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November 27, 2018

Phil Christy
Deputy Executive Director
Office of Acquisition, Logistics and Construction
U.S. Department of Veterans Affairs
810 Vermont Avenue NW
Washington, DC 20420

Subject: Recommendations to Streamline the VA Federal Supply Schedule

Dear Phil,

The Coalition for Government Procurement ("the Coalition") appreciates the opportunity to work with the Department of Veterans Affairs ("VA") towards the mutual goal of common-sense in 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 more than \$145 billion dollars of the sales generated annually through government contracts. Coalition members include small, medium, and large business concerns that provide more than \$12 billion worth of medical/surgical products and pharmaceuticals to support the healthcare needs of veterans.

As you know, the majority of Coalition members participate in the VA Federal Supply Schedules ("FSS") and report both opportunities and challenges related to the program. We sincerely appreciate your consideration of the recommendations herein to improve the efficiency and effectiveness of the VA FSS to better support veterans' healthcare.

In May 2016, the Coalition submitted recommendations to streamline the VA FSS program in a *VA Multiple Award Schedule White Paper* (See Attachment). The objective was to improve the efficiency and effectiveness of the program and to enhance the delivery of medical products/services, and pharmaceuticals to our nation's veterans. In the absence of meaningful investment the last few years toward enhancing the FSS, procurements have migrated to other non-VA vehicles. The program, however, is still valuable for the VA and industry, as it constitutes a large and sustainable catalog of medical supplies, products, devices, and equipment where prices have been pre-determined to be fair and reasonable. As a result, the program provides a means of placing orders without elaborate

contracting efforts. Further, the FSS program provides a vital “safety net” for VA customers to efficiently procure thousands of products and services that cannot be procured under the micro-purchase threshold and are not covered by a VA national contract.

As a follow-up to our white paper, the Coalition would like to submit to the VA a set of “Top 10” recommendations that:

- Can be executed within the VA’s existing authorities
- Are consistent with GSA policy
- Relieve serious obstacles impeding the contract award process

By implementing these recommendations, the VA FSS can take immediate steps to meet their objectives to reduce procurement action lead times so that contracts are awarded faster resulting in greater availability of the latest healthcare technologies, supplies and services for veterans and also increase competition.

“Top 10” Recommendations to Streamline the FSS Program

Recommendations to Address Inconsistencies with GSA Policy

1. Revise the Department’s internal audit guidelines to reflect those currently in place at GSA, which are designed to effectively leverage auditing resources while still examining contract actions that are most impactful on Federal customers, and which do not usurp the authority of contracting officers.
 - a. Specifically, GSA’s Office of Audits currently prepares an annual audit plan that focuses on high dollar value contracts and contracts where either auditors or contracting officers have identified a reason why an audit would be warranted. Current VA policy requires audits of virtually all FSS offers and requests for modifications of any meaningful size, regardless of whether the audit is deemed beneficial by VA contracting officers. In addition, GSA utilizes a higher monetary threshold for audits, and utilizes its audit authority at the exercise of a contract’s option period rather than repetitively in response to contract modification requests.
2. Supplement GSAR 538.270 to give examples, relative to healthcare products and services, that might warrant the government receiving less favorable discounts than the best commercial customer. The additional language would be intended *only* to provide examples, and not as an exhaustive list.
3. When determining MFC, exclude prices of individual products offered as a part of a packaged price to commercial customers.
4. Use horizontal pricing analysis exclusively to compare identical (not similar) items when establishing FSS pricing.
5. Provide written guidelines to contracting officers and contractors for evaluation of offers from resellers. Guidance should address alternatives to submission of manufacturer CSP.

6. For non-65IB FSS contracts, the VA should revise its acquisition strategy for executing long-term contracts to award 20-year contracts similar to GSA. Specifically, these awards would include a 5-year base period of performance, followed by three 5-year option periods. Alternatively, the VA could examine whether a 10-year contract period is feasible.
7. Leverage GSA's IT electronic systems, such as e-offer and e-modifications, to streamline and expedite the acquisition process.

Recommendations to Address the VA's Unique Customer Base & Market Conditions

8. Exclude disclosure of transactions with commercial or state managed care entities that pay providers on behalf of beneficiaries from disclosure on the CSP. Federal treatment facilities purchasing drugs under FSS contracts are not managed care organizations and are unaffected by such business relationships.
9. Eliminate the Price Reductions Clause ("PRC"). The PRC is a costly, burdensome, and obsolete oversight mechanism that does not recognize that price and value are driven at the task order level, and limits the influx of competition into the Federal market from the private sector.

Recommendations to Address Complexity that is Specific to Covered Drugs

10. Covered drugs should not be subject to FSS pricing policies (i.e., disclosure of commercial pricing on the CSP, negotiation of MFC, subject to PRC) unless a contractor opts to have an OGA price list.
 - a. MAS prices would be established at the FCP.
 - b. Out year pricing would be controlled by the Max K FSS.

Thank you for considering industry's input on how to increase the efficiency and effectiveness of the FSS program, and thus speed the delivery of best value healthcare products and services to veterans. If you have any questions or concerns, please contact me at (202) 331-0975 or rwaldron@thecgp.org.

Sincerely,



Roger Waldron
President

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VA Multiple Award Schedule White Paper

Improvements Needed to Enhance the Effectiveness & Efficiency of the Program

May 2016

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VA Multiple Award Schedule White Paper

Improvements Needed to Enhance the Effectiveness & Efficiency of the Program

1. Overview

This document supplements the white paper submitted to the General Services Administration (GSA) by The Coalition for Government Procurement (Coalition) entitled “GSA Multiple Award Schedule Pricing: *Recommendations to Embrace Regulatory and Commercial Market Changes.*” That white paper offered recommendations to increase the efficiency and effectiveness of the Multiple Award Schedule (MAS)¹ program. See Attachment 1.



The Department of Veterans Affairs (VA) Schedule Program comprises nine Schedules operated by the VA under a delegation of authority from GSA.² The VA Schedules are a significant part of the overall Schedules program accounting for nearly \$14 billion in sales in FY2015 and providing Federal customers access to over 1 million products and services, ranging from high-tech surgical equipment to nursing care services.

The underlying findings and recommendations of the GSA MAS White Paper apply to the MAS Program as a whole. However, both the scope of the VA Schedule program and the numerous issues unique to the healthcare industry warrant separate consideration in this white paper. These differences will be discussed in greater detail, but they reflect (1) the specialized nature of products and services provided on the VA Schedules, such as pharmaceuticals and high tech medical and surgical equipment, (2) the existence of policies and procedures specific to the VA FSS Schedules, and (3) the ultimate end users of the medical supplies and services procured.

¹ Also commonly referred to as the Federal Supply Schedule or GSA Schedules program.

² See FAR 8.402(a).

The VA FSS Program is currently the largest integrated “market” within the federal government for the sale and distribution of medical products and supplies. This market faces challenges and stresses that could threaten its viability and significant status. Some Coalition members report that it can take up to a year to modify a contract to add products and up to two years to negotiate a new contract. The slow pace of processing contract actions is particularly troubling given the VA’s unique customer - medical facilities and personnel that serve more than 8 million of our nation’s veterans. Coalition members strongly believe that VA can shorten the time required to process contract actions, and improve the availability of innovative products by use of negotiation tactics that are more closely aligned to commercial practice and GSA policy.

In light of these programmatic challenges, this White Paper supplements the recommendations offered by the GSA MAS White Paper, with additional suggestions to make VA Schedule Program pricing policy:

1. Recognize commercial practice whenever possible
2. Be consistent with GSA policy
3. Result in more streamlined evaluation processes, and
4. Reduce the cost of contracting for both government and industry

The Coalition believes that the recommendations included in this paper will lead to increased efficiency in delivering products and services to veterans and reduce the cost of contracting for VA’s contractor base. In addition, we believe the changes will allow companies in the healthcare industry to introduce new, high value commercial products and services to the federal market, more rapidly than the current process allows. Greater simplification and speed will improve services to veterans and reduce cost to taxpayers. The Office of Federal Procurement Policy has recognized that simplifying federal procurement processes improves performance, drives performance, and increases savings³. Coalition members believe that the changes recommended in this White Paper are necessary to achieve those results.

³ Anne Rung, Administrator, OFPP, *Memorandum for Chief Acquisition Officers and Senior Executives, Transforming the Marketplace: Simplifying Federal Procurement to Improve Performance, Drive Innovation, and Increase Savings* (December 3, 2014).

2. Background

GSA Delegated Authority to the VA to Operate and Manage Schedules for Medical Supplies and Services

The Federal Property and Administrative Services Act of 1949 provides GSA with overall responsibility for the management and policy development of Federal Supply Schedule (FSS) programs for supplies and services.⁴ Beginning in 1960, GSA delegated the responsibility of

VA Schedule Programs	
65 I B	Drugs, Pharmaceuticals, & Hematology Related Products
65 II A	Medical Equipment & Supplies
65 II C	Dental Equipment & Supplies
65 II F	Patient Mobility Devices
65 V A	X-Ray Equipment & Supplies
65 VII	Invitro Diagnostics, Reagents, Test Kits, & Test Sets
66 III	Cost-Per-Test, Clinical Laboratory Analyzers
621 I	Professional & Allied Healthcare Staffing Services
621 II	Medical Laboratory Testing & Analysis Services

managing the FSS programs for medical products and services to the VA.⁵ Through this delegation, the VA National Acquisition Center (NAC) manages the FSS programs for all medical products under FSC classes 65 and 66. In 2001, GSA expanded the authorization for the VA FSS program to include services under Schedule 621 I (Professional and Allied Healthcare Staffing Services), and added Schedule 621 II (Reference Laboratory Services) shortly thereafter.⁶ Currently, the VA FSS manages nine programs. See Attachment 2 for VA Schedule sales information.

GSA's delegation of authority is limited to the **operation and management** of the medical supply and services Schedules and does not include authority to proscribe **policies and procedures** that govern the FSS program.⁷ Thus, the VA cannot establish acquisition policies and procedures independent of the GSA.

⁴ See *VA Federal Supply Schedule Service, General FAQs* at 4, found at <http://www.fss.va.gov/faqs/general.asp#q004>.

⁵ *Id.*; 73 Fed. Reg. 2714 (January 15, 2008).

⁶ See *VA Federal Supply Schedule Service, General FAQs* at 4.

⁷ See Government Accountability Office Report to Congressional Requesters, *Contracting Strategies, Data and Oversight Problems Hamper Opportunities to Leverage Value of Interagency and Enterprisewide Contracts* at note 4 (April 2010).

