


GSA POLICY AND PROCEDURE

SUBJECT: Procedural Guidance for Section 412 Exchanges for In-Kind Consideration

1. Purpose. To provide guidance on the process to exchange real property for in-kind consideration as authorized by section 412 of the GSA General Provisions, Consolidated Appropriations Act, 2005, Public Law 108-447, 118 Stat. 2809, 3259 (Dec. 8, 2004) (Section 412).
2. Background. This Policy and Procedure outlines PBS' procedures for real property exchanges under Section 412. Section 412 authorizes the Administrator of General Services to accept in-kind consideration for real property exchanges. The Policy and Procedure outlines identifying eligible properties, evaluating the proposed exchange, the approval process, and the implementation process.
3. Scope and applicability. This internal directive applies to all real property exchanges for in-kind considerations as authorized by Section 412.
4. Responsibilities. The Office of Real Property Asset Management manages exchanges under Section 412. Roles and responsibility are identified and detailed in the directive.
5. Signature.



NORMAN DONG
Commissioner
Public Buildings Service

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Date

**PBS P 4065.1 Procedural Guidance for Section 412 Exchanges for
In-Kind Consideration**

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Procedural Guidance

Section 412 Exchanges for In-Kind Consideration

Section 412 of the Consolidated Appropriations Act, 2005, Title V, General Services Administration, General Provisions, P.L. 108-447, 118 Stat. 2809, 3259 (Dec. 8, 2004) (hereinafter, "Section 412") authorizes the Administrator of General Services to accept in-kind consideration for real property exchanges.

History of PBS Exchange Guidance

In 1997, the PBS Commissioner issued a Memorandum to Assistant Regional Administrators setting forth guidance for real property exchanges of non-excess property as authorized under the Public Buildings Act of 1959 (*i.e.*, 40 U.S.C. §§ 602, 604 and 605, now codified at 40 U.S.C. §§ 3304(a), 3304(b) and 3305(a), respectively) and subsection 210(a)(12) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 490, now codified at 40 U.S.C. § 581(c)(1))(the "1949 Act"). The Memorandum did not cover exchanges for the disposal of surplus real property under subsection 203(c) of the 1949 Act (40 U.S.C. § 484(c), now codified at 40 U.S.C. § 543).

While the Memorandum still reflects current policy, this Procedural Guidance (Guidance) specifically outlines the steps involved in the exchange process under Section 412.¹

Goals of the Section 412 Exchange Program:

- Expand the options available to GSA for management of its real property portfolio.
- Help client agencies improve space utilization in furtherance of the goal of reducing the Federal footprint.
- Maximize use of the federally owned inventory, particularly Legacy buildings, consistent with Federal location and sustainability goals under Executive Orders 13006 and 13514, and seek ways to reduce the Government's reliance on privately owned leased space to meet long-term client agency housing needs.

Identifying GSA Properties for Exchange:

- a. Eligible Properties: Eligible properties include land and buildings that are under the jurisdiction, custody and control of GSA and are not "excess,"² as that term is defined in 40 U.S.C. § 102(3).

¹ Section 412 authorizes the Administrator to convey, by sale, lease, exchange or otherwise, including through leaseback arrangements, real and related personal property, or interests therein, and retain the net proceeds of such dispositions in an account within the Federal Buildings Fund to be used for the General Services Administration's real property capital needs, subject, however, to further Congressional appropriation.

² The term "excess property" means property under the control of a Federal agency that the head of the agency determines is not required to meet the agency's needs or responsibilities.

