



JUL 11 2003

GSA Office of Governmentwide Policy

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;  
May 7, 2003.

<u>Response Number</u>	<u>Date Received</u>	<u>Comment Date</u>	<u>Commenter</u>
2002-G505-1	05/29/03	05/29/03	Laurie Zissimos
2002-G505-2	07/01/03	07/01/03	Bruce Pollack

Attachments

2002-6505-1



"Zissimos Laurie"  
<Laurie.Zissimos@siemens.com>

To: "gsarcase.2002-505@gsa.gov" <gsarcase.2002-505@gsa.gov>  
cc:  
Subject: GSA IT Schedule Open to States

05/29/2003 01:16 PM

I would like to get some information regarding States ability to utilize the finance and leasing terms under the GSA IT Schedule. States and local governments can now obtain finance and leasing at very low, tax exempt rates and can only terminate a lease contract for non-appropriation. It would appear that if a state or local government were to use the GSA IT leasing terms (see Group 70), that banks and finance companies would be subject to a higher level of risk since the state and local governmental entities would have the ability to terminate a lease for convenience, nonrenewal and nonappropriation. Your comments are appreciated.

Laurie Zissimos

## **SIEMENS**

**Laurie L. Zissimos**  
**Director, Business Development-**  
**Government Finance and Leasing**  
**Siemens Financial Services, Inc.**  
**9690 Deereco Road, Ste 600**  
**Timonium, MD 21093**

☎ voice: (410) 453-6932

☎ fax: (410) 453-6901

✉ mail: [laurie.zissimos@siemens.com](mailto:laurie.zissimos@siemens.com)

website: <http://www.Siemensfinancial.com>

2002-6505-2



"Pollack, Bruce"  
<PollackB@sharpsec.com>  
07/01/2003 12:19 PM

To: "patrick.conley@gsa.gov" <patrick.conley@gsa.gov>, "GSARCASE.2002-505@GSA.GOV" <GSARCASE.2002-505@GSA.GOV>  
cc: "beth.arnold-messick@gsa.gov" <beth.arnold-messick@gsa.gov>  
Subject: Section 211 of E-Government Act of 2002 ( "to authorize the Administrator of GSA to provide for the use by State or Local Governments ..." )

Ref: GSAR Case 2002-G505

Thank you very much for forwarding the link from the Federal Register website which provides the overview of the GSA Regulation to implement Section 211 of the E-Government Act of 2002 (to authorize the Administrator of GSA to provide for the use by States or Local Governments of its Federal Supply Schedules for automated data processing equipment, software, supplies, support equipment and services):

<<http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2003/03-11271.htm>>  
<http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2003/03-11271.htm>

This Amendment, which took effect on May 7, 2003 notes that it applies to "Schedule 70 and Corporate Schedule Contracts Containing IT SINS".

In Section "C" of this amendment, as is noted in the Federal Register, it states, "State and Local Governments are authorized to procure IT products and services from Schedule 70, Information Technology, and the Corporate Schedule contracts containing the IT SINS listed below."

The of products and services, as a part of this amendment, specifically includes "FSC Class 5820 " (Radio and Television Communication Equipment), which is the FSC Class that our applicable information technology products falls under.

Can you please confirm that I am understanding this correctly, and as is noted in the Federal Register, that our applicable FSC Class 5820 information technology products are included as a part of Section 211 of the e-Gov Act of 2002, and as per this act, "Cooperative Purchasing provides authorized State and Local Government Entities Access" to these items.

Additionally, if there is anything further we must do to "register" to be a part of this initiative, please let us know.

Thank you again for your assistance.

Sincerely,

Bruce Pollack, CTS  
Assoc. Dir., Channels Mgt.  
Sharp Electronics Corporation  
LCD Products Group  
Direct Telephone: (201) 529-8728  
Facsimile: (201) 529-9636  
e-mail: <mailto:Bruce.Pollack@SharpUSA.com> Bruce.Pollack@SharpUSA.com

2002-0505-3



Linda K. Nelson  
07/23/2003 07:58 AM

To: LaRhonda M. Erby-Spriggs/MVA/CO/GSA/GOV@GSA  
cc: Mary P. Meredith/FXA/CO/GSA/GOV@GSA, Lisa D. Maguire/FXA/CO/GSA/GOV@GSA  
Subject: Interim Regulations for State and Local Government Use of Federal Schedule Contract: Supplemental Comments

LaRhonda,

Please add the below comment to the public comments received in response to GSAR Case 2002-G505. Request Steve upload the comment to the appropriate site. Thanks.

Linda Nelson  
Procurement Analyst  
Acquisition Policy Division, MVP  
Office of Acquisition Policy  
Office of Governmentwide Policy  
Telephone: 202-501-1900  
Facsimile: 202-501-1986



"Paul Dauer"  
<pfdauer@bbklaw.com  
>  
07/22/2003 07:34 PM

To: fmo839@airmail.net, hdlleditor@aol.com, cheryl\_burtzel@dell.com, margaret.mcconnell@domail.maricopa.edu, barnold@gibsondunn.com, david.drabkin@gsa.gov, mary.williams@gsa.gov, hillt@hayboo.com, cyukins@hklaw.com, mlove@hunton.com, richard.rector@piperrudnick.com, pwittie@reedsmith.com, hbell@smithcurrie.com  
cc:  
Subject: Interim Regulations for State and Local Government Use of Federal Schedule Contract: Supplemental Comments

The Council submitted written comments regarding the subject Regulations dated March 24, 2003. Based on the receipt of a number of comments GSA issued interim Regulations effective May 7, 2003 (68 Federal Register 24372).

A review of the interim Regulations and a review of the responses published in the Federal Register indicates that the GSA either misunderstood or misconstrued our comments with respect to the necessity for an agreement between GSA and any participating state and local agencies utilizing the schedules a matter of management and oversight of the program, a failure to incorporate an express statement recognizing the primacy of state and local contract law, and the desirability of authorizing state and local agencies to utilize the services of GSBCA for purposes of dispute resolution. The latter is also a matter which could be addressed by the agreement which the Council recommended in its first comment. GSA apparently believed that the comment with regard to the necessity for a cooperative agreement and to recognize the primacy of state and local law was limited to conflicts in Model Procurement Code states and the enabling provisions of the e-Government Act and of the implementing regulations.

The response by GSA specifically was:

"This issue is outside the scope of the proposed Rule. States and localities will need to make their own legal determinations as to whether use of the Schedules is consistent with their laws, regulations, and other policies."

Disregarding the first sentence, the second is an exact articulation of the concern by the Section and could be readily incorporated into the Regulations to avoid any misunderstandings by the state and local authorities. However, this does not fully address the thrust of the Section's comment which embraced a concern that absent a cooperative agreement between GSA and the participating local entities there would be no vehicle for effective oversight or administration of the program by GSA. That aspect of the Council's comment was not addressed.

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The Council support for a provision in the regulations permitting local entities to utilize the services of GSBCA in resolving disputes arising under or relating to the contract was addressed in the GSA responses by dismissing it as necessitating a statutory amendment to broaden the jurisdiction of GSBCA. To the extent that GSA perceived the thrust of the Councils' comment to be an assertion that the GSBCA statutory jurisdiction under the Contracts Disputes Act encompassed the resolution of state and local contract disputes, GSA misunderstood. I do not think anyone would argue that point. However, that does not dispose of the thrust of the comment since under the Inter-Governmental Cooperation Act there is authority for federal executive branch agencies to enter in cooperative agreements with other governmental entities to provide services to those agencies which the executive branch agencies otherwise perform. The exercise of that authority requires a written agreement between the provider agency and the user agency. The cooperative agreement addressed in our earlier comments would satisfy that requirement.

The interim rules also were revised to authorize state and local participating agencies to modify the terms and conditions under which a supply schedule order was entered into as long as the modifications were not in conflict with the standard provisions. This invites local entities to engage in negotiating contract terms which will promote disuniformity in contract terms among a vendor's governmental agencies. That is not a useful or healthy outcome. Rather, uniformity would serve the interest of the GSA schedule vendor and GSA.

