



October 30, 2019

Jeffrey Koses
Senior Procurement Executive
General Services Administration
1800 F St. NW
Washington, DC 20405-0001

Subject: Information Collection 3090-0235 Federal Supply Schedule Pricing Disclosures and Sales Reporting

Dear Mr. Koses,

The Coalition for Government Procurement appreciates the opportunity to submit follow-up comments regarding the General Services Administration's (GSA) review of the information collection requirements for the Federal Supply Schedule (FSS) Pricing Disclosures and Sales Reporting, which consists of the Commercial Sales Practices (CSP) disclosures and the Price Reductions Clause (PRC). We thank GSA for its willingness to engage with industry on this important issue and for updating its burden estimates based on industry feedback.

The Coalition for Government Procurement (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, 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 40 years towards the mutual goal of common-sense acquisition.

The Coalition's comments focus on:

1. The significant burden imposed by the Pricing Disclosures
2. Steps GSA should take to adhere the "regulatory philosophy" established in Executive Order 12866

I. Background

The PRC requires that a contractor reduce its Schedule 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 Schedule contract award. In a multi-year contract, the PRC assured that Schedule prices and pricing offered in response to subsequent task and delivery orders remained competitive with the current market. The PRC, however, is a tool developed and implemented for a time when the

MAS program was a mandatory source for all federal agencies, competition at the order level was limited, contractors utilized commercial price lists, and most agencies used the Schedules to purchase commercial products.

The CSP disclosure requires that contractors provide a year of historical data on commercial sales for all products and services offered on the Schedule 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, along with exceptions to such practices. Based on this information, GSA seeks to obtain the offeror's "best" price, which is the "best" price given to the offeror's most favored customer. The CSP disclosure requirement, however, does not account for the fact that there is a competition requirement for many Schedule orders.

II. Significant Regulations

On September 30, GSA released a notice of request for comments regarding an extension for the information collection notice for the FSS Pricing Disclosures and Sales Reporting. In the notice, GSA updated its estimate total annual cost burden of the FSS Pricing Disclosures to \$128 million per year. GSA's previous estimate of the total annual cost burden, which was published in a notice on May 28, was \$94 million per year. The Coalition appreciates GSA's consideration of feedback from industry on its burden estimate.¹

A. Requirements for Significant Regulations

Executive Order (EO) 12866, which was signed on September 30, 1993, established the "regulatory philosophy" of the Government that agencies should only promulgate such regulations as required by law, are necessary to interpret the law, or are made necessary by compelling public need.² The EO defined a significant regulatory action as any action that is likely to result in a rule that may have an annual effect on the economy of \$100 million or more.³ For those significant regulatory actions, the EO requires agencies to complete a cost benefit analysis (also known as a regulatory impact analysis).

EO 12866 also established twelve principles for agencies that ensure consistency with the Government's regulatory philosophy. The list of regulatory principles has been summarized in attachment 1, but seven of the principles are relevant to the FSS Pricing Disclosures:

2. Examine if existing regulations created or contributed to the problem that a new regulation is intended to correct and whether the original regulations should be modified instead.
3. Identify and assess available alternatives to direct regulation, including economic incentives to encourage the desired behavior.

¹ The Coalition and GSA disagree on the burden estimate, however both estimates are greater than \$100 million per year, so the differences are not relevant to these comments.

² EO 12866, page 1

³ There are three additional criteria which could lead to a significant regulatory action, which are not relevant to these comments.

5. Design regulations in the most cost-effective manner to achieve the regulatory objective, accounting for incentives for innovation, consistency, predictability, enforcement costs, flexibility, distributive impacts, and equity.
6. Propose or adopt a regulation only upon determining that its benefits justify its costs.
8. Specify performance objectives, rather than the behavior or manner of compliance.
11. Tailor regulations to impose the least burden on society.
12. Draft regulations to be simple and easy to understand; minimize the potential for uncertainty and litigation arising from uncertainty.⁴

In addition to EO 12866, OMB Circular A-4 “Regulatory Analysis,” published on September 17, 2003, provides guidance to agencies for conducting regulatory analyses. Circular A-4 standardized the process for regulatory analysis that is required by EO 12866. While EO 12866 requires regulatory analyses for significant proposed regulatory actions, Circular A-4 defines “proposed” as any regulatory actions under consideration regardless of the stage of the regulatory process.⁵

