

**GENERAL SERVICES
ADMINISTRATION**

48 CFR Parts 504, 507, 510, 511, 512, 514, 515, 538, 539, 543, 546, 552, and 570

[APD 2800.12A, CHGE 76]

RIN 3090-AF86

**General Services Administration
Acquisition Regulation; Acquisition of
Commercial Items**

AGENCY: Office of Acquisition Policy, GSA.

ACTION: Interim rule adopted as final with changes.

SUMMARY: On February 16, 1996, GSA published an interim rule revising the General Services Administration Acquisition Regulation (GSAR) to implement Items I and III of Federal Acquisition Circular 90-32 which amended the Federal Acquisition Regulation (FAR) to implement the portions of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355) dealing with the Truth in Negotiations Act and with the acquisition of commercial items (61 FR 6164 and corrections published at 61 FR 10846 and 61 FR 14032). The interim rule revised the GSAR to conform to the FAR as revised by FAC 90-32 and to implement portions of the FAR where necessary to provide agency procedures. The interim rule also canceled the Multiple Award Schedule (MAS) Policy Statement of October 1, 1982 (47 FR 50242, November 5, 1982). This final rule modifies certain portions of the interim rule and adopts the balance of rule as final.

DATES: *Effective Date:* August 21, 1997. *Applicability Date:* For solicitations issued on or after August 21, 1997, use of the new policies, provisions and clauses is optional for solicitations issued before December 19, 1997, and mandatory for solicitations issued on or after December 19, 1997. (See **SUPPLEMENTARY INFORMATION** for further guidance.)

FOR FURTHER INFORMATION CONTACT: Al Matera, Office of Acquisition Policy, (202) 501-1224.

SUPPLEMENTARY INFORMATION: All new solicitations for commercial items and open season solicitations issued under the multiple award schedule program after August 21, 1997 may use the policies, provisions and clauses in this final rule on an optional basis and solicitations issued on or after December 19, 1997 shall conform to this final rule. To the maximum extent practical,

solicitations for commercial items and open season solicitations, that have been issued but where no contract has been awarded shall be amended to conform to this final rule. However, offerors shall not be required to resubmit information on commercial sales practices and any requests for additional information shall be limited to the minimum needed. Existing MAS contracts that will expire more than three (3) years after the effective date of this rule shall be modified to conform to the requirements of this final rule.

A. Background

Recently, GSA has made a number of changes in the MAS program. This final rule represents a continuation of GSA's efforts to reinvent the MAS program in order to move the program to a future environment of greater use of commercial practices, increased competition, and greater responsibility for making smart buying decisions within the framework of the MAS program by contracting personnel at the front-line closest to the need. In moving toward this new environment, GSA is continuing to promote policies regarding the solicitation, award, and administration of MAS contracts that will allow GSA to continue to use the collective leverage of the Federal Government to set up MAS contracts, that will be easy for our customers to use and that will provide a wide variety of quality supplies and services at competitive prices.

GSA initiated this rule in order to simplify and streamline the process for awarding and administering MAS contracts and to bring GSA's policies and procedures for the MAS program in line with the Federal Acquisition Regulation (FAR) as amended to implement the Federal Acquisition Streamlining Act of 1994 and the Clinger-Cohen Act of 1996.

This final rule makes changes in the program by:

(1) Reducing the information/data required of offerors seeking to obtain MAS contracts and focusing whenever possible on the offeror's written pricing policies, or standard commercial sales practices if the offeror has no written policies, instead of on transactional sales data.

(2) Emphasizing the use of pre-award audits of information submitted in support of price negotiations and expressly limiting the contractual right to conduct post-award audits of proposal information.

(3) Eliminating requirements for offerors to certify sales data as current, accurate and complete while putting

offerors on notice of the Government's expectations for data submissions.

(4) Maintaining the Government's ability to make price adjustments so that, in the event the Government learns that inaccurate, not current or incomplete information was submitted, the Government will have a contractual remedy to recover any overcharges.

(5) Maintaining a post-award audit provision for monitoring compliance with specific contract provisions such as the Price Reduction clause, the Industrial Funding Fee clause and for overbillings.

GSA's Office of Acquisition Policy will continue to work with procurement officials in GSA's Federal Supply Service and the Department of Veterans Affairs (VA) and the Inspectors General of GSA and VA to ensure that contracting personnel and contract auditors fully understand the new rules, work together to protect the Government's interests, and put the new policies into effective operation.

Contractors and prospective contractors have long expressed their view that their participation in the Multiple Award Schedule (MAS) Program is hampered by rules they believe are unduly burdensome and difficult to implement. GSA believes that by making the changes embodied in this final rule it has removed many of the barriers to participation or full participation by both large and small business concerns, including small disadvantaged and women-owned small business concerns. By employing procedures that are more consistent with commercial practice, GSA expects to increase competition and thereby provide a wider range of choices at competitive prices to customer agencies.

On February 16, 1996, GSA published an interim rule revising the GSAR to implement Items I and III of Federal Acquisition Circular 90-32 which amended the FAR to implement the portions of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355) dealing with the Truth in Negotiations Act and with the acquisition of commercial items (61 FR 6164). The interim rule revised the GSAR to conform to the FAR as revised by FAC 90-32 and to implement portions of the FAR where necessary to provide agency procedures. The interim rule also canceled the Multiple Award Schedule (MAS) Policy Statement of October 1, 1982 (47 FR 50242, November 5, 1982).