In light of these foregoing aspects Mike Love and I have reviewed the interim regulations and have prepared a proposed supplemental letter of comment for consideration by the Council. By this e-mail I am circulating it for your comment as one of those who participated in responding to the original draft regulations. Attached is a copy of the interim regulations, and a copy of the Section's March 24 comment letter as originally submitted. Please review these materials and provide me your thoughts on the proposed supplemental comment letter and whether or not it should be presented to the Council.

Respectfully,

Paul F. Dauer

Paul F. Dauer  
Best Best & Krieger LLP  
400 Capitol Mall, Suite 1650  
Sacramento, CA 95814  
(916) 325-4000  
(916) 325-4010  
[PF Dauer@bbklaw.com](mailto:PF Dauer@bbklaw.com)

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- GSA IT.pdf



- ABA 071503 letter to linda nelson.doc

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**DRAFT** Letter from the Chair, PCS

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

Re: GSAR Case No. 2002-G505 Interim Rules: State & Local Use of Federal Supply Schedule (68 Fed. Reg. 24372 (May 7, 2003))

Dear Ms. Nelson:

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. 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 Governors of the American Bar Association except for the Public Procurement Principles and the Model Procurement Code, which have been so approved. Therefore, other than references to those principles and the Model Procurement Code, the comments should not be construed as representing the policy of the American Bar Association.

**A. Background**

By letter dated March 24, 2003, the Section submitted comments on the then proposed rules to implement state and local purchasing from federal supply schedules for information technology. The Section expressed concerns in three areas, of which one, the potential ambiguity in the phrase "principles of federal procurement law." was addressed in the interim regulations.

The Section's two other concerns must not have been fully or effectively

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communicated in our comments. The first was the lack of a contractual basis between the state and local agency and GSA to permit GSA and the state and local entities to administer effectively the use of the FSS schedules. The second was that the regulations note that state and local agencies could agree to utilize GSBCA for the resolution of disputes related to FSS IT schedule contracting. This is not an attempt to mandate the use of the GSBCA or expand its jurisdiction but would more appropriately be viewed as an alternative dispute resolution forum the state could adopt. There are in fact good reasons for so doing. To some extent, the two areas are interrelated.

## **B. Contractual Basis for State and Local Agency Use of the FSS IT Schedules**

The thrust of the Section's comments in this area focused on the need to provide a structured approach to implementing the cooperative purchasing authorized by the E-Government Act. As we read the interim rule, authorized entities may simply start to order under the schedule with wide latitude as to the negotiated terms of each order. GSA's only role is to receive its 1% industrial funding fee. It has no means to manage what the state or local entities do because it has no agreement with them. These authorized entities are not the same as existing users who are answerable to the executive branch or Congress. It also lacks any reliable means to even monitor what they might be doing because of the lack of agreement

These entities could also misinterpret the interim rule to provide state and local agencies independent contract authority to use the Federal Schedule notwithstanding applicable state and local public contracting requirements. The concern is that this inadvertently could circumvent state procurement laws applicable to state and local agencies which might not permit direct access to the FSS IT schedules. For example, if local law required sealed competitive bids on every contract, a state and local agency should not be lead to believe that the interim regulations are authority to ignore that requirement. We do not think it GSA's intent or that of the E-Government Act to preempt state and local law.

As an example of a structured cooperative purchasing solution, the Section in its comments described the Model Procurement Code paradigm for inter-governmental cooperative purchasing. It is entirely premised on each participating jurisdiction agreeing to the cooperative purchasing arrangement and the rules under which it will be used. This allows management of the process, transparency and thoughtful analysis of the authority of each involved entity of its authority to enter into the arrangement.. Apparently, the comment of the Section was not sufficiently clear and was misunderstood to be suggesting concern only for potential conflicts between Model Procurement Code jurisdictions and the E-Government Act and regulations.

The Section firmly believes, first, that the regulations should be clear in disavowing that they constitute any independent authority for state and local agencies to



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use the GSA schedules in lieu of the methods prescribed by their governing law. Second, we are concerned that the regulations could be misconstrued as condoning “piggybacking,” i.e. just using the GSA schedule prices as a benchmark for the start of negotiations, with or without competition for the order. Not only would this suggest GSA would not get all the fees due it, but it could open up completely invisible contracting arenas at state and local levels. Third, the only practical way to manage potential conflict between state and local contracting authority and practices and the newly authorized transactions under the FSS IT regulations is for GSA, as the program’s manager, to require a standardized agreement between GSA and the state and local ordering agency.

Inter-governmental, as a public contracting methodology, agreements are authorized under most, if not all, state and local law and are expressly authorized under the Inter-Governmental Cooperation Act (31 U.S.C. § 6505). Where such agreements are not allowed, one must question whether the use of the GSA schedule contracts would be permitted, but the absence of any requirement to enter into such an agreement unintentionally obscures this issue. This is not to suggest that GSA must determine or resolve whether any local entity has such authority, but it should revise its regulation to ensure the issue is not obscured. Such agreements, even when implementing purchases or acquisition of services, would not usually be subject to the ordinary purchasing or service contracting authorities or methodologies imposed on state and local agencies and thus would allow state and local entities to simply order off the GSA schedule. The rationale for exempting inter-agency agreements from the usual restrictions on state and local purchasing and service contracting is that these are not at issue when the goods or services are acquired through a non-market competitor like another governmental agency.

Provision for a cooperative agreement pursuant to which the state and local agencies access and use the FSS IT schedule for ordering would afford GSA a basis for monitoring the numbers of participating agencies, compliance with the regulatory and statutory terms of such use, and a measure of the volume to which this contract procedure is utilized by state and local entities. It would also allow vendors some better means to determine whether an order from a state or local entity was made under the GSA schedule or under some other authority. Without such a mechanism, vendors will find complying with their obligations to GSA more difficult and both GSA and the vendors will find defining those obligations more difficult; all needlessly. We do not believe that GSA is seeking to avoid managing this new aspect of its schedule program but remain concerned it has provided itself with no effective means to do so.

### **C. Provisions Enabling GSA to be the Arbiter of Contract Disputes**

The Section recommended that the regulations incorporate language which would provide for minimal due process in administrative dispute resolution and expressly permit the state or local agency in satisfaction of that requirement, to elect to have dispute

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resolution services provided by the GSBCA or another administrative forum. The comment in response concludes that “to implement the change proposed by the commenter would require a change in the Contract Disputes Act” because the jurisdiction of the GSBCA depends upon the Contracts Disputes Act of 1978. The Section respectfully suggests that GSBCA, like all other federal government agencies, can resort to the Inter-Governmental Cooperation Act (31 USC §6505) which act expressly authorizes executive branch agencies to provide state and local governments with services which the federal agency normally provides for itself or others under existing authorities. In fact, the Section understands such agreements have historically been used extensively, including by boards of contract appeals. OMB Circular A-97 further implements the Inter-Governmental Cooperation Act. The only conditions on provision of such services is that they must be *pursuant to a written request* from the state and local government, a provision which would be satisfied under the agreement suggested in our initial comment above, and that the providing agency be reimbursed for the costs of providing services.

Once again, the suggestion by the Section is that the regulations enable participating state and local agencies to provide for dispute resolution via the GSBCA. This is an economical and effective way to provide for minimal due process protections if the state or local agency did not otherwise have an appropriate dispute resolution mechanism for its public contracts. It also provides a forum familiar with the federal principles that should be the first recourse to resolving disputes under schedule contracts.

