



**The Coalition
for Government
Procurement**

September 9, 2013

Houston W Taylor
Assistant Commissioner, Office of Acquisition Management
General Services Administration
18th and F Streets, N.W.
Arlington, VA 22202

Dear Houston:

The Coalition for Government Procurement applauds the ability of the Multiple Award Schedule to deliver high quality commercial services and products to federal customers using stream-lined acquisition procedures. Our member companies believe, however, that the program can be significantly improved by revisions to the pricing policy and its operating procedures. As you know from our previous discussions with your office, the Coalition has developed a White Paper which discusses MAS pricing issues and presents suggestions to increase the efficiency and effectiveness of the program. The central thrust of the paper's recommendations is centered on the positive role competition at the task order level plays in driving pricing for customer agencies. We hope that this paper will be helpful to you as you consider further GSA Schedules modernization and revisions to General Services Acquisition Regulations (GSAR) Part 538.

The Coalition invites you to attend a meeting of its MAS Pricing Work Group on October 10, 2013. The purposes of the meeting are to discuss the paper, answer any questions that you may have and get your initial feedback. The meeting will be held from 1 to 4 at the Coalition office, 1990 M Street, N.W. Washington, D.C. 20036. We hope that you will be able to attend.

If you have questions or need additional information, please contact me (rwaldron@thecgp.org – 202-315-1051) or Carolyn Alston (calston@thecgp.org – 202-600-2915). We look forward to working with you on this matter of importance for government and industry.

Sincerely,

A handwritten signature in blue ink, appearing to read 'RWaldron', with a long horizontal flourish extending to the right.

Roger Waldron
President
The Coalition for Government Procurement



GSA Multiple Award Schedule Pricing

Recommendations to Embrace Regulatory and Commercial Market Changes

September 2013

This White Paper was prepared by The Coalition for Government Procurement (Coalition). The Coalition is a non-profit association of firms selling commercial services and products to the Federal Government. Members collectively account for approximately 70% of the sales generated through the GSA Multiple Award Schedules program and about half of the commercial item solutions purchased annually by the Federal Government.

White Paper

GSA Schedule Pricing Policy

Contents

- 1. Overview..... 2
- 2. Background..... 4
- 3. Environmental Scan..... 6
- 4. Most Favored Customer Pricing Policy 9
- 5. Disclosure of Commercial Pricing Practices 13
- 6. Price Reductions Clause (PRC) 20
- 7. Summary 22
- 8. Final Recommendations..... 22
- 9. List of Attachments..... 22

GSA Multiple Award Schedule Pricing

Recommendations to Embrace Regulatory and Commercial Market Changes

1. Overview

The General Services Administration (GSA) Multiple Award Schedule (MAS)¹ program is a valuable tool for the acquisition of a vast array of commercial services and products by federal agencies. The program is unique in its ability to provide a single platform that accommodates government-wide requirements for commercial items that also incorporates commercial practices. The program covers more than 40 Schedule contracts with revenue of approximately \$50 billion dollars, including Schedules operated by the Department of Veterans Affairs under a delegation of authority from GSA. Services account for approximately 70 percent of all sales. The MAS program lowers procurement costs by providing contracts through which federal agencies and

MAS Pricing Policy Targets for Reform
1. <i>Most Favored Customer policy (GSAR 538.270)</i>
2. <i>MAS Commercial Sales Practice disclosure</i>
3. <i>Price Reductions Clause (GSAR 552.238-75)</i>
4. <i>MAS procedures for Services acquisition</i>

other authorized users can competitively order reasonably priced services, products and solutions without the need to conduct individual full and open solicitation competitions.

Despite the ability of the MAS program to streamline service and product acquisitions for federal agencies, the program has become less efficient and cost effective in recent years due to the outdated pricing policies governing the negotiation, award and renewal of MAS contracts. Contracting procedures have not evolved to keep up with significant

¹ Also referred to as GSA Schedules or the Schedules Program

statutory and regulatory changes to MAS ordering procedures that provide for increased competition at the task and delivery order level among all MAS contractors. (See Federal Acquisition Regulation (FAR) 8.4). Similarly, current MAS contracting procedures fail to embrace the potential of the commercial market with its streamlined processes, lower costs and flexibility to offer the latest commercial solutions at true market prices. While the MAS program still offers contractors a valuable tool to access the federal market, Coalition members uniformly express the following concerns with the program:

- The Most Favored Customer (MFC) pricing policy at General Services Acquisition Regulation (GSAR) 538.270 is commonly misunderstood and in some cases misapplied to require that a contractor offer its best commercial price at the contract level, even where the terms and conditions of the government differ from those of commercial customers
- MAS Commercial Sales Practices (CSP) disclosure requirements are unclear, inconsistently applied, and exceed the amount of information needed to negotiate fair and reasonable Schedule contract prices
- The GSAR 552.238-75 Price Reductions Clause (PRC) results in high compliance costs and liability risks for contractors despite the fact that the clause is no longer needed to assure reasonable prices on MAS tasks orders
- MAS procedures are not adequately designed to meet the requirements of the acquisition of services and solutions

The underlying pricing policy of the MAS program has remained fundamentally unchanged for close to three decades. Changes to MAS ordering procedures and in the commercial market, however, offer opportunities to create an MAS pricing policy that operates more effectively for customers, the GSA and industry.

This white paper examines the MAS pricing policies and procedures that currently exist and provides specific recommendations to improve the efficiency and

<p style="text-align: center;">MAS Pricing Policy Reform</p> <p style="text-align: center;">Objectives:</p> <ol style="list-style-type: none">1. <i>Lower costs for government, industry and the taxpayer</i>2. <i>Establish consistency with recent regulatory changes</i>3. <i>Leverage commercial market and pricing strategies</i>4. <i>Accommodate services and solutions based pricing</i>5. <i>Provide clarity and consistency to enhance compliance by customer agencies and contractors</i>
--

effectiveness of the program with the goal of establishing a pricing policy that meets the following objectives.

2. Background

A. Creation of the MAS Program for Commercial Items

The original concept of the MAS program was to create a streamlined procurement program offering commercial items and reflecting commercial practices. The current pricing policy, which dates back to the 1980's, was originally designed to facilitate pricing of commercial products typically sold at some discount off of an established commercial list price using a standard set of commercial pricing practices.