On September 4, 1996, a notice was published in the **Federal Register** to familiarize the public with the status of finalizing the interim rule. The notice also extended the period for public

comment and provided notification of a public meeting to be held September 19, 1996. GSA provided the public commentors with the proposed final rule, a line-in-line out of the interim rule to illustrate the specific changes reflected in the final rule, the reconciliation of public comments, and an option paper that discussed the options being considered on the issue of post-award audit rights relating to information other than cost and pricing data submitted in connection with the contract or modification. GSA made revisions to the interim rule to address public comments and to take into account the enactment of the Federal Acquisition Reform Act of 1996 (renamed the Clinger-Cohen Act). Others in the public who did not comment during the public comment period were invited to request a copy of the information.

Comments on the interim rule were received from the American Bar Association (ABA), AT&T, Canon U.S.A., Inc., the Coalition for Government Procurement (CGP), the Council of Defense and Space Industry Associations (CODSIA), the Department of Justice (DOJ), the Department of Veterans Affairs (VA), the Federal Bar Association (FBA), Federal Schedules Incorporated, Hewlett Packard (HP), the Information Technology Association of America (ITAA), the Information Technology Industry Council (ITI), the Office of Inspector General for GSA, the Square D Company, and the Xerox Corp.

The major issues raised and GSA's resolution of those issues are outlined below.

Most Favored Customer Pricing Goal

Several commentors suggested that the negotiation objective of "most favored customer" should be eliminated in favor of a goal of "fair and reasonable" prices. The commentors indicated that GSA's pricing policy is inconsistent with the FAR and the goals of Congress and the Administration. They also assert that the most favored customer discount objective is inconsistent with FASA which defined fair and reasonable pricing as the objective for the Federal Government. Commentors argue that a fair and reasonable price does not have to be an offeror's most favored price and GSA's insistence on this policy runs counter to numerous actions that have been taken by Congress and the Administration. Industry commentors indicate that such a policy is not appropriate for an agency which has a history of pursuing civil fraud settlements and judgments. They suggest that as long as this policy remains, commercial companies must

make a significant investment in risk aversion infrastructure.

The final rule provides for GSA to continue to seek to obtain the offeror's best price (most favored customer) based on its evaluation of discounts, terms, conditions, and concessions offered to commercial customers for similar purchases.

The suggestion that FASA created a new standard by referring to "fair and reasonable pricing" is not accurate. A "fair and reasonable" price has long been the goal of the Federal procurement system and has been reflected in regulations for years. The pursuit of "most favored customer" pricing as a goal is consistent with commercial practice and totally consistent with the objective of negotiating a fair and reasonable price. In fact, the GAO specifically recommended that the GSA Administrator "amend MAS policies to clearly state that the price analysis GSA does to establish the Government's MAS negotiation objective should start with the best discount given to any of the vendor's customers but that GSA must consider legitimate differences in terms and conditions identified and valued by the offeror when negotiating the Government's MAS discount." (GAO/GGD-93-123, Multiple Award Schedule Contracting, August 1993). The final rule is consistent with GAO's recommendation.

GSA agrees that to be fair and reasonable a price does not have to be the offeror's most favored price and the final rule reflects that position. The final rule expressly states that the Government recognizes that the terms and conditions of commercial sales vary and that there may be legitimate reasons why the best price is not achieved. The final rule also states that the contracting officer may award a contract containing pricing which is less favorable than the best price the offeror extends to any commercial customer making similar purchases when the contracting officer determines that the prices offered to the Government are fair and reasonable even though comparable discounts were not negotiated, and award of a contract is otherwise in the best interest of the Government.

GSA and its contracting officers have a fiduciary responsibility to the taxpayers and to customer agencies to take full advantage of the Government's leverage in the market in order to obtain the best price (most favored customer) based on an evaluation of discounts, terms, conditions and concessions offered to commercial customers for similar purchases.

Pricing Disclosure/Information Submission Requirements

Industry commentors suggested the interim rule requires disclosures of singular transactions at lower prices than those offered the Government unless they involved erratic, ad hoc discounting. Commentors also found the provisions on ad hoc discounting to be confusing and subject to a wide range of interpretations. In addition, industry commentors suggested that the requirement to distinguish ad hoc discounts would require establishment of a database.

In addition, some commentors suggested that the requirement to disclose information on discounts other than those given to commercial, large volume end user customers was inappropriate.

Some commentors suggested the statement in the instructions for the Commercial Sales Practices Format, which indicated that GSA expects information submitted to be current, accurate, and complete, is an implied or constructive (de facto) certification.

The interim rule has been revised to clarify GSA's intent to obtain information on the offeror's written pricing policies, or standard commercial sale practices if the offeror has no written policies, and a general explanation of the circumstances and frequency of deviations from those policies or standard practices. Generally, only in cases where the offeror is deviating from its policies or practices to such an extent that the policies or practices alone cannot be relied upon by the contracting officer to make a determination that the prices offered are fair and reasonable, will the contracting officer ask for transactional information. In cases where information is requested, the request will be targeted to limit the submission of sales data to that needed by the contacting officer to establish whether the price is fair and reasonable.

In the final rule, the use of the terminology "ad hoc discounting" is eliminated. If the offeror deviates from its written discount policies or standard commercial sales practices, the offeror is requested to explain the circumstances surrounding the deviations and to explain how often the deviations occur. The offeror is also asked to describe the controls employed to assure the integrity of the offeror's pricing. Generally, only in cases where the offeror is deviating from its policies or practices to such an extent that the policies or practices alone cannot be relied upon by the contracting officer to make a determination that the prices

offered are fair and reasonable, will the contracting officer ask for transactional information.

