April 1, 2003

VIA HAND DELIVERY & ELECTRONIC MAIL

General Services Administration
Regulatory Secretariat (MVA)
1800 F Street, NW
Room 4035
Attn: Ms. Laurie Duarte
Washington, DC 20405

Ms. Linda G. Williams
Associate Administrator for Government Contracting
U.S. Small Business Administration
409 Third Street, S.W.
Mail Code 6530
Washington, DC 20416

Re: FAR Case No. 2002-029;
Proposed Rule: Contract Bundling

-and-

Proposed Rule: Small Business Government Contracting Programs

Dear Ms. Duarte and Ms. Williams:

On behalf of the Section of Public Contract Law of the American Bar Association (“the Section”), I am submitting comments on the above-referenced
matter. The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section's governing Council and substantive committees contain members representing these three segments to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

The Section is concerned that the proposed rules will not address the effects of contract bundling in a meaningful manner because they do not implement fully the recommendations of the Office of Management and Budget (“OMB”) in its October 2002 report, “Contract Bundling – A Strategy for Increasing Federal Contracting Opportunities for Small Business” (hereinafter the “OMB Report”). The OMB Report stated that several specific changes to the Federal Acquisition Regulation (“FAR”) and the Small Business Administration (“SBA”) regulations would be prepared to reduce the adverse impact of contract bundling on small businesses. The Section respectfully suggests that the proposed rules fall short of this objective.

Accordingly, we recommend that the proposed rules be modified in the manner set forth below. In addition, because the changes identified herein are significant, we recommend that any further changes be implemented as part of an interim rule to ensure another opportunity for public comment. For ease of reference between the two proposed rules, our comments are organized according to the action items identified in the OMB Report.

1. **OMB Item #3: Definition of Contract Bundling**

The OMB Report recommended that the definition of “contract bundling” be expanded to include task and delivery orders issued under multiple award contracts, as follows:

“3. Require contract bundling reviews for task and delivery orders under multiple award contract vehicles.

---

1 The Honorable Mary Ellen Coster Williams, Chair of the ABA Section of Public Contract Law, has recused herself on this matter, did not participate in the Section’s consideration of these comments, and abstained from voting to approve and send this letter. Similarly, Council Member Daniel I. Gordon recused himself on this matter and did not participate in either the preparation or approval of these comments.
The definition of contract bundling in the FAR and SBA regulations will be clarified to require contract bundling reviews by the agency OSDBU for task and delivery orders under multiple award contract vehicles. Because contract bundling reviews are not specifically required by the FAR or SBA regulations for agency multiple award contracts (MACs), multi-agency contracts, Government-Wide Acquisition Contracts (GWACs), or GSA’s Multiple Award Schedule Program, these contracts and the orders placed under these contracts effectively escape review. Recent and significant increases in this type of contracting make contract bundling review essential. Proposed regulatory changes will be prepared by January 31, 2003.”

The proposed change to the definition of contract bundling falls short of fully implementing this recommendation, because the proposed definition fails to cover task or delivery orders issued by an agency under the agency’s own multiple award contracts. The proposed change would cover only “[a]n indefinite quantity contract awarded to two or more sources under a single solicitation for the same or similar supplies and services” and “[a]n order placed against an indefinite quantity contract under a – (A) Federal Supply Schedule contract; or (B) Task-order contract or delivery order contract awarded by another agency (i.e., Government-wide acquisition contract or multi-agency contract)” (emphasis added).

If it makes sense for an agency to perform a bundling review of an order placed against a contract awarded by another agency, it makes equal sense for an agency to perform the same review for an order placed against the agency’s own contract. Indeed, the OMB Report draws no distinction between orders placed against an agency’s own multiple award contracts and those placed against another agency’s contracts. Thus, the definition of contract bundling should include orders placed against indefinite quantity, multiple award contracts awarded by any agency.

2. **OMB Item #4: OSDBU Reviews Above Thresholds**

The OMB Report recommended that agency Offices of Small and Disadvantaged Business Utilization (“OSDBUs”) review all proposed acquisitions above agency-specific dollar thresholds, as follows:

“4. Require agency review of proposed acquisitions above specified thresholds for unnecessary and unjustified contract bundling.

SBA regulations and the FAR will be modified to require contract bundling reviews of proposed acquisitions above agency-specific dollar thresholds. Individual agency review thresholds for acquisitions between $2 million and $7 million should be established based on an
agency’s volume of contracts and in consultation with the SBA and agency OSDBU. The review will be conducted by the agency OSDBU under guidelines established by the SBA before an agency finalizes a specific acquisition plan. However, appropriate time limits will be established to ensure expeditious consideration. Proposed regulatory changes will be prepared by January 31, 2003.”

The proposed regulatory changes fall well short of implementing such a system of review because they do not require that the OSDBU review a proposed acquisition plan, be afforded an opportunity to review and react to that proposed acquisition plan before it is finalized, and do so within specified time limits. The proposed change to the FAR would merely create the extremely general obligation of the agency “to coordinate the acquisition plan” with the cognizant small business specialist. The proposed SBA regulations are just marginally better; they would require that the agency coordinate the acquisition plan with the small business specialist “[a]s early as practicable, but no later than 30 days before the issuance of a solicitation.”

By contrast, the underlying recommendations were that (a) the OSDBU review “proposed” acquisitions, (b) the review occur “before an agency finalizes a specific acquisition plan,” and (c) “appropriate time limits … be established to ensure expeditious consideration” by the OSDBU. Because the proposed rules contain none of these significant features, we recommend that they be expanded accordingly to require agencies to submit a proposed acquisition plan to the small business specialist/OSDBU, that the plan not be finalized until the small business specialist/OSDBU completes its bundling review, and that the small business specialist/OSDBU be given a limited number of days within which to complete its task.