3. VA Has Established Acquisition Procedures that are Inconsistent with MAS Pricing Policy (GSAR 538)

A. Negotiations for the Lowest Price

The General Services Acquisition Regulation (GSAR) provides that Most Favored Customer (MFC) pricing is a negotiation objective⁸—not a regulatory requirement. The MAS program seeks pricing that would be offered to similarly situated commercial customers; which is not always equivalent to the contractor’s very best pricing. The GSAR recognizes that the government may not negotiate the lowest prices considering the differences between how the government and commercial customers buy. The GSAR 538.270 states some circumstances in which it is reasonable that the government not receive a contractor’s lowest price. Notwithstanding the GSAR, the government’s pricing policy and post-award enforcement through the Price Reductions Clause (PRC) is often misunderstood – by Contracting officers, auditors, and contractors - to require that a company offer the government its best price as a condition of award. VA price negotiations are sharply focused on best price and designation of the customer with the best price, regardless of terms, as the PRC “tracking customer”. In fact, VA has modified the Commercial Sales Practices format prescribed by GSA to include a definition of MFC as “[t]he commercial customer who receives the best upfront discounted price.”⁹ Commercially, a customer’s commitment to purchase and the terms of the purchase, have a direct correlation on a company’s decision to extend “best prices”. Given the lack of commitment and high cost of contracting, it is unrealistic to impose a “standard” that FSS pricing should equal or exceed a contractor’s best commercial prices. The Coalition recognizes the contracting agency’s duty to negotiate fair and reasonable prices. Prices, however, must also be commercially reasonable to sustain a robust FSS program, with high quality contractors, offering a broad array of innovative products and services.

A Race to the Bottom

A) MFC provided as an objective, not a regulatory requirement.

B) VA negotiations are, however, rigidly focused on best price and designation of MFC as tracking customer.

C) Inflexible MFC application leads to determinations unrelated to typical commercial engagements

⁸ General Services Acquisition Regulation (GSAR) 538.270

⁹ See Offeror’s Guide to Document 5 Commercial Sales Practices Format (November 2013).

B. Negotiations with Inadequate Consideration of Terms and Conditions

FAR 15.404-1 is clear that when performing a price analysis contracting officers should consider any differences between an offered price and a previous price offered to either a government or commercial customer. Particularly, subsection (b)(2)(ii) states:

(A) The prior price must be a valid basis for comparison. If there has been a significant time lapse between the last acquisition and the present one, if the terms and conditions of the acquisition are significantly different, or if the reasonableness of the prior price is uncertain, then the prior price may not be a valid basis for comparison.

(B) The prior price must be adjusted to account for materially differing terms and conditions, quantities and market and economic factors. For similar items, the contracting officer must also adjust the prior price to account for material differences between the similar item and the item being procured.

There are significant differences between the agreed upon terms of an FSS contract and a typical commercial agreement. Commercial pricing is typically based upon the terms and conditions of a specific sale. A sole source award and commitments, such as market share or volume are terms commonly negotiated in commercial agreements. VA Schedule contracts do not contain similar provisions. The FSS contract does not define requirements, commit to volume, or guarantee exclusivity. At the contract level, it is not practicable and sometimes not permissible, for the government to make commitments which lower cost or allocate risk between the contractor and the customer. To the contrary, the government imposes significant compliance burdens (and associated costs) not found in commercial agreements. GSA recently estimated that the cost of information collection and reporting alone on the GSA Schedules exceeds \$90 million annually¹⁰. This number does not consider the cost of performance.

The fundamental differences between the FSS and commercial agreements create situations where consideration of MFC is unrelated to a typical commercial engagement. Nevertheless, the government's negotiation objective is often established based on the low price without adequate regard to the difference in terms and conditions. An offeror may ultimately be able to negotiate other than the lowest commercial price with the government, however, starting negotiations at an unrealistic point can result in unnecessarily long and contentious negotiations. Additionally, without clear written guidelines, the experience of contractors and offerors can be inconsistent from one contracting officer to another and even from one negotiation to another.

¹⁰ 81 FR 21346 General Services Administration Acquisition Regulation; Submission for OMB Review; Federal Supply Schedule Pricing Disclosures, April 11, 2016.

C. Negotiations Based on Individual Products, Rather than Product Line

VA's pricing policy might more appropriately be described as "most favored *discount*" rather than "most favored *customer*". VA instructs offerors to make a detailed disclosure of commercial pricing information by product.¹¹ A prospective contractor may disclose several customers each of which purchase a group of products or services. Pricing could be based on any number of factors associated with entire product lines. The VA, in effect, requires the contractor to deconstruct prices and will attempt to negotiate the lowest price for each individual product without regard to the customer groupings. The Government's strategy ignores the fact that some commercial customers may get better pricing on a particular product, but may pay more elsewhere. Deconstructing customer groupings in this manner also disregards the associated commercial terms and conditions. This approach is commonly referred to as "cherry picking". This negotiation method puts contractors at a particular economic disadvantage when the government buys only the lowest priced items in large quantities without regard to the totality of the deal.

D. Use of Horizontal Price Analysis for Similar Rather than Identical Products

Offerors make voluminous disclosures of information about their commercial customers to facilitate the government's MFC price analysis. These disclosures help identify the MFC customer, determine the MFC price, and establish the PRC tracking customer. FSS negotiations are further complicated by the use of horizontal price comparisons of *similar* products. This practice is inconsistent with GSA policy. GSA uses horizontal pricing as a tool for analyzing *identical* products.¹² A price comparison for similar products may not be valid because of technical differences—there is no assurance of an 'apples to apples' comparison. Moreover, if the FSS price is based on those of a competitor, it becomes particularly inappropriate to designate one of the offeror's own customers as the tracking customer. The contractor is in a true "no win" situation because it is asked to accept an FSS price point that can be lower than its own MFC price, in order to obtain a contract.

GSA will typically tell an offeror the source of the price with which it is being compared. For example, prices from GSA Advantage! are often used for the comparison. The offeror (or contractor) can respond to the agency with an explanation of any differences in terms and conditions. To the contrary, the VA will not always identify the source of its pricing information. This lack of transparency makes it virtually impossible for an offeror to adequately explain pricing differences. The result can be lengthy, frustrating negotiations.

¹¹ Id, at page 3 check cite.

¹² See. e.g., <http://gsablogs.gsa.gov/gsablog/2014/12/15/collaborating-with-industry-and-customers-to-transform-the-multiple-award-schedules/>.

Finally, we note that comparison of similar products can lead to questionable medical practices. An invalid comparison can negate a physician's experience and preference when using or prescribing devices. Such invalid comparisons may ultimately harm our nation's veterans.

E. VA Deviates from GSA Policies Regarding Resellers

Resellers/Repackagers have become a major source for medical devices and pharmaceutical products on the VA schedule. Two of the top 5 VA FSS providers of medical devices are resellers. In addition, some of the largest suppliers of pharmaceuticals are resellers and provide drugs in packages that are convenient (e.g. dosage based) for users. Over the past 5 years, sales through key resellers of both medical devices and pharmaceuticals have grown significantly. Despite the increasing reliance on resellers, companies perceive that VA's FSS pricing policy with respect to resellers is particularly burdensome and inconsistent with how GSA handles similar offers. In 2008, the GSA provided written guidance in response to VA's effort to require that resellers designate a customer of the manufacturer as the tracking customer for purposes of the PRC¹³. GSA clarified that manufacturer information was to be used for negotiation purposes; not to identify a manufacturer's customer as the "tracking customers" for purposes of PRC compliance. Yet this practice persists with some VA contracting personnel insisting on using the manufacturer's price to wholesalers as the tracking customer.

Currently, a reseller with an offer of \$500,000 that does not have significant commercial sales is asked to provide CSP from the manufacturer. Additionally, VA will not consider a reseller's sales to a commercial wholesaler to be commercial sales when the wholesaler is a government prime contractor supplying the reseller's products to government customers. VA does not have written guidelines regarding what constitutes "significant" sales. Rather this decision is made on a case-by-case basis, sometimes resulting in inconsistent and counterproductive outcomes. For example, if a reseller has \$1 million in commercial sales of a product, but \$10 million of sales of the same product to Government customers, the VA may assert that the reseller's commercial sales are not significant because they are less than its Government sales. In practice, this position may result in the rejection of new FSS offers of highly desirable products that are only sold through distributors, because those manufacturers are unwilling to provide CSP data or they do not sell the product in package sizes offered by the reseller. Those manufacturers also may not have the expertise or resources to manage an FSS, or are unwilling to take on the excessive risks and burden of compliance with FSS requirements.

¹³ Letter from Wilkinson (GSA) to Frye and Robinson (VA) re "VA OIG Report No. 05-01670-04, 'Final Report - Special Review of Federal Supply Schedule Medical Equipment and Supply Contracts Awarded to Resellers' dated Jan. 4, 2008.

Coalition members report that, to its credit, the VA NAC has taken the position that it will not automatically reject the offer of a reseller that cannot submit a manufacturer's CSP. VA has allowed the reseller to submit a letter of supply from the manufacturer, along with information that supports price reasonableness. Other members report this is an ad hoc policy that is not followed consistently and reaching an agreement on what information is acceptable in lieu of the manufacturer's CSPs is difficult. VA has not yet issued written guidance on this topic. Further, VA has not defined the type of data that it would accept to determine that prices are acceptable for award. The absence of clear instruction results in inconsistency across the program. The Coalition believes that written instructions on this topic would expedite the evaluation of offers and assure that similarly situated companies are treated in a consistent manner.

Resellers that do provide manufacturer CSP face the challenge of establishing a tracking customer. A reseller ties PRC compliance to the manufacturer's disclosure at its own peril as the reseller has no control and may have no visibility into pricing changes made by the manufacturer throughout the contract term. Further, manufacturer CSP data is proprietary and may put manufacturers at risk of breaching contractual terms with their commercial customers by disclosing such data to the reseller or the Government. Historically, the VA has accepted the manufacturer's transfer price to the reseller for tracking purposes in the absence of a commercial customer. Again, however, there is no standard practice or guidance in this area.

We note that VA requires 100% audit of proposals from resellers that do not have significant commercial sales for a contract or modification with an estimated value of \$500,000 or more. GSA does not have a similar requirement. See Paragraph 7A. FSS disclosure requirements, negotiation procedures and the audit requirements combine to make the award of reseller contracts and modifications time consuming and frustrating for both contractors and the government. Resellers are among the largest suppliers of healthcare items to the VA. A time-consuming review of their offers and modifications results in unnecessary delays in access to critical drugs and medical supplies, as well as excess expenditure when a reseller proposal is poised to save the VA taxpayer dollars.

These time consuming practices may no longer be necessary to determine if a proposed price is fair and reasonable. Since the establishment of GSA's MAS policy in the 1980's various electronic tools have emerged that make commercial and government prices more visible. For example, GSA Advantage! displays pricing for products available through the Schedules managed by GSA and VA. GSA uses that information in making horizontal price analysis of identical products offered through the Schedules program. For generic drugs, which are identified on the schedule by their chemical name, not a brand name, it is easy to compare prices offered by different suppliers for these identical products.