The final rule provides for GSA to continue to seek information on the customer(s) or category of customer(s) that receives the offeror's best discount as well as customers or categories of customers that receive better prices (discounts and concessions in any combination) than those offered to the Government. Contracting officers cannot negotiate the best price for MAS products and services unless they consider the discounts that MAS offerors give to their best customers. Discounts offerors give to dealers, distributors, and original equipment manufacturers (OEMs) should not be considered "off limits" simply because the Government does not perform certain functions that those types of customers perform. GSA believes that an offeror's best discount should generally be the starting point of the price analysis GSA uses to establish the Government's MAS negotiation objective. GSA, however, recognizes the need to consider legitimate differences in the terms and conditions of sale between the Government's MAS purchases and vendor's other customers.

The final rule maintains the statement regarding GSA's expectation of receiving current, accurate, and complete data. GSA does not view a statement putting offeror/contractors on notice of its expectations as a de facto certification.

Post-Award Audit Rights

Industry commentators vigorously opposed the portions of GSA's interim rule and proposed final rule made available in August 1996 which maintained authority for post-award audits of data provided in support of price negotiations prior to award or contract modification. The commentators argued that the post-award access to pre-award data presented to support price negotiations is directly in conflict with the intent of Congress as contained in the Federal Acquisition Reform Act of 1996 (FARA) (renamed the Clinger-Cohen Act of 1996). In addition, industry commentators suggested that it is not a commercial practice to allow post-award audits of information provided during negotiations concerning pricing. Contractors have also expressed the view that the MAS contracts provide a relatively low profit margin and make it difficult for contractors to justify the investment in infrastructure required.

On the other hand, the Department of Justice (DOJ), GSA and VA Inspectors General (IG's) argued for retention of the

post-award audit rights for data provided in support of price negotiations prior to award or contract modification. DOJ and the IGs believe that retention of the post-award audit is necessary to protect the Government from fraudulent and inaccurate disclosures.

Some comments also were received on the post-award compliance audit rights. The Information Technology Association of America indicated that they agree that GSA needs to have access to records to determine compliance with the administration of the contract; i.e., price reductions, billing, etc. The Coalition for Government Procurement expressed a willingness to work with GSA on ways to give GSA the ability to check for billing errors if the post-award audit rights of information submitted in support of price negotiations prior to award or contract modification were eliminated.

The final rule deletes the contract clause that automatically provides post-award audit rights for pricing information in every schedule contract. GSA expects to shift its emphasis to use of pre-award audits of information submitted in support of price negotiations. In addition to other contract pricing tools, this shift will provide the contracting officer a mechanism for verifying information submitted by offerors and will help avoid the potential problem of overpricing by revealing inaccurate, incomplete or defective data before the contract is awarded. This approach is designed to avoid problems instead of uncovering problems after contract award. Notwithstanding this shift to pre-award audits, GSA recognizes that there may be circumstances which warrant a contractual right to access in order to conduct post-award audits of information provided during negotiations. However, GSA anticipates such instances will involve a limited number of schedules. Therefore, the final rule allows the contracting officer to modify the Examination of Records by GSA (Multiple Award Schedule) clause to provide for post-award access to records to verify the pre-award/modification pricing, sales or other data submitted related to the supplies or services offered under the contract which formed the basis for award or modification was accurate, current, and complete. Such a modification can only be made after the contracting officer makes a determination that there is a likelihood of significant harm to the Government without access to verify the information and obtains the Senior Procurement Executive's approval. In

such cases, the right to access expires 2 years after the award or modification. Such determinations must be made on a schedule-by-schedule basis. This approach is expected to enhance the Government's relationship with its contractors because it more nearly approximates commercial practice.

This change reflects a policy decision to make post-award audit provisions for information submitted in support of price negotiations prior to award or modification the exception rather than the general rule. GSA believes, as a legal matter, that GSA can conduct post-award audits of information submitted in support of price negotiations prior to award or contract modification. Expressly limiting the contractual post-award audit access for information provided during negotiations concerning pricing does not impact the Inspector General's independent authority under the Inspector General Act; nor would it preclude a contractor from voluntarily providing audit access should circumstances so warrant. It also does not impact independent authority granted by virtue of other statutes, for example 38 U.S.C. 8126.

Post-award compliance audits for overbillings, billing errors, compliance with the Price Reduction clause and the Industrial Funding Fee clause are maintained for all schedule contracts in the final rule.

Price Adjustment Clause

Industry commentators suggest that GSA's inclusion of a price adjustment clause, which covers situations after award in which incomplete, not current, or inaccurate pricing information is discovered, is not consistent with the spirit and intent of the Federal Acquisition Streamlining Act and the Federal Acquisition Reform Act (renamed the Clinger-Cohen Act), and is more restrictive than similar provisions used in commercial practice.

The final rule retains the Price Adjustment clause. Even though GSA has limited post-award audits of information submitted in support of price negotiations, there are other circumstances that may result in the Government discovering that the offeror/contractor submitted inaccurate, not current or incomplete information. For example, the IG may perform an audit based on its authority under the Inspector General Act. The IG may not find fraud but may find that incomplete, not current or inaccurate information was provided GSA and that the lack of information impacted the price the contracting officer negotiated. Without a clause, GSA has no recourse other than to try and convince the contractor to

negotiate an equitable settlement. The contractor would be under no contractual or legal obligation to do so.

B. Executive Order 12866

This final rule was submitted to the Office of Management and Budget (OMB) under Executive Order 12866, Regulatory Planning and Review. This rule is not a major rule under 5 U.S.C. 804.

