Dear Sir or Madam:

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 One Council member (Christopher Yukins), did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter. One Council member (Ty Hughes) does not join the Section’s recommendations in Sections II.B and II.C.
I. INTRODUCTION

The Section is pleased to have the opportunity to provide input on the proposed rule amending GSAR Part 538, Federal Supply Schedule Contracting. The Section believes that the solicitation of public comments on proposed changes to this important regulation is in the best interest of GSA Schedule holders as well as the acquisition community, and we look forward to continued opportunities to be actively involved in future GSAM/GSAR revisions.

As detailed below, the Section believes that the proposed changes to GSAR Part 538 are inextricably linked to a number of the significant issues being discussed by the Multiple Award Schedule Advisory Panel ("MAS Panel" or "Panel"). Consequently, the Section strongly recommends that GSA consider delaying the GSAR Part 538 Rewrite to allow GSA to consider the final recommendations of the Panel before finalizing any of the changes in the proposed rule.

In the event that GSA does not wait for the MAS Panel’s recommendations, the Section believes that serious consideration should be given to elimination of the current Commercial Sales Practices ("CSP") Format and Price Reductions Clause ("PRC"), as suggested by the Section in its comments to the MAS Panel (which are incorporated by reference). 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.

Finally, in the event that the GSA does not delay the Part 538 Rewrite or eliminate the CSP or PRC clauses, the Section recommends, at a minimum, clarifying a number of ambiguities introduced by the current draft of the proposed rule. Where possible, we have included specific suggestions to address noted areas of concern.

---

2 This letter is available in pdf format at http://www.abanet.org/contract/federal/regscomm/home.html#comments under the topic "Commercial Items."
II. DETAILED COMMENTS

A. The Part 538 Rewrite Should Be Delayed To Allow GSA To Consider And Address The Final Recommendations Of The MAS Advisory Panel.

The Section noted several references to the GSA MAS Panel in the responses to the public comments received following the Advanced Notice of Proposed Rulemaking. Several of these responses suggested that the GSA team would confer with the Panel or “await the results of the [MAS Panel’s] analysis and recommendations,” in several key areas, including the viability of the Price Reductions Clause. We concur with an approach that duly considers the findings and recommendations of the MAS Panel and would note that those findings and recommendations have yet to be released.

Nevertheless, we noted with concern that the GSA team expressed strong support for maintaining the current Price Reductions clause, Most Favored Customer pricing negotiation, and practices related to the establishment of a Basis of Award customer or customers within the text of the proposed rule. While we understand that the GSA is invested in the current process and policies, we also understand that the MAS Advisory Panel is comprised of a team of seasoned policy and procurement experts from across government and industry, which has spent considerable time and resources soliciting input and formulating recommendations that take into account the concerns of all of the various stakeholders in the MAS Program.

Therefore, we believe that it is in the best interests of all parties for the GSAR Part 538 Rewrite and the MAS Advisory Panel initiative to produce a collaborative result that clarifies and updates the MAS program in a way that addresses the complexities of the commercial marketplace.

B. GSA Should Rely On Task Order Competition, In Lieu Of Burdensome And Ambiguous CSPs and PRC Clauses, To Ensure Fair And Reasonable Prices.

In the enclosed comments submitted to the MAS Panel on October 18, 2008, the Section recommended that GSA consider eliminating the current CSP and PRC, given the significant burden and confusion engendered by those clauses, and instead rely on competition at the task order level in order to ensure that prices through the MAS Program are fair and reasonable. In making this recommendation, the Section offered the following justifications.
First, the Section pointed out that the level of competition among MAS Schedule holders at the task order level has increased greatly as the program has evolved—particularly with the requirements of Section 803 of the 2002 Defense Authorization Act (Pub. L. 107-107), which requires “fair notice” to “all contractors” or “as many schedule contractors as practicable,” and more recently with Section 863 of the 2009 Defense Authorization Act (Pub. L. No. 110-417), which expands the “fair notice” and “fair opportunity” requirements to all schedule purchases (products and services) over the simplified acquisition threshold by all agencies (DoD and non-DoD).

