GSA

GSA Office of Governmentwide Policy

March 25, 2003

MEMORANDUM FOR LAURA SMITH
DIRECTOR
ACQUISITION POLICY DIVISION

FROM: RODNEY P. LANTIER, DIRECTOR
REGULATORY AND FEDERAL ASSISTANCE
PUBLICATIONS DIVISION

SUBJECT: GSAR Case 2002-G505, Federal Supply Schedule Contracts-Acquisition of Information Technology by State and Local Governments Through Federal Supply Schedules

Attached are comments received on the subject GSAR case published at FR 68 3220; January 23, 2003.

Response Number	Date Received	Comment Date	Commenter
2002-G505-1	2/11/03	2/11/03	Karl James
2002-G505-2	2/13/03	2/13/03	Patrick C. Drury
2002-G505-3	2/24/03	2/24/03	Cassandra Walsh
2002-G505-4	3/12/03	3/12/03	Roger Neeland
2002-G505-5	3/18/03	3/18/03	Coalition for Government Procurement
2002-G505-6	3/19/03	3/19/03	National Association of State Procurement Officials
2002-G505-7	3/19/03	3/19/03	Mike Scanlan
2002-G505-8	3/23/03	3/23/03	Don Thomas

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
www.gsa.gov

Response Number	Date Received	Comment Date	Commenter
2002-G505-9	3/24/03	3/20/03	GWU/Law School Christopher Yukins
2002-G505-10	03/06/03	03/06/03	Ray Hooper, CPCM
2002-G505-11	3/24/03	3/24/03	Microsoft Corporation
2002-G505-12	3/24/03	3/24/03	Gus Maragos
2002-G505-13	3/24/03	3/24/03	ABA
2002-G505-14	3/25/03	3/25/03	FSS
2002-G505-15	3/25/03	3/25/03	Ann Marie Feely
2002-G505-16	3/25/03	3/25/03	David B. Wilhelmy
2002-G505-17	3/26/03	3/13/03	Department of Information Resources
2002-G505-18	3/26/03	3/26/03	NASCIO
2002-G505-19	3/26/03	2/04/03	GWU/Law School Christopher Yukins
2002-G505-20	3/26/03	Not listed	John Palatiello
2002-G505-21	3/27/03	03/24/03	Harris N. Miller Alan Chvotkin
2002-G505-22	3/12/03	3/12/03	NGIP
2002-G505-23	1/31/03	1/32/03	P.G. Wist
2002-G505-24	3/31/03	3/31/03	Motorola

Attachments

GSAR-2002-G505-1

"Karl, James"
<James.Karl@IronMountain.com>

02/11/2003 02:26 PM

To: "'GSARcase.2002-G505@gsa.gov'"
<GSARcase.2002-G505@gsa.gov>
cc:
Subject: Cooperative Purchasing

I am the Government Sales Manager for Iron Mountain. We have a GSA Schedule (GS-25F-0066M) for IT services however we are on Schedule 36. We would like approval to be able to offer our Schedule to State and Local governments.

Our services grew out of our Records Management Schedule and covers the Off Site Data Protection of back up computer tapes.

James Karl
Iron Mountain
Off-Site Data Protection, Government Sales
109 Green Spring Drive
Annapolis, MD 21403
Tel: 410-269-1682
Fax: 410-269-6057
Email: jkarl@ironmountain.com <mailto:jkarl@ironmountain.com>
www.ironmountain.com

2002-G505-2

"Drury, Patrick C. - ACA ITEC4" <Patrick.Drury@itec4.army.mil>

02/13/2003 12:09 PM

To: GSARcase.2002-G505@gsa.gov
cc:
Subject: GSAR Case No. 2002-G505

The following comment is submitted on GSAR Case No. 2002-G505.

The proposed regulation set forth in the January 23, 2003 issue of the Federal Register at 68 Federal Register 3220 et seq. does not explicitly address either the ability of States or localities to use BPAs that have been established by Federal agencies under GSA's Schedule 70 contracts or the ability of States and localities to establish BPAs of their own.

Under the terms and conditions of the underlying Schedule contracts, contractors agree to enter into BPA's with ordering activities and the States and localities would constitute eligible ordering activities under the proposed regulation.

On the other hand, the provisions on order placement at 552.238-79 refer only to the Schedule contract with no reference to BPA's.

Please confirm whether States and localities will be allowed (a) to place orders through existing BPAs that have been established by Federal agencies, and (b) to establish BPA's themselves under GSA's Schedule 70 contracts.

If the answer to either of the foregoing requests for clarification is affirmative, what procedures should be followed? With respect to an existing BPA established by a Federal agency, for example, would it be sufficient to amend the BPA to identify a State or local ordering activity and to include the State or local officials among the list of individuals authorized to purchase under the BPA--once the Schedule 70 contract upon which the BPA is based has been modified?

Patrick Drury
(703) 325-3359

2002-G505-3

February 24, 2003

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

RE: Comment on 2002-G505

Ms. Duarte,

Please accept this correspondence as my comment on the proposed rule allowing GSA to offer its services to State & Local governmental agencies.

The GSA FSS already unfairly competes with private industry by developing and offering e-commerce services called GSA Advantage and e-Buy. The private companies who offer similar e-commerce services to U.S. Federal agencies understand the situation and have bravely competed against their own government (GSA FSS) for years. However, if the GSA FSS is allowed to enter the State & Local government market, then all the firms currently providing e-commerce services to State & Local agencies will be adversely affected.

It is absolutely critical that the hundreds of firms offering such services to the State & Local agencies understand that Section 211 will devastate their businesses. No private firm can compete with a federally managed and subsidized program. Regardless of how the GSA FSS executives try to spin GSA Advantage and e-Buy, they are competing with the private sector. GSA even has a Sales and Marketing team that is funded to travel the country selling GSA's version of e-commerce solutions. In fact, in 2001-2002, the U.S. Air Force out of Wright-Patterson AFB in Ohio, tried to compete an e-commerce request for proposal (RFP) but ended up contracting with GSA to have GSA develop a custom e-commerce solution called AF Advantage...based on GSA Advantage. Many private firms were interested in the Air Force opportunity, but lost out to a government competitor.

Section 211 is inherently unfair unless it restricts use of GSA Advantage and e-Buy to existing Federal agencies ONLY.

Also, please note that my email attempts to G505@gsa.gov have all been returned due to faulty email address. You may want to update the information in the Federal Register.

Feel free to contact me via email at casswalsh@aol.com.

Cassandra

GSAR 2002-G505-4

"Roger Neeland"
<roger.neeland@vci-inc.com>

03/12/2003 10:57 AM

To: GSARcase.2002-G505@GSA.gov
cc: "'Joe Villarreal'" <villarrealj@vci-inc.com>, "'Ken Krause'" <ken.krause@vci-inc.com>, mollie.morgan@GSA.gov, jannine.wilkinson@GSA.gov
Subject: Proposed Rule Comments

VCI Inc. is a small business, certified through the SBA 8(a) program. VCI held a GSA FSS Schedule 70 contract with an effective period of 8/14/01 through 8/13/06 (GS-35F-0538L). On January 1, 2003, we voluntarily "migrated" this schedule to a GSA Corporate Schedule (BF0025N) after receiving advise from both SBA and GSA representatives that this would be advantageous to a small company with multiple service offerings.

VCI comments on GSA Proposed Rules posted January 23, 2003 focus on Subpart 538.7001 Definitions, specifically Schedule 70 definition.

It is unclear, and certainly not explicitly stated, that Special Item Numbers (SINs) which map from the IT Schedule 70 SIN of 132-51 "Information Technology Professional Services" are included in the "Schedule 70" definition, so as to allow their sale under provisions of section 211 of the E Government Act of 2002. Upon migration to a Corporate Schedule, these exact same services have a series of associated SINs, C D3xx. In our case they were C D301, 302, 306, 307, 308, 310, 311, 313, 316, 317 and 399. There are others in this series. These SINs are associated with a Corporate Schedule, not a Schedule 70, but they are the same IT services envisioned to be made available to state and local governments.

It is the concern of VCI as well as numerous other small companies who voluntarily converted from an IT Schedule 70 to a Corporate Schedule, that they will be unfairly excluded from the opportunity to sell their IT services to state and local governments unless Subpart 538.7001 definition of Schedule 70 explicitly includes all SINs which cover IT Services, whether they are in the Schedule 70 or a Corporate Schedule. The current reference to "services under Federal Supply Classification code d3 (ADP & Telecommunications Services) may be intended to serve this purpose, but if so, it is not clear to contractors, most GSA people or potential prospective state and local government buyers.

Roger Neeland, Ph.D., PMP
VCI Colorado Springs
Director, Strategic Project Office
Office 719-599-1471
Cell 719-963-8261

2002-G505-5

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Michael Kratt
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Carol Smith
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Mary Jane Sweeney
Gateway

Richard Tucker
Baxter Healthcare Corporation

Don Upson
webMethods, Inc.

Tom Walker
Haworth

Nelson Willore
American Seating Company

Karen Williams
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March 18, 2003

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

GSAR Case 2002-G505

Dear Ms. Duarte:

The Coalition for Government Procurement appreciates the opportunity to comment on the proposed rule to implement the Cooperative Purchasing section of the E-Gov Act. We have considerable experience with this issue and are perhaps the association most closely identified with it.

The Coalition is a multi-industry association of over 330 member companies selling commercial services and products to the federal government. Our members account for approximately half of the commercial item sales made to the federal government each year and over 70% of the sales made through GSA's Multiple Award Schedule program. Since 1979 the Coalition has worked *with* government officials to instill common sense acquisition policies.

The Coalition counts among its members virtually every major supplier of information technology services and products that sells through the Multiple Award Schedules program. This includes 9 of the top 10 suppliers and 12 of the top 15. These members generally support the ability to sell their services and products to state and local governments through Cooperative Purchasing, but have concerns with some aspects of the proposed rule published in the *Federal Register*.

Proper Classification of Sales

The primary concern Coalition members have in moving forward with Cooperative Purchasing is with how a sale will be classified as a schedule sale. Specifically, Coalition members need clearer guidance from GSA on how to report state and local government sales and remit the proper Industrial Funding Fee. A clear and well-communicated definition of this is critical to ensuring

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maximum contractor participation and the success of the program. Absent additional direction on this issue, contractor participation in the program is likely to be uneven and GSA may not realize the results forecast.

Currently, for example, many state governments will "piggyback" on the GSA schedule price for an item and place a state purchase order with a schedule contractor at the schedule price. The purchase is not classified by either party as a schedule sale for a variety of reasons. One of these is that the state action must conform to all of the acquisition rules of that specific state. These rules may not be consistent with schedule rules.

The Coalition believes that the practice of "piggybacking" will continue even after Cooperative Purchasing is in place. It is popular with many state governments and with contractors. We are concerned, though, that GSA will consider such sales as schedule sales, requiring contractors to report such activity each quarter and pay the relevant Industrial Funding Fee. Although the proposed rule indicates that any changes to the contract terms will result in a transaction not being classified as a schedule sale, contractor experience with current GSA IFF "reviews" indicates that some in the agency consider every government sale of and item on schedule to be a schedule sale, regardless of whether its was an open market transaction or, in some cases, even a sale made through another government contract.

In addition, it is not uncommon in the federal market to have an agency modify the terms of the schedule contract to conform to its own rules. This is allowable so long as the new rules do not conflict with those of the schedule. The resultant transaction is still counted as a schedule sale.

Our members are concerned that the same thing is happening and will continue to happen in the state and local government market and that it will be difficult to tell when a state intended to make a Cooperative Purchasing buy or a "piggyback" buy.

We are aware that the Federal Supply Service is working on a system of state-only Special Item Numbers (SIN's) to assist in the classification process. While this is a move that may help contractors and GSA tell the difference between a schedule and non-schedule sale, it is not sufficient in and of itself to eliminate contractor concern. First, this system is one that several of our member companies oppose as burdensome. Second, we believe it will not result in IFF review teams stopping their practice of challenging contractor classifications absent clear and consistent training.

The Coalition recommends that the final rule state that when a state or local government adds its own terms and conditions that directly conflict with the terms of the schedule contract, such a sale not be counted as a schedule transaction. States have different terms, for example, regarding Trade Agreements Act-related issues. Companies do not want to be held liable for a federal contract violation when a state purchases equipment that their laws allow them to obtain, but is not allowed for federal sales. It is virtually impossible for companies to monitor issues such as this, especially with extensive dealer participation. Similarly, "piggyback" sales that in no way reference the schedule contract number should not be considered schedule sales.

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State terms that augment, but do not supplant, the schedule terms, however, would not have this effect. Such transactions could be counted as schedule sales, just as similar federal purchases are.

The Coalition also recommend that GSA work with the National Association of State Purchasing Officers and the National Institute of Government Purchasing to develop a database of conflicting terms so that such classifications can be more easily made. Such information can also be shared with contractors so that all parties have access to the same information.

Further, it will be vital to the success of Cooperative Purchasing for all GSA IFF review teams to be thoroughly trained on the definitions of schedule and non-schedule sales. Contractors should not routinely be second-guessed or have to supply substantial amounts of paperwork to show why a relatively small amount of orders was classified in a certain way. Requiring contractors to account for state and order classification, in addition to their federal responsibilities, takes away time from core sales and customer service functions. It will be a strong disincentive to participating in Cooperative Purchasing absent clear and complete training to all involved.

The Coalition would also like to take this opportunity to state our concern with GSA essentially requiring contractors to monitor federal (and now state) agencies to ensure proper adherence to acquisition rules. Contractors are in business to do business and have their own contract rules to which they must adhere. Ensuring federal or state agency compliance with applicable ordering rules must first and foremost be the responsibility of federal and state governments. Requiring contractors to play this role is inappropriate and improperly shifts the burden of ensuring adherence.

Dealer Participation

The Coalition is also concerned with language in the proposed rule that will give dealers the ability to sell and bill directly to state and local governments. While we understand the intent of this provision is to provide contractors and dealers with additional flexibility, we urge caution. The types of actions contemplated by the proposed rule could create logistical and other problems for all involved. It would be difficult, if not impossible, for example, for schedule contract holders to accurately track and report on state and local government sales if too many dealers are allowed this flexibility. GSA needs to be aware of this concern and take steps to work with contractors to ensure that in extending the reach of information technology schedule contracts, it does not unintentionally create problems that could create a "black eye" for contractors, dealers, or GSA.

Of particular concern is the provision stating that dealer sales made at a price lower than the schedule price will trigger the Price Reductions Clause. The Price Reductions Clause is not automatically triggered if a one-time reduction is made. The statement in the proposed rule, therefore, is incorrect and should be withdrawn and made consistent with current schedule rules. In addition, GSA cannot encourage contractors to provide dealers with additional abilities on one hand, and then threaten to penalize contractors on the other.

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The Coalition feels that the decision on whether and how much a contractor wants to make its own contract available through Cooperative Purchasing be left to the contract holder. If they do elect to participate, they must have the same controls available to them governing how dealers will sell through their contracts that they do federally. We recommend that this part of the proposed rule be eliminated.

Order Acceptance

The proposed rule currently gives contractors the ability to reject an order within 5 days of receipt. Several contractors, however, have negotiated longer time frames into their contracts to decline an offer from some federal entities currently eligible to use schedule contracts. We recommend that the terms previously negotiated for order acceptance, or other general contract provisions, be the same for state and local governments. The proposed rule should be amended to reflect this flexibility.

Applicability to Only Information Technology

While most Coalition information technology schedule members support Cooperative Purchasing, it is important to note that the rest of the Coalition's membership is sharply divided on whether Cooperative Purchasing should be extended beyond this area. We feel it is important to be on record via these comments on this point. There is simply no consensus for or against Cooperative Purchasing in furniture, office supplies, certain office equipment areas, or other industries.

Coalition pharmaceutical members continue to be adamantly opposed to Cooperative Purchasing for their products. In fact, it is quite probable that our members in this area would actively oppose any expansion of Cooperative Purchasing beyond information technology. Such a move would be perceived as threatening their federal contract arrangements, regardless of whether any specific future proposal included their products.

The Coalition again appreciates the opportunity to comment on this proposed rule. We look forward to working with GSA to craft a final rule implementing Cooperative Purchasing for information technology schedule contracts and to making this program the success GSA and our technology members want it to be.

Sincerely,

Edward L. Allen
Executive Vice President

G505-6

2002-G505

19 March 2003

Submission to the
Office of the General Services Administration
Regarding
Proposed Rules for the E-Government Act,
Section 211
RE: 2002-G505

In Response to Federal Register Notice
January 23, 2003
RE: 2002-G505

Contact:
Denise Lea, President
National Association of State Procurement Officials
dlea@doa.state.la.us

National Association of State Procurement Officials
167 West Main Street ♦ Suite 600 ♦ Lexington, KY 40507 ♦ 859.514.9150

G505-6

I. Introduction

The National Association of State Procurement Officials is pleased to submit this response to the Request for Comments by the Office of Acquisition Policy, Government Services Administration regarding the proposed rules for Acquisition of Information Technology by State and Local Governments Through Federal Supply Schedules published in the January 23, 2003 Federal Register. NASPO thanks the GSA for requesting these comments and welcomes the opportunity to work with GSA-IT Acquisitions personnel as the proposed rules are amended.

In order for states to utilize the GSA schedules, NASPO asks that the GSA consider the following recommendations before finalizing its policies on section 211 of the E-Government Act.

