June 3, 1996

General Services Administration
Office of Acquisition Policy (MV)
18th & F Streets, N.W.
Room 4010
Washington, D.C. 20405


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 Public Contract Law Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section's governing Council and substantive committees contain a balance of members representing these three segments, to ensure that all points of view are considered. In this manner, 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 Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

The Section's comments are divided into two substantive sections. The first section consists of general comments regarding the implementation of this interim rule. The second section consists of comments regarding specific aspects of the interim rule.
I. GENERAL COMMENTS

The Section objects to the manner in which the General Services Administration ("GSA") published these regulations. First, the Section believes that GSA's attempt to implement these regulations as interim rules rather than proposed rules violates the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355 ("FASA"). Second, contrary to GSA's assertion, the Section takes the position that GSA's interim rule is a "significant regulatory action" under Executive Order 12866 and, as such, requires submission to the Office of Management and Budget for review in accordance with the Executive Order. Third, the Section disagrees with GSA's assertions about the Regulatory Flexibility Act. Fourth, the Section calls upon GSA to support its assertion that its interim regulations are consistent with standard commercial practice as required by FASA and the FAR.

A. GSA's Failure to Publish as Proposed Rules Prior to Implementation Violates FASA

GSA issued this interim rule amending the GSA Acquisition Regulations for the acquisition of commercial items without the benefit of any public comments. In doing so, GSA claimed that "urgent and compelling circumstances" justified their publication as interim and not proposed rules. The Section believes that these rules should have been issued as proposed rules.

More than a year has elapsed since FASA, Pub. L. No. 103-355, was signed into law on October 13, 1994. Section 10002(a) of FASA specifically required that all revisions to the FAR and agency FAR supplements be issued as proposed regulations. Section 10002(b) of FASA required that all proposed implementing regulations be "available for public comment for a period of not less than 60 days" before they are to take effect.

These provisions were included in FASA to avoid just this kind of situation in which issuance of implementing regulations are delayed to the point that they are issued hurriedly to take effect immediately without the benefit of any public comment. Because of these statutory directives contained in FASA, GSA is precluded from relying upon any alleged "urgent and compelling" circumstances in order to justify issuance of these regulations without the 60-day public comment period. The Section recommends that GSA delay implementation of these rules until it has had an opportunity to review those comments and make appropriate revisions.

B. Executive Order 12866

GSA also published these interim rules without submitting them to the Office of Management and Budget. The Section believes that GSA's actions were improper under the requirements of Executive Order 12866.

Pursuant to Executive Order ("EO") 12866, entitled "Regulatory Planning and Review," federal agencies must determine whether new and existing regulations constitute
"significant regulatory action" or a significant rule. EO 12866 reflects a policy initiative to reform the regulatory planning process. In part, the objective is (1) to enhance planning and coordination concerning both new and existing regulations; (2) to restore integrity and legitimacy to the regulatory review and oversight process; and (3) to make the process more accessible and open to the public.

When an agency action amounts to "significant regulatory action" within the meaning of EO 12866, the agency must submit detailed information about the rule to the Office of Information and Regulatory Affairs, Office of Management and Budget ("OIRA/OMB"). The submission is to include a copy of the draft regulatory action and an assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with any applicable statutory mandate.

In publishing this interim rule, GSA stated, without explanation, that it was not submitted to OIRA/OMB because it is not a significant rule as defined in EO 12866. According to the EO criteria for identifying "significant regulatory action," however, it appears that GSA's interim rule should have been treated as such. As expressed in further detail below, the interim rule is inconsistent with a statutory mandate, namely FASA. Moreover, it appears that this rule will adversely impact the government contracting community. For example, this rule will impose substantial new disclosure and record-keeping obligations on commercial contractors interested in GSA's MAS program. Evidently, GSA has failed to address these and other relevant criteria in determining whether the interim rule constitutes a significant regulatory action.

