

BEFORE THE
GENERAL SERVICES ADMINISTRATION

COMMENTS OF THE
NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.
IN RESPONSE TO NOTICE AND REQUEST FOR PUBLIC COMMENTS
NOTICE-MA-2017-03; DOCKET 2017-0002
EVALUATION OF EXISTING FEDERAL PROPERTY MANAGEMENT REGULATIONS

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INTRODUCTION

The National Motor Freight Traffic Association, Inc. (“NMFTA”) submits these comments in response to the May 30, 2017 Notice and Request for Comments, published by the General Services Administration (“GSA”) at 82 Fed. Reg. 24651 (“Notice”). That Notice seeks input on regulations in certain subchapters of 41 CFR part 102 of the Federal Management Regulation (“Part 102”) that may be appropriate for repeal, replacement, or modification in order to alleviate unnecessary regulatory burdens on business.

NMFTA is a nonprofit membership organization headquartered at 1001 North Fairfax Street, Suite 600, Alexandria, VA 22314, with a membership comprised primarily of motor carriers specializing in the transportation of less-than-truckload quantities of freight (LTL). NMFTA represents the interests and welfare of its members in judicial, regulatory and legislative proceedings that involve programs directly affecting their operations. Subchapter D of Part 102, which sets forth regulations pertaining to GSA’s transportation management and transportation audit programs, applies directly to NMFTA’s members who provide freight transportation services for the Government. Accordingly, NMFTA sets forth below its comments regarding Subchapter D and related provisions that impose unnecessary and unfair regulatory burdens on the motor carrier industry. By allowing for more cost effective and efficient service to Government shippers, the proposed regulatory modifications will not only aid those providing transportation services to the Government but will also make the movement of Government freight more desirable to the motor carrier industry, resulting in more options and better value for Government shippers.

DISCUSSION

I. Agencies should not be allowed to use rate tenders filed with other agencies

In 2000, GSA expanded the choices available to Government shippers for acquiring transportation and related services. One of the new options added to these regulations was to allow agencies shipping freight to borrow tenders that transportation service providers (“TSPs”), including motor carriers, had filed with other agencies. Specifically, 41 C.F.R. § 102-117.30(b) of Part 102 was amended to allow Government agencies to:

Use another agency’s contract or rate tender with a TSP only if allowed by the terms of that agreement or if the Administrator of General Services delegates authority to another agency to enter an agreement available to other Executive agencies. . .

Other regulations advise that such usage of another agency’s tender should be considered “when the contract or rate tender offers better or equal value than otherwise available to you.” 41 C.F.R. § 102–117.40; *see also* § 102–117.45. In short, GSA has effectively given itself the authority to expand the use of a tender beyond the Government shipper for whom it was intended.

This option effectively deprives TSPs of control over what is one of the most important business decisions they make, namely the pricing for their services. When a motor carrier submits a tender to a particular agency, the offered rates are based upon the characteristics of the particular commodities that agency ships (including their density, stowability, value, liability, and handling characteristics, among others) on the involved traffic lanes, the likely volume of freight on those lanes, and any accessorial or other transportation-related services associated with that particular agency’s freight movements. Given the diverse characteristics of the freight moved by various agencies, rates offered to different agencies will naturally differ. While rates offered to one agency may appear to offer a better value than those offered to another shipping

agency, that is due entirely to the particular nature of the freight involved, including volume on traffic lanes, in each case.

If agencies are allowed to use another agency's tender because GSA has authorized such use, the offered rate is being applied to freight that could not have been and was not considered when the tender rates were developed by the TSP. And if the rate offered to the borrowing agency was higher, that suggests that the specific characteristics of its freight and other considerations necessitated a higher rate to allow the involved motor carrier to make a fair profit on the services provided. Thus, allowing one Government shipper to use another agency's rate tenders could result in an economic loss to the involved carrier, unfairly and unnecessarily burdening the involved TSPs in a manner that is inconsistent with this administration's regulatory objectives.