Second, the Section reasoned that 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, provides an important mechanism for ensuring that the Government achieves a fair and reasonable price on purchases made through the MAS Program.

Third, the Section urged the Panel to consider the fact that the MAS Program has undergone tremendous growth over the past several decades, to the point that the MAS program currently includes more than 10,000 contractors, who deliver more than $32 billion in goods and services through more than 16,000 contracts. 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, the Section noted that the MAS Program is subject to competition from a number of other competing vehicles— including, for example, 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 the 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.

Finally, the Section pointed out that an approach that relies solely on task order competition is supported by (A) 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,” and (B) by the SARA Panel’s recommendation to establish a new “information technology schedule” that would eliminate negotiation of prices as well as the PRC, but would force contractors to post their rates and be bound by the prices proposed in response to a task order request. SARA Panel Report, Ch. 1, § III.4 at 102-05.

For these same reasons, which are explained in more detail in the attached comments, the Section urges GSA to consider rewriting GSAR Part 538 to eliminate the burdensome and confusing CSP and PRC clauses, and to rely instead on the enhanced task order competition required by recent changes in law to ensure that prices are fair and reasonable.

C. **GSA Should Provide Clear Guidance And Instructions For Negotiating Fair And Reasonable Prices.**

In the event that GSA does not delay the Part 538 Rewrite or eliminate the current CSP-1, the Section recommends that GSA consider the detailed recommendations that were previously submitted to the MAS Panel for clarifying the CSP instructions, including the following:

1. **Clearly Define Price Negotiation Objective (GSAR 538.1504).**

Under the FAR, contracting officers are required to make a determination that prices are “fair and reasonable” when awarding contracts for supplies and services. See, e.g., FAR 15.402(a) (“Contracting officers must purchase supplies and services from responsible sources at fair and reasonable prices.”). Consistent with this obligation, the FAR provisions governing the use of MAS Schedules recognize that the objective in using MAS Schedules is to obtain a “fair and reasonable price.” See FAR 8.404(d) (“[O]rdering activities are not required to make a separate determination of fair and reasonable pricing, . . . GSA has already negotiated fair and reasonable pricing, . . .”).

Consistent with this obligation, the current GSAR, as well as the proposed GSAR 538 rewrite, includes a number of provisions recognizing the contracting officer’s obligation to determine that prices are fair and reasonable. See, e.g., GSAR 538.1203(c)(72)(i)(D), (ii)(B) (“The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether the price(s) offered is fair and reasonable.”) (emphasis added); GSAR 552.238-65(a)(5), 552.238-66(a)(5) (“The Contracting Officer may ask for additional information to demonstrate that the products and/or services offered
meet the definition of a commercial item and/or to determine whether the offered price(s) is fair and reasonable.”).

Nevertheless, the proposed rule at GSAR 538.1504 (formerly located at GSAR 538.270) continues to state that GSA’s pricing policy is to “seek to obtain the offeror’s best price (the best price given to the most favored customer).” Although this pricing policy recognizes that “there may be legitimate reasons why the best price is not achieved,” id., it purports to limit the contracting officer’s ability to negotiate prices that are “less favorable than the best price the Offeror extends to any commercial customer for similar purchases” unless the contracting officer determines that (1) “[t]he prices offered to the Government are fair and reasonable, even though comparable discounts were not negotiated,” and (2) “[a]ward is otherwise in the best interest of the Government.” GSAR 538.1504(d).

The Section believes that this policy is inconsistent with current provisions of the GSAR and the proposed GSAR 538 rewrite, and it is potentially more restrictive than required by statute and regulation. The Section therefore recommends that the policy be revised to state clearly that the goal in negotiating prices is to obtain a “fair and reasonable price.”

2. Clearly Prohibit Contracting Officers From Requesting Detailed Cost Breakdowns (GSAR 538.1504).

Current GSA regulations clearly instruct contracting officers that, in the event additional information is required from an offeror to evaluate prices, the contracting officer is not to request “detailed cost breakdowns.” GSAR 538.270 (c)(7) (“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.”) (emphasis added).

