Dear Sir/Madam:

The following comments/suggestions are submitted in regards to “GSAR Case 2013-G502”. It is recommended that GSA consider the following comments when developing the final rule.

None of the SCP-FSS provisions appear to be included in GSAR Case 2013-G502 for inclusion into the GSAM. Are the SCP-FSS provisions being deleted entirely? If not deleted, will they be published for comments and an IRFA analysis conducted to determine the costs and economic impact on small businesses? As part of that IRFA analysis, please address the following collections of information, mandated for submittal in all FSS solicitations, which do not appear to be listed in OMB’s current Inventory of Approved Information Collections on reginfo.gov:

a. Completion of “Pathway to Success” training and submittal of certificate
b. Purchase and use of Digital Certificate in order to submit proposal thru eOffer
c. An Agent Authorization Letter, if applicable
d. A complete copy of the offeror's current CCR and ORCA
e. Copy (or copies) of any cancellation received in the preceding two years from any previous GSA Schedule contracts or proposal
f. Provide the contract number(s) and price lists of any other GSA Schedule contract(s).
g. Identify any pending offers under other GSA Schedules including the name and phone number of the contract specialist evaluating the offer
h. Provide a copy of offeror's most current, complete, audited (if available) two years of financial statements (at a minimum, balance sheets and income statements)
i. Technical Proposal (in addition to FAR 52.212-1's "technical description of the items being offered in sufficient detail to evaluate compliance with the requirements in the solicitation. This may include product literature, or other documents, if necessary.") "Factors":

1. Also, how did FSS determine the blanket mandatory "minimum of two years" requirement for experience to be applicable across the board for all schedules? Shouldn't this be broken down and applied individually by SIN? Is this reasonable and relevant?
2. At least two "Relevant Project Experience" *detailed* descriptions for each SIN.
3. The offeror shall order and obtain a Past Performance Evaluation from Open Ratings, Inc. (ORI). See FedBizOpps Document 6. Offerors are responsible for payment to ORI for the Past Performance Evaluation.
4. Quality Control procedure details.

j. Price Proposal Template
k. Supporting Pricing Documentation
l. Price Narrative
m. Commercial Price List or Market Rate Sheet (if applicable)
n. The Offeror must complete and submit the Readiness Assessment for Prospective Offerors.
o. Copy (or copies) of any rejection notice(s) received in the preceding two years from any previous GSA Schedule contracts or proposal
p. An "acceptable" Letter of Commitment/Supply must be provided (by a third party).
q. "Read Me First" requirements for offerors (and contractors for mods) to name all eOffer/eMod files in a particular naming convention/"protocol" or face rejection of the offer/mod.
r. Checklist
s. Vets 100 (which is a violation of Privacy Act and FAR 22.1304 procedures)
t. Completed CSP form (GSA needs to clarify the definition of MFS as the CSP instructions for column 1 says " A “customer” is any entity, except the Federal Government " whereas the SCP-FSS provisions permit the MFC to be a "Federal agency". How does GSA expect offerors to

address situations where a firm sells only to the federal government? Also GSA should clarify in GSAM that a firm's MFC is based on the best discount offered to a particular customer rather than based on the gross % of sales to any customer. Also GSA should clarify the difference between an MFC and a BOA 'class of customer'. [Also, is there a reason GSA does not assign a form # to the CSP form?]

FSS solicitations, as well as the proposed GSAR 552.238-92 provision, imply that award will be made using "best value" techniques as defined under FAR 15.2's Source Selection procedures and FAR 2.1 as the " expected outcome of an acquisition that, in the Government's estimation, provides the ***greatest*** overall benefit in response to the requirement." Technical proposals are required for "complex items" and "includes, among other things, the engineering approach, special manufacturing processes, and special testing techniques." GAO has sustained numerous protests where there was no "evidence that the SSEB and SSA meaningfully considered the technical or qualitative ***distinctions*** between the *competing proposals* under the technical evaluation factors." GAO goes on to state that proposals must be "*differentiated* to distinguish their relative quality under each stated evaluation factor by considering the *degree* to which technically acceptable proposals exceed the stated minimum requirements or will better satisfy the agency's need."

