VIA ELECTRONIC MAIL, AND FACSIMILE

Director
Regulations Management (00REG1)
Department of Veterans Affairs
810 Vermont Avenue, N.W.
Room 1068
Washington, DC 20420

Re: Veterans Affairs Acquisition Regulation; Plain Language Rewrite; 71 Fed. Reg. 2342 (January 13, 2006); Comments in Response to RIN 2900-AK78

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.

The Section is authorized to submit comments 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.1

1 This letter is available in pdf format at http://www.abanet.org/contract/Federal/regscomm/home.html under the topic “Health Care.”
I. INTRODUCTION

In the proposed rule, the Department of Veterans Affairs ("VA") proposes to revise its Acquisition Regulation “to conform to plain language principles.” 71 Fed. Reg. 2342. The proposed rule would revise multiple sections of the Veterans Affairs Acquisition Regulation (“VAAR”), which is a supplement to the Federal Acquisition Regulation (“FAR”). Because such plain language revisions should make the VAAR easier for the Government to administer and for industry to follow, the Section supports the VA’s efforts in this regard.

In a number of respects discussed below, however, the proposed rule would leave aspects of the VAAR unclear. In other respects, it appears that the VA has missed an opportunity to clarify certain provisions in the VAAR that are ambiguous and thus lack the “plain meaning” that the proposed rule seeks to implement. In the discussion that follows, we provide analysis regarding the ambiguities and offer suggested clarifications.

Finally, as discussed in Section II.D below, we note that the VA regularly includes clauses in solicitations and contracts that are not included in the VAAR. Many of these standard clauses affect substantive rights and, as such, should be subject to the same notice and comment process as the clauses addressed in the Proposed Rule.

II. COMMENTS

A. Subpart 817.1 Requires Greater Clarity

As with other provisions in the proposed rule, the VA proposes to rewrite 48 C.F.R. Part 817 – Special Contracting Methods, including Subpart 817.1 - Multi-year Contracting and Subpart 817.2 – Options to conform to plain language principles and change the delegation of authority to promote greater efficiency. These subparts in the proposed rule, however, are unclear as to their application to standard multi-year pricing provisions and option clauses included in Federal Supply Schedule (“FSS”) contracts and other contracts that include special VA clauses “AS 1508 – Option to Extend the Term of Contract” and “AS 1906 – Master Agreements and Pharmaceutical Pricing Agreements.”

Subpart 817.1 in the proposed rule provides that VA contracting officers may enter into multi-year contracts for supplies and services for a period up to five fiscal years under 38 U.S.C. § 114, which authorizes the VA to obligate the Government to perform for a term that exceeds one year but may not exceed five years. See Proposed Rule, Section 817.105-1. Neither the current VAAR nor the
proposed VAAR rule defines “multi-year contract”; nevertheless, the term is defined in FAR 17.103, which expressly distinguishes between (i) multi-year contracts, which commit the Government to buy more than one year’s requirements but no more than five years’ requirements subject to annual appropriations, and (ii) multiple year contracts, which may not commit the Government to buy more than one year’s requirements. Both the VAAR and the FAR clearly distinguish multi-year contracts subject to the five-year limit and option year contracts, which are subject to the normal one-year limit, as distinct contract types. The VAAR, however, fails to address how these principles apply when the VA contract is a five-year multi-year contract with additional option years that may extend the terms of the contract beyond the five-year term on a year-by-year basis. Specifically, the regulation should clarify that a multi-year contract with a five-year term, as authorized by 38 U.S.C. §114, is distinct from multiple options for renewal. We recommend that the VAAR explain that the options are stand-alone contracts separate from the multi-year contract, which is authorized only for a term of five fiscal years.

