

agency's contract, agencies would be required to submit such orders to PCRs for review, when the orders include bundling.

The final comment on proposed §§ 125.2(d)(1)(iii) and (iv) noted that the proposed definition of bundling is deficient because it does not cover "new work." Contrary to that commenter's assertion, nothing in the regulations exempts a new requirement from falling within the scope of the definition of contract bundling. The regulatory definition of "separate smaller contract" is based on the definition of that term under Section 3(o)(3) of the Small Business Act, 15 U.S.C. 632(o)(3). Like the statutory definition, § 125.2(d)(1)(ii) defines a "separate smaller contract" for purposes of a bundled contract, as one that "has previously been performed by one or more small business concerns or was suitable for award to one or more small business concerns." This definition does not mean that none of the individual requirements comprising the bundled acquisition can qualify as "new work." Instead, it requires that some portion of the bundled procurement must have been either performed or suitable for performance by a small business.

After considering all of the comments on proposed §§ 125.2(d)(1)(iii) and (iv), SBA believes that the amendment effectively implements OMB's recommendation to compel bundling reviews of task and delivery orders. SBA is therefore adopting the definition of "single contract" as proposed in § 125.2(d)(1)(iii), but is deleting the proposed definition of "order" under § 125.2(d)(1)(iv), as unnecessary.

6. Comments on Amendments Concerning "Substantial Bundling"

In an effort to streamline the requirements for reviewing and justifying bundled requirements, this proposed rule provides new § 125.2(d)(1)(v) to replace the existing § 125.2(d)(1)(iii). This new section defines "substantial bundling" as any bundling that meets the dollar amounts specified in proposed § 125.2(b)(2)(i). The proposed rule also adds new § 125.2(d)(7)(i)(E), requiring that in the event of substantial bundling, the agency must identify the alternative strategies that would reduce or minimize the scope of the bundling and the rationale for not selecting those alternatives. The rule further proposed new § 125.2(d)(7)(ii), directing the procuring agency to provide the PCR and agency OSDBU a copy of the proposed acquisition strategy containing substantial bundling and the required

analysis, at least 30 days prior to the release of a solicitation.

SBA received one comment on this proposal. This commenter objected to the amendments because the commenter believes that government acquisition professionals need additional training and support and because the change will increase the workload of contracting officers.

SBA recognizes that lowering the threshold for "substantial bundling" would mean enlarging the number of procurements that would require the additional written justification under § 125.2(d)(7). However, SBA continues to believe that this change will simplify the application of § 125.2(b)(2)(i) and § 125.2(d)(7), by using the same three-tier dollar threshold to trigger the bundling reviews and the required supporting analysis for substantial bundling. Also, the changes in the requirement for written justifications are consistent with OMB's report recommendations relating to the identification of alternative acquisition strategies. As a result, SBA is adopting these proposed amendments with one change. SBA renumbered § 125.2(d)(1)(v) as § 125.2(d)(1)(iv).

7. Comments on Requirement for Contract Bundling Report

SBA received three comments on its proposal to add new § 125.2(e) to impose a new OSDBU oversight function. The proposed § 125.2(e) dictates that OSDBUs conduct periodic reviews to assess: (1) The extent to which small businesses are receiving their fair share of Federal procurements; (2) the adequacy of bundling documentation and justification; and (3) the adequacy of actions taken to mitigate the effects of necessary and justified contract bundling, including the agency's oversight of compliance with subcontracting plans. OSDBUs also would be required to submit a copy of their assessment to the Agency Head and SBA Administrator.

One commenter recommended that this section be amended to require that Federal agencies negotiate with SBA two-part goals for prime and subcontract awards to the various types of small businesses and that OSDBUs assess and track the awards to the various categories of small business concerns.

SBA declines to adopt this recommendation because there is already a process in place for negotiating small business goals. Section 15(j) of the Small Business Act, 15 U.S.C. 644(j), charges SBA with responsibility for negotiating small business goals with Federal agencies. Pursuant to those responsibilities, the

SBA has issued Goaling Guidelines that provide policy direction for establishing annual goals, reporting procurement activity and submitting corrective action plans when the goals are not satisfied. See <http://sba.gov/GC>. Most recently, on July 23, 2003, SBA published a notice in the **Federal Register**, soliciting comments on proposed revisions to its Goaling Guidelines. 68 FR 43566. The proposed revisions clarify SBA's goaling policies and are designed to ensure that the process is transparent. The proposed Goaling Guidelines are posted on SBA's Web site at <http://www.sba.gov/GC/goals>. Accordingly, there is no need for SBA to revise § 125.2(e) to address SBA procedures for negotiating and monitoring goal achievements.

Another commenter suggested that SBA require annual OSDBU reviews rather than "periodic" reviews. This commenter also suggested that the OSDBU reviews encompass agency performance in the area of contracting with women and minority-owned small businesses.

SBA agrees that a requirement for "annual" reviews is much clearer than one for merely "periodic" reviews. Thus, SBA has incorporated that suggestion. SBA is not, however, adopting the second recommendation regarding the contents of the OSDBU reviews. The proposed § 125.2(e) already provides that the OSDBU review should address the extent to which small businesses are receiving their fair share of Federal procurement, which includes contracting with women and minority-owned small businesses. There is, therefore, no need to single out these two categories of small businesses in the section. For this reason, SBA has adopted § 125.2(e) as proposed, with the exception of changing the requirement for periodic review to reviews on an annual basis.

C. Compliance With Executive Orders 12866, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612)

OMB has determined that this final rule is a significant regulatory action under Executive Order 12866. The rule implements the recommendations of the OMB report entitled "Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business." This rule is part of the President's initiative for small business growth.

For purposes of Executive Order 12988, SBA has drafted this proposed rule, to the extent practicable, in accordance with the standards set forth in section 3 of that Order.