- Although this Guidance specifically addresses the exchange of non-excess real property, PBS can perform an exchange of excess real property using Section 412 or other authorities, as appropriate, as long as certain conditions are met.
 - The Office of Real Property Utilization and Disposal (PTZ) will advise the Office of Portfolio Management (PT) when property under GSA's jurisdiction, custody and control that is determined to be excess is eligible for an exchange and will assist the region in evaluating possible exchange options.
- b. Exchange Candidate Criteria:
- Exchanges should maximize the value of the property to the Government and be considered part of the agency's asset management strategy. When analyzing properties to be exchanged:
 - Consider whether exchanging the property would result in meeting client agency needs by receiving consideration that would enhance other assets within the PBS portfolio.
 - Demonstrate through comprehensive financial analysis (see Appendix B – Preparing the In-Kind Exchange Business Case Analysis) that exchanging the property would be in the best interest of the Government, taking into consideration operation and maintenance expenses and other pertinent costs associated with operating the property as-is, exchanging it for construction services or removing it from the portfolio through the disposal process.
 - Consideration must be given to the option that minimizes the Government's cost and risk exposure for properties that are vacant or underutilized.
 - High value properties in desirable locations that will generate considerable market interest in an exchange transaction.
 - Exchanges should not increase GSA's reliance on leasing, unless it is cost-advantageous for the Government. Managers should avoid exchanging properties needed for Federal use that are consistent with Federal locational policies and sustainability goals.
 - Properties with high reuse potential as a whole, or properties that could be improved by subdividing or parceling into sections for exchange.
 - Properties that GSA can continue to occupy as a space tenant after exchange and redevelopment.

Acceptable Forms of Consideration for the In-Kind Exchange

Acceptable forms of consideration³ for an In-Kind Exchange transaction could include:

- a. Design and construction services for the alteration, repair or improvement of property under GSA's jurisdiction, custody and control - preferably in the area or region where the

³ Consideration is defined as the real estate or construction services being offered in exchange for GSA's property.

property to be exchanged is located. These services could include architectural and engineering, infrastructure (e.g., mechanical, electrical, plumbing, structural, and civil), landscaping, and security;

- b. The construction of a new, energy efficient replacement building or the acquisition of an existing privately owned building that meets the Government's specifications before or after renovation⁴; or
- c. Other consideration specific to a particular transaction, such as furniture, fixtures and equipment, information technology, move and relocation services, and swing space for displaced occupants.

The consideration being received should be in furtherance of the Goals of the Section 412 Exchange Program, as described earlier in this Guidance.

Additional Exchange Criteria to Consider

- a. Planning: Selecting an appropriate project for an In-Kind Exchange can be quite complex, as planning a renovation or new construction project can require a significant amount of preparation and considerable effort. As a part of the selection process, the solicitation, as described later in this Guidance, must include the time frame that the agency will require for completion of the required construction services and property exchange.
- b. Additional Funding: As the scope of work that will constitute the consideration to be received by the Government is planned and executed, additional funds from GSA to complete the transaction may be needed. The availability of additional funding may impact the selection of the property or services being sought by the Government, and this contingency should be addressed in the Business Case Analysis (BCA) and exchange agreement with the offeror.
- c. Timing: The timing for the selection, completion and commissioning of the required services will be a significant factor in the Preferred Selected Exchange Offeror (PSEO) selection process and should be addressed in the BCA, the Request for Information (RFI), if applicable, and ultimately, the solicitation. These processes are described later in this Guidance.

Central Office Support and Assistance

- a. Project approval: The region must notify PT of its plans to pursue an exchange for in-kind consideration, and PT will assign a National Project Manager (NPM) to assist the

⁴ It should be noted that the construction or acquisition of a new building may be accomplished more appropriately under 40 U.S.C §§ 581 or 3304, and the Office of General Counsel (OGC) can assist the region in making that determination.

region in preparing its BCA and other supporting documentation to obtain project approval.

- b. Project funding: All requests for funding, including site acquisition, tenant relocation, asset due-diligence⁵, or any other cash obligations, such as change orders, must be coordinated through the NPM to determine the appropriate budget activity and to obtain any necessary approvals.
- c. Additional services: Additional transactional support is available from PTZ, on a reimbursable basis, for asset due-diligence information. PTZ also is available to perform Targeted Asset Reviews to help identify properties that the region may want to consider for an exchange.

Evaluating the Proposed Exchange

The region must prepare a BCA to assess the feasibility of the proposed exchange. The NPM will assist the region with this requirement.

At a minimum, the BCA must evaluate the standard investment options for the property (*i.e.*, retention, disposal or exchange) and address why it has selected exchange as the most appropriate alternative.

