

*Chapter 9*  
**Simplified Acquisition  
Procedures**



*2014 Contract Attorneys Deskbook*

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## CHAPTER 9

### SIMPLIFIED ACQUISITIONS

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## **CHAPTER 9**

### **SIMPLIFIED ACQUISITIONS**

#### **I. INTRODUCTION**

Following this block of instruction, students should:

- A. Understand that Simplified Acquisitions streamline the acquisition process and can result in substantial savings of time and money to the Government.
- B. Understand how Simplified Acquisitions differ from the Sealed Bidding and Negotiated Procurement methods of acquisitions.
- C. Understand when you can use Simplified Acquisitions, and the different competition requirements and thresholds that apply to different Simplified Acquisition procedures.
- D. Understand the various simplified acquisitions procedures and the situations when each procedure should be used.

#### **II. REFERENCES**

- A. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994) (hereinafter FASA).
- B. Federal Acquisition Regulation (hereinafter FAR) Part 13, Simplified Acquisition Procedures.
- C. FAR Part 8, Required Sources of Supplies and Services.
- D. FAR Part 5, Publicizing Contract Actions.
- E. FAR Part 2, Definitions of Words and Terms.
- F. Defense Federal Acquisition Regulation Supplement (DFARS) Part 213, Simplified Acquisitions Procedures.
- G. DOD Financial Management Regulation (FMR), Volume 5, 0204, Imprest Funds (May 2012).
- H. DOD Financial Management Regulation (FMR), Volume 10, Chapter 23, Purchase Card Payments (Sep 2010).
- I. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 822.

### III. OVERVIEW

- A. What is a Simplified Acquisition? To streamline the federal procurement process, in 1994, Congress authorized the use of a simplified acquisition process for purchases of supplies and services under certain thresholds. The goal was to allow agency officials to expedite the evaluation and selection processes and keep documentation to a minimum.<sup>1</sup>
- B. Simplified acquisition procedures are those procedures prescribed in Part 13 of the FAR, Part 213 of the DFARS, and agency FAR supplements for making simplified acquisitions. The simplified acquisition procedures include the use of SF 1449 (Solicitation / Contract / Order for Commercial Items), SF18 (Request for Quotation), purchase orders, blanket purchase agreements (BPA's), imprest funds, and government purchase cards (GPC's are basically government credit cards).
- C. Purpose. FAR 13.002. Simplified acquisition procedures are used to:
1. Reduce administrative costs;
  2. Improve opportunities for small disadvantaged, women-owned, veteran-owned, HUBZone, and service-disabled veteran-owned small business concerns to obtain a fair proportion of government contracts;
  3. Promote efficiency and economy in contracting;
  4. Avoid unnecessary burdens for agencies and contractors.
- D. Thresholds. There are basically four different categories of purchases authorized to use a form of the simplified acquisition procedures. Three of the four categories are primarily defined by thresholds. The following chart summarizes the thresholds, which are then further defined below the chart:

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<sup>1</sup> GAO Report to Congressional Committees, September 2003, Contract Management, No Reliable Data to Measure Benefits of the Simplified Acquisition Test Program, GAO-03-1068, pg. 2.

Simplified Acquisition Method	Normal Thresholds	Purchase made (or awarded & performed) <u>inside the U.S. in support of a contingency operation</u> or to facilitate the defense against or recovery from NBCR	Purchase made (or awarded & performed) <u>outside<sup>2</sup> the U.S</u> in support of a contingency operation or NBCR recovery.
Micro-Purchase	\$3,000 <sup>3</sup>	\$15,000	\$30,000
SAP	\$150,000 <sup>4</sup>	\$300,000	\$1,000,000
Commercial Items <sup>5</sup>	[\$6,500,000]	[\$12,000,000]	[\$12,000,000]

1. Simplified Acquisition Threshold. Acquisitions of supplies or services in the amount of \$150,000 or less are called simplified acquisitions. They may use the simplified acquisition procedures (SAP) listed in FAR Part 13. FAR 2.101.
  - a. The Simplified Acquisition threshold increases to **\$300,000** for contract awards and purchases **inside the U.S.** if the head of the agency determines the acquisition of supplies or services is to be used to in support of a *contingency operation* or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack (NBCR). FAR 2.101.
  - b. The Simplified Acquisition threshold increases to **\$300,000** for contract awards and purchases **outside the U.S.** if the head of the contracting activity determines the acquisition of supplies or services is to be used to in support of a *humanitarian or peacekeeping operation*, as defined in FAR 2.101.

<sup>2</sup> Section 843 of the National Defense Authorization Act for Fiscal Year 2012 permits DoD to designate a single lead contracting activity inside the United States to act as a “reach-back contracting authority” in support of OEF and Operation New Dawn. The single reach-back contracting authority may use the increased thresholds available to support contingencies even if the contracts are awarded inside the United States.

<sup>3</sup> Per the definition in FAR 2.101, the micro-purchase threshold is \$2,000 for purchase of construction subject to the Davis-Bacon Act and \$2,500 for purchase of services subject to the Service Contract Act.

<sup>4</sup> A DoD Class Deviation (DARS Tracking Number: 2011-O0009), effective March 28, 2011, raised the Simplified Acquisition Threshold to \$300,000 “when soliciting or awarding contracts to be awarded and performed outside the United States, or making purchases outside the United States, for acquisitions of supplies and services that, as determined by the head of the contracting activity, are to be used to support a *humanitarian or peacekeeping operation*, as defined at FAR 2.101” (emphasis added). The Class Deviation has since been incorporated into the Simplified Acquisition definition at DFARS 202.101.

<sup>5</sup> Authority for the CITP lapsed on 1 Jan 2012, but was reauthorized by section 822 of the 2013 NDAA. Authority for the program will lapse on 1 Jan 2015, absent Congressional action to re-extend the program or to make it permanent. Curiously, the NDAA provision that reauthorized the program included an effective date of 1 January 2012, which in effect retroactively authorizes the program for all of 2012 (i.e. between the date the authority originally lapsed (1 Jan 2012) and the date the NDAA was signed into law (2 Jan 2013)). Whether this retroactive effect has any practical importance remains to be seen. For more information, see Chapter 10.

- c. The Simplified Acquisition threshold increases to **\$1,000,000** for contract awards and purchases **outside the U.S.** if the head of the agency determines the acquisition of supplies or services is to be used to in support of a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. FAR 2.101. The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 822.
2. **Micro Purchase Threshold.** Acquisition of supplies or services, the aggregate amount of which does not exceed **\$3,000** are called micro purchases. In the case of construction, the limit is \$2,000 and in the case of acquisitions subject to the Service Contract Act the limit is \$2,500.<sup>6</sup> FAR 2.101.
- a. If the head of the agency determines the acquisitions of supplies or services is in support of a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical or radiological attack the micro-purchase threshold increases to **\$15,000** for any contract to be awarded and performed, or purchase to be made **inside the U.S.** FAR 2.101; FAR 13.201(g). Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 822.
  - b. If the head of the agency determines the acquisitions of supplies or services is in support of a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical or radiological attack the micro-purchase threshold increases to **\$30,000** for any contract to be awarded and performed, or purchase to be made **outside the U.S.** FAR 2.101; FAR 13.201(g). Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 822.
    - (1) Purchases using this authority must have a clear and direct relationship to the support of a contingency operation or the defense against or recovery from nuclear, biological, chemical, or radiological attack.

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<sup>6</sup> Effective September 28, 2006, the Civilian Agency Acquisition Council and the Defense Acquisition Regulation Council (FAR Councils) adjusted general micro-purchase for inflation from \$2,500 to \$3,000, pursuant to Pub. L. No. 108-375, § 807. The FAR Councils could not adjust the micro-purchase thresholds for non-exempt service contracts and construction contracts because of limitation created by the Service Contract Act and the Davis-Bacon Wage Act. *See* Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds, 71 Fed. Reg. 57,363.

- (2) The government-wide commercial purchase card is the preferred method of making micro-purchases, although any of the contract vehicles may be used if agency procedures allow it. FAR 13.201(b). NOTE: As of 31 July 2000, DoD requires the use of the government purchase card (GPC) for all purchases at or below the micro-purchase threshold. 65 Fed. Reg. 46,625 (2000). See DFARS 213.270 (for exceptions to the policy); see AFARS 5113.270-90 (for agency specific requirements for the purchase card program).
  - (3) No provisions or clauses are required for micro-purchases, but they may be used. FAR Part 8 DOES apply to micro-purchases. FAR 13.201(d).
  - (4) Competition is not required if the authorized individual considers the price reasonable. To the extent practicable, micro-purchases shall be distributed equitably among qualified suppliers. FAR 13.203(a).
3. Commercial Item Test Program Threshold.<sup>7</sup> Congress created a Commercial Item Test Program (CITP) authority for agencies to use simplified acquisition procedures to purchase commercial item supplies and services for amounts greater than the simplified acquisition threshold but not greater than **\$6,500,000**. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4202(a) (1) (A) (codified at 10 U.S.C. § 2304(g)(1)(B)). FAR 13.5.<sup>8</sup>
- a. For a **contingency operation** or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States, the \$6,500,000 commercial item test program threshold increases to **\$12,000,000**. *See* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1443.
  - b. For the period of the CITP test, contracting activities are to use simplified acquisition procedures to the maximum extent practicable. FAR 13.500(b).
  - c. Congress created the CITP authority to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors. 10 U.S.C. § 2304(g)(1). Therefore,

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<sup>7</sup> *See* footnote 5 above.

<sup>8</sup> Effective October 1, 2010, the FAR Councils adjusted the maximum purchase threshold for the Commercial Items Test Program for inflation from \$5.5 million to \$6.5 million. *See* Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds, 75 Fed. Reg. 53169-01.

agencies should take advantage of the simplified acquisition method of acquisition whenever possible in conjunction with the CITP authority. See East West Research, Inc., B-239516, Aug. 29, 1990, 90-2 CPD ¶ 178 (In keeping with their purpose promoting efficiency and economy in contracting small purchase procedures are specifically excepted from the full and open competition requirements of the Competition in Contracting Act of 1984 and the mandatory use of commercial item descriptions); see also American Eurocopter Corporation, B-283700, Dec. 16, 1999, 99-2 CPD P 110 (agency used authority of FAR 13.5 to purchase a Bell Helicopter).

- d. On January 15, 2013 the Defense Procurement and Acquisition Policy (DPAP) authorized a class deviation from FAR Subpart 13.5, “Test Program For Certain Commercial Items,” **whereby extending authority to issue solicitations under this Subpart from January 1, 2012, to January 1, 2015**<sup>9</sup>.
  - e. ***Section 821: Extension of Authority for Use of Simplified Acquisition Procedures for Certain Commercial Items*** – This provision **extends to 2015 the “test program”** in which an agency may use simplified procedures to purchase commercial items in amounts greater than the simplified acquisition threshold, but not exceeding \$6,500,000 (\$12,000,000 for acquisitions in support of a contingency operation or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack) .
  - f. Section 822: Fiscal Year 2013 National Defense Authorization Act -renewed and extended the test program which allows agencies to use simplified acquisition procedures for certain commercial items above the simplified acquisition threshold. The deviation is effective immediately and will remain in effect until incorporated into the FAR or otherwise rescinded.
4. Personal Services. If an agency has specific statutory authority to acquire personal services, that agency may use simplified acquisition procedures to acquire those services. FAR 13.003 and FAR 37.104.

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<sup>9</sup> Director, DPAP memo of 15 January 2013, DARS Tracking Number: 2013-O0004, Class Deviation— Extension of Authority for Use of Simplified Acquisition Procedures for Certain Commercial Items, available at <http://www.acq.osd.mil/dpap/policy/policyvault/USA000244-13-DPAP.pdf>.

#### IV. DEFINITIONS.

- A. Authorized Individual. A person who has been granted authority under agency procedures to acquire supplies and services in accordance with the simplified acquisition procedures of FAR Part 13. FAR 13.001.
- B. Commercial Item Test Program (CITP).<sup>10</sup> A program designed to implement the federal government's preference for the acquisition of commercial items by establishing acquisition policies more closely resembling those of the commercial marketplace. In general, this program allows for the procurement of commercial items using simplified acquisition procedures as long as the commercial item costs less than \$6,500,000. See FAR Part 13.5 and Chapter 10 of the Contract Attorneys Deskbook for a comprehensive outline. **Note that the authority to issue solicitations and to use the increased thresholds under the Test Program for Certain Commercial Items was extended to January 1, 2015.**
- C. Contingency Operation. For purposes of determining the applicable simplified acquisition threshold, a contingency operation is a military operation that is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operation, or hostilities against an enemy of the United States or against an opposing military force; or a military operation that results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of 10 U.S.C. chapter 15 of 10 USC or any other provision of law during a war or during a national emergency declared by the President or Congress. FAR 2.101 and 10 U.S.C. § 101(a)(13).
- D. Governmentwide Commercial Purchase Card. A purchase card, similar in nature to a commercial credit card, issued to authorized agency personnel to use to acquire and to pay for supplies and services. FAR 13.001.
- E. "In support of." For purposes of determining applicable simplified acquisition threshold, the determination as to whether the supplies or services are to be used in support of such a contingency operation is to be made by the head of the agency, which for the Army is the Assistant Secretary of the Army (Acquisition, Logistics and Technology). FAR 2.101. By memorandum dated March 24, 2004, the ASA(ALT) delegated this authority down to each Head of Contracting Activity, who may further delegate this authority down to "any official in procurement channels, who is at least one level above the contracting officer." Typically, the authority is re-delegated down to the Directors of Contracting or to the chiefs of contracting offices.

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<sup>10</sup> See footnote 5 above.

