

General Services Administration
Washington, DC 20405

APD 2800.12B, CHGE 18 (Addendum)

February 27, 2007

GSA ORDER
(ADDENDUM)

Subject: Amendment 2007-01; GSAR Case 2006-G522, Federal Supply Schedule Contracts—Recovery Purchasing by State and Local Governments Through Federal Supply Schedules (Change 18)

1. Purpose. This order transmits a revision to the looseleaf pages of GSAR Case 2006-G522, Federal Supply Schedule Contracts—Recovery Purchasing by State and Local Governments Through Federal Supply Schedules (Change 18).
2. Background. Due to further changes in the formatting of pages in GSAM Part 538, the pages are being reissued. This document reflects format changes only.
3. Effective date. February 1, 2007.
4. Explanation of changes. Due to reflow, pages 538-1 thru 538-6 are being reissued.

Remove pages

538-1 thru 538-6

Insert pages

538-1 thru 538-6

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PART 538—FEDERAL SUPPLY SCHEDULE CONTRACTING

Subpart 538.2—Establishing and Administering Federal Supply Schedules

538.270 Evaluation of multiple award schedule (MAS) offers.

(a) The Government will seek to obtain the offeror's best price (the best price given to the most favored customer). However, the Government recognizes that the terms and conditions of commercial sales vary and there may be legitimate reasons why the best price is not achieved.

(b) Establish negotiation objectives based on a review of relevant data and determine price reasonableness.

(c) When establishing negotiation objectives and determining price reasonableness, compare the terms and conditions of the MAS solicitation with the terms and conditions of agreements with the offeror's commercial customers. When determining the Government's price negotiation objectives, consider the following factors:

- (1) Aggregate volume of anticipated purchases.
- (2) The purchase of a minimum quantity or a pattern of historic purchases.
- (3) Prices taking into consideration any combination of discounts and concessions offered to commercial customers.
- (4) Length of the contract period.
- (5) Warranties, training, and/or maintenance included in the purchase price or provided at additional cost to the product prices.
- (6) Ordering and delivery practices.
- (7) Any other relevant information, including differences between the MAS solicitation and commercial terms and conditions that may warrant differentials between the offer and the discounts offered to the most favored commercial customer(s). For example, an offeror may incur more expense selling to the Government than to the customer who receives the offeror's best price, or the customer (*e.g.*, dealer, distributor, original equipment manufacturer, other reseller) who receives the best price may perform certain value-added functions for the offeror that the Government does not perform. In such cases, some reduction in the discount given to the Government may be appropriate. If the best price is not offered to the Government, you should ask the offeror to identify and explain the reason for any differences. Do not require offerors to provide detailed cost breakdowns.

(d) You may award a contract containing pricing which is less favorable than the best price the offeror extends to any commercial customer for similar purchases if you make a determination that both of the following conditions exist:

(1) The prices offered to the Government are fair and reasonable, even though comparable discounts were not negotiated.

(2) Award is otherwise in the best interest of the Government.

538.271 MAS contract awards.

(a) MAS awards will be for commercial items as defined in FAR 2.101. Negotiate contracts as a discount from established catalog prices.

(b) Before awarding any MAS contract, determine that the offered prices are fair and reasonable (see FAR Subpart 15.4 and [538.270](#)). Document the negotiation and your determination using FAR 15.406-3 as guidance.

(c) State clearly in the award document the price/discount relationship between the Government and the identified commercial customer (or category of customers) on which the award is predicated.

538.272 MAS price reductions.

(a) Section [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."

(b) Make sure that the contractor understands the requirements of section [552.238-75](#) and agrees to report to you all price reductions as provided for in the clause.

538.273 Contract clauses.

(a) *Multiple award schedules.* Insert in solicitations and contracts:

(1) [552.238-70](#), Identification of Electronic Office Equipment Providing Accessibility for the Handicapped, if you include electronic office equipment items.