In preparing the BCA, the region should consider that both internal and external stakeholders may become involved in the process, and all aspects of the proposed exchange should be considered and evaluated as a part of the region's due-diligence, including:

- The property's appraised market value and its attributes, such as condition, location and marketability for exchange purposes.
- Unsolicited public or private sector interest in acquiring the property, if any.
- If vacant land, the availability of municipal services (*e.g.*, water, sewer, fire and police protection).
- Direct and indirect costs of agency and contractor personnel assigned to the project.
- Any additional costs needed to execute the transaction and the resultant impact on the property's exchange value (*e.g.*, environmental studies and remediation expenses, site inspections, surveys, engineering studies, soil compaction reports, section 106 mitigation).
- A description of the benefits of the transaction, both tangible and intangible (*e.g.*, reducing the tenant footprint, energy savings and any other cost avoidance resulting from the exchange).

⁵ Due diligence is the general term that is used for the collection of property data and information (*e.g.*, exchange value, title report, survey, environmental studies, soil reports, engineering studies, historic documentation, and architectural plans) that will be used by GSA and the developer (or public body) to evaluate the feasibility of the proposed exchange transaction.

- A financial analysis comparing the value of the property to be exchanged and the value of the services or property, or both, to be received.
- Overview of proposed transaction structure. If this is unclear, it signals that an RFI could be beneficial to better inform the agency about the proposed transaction.

Administrator's Preliminary Approval

Upon completion of its analysis, the region must submit the Fact Sheet and BCA, each of which is described in greater detail in Appendix B, to PT to coordinate review of the proposed exchange with the PBS Commissioner's office, the Office of General Counsel, the Office of Congressional and Intergovernmental Affairs, and the Administrator.

The Administrator's preliminary approval package must include a memorandum from the Regional Administrator to the Administrator requesting approval to proceed with the proposed exchange. As part of the approval package, the region must request a delegation from the Administrator to the individual who will serve as the approving official for the purpose of selecting the PSEO.

The Administrator must approve the region's preliminary exchange plans before the region may issue the RFI⁶ or initiate discussions about the proposed project with the public, oversight committees and other interested external stakeholders. This is a precautionary measure that allows GSA to assess the potential viability of the proposed exchange transaction. Upon preliminary approval by the Administrator, the region may start the Implementation Process as described below.

The Implementation Process

- Determine Preliminary Cost Estimate:** The region should prepare a detailed estimate of the costs and expenses it will incur to obtain the necessary due diligence information for the exchange. The estimate should include, at a minimum, the ASTM 1527-05 Phase 1 Environmental Site Assessment, as such standard may be revised from time to time, and the estimated cost of any necessary site remediation, title report, survey, appraisal, and any other necessary due diligence activities.

⁶ Before doing extensive work on a potential exchange transaction, the region may issue an RFI, if doing so would be beneficial, to detail the subject property's attributes and the types of transaction structures GSA would consider for the property. The RFI should be used if GSA is unsure whether there is interest from non-Federal entities in the subject property or if GSA would like feedback on proposed transactions structures, but the RFI is not required.

Upon completion of the draft RFI (if applicable), the region must transmit it to PT for review and consideration by the PBS Commissioner's office, the Office of General Counsel, the Office of Congressional and Intergovernmental Affairs, and the Administrator. Upon successful completion of this review and approval process, PT will notify the region that the RFI can be posted on FedBizOpps.

b. Preparing the Solicitation⁷:

- (1) The region must establish a team that is comprised of, at a minimum, a project manager, a contracting officer with an unlimited warrant, one member from the regional Office of Portfolio Management, a subject matter expert in architecture, a subject matter expert in construction, an attorney from the Office of Regional Counsel, and, for exchanges involving historic buildings, the Regional Historic Preservation Officer.
- (2) While the Federal Acquisition Regulation (FAR) does not apply, the contracting officer is still responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the solicitation and the exchange agreement, and safeguarding the interests of the United States in its contractual relationships, as set forth in greater detail in FAR subpart 1.6 and the General Services Administration Acquisition Manual subpart 501.6. Depending on the delegation of authority from the Administrator described in the section on the Administrator's Preliminary Approval, above, the contracting officer may, or may not, serve as the approving official for the exchange transaction.
- (3) The region must coordinate the preparation of the solicitation with the NPM. The package may include a Request for Qualifications (RFQ), a Request for Proposals (RFP), or an Invitation for Bids (IFB), or any combination of the foregoing. Any proposed RFQ, RFP or IFB must have concurrence from the Office of Regional Counsel.
- (4) The solicitation must advise potential offerors what real property or construction services GSA is seeking to acquire in exchange for the subject property. Each type of service must include a scope of work that is sufficiently detailed to enable prospective offerors to understand and evaluate the services sought by GSA and balance the value of the real property being offered against the services sought. The detailed scope of work also enables GSA to prepare an Independent Government Estimate of the anticipated cost of these services.
- (5) If the region proposes to attach a draft of the exchange agreement to its solicitation, the draft must be approved by the Administrator prior to inclusion. Any proposed exchange agreement must have concurrence from the Office of Regional Counsel.
- (6) The NPM will be responsible to coordinate approval of the issuance package with PT and the Office of Design and Construction, as well as the PBS Commissioner's office, the Office of General Counsel, the Office of Congressional and Intergovernmental Affairs, and the Administrator.

