



September 18, 2020

Jeff Koses  
Senior Procurement Executive  
Office of Acquisition Policy  
U.S. General Services Administration  
1800 F Street, NW  
Washington, DC 20006

Subject: GSAR Case 2020-G502

Dear Mr. Koses,

The Coalition for Government Procurement (“the Coalition”) sincerely appreciates the opportunity to submit comments in response to the Increasing Order Level Competition for Federal Supply Schedules advanced notice of proposed rulemaking (ANPR).

The Coalition is a non-profit association of firms selling commercial services, products, and solutions 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. 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 over 40 years towards the mutual goal of common-sense acquisition.

The Coalition has long supported the implementation of Section 876 of the National Defense Authorization Act (NDAA) for FY 2019, which authorizes civilian agencies to award one or more contracts for services acquired on an hourly rate basis without considering price as an evaluation factor at the contract level. Implementation of this authority would increase competition, reduce administrative burdens for both the Government and industry, eliminate barriers to the Federal market for small businesses, and increase agencies’ access to innovation from the commercial market.

A significant administrative burden that would be removed through the implementation of Section 876 is the negotiation of prices at the contract level under multiple award Indefinite Delivery, Indefinite Quantity contracts (IDIQs), including the Federal Supply Schedules (FSS) program. The implementations of Section 876 would ease the arbitrary, burdensome, and outdated administrative processes associated with establishing contract level pricing, for both Government and industry, so that new innovations from the commercial market could be made available to customer agencies quickly. It also would allow for contractors to focus on pricing solutions at the task order level, where it matters most, in response to actual customer agency requirements.

The shift from pricing at the contract award level to pricing at the task order level under IDIQ contracts for services also would increase competition by reducing administrative costs and risks for contractors, especially small businesses. Contractor risk would be reduced because contract level pricing would no longer be subject to audit and monitoring per the Price Reductions Clause (PRC), as competition at the

task order level will assure robust pricing and best value for customer agencies. This approach would improve the alignment of the FSS program with the commercial market, continuing the march away from bureaucratic, non-competitive practices, like cost-build negotiations of contract service rates. Finally, with the reduction of the administrative costs and risks to service contractors, market access for small businesses would increase, along with the unique innovations they bring to the federal market.

Simply put, “the implementation of Section 876 would be a great multiplier in effectively bringing competition, innovation, and small business capability from the commercial market to customer agencies. As such, the Coalition strongly recommends that GSA advance the implementation of Section 876 for the FSS, as they have for the ASTRO solicitation via the recent FAR deviation. As described above, Congress has provided significant streamlining and cost benefits to both the government and contractors through Section 876, and we believe that they should be made available as soon as possible through the Schedules program.

In addition, set forth below, the Coalition sets forth its feedback on the questions raised in the ANPR.

## **1. Implementing the Authority**

The ANPR asks if “GSA [should] look at beginning with the entire FSS program or just a portion (*e.g.*, one or more category, subcategory, or SIN),” as well as whether GSA should strip hourly pricing out of existing contracts or implement unpriced contracts as new contracts and renewals are awarded.

To reduce confusion, the authority should be introduced at once across the Schedule program, rather than a portion thereof. GSA is migrating to a single Schedule platform. Implementation of Section 876 should follow that practice, rather than depart from it, to avoid prolonging the migration unnecessarily. Section 876 does not draw any distinctions with regard to the type of services at issue and instead applies generally. From a price competition standpoint, the type of services, whether information technology or facility management, does not affect the underlying principle of Section 876, which is that where the orders are competed on an hourly basis at the order level, there is no need also to request and evaluate prices at the contract level.

Similarly, rather than subject contractors to differing compliance standards, GSA should apply the same approach of eliminating reliance on contract pricing across the board rather than executing a phased approach to implement Section 876, as Schedule solicitations are open and continually refreshed. Any other approach is likely to result in significant confusion as well as disputes.