F. Use of E-tools Could Simplify the Acquisition Process

GSA uses a web-based application that allows companies to electronically prepare and submit a GSA Schedule contract proposals and modifications to the government. The purpose of the system is to create an interactive, secure electronic environment that simplifies the contracting process from submission of proposal to awards. VA does not have a similar system although it is currently considering changes that would move away from its currently paper based environment. As VA explores its options, the Coalition urges VA to work with GSA and industry to consider the benefits of using the GSA e-offer and e-modifications application. A collaboration between the stakeholders could enhance the use of best practices. Moreover, for companies that hold both GSA and VA contracts, use of the same system could increase consistency, enhance compliance and reduce costs.

G. Recommendations Addressing Inconsistency with GSA Policy

1. Clarify VA policy to eliminate misunderstandings about MFC negotiation objectives and the requirement to award at the lowest commercial price
2. Supplement GSAR 538.270 to give specific examples, relative to healthcare products and services, that might warrant the government receiving less favorable discounts than the best commercial customer
3. When determining MFC, recognize and differentiate prices of products offered as a part of a package to commercial customers
4. Use horizontal pricing analysis exclusively to compare identical (not similar) items
5. When horizontal price analysis is used:
 - a. identify the source of the data to the offeror/contractor and
 - b. consider the terms and conditions under which the product was sold
 - c. increase transparency of the government's price analysis by using data in GSA Advantage!
6. Provide guidance to enhance use of horizontal pricing, as a substitute for CSP disclosure, when evaluating reseller offers

7. Provide written guidance to assure that contracting officers and contractors have a uniform and reasonable approach to determining “significant sales”
8. Provide written guidelines to contracting officers and contractors for evaluation of offers from resellers—guidance should address alternatives to submission of manufacturer CSP
9. Consider the use of GSA e-offer and e-modifications as a method to streamline and speed up the acquisition process

4. Special Marketing Considerations Make Application of MAS Pricing Policy (CSPs and the PRC) Particularly Difficult for All Providers of Commercial Healthcare Products and Services

A. The Commercial Market for Healthcare Products is Complex and Fast Paced

Healthcare products are unlike many items sold under the FSS for the following reasons:

- i. Multiple prescription drug products may generally address the same diseases or conditions, but often have unique properties that make one more suitable for one patient than another
- ii. The competitive landscape is subject to constant change as new products enter the market, products are approved for new indications
- iii. For drugs, biologics and some other medical supply products, there simply are no identical products or even appropriate substitutes

Manufacturers develop commercial pricing programs to meet current market conditions or to target specific opportunities. Similarly, for service providers, prices are not based on a static price list. Instead transactional pricing is based on the scope of a job and what the market will ultimately bear. As the original MAS Pricing White Paper points out, the CSP format is a daunting process for any industry. For the healthcare industry, completing the CSP format is particularly challenging because the terminology is confusing and ill-suited to typical business practices. For example, the CSP requires that an offeror make distinctions between standard and non-standard (i.e., deviations) practices. Without better guidance from the government, it is often unclear whether to characterize

business practices as standard practices or deviations. Further, the sheer number of customer transactions typical for this industry makes compliance with disclosure and reporting requirements very burdensome.

B. Commercially, Favorable Pricing and Discounts are Designed to Incentivize Purchasing

Fitting a Square Peg to a Round Hole

A) Commercial prices are based on specific and changing demands

B) Typical commercial discounts and strategies drive future usage

C) CSP and PRC requirements are disconnected with the realities of the commercial market

Programs intended to incentivize purchases through performance-based discounts are typical in the healthcare industry but are unlike the purchase terms of the FSS. It is not uncommon for (i) discounts to be provided after the point of sale through rebates, or (ii) for discounts on new sales to be based on prior purchasing experience. The amount of such price adjustments may be measured by cumulative purchases, or the percentage of the customer's requirements for that class of drug or type of medical supply. Further, hospitals and other institutions typically have formularies of preferred drugs that they stock. These formularies impact product use and market share. By contrast, FSS prices are negotiated without regard to placement on any formulary, even though formulary decisions significantly affect sales volume. For healthcare companies, there may be no commercial customer or agreement comparable to the government, making it difficult to determine the "most favored price" given the terms and conditions of the agreement.

C. Including Multiple Products in Sales is a Common Marketing Strategy

This strategy may be used to leverage the market strength of one or more products, introduce new products, increase sales of weaker products, or expose the user to a greater portfolio of products. Sometimes the price for products when packaged together in a sale is the same percentage off the wholesale price for each, contingent on meeting the eligibility requirements, and sometimes the percentages vary for products within the package. Other times, manufacturers offer a single market basket price for all products covered by the agreement. Although commercial pricing is based on the total package, the CSP requires item-by-item disclosure. Applicable agency guidance provides as follows regarding the required format for CSP pricing disclosures:

"In determining your lowest price, you should be looking for the lowest price currently received by any customer for each line item based upon the upfront discount received In

this column you will list the name of the Most Favored Customer whose pricing is the lowest offered price for a particular line item.”¹⁴

Disclosing information in the required CSP format makes little sense without also disclosing information of the packaging arrangement requirements. Commercially the pricing is based on the total package. On the FSS however, the contractor has to calculate pricing for individual items in the package, which may appear to be at a deep discount in isolation. The requirement to disclose pricing by line item creates a disconnect between the required disclosures and the basis on which the items offered are actually sold commercially. Not only does this result in a disclosure process that is more complicated and burdensome for prospective contractors, it also leads to greater difficulties with respect to PRC compliance, both for contractors and the Government.

It should be noted that while it is impracticable to negotiate the discounts discussed in this section at the FSS contract level, the government can negotiate deeper discounts using FSS Schedule BPA's and National Contracts. Using these vehicles, VA can develop specific requirements and terms that warrant pricing for unique circumstances, without using overly aggressive FSS negotiations.

D. Recommendations Addressing Unique Market Conditions

- 1.** Revise and clarify the CSP to make it more relevant to the healthcare industry. Exclude disclosure of detailed information about pricing programs that are completely dissimilar to the terms of the FSS; for example:
 - a.** Incentive programs
 - b.** Performance based discounts
 - c.** Pricing based on acquisition of a complete package of multiple products

As an alternative the CSP could ask for summary disclosure of these pricing practices. A Contracting Officer can ask for a detailed disclosure on particular case when needed to adequately evaluate offers received.

- 2.** Provide that a PRC not be triggered based on incentive programs, performance based discounts and packaged pricing.

¹⁴ http://www.va.gov/oal/docs/business/nac/fsswebinarcontractorguidetothebsp_20130821.pdf.

3. Enhance the ability of the government to negotiate deep discounts by developing a template of special terms and pricing that ordering agencies can use when soliciting for task orders and BPAs. These terms would, to the maximum extent practicable, emulate terms and conditions that result in the most favorable commercial pricing.

5. A Unique Commercial Customer Base Makes Application of MAS Pricing Policy (CSPs and the PRC) Particularly Difficult for Providers of Healthcare Products and Services

A. Sales of Pharmaceutical and Biological Products and Some Devices are Made to Providers Who are Often Members of Group Purchasing Arrangements and who Administer or Dispense Drugs or Devices to Patients Covered by Insurance Plans

Thus, sales are often driven by prescribing practices, group purchasing organization (GPO) memberships, and health plan coverage policies within a particular therapeutic class. In addition, commercial categories of customers are often blurred. A single purchaser may be included in a class of trade, be a member of multiple GPOs, some of which may buy on behalf of multiple trade classes, and also may contract with a manufacturer separately. Because of these blurred lines, the tracking customer can effectively be more expansive than intended and very burdensome to track. The government does not perform in a similar manner and cannot be equated to these commercial customers. Logistically it is difficult to set up systems to monitor these customers, making compliance with the PRC tracking customer requirements difficult.

B. Drug Manufacturers do Business with Customers that Do Not Make Direct Purchases

For example, GPOs arrange purchasing terms, and some non-federal health plans reimburse providers on behalf of their insured. The CSP format requires manufacturers to disclose discounts and price concessions. However, prescribing and reimbursement practices typically drive sales of branded pharmaceuticals and some devices more than purchase terms. Managed care coverage and reimbursement policies can affect commercial sales and influence purchasing decisions more than the manufacturer's selling price. Manufacturers often provide co-payment assistance and prescription rebates on units

"Because of these blurred lines, the tracking customer can effectively be more expansive than intended and very

dispensed to beneficiaries, which do not adjust the purchase price they charge their customers. Such transactions cannot be so easily pigeon-holed. Requiring disclosure on the CSP and considering such customers as potential tracking customers complicates the negotiation process.

C. Because the Commercial Customer Base and Pricing Considerations are so Dissimilar to the Way Products are Purchased Under VA Schedule Contracts, Certain Commercial Customers Rarely Form the Basis of Award

Price adjustments based on performance metrics are not only very different than the purchasing terms of the FSS, the amount applicable to a tracking customer sale is often contingent and unknown when the customer is invoiced. This method of pricing can necessitate retroactive price adjustments, making it difficult to pass through reductions in accordance with the PRC requirements. Moreover, the tracking customer may not be participating in an incentive program at the time of award, but may do so at some point after award. This change creates confusion regarding the necessity to pass through a lower price based on very different terms and conditions even where the government does not meet the criteria for receiving the discount. For these reasons, manufacturers have requested that discounts contingent on performance criteria be excluded from disclosure and the PRC, but contracting officers are not uniformly willing to do so. Some companies have built systems to overcome the difficulties of compliance. However, the cost of launching and maintaining such systems, as well as the risks of non-compliance, are significant obstacles to participating in the Schedules program.

D. Recommendation Addressing Unique Commercial Customer Base

Exclude disclosure of transactions with commercial or state entities that pay providers on behalf of beneficiaries from disclosure on the CSP. Federal treatment facilities purchasing drugs under FSS contracts are not managed care organizations and are unaffected by such business relationships.

6. Opportunities Exist to Streamline the Acquisition of Covered Drugs through the FSS

A. The Veterans Health Care Act Controls the Price of Covered Drugs Under Schedule 651B Contracts

As a matter of policy, VA also applies MAS pricing policies to the negotiation of the same items. The application of both the Veterans Health Care Act (VHCA) and MAS pricing policy results in a negotiation scheme which is unnecessarily complex for both the government and FSS contractors.

Covered drugs are prescription drugs marketed under a New Drug Application (i.e., brand drugs), including, authorized generic drugs and all biological products. The VA distinguishes covered drugs from generic drugs by using two different SINS: 42-2A and 42-2B. The VHCA requires manufacturers of covered drugs to offer them for sale through the Schedule program to four federal agencies (Big Four), including the VA and DoD. Contractors may not charge the Big Four a price that exceeds an amount established by a statutory formula (frequently referred to as the “Federal Ceiling Price” or “FCP”). The FCP is calculated as 76% of the manufacturer’s reported Non-Federal Average Manufacturers Price (NFAMP), as defined in the statute, for a twelve-month period, plus inflation. Inflation is calculated as a percentage increase over the Consumer Price Index-Urban (CPIU) for the same period. 38 USC §8126(a)(c). Manufacturers of covered drugs must comply with these requirements as a condition of both Medicaid coverage and payment by any of the Big Four Federal agencies. 38 USC §8126(a)(b).

