



**The Coalition
for Government
Procurement**

September 30, 2011

Houston Taylor
Assistant Commissioner of FAS
Office of Acquisition Management
General Services Administration
2200 Crystal Drive
Arlington, VA 22202-3103

Dear Mr. Taylor,

The Coalition for Government Procurement sincerely appreciates GSA's efforts to engage with industry on the topic of Other Direct Costs (ODCs). We are pleased to deliver the attached white paper in response to your request for feedback on possible solutions to how materials and ODCs may be acquired under the FSS Program. The white paper was developed by the Coalition's ODC Working Group which includes members of the IT/Services Committee.

We would be happy to meet with you to discuss the recommendations in the attached white paper at your earliest convenience. The Coalition looks forward to continuing the dialogue with you regarding mutually beneficial solutions for ODCs.

Sincerely,

A handwritten signature in black ink, appearing to read 'RWaldron', with a long horizontal flourish extending to the right.

Roger Waldron
President

**Coalition for Government Procurement
Other Direct Costs Working Group
White Paper**

I. Summary

Multiple Award Schedule (“MAS”) contracts were conceived as a means to enable agencies to purchase commercially available products and services in a streamlined manner. Flexibility and administrative convenience are integral to the success of the MAS Program.

Since the MAS Program was established, and partly encouraged by the Federal Acquisition Streamlining Act, the use of multiple award, indefinite delivery/indefinite quantity (“IDIQ”) contracts has increased. MAS contracts and multiple award IDIQ contracts often are used to acquire similar products and services.

Agencies often need to acquire solutions rather than isolated products or services. To provide a solution, MAS vendors may need to rely on materials that have not been listed on an MAS Schedule to fulfill a particular agency’s specific need. The Federal Acquisition Regulation (“FAR”) provides flexibility to accommodate such an approach. This approach has been employed for multiple award IDIQ contracts that are priced on a time and materials (“T&M”) or labor hour basis. Comparable flexibility may be employed for the benefit of the MAS Program. In short, pursuant to FAR 52.212-4 Alternate 1, GSA may authorize agencies to identify ODCs at the order level when placing orders under the MAS Program.

Attached is a summary of responses to six areas of concern expressed by GSA regarding the treatment of ODCs as conveyed to the Coalition.

II. Background – The Problem

A. Open Market Items – The Historical Problem

For many years prior to the late 1990s, it had been the practice to include items or materials that were not listed or priced on a Schedule contract in orders under that contract. Such items were designated as “open market items.”

MAS procedures are deemed to satisfy the requirement for full and open competition. *See* 41 U.S.C. § 259(b)(3); FAR 6.102(d)(3). To the extent an agency follows such procedures, acquisition of the product or services acquired satisfies all competition requirements.

In *ATA Defense Industries v. U.S.*, 38 Fed Cl. 489 (1997) and *Pyxis Corp.*, B-282469 et al., July 15, 1999, 99-2 CPD ¶ 16, the Court of Federal Claims and the Government Accountability Office (“GAO”), respectively, held that items which are not listed on an MAS contract must be acquired in accordance with the full and open competition requirements of the Competition in Contracting Act (“CICA”) rather than the MAS ordering procedures. GAO held, for example, that there was no statutory authority for the procurement of “incidental” items under the MAS program.

GAO has stated that “[n]on-FSS products and services may not be purchased using FSS procedures; instead, their purchase requires compliance with the applicable procurement laws and regulations, including those requiring the use of competitive procedures.” *CourtSmart Digital Systems, Inc.*, B-292995.2; Feb. 13, 2004, 2004 CPD ¶ 79. GAO thus has viewed open market items as outside the scope of the MAS program.

B. Current Impediments To Workable Solutions

Under the line of cases discussed above, to acquire open market items, it has been thought that agencies must follow all applicable statutes and regulations, such as synopsis, competition, etc. that are applicable based on the dollar value of the items because such acquisitions are not within the parameters (and authority) of the MAS Program and thus independently must satisfy competition and other requirements as if the purchase was independent of the Schedule Program.