When the current MAS pricing policy was developed fair and reasonable contract pricing was assured by 1) contractor disclosures of commercial sales, discounting and/or pricing practices; 2) the government's MFC pricing negotiation objective; and 3) enforcement of the PRC. These three elements worked together to assure that MAS contract prices were fair and reasonable at the time of negotiations and throughout the life of an MAS contract. Using these elements, fair and reasonable pricing is established at the contract level, rather than competitive pricing at the order level.

B. Prior Studies Recommend Alternatives to Existing Pricing Policy

There have been two significant studies of the MAS program in the past decade. Both studies were conducted by panels comprised of representatives from both the public and private sectors. The 2007 Services Acquisition Reform Act Acquisition Advisory Panel ("SARA Panel")² included a review of the GSA schedules. Several years later, the Multiple Award Schedule Advisory Panel³ issued a report⁴ providing advice and recommendations to GSA on MAS pricing provisions. Both reviews recommended that GSA consider alternatives to its most favored customer pricing policy and the use of the PRC. The GSA made some limited changes in response to both reports. In neither case, however, did GSA implement recommendations to **change** its basic pricing policy or to dramatically constrain its use of the PRC.

C. Schedules Modernization: An Opportunity for Pricing Reform

GSA is currently in the process of modernizing the GSA Schedules program with stated goals focusing on four distinct areas:

1. Data Driven Pricing;
2. Flexible Contracting;
3. Enhanced Service Delivery; and
4. Increased Knowledge Management Capabilities

From an industry perspective, these modernization efforts have focused more on process than on incorporating best commercial pricing practices. A decrease in total

² Established pursuant to Section 1423 of the Services Acquisition Reform Act of 2003, 41 USC 428a.
http://www.acquisition.gov/comp/aap/24102_GSA.pdf

³ Established by the Administrator of General Services in March 2008.
http://www.acquisition.gov/comp/masap/documents/MAS_Panel_Final_Report_Signatures.pdf

⁴ Multiple Award Schedule Advisory Panel Final Report February 2010.

acquisition costs requires a focus on the fundamental pricing policies, which are the subject of this white paper.

D. Upcoming GSAR Rewrite to Update MAS Pricing Policy

Over the last year, GSA has publicly stated that it is planning a rewrite of GSAR Part 538, including those sections covering MAS pricing. This will be the second attempt to rewrite GSAR Part 538. In December 2012, a GSA proposed rule was withdrawn without being published as final. The Coalition applauds GSA for refocusing on this effort and appreciates the opportunity to engage in a Myth-Busters dialogue regarding the current pricing policy. Government and industry share a common goal of ensuring the MAS program enhances competition while providing efficient, effective best value solutions for customer agencies and the American taxpayer. This white paper offers an industry partner perspective, which can be considered in restructuring the pricing policy for the next rewrite.

3. Environmental Scan

There have been significant changes in the government and commercial markets since the inception of the updated MAS pricing policy in the 1990's. Changes to federal regulations within the past 20 years provided increasingly greater competition at the task order level. Commercial services, bundled solutions, and high tech products as opposed to commoditized products account for a significant percentage of MAS sales. The internet and e-tools such as GSA Advantage! and GSA e-Buy provide greater visibility into pricing for government customers and commercial schedule contract holders. As a result of these changes the government is less dependent on pre-award pricing disclosures and the PRC to assure fair and reasonable GSA Schedule prices. The cumulative impact of these environmental changes should drive corresponding changes in MAS pricing policy.

A. *Significant Government Changes*

The government has changed both the rules that agencies must follow when ordering from the Schedules and the types of solutions that it buys.

- i. **Regulatory Changes:** Effective in May 2011, new FAR Subpart 8.4 ordering rules went into effect for all federal agencies. The FAR revisions significantly increased the number of competitions needed to place an MAS order. Specifically, the FAR now requires that:
 - a. All orders over the Simplified Acquisition Threshold (SAT) (currently, \$150,000) must be competed and price reductions sought from all MAS contractors capable of meeting the customer agency requirement.
 - b. Orders for services requiring a Statement of Work must be competed if they exceed the micropurchase threshold (currently \$3,000).
 - c. Blanket Purchase Agreements (“BPAs”) must be competed, further creating downward pressures on GSA Schedule prices.

In addition, there is a preference to award multiple BPAs (as opposed to awarding a single contractor), which creates further competition for BPA orders.

If an order is not competed, as required, the ordering activity must justify and document its decision not to do so. Prior to the implementation of these new task order competition requirements, the MAS terms and ordering regulations identified the maximum order threshold (MOT) as the dollar level at which some additional, but limited task order competitions were required. The MOT generally ranges from \$500,000 to \$1 million depending on the specific contract schedule – greatly exceeding the new SAT competition threshold. The MOT is still in MAS contracts

and has not been lowered consistent with the new statutory and regulatory competition requirements for orders exceeding \$150,000.

- ii. **Changes in Purchasing Trends:** Coalition members report that Federal agencies (like commercial buyers) sometimes seek complex solutions involving both products and cross-functional services. Pricing of some solutions can be difficult in MAS contracts, which typically feature pricing for discrete products and distinct labor categories. Increasingly, agencies require total solutions. Contractors need the flexibility to mix and match their contract and non-Schedule items in a fast and efficient way. The GSA Schedule program, as it is currently structured, does not allow for this practice.

B. Significant Commercial Changes

MAS contractors increasingly rely more on customized pricing in their normal commercial sales and less on formal commercial price lists. This is particularly the case in the services and information technology sectors. Highly competitive markets often feature pricing based on analysis and research of a particular transaction or target market. Commercial products are often sold as a package, with services being a part of the package (e.g., maintenance /software /training/ customization). Along with these specific delivery terms, geographic scope and availability also drive changes to the traditional pricing of products. Responding to customer demand, contractors increasingly offer new and different professional services in the form of solutions. Technology has made business faster, allowing for far-reaching, almost real-time collaborations. The speed at which such services are offered can be problematic for the MAS program as it often can take a fair amount of time to negotiate the pricing for a new service or product to be added to an MAS contract. Meanwhile, customer agencies either do not have access to the latest solutions or they purchase the newest technologies through other vehicles.

