



JUN 24 2003

GSA Office of Governmentwide Policy

MEMORANDUM FOR RONALD POUSSARD

DIRECTOR  
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM:

RODNEY P. LANTIER  
DIRECTOR  
REGULATORY AND FEDERAL ASSISTANCE  
PUBLICATIONS DIVISION

SUBJECT:

FAR Case 1999-603, Federal Supply Schedules Services and  
Blanket Purchase Agreements (BPAs)

Attached are comments received on the subject FAR case published at 68 FR 19294;  
April 18, 2003. The comment closing date was June 17, 2003.

<u>Response Number</u>	<u>Date Received</u>	<u>Comment Date</u>	<u>Commenter</u>
1999-603-1	04/18/03	04/18/03	George Marchant (Army)
1999-603-2	04/19/03	04/19/03	Vernon Edwards
1999-603-3	04/21/03	04/21/03	Les Journet (Navy)
1999-603-4	04/22/03	04/22/03	Linda Wallis
1999-603-5	04/23/03	04/23/03	Stephanie Royal
1999-603-6	04/25/03	04/25/03	Earl T. Faria, Jr.
1999-603-7	04/28/03	04/28/03	Roger Porter
1999-603-8	06/16/03	06/16/03	Ronald Kovach/EPA
1999-603-9	04/29/03	04/29/03	Roberta Roberts (Army)
1999-603-10	05/12/03	05/12/03	Patrick Gourley

U.S. General Services Administration  
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<u>Response Number</u>	<u>Date Received</u>	<u>Comment Date</u>	<u>Commenter</u>
1999-603-11	05/27/03	05/27/03	John Taylor
1999-603-12	05/29/03	05/23/03	Mark Bennett
1999-603-13	06/10/03	06/02/03	Coalition for Government Procurement
1999-603-14	06/05/03	06/05/03	Paulette Creighton (VA)
1999-603-15	06/06/03	06/06/03	Daniel Fleischman (AF)
1999-603-16	06/17/03	06/17/03	Development InfoStructure
1999-603-17	06/16/03	06/16/03	Melissa Rider (Army)
1999-603-18	06/16/03	06/16/03	Catherine Stewart (FBP)
1999-603-19	06/16/03	06/16/03	Nancy Barrere (DOC)
1999-603-20	06/17/03	06/17/03	Daniel Levinson (GSA/OIG)
1999-603-21	06/17/03	06/17/03	Michael McLay
1999-603-22	06/17/03	06/17/03	Harris Miller (ITAA)
1999-603-23	06/17/03	06/17/03	Becky Gebhard (AFMC)
1999-603-24	06/17/03	06/17/03	Ralph Thomas (NASA)
1999-603-25	06/17/03	06/17/03	Allen Chuotkin (PSC)
1999-603-26	06/17/03	06/17/03	Alan Schoenberg (HHS)
1999-603-27	06/17/03	06/17/03	Caz Wong (AF)

<u>Response Number</u>	<u>Date Received</u>	<u>Comment Date</u>	<u>Commenter</u>
1999-603-28	06/17/03	06/17/03	Tracy Wilmot (GSA/PBS)
1999-603-29	06/18/03	06/18/03	Timonthy Wilson (Treasury)
1999-603-30	06/20/03	06/20/03	Lisa Maguire GSA/FSS)
1999-603-31	6/20/03	06/20/03	Michael McLay (additional comments see #21)
1999-603-32	06/24/03	06/24/03	DoD/IG
Attachments			

1999-603-1



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04/18/2003 12:08 PM

To: "farcase.1999-603@gsa.gov" <farcase.1999-603@gsa.gov>  
cc: "Marchant, George W [AMSTA-AQ-APG]"  
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Subject: Comments on FAR case 1999-603

The following are our comments on the FAR case:

8.401 Explain here the relationship and differences between the discussion of multiple award contracts at Part 8.4 and 16.5. Are the 16.500(a) and (d) and 16.505 requirements, the DOD systems mentioned in 8.401(a)? If not, what are the differences between Parts 8.4 and 16.5 multiple award actions? Rationale---clear up confusion.

Also recommend that 16.505 be revised to incorporate there some of the new requirements for orders that are being imposed in 8.4. This would include for 16.5, the requirement for a statement of work for any multiple award action in Part 16.5 that is priced on an hourly rate by category of hours basis, further defining "fair opportunity", further define "logical follow-on", and introduce level of approvals for sole source orders for services in the same manner as in Part 8, or clarify that the CICA applies. Rationale --to impose the same controls on part 16.5 as on part 8 and to revise part 16 in parallel to Part 8.

8.401.(b) Make the FSS contracts and instructions for ordering against each available on line and be directly linked here. Rationale--it is essential to make these available to all ordering offices quickly. They should not have to order and maintain hard copies as indicated. This will also facilitate compliance .

8.403(c) In the 5th line after "rates" and before "for" insert "(but not the number of hours to perform the service or mix of categories of labor hours needed)" Rationale----to clarify. Also to lead in to the discussion at 8.404-2.

General. Throughout the coverage here, and elsewhere in the FAR/DFARS) delete the phrase "to the maximum extent practicable ,or similar terms. Rationale. Either the statement is a requirement or not. Such statements, designed to give flexibility and more discretion to the process, actually create confusion and place the PCO in a potential adversarial relationship with the customer. The PCO may believe it practicable for the customer to create a performance sow, The customer, looking for ever faster awards, may believe the contrary. Who decides in an era of maximum customer support? If the above deletion is not possible throughout the FAR and here, include after the word "...practicable (or the similar possible)" the phrase "as determined by the PCO" or something substantially similar. Rationale--clarify who decides whether a requirement stated in the regs is practicable or possible here and elsewhere in the regulations. Also promote teaming and preclude the potential for adversarial relationships between the contracting and requirements personnel.

8.404-5 Delete "consider including" and substitute "include" in the second line. Rationale--the phrase "consider including " marginalizes the requirement to include small and small disadvantaged businesses. The later phrase "if available" gives the needed flexibility.

8.405-2 At the end of the first sentence insert "Oral orders may not be used for services priced in the FSS contracts on an hourly rate basis." Rationale--to clarify, and eliminate any misunderstanding that oral orders cannot be used for such services when a sow is required



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1999-603-2

April 19, 2003

General Services Administration  
FAR Secretariat (MVA)  
1800 F Street, NW, Room 4035  
ATTN: Laurie Duarte  
Washington, DC 20405

Subject: FAR Case 1999-603 — Federal Supply Schedules and Blanket Purchase Agreements

I am submitting the following comments in response to the subject proposed rule published in the Federal Register on April 18, 2003, 68 Fed. Reg. 19294.

**§ 8.403(a)** — In the third sentence, the phrase, “ordering offices need not seek further competition” is misleading and inconsistent with the requirements of proposed §§ 8.404-1 and 8.404-2, which require ordering offices to seek best value by considering more than one schedule contractor, unless a sole source justification is prepared and approved in accordance with proposed § 8.405-6(a)(5). I suggest that you revise the sentence to read: “ordering offices need not seek competition from companies that are not schedule contractors... .”

**§ 8.404-1(c)** — Near the end of the first paragraph, following the sentence which reads: “Select the delivery and other options available under the schedule that offers the best value to meet the agency’s needs,” I suggest that you insert the following sentence: “Ordering offices must consider price when determining best value.” This may seem unnecessary, but the requirement to evaluate price is not obvious from the language of the proposed rule, especially since § 8.403(c) says that GSA has already determined that schedule prices are fair and reasonable, which could be interpreted to mean that ordering offices need not give further consideration to price.

**§ 8.404-1(c)** — The proposed rule lists seven factors that ordering offices may consider when comparing schedule contractors. They are the same factors currently listed in FAR § 8.404(b)(2). Except for the first factor, they mainly apply to supplies, rather than to services. I suggest that you add one or two factors that apply to services, as well, such as (a) experience, (b) past performance, and (c) key personnel.

**§ 8.404-1(d)(1)** — The proposed rule says that ordering offices must review “an appropriate number of additional schedule contractor’s catalogs or pricelists” when placing orders in excess of the maximum order threshold. Apparently, GSA thinks that if an order will exceed the maximum order threshold a review of “at least three” schedule contractors, as prescribed by § 8.404-1(c), is not enough. But the phrase “an appropriate number” is vague. While I do not think that you should state a specific number, I suggest that you state the policy objective in clear and unambiguous terms. Think of it this way: On what basis would you assess the effectiveness of

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agency implementation of the policy objective? If you cannot make the policy objective clearer, then I suggest that you consider eliminating the requirement to consider more than three schedule contractors.

**§ 8.404-2** — I suggest that you change the title of this subsection to: “Ordering procedures for hourly rate services,” in order to be consistent with the logic underlying the distinction between the procedures in § 8.404-1 and § 8.404-2 and to better coordinate with the title of § 8.404-1.

**§ 8.404-2(c)(1)(iii)** — I suggest that you delete this subparagraph, since it is redundant of § 8.404-2(c)(4).

**§ 8.404-2(c)(2)(i)** — Must ordering offices consider price when evaluating schedule contractors? The answer may seem obvious, but it is not. If ordering offices must evaluate price, then I suggest that you insert the following sentence between the first and second sentences of the subparagraph: “Price must be a selection criterion.”

**§ 8.404-1(c)(2)(ii)** — The proposed rule says that when an ordering office is placing an order that will exceed the maximum order threshold or is establishing a BPA, the ordering office must send the statement of work and selection criteria to “an appropriate number of additional schedule contractors that offer services that will meet the agency’s needs.” Apparently, GSA thinks that once an order will exceed the maximum order threshold it is not enough to send the statement of work and criteria to “at least three” schedule contractors, as prescribed by § 8.404-2(c)(2)(i). But the phrase “an appropriate number” is vague. While you should not state a specific number, I suggest that you either state the policy objective in clear and unambiguous terms or eliminate the requirement to consider more than three schedule contractors.

**§ 8.404-2(c)(3)** — Must ordering offices evaluate all responses received from schedule contractors? If so, then I suggest that in the final rule you insert the word *all* in the first sentence, as follows: “The ordering office shall evaluate *all* responses received by a specified deadline against the selection criteria provided to the schedule contractors.” If not, then I suggest that the final rule state the policy.

**§ 8.404-2(c)(3)** — Must ordering offices consider only the selection criteria that were provided to the schedule contractors when determining best value, or may they consider other factors as well, such as factors that they did not think of until after they received responses? In other words, does a rule like the one in the second sentence of FAR § 15.305(a) apply when placing orders for services priced at hourly rates? This is not obvious from the language of the proposed rule, but it is important, because the GAO will entertain protests against schedule orders.

**§ 8.404-2(c)(4)** — The proposed rule requires ordering offices to develop quality assurance surveillance plans when using performance-based statements of work, but not otherwise. Should not agencies perform contract quality assurance in all cases, as required by FAR § 46.103, § 46.104, and Subpart 46.4, whether or not the statement of work is performance-based? And is it not possible that the proposed rule would discourage the use of performance-based statements of work by requiring ordering offices to develop quality assurance surveillance plans only when using performance-based statements of work? I suggest that the final rule require agencies to develop quality assurance surveillance plans in all cases, whether the statement of work is performance-based or not.

**§ 8.404-3** — When an ordering office establishes a BPA, does that mean it no longer has to comply with the procedures in either § 8.404-1 or § 8.404-2 when placing future orders with the

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BPA contractor? GSA answers this question quite clearly in the instructions at its website, which state: "Once a single BPA has been established, task/delivery orders can be placed without further competition." Thus, GSA's present stance is that the rule in FAR § 13.303-5(c), which says: "The existence of a BPA does not justify purchasing from only one source..." does not apply to BPAs under GSA schedule contracts. Is this to be the policy under the new FAR rule? If so, it is not obvious from the text of the proposed rule. I suggest that if the policy is to be that by establishing a BPA an ordering office need not subsequently follow the procedures in either § 8.404-1 or § 8.404-2 when placing orders with the BPA contractor, then the final rule should say so clearly and unambiguously. Otherwise, the final rule should state that the establishment of a BPA does not eliminate the need to comply with the procedures in §§ 8.404-1 and 8.404-2 in the placement of future orders.

By the way, if the policy will be that ordering offices can avoid the procedures in §§ 8.404-1 and 8.404-2 by establishing a single-award BPA, then you will have created a massive loophole in the proposed requirement in § 8.404-6(a)(5) to justify and obtain approval of sole source orders. It might be much easier to hold one sham competition to establish a BPA with a favorite schedule contractor and then happily order-away than to prepare and obtain approval of several sole source justifications.

**§ 8.404-6(a)(5)** — Are sole source justifications to be made available to the public, or at least to schedule contractors, upon request, as is the case under FAR § 6.305(a)? If so, the final rule should so provide.

**§ 8.404-6(b)(4)** — The proposed rule says that ordering offices must document the rationale for using other than a firm-fixed-price order. This suggests that orders may be priced on other than a firm-fixed-price basis. Is that the case? May ordering offices issue orders priced on a time-and-materials or labor-hour basis? This is one of the hot issues of the moment and the proposed rule does not settle it. You should bite the bullet and state the policy, one way or the other. I suggest that you state the policy clearly and unambiguously somewhere in § 8.403(c). Either state: "Orders must be priced on a firm-fixed-price basis," or "Orders may be priced on a firm-fixed price, time-and-materials, or labor-hour basis."

**§ 8.405-4(a)** — I suggest that you revise this paragraph to read as follows: "If the contractor fails to perform an order, the ordering office may modify the order date to establish a new delivery date (after obtaining consideration, as appropriate), terminate for cause, or terminate for convenience at no cost to the Government."

Sincerely,

  
Vernon J. Edwards

1999-603-3



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cc:  
Subject: FW: Proposed Rule 99-603, FSS Schedules and BPAs is Available

04/21/2003 06:05 PM

Comment: The proposed rule does NOT include the Ordering Procedures in DFARS 208.404-70, applicable to DoD activities, which implements Section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107-107); and also applies to orders placed by non-DoD agencies on behalf of DoD.

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1999-603-4



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cc:  
Subject: FAR Case 1999-603 Comments

04/22/2003 09:09 AM

Reference Language in 8.404-1 Title and 8.404-1(a). The GSA special ordering procedures made this definition of fixed-price services as "services without an SOW" which I believe is clearer and less open to interpretation.

Reference 8.404-6(a)(5)(i)(ii) . Clarify threshold. Is the FAR 6.303-2 format required for sole source justifications above micro-purchase threshold up to small purchase threshold (\$2500-\$100,000)? If so, (ii) approval levels for proposed orders exceeding \$2,500 but not exceeding \$100,000 need to be added.

Linda C. Wallis  
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1999-603-5



**Stephanie**  
<[sroyal@workplace.us](mailto:sroyal@workplace.us)>  
>

To: [farcase.1999-603@gsa.gov](mailto:farcase.1999-603@gsa.gov).  
cc: (bcc: FARCASE.1999-603)  
Subject: FAR case 1999-603

04/23/2003 11:13 AM

**RE: FAR case 1999-603**

I hold GSA contract #GS-29F-0018N for design and installation services. When working with products we only specify products that are on GSA contract.

I am interested in this solicitation and would like to better understand what the requirements are and how I can be considered for this.

I look forward to hearing from someone soon.

Thank you!

Stephanie Royal  
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1999-603-6



PaintMAN97@aol.com

04/25/2003 10:14 AM

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Subject: FAR Case 1999-603

Dear Ms. Laurie Duarte,

The comments to follow are related to 48 CFR parts 8 and 38 dated April 18, 2003 for Federal Acquisition Regulation; Federal Supply Schedules Services and Blanket Purchase Agreements (BPA's); Proposed Rule, FAR Case 1999-603.

First; Section 8.403 Use of Federal Supply Schedules, para. (a) [last sentence] "Therefore, when establishing a Blanket Purchase Agreement or placing orders under Federal Supply Schedules using the procedures of 8.404, ordering offices need not seek further competition, synopsise the requirement, or consider small business programs." This doesn't seem fair at all. If a purchase or a requirement is to be filled outside of the constraints of the original contract then it should be open to all, especially small business who in most cases can respond in a more timely and competitive manner to blanket purchases.

Second; Section 8.404-5 Small Business [third sentence] "For orders exceeding the micropurchase threshold, ordering offices should give preference to the items of small business concerns when two or more items at the same delivered price will satisfy the requirement." Why should preference only be given when the price is the same? If the prices for the small businesses were the same, wouldn't they have already been awarded the item? A small business will never have the same purchasing power of a large company, and to expect the small business to be at the same selling price of a large business is nonsense. Why can't the GSA allow for small business awards if the small business is within 10% of the requirement? This would allow the small business community to win some awards without the government being price gouged. The 10% is an arbitrary figure that somewhat makes up for the difference in the buying power between most small and large businesses.

If any clarification is necessary please feel free to contact me.

Sincerely,

Earl T. Faria Jr.  
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1999-603-7



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cc:  
Subject: Comments

04/28/2003 12:58 PM

Sec 8.404-2(c). describes the content of the Statement of Work. Of the identified items, the work to be performed, location of work, and applicable standards are proper SOW items. The remaining items, such as security clearances, period of performance, and deliverable schedule should be included in the order, but should be placed in their proper place according to the Uniform Contract Format.

Section 8.404(c)(2). Change: From, Schedule contractors should...submit firm-fixed prices To, Schedule contractors should...submit firm-fixed prices or fixed price rates.

Most Significant!! Section 8.404-2(c)(4) which discusses quality assurance surveillance plans. The first sentence in this Section of the proposed rule is contradictory within itself, and as such will cause implementation problems. The requirement for the plan (nor any requirement) should not be applicable "to the maximum extent practicable" and to "shall". A quality assurance plan should unequivocally be required (a waiver provisio might be appropriate if at a high enough level). Further, the Section only addresses the surveillance plan requirement in the context of when a performance based Statement of Work is used. The surveillance plan requirement should be firm and be used whether the SOW is performance based or otherwise.





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06/16/2003 10:51 AM

To: farcase.1999-603@gsa.gov  
CC:  
Subject: FAR Case 1999-603 Comments

1999-603-8

(Embedded image moved to file: pic13784.pcx)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OFFICE OF  
ADMINISTRATION  
AND RESOURCES  
MANAGEMENT

June 12, 2003

General Service Administration  
FAR Secretariat (MVA)  
1800 F Street, NW, Room 4035  
Attn: Laurie Durate  
Washington, D.C. 20405

Dear Ms. Duarte:

Thank you for the opportunity to comment on FAR case 1999-603, proposed changes on Federal Supply Schedules (FSS) Services and Blanket Purchase Agreements (BPAs). EPA supports the FAR council's efforts to improve the FSS and BPA procedures for the acquisition of services. We have reviewed the contents of the proposed rule and submit the following comments for your consideration:

1. Section 8.401, General, paragraph (b), only provides a mailing address for copies of GSA Form 457 and requests for copies of schedules. We recommend an internet address also be provided.
2. Section 8.403, Use of Federal Supply Schedules, paragraph (a), states "...ordering offices need not seek further competition,..." Such a statement is confusing and may be taken out of context. As written, one can infer that ordering offices need only pick the source they want rather than being required to compare prices of the schedule contractors to determine the best value before selecting a source. The statement should be clarified to eliminate any potential confusion.
3. Section 8.404-2, Ordering procedures for services using a statement of work, paragraphs (c)(1)(iii) and (c)(4) both require and discuss developing quality assurance surveillance plans. Citing the same requirement in two different sections is redundant and confusing. We recommend paragraph (c)(4) be combined into paragraph (c)(1)(iii).
4. Section 8.404-2, Ordering procedures for services using a statement of work, paragraph (a) states, "Ordering offices shall use the procedures in this subsection when ordering services priced at hourly rates in the schedule contracts." Paragraph (c)(2)(i) states, "Schedule contractors should be requested to submit firm-fixed prices to perform the services identified in the statement of work." These two paragraphs

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conflict because hours and hourly rates are irrelevant when bidding on a performance statement of work on a firm-fixed price basis. We recommend striking "priced at hourly rates" from paragraph (a) to correct this inconsistency. In addition, the section is limited as it does not allow for the inclusion of unknown and unpredictable items such as travel to destinations that can not be predetermined in advance. Providing flexibility similar to a time and materials contract for such items would significantly benefit both the Government and industry.

If you require any additional information, please contact Cal McWhirter on (202) 564-4379 or E-mail him at: <mcwhirter.cal@epa.gov>.

Sincerely, /signed/

Ronald L. Kovach, Director  
Policy, Training, and Oversight Division  
Office of Acquisition Management



pic13784.pcx

1999-603-9



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cc:  
Subject: Proposed rule on GSA Schedules

04/29/2003 11:20 AM

Ref: Federal Register, Vo. 68; No. 75; Friday April 18 2003

8.404-6 Documentation. Recommend change 8.404-6 (a) (4) to read "The best value decision for restricting consideration of ....."

REASON: GSA has historically not recognized "sole source" when using the FSS. They emphasize "best value" decisions. The term "best value" is used throughout the proposed change also. A best value decision takes into consideration circumstances, rationale and any other pertinent factors.

8.404-6 (a) (5) (A) I don't find the referenced "2.101 under this subpart". However, I think this whole section (5) should be dropped. The GSA schedules have always been viewed as efficient. This documentation severely bogs down the process. It is easy for a GSA FSS buy to go to these dollar amounts. Most of the time when it has to be a certain source, it is a simple obvious, easily determinable reason. This should be left to the Contracting Officer (KO) to decide. A KO can confer with the Competition Advocate as they see fit.

If I were a KO facing all this detailed documentation and levels of review, I would even think twice about using the FSS and consider an alternate route. We have to be fair to contractors but we also have a responsibility of efficiently and effectively filling the needs of the Government at reasonable use of resources. This defeats everything the Federal Acquisition Streamlining Act (FASA) started. Adequate, but informal, documentation of the best value decision should be at KO level.

1999-603-10



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05/12/2003 11:14 AM

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Subject: PUBLIC COMMENT ON PROPOSED RULE

With regards to FAR Case 1999-603

The relational intent of proposed paragraphs 8.403(c), 8.404-1(c) and 8.404-3 is unclear. I recommend that the language be revised to make the intent more obvious with regard to the following question.

<?xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />

**If an ordering office reviews 3 schedules and makes a best value determination as required by 8.404-1(c) and uses that best value determination to award a single BPA as permitted by 8.404-3, does this satisfy the requirement of 8.403(c) to follow 8.404 ordering procedures, thereby permitting the ordering office to place numerous orders with the single BPA holder on a recurring basis? Or is the ordering office still required to review 3 schedules again and again, before placing each new order placed?**

I believe that the intent is to permit the review of 3 schedules and to allow the best value determination to take place at the BPA level so that an ordering office is not required to review 3 schedules before placing each order against a properly established single BPA. If my interpretation is correct, please make this more obvious in the FAR language. As written it seems rather ambiguous.

**Patrick Gourley, Centers for Disease Control and Prevention  
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1999-603-11



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cc:  
Subject: FAR Case 1999-603

05/27/2003 04:54 PM

Afternoon,

My boss passed an article on to me today from the Federal Register/Vol. 68, No. 75/Friday, April 18, 2003, Proposed Rules, Part III. After looking over the proposed changes, a few comments came to mind that seems worth mentioning/consideration.

**Section 8.404-2(c2) Ordering Procedures for Services Using a Statement of Work.** This paragraph and associated sub-paragraphs indicate orders exceeding the Maximum Order Threshold (MOT) must be competed to at least 3 schedule contractors. Recent FAR guidance indicates that MAS BPA's must be competed amongst all BPA contractors as opposed to recent practice of meeting a minimum of 3 to 4 contractors. Think the flexibility of the proposed change is more conducive if a customer has a particular vendor in mind and only needs to ensure fair competition is met for the MOT. Of course it may turn out one of the other sources' proposal turns out to be the best value. However, not mandating solicitation to MAS BPA's with more than say 4 schedule contractors may be favored because it saves unnecessary expended resources on both the vendors and the Government entity that has to evaluate the proposals. In our situation, we have 9 primes.

**Section 8.404-3 BPA's.** Although 8.404-5 addresses Small Business Concerns, interpretation to section 8.404-3 eludes that an activity can solicit MAS BPA's via maximum competition with intent to award to 1 or more schedule contractors. Experience reflects that the Small Business Administration gets very concerned if Small Business is not considered. For instance, if there's a potential that a small business can support the work requirements outlined in the acquisition, then targeting just Large Business's can cause reason for a protest by a small business schedule holder. Therefore, maybe a little more emphasis should be included with regards to small businesses.

**Section 8.404-8 Ordering Procedures for Mandatory Use Schedules.** Subparagraph's "b" and "e(1)" seem to contradict each other. Paragraph "b" specifically prohibits solicitation, quotes, market analysis, etc. Yet paragraph "e(1)" indicates the possibility of getting a waiver if supplies and services from another source is available. Some clarity may be appropriate in this area. Although mandated use can be of value, they can have a negative affect if the market has changed such that new or existing businesses can offer the same or similar services during the course of the mandated vehicle's lifecycle. If market analysis, quotes, etc. are prohibited, the Government could be in a position where it can't take advantage of a potential best value alternative. How can you accomplish items "e(1)" and subparagraph 2 if the Government isn't afforded the flexibility to accomplish alternatives for pricing and best value?

Appreciate the opportunity to provide comments and the fact that services is gaining attention with regards to guidance and direction related to the MAS schedule program.

Respectively,

*John Taylor*  
HQ SSG IT Services Project Manager  
DSN: 596-1108 Comm: (334) 416-1108  
Fax: 596-4540

1999-603-12

Date: May 29, 2003

To: FAR Secretariat                      Attn: Laurie Duarte

From: Mark Benett

SUBJECT: FAR Proposed Rule 1999-603, Federal Supply Schedules Services and Blanket Purchase Agreements

General Comments:

1. According to FAR 8.401, Federal Supply Schedules (FSS) are to provide "commonly used commercial supplies and services," however, there are conflicts between the language in the FAR and GSA ordering procedures regarding the type of contracts that may be used for commercial items. Specifically, FAR 12.207 prohibits the use of anything other than firm fixed price (FFP) and FFP with an economic price adjustment while GSA ordering procedures allow placement of time and materials and labor hour orders against the schedules. The proposed rule goes a long way toward closing the gap, but does not completely reconcile these differences.
2. I have observed that the schedules which offer technical services at hourly rates are being used to order services, like satellite operations support that hardly seem to be "common" or "commercial." Also, because the schedules are priced using hourly rates, and GSA does not police the statements of work, some of the services ordered appear to be unauthorized personal services.

Specific Comments on the Proposed Rule:

1. Page 19294, bottom of 3<sup>rd</sup> Column, under the title "Part 8 -- Required Sources of Supplies and Services." The first paragraph describes changes to FAR 8.401(d) and (d)(2), however, the revised text deletes paragraph (d) entirely. Have these paragraphs been deleted? If not, you need to provide the new text for review.
2. Page 19296, middle of 1<sup>st</sup> Column, Para 8.404-2(c). This paragraph lists travel as a special requirement that may be included in a statement of work (SOW). How should travel be priced on a GSA order for services? My experience is that travel is usually paid by adding a cost reimbursement line item to the order. Given the direction at FAR 12.207 to use only fixed price contracts for acquisition of commercial items, is this acceptable?
3. Page 19296, Para 8.404-2 (c)(2)(i). This paragraph provides some much needed direction, but I think it needs to be strengthened and clarified. It should be made clear that the line items on the order should be priced by the task(s) to be performed and not by hourly rates. However, the ordering officer may need a price breakdown based on the

1999-603-12

hourly rates in the GSA schedule in order to verify that the services supplied actually fall under the GSA schedule and that the rates can be traced back to it. I suggest adding the following language: "Line items in individual orders shall be priced by the task(s) or service(s) to be performed rather than the hourly rates provided in the schedule. Ordering officers may request a price breakdown based on the vendors GSA schedule hourly rates in order to verify that services proposed properly fall under the schedule.

4. Page 19296, Para 8.404-2. This section should state that the ordering office is responsible for conducting market research to determine that the service to be provided is commercial in nature. Many complex technical services can be broken down into commercially available professional labor categories such as engineer, scientist or analyst. One example I've seen is satellite operations. The government has a requirement for satellite support services, which can be performed by system engineers and systems analysts, but does this qualify as a commercial service under FAR 2.101? If the satellite it supports is a commercial item, the service may qualify under para (5) of the definition as long as similar services are offered to the general public. If the satellite is not a commercial item, the services must be similar to or of the same type as services offered to the general public to qualify under para (6). Para (6) requires that the services must be sold in substantial quantities based on catalog or market prices for the specific tasks performed. Under the FAR definition, support services for a communications satellite may be commercial whereas support services for a weapons system satellite may not qualify.

5. Page 19297, Para 8.404-6, paras (a)(4)(i) and (iii). If the service is of a "unique or specialized nature," it probably would not qualify as a commercial item under the definition at FAR 2.101, so I'm not sure that this should be provided as a valid reason to limit competition on a commercial contract.

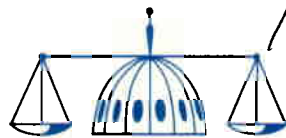
6. Page 19297, Para 8.404-6. I'm really glad to see some guidance on what should be documented in the order file.

7. Page 19297, Para 8.404-6, para (4)(i). I would like to see some guidance on when you can use a contract type other than FFP for a GSA order for services. I believe the FAR direction at 12.207, 16.201, 16.301-3(b), and the commercial item definition at 2.101, specifically prohibit any other contract type. If the CO is allowed to make a decision to use other than a FFP or FFP with EPA type contract, the circumstances need to be narrowly defined. Absent that, it should at least be subject to approval at a level above the CO.

You may call me at (719) 567-3833 with any questions related to this response.



1999-603-13



### Coalition for Government Procurement

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www.coalgovpro.org

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June 2, 2003

General Services Administration  
 FAR Secretariat (MVA)  
 1800 F Street, NW  
 Room 4035  
 Washington, D.C. 20405  
 Attn: Laurie Duarte

RE: FAR Case 1999-603

Dear Ms. Duarte:

The Coalition for Government Procurement is pleased to have the opportunity to comment on the above-referenced proposed rule issued in the April 18, 2003 Federal Register. The Coalition has long supported and called for the inclusion of service ordering rules for GSA Multiple Award Schedules in the Federal Acquisition Regulations (FAR). Generally, we believe that publishing such rules in the FAR will provide clearer and more readily available guidance to federal agencies using schedule contracts and help ensure that such contracts are used properly.

The Coalition is a multi-industry association of companies selling commercial services and products to the federal government. The Coalition represents over 330 member companies selling commercial services and products through Multiple Award Schedule contracts. Our members account for approximately 70% of the sales made through the schedules program and about half of the commercial sales made to the federal government each year. The Coalition has worked *with* federal policy makers for 24 years to promote common sense procurement practices.

