November 21, 2014

General Services Administration
Regulatory Secretariat (MVCB)
1800 F Street N.W., 2nd Floor
Washington, DC 20405-0001

ATTN: Hada Flowers

Re: GSAR Case 2013-G502, Federal Supply Schedule Contracting (Administrative Changes)

Ms. Flowers:

Thank you for the opportunity to provide comments on the proposed General Services Administration Acquisition Regulation (GSAR) making administrative changes to the GSA Multiple Award Schedule (MAS) contracting program.

The Coalition for Government Procurement ("The Coalition") is a non-profit association of 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 35 years towards the mutual goal of common sense acquisition. We offer the following specific comments on the proposed rule.

1. The Regulatory Background section states that-

> "GSAR Part 538 will be amended to include MAS policies contained in FAS Acquisition Letters (ALs) and Instructional Letters (ILs). Bringing these policies into the GSAM will allow for greater transparency and an opportunity for the public to comment on these longstanding procedures "

We applaud GSA efforts to provide greater transparency.

2. While the GSAR is a mechanism for providing transparency, the Coalition sees value in GSA maintaining a system of Acquisition Letters or Instructional Letters to supplement the GSAR. The objective of such a system would be to retain some mechanism for quickly adding, correcting, or revising polies as needed. Changes to the GSAR can take an extraordinarily long time to implement.

3. As drafted, the rule does not achieve the goal of allowing robust public comment on long-standing procedures. The scope of this rulemaking is so extensive that it decreases rather than increases transparency and discourages public comment.

A. The structure of the rule was difficult to follow. For example,

i. The background statement says there are 35 new FSS specific clauses currently in FSS solicitations that will be incorporated into the GSAR. There are, however, approximately 45 clauses listed in the table that starts on page 54126. It is not clear which clauses are moved as is and which have changes to the substantive provisions.

ii. The rule reinstates certain clauses that were removed from GSAR. It is not clear why those rules were removed, but on at least 3 of those provisions—Evaluation of Commercial items (538.273(c)(1); Payment by Credit Card (538.273(d)(12) and Warranty (538.273(d)(13)—the Coalition has substantive comments.

B. There are significant clauses covered by the rule that should be the subject of a separate rule making, such as the Price Reduction Clause. Including such provisions in this massive collection of clauses does not offer the opportunity to propose changes in this important area.

C. The proposed rule perpetuates outdated policies by bringing them to the GSAR unchanged. By incorporating historical policy/guidance into the regulations – without performing a detailed analysis or obtaining a baseline understanding of how each of those legacy policies have historically been administered and implemented across all schedules and by the GSA FSS CO community – the GSA runs the risk of creating more confusion, rather than clarity, within the FSS program.

This regulatory effort misses an opportunity to provide changes that enhance the program. More importantly, it may make some changes harder to accomplish because the clauses would become part of a formal body of regulations.

We believe that the rule does more than merely make administrative changes. We strongly recommend that GSA reissue this proposed rule with the objective of dividing it into separate parts. Multiple, smaller, rulemaking would facilitate discussion of important policy issues.

We recommend that the first proposed rule should cover only those clauses which are now included in all GSA Schedule contracts and which are being incorporated into the GSAR without change.

4. There are new clauses prescribed by the rule that are not currently used in Multiple Award Schedule solicitations. The Federal Register notice describes these clauses as reinstated from a previous version of the regulation. For example

A. Proposed 538.273(c) would add an addendum to 52.212-2 Evaluation –Commercial items.

B. Proposed 552.238-97 Payment by Credit Cards – contains new text. Much of this language may have been compiled from other policy statements or administrative provisions, but the clause has not been subject to a previous rule making.

The Coalition recommends that any clauses with new content be deleted from the current proposed rule and treated as separate rulemakings in order to fully vet the new provisions.

5. 552.238-97: Credit Cards – The requirement for 24 hours notice whenever the vendor will not accept Government credits cards for payment is unreasonably short, particularly with respect to orders placed by fax or electronically. We recommend revising this to 72 hours.

6. The proposed GSAR would add a section 552.238-92 Evaluation – Commercial Items and Alternate One.

A. A clause entitled EVALUATION—COMMERCIAL ITEMS (MULTIPLE AWARD SCHEDULE) (552.212-73) has been in the MAS contract since 1997.

B. Alternate One, however, is new and a significant change to the way resellers' offers are now evaluated. Further, the provisions of the clause are inconsistent with MAS contracting policy and procedures.