In addition to the above clarifications of the Section’s comments in its March 24, 2003 letter, we note that the interim regulations have introduced a further questionable aspect. The original proposed regulations prohibited state and local entities from modifying the terms and conditions of the FSS IT contract. That provision had the highly desirable effect of ensuring that contracts placed with FSS contractors would be largely uniform irrespective of the ordering governmental agency. The interim regulations at Section 552.238-79(a)(3) expressly authorize ordering entities to “include terms and conditions required by statute, ordinance, regulation or order as part of a statement of work . . . to the extent these terms and conditions do not conflict with the terms and conditions of the schedule contract.” This provision permits local entities to adopt ordinances, regulations, or even informal directives which require terms and conditions that, although not in direct conflict with the terms and conditions of the schedule contract, will introduce non-uniformity for that schedule contractor. While a provision in the regulations that a statutory or constitutional requirement imposed on a state and local entity should take precedence over a schedule contract provision is desirable, these should be the narrowest of exceptions. The Section recommends that GSA revert to the language in Section 552.238-79(a)(3) proposed in 68 Fed. Reg. 3225 (January 23, 2003).

Finally, the Section renews its recommendation for the addition of language to Section 552.238-79 concerning the minimal qualifications for the disputes process.

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These are fundamental safeguards endorsed by the American Bar Association, and not just the Section of Public Contract Law.

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

Sincerely,

Hurbert J. Bell, Jr.  
Chair

HJB:PFD/pvfe

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(c) Each petition or request for an exemption from the requirement of a tolerance or repeal of an exemption shall be accompanied by a fee of \$14,925.

(d) Each petition or request for a temporary tolerance or a temporary exemption from the requirement of a tolerance shall be accompanied by a fee of \$32,325 except as provided in paragraph (e) of this section. A petition or request to renew or extend such temporary tolerance or temporary exemption shall be accompanied by a fee of \$4,600.

(e) A petition or request for a temporary tolerance for a pesticide chemical which has a tolerance for other uses at the same numerical level or a higher numerical level shall be accompanied by a fee of \$16,075, plus \$1,225 for each raw agricultural commodity on which the temporary tolerance is sought.

(f) Each petition or request for repeal of a tolerance shall be accompanied by a fee of \$10,125. Such fee is not required when, in connection with the change sought under this paragraph, a petition or request is filed for the establishment of new tolerances to take the place of those sought to be repealed and a fee is paid as required by paragraph (a) of this section.

(g) If a petition or a request is not accepted for processing because it is technically incomplete, the fee, less \$2,025 for handling and initial review, shall be returned. If a petition is withdrawn by the petitioner after initial processing, but before significant Agency scientific review has begun, the fee, less \$2,025 for handling and initial review, shall be returned. If an unacceptable or withdrawn petition is resubmitted, it shall be accompanied by the fee that would be required if it were being submitted for the first time.

(h) Each petition or request for a crop group tolerance, regardless of the number of raw agricultural commodities involved, shall be accompanied by a fee equal to the fee required by the analogous category for a single tolerance that is not a crop group tolerance, i.e., paragraphs (a) through (f) of this section, without a charge for each commodity where that would otherwise apply.

(i) Objections under section 408(d)(5) of the Act shall be accompanied by a filing fee of \$4,050.

(j)(1) In the event of a referral of a petition or proposal under this section to an advisory committee, the costs shall be borne by the person who requests the referral of the data to the advisory committee.

(2) Costs of the advisory committee shall include compensation for experts

as provided in § 180.11(c) and the expenses of the secretariat, including the costs of duplicating petitions and other related material referred to the committee.

(3) An advance deposit shall be made in the amount of \$40,400 to cover the costs of the advisory committee. Further advance deposits of \$40,400 each shall be made upon request of the Administrator when necessary to prevent arrears in the payment of such costs. Any deposits in excess of actual expenses will be refunded to the depositor.

(k) The person who files a petition for judicial review of an order under section 408(d)(5) or (e) of the Act shall pay the costs of preparing the record on which the order is based unless the person has no financial interest in the petition for judicial review.

(l) No fee under this section will be imposed on the Interregional Research Project Number 4 (IR-4 Program).

(m) The Administrator may waive or refund part or all of any fee imposed by this section if the Administrator determines in his or her sole discretion that such a waiver or refund will promote the public interest or that payment of the fee would work an unreasonable hardship on the person on whom the fee is imposed. A request for waiver or refund of a fee shall be submitted in writing to the Environmental Protection Agency, Office of Pesticide Programs, Registration Division (7505C), 1200 Pennsylvania Avenue, NW., Washington, DC 20460. A fee of \$2,025 shall accompany every request for a waiver or refund, except that the fee under this sentence shall not be imposed on any person who has no financial interest in any action requested by such person under paragraphs (a) through (k) of this section. The fee for requesting a waiver or refund shall be refunded if the request is granted.

(n) All deposits and fees required by the regulations in this part shall be paid by money order, bank draft, or certified check drawn to the order of the Environmental Protection Agency. All deposits and fees shall be forwarded to the Environmental Protection Agency, Headquarters Accounting Operations Branch, Office of Pesticide Programs (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. The payments should be specifically labeled "Tolerance Petition Fees" and should be accompanied only by a copy of the letter or petition requesting the tolerance. The actual letter or petition, along with supporting data, shall be forwarded within 30 days of payment to the

Environmental Protection Agency, Office of Pesticide Programs, Registration Division (7505C), 1200 Pennsylvania Avenue, NW., Washington, DC 20460. A petition will not be accepted for processing until the required fees have been submitted. A petition for which a waiver of fees has been requested will not be accepted for processing until the fee has been waived or, if the waiver has been denied, the proper fee is submitted after notice of denial. A request for waiver or refund will not be accepted after scientific review has begun on a petition.

(o) This fee schedule will be changed annually by the same percentage as the percent change in the Federal General Schedule (GS) pay scale. In addition, processing costs and fees will periodically be reviewed and changes will be made to the schedule as necessary. When automatic adjustments are made based on the GS pay scale, the new fee schedule will be published in the **Federal Register** as a final rule to become effective 30 days or more after publication, as specified in the rule. When changes are made based on periodic reviews, the changes will be subject to public comment.

[FR Doc. 03-11195 Filed 5-6-03; 8:45 am]  
BILLING CODE 6560-50-S

## GENERAL SERVICES ADMINISTRATION

48 CFR Parts 511, 516, 532, 538, 546, and 552

[GSAR Amendment 2003-01; GSAR Case No. 2002-G505]

RIN 9000-AH76

### General Services Administration Acquisition Regulation; Federal Supply Schedule Contracts—Acquisition of Information Technology by State and Local Governments Through Federal Supply Schedules

**AGENCIES:** Office of Acquisition Policy, General Services Administration (GSA).

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The General Services Administration (GSA) is amending the General Services Administration Acquisition Regulation (GSAR) to implement section 211 of the E-Government Act of 2002. Section 211 authorizes the Administrator of GSA to provide for the use by States or local governments of its Federal Supply Schedules for automated data processing equipment (including

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firmware), software, supplies, support equipment, and services.

**DATES:** *Effective Date:* May 7, 2003.

*Applicability Date:* This amendment applies to solicitations and existing contracts for Schedule 70, Information Technology (IT), and the Corporate Schedule, containing Information Technology (IT) Special Item Numbers SINs, as defined in GSAM 538.7001, Definitions, Schedule 70. Further, this amendment applies to contracts awarded after the effective date of this rule for Schedule 70 and Corporate Schedule contracts containing IT SINs. Existing Schedule 70 contracts and Corporate Schedule contracts containing IT SINs, shall be modified by mutual agreement of both parties.

*Comment Date:* Interested parties should submit comments to the Regulatory Secretariat at the address shown below on or before July 7, 2003 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit written comments to— General Services Administration, Regulatory Secretariat (MVA), 1800 F Street, NW., Room 4035, Attn: Ms. Laurie Duarte, Washington, DC 20405. Submit electronic comments via the Internet to—*gsarcase.2002-505@gsa.gov*. Please submit comments only and cite GSAR case 2002-G505, in all correspondence related to this case.

