



August 14, 2017

Michael Downing
Regulatory Reform Officer
General Services Administration
1800 F St. NW
Washington, DC 20405-0001

Subject: Notice MV-2017-01 Evaluation of Existing Acquisition Regulations

Dear Mr. Downing,

The Coalition for Government Procurement appreciates the opportunity to submit the following comments regarding the General Services Administration's (GSA) evaluation of existing acquisition regulations in accordance with Executive Order (EO) 13777 "Enforcing the Regulatory Reform Agenda."

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 tens of billions of dollars of the sales generated through the GSA Multiple Award Schedules (MAS) program, VA Federal Supply Schedules (FSS), the Government-wide Acquisition Contracts (GWAC), and agency-specific multiple award contracts (MAC). Coalition members include small, medium, and large businesses that account for more than \$145 billion in Federal Government contracts. The Coalition is proud to have worked with Government officials for more than 35 years towards the mutual goal of common sense acquisition.

As requested, the Coalition's comments will provide recommendations for the repeal, replacement, or modification of the following acquisition regulations:

- The Price Reductions Clause (PRC) and the Commercial Sales Practice (CSP) format
- The Transactional Data Reporting (TDR) rule
- Evergreen Contracting
- Order Level Materials (OLM) Regulation
- Commercial Supplier Agreement
- Pricing Policy Reforms
- "Best-in-Class" Contracts

Additionally, the Coalition has provided feedback on other regulations and practices which are burdensome to contractors and should be reviewed and reformed.

I. The Price Reductions Clause (PRC) and the Commercial Sales Practice (CSP) Format

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 during the initial award. In a multiple year contract, the PRC assured that MAS prices and pricing offered in response to subsequent 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.

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 require offerors to disclose their standard commercial sales and discounting practices, and exceptions to such practices. The CSP does not acknowledge that there is a competition requirement for many GSA Schedule orders.

The PRC¹ and the CSP² no longer have practical utility in today's Schedules program. These compliance and data reporting mechanisms cause significant burdens for Schedules contractors, both in terms of time spent on compliance activities and the costs of those activities. These costs are inevitably passed on to customer agencies in the form of higher pricing for services and products offered under GSA and VA Schedules. Unfortunately, these investments do not result in increased value for customer agencies or taxpayers. Today "fair and reasonable" pricing under Schedule contracts is primarily driven by competition and market forces, not the PRC and CSP.

These two regulations pose significant burdens for Schedule contractors, are outdated, unnecessary, or ineffective, and impose costs that exceed benefits. As such, GSA should eliminate the PRC and the CSP. The Coalition has outlined the significant burdens associated with these regulations and developed an appropriate alternative that would ensure the Schedules program's eminence in the Federal market.

A. The PRC and CSP are Unnecessary and Burdensome

The Coalition has estimated that the cost of compliance with the PRC and CSP to industry is approximately \$850 million³ every year. This estimate includes the cost for industry to monitor and track sales, train employees, maintain compliance systems, develop a CSP, and maintain/modify a CSP. This cost is ultimately passed on to agency buyers in the form of higher prices. This burden is likely underestimated because it does not account for the costs of consultants and lawyers which companies frequently utilize in order to comply with these regulations.

Perhaps the most powerful statement of the PRC's lack of utility in driving price reductions at the contract level comes from GSA's Transactional Data proposed rule published on March 4, 2015. In the Background section of the proposed rule, GSA notes that based on an analysis of modifications from 9 Schedule contracts between October 1, 2013 and August 4, 2014:

¹ GSAR 552.238-75

² GSAR 515.408

³ For more information on the burden estimates see the Coalition's 2016 submissions on the FSS Pricing Disclosures http://thecgp.org/images/FSS-Pricing-Disclosures_Final-v2b-1.pdf

“only about 3 percent of the total price reductions received under the price reductions clause were tied to the ‘tracking customer’ feature. The vast majority (approximately 78 percent) came as a result of commercial pricelist adjustments and market rate changes, with the balance for other reasons.”⁴

Based on GSA’s public statement in the Transactional Data Reporting proposed rule as well as Coalition member feedback, there is agreement between GSA and its contractors that market conditions and competition are the significant drivers of price reductions in the Schedules program.

B. The PRC and CSP are Outdated Policies

The current pricing regime in the Schedules was developed at a time when contractors generally had standard prices and price lists to which they adhered. The goal of GSA was to achieve a discount from a standard price list through contractor disclosures of commercial sales (i.e. CSP) and then to maintain that relationship throughout the life of the contract (i.e. PRC). The market has changed substantially since these processes were created and they are no longer effective pricing policies.

