THE COALITION
FOR GOVERNMENT PROCUREMENT

1990 M Street, Suite 450
Washington, DC 20036

Phone: 202-331-0975
Fax: 202-822-9788

www.thecgp.org

September 20, 2023

Mark Lee
Assistant Commissioner
Office of Policy and Compliance
Federal Acquisition Service
General Services Administration
1800 F Street, NW
Washington, DC 20405

Dear Mr. Lee:

Thank you for your engagement with industry at the Coalition for Government Procurement's meeting on the Federal Acquisition Service's (FAS) current pricing and negotiation guidance and their implementation within the Multiple Award Schedule (MAS) program. The exchange clearly demonstrated the keen interest of all stakeholders in arriving at fair and reasonable prices in a predictable manner to assure efficient contract administration. Coalition members especially appreciated your willingness to listen as they shared their current experiences in contract negotiations and modification processing.

Over the course of their MAS contract negotiations, Coalition members have learned that FAS operational policy guidance, "FAS Policy and Procedure (PAP) 2021-05, Evaluation of FSS Program Pricing," is shaping contracting officer actions, including the focus of negotiations and the establishment of new document requests, among other directives/positions communicated to MAS contractors. This operational guidance raises questions regarding its relationship to the GSAR and FAR regarding the negotiation of fair and reasonable prices under the MAS program.

At the outset, it is not clear why an operational policy implemented with the force and effect of law and regulation has not undergone required public notice and comment, let alone been made available for contractors to use for compliance purposes. Notice and comments provide transparency, affording the agency an opportunity to improve a regulation to assure efficient policy administration. Additionally, a lack of transparency leaves contractors in the dark as to what is expected and provides fertile ground for a regulation's inconsistent or arbitrary implementation. It is no surprise that, in connection with the PAP, we are hearing of different implementation practices in different offices. Further, given the significant paperwork burden implications of the guidance, it is not clear whether any check has been made for the policy's compliance with the Paperwork Reduction Act.

Attached to this letter is our analysis of the PAP's key provisions. In the spirit of collaboration to improve the process, the Coalition offers to sponsor a session between contractors and FAS to work through the identified comments. Please let me know an opportune time for a follow-up meeting and we can work on the logistics.

Finally, FAS should make all PAPs and other such guidance available in a common library for public access. By so doing, all parties would be operating with a common understanding of policies and processes, which would serve to improve the efficiency of the contract administration process.

In the meantime, again, please accept our appreciation for engagement, and we look forward to continuing the dialogue on this important matter.

Thank you,

Roger Waldron

cc: FAS Commissioner Sonny Hashmi and GSA Senior Procurement Executive Jeff Koses

Feedback from The Coalition for Government Procurement on FAS Policy and Procedure (PAP) 2021-05, "Evaluation of FSS Program Pricing"

Unless otherwise noted, all quoted material is from FAS Policy and Procedure 2021-05, "Evaluation of FSS Program Pricing."

General Considerations

1. General Considerations, (3): *Ensure that offered products and services fall within the scope of the FSS solicitation and the vendor's proposed Special Item Numbers (SINs).*
    a. **Discussion:** As the Schedule has evolved, it has become increasingly service-focused, and many customers want total solutions from Schedule vendors. Requiring all product and service offerings to fall within the vendor's SINs unnecessarily hinders companies offering total solutions to their agency customers as they cannot offer supporting products/services under the same SIN as the primary solution. For instance, a contractor may wish to offer security services under an engineering services SIN because the region it works in requires additional security personnel, but it cannot do so if forced to undergo a scope review.
    b. **Recommendations**
        i. Only require contracting officers to conduct commercial items determinations.
        ii. Allow companies to select SINs that match their actual business practices which would allow/promote more competition at the SIN level.

