

**BEFORE THE  
UNITED STATES GENERAL SERVICES ADMINISTRATION**

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**COMMENTS OF THE  
NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.  
IN RESPONSE TO GSA'S  
NOTICE OF PROPOSED RULEMAKING  
GENERAL SERVICES ADMINISTRATION ACQUISITION REGULATION (GSAR);  
INDUSTRIAL FUNDING FEE (IFF) AND SALES REPORTING**

**GSAR CASE 2012-G503; DOCKET 2012-0018; SEQUENCE 1; RIN 3090-AJ31**

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## **I. INTRODUCTION**

The comments are submitted on behalf of the National Motor Freight Traffic Association, Inc., (“NMFTA”) in response to a notice of a proposed rule published on December 28, 2012, and entitled “General Services Administration Acquisition Regulation (GSAR); Industrial Funding Fee (IFF) and Sales Reporting, GSAR Case 2012-G503; Docket 2012-0018; Sequence 1, RIN 3090-AJ31 (“Notice”). The proposed rule seeks to permit GSA to use funds collected through the IFF, and that are in excess of what it needs to operate the Multiple Award Schedule (MAS), for other Federal Acquisition Services program. NMFTA opposes the proposed changes to the rule.

## **II. STATEMENT OF INTEREST**

Plaintiff NMFTA is a nonprofit membership organization headquartered at 1001 North Fairfax Street, Suite 600, Alexandria, VA 22314. Its membership is comprised of motor carriers and transportation companies operating in interstate, intrastate and foreign commerce. NMFTA’s mission is to serve as a research and development organization providing the transportation industry with the necessary information to advance and improve their interests and welfare. NMFTA is committed to helping the industry meet the transportation challenges through research, education, and publication of specifications, rules, transportation codes and the preparation and dissemination of studies, reports and analyses. One particular focus of NMFTA is to represent the rights of its members transporting freight for the federal government.

Many of NMFTA’s members are federal contractors who participate in GSA’s General Freight Traffic Management Program and tender rate offers under the applicable Requests for Offer, Standard Tender of Service, and Filing Instructions. While these and other related documents occasionally use the terms “Industrial Funding Fee” and “IFF,” NMFTA does not

believe the Industrial Funding Fee contract clause at 48 C.F.R. §552.238-74 governs this program.

In the Code of Federal Regulations, the Industrial Funding Fee 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 it is to be 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 section of the Code of Federal Regulations that requires inclusion of the contract provision found in 48 C.F.R. §552.238-74, the subject of this rulemaking, in contracts involving 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. None of the documents that govern this rate tender program refer to the program as a multiple or single award schedule or as an acquisition of a commercial item. Therefore, NMFTA does not believe the Industrial Funding Fee contract clause at 48 C.F.R. §552.238-74 applies to the General Freight Traffic Management Program's rate tender program.

Nevertheless, to the extent that, by the occasional reference to the term IFF or "Industrial Funding Fee" in the governing documents to GSA's General Freight Traffic Management Program's rate tender program, GSA applies 48 C.F.R. §552.238-74 to such contracting arrangements, and to the extent that NMFTA has members to whom the Industrial Funding Fee otherwise applies, it submits these comments.

### **III. COMMENTS OF NMFTA**

NMFTA members believe that the GSA's IFF is an unauthorized burden on federal contractors, and that the proposed rule is unjustified, vague, and legally unsustainable.

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 the 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 meets none of these requirements, and the proposed changes to the rule simply compound its legal deficiencies. 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's proposed rule meets none of these requirements. And to NMFTA's knowledge, GSA has never established a factual basis for the IFF to comply with this statute.

The problems with the proposed rule include:

- GSA does not cite to any statutory authority to impose a fee upon contractors or to establish the IFF regulation. The December 28, 2012, Notice cites to 40 U.S.C. §321 for

its authority to use certain excess funds for certain purposes. Section 321 does not itself authorize the imposition of any fees. Section 321 does not itself authorize any of the sources of funds that are the subject of its provisions. Section 321 does not cite to the IFF as a source of such funds.

- The Notice does not identify 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 the 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.
- The Notice does not attempt to demonstrate that the IFF is fair.
- The Notice does not attempt to explain how the fee is based on the costs to the Government, the value of the service or thing to the recipient, a public policy or interest served; and other relevant facts.
- The Notice does not propose the amount of the fee.
- Instead of complying with Section 9701 by justifying the amount of the fee to be imposed, the proposed rule itself specifically defers from quantifying the amount of the fee, claiming for GSA the authority to establish the amount of the fee outside of the rulemaking process.
- Not only does the Notice not quantify the amount of the fee, under the proposed rule 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 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, the Federal Acquisition Service has no criteria or methodology for reviewing the amount of the IFF and determining whether it needs to be changed. (See Attachment A, AUDIT OF THE MULTIPLE AWARD SCHEDULE PROGRAM INDUSTRIAL FUNDING FEE, REPORT NUMBER A090256/Q/A/P12003, February 3, 2012) The IG's report states that the lowest version of the IFF, 0.75%, "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% for the MAS, the IFF amount in other contexts goes up to 2% and 4%, and if applicable to the General Freight rate tender program, 6% of the contract amount. NMFTA believes that under any current contract subject to the IFF, the IFF amount is unreasonable and arbitrary and capricious. Even if GSA were to revise the proposed rule to incorporate the current MAS IFF amount into the rule, a rate of 0.75% of the contract price, it cannot justify imposing that high a fee on the public.

#### **IV. CONCLUSION**

The Industrial Funding Fee is 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. Under the proposed rule, that burden is legally unsustainable under 31 U.S.C. § 9701(b).

Respectfully submitted,

DATE: February 26, 2013

/s/Paul D. Cullen, Jr.

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