

AMERICAN BAR ASSOCIATION

Section of Public Contract Law
Writer's Address and Telephone



2008-2009

CHAIR

Michael W. Mutek
1200 S Jupiter Rd
Garland, TX 75042
(972) 205-5177

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Washington, DC 20036
(202) 955-8536

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(415) 397-2823

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(703) 681-8507

BUDGET AND FINANCE OFFICER

Mark D. Colley
555 12th St NW, Ste 100
Washington, DC 20004
(202) 942-5720

SECTION DELEGATES

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311 California St, 10th Flr
San Francisco, CA 94104
(415) 365-5333

John S. Pachter
8000 Towers Crescent Dr, Ste 900
Vienna, VA 22182
(703) 847-6260

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Marilyn Neforas
321 N Clark St, M/S 19.1
Chicago, IL 60654
(312) 988-5596

October 17, 2008

VIA ELECTRONIC AND U.S. MAIL

Ms. Pat Brooks
Designated Federal Officer
Multiple Award Schedule Advisory Panel
U.S. General Services Administration
2011 Crystal Drive, Suite 911
Arlington, VA 22205
Tel: 703-605-3406
Fax: 703-605-3454
Email: mas.advisorypanel@gsa.gov.

Subject: Comments to the GSA Multiple Award Schedule Advisory Panel

Dear Ms. Brooks:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section's governing Council and substantive committees have members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.¹

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the

¹ Sharon L. Larkin, a Council member of the Section of Public Contract Law, did not participate in the Section's consideration of these comments and abstained from the voting to approve and send this letter.

Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.²

I. INTRODUCTION

The Section is pleased to provide input on the following specific questions, which were posed by the MAS Panel in its August 26, 2008 meeting notice (73 Fed. Reg. 50329):

- (1) Where does competition take place?
- (2) If competition takes place primarily at the task/delivery order level, does a fair and reasonable price determination at the MAS contract level really matter?
- (3) If the Panel consensus is that competition is at the task order level, are the methods that GSA uses to determine fair and reasonable prices and maintain the price/discount relationship with the basis of award customer(s) adequate?
- (4) If the current policy is not adequate, what are the recommendations to improve the policy/guidance?
- (5) If fair and reasonable price determination at the MAS contract level is not beneficial and the fair and reasonable price determination is to be determined only at the task/delivery order level, then what is the GSA role?

As detailed below, the Section believes that serious consideration should be given to elimination of the current Commercial Sales Practices (“CSP”) and Price Reductions Clause (“PRC”), as suggested by the Panel’s questions. These clauses have created significant burden and confusion for contractors and government officials alike, and are arguably unnecessary in light of the high level of competition and other changes that have occurred in the MAS Program since these clauses were first promulgated. In the event that the Panel does not recommend the elimination of these clauses, we have included specific recommendations for ways in which these clauses should be clarified to remove the substantial ambiguity that currently exists.

² This letter is available in pdf format at: <http://www.abanet.org/contract/regscomm/home.html> under the topic “Commercial Items.”

II. DETAILED RESPONSE

QUESTION NO. 1: *Where does competition take place?*

Because Multiple Award Schedule (“MAS”) contracts are awarded pursuant to a “standing solicitation,” under which there is no formal closing date for submission of offers and offers may be submitted for consideration at any time without direct comparisons against other offerors, there is, strictly speaking, no formal head-to-head “competition” in the award of the MAS contracts themselves.³ Instead, formal competition generally occurs at the order level, from the process of publication of widely available prices and under the ordering procedures currently set forth in Federal Acquisition Regulation (“FAR”) Subpart 8.4.⁴ Pursuant to the current ordering procedures, which have been amended in recent years to provide an enhanced level of competition at the order level, the degree of competition depends on the value and nature of the product or service being acquired.

Moreover, Section 863 of the “Duncan Hunter National Defense Authorization Act for Fiscal Year 2009,” Pub. L. No. 110-417 (“FY09 NDAA”), which was signed into law on October 14, 2008, requires that the FAR be amended to further enhance these ordering procedures. In particular, Section 863 will require that all purchases of property or services in excess of the simplified acquisition threshold that are made under MAS Schedule contracts and other multiple award contracts must be made on a “competitive basis” unless an exception for full and open competition applies.⁵ Similar to Section 803 of the National Defense Authorization Act of 2002 (“FY02 NDAA”),⁶ the requirement to

³ See, e.g., Solicitation No. FCIS-JB-980001-B, Refresh 22 at viii (“This standing solicitation will remain in effect until replaced by an updated solicitation. There will be no closing date for receipt of offers. Therefore, offers may be submitted for consideration at any time. There is no prescribed contract beginning and ending date. Contracts awarded under this Information Technology Solicitation will have variable contract periods; i.e., contracts will be in effect for an initial period of five years from the date of award, with a possibility to extend the contract for three optional five year periods.”).

⁴ See FAR 8.405 (“Ordering activities shall use the ordering procedures of [FAR Subpart 8.4] when placing an order or establishing a BPA for supplies or services. The procedures in this section apply to all schedules”).

⁵ Pub. L. No. 110-417, § 863(b)(1).

⁶ Section 803 of the FY02 NDAA, which applied only to purchases by DoD over \$100,000, likewise required “fair notice” to all schedule holders and a “a fair opportunity to make an offer and have that offer fairly considered.” Pub. L. No. 107-107, § 803. The FY09 NDAA, which expands these requirements to all schedule purchases (products and services) over the simplified acquisition

use “competitive procedures” will require (1) that all contractors offering the property or services be afforded “fair notice of the intent to make that purchase (including a description of the work to be performed and the basis on which the selection will be made)”; and (2) that all contractors responding to the notice be afforded “a fair opportunity to make an offer and have that offer fairly considered by the official making the purchase.”⁷ When implemented, this requirement will significantly enhance the substantial competitive forces that already exist at the task order level under the current MAS Schedule ordering procedures, which are summarized below.

A. Competition Requirements for Supplies or Services Not Requiring a Statement Of Work.

For products or services that do not require a statement of work (“SOW”), ordering activities are required to adhere to the following competition requirements at the task order level:

1. Orders At Or Below The Micro-Purchase Threshold. Ordering activities are encouraged to “distribute orders among contractors,” but are not required, to solicit from a specific number of schedule contractors. Instead, orders may be placed “with any Federal Supply Schedule contractor that can meet the agency’s needs.” FAR 8.405-1(b).
2. Orders Over Micro-Purchase Threshold But Under Maximum Order Threshold. Ordering activities are instructed to survey “at least three schedule contractors by reviewing the GSA Advantage! on-line shopping service, or by reviewing the catalogs or pricelists of at least three schedule contractors.” FAR 8.405-1(c).
3. Orders Over Maximum Order Threshold. In addition to surveying at least three schedule contractors, as required by FAR 8.405-1(c), ordering activities are instructed to review the pricelists “of additional schedule contractors (the GSA Advantage! on-line shopping service can be used to facilitate this review),” and to “seek price reductions from the schedule contractor(s) considered to offer the best value.” FAR 8.405-1(d)(1)-(2).

threshold by all agencies (DoD and non-DoD), repeals Section 803 as “redundant. Pub. L. No. 110-417, § 863(f).

⁷ *Id.*, § 863(b)(2).

B. Competition Requirements for Services Requiring a Statement of Work (SOW).

For services that require a SOW, ordering activities are required to issue a request for quotes (“RFQ”), which must be provided to any schedule contractor that requests a copy of it, and adhere to the following competition requirements at the task order level:

1. Orders At Or Below The Micro-Purchase Threshold. Ordering activities are encouraged to “distribute orders among contractors,” and are required to provide the RFQ to, but are not required to solicit from, a specific number of schedule contractors. Instead, orders may be placed “with any Federal Supply Schedule contractor that can meet the agency’s needs.” FAR 8.405-2(c)(1).
2. Orders Over Micro-Purchase Threshold But Under Maximum Order Threshold. Ordering activities are instructed to provide the RFQ (including the SOW and evaluation criteria) “to at least three schedule contractors that offer services that will meet the agency’s needs.” FAR 8.405-2(c)(2).
3. Orders Over Maximum Order Threshold. In addition to providing the RFQ to at least three schedule contractors, as required by FAR 8.405-2(c)(2), ordering activities are instructed to seek price reductions, and provide the RFQ “to additional schedule contractors that offer services that will meet the needs of the ordering activity. When determining the appropriate number of additional schedule contractors, the ordering activity may consider, among other factors, the following: (A) The complexity, scope and estimated value of the requirement. (B) The market search results” FAR 8.405-2(c)(3)(i).

