

Congress of the United States
House of Representatives
108th Congress
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6315

April 1, 2003

Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVA)
1800 F Street, N.W., Room 4035
Washington, DC 20405

Re: FAR Case 2002-029

Dear Ms. Duarte:

Combining small business contracts into giant contracts that are too large for small business participation is a significant problem for our nation's small firms. According to OMB's own report released on October 31, 2002, from fiscal year 1991 to fiscal year 2000, the number of new prime contracts awarded to small businesses decreased from 26,506 to 11,651 - a 56 percent decrease in the number of small business government prime contractors in 9 years. The OMB attributes this decrease in small business prime contracting to "contract bundling." Over the past ten years, the Committee on Small Business has held eight hearings on this important issue.

There is a direct correlation between contract bundling and an agency's ability to achieve its small business goals. Obviously, when agencies create contracts that are too large for small businesses to perform as prime contractors, agencies are less likely to achieve their statutory small business goals. In fact, over the past two fiscal years, the Bush Administration has not achieved any of its small business goals.

Clearly, something must be done about the rampant contract bundling that is driving small businesses out of the federal marketplace. In March of 2001, the President introduced his small business agenda. And now, nearly a year later, proposed regulations have been published.

As the Ranking Democratic Member of the Committee on Small Business, I share the President's commitment to increasing opportunities for small businesses in the federal contracting arena. And, in this pursuit, I am submitting comments on the proposed rule published in the *Federal Register* on January 31, 2003.

Unfortunately, the proposed rule falls far short, and will ultimately exacerbate the problem of contract bundling. Additional comments on the proposed rule will cover five primary areas: imposition of dollar thresholds, involvement of OSDBUs, definition changes, subcontracting plan reviews, and Procurement Center Representatives. It is important to note that any advances the rule might make will not be realized because the administration has failed to provide adequate funding or resources.

Imposition of Dollar Thresholds

It is very confusing that in the *Federal Register* preamble one of the stated goals of the President's small business agenda, and therefore the proposed regulation, was to "improve the access of small business to Federal contracting opportunities." However, one of the proposals contained in the rule does not increase opportunities, it actually reduces them for small businesses.

Current law requires the review of any contract bundle that meets the definition, and results in the consolidation of two or more contracts. The law also requires that market research is done - on any contract that meets the definition of bundling - to determine whether the bundling is justified.

The current statutory definition of "bundling" does not include any reference to specific dollar figures. The intent of the statute was to ensure that "to the maximum extent practicable, procurement strategies used by the various agencies having contracting authority shall facilitate the maximum participation of small business concerns as prime contractors, subcontractors, and suppliers." The statute lays out additional requirements for those procurements that involve "substantial bundling of contract requirements." It was clearly not the intent of the statute to establish specific dollar thresholds below which contract bundling could occur without review, which will be the result if the proposed regulations are implemented.

The proposed change establishes the first ever dollar thresholds for evaluation. The rule establishes these thresholds at \$7 million or more for the Department of Defense; \$5 million or more for NASA, the Department of Energy and GSA; and \$2 million or more for all other agencies.

In fact, there is a statutory requirement that small businesses are the primary source on contracts valued greater than \$2,500 and less than \$100,000. These are the types of contracts that a small business new to the procurement arena would usually win. However, the proposed regulation would have the result of eliminating these smaller contracts, thereby precluding the next generation of small business federal contractors. These small companies will be unable to bid on these large contracts which require a higher degree of sophistication, as well as greater financing ability.

In this case, the proposed rule reduces the current reviews required and will impact numerous small businesses who perform contracts below the dollar thresholds specified. If the goal of the proposed regulation is to increase small business opportunities, this proposal is in direct contradiction to this goal.

Involvement of Offices of Small and Disadvantaged Business Utilization (OSDBUs)

A significant issue with contract bundling is the perception that bundling decisions are made behind closed doors. Transparency is greatly needed in this process. In order to provide this transparency, the proposed rule appears to attempt to involve agency OSDBUs in the contract bundling review process.

The proposed rule requires that the contract planning office notify the agency's small business specialist of acquisition strategies that exceed the dollar thresholds previously addressed. The small business specialist will then be required to notify the agency OSDBU if the contract "strategy involves contract bundling that is unnecessary, unjustified, or not identified as bundled by the agency."

However, increasing the role of OSDBUs without providing them the authority to stop an acquisition or to be the final say in determining an acquisition strategy does nothing. As "unnecessary" and "unjustified" bundling are already prohibited by statute, the most the OSDBU would be able to accomplish under the proposed rule would be to notify the contracting activity, possibly through the agency head, that the acquisition as planned was unlawful.

This proposal will, in no way, lead to stopping contracts from being bundled. And, it does nothing to increase the access of small businesses to federal contracts, which is the goal of the proposed regulations.

Definition Changes

The interpretation of the definition of "contract bundling" has been a significant obstacle to the access of small businesses to the federal market. Agencies have searched for and found loopholes to bypass the definition and refer to bundling in other terms, e.g., prime-vendor, virtual prime-vendor, third party logistics. By using these other terms to describe their contracts, agencies have been successful in by-passing statutes designed to increase small business access to the federal contracting arena.

“Contract bundling” is statutorily defined in Section 3(o) of the Small Business Act (P.L. 85-536, as amended) as “consolidating two or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern due to: a) the diversity, size, or specialized nature of the elements of the performance specified; b) the aggregate dollar value of the anticipated award; c) the geographical dispersion of the contract performance sites; or d) any combination of the factors described in subparagraphs (a), (b), and (c).”

