

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

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February 25, 2000
CODSIA Case No. 5-99

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

Re: FAC 97-15, FAR Case 1997-306 (97-306); Interim Rule with Request for
Comments Contract Bundling Under the Small Business Reauthorization Act of
1997

Dear Ms. Duarte:

This is in response to the December 27, 1999 *Federal Register* notice which requested comments on the interim rules related to contract bundling 1999 (FAC 97-15, FAR Case 1997-306; 64 Fed. Reg. 72441-7244). We appreciate the opportunity to comment on the interim regulations which resulted from the Small Business Reorganization Act of 1997.

Formed in 1964 by industry associations with common interests in the defense and space fields, the Council of Defense and Space Industries Association (CODSIA) is currently composed of eight associations representing over 4,000 member firms across the nation. Participation in CODSIA projects is strictly voluntary. A decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

Contract bundling is a subject that is familiar to both the large and small member companies in the CODSIA member associations. We, therefore, reviewed both interim rules implementing the bundling sections of the Small Business Reauthorization Act of 1997 (P.L. 105-135, § 411-417). These comments refer to the SBA rules that became effective on December 27, 1999 (64 Fed. Reg. 57366-72) and the Federal Acquisition Regulation interim rule, also effective on December 27, 1999 (64 Fed. Reg. 72441-44). This letter and the attached detailed comments focus on the FAR rule, but necessarily

requires reference to the SBA rule. CODSIA members have two general observations regarding the two rules.

The first regards the focus of the FAR interim regulations. Many of our small member firms are more concerned with earning revenue than they are with being a government prime contractor. Therefore, views are split within our associations as to the benefits or detriments of contract bundling on small firms. When appropriate, most small businesses prefer to be the prime on federal government contracts because prime contractor status normally enhances a small business's access to capital on slightly more favorable terms because the financial institutions can receive contract payments directly from the government. However, our small business member companies do not oppose contract bundling or consolidation in concept or in practice. They recognize that today's fiscal and budgetary constraints may require the consolidation of limited or specific tasks into larger contracts in order to permit the agency or prime contractor to integrate or coordinate specific performance of specific tasks with the overall prime contract requirement and agency objective. Their interest in those instances is to obtain a portion of the work as subcontractors that is consistent with their capabilities.

This practical view from small business members in the CODSIA member associations is in line with the Reauthorization Act, which recognized that the consolidation of contract requirements may be necessary and justified. We agree that federal agencies must take steps to promote small business participation. These steps may be through the elimination of unjustified bundling in order to promote competition (as GAO decisions have indicated) or by providing prime contractor incentives for greater small business participation through subcontracting opportunities. We do not equate small business "participation" with small business prime contracts only as the interim rules seem to suggest. Rather, we believe that small business "participation" can be a combination of revenues as subcontractors or revenues as prime contractors and that the source of revenues is contingent upon the circumstances of the bundled or unbundled requirement(s).

Our second general observation is that whenever consolidation is an optimum solution, (and the various requirements under these interim regulations have been satisfied), the issue of specific small business involvement for specific tasks should be addressed. In reviewing the size and scope of potential consolidation, contracting officers should consider grouping the rest of the contracts into central themes – such as environmental or certain specialty areas (*i.e.*, elevator, alarm or fire systems). These types of tasks could then be "set-aside" by the (large business) prime contractor for small business participation or competed in such a way that small businesses, either independently or as part of a joint venture or team member, have a viable chance of winning a contract award.

Again, thank you for the opportunity to comment. If you have any questions, please feel free to contact David Dempsey, the Project Officer for CODSIA Case No. 5-99. He can be reached at 202.861.6480 or <david.dempsey@piperrudnick.com>.