C. Competition Requirements for Department of Defense Orders.

In addition to these general procedures, all orders over \$100,000 placed by or on behalf of Department of Defense (“DoD”) activities are subject to additional procedures designed to enhance competition, as called for by Section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107-107), which requires “fair notice” to “all contractors” or “as many schedule contractors as practicable.”⁸

⁸ As noted above, Section 863 of the FY09 NDAA, which expands the “fair notice” and “fair opportunity” requirements to all schedule purchases (products and services) over the simplified

1. Notice to All Contractors. DoD activities satisfy the requirement for competition if notice is provided to “[a]ll contractors offering the required supplies or services under the applicable multiple award schedule, and affords all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered.” DFARS 208.405-70(c)(2)). According to guidance issued by DoD, “[p]osting of a request for quotations on the General Services Administration’s electronic quote system, ‘e-Buy’ (www.gsaAdvantage.gov), is one medium for providing fair notice to all contractors as required by DFARS 208.405-70(c)(2).” PGI 208.405-70.

2. Notice to As Many Schedule Holders As Practicable. Alternatively, DoD activities satisfy the requirement for competition if notice is provided to “[a]s many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that offers will be received from at least three contractors that can fulfill the requirements,” DFARS 208.405-70(c)(1). To satisfy this requirement, the Contracting Officer must:
 - Receive offers from at least three contractors that can fulfill the requirements; or
 - Determine in writing that no additional contractors that can fulfill the requirements could be identified despite reasonable efforts to do so (documentation should clearly explain efforts made to obtain offers from at least three contractors); and
 - Ensure that all offers received are fairly considered.

Id.

D. Justification for Limiting Competition for Schedule Orders

So long as the ordering procedures in FAR 8.404 are followed, orders (as well as Blanket Purchase Agreements) placed through MAS Contracts are deemed by statute and regulation to have been awarded through “full and open

competition.” *See* FAR 8.404(a).⁹ Nevertheless, the MAS ordering procedures in FAR Subpart 8.4 recognize that there may be circumstances in which it is appropriate to limit the number of Schedule contractors considered for award of a particular order. Similar to the provisions in FAR Subpart 6.3 and the Competition In Contracting Act (“CICA”) regarding the use of “Other Than Full and Open Competition,” potential justifications for limiting competition for Schedule orders include situations in which —

- “Only one source is capable of responding due to the unique or specialized nature of the work”;
- “The new work is a logical follow-on to an original Federal Supply Schedule order provided that the original order was placed in accordance with the applicable Federal Supply Schedule ordering procedures. The original order must not have been previously issued under sole source or limited source procedures”; and
- “An urgent and compelling need exists, and following the ordering procedures would result in unacceptable delays.”

FAR 8.405-6(b).¹⁰

In order to limit the number of Schedule contractors to fewer than the number called for in FAR 8.404, or to limit an order to a particular name brand, an ordering activity must prepare a written justification and approval. FAR 8.405-6(c).¹¹ The type of justification and the level of approval, like the amount of

⁹ FAR 8.404(a) (“BPAs and orders placed against a MAS, using the[se] procedures . . . , are considered to be issued using full and open competition.”). *See also* 10 U.S.C. § 2302(2)(C) (“The term ‘competitive procedures’ means procedures under which the head of an agency enters into a contract pursuant to full and open competition. Such term also includes [t]he procedures established by the Administrator of General Services for the multiple award schedule program of the General Services Administration if -- (i) participation in the program has been open to all responsible sources; and (ii) orders and contracts under such program result in the lowest overall cost alternative to meet the needs of the United States”); 41 U.S.C. § 259 (same).

¹⁰ *See also* 10 U.S.C. § 2304(c) (justifying use of other than competitive procedures); 41 U.S.C. § 253(c) (same).

¹¹ *See* FAR 8.405-6 (“(a) Orders placed under Federal Supply Schedules are exempt from the requirements in Part 6. However, an ordering activity must justify its action when restricting consideration— (1) [o]f schedule contractors to fewer than required in 8.405-1 or 8.405-2; or (2) [t]o an item peculiar to one manufacturer (e.g., a particular brand name, product, or a feature of a product, peculiar to one manufacturer). A brand name item, whether available on one or more schedule contracts, is an item peculiar to one manufacturer. Brand name specifications shall not be used unless the particular brand name, product, or feature is essential to the Government’s

competition required, are dependent on the value of the products or services being ordered:

1. Orders Under Simplified Acquisition Threshold. Before limiting competition for orders under the simplified acquisition threshold, the contracting officer from the ordering activity must prepare a written justification to “document the circumstances” for limiting consideration. FAR 8.405-6(f). Where the ordering activity limits consideration to a particular brand name, and the order is over \$25,000, this written justification must be posted to e-Buy along with the RFQ. FAR 8.405-6(d)(1).¹²

2. Orders Over Simplified Acquisition Threshold. Before limiting competition for orders above the simplified acquisition threshold, the ordering activity must prepare a written justification that includes the following:
 - “Identification of the agency and the contracting activity, and specific identification of the document as a ‘Limited Source Justification;’”
 - “Nature and/or description of the action being approved”;
 - “A description of the supplies or services required to meet the agency’s needs (including the estimated value)”;
 - “Identification of the justification rationale (see 8.405-6(a) and (b)) and, if applicable, a demonstration of the proposed contractor’s unique qualifications to provide the required supply or service”;
 - “A determination by the ordering activity contracting officer that the order represents the best value consistent with 8.404(d)”;

requirements, and market research indicates other companies’ similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency’s needs.”).

¹² The FAR does provide exceptions to the e-Buy posting requirement where “[d]isclosure would compromise the national security (e.g., would result in disclosure of classified information) or create other security risks,” or “[t]he nature of the file (e.g., size, format) does not make it cost-effective or practicable for contracting officers to provide access through e-Buy,” or “[t]he agency’s senior procurement executive makes a written determination that access through e-Buy is not in the Government’s interest.” FAR 8.405-6(e).

- “A description of the market research conducted among schedule holders and the results or a statement of the reason market research was not conducted”;
- “Any other facts supporting the justification”;
- “A statement of the actions, if any, the agency may take to remove or overcome any barriers that led to the restricted consideration before any subsequent acquisition for the supplies or services is made”;
- “The ordering activity contracting officer’s certification that the justification is accurate and complete to the best of the contracting officer’s knowledge and belief”; and
- “Evidence that any supporting data that is the responsibility of technical or requirements personnel (e.g., verifying the Government’s minimum needs or requirements or other rationale for limited sources) and which form a basis for the justification have been certified as complete and accurate by the technical or requirements personnel.”

FAR 8.405-6(g)(2).

For orders below \$550,000, the justification for restricting competition can be approved by the ordering activity contracting officer. FAR 8.405-6(h)(1). For orders over \$550,000 but below \$11.5 million, the justification must be approved by the competition advocate of the ordering activity. FAR 8.405-6(h)(2). For orders over \$11.5 million but below \$57 million (or below \$78.5 million for orders by DoD, NASA, and the Coast Guard), the justification must be approved by the competition advocate and either one of the following: (i) the head of the procuring activity placing the order, or his or designee; or (ii) the senior procurement executive of the agency placing the order. FAR 8.405-6(h)(3). For orders over \$57 million (or over \$78.5 million for orders by DoD, NASA, and the Coast Guard), the justification must be approved by the senior procurement executive of the agency placing the order. FAR 8.405-6(h)(4).

QUESTION No. 2: *If competition takes place primarily at the task/delivery order level, does a fair and reasonable price determination at the MAS contract level really matter?*

GSA has traditionally taken the position that negotiation of prices at the MAS contract level is necessary to ensure that the Government achieves competitive prices for goods and services purchased through the MAS Program. For example, more than thirty years ago, GSA responded to criticism that the MAS Program was not achieving the lowest possible price for the Government by arguing that the contract negotiation techniques in use at that time¹³ provided an additional “competitive” force that helped the Government achieve its price objectives:

[T]he [GSA Multiple Award Program] provides for a high level of competition in that it takes advantage of or fosters competition at three levels to insure [*sic*] that the Government obtains the lowest possible price.

The first level of competition “coat-tails” commercial market forces. In a free economy it is an economic axiom that the commercial market is an accurate and sometime ruthless evaluator of what a product is worth. Apart from short-term aberrations that may attend advertising campaigns or consumer fads, market forces eliminate poor products and the surviving good products usually sell at a price commensurate with relative worth. Hence, if several firms offer items of dissimilar manufacture to serve a similar purpose, the market will generally select out the better items and reflect its decision by purchasing the item at the prices established through competition in the open market.