**FOR FURTHER INFORMATION CONTACT:** The Regulatory Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501-1900. Please cite GSAR case 2002-G505. The TTY Federal Relay Number for further information is 1-800-877-8973.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This interim rule amends GSAM Parts 511, 516, 532, 538 and 552 to implement Section 211 of the E-Government Act of 2002. Section 211 of the E-Government Act of 2002 (Pub. L. 107-347) amended the Federal Property and Administrative Services Act to allow for "cooperative purchasing," where the Administrator of GSA provides States and localities access to certain items offered through GSA's supply schedules. 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** to purchase automated data processing

equipment (ADPE) (including firmware), software, supplies, support equipment, and services. "State or local government" includes any State, local, regional, or tribal government, or any instrumentality thereof (including any local educational agency or institution of higher education). Eligible ordering activities (as defined in 552.238-78(b), Scope of Contract (Eligible Ordering Activities)) are encouraged, but not required, to use the ordering procedures outlined in Federal Acquisition Regulation Subpart 8.4 (48 CFR Chapter 1, Subpart 8.4).

GSA published a proposed rule in the **Federal Register** at 68 FR 3220, January 23, 2003. GSA concluded that the proposed rule should be converted to an interim rule, with substantive changes. The interim rule modifies the proposed rule to—

- Incorporate schedule 70 information technology (IT) special item numbers (SINs) that are included in IT "corporate" schedule contracts;
- Delete the language regarding dealer sales and their impact on the price reduction clause from the clause at 552.232-83, Contractor's Billing Responsibilities;
- Permit authorized state and local governments to add terms and conditions as part of the statement of work (SOW) or statement of objectives (SOO) required by the state or local government statutes, ordinances, regulations or orders to the extent that they do not conflict with the schedule contract terms and conditions; and
- Revise the disputes language in the clause at 552.238-79, Use of Federal Supply Schedule Contracts by Entities—Cooperative Purchasing, to encourage the use of Alternative Dispute Resolution to the extent authorized by law.

**B. Summary and Discussion of Significant Comments**

Twenty-four respondents submitted public comments during the comment period. These comments were considered in the formulation of the interim rule and their disposition is summarized as follows:

**1. Scope of Rule**

a. Several respondents addressed whether Information Technology (IT) available on the GSA corporate schedule will be available for State or local use.

*Response:* Yes. However, only the Corporate Schedule contracts containing IT Special Item Numbers (SINs), will be available for State or local use.

b. One respondent objected to the inclusion of Architect and Engineering services in the schedules program as

violating both the Brooks Architect and Engineering Act and most state statutes.

*Response:* Neither the proposed rule, nor the interim rule, add Architect and Engineering services to the schedules program. Neither the Brooks Architect and Engineering Act, nor the state statutes identified in the respondent's comments, apply to the information technology hardware, software or services provided by Schedule 70 or the information technology corporate Schedule contracts containing IT SINs.

c. Several contractors responding to the rule expressed interest in participating in this program; however, the products and services they offer do not fall within the scope of the products and services offered under Schedule 70 or the Corporate Schedule, containing IT SINs, or they have IT services on another Federal Supply Schedule in support of other Federal supply classes not covered by this rule.

*Response:* Cooperative purchasing may only be conducted pursuant to statutory authorization. Section 211 of the e-Government Act of 2002 authorizes GSA to provide State and local government entities access to information technology products, services, and support equipment. Section 211 does not grant authority to GSA to broaden the scope of this rule to include products and services other than those specifically authorized by that Section. However, to the extent any business offers a product or service that falls within the scope of the rule, that entity may seek to sell their product or service to the Federal Government, states, and localities, by negotiating a schedule contract under Schedule 70 or the Corporate Schedule, containing IT SINs.

d. One respondent expressed concern with allowing dealers to sell to State and local governments.

*Response:* Disagree. State and local government entities should be able to access the same distribution network for goods and services as all other authorized users of the GSA Schedules.

e. One respondent raised concerns about extending cooperative purchasing to commodities other than IT.

*Response:* The statute and this regulation limit application of cooperative purchasing to IT products, services, and support equipment.

**2. Ordering**

a. One respondent inquired as to whether State and local entities will be allowed to: place orders through existing BPAs; establish BPAs; and place orders against future BPAs.

*Response:* State and local entities will not be allowed to place orders through

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BPA's established prior to this rule unless the State or local entity was previously identified as a user of the BPA consistent with law. However, State and local entities will be allowed to establish their own BPA's upon issuance of an effective rule.

b. Several respondents addressed issues involving e-Commerce.

*Response:* These comments are outside the scope of the proposed rule. However, GSA may conduct a business case analysis to evaluate the feasibility of allowing non-federal eligible ordering activities to use GSA Advantage! or any other e-commerce.

c. Several respondents objected to the language, which prohibits eligible ordering activities from adding additional terms and conditions.

*Response:* This restrictive language has been removed. Eligible ordering activities may add terms and conditions required by statutes, ordinances, regulations, or orders, to the extent that they do not conflict with the schedule contract terms and conditions.

d. Several respondents raised concerns regarding the language added to the clause at 552.232-83, Contractor's Billing Responsibilities, concerning dealer sales. They asserted that the language appears to conflict with the language in paragraph (d)(3) of the clause at 552.238-75, concerning eligible ordering activities.

*Response:* The language in the clause at 552.232-83, Contractor's Billing Responsibilities, was removed.

e. Several respondents objected to limiting acceptance or decline of orders to five days because their contracts allow longer time periods to decline order.

*Response:* To the extent that the language of individually negotiated contracts allows for a longer response time, that contract language prevails.

f. Several respondents objected to allowing the vendors to decline orders placed by State and local entities.

*Response:* The e-Government Act makes clear that vendor participation is voluntary. Section 211 of the Act states in paragraph (c)(2), "Voluntary Use—In any case of the use by a State or local government of a Federal supply schedule pursuant to paragraph (1), participation by a firm that sells to the Federal Government through the supply schedule shall be voluntary with respect to a sale to the State or local government through such supply schedule." (Emphasis added.)

g. One respondent raised a concern whether various states implementing the model procurement code will be able to use the GSA schedules under this proposed rule.

*Response:* This issue is outside the scope of the proposed rule. States and localities will need to make their own legal determinations as to whether use of the schedules is consistent with their laws, regulations, and other policies.

h. One respondent questioned whether the FAR ordering procedures must be used by non-federal eligible ordering activities.

*Response:* The preamble now contains language, which encourages the use of Federal Acquisition Regulation Subpart 8.4 (48 CFR Chapter 1, Subpart 8.4), but does not require its use.

### 3. Fees

a. Several respondents asked for further clarity on when a particular sale should be recorded as a schedule sale for purposes of calculating the industrial funding fee.

*Response:* The proposed rule does not address this topic and any clarification of this issue would be subject to its own rulemaking.

b. Various respondents suggested that the Industrial Funding Fee be waived for cooperative purchasing sales or remitted to the States.

*Response:* GSA instituted the Industrial Funding Fee as a means of cost recovery at the direction of Congress. GSA does not intend to waive this feature of its program.

### 4. Dispute Resolution

a. Several respondents suggested that dispute resolution for State and local government entities be performed by the GSA Board of Contract Appeals (GSBCA).

*Response:* Under the proposed rule as well as this interim rule, orders placed by eligible ordering activities create new contracts to which the Federal Government is not a party. The jurisdiction of the GSBCA depends upon the Contract Disputes Act of 1978 and is limited to review of contract disputes where the Federal Government awards the contract. To implement the change proposed by the commenter would require a change to the Contract Disputes Act.

b. Several respondents addressed the desirability of allowing contract disputes to be resolved through arbitration or other forms of alternative dispute resolution.

*Response:* The interim rule addresses this issue. Paragraph (a)(1) of the clause at 552.238-79, Use of Federal Supply Schedule Contracts by Certain Entities—Cooperative Purchasing, encourages the use of alternative dispute resolution to the extent authorized by law.

### 5. Other Issues

a. One respondent opposed Most Favored Customer pricing clauses.

*Response:* This issue is beyond the scope of this rule, which focuses on making certain schedule contracts available for cooperative purchasing. The proposed rule does not change existing GSA Multiple Award Schedule pricing policies.

b. One respondent suggested that State and local entities be able to contribute past performance history for Schedule 70 contractors.