C. Regulatory Flexibility Act

A Final Regulatory Flexibility Analysis (FRFA) has been prepared and may be obtained from the Office of Acquisition Policy, 18th & F Streets, NW., Washington, DC 20405. A copy of the FRFA has been submitted to the Chief Counsel for Advocacy of the Small Business Administration. The analysis is summarized as follows:

This rule revises the GSAR to bring it into conformance with the Federal Acquisition Regulation (FAR) as amended by Items I and III of Federal Acquisition Circular 90-32 which implemented portions of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355) dealing with the acquisition of commercial items and the Truth in Negotiations Act. The two Final Regulatory Flexibility Analyses (one for Commercial Items, FAR Case 94-790, and the other for TINA, FAR Case 94-721) that support the FAR changes serve the same purpose for this implementation. This regulatory flexibility analysis focuses on the GSAR changes relating to the Multiple Award Schedule (MAS) Program.

MAS solicitations will require the submission of information from each offeror on its pricing and discount policies, business practices, commercial terms and conditions, and commercial pricelists. This submission is in accordance with FAR 15.804-5, which provides for submission of information other than cost or pricing data. Such information is considered to be the least burdensome for offerors, yet still provide sufficient information to determine price reasonableness.

This rule will apply to all offerors responding to MAS solicitations and to MAS contractors. Of the estimated 4,000 offers submitted annually in response to the various MAS solicitations, approximately 75 percent are received from small businesses. Thus, this rule is expected to have an impact on approximately 3,000 small businesses.

This rule will not have a significant economic impact on small businesses. As noted above, the commercial item and TINA changes merely bring the GSAR into conformance with recent FAR changes. For the MAS element, the

policies and procedures are deemed to be the least onerous and least intrusive ones for offerors and contractors, but still provide GSA with sufficient information to fully evaluate offers and determine price reasonableness.

Since the establishment of the MAS Improvement Project in 1990, GSA has considered and tested numerous alternative data submissions under the MAS Program. Of note are the pilot test solicitations conducted in accordance with the **Federal Register** notice dated February 18, 1992, two National Performance Review Reinvention Pilot test solicitations issued by GSA's Information Technology Service, and the pilot test solicitations issued pursuant to FSS Acquisition Letter FC-94-3. The conduct of those procurement actions has been fully evaluated and considered in developing this final rule. All public comments also have been considered. The policies and procedures set forth herein are deemed to be the least onerous and least intrusive ones for potential contractors, but still provide GSA with sufficient information to fully evaluate offers and determine price reasonableness.

This final rule is expected to have a beneficial impact on small entities because the rule simplifies procedures for the MAS program, reduces the amount of information provided to support price negotiations and limits post-award audits of contractors records.

D. Paperwork Reduction Act

The Paperwork Reduction Act applies to this final rule. The information collection requirements in 515.804-6 and related provisions and clauses have been approved by the Office of Management and Budget (OMB) under OMB Control Number 9000-0013. The information collection requirements in 552.212-70, Preparation of Offer (Multiple Award Schedule), represent customary commercial practice and are approved under OMB Control Number 3090-0250.

List of Subjects in 48 CFR Parts 504, 507, 510, 511, 512, 514, 515, 538, 539, 543, 546, 552, and 570

Government procurement.

Accordingly, the interim rule amending 48 CFR Parts 504, 507, 510, 511, 512, 514, 515, 538, 539, 543, 546, and 552 and 570 published at 61 FR 6164, February 16, 1996, and corrections published at 61 FR 10846 (March 15, 1996) and 61 FR 14032 (March 29, 1996) is adopted as a final rule with the following changes:

1. The authority citation for 48 CFR Parts 504, 507, 510, 511, 512, 514, 515,

538, 539, 543, 546, 552 and 570 continues to read as follows:

Authority: 40 U.S.C. 486(c).

PART 515—CONTRACTING BY NEGOTIATION

2. Section 515.106-70 is revised to read as follows:

515.106-70 Examination of records by GSA clause.

(a) The contracting officer shall insert the clause at 552.215-70, Examination of Records by GSA, in solicitations and contracts, other than multiple award schedule contracts, that

(1) Involve the use and disposition of Government-furnished property,

(2) Provide for advance payments, progress payments based on cost, or guaranteed loan,

(3) Contain a price warranty or price reduction clause,

(4) Involve income to the Government where income is based on operations that are under the control of the contractor,

(5) Include an economic price adjustment clause,

(6) Are requirements, indefinite-quantity, or letter type contracts as defined in FAR part 16,

(7) Are subject to adjustment based on a negotiated cost escalation base, or

(8) Contain the provision at FAR 52.223-4, Recovered Material Certification. The contracting officer may modify the clause to define the specific area of audit (e.g., the use or disposition of Government-furnished property, compliance with the price reduction clause). Counsel and the Assistant Inspector General—Auditing or Regional Inspector General—Auditing, as appropriate, must concur in any modifications to the clause.

(b) The contracting officer shall insert the clause at 552.215-71, Examination of Records by GSA (Multiple Award Schedule), in solicitations and multiple award schedule contracts. With the Senior Procurement Executive's approval, the contracting officer may modify the clause to also provide for post-award access to and the right to examine records to verify that the pre-award/modification pricing, sales or other data related to the supplies or services offered under the contract which formed the basis for the award/modification was accurate, current, and complete. Such a modification of the clause shall provide for the right of access to expire 2 years after award or modification. Before modifying the clause, the contracting officer shall make a determination that absent such access there is a likelihood of significant

harm to the Government and submit it to the Senior Procurement Executive for approval. Such determinations must be made on a schedule-by-schedule basis.

3. Section 515.804-6 is revised to read as follows:

515.804-6 Instructions for submission of cost or pricing data or information other than cost or pricing data.

(a) Contracting officers should use Alternate IV of the FAR provision at 52.215-41, Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data, to provide the format for submission of information other than cost or pricing data for multiple award schedule (MAS) contracts. To provide for uniformity in requests under the MAS program, contracting officers should insert the following in paragraph (b) of the provision.