- F. Imprest Fund. A cash fund of a fixed amount established by an advance of funds without charge to an appropriation, from an agency finance or disbursing officer to a duly appointed cashier, for disbursement as needed from time to time in making payment in cash for relatively small amounts. FAR 13.001.
- G. Humanitarian or Peacekeeping Operation. A military operation in support of the provision of humanitarian or foreign disaster assistance or in support of a peacekeeping operation under chapter VI or VII of the Charter of the United Nations. The term does not include routine training, force rotation, or stationing (10 U.S.C. § 2302(8) and 41 U.S.C § 153(2)). FAR 2.101.
- H. Purchase Order. A government offer to buy certain supplies or services, including construction and research and development, upon specified terms and conditions, using simplified acquisition procedures. FAR 2.101.
- I. Request for Quotes (RFQ). When a contracting officer solicits vendors to fill an agency need while using simplified acquisitions procedures, the solicitation is called a Request for Quotes. Vendors’ responses to fill the agency needs are called “quotes.” A quotation is not an offer, and consequently, cannot be accepted by the government to form a binding contract. The order by the government is the offer. When the contractor accepts the government’s order, a legal contract is formed. FAR 13.004.

## V. WHEN TO USE SAP – OVERVIEW OF POLICY PRE-REQUISITES

- A. General Rule: Agencies **shall use** simplified acquisition procedures to the “maximum extent practicable” for all purchases of supplies or services not exceeding the simplified acquisition threshold (including purchases at or below the micro-purchase threshold). FAR 13.003(a).<sup>11</sup>
- B. Overview of Pre-Requisites. There are pre-requisites to using SAP.
  - 1. Agencies shall **not** use simplified acquisition procedures to acquire supplies and services initially estimated to exceed the simplified acquisition threshold, or that will, in fact, exceed it. FAR 13.003(c).
    - a. Options. Options may be included in simplified acquisitions but the threshold value of the acquisition is determined by

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<sup>11</sup> In support of contingency operations defined by 10 U.S.C. § 101(a)(13), or to facilitate defense against or recovery from NBC or radiological attack, the simplified acquisition threshold increases to \$300,000 for purchase made in the U.S., or \$1,000,000 for purchase made outside the U.S. Service Acquisition Reform Act of 2003, Pub. L. No. 108-136, § 1443; increased thresholds in the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 817; and FAR 2.101 and DFARS 202.101. In support of “humanitarian or peacekeeping” operations, the Simplified Acquisition Threshold is \$300,000 for purchases made, or contracts to be awarded and performed, outside the United States. *See* note 4 *supra*.

adding the value of the base contract and all options. FAR 13.106-1(e).

2. Agencies shall **not** divide requirements that exceed the simplified acquisition threshold into multiple purchases merely to justify using simplified acquisition procedures. 10 U.S.C. § 2304(g)(2); FAR 13.003(c).
  - a. *See* L.A. Systems v. Department of the Army, GSBICA 13472-P, 96-1 BCA ¶ 28,220 (Government improperly fragmented purchase of computer upgrades into four parts because agency knew that all four upgrades were necessary and were, therefore, one requirement).
  - b. *But see* Petchem, Inc. v. United States, 99 F.Supp. 2d 50 (D.D.C. 2000) (Navy did not violate CICA by purchasing tugboat services on a piecemeal basis when it used an IDIQ contract, even though total value of the services were expected to exceed \$100,000, because actual requirement was indeterminate and a prior competitive solicitation did not result in reasonable offers); Mas-Hamilton Group, Inc., B-249049, Oct. 20, 1992, 72 Comp. Gen. 6, 92-2 CPD ¶ 259 (Where an agency was not in a position to proceed with fully competitive award for critical items, agency's utilization of small purchase procedures to make interim, emergency filler buys on an as-needed, urgent basis was not improper).
3. If other existing ID/IQ contracts or other existing contracts would satisfy the agency's requirement, the agency must order off the other contract. FAR 13.003(a)(2) & (3).
4. Required Supply or Service: If agency's requirement can be met by using a required source of supply or a required source of services under FAR Part 8, then the agency must acquire the item in that manner. FAR 13.003(a)(1)
5. Small Business Set-Aside. All acquisitions exceeding the micro-purchase threshold but under the simplified acquisition threshold are reserved exclusively for small business concerns and **shall** be set aside. FAR 13.003(b).

## **VI. PRE-REQUISITE: REQUIRED SOURCES OF SUPPLIES AND SERVICES**

- A. FAR Policy for Required Sources of Supplies and Services. **Prior to competing a contract for supplies or services** through **ANY** method of acquisition (Simplified Acquisitions, Sealed Bidding, or Negotiations),

agencies must determine whether they can satisfy their needs through Required Sources of Supplies and Services under FAR Part 8. (e.g., Federal Prison Industries, Committee for Purchase from People who are Blind or Severely Disabled, and Federal Supply Schedule contracts).<sup>12</sup> FAR 8.002.<sup>13</sup>

- B. Required Sources of Supplies. Agencies **shall satisfy** requirements for supplies in the descending order of priority listed below (FAR 8.002(a)(1):
1. First, Agency inventories;
  2. Second, Excess from other agencies (see FAR Subpart 8.1);
  3. Third, Federal Prison Industries, Inc. (FPI) (see FAR Subpart 8.6).
    - a. FPI (also referred to as UNICOR) is a self-supporting, wholly owned government corporation that provides training and employment for Federal penal and correctional prisoners through the creation and sale of its supplies and services to government agencies. FPI diversifies its supplies and services to minimize adverse impact on private industry. FAR 8.601; 18 U.S.C. §§ 4121-4128 (2006). See [www.unicor.gov](http://www.unicor.gov).
    - b. Although FAR 8.002 lists FPI/UNICOR as a mandatory supply source, due to statutory changes, FPI is now a qualified mandatory source pursuant to Section 637 of Division H of the Consolidated Appropriations Act, 2005 (Public Law 108-447). National Defense Authorization Act (NDAA) for FY 2002, Pub. L. No. 107-107, div. a, Title VIII, § 811(a)(1), 115 Stat. 1180-81 (2001), as amended by the NDAA for FY 2008, Pub. L. No. 110-181, Div. A, Title VIII, § 827, 122 Stat. 228-29 (2008)(appearing at 10 U.S.C. § 2410n (b)).
      - (1) The 2005 CAA provided that none of the funds made available under that or any other Act for fiscal year 2005 *and each fiscal year thereafter* shall be expended for the purchase of a product or service offered by FPI, unless the agency making the purchase determines that

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<sup>12</sup> Federal Supply Schedule is no longer mandatory, but is a preferred method of purchasing. See Murray-Benjamin Elec. Co., LLP, B-298481, 2006 U.S. Comp. Gen. LEXIS 143 (Sept. 7, 2006).

<sup>13</sup> DoD, GSA, and NASA are proposing to amend the FAR part 8. FAR part 8 requires Federal agencies to satisfy their requirements for supplies and services from or through a list of sources in order of priority. This proposed rule would amend FAR part 8 by revising FAR 8.000, 8.002, 8.003, and 8.004, eliminating outdated categories, and distinguishing between Government sources (e.g., Federal Supply Schedules (FSS)) and private-sector sources. See FAR Case 2009-024, Prioritizing Sources of Supplies and Services for Use by the Government, Proposed rule, 76 Fed. Reg. 34634, June 14, 2011.

the offered product or service provides the best value to the buying agency.

- (2) The statutory guidance has been implemented at FAR 8.602 and 8.605.

c. Procedures for FPI Procurements.

- (1) Market Research Requirement. Prior to procuring from FPI/UNICOR, agencies are unilaterally required to conduct market research to determine whether UNICOR products are comparable to products available in the commercial market in terms of price, quality and time of delivery. FAR 8.602 (a)(1).<sup>14</sup>
- (2) Written D&F. The contracting officer must prepare a written determination with supporting rationale comparing the FPI item to supplies available from the private sector in terms of price, quality, and time of delivery. **If the FPI item is comparable**, the agency shall purchase the item from FPI unless the agency has one of the waivers or exceptions below. FAR 8.602(a)(2).
  - (a) Waivers. FPI may grant a waiver for purchase of supplies in the FPI Schedule from another source. There are two types of waivers: General and Formal. FAR 8.604.
  - (b) Exceptions. Purchase from FPI is not required and a waiver is not needed if:
    - (i) Public exigency requires immediate delivery or performance;
    - (ii) Suitable used or excess supplies are available;
    - (iii) The supplies are acquired and used outside the United States;
    - (iv) Items total \$3,000 or less (below the micro purchase threshold);

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<sup>14</sup> The arbitration provisions of 18 U.S.C. § 4124(b) do not apply to the initial market research decision conducted by the agency. However, once the agency finds that FPI is not comparable and decides to acquire the item using any of the authorized procedures, any dispute regarding price, quality, character, or suitability of supplies produced by FPI are subject to arbitration as specified in 18 U.S.C. § 4124. Arbitration decisions are final and binding on all parties. FAR 8.602(d).

- (v) Acquiring services; or
  - (vi) FPI already offers exclusively on a competitive (non-mandatory) basis, as identified in the FPI schedule. FAR 8.605.
- (3) If FPI products are not comparable, an agency must acquire the item (FAR 8.602(a)(4)(ii):
- (a) Using Competitive Procedures in FAR 6.102, 19.5 or Part 13;
- OR
- (b) Using the fair opportunity procedures in FAR 16.505, if placing an order under a multiple award delivery-order contract.
- (4) In both cases, the agency **MUST** include FPI in the solicitation process and consider a timely offer from FPI. Posting the solicitation on FedBizOps is adequate notice. If the solicitation is not posted on FedBizOps, then a copy of the solicitation must be sent to FPI. FAR 8.602(a)(4).
- (5) If the agency is using the fair opportunity procedures in FAR 16.505 or using the multiple award schedule issued pursuant to FAR Subpart 8.4, the agency must also provide FPI the item description or specification, the evaluation factors that will be used as the basis for source selection **AND** consider a timely offer from FPI. FAR 8.602(a)(4)(iii).
- (6) Agencies are to award to the source offering the best value to the government. If FPI is determined to be the best value, order from FPI. FAR 8.602(a)(4)(iv).
- d. If agencies do procure supplies via FPI/UNICOR (after making the above determinations and findings), they are **required** to rate FPI performance, and compare it to the private sector. FAR 8.606.
- e. **DOD Restrictions.** Section 827 of the NDAA Fiscal Year 2008 (Pub. Law. 110-181) required DoD to use competitive procedures when procuring products for which FPI has a significant market share. The statute's implementing regulation is at DFARS 208.602-70. FPI is treated as having a

“significant market share” if FPI’s share of the Department of Defense market is greater than 5 percent. In that case, DoD must acquire the item (FAR 208.602-70(c):

- (1) Using Competitive Procedures in FAR 6.102, 19.5 or Part 13; OR
- (2) Using the fair opportunity procedures in FAR 16.505, if placing an order under a multiple award delivery-order contract; AND
- (3) The agency MUST include FPI in the solicitation process, consider a timely offer from FPI, and make an award in accord with FAR 8.602(a)(4)(ii) through (v.)
- (4) A list of the federal supply classification codes of items for which FPI has more than a 5% share is maintained at [http://www.acq.osd.mil/dpap/cpic/cp/specific\\_policy\\_areas.html#federal\\_prison](http://www.acq.osd.mil/dpap/cpic/cp/specific_policy_areas.html#federal_prison) (last visited 29 Jun 2014).
  - (a) *Case Study.* GAO has found DOD reasonably exercised its discretion in implementing the 2008 NDAA when it established an effective date that began 30 days after its issuance of an amended list of product categories for which FPI has a significant share. After DoD issued an amendment adding shirts to the list, but prior to the effective date of the amendment, the Defense Supply Center Philadelphia (DSCP) non-competitively issued a solicitation to FPI. DSCP had previously completed a comparability assessment, determined FPI’s products were comparable and decided to award to FPI. GAO found DSCP properly followed DoD’s implementation instructions. Ashland Sales & Service Co., B-401481, 15 Sept. 2009, 2009 CPD ¶ 186.

4. Fourth, supplies which are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (Ability One) (FAR 8.002(a)(1)(iv).

- a. Ability One markets its supplies available through the Skilcraft® brand name. See [www.jwod.org](http://www.jwod.org)<sup>15</sup> and FAR Subpart 8.7;
  - b. Contractors who purchase supplies and services for U.S. Government use, must also purchase supplies and services from Ability One. FAR 8.002(c) and FAR 52.208-9.
5. Fifth, wholesale supply sources, such as stock programs of the General Services Administration (GSA) (*see* 41 CFR 101-26.3), the Defense Logistics Agency (*see* 41 CFR 101-26.6), the Department of Veterans Affairs (*see* 41 CFR 101-26.704), and military inventory control points (FAR 8.002(a)(1)(v)).
  6. Sixth, Mandatory Use Federal Supply Schedules (FSS) (*see* FAR Subpart 8.4). See <http://www.gsa.gov/portal/category/100615>. The GSA competes and maintains all FSS.
    - a. Although FAR 8.002 lists mandatory FSS as a required supply source, the GSA has not maintained a mandatory FSS since the 1990's.<sup>16</sup>
    - b. GAO has reiterated that the current GSA's FSS are not mandatory. See Murray-Benjamin Electric Company, LLP, B-298481, Sept. 7, 2006; 2006 CPD ¶ 129. GAO denied a protest holding that "while the list of required sources found in FAR § 8.002 places non-mandatory FSS contracts above commercial sources in priority, it does not *require* an agency to order from the FSS."<sup>17</sup>

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<sup>15</sup> Effective September 28, 2006, the Javits-Wagner-O'Day (JWOD) required source program changed its name to AbilityOne. Some AbilityOne products can also be found on GSA's Federal Supply Schedules.

<sup>16</sup> While FAR 8.002 still lists mandatory and optional schedules as separate priority sources, mandatory schedules have not been in use by GSA since the mid-1990s. Today, all schedules are "optional use," even though FAR 8.002 still lists "mandatory use" FSS (Telephone Interview with Roger Waldron, Acting Senior Procurement Executive, General Services Administration (Oct. 19, 2006)). See also notes 11 and 12, *supra*.

