



GENERAL SERVICES ADMINISTRATION

48 CFR Parts 515, 538, and 552

[GSAR Case 2016-G506; Docket No. 2016-0016; Sequence No. 1]

RIN 3090-AJ75

**General Services Administration Acquisition Regulation
(GSAR); Federal Supply Schedule, Order-Level Materials**

AGENCY: Office of Acquisition Policy, General Services
Administration.

ACTION: Final rule.

SUMMARY: The General Services Administration (GSA) is amending the General Services Administration Acquisition Regulation (GSAR) to clarify the authority to acquire order-level materials (OLMs) when placing an individual task or delivery order against a Federal Supply Schedule (FSS) contract or FSS blanket purchase agreement (BPA). OLMs are supplies and/or services acquired in direct support of an individual task or delivery order placed against an FSS contract or BPA, when the supplies and/or services are not known at the time of contract or BPA award.

DATES: Effective: **[INSERT DATE OF PUBLICATION IN THE
FEDERAL REGISTER]** .

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leah.price@gsa.gov. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite GSAR Case 2016-G506.

SUPPLEMENTARY INFORMATION:

I. Background

GSA's Federal Supply Schedule (FSS) program, commonly known as the GSA Schedules program or Multiple Award Schedule (MAS) program is the Government's most used commercial-item purchasing channel, accounting for approximately \$33 billion of Federal contract awards in fiscal year 2016 (not including the VA Schedules). GSA Schedules provide a convenient and effective option for both ordering activities and Schedule contractors. Ordering activities enjoy simplified ordering procedures and reduced prices, while Schedule contractors connect with federal business quickly and easily. Additional features of the Schedules program, including Blanket Purchase Agreements (BPAs) and Contractor Team Arrangements (CTAs), greatly enhance the flexibility of the program.

These features offer:

- Additional price discounts for ordering activities;
- Expanded opportunities for contractors;

- Elimination of redundant effort, with a single contracting vehicle fulfilling complex or ongoing needs;
- Reductions in administrative time and paperwork;
- Expanded business opportunities for socioeconomic groups; and
- Help for ordering activities wishing to reach socioeconomic goals.

The Schedules Program supports Federal Agencies' missions by providing access from simple commodities such as pens and pencils to complex services such as IT Modernization.

Authority for This Rulemaking

41 U.S.C. 152(3)(B) deemed FSS procedures to meet the Competition in Contracting Act (CICA) requirement of full and open competition as long as participation has been open to all responsible sources; and orders and contracts under those procedures result in the lowest overall cost alternative to meet the needs of the Federal Government.

GSA has long recognized the lowest overall cost alternative does not just include the actual price paid to the contractor, but also the administrative cost of

conducting the acquisition. For example, GSA charges a low transactional fee for orders to be placed against a Schedule and the efficiency of the simplified acquisition process translates to time and cost savings. The administrative cost to acquire similar goods or services combined with possible fees on a new contract duplicates efforts resulting in a less efficient way to acquire those goods or services.

This is also consistent with the Federal Acquisition System and its principle to minimize administrative operating costs (FAR 1.102(b)(2)). The Federal Acquisition System is designed to deliver the best value product or service to the customer in terms of cost, quality, and timeliness. By lowering the cost to conduct the acquisition, and simplifying the acquisition process, administrative savings can be achieved.

II. Discussion of the Proposed Rule

The proposed rule published in the Federal Register at 81 FR 62445 on September 9, 2016 and addressed the importance of providing the same flexibility for the FSS program that is currently authorized for other indefinite delivery, indefinite quantity (IDIQ) vehicles, which will help reduce contract duplication and the associated administrative costs and inefficiencies. GSA also

discussed how the proposed changes would also reduce transaction costs by eliminating the need for additional contracts for ancillary work. The rule aimed at achieving parity between the FSS programs and other IDIQs, in terms of acquiring OLMs.

The rule presented two price protections found in all IDIQ contracts which authorized OLMs plus three additional price protections not generally found in such contracts.