At a minimum, GSA's failure to explain its finding that this rule is not significant indicates an abandonment of the executive policy of restoring integrity and legitimacy to regulatory review and oversight practices. Additionally, by denying the public any opportunity to comment on the rule prior to its effective date, GSA unnecessarily has deserted the EO's goal of making the process more accessible and open to the public. In the interest of the policy objectives contained in EO 12866 and pursuant to the criteria mandated therein, we recommend that GSA reconsider its position that the interim rule is not significant.

C. Regulatory Flexibility Act

The Section also disagrees with GSA's assertion that these interim regulations will have a "positive economic impact on a substantial number of small entities" within the meaning of the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq.

The initial regulatory flexibility analysis prepared by GSA is based on an incorrect assumption that the GSAR changes made in "this interim rule simply revise the GSAR to bring it into conformance with the FAR." This statement is not correct. The changes made to the GSAR in this interim rule go far beyond anything in the FAR and likely will have a
detrimental impact on small businesses. For example, these interim regulations provide for new access to records and post-award audit rights for commercial items that are contrary to both FASA and the FAR. These interim regulations also contain several other provisions, including those regarding submission of detailed sales information and most-favored-customer price negotiation objectives, that are at odds with the FAR.

The Section also disagrees with GSA's assertion in the initial regulatory flexibility analysis that the policies and procedures provided in the interim rules are consistent with customary commercial practices. GSA offers no support for this assertion. As discussed below in more detail, a determination that a practice is "standard commercial practice" requires analysis of the extent and manner of usage of the practice in particular industries within the commercial marketplace. It does not appear that GSA has attempted to perform any analysis other than to rely upon anecdotal evidence of the existence of such practices in a few instances. This is not sufficient to support a finding that any of the provisions in the interim rules are consistent with "standard commercial practice."

The Section recommends that GSA withdraw this interim rule until such time as it has revised its initial regulatory flexibility analysis in order to reflect appropriately the impact of the interim rule on small businesses.

D. The New Rule is Inconsistent with Standard Commercial Practice

The statutory phrase "standard commercial practice" means a practice that is typically and ordinarily used in the commercial marketplace. Adequate substantiation that a practice is standard requires an identification and examination of the extent and manner of usage of the practice.

The Section calls upon GSA to make public any and all support for its determination that its interim rules are consistent with "standard commercial practice," as required by FASA. Nowhere in its February 16, 1996 Federal Register notice does GSA offer any such support. In order for those most affected by these regulations to effectively comment, GSA should make public the support for its determination prior to finalization of these rules.

Any support offered by GSA must be more than a simple collection of isolated examples of portions of similar provisions that may exist in certain contracts within certain industries. This was the approach taken in the July 1995 report of the GSA/VA Offices of Inspector General entitled "Procurement Reform and the MAS Program." No reasonable conclusions about "standard commercial practices" can be drawn from such an approach.

Moreover, several provisions in GSA's interim rules do not appear to be supportable as allegedly consistent with standard commercial practice. First, these rules impose defective pricing penalties that have no basis in commercial practice or in the FAR. Not one of the examples cited in the GSA/VA Inspector Generals report of July 1995 included any such defective pricing remedy. Second, these rules continue GSA's MAS price reduction
clause that is more restrictive than any similar provision to be found in commercial practice or identified in the GSA/VA July 1995 report. Third, the interim rules require disclosure of singular transactions for which discounts exceed those offered to the Government. Such detailed disclosures are not typical or ordinary of commercial practice. The FAR itself has a much broader focus, emphasizing catalogs and established discounting policies rather than the singular transaction. Finally, the interim rules formalize GSA's long-standing and much-criticized policy of seeking most favored customer ("MFC") pricing. While there does exist some evidence of vendors seeking MFC pricing in commercial settings, such practice does not appear to be typical or ordinary. Moreover, GSA's continued insistence on such MFC pricing is inconsistent with the FAR (which seeks only fair and reasonable pricing) and the goals of Congress and the Administration regarding commercial item acquisitions. Given these examples, the need is even greater for GSA's support for its determination that its interim rules are consistent with standard commercial practices to be exposed to public scrutiny.