C. Growth of Internet/Digital Tools

The increasing availability of digital tools and the resulting enhanced market transparency enables all customers, including GSA, to have greater visibility concerning fair and reasonable pricing while increasing competition across the federal enterprise. Federal regulations encourage agencies to use e-tools such as GSA Advantage! and GSA eBuy when placing an order, providing greater competition and pricing visibility for the government and sales opportunities for Schedule contractors at the task order level. GSA continues to grow its suite of e-tools, having recently launched a reverse auction capability for schedules ordering. These tools allow GSA to be less dependent upon contractor disclosures and the protracted (and possibly dated) information that GSA traditionally has relied upon in negotiating MAS pricing. Digital tools provide the capability for streamlined task order competition for specific requirements.

D. Cumulative Impact of Environmental Changes on MAS Pricing

Current MAS pricing is exemplified by the formation, in effect, of a catalog for federal agency users developed by reference to commercial price lists. It increasingly is the case, however, that commercial pricing is market based. Contractors less frequently rely on standard price lists in their commercial business and federal agency users less frequently buy at the GSA “catalog” price. Instead, agencies conduct competitions or otherwise place orders at prices below the MAS contract pricing. This rigorous task order competition offers an opportunity to streamline now lengthy and complex upfront contract pricing procedures.

4. Most Favored Customer Pricing Policy

A. Confusion concerning MFC vs. Best Price

A persistent area of confusion in the MAS Program is the extent to which GSA is entitled, as a matter of law or by contract, to treatment as the “most favored customer” (i.e., to receive pricing that is at least as favorable as any other customer of a contractor).

In part, this confusion is due to the manner in which GSA describes MAS pricing. For example, GSA's own website states:

Customers contract with pre-approved vendors and benefit from "most-favored customer" pricing with GSA Schedules (also referred to as Multiple Award Schedules (MAS) and Federal Supply Schedules (FSS))⁵.

This statement suggests that a customer will always get a contractor's best prices. The GSAR makes it clear, however, that MFC is a negotiation objective rather than a requirement.⁶ The MAS program seeks pricing that would be offered to similarly situated commercial customers; which is not always equivalent to the contractor's very best pricing. The GSA should not continue to put itself in a "no-win" position of having to defend itself as to whether its program delivers the very best price.

Commercial entities offer favorable pricing to customers that make substantial purchase commitments and minimize the risks of the contract terms. At the contract level, the MAS agreement does not define requirements, commit to volume or guarantee exclusivity—criteria often used in both the federal and commercial markets to determine which customers obtain better pricing. Contractors may also provide more favorable pricing to commercial customers that assume value added functions such as participating in joint marketing agreements, or assisting with sales, distribution, or inventory. At the MAS contract level, it is not practicable or permissible for the government to make such commitments.

In fact, the government imposes significant compliance burdens (and associated costs) typically not found in commercial agreements. The GSAR recognizes that GSA may not negotiate the best prices because of differences between how the government and commercial customers buy. The GSAR states some circumstances in which it is

⁵ www.gsa.gov/portal/category/100615

⁶ GSAR 552.238-75

reasonable that the government not get a contractor's best price. Notwithstanding the GSAR, GSA's pricing policy and post-award enforcement through the PRC is often misunderstood – by Contracting officers, auditors, and contractors - to require that a company offer the government its best price as a condition of award.

B. Complications for Service Contracts

Negotiation of MFC pricing can be particularly difficult for professional services contractors where commercial pricing is often market based. For these entities prices are not based on a static price list. Instead project pricing is based on the scope of a job and what the market will ultimately bear. For these companies there may be no direct comparison for pricing, making it difficult to determine the “most favored price” given the terms and conditions of the agreement. Moreover, there are circumstances when both GSA and the MAS offeror agree that there are differences between the government and commercial agreements. The government has, however, often been unwilling to accept less than the best price. For example, MAS offerors are asked to justify not offering the government their subcontract rate to federal prime contractors; these prices are not, however, reflective of a typical commercial engagement.

C. Problems Identifying Best Price

A further concern is that, a pricing policy dependent on the “best” price is problematic even if it is the “best” price for a similarly situated commercial customer. An effort to find the best single price over the period of time required for disclosure by the Commercial Sales Practices (CSP) format can be a daunting process. This is particularly true in high transaction businesses and/or where commercial pricing is highly customized and items, particularly services, can be bundled and customized to suit the particular commercial customer or market. Attempts to identify, monitor and report “best” price for disclosure and application of the PRC significantly increase a contractor's liability risks and cost of compliance. The cost of such efforts outweighs the benefits, because once found the terms and conditions of the “best” price can be so

different from the MAS agreement at the contract level that it is not a valid basis for comparison.

As noted in paragraphs (A) through (C) above, a reading of the MFC policy to require best price is inconsistent with the GSAR and creates false expectations on the part of GSA customers. The inconsistent interpretations lead to protracted negotiations and significant risk of liabilities on contractors. If for no other reason, MFC is problematic because of the significant ambiguities as to what the term means.

D. Pricing Policy Recommendations

The Coalition recommends that GSA delete the phrases “Most Favored Customer” and “Best Price” from its pricing policy. Instead, GSA should rewrite GSAR 538.270 *Evaluation of Multiple Award Schedule (MAS) offers* to require negotiation of fair and reasonable prices. Price evaluations should compare the benefits, potential volume, and terms and agreements of the MAS contract with those of similar commercial customers. Such a policy confirms the government’s intent to fully leverage its volume while still recognizing that a contractor’s commercial customer may warrant a better price than that negotiated at the MAS contract level. Restatement of the current MFC policy is necessary to properly focus the MAS program on negotiating prices that are good for federal customers and fair for industry.

The discussion above indicates the difficulty of pricing professional services at the contract level. To establish a more reasonable vehicle for pricing services we recommend that GSA pilot test a recommendation made by the SARA Panel. See *Report of the Acquisition Advisory Panel*, at 102 (2007)⁷. The SARA Panel’s recommendation was that GSA establish a new Schedule for professional services where contractors agree to ceiling pricing at the contract level. More specific pricing would be set by competition at the task order level rather than MFC negotiations at the contract level. This approach

⁷ http://www.acquisition.gov/comp/aap/24102_GSA.pdf

would streamline the initial process of awarding a GSA Schedule contract and would also enhance competition at the task order level. This approach is consistent with the current FAR 8.4 competitive ordering requirements for task and delivery orders mandated by Section 863 of the FY 2009 National Defense Authorization Act (NDAA). The NDAA made clear Congress's preference for competition at the order level under the MAS program.