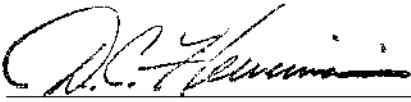
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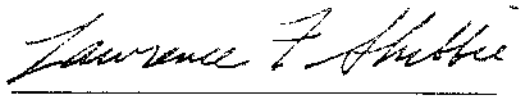
Lorraine M. Lavet
Chief Operating Officer
American Electronics Association



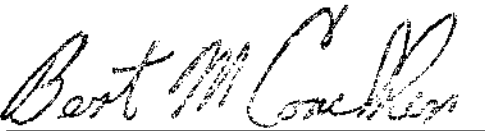
Gary D. Engbretson
President
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Dan C. Heinemeier
President, GEIA
Electronic Industries Alliance



Lawrence F. Skibbie
President
National Defense Industrial
Association



Bert M. Concklin
President
Professional Services Council

Attachment

cc: Dee Lee, Administrator, Office of Federal Procurement Policy
Colonel Dave Kerrins, Acting Director, Defense Procurement
Stan Soloway, Deputy Under Secretary of Defense (Acquisition Reform)
Linda Williams, Deputy Associate Administrator for Government Contracting,
Small Business Administration

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
CODSIA Case No. 5-99
Comments on FAC 97-15, FAR Case 1997-306 (97-306)

ISSUE

PART 2 – Definitions of Word and Terms

Sec. 2.101 Definitions

COMMENT

This definition corresponds to the definition in the Small Business Reauthorization Act of 1997, P.L. 105-135 (the Reauthorization Act). However, there appears to be an inadvertent omission in the definition of “bundled requirement or bundling.” This definition omits any reference to construction services even though construction work and construction services are otherwise noted throughout the SBA’s interim regulation published on October 25, 1999 (64 Fed. Reg. 57366). While such references do not appear widely throughout FAC 97-15, FAR Case 1997-306, it may be an omission that should be inserted. We recommend the following addition (in boldface font) to the definition of “bundled requirement or bundling.”

Bundling means –

Consolidating two or more procurement requirements for supplies or services (**including construction or construction services**) previously provided or performed under separate smaller contracts...

We note that the word “supplies” has been substituted for the Reauthorization Act’s use of the word “goods.” *See* Reauthorization Act, § 412. We realize that “supplies” is a defined term in FAR 2.101 and assume that is why the term was used. But “goods” is a defined term under the Uniform Commercial Code and appears in every state’s commercial statutes. Moreover, the SBA regulations (interim and proposed) refer to “goods” and not “supplies.” *See* 13 C.F.R. § 125.2(d), 64 Fed. Reg. 57371, 64 Fed. Reg. 2156. For the sake of clarity, we suggest that the final FAR rule explain why the term “supplies” was used instead of “goods.”

ISSUE

PART 5 – Publicizing Contract Actions

Sec. 5.206 Notices of subcontracting opportunities.

COMMENT

One notable omission in SBA's proposed rule issued on January 13, 1999 (64 Fed. Reg. 2153-2157) and interim rule (64 Fed. Reg. 57366) was the lack of emphasis on small business opportunities and notice. Far.5.206 of the interim rule (FAC 97-15, FAR Case 1997-306) addresses that issue with its authorization to prime contractors to publicize subcontracting opportunities through the CBD. We are pleased that the FAR Council has rectified that omission in its interim regulations.

Many federal agencies and prime contractors are using various forms of electronic notification of subcontracting opportunities, such as the internet and emerging business-to-business relationships between businesses. We believe that specific reference to such electronic publicity should be mentioned and encouraged in FAR 5.206.

ISSUE

PART 7 – Acquisition Planning

Sec. 7.105 Contents of written acquisition plans

COMMENT

Part 7.105 omits some of the elements raised in the SBA's interim rule (64 Fed. Reg. 57366), dealing with the Procurement Center Representative (PCR) and procuring activity responsibility (*see* 13 C.F.R. § 125(b), 64 Fed. Reg. 57370-1). We recommend that a reference to 13 C.F.R. § 125 appear in FAR Part 7 if the FAR Council does not intend to identify the PCR responsibilities.

In particular, we are concerned about the contracting officer's knowledge and awareness of the PCR's authority to recommend alternative procurement methods to bundled requirements. For example, the SBA's interim regulation specified that one such alternative method is to "breakout" discrete requirements for small business set-asides. Another example of an alternative is to "reserve" one or more awards for small companies when issuing multiple awards under a task order contract. (*See* 13 C.F.R. § 125.2(b) (5)(i) (B), (C), 64 Fed. Reg. 57371.) We view the "multiple award task order "reserve" as virtually identical to a partial set-aside similar in scope and intent as set forth in FAR 19.502.