The administration has recognized that the current “contract bundling” definition is flawed, yet the proposed rule makes only minor modifications to the “bundling” definition. These cosmetic changes do not address the most glaring problems with the definition.

It is clear from reports prepared for the SBA’s Office of Advocacy, that most contract bundling is accomplished through “accretive bundling, where diverse, but related, tasks are added to existing contracts.”¹ The proposed rule is vague as to whether task or delivery orders added to existing contracts will be covered by the definition and reviewed, or whether only task or delivery orders over certain dollar thresholds will be reviewed.

Lastly, the proposed definition change does not address those contracts that could be, but currently are not being, performed by small businesses. Evaluating the impact of a contract bundle on small companies without considering the capabilities of other small firms is only half of the evaluation. One of the most egregious examples of this is the numerous construction contracts that have been consolidated. These contracts have historically not been included in the definition because construction is always considered “new work” and not a contract previously performed by small businesses. However, it is important that construction contracts are included in the definition. Without addressing all aspects of the definition of “bundling” that has allowed agencies to short-circuit statutory requirements, this proposed change will be ineffective.

Subcontracting Plan Reviews

With prime contracting opportunities for small businesses decreasing so significantly, more and more small businesses are being forced into the role of subcontractors from prime contractors. As subcontractors, small firms have fewer protections than as prime contractors. There is clearly a lack of monitoring to ensure that small businesses receive the maximum opportunity to participate in large federal prime contracts.

¹“The Impact of Contract Bundling on Small Business, FY 1992 - FY 2001,” prepared by Eagle Eye Publishers for the SBA’s Office of Advocacy, October 2002.

Current regulations require the review of large business prime contractor's subcontracting plans to establish whether the small business subcontracting goals have been achieved. These reviews are performed by the SBA's Commercial Marketing Representatives and by agency small business specialists.

The proposed regulation requires that the inclusion of subcontracting plan achievements in agency performance evaluations of prime contractors. The evaluations have never proven adequate and the penalty provisions for liquidated damages have never been assessed. Therefore, the proposed change does nothing because there is no linkage between the review and the penalty.

Procurement Center Representatives

The proposed regulations contain numerous examples of additional duties provided to the SBA's Procurement Center Representatives (PCRs). The rule requires PCRs to: 1) review contracts not set-aside for small businesses and identify alternate strategies to increase small business participation; 2) review acquisitions within 30 days of the agency issuing the solicitation; 3) work with agency small business specialists; 4) review agency acquisition strategies and analyses; 5) review agency's oversight of agency subcontracting programs; 6) review agency assessments of contractor compliance with subcontracting plans; and 7) revise agency acquisition strategies to increase small business teaming. These additional duties will not only require additional PCR time, but also additional resources in the form of travel dollars. The rule does not address the role of Commercial Marketing Representatives (CMRs) - the employees of the SBA tasked with the responsibility of ensuring prime contractor compliance with subcontracting plans - but adds on CMR duties to existing PCRs.

There is substantial concern that the administration has provided no funding specifically for hiring additional Procurement Center Representatives (PCRs) and Commercial Marketing Representatives (CMRs). There are currently 47 PCRs, and many of these PCRs already perform double-duty as CMRs. There are currently only four full-time CMRs. Four employees nationwide can in no way provide the proper assurance that prime contractors are complying with small firm subcontracting requirements.

It is a matter of resources. The fact is, there is not currently even one PCR per state, and certainly not enough to perform increased enforcement duties on contract consolidations. The administration has proposed no additional resources to either hire additional PCRs or CMRs, or even to ensure adequate travel dollars for existing personnel. These actions doom this effort to failure.

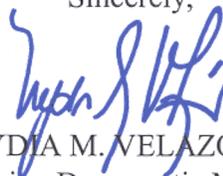
In addition to concerns regarding the substantive provisions contained in the regulation, the FAR Council has skirted its responsibilities in complying with the Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA).

The RFA imposes both analytical and procedural requirements on Federal agencies to ensure that they carefully consider the effect of their regulations on small businesses. The January 31st proposed regulation clearly states that this regulation may have a significant economic impact on a substantial number of small businesses. Therefore, the rule is subject to particular attention regarding its impact on small businesses and a full analysis under the RFA. The RFA specifically requires Federal agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure such proposals are given serious consideration. However, in this proposed regulation, the FAR Council only actually proposes one approach to implementing OMB's recommendations. In order to fully comply with the RFA, you are encouraged to develop and propose regulatory alternatives that will minimize the impact of this regulation on small firms.

There is also concern about the FAR Council's compliance with section 609(a) of the Regulatory Flexibility Act. This requires agencies to assure that small businesses have an opportunity to participate in rulemakings that will considerably impact them. The success of the FAR Council in carrying out the obligations under the RFA requires early and continuing interaction with small businesses throughout the regulatory development process. The interactions with small businesses should be a genuine dialogue with meaningful engagement and exchange of ideas and information. This required interaction has not occurred in the formulation of this rule.

The proposed regulations published in the *Federal Register* on January 31st, can be characterized as assigning additional duties to individuals who have no real authority and insufficient resources to perform their current functions. In fact, the proposed regulations are so weak, it is unlikely that any small business will see increased federal contract opportunities when these regulations are finalized.

Sincerely,



NYDIA M. VELAZQUEZ
Ranking Democratic Member