Accordingly, NMFTA proposes that Part 102 be modified to exclude this option, which did not exist prior to 2000, by eliminating it from 41 C.F.R. §§ 102-117.30(b), 117.40, and 117.45. The benefits to TSP businesses will exceed any harm to Government shippers because they will still have several other options available. Specifically, each Government agency will still be able to use either tenders submitted to that agency or the applicable GSA tender of service; to contract directly with TSPs; or, for regulated freight, to negotiate a rate reduced from the applicable commercial rate under 49 U.S.C. § 13712. *See* 41 C.F.R. § 102-117.30(a), (c) & (d). If the "better value" rate offered to another agency is appropriate for a shipping agency's needs, that agency should be able to obtain a comparable rate through one of these three other options.

II. When evaluating TSP performance, an agency should consider whether the TSP had any responsibility for the accidents, losses, damages or misdirected shipments

Part 102 sets out a number of criteria to be used by Government shippers in evaluating TSP performance. *See* 41 C.F.R. § 102–117.280¹. One of the factors in that analysis is the TSP’s safety record, which is defined to include “(accidents, losses, damages or misdirected shipments) as a percentage of all shipments.” *Id.* NMFTA thoroughly agrees that a motor carrier’s safety record should be considered by a shipper selecting among multiple carriers wishing to serve as a TSP. However, the scope of conduct that comes within this definition is so broad that it will eliminate carriers without real safety problems.

A motor carrier TSP should not be held responsible for “accidents, losses, damages or misdirected shipments” unless that carrier or its driver is at fault and bears some responsibility for the event. A carrier that causes accidents, loses or misdirects shipments, or damages freight is more likely to have a poor safety disposition than a carrier that did not bear any responsibility. Treating both categories of carriers similarly in evaluating performance unfairly penalizes and burdens innocent victims of events set in motion by third parties or by acts of god. It also deprives the Government of services of desirable TSPs if carriers that were not at fault are disqualified from handling Government freight.

Since the likelihood of future crashes, losses and damages is increased only if the carrier TSP has been at fault in the past, a caveat reflecting such a requirement should be included in this provision. Accordingly, NMFTA proposes that the language of 41 C.F.R. § 102-117.280(h)

¹ The entire list of performance measures, which is not meant to be all-inclusive, includes: “(a) TSP’s percentage of on-time deliveries; (b) Percentage of shipments that include overcharges or undercharges; (c) Percentage of claims received in a given period; (d) Percentage of returns received on time; (e) Percentage of shipments rejected; (f) Percentage of billing improprieties; (g) Average response time on tracing shipments; (h) TSP’s safety record (accidents, losses, damages or misdirected shipments) as a percentage of all shipments; (i) TSP’s driving record (accidents, traffic tickets and driving complaints) as a percentage of shipments; and (j) Percentage of customer satisfaction reports on carrier performance.”

be modified to state that agencies should consider a “TSP’s safety record (accidents, losses, damages or misdirected shipments, when a TSP was found to be at fault) as a percentage of all shipments.” Such a modification would ensure that only substandard TSPs are precluded from serving the Government.

III. TSPs and Government shippers should both be allowed to collect interest when they prevail in billing disputes

Part 102 not only allows the Government to charge interest on amounts due from a TSP, but it provides for the accrual of interest from the voucher payment date on all overcharges. *See* 41 C.F.R. §§ 102-117.65, 118.140(e) & 118.635. Further, interest accrues notwithstanding the fact that the TSP had an objectively valid argument to support its original billing and in opposition to the alleged overcharge.

However, the accrual of interest is not mutual. To the contrary, Part 102 expressly provides that a Government agency need not pay interest on a disputed amount claimed by a TSP. *See* 41 C.F.R. § 102-118.465. This provision cites generally to the Prompt Payment Act, 31 U.S.C. § 3901 *et seq.* (the “Act”), to support the disparate treatment of TSPs without citing to any particular provision within that Act. *See id.* Nor have we been able to find any provision in the Act that mandates such a disparate result.

In fact, the opposite is true. The Act provides at 31 U.S.C. § 3902(a) as follows with respect to interest penalties:

the head of an agency acquiring property or service from a business concern, who does not pay the concern for each complete delivered item of property or service by the required payment date, shall pay an interest penalty to the concern on the amount of the payment due. The interest shall be computed at the rate of interest established by the Secretary of the Treasury, and published in the Federal Register, for interest payments under section 7109(a)(1) and (b) of title 41, which is in effect at the time the agency accrues the obligation to pay a late payment interest penalty.