Clarity is especially important in this area because the Veterans Health Care Act ("VHCA"), in 38 U.S.C. § 8126(d), provides that “in case of a covered drug of a manufacturer that has entered into a multi-year contract with the Secretary [of the VA] under subsection (a)(2) for the procurement of the drug – (1) during any one-year period that follows the first year for which the contract is in effect, the contract price charged for the drug may not exceed the contract price charged during the preceding one-year period...” Because by law a multi-year contract may not exceed five years, it may only be in effect for five years. Moreover, option contracts are created by distinct offers that are not accepted until option exercise, and contractors are entitled to offer separate pricing for option year contracts, which the agency is free to accept or reject. Therefore, we recommend that VA revise the regulation to make it clear that statutory ceilings on prices charged in the out years of a multi-year contract do not apply beyond the effective date of the multi-year contract and do not apply to one-year contracts created by option exercise, which are not multi-year contracts.

We believe such language reflects Congress’s intent to limit price increases to the rate of inflation during the term of a multi-year contract to no more than five years, which has been the maximum authorized term of a multi-year contract. We do not believe Congress contemplated that the VA might extend the awarded contract price for ten years through use of multiple options, and, in the absence of clear language of congressional intent to the contrary, preventing contractors from repricing their contracts for ten years is fundamentally unfair. In this regard, it is important to note that limiting the application of the multi-year contract price provision to the four out-years of a five-year multi-year contract would not affect
the separate statutory ceiling price on procurement of pharmaceuticals required by 38 U.S.C. § 8126(a), under VA contracts, including option year contracts, which is incorporated into the VA’s contracts through “AS 1906 – Master Agreements and Pharmaceutical Pricing Agreements.” It would, however, permit contractors after five years to increase Federal Supply Schedule contract prices charged user agencies that are not entitled to the statutory price ceiling or negotiated prices below the ceiling pursuant to the Economic Price Adjustment clause in their contracts.

The recommended addition to the proposed rule would be consistent with the VA’s current practice of applying the contract price limitation required in 38 U.S.C. 1826(d) for no more than four years after the first year of the multi-year contract. Moreover, incorporating the VA’s practice of limiting the multi-year contract price ceiling into a rule, instead of advising contractors of the agency’s policy in letters accompanying solicitations (which is the current practice), would provide contractors with certainty of their obligations and in their financial planning.

Similarly, we recommend that the regulation specify language to be set forth in the contract’s standard option clause that makes application of the ceiling prices clear. At present, “AS 1508 – Option to Extend the Term of Contract” is not published in the VAAR, although its operation in conjunction with the VHCA affects substantive contractor rights. Amending the proposed rule to include the specific contract clause would put all parties on notice that the extension of contract prices under the option clause is not subject to the statutory price limitations applicable to the awarded five-year contract, thereby preventing future problems concerning application of the contract clause.

B. The Price Reduction Clause Requires Clarification In Several Respects

Pharmaceutical and Medical Device FSS Solicitations currently contain GSA FAR Supplement (“GSAR”) 552.238-75 – Price Reductions, known as the “Price Reductions Clause.” This clause establishes a framework under which FSS contract pricing effectively is “tied” to identified commercial pricing throughout the contract period so that price reductions provided to the commercial customer result in equivalent reductions to FSS pricing. This commercial customer(s) is commonly referred to as the “tracking customer.” The stated purpose of this relationship is to permit the Government to obtain the benefit of commercial price reductions during the course of the contract, which can last for 10 years or sometimes even longer.
As currently drafted, the Price Reductions Clause requires clarification as to the following:

(1) the identity of the tracking customer and whether it is required to be the most favored customer ("MFC");

(2) the circumstances under which the clause will be considered to be "triggered" such that commercial pricing must be reported to the VA and an FSS price adjustment will be necessary; and

(3) exactly when the FSS price reduction is required to take effect, assuming the clause has been triggered.

We further note that special issues arise in the context of application of the clause to innovator pharmaceuticals placed on FSS contracts at Federal Ceiling Prices, as required under the VHCA, 38 U.S.C. § 8126. We discuss these concerns in turn below.

1. According to the current version of the Price Reductions Clause, the offeror and the contracting officer are to agree during negotiations upon the "customer (or category of customers) which will be the basis of award ...." The VA generally has interpreted this to mean that a customer or class of customers is identified as the "tracking customer" that is monitored throughout the contract period. There has been some misunderstanding regarding whether this tracking customer is required to be the most favored customer (or "MFC") for a particular product or group of products. We understand that the identity of the tracking customer is subject to negotiation and that it does not necessarily have to be the MFC. Nonetheless, there has been considerable misunderstanding on this issue both in the Government and industry. Additional text in the clause could clarify this matter.