Although the current GSAR clearly prohibits contracting officers from requesting detailed cost breakdowns, the proposed rewrite includes slightly more ambiguous language that “[o]fferors should not be required to provide detailed cost breakdowns.” GSAR 538.1504(c)(7) (emphasis added). GSA’s use of the more permissive language “should not” (as opposed to “shall not” or “must not”) suggests that contracting officers may in fact require offerors to submit detailed cost breakdowns, which would be inconsistent with the nature of the MAS Schedules as commercial item contracts. See, e.g., FAR 15.403-1(b) (“The contracting officer shall not require submission of cost or pricing data to support

---

3 According to the FAR, the word “should” means “an expected course of action or policy that is to be followed unless inappropriate for a particular circumstance.” FAR 2.101. By contrast, “shall” or “must” means “the imperative.” Id.
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 . . . .”) (emphasis added).

The Section therefore recommends that the proposed language in GSAR 538.1504(c)(7) be revised to state that in the event additional information is required to determine whether a proposed price is fair and reasonable, “offerors shall not be required to provide detailed cost breakdowns.”

3. Allow Use Of Offeror’s Own Format To Negotiate Prices (GSAR 538.1504).

The current CSP instructions allow offerors to submit CSP information in the form prescribed by GSA, or in the contractor’s own format. See GSAR 515.408(a)(2) (“Commercial Sales Practices. The Offeror shall submit information in the format provided in this solicitation in accordance with the instructions at Figure 515.4-2 of the GSA Acquisition Regulation (48 C.F.R. 515.4-2), or submit information in the Offeror’s own format.”). Unfortunately, the proposed Part 538 eliminates this flexibility, and appears to require the use of the specific CSP-1 and CSP-2 Formats prescribed in the solicitation.

The Section believes that to require an offeror to respond using only the prescribed CSP-1 and CSP-2 Formats unreasonably restricts disclosures to a format that is inflexible, does not recognize the differences in commercial companies’ commercial accounting systems, and provides no mechanism for further expanding upon its commercial sales practices. We recommend reinstating language that would provide for the offerors to make disclosures in their own format, provided the key pricing information requested is disclosed.

The Section also recommends that the CSP-1 instructions should be clarified to make clear that the sales data and subsequent monitoring of discounts to the tracking customer should be based on and mirror the way in which the vendor sells to its commercial customers. For example, many commercial companies monitor discounts on an aggregate basis, on the basis of overall achieved revenues from customers rather than on the basis of individual sales. Thus, they will give a variety of discounts to a good customer based on the overall net revenue from that customer (or group of customers). Often, the GSA contracting officials will ignore this reality, and will demand data on individual sales and then seek to require the contractor to monitor individual sales to the designated tracking customer for purposes of the Price Reduction Clause. This requires the vendor to adopt a method for monitoring its sales to the tracking customer that is solely for the
purpose of Schedule contract compliance. It ignores the basic concept of commerciality – mirroring and leveraging the way in which the vendor sells to its commercial customers. Therefore, the CSP-1 instructions and related regulations should be clarified to make clear that the sales data and monitoring of discounts to the tracking customer should be based on the way in which the vendor sells to its commercial customers.

4. **Specifically Identify The Basis Of Award Customer And Basis Of Award (GSAR 538.1506-2).**

The background to the proposed GSAR 538 Rewrite states that a new clause at GSAR 538.1506-2, “Price Negotiation Memorandum,” will be added to “clarify] the relationship of the parties in terms of a percentage or ratio.” While the Section applauds this recommendation (which is consistent with the recommendations made to the MAS Panel), the proposed clause at GSAR 538.1506-2 was not included in the proposed Part 538 Rewrite.

The Section recommends that this proposed clause be provided for public comment, and that it specifically require that the basis of award customer and price/discount relationship be included in the Schedule Contract. The clause should also address the contractor’s obligation in the event the basis of award no longer exists or changes.