In that regard, FAR 8.402(f) provides that an ordering activity contracting officer may add open market items to an order only if all “applicable acquisition regulations pertaining to the purchase of the items not on the Federal Supply Schedule have been followed (e.g., publicizing (Part 5), competition requirements (Part 6), acquisition of commercial items (Part 12), contracting methods (Parts 13, 14, and 15), and small business programs (Part 19).” GSA ordering guidance provides:

Other Direct Costs (ODCs) are charges in direct support of a service. They are commercial items. To the extent possible, all anticipated ODCs associated with performance and within the scope of the GSA Schedule contract should be offered and have an established contract price. Other Direct Costs must not be the primary purpose of the task order.

GSA Schedules currently provides an Ancillary Supplies and/or Services Special Item Number (SIN) that can support supplies or services from a specific Schedule. Note these supplies and services can only be purchased in support of other supplies/services available through that specific Schedule or SINs listed in the description.

<http://www.gsa.gov/portal/content/200369#otherdirectcosts>.

Under current practice for most Schedules, therefore, ODCs must be listed at contract level to be included in an order. The exception to this process is for items that do not exceed the micro-purchase threshold (currently \$3,000), since such items may be purchased outside of the normal competition requirements in any case. The challenge of this approach is that one often cannot know in advance what the ODCs will be required for the work. As a result, such materials have to be acquired as open market items. That approach greatly constrains the flexibility and efficiency of the MAS Program.

Whereas GSA generally requires materials and ODCs to be specifically listed and priced at the contract level in order to be included in a MAS order, the same types of items may be acquired under orders placed against IDIQ contracts without the need to identify and price them at the contract level. This greater flexibility may drive users to rely on IDIQ contract vehicles rather than the MAS Program.

Under most IDIQ contracts, these items are usually referenced in a general statement describing the overall scope/operation of the contract. Reimbursement and identification are then governed by the standard FAR clauses at the order level. This approach makes for sound procurement policy balancing competition with cost effective procedures for acquiring needed services. GSA does not require a specific listing and pricing at the contract level for all materials and ODCs under government-wide contracts, such as Alliant.

III. A Solution

Current FAR clauses contemplate that materials or ODCs can be defined and priced at the order level. This is the procedure authorized for multiple award IDIQ contracts for services that are priced on a T&M or labor hour basis. This same approach could be used under the Schedules to implement a practical approach. The current requirements for competitions of Schedule orders in FAR Subpart 8.4 provides further assurance that the prices involved in this approach will be fair and reasonable.

This approach does not require the formulation of a separate Special Item Number ("SIN"). To the contrary, the contract merely must identify ODCs as within the scope of the contract, subject to determination by the ordering contracting officer. By contrast, adoption of a SIN might require the solicitation of pricing disclosures that would be unworkable where, as here, the particular materials that might be required for a specific solution cannot reasonably be identified in advance.

As discussed below, because it relies on an existing FAR clause, the suggested approach would not require various revisions to the FAR. Instead, contractual

language would make clear that the type of materials at issue may be identified and priced at the order level.

A. FAR 52.212-4, Contract Terms and Conditions – Commercial Items

FAR 52.212-4, Contract Terms and Conditions – Commercial Items, Alternate I (Oct 2008) addresses materials/ODCs under commercial item IDIQ contracts that are priced on a time and materials (T&M) or labor hour basis. This clause permits itemization and pricing of ODCs at the order level. FAR 52.212-4 is already included in MAS contracts.

Under FAR 52.212-4, Alternate I, the specific materials and ODCs are not required to be listed at the contract level to be included in a task order. With regard to ODCs, the insert at FAR 52.212-4(i)(1)(ii)(D)(1) instructs in part that “If this is an indefinite delivery contract, the Contracting Officer may insert ‘Each order must list separately the elements of other direct charge(s) for that order’, or if no reimbursement for other direct costs will be provided insert ‘None’.” Similarly, the clause provides for the identification of the payment for material handling at the order level. *See* FAR 52.212-4(i)(1)(ii)(D)(2). Although ODCs are addressed at the order level, therefore, they are viewed as within the scope of the contract.