(1) An offer prepared and submitted in accordance with the clause at 552.212-70, Preparation of Offer (Multiple Award Schedule);

(2) Commercial sales practices. The Offeror shall submit information in the format provided in this solicitation in accordance with the instructions at Table 515-1 of the GSA Acquisition Regulation; or submit information in the Offeror's own format.

(3) Any additional supporting information requested by the Contracting Officer. The Contracting Officer may require additional supporting information, but only to the

extent necessary to determine whether the price(s) offered is fair and reasonable.

(4) By submission of an offer in response to this solicitation, the Offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before initial award, books, records, documents, papers, and other directly pertinent records to verify the pricing, sales and other data related to the supplies or services proposed in order to determine the reasonableness of price(s). Access does not extend to Offeror's cost or profit information or other data relevant solely to the Offeror's determination of the prices to be offered in the catalog or marketplace.

(b) Contracting officers shall insert the following format for commercial sales practices in the exhibits or attachments section of the solicitation (see FAR 12.303).

COMMERCIAL SALES PRACTICES FORMAT

Name of Offeror _____ SIN(S) _____

Note: Please refer to clause 552.212-70, PREPARATION OF OFFER (MULTIPLE AWARD SCHEDULE), for additional information concerning your offer. Provide the following information for each SIN (or group of SINs or SubSIN) for which information is the same.

(1) Provide the dollar value of sales to the general public at or based on an established catalog or market price during the previous 12 month period or the offerors last fiscal year. \$ _____. State beginning and ending of the 12 month period. Beginning _____

Ending _____. In the event that a dollar value is not an appropriate measure of the sales, provide and describe your own measure of the sales of the item(s).

(2) Show your total projected annual sales to the Government under this contract for the contract term, excluding options, for each SIN offered. If you currently hold a Federal Supply Schedule contract for the SIN the total projected annual sales should be based on your most recent 12 months of sales under that contract. SIN _____ \$ _____; SIN _____ \$ _____; SIN _____ \$ _____

(3) Based on your written discounting policies (standard commercial sales practices in the event you do not have written discounting policies), are the discounts and any concessions which you offer the Government equal to or better than your best price (discount and concessions in any combination) offered to any customer acquiring the same items regardless of quantity or terms and conditions? YES ____ NO _____. (See definition of "concession" and "discount" in 552.212-70).

(4)(a) Based on your written discounting policies (standard commercial sales practices in the event you do not have written discounting policies), provide information as requested for each SIN (or group of SINs for which the information is the same) in accordance with the instructions at Table 515-1 which is provided in this solicitation for your convenience. The information should be provided in the chart below or in an equivalent format developed by the offeror. Rows should be added to accommodate as many customers as required. See definition of "concession" and "discount" in 552.212-70.

Column 1 Customer	Column 2 discount	Column 3 quantity/volume	Column 4 FOB term	Column 5 concessions

(b) Do any deviations from your written policies or standard commercial sales practices disclosed in the above chart ever result in better discounts (lower prices) or concessions than indicated? YES ____ NO _____. If YES, explain deviations in accordance with the instructions at Table 515-1 which is provided in this solicitation for your convenience.

(5) If you are a dealer/reseller without significant sales to the general public, you should provide manufacturers' information required by paragraphs (1) through (4) above for each item/SIN offered, if the manufacturer's sales under any resulting contract are expected to exceed \$500,000. You must also obtain written authorization from the manufacturer(s) for Government access, at any time before award or before

agreeing to a modification, to the manufacturer's sales records for the purpose of verifying the information submitted by the manufacturer. The information is required in order to enable the Government to make a determination that the offered price is fair and reasonable. To expedite the review and processing of offers, you should advise the manufacturer(s) of this requirement. The contracting officer may require the information be submitted on electronic media with commercially available spreadsheet(s). The information may be provided by the manufacturer directly to the Government. If the manufacturer's item(s) is being offered by multiple dealers/resellers, only one copy of the requested information should be submitted to the Government. In addition, you must submit the following

information along with a listing of contact information regarding each of the manufacturers whose products and/or services are included in the offer (include the manufacturer's name, address, the manufacturer's contact point, telephone number, and FAX number) for each model offered by SIN:

- (a) Manufacturer's Name
- (b) Manufacturer's Part Number
- (c) Dealer's/Reseller's Part Number
- (d) Product Description
- (e) Manufacturer's List Price
- (f) Dealer's/Reseller's percentage discount from List Price or net prices

(End of Format)

(c) The contracting officer should include the instructions for completing

the commercial sales practices format in Table 515-1 in solicitations issued under the multiple award schedule program.

TABLE 515-1—INSTRUCTIONS FOR COMMERCIAL SALES PRACTICES FORMAT

If you responded "YES" to question (3), on the COMMERCIAL SALES PRACTICES FORMAT, complete the chart in question (4)(a) for the customer(s) who receive your best discount. If you responded "NO" complete the chart in question (4)(a) showing your written policies or standard sales practices for all customers or customer categories to whom you sell at a price (discounts and concessions in combination) that is equal to or better than the price(s) offered to the Government under this solicitation or with which the Offeror has a current agreement to sell at a discount which equals or exceeds the discount(s) offered under this solicitation. Such agreement shall be in effect on the date the offer is submitted or contain an effective date during the proposed multiple award schedule contract period. If your offer is lower than your price to other customers or customer categories you will be aligned with the customer or category of customer that receives your best price for purposes of the Price Reduction clause at 552.238-76. The Government expects you to provide information required by the format in accordance with these instructions that is, to the best of your knowledge and belief, current, accurate, and complete as of 14 calendar days prior to its submission. You must also disclose any changes in your price list(s), discounts and/or discounting policies which occur after the offer is submitted, but before the close of negotiations. If your discount practices vary by model or product line, the discount information should be by model or product line as appropriate. You may limit the number of models or product lines reported to those which exceed 75% of actual historical Government sales (commercial sales may be substituted if Government sales are unavailable) value of the special item number (SIN).

