

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

b. Several respondents addressed issues involving e-Commerce.

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Fees

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

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

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

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

4. Dispute Resolution

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

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

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

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

5. Other Issues

a. One respondent opposed Most Favored Customer pricing clauses.

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

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

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

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

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

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

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

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

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

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

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