B. The VHCA Also Limits Price Increases in Contract Out Years

Covered drugs sold under VA FSS contracts are subject to a separate price cap in the years following the first year of the contract. By statute, after the first year, contract prices cannot exceed prices charged in the previous year, increased by CPIU. 38 USC §8126(d). This cap, referred to as the “MaxCap”, applies even when a price increase would not exceed 76% of the NFAMP, and would ordinarily have been permitted under the FSS contract’s Economic Price Adjustment (EPA) Clause. Every year after the first year, the VA compares the MaxCap to the calculated NFAMP price and if the calculated price is higher than the MaxCap plus CPIU, the latter becomes the Big Four price for the next calendar year. The OGA price for each successive year of the contract is limited to the FSS price increased by CPIU.

C. Manufacturers of Covered Drugs May Have Two Schedule Price Lists, One for the “Big Four” Agencies Based on the Statutory Price Ceiling and Another for Other Government Agencies, Based on MAS Pricing Policy

Other Government Agencies (OGAs) can purchase covered drugs under the VA Federal Supply Schedule, but are not entitled to FCP. Consequently, manufacturers of covered drugs are permitted to maintain two Schedule price lists. The OGA price is negotiated based on information provided in the standard CSP format. The VA, however, interprets the MaxCap as applicable to the OGA price after the first year of the contract. The VA interpretation essentially limits OGA price increases to the CPIU. Because of this limitation, FSS contractors may be unable to have schedule contract prices increase consistent with prices paid by their commercial customers.

D. Application of FSS Pricing Policy to Covered Drugs is Not Necessary to Assure Fair and Reasonable Pricing

The government's interests in assuring that VA customers receive fair and reasonable FSS prices are well covered by implementation of the complex requirements of the VHCA. Nearly all purchases of covered drugs under Schedules contracts are made by the Big Four federal agencies and prices to these agencies are controlled by statute. The statutory price ceiling is at least 24% below market (i.e., 24% below the average discounted price paid by commercial customers). Although the statutory price is a ceiling not a floor, in practice, the negotiated FSS price is rarely lower than the FCP.

The process of FSS pricing disclosure and negotiation is long and costly for both contractors and the government. A potential offeror must be able to monitor, assemble, and vet a massive amount of transactional data in order to disclose accurately on the CSP format prescribed by the solicitation. After award, contractors must be capable of capturing data regarding schedule, other government, and commercial sales transactions in order to comply with the provisions of the PRC. The Government has to develop procedures and maintain systems to receive, analyze, evaluate, and monitor the data that it receives from contractors. The costs imposed by the pricing policy likely exceed any price decreases actually negotiated by the government that would be applicable to the relatively few OGA orders that flow through the FSS.

E. Application of the PRC to Covered Drugs is Not Necessary to Assure that Prices Remain Fair Compared to the Commercial Market Throughout the Life of the Contract

A contractor must offer covered drugs on schedule, at no more than the FCP. The FCP is calculated as a percentage of a market rate thus tying it to the commercial market. In out years of the contract, prices can be increased only by the CPIU, even if the tracking customer price has increased. See discussion of the MaxCap in Paragraph B of this section. Thus, because (1) calculation of the FCP is based on a percentage of the market price and (2) increases are held to inflation by statutory price controls, the PRC is unnecessary to assure that prices remain fair and reasonable for the life of the Schedule contract.

F. Application of the PRC is Not Only Unnecessary; it Further Complicates an Already Complex Statutory Regime

The following paragraphs relay circumstance based on experiences of Coalition members that are particularly troubling and perplexing to VA FSS contractors. We note that there is an absence of

uniform regulations, or written guidance on application of the PRC. This lack of written instruction results in delays and inconsistent processing of contract actions.

- i. VA establishes a commercial tracking customer for covered drugs, even though the FSS price for the overwhelming majority of purchases is mandated by statute and not based on the price of a commercial customer or category of customer. A tracking customer is established even though a company may opt not to negotiate an OGA price. As a result, price reductions may become applicable in commercially unreasonable circumstances. The VA interprets the PRC as triggered for the Big Four price if either the tracking customer or OGA price falls below FCP. The contractor must reduce the Big Four contract price to match the OGA price, even if the tracking customer price was not the basis of the Big Four contract price.
- ii. Prices paid to the tracking customer may prevent a contractor from negotiating the full FCP in subsequent years of the contract. As described in paragraph (i) above, a covered drug can have both a FCP and a tracking customer price. After the first year of the contract, the MaxCap allows the FCP to increase in accordance with the CPIU (unless the NFAMP calculation is lower). The VA NAC will not permit the full price increase allowed by the CPIU, if the FCP would exceed the current tracking customer price. This policy means the tracking customer price not only becomes the contract price for the entire year, it will set the OGA price subject to the MaxCap until the next first year under the VHCA. The unintended, administratively burdensome result is that manufacturers will not voluntarily offer the VA permanent price reductions. Rather manufacturers provide only temporary commercial price reductions to avoid years of suppressed prices.
- iii. Prior year pricing to tracking customers and application of the MaxCap, combine to artificially constrain pricing on subsequent contracts. This occurs because the VA has *decoupled* the statutory MaxCap (applicable after the first contract year) from the actual contract award date. Thus, it has a policy of standardizing the “first year” of Schedule 65IB contracts, regardless of when the new contract is actually awarded. *For purposes of administering contracts subject to the VHCA*, all contract years begin on January 1st, and a new first year occurs every five years. As a result, FSS contracts offering covered drugs have both a “true” first year and a “deemed” first year. The “deemed” first year is the same year for every Schedule 65IB contract. In addition, for purposes of determining the MaxCap, the VA has decided that the FSS price for the prior year is the price in effect on the last day of the prior fiscal year, i.e., September 30. Thus, the prior year

FSS price to which CPIU is added may be less than the price charged on the last day of the actual first year of the contract or the deemed first year which is a calendar year (i.e., on December 31st.)

The disconnect between the true first year and deemed first year of the contract creates considerable confusion and unfairly suppresses prices for long periods of time. Because the deemed “first year” is rarely the same as the true first year of the contract application of the PRC, the Economic Price Adjustment (EPA) clause, and the VHCA can deny the contractor the ability to ever negotiate a higher price based on current market conditions. The following example demonstrates how application of the VCHA and MAS policy combine to result in a situation that is untenable for commercial contractors. Assume that:

- The “deemed first year” for all Schedule 65I B contracts began January 1, 2014. The next deemed first year will become effective 5 years later, i.e. January 1, 2019
- A current FSS contractor is awarded a new Schedule 65IB with the true year beginning on June 1, 2017
 - A new tracking customer is established at the time of award
 - FSS price negotiations based on the tracking customer would result in prices greater than the prior year pricing plus CPIU

Because of the VCHA, the MaxCap will prevent prices to the Big Four from rising above the expired FSS contract price in effect on September 30, 2016 plus CPIU until the end of 2018 – more than a year after the contract award date. Additionally, even though negotiation based on the commercial tracking customer may warrant higher prices to OGA’s, VA could disallow the increase because of the MaxCap. Historically, the VA has agreed to negotiate new OGA prices without regard to the MaxCap, while applying it to the Big Four prices, even though it has interpreted the MaxCap as applicable to OGA prices. Otherwise, there would never be an opportunity to negotiate contract prices reflecting current commercial prices. If prices in each of the deemed out years of a multiple year contract may not exceed the prior year prices plus the CPIU, the suppressed MaxCap prices that apply on January 1, 2017 would be the FSS prices in effect on September 30, 2017, and would set the MaxCap applicable to 2018. Nevertheless, there is no written policy granting such relief.

The MaxCap will not apply in 2019, because it is the next “deemed” first year. See discussion in paragraph 6 B above. Thus, the Big Four price is capped only by the NFAMP calculation. Theoretically the contractor can also increase OGA prices in 2019 without regard to the FSS price in effect on September 30, 2018, and the VA has allowed OGA prices to increase under the EPA clause in a “deemed” first year. However, the contractor’s ability to increase both Big Four and OGA prices may be constrained by the new tracking customer price that was established at the time of award on June

2017. Even though commercial prices may have again increased, VA will hold the contractor to the agreement reached in June 2017 regarding prices to the tracking customer.

G. Recommendations Addressing Complexity Related to Covered Drugs

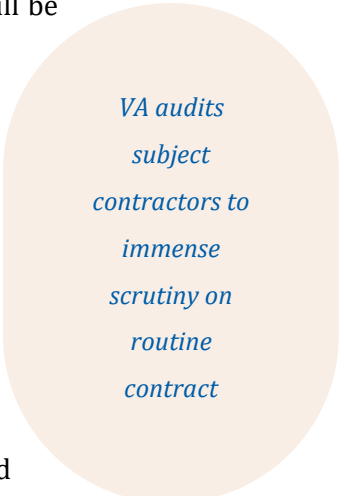
- 1.** Covered drugs should not be subject to FSS pricing policies (i.e., disclosure of commercial pricing on the CSP, negotiation of MFC, subject to PRC) unless a contractor opts to have an OGA price list.
 - a.** MAS prices for the Big Four agencies would be established at the FCP
 - b.** Out year pricing would be controlled by the MaxCap except the MaxCap should not constrain negotiation and award of new contract prices for OGAs during an out year
- 2.** If the PRC is retained, it should not be applied to prevent contractors from the benefit of the maximum statutory price increase in out years. Such a result is inconsistent with the MAS EPA clause and the VHCA, which contemplates that manufacturer price increases will only be limited to CPIU for five-year periods.
- 3.** An OGA price list should not be subject to the MaxCap. Price increases should be allowed in accordance with GSA policy, i.e.
 - a.** 552.216-70 Economic Price Adjustment – Multiple Award Schedule Contracts or
 - b.** Clause I-FSS-969 Economic Price Adjustment – FSS Multiple Award Schedule
- 4.** If the MaxCap in effect on the award date prevented the contractor from negotiating a higher price, the negotiated price should not continue to be constrained in the contract year when the MaxCap does not apply.
- 5.** The VA should establish a clear, comprehensive set of written guidelines as to how FSS contracts will be negotiated and how the PRC will be applied.