I. Terms and conditions:

NASPO recommends that the GSA include a process whereby states can attach an addendum to the terms and conditions to include state laws and regulations as many states have statutory contract requirements.

If the GSA does not permit the states to attach terms and conditions, NASPO recommends the GSA develop a policy and process to protect states under the federal terms and conditions.

II. Financial issues

"NASPO opposes the use of most-favored customer pricing clauses" because it "sets an artificial floor on prices by requiring a vendor to always give the particular public entity using the clause the price it gives its 'most favored customer.' The clause restricts the pricing that other jurisdictions are able to obtain by committing firms to a national price when in fact conditions in different localities" justify "varying pricing strategies."[1]

NASPO suggests that a portion of the vendor fee be allocated back to the states through a rebate program or that states be exempt.

III. Processes

NASPO recommends that:

- The GSA provide the mechanism for state auditors to distinguish between orders placed by the state and orders placed by the federal government or other entities.

- The GSA provide the process for tracking the order and specify the GSA office responsible for tracking the order.

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[1] National Association of State Procurement Officials, *NASPO State and Local Government Purchasing Principles & Practices*, (Lexington, KY: NASPO, 2001), 5.

- The GSA delineate whether a sale will be reported as a federal sale or a state sale.

- The GSA include the process and the agency or office responsible for record keeping in case of questions or discrepancies.

IV. Vendor issues

NASPO recommends:

- Creating a process whereby states can identify vendors who have a history of rejecting state orders since larger vendors have expressed a reluctance to give states the same deal they give the federal government.

- Providing a process and mechanism for protecting states if a vendor fails to deliver.

- Permitting states to contribute to the development of a Schedule 70 contractor's "history of performance."

- GSA include a provision prohibiting schedule holders from telling states that the GSA does not allow schedule holders to extend schedules to states under state specific terms and conditions.

- GSA prohibit vendors from adding conditions, in particular, no click agreements in on-line ordering processes.

- GSA provide vendor education to prevent vendors from erroneously telling state agency personnel that they are allowed to buy off the federal schedule, the purchase is not legal until it has also satisfied state laws.

- GSA educate small and minority businesses to ensure they know that they have to comply with state small and minority business regulations. In addition provided these vendors with information on how to participate as schedule vendors.

- GSA create a process to protect the states should a vendor give inaccurate or incomplete information.

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Mike.Scanlan@co.hennepin.mn.us

03/19/2003 02:15 PM

To: GSARcase.2002-G505@gsa.gov
cc:
Subject: Re: 2002-G505 GSA Comments

Thank you!
I hope this is approved. It will simplify our acqusitions costs.

Mike Scanlan
Hennepin County, MN

G 505-8

DDthomas1213@aol.com

03/23/2003 04:30 PM

To: GSARcase.2002-G505@gsa.gov
cc:
Subject: Purchasing from Non-US manufacturing companies Indirectly

Why does GSA purchase goods and services from a vendor that is getting the supplies or equipment from a non-qualified source that in turn is getting the product from China or sometimes is coming into Mexico and then to a US company for resale to GSA's supplier and then to GSA?

What are the procedures for GSA procurement of this nature?

Thank you,

Don Thomas
email DDthomas1213@aol.com

THE GEORGE
WASHINGTON
UNIVERSITY
LAW SCHOOL
WASHINGTON DC

G505-9

March 20, 2003

BY ELECTRONIC SUBMISSION

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

Attn: Ms. Laurie Duarte

Re: GSAR Case No. 2002-G505: "Cooperative Purchasing":
Role of the General Services Board of Contract Appeals

Dear Ms. Duarte:

Please accept this comment on the referenced proposed rule, regarding the acquisition of information technology by state and local governments through the Federal Supply Schedules, under "cooperative purchasing." The purpose of this comment is to recommend that the General Services Board of Contract Appeals (GSBCA) be named as the arbitral forum of choice to hear and resolve disputes that may arise through cooperative purchasing.

The supplementary information issued with the proposed rule, which was published at 68 *Federal Register* 3220 (January 23, 2003), provided as follows regarding disputes that may arise as a result of cooperative purchasing:

> The Federal government would not be liable for the performance or nonperformance of contracts established under the authority of this rule between schedule contractors and eligible non-federal entities. Disputes that could not be resolved by the parties to the new contract could be litigated in any State or Federal court with jurisdiction over the parties, using principles of Federal procurement law and the Uniform Commercial Code, as applicable and appropriate.

68 *Federal Register*, at 3221; *see also id.* at 3225 (text of proposed GSAR 552.238-79 ("Disputes which cannot be resolved by the parties to the new contract may be litigated in any State or Federal court with jurisdiction over the parties, using principles of Federal procurement law and the Uniform Commercial Code, as applicable.").

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The supplementary information and the proposed rule raise serious questions regarding both choice of forum and choice of law. If contractors may find themselves drawn into courts across literally thousands of state and local jurisdictions, the contractors will be less likely to agree to sell to state and local governments. And if those jurisdictions impose hundreds, if not thousands, of different legal schemes on contractors, the welter of confusing and conflicting laws may, in effect, destroy the effectiveness of cooperative purchasing.

To resolve the choice-of-forum issues, the General Services Administration (GSA) may wish to consider making the General Services Board of Contract Appeals (GSBCA) the forum of choice for disputes under cooperative purchasing. This would establish a centralized, stable forum for hearing disputes involving cooperative purchasing.

By looking to the GSBCA to resolve the choice-of-forum issue, GSA may in effect ease the choice-of-law problem. The GSBCA has already developed a substantial body of precedents on the Federal Supply Schedules, and the judges of the GSBCA have a thorough, working knowledge of federal procurement law. Unlike their counterparts in the federal, state and local courts, the judges on the GSBCA are unlikely to take the law surrounding the schedules in new, unexpected directions. Cooperative purchasing would, in other words, be launched on a much more stable legal base.

This leaves unresolved, however, the conflicts-of-law issue at the very heart of cooperative purchasing: the conflict between state/local and federal procurement laws. The proposed rule states, in relevant part (and with emphasis added):

> Use of Federal Supply Schedule Contracts by Certain Entities--Cooperative Purchasing (Date)
>
> (a) If an entity identified in paragraph (b) of the clause at 552.238-78, Eligible Ordering Activities [e.g., state or local government], elects to place a delivery order under this contract, such order shall be subject to the following conditions:
>
> (1) When the Contractor accepts an order from such an entity, a separate contract is formed which incorporates by reference all the terms and conditions of the Schedule contract except the Disputes clause, the patent indemnity clause, and the portion of the Commercial Item Contract Terms and Conditions that specifies ``Compliance with laws unique to Government contracts" (which applies only to contracts with entities of the Executive branch of the U.S. Government). The parties to this new contract which incorporates the terms and conditions of the Schedule contract are the individual ordering activity [*i.e.*, the state or local government] and the Contractor. The U.S. Government shall not be liable for the performance or nonperformance of the new contract. Disputes which cannot be resolved by the parties to the new contract may be litigated in any State or Federal court with jurisdiction over the parties, using principles of Federal procurement law and the Uniform Commercial Code, as applicable.

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(2) Where contract clauses refer to action by a Contracting Officer or a Contracting Officer of GSA that shall mean the individual responsible for placing the order for the ordering activity (e.g. FAR 52.212-4 at paragraph (f) and FSS clause I-FSS-249 B.)

(3) As a condition of using this contract, eligible ordering activities agree to abide by all terms and conditions of the Schedule contract, except for those deleted clauses or portions of clauses mentioned in paragraph (a)(1) of this clause. Ordering activities may not modify, delete or add to the terms and conditions of the Schedule contract. To the extent that orders placed by such ordering activities may include additional terms and conditions not found in the Schedule contract, those terms and conditions are null, void, and of no effect. . . .

(4) The ordering activity is responsible for all payments due the Contractor under the contract formed by acceptance of the ordering activity's order, without recourse to the agency of the U.S. Government, which awarded the Schedule contract.

(5) The Contractor is encouraged, but not obligated, to accept orders from such entities. The Contractor may, within 5 days of receipt of the order, decline to accept any order, for any reason. The Contractor shall fulfill orders placed by such entities, which are not declined within the 5-day period.

Proposed GSAR 552.238-79, *reproduced at* 68 *Federal Register* 3225 (emphasis added). As the provisions quoted above make clear, the proposed rule would simply nullify any state or local rules that "modify, delete or add to" the terms and conditions of the schedules contract. This approach, which would undercut any conflicting state or local policies (including socioeconomic policies), could raise serious concerns among state and local governments.

To ease this tension between federal and state laws, GSA may wish to consider making the GSBCA the *arbitral* forum of choice for disputes involving cooperative purchasing. Arbitration is almost always a much more flexible process than traditional litigation. The GSBCA, unlike a district court, might well be able to resolve cooperative purchasing disputes in arbitration on a more equitable basis, giving some consideration to state and local policies. The GSBCA arbitrations would lack the rigid boundaries of formal adjudication, and as a result would likely have a greater chance of success.

Ultimately, of course, whether to use the GSBCA to resolve disputes involving cooperative purchasing will be an internal policy decision for GSA. In assessing this policy decision, GSA may wish to consider the following issues:

- **GSBCA's Funding:** It is not clear that the GSBCA would have funding through appropriations to support this new jurisdiction. The GSBCA could perhaps solve this problem by entering into memoranda of understanding for compensation with the potential disputing parties, or by sharing in GSA's proceeds under the Industrial Funding Fee (IFF). In the latter case – if the GSBCA were funded by the IFF – GSA could point to the disputes process as part of a package of services delivered by GSA in return for the fee.

G505-9

- **Application of State/Local Law:** State and local governments may be concerned that the GSBCA will give too little weight to state or local policies in their arbitration decisions. This is a problem that the GSBCA will have to address with sensitivity to state and local governments' autonomy and authority. Moreover, if GSA retains its current position on the preeminence of federal contract terms – that if orders "include additional terms and conditions not found in the Schedule contract, those terms and conditions are null, void, and of no effect" – informal arbitration may be the *only* practical way to give special state or local provisions any consideration.

- **Accountability/Transparency:** Some state and local governments may be concerned with arbitration before the GSBCA, because typically arbitration decisions are not published and cannot be appealed. To address these problems, GSA may wish to consider publishing the GSBCA arbitral decisions on the Internet. This would make the decisionmaking very transparent, and would, at least indirectly, address accountability concerns.

- **State Laws May Ban Arbitration:** Even if state laws permit cooperative purchasing – which is a separate, sometimes difficult question – other laws in those same states may bar state agencies from using arbitration. In drafting a clause to implement the GSBCA's "jurisdiction" to hear arbitrations based on cooperative purchasing, GSA may wish to make it very clear that those states with conflicting local laws may always "opt out" of the proposed arbitration system.

Thank you, again, for your attention to this matter, and for this opportunity to submit comments on this important initiative.

Very truly yours,

Christopher R. Yukins

Cc: Judge Stephen M. Daniels
Chairman, GSBCA

2002-G505-10

RHooper@co.seminole
.fl.us

03/06/2003 08:52 AM

To: GSARcase.2002-G505@gsa.gov
cc:
Subject: 2002-G505

Seminole County Government supports the use of GSA schedules for local government. Local government purchasing staffs are very small and have limited resources. The use of GSA schedule will assist local government to be able to use schedules and award Purchase Orders quickly and efficiently; therefore saving time and money. We are a member of the regional cooperative purchasing unit (SICOP) of Central Florida and the mission is to support cooperative purchasing. We are allow to purchase directly from Skillcraft and Pride enterprises that are exempted from competitive purchasing procedures and would like the opportunity to use GSA schedules for IT equipment and services.

Ray Hooper, CPCM
Purchasing and Contracts Manager
Seminole County Government

2002-G505-11

Via Electronic Mail (GSARcase.2002-G505@gsa.gov)

March 24, 2003

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

Re: GSAR Case 2002-G505; Acquisition of Information Technology by State and Local Governments Through Federal Supply Schedules.

Dear Ms. Duarte:

Microsoft Corporation ("Microsoft") respectfully submits these comments in response to the General Services Administration's ("GSA") January 23, 2003, proposed rule and request for comments regarding implementation of Section 211 of the E-Government Act of 2002. Pursuant to Section 211, GSA is authorized to permit States and local governments to use GSA's federal supply schedule ("Schedule") contracts for the acquisition of "automated data processing equipment (including firmware), software, supplies, support equipment, and services (as contained in Federal supply classification code group 70)."

Microsoft supports the voluntary use of Schedule contracts by our State and local agency customers. The proposed regulations address many of the issues that will allow full implementation of this important program. However, there are a number of areas that need to be clarified prior to final promulgation of the regulations in order to avoid unnecessary risks and litigation that will only create delays in implementation and use. GSA should take the lead role in resolving these issues so that the tens of thousands of Schedule participants, both from the private and public sectors, can implement this effort successfully and properly on an expedited basis. Among the issues that need to be resolved are:

- Clarification of the applicability of State and local laws and regulations
- Acceptability of additional non-statutory terms and conditions
- Clarification of the applicability of federal laws
- The ultimate contractual responsibility of GSA for task and delivery orders

2002-G505-11

- The access of small local resellers to Schedule contracts

Our detailed comments follow.

Clarification of the Applicability of State and Local Laws and Regulations

It is a fact that each of the States and many of the local jurisdictions have laws and mandatory regulations that apply to purchases of information technology products and services. Those laws and regulations will apply to acquisitions made by those entities under Schedule contracts as currently presented in the proposed regulations. Based on public comments in response to questions raised at the various public forums on this proposed rule, GSA is aware of this issue but has, at this point in time, not addressed it directly in the proposed regulations. As a result, each of the 8,000 schedule contract holders and the tens of thousands of suppliers will be required to examine each individual purchase order in an attempt to determine the actual effect of those State statutes and regulations. The potential volume of purchase orders issued by State and local governments through the GSA schedule makes this task burdensome, inefficient and risky for the contracting parties. The situation is exacerbated by the fact that the proposed regulations actually prohibit States and local jurisdictions from placing additional requirements on Schedule contractors.

GSA, as the Federal agency responsible for the proper administration of Schedule contracts, should take the lead in providing specific guidance, with the cooperation and assistance of States and local jurisdictions seeking to access Schedule contracts, on the applicability of specific non-federal statutes and regulations. Such guidance should be in the form of an addendum that would be made part of the task or delivery order as applicable. With such an addendum, both Schedule contractors and their numerous public sectors customers, could contract for information technology goods and services with confidence that such actions were in accordance with applicable laws and regulations. Without such guidance, the risks will be very high and in many cases unacceptable thereby negating the benefits of the legislation.

Acceptability of Additional Non-Statutory Terms and Conditions

As a direct corollary to required statutory terms and conditions discussed above, the proposed regulations prohibit, without clear explanation or justification, States and local jurisdictions from imposing additional terms and conditions on task and delivery orders. Such a prohibition will limit the ability of States and local jurisdictions from reaping the benefits of the statutory change by preventing their use of Schedule contracts when non-contradictory terms and conditions that would otherwise be agreed to by the Schedule contractor are required. Because the real benefit of the statutory change is to allow States and local jurisdictions to benefit from the volume price discounts, GSA should not limit

that benefit by prohibiting two contracting parties from agreeing to necessary and acceptable additional terms and conditions.

Clarification of the Applicability of Federal Laws

Schedule contracts and contractors are subject to a wide variety of federal laws and mandatory regulations because purchases are being made with federal dollars by federal agencies. Those laws range from the Prompt Payment Act to the Buy American and Trade Agreements Acts, to the Contract Disputes Act. The proposed regulations attempt to specifically apply some of the federal laws and regulations to the task and delivery orders issued by a State or local jurisdiction, e.g., the Prompt Payment Act, specifically exempt others, e.g., the Contract Disputes Act, and does not address at all the applicability of other laws, e.g., the Service Contract Act, the Buy American and Trade Agreements Acts.

In order to avoid the confusion and risks associated with such a system, GSA should specifically analyze and clarify the applicability of federal statutory requirements. The proposed regulations as currently drafted are contradictory in terms of the applicability of federal law and do not provide clear analysis in terms of determining applicability. For example, the proposed regulations state the federal Prompt Payment Act, with its associated penalties and administrative procedures is made applicable to sovereign entities, i.e., the States. On the other hand, the proposed regulations state that the Contract Disputes Act does not apply when the Schedule contract under which the task and delivery orders are made is clearly covered by the Contract Disputes Act. It does not seem sufficient to merely declare, as the proposed regulations do, that the task or delivery order creates a separate contract which presumably would not be a contract for property or services by an "executive agency" as required by the Contract Disputes Act while still being an acquisition by a "head of an agency" as defined by the Prompt Payment Act. Microsoft recommends that GSA clarify the applicability of federal statutes in order to avoid the risk and litigation that will necessarily follow from not addressing this uncertainty.

The Ultimate Contractual Responsibility of GSA for Task and Delivery Orders

The proposed regulations, by stating that a separate "contract" is formed with each task or delivery order issued by a State or local agency, creates the situation whereby GSA takes no responsibility for either party's performance while still collecting an industrial funding fee for managing the "contract." Such a position creates uncertainty as to the ultimate responsible party for the government. Additionally, the outcome is that GSA benefits from the theory of one large customer for purposes of volume discounts while the benefits of a "single" customer for Schedule contractors is eliminated when performance issues arise. With GSA receiving State tax dollars as compensation for administering the Schedule contracts, it should assume responsibility for administration of the contract including disputes and performance issues.