Other statutory provisions state that interest is due even if it is not requested by the contractor, and set out procedures to be followed by a contractor to submit a claim for interest as well as other amounts due from the Government. *See* 31 U.S.C. §§ 3902(c)(1) & 3907. Thus, the one-sided exclusion from payment of interest to a TSP that prevails on a claim is inconsistent with the Act. The regulation also places an undue economic burden on carriers that are deprived by the Government of compensation that was rightly due and owing to them. To avoid such unfair economic harm to businesses, the response in 41 C.F.R. § 102-118.465 to the question “Must my agency pay interest on a disputed amount claimed by a TSP?” should be modified to read “Yes, interest penalties are required when payment is delayed because of a dispute between an agency and a TSP.” This modified response simply gives TSPs the same right as the Government to earn interest on amounts they were wrongly deprived of.

IV. Time limits imposed by statute are mandatory

In discussing mandatory terms and conditions governing the use of bills of lading, Part 102 provides that the time limits “within which notice must be given to the TSP, or a claim must be filed, or suit must be instituted, shall not apply if the shipment is lost, damaged or undergoes shrinkage in transit”, unless the responsible Government official agrees in writing that such time limits will apply. *See* 41 C.F.R. § 102-118.140(d).

Various statutes establish time periods that govern particular steps in the processing of disputes between shippers and TSPs that involve the condition of the involved freight, whether those disputes are presented as administrative claims to the involved agency or through the filing of lawsuits in state or federal courts. *See, e.g.*, 49 U.S.C. § 13710(a)(3); 49 U.S.C. § 14705(f); 28 U.S.C. § 2415; *see also* 41 C.F.R. §§ 102-118.455 & 118.460 (regulations setting forth time limits for all modes of transportation). While Government shippers are sometimes given more time than commercial shippers to pursue their causes of action, the statutes nevertheless impose

an absolute time limit upon those claims as well. *See id.* In some cases, the applicable statute even determines when a claim accrues and the stated time period starts running. For example, 49 U.S.C. § 14705(g) states that a claim related to a shipment of property accrues upon delivery or tender of delivery by the carrier.

None of those statutory provisions contain any exclusion, exemption, or other language that would waive or toll the stated time period because the situation involved loss, damage, or shrinkage of freight being moved for a Government shipper. *See id.* Under the circumstances, it might well be argued that GSA has exceeded its regulatory authority insofar as this provision establishes a presumption that statutory time periods do not apply.

Nor is such a unilateral waiver appropriate as a practical matter under these common scenarios that are in many cases precisely the source of the claims or lawsuits covered by the stated limitations periods. Statutory time limits on the presentation of claims and/or the filing of administrative actions or lawsuits are intended to eliminate stale claims fraught with missing facts and evidence due to the passage of time. Allowing GSA to unilaterally extend those time periods by regulation could produce the contrary result, frustrating the clear intent of Congress that transportation claims be resolved in a relatively short period of time. *See, e.g., Inter-Coastal Xpress, Inc. v. United States*, 49 Fed. Cl. 531, 541 (2001), *aff'd*, 296 F.3d 1357 (Fed. Cir. 2002); *Bowman Trans., Inc. v. United States*, 220 Ct. Cl. 36, 40, 597 F.2d 254 (1979). Extra time, if ever allowed, should be the exception not the rule. TSPs are unfairly burdened if the time for initiating a claim or lawsuit can be extended indefinitely by GSA. Accordingly, this waiver language should be eliminated from 41 C.F.R. § 102–118.140(d).

