On December 9, 1996, the Section submitted comments to the General Services Administration regarding its proposed rule on ordering procedures under nonmandatory schedule contracts. The Section expressed support for the reform efforts reflected in the proposed regulations aimed at streamlining the Government’s acquisition of commercial items, but expressed concern that proposed regulations may not be adequately supported by sufficient statutory basis and may be open to legal challenge.

The Section recommended that the GSA reconsider the removal of the synopsis requirement in the Commerce Business Daily (CBD) for orders placed against multiple or scheduled contracts, including nonmandatory scheduled contracts. The Section also suggested that the GSA modify the proposed rule to require that solicitations for non-mandatory schedule contracts state an overall maximum quantity to be procured, and require that the overall maximum be reflected in the resulting schedule contracts. Finally, the Section suggested that GSA revise the proposed rule to more clearly define “best value” to mean award to the lowest overall cost alternative to meet the minimum needs of the Government.
Ordering Procedures Under Non-Mandatory Schedule Contracts

The Section is authorized to submit comments on acquisition regulations under special authority granted by the American Bar 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 proposed regulations provide for new provisions governing ordering from non-mandatory schedule contracts awarded under the General Services Administration's Multiple Award Schedule ("MAS") Program. These proposed regulations reflect inclusion of the non-mandatory schedule contracts for automatic data processing ("ADP") and telecommunications products and services that were previously governed by the now defunct Federal Information Resources Management Regulation. These proposed regulations also implement changes pertaining to procedures applicable when placing orders against non-mandatory schedule contracts above the maximum order threshold.

The Section supports the reform efforts reflected in the proposed regulations aimed at streamlining the Government's acquisition of commercial items. However, the Section is concerned that the proposed regulations may not be adequately supported by a sufficient statutory basis and may be viewed as inconsistent with certain existing statutory provisions. As a result, implementation of the proposed regulations would be open to legal challenge and may not achieve the desired reform goals. The Section offers the following specific comments aimed at improving the legal basis for the proposed provisions while achieving the desired results.

A. Removal of CBD Synopsis Requirement

The proposed regulations at FAR § 8.404 (a) state that orders placed against multiple award schedule contracts, including non-mandatory schedule contracts, are not required to be synopsized in the Commerce Business Daily ("CBD") or otherwise be subject to any further competition. While the Section generally supports this provision, it may be open to legal challenge since it may be viewed as lacking proper statutory support and as possibly inconsistent with existing statutory provisions.

As set forth in proposed FAR § 8.404(a), GSA's general justification for removal of the synopsis requirement is that the procedures used in the MAS Program to award contracts and place orders are considered competitive procedures within the meaning of the statutory requirements for full and open competition. Although not identified specifically, GSA is relying upon the statutory provisions of the Competition in Contracting Act ("CICA") which state that the procedures used in the MAS Program qualify as competitive procedures if:

1. participation in the program is open to all responsible sources; and
2. orders and contracts under such procedures result in the lowest overall cost alternative to meet the needs of the Government.

41 U.S.C. § 259(b)(3). GSA appears to have a defensible position given the fact that (i) GSA's MAS solicitations are open to all responsible sources and (ii) the resulting prices and discounts do result in orders based on the lowest cost to meet the Government's needs.

However, in comments dated April 25, 1994, prior to passage of the Federal Acquisition Streamlining Act of 1994 ("FASA") and the Federal Acquisition Reform Act of 1996 ("FARA"), this Section stated that GSA lacked the legal authority to alter or otherwise deviate from the statutory synopsis requirement in connection with orders placed against non-mandatory schedule contracts. Based on this statutory requirement, the Section stated that any order in excess of $25,000 to be placed against non-mandatory schedule contracts was required to be synopsized in the CBD and that none of the then-existing exemptions to such synopsis requirement were applicable. The Section's position was consistent with the opinions expressed by the

The statutory requirements regarding CBD synopses state essentially that all orders under a "basic agreement, basic ordering agreement, or similar arrangement" that exceed $25,000 must be synopsized in the CBD, including a notice that all responsible sources may compete for the order. See 41 U.S.C. 416(a)(1); 15 U.S.C. 637(e)(1). In the GAO documents referenced above, GAO stated that non-mandatory schedule contracts were the type of "similar arrangement" with respect to which orders were specifically required to be synopsized. GAO also explained that none of the then-existing statutory exemptions applied, including the exemption for orders placed against "requirements" contracts.