The Coalition worked with GSA to add services to the Multiple Award Schedules program and in crafting the special ordering rules that were later developed to guide agencies wishing to purchase services from it. We believe that adding these rules to the FAR is an important step and generally support the proposed rule. Guidance on the preparation of statements of work, acquisition planning, performance-based contracting, and proper use of Blanket Purchase Agreements is all needed and appropriate. Publishing such

... representing commercial service and product suppliers to the Federal Government.

*Handwritten:*  
 Read  
 6-10-03  
 (10)



guidance in the FAR will enable federal users to use schedule contracts appropriately and better enable GSA to train federal customers on proper schedules use.

The Coalition recommends that language be added to the proposed rule, however, to clarify the use of firm-fixed price contracts when services are purchased. Firm-fixed pricing can be an appropriate tool to acquire services and products. It is not, however, always the most appropriate method and we are concerned that guidance to that effect may result in reduced flexibility for federal agencies and increased costs. Acquisition methods necessarily change depending on what is being purchased, how it is to be used, acquisition time frames, and delivery schedules. Firm-fixed pricing, time and materials acquisition, cost plus acquisitions, or other methods should all be available to federal buyers using schedule contracts to acquire professional services.

Our members report, for example, that the firm-fixed price acquisition method may sometimes be more costly than a time and materials approach. If there are too many variables in an acquisition, contractors will take steps to ensure that their financial risks are minimized and price their proposals accordingly. In a time and materials environment, contractors will bill only for work performed. The government may save through the use of this acquisition method when the actual project turns out to be less costly than it originally appeared to be. Under a firm-fixed price scenario the government would pay the agreed to price. Under a time and materials scenario, it would pay only for the actual time and materials used.

The Coalition also believes it is important to note that most time and material purchases are not issued on an open-ended "carte blanche" basis. Again, the feedback from our members indicates that many federal agencies routinely place "not to exceed" caps on their time and material purchases. This ensures that the government does not spend more than it feels it needs to on a project and provides an important incentive for contractors to ensure prompt and efficient performance. These practices ensure that time and material acquisitions meet government needs, while still ensuring proper oversight.

The Coalition recommends, therefore, that language be added to the proposed rule in Section 8.404-2(c) (2) (i) indicating that time and material purchases may also be an appropriate acquisition method depending on the circumstances of a specific procurement. We recommend adding the following at the end of this current paragraph,

"The use of other acquisition methods, such as time and materials contracting, may be appropriate when specific cases so indicate. The use of such alternative methods is not prohibited by this subsection."

We believe that the addition of this language will ensure that federal buyers have options when using schedule contracts to obtain services. It also removes ambiguities that many of our members are concerned will lead federal buyers to assume that firm, fixed price acquisitions are the only appropriate acquisition option. The Coalition asks that this addition be given appropriate consideration in the crafting of a final rule.

603-13

The Coalition looks forward to continuing our work with GSA and others to promote efficient, effective government acquisition methods. We appreciate the opportunity to have our views made known on issues such as this FAR Case.

Thank you for your time and attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Ed L. Allen". The signature is fluid and cursive, with the first name "Ed" and last name "Allen" clearly distinguishable.

Edward L. Allen  
Executive Vice President

1999-603-14



"Creighton, Paulette"  
<paulette.creighton@  
mail.va.gov>  
06/05/2003 09:55 AM

To: "Farcase.1999-603@gsa.gov" <Farcase.1999-603@gsa.gov>  
cc: "linda.nelson@gsa.gov" <linda.nelson@gsa.gov>, "Latvanas, Barbara"  
<barbara.latvanas@mail.va.gov>  
Subject: FW: FAR Case #1999-603 - Federal Supply Schedules Services and Blanket Purchase Agreements (BPAs)

Thank you for the opportunity to comment on the proposed rule, FAR Case 1999-603 - Federal Supply Schedules Services and Blanket Purchase Agreements (BPAs). The following comments and questions are submitted on behalf of the Department of Veterans Affairs.

>  
Federal Register/ Vol. 68, No. 75 / Friday, April 18, 2003 / Proposed Rules  
Comments for proposed revisions to FAR Part 8

8.401 General

1. This section should acknowledge and clarify that GSA has delegated the award, negotiation, and administration of some schedules to VA. We suggest language similar to that found in FAR 38.101(d).
2. In the second sentence of paragraph (a), change, "awarded with commercial firms" to, "awarded to commercial firms".
3. In paragraph (b), it should be clarified that ordering offices do not always issue orders directly to the schedule contractors; i.e., VA's schedules have contract terms that authorize ordering, distribution, and invoicing to be done through federal Prime Vendor programs.
4. We noted that there was some inconsistency throughout 8.4 in referring to the office or individuals that would place orders against the schedules. For example, paragraph (d) of this section uses the term "ordering contracting officer". In 8.405-7, the term "ordering agency contracting officer" is used. The language should be consistent, or, if the difference is intentional, the differing terms should be defined.

8.402 Applicability

Add VA to the second sentence, i.e. "GSA or VA may have established special ordering procedures...."

8.403 Use of Federal Supply Schedules

1. Modify the punctuation in the first sentence of paragraph (a) by deleting the first comma and adding parentheses to clarify that only the one citation is not applicable to orders placed against the schedules; i.e. "Parts 13 (except 13.303-2(c)(3)), 15, and 19 do not apply...."
2. In paragraph (c), third sentence, change, "GSA has already determined...", to, "FSS schedule contracting officers have already determined..."

8.404 Using schedules

Since the NAC, GLAC, and VISN offices provide contracting services (but do not necessarily issue orders), and often negotiate BPAs, we suggest the first sentence be modified to, "Contracting and ordering offices shall..."  
8.404-2 Ordering procedures for services using a statement of work

1. Performance based contracting may include non-financial incentives. To be consistent with FAR 37.601(d) and 37.602-4, change, "financial incentives" to, "performance incentives" in paragraph (c)(1)(ii).

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2. In paragraph (c)(2)(i), modify the last sentence to, "Schedule contractors should be requested to submit firm-fixed prices, or ceiling prices, to perform the services identified in the statement of work." This would be consistent with the clause G-FSS-920 Ordering Procedures for Services (Requiring a Statement of Work) (MAR 2003).

#### 8.404-3 Blanket purchase agreements (BPAs)

1. Need clarification on the requirement in (a)(3) that all participating agencies to a BPA be signatories to the BPA. Is this a requirement to have every participating agency physically sign the BPA document? This is an additional administrative burden that we currently do not have in place. Would evidence of the agencies' consent and active participation (e.g. submission of their requirements or participation in the evaluation of offers) satisfy this requirement?

2. Please clarify the reference to 8.403 in this section's (b)(2)(ii) and (c). 8.403 doesn't seem provide any clarification or additional information on the subject of these paragraphs.

#### 8.404-5 Small business

Add the word "business" after "service disabled veteran-owned small".

#### 8.404-6 Documentation

1. This entire section is confusing and needs clarification. Paragraph (a)(4) requires that the ordering office document the file when only one schedule contractor is considered, and outlines some situations when it may be appropriate to consider only one. It does not appear that anything more than a memo to the file is necessary. However, paragraph (a)(5) places far greater documentation requirements on "sole source requirements". Is there a distinction between the situations outlined in paragraph (a)(4) and "sole source requirements"? Also, there is a reference to FAR 2.101; but 2.101 only defines a sole source acquisition, not sole source requirements.

2. The requirement in paragraph (a)(5) to prepare sole source justifications using the rather extensive format at 6.303-2 and obtaining approvals at high levels as described in part 6 seems contrary to FAR 6.102(d)(3) which states use of FSS multiple award schedules is a competitive procedure, and FAR 38.101(e) which states Part 6 does not apply to orders and BPA's placed under schedule contracts. The requirements of this section also greatly undermine the flexibility and ease that the FSS program offers its customers.

#### 8.405-2 Order Placement

Delete, "...directly with the contractor..." in the second sentence. (Orders may also be placed through a prime vendor contractor.)

#### 8.405-4 Remedies for inadequate performance

1. In paragraph (a), the terminology should be consistent with paragraph (a) of 8.405-5; i.e., change, "ordering office" to "ordering agency contracting officer".

2. The language in paragraphs (b), (c) and (d) is unnecessary and may even conflict with 52.212-4(a). We suggest these paragraphs be deleted.

#### 8.405-5 Termination for cause

1. We suggest that only paragraph (a) and (b)(1) be retained, and (b)(2) through (5) be deleted in their entirety. Paragraph (a) adequately addresses how terminations for cause should be handled since it states that

603-14

FAR12.403 applies.

2. FSS has a cancellation clause that is often used to delete supplies or services in the contract. Therefore, modify the language in paragraph (c) to acknowledge cancellation in addition to termination for cause. The last sentence is confusing, and we suggest that the latter part be deleted. (i.e., "...unless terminated for the convenience of the Government by the ordering agency contracting officer.")

Thank You,  
Paulette Creighton  
Senior Procurement Analyst  
Acquisition Policy Division (049A5A)  
Phone 202-273-8821  
Fax 202-273-9203

>

1999-603-15



**"Fleischman Daniel R  
Civ ASC/PKC"  
<Daniel.Fleischman@  
wpafb.af.mil>**

To: "farcase.1999-603@gsa.gov" <farcase.1999-603@gsa.gov>  
cc: "Snavelly Debbie B Civ ASC/PKW" <Debbie.Snavelly@wpafb.af.mil>,  
"Myers Dominique B Civ ASC/PKC" <Dominique.Myers@wpafb.af.mil>  
Subject: Comments on FAR Case

06/06/2003 07:25 AM

ASC/PKW, at Wright-Patterson AFB Ohio, requested the attached comments be considered regarding FAR Case 1999-603:

<<99-603.pdf>>

Your favorable consideration of these comments would be most appreciated.

Dan Fleischman  
Procurement Analyst  
ASC/PKC, WPAFB OH



99-603.pdf

603-15

PKW COMMENTS ON FAR CASE 1999-603

1. Para 2 directly under "PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES" begins with a sentence fragment "... and adding in its place." Specify what is to be added in the place of the deleted word "office".
2. Para 6 adds 8.404-2 (c)(2)(i) which says that schedule contractors "... should be requested to submit firm-fixed prices to perform ..." services. The use of "should" vs the more prescriptive "shall" seems to indicate that the orders need not be fixed-price. The requirement at 8.404-6(b)(4) for documentation of the rationale for using other than a firm-fixed price order reinforces this interpretation.
3. Para 5 added the requirement at 8.404-2(c)(3) which requires a reasonableness determination for orders for services using a statement of work. It would seem that this requirement should apply only to firm-fixed price orders where a specific level of effort and mix of labor are proposed. On indefinite-quantity orders there would be no firm level of effort/mix to evaluate and the only fixed prices would be those for individual labor hours already determined to be fair and reasonable. If the intention of this revised Part 8 is to allow other than fixed-price orders (see paragraph 2 above), this requirement should be modified to limit the reasonableness determination requirement to firm-fixed price orders only.
4. Para 7 states at 8.404-3(b)(3) "... All orders under the BPA shall specify a price for the performance of the specific task identified in the statement of work." If this is meant to require that all orders under BPAs be firm-fixed price, this should be stated more clearly. This will be a very large change for some users of BPAs and should be stated in no uncertain terms so there will be no disagreement as to the intent of the paragraph.
5. Para 7 at 8.404-3 (c) requires that "Ordering offices shall review BPAs at least once a year." Logically this would apply to those ordering offices that awarded the BPA and not offices that are just authorized users of the BPA. This could be clarified by adding "awarded by their office" after "BPAs".



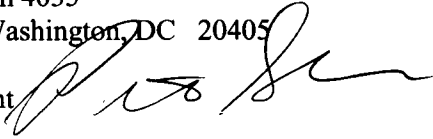
1999-603-16

1137 North Highland Street  
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June 16, 2003

ContactUs@devis.com  
www.devis.com

**TO:** General Services Administration  
FAR Secretariat (MVA),  
1800 F Street, NW, Room 4035  
ATTN: Laurie Duarte, Washington, DC 20405

**FROM:** Peter Gallagher, President 

**COPY:** Small Business Administration, Office of Advocacy  
Rep. Tom Davis, Chairman of the House Government Reform  
Committee

**SUBJECT:** Small Business Opportunities – Blanket Purchase Authorization on  
the GSA Federal Supply Schedule

**REF:** April 18, 2003, 48 CFR Parts 8 and 38 FAR Case 1999-603 RIN  
9000-AJ63

First I would like to thank you for your efforts to make the GSA Federal Supply Schedule fair and equitable for small businesses working in the Government IT sector. I am President of a small IT services contractor, Development InfoStructure (devIS) working for GSA, Department of Labor, Department of State, and USAID under the GSA IT/70 Services Schedule (GS-35F-0217J). devIS has been in business for over 10 years and employs 40 staff managed from our headquarters in Arlington, VA. Access to the GSA Federal Supply Schedule (FSS) for IT services contracting is essential for our competitiveness and the Blanket Purchase Authorization (BPA) has been a major component of our success.

A small business needs a mechanism under which it can establish long-term relationships without requiring major procurement actions. The more intricate the rules for creating a BPA the less likely it will be that contracting officials will use the tool for small business and small value procurements. While the total dollar value may not be large on a BPA the duration of the relationship is key to building contractor skill sets that match client requirements. The rules you are promulgating in the Referenced Federal Register where you seek greater competition and fairness may actually discourage BPA usage and decrease competitiveness for small businesses. Large and small businesses need not be treated exactly the same way when it comes to competing for BPA contracts. In fact, making it easier to set up a BPA with a small business and requiring more documentation/competitive process for large businesses would do a lot to encourage small business BPA usage.

*Rec'd  
6/17/03*



003-16

The GAO report (GAO-01-125) cited as background is from November 2000. Since then the FSS sales have taken off to where it is now almost equivalent to the value of combined traditional procurements. In the GAO study rules to evaluate multiple bidders were not adhered to. Some of the impetus for the proposed changes appears to have come largely in reaction to extensive usage of the FSS by larger companies who are doing extensive business with the Federal Government. Also, reaction to larger firms that for one reason or another were still able to qualify as small business got some press (as an aside, we fully support the recent legislation to annually validate small business status). The data on usage shows that large firms do the majority of the work under the FSS. The large companies are the ones that can now compete effectively for larger, often bundled, full service systems integration contracts. These larger businesses do not really need the FSS to compete.

I believe that the FSS could be a very strong advocate for small business participation and encouraging BPA usage by small businesses is a great way to allow risk-taking innovators like devIS to market their services. Also, when devIS manages a BPA contract the small business gets the work rather than the large Prime contractor providing sometimes non-strategic work to a small business subcontractor, or perhaps not providing any business at all to the small business. The FSS as a vehicle can be fine tuned to the needs of small business by encouraging and facilitating usage for small businesses and even emerging businesses. The Government is not at risk since it is easy to cancel a BPA without an Agency committing millions to a long term relationship. The BPA leaves the door open to a long-term relationship and is the ultimate incentive, whether multiple or one BPA contract is in place for a given set of tasks.

The GSA, Congress, and the Small Business Administration should be more aggressive in making the FSS work for small business. The FSS should encourage limiting procurements to small businesses on the FSS and revise rules to make it easier to procure small businesses for BPA contracts. By "leveling" the playing field and requiring equal competitive documentation for a devIS versus an IBM the revised rules do not do enough to promote small business.



"Rider, Melissa D Ms  
SAALT"  
<melissa.rider@saalt.a  
rmy.mil>

06/16/2003 11:49 AM

To: "farcase.1999-603@gsa.gov" <farcase.1999-603@gsa.gov>  
cc: "Love, Kathy Ms ACA" <kathy.love@saalt.army.mil>  
Subject: Public comments for FAR Case 1999-603 from the Army Contracting Agency

1999-603-17

The Army Contracting Agency has reviewed the proposed rule for FAR Case 1999-603, Federal Supply Schedules Services and Blanket Purchase Agreements (BPAs), that was published in the Federal Register at page 19294 on April 18, 2003. We offer the following comments:

1. The language in 8.403(a) that "ordering offices need not seek further competition" when placing orders is very confusing. A casual reading of this section gives the impression that you can pick any schedule and place an order. It's not until further reading of Part 8, that there is an explanation of the need to "review" and "consider" schedules before placing an order. We believe the language in 8.403 intends to convey the message that there is no need to compete external to the FSS/BPAs. Please clarify the language at 8.403(a) to avoid inappropriate sole source actions under the schedules.

2. Para 8.404-1(d)(1) states that ordering offices should review an "appropriate" number of additional schedule contractors when placing an order that exceeds the maximum order threshold. Given that the language in paragraph 8.404-1(c) refers to "at least three schedule contractors," it is unclear if the guidance is that you need more than three or that less than three is ok. Please include some boundaries for the range of what number of sources are considered "appropriate" means within the guidance at 8.404-1(d)(1).

3. Section 8.404-3 deals with BPAs against FSS. This section is rather ambiguous. Paragraph 8.404-3(a) (2) states that BPA awards should be made using the procedures of 8.404-1 or 8.404-2. But, those sections are intended to provide guidance for placing individual orders. Since the issuance of a BPA creates the potential for lots of subsequent orders, more definitive guidance is necessary. At least, the significance of the total estimated value of BPAs should be mentioned - i.e. if all orders against the BPAs will be less than \$2,500, do you still need to follow Part 8 guidance regarding orders over \$2,500 when issuing the BPA itself? Please clarify that the entire anticipated amount of orders to be placed against the resultant BPA must be considered when selecting the method used to create the BPA.

4. The language in 8.404-3 (b) seems to conflict with the intent to review or consider several schedules before placing an order. Without mentioning a dollar value, the section states that you can issue one BPA against a schedule and then proceed to place orders directly against that BPA without more competition. Please clarify that the competition used to establish the BPA need not be repeated as orders are placed, even when only one BPA is established.

5. Paragraph 8.404-5 advises us to consider small business before placing an order. Though it is not mandated, it does appear to conflict with 8.403(a), which states that ordering offices need not "consider small business programs" when placing orders. Please clarify when Part 19 procedures apply (i.e., they only apply when GSA established the original contracts). A lead in to the section such as "Although Part 19 procedures do not apply when placing orders under FSS contracts, agencies may apply any orders placed with small businesses toward their annual small business goals." would clarify the concept.

Thanks for the opportunity to comment. My action officer for this action is Ms. Kathy Love, (703) 681-7560.

Melissa Rider  
Director, Contract Policy and Support  
Army Contracting Agency

1999-603-18



"Cathy S Stewart"  
<cstewart1@bop.gov>

06/16/2003 02:13 PM

To: farcase.1999-603@gsa.gov  
CC:  
Subject: FAR Case 1999-603

Attached are comments from the Bureau of Prisons, Information Technology Acquisition Section regarding the above referenced FAR case.

If you have any questions or require further information, please feel free to contact me.

Catherine S. Stewart  
Contracting Officer  
National Contracts and Policy Section  
Federal Bureau of Prisons  
(202) 307-0985  
cstewart1@bop.gov



prop\_rule\_FSS\_2.wp

Subject: Federal Acquisition Regulation (FAR) Case 1999-603  
Federal Supply Schedules (FSS) Services and  
Blanket Purchase Agreements (BPAs)

As stated in the introductory paragraphs, the Multiple Award Schedules (MAS) program is intended to provide agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying. The new procedures outlined in the proposed rule degrade the flexibility and ease of use for the schedules. The following comments are offered:

- 8.403(c), Pricing. The term "fixed price" or "fixed prices" is confusing. It implies that the prices are not variable and cannot be changed. The prices on GSA FSS appear in many cases to be appropriate for very small quantities, however, if the Government has a larger requirement and actively reviews these requirements with schedule holders, these "fixed prices" are no longer "fixed". The proposed rule wording implies that Contracting Officers cannot negotiate prices unless the maximum order limitation is exceeded. Reference 8.404-4 in this part.
- 8.404-1(d), Orders exceeding the maximum order threshold. This part states that the maximum order threshold represents the point where it is advantageous for the ordering office to seek a price reduction. Again, this appears to state that until the maximum order threshold is met, it is not advantageous for the Contracting Officer to seek a quantity discount. This language should be revised. Generally, price discounts can be found with any amount of goods and services if a comparison is invoked by the Contracting Officer. Reference 8.404-4 in this part.
- 8.404-1(d)(1). To exceed the maximum threshold, the proposed rule states that ordering offices shall review an appropriate number of additional schedule contractors' catalogs or pricelists. The language is imprecise and open to interpretation. What is an appropriate number? Is this a discretionary number in the determination of the Contracting Officer?
- 8.404(c)(2)(ii). To exceed the maximum threshold, the proposed rule states that ordering offices shall review an appropriate number of additional schedule contractors' catalogs or pricelists. The language is imprecise and open to interpretation. What is an appropriate number? Is this a discretionary number in the determination of the Contracting Officer?

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- 8.404(c)(2)(iii). The proposed rule states that the ordering office shall provide the statement of work and selection criteria to any schedule contractor who requests a copy of it. This requirement appears to defeat the purpose of a simplified process, especially if the Government conducted its procurement planning and found several vendors with special abilities and qualifications. It is unclear as to why this requirement is included.
- 8.404-3(a)(2) Blanket purchase agreements (BPAs). The proposed rule states that the BPA shall address the "...frequency of ordering, invoicing, discounts, requirements (e.g. estimated quantities..." The purpose of a BPA is to provide the Government with an ordering vehicle(s) for "a wide variety of items in a broad class of supplies or services that are generally purchased, but the exact items, quantities, and delivery requirements are not known in advance and may vary considerably." Addressing requirements (e.g., estimated quantities) is language similar to requirements type contracts and may impose restrictions or expectations similar to a indefinite delivery/indefinite quantity or requirements type contract. This language should be removed.
- 8.404-3(a)(3) The requirement for all participating agencies be signatories to the BPA is unclear. The effort to obtain this will discourage most agencies from establishing multi-agency BPAs to the detriment of procurement flexibility. Perhaps an alternative may be the sponsoring agency is required to post all multi-agency BPAs (terms, conditions for use and available items) on an accessible website or to have the BPA holder post on its website.
- 8.404-6(a)(5) Documentation. As stated in this part, Orders placed under the Federal Supply Schedules are exempt from the requirements in Part 6, however, the proposed rule is imposing the same, or very similar, documentation and approval requirements. The documentation and approval process should be simplified to reflect the Government's issuance of delivery/task orders as compared to contract actions requiring full and open competition.
- The proposed rule references GSA Advantage! several times as a resource for information about the supplies and services available on FSS. The information in GSA Advantage! is not complete and definitely not current. Additionally, information about services is almost nonexistent. Though some contractors have information about their GSA FSS available on their Internet sites, allowing the Government

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to research terms and conditions and the availability of items and services, a number of other vendors do not. Obtaining copies of the schedules directly from GSA appears to be time-consuming and lengthy process according to GSA's customer service helpdesk. The Contracting Officer is thereby forced in many cases to rely on information from the contractor as to whether items or services are actually on its GSA FSS or if there are special ordering conditions. The information from the contractor has proven faulty in a number of cases or there is a hesitance in providing it, because it is so voluminous. GSA should either provide access to updated copies of all schedules electronically or mandate the contractor do so in award or renewal of contract. The Contracting Officer should have an independent and timely means of verifying FSS terms and conditions and appropriate contract line items.

1999-603-19



**nbarrere@doc.gov**

06/16/2003 05:21 PM

To: farcase.1999-603@gsa.gov

cc: cMakris@doc.gov, lAndrecs@doc.gov, mSade@doc.gov

Subject: DOC Comments on Proposed FAR Rule: Federal Supply Schedules  
and Blanket Purchase Agreements (BPAs) (FAR Case 1999-603)

June 16, 2003

Attention: Laurie Duarte, FAR Secretariat

Please find enclosed comments on the proposed rule from the U.S. Department of Commerce. If you have any questions about these, please contact Nancy Barrere at Nbarrere@doc.gov.

(See attached file: docommentsfssbpafarcase.doc)

Nancy J. Barrere, Procurement Analyst  
U.S. Department of Commerce  
Office of Acquisition Management  
Acquisition Policy and Programs  
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Nbarrere@doc.gov docommentsfssbpafarcase.doc

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The following are the U.S. Department of Commerce's comments on the proposed FAR rule "Federal Supply Schedules Services and Blanket Purchase Agreements (BPAs)" (FAR Case 1999-603).

1) The new proposed regulations should emphasize that competition on GSA Schedule must be received from firms that offer **similar** products and services. Otherwise, competition could seem perfunctory.

2) Regarding Proposed FAR 8.404-4. Recommend adding the following paragraph at the end of the currently proposed paragraph:

"When appropriate, ordering agencies should try to negotiate on-site Government labor rates when the contractor will be providing services for an extended period of time on Government property. This should be done regardless of whether on-site Government rates are included in the contractor's approved GSA pricelist." Negotiating such rates where warranted could help ensure more realistic pricing and competitive labor rates.

3) Regarding Proposed FAR 8.404-6

a) This section seems to imply that brand name justifications constitute sole source procurement. This is not the case. For instance, certain brand name IT equipment is on different schedules at different prices. Contracting Officers should always be incentivized to find a better price (particularly when better prices are on schedule).

b) For services, when a COR or COTR is appointed, a designation memorandum should be sent to that individual which outlines what he/she can and cannot do administratively on GSA orders. For instance, this memorandum should outline how hours are to be monitored on a time and materials order, how Government property is to be handled, how changes to the order can be made, etc. Contracting Officers should be required to issue such a memorandum.

4) There seems to be a contradiction on the overall approach to this new revision. For instance, 8.403 states "using the procedures in this subpart, are considered to be issued using full and open competition". However, paragraph 8.404-6 clearly indicates that GSA schedule procurements can be sole source. These two diverse statements should be reconciled.

5) Quantity Discounts

Quantity Discounts are on schedule in many different ways. On occasion, GSA may not have received a valid quantity discount for the specific quantity being proposed for a particular Agency order. This situation can be alleviated with the following clause (probably best under 8-404-4).

"Ordering activities need to ensure that the quantity discount on a particular GSA pricelist make sense for the order being placed. Contracting Officers need to examine the applicable discounts which GSA has received to ensure they are in alignment with the order to be placed."



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6) Regarding FAR 8.402: For completeness and clarity, recommend changing the first sentence to read: "Procedures in this subpart apply to (a) individual orders placed against Federal Supply Schedules, (b) Blanket Purchase Agreements (BPA's) established against Federal Supply Schedules, and (c) orders placed against BPA's that were issued against Federal Supply Schedules."

7) Regarding FAR 8.403:

For clarity, recommend changing first sentence in paragraph (a) to read: "(a) General. Part 13, except 13.303-2(c)(3), Part 15 and Part 19 do not apply to orders or Blanket Purchase Agreements placed against Federal Supply Schedules (see 8.4.4-5)."

In paragraph (a), recommend changing the sentence that reads "Therefore, when establishing a Blanket Purchasing Agreement or placing orders under Federal Supply Schedules using the procedures of 8.404, ordering offices need not seek further competition, ..." to read "Therefore, when establishing a Blanket Purchasing Agreement or placing orders under Federal Supply Schedules using the procedures of 8.404, ordering offices need not seek competition outside of the Federal Supply Schedules program, ..." This would be preferable because 8.404 currently requires consideration of more than one MAS Contractor for orders and BPA's, and ordering offices should be encouraged to seek multiple quotes/proposals under the Federal Supply Schedules program.

In Paragraph (b), recommend changing the first sentence to read: "Orders and Blanket Purchase Agreements placed/established under a Federal Supply Schedule contract ...", This signals that acquisition planning is not ignored before an agency establishes a Blanket Purchase Agreement.

In paragraph (c), consider changing the 2<sup>nd</sup> sentence to read: "Services offered on the schedule are priced either on a labor-hour fully burdened hourly rate basis or at a fixed price for performance..." That way, it is clearer than simply stating "hourly rates."

8) Regarding FAR 8.404-2: For clarity, consider changing the title to read "Ordering procedures for labor-hour services using a statement of work."

9) Regarding 8.404-2(a): Recommend changing the first sentence to read: "Ordering offices shall use the procedures in this section when ordering services at fully burdened hourly rates (labor-hour contract type) as established by GSA in the schedule contracts." That way, it is clearer about what is meant by "hourly rates."

10) Regarding 8.404-2(c): Recommend changing the first sentence to read: "The ordering office shall assist the requiring office in developing an adequately defined statement of work." The ordering office is typically not responsible for developing the customer's SOW.

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11) Regarding 8.404-2(c): Recommend changing the 2<sup>nd</sup> sentence to read: "All statements of work shall include, at a minimum, ..." That way, it is encouraged to be more specific rather than less specific about the nature of the requirements.

12) Regarding 8.404-2(c)(2)(i): Recommend changing the first sentence to read: "... and selection criteria which must include non-price/cost evaluation factors (e.g., experience, past performance, quality of technical approach, quality of work breakdown structure) and price/cost." The change clarifies that price/cost should always be a factor. Suggest deleting the remainder of the sentence, since its subject is different and should be addressed in a separate sentence.

12) Regarding 8.404-2(c)(2)(i): Recommend adding a new sentence after the revised first sentence that reads "The statement of work, quote/proposal submission instructions and evaluation criteria for award should be submitted to at least three schedule contractors (assuming that the requirement is not restricted by a manufacturer of equipment to only certain authorized resellers of their products, to certain authorized business partners, or by other legitimate circumstances to less than three companies that have a schedule contract). See also 8.404-6." This would address those real world limiting circumstances where, for example, if one is ordering services to implement a certain kind of commercial software, manufacturers of software (Oracle, IBM, others) might to restrict who can "touch" their product and implement it to those who are specifically trained and certified by their company to do so. The same situation holds true for installation and configuration of complex computer equipment from certain manufacturers.

13) Regarding 8.404-2(c)(2)(ii): Recommend changing the first sentence to read: "...the ordering office shall, in addition to meeting the requirements of paragraph (c)(2)(i), provide the statement of work, proposal/quote submission instructions and evaluation criteria to an appropriate number of additional schedule contractors (if available) that could reasonably be expected to be able to meet agency needs." This makes the intent of this paragraph consistent with the recommended changes to paragraph 8.404-2(c)(2)(i) above.