Notably, the PRC and the CSP do not account for crucial aspects of the market including:

- The dynamic nature of prices which can change multiple times in a single day
- The proliferation of service and technology companies that create unique solutions for their customers without relying on catalogs and price lists
- The proliferation of high tech products and services which may not have historical pricing data that can be submitted in a CSP format
- The complexity of labor categories, which are not always used in the private sector

C. The PRC and CSP Inhibit the Schedules

The Schedules program offers many benefits to federal customers including:

- Compliance with government-wide acquisition policies such as compliance with the TAA and small business subcontracting plans
- Continuous open season, which provides a wide array of businesses offering numerous products and services
- 15,000 qualified vendors
- The ability to create blanket purchase agreements

The program is, however, in a period of transition and must adapt to the market in order to thrive. The Schedules are facing competition from other government-wide contracts (such as NASA SEWP), agency-specific contracts, DoD FedMall, and potentially from the online commercial marketplace, as proposed in the Section 801 of the 2018 National Defense

⁴ GSAR; Transactional Data Reporting, 80 Federal Register 11623

Authorization Act⁵. One of GSA's most effective marketing tools for the Schedules is the program's 15,000 qualified vendors. Yet, due to the costs and compliance risks associated with the Schedules, contractors often direct agencies to use other vehicles, which are less burdensome to industry.

Eliminating the PRC and CSP would modernize the program, reduce cost and enable industry to more effectively market the Schedules to more agency buyers.

D. An Alternative to the PRC and the CSP

The Coalition has long advocated for the reform of the PRC and the CSP, and we have recommended an alternative that could be utilized instead. GSA could pilot a "Comprehensive, Competitive Services Schedule (CCSS)" for IT and professional services. Under this CCSS, GSA and offerors would negotiate basic agreements establishing key terms and conditions (e.g. Industrial Funding Fee, Commercial Supplier Agreement, small business subcontracting plans, and other applicable commercial and/or government-unique terms) that would govern at the subsequent task order competition. The CCSS would allow for Other Direct Costs (ODCs) at the order level, consistent with FAR 52.212-4. Offerors would be required to post their hourly rates via GSA Advantage!, and the PRC and CSP would be eliminated.

Entering into the agreement, itself, would be a condition for participating/competing at the task order level. Further, audits under this CCSS would mirror standard commercial practice. Specifically, they could be performed focusing on task order performance of the service requirement. After the CCSS has been piloted for IT and professional services, the concept should be expanded to the rest of the Schedules program.⁶

Finally, GSA, recognizing the shortcomings of the PRC and the CSP, has begun the process of phasing out the PRC and the CSP with the introduction of transactional data reporting. The Coalition believes, however, that GSA should eliminate the PRC and CSP without requiring a contractor to accept transactional data reporting (which is also a significant cost burden to industry). Eliminating these burdensome regulations matches the spirit and intent of the Executive Order to reduce burdensome regulations and would enhance the value of the Schedules program for Federal buyers.

II. The Transactional Data Reporting (TDR) rule

In June 2016, GSA finalized the Transactional Data Reporting (TDR) rule—one of the most significant changes to the Schedules program in a generation.⁷ If a contractor decides to participate in the TDR pilot, they are required to report 11 transactional data elements for every order under their GSA contract. Additionally, to compensate for the additional burden to

⁵ H.R. 2810 National Defense Authorization Act for Fiscal Year 2018
<https://www.congress.gov/115/bills/hr2810/BILLS-115hr2810rh.pdf>

⁶ See Coalition's April 21, 2016 blog "How GSA can make it easier to deliver best value Services and Solutions through the Federal Supply Schedule (FSS) Program" for the legal justification of the CCSS <http://thecgp.org/how-gsa-can-make-it-easier-to-deliver-best-value-services-and-solutions-through-the-federal-supply-schedule-fss-program.html>

⁷ GSAR 552.238-74 Alternate I (Jun. 2016) and GSAR 538.273(b)(1)

industry, contractors will no longer have to comply with the PRC or CSP. The goal of rule is to provide GSA with a repository of transactional data which could be used by contracting officers when negotiating fair and reasonable prices. The ultimate objective of the rule is to improve GSA's ability to conduct price analysis, validate fair and reasonable pricing, and allow customers to compare their prices to other GSA contracts.

The Coalition recommends that GSA terminate the TDR pilot immediately. TDR is burdensome to industry and ultimately ineffective for gathering information on fair and reasonable pricing, since the data does not include information on the terms and conditions of the order. Additionally, Coalition members have confirmed many of the concerns that were raised when this rule was first proposed. Specifically, the data is being used to drive prices lower without regard to terms and conditions, which will damage the supply the chain. Furthermore, auditors and contracting officers are still requesting commercial sales practices from pilot participants despite the elimination of the CSP—this practice significantly increases the burden of TDR, beyond the estimates provided by GSA. Furthermore, members remain concerned that TDR will not increase the value of the Schedules program to Federal customers.

