SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121 and 125

Government Contracting Programs

AGENCY: Small Business Administration.

ACTION: Interim rule with request for comments.

SUMMARY: The Small Business Administration (SBA) is amending its regulations to address contract bundling due to changes set forth in the Small Business Reauthorization Act of 1997 (Pub. L. 105–135, 111 Stat. 2617). In addition, this rule restates SBA's current authority to appeal to the head of a procuring agency decisions made by the agency that SBA believes to adversely affect small businesses.

DATES: Effective Date: December 27, 1999.

Comment Date: Comments due on or before December 27, 1999.

ADDRESSES: Address comments to Linda G. Williams, Deputy Associate Deputy Administrator for Government Contracting and Minority Enterprise Development, U.S. Small Business Administration, 409 Third Street, SW, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Anthony Robinson, Office of Government Contracting, (202) 205–6465.

SUPPLEMENTARY INFORMATION: Section 15(a) of the Small Business Act, 15 U.S.C. 644(a), authorizes SBA to appeal to the head of a procuring agency certain decisions made by the agency that SBA believes adversely affects small businesses. Section 413(b)(1) of Pub. L. 105–135 reinforced existing appeal rights and further defined section 15(a) of the Small Business Act for ''an unnecessary or unjustified bundling of contract requirements.'' It left intact, however, SBA's current appeal rights. In this regard, the Joint Explanatory Statement of the bundling provisions contained in Public Law 105–135 as set forth in the Congressional Record specifically provided that ''(n)othing in [the bundling amendments] is intended to amend or change in any way the existing obligations imposed on a procuring activity or the authority granted to the Small Business Administration under section 15(a) of the Small Business Act.'' 143 Cong. Rec. S11522, S11526 (daily ed. Oct. 31, 1997).

On January 13, 1999, SBA published a proposed rule in the **Federal Register** requesting public comments on implementation of sections 411–417 of the Small Business Reauthorization Act of 1997 (Pub. L. 105–135). *See* 64 FR 2153, Jan. 13, 1999. The statutory amendments recognize that the consolidation of contract requirements may be necessary and justified, in some cases. The rule requires that each Federal agency, to the maximum extent practicable, take steps to avoid unnecessary and unjustified bundling of contract requirements that preclude small business participation as prime contractors. The rule also requires each agency to eliminate obstacles to small business participation as prime contractors.

The comment period for 64 FR 2153 closed on March 15, 1999. SBA received 32 comments in response to the proposed rule. The comments are comprised of 11 (34 percent) from Government agencies, 11 (34 percent) from trade associations, 9 (28 percent) from small-businesses, and 1 (3 percent) from a large business.

SBA specifically requested comments on three difficult definitional areas: (1) What constitutes substantial bundling?; (2) what constitutes measurably substantial benefits as a justification for bundling?; and (3) what quantifiable test constitutes substantial if reduction of administrative or personnel costs is the sole basis for bundling? The comments and recommendations received by SBA to these questions and to other provisions of the proposed rule are discussed below in the section-by-section analysis.

SBA also identifies in the section-by-section analysis below the number of specific comments relating to particular provisions of the rule. Not all comments received addressed the issues contained in the proposed rule. For instance, several commenters identified a particular provision, but spoke of the problems caused by bundling generally, and not how the provision itself should be changed. Other commenters stated that they agreed with or disagreed with a particular provision without offering any reasoning or alternatives. Thus, SBA has not identified every comment that it received in response to a particular provision and responded to them.

Consistent with the statutory amendments, this rule defines ''bundling,'' identifies the circumstances under which such ''bundling'' may be necessary and justified, and permits SBA to appeal bundling actions that it believes to be unnecessary and unjustified to the head of the procuring agency. It also authorizes two or more small businesses to form a contract team and for that team to be considered a small business for purposes of a bundled procurement requirement, provided that each small business partner to the teaming arrangement individually qualifies as a small business under the SIC code for the requirement. Finally, the rule restates SBA's current authority to appeal to the head of an agency other procurement decisions made by procuring activities that SBA believes will adversely affect small business.

The rule reorganizes and amends 13 CFR 125.2 to more clearly explain SBA's current rights under section 15(a) of the Small Business Act. The rule sets forth a procuring activity's current responsibilities to submit a proposed procurement to SBA for review whenever the procurement includes in its statement of work goods or services currently being performed by a small business and the magnitude of the quantity or estimated dollar value of the proposed procurement would render small business prime contract participation unlikely. It also requires a procuring activity to submit a proposed procurement to SBA for review where a proposed procurement for construction seeks to package or consolidate discrete construction projects. In addition, it authorizes SBA to appeal disagreements over the suitability of a particular acquisition for a small business set-aside first to the head of the contracting activity, and then to the head of the agency. This authority is currently granted to SBA by section 15(a) of the Small Business Act and was not affected by the addition of new rights regarding ''bundling.'' This rule does not apply to contracts to be *awarded and performed* entirely outside of the United States.

