Section of Public Contract Law
AMERICAN BAR ASSOCIATION

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VIA REGULATORY PORTAL AND U.S. MAIL

General Services Administration
Regulatory Secretariat (MVCB)
Attn: Ms. Flowers
1800 F Street NW, 2nd Floor
Washington, DC 20405-0001

Re: Comments on GSAR Case 2013–G504, General Services Administration Acquisition Regulation (GSAR); Transactional Data Reporting; 80 Fed. Reg. 11619 (March 4, 2015)

Dear Ms. Flowers:

On behalf of the Section of Public Contract Law (Section) of the American Bar Association (ABA), I am submitting comments on the above-referenced Proposed Rule.[1] The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section's governing Council and substantive committees include 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.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the ABA's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the policy of the ABA.[2]

I. INTRODUCTION

The Section is pleased to have the opportunity to provide input on the U.S. General Services Administration's (GSA) proposed rule to amend the General Services

[1] Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, did not participate in the Section's consideration of these comments and abstained from the voting to approve and send this letter.

[2] This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic "Commercial Products and Services."

Acquisition Regulation (GSAR) to implement a pilot program requiring the reporting of transactional data for sales made under GSA Federal Supply Schedule (FSS) contracts[3] as well as to implement the rule across GSA's non-FSS contract vehicles—Governmentwide Acquisition Contracts (GWACs) and Governmentwide Indefinite-Delivery, Indefinite-Quality (IDIQ) contracts. 80 Fed. Reg. 11619. The Proposed Rule would, among other things, replace GSAR 552.238-75, "Price Reductions" (Price Reductions Clause, or PRC)[4] in Federal Supply Schedule (FSS) contracts with a requirement that GSA contract holders report transactional data for all sales made to federal government customers under those contracts.

The Section is concerned that GSA has underestimated what will likely be unduly burdensome costs and risks to the Government and contractors of complying with the proposed transactional-data reporting requirements. The Section accordingly encourages GSA to reconsider the Proposed Rule. In addition, the Section has identified aspects of the proposed transactional-data reporting that, before implementation, require clarification or amplification. Beyond those requirements, the Section applauds GSA's proposal to suspend certain requirements of the PRC for contractors who are subject to transactional-data reporting although, for the reasons discussed in prior Section comments[5] and in the Proposed Rule,[6] the Section recommends that the PRC be removed from FSS contracts regardless of whether or when GSA implements transactional-data reporting requirements. Further, for the reasons discussed below, the Section also recommends that GSA consider revisions to Commercial Sales Practice (CSP) disclosure requirements impacted by the Proposed Rule.

II. BACKGROUND

The Proposed Rule is intended to facilitate the Office of Federal Procurement Policy's (OFPP) new purchasing vision. OFPP's approach relies on horizontal as well as vertical pricing comparisons through category management, using a Common Acquisition Platform (CAP) that it is developing to manage pricing of commonly

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[3] The Proposed Rule will not apply to certain FSS contracts managed by the Department of Veterans' Affairs (VA) under a delegation of authority from GSA.

[4] The Proposed Rule retains section (e) of the PRC allowing contractors to offer a voluntary governmentwide price reduction at any time and adds a new requirement allowing the Government to request a price reduction at any time. The Proposed Rule eliminates the most burdensome provisions of the PRC, however, including section (c), which requires a contractor to lower FSS contract prices when it decreases its list price or offers more favorable pricing, terms, or conditions to "identified customers," a specific customer, or a group of customers as negotiated between the contractor and contracting officers.

[5] See the Section's prior comments to the GSA Multiple Award Schedule Advisory Panel dated October 17, 2008 and to GSAR Case 2006-G507, GSAR Part 538 Rewrite, 74 Fed. Reg. 4596 (January 26, 2009), dated March 27, 2009 available at: http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic "Commercial Products and Services."

[6] *See* Section III.C., *infra.*

purchased goods and services throughout the Government.[7] 80 Fed. Reg. at 11620-11621. To implement category management and the CAP, the Government seeks data pertaining to government purchases, which, according to the Proposed Rule, are not readily available from government-internal data sources.

The Proposed Rule accordingly will require GSA contractors to provide transactional data for sales to the Government under GSA-administered FSS Schedules,[8] and also to collect this data for GSA's GWAC, and IDIQ contracts, as a no-cost modification to their contracts. *Id.* at 11621. Under the proposed rule, Contractors will need to collect and report, among other data points, the unit prices paid, quantities sold, and total prices, as well as manufacturer names and part numbers for each of their orders and Blanket Purchase Agreements (BPAs) issued under these contract vehicles across all agencies. *Id.* at 11627-28. The Proposed Rule also would modify the current PRC in those FSS contracts for which transactional-data reporting is required. For these contracts, GSA has added an Alternate II to the PRC that retains section (e) providing that the contractor may offer GSA a voluntary governmentwide price reduction at any time, and adds a new provision allowing GSA to request a price reduction at any time. The Proposed Rule does not remove FSS contractors' obligations to prepare CSP disclosures, and, in certain circumstances, appears to expand their use by allowing contracting officers (COs) to request updated CSP disclosures throughout the life of the contract.

