



## MEMORANDUM FOR GSA CONTRACTING ACTIVITIES

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JEFFREY KOSES  
Date: 2019.03.08  
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1. Purpose.

This class deviation is issued to provide immediate authority while the Public Service provides guidance on a phased implementation across the regions.

## 2. Applicability.

The deviation also provides significant changes throughout GSAM 541 by updating relevant language and removing obsolete details related to the GSA Acquisition of Utility Services.

### 3. Authority.

This class deviation is issued under the authority of FAR 1.404 and GSAM 501.404.

This deviation is issued following consultation with the Chair of the Civilian Agency Acquisition Council (CAAC) in accordance with FAR 1.404(a) and GSAM 501.404(a).

4. Deviation.

See Attachment A for the changes in the FAR text, and Attachment B for changes in the GSAM text as revised by this deviation.

5. Effective Date.

This deviation is effective immediately and remains in effect until incorporated into the FAR and GSAM.

6. Cancellation

SPE Memorandum SPE-2012-02-27, PBS Acquisition Management and Policy Division (PGQA) Request for Class Deviation to FAR 41.202(e) when regulated providers refuse to sign bilateral contracts, is hereby cancelled

7. References.

- a) 31 U.S.C. §1501 *Documentary evidence requirement for Government obligations.*
- b) FAR Part 41.2 *Acquiring Utility Services.*
- c) GSAM 541 *Acquisition of Utility Services.*

8. Point of Contact.

If you have any questions please contact Tony O. Hubbard, Senior Policy Advisor, General Services Acquisition Policy Division (MVAC) at [tony.hubbard@gsa.gov](mailto:tony.hubbard@gsa.gov).

Attachment A - FAR Deviation Text  
Attachment B - GSAM Deviation Text  
Attachment C - PBS Approved Business Case

## ATTACHMENT A

### FAR DEVIATION TEXT

**FAR Baseline: Change 2019-01 effective 1/22/2019**

- Additions to baseline made by rule are indicated by [bold text in brackets]
- Deletions to baseline made by rule are indicated by ~~strikethroughs~~
- Five asterisks (\*\*\*\*\* ) indicate that there are no revisions between the preceding and following sections
- Three asterisks (\*\*\*) indicate that there are no revisions between the material shown within a subsection

### **Subpart 41.2—Acquiring Utility Services**

#### **41.201 Policy.**

\* \* \*

**[(f) Notwithstanding the policy as set forth at FAR 41.201(b), the General Services Administration (GSA) is exempt from the requirement to acquire a bilateral written contract for the acquisition of utility services from regulated utility providers and further exempt from the procedures listed in FAR 41.202 when acquiring such services. Instead, GSA will follow the procedures set forth at GSAM 541. Except as otherwise set forth in this deviation, GSA will continue to follow the procedures listed in FAR 41.204.]**

#### **41.204(c)(1)**

**[(iii) The utility supplier refuses, fails, or otherwise declines to execute an authorization. In such an occurrence, follow the procedures set forth at GSAM 541.]**

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#### **41.204(c)(3)**

The contracting officer shall execute the Authorization, ~~and attach it to a Standard Form (SF) 26, Award/Contract,~~ along with any modifications such as connection charges, special facilities, or service arrangements. The contracting officer shall also attach any specific fiscal, operational, and administrative requirements of the agency, applicable rate schedules, technical information and detailed maps or drawings of delivery points, details on Government ownership, maintenance, or repair of facilities, and other information deemed necessary to fully define the service conditions in the Authorization/contract.

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## ATTACHMENT B

### GSAM TEXT

**GSAM Baseline: Change 96 effective 1/14/2019**

- Additions to baseline made by rule are indicated by [bold text in brackets]
- Deletions to baseline made by rule are indicated by ~~strikethroughs~~
- Five asterisks (\*\*\*\*\* ) indicate that there are no revisions between the preceding and following sections
- Three asterisks (\*\*\*) indicate that there are no revisions between the material shown within a subsection

### **Part 541—Acquisition of Utility Services**

#### **Subpart 541.1—General**

\* \* \*

##### **541.101 Definitions.**

\* \* \*

~~“Local regulated utility” means a utility controlled by a body that regulates a utility which is owned or operated by the same entity that created the regulatory body, e.g., a municipal utility.~~

~~“Tariff regulated utility” means a utility regulated by an independent regulatory body.~~

#### **Subpart 541.2—Acquiring Utility Services**

##### **541.201 Policy.**

(a) GSA purchases utility services in a manner that is consistent with the regulations, rulings and franchise or service territories. Rates are established by independent regulatory bodies. These tariff rates:

- (1) Are considered “prices set by law or regulation”; and
- (2) Are sufficient to set prices without obtaining cost or pricing data (see FAR 15.403-1(c)(2)).

