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September 28, 2017

Deidre Lee  
Chairperson  
Section 809 Panel  
1400 Key Blvd. Suite 210  
Arlington, VA 22209

Dear Ms. Lee,

The Coalition for Government Procurement appreciates the opportunity to provide input to the Section 809 Panel. As you requested during our Spring Conference earlier this year, we have completed a list of specific recommendations, including line-in/line-out changes. Our recommendations follow several themes:

- Reducing unnecessary regulations on industry
- Empowering successful acquisition management
- Strengthening interagency contracts to ensure that DoD contracting officers can make informed contracting choices

We would be happy to answer any questions that you or the other Commissioners may have about our recommendations.

Regards,

Roger Waldron  
President, Coalition for Government Procurement

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## **Labor Qualifications**

### **Current State:**

Increasingly, high tech and cybersecurity specialists are obtaining qualifications and certifications instead of college degrees. This trend is posing a problem for the Federal Government which will create highly prescriptive labor categories, which in turns limits access to innovative contractors. Recognizing this trend in 2000, Congress passed a provision which restricted the use of minimum education requirements for the procurement of IT services. In accordance with the 2001 National Defense Authorization Act, this requirement was codified into FAR 39.104. Despite the efforts of Congress, agencies are still creating overly prescriptive labor categories.

### **Recommendation:**

Revise FAR 39.104 to discourage the addition of labor qualifications at the IDIQ-level

### **Rationale:**

Visionaries of technology, such as Bill Gates, Steve Jobs, and Mark Zuckerberg would not be able to work on some government information technology contracts, because they did not complete college. Particularly in the information technology sector, work experience and certifications can be as important, if not more important, than a college degree. By limiting labor restrictions at the IDIQ level, the ordering activity can make the ultimate decision about the appropriate labor qualifications.

Members have also reported that an unintended side effect of these prescriptive labor categories is that they are sometimes written without appropriate equivalencies, which ultimately prevents veterans from qualifying for the work.

**Line-in/Line-out:**

**FAR Change:**

**Subpart 39.104 – Information Technology Services.**

(a) When acquiring information technology services, solicitations must not describe any minimum experience or educational requirement for proposed contractor personnel unless the contracting officer determines that the needs of the agency –

(1)(a) Cannot be met without that requirement; or

(2)(b) Require the use of other than a performance-based acquisition (see Subpart 37.6).

(b) When acquiring information technology services agencies should not describe any minimum experience or education requirement for proposed contractor personnel in Indefinite Delivery/Indefinite Quantity contracts.

(1) Ordering activities may describe minimum experience or education requirements for proposed contractor personnel in task orders issued against Indefinite Delivery/Indefinite Quantity contracts if the conditions of 39.104(a) are met.

## **Remove BIC Designations**

### **Current State:**

In December 2014, the Office of Federal Procurement Policy (OFPP) issued the memorandum entitled *Transforming the Marketplace: Simplifying Federal Procurement to Improve Performance, Drive Innovation, and Increase Savings*. The memorandum introduced the concept of Category Management and “Best-in-Class” (BIC) to Federal Procurement. OFPP later established the Category Management Leadership Council (CMLC), which would be responsible for determining BIC contracts, and issued *Government-Wide Category Management, Guidance Document*, which provided guidance for determining BIC contracts. The CMLC has designated at least 18 contracts as BIC. In October 2016, OFPP released a proposed circular to implement Category Management.

### **Recommended Action:**

The Coalition recommends OFPP rescind the *Government-Wide Category Management, Guidance Document* and revoke the charter for the Category Management Leadership Council.

### **Rationale:**

First, as a threshold matter, it remains unclear what, if any, statutory authority exists to support the mandatory designation for BIC contracts by OMB. To date, OMB has yet to provide any statutory authority for its designation. Second, as a policy matter, mandatory contract vehicles could lead to significant risk for government and industry. Without vigilance, a well-intended cross-functional team could designate “winners and losers” through mandatory contract solutions for customer agencies and contractors in an attempt to manage the market. Such an approach will limit access to ongoing commercial competition and innovation, as well as negatively impact the small business community. Finally, it should be noted that the draft circular makes no provision for industry input when selecting a BIC contract solution.

See:

- [OFPP and Category Management: Pressing the Pause Button, December 1, 2016](#)
- [The Unintended Consequences of Category Management’s Best-in-Class \(BIC\) Approach?, December 8, 2016](#)
- [Coalition Response to Draft Circular](#)

**Line-in/Line-out:**

None required, OFPP has the authority to take action on these recommendations.

## **Evaluating Price at the Task and Delivery Order**

### **Current State:**

For Indefinite Delivery/Indefinite Quantity (IDIQ) contracts, the government must evaluate price of the offerors before an award can be made. When orders are placed against the IDIQ, agencies will often reevaluate price reasonableness of the contractor. For example, DoD is required to make fair and reasonable price determinations when using the Schedules, even though GSA has already made a fair and reasonable price determination. The 2017 NDAA changed this process, allowing DoD to make multiple award IDIQ service contract awards without a fair and reasonable price determination, leaving that decision to the ordering activity.

### **Recommendation:**

Expand the 2017 NDAA language to apply to civilian agencies.

### **Rationale:**

The provision in the 2017 NDAA is a simple, common sense reform that should be extended to civilian agencies as well. DoD is a significant user of the GSA Schedules, and this provision would benefit the Schedules by improving the flexibility of their use creating more flexibility. It should be noted that the idea of an unpriced Schedule was also advocated by the SARA panel in their 2007 report to Congress, and DoD recommended this change for inclusion in the 2018 NDAA.

Ultimately, competition at the task order level for known requirements will drive better value to the agencies.

**Line-in/Line-out:**

**Legislative Change:**

**SEC. \_\_\_\_. EXCPTION TO REQUIREMENT TO INCLUDE COST OR PRICE TO THE GOVERNMENT AS A FACTOR IN THE EVALUATION OF PROPOSALS FOR CERTAIN MULTIPLE-AWARD TASK OR DELIVERY ORDER CONTRACTS AND CERTAIN FEDERAL SUPPLY SCHEDULE CONTRACTS**

*Section 3306(c) of title 41, United States Code, is amended –*

*(1) in paragraph (1), by inserting “except as provided in paragraph (3),” in subparagraphs (B) and (c) after the subparagraph designation; and*

*(2) by adding at the end of the following new paragraph:*

*“(3) EXCEPTIONS FOR CERTAIN INDEFINITE DELIVERY, INDEFINITE QUANTITY MULTIPLE AWARD CONTRACTS AND CERTAIN FEDERAL SUPPLY SCHEDULE CONTRACTS FOR SERVICES ACQUIRED ON AN HOURLY RATE. – If the head of an agency issues a solicitation for two or more contracts for services to be acquired on an hourly rate basis under the authority of sections 4103 and 4106 of this title (multiple award task or delivery order contracts) or section 152(3) of this title and section 501(b) of title 40 (Federal Supply Schedule contracts), then –*

*“(A) when the contracts feature individually competed task or delivery order based on or built up from hourly rates, the contracting officer need not consider cost or price as an evaluation factor for contract award;*

*“(B) the disclosure requirement of subparagraph (C) or paragraph (1) shall not apply; and*

*“(C) cost or price to the Federal Government shall be considered in conjunction with the issuance pursuant to section 4106(c) of this title of any task or delivery order under and contract resulting from the solicitation.”.*

**Changes to Existing Law:**

**TITLE 41, UNITED STATES CODE**

**§3306. Planning and solicitation requirements**

**(a) PLANNING AND SPECIFICATIONS. –**

**(1) PREPARING FOR PROCUREMENT. –** In preparing for the procurement of property or services, an executive agency shall –

- (A) specify its needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement;
- (B) use advance procurement planning and market research; and
- (C) develop specifications in the manner necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.

(2) REQUIREMENTS OF SPECIFICATIONS. – Each solicitation under this division shall include specifications that –

- (A) consistent with this division, permit full and open competition; and
- (B) include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law.

(3) TYPES OF SPECIFICATIONS. – For the purposes of paragraphs (1) and (2), the type of specification included in a solicitation shall depend on the nature of the needs of the executive agency and the market available to satisfy those needs. Subject to those needs, specifications may be stated in terms of –

- (A) function, so that a variety of products or services may qualify;
- (B) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or
- (C) design requirements.

(b) CONTENTS OF SOLICITATION. – In addition to the specifications described in subsection (a), each solicitation for sealed bids or competitive proposals (other than for a procurement for commercial items using special simplified procedures or a purchase for an amount not greater than the simplified acquisition threshold) shall at a minimum include –

- (1) a statement of –
  - (A) all significant factors and significant subfactors that the executive agency reasonably expects to consider in evaluating sealed bids (including price) or competitive proposals (including cost or price, cost-related or price-related factors and subfactors, and noncost-related or nonprice-related factors and subfactors); and
  - (B) the relative importance assigned to each of those factors and subfactors; and

(2)(A) in the case of sealed bids –

- (i) a statement that sealed bids will be evaluated without discussions with the bidders; and
  - (ii) the time and place for the opening of the sealed bids; or
- (B) in the case of competitive proposals –
- (i) either a statement that the proposals are intended to be evaluated with, and the award made after, discussions with the offerors, or a statement that the proposals are intended to be evaluated, and the award made, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) unless discussions are determined to be necessary; and
  - (ii) the time and place for submission of proposals.

(c) EVALUATION FACTORS. –

(1) IN GENERAL. – In prescribing the evaluation factors to be included in each solicitation for competitive proposals, an executive agency shall –

- (A) establish clearly the relative importance assigned to the evaluation factors and subfactors, including the quality of the product or services to be provided (including technical capability, management capability, prior experience, and past performance of the offeror);
- (B) except as provided in paragraph (3), include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals; and
- (C) except as provided in paragraph (3), disclose to offerors whether all evaluation factors other than cost or price, when combined, are –

- (i) significantly more important than cost or price;
- (ii) approximately equal in importance to cost or price; or
- (iii) significantly less important than cost or price.

(2) RESTRICTION ON IMPLEMENTING REGULATIONS. – Regulations implementing paragraph (1)(C) may not define the terms “significantly more important” and “significantly less important” as specific numeric weights that would be applied uniformly to all solicitations or a class of solicitations.

(3) EXCEPTIONS FOR CERTAIN INDEFINITE DELIVERY, INDEFINITE QUANTITY MULTIPLE AWARD CONTRACTS AND CERTAIN FEDERAL SUPPLY SCHEDULE CONTRACTS FOR SERVICES ACQUIRED ON AN HOURLY RATE. – If the head of an agency issues a solicitation for two or more contracts for services to be acquired on an hourly rate basis under the authority of sections 4103 and 4106 of this title (multiple award task or delivery order

contracts) or section 152(3) of this title and section 501(b) of title 40 (Federal Supply Schedule contracts), then –

(A) when the contract or contracts feature individually competed task or delivery orders based on, or built up from, hourly rates, the Contracting Officer need not consider cost or price as an evaluation factor for contract award;

(B) the disclosure requirement of subparagraph (C) of paragraph (1) shall not apply; and

(C)(1) cost or price to the Federal Government shall be considered in conjunction with the issuance pursuant to section 4106(c) of this title of a task or delivery order under any contract resulting from the solicitation.

(2) Upon the issuance of such a task order, an executive agency shall then disclose to offerors whether all evaluation factors other than cost or price, when combined are –

(i) significantly more important than cost or price;

(ii) approximately equal in importance to cost or price; or

(iii) significantly less important than cost or price.

(d) ADDITIONAL INFORMATION IN SOLICITATION. – This section does not prohibit an executive agency from –

(1) providing additional information in a solicitation, including numeric weights for all evaluation factors and subfactors on a case-by-case basis; or

(2) stating in a solicitation that award will be made to the offeror that meets the solicitation's mandatory requirements at the lowest cost or price.

(e) LIMITATION ON EVALUATION OF PURCHASE OPTIONS. – An executive agency, in issuing a solicitation for a contract to be awarded using sealed bid procedures, may not include in the solicitation a clause providing for the evaluation of prices for options to purchase additional property or services under the contract unless the executive agency has determined that there is a reasonable likelihood that the options will be exercised.

(f) \*\*\*

## **Permanent Sun-Setting**

### **Current State:**

On May 10, 2012, Executive Order (“EO”) 13610, “Identifying and Reducing Regulatory Burdens,” authorized the Office of Information and Regulatory Affairs (“OIRA”) to coordinate retrospective reviews of existing regulations. Specifically, consistent with EO 13563, agencies are directed to report to OIRA the status of their internal “periodic reviews” of existing regulations, which seek to identify opportunities to streamline, expand, repeal regulations.

### **Recommended Action:**

The Coalition recommends a permanent sun-setting for all procurement regulations, which are not required by statute. New regulations should expire after five years. Existing regulations should be revised to include an expiration date no greater than five years. In order to effectively manage this process, the expiration dates for regulations should be spread out to limit the burden to the Government.

### **Rationale:**

Currently, the Code of Federal Regulations (“CFR”) exceeds 185,000 pages, and in Fiscal Year 2016, the Federal government issued nearly 96,000 pages of regulatory notices through the Federal Register. In this environment, it is imperative to ensure that regulations are being regularly reviewed and updated for relevance.

**Line-in/Line-out:**

**Legislative Change:**

**SEC. \_\_\_\_. PERMENANT SUNSETTING OF ACQUISITION REGULATIONS**

- (a) For all future changes to the Federal Acquisition Regulations, Agency-Specific Supplemental Regulations, and Class Deviations from the Federal Acquisition Regulations, which are not required by statute, agencies will specify an expiration date not to exceed five years from implementation of the regulation*
  
- (b) For all existing Federal Acquisition Regulations, Agency-Specific Supplemental Regulations, and Class Deviations from the Federal Acquisition Regulations, which are not required by statute, agencies will revise the regulations to add an expiration date, which is not to exceed five years from the enactment of this Act.*
  
- (c) Temporary Extensions*
  - (1) Agencies may issue temporary extensions of Federal Acquisition Regulations, Agency-Specific Supplemental Regulations, and Class Deviations from the Federal Acquisition Regulations, which are not required by statute, for no longer than a period of 18 months, provided that a rulemaking process has begun to replace the regulation prior to the exercise of the temporary extension.*

## **Eliminating the Burden to Report Executive Compensation**

### **Current State:**

In 2006, Congress passed the Federal Funding Accountability and Transparency Act of 2006 (Public Law 109-282, as amended, codified at 31 USC 6101 note), which required the Office of Management and Budget to create a single, searchable website that contains information on contractors and grantees. As a result of this act, USA Spending.gov was created in 2007. The FFATA was revised by Section 6202 of the Government Funding and Transparency Act of 2008, which required that awardees (including first tier subcontractors) report the names and total compensation of the five most highly compensated officers of the entity if the entity received 80 percent of more of its annual gross revenues in Federal awards; had \$25 million or more in annual gross revenue; and if the public does not have access to compensation information through periodic reports.

### **Recommended Action:**

Eliminate the requirement to report executive compensation

### **Rationale:**

The Department of Defense has recommended that Congress reduce the burden of this provision, noting that “generally executive compensation data is not used in making procurement decisions.” Although there are exceptions to the reporting if the data is already publicly available, the entities still must report this data in the System for Award Management and reference the public availability. Additionally, the FAR Council estimates that the reporting leads to 55,000 hours of paperwork burden each year. Further, over half of the respondents affected by this burden are small businesses. All told, there is no apparent, offsetting public policy good for this identified burden.