2002-G505-11

The Access of Small Local Resellers to Schedule Contracts

In both its commercial and public sector business, Microsoft relies upon an extensive network of value added resellers to sell and lease its products and services. Small business concerns are an important part of this reseller model. These small business concerns often have a limited number of customers that may not include federal agencies. As a result, the small reseller has no need to incur the expense of maintaining a Schedule contract. The proposed regulations do not, however, address how these small business concerns will be able to access Schedule contracts, easily and inexpensively, in order to continue to serve our mutual State and local agency customers. As part of the regulations implementing Section 211, GSA should make the commitment to establish a program of simplifying and expediting the award of Schedule contracts to small business concerns that focus on doing business with State and local agencies.

Thank you for your consideration of these comments. Microsoft considers this effort to be an important change in the manner in which our State and local agency customers can acquire our products and services. We are confident that by addressing the issues raised above, GSA will be able to eliminate much of the uncertainty and ambiguity currently surrounding this effort and will therefore make it a much more viable program.

2002-G505-12

Gus.Maragos@das.state.oh.us

03/24/2003 06:48 PM

To: GSARcase.2002-G505@gsa.gov
cc: Greg.Jackson@das.state.oh.us, Mary.Carroll@das.state.oh.us, Beth.Stalnaker@das.state.oh.us, Jim.DeLong@das.state.oh.us, Deborah.Archie@das.state.oh.us
Subject: FAR Case 2002-G505

Dear: Regulatory Secretariat
Attn: Ms. Laurie Duarte
Re: **FAR Case 2002-G505**
Date: March 24, 2003

As advised by Mary Meredith, GSA please consider this email Ohio's Formal Public Process for FAR Case 2002-G505. The State of Ohio is certainly interested in and supportive of the E-Government Act of 2002 – GSA Cooperative Procurement, "cooperative purchasing". We share the desire to make government more efficient by reducing duplication of effort and to utilize volume purchasing for IT products and Services. We understand that to realize the full potential of "cooperative purchasing" we may need to think "outside the box" and set aside traditional procurement practices. After our review of the aforementioned Act we wanted to share some of our initial thoughts, which are listed below.

Provisions required by Ohio Law

Office of Budget Management certification of funds ORC 126.07
Maximum dollar value of contract 126.07
Cannot cross biennium, Term may not exceed two years ORC 131.33 (also a constitutional requirement)
Indemnity, State may only indemnify in extremely limited circumstances
EEO provision ORC 125.111

Provisions advised by the Ohio Attorney General

Non-Appropriation of Funds, financial obligation subject to the appropriation of adequate funds, which is set by Ohio General Assembly. Also, if funding is not continued the contract will be terminated.
Ohio Law provision establishing law and jurisdiction in the event of a dispute
Indemnity, contractor will indemnify the state
Ownership of Deliverable (custom developed IT) transfer of rights in intellectual property

Provisions required by the Ohio Department of Administrative Services, Policy Directive

Independent Contractor is responsible for social security, unemployment tax, workers compensation, etc…
Certification of Compliance with Ohio Ethics Laws and Campaign Contributions Law
Policy Objective
Local Business Preference, Ohio certified MBEs ORC 125.081 and EDGE Program participants by Executive Order.

Provisions advised for best practice

Detailed Scope of Work, Ohio STS is very specific.
Schedule for Payment, deliverable based payments with or without holdback
Ownership of Deliverable under Ohio Terms & Conditions the State owns all custom software, contractor shall not copyright, state has right to copy, distribute, and modify
Compliance with Applicable Law

General Issues

2002-S505-12

Ohio STS, the State receives the revenue share.
Ohio STS dealers may be placed under the Schedule, liability remains with the Contractor.
Ohio STS "Deliverables hereunder are merchantable and fit for the particular purpose described in this contract".
Ohio STS the contractor is liable for direct damages with no cap.
Ohio STS payment is triggered by receipt of invoice of acceptance of software.
Ohio STS rates for Travel Expenses are set by OBM & GSA is based on Federal Joint Travel Rates.

Taking into account that you may not be familiar with some of the terminology used above please don't hesitate to seek any clarification needed. We would also like to point out that Ohio currently uses GSA contacts as a basis for negotiating our State Term Schedules.

In conclusion the E-Government Act of 2002 has challenges, which may difficult to resolve but are not considered impossible to achieve. Many of the statements mentioned herein are inhibitors that unfortunately prevent Ohio from immediately participating in "cooperative purchasing". By your own account the inability to modify the GSA Contract Terms & Conditions is a potential "deal breaker". Nevertheless, Ohio recognizes the probable benefits of this Act and will continue to seek avenues to leverage opportunities such as this. The State of Ohio is committed to governmental collaboration, improving government performance, and all levels of service delivery. Please keep us informed of any amendments, legislation, or new Bills that may ease our compliance towards this effort.

Should you have any questions, desire additional comments, or would any other information regarding our formal response please feel free to contact us.

Regards,
Gus Maragos
Assistant Deputy Director of IT Policy
Computer Services Division
Ohio Department of Administrative Services
Phone: 614-728-8900 Fax: 614-644-1428

2002-G505-13

2002-2003
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March 24, 2003

VIA HAND DELIVERY
& ELECTRONIC MAIL

General Services Administration
Regulatory Secretariat (MVA)
1800 F Street, N.W.
Room 4035
Washington, DC 20405
Attn: Ms. Laurie Duarte

Re: GSAR Case No. 2002-G505
Proposed Rule: State/Local Use of Federal Supply Schedule
68 Fed. Reg. 3220 (January 23, 2003)

Dear Ms. Duarte:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter.[1] The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section's governing Council and substantive committees contain members representing these three segments to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of

[1] The Honorable Mary Ellen Coster Williams, Chair of the ABA Section of Public Contract Law, has recused herself on this matter, did not participate in the Section's consideration of these comments, and abstained from voting to approve and send this letter. Similarly, Council Member Daniel I. Gordon recused himself on this matter and did not participate in either the preparation or approval of these comments.

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Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

Background

Section 211 of the E-Government Act of 2002 (Pub. Law 107-347) authorizes the Administrator of the General Services Administration ("GSA") to provide for use by state and local governments of its Federal Supply Schedule ("FSS") for automated data processing equipment (ADPE), software, supplies, support equipment, and services (as contained in the FSS Group 70 schedule). This procurement vehicle could be of major assistance to state and local governments, particularly in light of the economic and budgetary strictures they currently face. Not only can they realize the economies of scale available through FSS acquisitions, they also can realize administrative savings.

At the same time, the proposed rule implementing Section 211 of the E-Government Act appears to state that the Federal Government is not a party when a state or local agency uses the FSS Group 70 contract (hereafter "FSS contract" or "Schedule contract") as the basis for contracting with an IT vendor. The proposed rule provides that an order will create a new, separate contract between the user agency and the FSS vendor, expressly excluding the Federal Government as a contract party.

The proposed rule further provides that use of a Schedule contract by a state or local agency is wholly voluntary; and schedule contractors are permitted to decide whether or not they will accept orders from state and local agencies under these contracts. The proposed rule explains that state and local use of federal schedules will be on terms and conditions identical to those that apply to a Schedule contract, with a few limited exceptions. Thus, the proposed rule expressly prohibits modifying the Schedule contract terms and conditions (proposed Section 552.238-79(a)(1)), but it excludes the federal "Disputes" clause and instead provides that disputes in performance of the state and local orders "may be litigated in any State or Federal court with jurisdiction over the parties, using principles of Federal procurement law and the Uniform Commercial Code, as applicable." *Id.*

The Section has three principal areas of concern with the proposed rule:

(i) a lack of clarity regarding the interface between the enabling statute and the implementing regulations, on the one hand, and the law of public contracting applicable to state and local agencies, on the other;

(ii) the potential ambiguity of the phrase "principles of Federal procurement law" in proposed Section 552.238-79(a)(1); and

2002-G006-13

(iii) the failure of the proposed rule to address or provide for administrative dispute resolution procedures.

Each of these concerns is addressed in detail below.

State and Local Organic Law

The E-Government Act authorizes the Administrator to allow state and local use of FSS Group 70 schedule contracts, but it does not grant contracting authority to state and local agencies. Thus, use of the FSS contracts may be contrary to the existing procurement laws of certain state or local agencies, or may be subject to other constraints. For example, a state or local agency that is required by charter or ordinance to award purchase contracts on the basis of the lowest bid meeting the quality requirements of the agency may still be required to comply with such provisions when selecting among FSS contractors.

Accordingly, to avoid confusion on this important issue, the Section recommends that the proposed rule make clear that the E-Government Act's authority to allow state and local agencies to use FSS Group 70 contracts does not, in and of itself, provide those agencies with independent authority to use such contracting vehicles, nor does it preempt the requirements of applicable state and local law.

Notably, if a state has adopted Article 10 of ABA Model Procurement Code ("MPC") for State and Local Governments verbatim and applied it to local agencies, then agencies in that state could use the FSS schedule without further legislative authorization because GSA is an External Procurement Activity under §10-101(2), and § 10-201(1) authorizes this type of cooperative purchasing. This cooperative purchasing authority, however, is conditioned on the existence of a formal agreement between the local agency and GSA. Moreover,

> All Cooperative Purchasing conducted under this Article shall be through contracts awarded through full and open competition, including use of source selection methods substantially equivalent to those specified in Article 3 (Source Selection and Contract Formation) of this Code.

MPC § 10-201(2). Thus, in this hypothetical state, the local agency would have to: (i) determine that the GSA schedule award met the local agency's source selection requirements (much as FAR 8.404 does at the federal level); and/or (ii) institute procedures for placing orders that would comply with the local source selection

requirements. Local agencies in this hypothetical state also would be prohibited from using GSA's schedule to circumvent procurement requirements. MPC § 10-207.

GSA has no existing contractual or other relationship with state or local agencies that might choose to access the FSS schedule contracts, and the proposed rule does not contemplate any type of formal agreements between GSA and those agencies. The Section recommends that use of such agreements – under standard terms – be made a requirement under the proposed rule. Otherwise, GSA will have no means of managing state and local agencies' use of the Schedule contract or knowing which agencies are using the authority – a result that clearly would be contrary to current efforts to make FSS use more, not less, transparent.

The Section does not contemplate GSA taking any more active role in the administration of individual orders than the proposed rule contemplates; such administration would still be the responsibility of the vendor and state or local agency. Nonetheless, an FSS contract is a GSA vehicle that GSA needs to manage. Without an agreement between GSA and a state or local agency, GSA's ability to manage the underlying vehicle will be much less clear. Also subject to debate will be the proposed rule's ability to bind nonfederal entities absent their agreement, a question that could be raised in litigation -- to which GSA would not be a party -- between the vendor and the nonfederal agency. Requiring such an agreement is also consistent with the cooperative agreement process provided in Article 10 of the MPC.

Uniform Procurement Principles

As currently written, the proposed rule states that disputes will be litigated "using principles of Federal procurement law" and the Uniform Commercial Code, as applicable. To ensure uniformity when state and local government agencies use Schedule contracts, the Section recommends that the phrase "principles of Federal procurement law" be clarified by including a reference to "applicable federal acquisition statutes, regulations, and case law." This will minimize possible ambiguities concerning which "principles" may apply, as well as avoid circumstances in which the contract of a single FSS contractor is interpreted or administered by various jurisdictions under different legal rules.

Applying Federal procurement law to contracts involving state or local entities is not unusual. Most state and local government agencies receive federal money through grants and, as such, must comply with many of the same federal procurement laws. States generally have specific authority to receive such grants and to comply with applicable federal law. *See, e.g.,* MPC § 11-301. Thus, the Section recommends that the last sentence of Section 552.238-79(a)(1) be revised to read as follows:

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> "Disputes that cannot be resolved by the parties to the new contract may be litigated in any State or Federal court with jurisdiction over the parties, applying Federal procurement law, including statutes, regulations and case law, and, if pertinent, the Uniform Commercial Code."

Administrative Dispute Resolution Procedures

Under the proposed rule, the standard FSS "Disputes" clause is expressly exempted from the terms and conditions applicable to state and local use of the schedules. Instead, the proposed rule suggests that all disputes must be resolved through formal litigation, either in state or federal court. The regulations do not provide for administrative dispute resolution procedures for either bid protests or contract disputes.

Use of administrative dispute resolution procedures can avoid substantial time and expense for all parties. Such procedures are widely available under existing state and federal procurement laws. In fact, MPC § 10-301 provides for an administrative dispute resolution process specifically tailored to cooperative purchasing of the type used in FSS contracts.

Appropriate administrative dispute resolution procedures should include at least minimal due process requirements such as notice, fair opportunity to be heard, and written administrative decisions. Many state and local governmental entities have already adopted such procedures for both pre-award and post-award disputes. Permitting them to apply those procedures to controversies arising under orders placed against Schedule contracts would not appear to impose a significant burden. For those states and local governmental entities that do not have such procedures, allowing them to adopt appropriate procedures within these broad guidelines is both appropriate and necessary to ensure that FSS vendors accepting orders from state and local governmental entities can use an administrative remedy without resort to formal litigation.

The Section recommends that the proposed rule include a modified Disputes clause applicable to orders by state or local entities, which would allow the state or local agency to elect to have either the General Services Board of Contract Appeals ("GSBCA") or another administrative forum resolve disputes. That is, the regulation would delete the Disputes clause from those exempted under Section 552.238-79(a)(1) and revise proposed regulation 538.7003 to add: "(q) 552.233-1, Disputes." This will permit substituting "ordering activity" for "Government" where it appears in the clause. Additionally, subsection (a) should be deleted because the Contract Disputes Act applies only to the Federal Government, and subsection (f) should be modified to specify appeal to either the GSBCA or other administrative forum.

2002-6505-13

The Section also recommends adding the following to proposed regulation 552.238-79:

> "(c) The ordering activity shall be solely responsible for resolving all contractual and administrative issues arising out of any work order, including source evaluation, source selection, protests, disputes, and claims. The ordering activity shall provide in writing a quasi judicial administrative procedure to handle and resolve disputes concerning or arising out of its work order contract, which shall incorporate an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment."

This provision will foster a parity in remedies and procedures for federal and non-federal schedule transactions. *See* MPC §10-301 (containing similar provisions).

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Hubert J. Bell, Jr. /RHR

Hubert J. Bell, Jr.
Chair-Elect, Section of Public Contract Law

cc: Mary Ellen Coster Williams
Patricia H. Wittie
Patricia A. Meagher
Marshall J. Doke, Jr.
Norman R. Thorpe
Gregory A. Smith
Council Members
Co-Chairs of the State and Local Procurement Division and the Commercial Products & Services Committee
Richard P. Rector

2002-G505-14

GSA

Mary P. Meredith

03/25/2003 01:49 PM

To: Linda K. Nelson/MVP/CO/GSA/GOV@GSA, gsarCASE.2002-G505@GSA.GOV
cc: Lisa D. Maguire/FCO/CO/GSA/GOV@GSA, Bonnie C. Larrabee/FCO/CO/GSA/GOV@GSA
Subject: Cooperative Purchasing Comments, GSARCase 2002-G505

Linda/Laurie,

Please find attached the comments from the Federal Supply Service concerning Cooperative Purchasing, GSARCase 2002-G505.

If there are any questions, please feel free to contact me on 703-305-3324.

Mary Meredith
Procurement Analyst

CoopComments.do

Effective March 1, 2002, the Corporate Contract, Solicitation Number FCO-00-CORP-0000C, has been transferred to Region 10. All inquiries concerning the Corporate Solicitation should be directed to Ms. Patricia Austin at Patricia.Austin@GSA.GOV, or 253-931-7083.

COMMENTS
GSAR CASE 2002-G505- 14
COOPERATIVE PURCHASING

1. Federal Register notice, page 3220, column 2, Background, paragraph 2, states that, section 211 amends 40 U.S.C. 502 by adding a new subsection "(c)" that allows, to the extent authorized by the Administrator, a State or local government to use "Federal supply schedules of the General Services Administration for automated data processing equipment (ADPE)(including firmware, software, supplies, support equipment and services (as contained in Federal supply classification code group 70)."

Additionally, Federal Register notice, page 3220, column 3, Limited Scope, states that, "Because the law specifies that schedule access applies to offerings "contained in Federal supply classification code group 70," the proposed GSAR changes would limit state and local purchases to the GSA's Schedule 70 contracts. The rule would not authorize access to ADPE available through GSA schedules other than Schedule 70."

Further, Federal Register notice, page 3222, column 3, 538.7001 Definitions, Schedule 70, states, "Schedule 70 . . . means schedule 70 contracts, including products under Federal Supply Classification Code 70 of the Federal Supply Schedule program, services under Federal Supply Classification Code d3 (ADP, Telecommunication Services), and support items under both of these codes.

This language creates some confusion in that the language in the Statute refers to "automated data processing equipment (ADPE)(including firmware), software, supplies, support equipment, and services (as contained in **Federal supply classification code group 70**)." A classification code is a coding system used to group like products for management and acquisition purposes. FSC group 70 includes only products and represents a subset of the products and services available on the Information Technology (IT) schedule as a whole.

GSA, based on the language in the statute, has restricted "state and local purchases to GSA's **Schedule 70 contracts"** as defined in the proposed rule.