**[(b) A bilateral written contract is not required to establish new accounts with a regulated utility service provider or to pay for services rendered by any such provider.]**

**[(c) Except as required during an emergency situation, a GSA purchase card may not be used as a payment method for any utility services. If a GSA purchase card is used during an emergency situation, the purchase card holder must inform the designated GSA budget office.]**

## 541.202 Procedures

**[(a) All procedures listed in paragraphs (b) through (i) of this section do not apply to regulated utilities. Specific guidance and procedures for regulated utilities can be found on GSA's Acquisition Portal at <https://insite.gsa.gov/acquisitionportal>.]**

**[b](a)** Contracting officers shall perform market research and create acquisition plans in accordance with FAR 41.202 (a), (b), and (e).

**[c](b)** Acquisition plans for utility acquisitions over the simplified acquisition threshold are required for separate contracts and orders against GSA areawide contracts; this does not apply to the basic areawide contract.

**[d](e)** In accordance with [40 U.S.C. § 501\(b\)\(1\)\(B\)](#) and FAR § 41.103(a), a GSA order or contract for utility service cannot exceed a 10 year performance period.

**[e](d)** The statement of work for a utility contract must include the building number(s) and the specified period of performance.

**[f](e)** The Independent Government Cost Estimate for a utility contract must include all of the following information:

- (1) A cost estimate for all individual months up to the thirteenth month;
- (2) The known tariff rate increases in months beyond the 13 month; and
- (3) Total estimated award amount for the entire period of performance.

**[g](f)** *Federal Procurement Data System reporting for utility contract actions.*

(1) The award amount in the Federal Procurement Data System must align with any independent government cost estimate. The "Action Obligation" field must cover the first year of performance, and the "Base and All Options Value" field must cover the entire period of performance.

(2) The contracting officer must update the award amount for the contract and report the actual values in FPDS to match the new anticipated award amount based on actual costs previously obligated and any changes to the estimated value for future years halfway through the period of performance whenever the period of performance is five years or greater. The update must include actual payments to date, and a revised projection for the duration of the performance period.

(3) The contracting officer must update the award amount at the end of the entire period of performance to match the actual costs.

**[h](g)** A GSA purchase card must not be used as a payment method for any utility contract unless there are unusual circumstances or emergency situations that exist. If a GSA purchase card is used, you must inform your designated GSA budget office.

~~[i](h)~~ Utility accounts and invoices must be monitored in accordance with the GSA Utility Program Standard Operating Procedures at <https://insite.gsa.gov/utilityacquisition>.

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**~~541.206 Interagency agreements format.~~**

~~When acquiring utility services for another agency the following format shall be used in accordance with 40 U.S.C. 501 (b) which clearly delineates the roles and responsibilities of the servicing and requesting agencies. (See [http://www.gsa.gov/energy\\_library](http://www.gsa.gov/energy_library)).~~

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## ATTACHMENT C

Public Buildings Service

FEBRUARY 19, 2019

MEMORANDUM FOR: JEFFREY A. KOSES  
SENIOR PROCUREMENT EXECUTIVE  
OFFICE OF ACQUISITION POLICY (M1V)

FROM: TRACY M. MARCINOWSKI  
ASSISTANT COMMISSIONER  
OFFICE OF ACQUISITION MANAGEMENT (PQ)

ANDREW M. HELLER  
ASSISTANT COMMISSIONER  
OFFICE OF FACILITIES MANAGEMENT (PM)

KATHY K. HAMMER  
DIRECTOR, FINANCIAL MANAGEMENT  
OFFICE OF CHIEF FINANCIAL OFFICER (BG)

e-Signed by Kathy Hammer  
on 2019-03-01

SUBJECT: Business Case in support of a class deviation to remove and streamline procedures for acquiring utility services from regulated utilities

### 1.0 REQUEST

The Public Buildings Service (PBS) requests a class deviation in accordance with Federal Acquisition Regulation (FAR) Subpart 1.404 and General Services Administration Acquisition Manual (GSAM) 501.404(a) to (1) remove the unnecessary, burdensome, and costly regulatory requirements to seek bilateral written contracts for services provided by public utilities under rates approved and/or established by a regulatory body and (2) implement new, more efficient procedures in the GSAM to streamline the process. This deviation only applies to the acquisition of utility services from regulated utilities.