**Line-in/Line-out:**

**Legislative Change:**

**SEC. \_\_.ELIMINATION OF EXECUTIVE COMPENSATION REPORTING REQUIREMENTS APPLICABLE TO CONTRACTS OR SUBCONTRACTS**

*The Federal Funding Accountability and Transparency Act of 2006 (Public Law 109-282; 31 U.S.C 6101 note), as amended, is amended by deleting Section 2(b)(1)(F).*

**Regulatory Change:**

**31 U.S.C 6101 note and FAR 4.14**

**SEC.2 FULL DISCLOSURE OF ENTITIES RECEIVING FEDERAL FUNDING**

\* \* \*

(b)In General. –

(1)Website. – Not later than January 1, 2008, the Office of Management and Budget shall, in accordance with this section, section 204 of the E-Government Act of 2002 (Public Law 107-347; 44 U.S.C. 3501 note), and the Office of Federal Procurement Policy Act ([former] 41 U.S.C. 403 [401] et seq.) [now division B (except sections 1123, 2303, 2304, and 2313) of subtitle I of title 41], ensure the existence and operation of a single searchable website, accessible by the public at no cost to access, that includes for each Federal award –

- (A) the name of the entity receiving the award;
- (B) the amount of the award;
- (C) information on the award including transaction type, funding agency, the North American Industry Classification System code or Catalog of Federal Domestic Assistance number (where applicable), program source, and an award title descriptive of the purpose of each funding action;
- (D)the location of the entity receiving the award and the primary location of performance under the award, including the city, State, congressional district, and country;
- (E)a unique identifier of the entity receiving the award and of the parent entity of the recipient, should the entity be owned by another entity;
- ~~(F)the names and total compensation of the five most highly compensated officers of the entity if—
  - ~~(i)the entity in the preceding fiscal year received—~~~~

- ~~(I)~~ 80 percent or more of its annual gross revenues in Federal awards; and
  - ~~(II)~~ \$25,000,000 or more in annual gross revenues from Federal awards; and
  - ~~(ii)~~ the public does not have access to information about the compensation of the senior executives of the entity through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. [; and]
- ~~(F)~~~~(G)~~ any other relevant information specified by the Office of Management and Budget.

#### **Subpart 4.14—Reporting Executive Compensation and First-Tier Subcontract Awards**

##### ~~4.1400 Scope of subpart.~~

~~This subpart implements section 2 of the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109-282), as amended by section 6202 of the Government Funding Transparency Act of 2008 (Pub. L. 110-252), which requires contractors to report subcontract award data and the total compensation of the five most highly compensated executives of the contractor and subcontractor. The public may view first-tier subcontract award data at <https://www.usaspending.gov>.~~

##### ~~4.1401 Applicability.~~

- ~~(a) This subpart applies to all contracts with a value of \$30,000 or more. Nothing in this subpart requires the disclosure of classified information.~~
- ~~(b) Reporting of subcontract information will be limited to the first-tier subcontractor.~~

##### ~~4.1402 Procedures.~~

~~(a) Agencies shall ensure that contractors comply with the reporting requirements of 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards. Agencies shall review contractor reports on a quarterly basis to ensure the information is consistent with contract information. The agency is not required to address data for which the agency would not normally have supporting information, such as the compensation information required of contractors and first-tier subcontractors. However, the agency shall inform the contractor of any inconsistencies with the contract information and require that the contractor correct the report, or provide a~~

reasonable explanation as to why it believes the information is correct. Agencies may review the reports at <http://www.fsrs.gov>.

~~(b) When contracting officers report the contract action to the Federal Procurement Data System (FPDS) in accordance with FAR Subpart 4.6, certain data will then pre-populate from FPDS, to assist contractors in completing and submitting their reports. If data originating from FPDS is found by the contractor to be in error when the contractor completes the subcontract report, the contractor should notify the Government contracting officer, who is responsible for correcting the data in FPDS. Contracts reported using the generic entity identifier allowed at FAR 4.605(c)(2) will interfere with the contractor's ability to comply with this reporting requirement, because the data will not pre-populate from FPDS.~~

~~(c) If the contractor fails to comply with the reporting requirements, the contracting officer shall exercise appropriate contractual remedies. In addition, the contracting officer shall make the contractor's failure to comply with the reporting requirements a part of the contractor's performance information under Subpart 42.15.~~

~~(d) There is a reporting exception in 52.204-10(g) for contractors and subcontractors who had gross income in the previous tax year under \$300,000.~~

~~4.1403 Contract clause.~~

~~(a) Except as provided in paragraph (b) of this section, the contracting officer shall insert the clause at 52.204-10, Reporting Executive Compensation and First Tier Subcontract Awards, in all solicitations and contracts of \$30,000 or more.~~

~~(b) The clause is not prescribed for contracts that are not required to be reported in the Federal Procurement Data System (FPDS) (see Subpart 4.6).~~

## **Raise the Micro-Purchase Threshold to \$10,000**

### **Current State:**

The micro-purchase threshold demarks the dollar threshold level, below which, orders are exempt from many acquisition regulations. The micro-purchase threshold is currently \$5,000 for DoD and \$3,500 for civilian agencies.

### **Recommended Action:**

Raise the micro-purchase threshold to \$10,000 for both civilian agencies and the Department of Defense.

Update 41 U.S.C. 1908 to require that thresholds in government procurement be reevaluated every year instead of every five years.

### **Rationale:**

Increasing the micro-purchase threshold has been advocated by DoD as a way to improve the speed the procurement system. Ultimately the change would affect less than one percent of total contract spending, yet still increase the speed of thousands of transactions, with which, there is minimal risk to the government from a price standpoint. Indeed, over the past decade, agencies have developed a number of systems designed to reduce the risk of fraud, waste, abuse, and misuse of government purchase cards. This includes government-wide metrics collected through the GSA SmartPay program, which provides the opportunity to identify the misuse of purchase cards.

**Line-in/Line-out:**

**Legislative Change:**

**SEC. \_\_. MICRO-PURCHASE THRESHOLD APPLICABLE TO GOVERNMENT  
PROCUREMENTS**

(a) *INCREASING IN THRESHOLD.* – Section 1902(a)(1) of title 41, United States Code, is amended –

(1) by striking “section 2338 and 2339” and inserting “section 2339,” and

(2) by striking “\$3,000” and inserting “\$10,000.”

(b) *CONFORMING AND CLERICAL AMENDMENTS.* – (1) Section 2338 of title 10, United States Code, is repealed.

(2) The table of sections at the beginning of chapter 137 of such title is amended by striking the item relating to section 2338.

(c) *ADJUSTING FOR INFLATION.* – Section 1908(c)(2), United State Code, is amended –

(1) by striking “evenly divisible by 5,”

**Changes to Existing Law:**

**TITLE 41, UNITED STATES CODE**

**§1902 Procedures applicable to purchases below micro-purchase threshold**

(a) Definition. –

(1) Except as provided in sections ~~2338 and~~ 2339 of title 10 and paragraph (2) of this subsection, for purposes of this section, the micro-purchase threshold is ~~\$3,000~~ \$10,000.

\*\*\*\*

**§1908 Inflation adjustment of acquisition-related dollar thresholds**

\*\*\*\*

(c) Requirement for Periodic Adjustment. –

(2) *ADJUSTMENT.* – On October 1 of each year ~~evenly divisible by 5~~, the Council shall adjust each acquisition-related dollar threshold provided by law, as

described in subsection (b)(1), to the baseline constant dollar value of that threshold.

\*\*\*\*

**FAR Change:**

**Subpart 2.1 – Definitions**

“Micro-purchase threshold” means ~~\$10,000~~~~\$3,500~~, except it means –

- (1) For acquisitions of construction subject to 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction), \$2,000;
- (2) For acquisitions of services subject to 41 U.S.C. chapter 67, Service Contract Labor Standards, \$2,500; and
- (3) For acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical or radiological attack as described in 13.201(g)(1), except for construction subject to 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction) (41 U.S.C. 1903) –
  - (i) \$20,000 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and
  - (ii) \$30,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States.

## **Require Debriefings over the Simplified Acquisition Threshold**

### **Current State:**

Currently, FAR 15.506 requires agencies to provide a debriefing for Part 15 acquisitions, if a vendor makes a written request within 3 days of contract award. Additionally, FAR 16.505 requires debriefings for task orders on Indefinite Delivery contracts that are greater than \$5.5 million. OFPP released its third “Myth-Busters” Memo in 2017, which provided agencies with guidance on conducting effective debriefings, and, in particular, noted that “to maximize the return on its acquisition investment and to ensure access to high-quality solutions, the Federal government must ensure it conducts productive interactions with its industry partners.”

### **Recommended Actions:**

Require debriefings for task orders, delivery orders, blanket purchase agreements, and contracts over the simplified acquisition threshold (SAT).

### **Rationale:**

Requiring debriefings for contracts over the SAT would lead to an increased burden for contracting officers, but the policy change will also create significant benefits. The change will lead to increased communications between government and industry and an understanding of the drivers of the given transaction, all adding to the knowledge and experience base of the parties for future engagements. Additionally, it would help reduce bid protests by ensuring that unsuccessful bidders have access to information that clarifies the rationale underpinning the procurement decision.

## Line-in/Line-out:

## Regulatory Change:

### 15.506 Postaward debriefing of offerors.

(a)(1) An offeror, ~~upon its written request received by the agency within 3 days after the date on which that offeror has received notification of contract award in accordance with 15.503(b)~~ for all awards valued in excess of the simplified acquisition threshold, shall be debriefed and furnished the basis for the selection decision and contract award.

(2) To the maximum extent practicable, the debriefing should occur within 5 days after ~~receipt of the written request~~ the notification of contract award in accordance with 15.503(b). Offerors that requested a postaward debriefing in lieu of a preaward debriefing, or whose debriefing was delayed for compelling reasons beyond contract award, also should be debriefed within this time period.

(3) An offeror that was notified of exclusion from the competition (see 15.505(a)), but failed to submit a timely request, is not entitled to a debriefing.

~~(4)(i) Untimely debriefing requests may be accommodated.~~

~~(ii) Government accommodation of a request for delayed debriefing pursuant to 15.505(a)(2), or any untimely debriefing request, does not automatically extend the deadlines for filing protests. Debriefings delayed pursuant to 15.505(a)(2) could affect the timeliness of any protest filed subsequent to the debriefing.~~

(b) Debriefings of successful and unsuccessful offerors may be done orally, in writing, or by any other method acceptable to the contracting officer.

(c) The contracting officer should normally chair any debriefing session held. Individuals who conducted the evaluations shall provide support.

(d) At a minimum, the debriefing information shall include –

(1) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;

(2) The overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror;

(3) The overall ranking of all offerors, when any ranking was developed by the agency during the source selection;

- (4) A summary of the rationale for award;
- (5) For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror; and
- (6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

(e) The debriefing shall not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, the debriefing shall not reveal any information prohibited from disclosure by 24.202 or exempt from release under the Freedom of Information Act (5 U.S.C. 552) including –

- (1) Trade secrets;
- (2) Privileged or confidential manufacturing processes and techniques;
- (3) Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; and
- (4) The names of individuals providing reference information about an offeror's past performance.

(f) An official summary of the debriefing shall be included in the contract file.

(g) For the purposes of this section, the term "award" includes the award of a contract under 15.503, task orders, delivery orders, and blanket purchase agreements.

## **Reform the Lowest Price Technically Acceptable Source Selection Process**

### **Current State:**

Currently, Part 15.101-2 of the FAR defines the Lowest Price Technically Acceptable (“LPTA”) source selection process to be, “...appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price.” Pursuant to a March 2015 memorandum from the Undersecretary of Defense for Acquisition, Technology, & Logistics (“AT&L”), LPTA is only appropriate when:

1. There are well-defined requirements
2. The risk of unsuccessful contract performance is minimal
3. Price is a significant factor in the source selection
4. There is neither value, need, nor willingness to pay for higher performance

### **Recommended Action:**

The Coalition recommends that the LPTA source selection process be removed from the best value continuum and modified to ensure its appropriate application.

### **Rationale:**

FAR Part 1.102 states, “[t]he vision for the Federal Acquisition System is to deliver on a timely basis the *best value product or service* to the customer, while maintaining the public’s trust and fulfilling public policy objectives.” [Emphasis added.] Under these circumstances, the identification of an LPTA source selection process unnecessarily introduces risks, confusion, and complexity into the award review and analysis, which could undermine the ability of the Federal government to access innovative solutions, increase performance challenges, and limit best value competition. Simply put, on a best value continuum, a buyer should always be trying to achieve their maximum utility and technical acceptability at the lowest price.

**Line-in, Line-out:**

**FAR Change:**

**15.101-2 15.102 -- Lowest Price Technically Acceptable Source Selection Process.**

(a) The lowest price technically acceptable source selection process is appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price.

(b) The lowest price technically acceptable process may only be used when the following conditions exist:

- (1) The requirements of the procurement are well defined;
- (2) The risk of unsuccessful contract performance is minimal;
- (3) Price is the sole determining factor in the source selection; and
- (4) There is neither value, need, nor willingness to pay for higher performance

(b)(c) When using the lowest price technically acceptable process, the following apply:

- (1) The evaluation factors and significant subfactors that establish the requirements of acceptability shall be set forth in the solicitation. Solicitations shall specify that award will be made on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-cost factors. If the contracting officer documents the file pursuant to 15.304(c)(3)(iii), past performance need not be an evaluation factor in lowest price technically acceptable source selections. If the contracting officer elects to consider past performance as an evaluation factor, it shall be evaluated in accordance with 15.305. However, the comparative assessment in 15.305(a)(2)(i) does not apply. If the contracting officer determines that a small business' past performance is not acceptable, the matter shall be referred to the Small Business Administration for a Certificate of Competency determination, in accordance with the procedures contained in Subpart 19.6 and 15 U.S.C. 637(b)(7)).
- (2) Tradeoffs are not permitted.
- (3) Proposals are evaluated for acceptability but not ranked using the non-cost/price factors.
- (4) Exchanges may occur (see 15.306).

## **System for Award Management Database**

### **Current State:**

All companies wishing to do business with the U.S. Government must be registered in the online System for Award Management (“SAM”) database. This registration process requires companies to input information covering administrative, functional, and financial areas. It also acts as a standing representation to the U.S. Government of the registrant’s compliance with various facets of procurement law, for example, labor and trade requirements. Not all representations addressed in the registration apply universally to all companies, as some are industry-specific, yet all companies must understand and respond to the registration inquiries as a threshold “right” to contract with the government. Moreover, the representations are often based in regulations or statutes and can be complicated to even a trained government contracts lawyer, when in reality, the SAM administrator at most businesses is not an attorney, much less an attorney well-versed in the nuances of FAR provisions. Not all companies have the resources to consider the intricacies of certain these questions and answer them accurately, thus creating a two-fold issue: 1. Exposing businesses to unnecessary risk of misrepresentation and 2. Discouraging small businesses from entering the market.

### **Recommended Action:**

The Coalition recommends that the SAM registration process be streamlined to remove redundancies, clarify questions, and allow registrants to opt-out of making representations for regulations that do not apply.

Specifically, the following representations should be addressed:

- Streamline the Federal Awardee Performance and Integrity Information System questions (FAPIIS) (FAR 52.209-5, 52.209-7; 52.209-11 (Certificate Regarding Responsibility Matters, Information Regarding Responsibility Matters, and Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction under any Federal Law, respectively). There are currently multiple complex and burdensome representations aimed at the same goal: determining contractor integrity for responsibility assessment. According to Section 872 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, the purpose of FAPIIS is to “significantly enhance the Government’s ability to evaluate the business ethics and quality of prospective contractors competing for Federal contracts and to protect taxpayers from doing business with contractors that are not responsible sources.” (Emphasis added). However, as implemented this rule imposes burdensome obligations on contractors that reach beyond the

information required under the policy in FAR Part 9 that defines what is necessary to determine a contractor's responsibility. See FAR 9.104-2, General Standards, see also FAR 9.104-3, Application of Standards. While the FAR policy on responsibility makes clear the importance of integrity, ethics, and ability to perform, the unique and complex set of questions posed by FAPIIS are unnecessary to meet that need.

- Reconsider the necessity of obtaining the information gathered through industry and work-specific representations such as those listed below, or, at a minimum allow contractors to opt-out by selecting "Not Applicable":
  - FAR 52.222-41 Service Contract Act and associated questions (52.222-48; - 52 - these are very poorly worded representations that only apply to companies who provide services)
  - 52.223-1, Biobased Product Certification. This provision applies to solicitations that require the delivery or specify the use of USDA-designated items; or include the clause at 52.223-2, Affirmative Procurement of Biobased Products Under Service and Construction Contracts.
  - 52.223-4, Recovered Material Certification. This provision applies to solicitations that are for, or specify the use of, EPA-designated items.
  - 52.223-9, with its Alternate I, Estimate of Percentage of Recovered Material Content for EPA-Designated Products (Alternate I only).
  - 52.223-22, Public Disclosure of Greenhouse Gas Emissions and Reduction Goals-Representation. This provision applies to solicitation that include the clause at 52.204-7.
- Eliminate the following representations
  - 52.227-6, Royalty Information and 52.227-15, Representation of Limited Rights Data and Restricted Computer Software. These representations are contract specific and should not be included in a standing representation in an online database - there are more efficient and practical ways to obtain this information when needed.
  - 52.204-17, Ownership or Control of Offeror and 52.204-20, Predecessor of Offeror. These clauses were implemented to provide additional information to a contracting officer regarding the history and integrity of a company. There are more efficient means of obtaining information suitable to determine whether a contractor is worthy of receiving US funds.