14) Regarding 8.404-3: Recommend a new paragraph (a) that compares and contrasts federal supply schedule BPAs to open market BPAs and making the current paragraph (a) into paragraph (c), with subsequent paragraphs moving down accordingly. While they are both called BPA's, they are actually very different (prices for orders placed under open market BPA's for products must be determined to be fair and reasonable each time an order is placed, whereas prices for products under federal supply schedule BPAs have already been determined to be fair and reasonable. Also, orders under open market BPA's may be no larger than the simplified acquisition threshold, while there is no such limit for federal supply schedule BPAs. Finally, open market BPA's may contain their own terms and conditions, whereas federal supply schedule BPA's are supposed to leverage existing terms and conditions from the federal supply schedule contract against which the BPA is established. This distinction between the different types of BPA's currently appears nowhere in the FAR, and 8.404-3 would be an appropriate place to make that distinction.

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15) Recommend adding a new paragraph (b) titled "Format of federal supply schedule blanket purchase agreements." The paragraph should (i) provide the GSA sample format for BPAs.

16) Recommend calling BPAs in 8.404 "federal supply schedule BPAs" instead of simply calling them BPAs. That way, it is clear which kind of BPA is being addressed (open market BPAs are entirely different and are addressed in Part 13.)

17) Recommend adding a new paragraph that addresses whether federal supply schedule orders may contain one or more options to extend the term of the order or one or more options to extend services, such as is done under IDIQ contracts that contain clauses for those situations. This is a question that frequently comes up, and different agencies have different approaches to dealing with this issue. FAR 8.404 should address this issue and establish procedures for inclusion of such options if such options are considered to be acceptable.



U.S. GENERAL SERVICES ADMINISTRATION  
Office of Inspector General

1999-603-20

June 17, 2003

FAR Secretariat (MVA)  
General Services Administration  
1800 F Street, NW  
Room 4035  
Washington, DC 20405  
Attn: Laurie Duarte

Re: FAR Case 1999-603 – Proposed Rule Regarding Federal Supply  
Schedules Services and BPAs

Dear Ms. Duarte:

This letter transmits the comments of the General Services Administration Office of Inspector General (OIG) on the above-captioned proposed FAR rule. The rule would modify FAR coverage at Part 8.4 governing agency ordering procedures under GSA's Multiple Award Schedules (MAS) contracts. We believe the rule is an improvement on current coverage in several ways. It would incorporate into regulation existing GSA-issued Special Ordering Procedures (2000) for ordering under hourly rate service contracts; this will raise the visibility of these procedures and make them more accessible to ordering agencies. Substantively, the proposed rule clarifies and adds documentation requirements to the coverage regarding price comparison and analysis on orders, as well as to the coverage on limiting competition. We believe this new coverage will help to ensure ordering agencies are properly and effectively performing price comparisons, and are observing competition principles when placing MAS orders. We also note that we support the rule's guidance to contracting officers (COs) that statements of work (SOW) should, to the maximum practicable extent, be performance-based, and that COs should request firm-fixed price proposals or quotes.

We do have several suggestions regarding the proposed rule's content. These suggestions relate to use of the term "best value"; the standard for other than fixed price orders; awareness by ordering agencies of Other Direct Costs (ODCs) associated with services task orders; and seeking price reductions on orders generally.

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### **Reference Best Value Definition**

First, as "best value" is the standard for making MAS awards, we believe that the coverage could benefit from adding language, perhaps at § 8.403(c), to either restate in full or at least reference the definition of this term in FAR Part 2. It may be helpful for ordering agency contracting officials (COs) to be reminded of this definition when placing an MAS order.

### **Use of Other Than Fixed-Price Orders**

We also believe that the proposed coverage should include a reference to the FAR standard applicable to use of time-and-materials contracts -- that such contracts not be used unless it is not possible at the time of placing the order "to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence." FAR § 16.601(b). Although the proposed rule expresses a preference for firm-fixed price orders, it does not preclude time-and-materials orders. We believe it would, thus, be helpful to ordering agencies to include a reference to FAR § 16.601(b) in the language at § 8.404-6(b) regarding the documentation requirements applicable to buying hourly rate services.

### **Other Direct Costs**

We are concerned that ordering agencies which are purchasing hourly rates services (those that require a statement of work) may not understand that ODCs may be involved or added on to the labor hours quotes provided by MAS vendors. Although GSA tries to prenegotiate the price or cost of ODCs, it cannot always anticipate all the ODCs involved in a user agency's task. Our audit work has indicated that such ODCs can sometimes be substantial in amount. For this reason, we would suggest that language be added to the rule to put agency users on notice that such costs may be involved, and that care should be taken to scrutinize and negotiate them in the ordering process. Such language would probably be most appropriately added at § 8.404-2 (c)(3), which contains coverage on agencies' responsibility to make a price reasonableness determination as to the overall task order.

### **Price Reductions**

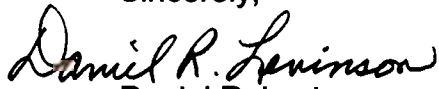
We recommend that language be added to § 8.403 (Use of Federal Supply Schedules) to emphasize that ordering agencies are always free to seek better prices at any purchase level from MAS vendors. Section 8.403(c) addresses the fact that GSA has made an initial determination that hourly rates (and prices for products or fixed-price services) are fair and reasonable. Although we understand that the language is meant somewhat narrowly to explain GSA's role, we believe it may suggest to ordering agencies that they are precluded or discouraged from seeking further better prices themselves. We suggest that a

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sentence be added at the end of that section which provides – “Although GSA had already negotiated fair and reasonable pricing, ordering agencies are always encouraged to seek additional discounts whatever the volume or dollar amount of their proposed order.”

Please feel free to call my counsel, Kathleen Tighe, on (20) 501-1932 with any questions regarding these comments.

Sincerely,

A handwritten signature in cursive script that reads "Daniel R. Levinson".

Daniel R. Levinson  
Inspector General

1999-603-21



"Michael McLay"  
<mclay@python.net>  
06/17/2003 10:46 AM

To: farcase.1999-603@gsa.gov  
cc:  
Subject: Comments on the FAR Rule Changes

#### Comments on Proposed FAR Rule Changes

In the introductory "Background" section the announcement states:

The Multiple Award Schedules (MAS) program... provides Federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying. For much of its history, the MAS focused on the sale of products. In recent years, however, GSA has sought to facilitate broad access to service contractors."

The rules for the procurement of software services will be improved if provisions are added that will enable agencies to jointly sponsor funding of projects through not-for-profit organizations that develop Free and Open Source Software (FOSS). These organizations build core infrastructure software that is used extensively by the government [1] and the President's Information Technology Advisory Committee recommends that the government invest in the development of FOSS [2]. Under the current procurement process there is no direct funding mechanism that targets making improvements to this core software, yet those improvements would benefit many government IT projects which are built using the FOSS software. The not-for-profit organizations already have an infrastructure in place for managing the development of software. If infrastructure funding were made available to these organizations they could use the money to make general technology improvements.

A second improvement to the process of contracting for services would be create a service similar to the "GSA Advantage" that is tailored for managing software projects. This service would provide a task oriented bidding mechanism through an automated website. This mechanism would enable long term software service contracts to leverage the existing software management infrastructure of the not-for-profit organizations that are already overseeing the development of software infrastructure components. The "GSA Software Advantage" system would inter-operate with the management systems of the not-for-profit organizations and delegate the management of short term tasks to the automated systems of the not-for-profit organizations. The systems would work together to manage bidding on tasks, to monitor the status of the tasks, and to create an archival record of project activities.

The systems would automate a proven agile project management methodology that is widely used by FOSS projects. This methodology supports collaboration between all of the developers working on a project. The process uses peer review and automated regression testing for quality assurance. The methodology requires that a working system be delivered every two to three weeks. The customers and developers end each cycle with a progress review and planning session to insure that the highest priority tasks are always the first to be completed. The short feedback cycle reduces the risk to the contractor and to the customer. The methodology also reduces the probability of project failure.

The new management approach will still support periodic formal program reviews, but the shortened internal of the development loop will eliminate unpleasant surprises at the end of these longer formal review cycles. The list of developers that would be eligible for bidding on the tasks from the not-for-profits would be pre-qualified as GSA service providers using the



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existing rules. The purpose of adding the not-for-profit intermediary is to take advantage of their established infrastructure for managing the allocation of resources for the short term tasks. This approach also lowers barriers between developers who are working for different contractors and on different projects by providing them with a collaborative work environment. By providing a shared workspace for software development the developers will be able to leverage a wider knowledge-base of expertise and unrelated Federal IT projects will be able to minimize the duplication of effort on core shared technology. The system moves developers from the isolation of the traditional smokestack and places them in a highly productive development environment.

These proposed changes to the approach used to procure software are a significant departure from the traditional process for developing and deploying large government software systems. A trial program should be put in place in order to prove or disprove the viability of this approach. This trial would be a two-three year demonstration project in which government funding would be made available to several well established not-for-profit software development activities. These projects would be monitored to determine if the process provides an efficient and accountable alternative to the traditional software project management process.

#### Background

For procurement of discrete services in which the scope of the work is easily identified, is self contained, and can be uniformly carried out by any certified individual; such as janitors, security guards, or electricians; the use of a MAS based purchase of services is analogous to the procurement of a physical product. The applicability of this approach becomes strained when the procurement is for software development services. Software services acquisition differs from the acquisition of services for repetitive activities in that the knowledge, skills, and abilities necessary to carry out the software tasks vary greatly and the tasks tend to be creative work that are only executed once. The procurement of services for a project is further complicated because the requirements for the individual tasks of projects often span many domains of technology expertise. Treating software developers as generic, interchangeable resources that can be supplied by any IT job shop is inappropriate because the abilities of individual programmers can vary by orders of magnitude, and the most talented individuals for the tasks of a project are unlikely to all be employed by a single company.

The computer programming profession is a knowledge industry similar to the legal and medical professions. Specialists gain reputations within their field and groups of specialists within these communities often join together in partnerships and sell their services collectively. The professions also form associations that provide continuing education services for the working professionals, organize meetings for networking between the individuals, define standards of performance for the industry, and to carry out collaborative activities that advances the profession. These self organizing communities are a resource that could be utilized by the procurement process.

For the software development profession, this natural self organization process has been taken to a new level of collaboration as a result of the Internet. This is in part because of the complex, inter-dependent nature of software systems and the ease which the task of software collaboration can be accomplished using the Internet.

During the 1980's the personal computers emerged as a office productivity tool on which general purpose software, such as word processors, spreadsheets, and drawing tools. could improve the efficiency of developing documents and managing small data sets. This class of software differed from the highly complex and inter-dependent software that was developed for mainframe computers in that the desktop applications were self-contained and where simple enough office workers could easily learn to use the software by



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reading a manual. This special class of software enabled some software to be viewed as a manufactured product. This software makes up a relatively small percentage of the source code that is written by the industry, but because of advertising and the widespread use of this software by end users it has taken on the appearance of being the largest segment of the software market.

The software professionals working in the software-as-a-product market act much like their counterparts in the medical and legal professions. An individual or small team works on an isolated body. The external interactions of that body on other bodies is minimal. That is, the applications are self contained and do not require data to be exchanged with other applications in order to be useful to an organization. The Internet and the World Wide Web has changed the nature of software systems used by end users. This change has turned the millions of discrete and isolated computers into a single living organism in which information can be share globally, but also in which security errors in software can propagate around the planet within minutes. This fundamental change has a profound impact on the how software is developed.

Tim O'Reilly points out in [3] that, unlike the shrink wrap COTS world of software-as-a-product, the development of software for Internet based services is a continuous process. Web servers are under constant development. A Federal procurement policy for procurement of software should reflect the reality of how software is being developed on the Internet. This observation of how software is developed by industry is not reflected in the traditional waterfall development process that is used in the development of large Federal software procurements. A new agile development model using a methodology pioneered by "Extreme Programming" is a better match to the reality of a continuously evolving system of interconnected software applications.

The agile business process is based on an underlying assumption that chaos and complexity theory are a realistic model of how systems interact in the world. This model recognizes that we do not have a perfect vision of the final outcome of a software development project and that customers need to continuously update their priorities based on the feedback from the developers. New ideas are discovered throughout the development process and an agile methodology allows the customer and the developer to capitalize on these innovations. By contrast, the traditional waterfall model constrains the software developer in a straitjacket of deliverables defined months or years in the past. The inflexibility of the traditional development process results in the delivery of systems that were technically in compliance with the contractual obligations, but are impaired or useless from the perspective of the end user.

An agile development methodology acknowledges the imperfect nature of predicting the future and addresses the problem by using a very short feedback cycle in the development process. Under this methodology the development cycle is measured in two to three week intervals instead of years. This short feedback loop mitigates risk for both the customer and the contractor. This methodology works to strips away the layers of management that often impede development. By placing the customer in direct and frequent contact with the software experts who are tasked with writing the software, the process assure that the system that is delivered matches the top priority requirements of the customer.

The traditional use of a primary contractor, who subcontracts to specialists, for the procurement of software development also fails to leverage the self organizing nature of the community of software development professionals. One core problem is the excessively high overhead rates and stifling effects that in created by these highly structured organizations and their subcontracting task management infrastructures. The business interests of contractors

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include layers of management that slow communications and place roadblocks in the process of quickly making changes to plans. This organizational structure lack the agility to quickly adapt to the day to day reality of developing large scale interrelated software development projects. This inflexibility is at least partially responsible for the budget overruns of typical large government software procurements and the high rate of complete failures of software projects.

Federal, state, and local government procurements for software services could leverage the existing organizations of software specialists to build a software infrastructure by using the not-for-profit organizations as conduits between the customers in the individual agencies and the programming professionals who formed these organizations. Under this system of contracting, the organizations would have programmers available on retainer to carry out specific tasks for agencies and when specific tasks are not available for a given programmer, they would work on the core technology development of the core technology that is managed by the organization. For instance, the GNU Foundation, the Python Software Foundation, the Gnome Foundation, the EuroZope Foundation, the Mozilla Project, and the Xfree86 Project Inc. all make use of volunteers to continue to develop and improve the quality and efficiency of their code bases. These volunteers are often employed by companies who indirectly benefit from the improvements to the technologies. This proposed approach for managing contracts for software development would allow the programmers working on government contracts to act in a manner that compatible with the natural process of the Free and Open Source Software (FOSS) market.

Under this system of procurement a programmer may spend 50-90% of their time working on specific tasks for a Federal, state or local agency. Their remaining time would be used to add new features, to refine old features, to optimize performance, to carry out regression testing, or to track down and eliminate registered bugs. The results of these task independent activities would be a general improvement in the code pool. These improvements would benefit all of the projects that make use of the technology.

#### Accountability and Automating the Process

The transparency of the open source development process will minimize the possibility for funding abuse. The existing open source culture has attracted participants who are generally not opportunists. They work in a market in which the rewards for participation are simply merit, status, and professional reputation. This is in stark contrast to the closed source commercial off the shelf (COTS) software world in which the monopolistic consequences of restricting access to the source code enables successful vendors to extract 50-80% profit margins. With such high profit potential, the closed source market has become a magnet for opportunists.

In the open source culture all evidence of the work activities are visible to the world. Non-performers are readily apparent and are removed from the pool of developers. Those who has participated in a successful open source project know that sloppy work and non-cooperative attitudes are not tolerated. This is a natural result of the process. The most valued asset to each participant is their time. People who waste their time are asked to move on and not disrupt the productive developers.

A procurement policy that can complement this highly efficient market and capitalize on the existing infrastructure holds great promise in reducing cost of large scale projects and reducing the rate of project failures. The history of the computer industry includes special circumstances in which the government set up special organizational structures to address government needs that are not efficiently addressed by the commercial markets. For instance, the Rand Corporation was set up to develop software for the government because no commercial enterprises were willing to take on the task

[4] and virtually all of the software used in high energy experimental physics is developed by grants from the government rather than by speculative commercial development.

If there are cost or technical advantages to the government in developing an organizational structure to oversee the coordination of the critical infrastructure of Federal, state, and local government IT systems then it is in the best interest of the taxpayers to at least conduct a trial to test the hypothesis. For the case of experimenting with alternative methods for developing large, inter-connected software systems for the government the mechanism for carrying out a series of inexpensive experiments is already be at hand.

The primary development sites for projects such as GNU, Debian, and Python are already highly organized and automated. They typically use CVS for managing the revisions of versions of software. They use Mailman to manage email lists that are frequented by developers, end users, and special interest groups. They use build farms that automatically run regression tests of the code base and flag errors when someone checks in a patch that breaks the head of the code base. They have bug tracking software, such as Bugzilla, that are used to manage all bugs reported on the code base. The bugs are assigned to a team member for resolution based on the expertise of the member and the nature of the bug. Feature requests are tracked in a similar manner. New tools that will improve project management are also in development. The Subversion project is building a replacement for CVS that will fix flaws in the architecture of CVS and that will make better use of standards, such as WebDAV. The GForge project is building an easier to use and to install replacement for the SourceForge repository. This new tool adds capabilities, such as project schedule tracking, to the set of features available to projects.

These automated systems could easily be extended to include project contracting and reporting capabilities that would simplify the process of agencies seeking software service contracts. It is in the government's best interest to fund the development of this capabilities and to set up the infrastructure that will allow the government to tap into the pool of organized programming talent. This group includes many individuals and small companies that currently finds the government contracting process to be cost prohibitive to pursue. Many highly talented developers have given up on bidding on government projects because the contracting process is simply not cost effective for the individuals, or small businesses to carry out. Also, infrastructure for organizing procurements as a process of bidding on very short term tasks, as would be used using the "Extreme Programming" methodology, does not exist. Integrating a task order bidding process into the existing organizational structures would open up a new market for government procurement.

The section 8.404-3 titled "Blanket purchase agreements (BPAs)" is suppose to support a flexible methodology for procurement of services by agencies, however, the infrastructure envisioned by the procurement process is still grounded in a paper based procurement methodology. For instance, the following quote:

8.405 3 (2) When the schedule contracting agency performs the inspection, the ordering office will provide two copies of the order specifying source inspection to the schedule contracting agency.

Assuming we automate the process of tracking work assignments, work reporting, and work inspection, all of the data will be available for inspection in the project management system as a permanent record. This addition to the existing development infrastructures of not-for-profit organizations would be a trivial extension to what is already in place. The investment would make way for the creation of a highly efficient system for outsourcing work

directly from the customers in agencies to the most talented developers available. By automating the reporting requirements we also minimize the time that a programmer must spend on developing status reports and on the validation of completion of contractual requirements. The programmers can spend all of the time developing software and the system will automatically validate that the work has been completed according to the customer's requirements.

#### Serendipitous Benefits

Increasing the pool of FOSS based software has several intangible benefits. The source code that is made freely available becomes a valuable educational resource. For software, as with literature, the best way to learn is write well is to study the works of great authors. Teaching the next generation of software developers by using the live software used by the government will eliminate the post-graduation training period that is required to bring the programmer up to speed on the software they are expected to help develop and maintain. Instead, they come to work with a working knowledge of the software that is in use by the agencies.

A secondary benefit of FOSS based development is that we have the opportunity to further reduce the cost of software through collaboration on projects with other governments around the world. For the advanced industrial nations this cost sharing will include investments from government outside our borders. For the less developed nations the collaboration will likely take the form of tapping into the pool of software developers who will emerge as a result of having access to the source code that is developed by the developed nations. Sharing the source code is a very inexpensive form of foreign aid. It also makes our country the benefactor for improving the infrastructures of those countries. This form of aid translates directly into good will. This leg-up collaboration also becomes a process to improve the communications between cultures. It could be viewed as a form of "Good Will Games" for the technical communities in all nations.

#### Facilitating Software Development for State and Local Governments

The Federal government often interacts with state and local agencies and it is advantageous to all levels of government if software systems that are used at all levels of government make use of standards for communications of information between the agencies. Currently each state and local agency works independently to develop their IT infrastructures. The agencies at all levels of government can achieve economies of scale if some of this work is carried out as a coordinated collaboration on software development.

This collaboration is starting to occur. There are informal arrangements in place in which state agencies are starting to collaborate on the use of FOSS. Some states have started to coordinate efforts on the development of tools for managing state regulations and the dissemination of information[5]. This sharing of software development expenses could easily cut the development costs of state IT infrastructures in half. This cost could be further reduced if software tools were deployed that facilitated the organization of these efforts. This formalization of the process would reduce redundancy of effort by facilitating easier discovery of technology that could be adopted rather than reinvented.

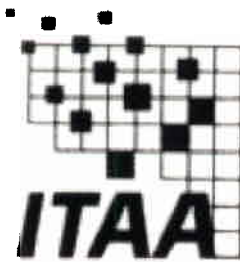
#### References

- [1] <http://www.egovos.org/pdf/dodfoss.pdf>
- [2] <http://www.ccic.gov/pubs/pitac/pres-oss-11sep00.pdf>
- [3] "Why Scripting Languages Matter" - <http://www.oreillynet.com/pub/wlg/3190>
- [4] "From Airline Reservations to Sonic the Hedgehog: A History of the

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Software Industry" ISBN-0262-03303-8. While there are plenty of commercial software firms willing to build government IT technologies today, the question that needs to be asked is whether these companies are willing to do so under the terms that are more favorable to the government. The closed source community justifies their high profit margins because they are making a speculative investment of building products that may not find a market. Government software procurements are not speculative. The cost of the systems can be calculated in advanced and contracts for the work do not require commercial speculation. This reduces the cost to the government by eliminating the excess profits that are expected by the commercial sector working in a speculative marketplace. There is nothing radical in this suggestion. COTS market represents less than 50% of the total software industry. Most software is developed outside this speculative market. The choice of markets the government buys from only differs in who pays the upfront cost of the investment. In the end the government will pay the full price regardless of the market. The difference in total cost is the difference between spending 10% on profit for contracted services and 50-80% on software that is developed speculatively.

[5] Rhode Island and Hawaii are collaborating on the development of Zope based servers for projects. Rhode Island had already deployed a system for managing the submission of state regulations using FOSS technology. Having discovered that Hawaii was developing FOSS based services to perform other functions, the two states started collaborating on development. By isolating the state specific aspects of their next generation of tools they will be developing tools that can be used by both states. On last report they were starting to talk with other states and plan to expand the pools of collaboration.



1999-603-22

June 17, 2003

Ms. Laurie Duarte  
General Services Administration  
FAR Secretariat (MVA)  
1800 F Street, NW  
Room 4035  
Washington, DC 20405

Dear Ms. Duarte:

**Re. FAR Case 1999-603; Federal Supply Schedules Services and Blanket Purchase Agreements**

The Information Technology Association of America ("ITAA") submits these comments in response to the April 18, 2003 proposed rule and request for comments regarding proposed revisions to the Federal Acquisition Regulation ("FAR") concerning the Federal Government's acquisition of commercial services under the Federal Supply Schedules. As presented in more detail below, the ITAA believes that several revisions to the proposed rule are necessary to ensure consistency with the Federal Acquisition Streamlining Act ("FASA") and to provide meaningful guidance to the contracting community.

Our comments and recommendations may be summarized as follows:

- A. The proposed provisions addressing use of firm fixed prices for services should be revised to track the statutory language set out in FASA and to provide guidance consistent with existing law.
- B. The proposed language that would grant ordering agencies the unilateral right to reduce the order price to account for reduced value should be deleted.
- C. The proposed inspection and acceptance procedures addressing services are not balanced and are inconsistent with customary commercial practice and, therefore, should be deleted.
- D. The BPA requirements concerning statements of work should be clarified so that, consistent with FAR 8.404-1(c), the requirements do not apply to orders for supplies or fixed-priced services.
- E. The ITAA agrees with the inclusion of guidance addressing sole source acquisitions, but this guidance should be moved to the more substantive sections that address ordering procedures, *i.e.*, FAR 8.404-1 and FAR 8.804-2.

The ITAA provides global public policy, business networking, and national leadership to promote the continued rapid growth of the IT industry. The ITAA consists of over 500 corporate members throughout the U.S., and a global network of 47 countries' IT associations. The

**Information Technology Association of America**

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Association plays a leading role in issues of IT industry concern including information security, taxes and finance policy, digital intellectual property protection, telecommunications competition, workforce and education, immigration, online privacy and consumer protection, government IT procurement, human resources and e-commerce policy. ITAA members range from the smallest IT start-ups to industry leaders in the Internet, software, IT services, ASP, digital content, systems integration, telecommunications, and enterprise solution fields. Please visit [www.ITAA.org](http://www.ITAA.org) for more information on the ITAA's activities.

We appreciate this opportunity to provide our comments and recommendations.

## COMMENTS AND RECOMMENDATIONS.

### A. The Proposed Provisions Addressing Use of Firm Fixed Prices for Service Acquisitions Should Be Revised To Track Statutory Language and To Provide Guidance That Is Consistent with Law.

The ITAA recommends that the FAR Councils revise the proposed rule to track more closely the applicable statutory language set out in FASA regarding when it is appropriate to solicit orders on a basis other than firm-fixed price. The language at issue appears at proposed FAR 8.404-2(c)(2)(i), which pertains to ordering procedures for services using a statement of work, and proposed FAR 8.404-3(b), which pertains to blanket purchase agreements. Specifically, proposed FAR 8.404-2(c)(2)(i) provides:

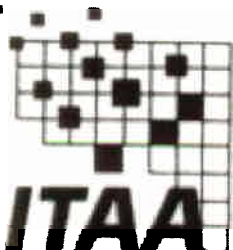
Schedule contractors should be requested to submit firm-fixed prices to perform the services identified in the statement of work.

The wording at proposed FAR 8.404-3(b)(iii) requires that orders specify a "price."

Importantly, the proposed language, as currently worded, does not provide meaningful guidance regarding when use of firm-fixed-price terms is appropriate. In this regard, the instruction that schedule contractors "should" be requested to submit firm-fixed prices provides no indication of what factors are applicable to the determination of whether or not firm-fixed price terms are appropriate. Moreover, the fact that the language differs from that set out in FASA adds to the confusion.

We recommend that the language be revised to track more closely the language set out in FASA, which requires that "firm, fixed price contracts or fixed price with economic price adjustment contracts be used to the maximum extent **practicable**." Pub. L. 103-355, § 8002(d) (Emphasis added.). We also recommend that the rule be revised to include meaningful guidance as to when the solicitation of a firm-fixed price offer may not be practicable. In this regard, we address the FAR Councils' attention to FAR 16.103(b) ("Negotiating Contract Type"), which provides:

A firm-fixed-price contract, which best utilizes the basic profit motive of business enterprise, shall be used when the **risk involved is minimal or can be predicted with an acceptable degree of certainty**. However, when a reasonable basis for firm pricing does not exist, other contract types should be considered



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FAR 16.103(b) (emphasis added). U.S. General Accounting Office case law also provides helpful guidance. See, e.g., BMAR & Assocs., Inc., B-281664, 99-1 CPD ¶ 62. In BMAR, the GAO sustained a bid protest against a firm-fixed price procurement in which there existed no detailed estimate of projected work under the contract. The GAO ruled that requiring proposals on a fixed-price basis would impose unreasonable risk on the winning contractor as well as inflate the Government's price as a result of offerors including price allowances for large "contingencies" in their proposals. Thus, as reflected in FAR 16.103(b) and GAO caselaw, it is unreasonable to impose firm-fixed-price terms when a requirement is not definitive enough to reduce risk to a reasonable level.

Accordingly, we recommend that the FAR Councils:

1. Revise proposed FAR 8.404-2(c)(2)(i) to read:

(2)(i) For proposed orders not expected to exceed the maximum order threshold, the ordering office must provide the statement of work, and selection criteria (e.g., experience and past performance) to at least three schedule contractors. Schedule contractors should be requested to submit, to the maximum extent practicable, proposals or quotes on a firm fixed price basis to perform services identified in the statement of work. Factors to consider in determining whether or not soliciting quotes or proposals on a firm fixed price basis is practicable include whether an accurate estimate of the extent or duration of the work has been provided to the offerors, whether it is possible at the time of placing the order to anticipate costs with any reasonable degree of confidence, whether the risks involved can be predicted with a reasonable degree of accuracy, and any other indication that a fixed-price basis would impose unreasonable risk on the contractor or inflate the Government's price as a result of offerors including price allowances for "contingencies" in their proposals.

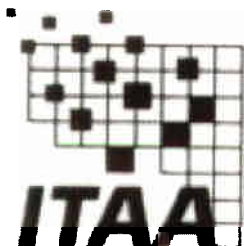
2. Revise proposed FAR 8.404-3(b)(3) to read:

(3) If the BPA is for hour rate services, the ordering office shall develop a statement of work for requirements covered by the BPA, unless the BPA contains fixed prices for specific tasks. All orders under the BPA shall, to the maximum extent practicable as provided for in FAR 8.404-2(c)(2)(i), specify a price for the performance of the specific task identified in the statement of work.

The recommended revisions above are necessary to provide appropriate guidance to contracting officials. The revisions are also consistent with FASA, current FAR Part 16 guidance, and GAO case law.

**B. The Proposed Rule Would Inappropriately Grant Agencies the Unilateral Right To Reduce the Order Price.**

Proposed FAR 8.405-4(c) would grant ordering agencies the unilateral right to reduce the order price whenever the agency deems it has not received full value as a result of an alleged performance deficiency. Specifically, the proposed language reads:





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(c) If reperformance will not correct the defects or is not possible, the ordering office may require the contractor to ensure that future performance conforms to order requirements and **may reduce the order price to reflect its reduced value.**

The proposed language provides no mechanism by which the contracting officer determines the appropriate amount of the price reduction, and no mechanism by which a contractor may contest such a price reduction. Without such mechanisms, the provision provides an overly broad right that may be subject to abuse.

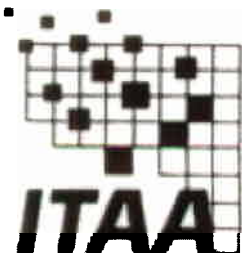
The ITAA recommends that the proposed language be deleted. Not only does the language lack a fair balance, it is unnecessary. An ordering agency's rights under the standard commercial termination for convenience provisions of FAR 52.212-4(l) provide ordering agencies the right to terminate, in whole or in part, including that part of a contractor's performance that is inadequate. Importantly, the rights and remedies under the termination for convenience clause are well understood and would provide for a mechanism for determining an appropriate adjustment to the order price. Consequently, the proposed language is unnecessary.

**C. The New Inspection and Acceptance Procedures Addressing Services Lack a Fair Balance and Are Inconsistent with Customary Commercial Practice.**

The proposed rule would add a new provision at FAR 8.405-3(b) addressing inspection and acceptance of services. This provision, in effect, would grant ordering agencies an incredibly broad right to inspect and test all services at any time or place during the period of the order. Moreover, if the ordering office chooses to perform inspections or tests on the premises of the contractor or subcontractor, the rule would require contractors and their subcontractors to furnish—at no increase in order price—all reasonable facilities and assistance for the “safe and convenient” performance of these duties. This proposed wording is a substantial change to the current rules, is onerous, and is inconsistent with standard commercial practice.