2. General Considerations, (5): *Be alert to situations where a vendor proposes two or more identical commercial products. Ensure that identical commercial products with the same terms and conditions (i.e., delivery, warranty, etc.) are not awarded to the same SIN. Identical commercial products with the same terms and conditions may be awarded under different SINs if the prices are the same, there is a valid business reason, and the rationale is fully documented. Identical commercial products with the same terms and conditions should never be awarded to the contract at different price points.*
    a. **Discussion:** Despite this guidance, contractors report that contracting officers almost never allow offerors to cross-list products under multiple SINs, because of the requirement to demonstrate a valid business reason and document the rationale. This practice conflicts with FAS's (and indeed, the Federal Government's) desire to follow commercial best practices in commercial item acquisition because listing a solution under multiple SINs mirrors how organizations address distinct market segments. In effect, under its policy, GSA morphs commercial best practices into government-unique practices with no identified benefit to the Government and in contravention of procurement policy.
    b. **Recommendations**
        i. Ensure that contracting officers allow contractors to cross-list products in a manner that follows commercial best practices. Contracting officers and

contractors should not be required to provide additional rationale, justification or documentation beyond what is required for adding those products or services to the contract.

3. General Considerations, (6): *Leverage the collective buying power of the government to obtain competitive, market-based pricing.*

    a. **Discussion:** Directing contracting officers to leverage "collective buying power" encourages unrealistic/unachievable negotiation objectives for contracting officers and contractors. The underlying schedule contract terms and conditions do not leverage the collective buying power of the Federal Government. MAS contracts are non-mandatory. They are not requirements contracts. Rather, MAS contracts are IDIQ contracts that only guarantee (i) a $2,500 minimum purchase over 20 years for consideration and (ii) the opportunity to compete. At the time an offer is made, the contracting officer cannot commit the Government to purchase anything beyond that $2,500 minimum over the 20-year life of the contract. Thus, there is effectively no aggregate collective buying power to leverage at the time of award to justify a business commitment to price, only the promise of access to the Schedule marketplace. The relevant pricing question should not be MFC and highly competitive, or even lowest overall cost. It should be whether the price is fair and reasonable.
    b. **Recommendations**
        i. Revise or remove this language to match Schedule contract terms and market conditions accurately.

4. General Considerations, (6): *The Competition in Contracting Act (CICA) of 1984 (41 U.S.C. 253) provides that procedures established under the FSS program are competitive as long as orders and contracts result in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the needs of the Federal Government.*

    a. **Discussion:** In assessing the "lowest ***overall*** cost alternative" (emphasis added), FAS should reference "total acquisition cost" (TAC). Doing so would provide clarity across FAS and assure an accounting for, and minimization of, all the costs associated with the acquisition process, not only price. TAC includes, but is not limited to, acquisition planning, issuance of the solicitation, negotiation of contracts, time, and administration and management costs. It should be recalled that the MAS program saves customer agencies time and money through efficient access to the commercial market by lowering overall costs to the Government through standard contract terms for established contract frameworks that are the foundation for streamlined task and delivery order competitions. Leveraging TAC under this regime, then, permits contracting officers to consider how additional administrative burden on the Schedule results in higher acquisition costs for Federal agency customers in order to avoid scenarios where a marginal decrease in price is outweighed by a marginal increase in administrative cost.
    b. Recommendations
        i. Incorporate TAC into this section to emphasize that the lowest cost alternative is not derived exclusively by focusing on the lowest contract price. It is arrived at

by assessing all the cost inputs associated with the purchase involved. Moreover, because the MAS program is not mandatory, any decision by a contracting officer to use the program reflects their assessment that the MAS program will result in the best value, lowest TAC.

5. General Considerations, (7): *Treat determinations of fair and reasonable pricing independently from prior determinations concerning the same or similar items. The information used in prior determinations may no longer be valid or applicable.*
    a. **Discussion:** Some contracting officers interpret the language to require the revalidation of fair and reasonable pricing, even when pricing has been determined to be fair and reasonable and still valid, or when it is not associated with a pending modification, adding unnecessary administrative burden and delay. A more realistic and efficient policy than revalidation would be to encourage contracting officers to restrict new fair and reasonable price determinations to the option period or other significant overall pricing events, such as the initial award of a contract or a modification to add the product or service. Currently, contractors are being subjected to "fair and reasonable price re-determinations" for an entire contract (all line items) triggered by the submission of contract modifications, or when contractors are adding already awarded products or services to new SINs. This approach undermines the validity of the Schedule contract for all stakeholders, creating unnecessary, unproductive costs and administrative burdens on contracting officers and contractors alike. Furthermore, GSA is moving towards a pricing structure increasingly reliant on transactional prices paid data. If policy guidance prohibits a reliance on previous fair and reasonable determinations, then this transactional data that GSA collects is rendered questionable by this policy.
    b. **Recommendations**
        i. Instruct contracting officers to restrict determinations of fair and reasonable pricing to significant events, such as the option period or contract award or the initial modification to add the product or service.
        ii. Guidance should encourage contracting officers to rely on their best business judgment. For example, this current policy does not provide an exception for a fair and reasonable determination made by the same contracting officer.