Column 1—Identify the applicable customer or category of customer. A "customer" is any entity, except the Federal Government, which acquires supplies or services from the Offeror. The term customer includes, but is not limited to original equipment manufacturers, value added resellers, state and local governments, distributors, educational institutions (an elementary, junior high, or degree granting school which maintains a regular faculty and established curriculum and an organized body of students), dealers, national accounts, and end users. In any instance where the Offeror is asked to disclose information for a customer, the Offeror may disclose information by category of customer if the offeror's discount policies or practices are the same for all customers in the category. (Use a separate line for each customer or category of customer.)

Column 2—Identify the discount. The term "discount" is as defined in solicitation clause 552.212-70 Preparation of Offer (Multiple

Award Schedule). Indicate the best discount (based on your written discounting policies or standard commercial discounting practices if you do not have written discounting policies) at which you sell to the customer or category of customer identified in column 1, without regard to quantity; terms and conditions of the agreements under which the discounts are given; and whether the agreements are written or oral. Net prices or discounts off of other price lists should be expressed as percentage discounts from the price list which is the basis for your offer. If the discount disclosed is a combination of various discounts (prompt payment, quantity, etc.), the percentage should be broken out for each type of discount. If the price lists which are the basis of the discounts given to the customers identified in the chart are different than the price list submitted upon which your offer is based, identify the type or title and date of each price list. The contracting officer may require submission of these price lists. To expedite evaluation, offerors may provide these price lists at the time of submission.

Column 3—Identify the quantity or volume of sales. Insert the minimum quantity or sales volume which the identified customer or category of customer must either purchase/order, per order or within a specified period, to earn the discount. When purchases/orders must be placed within a specified period to earn a discount indicate the time period.

Column 4—Indicate the FOB delivery term for each identified customer. (See FAR 47.3 for an explanation of FOB delivery terms.)

Column 5—Indicate concessions regardless of quantity granted to the identified customer or category of customer. Concessions are defined in solicitation clause 552.212-70 Preparation of Offers (Multiple Award Schedule). If the space provided is inadequate, the disclosure should be made on a separate sheet by reference.

If you respond "YES" to question 4(b) in the Commercial Sales Practices Format, provide an explanation of the circumstances under which you deviate from your written policies or standard commercial sales practices disclosed in the chart on the Commercial Sales Practices Format and explain how often they occur. Your explanation should include a discussion of situations that lead to deviations from standard practice, an explanation of how often they occur, and the controls you employ to assure the integrity of your pricing. Examples of typical deviations may include, but are not limited to, one time goodwill discounts to charity organizations or to compensate an otherwise disgruntled customer; a limited sale of obsolete or damaged goods; the sale of sample goods to a new customer; or the sales of prototype goods for testing purposes.

If deviations from your written policies or standard commercial sales practices disclosed in the chart on the Commercial Sales Practices Format are so significant and/or frequent that the Contracting Officer cannot establish whether the price(s) offered is fair and reasonable, then you may be asked to provide additional information. The Contracting Officer may ask for information to demonstrate that you have made

substantial sales of the item(s) in the commercial market consistent with the information reflected on the chart on the Commercial Sales Practice Format, a description of the conditions surrounding those sales deviations, or other information that may be necessary in order for the Contracting Officer to determine whether your offered price(s) is fair and reasonable. In cases where additional information is requested, the Contracting Officer will target the request in order to limit the submission of data to that needed to establish the reasonableness of the offered price.

(d) The contracting officer shall insert the clause at 48 CFR 552.215-72, Price Adjustment—Failure to Provide Accurate Information, in solicitations and contracts to be awarded under the multiple award schedule program.

(e) The contracting officer should use Alternate IV of the FAR clause at 52.215-42, Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data—Modifications, to provide for submission of information other than cost and pricing data for MAS contracts. To provide for uniformity in requests under the MAS program, the contracting officer should insert the following in paragraph (b) of the clause.

(1) Information required by the clause at 552.243-72, Modifications (Multiple Award Schedule);

(2) Any additional supporting information requested by the Contracting Officer. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether the price(s) offered is fair and reasonable.

(3) By submitting a request for modification, the Contractor grants the Contracting Officer or an authorized representative the right to examine, at any time before agreeing to a modification, books, records, documents, papers, and other directly pertinent records to verify the pricing, sales and other data related to the supplies or services proposed in order to determine the reasonableness of price(s). Access does not extend to Contractor's cost or profit information or other data relevant solely to the Contractor's determination of the prices to be offered in the catalog or marketplace.

PART 538—FSS SCHEDULE CONTRACTING

4. Section 538.270 is revised to read as follows:

538.270 Evaluation of multiple award schedule offers.

(a) The Government will seek to obtain the offeror's best price (the best price given to the most favored customer). However, the Government recognizes that the terms and conditions of commercial sales vary and that there may be legitimate reasons why the best price is not achieved.

(b) The contracting officer will establish negotiation objectives based on a review of relevant data and determine price reasonableness.