## **2. Contract Type**

The ANPR asks whether Section 876 is restricted to labor-hour and time and materials contracts or may be applied to fixed-price contracts. The ANPR further asks whether “full and open competition” is required for orders under Section 876.

Neither Section 876 nor the relevant legislative history (the Conference Report for NDAA 2019) states that the application of Section 876 is limited to labor-hour or time and materials orders or orders that are “performed” on that basis. Neither states that the rates must be framed as per person per hour. Section 876, thus, does not preclude application to services priced on the basis of time, such as an aggregate hourly rate or a team-based rate.

The language in Section 876 refers to “services to be acquired on an hourly rate basis” and “individually competed task or delivery orders based on hourly rates.” The statutory language thus applies when the orders are “**based**” on hourly rates. (Emphasis added.) Price is based (at least in part) on hourly rates when it is the composite of rates and another element (*i.e.*, hours). Moreover, in focusing on the hourly aspect, the statutory language addresses services that are priced as a function of time rather than the performance of a specific task. Currently, FAR 8.404(d) states that services “offered on the schedule are priced either at hourly rates, or at a fixed price for performance of a specific task (*e.g.*, installation, maintenance, and repair). Although this language may not accurately characterize how Schedule contracts for services have been structured over the life of the program, it does appear to treat services other than those “for the performance of a specific task” as services acquired as a function of time.

More to the point, Section 876 was written with the goal of “Increasing Competition at the Task Order Level.” It is clear, from the language and the limited legislative history, that the section was not intended to be read in a restrictive manner, *e.g.*, requiring pricing only on a “per hour” basis. Indeed, doing so would wind up reducing the number market participants under this authority to those who, in their commercial practice, fashion the pricing in a particular, limited way. It should be recognized that, in the commercial space, hourly based pricing can take different forms, like per hour pricing, team-based pricing, or aggregate pricing based on hours tasked to a project. Limiting participation to one form of pricing on an hourly basis, then, ultimately would wind up “reducing,” not “increasing,” competition at the task order level.

If orders are firm-fixed price as a result of offerors applying (potentially unique) labor mixes to hourly rates or otherwise, the firm-fixed price will be “based on” hours and, thereby, hourly rates. With such orders, there is competition at the order level for the establishment of an order price. In this circumstance (*i.e.*, where competed orders will be firm-fixed price), the hourly rates (if any) in the contract will not reflect the actual price the Government will pay (as that is a firm-fixed price). Instead, the Government will pay the firm-fixed price. As the firm-fixed prices reflect what the Government will pay, whereas any base contract rates alone will not, it seems only sensible to evaluate the proposed firm-fixed prices rather than individual rates. The statutory provision regarding single-award IDIQs (41 U.S.C. § 4103(d)(3)(A)(ii)) permits task orders under such contracts at firm-fixed prices, even if prices are not set forth in the contract for the specific services. This language recognizes the reality is that fixed-price orders pose less risk than orders in which the amounts ultimately paid may vary based on the hours of work performed.

In terms of the level of competition, Section 876 does not state that competition for orders under unpriced service contracts must be “full and open” (as per FAR Subpart 6.3), nor does it address whether competition may be conducted on a more limited basis. Currently, agencies need not engage in full and open competition for orders, as the Schedules program is deemed competitive (41 U.S.C. § 152(3)), and agencies need only follow the parameters of FAR Subpart 8.4 with regard to order competitions. Pursuant to FAR 8.405-2, when services require a statement of work, agencies must determine that order pricing is fair and reasonable and may **not** rely on the contract pricing in this regard. The agency in this instance must rely on order level competition to ensure pricing is fair and reasonable. These competitions, however, need not be held among all interested parties or even all Schedule holders. *See* FAR 8.405-6. Similarly, competition for orders under IDIQ contracts are not open to all interested parties and instead are limited to a “fair opportunity to compete” among existing contract holders. *See* 41 U.S.C. § 4106(c). Accordingly, there is no reason to read Section 876 to impose a broader form of competition than currently required for the circumstances where an agency may not rely on the

Schedule contract pricing to determine if a price is fair and reasonable and instead must do so at the order level.