**D. GSA Should Provide Clear Guidance And Instructions For Completing The CSP-1 Format (GSAR 552.238-65).**

As detailed in the attached comments to the MAS Panel, the CSP-1 contains a number of ambiguities that create considerable confusion, burden and risk for contractors. Unfortunately, these issues have not been clarified in the Part 538 Rewrite, which for the most part incorporates the existing CSP-1 Format and instructions. The Section therefore recommends that clear guidance be issued for completing the CSP-1, to include the following:

1. **Limit CSP-1 To Comparable Customers/Transactions (GSAR 552.238-65).**

GSA should limit CSP data (to the extent still required) to a reasonable period of time (e.g., 12 months), for transactions or customers that are comparable to GSA, taking into consideration the following factors that contracting officers are currently instructed in GSAR 538.270(c) to considered when negotiating price:

   - “Aggregate volume of anticipated purchases”;}
o “The purchase of a minimum quantity or a pattern of historic purchases”;

o “Prices taking into consideration any combination of discounts and concessions offered to commercial customers”;

o “Length of the contract period”;

o “Warranties, training, and/or maintenance included in the purchase price or provided at additional cost to the product prices”;

o “Ordering and delivery practices”; and

o “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).”

2. **Provide “Safe Harbor” For Preparation Of CSP-1 (GSAR 552.238-65).**

GSA should consider providing contractors a “safe harbor” against allegations of “defective pricing,” for example, by allowing contractors the option to provide actual sales data for a mutually agreed upon and reasonable period of time (e.g., 12 months) for transactions involving items offered under the Schedule.

**E. GSA Should Provide Clear Guidance And Instructions For Completing The Proposed CSP-2 Format (GSAR 552.238-66).**

The proposed GSAR 538 Rewrite includes a new proposed “CSP-2” form which was created for “Professional Services” to reflect contracts awarded for services.” Because much of the basic structure and language for the CSP-2 was borrowed from the existing CSP-1 form and instructions, the proposed CSP-2 suffers from many of the same ambiguities as the CSP-1. Therefore, the Section recommends that GSA consider making the same changes and clarifications to the proposed CSP-2. In addition, the new proposed CSP-2 raises the following unique issues and ambiguities that should be clarified in any final rules that call for the use of this proposed form.

1. **Use Of The Proposed CSP-2 Form For Pricing Of Supplies (GSAR 552.238-66).**

The CSP-2 “Commercial Sales Practices Format – Supplies and/or Services With Market Pricing Without an Established Catalog Price” seems intended for the disclosure of commercial sales practices for both supplies and services.
Nevertheless, it is unclear how the CSP-2 is to be used when disclosing supplies pricing:

- The CSP-2 Table at ¶ (b)(2) requests information such as Contract Number, Type of Contract, Period of Contract, Prime or Subcontract, and Customer Point of Contact Information, but nowhere does this table require the disclosure of pricing/discount information. Consequently, if this particular part of the CSP-2 were designed to communicate pricing practices for supplies without an established catalog price, it is unclear how it accomplishes that objective without any requirement for including pricing/discount information.

- The CSP-2 Table at ¶ (c)(2) seems designed for the disclosure of pricing information related to the sale of services only. It is designed to require the offeror to disclose its lowest net billing rate ever offered to a commercial (or government in the absence of “significant” commercial sales) customer, although the time period for the disclosure, again, is unclear. Although this table does include a column for price, it does not appear suitable for the disclosure of supplies without an established catalog price.

- The CSP-2 Table at ¶ (d)(2) is provided for the disclosure of pricing information for “flat rate services and/or supplies.” This table provides for disclosures similar to those covered by the table at ¶ (c)(2); nevertheless, the inclusion of so-called “flat rate services and/or supplies” is new and little explanation or background has been provided.

If the CSP-2 is meant for both supplies and services, as the title of the clause implies, it is unclear how an offeror is to disclose one or the other in the format provided. The Section recommends that GSA provide clear guidance regarding the specific circumstances under which the CSP-2 should be used for pricing of supplies. In any event, the phrase “and/or” is ambiguous.