At the second level of competition, it is precisely the above forces that are brought to bear when [GSA] negotiate[s] multiple award contracts pursuant to our benchmark negotiation procedures. . . . Based on the

¹³ At the time, GSA relied on “benchmarking” procedures, whereby a “benchmark” contractor was selected, based on a variety of factors such as “the amount of discount offered on catalog prices, the contractor’s ability to handle volume sales, and its ability to provide reasonably complete product lines.” GAO Report No. PSAD-77-69, “*Federal Supply Service Not Buying Goods At Lowest Possible Price*,” B-114807, March 4, 1977, at 2. Once the benchmark contractor was established, “[a]ll prospective contractors meeting or exceeding the benchmark contractor’s offer can be awarded a contract that is then listed on the Federal Supply Schedule.” *Id.*

discount structures available to all other classes of customers, [MAS] contracting personnel negotiate discounts commensurate with the Government's volume of business and, at a minimum, usually obtain most favored customer pricing.

The third level of competition extends into the ordering process. [Applicable regulations] direct[] ordering agencies to purchase their requirements from the lowest-priced source which provides items that will adequately serve the functional end-use purpose. The [applicable regulations] further require[] written documentation to support orders at other than the lowest prices in cases where the value involved exceeds \$250. It is the intent of these regulations to safeguard against capricious ordering of higher priced items for reasons of preference.

GAO Report No. PSAD-77-69, "*Federal Supply Service Not Buying Goods At Lowest Possible Price*," B-114807, March 4, 1977, at App. II, p. 19.

Although GSA's techniques for negotiating prices at the MAS Contract level have evolved over the past thirty years – first with introduction of the Discount Schedule and Marketing Data ("DSMD") form, which was later replaced by the current Commercial Sales Practices ("CSP") submission – GSA has continued to rely on the negotiation of prices at the MAS contract level as an additional means of achieving its price objectives.¹⁴ As suggested by the Panel's question, however, a compelling argument can be made, given the significant

¹⁴ See 47 Fed. Reg. 50242, 50244 (Nov. 5, 1982) (1982 Policy Statement discussing, *inter alia*, the requirement for submission of DSMD in "[a]ll MAS solicitations," which "will be used by the Government in . . . the price reasonableness determination"); 56 Fed. Reg. 5695 (Nov. 7, 1991) (introducing "pilot test" of revised DSMD form, aimed at "clarifying and simplifying the data submission requirements, and on decreasing the amount of data required from offerors"); 62 Fed. Reg. 44518, 44520 (Aug. 21, 1997) (1996 Policy Statement, discussing *inter alia* requirement for submission of CSP, and noting that "[c]ontracting officers cannot negotiate the best price for MAS products and services unless they consider the discounts that MAS offerors give to their best customers"). Cf. *United States v. Data Translation, Inc.*, 984 F.2d 1256, 1262 (1st Cir. 1992) ("Under the MAS program, the existence of competition in the commercial marketplace itself helps to provide assurance of low prices for the government as well. The listing of several competing, say, lamp manufacturers in the government MAS catalogue provides added assurance of low prices. *The MAS negotiating process, with its questionnaire answers (and later audits to ensure compliance), offers a third way to guarantee "low prices."*) (emphasis added).

changes in the MAS Program over the past several decades, that prices may be determined to be fair and reasonable based solely on order competition.

First, it is notable that the current process of publication of products and pricing by Schedule contractors coupled with the discretion afforded government buyers to select the contractors from whom they wish to obtain quotes, generates a significant competitive environment. In that regard, published prices are widely available to government buyers and Schedule holder competitors alike on GSA Advantage!. Using these tools, government buyers can survey the market and avoid those Schedule holders whose prices appear uncompetitive, thereby incentivizing GSA Schedule holders to publish reasonable prices in order to increase the number of inquiries they receive from government buyers. This competitive environment is amplified with every advance in information technology that increases the transparency of product descriptions and prices to both competitors and government buyers on published GSA Schedule contracts.

Second, as discussed above, the MAS ordering procedures have been substantially revised in recent years to provide for greater competition at the task/delivery order level – particularly within DoD, which essentially requires ordering activities to provide all MAS contractors “fair notice” and an opportunity to compete on all orders over \$100,000. These enhanced competition requirements, as well as the ability of MAS contractors to protest the award of task orders/delivery orders at GAO,¹⁵ provides an important mechanism for ensuring that the Government achieves a fair and reasonable price on purchases made through the MAS Program.

Third, it has been widely acknowledged that the MAS Program has undergone tremendous growth over the past several decades, resulting in a substantial number of contractors competing to provide goods and services to the Government through the MAS program. For example, in 1985 it was reported that the MAS Program consisted of 4,000 MAS contractors who delivered \$2.3 billion in goods to the Government.¹⁶ By 1992, the program grown to include more than

¹⁵ See, e.g., *Advanced Technology Sys., Inc.*, B- 298854, Dec. 29, 2006, 2007 CPD ¶ 22 at 5 (“In the context of an RFQ, where an agency solicits FSS vendor responses and uses an evaluation approach similar to that used in FAR Part 15 negotiated procurements, our Office will review the agency’s actions to ensure that the evaluation of vendors’ submissions was reasonable and consistent with the solicitation’s evaluation criteria and applicable procurement statutes and regulations.”) (citing *Labat-Anderson, Inc.*, B-287081, Apr. 16, 2001, 2001 CPD ¶ 79 at 5-6; *Digital Sys. Group, Inc.*, B-286931, Mar. 7, 2001, 2001 CPD ¶ 50 at 6).

¹⁶ GAO Report No. GAO/GGD-86-99BR, “*GSA Procurement: Are Prices Negotiated For Multiple Award Schedules Reasonable?*” July 1986 at 4.

6,500 contractors who provided nearly \$5 billion in goods to the Government.¹⁷ Today, the program includes more than 10,000 contractors, who deliver more than \$32 billion in goods and services through more than 16,000 contracts.¹⁸ As a result of this dramatic increase in the number of MAS contracts and contractors vying to sell their goods and services to the Government, the level of competition at the task order/delivery order level has presumably increased, as well, providing greater assurance that prices for goods and services acquired through the MAS program are in fact fair and reasonable.

Fourth, at the same time that the GSA Schedules program has experienced tremendous growth, a proliferation of competing vehicles have also sprung up throughout the federal marketplace – including, for example, Government-Wide Acquisition Contracts (“GWACs”) such as NASA’s “Solutions for Enterprise-Wide Procurement” Contract (“SEWP”), DHS’ “Enterprise Acquisition Gateway for Leading Edge Solutions” Contract (“EAGLE”) and NIH’s “Chief Information Officer - Solutions and Partners 2 Innovations” Contracts (“CIO-SP2i”). The availability of these competing vehicles, as well as agencies’ ability to engage in competitive procurements for significant requirements, provide further assurance that the prices offered through the MAS program are fair and reasonable.

In light of these changes, a compelling argument can be made that a determination of fair and reasonable prices at the time of award of the MAS Contract is unnecessary, and that prices instead should be determined based solely on order competition. Such an approach is also supported by Section 5401 of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 104-106 (“FASA”), which authorized GSA to undertake a four-year pilot program “to test streamlined procedures for the procurement of information technology products and services available for ordering through the Multiple Award Schedules.” Under this pilot authority, the Schedule holder would have been free to “establish[] the prices under a covered Multiple Award Schedule contract and . . . adjust those prices at any time in the discretion of the vendor.” Pub. L. No. 104-106(c)(2)(B).

Similarly, such an approach was to some extent endorsed by the SARA Panel’s recommendation in relation to services lacking a defined scope of work for the establishment of a new “information technology schedule” that would eliminate negotiation of prices as well as the Price Reductions Clause, GSAR 552.238-75 –

¹⁷ GAO Report No. GAO/GGD-93-123, “*Multiple Award Schedule Contracting: Changes Needed in Negotiation Objectives and Data Requirements*,” Aug. 1993 at 16-17.

¹⁸ GAO Report No. GAO-05-229, “*Contract Management: Opportunities To Improve Pricing Of GSA Multiple Award Schedule Contracts*,” Feb. 2005 at 1.

Price Reductions (Sep 1999) (Alternate I – May 2004), commonly referred to as the “Price Reductions Clause” (hereinafter referred to as the “PRC”). SARA Panel Report, Ch. 1, § III.4 at 102-05. Under this proposal, contractors would be free to set and change their rates at any time, but would also be forced to post their rates and would be bound by the prices proposed in response to a task order request. *Id.* According to the SARA Panel, this system would “foster a more dynamic model, improve efficiency and reduce costs for government and industry, and foster greater competition and transparency.” SARA Panel Report, Ch. 1, § III.4 at 102-05.

Thus, whatever “competitive” effect is achieved by GSA through the determination of prices at the MAS contract level, the Panel should consider whether this determination is necessary given the competitive forces at work within the MAS Program itself as a result of the significant growth and other changes that have taken place in the MAS Program over the past several decades. This is particularly important in light of the significant burdens and confusion that surround the mechanisms currently used by GSA in its price determinations, as discussed in the next section.