Circular A-4 also established a presumption against regulations, “Before recommending Federal regulatory action, an agency must demonstrate that the proposed action is necessary.”⁶ The Circular also notes that, “[e]ven where a market failure clearly exists, you should consider other means of dealing with the failure before turning to Federal regulation.”⁷ Finally, there is a specific presumption against economic regulations, which the Circular notes can be unintentionally harmful and impede market efficiencies, and thus, “a particularly demanding burden of proof is required to demonstrate the need for...price controls in competitive markets.”⁸

The last relevant regulatory document is EO 13563, which was signed on January 18, 2011 and reaffirms the principles established in EO 12866.⁹ While EO 12866 and Circular A-4 required the Government to complete regulatory analyses for proposed significant regulatory actions, EO 13563 applied those same principles to retrospective analyses of existing rules.¹⁰ Agencies are required to consider how to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome. The EO also requires agencies to develop plans to periodically review their existing significant regulations.¹¹

After the EO was signed in 2011, GSA prepared a final plan for retrospective analysis that included the PRC.¹² GSA estimated that the total annual burden of the PRC was 13,500 hours and has since increased the PRC annual burden estimate to over 1 million hours, an increase of over 7,700 percent.¹³

B. The PRC and CSP are Significant Regulations

⁴ EO 12866, pages 1-2

⁵ Circular A-4, page 1 footnote 1

⁶ Circular A-4, page 3

⁷ Circular A-4, page 6

⁸ *Ibid*

⁹ EO 13563, page 1

¹⁰ EO 13563, page 2

¹¹ *Ibid*

¹² “Final Plan for Retrospective Analysis of Existing Rules,” August 18, 2011

¹³ The 2011 estimate was for the PRC not the CSP or sales reporting like the 2016 and 2019 estimates. Additionally, the 2011 estimate was calculated in burden hours not dollar value.

GSA's estimate for the total annual cost burden of the FSS Pricing Disclosures is now greater than \$100 million per year, and thus, pursuant to EO 12866, GSA and OIRA should be classifying the FSS Pricing Disclosures as a significant regulatory action. GSA also should be adding the FSS Pricing Disclosures to its plan for a periodic retrospective review of significant regulations and complete a cost benefit analysis, in accordance with the principles established in EO 12866, Circular A-4, and EO 13563.

The PRC establishes a price control, specifically a price ceiling that is tied to a contractor's most favored customer pricing. The Schedules program, comprised of over 13,000 contractors, is a competitive market. GSA should determine if the PRC meets the "particularly demanding burden of proof," established in Circular A-4, to impose a price control in a competitive market.

GSA also should reform the CSP to ensure that the regulations conform with the regulatory principles established in EO 12866. For example, the regulatory principles require agencies to draft simple regulations that are easy to understand and minimize the potential for litigation arising from uncertainty. Yet, key terms in the CSP, including most favored customer, basis of award, standard practice, non-standard practice, and exceptions, and not defined. In addition, the regulatory principles require agencies to specify performance objectives rather than a behavior or manner of compliance. The PRC, instead, establishes a complex process-focused, regulatory environment that requires contractors to track prices for their basis of award customer, rather than specifying performance objectives.

Additionally, the CSP format is cumbersome, confusing, and impractical, which raises concerns about its adherence to EO 12866. For example, the GSA Inspector General found in its 2016 summary of pre-award audits that almost 80 percent audited contracts failed to submit current, accurate, and complete data.¹⁴ It is evident from the high degree of non-conformance that even experienced contractors struggle with CSP disclosure requirements.

III. Recommendations

The Coalition is providing the following recommendations for GSA to ensure that the FSS Pricing Disclosures comply with EO 12866, Circular A-4, and EO 13563.

1. GSA and OIRA should designate the FSS Pricing Disclosures as a significant regulatory action since GSA has determined that the annual cost exceeds \$100 million.
2. GSA should conduct a regulatory analysis of the FSS Pricing Disclosures, following the procedures outlined in Circular A-4, analyzing the benefits, costs, impact on small businesses, and alternatives. Given the significant adjustment in the burden estimates since 2011, GSA should initiate a retrospective regulatory analysis under the auspices of EO 13563.
3. GSA should determine if the FSS Pricing Disclosures meet the "particularly demanding burden of proof" required to impose a price control in a competitive market.