III. COMMENTS

A. GSA Underestimates the True Cost and Impact of Transactional Data Reporting and Should Reconsider the Proposed Rule.

GSA recognizes that the Proposed Rule will have a "significant economic impact." *Id.* at 11624. GSA asserts, however, that the expected compliance costs will be offset by the projected benefits identified in the Proposed Rule, including "greater insight and visibility into customer buying habits and knowledge of market competition." *Id.* In fact, the Proposed Rule states that by replacing the PRC's requirement to establish "identified" (or "tracking") customers with transactional-data reporting, contractors' annual burden will be reduced by 85%, or $51 million in administrative costs. *Id.* at 11622. In the Section's view, GSA may have overestimated the Proposed Rule's potential savings and has grossly underestimated the resulting compliance burden.[9] For the reasons below, the Section recommends that GSA

[7] The Section notes its concerns about collection and protection of transactional data covered by the Proposed Rule given the developmental status of the CAP (CAP website: http://gsa.gov/portal/category/106839).

[8] The Proposed Rule's notice indicates that GSA will initiate the program on a pilot basis followed by a phased implementation. *See* 80 Fed. Reg. at 11621.

[9] The Section notes that GSA analyzed, and rejected, using its existing internal systems for sourcing transactional data in part because it concluded that "GSA would incur significant IT development costs" in implementing the effort. *Id.*

reconsider the transactional-data reporting requirements and conduct a more robust, data-driven assessment of the projected compliance costs, particularly those for small-business contractors.

1. GSA Has Underestimated Contractor Costs in Implementing Systems to Comply with the Proposed Rule.

In estimating the burden to be imposed on contractors, GSA determined that the public reporting burden will be insubstantial, amounting to a "one-time initial set-up burden of 6 hours." *Id.* at 11625. This six-hour estimate includes the time that GSA estimates will be required for reviewing instructions, searching existing databases and other sources of information, and gathering and reviewing the collected information. *Id.* This estimate also includes the effort that GSA anticipates contractors will be required to make to institute changes to contractor training, compliance systems, negotiations, and audit preparation—and presumably includes the time and expense required to modify data-gathering, reporting, and information-technology (IT) systems to accurately and efficiently report the data required by the Proposed Rule.

The Section suggests that the hours required will in fact be much higher. Typically, any new reporting requirement will require extensive efforts to assess the availability of data, test the accuracy of the data, and determine the system enhancements needed to accommodate the new requirement. Many contractors may require substantial changes or upgrades to business systems in order to provide the data sought by GSA in a form that will allow for meaningful and accurate pricing comparison as intended. For example, the fields required by GSA for transactional-data reporting may not reside in the same IT system; few accounting systems include both manufacturer part number and contractor part number in the same system when those part numbers differ. Thus, contractors may need custom development to merge data elements from accounting and other systems (e.g., materials management) to meet the requirements of the Proposed Rule.[10] These and other needed changes would require coordination among functions such as the contractors' IT departments and change-management teams as well as responsible executives. The time needed just to search for, extract, review, and test such data, and implement system modifications, will well exceed six hours.

GSA underestimates not only the hours required for set-up but also the hourly cost of those efforts. GSA estimates the net impact of the reporting requirement on contractors using a loaded rate of $68 per hour.[11] The Section believes that flat rate may not reflect the broad and technology-intensive labor and management required for these efforts. As noted above, it would be reasonable to expect contractors to engage

[10] As another example, the transactional-data elements required to be provided by contractors as part of the Proposed Rule must include both product-level and order-level data and therefore would likely require consolidation of data from multiple IT systems, or potentially the development of entirely new data-collection modules or systems for contractors to comply with these reporting requirements.

[11] The Proposed Rule calculated this rate as $50 per hour times a 1.36 burden factor but does not explain the basis for either figure.

multiple resources across the organization to support both the set-up and reporting process—including functions with higher-cost positions such as the legal department, internal audit, and compliance. Further, many contractors likely would engage external consultants and outside counsel to assess their systems for compliance with reporting requirements, further increasing the hourly cost.[12] Moreover, in collecting this competition-sensitive data, it is likely that contractors will want to ensure that they have in place adequate security controls so that the data furnished will be accurate and complete, and protected during the collection, archiving, and transmission process. The Proposed Rule does not indicate that GSA considered these higher costs of establishing a compliant system for data reporting when it chose a $68 per hour rate. The Section recommends that GSA revisit the hourly rate and the hours to which they apply for set-up—and suggests that both figures will be much higher upon re-examination.