### **3. Mixed-Use Contracts**

In regard to mixed-use contracts (products and services on a single contract), we submit that the portion of the contract involving services simply should be unpriced rather than breaking the services into a separate contract. Separation into multiple contracts would undermine GSA's recent (and valuable) initiative to consolidate the Schedules program and add to administrative burdens for GSA and industry. In implementing such an approach, GSA might give regard to use of the terms contracts (or portions of contracts) for services to be acquired on an hourly rate basis in the regulatory language to minimize confusion.

### **4. FAR Changes Necessary**

Section 876 allows for pricing of services provided on a Schedule to be established at the order-level rather than the Schedule contract level because price need not be a factor in the consideration for award. If the agency is not required to consider price when awarding the contract, there is no reason to include prices in the contract. Instead, all consideration of price may be deferred to the competed orders. Even if pricing were included in the contract (but not evaluated), that fact alone would not establish that the order pricing is fair and reasonable because the contract pricing was not the subject of competition or offered for the purposes of analysis of selection for award (which may impose competitive pressures).

If services are not priced at the contract level, there could not be a determination of fair and reasonable price for the contract. Such a determination instead would need to be made at the order level (thereby satisfying FAR 12.209). FAR 8.405-2 already includes the requirement to determine the price is fair and reasonable in response to the task order statement of work.

We recommend the following changes to FAR 8.401 (quoted below in italicized text). Additions are noted by underlining. Deletions are noted by strikethrough.

#### **FAR 8.401**

*Multiple Award Schedule (MAS) means contracts awarded by GSA or the Department of Veterans Affairs (VA) for similar or comparable supplies, or services, established with more than one supplier, ~~at varying prices~~. The primary statutory authorities for the MAS program are 41 U.S.C. 152(3), Competitive Procedures, and 40 U.S.C. 501, Services for Executive Agencies.*

#### **FAR 8.402**

It is not clear that Section 8.402 must be changed as it primarily describes aspects of the Schedule program rather than prescribes how it must be implemented or what terms contracts may include. Nonetheless, to avoid confusion, we recommend the following changes to FAR 8.402 (quoted below in italicized text). Additions are noted by underlining. Deletions are noted by strikethrough.

*(a) The Federal Supply Schedule program is also known as the GSA Schedules Program or the Multiple Award Schedule Program. The Federal Supply Schedule program is directed and managed by GSA and provides Federal agencies (see 8.004) with a simplified process for obtaining commercial supplies and services at prices associated with volume buying. Indefinite delivery contracts are awarded to provide supplies and services at stated prices for given periods of time. GSA may delegate certain responsibilities to other agencies (e.g., GSA has delegated authority to the VA to procure medical supplies under the VA Federal Supply Schedules program). Orders issued under the VA Federal Supply Schedule program are covered by this subpart. Additionally, the Department of Defense (DoD) manages similar systems of schedule-type contracting for military items; however, DoD systems are not covered by this subpart.*

*(b) GSA schedule contracts (other than contracts for services to be acquired on an hourly rate basis, see 8.404(d)(2)) require schedule contractors to publish an "Authorized Federal Supply Schedule Pricelist" (pricelist). The pricelist contains all supplies and services offered by a schedule contractor. In addition, each pricelist contains the pricing and the terms and conditions pertaining to each Special Item Number that is on schedule. The schedule contractor is required to provide one copy of its pricelist to any ordering activity upon request. Also, a copy of the pricelist may be obtained from the Federal Supply Service by submitting a written e-mail request to [schedules.infocenter@gsa.gov](mailto:schedules.infocenter@gsa.gov) or by telephone at 1-800-488-3111. This subpart, together with the pricelists, contain necessary information for placing delivery or task orders with schedule contractors. In addition, the GSA schedule contracting office issues Federal Supply Schedules publications that contain a general overview of the Federal Supply Schedule (FSS) program and address pertinent topics. Ordering activities may request copies of schedules publications by contacting the Centralized Mailing List Service through the Internet at <http://www.gsa.gov/cmls>, submitting written e-mail requests to [CMLS@gsa.gov](mailto:CMLS@gsa.gov); or by completing GSA Form 457, FSS Publications Mailing List Application, and mailing it to the GSA Centralized Mailing List Service (7SM), P.O. Box 6477, Fort Worth, TX 76115. Copies of GSA Form 457 may also be obtained from the above-referenced points of contact.*