We suggest revising section (a) of the Price Reductions Clause by adding the language in bold typeface, as follows:

(a) Before award of a contract, the Contracting Officer and the Offeror will agree upon (1) the customer (or category of customers) which will be the basis of award, and (2) the Government’s price or discount relationship to the identified customer (or category of customers). Note that this customer or category of customer may be, but is not required to be, the most favored customer (MFC) for the
particular product, and if the basis of award customer is not the MFC, the contracting officer shall not use the MFC prices disclosed in the contractor's Commercial Sales Practices to establish the discount relationship. The discount relationship shall be maintained throughout the contract period. Any change in the Contractor’s commercial pricing or discount arrangement applicable to the identified customer (or category of customers) which disturbs this relationship shall constitute a price reduction.

2. The section of the Price Reductions Clause that discusses the circumstances under which the clause is to be triggered – i.e., such that commercial pricing must be reported to the VA and an FSS price adjustment effected – also requires clarification. The clause currently provides:

(c)
(1) A price reduction shall apply to purchases under this contract if, after the date negotiations conclude, the Contractor—
(i) Revises the commercial catalog, pricelist, schedule or other document upon which contract award was predicated to reduce prices;
(ii) Grants more favorable discounts or terms and conditions than those contained in the commercial catalog, pricelist, schedule or other documents upon which contract award was predicated; or
(iii) Grants special discounts to the customer (or category of customers) that formed the basis of award, and the change disturbs the price/discount relationship of the Government to the customer (or category of customers) that was the basis of award.

As referenced above, the purpose of the Price Reductions Clause is to establish a relationship between commercial tracking customer(s) pricing and FSS pricing. The language in (c)(1)(i), however, references the “commercial catalog, pricelist, schedule or other document upon which contract award was predicated,” and not the pricing to the “customer” or “category of customer” (i.e., the tracking customer). In our view, the text in these two subpoints is confusing because it can be read to suggest that two tracking relationships are to be monitored: one with the tracking customer (discussed in (iii)), and yet another with a separate commercial
catalog or pricelist whose revision may have no effect on contracted pricing to the tracking customer.

We believe the intent of sections (i), (ii), and (iii) is to provide that any affirmative step by the contractor that results in reduced pricing to the tracking customer(s) – whether it be a revision to a catalog or schedule that sets the tracking customer’s(s) pricing, “more favorable discounts or terms and conditions” in a contract, or “special discounts” is considered to “trigger” the clause. The reduction of prices set forth in a standard commercial catalog that has no effect on pricing to the tracking customer would not, however, trigger the clause. We therefore suggest that section (c) of the clause be clarified to indicate that only price reductions provided to the tracking customer will be considered to trigger the clause.

Moreover, the text should take into account that there are situations where the offering of special terms and conditions and/or reduced pricing to the tracking customer should not result in a price reduction on the FSS. Some examples of such situations – that the clause should reference as being excluded from the circumstances that would trigger a price reduction – include those where the tracking customer is offered reduced pricing in return for new and different consideration not included in the terms of the FSS contract, such as exclusivity, market share, purchase volume commitment, or formulary placement. The clause also should distinguish between upfront or “off-invoice” pricing and performance-based pricing that is offered through “back-end” rebates. It should then clarify when the clause would be triggered (i.e., at the time the rebate arrangement is entered or when a rebate is earned) where such rebate arrangements are entered into with a tracking customer. In addition, the clause should make clear that product price reductions that result from services provided by the customer also should not result in a price reduction.

Further, section (a) of the Price Reductions Clause provides:

Any change in the Contractor’s commercial pricing or discount arrangement applicable to the identified customer (or category of customers) which disturbs this relationship shall constitute a price reduction.