V. One pre-payment and one post-payment audit are sufficient to protect the Government's interests

Before a Government agency pays a motor carrier or other TSP for the movement of freight, it is required by both the applicable statute and the regulations in Part 102 to review the bill submitted by the TSP in a prepayment audit. *See* 31 U.S.C. § 3726(a); 41 C.F.R. §§ 102-118.265 & 118.280 (modified at 81 Fed. Reg. 65296, 65300 & 65301 (Sept. 22, 2016), but not yet codified). A prepayment audit involves “review of transportation documentation before payment to determine their validity, propriety, and conformity of rates with tariffs, quotations, agreements, contracts, or tenders [in order to] detect and eliminate billing errors before payment...” 41 C.F.R. § 102-118.265; *see also* 41 C.F.R. §102-118.35 (definition) (both at 81 Fed. Reg. 65299-65300, Sept. 22, 2016). To provide adequate oversight for this process, most transportation bills are also subjected to a post-payment audit by GSA, a procedure in which GSA essentially duplicates the payment review process to ensure “their validity, propriety, and conformity of rates with tariffs, quotations, agreements, contracts, or tenders...” and then makes needed adjustments and takes collection actions where necessary. 41 C.F.R. § 102-118.400, 118.405, 118.410 & 118.430(a) (81 Fed. Reg. 65303-65304, Sept. 22, 2016). Typically, this post-payment audit is performed by an outside audit contracting company whose sole compensation is an agreed percentage of the identified overcharges.

NMFTA recognizes the Government's need to audit bills submitted by TSPs to ensure that any transportation-related payments are absolutely correct. However, GSA's existing audit process, as described to us by GSA, transforms the post-payment audit process into a system that is structured to find billing errors even when their existence is questionable. This problem arises because GSA's audit of a TSP's bill that was audited pre-payment is still not final if GSA's prime outsider contractor fails to identify any overcharges. In those cases, GSA itself commonly

subjects motor carrier bills to yet another post-payment audit (a third audit). Like the outside contract auditors, GSA depends upon overcharges to fund its audit operations. Thus, GSA (like its outside audit contractors) must find billing errors resulting in overcharges even though none were found by either the shipping agency's auditor or GSA's prime outside contract auditor. NMFTA believes this effectively turns post-payment audits into a process grasping at straws in an unwarranted attempt to identify alleged billing errors.

NMFTA seriously questions whether legitimate billing errors exist after two sets of experienced transportation auditors (one from the shipping agency and the other contracted by GSA) have both thoroughly audited the involved TSP bills. As stated in the Senate Report accompanying the 1998 statutory amendments that made a pre-payment audit mandatory: "Deregulation and technological advances have impacted positively on the current ability of agencies to determine the accuracy of transportation bills promptly, using immediate and easy computer access to rate information." *See* Senate Committee on Governmental Affairs, *Travel and Transportation Reform Act of 1998*, S. Rpt. 105-295, at p.3 (Aug. 25, 1998). If errors do exist after pre and post-payment audits, it is a flaw that should be corrected by improved training programs for the individuals who perform the shipping agency and GSA first tier audits. A third audit, that may well lead to some spurious overcharges, imposes an unfair economic burden on TSPs who must either allocate resources to challenging questionable overcharge claims or incorporate them as an added cost of doing business with the Government. The process also certainly deters some well-qualified motor carriers from serving the Government, reducing competition in this marketplace.

To minimize this unfair and unnecessary regulatory burden, NMFTA proposes that Part 102 be modified to expressly limit GSA to a single post-payment audit of transportation bills.

This could be done several ways. The definition of post-payment audit at 41 C.F.R. § 102-118.35 (81 Fed. Reg. 65299, Sept. 22, 2016) could be modified to include the word “one” and read: “one audit of transportation billing documents, and all related transportation documents after payment, to decide their validity, propriety, and conformity of rates with tariffs, quotations, agreements, contracts or tenders.” Alternatively, or in addition, 41 C.F.R. § 102-118.435 (81 Fed. Reg. 65304, Sept. 22, 2016), which identifies the procedures that may be used by the GSA Audit Division in conducting transportation audits, should be modified at subpart (a)(1) to allow the Division “In a single audit of TSP bills to examine and analyze transportation documents and payments to discover their validity, relevance and conformity with tariffs, quotations, contracts, agreements, or tenders and make adjustments to protect the interest of an agency”. In either case, the two remaining levels of audits — one pre-payment and one post-payment — will adequately protect the Government’s interest in accurate billing without imposing unfair financial regulatory burdens on the TSPs providing Government shippers with transportation services.