2. GSA Has Underestimated Contractors' Recurring Compliance Costs.

GSA also appears to have underestimated the compliance costs that will extend beyond the initial set-up. GSA estimates that the monthly burden for reporting of data will be 31 minutes. *Id.* GSA explained that it calculated this estimate by using a weighted average based on the value of contracts as measured by sales volume. *Id.* The estimated monthly hours vary from two minutes for contractors with no sales to four hours for contractors with a contract value of over $50 million. *Id.* The Section believes that this calculation underestimates the effort required to ensure data reported is accurate and complete through internal review and validation of data before monthly submissions to GSA.

GSA may have underestimated this time in part because the relationship GSA perceives between total contract value and transaction volume, in many cases, may be a false correlation. For example, a contractor that has received a single task order for $20 million will have a lower estimated administrative burden under the Proposed Rule than a contractor holding thousands of individual FSS task orders that total $20 million. The Proposed Rule does not suggest that GSA has analyzed whether and how ongoing reporting burdens may vary significantly for contractors with comparable total sales in this way. The Section recommends that GSA undertake such an analysis.

Further, GSA's estimate erroneously assumes minimal efforts for contractors with low monthly sales relative to those with significant monthly sales. To query, cleanse, review, submit, and archive[13] the required reporting elements will require all contractors, regardless of sales volume, to undertake many of the same activities and effort. To that end, a contractor without any Schedule sales in a particular month will

[12] The estimated burden would be even larger for small businesses, many of whom utilize external resources to support changes to their systems and data.

[13] Any data collection will also require data archiving so that the contractor can comply with retention and audit requirements and also have its own set of data for future negotiations.

still incur well over the estimated two minutes of effort just to verify the lack of sales and submit a "zero" sales report through the forthcoming reporting portal.

Finally, GSA's estimate of monthly compliance costs excludes three potentially significant costs. First, the estimate does not include recurring maintenance activities, such as data maintenance. Instead, the estimate incorporates these maintenance costs into the estimated costs of initial set-up—even though these costs will be incurred on an ongoing basis. Second, the estimate excludes the potential costs of mid-contract reporting changes ordered by GSA pursuant to its proposed unilateral right to change transactional-data reporting requirements. *Id.* at 11628. The estimated burdens do not account for time required to review, test, and implement these potential future changes within the 60-day windows permitted by the rule. Third, GSA again relies on the $68 hourly rate for maintenance activities, which is too low in the Section's view. For all of these reasons, the Section urges GSA to reevaluate its estimated monthly compliance costs.[14]

3. Transactional Data Reporting May Disproportionally Affect Small Business Contractors.

In reassessing the costs of compliance against the potential value to contractors and the Government, the Section believes that GSA also should consider that the initial and recurring costs will likely have a disproportionate effect on small businesses. Small business concerns are typically less capable of absorbing increased administrative burdens and overhead. Accordingly, the ability of small businesses to effectively compete against larger firms for orders may be adversely affected in both FSS and non-FSS contracts, which is contrary to federal procurement law and policy relating to small businesses. GSA appears to have given limited consideration to these burdens even though small businesses make up the vast majority of GSA's contractor community. These disproportionate effects should be reconsidered.

4. The Proposed Rule Does Not Allow Sufficient Time for Transactional Data Reporting.

The Proposed Rule requires contractors to submit reports within 15 calendar days of the end of each monthly reporting period. This requirement does not appear to provide contractors adequate time to prepare and review transactional data for accuracy and completeness. The timing requirement also does not account for Contractor Team Arrangements (CTAs) and similar arrangements: reporting on them requires

[14] The Section further suggests that experience with the Industrial Funding Fee (IFF) portends high costs to provide complete and accurate data under the Proposed Rule. According to a recent GSA audit memorandum, "[o]ver one-third of the audited contractors did not have adequate systems to accumulate and report schedule sales, and many contractors improperly calculated their Industrial Funding Fee (IFF) for remittance to GSA." Major Issues from Multiple Award Schedule Preaward Audits, Audit Memorandum Number A120050-5, March 13, 2015, at 1. If contractors have difficulties preparing IFF reports, they likely will have similar or more serious challenges capturing the data fields required by the Proposed Rule—reinforcing the likelihood of significant up-front and recurring costs.

coordination with individuals and groups outside the vendor's own organization. Nor does the time allotted allow coordination needed for resellers, which make up one-third of the Schedule sales, for whom accessing the necessary information may require regularly interfacing with numerous manufacturers, most likely through separately performed data queries/exchanges.