The Schedule 70 contracts include more than FSC 70 and d3 products and services. Below is an extensive list of products and services offered under Schedule 70:

a. Federal supply classification group 70 is limited to the products listed below:

FSC Class 7010 – System Configuration

End User Computers/Desktop Computers

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Professional Workstations
Servers
Laptop/Portable/Notebook Computers
Large Scale Computers
Optical and Imaging Systems
Other System Configuration Equipment Not Elsewhere Classified

FSC Class 7025 – Input/Output and Storage Devices

Printers
Displays
Graphics, including Video Graphics, Light Pens, Digitizers, Scanners, and Touch Screens
Network Equipment
Other Communications Equipment
Optical Recognition Input/Output Devices
Storage Devices, including Magnetic Storage, Magnetic Tape Storage and Optical Disk Storage
Other Input/Output and Storage Devices Not Elsewhere Classified

FSC Class 7030 – Information Technology Software Licenses (Term & Perpetual)

FSC Class 7035 - ADP Support Equipment

FSC Class 7042 – Mini and Micro Computer Control Devices

Microcomputer Control Devices
Telephone Answering and Voice Messaging Systems

FSC Class 7050 - ADP Components

ADP Boards

b. In addition to the products under FSC group 70, the products and services identified below are also included on the IT MAS solicitation/schedule.

Federal Supply Classification Group 58

Various communication, detection and coherent radiation equipment to include:

Telephone & Telegraph Equipment
Communications Security Equipment & Components
Teletype & Facsimile Equipment
Radio & Television Communication Equipment

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Radio Navigation Equipment
Intercommunication & Public Address Systems

Federal Supply Classification Group 59

FSC Class 5995 – Cable, Cord, & Wire Assemblies: Communications Equipment
Communications Equipment Cables

Federal Supply Classification Group 60

FSC Class 6015 - Fiber Optic Cables

FSC Class 6020 – Fiber Optic cable Assemblies and Harnesses
Fiber Optic Cable Assemblies and Harnesses

FSC Class 6145 – Wire & Cable, Electrical
Coaxial Cables

Services which include Product Service Codes W, J, D & U

Leasing of Product
Daily/Short Term Rental
Maintenance of Software
Maintenance of Equipment, Repair Service & Repair Parts/Spare Parts
Training Courses for IT Equipment and Software

Professional Services:

IT Facility Operation and Maintenance
IT Systems Development Services
IT Systems Analysis Services
Automated Information Systems Design and Integration Services
Programming Services
IT Backup and Security Services
IT Data Conversion Services
Computer Aided Design/Computer Aided Manufacturing (CAD/CAM) Services
IT Network Management Services
Automated News Services, Data Services, or Other Information Services
Other Information Technology Services, Not Elsewhere Classified

Electronic Commerce Services – ADP & Telecommunications Transmission Services:

Value Added Network Services (VANS)

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E-Mail Services
Internet Access Services
Navigation Service

Wireless Services - Excluding local and long distance voice, data, video, and dedicated transmission services which are NOT mobile.)

Paging Services
Cellular/PCS Voice Services

FSS believes that the "Limited Scope" section of the Federal Register is too narrow and that it is the intent of the Statute to include both IT products and services (e.g., firmware, software, supplies, support equipment, and services) for cooperative purchasing. FSS further believes that the use of the term Schedule 70 in the proposed rule to describe the IT schedule may further lend itself to confusion since there already exists an FSC group 70, which is limited to products.

In addition to the Schedule 70 products and services, there is also a Corporate Schedule, which houses Schedule 70 Special Item Numbers (SINs). Under the Corporate Schedule, contractors are only allowed to offer its products and services through a single solicitation (e.g., Schedule 70 or the Corporate Schedule, not both Schedules). By restricting access to IT products/services to Schedule 70, Corporate contractors are denied the ability to offer their products/services to State and local governments, which would prevent over 100 of the industry leaders from accessing State and local markets. This restriction could also result in a decrease in participation in the Corporate solicitation by contractors.

Below is a listing of Corporate Schedule SINs for IT products and services which should be authorized for use State and local governments:

- **C 5805**, Telephone and Telegraph Equipment
- **C 5810**, Communications Security Equipment and Components
- **C 5820C**, Radio and Television Communication Equipment, Except Airborne, Includes Telemetering Equipment; Monitors and Monitors/Receivers, Including Spare & Repair Parts and Accessories; Television Cameras, Color or Monochrome, Including Spare & Repair Parts and Accessories; Audio Equipment, Including Spare and Repair Parts & Accessories; Telecommunications Equipment, Including Spare and Repair Parts & Accessories
- **C 5821B**, Radio and Television Communication Equipment, Airborne, Includes Telemetering Equipment
- **C 5825**, Radio Navigation Equipment, Except Airborne, Includes Loran Equipment; Shoran Equipment; Direction Finding Equipment
- **C 5826**, Radio Navigation Equipment, Airborne, Includes Loran Equipment; Shoran Equipment; Direction Finding Equipment

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- **C 5830**, Intercommunication and Public Access Systems, Except Airborne, Includes Wired Audio Systems; Office Type Systems; Shipboard Systems; Tank Systems
- **C 5841**, Radar Equipment, Airborne, Note-Radar assemblies and subassemblies designed specifically for use with fire control equipment or guided missiles are excluded from this class and are included in the appropriate classes of Group 12 or Group 14.
- **C 5895B**, IT Communication Equipment
- **C 5995**, Cable, Cord, and Wire Assemblies: Communications Equipment, Includes only those types of cable, cord, and Wire Assemblies and Sets (and Wiring Harnesses) used on or with equipment and components covered by Groups 58 and 59.
- **C 6015**, Fiber Optic Cables
- **C 6020**, Fiber Optic Cable Assemblies and Harnesses
- **C 6145B**, Coaxial Cable for IT
- **C 7010**, UT Equipment System Configuration
- **C 7025**, IT Input/Output and Storage Devices
- **C 7030**, IT Software
- **C 7035**, IT Support Equipment
- **C 7042**, Mini and Micro Computer Control Devices
- **C 7050**, IT Components
- **C D301**, IT Facility Operation and Maintenance Services
- **C D302**, IT Systems Development Services
- **C D304**, IT Telecommunications and Transmission Services
- **C D306**, IT Systems Analysis Services
- **C D307**, Automated Information System Design and Integration Services
- **C D308**, Programming Services
- **C D310**, IT Backup and Security Services
- **C D311**, IT Data Conversion Services
- **C D313**, Computer Aided Design/Computer Aided Manufacturing (CAD/CAM)
- **C D316**, Telecommunications Network Management Services
- **C D317**, Automated News Services, Data Services, or Other Information Services
- **C D399**, Other ADP and Telecommunications Services (includes data storage on tapes, compact disks, etc.)
- **C J070**, Information Technology – Maintenance of Equipment, Repair Services and/or Repair/Spare Parts
- **C N070**, Information Technology Installation of IT Equipment (including firmware), software, supplies and support equipment
- **C U012**, IT Software, Equipment, and Telecommunications Training

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The FSS recommends that the language in the "Limited Scope" section be revised to broaden the scope to include all of the products and services offered through both the IT Schedule, and the IT Schedule SINs offered under the Corporate Schedule.

2. Federal Register notice, page 3221, column 1, Defined terms and conditions, states, "Under proposed GSAR clause 552.238-79, which would be incorporated into covered schedule contracts of participating contractors, a new contract would be formed when the schedule contractor accepted an order from a State or locality. . . . with certain exceptions provided in this rule, terms and conditions of the underlying schedule contract would be incorporated by reference into the new contract between the State or locality and the contractor. Buyers would not be permitted to place additional requirements on schedule contractors".

FSS believes that the prohibition against placing additional requirements on schedule contractors will make it extremely difficult for the states to use our contracts. We recommend that the rule allow, based upon mutual consent between the State or locality and the contractor, the addition of terms and conditions to the schedule order or BPA, so long as those terms and conditions are not in conflict with the underlying contract and schedule.

3. Federal Register notice, page 3221, column 1, Defined terms and conditions, states, "a new contract would be formed when the schedule contractor accepted an order from a State or locality". This section further states, "terms and conditions of the underlying schedule contract would be incorporated by reference into the new contract between the State and locality and the contractor".

This section is unclear as to whether the "new contract" is the actual task order issued against the schedule, or whether the "new contract" is literally a new contract between the State and local governments and the schedule contractor, incorporating the terms and conditions of the schedule contract incorporated into the State and local government's new contract.

FSS recommends that this section be modified to clearly articulate the intent of this section.

4. Federal Register notice, page 3221, last paragraph, column 1, states, GSA will "monitor the effect of cooperative purchasing on Federal purchasing, including any changes in access for Federal customers and the impact on GSA's ability to negotiate favorable pricing and terms and conditions".

How is it envisioned that FSS will be able to monitor and assess this data?

5. Federal Register notice, page 3222, column 3, Definitions, Schedule 70.

FSS recommends that this section be modified to include all FSC Groups under Schedule 70 for products and **services** (e.g., firmware, software, supplies, and support equipment).

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FSS further recommends that this section be revised to include the IT products and services that are available under the Corporate schedule.

6. Federal Register notice, page 3223, column 3, 552.232-77, Payment by Credit Card. The language of the clause is not consistent with the language of the current clause.

FSS recommends that the clause be revised to read:

552.232-77 PAYMENT BY CREDIT CARD (DATE) (ALTERNATE I—DATE)

(a) Definitions.

"*Credit card*" means any credit card used to pay for purchases, including the Governmentwide Commercial Purchase Card.

"*Governmentwide commercial purchase card*" means a uniquely numbered credit card issued by a contractor under GSA's Governmentwide Contract for Fleet, Travel, and purchase Card Services to named individual Government employees or entities to pay for official Government purchases.

"*Oral order*" means an order placed orally either in person or by telephone.

(b) The Contractor must accept the credit card for payments equal to or less than the micro-purchase threshold (see Federal Acquisition Regulation 2.101) for oral or written orders under this contract.

(c) The Contractor and the ordering agency may agree to use the credit card for dollar amounts over the micro-purchase threshold, and the Government encourages the Contractor to accept payment by the purchase card. The dollar value of a purchase card action must not exceed the ordering agency's established limit. If the Contractor will not accept payment by the purchase card for an order exceeding the micro-purchase threshold, the Contractor must so advise the ordering agency within 24 hours of receipt of the order.

(d) The Contractor shall not process a transaction for payment through the credit card clearinghouse until the purchased supplies have been shipped or services performed. Unless the cardholder requests correction or replacement of a defective or faulty item under other contract requirements, the Contractor must immediately credit a cardholder's account for items returned as defective or faulty.

(e) Payments made using the credit card are not eligible for any negotiated prompt payment discount. Payment made using an ordering activity debit card will receive the applicable prompt payment discount.

7. Federal Register notice, page 3224, column 2, 552.232-83, Contractor's billing responsibilities, paragraph (b).

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FSS recommends that this paragraph of the clause be deleted. The applicability of the Price Reduction clause has changed since this clause was initially drafted in 1995. The paragraph is no longer appropriate.

8. Federal Register notice, page 3224, 552.238-75, Price Reductions, paragraph (d)(3). The Federal Register proposes to add a new paragraph (d)(3), which reads, . . . (d) There shall be no price reduction for sales -- . . . (3) To eligible ordering activities under this contract; or . . .

A number of the Schedule 70 contracts have negotiated State or local governments as the Most Favored Customer (MFC). The addition of this paragraph (d)(3) creates problems with the MFC/Government relationship in those contracts and needs to be reviewed and addressed.

9. Federal Register notice, page 3225, Use of Federal Supply Schedule Contracts by Certain Entities – Cooperative Purchasing, subparagraph (a)(3), states, "Ordering activities may not modify, delete or add to the terms and conditions of the Schedule contract".

FSS recommends that this language be revised to allow State and local governments to add to the contract requirements, as long as, the additions do not contradict the original contract terms and conditions.

10. The Federal Register does not address the ordering procedures that must be used by State/local entities when purchasing under schedules.

FSS recommends the preamble to the proposed rule include language that the proposed rule be revised to state, specifically, that State and local entities may use the Federal Supply Schedules' established ordering procedures when placing orders under the schedules program to ensure the best value while utilizing the Schedules program. In the event that State and local entities are unable to use the Schedules ordering procedures, the State or local's established ordering procedures may be used.

11. Schedule 70, Information Technology, currently uses a Scope of Contract clause, which, among other things, identifies authorized users of that Schedule. The proposed rule published Clause 552.238-82, Eligible Ordering Activities, which also identifies the activities authorized as users of Schedule 70.

FSS recommends that the language of the two clauses be merged into a single clause to eliminate duplication and published in the Federal Register. The proposed clause language would read as follows:

C.4 SCOPE OF CONTRACT

(a) This solicitation is issued to establish contracts which may be used on a nonmandatory basis by the agencies and activities named below, as a source of supply for

G505-14

the supplies or services described herein, for delivery within the 48 contiguous States and Washington, D.C. For Special Item Number 132-53 Wireless Services ONLY, limited geographic coverage (consistent with the Offeror's commercial practice) may be proposed. Resultant contracts may also be used for delivery to Alaska, Hawaii, the Commonwealth of Puerto Rico, and overseas locations.

(1) Executive agencies (as defined in 48 CFR 2.1) including nonappropriated fund activities as prescribed in 41 CFR 101—26.000);

(2) Government contractors authorized in writing by a Federal agency pursuant to FAR 51.1;

(3) Mixed ownership Government corporations (as defined in the Government Corporation Control Act);

(4) Federal Agencies, including establishments in the legislative or judicial branch of government (except the Senate, the House of Representatives and the Architect of the Capitol and any activities under the direction of the Architect of the Capitol).

(5) The District of Columbia; and

(6) Tribal governments when authorized under 25 USC 450j(k); and

(7) Qualified Nonprofit Agencies as authorized under 40 USC 502(b); and

(8) Organizations, other than those identified in paragraph (b) below, authorized by GSA pursuant to statute or regulation to use GSA as a source of supply.

(b) The following activities may place orders against information technology schedule contracts on an optional basis; PROVIDED, the contractor accepts order(s) from such activities:

State and local government which includes any state, local, regional or tribal government or any instrumentality thereof (including any local educational agency or institution of higher learning).

(c) Articles or services may be ordered from time to time in such quantities as may be needed to fill any requirement, subject to the Order Limitations thresholds which will be specified in resultant contracts. Overseas activities may place orders directly with schedule contractors for delivery to CONUS port or consolidation point.

(d) For orders received from activities within the Executive Branch of the Government, each Contractor is obligated to deliver all articles or services contracted for that may be ordered during the contract term, except as otherwise provided herein.

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(e) The Contractor is not obligated to accept orders received from activities outside the Executive Branch; however, the Contractor is encouraged to accept such orders. If the Contractor is unwilling to accept such an order, the Contractor shall return it by mailing it or delivering it to the ordering office within 5 workdays from receipt. Failure to return an order shall constitute acceptance whereupon all provisions of the contract shall apply.

(f) The Government is obligated to purchase under each resultant contract a guaranteed minimum of $2,500 (two thousand, five hundred dollars) during the contract term.

2002-G505-15

"Annemarie Feely"
<afeely26@hotmail.com>

03/25/2003 02:45 PM

To: GSARcase.2002-G505@gsa.gov
cc:
Subject: GSA Supply Schedule PL 107 egov

As a technology industry professional for over 20 years, I believe that you are in the right track to harnessing the tremendous purchasing power of the federal government on behalf of the states and federal contractors. This will benefit small municipalities who may not have expertise or clout to negotiate with technology and solution providers and therefore they may receive less quality and service for their public technology purchases. The ability to have federal contracts public via internet and allow all technology providers to compete openly and in writing will save time and effort on both suppliers and public sector buyers. It will also reduce opportunity for corruption if all contracts require more than one source, preferably two or three that meet the spec, provided that there is a ongoing formal process for monitoring the vendors delivery/performance which is also made public (at least annually) via the internet. It just makes sense.

Respectfully,

Annemarie Feely
Menlo park California
afeely26@hotmail.com

The new MSN 8: advanced junk mail protection and 2 months FREE*
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2002-G505-16

Norene
<norenem@intl-baler.com>

03/25/2003 09:39 AM

To: GSARcase.2002-G505@gsa.gov
cc:
Subject: Purchasing Baler from our Company

We are a manufacturing company in Jacksonville, Florida. We have been in business for 57 years. We are a small company and would like to bid on government jobs. We manufacture balers for recycling - Please e mail or mail to us how we can be on your mailing list. We would like to send you a brochure and price list. We have balers for solid waste, recyling and scrap metal and a product line of waste management equipment.

David B. Wilhelmy, VP Sales & Marketing
International Baler Corporation
5400 Rio Grande Avenue
Jacksonville, FL 32254
E-Mail: ibc@intl-baler.com

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DEPARTMENT OF INFORMATION RESOURCES

P.O. Box 13564 ♦ Austin, TX 78711-3564 ♦ www.dir.state.tx.us
Tel: (512) 475-4700 ♦ Fax: (512) 475-4759

CAROLYN PURCELL
Chief Information Officer
State of Texas

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March 13, 2003

General Services Administration
Regulatory Secretariat (MVA)
Attn: Ms. Laurie Duarte
1800 F Street, N.W., Room 4035
Washington, D.C. 20405

RE: Comments on GSA Case 2002-G505 by State of Texas, Department of Information Resources

Dear Ms. Duarte:

The Department of Information Resources for the State of Texas (DIR) is authorized to procure on behalf of Texas state agencies and local governments, indefinite quantity contracts for "information resources technologies," which includes hardware, software, services, supplies, personnel, facility resources, maintenance and training related to data processing and telecommunications, Section 2054.003 (7), Texas Government Code. Given this mandate from the legislature, DIR performs a similar function to the General Services Administration in its Schedule 70 contracting activities.

