

This is a position paper by the Office of Inspector General, U. S. General Services Administration, addressing the effect of procurement reform proposals on some aspects of the Multiple Award Schedule program.

## EXECUTIVE SUMMARY

The recent round of procurement legislation, as embodied in the Federal Acquisition Streamlining Act of 1994 (FASA), as well as proposed legislation now pending before Congress, has produced many laudable reforms that have streamlined the procurement process and moved the government away from government-unique specifications and toward the acquisition of commercial products. We need to insure, though, that in making this transition, we do not ignore the lessons we have learned about how to buy these commercial products intelligently. Buying commercially is not new to the government; commercial product acquisitions already amount to billions of dollars each year. In the context of the Multiple Award Schedule (MAS) program alone, under which agencies make individual purchases of relatively smaller quantities of commercial items, government purchases of commercial items exceed \$9 billion annually.

A number of safeguards -- such as certifications, disclosure requirements and audit rights -- have been built into the MAS procurement process in response to General Accounting Office (GAO) recommendations and evidence of contractor abuses. These safeguards help insure that when the government buys commercial products, it does so in a manner that provides a fair process and guarantees that the government, and thus the taxpayer, gets a good deal. As we shift toward far greater reliance on commercial product acquisitions to meet the government's needs, it is critically important that we not discard those mechanisms that have proven essential to getting the fairest deal for the government and protecting the taxpayer's interests.

In relying on these mechanisms, particularly in the context of the MAS program, the government operates in the same manner as do large corporate purchasers. Despite abundant lobbying rhetoric to the contrary, the fact is that large corporate purchasers use these very same safeguards in conducting procurements with their own commercial suppliers. Like the government in the MAS program, corporate purchasers take maximum advantage of their potential purchasing power, seeking to obtain from their suppliers such terms as most-favored customer treatment and audit access when their volume of purchases so permits. When industry representatives have testified before Congress about the so-called burdens of the federal procurement process, they have spoken from the perspective of sellers of goods; they have not addressed how they acquire commercial goods when they act as purchasers.

We agree that many of the reforms of the commercial product acquisition process are salutary, but caution against painting with too broad a brush. Not all commercial product acquisitions are the same. If the goal of acquisition reform is to make the government operate more like a business, then the MAS program should serve as a model rather than as an object of government reform. The MAS program has already developed the safeguards necessary to insure that the taxpayer's interests are fully protected. We need to insure that the current reform efforts do not take those safeguards away.

This paper explores some of these themes in the context of specific procurement reform initiatives as applied to the MAS program.

- Background of the MAS program

The MAS program, which is administered by the General Services Administration (GSA) and the Department of Veterans Affairs (VA), provides federal agencies with a simplified procedure for acquiring commonly used supplies and services at prices that generally reflect the discounts to which the government ought to be entitled given its large volume of purchases. The MAS program has been recognized by industry and government users alike as an effective mode of procurement. MAS prices are relied on as benchmarks in Department of Defense cost contracts and by state and local governments.

- Key safeguards in the MAS procurement process

Four key safeguards have been built into the MAS procurement process over time to protect against loss of taxpayer dollars -- disclosure requirements, certifications, price reduction requirements and audit rights. Long-standing industry proposals to curtail or eliminate them have been incorporated into or discussed in the context of recent procurement initiatives.

- Data disclosure requirements -- Unlike many procurements, MAS procurements ordinarily do not require detailed cost data from contractors, but rather simply require the disclosure of sales and discount information. This data requirement is the principal means by which GSA and the VA insure that the prices they negotiate are fair and reasonable. Pending legislation would create an MAS pilot program which would eliminate disclosure requirements. This pilot program would, through the establishment of an electronic marketplace mechanism, rely on competitive market forces to determine prices for a billion dollar MAS computer supply program. Because of the nature of MAS contracting, we do not believe that such a mechanism can always effectively substitute for disclosure requirements and price negotiation as an assurance of reasonable prices.

- Certifications -- Recent legislation would eliminate or curtail the use of certifications in connection with procurements. It has been our experience that certifications relating to sales and pricing disclosures have proven necessary to insure that contractors accurately disclose information to the government. Notwithstanding industry protestations that these certification requirements are overly burdensome and are driving contractors away from federal contracting, the fact is that the number of contractors who do business with the government on MAS contracts generally has risen.

- Price reduction requirements -- Such requirements insure that the government retains current market pricing during a contract. Price reduction mechanisms are particularly important in MAS contracts, which are mainly of a three to five year duration.