7. The VA Audit Procedures Differ from GSA and Extend the Time Required to Process Offers and Modifications

A. The VA Requires Pre-Award Audits for Contract Actions Over Specified Thresholds

VA subjects its contractors to immense scrutiny on routine contract actions. Under current VA policy, pre-award audits are required on awards or modifications for pharmaceutical, drugs, and hematology products (Schedule 651B) with estimated annual sales to the VA of \$5 million or more, and awards or modifications for all other VA FSS products and services with expected annual sales of \$3 million or more. In addition, the VA requires audit of proposals from resellers (defined by the VA as any company other than the manufacturer) that do not have significant commercial sales for a contract or modification with an estimated value of \$500,000 or more.¹⁵

VA's pre-award audit process extends the time required for the agency to award proposals for contracts and modifications. The current policy removes the discretion typically exercised by the government to determine when an audit is necessary. Elimination of discretion, combined with finite resources, virtually ensures that all large contract and modification actions will suffer a delay in award regardless of the complexity of the proposal. For example, a modification to add a large line of medical devices at the prices well below the lowest commercial price will be audited regardless of whether there is a specific business justification to do so. The consequence of an audit under these circumstances could be a delay in the award or modification, and as a result, the availability of these medical devices to the nation's veterans. In addition, this unnecessary action could well delay other, more worthwhile audits. Moreover, the VA OIG as a matter of practice asserts that CSP disclosures become "stale" after 60 days, and will require offerors to update and resubmit CSP data if negotiations have extended beyond 60 days from the prior CSP submission. Given that contract negotiations very often extend over one year and beyond, this view results in a repeated cycle of CSP updates and new audit reviews.



*VA audits
subject
contractors to
immense
scrutiny on
routine
contract*

GSA's Office of Audits takes a different approach to identifying contracts for audits. GSA prepares an annual audit plan that focuses on high dollar value contracts and contracts where either the auditors or contracting officers have identified a reason why an audit would be warranted. GSA typically audits a comparatively low number of contracts per year, however those contracts cover a high

¹⁵ See *Office of Inspector General Review Criteria* at <http://www.va.gov/oal/business/fss/oig.asp>.

percentage of Schedule dollars. This approach is designed to leverage audit resources while still examining contract actions that have the most significant impact on federal customers.

B. VA Audits Lack Transparency

A pre-award audit evaluates contractor submitted CSP information and whether offered prices are fair and reasonable. The audit provides advice to the contracting officer on a number of issues that affect a decision to award a contract or issue a modification including:

- Negotiation strategies
- Selection of tracking customers for purposes of the Price Reductions Identification clause
- Purchasing practices that may affect negotiations.

At the end of the process Coalition members report that, VA does not provide the contractor a copy of the audit report or a debriefing on the government's position. As a result, the contractor may lack understanding of the basis for the government's negotiation position. The lack of transparency can result in government positions that are based on a misunderstanding of the contractor's data without any comments or corrections by the contractor. This is an unsatisfactory result for both the contractor and contracting officer.

C. Recommendations Addressing Audits

1. Revise internal audit guidelines to select contract actions to be audited based on best leveraging government resources and eliminating low risk contract actions from the requirement for pre-award audit. Audit decisions should not be based exclusively on arbitrary monetary thresholds.
2. Revise criteria for review of proposals from resellers; use same criteria as proposals from other offerors.
3. Develop a streamlined audit approach with templates/guidelines based on a manufacture's historical performance.
4. Establish transparency in audits and negotiations by providing contractors with copies of audit reports. At a minimum share findings without any recommendations made by the auditor to the contracting officer.
5. The OIG should periodically share best practices to increase quality of submissions and reduce time for completing offers.

8. Summary of Recommendations

This White Paper contains a number of recommendations to change VA pricing policies and procedure related to the FSS program. In summary, the recommendations would clarify price negotiation objectives, make the CSP more relevant to the healthcare industry and exclude from disclosure and negotiations certain commercial practices that are so dissimilar from the federal government that they rarely form the basis of negotiation. The Coalition believes that by implementing these recommendations, VA will achieve a FSS program that:

- Recognizes commercial practice whenever possible
- Is consistent with GSA's policy direction
- Streamlines evaluation processes and
- Reduces the cost of contracting for both government and industry

Coalition members wholeheartedly agree with the Administrator of the OFPP that simplification of federal procurement drives improved performance, innovation, and savings. We would value the opportunity to work with VA to improve the FSS acquisition process.

List of Recommendations

Recommendations Addressing Inconsistency with GSA Policy

1. Clarify VA policy to eliminate misunderstandings about MFC negotiation objectives and the requirement to award at the lowest commercial price
2. Supplement GSAR 538.270 to give specific examples, relative to healthcare products and services, that might warrant the government receiving less favorable discounts than the best commercial customer
3. When determining MFC, exclude prices of products offered as a part of a packaged price to commercial customers
4. Use horizontal pricing analysis exclusively to compare identical (not similar) items
5. When horizontal price analysis is used
 - a. Identify the source of the data to the offeror/contractor and
 - b. Consider the terms and conditions under which the product was sold

- c.** Increase transparency of the government’s price analysis by using data in GSA Advantage!
- 6.** Provide guidance to enhance use of horizontal pricing, as a substitute for CSP disclosure, when evaluating reseller offers
- 7.** Provide guidance to assure that contracting officers have a uniform and reasonable approach to determining “significant sales”
- 8.** Provide written guidelines to contracting officers and contractors for evaluation of offers from resellers. Guidance should address alternatives to submission of manufacturer CSP
- 9.** Consider the use of GSA e-offer and e-modifications as a method to streamline and speed up the acquisition process

Recommendations Addressing Unique Market Conditions

- 1.** Revise and clarify the CSP to make it more relevant to the healthcare industry. Exclude disclosure of detailed information about pricing programs that are completely dissimilar to the terms of the FSS; for example
 - a.** Incentive programs
 - b.** Performance based discounts
 - c.** Pricing based on acquisition of a complete package of multiple products

As an alternative the CSP could ask for summary disclosure of these pricing practices. A Contracting Officer can ask for a detailed disclosure on a particular case when needed to adequately evaluate offers received.

- 2.** Provide that a PRC not be triggered based on incentive programs, performance based discounts and packaged pricing
- 3.** Enhance the ability of government to negotiate deep discounts by developing a template of special terms and pricing that ordering agencies can use when soliciting for task orders and BPAs. These terms would, to the maximum extent practicable, emulate terms and conditions that result in the most favorable commercial pricing

Recommendation Addressing Unique Commercial Customer Base

1. Exclude disclosure of transactions with commercial or state entities that pay providers on behalf of beneficiaries from disclosure on the CSP. Federal treatment facilities purchasing drugs under FSS contracts are not managed care organizations and are unaffected by such business relationships

Recommendations Addressing Complexity Specific to Covered Drugs

1. Covered drugs should not be subject to FSS pricing policies (i.e., disclosure of commercial pricing on the CSP, negotiation of MFC, subject to PRC) unless a contractor opts to have an OGA price list
 - a. MAS prices would be established at the FCP
 - b. Out year pricing would be controlled by the MaxCap
2. If the PRC is retained, it should not be applied to prevent a contractor from the benefit of the maximum statutory price increase in out years. Such a result is inconsistent with the MAS EPA clause and the VHCA, which contemplates that manufacturer price increases will only be limited to CPIU for five-year periods
3. An OGA price list should not be subject to the MaxCap. Price increases should be allowed in accordance with GSA policy, i.e.
 - a. 552.216-70 Economic Price Adjustment – Multiple Award Schedule Contracts or
 - b. Clause I-FSS-969 Economic Price Adjustment – FSS Multiple Award Schedule
4. If the MaxCap in effect on the award date prevented the contractor from negotiating a higher price, the negotiated price should not continue to be constrained in the contract year when the MaxCap doesn't apply
5. The VA should establish a clear, comprehensive set of written guidelines as to how FSS contracts will be negotiated and how the PRC will be applied

Recommendations Addressing Audits

1. Revise internal audit guidelines to select contract actions to be audited based on best leveraging government resources and eliminating low risk contract actions from the requirement for pre-award audit. Audit decisions should not be based exclusively on arbitrary monetary thresholds
2. Revise criteria for review of proposals from resellers; use same criteria as proposals from other offerors
3. Develop a streamlined audit approach with templates/guidelines based on a manufacture's historical performance
4. Establish transparency in audits and negotiations by providing contractors with copies of audit reports and findings. At a minimum, share findings without any recommendations made by the auditor to the contracting officer
5. The OIG should periodically share best practices to increase quality of submissions and reduce time for completing offers

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This white paper was prepared by The Coalition for Government Procurement (Coalition). The Coalition is a non-profit association of firms selling commercial services and products to the Federal Government.

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List of Attachments

1. "GSA Multiple Award Schedule Pricing: *Recommendations to Embrace Regulatory and Commercial Market Changes.*"
2. VA Schedule Sales Information

Attachment 1



GSA Multiple Award Schedule Pricing

Recommendations to Embrace Regulatory and Commercial Market Changes

September 2013

This White Paper was prepared by The Coalition for Government Procurement (Coalition). The Coalition is a non-profit association of firms selling commercial services and products to the Federal Government. Members collectively account for approximately 70% of the sales generated through the GSA Multiple Award Schedules program and about half of the commercial item solutions purchased annually by the Federal Government.

White Paper

GSA Schedule Pricing Policy

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GSA Multiple Award Schedule Pricing

Recommendations to Embrace Regulatory and Commercial Market Changes

1. Overview

The General Services Administration (GSA) Multiple Award Schedule (MAS)¹⁶ program is a valuable tool for the acquisition of a vast array of commercial services and products by federal agencies. The program is unique in its ability to provide a single platform that accommodates government-wide requirements for commercial items that also incorporates commercial practices. The program covers more than 40 Schedule contracts with revenue of approximately \$50 billion dollars, including Schedules operated by the Department of Veterans Affairs under a delegation of authority from GSA. Services account for approximately 70 percent of all sales. The MAS program lowers procurement costs by providing contracts through which federal agencies and other authorized users can competitively order reasonably priced services, products and

solutions without the need to conduct individual full and open solicitation competitions.

MAS Pricing Policy Targets for Reform

1. *Most Favored Customer policy (GSAR 538.270)*
2. *MAS Commercial Sales Practice disclosure*
3. *Price Reductions Clause (GSAR 552.238-75)*
4. *MAS procedures for Services acquisition*

Despite the ability of the MAS program to streamline service and product acquisitions for federal agencies, the program has become less efficient and cost effective in recent years due to the outdated pricing policies governing the negotiation, award and

renewal of MAS contracts. Contracting procedures have not evolved to keep up with significant statutory and regulatory changes to MAS ordering procedures that provide for increased competition at the task and delivery order level among all MAS contractors.

¹⁶ Also referred to as GSA Schedules or the Schedules Program

(See Federal Acquisition Regulation (FAR) 8.4). Similarly, current MAS contracting procedures fail to embrace the potential of the commercial market with its streamlined processes, lower costs and flexibility to offer the latest commercial solutions at true market prices. While the MAS program still offers contractors a valuable tool to access the federal market, Coalition members uniformly express the following concerns with the program:

- The Most Favored Customer (MFC) pricing policy at General Services Acquisition Regulation (GSAR) 538.270 is commonly misunderstood and in some cases misapplied to require that a contractor offer its best commercial price at the contract level, even where the terms and conditions of the government differ from those of commercial customers
- MAS Commercial Sales Practices (CSP) disclosure requirements are unclear, inconsistently applied, and exceed the amount of information needed to negotiate fair and reasonable Schedule contract prices
- The GSAR 552.238-75 Price Reductions Clause (PRC) results in high compliance costs and liability risks for contractors despite the fact that the clause is no longer needed to assure reasonable prices on MAS tasks orders
- MAS procedures are not adequately designed to meet the requirements of the acquisition of services and solutions

The underlying pricing policy of the MAS program has remained fundamentally unchanged for close to three decades. Changes to MAS ordering procedures and in the commercial market, however, offer opportunities to create an MAS pricing policy that operates more effectively for customers, the GSA and industry.