In implementing the new statutory bundling provisions, the rule also requires a procuring activity to submit a proposed procurement to SBA for review whenever the procurement includes in its statement of work a ''bundled'' requirement, and authorizes SBA to appeal to the head of the contracting activity, and then to the head of the agency, ''bundled'' requirements that SBA believes are not necessary and justified. Whenever the procurement includes in its statement of work a ''substantial bundling'' of contract requirements, Section 15(a)(3) of the Small Business Act requires that the procuring activity document the benefits to be derived from the bundled contract and to justify its use.

The Small Business Act does not define ''substantial bundling.'' The SBA defines substantial bundling in this interim rule.

The rule also defines what constitutes ''measurably substantial benefits'' for purposes of determining whether

bundling is necessary and justified. The rule defines ''measurably substantial benefits'' to include, in any combination, or in the aggregate, cost savings; quality improvements that will save time, improve, or enhance performance or efficiency; reduction in acquisition cycle times; better terms and conditions; or any other benefits. In assessing whether benefits would be achieved through bundling, the analysis must compare the cost that was charged by small businesses for the work that they performed and, where available, the cost that could have been or could be charged by small businesses for the work not previously performed by small business. To proceed with a bundled procurement, a procuring activity must quantify the identified benefits as noted herein and explain how their impact would be measurably substantial.

The statute recognizes that in some circumstances bundling should be permitted because of the benefits that flow to the Government as a result of consolidation of requirements. Congress determined that those benefits may overcome any impact on small business in certain circumstances. The statutory language requires contracting officers to demonstrate ''measurably substantial benefits'' and the Joint Explanatory Statement calls for meaningful, enforceable controls to preclude unnecessary and unjustified bundling. Pursuant to the statute, there are two requirements that must be satisfied before items are bundled. The benefits to be derived by the Government must be ''measurable'' and they must be ''substantial.'' In order to be ''measurable,'' the benefits must be quantifiable. Pursuant to the statutory language, however, quantifiable benefits are not sufficient to justify bundling unless they are also ''substantial.'' SBA developed objective, quantifiable criteria for determining when a consolidation of procurements will provide ''measurably substantial benefits,'' and, thus, when bundling will be necessary and justified.

The proposed regulation (64 FR 2153) identified areas in which there may be ''measurably substantial benefits,'' including cost savings or price reduction; quality improvements that will save time or improve or enhance performance or efficiency; reduction in acquisition cycle times; or better terms and conditions. The proposed rule also established specific criteria for measuring whether these benefits or improvements, which are to be derived, are ''substantial.'' Those criteria are maintained in this interim rule.

The proposed regulation (64 FR 2153) also reiterated the statutory requirement that the reduction of administrative or personnel costs alone cannot be a justification for bundling unless the administrative or personnel costs are expected to be ''substantial'' in relation to the dollar value of the procurement (including options) to be consolidated. In determining whether the reduction of administrative or personnel costs are ''substantial,'' the statute clearly required a comparison between the administrative or personnel costs without bundling to those anticipated with bundling. In response to public comment, this interim rule implements a quantifiable test, outlined below, for determining whether administrative or personnel cost savings are expected to be ''substantial.''

SBA is concerned that bundled contracts will render small business participation as prime contractors unlikely. Section 125.2(b)(5) of this interim rule authorizes SBA's Procurement Center Representatives (PCRs) to recommend alternative procurement methods to agencies to provide prime contract opportunities. These strategies include, under appropriate circumstances: (1) Breaking up the procurement into smaller discrete procurements to render them suitable for small business set-asides; (2) breaking out discrete components, where practicable, to be set aside for small business; or (3) when issuing multiple awards against a single solicitation, reserving one or more awards for small companies.

Section by Section Analysis

SBA received 10 comments concerning proposed § 121.103(f)(3). This section authorizes an exclusion from SBA's affiliation rules for a procurement that qualifies as a ''bundled'' requirement. Eight comments were in strong support of this section. One comment thought that this section should ''address the implications of past performance.'' SBA believes that past performance should have no bearing on this regulatory provision for several reasons. Section 121.103(f)(3) is a *size* regulation. Past performance is more typically associated with responsibility, or a firm's ability to perform a specific contract opportunity. A firm's ability to perform a given contract, based on capacity, past performance, or other responsibility criteria, does not affect whether the concern is a small business or not. Moreover, this provision is a size rule for joint ventures or teaming relationships. A joint venture is normally a one-time association to perform a particular contract. There most likely is not any past performance history on the joint venture entity. In addition, one commenter suggested that the proposed rule reference a number of existing FAR provisions dealing with liability, consent to subcontracts, and performance and payment bonds. SBA believes existing Federal Acquisition Regulation (FAR) provisions are adequate for purposes of this rule and sees no need to amend this section.