2. **Number of Contracts Required To Be Disclosed In CSP-2 (GSAR 552.238-66(b)(1)).**

   The CSP-2 instructions at ¶ (b)(1) require that the offeror provide information regarding Contract/Agreement Number, Type and Period. Nevertheless, it is unclear how many contracts are required to be disclosed for a particular line item, and what criteria are to be used to identify relevant contract
data (e.g., those with the deepest discounts, those with comparable terms and conditions, etc). Furthermore, as noted above, the pricing component is missing from the current version, and the instructions do not address the requirement for disclosing lowest price or deviations from standard practice. The Section therefore recommends that, if retained, this table be clarified to address: (1) the scope and time period for the disclosures; (2) the criteria for determining the contracts required to be disclosed (number, terms, and conditions, etc); and (3) the nature of the pricing disclosure required.

3. **Net Billing Rates and Discounts (GSAR 552.238-66(c)(1)).**

   The CSP-2 instructions at ¶ (c)(1) require the offeror to provide the “lowest net billable rate” offered to any commercial customer. GSA offers clarification on the term “billed rates,” suggesting that these are the “fully, loaded/burdened rates which may be indicated on the invoice to the customer.” The following column requests that the offeror provide “the discount, if any, being offered off the lowest net billable rate.” At a minimum, this introduces ambiguity in that the very concept of “net billable rate” seems to suggest that the rate disclosed would be the final rate that was “net” to the customer. The circumstances under which a discount would be offered that resulted in a lower rate than that which was shown on an invoice to the customer are not immediately apparent, and it raises the question of what GSA really intends be disclosed.

4. **Prime/Sub Contract Disclosures (GSAR 552.238-66(b)(1)).**

   The CSP-2 instructions at ¶ (b)(1) also provide for the offeror to indicate the “capacity, prime or sub, the offeror acted as on the referenced contract/agreement.” We believe this requires additional explanation from the GSA team, because it seems to require an offeror to disclose pricing on a contract other than its own (e.g., the format seems to provide for an offeror to disclose a contract between a third party and the government to which the offeror was a subcontractor, rather than disclosing its own subcontract and the price it offered the prime). Furthermore, under the scenario considered above, it is unclear whether such a contract would be subject to disclosure if it were considered by GSA to be a federal contract, provided that the contractor had sufficient commercial sales as defined in the instructions.

5. **Flat Rate Pricing (GSAR 552.238-66(d)(1)).**

   The CSP-2 instructions at ¶ (d)(1) provide guidance for completing disclosures for flat rate services and/or supplies, which are defined as “comprehensive, fixed pricing that includes all elements of the proposed supply and/or service and is not based on an established catalog price.” There is little by way of explanation here. It would seem that the GSA team may have intended to
address the topic of solutions pricing under discussion by the MAS Advisory Panel, and if that is indeed the case, the Section supports their stated desire to consider the findings of the Panel before moving forward with some of the proposed changes to Section 538. The instructions at ¶ (d)(1) as written require much the same information and contain many of the same ambiguities as the services pricing table at ¶ (c)(2).

F. **GSA Should Clarify The Proposed Regulations Regarding “Contractor Partnering Agreements” (GSAR 552.238-55).**

It appears that proposed GSAR 552.238-55 Contractor Partnering Arrangements (I-FSS-40) has simply renamed the Contractor Team Arrangements for which GSA has provided guidance online (see, for example, Elements of a Contractor Team Arrangement (“CTA”) Document at http://www.gsa.gov), except as noted below. The Section suggests that the final rule include an explanation as to the name change and clarification as to whether this changes any of the guidance to date. We note that the name change may cause confusion among current contractors.