QUESTION No. 3: *If the Panel consensus is that competition is at the task order level, are the methods that GSA uses to determine fair and reasonable prices and maintain the price/discount relationship with the basis of award customer(s) adequate?*

GSA currently relies on two mechanisms to ensure that the Government achieves fair and reasonable prices through MAS contracts: (a) the evaluation of discounts offered by MAS contractors in the commercial marketplace, as reflected in the contractors’ Commercial Sales Practices (“CSP”); and (b) the ongoing monitoring of discounts offered to MAS contractors’ “basis of award” customer(s), through the Price Reductions Clause. Even if the Panel were to conclude that these mechanisms are necessary despite the significant requirements for competition at the task/delivery order level, the Panel’s recommendations should address the significant burdens, confusion, and risk that these mechanisms place on contractors and government personnel alike, given the lack of clear guidance.

E. Issues with Current Commercial Sales Practices (CSP) Requirements

The current CSP instructions generally require an offeror to state whether the prices offered to the Government are equal to or better than the “best price (discount and concessions in any combination) offered to any customer acquiring the same items regardless of quantity or terms and conditions,” based on the contractor’s “written discounting policies” or “standard commercial sales practices in the event you do not have written discounting policies.” CSP-1 Instructions ¶ 3.

For any customer(s) who receives the contractor's "best discount," or who buy at a price "that is equal to or better than the price(s) offered to the Government under this solicitation or with which the Offeror has a current agreement to sell at a discount which equals or exceeds the discount(s) offered under this solicitation," the CSP requires the contractor to disclose the following detailed information:

- Customer or category of customer, which includes "any entity, except the Federal Government, which acquires supplies or services from the Offeror";
- The "best discount (based on your written discounting policies or standard commercial discounting practices if you do not have written discounting policies) at which you sell to the customer or category of customer identified in column 1, without regard to quantity; terms and conditions of the agreements under which the discounts are given; and whether the agreements are written or oral";
- Quantity or volume of sales "which the identified customer or category of customer must either purchase/order, per order or within a specified period, to earn the discount";
- FOB delivery term; and
- "Concessions regardless of quantity granted to the identified customer or category of customer."

Id. ¶ 4(a); Figure 515.4-2-Instructions for Commercial Sales Practices Format.

In addition to these disclosures, the CSP instructions require offerors to disclose whether "any deviations from your written policies or standard commercial sales practices disclosed in the above chart ever result in better discounts (lower prices) or concessions than indicated." CSP-1 Instructions ¶ 4(b). For purposes of this disclosure requirement, concession is broadly defined to mean "a benefit, enhancement or privilege (other than a discount), which either reduces the overall cost of a customer's acquisition or encourages a customer to consummate a purchase. Concessions include, but are not limited to freight allowance, extended warranty, extended price guarantees, free installation and bonus goods." GSAR 552.212-70(a), "Preparation of Offer (Multiple Award Schedule)."

As currently formulated, the CSP instructions include a number of uncertainties, and create significant burdens and risks for contractors, including the following:

1. Lack of Clear Guidance Regarding Time Period Subject to Disclosure in CSP.

The MAS Solicitation generally requires offerors to provide information regarding the historical volume of sales to commercial customers during the preceding 12-month period, along with the projected level of sales based on the contractor's sales through the Schedule for the preceding 12-month period.¹⁹ Although this would suggest that the disclosures in the CSP should likewise be subject to a 12-month limitation, the CSP instructions do not expressly state the time period of the data to be disclosed in the CSP. Similarly, the CSP instructions do not expressly allow for consideration of other (shorter) periods depending on the availability or amount of data involved. In addition, there is potential confusion as to when a "sale" occurs: Is it when the order is placed, when the products arrive or the services are performed, when the revenue is recognized, when the invoice is sent, or when payment is received?

As a result, contractors face potential confusion and risk regarding the appropriate time period subject to disclosure, as well as the potential burden of retrieving, compiling, and analyzing large amounts of data in the event the Government demands data from an arbitrarily imposed period of time (*e.g.*, 12 months) regardless of the volume of sales data involved.

Accordingly, to the extent that the Panel recommends changes to GSA's mechanisms for determining prices at the MAS Contract level (in lieu of relying solely on competition at the task order/delivery order level), the Section recommends revising the CSP instructions to clarify the time period to be addressed in the CSP submission or to expressly allow contractors to propose particular time periods based on the amount or availability of data.

¹⁹ CSP-1 Instructions ¶ 1 ("Provide the dollar value of sales to the general public at or based on an established catalog or market price during the previous 12-month period or the offerors' last fiscal year."); *id.* ¶ (2) ("Show your total projected annual sales to the Government under this contract for the contract term, excluding options, for each SIN offered. If you currently hold a Federal Supply Schedule contract for the SIN the total projected annual sales should be based on your most recent 12 months of sales under that contract.").

2. Lack of Clear Guidance Regarding Transactions and Discounts Subject to Disclosure in CSP.

The CSP-1 broadly requires contractors to disclose the “best discount” granted to each category of customer, regardless of “quantity; terms and conditions of the agreements under which the discounts are given; and whether the agreements are written or oral.” Figure 515.4-2-Instructions for Commercial Sales Practices Format. For purposes of this requirement, GSA has broadly defined “discount” to include any “reduction to catalog prices (published or unpublished),” including any “rebates, quantity discounts, purchase option credits, and any other terms or conditions other than concessions) which reduce the amount of money a customer ultimately pays for goods or services ordered or received. *Any* net price lower than the list price is considered a ‘discount’ by the percentage difference from the list price to the net price.” GSAR 552.212-70(a) (emphasis added).

Read literally, the CSP instructions could be interpreted to require the contractor to disclose *all* discounts granted to *all* customers, regardless of terms and conditions, rather than disclosing only the data that is relevant to the Government’s price analysis.²⁰ To the extent the instructions are interpreted and applied in such a sweeping manner, such an interpretation raises significant burdens and risks for contractors, and is inconsistent with the rules governing commercial item contracts – rules that were designed to simplify the federal procurement process by “establishing acquisition policies more closely resembling those of the commercial marketplace”,²¹ eliminating unnecessary certifications,²² and eliminating the requirement for contractors to submit certified “cost or pricing data” when selling commercial items.²³

Consistent with this rationale, in *United States v. Data Translation, Inc.*, 984 F.2d 1256, 1262 (1st Cir. 1992), the Court of Appeals for the First Circuit held

²⁰ See Figure 515.4-2, “Instructions for Commercial Sales Practices Format” (“[S]how[] your written policies or standard sales practices for *all* customers or customer categories to whom you sell at a price (discounts and concessions in combination) that is equal to or better than the price(s) offered to the Government.”) (emphasis added); CSP-1 Instructions ¶ 3 (“[A]re the discounts and any concessions which you offer the Government equal to or better than your best price (discount and concessions in any combination) offered to *any* customer. . . .”) (emphasis added).

²¹ FAR 12.000.

²² FAR 1.107.

²³ FAR 15.403-1(b)(3).

that interpreting the MAS solicitation²⁴ instructions in such a literal manner was unreasonable in light of the burden imposed on contractors:

An ordinary business person would not seem likely to interpret the form literally, for, read literally, the form asks a business to shoulder a compliance burden which will often seem inordinately difficult or impossible to carry out. Consider, for example, an office supply firm, or a furniture company, or a computer parts manufacturer, operating in a competitive industry. Such a firm, selling its products to tens of thousands of different customers, through a host of different sales personnel, might vary prices considerably, in response to shifting competitive pressures, from market to market, from time to time, or from one customer to another, either through direct price cuts or through the creation of small “terms of trade” advantages. To require a paper report of every such variation is to require a paperwork blizzard, even assuming that the company keeps track, on paper, of every variation, not only in the price, but also in the price-related terms and conditions of sale.

Id. at 1261.