An alternative viewpoint was expressed within the Section that two studies exist which have examined commercial practices in connection with MAS contracts which allegedly support GSA's assertions regarding "standard commercial practices" - the July 1995 GSA/VA report discussed above and an August 1993 report by the General Accounting Office titled "Multiple Award Schedule Contracting: Changes Needed in Negotiation Objectives and Data Requirements." This position was not adopted, as indicated above, because these reports were not prepared for the purpose of analyzing standard commercial practices. Nothing in these two reports provides any identification or examination of the extent and manner of usage of commercial practices. Moreover, nothing in GSA's interim regulations indicate the extent, if any, that GSA relied upon these reports as support for its position.

An alternative viewpoint was also expressed that GSA's interim regulations could nonetheless be viewed as consistent with FASA and the FAR since clauses that are required by law or are consistent with standard commercial practices are required to be used "to the maximum extent practicable." This alternative viewpoint was also not adopted because GSA's interim regulations have not been justified on the basis that it would be impractical not to use the provisions set forth in the regulations. GSA's only basis for justifying its interim regulations is that they are consistent with standard commercial practices. Moreover, any attempt by GSA to justify its interim regulations as the only practical alternatives, even if not required by law or consistent with standard commercial practices, would only serve to more clearly require review of the interim regulations by OMB under Executive Order 12866.
II. SPECIFIC COMMENTS

A. Access to Records and Post Award Audit Rights

The interim regulations contain several provisions that provide for access to records and the right to conduct post-award audits by GSA:

- GSAR § 515.106-70
- GSAR § 515.804-6(a)(4) and (b)(5)
- GSAR § 552.215-70
- GSAR § 552.215-71
- GSAR § 552.215-72

These provisions are not consistent with -- and, in fact, are prohibited by -- either FASA or the FAR implementing regulations. Moreover, the provisions are confusing and impose further barriers and uncertainty in the acquisition of commercial items.

1. The Interim Regulations Provide for Two Different Post-Award Audits

GSA's interim regulations contain a new clause at GSA FAR Supplement § 552.215-71 titled "Examination of Records by GSA (Multiple Award Schedule)," in addition to its standard "Examination of Records by GSA" clause at GSA FAR Supplement § 552.215-70. The new "Examination of Records" clause at GSA FAR Supplement § 552.215-71 is specifically applicable to MAS contracts.

Under this new clause, GSA grants itself access to and the right to audit all of a schedule contractor's "books, documents, papers, and records of the Contractor involving transactions related to" the schedule contract for a period of up to "2 years after the end of the basic contract period or after the end of the option period for any option periods" in order to check for "overbillings, billing errors, compliance with the Price Reduction clause and compliance with the Industrial Funding Fee clause." This new clause appears to limit the scope of GSA's post-award audit right to transactions occurring during performance of the contract and to exclude audit of sales and pricing information submitted during price negotiations. Given that many contracts have a five-year basic period with a five-year option period, such audit rights impose a significant burden on contractors to retain records for up to twelve years.

However, post-award audit of information submitted during negotiations is covered by another new clause set forth in the interim regulations. The new provision at GSA FAR Supplement § 515.804-6, which contains instructions that schedule offerors are required to follow in submitting their detailed statements of commercial sales practices, provides for a separate audit right of GSA in addition to the audit rights granted in the "Examination of Records" clause for MAS contracts discussed above. This new provision at GSA FAR Supplement § 515.804-6 states that by submission of an offer or a request for modification,
the offeror grants to GSA additional audit rights "for two years after award or modification of this contract to verify that the information submitted was complete, current and accurate." It appears that this audit provision is meant to cover audit of sales and pricing information submitted during price negotiations, which was apparently excluded from the "Examination of Records" clause for MAS contracts. In addition, these instructions also require offerors that are dealers/resellers to submit (or have the manufacturer submit) detailed sales information relative to the manufacturer's pricing to the dealer along with written access granted by the manufacturer to its records. Therefore, it would appear that the access required to be granted by the manufacturer to its records would also include a grant to GSA to conduct a post-award audit of that information for accuracy, currency and completeness up to two years after the contract award or modification at issue.