The Section also notes the concern that the change in name to a “partnering arrangement” may misidentify the relationship of the parties as partners as a legal relationship instead of team member and team lead. This may be of particular concern with respect to payment disputes because GSAR rewrite 538.906–3(d) requires the agreement between the partners to “acknowledge that any dispute involving the distribution of payment between the lead partner and the team members will be resolved by all partners, without any involvement by the Government.” This means that courts or other judicial bodies relatively unfamiliar with government contracts may look to the name partnering agreement as a means of attempting to identify the rights and responsibilities of the parties.

The Section also requests that GSA consider how the name change impacts other references to the contractor team arrangements – for example, under GSAR 519.1202-4 Procedures with Respect to Small Business Programs, would the reference to a teaming arrangement member include a partner arrangement member? Or is the change intended to remove this category from eligibility in favor of FAR Part 9 teaming agreements?

In addition, the proposed language at 538.906-3 appears to add a requirement that is not in the current GSA advice to contractors, which states: “The lead partner is responsible for identifying FSS contract numbers.” The prior advice appears to place responsibility on each contractor to supply its FSS contract
number. Is the intent to require the lead partner to provide each team partner’s FSS contract number to the ordering activity?

Finally, the Section encourages GSA to provide additional guidance on invoicing/billing, an issue of considerable confusion for both contractors and ordering activities. Although the clause is clear that each party is responsible for the payment of IFF under its contract, it is silent regarding the process to be used for invoicing/billing. Currently, the only guidance on this issue is found in GSA’s online guidance, which states as follows:

While the team lead may submit an invoice on behalf of all team members, GSA recommends that payment be made to each team member. GSA recognizes, however, that there may be instances where it is advantageous to craft the CTA document so that payment is made to the team lead who, in turn, pays each team member. Under such circumstances, the CTA document should clearly indicate that all team members agree to this method of payment. The CTA document should also acknowledge that any dispute involving the distribution of payment between the team lead and the team members will be resolved by the team members, without any involvement by the government. ⁴

The Section recommends that GSA consider incorporating this and other guidance regarding contractor teaming arrangements into the GSAR Part 538, to provide greater certainty to contractors and ordering activities alike.

G. **GSA Should Clarify The Proposed Regulations Regarding Commercial Warranties (GSAR 52.238-87).**

The Section encourages GSA to clarify the warranty provisions in the GSAR and the FAR. First, we encourage GSA to adopt the standard FAR 52.212-4(p) language. In the commentary to this proposed rule, the 34th commenter noted that GSA’s deviation to FAR 52.212-4(p) addressing Limitation of Liability adds an additional burden to GSA contractors dissimilar to other commercial item contracts with the Federal Government. In particular, this commenter noted that the GSA’s deviation does not permit an exclusion of consequential damages for implied warranty claims, contrary to commercial practice. Although GSA’s response indicated that GSAR 52.246-73 was sufficient and a deviation is not

⁴ See General Services Administration, “Elements of a Contractor Team Arrangement (CTA) Document” (http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_BASIC&contentId=18047).
necessary, the Section encourages GSA to reconsider the decision not to allow an exclusion of consequential damages for implied warranty claims.

Second, the Section believes that the inclusion of GSAR 52.238-87 is not appropriate for commercial item purchases. GSAR 552.246-73 is not in line with FAR 12.301, the implementing regulation for 41 U.S.C. § 264, which requires that “contracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses - (1) Required to implement provisions of law or executive orders applicable to the acquisition of commercial items; or (2) Determined to be consistent with customary commercial practice.” We note that GSAR 552.238-86 incorporates the contractor’s commercial warranty and encourage GSA to clarify in 538.1203(c)(60) that this clause should be inserted in all Schedule 70 MAS contracts.

Finally, the guarantee language in the rewrite has caused confusion and should be clarified. In particular, 552.238-57 appears to conflict with the warranty provisions, among other concerns. This clause in the current GSAR only applies to construction contracts (546.710(c)). We encourage GSA to clarify that this clause should only be inserted in accordance with 546.710(c), as opposed to 538.1203(c)(33).