This language does not sufficiently make clear that the only “disturbance” in the relationship that would require an FSS price reduction would be one that lowers tracking customer pricing below the tracking customer price upon which the ratio is premised. We recommend that it be revised to provide: “A reduction in the commercial pricing or increase in the discount provided to the identified customer (or category of customer) that causes that customer’s (or category of customer’s)
price to fall below the price on which the Price Reductions Clause tracking relationship was premised shall constitute a price reduction to that customer.” The following example illustrates how the clause would apply. Assume that the tracking relationship is premised on a tracking customer price of $100. The tracking customer price is then increased to $110. Later, there is a price decrease and the tracking customer price drops to $108. Because $108 is higher than the $100 upon which the relationship was based, the reduction from $110 to $108 does not constitute a price reduction for purposes of the Price Reductions Clause. A price reduction exists only when the tracking customer price drops below the initial tracking customer price of $100.

3. The Price Reductions Clause requires clarification as to exactly when the FSS price reduction is required to take effect, assuming the clause has been triggered. As currently written, the clause provides:

(2) The Contractor shall offer the price reduction to the Government with the same effective date, and for the same time period, as extended to the commercial customer (or category of customers).

The Price Reductions Clause, however, only requires the contractor to notify the Contracting Officer of a tracking customer price reduction within 15 days of its effective date. Thereafter, it often takes weeks or months before the FSS contract is formally modified by the contracting officer to reflect the price reduction. Accordingly, it is not feasible or realistic to require the contractor to make a revised price available to the Government with the “same effective date” as for the tracking customer. We therefore suggest that the following text be deleted: “with the same effective date, and.” This would result in the new government price being applicable only upon modification of the contract.

Furthermore, we recommend that VA clarify that the term “grants” in (c)(1)(ii) and (c)(1)(iii) refers to a sale rather than an offer for sale, i.e., the clause is triggered only by a sale to a tracking customer rather than an offer of a sale to a tracking customer.

Finally, as currently drafted, the Price Reductions Clause does not address the special application of the clause to pharmaceutical products placed on FSS contracts at Federal Ceiling Prices. Because contractors need to be able to rely on consistent application of the clause, we suggest that it be revised to include the informal guidance regarding this circumstance issued by the VA on May 1, 1997 (enclosed herewith).
C. The Price Adjustment Clause Is Unclear

Pharmaceutical and Medical Device FSS Solicitations currently contain GSAR 552.215-72 (variation), in essence, to provide the VA with a remedy for defective pricing (or, more precisely, for failure to disclose current, accurate, and complete information requested by the Solicitation or other Government representatives). We urge the VA to seek further variation from the GSA clause (beyond the 60-day period specified in subparagraph (b)) to clarify the ambiguity that exists in the current clause between paragraphs (a)(2), (a)(3) and (b) with regard to the cut-off date for commercial pricing information to be updated. This issue is critical because it directly affects a contractor’s obligation to submit updated commercial sales practices information throughout the contract negotiation and final proposal revision process that serve as the basis for enforcement actions by the VA Office of Inspector General and the Department of Justice.

It is clear from GSAR 552.215-72 (a)(2) and (b) that commercial sales practice (“CSP”) information is considered current, accurate and complete if it is current, accurate and complete as of 60 calendar days prior to a contractor’s submission. From this, a contractor should understand that the CSP data submitted to support final negotiations, as well as its Final Proposal Revision (“FPR”) is sufficiently current, if it was current, accurate, and complete within 60 days of those events. Paragraph (a)(3), however, introduces uncertainty with regard to what information a contractor must update and when. It is not clear whether only commercial pricelist(s), discounts, or discounting policies must be updated, or whether any and all information submitted as part of the CSP, such as price concessions or other similar transactional pricing data requested during the course of a pre-award audit, must be updated as well.

