



SMALL BUSINESS ADMINISTRATION

13 CFR Part 125

RIN 3245-AH70

Ownership and Control and Contractual Assistance Requirement for the 8(a) Business

Development Program; Correction

AGENCY: Small Business Administration.

ACTION: Correcting amendment.

SUMMARY: This document corrects a technical error in the definition of substantial bundling that appeared in the *Federal Register* on April 27, 2023, a final rule entitled, “Ownership and Control and Contractual Assistance Requirements for the 8(a) Business Development Program.” The definition of substantial bundling, as it relates to Blanket Purchase Agreements (BPAs), improperly limited substantial bundling to BPAs entered against a U.S. General Services Administration (GSA) Schedule Contract. This notice removes that limitation so that the definition of substantial bundling applies to all BPAs and not only BPAs entered against GSA Schedule Contracts.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Sam Le at (202) 619-1789 or sam.le@sba.gov.

SUPPLEMENTARY INFORMATION:

I. Summary of Errors

This technical correction amends the definition of substantial bundling in the U.S. Small Business Administration’s (SBA’s) regulations at 13 Code of Federal Regulations (CFR) 125.1. The definition of substantial bundling, as previously published on page 26210 of FR Doc. 2023-07855, mistakenly limited the scope of substantial bundling, with respect to BPAs, to apply only to BPAs entered against GSA Schedule Contracts, as authorized by Federal Acquisition Regulations (FAR) subpart 8.4. BPAs, however, may be entered in other contexts aside from

GSA Schedule Contracts, including as authorized by simplified acquisition procedures at section 13.303 of the FAR.

The SBA did not intend to limit the application of the substantial bundling definition only to BPAs entered against GSA Schedule Contracts. This is clear from the preamble to SBA's final rule, published at pages 26188-26189 of 88 FR 26164, which reads, "SBA agrees that the consolidation and bundling requirements should apply to BPAs established with more than one supplier or a single firm and to both BPAs established under FAR Part 8 or Part 13 procedures." Furthermore, the definition of bundling, as defined in the same final rule that is at issue, applies to BPAs without any specification for whether those BPAs are issued against a GSA Schedule contract or in accordance with simplified acquisition procedures. Based on the clear intent in the preamble and the already established definition of bundling, SBA amends the definition of substantial bundling to remove the reference to GSA Schedule contracts for BPAs impacted by substantial bundling.

II. Waiver of Proposed Rulemaking and Waiver of the Delay in Effective Date

Under the Administrative Procedure Act (APA) (5 U.S.C. 551, et seq.), while a notice of proposed rulemaking and an opportunity for public comment is generally required before the promulgation of regulations, this is not required when an agency, for good cause, finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest and incorporates a statement of the reasons for that finding in the document. The APA also generally requires that a final rule be effective no sooner than 30 days after the date of publication in the Federal Register, though an agency may also waive this requirement for good cause found.

Sections 553(b)(B) and 553(d)(3) of the APA provide the exceptions from the APA notice and comment and delay in effective date requirements. Section 553(b)(B) of the APA authorizes an agency to dispense with normal notice and comment rulemaking procedures when the agency finds, for good cause, that the notice and comment process is impracticable, unnecessary, or contrary to the public interest. Additionally, the agency must state that

conclusion and the supporting rationale in the rule. Similarly, section 553(d)(3) of the APA allows the agency to waive the 30-day delay in effective date where good cause is found and the agency includes that conclusion and the supporting rationale in the rule.

The SBA is publishing this technical correction without advance notice or an opportunity for comment because it falls under the “good cause” exception of the APA, 5 U.S.C. 553(b)(B). This document corrects technical errors made in the final rule, which was published in accordance with the APA after the SBA proposed the rule and provided the public with an opportunity to comment on the proposal. The correction contained in this document does not make any substantive changes to the policies adopted in the final rule and explained in the preamble. This document makes a technical correction within the regulation text to align the definition of substantial bundling with the already published definition of bundling and for consistency with the policy discussion of the substantial bundling definition in the preamble to the final rule. The policy discussion explained that the substantial bundling definition would apply to all BPAs and not just those awarded against GSA Schedule Contracts, as supported by the public comments received. Therefore, the SBA finds good cause to conclude that it is impracticable, unnecessary, and contrary to the public interest to undertake further notice and comment procedures to incorporate this correction.

The SBA is also waiving the 30-day delay in effective date for this correction. It is in the public interest to ensure that the final rules setting forth the definition of substantial bundling be accurate so that agencies and small businesses are aware of when a procurement action falls within that definition such that the agency prepares the necessary justification and completes the required analyses and assessments to maximize small business participation to the extent possible. If the definition of substantial bundling remains improperly limited in its application due to the technical oversight in the definition, there is potential for small businesses to lose the opportunity to protest procurement actions that were not properly documented to support substantial bundling. The SBA finds that delaying the effective date of this correction would be

contrary to the public interest. In doing so, the SBA finds good cause to waive the 30-day delay in the effective date.

List of Subjects

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

For the reasons stated above, 13 CFR part 125 is corrected by making the following correcting amendments:

PART 125—GOVERNMENT CONTRACTING PROGRAMS

1. The authority citation for part 125 continues to read as follows:

Authority: 15 U.S.C. 632(p), (q), 634(b)(6), 637, 644, 657(b), 657(f), 657r, and 657s.

2. Amend § 125.1 by revising the definition of “Substantial bundling” to read as follows:

§ 125.1 What definitions are important to SBA's Government Contracting Programs?

* * * * *

Substantial bundling means any bundling that meets or exceeds the following dollar amounts (if the acquisition strategy contemplates multiple award contracts, orders placed under unrestricted multiple award contracts, or a Blanket Purchase Agreement or a task or delivery order contract awarded by another agency, these thresholds apply to the cumulative estimated value of the Multiple Award Contracts, orders, or Blanket Purchase Agreement, including options):

- (1) \$8.0 million or more for the Department of Defense;
- (2) \$6.0 million or more for the National Aeronautics and Space Administration, the General Services Administration, and the Department of Energy; and
- (3) \$2.5 million or more for all other agencies.

Larry Stubblefield,
Deputy Associate Administrator,

Office of Government Contracting and Business Development.

[FR Doc. 2024-05977 Filed: 3/27/2024 8:45 am; Publication Date: 3/28/2024]