*Response:* To the extent that past performance information is voluntarily submitted to the GSA contracting officer by State and local government entities as a result of cooperative purchasing, the GSA shall give the information due consideration in future negotiations regarding the contractor's continued participation in the schedules program and selling to States and localities.

c. One respondent addressed the concern regarding the origin of products from non-qualified sources.

*Response:* This issue is outside the scope of this rule. Existing statutes and regulations address this concern already.

d. One respondent asked GSA to commit to establishing a program for awarding schedule contracts to small businesses specializing in doing business with State and local governments.

*Response:* This issue is outside the scope of the rule. GSA has existing programs to encourage small businesses to seek schedule contracts.

e. One respondent asked how FSS will be able to monitor and assess the effect of cooperative purchasing.

*Response:* To evaluate the effect of cooperative purchasing, GSA intends to monitor changes in access for federal customers and the impact on GSA's ability to negotiate favorable pricing and terms and conditions. GSA will also monitor participation by small businesses.

f. One respondent suggested that contractors be allowed to modify their contracts if they no longer wished to accept orders from State and local government under its Schedule contract.

*Response:* The statute requires that participation be voluntary on the part of the contractors. Contractors wishing to be removed from participation in cooperative purchasing, after electing to participate, should submit a contract modification request to their GSA contracting officer.

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**C. List of Information Technology Special Item Numbers**

State and local governments are authorized to procure IT products and services from Schedule 70, Information Technology and the Corporate Schedule contracts containing the IT SINs listed below. The listing of SINs is also available at <http://fss.gsa.gov/elibrary>. Click on Schedules e-Library. A logo will identify all the participating contractors and special items numbers available for purchase by eligible non-federal ordering activities.

*Schedule 70 Special Item Numbers*

**SPECIAL ITEM NO. 132-3 LEASING OF PRODUCT (FPDS Code W070)**

**SPECIAL ITEM NO. 132-4 DAILY / SHORT TERM RENTAL (FPDS Code W070)**

**SPECIAL ITEM NO. 132-8 PURCHASE OF EQUIPMENT**

FSC Class 7010—System Configuration  
End User Computers/Desktop Computers  
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 7035—ADP Support Equipment

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

FSC Class 5995—Cable, Cord, and Wire Assemblies: **Communications** Equipment

Communications Equipment Cables

FSC Class 6015—Fiber Optic Cables  
Fiber Optic Cables

FSC Class 6020—Fiber Optic Cable Assemblies and Harnesses

Fiber Optic Cable Assemblies and Harnesses

FSC Class 6145—Wire and Cable, Electrical

Coaxial Cables

FSC Class 5805—Telephone and Telegraph Equipment

Telephone Equipment  
Audio and Video Conferencing Equipment

FSC Class 5810—Communications Security Equipment and Components

Communications Security Equipment

FSC Class 5815—Teletype and Facsimile Equipment

Facsimile Equipment (FAX)

FSC Class 5820—Radio and Television Communication Equipment, Except Airborne

Two-Way Radio Transmitters/Receivers/  
Antennas

Broadcast Band Radio Transmitters/  
Receivers/Antennas

Microwave Radio Equipment/Antennas  
and Waveguides

Satellite Communications Equipment

FSC Class 5821—Radio and Television Communication Equipment, Airborne

Airborne Radio Transmitters/Receivers

FSC Class 5825—Radio Navigation Equipment, Except Airborne

Radio Navigation Equipment/Antennas

FSC Class 5826—Radio Navigation Equipment, Airborne

Airborne Radio Navigation Equipment

FSC Class 5830—Intercommunication and Public Address Systems, Except Airborne

Pagers and Public Address Systems  
(wired and wireless transmission,  
including background music systems)

FSC Class 5841—Radar Equipment, Airborne

Airborne Radar Equipment

FSC Class 5895—Miscellaneous Communication Equipment

Miscellaneous Communications Equipment

Special Physical, Visual, Speech, and Hearing Aid Equipment

Used Equipment  
Installation for equipment offered under SIN 132-8 (FPDS Code N070)

Deinstallation for equipment offered under SIN 132-8 (FPDS Code N070)

Reinstallation for equipment offered under SIN 132-8 (FPDS Code N070)

Special Item No. 132-12 Maintenance of Equipment, Repair Service, and Repair Parts/Spare Parts (FPDS Code for Maintenance and Repair Service—J070; FSC Class for Repair Parts/Spare Parts—See FSC Class for basic equipment)

Special Item No. 132-32 Term Software Licenses

FSC Class 7030—Information Technology Software

Large Scale Computers

Operating System Software

Application Software

Electronic Commerce (EC) Software

Utility Software

Communications Software

Core Financial Management Software

Ancillary Financial Systems Software

Special Physical, Visual, Speech, and Hearing Aid Software

Microcomputers

Operating System Software

Application Software

Electronic Commerce (EC) Software

Utility Software

Communications Software

Core Financial Management Software

Ancillary Financial Systems Software

Special Physical, Visual, Speech, and Hearing Aid Software

Special Item No. 132-33 Perpetual Software Licenses

FSC Class 7030—Information Technology Software

Large Scale Computers

Operating System Software

Application Software

Electronic Commerce (EC) Software

Utility Software

Communications Software

Core Financial Management Software

Ancillary Financial Systems Software

Special Physical, Visual, Speech, and Hearing Aid Software

Microcomputers

Operating System Software

Application Software

Electronic Commerce (EC) Software

Utility Software

Communications Software

Core Financial Management Software

Ancillary Financial Systems Software

Special Physical, Visual, Speech, and Hearing Aid Software

Special Item No. 132-34 Maintenance of Software

Special Item No. 132-50 Training Courses for Information Technology Equipment and Software (FPDS Code U012)

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Special Item No. 132-51 Information Technology Professional Services  
IT Facility Operation and Maintenance (FPDS CODE D301)  
IT Systems Development Services (FPDS CODE D302)  
IT Systems Analysis Services (FPDS Code D306)  
Automated Information Systems Design and Integration Services (FPDS Code D307)  
Programming Services (FPDS Code D308)  
IT Backup and Security Services (FPDS Code D310)  
IT Data Conversion Services (FPDS Code D311)  
Computer Aided Design/Computer Aided Manufacturing (CAD/CAM) Services (FPDS Code D313)  
IT Network Management Services (FPDS Code D316)  
Automated News Services, Data Services, or Other Information Services (FPDS Code D317)  
Other Information Technology Services, Not Elsewhere Classified (FPDS Code D399)  
Special Item No. 132-52 Electronic Commerce Services FPDS Code D304—ADP and Telecommunications Transmission Services  
Value Added Network Services (VANS)  
E-Mail Services  
Internet Access Services  
Navigation Services

**FPDS CODE D399—OTHER DATA TRANSMISSION SERVICES, NOT ELSEWHERE CLASSIFIED (except "Voice" and Pager Transmission Services)**

Special Item No. 132-53 Wireless Services (FPDS Code D304)  
Excluding local and long distance voice, data, video, and dedicated transmission services which are NOT mobile)  
Paging Services  
Cellular/PCS Voice Services

*Corporate Schedule Special Item Numbers*

- C 5805, Telephone and Telegraph Equipment
- C 5810, Communications Security Equipment and Components
- C 5815, Teletype and Facsimile Equipment (includes Ticker, Tape and Sigot Equipment)
- 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.
- 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.
- C W070, Lease or Rental of Equipment.

**D. Unfunded Mandates Reform Act and Executive Order 13132**

The following statutes and Executive orders do not apply to this rulemaking: Unfunded Mandates Reform Act of 1995; Executive Order 13175, Consultation and Coordination with Indian Tribal Governments; and Executive Order 13132, Federalism.