Even less clear is the frequency with which offerors are expected to submit updated CSP data to be in compliance with their obligations under this clause. Accordingly, we recommend that the VA confirm offerors’ obligations and we suggest that in doing so, the VA consider the time required to collect, validate, and submit updated CSP data. Specifically, we propose that the VA make the following changes to GSAR 552.215-72:

1. Revise (a)(2) to state: “Submit current, accurate and complete information, including commercial sales practices information.”
2. Delete (a)(3)
3. Amend (b) to state (changes in bold typeface):

   Except as otherwise provided, the Government will consider information submitted, including
commercial sales practices information, to be current, accurate, and complete if the data is current, accurate and complete as of 60 calendar days prior to the date it is submitted. To be current, accurate, and complete, commercial sales practices information submitted in support of the offeror’s Final Proposal Revision must be current, accurate and complete as of 15 calendar days prior to the date of submission of the offeror’s Final Proposal Revision.

Finally, we recommend that VA make clear that CSP data need not be updated to include pricing data that was not required by the CSPs, such as pricing to a customer who receives higher prices than the Government even if that customer is the tracking customer.

D. Many Critical Clauses Included In VA Solicitations Are Not In The Acquisition Regulation

While the VA is in the process of revising its procurement regulations, we suggest that the agency take the opportunity, as a general matter, to consider whether certain solicitation clauses that affect substantive rights should be subject to publication in the Federal Register and incorporation into the VAAR. Where solicitation clauses have an impact on substantive rights and responsibilities, the VA should publish those clauses for public comment and incorporate them into the VAAR, in accordance with applicable statutes and procurement regulations. Although the Administrative Procedures Act ("APA") explicitly exempts the FAR and agency acquisition supplements from its rulemaking requirements, there are at least two statutes that require publication of certain procurement policies, procedures, and guidance: (1) the Office of Federal Procurement Policy Act ("OFPPA"), 41 U.S.C. § 418b; and (2) the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. In addition, the FAR expresses a clear policy that agency-specific acquisition regulations be codified in the appropriate FAR supplement following the required publication in the Federal Register.

The OFPPA requires that, for certain types of procurement rules, the promulgating agency give the public notice of the rule and an opportunity to provide comment. Specifically, the OFPPA publication for public comment requirements apply to any "procurement policy, regulation, procedure, or form," that has: "(1) a significant effect beyond the internal operating procedures of the agency issuing the procurement policy, regulation, procedure or form, or (2) a significant cost or administrative impact on contractors or offerors." 41 U.S.C. §
418b(a). For applicable policies, regulations, procedures, and forms, the agency must publish the rule in the Federal Register for public comment at least 60 days before the rule is to take effect. *Id.* The agency must also provide at least a 30-day period for “receiving and considering the views of all interested parties.” 41 U.S.C. § 418b(b).

Although the OFPPA does not require the same level of procedural formalities as the APA, it applies broadly to all rules that either affect matters beyond internal agency procedures or impose significant costs or administrative burdens on contractors. Although the precise nature of the OFPPA’s applicability has not been defined through case law, recent U.S. Court of Federal Claims cases have made clear that the failure of an agency to follow the publication requirements of 41 U.S.C. § 418b may be grounds to invalidate an agency policy. In three separate cases, the Court of Federal Claims has held certain Defense Energy Support Center (“DESC”) class deviations to be invalid because of the agency’s failure to publish the deviations for public comment, as required by the OFPPA, 41 U.S.C. § 418b(a). *La Gloria Oil & Gas Co. v. United States*, 56 Fed. Cl. 211 (2003); *Navajo Refining Co. v. United States*, 58 Fed. Cl. 200 (2003); *Tesoro Hawaii Corp. v. United States*, 58 Fed. Cl. 65 (2003), rev’d on other grounds in *Tesoro Hawaii Corp. v. United States*, 405 F.3d 1339 (Fed. Cir. 2005). In each of these cases, the Court of Federal Claims reasoned that, although class deviations are not specifically identified by the OFPPA as requiring publication, such agency rules fit within the requirements for changes to “procurement policy, regulation, procedure, or form” contained in 41 U.S.C. § 418b. Because the DESC failed to publish notice of the class deviations in the Federal Register, the Court of Federal Claims invalidated the deviations for the years in question.