**Rationale:**

SAM is intended to be an information gathering tool by the government - not a barrier for businesses to enter the market or a minefield of liability exposure for potential misrepresentations made in good faith. Over time, however, it has expanded beyond what is necessary to enable the government to make informed contracting decisions. The representations noted above address approximately half of the representations arising under the SAM registration. They are complex and overly burdensome for the quality of information obtained and do not take into account the many shapes and sizes of the companies seeking to contract with the government. Streamlining clauses, and eliminating or allowing companies to opt-out of others would help improve this database without hamstringing the government from its ability to adequately assess a contractor's integrity and capability to perform.

**Line-in, line-out:**

None, the General Services Administration already has the authority.

## **Career-Based Support for Acquisition Workforce Professionals**

### **Current State:**

Professional development of the acquisition workforce is essential to improving the efficiency of the procurement system. Recent trends raise concerns. The average contracting officer has 13 years of experience, whereas fifteen years ago they had 20 years of experience. Additionally, the acquisition process is complex, as is the technology acquired, which, itself, has evolved and continues to evolve rapidly. This technology must be reduced to requirements that are understood and that promote competition. With such complexity and tasks associated with the process, it is imperative that the acquisition workforce have access to effective professional development.

### **Recommended Actions:**

Congress should direct OFPP to develop guidance requiring training in market research and competition. Additionally, Congress should direct OFPP to set minimum IT graduation requirements for all acquisition personnel and require more advanced training for those in the IT career path. Moreover, agency adherence enforcement of these requirements for their personnel should be evaluated in the context of program/budget requests to assure that the appropriate stewardship exists for the approval and funding being sought. Finally, Congress should authorize the creation of an industry exchange program for Government program managers. OFPP should establish guidance that requires participation to achieve career advancement.

### **Rationale:**

Given the critical missions served, the increasing demand for technological fluency, and the overarching importance of their function to the nation, the acquisition workforce must be professionally supported and compensated to assure a continuity of expertise. To this end, the government should be updating and enhancing acquisition workforce education, areas of specialization, and professional development. Further, an industry exchange program would help to improve communications between government and industry as well as provide program managers with insights into the commercial sectors.

**Line-in/Line-out:**

**Legislative Change:**

**SEC. \_\_. CAREER-BASED SUPPORT FOR THE ACQUISITION WORKFORCE**

*(a) OFFICE OF FEDERAL PROCUREMENT POLICY GUIDANCE. –*

- (1) Not later than one year after the date of the enactment of this Act, the Administrator for Federal Procurement Policy shall issue guidance, which:*
- A. Develops additional training opportunities for the acquisition workforce in market research and competition*
  - B. Creates an industry exchange program for acquisition professionals*
  - C. Provides incentives for the acquisition workforce to utilize these resources*

**OMB Circular No. A-11 Change:**

**51.3 Analysis of resources**

Use a tabular presentation to identify the financial and personnel resources required at the program levels under consideration. For all Information Technology (IT) budgetary resources and for all major IT investments, include also a breakout of resources (financial, and if available, personnel) within each program level. The tabular presentation should include in its title the phrase "IT Table" and identify, by each major IT investment, the IT investment title, its unique investment identifier (UII), all principal supported program names, and the IT investment's budget authority level (PY, CY, and BY).

The table should reflect the resources associated with the actual program dollars going to this IT investment. All justifications should clearly show in text and tables the IT investment request within each bureau, account, and program activity level. Your justification materials should include a section beginning with the words "IT Resource Statements" that provides the following:

- (a) A statement from the CIO indicating the extent to which the CIO has reviewed and had significant input in approving IT Investments included in this budget request. For example, if the CIO has reviewed and approved all the Investments from bureau/component/Operating Division/Mode A, B, and C,

but not D, then the statement must identify that the CIO reviewed and approved Investments from bureau/component/Operating Division/Mode A, B, and C.

(b) A statement from the Chief Financial Officer (CFO) and CIO identifying the extent to which the CIO had a significant role in reviewing planned IT support for major programs and significant increases and decreases in IT resources reflected in this budget, **along with a statement that acquisition training necessary to facilitate any associated procurement activity has been provided to, and completed by, the acquisition organization associated with the activity for which approval and funding are being sought.**

(c) An update of the CIO's common baseline rating for Element D ("D1. CIO reviews and approves major IT Investment portion of budget request"):

- 1) Incomplete - Agency has not started development of a plan describing the changes it will make to ensure that all baseline FITARA responsibilities are in place.
- 2) Partially Addressed - Agency is working to develop a plan describing the changes it will make to ensure that all baseline FITARA responsibilities are in place.
- 3) Fully Implemented - Agency has developed and implemented its plan to ensure that all common baseline FITARA responsibilities are in place.

(d) The extent to which the CIO can certify the use of incremental development. For example, if the CIO can certify that all the Investments from bureau/component/Operating Division/Mode A, B, and C, but not D, are using incremental development practices then the statement must identify that the CIO certifies that Investments from bureaus/components/Operating Divisions/Modes A, B, and C are using incremental development practices.

The above statements and discussion must also be included in your agency's annual assurance statement described in OMB Circular No. A-123 Management's Responsibility for Enterprise Risk Management and Internal Control and your agency's public Congressional Justification materials. Additional details on ERM requirements are also included in section 270. To the extent possible, you should attempt to align your budget accounts with programs, distinguishing among components that contribute to different strategic objectives. This should relate program objectives (see section 240) and budget accounts or sub-accounts. In addition, you should include the full cost of a program where possible. In some cases, you may want to consider requesting budgetary resources to cover all indirect costs in the budget account or program activity that funds the program, and paying for all central services as they are

used. In other cases, you may want to request appropriations for some central accounts providing support services; in these cases, you should include a table showing the full cost of resources used by each program, whether paid from its budget account or not. Present resources required for PY and CY, as well as the estimated requirements for each funding option for BY through BY+9, where applicable. If CY cancellations or supplementals are pending or proposed, identify these separately. A subsidiary breakdown of such items as personnel compensation, capital outlay, or other categories of special concern would be useful. Generally, present financial data in terms of new budget authority and outlays. However, your OMB representative may require additional measures, such as unobligated balances and offsetting collections.

Describe budgetary resources requests in the context of your management plan for the programs and activities. Describe resources requested for IT investments in the context of your program requirements. For IT expenditures proposed, demonstrate that all opportunities for coordination with Administration goals and eliminating redundant activities have been explored. Explain the analysis used to determine the resources needed to accomplish program and Administration goals, and demonstrate that all opportunities for making more efficient and effective use of resources have been explored.

## **Facilities Need DPAP Approval for MIL STD 129**

### **Current State:**

MIL-STD-129 (applicable to DoD ordering activities) and FED-STD-123 (applicable to civilian agencies) are government-unique requirements related to the marking of units, unit packages, and unit loads that are being shipped to military facilities and supply centers. Shipments to these destinations are required to have various data elements, which are provided for display on the individual unit, the package of units, and the load of unit packages being delivered and stored. Recently, a cross-organizational team from GSA determined that compliance with MIL-STD-129 and FED-STD-123 would be strictly enforced on all GSA Schedules orders without exception.<sup>1</sup>

### **Recommended Action:**

The Coalition recommends that new requirements be implemented for facilities to obtain approval from DPAP prior to the use of MIL-STD-129 in the acquisition of commercial items.

### **Rationale:**

Coalition members report that the mandatory application of the standards to contracts increases costs, creates government-unique processes, and enhances their risks. Despite the burden MIL-STD-129 poses to contractors, there are reasons why a facility would need to use MIL-STD-129, therefore the Coalition recommends that DPAP create an approval process for facilities to use MIL-STD-129, and publish a list of the facilities that have received approval in order to help companies provide better service to their customers.

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<sup>1</sup> See: <http://thecgp.org/images/MIL-STD-129-GSA-January-5-response-Received-January-26-1.pdf>

## **Line-in/Line-out:**

## **Regulatory Change:**

## **Issue Memo from DPAP**

*SUBJECT: Use of MIL-STD-129*

*MIL-STD-129 is a requirement related to the marking of units, unit packages, and unit loads that are being shipped to military facilities and supply centers. The requirement is currently included in all delivery orders for the General Services Administration's Multiple Award Schedules.*

*FAR 12.301(a) requires that for the acquisition of commercial items, "to the maximum extent practicable, include only those clauses – ...determined to be consistent with customary commercial practice." MIL-STD-129 is not a customary commercial practice.*

*Ordering activities may continue to use MIL-STD-129 for non-commercial items at their discretion. For the acquisition of commercial items, ordering activities or facilities must receive prior approval from DPAP in order to use MIL-STD-129. The approval will be last for one year and apply to commercial items shipped to a specific facility or location.*

*Requests for approval to use MIL-STD-129 must be sent to \_\_\_\_\_, and DPAP will promptly provide a written decision. Requests from ordering activities for the use of MIL-STD-129 should include:*

- *A rationale for the use MIL-STD-129*
- *A list facilities and supply centers that will use MIL-STD-129*

*DPAP will maintain a list of facilities that have approval to use MIL-STD-129 in the acquisition of commercial items.*

## **Improve FedBizOpps**

### **Current State:**

Federal Business Opportunities (“FedBizOpps”) is an online web portal that serves as the single government point-of-entry for Federal procurement opportunities valued over \$25,000. The platform, which is operated under the authority of the GSA, enables Federal customers to publicize business opportunities for commercial vendors access and response.

### **Recommended Action:**

The Coalition recommends that GSA modernize the FedBizOpps portal through upgrades that enhance its transparency, user interface, and functionality. GSA should form a working group with representatives from other government agencies and industry to consider enhancements to the system.

### **Rationale:**

The current FedBizOpps portal lacks many of the features found on comparable commercial market platforms. For instance, when performing a search on the portal, upon selecting a search query, if a user wishes to return to the main search results, they are required to “reload” the webpage, effectively rendering the “back” button function useless. Without critical modernization upgrades to the portal, these design flaws limit transparency and competition, decrease effectiveness for the user, and increase delay, all of which translates into higher prices paid by Federal customers, and ultimately, the American taxpayer.

### **Line-in/Line-out:**

None required, GSA already has the authority to manage the FedBizOpps.

## **Identifying and Measuring Key Performance Indicators for Contract Personnel, Program Managers, and Organizations**

### **Current State:**

Members are concerned that the procurement process has become bogged down by process-focused requirements, which has led to a risk-averse culture. The ultimate purpose of the acquisition system is to support the mission requirements of Federal agencies, while finding the best value for the American taxpayer.

### **Recommendation:**

OFPP should issue guidance on the development of effective Key Performance Indicators (KPI) for the acquisition workforce. Agencies should utilize KPIs for contract personnel that reward innovation, mission fulfillment, and attention to total cost of acquisition through indicators such as market research, extent of communications with industry, competition, and the appropriate use of commercial items and practices. A similar effort should be undertaken at the agency level in connection with success in meeting procurement goals.

### **Rationale:**

The professionalism expected of contract and program managers cannot thrive in a risk-averse environment, as the government relies on these individuals to exercise discretion, which always involves an element of risk. Thus, for the government to expand opportunities for professionals to exercise discretion, in addition to balancing the levels of discretion against technical and program experience, it needs to recast the work environment to accept rational risk-taking. In this regard, critical professional behaviors expected of those exercising discretion should be manifested in the KPIs that are realistic, understandable, and meaningful, against which, those professionals will be evaluated. In addition, these KPIs should be aligned to the extent practicable to reward mission fulfillment. Likewise, indicators need to be established and followed by the organizations in which these professionals perform to assure that these organizations create the culture necessary to support contract and programs

### **Line-in/Line-out:**

None required, OFPP has the authority to implement the recommendations.

## **Improving Performance-Based Acquisition**

### **Current State:**

Performance Based Acquisition (PBA) is an approach to acquisition that focuses on describing end results (rather than dictating the manner in which the contracted work is to be done) and measuring and compensating vendors on the basis of whether or not those results were obtained. Additionally, FAR 37 requires, “the use of performance-based acquisitions for services to the maximum extent practicable.” The oversight community, in particular the Government Accountability Office, has found that agencies are not following PBA regulations consistently. The Defense Acquisition University (DAU) offers one course in Performance-Based Logistics, but it does not currently offer courses dedicated to PBA.

### **Recommendations:**

Create a PBA training course in the DAU. Additionally, create a certification or training track that encourages the acquisition workforce to expand its PBA skill set.

OFPP can develop Key Performance Indicators (KPIs) around PBA, which can be used to help drive cultural changes.

### **Rationale:**

If PBA were used the maximum extent practicable, there would a significant change in government procurements, shifting the focus from process to outcomes. Additionally, improving the acquisition workforce’s use of PBA could lead to lower costs for the American taxpayer.

### **Line-in/Line-Out:**

None required, DoD and OFPP have the authority to implement the changes.

## The GSA Multiple Award Schedules

The Coalition has prepared a number of recommendations for the improvement of the GSA Multiple Award Schedule (MAS). Although the program is not managed by DoD, the Department is the largest user of MAS, and improvements in Schedules will provide benefits to DoD customers.

The Schedules provide significant benefits for DoD customers, including:

- Continuous open season which ensure access to innovative products/services and companies
- Access to more than 10,000 qualified contractors
- The ability to meet small business goals - DoD regularly procures more than 10 percent of all its small business purchases on the Schedules
- Streamlined ordering procedures

The Administration has also recognized the opportunities that the Schedules can provide to buyers. OMB Memoranda M-17-22 established that the government should utilize pre-existing contracts, including the Schedules in order to avoid redundant contract actions.

## Price Reductions Clause - Multiple Award Schedule

### Current State:

The Price Reductions Clause (PRC) requires that contractors establish a basis of award customer (or group of customers) and maintain a discount relationship with the basis of award throughout the life of the contract. Originally intended as method to ensure fair and reasonable pricing throughout the life of the contract, the PRC provides little practical utility to the government and represents an immense burden for industry costing millions of dollars each year.

### Recommended Action:

Eliminate the PRC.

### Rationale:

For years, the Coalition has argued that the PRC no longer has any practical utility. Price reductions are driven by competitive forces, not the PRC. In fact, GSA has determined that only 3 percent of price reductions were driven by the PRC; the vast majority of reductions were caused by market forces. While the government receives little practical utility from the PRC, industry is faced with an immense tracking burden that costs millions of dollars each year. Finally, no other commercial item contract requires the PRC.

For more information from the Coalition on why the PRC is no longer necessary, please see:

- [Burden of the Price Reductions Clause- Submission 1 \(2/27/12\)](#)
- [Burden of the Price Reductions Clause- Submission 2 \(4/16/12\)](#)
- [Letter to Houston Taylor, Assistant Commissioner, Office of Acquisition Management on Price Reductions Clause Waiver \(4/3/13\)](#)
- [GSA Multiple Award Schedule Pricing: Recommendations to Embrace Regulatory and Commercial Market Changes \(9/9/13\)](#)
- [Coalition Letter to GSA on a Price Reductions Clause Waiver \(8/1/14\)](#)
- [Transactional Data Proposed Rule Comments \(5/2/2015\)](#)
- [FSS Pricing Disclosure Comments \(1/19/16\)](#)
- [Comments on FSS Pricing Disclosures #2 \(5/11/16\)](#)

**Line-in/Line-out:**

**GSAM Change:**

**Subpart 552.2 – Text of Provisions and Clauses**

**552.238-75 Price Reductions.**

As prescribed in 538.273(b)(2), insert the following clause:

Price Reductions (Jul 2016)

~~(a) Before award of a contract, the Contracting Officer and the Offeror will agree upon (1) the customer (or category of customers) which will be the basis of award, and (2) the Government's price or discount relationship to the identified customer (or category of customers). This relationship shall be maintained throughout the contract period. Any change in the Contractor's commercial pricing or discount arrangement applicable to the identified customer (or category of customers) which disturbs this relationship shall constitute a price reduction.~~

~~(b) During the contract period, the Contractor shall report to the Contracting Officer all price reductions to the customer (or category of customers) that was the basis of award. The Contractor's report shall include an explanation of the conditions under which the reductions were made.~~

~~(c)~~

~~(1) A price reduction shall apply to purchases under this contract if, after the date negotiations conclude, the Contractor—~~

~~(i) Revises the commercial catalog, pricelist, schedule or other document upon which contract award was predicated to reduce prices;~~

~~(ii) Grants more favorable discounts or terms and conditions than those contained in the commercial catalog, pricelist, schedule or other documents upon which contract award was predicated; or~~

~~(iii) Grants special discounts to the customer (or category of customers) that formed the basis of award, and the change disturbs the price/discount relationship of the Government to the customer (or category of customers) that was the basis of award.~~

~~(2) The Contractor shall offer the price reduction to the eligible ordering activity with the same effective date, and for the same time period, as extended to the commercial customer (or category of customers).~~

~~(d) There shall be no price reduction for sales—~~

~~(1) To commercial customers under firm, fixed-price definite quantity contracts with specified delivery in excess of the maximum order threshold specified in this contract;~~

~~(2) To Federal agencies;~~

~~(3) Made to Eligible Ordering Activities identified in GSAR Clause 552.238-78 when the order is placed under this contract (and the Eligible Ordering Activities identified in GSAR Clause 552.238-78 is the agreed upon customer or category of customer that is the basis of award); or~~

~~(4) Caused by an error in quotation or billing, provided adequate documentation is furnished by the Contractor to the Contracting Officer.~~

~~(a)~~(e) The Contractor may offer the Contracting Officer a voluntary Governmentwide price reduction at any time during the contract period.