Traditional Offers and Contracts

6. Traditional Offers and Contracts, (1): *When evaluating traditional offers and contracts - [contracting officers shall] seek equal to or better than the best price and non-price terms and conditions given to the MFC (Most Favored Customer).*
    a. **Discussion:** The language in this section matches GSAR 538.270-1 but fails to include the full language at (c): "The Government will seek to obtain the offeror's best price (the best price given to the most favored customer). **However, the Government recognizes that the terms and conditions of commercial sales vary and there may be legitimate reasons why the best price is not achieved.**" [Emphasis added.] Thus, by eliminating the full text of the GSAR, the PAP does not provide contracting officers with clear and complete guidance to determine fair and reasonable pricing and de-emphasizes contracting officer discretion in the process.

b. **Recommendations**
    i. Ensure that all the language from GSAR 538.270-1 (c) is included in this instruction, and that contracting officer discretion in the process is emphasized.

7. Traditional Offers and Contracts, (2): *Negotiate concessions from established catalogs (when the vendor has a commercial catalog), including price and non-price terms and conditions.*
    a. **Discussion:** This section matches the GSAR, but should address circumstances where contractors have no catalog, as is the case for many services companies, which currently comprise the majority of MAS contractors.
    b. **Recommendations**
        i. Add language to address situations where contractors submitting a traditional offer have no catalog. Some important topics to consider include how to establish market rates, how to evaluate proposed cost-build proposals, and how to evaluate supporting documentation from firm fixed price contracts which do not align to hourly rates.

8. Traditional Offers and Contracts, (4): *Vendors have been advised that MFC prices that are not highly competitive will not be determined fair and reasonable and will not be accepted (see FAS provision SCP-FSS-001* Instructions Applicable to All Offerors*).*
    a. **Discussion:** Because the "highly competitive" language has been eliminated in SCP-FSS-001 since Refresh 16 (and removed in Refresh 17), this language should be removed. The impact of this language on contract negotiation is still rippling through the system. To ensure that this commonsense policy change takes hold, the language should be deleted from all policy guidance, and contracting officer training should be updated to address the change in the context of determining a “fair and reasonable” price.
    b. **Recommendations**
        i. Remove this provision to conform to the MAS Solicitation.
        ii. Advise contracting officers that the “highly competitive” language no longer controls fair and reasonable price determinations.

9. Traditional Offers and Contracts, (5): *If necessary, COs may request* data other than certified cost or pricing data *to supplement the supporting documentation submitted with the offer (see FAR 15.402(a)(2)(ii)).*
    a. **Discussion:** This section risks distorting a holistic reading of the FAR provision and could undermine the intent of the underlying statute on which it is based. In effect, the FAR section sets forth a hierarchy of data that may be requested when certified cost or pricing data are not required under FAR 15.403-4. FAR 15.402(a)(3) provides some context, stating that contracting officers should "[o]btain the type and quantity of data necessary to establish a fair and reasonable price, ***but not more data than is necessary***. Requesting unnecessary data can lead to increased proposal preparation costs, generally extend acquisition lead time, and consume additional contractor and Government resources." [Emphasis added.] The language should be changed to provide detail and context.

b. Recommendations

i. Add language from FAR 15.402(a)(3) that mentions the need to limit requests to necessary data.

TDR Offers and Contracts

10. TDR Offers and Contracts, (1)(iii): *(1) Use data that is already readily available in accordance with FAR 15.404-1(b)(2)(ii): … (iii) Commercial data sources that consolidate and normalize prices offered by commercial vendors to the general public to compare prices for the same or similar items (e.g., pricing databases).*
    a. **Discussion:** The discussion of pricing databases does not mention what factors affect the relevance of pricing data. Incorporating the more extensive guidance from FAR 15.404-1(b)(2)(ii) on factors that are to be considered (*e.g.*, terms and conditions, age, volume, quality) when comparing pricing data in determining fair and reasonable pricing would improve the readability and effectiveness of the guidance.
    b. **Recommendations**
        i. Incorporate guidance from FAR 15.404-1(b)(2)(ii) to ensure contracting officers use pricing data in a manner consistent with existing regulations.