(2) [552.238-71](#), Submission and Distribution of Authorized FSS Schedule Pricelists. In solicitations and contracts for:

(i) FSS Schedule 70 and the Consolidated Products and Services Schedule contracts containing information technology Special Item Numbers; or

(ii) Federal Supply Schedule contracts for recovery purchasing (see [538.7102](#)), use Alternate I. If GSA is not prepared to accept electronic submissions for a particular schedule delete—

(A) The paragraph identifier “(i)” in (b)(1) and the word “and” at the end of paragraph (b)(1)(i); and

(B) Paragraphs (b)(1)(ii) and (b)(3).

(3) [552.238-72](#), Identification of Products that have Environmental Attributes.

(4) [552.238-73](#), Cancellation.

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

(1) [552.238-74](#), Industrial Funding Fee and Sales Reporting.

(2) [552.238-75](#), Price Reductions. Use Alternate I in solicitations and contracts for—

(i) FSS Schedule 70 and the Consolidated Products and Services Schedule contracts containing information technology Special Item Numbers; or

(ii) Federal Supply Schedule contracts for recovery purchasing (see [538.7102](#)).

Subpart 538.70—Cooperative Purchasing

538.7000 Scope of subpart.

This subpart prescribes policies and procedures that implement statutory provisions authorizing non-federal organizations to use Schedule 70 and Consolidated Products and Services Schedule contracts containing information technology Special Item Numbers (SINs).

538.7001 Definitions.

“Ordering activity” (also called “ordering agency” and “ordering office”) means an eligible ordering activity (see [552.238-78](#)) authorized to place orders under Federal Supply Schedule contracts.

“Schedule 70,” as used in this subpart, means Schedule 70 information technology contracts, and Consolidated Products and Services Schedule contracts containing information technology SINs. The Consolidated Products and Services Schedule is a compilation of multiple individual Federal Supply Schedules; therefore, only the SINs that fall under Schedule 70 of the Consolidated Products and Services Schedule will apply to Cooperative Purchasing. No other Schedules, or SINs, containing information technology outside of Schedule 70 SINs, and Consolidated Products and Services Schedule contracts containing Schedule 70 SINs, will apply.

“State and local government entities,” as used in this subpart, means the states of the United States, counties, municipalities, cities, towns, townships, tribal governments, public authorities (including public or Indian housing agencies under the United States Housing Act of 1937), school districts, colleges and other institutions of higher education, council of governments (incorporated or not), regional or interstate government entities, or any agency or instrumentality of the preceding entities (including any local educational agency or institution of higher education), and including legislative and judicial departments. The term does not include contractors of, or grantees of, State or local governments.

(1) “Local educational agency” has the meaning given that term in section 8013 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7713).

(2) “Institution of higher education” has the meaning given that term in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)).

(3) “Tribal government” means—

(i) The governing body of any Indian tribe, band, nation, or other organized group or community located in the continental United States (excluding the State of Alaska) that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; and

(ii) Any Alaska Native regional or village corporation established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*).

538.7002 General.

(a) 40 U.S.C. 501, (the Act) authorizes the Administrator of General Services to procure and supply personal property and nonpersonal services for the use of Executive agencies. Under 40 U.S.C. 502, the goods and services available to executive agencies are also available to mixed ownership Government corporations, establishments within the legislative or judicial branches of Government (excepting the Senate, House of Representatives, Architect of the Capitol, and any activities under the direction of the Architect of the Capitol), the District of Columbia, and Qualified Non-profit Agencies.

(b) Section 211 of the E-Government Act of 2002 amends 40 U.S.C. 502 to authorize the Administrator of General Services to provide for use of certain Federal Supply Schedules of the GSA by a State or local government, which includes any State, local, regional, or tribal government, or any instrumentality thereof (including any local educational agency or institution of higher education).

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(c) State and local governments are authorized to procure only from the information technology Federal Supply Schedule (Schedule 70) contracts and Consolidated Products and Services Schedule contracts containing information technology SINS. A listing of the participating contractors and SINS for the products and services that are available through Schedule 70 and Consolidated Products and Services Schedule contracts containing information technology SINS, is available in GSA's Schedules e-Library at web site <http://fss.gsa.gov/elibrary>. Click on Schedules e-Library and then click on the ICON labeled Cooperative Purchasing, State and Local. The contractors and the products and services available for cooperative purchasing will be labeled with the ICON.