<sup>17</sup> See Murray-Benjamin Electric Company, LLP, B-298481, Sept. 7, 2006; U.S. Comp. Gen. LEXIS 143, at note 5: As explained by GSA, while agencies are encouraged to use the FSS, where an agency concludes that it is in its best interests to meet its needs through an open-market procurement, it is free to do so. GSA Comments at 1. *MBE asserts that DLA did not make a "best interests" determination, but we are aware of no legal requirement--and MBE cites none--that an agency do so.* In any case, such a determination *is implicit from the record.* DLA explains that this acquisition is for critical application items used on a critical weapons system--nuclear power plants, weapons system code 21N--and will result in moving inventory control into the hands of the contractor. Agency Report (AR) ¶¶ 28-29. For these reasons, DLA determined that it is necessary to make a determination of best value among competing proposals. (Emphasis added).

7. Seventh, *Optional Use* Federal Supply Schedules (*see* FAR Subpart 8.4).<sup>18</sup>
  - a. The GSA’s interpretation of FAR § 8.002 is that the optional FSS schedules are a “*preferred* source of supply for Government agencies. . . .” There are currently no mandatory FSS, however.
  - b. The GSA FSS policy is that Government agencies should first consider whether it can best fulfill its requirements through the use of an FSS schedule contractor. Where possible, agencies should generally use the FSS schedule in accordance with the procedures set forth in FAR 8.401 *et seq.* *See Murray-Benjamin Electric Company, LLP*, B-298481, Sept. 7, 2006; 2006 CPD P 129.
  - c. On 13 May 2014, DoD issued a class deviation clarifying that ordering activity contracting officers are responsible for making a determination of fair and reasonable pricing when using Federal Supply Schedules for individual orders. Office of the Under Secretary of Defense-Acquisition, Technology, and Logistics, Class Deviation—Determination of Fair and Reasonable Prices When Using Federal Supply Schedule Contracts, DARS Tracking Number: 2014-O00011 (13 May 2014).
8. Commercial sources of supplies (including educational and nonprofit institutions). Once a Contracting Officer determines that the supply requirement cannot be filled with a required source, then he/she may compete the requirement via one of the three acquisition methods (Simplified Acquisition Procedures, Sealed Bidding, Contracting by Negotiation). FAR 8.004(b)
9. Statutory Sole Sources. In addition to the priority list for Required Sources of Supplies and Services in FAR 8.002, agencies must procure some types of supplies and services from statutory sole sources. These required supply and services procurements include: Helium (FAR Subpart 8.5), Printing Services and Related Supplies (FAR Subpart 8.8), and Leasing of Motor Vehicles (FAR Subpart 8.11)
10. Bottom Line on Required Sources of Supply. Due to the significant restrictions on the use of FPI/UNICOR, the fact that there are no longer any mandatory FSS, and the flexibility that the GAO has given agencies in determining whether to use Optional FSS, contracting offices should focus on whether the Committee for Purchase From

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<sup>18</sup> *See* GSA website “Welcome to GSA Schedules” available at <http://www.gsa.gov/portal/category/100615> for an overview of Federal Supply Schedule policies and procedures.

People Who Are Blind or Severely Disabled (Ability One/JWOD) can meet their supply needs prior to competing an acquisition.

C. Required Sources of Services.

1. Agencies shall satisfy requirements for services in the descending order of priority listed below:
  - a. Services which are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (see FAR Subpart 8.7);<sup>19</sup>
  - b. Mandatory Federal Supply Schedules<sup>20</sup> (see FAR Subpart 8.4);<sup>21</sup>
  - c. Optional use Federal Supply Schedules (see FAR Subpart 8.4);
  - d. Federal Prison Industries, Inc. (see FAR Subpart 8.6);<sup>22</sup>
  - e. Commercial Sources of Services (including educational and nonprofit institutions). Once a Contracting Officer determines that the service requirement cannot be filled with a required source,<sup>23</sup> then he/she may compete the requirement via one of the three acquisition methods (Simplified Acquisitions, Sealed Bidding, and Negotiations).
2. The same constraints apply to the priority list for Required Sources of Services as discussed in section VI.B. for Required Sources of Supplies.
3. Bottom Line on Required Sources of Services. Due to the significant restrictions on the use of FPI/UNICOR, the fact that there are no longer any mandatory FSS, and the flexibility that the GAO has given agencies in determining whether to use Optional FSS, contracting offices should focus on whether the Committee for Purchase From

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<sup>19</sup> AbilityOne provides both supplies and services to the federal government.

<sup>20</sup> Although called the “Federal Supply Schedule,” the FSS includes services as well as supplies.

<sup>21</sup> See *supra* note 15 (The GSA no longer maintains “mandatory use” FSS).

<sup>22</sup> See *supra* Section VI.B.3. (Federal Prison Industries) (FPI/UNICOR is a “*qualified mandatory RSS*.” Agencies may not meet their supply or service requirements via FPI *unless* the agency determines that FPI provides the best value to the agency).

<sup>23</sup> In addition to the priority list for Required Sources of Supplies and Services in FAR 8.002, agencies must procure some types of supplies and services from statutory sole sources. These required supply and services procurements include: Helium (FAR Subpart 8.5), Printing Services and Related Supplies (FAR Subpart 8.8), and Leasing of Motor Vehicles (FAR Subpart 8.11).

People Who Are Blind or Severely Disabled (Ability One/JWOD) can meet their services needs prior to competing an acquisition.

## **VII. PRE-REQUISITE: SMALL-BUSINESS SET-ASIDES**

- A. General Rule. Simplified acquisitions exceeding the micro-purchase threshold but under the simplified acquisition threshold are reserved exclusively for small business concerns. FAR 13.003(b).
1. Exceptions. In general, the set-aside requirement above does not apply when:
    - a. The small business set-aside requirement does not apply to purchases from required sources of supply under FAR Part 8. FAR 19.502-1(b).
    - b. Purchases occur outside the United States, its territories and possessions, Puerto Rico, and the District of Columbia. FAR 19.000(b).
    - c. There is no reasonable expectation of obtaining quotations from two or more responsible small business concerns that are competitive in terms of market prices, quality, or delivery. This is called the Rule of Two. FAR 19.502-2(b)(1). However, there are small business programs that permit or require awards to small business even where the Rule of Two is not met.
  2. For a more complete discussion of small business set-asides, please refer to the Chapter 13.

## **VIII. COMPETITION REQUIREMENTS.**

- A. General Rules. FAR 13.104; FAR 13.106-1.
1. The Competition in Contracting Act of 1984 (CICA) exempts simplified acquisition procedures from the requirement that agencies obtain full and open competition. 10 U.S.C. § 2304(g)(1); 41 U.S.C. § 3301.
  2. For simplified acquisitions, CICA requires only that agencies obtain competition to the “**maximum extent practicable**” to obtain supplies and services from the source whose offer is the most advantageous to the government, considering the administrative cost of the purchase. 10 U.S.C. § 2304(g)(3); 41 U.S.C. §§ 3301, 111; FAR 13.104.

B. Defining "maximum extent practicable."

1. Agency must make reasonable efforts, consistent with efficiency and economy, to give responsible sources the opportunity to compete.
  - a. FAR 13.104 no longer contains a provision that the solicitation of three or more vendors is required to ensure competition to the maximum extent practicable when using simplified acquisition procedures.
    - (1) Contracting officers, however, should consider using solicitation of at least three sources to promote competition to the maximum extent practicable; and
    - (2) Whenever possible they should request quotations or offers from two sources not included in the previous solicitation.
  - b. If not providing access to notice through the single government-wide point of entry, competition requirements ordinarily can be obtained by soliciting quotes from sources within the local trade area. FAR 13.104(b).
  - c. Vendors who ask to compete should be afforded a reasonable opportunity to compete. Proper publication of a solicitation on FEDBIZOPS will satisfy agency's obligation to encourage maximum competition.
    - (1) PR Newswire Assn, LLC, B-400430, 26 Sept. 2008 (incumbent claimed no actual notice, GAO ruled post on FEDBIZOPS put PR Newswire on constructive notice); Optelec U.S. Inc., B-400349, B400349.2, 16 Oct. 2008 (Optelec found solicitation day before proposals due, GAO held once advised solicitation would be posted on FEDBIZOPS, it was Optelec's responsibility to obtain it).
    - (2) Gateway Cable Co., B-223157, Sep. 22, 1986, 65 Comp. Gen. 854, 86-2 CPD ¶ 333 (agency failed to satisfy competition to the maximum extent practicable when it failed to solicit the protesting vendor, who called the contracting officer 19 times in regards to an acquisition requirement).
    - (3) While the "maximum extent practicable" standard can generally be met through the solicitation of at least three sources, an agency may not deliberately fail to solicit a responsible source that has expressed interest

in competing without a reasonable basis for questioning the source's ability to meet the agency's needs. Solutions Lucid Group, LLC, B-400967, Comp. Gen., Apr. 2, 2009 (Vendor exclusion for use of non-domestic products on prior purchase order unreasonable when domestic requirement no longer applied to current purchase); Military Agency Servs. Pty., Ltd., B-290414 et al., Aug. 1, 2002, 2002 CPD ¶ 130 (Deliberate vendor exclusion from competition for a BPA order not decided by GAO because Vendor unable to show it would have had a substantial chance of award, but for the agency's actions); Bosco Contracting, Inc., B-270366, Mar. 4, 1996, 96-1 CPD ¶ 140 (Deliberate exclusion of incumbent from solicitation for two-month interim services contract unreasonable where incumbent asked to compete and incumbent's alleged poor past performance was unsupported by the record).

- d. Contracting officers should generally solicit the incumbent.
  - (1) An agency's failure to solicit an incumbent, however, is not an automatic violation of the requirement to promote competition to the maximum extent practicable.
  - (2) Rather, the determinative question is whether an agency, that deliberately excluded a firm that expressed an interest in competing, acted reasonably. PR Newswire Assn, LLC, B-400430, 26 Sept. 2008, 2008 CPD ¶ 178 (incumbent claimed no actual notice, GAO ruled post on FEDBIZOPS put PR Newswire on constructive notice).

C. Considerations for soliciting competition.

- 1. Contracting officers shall not:
  - a. solicit quotations based on personal preference (FAR 13.104(a)(1)); or
  - b. restrict solicitation to suppliers of well-known and widely distributed makes or brands (FAR 13.104(a)(2)). An agency should not include restrictive provisions, such as specifying a particular manufacturer's product, unless it is absolutely necessary to satisfy the agency's needs.<sup>24</sup> See American

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<sup>24</sup> FAR 13.106-3 and 13.501 outline file documentation requirements that explain the use of brand name specifications or other circumstances that explain the absence of competition.

Eurocopter Corporation, B-283700, Dec. 16, 1999, 99-2 CPD ¶ 110 (finding reasonable the solicitation for a Bell Helicopter model 407); *But see* Delta International, Inc., B-284364.2, May 11, 2000, 2000-1 CPD ¶ 78 (agency could not justify how only one type of x-ray system would meet its needs). *See also*, FAR 11.104.

2. Before requesting quotes, FAR 13.106-1(a) requires the contracting officer to consider:
  - a. The nature of the article or service to be purchased and whether it is highly competitive and readily available in several makes or brands, or is relatively noncompetitive;
  - b. The availability of an electronic commerce method that employs widespread electronic public notice;
  - c. The urgency of the proposed purchase;
  - d. The dollar value of the proposed purchase; and
  - e. Past experience concerning specific dealers' prices.
3. Sole source Acquisitions (including Brand Name).
  - a. For items under the SAP threshold, an agency may limit a Request For Quotes (RFQ) to a single source ONLY IF the contacting officer has determined that only one source is reasonably available (e.g., urgency, exclusive licensing agreements, brand name, or industrial mobilization). FAR 13.106-1(b). A formal justification and approval (J&A) is not required by the FAR, but FAR 13.106-3 does require the explanation of the absence of competition.
  - b. For commercial items in excess of the SAP threshold, a formal J&A is required pursuant to the requirements listed in FAR 13.501(a). FAR 13.106-1(b)(2).
  - c. Agencies must furnish potential offerors a reasonable opportunity to respond to the agency's notice of intent to award on a sole source basis. *See* Jack Faucett Associates, Inc., B-279347, June 3, 1998, 98-1 CPD ¶ 155 (unreasonable to issue purchase order one day after providing FACNET notice of intent to sole-source award); Information Ventures, Inc., B-293541, Apr. 9, 2004, 2004 CPD ¶ 81 (1 1/2 business days does not provide potential sources with a reasonable opportunity to respond, particularly where the record does not show a need for the short response period and the agency knew

of the requirement well in advance of issuing the notice). Similarly, FAR 5.102(a)(6) requires publication of a brand name justification.

4. Micro-purchases & Competition. FAR 13.203.
  - a. Competition is not required for a micro-purchase if the contracting officer determines that the price is reasonable. FAR 13.203(a)(2); Michael Ritschard, B-276820, Jul. 28, 1997, 97-2 CPD ¶ 32 (contracting officer properly sought quotes from two of five known sources, and made award).
  - b. To the maximum extent practicable, micro-purchases shall be distributed equitably among qualified suppliers. FAR 13.202(a)(1). *See* Grimm's Orthopedic Supply & Repair, B-231578, Sept. 19, 1988, 88-2 CPD ¶ 258 (agency properly distributed orthopedic business based on a rotation list).