VI. The Administrative Service Charge is costly and unjustified

Another area of concern to TSPs is the “administrative service charge as a participant in the GSA rate tender programs...” referred to in 41 C.F.R. § 102-117.35. This regulation does not define “administrative service charge,” does not cite to GSA’s authority to impose such a service charge, and does not cite to where the provision requiring such a service charge may be found. NMFTA believes this rule relates to what is sometimes called the “Industrial Funding Fee” (“IFF”) required by GSA’s contracting documents, including its Request for Offer and Standard Tender of Service. If that is the service charge referred to here, it is a costly and unjustified burden on TSPs for several reasons, and it should be abolished.

This fee is actually paid for by TSPs - not agencies. It was not established by a rule as required by statute. The fee is 6% of the contract amount – no matter how large the amount of the contract. This is an excessive fee that has never been and cannot be justified. Finally, GSA’s related rules for TSPs obligations related to information reporting related to the fee are burdensome and conflict with other rules and statutes.

In the Code of Federal Regulations, the IFF contract clause at 48 C.F.R. § 552.238-74 is required to be inserted into solicitations and contracts for GSA’s multiple and single award schedules under 48 C.F.R. §538.273(b)(1), and included as a contract term and condition applicable to GSA’s acquisition of commercial items under 48 C.F.R. §§ 512.301(a)(1) & 552.212-71(b). There is no provision that requires inclusion of the contract clause found in 48 C.F.R. §552.238-74 in contracts under the General Freight Traffic Management Program’s rate tender program. None of the documents that govern this rate tender program cite to 48 C.F.R. §552.238-74, nor do they refer to the program as a multiple or single award schedule or as an acquisition of a commercial item. Therefore, the IFF contract clause at 48 C.F.R. §552.238-74 does not apply to the General Freight Traffic Management Program’s rate tender program. GSA confirmed this fact in its Federal Register notice related to the Industrial Funding Fee at 79 Fed. Reg. 21400, 21401 (April 16, 2014).

Nevertheless, GSA uses its Request for Offer and Standard Tender of Service (“STOS”) documents to apply the “Industrial Funding Fee” or “administrative service charge” to its General Freight Traffic Management Program’s rate tender program. GSA has woefully underestimated the burden of complying with the IFF’s information collection requirements under its freight management program. Those requirements go far beyond what is necessary for GSA to perform its functions.

A. GSA's information collection requirements imposed upon TSPs are unnecessarily burdensome

GSA requires TSPs to submit information with three times the frequency of information submission required under the IFF clause at 48 C.F.R. §552.238-74. Under that clause, information is required to be submitted on a quarterly basis. Under the STOS governing TSPs in the freight management program, reports are due on a *monthly* basis. See <https://www.gsa.gov/portal/getMediaData?mediaId=139834>, STOS, p. 36. This represents a much greater information collection burden than required of other federal contractors.

B. The scope of information GSA requires TSPs to report is greater than described in the IFF rule and greater than is necessary for GSA to perform its duties

The Notice does not describe the scope of the information required to be collected under the IFF clause at 48 C.F.R. §552.238-74. Under that clause, contractors are required to “report all contract sales under the contract” with the relevant data points being the dollar value of all sales (including the IFF) separated by “each National Stock Number (NSN), Special Item Number (SIN), or sub item.” Thus, the information that GSA requires contractors to report is the amount of the relevant total contract sales for the reporting period, broken down by category.

GSA's STOS requires TSPs to report a much greater scope of information than under the IFF rule; requiring TSPs to report no less than 19 separate pieces of data for each and every transaction (freight shipment). Rather than reporting the total sales under each contract category, TSPs must report, for *each* freight shipment:

- * SCAC - Standard Carrier Alpha Code
- * DATE PAID BY AGENCY - Date TSP received payment from the customer agency
- * TPI/NON-TPI - Indicate if the service was booked through the TPI system
- * PPE/NON-PPP – Indicate if the service was paid for through PPE
- * BILL OF LADING NUMBER - BOL number generated through TMSS or other external unique number
- * PRO BILL NUMBER - Number TSP used to track shipment

