

ALERT

GSA Expands Schedule Contractors' Authority to Provide Off-Schedule Materials and Services Without Using "Open-Market" Procedures

January 25, 2018

WHAT: The General Services Administration (GSA) issued new rules that significantly expand the ability of GSA Schedule holders to include "non-Schedule" materials and services—referred to in the new rule as "Order-Level Materials"—on orders placed under GSA Schedule contracts.

WHEN: GSA published its Final Rule yesterday, with an effective date of January 24, 2018.

WHAT DOES IT MEAN FOR INDUSTRY: The GSA Schedules program provides streamlined procedures for agencies to acquire a broad array of commercial products and services. However, GSA's ordering procedures have traditionally imposed significant restrictions on agencies' ability to include non-Schedule items (referred to as "Open Market" items). As a practical matter, the rules governing the purchase of Open Market items have only authorized the procurement of non-Schedule products and services *below the micro-purchase threshold*. Under the Final Rule issued yesterday, GSA has expanded agencies' ability to acquire non-Schedule supplies and services (now referred to as "Order-Level Materials" or "OLMs") when placing orders or blanket purchase agreements (BPAs) through GSA Schedules, as long as certain conditions are satisfied. Click below to read our discussion of these conditions.

Authors

Kevin J. Maynard
Partner
202.719.3143
kmaynard@wiley.law
Gary S. Ward
Associate
202.719.7571
gsward@wiley.law

Practice Areas

Government Contracts
GSA Schedule and Commercial Item
Contracts

The Final Rule defines OLMs as supplies or services that are "acquired in **direct support** of an individual task or delivery order placed against a Federal Supply Schedule (FSS) contract or FSS BPA," and that are "**not known at the time of Schedule contract** or FSS BPA award." Importantly, the Rule also makes clear that OLMs "are not open market items," and are not subject to the rules in FAR 8.4 governing Open Market purchases. Instead, OLMs are subject to their own special ordering procedures in new GSAR 552.238-82, which establishes the following rules for including OLMs on GSA Schedule orders and BPAs.

- **OLMs Limited To 1/3 of Order Value:** Under the Final Rule, OLMs may only be acquired "in **direct support** of an individual task or delivery order and **not as the primary basis or purpose** of the order." Towards this end, the cumulative value of all OLMs (excluding travel) under each individual order may not exceed 33.33% of the total value of the order.
- **Schedule Holder Required to Obtain Three Quotes for OLMs.** In order to establish price reasonableness, Schedule holders must obtain a minimum of **three quotes** for each OLM above the simplified acquisition threshold. Schedule holders are not required to submit quotes to the Contracting Officer, but are required to preserve quotes for possible audit. In addition, the Final Rule provides that Schedule holders with approved purchasing systems are exempt from the requirement to obtain three quotes, but are instead required to follow their purchasing system requirements when proposing OLMs.
- **OLMs Exempt From CSP, PRC and Other Schedule Obligations.** Under the new Rule, Schedule holders "are **not required** to submit commercial sales practices [CSP] disclosures" for OLMs. In addition, the Rule provides that OLMs are **exempt** from the Price Reductions Clause (PRC) and Economic Price Adjustment (EPA) Clause, and are not included on Schedule holders' approved pricelists. However, Schedule holders **are required** to include OLMs in their quarterly sales reports and transactional data reports (if applicable), and also **are required** to pay IFF on OLMs (except for travel).

GSA will implement this change by publishing a list of Schedules that are authorized to include OLMs (to be maintained at www.gsa.gov/ols), and by initiating bilateral modifications to add an OLM Special Item Number (SIN) to existing and new contracts within those authorized Schedules.