538.7003 Policy.

Preparing solicitations when schedules are open to eligible non-federal entities. When opening Schedule 70 and the Consolidated Products and Services Schedule containing information technology SINS, for use by eligible non-federal entities, the contracting officer must make minor modifications to certain Federal Acquisition Regulation and GSAM provisions and clauses in order to make clear distinctions between the rights and responsibilities of the U.S. Government in its management and regulatory capacity pursuant to which it awards schedule contracts and fulfills associated Federal requirements versus the rights and responsibilities of eligible ordering activities placing orders to fulfill agency needs. Accordingly, the contracting officer is authorized to modify the following FAR provisions/clauses to delete "Government" or similar language referring to the U.S. Government and substitute "ordering activity" or similar language when preparing solicitations and contracts to be awarded under Schedule 70 and the Consolidated Products and Services Schedule containing information technology SINS. When such changes are made, the word "(DEVIATION)" shall be added at the end of the title of the provision or clause. These clauses include but are not limited to:

- (a) 52.212-4, Contract Terms and Conditions—Commercial Items.
- (b) 52.216-18, Ordering.
- (c) 52.216-19, Order Limitations.

- (d) 52.229-1, State and Local Taxes.
- (e) 52.229-3, Federal, State, and Local Taxes.
- (f) 52.232-7, Payments Under Time-and-Materials and Labor-Hour Contracts.
- (g) 52.232-17, Interest.
- (h) 52.232-19, Availability of Funds for the Next Fiscal Year.
- (i) 52.232-34, Payment by Electronic Funds Transfer—Other than Central Contractor Registration.
- (j) 52.232-36, Payment by Third Party.
- (k) 52.237-3, Continuity of Services.
- (l) 52.246-4, Inspection of Services-Fixed Price.
- (m) 52.246-6, Inspection—Time-and-Material and Labor-Hour.
- (n) 52.247-34, F.O.B. Destination.
- (o) 52.247-38, F.O.B. Inland Carrier Point of Exportation.

538.7004 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the clause at [552.238-77](#), Definition (Federal Supply Schedules), in solicitations and schedule contracts for Schedule 70 and the Consolidated Products and Services Schedule contracts containing information technology SINS.

The contracting officer shall insert the clause at [552.238-78](#), Scope of Contract (Eligible Ordering Activities), in solicitations and contracts for Schedule 70 and the Consolidated Products and Services Schedule contracts containing information technology SINS.

(b) The contracting officer shall insert the clause at [552.238-79](#), Use of Federal Supply Schedule Contracts by Certain Entities—Cooperative Purchasing, in solicitations and Schedule 70 contracts and the Consolidated Products and Services Schedule contracts containing information technology SINS.

(c) See [552.101-70](#) for authorized FAR deviations.

Subpart 538.71—Recovery Purchasing

538.7100 Scope of subpart.

This subpart prescribes policies and procedures to implement the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364) authorizing non-federal organizations to use Federal Supply Schedule contracts to purchase products and services to be used for recovery from major disasters, terrorism or nuclear, biological, chemical, or radiological attack.

538.7101 Definitions.

The definitions in subsection [538.7001](#) shall apply for purposes of this subpart.

538.7102 General.

(a) Section 833 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364) amends 40 U.S.C. 502 to authorize the Administrator of General Services to provide to State and local governments the use of Federal Supply Schedules of the GSA for purchase of products and services to be used to facilitate recovery from a major disaster declared by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*) or to facilitate recovery from terrorism or nuclear, biological, chemical, or radiological attack. Section 833 requires the Secretary of Homeland Security to determine which products and services qualify before the Administrator provides for the use of the Federal Supply Schedules. Use of Federal supply schedules by State and local governments is voluntary. Agreement of a schedule contractor to offer recovery purchasing under the contract and acceptance of any order for recovery purchasing from a state or local government is voluntary.