### 1.1 AREAS OF THE FAR AND GSAM TO BE REVISED

FAR Part 41 and GSAM Part 541:



## 2.0 PURPOSE

FAR 41.201(b) requires agencies to acquire utility services by a bilateral contract, except for acquisitions at or below the simplified acquisition threshold. However, if the utility provider refuses to execute a bilateral contract, citing to the authority at 31 U.S.C. § 1501(a)(8), FAR 41.202(c)(2) allows agencies to proceed with the acquisition and pay for utility service upon the presentation of a valid invoice, but only after following and documenting certain laborious and time consuming procedures. Upon further review of 31 U.S.C. § 1501(a)(8) and opinions from the Government Accountability Office (GAO), the additional procedures set forth at FAR 41.202(c) are not necessary in order to comply with applicable fiscal law regarding the recording of obligations. To the contrary, following these additional procedures has increased GSA's reporting risk due to disparities between contract and financial system data and created an increased workload for both PBS contracting and facilities management staff as they work to comply with unnecessary and burdensome regulatory requirements.

The requested FAR deviation and GSAM update will streamline work efforts to allow contracting officers to record obligations for all regulated utility services in a manner that is consistent with applicable fiscal law. The update also removes GSAM 541.206 because it is outdated.

## 3.0 BACKGROUND

As a matter of law, utilities are recorded as obligations only when supported by documentary evidence of "services provided by public utilities." 31 U.S.C. § 1501(a)(8). Based on the applicable statute, GAO has opined that "in the absence of binding contracts, obligations may be recorded only on the basis of utility services actually performed." 34 Comp. Gen. 459, 462 (1955); see also B-287619, July 5, 2001; *Funding of Maintenance Contract Extending beyond Fiscal Year*, B-259274, May 22, 1996. The requested FAR deviation and GSAM update are consistent with these long-standing fiscal law principles.

Although PBS contracting officers use EASi (the PBS contract writing system) to award contracts for utility services, most of these awards are not bilateral written contracts, but are instead issued unilaterally primarily to provide a mechanism for making future payments. The reason being that the contract information for utility payments entered into EASi does not interface with the Pegasys accounting system. As such, PBS emails account numbers, buildings addresses, and accounting information to GSA's Federal Shared Service Provider (FSSP), the Financial Services Division of the U.S. Department of Agriculture, which, in turn, manually enters that information into a master spreadsheet for use by Ameresco, a third-party utility payment processor, to verify invoices submitted by utility providers. Subject to such verification, payment is made to the utility provider, and Ameresco submits those actual payment records to Pegasys.

It is only upon receipt of the payment record that Pegasys, GSA's official accounting system of record, records a self-reversing estimated expense accrual, which is based



on the prior month's utility invoice as paid. It is important to note that while monthly estimated expense accruals are established, payments are issued to the utility provider for actual expenses (i.e., utilities consumed) regardless of the estimate. As such, the utility provider is paid upon presentation of a valid invoice and, only after such payment is made, Pegasys records the actual expenses.

Under the current process, awarded contracts and orders for utility services are really nothing more than "dummy" entries in that they are most often not signed by the utility provider and are not used to record obligations. Under the proposed FAR deviation, GSA's process to record utility obligations will remain unchanged. However, the method of transmitting utility account data for regulated utility accounts to the FSSP will no longer be done by a contract or task order. Instead, designated regional facilities management personnel will provide relevant account data directly to the FSSP.

#### **4.0 SUPPORTING JUSTIFICATION**

##### **4.1 Organization(s) Covered by the Request**

The organization covered by this request is PBS.

##### **4.2 Explanation of Affected Contract(s)**

GSA spends approximately \$400 million<sup>1</sup> annually on utilities, of which \$244 million is on electricity; \$28 million on steam; \$35 million on water; \$9 million on chilled water; and \$46 million on natural gas. Approximately 55%-60% of the electricity services are subject to regulation by a utility regulatory body. All of the utilities services for steam, water, and chilled water are provided by fully regulated entities.

##### **4.3 Market Research**

A regulated market assigns the responsibility of securing the commodity, transmission, and distribution to a single agent (the utility) at set guaranteed fees (the tariff). In the regulated environment, utility companies have exclusive control of the market which limits competition to one source (a monopoly). The applicable utility regulatory body (such as a public service commission, public utility commission, a municipality board or other governmental entity) governs the regulated utility including the reliability, safety and reasonableness of tariffs of the services provided by the regulated utility. Further, the regulated utility providers recognize that Federal retail customers must take service consistent with the approved tariff.