The government reserves the right to make one contract for the whole or a part of a manufacturer's product line, based solely on price. The result is that a furniture manufacturer could end up with its chairs on reseller one's contract and its tables on reseller two's contract. If that is a correct assessment, this methodology could cause havoc for service levels, the ability to offer solutions, and price structures. During "open season" the new offers for identical items can be accepted. The existing contract price theoretically would become the negotiation target. Importantly there are no "open seasons" in the MAS programs since all schedules are continuously open. Even if there were "open seasons," if the existing contractor loses the price competition – what would be the impact on multiple year BPA's?

C. Alternate One is prescribed for use in non-standing Schedules. At a minimum the rule should explain what a non-standing schedule is. It is not a concept currently in use.

7. The methodology for estimating Paperwork Burdens is flawed resulting in a significant underestimation of the burden imposed by the rule.

A. The estimated number of respondents is 20,500, the number of Schedule contractors. This number does not consider the number of suppliers and dealers that are also impacted by the requirements of the contract.

B. In each case the regulation assumes that the contractor will respond one time to an information request. Because of the changes in the government's requirements, changes in commercial business, problems with electronic systems, and inconsistent applications from one contracting activity to another, it would be rare for a contractor to respond once for any contract information requirement.

C. Most of the estimated burdens are at a small fraction of an hour per request. That is unrealistic. It appears the GSA's estimate is based on physical changes to contract

documents. The reality is that any single change (to payment, financing, billing, reporting or administrative requirements) involves changes beyond updating the contract. There are larger implications and the contractor's systems, controls, supply chain and distribution channels. The annual reporting burden does not appear to consider these associated changes.

8. 552.238-87 Information Collection Requirements. The Coalition asks that GSA clarify what information collection requirements are being referred to and comment on whether this provision would be accurate in all FSS solicitations as proposed.

9. Substituting the term "Federal Supply Schedule" for the current term "Multiple Award Schedule" uses a misnomer that will contribute to a misunderstanding of the scope and purpose of the program. The MAS has not been a supply program since the mid 1990's. The largest part of the program is for service. The biggest growth opportunity is for solutions and services. GSA's own Federal Supply Service years ago transitioned to the Federal Acquisition Service. Use of the term Federal Supply at this time would send a confusing message to customers and contractors. We recommend that GSA initiate a FAR case to delete all references to FSS and substitute GSA Schedule or GSA Multiple Award Schedule.

10. 552.238-85 Significant Changes. The Coalition recommend that GSA insert at the end of this paragraph a statement that prior to refreshing a solicitation to incorporate significant changes, existing contractors should be given no less than 60 days to review and comment or implement the provision. Currently, contractors may be required to implement significant changes without any notice or time to change internal procedures and systems. This dramatically increases the cost and risks of contracting.

11. Proposed 552.238-88 Notice Requests for Explanations or Information and Hours of Operation. The Coalition recommends that "…shall be directed…" be changed to read "…may be directed…" or use the term "should" as in current solicitations. It is helpful to have a designated point of contact that understands the solicitation and is available for comment. It would be unfortunate if the provision is read to prohibit knowledgeable and responsible officials from engaging in a discussion of the issues, such as acquisition policy, legal, contracting officers, contract specialist, ombudsmen, and management.

12. Proposed 538.273(d) directs use of the clause 552.238-71. The clause requires distribution of a paper price list. This is an opportunity for GSA to eliminate a requirement in light of the extensive electronic reporting required of contractors.

13. Proposed 52.238-95. The current GSAR does not contain the Discounts for Prompt Payment Clause referenced in the proposed rule.

The Coalition recommends the proposed clause be included for public comment in a subsequent rulemaking. It appears complicated, and its purpose is not clear. Prompt Payment discounts should be disclosed in the CSPF. Whether the contractor offers them to the government, or the contracting officer accepts them, should be subject to negotiation. The Government can advise its contracting staff of factors to consider without adding another clause to the contract.

14. 552.238 – 100: Shipping Points – Vendors frequently use multiple carriers for shipments. It is therefore not feasible to specify a specific carrier at the Schedule contract level.

15. Proposed 552.238-101 Marking and Documentation Requirements for Shipping. A similar provision is contained in some MAS solicitations for overseas delivery. Is this clause to be used only in OCONUS orders? If not, there may be a substantial, potentially onerous, impact on commercial item contractors that use standard commercial marking and documentation.

16. Proposed 552.238-102 Inspection. What is the purpose of including a unique Inspection clause in MAS contracts? The commercial item clause has an inspection provision and an alternate for use in service contracts. The proposed GSAR could be instrumental in reducing the complexity and cost of commercial item contracting by deleting provisions that supplement the FAR commercial item clauses.