A. TDR is Burdensome and Ineffective

The Coalition estimates that the cost of the TDR rule, if it were implemented across the entire Schedules program, would be approximately \$534 million annually. This estimate includes the cost to industry for collection, review and submission of the transactional data. Specifically, the Coalition's estimate was based on several premises. First, the burden is only assumed by contractors who have sales on their contract, since there is no reporting burden if there is nothing to report. Approximately, 37 percent of Schedule contract holders have no reported sales on their contracts, and thus were eliminated from the Coalition's estimate because their burden is most likely negligible. Second, the Coalition surveyed its members, requesting estimations of the monthly reporting burdens. The survey found that for large business, compliance would consume an additional 68 hours each month. Further, compliance for small business would consume an additional 38 hours of reporting burden every month. Third, the Coalition assumes the same hourly wage rate of \$68 per hour as used by GSA in their estimate.

Based on these premises the rule would cost a large business more than \$55,000 each year to comply, and it would cost a small business more than \$31,000 each year to comply. These estimates were created before the pilot began. Significantly since the pilot rolled out, Coalition members have confirmed these estimates, noting that the pilot sometimes required the addition of two to three full time employees to supervise and monitor the data collection.

The size of the burden is largely the result of two factors: duplication of effort and the labor-intensive nature of the data collection. Collecting data through 15,000 contractors is inefficient, and results in significant duplication of effort. Instead, GSA could improve eBuy, GSA Advantage!, and FPDS to collect data from hundreds of Federal activities instead of through more than 15,000 contractors.

In addition, even if companies have existing systems which can track transactional data (and most Coalition members report that they do not), the data still has to be reviewed before it can be submitted to the Government, due to the sensitive nature of the information. Furthermore, if

transactional data were collected through the government it would assure more complete and consistent data collection.

Despite the high cost for collection, the data has questionable utility. For example, the prices for firm fixed price contracts for services are based on requirements at the task order level. The utility of this transactional data is questionable because the price at the task order level will be based on the specific requirements of the buyer, but those unique terms and conditions are not collected in the transactional data. Yet, these firm fixed price contracts for services account for more than 51 percent of all sales under the Schedules program. Additionally in the furniture industry and the IT hardware (e.g. laptop and desktop computers) industry, products are configured based on the needs of the buyer. These configurations affect the price of the order; so that two orders with the same products could reasonably have wide differences in prices. Without collecting information such as the type of material used in the chair or the specific laptop configuration, the data will provide an incomplete picture. Industry remains concerned about a regulation that imposes such high costs for the Government and contractors in order to provide questionable benefits to the Government.

B. TDR is Not Attracting Agencies to the Schedules

In contrast to GSA's approach with TDR, DoD, GSA's largest customer, is moving to streamline their processes. Their new FedMall system allows buyers to make purchases of office supplies below the micro-purchase threshold. FedMall relies on a catalog upload without a contract or price negotiations. The program aims to take advantage of competitive forces to deliver the best value to buyers.

GSA should refocus its efforts to create a contracting program that is attractive to both Government and industry. For example, agencies have expressed a desire to have the capability to engage in cost-reimbursable contracting and to utilize Other Direct Costs on Schedule orders. Additionally, industry desires a stronger supply chain risk management program that reduces grey-market items on the Schedules. Significantly, these capabilities exist on competing vehicles. Instead of implementing a regulation that has limited utility, GSA could focus its efforts on providing services that are demanded by both Government and industry.

C. TDR Damages the Integrity of the Supply Chain

When TDR was proposed, the Coalition and other industry groups raised the concern that TDR would be used to drive contract level prices to the lowest reported point, regardless of terms and conditions, quantities, and market factors. A system that seeks to drive down pricing through constant comparisons of individual transactions leads to a downward or death spiral in pricing that is inconsistent with the dynamics of the commercial market place. It is simply not sustainable over the long term for the Federal supply chain.

This race to the bottom has also been called "lowest price, regardless." Despite assurances from GSA in the final rule that, "transactional data does not transform the federal acquisition system into a lowest-price procurement model," Coalition members have experienced erroneous price

comparisons that do not account for differing terms and conditions and they have been threatened with having products removed unless prices were lowered.⁸

This shift to a “lowest price, regardless” model is damaging the supplier base, discouraging small business from participating in the Schedules, incentivizing best value providers to leave the program, reducing competition, and encouraging unethical companies to sell grey-market items. GSA should terminate TDR immediately and update its own systems (particularly GSA Advantage!, GSA eBuy, and FPDS). These actions would ensure that GSA can access data, without imposing a significant burden on contractors or driving to a “lowest price, regardless” model for the Schedules program.