This white paper examines the MAS pricing policies and procedures that currently exist and provides specific recommendations to improve the efficiency and effectiveness

of the program with the goal of establishing a pricing policy that meets the following objectives.

MAS Pricing Policy Reform

Objectives:

1. *Lower costs for government, industry and the taxpayer*
2. *Establish consistency with recent regulatory changes*
3. *Leverage commercial market and pricing strategies*
4. *Accommodate services and solutions based pricing*
5. *Provide clarity and consistency to enhance compliance by customer agencies and contractors*

2. Background

A. Creation of the MAS Program for Commercial Items

The original concept of the MAS program was to create a streamlined procurement program offering commercial items and reflecting commercial practices. The current pricing policy, which dates back to the 1980's, was originally designed to facilitate pricing of commercial products typically sold at some discount off of an established commercial list price using a standard set of commercial pricing practices.

When the current MAS pricing policy was developed fair and reasonable contract pricing was assured by 1) contractor disclosures of commercial sales, discounting and/or pricing practices; 2) the government's MFC pricing negotiation objective; and 3) enforcement of the PRC. These three elements worked together to assure that MAS contract prices were fair and reasonable at the time of negotiations and throughout the life of an MAS contract. Using these elements, fair and reasonable pricing is established at the contract level, rather than competitive pricing at the order level.

B. Prior Studies Recommend Alternatives to Existing Pricing Policy

There have been two significant studies of the MAS program in the past decade. Both studies were conducted by panels comprised of representatives from both the public and private sectors. The 2007 Services Acquisition Reform Act Acquisition Advisory Panel ("[SARA Panel](#)")¹⁷ included a review of the GSA schedules. Several years later, the Multiple Award Schedule Advisory Panel¹⁸ issued a [report](#)¹⁹ providing advice and recommendations to GSA on MAS pricing provisions. Both reviews recommended that GSA consider alternatives to its most favored customer pricing policy and the use of the PRC. The GSA made some limited changes in response to both reports. In neither case, however, did GSA implement recommendations to change its basic pricing policy or to dramatically constrain its use of the PRC.

C. Schedules Modernization: An Opportunity for Pricing Reform

GSA is currently in the process of modernizing the GSA Schedules program with stated goals focusing on four distinct areas:

1. Data Driven Pricing;
2. Flexible Contracting;
3. Enhanced Service Delivery; and
4. Increased Knowledge Management Capabilities

From an industry perspective, these modernization efforts have focused more on process than on incorporating best commercial pricing practices. A decrease in total acquisition costs requires a focus on the fundamental pricing policies, which are the subject of this white paper.

¹⁷ Established pursuant to Section 1423 of the Services Acquisition Reform Act of 2003, 41 USC 428a. http://www.acquisition.gov/comp/aap/24102_GSA.pdf

¹⁸ Established by the Administrator of General Services in March 2008. http://www.acquisition.gov/comp/masap/documents/MAS_Panel_Final_Report_Signatures.pdf

¹⁹ Multiple Award Schedule Advisory Panel Final Report February 2010.

D. Upcoming GSAR Rewrite to Update MAS Pricing Policy

Over the last year, GSA has publicly stated that it is planning a rewrite of GSAR Part 538, including those sections covering MAS pricing. This will be the second attempt to rewrite GSAR Part 538. In December 2012, a GSA proposed rule was withdrawn without being published as final. The Coalition applauds GSA for refocusing on this effort and appreciates the opportunity to engage in a Myth-Busters dialogue regarding the current pricing policy. Government and industry share a common goal of ensuring the MAS program enhances competition while providing efficient, effective best value solutions for customer agencies and the American taxpayer. This white paper offers an industry partner perspective, which can be considered in restructuring the pricing policy for the next rewrite.

3. Environmental Scan

There have been significant changes in the government and commercial markets since the inception of the updated MAS pricing policy in the 1990's. Changes to federal regulations within the past 20 years provided increasingly greater competition at the task order level. Commercial services, bundled solutions, and high tech products as opposed to commoditized products account for a significant percentage of MAS sales. The internet and e-tools such as GSA Advantage! and GSA e-Buy provide greater visibility into pricing for government customers and commercial schedule contract holders. As a result of these changes the government is less dependent on pre-award pricing disclosures and the PRC to assure fair and reasonable GSA Schedule prices. The cumulative impact of these environmental changes should drive corresponding changes in MAS pricing policy.

A. Significant Government Changes

The government has changed both the rules that agencies must follow when ordering from the Schedules and the types of solutions that it buys.

- i. **Regulatory Changes:** Effective in May 2011, new FAR Subpart 8.4 ordering rules went into effect for all federal agencies. The FAR revisions significantly increased the number of competitions needed to place an MAS order. Specifically, the FAR now requires that:
 - a. All orders over the Simplified Acquisition Threshold (SAT) (currently, \$150,000) must be competed and price reductions sought from all MAS contractors capable of meeting the customer agency requirement.
 - b. Orders for services requiring a Statement of Work must be competed if they exceed the micropurchase threshold (currently \$3,000).
 - c. Blanket Purchase Agreements (“BPAs”) must be competed, further creating downward pressures on GSA Schedule prices.

In addition, there is a preference to award multiple BPAs (as opposed to awarding a single contractor), which creates further competition for BPA orders.

If an order is not competed, as required, the ordering activity must justify and document its decision not to do so. Prior to the implementation of these new task order competition requirements, the MAS terms and ordering regulations identified the maximum order threshold (MOT) as the dollar level at which some additional, but limited task order competitions were required. The MOT generally ranges from \$500,000 to \$1 million depending on the specific contract schedule—greatly exceeding the new SAT competition threshold. The MOT is still in MAS contracts and has not been lowered consistent with the new statutory and regulatory competition requirements for orders exceeding \$150,000.

- ii. **Changes in Purchasing Trends:** Coalition members report that Federal agencies (like commercial buyers) sometimes seek complex solutions

involving both products and cross-functional services. Pricing of some solutions can be difficult in MAS contracts, which typically feature pricing for discrete products and distinct labor categories. Increasingly, agencies require total solutions. Contractors need the flexibility to mix and match their contract and non-Schedule items in a fast and efficient way. The GSA Schedule program, as it is currently structured, does not allow for this practice.

B. Significant Commercial Changes

MAS contractors increasingly rely more on customized pricing in their normal commercial sales and less on formal commercial price lists. This is particularly the case in the services and information technology sectors. Highly competitive markets often feature pricing based on analysis and research of a particular transaction or target market. Commercial products are often sold as a package, with services being a part of the package (e.g., maintenance /software /training/ customization). Along with these specific delivery terms, geographic scope and availability also drive changes to the traditional pricing of products. Responding to customer demand, contractors increasingly offer new and different professional services in the form of solutions. Technology has made business faster, allowing for far-reaching, almost real-time collaborations. The speed at which such services are offered can be problematic for the MAS program as it often can take a fair amount of time to negotiate the pricing for a new service or product to be added to an MAS contract. Meanwhile, customer agencies either do not have access to the latest solutions or they purchase the newest technologies through other vehicles.

C. Growth of Internet/Digital Tools

The increasing availability of digital tools and the resulting enhanced market transparency enables all customers, including GSA, to have greater visibility concerning fair and reasonable pricing while increasing competition across the federal enterprise. Federal regulations encourage agencies to use e-tools such as GSA Advantage! and GSA

eBuy when placing an order, providing greater competition and pricing visibility for the government and sales opportunities for Schedule contractors at the task order level. GSA continues to grow its suite of e-tools, having recently launched a reverse auction capability for schedules ordering. These tools allow GSA to be less dependent upon contractor disclosures and the protracted (and possibly dated) information that GSA traditionally has relied upon in negotiating MAS pricing. Digital tools provide the capability for streamlined task order competition for specific requirements.

D. Cumulative Impact of Environmental Changes on MAS Pricing

Current MAS pricing is exemplified by the formation, in effect, of a catalog for federal agency users developed by reference to commercial price lists. It increasingly is the case, however, that commercial pricing is market based. Contractors less frequently rely on standard price lists in their commercial business and federal agency users less frequently buy at the GSA “catalog” price. Instead, agencies conduct competitions or otherwise place orders at prices below the MAS contract pricing. This rigorous task order competition offers an opportunity to streamline now lengthy and complex upfront contract pricing procedures.

4. Most Favored Customer Pricing Policy

A. Confusion concerning MFC vs. Best Price

A persistent area of confusion in the MAS Program is the extent to which GSA is entitled, as a matter of law or by contract, to treatment as the “most favored customer” (i.e., to receive pricing that is at least as favorable as any other customer of a contractor). In part, this confusion is due to the manner in which GSA describes MAS pricing. For example, GSA’s own website states:

Customers contract with pre-approved vendors and benefit from “most-favored customer” pricing with GSA Schedules (also referred to as Multiple Award Schedules (MAS) and Federal Supply Schedules (FSS))²⁰.

This statement suggests that a customer will always get a contractor’s best prices. The GSAR makes it clear, however, that MFC is a negotiation objective rather than a requirement.²¹ The MAS program seeks pricing that would be offered to similarly situated commercial customers; which is not always equivalent to the contractor’s very best pricing. The GSA should not continue to put itself in a “no-win” position of having to defend itself as to whether its program delivers the very best price.

Commercial entities offer favorable pricing to customers that make substantial purchase commitments and minimize the risks of the contract terms. At the contract level, the MAS agreement does not define requirements, commit to volume or guarantee exclusivity – criteria often used in both the federal and commercial markets to determine which customers obtain better pricing. Contractors may also provide more favorable pricing to commercial customers that assume value added functions such as participating in joint marketing agreements, or assisting with sales, distribution, or inventory. At the MAS contract level, it is not practicable or permissible for the government to make such commitments.

In fact, the government imposes significant compliance burdens (and associated costs) typically not found in commercial agreements. The GSAR recognizes that GSA may not negotiate the best prices because of differences between how the government and commercial customers buy. The GSAR states some circumstances in which it is reasonable that the government not get a contractor’s best price. Notwithstanding the GSAR, GSA’s pricing policy and post-award enforcement through the PRC is often

²⁰ www.gsa.gov/portal/category/100615

²¹ GSAR 552.238-75

misunderstood – by Contracting officers, auditors, and contractors - to require that a company offer the government its best price as a condition of award.