2. The Interim Regulations are Inconsistent with Statute and Regulations

These post-award audit provisions in the interim regulations are wholly inconsistent with FASA as well as the FAR implementing regulations. There exists no legitimate basis for GSA to insist upon post-award audit rights in connection with commercial item contracts, including its MAS contracts, that are beyond the limited rights granted in FASA and as implemented in the FAR. GSA appears to be taking the position that it is completely free to impose post-award audit rights that are beyond those provided for in statute and in the FAR. Such a position would not appear reasonable.

In Sections 2201 and 2251 of FASA, Congress consolidated the statutory audit provisions of TINA and other statutory coverage into comprehensive sections for the armed services agencies (now codified at 10 U.S.C. § 2313) and for the civilian agencies (now codified at 41 U.S.C. § 254d). These provisions of FASA grant executive agencies access to the records of a contractor or subcontractor in connection with contracts or subcontracts in which certified cost or pricing data is required to be submitted. In addition, these provisions of FASA retained the statutory post-award audit rights of the General Accounting Office ("GAO"), which is essentially applicable to all negotiated contracts. The only post-award audit rights concerning commercial item contracts that were granted by FASA to executive agencies, such as GSA, were set forth in Sections 1204 and 1251 of FASA (now codified at 10 U.S.C. § 2306a(d)(3) and 41 U.S.C. § 254b(d)(3)). These FASA provisions provide for limited post-award audits for up to two years from date of award in order to determine only the accuracy of the information submitted. They apply only in one exceptional situation -- when a contract is exempted from TINA under the new commercial item exemption and not under one of the more common TINA exemptions, such as the catalog or market price exemption which usually applies in MAS procurements.

The FAR regulations implementing these audit provisions of FASA are set forth in a new standard FAR audit clause -- FAR § 52.215-2 "Audit and Records-Negotiation" and a special FAR clause for the commercial item exemption-of-last-resort -- FAR § 52.215-43 "Audit-Commercial Items". It is important to note that under the new standard "Audit and
Records - Negotiation" clause at FAR § 52.215-2, access to records and audit rights of executive agencies are limited to pre-award activities and do not extend beyond the date of contract award in connection with contracts awarded based on the catalog or market price TINA exemption. In contrast, when contracts awarded based on the special exemption for commercial items, access to records and audit rights of executive agencies are granted for up to two years from date of award and are limited to determining only the accuracy of the information submitted pursuant to the special commercial item audit clause at FAR § 52.215-43 and as provided for in FASA.

Moreover, in Section 4201 of the Federal Acquisition Reform Act of 1996, Pub. L. No. 104-106 ("FARA") (enacted as part of the FY 1996 National Defense Authorization Act), Congress provided for a bright-line exemption from TINA for all commercial item contracts and eliminated the special post-award audit rights of executive agencies applicable to commercial item contracts which had been provided for in FASA. In doing so, Congress made it clear that it was affirmatively prohibiting the exercise of such post-award audit rights by executive agencies in connection with commercial item contracts in lieu of the GAO post-award audit rights. In the Conference Report on Section 4201 of FARA, Congress explained that:

In recognition of the authority of the General Accounting Office to audit contractor records, the conferees have removed the specific audit authorities in the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) that relate to information supplied by commercial suppliers in lieu of certified cost and pricing data.

House Conf. Rep. No. 104-450, at 966. Under FARA, the only post-award audit rights in connection with commercial item contracts, including MAS contracts, belong to GAO, a congressional agency. It is worth noting that the July 1995 Report of the GSA/VA Inspector General's Office criticized the language ultimately enacted in Section 4201 of FARA as ending GSA's ability to conduct post-award audits in connection with commercial item contracts, including MAS contracts. The July 1995 Report states:

Carving out an exception to these requirements, FASA limited audits of certain commercial product acquisitions, but not necessarily MAS acquisitions, to two years after contract award. Recently introduced legislation, H.R. 1670, would amend FASA and would appear to effectively eliminate the government's statutory authority to audit all procurements of commercial products, including MAS contracts.