All IDIQ contracts authorizing OLMs include two key government protections:

1. The contracting officer must determine the prices are fair and reasonable.

2. FAR Clause 52.212-4 Alternate 1 paragraph (i) (1) (ii) which addresses:

- a. Paying for commercial items at prices not to exceed established catalog or market price

- b. Conditions for reimbursing contractors for actual cost

- c. Procedures for handling indirect cost reimbursement

The three unique protections GSA included in the proposed rule were:

1. The requirement to submit three quotes;

2. Limitation of percentage of order which can be OLM;

and

3. Establishment of an OLM SIN, which requires reporting of OLM.

Commenters noted that due to these three unique GSA protections, the proposed rule did not fully meet the parity objective. In the final rule, GSA maintained these three unique protections while simplifying and narrowing the three quote requirement. This is more fully discussed in the Analysis of Public Comments section. GSA agrees that this leaves the final rule close to, but not at full parity. However, the requirements are currently the best available means to ensure price reasonableness and provide confidence to customers when using the new OLM authority on Federal Supply Schedules. This is more fully discussed in the Analysis of Public Comments section.

These price protections, when combined with the current design of the FSS program, are sufficient to ensure the Federal Supply Schedules continue to offer the lowest overall cost alternative. Other key features of the FSS program include ordering procedures designed to promote competition, and, at certain dollar levels to increase competition, an existing deviation to FAR 51 (which authorizes GSA contractors, performing on a time-and-material or labor-hour basis, to purchase ancillary

supplies and services from Schedule contractors or process requisitions through the GSA Global Supply Program) the Acquisition Gateway, (a logical home for a future GSA effort to publicize OLM best practices), and ongoing category management work to improve the acquisition of services and IT, all work together, with this final rule, to ensure Federal Supply Schedules remain open to all and are the lowest overall cost alternative.

A. Summary of Significant Changes

Four respondents submitted comments on the proposed rule. The General Services Administration has reviewed the comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows: This final rule makes the following significant changes from the proposed rule:

Eligible Schedules: GSAR 538.7201 has been revised to reference a website that lists the Federal Supply Schedules authorized to include OLMs.

Indirect Costs: The instructions to contracting officers in GSAR 538.7204 subparagraph (a) (3) have been revised to allow for indirect costs, consistent with the procedures in FAR clause 52.212-4 Alternate I (i) (1) (ii) (D) (2).

Clause Text: GSAR clause 552.238-82, Special Ordering Procedures for the Acquisition of Order-Level Materials, has been revised as follows:

- Vendors must obtain three quotes for each order-level material above the simplified acquisition threshold, for the ordering activity contracting officer to determine OLM prices fair and reasonable. Contractors with an approved purchasing system per FAR 44.3 are exempt from the three quote requirement.
- Provides procedures for the ordering activity contracting officer to make a determination that all indirect costs associated with OLMs are fair and reasonable.
- Clarifies travel costs are governed by FAR 31.205-46 and exempts travel OLMs from certain requirements, including the 1/3 of the order threshold, price reasonableness determination requirement, and GSAR clause 552.238-74 Industrial Funding Fee and Sales Reporting.
- Clarifies the ordering activity contracting officer is required to follow the procedures found at FAR 8.404(h)(3)(iv) prior to an increase in the ceiling price of OLMs.

B. Analysis of Public Comments

GSA received four comment letters in response to the proposed rule.¹ All comments filed were considered, many of which led to the changes described in the previous section.² Public comments are grouped into categories in order to provide clarification and to better respond to the issues raised.

1. Three Quote Requirement

Comment: Two commenters recommended GSA eliminate the proposed requirement for contractors to submit three quotes to the ordering activity contracting officer to determine price reasonableness.³ One commenter stated the requirement would be burdensome and unnecessary; that commenter also asked if the lowest priced quote would be the basis for the price evaluation.⁴ The other commenter asked if the same three quotes could be used for multiple orders.⁵

Response: GSA partially agreed with two of the commenter's recommended alternatives and revised and narrowed the three quote requirement for each OLM. First, the special ordering procedures at GSAR 552.238-82(d)(7)(i) has been revised to instruct contractors to obtain three quotes for each OLM above the simplified acquisition

¹ See GSAR Case 2016-G506; Docket 2016-0016; Sequence 1 [81 FR 62445 (Sep. 9, 2016)]

² See Section II.A, Summary of Changes Made at the Final Rule Stage

³ See e.g., CGP and ITAPS Letter and DM Letter.

⁴ See CGP and ITAPS Letter.