As an initial point, FAR 52.212-4(a) (Inspection and Acceptance) already adequately addresses the issue of inspection and acceptance and, according to FAR Part 12, already sets out the standard terms applicable to the acquisition of commercial items (including services). We see no need for two different inspection and acceptance requirements, especially considering that the proposed provision departs significantly from the current FAR 52.212-4 language.

Further, the proposed language is inconsistent with customary commercial practice. Inspection and acceptance terms are typically negotiated based on the type of service involved, but in no event are such terms left so open-ended and dependent on the ordering party's whims so as to impose such significant risks and potential cost impacts for the performing party. As indicated above, the proposed language would essentially permit an ordering agency to inspect and test a contractor's work whenever and wherever it wants, and would even make the contractor liable for the costs associated with the agency's testing at the contractor's or



subcontractor's facility. The language even omits the existing provision applicable to orders placed for products (FAR 8.405-3(a)(d)), which states the well established (at least until now) rule that "acceptance shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amounting to fraud." The FAR Councils' proposed language is unfair and would constitute an unjustified departure from current law.

The language that the FAR Councils are proposing is clearly contrary to FASA's mandate that only those provisions required to implement law or that are consistent with customary commercial practice may be included in commercial item contracts. Because the language of proposed FAR 8.405-3 fails to meet that standard, it must be struck from the proposed rule.

**D. The Scope of Work Requirements Applicable to BPAs Should Be Clarified To Read that the Requirements Do Not Apply to Orders for Supplies or Fixed Price Services.**

The language located at proposed FAR 8.404-3(b)(2)(i) would provide that, when an agency places an order against a BPA, it must forward its requirements or statement of work to the BPA holders. This proposed language, however, is inconsistent with the ordering procedures applicable to supplies and fixed priced services, which are located at FAR 8.404-1. FAR 8.404-1(c) simply provides:

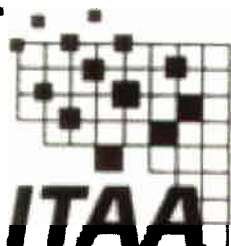
Before placing an order, an ordering office shall consider reasonably available information about the supply or service offered under MAS contracts by using the GSA Advantage! on-line shopping service, or by reviewing the catalogs or pricelists of at least three schedule contractors.

These procedures do not require agencies to prepare and circulate to offerors either a requirements or a statement of work document.

Accordingly, the ITAA recommends that FAR 8.404-3(b)(2)(i) be revised to clarify that the provision does not apply to orders for products or fixed price services.

**E. The ITAA Supports Inclusion of Guidance Addressing Sole Source Acquisitions.**

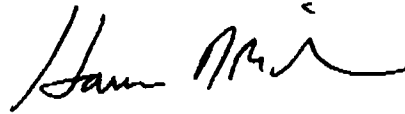
The ITAA supports the FAR Councils' inclusion of proposed FAR 8.404-6(a)(4), which addresses the circumstances pertaining to when restricted competition is appropriate. The location of this language, however, (in the section dealing with documentation) is not the most appropriate. Because the provisions at issue constitute a substantive rule and pertain directly to the requirements set out in FAR 8.404-1 and FAR 8.404-2, we recommend that the proposed FAR 8.404-6(a)(4) language be transferred to the end of FAR 8.404-1 (Ordering Procedures for Supplies and Fixed-Price Services) and FAR 8.404-2 (Ordering Procedures for Services Using a Statement of Work). Similarly, we also recommend that the closely related provisions of FAR 8.404-6(a)(5) that address sole source justifications and approvals be relocated to the end of FAR 8.404-1 and FAR 8.404-2.



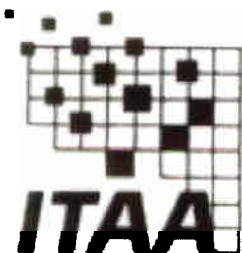
**CONCLUSION.**

The ITAA appreciates this opportunity to comment on this important proposed rule. We look forward to a continued dialogue with the FAR Councils regarding issues that pertain to the Federal Supply Schedules and the acquisition of commercial services.

Respectfully submitted,



Harris N. Miller  
President  
Information Technology Association of America



1999-603-23



"Gebhard Becky A Civ  
HQ AFMC/PKV"  
<Becky.Gebhard@wpa  
fb.af.mil>

To: "farcase.1999-603@gsa.gov" <farcase.1999-603@gsa.gov>  
cc:  
Subject: FAR comments

06/17/2003 03:06 PM

Attached are the combined comments from AFMC. We hope it helps you in your final determinations.

***Becky Gebhard, CPCM***  
**Procurement Analyst**  
**HQ AFMC/PKV**  
**4375 Chidlaw Rd, Rm S260**  
**Wright Patterson AFB, OH 45433-5006**  
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Part B The item.doc

### Comments to FAR Case 1999-603

1. Part B The item (2) indicating the amendment to section 8.401 is incomplete. It indicates to delete the word "office" but fails to include what should be added in its place.
2. FAR 8.403(a) states "when establishing a Blanket Purchase Agreement...order offices need not...consider small business programs." However, in 8.404-5, Small Business, it states "When conducting evaluations or establishing a BPA and before placing an order, consider including, if available, one or more small business, etc." These references appear to conflict. FAR 19.202-1 encourages small business participation but, 8.403 states Part 19 does not apply.
3. FAR 8.404-2 (c): "All statements of work shall include the work to be performed, location of work, period of performance, deliverable schedule, applicable standards, and any special requirements (e.g., security clearances, travel, special knowledge)." If using an RFQ'(SF 18s), location of work either in block 8 or in the schedule, and period of performance/deliverable schedule included in Section F, would be duplicative.
4. FAR 8.404-2(c). QASP language should only appear in one place, not fragmented in two places.
5. FAR 8.404-2 (c)(1): "Agencies shall use performance-based statements of work to the maximum extent practicable. When preparing statements of work, ordering offices shall, to the maximum extent practicable--"  
Recommend rewording subparagraph "iii" to read: Develop a quality assurance surveillance plan and Service Delivery Summary (SDS) simultaneously with the Statement of Work (SOW) and incorporate the SDS into the SOW."
6. FAR 8.404-2 (c)(2)(i) indicates firm-fixed-prices should be requested. In the past, labor hour or time and material pricing have been allowed. It is unclear whether the intent is to prohibit use of labor hour or time and material pricing. Since the term "should" is used instead of "shall," latitude exists for Contracting Officers to interpret that firm-fixed-price is not mandatory. Recommend the intent in terms of pricing arrangement be more clearly stated. If labor hour and T&M pricing are still allowed, ~~recommend this be changed to:~~ "Schedule contractors should be requested to submit firm-fixed-prices (or ceiling prices when the contracting officer has determined that no contract type other than labor hour or T&M is appropriate) to perform...."
7. FAR 8.404-2(c)(2)(ii), says to solicit "an appropriate number of additional schedule contractors" besides the three called out in (i) above. DFARS 208.404-70(c)(1) requires us in DoD to solicit every schedule holder when we are buying services \$100,000 and above. I do not see this as a conflict. In my opinion, the existing DFARS further defines what is an appropriate number.
8. FAR 8.404-3(a)(1) Recommend including in the list of considerations, an element that reflects the dilution of available work that may result from increasing the number of awardees. Industry feedback has indicated that the effort put into proposing for BPA awards may not be warranted if too many awards are made FAR 8.404-3(b)(3), the last ~~sentence indicates~~ "all orders under the BPA shall specify a price for the performance of the specific task." It is unclear whether the intent is for this to read "fixed price" or

whether the latitude exists to place labor hour and T&M orders and the price could mean either a fixed price or a ceiling price.

9. Reference FAR 8.404-5 Small business: While an order can't be a small business set-aside when following FAR 8.4 procedures, it is unclear whether a contracting officer can send the solicitation package only to small business or could consider small business status as part of the evaluation criteria. As currently written, it appears that the only preference allowed is when two or more items are at the same delivered price. It is noted that the possible evaluation factors listed in 8.404-1(c) is silent regarding small business size and agency small business goals. If the intent is to allow no preference, one of the drawbacks of using the FSS program in lieu of other competitive procedures is the possible negative impact on agency small business goals.

10. FAR 8.404-6(a)(5)(i) "Orders placed under the Federal supply Schedules are exempt from the requirements in Part 6" and "(ii) Justifications and approvals are required only for sole source requirements."  
Appears to be a contradiction.

11. FAR 8.404-6 (a)(5)(A) The sole source justification language proposed for addition here , subparagraph (5), Sole source requirements states that FSS "are exempt from requirements of Part 6. However, ordering offices shall (A) conduct sole source requirements.....only if the need is justified in writing and approved at the level specified in para...of this section;" Since 8.404-3(b) grants the authority to award a single BPA and authorizes users to place the order directly under the established BPA when the need for the supply or service arises, is the sole source approval under 8.404-6 Documentation now required when establishing the single award? Or when going to the single source after award? Or is it both? Or is it only required when placing an order with a single source when there are multiple BPAs available? If justification is required for the single BPA award, recommend insertion of a reference into 8.404-3(b) to advise the reader, and 8.404-6(a)(5) should be also be changed to address sole source BPA awards.

12. FAR 8.404-6(a)(5)(B)(ii) - talks to J&A's for sole source requirements, but should also include those for brand name or equal.

13. Section 8.404-6(a)(5)(B)(ii)(A) - talks to J&A's for \$100,000 and up. There used to be an AFFARS reference (5313.106-1) which allowed a short form J&A for under \$100,000. Not sure if this means that a long form is now required, but that dollar level is not addressed at all in this document.

14. AR 8.404-6(a)(5)(ii)(A) - (D): This appears to be simply a regurgitation of FAR 6.304. If the thresholds are the same, recommend just referencing the reader back to the thresholds at FAR 6.304. If they ever change, you won't have to update or amend multiple places of the FAR.

15. FAR 8.404-6(b)(4), which provides that the ordering office shall document the rationale for using other than (i) a firm-fixed price order; or (ii) a performance-based order. If the language envisions use of T&M or labor hour orders, further explanation is

needed. Does the language envision firm-fixed price orders with award fee or performance/delivery incentives? The FAR Council might consider providing further explanation/clarification on these points or examples as to the types of non-FFP or performance-based orders envisioned.

16. FAR 8.405-5(b)(2), the only costs mentioned that the ordering office may charge are excess costs resulting from reprocurement. FAR 12.403(b)(2) allows excess reprocurement costs and any incidental or consequential damages incurred because of the termination. Recommend the change to FAR 8.405-5(b)(2) be amended to allow incidental or consequential damages.

17. In FAR 8.405-6(a), recommend the first sentence begin "An ordering agency contracting officer...."

I received the following comment. While it's obvious to me the author is confused regarding competition of the original schedule and fair opportunity when placing orders, confusion over when sole source documentation is needed still exists. Whether it is clarified here or referenced in Part 6 some explanation would help.

18. The following new section is really confusing. If the very nature of the FSS means that it has already been competed and is therefore exempt from section 6 of the FAR, how can there ever be a need for a sole source documentation? If an item is on the FSS that is only one-of-a-kind type of an item - how could it have been placed in the FSS through competition in the first place? Also it is not clear whether the requirement to "document in writing" is for it to be documented as to why the exemption from section 6 of the FAR is being ignored -or documentation in writing of a sole source justification. (I am pretty sure they mean the sole source justification - but it kind of reads the other way and will be confusing to others).

#### "8.404-6 Documentation

(5) *Sole source requirements.* (i) Orders placed under the Federal Supply Schedules are exempt from the requirements in Part 6. However, ordering offices shall-

(A) Conduct sole source requirements, as defined in 2.101, under this subpart only if the need to do so is justified in writing and approved at the levels specified in paragraph (a)(5)(ii) of this section; and

(B) Prepare sole source justifications using the format at 6.303-2, modified to reflect an acquisition under the authority of Section 201 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 501)."

1999-603-24



"Ralph C. Thomas"  
<rthomas@hq.nasa.gov  
>

06/17/2003 04:39 PM

To: farcase.1999-603@gsa.gov  
cc:  
Subject: Comments of the Federal OSDBU Directors Interagency Council on the  
Proposed Rule on Federal Supply Schedules

Dear Sir: Attached please find the Comments of the Federal OSDBU Directors  
Interagency Council on the above referenced subject. Ralph C. Thomas III,



Chair. GSA Schedule reg comments - OSDBU Directors



603-24

**Comments of the Federal OSDBU Directors Interagency Council on  
Federal Supply Schedules Services Proposed Rule  
48 CFR Parts 8 and 38  
Published in the Federal Register April 18, 2003**

Introduction

The Federal OSDBU Directors Interagency Council is a non-profit organization with open membership to all Directors of the Offices of Small and Disadvantaged Business Utilization (OSDBU's) within the various federal agencies. In 1978 Public Law 95-507 established OSDBU's in every federal agency having contracting authority. In general the responsibility of the OSDBU's is to promote and facilitate the utilization of all categories of small business (as defined by the Small Business Administration) to the maximum extent practicable.

In 1980 the OSDBU Directors established the Council as a centerplace for the exchange and sharing of best practices and effective strategies to assist them in the carrying out of their statutory mission. The organization meets on at least a monthly basis and has produced best practice manuals and reports through an array of specially-focused working groups. The following are the collective views of the OSDBU Directors that participated in these comments.

Comments

The proposed regulations provide for more competition in the placement of orders from GSA Federal Supply Schedules (FSS). However, the proposed regulations make no improvement in the area of small business utilization. They do not require the utilization of small businesses if sufficient number exist to compete an order among them. Nor do they afford Offices of Small and Disadvantaged Business Utilization (OSDBUs) and Small Business Administration Procurement Center Representatives (PCRs) the opportunity to influence planned FSS procurements.

1. Conformance to Proposed Bundling Regulations

The proposed regulations should be made to conform to regulations proposed January 31, 2003 regarding contract bundling, especially with regard to OSDBU and PCR review of bundled procurements, including those done via FSS. Those proposed regulations modify current regulations at FAR 8.404(a)(1), which exempt GSA Schedule orders from the provisions of FAR Part 19.

2. Application of FAR Part 19 to Federal Supply Schedule Orders

The proposed regulations at 8.403(a) provide that the provisions of Part 19 do not apply to FSS orders. Certain provisions of FAR Part 19 should apply to Federal Supply Schedule Orders. Application of FAR Part 19 rules regarding small business utilization, OSDBU/PCR review and appeal, and subcontracting to FSS orders would significantly increase small business utilization.

Under the current and proposed regulations, the provisions in FAR 19.502-2 for setting aside for small businesses: 1. all procurements exceeding \$2,500 but not over \$100,000; and 2. all procurements where a reasonable expectation exists of receiving offers from at least two responsible small businesses at fair market prices, do not apply to FSS orders.

Current and proposed regulations do not afford OSDBUs/PCRs authority to review non-bundled FSS orders for purposes of stimulating small business utilization as they can open market buys - FAR 19.402(C)(1)(i). OSDBUs cannot directly influence small business utilization in procurements they do not review. OSDBUs/PCRs should be provided authority by regulation to review and make recommendations regarding FSS procurement strategies.

Current and proposed regulations do not appear to provide specific authority for OSDBUs/PCRs to appeal rejected recommendations pertaining to FSS orders as they can open market buys under FAR 19.505. The ability to appeal a rejection of an OSDBU/PCR recommendation is a powerful practical and influential tool in stimulating small business utilization and it should be included in these regulations to promote small business utilization.

Under current and proposed regulations, specific subcontracting plans are not required from GSA Schedule buys (FAR 19.7). Review of FSS procurements would enable OSDBUs/PCRs to require subcontracting plans specific to FSS orders over \$500,000 placed with large business.

### 3. Additional Recommendations Regarding FSS Orders

The following are additional recommendations to make orders from FSS more small business friendly:

- Restrict orders from FSS that are over \$2,500 and under \$100,000 to small businesses.
- Create separate GSA Schedule websites for small businesses and/or for placement of orders under \$100,000.
- Require a market survey such as a sources sought notice to small businesses (possibly via a GSA Schedule **small business website**) prior to placement of a GSA Schedule order to a large business.
- Apply the “rule of two” to FSS orders - if there are two (or three) small businesses on FSS that can reasonably be expected to perform the requirement, then the requirement must be set aside for small business.
- Enable sole source contracting from all 8(a) contractors on FSS up to the \$3M limit (this is currently permitted for 150 8(a) IT contractors via GSA FAST).
- Enable HUBZone sole source contracting via FSS if there is only one HUBZone source able to perform the requirement on FSS.
- **Actively ensure** that all **small business** designations on **FSS** contractors are up to date

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(e.g.- update existing FSS records to reflect new HUBZone or service disabled veteran-owned status). This would eliminate a five year lag between the invention of new small business categories (and associated goals) and being able to obtain credit for their utilization via FSS. Comparisons should periodically be made between FSS contract holder record status and the ProNet or the Central Contractor Registration database.

Respectfully submitted,

(signed)

Ralph C. Thomas III  
Chair

1999-603-25



**PROFESSIONAL SERVICES COUNCIL**

June 17, 2003

General Services Administration  
FAR Secretariat (MVA)  
Room 4035  
1800 F Street, N.W.  
Washington, D.C. 20405

[farcase.1999-603@gsa.gov](mailto:farcase.1999-603@gsa.gov)

Attn: Laurie Duarte

Re: FAR Case 1999-603: Federal Supply Schedules Services and Blanket Purchase Agreements

Dear Ms. Duarte:

The Professional Services Council (PSC) is pleased to submit the following comments on the proposed FAR rule published on April 18, 2003 (68 F.R. 19294) amending the FAR to incorporate policies for services and to strengthen the procedures for establishing Blanket Purchase Agreements under the Federal Supply Schedules.

PSC is the leading national trade association representing the professional and technical services industry doing business with the federal government. PSC's approximately 150 member companies perform billions in contracts annually with the federal government and other entities, from information technology to high-end consulting, engineering, scientific and environmental services. Most of our companies provide services under the GSA Schedules.

**SUMMARY**

PSC supports the effort to update the regulatory coverage on ordering procedures under FAR Part 8.404, and to include in the regulations the heretofore-special ordering procedures that existed outside of the regulations.

We also support the goal of increasing competition under BPAs, but the final regulatory changes must be carefully evaluated and balanced against the need for agency flexibilities in creating and using BPAs. FAR 13.303 provides clear guidance to all agencies on the creation, use, monitoring and termination of BPAs; these regulations should be carefully meshed with the changes proposed to be included in FAR Part 8.404 relating to BPAs under the GSA schedules.

## SPECIFIC COMMENTS

1. In new Section 8.404-2(c)(2), relating to orders exceeding the micro-purchase threshold but not expected to exceed the maximum ordering threshold, we recommend clarifying the last sentence of subparagraph (i) by adding at the beginning of the sentence the phrase “To the maximum extent practicable,”. We support ordering offices requesting schedule contracts to submit firm fixed prices to perform the statement of work; however, as recognized at 8.404-2(a), the procedures in this section are to be used when ordering services priced at hourly rates, and firm fixed prices may not be the most appropriate pricing for these performance-based contracts. The pricing flexibility is particularly important since subparagraph (ii) ties back to subparagraph (i) as an essential element in establishing a blanket purchase agreement (BPA) under 8.404-3.
2. Section 8.404-3(a) provides guidance on the establishment of BPAs by ordering offices, building on the limited coverage in existing Section 8.404(b)(4). However, the existing coverage does provide an important cross-reference to the coverage in FAR 13.303-2(c) that should be retained. New 8.404-3(a) provides new and substantive criteria, beyond those required by FAR Part 13, which an ordering office must consider before establishing a BPA under the Schedules. We are concerned that the additional criteria in this section mesh with the overall FAR criteria.
3. In new Section 8.404-3(b)(3), relating to pricing for BPAs based on hourly rates, we recommend adding new sentences before the final sentence as follows: “To the maximum extent practicable, schedule contractors should be requested to submit firm-fixed prices to perform the services identified in the statement of work. If a firm-fixed price quotation is not practicable, a time and materials or labor hour quotation may be requested.”
4. In revised Section 8.404-3, relating to BPAs, the regulation should more clearly differentiate among a single BPA award, multiple BPAs to fill the same repetitive needs for supplies or services, and a multi-agency BPA(s). Nothing in Section 8.404-3 defines or explains the various terms and the regulation would be improved with such definition or explanation.
5. Furthermore, 8.404-3(a)(2) creates confusion by requiring award decisions to follow new 8.404-1 or 8.404-2, but neither of these sections provides sufficient “procedures” to add clarity to the requirement for establishing a BPA.
6. In revised Section 8.404-3(c), relating to the annual review, we recommend that an additional criterion of the review should be whether the acquisition strategy that led to the establishment of the BPA, as determined under 8-404-3(a)(1), remains valid. FAR 13.303-6 provides additional criteria that any agency creating a BPA should annually follow; we believe Section 8.404-3(c) would also benefit from a cross-reference to these FAR 13.303-6 procedures. Furthermore, the parenthetical cross-reference to FAR 8.403 adds little since 8.403 (and specifically 8.403(c)) relates solely to orders placed against a Schedule contract.
7. In new Section 8.404-6(a)(4), relating to documentation, subparagraphs (a)(4) and (a)(5) provide more than documentation provisions. These two subparagraphs, in particular, provide substantive authorities for limiting competition or making an award on a sole-source basis, including the higher-level approvals required. We recommend that these provisions be moved

out of the documentation section and either added as new paragraphs in 8.404, replicated in 8-404-1 and 8.404-2, or cross-referenced in both 8.404-1 and 8.404-2.

## CONCLUSION

PSC supports updating the regulatory coverage and focusing on efforts to enhance agency competition for its requirements. However, we are concerned that some of the provisions create more confusion with other provisions of the FAR and fail to provide needed clarifications.

Furthermore, GSA has proposed numerous changes to the Schedules program over the past several months. Each of them is significant alone. We are concerned about the impact of the changes when any (or all) of them are finalized. We strongly recommend that GSA publish an integrated version of the Schedules rules with all of the proposed changes to be adopted so that the public can comment on the cumulative interaction of all of the changes.

Thank you for your consideration of these comments. If you have any questions or if PSC can provide you with any additional information, please do not hesitate to let me know. I can be reached at (703) 875-8059 or at [Chvotkin@pscouncil.org](mailto:Chvotkin@pscouncil.org).

Sincerely,



Alan Chvotkin  
Senior Vice President and Counsel

1999-603-26



"Schoenberg, Alan  
(HHS/OS)"  
<Alan.Schoenberg@hhs.gov>

To: "farcase.1999-603@gsa.gov" <farcase.1999-603@gsa.gov>  
cc:  
Subject: FW: FDA Comments: Proposed FSS Rule

06/17/2003 06:11 PM

Note to FAR Secretariat:

I'm forwarding to you, for your review, FDA's comments (enclosed) on the proposed FAR rule on FSS Services and BPAs. [To place FDA within an overall organizational context, it is an agency within the Department of Health and Human Services (HHS)]. Thank you.

Al Schoenberg  
HHS CAAC Representative  
202-690-6361



FAR Rule Change Comments FSS Services

Office of Acquisitions and Grants Services, FDA

**Comments on Proposed FAR Rule Changes**  
*Federal Supply Schedule Services and Blanket Purchase Agreements*

Published in Federal Register (Volume 68, Number 75) on April 18, 2003

Summary of Proposed Change:

The FAR rule change proposes to amend the Federal Acquisition Regulation (FAR) to incorporate policies for services and to strengthen the procedures for establishing Blanket Purchase Agreements under the Federal Supply Schedules.

Because FAR subpart 8.4 has remained primarily geared towards products, agencies have been inconsistent in adhering to certain basic acquisition requirements when buying services off MAS. The proposed rule seeks to significantly improve the application of acquisition basics on MAS purchases for services under FAR subpart 8.4. Accordingly, the rule proposes to amend FAR subpart 8.4 to—

- (1) Add new coverage on use of statements of work when acquiring services from the schedules;
- (2) Clarify and strengthen the procedures for establishing Blanket Purchase Agreements against the schedules;
- (3) Reinforce documentation requirements generally and address the documentation of sole source orders in particular;
- (4) Highlight the availability of "e-Buy," GSA's electronic quote system, to encourage greater transparency through use of electronic media;
- (5) Add new coverage to allow agencies to make payment for oral or written orders by any authorized means, including the Government-wide commercial purchase card;
- (6) Clarify the procedures for termination for cause and convenience; and
- (7) Reorganize and revise the subpart text for ease of use.

Comments

Sec. 8.403(a) – The phrase “ordering offices need not seek further competition...” may provide confusion since it is referring to only competition from firms not on the schedule.

Sec. 8.404-2(c)(2)(ii) – If an order exceeds the maximum order threshold, the statement of work and selection criteria must be provided to “an appropriate number of additional schedule contractors.” Benefits of utilizing the schedule decrease by having to evaluate additional offers. Moreover, the objective of the requirement to provide the information to additional contractors is not clear.

Sec. 8.404-3: The FAR rule change is unclear as to whether an order under a BPA can be issued without further competition., i.e, do the procedures proposed under 8.404-1 or 8.404-2 apply to orders placed under the BPA?

June 12, 2003



1999-603-27



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To: "farcase.1999-603@gsa.gov" <farcase.1999-603@gsa.gov>  
cc:  
Subject: Comments re FAR case 1999-603

06/17/2003 06:40 PM

I am a civilian procurement attorney working for the Air Force. The following are my individual comments, which have not been coordinated through the Air Force.

FAR 8.401

1. In paragraph (a), I would not say that FSS are indefinite delivery contracts. FAR 16.501-2 states that there are three types of indefinite-delivery contracts: definite-quantity, requirements, and indefinite-quantity contracts. FSS come closest to being considered IDIQ contracts. However, FSS do not comply with all FAR Part 16 requirements for IDIQ contracts or the other indefinite-delivery types of contracts, and you do not want to imply that they must.

FAR 8.404-1 and 8.404-2

2. The title of FAR 8.404-1 states that it governs fixed-priced services, while the title for FAR 8.404-2 states that it governs services using a statement of work (SOW).

a. Which of these sections would apply if purchasing fixed-priced services with a SOW? As now written, both sections would appear to apply.

b. Which of these sections would apply if purchasing time-and-material (T&M) services? (I presume that some FSS have T&M line items, since GSA's Special Ordering Procedures for Services Requiring a Statement of Work dated 7 April 03 state that T&M quotes may be requested). As now written, I think neither section would apply to T&M purchases.

(i) T&M is not listed as a type of fixed-price contract in FAR Part 16; therefore, FAR 8.404-1 would not appear to apply. Although FAR 8.404-2 is entitled as applying to services with a SOW, paragraph (a) of this section states that it applies to services priced at hourly rates. Although I have never seen T&M services purchased without a SOW, T&M orders are not, strictly speaking, priced only using hourly rates. Payment for T&M is a combination of hourly rates for the time and cost reimbursement for the materials. Therefore, the present wording of FAR 8.404-2 would appear to apply to labor hour (LH) but not T&M orders.

(ii) I recommend addressing these problems by entitling FAR 8.404-1 as applicable to supplies and fixed-priced contracts without a SOW and FAR 8.404-2 as applicable to services with a SOW. FAR 8.404-2 would need to be revised to address three types of contracts with a SOW: fixed-priced, LH, and T&M.

c. FAR 8.404-2(c)(2)(i) states that schedule contractors should be requested to submit firm-fixed prices to perform the services identified in

the SOW. I presume this means one firm-fixed price for each line item on the order. This wording would not work for LH or T&M orders, since such orders have ceiling prices, rather than firm-fixed prices, for each line item.

d. FAR 8.404-2(c)(2)(iii) and FAR 8.404-2(c)(3) state that the Government must provide a copy of the RFQ (containing the SOW and evaluation criteria) to any FSS contractor who requests one and must evaluate responses from any FSS contractor who submits a response. I strongly recommend that you reconsider this requirement.

(i) My experience is that the greatest value contracting officers see in using FSS is the time saved. Of what value is it to state in your regulations that the RFQ must be sent to at least three FSS contractors, if the regs also require that we send it to 20 more contractors who request copies and then must evaluate their responses? Evaluation of services are, by nature, longer evaluation processes. The more sources playing, the longer this process becomes. In a streamlined process, the Government, rather than the contractors, should be able to determine the number of contractors evaluated, as long as a reasonable minimum number is considered. I believe that contracting officers will use methods other than FSS to purchase services if FSS does not remain streamlined.

(ii) PL 107-107, Section 803, applies to all of DOD's individual purchases of services over \$100,000 made against a multiple award contract, including multiple-award FSS. This statute requires DOD to send the work description and selection criteria either to ALL multiple-award FSS contractors who provide such services or to a practicable number, as long as offers are received from at least three qualified contractors or the contracting officer determines that no additional qualified contractors were able to be identified with reasonable efforts. FAR 8.404-2(c)(2)(iii) and FAR 8.404-2(c)(3) would hold DOD to a standard higher than that set by this statute, which was passed only 18 months ago (28 Dec 01). I recommend that you adopt the standard used in this statute regarding who must be provided with the RFQ and whose responses must be evaluated and specifically state that the Government is not required to consider offers from FSS contractors who were not requested to respond.

FAR 8.404-3

3. FAR 8.404-3 contains the same problems discussed above: (a) identifying services as being hourly rate or fixed priced but not addressing T&M services and (b) assuming that fixed-priced services will never have a SOW.

FAR 8.404-6

4. I have several concerns with this section. CICA essentially states that purchases off GSA contracts meet the requirements of full and open competition as long as GSA procedures are followed. FAR 8.404-6 needs to create GSA procedures which are easily understood, address common fact situations, and are streamlined. I recommend re-writing this section to better accomplish these goals. In addition, this section needs to be rewritten so that it does not conflict with/restrict that which is required or authorized under PL 107-107, Section 803, which is applicable to DOD purchases of FSS services over \$100,000.

5. FAR 8.404-6(a)(4) lists three examples of when the Government may consider fewer schedule contractors than required by FAR 8.404-1 or 8.404-2. FAR 8.404-6(a)(5) describes the process by which sole-source orders must be

justified. How these paragraphs interact is not clear, and I think they do not adequately address common fact situations.

6. Consider a purchase of a supply over the micro-purchase level and under the maximum order threshold. Presume that the Government reviews the catalogs of five schedule contractors and determines that only two meet the Government's requirements. Has the Government met the requirement in FAR 8.404-1 to review the catalogs of at least three contractors? In other words, does the wording of FAR 8.404-1 require looking at catalogs of at least three contractors who can meet the Government's needs? (I have not advised my clients that this is presently required, based upon inferences in the decisions in Midmark Corporation, B-278298, 1998 U.S. Comp. Gen. LEXIS 8, January 14, 1998, and National Mailing Systems, B-250950.2, 1993 U.S. Comp. Gen. LEXIS 146, February 12, 1993.) Your rewrite of FAR Subpart 8.4 should address this common fact situation.