DIR has reviewed proposed GSA case number 2002-G505. As proposed, language added in Section 552.238-79 (a) (3) shall prevent Texas state agencies from issuing orders under the Schedule 70 contracts.

Section 552.238-79 (a) (3) states, in pertinent part: "As a condition of using this contract, eligible ordering activities agree to abide by all terms and conditions of the Schedule contract, except those deleted clauses or portions of clauses mentioned in paragraph (a) (1) of this clause. Ordering activities may not modify, delete or add to the terms and conditions of the Schedule contract. To the extent that orders placed by such ordering activities may include additional terms and conditions not found in the Schedule Contract, those terms and conditions are null, void, and of no effect."

The legislature of the state of Texas has enacted many statutes that govern how state agencies shall expend public funds. Those statutory requirements prohibit the expenditure of state funds unless a state agency complies with the statute, uses certain statutory language in a contract, or incorporates a specific citation into a contract. There are dozens of examples of provisions of Texas law that impact how a state contract must read. For example, vendors must certify to the State that

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they have not violated federal and state antitrust laws (Section 2155.005, Texas Government Code), and that they are not ineligible to receive a state contract (Section 2155.004(c), Texas Government Code). Every state contract must incorporate the state's alternative dispute resolution process, found at Chapter 2260, Texas Government Code. There are more instances in Texas law, but the point is that Texas state agencies must have the discretion to modify the Schedule 70 contracts in order to use them.

Further, DIR suggests all states and many local governments also have enacted procurement and contracting policies that attempt to protect the taxpayers' funds in various ways. To the extent these initiatives are mandatory like the examples from Texas, then other states and local communities would need to have the opportunity to change the Schedule 70 terms and conditions in order to utilize these federal contracts.

Flexibility for potential customers like state and local governments would not necessarily disadvantage the federal vendors under the Schedule 70 contracts. Although the vast variety of state and local government procurement related requirements could be a significant business risk for a federal vendor, federal vendors may pick and choose which orders are acceptable, according to the statute and the GSA proposed rules.

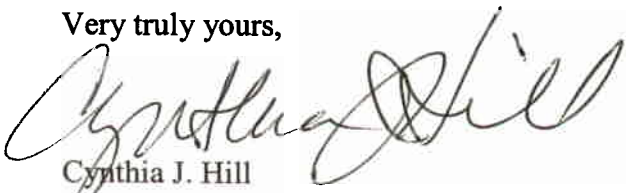
Section 211 of Title II of the E-Government Act of 2002 mandates the GSA Administrator to "provide for the use" of the Schedule 70 contracts by state and local governments. Nothing in the text of the law requires that the terms and conditions of a purchase by a state or local government be exclusively based on terms and conditions of Schedule 70 contracts. Each state and local government has its own policies related to expenditure of its funds – prohibiting any changes to the Schedule 70 contracts will thwart the participation of state and local government, instead of enhancing it. GSA seems to acknowledge that the Schedule 70 contracts require some change – at least for prompt payment issues. See Section 538.232-81.

Congress left the decision of contracting under the schedule 70 contracts to the actual ordering entity and vendor. GSA should follow this direction in its rules.

2002-G505-17

I hope this information is useful to you.

Very truly yours,



Cynthia J. Hill
Attorney
DIR

CH:jl

xc: Carolyn Purcell, Chief Information Officer, DIR
Renée Mauzy, General Counsel, DIR

G505-18

March 26, 2003

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

RE: GSAR Case No. 2002-G505

The National Association of State Chief Information Officers (NASCIO) is pleased to submit this response to the General Services Administration's proposed rules for the Acquisition of Information Technology by State and Local Governments Through Federal Supply Schedules published in the January 23, 2003, Federal Register.

NASCIO generally views the ability to utilize GSA supply schedules as favorable since it will provide states with an additional option to procure information technology service and equipment. The potential for lower pricing, less administrative burden and shortened procurement lead time is certainly welcome, particularly in light of the current fiscal conditions in many states.

In order to take advantage of this new capability, however, states must overcome a number of potential legal and administrative hurdles. Many states will have to change their procurement laws and policies to use the schedules, while others may opt not to participate simply because they can negotiate pricing that is competitive with the GSA schedule.

NASCIO offers the following comments and recommendations for GSA's consideration before finalizing its policies on implementing Section 211 of the E-Government Act of 2002:

Contract Terms and Conditions
Under the proposed rules, a new contract would be formed when the schedule contractor accepts an order from a state or locality. However, terms and conditions of the underlying schedule contract would be incorporated by reference into the new contract and buyers would not be permitted to place additional requirements on schedule contractors. This is a potential "deal breaker" for many jurisdictions that have laws requiring certain contract clauses (e.g., non-discrimination or vendor preferences).

Recommendation
NASCIO recommends that states wishing to buy directly off of federal schedules have the ability to modify contract terms and conditions to meet their statutory requirements.

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Ph. (859) 231-1971 • FAX (859) 231-1928 • E-mail: nascio@amrinc.net • Website: http://www.nascio.org

Pricing
The prices of supplies and services available on schedule contracts include a 1% administrative fee to cover the costs incurred by GSA to operate the schedules program.

Recommendation
NASCIO advocates that the GSA administrative fee should not apply to state government use. There should be little or no additional workload required of GSA to enable this cooperative purchasing capability, and this contracting vehicle should not cost states more than what they could achieve by "piggybacking" on the federal contract (i.e., adopt it and make it a state contract).

Voluntary Use
NASCIO recognizes that participation by states and vendors is strictly voluntary and that schedule contractors have a 5-day period to decline or accept the order. However, the proposed rules also give vendors the right to decline orders on a case-by-case basis even after an existing contract has been modified.

Recommendation
NASCIO recommends that once a contract is opened for state use with the concurrence of the vendor, it should remain open for the entire contract engagement. The current rules contemplate that each use (order) would be subject to the vendor's approval. NASCIO is concerned that this gives the vendor community the opportunity to "cherry pick" the business they are interested in and does not give states a reliable acquisition methodology.

Conclusion
NASCIO appreciates Congress' efforts to enhance intergovernmental cooperation and make government more efficient by reducing duplication of effort and utilizing volume purchasing for the acquisition of IT products and services. The availability of alternative procurement options for state and local governments is certainly a positive step. More work needs to be done, however, as state laws and various administrative complications will likely prevent states from participating initially.

NASCIO also wishes to thank the GSA for soliciting comments on this important issue. We look forward to the opportunity to work with GSA personnel to develop solutions that will allow greater participation by states.

Sincerely,

Gerry Wethington

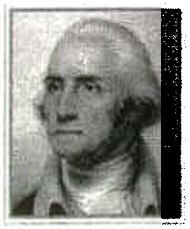
Gerry Wethington
NASCIO President

Conclusion

Professor Christopher Yukins

cyukins@law.gwu.edu

Tel. 202-992-9994



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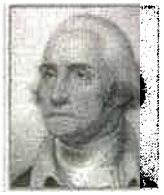
Recommendations

- <u>If narrower approach is to prevail</u>: Clarify that proposed rule requires dealers' reporting, and across-the-board discounts, only for discounted sales "under this contract," *i.e.*, **only for sales under the GSA schedules.** Clarify how this meshes with the Price Reduction clause

- <u>If broader approach is taken</u>: Before creating a system that discourages discounting in the commercial market, GSA should undertake a careful review of the proposed rules' likely impacts on commercial pricing – and of any antitrust/legal issues.



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Problems with Interpretations

- **Narrow:** If the provision means that only *schedule* sales need to be reported and only *schedule* sales will cause price reductions, why is there a reference to triggering a discount under the Price Reduction clause – which is normally triggered only by discounted sales *outside the schedules*?

- **Broad:** If the clause means that *any* dealer commercial discount could trigger the Price Reduction clause, then this raises anti-competitive concerns that were not addressed by the proposed rule.

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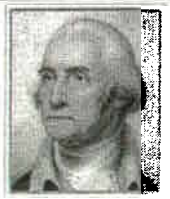
What does the new language mean?

- **Narrow reading**: only sales "under this contract" – i.e., only sales to government customers – need to be reported by dealers, and will trigger an across-the-board price reduction for a manufacturer. Commercial sales are irrelevant.

- **Broader reading**: Causes concern: if *all* dealer sales and prices must be reported to the manufacturer (GSA contractor), and *any dealer commercial discount* (to basis-of-award customer) may force the manufacturer/contractor to give across-the-board discounts on all schedule sales, proposed rule may sharply discourage dealer discounting (and may encourage vertical price constraints by manufacturers)



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6565-19

Key Language from Proposed Rule: New GSAR 552.232-83(b)

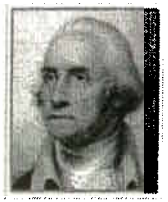
b) An agreement between a Contractor and its dealers pursuant to this procedure will not establish privity of contract between dealers and the Government. Price reductions made by a participating dealer on sales under this contract will result in an overall price reduction being assessed against the Contractor as provided for in the Price Reduction clause.

New Rule: Insert Provision in IT Schedule Contracts

- The provision at issue (GSAR 552.232-83) would, per the proposed rule, be inserted in all IT schedule contracts:

532.206 Solicitation provisions and contract clauses.

(a) * * * (b) The contracting officer shall insert the clause at 552.232-81, Payments by Non-Federal Ordering Activities, in solicitations and schedule contracts for Schedule 70. (c) The contracting officer shall insert the provision at 552.232-82, Contractor's Remittance (Payment) Address, in solicitations and schedule contracts for Schedule 70. (d) <u>The contracting officer shall insert the clause at 552.232-83, Contractor's Billing Responsibilities, in solicitations and schedule contracts for Schedule 70.</u>



The new provision appears to replace this one, from the current IT schedule contract:

C.16 CONTRACTOR'S BILLING RESPONSIBILITIES (G-FSS-913)(MAY 2000)

The Contractor is required to perform all billings made pursuant to this contract. However, if the Contractor has dealers which participate on the contract, and the billing/payment process by the Contractor for sales made by the dealer is a significant administrative burden, the following alternative procedures may be used:

Where dealers are allowed by the Contractor to bill Government agencies and accept payment in the Contractor's name, the Contractor agrees to obtain from all dealers participating in the performance of the contract a written agreement which will require dealers to:

(1) Comply with the same terms and conditions regarding prices as the Contractor, for sales made under the contract;

(2) Maintain a system of reporting sales under the contract to the manufacturer which includes:

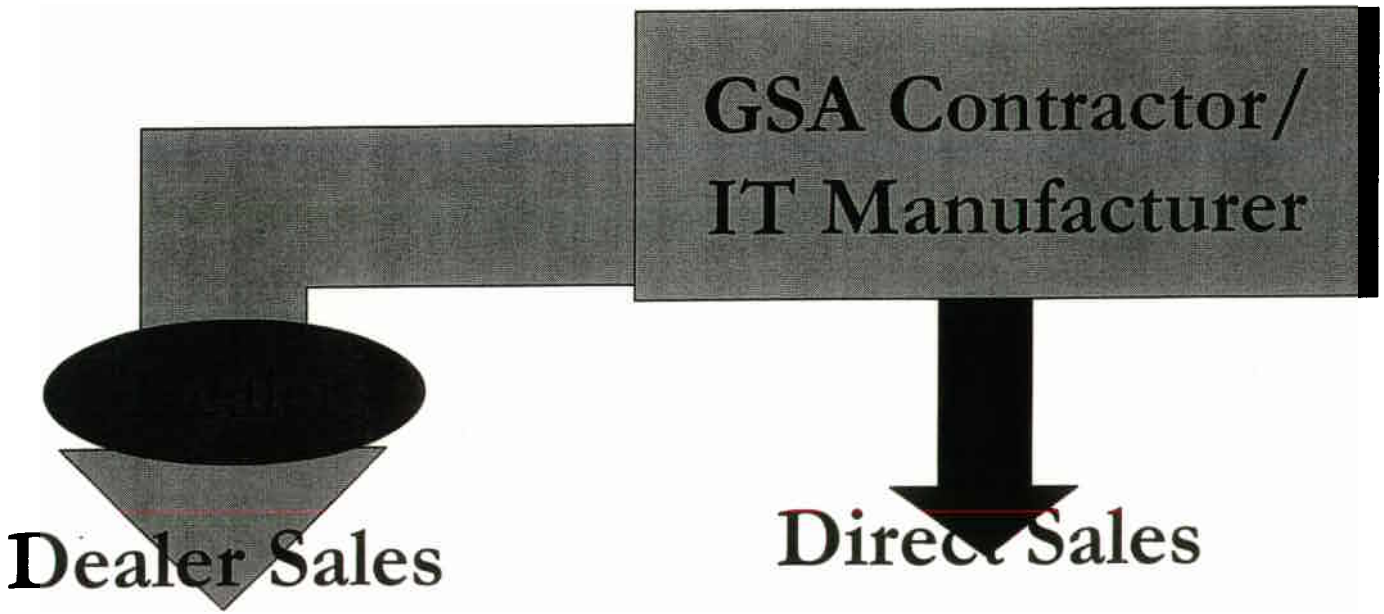
(a) the date of sale,
(b) the agency to which the sale was made,
(c) the product/model sold,
(d) the quantity of each product/model sold,
(e) the price at which it was sold, including discounts, and
(f) all other significant sales data;

(3) Be subject to audit by the Government, with respect to sales made under the contract; and

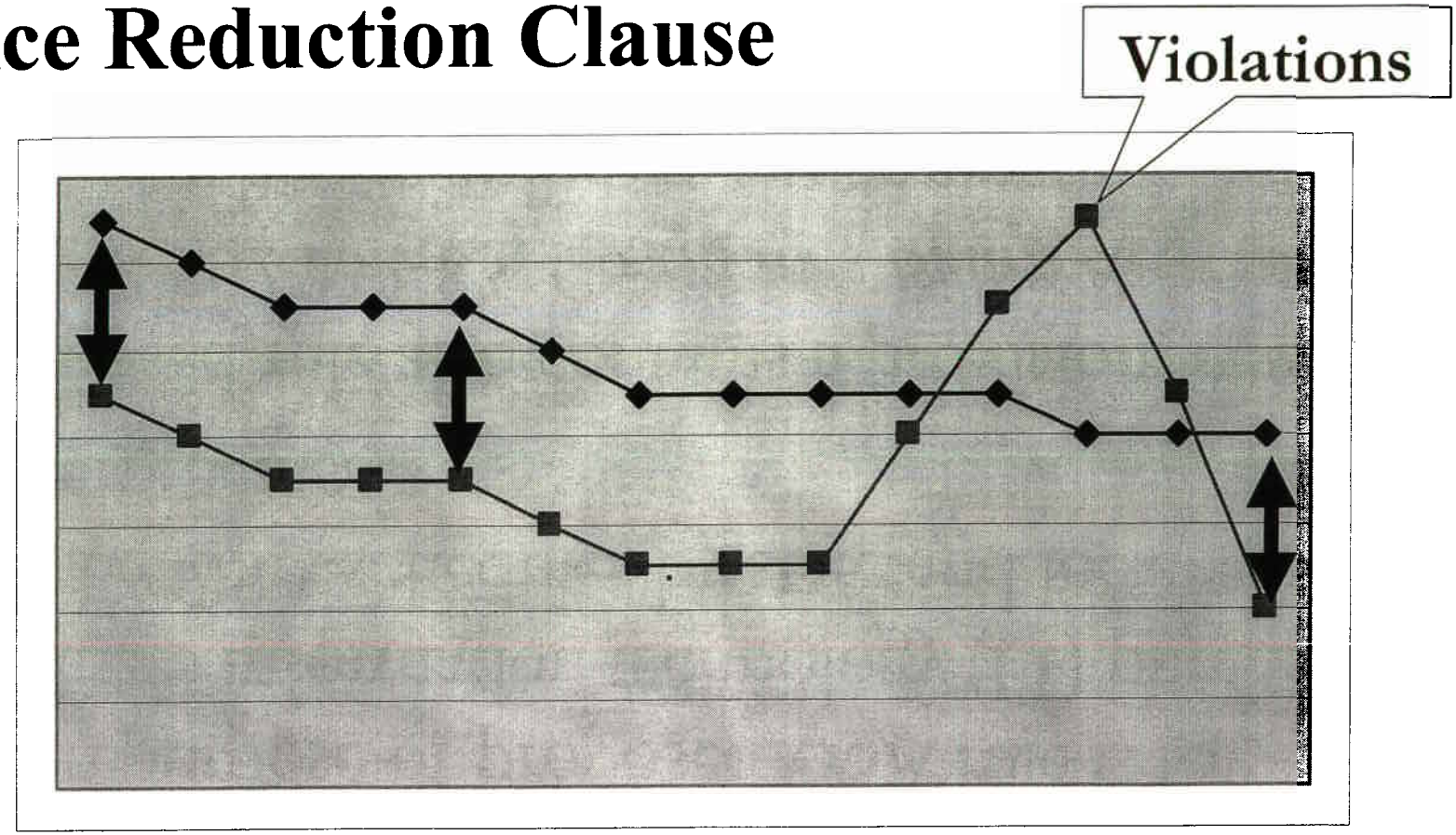
(4) Place orders and accept payment in the name of the Contractor, in care of the dealer.