III. Evergreen Contracting

One of the pillars of success for the Schedules program is the continuity and opportunity provided by the program’s 20-year contract terms. This 20-year period of performance was introduced in the mid-1990’s, and as a result of this change a large number of successful Schedule contracts were reaching the end of their 20-year period at the same time. In collaboration with the Coalition, GSA created the Contract Continuity Initiative and the Streamlined Offer for these vendors to submit proposals for their new contracts. This streamlined process eliminated or reduced several burdensome aspects of a proposal, including readiness assessment, financial statements, and corporate experience. The removal program was limited to successful contractors who have a demonstrated history of success in the Schedules program.

The Coalition recommends that GSA build on the success of the streamlined offer and create a true evergreen program, where contracts can be renewed for an unlimited number of option periods. Ultimately, the streamlined offer demonstrates that it is unnecessary to make contractors complete new full-blown proposals at the end of their 20-year period of performance. Additionally, GSA already has protections in place to mitigate the risks of evergreen contracting. First, Schedule contracts do not guarantee Government obligations, other than a \$2,500 per year minimum. Second, GSA can cancel Schedule contracts for lack of sales, ensuring that only successful contractors will be able to participate in the evergreen contracts.⁹ Finally, GSA can choose not to exercise an option, providing further protection to the Government.

Updating the Schedules to allow for evergreen contracting would benefit GSA customers, resolve any misunderstandings regarding BPA’s, and ensure that agency buyers continue to have access to the products and services they need to fulfill their missions. Additionally, extending the evergreen program benefits both GSA and industry by limiting unnecessary burdens. Although GSA’s Contract Continuity Initiative has been successful in alleviating some industry burdens, the process has led to confusion among agencies about the future of BPA’s, particularly for those vendors with dual contracts.

IV. Order Level Materials Regulation

⁸ GSAR; Transactional Data Reporting, 81 Federal Register 41108

⁹ I-FSS-639 Contract Sales Criteria (Mar. 2002)

The Coalition recommends that GSA move forward with adding the capability to utilize Order Level Materials (OLM) to the Schedules. The lack of OLM's (also known as Other Direct Costs or ODC's) on the Schedules makes it more difficult to procure total solutions. Additionally, Coalition members have reported that the lack of ODC's incentivizes agencies to use other vehicles. Notably, the FAR already allows for the inclusion ODC's in commercial item contracts.¹⁰

The Coalition has already submitted comments on GSA's proposed rule¹¹, and we recommend that GSA modify the rule so that:

- Contractors are not required to submit three quotes for price reasonableness because it is a burdensome non-commercial practice and it is not required when pricing ODC's on other government contracts
- Contractors are not required to report order level materials through a separate SIN—the burdensome process would allow GSA to collect data of limited value at a cost to contractors
- Agencies are allowed to retain the discretion to allow for indirect costs at the order level
- OLM's are allowed to be greater than 33 percent of the value of the order.

V. Commercial Supplier Agreement Deviation

On May 31, 2016, GSA issued a proposed rule entitled, Unenforceable Commercial Supplier Agreement Terms.¹² The proposed rule is intended to streamline end user license agreement reviews and contract negotiations by ensuring that certain contract language defers to Federal law where there is a conflict with commercial terms.

As written, the proposed changes to the GSAR would have far-reaching, unintended negative impacts on the availability of commercial products and services to Federal agencies. We are concerned especially with the proposed rule's significant change to the "order of precedence" language of the commercial item clause. The July 2015 class deviation creates a preference for government terms and conditions. Such a preference is inconsistent with law, regulation, and commercial practice. Further, it presents an unnecessary burden to contractors. The increase in burden and risk, decreases contractor incentive to bring innovative solutions to the Federal marketplace, and thus, it undermines the government's ability to achieve the very outcomes intended by the issuance of the proposed rule.

The proposed rule creates conflict with the underlying statutory authority for commercial item contracting, as well as with over 20 years of regulatory implementation through the FAR.

The Federal Acquisition Streamlining Act of 1994 (FASA) requires that, to the maximum extent practicable, the agency head ensure that commercial items are procured to fulfill agency requirements, that requirements be modified so that they can be met by commercial items, that

¹⁰ FAR 52.212-4 Alternate I (Jan. 2017)

¹¹ GSAR; Federal Supply Schedule, Order-Level Materials, 81 Federal Register 62445

¹² GSAR; Unenforceable Commercial Supplier Agreement Terms, 81 Federal Register 34302

specifications be stated to enable offerors to supply commercial items, and that policies be revised to reduce the impediments to acquiring commercial items. See 41 U.S.C. 3077.