Since the Section's April 1994 comments, FASA and FARA have made certain changes to the statutory exemptions to the CBD synopsis requirements. Although supporters of those statutory changes may have intended that the changes permit removal of the CBD synopsis requirement in connection with orders against non-mandatory schedule contracts, it is not completely clear that the actual wording of the statutes supports such a regulatory change.

Generally, the affirmative obligation to synopsize all orders in excess of $25,000 placed against basic ordering agreements or similar arrangements still remains in place. Nevertheless, among other things, Congress added two exemptions that are relevant to orders placed against non-mandatory schedule contracts: (1) an exemption for orders under the $100,000 simplified acquisition threshold that are placed through a system with interim FACNET capability (the $100,000 can be increased to $250,000 for orders placed through systems with full FACNET capability when Government-wide FACNET capability has been achieved); and (2) an exemption for orders placed against "task order" and "delivery order" contracts. See 41 U.S.C. 416(c)(1); 15 U.S.C. 637(c)(1); 41 U.S.C. 253j(a); 10 U.S.C. 2304c(a). The new FACNET exemption may apply to exempt orders under $100,000 (and later up to $250,000 after Government-wide FACNET capability is achieved) that are placed against non-mandatory schedule contracts through GSA's Advantage! system. The new statutory exemption for task and delivery order contracts may also apply to exempt all other orders placed against non-mandatory schedule contracts if certain changes are made in GSA's proposed regulations.

The statutes governing task order and delivery order contracts require that the solicitations for such contracts include, among other things, "the maximum quantity or dollar value of the services or property to be procured under the contract." 41 U.S.C. 253h(b)(2); 10 U.S.C. 2304a(b)(2). The statutory definition of task order and delivery order contracts reflects this requirement for specifying a maximum quantity or dollar value to be procured. 41 U.S.C. 253k; 10 U.S.C. 2304d.

GSA's solicitations for non-mandatory schedule contracts currently do not specify any maximum quantity or dollar value to be procured. GSA's solicitations for non-mandatory schedule contracts merely state estimated sales. The solicitations contain no maximum limitation whatsoever on the quantity or dollar value that may be procured under the resulting schedule contracts. Moreover, the solicitations do not limit in any way (i) the number of schedule contracts that may be awarded under the solicitations or (ii) the total quantity or dollar volume of goods or services that may be procured under the resulting contracts.

As a result, GSA's proposed regulations may be susceptible to legal challenges to the extent that they do not comply with the statutory requirements to synopsize orders in the CBD and to permit all responsible sources, including non-schedule vendors, to compete for those orders. Nevertheless, the proposed regulations are consistent with other provisions of the FAR, including FAR 5.202(a)(6), which provides a regulatory exemption to the CBD synopsis requirement for orders placed against indefinite-delivery indefinite-quantity contracts, and FAR 5.202(a)(11), which provides for a regulatory exemption for contract actions made under the terms of an existing contract that was previously synopsized in sufficient detail with respect to the current order.

If GSA desires to go forward with its proposed regulations absent further authorizing legislation, GSA should revise the regulations to require that its solicitations for non-mandatory schedule contracts state an overall maximum quantity or dollar value to be procured under such solicitations and require that such
overall maximums be reflected in the resulting non-mandatory schedule contracts. The maximum quantity or dollar value could be stated as an annual maximum or a maximum for the total period of the resulting contracts. With these changes, non-mandatory schedule contracts would fit squarely within the new statutory exemption from the CBD synopsis requirements provided in FASA and FARA for task and delivery order contracts.