An agreement between a Contractor and its dealers pursuant to this procedure will not establish privity of contract between dealers and the Government.

Structure of Sales Channels



Understanding the GSA Schedules' Price Reduction Clause



Price to "Basis of Award" (Commercial) Customer

Price to Government Customers Under GSA Schedules

Summary of Comment

- Main purpose of proposed GSA rule is to facilitate information technology (IT) purchases via the GSA schedules by state and local governments
- Proposed rule also contains a provision, new GSAR 552.232-83, *Contractor's Billing Responsibility*, that may have significant anticompetitive effects in the commercial marketplace, by discouraging commercial discounting by dealers

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WASHINGTON DC

G505-19

Introduction

- These slides are being submitted for consideration at the public meeting to be held at the General Services Administration, 1800 F Street, NW, Washington, D.C., on Feb. 4, 2003, from 10 am – 12 noon.
- These comments are being submitted by Professor Christopher Yukins in his personal capacity; they do not necessarily reflect the position of The George Washington University or any other person
- Professor Yukins requests an opportunity to present these comments at the public meeting; because of a previously scheduled colloquium at GWU Law School with OFPP Administrator Styles and many others, he will not be able to attend the GSA public meeting until after 11:15 a.m., and so he requests that his comments, if accepted, be placed late in the agenda.

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WASHINGTON DC

G505-19

GSAR Case No. 2002-G505: Acquisition of IT by State & Local Governments: Possible Pricing Impacts

Comments of

Professor Christopher R. Yukins

Associate Professor of Government Contracts Law

The George Washington University School of Law

February 4, 2003

THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

WASHINGTON DC

G505-20

GSA Federal Supply Schedule: Cooperative Purchasing in IT

comment of

John M. Palatiello

on behalf of

COFPAES & MAPPS

G505-20

G 105-20

Interested Parties

- Council on Federal Procurement of Architectural & Engineering Services (COFPAES) -- a coalition of ACSM, AIA, ASCE & NSPE -- leading A/E professional societies
- Management Association for Private Photogrammetric Surveyors (MAPPS) -- a trade association of 170+ mapping & GIS firms

G 105-20

C505-20

Legislation & Proposed Rule

- "automated data processing equipment (including firmware), software, supplies, support equipment, and services"

C505-20

G505-20

Exception

- An exception is needed to clarify that A/E services, including mapping, remote sensing and GIS may ***NOT*** be purchased under the Federal Supply Schedule

G505-20

G505-20

Current Law & Regulation

- Brooks Act Definition (40 U.S.C. 541 (3))

G505-20

G505-20

Current Law & Regulation

- Brooks Act Definition (40 U.S.C. 541 (3))
- The term "architectural and engineering services" means--

G505-20

G 505-20

Current Law & Regulation

- Brooks Act Definition (40 U.S.C. 541 (3))
- The term "architectural and engineering services" means--
- (A) professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this paragraph;

G 505-20

G585-20

Current Law & Regulation

- Brooks Act Definition (40 U.S.C. 541 (3))
- The term "architectural and engineering services" means--
- (B) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and

G585-20

G505-20

Current Law & Regulation

- Brooks Act Definition (40 U.S.C. 541 (3))
- The term "architectural and engineering services" means--
- (C) such other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, *surveying and mapping*, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services. (emphasis added)

G505-20

G 505-20

Current Law & Regulation

- (FAR) 48 CFR 36.601-4(a)(4)
- Contracting officers should consider the following services to be "architect-engineer services" subject to the procedures of this subpart:

G 505-20

G505-20

Current Law & Regulation

- (FAR) 48 CFR 36.601-4(a)(4)
- Contracting officers should consider the following services to be "architect-engineer services" subject to the procedures of this subpart:

- Professional surveying and mapping services of an architectural or engineering nature.

G505-20

G 505-20

Current Law & Regulation

- (FAR) 48 CFR 36.601-4(a)(4)
- Contracting officers should consider the following services to be "architect-engineer services" subject to the procedures of this subpart:

- Surveying is considered to be an architectural and engineering service and shall be procured pursuant to 36.601 from registered surveyors or architects or engineers.

G 505-20

GSDC-20

Current Law & Regulation

- (FAR) 48 CFR 36.601-4(a)(4)
- Contracting officers should consider the following services to be "architect-engineer services" subject to the procedures of this subpart:
- Mapping associated with the ***research***, planning, development, design, construction or alteration of real property is considered to be an architectural or engineering service and is to be procured pursuant to 36.601.
- *Note: what Federal agency mapping need is NOT associated with research of real property? Researching real property is why one seeks mapping data.*

GSDC-20

GSBC-20

State Law

- More than 40 States have "mini-Brooks Acts" providing for QBS procurement of A/E/S/M services

GSBC-20

G506-20

State Law

- More than 40 States have "mini-Brooks Acts" providing for QBS procurement of A/E/S/M services
- Many states define mapping and GIS as the practice of surveying

G506-20

G505-20

State Law

- More than 40 States have "mini-Brooks Acts" providing for QBS procurement of A/E/S/M services
- Many states define mapping and GIS as the practice of surveying

G505-20

G505-20

QBS for Mapping in the States

- QBS Laws
- Licensing Laws
- To determine QBS application, analyze state procurement law and licensing law

G505-20

GBB-20

Alabama

- **QBS Law**

  Professional services of architects, landscape architects, engineers, **land surveyors**, geosciences, and other similar professionals shall be procured in accordance with competitive, qualifications-based selection policies and procedures.

- **Survey Licensing Law**

  Practice of land surveying is "Professional services, including, but not limited to,…**mapping**…and the utilization… of these acts…into an orderly survey map…"

GBB-20

GBB 20

Alaska

- **QBS Law**

  A procurement officer shall negotiate a contract for an agency with the most qualified and suitable firm or person of demonstrated competence for architectural, engineering, or **land surveying** services.

- **Survey Licensing Law**

  "The practice of land surveying means…any service or work…including **topography**…and for the preparation and perpetuation of **maps**…for location of… boundaries"

SB05-20

Arizona

- <u>QBS Law</u>

  Architect, engineer, assayer, geologist, landscape architect and **land surveying** services shall be procured on the basis of demonstrated competence and qualifications for the type of services required and at fair and reasonable prices.

- <u>Survey Licensing Law</u>

  "Land surveying practice" means…(d) Measurements by angles, distances and **elevations**…for the purposes of determining their size, shape, **topography**… and the preparation of…**maps**.

G 506-20

Arkansas

- **QBS Law**

  Contracts for professional services including legal, architectural, engineering, **land surveying**, and such other consulting services shall be negotiated on the basis of demonstrated competence and qualifications at fair and reasonable prices and the use of competitive bidding is prohibited.

- **Survey Licensing Law**

  Land surveying means any service…and the preparation of official plats or **maps** of land.

G 506-20

California

- **QBS Law**

  Selection of firms based on qualifications applies to architectural, landscape architectural, engineering, environmental, and **land surveying** services" includes those professional services of an architectural, landscape architectural, engineering, environmental, or land surveying nature.

- **Survey Licensing Law**

  Includes licensing of "**photogrammetric surveyors**", but no means of issuing licenses exists.

Colorado

- **QBS Law**

  "Professional services" means those services within the scope of the following: the practice of architecture, engineering, or **land surveying**, as defined by law. Contracts shall be evaluated by qualifications and performance.

- **Survey Licensing Law**

  "Professional land surveying includes… Preparation of the boundary control portions of **geographic information systems**…"

B505-2d

Connecticut

- **QBS Law**

  The commissioner shall negotiate a contract for such services with the most qualified firm from among the list of firms submitted by the panel at compensation determined in writing to be fair and reasonable to the state.

- **Survey Licensing Law**

  "Land Surveyor means a person who engages in the practice...including surveying and measuring the area of any portion of the earth's face…for the establishment, reestablishment…of land boundaries…"

G505-20

Delaware

- **QBS Law**

  Agencies shall use the qualifications selection process described in paragraphs (1)-(5) for those professional services within the scope of the practice of architecture, professional engineering.... **professional land surveying**, construction management, landscape architecture.

- **Survey Licensing Law**

  The practice of land surveying includes "the horizontal and vertical control for aerial surveys and **photogrammetric** compilation."

G505-20

Florida

- **QBS Law**

  "Professional services" means those services within the scope of the practice of architecture, professional engineering, landscape architecture, or **registered surveying and mapping.** Selection shall be made from those firms deemed to be the most highly qualified.

- **Survey Licensing Law**

  Licensing program in place for the "practice of **surveying and mapping**."

G505-20

Georgia

- **QBS Law**

  "Professional services" means those services in the practice of architecture, professional engineering, **land surveying**, or landscape architecture. In "contract negotiations" selection, a state representative shall negotiate a contract with the highest qualified person at compensation determined to be fair and reasonable.

- **Survey Licensing Law**

  "Land surveying means any service, work, or practice…as applied to:(F) Utilization of measurement device or systems, such as **aerial photogrammetry**…**land information systems**…for evaluation or location of property, easement, or right of way boundaries; (G) The preparation and perpetuation of **maps**…representing these services"

G505-20

Hawaii

- **QBS Law**

  Contracts for professional services shall be awarded on the basis of demonstrated competence and qualification for the type of services required, and at fair and reasonable prices.

- **Survey Licensing Law**

  "Surveyor" or "land surveyor" means a person who holds oneself out as able to make, or who does make cadastral surveys of areas for their correct determination and description, either for conveyancing or for the establishment or reestablishment of land boundaries or the plotting of lands and subdivisions thereof.

G505-20

Illinois

- <u>QBS Law</u>

  The policy of State agencies is to publicly announce all requirements for architectural, engineering, and **land surveying** services, to procure these services on the basis of demonstrated competence and qualifications, and to negotiate contracts at fair and reasonable prices.

- <u>Survey Licensing Law</u>

  "Practice of land surveying may include: "(e) Labeling, designating, naming… property lines or land title lines…on any photograph…or **photogrammetric map**... for the purpose of recording"

G 505-20

Indiana

- **QBS Law**

  "Professional services" means services within the scope of architecture, professional engineering, or **land surveying**. A public agency may make all contracts for professional services on the basis of competence and qualifications, and negotiate compensation determined to be reasonable.

- **Survey Licensing Law**

  "Practice of land surveying" includes:

  "The determination of elevations and preparation of **topographic drawings** for tracts of land.

Feb-20

Iowa

- **QBS Law**
  No Law Exists

- **Survey Licensing Law**
  "The practice of land surveying includes providing professional services such as… **mapping**…relative to the location of property lines or boundaries…and the utilization, development, and interpretation… into [a] **map**."

Kansas

- **QBS Law**

  When a project requiring engineering or **land surveying** services is proposed for a state agency, the agency head for such state agency shall evaluate current statements of qualifications and performance data on file with the agency head...

- **Survey Licensing Law**

  "Practice of land surveying includes: (3) The preparation of the original descriptions of real property for the conveyance of or recording thereof and the preparation of **maps**."

G 606-30

Kentucky

- <u>QBS Law</u>

  Law applies to architectural and engineering services only.

- <u>Survey Licensing Law</u>

  "Land surveying shall include…(b) Establishment of **photogrammetric** and geodetic control that is published and used for the determination,…of property boundaries."

G505-20

Louisiana

- **QBS Law**

  Law applies to architectural and engineering services only.

- **Survey Licensing Law**

  "Practice of land surveying shall include the measuring of areas…for the establishment, reestablishment…of land boundaries…and **mapping** and **topographical** work."

G505-20

Maine

- **QBS Law**

  Law applies to architectural and engineering services only.

- **Survey Licensing Law**

  "Practice of land surveying means any service or work…for the purposes of determining areas and volumes…and for the platting and layout of lands…, including **topography**, and for the preparation and perpetuation of **maps**."

G505-20

Maryland

- **QBS Law**

  Law applies to architectural and engineering services only.

- **Survey Licensing Law**

  "Practice of land surveying means any service…v) utilizing measurement devices or systems, such as aerial **photogrammetry**, global positioning systems, geographical information systems…for location…of boundaries."

Massachusetts

- <u>QBS Law</u>

  Law applies to architectural and engineering “designer” services only.

- <u>Survey Licensing Law</u>

  "Practice of land surveying, any service or work,… involves…the act of measuring…for the monumenting,…and for the preparation and perpetuation **maps**.”

G505-20

Michigan

- **QBS Law**

  No Law Exists

- **Survey Licensing Law**

  "Practice of professional surveying means providing professional services such as…**mapping**…and interpretations into an orderly survey **map**…"

Minnesota

- <u>QBS Law</u>

  Law applies to Architectural and Engineering Services only.

- <u>Survey Licensing Law</u>

  "Land surveying means… measuring and locating lines, angles, elevations and natural or artificial features… planning, designing and platting of land an subdivisions including the **topography**… preparing and perpetuating **maps**."

G 505-20

Missouri

- **QBS Law**

  Contracts for architectural, engineering and **land surveying** services shall be negotiated on the basis of demonstrated competence and qualifications for the type of services required and at fair and reasonable prices.

- **Survey Licensing Law**

  "Any person practices as a 'land surveyor' who renders…any service comprising…the preparation of **maps** showing the shape and area of tracts of land…"

G506-20

Montana

- **QBS Law**

  State policy requires agencies to announce publicly requirements for architectural, engineering, and **land surveying** services and negotiate contracts for such professional services on the basis of demonstrated competence and qualifications for the type of professional services required and at fair and reasonable prices.

- **Survey Licensing Law**

  "Practice of land surveying means any service or work…measurement and allocation of lines, angles, elevations…and preparation and perpetuating of **maps**..."

Nebraska

- **QBS Law**

  Professional services shall mean those services in the practice of architecture, professional engineering, landscape architecture, or registered **land surveying**. The agency shall make a finding that the firm to be employed is fully qualified to render the required service.

- **Survey Licensing Law**

  "Land surveying shall mean the establishment…or corners and boundaries …to furnish a **topographic** plat of a lot…for the purpose of establishing the facts of size, area, shape, **topography**…of...improved or unimproved property.

Nevada

- <u>QBS Law</u>

  Selection of a professional engineer, **professional land surveyor** or registered architect to perform services... must be made on the basis of the competence and qualifications…and not on the basis of competitive fees.

- <u>Survey Licensing Law</u>

  Determines the configuration or contour of the earth's surface or the position of fixed objects thereon by measuring lines and angles and applying the principles of trigonometry… **topographic surveying**…Making a survey exclusively for geological or landscaping purposes or **photogrammetry**.

G505-20

New Hampshire

- **QBS Law**

  Agencies shall negotiate contracts for engineering, architectural, and **surveying** services on the basis of demonstrated competence and qualifications for the type of professional services required, and at a fair and reasonable prices.

- **Survey Licensing Law**

  "Practice of land surveying means any service or work…which involves the application of special knowledge…measuring and locating lines, angles, elevations …for determining areas and volumes, including **topography** and for the preparation and perpetuation of **maps**…that represent these surveys..."

G505-20

New Jersey

- <u>QBS Law</u>

  State contracts for architectural, engineering and **land surveying** services shall be publicly announced prior to being awarded, and contracts shall be negotiated on the basis of demonstrated competence and qualifications at fair and reasonable compensation.

- <u>Survey Licensing Law</u>

  "Practice of land surveying… shall mean…measuring and locating…elevations, natural and man-made **topographical** features in the air, on the surface of the earth...the preparation and perpetuation of **maps**...the establishment and maintenance of **base mapping** …for land information systems"

SB 505-20

New Mexico

- **QBS Law**

  A state agency or local public body, when procuring the services of architects, landscape architects, engineers or **surveyors** for state public works projects or local public works projects, shall comply with a competitive sealed qualifications-based proposals. For each proposed state or local public works design and build project, a *two-phase procedure* for awarding design and build contracts shall be adopted.

- **Survey Licensing Law**

  "Practice of land surveying means any service or work…which involves the application of principles for: (3) the application of **photogrammetric** methods used to derive **topographic** and other data;…"

New York

- **QBS Law**

  It is the policy of New York state to negotiate contracts for architectural and/or engineering services and/or **surveying** services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable fees.

- **Survey Licensing Law**

  "Practice of land surveying is… measuring and plotting of dimensions and areas of any portion of the earth…the contour of the earth…incidental to subdivisions for the correct determination, description, conveying and recording thereof…"

North Carolina

- **QBS Law**

  It is the public policy of this State to announce all requirements for architectural, engineering, and **surveying services**, to select firms qualified to provide such services on the basis of demonstrated competence and qualification, and thereafter to negotiate a contract for at a fair and reasonable fee with the best qualified firm.

- **Survey Licensing Law**

  "Practice of land surveying-providing services such as **mapping**...determining the configuration or contour of the earth's surface or the position of fixed objects on the earth's surface by...**photogrammetry**. Creating, preparing, modifying data...land information systems and geographic information systems..."

G 505-20

North Dakota

QBS Law

No Law Exists

- **Survey Licensing Law**
  "Land surveying means any service comprising… incidental **topography**; the preparation of **maps**…of land and their subdivision into smaller tracts and the preparation of official plats or **maps**"

G 505-20

G505-20

Ohio

- **QBS Law**

  Professional design services means services within the practice of an architect or landscape architect or a professional engineer or **surveyor** registered. Firms shall be selected for being most qualified and contracts negotiated at a compensation determined to be fair and reasonable.