⁷ Existing authorities also enable GSA to negotiate directly with interested parties, rather than conducting a competitive solicitation. In such an instance, a solicitation is not necessary, but a BCA must be prepared to justify exchange as the most appropriate alternative for the property, and the Administrator must provide approval before negotiations with the interested party may commence.

- c. Evaluate Offers and Select the Preferred Selected Exchange Offeror: The approval authority must use a technical evaluation panel to evaluate the offers. The contracting officer is responsible for developing the technical evaluation plan and selecting the individuals to participate on the panel. The contracting officer must develop evaluation factors and significant subfactors, if appropriate, such as past performance, compliance with solicitation requirements, technical excellence, management capability, personnel qualifications, and prior experience, and their relative importance, based upon the particulars of the project, in addition to the cash equivalent value being offered. The approving official (if different from the contracting officer) must approve the technical evaluation plan and the individuals selected to serve on the evaluation panel.

The technical evaluation panel will evaluate the offers and determine which one provides the best overall value to the Government based upon the property's exchange value, proposed construction services offered as consideration and the other evaluation factors set forth in the solicitation.

- (1) Best Overall Value. For purposes of an exchange for services, the term "best overall value" means the offer that, in the Government's estimation, yields the greatest expected overall benefit when considered against the evaluation criteria. The panel must provide a written recommendation to the approving official that identifies the PSEO. The approving official will then select the PSEO for purposes of entering into negotiations to finalize the exchange transaction.
- (2) Property Exchange Value. To ensure that GSA receives commensurate value as part of the exchange, GSA will procure an independent private sector appraisal to determine the value of the property being offered for exchange in the context of the proposed transaction.

Further, GSA will prepare an Independent Government Estimate to value the proposed services offered as consideration. GSA will not enter into the exchange transaction unless the value of the services to be received (plus any cash equalization component) is equal to or greater than the value of property being exchanged in the context of the proposed transaction. Should the value of the services offered as consideration exceed the value of the property proposed for exchange, GSA may include a cash equalization component to equalize values⁸.

⁸ Any cash equalization component to be paid by GSA is subject to the availability of funds and the current prospectus threshold in the fiscal year that the payment will be made. GSA should carefully consider the possibility of including a cash equalization component as part of the project planning and implementation processes.

- d. Negotiate the Exchange Transaction. In most instances, an appropriately warranted regional contracting officer will take the lead on finalizing the exchange agreement with the PSEO, working in conjunction with assigned legal counsel. As noted below, prior to executing the exchange agreement, the PBS Commissioner and the Administrator must be briefed or otherwise notified. The region should provide regular updates to PT and the PBS Commissioner's office on the status of the negotiations. After negotiations are complete, the contracting officer will sign the exchange agreement.
- e. Environmental and Historic Preservation Requirements. The region must satisfy all applicable environmental and historic preservation requirements before completing the conveyance.

Internal Communications

As the project progresses, PT will assist the region with coordinating and leading briefings for the PBS Commissioner and Administrator at certain project milestones and as otherwise requested by senior management. These milestones may include: (1) at the time the preliminary exchange plans are submitted for approval (and prior to issuing an RFI, if needed), (2) prior to issuing a solicitation, (3) prior to selecting the PSEO, and (4) prior to signing the final negotiated exchange agreement.