7. Let's presume that you decide that FAR 8.404-1 requires reviewing catalogs of at least three qualified contractors and state this in the reg. Then, in the fact situation I've described, the Government would have to read FAR 8.404-6(a)(4) to see if it has justification to review fewer than three. This is a problem because the facts of the scenario I've described don't meet the criteria of any of the example justifications in paragraph (a)(4). The contracting officer might then go to paragraph 8.404-6(a)(5) to see if it would authorize what is similar to a "limited competition" between these two sources but this paragraph only addresses sole source situations.

8. Another problem with FAR 8.404-6 is that the wording of two of the three example justifications listed in (a)(4) are similar to but are not the same as two of the exceptions to the fair opportunity process listed in FAR 16.505(b)(2). The fact that there is a difference in the wording may give the inference that there is a difference in the meaning you intend for the two exceptions in (a)(4).

9. Public Law 107-107, Section 803, lists four legal justifications for DOD to sole source an FSS service purchase over \$100,000. These are the first three exceptions to the fair opportunity process listed in FAR 16.505(b)(2) and the fourth is when a statute expressly authorizes or requires that the purchase be made from a specified source. How are paragraphs (a)(4) and (a)(5) to be interpreted for buys for which this public law is applicable? Can DOD continue to use the four exceptions in the public law, or is your FAR provision restrictive for these types of buys?

10. The term "J&A" is a term of art known by contracting officers to refer to the seven justifications to award under other than full and open competition found in FAR Part 6. In paragraph (a)(5), it is better to use a different term to describe justifying sole source purchases against FSS so that you do not confuse these two processes. I would simply refer to the FSS sole source document as a "written determination."

11. I recommend that you do not require the written determination to track language similar to that used for FAR Part 6 J&As or that levels about the contracting officer approve such determinations. Again, you would be creating time-consuming processes that add little value which will influence contracting officers not to use FSS. In PL107-107, Section 803, Congress states that all that is required to justify a DOD sole-source purchase of FSS services over \$100,000 is a written determination by a DOD contracting officer which explains why one of the four stated sole-source exceptions has been met. This is simple and all that is needed in case the issue is litigated.

12. FAR 8.404-6 needs to set forth all the reasons why FSS sole sources are authorized so that this issue is fully addressed. Paragraph (a)(5) discusses sole source FSS buys but does not address the reasons which

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authorize such sole sources. Readers may think that paragraph (a)(4) addresses this issue, but it has a broader application and does not address some of the common reasons why sole sources occur (see above discussion).

13. Paragraph (a)(4)(ii) is written so that no one will be able to use the follow-on exception until they have awarded an initial order after issuance of the revised FAR Subpart 8.4, then are procuring follow-on work in a subsequent order. Is this your intent?

14. In paragraph (a)(5)(i)(A), I would not refer to the sole source definition in FAR 2.101, as I do not think that FSS orders are solicited and negotiated with only one source.

FAR 8.405-5 and 8.405-6

15. These clauses would change the Government's termination rights for default and convenience from those in FAR Part 49 to those in FAR Part 12. Why is this being done? In my experience, most of the supplies and services my base buys are not commercial items. Second, the Government's termination rights spring from the terms of its contracts. If current schedules state termination rights under FAR Part 49, we cannot change to FAR Part 12 termination rights without modification of the schedules. Is GSA able to modify all existing schedules at the same time that the FAR Subpart is finalized?

Thank you for taking the time to consider my comments. I am very interested in seeing how the rule is finalized.

Caz Wong  
Attorney Advisor

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1999-603-28



**Tracy G. Wilmot**  
Sent by: Tracy G. Wilmot

06/17/2003 07:13 PM

To: farcase.1999-603@gsa.gov, Laurie A.  
Duarte/MVA/CO/GSA/GOV@GSA  
cc: Karen S. Hester/9PMA/R09/GSA/GOV@GSA, Veronica L.  
Hennessey/9PMA/R09/GSA/GOV@GSA, Patricia J.  
Roberts/9PM/R09/GSA/GOV@GSA, Jewell D.  
Johnson/9PMF/R09/GSA/GOV@GSA, Matthew A.  
Urnezis/PX/CO/GSA/GOV@GSA  
Subject: FAR Proposed Rule 1999-603, Federal Supply Schedules Services and  
Blanket  
Purchase Agreements

Hi Laurie,

Attached are drafts comments and/or suggestion in regard to FAR Proposed Rule 1999-603. We will be forthcoming with a final revision by the end of the week.



MASFARComments.doc

Thank you for your consideration.  
Tracy Wilmot  
Real Property Programs Division (9PM)

**Comments (as it relates to PBS Services) on  
FAR Proposed Rule 1999-603  
Federal Supply Schedules Services and Blanket Purchase Agreements**

1. **8.401(a)** - The reference in this paragraph states in part "services at prices associated with volume buying (also see 8.002)". First, the reference that services is considered a form of volume buying is a little misleading to our PBS customers. The commercial market place clearly views volume buying as products specific, not services. Also, it usually includes discounts when a certain volume is obtained a reduction to the cost is accompanied. Services should not be considered as a form of volume buying, since you are not buying the same *identical item* at a unit cost over and over. With products you can provide a customer discounts because purchasing in bulk and/or bundled quantities is cheaper for the seller. However, with services you cannot provide a discount in this fashion, because bottom line services are direct labor oriented and driven ultimately by Service Contract Act wages that cannot be discounted due to minimum wages and fringe benefits that must be paid.

The reference to "8.002" can be removed as it really doesn't relate to the sentence. 8.002 is essentially a priority list not a pricing and/or simplified process reference, which is what the sentence is communicating.

2. **8.401(b)** - Should a statement be made that as long as three vendors are solicited for proposals, etc...? The inference is you can just directly go to one contractor, and should be clarified that prospective awardees are to be given a fair opportunity for award, in accordance with FAR subpart 16.505(b)(1).

3. **8.401(c)** - Again there is an inference that you can directly place orders with contractors without obtaining competition and should be clarified. In regard to the Government wide commercial purchase card it alludes that you can process all payments using the purchase card and should be clarified that payments can be made to contractors, provided it is within the purchase card holder's authority. Also, it must be okay with the Contractor and specified in the delivery/task order.

The solicitations currently being issued on FEDBizOps refer to "ordering officials" and the proposed language under this rule states "ordering contracting officer". The same designation should be consistent throughout.

4. **8.403(a)** - Although the use of MAS Contracts is considered to be fulfilling the requirements of full and open competition (FAR 6.102(d)(3)), when following MAS ordering procedures. However, is it really maximizing competition for a given service requirement? Full and open competition really is actually seen when there is a requirement for a service at a given location and competition is solicited at that point. It is a fact that you will receive more competition for a service by soliciting on the open market, than merely picking three vendors from a MAS contract. The best value is very important to our customer and picking from a MAS contract vendor short list, rather than soliciting on a nationwide basis at the time the service is needed, will minimize our ability to serve our customers and obtain best value. Therefore, if the primary objective of discussions is to maximize the Government's ability to obtain best value, based on the requirement and the evaluation factors set forth in the Task Order Solicitation how can MAS Contracts really afford the best value (ref. 15.306(d)(2))?

A conflict and/or confusion of regulations exists in regard to using schedules and how orders are placed. Under the FAR 6.102(d)(3) it states that one of the several competitive procedures available is the use of MAS issued under the procedures established by the Administrator of General Services consistent with the requirement of 41 U.S.C. 259(b)(3)(A) for the MAS program of the General Services Administration. However, policy states in part under FAR 6.101 that

"Contracting Officers shall provide for full and open competition through use of the competitive procedure(s) contained in this subpart that are **best suited to the circumstances of the contract action and consistent with the need to fulfill the Government's requirements efficiently** (10 U.S.C. 2304 and 41 U.S.C. 253)". Furthermore, under 41 U.S.C. 253 it states in part "An executive agency in conducting a procurement for services shall obtain full and open competition through the use of competitive procedures and shall use the **competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement**". The point of these passages from the FAR and U.S.C. is that we are to obtain for the customer the best value to fulfill a Government requirement. The building services required normally by PBS customers are recurring and should be procured competitively at the time the services are needed.

The confusion specifically arises under FAR 8.404(a)(1) wherein it states "Parts 13 and 19 do not apply to orders placed against Federal Supply Schedules, except for the provision at FAR 13.303-2(c)(3). Orders placed against a Multiple Award Schedule (MAS), using the procedures in this subpart, are considered to be issued using full and open competition (see FAR 6.102(d)(3)". Both awarded contracts and solicitations on the street for MAS contracts are being done as commercial item contracts. The applicability of other FAR Chapters to commercial item contracts is defined under FAR 12.102. It states in part that:

(1) Contracting officers **shall use** the policies in this part in conjunction with the policies and procedures for solicitation, evaluation and award prescribed **in Part 13**, Simplified Acquisition Procedures; **Part 14**, Sealed Bidding; or **Part 15**, Contracting by Negotiation, as appropriate for the particular acquisition AND;

(2) Contracts for the acquisition of commercial items are subject to the policies in other parts of this chapter. When a policy in another part of this chapter is inconsistent with a policy in this part, **this Part 12 shall take precedence for the acquisition of commercial items**.

Therefore, since Part 12 takes precedence for these acquisitions, FAR Parts 13 and 19 now become applicable and coincide with the Government's policy to provide maximum practicable opportunities to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns (Ref. FAR 19.201(a)). Lastly, if the Government is to provide maximum opportunities to preference programs, including NISH, then why is GSA establishing national schedules for items we can better acquire sole source or with limited competition from the local market?

5. **8.403(c)** - Yes, FSS has allegedly handled awarding MAS contracts and the up-front work associated with it, but the fact of the matter is when the customer needs a service task order awarded, the customer will have to follow the ordering procedures described as "Services Requiring a Statement of Work". The customers will have to develop their own SOW, negotiate their own pricing, handle protests, evaluate offers, conduct pre & post award meetings, etc. How can GSA remain customer focused if we do not provide the actual labor-intensive part of the procurement process, which happens at the task order stage? The more serious question is why should the customers continue to do business with GSA if they are expected to take on all these added responsibilities that PBS contract and technical associates currently provide? Who will they go to for expertise if they need assistance with such things as:

- Development of a Performance Based SOW;
- How to develop a Source Selection Plan (SSP);



- How to acquire the latest Wage Determination and whether it is the correct one for the service;
- How to prepare a competitive range determination;
- When EEO Clearance required;
- How to handle mistakes in offer;
- Where to obtain "Equal Employment Opportunity is the Law" posters;
- How to handle Subcontracting Plans and the subsequent administration of Subcontracting Plans (e.g. SF 294 & SF 295s), as well as whether their required or not;
- When price evaluation adjustment is required and if so how to incorporate that into SOW;
- What is required when debriefing Contractors; and
- Etc., etc., etc..

Again, as stated above if services require the development of a SOW and the subsequent receipt of proposals, which includes pricing, how can the statement be made that GSA has determined prices under MAS to be fair & reasonable? In addition, PBS is focused on providing the customer the best value, which may not be strictly limited to price. Source Selection is used exclusively to provide the customer the latitude to determine the importance of specific non-priced factors. Because, non-priced factors when taken together may be more important than price and are specific to each individual acquisition, how is the customer supposed to know these contractors are qualified to be on a vendor list? What was the basis of comparison and/or standards they had to adhere to in order to be added to the vendor list beside price? What non-priced factors were utilized?

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As indicated within FAR 15.404-1 there are two preferred techniques use when analyzing pricing information provided by the offeror(s) and that is as follows:

- (1) Comparison of proposed prices received in response to the solicitation. Normally, adequate price competition establishes price reasonableness (see FAR 15.403-1(c)(1)); and
- (2) Comparison of previously proposed prices and previous Government and commercial contract prices with current proposed prices for the same or similar items, if both the validity of the comparison and the reasonableness of the previous price(s) can be established.

Therefore, if pricing is not received until a SOW is shared with MAS Contractors to provide offers, then can the statement be made that GSA has determined prices under the MAS to be fair & reasonable in accordance with preferred techniques identified under FAR 15.404-1?

**FACT** - Using MAS Contracts for PBS Service (e.g., landscape maintenance, elevator maintenance, etc.) needs will not provide the customer the best value the majority of the time. As noted in the proposed language, the words "lowest overall cost" is considered best value, which is clearly only an FSS approach and is in conflict with FAR Part 16.505. Under FAR Part 8.404 it alludes to the fact that by placing an order against a MAS schedule using the procedures in this section, the ordering office has concluded that the order represents the best value and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.)



to meet the Government's needs. This does not provide a trade-off or best value as defined in FAR Part 15.101-1.

PBS, almost exclusively, uses source selection procedures for service contracts and considers **price**, including profit and overhead, as one of the factors. FSS's focus on lowest cost appears to be in conflict with commercial item practices under FAR Part 12.207 Contract type. Agencies shall use firm-fixed-price contracts or fixed-price contracts with economic price adjustment for the acquisition of commercial items. Indefinite-delivery contracts (see Subpart 16.5) may be used where the prices are established based on a firm-fixed-price or fixed-price with economic price adjustment. **Use of any other contract type to acquire commercial items is prohibited.** Therefore, as a valued added service to the customer, PBS technical and contracting associates, along with the customer, not only evaluate price, but also include non-priced factors such as past performance, experience, technical excellence, management capability, personnel qualifications, etc.. These are other valuable selection criteria when considering the best value or trade-off determination in selecting a contractor.

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6. **8.404-1(b) - For orders of services and/or products up to the micro-purchase threshold**

Customers needing services under \$2,500 are led to believe that they may place an order with any MAS Schedule Contractor. However, there are other avenues for obtaining services more expeditiously if needed. The majority of purchases made under \$2,500 are usually rushed procurements and when placing an order using the MAS, the customer may be subject to various delays, such as the following:

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- (2) The Contracting Officer associated with the MAS Contract may not be available to contact in case there are specific questions a customer would like to ask;
- (3) The service cannot be provided within the delivery time required;
- (4) If the service requirement does not have pricing, then a quote would have to be obtained from the vendor.

As stated in part under FAR 13.201, the Government wide commercial purchase card shall be the preferred method to purchase and to pay for micro-purchases. Micro-purchases may be awarded without soliciting competitive quotations if the contracting officer or individual appointed in accordance with 1.603-3(b) considers the price to be reasonable. So, if the customer has a micro-purchase that can be handled as an oral procurement with a simple phone call, then they would not be subject to the above concerns.

7. **8.404-1(c)** - For orders above the micro-purchase threshold but below the maximum order threshold

As stated in the paragraph above, the same concerns are still an issue for the customer to deal with up to the maximum order threshold. In the case of services, since there is no pre-pricing available for services then a Statement of Work (SOW) will be required. This will require providing all contractors on the MAS schedule a fair opportunity in providing an offer to evaluate and make a best value selection. Although, the MAS ordering procedures state to go to at least 3 Schedule contractors, going to all eligible contractors will afford the customer maximum competition and ultimately a better value for their service requirement.

8. **8.404-1(d)** - For orders above the maximum order threshold

Again, as described in the two paragraphs above, the same concerns exist with MAS orders above the maximum order threshold. The customer should be cognizant that the more competition received will provide them the best value in obtaining the services they need. Source Selection procedures that include non-price and price factors will ensure that the customer can use trade-offs in determining a best value decision.

9. **8.404-2(a)** - The paragraph alleges that when ordering services that there are priced hourly rates in the schedule contracts. However, when visiting GSA advantage to access pricing more often than not, there is no pricing to utilize and therefore you are faced with having to contact vendors for information. One of the supposed advantages of using schedules was that there is up front pricing, so that a customer would not have to conduct this task?

In addition, if the contractor is pricing everything by hourly rates then there really are no services on schedule that are considered full services. The schedule's focus on lowest cost appears to be in conflict with commercial item practices under FAR Part 12.207 Contract type. Agencies shall use firm-fixed-price contracts or fixed-price contracts with economic price adjustment for the acquisition of commercial items. Indefinite-delivery contracts (see Subpart 16.5) may be used where the prices are established based on a firm-fixed-price or fixed-price with economic price adjustment. Use of any other contract type to acquire commercial items is prohibited. It seems that schedules are merely organized to buy direct labor only and/or man-hours, which is not in concert with commercial item contracting. PBS customers are not only buying direct labor, but all the other associated costs attributable in providing full service contracts, which includes G&A, Profit, Supplies and Materials, Supervision, other Indirect costs, etc. Fixed pricing is done to primarily put more risk on the contractor to perform, whereas if the customer is reduced to buying man-hours at hourly rates the risk shifts more so to the Government and administration can become burdensome.

10. **8.404-2(b)** - Same comments as with paragraph #6 above.

11. **8.404-2(c)** - The main question for this paragraph - when the ordering office is required to develop a SOW, what is really the benefit and/or value added reason for a customer in using the ordering procedures set forth in the schedules? Is the 1% or the proposed .75% schedules fee really worth it to an ordering office in using the schedules, if all they save is maybe

synopsis time? One of the main marketing advantages always shared with potential customers is that the use of schedules saves time. However, in the case of service contracts the majority of them are recurring contracts and acquisition planning is done months in advance, where potential synopsis time is irrelevant when awarding 5 to 9 year contracts. In addition, there are a majority of those contracts that are awarded under sole source procedures, such as using NISH and the Small Business Administration's 8(a) Program.

Lastly, what if a customer does not have the procurement expertise required in house to deal with some of the items listed below (in regard to service contracts), who are then to go to for that assistance?

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- Where can I obtain "Equal Employment Opportunity is the Law" posters;
- How to handle Subcontracting Plans and the subsequent administration of Subcontracting Plans (e.g. SF 294 & SF 295s), as well as whether their required or not;
- Is price evaluation adjustment (FAR Part 19) required and if so how to incorporate that into SOW; and
- What is required in regard to Debriefing of the Contractors.

If these ordering procedures ultimately have to be incorporated into the FAR, then reducing paragraph 8.404-2(c) to just referencing Part 15 and 37 in regard to Source Selection and Performance Based SOW would alleviate having to unnecessarily describe something that is already described in FAR elsewhere. Also, it would ensure that no ambiguities between FAR Parts would exist.

12. **8.404-5** - It states in part that "before placing an order, consider including, if available, one or more small business, veteran-owned small business . . .". Is the mere statement consider actually valid or should the statement be made "before placing an order you shall consider one or more. . ."? It seems this paragraph should be consistent with FAR Part 19.202-1 "Encouraging Small Business Participation in Acquisitions". Again, since schedules that include services are being awarded as commercial items, FAR Parts 13 and 19 apply and therefore the proposed changes should be reflective of this.

12. **8.404-6(a) & (b)** - First, should the title of this be "Delivery/Task Order Award Documentation", rather than just "Documentation"? The reason being is the language appears to be mixed up requiring pre and post award documentation in a tone that conveys post award. For example, under paragraph (a)(4) wherein it states "the circumstances and rationale for restricting consideration of schedule contractors to less than that required . . .". Shouldn't this be a minimum documentation requirement before award and not done after, as inferred by the proposed language. The other items such as service purchased, number of contracts reviewed and amount paid are definitely items that can be documented after award, but not when it comes to the rationale for restricting consideration or sole source justifications.

Furthermore, not sure why minimum documentation is trying to be communicated, as it may be encouraging lack of adequate documentation. For example, award documents not listed as a minimum that are required are such things as -

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- SF-279 - As required by GSAM 504.602-70 "General Services Administration Procurement Data System (GPDS)"
- Price Analysis - As required by FAR 15.404-1 "Proposal Analysis Techniques"

In regard to the services paragraph (b), it is also in the past tense stating in part "for services acquired . . .the ordering office shall also document, at a minimum", the evaluation methodology used in selecting the contractor for award. However, this evaluation methodology should have been already done as part of the SOW and/or solicitation prepared for the prospective contractors (reference FAR Part 15.101-1 "Trade-off Process").

Another questionable item is the statement for using other than firm fixed price order or performance-based order. Since these schedules are being awarded commercially, the use of any other contract type to acquire commercial items is prohibited, so this may need to be changed and/or removed.

Lastly, another possible way of approaching this "documentation" paragraph is to distinguish what is required as far as preaward and postaward requirements.

13. **8.404-7** - Possibly changing that payment for oral orders should read, "agencies may make payments for oral orders (w/confirming order over micro-purchase threshold)". Just need to make sure we are communicating that a purchase card is a not a purchase method and only a payment method.

14. **8.405-3(b)** - Under paragraph (b) "Services", shouldn't the inspection and acceptance language of either FAR Part 52.212-4(a) "Inspection/Acceptance" or FAR Part 46.304 "Fixed-price service contracts"? One conflict may be that the proposed language states shall perform inspections and tests as specified in the QASP, which is not a requirement within any of the inspection/acceptance clauses.

15. **8.405-5** - Paragraph (b)(1) is in the middle of paragraph (a) and just needs to be changed to reflect (b)(1) as it's own paragraph.

1999-603-28

**Tracy G. Wilmot**  
06/20/2003 06:54 PM

To: farcase.1999-603@gsa.gov, Laurie A. Duarte/MVA/CO/GSA/GOV  
cc: twilmot945@aol.com, Karen S. Hester/9PMA/R09/GSA/GOV, Patricia  
J. Roberts/9PM/R09/GSA/GOV, John M. Tate/9PM/R09/GSA/GOV,  
Jewell D. Johnson/9PMF/R09/GSA/GOV, Veronica L.  
Hennessey/9PMA/R09/GSA/GOV, Matthew A.  
Urnezis/PX/CO/GSA/GOV  
Subject: FAR Proposed Rule 1999-603, Federal Supply Schedules Services and  
Blanket

Hi Laurie,

In follow-up to our previous email on 6/17/2003, attached is the final revision of our comments.

Again, thank you for your consideration.

Tracy Wilmot

General Services Administration

Real Property Programs Division (9PM)

450 Golden Gate Ave.

San Francisco, CA 94102-3434

**Tracy G. Wilmot**  
06/17/2003 04:13 PM

To: farcase.1999-603@gsa.gov, Laurie A. Duarte/MVA/CO/GSA/GOV@GSA  
cc: Karen S. Hester/9PMA/R09/GSA/GOV@GSA, Veronica L. Hennessey/9PMA/R09/GSA/GOV@GSA, Patricia  
J. Roberts/9PM/R09/GSA/GOV@GSA, Jewell D. Johnson/9PMF/R09/GSA/GOV@GSA, Matthew A.  
Urnezis/PX/CO/GSA/GOV@GSA  
bcc:  
Subject: FAR Proposed Rule 1999-603, Federal Supply Schedules Services and BlanketPurchase Agreements

Hi Laurie,

Attached are drafts comments and/or suggestion in regard to FAR Proposed Rule 1999-603. We  
will be forthcoming with a final revision by the end of the week.

Thank you for your consideration.  
Tracy Wilmot

1999-603-28



Real Property Programs Division (9PM) MASFARComments.dc Commentsfarcase1999-603.d

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**Comments (as it relates to PBS Services) on  
FAR Proposed Rule 1999-603  
Federal Supply Schedules Services and Blanket Purchase Agreements**

1. **8.401(a)** - The reference in this paragraph states in part "services at prices associated with volume buying (also see 8.002)". First, the reference that services is considered a form of volume buying is a little misleading to our PBS customers. The commercial market place clearly views volume buying as products specific, not services. Also, it usually includes discounts when a certain volume is obtained a reduction to the cost is accompanied. Services should not be considered as a form of volume buying, since you are not buying the same *identical item* at a unit cost over and over. With products you can provide a customer discounts because purchasing in bulk and/or bundled quantities is cheaper for the seller. However, with services you cannot provide a discount in this fashion, because bottom line services are direct labor oriented and driven ultimately by Service Contract Act wages that cannot be discounted due to minimum wages and fringe benefits that must be paid.

The reference to "8.002" can be removed as it really doesn't relate to the sentence. 8.002 is essentially a priority list not a pricing and/or simplified process reference, which is what the sentence is communicating.

2. **8.401(b)** - Should a statement be made that as long as three vendors are solicited for proposals, etc...? The inference is you can just directly go to one contractor, and should be clarified that prospective awardees are to be given a fair opportunity for award, in accordance with FAR subpart 16.505(b)(1).

3. **8.401(c)** - Again there is an inference that you can directly place orders with contractors without obtaining competition and should be clarified. In regard to the Government wide commercial purchase card it alludes that you can process all payments using the purchase card and should be clarified that payments can be made to contractors, provided it is within the purchase card holder's authority. Also, it must be okay with the Contractor and specified in the delivery/task order.

The solicitations currently being issued on FEDBizOps refer to "ordering officials" and the proposed language under this rule states "ordering contracting officer". The same designation should be consistent throughout.

4. **8.403(a)** - Although the use of MAS Contracts is considered to be fulfilling the requirements of full and open competition (FAR 6.102(d)(3)), when following MAS ordering procedures. However, is it really maximizing competition for a given service requirement? Full and open competition really is actually seen when there is a requirement for a service at a given location and competition is solicited at that point. It is a fact that you will receive more competition for a service by soliciting on the open market, than merely picking three vendors from a MAS contract. The best value is very important to our customer and picking from a MAS contract vendor short list, rather than soliciting on a nationwide basis at the time the service is needed, will minimize our ability to serve our customers and obtain best value. Therefore, if the primary objective of discussions is to maximize the Government's ability to obtain best value, based on the requirement and the evaluation factors set forth in the Task Order Solicitation how can MAS Contracts really afford the best value (ref. 15.306(d)(2))?

A conflict and/or confusion of regulations exists in regard to using schedules and how orders are placed. Under the FAR 6.102(d)(3) it states that one of the several competitive procedures available is the use of MAS issued under the procedures established by the Administrator of General Services consistent with the requirement of 41 U.S.C. 259(b)(3)(A) for the MAS program of the General Services Administration. However, policy states in part under FAR 6.101 that



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"Contracting Officers shall provide for full and open competition through use of the competitive procedure(s) contained in this subpart that are **best suited to the circumstances of the contract action and consistent with the need to fulfill the Government's requirements efficiently** (10 U.S.C. 2304 and 41 U.S.C. 253)". Furthermore, under 41 U.S.C. 253 it states in part "An executive agency in conducting a procurement for services shall obtain full and open competition through the use of competitive procedures and shall use the **competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement**". The point of these passages from the FAR and U.S.C. is that we are to obtain for the customer the best value to fulfill a Government requirement. The building services required normally by PBS customers are recurring and should be procured competitively at the time the services are needed.

The confusion specifically arises under FAR 8.404(a)(1) wherein it states "Parts 13 and 19 do not apply to orders placed against Federal Supply Schedules, except for the provision at FAR 13.303-2(c)(3). Orders placed against a Multiple Award Schedule (MAS), using the procedures in this subpart, are considered to be issued using full and open competition (see FAR 6.102(d)(3))". Both awarded contracts and solicitations on the street for MAS contracts are being done as commercial item contracts. The applicability of other FAR Chapters to commercial item contracts is defined under FAR 12.102. It states in part that:

(1) Contracting officers **shall use** the policies in this part in conjunction with the policies and procedures for solicitation, evaluation and award prescribed **in Part 13**, Simplified Acquisition Procedures; **Part 14**, Sealed Bidding; or **Part 15**, Contracting by Negotiation, as appropriate for the particular acquisition AND;

(2) Contracts for the acquisition of commercial items are subject to the policies in other parts of this chapter. When a policy in another part of this chapter is inconsistent with a policy in this part, **this Part 12 shall take precedence for the acquisition of commercial items**.

Therefore, since Part 12 takes precedence for these acquisitions, FAR Parts 13 and 19 now become applicable and coincide with the Government's policy to provide maximum practicable opportunities to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns (Ref. FAR 19.201(a)). Lastly, if the Government is to provide maximum opportunities to preference programs, including NISH, then why is GSA establishing national schedules for items we can better acquire sole source or with limited competition from the local market?

5. **8.403(c)** - Yes, FSS has allegedly handled awarding MAS contracts and the up-front work associated with it, but the fact of the matter is when the customer needs a service task order awarded, the customer will have to follow the ordering procedures described as "**Services Requiring a Statement of Work**". The customers will have to develop their own SOW, negotiate their own pricing, handle protests, evaluate offers, conduct pre & post award meetings, etc. How can GSA remain customer focused if we do not provide the actual labor-intensive part of the procurement process, which happens at the task order stage? The more serious question is why should the customers continue to do business with GSA if they are expected to take on all these added responsibilities that PBS contract and technical associates currently provide? Who will they go to for expertise if they need assistance with such things as:

- Development of a Performance Based SOW;
- How to develop a Source Selection Plan (SSP);



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- How to acquire the latest Wage Determination and whether it is the correct one for the service;
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- How to handle Subcontracting Plans and the subsequent administration of Subcontracting Plans (e.g. SF 294 & SF 295s), as well as whether their required or not;
- Is price evaluation adjustment (FAR Part 19) required and if so how to incorporate that into SOW; and
- What is required in regard to Debriefing of the Contractors.

If these ordering procedures ultimately have to be incorporated into the FAR, then reducing paragraph 8.404-2(c) to just referencing Part 15 and 37 in regard to Source Selection and Performance Based SOW would alleviate having to unnecessarily describe something that is already described in FAR elsewhere. Also, it would ensure that no ambiguities between FAR Parts would exist.

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12. **8.404-6(a) & (b)** - First, should the title of this be "Delivery/Task Order Award Documentation", rather than just "Documentation"? The reason being is the language appears to be mixed up requiring pre and post award documentation in a tone that conveys post award. For example, under paragraph (a)(4) wherein it states "the circumstances and rationale for restricting consideration of schedule contractors to less than that required . . .". Shouldn't this be a minimum documentation requirement before award and not done after, as inferred by the proposed language. The other items such as service purchased, number of contracts reviewed and amount paid are definitely items that can be documented after award, but not when it comes to the rationale for restricting consideration or sole source justifications.

Furthermore, not sure why minimum documentation is trying to be communicated, as it may be encouraging lack of adequate documentation. For example, award documents not listed as a minimum that are required are such things as -

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- SF-279 - As required by GSAM 504.602-70 "General Services Administration Procurement Data System (GPDS)"
- Price Analysis - As required by FAR 15.404-1 "Proposal Analysis Techniques"

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14. **8.405-3(b)** - Under paragraph (b) "Services", shouldn't the inspection and acceptance language of either FAR Part 52.212-4(a) "Inspection/Acceptance" or FAR Part 46.304 "Fixed-price service contracts"? One conflict may be that the proposed language states shall perform inspections and tests as specified in the QASP, which is not a requirement within any of the inspection/acceptance clauses.

15. **8.405-5** - Paragraph (b)(1) is in the middle of paragraph (a) and just needs to be changed to reflect (b)(1) as it's own paragraph.