**B. Orders in Excess of the Maximum Order Thresholds**

The proposed provision at FAR ◆ 8.404(b)(3) provides that each schedule contract will have an established "maximum order threshold" and that orders in excess of such "thresholds" may be placed against schedule contracts under certain conditions. No maximum ceiling or other limitation is included on how far the threshold can be exceeded. Contracting officers are permitted to place orders in any amount in excess of these maximum order "thresholds" and, before placing such orders, are required only to:

(i) review the catalogs, including price lists, of additional schedule contractors, if appropriate, considering the dollar value of the proposed order; and

(ii) seek a further reduction in price and/or more favorable delivery terms before selecting the contractor to receive the order.

The Section generally supports these provisions in that they make it easier for ordering agencies to acquire commercial items.

However, in addition to the concerns expressed above regarding the CBD statutory requirements, this proposed provision may also be viewed as in conflict with the full and open competition requirements of the Competition in Contracting Act ("CICA") which are applicable to the MAS Program. None of the statutory changes in FASA or FARA have altered CICA's competition requirements regarding the MAS Program. CICA still requires that participation in the MAS Program be open to all responsible sources and that orders and contracts result in the lowest overall cost to meet the needs of the Government.

An ordering scheme somewhat similar to that included in GSA's proposed regulations was previously used by GSA in its schedule solicitations and was struck down by GAO in its bid protest decision in Komatsu Dresser Co., B-246121, Feb. 19, 1992, 92-1 CPD ◆ 202. In Komatsu Dresser, GAO ruled that the then-existing "requote" procedure provided for in schedule solicitations and contracts violated CICA's competition requirements applicable to the MAS Program. The requote procedures provided for limited competition exclusively among schedule vendors for orders in excess of the then-existing maximum order limitations (as opposed to the "thresholds" currently proposed). GAO ruled that these requote procedures violated both of the two statutory competitive conditions applicable to the MAS Program. GAO held that competition among all responsible sources for the orders in excess of the maximum order limitations was precluded since non-schedule vendors, such as Komatsu Dresser, were precluded from competing. GAO also held that orders under such requote procedures would not necessarily result in the lowest overall cost to the government; only perhaps the lowest cost available from schedule vendors. Komatsu Dresser, 92-1 CPD ◆ 202 at 5.

The proposed provisions at FAR ◆ 8.404(b)(3) may suffer from some of the same problems as the former requote procedures that were struck down by GAO in Komatsu Dresser. Under these new provisions, a contracting officer is not required to seek competition among schedule vendors. Instead, the contracting officer need only review the price catalogs of "additional" schedule contractors and seek a price reduction or more favorable delivery terms before selecting the schedule vendor to receive the order. In addition, as discussed below, the proposed provisions instruct the ordering officer in making the award selection to use "best value" criteria that do not specifically mention price or cost as a material factor.

The use of maximum order "thresholds" in the proposed provisions instead of the maximum order limitations used in the requote procedures may not be a sufficient distinction to support a different result than that reached by GAO in Komatsu Dresser. In Komatsu Dresser, GAO stated that a schedule solicitation represented a competition for quantities up to the advertised maximum order limitation, not quantities in
excess of the maximum order limitation. Under the new proposed regulations, a reasonable argument could be made that schedule solicitations will now represent a competition for quantities up to and beyond the maximum order threshold. However, such schedule solicitations may not necessarily be deemed to be a competition for any and all quantities in excess of such thresholds, especially if no overall maximum quantity to be procured under the schedule solicitation is stated. These new provisions therefore, may be susceptible to challenge on the same grounds as the requote procedures addressed in Komatsu Dresser.