5. The Price Reduction Clause's History Suggests That GSA's Proposed Use of Transactional Data May Not Achieve Desired Price Savings.

The history of the PRC shows that GSA may not achieve the lower pricing it expects through transactional-data reporting. Early versions of the PRC included sales to federal customers as among the discounted sales that could trigger price reductions. *See, e.g.*, 41 CFR § 5A-73.217-5 (1984). Nonetheless, GSA found that including sales to federal customers in the PRC discouraged discounts to federal agencies. In 1994, GSA amended the GSAR to specifically exclude federal sales from the PRC. 59 Fed. Reg. 52450, 52451–52. In this revised version of the PRC, GSA eliminated the language that included sales to federal customers as triggering sales; GSA did so to encourage FSS contract holders to offer "spot discounts" to federal customers. *See also* FAR 8.405-4 ("[s]chedule contractors are not required to pass on to all schedule users a price reduction extended only to an individual ordering activity for a specific order"). History is likely to repeat itself with the Proposed Rule. FSS Schedule-holders may be reluctant to offer spot discounts to federal agencies out of concern that, after that discounted transaction, other federal agencies will demand identical discounted pricing without concern for the nature and context of the original spot discount. GSA's proposed use of transactional data to identify spot discounts for government buyers to use to demand comparable discounts may have a similar chilling effect on sales to federal customers as did the early versions of the PRC.

In summary, the actual level of effort necessary to comply with the set-up and reporting efforts—and the cost of that effort—will significantly exceed GSA's estimate while the savings to the Government will likely be lower than expected, particularly if the data reporting results in decreased discounting. The Section accordingly urges GSA to reconsider the transactional-data reporting requirements.

B. If Implemented, the Proposed Transactional Data Reporting Requirements Should Be Revised to Address Key Issues.

1. GSA Should Provide Guidelines on Using Data Reported Under the Proposed Rule.

The Proposed Rule provides that "Government buyers will be able to use [reported] data, with other relevant information – such as customer satisfaction with the performance of the contractor-furnished solution – to determine fair and reasonable pricing as part of a best value solution." 80 Fed. Reg. at 11621. GSA's proposal to revise the PRC and leverage transactional data collected from contractors to promote

fair and reasonable pricing contradicts the price analysis requirements in the Federal Acquisition Regulation (FAR), however. FAR 15.404-1, Proposal Analysis Techniques, recognizes that adequate price competition provides a sound basis to conclude that prices are fair and reasonable. Furthermore, the Proposed Rule does not identify how buyers should actually use the transactional data in price analysis and other procurement decisions. Without clear direction, pricing negotiations will be more burdensome as buyers seek additional information and explanations on the data provided—creating additional government-unique burdens that run counter to commercial-item contracting. GSA should prescribe procedures for how government buyers will use transactional data in combination with other factors to determine fair and reasonable pricing and in making other procurement decisions.

2. The Transactional Data Reporting Requirements Require Clarification.

The Proposed Rule is ambiguous with regard to what transactional data will be sought and how data relating to certain transactions will be segregated and utilized.[15]

a. Differing Terms and Conditions

The Proposed Rule does not address how contractors should report, or how GSA will consider, differing terms and conditions among the transactions to be reported under the proposed clauses. Many contractors regularly offer pricing-related terms (e.g., non-standard terms, promotions, federal orders over the maximum order threshold) that may vary based on customer needs. In addition, in practice, contractors' Schedule prices are ceiling prices that ordering agencies can, and frequently do, negotiate downward when awarding task or delivery orders. If the proposed data collection cannot effectively capture and consider different terms, conditions, and negotiations, then COs and category managers presented only with the data points identified in the Proposed Rule may draw incorrect or inaccurate conclusions when comparing sales of similar items or services.

As one important example, contractors frequently offer products and services through GSA contracts on a "bundled" basis both in quotes and in orders. The Proposed Rule does not provide any guidance on how a contractor should report bundled products and services. This practice of bundling has a direct impact on how the data may be reported from a contractor's systems. For example, an ordering activity may need to purchase hardware, software, and installation services at the same time. A Schedule contractor might "bundle" these products and services into a single line item, or the contractor might separately itemize the items in its proposal but be awarded an

[15] The Section notes with concern that GSA appears to have been announcing some or all elements of the planned implementation on a GSA blog. *See, e.g.*, https://interact.gsa.gov/blog/multiple-award-schedules-transformation-what-transactional-data-and-what-schedules-are-impacted (last visited May 8, 2015). The Section strongly encourages GSA to conduct its rulemaking and publish its interpretive guidance for the Proposed Rule (and other regulations) in the Federal Register so that all interested parties have access to the same information through a single centralized forum that will be maintained and archived on a common basis.