FASA is implemented at Part 12 of the FAR. Pursuant to FAR 12.212(a), the government is required to procure software under commercial license terms. In addition, FAR 12.212(b) limits the government's rights to, "only those rights specified in the license contained in any addendum to the contract." Further, FAR 12.301(a) stipulates that, "contracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses required by law or...[d]etermined to be consistent with customary commercial practice." Moreover, FAR 12.302(c) precludes the inclusion of, "any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures."

The order of precedence established in the July 2015 class deviation appears to contradict existing statutes and regulations.

The Coalition recommends that GSA reverse the change to the order of precedence and return to the FAR clause language that existed prior to the July 2015 class deviation. The changes made by the July 2015 class deviation go beyond what is necessary for GSA's purposes (especially considering that GSA enumerated the provisions that it needed). By establishing a preference for government terms and conditions, the changes introduced in the July 2015 class deviation contradict numerous FAR clauses, as well as FASA, which mandates a preference for commercial terms and conditions, and thus, provides fertile ground for wasteful conflict resolution.

VI. Pricing Policy Reforms

The Schedules program has, at times, received criticism from Congress, oversight groups, ordering agencies, and even GSA's Office of Inspector General (IG). Although the Coalition believes that the Schedules are in need of reform, in particular the changes included in these comments, some of the criticisms of the Schedules result from a fundamental misunderstanding about the program. These criticisms of the Schedules equate contract price with an order price, which ignores the power of market forces in achieving dynamic prices.

For example, GSA's Inspector General published a report in July 2016 which analyzed the prices of Information Technology products sold by resellers on the Schedules. In the report, the IG found that prices on the Schedule are higher than those commercially available. Significantly, the IG noted that:

IT schedule prices that are higher than those commercially available are inconsistent with provisions of the laws, regulations, and policies [of the Schedules Program]. Such pricing fails to fulfill a primary component of the value proposition of the

Schedules Program, which is competitive, market-based pricing that leverages the buying power of the Federal government.¹³

Significantly, the IG analyzed contract prices, not order price, and the report demonstrates that they expect that the program will deliver the lowest price at the contract level. Pricing is the direct result of known requirements – and a Schedule contract only has a guaranteed minimum of \$2,500 and the *opportunity* to compete for work. If the buyers want competitive pricing there must be a firm commitment with well-developed requirements.

Fundamentally, the Schedules program is designed to foster competition at the task order level. This tenant of the program is enshrined in the statutory and management changes that have occurred within the Schedules in the last 10 years. Significantly since the update to ordering procedures in 2011, buyers are required to seek additional competition for orders over \$150,000. This change in ordering procedures recognizes the power of market forces and competition in achieving the best value for buyers. It also demonstrates that that it is easier to achieve volume discounts with a firm commitment.

Ultimately, there is a misunderstanding about the program, which is exasperated by the confusing pricing policies of GSA. In actuality, the Schedule price should be a fair and reasonable price, and agency buyers can negotiate pricing at the order level which fits their unique mission needs. In order to help resolve this misunderstanding, GSA should make the following revisions:

- Update FAR 8.402(a) to read as follows: “simplified process for obtaining commercial supplies and services at prices associated with volume buying for task and delivery orders.”
- Update the GSA Acquisition Manual to eliminate the phrase “most favored customer”
- Update the GSA Acquisition Manual 538.270-1(c) to state that GSA will seek to obtain a fair and reasonable price, not the best price or the most favored customer price
- Rescind FAS Procurement Information Notice 2012-04. This document provides guidance on verifying most favored customer pricing and will no longer be necessary if most favored customer is deleted from the GSA Acquisition Manual

VII. Best-in-Class Designations

In December 2014, the Office of Federal Procurement Policy (OFPP) issued the memorandum entitled *Transforming the Marketplace: Simplifying Federal Procurement to Improve Performance, Drive Innovation, and Increase Savings*.¹⁴ The memorandum introduced the concepts of Category Management and “Best-in-Class” (BIC) to Federal Procurement. According to the memo, BIC criteria were developed so that category managers could identify best contracts and practices

¹³ See *IT Reseller Contracts Present Significant Challenges for GSA’s Schedules Program Report Number A120026/Q/6/P16003*, dated July 22, 2016, available at https://www.gsaig.gov/sites/default/files/audit-reports/A120026_1_0.pdf

¹⁴ See *Transforming the Marketplace: Simplifying Federal Procurement to Improve Performance, Drive Innovation, and Increase Savings*, dated December 4, 2014, available at <https://obamawhitehouse.archives.gov/sites/default/files/omb/procurement/memo/simplifying-federal-procurement-to-improve-performance-drive-innovation-increase-savings.pdf>

within their categories and validate performance metrics. The Category Management Leadership Council (CMLC) later developed criteria for BIC contracts which included:

- Rigorous Requirements Definitions and Planning Processes
- Appropriate Pricing Strategies
- Data-Driven Demand Management Strategies
- Category and Performance Management Practices
- Independently Validated Reviews

In practice, agencies are encouraged, and in some cases required, to utilize BIC contracts in order to achieve administrative savings and reduce contract duplication. The Coalition supports the goals of Category Management, namely to encourage the use of existing contract vehicles, reduce contract duplication, improve requirements development, and share best practices. There are, however, aspects of Category Management and BIC that OFPP should address prior to further implementation.