In order to support its proposed provisions, GSA could rely upon the new task order and delivery order statutory provisions which permit contracting officers to limit competition for orders to vendors that have been awarded such task and delivery order contracts. See 41 U.S.C. § 253j(b); 10 U.S.C. § 2304c(b). The task order and delivery order statutory provisions require only that "all contractors awarded such contracts shall be provided a fair opportunity to be considered . . . for each task or delivery order in excess of $2,500" unless certain exceptions are satisfied. 41 U.S.C. § 253j(b); 10 U.S.C. § 2304c(b).

However, as discussed above, the lack of any maximum ceiling on the quantity or dollar value of the goods and services to be procured under the non-mandatory schedule contracts precludes these contracts from falling squarely within this new statutory category. As suggested above, if GSA desires to go forward with its proposed provisions absent further legislation it should modify the provisions to require that the solicitations for non-mandatory schedule contracts state an overall maximum quantity or dollar value to be procured under such solicitations and require that such overall maximum be reflected in the resulting schedule contracts.

In this regard, the Section supports the proposed provision at FAR § 8.404(b)(4) which encourages use of blanket purchase agreements ("BPA") under schedule contracts to fill recurring requirements. While BPA's typically include an overall maximum quantity to be procured, the Section recommends revising the third sentence of this provision to include such a reference as follows: "BPAs should address the frequency of ordering and invoicing, discounts, delivery locations and times, and overall maximum quantities to be procured." (Additions in italics.)

In addition, GSA should revise its proposed regulations in order to squarely comply with the statutory requirement that all vendors of task and delivery order contracts be provided a "fair opportunity" to be considered for all orders in excess of $2,500, absent certain exceptions. As proposed in FAR § 8.404(b)(3)(i), the ordering office need only "review the catalogs, including price lists, of additional contractors, if appropriate, considering the dollar value of the proposed order" in connection with orders in excess of the maximum order threshold. The Section proposes that this provision be revised as follows:

Before placing an order, ordering offices should consider reasonably available information about products offered under Multiple Award Schedule (MAS) contracts by using the "GSA Advantage!" on-line shopping service, or if an automated information system is not available, by reviewing the catalog, including price lists, of at least 3 schedule contractors.

This is the same language that GSA proposes at FAR § 8.404(b)(2) for use in connection with orders below the maximum order threshold but above the micro-purchase threshold of $2,500.

C. Best Value Selection Criteria

The proposed provision at FAR § 8.404(b)(6) states that orders exceeding the micro-purchase threshold of $2,500 "should be placed with the schedule contractor that can provide an item which represents the best value." The proposed provision goes on to instruct the ordering office to consider such characteristics as special features, trade ins, probable life, warranties, maintenance availability, past performance and environmental and energy efficiency in making its best value selection. No mention is made of price or cost as a consideration. Nor is any mention made of any Government needs as a consideration.

As indicated above, the MAS Program remains subject to a specific statutory requirement that all orders and contracts result in the lowest overall cost alternative to meet the needs of the Government. 41 U.S.C.
259(b)(3). As the Section stated in its April 1994 comments in response to similar language proposed in connection with the MAS Program, the phrase "lowest overall cost alternative means just that -- selecting the lowest cost product among competing products that meet the needs of the Government. This means that award of an order is required to be made to the schedule vendor offering the lowest cost alternative that will satisfy the Government requirements. While the statutes governing use of competitive procedures in the MAS Program require acquisition of the lowest overall cost alternative to meet the needs of the Government, this does not mean that an ordering agency is required to order from the lowest priced vendor if the agency's minimum needs reasonably require purchase of a higher-priced item. See, e.g., Dictaphone Corp., B-228366, Jan. 12, 1988, 88-1 CPD 19; Haworth, Inc., B-252826; B-252831, July 29, 1993, 93-2 CPD 61.

Accordingly, the Section recommends that the proposed provision be revised to more clearly define "best value" to mean award to the lowest overall cost alternative to meet the minimum needs of the Government. At a minimum, the Section recommends that the current language in FAR 8.404(b)(2), which refers to selecting the award that "represents the best value and meets the agency's needs at the lowest overall cost" be retained.

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

Sincerely,

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