un-itemized, lump-sum order by the contracting officer. The Proposed Rule should provide guidance for reporting of bundling or similar differences in the transactional-data system such as reporting of highly-customizable offerings that may not provide clear visibility into the differences between various configurations sold.[16]

As another important example, the Proposed Rule does not address how contractors will report professional services priced at other-than-hourly rates. Some contractors offer professional services at a daily rate or on a fixed-price-per-activity basis. In such cases, the same employee could perform work at hourly rates under one contract vehicle, daily rates on second contract vehicle, and a fixed price for a particular task under a third contract vehicle. And, indeed, under these different contract vehicles different risks and costs may be involved, which also would affect the ultimate rates and prices. The Proposed Rule does not, but should, address how contractors will report these differing types of professional-services pricing and how these types of divergent data will be used and/or evaluated.

In sum, GSA should propose guidelines and requirements for agencies' consideration of differing terms and conditions offered by a contractor when negotiating contract pricing based on data collected under the Proposed Rule. The Section also believes that GSA should ensure that the transactional data collected under the Proposed Rule provides means sufficient to capture these differences and nuances for buyers' consideration.

b. Professional Services

The Proposed Rule states that the initial roll out will cover "commercial products and *commoditized services* that experience high volume of repetitive purchasing under identical or substantially similar terms and conditions." *Id.* at 11624 (emphasis added). The Proposed Rule does not define "commoditized service," however, and should do so to allow contractors to understand the types of services that will require reporting.

Even after GSA defines "commoditized services," contractors will likely need to undertake labor-intensive, costly efforts to determine which services fit the definition and must be reported. Indeed, reporting professional-services pricing will be significantly more complex than reporting product pricing because contractors routinely have different labor categories across federal contracts, varying qualifications for labor categories with the same title, and differing titles for labor categories with the same

[16] The Section recognizes that GSA has deemed successful the transactional-data reporting requirements under its Federal Strategic Sourcing Initiative (FSSI) Office Supply 2 (OS2) contract vehicle. However, the Section cautions that the OS2 contract includes highly commoditized commercially available off-the-shelf (COTS) products that are not necessarily comparable to products and especially services offered through other types of GSA vehicles.

qualifications.[17] Accordingly, to identify which labor categories across federal contracts must be reported, contractors will need to map labor categories across contract vehicles, often a very labor-intensive exercise. To complicate matters, some agencies create their own labor categories and qualifications when requesting quotes under requests for quotes (RFQs) for task orders or BPAs, which adds another layer of complexity to mapping sales data for reporting. Finally, as discussed above, the data sought by the Proposed Rule do not allow for reporting of differing terms and conditions, making identification of services purchased under "substantially similar terms and conditions" challenging if not impossible.

c. "Non-Federal" Sales

One of the transactional-data elements that contractors must report is the "Non Federal Entity, if applicable." *Id.* at 11627-28. The Proposed Rule nevertheless leaves unstated which sales to non-federal entities must be reported under the Proposed Rule. If, for example, GSA intends that this field cover sales to state and local entities purchasing from FSS contracts under cooperative purchasing arrangements, sales to federal prime contractors purchasing under authority of FAR Part 51, or something else entirely, then GSA should clarify which of these are the types of sales to non-federal entities for which it is requiring data reporting.

3. The Proposed Rule Must Ensure Protection of Confidential and Proprietary Information That Is Exempt from Disclosure Under FOIA and Prohibited from Disclosure Under the Trade Secrets Act.

The Section is also concerned that the Proposed Rule does not address how GSA intends to use the data collected under the Proposed Rule and with whom that information will be shared. The Freedom of Information Act (FOIA) protects from public release certain commercial information in the possession of the Government. 5 U.S.C. § 552. In particular, FOIA Exemption 4 protects "matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential." *Canadian Comm'l Corp. v. Air Force*, 514 F.3d 37, 39 (D.C. Cir. 2008). In addition, the Trade Secrets Act prohibits unauthorized disclosure of "practically any commercial or financial data collected by any federal employee from any source in performance of the duties of his or her employment." *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1140 (D.C. Cir. 1987). At a minimum, the reporting of line-item pricing contemplated by GSA under the Proposed Rule is protected from disclosure by FOIA Exemption 4 and prohibited from disclosure by the Trade Secrets Act.

[17] The Section recognizes that GSA is streamlining its professional services schedules. But as noted in the paragraph above, some federal agencies have their own labor categories that a contractor must utilize when responding to a particular solicitation.