B. Complications for Service Contracts

Negotiation of MFC pricing can be particularly difficult for professional services contractors where commercial pricing is often market based. For these entities prices are not based on a static price list. Instead project pricing is based on the scope of a job and what the market will ultimately bear. For these companies there may be no direct comparison for pricing, making it difficult to determine the “most favored price” given the terms and conditions of the agreement. Moreover, there are circumstances when both GSA and the MAS offeror agree that there are differences between the government and commercial agreements. The government has, however, often been unwilling to except less than the best price. For example, MAS offerors are asked to justify not offering the government their subcontract rate to federal prime contractors; these prices are not, however, reflective of a typical commercial engagement.

C. Problems Identifying Best Price

A further concern is that, a pricing policy dependent on the “best” price is problematic even if it is the “best” price for a similarly situated commercial customer. An effort to find the best single price over the period of time required for disclosure by the Commercial Sales Practices (CSP) format can be a daunting process. This is particularly true in high transaction businesses and/or where commercial pricing is highly customized and items, particularly services, can be bundled and customized to suit the particular commercial customer or market. Attempts to identify, monitor and report “best” price for disclosure and application of the PRC significantly increase a contractor’s liability risks and cost of compliance. The cost of such efforts outweighs the benefits, because once found the terms and conditions of the “best” price can be so different from the MAS agreement at the contract level that it is not a valid basis for comparison.

As noted in paragraphs (A) through (C) above, a reading of the MFC policy to require best price is inconsistent with the GSAR and creates false expectations on the part of GSA customers. The inconsistent interpretations lead to protracted negotiations and significant risk of liabilities on contractors. If for no other reason, MFC is problematic because of the significant ambiguities as to what the term means.

D. Pricing Policy Recommendations

The Coalition recommends that GSA delete the phrases “Most Favored Customer” and “Best Price” from its pricing policy. Instead, GSA should rewrite GSAR 538.270 *Evaluation of Multiple Award Schedule (MAS) offers* to require negotiation of fair and reasonable prices. Price evaluations should compare the benefits, potential volume, and terms and agreements of the MAS contract with those of similar commercial customers. Such a policy confirms the government’s intent to fully leverage its volume while still recognizing that a contractor’s commercial customer may warrant a better price than that negotiated at the MAS contract level. Restatement of the current MFC policy is necessary to properly focus the MAS program on negotiating prices that are good for federal customers and fair for industry.

The discussion above indicates the difficulty of pricing professional services at the contract level. To establish a more reasonable vehicle for pricing services we recommend that GSA pilot test a recommendation made by the SARA Panel. See *Report of the Acquisition Advisory Panel*, at 102 (2007)²². The SARA Panel’s recommendation was that GSA establish a new Schedule for professional services where contractors agree to ceiling pricing at the contract level. More specific pricing would be set by competition at the task order level rather than MFC negotiations at the contract level. This approach would streamline the initial process of awarding a GSA Schedule contract and would also enhance competition at the task order level. This approach is consistent with the current FAR 8.4 competitive ordering requirements for task and delivery orders mandated by

²² http://www.acquisition.gov/comp/aap/24102_GSA.pdf

Section 863 of the FY 2009 National Defense Authorization Act (NDAA). The NDAA made clear Congress's preference for competition at the order level under the MAS program.

**Recommendations
MAS Pricing Policy**

1. *Delete the terms MFC and Best Price from the MAS pricing policy.*
2. *Price evaluation should compare the benefits, potential volume and terms and conditions of government and commercial customers.*
3. *Pilot test new professional services schedule with reliance on task order price negotiation.*

5. Disclosure of Commercial Pricing Practices

In addition to the MFC, the Commercial Sales Practices (CSP) disclosure requirements are also in need of reform. Current CSP format for disclosures does not provide for consideration of the existing GSA Schedule ordering procedures, creates ambiguity in disclosure requirements, and requires the release of data that exceeds the needs of the government to negotiate fair and reasonable prices. As a result the document is unduly burdensome and results in protracted negotiations for government and industry.

The CSP

The Commercial Sales Practices Format (CSP) must be completed ... demonstrating comparative pricing with your best customer(s). A general explanation of the circumstances and frequency of deviations from your standard commercial practices is required [see Clause 552.212-70, Preparation of Offer (Multiple Awards Schedule)]. A separate CSP must be completed for each pricing structure proposed.

i. Source: GSA MOBIS Schedule

A. CSP Data Requirements Do Not Support the Government's Pricing Objective

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 offers to disclose their standard commercial sales and discounting practices, and

exceptions to such practices. The CSP format does not acknowledge that there is a competition requirement for many GSA Schedule orders. With task order competition so frequently being required, the detailed pricing disclosures and accompanying historical pricing analysis for all commercial transactions is no longer necessary. Instead, competition in the market drives low task order pricing. This is especially true for professional services orders, where task order competition based on customer specific requirements is almost always required.

CSP disclosure is a particular challenge for IT and professional services companies. Such firms may not use commercial price lists because their pricing is market based and priced based on particular opportunities. The requirements of a specific opportunity, the scope of the opportunity, the risks associated with the successful performance of the opportunity, whether it is being sold as a fixed price project or a time and materials contract, and many other factors come into play for services companies when they price their commercial and government services. Attempting to look at historical pricing practices to compare the pricing on opportunities that may be vastly different from one another in order to develop fair and reasonable GSA Schedule contract prices is not easily accomplished. Further, this method does not result in an “apples-to-apples” comparison that can reasonably be used for comparing prices and making a fairness determination.

The instructions of the CSP-1 form directs offerors to disclose all customers and defines a customer to be any entity, other than the federal government, which acquires supplies or services from the offeror²³. Notwithstanding the GSAR, many GSA Schedule solicitations request information about the most favored *federal* customer from all offerors. This information request may be appropriate for companies that do not have adequate commercial sales, but it should not be asked from all offerors. “Most Favored Federal Customer” is an example of another data request that exceeds the government’s

²³ GSAR 515.408

need in price negotiations. This disclosure requirement is unnecessary for any offeror that has commercial sales.

B. Some CSP Data Requests Are Unclear and Inconsistently Interpreted

The following are just some of the issues with the CSP:

i. “Standard” practices vs. “deviations”/non-standard practices

The CSP-1 speaks to standard practices and deviations from standard practices (i.e., non-standard practices) but goes no further in explaining these terms. Because the terms “standard practice” and “non-standard practice” are not clearly defined, there is great ambiguity as to what is required in a contractor’s disclosures.

This ambiguity increases the risk that a contractor can face from audits and from preparing disclosures that the government later – incorrectly - deems to be inaccurate, incomplete or fraudulent. The lack of clarity in these terms has already led to major issues for some companies. Several multi-million dollar False Claims Act settlements have resulted from contractors disclosing what they believed to be all of their standard practices with acknowledgement of deviations, only later to have a GSA auditor assert that deviations occurred frequently enough that they could no longer be called “deviations” and should have been included in detail among their standard practices. Without a clear definition, schedule contractors are vulnerable to imposition of significant penalties for what are otherwise reasonable differences in understanding of ambiguous terms.

ii. Use of Pricing Charts, Templates and Forms Required by Individual Schedules in Addition to the CSP Disclosure

While it has not been formalized in the GSAR, a majority of GSA Schedule solicitations require a “discount proposal spreadsheet” or “MFC pricing matrix.” These spreadsheets require a company to disclose the MFC or best price for each item they wish to sell through their GSA Schedule contract, regardless of terms and conditions. The time

and effort needed to provide this additional information on a line-item basis is significant and seemingly redundant given the requirements of the CSP-1 to disclose both standard and non-standard pricing practices. The information required in the matrixes is also confusing, as many contractors and government employees alike have different interpretations of the term MFC.

Disclosure on a line item basis can be particularly complicated for professional services contracts. In many instances, commercial contractors do not build commercial prices based on fixed hourly rates but rather on the scope of the job and competition, i.e. what the market will bear. Under these circumstances, expecting justification of an hourly rate for a labor category is unreasonable.

iii. Application of Disclosure Requirements to Bundled Solutions

Many contractors, particularly those selling managed services and IT solutions, offer bundled solutions. MAS solicitations are unclear as to what types of disclosure are required for bundled offerings. Are contractors required to “deconstruct” the pricing that they offer in their commercial solutions for the purposes of selling through GSA Schedule contracts? If these contracts are meant to be commercial in nature, a contractor should be able to price their offerings in the same manner that they price them for commercial customers.

What if in the commercial markets, a contractor offers a single item at a greatly reduced price but all other items on the same order are priced normally or higher than normal prices? Such a discount often is a sales inducement for the entire order, not just the single item so 'discounted'. As such, the discount does not reflect a judgment about the appropriate pricing of the single item but rather the competitive value of the entire transaction. Should the government be entitled to the low pricing offered on that single item? The disclosures that are required by the government, and particularly those required in the MFC pricing matrices included in each solicitation, suggests that the

government does believe it is entitled to these low line-item prices despite the fact that this is not the way that a company may price its offerings commercially.

The lack of clarity around this issue contributes to the complexity that many companies face as they prepare their GSA Schedule proposals. In order to disclose prices that may be the result of bundling or the unique circumstances of a particular transaction, an MAS offeror may need to perform extremely detailed pricing analyses to prepare for negotiations. For a large company with thousands of customers that may all have unique pricing, this can be a huge undertaking. The resulting negotiations can be very lengthy and difficult, and they can lead to pricing that is not fair and reasonable for contractors or for the government. This lack of clarity can also lead a contractor to make disclosures that they believe are accurate and best represent what the government is asking for, but may be interpreted in a different manner by the Office of Inspector General (“OIG”) if the contractor is later audited.

C. The Volume of Data that a Contractor Must Analyze Adds to the Burden of Disclosure

The CSP format was constructed in a commercial market when prices were less volatile and contractors had standard practices and price lists. As discussed in the Environmental Scan above, for many services and high tech industry sectors this is no longer the case. Consequently it is difficult to disclose in the CSP format that is requested. For companies, with numerous products and customers, making comprehensive and all inclusive disclosures about their non-standard pricing practices is a massive undertaking. Even with modern accounting systems, the volume of data that may need to be analyzed to meet this requirement and the effort it takes to fully understand and accurately describe a company’s historical pricing practices is a costly and time consuming task.

D. Format

The government currently requires contractors to disclose pricing information in the chart included in the CSP-1 form. Despite the fact that the form allows for contractors

to use an “equivalent format developed by the offeror,” most Contracting Officers require pricing disclosures in the format required by the CSP-1. This format, in addition to the format required in most solicitation’s supplemental pricing charts, is not flexible enough for many companies to accurately and completely describe their commercial pricing practices. It can lead contractors into error and liability when they attempt to use the form but it is either misunderstood or misinterpreted by a government contracting officer or auditor.