The court in *Data Translation* also reasoned that requiring disclosure of all discounts offered to all customers was inconsistent with the statutory authority for the MAS program, through which “Congress authorized, and the GSA designed the MAS program as a *simplified* alternative for government procurement of common

²⁴ Although *Data Translation* involved the interpretation of GSA’s “Discount Schedule and Marketing Data” submission, the same rationale applies to the current CSP submission, which was intended to *reduce* the burden on contractors in connection with the pricing of MAS contracts. See 62 Fed. Reg. 44518, 445119 (Aug. 21, 1997) (noting that CSP had been revised, in response to industry complaints regarding burden and confusion, “to clarify GSA’s intent to obtain information on the offeror’s written pricing policies, or standard commercial sale practices if the offeror has no written policies,” so that “only in cases where the offeror is deviating from its policies or practices to such an extent that the policies or practices alone cannot be relied upon by the contracting officer to make a determination that the prices offered are fair and reasonable, will the contracting officer ask for transactional information. In cases where information is requested, the request will be targeted to limit the submission of sales data to that needed by the contacting officer to establish whether the price is fair and reasonable.”).

items sold competitively in the commercial marketplace.” *Id.* at 1262 (citing H.R.Rep. 1157, 98th Cong., 2d Sess. 18 (1984)). According to the court, “[t]o the extent . . . that the [CSP] questionnaire and audits become as burdensome as the ‘sole source’ selection process, the MAS program abandons its basic ‘simplification’ rationale” and “could result in the government’s being charged higher, not lower, prices.” 984 F.2d at 1262 (citing Robert S. Brams & Daniel J. Kelly, *Multiple Award Schedule Contracting: A Practical Guide to Surviving Its Shortcomings, Ambiguities and Pitfalls*, 19 Pub. Cont. L.J. 441, 453-60, 467-72 (1990)). Ultimately, the court in *Data Translation* concluded that the MAS Solicitation required “a ‘practical’ effort to supply *relevant* price discount data,” whereby the contractor is obligated to “disclose *significantly relevant* price discounts that [the contractor] normally provided other customers making purchases *roughly comparable* to the agency purchases the Government contemplated would occur under the MAS program.” 984 F.2d at 1263.

Although GSA regulations recognize that the Government may not be entitled to the same discounts provided to commercial customers based on differences in terms and conditions,²⁵ the CSP instructions do not reflect *Data Translation*’s common-sense interpretation in defining the scope of transactions to be disclosed in the CSP.²⁶ As a result of GSA’s all-encompassing interpretation requiring disclosure of all discounts to all customers on all transactions, contractors face a significant burden in compiling commercial sales practices information. This task is particularly burdensome for –

²⁵ See GSAR 538.270(a)-(c) (recognizing that although GSA “will seek to obtain the offeror’s best price (the best price given to the most favored customer),” there may be “legitimate reasons why the best price is not achieved,” including “volume” or minimum quantity requirements, “a pattern of historic purchases,” length of the contract period or “[a]ny other relevant information, including differences between the MAS solicitation and commercial terms and conditions that may warrant differentials between the offer and the discounts offered to the most favored commercial customer(s). For example, an offeror may incur more expense selling to the Government than to the customer who receives the offeror’s best price, or the customer (e.g., dealer, distributor, original equipment manufacturer, other reseller) who receives the best price may perform certain value-added functions for the offeror that the Government does not perform. In such cases, some reduction in the discount given to the Government may be appropriate. If the best price is not offered to the Government, you should ask the offeror to identify and explain the reason for any differences. Do not require offerors to provide detailed cost breakdowns.”).

²⁶ See GAO Report No. GAO/GGD-93-123, “*Multiple Award Schedule Contracting: Changes Needed in Negotiation Objectives and Data Requirements*,” Aug. 1993 at 68-9 (noting that MAS Contractors had expressed concerns regarding “lack of clarity” surrounding DSMD requirements, citing *Data Translation*’s finding that DSMD instructions were “virtually unintelligible,” but noting that GSA nevertheless “believes data should be collected from vendors regarding all customer categories”).

- Contractors that offer a number of different products or services or have a large volume of sales;
- Contractors that have large, decentralized or dispersed sales forces that are authorized to grant discounts;
- Contractors whose commercial accounting systems are not set up to readily track and report the information called for in the CSP-1;
- Contractors that do not grant or monitor discounts on the basis of individual transactions, but who instead base (and vary) their discounts based on consideration of the overall volume of sales for a particular customer over time, as well as other factors; or
- Contractors without well-defined or rigidly enforced discounting policies, but that instead must establish commercial pricing based on an analysis of “commercial practices.”

This overly-broad interpretation also imposes significant risk on contractors, who face the prospect of fighting allegations of “defective pricing” under the clause entitled “Price Adjustment, Failure to Provide Accurate Information,” GSAR 552.215-72,²⁷ or even allegations of fraud, for failing to disclose all discounts to all customers on all transactions.

Accordingly, to the extent that the Panel recommends changes to the CSP-1 or other mechanisms for determining prices at the MAS Contract level (in lieu of relying solely on competition at the task order/delivery order level), the Section recommends revising the CSP to require only the disclosure of discounts on transactions that are *comparable to GSA sales*. Such an approach should aim to minimize the burden, confusion, and risk to contractors, while ensuring that the Government requests and receives only the information that is necessary to determine that prices are fair and reasonable.

²⁷ GSAR 552.215-72(a) (“The Government, at its election, may reduce the price of this contract or contract modification if the Contracting Officer determines after award of this contract or contract modification that the price negotiated was increased by a significant amount because the Contractor failed to: (1) Provide information required by this solicitation/contract or otherwise requested by the Government; or (2) Submit information that was current, accurate, and complete; or (3) Disclose changes in the Contractor’s commercial pricelist(s), discounts or discounting policies which occurred after the original submission and prior to the completion of negotiations.”).

3. Lack of Clear Guidance Regarding “Deviations.”

The CSP-1 form requires contractors to disclose “the best discount” at which the contractor sells to each category of customer, regardless of quantity or terms and conditions. Figure 515.4-2-Instructions for Commercial Sales Practices Format. In addition, contractors are required to disclose whether “any deviations” from the contractor’s written policies or standard commercial sales practices that “*ever* result in better discounts (lower prices) or concessions” than the contractor’s “best discount.” CSP-1 ¶ 4(b) (emphasis added). For purposes of this disclosure, GSA broadly defines “concession” to include any “benefit, enhancement or privilege (other than a discount), which either reduces the overall cost of a customer’s acquisition or encourages a customer to consummate a purchase. Concessions include, but are not limited to freight allowance, extended warranty, extended price guarantees, free installation and bonus goods.” GSAR 552.212-70(a).

As with the definition of “discounts,” the definition of “concession” is overly broad, resulting in confusion, burden and risk. In addition, there is an inherent inconsistency and tension in requiring contractors to disclose their “best discount,” while at the same time requiring the contractor to disclose any and all discounts or concessions that are “better” than the contractor’s “best” discount. In other words, if, in fact, the CSP-1 requires the contractor to disclose the “best discount” granted to any customer regardless of terms and conditions, then it is unclear what purpose is served by asking the contractor whether it ever grants “better” discounts.

To the extent the intent is to require disclosure of the contractor’s best “standard discount,” as well as any “non-standard discounts” (*i.e.*, deviations) above their standard, the CSP-1 instructions include no specific guidance for determining what percentage of sales or other criteria should be applied to determine what constitutes a “standard discount” versus a “deviation.” In June 2007, guidance was incorporated into the Refresh #21 to the IT/70 Schedule Solicitation, which instructed offerors that “deviations” should represent “a small percentage of [the offeror’s] total sales” that are “outside [the offeror’s] normal discounting practices.” *See* Solicitation No. FCIS-JB-980001-B REFRESH #21 (June 13, 2007). Nevertheless, that guidance was deleted from the latest Refresh of the IT/70 Schedule, which was issued in June 2008. *See* Solicitation No. FCIS-JB-980001-B REFRESH #22 (June 6, 2008). Moreover, even that short-lived guidance from Refresh #21 failed to define what represents a “small” percentage of sales.

Therefore, to the extent that the Panel recommends changes to the CSP-1, the Section recommends that the CSP be revised to provide clear guidance for contractors to determine what constitutes “standard discounts” versus “deviations.”

4. Lack of Clear Guidance Regarding Use of “Cost Build-Up.”

Although MAS Contracts are commercial item contracts,²⁸ for which the FAR prohibits contracting officers from requesting certified “cost or pricing data,”²⁹ there are certain circumstances in which MAS contractors may agree to negotiate GSA Schedule prices on the basis of a “cost build up” or where GSA contracting officer’s regularly request it. Despite this practice, there is no express authorization in the MAS Solicitation or regulations authorizing or outlining the procedures for such a process. In addition, it is arguably inconsistent with the underlying nature of the GSA Schedules as commercial item contracts to allow such a practice. Finally, to the extent that prices are established based on cost (as opposed to price), then the inclusion of a price reductions clause tied to a particular “basis of award customer” would seem inapplicable.

Therefore, to the extent that the Panel recommends changes to the CSP-1, the MAS Solicitation should contain clearer instructions regarding the appropriateness of requesting cost information of MAS contractors and the applicability of the Price Reductions Clause for MAS contractors who agree to negotiate prices based on a “cost-build up.”