## **IX. SIMPLIFIED ACQUISITION METHOD OF CONTRACTING.**

- A. Policy. Authorized individuals shall make purchases in the simplified manner that is most suitable, efficient, and economical based on the circumstances of each acquisition. FAR 13.003(g). In some cases, agencies delegate authority to use simplified acquisition procedures below the contracting officer to these "Authorized Individuals."
- B. Request for Quotations – Legal Formation of the contract.
  1. In simplified acquisitions, the government solicits quotes. A quotation is not an offer, and can't be accepted by the government to form a binding contract. FAR 13.004(a); Eastman Kodak Co., B-271009, May 8, 1996, 96-1 CPD ¶ 215 (contending that the cancellation was unreasonable due to a lack of planning. GAO held that DOT properly cancelled the solicitation after determining that: (1) the solicitation did not meet its needs; and (2) more relaxed specifications would result in more savings and competition. Accordingly, the protest was denied.).
  2. Offer. After considering the quotes, if the government is interested, it submits an order, which is a legal offer to buy supplies or services under specified terms and conditions. A supplier creates a contract when it accepts the government's order. FAR 13.004(a). C&M Mach. Prods., Inc., ASBCA No. 39635, 90-2 BCA ¶ 22,787 (bidder's response to purchase order proposing a new price was a counteroffer that the government could accept or reject). *See*, Kingdomware

Technologies, B-407628, January, 2013, the agency is not required to remove all uncertainty from the mind of every prospective vendor.

3. Acceptance. FAR 13.004(b). A contractor may accept a government order by:
  - a. notifying the government, preferably in writing;
  - b. furnishing supplies or services; or
  - c. proceeding with work to the point where substantial performance has occurred.
    - (1) When does substantial performance occur?<sup>25</sup> See the case study following "Cancellation of an RFQ" below.
    - (2) Sunshine Cordage Corp., ASBCA 38904, 90-1 BCA 22,382 at 112,471 (Oct. 18, 1989)(citing Klass Engineering, Inc., ASBCA 22052, 78-2 BCA 13,236, at 64,716, modified and aff'd on recon., 78-2 BCA 13,463. See also, Tefft, Kelly and Motley, Inc., GSBCA 6562, 83-1 BCA 16,177, at 80,388 (1982) (teaching contractor entitled to compensation for preparation expense incurred before government terminated contract).
4. Cancellation of an RFQ. A contracting agency needs a reasonable basis to support a decision to cancel an RFQ. Deva & Assoc. PC, B-309972.3, Apr. 29, 2008, 2008 CPD ¶ 89 at 3.
  - a. A reasonable basis to cancel exists when, for example, an agency determines that a solicitation does not accurately reflect its needs, or where there is a material increase in the services needed to satisfy the agency's requirements. Logistics Solutions Group, Inc., B-294604.7, B-294604.8, July 28, 2005, 2005 CPD ¶ 141 at 3.
  - b. A solicitation may be cancelled where, during the course of the procurement, the item or services involved are discovered to be on, or have been added to, the JWOD procurement list. Best Foam Fabricators, Inc., B-259905.3, Jun. 16, 1995, 95-1 CPD ¶ 275 at 2 (Item added to the list on 1 January during the procurement and agency properly canceled the procurement on

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<sup>25</sup> "Substantial performance" is a phrase used in construction or service contracts, which is synonymous with "substantial completion." It is defined as performance short of full performance, but nevertheless good faith performance in compliance with the contract except for minor deviations. RALPH C. NASH, ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK, at 555 (3d ed. 2007).

30 January when original awardee could not perform.) *But see OSC Solutions, Inc.*, B-401498, Sept. 14, 2009 (RFQ may not be cancelled and a BPA sole-sourced to the Industries of the Blind under the authority of the JWOD Act when an item is not yet added to the JWOD procurement list).

- c. Cancellation versus Termination. If acceptance of an order has occurred, the agency must terminate the contract rather than cancel it. Termination normally involves a monetary settlement for the vendor. FAR 13.302-4.

*Case Study:* GSA solicited quotes for instructors to teach a four-week acquisition course in Arlington, Virginia. GI, who was just one of several vendors, sent a quote for \$6800. GSA issued the purchase order to GI on April 21. On May 11, GSA gave GI the course materials and GI began reviewing them immediately. May 18, a losing vendor filed a protest with GAO protesting the award to GI. On May 27, GSA canceled the purchase order with GI. GAO dismissed the protest on 2 June after GSA stated it canceled the order due to the use of “defective evaluation criteria” in the selection of instructors. GI filed a T4C settlement proposal to recover \$3,849.20, based on an hourly teaching rate of \$50.00 per hour. GI stated he incurred 61 hours of preparation time plus overhead expenses. GSA paid GI a total settlement of \$425.00. GI appealed to the ASBCA.

*Question:* Did GI accept the government’s purchase order by substantial performance such that there was a binding contract?

At trial, the government requested dismissal arguing that GI had not “accepted” the government’s purchase order so no legally binding contract existed. The ASBCA stated “so long as the contractor does not ask to change the terms of the contract after issuance of a purchase order, acceptance of an offer occurs once the contractor commences ‘substantial performance’ of the order, which in turn creates a binding contract.” In this case, the ASBCA found that acceptance had occurred by examining the actions of both parties. ASBCA stated that when the government provided GI the course materials and they received and began reviewing them, acceptance had occurred. The ASBCA also noted that by paying \$425.00, the contracting officer had correctly decided a binding contract existed (there could be no settlement if there was no contract). The ASBCA eventually awarded GI a termination settlement of \$2,236.92. Giancola & Associates vs. GSA, GSBICA 12128, Feb. 5, 1993.

- C. Authority to Combine Methods of Contracting.

1. For acquisitions under the simplified acquisition threshold for other than commercial items, authorized individuals may use any appropriate combination of the procedures in FAR part 13 (simplified acquisitions), Part 14 (sealed bidding), Part 15 (competitive negotiations), Part 35 (research and development contracting), or Part 36 (construction and architect-engineer contracts). FAR 13.003(g)(1).
2. For acquisitions of commercial items under the CITP threshold, authorized individuals shall make purchases using any appropriate combination of FAR Part 12 (commercial items), Part 13 (simplified acquisitions), Part 14 (sealed bidding), and Part 15 (competitive negotiations). FAR 13.003(g)(2).

D. Evaluation Procedures & Criteria.

1. Evaluations must be conducted fairly and in accordance with the terms of the solicitation. Kathryn Huddleston & Assocs., Ltd., B-289453, Mar. 11, 2002, 2002 CPD ¶ 57; Finlen Complex Inc., B-288280, Oct. 10, 2001, 2001 CPD ¶ 167; Diebold, Inc., B-404823, Jun 2, 2011, “it is a fundamental principle of government procurement that competition must be conducted on an equal basis, that is, offerors must be treated equally and be provided with a common basis for the preparation of their proposals.” When using simplified acquisitions, agencies must still follow stated evaluation criteria. Low & Associates, Inc., B-297444.2, Apr. 13, 2006, 2006 CPD ¶ 76 (LAI successfully protested Nat’l Science Foundation award claiming agency waived material solicitation requirements).
  - a. Sea Box, Inc., B-405711.2, 2012 CPD ¶ 116 (Comp. Gen. Mar. 18, 2012) (GAO will review allegations of improper agency actions in conducting simplified acquisitions to ensure that the procurements are conducted consistent with a concern for fair and equitable competition and with the terms of the solicitation.) Also see, Novex Enterprises, B-407914, April 5, 2013, (The protester argues that it was improper to consider PTI’s shorter delivery schedule, this argument has no merit because the solicitation specifically provided for the consideration of both price and non-price factors in the award decision, and also stated that one of the non-price factors was offered delivery).
  - b. Agency unreasonably evaluated the protester’s bid of an equal product under a brand name or equal solicitation conducted under simplified acquisition procedures where the solicitation lacked salient characteristics and the equal product was not shown to be significantly different from the brand name

product. See, Veterans Healthcare Supply Solutions, Inc., B-407223.2, December 13, 2012.

2. Evaluation Procedures. The contracting officer has broad discretion in fashioning suitable evaluation criteria. The procedures in FAR Part 14 (sealed bidding) and Part 15 (competitive negotiations) are NOT mandatory. At the contracting officer's discretion, one or more, but not necessarily all, of the evaluation procedures in FAR Part 14 or 15 may be used. FAR 13.106-2(b). See Cromartie and Breakfield, B-279859, Jul. 27, 1998, 98-2 CPD ¶ 32 (upholding rejection of quote using Part 14 procedures for suspected mistake). When the contracting officer uses procedures outlined in Parts 14 or 15, GAO will evaluate the government's conduct in light of the standards outlined in those Parts. See ERIE Strayer Company, B-406131, Feb. 21, 2012 (sustaining a protest when the government had communications with one contractor that amounted to discussions under Part 15, but did not have communications or discussions with the protestor; "Although an agency is not required to conduct discussions under simplified acquisition procedures, where an agency avails itself of negotiated procurement procedures, the agency should fairly and reasonably treat offerors in the conduct of those procedures."). See Tipton Textile Rental, Inc., B-406372, May 9, 2012, (GAO sustained the protest because once the agency opened discussions, the discussions had to be meaningful and they were not.)
3. Contracting officers shall consider all quotations that are timely received. FAR 13.003(h)(3).
  - a. The Government can solicit and receive new quotations any time before contract formation, unless a request for quotations establishes a firm closing date. Technology Advancement Group, B-238273, May 1, 1990, 90-1 CPD ¶ 439; ATF Constr. Co., Inc., B-260829, July 18, 1995, 95-2 CPD ¶ 29.
  - b. When a purchase order has been issued prior to receipt of a quote, the agency's decision not to consider the quote is unobjectionable. Comspace Corp. B-274037, Nov. 14, 1996, 96-2 CPD ¶ 186.
  - c. Agency was not obligated to consider vendor's quote where the record shows that the agency did not receive written verification of information related to the quote and the vendor was advised that failure to respond would constitute withdrawal of quote. B&S Transport, Inc., B-407589, Dec. 27 2012.

4. If a solicitation contains no evaluation factors other than price, price is the sole evaluation criterion. AMBAC International, B-234281, May 23, 1989, 89-1 CPD ¶ 492 (price was the only term solicited from each participating contractor).
5. If using price and other factors, ensure quotes can be evaluated in an efficient and minimally burdensome fashion. Formal evaluation plans, discussions, and scoring of quotes are not required.<sup>26</sup> Contracting officers may conduct comparative evaluations of offers. FAR 13.106-2(b)(3); *See* United Marine International LLC, B-281512, Feb. 22, 1999, 99-1 CPD ¶ 44 (discussions not required).
6. Evaluation of other factors, such as past performance:
  - a. Does not require the creation or existence of a formal data base; and
  - b. May be based on information such as the contracting officer's knowledge of, and previous experience with, the supply or service being acquired, customer surveys, or other reasonable basis. FAR 13.106-2(b)(3); *See* MAC's General Contractor, B-276755, July 24, 1997, 97-2 CPD ¶ 29 (reasonable to use protester's default termination under a prior contract as basis for selecting a higher quote for award); Environmental Tectonics Corp., B-280573.2, Dec. 1, 1998, 98-2 CPD ¶ 140 (Navy properly considered evidence of past performance from sources not listed in vendor's quotation).

E. Award and Documentation. FAR 13.106-3

1. Basis of Award. Regardless of the method used to solicit quotes, the contracting officer shall notify potential quoters of the basis on which award will be made (price alone or price and other factors, e.g., past performance and quality). Contracting officers are encouraged to use best value. FAR 13.106-1(a)(2). Notice to unsuccessful vendors shall be provided if requested. FAR 13.106-3(c) and (d).
2. Price Reasonableness. The contracting officer must determine that a price is fair and reasonable before making a contract award. The protester challenges the agency's price realism evaluation, arguing that CWS's price is so low that this should have raised significant concerns with CWS's understanding of the PWS. Protestor generally disagrees with the agency's price realism judgment and argues that the agency should have documented more detailed analysis, the protester does not

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<sup>26</sup> Some documentation in the contract file to support the award decision is still required (*see* FAR 13.106-3 and documentation discussion *infra*).

show that the agency acted unreasonably - Protest Denied. See, Preferred Systems Solutions, Inc., B-407234; B-407234.2, November 30, 2012.

3. Documentation.

- a. Documentation should be kept to a minimum. FAR 13.106-3(b) provides examples of the types of information that should be recorded.<sup>27</sup>
- b. The contracting officer *must* include a statement in the contract file supporting the award decision if other than price-related factors were considered in selecting the supplier. FAR 13.106-3(b)(3)(ii); See Universal Building Maintenance, Inc., B-282456, Jul. 15, 1999, 99-2 CPD ¶ 32 (protest sustained because contracting officer failed to document award selection, and FAR Parts 12 and 13 required some explanation of the award decision). See also, Resource Dimensions, LLC, B-404536, Feb. 24, 2011, 2011 CPD ¶ 50 (sustaining a protest where an agency used SAP and oral presentations, but the agency failed to provide adequate supporting rationale in the record for GAO to conclude the agency acted reasonably).

F. Authority to Innovate. Contracting Officers shall use innovative approaches, to the maximum extent practicable, in awarding contracts using simplified acquisition procedures. FAR 13.003(h)(4).

1. Example of an Innovative Approach: Reverse auctions. Prospective contractors bid down the price in real time to compete to provide the product sought by the government. See Thomas F. Burke, *Online Reverse Auctions*, West Group Briefing Papers (Oct. 2000). Tremendous growth potential, yet no statutory or regulatory guidance.
  - a. There are few reported GAO cases dealing directly with reverse auctions: See, e.g., Royal Hawaiian Movers, B-288653, Oct. 31, 2001, 2001 CPD ¶ 182; Pacific Island Movers, B-287643.2, July 19, 2001, 2001 CPD ¶ 126.
  - b. In general, the use of reverse auctions has been sustained by GAO. See MTB Group, B-295463, Feb. 23, 2005 (concluding that procurement using reverse auction format is permissible because agency is conducting reverse auction under simplified acquisition procedures which encourage use of innovative

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<sup>27</sup> For oral solicitations, the contracting office should generally maintain records of oral price quotations, including the names of the suppliers contacted and the prices and other terms and conditions quoted by each. For written solicitations, the contracting office should generally maintain notes or abstracts to show prices, delivery, references to printed price lists used, the supplier or suppliers contacted, and other pertinent data. FAR 13.106-3(b)(1) and (b)(2).

procedures). There has been some recent criticism of reverse auctions however in that: they typically require contractors to disclose their prices to each other (contractors are informed whether they are the current low bidder, but don't see the name of the low-bidding contractor or the actual bid price until close of the auction); the pricing competition saves money for the government but reduces prices to levels that small business cannot afford; and reverse auctions fail to take into account past performance and other non-price factors that help the government achieve the best value on a specific procurement.