The Proposed Rule does not state how GSA will protect the transactional data it receives from contractors from public disclosure.[18] The type of data required by the Proposed Rule frequently is provided by contractors with a legend identifying the confidential and proprietary nature of the data. GSA should consider how contractors can include such a legend when reporting confidential and proprietary data through an electronic transactional-data reporting system. Also, the proposed rule should provide remedies for contractors in the event of improper disclosure of this protected data by GSA.[19]

4. Different Reporting Requirements and Timing for IFF and Transactional Data Reporting Place Further Burdens on Contractors.

The transactional-data reports required by the Proposed Rule would be due on a monthly basis while IFF reports would continue to be due on a quarterly basis. These timing inconsistencies may cause unnecessary confusion on the contractor's behalf. 80 Fed. Reg. at 11621, 11627, 11628. GSA should consider the impact on contractors of these continuous reporting obligations. And, as stated above, contractors may find the overall change in requirements just as or even more burdensome than the existing PRC tracking customer requirement.

5. GSA's Ability to Unilaterally Change Required Reporting Adds Uncertainty for Contractors.

The Proposed Rule includes a provision permitting GSA to change reporting instructions unilaterally, including data points and submission requirements, following 60 days' notice to the contractor. *Id.* at 11628. Any changes, including minor data-submission requirements, may not be feasible for contractors to implement in the required timeframe or without an adjustment in price or terms. Although the Proposed Rule states that GSA will not provide compensation for the change, the Section believes this no-cost change construct needs to be reconsidered by GSA, as it poses risks and costs for which contractors should be able to negotiate compensation.

Based on the challenges identified above, it seems unlikely that GSA will satisfy its stated objective of improving category management through access to prices paid by other federal customers and a focus on horizontal pricing. This cannot be a "one-size-fits-all" approach through which products and services can be measured on a common unit basis. At a minimum, GSA should consider which commoditized products and services have basic, substantially similar pricing structures that would allow for

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[18] The Section raised a similar concern on page 15 of its April 20, 2015 Comments to Notice—MVA-2015-01: General Services Administration, Notice of a Class Deviation to Address Commercial Supplier Agreement Terms Inconsistent with Federal Law, 80 Fed. Reg. 15011 (March 20, 2015), regarding confidentiality of Commercial Supplier Agreement terms and conditions.

[19] If GSA intends, as it has indicated, to distribute the data during competitions to government buyers, then there is also the risk the buyers will disclose data to competitors in an effort to spur price competition. The Proposed Rule should be revised to address these procurement-integrity concerns.

transactional-data reporting that can be used to perform a meaningful price analysis and then limit the Proposed Rule to those products and services for a defined pilot program.

C. The Section Supports Eliminating the Price Reduction Clause.

The Section appreciates GSA's recognition that the PRC is outdated and unworkable in today's environment. The Section agrees with GSA's assessment that changes in the federal market over time have lessened the impact of the tracking-customer mechanism implemented by the PRC. *Id.* at 11622. The Section further agrees that the PRC plays little, if any, role in the negotiation of volume pricing, and that the Government is not a market driver for commercially available off-the-shelf (COTS) pricing. *See id.* As noted by GSA, most FSS contract price reductions result from general market forces and competition for orders and BPAs rather than from obligations under the PRC.[20] *Id.* The Section accordingly applauds GSA's efforts to eliminate the burden of the PRC and encourages GSA to do so regardless of whether it adopts the transactional-date reporting requirements.

1. The Section Encourages GSA to Eliminate the Price Reductions Clause as Proposed Because the PRC No Longer Fulfills Its Stated Purpose.

The Section and its members have encouraged GSA to abandon the PRC along with the requirements to prepare and disclose commercial sales practices through the CSP.[21] Nonetheless, the Section does not believe that the elimination of the tracking-customer provisions in the PRC should be contingent upon an unrelated and perhaps more burdensome obligation to report transactional data.

Over the past several decades, the FSS program has evolved to include fewer commodities and has seen a significant increase in services and solutions. Many of these products and services, while generally comparable to their commercial counterparts, are not necessarily priced in a similar manner, in identical configurations, or with similar terms and conditions. As a result, the tracking-customer requirements for contractors offering these products and services are often made impractical because of these differences. As discussed above in Section II and III.A, these differences will make the use of transactional data to perform "horizontal" pricing analysis across vendors, as the GSA intends, challenging at best.

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[20] In the Proposed Rule, GSA explained that it "recently analyzed modifications issued between October 1, 2013 and August 4, 2014 under nine FSS contracts and found that only about 3% of the total price reductions received under the PRC were tied to the 'tracking customer' feature; 78% came as a result of commercial pricelist adjustments and market rate changes." *Id.* at 11622-23.