In May 2015, the CMLC issued *Government-Wide Category Management, Guidance Document – Version 1.0*.¹⁵ This document outlined the responsibilities of the CMLC and category managers, and it provided guidance on the selection of best in class contracts. The guidance document did not go through a rule-making process and has not been incorporated into the Federal Acquisition Regulations. A draft OMB circular to formally codify category management was released for public comment on October 7, 2016.¹⁶ OMB has not issued a final circular or provided an update on the status of the draft circular.

The Coalition is concerned about the identification of BIC contracts by the CMLC, which has identified at least 18 BIC contracts to date.¹⁷ The current BIC criteria focus on administrative process-related measures and data reporting. As a result, the CMLC is establishing a management framework that selects BIC contract “winners and losers” based on government-unique processes and data reporting, rather than contract performance characteristics that deliver best value mission support.

Additionally, there is concern that agencies are making significant changes to their contracts to achieve BIC designations. For example, GSA has proposed changing Schedules 51V, 73, and 75 in order to incorporate BIC features, but the BIC criteria have not been formalized through a rulemaking process.¹⁸ The Coalition requests that GSA, OFPP, and the CMLC work to create specific guidance for BIC, seek public comment on that guidance, and freeze all BIC determinations until that guidance has been finalized. The BIC freeze will limit the government’s burden, particularly if the BIC criteria are changed as a result of the rulemaking.

¹⁵ See *Government-Wide Category Management, Guidance Document – Version 1.0*, dated May 21, 2015, available at http://thecgp.org/images/Gov-wide_CM_Guidance_V1-2.pdf also available on the Acquisition Gateway

¹⁶ Proposed Office of Management and Budget Circular No. A-XXX, “Implementing Category Management for Common Goods and Services,” 81 Federal Register 69860

¹⁷ See “Best-in-Class Solutions (as of May 17, 2017),” available at <http://thecgp.org/bestinclass-consolidatedlistupdated5-17-17updated-1> also available on the Acquisition Gateway

¹⁸ See “Request for Information Reopening of Multiple Award Schedule 75 – Office Products and Supplies,” available at https://interact.gsa.gov/sites/default/files/RFI-Re-openingofMAS75_0.pdf

There are still unanswered questions about BIC criteria, and we would request that GSA's Government-wide Category Management PMO provide responses to the following questions:

- According to the existing guidance any agency's contract can be made BIC. By what authority are other agencies permitted to use those vehicles? GSA has specific statutory authority in the Property Act to manage government-wide contracts and OFPP has the authority to designate GWACs under the Clinger-Cohen Act. Has a similar authority been extended to other agencies? For example, the Performance Work Statement for the Total Delivery Solution, a BIC Mandatory Contract managed by DoD, states that Federal agencies can utilize the contract, but the contract does not provide the authority for DoD to operate a government-wide contract.
- Are meetings of the CMLC open to the public? Are the minutes from the meetings, in particular the discussions and decisions about BIC contracts, publically available?
- The Regulatory Freeze issued on January 20 required agencies to "review questions of fact, law, and policy [the regulations] raise." Although the Category Management guidance was not published in the Federal Register, the regulatory freeze covered "any agency statement of general applicability and future effect 'that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue.'" Have the BIC criteria been reviewed by the new Administration?
- If a government-wide contract is not selected as BIC, will agencies assume that they should no longer use them? To what extent will agencies' needs now be permitted to drive their use of contracts? What guidance will be provided in this case?

There are still outstanding questions in regards to BIC, which should be addressed before the government undertakes the burden of adding BIC criteria to their contracts. GSA, OFPP and CMLC should address these concerns and develop final guidance with input from stakeholders. At the very least, this significant change to the acquisition system should be codified into the Federal Acquisition Regulations.

VIII. Miscellaneous

There are numerous other opportunities for GSA to improve the utility and performance of the Schedules.