With this view in mind, the requirement for a fair market price that accompanies a full or partial small business set-aside should be included with the language regarding task order contracts. This recommendation is consistent with the Small Business Act (*see* 15 U.S.C. § 644(a) which states: "A contract may not be awarded under this subsection if the award of the contract would result in a cost to the awarding agency which exceeds a fair market price."). Further, we believe that if task order contracts were reserved for small business participation at a fair market price, then contracting officers would be more receptive to such a recommendation from the PCR. We recommend the following change to 13 C.F.R. § 125.2(b) (5)(i)(C), which appears in boldface:

Reserving one or more awards for small companies **on a partial set-aside basis consistent with FAR 19.502-3**, when issuing multiple awards under task order contracts.

Concurrent with this recommendation for the SBA regulations, we suggest the following addition to FAR 19.502-3(a)(5):

. . . Under certain specified conditions, partial set-asides may be used in conjunction with multiyear contracting procedures. **For example, when requirements from separate smaller contracts are bundled (see 2.101), partial set-asides may be appropriate**

for specific tasks included in the overall consolidated requirement.

ISSUE

Sec. 7.107 Additional requirements for acquisition for acquisitions involving bundling of contract requirements

COMMENT

We are concerned about the effects of an apparent ambiguity regarding the percentages in FAR 7.107(b)(1) and (2) related to “measurable benefits.” Although we can presently accept the dollar thresholds for purposes of requiring measurable benefits, the very nature of an option contract means that an option may not be exercised. We suggest these subparagraph provisions be refined to recognize that the measured benefits are for each option year rather than the value of the entire contract. For example, if the contracting officer contemplates a bundled or substantially bundled contract for one base year with four option years and the total value of the contract is \$75 million or less (*i.e.*, \$15 million per year), then the “measurable benefit” should be identified and justified in terms of \$1.5 million per year (rather than \$7.5 million) for each year of the five year option contract.

We see no language in the Reauthorization Act nor its legislative history that requires consolidation savings be measured in terms of 10% for each year of an option contract. It would also be inconsistent with the purpose of the Reauthorization Act for the contracting officer to measure the consolidation benefits for the total contract by assuming that all options will be exercised through the last option year. Either scenario invites disagreement. We are concerned that contracting officers or PCRs may misapply the intent of the Reauthorization Act.

Accordingly, we recommend that FAR 7.107(b) be deleted in its entirety and be replaced with the following language. We base our recommendation on language from 13 C.F.R. § 125(d)(iii)(A) (*see* 64 Fed. Reg. 57372) and believe that it will clarify any potential ambiguity regarding measurable benefits regarding option contracts. We suggest the following language for the FAR:

(b) The procuring activity must quantify the identified benefits of contract bundling and explain how contract bundling or substantial bundling would be measured and how the benefits would be substantial. The measurable benefits may include cost savings and/or price reduction, quality improvements that will save time or improve or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions, and any other benefits that individually, in combination, or in the aggregate would lead to:

(1) Measurable benefits equivalent to 10 percent of the total contract value when the total contract value is estimated to be \$75 million or less (including the

exercise of all options set forth in the solicitation) as measured on a per option year basis (i.e., 10 percent of the value of the contract's base year or any succeeding option year); or

(2) Measurable benefits equivalent to 5 percent of the total contract value when the total contract value is estimated to be \$75 million or more (including the exercise of all options set forth in the solicitation) as measured on a per option year basis (i.e., 5 percent of the value of the contract's base year or any succeeding option year).

We support the requirements of FAR 7.107(e)(3) & (4), which relate to teaming of small businesses (apparently as a joint venture) and subsequent participation as subcontractors. These opportunities were not adequately addressed in the SBA's interim rule issued on October 25, 1999 (*see* 13 C.F.R. § 125 (d)(4)(iii), 64 Fed. Reg. 57372). We believe that Congress, based on §411 and §413 of the Reauthorization Act, intended continued small business involvement with bundled procurements as subcontractors and not only as prime contractors when a bundled procurement is necessary and justified. However, the SBA's interim language in October 1999, and consequently the FAR Council's interim language in December 1999, appears to promote only small business prime contracts even for justified bundled procurements. This approach ignores the lucrative value of government subcontracts. Consistent with our above recommendation for 13 C.F.R. § 125 (b)(5)(i)(C), we recommend the following language for FAR 7.107(e)(3):

Specify actions designed to maximize small business participation as contractors or subcontractors, including provisions that encourage small business teaming and joint ventures, and in consultation with the PCR, procurement breakouts for small business participation or set-asides or task orders reserved for small businesses under multiple award task order contracts;

We believe the above provision establishes responsibilities for both the contracting officer and the PCR that is intended by the Reauthorization Act.

