

116 Eclipse Way
 Mooresville, NC 28117

August 4, 2008

GSA Multiple Award Schedule Advisory Panel
 U.S. General Services Administration
 2011 Crystal Drive
 Suite 911
 Arlington, VA 22205

RE: MAS Schedule Policy Advisory Panel Discussion on Fair and Reasonable Price Determinations.

Dear Distinguished Panel Members:

I am a retired acquisition official of the U.S. General Services Administration. I was one of the key architects of many of the Multiple Schedules Policies that you have been reviewing and discussing. As a contract negotiator, I personally awarded over a thousand schedule contracts; as a supervisor I reviewed and concurred in still a thousand more, and while serving as the Director of the Federal Schedule Policy Office, I developed and implemented key regulations, policies, and training materials for the MAS program.

Milton Berle, comic and occasional wise sage, noted years ago, "If opportunity doesn't knock build a door." GSA, industry and your panel are fashioning such a door and that is wonderful. Transformation is in the air. Ingenuity, courage, and hard work will improve the schedules program.

However, I offer one big caveat. The old adage that warns us that those who ignore the lessons of the past are doomed to repeat them is in play here. From 1974 through 2006, there were over 30 reports authored by Congress, the GAO, and the GSA Office of Inspector General that were critical of the GSA schedules program. The panel members should be cognizant of these reports and the efforts made to improve the program based on these

criticisms. The success of this panel will not be the result of a spontaneous combustion of ideas. The ideas should be developed with a good historical perspective of the program.

The key criticism distilled from these aforementioned reports was GSA's inability to obtain volume pricing from its vendors. The Most Favored Customer (MFC) Pricing Policy developed in the early 80's along with an aggressive audit program eliminated much of that criticism. Additionally, a robust Federal Supply Service policy office provided extensive policy guidance in the 1990's that ensured uniform interpretations of the key provisions of the program.

I note that the MAS panel goal and objective is to look into these policies consistent with "commercial practices". I believe this objective means ascertaining the commercial practices of the **purchasing departments** of corporate America, not solely the commercial sales and marketing practices of the vendor community. The panel will find Most Favored Customer (MFC), audit and price reduction provisions in the contracts and contract forms of America's premiere purchasing departments. They are also to be found in the purchasing departments of some of the schedule contractors. I encourage the panel to invite a few purchasing directors from corporate America with similar missions akin to those of GSA (e.g., Lowe's, Sears, Target, Best Buy).

I strongly urge this panel not to take away the key contracting tools of the GSA buyer; tools crafted from the numerous recommendations of the GAO, Congress and the OIG. Why take away the provisions from GSA contracts that are routinely used effectively by large corporate buyers? In one of its numerous reports to GSA on the MAS program, GAO argues that GSA contracting officers cannot negotiate the best prices unless they consider the discounts offered most favored customers and such a negotiation tool in supporting a fair and reasonableness determination was also a "commercial practice". Every professional buyer in both the public and private sector know that you don't begin negotiations at the low end of the discount structure. Industry's call for the demise of the MFC provision and substituting "fair and reasonable pricing" is nothing more than a euphemism for offering the government's negotiator lower discounts and higher prices. MFC is only a tool that helps the government buyer to make the determination of a fair and reasonable price. When a similar proposal was floated around in the mid 90's, Eleanor Spector, then DOD's Procurement

Director, called such a proposal to the Schedules program a very anti-buyer, pro-vendor idea. I resurrect that concern today.

GSA was formed by Congress in 1949 with the idea of creating an economical and efficient purchasing agent for the federal government that effectively leveraged its large purchasing volume. GSA is abdicating that responsibility by encouraging its customers to haggle for the better price (see PIB "Fair and Reasonable Prices and the MAS Pricing Policy already provided the panel). If the prices negotiated are not fair and reasonable as some are arguing, or not the best, and that further negotiation is required at the ordering level, then essentially the contract is vitiated to that of an agreement between GSA and the GSA vendor. And, with "Agreements" vis a vis" bona fide contracts, you will probably engender a need for more stringent synopsis requirements at the ordering level as well as complying with small business regulations which require set asides to orders up to \$100k. These additional requirements will eviscerate the overall benefits of the MAS program.