- c. Additionally, the GAO has held that internet failure may not excuse late delivery of contractor's proposal. Performance Construction, Inc., B-286192, Oct. 30, 2000, 2000 CPD. ¶ 180. This rule could affect reverse auctions, which are exclusively conducted using electronic forums (*see, e.g.*, [www.feddbid.com](http://www.feddbid.com) – FedBid is a commercial vendor that hosts many of the reverse auctions used by federal agencies).

## **X. PUBLICIZING AGENCY CONTRACT ACTIONS. FAR PART 5.**

- A. Policy. Prior to awarding government contracts, agencies must comply with the publicizing requirements of FAR Part 5.<sup>28</sup>
- B. Exception for contract actions outside the United States. The contracting officer need not submit a notice to the government point of entry (GPE) if the proposed contract action is by a defense agency and the proposed contract action will be made and performed outside the United States and its outlying areas, and only local sources will be solicited. This exception does NOT apply to proposed contract actions covered by the World Trade Organization Government Procurement Agreement or a Free Trade Agreement. FAR 5.202(a)(12).
- C. Definitions.
  1. Publicizing means to disseminate information in a public forum so that potential vendors are informed of the agency's need, and the agency's proposed contract action. As the value of the anticipated acquisition increases, agencies have to meet more stringent requirements to ensure the proposed contract action is disseminated to the public.
  2. Posting is a limited form of publicizing where a contracting officer informs the public of a proposed contract action by displaying a summary of the anticipated solicitation (a synopsis), or displaying the

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<sup>28</sup> See *infra*, Appendix B: Publicizing and Synopsis Requirements for Government Procurements (containing a chart that summarizes publicizing and synopsis requirements for all methods of acquisitions depending on the value of the procurement).

actual solicitation, in a public place (usually a “contract action display board” outside the contracting office), or by an equivalent electronic means (usually a contracting office webpage).

3. A synopsis is a notice to the public that summarizes the anticipated solicitation. At a minimum, a synopsis must include: a clear and concise description of the supplies or services that the agency needs, the description must not be unnecessarily restrictive of competition, and the description should allow prospective offerors to make an informed business judgment as to whether they should seek more information (a copy of the solicitation) and/or offer to fulfill the agency need. FAR 5.207(c).
4. A solicitation means any request to submit offers or quotations to the Government. Solicitations under sealed bid procedures are called “invitations for bids” or IFB. Solicitations under negotiated procedures are called “requests for proposals” or RFP. Solicitations under simplified acquisition procedures may require submission of either a quotation or an offer (FAR 2.101), but most frequently take the form of a “request for quotation” or RFQ.

D. Publicizing Requirements. Contracting officers must publicize proposed contract actions as follows:

1. For proposed contract actions expected to exceed the Simplified Acquisitions Threshold (SAT), agencies must synopsisize on the Government-wide Point of Entry (GPE)<sup>29</sup> for at least **15 days**, and then issue a solicitation and allow at least **30 days** to respond. FAR 5.203.
2. For proposed contract actions expected to exceed \$25,000 but less than the Simplified Acquisitions Threshold (SAT), agencies must synopsisize on the GPE for at least **15 days**, and then issue a solicitation and allow a “reasonable opportunity to respond.” FAR 5.203. *This can be less than 30 days.*
3. For proposed contract actions expected to exceed \$15,000, but not expected to exceed \$25,000, agencies must post (displayed in a public place or by an appropriate and equivalent electronic means), a synopsis of the solicitation, *or the actual solicitation*, for at least **10 days**. If a contracting officer posts a synopsis, then they must allow “a reasonable opportunity to respond” after issuing the solicitation. FAR 5.101(a)(2).
4. Synopsis requirements. FAR 5.207.

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<sup>29</sup> The GPE is available online at the Federal Business Opportunities website, available at [www.fbo.gov](http://www.fbo.gov).

- a. The synopsis must include a statement that all responsible sources may submit a response, which, if timely received, must be considered by the agency.
  - b. The synopsis must be posted not later than the date the solicitation is issued, and must remain posted for at least 10 days or until after quotations have been opened, whichever is later.
  - c. If solicitations are posted instead of a synopsis, the contracting officer may employ various methods of satisfying the description of supplies or services required by FAR 5.207(c). For example, the contracting officer may meet the requirements of 5.207(c) by stamping the solicitation, by a cover sheet to the solicitation, or by placing a general statement in the display room. FAR 5.101(a)(2)(i).
  - d. Exception to Posting Requirement. If an agency issues an oral solicitation (as opposed to a written solicitation), it needs not comply with the public posting/display requirements. FAR 5.101(a)(2)(ii). Oral solicitations, however, should only be used for non-complex requirements.
5. For proposed contract actions less than \$15,000 and/or the micro-purchase threshold, there are no required publicizing requirements.
6. When acquiring commercial items whose value exceeds \$25,000, the contracting officer may publicize the agency need, at his/her discretion, in one of two ways:
- a. Combined Synopsis/Solicitation: Agencies may issue a combined synopsis/solicitation on the GPE in accordance with the procedures detailed at FAR 12.603. The agency issues a combined synopsis/solicitation and then provides a “reasonable response time.” See FAR 5.203(a)(2), FAR 12.603(a) and 12.603(c)(3).
  - b. Shortened Synopsis/Solicitation: Agencies may issue a separate synopsis and solicitation on the GPE. The synopsis must remain on the GPE for a “reasonable time period,” *which may be less than 15 days*. The agency should then issue the solicitation on the GPE, providing potential vendors a “reasonable opportunity to respond” to the solicitation, *which may be less than 30 days*. FAR 5.203
  - c. Reasonable Response Time. Contracting officers shall establish deadlines for the submission of responses to solicitations that afford suppliers a reasonable period of time to respond. FAR

13.003(h)(2). *See* American Artisan Productions, Inc., B-281409, Dec. 21, 1998, 98-2 CPD ¶ 155 (finding fifteen day response period reasonable); Military Agency Services Pty., Ltd., B-290414 et al., Aug. 1, 2002 (finding near immediate response period (24 hours) reasonable where publication requirements did not apply overseas, only prices were requested, all requested sources timely submitted quotes and due to security concerns, agency routinely received and filled requests for picket boat services within a 72 hour period). *But see* KPMG Consulting, B-290716, B-290716.2, Sept. 23, 2002, 2002 CPD ¶ 196 (agency may, if not prohibited by solicitation, consider a late quote).

E. Methods of soliciting quotes.

1. Oral. FAR 13.106-1(c).

a. Contracting officers shall solicit quotes orally to the maximum extent practicable, if:

(1) The acquisition does not exceed the simplified acquisition threshold;

(2) It is more efficient than soliciting through available electronic commerce alternatives; and

(3) Notice is not required under FAR 5.101.

b. It may not be practicable for actions exceeding \$30,000 unless covered by an exception in FAR 5.202.

c. The contracting officer shall issue a written solicitation for construction requirements exceeding \$2,000.  
FAR 13.106-1(d).

2. Electronic Commerce.

a. Agencies shall use electronic commerce when practicable and cost-effective. FAR 13.003(f); FAR Subpart 4.5.

b. Drawings and lengthy specifications can be provided off-line in hard copy or through other appropriate means. FAR 13.003(f).

c. This is an exploding growth area involving numerous “e-government” initiatives.

(1) In December 2002, the President established an e-government office within the White House Office of

Management and Budget. E-Government Act of 2002, Pub. L. No. 107-347.

- (2) On May 12, 2004, the Office of Federal Procurement Policy issued a memorandum on the subject of “Utilization of Commercially Available Online Procurement Services,” which encouraged agencies to take advantage of these services for the acquisition of commercial items, including goods and services.
  - (3) Electronic Signatures in federal procurement. 65 Fed. Reg. 65,698 (Nov. 1, 2000) (*see* FAR 2.101 and 4.502).
  - (4) Effective 1 October 2001, mandatory single point of electronic access to government-wide procurement opportunities. *See* [www.fbo.gov](http://www.fbo.gov).
  - (5) Section 508 of the Rehabilitation Act of 1973. As of June 25, 2001, government contracts awarded for electronic and information technology (EIT) must contain technology that is accessible to disabled federal employees and disabled members of the public (“508 Compliant”). 66 Fed. Reg. 20,894 (Apr. 25, 2001); *see also* FAR 39.2.
  - (6) *See* OMB Office of E-Government & Information Technology, for more information and current policies (available at <http://www.whitehouse.gov/omb/e-gov>).
3. Written. FAR 13.106-1(d).
- a. Contracting officers shall issue a written solicitation for construction requirements exceeding \$2,000.
  - b. If obtaining electronic or oral quotations is uneconomical, contracting officers should issue paper solicitations for contract actions likely to exceed \$30,000.

## **XI. PURCHASING TECHNIQUES**

- A. General. There are four basic simplified acquisition options for procuring items: Purchase Orders (FAR 13.302 and 13.306); Blanket Purchase Agreements (FAR 13.303); Imprest Funds (FAR 13.305); and Governmentwide Commercial Purchase Card (government credit card) (FAR 13.301).
- B. Purchase Orders. FAR 13.302.

1. Definition. A purchase order is a government offer to buy certain supplies, services, or construction, from commercial sources, upon specified terms and conditions. FAR 13.004. A purchase order is different than a delivery order, which is placed against an established contract (*e.g.* a delivery order for supplies might be placed against an existing indefinite delivery type contract; a task order is used to order services from and indefinite delivery contract).
2. Forms. FAR 13.307.
  - a. SF 1449, Solicitation/Contract/Order.
    - (1) The SF 1449 is a multipurpose form used for negotiated purchases of supplies or services, delivery or task orders, inspection and receiving reports, and invoices.
    - (2) Contracting officers use this form for purchases of commercial items. Per DFARS 213.307, if SF 1449 is not used, DD Form 1155 (Order for Supplies or Services) should be used. FAR 13.307 and FAR 12.204.
    - (3) Except when quotations are solicited electronically or orally, the SF 1449, SF 18, or an agency automated form is used to request quotations.
  - b. SF 44 Purchase Order – Invoice Voucher. This is a multipurpose pocket-size purchase order form designed primarily for on-the-spot, over-the-counter purchase of supplies and nonpersonal services while away from the purchasing office or at isolated activities. FAR 13.306. Due to the increased use and acceptance of the Governmentwide Commercial Purchase Card, the use of the SF44 within DoD is typically limited to purchases of: fuel and oil; overseas transactions in support of a contingency environment; and purchases in support of certain intelligence activities. DFARS 213.306(a)(1).
    - (1) Because the SF 44 is used only for on-the-spot purchases of supplies or services that are immediately available, no clauses are used with this form. Properly authorized field ordering officers<sup>30</sup> may also use the SF44, but only up to the micro-purchase threshold.

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<sup>30</sup> See also, Handbook 09-16, Field Ordering Officer and Paying Agent TTPs, available at <http://usacac.army.mil/cac2/call/docs/09-16/09-16.pdf>.

- (2) This form may be used only if all of the following conditions are satisfied:
  - (a) The amount of the purchase is at or below the micro-purchase threshold, except for purchases made under unusual and compelling urgency or in support of contingency operations. Agencies may establish higher dollar limitations for specific activities or items;
  - (b) The supplies or services are immediately available;
  - (c) One delivery and one payment will be made;  
AND
  - (d) Its use is determined to be more economical and efficient than use of other simplified acquisition procedures. FAR 13.306(a).

3. General Rules for Purchase Orders.

- a. Purchase Orders are generally issued on a fixed price basis. FAR 13.302-1(a). However, the FAR does provide guidelines for an “unpriced purchase order method” in FAR 13.302-2.
- b. FAR 12.207 governs contract types for the acquisition of commercial items.
- c. Purchase orders shall:
  - (1) Specify the quantity of supplies or scope of services ordered.
  - (2) Contain a determinable date by which delivery or performance is required.
  - (3) Provide for inspection as prescribed in FAR Part 46. Generally, inspection and acceptance should be at destination.
  - (4) Specify F.O.B. destination for supplies within the continental United States unless there are valid reasons to the contrary. FAR 13.302-1(b).

4. Unpriced Purchase Orders. FAR 13.302-2.

- a. An unpriced purchase order is an order for supplies or services where the price is not established when the order is issued. A realistic monetary limitation, either for each line item or for the total order, shall be placed on each unpriced purchase order.
  - b. It may be used only when it is impractical to obtain pricing in advance AND the purchase is for
    - (1) Repairs to equipment requiring disassembly to determine the nature and extent of repairs;
    - (2) Material available from only one source and for which cost cannot be readily established; OR
    - (3) Supplies or services for which prices are known to be competitive, but exact prices are not known (*e.g.*, miscellaneous repair parts, maintenance agreements).
5. Termination or cancellation of purchase orders. FAR 13.302-4.
- a. The government may withdraw, amend, or cancel an order at any time before acceptance. See *Alsace Industrial, Inc.*, ASBCA No. 51708, 99-1 BCA ¶ 30,220 (holding that the government's offer under the unilateral purchase order lapsed by its own terms when Alsace failed to deliver on time); *Master Research & Mfg., Inc.*, ASBCA No. 46341, 94-2 BCA ¶ 26,747.
  - b. If the contractor has not accepted a purchase order in writing, the contracting officer may notify the contractor in writing, and:
    - (1) Cancel the purchase order, if the contractor accepts the cancellation; or
    - (2) Process the termination action if the contractor does not accept the cancellation or claims that it incurred costs as a result of beginning performance. FAR 13.302-4(b). *But see Rex Sys., Inc.*, ASBCA No. 45301, 93-3 BCA ¶ 26,065 (contractor's substantial performance only required government to keep its unilateral purchase order offer open until the delivery date, after which the government could cancel when goods were not timely delivered).
  - c. Once the contractor accepts a purchase order in writing, the government cannot cancel it; the contracting officer must terminate the contract in accordance with:

- (1) FAR 12.403(d) and 52.212-4(l) for commercial items; or
- (2) FAR Part 49 and 52.213-4 for other than commercial items.