5. Lack of Clear Guidance Regarding Pricing Information of the Contractor’s Manufacturers or Suppliers.

The CSP-1 instructions require the submission of manufacturer’s sales data only in cases where the dealer/reseller does not have “significant” commercial sales of its own:

²⁸ See, e.g., GSAR 538.271(a) (“MAS awards will be for commercial items as defined in FAR 2.101.”); Solicitation No. FCIS-JB-980001-B REFRESH #21, Part 1 at xii (“This solicitation has been prepared in accordance with FAR Part 12, Acquisition of Commercial Items, which implements Title VIII of the Federal Acquisition Streamlining Act (FASA) of 1994 (Public Law 103-355), the Clinger-Cohen Act of 1996 (Public Law 104-106), and the final rule, published as General Services Administration Acquisition Regulation (GSAR) Change 76, regarding commercial item acquisitions under the Multiple Award Schedules Program.”).

²⁹ FAR 15.403-1(b) (“The contracting officer shall not require submission of cost or pricing data to support any action (contracts, subcontracts, or modifications) (but may require information other than cost or pricing data to support a determination of price reasonableness or cost realism) [w]hen a commercial item is being acquired . . .”) (implementing 10 U.S.C. § 2306a and 41 U.S.C. § 254b).

If you are a dealer/reseller *without significant sales to the general public*, you should provide manufacturers' information required by paragraphs (1) through (4) above for each item/SIN offered, if the manufacturer's sales under any resulting contract are expected to exceed \$500,000. You must also obtain written authorization from the manufacturer(s) for Government access, at any time before award or before agreeing to a modification, to the manufacturer's sales records for the purpose of verifying the information submitted by the manufacturer.

Figure 515.4-2-Instructions for Commercial Sales Practices Format (emphasis added).

Despite this instruction, GSA contracting officers have reportedly required manufacturers or OEMs to provide detailed pricing disclosures that are the same or similar to the pricing information the proposed contractor must disclose – even where the MAS contractor (for example a reseller) has substantial commercial sales of its own. Even where this requirement applies, subjecting manufacturers (or even Schedule contractors) to audits is inconsistent with commercial practice, and contrary to the statutes and regulations governing commercial item contracts, which limit the Government's right to audit commercial item contracts.³⁰

Therefore, to the extent that the Panel recommends changes to the CSP-1, the Section believes that additional guidance should be provided to contracting officers to reinforce that the practice of requiring sales data from manufacturers is inappropriate and unnecessary. In addition, consideration should be given to removing the requirement that manufacturers must agree to audit.

F. Issues with the Current Price Reductions Clause.

The PRC is a complicated price maintenance clause that transfers to MAS contractors the responsibility of monitoring their pricing practices in effect at the

³⁰ For a thorough discussion of the limits on GSA's right to audit MAS Contracts, see ABA Letter Re: "Interim Rule Amending The General Services Administration Acquisition Regulation For The Acquisition of Commercial Items, 61 Fed. Reg. 6164 (Feb. 16, 1996)" dated June 3, 1996 at 7-9 (available at http://www.abanet.org/contract/federal/regscmm/commercial_001a.pdf); ABA Letter Re: "Advance Notice of Proposed Rulemaking GSAR ANPR 2005-N01, 70 Fed. Reg. 19051 (April 12, 2005); GSAR Revision Regarding Post-Award Audit Rights " dated May 10, 2005 (available at http://www.abanet.org/contract/federal/regscmm/commercial_023.pdf).

time of award and reporting changes in these pricing practices to the contracting officer to the extent changes constitute a reduction in price. The obligation arises immediately upon award and continues throughout the life of a MAS contract. Simply stated, the PRC establishes a framework under which MAS contract pricing is linked to bases of award, and requires that price reductions made to the bases of award be passed on to the Government immediately and in a comparable manner so as to preserve the relationship between the bases of award and the MAS contract price established at the time of award.

MAS contractors report that the PRC is difficult to implement and monitor, and generates significant risk and confusion. At the same time, the obligations arising under the PRC vary greatly, depending significantly on the manner in which a MAS contract is negotiated and awarded. In most cases, understanding exactly how the PRC applies in any given MAS contract requires careful study and analysis. Even the most conscientious MAS contractor with the most diligently conceived compliance program can run afoul of this complicated clause.

For this reason, the Section strongly urges that the Panel to consider whether the compliance costs associated with the PRC outweigh any purported benefits derived from the PRC and to consider whether the PRC is necessary in light of the high degree of competition required at the task/delivery order level. If the Panel does not recommend an alternative method to the PRC and instead concludes that the PRC remains a viable pricing instrument serving legitimate pricing goals, the Section recommends the Panel materially change the PRC to alleviate ambiguity, improve understanding both within the Government and the contractor community, and to reduce the compliance burden associated with the PRC.

1. Background

The current version of the Price Reductions Clause dates to 1994, with minor changes made in 1999 and 2004 to change the phrase “maximum order limitation” to “maximum order threshold” and to exclude cooperative purchasing sales from potential events that trigger a price reduction under the PRC. Nevertheless, the PRC has a much longer history, with differing versions dating back over fifty years.³¹ Despite its long history, there are few cases interpreting the PRC, and contractors have little guidance to turn to for objective standards for interpreting and implementing the PRC within their businesses. Moreover,

³¹ For a thorough discussion of the history of the PRC, see John A. Howell, “A Clause in Search of Meaning: A Critical Dissection Of The Price Reductions Clause (Plus Suggestions For Reform),” 37 Pub. Contr. L. J. 337, 340-534 (Spring 2008) (hereinafter “Howell”).

compliance with the PRC – which is unlike any commercial equivalent in terms of scope and potential risk – carries with it significant costs,³² which inevitably are borne by government customers either in terms of market participation or in terms of the cost of the unique compliance systems required to comply with it.

The PRC creates three distinct price maintenance obligations. At time of award, the Government and the MAS contractor are supposed to negotiate a basis of award, which is comprised of (1) an identified customer or class of customers and (2) a price list or other pricing document upon which award pricing is based. A price relationship is formed between the Government's price and the identified customer or category of customers designated as the basis of award. Thereafter, during the contract period, a "price reduction" can arise:

- if the MAS contractor revises its price list or other pricing document upon which contract award was predicated to reduce prices;
- if the MAS contractor grants more favorable discounts or terms and conditions than those contained in the price list or other pricing document upon which award was predicated; or
- if the MAS contractor grants special discounts to the customer (or category of customers) designated as the basis of award and such discount "disturbs the price/discount relationship of the Government to the basis of award customer(s)."

GSAR 552.238-75(c)(1)(i)-(iii).

If a price reduction occurs, the MAS contractor is required to notify the Government of the price reduction within fifteen days and to reduce MAS contract prices accordingly for all future sales under the MAS Contract so as to maintain the price relationship between the Government and the basis of award customer(s).

³² *But see* Fed. Supply Serv., GSA, *Commercial Item Acquisition, an Anthology of Commercial Terms and Conditions* (2000). By including 22 "Most Favored Customer" clauses gleaned from commercial purchasers, GSA implicitly suggests such clauses are analogous to the PRC. First, the fact that such terms exist on purchasers' standard forms is not an indication of how often the purchasers are successful in getting sellers to agree to them. Sellers can *negotiate* those clauses to remove them entirely or to modify them so that they make sense in the particular context they are being used. Thus, to the extent such clauses are actually used in the commercial marketplace, such terms are typically much simpler and easier to administer than the PRC. Lastly, the compliance risks in the commercial context are simply not comparable to the compliance risks associated with the PRC (e.g., termination for default, suspension, and debarment, monetary penalties under the Civil False Claims Act, and possible criminal prosecution).

However, several exceptions apply. These exceptions are expressly stated under paragraph (d) of the PRC and include:

- sales made under firm fixed price definite quantity contracts with specified delivery in excess of the maximum order threshold;
- sales to federal agencies;
- sales to state and local government entities under cooperative purchasing provisions of the MAS contract; and
- sales at prices or discounts that represent an error in quotation or billing.

GSAR 552.238-75(d)(1)-(4).

2. Lack of Clear Guidance Regarding Identification of Basis of Award Customer.

Since GSA issued its “1982 Policy Statement” on MAS pricing, GSA has clearly recognized that, while its goal may be to obtain “most favored customer” pricing, there may be legitimate reasons why GSA is not entitled to an offeror’s best discount. In fact, GSA’s current regulations expressly recognize that although GSA “will seek to obtain the offeror’s best price (the best price given to the most favored customer),” there may be “legitimate reasons why the best price is not achieved.” GSAR 538.270(a). Therefore, contracting officers are instructed that they “may award a contract containing pricing which is less favorable than the best price the offeror extends to any commercial customer for similar purchases,” so long as the prices are “fair and reasonable” and award is “otherwise in the best interest of the Government.” GSAR 538.270(d). Among the factors that may be considered in negotiating prices are the following:

- (1) Aggregate volume of anticipated purchases.
- (2) The purchase of a minimum quantity or a pattern of historic purchases.
- (3) Prices taking into consideration any combination of discounts and concessions offered to commercial customers.
- (4) Length of the contract period.