Another key criticism of the program from our customers during the period 1977 through 1988 was the lack of contract coverage. During that era, a typical GSA schedule contract had a one year period of performance. In the late 1980's, we converted the contract periods to three year instruments and subsequently to five years. Those significant changes in contract periods satisfied both the vendor community and our client agency partners. In the mid 1990's, the program went "evergreen" (basic 5 year contract with 3 five year option periods). However, the evergreen program was not without problems and concerns. The number of audits were dramatically reduced and the analysis to exercise the option periods were, in many cases, perfunctory. Detailed price analysis was absent in many of the cases we reviewed. Evergreen contracting periods are used commercially to leverage buying power with a few select companies. GSA does not effectively leverage this long term arrangement. **The panel should recommend that long term contracts should only be awarded to those firms that provide for MFC pricing.**

In addition to the effective leveraging of long term contract periods, another contractual provision that could help attain MFC pricing is the old Maximum Order Limit (MOL) provision. In the 70's, 80's, and 90's, contractor ordering limits were based on a tiered structure. For example, a vendor providing fair and reasonable pricing but not MFC pricing was given

a lower level. The higher the discounts, the higher the MOL in the vendors contract. Those vendors that provided MFC pricing were either given the higher tier or no limit. It may be time to rethink the use of the old MOL provisions if GSA is unable to obtain MFC pricing during negotiations. Today, the MOL has been replaced by a Maximum Order (MO) provision. The current MO provision only asks the contractor to **consider** providing a higher discount. The old MOL provision **required** a higher discount at higher volume of sales.

Another key and effective price negotiation tool was the audit, both pre award and post. President Reagan once declared: "Trust but verify, play the game but cut the cards." GSA has, unfortunately, been lax in verification. And, GSA has not been "cutting the cards". In its testimony to the U.S. Senate in 2005, GAO noted that pricing problems persist and that pre award audits continue to be used on a limited basis. GAO noted that when GSA used audits, "it has been able to award or recover millions of dollars in overcharges. The use of audits has declined dramatically despite dramatic increases in program sales." The GSA OIG confirmed the GAO's findings in these hearings noting: "In the three-year period prior to the 1997 rule that eliminated post award audits, fully 84% of post award audits contained findings of defective pricing, recovering over \$110 million in civil fraud penalties." Both the GAO and the GSA OIG urged before the Senate that post award audits be reinstated into the schedules program and the use of pre award audits be dramatically increased. Since those hearings, the ratio of audits to contracts awarded remains absurdly low and at that level provides no credible verification process to this multibillion dollar program. And, yes, panel, audit provisions are a commercial practice for many of the purchasing departments of corporate America. **In order to ensure valid and reliable price reasonableness determinations, the panel should recommend a dramatic increase in the use of pre award audits and the reinstatement of the post award audit.**

I strongly concur with the recommendation provided by David Cotton (July 21, 2008) to this panel that action be taken to assure that the price reduction and MFC clauses are interpreted consistently and correctly. The new Multiple Award Schedule Program Office within GSA will foster such consistencies envisioned by Mr. Cotton and many others. Training must be provided annually to all GSA contracting officials including members of the OIG. GSA officials should also participate in annual training programs offered by consulting firms for their clients on a routine basis on the

interpretations of these clauses. A dedicated web site should be established on the proper interpretation of these two key provisions with clear and concise samples and with clear and concise questions and answers.

Though GSA has a duty to periodically improve its services, products and offerings to customers, I am just a bit puzzled by the genesis of this panel. I've read in trade journals that this panel was created at the request of the previous GSA Administrator and her concerns about some large schedule contractors canceling contracts because of the burdensome requirements. If I recall correctly, the contract retention rates during the 1980's and 1990's hovered between 92% and 95%. Annually, about 5% to 8% of schedule contractors opted to use the 60 day cancellation provision. The vast preponderance of schedule contractors remain in the program after contract award. They view the program as profitable and worth the effort. This is a remarkable statistic especially when you consider that most of the schedule contractors are small business concerns and that approximately 30% of all small business firms at the macro level in America fail in their first year of operation. Ask GSA to give you the latest figures on the retention rate of its MAS contractors. Ask how many GSA schedule contractors have cancelled their contracts in 2007 and how many to date in 2008? GSA has had only a handful of high profile contractors cancel contracts this past year and some were under questionable circumstances. Is this a classic case of the tail wagging the dog in determining whether to revise or eliminate key policies or to undo much of the progress GSA has achieved in improving the program?