(c) When establishing negotiation objectives and determining price reasonableness, contracting officers will compare the terms and conditions of the MAS solicitation with the terms and conditions of agreements with the offeror's commercial customers. The contracting officer will consider the following factors when determining the Government's price negotiation objectives:

- (1) Aggregate volume of anticipated purchases;
- (2) The purchase of a minimum quantity or a pattern of historic purchases;
- (3) Prices taking into consideration any combination of discounts and concessions offered to commercial customers;
- (4) Length of the contract period;
- (5) Warranties, training and/or maintenance included in the purchase price or provided at additional cost to the product prices;
- (6) Ordering and delivery practices; and
- (7) Any other relevant information including differences between the MAS solicitation and commercial terms and conditions that may warrant differentials between the offer and the best prices offered to the most favored commercial customer(s). For example, if it is more expensive for an offeror to sell to the Government than to the customer who receives the offeror's best price or if the customer (e.g., dealer, distributor, OEM, other reseller) who receives the best price performs certain value-added functions for the offeror that the Government does not perform, then some reduction in the discount given to the Government may be appropriate. In cases where the best price is not offered to the Government, the contracting officer should ask the offeror to identify and explain the reason for any differences. Offerors shall not be required to provide detailed cost breakdowns.

(c) The contracting officer may award a contract containing pricing which is less favorable than the best price the offeror extends to any commercial customer for similar purchases, when the contracting officer makes a determination that:

- (1) The prices offered to the Government are fair and reasonable even though comparable discounts were not negotiated, and
- (2) Award of a contract is otherwise in the best interest of the Government.

5. Section 538.271 is amended by revising paragraph (a) to read as follows:

538.271 MAS contract awards.

(a) MAS awards will be for commercial items as defined in FAR 2.101. Contracts will be negotiated as a discount from established catalog prices.

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PART 543—CONTRACT MODIFICATIONS

6. Section 543.205 is amended by revising paragraph (c) to read as follows:

543.205 Contract clauses.

* * * * *

(c) The contracting officer shall insert the clause at 48 CFR 552.243-72, Modifications (Multiple Award Schedule), in solicitations and multiple award schedule contracts.

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. Section 552.212-70 is revised to read as follows:

552.212-70 Preparation of Offer (Multiple Award Schedule)

As prescribed in 48 CFR 512.301(a)(1), insert the following clause:

PREPARATION OF OFFER (MULTIPLE AWARD SCHEDULE) (AUG 1997)

(a) *Definitions. Concession*, as used in this solicitation, means a benefit, enhancement or privilege (other than a discount), which either reduces the overall cost of a customer's acquisition or encourages a customer to consummate a purchase. Concessions include, but are not limited to freight allowance, extended warranty, extended price guarantees, free installation and bonus goods.

Discount, as used in this solicitation, means a reduction to catalog prices (published or unpublished). Discounts include, but are not limited to, rebates, quantity discounts, purchase option credits, and any other terms or conditions other than concessions) which reduce the amount of money a customer ultimately pays for goods or services ordered or received. Any net price lower than the list price is considered a "discount" by the percentage difference from the list price to the net price.

(b) For each Special Item Number (SIN) included in an offer, the Offeror shall provide the information outlined in paragraph (c). Offerors may provide a single response covering more than one SIN, if the information disclosed is the same for all products under each SIN. If discounts and concessions vary by model or product line, offerors shall ensure that information is clearly annotated as to item or items referenced.

(c) Provide information described below for each SIN:

(1) Two copies of the offeror's current published (dated or otherwise identified) commercial descriptive catalogs and/or price list(s) from which discounts are offered. If special catalogs or price lists are printed for the purpose of this offer, such descriptive catalogs or price lists shall include a statement indicating the special catalog or price list represent a verbatim extract from the Offeror's commercial catalog and/or price list and identify the descriptive catalog and/or price list from which the information has been extracted.

(2) Next to each offered item in the commercial catalog and/or price list, the Offeror shall write the special item number (SIN) under which the item is being offered. Unless a special catalog or price list is submitted, all other items shall be marked "excluded," lined out, and initialed by the offeror.

(3) The discount(s) offered under this solicitation. The description of discounts offered shall include all discounts, such as prompt payment discounts, quantity/dollar volume discounts (indicate whether models/products can be combined within the SIN or whether SINs can be combined to earn discounts), blanket purchase agreement discounts, or purchase option credits. If the terms of sale appearing in the commercial catalogs or price list on which an offer is based are in conflict with the terms of this solicitation, the latter shall govern.

(4) A description of concessions offered under this solicitation which are not granted to other customers. Such concessions may include, but are not limited to, an extended warranty, a return/exchange goods policy, or enhanced or additional services.

(5) If the Offeror is a dealer/reseller or the Offeror will use dealers to perform any aspect of contract awarded under this solicitation, describe the functions, if any, that the dealer/reseller will perform.

(End of Clause)

8. Section 552.212-71 is amended by revising the date of the provision and revising the title of provision number 552.215-72 in the body of the provision to read as follows:

552.212-71 Contract Terms and Conditions Applicable to GSA Acquisition of Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS APPLICABLE TO GSA ACQUISITION OF COMMERCIAL ITEMS (AUG 1997)

* * * * *

552.215-72 Price Adjustment—Failure to Provide Accurate Information

* * * * *

9. Section 552.212-73 is revised to read as follows:

552.212-73 Evaluation—Commercial Items (Multiple Award Schedule).

As prescribed in 48 CFR 512.301(a)(4), insert the following provisions:

EVALUATION—COMMERCIAL ITEMS (MULTIPLE AWARD SCHEDULE) (AUG 1997)

(a) The Government may make multiple awards for the supplies or services offered in response to this solicitation that meet the definition of a "commercial item" in FAR 52.202-1. Awards may be made to those responsible offerors that offer reasonable pricing, conforming to the solicitation, and will be most advantageous to the Government, taking into consideration the multiplicity and complexity of items of various manufacturers and the differences in performance required to accomplish or produce required end results, production and distribution facilities, price, compliance with delivery requirements, and other pertinent factors. By providing a selection of comparable supplies or services, ordering activities are afforded the opportunity to fulfill their requirements with the item(s) that constitute the best value and that meet their needs at the lowest overall cost.