11. TDR Offers and Contracts, (4): *If prices cannot be determined fair and reasonable based on readily available data, perform* **market research** *to compare prices for the same or similar items in accordance with FAR 15.404-1(b)(2)(vi). This requires a more manual approach to comparison of prices, e.g., performing market research by searching the internet for the same or similar items.*
    a. Discussion: This section mentions "performing market research by searching the internet for same or similar items" without providing the appropriate caveats. It should warn contracting officers that it may be difficult or impossible to determine if an item is the same or similar based on an internet search alone, as all product characteristics and transaction terms may not be known or comparable. For instance, it may be impossible to determine if a product returned by internet searching is or is not TAA-compliant. Additionally, some companies will offer multiple versions of the same products, for example, a TAA-compliant version for the Government and non-TAA compliant version for commercial customers. Some products are more complicated if they meet other Government requirements including the Berry Amendment or co-branded AbilityOne products.
    b. **Recommendations**
        i. Warn contracting officers of potential challenges in obtaining comparable product information associated with performing market research via internet searches.

Appendix B

12. Appendix B: Most Favored Customer and Basis of Award, 3. How can MFC pricing be substantiated? A. Invoices: *The most common method is for the vendor to submit invoices from the designated MFC. Vendors can provide invoices with little difficulty, and do so under what is essentially an honor system, since validity and accuracy do not have to be certified.*

a. **Discussion:** This section states that "vendors can provide invoices with little difficulty," but this conclusion is not necessarily true. Many service companies do not invoice based on hourly rates or using the exact same labor categories found in GSA contracts. They frequently perform services via a statement of work on a firm-fixed-price basis. So, their invoices are not a useful source of information for a contracting officer attempting to determine if their labor rates are fair and reasonable for contract award. Also, product sellers face difficulties providing invoices because some GSA Schedule contracts contain millions of awarded products, and the solicitation is clear that contractors must provide invoices for every product and service. Requesting invoices could require them to gather millions of invoices that a contracting officer will likely be unable to review in any meaningful way because of the volume of data and information. Both problems could be solved by recognizing that the Commercial Sales Practices (CSP) disclosure is sufficient, as it already contains the information in the invoices in a relevant format for GSA, and it is certified by the contractor.

b. **Recommendations**

   i. Stop advising contracting officers to seek invoices from offerors. At the very least, the language in the solicitation and supporting policy guidance should remove the requirement to provide invoices for every product or service. Instead contracting officers should use their business judgement and determine if invoices are required for specific products and services.

   ii. Remind contracting officers that if the CSP contains sufficient data and there is no information that raises questions regarding the accuracy of the CSP data, contracting officers should not be asking for invoices. Indeed, if the submission of invoices is routinely/consistently required by contracting officers regardless of the accuracy of the CSP, then FAS practice essentially has established a new data submission requirement that has not gone through rule-making and public comment.

13. Appendix B: Most Favored Customer and Basis of Award, 3. How can MFC pricing be substantiated?, A. Invoices: *If invoice validity or accuracy is at all in question, the CO can and should contact the MFC directly to verify the invoiced items and rates.*

    a. **Discussion:** Advising contracting officers to contact an offeror's MFC to verify prices "if invoice validity or accuracy is at all in question" introduces unnecessary administrative burden and uncertainty, as contractors certify that their CSP disclosures are current, accurate, and complete. Such certifications are subject to the False Claims Act. Further, promoting the verification of prices in this manner can interfere in the commercial relationships between contractors and suppliers. **GSA is not negotiating contract line item by contract line item. For contractors with over a million items on contract this approach/standard is operationally impossible to implement. It also overwhelms contracting officers. FAS should be focusing on commercial practices for pricing catalog offerings (*e.g.*, discounting strategies across product lines and among products with associated consumables) to achieve effective, fair and reasonable pricing for customer agencies. The delays and**

paperwork associated with line-by-line determinations have already led to gaps in product offerings, which in turn has led customer agencies to look outside the program to open market buys to meet mission needs.

b. **Recommendations**
    i. Advise contracting officers not to contact commercial customers to verify invoices. Contracting officers should go back to the offeror for further clarification of an invoice issue.