C. Blanket Purchase Agreements. FAR 13.303.

1. Definition. A blanket purchase agreement (BPA) is a simplified method of filling anticipated repetitive needs for supplies or services by establishing “charge accounts” with qualified sources of supply. FAR 13.303-1(a).
  - a. A BPA is **not** a contract. The actual contract is not formed until an order is issued or the basic agreement is incorporated into a new contract by reference. Zhengxing v. U.S., 71 Fed. Cl. 732 (2006) (discussing that it is well settled that a BPA is not a contract); Modern Systems Technology Corp. v. United States, 24 Cl.Ct. 360 (1991) (Judge Bruggink provides comprehensive analysis of legal effect of a BPA in granting summary judgment to Postal Service in breach claim); Envirosolve, LLC, B-294974.4, June 8, 2005, 2005 CPD ¶ 106 (for a summary of the law surrounding BPAs); Prod. Packaging, ASBCA No. 53662, 03-2 BCA ¶ 32,388 (ASBCA 2003) (stating “it is well established that a BPA is not a contract. Rather, a BPA is nothing more than an agreement of terms by which the government could purchase.”).
  - b. BPAs may be issued without a commitment of funds; however, a commitment and an obligation of funds must separately support each order placed under a BPA. FAR 13.303-1(c).
  - c. Blanket purchase agreements should include the maximum possible discounts, allow for adequate documentation of individual transactions, and provide for periodic billing. FAR 13.303-2(d).
  - d. Since a BPA is not a contract, there is no established jurisdiction under the Contract Disputes Act (CDA). Zhengxing v. U.S., 71 Fed. Cl. 732, 739 (2006); Julian Freeman, ASBCA No. 46675, Oct. 27, 1994, 94-3 BCA ¶ 135,906.
2. Limits on BPA usage.
  - a. The use of a BPA does not justify purchasing from only one source or avoiding small business set-asides. FAR 13.303-5(c).

- b. If there is an insufficient number of BPAs to ensure maximum practicable competition for a particular purchase, the contracting officer must solicit from other sources or create additional BPAs. FAR 13.303-5(d). *Compare Logan, LLC*, B-294974.6, Dec. 1, 2006, 2006 CPD ¶ 188 (There is no requirement that an agency conduct further competition among the BPA holders in connection with each individual purchase order subsequently issued under the BPAs, when the BPAs were originally competitively established).
  - c. A BPA may be properly established when:
    - (1) There is a wide variety of items in a broad class of supplies and services that are generally purchased, but the exact items, quantities, and delivery requirements are not known in advance and may vary considerably.
    - (2) There is a need to provide commercial sources of supply for one or more offices or projects that do not have or need authority to purchase otherwise.
    - (3) Use of BPAs would avoid the writing of numerous purchase orders.
    - (4) There is no existing requirements contract for the same supply or service that the contracting activity is legally obligated to use. FAR 13.303-2(a).
3. Establishment of BPAs. FAR 13.303-2(b-c).
- a. After determining a BPA to be advantageous, contracting officers shall:
    - (1) Establish the parameters of the BPA. Will the agreement be limited to individually identified items, or will it merely identify broad commodity groups or classes of goods and services?
    - (2) Consider quality suppliers who have provided numerous purchases at or below the simplified acquisition threshold.
  - b. BPAs may be established with:
    - (1) More than one supplier for goods and services of the same type to provide maximum practicable competition.

- (2) A single source from which numerous individual purchases at or below the simplified acquisition threshold will likely be made. This may be a useful tool in a contingency operation where vendor choices may be limited, and contract personnel can negotiate the terms for subsequent orders in advance of, or concurrent with, a deployment.
- (3) The FAR authorizes the creation of BPAs under the Federal Supply Schedule (FSS) “if not inconsistent with the terms of the applicable schedule contract.” FAR 13.303-2(c)(3).
  - (a) FAR 8.405-3 provides detailed guidance for creating a BPA under the FSS. Among other things, it provides:
    - (i) Ordering activities shall establish BPAs to fill repetitive needs or supplies and services with the schedule contractor(s) that can provide the supply or service that represents the best value;
    - (ii) Ordering activities may consider factors then price when determining best value (such as past performance, special features, warranty considerations, delivery terms, environmental concerns, etc.);
    - (iii) Ordering offices shall, to the maximum extent practicable, give preference to establishing multiple-award BPAs rather than single-award BPAs. FAR 8.405-3(b) provides additional guidance for awarding BPAs pursuant to a competitive process. When single award BPAs are appropriate, FAR 8.405-3(a)(3) provides additional limitations and guidance;
    - (iv) BPAs should address the frequency of ordering and invoicing, discounts, and delivery locations and times.

- (v) Ordering offices should specify the procedures for placing orders or calls against a BPA.
  - (b) GSA provides information regarding BPAs and GSA schedules and a sample BPA format for agencies to use. *See* Appendix B (also *available at* <http://www.gsa.gov/portal/content/199353>).
  - (c) Benefits of establishing BPAs with a FSS contractor.
    - (i) It can reduce costs. Agencies can seek further price reductions from the FSS contract price.
    - (ii) It can streamline the ordering process. A study of the FSS process revealed that it was faster to place an order against a BPA than it was to place an order under a FSS.
    - (iii) Purchases against BPAs established under GSA multiple award schedule contracts can exceed the simplified acquisition threshold and the \$6,500,000 limit of FAR 13.5. FAR 13.303-5(b)(1).
4. Review of BPAs. The contracting officer who entered into the BPA shall (FAR 13.303-6):
- a. Ensure it is reviewed at least annually and updated if necessary;
  - b. Maintain awareness in market conditions, sources of supply, and other pertinent factors that warrant new arrangements or modifications of existing arrangements; and
  - c. Review a sufficient random sample of orders at least annually to make sure authorized procedures are being followed.

D. Imprest Funds. FAR Part 13.305; DFARS 213.305.

- 1. Definition. An imprest fund is a “cash fund of a fixed amount established by an advance of funds, without charge to an appropriation, from an agency finance or disbursing officer to a duly appointed cashier, for disbursement as needed from time to time in making payment in cash for relatively small amounts.” FAR 13.001.

2. DOD Policy. DOD does not support the use of cash payments from imprest funds. This policy is based, in part, on the mandatory electronic funds transfer requirements of the Debt Collection Improvement Act of 1996 (Pub. L. 104-134). DFARS 213.305-1(1).
3. DOD Use.
  - a. Use of imprest funds must comply with the conditions stated in the DOD Financial Management Regulation (DOD 7000.14-R, Volume 5, Chapter 2, Disbursing Offices, Officers, and Agents (*see* para. 0204, discussing Imprest Funds specifically).), the Treasury Financial Manual (TFM, Vol.1, Part 4, Chapter 3000, section 3020), FAR 13.305, and DFARS 213.305.
  - b. On a very limited basis, installation commanders and commanders of other activities with contracting authority may be granted authority to establish imprest funds. DFARS 213.305-3(d)(i). Approval is required from the Director for Financial Commerce, Office of the Deputy Chief Financial Officer, Office of the Under Secretary of Defense (Comptroller). DFARS 213.305-3(d)(ii).
  - c. The DoD FMR explains that “Imprest funds are generally not authorized for DoD activities. Exceptions are allowed for contingency and classified operations. Submit specific requests for exception in accordance with Chapter 1 [of DoD FMR, Vol. 5]. Include adequate justification and demonstrate that the use of a government purchase card, third party draft, purchase card convenience check, government travel card, or other reasonable alternatives are not feasible for the specific situation.” DoD FMR Vol. 5, Chapter 2, para. 020402.
  - d. When specifically authorized, DFARS 213.305-3(d)(iii), provides that imprest funds can be used without further approval for:
    - (1) Overseas transactions at or below the micro-purchase threshold in support of a contingency operation as defined in 10 U.S.C. § 101(a)(13) or a humanitarian or peacekeeping operation as defined in 10 U.S.C. § 2302(7); and
    - (2) Classified transactions.
  - e. The DoD FMR provides additional limitations on the use of, and safeguarding of imprest funds on the rare occasions that they are authorized. *See generally*, DoD FMR Vol. 5, Chapter 2, para. 0204.

E. Government-wide Commercial Purchase Card. FAR 13.301; DFARS 213.270; DFARS 213.301.

1. Purpose. The government-wide commercial purchase card (GCPC or GPC) is a government-managed charge card used by specific authorized individuals to make purchases on behalf of the government. Like any other contract, purchases made with the GPC obligate appropriated funds. The GPC is authorized for use in making and/or paying for purchases of supplies, services, or construction.<sup>31</sup> DOD contracting officers must use the card for all acquisitions at or below \$3,000 unless a specific exception applies. DFARS 213.270.
2. Use. Agencies shall use the GPC and electronic purchasing techniques to the maximum extent practicable in conducting simplified acquisitions. FAR 13.003(e).
3. Implementation.
  - a. Currently, the General Services Administration (GSA) runs this initiative through the SmartPay purchase charge card program. Information on this program can be found at <https://smartpay.gsa.gov/program-coordinators/card-basics> (last visited 29 Jun 2014).
  - b. Agencies using government-wide commercial purchase cards shall establish procedures for use and control of the card. FAR 13.301(b). Procedures and purchasing authority differ among agencies (i.e., AFARS 5113.202, 5113.270).
  - c. Agencies must have effective training programs in place to avoid card abuses. For example, cardholders may be bypassing required sources of supply. See Memorandum, Administrator of the Office of Federal Procurement Policy, to Agency Senior Procurement executives, subject: Applicability of the Javits-Wagner-O'Day Program for Micro purchases (Feb. 16, 1999) (clarifies that JWOD's status as a priority source under FAR 8.7 applies to micro purchases).
  - d. A new Army GPC SOP was published on 3 May 2013 and supersedes previous policy. The new SOP has been added to the AFARS as Appendix EE (available at <http://farsite.hill.af.mil/vfafara.htm>).

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<sup>31</sup> DOD's purchase card limit is \$25,000 if the criteria in DFARS 213.301(2) are met. DFARS 213.301(3) permits a contracting officer supporting a contingency, humanitarian, or peacekeeping operation to make purchases that exceed the micro-purchase threshold but do not exceed the SAT so long as other stated criteria are met.

4. Required Sources. GPC Cardholders must still abide by the FAR's provisions for required sources of supply and services. Some of those requirements are listed below:
  - a. FAR Part 8 Required Sources of Supply and Services.
  - b. FAR Part 41 Public Utility Services
  - c. Printing and related supplies. FAR 8.8
  - d. Leased motor vehicles FAR 8.11.
  - e. Strategic and critical materials (metals and ores) from inventories exceeding Defense National Stockpile requirements;
  - f. Helium FAR 8.5
  - g. Micro-purchases may be procured from small businesses, but a set aside for small businesses is not required.
  
5. Restrictions.
  - a. Agency specific policies may restrict what GPC holders can purchase.<sup>32</sup> Most agencies will restrict cash advances.
  - b. The GPC may not be used to purchase long-term rental or lease of land or buildings.
  - c. The GPC may not be used for travel or travel related expenses. However, conference rooms, meeting spaces, local transportation services such as metro fare cards, subway tokens and shuttle services can be purchased.
  - d. Contracting officers may not use the GPC to purchase goods or services exceeding the micro-purchase threshold if the contractor has a delinquent debt flag in the Central Contractor Registration (CCR) database. FAC 2005-38, 74 FR 65600, 12/10/2009, effective 2/1/2010; FAR 32.1108.
    - (1) Contracting officer's must check the CCR database when the contract or order is over the micro-purchase threshold, even if purchasing from GSA. GPC holders

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<sup>32</sup> For example, ASA(ALT) memo of 31 Oct 2011, "Mandatory Use of Blanket Purchase Agreements (BPAs) for Office Supplies," requires cardholders to use established Army-wide BPAs to fill needs for office supplies, absent one of several listed exceptions. Memo available at [http://www.jrtc-polk.army.mil/doc/NEWwebpagecontents/GPC/ASA\(ALT\)BPAmemo.pdf](http://www.jrtc-polk.army.mil/doc/NEWwebpagecontents/GPC/ASA(ALT)BPAmemo.pdf).

are exempt as long as the purchase is under the micro-purchase threshold.

- (2) This rule does not apply to individual travel charge cards or centrally billed accounts for travel/transportation services.
- (3) Contracting officer's shall not use the presence of the CCR debt flag to exclude a contractor from receipt of contract award or placement of an order. Instead, other payment methods (like an electronic funds transfer) must be pursued. If the Contractor pays the debt, then GPC may be used as a payment method. FAR 32.1108; FAC 2005-38, 74 FR 65600, 12/10/2009, effective 2/1/2010.
- (4) Why? This restriction is in place so that the government can increase its ability to recoup funds when a contractor owes the government funds. Since the GPC system employs a 3<sup>rd</sup> party (the charge card company) to pay for good and services, a direct offset between a debtor contractor and the government is not practicable.