The FAR guidance offers several instructive points that are equally relevant to MAS orders. First, the FAR recognizes that these items are unique to the requirement articulated at the task order competition level. Second, the FAR acknowledges that these items do not have to be specifically listed and priced at the contract level in order to be within the scope of the contract.

The regulatory history of the FAR 52.212-4 Alternate I demonstrates that the clause was structured to provide flexibility at the task order level for ODCs. The Preamble to the final rule implementing FAR 52.212-4 Alternate I, is instructive. In response to a comment requesting clarification as to which contracting officer (the contracting officer that awards the contract or the contracting officer that awards a task order) has the authority to determine the method for reimbursing ODCs and indirect costs under IDIQ contracts, the Preamble states:

As stated in the alternate clause at (i)(1)(ii)(D)(1) and (2) of 52.212-4 Alternate I, the contracting officer awarding the indefinite delivery contract can authorize the other contracting offices to determine how ODC and indirect costs will be reimbursed.

See 71 Fed. Reg. 74667, 74673 (December 12, 2006).

B. A Practical Approach

The approach outlined above recognizes that pursuant to the current FAR, ODCs do not have to be identified or priced at the contract level to be included in an order under an IDIQ contract. The contracting officer who awards the contract can authorize the offices that place the order to determine how ODCs will be reimbursed, which can be specified in the individual order. The FAR does not require the contracting officer that places the order to meet any competition requirements for the ODCs that are separate or apart from placement of the order itself.

To foster flexibility, this approach should be permitted when placing firm fixed price orders as well as when placing labor hour or T&M orders. Even when materials are reimbursed at cost, the amount for materials may be competed on a “not-to-exceed” basis in competitions for orders, thereby ensuring a fair and reasonable price and safeguarding the government’s interests.

FAR 52.212-4 Alternate I sets forth the reimbursement framework for materials and related costs, including material handling costs. The FAR clause provides that the contracting officer has the right to access and review all invoices and subcontracts for materials acquired at cost. The FAR clause also provides for the reimbursement by the contractor to the government for any overpayments.

To implement this solution, no regulatory change is necessary because the approach merely concerns the application of an existing FAR clause. GSA has authority to define the ordering procedures for the MAS Program. An existing FAR clause in MAS contracts (FAR 52.212-4 Alternate I) allows for pricing of ODCs at the order level. Accordingly, GSA could implement the approach simply through contractual language.

To implement this approach, the MAS contracts should be modified to state substantially as follows:

Consistent with FAR 52.212-4 Alternate I, in placing any order under the contract (including firm fixed-price orders), the ordering agency may acquire materials or items that are not listed on the contract provided that such materials or items (i) are in support of the order rather than the primary purpose therefore and (ii) the order is subject to competition in accordance with FAR Subpart 8.4. Such materials or items shall be identified in the order and reimbursed in accordance with FAR 52.212-4 Alternate I, as further defined in the order. The contract states the total amount payable for indirect costs (e.g., material handling) for such materials or

items, and each order shall identify the amount (if any) payable for the order.

Such language would make clear that the contract scope encompasses ODCs within the scope of the contract, pursuant to FAR 52.212-4 Alternate I. Such ODCs, therefore, would not constitute “open market” items that are not within the ambit of MAS contracts and thus independently must meet statutory and regulatory requirements applicable to acquisitions, such as synopsis and competition. Just as agencies placing orders under IDIQ contracts do not need to follow such requirements when placing orders that include ODCs, the same would be true for MAS orders.