**E. Executive Order 12866**

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

**F. Regulatory Flexibility Act**

An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and submitted to the Chief Counsel for Advocacy of the Small Business Administration. Copies of the IRFA are available from the Regulatory Secretariat. GSA will consider comments from small entities concerning the affected GSAR Parts 511, 516, 532, 538, and 552 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, *et seq.*, GSAR case 2002-G505, in correspondence. The IRFA indicates that the interim rule will affect large and small entities including small businesses that are awarded Schedule 70 contracts and Corporate Schedule contracts containing IT SINs, under the GSA Federal Supply Schedule program; non-schedule contractors, including small businesses, contracting with State or local governments; and small governmental jurisdictions that will be eligible to place orders under Schedule 70 contracts and Corporate Schedule



contracts containing IT SINS. The analysis is as follows:

This Initial Regulatory Flexibility Analysis has been prepared consistent with the criteria of 5 U.S.C. 604.

1. Description of the reasons why action by the agency is being considered.

To implement section 211, Authorization for Acquisition of Information Technology by States and Local Governments through Federal Supply Schedules, of the E-Government Act of 2002 (Pub. L. 107-347). Section 211 amends section 502 of title 40, United States Code, to authorize the Administrator to provide for use by State or local governments of Federal Supply Schedules of the General Services Administration for automated data processing equipment (including firmware), software, supplies, support equipment, and services. The rule opens the Federal Supply Schedule 70 and Corporate Schedule contracts containing information technology (IT) Special Item Numbers (SINs), for use by other governmental entities to enhance intergovernmental cooperation.

2. Succinct statement of the objectives of, and legal basis for the interim rule.

The interim rule will implement section 211 of the E-Government Act of 2002 with the objective of opening the Federal Supply Schedule 70 and Corporate Schedule contracts containing IT SINS for use by other governmental entities to enhance intergovernmental cooperation. The goal of the new rule is to make "government" (considering all levels) more efficient by reducing duplication of effort and utilizing volume purchasing techniques for the acquisition of IT products and services.

3. Description of, and where feasible, estimate of the number of small entities to which the interim rule will apply.

The rule will affect large and small entities including small businesses, that are awarded Schedule 70 contracts and Corporate Schedule contracts containing IT SINS, under the GSA Federal Supply Schedule program; non-schedule contractors, including small businesses, contracting with State or local governments; and small governmental jurisdictions that will be eligible to place orders under Schedule 70 and Corporate Schedule contracts containing IT SINS. Approximately sixty-eight percent (2,300) of GSA Schedule 70 contractors are small businesses and approximately sixty-eight percent (125) of Corporate Schedule contractors are small businesses. All of those small business Schedule 70 contractors, and Corporate Schedule contractors, containing IT SINS will be allowed, at the schedule contractor's option, to accept orders from State and local governments. Obviously, the expanded authority to order from Schedule 70 and Corporate Schedule contracts containing IT SINS, could increase the sales of small business schedule contractors. It is difficult to identify the number of non-schedule small businesses that currently sell directly to State and local governments. The ability of governmental entities to use Schedule 70 and Corporate Schedule contracts containing IT SINS, may affect the competitive marketplace in which those small businesses operate. State and local

government agencies could realize lower prices on some products and services, less administrative burden and shortened procurement lead times. The rule does not affect or waive State or local government preference programs. Finally, small governmental jurisdictions will also be affected. The 50 states, 3139 counties, 19,365 incorporated municipalities, 30,386 minor subdivisions, 3,200 public housing authorities, 14,178 school districts, 1,625 public educational institutions of higher learning, and 550 Indian tribal governments would be among those affected if they chose to order from Schedule 70 and Corporate Schedule contracts containing IT SINS. Federal Supply Schedule contracts are negotiated as volume purchase agreements, with generally very favorable pricing. The ability of small governmental entities to order from Schedule 70 and associated Corporate Schedule contracts holds out the potential for significant cost savings for those organizations.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

The interim rule makes changes in certain provisions or clauses in order to recognize the fact that authorized non-federal ordering activities may place orders under the contract. The Office of Management and Budget under the Paperwork Reduction Act has previously approved these clauses and the changes do not impact the information collection or recordkeeping requirements.

5. Identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap or conflict with the rule.

The interim rule does not duplicate, overlap, or conflict with any other Federal rules.

6. Description of any significant alternatives to the interim rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the rule on small entities.

There are no practical alternatives that will accomplish the objective of this rule.

#### G. Paperwork Reduction Act

The new provision at GSAR 552.232-82, Contractor's Remittance (Payment) Address, contains an information collection requirement that is subject to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). The provision provides for the offeror to indicate the payment address to which checks should be mailed for payment of invoices and provides for the offeror to identify participating dealers and provide their addresses for receiving orders and payments on behalf of the contractor. This information is the same as is normally required in the commercial world and does not represent a Government-unique information collection. Therefore, the estimated

burden for this clause under the Paperwork Reduction Act is zero. GSA has a blanket approval under control number 3090-0250 from OMB for information collections with a zero burden estimate.

The new clause at GSAR 552.232-83, Contractor's Billing Responsibilities, contains a recordkeeping requirement that is subject to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). The clause provides for the contractor to require all dealers participating in the performance of the contract to agree to maintain certain records on sales made under the contract on behalf of the contractor. The records required are the same as those normally maintained by dealers in the commercial world and do not represent a Government-unique recordkeeping requirement. Therefore, the estimated burden for this clause under the Paperwork Reduction Act is zero. GSA has a blanket approval under control number 3090-0250 from OMB for information collections with a zero burden estimate.

The revised clause at GSAR 552.238-75, Price Reductions, contains an information collection requirement that is subject to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) that has previously been approved by the OMB under the Paperwork Reduction Act and assigned control number 3090-0235. The changes made to the clause by this rule do not have an impact on the information collection requirement, which was previously approved. Therefore, it has not been submitted to OMB for approval under the Act.

#### H. Determination To Issue an Interim Rule

A determination has been made under the authority of the Administrator of General Services that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to implement Section 211 of the E-Government Act of 2002, signed by the President on December 17, 2002. This case was published for public comment as a proposed rule at 68 FR 3220, January 23, 2003, and resulting comments have been incorporated into the rule. GSA wishes to obtain public comments on the changes. Due to the statutory deadline, the rule is being issued as an interim rule rather than as a second proposed rule. Title IV, Section 402 of the Act directed that within 120 days, the Administrator of General Services implement the provision of the Act. However, pursuant to Public Law 98-577 and FAR 1.501, public comments received in response to this interim rule

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will be considered in formulating the final rule.

**List of Subjects in 48 CFR Parts 511, 516, 532, 538, 546, and 552**

Government procurement.

Dated: May 2, 2003.

David A. Drabkin,  
Deputy Associate Administrator, Office of  
Acquisition Policy.

■ Therefore, GSA amends 48 CFR parts 511, 516, 532, 538, 546, and 552 as set forth below:

■ 1. The authority citation for 48 CFR parts 511, 516, 532, 538, 546, and 552 is revised to read as follows:

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

**PART 511—DESCRIBING AGENCY NEEDS**

■ 2. Amend section 511.204 in paragraphs (c)(3) and (d) by adding a sentence to the end of each paragraph to read as follows:

**511.204 Solicitation provisions and contract clauses.**

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \* In solicitations and contracts for FSS Schedule 70 and the Corporate Schedule containing information technology Special Item Numbers, use Alternate I.

(d) \* \* \* In solicitations and contracts for FSS Schedule 70 and the Corporate Schedule containing information technology Special Item Numbers, use Alternate I.

**PART 516—TYPES OF CONTRACTS**

■ 3. Amend section 516.506 by redesignating paragraph (c) as paragraph (d); adding a new paragraph (c); and revising the last sentence in the newly designated paragraph (d) to read as follows:

**516.506 Solicitation provisions and contract clauses.**

\* \* \* \* \*

(c) In solicitations and contracts for FSS Schedule 70 and the Corporate Schedule containing information technology Special Item Numbers, use 552.216–72, Placement of Orders, Alternate III, instead of Alternate II.

(d) \* \* \* Use 552.216–73 Alternate II when 552.216–72 Alternate II or Alternate III are prescribed.