SBA received two comments concerning § 125.2(a). One commenter thought that a literal reading of this section requires all awards to be made to small businesses. SBA first notes that the language contained in the regulations repeats almost verbatim the statutory language contained in section 15(a) of the Small Business Act. SBA does not agree that language requires what the commenter suggests. The statutory and regulatory language requires award to a small business only where ''SBA and the procuring or disposal agency'' determine one of four things to be present. If the procuring or disposal agency does not agree that one of those circumstances exists and SBA does not appeal that decision to the head of the agency, award need not be made to a small business. Another commenter suggested extending the rule to include nonprofit agencies contracting with the Government. SBA's size regulations have historically defined a ''small business concern'' to be a business entity organized for profit. This rule is not the appropriate vehicle to consider changes to that longstanding position, and SBA makes no changes in that regard.

SBA received no comments concerning § 125.2(b)(1), which generally discusses the duties of SBA PCRs. As such, § 125.2(b)(1) remains as proposed.

SBA received eight comments concerning § 125.2(b)(2), which requires the procuring agency to provide a copy of a proposed acquisition strategy to the PCR 30 days prior to issuance or to the Government Contracting Area Office if a PCR is not assigned to the buying activity. This section is consistent with FAR 19.202–1(e)(1) (Encouraging Small Business Participation). Most of the comments expressed concern about possible delays in SBA's response. The procedures and time frames for PCR response are set forth in FAR 19.402(c)(2) and FAR 19.505 (48 CFR 19.402 and 19.505) which SBA believes are adequate. Therefore, the interim rule remains as proposed.

SBA received four comments concerning § 125.2(b)(3) that requires the procuring agency to give the PCR a written statement of explanation and justification for bundling. The statement

must explain why certain small business accommodations are not possible. One commenter thought this section would be burdensome and adds little value given the other criteria in the rule. Sections 411 through 417 of SBA's Reauthorization Act specifically require this written justification. As such, it remains as proposed in this interim rule.

SBA received one comment concerning § 125.2(b)(4), which requires PCRs to identify capable small businesses, including small business teams, for particular requirements on bundled contracts. The commenter suggested a 30-calendar-day requirement for such an identification process to avoid or limit acquisition delays. Timeframes regarding PCR actions are currently addressed in 48 CFR 19.5. This section remains as proposed.

Six commenters endorsed the proposed change to § 125.2(b)(5), which provides the SBA's PCRs with a number of alternatives to recommend to procurement officials who are considering the bundling of contracts into one larger contract. These commenters also recommended that proposed § 125.2(b)(5) be modified to include the following two additional alternatives: recommending the solicitation and resultant contract specifically state the small business subcontracting goals which are expected of the contractor awardee, and recommending that the small business subcontracting goals be based on contract dollars versus subcontract dollars. SBA finds that these suggestions have merit and have incorporated them in this interim rule.

One commenter suggested a time frame to develop alternatives to bundling. FAR 19.402(c)(2) already specifies the time frame.

SBA received three comments concerning § 125.2(b)(6), which authorizes a PCR to appeal to the head of the contracting activity and subsequently to the secretary of the department, or the head of the agency, in cases where there is disagreement between the PCR and the contracting officer. One commenter suggested that this section be clarified by stating that the appeal be initiated within 30 calendar days of following receipt of the contracting activity's acquisition strategy statement. SBA believes that existing provisions in FAR 19.505 adequately address this issue.

SBA received one comment concerning § 125.2(b)(7), which requires the PCR to work with the procuring activity's Small Disadvantaged Business Utilization Specialists (SADBUS). The commenter stated that term was changed to Small Business Specialist in 1997. This term was changed by the Federal Acquisition Streamlining Act (FASA) in 1995. Accordingly SBA will incorporate the recommended change.

SBA received one comment concerning § 125.2(d)(1), which defines certain identified terms used in these regulations. The comment related to the impact of the rule on simplified acquisitions and administrative lead-time. Since the interim rule establishes a dollar value standard for the determination of substantial bundling, this section need not be changed from the proposed rule.

SBA received no comments concerning § 125.2(d)(2), which restates the statutory mandates. This section is not changed in this interim rule.

