Comments

### 1. Comments on Requirement for Bundling Reviews

SBA received six comments concerning its proposal to add a new § 125.2(b)(2), requiring bundling reviews of proposed acquisition strategies or plans. As proposed, that section requires an agency to coordinate its acquisition strategy or plan with its SBS whenever the agency's contemplated strategy or plan exceeds the applicable agency threshold established in the proposed § 125.2(b)(2)(i) (discussed below) and is not set-aside for small businesses. The proposed § 125.2(b)(2) provides a minimum period of no later than 30 days before the issuance of the solicitation, for the agency to coordinate

its plan with the SBS. In addition, under the proposed § 125.2(b)(2), the SBS is required to notify the agency OSDBU if the proposed acquisition strategy or plan includes bundled requirements that the agency has not identified as bundled or includes unnecessary or unjustified bundling of requirements.

All six comments on the proposed § 125.2(b)(2) expressed support for the requirement for SBS bundling reviews. Three of those six comments recommended allowing the SBS more time to complete the bundling reviews. These three commenters believed that a notification timeframe of no later than 30 days prior to the issuance of the solicitation may be too late in the process for the SBS to influence the structure of the acquisition and assist in identifying small business sources. As an alternative, one of these three commenters recommended official SBS notification at the time the contracting officer is first notified of the requirement; the second suggested a provision precluding the contracting officer from finalizing the acquisition plan until the SBS completed the bundling review within a "limited number of days"; and the third recommended a minimum 40-day review period.

SBA has declined to adopt any of these recommendations because they would unduly burden the procurement process. The requirement for bundling reviews under the proposed § 125.2(b)(2) implicitly recognizes the need for SBS and OSDBU involvement in the acquisition process to facilitate greater participation of small businesses in Federal contracts. The necessity for their involvement in the process, however, must be balanced against the practical imperative for an operationally efficient Federal acquisition system. SBA does not believe that mandating a specific time that SBSs must receive the acquisition plan or strategy accommodates the unique planning processes of individual agencies and procurements. The proposed language in § 125.2(b)(2) for coordination "as early in the planning process as practicable, but no later than 30 days," affords the flexibility that the process dictates and also emphasizes the agency's obligation for early coordination.

The other commenters on the proposed § 125.2(b)(2) urged for a more stringent provision. Two commenters recommended that the section authorize OSDBUs to stop an acquisition if the OSDBU determines that it includes unnecessary or unjustified bundling. Still another commenter urged for a provision precluding all contract