⁵ See DM Letter.

threshold. The three quotes are not submitted with the offer, but should be maintained in the contractor's file and are still subject to audit. The threshold has been increased from the micro-purchase threshold to the simplified acquisition threshold to be consistent with ordering procedures at FAR Subpart 8.4. Second, paragraph (d)(7)(i) has been revised to exempt contractors that have an approved purchasing system determined by a Contractor Purchasing System Review (CPSR) per FAR 44.3 from the three quote requirement. The contractor shall follow its purchasing system requirement instead of the three quote requirement identified in paragraphs (d)(7)(i)(A)-(C). The ordering activity contracting officer will make the determination that prices for all OLMs are fair and reasonable and may make this determination based on relevant pricing available, including the direct competition of offers received in response to their solicitation. Lastly, the addition of the OLM authority to the authorized Schedules provides an added flexibility through which industry can provide complete procurement solutions through the FSS program, reducing the need for contractors to prepare solutions for separate contracts. The reduction results in managing fewer open market contracts and decreasing proposal costs.

2. OLM Threshold of 33 Percent

Comment: Two commenters recommended GSA remove the requirement that OLMs be limited to 33 percent of the order per the special ordering procedures at GSAR 552.238-82(d)(4).⁶ One commenter stated the 33 percent threshold was arbitrary and may be difficult to maintain over time, noting that other direct cost (ODC) Special Item Numbers (SINs) currently used in the Schedules program have no such limits.⁷ The second commenter also stated the threshold was arbitrary and will invoke unnecessary consequences, citing examples where travel costs may exceed the OLM threshold.⁸

Response: GSA agrees that travel should not be included in the limitation and made this change in the final rule. However, GSA does not agree that the 33 percent cap on OLMs is arbitrary, although to make it easier to understand and remember, it is revising the threshold to 33.33 percent or 1/3 of the order. 41 U.S.C. 152(3)(B) deemed FSS procedures to meet the Competition in Contracting Act (CICA) requirement of full and open competition as long as participation has been open to all responsible sources; and orders and contracts under those procedures result in the lowest overall cost alternative.

⁶ See e.g., CGP and ITAPS Letter and Jalad Letter.

⁷ See CGP and ITAPS Letter.

⁸ See Jalad Letter.

This statutory language is not found in other IDIQ contracts.

GSA determined that to meet the statutory requirement, additional levels of protection were required, one of which was a cap on order level materials.

Having determined there must be a cap, GSA's next consideration is around the appropriate level. In large scale Engineering Services and IT buys, GSA is aware of customer agencies adding additional controls once materials top 10 percent. On the other hand, in advertising services, media time, a single OLM, can easily exceed 25 percent of the cost of an order. To provide a reverse example, as a result of industry feedback associated with the Maximum Order Threshold in installation services for systems furniture, GSA learned that installation services often top 25 percent of the cost of the furniture.

Thus, GSA concluded: 1) there has to be a cap, 2) the cap should be above 25 percent, and 3) the cap has to be below 50 percent, to ensure the principle purpose of the order was to acquire a service or product off of the Federal Supply Schedule. While any number between 26 percent and 49 percent would fit, GSA also concluded that to be consistent the Federal Supply Schedules program, the cap has to be clear, has to be easy to explain to customer

agencies, has to be easy for contractors to understand and follow, has to be easy for GSA to conduct needed training, and has to be easy for everyone to remember. There is only one number between 1/4 and 1/2 which meets all these criteria: 1/3. Thus, GSA set the OLM cap at 1/3, or 33.33 percent.

3. Travel Costs

Comment: Two parties submitted comments relating to the application of certain OLM requirements and procedures to travel costs.⁹ One commenter asked if the OLM ordering procedures would contain the same flexibility as Schedule clause C-FSS-370 Contractor Tasks/Special Requirements.¹⁰ The other commenter stated applying the proposed OLM procedures to travel costs would be burdensome on ordering agencies.¹¹

Response: The special ordering procedures at GSAR clause 552.238-82 have been revised to allow the same flexibility as Schedules clause C-FSS-370 Contractor Tasks/Special Requirements. For the authorized Schedules allowing for OLMs, the GSAR clause 552.238-82 Special Ordering Procedures for the Acquisition of Order-Level Materials will replace the travel portion (b) of the

⁹ See e.g., CGP and ITAPS Letter and Jalad Letter.

¹⁰ See CGP and ITAPS Letter.