SBA received 38 separate comments concerning § 125.2(d)(3) and its subsections. Paragraph (d)(3)(i) mandates market research to determine whether bundling is necessary and justified. We believe that the paragraph, as written, meets the congressional intent, and it will remain as proposed. The comments received concerning § 125.2(d)(3)(iii)(A) were diverse, but none offered definitive criteria from which to quantify measurably substantial benefits. SBA has reconsidered its original proposal and has formulated a two tiered approach to quantify measurably substantial benefits. In the first approach, depending upon the estimated dollar value of the procurement (including options), the contracting activity must quantify the identified benefits and explain how their impact would be measurably substantial. SBA has established percentages to quantify the benefits which must be met. In the second approach, where the benefits do not meet the thresholds established by SBA, the Assistant Secretaries with responsibility for acquisition matters (Service Acquisition Executives) or the Under Secretary of Defense for Acquisition and Technology (for other Defense Agencies) in the Department of Defense, and the Deputy Under Secretary or equivalent for civilian agencies can determine on a non-delegable basis, that the consolidated requirement is critical to the success of the agency's mission. The procedures in § 125.2(d)(3)(iii) (A) and (B) are not applicable to consolidated procurements that are subject to the cost comparisons conducted in accordance with OMB Circular A–76.

SBA received two comments concerning § 125.2(d)(4), which requires agencies, in cases of substantial bundling, to document their procurement strategies and to include a determination that the anticipated benefits justify the use of bundling. One commenter believed that the rule should state that SBA will assist the contracting officer in identifying less obvious obstacles to small business participation. Because this is implicitly stated elsewhere in the rule, SBA believes that re-statement here is unnecessary.

One commenter recommended deletion of § 125.2(d)(4)(iii), as its might be confusing. SBA believes that the provision is clear, and does not change it from the proposed rule.

SBA received six comments concerning proposed § 125.2(d)(5), which specified values for small business evaluation criteria. Some commenters believed that this proposal unduly involved the SBA in another agency's contractor selection process. SBA believes that its statutory mandate provides authority to require this evaluation criteria. Accordingly, this section remains unchanged in this interim rule.

SBA received eight comments on § 125.6(g). This section provides that when the small business members of a team submitting an offer are exempt from affiliation, the performance of work requirements shall apply to the cooperative effort of the team or joint venture, not its individual members. Seven commenters recommended that for services, this section should be strengthened to require that the cooperative effort of the team or joint venture perform at least 70 percent of the cost of the contract incurred for personnel. Changing the percentages of work required by small businesses is beyond the scope of this rule.

Another commenter suggested clarifying language regarding contractual obligations, similar to an earlier recommendation. SBA finds this change unnecessary.

Defining Substantial Bundling

The SBA sought comments on appropriate ways to define substantial bundling (for example, in terms of threshold contract value or a threshold number of geographic locations and Standard Industrial Classification (SIC) codes). Several commenters recommended that substantial bundling not be defined and to leave determinations of substantial bundling to the discretion of the contracting officer. The supporting rationale for this approach is that if the Congress wanted to define substantial bundling they would have done so in statute. The absence of a clear-cut definition of substantial bundling, however, creates a

number of serious administrative issues, which, if unresolved, would defeat congressional intent. SBA's approach is to provide a clear and reasonable standard. For example, in evaluating the level of substantial bundling, the Congress directed that the Federal Procurement Data Center track bundling of contract awards at the five million-dollar level. While SBA believes that this level is too low for the purpose of defining ''substantial bundling,'' it demonstrates that a single dollar standard for defining substantial bundling is consistent with congressional intent. Several other commenters supported an objective standard for determining what constitutes ''substantial bundling.''

Bundling is any contract consolidation that renders a contract likely to be unsuitable for award to a small business concern due to the aggregate dollar value of the anticipated award; the diversity, size, or specialized nature of the elements of the performance specified; the geographic dispersion of contract performance sites; or any combination of these three criteria. SBA determined that the aggregate dollar value of the anticipated award is the single most important criteria for determining substantial bundling. The other criteria, while significant, do not rise to the level of importance as the aggregate dollar value of anticipated award. In addition, the other criteria are generally correlated to high aggregate dollar levels.

As such, this interim rule defines substantial bundling as the aggregation of two or more contracts whose combined average annual value is at least $10 million. Typically, contracts are described in terms of their total value over the life of the contract. Thus, for example, a one-year contract with four one-year options with a value of $10 million for the base year and each option year, would be considered a $50 million contract. SBA determined that the $10 million substantial bundling threshold will meet the statutory mandate to avoid unnecessary and unjustified bundling of contract requirements that precludes small-business participation as prime contractors. Establishing the $10 million threshold will not unduly burden federal agencies with the administrative requirements of this regulation. Using the threshold, contracting officers and the public can easily determine whether a given consolidation of requirements constitutes substantial bundling. For example, a consolidation of two contracts each with an average value of $6 million into one contract with an average annual value of $12 million constitutes substantial bundling.