- *Streamline and Simplify Audits*—Audits under the GSA Schedules are farther reaching than other commercial item contracting programs and result in increased risk and costs for contractors. GSA should convene a working group of government and industry representatives to revise GSAR 552.215-71 Examination of Records by GSA (Multiple Award Schedule).
- *Establish Guidance on Contractor Assistance Visits*—These visits, managed by GSA's Industrial Operations Analysts, were originally intended to educate contractors, assist with contractor questions or concerns, and to offer business development resources. However, the visits have expanded in scope to become similar to an audit. GSAR 552.215-71 should be modified to provide some direction on the scope of these visits and to limit the visits to two in any one 5-year option period.

- *Create a MAS Chief Procurement Officer*—Coalition members report that there is a large discrepancy in the interpretation of GSA’s regulations between centers, offices, and individual contracting officers. Two examples are transactional data where contracting officers are still requesting CSP information, and the streamlined submission, where contracting officers are treating the proposal as a new offer. The Coalition recommends that GSA create a MAS Chief Procurement Officer who would oversee a MAS Program Office which would ensure that regulations are implemented uniformly across the Schedules program. This office would also liaise with the Department of Veterans Affairs Federal Supply Schedule program which has begun to deviate from GSA’s policies on the management of the Schedules, and ensure consistency of policy between the VA and GSA.
- *Simplify Schedules Ordering Procedures*—GSA should convene a working group of government and industry representatives to revise FAR 8.405 Ordering Procedures for the Federal Supply Schedules. In order to maintain its relevance, GSA needs to ensure that its ordering procedures are streamlined and effective. Additionally, GSA should look to provide more flexibility in regards to single-award BPA’s. Changes to the ordering procedures in 2011 limited the use of single-award BPA’s, but this process has caused immense harm to the Department of Veterans Affairs pharmaceutical program which relied on this tool.
- *Delete Duplicative Special Item Numbers (SIN’s)*—GSA has created a bevy of new SIN’s, which are a method of marketing the Schedules to new customers. Many of these SIN’s, however, overlap with existing SIN’s, and result in higher compliance costs to vendors. GSA should review duplicative SIN’s and create a standardized and more rigorous process for adding SIN’s. This process should include some form of a business case analysis which demonstrates the need for the new SIN. GSA could incorporate this new guidance into FAR 38.201 Establishing and Administering Federal Supply Schedules.
- *Return to Continuous Open Seasons for all of the Schedules*—This is one of the defining characteristics of the Schedules program when compared to other government contracts. It ensures that the Schedules are competitive and innovative. GSA should re-open any Schedule or SIN that is currently closed to new offers, in particular Schedule 75 for Office Supplies which has been closed to new offers since 2010.
- *Reestablish GSA Expo*—Coalition members have expressed their concerns in recent years about the lack of quality, in-person training that agency buyers receive in how to use the Schedules. Reinstating an event like the Expo (which operated at no cost to the Government) is crucial for ensuring that buyers understand the Schedules and use them appropriately. Even if GSA’s policies and regulations are improved, they will still need to be communicated to agency buyers in order to be effective.
- *Put the Commercial Back in Commercial Item Contracting*—There has been a proliferation of non-commercial clauses in the Schedules, which is a commercial item contract. For example, some contracts now feature FOB Destination, even though it is not standard for the company and ultimately leads to delays for product delivery. Additionally in some cases, the Government has replaced the standard commercial termination clauses

from FAR 52.212-4 with clauses from FAR 49, even though they are not commercial clauses. GSA should gather input from industry and conduct a review of the clauses incorporated in its contracts in order to counter this trend.

IX. Summary of Recommendations

GSA has the potential to be the leader in Federal acquisition, but there are important changes that need to be made to its programs, particularly the GSA Schedules, in order to achieve that vision. The Coalition recommends that GSA take the following actions to streamline its regulations, and ultimately make the Schedules more attractive to both Government and industry:

- 1) Eliminate the PRC and the CSP Format
- 2) Implement a CCSS pilot for IT and professional services
- 3) Cancel the TDR Pilot
- 4) Improve GSA Systems including eBuy, Advantage!, and FPDS in order to collect accurate data
- 5) Create evergreen contracts for the Schedules
- 6) Issue a final Order Level Materials rule
- 7) Reverse the change in the order of precedence for the Commercial Supplier Agreement
- 8) Update FAR 8.402(a) to read as follows: “simplified process for obtaining commercial supplies and services at prices associated with volume buying for task and delivery orders.”
- 9) Update the GSA Acquisition Manual to eliminate the phrase “most favored customer”
- 10) Update the GSA Acquisition Manual 538.270-1(c) to state that GSA will seek to obtain a fair and reasonable price, not the best price or the most favored customer price
- 11) Rescind FAS Procurement Information Notice 2012-04
- 12) Freeze BIC determinations until final guidance has been created and promulgated into the FAR
- 13) Convene a working group of government and industry representatives to revise GSAR 552.215-71 Examination of Records by GSA (Multiple Award Schedule)
- 14) Modify GSAR 552.215-71 to provide some direction on the scope of Contractor Assistance Visits and limit the visits to two in any one 5-year option period
- 15) Establish a MAS Chief Procurement Officer to manage the policy of the Schedules
- 16) Convene a working group of government and industry representatives to revise FAR 8.405 Ordering Procedures for the Federal Supply Schedules
- 17) Create more flexibility in FAR 8.405 to allow for single award BPA’s
- 18) Review duplicative SIN’s and create a standardized and more rigorous process for adding SIN’s to ensure the investment of adding SIN’s is justified
- 19) Reestablish continuous open seasons for all of the Schedules
- 20) Reestablish the GSA Expo
- 21) GSA should gather input from industry and conduct a review of the clauses incorporated in its contracts in order to limit non-commercial clauses