In addition to the publication requirements found in the OFPPA, FOIA may impose requirements regarding the publication of agency procurement regulations. FOIA requires that the following categories of agency rules be published in the Federal Register, “for the guidance of the public”:

...  

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability and adopted by the agency; and
(E) each amendment, revision, or repeal of the foregoing.

5 U.S.C. §§ 552(a)(1)(C) – 552(a)(1)(E). Although FOIA does not impose OFPPA’s requirement that agency rules be published for public comment, it nonetheless requires that agencies provide information to the public through publication.

In addition to those publication requirements imposed by statute, the FAR expresses a clear policy that agency acquisition regulations should be published in the Federal Register and codified in the Code of Federal Regulations. Specifically, the FAR states:

Agency heads shall establish procedures to ensure that agency acquisition regulations are published for comment in the Federal Register in conformance with the procedures in subpart 1.5 and as required by section 22 of the Office of Federal Procurement Policy Act, as amended (41 U.S.C. 418b), and other applicable statutes, when they have a significant effect beyond the internal operating procedures of the agency or have a significant cost or administrative impact on contractors or offerors. However, publication is not required for issuances that merely implement or supplement higher level issuances that have previously undergone the public comment process, unless such implementation or supplementation results in an additional significant cost or administrative impact on contractors or offerors or effect beyond the internal operating procedures of the issuing organization.

FAR 1.301. Therefore, the FAR distinguishes between those clauses that affect interests beyond internal agency operating procedures and those that merely relate to those internal matters. The FAR further provides:

Agency-wide acquisition regulations shall be published in the Federal Register as required by law, shall be codified under an assigned chapter in Title 48, Code of Federal Regulations, and shall parallel the FAR in format, arrangement, and numbering system (but see 1.104–1(c)). Coverage in an agency acquisition regulation that implements a specific part, subpart, section, or subsection of the FAR shall be numbered and titled to correspond to the appropriate FAR number and title. Supplementary material for which there is no counterpart in the FAR shall be codified using chapter, part, subpart, section, or subsection numbers of 70 and up (e.g., for the
Department of Interior, whose assigned chapter number in Title 48 is 14, part 1470, subpart 1401.70, section 1401.370, or subsection 1401.301-70.)

48 C.F.R. § 1.303. The FAR therefore dictates that those regulations required to be published in the Federal Register, i.e., those having external effects, should also be codified in the appropriate agency FAR supplement.

In light of the requirements discussed above, several clauses that are used in VA solicitations but are not in the VAAR should be published for public comment in the Federal Register and incorporated into the VAAR Solicitation Provisions and Contract Clauses at 48 C.F.R. Part 852. For example, Clause AS 13, Examination of Records by VA (Multiple Award Schedule) (Feb. 1998), provides the Secretary with an expansive auditing right and imposes substantial recordkeeping requirements on contractors. In addition, Clause AS 13 references 48 C.F.R. 552.215-72, Price Adjustment – Failure to Provide Accurate Information (Aug. 1997), a clause that provides for a price reduction where the contractor has failed to submit accurate information. Because the Examination of Records Clause imposes obvious administrative burdens on a contractor and provides the potential for economic deprivation, it: (1) has a “significant effect beyond the internal operating procedures of the agency” and causes a “significant cost or administrative impact” under the OFPPA rules for publication in the Federal Register; (2) is a substantive rule or policy of generally applicability under FOIA, 5 U.S.C. § 552(a)(1)(D); and (3) has “a significant effect beyond the internal operating procedures of the agency” under the FAR. Accordingly, the Examination of Records Clause should be published in the Federal Register for public comment and adopted as part of the VAAR.

A second example of a clause with a significant effect that has not been published in the Federal Register or incorporated as part of the VAAR is G-FSS-906, Vendor Managed Inventory (“VMI”) Program (MAS) (Jan. 1999). The VMI Clause provides a substantive right for contractors that provide a “VMI-type system” commercially to do so under a Blanket Purchase Agreement. As noted with respect to the Examination of Records Clause, the VMI Clause clearly affects matters beyond the internal operating procedure of the VA and has significant substantive effects on the rights of contractors and offerors. As such, the VMI program clause should be published for public comment and codified as part of the VAAR.