- * INVOICE NUMBER - Number on invoice submitted to customer agency for shipment payment
- * AGENCY - Agency for which the service was provided
- * TOTAL SHIPMENT DISTANCE - Total distance from pickup location to delivery location
- * TOTAL SHIPMENT WEIGHT – Total weight of cargo being shipped
- * COST OF ACCESSORIALS, IF NEEDED – Total cost of any accessorials
- * TOTAL SHIPMENT COST – Total amount paid to TSP for shipment
- * BASE COST PER MILE – Total shipment cost minus cost of accessorials divide by distance (formula already in sheet)
- * FUEL SURCHARGE - Total fuel surcharge for the shipment
- * AMOUNT SUBJECT TO IFF - Total shipment value less the fuel surcharge
- * IFF DUE – 6% of the amount subject to IFF
- * DATE IFF PAID - Date payment amount submitted to GSA (please leave blank if payment has not yet been submitted)
- * DATE OF CK - Date of check
- * CK NUMBER - Number of the check

See GSA's FY 2016 RFO, <https://www.gsa.gov/portal/getMediaData?mediaId=239603>,

Appendix A. The time burden of creating these data points for each freight shipment arranged through GSA's program is much higher than five minutes each reporting period.

Furthermore, not all of these data points are necessary for GSA to perform its program functions. If GSA's own IFF at 48 C.F.R. §552.238-74 rule is any guideline, the only information that GSA may need would be the total value of all sales per SCAC for freight movements moved under its freight transportation management program. From that number alone GSA can calculate whether the TSP has paid the proper IFF amount. The reporting of the additional data is an unjustified burden on TSPs.

C. GSA requires reporting on transactions in which it has no legitimate interest

GSA exacerbates this burden by requiring TSPs to report the information listed above on a universe of shipments that includes those not arranged through GSA's freight transportation management system. GSA also requires TSPs to discern which of its freight shipments fall into a poorly defined universe of shipments to which GSA claims an IFF. For example, one of the

data points listed above asks TSPs to report whether the service was booked through the TMS (Transportation Management System) or was a non-TMS shipment. *See* GSA’s FY 2016 RFO, Appendix A, *supra*. GSA has no legitimate purpose for information related to non-TMS shipments or the payment of an IFF upon them.

The STOS provides for an open-ended list of all categories of freight shipments that it considers to be moved through its freight management transportation program. Examples of shipments on which an IFF payment is due include *but are not limited to*:

- * Shipments using a GBL
- * Shipments moving under the terms and conditions of this STOS
- * Shipments moving under the General and agency/organization-specific Request for Offers
- * Shipments that are managed through the use of TransPort Integrator
- * Shipments moving under paper tenders, solicited by GSA or a participating agency.
- * Shipments referencing GSA tenders.

STOS, *supra*, p.12-13(Emphasis added). Without a single clear definition of the universe of freight shipments GSA arranges through its system, it is nearly impossible for the agency and the public to accurately estimate the burden of reporting the IFF information. It is a burden itself for the clerical and accounting staff at TSPs to try to identify which of its freight shipments fall into one of the broad examples provided by GSA or fall into one of the unstated categories suggested by the “but are not limited to” language.

Although the outer bounds of GSA’s information collection requirement are unclear, several of the examples required to be reported by the STOS clearly include freight shipments that are not arranged through GSA’s freight transportation management system. For example, “shipments moving under paper tenders” solicited by a participating agency are not necessarily shipments arranged by GSA. If the agency solicits the tender separately from GSA and freight is moved under that tender, then it is not a shipment arranged through GSA’s system.

If a freight shipment is either “moving under the terms or conditions of the STOS” or “referencing GSA tenders,” that does not mean that it was arranged through GSA’s freight management program. Because freight rate tenders are by definition, tendered by TSPs, it is more accurate to describe them as TSP tenders, not GSA tenders. GSA does not own a proprietary interest in the contract conditions it imposes upon TSPs or the amount of the rates that TSPs, themselves, create and tender to GSA. TSPs may freely negotiate contract terms and rates directly with other agencies with reference to the rates it tendered to GSA, and it may include terms required under the STOS. Such freight shipments do not go through and are not arranged by GSA’s freight transportation management program. Reports on such shipments would necessarily include the TSP’s proprietary business information - identifying their customers and the rates offered to them. This information serves no purpose in GSA’s performance of its proper functions. GSA has no legitimate interest in collecting information related to such freight shipments or in collecting a fee upon them.