Recommendations MAS Pricing Policy
<i>1. Delete the terms MFC and Best Price from the MAS pricing policy.</i>
<i>2. Price evaluation should compare the benefits, potential volume and terms and conditions of government and commercial customers.</i>
<i>3. Pilot test new professional services schedule with reliance on task order price negotiation.</i>

5. Disclosure of Commercial Pricing Practices

In addition to the MFC, the Commercial Sales Practices (CSP) disclosure requirements are also in need of reform. Current CSP format for disclosures does not provide for consideration of the existing GSA Schedule ordering procedures, creates ambiguity in disclosure requirements, and requires the release of data that exceeds the needs of the government to negotiate fair and reasonable prices. As a result the document is unduly burdensome and results in protracted negotiations for government and industry.

A. CSP Data Requirements Do Not Support the Government's Pricing Objective

The CSP requires that contractors provide a year of historical data on commercial sales for all products and services offered on the MAS contract. Disclosure is required regardless of dollar value or terms and conditions. In addition, the CSP instructions

The CSP

The Commercial Sales Practices Format (CSP) must be completed ... demonstrating comparative pricing with your best customer(s). A general explanation of the circumstances and frequency of deviations from your standard commercial practices is required [see Clause 552.212-70, Preparation of Offer (Multiple Awards Schedule)]. A separate CSP must be completed for each pricing structure proposed.

Source: GSA MOBIS Schedule

require offers to disclose their standard commercial sales and discounting practices, and exceptions to such practices. The CSP format does not acknowledge that there is a competition requirement for many GSA Schedule orders. With task order competition so frequently being required, the detailed pricing disclosures and accompanying historical pricing analysis for all commercial transactions is no longer necessary. Instead, competition in the market drives low task order pricing. This is especially true for professional services orders, where task order competition based on customer specific requirements is almost always required.

CSP disclosure is a particular challenge for IT and professional services companies. Such firms may not use commercial price lists because their pricing is market based and priced based on particular opportunities. The requirements of a specific opportunity, the scope of the opportunity, the risks associated with the successful performance of the opportunity, whether it is being sold as a fixed price project or a time and materials contract, and many other factors come into play for services companies when they price their commercial and government services. Attempting to look at historical pricing practices to compare the pricing on opportunities that may be vastly different from one another in order to develop fair and reasonable GSA Schedule contract prices is not easily accomplished. Further, this method does not result in an “apples-to-apples” comparison that can reasonably be used for comparing prices and making a fairness determination.

The instructions of the CSP-1 form directs offerors to disclose all customers and defines a customer to be any entity, other than the federal government, which acquires

supplies or services from the offeror⁸. Notwithstanding the GSAR, many GSA Schedule solicitations request information about the most favored *federal* customer from all offerors. This information request may be appropriate for companies that do not have adequate commercial sales, but it should not be asked from all offerors. “Most Favored Federal Customer” is an example of another data request that exceeds the government’s need in price negotiations. This disclosure requirement is unnecessary for any offeror that has commercial sales.

B. Some CSP Data Requests Are Unclear and Inconsistently Interpreted

The following are just some of the issues with the CSP:

i. “Standard” practices vs. “deviations”/non-standard practices

The CSP-1 speaks to standard practices and deviations from **standard** practices (i.e., non-standard practices) but goes no further in explaining these **terms**. Because the terms “standard practice” and “non-standard practice” are not clearly defined, there is great ambiguity as to what is required in a contractor’s disclosures.

This ambiguity increases the risk that a contractor can face from audits and from preparing disclosures that the government later – incorrectly – deems to be inaccurate, incomplete or fraudulent. The lack of clarity in these terms has already led to major issues for some companies. Several multi-million dollar False Claims Act settlements have resulted from contractors disclosing what they believed to be all of their standard practices with acknowledgement of deviations, only later to have a GSA auditor assert that deviations occurred frequently enough that they could no longer be called “deviations” and should have been included in detail among their standard practices. Without a clear definition, schedule contractors are vulnerable to imposition of significant penalties for what are otherwise reasonable differences in understanding of ambiguous terms.

⁸ GSAR 515.408

ii. Use of Pricing Charts, Templates and Forms Required by Individual Schedules in Addition to the CSP Disclosure

While it has not been formalized in the GSAR, a majority of GSA Schedule solicitations require a “discount proposal spreadsheet” or “MFC pricing matrix.” These spreadsheets require a company to disclose the MFC or best price for each item they wish to sell through their GSA Schedule contract, regardless of terms and conditions. The time and effort needed to provide this additional information on a line-item basis is significant and seemingly redundant given the requirements of the CSP-1 to disclose both standard and non-standard pricing practices. The information required in the matrixes is also confusing, as many contractors and government employees alike have different interpretations of the term MFC.

Disclosure on a line item basis can be particularly complicated for professional services contracts. In many instances, commercial contractors do not build commercial prices based on fixed hourly rates but rather on the scope of the job and competition, i.e. what the market will bear. Under these circumstances, expecting justification of an hourly rate for a labor category is unreasonable.

iii. Application of Disclosure Requirements to Bundled Solutions

Many contractors, particularly those selling managed services and IT solutions, offer bundled solutions. MAS solicitations are unclear as to what types of disclosure are required for bundled offerings. Are contractors required to “deconstruct” the pricing that they offer in their commercial solutions for the purposes of selling through GSA Schedule contracts? If these contracts are meant to be **commercial** in nature, a contractor should be able to price their offerings in the same manner that they price them for commercial customers.

What if in the commercial markets, a contractor offers a single item at a greatly reduced price but all other items on the same order are priced normally or higher than

normal prices? Such a discount often is a sales inducement for the entire order, not just the single item so 'discounted'. As such, the discount does not reflect a judgment about the appropriate pricing of the single item but rather the competitive value of the entire transaction. Should the government be entitled to the low pricing offered on that single item? The disclosures that are required by the government, and particularly those required in the MFC pricing matrices included in each solicitation, suggests that the government does believe it is entitled to these low line-item prices despite the fact that this is not the way that a company may price its offerings commercially.