FSS MAS acquisitions are price competitive but are essentially sole source procurements in that there is no head-to-head competition among sources. FAR 15.002(a) states "When contracting in a sole source environment, the request for proposals (RFP) should be tailored to remove unnecessary information and requirements; *e.g.*, *evaluation criteria* and *voluminous proposal preparation instructions*." It appears that FAS intends to use LPTA procedures for evaluation of "technical proposals", however FAR 15.003 states that LPTA "Solicitations shall specify that award will be made on the basis of the lowest evaluated price of proposal**s** meeting or exceeding the acceptability standards for non-cost factors" which is not stipulated in any FSS contract. Of tantamount importance for source selection acquisitions is the requirement for the solicitation to cite the " relative importance" of the evaluation factors which FSS solicitations fail to do (see FAR 52.212-2 provision). Another mandatory requirement for use of source selection procedures is the FAR requirement to include one of the phrases under 15.304(e) (see FAR 52.212-2 provision) which FSS solicitations fail to include.

Again, the whole point of using a source selection procedure is for selecting the *best* source in a competitive environment. According to FAR 15.302 " The objective of source selection is to ***select*** the proposal that represents the best value" and 15.303 " Select the source or sources whose proposal is the best value to the Government." FAR 15.3 requires agencies to "evaluate *competitive proposals* and then assess their relative qualities... The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file." Even FAR 52.212-2 says "The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government…" The provision also requires agencies to stipulate the 'relative importance' of evaluation factors.

So, according to FAR, FAS has no authority to reject an offer on the basis of an "unacceptable" proposal since FSS solicitations fail to comply with FAR 15 LPTA requirements. FSS "rejection notice(s)" must comply with FAR requirements for a formal determination that a "rejection" of an offer is based on non-responsiveness (i.e. failure to meet technical spec requirement) or non-responsibility (e.g. experience, past performance). There are serious concerns that FAS rejections of small businesses as 'unacceptable' was/is, in reality, based on a

responsibility/capability criteria requiring a COC be requested from SBA. This differs from a true source selection procurement where a small business can be determined unsuccessful, based on a lower scored technical proposal, without COs having to request a COC.

In my opinion, FAS should focus on reviewing technical descriptions per FAR 52.212-1 to ensure compliance with any spec requirement, if applicable, for ensuring an offeror is responsive. And COs should review past performance in FAPIIS and the company's experience and credit-worthiness (e.g. via Dun & Bradstreet reports) to ensure an offeror is responsible/capable before requesting a COC from SBA for small businesses.

There also appears to be no inclusion of the Clause FSS-639, ***Contract Sales Criteria*** which required contractors to meet $25,000 in sales each year (after the initial 24-month period) or face 'cancellation' of the contract. Has this clause been deleted in its entirety? If so, will GSA establish a method for determining minimum guarantees and minimum contract values per SIN? Although I did not approve of GSA's establishment of a blanket $25K minimum requirement of sales for all sales, but I am concerned that an offeror could submit a proposal for one $10 item and expect award of a 20-year contract. The administrative burden and costs to GSA could be astronomical if GSA fails to address this issue.