- **Survey Licensing Law**

  "Practice of land surveying means any professional service… including measuring the area of any portion of the earth's surface…for the establishment or re-establishment of land boundaries…"

Oklahoma

- **QBS Law**

  In the selection of a consultant to provide architectural, engineering, or **land surveying services**, all political subdivisions shall select a consultant based upon the professional qualifications and technical experience of the consultant.

- **Survey Licensing Law**

  Any service or work…which involves…the design, establishment and administration of land and geographic information systems …for monumenting of property and land boundaries and for the platting and layout of land and subdivisions thereof, including the **topography**; and for the preparation and perpetuation of **maps**…that represent these surveys"

G505-20

Oregon

- **QBS Law**

  A contract entered into by a public agency for the consulting services of registered professional engineers, registered architects or **registered professional land surveyors** shall be selected on the basis of qualifications.

- **Survey Licensing Law**

  Practice of land surveying means that branch of the practice of engineering in which …surveys are made to determine area or topography... establish lines, grades or elevations, or to determine or estimate quantities of materials required, removed or in place for horizontal or vertical mapping control or geodetic control; or consultation, investigation, evaluation or planning relating to land surveying

G505-20

Pennsylvania

- **QBS Law**

  Design professional services are those within the practice of architecture, geology, engineering, landscape architecture or land surveying, including studies, investigations, **surveying, mapping...** A selection committee shall select design professionals deemed to be the most highly qualified to provide the services required.

- **Survey Licensing Law**

  "Engineering Land Surveys means surveys for: the determination of the configuration or contour of the earth's surface...or the position of fixed objects...by means of measuring lines and angles...and applying... **photogrammetry**,...and the preparation of plans and specifications..."

G506-20

G506-20

Rhode Island

- **QBS Law**

  It shall be the policy of this state to publicly announce requirements for architectural, engineering, and consultants services...and to negotiate contracts for such professional services on the basis of demonstrated competence and qualifications and at fair and reasonable prices.

- **Survey Licensing Law**

  "Practice of land surveying means any service or work…to perform the act of measuring and locating lines, angles, **elevations**, natural and manmade features in the air, on the surface of the earth…for the purpose of determining areas and volumes for monumenting of property boundaries for the platting and layout of lands and their subdivisions, including the **topography**…of streets and for the preparation of **maps**"

South Carolina

- <u>QBS Law</u>

  State policies requires a public announcement of requirements for architect-engineer, construction management, and **land surveying** services and to negotiate contracts on the basis of demonstrated competence and qualification for the particular type of services required and at fair and reasonable prices.

- <u>Survey Licensing Law</u>

  "The practice of Tier A land surveying…including the **topographical** alignment …for the preparation of maps, plats...also includes **aerial surveys** and **photo-grammetric** compilation… preparation of **topographic maps** and surveys…**GIS**..."

South Dakota

- **QBS Law**

  No Law Exists

- **Survey Licensing Law**

  "Practice of land surveying means to practice professional services including…**mapping**…and interpretation into an orderly survey **map**...(6) Creates, prepares or modifies electronic or computerized data, including **land information systems** and **geographic information systems.**

G-26-20

G505-20

Tennessee

- **QBS Law**

  All personal services, professional services, and **consultant services** purchased by the state government shall require evaluation and consideration of proposers' qualifications and cost in the awarding of the contracts.

- **Survey Licensing Law**

  "Surveying means…the application of **photo-grammetric** methods used to derive **topographic** and other data"

G505-20

Texas

- **QBS Law**

A governmental entity may not select an architect, a landscape architect, **a land surveyor**, or a professional engineer on the basis of competitive bids, but shall make the selection and award on the basis of demonstrated competence, qualifications, and a fair and reasonable price.

- **Survey Licensing Law**

"Professional surveying" means the practice of land, boundary, or property surveying or other similar services for…the location of…boundaries, platting and layout of lands…or the preparation and perpetuation of **maps**,…the term includes **mapping**"

G505-20

Utah

- **QBS Law**

  Law applies to architectural and engineering services only.

- **Survey Licensing Law**

  "…land surveying means...to perform the act of measuring and locating lines, angles, **elevations**, natural and manmade features in the air, on the surface of the earth…for the purpose of determining areas and volumes for monumenting of property boundaries for the platting and layout of lands and their subdivisions, including the **topography**…of streets and for the preparation of **maps.**"

G505-20

G505-20

Virginia

- **QBS Law**

For procurement of professional services, the public body shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services.

- **Survey Licensing Law**

The practice of land surveying includes surveying areas for…the determination of **topography.**

G505-20

Washington State

- **QBS Law**

  Consultant contracts for professional or technical expertise shall be selected by competitive solicitation.

  "Consultant" means an independent individual or firm contracting with an agency to perform a service or render an opinion or recommendation.

- **Survey Licensing Law**

  "Land surveying… shall mean…the survey of land areas for the purpose of determining the **topography** thereof, the making of topographical delineations and the preparing of **maps**"

6585-20

West Virginia

- **QBS Law**

  Law applies to Architectural and Engineering Services only.

- **Survey Licensing Law**

  "Practice of land surveying means determination of the configuration or contour of the earth's surface or the position of fixed objects thereon … by conventional methods or **GPS**… the preparation of **maps** or drawings…"

Wisconsin

- **QBS Law**

  No Law Exists

- **Survey Licensing Law**

  "Land surveying means any service comprising…the preparation of **maps** showing the shape and area of tracts of land…layout of roads, streets,…official plats, or maps, of land in the state.

G505-20

G 505-20

Wyoming

- **QBS Law**

  Agencies shall evaluate qualifications and performance of firms and shall select not less than three qualified firms to perform professional services. Firms shall submit an unpriced proposal to do the work. "Professional services" include architecture, engineering or **land surveying**.

- **Survey Licensing Law**

  "Land surveying practice means…Measurement by angles, distance, elevations…for determining… **topography**, and the preparation and perpetuation of field note records and **maps**…"

G 505-20

Conclusion

- To assure that cooperative purchasing of IT is consistent with Federal law and regulation, as well as State law, mapping and GIS services must be exempt

For Further Information:

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2002-G505-21

March 24, 2003

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

Dear Ms. Duarte:

Re. GSAR Case 2002-G505; Acquisition of Information Technology by State and Local Governments Through Federal Supply Schedules.

The Information Technology Association of America ("ITAA") and the Professional Services Council ("PSC") submit these comments in response to the General Services Administration's ("GSA's") January 23, 2003 proposed rule and request for comments regarding implementation of section 211 of the E-Government Act of 2002. Pursuant to section 211, GSA is authorized to enable states and local governments to use GSA's federal supply schedule ("FSS" or the "Schedule") for "automated data processing equipment (including firmware), software, supplies, support equipment, and services (as contained in Federal supply classification code group 70)." (Hereinafter, we refer to this initiative as the "Cooperative Purchasing" initiative.) We believe that GSA's proposed rule represents a strong start for determining the best way to implement the Cooperative Purchasing initiative. We also appreciate that GSA has held two public meetings to obtain further public comments on the proposed rule. We do, however, have several comments and recommendations that we ask that GSA consider.

Our comments and recommendations, which are presented in detail below, may be summarized as follows:

A. The proposed provisions should permit supplemental terms and conditions that have been mutually agreed to by the vendor and state or local agency, provided such terms and conditions are not inconsistent with the underlying schedule contract, so that state and local buyers are better able to comply with their own procurement laws and regulations.

B. Federal, state, and local agencies should be treated equally with respect to vendor offers of additional discounts—i.e., vendor discounts offered to state and local agencies should not trigger price reduction requirements under the federal Schedules.

G505-21

C. Dealer sales to commercial buyers should not trigger price reductions under the federal Schedules because schedule contractors cannot legally control prices offered by their dealers.

D. GSA should be solely responsibility for enforcing general "policing" provisions such as the Price Reductions clause, Examination of Records by GSA clause, Industrial Funding Fee clause, etc.

E. Sales to state and local agencies that are based on FSS pricing but that are not placed under the vendor's Schedule contract should not be treated as FSS sales for industrial funding fee or any other purpose.

F. The period of time that vendors are permitted to decline a state or local agency order should be consistent with the existing contract terms that govern use of the vendor's contract by "optional users."

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 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 for more information on the ITAA's activities.

PSC is the leading national trade association representing the professional and technical services industry doing business with the federal government. PSC's approximately 145 member companies provide a wide range of services, including information technology, high-end consulting, engineering, scientific and environmental services. Our members include small, mid-size and large businesses.

We appreciate this opportunity to provide our comments.

COMMENTS AND RECOMMENDATIONS.

A. The Cooperative Purchasing Rule Should Permit Mutually Agreed Upon Additional Terms and Conditions.

The Cooperative Purchasing initiative authorized by section 211 of the E-Government Act would be more effective if state and local agencies and IT vendors were permitted a reasonable degree of flexibility to negotiate supplemental terms and conditions. Without such flexibility, we are concerned that state or local agency buyers

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would lack the ability to negotiate additional contract provisions that are necessary for the buyer to comply with applicable state procurement laws and regulations. Consequently, many state and local agencies would be unable to benefit from the Cooperative Purchasing initiative.

As currently drafted, the proposed rule would prohibit state and local agencies from adding to the terms and conditions of the schedule contract. See 552.238-79(a)(3) ("Use of Federal Supply Schedule Contracts by Certain Entities—Cooperative Purchasing"). In this regard, we share GSA's concern that permitting state and local agencies to modify, delete, or add contract terms without restriction would significantly dilute the administrative efficiencies achieved through the FSS program. We suggest, however, that this concern may be adequately addressed by simply imposing the following two restrictions that we believe would satisfy GSA's objectives while still providing for the necessary degree of flexibility to enable compliance with state and local government laws and regulations:

> (1) Any supplemental term or condition will be subject to a mutual agreement that is expressed in a single writing between the ordering activity and the vendor; and
>
> (2) Any supplemental terms or conditions will not conflict with the terms and conditions of the vendor's Schedule contract.

To implement these two points, we ask that GSA consider revising the proposed language of GSAR 552.238-79 to read as follows:

> (3) As a condition of using this contract, eligible ordering activities agree to abide by all terms and conditions of the Schedule contract, except for those deleted clauses or portions of clauses mentioned in paragraph (a)(1) of this clause. Ordering activities may ~~not~~ modify~~, delete~~ or add to the terms and conditions of the Schedule contract only to the extent that such modifications or additions are not inconsistent with the existing terms of the Schedule contract and are agreed to in a written document signed by both the ordering activity and the Contractor. To the extent that orders placed by such ordering activities may include additional or modified terms and conditions that have not been agreed to by the Contractor in a document signed by the Contractor and the ordering activity, ~~found in the Schedule contract,~~ those terms and conditions are null, void, and of no effect, and shall otherwise be deemed preempted by Federal law.

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Our proposal that additional terms be subject to an agreement expressed in a written document signed by both parties is intended to avoid a "battle of the forms" scenario. That is, additional terms contained in an ordering activity's purchase order should not legally bind the vendor—even if the vendor fulfills the order (while perhaps not realizing that additional terms had been added)—if those terms are not part of a written document signed by both parties expressing their consent to be bound by the additional terms. The proposed language permitting modification of terms is intended to cover instances where language is added to an existing Schedule contract provision and, as modified, the provision does not conflict with the original Schedule contract terms.

Importantly, we believe our proposal would be very easy to implement and administer. For example, GSA, in cooperation with the ITAA and PSC, could draft a sample form—something akin to a sample BPA or other type of agreement addendum—that would be placed on GSA's Web site for easy reference. Vendors and state and local agencies could then use the form to add the necessary mutually agreed upon terms and conditions. The additional terms would be enforced as between the vendor and the state or local buyer and would not impose any additional administrative burdens on GSA.

In sum, without the necessary flexibility to negotiate additional terms and conditions, many state and local agencies are prevented by their own procurement rules (at least as currently structured) from benefiting from the FSS program. Therefore, we ask that GSA consider our recommendation.

B. Federal, State, and Local Agencies Should Be Treated Similarly with Respect to Discounts.

Under the current system, a vendor discount offered to a Federal agency does not trigger a government-wide price reduction. The Price Reductions clause, GSAR 552.238-75(d), specifically provides that "[t]here shall be no price reduction for sales . . . [t]o Federal agencies." Contrary to the treatment afforded to Federal agencies, however, the proposed rule would seem to subject state and local agency purchases to the price reduction provisions. For example, proposed clause GSAR 552.232-83(b) ("Contractor's Billing Responsibilities") provides:

> Price reductions made by a participating dealer on sales under this contract will result in an overall price reduction being assessed against the Contractor as provided for in the Price Reduction clause.

The Price Reduction clause, in turn, only explicitly exempts Federal agency purchases. Obviously, vendors may be precluded from offering discounts to state and local agencies to the same extent as Federal agencies if a single discount offered to a state or local agency could trigger an overall, government-wide price reduction. Thus, the

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proposed rule restricts the ability of state and local agencies to tap into additional vendor discounts to the same extent afforded to Federal agencies and precludes federal Schedules contractors from meeting the competitive state or local marketplace.

We believe that it was congressional intent (as reflected in the E-Government Act) to enable state and local agencies to benefit from the FSS program to the same extent as Federal agencies. The proposed rule's treatment of price reductions, however, is inconsistent with that intent. Therefore, we ask that GSA revise the proposed rule to provide that sales to state and local agencies shall not trigger a price reduction under the Price Reductions clause.

C. Price Reductions Should Not Apply to Dealers.

We are concerned that the proposed provisions regarding sales made by participating dealers could be read to pose unacceptable risks for Schedule contractors that have identified participating dealers in their contracts. The specific wording at issue is set out in proposed GSAR 552.232-83 ("Contractor's Billing Responsibilities"). Subsection (a)(1) of that clause would require dealers to "[c]omply with the same terms and conditions regarding prices as the Contractor for sales made under the contract." Subsection (b) would further require that "[p]rice reductions made by a participating dealer on sales under this contract will result in an overall price reduction being assessed against the Contractor as provided for in the Price Reduction clause." These provisions are, at best, confusing. At worst, they would pose unacceptable legal and business risks.

As an initial point, and as indicated above in Section B, sales made to state and local agencies—including sales made through participating dealers—should not be subject to the Price Reduction clause. Sales to Federal agencies are not treated in that way and, in our view, the interests of fairness, 1/ efficiency, and consistency with congressional intent mandate that state and local agencies be treated similarly.

In addition, it has been reported that the proposed language could be interpreted as applying to sales by participating dealers to commercial buyers. We believe that such a result would be unreasonable. As a general principle, vendors and manufacturers have no control over the prices that are charged by their dealers. Indeed, Federal and state antitrust and unfair trade practices laws significantly restrict the ability of manufacturers and vendors to control the prices charged by their dealers. As applied here, without the ability to control dealer prices, the Schedule contractor could be subject to substantial liability if one of its dealers offered a discount to a customer that would trigger a price reduction. Depending on the extent of the discount and the Schedule contractor's sales volume, the price reduction could result in very substantial

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1/ Like Federal agencies, state and local agency purchasers will be expected to pay a fee for purchases made from the GSA Schedule under this Cooperative Purchasing Initiative.

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monetary losses for the Schedule contractor. In our view, the risks posed by such a rule would be unacceptable.

To correct/clarify this issue, we recommend that GSA delete the two sentences identified above. Elimination of the two sentences would clarify that Schedule contractors cannot be penalized for commercial sales made by their dealers (even if the dealer is listed as a participating dealer under the Schedule contract). Similarly, the rule should clearly address the coverage of fees to be paid for these dealer sales.

D. GSA Should Retain Sole Responsibility Over General Administrative and "Policing" Provisions.

The proposed clause 552.238-79(a)(1) ("Use of Federal Supply Schedule Contracts by Certain Entities—Cooperative Purchasing") provides that "[w]hen a contractor accepts an order from [a state or local] entity, a separate contract is formed which incorporates by reference all the terms and conditions of the Schedule contract except the Disputes clause, ..." We believe that the reference in this provision and elsewhere to "a separate contract" being formed is confusing and may lead to undesirable outcomes. We respectfully ask that it be deleted.

Under the current rules, GSA has the authority to enforce the administrative and "policing" provisions set out in Schedule contracts, including GSAR 552.215-71 (Examination of Records by GSA) GSAR 552.238-75 (Price Reductions), GSAR 552.238-76 (Industrial Funding Fee), etc. We are concerned that the language regarding a "separate contract" being formed might enable a state or local agency to assert that it may step into GSA's position and directly enforce these administrative provisions against the vendor. At least in theory, because a "separate contract" would be deemed formed, the state or local buyer could argue that this "separate contract" is between the buyer and the vendor and that the rights provided to the "government" under the contract must be deemed provided to the state or local agency. Since GSA would not be a party to the "separate contract," it would have no role to play with respect to the separate contract's enforcement and administrative provisions. To say the least, such a situation would result in a chaotic situation where the Schedule contractor might be required to answer questions regarding price reductions and be improperly subject to oversight and review by many different state and local agencies.

Thus, we recommend that GSA delete all references in the proposed rule to a "separate contract" being formed. 2/ Also, we request that the rule be revised to clearly provide that (i) only GSA has oversight over a Schedule contract's administrative and enforcement provisions (such as those identified above), and (ii) that the commercial item provisions (e.g., FAR 52.212-4) set out in the applicable SINs and Price Lists are the only provisions subject to direct enforcement by the state or local buyer.