These examples illustrate that certain VA regulations and policies currently contained in solicitation clauses that are not part of the VAAR, should be published for public comment and incorporated into the VAAR. The OFPPA, FOIA, and
FAR requirements regarding publication and codification of substantive agency procurement regulations are designed to promote public and industry participation, transparency, and convenient access to important contracting information. We suggest that, as part of its effort to revise the VAAR, the VA should identify those clauses with publication for comment and codification requirements under the OFPPA, FOIA, and the FAR and take appropriate action in accordance with those requirements. In that regard, we suggest that in addition to the examples discussed above, other clauses that should be subject to notice and comment are: Default; Performance Reporting; Interpretation of Contract Requirements; Expressed Warranty; Guaranteed Minimum; Economic Price Adjustment; Price Lists; and Contract Sales Criteria.

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,

Robert L. Schaefer
Chair

Enclosure

cc: Michael A. Hordell
    Patricia A. Meagher
    Michael W. Mutek
    Carol N. Park-Conroy
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    Co-Chairs and Vice Chairs of the
    Health Care Contracting Committee
    David Kasanow
INTERACTIONS OF PRICE REDUCTION CLAUSE WITH FEDERAL CEILING PRICES (FCPs)

I. **Price Reduction Clause for Dual Pricing Companies**

You have elected dual pricing, thus creating two lists of contract prices for all authorized FSS users. One list will be applicable to all VA, DoD, PHS (including IHS), and Coast Guard facilities; the other will be applicable for all other government agencies (OGAs). The list of negotiated FSS contract prices for non-VA/DoD/PHS/IHS/Coast Guard authorized users (OGAs) is fully subject to the Price Reduction Clause’s comparable tracking customer-mechanism beginning on the date of award. The other pricelist, the list of VA/DoD/PHS/IHS/Coast Guard prices that are based upon reported Federal Ceiling Prices (FCPs), will not be subject to the tracking mechanism (except for prices on it that are currently below FCP). If the discounts to the tracking customer ever increase to a point that they result in FSS OGA net prices below the then current FCPs, the Price Reduction Clause will be activated on the VA/DoD/PHS/IHS/Coast Guard pricelist, and a one-to-one ratio will take effect whereby, VA/DoD/PHS/IHS/Coast Guard customers are entitled to discount equal to OGA and tracking customer discounts.

II. **Price Reduction Clause for Single Pricing Companies**

You have elected single pricing, thus creating one list of contract prices to all authorized FSS users based upon (where applicable) your reported Federal Ceiling Prices (FCPs). The ramifications of this choice are as follows: covered drugs whose FSS prices are determined solely by negotiation (because their MFC prices are lower than FCPs) are fully subject to the Price Reduction Clause’s comparable customer tracking mechanism, beginning on the date of the award.

Covered items whose FSS selling prices are their FCPs will not be subject to the tracking mechanism initially. However, if a vendor’s discounts to the category of comparability ever increase to a point that the result in net prices below the then current statutorily imposed FCPs, the Price Reduction Clause will be activated and a one-to-one ratio will take effect. whereby FSS customers are entitled to discounts equal to the category of comparability discounts. In the event that you choose to elect dual pricing during a future FCP annual reporting month (November), negotiations shall be reopened to establish separate FSS prices for non-VA/DoD/PHS/IHS/Coast Guard authorized FSS users (OGAs). These negotiated FSS contract prices will be fully subject to the Price Reduction Clause's comparable customer discount tracking mechanism.
III. **Temporary Price Reductions & Federal Ceiling Prices (FCPs)**

The following is VA's policy regarding temporary FSS price reductions (TPRs) and calculation of Federal Ceiling Prices (FCPs):

During a second or subsequent year of a multiyear FSS contract, the dual FCP calculation that begins with the contract price in effect on September 30th to obtain a FSS max. should not utilize a properly requested and approved TPR price in effect on that date. Those most recent MFC (most favored customer) negotiated contract price or stipulated annual, single price is the correct place to begin the calculation.