~~(b)~~(f) The Contractor shall notify the Contracting Officer of any price reduction subject to this clause as soon as possible, but not later than 15 calendar days after its effective date.

~~(c)~~(g) The contract will be modified to reflect any price reduction which becomes applicable in accordance with this clause.

(End of clause)

## **Transactional Data Reporting - GSA Multiple Award Schedule**

### **Current State:**

The final Transactional Data Reporting (TDR) rule, which was issued on June 23, 2016, requires Schedule contract holders to report eleven transactional data elements to GSA on a monthly basis. To compensate for its additional contractor burden, the rule eliminates the Commercial Sales Practice disclosures and the Price Reduction Clause. The Coalition has maintained that the rule is unnecessary, burdensome, and costly. The data has limited value to the government, because it is collected without understanding the underlying terms and conditions of the order is incomplete and could lead to confusion among contracting officers. Further, by implementing non-commercial practices, the rule limits access to innovative solutions in the Federal marketplace.

### **Recommended Action:**

The TDR clause should be deleted.

### **Rationale:**

In particular, the final rule implements unnecessary, costly, and burdensome requirements on contractors for the submission of data that is already in the possession of the government. Consequently, Federal customers are likely to see decreased access to innovative solutions.

Line-in/Line-out:

GSAM Change:

**Subpart 552.2 – Text of Provisions and Clauses**

**552.238-74 Industrial Funding Fee and Sales Reporting.**

\*\*\*\*

~~Alternate I (Jun 2016). As prescribed in 538.273(b)(1), substitute the following paragraphs (a), (b), (c), and (d) for paragraphs (a), (b), (c), and (d) of the basic clause:~~

~~(a) Definition. "Transactional data" encompasses the historical details of the products or services delivered by the Contractor during the performance of task or delivery orders issued against this contract.~~

~~(b) Reporting of Transactional Data. The Contractor must report all transactional data under this contract as follows:~~

~~(1) The Contractor must electronically report transactional data by utilizing the automated reporting system at an Internet website designated by the General Services Administration (GSA) or by uploading the data according to GSA instructions. GSA will post registration instructions and reporting procedures on the Vendor Support Center website, <https://vsc.gsa.gov>. The reporting system website address, as well as registration instructions and reporting procedures, will be provided at the time of award or inclusion of this clause in the contract.~~

~~(2) The Contractor must provide, at no additional cost to the Government, the following transactional data elements, as applicable:~~

- ~~(i) Contract or Blanket Purchase Agreement (BPA) Number.~~
- ~~(ii) Delivery/Task Order Number/Procurement Instrument Identifier (PIID).~~
- ~~(iii) Non Federal Entity.~~
- ~~(iv) Description of Deliverable.~~
- ~~(v) Manufacturer Name.~~
- ~~(vi) Manufacturer Part Number.~~
- ~~(vii) Unit Measure (each, hour, case, lot).~~
- ~~(viii) Quantity of Item Sold.~~
- ~~(ix) Universal Product Code.~~
- ~~(x) Price Paid per Unit.~~
- ~~(xi) Total Price.~~

~~Note to paragraph (b)(2): The Contracting Officer may add data elements to the standard elements listed in paragraph (b)(2) of this section with the approvals listed in GSAM.~~

~~(3) The contractor must report transactional data within 30 calendar days from the last calendar day of the month. If there was no contract activity during the month, the Contractor must submit a confirmation of no reportable transactional data within 30 calendar days of the last calendar day of the month.~~

~~(4) The Contractor must report the price paid per unit, total price, or any other data elements with an associated monetary value listed in (b)(2) of this section, in U.S. dollars.~~

~~(5) The reported price paid per unit and total price must include the Industrial Funding Fee (IFF).~~

~~(6) The Contractor must maintain a consistent accounting method of transactional data reporting, based on the Contractor's established commercial accounting practice.~~

~~(7) Reporting Points:~~

~~(i) The acceptable points at which transactional data may be reported include—~~

~~(A) Issuance of an invoice; or~~

~~(B) Receipt of payment.~~

~~(ii) The Contractor must determine whether to report transactional data on the basis of invoices issued or payments received.~~

~~(8) The Contractor must continue to furnish reports, including confirmation of no transactional data, through physical completion of the last outstanding task or delivery order of the contract.~~

~~(9) Unless otherwise expressly stated by the ordering activity, orders that contain classified information or other information that would compromise national security are exempt from this reporting requirement.~~

~~(10) This clause does not exempt the Contractor from fulfilling existing reporting requirements contained elsewhere in the contract.~~

~~(11) GSA reserves the unilateral right to change reporting instructions following 60 calendar days' advance notification to the Contractor.~~

~~(c) Industrial Funding Fee (IFF).~~

~~(1) This contract includes an IFF charged on orders placed against this contract. The IFF is paid by the authorized ordering activity but remitted to GSA by the Contractor. The IFF reimburses GSA for the costs of operating the Federal Supply Schedule program, as set forth in 40 U.S.C. 321: Acquisition Services Fund. Net operating revenues generated by the IFF are also applied to fund initiatives benefitting other authorized GSA programs, in accordance with 40 U.S.C. 321.~~

~~(2) GSA has the unilateral right to change the fee amount at any time, but not more than once per year; GSA will provide reasonable notice prior to the~~

effective date of any change. GSA will post notice of the current IFF on the Vendor Support Center website at <https://vsc.gsa.gov>.

~~(3) Offerors must include the IFF in their prices. The fee is included in the awarded price(s) and reflected in the total amount charged to ordering activities. The fee will not be included in the price of non-contract items purchased pursuant to a separate contracting authority, such as a Governmentwide Acquisition Contract (GWAC); a separately awarded Federal Acquisition Regulation (FAR) Part 12, FAR Part 13, FAR Part 14, or FAR Part 15 procurement; or a non-FAR contract.~~

~~(4) The Contractor must remit the IFF to GSA in U.S. dollars within 30 calendar days after the last calendar day of the reporting quarter; final payment must be remitted within 30 calendar days after physical completion of the last outstanding task order or delivery order issued against the contract.~~

~~(5) GSA reserves the unilateral right to change remittance instructions following 60-calendar days' advance notification to the Contractor.~~

~~(d) The Contractor's failure to remit the full amount of the IFF within 30 calendar days after the end of the applicable reporting period constitutes a contract debt to the United States Government under the terms of FAR Subpart 32.6. The Government may exercise all rights under the Debt Collection Improvement Act of 1996, including withholding or offsetting payments and interest on the debt (see FAR clause 52.232-17, Interest). If the Contractor fails to submit the required transactional data reports, falsifies them, or fails to timely pay the IFF, these reasons constitute sufficient cause for the Government to terminate the contract for cause.~~

## **Subpart 538.2 Establishing and Administering Federal Supply Schedules**

### **538.273 Contract Clauses**

\*\*\*\*

~~(b) *Multiple and single award schedules.* Insert the following in solicitations and contracts:~~

~~(1) 552.238-74, *Industrial Funding Fee and Sales Reporting.* Use Alternate I for Federal Supply Schedules with Transactional Data Reporting requirements. Clause 552.238-75 Alternate I should also be used when vendors agree to include clause 552.238-74 Alternate I in the contract.~~

~~(2) 552.238-75, *Price Reductions.* Use Alternate II for Federal Supply Schedules with Transactional Data Reporting requirements. This alternate clause is used when vendors agree to include clause 552.238-74 Alternate I in the contract.~~

~~(3) 552.238-81, *Modifications (Federal Supply Schedule).*~~

~~(i) Use Alternate I for Federal Supply Schedules that only accept electronic modifications.~~

~~(ii) Use Alternate II for Federal Supply Schedules with Transactional Data Reporting requirements. This alternate clause is used when vendors agree to include clause 552.238-74 Alternate I in the contract.~~

## Duplicative Special Item Numbers

### Current State:

Currently, MAS is divided into schedules that correspond to a product or service, and each schedule is sub-divided into Special Item Numbers (SIN). Recently, a trend has emerged that GSA will create a new SIN in order to market a specific set of products or services to agency buyers. Examples of this trend include the Health IT SIN, the Highly Adaptive Cyber Security SINs, the Earth Observation SIN, and a proposed Continuous Diagnostics and Mitigation SIN, all on Schedule 70.

### Recommended Action:

Require a business case analysis before any new SINs are created.

### Rationale:

Industry understands that there are reasons to add new SINs, but the recent practice associated with adding new SINs has generated concern. The Coalition's members believe that, before new SINs are added, GSA should complete a thorough business case justifying the addition, including data manifesting the firm commitments received from agency buyers to use the new SINs. GSA should look at the model set by the Alliant GWAC, which does not subdivide the contract into functional areas or line items. That contract is used to acquire health IT, even without a specific health IT category.

For more information from the Coalition on the process of adding new SINs, please see:

- [Coalition Health IT SIN Comments \(2/8/16\)](#)
- [Coalition Response to GSA IT Schedule 70 Highly Adaptive Cybersecurity Services \(HACS\) SIN RFI \(6/21/16\)](#)
- [Coalition Comments on GSA Proposed Continuous Diagnostics and Mitigation \(CDM\) SIN \(5/1/17\)](#)

**Line-in/Line-out:**

**FAR Change:**

## **Subpart 38.2 – Establishing and Administering Federal Supply Schedules**

### **38.201 Coordination requirements.**

(a) Subject to interagency agreements, contracting officers having responsibility for awarding Federal Supply Schedule contracts shall coordinate and obtain approval of the General Services Administration's Federal Supply Service (FSS) before –

- (1) Establishing new schedules;
- (2) Discontinuing existing schedules;
- (3) Changing the scope of agency or geographical coverage of existing schedules; or
- (4) Adding or deleting special item numbers, national stock numbers, or revising their description.

(b) Requests should be forwarded to the:

General Services Administration  
Federal Supply Service  
Office of Acquisition (FC)  
Washington, DC 20406.

### **38.202 Establishing New Special Item Numbers**

(a) Before adding a new special item number to the Federal Supply Schedule, the General Services Administration's Federal Acquisition Service shall produce and make available to the public a business case analysis for the new special item number, which shall include the following –

- (1) A rationale for the new special item number, including why an existing special item number does not contain the scope of the products or services;
- (2) Data demonstrating firm agency commitments to use the new special item number; and
- (3) A marketing plan for the new special item number.

## **Develop Alternative Methods for Pricing GSA Schedule Contracts.**

### **Current State:**

Pursuant to General Services Administration Acquisition Regulation (“GSAR”) 515.408, vendors are required to provide a year of historical data on commercial sales for all products and services in order to include them on their Multiple Award Contract (“MAS”). This Commercial Sales Practices (CSP) information is used to determine whether offered prices are fair and reasonable. Disclosure is required regardless of dollar value or terms and conditions. In addition, offerors are required to submit standard commercial sales and discounting practices, as well as exceptions to those practices.

### **Recommended Action:**

The Coalition recommends that GSA pilot a “Comprehensive, Competitive Services Schedule (CCSS)” for IT and Professional Services. Under the CCSS, GSA and offerors would negotiate basic agreements establishing key terms and conditions (*e.g.* Industrial Funding Fee, Commercial Supplier Agreement, small business subcontracting plans, and other applicable commercial and/or government-unique terms) that would govern at the subsequent task order competition. GSA would post ceiling rates for labor categories on GSA Advantage. Pricing would ultimately occur based on competition at the task order level in response to known requirements. Contractors would be exempt from the PRC, CSP, and transactional data reporting. The CCSS would also authorize the use of Other Direct Costs or Order Level Materials.<sup>2</sup>

### **Rationale:**

The CSP format causes significant burdens for vendors, both in terms of time spent on compliance activities, and the costs associated with those activities. These costs are inevitably passed on to customer agencies in the form of higher pricing for services and products offered under the GSA’s and the VA’s MAS programs. Other less burdensome, more market driven solutions can be used to negotiate MAS task and delivery order prices. Moreover, market driven solutions provide more rapid Federal government access to cutting-edge, innovative technologies, and solutions.

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<sup>2</sup> See: Coalition Comments on GSA Acquisition Reform

**Line-in/Line-out:**

**515.408 Solicitation provisions and contract clauses.**

MAS Request for Information Other than Cost or Pricing Data

(a) Use Alternate IV of the FAR provision at 52.215-20, Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data, for MAS solicitations to provide the format for submission of information other than cost or pricing data for MAS solicitations. To provide uniformity in requests under the MAS program, you should insert the following in paragraph (b) of the provision:

(1) An offer prepared and submitted in accordance with the clause at 552.212-70, Preparation of Offer (Multiple Award Schedule).

(2) Commercial sales practices. When the solicitation contains the basic clause 552.238-74 Industrial Funding Fee and Sales Reporting, the Offeror must submit information in the format provided in this solicitation in accordance with the instructions at Figure 515.4-2 of the GSA Acquisition Regulation (48 CFR 515.4-2), or submit information in the Offeror's own format. The offeror does not submit information if the solicitation contains 552.216-77.

(b) When the contract contains the basic clause 552.238-74 Industrial Funding Fee and Sales Reporting, insert the following format for commercial sales practices in the exhibits or attachments section of the solicitation and resulting contract (see FAR 12.303). Do not insert the format for the commercial sales practices if the solicitation contains 552.216-77.

\*\*\*\*

(c) When the contract contains the basic clause 552.238-74 Industrial Funding Fee and Sales Reporting, include the instructions for completing the commercial sales practices format in Figure 515.4-2 in solicitations issued under the MAS program. Do not include the instructions for the commercial sales practices if the solicitation contains 552.216-77.

\*\*\*\*

(d) When the contract contains the basic clause 552.238-74 Industrial Funding Fee and Sales Reporting, insert the clause at 552.215-72, Price Adjustment-Failure to Provide

Accurate Information, in solicitations and contracts under the MAS program. Do not insert the clause if the solicitation contains 552.216-77.

### **538.270-3 Evaluation of offers on the Comprehensive Competitive Services Schedule**

(a) *Applicability.* Utilize this evaluation methodology for negotiating MAS offers on the Comprehensive Competitive Services Schedule (see 552.216-77).

(b) Contracting Officers shall utilize the techniques in FAR 15.404 when evaluating pricing for MAS offers.

(1) The Contracting Officer shall perform market research to compare prices for the same or similar items in accordance with FAR 15.404-1(b)(2)(vi).

### **538.272 MAS price reductions.**

(a) *Applicability.* This section applies when the contract contains the basic clause 552.238-74 Industrial Funding Fee and Sales Reporting. This section does not apply if the solicitation contains 552.216-77.

(b) The basic clause and Alternate I of 552.238-75, Price Reductions, requires the contractor to maintain during the contract period the negotiated price/discount relationship (and/or term and condition relationship) between the eligible ordering activities and the offeror's customer or category of customers on which the contract award was predicated (see 538.271(c) ). If a change occurs in the contractor's commercial pricing or discount arrangement applicable to the identified commercial customer (or category of customers) that results in a less advantageous relationship between the eligible ordering activities and this customer or category of customers, the change constitutes a "price reduction."

(c) Ensure that the contractor understands the requirements of section 552.238-75 and agrees to report all price reductions to the Contracting Officer as provided for in the clause.

### **538.273 Contract clauses.**

\*\*\*\*

(b) Multiple and single award schedules. Insert the following in solicitations and contracts

\*\*\*\*

(2) 552.238-75, Price Reductions. Use Alternate II for Federal Supply Schedules with Transactional Data Reporting requirements or Competitive, Comprehensive Services Schedules 552.216-77. This alternate clause is used when vendors agree to include clause 552.238-74 Alternate I in the contract.