14. Appendix B: Most Favored Customer and Basis of Award, 4. How much information is required to adequately substantiate MFC pricing?: *This is a discretionary decision to be made by the CO. In its discussion of cost and price negotiation policies and procedures, FAR 15.402 helps establish a ceiling on information requests, stating that COs should not obtain more information than is necessary. However, COs are fully empowered to ask vendors questions and seek additional supporting information to verify MFC data when needed.*
    a. **Discussion:** Aside from the reference to MFC pricing (*see* (13)), this section advises contracting officers not to request more information than necessary to substantiate pricing per FAR 15.402, but also states contracting officers are "fully empowered to ask vendors questions and seek additional supporting information." This language is confusing and, in practice, encourages overly burdensome document requests. A reset in training to review and address the underlying basis for the regulation would be a positive step for contracting officers and contractors. The Government should not start its information request decision from the standpoint of what is allowed maximally and working backwards. It should start from what is needed at a minimum and work forward to the amount of information that is sufficient. In this regard, it should be remembered that we are talking about a contract negotiation, not an audit.
    b. **Recommendations**
        i. Amend this section to make clear that the Government should seek the minimum amount of information necessary to verify pricing.
        ii. Incorporate training for contracting officers on how much data to seek to ensure contracting officers understand the goal of substantiating MFC pricing.

15. Appendix B Most Favored Customer and Basis of Award, 5. How are basis of award handled when the MFC is the Federal Government?, (A)(3): *In most cases, it is best to identify the BOA as the category of "All Commercial Customers" (especially when commercial sales are very limited). This provides the best price protection for the government throughout the life of the contract. However, if it is in the best interest of the government to do so, COs may designate the closest commercial customer as the BOA, and state the associated price/discount relationship relative to this customer instead.*
    a. **Discussion:** Any use of "all commercial customers" as the BOA is inconsistent with commercial practice and is anti-competitive, limiting the ability of businesses to compete in the private sector for requirements separate and distinct from the MAS program and the Federal market. In effect, it is a restriction on trade (raising significant policy questions, as GSA, a reseller of products and services to Federal

agencies, is restricting the ability of MAS contractors to sell to other private, commercial customers through the imposition of a pricing penalty) that harms the commercial market, raises prices for subcontracts under Federal prime contracts, and negatively impacts MAS contractors, especially small businesses. Advising contracting officers to pursue "All Commercial Customers" as the BOA in most cases is counterproductive and is inconsistent with the underlying intent of the GSAR implementing the PRC. It further undermines the Government's industrial base, whipsawing contractors economically by applying, through the PRC tracking, pricing based on definitized commercial terms and conditions to the government context, where those conditions do not exist and could not justify such pricing.

b. **Recommendations**
    i. Work with stakeholders to craft new guidance for circumstances where the MFC is the Federal Government, eliminating the use of "all commercial customers" and focusing on identifying an appropriate commercial customer with similar terms and conditions and/or exploring other approaches for identifying tracking customers, whether they be commercial or Federal entities. In addressing this guidance, FAS should engage with its industry partners, providing a consistent, transparent process for dialogue on this and all future pricing guidance.

16. Appendix B Most Favored Customer and Basis of Award, 5. How are basis of award handled when the MFC is the Federal Government?, (B)(3): *Negotiations should be based on the presumption that the dealer/reseller will get the manufacturer's MFC pricing. This does not make the government a party to the relationship between the dealer/reseller and the manufacturer, but it is a reasonable basis for setting negotiations objectives with the dealer/reseller.*
    a. **Discussion:** To the extent this section directs that the Government's negotiation objective when working with a dealer is the dealer's MFC pricing from the manufacturer, this approach does not account for differing terms and conditions, including the services/support a dealer provides to a manufacturer in exchange for MFC pricing. The consideration for the price the dealer receives from the manufacturer is based on the dealer's/reseller's performance of value-added services (*e.g.* delivery, storage, order processing, paperwork, sales and marketing, brand and OEM exclusivity, and warranty management). Significantly, these valued-added services are not (and in some cases cannot) be provided by the Federal Government, which is why the Federal Government should not be eligible for most dealer/reseller prices. Thus, the presumption may be incorrect and creates confusion.
    b. **Recommendations**
        i. Eliminate the presumption that dealer/reseller pricing is based on MFC pricing from the manufacturer.