6. Uses. FAR 13.301(c).
  - a. To make micro-purchases.
  - b. To place task or delivery orders (if authorized in the basic contract, basic ordering agreement, or BPA).
  - c. To make payments when the contractor agrees to accept payment by the card.
  - d. Additional uses and guidance for DoD are described above and are included in DFARS 213.301.
  - e. As a general rule, **DO NOT ISSUE THE GPC TO CONTRACTORS!** AFI 64-117, Air Force Government Purchase Card Program (20 September 2011); FAR 13.301(a); FAR 1.603-3. But see GPC SOP dtd 3 May 2013, para. 1-5, providing that certain contractors working under cost type contracts may request a GPC.
7. "Control Weaknesses." Several GAO reports and a DOD IG Audit Report have identified control weaknesses that leave agencies vulnerable to fraud and abuse. DOD IG Audit Report, Controls Over the DoD Purchase Card Program, Rept. No. D-2002-075, 29 March

2002; GAO Rept. No. 02-676T, Government Purchase Cards: Control Weaknesses Expose Agencies to Fraud and Abuse, (May 1, 2002); GAO Rept. No. 02-506T, Governmentwide Purchase Cards: Actions Needed to Strengthen Internal Controls to Reduce Fraudulent, Improper, and Abusive Purchases, March, 2008. Problem areas include:

- a. Lack of Training for both GPC cardholders and issuing/approving officials.
- b. Selecting Cardholders and Assigning Approving Officials. Cardholders should be mature, responsible individuals. Approving Officials should be individuals with some supervisory responsibility over individual cardholders.
- c. Inadequate Internal Controls. Poor review and approval procedures lead to fraudulent transactions and mistakes. Internal controls must also account for the management and accounting of personal property after purchase to ensure that an otherwise legitimate purchase is not converted to personal use.
- d. Splitting purchases to avoid spending limits. Splitting a known requirement into multiple smaller procurements under the micro-purchase threshold is an impermissible, but tempting pitfall for cardholders and commands.

8. Practical Pointers

- a. Training. Online training is available from the GSA SmartPay website at <http://www.gsa.gov>.
- b. Issue cards only to GOVERNMENT employees (NOT contractors) who are authorized and trained to use the GPC.
- c. Authorizing officials should be responsible for no more than 5-7 cardholders. Authorizing officials should have some supervisory responsibility over their cardholders.
- d. Authorizing officials should not also be a cardholder.
- e. Scrutinize single purchases and monthly spending limits.
- f. Closely monitor the use of convenience checks.

## XII. USING THE FEDERAL SUPPLY SCHEDULES (FSS)

### A. Background.

1. The General Services Administration (GSA) manages the FSS program pursuant to the Section 201 of the Federal Property Administrative Services Act of 1949. A FSS is also known as a multiple award schedule (MAS).
2. The Federal Supply Schedule (FSS) program provides federal agencies with a simplified process for obtaining commonly used commercial supplies and services at prices associated with volume buying. The FSS program provides over four million commercial off-the-shelf products and services, at stated prices, for given periods of time.
3. Congress recognizes the multiple award schedule (MAS) program as a full and open competition procedure if participation in the program has been open to all responsible sources and orders and contracts under the program result in the lowest overall cost alternative to the United States. 10 U.S.C. § 2302(2)(C). But see *Reep, Inc.*, B-290665, Sep. 17, 2002, 2002 CPD ¶ 158 (to satisfy the statutory obligation of competitive acquisitions . . . “an agency is required to consider reasonably available information . . . typically by reviewing the prices of at least three schedule vendors.” The agency failed to meet its obligation by not awarding to a vendor providing the best value to the government at the lowest overall cost.).
4. Therefore, an agency need not take certain additional actions, such as:
  - a. NO need to seek further competition outside the FSS itself.
    - (1) But see *Draeger Safety, Inc.*, B-285366, B-285366.2, Aug. 23, 2000, 2000 CPD ¶ 139 (though the government need not seek further competition when buying from the FSS, if it asks for competition among FSS vendors, it must give those vendors sufficient details about the solicitation to allow them to compete intelligently and fairly).
    - (2) **For DoD agencies**, Section 803 of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, as implemented by DFARS 208.405-70, requires each order of supplies or services under the FSS (including FSS BPAs) exceeding \$150,000 to be placed on a competitive basis, unless the requirement is waived based upon a justification prepared in accordance with FAR 8.405-6. Placing an order on a

“competitive basis” requires a contracting officer to provide fair notice of the intent to make the purchase, including a description of the supplies/services along with the source selection criteria, to:

- (a) As many schedule contractors as practicable to ensure the receipt of at least three qualified offerors. The contracting officer must then actually receive three qualified offers or determine in writing that no additional contractors can fulfill the requirements. DFARS 208.405-70(c)(1). All offers received must then be fairly considered;

or

- (b) All contractors offering the required supplies/services under the applicable schedule. If such notification is provided, the contracting officer must then afford schedule holders a fair opportunity to submit an offer and to have it fairly considered. DFARS 208.405-70(c)(2). Note PGI 208.405-70(1) states that posting an RFQ on GSA’s “eBuy” ([www.gsaAdvantage.gov](http://www.gsaAdvantage.gov)) “is one medium of providing fair notice to all contractors as required by DFARS 208.405-70(c)(2).”

- b. Generally, NO Synopsis requirement under FAR Part 5. FAR 8.404(a).<sup>33</sup>
- c. No separate determination of fair and reasonable pricing (FAR 8.404(d)), except for price evaluation required by 8.405-2(d), which states that when services require a statement of work, the ordering activity is responsible for considering the level of effort and the labor mix proposed to perform a specific task being ordered, and for determining that the total price is reasonable. However, on 13 May 2014, DoD issued a class deviation clarifying that ordering activity contracting officers are responsible for making a determination of fair and reasonable pricing when using Federal Supply Schedules for individual orders. Office of the Under Secretary of Defense-

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<sup>33</sup> See FAR 8.404(g)(1) which does require publication of contract actions funded in whole or in part by the American Recovery and Reinvestment Act of 2009. FAR 8.404(g)(2) requires publication when an order is awarded, or a BPA is established, with an estimated value in excess of the SAT, and it is supported by a limited sources justification.

Acquisition, Technology, and Logistics, Class Deviation—  
Determination of Fair and Reasonable Prices When Using  
Federal Supply Schedule Contracts, DARS Tracking Number:  
2014-O00011 (13 May 2014).

- d. NO small business set-asides in accordance with FAR 19.5. FAR 8.405-5. *See* Global Analytic Information Technology Services, Inc., B-297200.3, Mar. 21, 2006, 2006 CPD ¶ 53 (Small business set-aside requirements in FAR Part 19 do not apply to FSS Schedules). However, orders placed with small business concerns may still be credited toward an organization's small business goals. FAR 8.405-5(b). Further, activities may consider socio-economic status during competitively awarded orders or BPAs. FAR 8.405-5(c).
- e. NO responsibility determination for FSS order. *See* Advance Tech. Sys., Inc., B-296493.6, Oct. 6, 2006, 2006 CPD ¶ 151 (an ordering agency is not required to make a responsibility determination each time it places a task or delivery order).
- f. However, the FAR was amended effective April 2, 2012, that adopted as final, with changes, the interim rule, 76 Fed. Reg. 14548 (Mar. 16, 2011), which implemented a section of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 to enhance competition in the purchase of supplies and services by all executive agencies under multiple-award contracts. For each purchase of supplies or services in excess of the simplified threshold under a multiple-award contract, the rule requires the provision of fair notice of intent to make a purchase (including a description of the work to be performed and the basis on which the selection will be made) to all contractors offering such supplies or services under the multiple-award contract.<sup>34</sup>

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<sup>34</sup> In addition, the rule requires that all contractors responding to the notice be afforded a fair opportunity to make an offer and have that offer fairly considered by the purchasing official. A notice may be provided to fewer than all contractors offering such supplies or services under a multiple-award contract only if the notice is provided to as many contractors as practicable. When notice is provided to fewer than all the contractors, a purchase cannot be made unless: (i) offers were received from at least three qualified contractors; or (ii) a contracting officer determines in writing that no additional qualified contractors were able to be identified despite reasonable efforts to do so. 76 Fed. Reg. 14548 (Mar. 16, 2011)

B. Ordering under the FSS.

1. **For DoD agencies**, Section 854 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 107-107, as implemented by DFARS 208.405-70, requires departments and agencies to review and approve orders placed for supplies or services under non-DoD contracts, whether through direct acquisition or assisted acquisitions, when the amount of the order exceeds the simplified acquisition threshold. Before placing an order against these non-DoD contract vehicles, which include FSS, contracting officers must consider various factors and determine the acquisition is in the best interest of DoD. *See* Director, Defense Procurement and Acquisition Policy (DPAP), memos of 24 Aug 2009 (Interagency Acquisition Update); 25 Apr 2013 (Support Agreements); and (17 June 2005) (Proper Use of Non-DoD Contracts); *see also* Memorandum, Principal Deputy Under Secretary of Defense (Comptroller) & Acting Under Secretary of Defense (Acquisition, Technology & Logistics), Subject: Proper Use of Non-DoD Contracts (Oct. 29, 2004); Memorandum, Assistant Secretary of the Army (Financial Management and Comptroller) & Secretary of the Army (Acquisition, Logistics, and Technology), Subject: Proper Use of Non-Department of Defense (Non-DoD) Contracts (July 12, 2005) (**establishes Army policy for reviewing and use of non-DoD contracts vehicles**). A summary of current Interagency Acquisition Policy and links to many of the memos referenced above can be found at [http://www.acq.osd.mil/dpap/cpic/cp/interagency\\_acquisition.html](http://www.acq.osd.mil/dpap/cpic/cp/interagency_acquisition.html). *See also*, DFARS 217.802.
2. Agencies place orders to obtain supplies or services from a FSS contractor. When placing the order, the agency has determined that the order represents the best value and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the government's needs. Even though GSA has already determined prices to be fair and reasonable, Agencies may always seek additional discounts. FAR 8.404(d).
3. An agency must reasonably ensure that the selection meets its needs by considering reasonably available information about products offered under FSS contracts. Pyxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD ¶ 18.
4. If an agency places an order against an expired FSS contract, it may result in an improper sole-source award. DRS Precision Echo, Inc., B-284080; B-284080.2, Feb. 14, 2000, 2000 CPD ¶ 26.
5. If an agency places an order against an FSS contract, then all items or supplies ordered must be covered by the vendor's FSS contract (no

“off the schedule buys”). Science Appl. Internat’l Corp., B-401773, Nov. 10, 2009, 2009 CPD ¶ 229 (holding agencies could not submit purchase order to FSS vendor when two of six items were not on the FSS contract at the time of the order but were added prior to the delivery date); Symplicity Corp., B-291902, Apr. 29, 2003, 2003 CPD ¶ 89 (Agency can not award to a vendor whose labor categories are outside the scope of its FSS contract); Omniplex World Servs., Corp., B-291105, Nov. 6, 2002, 2002 CPD ¶ 199 (BPA improper when the services are not within the scope of the offeror’s FSS contract). *See also* FAR 8.402(f), which explains that items not on FSS schedule may be added to FSS orders only if those added items meet all applicable competition and procurement regulations. *See also*, Rapiscan Systems, Inc., B-401773.2, B-401773.3, March 15, 2010 (explaining that the “sole exception to [the FAR 8.402(f)] requirement is for items that do not exceed the micro-purchase threshold of \$3,000, since such items properly may be purchased outside the normal competition requirements in any case.”).

6. Thresholds.

- a. *At or under the micro-purchase threshold (MPT).* Agencies can place an order with any FSS contractor. FAR 8.405-1(b).
- b. *Above the micro-purchase threshold, but below the simplified acquisition threshold (SAT).* Procedures vary slightly depending on whether a statement of work is required. *See* FAR 8.405-1 and 8.405-2.
  - (1) *Orders exceeding the MPT but not exceeding the SAT, and which do NOT require a statement of work (SOW).* FAR 8.405-1(c). Activities shall place the order with the schedule contractor that represents the best value. Before placing orders, the activity shall:
    - (a) Consider reasonably available information using the "GSA Advantage!" on-line shopping service, by reviewing catalogs/pricelists of at least three schedule contractors, or by requesting quotes from at least three schedule contractors; or
    - (b) Document the circumstances for restricting consideration to fewer than three schedule contractors based on one of the reasons specified in FAR 8.405-6(a):
      - (i) An urgent and compelling need exists;

- (ii) Only one source is capable of providing the required supplies or services because they are unique or highly specialized; or
  - (iii) In the interests of economy and efficiency, the new work is a logical follow-on to a previous FSS order. The previous FSS order must have been placed in accordance with proper ordering procedures and must not have been ordered as a sole-source or limited source order.
- (2) *Orders exceeding the MPT but not exceeding the SAT, and which DO require a statement of work (SOW).* FAR 8.405-2(c)(2). Activities shall place the order with the schedule contractor that represents the best value. Before placing orders, the activity shall:
  - (a) Develop a SOW in accordance with FAR 8.405-2(b) (*i.e.*, they shall include: descriptions of work to be performed; deliverables schedules; performance standards; location of work; period of performance; special requirements; and whenever possible, shall be performance-based);
  - (b) Provide an RFQ to at least three schedule contractors that offer services that will meet or exceed the agency's needs, or document circumstances for restricting consideration based on one of the reasons specified in FAR 8.405-6(a) (urgent and compelling need; only one source capable; logical follow-on); and
  - (c) Specify the type of order (*i.e.* firm-fixed-price, labor-hour) for the services specified in the SOW. The KO should establish firm-fixed prices, as appropriate.
- (3) *Above the simplified acquisition threshold (SAT).* Procedures vary slightly depending on whether a statement of work is required. *See* FAR 8.405-1 and 8.405-2.
- (4) *Orders exceeding the SAT and which do NOT require a statement of work (SOW).* FAR 8.405-1(d). Each order

shall be placed on a competitive basis unless a justification is prepared and approved in accordance with FAR 8.405-6.