D. There is no rule establishing an Administrative Service Charge on TSPs

As the name indicates, the IFF is a fee imposed upon members of the public: federal contractors. Federal agencies are only authorized to impose a fee for a service or thing of value provided by the agency if the fee is prescribed by regulation, is fair, and based on costs to the Government, the value of the service or thing to the recipient, the public policy or interest served, and other relevant facts. 31 U.S.C. §9701 (b)(1) & (2).

The current IFF established in 48 C.F.R. §552.238-74 and the Freight Tender Program’s “administrative service charge” meets none of these requirements. 31 U.S.C. §9701 provides, in pertinent part:

- (a) It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation) to a person (except a

person on official business of the United States Government) is to be self-sustaining to the extent possible.

(b) The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be--

(1) fair; and

(2) based on--

(A) the costs to the Government; (B) the value of the service or thing to the recipient; (C) public policy or interest served; and (D) other relevant facts.

31 U.S.C. §9701. GSA has met none of these requirements to impose an administrative service charge. And to NMFTA's knowledge, GSA has never established the proper factual justification for the IFF to comply with this statute. The problems include:

- GSA does not cite any statutory authority to impose a fee upon contractors or establish the IFF regulation. GSA's December 28, 2012, Federal Register notice cites 40 U.S.C. § 321 as authority to use certain excess funds for certain purposes., but Section 321 does not itself authorize the imposition of fees, does not authorize any sources of funds that are the subject of its provisions, and does not cite to the IFF as a source of such funds.
- GSA has not identified the service or thing of value being provided by the agency to the contractor under Section 9701. In fact, for the history of the IFF, GSA has maintained that the purpose of the IFF is to cover the administrative costs of providing procurement services to GSA's customer agencies. GSA has never claimed, and does not in the Notice claim, that the IFF confers a benefit to the federal contractor.
- GSA has not attempted to demonstrate that the IFF is fair.
- GSA has not attempted to explain how the IFF is based on the actual costs to the Government, the value of the service or thing to the recipient, a public policy or interest served, and other relevant facts.
- GSA has not established the amount of the fee in a rule.
- Instead of complying with Section 9701 by justifying the amount of the fee to be imposed, the rule itself specifically defers from quantifying the amount of the fee. GSA claims the authority to establish the amount of the fee outside of the rulemaking process.
- GSA gives itself the authority to set the fee at a level that allows it to be applied to recouping "losses" and unspecified "fund initiatives benefitting other [Federal

Acquisition Service] FAS programs” of unknown scope and cost. The amount of the fee is limited only by GSA’s initiative and imagination to create FAS services.

According to the GSA Office of the Inspector General (“IG”), the FAS has no criteria or methodology for reviewing the amount of the IFF and determining whether it needs to be changed. *See* Audit of The Multiple Award Schedule Program Industrial Funding Fee (Feb. 3, 2012), https://oversight.garden/reports/gsa/A090256_1. The IG’s report states that the lowest version of the IFF, 0.75%, on MAS contracts “consistently generates net operating revenue in excess of the amounts required to recover MAS [Multiple Award Schedule] costs.” According to the IG, as of September 2009, that excess totaled \$687.5 million.

While the IFF is 0.75% of the contract value for the MAS, 2.5% for domestic Household Goods freight, and 1.5% for international Household Goods shipments contractors, the rate is an unjustifiably burdensome 6% for the General Freight Rate Tender program. Even if GSA were to revise the administrative service charge to incorporate the current MAS IFF rate of 0.75% of the contract price, it cannot justify imposing the burden of even that high a fee on TSPs.

In sum, the IFF and Administrative Service Charge imposes an unsustainable burden on federal contractors. Nowhere has Congress authorized federal contractors providing goods and services to the government to also perform accounting and reporting services and to fund GSA’s acquisition services. GSA’s acquisition services serve and confer benefits upon GSA’s customer agencies, not contractors. If GSA otherwise has authority to seek funding from its customer agencies to supports its programs, then it should seek funding directly from those agencies rather than to place the burden upon its contractors. This is precisely the type of agency-imposed

burden that should be eliminated under E.O. 13777.

Respectfully submitted,



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