**PART 532—CONTRACT FINANCING**

■ 4. Revise section 532.206 to read as follows:

**532.206 Solicitation provisions and contract clauses.**

(a) *Discounts for prompt payment.* Include 552.232–8, Discounts for Prompt Payments, in multiple award schedule solicitations and contracts instead of the clause at FAR 52.232–8. In solicitations and contracts for FSS Schedule 70 and the Corporate Schedule containing information technology Special Item Numbers (SINs), use Alternate I.

(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 and Corporate Schedule contracts containing information technology SINs.

(c) The contracting officer shall insert the provision at 552.232–82, Contractor's Remittance (Payment) Address, in all Federal Supply Schedule solicitations and contracts.

(d) The contracting officer shall insert the clause at 552.232–83, Contractor's Billing Responsibilities, in all Multiple Award Schedule solicitations and contracts.

**532.7003 Contract clause.**

■ 5. Amend section 532.7003 by revising paragraph (b); and adding a new paragraph (c) to read as follows:

\* \* \* \* \*

(b) *Federal Supply Service contracts.* Use Alternate I of the clause at 552.232–77 for all FSS schedule solicitations and contracts, except Federal Supply Schedule 70, Information Technology, and the Corporate Schedule contracts containing Information Technology Special Item Numbers.

(c) *Federal Supply Service schedule contracts for information technology Special Item Numbers.* In solicitations and contracts for FSS Schedule 70 and the Corporate Schedule containing information technology Special Item Numbers, use 552.232–79 instead of 552.232–77.

**PART 538—FEDERAL SUPPLY SCHEDULE CONTRACTING**

**538.272 [Amended]**

■ 6. Amend paragraph (a) of section 538.272 by removing "Government" each time it is used (twice) and adding "eligible ordering activities" in its place.

■ 7. Amend section 538.273 by revising the introductory text of paragraph (a)(2); and adding a sentence at the end of paragraph (b)(2) to read as follows:

**538.273 Contract clauses.**

(a) \* \* \*

(2) 552.237–71, Submission and Distribution of Authorized FSS

Schedule Pricelists. In solicitations and contracts for FSS Schedule 70 and the Corporate Schedule contracts containing information technology Special Item Numbers, use Alternate I. If GSA is not prepared to accept electronic submissions for a particular schedule, delete:

\* \* \* \* \*

(b) \* \* \* In solicitations and contracts for FSS Schedule 70 and the Corporate Schedule contracts containing information technology Special Item Numbers, use Alternate I.

■ 8. Add Subpart 538.70 to read as follows:

**Subpart 538.70 Cooperative Purchasing**

Sec.

538.7000 Scope of subpart.

538.7001 Definitions.

538.7002 General.

538.7003 Policy.

538.7004 Solicitation provisions and contract clauses.

**538.7000 Scope of subpart.**

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

**538.7001 Definitions.**

*Ordering activity* (also called "ordering agency" and "ordering office") means an eligible ordering activity (see 552.238–78) authorized to place orders under Federal supply schedule contracts.

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

*State and local government entities*, as used in this subpart, means the states of the United States, counties, municipalities, cities, towns, townships, tribal governments, public authorities (including public or Indian housing agencies under the United States Housing Act of 1937), school districts, colleges and other institutions of higher education, council of governments (incorporated or not), regional or

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interstate government entities, or any agency or instrumentality of the preceding entities (including any local educational agency or institution of higher education), and including legislative and judicial departments. The term does not include contractors of, or grantees of, State or local governments.

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

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

(3) *Tribal government* means—

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

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

#### 538.7002 General.

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

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

(c) State and local governments are authorized to procure only from the information technology Federal Supply Schedule (Schedule 70) contracts and Corporate Schedule contracts containing information technology SINs. A listing of the participating contractors and SINs for the products and services that are available through Schedule 70 and

Corporate Schedule contracts containing information technology SINs, is available in GSA's Schedules e-Library at web site <http://fss.gsa.gov/elibrary>. Click on Schedules e-Library and then click on the ICON labeled Cooperative Purchasing, State and Local. The contractors and the products and services available for cooperative purchasing will be labeled with the ICON.

#### 538.7003 Policy.

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

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

- (n) 52.247-34, F.O.B. Destination.
- (o) 52.247-38, F.O.B. Inland Carrier Point of Exportation.

#### 538.7004 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the clause at 552.238-77, Definition (Federal Supply Schedules), in solicitations and schedule contracts for Schedule 70 and the Corporate Schedule contracts containing information technology SINs.

(b) The contracting officer shall insert the clause at 552.238-78, Scope of Contract (Eligible Ordering Activities), in solicitations and contracts for Schedule 70 and the Corporate Schedule contracts containing information technology SINs.

(c) The contracting officer shall insert the clause at 552.238-79, Use of Federal Supply Schedule Contracts by Certain Entities—Cooperative Purchasing, in solicitations and Schedule 70 contracts and the Corporate Schedule contracts containing information technology SINs.

(d) See 552.107-70 for authorized FAR deviations.

#### PART 546—QUALITY ASSURANCE

- 9. Amend section 546.710 in paragraph (b) by adding a sentence to the end of the paragraph to read as follows:

#### 546.710 Contract clauses.

\* \* \* \* \*

(b) \* \* \* In solicitations and contracts for FSS Schedule 70 and the Corporate Schedule containing information technology Special Item Numbers, use Alternate I.

#### PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 10. Amend section 552.211-75 by adding Alternate I to read as follows:

#### 552.211-75 Preservation, Packaging and Packing.

\* \* \* \* \*

*Alternate I (May 2003).* As prescribed at 511.204(c)(3), insert the following sentence in place of the last sentence of the clause:

Where special or unusual packing is specified in an order, but not specifically provided for by the contract, such packing details must be the subject of an agreement independently arrived at between the ordering activity and the Contractor.

- 11. Amend section 552.211-77 by adding Alternate I to read as follows:

#### 552.211-77 Packing List.

\* \* \* \* \*

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*Alternate I (May 2003).* As prescribed at 511.204(d), substitute the following paragraphs (a)(3) and (b) for (a)(3) and (b) of the basic clause:

(a)(3) Ordering activity order or requisition number;

(b) When payment will be made by Ordering activity commercial credit card, in addition to the information in (a) above, the packing list or shipping document shall include:

(1) Cardholder name and telephone number; and

(2) The term "Credit Card."

■ 12. Amend section 552.216-72 by adding Alternate III to read as follows:

**552.216-72 Placement of Orders.**

\* \* \* \* \*

*Alternate III (May 2003).* As prescribed in 516.506(c), substitute the following paragraphs (a), (c), and (d) for paragraphs (a), (c), and (d) of the basic clause:

(a) See 552.238-78, Scope of Contract (Eligible Ordering Activities), for who may order under this contract.

(c) If the Contractor agrees, GSA's Federal Supply Service (FSS) will place orders for eligible ordering activities, as defined in paragraph (a) of the clause at 552.238-78, by EDI using computer-to-computer EDI. If computer-to-computer EDI is not possible, FSS will use an alternative EDI method allowing the Contractor to receive orders by facsimile transmission. Subject to the Contractor's agreement, other eligible ordering activities, as defined in paragraphs (a) and (b) of the clause at 552.238-78, may also place orders by EDI.

(d) When computer-to-computer EDI procedures will be used to place orders, the Contractor shall enter into one or more Trading Partner Agreements (TPA) with each ordering activity placing orders electronically in order to ensure mutual understanding by the parties of certain electronic transaction conventions and to recognize the rights and responsibilities of the parties as they apply to this method of placing orders. The TPA must identify, among other things, the third party provider(s) through which electronic orders are placed, the transaction sets used, security procedures, and guidelines for implementation. Ordering activities may obtain a sample format to customize as needed from the office specified in paragraph (g) of this clause.

■ 13. Amend section 552.232-8 by adding Alternate I to read as follows:

**552.232-8 Discounts for Prompt Payment.**

\* \* \* \* \*

*Alternate I (May 2003).* As prescribed in 532.206(a), remove paragraph (d) and redesignate paragraphs (e), (f), and (g) as (d), (e), and (f), respectively.