Uses of government unique provisions are in some circumstances already adding to both the government and contractor cost of performance. For example, there is a question on VA Schedules as to whether direct delivery to veterans' homes is permitted under the contract. The VA Medical Centers and patients groups want this to continue, but the VA National Acquisition Center's position is that someone from the Government needs to inspect before payment can occur. This will become very expensive for the VA as they will either be significantly shipping costs or products will need to be stored until the patient can come in to pick the products up. FAR permits more flexibility in a commercial item contract. FAR 12.402(a) provides that acceptance under commercial item contracts is generally based on the contractor's attestation that the products conform to the contract requirements. Our concern is that the new inspection clause may cause agencies to unnecessarily hold up acceptance and payment until they complete documentation required for an inspection.

17. The proposed change includes clauses which are unique to an individual procurement. GSA should consider removing such provisions from the GSAR and including them in a document or database that is easier to change to keep pace with federal and industry changes. For example

A. 538.273(d)(21) prescribes a samples clause applicable only to carpet

B. 538. 273(d)(38) prescribes a clause applicable only to vehicles.

C. 538.273(d) (22) prescribes a clause restricting the receipt of orders from Navy ships that is only applicable to copiers, supplies and services

D. 538.273(d) (30) prescribes an Excise Tax applicable only to tires and tubes

E. 538.273(d)(39) prescribes a clause applicable only in contracts for vehicles.

18. Proposed 552.238.103 Vendor Managed Inventory typically applies only in Schedule 51V and perhaps Schedule 75. Should this clause be included in all solicitations?

19. 552.238-118 Delivery Prices. Delivery prices and terms are a matter of FSS contract negotiations, which should be based on a contractor's commercial practices. Mandating specific delivery terms and pricing through the GSAR will result in schedule contractors having to deviate from their standard commercial practices. Customization of these terms to meet

GSA specific requirements could necessitate wholesale changes to contractor shipping and delivery processes.

20. 552.238-114 Delivery Prices Overseas. As in paragraph 19 above, Delivery Prices and terms are a matter of FSS contract negotiations, which should be based on a contractor's commercial practices.

21. Several clauses cite 538.1203 as the prescribing regulation. We did not find that citation in either the proposed or existing GSAR.

A. 552.238–97 Payment by Credit Card.

B. 552.238–98 Warranty (Federal Supply Schedules)

C. 552.238–119 Federal Excise Tax.

22. 552.238-120 Guarantee. This clause is applicable only to major appliances. GSA should consider going to standard commercial warranty in all MAS schedules as provided for in the proposed Warranty Clause 552.238–98 and FAR 52.212-4 Contract Terms and Conditions—Commercial Items.

23. Currently, some but not all MAS contain an Interpretation of Contract Requirements. The Coalition recommends that GSA should the delete the clause 552.238-125 "Interpretation of Contract Requirements" from the proposed rule. First, the clause is unnecessary because the rules of contract interpretation are well established through case law. This new provision introduces ambiguity into a well-established and understood system. Second, the rule potentially chills communication between the contractor and its customer. Under this proposed regulation, it could be argued that nothing that the customer agency or GSA's own contracting specialist communicates is "binding." Finally, the rule may result in a significant increase in the GSA Contracting Officer's workload as contractors request "binding" interpretations of numerous provisions in writing—or, alternatively, contractors will not bring issues to the GSA Contracting Officer at all for fear of an adverse finding that down the road, the Government might argue forecloses the contractor's position. In short, the language of the proposed clause does not facilitate the dynamic relationship that is necessary between the Government and GSA Schedule contractors.

24. Some of the proposed clauses seem impracticable to negotiate at the schedule contract level. GSA should consider deleting such clauses from the GSAR or including instructions for implementing the provisions at the task order level. For example:

A. 552.238.108 Performance Oriented Packaging

B. 552.238-129 Spare Parts

C. 552.238-113 Parts and Service. Paragraph (c) requests Contractors to include in the price list the names and addresses of all supply and service points maintained in the geographic area in which the Contractor will perform. Furthermore, the contractor must indicate opposite each point whether or not a complete stock of repair parts for items offered is carried at that point, and whether or not mechanical service is available. This information may not be available at the time an offer is submitted and the contract

awarded. Further, the requirement complicates compliance with GSA Advantage. For products, the price list is itemized in GSA Advantage – this means that new fields would need to be added to the system requirements or as an additional burden to the contractor; they would need to upload an additional text file into their SIP upload.

In light of the volume of changes, GSA should allocate additional time to allow interested parties to comment on the proposed language, discuss specific issues with each of the legacy policies, and the implications on current operations. Given the broad scope of the schedule program, and its importance to federal customers and GSA contractors, careful consideration should be given to each of the proposed clauses included in the proposed rule. The Coalition for Government Procurement appreciates your consideration of our comments.

Sincerely,

Roger Waldron
President