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**Comments (as it relates to PBS Services) on  
FAR Proposed Rule 1999-603  
Federal Supply Schedules Services and Blanket Purchase Agreements**

1. **8.401(a)** - The reference in this paragraph states in part "services at prices associated with volume buying (also see 8.002)". First, the reference that services is considered a form of volume buying is a little misleading to our PBS customers. The commercial market place clearly views volume buying as products specific, not services. Also, it usually includes discounts when a certain volume is obtained a reduction to the cost is accompanied. Services should not be considered as a form of volume buying, since you are not buying the same *identical item* at a unit cost over and over. With products you can provide a customer discounts because purchasing in bulk and/or bundled quantities is cheaper for the seller. However, with services, you cannot provide a discount in this fashion, because bottom line services are direct labor oriented and driven ultimately by Service Contract Act wages that cannot be discounted due to minimum wages and fringe benefits that must be paid.

The reference to "8.002" can be removed as it really doesn't relate to the sentence. 8.002 is essentially a priority list not a pricing and/or simplified process reference, which is what the sentence is communicating.

2. **8.401(b)** - Should a statement be made that as long as three vendors are solicited for proposals, etc...? The inference is you can just directly go to one contractor, and should be clarified that prospective awardees are to be given a fair opportunity for award, in accordance with FAR subpart 16.505(b)(1).

3. **8.401(c)** - Again there is an inference that you can directly place orders with contractors without obtaining competition which should be clarified. In regard to the Government wide commercial purchase card it implies that you can process **all** payments using the purchase card and should be clarified that payments can be made to contractors, provided they are within the purchase card holder's authority. Also, it must be okay with the Contractor and specified in the delivery/task order.

The solicitations currently being issued on FEDBizOps refer to "ordering officials" and the proposed language under this rule states "ordering contracting officer". The same designation should be consistent throughout.

4. **8.403(a)** - Although the use of MAS Contracts is said to be fulfilling the requirements of full and open competition (FAR 6.102(d)(3)), when following MAS ordering procedures, is it really maximizing competition for a given service requirement? Full and open competition really is actually seen when there is a requirement for a service at a given location and competition is solicited at that point. It is a fact that you will receive more competition for a service by soliciting on the open market, than merely picking three vendors from a MAS contract. The best value is very important to our customer and picking from a MAS contract vendor short list, rather than soliciting on a nationwide basis at the time the service is needed, will minimize our ability to serve our customers and obtain best value. Therefore, if the primary objective of discussions is to maximize the Government's ability to obtain best value, based on the requirement and the evaluation factors set forth in the Task Order Solicitation, how can MAS Contracts really afford the best value (ref. 15.306(d)(2))?

A conflict and/or confusion of regulations exists in regard to using schedules and how orders are placed. In FAR 6.102(d)(3), it states that one of the several competitive procedures available is the use of MAS issued under the procedures established by the Administrator of General Services consistent with the requirement of 41 U.S.C. 259(b)(3)(A) for the MAS program of the



General Services Administration. However, policy states in part under FAR 6.101 that "Contracting Officers shall provide for full and open competition through use of the competitive procedure(s) contained in this subpart that are **best suited to the circumstances of the contract action and consistent with the need to fulfill the Government's requirements efficiently** (10 U.S.C. 2304 and 41 U.S.C. 253)". Furthermore, under 41 U.S.C. 253 it states in part "An executive agency in conducting a procurement for services shall obtain full and open competition through the use of competitive procedures and shall use the **competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement**". The point of these passages from the FAR and U.S.C. is that we are to obtain for the customer the best value to fulfill a Government requirement and the contracting officer is to select the procedure. The building services required normally by PBS customers are recurring and should be procured competitively at the time the services are needed.

The confusion specifically arises under FAR 8.404(a)(1) wherein it states "Parts 13 and 19 do not apply to orders placed against Federal Supply Schedules, except for the provision at FAR 13.303-2(c)(3). Orders placed against a Multiple Award Schedule (MAS), using the procedures in this subpart, are *considered to be issued using full and open competition* (see FAR 6.102(d)(3)". Both awarded contracts and solicitations on the street for MAS contracts are being done as commercial item contracts. The applicability of other FAR Chapters to commercial item contracts is defined under FAR 12.102. It states in part that:

(1) Contracting officers **shall use** the policies in this part in conjunction with the policies and procedures for solicitation, evaluation and award prescribed **in Part 13**, Simplified Acquisition Procedures; **Part 14**, Sealed Bidding; or **Part 15**, Contracting by Negotiation, as appropriate for the particular acquisition AND;

(2) Contracts for the acquisition of commercial items are subject to the policies in other parts of this chapter. When a policy in another part of this chapter is inconsistent with a policy in this part, **this Part 12 shall take precedence for the acquisition of commercial items**.

Therefore, since Part 12 takes precedence for these acquisitions, FAR Parts 13 and 19 now become applicable and coincide with the Government's policy to provide maximum practicable opportunities to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns (Ref. FAR 19.201(a)). If the Government is to provide maximum opportunities to preference programs, including NISH, then why is GSA establishing national schedules for items we can better acquire sole source through a preference program or with limited competition from the local market?

5. **8.403(b)** - The proposed language states in part "orders placed under a Federal Supply Schedule contract are not exempt from the development of acquisition plans (see subpart 7.1) . . .". Under FAR 7.105 it states in part "The plan must address all the technical, business, management, and other significant considerations that will control the acquisition. . . Acquisition plans for service contracts or orders must describe the strategies for implementing performance-based contracting methods or must provide rationale for not using those methods (see Subpart 37.6)". One of the primary concerns that should be addressed in the development of an acquisition plan is how we document our use, or non-use, of Preference Programs, as required under FAR Parts 8.704 and 19.502-1. One of the acquisition plan requirements is to develop a "plan of action" that addresses these very issues, as well as issues raised from public comments to FAR Case 2002-029 that deals with "Contract Bundling".

In regard to FAR 19.502-1(b), the statement that the requirement does not apply to purchases from Federal Supply Schedule contracts is only valid up to \$2,500 and should be not

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misinterpreted for requirements above this amount. For service requirements, as required by FAR 19.502-1(a), "the contracting officer shall set aside an individual acquisition or class of acquisitions for competition among small businesses". The reference to required sources under FAR 8.002 clearly is in conflict with FAR 19.502-1, because if all the sources listed under FAR 8.002 are required sources, then are we saying the set aside requirements under FAR 19.502-1 for all purchases are inapplicable?

It is very clear under FAR Part 19 that small business set-asides are required. The general policy under FAR 19.201(a) states "It is the policy of the Government to provide maximum practicable opportunities in its acquisitions to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. Such concerns must also have the maximum practicable opportunity to participate as subcontractors in the contracts awarded by any executive agency, consistent with efficient contract performance. The Small Business Administration (SBA) counsels and assists small business concerns and assists contracting personnel to ensure that a fair proportion of contracts for supplies and services is placed with small business". The formulation and/or creation of MAS schedule contracts for services that are nationwide or global in their area of coverage are not promoting this general policy.

Some other FAR cites that demonstrate the requirement for using small business set-asides are shown below:

1. **FAR 19.502-2 Total small business set-asides.**

(a) Except for those acquisitions set aside for very small business concerns (see Subpart 19.9), each acquisition of supplies or services that has an anticipated dollar value exceeding \$2,500 (\$7,500 for acquisitions as described in 13.201(g)(1)(i) or \$15,000 for acquisitions as described in 13.201(g)(1)(ii)), but not over \$100,000 (\$200,000 for acquisitions described in paragraph (2)(i) of the Simplified Acquisition Threshold definition at 2.101), is automatically reserved exclusively for small business concerns and shall be set aside for small business unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery. . . .

(b)The contracting officer shall set aside any acquisition over \$100,000 for small business participation when there is a reasonable expectation that (1) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns (but see paragraph (c) of this subsection); and (2) award will be made at fair market prices. Total small business set-asides shall not be made unless such a reasonable expectation exists (but see 19.502-3 as to partial set-asides). . .

2. **FAR 19.501 General.**

(a) The purpose of small business set-asides is to award certain acquisitions exclusively to small business concerns. A "set-aside for small business" is the reserving of an acquisition exclusively for participation by small business concerns. A small business set-aside may be open to all small businesses. . .

(d) The contracting officer shall review acquisitions to determine if they can be set aside for small business, giving consideration to the recommendations of agency personnel having cognizance of the agency's small business programs. The contracting officer shall document why a small business set-aside is



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inappropriate when an acquisition is not set aside for small business, unless a HUBZone small business set-aside or HUBZone small business sole source award is anticipated. . .

6. **8.403(c)** - Yes, FSS has allegedly handled awarding MAS contracts and the up-front work associated with it, but the fact of the matter is when the customer needs a service task order awarded, the customer will have to follow the ordering procedures described as "Services Requiring a Statement of Work". The customers will have to develop their own SOW, negotiate their own pricing, handle protests, evaluate offers, conduct pre-and-post award meetings, etc. How can GSA remain customer focused if the customer must provide the actual labor-intensive part of the procurement process, which happens at the task order stage? The more serious question is why should the customers continue to do business with GSA if they are expected to take on all these added responsibilities that PBS contract and technical associates currently provide? Who will they go to for expertise if they need assistance with such things as?

- Development of a Performance Based SOW;
- How to develop a Source Selection Plan (SSP);
- How to acquire the latest Wage Determination and whether it is the correct one for the service;
- How to prepare a competitive range determination;
- When EEO Clearance required;
- How to handle mistakes in offer;
- Where to obtain "Equal Employment Opportunity is the Law" posters;
- How to handle Subcontracting Plans and the subsequent administration of Subcontracting Plans (e.g. SF 294 & SF 295s), as well as whether they are required, or not;
- When price evaluation adjustment is required and if so how to incorporate that into SOW;
- What is required when debriefing Contractors; and
- Etc., etc., etc..

Again, as stated above, if services require the development of a SOW and the subsequent receipt of proposals, which includes pricing, how can the statement be made that GSA has determined prices under MAS to be fair & reasonable? In addition, PBS is focused on providing the customer the best value, which may not be strictly limited to price. Source Selection is used to provide the customer the latitude to determine the importance of specific non-priced factors. Non-priced factors, when taken together, may be more important than price and are specific to each individual acquisition. How is the customer supposed to know these contractors have the non-priced factors and are qualified to be on a vendor list? What, besides price, was the basis of comparison and/or standards they had to adhere to in order to be added to the vendor list? What non-priced factors were utilized?

As required for awards made under Commercial Item procedures, determination of price reasonableness is required in accordance with FAR 12.208, which, in addition, further defines, because when establishing price reasonableness using negotiated procedures over the SAT, that it be in accordance with FAR 15.404-1.

As indicated within FAR 15.404-1 there are two preferred techniques to use when analyzing pricing information provided by the offeror(s), as follow:

- (1) Comparison of proposed prices received in response to the solicitation. Normally, adequate price competition establishes price reasonableness (see FAR 15.403-1(c)(1)); and

(2) Comparison of previously proposed prices and previous Government and commercial contract prices with current proposed prices for the same or similar items, if both the validity of the comparison and the reasonableness of the previous price(s) can be established.

Therefore, if pricing is not received until a SOW is shared with MAS Contractors to provide offers, then can the statement be made that GSA has determined prices under the MAS to be fair & reasonable in accordance with preferred techniques identified under FAR 15.404-1?

**FACT** - Using MAS Contracts for PBS Service needs (e.g., landscape maintenance, elevator maintenance, etc.) will not provide the customer the best value the majority of the time. As noted in the proposed language, the words "lowest overall cost" is considered best value, which is clearly only an FSS approach and is in conflict with FAR Part 16.505. Under FAR Part 8.404 it alludes to the fact that by placing an order against a MAS schedule using the procedures in this section, the ordering office has concluded that the order represents the best value and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the Government's needs. This does not provide a trade-off or best value as defined in FAR Part 15.101-1. As you know OMB's 2002 report to the President specifies best value as their number 1 item.

PBS, almost exclusively, uses source selection procedures for service contracts and considers price, including profit and overhead, as one of the factors. FSS's focus on lowest cost appears to be in conflict with commercial item practices under FAR Part 12.207 Contract type. Agencies shall use firm-fixed-price contracts or fixed-price contracts with economic price adjustment for the acquisition of commercial items. Indefinite-delivery contracts (see Subpart 16.5) may be used where the prices are established based on a firm-fixed-price or fixed-price with economic price adjustment. Use of any other contract type to acquire commercial items is prohibited. Therefore, as a valued added service to the customer, PBS technical and contracting associates, along with the customer, not only evaluate price, but also include non-priced factors such as past performance, experience, technical excellence, management capability, personnel qualifications, etc.. These are other valuable selection criteria when considering the best value or trade-off determination in selecting a contractor.

In fact, under two recently issued Solicitations 6FEC-E6-970173-R8 and 6FEC-E6-030292, the Contract Type noted in the solicitation states the Government contemplates award of a Fixed Price Indefinite Delivery/Indefinite Quantity contracts with EPA Adjustment to result from this solicitation. However, it further states "Not applicable to Attachment 3 Hardware Store", which is the Attachment that includes the requirements for Elevator Inspection, Fire Alarm System Preventative Maintenance and Repair services, Fire Suppression System Preventative Maintenance and Repair Services and Elevator & Escalator Preventive Maintenance services. If the service requirements stipulated under Attachment 3 are neither firm-fixed-price nor fixed-price with economic price adjustment, then no awards can be considered commercial item. The failure to provide wage determinations and sufficient pricing under MAS Contracts for services should be considered when deciding the acquisition approach in meeting a customer's expectation and/or service need.

PBS is very value-added in providing customers (property manager) all the support necessary to assist with their requests, such as development of SOWs, handling the total procurement process in regard to negotiations, evaluations, awards, protests, etc. If PBS is pushed into the use of MAS contracts for services, our customers will take on the substantial burden of handling all the tasks normally provided by PBS contract and technical associates. They do not have the necessary staffing for this. In addition, this burden to our customers could drive our customers away from using GSA if they are expected to now be responsible for all the value-added services PBS is currently providing to them.

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7. **8.404-1(b)** - For orders of services and/or products up to the micro-purchase threshold

Customers needing services under \$2,500 are led to believe that they may place an order with any MAS Schedule Contractor. However, there are other avenues for obtaining services more expeditiously if needed. The majority of purchases made under \$2,500 are usually rushed procurements and when placing an order using the MAS, the customer may be subject to various delays, such as the following:

- (1) The delivery order/task order may not process properly online;
- (2) The Contracting Officer associated with the MAS Contract may not be available to contact in case there are specific questions a customer would like to ask;
- (3) The service cannot be provided within the delivery time required;
- (4) If the service requirement does not have pricing, then a quote would have to be obtained from the vendor.

As stated in part under FAR 13.201, the Government wide commercial purchase card shall be the preferred method to purchase and to pay for micro-purchases. Micro-purchases may be awarded without soliciting competitive quotations if the contracting officer or individual appointed in accordance with 1.603-3(b) considers the price to be reasonable. So, if the customer has a micro-purchase that can be handled as an oral procurement with a simple phone call, then they would not be subject to the above concerns.

8. **8.404-1(c)** - For orders above the micro-purchase threshold but below the maximum order threshold

As stated in the paragraph above, the same concerns are still an issue for the customer to deal with up to the maximum order threshold. In the case of services, since there is no pre-pricing available for services, a Statement of Work (SOW) will be required and wage determination. All contractors on the MAS schedule must also be afforded a fair opportunity to provide an offer upon which we can make a best value selection. The MAS ordering procedures state that one is to solicit from at least 3 Schedule contractors, however soliciting from all eligible contractors will afford the customer maximum competition and ultimately a better value for their service requirement. Even then, the issue of non-priced factors remains.

9. **8.404-1(d)** - For orders above the maximum order threshold

Again, as described in the two paragraphs above, the same concerns exist with MAS orders above the maximum order threshold. The customer should be cognizant that the more competition received will provide them the best value in obtaining the services they need. Source Selection procedures that include both non-priced and priced factors are essential, so that the customer can use trade-offs in determining a best value decision.

10. **8.404-2(a)** - The paragraph alleges that, when ordering services, there are priced hourly rates in the schedule contracts. However, when visiting GSA advantage to access pricing more often than not there is no pricing to utilize and, therefore, you are faced with having to contact vendors for information. One of the supposed advantages of using schedules was that there is "up-front" pricing, so that a customer would not have to conduct this task.

In addition, if the contractor is pricing everything by hourly rates, then there really are no services on schedule that are considered "full services". The schedule's focus on lowest cost appears to be in conflict with commercial item practices under FAR Part 12.207 Contract type. Agencies shall use firm-fixed-price contracts or fixed-price contracts with economic price adjustment for the

acquisition of commercial items. Indefinite-delivery contracts (see Subpart 16.5) may be used where the prices are established based on a firm-fixed-price or fixed-price with economic price adjustment. **Use of any other contract type to acquire commercial items is prohibited.** It seems that schedules are merely organized to buy direct labor only and/or man-hours, which is not in concert with commercial item contracting. PBS customers are not only buying direct labor, but all the other associated costs attributable in providing full service contracts, which includes G&A, Profit, Supplies and Materials, Supervision, other Indirect costs, etc. Fixed pricing is done to primarily put more risk on the contractor to perform, whereas, if the customer is reduced to buying man-hours at hourly rates the risk shifts more so to the Government and administration can become burdensome.

11. **8.404-2(b)** - Same comments as with paragraph #6 above.

12. **8.404-2(c)** - The main question for this paragraph - when the ordering office is required to develop a SOW, what is really the benefit and/or value added reason for a customer to use the ordering procedures set forth in the schedules? Is the 1% (or the proposed .75%) schedules fee really worth it to an ordering office to use the schedules, if all they save is, maybe, synopsis time? One of the main advantages claimed by FSS Marketing is that the use of schedules saves time. However, in the case of service contracts the majority of them are recurring contracts and acquisition planning is done months in advance, where potential synopsis time is irrelevant when awarding 5 to 9 year contracts. In addition, there is a majority of those contracts that are awarded sole source to preference programs, such as NISH and the Small Business Administration's 8(a) Program.

Lastly, what if a customer does not have the necessary procurement expertise in-house to deal with some of the items listed below (in regard to service contracts)? Who then are they to go to for that assistance? The FSS procuring contracting officer will not be able to provide it.

- How to develop a Performance Based SOW;
- How to develop a Source Selection Plan (SSP);
- How to acquire the latest Wage Determination and whether it is the correct one for the service;
- How to prepare a competitive range determination;
- Whether a EEO Clearance is required;
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If these ordering procedures ultimately have to be incorporated into the FAR, then reducing paragraph 8.404-2(c) to just referring to Part 15 and 37 in regard to Source Selection and Performance Based SOWs would alleviate having to unnecessarily describe something that is already described in the FAR elsewhere. Also, it would lessen ambiguities among FAR Parts.

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Furthermore, it is unclear why minimum documentation is trying to be communicated, as it may be encouraging lack of adequate documentation. For example, award documents not listed as a minimum that are required are such things as -

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Another questionable item is the statement for using other than firm, fixed-price orders or performance-based orders. Since these schedules are being awarded commercially, the use of any other contract type to acquire commercial items is prohibited, so this may need to be changed and/or removed.

Another possible way of approaching this "documentation" paragraph is to distinguish what is required as far as pre-award and post-award requirements.

15. **8.404-7** - Possibly change payment for oral orders to read, "agencies may make payments for oral orders (with confirming order over micro-purchase threshold)". We just need to make sure we are communicating that a purchase card is a not a purchase method and is only a payment method. In addition, oral orders for services are not preferred, because of the requirement for a wage determination.

16. **8.405-3(b)** - Under paragraph (b) "Services", shouldn't the inspection and acceptance language of either FAR Part 52.212-4(a) "Inspection/Acceptance" or FAR Part 46.304 "Fixed-price service contracts" be included? One conflict may be that the proposed language states shall perform inspections and tests as specified in the QASP, which is not a requirement within any of the inspection/acceptance clauses.

17. **8.405-5** - Paragraph (b)(1) is in the middle of paragraph (a) and just needs to be changed to reflect (b)(1) as a separate paragraph.

1999-603-29



**Timothy.Wilson@bpd.treas.gov**

06/18/2003 12:49 AM

To: farcase.1999-603@gsa.gov  
cc:  
Subject: Clarification/Definition

To Whom It May Concern,

I believe that the term multi-agency BPA needs to be defined. My understanding would be that a multi-agency BPA would have authorized callers from multiple agencies named on the BPA. Would this be close to the correct definition?

Thank you for your consideration of this comment.

Tim Wilson  
Contract Specialist/Contracting Officer  
(304) 480-7140  
Timothy.Wilson@bpd.treas.gov





1999-603-29



**Timothy.Wilson@bpd.treas.gov**

06/18/2003 12:49 AM

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1999-603-30



**Lisa D. Maguire**

06/20/2003 12:39 PM

To: Linda K. Nelson/MVP/CO/GSA/GOV@GSA, Laurie A. Duarte/MVA/CO/GSA/GOV@GSA, farcase.1999-603@gsa.gov  
cc: Lisa D. Maguire/FXA/CO/GSA/GOV@GSA, Linda T. Miller/FXA/CO/GSA/GOV@GSA, Roger D. Waldron/FXA/CO/GSA/GOV@GSA  
Subject: FAR Case 1999-603

Good afternoon Linda & Laurie:

Please find attached FSS' comments regarding the rewrite of section 8.4. I apologize for the lateness of the submission. I have provided a narrative of the comments and a copy of the proposed rule with the revisions annotated using the "track changes" feature of Word.



FAR 8.4 Proposed Rule Revisions.doc FAR 8.4 Formal Comments.doc

I am interested in reviewing the other comments received on this FAR Case at the earliest opportunity.

Thanks,

Lisa D. Maguire  
Division Director  
Commercial Acquisition Policy Division  
FSS Acquisition Management Center (FXA)  
703-308-1419



603-30

COMMENTS  
FAR Case 1999-603  
Federal Acquisition Regulation; Federal Supply Schedule Services and  
Blanket Purchase Agreements

The Federal Supply Service Office of Acquisition Management respectfully submits the following comments to the Federal Acquisition Regulation (FAR) Secretariat pertaining to FAR Case 1999-603—the rewrite of FAR 8.4.

**8.401(a)** — Change the first sentence from "The Federal Supply Schedule program..." to read, "The Federal Supply Schedule program (also known as the Multiple Award Schedule (MAS) program)...." Change the second sentence from "Indefinite delivery contracts awarded with commercial firms to provide supplies and services at stated prices..." to read, "Indefinite delivery contracts awarded to commercial firms to provide supplies and services at stated prices..." to maintain consistency throughout FAR 8.4.

**8.401(c)** — Change the first sentence from "GSA offers an on-line shopping..." to read, "GSA offers an online shopping...." Change the fourth sentence from "GSA's electronic quote system...provides a medium for transmitting notice to..." to read, "GSA's electronic Request for Quotation (RFQ) system...provides a medium for transmitting a notice to...."

**8.402** — Change the first sentence from "Procedures in this subpart apply to orders placed against Federal Supply Schedules." to read, "Procedures in this subpart apply to orders placed against Federal Supply Schedule contracts." Add a sentence to the end of the paragraph that states, "When a schedule contract contains special ordering procedures established by GSA, unless otherwise noted, the ordering procedures in FAR 8.404 do not apply."

**8.403(a)** — Change the first sentence from "...orders placed against Federal Supply Schedules..." to read, "...orders placed against Federal Supply Schedule contracts...." Change the third sentence from "...placing orders under Federal Supply Schedules using..." to read, "...placing orders under Federal Supply Schedule contracts using...."

**8.404-1(c)** — Change the third sentence from "...by using the GSA Advantage! on-line shopping..." to read, "...by using the GSA Advantage! online shopping...." Change the fourth sentence from "...available under the schedule that..." to read, "...available under the schedule contract that...."

**8.404-1(d)** — Remove the following words from the third sentence: "or establishing a Blanket Purchase Agreement (BPA) (see 8.404-3)." This language confuses the issue. There is already clear language contained within 8.404-3(a)(2) that requires ordering offices to follow the ordering procedures in 8.404-1 or 8.404-2.

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**8.404-1(d)(1)** — Change the sentence from "...the GSA Advantage! on-line shopping..." to read, "the GSA Advantage! online shopping...."

**8.404-2** — Change the title from "Ordering procedures for services using a statement of work" to read, "Ordering procedures for services requiring a statement of work."

**8.404-2(a)** — FSS recommends that this language be strengthened to allow ordering offices to use a statement of work for services priced other than at hourly rates such as share-in savings, recovery fees (i.e., 25% recovery), and debt collection fees (i.e., 18%). FSS will also need to address how the Special Item Numbers that require a statement of work will be identified in Schedule publications and contractors' catalogs/pricelists.

**8.404-2(c)** — Revise the introductory language from "*For orders exceeding the micro-purchase threshold*" to read, "*For orders exceeding the micro-purchase threshold but not exceeding the maximum order threshold.*"

**8.404-2(c)(2)(i)** — Restructure the first sentence to remove "For proposed orders not expected to exceed the maximum order threshold," and to clarify that the Request for Quotation, which includes the statement of work and selection criteria, must be provided to at least three schedule contractors that offer services that will meet the ordering office's needs. The revised sentence reads as follows: "The ordering office must provide the Request for Quotation (RFQ), which includes the statement of work and selection criteria (*e.g.*, experience and past performance), to at least three schedule contractors that offer services that will meet the agency's needs."

**8.404-2(c)(2)(ii)** — Restructure this paragraph to be **8.404-2(d)** and title it "*For proposed orders exceeding the maximum order threshold.*" Remove the reference to BPAs, change the reference citation from paragraph (c)(2)(i) to (c), and add language regarding price reductions so that the paragraph reads as follows: "*For proposed orders exceeding the maximum order threshold.* The ordering office shall, in addition to meeting the requirements of paragraph (c) of this section, provide the RFQ, which includes the statement of work and selection criteria, to an appropriate number of additional schedule contractors that offer services that will meet the agency's needs and seek price reductions (see 8.404-4)."

**8.404-2(c)(2)(iii)** — Restructure this paragraph to **8.404-2(c)(2)(ii)**. Revise the sentence from "The ordering office shall provide the statement of work and selection criteria to any schedule contractor who requests a copy of it" to read, "The ordering office shall provide the RFQ, which includes the statement of work and selection criteria, to any schedule contractor who requests a copy of it."

\*In view of the June 12, 2003 GAO decision in Savantage Financial Services Inc., FXA will discuss the inclusion of the preceding language with MV and LP.

**8.404-2(c)(3)** — Restructure this paragraph to **8.404-2(c)(2)(iii)**. Revise the last sentence to delete the reference to BPAs.

**8.404-2(c)(4)** — Restructure this paragraph to **8.404-2(c)(2)(iv)**. Remove the following language from the paragraph since FAR 37.602-2 already states exactly the same language: "These plans shall recognize the responsibility of the contractor (see 46.105) to carry out its quality control obligations and shall contain measurable inspection and acceptance criteria corresponding to the performance standards contained in the statement of work. The quality assurance surveillance plans shall focus on the level of performance required by the statement of work, rather than the methodology used by the contractor to achieve that level of performance."

**8.404-3(a)(1)** — To maintain consistency of terminology, revise and combine the third and fourth sentences from, "The number of BPAs to be awarded is within the discretion of the office establishing the BPA. The number of BPA awards should be based on a strategy...", to read as follows: "The number of BPAs to be established is within the discretion of the office establishing the BPAs and should be based on a strategy that is expected to maximize the effectiveness of the BPAs." Change the fifth sentence from "In determining how many BPAs to award..." to read, "In determining how many BPAs to establish...."

**8.404-3(a)(2)** — To maintain consistency of terminology, change the first sentence from "Award of a single BPA..." to read, "Establishment of a single BPA..." Need clarification as to the meaning of the last sentence, "In addition, multiple BPAs shall specify the procedures for placing orders under the BPA."

**8.404-3(a)(3)** — Change the sentence from "Establishment of a multi-agency BPA against a Federal Supply Schedule is permitted if all participating agencies are signatories to the BPA..." to read as follows: "Establishment of a multi-agency BPA against a Federal Supply Schedule contract is permitted if all participating agencies are signatories at the time the BPA is established."

**8.404-3(b)(1)** — To maintain consistency of terminology, change "Single award BPA" to read, "Single BPA." Change the second sentence from "If the ordering office awards..." to read, "If the ordering office establishes...."

**8.404-3(b)(2)** — To maintain consistency of terminology, change "If the ordering office awards..." to read, "If the ordering office establishes...." Change "...before placing an order exceeding \$2500, the ordering office shall—" to read, "...before placing an order exceeding the micro-purchase threshold, the ordering office shall—."

**8.404-3(b)(2)(iii)** — Change the sentence from "Award the order to..." to read, "Place the order with...."

**8.404-4** — Change the first sentence from "In addition to the circumstances in paragraph 8.404-1(d)..." to read, "In addition to seeking price reductions before placing an order exceeding the maximum order threshold...."

**8.404-5** — Change the first sentence from "...service-disabled veteran-owned small, HUBZone small business..." to read, "...service-disabled veteran-owned small business, HUBZone small business...." Change the second sentence from "Orders placed against the schedules may..." to read, "Orders placed against schedule contracts may...." Change the fourth sentence from "...GSA Advantage! and the Schedules e-Library..." to read, "GSA Advantage! and Schedules e-Library...."

**8.404-6(a)(4)(ii)** — Change "...the original order was awarded..." to read, "...the original order was placed...."

**8.404-6(a)(4)(iii)** — Change the first sentence from "An item peculiar to one manufacturer" to read, "The item is peculiar to one manufacturer."

**8.404-6(a)(5)(i)** — Change "Orders placed under the Federal Supply Schedules are exempt..." to read, "Orders placed under Federal Supply Schedule contracts are exempt...."

**8.404-6(a)(5)(i)(B)** — Change "Prepare sole source justifications using the format at..." to read, "Prepare sole source justifications using the information at...."

**8.404-6(a)(5)(ii)(B)** — Remove the last two words "and approval" from the first sentence to eliminate the redundancy.

**8.404-6(a)(5)(ii)(C)** — In the first sentence, change "...head of the ordering agency..." to read, "...head of the procuring activity..." to maintain consistency with FAR 6.304(a)(3) and the preceding paragraph of the proposed rule; change "...the official described in 6.304(a)(3) and (a)(4)..." to read, "an official described in 6.304(a)(3)(i) or (ii)...;" and remove the last two words "and approval" to eliminate the redundancy. The resulting sentence reads as follows: "For a proposed order exceeding \$10,000,000 but not exceeding \$50,000,000, the head of the procuring activity or an official described in 6.304(a)(3)(i) or (ii) shall approve the justification."