- (5) Warranties, training, or maintenance (or more than one of the above), included in the purchase price or provided at additional cost to the product prices.
- (6) Ordering and delivery practices.
- (7) Any other relevant information, including differences between the MAS solicitation and commercial terms and conditions that may warrant differentials between the offer and the discounts offered to the most favored commercial customer(s). For example, an offeror may incur more expense selling to the Government than to the customer who receives the offeror's best price, or the customer (e.g., dealer, distributor, original equipment manufacturer, other reseller) who receives the best price may perform certain value-added functions for the offeror that the Government does not perform. In such cases, some reduction in the discount given to the Government may be appropriate. If the best price is not offered to the Government, you should ask the offeror to identify and explain the reason for any differences. Do not require offerors to provide detailed cost breakdowns.

GSAR 538.270(c).

Despite the clear guidance that GSA is not necessarily entitled to the "best" discount, there has been considerable misunderstanding among contractors and contracting officers alike whether the customer selected as the basis of award must be a MAS contractor's most favored or best customer. Therefore, to the extent that the Panel does not recommend repeal of the PRC, the Section believes that additional guidance should be provided to contracting officers to reinforce that the basis of award customer need not be the contractor's "best" customer. In addition, additional guidance should be provided to identify clearly the basis of award customer and define the "price/discount" relationship for purposes of tracking under the PRC.

3. Lack of Clear Guidance Regarding Application to Manufacturers.

As discussed above, there is considerable confusion regarding manufacturers' obligation to provide commercial sales practices information, even where the Schedule holder is a dealer/reseller with significant commercial sales of its own. In a related vein, there is considerable confusion regarding the application of the PRC to manufacturers who do not directly hold a Schedule contract. For

example, the latest refresh of the IT/70 Schedule, issued in June 2008, includes a template for manufacturers' letter of supply, which requires manufacturers to report price reductions:

PRICE REDUCTION NOTIFICATION

(Manufacturer's Name) agrees to notify [Reseller's Name] no less than thirty (30) days before any of the following:

- Reduction of commercial price list of any product listed on a GSA Schedule Contract.
- Decrease in reseller cost for any product listed on GSA Schedule Contract
- Temporary price reductions, rebates, and/or promotions.

See Solicitation No. FCIS-JB-980001-B REFRESH #22 (June 6, 2008) at Attachment 12.

This practice is inconsistent with guidance issued by GSA's Chief Acquisition Officer less than a year ago, which recognized that discounts offered by a manufacturer are to be used solely for purposes of negotiating price, and are *irrelevant* for determining compliance with the PRC. GSA issued that guidance, which was posted by the Panel to its website, in response to a proposal by the Veterans Administration (VA) Inspector General. The proposal suggested modifying the PRC to require monitoring of discounts offered by a manufacturer to its commercial customers for purposes of the PRC where an entity other than a manufacturer holds a Schedule contract. In response to that suggestion, GSA issued the following guidance:

With respect to the identification of the appropriate party to be used as the "tracking customer" for price reduction purposes, GSA's policy has not changed since our previous determination on this issue transmitted to the NAC on February 28, 2003. GSA does not contemplate third party tracking for price reduction purposes. An MAS contactor who is a reseller does not control the discounts given by a manufacturer to other customers. There is, therefore,

a lack of nexus between the pricing relationship negotiated between the manufacturer and its other customers, and the pricing relationship envisioned by the Price Reductions clause. For price reduction purposes, in cases where the reseller is the offeror, it is the pricing relationship that the offeror has with the manufacturer that must be maintained throughout the contract period.

The GSAR 515.408, Commercial Sales Practices Format (CSPF), paragraph (5), requires an offeror, who is a dealer/reseller without significant sales to the general public, to provide manufacturers' sales information if contract sales are expected to exceed \$500,000. This information can be obtained any time before award or before agreeing to a contract modification including price increases. Further, the CSPF informs the offeror that this information is required to enable the Government to make a determination that the offered price is fair and reasonable. Although the manufacturers' information is used for negotiation purposes, it is not intended that the manufacturer's customers be identified and used as "tracking customers" under the Price Reductions clause.

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 (available at http://acquisition.gov/comp/masap/documents/GSA_Panel_supporting_docs.pdf).

Therefore, to the extent that the Panel does not recommend repeal of the PRC, the Section believes that additional guidance should be provided to make clear that discounts granted by manufacturers or other third parties are irrelevant for purposes of the PRC, consistent with GSA's January 2008 guidance to the VA.

4. Uncertainty Regarding The Effectiveness Of the PRC To Ensure Fair Pricing.

It is noteworthy that the PRC does not necessarily ensure competitive market pricing. Rather, the PRC functions to gauge changes only in a contractor's

own pricing and sales practices and ensure the GSA obtains reductions arising from those pricing and sales practices in the future. To avoid triggering the PRC, a savvy contractor could consciously avoid offering to lower its prices on commercial sales that would otherwise trigger the PRC because the potential revenue impact on all of its future government sales outweighs the value of any single commercial sales transaction. In this way, the PRC could theoretically act as a *disincentive* for contractors to offer lower prices. In other words, instead of lowering prices paid by the Government, the PRC could have the opposite effect of artificially increasing or maintaining prices.

5. Other Ambiguities, Burdens, and Risks.

In addition to these broader issues, it has been widely acknowledged that the PRC is extremely burdensome and the source of great confusion for contractors and contracting officials alike.³³ This burden is particularly significant for contractors who would not otherwise monitor discounts on individual transactions – for example, contractors whose commercial discounts are granted on the basis of the overall net revenue from that customer (or group of customers). Requiring such contractors to develop and maintain unique processes and procedures for monitoring its sales to the tracking customer *solely* for the purpose of Schedule contract compliance imposes a potentially significant burden, and ignores the fundamental goals of commercial item procurements – that is, to mirror and leverage the way in which the vendor sells to its commercial customers, by “establishing acquisition policies more closely resembling those of the commercial marketplace.”³⁴

In light of the burdens, ambiguities, and risks associated with the PRC, the Section believes that serious consideration should be given to elimination of the current PRC. Nevertheless, in the event the Panel does not recommend elimination of the PRC, the Section offers a number of specific recommendations for addressing the ambiguities and inconsistencies in the current PRC, so as to reduce the confusion and the burden associated with the clause.

³³ See, e.g., Howell, *supra*, at 370 (“The [Price Reductions Clause] is extremely complicated to administer and frequently results in extensive monetary exposure for MAS contractors. . . . Schedule contractors have consistently complained about the burdens of complying with the Price Reductions clause. In addition, schedule contractors have argued that the clause is inconsistent with customary commercial practice¹⁴⁶ and should be removed from the GSAR. Third, at least one commentator has suggested that the clause is particularly unsuited for the current services-centric schedules environment. Finally, schedule contractors have complained about the clause’s vagueness and imprecision.”).

³⁴ FAR 12.000.

QUESTION No. 4: *If the current policy is not adequate, what are the recommendations to improve the policy/guidance?*

- **Recommendation No. 1:** GSA should consider eliminating the CSP and PRC requirement, which are unnecessarily confusing and burdensome, and instead rely on the competitive effect that occurs from the ordering procedures currently used - namely, publication of contractor's Schedule rates, as well as ordering activities' obligation to survey a number of Schedule contracts for smaller dollar orders, or to conduct a competition at the order level for larger orders
- **Recommendation No. 2:** In the event the Panel does not recommend elimination of the CSP, GSA's pricing policy should continue to recognize and emphasize to contracting officers that, while its objective is to "seek to obtain the offeror's best price (the best price given to the most favored customer)," in some cases "there may be legitimate reasons why the best price is not achieved. GSA may not be entitled to best discount." GSAR 538.270(a).
- **Recommendation No. 3:** In the event the Panel does not recommend elimination of the CSP, GSA should provide clear instructions regarding the preparation of CSPs which, among other things, should limit CSP data (to the extent still required) to a reasonable period of time, for transactions or customers that are comparable to GSA, taking into consideration the same factors that are currently considered in negotiating price, such as:
 - "Aggregate volume of anticipated purchases";
 - "The purchase of a minimum quantity or a pattern of historic purchases";
 - "Prices taking into consideration any combination of discounts and concessions offered to commercial customers";
 - "Length of the contract period";
 - "Warranties, training, and/or maintenance included in the purchase price or provided at additional cost to the product prices";
 - "Ordering and delivery practices"; and
 - "Any other relevant information, including differences between the MAS solicitation and commercial terms and conditions that may warrant differentials between the offer and the discounts offered to the most favored commercial customer(s)." GSAR 538.270(c).