Defining Measurably Substantial Benefits

When a procuring activity intends to proceed with a ''bundled'' requirement, it must document that the bundling is necessary and justified. If it cannot do so, the procuring activity cannot go forward with the consolidation. In order for bundling to be necessary and justified, the consolidation must achieve ''measurably substantial benefits.'' In its proposed rule, SBA specifically asked for comments on how SBA could best objectively define this term. SBA received 11 comments regarding how ''measurable substantial benefits'' should be defined. Of these eleven, four were from Federal Government agencies, six from trade associations, and one from a small business firm.

Several commenters suggested that ''measurably substantial benefits'' cannot be defined since the criteria set forth in the legislation are not directly comparable. SBA recognizes the lack of direct comparability in the criteria as commonly understood. However, to meet Congressional intent, SBA has determined that for purposes of this interim rule all anticipated benefits be expressed in dollars. This will permit computation of benefits as a percentage of the total anticipated contract award.

After considering all comments received, SBA concluded that measurably substantial benefits must be expressed as a percentage of the anticipated contract award value (including options). This is necessary in order to facilitate comparisons among the varying benefits to be derived. In other words, a reduction in cycle time must be converted to a dollar value in order to be compared to the other criteria such as cost savings. Without a common denominator such as dollars, or percent of dollars, the careful analysis and justification the law contemplates would not be possible. The inability to express the various competing criteria without a common denominator would, in effect, prevent evaluation. Several commenters offered a percentage savings. Two recommended 25 percent and one recommended 20 percent. One commenter advocated flexibility and did not propose a percentage. Even though the commenters recommended a higher percentage than those adopted by SBA in this interim rule, SBA believes that its approach provides an appropriate balance between the efficiencies of larger procurements and the socio-economic benefits derived through the use of small businesses.

SBA determined that measurably substantial benefits should be quantified using a two tiered approach: (1) Benefits equivalent to 10 percent if the contract value (including options) is $75 million or less; or (2) benefits equivalent to 5 percent if the contract value (including options) is over $75 million. The 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 the above benefits. The rule also permits the Assistant Secretaries with responsibility for acquisition matters (Service Acquisition Executives) or the Under Secretary of Defense for Acquisition and Technology (for other Defense Agencies) in the Department of Defense, and the Deputy Secretary or equivalent for civilian agencies, on a non-delegable basis, to determine that a bundled contract is necessary and justified when: (1) There are benefits that do not meet the thresholds defined above but, in the aggregate, are critical to the agency's mission success; and (2) the procurement strategy provides for maximum practicable participation by small businesses.

The procedures described above do not apply to consolidated procurements that are subject to the cost comparisons conducted in accordance with OMB Circular A–76.

SBA believes that this approach takes into consideration the likelihood that savings will vary depending on the size of the contract. SBA has no historical data on cost savings associated with bundled contracts from which to determine a quantifiable measure. However, SBA does maintain records on the value of bundled contracts that we review. Based on data that SBA has collected over the past 4 years, it was determined that the majority of bundled contracts fell within a range between $50 million and $75 million. We believe that the highest percentage to quantify the benefits should be applied to contracts of $75 million or less. At levels above $75 million, benefits equivalent to 5 percent of the contract value (including options) would still equate to measurably substantial benefits.

Defining Measurably Substantial Administrative or Personnel Cost Savings

This interim rule reiterates the statutory requirement that the reduction of administrative or personnel costs

alone cannot be a justification for bundling unless the administrative or personnel costs are expected to be ''substantial'' in relation to the dollar value of the procurement (including options) to be consolidated. In determining whether the reduction of administrative or personnel costs are ''substantial,'' the statute clearly requires a comparison between the administrative or personnel costs without bundling to those anticipated with bundling. SBA is committed to implementing a quantifiable test for determining whether administrative or personnel cost savings are expected to be ''substantial.''

SBA specifically requested comments on how best to define ''substantial'' administrative or personnel cost savings. SBA received six comments regarding defining ''measurably substantial administrative or personnel cost savings,'' two from Federal agencies, three from trade associations, and one from a small business concern. Several commenters offered specific percentages to define substantial administrative savings. Commenters suggested 10 percent, 20 percent and 25 percent. SBA determined that a saving of at least 10 percent of the anticipated contract award (including options) will be deemed substantial for purposes of this section.

Compliance With Executive Orders 12612, 12788 and 12866, the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), and the Paperwork Reduction Act (44 U.S.C. Chapter 3501 et seq.)