¹¹ See Jalad Letter.

Schedules clause C-FSS-370 Contractor Tasks/Special Requirements. Specifically, the final rule clarifies travel OLMs will continue to be handled in accordance with FAR Part 31.205-46 and exempts travel OLMs from the requirements in clause 552.238-74 Industrial Funding Fee and Sales Reporting, the 33.33 percent threshold, and the price reasonableness determination in subparagraph (d)(7) of GSAR clause 552.238-82. However, if an order includes both travel and non-travel OLMs, the non-travel OLMs in the order must comply with all OLM requirements in GSAR clause 552.238-82.

4. Applicability of GSAR Clause 552.238-74 Industrial Funding Fee and Sales Reporting

Comment: One party provided comments relating to the applicability of GSAR clause 552.238-74 Industrial Funding Fee and Sales Reporting on OLMs.¹²

The basic version of the clause requires contractors to report Schedule sales within 30 days after the end of each quarter. Alternate I of the clause requires contractors to report transactional data within 30 days after the end of each month. Both versions of the clause require contractors to remit IFF payments within 30 days after the end of each quarter. The IFF, currently set at

¹² See CGP Letter.

0.75 percent, is charged to ordering activities for the use of the Schedules program but is remitted by the contractor; the amount of IFF due each quarter is based upon the amount of reported sales. The proposed rule treated all OLMs as reportable sales in regards to GSAR clause 552.238-74.

The commenter stated reporting OLMs is an information collection burden that should be borne by the Government. The commenter also submitted three questions:

- Is the IFF applicable to OLMs reported under the OLM SIN?
- How will GSA use lump sum sales reported through the 72A Reporting System to evaluate appropriate OLM usage?
- Do transactional data reporting requirements apply for OLMs under contracts that include Alternate I of clause 552.238.74?

Response: Task or delivery orders line items that include OLMs are subject to the reporting and IFF remittance requirements of GSAR clause 552.238-74, with the exception of travel costs. The information collection burden for both versions of that clause is already addressed by existing information collections that are approved by the Office of Management and Budget's Office of Information and Regulatory Affairs, in accordance with the

Paperwork Reduction Act;¹³ those estimates are updated every three years to account for changes in the program over time.

As to the questions regarding OLM and sales reporting, GSA offers the following responses:

- The IFF is applied to OLMs reported under the OLM SINS, except for travel.
- Including OLMs (other than travel) in these information collections provides GSA a control mechanism to ensure that the Federal Supply Schedules continue to ensure the lowest overall cost alternative.
- OLMs (other than travel) are subject to the transactional data reporting requirements of GSAR clause 552.238-74 Alternate I.

5. Parity with Other Government Contract Vehicles

Comment: One commenter stated the proposed rule fails to meet its objective of establishing parity with other Government contract vehicles.¹⁴

The proposed rule noted, "Currently, [IDIQ] contracts provide the flexibility to easily acquire order-level materials; however the FSS program does not. This proposed

¹³ Pub. L. 104-13, 109 Stat. 163

¹⁴ See CGP and ITAPS Letter.

rule aims to create parity between the FSS program and other commercial IDIQs..."¹⁵ However, the commenter stated the proposed rule failed to provide parity with other programs because other programs do not have requirements to send three quotes or report OLMs, but do allow contractors to recover indirect costs.

Response: As noted in the proposed rule and acknowledged by the commenter, other commercial-item IDIQ contracts allow for OLMs. Accordingly, this rule provides parity in that regard. However, this final rule requires OLMs (other than travel costs) to be reported in accordance with GSAR clause 52.238-74 to provide GSA insight into their use and to facilitate IFF collection.

6. Requirements of FAR Clause 52.212-4 Alternate I

Comment: One commenter stated the FAR does not require the procedures proposed by this rule and the existing FAR clause 52.212-4 Alternate I provides a mechanism to obtain OLMs that ensures the integrity of the Schedules program.¹⁶

Response: Several changes have been made to the GSAR text as a result of comments received in response to the proposed rule. The intent of these changes, and the rule in general, is to align OLM ordering procedures with existing

¹⁵ See GSAR Case 2016-G506; Docket 2016-0016; Sequence 1 [81 FR 62445 (Sep. 9, 2016)].