(b) A written notice of award or acceptance of an offer, mailed or otherwise furnished to the offeror within the time for acceptance specified in the offer, shall result in a binding contract without further action by either party. Before the offer's specified expiration time, the Government may accept an offer (or part of an offer), whether or not there are negotiations after its receipt, unless a written notice of withdrawal is received before award.

(End of Provision)

Alternate I (AUG 1997):

When anticipating competition of identical items, add the following paragraph after paragraph (b) of the basic provision.

(c) The Government reserves the right to award only one contract for all or a part of a manufacturer's product line. When two or more offerors (e.g., dealers/resellers) offer the identical product, award may be made competitively to only one offeror on the basis of the lowest price. (Discounts for early payment will not be considered as an evaluation factor in determining the low offeror). During initial open season for an option period, any offers that are equal to or lower than the current contract price received for identical items will be considered. Current contractors will also be allowed to submit offers for identical items during this initial open season. The current contractor which has the identical item on contract will be included in the evaluation process. The Government will evaluate all offers and may award only one contract for each specified product or aggregate group.

10. Section 552.215-71 is revised to read as follows:

552.215-71 Examination of records by GSA (Multiple Award Schedule).

As prescribed in 48 CFR 515.106-70, insert the following clause:

EXAMINATION OF RECORDS BY GSA (MULTIPLE AWARD SCHEDULE) (AUG 1997)

The Contractor agrees that the Administrator of General Services or any duly authorized representative shall have

access to and the right to examine any books, documents, papers and records of the Contractor involving transactions related to this contract for overbillings, billing errors, compliance with the Price Reduction clause and compliance with the Industrial Funding Fee clause of this contract. This authority shall expire 3 years after final payment. The basic contract and each option shall be treated as separate contracts for purposes of applying this clause.

(End of Clause)

11. Section 552.215-72 is revised to read as follows:

552.215-72 Price adjustment—Failure to provide accurate information.

As prescribed in 48 CFR 515.804-6(d), insert the following clause:

PRICE ADJUSTMENT—FAILURE TO PROVIDE ACCURATE INFORMATION: (AUG 1997)

(a) The Government, at its election, may reduce the price of this contract or contract modification if the Contracting Officer determines after award of this contract or contract modification that the price negotiated was increased by a significant amount because the Contractor failed to:

- (1) provide information required by this solicitation/contract or otherwise requested by the Government; or
- (2) submit information that was current, accurate, and complete; or
- (3) disclose changes in the Contractor's commercial pricelist(s), discounts or discounting policies which occurred after the original submission and prior to the completion of negotiations.

(b) The Government will consider information submitted to be current, accurate and complete if the data is current, accurate and complete as of 14 calendar days prior to the date it is submitted.

(c) If any reduction in the contract price under this clause reduces the price for items for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor shall be liable to and shall pay the United States—

- (1) The amount of the overpayment; and
- (2) Simple interest on the amount of such overpayment to be computed from the date(s) of overpayment to the Contractor to the date the Government is repaid by the Contractor at the applicable underpayment rate effective each quarter prescribed by the Secretary of the Treasury under 26 U.S.C. 6621(a)(2).

(d) Failure to agree on the amount of the decrease shall be resolved as a dispute.

(e) In addition to the remedy in paragraph (a) of this clause, the Government may terminate this contract for default. The rights and remedies of the Government specified herein are not exclusive, and are in addition to any other rights and remedies provided by law or under this contract.

(End of Clause)

12. Section 552.243-72 is amended by revising the date of the clause, by revising paragraphs (a), (b)(1) introductory text, (b)(1) (i), (ii) and (viii), (b)(3), and by deleting paragraph (b)(4) and Alternate I to read as follows:

552.243-72 Modifications (Multiple Award Schedule).

* * * * *

MODIFICATIONS (MULTIPLE AWARD SCHEDULE) (AUG 1997)

(a) General. The Contractor may request a contract modification by submitting a request to the Contracting Officer for approval, except as noted in paragraph (d) of this clause. At a minimum, every request shall describe the proposed change(s) and provide the rationale for the requested change(s).

(b) * * *

(1) Additional items/additional SIN's. When requesting additions, the following information must be submitted:

(i) Information requested in paragraphs (1) and (2) of the Commercial Sales Practice Format to add SIN's.

(ii) Discount information for the new item(s) or new SIN(s). Specifically, submit the information requested in paragraphs 3 through 5 as applicable of the Commercial Sales Practice Format. If this information is the same as the initial award, a statement to that effect may be submitted instead.

* * * * *

(viii) Any information requested by 52.212-3(f), Offerors Representations and Certifications—Commercial Items, that may be necessary to assure compliance with 552.225-9, Trade Agreements Act.

* * * * *

(3) Price Reduction. The Contractor shall indicate whether the price reduction falls under the item (i), (ii), or (iii) of subparagraph (c)(1) of the Price Reduction clause at 552.238-76. If the Price reduction falls under item (i), the Contractor shall submit a copy of the dated commercial price list. If the price reduction falls under item (ii) or (iii), the Contractor shall submit a copy of the applicable price list(s), bulletins or letters or customer agreements which outline the effective date, duration, terms and conditions of the price reduction.

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PART 570—ACQUISITION OF LEASEHOLD INTERESTS IN REAL PROPERTY

13. Section 570.308-2 is amended by revising paragraph (e) to read as follows:

570.308-2 Cost or pricing data.

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(e) If the proposed lessor refuses to provide data when required, the contracting officer shall follow the procedures in FAR 15.804-6(e).

Dated: August 15, 1997.

Ida M. Ustad,

Deputy Associate Administrator for Acquisition Policy.

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