- Audit rights -- Pending legislation would effectively eliminate the government's statutory authority to audit all commercial item contracts, including MAS contracts. Eliminating audit rights would strip the government of one of the most important tools it has to detect and recover for contractor overpricing, whether accidental or deliberate, and would hand contractors "carte blanche" to violate contract terms.

- The government as a business

The success of industry in garnering support for many of its procurement

initiatives is reflective of the popular misconception that the government operates in ways significantly different than the ways in which industry operates. We examined the terms and conditions contained in a sampling of commercial agreements between large volume purchasers and their commercial suppliers. The agreements were obtained in the course of audits conducted by both the GSA and VA Offices of Inspectors General. All of the agreements contained at least one of the following safeguards -- most-favored customer requirements, price reduction clauses, and the right to audit the records of suppliers. It is apparent that large volume purchasers in the private sector take maximum advantage of their size and potential purchasing power to obtain the most favorable terms possible in the marketplace.

- Recommendations

We recommend specific legislative or regulatory actions to address the concerns we raise in this paper. Our principal recommendations include:

- A clear statement that the government shall have reasonable audit access rights for a period of three years after final contract payment;

- At a minimum, a retention of all certifications relating to pricing disclosures presently required on acquisitions, including MAS acquisitions, exempt from TINA cost or pricing data requirements;<sup>1</sup>

- A statement recognizing that the price reduction clause is commonly included in private sector commercial contracts and will be included in MAS contracts.

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<sup>1</sup> In this paper, we do not address certifications used by the government which do not relate to pricing and data disclosure requirements.

## INTRODUCTION

The ongoing process of federal procurement reform, which most recently resulted in the passage of the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. 103-355, has its genesis in very legitimate concerns over the increasing complexity and often contradictory nature of the rules and regulations governing the federal procurement process. In recent years, the need for procurement reform has been raised by a number of procurement review panels and commissions. For example, in 1986, the President's Blue Ribbon Commission on Defense Management (known as the Packard Commission) stated that new legislative initiatives were needed to recodify federal procurement laws and create "a single, consistent, and greatly simplified procurement statute."<sup>2</sup> More recently, the Advisory Panel on Streamlining and Codifying Acquisition Laws (the Section 800 Panel)<sup>3</sup> recommended a number of changes to the government's acquisition of commercial technologies, including a broadened definition of commercial items and stronger policy language in favor of using nondevelopmental items.

The conclusions of the Section 800 panel were reiterated in 1993 by the government-wide National Performance Review (NPR). The NPR report recommended an increased reliance on the acquisition of commercial items, and an increased simplified acquisition threshold, among other streamlining measures. Billed as a "comprehensive" overhaul of the federal acquisition process and based in part on the conclusions reached in all of these reports, FASA enacted provisions aiming to increase the government's access to products developed in the commercial sector, consolidate or eliminate some procurement requirements, encourage performance-based contracting, and create a new simplified acquisition threshold, which is used to exempt smaller dollar procurements from a variety of procurement laws.<sup>4</sup>

Although the Federal Acquisition Regulation (FAR) implementation of FASA is not yet complete, the procurement reform movement has continued into the present Congress. On February 27, 1995, the Federal Acquisition Improvement Act of 1995 (FASA II) was introduced into Congress as S. 669 and H.R. 1388. Among other things, the bills would substantially increase the approval thresholds for conducting procurements without full and open competition and would raise again, this time to \$1 million, the simplified acquisition threshold for certain procurements of services. Another pending bill, S. 675, aims to automate and streamline ordering and contracting procedures for the acquisition of certain commercial items. Introduced on May 18, 1995, the Federal Acquisition Reform Act of 1995, H.R. 1670, would give all commercial item procurements a new across-the-board exemption from

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<sup>2</sup> President's Blue Ribbon Commission on Defense Management, A Report to the President on Defense Acquisition, A Formula for Action, p. 18 (April 1986).

<sup>3</sup> The Advisory Panel was created by Section 800 of the National Defense Authorization Act, FY 1991, Pub. L. No. 101-510 (1990). The Panel forwarded its findings in the Report of the Advisory Panel on Streamlining and Codifying Acquisition Laws to the Congressional defense committees in January 1993.

<sup>4</sup> S. Rep. 258, 103d Cong., 2d Sess. (1994).

the various truth in negotiation requirements which are designed to allow the government to purchase at the lowest possible price.