The GSA OIG consistently reports that large percentages of MAS contractors fail to provide current, accurate and complete information. The OIG semi-annual report for the period April 1, 2012 – September 30, 2012 states that 3 of 4 MAS audits it conducted found contractors failed to accurately disclose commercial sales practices. Given the discussion above and the OIG findings, GSA should consider whether the CSP is an effective vehicle for disclosure. These issues are reminiscent of the Discount Schedule and Marketing Data (DSMD) Sheets, the disclosure document that preceded the CSP. In reviewing the DSMD the United States Court of Appeals for the First Circuit concluded that the documents were “ ...virtually unintelligible, and that a literal interpretation would have required defendant to reveal every price discount it ever provided to any of its customers. The court held that such provision was “inordinately difficult to carry out and did not call for literal compliance.²⁴” The reality is that the CSP in its current format and as evaluated by both the OIG and contracting officers has resulted in offerors being required to disclose the same level of detail and data that the court found to be faulty with the DSMD. Failure to do so has resulted in contractors facing the aforementioned allegations of defective pricing.

²⁴ United States v. Data Translation, Inc., 984 F.2d 1256

E. Recommendations

To ensure that the information that GSA requires from contractors is consistent with the government's objective of negotiating fair and reasonable prices, the Coalition recommends the following:

Recommendations

Disclosure of Commercial Sales Practices

1. *Make the data collection tool consistent with MAS ordering procedures. With the change to the ordering procedures, the contract negotiations should focus on commercial transactions up to \$150,000 and an explanation of sales practices over that amount.*
2. *Discontinue use of line item disclosure in supplemental matrices, tools and data requests.*
3. *Delete requirements for disclosure of most favored federal customer.*
4. *Clarify key terms.*
5. *Create more flexible formats to accommodate the scope and diversity of GSA Schedule contractors' commercial sales practices.*
6. *Hold discussions with industry about the type of data that is available to meet the government's pricing goals.*

6. Price Reductions Clause (PRC)

A. The PRC is No Longer Necessary To Assure Reasonable Prices

The PRC concept dates back to the early 1980's. 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. In a multiple year contract, the

PRC assured that prices on 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. It also reflects a time when robust task and delivery order competitions were not mandated by law or regulation. Due to changes described in the Environmental Scan above, the PRC is no longer needed to assure reasonable task order pricing. The MAS program is no longer mandatory so government buyers are no longer the captive customers they were when the clause was first implemented. Schedule vendors must watch their pricing at all times to stay competitive. Task order competition for specific requirements is mandated by statute and regulation and drives lower pricing for agency customers.

B. Increased Transactional and Administrative Costs Lead to Higher Prices

The government and contractors spend tens of millions of dollars a year negotiating, overseeing, reviewing and complying with the PRC. See Attachment 1. Contractors implement compliance infrastructures, including personnel and systems, to address compliance risk associated with the PRC. These costs are ultimately passed on in the form of higher prices. In turn, the government maintains a costly infrastructure to oversee and review compliance with the PRC.

C. The PRC also unduly restricts competition in the marketplace

A price reduction on a single completely unrelated commercial transaction may trigger a price reduction that could be effective for up to 20 years. Consequently, contractors are restricted from effectively competing in the commercial marketplace. Indeed, the ultimate confirmation of the anti-competitive impact of the PRC is GSA's recent waiver of the PRC clause at the apparent request of the Air Force in order to increase competition for a series of Air Force furniture procurements. In this situation, the PRC essentially restricted MAS furniture contractors from competing for the Air Force furniture requirements. Absent a waiver, the commercial sales required to execute the Air Force's method of award could have triggered a price reduction under offerors' MAS contracts. At the request of the Air Force, the GSA waived the applicability of the

clause to commercial transactions related to the Air Force's furniture procurement. GSA's actions here make clear the anti-competitive impact of the clause. In essence, the PRC requires a prudent MAS contractor to create a compliance infrastructure designed to restrict its ability to compete in the commercial and Federal non MAS marketplace.

D. PRC Recommendations

Significant compliance costs can be saved by both government and industry with the adoption of a pricing policy and PRC that embraces the new competitive nature of schedule task order contracting. Adopting the following recommendations would achieve this objective.

1. Eliminate the PRC. This change would eliminate a costly, yet unnecessary compliance requirement and will empower contractors to focus even more resources on improving performance and delivery outcomes for the American taxpayer. Again, both the 2007 SARA panel and the 2010 MAS Advisory Panel recommended eliminating or curtailing the application of the PRC.

2. Alternatively, limit application of the PRC to orders less than \$150,000. This can be accomplished by reducing the Maximum Order threshold to \$150,000, consistent with the revised FAR 8.4 MAS ordering procedures. This change can be accomplished simply by a change to MAS solicitations. A FAR change would not be required.

7. Summary

GSA's mission is to deliver "the best value in real estate, acquisition, and technology services to government and the American people." In addition, one of the agency's top priorities is to use the purchasing power of the federal government to drive down prices, deliver better value, and reduce costs to its customer agencies. The MAS has been and continues to be an important tool for delivering GSA's

Recommendations Price Reduction Clause

- 1. Eliminate the PRC.*
- 2. Alternatively, limit application of the PRC to orders less than \$150,000*

promise to its customer base. With sales of approximately \$50 billion annually, inclusive of VA Schedules, the GSA Schedules program helps agencies fulfill critical missions and lower the cost of government. The Schedule pricing policy has, however, not kept pace with changes in the MAS ordering procedures. Further, the policy has not adequately adapted to those sectors of the commercial market that have highly customized transactional pricing models. Professional services, now the largest part of the Schedules program, has been disproportionally impacted by a static MAS pricing policy. The MAS price negotiation objective is subject to varying interpretations, the data disclosure requirements exceed the government's needs, and the PRC exposes Schedule contractors to high risks of noncompliance. All of these factors increase contractor costs which are ultimately passed on to the federal customer in the form of higher prices. In order to harmonize MAS pricing policy with the new FAR 8.4 Schedules ordering procedures, the Coalition recommends that GSA take the actions set forth in Section 8 below.

8. Final Recommendations

1. **Delete the phrases “Most Favored Customer” and “Best Price” from its pricing policy.** GSA should rewrite GSAR 538.270 *Evaluation of Multiple Award Schedule (MAS) offers* to require negotiation of fair and reasonable prices. Price evaluations should compare the benefits, potential volume, and terms and agreements of the MAS contract with those of similar commercial customers. Such a policy confirms the government's intent to fully leverage its volume while still recognizing that a commercial customer may warrant a better price than that negotiated at the MAS contract level. Restatement of the current MFC policy is necessary to properly focus the MAS program on negotiating prices that are good for federal customers and fair for industry.
2. **Pilot test a recommendation made by the Services Acquisition Reform Act (SARA) Acquisition Advisory Panel.** Specifically, the GSA should establish a new Schedule for professional services where contractors agree to ceiling

pricing at the contract level. The ceiling price would not be subject to negotiation. More specific pricing would be set by competition at the task order level rather than MFC negotiations at the contract level. This approach would streamline the initial process of awarding a GSA Schedule contract and would also enhance competition at the task order level.

3. **Review and revise the commercial sales practices CSP format** in order to:

- Make the data collection tool consistent with the revisions to FAR 8.4. GSA Schedule ordering procedures. With the change to these procedures, the contract negotiations should focus on commercial transactions up to \$150,000 and require only a general explanation of sales practices over that amount.
- Discontinue use of line item disclosure in the form of supplemental matrices, tools, spreadsheets and disclosures.
- Delete requirements for disclosure of most favored federal customer.
- Clarify key terms such as “standard practice”, “best price”, “best discount”, “commercial”, and “exceptions”.
- Create a more flexible format to accommodate the scope and diversity of GSA Schedule contractors’ commercial sales practices.

4. **Eliminate the PRC.** This change would eliminate a costly and unnecessary compliance requirement and will empower contractors to focus even more resources on improving performance and delivery outcomes for the American taxpayer. Both the 2007 SARA panel and the 2010 MAS Advisory Panel recommended eliminating or curtailing the application of the PRC. Alternatively, limit application of the PRC to orders less than \$150,000. This can be accomplished by reducing the MOT on all MAS contracts the simplified

acquisition threshold, consistent with the revised FAR 8.4 MAS ordering procedures.

These recommendations provide a path for GSA to effectively realign MAS pricing policy with current regulations and the commercial marketplace that will lead to greater program efficiency and effectiveness and lower costs for government and industry. Given that higher costs inevitably result in higher prices for federal agencies, the time is now for change. The Coalition asks that GSA consider these recommendations as part of the Schedules Modernization program and the upcoming GSAR Part 538 rewrite. We look forward to engaging with GSA in a “Myth-buster’s” dialogue about how to implement these MAS Pricing Policy reforms.

List of Attachments

February 27, 2012 Letter, Subject Re: Information Collection 3090-0235, Price Reduction Clause Letter

April 16, 2012 Letter, Subject Re: Information Collection 3090-0235, Price Reduction Clause Letter

Attachment 2

VA Schedule Sales

Schedule		FY 2012	FY 2013	Change 2012-2013	FY 2014	Change 2013- 2014	FY 2015	Change 2014- 2015
621 I	Professional & Allied Healthcare Staffing Services	\$484,700,376	\$428,133,317	-\$56,567,059	\$433,437,285	\$5,303,968	\$437,262,304.94	\$3,825,020.31
621 II	Medical Laboratory Testing & Analysis Services	\$76,792,027	\$80,997,691	\$4,205,664	\$96,706,358	\$15,708,667	\$111,928,943.78	\$15,222,585.78
65 I B	Drugs, Pharmaceuticals, & Hematology Related Products	\$8,221,650,847	\$8,055,115,497	- \$166,535,350	\$8,761,179,889	\$706,064,392	\$10,956,722,936.35	\$2,195,543,047.72
65 II A	Medical Equipment & Supplies	\$1,534,651,562	\$1,745,382,666	\$210,731,104	\$1,752,364,021	\$6,981,355	\$1,711,357,546.32	-\$41,006,475.03
65 II C	Dental Equipment & Supplies	\$121,713,892	\$92,065,306	-\$29,648,586	\$124,210,867	\$32,145,561	\$134,870,634.47	\$10,659,767.08
65 II F	Patient Mobility Devices	\$116,696,572	\$127,440,450	\$10,743,878	\$144,413,062	\$16,972,612	\$156,339,297.21	\$11,926,235.59
65 V A	X-Ray Equipment & Supplies	\$5,458,616	\$4,786,821	-\$671,795	\$3,478,299	-\$1,308,522	\$4,009,410.96	\$531,112.43
65 VII	Invitro Diagnostics, Reagents, Test Kits, & Test Sets	\$170,764,865	\$158,003,898	-\$12,760,967	\$158,644,271	\$640,373	\$154,591,152.39	-\$4,053,118.59
66 III	Cost-per-Test Clinical Laboratory Analyzers	\$278,237,075	\$285,611,543	\$7,374,468	\$287,265,283	\$1,653,740	\$289,658,583.00	\$2,393,300.48
Total		\$11,010,665,832	\$10,977,537,189	-\$33,128,643	\$11,761,699,334	\$784,162,145	\$13,956,740,809.42	\$2,195,041,475.77