Lastly, I end with a quote from Shakespeare: "The fault dear Brutus is not in our stars, but in ourselves." The problems with the GSA schedules program are not the three prominent clauses that this panel is reviewing. It is with the culture: the absence of a quality culture; the absence of excellence. However GSA in the end defines excellence or success, it is important to keep in mind as many leaders and management consultants have noted that it is not a project, slogan, poster, act, job description or meeting a goal. Excellence is a way of life.

Sincerely,



Nicholas Economou, CPPO
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NICHOLAS ECONOMOU

Nicholas Economou is the owner and president of the FSL Government Contracts Center, LLC, Mooresville, NC. The firm provides consulting services to businesses involved in federal, state, and local government contracting. Prior to this, Mr. Economou was owner and president of the FSL Procurement Solutions, LLC, Manassas, VA. The firm provided consulting services to procurement organizations involved in public procurement.

In 2003, Mr. Economou retired from the U.S. General Services Administration after serving 30 years in key acquisition positions. He has served as a negotiator, contract administrator, cost and price analyst, supervisor, division director and from 1987 to 2000 served as the Director of the Federal Supply Service Procurement Policy Office. He chaired the FAR committee on Multiple Award Schedules of the Civilian Agency Acquisition Council. He has provided technical expertise to officials within the Department of Justice on matters involving defective pricing claims.

He graduated from Youngstown State University with a major in business administration and received his Master of Science with emphasis in procurement and contracting from the George Washington University.

He has a professional certification, Certified Public Purchasing Officer, from the National Institute of Governmental Purchasing and maintains membership with the National Contract Management Association and the National Institute of Governmental Purchasing.

He has authored the first edition of the *Anthology of Commercial Terms and Conditions* and was a key contributor to the second edition. He has developed and implemented numerous regulations, policies, and procedures concerning the GSA Multiple Award Schedules Program. He has developed and implemented a specialized 5 course certification program for contractors, the "Government Contractors Certificate Program" on behalf of the National Institute of Governmental Purchasing. He has lectured nationally on procurement policy issues and has taught courses on the how's and whys of governmental purchasing.

He has received numerous awards including the Excellence in Administration Award for his cost cutting initiatives with the U.S. Navy and for standardizing reprographic equipment for the Navy fleet; the Hammer Award and his reinvention efforts for improving the GSA Schedules Program and the Excellence in Partnership Award from the Coalition for Government Procurement and the *Federal Times*.

Mr. Economou is a decorated Vietnam veteran and member of the Veterans of Foreign Wars.

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August 13, 2008

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Dear Distinguished Panel Members:

I am amending my position paper dated August 4th by adding the following:

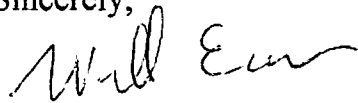
Reference is made to recent industry comments to the MAS Advisory Panel for the mid August, 2008 meeting. An industry association concludes in its paper: "Therefore, we submit and emphasize that the final price paid by the ordering activity is handled at the task order or delivery order level and the schedule price is simply a not to exceed price."

Industry perceives the contract award price to be negotiated by GSA as a suggested government list price. The resultant Multiple Award Schedule contract price is **relegated** to something of an "MSRP", a "sticker price". The proposal from industry essentially allows prices to be negotiated and awarded higher than would otherwise be the case under MFC at the GSA contract level. To the distinguished legal counsel member of this panel, does this approach pass the requirements of 41USC259? I don't think so. The Competition in Contracting Act of 1984 exempts schedule orders from the full and open competition requirements of FAR Part 6. To their credit and ingenuity, the authors of the exemption were fully aware of the new MAS policy statement issued in 1982 which espoused the most favored pricing policy. The new pricing policy was seen as a mechanism of

ensuring fair and reasonable pricing in the absence of traditional competition. As long as the government could be assured of obtaining the lowest overall cost alternative at **both** the contract level **and** at the ordering level, the MAS program would be exempt from the requirements for full and open competition. In the approach described by industry, the price reasonableness determination constructed under the underlying GSA contract is no more than a disingenuous and fallacious legal cover, separate from reality.

Industry's position is simply to dilute the concept of the government's aggregate purchasing power. The taxpayer clearly expects the government to get the best prices available in the marketplace, and the GAO, the Congress, and the GSA OIG have consistently recommended that the government take advantage of its paramount bargaining position.

Sincerely,

A handwritten signature in cursive script, appearing to read "Nick Economou".

Nicholas Economou, CPPO