**8.404-6(a)(5)(ii)(D)** — Remove the last two words "and approval" from the first sentence to eliminate the redundancy.

**8.404-6(b)(1)** — Change "...selecting the contractor for award..." to read, "...selecting the contractor to receive the order...."

**8.404-6(b)(2)** — Change "...in making the award decision..." to read, "in making the selection...."

**8.404-6(b)(3)** — Remove the words "price reasonableness."

**8.404-8** — Ordering procedures for mandatory use schedules

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\*FXA will discuss with the subject of mandatory use schedules with MV and will then consider whether all language regarding mandatory use schedules should be deleted from the FAR.

**8.404-8(c)(3)** — (*assuming that mandatory use schedules are retained*)...Change "maximum order limitation" to read "maximum order threshold."

**8.405-2** — Change the first sentence from "...to order supplies or services from schedules" to read, "...to order supplies or services from schedule contracts." Change the second sentence from "...within the limitations specified in each schedule" to read, "...within the limitations specified in each schedule contract." Change the third sentence from "...required by the schedule:" to read, "...required by the schedule contract:"

**8.405-3(a)(1)(i)** — Change "The schedule indicates..." to read, "The schedule contract indicates...."

**8.405-3(a)(4)** — Change "Unless otherwise provided in the schedule..." to read, "Unless otherwise provided in the schedule contract...."

**8.405-4** — Change "...may terminate for cause..." to read, "...may terminate the order for cause...."

**8.405-5(b)(1)** — Change "....has terminated an individual order by a Federal Supply Schedule contractor..." to read, "....has terminated an individual order to a Federal Supply Schedule contractor...."

**8.405-5(b)(5)(i)(B)** — Change the word "number" to read, "numbers."

**8.405-6(a)** — Change the first sentence from "Ordering agency contracting officer..." to read, "An ordering agency contracting officer...."

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 8 and 38**

**[FAR Case 1999-603]**

**RIN: 9000-AJ63**

**Federal Acquisition Regulation; Federal Supply Schedules  
Services and Blanket Purchase Agreements (BPAs)**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to incorporate policies for services and to strengthen the procedures for establishing Blanket Purchase Agreements under the Federal Supply Schedules.

**DATES:** Interested parties should submit comments in writing on or before **[Insert 60 days after FEDERAL REGISTER publication date]** to be considered in the formulation of a final rule.

**ADDRESSES:** Submit written comments to—

General Services Administration  
FAR Secretariat (MVA)  
1800 F Street, NW, Room 4035  
ATTN: Laurie Duarte  
Washington, DC 20405

Submit **electronic comments via the Internet to—**



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farcase.1999-603@gsa.gov

Please submit comments only and cite FAR case 1999-603 in all correspondence related to this case.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501-1900. Please cite FAR case 1999-603.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

The Multiple Award Schedules (MAS) program, directed and managed by the General Services Administration (GSA), provides Federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying. For much of its history, the MAS focused on the sale of products. In recent years, however, GSA has sought to facilitate broad access to service contractors. This general transformation of the schedules program has coincided with a trend in Federal procurement towards acquiring managed solutions from the marketplace. The amount of services acquisition from the MAS has grown steadily as agencies increasingly turn to schedule contractors to meet their needs.

To assist its customers, GSA developed "special ordering procedures" that address the acquisition of services.

However, because FAR subpart 8.4 has remained primarily



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geared towards products, agencies have been inconsistent in adhering to certain basic acquisition requirements when buying services off the MAS, such as in their use of statements of work, effective pricing of orders, application of competition, and proper documentation of award decisions.

The FAR Council seeks to significantly improve the application of acquisition basics on MAS purchases for services and reinforce sound MAS practices generally. To achieve this result, the Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulations Council (DARC) are proposing numerous amendments to FAR subpart 8.4. In developing these changes, the CAAC and DARC, in coordination with the FAR Council, carefully considered the findings and recommendations made by the General Accounting Office in its report no. GAO-01-125, Contract Management: Not Following Procedures Undermines Best Pricing Under GSA's Schedule.

Accordingly, the rule proposes to amend FAR subpart 8.4 to—

- Add new coverage on use of statements of work when acquiring services from the schedules;
- Clarify and strengthen the procedures for establishing Blanket Purchase Agreements against the schedules;
- Reinforce documentation requirements generally and address the documentation of sole source orders in particular;

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- Highlight the availability of "e-Buy," GSA's electronic quote system, to encourage greater transparency through use of electronic media;
- Add new coverage to allow agencies to make payment for oral or written orders by any authorized means, including the Governmentwide commercial purchase card;
- Clarify the procedures for termination for cause and convenience; and
- Reorganize and revise the subpart text for ease of use.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

**B. Regulatory Flexibility Act**

The Councils do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule addresses internal Government administrative procedures and does not impose any additional requirements on Government offerors or contractors. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Parts 8 and 38 in accordance with 5 U.S.C. 610.

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Interested parties must submit such comments separately and should cite 5 U.S.C. 601, et seq. (FAR case 1999-603), in correspondence.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

**List of Subjects in 48 CFR Parts 8 and 38**

Government procurement.

Dated: April 14, 2003

CECELIA L. DAVIS,  
Acting Director,  
Acquisition Policy Division.

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Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 8 and 38 as set forth below:

1. The authority citation for 48 CFR parts 8 and 38 continues to read as follows:

**AUTHORITY:** 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

**PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES**

2. Amend section 8.401 by revising paragraphs (a), (b), and (c); and by removing from the introductory text of paragraph (d) and (d)(2) the word "office" and adding "agency" in its place. The revised text reads as follows:

**8.401 General.**

(a) The Federal Supply Schedule program (also known as the Multiple Award Schedule (MAS) program), directed and managed by the General Services Administration (GSA), provides Federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying (also see 8.002). Indefinite delivery contracts are awarded to commercial firms to provide supplies and services at stated prices for given periods of time. The Department of Defense manages a similar system of schedule-type contracting for military items. The Department of Defense systems are not covered by this subpart.

(b) The GSA schedule contracting office issues Federal Supply Schedules publications containing the information necessary for placing delivery or task orders with schedule

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contractors. Ordering offices issue orders directly to the schedule contractors. Ordering offices may request copies of schedules by completing GSA Form 457, FSS Publications Mailing List Application, and mailing it to the—

GSA Centralized Mailing List Service (7CAFL)  
P.O. Box 6477  
Fort Worth, TX 76115.

Copies of GSA Form 457 also may be obtained from this address.

(c) GSA offers an online shopping service called "GSA Advantage!." It enables ordering offices to search specific information (i.e., national stock number, part number, common name), review delivery options, place orders directly with contractors (or ask GSA to place orders on the agency's behalf), and pay contractors for orders using the Governmentwide commercial purchase card (or pay GSA). Ordering offices may access the "GSA Advantage!" shopping service at <http://www.gsaadvantage.gov>. GSA's electronic Request for Quotation (RFQ) system, "e-Buy," which may be accessed through GSA Advantage!, provides a medium for transmitting a notice to contractors of the ordering office's needs. For more information or assistance, contact GSA at Internet e-mail address: [gsa.advantage@gsa.gov](mailto:gsa.advantage@gsa.gov).

\* \* \* \* \*

3. Revise section 8.402 to read as follows:

**8.402 Applicability.**

Procedures in this subpart apply to orders placed against Federal Supply Schedule contracts. GSA may have

established special ordering procedures for a particular schedule in which case that schedule will specify those special ordering procedures. When a schedule contract contains special ordering procedures established by GSA, unless otherwise noted, the ordering procedures in FAR 8.404 do not apply.

4. Add section 8.403 to read as follows:

**8.403 Use of Federal Supply Schedules.**

(a) General. Parts 13, except 13.303-2(c)(3), 15, and 19 do not apply to orders placed against Federal Supply Schedule contracts (see 8.404-5). Orders and Blanket Purchase Agreements placed against a Multiple Award Schedule (MAS), using the procedures in this subpart, are considered to be issued using full and open competition (see 6.102(d)(3)). Therefore, when establishing a Blanket Purchase Agreement or placing orders under Federal Supply Schedule contracts using the procedures of 8.404, ordering offices need not seek further competition, synopsise the requirement, or consider small business programs.

(b) Acquisition planning. Orders placed under a Federal Supply Schedule contract are not exempt from the development of acquisition plans (see subpart 7.1), and an information technology acquisition strategy (see Part 39).

(c) Pricing. 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). 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 offices are not required to make a separate determination of fair and reasonable pricing except for a price evaluation as required by 8.404-2(c)(3). By placing an order against a schedule contract using the procedures in 8.404, the ordering office has concluded that the order represents the best value and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the Government's needs.

5. Revise section 8.404 and the section heading to read as follows:

**8.404 Ordering procedures for Federal Supply Schedules.**

Ordering offices shall use the ordering procedures of this section when placing an order or establishing a Blanket Purchase Agreement (BPA) for supplies or services. The procedures in this section, other than those in 8.404-8, apply to all optional and mandatory use schedules. The procedures in 8.404-8 apply only to mandatory use schedules.

6. Add sections 8.404-1 and 8.404-2 to read as follows:

**8.404-1 Ordering procedures for supplies and fixed-price services.**

(a) Ordering offices shall use the procedures of this subsection for ordering supplies and for ordering services that are listed in the schedule contracts as a fixed price



for the performance of a specific task (e.g., installation, maintenance and repair).

(b) Orders at or below the micro-purchase threshold.

Ordering offices may place orders at or below the micro-purchase threshold with any Federal Supply Schedule contractor that can meet the agency's needs.

(c) Orders exceeding the micro-purchase threshold but not exceeding the maximum order threshold. Place orders

with the schedule contractor that can provide the supply or service that represents the best value. Before placing an order, an ordering office shall consider reasonably available information about the supply or service offered under MAS contracts by using the GSA Advantage! online shopping service, or by reviewing the catalogs or pricelists of at least three schedule contractors (see 8.404-5). Select the delivery and other options available under the schedule contract that offers the best value to meet the agency's needs. The ordering office may consider among other factors—

- (1) Special features of the supply or service required for effective program performance;
- (2) Trade-in considerations;
- (3) Probable life of the item selected as compared with that of a comparable item;
- (4) Warranty considerations;
- (5) Maintenance availability;

- (6) Past performance; and
- (7) Environmental and energy efficiency

considerations.

(d) Orders exceeding the maximum order threshold. Each schedule contract has an established maximum order threshold. This threshold represents the point where it is advantageous for the ordering office to seek a price reduction. In addition to following the procedures in paragraph (c) of this section and before placing an order that exceeds the maximum order threshold, ordering offices shall—

(1) Review an appropriate number of additional schedule contractors' catalogs or pricelists, or use the GSA Advantage!online shopping service;

(2) Based upon the initial evaluation, seek price reductions from the schedule contractor(s) considered to offer the best value (see 8.403); and

(3) After seeking price reductions (see 8.404-4), place the order with the schedule contractor that provides the best value(see 8.403). If further price reductions are not offered, an order may still be placed.

**8.404-2 Ordering procedures for services requiring a statement of work.**

(a) Ordering offices shall use the procedures in this subsection when ordering services priced at hourly rates in the schedule contracts. The applicable services will be

identified in the Federal Supply Schedule publications and the contractor's catalogs/pricelists.

(b) Orders at or below the micro-purchase threshold.

Ordering offices may place orders at or below the micro-purchase threshold with any Federal Supply Schedule contractor that can meet the agency's needs.

(c) For orders exceeding the micro-purchase threshold but not exceeding the maximum order threshold. The ordering office shall develop a statement of work. All statements of work shall include the work to be performed, location of work, period of performance, deliverable schedule, applicable standards, and any special requirements (e.g., security clearances, travel, special knowledge).

(1) Agencies shall use performance-based statements of work to the maximum extent practicable. When preparing statements of work, ordering offices shall, to the maximum extent practicable—

(i) Describe the requirements in terms of results required rather than the methods of performance of the work;

(ii) Rely on the use of measurable performance standards and financial incentives to encourage innovative and cost effective methods of performing the work; and

(iii) Develop a quality assurance surveillance plan that will be used to monitor performance.

(2)(i) The ordering office must provide the Request for Quotation (RFQ), which includes the statement of work and selection criteria (e.g., experience and past

performance), to at least three schedule contractors that offer services that will meet the agency's needs. Schedule contractors should be requested to submit firm-fixed prices to perform the services identified in the statement of work.

(ii) The ordering office shall provide the RFQ, which includes the statement of work and selection criteria, to any schedule contractor who requests a copy of it.

(iii) The ordering office shall evaluate responses received against the selection criteria provided to the schedule contractors. The ordering office is responsible for considering the level of effort and mix of labor proposed to perform a specific task being ordered and for making a determination that the total price is reasonable. Place the order with the schedule contractor that represents the best value (see 8.403).

(iv) To the maximum extent practicable, ordering offices shall develop quality assurance surveillance plans (see 37.602-2) when using a performance-based statement of work. (d) *For proposed orders exceeding the maximum order threshold.* The ordering office shall, in addition to meeting the requirements of paragraph (c) of this section, provide the RFQ, which includes the statement of work and selection criteria, to an appropriate number of additional schedule contractors that offer services that will meet the agency's needs and seek price reductions (see 8.404-4).

7. Revise section 8.404-3 and the section heading to read as follows:

**8.404-3 Blanket purchase agreements (BPAs).**

(a) (1) Establishment. Ordering offices may establish BPAs under any schedule contract to fill repetitive needs for supplies or services. BPAs may be established with one or more schedule contractors. The number of BPAs to be established is within the discretion of the office establishing the BPAs and should be based on a strategy that is expected to maximize the effectiveness of the BPA(s). In determining how many BPAs to establish, consider—

- (i) The scope and complexity of the requirement(s);
- (ii) The technical qualifications of the Schedule contractor(s);
- (iii) The administrative costs of BPAs; and
- (iv) The need to periodically compare multiple technical approaches or prices.

(2) Establishment of a single BPA or multiple BPAs shall be made using the procedures of 8.404-1 or 8.404-2. BPAs shall address the frequency of ordering, invoicing, discounts, requirements (e.g. estimated quantities, work to be performed), delivery locations, and time. In addition, multiple BPAs shall specify the procedures for placing orders under the BPA.

(3) Establishment of a multi-agency BPA against a Federal Supply Schedule contract is permitted if all

participating agencies are signatories at the time the BPA is established.

(b) Ordering from blanket purchase agreements (BPAs)—

(1) Single BPA. If the ordering office establishes one BPA, authorized users may place the order directly under the established BPA when the need for the supply or service arises.

(2) Multiple BPAs. If the ordering office establishes multiple BPAs, before placing an order exceeding the micro-purchase threshold, the ordering office shall—

(i) Forward the requirement or statement of work along with the selection criteria to the number of BPA holders according to the procedures provided in the BPA;

(ii) Evaluate the responses received and make a best value determination (see 8.403); and

(iii) Place the order with the schedule contractor that represents the best value.

(3) If the BPA is for hourly rate services, the ordering office shall develop a statement of work for requirements covered by the BPA, unless the BPA contains fixed prices for specific tasks. All orders under the BPA shall specify a price for the performance of the specific task identified in the statement of work.

(c) Review of BPAs. Ordering offices shall review BPAs at least once a year. The purpose of the review is to determine whether the BPA still represents the best value

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(see 8.403). During the annual review, agencies shall consider whether additional price reductions could be obtained if estimated quantities/amounts have been exceeded and seek price reductions where possible.

8. Add sections 8.404-4, 8.404-5, 8.404-6, 8.404-7, and 8.404-8 to read as follows:

**8.404-4 Price reductions.**

In addition to seeking price reductions before placing an order exceeding the maximum order threshold, there may be other reasons to request a price reduction. For example, ordering offices should seek a price reduction when the supply or service is available elsewhere at a lower price or when establishing a BPA to fill recurring requirements. The potential volume of orders under BPAs, regardless of the size of the individual order, offers the opportunity to secure greater discounts. Schedule contractors are not required to pass on to all schedule users a price reduction extended only to an individual agency for a specific order.

**8.404-5 Small business.**

When conducting evaluations or establishing a BPA and before placing an order, consider including, if available, one or more small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, women-owned small business, or small disadvantaged business schedule contractor(s). Orders placed against schedule contracts may be credited toward the ordering agency's small business goals. For orders exceeding the



micro-purchase threshold, ordering offices should give preference to the items of small business concerns when two or more items at the same delivered price will satisfy the requirement. Ordering offices should survey GSA Advantage! and Schedules e-Library at <http://www.fss.gsa.gov> for specific size status information for all schedule contractors.

**8.404-6 Documentation.**

(a) The ordering office shall document, at a minimum—

(1) The number and identity of the contracts reviewed and considered and the contractor from whom the supply or service was purchased;

(2) The supply or service purchased;

(3) The amount paid; and

(4) The circumstances and rationale for restricting consideration of schedule contractors to less than that required in 8.404-1 or 8.404-2, such as—

(i) Only one source is capable of responding due to the unique or specialized nature of the work;

(ii) The new work is a logical follow-on to an existing order provided that the original order was placed in accordance with 8.404-1 or 8.404-2; or

(iii) The item is peculiar to one manufacturer. A brand name item available on various schedule contracts is an item peculiar to one manufacturer.

(5) Sole source requirements. (i) Orders placed under Federal Supply Schedule contracts are exempt from the requirements in Part 6. However, ordering offices shall—

(A) Conduct sole source requirements, as defined in 2.101, under this subpart only if the need to do so is justified in writing and approved at the levels specified in paragraph (a)(5)(ii) of this section; and

(B) Prepare sole source justifications using the information at 6.303-2, modified to reflect an acquisition under the authority of Section 201 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 501).

(ii) Justifications and approvals are required only for sole source requirements.

(A) For proposed orders exceeding \$100,000, but not exceeding \$500,000, the contracting officer's certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief will serve as approval, unless a higher approval level is established in accordance with agency procedures.

(B) For a proposed order exceeding \$500,000, but not exceeding \$10,000,000, the competition advocate for the procuring activity, designated pursuant to 6.501, or an official described in 6.304(a)(3) or (a)(4) must approve the justification. This authority is not delegable.

(C) For a proposed order exceeding \$10,000,000 but not exceeding \$50,000,000, the head of the procuring activity or an official described in 6.304(a)(3)(i) or (ii)

shall approve the justification. This authority is not delegable.

(D) For a proposed order exceeding \$50,000,000, the official described in 6.304(a)(4) shall approve the justification. This authority is not delegable, except as provided in 6.304(a)(4).

(b) Additionally, for services acquired using the procedures at 8.404-2, the ordering office shall also document, at a minimum—

(1) The evaluation methodology used in selecting the contractor to receive the order;

(2) The rationale for any tradeoffs in making the selection;

(3) The determination required by 8.404-2(c)(3); and

(4) The rationale for using other than—

(i) A firm-fixed price order; or

(ii) A performance-based order.

**8.404-7 Payment.**

Agencies may make payments for oral or written orders by any authorized means, including the Governmentwide commercial purchase card.

**8.404-8 Ordering procedures for mandatory use schedules.**

(a) This subsection applies only to orders against schedule contracts with mandatory users. When ordering from multiple-award schedules, mandatory users shall also follow

the procedures provided in this section for optional use schedules, as appropriate.

(b) Ordering offices shall not solicit bids, proposals, quotations, or otherwise test the market solely for the purpose of seeking alternative sources to Federal Supply Schedules.

(c) Schedules identify executive agencies required to use them as mandatory sources of supply. The single-award schedule shall be used as a primary source and the multiple-award schedule as a secondary source. Mandatory use of schedules is not a requirement if—

(1) The schedule contractor is unable to satisfy the ordering office's urgent delivery requirement;

(2) The order is below the minimum order thresholds;

(3) The order is above the maximum order threshold;

(4) The consignee is located outside the area of geographical coverage stated in the schedule; and

(5) A lower price for an identical item (i.e., same make and model) is available from another source.

(d) After any consultation required by the schedule, ordering offices are not required to forego or postpone their legitimate needs pending the award or renewal of any schedule contract.

(e)(1) When an ordering office that is a mandatory user under a schedule determines that supplies or services available from the schedule will not meet its specific

needs, but similar supplies or services from another source will, it shall submit a request for waiver to the—

Commissioner  
Federal Supply Service (F)  
GSA  
Washington, DC 20406

(2) Ordering offices shall not initiate action to acquire similar supplies or services from nonschedule sources until a request for waiver is approved by the Commissioner of the Federal Supply Service, except as otherwise provided in inter-agency agreements. Requests shall contain the following information:

(i) A complete description of the required supply or service, whenever possible; e.g., descriptive literature such as cuts, illustrations, drawings, and brochures that explain the characteristics and/or construction.

(ii) A comparison of prices and the technical differences between the requested supply or service and the schedule supply or service, identifying as a minimum the—

(A) Inadequacies of the schedule supply or service to perform required functions; and

(B) Technical, economic, or other advantages of the supply or service requested.

(iii) Quantity required.

(iv) Estimated annual usage or a statement that the requirement is nonrecurrent or unpredictable.

9. Amend section 8.405-2 by revising the introductory paragraph; and by removing from paragraph (h) "must" and adding "shall" in its place. The revised text reads as follows:

**8.405-2 Order placement.**

Ordering offices may place orders orally or use Optional Form 347, an agency-prescribed form, or an established electronic communications format to order supplies or services from schedule contracts. The ordering office shall place orders directly with the contractor within the limitations specified in each schedule contract. Orders shall include the following information in addition to any information required by the schedule contract:

\* \* \* \* \*

10. Revise sections 8.405-3 and 8.405-4, 8.405-5, and 8.405-6 and their section headings to read as follows:

**8.405-3 Inspection and acceptance.**

(a) Supplies. (1) Consignees shall inspect supplies at destination except when—

(i) The schedule contract indicates that mandatory source inspection is required by the schedule contracting agency; or

(ii) A schedule item is covered by a product description, and the ordering office determines that the schedule contracting agency's inspection assistance is needed (based on the ordering volume, the complexity of supplies, or the past performance of the supplier).

(2) When the schedule contracting agency performs the inspection, the ordering office will provide two copies of the order specifying source inspection to the schedule contracting agency. The schedule contracting agency will notify the ordering office of acceptance or rejection of the supplies.

(3) Material inspected at source by the schedule contracting agency, and determined to conform with the product description of the schedule, shall not be reinspected for the same purpose. The consignee shall limit inspection to quantity and condition on receipt.

(4) Unless otherwise provided in the schedule contract, acceptance is conclusive, except as regards for latent defects, fraud, or gross mistakes as that amount to fraud.

(b) Services. (1) The ordering office has the right to inspect and test all services called for by the order, to the extent practicable, at all times and places during the period of the order. The ordering office shall perform inspections and tests as specified in the quality assurance surveillance plan in a manner that will not unduly delay the work.

(2) If the ordering office performs inspections or tests on the premises of the contractor or a subcontractor, the contractor shall furnish, and shall require subcontractors to furnish, at no increase in order price,



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all reasonable facilities and assistance for the safe and convenient performance of these duties.

**8.405-4 Remedies for inadequate performance.**

(a) If the contractor fails to perform an order, the ordering office may terminate the order for cause or modify the order to establish a new delivery date (after obtaining consideration, as appropriate).

(b) If a contractor delivers a supply or service, but it does not conform to the order requirements, the ordering office may require the contractor to correct the defect by reperformance, at no increase in order price.

(c) If reperformance will not correct the defects or is not possible, the ordering office may require the contractor to ensure that future performance conforms to order requirements and may reduce the order price to reflect its reduced value.

(d) If the contractor does not promptly perform or does not take action to ensure conformity for future performance, the ordering office may terminate the order for cause.

Ordering offices shall follow the procedures at 8.405-5 when terminating an order for cause.

**8.405-5 Termination for cause.**

(a) An ordering agency contracting officer may terminate individual orders for cause. Terminations for cause shall comply with FAR 12.403.

(b) (1) The schedule contracting office shall be notified of all cases where an ordering agency contracting officer

has terminated an individual order to a Federal Supply Schedule contractor for cause or if fraud is suspected.

(2) If the contractor claims that the failure was excusable, the ordering agency contracting officer shall consider the question of the failure to be a contract dispute (see 8.405-7). If the contractor does not claim that the failure was excusable, the ordering office may charge the terminated contractor with excess costs resulting from repurchase.

(3) Any repurchase shall be made at as low a price as reasonable considering the quality required by the Government, delivery requirement, and administrative expenses. Copies of all repurchase orders, except the copy furnished to the contractor or any other commercial concern, shall include the notation:

Repurchase against the account of \_\_\_\_\_  
[insert contractor's name] under Order \_\_\_\_\_  
[insert number] under Contract \_\_\_\_\_ [insert  
number].

(4) When excess costs are anticipated, the ordering office may withhold funds due the contractor as offset security. Ordering offices shall minimize excess costs to be charged against the contractor and collect or setoff any excess costs owed.

(5) If an ordering agency contracting officer is unable to collect excess repurchase costs, it shall notify the schedule contracting office after final payment to the repurchase contractor.

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(i) The notice shall include the following information about the terminated order:

- (A) Name and address of the contractor.
- (B) Schedule, contract, and order numbers.
- (C) National stock or special item number(s), and a brief description of the item(s).
- (D) Cost of schedule items involved.
- (E) Excess costs to be collected.
- (F) Other pertinent data.

(ii) The notice shall also include the following information about the repurchase contract:

- (A) Name and address of the contractor.
- (B) Item repurchase cost.
- (C) Repurchase order number and date of payment.
- (D) Contract number, if any.
- (E) Other pertinent data.

(c) Only the schedule contracting officer may terminate for cause any or all supplies or services covered by the schedule contract. If the schedule contracting officer has terminated any items covered by the schedule contract, no further orders may be placed for those items. Orders placed prior to termination for cause shall be fulfilled by the contractor unless terminated for the convenience of the Government by the ordering agency contracting officer.

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**8.405-6 Termination for the Government's convenience.**

(a) An ordering agency contracting officer may terminate individual orders for the convenience of the Government. Terminations for convenience shall comply with FAR 12.403.

(b) Only the schedule contracting officer may terminate any or all supplies or services covered by the schedule contract for the convenience of the Government.

(c) Before terminating orders for convenience, the ordering agency contracting officer shall endeavor to enter into a "no cost" settlement agreement with the contractor.

**8.405-7 [Amended]**

11. Amend section 8.405-7 by removing from the introductory text of paragraph (a)(1) and paragraphs (a)(2) and (b) the word "office" and adding "agency" in its place.

**PART 38—FEDERAL SUPPLY SCHEDULE CONTRACTING**

12. Revise section 38.000 to read as follows:

**38.000 Scope of part.**

This part prescribes policies and procedures for contracting for supplies and services under the Federal Supply Schedule program, which is directed and managed by the General Services Administration (see Subpart 8.4, Federal Supply Schedules, for additional information). The Department of Defense manages a similar system of schedule contracting for military items. The Department of Defense systems are not a part of the Federal Supply Schedule program.

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**38.101 [Amended]**

13. Amend section 38.101 in the first sentence of paragraph (a) by removing "commonly used" and adding "commercial" in its place; in the second sentence by removing the parenthetical "(including requirements contracts)"; and in the last sentence of paragraph (e) by removing "(see 8.404)" and adding "(see 8.403)" in its place.

**[BILLING CODE 6820-EP]**

1999-603-31



943ht@comcast.net

06/20/2003 11:50 AM

To: farcase.1999-603@gsa.gov

cc:

Subject: Fwd: Comments on the FAR Rule Changes

I received some good feedback on my submission regarding the FAR from a colleague yesterday and I think some of the concerns he raised indicate that my earlier submission was not crystal clear on a few points. What follows is my reply to his email.

On Friday 20 June 2003 08:17 am, Someone wrote:

> Interesting comments! I like the focus on FOSS as an issue for the  
> government but the "how to do it" and relationship to MAS/BPA is not  
> totally realistic. I have a different opinion on your promotion of  
> non-profit's that do software development. Also, the suggestion that any  
> of this is done for "free" because there is some spare time available by

The intention was not to have them work on the infrastructure development for free. The government would fund this full-time work as well, but it would be general funding that would be directed by the developers of the FOSS infrastructure. That is, there might be several million dollars allocated for the development of Python 3.0 and some more money funding a specific package for Python, such as a pure Python package that reimplements Glade using PyGtk. The Gnome project would get a similar pool of funding for improvements to Gnome and GNU might be funded directly to work on gcc. Other funding might be targeted towards making improvements to KOffice or OpenOffice that specifically meet the needs of the government. The intention is to have a pool of developers from the small business community who are funded full time to work on specific projects as well as the infrastructure projects. These developers should not sit idle while they are waiting for the next project task to show up on which they can participate.

> programmers who <<may spend 50-90% of their time working on specific tasks  
> for a Federal, state or local agency>> - everyone is busy full-time and has  
> to get paid for their work. In fact, the FAR would not let me be  
> reimbursed for non-utilized time like you are suggesting as it would  
> inflate my overhead rates - without a specific R&D program Federal  
> contractors have no way to cover costs as you suggest. And of course most  
> clients will not pay high overhead rates so the company that follows this  
> model may go out of business.  
> Most of the SD for the Federal space is built by systems integrators  
> and software development shops - the mark-up/profits are always less than  
> 10% - usually around 5% so there is no "fluff" time for doing free work.  
> So while the big guys like IBM/EDS/BaH may make a lot of money overall,  
> their profit margins are very low. As you note this contrasts with an MS  
> or Oracle that makes a huge profit margin.

Exactly, the government is paying more than they should because when they buy software from speculators. This is an avoidable expense if the process is restructured and software is purchased as a service. My proposal tries to address the spectrum of funding required. Project managers have targeted goals, but all projects need to pool some percentage of the resources to pay for the general infrastructure. The infrastructure would be funded by allocating a percentage of the project funds to FOSS infrastructure projects on that are used by the specific projects. They would traditionally have spent this money on licensing of commercial COTS software. The only difference will be that this overhead will now be an investment instead of a per-seat expense.

The arrangement also calls for picking the talent to work on the specific tasks from a talent pool of GSA approved contractors. The goal is to level

the playing field by making it as easy developers who work for small shops to be utilized on a project. The current practice of hiring a primary contractor and having them hire subcontractors adds a significant overhead cost to the government's purchase price for buying software as services. The small shops generally have lower overhead rates, but if this cost is loaded with the "management" fees charged by the primes then the government does not get the cost advantage that are available through the use of efficient small businesses.

- > This SD/Systems Integrator
- > arena is where the Feds can have an impact - all SD should be published by
- > these firms and they should contribute - on a PAID basis - to OSS projects.
- > Non-profits set-up for OSS generally do not accept funds (a la
- > Apache) but serve only to hold copyright and ensure the software stays
- > free. Trying to fund and set-up non-profits as functional contracting
- > entities that can meet Federal requirements is tough - grant requirements
- > are a bit easier but it would still lead to potentially wasteful
- > competition.