■ 14. Add section 552.232-79 to read as follows:

**552.232-79 Payment by Credit Card.**

■ As prescribed in 532.7003(c) insert the following clause:

Payment By Credit Card (May 2003)

(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 Governmentwide commercial purchase 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. (End of clause)

■ 15. Add sections 552.232-81, 552.232-82, and 552.232-83 to read as follows:

**552.232-81 Payments by Non-Federal Ordering Activities.**

As prescribed in 532.206(b), insert the following clause:

Payments By Non-Federal Ordering Activities (May 2003)

If eligible non-federal ordering activities are subject to a State prompt payment law, the terms and conditions of the applicable State law apply to the orders placed under this contract by such activities. If eligible non-federal ordering activities are not subject to a State prompt payment law, the terms and conditions of the Federal Prompt Payment Act as reflected in Federal Acquisition Regulation clause 52.232-25, Prompt Payment, or 52.212-4, Contract Terms and Conditions—Commercial Items, apply to such activities in the same manner as to Federal ordering activities. (End of clause)

**552.232-82 Contractor's Remittance (Payment) Address.**

As prescribed in 532.206(c), insert the following provision:

Contractor's Remittance (Payment) Address (May 2003)

(a) Payment by electronic funds transfer (EFT) is the preferred method of payment. However, under certain conditions, the ordering activity may elect to make payment by check. The offeror shall indicate below the payment address to which checks should be mailed for payment of proper invoices submitted under a resultant contract.

Payment Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(b) Offeror shall furnish by attachment to this solicitation, the remittance (payment) addresses of all authorized participating dealers receiving orders and accepting payment by check in the name of the Contractor in care of the dealer, if different from their ordering address(es) specified elsewhere in this solicitation. If a dealer's ordering and remittance address differ, both must be furnished and identified as such.

(c) All offerors are cautioned that if the remittance (payment) address shown on an actual invoice differs from that shown in paragraph (b) of this provision or on the attachment, the remittance address(es) in paragraph (b) of this provision or attached will govern. Payment to any other address, except as provided for through EFT payment methods, will require an administrative change to the contract.

**Note:** All orders placed against a Federal Supply Schedule contract are to be paid by the individual ordering activity placing the order. Each order will cite the appropriate ordering activity payment address, and proper invoices should be sent to that address. Proper invoices should be sent to GSA only for orders placed by GSA. Any other ordering activity's invoices sent to GSA will only delay your payment. (End of provision)

**552.232-83 Contractor's Billing Responsibilities.**

As prescribed in 532.206(d), insert the following clause:

Contractor's Billing Responsibilities (May 2003)

The Contractor is required to perform all billings made pursuant to this contract. However, if the Contractor has dealers that 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 ordering activities 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—

- (i) The date of sale;
- (ii) The ordering activity to which the sale was made;
- (iii) The service or product/model sold;
- (iv) The quantity of each service or product/model sold;
- (v) The price at which it was sold, including discounts; and
- (vi) 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 payments 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. (End of clause)

■ 16. Amend section 552.238-71 by adding Alternate I to read as follows:

**552.238-71 Submission and Distribution of Authorized FSS Schedule Pricelists.**

\* \* \* \* \*

*Alternate I (May 2003).* As prescribed in 538.273(a)(2), substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) *Definition.* For the purposes of this clause, the Mailing List is [Contracting officer shall insert either: "the list of addressees provided to the Contractor by the Contracting Officer" or "the Contractor's listing of its ordering activity customers"].

■ 17. Amend section 552.238-75 by adding Alternate I to read as follows:

**552.238-75 Price Reductions.**

\* \* \* \* \*

*Alternate I (May 2003).* As prescribed in 538.273(b)(2), substitute the following paragraph (c)(2) for paragraph (c)(2) of the basic clause, and substitute the following paragraph (d)(2) for paragraph (d)(2) of the basic clause.

(c)(2) The Contractor shall offer the price reduction to the eligible ordering activities with the same effective date, and for the same time period, as extended to the commercial customer (or category of customers).

(d)(2) To eligible ordering activities under this contract; or

■ 18. Add sections 552.238-77 through 552.238-79 to read as follows:

**552.238-77 Definition (Federal Supply Schedules).**

As prescribed in 538.7004(a), insert the following clause:

Definition (Federal Supply Schedules) (May 2003)

*Ordering activity* (also called "ordering agency" and "ordering office") means an eligible ordering activity (see 552.238-78) authorized to place orders under Federal Supply Schedule contracts. (End of clause)

**552.238-78 Scope of Contract (Eligible Ordering Activities).**

As prescribed in 538.7004(b), insert the following clause:

Scope of Contract (Eligible Ordering Activities) (May 2003)

(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 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 FAR Subpart 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;

(6) Tribal governments when authorized under 25 U.S.C. 450j(k);

(7) Qualified Nonprofit Agencies as authorized under 40 U.S.C. 502(b); and

(8) Organizations, other than those identified in paragraph (b) of this clause, 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 70 contracts and Corporate Schedule contracts containing information technology special item numbers, on an optional basis; PROVIDED, the Contractor accepts order(s) from such activities:

State and local government, 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.

(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 decline the order in accordance with 552.238-79(f)(2). 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. (End of clause)

**552.238-79 Use of Federal Supply Schedule Contracts by Certain Entities—Cooperative Purchasing.**

As prescribed in 538.7004(c), insert the following clause:

Use of Federal Supply Schedule Contracts by Certain Entities—Cooperative Purchasing (May 2003)

(a) If an entity identified in paragraph (b) of the clause at 552.238-78, Scope of Contract (Eligible Ordering Activities), elects to place an order under this contract, the entity agrees that the 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 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, applying Federal procurement law, including statutes, regulations and case law, and, if pertinent, the Uniform Commercial Code. To the extent authorized by law, parties to this new contract are encouraged to resolve disputes through Alternative Dispute Resolution.

(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 include terms and conditions required by statute, ordinance, regulation or order as a part of a statement of work (SOW) or statement of objective (SOO) to the extent that these terms and conditions do not conflict with the terms and conditions of the Schedule contract. The ordering activity and the Contractor expressly acknowledge that, in entering into an agreement for the ordering

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activity to purchase goods or services from the Contractor, neither the ordering activity nor the Contractor will look to, primarily or in any secondary capacity, or file any claim against the United States or any of its agencies with respect to any failure of performance by the other party.

(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.

(6) The supplies or services purchased will be used for governmental purposes only and will not be resold for personal use. Disposal of property acquired will be in accordance with the established procedures of the ordering activity for the disposal of personal property.

(b) If the Schedule Contractor accepts an order from an entity identified in paragraph (b) of the clause at 552.238-78, Scope of

Contract (Eligible Ordering Activities), the Contractor agrees to the following conditions:

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

(2) 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 decline the order using the same means as those used to place the order. The Contractor shall fulfill orders placed by such entities, which are not declined within the 5-day period.

(c) In accordance with clause 552.238-74, Contractor's Report of Sales, the Contractor must report the quarterly dollar value of all sales under this contract. When submitting sales reports, the contractor must report two dollar values for each Special Item Number: (1) the dollar value for sales to entities identified in paragraph (a) of the clause at 552.238-78, Scope of Contract (Eligible Ordering Activities), and (2) the dollar value for sales to entities identified in paragraph (b) of clause 552.238-78. (End of clause)

■ 19. Amend section 552.246-73 by adding Alternate I to read as follows:

**552.246-73 Warranty—Multiple Award Schedule.**

\* \* \* \* \*

*Alternate I (May 2003).* As prescribed in 546.710(b), substitute the following paragraphs (b)(1) and (b)(3) for paragraphs (b)(1) and (b)(3) of the basic clause:

(b)(1) The Contractor must provide, at a minimum, a warranty on all non-consumable parts for a period of 90 days from the date that the ordering activity accepts the product.

(b)(3) The Contractor must bear the transportation costs of returning the products to and from the repair facility, or the costs involved with Contractor personnel traveling to the ordering activity facility for the purpose of repairing the product onsite, during the 90-day warranty period.

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