



## The Coalition for Government Procurement

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Donna Yesner  
McKenna, Long & Aldridge

1990 M Street NW  
Suite 450  
Washington, DC 20036

Phone: 202.331.0975

Fax: 202.822.9788

[www.thecgp.org](http://www.thecgp.org)

March 15, 2011

Houston Taylor

Assistant Commissioner

Office of Acquisition Management

General Services Administration

2200 Crystal Drive

Arlington, VA 22202

Subject: FAR Part 51 Deviation

Dear Houston,

The Coalition for Government Procurement ("the Coalition") sincerely appreciates the opportunity to engage with the Office of Acquisition Management on a number of issues important to the contractor community. One topic of particular interest to member companies that do business with the Public Buildings Service is the FAR Part 51 Deviation. The Coalition believes that the deviation is a positive first step. However, as currently structured the deviation will have limited impact. This letter responds to GSA's request for further feedback and outlines our concerns regarding the limited terms of the deviation.

The Coalition is a non-profit association of approximately 300 companies offering commercial services and products to Federal agencies through the General Services Administration's ("GSA's") Multiple Award Schedule ("MAS") program and other governmentwide contract vehicles. Our members account for approximately 70 percent of the business

conducted through MAS contracts and about half of the commercial solutions purchased annually by the Federal Government. In addition, our members are contractors on many agency wide multiple award contracts as well as multi-agency contracts ("MACs"). Coalition members include small, medium and large business concerns. The Coalition is proud to have worked with government officials for over 30 years to promote common sense acquisition solutions.

In February 2010, GSA approved a deviation to FAR Part 51.1 expanding the authority of GSA contractors to use GSA sources of supply (the Multiple Award Schedule and the Global Supply programs) for the cost reimbursement portion of time-and-material/labor hour contracts and orders. There are four criteria that must be met in order to use the Part 51 deviation: 1) primary orders must be issued on a T&M/LH basis, 2) the secondary orders must be placed in accordance with FAR 8.405-1, Ordering Procedures for Supplies, and Services Not Requiring a Statement of Work, 3) supplies and/or services must be ancillary to the primary purpose of the order, and 4) use of the deviation is limited to the Federal Government.

The deviation includes two significant limitations. First, the deviation does not allow the buying contractor to include a fixed amount as a material handling fee for the administrative costs associated with acquisition of the MAS products and subsequent delivery to the government. Second, the authorization to use the MAS program or the Global Supply program as a source of supply is limited to GSA contractors.

#### **I. The Deviation Prohibits Reimbursement of Fixed Amount as a Material Handling Fee**

Sections 3.2., 4.2.1.2 and 5.0 prohibit any additional fee associated with items procured by a buying contractor. The inability to recover any costs

associated with the acquisition and delivery of MAS products to the Government will severely limit the effectiveness of the deviation. Buying contractors will not seek or utilize the authorization if reasonable administrative costs associated with the acquisition and delivery of MAS products cannot be reimbursed. In essence, the deviation creates a framework whereby a contractor must absorb any additional costs associated with utilizing the MAS program. This approach is simply not economically viable for GSA contractors using the MAS program as a source of supply.

Moreover, the FAR contemplates the negotiation of a material handling fee as an indirect cost under commercial time-and-material/labor hour contracts. FAR 52.212-4(i)(1)(ii)(2), Alternate I, which is included in most MAS service contracts, states the following:

*Indirect Costs (Material Handling, Subcontract Administration, etc.,).* The Government will reimburse the Contractor for indirect costs on a pro-rata basis over the period of contract performance at the following fixed price: [Insert a fixed amount for the indirect costs and payment schedule. Insert "\$0" if no fixed price reimbursement for indirect costs will be provided. (If this is an indefinite delivery contract, the Contracting Officer may insert "Each order must list separately the fixed amount for the indirect costs and payment schedule or, if no reimbursement for indirect costs, insert 'None')."]