*(c)(1) GSA offers an on-line shopping service called "GSA Advantage!" through which ordering activities may place orders against Schedules. (Ordering activities may also use GSA Advantage! to place orders through GSA's Global Supply System, a GSA wholesale supply source, formerly known as "GSA Stock" or the "Customer Supply Center." FAR subpart 8.4 is not applicable to orders placed through the GSA Global Supply System.) Ordering activities may access GSA Advantage! through the GSA Federal Supply Service Home Page (<http://www.gsa.gov/fas>) or the GSA Federal Supply Schedule Home Page at <http://www.gsa.gov/schedules>.*

*(2) GSA Advantage! enables ordering activities to search specific information (i.e., national stock number, part number, common name), review delivery options, place orders directly with Schedule contractors (except see 8.405-6) and pay for orders using the Governmentwide commercial purchase card.*

*(d)(1) e-Buy, GSA's electronic Request for Quotation (RFQ) system, is a part of a suite of on-line tools which complement GSA Advantage!. E-Buy allows ordering activities to post requirements, obtain quotes, and issue orders electronically. Posting an RFQ on e-Buy—*

*(i) Is one medium for providing fair notice to all schedule contractors offering such supplies and services as required by 8.405-1, 8.405-2, and 8.405-3; and*

*(ii) Is required when an order contains brand-name specifications (see 8.405-6).*

(2) Ordering activities may access e-Buy at <http://www.ebuy.gsa.gov>. For more information or assistance on either GSA Advantage! or e-Buy, contact GSA at Internet e-mail address [gsa.advantage@gsa.gov](mailto:gsa.advantage@gsa.gov).

(e) For more information or assistance regarding the Federal Supply Schedule Program, review the following website: <http://www.gsa.gov/schedules>. Additionally, for on-line training courses regarding the Schedules Program, review the following website: <http://www.gsa.gov/training>.

(f) For administrative convenience, an ordering activity contracting officer may add items not on the Federal Supply Schedule (also referred to as open market items) to a Federal Supply Schedule blanket purchase agreement (BPA) or an individual task or delivery order only if—

(1) All applicable acquisition regulations pertaining to the purchase of the items not on the Federal Supply Schedule have been followed (e.g., publicizing (part 5), competition requirements (part 6), acquisition of commercial items (part 12), contracting methods (parts 13, 14, and 15), and small business programs (part 19));

(2) The ordering activity contracting officer has determined the price for the items not on the Federal Supply Schedule is fair and reasonable;

(3) The items are clearly labeled on the order as items not on the Federal Supply Schedule and they conform to the rules for numbering line items at subpart 4.10; and

(4) All clauses applicable to items not on the Federal Supply Schedule are included in the order.

(g) When using the Governmentwide commercial purchase card as a method of payment, orders at or below the micro-purchase threshold are exempt from verification in the System for Award Management as to whether the contractor has a delinquent debt subject to collection under the Treasury Offset Program (TOP).

#### **FAR 8.404**

We recommend the following changes to FAR 8.404(d) in light of Section 876 (quoted below in italicized text). Additions are noted by underlining. Deletions are noted by strikethrough.

(d) Pricing. (1) Supplies offered on the schedule are listed at fixed prices. Except as addressed in subparagraph (2) below, services offered on the schedule are priced either at hourly rates, or at a fixed price for performance of a specific task (e.g., installation, maintenance, and repair). GSA has already determined the prices of supplies and such fixed-price services, and rates for services offered at hourly rates, under schedule contracts to be fair and reasonable in awarding the contract. Therefore, ordering activities are not required to make a separate determination of fair and reasonable pricing, except for a price evaluation as required by 8.405-2(d). By placing an order against a schedule contract using the procedures in 8.405, the ordering activity has concluded that the order represents the best value (as defined in FAR 2.101) and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the Government's needs. Although GSA has already negotiated fair and reasonable pricing, ordering activities may seek additional discounts before placing an order (see 8.405-4).