GSA/VA IG July 1995 Report at 21. H.R. 1670 was the version of FASA that was introduced in the House. The language in H.R. 1670 that is referred to in the GSA/VA IG report is essentially the same language that was ultimately enacted in the final version of Section 4201 of FARA.
An alternative viewpoint was expressed within the Section to the effect that these audit provisions from the GSA interim regulations reflect a reasonable interpretation of FASA and the FAR implementing regulations. The alternative viewpoint was premised on an assertion that the language of FASA and the FAR implementing regulations do not restrict or preclude executive agencies, such as GSA, from providing for audit access through agency-level supplemental regulations in connection with TINA-exceptioned catalog or market price procurements when such access is appropriate in the context of a particular contracting program, such as the MAS Program. The alternative viewpoint pointed out that prior to enactment of FASA, GSA had derived its post-award audit authority in MAS procurements contractually through the "Examination of Records by GSA" clause, previously at GSAR 552.215-70 and that FASA allegedly did not statutorily create or restrict such existing audit authorities but simply created specific audit authority in connection with the new statutory commercial item TINA-exemption of last resort. The alternative viewpoint also asserted that FARA effectively returned the status-quo by eliminating the specific audit authority which had been put in place by FASA. The alternative viewpoint also recommended that the bifurcated audit authority provided for in the GSA interim regulations be consolidated and harmonized into one clause so that schedule contractors not be subject to two forms of post-award audits. Under the bifurcated approach, GSA would be required to conduct two separate post-award audits on one MAS contract -- one within two years of contract award to verify pricing disclosures (defective pricing) and another within two years from contract completion with the Industrial Funding Fee and Price Reduction provisions over the contract term. The alternative viewpoint noted that this bifurcation of the post-award audit authority would increase the audit burden on contractors by increasing the number of audits and by escalating routine contract audits into fraud investigations.

These alternative viewpoints were not adopted for the reasons set forth above. It is the position of the Section that the post-award audit provisions of GSA's interim regulations are inconsistent with FASA and the FAR implementing regulations, as well as the provisions of FARA.

3. "De Facto Certification"

In addition to these burdensome post-award audit rights, the GSA interim regulations continue to provide for onerous defective pricing penalties yet purport to implement the provisions of FASA which require elimination of certification requirements in connection with pricing information submitted under a TINA exemption. Through its most recent schedule solicitations, GSA has utilize a clause titled "Certificate of Established Catalog Price Exemption From the Submission of Cost or Pricing Data" which required schedule offerors to certify, among other things, that "all of the data (including sales data) submitted with this certificate are accurate, complete and current representations of actual transactions to the date when price negotiations are concluded." This certification was required even when a TINA exemption was established. Under a companion clause titled "Price Reduction for Defective Pricing Data," GSA was granted a post-award price reduction if the data submitted by the offeror was found to be other than accurate, current or complete.
Removal of this type of certification was required by Sections 1203 and 1251 of FASA (now codified at 10 U.S.C. § 2306a(c)(2) and 41 U.S.C. § 254b(c)(2)) which prohibits any requirements for certification as to accuracy, currency and completeness in connection with information submitted when one of the TINA exemptions is established. GSA's interim regulations purport to implement this requirement of FASA by removing the clause requiring schedule offerors to certify that all sales information they submit to GSA in connection with their schedule proposal is "accurate, current and complete." However, as discussed herein, GSA's interim regulations also provide for a new clause at GSAR FAR Supplement § 552.215-72 titled "Price Adjustment for Incomplete, not Current, or Inaccurate Information Other Than Cost or Pricing Data (Feb 1996)." This new clause provides for a post-award price reduction if the information submitted is determined to be other than complete, current or accurate.