Some of the not-for-profits have been set up to allow funding to be accepted. The Open Source Application Foundation was specifically set up to manage the funding and development of Chandler and the Python Foundation is not qualified as a fundable organization as well. If we travel back in history, the RAND Corporation was set up as a not-for-profit for the specific task of managing the development of one of the first very large software development projects by the government [1]. I'm really proposing we return to these roots.

- > Setting up non-profits to compete with businesses also is not
- > an easy or realistic sell to most legislators. I worked at a non-profit -
- > Catholic Relief Services - for 3 years and it is a great organization with
- > maybe 50 years history. They (non-profits) are just as difficult to run as
- > a business and they just can't be designed easily to do real software work.
- > Most of the best - I can't think of one that does not - OSS products have
- > commercial backing/interest. The commercial interests should still do the
- > SD and be paid to coordinate projects - the output however must be OSS
- > (i.e. FOSS). We are setting up a non-profit - OpenInfoStructure.org - to
- > hold
- > copyright to the software we develop with government funds. I expect an
- > announcement from DoL in July on this and related to a Python/Zope product
- > we built for them that we will publish. Also some stuff we are doing pro
- > bono related to accessibility/DAISY will get out through this non-profit.

This pro bono work should be funded as general infrastructure work. No specific project should cover all of the costs, but they all could benefit from the work. Why should a contractor be expected to foot the bill out of the kindness of their heart?

- > But our non-profit just holds title to the source code - no funding or
- > contracted work. If you can leverage all of these highly competitive
- > Federal consulting firms - especially the small businesses - to develop
- > technology that will be shared as a rule then you get a workable business
- > model.

Leveraging the talent in the highly competitive consulting firms is what the proposal tries to accomplish. I am suggesting that this leveraging of the activity could be managed by automated software that is housed by the not-for-profits because they already have most of the software infrastructure in place to manage the software development process. The funding process becomes a task letting and task bidding mechanism in which funds flow through the not-for-profits. There will still be government oversight of the contractor's performance and the pool of "approved" developers would be drawn from the GSA schedule for these tasks. The management of specific projects,



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as opposed to the general infrastructure development, would probably be managed by a for-profit contractor, but they would select developers out of the general pool of GSA approved developers based on developer's bids on specific tasks, rather than just from their base of employees.

I admit that the "how" of the specific aspects of how the system would work is still a bit fuzzy. The intention is to create a system in which the best talent available at a given moment is assigned to a specific task, regardless of which organization signs their paycheck. The current contracting structure does not do this efficiently. The lack of coordination between projects is at the heart of the problem. This is suppose to be addressed by the FEA. My proposal attempts to leverage existing organizational structures to do this efficiently. I think the approach could level the playing field and enable small firms to more easily find work on government contracts.

- > We are starting conversations with the local MetroCIO council and
- > researching some of the organizations that coordinate software development
- > for local entities - and there are several. This sharing will come
- > logically out of the mix as the norm becomes building shared software
- > (leading to components...).

When state and local governments are added into the mix the value of creating a mechanism for allocating funding for general infrastructure becomes even more apparent. Few cities have large enough IT budgets to justify creating and maintaining software to managing the city budget, but if a general package for doing so were developed as part of the U.S. IT infrastructure, then they could all use the software. The speculative software market fills this void by selling closed source applications to as many cities as they can sign up. Unfortunately this competitive market results in duplication of effort, added expense to cover the risk assumed by the speculators, and an added burden for validating that all of the vendor's applications meet state and Federal requirements for reporting information to agencies outside of the city's jurisdiction.

- > Always appreciate hearing your views Michael. We can debate this
- > one next time we meet.

Thanks for the feedback. I've tried to answer your concerns in my reply. I won't profess to having a infallible answer to every question, but I hope we are getting closer to being on the same page. I'd like to continue the dialog with the goal of defining a system that would be technically and politically feasible.

[1] The details behind the creation of RAND Corporation are described in the book "From Airline Reservation to Sonic the Hedgehog: A History of the Software Industry"

----- Message from "Michael McLay" <mclay@python.net> on Tue, 17 Jun 2003 10:46:20 -0400 -----

**To:** farcase.1999-603@gsa.gov

**Subject** Comments on the FAR Rule  
: Changes

Comments on Proposed FAR Rule Changes

In the introductory "Background" section the announcement states:

The Multiple Award Schedules (MAS) program... provides Federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying. For much of its history, the MAS focused on the sale of products. In recent years, however, GSA has sought to facilitate broad access to service contractors."

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The rules for the procurement of software services will be improved if provisions are added that will enable agencies to jointly sponsor funding of projects through not-for-profit organizations that develop Free and Open Source Software (FOSS). These organizations build core infrastructure software that is used extensively by the government [1] and the President's Information Technology Advisory Committee recommends that the government invest in the development of FOSS [2]. Under the current procurement process there is no direct funding mechanism that targets making improvements to this core software, yet those improvements would benefit many government IT projects which are built using the FOSS software. The not-for-profit organizations already have an infrastructure in place for managing the development of software. If infrastructure funding were made available to these organizations they could use the money to make general technology improvements.

A second improvement to the process of contracting for services would be create a service similar to the "GSA Advantage" that is tailored for managing software projects. This service would provide a task oriented bidding mechanism through an automated website. This mechanism would enable long term software service contracts to leverage the existing software management infrastructure of the not-for-profit organizations that are already overseeing the development of software infrastructure components. The "GSA Software Advantage" system would inter-operate with the management systems of the not-for-profit organizations and delegate the management of short term tasks to the automated systems of the not-for-profit organizations. The systems would work together to manage bidding on tasks, to monitor the status of the tasks, and to create an archival record of project activities.

The systems would automate a proven agile project management methodology that is widely used by FOSS projects. This methodology supports collaboration between all of the developers working on a project. The process uses peer review and automated regression testing for quality assurance. The methodology requires that a working system be delivered every two to three weeks. The customers and developers end each cycle with a progress review and planning session to insure that the highest priority tasks are always the first to be completed. The short feedback cycle reduces the risk to the contractor and to the customer. The methodology also reduces the probability of project failure.

The new management approach will still support periodic formal program reviews, but the shortened internal of the development loop will eliminate unpleasant surprises at the end of these longer formal review cycles. The list of developers that would be eligible for bidding on the tasks from the not-for-profits would be pre-qualified as GSA service providers using the existing rules. The purpose of adding the not-for-profit intermediary is to take advantage of their established infrastructure for managing the allocation of resources for the short term tasks. This approach also lowers barriers between developers who are working for different contractors and on different projects by providing them with a collaborative work environment. By providing a shared workspace for software development the developers will be able to leverage a wider knowledge-base of expertise and unrelated Federal IT projects will be able to minimize the duplication of effort on core shared technology. The system moves developers from the isolation of the traditional smokestack and places them in a highly productive development environment.

These proposed changes to the approach used to procure software are a significant departure from the traditional process for developing and deploying large government software systems. A trial program should be put in place in order to prove or disprove the viability of this approach. This trial would be a two-three year demonstration project in which government funding would be made available to several well established not-for-profit

software development activities. These projects would be monitored to determine if the process provides an efficient and accountable alternative to the traditional software project management process.

#### Background

For procurement of discrete services in which the scope of the work is easily identified, is self contained, and can be uniformly carried out by any certified individual; such as janitors, security guards, or electricians; the use of a MAS based purchase of services is analogous to the procurement of a physical product. The applicability of this approach becomes strained when the procurement is for software development services. Software services acquisition differs from the acquisition of services for repetitive activities in that the knowledge, skills, and abilities necessary to carry out the software tasks vary greatly and the tasks tend to be creative work that are only executed once. The procurement of services for a project is further complicated because the requirements for the individual tasks of projects often span many domains of technology expertise. Treating software developers as generic, interchangeable resources that can be supplied by any IT job shop is inappropriate because the abilities of individual programmers can vary by orders of magnitude, and the most talented individuals for the tasks of a project are unlikely to all be employed by a single company.

The computer programming profession is a knowledge industry similar to the legal and medical professions. Specialists gain reputations within their field and groups of specialists within these communities often join together in partnerships and sell their services collectively. The professions also form associations that provide continuing education services for the working professionals, organize meetings for networking between the individuals, define standards of performance for the industry, and to carry out collaborative activities that advances the profession. These self organizing communities are a resource that could be utilized by the procurement process.

For the software development profession, this natural self organization process has been taken to a new level of collaboration as a result of the Internet. This is in part because of the complex, inter-dependent nature of software systems and the ease which which the task of software collaboration can be accomplished using the Internet.

During the 1980's the personal computers emerged as a office productivity tool on which general purpose software, such as word processors, spreadsheets, and drawing tools. could improve the efficiency of developing documents and managing small data sets. This class of software differed from the highly complex and inter-dependent software that was developed for mainframe computers in that the desktop applications were self-contained and where simple enough office workers could easily learn to use the software by reading a manual. This special class of software enabled some software to be viewed as a manufactured product. This software makes up a relatively small percentage of the source code that is written by the industry, but because of advertising and the widespread use of this software by end users it has taken on the appearance of being the largest segment of the software market.

The software professionals working in the software-as-a-product market act much like their counterparts in the medical and legal professions. An individual or small team works on an isolated body. The external interactions of that body on other bodies is minimal. That is, the applications are self contained and do not require data to be exchanged with other applications in order to be useful to an organization. The Internet and the World Wide Web has changed the nature of software systems used by end users. This change has turned the millions of discrete and isolated computers into a single living organism in which information can be share globally, but also in which security errors in software can propagate around the planet within minutes. This fundamental change has a profound impact on the how software is

developed.

Tim O'Reilly points out in [3] that, unlike the shrink wrap COTS world of software-as-a-product, the development of software for Internet based services is a continuous process. Web servers are under constant development. A Federal procurement policy for procurement of software should reflect the reality of how software is being developed on the Internet. This observation of how software is developed by industry is not reflected in the traditional waterfall development process that is used in the development of large Federal software procurements. A new agile development model using a methodology pioneered by "Extreme Programming" is a better match to the reality of a continuously evolving system of interconnected software applications.

The agile business process is based on an underlying assumption that chaos and complexity theory are a realistic model of how systems interact in the world. This model recognizes that we do not have a perfect vision of the final outcome of a software development project and that customers need to continuously update their priorities based on the feedback from the developers. New ideas are discovered throughout the development process and an agile methodology allows the customer and the developer to capitalize on these innovations. By contrast, the traditional waterfall model constrains the software developer in a straitjacket of deliverables defined months or years in the past. The inflexibility of the traditional development process results in the delivery of systems that were technically in compliance with the contractual obligations, but are impaired or useless from the perspective of the end user.

An agile development methodology acknowledges the imperfect nature of predicting the future and addresses the problem by using a very short feedback cycle in the development process. Under this methodology the development cycle is measured in two to three week intervals instead of years. This short feedback loop mitigates risk for both the customer and the contractor. This methodology works to strip away the layers of management that often impede development. By placing the customer in direct and frequent contact with the software experts who are tasked with writing the software, the process assures that the system that is delivered matches the top priority requirements of the customer.

The traditional use of a primary contractor, who subcontracts to specialists, for the procurement of software development also fails to leverage the self organizing nature of the community of software development professionals. One core problem is the excessively high overhead rates and stifling effects that are created by these highly structured organizations and their subcontracting task management infrastructures. The business interests of contractors include layers of management that slow communications and place roadblocks in the process of quickly making changes to plans. This organizational structure lacks the agility to quickly adapt to the day to day reality of developing large scale interrelated software development projects. This inflexibility is at least partially responsible for the budget overruns of typical large government software procurements and the high rate of complete failures of software projects.

Federal, state, and local government procurements for software services could leverage the existing organizations of software specialists to build a software infrastructure by using the not-for-profit organizations as conduits between the customers in the individual agencies and the programming professionals who formed these organizations. Under this system of contracting, the organizations would have programmers available on retainer to carry out specific tasks for agencies and when specific tasks are not available for a given programmer, they would work on the core technology development of the core technology that is managed by the organization. For

instance, the GNU Foundation, the Python Software Foundation, the Gnome Foundation, the EuroZope Foundation, the Mozilla Project, and the Xfree86 Project Inc. all make use of volunteers to continue to develop and improve the quality and efficiency of their code bases. These volunteers are often employed by companies who indirectly benefit from the improvements to the technologies. This proposed approach for managing contracts for software development would allow the programmers working on government contracts to act in a manner that compatible with the natural process of the Free and Open Source Software (FOSS) market.

Under this system of procurement a programmer may spend 50-90% of their time working on specific tasks for a Federal, state or local agency. Their remaining time would be used to add new features, to refine old features, to optimize performance, to carry out regression testing, or to track down and eliminate registered bugs. The results of these task independent activities would be a general improvement in the code pool. These improvements would benefit all of the projects that make use of the technology.

#### Accountability and Automating the Process

The transparency of the open source development process will minimize the possibility for funding abuse. The existing open source culture has attracted participants who are generally not opportunists. They work in a market in which the rewards for participation are simply merit, status, and professional reputation. This is in stark contrast to the closed source commercial off the shelf (COTS) software world in which the monopolistic consequences of restricting access to the source code enables successful vendors to extract 50-80% profit margins. With such high profit potential, the closed source market has become a magnet for opportunists.

In the open source culture all evidence of the work activities are visible to the world. Non-performers are readily apparent and are removed from the pool of developers. Those who has participated in a successful open source project know that sloppy work and non-cooperative attitudes are not tolerated. This is a natural result of the process. The most valued asset to each participant is their time. People who waste their time are asked to move on and not disrupt the productive developers.

A procurement policy that can complement this highly efficient market and capitalize on the existing infrastructure holds great promise in reducing cost of large scale projects and reducing the rate of project failures. The history of the computer industry includes special circumstances in which the government set up special organizational structures to address government needs that are not efficiently addressed by the commercial markets. For instance, the Rand Corporation was set up to develop software for the government because no commercial enterprises were willing to take on the task [4] and virtually all of the software used in high energy experimental physics is developed by grants from the government rather than by speculative commercial development.

If there are cost or technical advantages to the government in developing an organizational structure to oversee the coordination of the critical infrastructure of Federal, state, and local government IT systems then it is in the best interest of the taxpayers to at least conduct a trial to test the hypothesis. For the case of experimenting with alternative methods for developing large, inter-connected software systems for the government the mechanism for carrying out a series of inexpensive experiments is already be at hand.

The primary development sites for projects such as GNU, Debian, and Python are already highly organized and automated. They typically use CVS for managing the revisions of versions of software. They use Mailman to manage email lists that are frequented by developers, end users, and special interest groups.



They use build farms that automatically run regression tests of the code base and flag errors when someone checks in a patch that breaks the head of the code base. They have bug tracking software, such as Bugzilla, that are used to manage all bugs reported on the code base. The bugs are assigned to a team member for resolution based on the expertise of the member and the nature of the bug. Feature requests are tracked in a similar manner. New tools that will improve project management are also in development. The Subversion project is building a replacement for CVS that will fix flaws in the architecture of CVS and that will make better use of standards, such as WebDAV. The GForge project is building an easier to use and to install replacement for the SourceForge repository. This new tool adds capabilities, such as project schedule tracking, to the set of features available to projects.

These automated systems could easily be extended to include project contracting and reporting capabilities that would simplify the process of agencies seeking software service contracts. It is in the government's best interest to fund the development of this capabilities and to set up the infrastructure that will allow the government to tap into the pool of organized programming talent. This group includes many individuals and small companies that currently finds the government contracting process to be cost prohibitive to pursue. Many highly talented developers have given up on bidding on government projects because the contracting process is simply not cost effective for the individuals, or small businesses to carry out. Also, infrastructure for organizing procurements as a process of bidding on very short term tasks, as would be used using the "Extreme Programming" methodology, does not exist. Integrating a task order bidding process into the existing organizational structures would open up a new market for government procurement.

The section 8.404-3 titled "Blanket purchase agreements (BPAs)" is suppose to support a flexible methodology for procurement of services by agencies, however, the infrastructure envisioned by the procurement process is still grounded in a paper based procurement methodology. For instance, the following quote:

8.405 3 (2) When the schedule contracting agency performs the inspection, the ordering office will provide two copies of the order specifying source inspection to the schedule contracting agency.

Assuming we automate the process of tracking work assignments, work reporting, and work inspection, all of the data will be available for inspection in the project management system as a permanent record. This addition to the ~~existing development infrastructures of not-for-profit organizations would be~~ a trivial extension to what is already in place. The investment would make way for the creation of a highly efficient system for outsourcing work directly from the customers in agencies to the most talented developers available. By automating the reporting requirements we also minimize the time that a programmer must spend on developing status reports and on the validation of completion of contractual requirements. The programmers can spend all of the time developing software and the system will automatically validate that the work has been completed according to the customer's requirements.

#### Serendipitous Benefits

Increasing the pool of FOSS based software has several intangible benefits. The source code that is made freely available becomes a valuable educational resource. For software, as with literature, the best way to learn is write well is to study the works of great authors. Teaching the next generation of software developers by using the live software used by the government will ~~eliminate the post-graduation training period that is required to bring the~~ programmer up to speed on the software they are expected to help develop and

maintain. Instead, they come to work with a working knowledge of the software that is in use by the agencies.

A secondary benefit of FOSS based development is that we have the opportunity to further reduce the cost of software through collaboration on projects with other governments around the world. For the advanced industrial nations this cost sharing will include investments from government outside our borders. For the less developed nations the collaboration will likely take the form of tapping into the pool of software developers who will emerge as a result of having access to the source code that is developed by the developed nations. Sharing the source code is a very inexpensive form of foreign aid. It also makes our country the benefactor for improving the infrastructures of those countries. This form of aid translates directly into good will. This leg-up collaboration also becomes a process to improve the communications between cultures. It could be viewed as a form of "Good Will Games" for the technical communities in all nations.

#### Facilitating Software Development for State and Local Governments

The Federal government often interacts with state and local agencies and it is advantageous to all levels of government if software systems that are used at all levels of government make use of standards for communications of information between the agencies. Currently each state and local agency works independently to develop their IT infrastructures. The agencies at all levels of government can achieve economies of scale if some of this work is carried out as a coordinated collaboration on software development.

This collaboration is starting to occur. There are informal arrangements in place in which state agencies are starting to collaborate on the use of FOSS. Some states have started to coordinate efforts on the development of tools for managing state regulations and the dissemination of information[5]. This sharing of software development expenses could easily cut the development costs of state IT infrastructures in half. This cost could be further reduced if software tools were deployed that facilitated the organization of these efforts. This formalization of the process would reduce redundancy of effort by facilitating easier discovery of technology that could be adopted rather than reinvented.

#### References

- [1] <http://www.egovos.org/pdf/dodfoss.pdf>
- [2] <http://www.ccic.gov/pubs/pitac/pres-oss-11sep00.pdf>
- [3] "Why Scripting Languages Matter" - <http://www.oreillynet.com/pub/wlg/3190>
- [4] "From Airline Reservations to Sonic the Hedgehog: A History of the Software Industry" ISBN-0262-03303-8. While there are plenty of commercial software firms willing to build government IT technologies today, the question that needs to be asked is whether these companies are willing to do so under the terms that are more favorable to the government. The closed source community justifies their high profit margins because they are making a speculative investment of building products that may not find a market. Government software procurements are not speculative. The cost of the systems can be calculated in advanced and contracts for the work do not require commercial speculation. This reduces the cost to the government by eliminating the excess profits that are expected by the commercial sector working in a speculative marketplace. There is nothing radical in this suggestion. COTS market represents less than 50% of the total software industry. Most software is developed outside this speculative market. The choice of markets the government buys from only differs in who pays the upfront cost of the investment. In the end the government will pay the full price regardless of the market. The difference in total cost is the

difference between spending 10% on profit for contracted services and 50-80% on software that is developed speculatively.

[5] Rhode Island and Hawaii are collaborating on the development of Zope based servers for projects. Rhode Island had already deployed a system for managing the submission of state regulations using FOSS technology. Having discovered that Hawaii was developing FOSS based services to perform other functions, the two states started collaborating on development. By isolating the state specific aspects of their next generation of tools they will be developing tools that can be used by both states. On last report they were starting to talk with other states and plan to expand the pools of collaboration.





INSPECTOR GENERAL  
DEPARTMENT OF DEFENSE  
400 ARMY NAVY DRIVE  
ARLINGTON, VIRGINIA 22202-4704

1999-603-32

**JUN 16 2003**

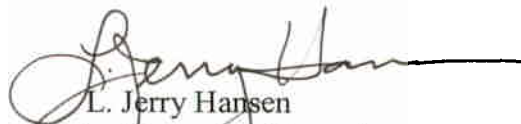
Ms. Laurie Duarte  
General Services Administration  
FAR Secretariat (MVA)  
1800 F Street, NW, Room 4035  
Washington, DC 20405

Dear Ms. Duarte:

We have reviewed the proposed Federal Acquisition Regulations (FAR) Case No. 1999-603, "Federal Supply Schedule Services and Blanket Purchase Agreements," and generally agree with the proposed amendments to FAR Subpart 8.4. However, we recommend that the proposed language in FAR Subpart 8.404-6, "Documentation," be clarified to avoid confusion concerning the use of sole source when issuing orders from Federal Supply Schedules.

FAR 8.404-6 should specifically state whether sole source procedures are authorized and that, in those cases, the sole source provisions of FAR Subpart 8.404-6 should be used for documentation and approval. The proposed language in FAR 8.404-6, paragraph (5), "Sole source requirements," states that orders placed under the Federal Supply Schedule are exempt from the requirements of FAR Part 6. However, paragraph (5)(A) also provides that sole source requirements are authorized if the need to do so is justified in writing and approved at levels specified.

Thank you for the opportunity to comment on the proposed rule. If you have any questions, please contact Ms. Madelaine E. Fusfield at (703) 604-8739 or mail to [mfusfield@dodig.osd.mil](mailto:mfusfield@dodig.osd.mil).

  
L. Jerry Hansen  
Assistant Inspector General  
for Inspections and Policy

06/24/03  
©

1999-603-33



"Gebhard Becky A Civ  
HQ AFMC/PKV"  
<Becky.Gebhard@wpa  
fb.af.mil>

To: "farcase.1999-603@gsa.gov" <farcase.1999-603@gsa.gov>  
cc:  
Subject: FW: FAR Case 1999-603 Second Request

06/23/2003 10:38 AM

While this is late, I am sending in case you decide to at least read what else has come in. It is from the AFMC/IG.

8.403(a) and 8.404-6(a)(5)(i) of the rewrite appears to go against what was briefed in D.C.. Per 8.403(a) rewrite, orders are considered to be issued using full and open competition. Therefore, when placing orders under Federal Supply Schedules, ordering offices need not seek further competition. Per 8.404-6(a)(5)(i) of the rewrite, orders placed under the Federal Supply Schedules are exempt from the requirements in Part 6. However, in D.C., it was briefed that orders for services over \$100,000 placed against multiple award contracts, including Federal Supply Schedules, must be awarded on a competitive basis. For FSS, competitive basis is satisfied if notice is provided to as many contractors as practicable and offers are received from at least 3 qualified contractors (unless CO determines that no additional qualified contractors were reasonably able to be identified), or fair notice provided to all contractors offering such services. Contracting Office may waive the requirement only if one of the exempted circumstances (e.g. urgency, sole source, minimum guarantee) applies, or if statute identifies a specified source.

Also see 8.404-1© rewrite - "or by reviewing the catalogs or price lists of at least three schedule contractors". Review or receive?

Also 8.404-2©(2)(i) of rewrite says to provide to at least three contractors. Provide or receive?

8.403(b) rewrite is great - it addresses one of my findings - orders placed under a FSS contract are not exempt from the development of acquisition plans. Likewise, like 8.404-2(4) of rewrite concerning quality assurance surveillance plans when using a performance-based statement of work.

8.404-2: Is it suitable to call out a statement of work in lieu of a statement of objective in this instance? Just wanted to verify. If Ktrs. have to submit firm fixed prices for services, why not a SOW in response to a SOO?

Doesn't 8.404-8(b) go against 8.404-8(c)(5)? Mandatory use of schedules is not required if a lower price for an identical item is available from another source. Testing the market is one way of discovering this. How else would the person have known of the lower price? It must be based on some kind of experience with the market. So its OK if the knowledge was received based on a prior order, just not this specific order or if an office mate tells the buyer...just seems a little quirky.

-----Original Message-----

**From:** Wittkoff Julie Maj HQ AFMC/IG  
**Sent:** Wednesday, June 11, 2003 4:08 PM  
**To:** Williams Derrick O MSgt HQ AFMC/IGIC; Long Marilyn L Civ HQ AFMC/IGICC  
**Subject:** FW: FAR Case 1999-603 Second Request

This is the first I have seen of this, but if you have any comments please send to me ASAP.

-----Original Message-----

**From:** Gebhard Becky A Civ HQ AFMC/PKV  
**Sent:** Wednesday, June 11, 2003 3:49 PM  
**To:** AFMC/PK DRUS-Plus  
**Subject:** FW: FAR Case 1999-603 Second Request

To date I have received only 2 replies on this issue. Replies were due by 06 June 03.

311 HSW, Brooks and 88th ABW, Wright Patterson receive an "atta boy" for their timely replies.

1999-603-33

Please send your comments ASAP. Thanks, Becky

-----Original Message-----

**From:** Gebhard Becky A Civ HQ AFMC/PKV

**Sent:** Thursday, April 24, 2003 3:57 PM

**To:** AFMC/PK DRUS-Plus

**Subject:** FAR Case 1999-603

1. A FAR proposed rule on Federal Supply Schedules and Blanket Purchase Agreements (FAR case 1999-603) is out for comment, with comments being due to the FAR Secretariat on 17 Jun 03.

The proposed rule is attached and can also be found at the following website:

<http://www.arnet.gov/far/ProposedRules/>.

2. AFMC/PKV will be consolidating field comments for submission. Interested parties may forward comments **by 06 June 03** to Ms. Becky Gebhard, AFMC/PKV, 937-656-0358, DSN 986-0358, email address [becky.gebhard@wpafb.af.mil](mailto:becky.gebhard@wpafb.af.mil).

***Becky Gebhard, CPCM***

**Procurement Analyst**

**HQ AFMC/PKV**

**4375 Chidlaw Rd, Rm S260**

**Wright Patterson AFB, OH 45433-5006**

**COMM: (937) 656-0358, DSN 986**

**FAX: (937) 904-1073, DSN 674**

1999-603-34



Linda K. Nelson  
06/26/2003 09:24 AM

To: farcase.1999-603@gsa.gov  
cc:  
Subject: FAR case 1999-603

Linda Nelson  
Procurement Analyst  
Acquisition Policy Division, MVP  
Office of Acquisition Policy  
Office of Governmentwide Policy  
Telephone: 202-501-1900  
Facsimile: 202-501-1986

----- Forwarded by Linda K. Nelson/MVP/CO/GSA/GOV on 06/26/2003 09:21 AM -----



"Tom Ubl"  
<ubl@1cinc.com>  
06/25/2003 01:14 PM

To: linda.nelson@gsa.gov  
cc:  
Subject: FAR case 1999-603

General Services Administration  
FAR Secretariat (MVA)  
1800 F Street, NW, Rm. 4035  
Washington, DC 20405

Subject: FAR case 1999-603, Federal Supply Schedules and Blanket Purchase Agreements.

COMMENTS - (Specific to Services)

The proposed rule continues to advocate, on the surface, that the use of GSA MAS is fulfillment of competition [FAR 6.102(d)(3)], as referenced in proposed section 8.403(a). Specific to service contracting, the proposed rule is contrary to the claim of fulfillment of competition and is essentially a "Cardinal Change" *expo facto* and retroactive to existing GSA MAS contractors.

The GSA MAS is a "Price Warranted" IDIQ contract type, whereby the extended pricing represents a fully loaded or wrapped rate that includes the contractor's indirect expenses and fee/profit. The contracting community engaged the use of schedules because it supported the streamlining contained in FASA and the fulfillment elements of CICA. The streamlining and reduction of administrative burdens and bid and proposal expenses was a contributing factor to encourage the contracting community to utilize the GSA MAS program. The GSA MAS was viewed as the efficient way when compared to the various agencies or activities internal contract departments that take 180+ days to get a similar procurement awarded.

Most important is the fact that the contractors are required to adhere to the Most Favored Customer (MFC) clause and Price Reduction Clause (PRC) as a term and condition of being issued a GSA MAS. Violation of the MFC/PRC results in significant penalties to include termination or possible adjudication under the False Claims Act. It can now be reasonably argued by the contractor that the requirements as contained in the proposed rule negate fulfillment of competition. How are TINA violations, defective pricing instances, and False Claims actions to be enforced when the MFC/PRC is now invalid due to the proposed and enacted competitive requirements? The proposed rule in addition to section 803 of the Defense Authorization Act has and will further augment the

1999-03-34

compromise of U.S. code.

In addition to the compromise of existing laws is the question of how is the Industrial Funding Fee now justified when streamlined and expense offsets have been voided? We are already observing deficiency impacts in the GSA FTS Regions, whereby stellar processing time of awards has been severally impacted.

Now contractors are being expected to maintain current liabilities associated with the MFC/PRC, assume additional liabilities associated with Performance Based initiatives, while continuing to extend the best discounts and multiple concessions. Consideration was already achieved during the negotiation and award of the schedule basic.

The augmentation of best value by requiring contracting officers to solicit additional contractors as referenced in proposed section 8.404-2(2)(ii) furthers negates the claim of competitive fulfillment undermining [FAR 6.102(d)(3), as referenced in proposed 8.403(a)].

A major problem exists in the fact that there is general confusion with regard to understanding the difference between a "Cost Based" and "Price Warranted" contracting vehicle. Cost based initiatives justify indirect expenses then focus on the negotiation of fee. The underlying elements of Best Value Evaluation as applied in common practice, do not differentiate the GSA MAS as a "Price Warranted" contracting vehicle. The result is application of a process that does not considered geographic/demographic cost variance, resulting in unjust discrimination because the indirect cost considerations are included in the contractors pricing. The Department of Labor, Bureau of Labor Statistics is indicative of understanding geographic/demographic variance.

Eliminate or modify FAR 6.102 from Part 8.4 because it simply no longer applies as is maintained. Provide some form of justification for the Industrial Funding Fee in consideration of the new competitive requirements, explain to the taxpayer why false claims and fraud adjudication has been compromised, and identify the GSA MAS program for what it has now become - "A Qualified Bidders List."

Thomas M. Ubl  
1 Consortium, Inc. (1CI)

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