H. GSA Should Clarify The Proposed Regulations Regarding Blanket Purchase Agreements (552.238-91(c)).

The Section encourages GSA to clarify the language in 552.238-91(c), Blanket Purchase Agreements (I-FSS-646), that is currently a part of Refresh 22. Section (c) states “BPAs may be established to obtain the maximum discount/lowest net price available in those schedule contracts containing volume or quantity discount arrangements.” By contrast, FAR 8.404(d) states:

By placing an order against a schedule contract using the procedures in 8.405, the ordering activity has concluded that the order represents the best value (as defined in FAR 2.101) and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the Government’s needs. Although GSA has already negotiated fair and reasonable pricing, ordering activities may seek additional discounts before placing an order (see 8.405-4).

The Section is concerned that the proposed language at GSAR 552.238-91 could be read to allow issuance of a BPA only in the event the contractor is
offering the lowest net price or maximum discount available to the ordering agency although the FAR provides only that the agency may seek “additional discounts,” which may not necessarily provide the lowest net price or the maximum discount. As a practical matter, the BPAs are often used to establish additional discounts based on increased volume of sales, and the proposed GSAR language may interfere with that if the lowest tier of discounts is not the lowest net price. The Section therefore recommends that GSAR 552.538-91 be clarified to be consistent with FAR 8.4.

I. GSA Should Clarify The Proposed Regulations Regarding Participating Dealer Reporting Requirements (552.238-83).

The proposed rewrite of 552.238-83, Contractor’s Billing Responsibilities, continues with the language from former clause 552.232-83, requiring a contractor to maintain as part of its system of reporting for participating dealers “all other significant sales data.” When this was adopted in 2003, the comments indicated:

The new clause at GSAR 552.232-83, Contractor's Billing Responsibilities, contains a recordkeeping requirement that is subject to the Paperwork Reduction Act (44 U.S.C. 3501 et seq.). The clause provides for the contractor to require all dealers participating in the performance of the contract to agree to maintain certain records on sales made under the contract on behalf of the contractor. The records required are the same as those normally maintained by dealers in the commercial world and do not represent a Government-unique recordkeeping requirement. Therefore, the estimated burden for this clause under the Paperwork Reduction Act is zero. GSA has a blanket approval under control number 3090-0250 from OMB for information collections with a zero burden estimate.

In this regard, we ask GSA to revise 552.238-83(a)(2)(iv) to include similar language, such as “All other significant sales data normally maintained by dealers in the commercial marketplace.” In lieu of such a revision, we ask GSA to clarify what is intended by significant sales data.
J. **GSA Should Provide Clear Guidance And Instructions For Triggering Price Reductions.**

Although GSA has not revised the PRC, pending the recommendations of the MAS Panel, it has included proposed revisions to GSAR 538.1506 which are intended to “bring clarity” to certain aspects of the PRC. Unfortunately, these changes do not address the significant number of ambiguities surrounding the PRC. Therefore, in the event that GSA does not delay the Part 538 Rewrite or eliminate the PRC, the Section recommends that GSA consider the detailed recommendations that were previously submitted to the MAS Panel for clarifying the PRC, including the following.

1. **Define The Circumstances That Trigger A Price Reduction.**

In addition to identifying the basis of award customer and price/discount relationship, Part 538 should be revised to require that the contract specifically define the circumstances that would trigger a price reduction. This clarity is needed in light of the substantial ambiguity in the current PRC clause. See American Bar Association Comments To The Multiple Award Schedule Advisory Panel, dated Oct. 17, 2008 (enclosed). That clause states that a price reduction will be triggered not only when the Schedule holder 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).” Rather, a reduction will be triggered more broadly where the Schedule holder grants “more favorable discounts or terms and conditions than those contained in the commercial catalog, pricelist, schedule or other documents upon which award was predicated.” GSAR 552.238-75(c)(1)(i)-(iii).