Likewise, there does not appear to be included the following FSS provisions/clauses. Have they all been deleted in their entirety and/or incorporated into new GSAR clauses/provisions? If not abolished, will they be published for comment in the future?
FSS-370 Contractor Tasks/Special Requirements
FSS-440 -- PRESERVATION, PACKAGING, PACKING, AND MARKING AND LABELING OF HAZARDOUS MATERIALS (HAZMAT) FOR SURFACE SHIPMENT
FSS-456 -- PACKAGING AND PACKING
FSS-522 -- INSPECTION AT DESTINATION (replaced with proposed GSAR 552.238-102?)
FSS-106 -- GUARANTEED MINIMUM
FSS-163 -- OPTION TO EXTEND THE TERM OF THE CONTRACT (EVERGREEN)
FSS-40 -- CONTRACTOR TEAM ARRANGEMENTS
FSS-50 -- PERFORMANCE REPORTING REQUIREMENTS
FSS-599 -- ELECTRONIC COMMERCE--FACNET
FSS-60 -- PERFORMANCE INCENTIVES
FSS-600 -- CONTRACT PRICE LISTS (replaced by GSAR 552.238–71?)
FSS-644 -- DEALERS AND SUPPLIERS (OCT
FSS-646 -- BLANKET PURCHASE AGREEMENTS
FSS-969 -- ECONOMIC PRICE ADJUSTMENT-FSS MULTIPLE AWARD SCHEDULE
FSS-11 -- CONSIDERATION OF OFFERS UNDER STANDING SOLICITATION
FSS-12- PERIOD FOR ACCEPTANCE OF OFFERS
FSS-96 -- ESTIMATED SALES
FSS-101 -- FINAL PROPOSAL REVISION
FSS-59 -- AWARD
FSS-151 -- ADDITIONAL EVALUATION FACTORS FOR AWARD (MAR 2014)

Is the "New Contractor Orientation" required to be taken by all contractors post-award? It does not appear to be included in any of the GSAR clauses. If mandatory, will a contract clause be developed for future publication and an IRFA analysis conducted to determine the cost burden and impact on small businesses?

If the Evergreen clause is deleted, will GSA incorporate a Deviation or something in GSAM that authorizes FSS to award multi-year (i.e. 5-year) contracts under FAR 17.1 and, if appropriate,

waive the Cancellation clause requirement, and report schedule contracts accordingly in FPDS as multi-year contracts? Likewise, will GSA include approval to Deviate from FAR 17.204(e) limitations for "basic and option periods" on service contracts to not exceed 5 years "and the total of the basic and option quantities shall not exceed the requirement for 5 years in the case of supplies." Unlike FAR 17.204(e), GSAM 517 even limits IT contracts to not 5 years, yet all FSS contracts are for 20 years (5-year basic and 3 5-year options). I have been unsuccessful in finding any regulation or approved Class Deviation that permits GSA to award 20-year contracts for both services and supplies.

Is there any plan by FAS to ensure streamlined solicitations are in compliance with FAR 12.603 for Commercial Items? Currently FSS solicitations contain clauses/provisions in full text and duplicate clauses and provisions that are addressed under FAR 52.212-4 and FAR 52-212-5. Also FAR 52.212-5 clause is not set up properly in solicitations to allow COs to select the applicable clause with designation of an 'X' to "check as appropriate". Please consider following FAR's procedures for streamlined solicitations for commercial items.

Also FSS issues an email notice to contractors requiring "submission" of 'affirmation' responses to GSA in order to exercise an option including confirming there are no changes in MFC, BOA, and requiring a business size "redetermination" (in lieu of the NAICS code business size rerepresentation certification in Reps & Certs). This seems to be entirely contrary to the fed's right to exercise an option unilaterally and the fact that 'changes' are not authorized for options. Any change must be executed via a separate mod. Also this 'submission' Collection of Information does not appear to be covered in the inventory list of OMB-approved PRA collections on reginfo.gov's website.

Also part of GSA's requirement to exercise an FSS option is that all "mass mods" must have been accepted by the contractor, yet there is no FSS or GSAR clause that stipulates a time frame or, IAW FAR 1.108(d)(3), to "include…appropriate consideration" as was the case when the e-Verify clause was published. Does GSA intend to develop a clause to address the requirement for contractors to accept mass mods and to conduct the IRFA analysis?