(2) For contracts for services to be acquired on an hourly rate basis (either as labor-hour, time and materials, or firm-fixed price, including pricing in the aggregate or pricing that is team-based basis), the

*schedule contracts do not include prices or price lists. Prices instead are established at the order level through competition in accordance with this subpart. Ordering activities must make a determination that the prices of such orders are fair and reasonable.*

## **FAR 12.207**

We recommend the following changes to FAR 12.207(c)(1) (quoted below in italicized text). Additions are noted by underlining. Deletions are noted by strikethrough.

*(c)(1) Indefinite-delivery contracts (see Subpart 16.5) may be used when—*

*(i) The prices are established based on a firm-fixed-price or fixed-price with economic price adjustment in the contract or order; or*

*(ii) Rates are established for commercial services acquired on a time-and-materials or labor-hour basis in the contract or order.*

## **Submission of Price Information for Contract**

As for the question in the ANPR whether FSS contractors submitting offers involving services might be requested to submit price or cost information in response to solicitation for award of a task or delivery order to support a fair and reasonable determination, FAR 15.404-1(b)(2) provides a variety of techniques that may be used to assess whether a proposed price is fair and reasonable. FAR 15.404-1(b)(1) provides that data from the contractor or offeror may be used “when there is no other means for determining a fair and reasonable price.” Reliance on the offeror’s data thus is a last resort. We note that as Section 876 requires competition, the ordering activity will have the benefit of competition to assist in determining that the awarded order price is fair and reasonable.

## **5. GSAR Changes Necessary**

Implementation of Section 876 would render the Price Reductions clause inapplicable at least for the services portion of relevant contracts. As Congress has recognized that pricing at the order level alone (via competition) is sufficient to establish fair and reasonable pricing and contract prices for services are not required in such instance, there is a reasonable basis for GSA to conclude that the Government’s interests are adequately protected by order pricing such that the Price Reductions clause is not necessary for contracts for which only orders are priced.

Transactional data reporting has served as an alternative to reliance on the Price Reductions clause. Just as Section 876 renders the Price Reductions clause obsolete, so too does it eliminate the need to rely on transactional data reporting.

Price lists for services that are to be priced at the order level also are not necessary for contracts for services to be acquired on an hourly rate basis. If prices will be determined and must be evaluated at the order level to determine if they are fair and reasonable, unevaluated price lists included in a proposal for a contract do not serve a meaningful purpose and instead impose an unnecessary burden. Moreover, the inclusion of price lists may cause confusion as to what a contracting activity should consider in evaluating price at the order level, *i.e.*, order-level pricing.

## **6. Updated GSA Guidance**

For services that will be priced at the order level, a request that offerors provide hourly rate information in response to the solicitation does not make sense if it will not be evaluated as part of the consideration for award. GSA guidance and the terms of the Schedule solicitation(s) should be revised to make clear that price lists are not required for contracts (or portions of contracts) for services to be acquired on an hourly rate basis. The request for such information merely will add a burden to industry while providing information for which the agency may have little use as it will not avoid the need to evaluate pricing at the order level and may be rendered obsolete by the time particular order(s) are issued.

GSA also would need to update guidance and training for contracting officers related to any change in process at the order level. This information and guidance and training should include what contracting officers should be requesting in an RFP. Specifically, because price evaluation will not take place at the contract level, guidance should clarify that, consistent with the FAR, GSA should not be requesting prices for such an evaluation.

The Coalition appreciates the opportunity to provide feedback on the advanced notice of proposed rulemaking and hopes you find these comments useful.

Thank you for your time and consideration.

Sincerely,

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

Roger Waldron  
President