¹⁶ See CGP and ITAPS Letter.

authorities, including the FAR, to the maximum extent possible. However, GSA received feedback from its customer agencies that special OLM ordering procedures would be needed in order to ensure appropriate use of the authorized Schedules that allow for OLMs. In addition to special ordering procedures, customer agency feedback contributed to the 33.33 percent threshold for OLMs. GSA received feedback from customer agencies that a threshold over 50 percent would be too high since over half of the order would be comprised of order-level materials and not be consistent with the intent of the OLM authority. OLMs are to be placed in direct support of a task or delivery order (and not the primary purpose), therefore the ⅓ threshold struck a balance by encouraging the use of OLMs while enforcing a control mechanism at the same time.

7. Indirect Costs

Comment: One commenter stated the GSAR rule should not preclude agencies from allowing indirect costs. Proposed GSAR 538.7103(a)(3) stated, "Insert 'none' in FAR clause 52.212-4(i)(1)(ii)(D)(2)." The commenter indicated there are costs associated with contractors procuring OLMs separate from the fully burdened labor rate awarded on the Schedule contract, and the proposed rule does not provide a mechanism for recovering those costs.

Response: The GSAR text at 52.238-82 (d) (7) has been revised to be consistent with the current FAR fill-in found at 52.212-4 Alternate 1 (i) (1) (ii) (D) (2) to allow the flexibility for vendors to recover indirect costs.

8. Existing Ancillary Products/Services SINS on Schedules

Comment: One commenter inquired about the impact the proposed rule would have on SINS under existing Schedules for ancillary products/services and other direct costs (ODCs).¹⁷

Response: GSA is implementing non-regulatory guidance for its FSS acquisition workforce in conjunction with this regulatory final rule, which will be viewable to the public in the General Services Administration Acquisition Manual (GSAM) posted on Acquisition.gov.¹⁸ The new non-regulatory GSAM guidance states items awarded under ancillary supplies or ODC SINS are not considered order-level materials.

9. Special Ordering Procedures - Order Preference

Comment: One commenter asked whether the OLM clause's requirement to follow the procedures at FAR 8.404(h) is intended to require ordering agencies to specify to Schedule contractors the type of request for quotations

¹⁷ Ibid.

¹⁸ https://www.acquisition.gov/?q=gsam_looseleaf

they must use in obtaining quotations for OLMs.¹⁹

Response: The intent of the special ordering procedures at 552.238-82(d)(6) clause is to provide guidance on the type of order preference for services and direction to the ordering activity on issuing time-and-materials or labor hour orders including OLMs.

10. Special Ordering Procedures - OLM SIN

Comment: One commenter inquired about the process for obtaining an OLM Special Item Number (SIN).

Response: The OLM SIN will be added to all existing contracts for Schedules authorized to allow for OLMs by a Government-initiated bilateral modification. New contracts under any Schedule authorized to allow for OLMs will include the OLM SIN once the Schedule solicitation is updated. However, the OLM SIN cannot be the only awarded SIN on a FSS contract or a FSS BPA.

11. Special Ordering Procedures - Ceiling Price

Comment: One commenter recommended GSA delete the proposed procedures at GSAR 552.238-82(d)(9), which required ordering activities to follow the procedures at FAR 8.405-6(d) in the event the ordering activity increases the ceiling price of an OLM above the micro-purchase threshold. The commenter indicated these procedures are a

¹⁹ See CGP and ITAPS Letter.

burdensome requirement that conflicts with the contracting officer's independent judgment to determine what constitutes a cardinal change.²⁰

Response: The procedures in GSAR clause 552.238-82 have been revised to be consistent with the requirements at FAR 8.404(h)(3)(iv). The clause reiterates the procedures required when increasing the ceiling price for OLMs.

12. Open Market Items

Comment: One commenter requested GSA define open market items in the GSAR rule.²¹

Response: Open market items are procured in accordance with FAR 8.402(f) and are purchased outside the authority of the Schedules program using open market procedures (e.g., FAR Parts 13, 14, and 15). The difference in authority is addressed in the OLM definition and the special ordering procedures of the final rule. Accordingly, GSA chose not to define open market items in the new GSAR provisions and GSAR clause.

13. Schedule Pricelists for OLMs

Comment: One commenter asked whether contractors will be required to build a fixed burden into their Schedule

²⁰ See Jalad Letter.