These new clauses are no different than the previous prohibited clauses that they are meant to replace. Nothing is changed. Words are manipulated, but the result is the same. Even though technically no certification is required, the sales information and statements concerning its commercial sales practices that a schedule offeror is required to submit will be deemed to be warranted as "complete, current and accurate." If such information is found to be other than "complete, current and accurate" during a post-award audit, the GSA will be entitled to a price reduction. The result is increased risk and uncertainty on the part of the vendors submitting the information. An alternative viewpoint suggested that the standard has the effect of assuring that contracting officers can make price reasonableness determinations based on reliable data. However, this alternative viewpoint was not adopted because Congress rejected such a justification when it eliminated the certification requirement.

B. Commercial Sales Practices Data Request

Table 515-1, Instructions For Commercial Sales Practices Format (page 6168) undertakes to define the term customer in the paragraph beginning "Column 1.". The definition is overinclusive and fails to recognize distinctions between end users and resellers which color commercial pricing practices.

The definition states that anyone who acquires supplies or services from the offeror, except the Federal Government, is a customer. The definition then gives the following non-exhaustive list of examples of what the term "customer" includes:

Original equipment manufacturers
Value added resellers
State and local governments
Distributors
Educational institutions
Dealers
National accounts, and
End users.

The central point of requiring information about pricing, discounts and other commercial practices of an offeror is to make comparisons. The definition as it stands makes it impossible to make realistic or informed comparisons because it lumps together non-comparable entities. Other distinctions may be needed, but the most significant omission is the lack of distinction between those entities which are end-users and those which are not.

Between the offeror and the end user a number of things may have to occur which must be paid for and which, presumably, add value. When these functions are essential to complete the transaction from offeror to the end-user someone must perform the functions. The performers typically are original equipment manufacturers, distributors, wholesalers, value added resellers and the like. What they do adds to the price paid by the end-user and hopefully to the value he receives.

Comparing what one of these entities pays for a chair to what an end-user pays for the same chair is similar to comparing an FOB origin price to and FOB destination price. Unless the freight bill is accounted for the comparison is not complete and not useful.

We are concerned that in the absence of any further distinction, the Government negotiator will examine the pricing (discounts) to all "customers," select the lowest price and base his discount aspirations on that price. This will not only be unreasonable, it will not work.

The Multiple Award Schedule Policy Statement of October 1, 1982 recognized that all "customers" were not the same and made some provision for rationalizing the distinctions (Policy Statement sections II & V; Pricing Guide section IV. D). Although the 1982 policy statement's provisions were not ideal, what help they provided is now gone.

We believe that it is important to distinguish between end-users and other categories of customers. We also believe that the reality of this distinction should be reflected in the Government's approach to achieving fair and reasonable prices.

An alternative viewpoint was expressed within the Section that the new information disclosure requirements represented an improvement on prior requirements. Under this view, the new format is better because it requires offerors to provide less information. The alternative viewpoint also asserts that pricing disclosures, in addition to market research, are necessary for the government to utilize fully its purchasing power.

The Section did not adopt these alternative views. Although the Section agrees that the new requirements, under some circumstances, may allow an offeror to submit less
information, the Section believes that GSA has not justified adequately why even the reduced amount of information is necessary.

C. Price Negotiation Objective – Most Favored Customer

GSA has imposed on the contracting officer the requirement to seek and receive Most Favored Customer ("MFC") prices, which is diametrically opposed to the commercial item pricing requirements of FASA, TINA, and FAR subpart 15.8. GSA has no basis for implementing such requirements which stray so far from both the letter and the spirit of the underlying statute. The basis of pricing according to FASA and TINA should be to receive a fair and reasonable price. It is reasonable that GSA would be able to negotiate fair and reasonable pricing if more market research was required prior to establishing a reasonable negotiation position, rather than require the contractor to justify any differences in discount.