The lack of clarity around this issue contributes to the complexity that many companies face as they prepare their GSA Schedule proposals. In order to disclose prices that may be the result of bundling or the unique circumstances of a particular transaction, an MAS offeror may need to perform extremely detailed pricing analyses to prepare for negotiations. For a large company with thousands of customers that may all have unique pricing, this can be a huge undertaking. The resulting negotiations can be very lengthy and difficult, and they can lead to pricing that is not fair and reasonable for contractors or for the government. This lack of clarity can also lead a contractor to make disclosures that they believe are accurate and best represent what the government is asking for, but may be interpreted in a different manner by the Office of Inspector General ("OIG") if the contractor is later audited.

C. The Volume of Data that a Contractor Must Analyze Adds to the Burden of Disclosure

The CSP format was constructed in a commercial market when prices were less volatile and contractors had standard practices and price lists. As discussed in the Environmental Scan above, for many services and high tech industry sectors this is no longer the case. Consequently it is difficult to disclose in the CSP format that is requested. For companies, with numerous products and customers, making comprehensive and all inclusive disclosures about their non-standard pricing practices

is a massive undertaking. Even with modern accounting systems, the volume of data that may need to be analyzed to meet this requirement and the effort it takes to fully understand and accurately describe a company's historical pricing practices is a costly and time consuming task.

D. Format

The government currently requires contractors to disclose pricing information in the chart included in the CSP-1 form. Despite the fact that the form allows for contractors to use an "equivalent format developed by the offeror," most Contracting Officers require pricing disclosures in the format required by the CSP-1. This format, in addition to the format required in most solicitation's supplemental pricing charts, is not flexible enough for many companies to accurately and completely describe their commercial pricing practices. It can lead contractors into error and liability when they attempt to use the form but it is either misunderstood or misinterpreted by a government contracting officer or auditor.

The GSA OIG consistently reports that large percentages of MAS contractors fail to provide current, accurate and complete information. The OIG semi-annual report for the period April 1, 2012 - September 30, 2012 states that 3 of 4 MAS audits it conducted found contractors failed to accurately disclose commercial sales practices. Given the discussion above and the OIG findings, GSA should consider whether the CSP is an effective vehicle for disclosure. These issues are reminiscent of the Discount Schedule and Marketing Data (DSMD) Sheets, the disclosure document that preceded the CSP. In reviewing the DSMD the United States Court of Appeals for the First Circuit concluded that the documents were " ...virtually unintelligible, and that a literal interpretation would have required defendant to reveal every price discount it ever provided to any of its customers. The court held that such provision was "inordinately difficult to carry out

and did not call for literal compliance.⁹ The reality is that the CSP in its current format and as evaluated by both the OIG and contracting officers has resulted in offerors being required to disclose the same level of detail and data that the court found to be faulty with the DSMD. Failure to do so has resulted in contractors facing the aforementioned allegations of defective pricing.

E. Recommendations

To ensure that the information that GSA requires from contractors is consistent with the government's objective of negotiating fair and reasonable prices, the Coalition recommends the following:

Recommendations

Disclosure of Commercial Sales Practices

- 1. Make the data collection tool consistent with MAS ordering procedures. With the change to the ordering procedures, the contract negotiations should focus on commercial transactions up to \$150,000 and an explanation of sales practices over that amount.*
- 2. Discontinue use of line item disclosure in supplemental matrices, tools and data requests.*
- 3. Delete requirements for disclosure of most favored federal customer.*
- 4. Clarify key terms.*
- 5. Create more flexible formats to accommodate the scope and diversity of GSA Schedule contractors' commercial sales practices.*
- 6. Hold discussions with industry about the type of data that is available to meet the government's pricing goals.*

⁹ United States v. Data Translation, Inc., 984 F.2d 1256

6. Price Reductions Clause (PRC)

A. The PRC is No Longer Necessary To Assure Reasonable Prices

The PRC concept dates back to the early 1980's. The PRC requires that a contractor reduce its MAS contract price, whenever it reduces its price to the commercial customer that was the basis of award. It was originally intended to assure that the government maintained the benefit of the bargain that it negotiated. In a multiple year contract, the PRC assured that prices on task orders remained competitive with the current market. The PRC reflects a time when the MAS program was a mandatory source for all federal agencies and competition at the order level was limited. It also reflects a time when robust task and delivery order competitions were not mandated by law or regulation. Due to changes described in the Environmental Scan above, the PRC is no longer needed to assure reasonable task order pricing. The MAS program is no longer mandatory so government buyers are no longer the captive customers they were when the clause was first implemented. Schedule vendors must watch their pricing at all times to stay competitive. Task order competition for specific requirements is mandated by statute and regulation and drives lower pricing for agency customers.

B. Increased Transactional and Administrative Costs Lead to Higher Prices

The government and contractors spend tens of millions of dollars a year negotiating, overseeing, reviewing and complying with the PRC. See Attachment 1. Contractors implement compliance infrastructures, including personnel and systems, to address compliance risk associated with the PRC. These costs are ultimately passed on in the form of higher prices. In turn, the government maintains a costly infrastructure to oversee and review compliance with the PRC.

C. The PRC also unduly restricts competition in the marketplace

A price reduction on a single completely unrelated commercial transaction may trigger a price reduction that could be effective for up to 20 years. Consequently, contractors are restricted from effectively competing in the commercial marketplace.

Indeed, the ultimate confirmation of the anti-competitive impact of the PRC is GSA's recent waiver of the PRC clause at the apparent request of the Air Force in order to increase competition for a series of Air Force furniture procurements. In this situation, the PRC essentially restricted MAS furniture contractors from competing for the Air Force furniture requirements. Absent a waiver, the commercial sales required to execute the Air Force's method of award could have triggered a price reduction under offerors' MAS contracts. At the request of the Air Force, the GSA waived the applicability of the clause to commercial transactions related to the Air Force's furniture procurement. GSA's actions here make clear the anti-competitive impact of the clause. In essence, the PRC requires a prudent MAS contractor to create a compliance infrastructure designed to restrict its ability to compete in the commercial and Federal non MAS marketplace.

D. PRC Recommendations

Significant compliance costs can be saved by both government and industry with the adoption of a pricing policy and PRC that embraces the new competitive nature of schedule task order contracting. Adopting the following recommendations would achieve this objective.

1. Eliminate the PRC. This change would eliminate a costly, yet unnecessary compliance requirement and will empower contractors to focus even more resources on improving performance and delivery outcomes for the American taxpayer. Again, both the 2007 SARA panel and the 2010 MAS Advisory Panel recommended eliminating or curtailing the application of the PRC.