2/ To our knowledge, no similar terminology regarding a "separate contract" being formed with respect to a task or delivery order is addressed in the GSAR.

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E. The Proposed Rule Should Clarify that State and Local Sales that Do Not Reference the Contractor's GSA Schedule Contract Are Not FSS Sales.

Many vendors have state contracts that reference the vendor's FSS pricing as the basis for the price offered to the state. It is reasonable to expect that at least some, if not many, states will continue to insist upon the vendor's FSS price even where the state declines to utilize Cooperative Purchasing. We are concerned that although these state contracts are not part of the FSS program, GSA auditors might nonetheless count these contracts when auditing the industrial funding fee owed by vendors. The basis for this concern are reports that GSA auditors have claimed that vendors' open market sales that do not reference another government contract vehicle are presumed to be subject to the vendor's Schedule contract. In order to foreclose any potential confusion in the future, we ask that GSA explicitly recognize in the proposed rule or accompanying commentary that the mere reference to, or use of, a vendor's FSS pricing in a state contract will not result in an industrial funding fee or any other FSS obligation.

F. The Period for Accepting Orders Should Be Treated in Accordance with the Terms Applicable to "Optional Users" within the Vendor's Schedule Contract.

Proposed GSAR 552.248-79 (Use of Federal Supply Schedule Contracts by Certain Entities—Cooperative Purchasing) provides that a contractor may decline to accept an order from a state or local agency within five days of receipt of the order. GSAR 552.238-79(a)(5). For many vendors, the five-day requirement is inconsistent with the time permitted to decline orders placed by other "optional users" under the existing Schedule contract's terms. In the interests of consistency and administrative efficiency, we recommend that the proposed rule by revised to provide that the time permitted for a vendor to decline an order by a state or local agency will be in accordance with the provisions applicable to "optional users" as set out in the vendor's Schedule contract. Alternatively, to avoid the risk of any confusion, the requirement to "decline" an order could be replaced with a provision that only "accepted" orders are effective.

CONCLUSION.

We fully support GSA's efforts to implement the Cooperative Purchasing initiative and we stand ready to partner with GSA in providing whatever assistance GSA may deem helpful. In this regard, we understand that GSA may need vendor support with respect to tracking vendor sales to state and local agencies under the Cooperative Purchasing initiative. Our respective memberships have indicated a willingness to assist GSA in this regard, but we do ask that GSA attempt to minimize the reporting burden as much as possible and allow for flexibility in how state and local sales are reported.

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We look forward to a continued dialogue with the GSA regarding the Cooperative Purchasing and other important procurement issues.

Respectfully submitted,

Harris N. Miller
President
Information Technology Association of America

Respectfully submitted,

Alan Chvotkin
Senior Vice President and Counsel
Professional Services Council

2002-G505-22

NIGP
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City of McKinney, TX

March 12, 2003

Ms. Laurie Duarte
General Services Administration
Regulatory Secretariat (MVA)
1800 F Street, N.W., Room 4035
Washington, DC 20515

Reference 2002-G505

Dear Ms. Duarte:

I am writing to offer my association's strong endorsement of Section 211 of the e-Government Act of 2002 and 2002-G505.

I represent the National Institute of Governmental Purchasing (NIGP) as its Chief Executive. Organized in 1944, NIGP is an international not-for-profit educational and technical organization of public purchasing agencies. The Institute is composed of 66 affiliate chapters and more than 2,200 agency members representing federal, state, provincial and local government levels throughout the United States and Canada. These agencies represent over 15,000 individuals serving the public procurement community. The mission of the Institute is to enhance public procurement, promote the profession and preserve the public trust by providing expertise, direction, and leadership for members and other stakeholders.

Our endorsement is predicated on the fact that the e-Government Act of 2002 authorizes a cooperative purchasing program that would permit state and local governments to gain access to volume discounted prices from the U.S. General Services Administration (GSA) for commercial products and services related to Information Technology. Access to this program by state and local governmental agencies throughout the country could potentially save public taxpayers hundreds of millions of dollars every year.

Most importantly, the Institute believes that cooperative ventures are essential to the profession. We are convinced that public procurement is on the threshold of transforming to a true profession – shifting away from a clerical, controlling function and towards a highly professional, enabling, strategic function. In order to accomplish this, procurement agents are challenged to re-align their priorities and resources so that they have the capacity to focus on procurements that add extraordinary value to their entities. One critical way to meet this challenge is to access cooperative agreements that satisfy high volume/low value purchases so that the time typically used to solicit these types of contracts can be applied to more complex solicitations. Access to GSA's Schedule 70 contracts will certainly achieve this objective.

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The concept of cooperative purchasing is not new. Members of our association have been utilizing this acquisition tool since the mid 1930's. And the concept is continuing to grow not only in the public governmental sector but also in corporate America under buying consortiums. Through the decades, cooperative purchasing has provided for lower prices, a wider selection of items, and significant administrative savings. In fact, our national association adopted a resolution several years ago supporting the concept of cooperative purchasing.

In short, NIGP strongly endorses Section 211 as well as any future legislation that promotes cooperation and collaboration among the various levels of the public sector. We applaud the actions of our United States Congress as they empower government to achieve efficiencies and economies in public procurement – and we certainly applaud your willingness to extend GSA pricing to state and local governments.

Sincerely,

Rick Grimm, CPPO, CPPB
Chief Executive Officer

Cc: Nicholas Economou, CPPO
Director Acquisition & Supply Integration Center
General Services Administration Federal Supply Service

2002-G505-1
2002-G505-23

"P G Wist"
<Wist@arch.com>

01/31/2003 10:39 AM

To: G505@gsa.gov
cc: meeting.2002-G505@gsa.gov
Subject: 2002-G505 proposal to expand FSS IT schedule to state and local government

Arch Wireless holds a GSA contract with Federal Technology Service for Advanced Wireless Messaging and Paging Products and Services
(http://www.gsa.gov/Portal/content/offerings_content.jsp?contentOID=116644&contentType=1004)

This contract is for the **same products and services** that are on the 70 IT schedule for the cellular/paging SIN. We just elected to work from this contract rather than confusing Federal customers with two similar contracts and incurring additional administrative costs.

Please advise how this contract can be added to the proposal.

Thank you,

PG Wist
Federal Program Manager
Arch Wireless
10 Crossroads Drive, Suite 100
Owings Mills, MD 21117

410-356-0613 ext. 223

MOTOROLA

GSAR 2002 G-505-24

March 21, 2003

General Services Administration
Regulatory Secretariat (MVA)
1800 F Street, NW
Room 4035
Washington, D.C. 20405

Attention: Ms. Laurie Duarte

Reference: GSAR Case No. 2002-G505

Dear Ms. Duarte:

Thank you for the opportunity to offer comments on GSA's proposed rule establishing a new GSAR subpart 538.70 and associated clauses to implement Section 211 of the E-Government Act of 2002 (the "Act"), commonly referred to as "cooperative purchasing".

The Commercial, Government and Industrial Solutions Sector of Motorola, Inc. ("Motorola") provides two-way wireless communication system, product, and service solutions to governments worldwide. Since Motorola contracts a substantially larger volume with state and local government customers than it does with the U.S. Federal Government under our current Schedule contract, effective implementation of cooperative purchasing could have a significant impact on our current and future U.S. state and local government operations.

Motorola's comments address two key issues regarding (A) voluntary use of cooperative purchasing and (B) defined terms and conditions that would apply to state or local government orders. Motorola is also providing comments on two other issues (C), and has attached a list of specific changes it recommends be made to the proposed rule.

A. Voluntary Use

The Act is quite clear that participation in the cooperative purchasing program is not mandatory, but rather voluntary on the part of both GSA Schedule contractors and state and local governments. Motorola believes there are certain aspects of the proposed rule that require modification in order to ensure that the program is truly voluntary in its implementation.

The Initial Regulatory Flexibility Analysis indicates that there are over 70,000 entities that might be able to use cooperative purchasing. Some Schedule contractors currently serve a significant portion of those entities through nationwide networks of independently

Rec'd 3/31/03

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owned and operated distributors or dealers (many of whom are small businesses) who play a critical role in providing sales and service to state and local governments as well as other non-government customers. Once cooperative purchasing is implemented, state and local governments may bypass these small businesses. A loss of state and local government sales could affect the viability of such businesses, causing the loss of a distribution method for non-government sales. Therefore, it is essential that contractors be allowed to decide in a manageable way whether (and to what degree) they wish to participate in the cooperative purchasing program and to have the flexibility to modify that participation at any time.

A.1 Phased or Pilot Implementation. Considering the potential significance of cooperative purchasing on all parties (GSA, state and local governments, Schedule contractors, and independently owned and operated third parties), a Schedule contractor should be permitted to consider a phased or pilot implementation of cooperative purchasing. A pilot implementation for a limited number of customers or for a limited period of time might serve to effectively address and resolve issues which Motorola and others may have already identified, as well as identifying and resolving issues which are not yet readily apparent. If a Schedule contractor agrees to modify its current contract to include GSAR subpart 538.70, that contractor should be able to modify its contract to delete that GSA subpart if it later determines that it no longer chooses to accept orders from state and local governments under its Schedule contract.

A.2 Published Criteria for Participation. New Schedule contractors, or even current contractors whose contracts are scheduled for renewal, appear to have no option to decline inclusion of GSAR subpart 538.70 in their contracts. If they do not choose to participate in the cooperative purchasing program, they must reject orders from state and local governments on an individual order basis. If a Schedule contractor has determined that it does not wish to participate in the program under any circumstances, it should not be forced to design a process or allocate resources to screen potential orders for the sole purpose of rejecting them. Such a requirement undermines the voluntary nature of the program, imposing an unnecessary and wasteful burden on Schedule contractors while at the same time wasting the time and resources of state and local governments. GSAR subpart 538.70 should be modified to make it clear that a contractor will be permitted to publish specific participation criteria in its published pricelist, and that any order which does not meet the published criteria will be deemed rejected by the contractor. As indicated above, a contractor should not be forced to design a process to screen potential orders for the sole purpose of rejecting them. Further, a contractor must be free to modify its published criteria as frequently as it may require, particularly for some period of time after an interim or final rule becomes effective, in order to effectively manage its own participation in the cooperative purchasing program.

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A.3. Rejection of Orders. The proposed rule stipulates that a contractor may reject an order from a state or local government within five days of receipt of the order. This period is insufficient to receive, review and determine whether rejection is appropriate. A contractor's current order fulfillment system may require a longer period of time in which to perform these operations. We note that pursuant to the Defense Priorities and Allocations System ("DPAS") a Federal Government contractor has fifteen working days after receipt of a "DO" rated order in which to accept or reject the order. If this period of time is considered appropriate for acceptance or rejection of orders for programs certified in the national defense, at least this (or longer) period of time should be sufficient for acceptance or rejection of orders from state and local governments. We also believe that expression of time in "working days" is impractical since the federal government, state and local governments, and private contractors do not recognize a uniform holiday schedule. A period of time expressed in calendar days is far more practical and understood by all. Motorola recommends that contractors be permitted a period of 21 calendar days after receipt of an order in which to reject orders from state and local governments.

B. Defined Terms and Conditions

Under proposed GSAR clause 552.238-79, a new contract will be formed when a Schedule contractor accepts an order from a state or local government. Terms and conditions of the GSA Schedule Contract will be incorporated by reference in the new contract between the contractor and the state or local government, and those governments will not be permitted to place additional requirements, or include additional terms and conditions, on Schedule contractors. Motorola believes this is the single largest obstacle to effective implementation of cooperative purchasing - an obstacle which places the contractor squarely in the middle of a potential quagmire of conflicting terms and conditions, diverse opinions of contractual interpretation, and uncertain legal outcomes.

B.1. Prohibition on Inclusion of Additional Terms: Proposed GSAR clause 552.238-79 states, fairly unequivocally, that state and local governments will not be permitted to place additional requirements (including additional terms and conditions) on Schedule contractors. Yet many state and local governments must, by law, include certain terms and conditions in every contract into which they enter. Some of these terms may be clearly "in addition to" the terms and conditions of a Schedule 70 contract. Other terms may deal with the same, or very similar, subject matter as terms included in a Schedule contract, but may be in conflict with those terms, e.g. requirements for utilization of small and disadvantaged business. If a new contract between a state or local government and a Schedule contractor is formed when an order from the former is accepted by the latter, GSA is not in a position to dictate the terms and conditions of that contract. GSA's stated position may be enforceable (or accepted) in some state and local jurisdictions and unenforceable (and ultimately rejected) in others. GSA must

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assume a more proactive role in resolving the potential issues described above prior to promulgation of an interim or final rule. GSA should be encouraging, or even requiring, state and local governments to affirmatively accept Schedule 70 terms and affirmatively agree that no other requirements or additional terms and conditions may apply unless specifically agreed to by the contractor as described below.

B.2. Contractor Acceptance of Additional Terms: If a new contract between a state and local government and a Schedule contractor is established when the contractor accepts an order under a Schedule contract, the parties to that contract should be free to negotiate the terms and conditions of the agreement. For example, if a contractor and a state government are willing to enter into a basic ordering agreement for cooperative purchasing purchases, and the parties agree to additional terms applicable to those purchases, why would GSA object?

B.3 Accurate Identification of Cooperative Purchasing Orders. It is essential for several purposes (e.g. price reductions, IFF) that there be no doubt whether an order received from an entity that is eligible to use cooperative purchasing is actually being placed against the Schedule contract. We suggest that there be a requirement that all cooperative purchasing orders must contain specific mandated language. The absence of the mandated language would mean that an order is not being made under the Schedule contract. This approach is intended to be similar to the approach used under the Defense Priorities and Allocations System, whereby specific language (FAR 52.211-15) must be included on the purchase order for that order to be considered a "rated" order.

C. Other Recommendations

Motorola offers the following additional recommendations for consideration by GSA prior to promulgation of an interim or final rule:

C.1. Ordering Activities: Proposed GSAR 538.7001 includes a definition of new Ordering Activities to whom cooperative purchasing shall be available. It appears to include all colleges and institutions of higher education, regardless of whether or not those institutions are part of a state or local government. Proposed GSAR 552.238-78(b) provides a clearer definition of eligible Ordering Activities. Since identification of eligible Ordering Activities may be problematic in some cases, consistency in definitions is essential. We suggest that the language of proposed GSAR 538.7001 be modified to track the statutory definition or the definition in proposed GSAR 552.238-78(b).

C.2 Price Reductions by Participating Dealers: Proposed GSAR 552.232-83(b) states that a price reduction made by a participating dealer on a cooperative purchasing sale will result in an overall price reduction being assessed against a contractor as provided in the contract Price Reduction clause. If participating dealer price reductions

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will trigger overall Contract Price Reductions, Schedule contractors may find it impossible to utilize participating dealers at all.

Once again, we thank you for the opportunity to offer comments on the proposed implementation of cooperative purchasing, and hope that you will consider each in formulation of another proposed, interim or final rule. If GSA has any questions or requires additional clarification with respect to Motorola's comments and recommendations offered herein, please do not hesitate to contact me at 410-712-6421.

Sincerely,

Jeffrey Kidwell
Division Contracts Manager
GSA Schedule Program

Attachment – 2 pages

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SPECIFIC COOPERATIVE PURCHASING RECOMMENDATIONS

A.1 In proposed 552.238-79, add a new section (c) to read as follows:

> Either the GSA Contracting Officer or the Contractor may, by written notice to the other party, at any time, voluntarily elect to remove this clause 552.238-79 from its Schedule Contract. Such removal will be effective upon receipt of said notice. If such removal occurs, the Contractor must immediately amend its Published Price List to reflect the removal of this clause.

A.2 In proposed 552.238-79, add a new section (d) to read as follows:

> The Contractor is encouraged, but not obligated, to identify, in its Published Price List or another easily identified and accessible medium, those orders that it will not accept. Such identification may be in the form of specific customers, or classes of customers, or specific products or services, or maximum or minimum dollar amounts, or other criteria deemed appropriate by the Contractor. Any order that is received by a Contractor notwithstanding that it had been identified by a Contractor as being one that would not be accepted shall be null and void.

A.3 In proposed 552.238-79, section (b) (2), change "5 days" to "21 calendar days", and change "5-day period" to "21-calendar day period".

B.1 GSA needs to aggressively educate and encourage governments that are eligible for cooperative purchasing to adopt measures that would allow governments to conduct cooperative purchasing in accordance with GSA requirements relating to additional or modified terms and conditions.

B.2 In proposed 552.238-79(a)(3), add at the end of the second sentence the following:

> "; however, an ordering activity and a Contractor may agree, in a written agreement executed by both parties prior to the placement of an order, to add terms and conditions not inconsistent with the terms and conditions found in the Schedule Contract."

Also, in the third sentence of proposed 552.238-79(a)(3), add "or in a preexisting written agreement" after "the Schedule contract".

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B.3 In proposed new section 552.238-75, change (d) (3) to read "To eligible ordering activities made under this contract; or ".

Also, add a new subparagraph (7) to proposed 552.238-79(a) to read as follows:

> Delivery orders placed under this contract must include the following provision: COOPERATIVE PURCHASING This is a delivery order placed under the authority of Section 211 of the E-Government Act of 2002.

C.1 Change the definition of "*State and local government entities*" in proposed 538.7001 to be identical with the definitions in the Act, or use the language in proposed 552.238-78(b).

C.2 In proposed 552.232-83, delete the last sentence of section (b).