(3) 552.28-81, Modifications (Federal Supply Schedule).

(i) Use Alternate I for Federal Supply Schedules that only accept electronic modifications.

(ii) Use Alternate II for Federal Supply Schedules with Transactional Data Reporting requirements or Competitive, Comprehensive Services Schedules 552.216-77. This alternate clause is used when vendors agree to include clause 552.238-74 Alternate I in the contract.

(4) Insert clause 552.216-77 in solicitations for Federal Supply Schedule contracts which have been designated as Comprehensive, Competitive Services Schedule.

\*\*\*\*

### **GSAM 552.216-77 Comprehensive Competitive Services Schedule**

As prescribed in 516.506(f), insert the following provisions:

Comprehensive, Competitive Services Schedule (DATE)

(a) Definition. "Comprehensive Competitive Services Schedule" a Federal Supply Schedule under which pricing is determined by competition on task orders.

(b) Under the Comprehensive Competitive Services Schedules, a contractor is exempt from the Price Reductions Clause, Transactional Data Reporting, and the Commercial Sales Practice Format.

(c) The contractor will negotiate ceiling rates for labor categories with the Government, which will be posted to GSA Advantage!.

## **Implement OLM**

### **Current State:**

In September 2016, the GSA published a proposed rule that would add the capability to utilize Order Level Materials (OLM)<sup>3</sup> to the Schedules program. The current lack of OLM's on the Schedules makes it more difficult to procure total solutions. In addition, Coalition members have reported that the lack of ODC's forces agencies to use other vehicles. Significantly, the FAR already authorizes the inclusion of ODC's in commercial item contracts.

### **Recommended Action:**

The Coalition recommends that GSA move forward with the proposed rule with the following modifications:

- Remove requirement for contractors to submit three quotes for price reasonableness because it is a burdensome, non-commercial practice.
- Remove requirements for contractors to report OLM's through a separate SIN. This process is burdensome, comes at a high cost to contractors, and does not yield meaningful data for GSA.
- Empower agencies with the discretionary authority to allow for indirect costs at the order level.
- Authorize OLM's to exceed 33 percent of the value of the order.

### **Rationale:**

This approach would enhance the quality of the Schedules program by increasing the ability for customers to procure total solutions in the least burdensome manner. In addition, it will empower Federal customers to realize lower Total Acquisition Costs.

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<sup>3</sup> Also known as Other Direct Costs or "ODC's"

**Line-in/Line-out:**

**GSAM Change:**

**Insert the following**

**Part 515 – Contracting by Negotiation**

**515.408 Solicitation Provisions and Contract Clauses**

\*\*\*\*

*(c) Offerors are not required to complete the commercial sales practices disclosure for order-level materials (See subpart 538.71).*

**Part 538 – Federal Supply Schedule Contracting**

**538.71 – Order-Level Materials**

538.7100 Definitions.

*Order-level materials means supplies and/or services acquired in direct support of an individual task or delivery order placed against a Federal Supply Schedule (FSS) contract, when the supplies and/or services are not known at the time of Schedule contract award. The prices of order-level materials are not established in the FSS contract. Order-level materials are not open market items discussed in FAR 8.402(f).*

538.7101 Applicability.

*Order-level materials are authorized under all of the Federal Supply Schedule contracts*

538.7103 Contract Clauses.

*(a) Use FAR clause 52.212-4 Alternate I in all Federal Supply Schedules authorized for the acquisition of order-level materials (see 538.7101). Use the following language for the clause fill-in:*

*(1) Insert “Each order must list separately subcontracts for services excluded from the FSS Hourly.*

*(2) Insert “Each order must list separately the elements of other direct charge(s) for that order” in (i)(1)(ii)(D)(1).*

(b) Use 552.238-XX, *Special Ordering Procedures for the Acquisition of Order-Level Materials* in all Federal Supply Schedules authorized for the acquisition of order-level materials (see 538.7101).

**Part 552 – Solicitation Provisions and Contract Clauses**

**552.238-XX *Special Ordering Procedures for the Acquisition of Order-Level Materials.***

As prescribed in 538.7103(b), insert the following clause:

***Special Ordering Procedures for the Acquisition of Order-Level Materials (DATE)***

- (a) *Order-level materials means supplies and/or services acquired in direct support of an individual task or delivery order placed against a Federal Supply Schedule (FSS) contract or FSS BPA, when the supplies and/or services are not known at the time of Schedule contract award. The prices of order-level materials are not established in the FSS contract. Order-level materials that are acquired following the procedures in paragraph (d) of this clause are not open market items discussed in FAR 8.402(f).*
- (b) *FAR 8.403(b) provides that GSA may establish special ordering procedures for a particular FSS or for some Special Item Numbers (SINs) within a Schedule.*
- (c) *The procedures in FAR Subpart 8.4 apply to this contract, with the exceptions listed in this clause. If a requirement in this clause is inconsistent with FAR Subpart 8.4, this clause takes precedence.*
- (d) *Procedures for including order-level materials when placing an individual task or delivery order against an FSS contract or FSS Blanket Purchase Agreement (BPA).*
  - (1) *The procedures discussed in FAR 8.402(f) do not apply when placing task and delivery orders for order-level materials.*
  - (2) *Order-level materials are included in the definition of the term “materials” in GSAR clause 552.212-4 Alternate I, and therefore all provisions of clause 552.212-4 Alternate I that apply to “materials” also apply to order-level materials. The ordering activity shall follow procedures under the Federal Travel Regulation and FAR Part 31 when order-level materials include travel.*
  - (3) *Order-level materials shall only be acquired in direct support of an order and not as the primary basis.*
  - (4) *Prior to the placement of an order that includes order-level materials, the ordering activity shall follow procedures in FAR 8.404(h).*
  - (5) *In accordance with GSAR clause 552.215-71 Examination of Records by GSA, GSA has the authority to examine the contractor's records for compliance with*

*the pricing provisions in FAR clause 52.212-4 Alternate I, to include examination of any books, documents, papers, and records involving transactions related to the contract for overbillings, billing errors, and compliance with the IFF and the Sales Reporting clauses of the contract.*

*(6) Order-level materials are exempt from the following clauses:*

- i. 552.216-70 Economic Price Adjustment – FSS Multiple Award Schedule Contracts.*
- ii. 552.238-71 Submission and Distribution of Authorized FSS Schedule Pricelists.*
- iii. 552.238-75 Price Reductions.*

*(End of Clause)*

## The Commercial Supplier Agreement

### Current State:

In May 2016, GSA issued a proposed rule that intends to streamline the end-user license agreement reviews and contract negotiations processes by ensuring that certain contract language defers to Federal law where there is a conflict with commercial terms. Specifically, the proposed rule adopts a modified “order of precedence,” which contradicts both law and regulation, and which creates a preference for government terms and conditions.

### Recommended Action:

The Coalition recommends that GSA reverse the change in the order of precedence and return to the FAR clause language that existed prior to the July 2015 class deviation.

### Rationale:

As written, the proposed changes to the GSAR would have far-reaching, unintended negative impacts on the availability of commercial products and services to Federal agencies. The increased burdens add risk and decreases government and contractor incentive to bring innovative solutions to the Federal marketplace.

See:

- *FAR & Beyond Blog*
  - [September 3, 2015](#)
  - [March 4, 2016](#)
- [Coalition Comments on Class Deviation](#)
- [Coalition Response to Class Deviation](#)
- [Coalition Comments on Proposed Rule](#)

**Line-in/Line-out:**

**GSAM Change:**

**Insert the following**

### **Part 502 – Definitions of Words and Terms**

#### **502.1 – Definitions**

##### *502.101 Definitions*

*Commercial supplier agreements means terms and conditions customarily offered to the public by vendors of supplies or services that meet the definition of “commercial item” set forth in FAR 2.101 and intended to create a binding legal obligation on the end user. Commercial supplier agreements are particularly common in information technology acquisitions, including acquisitions of commercial computer software and commercial technical data, but they may apply to any supply or service. The term applies –*

- (1) Regardless of the format or style of the document. For example, a commercial supplier agreement may be styled as standard terms of sale or lease, Terms of Service (TOS), End User License Agreement (EULA), or another similar legal instrument or agreement, and may be presented as part of a proposal or quotation responding to a solicitation for a contract or order;*
- (2) Regardless of the media or delivery mechanism used. For example, a commercial supplier agreement may be presented as one or more paper documents or may appear on a computer or other electronic device screen during a purchase, software installation, other product delivery, registration for a service, or another transaction*

### **Part 512 – Acquisition of Commercial Items**

#### **512.2 – Special Requirements for the Acquisition of Commercial Items**

##### *512.216 Unenforceability of unauthorized obligations.*

*GSA has a deviation to FAR 12.216 for this section to read as follows:  
For commercial contracts, supplier license agreements are referred to as commercial supplier agreements (defined in 502.101). Paragraph (u) of clause 552.212-4 prevents violations of the Anti-Deficiency Act ([31 U.S.C. 1341](#)) for supplies or services acquired subject to a commercial supplier agreement.*

##### *512.301 Solicitation provisions and contract clauses for the acquisition of commercial items.*

\*\*\*\*

- (e) *GSA has a deviation to revise certain paragraphs of FAR clause 52.212-4. Use clause 552.212-4 Contract Terms and Conditions – Commercial Items (FAR DEVIATION), for acquisitions of commercial items in lieu of FAR 52.212-4. The contracting officer may tailor this clause in accordance with FAR 12.302 and GSAM 512.302.*

### **Part 513 – Simplified Acquisition Procedures**

#### **513.2 – Actions At or Below the Micro-Purchase Threshold**

##### *513.202 Unenforceability of unauthorized obligations*

*Clause 552.232-39, Unenforceability of Unauthorized Obligations (FAR DEVIATION), will automatically apply to any micro-purchase in lieu of FAR 52.232-39 for supplies and services acquired subject to a commercial supplier agreement (as defined in 502.101), in micro-purchases.*

#### **513.3 – Simplified Acquisition methods**

##### *513.302-5 Clauses*

*Where the supplies or services are offered under a commercial supplier agreement (as defined in 502.101), the purchase order or modification shall incorporate clause 552.232-39, Unenforceability of Unauthorized Obligations (FAR DEVIATION), in lieu of FAR 52.232-39, and clause 552.232-78, Commercial Supplier Agreements-Unenforceable Clauses.*

### **Part 532 – Contract Financing**

#### **532.7 – Contract Funding**

##### *532.705 Unenforceability of unauthorized obligations*

*Supplier license agreements defined in FAR 32.705 are equivalent to commercial supplier agreements defined in 502.101.*

##### *532.706-3 Clause for unenforceability of unauthorized obligations*

- (a) *The contracting officer shall utilize the clause at 552.232-39, Unenforceability of Unauthorized Obligations (FAR DEVIATION) in all solicitations and contracts in lieu of FAR 52.232-39.*

- (b) *The contracting officer shall utilize the clause at 552.232-78, Commercial Supplier Agreements – Unenforceable Clauses, in all solicitations and contracts (including orders) when not using FAR part 12.*

**Part 552 – Solicitation Provisions and Contract Clauses**

**552.212-4 Contract Terms and Conditions – Commercial Items (FAR DEVIATION)**

*As prescribed in 512.301(e), replace paragraphs (g)(2) and (u) of FAR clause 52.212-4. Also, add paragraph (w) to FAR clause 52.212-4.*

**Contract Terms and Conditions – Commercial Items (FAR DEVIATION) (Date)**

*(g)(2) The due date for making invoice payments by the designated payment office is the later of the following two events:*

*(i) The 10th day after the designated billing office receives a proper invoice from the Contractor. If the designated billing office fails to annotate the invoice with the date of receipt at the time of receipt, the invoice payment due date shall be the 10th day after the date of the Contractor's invoice; provided the Contractor submitted a proper invoice and no disagreement exists over quantity, quality, or Contractor compliance with contract requirements.*

*(ii) The 10th day after Government acceptance of supplies delivered or services performed by the Contractor.*

*(u) Unauthorized Obligations.*

*(1) Except as stated in paragraph (u)(2) of this clause, when any supply or service acquired under this contract is subject to any commercial supplier agreement (as defined in 502.101) that includes any language, provision, or clause requiring the Government to pay any future fees, penalties, interest, legal costs or to indemnify the Contractor or any person or entity for damages, costs, fees, or any other loss or liability that would create an Anti-Deficiency Act violation (31 U.S.C. 1341), the following shall govern:*

*(i) Any such language, provision, or clause is unenforceable against the Government.*

*(ii) Neither the Government nor any Government authorized end user shall be deemed to have agreed to such clause by virtue of it appearing in the commercial supplier agreement. If the commercial supplier agreement is invoked through an "I agree" click box or other comparable mechanism (e.g., "click-wrap" or "browse-wrap" agreements), execution does not bind the Government or any Government authorized end user to such clause.*

*(iii) Any such language, provision, or clause is deemed to be stricken from the commercial supplier agreement.*

*(2) Paragraph (u)(1) of this clause does not apply to indemnification or any other payment by the Government that is expressly authorized by statute and specifically authorized under applicable agency regulations and procedures.*

*(w) Commercial supplier agreements – unenforceable clauses. When any supply or service acquired under this contract is subject to a commercial supplier agreement (as defined in 502.101), the following language shall be deemed incorporated into the commercial supplier agreement. As used herein, “this agreement” means the commercial supplier agreement:*

*(1) Notwithstanding any other provision of this agreement, when the end user is an agency or instrumentality of the U.S. Government, the following shall apply:*

*(i) Applicability. This agreement is a part of a contract between the commercial supplier and the U.S. Government for the acquisition of the supply or service that necessitates a license (including all contracts, task orders, and delivery orders under FAR Part 12).*

*(ii) End user. This agreement shall bind the ordering activity as end user but shall not operate to bind a Government employee or person acting on behalf of the Government in his or her personal capacity.*

*(iii) Law and disputes. This agreement is governed by Federal law.*

*(A) Any language purporting to subject the U.S. Government to the laws of a U.S. state, U.S. territory, district, or municipality, or a foreign nation, except where Federal law expressly provides for the application of such laws, is hereby deleted.*

*(B) Any language requiring dispute resolution in a specific forum or venue that is different from that prescribed by applicable Federal law is hereby deleted.*

*(C) Any language prescribing a different time period for bringing an action than that prescribed by applicable Federal law in relation to a dispute is hereby deleted.*

*(iv) Continued performance. The supplier or licensor shall not unilaterally revoke, terminate or suspend any rights granted to the Government except as allowed by this contract. If the supplier or licensor believes the ordering activity to be in breach of the agreement, it shall pursue its rights under the Contract Disputes Act or other applicable Federal statute while continuing performance as set forth in paragraph (d) (Disputes).*

*(v) Arbitration; equitable or injunctive relief. In the event of a claim or dispute arising under or relating to this agreement, a binding arbitration shall not be used unless specifically authorized by agency guidance, and equitable or injunctive relief, including the award of attorney fees, costs or interest, may be awarded against the U.S. Government only when explicitly provided by statute (e.g., Prompt Payment Act or Equal Access to Justice Act).*

*(vi) Additional terms.*

*(A) This commercial supplier agreement may incorporate additional terms by reference.*

- (B) *After award, the contractor may unilaterally revise terms provided:*
- (1) *Terms do not materially change government rights or obligations;*
  - (2) *Terms do not increase government prices;*
  - (3) *Terms do not decrease overall level of service; and*
  - (4) *Terms do not limit any other Government right addressed elsewhere in this contract.*

(vii) *No automatic renewals. If any license or service tied to periodic payment is provided under this agreement (e.g., annual software maintenance or annual lease term), such license or service shall not renew automatically upon expiration of its current term without prior express Government approval.*

(viii) *Indemnification. Any clause of this agreement requiring the commercial supplier or licensor to defend or indemnify the end user is hereby amended to provide that the U.S. Department of Justice has the sole right to represent the United States in any such action, in accordance with 28 U.S.C. 516.*

(ix) *Audits. Any clause of this agreement permitting the commercial supplier or licensor to audit the end user's compliance with this agreement is hereby amended as follows:*

(A) *Discrepancies found in an audit may result in a charge by the commercial supplier or licensor to the ordering activity. Any resulting invoice must comply with the proper invoicing requirements specified in the underlying Government contract or order.*

(B) *This charge, if disputed by the ordering activity, will be resolved through the Disputes clause at 522.212-4(d); no payment obligation shall arise on the part of the ordering activity until the conclusion of the dispute process.*

(C) *Any audit requested by the contractor will be performed at the contractor's expense, without reimbursement by the Government.*

(x) *Taxes or surcharges. Any taxes or surcharges which the commercial supplier or licensor seeks to pass along to the Government as end user will be governed by the terms of the underlying Government contract or order and, in any event, must be submitted to the Contracting Officer for a determination of applicability prior to invoicing unless specifically agreed to otherwise in the Government contract.*

(xi) *Non-assignment. This agreement may not be assigned, nor may any rights or obligations thereunder be delegated, without the Government's prior approval, except as expressly permitted under subparagraph (b) of this clause at 552.212-4.*

(xii) *Confidential information. If this agreement includes a confidentiality clause, such clause is hereby amended to state that neither the agreement nor the Federal Supply Schedule price list shall be deemed "confidential information." Issues regarding release of "unit pricing" will be resolved consistent with the Freedom of Information Act. Notwithstanding anything in this agreement to the contrary, the Government may retain any confidential information as required by law, regulation or its internal document retention procedures for legal, regulatory or compliance*

*purposes; provided, however, that all such retained confidential information will continue to be subject to the confidentiality obligations of this agreement.*

*(2) If any language, provision, or clause of this agreement conflicts or is inconsistent with the preceding paragraph (w)(1), the language, provisions, or clause of paragraph (w)(1) shall prevail to the extent of such inconsistency.*

*(End of clause)*

## Changes to the Auditing Process

### Current State:

The impact of government audits of contracts often extend beyond those of their commercial market counterparts. This impact can be even more significant where they are conducted by Inspectors General. The OIG plays a crucial role in detecting waste, fraud, and abuse, as well as in auditing contracts. This dual role introduces a potential conflict of interest, as failure to resolve negative findings in a contract audit may become reasons for programmatic audits. In the case of GSA, the unintended consequence of this dual role is that contract audits can be unduly influenced by the OIG's program audits and investigative functions. Contracting officers and management officials may unnecessarily defer to the authority of the OIG, rather than concentrating on the business decisions. The results are labor-intensive, risk-adverse processes, often resulting in audits that take unnecessarily long periods to complete. Delays increase costs and reduce access to innovation in the Federal marketplace.