2. **Define Circumstances That Will Not Trigger A Price Reduction.**

In addition to defining when a price reduction is triggered, the regulations should expressly define the types of transactions that should not reasonably trigger a price reduction, including transactions involving:

- any sale to the Government (whether made through the MAS Schedule or not), as well as sales to “eligible ordering activities” under the MAS Schedule;
- any customer not falling within the agreed-upon basis of award, as defined in the Schedule;
- products and/or services not on the MAS Schedule at the time of the transaction;
o settlement of customer disputes or customer satisfaction issue,

o demonstration, laboratory or “beta” products;

o charity or philanthropic purposes;

o delivery or performance outside the geographic scope of this contract;

o any sale reasonably estimated to exceed the maximum order threshold, including time-and-materials contracts;

o 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; and

o other types of transactions specifically agreed to by the parties in negotiations.

3. Clarify The Relationship Between The PRC And EPA Clauses.

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 clause used in MAS contracts that are awarded based on a commercial price list, GSAR 16-70 (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.

K. GSA Should Rely Upon Government-wide OCI and PCI Standards (GSAR 552.238-23).

As part of the GSAR 538 Rewrite, GSA has included the proposed clause at 552.238-23, “Organizational Conflicts of Interest (CI-FSS-054),” which attempts to address organizational conflicts of interest (“OCI”), as well as individual conflicts of interest and financial conflicts of interest.

As a threshold matter, the Section notes that the FAR Council issued two advanced notices of proposed rulemaking in 2008 that would address
organizational and personal conflicts of interest. To avoid creating conflicting guidance or confusion for contractors, the Section recommends that GSA postpone modifying 552.238-23 until such time as the final rule changes have been issued by the FAR Council.

Additionally, the Section notes that although the clause addresses three separate types of conflicts – “organizational,” “individual,” and “financial” conflicts – it only defines organizational conflicts, and includes no guidance or basic definition regarding personal or financial conflicts. In addition, the definition of organizational conflict of interest in the proposed clause differs from the existing definition in the FAR,\(^5\) which could lead to unnecessary conflict and confusion.

Finally, the clause includes other potentially ambiguous language, including the references to a contractor’s “affiliates” and the characterization of a “potential” OCI that can be “reasonably anticipated.” If the proposed changes to the existing OCI clause remain, the Section recommends that the clause be clarified to include additional definitions and guidance, and that it be limited to those conflicts that are truly organizational in nature and that additional clarification be provided in the other areas noted.

L. “Use of Non-Government Employees to Review Offers” (GSAR 552.238–19).

The proposed clause at GSAR 552.238–19(c), “Use of Non-Government Employees to Review Offers,” states that where personnel from non-governmental organizations are involved in the evaluation of proposals, “personnel from these organizations will be required to execute a non-disclosure and organizational conflict of interest statements.” The Section recommends that this clause reference the non-disclosure and conflict of interest obligations imposed under existing GSAR 515.305 (Figure 515.3-1), or otherwise define the scope of the non-disclosure and conflict of interest obligations to include, at a minimum, assurances that information will be used solely for evaluation purposes and will not be disclosed outside the Government.

---

\(^5\) See Far 2.101 (“‘Organizational conflict of interest’ means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.”).
M. **Miscellaneous Issues.**

In a number of instances, the final rule does not include changes that were discussed in the commentary. For example:

- The background indicates that GSAR 538.4202 will include additional verbiage to provide specific guidelines on the schedule renewal process, but this was not included in the proposed rule.

- The rewrite removes subpart 538.2, including 538.71, which requires insertion of 552.238-71, Submission and Distribution of Authorized FSS Schedule Pricelists. Although there are remaining references in the GSAR rewrite, there is nothing that requires insertion of this clause. As a result, we recommend a conforming change to remove all references to this clause, and, as a result, the distribution of these pricelists.

- Subsection (d)(8) of the proposed clause at 552.238–10, “Additional Offer Submission Instructions (Federal Supply Schedules)(SCP–FSS–001),” asks any entity other than the manufacturer to provide “a guaranteed source of supply letter.” The Section recommends that GSA please clarify if the guaranteed source of supply letter is the same as the requirements in 552.238-90, or, if not, what the required elements of a “guaranteed” source of supply letter are.

II. **CONCLUSION**

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

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