The regulatory body authorizes the tariff or rate the public utility can charge, gives them a guarantee fixed return on their equity investment in the company, and presides over the performance of the utility to ensure continued performance. The regulatory body has broad authority for the supervision and regulation of activities of public utility companies. In addition to setting utility rates, the regulatory body collects and maintains records and reports of public utility companies, reviews plans for service, inspects

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<sup>1</sup> 2017 utility data from PBS Energy Usage and Analysis System.

equipment, audits financial records, handles consumer complaints, promulgates and enforces rules and regulations, defends its decisions on appeal to State courts, and intervenes in relevant cases before federal regulatory commissions and federal courts. Federal, state and local regulatory bodies are responsible for ensuring that utility services are reliable, safe and that utility practices (i.e. billing, metering, meter reading, line extensions, etc.) adhere to various industry practices and standards. Issues with past performance are generally concerned with issues that are entirely subject to regulatory oversight. GSA benefits from that regulatory oversight as a retail consumer of public utility services and has authority to participate in these regulatory proceedings to ensure executive agencies receive reliable utility services at the appropriate tariff.

The regulated utility is granted an exclusive service territory franchise in exchange for an obligation to serve all customers at the regulated conditions of service imposed by the regulatory body. In certain markets, the natural gas and electric commodity items have been deregulated and are available from providers certified by state regulators and Federal Energy Regulatory Commission. However, due to the critical nature of service and potential danger inherent in many utility services, most gas and electric utilities are regulated by applicable regulatory bodies which set standards for service and have the authority to take corrective action in the event those standards are not met.

## **5.0 EFFECTS**

### **5.1 Effect on the Agency, Contracting Officers, and the Acquisition Teams**

The deviation will enable GSA to update its processes to more closely align with how regulated utility services are actually recorded and paid. The deviation will relieve the acquisition workforce from preparing unnecessary, burdensome, and costly documentation required by the FAR. For example, contracting personnel will no longer need to:

- Develop written acquisition plans as required in FAR 7.105.
- Maintain contract files with the documentation listed in FAR subpart 41.202(c)-(e).
- Record utility obligations in the Federal Data Procurement System (FPDS) via reconciliation modifications as required in GSAM 541.202(f).

### **5.2 Effect on Contractors**

It is not anticipated that this deviation will have any effect on contractors as payments currently are routinely made to regulated public utilities in the absence of bilateral written contracts. Regulated utility providers will continue to be paid upon presentation or submission of invoices as is currently done.

### **5.3 Effect on Customer Agencies**

None

### **5.4 Effects on Small Businesses**

None

### **5.5 Effect on Other Services**

None

### **5.6 Effect on Automated Systems (i.e. Financial and Procurement)**

There will be no impact to the financial or accounting systems. Contracts for regulated utility accounts currently in EASi will be closed out in accordance with implementation procedures adopted by PBS. Moving forward, rather than using contract data in FPDS, regulated utility payment data from Pegasys will be used for compliance with the Digital Accountability and Transparency Act of 2014.

## **6.0 OPPORTUNITIES FOR EFFICIENCY UNDER THE PROPOSED STRATEGY**

Implementing this deviation will result in estimated savings equivalent to between 12 and 15 Full Time Employees by eliminating unnecessary and burdensome paperwork for recording and paying regulated utility providers.

## **7.0 PROPOSED MILESTONES FOR INITIATION, INCLUDING TRAINING**

See Attachment A.

## **8.0 RECOMMENDED FAR AND GSAM LANGUAGE:**

See Attachment B and Attachment C.

## **9.0 ATTACHMENTS**

**Attachment A – Proposed Milestones**

**Attachment B – Current and Proposed FAR Wording**

**Attachment C – Current and Proposed GSAM Wording**

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**ATTACHMENT A**  
**PROPOSED MILESTONES - REGULATED UTILITIES DEVIATION**

<b>Action</b>	<b>When</b>
Identify regulated utility contracts in Regions 1 and 2	Upon issuance of deviation
Issue memo announcing deviation, new regulated utility procedures, and test of new procedures in Regions 1 and 2	2 weeks after issuance of deviation
Regions 1 and 2 begin closing out regulated utility contracts in accordance with new procedures	2 weeks after issuance of deviation
Refine regulated utility procedures as necessary	3 months after issuance of deviation
Issue memo adopting regulated utility procedures nationally	4 months after issuance of deviation
Provide additional training as necessary	As needed