March 15, 1999

Ms. Judith Roussel
Associate Administrator for
Government Contracting
U.S. Small Business Administration
409 Third Street, S.W., Mail Code 6250
Washington, D.C. 20416

Re: Government Contracting Programs, 64 Fed. Reg. 2153 (Jan. 13, 1999)

Dear Ms. Roussel:

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.

In general, the Small Business Administration has done a good job in implementing the changes directed in the Small Business Reauthorization Act of 1997 (the "Statute"). In some instances, however, the proposed rule falls short of providing protection to the small business community that the Statute intended. The Section believes that, in some cases, the proposed rule gives too much discretion to the contracting official, which may have the inadvertent effect of adversely impacting small business.

Measurably Substantial Benefits

One point of concern the Section found was in the proposed language regarding the determination of whether a consolidated requirement is necessary and justified. In particular, Section 125.2, paragraph (d)(3)(iii)(A), sentence three reads:

Measurably substantial benefits include any one, or more, of the following in any combination, or in aggregate.

The Section noted that the Statute addressing this issue specifically calls for a "combination of benefits," thereby requiring that the contracting agency have multiple reasons for consolidating a procurement (15 U.S.C. 664 (e)(2)(B)). The proposed rule, as written, would allow a contracting agency to justify their decision to bundle a procurement by relying upon "any one" benefit. The standard for justifying bundling could thus be lowered, allowing procuring agencies even greater opportunity to bundle procurements than exists today.

An examination of GAO decisions supports the Section's position on this issue. For example, the GAO has seldom -- if ever -- regarded projected cost saving by itself as a sufficient justification for bundling of requirements into a single solicitation. To the contrary, GAO's operating assumption has been that competition inevitably lowers prices, while bundling is likely to raise them (Allfast Fastening Systems, Inc. B-251313, Mar. 25, 1993, 93-1 CPD ¶ 266). Under the proposed rule, however, an agency would be permitted to use projected cost savings as the sole justification for
consolidating a procurement.

The Section, therefore, believes that the words any one, or more, of should be removed from the above-cited sentence. This would bring the proposed rule into line with the existing Statute.

Cost Savings And/Or Price Reduction

The Section is also concerned with the list of proposed benefits agencies may use to justify the consolidation of procurements. Section 125.2, paragraph (d)(3)(iii)(A)(1), lists the first potential benefit for justifying consolidation as:

(1) Cost savings and/or price reduction

Once again, the Section notes that this justification is an expansion of the wording in the Statute. The Statute specifies cost savings as a reason for consolidation, but does not mention price reductions (15 U.S.C. 664 (e)(2)(B)(i)). The Section believes that the inclusion of this additional language may cause confusion among contracting agencies, and inadvertently, increase the use of consolidated procurements. Cost savings reflect determinable administrative costs incurred by an agency in conducting multiple, separate, or consolidated procurement. Price reductions are far too speculative to justify the use of a consolidated procurement. The Section recommends that price reductions be removed from the proposed rule as a justifiable benefit for bundling.

Substantial

The Small Business Administration has requested assistance in defining and quantifying the term "substantial" as it appears throughout the Regulations. More specifically, SBA requests comments on (1) the appropriate measurements that Procurement Center Representatives may use to gauge whether or not a benefit is "substantial" (proposed rule at 13 CFR 125.2(d)(3)(iii)(A)), and (2) how best to define "substantial" administrative or personnel cost savings for purposes of the statutory reference to reduction in administrative or personnel costs (proposed rule at 13 CFR 125.2(d)(3)(iii)(B)).

13 CFR 125.2(d)(3)(iii)(A)

The first of these two issues arises when an agency is required to determine whether or not the Government will obtain "measurably substantial benefits" from a bundled procurement. Possible "benefits" have been listed in the proposed rule, and involve a wide variety of potentially positive results, which differ from each other in both substance and form. As SBA notes, whether any of those benefits would justify bundling involves a two-part test: the benefits must be "measurable" and they must be "substantial."

The Section believes that given the diversity of potential benefits that might justify bundling, it is impossible to construct a single meaningful definition of "substantial" for purposes of this particular test. Any such definition might be useful when analyzing one type of benefit, but arbitrary when used in connection with another type of benefit. Moreover, GAO has often utilized quantitative analysis in bid protests, and has had little difficulty in determining whether an agency's rationale for bundling is sufficiently weighty based on such an analysis. See, e.g., National Airmotive Corp., B-290194, Sep. 4, 1998, 98-2 CPD ¶ 60 (agency provided quantitative analysis of readiness information that was sufficient to justify bundling; protest denied); Pemco Aeroplex, Inc., B-280397, Sep. 25, 1998, 98-2 CPD ¶ 79 (agency failed to provide quantitative analysis of readiness information sufficient to justify its position; protest sustained); and Titan Dynamics Simulations, Inc., B-275559, Oct. 13, 1994, 94-2 CPD ¶ 139 (agency provided sufficient quantitative information regarding failure rates; protest denied). Although a "bright line" test is always desirable, in this situation imposition of such a test appears to be unrealistic, and likely to lead to micromanagement of the decision-making process, which is counterproductive.

Accordingly, the Section recommends that the proposed rule should not attempt to define "substantial" for purposes of the test in 13 CFR 125.2(d)(3)(iii)(A).

13 CFR 125.2(d)(3)(iii)(B)

Under the statute and the proposed rule, "cost savings" is one of the potential benefits that may be used to justify a consolidated procurement. Nevertheless, Congress expressly stated that the reduction of an agency's administrative or personnel costs alone shall not be a justification for bundling of contract requirements unless the cost savings are expected to be "substantial" in relation to the dollar value of the procurement requirements to be consolidated. (15 U.S.C. 644(e)(2)(C).)

A review of case law from GAO decisions reveals that agencies sometimes assert "administrative savings" as a justification for bundling, but that GAO rarely upholds that justification in the face of a protest. Only where the
administrative burden has been regarded as overwhelming has GAO upheld the agency's position. Compare, Better Service, B-265751, B-265751.2, Jan. 18, 1996, 96-1 CPD ¶ 90 and Advanced Elevator Services, Inc., B-272340, B-272340.2, Sep. 26, 1996, 96-2 CPD ¶ 125. The Section believes that this high standard should be incorporated into the regulations, and that the term "substantial" for purposes of this particular test should be quantified. More particularly, the Section recommends that in order to be regarded as "substantial," administrative and personnel cost savings should be equal to no less than twenty percent (20%) of the total anticipated dollar value of the bundled procurement.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

David A. Churchill
Chair, Section of Public Contract Law

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