The publication says GSAR's 552.238-73 Cancellation clause "provides instructions to the Offeror on canceling its FSS contracts." Yet the clause says " *Either party* may cancel this contract in whole or in part by providing written notice". GSAR should correct this clause, in my opinion, to reflect that the clause is intended for use by contractors only. GSA's remedy/rights to 'cancel' a contract are limited to FAR 52.212-4 or 49's T4C or T4D clause authority. Also the clause says "If the Contractor elects to cancel this contract, the Government will not reimburse the minimum guarantee." This appears to be contrary to FAR 16.501-2(b)(3)'s requirement that the Government's "obligation" in IDIQ contracts is "to the minimum quantity specified in the contract". GAO issued a report requiring agencies to obligate the minimum guaranteed quantity at the time of award. GSA's cancellation clause appears to be in violation of the FAR in my opinion. I recommend GSA consult legal counsel.

Please clarify that GSAR 552.238-91 Authorized Negotiators is a provision. Currently GSA requires bilateral post-award approval of modifications to the contractor's "Authorized Negotiators" under the "provision" , yet these changes are being executed as unilateral admin mods. Also, this requirement appears to be duplicative of FAR 52.203-2 provision which is mandatory for all FSS contracts. (It is included in 52.204-8, but for some reason does not appear to be included in FAR 52.212-3. Maybe it is included in 52.212-4's " 41 U.S.C. chapter

21 relating to procurement integrity".) If kept, GSA should consider including it in FAR IAW 1.304(c) as it would likely be applicable to other federal agencies.

GSAR 552.238-125 appears unnecessary and could be in conflict with FAR 52.212-4(s)'s Order of Precedence. Also disagreements in interpretation of contract clauses are subject to FAR 33's Disputes clause. Ditto with GSA's proposed 552.238-125 clause. "Interpretation" is the definition of a claim.

In this digital age of electronics, GSAR 552.238-88 also appears duplicative and/or unnecessary. Information for offerors to submit questions is already included in the SF1449. Hours of operation appear to unnecessary.

There are already FAR provisions/clauses to address 'english language' and U.S. 'dollar' requirements.

GSAR 552.238-102 appears to be in conflict with FAR 52.212-4(a). Also it appears to be in conflict with FAR 46.407's "(f) When supplies or services are accepted with critical or major nonconformances as authorized in paragraph (c) of this section, the contracting officer must modify the contract to provide for an **equitable price reduction** or other consideration.**"** I believe the federal government is prohibited from establishing contingency fees under FAR 31.205-7's Cost Principles unless " foreseeable within reasonable limits of accuracy; *e.g.*, anticipated costs of rejects and defective work. Contingencies of this category are to be included in the estimates of future costs so as to provide the best estimate of performance cost." I don't see how GSA believes it can reasonably forecast an estimate of "future costs" in order to establish a "man-hour" rate for 20 years out. My recommendation would be to simply address any "additional costs" as an "equitable price reduction" under a mod based on actual costs in accordance with FAR's various Changes clauses.

GSA's 552.238-94 appears to be in conflict with FAR. In particular, FAR 52.212-4 Alternate I's "access to records" is limited to service contracts and restricts access to timecards to verify labor hours charged and, in the case of a cost-reimbursable T&M contract, invoices to certify material costs. FAR 52.212-5(d) limits access and examination of records to the Comptroller General. Recommend GSA consult the OIG and OGC about the legal authority for this clause as it relates to 52.212. Also FAR prohibits agencies from treating a "basic contract and each option" as "*separate contracts*". The basic and all options are one contract.