[21] *See* note 5, *supra*. In addition, the Section also notes the final report of the Multiple Award Schedule Advisory Panel provided to GSA in 2010 (available at http://goo.gl/2Kq4Zl). The Panel recommended eliminating the PRC for services immediately and removing the PRC for supplies over time as GSA implemented other recommendations for competition and price transparency.

In addition, the increase in competition at the task order and BPA level mandated by the National Defense Authorization Act for Fiscal Year 2009, as implemented by the FAR Council in March 2011, has minimized the usefulness of the PRC in ensuring price reasonableness. The resulting changes to ordering procedures at FAR Subpart 8.4 require competition for all orders and BPAs above the simplified acquisition threshold. This competition requirement is much more effective at ensuring that pricing is fair and reasonable than tracking pricing granted to a particular commercial customer or group of customers.[22]

Finally, the changing profile of GSA schedule holders and evolving negotiation strategies for PRC terms have reduced the impact of the tracking-customer mechanism. As noted in the Proposed Rule, an increasing percentage of FSS contractors are resellers with little or no commercial sales. The nature of many reseller agreements (often negotiated on a cost-plus-markup basis without reference to commercial sales prices) combined with the rise in professional-services contractors has resulted in an increase in contracts that do not contain true tracking customers, or tracking customers that do not serve GSA's purpose of securing prices and discounts pegged to changes in the commercial marketplace during the period of FSS contract performance. As contractors become more mature in the FSS marketplace, they are negotiating narrower bands of tracking customers and lower maximum-order thresholds. These factors effectively reduce the volume of commercial transactions subject to the PRC, thus moving continued use of the PRC further from its intended purpose.

2. GSA Should Clarify How Eliminating the PRC Affects Other GSA Regulations and Internal Policy.

The Proposed Rule has not adequately addressed the impact of changes to the alternative PRC language to other sections of existing GSA regulations and internal policy. The Section notes that the following provisions of the GSA Acquisition Manual (GSAM) also would need to be amended to reflect the proposed changes to the PRC's use and application:

- Figure 515.4-2, Instructions for Commercial Sales Practices: "If your offer is lower than your price to other customers or customer categories, you will be aligned with the customer or category of customer that receives your best price for purposes of the Price Reductions clause at 552.238-75."

[22] The Section also notes that the Government is prohibited from asking for cost or pricing data when an award is based on adequate price competition. FAR 15.403-1(b)(1). In such situations, the Government recognizes that market forces ensure that pricing offered to the Government is fair and reasonable. Accordingly, the Government does not need the PRC to ensure that its pricing remains fair and reasonable with the competition requirements imposed at the task- or delivery-order level by FAR 8.405-1(d).

- 538.272, MAS Price Reductions:

> (a) Section 552.238-75, Price Reductions, requires the contractor to maintain during the contract period the negotiated price/discount relationship (and/or term and condition relationship) between the eligible ordering activities and the offeror's customer or category of customers on which the contract award was predicated (see 538.271(c)). If a change occurs in the contractor's commercial pricing or discount arrangement applicable to the identified commercial customer (or category of customers) that results in a less advantageous relationship between the eligible ordering activities and this customer or category of customers, the change constitutes a "price reduction."
>
> (b) Make sure that the contractor understands the requirements of section 552.238-75 and agrees to report to you all price reductions as provided for in the clause.

These provisions should be revised to address the changed requirements of the proposed Alternate II of the PRC which states:

> (a) The Government may request from the contractor a price reduction at any time during the contract period.
>
> (b) The Contractor may offer the Contracting Officer a voluntary Government wide price reduction at any time during the contract period.

Furthermore, the Section believes this proposed Alternate II is not necessary as it merely states procedures that are afforded to either party at any time as part of normal price negotiations.

D. The Section Is Concerned about the Proposed Rule's Change to CSP Disclosure Obligations.

The Proposed Rule provides that "GSA would maintain the right throughout the life of the FSS contract(s) to ask a vendor for updates to its disclosures on its commercial sales format . . . where commercial benchmarks or other available data on commercial pricing is insufficient to establish price reasonableness." 80 Fed. Reg. at 11621. This statement raises questions and concerns based on the inherent challenges and long-standing issues with existing CSP disclosure requirements. The Section recommends ensuring that the following issues are considered and adequately addressed in any new or updated regulations.

1. Current Regulatory Authority Does Not Provide For Continual CSP Updates.

The statement quoted above implies that GSA would have the authority to require contractors to provide updated CSP disclosures at any point during an FSS

contract. Currently, the GSAR requires contractors to provide CSP disclosures at certain key junctures during the contract lifecycle, including before contract award, before option exercise, and in conjunction with certain contract modification requests (e.g. product/service additions). These current requirements are consistent with FAR 15.402(a), which provides that the contracting officer shall determine that contract pricing is fair and reasonable at the time of contract award. Nothing in the GSAR, other regulations, or federal procurement law requires GSA to monitor FSS pricing continually, however. And it is unclear under what existing authority GSA will be permitted to require updated CSP disclosures at any time.