²¹ See CGP and ITAPS Letter.

pricelists for OLMS.²²

Response: The nature of the specific OLMs will not be known at the time of the FSS contract or FSS BPA award. Consequently, any potential indirect costs could not be specified in advance and included on the Schedule pricelist. However, the final rule allows indirect costs in accordance with the procedures at GSAR 538.7204, which is in alignment with FAR clause 52.212-4 Alternate I.

III. Expected Cost Savings of This Final Rule

Data was gathered from GSA's Federal Acquisition Service (FAS) to estimate total annualized cost savings that will be achieved from the number of Schedule contracts that will authorize OLM. A 7 percent discount rate was used for all calculations.

GSA reviewed active FY 2018 contracts for contractors that hold Schedule and non-Schedule contracts to understand the duplicate contract landscape. The total baseline population is 16,450 contracts that include Schedule and non-Schedule contracts. Of the total contract population, 14,674 were Schedule contracts and 1,776 were non-Schedule contracts. Small businesses were about 80 percent of this population with large businesses representing the remaining 20 percent of the total population. The data illustrated

²² See Jones Letter.

that 11 percent of the total contract population hold Schedule and non-Schedule contracts. Of the 11 percent, about 59 percent of those contracts are duplicates. From the 59 percent of duplicate contracts, it is estimated there will be a 50 percent contract reduction, thus resulting in contract proposal and contract administrations savings for industry. It is understood, that one contractor may hold more than one duplicate contract among their Schedule and non-Schedule contracts. The estimated 50 percent reduction in duplicate contracts represents 421 small business contracts and 105 large business contracts.

Government Cost Savings

Allowing OLMs on authorized Schedules will help reduce contract duplication and associated administrative costs. By reducing the amount of duplicate and ancillary contracts, cost savings will be achieved by a reduction in source selection procedures and contract administration. It was estimated that two source selection participants require an average of 24 hours to execute the source selection process per contract. Contract administration savings was calculated by estimating four hours per contract per year. By combining the savings achieved from the reduction of source selection procedures and contract administration, the estimated annualized cost savings for

the Government is \$109,434.

Public Cost Savings

The addition of the OLMs on authorized Schedules will result in proposal preparation and contract administration savings for both small and large businesses. It was estimated that a senior and a journeyman level representative require 24 hours to prepare a proposal to acquire a new contract. Contract administration savings was calculated by estimating four hours per contract per year. By combining the savings achieved from the reduction of proposal preparation for new contracts and contract administration, the estimated annualized cost savings for the public is \$164,559.

The OLM authority adds GSAR clause 552.238-82, Special Ordering Procedures, which includes a requirement for the contractor proposing OLMs as part of a solution to obtain three quotes for each order above the simplified acquisition threshold to support the price reasonableness of the OLMs consistent with existing standard procedures at FAR 8.405-1(d). One of these quotes may be furnished by the contractor, and if the contractor has an approved purchasing system per FAR 44.3, they are exempt from the three quote requirement. It was estimated that 10 percent of the total Schedule population (1,467 contracts) would

require one hour to document their records that three quotes were obtained to support price reasonableness. The estimated annualized cost for the public is \$35,076. The total net savings for the public is \$121,012.

The total annualized cost savings is estimated at \$230,446.

IV. Executive Order 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. 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.

V. Executive Order 13771

This final rule is considered an EO 13771 deregulatory action. Details on the estimated cost savings of this proposed rule can be found in the rule's economic analysis.

Expected annualized cost savings are \$230,446 (7 percent discount rate, in perpetuity).

VI. Executive Order 13777

This final rule was identified by GSA's Regulatory Reform Task Force as a rule that improves efficiency by eliminating procedures with costs that exceed the benefits as described in section IV.

VII. Regulatory Flexibility Act

This final rule will not 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 merely clarifies the authority to acquire OLMs when placing a task or delivery order against an authorized FSS contract or FSS BPA. The rule imposes no new reporting, recordkeeping, or other information collection requirements.

Although this rule does not have a significant impact on a substantial number of small entities, GSA nonetheless opted to prepare an Initial Regulatory Flexibility Analysis (IRFA) in conjunction with the proposed rule. As a result, GSA has also prepared a Final Regulatory Flexibility Analysis (FRFA), consistent with 5 U.S.C. 603, which is summarized as follows:

GSA does not expect this 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.