We support the sentiment of the statement in FAR 7.107 (h) that "the requirements of this section do not apply to bundled contracts awarded in accordance with OMB A-76." Given the complexity of the requirements of the A-76 procedures, we suggest the following sentence be substituted:

(h) The requirements of this section do not apply to performance work statements (see 7.304) drafted under the

procedures of OMB Circular A-76 that become the basis for a cost comparison conducted under A-76.

We believe that restricting the exception to “awards” under A-76 overlooks the significance of the performance work statement in the A-76 process as well as the entire A-76 cost comparison process. In other words, the underlying assumption to contract bundling is that the work is already being performed by private industry. Bundling has no place in the A-76 procedures because that assumption is not present. Under A-76, commercial activities are being performed by government FTEs and those commercial activities are being studied under the A-76 procedures. The performance work statement that results from the A-76 study identifies the government’s requirements for purposes of a cost comparison between the public and private sector. Bundling should not be an element of an A-76 study or the development of a performance work statement because no foundation exists from the prior commercial activities of the government FTEs.

We strongly recommend that our recommended sentence be the only sentence in FAR 7.107(h). The second sentence states “However, agencies must comply with the requirements of this section if they have not been met under A-76 procedures.” We strongly recommend that the complex panoply of A-76 procedures and requirements not be invoked with, or related in any way to, contract bundling.

We appreciate that FAR 7.107(h) recognizes that requirements related to *measuring the impact* of bundling do not apply to *contracts* awarded in accordance with OMB Circular A-76. Nevertheless, we believe the language should be more explicit through references to the entire *A-76 process*.

ISSUE

PART 15 – Contracting by negotiation
Sec. 15.305 Proposal evaluation

COMMENT

We are concerned with FAR 15.305 (a)(5) and its requirement that a small business must be given “the highest rating” for an evaluation factor relating to past performance and small business participation. It seems incongruous to give a small business evaluation points for an evaluation factor (*i.e.*, small business subcontracting goals and plans) which presumes that the offeror is a large business.

More importantly, subparagraph (a)(5) appears based on several unsubstantiated assumptions. For example, the provision apparently assumes that the “small business concern” would be a small business joint venture formed solely in order to compete for the bundled requirement. In other words, a new entity. With regard to past performance of such an entity, FAR 15.305(a)(5) then requires the highest evaluation possible for past performance of attaining small business utilization goals. This approach is inconsistent with the SBA’s position that “there most likely is not any past performance history on the joint venture entity...” (64 Fed. Reg. 57367). Moreover, an earlier section of FAR 15.305 (*see* FAR 15.305(a)(2)(iv) which is based on the Federal Acquisition Reform Act and the Clinger-Cohen Act) states: “In the case of an offeror *without* a record of relevant past performance or for whom information on past performance is *not available*, the offeror *may not be evaluated favorably* or unfavorably on past performance” (emphasis added). It appears FAR 15.305(a)(5) is inconsistent with the SBA’s position regarding past performance, the two earlier procurement reform initiatives, and the language presently in the FAR.

Although an offeror can be evaluated with respect to past compliance with subcontracting plan goals for SDBs (*see* FAR 15.305(a)(2)(v)), this is not equivalent to awarding evaluation points for an offeror who has *no* past performance history (and if formed solely to compete for a bundling requirement, *never will* have any past performance history). As quoted by the SBA in the *Federal Register* (*see* 64 Fed. Reg. 57366), “nothing in the bundling amendments is intended to amend or change *in any way* the existing obligations imposed on a procuring activity” (emphasis added). There is no authority in the Reauthorization Act or elsewhere that permits the interim FAR rules or the interim SBA rule (*see* 13 C.F.R. § 125.2(d)(5)(B)(ii), 64 Fed. Reg. 57372) to change the evaluation of offers in the area of past performance. Therefore, if the small business offeror is a teaming entity or a small business with no past performance history regarding compliance with small business subcontracting goals or SDB goals, these interim regulations should not go beyond the existing FAR absent express statutory authority. We strongly recommend that FAR 15.305(3)(5) be deleted in the final rule.