SBA certifies that this interim rule, if adopted in final form, would not be a significant rule within the meaning of Executive Order 12866. The rule does not impose costs upon the businesses, which may be affected by it. It is not likely to have an annual economic impact of $100 million or more, result in a major increase in costs or prices, or have a significant adverse effect on competition or the United States economy.

SBA has determined that this interim rule may have a significant beneficial economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. §§ 601–612. The interim rule can potentially apply to all small businesses that are performing or may want to perform on the prime contract opportunities of the Federal Government. While there is no precise estimate of the number of small entities or the extent of the economic impact, SBA believes that a significant number of small businesses would be affected. SBA has submitted a complete Initial Regulatory Flexibility Analysis of this interim rule to the Chief Counsel for Advocacy of the Small Business Administration. For a copy of this analysis, please contact Anthony Robinson at (202) 205–6465.

For the purpose of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA certifies that this rule would not impose new reporting or record keeping requirements, other than those required on the Government by law.

For purposes of Executive Order 12612, SBA certifies that this rule does not have any federalism implications warranting the preparation of a Federalism Assessment.

For purposes of Executive Order 12778, the SBA certifies that this rule is drafted, to the extent practicable, in accordance with the standards set forth in section 2 of this order.

List of Subjects

13 CFR Part 121

Government procurement, Government property, Grant programs-business, Individuals with disabilities, Loan programs-business, Small businesses.

13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance.

For the reasons stated in the preamble, SBA amends 13 CFR part 121 and 125 as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

1. The authority citation for 13 CFR part 121 is revised to read as follows:

Authority: 15 U.S.C. 632(a), 634(b)(6), 637(a), 644(c), and 662(5); and Sec. 304, Pub. L. 103–403, 108 Stat. 4175, 4188.

2. Section 121.103, revise paragraphs (f)(3)(i) to read as follows:

§ 121.103 What is affiliation?

* * * * *

(f) * * *

(3) * * *

(i) A joint venture or teaming arrangement of two or more business concerns may submit an offer as a small business for a Federal procurement without regard to affiliation under paragraph (f) of this section so long as each concern is small under the size standard corresponding to the SIC code assigned to the contract, provided:

(A) The procurement qualifies as a ''bundled'' requirement, at any dollar value, within the meaning of § 125.2(d)(1)(i) of this chapter; or

(B) The procurement is other than a ''bundled'' requirement within the meaning of § 125.2(d)(1)(i) of this chapter, and:

(*1*) For a procurement having a revenue-based size standard, the dollar value of the procurement, including options, exceeds half the size standard corresponding to the SIC code assigned to the contract; or

(*2*) For a procurement having an employee-based size standard, the dollar value of the procurement, including options, exceeds $10 million.

* * * * *

PART 125—GOVERNMENT CONTRACTING PROGRAMS

1. The authority citation for 13 CFR part 125 is revised to read as follows:

Authority: 15 U.S.C. 634(b)(6), 637 and 644; 31 U.S.C. 9701, 9702.

2. In § 125.2, redesignate paragraphs (a) and (b) as paragraphs (b) and (c), respectively, revise newly designated paragraph (b), and add new paragraphs (a) and (d) to read as follows:

§ 125.2 Prime contracting assistance.

(a) *General.* Small business concerns must receive any award or contract, or any contract for the sale of Government property, that SBA and the procuring or disposal agency determine to be in the interest of:

(1) Maintaining or mobilizing the Nation's full productive capacity;

(2) War or national defense programs;

(3) Assuring that a fair proportion of the total purchases and contracts for property, services and construction for the Government in each industry category are placed with small business concerns; or

(4) Assuring that a fair proportion of the total sales of Government property is made to small business concerns.

(b) *PCR and procuring activity responsibilities.* (1) SBA Procurement Center Representatives (PCRs) are generally located at Federal agencies and buying activities which have major contracting programs. PCRs review all acquisitions not set-aside for small businesses to determine whether a set-aside is appropriate.

(2) A procuring activity must provide a copy of a proposed acquisition strategy (e.g., Department of Defense Form 2579, or equivalent) to the applicable PCR (or to the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located if a PCR is not assigned to the procuring activity) at least 30 days prior to a solicitation's issuance whenever a proposed acquisition strategy:

(i) Includes in its description goods or services currently being performed by a small business and the magnitude of the quantity or estimated dollar value of the proposed procurement would render small business prime contract participation unlikely;

(ii) Seeks to package or consolidate discrete construction projects; or

(iii) Meets the definition of a bundled requirement as defined in paragraph (d)(1)(i) of this section.