- **Recommendation No. 4:** In the event the Panel does not recommend elimination of the CSP, GSA should consider providing contractors a “safe harbor” against allegations of “defective pricing,” for example, by allowing contractors to disclose *actual* sales data for a mutually agreed upon and reasonable period of time for transactions involving items offered under the Schedule.
- **Recommendation No. 5:** In the event the Panel does not recommend elimination of the CSP, the Panel should clarify the circumstances under which it may be appropriate for offerors to submit cost information voluntarily (*i.e.*, explicitly allow offerors the *option* of establishing prices through a “cost build-up”). This might occur, for example, where the offeror routinely uses a cost build-up model to quote prices to its commercial customers, or where the amount of pricing information from the offerors’ commercial sales does not allow the contracting officer to determine a fair and reasonable price. If cost build-up is used as the basis for negotiating pricing, then the PRC should not be made applicable to that GSA Schedule contract.
- **Recommendation No. 6:** In the event the Panel does not recommend elimination of the PRC, the Section recommends revising GSA’s Pricing Policy and the PRC to require expressly that contracting officers and MAS contractors define the basis of award and the pricing relationship in the contract award documents and in all modifications to add new products. To guide the parties in the negotiation process, GSA’s policies should make clear that the basis of award customer need not be the contractor’s most favored customer. This can be accomplished by adding the following sentence at the end of paragraph (a) of the clause: “The identified customer (or category of customers) which will be the basis of award may be, but is not required to be, the Offeror’s most favored customer.” Finally, the clause should specifically define how a price reduction will be triggered and calculated, which is currently a source of considerable confusion.
- **Recommendation No. 7:** In the event the Panel does not recommend elimination of the PRC, the Section recommends that GSA eliminate or clarify when a price reduction has been triggered based on contractors “[g]rant [of] more favorable discount or terms and conditions than those contained in the commercial catalog, pricelist, schedule or other documents upon which award was predicated.” The Section believes this requirement is confusing, overly broad, and not necessary to assure the Government fair price maintenance. The Section recommends deleting GSAR 552.238-75 (c)(1)(ii) altogether. In the alternative, the Section recommends removing

the language regarding terms and conditions and making clear that the obligation only applies to the extent that the change disturbs the price/discount relationship of the Government to the customer (or category of customers) that was the basis of award. Finally, if the Panel believes that the language concerning terms and conditions serves some reasonable purpose, the Section recommends that the language “more favorable discounts or terms and conditions” be clarified by adding thereafter “material to price afforded the basis of award customer (or category of customers)”

- **Recommendation No. 8:** In the event the Panel does not recommend elimination of the PRC, the Section recommends updating the clause to expressly exempt additional types of transactions that should not reasonably trigger a price reduction, by adding the following clarifications:
 - Add as a new exemption: “To any customer not in the basis of award.” This exemption is typically inferred by MAS contractors. Nevertheless, it would alleviate confusion to simply and clearly exclude non-basis of award customers;
 - Add as a new exemption: “For products and/or services not on the MAS contract at the time of the transaction.” This exemption is typically inferred by MAS contractors. Nevertheless, it would alleviate confusion to simply and clearly exclude sales of such products and/or services.
 - Add as a new exemption: “Involving settlement of customer disputes or customer satisfaction issue.” Special discounts that involve these matters are not reflective of a MAS contractor’s sales practices and may involve assessment of a contractor’s legal liability with a customer that is not comparable to a MAS contract order.
 - Add as a new exemption: “For charity or philanthropic purposes.” Currently, such transactions could occur with a basis of award customer and trigger the PRC. Such transactions, however, typically are not for profit and are not reflective of a MAS contractor’s standard sales practices.
 - Add as a new exemption: “Providing for delivery or performance outside the geographic scope of this contract.” This exemption is typically inferred by MAS contractors. Nevertheless, it would alleviate confusion to simply and clearly exclude transactions

calling for delivery or performance outside the geographic scope of the MAS contract.

- Expand GSAR 552.238-75 (d)(3) to exclude all transactions executed under the MAS contract. Currently, this exemption excludes only state and local governments ordering under the MAS contract. Nevertheless, any order with any entity eligible or authorized to order under the MAS contract that is actually placing an order under the MAS contract should be expressly excluded. This exemption is typically inferred by MAS contractors. Consistent with our prior recommendations, it would alleviate confusion to simply and clearly exclude any transaction executed under the MAS contract, including those placed by eligible or authorized entities.
- Subparagraph (d)(1) of the PRC should be revised. The word “commercial” should be removed, as it may or may not be applicable – it appears to have been included based on the assumption that a commercial customer will be the basis of award customer, which, as stated above, is not always the case. The words “definite quantity” and “with specified delivery” should also be removed. This language appears to apply to products, and would more clearly apply to both products and services without this language. Moreover, all contracts in excess of the maximum order threshold are unlike the pricing on a MAS contract, regardless of whether they are definite quantity contracts with specified delivery.
- Subparagraph (d)(1)(a) of the PRC excludes only firm fixed price contracts. Contracts other than firm fixed price should be added. For example, time and materials contracts should be excluded if they are reasonably estimated to exceed the maximum order threshold when the pricing is established.
- Add as a new exemption: “Outstanding contractual pricing obligations existing at time of award or that arise from modifications or options honoring discounts or pricing in existing contracts that did not otherwise trigger the price reduction reporting or reduction provisions of this clause at the time the sale was first entered into.” The Section believes this issue deserves clarification, and recommends that an exemption be added to the PRC that expressly exempts pricing provided to customers under existing contracts via modification or options that would otherwise trigger the PRC but for

the fact the transaction was pre-existing at the time of award or did not trigger the PRC at the time the original contract was established. Such a clarification would alleviate significant confusion regarding the PRC as currently written and make administering the PRC much less onerous.

- Finally, the Section recommends that contractors expressly be allowed to identify other types of transactions not subject to the PRC in their proposals. This could easily be done by identifying PRC exemptions as one type of clarification that a MAS contractor may make in preparation of its proposal. Each industry is unique, and the types of transactions that reasonably might be excluded for one industry differ from the types of transactions that reasonably should be excluded from another. Encouraging clarification by contractors would allow them to address their industries and business practices in a meaningful manner – more like the manner in which commercial contracts are negotiated – and would promote compliance by drawing attention to the PRC up front during the proposal preparation process.
- **Recommendation No. 9:** In the event the Panel does not recommend elimination of the PRC, the Section recommends that GSA expressly clarify the contractor's obligation in the event the basis of award no longer exists or changes. It is not uncommon, for example, for a MAS contractor's basis of award customer or class of customers to undergo changes because customers discontinue business with the MAS contractor or, because of internal reorganization, the composition of types of customer segments changes over time. Changes in accounts can be particularly frequent, for example, where strategic and national accounts represent the basis of award customer class. In such event, is the contractor required to notify the Government, track the original class, track the new class, or track both the new and the old class? Because MAS contracts are not clear regarding the MAS contractor's obligations under these circumstances, the Section recommends establishing clear guidance and directions to address these situations.
- **Recommendation No. 10:** In the event the Panel does not recommend elimination of the PRC, the Section recommends that GSA clarify the contractor's obligations when a government agency (federal, state or local) or government contract serves as the basis of award customer.


- **Recommendation No. 11:** In the event the Panel does not recommend elimination of the PRC, the Section recommends that GSA clarify the interplay between the PRC and the Economic Price Adjustment (EPA) clauses, which can be confusing to understand and administer. The EPA clause used in MAS contracts that are awarded based on a commercial price list, GSAR 552.216-70 (Economic Price Adjustment – FSS Multiple Award Schedule Contracts (Sept. 1999) (Alt. I – Sept. 1999), does not address how the annual price increases afforded by the clause work with the PRC. Thus, an argument can be made that every economic price adjustment would disturb the price relationship first established at time of award. This possibility is likely unintended, but in any event should be clarified in the PRC.

III. **CONCLUSION**

The Section welcomes this opportunity to provide input to the Panel as it formulates its recommendations for improving the processes used to ensure that the Government achieves a fair and reasonable price for purchases made through the MAS Program. As discussed above, serious consideration should be given to elimination of the CSP and PRC, given the significant burden, confusion, and risk associated with these clauses, as well as the significant changes that have occurred in the MAS Program that have rendered these clauses unnecessary. In the event that these clauses are not eliminated, they should be clarified, as discussed above, to address the substantial ambiguity that currently exists.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,



Michael W. Mutek
Chair, Section of Public Contract Law

Ms. Pat Brooks
October 17, 2008
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cc:

Karen L. Manos

Donald G. Featherstun

Carol N. Park Conroy

Mark D. Colley

Allan J. Joseph

John S. Pachter

Patricia A. Meagher

Michael A. Hordell

Council Members, Section of Public Contract Law

Chair(s) and Vice Chair(s) of the Commercial Products And Services Committee

Scott M. McCaleb

Kara M. Sacilotto