ISSUE

PART 19 – Small business programs

Sec. 19.101 Explanation of terms

Sec. 19.201 General policy

COMMENT

The change appearing in FAR 19.101(g)(1), which permits small business teaming arrangements, is consistent with § 413(e)(4) of the Reauthorization Act. That provision specifically authorizes small business teaming arrangements to submit offers on bundled requirements without affecting each team member's small business size status.

However, FAR 19.101(g)(ii) (and 13 C.F.R. § 121.103(f)(i)(B), 64 Fed. Reg. 57370) is clearly outside the authority of the Reauthorization Act. Section 413(e)(4) of the Reauthorization Act is quite explicit when it states:

In the case of a solicitation of offers for a bundled contract that is issued by the head of an agency, a small-business concern may submit an offer that provides for use of a particular team of subcontractors for the performance of the contract. ... If a small business concern teams under this paragraph, it shall not affect its status as a small business concern for any other purpose.

Nevertheless, FAR 19.101(g)(ii) permits small business teaming for non-bundled requirements. This is an incorrect implementation of the Reauthorization Act which suggests that subparagraph (ii) ought to be deleted.

The FAR's interim joint venture definition at FAR 19.101(g) does address an unintended consequence of the SBA's interim rule (64 Fed. Reg. 57366). Under both the SBA and FAR rules (as well as the Reauthorization Act) a small business team member or joint venture participant was allowed to remain a small business for purposes other than bundled contract competitions. Perversely, under the SBA's interim rule, small business joint venture(s) could receive "large business" revenues forever because the SBA interim regulations had no specific boundaries on joint ventures competing for bundled contracts. This would have sanctioned *de facto* large businesses. Such a circumstance would permit a small business to be exempt from the Cost Accounting Standards, submission of small business subcontracting plans and the like. FAR 19.101(g) specifies that a "joint venture is an association ... to engage in and carry out a single specific business venture for joint profit ... *but not on a continuing or permanent basis for conducting business generally.*" Emphasis added. The FAR definition of a joint venture under FAR 19.101(g) is a more accurate implementation of § 413 of the Reauthorization Act.

We also wish to emphasize that “unbundled contracts” include 8(a) contracts. The Reauthorization Act does not explicitly address 8(a) contracts, but the Act only permits joint venture exemptions for bundled contracts. Therefore, it seems inconsistent with the Reauthorization Act and the 8(a) small business development program for SBA and the FAR Council to permit 8(a) small businesses to team with each other for “other than a ‘bundled’ requirement” (such as an unrestricted contract or an 8(a) contract) and also waive the requirement that an 8(a) company receive no less than 51 percent of any profits from an 8(a) set-aside contract or any other type of “non-bundled” contract. This appears to be the unintended consequence of subparagraph (ii).

Our final comment regarding FAR 19.101(g) is to delete all of FAR 19.101(g)(i) and (ii). This entire text could be replaced (with appropriate revisions to reflect the context) by the language from the SBA’s interim rule at 13 C.F.R. § 121.103(f)(3)(i). We recommend the following language:

FAR 19.101 (g)(i). A joint venture or teaming arrangement of two or more business concerns may submit an offer as a small business without regard to affiliation as described herein so long as each concern is small under the size standard corresponding to the SIC code assigned to the solicitation and provided that the procurement qualifies as a bundled requirement within the meaning of 2.101 that is solicited in accordance with 7.107.

We believe this guidance accurately reflects the letter and intent of the Reauthorization Act, and constitutes legally permissible language.

¹ Prior to this interim rule, 13 C.F.R. § 121.103 (f)(3)(i) (Jan. 1999 ed.) stated: “A joint venture or teaming arrangement of two or more business concerns may submit an offer as a small business for a *non-8(a)* Federal procurement without regard to affiliation under paragraph (f) ...” Emphasis added.