A primary focus of FASA and many of the current reform initiatives, as well as past acquisition reform recommendations, has been on efforts to make the federal government operate more like the private sector in the acquisition arena, particularly in the procurement of commercial products. We particularly applaud Congressional efforts, as embodied in FASA, to move toward a performance-based, results-oriented acquisition process and to delegate procurement functions from agency heads to lower level officials, which should promote flexibility in procurement decisions. Another result of the recent procurement initiatives has been the push to increase commercial item acquisitions so as to reduce the expensive and time-consuming process of procuring government-unique items whenever possible, and to replace them with common-use items which may be purchased in mass quantities, at significant volume discounts. This is entirely appropriate and will be a significant accomplishment of the procurement reform movement.

We are concerned, however, that to meet industry's concerns, the pendulum of procurement reform has begun to swing too far and, in so doing, we have lost our focus on who should be the primary beneficiary of any federal procurement reform -- the American taxpayer. In response to industry complaints regarding purported burdens on the contracting process, FASA and other reform initiatives seek, in part, to loosen information disclosure requirements, curtail or eliminate audit rights and eliminate enforcement mechanisms. The numerous safeguards painstakingly built into the contracting process, such as most-favored customer status, the Truth in Negotiations Act, defective pricing and price reduction clauses, and the right to audit for contract overpricing and for fraud, are in place because of a real and demonstrated need to protect the taxpayer from potential contractor abuse. While industry strenuously argues that such safeguards are incompatible with commercial sales practices, our own documented experience is that large private sector purchasers consistently require the same types of safeguards in their own contracts as does the federal government.

One of the rallying cries of the current reform initiatives is that the federal government should conduct purchases the way an individual does in a discount retail establishment such as Office Depot or Wal-Mart. However, we believe that the government, as the nation's largest single potential purchaser, spending about \$200 billion annually in goods and services, is in a position to obtain much more favorable pricing and conditions than an individual making small, one-time purchases at a Wal-Mart. It has been our experience that large corporate purchasers conduct their procurements in this manner whenever possible, taking maximum advantage of their potential purchasing power.

One of the most important vehicles by which the buying power of the federal government is harnessed in the procurement of commercial products is the Multiple Award Schedule (MAS) program. The program allows government agencies to make individual purchases of relatively small quantities of commercially available, common-use, off-the-shelf items and services while securing the benefits of the government's aggregate purchasing power. Aside from its importance to direct government users (both civilian and military agencies), the prices negotiated in MAS contracts are often used by state agencies and even large private-sector purchasers as benchmarks for the reasonableness of prices in other commercial item procurements.

Although FASA and its predecessor reform proposals did not focus directly on the MAS program, many of the FASA-inspired changes to commercial items acquisitions now being implemented through regulatory changes, including disclosure requirements and curtailment of audit rights, may severely impair the program. Other current initiatives confront the MAS program directly. For example, S. 675 proposes a four-year "pilot program" encompassing all computer-related MAS contracts, under which contracting officers would be able to negotiate terms and conditions, but not prices. Another recently introduced bill, H.R. 1670, would eliminate certain contractor certifications and may effectively remove audit rights for MAS contracts. Other industry proposals not yet introduced as legislation would eliminate the price reduction clause under

which the government receives price adjustments during the terms of MAS contracts.<sup>5</sup>

This paper examines the recent reform initiatives in the context of the MAS program.

- First, we provide some background on the MAS program. We examine the bases for the MAS pricing mechanism and discuss the GAO reports which forced the government to reexamine its negotiation objectives to focus on maximizing the government's total buying power. We also present some testimonials to the importance and usefulness of the MAS program from both government users of the program and contractors who supply products under it.

- Second, we review some specific proposals contained in current reform initiatives which, if applied to the MAS program, will significantly increase the cost of acquisitions to taxpayers. Specifically, we examine four safeguards -- disclosure requirements, certifications, price reduction requirements, and audit rights -- in the context of current or pending proposals which would curtail or eliminate them. These safeguards have been built into the MAS procurement process over the years in response to GAO recommendations and documented instances of contractor abuse.

- Third, we examine the principal faulty assumption on which many of the procurement reform proposals relating to commercial products are based -- that the government imposes special requirements on the contracting community that are different from those the contracting community seeks from its own commercial suppliers. We show that, in fact, in the key areas of most-favored customer requirements, price reductions and audit access, government practices through the MAS program are very much the same as those found in the commercial arena. We show that in the competitive marketplace large volume purchasers can and do set conditions like the government does because it is in their economic interest to

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<sup>5</sup> See, e.g. Robert J. Sherry, Reinventing MAS Contracting & Pricing: Some Basic Problems & Simple Solutions, Cost, Pricing & Accounting Report (February 1994). See also Hearings Before the Senate Armed Services Subcommittee on Acquisition and Technology, 104th Cong., 1st Sess. (1995) (Statement of Peter DeMayo, Lockheed Martin Corporation and Acquisition Reform Working Group)(recommends the elimination of contractor certifications and government postaward audit rights).

do so.