**Recommendations
Price Reduction Clause**

1. *Eliminate the PRC.*
2. *Alternatively, limit application of the PRC to orders less than \$150,000*

2. Alternatively, limit application of the PRC to orders less than \$150,000. This can be accomplished by reducing the Maximum Order threshold to \$150,000, consistent

with the revised FAR 8.4 MAS ordering procedures. This change can be accomplished simply by a change to MAS solicitations. A FAR change would not be required.

7. Summary

GSA's mission is to deliver "the best value in real estate, acquisition, and technology services to government and the American people." In addition, one of the agency's top priorities is to use the purchasing power of the federal government to drive down prices, deliver better value, and reduce costs to its customer agencies. The MAS has been and continues to be an important tool for delivering GSA's promise to its customer base. With sales of approximately \$50 billion annually, inclusive of VA Schedules, the GSA Schedules program helps agencies fulfill critical missions and lower the cost of government. The Schedule pricing policy has, however, not kept pace with changes in the MAS ordering procedures. Further, the policy has not adequately adapted to those sectors of the commercial market that have highly customized transactional pricing models. Professional services, now the largest part of the Schedules program, has been disproportionately impacted by a static MAS pricing policy. The MAS price negotiation objective is subject to varying interpretations, the data disclosure requirements exceed the government's needs, and the PRC exposes Schedule contractors to high risks of noncompliance. All of these factors increase contractor costs which are ultimately passed on to the federal customer in the form of higher prices. In order to harmonize MAS pricing policy with the new FAR 8.4 Schedules ordering procedures, the Coalition recommends that GSA take the actions set forth in Section 8 below.

8. Final Recommendations

1. **Delete the phrases "Most Favored Customer" and "Best Price" from its pricing policy.** GSA should rewrite GSAR 538.270 *Evaluation of Multiple Award Schedule (MAS) offers* to require negotiation of fair and reasonable prices. Price evaluations should compare the benefits, potential volume, and

terms and agreements of the MAS contract with those of similar commercial customers. Such a policy confirms the government's intent to fully leverage its volume while still recognizing that a commercial customer may warrant a better price than that negotiated at the MAS contract level. Restatement of the current MFC policy is necessary to properly focus the MAS program on negotiating prices that are good for federal customers and fair for industry.

2. **Pilot test a recommendation made by the Services Acquisition Reform Act (SARA) Acquisition Advisory Panel.** Specifically, the GSA should establish a new Schedule for professional services where contractors agree to ceiling pricing at the contract level. The ceiling price would not be subject to negotiation. More specific pricing would be set by competition at the task order level rather than MFC negotiations at the contract level. This approach would streamline the initial process of awarding a GSA Schedule contract and would also enhance competition at the task order level.
3. **Review and revise the commercial sales practices CSP format** in order to:
 - Make the data collection tool consistent with the revisions to FAR 8.4. GSA Schedule ordering procedures. With the change to these procedures, the contract negotiations should focus on commercial transactions up to \$150,000 and require only a general explanation of sales practices over that amount.
 - Discontinue use of line item disclosure in the form of supplemental matrices, tools, spreadsheets and disclosures.
 - Delete requirements for disclosure of most favored federal customer.
 - Clarify key terms such as "standard practice", "best price", "best discount", "commercial", "exceptions".

- Create a more flexible format to accommodate the scope and diversity of GSA Schedule contractors' commercial sales practices.
4. **Eliminate the PRC.** This change would eliminate a costly and unnecessary compliance requirement and will empower contractors to focus even more resources on improving performance and delivery outcomes for the American taxpayer. Both the 2007 SARA panel and the 2010 MAS Advisory Panel recommended eliminating or curtailing the application of the PRC. Alternatively, limit application of the PRC to orders less than \$150,000. This can be accomplished by reducing the MOT on all MAS contracts the simplified acquisition threshold, consistent with the revised FAR 8.4 MAS ordering procedures.

These recommendations provide a path for GSA to effectively realign MAS pricing policy with current regulations and the commercial marketplace that will lead to greater program efficiency and effectiveness and lower costs for government and industry. Given that higher costs inevitably result in higher prices for federal agencies, the time is now for change. The Coalition asks that GSA consider these recommendations as part of the Schedules Modernization program and the upcoming GSAR Part 538 rewrite. We look forward to engaging with GSA in a "Myth-buster's" dialogue about how to implement these MAS Pricing Policy reforms.

List of Attachments

February 27, 2012 Letter, Subject Re: Information Collection 3090-0235, Price Reduction Clause Letter

April 16, 2012 Letter, Subject Re: Information Collection 3090-0235, Price Reduction Clause Letter



February 27, 2012

General Services Administration, Regulatory Secretariat (MVCB)
1275 First Street NE.
Washington, DC 20417
ATTN: Hada Flowers

Re: Information Collection 3090-0235, Price Reduction Clause

Ms. Flowers:

On behalf of The Coalition for Government Procurement, the following comments are provided in response to GSA's notice of request for comments on the information collection requirements of the GSAR Price Reductions Clause. The notice was published in the Federal Register on December 29, 2011.

The Coalition for Government Procurement ("The Coalition") is a non-profit association of approximately 300 firms selling commercial services and products to the Federal Government. Our members collectively account for approximately 70% of the sales generated through the GSA Multiple Award Schedules (MAS) program and about half of the commercial item solutions purchased annually by the Federal Government. Coalition members include small, medium and large business concerns. The Coalition is proud to have worked with Government officials over the past 30 years towards the mutual goal of common sense acquisition.

Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat will submit to the Office of Management and Budget a request to review and approve an extension of a previously approved information collection requirement regarding the GSAR Price Reductions Clause. This collection of information is neither needed nor has practical utility in today's government procurement system. A continuation of the Price Reductions Clause (PRC) is impractical and unnecessary due to the competitive environment in the current acquisition market, new economic realities, and the significant reporting burden on contractors which lacks any real public benefit.

As noted in Executive Order (EO) 13563, "Improving Regulation and Regulatory Review" published on January 18, 2011, our regulatory system is one that must "promote economic growth, innovation, competitiveness, and job creation... It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative." If there was ever an acquisition regulation that deserved a retrospective analysis and review under the EO, it would be the PRC. The PRC has outlived its perceived benefit and fails to achieve any of these overarching goals outlined in EO 13563.