Additionally, the Section is concerned by the proposed establishment of different dollar thresholds for bundling reviews at different agencies. The proposed rule would create a $7-million threshold for the Department of Defense (“DoD”), a $5-million threshold for three other agencies, and a $2-million threshold for all other agencies. A multi-tier system unduly complicates the regulations. Moreover, sustainment of the small business base at DoD is no less important than sustainment of the small business base at the civilian agencies and should not be subject to less attention. Indeed, statistics cited in the OMB Report reveal that DoD awarded 77.3% of federal bundled contract dollars in 2001. Thus, to achieve the goal of reducing the adverse impact of contract bundling on small businesses, effective monitoring of DoD procurements is essential.
3. OMB Item #6: Strengthening Compliance With Subcontracting Plans

The OMB Report recommended that agencies mitigate the effects of contract bundling by strengthening compliance with subcontracting plans and, in particular, that agencies use contractor compliance with subcontracting plans as an evaluation factor for future contract awards, as follows:

“6. Mitigate the effects of contract bundling by strengthening compliance with subcontracting plans.

In acquisitions where contract bundling is determined to be necessary and justified, actions will be taken to mitigate the effects of bundling by increasing subcontracting opportunities for small businesses. Federal contractors that receive contracts of $500,000 for products or services or $1 million for construction are generally required to prepare plans for subcontracting with small businesses. Compliance with these subcontracting plans and agency oversight of contractor compliance with the plans has been inconsistent. To encourage greater small business participation as subcontractors in bundled acquisitions, the FAR will be amended to require agencies to use contractor compliance with subcontracting plans as an evaluation factor for future contract awards. . . . Proposed regulatory changes will be prepared by January 31, 2003” (footnotes omitted).

The proposed change to the FAR falls short of implementing this objective because there would be no change to FAR 15.304, which is the section of the FAR that addresses evaluation factors to be used in making contract award decisions. The proposed regulations would only change FAR 42.1502 to require that an agency assess a contractor’s compliance with subcontracting plan goals as part of the agency’s broad evaluation of contract performance.

As the law currently stands, for solicitations involving bundling that offer significant opportunity for subcontracting, the contracting officer must include a factor to evaluate past performance indicating “the extent to which the offeror attained applicable goals for small business participation” under required subcontracting plans. 15 U.S.C. § 637(d)(4)(G)(ii); FAR 15.304(c)(3)(iii). The recommendation that the FAR be amended “to require that agencies use contractor compliance with subcontracting plans as an evaluation factor for future contract awards” logically means that the current regulation should be extended to require evaluation of subcontracting plan compliance in all solicitations, not just in those involving bundling. This interpretation promotes the recommendation’s stated purpose, which is “[t]o encourage greater small business participation as subcontractors in bundled acquisitions.” Consideration of subcontracting plan compliance in a source selection
should, in fact, encourage greater small business subcontract participation in bundled and non-bundled acquisitions alike.

Our view is that it would be most effective to change the FAR provision noted above, FAR 15.304(c)(3)(iii), to require the evaluation of subcontracting plan compliance not just in bundled procurements, but in procurements generally. Changing FAR 15.304 would be a straightforward implementation of the recommendation that the FAR be amended to make subcontracting plan compliance "an evaluation factor." This change also would have the benefit of simplifying the regulatory scheme.

Given the current extensive use of task and delivery orders under multiple award contracts, it also would be appropriate to modify FAR 8.404(b)(2) and FAR 16.505(b)(1)(iii)(A) to include subcontracting plan compliance as a suggested evaluation criterion in the award of task and delivery orders.

Finally, the proposed addition to FAR 42.1502 is too narrow in one other respect. The OMB Report sought greater compliance with subcontracting plans. Although goals are an important component of subcontracting plans, plans have other important components as well. For example, a plan must include a description of the principal types of supplies and services to be subcontracted. See FAR 52.219-9(d)(3). The degree to which subcontractors actually perform commercially useful functions under the contract can be an important aspect of subcontracting plan compliance and should be considered as part of the past performance assessment under FAR 42.1502. A plan also must contain a description of the efforts the offeror will make to ensure that small businesses have an equitable opportunity to compete for subcontracts and a description of the types of records that will be maintained to document efforts to comply with the plan's requirements. See FAR 52.219-9(d)(8), (11). In order to promote greater subcontracting plan compliance, the change to FAR 42.1502 should reflect this broader scope.

---

2 We acknowledge that there is an argument that inclusion of subcontracting plan compliance as one element of past performance, per a change to FAR 42.1502, could affect the evaluation of proposals in a tangential way because past performance is a mandatory evaluation criterion per FAR 15.304(c)(3)(ii). However, that approach falls far short of using contractor compliance with subcontracting plans as an evaluation factor for contract awards. Having subcontracting plan compliance listed in FAR 15.304, along with price and past performance, as a mandatory evaluation factor could make subcontracting plan compliance a meaningful discriminator in award decisions and, therefore, would cause contractors to devote greater attention to subcontracting plan compliance. By contrast, merely considering subcontracting plan compliance as an element in past performance assessments would have an indirect and attenuated effect on the source selection process and, therefore, would do little to address the effects of bundling. The proposed change to FAR 42.1502 should be merely a compliment to a change to FAR 15.304(c)(3)(iii).
The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

[Signature]

Hubert J. Bell, Jr.
Chair-Elect, Section of Public Contract Law

cc: Mary Ellen Coster Williams
    Patricia H. Wittie
    Robert L. Schaeffer
    Patricia A. Meagher
    Marshall J. Doke, Jr.
    Norman R. Thorpe
    Gregory A. Smith
    Council Members
    Chairs and Vice Chairs of the Small Business Committee
    Richard P. Rector