Use of the flexibility in the FAR to address ODCs at the task order level offers a means to place MAS contracts on a par with IDIQ vehicles, which is the spirit underlying the new ordering procedures reflected in the Interim Rule. Through reliance on FAR 52.212-4 Alternate I, GSA could authorize agencies that place orders under MAS contracts to determine how ODCs should be addressed at the order level.

Even if GSA were to conclude that the approach could not be implemented simply through contract language, GSA merely could make relevant changes in the General Services Acquisition Manual to ensure that contracting personnel have the requisite guidance.

C. Schedule Competitions – The Impact of Section 863

The approach outlined here would be limited to those instances where there is competition for orders, thereby providing further assurance that pricing is fair and reasonable.

As a result of Section 863 of the National Defense Authorization Act for Fiscal Year 2009, Pub. L. 110-417, FAR Subpart 8.4 now includes additional competition requirements for orders over the micro-purchase threshold and the Simplified Acquisition Threshold. This requirement was implemented through the Interim Rule published at 76 Fed. Reg. 14548 (March 16, 2011). To a significant degree, the Interim Rule reflects a convergence in treatment of MAS orders and orders under multiple award IDIQ contracts.

As a result of the new ordering procedures in the Interim Rule, Schedule orders (including for products and services specifically identified and priced in SINs) will be subject to a greater degree of competition than was the case when cases such as *ATA Defense Industries* and *Pyxis* were decided. At the same time, where there is competition for orders, ODCs included within such orders would be subject to competition at the order level.

Even if commercial items were not at issue, a contracting officer could determine that the prices offered (inclusive of any ODCs) are fair and reasonable based on the adequate price competition. In short, the contracting officer that places the order would not need to rely on the Schedule contract itself to satisfy the reasonableness of pricing for the ODCs as part of the competed order. This is the manner in which contracting officers can determine the reasonableness of pricing for competed contracts generally.

IV. Conclusion

The approach described above offers a practical approach to acquiring materials and items that are needed to implement a solution yet not specifically listed on an MAS contract. This approach does not require any legislative changes to the MAS Program or revisions to the FAR. Treatment of such ODCs under a standard FAR clause would be consistent with the treatment accorded to orders under analogous IDIQ contracts.

1. Possible Solutions

The Coalition White Paper sets forth, with supporting rationale, what the Coalition believes is the most effective, efficient and accountable solution to add materials and “ODCs” to MAS contracts. The use of a Special Item Number (SIN) or set of SINS as a placeholder for purposes of including materials at the order level is not necessary and may create confusion between SINS (priced SINS versus “unpriced” materials SIN).

As outlined in our White Paper, the Coalition supports the development of a contract provision that: (1) makes clear materials and “ODCs” are within the scope of the contract; (2) explains that materials may be included at the task order level consistent with the competition requirements at FAR 8.4; (3) references FAR 52.212-4 Alternate I; and (4) outlines any additional parameters, documentation requirements or processes agencies and contractors should follow (e.g. acquisition of materials cannot be primary purpose of the order). This approach is consistent with commercial practices as articulated by FAR Part 12 and FAR Clause 52.212-4 Alternate I.

GSA’s discussion questions appear to indicate that inclusion of materials may be limited to time and material (T&M) type orders. We believe that firm-fixed price task orders should also have the flexibility to include materials consistent with FAR 52.212-4, Alternate I. Indeed, the FAR does not prohibit such an approach. Most importantly, limiting materials to T&M task orders likely would encourage the use of such orders at a time when the government is seeking to promote firm-fixed price orders and contracts. It could also drive agencies to other contract vehicles that provide greater flexibility regarding materials on firm-fixed price orders.

2. Contract Proliferation Considerations

The Coalition strongly believes that the development of an efficient, effective, and accountable approach to the inclusion of materials and ODCs on MAS task orders is vital to ensuring the future growth of the MAS Program.