Also, there is no GSAR clause that mandates contractors be subjected routinely to Contractor Assistance Visits (CAV). Industry views these CAV visits as quasi-audits since the IOAs have access to the contractor's systems, records etc. GSA indicates that CAV visits 'benefit' small businesses, but that is contrary to my experience where small businesses have found the CAV to be so onerous that the contractor chose to cancel its contract rather than have to suffer thru a CAV. If GSA continues to conduct CAV visits, I recommend GSA create a clause to indicate it is mandatory, conduct the IRFA analysis of cost burden and impact on small businesses, and the CAV requirements:

"Required Documentation
• GSA contract (signed SF 1449)
• Final Proposal Revision
• Commercial Sales Practice (CSP-1)
• All approved modifications (SF 30)

• Current approved pricelist and all previously approved versions

Sales Records
The sales data that supports Ktr 72A reported
sales for the quarters being reviewed.

The following supporting documentation should also be made available (as applicable)
• RFQ/RFP
• Cost Proposal
• Purchase Order / Task Order
• Invoice

Topics to expect during the CAV (not exhaustive)
• Sales Reporting Tracking System
• MAS Pricing and Economic Price Adjustments
• Scope of Contract
• Environmental Attributes
• Trade Agreement Acts Compliance
• Pricelist and GSA Advantage! ®
• Most Favored Customer and Discount Relationship
• Administrative Accuracy"

The GSAR Clause and GSAM guidance should also address the "Report Card" and its input by COs, if applicable, into CPARS. GSA should also address the costs to the government for the IOAs to travel to the contractor's office, 'prepare' for the visits, etc.

Also GSAR needs to address the status of developing provisions/clauses related to various FSS Instructional Letters/ILs that appear to conflict with the FAR or create confusion such as the following:
a. FSS requires that all awards to large businesses must be for a minimum contract value of $650K even if the company does not anticipate sales in excess of $25K/yr or $500K for the 20-year contract period.
b. FSS requires some contractors to use the /.9925 formula to calculate the IFF fee in lieu of applying the IFF fee by multiplying prices by .75%. There is inconsistency because older contractors are using the division calculation for mods whereas new offerors are multiplying the .75%. Recommend a mass mod be issued to clarify federal requirement for contractors to multiply prices by the .75% fee.
c. FAS does not require submission of a subk plan if a contractor rerepresents it is a large business post-award. This appears to be contrary to FAR 19.702(a) which says "(a) Except as stated in paragraph (b)of this section, Section 8(d) of the Small Business Act (15 U.S.C. 637(d)) imposes the following requirements regarding subcontracting with small businesses and small business subcontracting plans:
(1) In negotiated acquisitions, each solicitation of offers to perform a contract or contract ***modification***, that individually is expected to exceed $650,000 ($1.5 million for construction) and that has subcontracting possibilities, shall require the apparently successful offeror to submit an acceptable subcontracting plan." 15USC637(d)(4) states "(b)Before the award of any contract to be let, or any amendment or ***modification*** to any contract let, by any Federal agency which—
(i) is to be awarded, or was let, pursuant to the negotiated method of procurement,
(ii) is required to include the clause stated in paragraph (3),

(iii) may exceed $1,000,000 in the case of a contract for the construction of any public facility, or $500,000 in the case of all other contracts, and
(iv) which offers subcontracting possibilities,
the apparent successful offeror **shall negotiate** with the procurement authority **a subcontracting plan** which incorporates the information prescribed in paragraph (6). The subcontracting plan shall be included in and made a material part of the contract."Agency COs throughout the government are complying with FAR by requiring subk plans from contractors upon rerepresentation as a large business. FPDS needs to be corrected to permit COs to report same. Or GSA needs to develop an approved class deviation in GSAR to *not* require subk plans from large businesses for offers, amendments, or mods.

Correct GSAR 552.238-83 to delete/update reference to FSS-600 clause.

GSA needs to address FAR 37.204 & 37.205 requirements as they relate to the proposed GSAR 552.238-93 provision, as well as FAR 37.114 and 7.5's requirement to address inherently or closely related functions in the Acquisition Plan.