GSA has prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

The rule clarifies the authority to acquire order-level materials when placing a task order or delivery order against an authorized FSS contract or FSS BPA. Task or delivery order line items that include OLMs are subject to the reporting and IFF remittance requirements of GSAR clause 552.238-74, with the exception of travel costs. The reporting and IFF remittance requirements of GSAR clause 552.238-74 is an existing requirement to those contractors that currently hold a GSA Schedule contract. There are over 15,000 (approximately 80 percent) small businesses that have GSA Schedule contracts, which already adhere to the required reporting and IFF remittance requirements of GSAR clause 552.238-74. The OLM authority will expand business opportunities for those small businesses that do not hold GSA Schedule contracts. Entities that do not hold GSA Schedule contracts, and are awarded task or delivery orders that include OLMs, are required to adhere to the reporting

requirement at GSAR clause 552.238-74. There were no comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the rule. Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Paperwork Reduction Act

The final rule does not contain any new information collection requirements that require the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35). Order-level materials, excluding travel, are subject to the reporting requirements of GSAR clause 552.238-74 Industrial Funding Fee and Sales Reporting, which is already approved through the information collection tracked under OMB Control Number 3090-0121.

List of Subjects in 48 CFR Parts 515, 538, and 552

Government procurement.

Dated: January 19, 2018

Jeffrey A. Koses,
Senior Procurement Executive,
General Services Administration.

Therefore, GSA amends 48 CFR parts 515, 538, and 552 as set forth below:

1. The authority citation for 48 CFR parts 515, 538, and 552 continues to read as follows:

Authority: 40 U.S.C. 121(c).

PART 515—CONTRACTING BY NEGOTIATION

2. Amend section 515.408 by adding a sentence to the end of the introductory text of paragraph (c) to read as follows:

515.408 Solicitation provisions and contract clauses

* * * * *

(c) * * * Offerors are not required to complete the commercial sales practices disclosure for order-level materials (See subpart 538.72).

* * * * *

PART 538—FEDERAL SUPPLY SCHEDULE CONTRACTING

3. Add subpart 538.72 to read as follows:

Subpart 538.72—Order-level Materials

Sec.

538.7200 Definitions.

538.7201 Applicability.

538.7202 [Reserved]

538.7204 Contract clauses.

Subpart 538.72—Order-level Materials

538.7200 Definitions.

As used in this subpart:

Order-level materials means supplies and/or services acquired in direct support of an individual task or delivery order placed against an authorized (see GSAR 538.7201(b) Federal Supply Schedule (FSS) contract or FSS Blanket Purchase Agreement (BPA)), when the supplies and/or services are not known at the time of Schedule contract or FSS BPA award. The prices of order-level materials are not established in the FSS contract or FSS BPA. However, order-level materials are purchased under the authority of the FSS program, pursuant to 41 U.S.C. 152(3), and are not open market items, which are discussed in FAR 8.402(f).

538.7201 Applicability.

(a) The GSA Senior Procurement Executive authorizes the use of order-level materials on Federal Supply Schedules.

(b) The list of Federal Supply Schedules authorized to allow for order-level materials is available at <https://www.gsa.gov/olm>.

538.7202 [Reserved]

538.7204 Contract clauses.

(a) Use FAR clause 52.212-4 Alternate I in all

Federal Supply Schedules authorized for the acquisition of order-level materials (see 538.7201 (b)). Use the following language for the clause fill-in:

(1) Insert "Each order must list separately subcontracts for services excluded from the FSS Hourly Rates" in paragraph (e) (1) (iii) (D).

(2) Insert "Each order must list separately the elements of other direct costs for that order" in paragraph (i) (1) (ii) (D) (1).

(3) Insert "Each order must list separately the fixed amount for the indirect costs and payment schedule; if no indirect costs are approved, insert 'None'" in (i) (1) (ii) (D) (2).

(b) Use 552.238-82, Special Ordering Procedures for the Acquisition of Order-Level Materials, in all Federal Supply Schedules authorized for the acquisition of order-level materials (see 538.7201).

PART 552-SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Add section 552.238-82 to read as follows:

**552.238-82 Special Ordering Procedures for the Acquisition
of Order-Level Materials**

As prescribed in 538.7204(b), insert the following
clause:

**SPECIAL ORDERING PROCEDURES FOR THE ACQUISITION OF ORDER-LEVEL MATERIALS
([INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL
REGISTER])**

(a) Definitions.