(3) Whenever any of the circumstances identified in paragraph (b)(2) of this section exist, the procuring activity must also submit to the applicable PCR (or to the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located if a PCR is not assigned to the procuring activity) a written statement explaining why:

(i) If the proposed acquisition strategy involves a bundled requirement, the procuring activity believes that the bundled requirement is necessary and justified under the analysis required by paragraph (d)(3)(iii) of this section; or

(ii) If the description of the requirement includes goods or services currently being performed by a small business and the magnitude of the quantity or estimated dollar value of the proposed procurement would render small business prime contract participation unlikely, or if a proposed procurement for construction seeks to package or consolidate discrete construction projects:

(A) The proposed acquisition cannot be divided into reasonably small lots to permit offers on quantities less than the total requirement;

(B) Delivery schedules cannot be established on a basis that will encourage small business participation;

(C) The proposed acquisition cannot be offered so as to make small business participation likely; or

(D) Construction cannot be procured as separate discrete projects.

(4) In conjunction with their duties to promote the set-aside of procurements for small business, PCRs will identify small businesses that are capable of performing particular requirements, including teams of small business concerns for larger or bundled requirements (see § 121.103(f)(3) of this chapter).

(5)(i) If a PCR believes that a proposed procurement will render small business prime contract participation unlikely, or if a PCR does not believe a bundled requirement to be necessary and justified, the PCR shall recommend to the procurement activity alternative procurement methods which would increase small business prime contract participation. Such alternatives may include:

(A) Breaking up the procurement into smaller discrete procurements;

(B) Breaking out one or more discrete components, for which a small business set-aside may be appropriate; and

(C) Reserving one or more awards for small companies when issuing multiple awards under task order contracts.

(i) Where bundling is necessary and justified, the PCR will work with the procuring activity to tailor a strategy that preserves small business prime contract participation to the maximum extent practicable.

(ii)The PCR will also work to ensure that small business participation is maximized through subcontracting opportunities. This may include:

(A) Recommending that the solicitation and resultant contract specifically state the small business subcontracting goals which are expected of the contractor awardee; and

(B) Recommending that the small business subcontracting goals be based on total contract dollars instead of subcontract dollars.

(6) In cases where there is disagreement between a PCR and the contracting officer over the suitability of a particular acquisition for a small business set-aside, whether or not the acquisition is a bundled or substantially bundled requirement within the meaning of paragraph (d) of this section, the PCR may initiate an appeal to the head of the contracting activity. If the head of the contracting activity agrees with the contracting officer, SBA may appeal the matter to the secretary of the department or head of the agency. The time limits for such appeals are set forth in 19.505 of the Federal Acquisition Regulation (FAR) (48 CFR 19.505).

(7) PCRs will work with a procuring activity's Small Business Specialist (SBS) to identify proposed solicitations that involve bundling, and with the agency acquisition officials to revise the acquisition strategies for such proposed solicitations, where appropriate, to increase the probability of participation by small businesses, including small business contract teams, as prime contractors. If small business participation as prime contractors appears unlikely, the SBS and PCR will facilitate small business participation as subcontractors or suppliers.

* * * * *

(d) Contract bundling—(1) Definitions—(i) Bundled requirement or bundling. The term ''bundled requirement or bundling'' refers to the consolidation of 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 paragraphs (d)(1)(i) (A), (B), and (C).

(ii) *Separate smaller contract:* A separate smaller contract is a contract that has previously been performed by one or more small business concerns or was suitable for award to one or more small business concerns.

(iii) *Substantial bundling:* Substantial bundling is any contract consolidation, which results in an award whose average annual value is $10 million or more.

(2) *Requirement to foster small business participation:* The Small Business Act requires each Federal agency to foster the participation of small business concerns as prime contractors, subcontractors, and suppliers in the contracting opportunities of the Government. To comply with this requirement, agency acquisition planners must:

(i) Structure procurement requirements to facilitate competition by and among small business concerns, including small disadvantaged, 8(a) and women-owned business concerns; and

(ii) Avoid unnecessary and unjustified bundling of contract requirements that inhibits or precludes small business participation in procurements as prime contractors.

(3) *Requirement for market research.* (i) In addition to the requirements of paragraph (b)(2) of this section and before proceeding with an acquisition strategy that could lead to a contract containing bundled or substantially bundled requirements, an agency must conduct market research to determine whether bundling of the requirements is necessary and justified. During the market research phase, the acquisition team should consult with the applicable PCR (or if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located).

(ii) The procuring activity must notify each small business which is performing a contract that it intends to consolidate that requirement with one or more other requirements at least 30

days prior to the issuance of the solicitation for the bundled or substantially bundled requirement. The procuring activity, at that time, should also provide to the small business the name, phone number and address of the applicable SBA PCR (or if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located).

(iii) When the procuring activity intends to proceed with an acquisition involving bundled or substantially bundled procurement requirements, it must document the acquisition strategy to include a determination that the bundling is necessary and justified, when compared to the benefits that could be derived from meeting the agency's requirements through separate smaller contracts.