DOD uses DCAA to conduct its own audits. DOD is, however, a major user of GSA acquisition program. Consequently, improvement to GSA's audit process would also likely reduce cost, and increase effectiveness, of DOD acquisitions.

### Recommended Action:

The Coalition recommends that GSA contract audits no longer be conducted by the Office of the Inspector General.

The decision to use the Inspector General as the audit arm of the contracting officer is made by internal agency directive. GSA Order 2030.2D ADM P Internal Audit Follow-up HB and GSA order OIG 5410.2 Office of Inspector General, Audit, Inspection, and Investigative Activities govern the role of the OIG in GSA contract audits. We recommend that both directives be modified to delete reference to contract audits.

GSA Schedule contracts included alternative II of 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders – Commercial Items. Section (d)(1) of that clause, among other things gives an Inspector General appointed under section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.) the right to –

- (i) Examine any of the Contractor's or any subcontractors' records that pertain to, and involve transactions relating to, this contract; and
- (ii) Interview any officer or employee regarding such transactions.

FAR 12.301(b)(4)(ii) prescribes the use of alternate II if "... the acquisition will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5). This provision is no longer widely needed in GSA commercial item contracts as Recovery act funds would generally no longer be applicable to current contracts and orders. We recommend that it no longer be incorporated in GSA Schedule solicitations and contracts.

Resources for the pricing support and contractor review should be transferred from the OIG and to the GSA Acquisition services. The Acquisition Services should establish a new office that would be

- Responsible for assisting contracting officers in price evaluation and negotiations
- Authorized to obtain audit assistance by hiring (FTE) or by contract

In addition, the Coalition recommends that GSA and DOD internal directives should include a minimum value for contracts to be subject to audits, a set period of time during which the audit must be completed, and requirements for the annual reporting of the number auditors and hours worked.

**Rationale:**

This change would allow for audit processes that address the business needs of the government and empower contracting officials to exercise pricing discretion afforded them by the FAR. It also would enhance the ability of the OIG to use their resources to more effectively investigate cases of suspected fraud waste and abuses.

Further, by implementing a minimum value at which contracts are subject to audits and setting a firm deadline for audit completion, the government could reduce costs, and incentivize, innovative suppliers to participate in the Federal marketplace. In addition, by requiring the reporting of the annual number of auditors and hours worked, the government could ensure that its auditing activities are cost effective.

**Line-in/Line-out:**

**Administrative Changes:**

*Remove FAR 52.212-5 Alternative II from GSA Schedule Contracts. GSA has the authority to amend its solicitations.*

**Revise GSA order OIG 5410.2 Office of Inspector General, Audit, Inspection, and Investigative Activities**

GENERAL SERVICES ADMINISTRATION  
Washington, DC 20405

OIG 5410.2  
DATE

GSA ORDER

SUBJECT: Office of Inspector General, Audit, Inspection, and Investigative Activities

1. Purpose. This update primarily adds the activities of the Office of Inspections but includes updates to all sections of the policy.
2. Background. This policy sets for the activities of the various components of the Office of Inspector General.
3. Applicability. All GSA and GSA/OIG employees.
4. Cancellation. OAD P 5410.1, Chapter 9, is cancelled.
5. Signature.

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Inspector General

**OFFICE OF INSPECTOR GENERAL, AUDIT, INSPECTION, AND  
INVESTIGATIVE ACTIVITIES**

**Part 1. Office of Inspector General Activities**

1. Audits, inspections, and investigations. The Office of Inspector General (OIG) conducts independent and objective reviews of GSA programs and activities. The OIG pursues a two-fold mission in performing audit, inspection, and investigative activities:

improving the economy, efficiency, and effectiveness of GSA programs; and detecting and preventing fraud, waste, and mismanagement. Reviews are performed by OIG employees with posts of duty in regional and Headquarters locations. Audit, inspection, and investigative activities are discussed in parts 2, 3, and 4.

2. Review of legislation and regulations. New and proposed legislation and regulations, concerning the programs and activities of GSA are reviewed by the OIG regarding their impact on economy and efficiency, and fraud prevention and detection. The review of legislation is performed by the Counsel to the Inspector General, while the review of regulations and directives is carried out by the OIG Clearance officer.

3. Allegations of wrongdoing. The OIG receives allegations and complaints about GSA operations nationwide. Suspected fraud, waste, and mismanagement can be reported to any Special Agent in Charge, or by contacting the OIG Hotline Officer in Washington, DC on 202-501-1780, toll free on 800-424-5210, or through the mail (GSA/OIG/Hotline, Washington, DC 20405). Potentially illegal or improper activities can be reported confidentially, where the identity of the person is not disclosed outside the OIG, or anonymously.

4. Access to GSA and contractor records. OIG auditors, analysts, criminal investigators, and attorneys have unrestricted access to all records, reports, reviews, documents, papers, and materials available to GSA and pertaining to agency programs and activities. When performing reviews of contractor records and proposals, access to information is provided by-statute, contract terms, and agreement between the contractor and the Government. To facilitate the process of gaining access to information, auditors, investigators, and attorneys carry credentials identifying them as OIG officials. OIG Special Agents carry a badge and credentials.

## **Part 2. Audit Activities**

1. General. This part provides guidance for agency officials needing information regarding audit requests, types of audits, steps in the audit process, audit resolution, and implementation reviews.

2. Audit requests. GSA managers and contracting officials can request audits of agency programs and activities, and contractor records or proposals at any time. In addition, the Office of Audits meets annually with the Heads of Services and Staff Offices and the Regional Administrators to discuss areas of concern for internal audit consideration ~~and specific contract or proposal information for contract audits.~~

3. Types of audits. The Office of Audits provides comprehensive coverage of GSA operations through program audits, including financial, regulatory, and system audits and assessments of internal controls. ~~The office conducts contract audits in support of GSA contracting officials to carry out their procurement responsibilities and obtain the best value for federal customers and American taxpayers.~~

a. Program audits are independent appraisals of GSA programs, financial management, operations, and activities that can be performed at any location where the agency conducts business. These audits generally determine whether an entity is using resources economically and efficiently, achieving desired program results, and complying with applicable laws and regulations.

~~b. Contract audits are audits of contractor records and proposals in support of GSA contracting officials. These audits relate to proposed or awarded contracts and can include preaward and postaward audits, price reduction and defective pricing reviews, contractor claims and termination reviews, and lease escalation evaluations.~~

~~(b.) c.~~ Special audits are one-time audits of identified problem areas that are performed on a priority basis. These audits are usually initiated by the Inspector General or the Assistant Inspector General for Auditing. These audits can also be requested by the Administrator, Deputy Administrator, Heads of Services and Staff Offices (HSSOs), and Regional Administrators (RAs). Requests for special audits should be directed to the IG, the Assistant Inspector General for Auditing, or the appropriate Regional Inspector General for Auditing or Associate Deputy Assistant Inspector General for Auditing.

4. Engagement letters. Engagement letters are usually issued to RAs or HSSOs to announce the OIG's intention to initiate internal or special audits. Engagement letters are not issued when the nature of the audit requires that the audit presence not be disclosed in advance or the need for such notification has been preempted by a formal entrance conference. ~~For contract audits, the contracting officer usually informs the contractor of the impending audit.~~

5. Entrance and exit conferences. Entrance and exit conferences are held with responsible management officials immediately prior to initiation and upon completion of the audit effort. Entrance conferences are to discuss the purpose, scope, and principal features of the audit; and provide management officials the opportunity to request specific coverage in relevant areas. Exit conferences are held following the audit to discuss audit findings and results, giving management officials the opportunity to ask questions and comment on the validity of the facts. Also, for all audits ~~except~~

~~contract audits~~, the exit conference allows management officials the opportunity to comment on the reasonableness of audit conclusions and proposed recommendations.

a. Internal, and special audits. Entrance and exit conferences are held with RA, HSSOs, or their designees.

~~b. Contract audits. Entrance and exit conferences (if applicable) are held with the contractor.~~

6. Draft audit reports. Draft audit reports are issued to GSA management officials ~~and, for certain types of contract audits, to GSA contractors~~. The draft reports give the auditee the opportunity to provide written comments that are included as an appendix in the final audit report.

a. Internal and special audits. Draft audit reports are issued to Regional Administrators or Heads of Service and Staff Offices. These GSA officials have 30 calendar days to provide written comments expressing either agreement or disagreement with each of the conclusions and recommendations contained in the report. These written comments are carefully analyzed when finalizing the audit report.

~~b. Contract audits. Draft audit reports are issued for multiple award schedule postaward audits. A draft report is transmitted to the contractor for written comment.~~

7. Final audit reports and resolution. In response to final audit reports, GSA managers ~~and contracting officers~~ develop specific plans regarding actions to be taken in response to audit findings and/or recommendations. Audit report resolution is the process by which GSA managers and OIG officials agree upon the actions to be taken. Detailed procedures for audit resolution are contained in GSA Order, Internal Audit Follow-up Handbook ([ADM P 2030.2D](#)).

a. Internal and special audits. Resolution is reached based upon the formal written action plans approved by the appropriate HSSO. For regional audits, the action plans are prepared by the RA and submitted through the appropriate HSSO to the audit office that issued the report.

~~b. Contract audits. Resolution is based upon an agreement on the Decision Record submitted by the contracting officer to the audit office that issued the report.~~

8. Implementation reviews. Implementation reviews are conducted to determine whether GSA management has adequately implemented actions agreed upon for

resolved internal and special audit reports. While these reviews are normally conducted after management has completed all corrective actions, interim reviews can be conducted where complex or lengthy corrective action is specified by management.

### **Part 3. Inspection Activities**

1. General. This part provides guidance for agency officials needing information regarding inspection requests, types of inspections, steps in the inspection process, inspection resolution, and implementation reviews.
2. Inspection requests. GSA managers can request inspections of agency programs and activities by contacting the Director of the Office of Inspections and Forensic Auditing.
3. Definition of Inspection. The term “inspection” includes evaluations, inquiries, and similar types of reviews that do not constitute an audit or a criminal investigation.
4. Types of inspections. The Office of Inspections and Forensic Auditing performs inspections that are systematic and independent assessments of the design, implementation, and/or results of GSA’s operations, programs, or policies. They provide information that is timely, credible, and useful for agency managers, policymakers, and others. Inspections can be used to determine efficiency, effectiveness, impact, and/or sustainability of agency operations, programs, or policies. They often recommend improvements and identify where administrative action is necessary. Other uses of inspections include but are not limited to: providing factual and analytical information; measuring performance; determining compliance with applicable law, regulation, and/or policy; identifying savings and funds be put to better use; sharing best practices or promising approaches; and assessing allegations of fraud, waste, abuse, and mismanagement.
5. Engagement letters. Engagement letters are usually issued to RAs or HSSOs to announce the OIG's intention to initiate inspections. Engagement letters are not issued when the nature of the review requires that the inspection presence not be disclosed in advance or the need for such notification has been preempted by a formal entrance conference.
6. Entrance and exit conferences. Entrance and exit conferences are usually held by the Director of the Office of Inspections and Forensic Auditing with responsible management officials immediately prior to initiation and upon completion of the inspection. Entrance conferences are held to discuss the purpose, scope, and principal features of the inspection. They also provide GSA officials the opportunity to request

specific coverage in relevant areas. Exit conferences are held following the review to discuss inspection findings and recommendations and offer management officials the opportunity to ask questions and provide feedback.

7. Draft inspection reports. Draft inspection reports are issued to RAs or HSSOs. These GSA officials have 30 calendar days to provide written comments expressing either agreement or disagreement with each of the conclusions and recommendations contained in the report. These written comments are analyzed and are included as an appendix in the final inspection report.

8. Final reports and resolution. In response to final inspection reports, GSA managers develop an action plan in response to the conclusions and recommendations contained in the report. Report resolution is the process by which GSA managers and OIG officials agree upon the action plan. Detailed procedures for inspection resolutions are contained in GSA Order Internal Audit Follow-up Handbook ([ADM P 2030.2D](#)).

9. Implementation reviews. The Office of Inspections and Forensic Auditing conducts reviews to determine whether GSA management has adequately implemented actions agreed upon for resolved inspection reports. While these reviews are normally conducted after management has completed all corrective actions, interim reviews can be conducted where complex or lengthy corrective action is specified by management.

#### **Part 4. Investigative Activities**

1. General. This part provides guidance for agency officials needing information regarding investigative requests, activities, reports, and referrals. This part also provides information concerning actions to be taken by management in response to investigative activities and reports.

2. Investigative requests. GSA managers and officials may request investigative services or support by contacting the Special Agent in Charge in field locations or the Office of Investigations at Headquarters.

3. Types of investigative activities. The Office of Investigations conducts criminal and non-criminal investigations of GSA programs, operations and employees, and also provides investigative support and assistance to GSA managers and officials.

a. Investigations are conducted of suspected or alleged wrongdoing involving GSA operations, personnel, and funds. This includes Federal employees involved in and with GSA programs and activities, GSA contractors providing services directly to GSA or to other Federal agencies, and any persons or entities involved or participating in any

such suspected or alleged wrongdoing.

b. Investigative support and assistance is provided to GSA managers and officials as follows:

(1) Security and personnel matters. Investigative assistance in these areas is provided after the GSA Security officer's review and initial factual analysis determines that activities warrant referral to the OIG.

(2) Tort claims and indebtedness matters. Investigative assistance in these areas is provided to the GSA Office of General Counsel in connection with litigation that has been initiated by, or against, GSA.

c. Liaison with the Department of Justice and U.S. Attorneys is provided on all potential and referred civil and criminal fraud actions. Liaison and litigation assistance is supplemented by the Counsel to the Inspector General.

d. Integrity Awareness Briefings are provided to GSA employees to heighten their awareness of potential fraud, waste and mismanagement, methods for reporting suspected wrongdoing, and the responsibility of the OIG to combat such activity.

4. Reporting suspected or alleged irregularity. The Office of Investigations receives allegations and complaints about GSA operations nationwide. Suspected fraud, waste, and mismanagement can be reported to any Special Agent in Charge, or by contacting the OIG Hotline Officer in Washington, DC on (202) 501-1780, toll free on 800-424-5210, or through the mail (GSA/OIG/Hotline, Washington, DC 20405). Potentially illegal or improper activities can be reported confidentially, where the identity of the person is not disclosed outside the OIG, or anonymously.