Managing the Exchange Transaction Post-Closing

The region is responsible for overseeing implementation of the exchange agreement, including acceptance of the services that are required to be delivered under the agreement. Global Project Management should be used to oversee and monitor the completion of the required work, and a qualified project manager should be engaged, as necessary, to assist with that process. If determined to be in the best interest of the Government, construction management services also may be procured to verify that the construction services are being delivered as specified in the exchange agreement. Title to the GSA property cannot be conveyed to the PSEO until the services required to be delivered under the exchange agreement are completed and accepted by GSA.

Managing the Risks

Risk is inherent to transactions of this complexity, but must be minimized to the greatest extent possible. Below are various risk factors to consider throughout project planning and execution.

- a. Certain renovations may have a prolonged commissioning time, which could extend beyond a year, to confirm that all systems are operating correctly, and issues of this nature must be addressed in the project timing and completion process.

- b. Unforeseen conditions may require funding in addition to the property being exchanged, and the region should program funding contingencies into its project planning and execution.
- c. The exchange of GSA's property will only occur after the PSEO completes the required construction services to the satisfaction of GSA. This risk will be minimized in the exchange agreement drafted in consultation with GSA's legal counsel, but there remains a risk that the Government may have to assume control of the project, and its source of funding, in the event the PSEO defaults in its obligations.
- d. With the assistance of legal counsel, the region should develop a contingency plan and be ready to implement it should the PSEO fail to complete the project as required by the exchange agreement.

Appendix A: Roles and Responsibilities

Entity	Roles & Responsibilities
Region	<ul style="list-style-type: none"> • The Regional Portfolio Director, the PBS Regional Commissioner and the Regional Administrator must approve the proposed exchange for in-kind consideration transaction before it is referred to PT for further evaluation. • Identifies federally owned properties in its inventory that may be suitable for an exchange for in-kind consideration, as well as the project(s) that form the basis of the consideration sought by the Government. • Performs asset due diligence to evaluate the potential of using the non-excess property for an exchange for in-kind consideration. • Prepares and issues the RFI to determine private sector interest in the project (if needed). • Prepares the BCA to determine the feasibility of using the property for an exchange. • Prepares the solicitation package and selects the PSEO. • Prepares, negotiates and executes the exchange agreement. • Performs all project management tasks necessary to complete the exchange transaction.

Entity	Roles & Responsibilities
<p align="center">The Office of Portfolio Management (PT)</p>	<ul style="list-style-type: none"> • Assigns an NPM to assist the region with its proposed exchange project. • Prepares fact sheet and communication plan associated with the proposed exchange transaction for external stakeholders. • Prepares transmittal letters and presents the proposed exchange to the PBS Commissioner and the Administrator. • Notifies the Office of Congressional and Intergovernmental Affairs and the Office of Communications and Marketing, and assists with stakeholder communications. • Monitors the region's completion of the exchange project and provides progress reports to appropriate officials. • Helps the region prepare funding application documents and oversees the project funding process. • The Center for Site Acquisition and Relocation within PT can provide the following services for the region: <ul style="list-style-type: none"> ➤ Evaluation of due diligence information. ➤ RFI development (if needed) ➤ Solicitation development ➤ Market engagement ➤ Negotiation ➤ Development of exchange agreement
<p align="center">The Office of Real Property Utilization and Disposal (PTZ)</p>	<ul style="list-style-type: none"> • On an as-needed and reimbursable basis, supports the regional PT office with desired transaction assistance, including: <ul style="list-style-type: none"> ➤ Targeted Asset Reviews ➤ Evaluation of available due diligence (realty and environmental) ➤ RFI development (if needed) ➤ Solicitation development ➤ Stakeholder outreach (such as Congressional oversight committees, local government officials, other community groups, state environmental regulatory agencies, and State Historic