By prohibiting any reimbursement of indirect costs, GSA has severely limited the utility of the deviation. There may be circumstances where a no fixed price reimbursement for indirect costs is appropriate for a particular task order. However, there may be other circumstances where such a fee is appropriate. The deviation should be flexible. Ordering activities should be able to exercise their business judgment in addressing indirect costs at the task order level. The Coalition recommends that GSA revoke the prohibition and allow the negotiation of a fixed amount as a material handling charge. This approach would provide a sound framework for both GSA and its contractors utilizing the MAS program as a source of supply. The key is the negotiation of a fixed fee as contemplated by the



FAR. A fixed fee limits the cost risk to the Government while allowing the contractor some reimbursement for reasonable indirect costs associated with the acquisition and delivery of MAS products as materials under a time-and-material/labor hour contract or task order. Appropriate reimbursement of such costs contributes to successful contract performance as contractors are less likely to take performance shortcuts to compensate for costs that are not reimbursed. It will also likely increase competition and save taxpayer money by making access to the MAS marketplace a viable source of supply for GSA contractors seeking competitively priced materials under time-and-material/labor hour contracts and/or task orders.

## **II. The Deviation Limits Authorizations To Use GSA As A Source Of Supply To GSA Contractors**

Sections 1.1 and 2.2 of the FAR Part 51 Deviation Ordering Guide state that the authority to use GSA's MAS and Global Supply programs as sources of supply is limited to GSA contractors who obtain a letter of authorization from a government ordering activity. As such, other Government ordering activities issuing time-and-material/labor hour contracts and/or orders cannot take advantage of the competitive MAS marketplace and contract prices for products meeting the government's needs. The Coalition appreciates that expanding the scope of the deviation may require a revision to FAR 51. However, we believe that it is a policy change whose time has come. In a time of significant budget challenges, opening up the MAS program as a governmentwide source of supply for time-and-material/labor hour contracts makes good business sense. It will save Government funding by providing all agencies and their contractors with access to negotiated MAS contract pricing as well as an opportunity for further price reductions consistent with the ordering procedures at FAR 8.405-1. Moreover, increased use of the MAS program as a source of supply for materials would enhance transparency and accountability in the use of time-and-

material/labor hour contracts and/or orders.

### **Conclusion**

Section 1.2 of the deviation states that “[t]he ability for GSA contractors to purchase from the FSS and Global Supply Programs benefits our customers and contractor community.” Section 1.2 also lists nine such benefits. The listed benefits include allowing GSA contractors to provide a total contract solution to meet customer’s needs, reducing agency procurement and contract administration costs and encouraging competition among contractors to see the best solution, resulting in cost savings to the Government. Unfortunately, as explained above, the deviation’s prohibition on negotiation of a material handling fee and its limited scope of authorized use undermine the benefits articulated in Section 1.2. The Coalition urges GSA to reconsider the prohibition on material handling fees and to work to implement the deviation in the FAR.

Thank you again for considering our feedback on the FAR Part 51 Deviation. We look forward to continued dialogue on this issue. We have also attached some implementation suggestions for the FAR Part 51 Deviation given that the two policy issues covered in this letter can be addressed. If there are any questions I may be reached at (202) 315-1051, or we would be happy to meet with you to discuss this further.

Sincerely,

A handwritten signature in dark ink, appearing to read "Aubrey Woully". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

p.p. Roger Waldron, President

## **Attachment**

### **FAR Part 51 Deviation Implementation**

The Coalition for Government Procurement has the following implementation suggestions in addition to the proposals covered in the letter.

- Broader dissemination of information regarding the value of using FAR 51 within GSA (and other agencies)
- An explanation of the benefits to GSA contractors of meeting their small business set-aside goals through GSA MAS Schedule purchases
  - Possibly insert language that incentivizes the GSA contractor to use FAR 51 as a vehicle for meeting these objectives
- Ensuring that GSA contractors understand that (by presenting a Letter of Authorization), GSA Schedule holders are permitted to price below their GSA Schedule price.
  - NOTE: This is perhaps one of the biggest challenges currently facing this adoption of FAR 51. In short, most feel that bidding on the work will trigger the Price Reductions Clause. As such, even with changes in the language, there would need to be a concerted marketing effort to educate all parties involved.
- Encouraging prompt payment for small business Schedule holders. GSA Schedule holders enjoy a level of certainty regarding payment when they sell to the federal government off their Schedules. Specifically related to GSA/PBS, contractors are often dealing with a construction environment where contractors 'pay when paid' and rarely agree to prompt net payment terms. This, too, makes a number of small business GSA Schedules holders wary about doing business with contractors.

We certainly appreciate GSA for considering these additional FAR Part 51 Deviation implementation concerns.