5. Investigative interviews. All GSA employees are required to cooperate fully with OIG investigative special agents. Generally, OIG special agents request that managers direct employees under their supervision to report for investigative interviews. Under some conditions, notification to the immediate supervisor is undesirable and the special agent notifies a higher level management official. To the extent possible, interviews are arranged to avoid unnecessary inconvenience to employees or their office.

6. Investigative reports and referrals. The results of investigative activity are presented in Reports of Investigation. The OIG does not have independent authority to prosecute or litigate criminal or civil cases, or impose administrative sanctions. Accordingly, Reports of Investigation are referred to those offices or individuals possessing these

authorities. The types of referrals contained in Reports of Investigation are:

a. Administrative referrals are addressed to the Administrator, the HSSO or Regional Commissioner, whichever has line authority over the employee or program area. Generally, these referrals are for non-prosecutable wrongdoing on the part of GSA employees where disciplinary action by management may be warranted.

b. Criminal and Civil referrals are addressed to the Department of Justice, U.S. Attorney offices, or State or local prosecutors. These referrals are for criminal prosecution or civil litigation.

c. Suspension and Debarment referrals are addressed to the GSA Suspension and Debarment Division. These referrals relate to wrongdoing on the part of a firm or individual doing business with the Government. In some instances, these referrals are made while contract fraud investigations are in progress.

d. Informational referrals are addressed to the Administrator, the HSSO, or the Regional Commissioner, whichever has line authority over the employee or program area. These referrals are used to inform officials when an investigation disclosed that a complaint or allegation was unfounded.

e. Program Fraud Civil Remedies Act referrals are addressed to the GSA Office of General Counsel for administrative litigation. These referrals involve false claims and false statements with a value less than \$150,000 that are litigated by the agency in lieu of the Department of Justice.

7. Management action on referrals. Reports of Investigation addressed to GSA management officials for consideration of administrative or suspension/debarment action (or for informational consideration) reference GSA Form 9577, Disposition Report which is used to inform the OIG of the actions' taken or to be taken by management. Generally, the Disposition Report should be completed and returned within 30 days. For Reports of Investigation involving criminal and civil referrals, GSA management has no action responsibilities. However, GSA management may be requested to consider appropriate administrative or suspension/debarment action should the Department of Justice or U.S. Attorney decline prosecution.

8. Review of Disposition Report. Upon receipt of the completed Disposition Report from GSA management, the Special Agent in Charge reviews the action proposed or taken by management and evaluates whether the action is commensurate with the investigative findings and agency regulations. If the action does not appear to be commensurate, the Special Agent in Charge contacts the cognizant management official to resolve concerns.

## Add Cost Reimbursement Capabilities

### Current State:

The MAS program allows for orders to be firm-fixed price, time-and-materials, and labor-hours. MAS contracts do not allow for cost reimbursable work, and this lack of functionality directly contributes to some agencies awarding their own IDIQ contracts to the same companies already holding Schedule contracts for the same or similar work. The statutory language authorizing GSA's MAS program does not prohibit, or even address, cost reimbursement contracting. 41 U.S.C. 3307 contains a general prohibition against the use of cost type contracts solely for the acquisition of commercial items. The differences in statutory approaches leads to differing conclusions as to whether cost type task orders can be issued against otherwise appropriate commercial item contracts, like GSA Schedule contracts.

### Recommended Action:

Amend 41 U.S.C. 3307 to clarify the permissibility of issuing cost type task orders under commercial item IDIQ contracts. Amend FAR 8, 12, and 16 accordingly. Amend MAS ordering procedures accordingly to include cost reimbursement capabilities.

The Coalition recommends that GSA implement these changes by adding a Special Item Number to each of their Services Schedules (03FAC, Professional Services Schedule, IT-70, etc.) which would allow for cost-reimbursable task orders.

### Rationale:

In dialogues with DoD, the Coalition has heard repeatedly and consistently that DoD creates its own contracts (even if the Schedules already provide the solution needed) simply because the Schedules lack cost reimbursement capabilities. Reducing contract duplication is one of the Administration's principal objectives, and it is an objective that is shared by the Coalition. Until GSA Schedules allow cost reimbursement capabilities, contract duplication will continue to persist.

For more information from the Coalition on cost reimbursement capabilities, please see:

- [Contract Duplication Memorandum to DOD, GSA and OMB- Letter \(11/16/12\)](#)
- [A Welcome Message from GSA! \(5/18/17\)](#)

**Line-in/Line-out:**

**Legislative Change:**

**SEC. \_\_. CLARIFICATION ON THE ABILITY TO USE COST-TYPE CONTRACTS FOR THE ACQUISITION OF COMMERCIAL ITEMS**

*Section 3307(c) of title 41, United States Code, is amended –*

(3) *in paragraph (4) subparagraph (A), by inserting the clause “Nothing in this provision shall prohibit the use of cost type task orders on indefinite delivery, indefinite quantity contracts; and*

(4) *by revising paragraph (4) subparagraph (A)(ii) to: “a prohibition on the use of contracts priced exclusively based on cost; and.”*

(5) *by inserting “or cost type task order” into paragraph (4) subparagraph (B) and into subparagraph (C) (ii)*

**Changes to Existing Law:**

**TITLE 41, UNITED STATES CODE**

**§3307. Preference for commercial items**

\* \* \*

(4) Provisions relating to types of contracts.-

(A) Types of contracts that may be used.-The Federal Acquisition Regulation shall include, for acquisitions of commercial items-

(i) a requirement that firm, fixed price contracts or fixed price with economic price adjustment contracts be used to the maximum extent practicable;

(ii) a prohibition on use contracts priced exclusively based on cost; and

(iii) ~~(ii)~~subject to subparagraph (B), authority for use of a time-and-materials or labor-hour contract for the procurement of commercial services that are commonly sold to the general public through those contracts and are purchased by the procuring agency on a competitive basis.

(iv) Nothing in this provision shall prohibit the use of cost type task orders on indefinite quantity, indefinite delivery contracts.

(B) When time-and-materials or labor-hour contract, or cost type task order may be used. A time-and-materials or labor-hour contract cost type task order may be used pursuant to the authority referred to in subparagraph (A)(iii)-

- (i) only for a procurement of commercial services in a category of commercial services described in subparagraph (C); and
- (ii) only if the contracting officer for the procurement-
  - (I) executes a determination and findings that no other contract type is suitable;
  - (II) includes in the contract a ceiling price that the contractor exceeds at its own risk; and
  - (III) authorizes a subsequent change in the ceiling price only on a determination, documented in the contract file, that it is in the best interest of the procuring agency to change the ceiling price.

(C) Categories of commercial services.-The categories of commercial services referred to in subparagraph (B) are as follows:

- (i) Commercial services procured for support of a commercial item, as described in section 103(5) of this title.
- (ii) Any other category of commercial services that the Administrator for Federal Procurement Policy designates in the Federal Acquisition Regulation for the purposes of this subparagraph on the basis that-
  - (I) the commercial services in the category are of a type of commercial services that are commonly sold to the general public through use of time-and-materials or labor-hour contracts or cost type task order; or
  - (II) it would be in the best interests of the Federal Government to authorize use of time-and-materials or labor-hour contracts, or cost type task order for purchases of the commercial services in the category.

### **Regulatory Changes:**

#### **FAR 16.301-3 Limitations.**

- (a) A cost-reimbursement contract may be used only when –
  - (1) The factors in 16.104 have been considered;
  - (2) A written acquisition plan has been approved and signed at least one level above the contracting officer;
  - (3) The contractor’s accounting system is adequate for determining costs applicable to the contract or order; and
  - (4) Prior to award of the contract or order, adequate Government resources are available to award and manage a contract other than firm-fixed-priced (see 7.104(e)). This includes appropriate Government surveillance during performance in accordance with 1.602-2, to provide reasonable assurance that efficient methods and effective cost controls are used.

(i) Designation of at least one contracting officer's representative (COR) qualified in accordance with 1.602-2 has been made prior to award of the contract or order; and

(ii) Appropriate Government surveillance during performance to provide reasonable assurance that efficient methods and effective cost controls are used.

(b) The use of cost-reimbursement contracts is prohibited for the acquisition of commercial items (see Parts 2 and 12). Nothing in this provision shall prohibit the use of cost reimbursable type task orders on indefinite quantity, indefinite delivery contracts.

#### **FAR 12.207 Contract type.**

(a) Except as provided in paragraph (b) of this section, agencies shall use firm-fixed-price contracts or fixed-price contracts with economic price adjustment for the acquisition of commercial items.

(b)(1) A time-and-materials contract ~~or~~ labor-hour contract (see subpart 16.6), or cost-reimbursable type task order contract may be used for the acquisition of commercial ~~services~~ items when—

(i) The item service is acquired under a contract awarded using—

(A) Competitive procedures (*e.g.*, the procedures in 6.102, the set-aside procedures in subpart 19.5, or competition conducted in accordance with Part 13);

(B) The procedures for other than full and open competition in 6.3 provided the agency receives offers that satisfy the Government's expressed requirement from two or more responsible offerors; or

(C) The fair opportunity procedures in 16.505 (including discretionary small business set-asides under 16.505(b)(2)(i)(F)), if placing an order under a multiple-award delivery-order contract; and

(ii) The contracting officer—

(A) Executes a determination and findings (D&F) for the contract, in accordance with paragraph (b)(2) of this section (but see paragraph (c) of this section for indefinite-delivery contracts), that no other contract type authorized by this subpart is suitable;

(B) Includes a ceiling price in the contract or order that the contractor exceeds at its own risk; and

(C) Prior to increasing the ceiling price of a time-and-materials or labor-hour, or cost reimbursable contract or order, shall—

(1) Conduct an analysis of pricing and other relevant factors to determine if the action is in the best interest of the Government;

(2) Document the decision in the contract or order file; and

(3) When making a change that modifies the general scope of—

- (i) A contract, follow the procedures at 6.303;
- (ii) An order issued under the Federal Supply Schedules, follow the procedures at 8.405-6; or
- (iii) An order issued under multiple award task and delivery order contracts, follow the procedures at 16.505(b)(2).

(2) Each D&F required by paragraph (b)(1)(ii)(A) of this section shall contain sufficient facts and rationale to justify that no other contract type authorized by this subpart is suitable. At a minimum, the D&F shall –

- (i) Include a description of the market research conducted (see 10.002(e));
- (ii) Establish that it is not possible at the time of placing the contract or order to accurately estimate the extent or duration of the work or to anticipate costs with any reasonable degree of confidence;
- (iii) Establish that the requirement has been structured to maximize the use of firm-fixed-price or fixed-price with economic price adjustment contracts (*e.g.*, by limiting the value or length of the time-and-material/labor-hour contract or order; establishing fixed prices for portions of the requirement) on future acquisitions for the same or similar requirements; and
- (iv) Describe actions planned to maximize the use of firm-fixed-price or fixed-price with economic price adjustment contracts on future acquisitions for the same requirements.

(3) See 16.601(d)(1) for additional approval required for contracts expected to extend beyond three years.

(4) See 8.404(h) for the requirement for determination and findings when using Federal Supply Schedules.

(c)(1) Indefinite-delivery contracts (see subpart 16.5) may be used when –

- (i) The prices are established based on a firm-fixed-price or fixed-price with economic price adjustment; or
- (ii) Rates are established for commercial services acquired on a time-and-materials, ~~or~~ labor-hour or cost-reimbursable basis.

(2) When an indefinite-delivery contract is awarded with services priced on a time-and-materials ~~or~~ labor-hour or cost-reimbursable basis, contracting officers shall, to the maximum extent practicable, also structure the contract to allow issuance of orders on a firm-fixed-price or fixed-price with economic price adjustment basis. For such contracts, the contracting officer shall execute the D&F required by paragraph (b)(2) of this section, for each order placed on a time-and-materials ~~or~~ labor-hour or cost-

reimbursable basis. Placement of orders shall be in accordance with subpart 8.4 or 16.5, as applicable.

(3) If an indefinite-delivery contract only allows for the issuance of orders on a time-and-materials ~~or~~ labor-hour or cost-reimbursable basis, the D&F required by paragraph (b)(2) of this section shall be executed to support the basic contract and shall also explain why providing for an alternative firm-fixed-price or fixed-price with economic price adjustment pricing structure is not practicable. The D&F for this contract shall be approved one level above the contracting officer. Placement of orders shall be in accordance with subpart 16.5.

(d) The contract types authorized by this subpart may be used in conjunction with an award fee and performance or delivery incentives when the award fee or incentive is based solely on factors other than cost (see 16.202-1 and 16.203-1).

(e) Use of any contract type other than those authorized by this subpart to acquire commercial items is prohibited.

#### **FAR 8.404 Use of Federal Supply Schedules.**

(d) *Pricing.*

(i) Supplies offered on the schedule are listed at fixed prices. Services offered on the schedule are priced either at hourly rates, or at a fixed price for performance of a specific task (e.g., installation, maintenance, and repair).

(ii) In addition to (i) above, Federal Supply Schedule contracts may address allowable cost in order to facilitate the award of cost reimbursable type task orders.

~~(iii)~~ (ii) GSA has already determined the prices of supplies and fixed-price services, and rates for services offered at hourly rates, under schedule contracts to be fair and reasonable. Therefore, ordering activities are not required to make a separate determination of fair and reasonable pricing, except for a price evaluation as required by 8.405-2(d). By placing an order against a schedule contract using the procedures in 8.405, the ordering activity has concluded that the order represents the best value (as defined in FAR 2.101) and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the Government's needs. Although GSA has already negotiated fair and reasonable pricing, ordering activities may seek additional discounts before placing an order (see 8.405-4).

## **Improve the eBuy Platform**

### **Current State:**

Current restrictions within the General Services Administration's ("GSA") platform reduce the efficiency of the Multiple Award Schedules ("MAS") program. Specifically, not all MAS contractors receive adequate notice of opportunities, and thus, may not be aware of teaming opportunities and may not have sufficient time to respond to specific agency requirements. Ultimately, these inefficiencies negatively impact the Federal government's access to innovative solutions.

### **Recommended Action:**

The Coalition recommends that the following changes be made to the eBuy platform:

- Increase the transparency of eBuy by enabling contractors under a specific Special Item Number ("SIN") to receive notifications for all opportunities, including small business set-asides.
  - In addition, publish old Request for Quotations ("RFQ") on eBuy.
- To enhance the data analytic capabilities of the Federal government, modify the eBuy platform so that it collects the transactional data of Federal customers.
- Enhance the usability of the platform by making changes that are designed to improve the user interface.

### **Rationale:**

Through these recommended changes, the eBuy platform would enable the Federal government to realize lower prices by increasing efficiency and competition. Further, it would promote better buying decisions by Federal agencies, as it would provide a data-driven analysis for these agencies to use when procuring goods and services.

### **Line-in/Line-out:**

None required, GSA already has the authority to manage the eBuy system.

## Determining Fair and Reasonable Pricing on Schedule Orders

### Current State:

On March 13, 2014, Defense Procurement and Acquisition Policy (DPAP) issued a class deviation “clarifying” (*i.e.* establishing) that DoD ordering activities are responsible for determining prices fair and reasonable for Blanket Purchase Agreements (BPAs), task orders, and delivery orders issued under GSA’s Multiple Award Schedule program. This deviation has generated significant discussion, analysis, and debate in the procurement community regarding the balance between procedures and outcomes when using the GSA’s Schedules streamlined ordering processes.

The impetus behind the DPAP deviation is a growing concern that, when using the GSA Schedules program, DoD contracting officers are not doing any analysis of proposed prices at the BPA and task order level. Rather, DoD contracting officers merely are relying on the language in FAR 8.4 that states GSA has already determined Schedule prices fair and reasonable, and, therefore, ordering activities are not required to make a separate determination of fair and reasonable pricing. See FAR 8.404(d). In essence, the concern is that the FAR 8.4 language promotes a lack of due diligence on the part of DoD contracting officers in evaluating task order and BPA pricing under the GSA schedules program. It should be noted that FAR 8.4 actually includes additional price analysis requirements for orders and BPAs requiring a statement of work.

DPAP’s concern is understandable. Some due diligence by the contracting officer is appropriate to ensure that the government is getting a fair deal at the task order level under multiple award contracts, including the GSA Schedules. At the same time, however, a balance should be struck recognizing that one of the important benefits of multiple award contracts is the streamlined task order competition process, a process mandated by statute and regulation. Currently, that balance has not been struck. Our members report that some DOD Contracting Officers are asking for cost data (and in some cases Cost and Pricing Data Certifications, as well) on schedule orders. Such requests are not appropriate or helpful for commercial item acquisition and add significant cost to contractors which, ultimately, will be passed on to the government.