FASA, and the resulting changes to TINA, were intended to foster government purchases of commercial items using commercial practices. In the commercial market, companies are not required either to disclose discounts offered to other customers or to negotiate prices based on what other customers have paid. Rather, prices are agreed upon based on knowledgeable buyers and sellers reaching agreement on what is a reasonable price for the product or service. In addition, FASA places the burden of making a determination of reasonableness on the contracting officer, with a limit on the amount of data supplied by the contractor.

1. Issues

There are three primary areas of concern with the interim GSAR related to MFC Pricing.

First, GSA has no legal basis to incorporate into regulation a requirement that is more stringent than the FAR. FAR § 1.302. Significantly, GSA has placed on the contractor the entire burden for justifying other than the best discount. This requirement contradicts the FAR's policy which provides that "[i]n establishing the reasonableness of prices, the contracting officer shall not obtain more information than is necessary." FAR § 15.802(a).

GSA's rule recognizes that "terms and conditions of commercial sales vary and that there may be legitimate reasons why the best discount is not achieved." (GSAR § 538.270(a)) However, the rule requires the offeror to justify those reasons which may require submission of excessive amounts of information to demonstrate price reasonableness. GSAR § 538.270(d)(7).

The GSAR interim rule demonstrates GSA's complete disregard for the intent of FASA to make the procurement process more efficient and to limit the submission of unnecessary data. FASA established a hierarchy for the information used to determine price
reasonableness. Under FAR § 15.802, for information related to prices, contracting officers must first rely on information available within the government; second, on information from sources other than the offeror; and only if necessary, on information from the offeror.

It is difficult to understand how GSA can justify the requirement for the offeror to provide the detailed information defined by the GSAR requirement. For example, the requirement to substantiate and value those differences will require providing information which is not maintained in that manner by most commercial companies, because "valuating" the differences in discount between customers is not required in the normal course of commercial business. By requiring information not regularly maintained by the offeror, GSA is again in conflict with TINA and the FAR related to commercial items. FAR § 15.804-5(b)(4) provides that "the contracting officer shall, to the maximum extent practicable, limit the scope of the request to include only information that is in the form regularly maintained by the offeror in commercial operations."

Second, GSA should simply require that the contracting officer negotiate prices which are fair and reasonable based on the circumstances of MAS and terms and conditions of the contract. With the incorporation of the Maximum Order clause, GSA customers who purchase over the contract MOL will have the opportunity to realize better discounts reflecting the purchase circumstances.

It is unreasonable for GSA to require the negotiation be targeted at the lowest discount offered to any commercial customer. GSA does not seem to appreciate that, under the MAS concept, it is incumbent on contractors to negotiate a fair and reasonable price. It is never in the interest of a company to have pricing on their MAS which is not inherently fair and reasonable, and therefore competitive, for the majority of circumstances within the MOL. If this was not the case, companies would lose sales to more competitively priced products, which reflects the commercial marketplace practice. These are not sole source contracts, but rather are a contracting mechanism for numerous contract awards by authorized buyers. Each buyer within the government has options when they buy a particular item. They will review the pricing for various companies for products which serve the same purpose and select the best value. The GSA MAS contracts are one mechanism and comparison of MAS pricing is a basis for making a determination of best value. With the implementation of GSA's Advantage program, this will be even more true.

In the commercial market, buyers and sellers agree upon pricing based on a wide variety of reasons, some of which are objective i.e. category of customer, while others are more subjective and may vary based on the customer's strategic importance, region, or industry. Under FASA, Congress recognized that the reasonableness of commercial item pricing is set by the market and any additional requirements for submission of data should be minimal for the contracting officer to make a determination the price is fair and reasonable.
GSA has asserted in its marketing of the MAS program that the schedules meet the requirements of competition. Based on this assertion, it is reasonable to expect that the adequate price competition standard as defined by TINA has been met as well. TINA and FAR subpart 15.8 are very clear that in cases of adequate price competition no further data is required. In addition, if additional information is necessary, FAR § 15.804-5(a)(3) provides that such information generally should be obtained from sources other than the offeror.

Third, GSA should incorporate the independent market research process into the evaluation and award of MAS contracts. The practices of each industry in which GSA operates will be different and these differences should be reflected in the negotiation process.