Entity	Roles & Responsibilities
	<p>Preservation Offices, in coordination with the Federal Preservation Officer, Regional Historic Preservation Officer and other PBS program officials, as applicable).</p> <ul style="list-style-type: none"> ➤ Assistance with applicable environmental and historic preservation statutory and regulatory requirements ➤ Market engagement ➤ Negotiation ➤ Appraisal review ➤ Development of conveyance documents <ul style="list-style-type: none"> • The region will need to execute an MOU with PTZ to confirm which contract services PTZ will provide to the region on a reimbursable basis.
The Office of Design and Construction (ODC)	<ul style="list-style-type: none"> • Assist with review of RFIs and BCAs for historic properties • Signature on section 106 compliance documents, as needed • Assist with stakeholder outreach to State Historic Preservation Offices
The Office of General Counsel (OGC)	<ul style="list-style-type: none"> • Reviews and concurs on the RFI (if needed), solicitation package, memoranda of agreement or understanding, letters of intent, exchange agreement, deed, and closing documents before execution.
PBS Commissioner	<ul style="list-style-type: none"> • Must approve the RFI (if needed), the solicitation package and the proposed exchange for in-kind consideration transaction before they are forwarded to the Administrator for final approval. • Discusses the exchange for in-kind consideration transaction with approving officials and other interested external stakeholders, as necessary.
GSA Administrator	<ul style="list-style-type: none"> • Must approve the RFI (if needed), the solicitation package and the proposed exchange for in-kind consideration transaction before they are referred to congressional committees. • Is apprised of stakeholder inquiries and intercedes, as necessary, on GSA's behalf.

Entity	Roles & Responsibilities
<p>Office of Congressional and Intergovernmental Affairs (OCIA)</p>	<ul style="list-style-type: none"> • Notify the following congressional committees of the proposed exchange: <ul style="list-style-type: none"> ➤ House Committee on Oversight and Government Reform ➤ House Committee on Transportation and Infrastructure ➤ House Committee on Appropriations, Financial Services and General Government Subcommittee ➤ Senate Committee on Homeland Security and Governmental Affairs ➤ Senate Committee on Environment and Public Works ➤ Senate Committee on Appropriations, Financial Services and General Government Subcommittee • Pre-brief to congressional committee staffers about the proposed exchange for in-kind consideration transaction and provides additional information, as requested, for review. • Notify congressional committees prior to issuance of RFI (if needed) and solicitation package. • Provide responses to questions about the proposed transaction. Although the congressional committees are not required to approve the proposed exchange for in-kind consideration transaction, GSA will consider any concerns they have regarding the project and will respond accordingly.

Appendix B: Preparing the In-Kind Exchange

Business Case Analysis

The Business Case Analysis (BCA) examines the feasibility of doing an exchange of a specific property for in-kind consideration. In accordance with OMB Circular A-94, the analysis reviews the attributes (*i.e., current and potential rental income*) and detriments (*i.e., operating and capital expenses*) of the selected property, its highest and best use, its potential for exchange, its market value, and the anticipated value of the construction services that GSA could receive in exchange for the Government's real property. The market value appraisal can be used as the basis for a majority of the required information.

Net Present Value Analysis

As stipulated in OMB Circular A-94 guidance:

The net present value is computed by assigning monetary values to benefits (*i.e., current and prospective rent*) and costs (*i.e., operating and capital expenses*), discounting future benefits and costs using an appropriate discount rate, and subtracting the sum total of discounted costs from the sum total of discounted benefits. Discounting benefits and costs transforms gains and losses occurring in different time periods to a common unit of measurement. Programs with positive net present value increase social resources and are generally preferred. Programs with negative net present value should generally be avoided.

The net present value (NPV) analysis should consider a minimum 20-year time horizon for the two net cash flow scenarios: Operate As-is and Exchange for In-kind Consideration. The Disposal scenario should not exceed a three-year time period, unless there are significant environmental conditions that must be remediated.

Findings and Determination

A Findings and Determination (F&D) must be included at the end of the NPV analysis to summarize the facts presented in the BCA and provide a logical argument for pursuing an In-Kind Exchange transaction. The F&D reviews the alternate capital investment and disposal options that were considered, justifies why an In-Kind Exchange is the preferred alternative and establishes a timeline for completing the project.

Fact Sheet

The Fact Sheet is an executive summary of the proposed exchange transaction and must accompany all transmittal letters to approving officials within the agency. It restates the salient points of the BCA and F&D, justifies why GSA is pursuing an In-Kind Exchange in lieu of other alternatives, stipulates what consideration GSA will accept for the exchanged Government property, and reviews the economic and non-economic factors of the In-Kind Exchange transaction. The non-economic factors may include:

- The expressions of interest received from prospective offerors during the RFI process;
- The potential to minimize Government expenditures while enhancing the efficiency and environmental conditions of the Government's workplace; and
- The need to expedite the exchange transaction to satisfy client agency requirements.