Agencies continually are looking for complete/total solutions to their procurement and program needs. The acquisition of many service total solutions usually includes materials, ODCs, and indirect costs (IDCs). Most MAC and GWACs allow for the inclusion of these items. Currently, the MAS Program is at a competitive disadvantage. More and more agencies are turning to, and will continue to turn to, other contract vehicles absent a solution to this challenge.

As such, addressing ODCs on MAS contracts will help reduce contract duplication and curb unnecessary bid and proposal expenses for government and industry.

This approach also alleviates any concern regarding excessive recovery by the contractor because materials and ODCs will be reimbursed at cost. Firm-fixed orders for total solutions with materials reimbursed at cost may be viewed as a positive approach to using MAS' commercial contracts.

3. Pricing

Materials, ODCs, and IDCs are reimbursed in accordance with FAR 52.212-4, Alternate I. Further, the new FAR Subpart 8.4 competitive ordering procedures mandated by Section 863 of the National Defense Authorization Act for Fiscal Year 2009 ensure transparency and competition for order. In conducting competitions and evaluating task order proposals, agencies would be required to consider the prices/costs proposed for materials, ODCs, and IDCs as part of any task order. It will be the procuring agency's responsibility to ensure that the selected task order proposal represents the best value, based on price (including materials, ODCs, and IDCs) and technical considerations. The Federal Acquisition Service is responsible for creating a framework that provides both the flexibility and the accountability necessary to ensure best value to the taxpayer.

Successful implementation of this approach will require education and information. Government and industry are both responsible for the effective and efficient implementation of materials, ODCs, and IDCs under the MAS Program.

4. Potential Unintended Consequences

Authorizing materials and ODCs on MAS contracts likely will provide greater opportunities for small business concerns. Small businesses will have greater opportunity to provide materials to MAS prime contractors who have small business subcontracting plans. In addition, enabling the acquisition of materials that are not currently priced on the contract likely will provide small business with greater opportunity to compete for requirements where larger firms may currently have more items on contract and thus can compete for more government work. Finally, a process for including materials, ODCs, and IDCs on task orders could reduce the need for, and time associated with, the type of complex contracting necessary to ensure all products and services are covered by a Schedule. Instead, contractors could focus on developing teams with specialized skill sets that represent an immediate value to the client while also addressing the Government's socioeconomic needs.

The approach offers savings by limiting reimbursement to the acquisition cost including the sum certain for IDCs. If the items were priced at the contract level – the contractor would be able to include profit – as the prices are negotiated based on commercial pricing practices and policies.

5. Transparency

As discussed above, some contractual language should be included in MAS contracts.

6. Compliance/Legal Issues

With regard to audit considerations, FAR 52.212-4 Alternate I lays out the reimbursement framework for materials, ODCs, and IDCs. The FAR clause provides that the contracting officer has the right to access and review all invoices and subcontracts for materials acquired at cost. The FAR clause also provides for the reimbursement by the contractor to the government for any overpayments. Moreover, the GSA schedule contracts include GSAR Clause 552.215-71, Examination of Records by GSA, which authorizes representatives of the GSA Administrator (the IG) to examine any books, documents, papers and records of the contractor involving transactions related to the contract for overbillings, billing errors, compliance with the Price Reduction clause, and compliance with the Industrial Funding Fee and the Sales reporting clause of the contract.

With regard to the green requirements, GSA has flexibility to address these issues in the contract provision authorizing ODCs. GSA could provide agencies with flexibility in determining their green requirements for materials or it could mandate all materials must be green. Given the uncertainty that the use of materials addresses at the task order level, it may be more efficient and effective to remind agencies to buy green materials but ultimately allow them to make the determination. Remember, customer agencies have the same mandates to buy green.

With regard to the Trade Agreements Act (TAA), GSA could apply the TAA threshold at the task order level to the acquisition of the materials as the items are not themselves covered by the contract and instead are acquired only through the order. Accordingly, if the total material cost below the TAA threshold (\$205,000), the TAA would not apply. Alternatively, GSA could mandate that all materials under a task order comply with the TAA.