Further, if contractors are required to provide updated CSP disclosures with increased frequency and at undetermined times, without sufficient notice and ample time to prepare the updates, then contractors may continue to have trouble with submitting accurate CSPs, as already noted by GSA and its Office of Inspector General (*see* Section III.D.4 below). Regardless, the increase in time and resources needed to produce updated CSP disclosures whenever requested by GSA may offset any perceived benefits that GSA believes contractors may realize from the removal of PRC monitoring requirements, to say nothing of the costs associated with the transactional-data reporting.

2. GSA's Standards for Requiring Updated CSPs and Then Using Those Disclosures Are Undefined.

The Proposed Rule provides that GSA may request updated CSPs throughout contract performance "where commercial benchmarks or other available data on commercial pricing is insufficient to establish price reasonableness." 80 Fed. Reg. at 11621. Nonetheless, the Proposed Rule leaves unstated how GSA will assess whether sufficient commercial benchmarks, metrics, and data are available and when the lack thereof may properly result in a request from GSA for a contractor to provide updated CSP disclosures. Establishing these standards would allow some measure of predictability for such requests, and potentially help to ensure that GSA treats contractors consistently when requesting updated CSPs. But these benchmarks and data requirements must be well understood before instituting any such proposed changes. In addition, the Section recommends that GSA explain the authority for resulting CSP requests and how the information will be used to establish fair and reasonable prices. The Section recommends that GSA propose clearly defined benchmarks and make them available for comment before implementation.

3. CSP Disclosure Requirements Remain Unclear.

As discussed in prior comments submitted by the Section to the MAS Panel in October 2008, CSP disclosure requirements still contain a number of ambiguities that create considerable confusion, burden, and risk for contractors.[23] For those reasons, the Section advises that GSA should provide additional clarity in the instructions for

[23] *See* note 5, *supra*.

completing the CSP-1 Format (GSAR 515.408). In doing so, GSA also should consider limiting CSP data requirements to a reasonable period of time and to only those transactions or customers that are comparable to GSA, taking into consideration the factors that COs are currently instructed in GSAR 538.270(c) to consider when negotiating price. Until these fundamental requirements are clearly addressed and the scope and frequency of CSP disclosures are limited to a reasonable extent, the same issues will continue to cause confusion and inconsistencies for both contractors and COs during contract negotiations.

4. Contractors Already Have Difficulty Complying with CSP Requirements.

The Proposed Rule acknowledges that "contractors continue to struggle to comply with the sales practice disclosure requirements." 80 Fed. Reg. at 11623. Recent OIG audit reports confirm this point, and highlight that for the majority of the contracts audited, CSP disclosures were not current, accurate and/or complete. *See* Major Issues from Multiple Award Schedules Audits, Audit Memorandum Number A120050-3, Mar. 8, 2013. Because the CSP disclosures present arguably the greatest source of confusion and risk for contractors under the FSS program, expanding GSA's authority to request disclosure updates at any point during the life of a Schedule, without providing additional guidance, may exacerbate existing problems with a program that is already not producing accurate disclosures as intended.

5. CSP Disclosure Requirements Are Unduly Burdensome.

Contractors often must perform a detailed analysis of transactional-sales data in order to prepare CSP disclosures that are current, accurate, and complete and that sufficiently mitigate the risks and ambiguities in GSA's CSP disclosure requirements. Such an exercise can take hundreds of hours and considerable resources; it may last many weeks or months. The expectation that a company spend this time and money in performing such diligence may be reasonable when required only at certain key junctures during contract performance—all of which can be planned for with sufficient lead time. But if contractors must produce updated CSPs at any point during Schedule performance at GSA's request, with potentially little or no advance notice, then many contractors will likely need new or substantially modified systems to collect, track, and maintain CSP data on a real-time basis so that they can respond on short notice to a CSP request. The resulting uncertainty, monitoring costs, and reporting costs will put an even greater burden on contractors than under the existing PRC clause, and it will make an already cumbersome requirement even more daunting to current and prospective contractors if clear guidance is not provided by GSA.

IV. CONCLUSION

For the reasons stated above, the Section recommends that GSA reconsider implementing the Proposed Rule. As stated in its prior Comments, the Section does nevertheless support elimination of the PRC and CSP requirements in FSS contracts.

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

Sincerely,

Stuart B. Nibley
Chair, Section of Public Contract Law

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