



MEMORANDUM FOR GSA CONTRACTING ACTIVITIES

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Date: 2019.12.04 09:10:05
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SUBJECT: GSAR Class Deviation - Clarifying the Government's Rights Under the Commercial Items Clause

1. **Purpose.** This memorandum approves a class deviation to the General Services Administration Acquisition Regulation (GSAR) to amend the GSAR for purposes of clarifying the Government's rights.
2. **Background.** As part of the Multiple Award Schedule (MAS) Reform effort, a concern with GSAR clause 552.212-4¹ was raised that the Government's rights, at the contract and order level, were ambiguous. The specific concern being ambiguity surrounding termination and other rights of the government (*i.e.*, it is not clear if the GSA contracting officer has termination rights at the contract level because the language speaks only to ordering activities).

Upon review, it was identified that this ambiguity stemmed from GSAR part 538.70 Purchasing by Non-Federal Entities, specifically GSAR 538.7003. GSAR 538.7003 authorizes GSA contracting officers to make minor modifications to certain Federal Acquisition Regulation (FAR) and General Services Administration Acquisition Manual (GSAM) provisions and clauses. The minor modification being the deletion of the word "Government" or similar language referring to the U.S. Government and substituting that language with the term "ordering activity" or similar language when preparing solicitations and contracts to be awarded under authorized Federal Supply Schedules². Additionally, when such minor modification is made, the word "(DEVIATION)" is added at the end of the title of the provision or clause.

¹GSAR clause 552.212-4, Contract Terms and Conditions - Commercial Items (FAR DEVIATION) is prescribed in certain circumstances (see 512.203(d)) in lieu of FAR clause 52.212-4, Contract Terms and Conditions - Commercial Items.

²GSAR 538.7003 lists fifteen (15) clauses; however the GSAR states this is not an all inclusive list.

The need to make these minor modifications has been determined to be no longer necessary. The reason is that the GSAR clauses prescribed in GSAR subpart 538.70 sufficiently address the rights of Non-Federal entities. As a result, this class deviation deletes 538.7003 to remove the ability to make these minor modifications. The Senior Procurement Executive (SPE) has determined it is in the best interest of GSA to issue this class deviation until such time the formal rulemaking process for purposes of updating the GSAR can be completed or other actions taken.

3. Applicability.

a. This class deviation applies to-

- i. Solicitations and contracts that utilized the authority in GSAR 538.7003 issued before the date of this deviation (see Section 4 below for instructions on how existing contracts are to be addressed); and
- ii. Solicitations issued on or after the date of this deviation where this authority would have been used.

b. This class deviation does not impact the authorized deviation related to FAR clause 52.212-4 regarding commercial supplier agreements (see GSAM 512.203 and 512.301(e)) or the clause fill-in instructions provided for the use of order-level materials (see GSAM 538.7204).

4. Instructions. FAS Office of Policy and Compliance and the MAS PMO will issue supplemental instructions to address timing on modifying existing MAS contracts.

5. Authority. This class deviation to the GSAR is issued under the authority GSAM 501.404.

6. Effective Date. This class deviation is effective immediately and remains in effect until incorporated into the GSAR.

7. Cancellations. Not Applicable

8. Point of Contact. Questions regarding this class deviation may be directed to GSARPolicy@gsa.gov.

Attachment

Attachment A – GSAR Line-In/Line-Out Text

TAB A – GSAR Line-In/Line-Out Text**GSAM Baseline: Change 103 effective 09/16/2019**

- Additions to baseline made by rule are indicated by [bold text in brackets]
- Deletions to baseline made by rule are indicated by ~~strikethroughs~~
- Five asterisks (* * * * *) indicate that there are no revisions between the preceding and following sections
- Three asterisks (* * *) indicate that there are no revisions between the material shown within a subsection

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Subpart 538.70 - Purchasing by Non-Federal Entities

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~~538.7003 Policy.~~

~~Preparing solicitations when schedules are open to eligible non-federal entities. When opening authorized Federal Supply Schedules 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 authorized Federal Supply Schedules. 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.~~

538.700[~~34 Solicitation provisions and e C~~]ontract clauses.

(a) The contracting officer shall insert the clause at 552.238-112, Definition (Federal Supply Schedules)—Non-Federal Entity, in solicitations and contracts for all Federal Supply Schedules.

(b) The contracting officer shall insert the clause at 552.238-113, Scope of Contract (Eligible Ordering Activities), in solicitations and contracts for all Federal Supply Schedules.

(c) The contracting officer shall insert the clause at 552.238-114, Use of Federal Supply Schedule Contracts by Non-Federal Entities, in solicitations and contracts for all Federal Supply Schedules.

~~(d) See 552.101-70 for authorized FAR deviations.~~

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