THE COALITION
FOR GOVERNMENT PROCUREMENT

May 31, 2023

Jeffrey A. Koses – M1V
Senior Procurement Executive
U.S. General Services Administration
1800 F St., NW
Washington, DC 20405

Re: Economic Price Adjustment Clause Implementation

Dear Mr. Koses:

I am writing regarding three procurement policy issues impacting Multiple Award Schedule (MAS) contract management. First, although the Federal Acquisition Service (FAS) appropriately collects commercial price data to analyze and understand current trends in the commercial market and obtain the data necessary to assess fair and reasonable pricing, increasingly, MAS contractors are facing a unique price analysis framework that focuses solely on low price without considering key commercial factors. Our members refer to this approach as the "Low Price Regardless of Context" (LPRC) framework. LPRC is inconsistent with FAR 15.404-1 and GSAR 538.270, which mandate consideration of relevant terms and conditions when determining fair and reasonable pricing under the MAS program.

Under this LPRC framework, the failure to consider price-affecting contract terms and conditions distorts the MAS market, creating a significant barrier to entry. For example, although country of origin can be a significant price differentiator for a product, there appears to be no operational practice or policy guidance addressing its consideration when analyzing price. This absence of guidance opens the door to price analysis that considers the pricing of products from products from non-Trade Agreements Act (TAA) countries, like China, which, fundamentally, is unfair to firms submitting offerors consistent with the requirements of the TAA. Given the rigid compliance regime of the government (of which TAA is a part), it is unclear, at best, how GSA is accounting for the cost of products subject to that regime when assessing their prices against those for the same products in the commercial market. The irony here is that GSA likely is utilizing commercial pricing for ineligible, non-TAA products to limit/restrict access of eligible, TAA compliant products.

Second, and equally problematic, is the fact that MAS price analysis appears to be conducted in accordance with undisclosed operational guidance. Contractors repeatedly point to instances where contracting officials cite unpublished operational policy guidance addressing price analysis, pricing information, and the negotiation of MAS contracts, all requiring certain prices, and all barred from contractors seeking to understand and validate such guidance.

This lack of transparency raises questions regarding adherence to the "rule-making process." For example, to the extent FAS internal guidance requires MAS offerors/contractors to collect, review, and submit additional pricing or other information, the guidance should be subject to public review and comment, as a de facto paperwork burden. Furthermore, transparency promotes accountability. Stakeholders across the federal market should be able to review any guidance to assess the paperwork burden and the consistency with statute and regulation.

Finally, the price analysis instructions included in the MAS solicitation disclosed by GSA create significant questions regarding their consistency with statute and regulation. In its instructions, GSA continues to state that, for pricing proposals, its goal:

> is to obtain equal to or better than the offeror's Most Favored Customer (MFC) pricing under the same or similar terms and conditions. GSA seeks to obtain the offeror's best price based on its evaluation of discounts, terms, conditions, and concessions offered to commercial customers. However, offers that propose Most Favored Customer pricing that is not ***highly competitive*** will not be determined fair and reasonable and will not be accepted. The U.S. Government Accountability Office [(GAO)] has specifically recommended that the price analysis GSA does to establish the Government's MAS negotiation objective should start with the best discount given to any of the vendor's customers.
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> (Emphasis added; quotations omitted.)

The definition of "highly competitive" is not found in law or regulation; nor is it clear how it contributes to a fair and reasonable price analysis. This language has been interpreted by contracting officers to mean that a price must be not only fair and reasonable, but also "highly competitive." There simply is no such requirement for "fair and reasonable" pricing in statute or regulation; nor does FAS provide any definition as to what constitutes "highly competitive" pricing on a contract that includes a guaranteed minimum of $2500 with the opportunity to compete for additional work on a governmentwide basis. GSA's insertion of the term "highly competitive" into its price analysis instructions creates a significant barrier to entry for commercial firms, with particular harm to small businesses, the very businesses the Administration has targeted for support.

All told, these policy and program approaches fundamentally undermine the incentive for commercial firms to participate in the government market. The result reduces access to the commercial market, limits competition, and hampers the ability of the MAS program to deliver best value solutions to support customer agency missions on behalf of the American people.

For all these reasons, any FAS internal guidance impacting the management of MAS contracts should be made public; the "highly competitive" language should be deleted from the MAS solicitation; and GSA should move to address LPRC by ensuring relevant terms and conditions are considered as part of MAS price analysis.

We look forward to hearing from you regarding these important procurement policy issues. If you have any questions regarding the concerns surrounding these issues, please do not hesitate to contact me at (202) 315-1051 or rwaldron@thecgp.org.

Sincerely,

Roger Waldron
President