



August 31, 2017

Jeff Koses
Senior Procurement Executive
General Services Administration
1800 F St. NW
Washington, DC 20405

Subject: Status of GSA's Order Level Materials and Commercial Supplier Agreement Proposed Rules

Dear Mr. Koses,

The Coalition for Government Procurement (the Coalition), on behalf of our member firms, is writing to express our concern regarding the status of the Order Level Materials Final Rule (GSAR Case 2016-G506) and the Unenforceable Commercial Supplier Agreement Terms Final Rule (GSAR Case 2015-G512). The General Services Administration (GSA) published these proposed rules in the Federal Register 12 months ago and 15 months ago, respectively. Significantly, the Semi-Annual Regulatory Agenda for GSA, which was released earlier this year, listed the expected date for the final rules as June 1, 2017. To date, neither rule has been issued.

The Coalition strongly recommends that GSA and the Office of Management and Budget finalize and issue these two rules, and, in so doing, incorporate the feedback which the Coalition and its members have provided. Finalizing and issuing these rules is vital step in adopting commercial practices consistent with the Federal Acquisition Streamlining Act of 1994 and improving the efficiency and effectiveness of the GSA Schedules for customer agencies and industry partners. In addition as addressed below, this action would be consistent with Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, (the EO) which directed the Federal Government to reduce the costs of regulations imposed on industry.

Order Level Materials Proposed Rule

The Order Level Materials (OLM) proposed rule will reduce contracting costs for government and industry by increasing the GSA Schedule program's capacity to provide comprehensive, commercial solutions. The federal government has a management goal of reducing unnecessary contract duplication through use of pre-existing contract vehicles. See the Office of Management and Budget (OMB) Memorandum M-17-22, *Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce*. The OMB memo directs agencies to consider using government-wide contracts, including the Schedules, for the acquisition of common goods and services through the GSA Schedules program.

GSA schedule contracts offer a vast array of products and services. Agencies may not, however, be able to use the program effectively to acquire solutions and complex projects when some, typically small, portion of the requirement is not available under a Schedule contract. The current program does not provide an efficient method for acquiring non-contract items (often referred to as "Other

Direct Costs” or ODC’s). Rather than risking or delaying completion of an acquisition to cover ODCs, an agency may choose to establish a more flexible contract option which largely duplicates MAS contract coverage.

Notably, FAR clause 52.212-4, Alternate 1, already authorizes a contract mechanism for competing, acquiring, and reimbursing contractors, at the order level for ODC’s, materials, and indirect clauses. To the best of the Coalition’s knowledge, the MAS program remains the only commercial item contracting program that has not fully incorporated the use of ODC’s, and thus, the program places its own contracts at a competitive disadvantage relative to other contracting options. Without an ODC mechanism in place, agencies are forced to look to alternative contracting vehicles.

An improved GSA Schedules program would reduce the need for duplicative contracts. Unnecessary contract duplication increases administrative costs for both Government and industry. Agencies must devote time and energy to developing duplicative contracts, which leads to increased bid, proposal, and contract administration costs. The Coalition has estimated that contract duplication will cost large contractors at least \$2 million per year and that it will cost small contractors at least \$500,000 per year to maintain contracts that offer the same or similar service to their GSA Schedule contract.

The Coalition recommends that GSA immediately issue the final GSAR rule, but with the following changes incorporated:

- Remove the requirement for contractors to submit three quotes for price reasonableness.
- Remove requirements for contractors to report OLM’s through a separate Special Item Number.
- 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.

As noted in the EO, “it is the policy of executive branch to...manage the costs associated with the governmental imposition of private expenditures to comply with Federal regulations.” The revised OLM rule would advance the Administration’s agenda by lowering the regulatory burdens for contractors.

Unenforceable Commercial Supplier Agreement Terms

The Unenforceable Commercial Supplier Agreement Terms Proposed Rule seeks to streamline “end user license agreement” reviews and contract negotiations. The rule would streamline the process by requiring contract language that defers to Federal law where there is a conflict with commercial terms. This approach will decrease the time spent negotiating specific contract terms for both Government and industry.

The Coalition supports the proposed rule’s intent, but we remain concerned that, in many respects, the rule goes too far. We are concerned especially with the proposed rule’s significant change to the “order of precedence” language of the commercial item clause. GSA’s July 2015 class deviation created a preference for government terms and conditions over commercial terms. As the Coalition has pointed out, such a preference is inconsistent with law, regulation, and commercial practice. Further, it presents unnecessary risks for commercial item contractors. The increased risk, decreases contractor incentive to bring innovative solutions to the Federal marketplace, and thus, it

undermines the government's ability to achieve the very outcomes intended by the issuance of the proposed rule.

As noted in our comments on the proposed rule, the Coalition recommends that GSA reverse the change to the order of precedence and return to the FAR clause language that existed prior to the July 2015 class deviation. The changes made by the July 2015 class deviation go beyond what is necessary for GSA's purposes (especially considering that GSA has already identified specific commercial terms which will not be accepted by the government). By establishing a preference for all government terms and conditions, the changes introduced in the July 2015 class deviation contradict numerous FAR clauses, as well as FASA, and thus, provides fertile ground for wasteful conflict resolution.

Issuing a revised final rule that returns to a preference for commercial terms and conditions will advance the Administration's management policies. Office of Management and Budget Memorandum M-17-22, *Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce*, explained that the Federal Government should be "applying best commercial buying practices" to more effectively manage contract spending. A revised final rule that returns to the standard preference for commercial terms will reduce costs and administrative burdens for contractors, consistent with the Administration's policies on reducing regulations and controlling regulatory costs.

The Coalition requests that GSA and OMB immediately incorporate our feedback and issue the final rule. The revised Commercial Supplier Agreement Terms rule would result in a significant reduction in costs for companies and government by streamlining the contract negotiation process and observe commercial best practices.

Each day that these rules remain unissued results in higher operational and administrative costs for government and industry.

Thank you for considering the Coalition's request for an update on the Order Level Materials Proposed Rule and the Commercial Supplier Agreement Proposed Rule. If there are any questions, please contact me at (202) 331-0975 or rwaldron@thecgp.org.

Sincerely,

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

Roger Waldron
President