I. PRC No Longer Has Practical Utility

The collection and monitoring of commercial transactions pursuant to the PRC has no practical utility under the current competitive framework governing MAS contracts and orders. Competition at the task and delivery order level essentially drives pricing for requirements under the modern MAS program. GSA has invested heavily in electronic tools (GSA Advantage! and eBuy) to enhance transparency and competition for orders and Blanket Purchase Agreements (BPAs) under the MAS program. These enhancements along with the new statutory and regulatory competition requirements for the MAS orders render the PRC a costly, outdated oversight mechanism that is no longer relevant.

On March 16, 2011, an interim rule was issued implementing Section 863 of the Duncan Hunter National Defense Authorization Act (NDAA) of FY 2009. Section 863 extends the competition requirements of Section 803 of the National Defense Authorization Act of 2002 government-wide. The interim rule amended Federal Acquisition Regulation (FAR) subpart 8.4 incorporating the new statutory competition requirements for orders exceeding the simplified acquisition threshold. The new FAR 8.4 establishes new enhanced competition requirements at the task/delivery order level. For orders exceeding the simplified acquisition threshold, the new regulations require ordering activities to provide notice and opportunity to compete to all MAS contractors capable of meeting the requirement. Alternatively, ordering activities can provide notice to less than all so long as they provide notice to as many as practicable to reasonably ensure receipt of at least three offerors. If notice is provided to less than all, the file must be documented demonstrating the ordering activity's efforts in identifying the contractors necessary to receive at least three offerors. The new FAR 8.4 ordering procedures also support competitive pricing by directing contracting officers to, at a minimum, conduct additional market research, review contracts, and seek price reductions for orders or Blanket Purchase Agreements exceeding \$150,000.

The efficiency and effectiveness of the MAS program's competitive, streamlined ordering process is supported by a robust set of competitive electronic tools (GSA Advantage!, GSA e-library, and E-buy). FAR 8.402(d)(1) provides that, for all orders exceeding the acquisition threshold of \$150,000, posting a Request for Quote (RFQ) on e-Buy meets the requirement of providing notice and an opportunity to compete to all schedule contractors offering the required products and services under the appropriate schedules. GSA Advantage!

and GSA e-library also provide a powerful online market research tools for program managers and contracting officers by offering access to MAS contract pricing and contract terms and conditions for millions of services and products.

Given new competitive requirements of Section 863 and FAR 8.4, combined with GSA's robust e-tools that provide real time competitive pricing for Schedule items, the PRC is outdated and no longer plays a meaningful role in driving pricing and value under the MAS program.

II. The PRC Limits MAS Schedule Contractors in the Commercial Market

Not only is the PRC outdated procurement policy, it is anti-competitive economic policy. Through the PRC, the government effectively limits a company's ability to compete in the commercial marketplace. Simply put, the PRC restricts an MAS contractor's ability to offer lower pricing to certain commercial customers. Due to the constraints of the PRC, companies are either discouraged from providing discounts to commercial customers or they may choose not to participate in the government market. As a result, MAS contractors forgo competing for the private requirements to the extent the transaction impacts PRC compliance. The limitations of the PRC are magnified for small businesses. The PRC's impact on the commercial market has a negative impact on innovation and job creation. To the degree that the PRC limits competition in the private sector, growth and job creation are negatively impacted as well. MAS Schedule contractors are refraining from investing in jobs, new services and products that would normally accompany growth fueled by competition in the marketplace.

III. PRC Reporting Burden

GSA's notice of request for comments estimates that the annual reporting burden for the Price Reductions Clause is 9,000 hours. This is based on an estimated 4,500 number of respondents, 4,500 annual responses, and an average of 2 hours that each MAS Schedule contractor spends on an annual basis complying with the PRC. The number of respondents and the burden hours are significantly understated. Currently there are approximately 16,000 MAS contractors holding roughly 19,000 MAS contracts. In addition, the estimated 2 hours per response annual reporting burden identified in the notice is also significantly understated. As such, the total annual paperwork burden associated with the PRC is far greater than the 9,000 burden hours referenced in the public notice

As demonstrated by the summary of the responses to the Coalition's survey set forth below, the public notice grossly underestimates the number of hours that companies spend complying with the PRC each year. Based on our current sampling of 25 companies holding MAS contracts, it is clear that, on average, PRC compliance involves significantly more than 2 hours annually. MAS Contractors invest time and money for PRC training, monitoring, systems development, oversight, self-audits, and compliance plans and personnel.

IV. Results of Contractor Survey

In response to GSA's notice of request for comments, the Coalition asked MAS Schedule contractors about the number of hours and costs involved in PRC compliance on an annual basis. The activities that these businesses commented on include training, systems development and monitoring, contract negotiations, and audit preparation. The following is an overview of the PRC's annual reporting burden as described by the 25 companies that responded. The Coalition is still receiving responses and requests an extension to provide updated estimates.

a. Training

MAS Schedule contractors were asked to estimate the number of hours and the costs involved in PRC training, as well as the number of employees involved. The companies indicated that they conduct internal PRC training for senior executives, the sales force, and compliance personnel. Costs include designing a training program, review by outside consultants, use of online training systems, tracking attendance and completion, and external training for some members of the company. The 25 companies that responded to the Coalition's inquiry spent an average of 80 to 90 hours on these PRC training activities on an annual basis per contractor with an average cost of approximately \$5,500 a year. Some contractors due to their size, indicated that they spent significantly more time than the average. Further, the respondents trained 110 employees on average, ranging from 2 to 500 employees each year.

b. Compliance Systems

In order to monitor compliance with the PRC, companies often need complex IT systems that connect with internal contracting systems and that provide information about potential PRC violations. Respondents indicated that monitoring can be done on a continuous basis or can be downloaded periodically, as on a weekly basis. The analysis may be automated or may require a manual review of contract and proposal documents. The average investment in compliance systems by the MAS Schedule respondents is over \$90,000 annually per contractor. The average number of hours invested in a one year period is more than 1,100 per contractor. In one instance, it was estimated that in the first year alone it took over 8,000 personnel hours to setup and monitor the new PRC compliance system—just short of the 9,000 Annual Reporting Burden hours that GSA estimated for *all* MAS Schedule contractors.