(b) State and local governments are authorized to use Federal Supply Schedules to procure products and services determined by the Secretary of Homeland Security to be used to facilitate recovery from major disasters, terrorism, or nuclear, biological, chemical, or radiological attack. A listing of the Federal Supply Schedules for the products and services is available in GSA's Schedules e-Library at web site <http://www.gsaelibrary.gsa.gov>. Click on the link, "Disaster Recovery Purchasing, State and Local." The participating contractors and the products and services available for recovery purchasing will be labeled with the Disaster Recovery Purchasing ICON.

(c) State and local governments that wish to use the Federal Supply Schedules to facilitate recovery from major disasters or attacks are responsible for ensuring that only authorized representatives of their governments place orders against these schedules and that procured products and services are used only for the purposes authorized by Section 833 of Public Law 109-364.

538.7103 Policy.

Preparing solicitations when schedules are open to eligible non-federal entities. When opening the Federal Supply Schedules for products and services determined by the Secretary of Homeland Security, for use by eligible non-federal entities, the contracting officer must make minor modifications to certain Federal Acquisition Regulation (FAR) and GSAM provisions and clauses in order to make clear distinctions between the rights and responsibilities of the U.S. Government in its management and regulatory capacity pursuant to which it awards schedule contracts and fulfills associated Federal requirements versus the rights and responsibilities of eligible ordering activities placing orders to fulfill agency needs. Accordingly, the contracting officer is authorized to modify the following FAR provisions/clauses to delete "Government" or similar language referring to the U.S. Government and substitute "ordering activity" or similar language when preparing solicitations and contracts to be awarded under the Federal Supply Schedules for products and services determined by the Secretary of Homeland Security. When such changes are made, the word "(DEVIATION)" shall be added at the end of the title of the provision or clause. These clauses include but are not limited to—

- (a) 52.212-4, Contract Terms and Conditions—Commercial Items.
- (b) 52.216-18, Ordering.
- (c) 52.216-19, Order Limitations.
- (d) 52.229-1, State and Local Taxes.
- (e) 52.229-3, Federal, State, and Local Taxes.
- (f) 52.232-7, Payments Under Time-and-Materials and Labor-Hour Contracts.
- (g) 52.232-17, Interest.
- (h) 52.232-19, Availability of Funds for the Next Fiscal Year.
- (i) 52.232-34, Payment by Electronic Funds Transfer—Other than Central Contractor Registration.
- (j) 52.232-36, Payment by Third Party.
- (k) 52.237-3, Continuity of Services.
- (l) 52.246-4, Inspection of Services-Fixed Price.
- (m) 52.246-6, Inspection-Time-and-Material and Labor-Hour.
- (n) 52.247-34, F.O.B. Destination.
- (o) 52.247-38, F.O.B. Inland Carrier Point of Exportation.

538.7104 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the clause at [552.238-76](#), Definition (Federal Supply Schedules)—Recovery Purchasing, in Federal Supply Schedule solicitations and contracts which contain products and services determined by the Secretary of Homeland Security to facilitate recovery from major disasters, terrorism, or nuclear, biological, chemical, or radiological attack.

(b) The contracting officer shall insert the clause at [552.238-78](#), Scope of Contract (Eligible Ordering Activities), with Alternate I in Federal Supply Schedule solicitations and contracts which contain products and services determined by the Secretary of Homeland Security to facilitate recovery from major disasters, terrorism, or nuclear, biological, chemical, or radiological attack.

(c) The contracting officer shall insert the clause at [552.238-80](#), Use of Federal Supply Schedule Contracts by Certain Entities—Recovery Purchasing, in Federal Supply Schedule solicitations and contracts which contain products and services determined by the Secretary of Homeland Security that facilitate recovery from major disasters, terrorism, or nuclear, biological, chemical, or radiological attack.

(d) See [552.101-70](#) for authorized Federal Acquisition Regulation deviations.

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