GSAR 552.238-92 appears to be duplicative and/or in conflict with FAR. "Multiple awards" and basis of awards are already addressed under FAR 52.212-1(g) and (h). Also the phrase "at the lowest overall cost" implies that there is a head-to-head price competition that is not applicable to schedule offers. Also paragraph (b) appears to duplicate FAR 52.212-2(c). Withdrawals are addressed under FAR 52.212-1.

GSA's proposed 552.238-89 provision appears to be duplicative or in conflict with FAR 12.303 which requires the remittance address be addressed in Block 18B of SF1449. Also the "provision" addresses post-award responsibilities of COs to review invoices which does not seem appropriate in a contract clause for contractors but more appropriate as GSAM guidance. Also EFT payment addresses are established in SAM. So how does this "provision" interact with the remittance address established in SAM as tied to a particular TIN/DUNS #? Paragraph (b) appears to authorize the use of convenience "checks" which was recently canceled via a GSA-wide email message. Also, how does GSA authorize direct payments to subs/dealers, etc, under paragraph (b)? Recommend GSA consult OIG on the legality of paragraph (b).

GSA's proposed 552.238-96 clause appears to be in conflict with FAR. How are Dealers permitted to bill ordering activities if payments are tied to the contractor's EFT in SAM? Recommend GSA consult OIG and CFO about the legality and applicability of this clause.

Recommend GSA review FAR 32.1108 as it applies to GSA's proposed 552.238-97 and the "third party" payment clause to ensure the proposed clause is not inconsistent with or in conflict with FAR. Also recommend clarifying paragraph (c) to ensure compliance with FAR 13 requirement that all "purchases" over the micro-purchase threshold must be awarded in the form of an formal order/contract and reported to FPDS. The "purchase card" may be used as *payment* for those orders/contracts that exceed the micro-purchase threshold.
GSA's proposed 552.238-98 clause appears to be duplicative or in conflict with FAR 52.212-4(o) clause. Also, COs are required to make a determination (D&F) in the Acquisition Plan IAW FAR 46.703 *prior* to including a warranty clause.

Recommend GSA delete 552.238-122 since the use of imprest funds are established by individual agencies. Also FAR 13.305-3 establishes Conditions for Use of Imprest Funds including a limit of $500. Also see this section for 'third party drafts'.

GSA's proposed 552.238-124 appears to be duplicative or inconsistent with FAR 52.216-22(d). The prescription calls for use in all FSS solicitations and contracts for supplies. However, the clause itself says IAW "552.238-78" which only applies to "solicitations and contracts which contain products and services determined by the Secretary of Homeland Security to facilitate recovery from major disasters, terrorism, or nuclear, biological, chemical, or radiological attack." So there appears to be inconsistency here. Also which products/services has DHS determined are *approved* for used by 'eligible ordering activities"? In other words, which solicitations are COs suppose to include the 552.238-78 clause? How or when is that determination to be made?

Recommend GSA include guidance and/or a contract clause in GSAM/GSAR to address pgs 2687-2788 of Title 26 of Internal Revenue Code's requirements for federal excise tax on trucks, tractors, and trailers with GVW > 33K, 26K, and 19,500K lbs, respectively, as well as applicability of the parts and accessories and possibly the credit for tires.

Recommend GSA clarify the use of the Price Reduction clause as it relates to EPA requests for decreases. Agencies typically use the EPA clause to make any and all price adjustments, both for increases and decreases. See FAR 16.203. Yet GSAR 552.216-70 says "Price decreases will be handled in accordance with the provisions of the Price Reduction Clause." My interpretation of the Price Reduction clause is that it is intended to address the BOA relationship which may include changes in the MFC, the category of customer, or the discount relationship. Also GSA needs to address the failure of GSAM to include a prescription under 516 for use of the 552.216-70 clause.

I apologize if this appears to be rushed. There was a lot of information to cover, but I ran out of time.

Thank you for this opportunity to comment.

Respectfully submitted,

Debbie Loftin