- (a) Activities shall place the order with the schedule contractor that represents the best value and may consider a variety of factors (*see* FAR 8.405-1(f)). Before placing orders, the activity shall:
  - (i) Post an RFQ on e-Buy to afford all relevant schedule contractors offering the required supplies or services an opportunity to submit a quote; or
  - (ii) Provide the RFQ to as many schedule contractors as practicable, consistent with market research, to reasonably ensure that quotes will be received from at least three contractors. When fewer than three quotes are received, the KO shall prepare a written determination explaining that no additional contractors could be identified despite reasonable efforts to do so.
- (b) Activities shall ensure that all quotes received are fairly considered and award is made in accordance with the evaluation criteria set out in the RFQ. The basis for the award decision, and other required aspects of the procurement must be documented in the contract file. FAR 8.405-1(g).
- (5) *Orders exceeding the SAT and which DO require a statement of work (SOW).* FAR 8.405-2(c)(3). In addition to the requirements for an order between the MPT and SAT that requires a SOW as stated above, each order above the SAT shall be placed on a competitive basis unless a justification is prepared and approved in accordance with FAR 8.405-6.
  - (a) Activities shall place the order with the schedule contractor that represents the best value and may consider a variety of factors (*see* FAR 8.405-2(d)). Before placing orders, the activity

shall prepare an RFQ that includes the SOW and evaluation criteria. The activity must then:

- (i) Post an RFQ on e-Buy to afford all relevant schedule contractors offering the required supplies or services an opportunity to submit a quote; or
- (ii) Provide the RFQ to as many schedule contractors as practicable, consistent with market research, to reasonably ensure that quotes will be received from at least three contractors. When fewer than three quotes are received, the KO shall prepare a written determination explaining that no additional contractors could be identified despite reasonable efforts to do so.

(b) Activities shall ensure that all quotes received are fairly considered and award is made in accordance with the evaluation criteria set out in the RFQ. The basis for the award decision, and other required aspects of the procurement must be documented in the contract file. FAR 8.405-2(f). Note the documentation for this type of order must consider the level of effort and labor mix in order to determine if price is reasonable.

(c) Time and materials and labor hour orders for services require additional determinations and findings. *See* FAR 8.405-2(e) and 8.404(h).

7. Advantages of FSS ordering.

- a. Reduce the time of buying.
- b. Reduce the cost of buying. Agencies can fill recurring needs while taking advantage of quantity discounts associated with government-wide purchasing.
- c. While not protest proof, ordering from a FSS should diminish the chances of a successful protest.
  - (1) Whether the agency satisfies a requirement through an order placed against a MAS contract/BPA or through an open market purchase from commercial sources is a matter of business judgment that the GAO will not

question unless there is a clear abuse of discretion. AMRAY, Inc., B-210490, Feb. 7, 1983, 83-1 CPD ¶ 135.

- (2) An agency may consider administrative costs in deciding whether to proceed with a MAS order, even though it knows it can satisfy requirements at a lower cost through a competitive procurement. Precise Copier Services, B-232660, Jan. 10, 1989, 89-1 CPD ¶ 25.
- (3) The GAO will review orders to ensure the choice of a vendor is reasonable. Commercial Drapery Contractors, Inc., B-271222, June 27, 1996, 96-1 CPD ¶ 290 (protest sustained where agency's initial failure to follow proper order procedures resulted in "need" to issue order to higher priced vendor, on the basis it was now the only vendor that could meet delivery schedule).
- (4) Section 843 of the 2008 NDAA granted GAO the authority to review bid protests of task or delivery orders over \$10 million. This authority was later codified at 41 U.S.C. § 253j(e) (now 41 U.S.C. § 4106(f)) for civilian agencies and 10 U.S.C. § 2304c(e) for DoD. Prior to the enactment of section 843, a protest of a task or delivery order was only authorized on the grounds that the order increased the scope, period, or maximum value of the contract under which the order was issued. As of 2013, only the civilian codification of section 843 contains a sunset provision. The GAO's authority to review bid protests for civilian agencies has been reset to 30 Sep 2016.

d. GSA awards and administers the contract (not the order). Problems with orders should be resolved directly with the contractor. Failing that, complaints concerning deficiencies can be lodged with GSA telephonically (1-800-488-3111) or electronically (through "GSA Advantage!").

## 8. Disadvantages.

- a. Must pay GSA's "service charge" or "Industrial Funding Fee" which funds GSA's costs associated with running the FSS program. Since January 1, 2004 the "Industrial Funding Fee" has been .075 percent. This fee is built into the cost of the

supplies or services procured and is not paid as a separate line item.

- b. Agencies cannot order “incidentals” on Federal Supply Schedule orders.
- (1) In ATA Defense Industries, Inc., 38 Fed. Cl. 489 (1997), the Court of Federal Claims ruled that “bundling” non-schedule products with schedule products violated the Competition in Contracting Act. The contract in question involved the upgrade of two target ranges at Fort Stewart, Georgia. The non-schedule items amounted to thirty-five percent of the contract value.
  - (2) Prior to 1999, the GAO allowed incidental purchases of non-schedule items in appropriate circumstances. ViON Corp., B-275063.2, Feb. 4, 1997, 97-1 CPD ¶ 53 (authorizing purchase of various cables, clamps, and controller cards necessary for the operation of CPUs ordered from the schedule).
  - (3) The GAO has concluded, in light of the COFC's analysis in ATA, that there is no statutory basis for the incidental test it enunciated in ViON. Agencies must comply with regulations governing purchases of non-FSS items, such as those concerning competition requirements, to justify including those items on a FSS delivery order. Pyxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD ¶ 18.
  - (4) FAR 8.402(f) permits adding “open market items” (i.e. items not on FSS schedule) to FSS orders provided that all other applicable acquisition regulations regarding the non-FSS items have been complied with (publicizing – Part 5; competition – Part 6; commercial item procurement – Part 12; method of procurement – Part 13, 14, or 15; and small business programs – Part 19). Non-FSS items must also be fairly and reasonably priced, must be clearly identified as non-FSS items on the order, and the order must contain all clauses applicable to non-FSS orders. Note that if the amount of non-schedule items does not exceed the micro-purchase threshold, these items may be added (*see* Rapiscan Systems, Inc., B-401773.2, B-401773.3, March 15, 2010 (explaining the “micro-purchase exception”) and Section XII.B.5 above.

### **XIII. CONCLUSION.**

**APPENDIX A:**

**PUBLICIZING SYNOPSIS/ SOLICITATION REQUIREMENTS AND SIMPLIFIED ACQUISITION THRESHOLD CHARTS**

**Publicizing Synopsis/Solicitation and Response Time Requirements<sup>1</sup>**

<u>Amount of Acquisition</u>	<u>Non-Commercial Items</u>	<u>Commercial Items</u>
\$0 – Micro-purchase Threshold <sup>2</sup>	NA	NA
>\$3K - \$15K	NA <sup>3</sup>	NA
>\$15K - \$25K	Post synopsis or solicitation electronically or in public place for at least 10 days, unless soliciting orally (FAR 5.101(a)(2)). <sup>4</sup> If KO posts a synopsis, allow “reasonable opportunity” to respond <sup>5</sup> after issuing solicitation.	Same as >15K - \$25K Non-Comm Items
>\$25K- \$SAT <sup>5</sup>	Synopsisize on GPE <sup>6</sup> for 15 days. Then issue solicitation <sup>7</sup> and allow a “reasonable opportunity to respond.” (FAR 5.201(b)(1)(i) and 5.203(b).  <b>Option #1:</b> Synopsisize on GPE for “reasonable period” (can be less than 15 days). Then, issue solicitation and allow “reasonable opportunity to respond” (can be less than 30 days) (FAR 5.203(a)(1), (b), and (c). <b>Option #2:</b> Use combined synopsis/solicitation procedure (there is no separate synopsis and solicitation). KO will establish a “reasonable response time.” (FAR 5.203(a)(2) and 12.603(a) and (c)(3)(ii).	
>\$SAT	Synopsisize on GPE for 15 days (FAR 5.203(a)). Issue solicitation and allow 30 days to respond (FAR 5.101(a)(1) and 5.203(c)).	Same as \$25K - \$SAT Comm Items above.

1. “Publicizing” or “notice” requirements are satisfied by posting a synopsis (i.e., summary) of a planned solicitation for the required period and in appropriate locations. The “solicitation response time” is the period starting the first day a solicitation is posted or mailed to potential offerors.  
 2. Generally the micro-purchase threshold is \$3K; for construction it is \$2K; for acquisitions subject to the Service Contracts Act it is \$2.5K; in support of contingency ops/ or NBCCR, defense it is \$15K for inside the U.S. and \$30K for outside the U.S.  
 3. No written solicitations required. Oral solicitations should be used to the “maximum extent practicable.” FAR 13.106-1(c).  
 4. Oral solicitation for requirements estimated between \$15K - \$25K should be used for non-complex requirements only.  
 5. “SAT” means “simplified acquisition threshold” under FAR Part 13 – normally \$150K. See simplified acquisition threshold chart on page 2.  
 6. Government-wide Point of Entry (GPE). The GPE is located at [www.fedbizops.com](http://www.fedbizops.com).  
 7. “Issue solicitation” means to publicize it on GPE, or by other electronic means, or to send it to potential offerors.

Simplified Acquisitions Thresholds

	<u>Standard Threshold<sup>1</sup></u>	<u>Purchases made or contracts awarded and performed <i>INSIDE</i> the U.S. in support of "contingency operation" or for NBC defense</u>	<u>Purchases made or contracts awarded and performed <i>OUTSIDE</i> the U.S. in support of "contingency operation" or for NBC defense</u>
<u>Micro Purchase</u>	\$3,000 <sup>2</sup>	\$15K	\$30K
<u>Simplified Acquisition<sup>3</sup></u>	\$150K	\$300K	\$1M <sup>4</sup>
<u>Commercial Item Test Program (CITP)<sup>5</sup></u>	>\$150K and ≤\$6.5M	>\$150K and ≤\$12M	>\$150K and ≤\$12M

1. Technically, the CITP does NOT increase the SAT. The CITP, however, does authorize the use of simplified acquisition procedures for commercial items up to a certain value even though they exceed the SAT.

2. The micro purchase threshold is limited to \$2k for construction services subject to the Davis-Bacon Act and to \$2.5k for services subject to the Service Contract Act.

3. These are acquisitions of supplies or services in the amount of \$150K or less using simplified acquisition procedures, FAR 2.101. "Simplified acquisition procedures" (SAP) are those described in FAR 13 (i.e., purchase orders, government purchase cards, BPA's, and imprest funds). If using SAP, then acquisitions are exempt from FAR Part 6 (competition) and there is no requirement to achieve "full and open competition." However, sole source acquisitions using SAP must still be justified in writing per FAR 13.501 and approved by a KO or head of procuring activity.

4. A DoD Class Deviation (DARS Tracking Number: 2011-00009), effective March 28, 2011, raised the Simplified Acquisition Threshold to \$300,000 "when soliciting or awarding contracts to be awarded and performed outside the United States, or making purchases outside the United States, for acquisitions of supplies and services that, as determined by the head of the contracting activity, are to be used to support a *humanitarian or peacekeeping operation*, as defined at FAR 2.101" (emphasis added). The Class Deviation has since been incorporated into the definition at DFARS 202.101.

5. CITP allows the use of SAP to purchase commercial item supplies and services for amounts greater than the SAT but not greater than \$6.5M or \$12M if in support of contingency operations or to facilitate defense against or recovery from NBCR attack. FAR 13.500(e). Authority for the CITP lapsed on 1 Jan 2012, but was reauthorized by section 822 of the 2013 NDAA. Authority for the program will lapse on 1 Jan 2015, absent Congressional action to re-extend the program or to make it permanent. Curiously, the NDAA provision that reauthorized the program included an effective date of 1 January 2012, which in effect retroactively authorizes the program for all of 2012 (i.e. between the date the authority originally lapsed (1 Jan 2012) and the date the NDAA was signed into law (2 Jan 2013)). Whether this retroactive effect has any practical importance remains to be seen.

## **APPENDIX B:**

### **Sample GSA Blanket Purchase Agreement Format**

#### **SAMPLE BPA FORMAT**

BPA NUMBER _____	
(CUSTOMER NAME) BLANKET PURCHASE AGREEMENT	
Pursuant to GSA Federal Supply Schedule Contract Number(s) _____ and Federal Acquisition Regulation (FAR) 8.405-3, Blanket Purchase Agreements (BPAs), the Contractor agrees to the following terms of a BPA EXCLUSIVELY WITH <u>                    (Ordering Agency)                    </u> :	
(1) The following contract services/products can be ordered under this BPA. All orders placed against this BPA are subject to the terms and conditions of the contract, except as noted below:	
<u>ITEM (Model/Part Number or Type of Service)</u>	<u>SPECIAL BPA DISCOUNT/PRICE</u>
_____	_____
_____	_____
(2) Delivery:	
<u>DESTINATION</u>	<u>DELIVERY SCHEDULE/DATES</u>
_____	_____
_____	_____
(3) The Government estimates, but does not guarantee, that the volume of purchases through this agreement will be _____.	
(4) This BPA does not obligate any funds.	
(5) This BPA expires on _____ or at the end of the contract period, whichever is earlier.	
(6) The following office(s) is hereby authorized to place orders under this BPA:	
<u>OFFICE</u>	<u>POINT OF CONTACT</u>
_____	_____
_____	_____
(7) Orders will be placed against this BPA via Electronic Data Interchange (EDI), FAX, paper, or oral communications.	
(8) Unless otherwise agreed to, all deliveries under this BPA must be accompanied by delivery tickets or sales slips that must contain the following information as a minimum:	
(a) Name of Contractor;	
(b) Contract Number;	
(c) BPA Number;	
(d) Model Number or National Stock Number (NSN);	
(e) Task/Delivery Order Number;	
(f) Date of Purchase;	
(g) Quantity, Unit Price, and Extension of Each Item (unit prices and extensions need not be shown when incompatible with the use of automated systems; provided, that the invoice is itemized to show the information); and	
(h) Date of Shipment.	
(9) The requirements of a proper invoice are as specified in the Federal Supply Schedule contract. Invoices will be submitted to the address specified within the task/delivery order transmission issued against this BPA.	
(10) The terms and conditions included in this BPA apply to all purchases made pursuant to it. In the event of an inconsistency between the provisions of this BPA and the Contractor's invoice, the provisions of this BPA will take precedence.	