c. Negotiations

MAS Schedule respondents indicated that the costs associated with PRC compliance begin as they prepare an offer. Many factors must be considered in order to determine the Basis of Award customer and pricing relationships during the initial offer submission. Because the PRC affects all services and products on a contract and discount ratios may differ for each, preparing and analyzing the initial offer is a significant investment and may involve finance, business units, sales, and legal. The respondents indicated that they spent up to 1,700 hours on MAS Schedule contract negotiations at an average of 272 hours. The average cost of these negotiations was more than \$45,000 and was more for newly established contracts.

d. Audits

MAS Schedule contractors spend a significant amount of time preparing for audits involving the PRC— GSA contractor assistance visits, pre-award and post-award audits. Companies may also conduct their own internal audits to assess contract compliance. Respondents estimated annual audit costs from \$2,500 to over \$2 million. The average annual investment in audits for responding companies was over \$100,000. The average number of hours spent preparing for audits involving the PRC was between 440 and 470 hours a year, which equates to approximately 2 months of full time work hours.

e. Total Annual Burden

Again, GSA's notice of request for comments estimates that the annual reporting burden for the PRC is 9,000 hours. In the Coalition's survey, companies were asked about the estimated total number of hours spent complying with the PRC on an annual basis and the associated cost. GSA's request for comments estimated that companies spend 2 hours a year complying with the PRC, while the respondents to the Coalition's survey indicated that they spent roughly 1,200 hours annually on PRC compliance. The average cost of these activities is between \$126,000 and \$135,000. As indicated by this sampling of small, medium, and large MAS Schedule contractors, the notice of request for comments far underestimates the regulatory burden of PRC compliance on commercial businesses.

Given that the PRC is based on an outmoded acquisition philosophy that is not relevant in today's MAS federal marketplace, the Coalition urges GSA to reconsider whether the immense reporting burden on commercial companies is still justifiable.

It would be our pleasure to meet with GSA's Office of Acquisition Policy to discuss this issue further. As we are continuing to get additional responses to our survey, the Coalition respectfully requests an extension to provide additional information on the burdens associated with PRC compliance. If you have any questions, please contact me at (202) 331-0975 or rwaldron@thecgp.org.

Sincerely,



Roger Waldron
President



April 16, 2012

General Services Administration, Regulatory Secretariat (MVCB)
1275 First Street NE
Washington, DC 20417
ATTN: Hada Flowers

Re: Information Collection 3090-0235, Price Reduction Clause

Ms. Flowers:

Thank you for the opportunity to provide additional comments on GSA's notice of request for comments on the information collection requirements of the GSAR Price Reductions Clause. An extension to the original notice was published in the Federal Register on March 15, 2012.

The Coalition for Government Procurement ("The Coalition") is a non-profit association of approximately 300 firms selling commercial services and products to the Federal Government. Our members collectively account for approximately 70% of the sales generated through the GSA Multiple Award Schedules (MAS) program and about half of the commercial item solutions purchased annually by the Federal Government. Coalition members include small, medium and large business concerns. The Coalition is proud to have worked with Government officials over the past 30 years towards the mutual goal of common sense acquisition.

Under the provisions of the Paperwork Reduction Act, the GSA Regulatory Secretariat will submit to the Office of Management and Budget a request to review and approve an

extension of the previously approved information collection requirement regarding the GSAR Price Reductions Clause. As described in our previous comments submitted February 27, 2012, it is clear that the Price Reductions Clause (PRC) is impractical and unnecessary based on the competitive environment in the current acquisition market, new economic realities, and the significant reporting burden on contractors which lacks any real public benefit.

In the Coalition's original PRC comments, we shared a summary of the results received in response to a survey of members on the burdens of PRC compliance. The Coalition asked MAS Schedule contractors about the number of hours and costs involved in PRC compliance on an annual basis. The notice estimated that MAS Schedule contractors spend an average of 2 hours annually complying with the PRC. However, the 25 respondents indicated that they spent roughly 1,200 hours annually on PRC compliance. Attachment 1 shows the responses received from 17 of these MAS Schedule contractors that agreed to provide this information anonymously.

The responses to the Coalition's survey also demonstrate the huge cost burden associated with PRC compliance for MAS contract holders. Large, medium, and small firms were asked about the investments involved in monitoring PRC compliance. Based on a review of the responses to the Coalition's survey, the average total cost of these activities is between \$126,000 and \$135,000 on annual basis, which inevitably impacts service and product pricing available to Federal agency customers and is ultimately paid by the American taxpayer. In addition, the PRC has a chilling impact on competition in the commercial market place. Prudent MAS contractors must always consider the impact of a commercial transaction in relation to PRC compliance. As a result, competitive flexibility is lost, limiting the ability of MAS contractors to compete in the commercial market place.

The collection and monitoring of commercial transactions pursuant to the PRC has no practical utility under the current competitive framework governing MAS contracts and orders. Statutory and regulatory competition requirements at the task and delivery order level essentially drive pricing for orders under the modern MAS program. GSA has also invested heavily in electronic tools (GSA Advantage! and eBuy) to enhance transparency and competition for orders and Blanket Purchase Agreements (BPAs) under the MAS program. These enhancements along with the statutory and regulatory competition requirements for

MAS orders under Section 863 and FAR 8.4 render the PRC a costly and outdated oversight mechanism that is no longer relevant.

In the current acquisition environment, the burden of the PRC far outweighs any benefit. Rather than requiring contractors to conduct PRC reporting, it would be more efficient and effective to continue encouraging robust competition at the task order level. A fundamental first step in restoring balance to MAS contracts, recognizing the central role competition and price reductions at the task order now play driving pricing under the MAS program, would be to lower the maximum order threshold (MOT) to \$150,000. This change would recognize the statutory requirement for competition above the MOT and would eliminate the burdensome paperwork and oversight of by MAS contractors for all commercial transactions over \$150,000. This simple step will reduce costly paperwork burdens on MAS contractors while maintaining the competition requirements for MAS orders exceeding \$150,000. After this initial step, GSA should further review the practical utility of the PRC and work towards elimination of the clause.

Again, it would be our pleasure to meet with GSA's Office of Acquisition Policy to discuss this issue further. If you have any questions, please contact me at (202) 331-0975 or rwaldron@thecgp.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'Roger Waldron', with a long horizontal flourish extending to the right.

Roger Waldron

President