The Coalition is also resubmitting our recommendations for improving the efficiency and effectiveness of the PRC and CSP, which were submitted on July 29 in response to the previous

¹⁴ "Major Issues from Multiple Award Schedule Preaward Audits," Memorandum Number A120050-6

information collection notice. These recommendations will help GSA meet the regulatory principles established in EO 12866 and are set out below:

1. Eliminate the PRC. GSA has indicated that the PRC has minimal benefits for Government customers, and the PRC is extremely burdensome to contractors.
2. As an alternative to the PRC, increase competition for task and delivery orders. GSA has already indicated that, the alternative to the PRC is increased competition for task and delivery orders.¹⁵ In order to increase competition, GSA should reduce the burdens of the Schedules to attract more companies, modernize e-Buy (GSA's request for quotes tool), and provide additional resources for marketing the Schedules to Government and industry.
3. Reform the CSP.
 - a. Provide an alternative CSP format for companies that do not utilize commercial price lists. Allow companies the flexibility to submit their disclosures in formats that appropriately match their internal systems and commercial practices.
 - b. Eliminate the terms "most favored customer," "best price," and "best discount."
 - c. Define ambiguous terms, such as "basis of award," "standard practice," "non-standard practice," and "exceptions."
 - d. Limit CSP disclosures to commercial transactions below the Simplified Acquisition Threshold (SAT). Commercial transactions above the SAT should require only a general explanation of sales practices over that amount. Government orders above the SAT are subject to additional competition requirements, and CSP disclosures are unnecessary because of the additional level of competition.
4. Establish the goal of MAS pricing negotiations as a fair and reasonable price, rather than most favored customer pricing. As Administrator Murphy correctly pointed out, competition occurs at the order level, and the MAS price should be considered a "rack rate." Instead of expending Government and industry resources negotiating the "best" contract price (which may not be achievable given the dynamic nature of pricing in today's market), the purpose of MAS contract negotiations should be to establish a ceiling price on Schedule contracts that is fair and reasonable. Competition at the order level in response to known requirements will provide customer agencies with lower pricing. In this regard, GSAR 538.270-1 and GSAR 515.408 should be updated accordingly.
5. Implement the authority to offer "unpriced" services on Schedule. Section 876 of the 2019 National Defense Authorization Act allows Federal agencies to award multiple award contracts for services priced as labor hours without considering price as an evaluation factor. GSA should move swiftly to implement this authority for the Schedules. "Unpriced" services would streamline the program for Government buyers and remove significant burdens for industry. DoD, which received a similar authority from Congress in 2016, issued a class deviation to implement the change within a year of receiving Congressional approval. GSA should consider similar approach to implementation.

Thank you for considering the Coalition's comments in response to the request for comments on the information collection for the FSS Pricing Disclosures and Sales Reporting. If there are any questions, please contact me at RWaldron@thecgp.org or (202) 331-0975.

¹⁵ General Services Administration Acquisition Regulation (GSAR); Transactional Data Reporting, March 4, 2015. 80 FR 11619.

Sincerely,

A handwritten signature in black ink, appearing to read 'Roger Waldron', written over a light gray rectangular background. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Roger Waldron
President

Attachment 1

Regulatory Principles Executive Order 12866

Executive Order 12866 established twelve principles for agencies to ensure consistency with the “regulatory philosophy” of the Federal Government.¹⁶ The Coalition has summarized the principles below:

1. Identify the problem that the regulation intends to address.
2. Examine if existing regulations created or contributed to the problem that a new regulation is intended to correct and whether the original regulations should be modified instead.
3. Identify and assess available alternatives to direct regulation including economic incentives to encourage the desired behavior.
4. Consider, to the extent reasonable, the degree and nature of the risks posed by substances or activities within an agency’s jurisdiction.
5. Design regulations in the most cost-effective manner to achieve the regulatory objective, accounting for incentives for innovation, consistency, predictability, enforcement costs, flexibility, distributive impacts, and equity.
6. Propose or adopt a regulation only upon determining that its benefits justify its costs.
7. Base decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for and consequences of the regulation.
8. Specify performance objectives, rather than the behavior or manner of compliance.
9. Minimize burdens to State, local, and tribal governments and harmonize Federal regulatory actions with these entities.
10. Avoid regulations that are inconsistent, incompatible, or duplicative with regulations of other Federal agencies.
11. Tailor regulations to impose the least burden on society.
12. Draft regulations to be simple and easy to understand; minimize the potential for uncertainty and litigation arising from uncertainty.

¹⁶ EO 12866, pages 1-2