Utilization of market research would provide a basis for establishing which discount structure best reflects how the GSA customer buys products. GSA would be able to determine a reasonable expectation regarding categories of customers and the related discount. Why shouldn't GSA structure the various MAS contracts based on the industry practices within a federal supply classification, e.g., ADP, Tools, or Furniture? For each industry, the standard business practices differ dramatically. For example, the marketplace for the purchase of computers, furniture, and motor vehicles are different and are affected by level of competition, investment in marketing, research and development, and the impact of different channels of distribution. In addition, the government's relative importance as a customer differs for each industry. It is unrealistic for GSA to consider that in every market they are in fact the largest customer. For many large commercial companies, especially information technology companies, the Federal government is no longer the largest customer and may not be strategically important.

Industry has found in the past that certain GSA contracting officers have established unreasonable contract negotiation objectives predicated on a category of customer, or customers that were not representative of the government customer. These positions often reflected a lack of understanding of the commercial marketplace and industry practices for the products being purchased. FASA and FAR Part 10 both address this by requiring that the government perform market research to determine the availability of commercial items for the intended purpose, and also to document the contracting practices in that market. FAR Part 12 anticipated that information from market research should be utilized in the formation of the resulting contract:

It is customary practice in the commercial marketplace for both the buyer and seller to propose terms and conditions for a given transaction... However, market research may indicate other customary commercial practices that are appropriate for the acquisition of the particular item. These practices should be considered for incorporation into the solicitation and contract if the contracting officer determines them appropriate in concluding a business arrangement satisfactory to both parties and not otherwise precluded by law or executive order.

(Emphasis added)
FAR § 12.213.

In addition, GSA should provide training to their contracting officers on commercial practices, how commercial contracts are negotiated, and on the differences in categories of customers and services provided by different channels of distribution. It should not be incumbent on the contractor to educate the contracting officer on these differences during each negotiation.

2. Summary

In many cases, companies do not offer GSA their "best" discount. There are numerous, valid business reasons for these differences. It should be noted that the process outlined in the GSAR often will not change the discount agreed upon. What it may do is protract and complicate the negotiation process, potentially resulting in an adversarial relationship between the company and GSA. In the spirit of FASA and GSA’s partnering with industry, this does not make sense. GSA should require that the prices be fair and reasonable and provide the internal tools and training for the contracting officer to make those determinations with a minimum of additional pricing information from the offeror. This is what is required by law, FASA, and the FAR. GSA cannot make a case for requiring a higher standard but rather the case is easily made that the FAR and TINA are more than adequate for the MAS contracts for commercial items.

An alternative view was expressed within the Section that FASA and the FAR allow for the MFC pricing tool. This view noted that the FAR team which drafted the regulation implementing FASA’s changes to TINA declined to prohibit MFC pricing on the grounds that certain circumstances might justify MFC pricing. The alternative view then asserted that the MAS program is an example of such a circumstance. The alternative view is premised on an assertion that the MFC pricing requirement is the only effective means for GSA to harness the volume purchasing power of the government because it allows GSA to target the best discount that an offeror’s commercial customer, with buying power similar to the government’s, obtains from that vendor. The alternative viewpoint also suggests that the forces of competition at the buying end alone will not result in fair and reasonable prices in the MAS program because agency users make small dollar individual buys and thus the government would be reduced to the position of a small retail buyer and would lose its volume purchasing power. The alternative viewpoint concludes that the MFC pricing policy is a reasonable and legally permissible way for GSA to implement within the MAS program, the requirement to obtain fair and reasonable prices.

For the reasons set forth above, the Section did not adopt this alternative viewpoint. The Section has long opposed such MFC pricing requirements. The FAR requires fair and reasonable prices not "most favored customer" prices. A fair and reasonable price does not have to be an offeror’s "most favored customer" price.
III. CONCLUSION

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

Sincerely,

[Signature]

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Chair, Section of Public Contract Law

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