Importantly, the deviation establishes an approach that is inconsistent with the treatment of orders under multiple award contracts. A review and comparison of FAR 16.505(b)(3) and FAR 8.404(d) reveals guidance that is essentially the same regarding the determination of fair and reasonable pricing at the order level. In both cases, the regulatory guidance informs contracting officers that if the prices are established at the contract level, the pricing policies and procedures of FAR 15.4 do not apply. FAR

8.404(d) states that since GSA has determined contract prices for supplies and service fair and reasonable; the ordering activity does not have to do a separate determination of fair and reasonable pricing at the order level. FAR 16.505(b)(3) states that:

“[i]f the contract *did not* establish the price for the supply or service, the contracting officer *must* establish prices for each order using the policies and methods in subpart 15.4.” [*Emphasis added.*]

As such, FAR 16.505(b)(3) also makes clear that if the prices **have been** established at the contract level under a multiple award contract, then the contracting officer **does not** have to make a fair and reasonable price determination pursuant to FAR 15.4.

**Recommended Action:**

1. Add language to clarify that, prior to the award of task and delivery orders placed under all IDIQ contracts (including those placed against the GSA Multiple Award schedule), contracting officials must exercise due diligence to ensure that the government is getting a fair and reasonable pricing for the item purchased in light of the particular circumstances of the order.
2. Add language to clarify that the formal price negotiation methods of FAR 15.4 are not required or encouraged. Requests for certified cost and pricing data are not authorized.
3. Clarify that additional fair and reasonable price determinations are not required for orders below the micro-purchase threshold.

**Line-in/Line-out:**

**Regulatory Change:**

**Class Deviation – Determination of Fair and Reasonable Prices When Using Federal Supply Schedule Contracts**

**8.404(d) Pricing. (DEVIATION)**

Supplies offered on the schedule are listed at fixed prices. Services offered on the schedule are priced either at hourly rates, or at a fixed price for the performance of a specific task (e.g. installation, maintenance, and repair). GSA has determined the prices of supplies and fixed-price services, and rates for services offered at hourly rates, to be fair and reasonable for the purpose of establishing the schedule contract. GSA's determination does not relieve the ordering activity contracting officer from the responsibility of making a determination of fair and reasonable pricing for individual orders above the micro-purchase threshold, BPAs, and orders under BPAs above the micro-purchase threshold, using the proposal analysis techniques at 15.404-1. The complexity and circumstances of each acquisition should determine the level of detail of the analysis required. Requests for certified cost and pricing data are not authorized.

**16.505(b)(3) Pricing orders. (DEVIATION)**

If the contract did not establish the price for the supply or service, the contracting officer must establish prices for each order using the policies and methods in subpart 15.4. A determination of fair and reasonable pricing does not relieve the ordering activity contracting officer from the responsibility of making a determination of fair and reasonable pricing for individual orders above the micro-purchase threshold. The complexity and circumstances of each acquisition should determine the level of detail of the analysis required.

## **Reform Procedures for Blanket Purchase Agreements**

### **Current State:**

In 2011, the FAR Council implemented new ordering procedures for the GSA Schedules, which created competition requirements, consistent with Section 863 of the 2009 National Defense Authorization Act (NDAA). The Coalition supported the effort to modernize the competition requirements. The FAR Council's interim rule to implement Section 863, however, also created unduly restrictive procedures for the establishment and use of Blanket Purchase Agreements (BPAs) under the Schedules program. These restrictions included limiting single award BPAs to a one-year base period and four one-year options, directing contracting officers to give preference to multiple award BPAs over single award BPAs, and limiting the value of single award BPAs to \$112 million.

### **Recommendation:**

Remove the restrictions on single award BPAs.

### **Rationale:**

Multiple and single award BPAs are both valuable acquisition tools that should be available to contracting officers. Indeed, there are many situations where multiple award BPAs are not the best fit given an agency's requirements, especially where an agency has well-defined requirements for a specific recurring need. In such circumstances, a single award BPA likely will provide a cost-effective solution to meet the agency's needs.

Line-in/Line-out:

FAR Change:

### Subpart 8.4 Federal Supply Schedules

#### 8.405-3 Blanket purchase agreements (BPAs).

(a) Establishment.

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~~(3)(i) The ordering activity contracting officer shall, to the maximum extent practicable, give preference to establishing multiple-award BPAs, rather than establishing a single-award BPA.~~

~~(ii) No single-award BPA with an estimated value exceeding \$112 million (including any options), may be awarded unless the head of the agency determines in writing that —~~

~~(A) The orders expected under the BPA are so integrally related that only a single source can reasonably perform the work;~~

~~(B) The BPA provides only for firm-fixed priced orders for —~~

~~(1) Products with unit prices established in the BPA; or~~

~~(2) Services with prices established in the BPA for specific tasks to be performed;~~

~~(C) Only one source is qualified and capable of performing the work at a reasonable price to the Government; or~~

~~(D) It is necessary in the public interest to award the BPA to a single source for exceptional circumstances.~~

~~(iii) The requirement for a determination for a single-award BPA greater than \$112 million is in addition to any applicable requirement for a limited-source justification at 8.405-6. However, the two documents may be combined into one document.~~

~~(i)(iv) In determining how many multiple-award BPAs to establish or that a single-award BPA is appropriate, the contracting officer should consider the following factors and document the decision in the acquisition plan or BPA file:~~

~~(A) The scope and complexity of the requirement(s);~~

~~(B) The benefits of on-going competition and the need to periodically compare multiple technical approaches or prices;~~

~~(C) The administrative costs of BPAs; and~~

(D) The technical qualifications of the schedule contractor(s).

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- (4) Minimum documentation. The ordering activity contracting officer shall include in the BPA file documentation the –
- i. Schedule contracts considered, noting the contractor to which the BPA was awarded;
  - ii. Description of the supply or service purchased;
  - iii. Price;
  - iv. Required justification for a limited-source BPA (see 8.405-6), if applicable;
  - ~~v. Determination for a single-award BPA exceeding \$112 million, if applicable (see (a)(3)(ii) of this section);~~
  - ~~vi. Documentation supporting the decision to establish multiple-award BPAs or a single-award BPA (see (a)(3)(iv));~~
  - vii. Evidence of compliance with paragraph (b) of this section, for competitively awarded BPAs, if applicable; and
  - viii. Basis for the award decision. This should include the evaluation methodology used in selecting the contractor, the rationale for any tradeoffs in making the selection, and a price reasonableness determination for services requiring a statement of work.

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(d) Duration of BPAs.

- a. ~~Multiple-award~~ BPAs generally should not exceed five years in length, but may do so to meet program requirements.
- ~~b. A single-award BPA shall not exceed one year. It may have up to four one-year options. See paragraph (e) of this section for requirements associated with option exercise.~~
- c. Contractors may be awarded BPAs that extend beyond the current term of their GSA Schedule contract, so long as there are option periods in their GSA Schedule contract that, if exercised, will cover the BPA's period of performance.

## **Business Case Analyses for Certain Interagency and Agency-Specific Acquisitions**

### **Current State:**

In 2011, the Office of Federal Procurement Policy (OFPP), issued a memorandum on “The Development, Review, and Approval of Business Cases for certain Interagency and Agency-Specific Acquisitions.” The memo outlines the process for developing, reviewing, and approving business cases to support the establishment and renewal of GWACs, multi-agency contracts, BPAs, and agency-specific contracts.

### **Recommended Action:**

Update the business case process to make the agency business cases, as well as the OFPP approvals and rationales available to the public.

### **Rationale:**

The memorandum was issued to encourage government buyers to utilize existing contract vehicles before creating their own contracts and engaging in the expensive process of contract duplication. Since the issuance of the memo, the Coalition is not aware of a single business case that has been rejected and few agencies will make their businesses cases available to public. The business cases, as well as the determinations from OFPP, are important documents which should be shared with industry as part of the overall review and approval process.

Additionally, while FAR 17.502-1 includes the business case process, the clause omits agency-specific contracts, even though they are explicitly included in the OFPP memorandum. This oversight should be corrected immediately.

**Line-in/Line-out:**

**FAR Change:**

### **Subpart 17.5 – Interagency Acquisitions**

#### **17.502-1 General.**

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(c) *Business-case analysis requirements for multi-agency contracts and governmentwide acquisition contracts.* In order to establish a multi-agency or governmentwide acquisition contract or covered agency-specific contract or covered agency-specific blanket purchase agreement, a business-case analysis must be prepared by the servicing agency and approved in accordance with the Office of Federal Procurement Policy (OFPP) business case guidance, available at <http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/development-review-and-approval-of-business-cases-for-certain-interagency-and-agency-specific-acquisitions-memo.pdf>. The business-case analysis shall –

- (1) Consider strategies for the effective participation of small businesses during acquisition planning (see 7.103(u));
- (2) Detail the administration of such contract, including an analysis of all direct and indirect costs to the Government of awarding and administering such contract;
- (3) Describe the impact such contract will have on the ability of the Government to leverage its purchasing power, *e.g.*, will it have a negative effect because it dilutes other existing contracts;
- (4) Include an analysis concluding that there is a need for establishing the multi-agency contract; and
- (5) Document roles and responsibilities in the administration of the contract.

In addition to being posted on the MAX website, the agency must publicly release the business case analysis.

## Shifting the Preference from Open Market to Existing Vehicles

### Current State:

FAR 17.502-2 requires that before an agency can utilize a GWAC they must complete a Determinations and Findings in accordance with the Economy Act. The clause creates a barrier for the use of the GWAC and to a lesser extent, the GSA Schedules program.

### Recommended Action:

Remove the requirement for a determinations and findings for the use of OMB-approved GWACs. Make corresponding changes for the GSA Schedules Program

Alternatively, DPAP could issue a blanket waiver for all GWACs and Schedules, which would amount to the same effect.

### Rationale:

The GWACs are popular, well-respected, and effective contract vehicles, among both Government and industry stakeholders, and it is not necessary to maintain such an onerous process for using them. Additionally, the Economy Act does not require that each individual order be approved in this manner, only that the “the head of the ordering agency or unit decides the order is in the best interest of the United States Government.”

Encouraging the use of existing contracts will immediately reduce contract duplication and lead to savings for the Government.

For more information from the Coalition on contract duplication and the utilization of existing vehicles, please see:

- [Revisiting Coalition Recommendations for Streamlining DoD Contracting](#)

**Line-in/Line-out:**

**Legislative Change:**

**SEC. \_\_. USE OF INTERAGENCY CONTRACTS**

- (a) *IN GENERAL.* – Section 865(b)(1) of the National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417; Stat. 4550) is amended –
- (1) *by striking subparagraph (B); and*
  - (2) *by redesignating subparagraph (C) as subparagraph (B)*
- (b) Section 865(d)(3) of the National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417; Stat. 4550) is amended –
- (1) *by deleting Federal Supply Schedules above \$500,000 and Government wide acquisition contracts*

**Changes to Existing Law:**

**SEC. 865 PREVENTING ABUSE OF INTERAGENCY CONTRACTS**

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(b) REGULATIONS REQUIRED. –

(1) *IN GENERAL.* – Not later than one year after the date of enactment of this Act, the Federal Acquisition Regulation shall be revised to require that all interagency acquisitions –

(A) include a written agreement between the requesting agency and the service agency assigning responsibility for the administration and management of the contract;

~~(B) include a determination that an interagency acquisition is the best procurement alternative; and~~

~~(C)~~(B) include sufficient documentation to ensure an adequate audit.

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(d) DEFINITIONS. – In this section:

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(3) The term “interagency contract” means a procedure by which an executive agency needing supplies or services (the requesting agency) obtains them from another executive agency (the servicing agency). The term includes acquisitions under section 1535 of title 31, United States Code (commonly referred to as the “Economy Act”); ~~Federal Supply Schedules over \$500,000, and Government wide acquisition contracts.~~

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## FAR Changes:

### 17.500 Scope of subpart.

(a) This subpart prescribes policies and procedures applicable to all interagency acquisitions under any authority, except as provided for in paragraph (c) of this section. In addition to complying with the interagency acquisition policy and procedures in this subpart, nondefense agencies acquiring supplies and services on behalf of the Department of Defense shall also comply with the policy and procedures at subpart 17.7.

(b) This subpart applies to interagency acquisitions, see 2.101 for definition, when—

(1) An agency needing supplies or services obtains them using another agency's contract; or

(2) An agency uses another agency to provide acquisition assistance, such as awarding and administering a contract, a task order, or delivery order.

(c) This subpart does not apply to—

(1) Interagency reimbursable work performed by Federal employees (other than acquisition assistance), or interagency activities where contracting is incidental to the purpose of the transaction; or

(2) Orders ~~of \$550,000 or less~~ issued against Federal Supply Schedules.

(3) "Governmentwide acquisition contract (GWAC)" ~~means a task order or delivery order contract for information technology established by one agency for Governmentwide use that is operated—~~

~~(1) By an executive agent designated by the Office of Management and Budget pursuant to 40 U.S.C. 11302(e); or~~

~~(2) Under a delegation of procurement authority issued by the General Services Administration (GSA) prior to August 7, 1996, under authority granted GSA by former section 40 U.S.C. 759, repealed by Pub. L. 104-106. The Economy Act does not apply to orders under a Governmentwide acquisition contract as defined in FAR 2.101.~~

## **Assisted Acquisition Centers of Excellence**

### **Current State:**

In accordance with FAR 17.502-1, DOD must complete a determination of best procurement approach in order to use assisted acquisition services, including acquisitions managed by GSA's FEDSIM, an organization that is considered by many Coalition members to be one of the most effective contracting centers in the Federal Government. FEDSIM successfully handles billions of dollars worth of procurements each year and has a 99% protest win rate. These determinations, however, delay the procurement process and ultimately duplicate the requirements in FAR 7.1 – Acquisition Plans.

### **Recommended Action:**

Create a process whereby these determinations can be waived for assisted acquisition centers that have a history of contracting excellence.

### **Rationale:**

Assisted acquisitions play a crucial role in the procurement process, particularly if a contracting office does not have the expertise or personnel to conduct complex high-value procurements. Organizations, such as FEDSIM, may have experience and capabilities to provide the best outcomes for DOD buyers, yet buyers may be deterred from using them because of this process.

**Line-in/Line-out:**

**Legislative Change:**

**SEC. \_\_. ASSISTED ACQUISITION CENTERS OF EXCELLENCE**

(c) *IN GENERAL.* – Section 865(b)(1) of the National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417; Stat. 4550) is amended –

(1) *by adding the following new paragraph:*

(2) *EXCEPTIONS FOR CERTAIN ASSISTED ACQUISITION CENTERS.* – The Director of the Office of Management and Budget may designate ‘Assisted Acquisition Centers of Excellence’ which shall be exempted from the requirement in 17.502-1(a)(1). Assisted Acquisition Centers of Excellence shall demonstrate a history of:

- i. Meeting schedule, performance, and delivery requirements*
- ii. Cost effectiveness for agency buyers”*

**FAR Change:**

**Subpart 17.5 Interagency Acquisitions**

**17.502 Procedures**

**17.502-1 General.**

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(d) Based on guidance developed by OFPP, the OMB Director may designate ‘Assisted Acquisition Centers of Excellence’ which shall be exempted from the requirement in 17.502-1(a)(1). Assisted Acquisition Centers of Excellence shall demonstrate a history of:

- (1) Meeting schedule, performance, and delivery requirements
- (2) Cost effectiveness for agency buyers

## **Online Marketplaces**

### **Current State:**

Recently, policy discussion has focused on the potential of commercial online marketplace platforms to streamline the acquisition process. When considering the potential of these online marketplace platforms, however, it is important to recognize that, although government and commercial entities may have similar operational processes, they are not identical. Therefore, it is imperative that any proposed online marketplace platform solution account for the various legal and policy drivers, as well as the mission of the government, which may preclude the wholesale adoption of this commercial practice.

### **Recommended Action:**

The Coalition recommends that, prior to any possible adoption of commercial online marketplace platforms by the government for the purpose of procuring commercial items, that rigorous research and vetting be undertaken to evaluate and understand the various implications that such platforms could have on the Federal procurement process.

### **Rationale:**

Although the concept of an online commercial marketplace solution could potentially be an important undertaking for the Federal procurement community, to date, there has not been significant deliberation over, and accounting for, what the adoption of a such a solution would mean for the Federal procurement process. Indeed, Congress has yet to hold any hearings to examine the key policy concerns that could potentially arise from the wholesale adoption of this commercial practice and there is lack of available research related to how the government would operationalize this concept.

### **Line-in/Line-out:**

None.