Order-level materials means supplies and/or services acquired in direct support of an individual task or delivery order placed against a Federal Supply Schedule (FSS) contract or FSS blanket purchase agreement (BPA), when the supplies and/or services are not known at the time of Schedule contract or FSS BPA award. The prices of order-level materials are not established in the FSS contract or FSS BPA. Order-level materials acquired following the procedures in paragraph (d) are done so under the authority of the FSS program, pursuant to 41 U.S.C. 152(3), and are not open market items, which are discussed in FAR 8.402(f).

(b) FAR 8.403(b) provides that GSA may establish special ordering procedures for a particular FSS.

(c) The procedures in FAR subpart 8.4 apply to this contract, with the exceptions listed in this clause. If a requirement in this clause is inconsistent with FAR subpart 8.4, this clause takes precedence pursuant to FAR 8.403(b).

(d) Procedures for including order-level materials when placing an individual task or delivery order against an FSS contract or FSS BPA.

(1) The procedures discussed in FAR 8.402(f) do not apply when placing task and delivery orders that include order-level materials.

(2) Order-level materials are included in the definition of the term "materials" in [FAR] clause 52.212-4 Alternate I, and therefore all provisions of FAR clause

52.212-4 Alternate I that apply to "materials" also apply to order-level materials.

(3) Order-level materials shall only be acquired in direct support of an individual task or delivery order and not as the primary basis or purpose of the order.

(4) The cumulative value of order-level materials in an individual task or delivery order awarded under a FSS contract or FSS BPA shall not exceed 33.33 percent of the total value of the individual task or delivery order.

(5) All order-level materials shall be placed under the Order-Level Materials SIN.

(6) Prior to the placement of an order that includes order-level materials, the Ordering Activity shall follow procedures in FAR 8.404(h).

(7) To support the price reasonableness of order-level materials,

(i) The contractor proposing order-level materials as part of a solution shall obtain a minimum of three quotes for each order-level material above the simplified acquisition threshold.

(A) One of these three quotes may include materials furnished by the contractor under FAR 52.212-4 Alt I (i) (1) (ii) (A).

(B) If the contractor cannot obtain three quotes, the contractor shall maintain its documentation of why three quotes could not be obtained to support their determination.

(C) A contractor with an approved purchasing system per FAR 44.3 shall instead follow its purchasing system requirement and is exempt from the requirements in 52.238-82 (d) (7) (i) (A) - (B).

(ii) The Ordering Activity Contracting Officer must make a determination that prices for all order-level materials are fair and reasonable. The Ordering Activity Contracting Officer may base this determination on a

comparison of the quotes received in response to the task or delivery order solicitation or other relevant pricing information available.

(iii) If indirect costs are approved per [FAR 52.212-4(i)(1)(ii)(D)(2) Alternate I], the Ordering Activity Contracting Officer must make a determination that all indirect costs approved for payment are fair and reasonable. Supporting data shall be submitted in a form acceptable to the Ordering Activity Contracting Officer.

(8) Prior to an increase in the ceiling price of order-level materials, the Ordering Activity Contracting Officer shall follow the procedures at FAR 8.404(h)(3)(iv).

(9) In accordance with GSAR clause 552.215-71 Examination of Records by GSA, GSA has the authority to examine the Contractor's records for compliance with the pricing provisions in FAR clause 52.212-4 Alternate I, to include examination of any books, documents, papers, and records involving transactions related to the contract for overbillings, billing errors, and compliance with the IFF and the Sales Reporting clauses of the contract.

(10) OLMs are exempt from the following clauses:

(i) 552.216-70 Economic Price Adjustment - FSS Multiple Award Schedule Contracts.

(ii) 552.238-71 Submission and Distribution of Authorized FSS Schedule Pricelists.

(iii) 552.238-75 Price Reductions.

(11) Exceptions for travel.

(i) Travel costs are governed by FAR 31.205-46 and therefore the requirements in paragraph (d)(7) do not apply to travel costs.

(ii) Travel costs do not count towards the 33.33% limitation described in paragraph (d)(4).

(iii) Travel costs are exempt from clause 552.238-74 Industrial Funding Fee and Sales Reporting.

(End of Clause)

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