(A) The procuring activity may determine a consolidated requirement to be necessary and justified if, as compared to the benefits that it would derive from contracting to meet those requirements if not consolidated, it would derive measurably substantial benefits. The procuring activity must quantify the identified benefits and explain how their impact would be measurably substantial. The 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*) Benefits equivalent to 10 percent if the contract value (including options) is $75 million or less; or

(*2*) Benefits equivalent to 5 percent if the contract value (including options) is over $75 million.

(B) Notwithstanding paragraph (d)(3)(iii)(A) of this section, the Assistant Secretaries with responsibility for acquisition matters (Service Acquisition Executives) or the Under Secretary of Defense for Acquisition and Technology (for other Defense Agencies) in the Department of Defense and the Deputy Secretary or equivalent in civilian agencies may, on a non-delegable basis determine that a consolidated requirement is necessary and justified when:

(*1*) There are benefits that do not meet the thresholds set forth in paragraph (d)(3)(iii)(A) of this section but, in the aggregate, are critical to the agency's mission success; and

(*2*) Procurement strategy provides for maximum practicable participation by small business.

(C) Notwithstanding paragraph (d)(3)(iii)(A) and (B) of this section, a consolidated requirement is necessary and justified when it is subject to the cost comparison conducted in accordance with OMB Circular A–76.

(D) The reduction of administrative or personnel costs alone shall not be a justification for bundling of contract requirements unless the administrative or personnel cost savings are expected to be substantial, in relation to the dollar value of the procurement to be consolidated (including options). To be substantial, such cost savings must be at least 10 percent of the contract value (including options).

(E) In assessing whether cost savings and/or a price reduction would be achieved through bundling, the procuring activity and SBA must compare the price that has been charged by small businesses for the work that they have performed and, where available, the price that could have been or could be charged by small businesses for the work not previously performed by small business.

(4) *Substantial bundling.* Where a proposed procurement strategy involves a substantial bundling of contract requirements, the procuring agency must, in the documentation of that strategy, include a determination that the anticipated benefits of the proposed bundled contract justify its use, and must include, at a minimum:

(i) The analysis for bundled requirements set forth in paragraph (d)(3)(iii) of this section;

(ii) An assessment of the specific impediments to participation by small business concerns as prime contractors that will result from the substantial bundling;

(iii) Actions designed to maximize small business participation as prime contractors, including provisions that encourage small business teaming for the substantially bundled requirement; and

(iv) Actions designed to maximize small business participation as subcontractors (including suppliers) at any tier under the contract or contracts that may be awarded to meet the requirements.

(5) *Significant subcontracting opportunity.* (i) Where a bundled or substantially bundled requirement offers a significant opportunity for subcontracting, the procuring agency must designate the following factors as significant factors in evaluating offers:

(A) A factor that is based on the rate of participation provided under the subcontracting plan for small business in the performance of the contract; and

(B) For the evaluation of past performance of an offeror, a factor that is based on the extent to which the offeror attained applicable goals for small business participation in the performance of contracts.

(ii) Where the offeror for such a bundled contract qualifies as a small business concern, the procuring agency must give to the offeror the highest score possible for the evaluation factors identified in paragraph (d)(5)(i) of this section.

5. In § 125.6, add new paragraph (g) to read as follows:

§ 125.6 Prime contractor performance requirements (limitations on subcontracting).

* * * * *

(g) Where an offeror is exempt from affiliation under § 121.103(f)(3) of this chapter and qualifies as a small business concern, the performance of work requirements set forth in this section apply to the cooperative effort of the team or joint venture, not its individual members.

Dated: October 19, 1999.

Aida Alvarez,

Administrator.

[FR Doc. 99–27801 Filed 10–22–99; 8:45 am]

BILLING CODE 8025–01–P

FEDERAL TRADE COMMISSION

16 CFR Part 241

Guides for the Dog and Cat Food Industry

AGENCY: Federal Trade Commission.

ACTION: Recession of the Guides for the Dog and Cat Food Industry; announcement of enforcement policy.

SUMMARY: On March 18, 1999, the Commission published a **Federal Register** document initiating the regulatory review of the Federal Trade Commission's (''Commission'' or ''FTC'' Guides for the Dog and Cat Food Industry (''Dog and Cat Food Guides'' or ''Guides'') and seeking public comment. The Commission has now completed its review, and this document announces the Commission's decision to rescind the Guides.

EFFECTIVE DATE: October 25, 1999.

ADDRESSES: Requests for copies of this document should be send to the Consumer Response Center, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The document is available on the Internet at the Commission's website. http://www.flc.gov.