Thank you for considering the Coalition’s comments in response to the request for comments on the evaluation of existing acquisition regulations. If there are any questions, please contact me at (202) 331-0975.

Sincerely,

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

Roger Waldron
President

Bibliography

Section I

- [GSA Multiple Award Schedule Pricing: Recommendations to Embrace Regulatory and Commercial Market Changes \(9/9/13\)](#)
- [MAS Reform: Towards an IT Innovation Schedule \(1/28/14\)](#)
- [VA Multiple Award Schedule: Improvements Needed to Enhance the Effectiveness & Efficiency of the Program \(6/6/16\)](#)
- [Comments on IC 3090-0235, Federal Supply Schedule Pricing Disclosures Submission #2 \(5/11/16\)](#)
- [Comments on IC 3090-0235, Federal Supply Schedule Pricing Disclosures \(1/19/16\)](#)
- [Coalition Letter to the GSA Senior Procurement Executive on the Price Reductions Clause Waiver \(8/1/14\)](#)
- [Coalition Letter to GSA Senior Procurement Executive on Recent Interpretations of the Price Reductions Clause \(7/29/14\)](#)
- [Coalition Letter to GSA Assistant Commissioner on the Price Reductions Clause Waiver \(4/3/13\)](#)
- [Comments on IC 3090-0235, Price Reductions Clause Submission #2 \(4/16/12\)](#)
- [Comments on IC 3090-0235, Price Reductions Clause Submission #1 \(2/27/12\)](#)

Section II

- [Comments on GSAR Case 2013-G504 Transactional Data Reporting \(5/4/15\)](#)
- [Statement on Transactional Data Reporting before the Subcommittee on Contracting and Workforce of the Committee on Small Business \(6/25/15\)](#)
- [Coalition Letter to GSA Senior Procurement Executive on the Implementation of the TDR Pilot \(8/10/16\)](#)

Section III

- [Evergreen Contracting: Ensuring Competition, Continuity, and Opportunity for Customer Agencies and Contractors \(3/24/15\)](#)
- [The Untapped Potential of GSA's Multiple Award Schedule \(MAS\) Program \(11/5/15\)](#)

Section IV

- [Other Direct Costs White Paper \(9/30/11\)](#)
- [Response to RFI FAS 2013-02 \(3/17/14\)](#)
- [Comments on GSAR Case 2016-G506 \(11/8/16\)](#)

Section V

- [Comments on GSAR Case 2015-G512: Unenforceable Commercial Supplier Agreement Terms Proposed Rule \(8/1/16\)](#)
- [Comments on Notice of Class Deviation MVA-2015-01 \(4/20/15\)](#)

Section VI

- [GSA Multiple Award Schedule Pricing: Recommendations to Embrace Regulatory and Commercial Market Changes \(9/9/13\)](#)
- [Comments on GSAR Case 2013-G504 Transactional Data Reporting \(5/4/15\)](#)

Section VII

- [Comments on Proposed OMB Circular A-XXX Implementing Category Management for Common Goods and Services \(11/7/16\)](#)
- [The Unintended Consequences of Category Management's Best-in-Class \(BIC\) Approach? \(12/8/16\)](#)
- [Best in Class Contracts – Where is the Classroom? \(7/27/17\)](#)

Section VIII

- [Quick Fixes - Opportunities to Lower Costs without Decreasing Value \(10/31/13\)](#)
- [Response to Request for Information on Re-Opening MAS 75 \(1/17/17\)](#)
- [Comments on GSA's Proposed Continuous Diagnostics and Mitigation \(CDM\) SIN \(5/1/17\)](#)
- [How to Know if a CAV is an audit? \(5/8/15\)](#)
- [Letter on FAR Part 12 and the Recent Court of Appeals for the Federal Circuit Decisions, CGI Federal Inc. v. US \(3/24/25\)](#)