- Fourth, we offer recommendations which we believe better balance the competing interests of cost to the taxpayer and burden on industry. We offer recommendations related to audit rights, price reduction and other requirements, both generally and as related to specific legislative proposals.

## **THE MULTIPLE AWARD SCHEDULE PROGRAM**

### **Background**

The supply schedule program provides federal agencies with a simplified procedure for acquiring small quantities of commonly used supplies and services at lower prices while obtaining discounts associated with volume buying. Administered primarily by the General Services Administration (GSA), the program consists of both single award and multiple award schedules. In FY 1994, the Multiple Award Schedule (MAS) program generated over \$9 billion annually in sales through roughly 7,500 contracts covering approximately 135 different commodity schedules, with products ranging from office furniture to mainframe computers and scientific equipment.<sup>6</sup> Under authority delegated by the Administrator of GSA, the Department of Veterans Affairs (VA) administers multiple award schedule contracts for the supply of pharmaceuticals and medical/surgical supplies and equipment which are purchased primarily by VA and Department of Defense (DOD) hospitals and other government medical facilities.

MAS contracts are negotiated contracts established with more than one contractor for the delivery of comparable commercial supplies or services. All responsible contractors may submit offers in response to a solicitation for MAS contracts; for the most part, there is no head-to-head competition between contractors. Contracts are awarded to contractors supplying the same generic types of items or services at varying prices for delivery within the same geographic areas. Federal agencies then simply order supplies or services from the schedules (or catalogs) at the prenegotiated prices and pay the contractors directly for their purchases. Agencies thus avoid using cumbersome and administratively costly traditional procurement procedures in their purchases of commercially available, common use items. By having GSA and the VA negotiate schedule contracts, agencies, as well as contractors, also avoid the cost of duplicating procurements for common use items.

Under the MAS program, prices are most often based on negotiated discounts from contractors' commercial price lists. In the late 1970's, the General Accounting

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<sup>6</sup> See, e.g., List of Federal Supply Service Publications, GSA Form 457 (contains list of MAS contracts). The sales and contract figures for the MAS program reflect the combined sales and numbers of contracts under both the GSA and VA programs.

Office (GAO) issued a series of reports critical of the existing policy of negotiating discounts for MAS contracts based on the size of individual orders from agencies rather than on total annual purchases.<sup>7</sup> The GAO found that the failure to focus on the government's consolidated annual buying volume rather than individual order sizes caused the government to pay higher prices. In response to the reports, GSA redefined MAS policy so that the goal was to obtain discounts from a contractor's commercial price list equal to or greater than the contractor's most-favored customer's discounts. The most-favored customer is that customer who receives the best discounts from the contractor's commercial price list when purchasing quantities comparable to the government's under similar terms and conditions.<sup>8</sup>

### **Industry and Government Support for the MAS Program**

The MAS program has been repeatedly recognized by industry as well as federal and state government agencies as an effective and economical mode of procurement. For example, in October 1993, the Council for Procurement Reform, which is comprised of leaders of industry, stated:

"We believe the Multiple Award Schedule program has proven to be an effective, efficient procurement vehicle which offers government buyers an easy way to buy small quantities of commercial goods at fair and reasonable prices. It is the single most important commercial product procurement program in the federal government."

Similarly, in a January 5, 1995 letter to Vice President Gore, the Coalition for Government Procurement, an industry trade association representing hundreds of vendors of commercial goods to the government, stated:

"The Coalition also strongly supports the Multiple Award Schedule (MAS) program. The MAS program is the government's best commercial products acquisition vehicle. It allows agencies to easily

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<sup>7</sup> GAO, Federal Supply Service Not Buying Goods At Lowest Possible Price, GAO/PSAD-77-69 (March 1977); GAO, Ineffective Management of GSA's Multiple Award Schedule Program -- A Costly, Serious, And Longstanding Problem, GAO/PSAD-79-71 (May 1979).

<sup>8</sup> Multiple Award Schedule Policy Statement, 47 Fed. Reg. 50,242, at 50,244 (1982).

and quickly purchase small quantities of commercial goods at fair and reasonable prices. Through the MAS program, users can choose the product that best meets their needs from a wide variety of goods. The Coalition estimates that the Multiple Award Schedule program saved the government \$2.3 billion in 1992 alone. These savings came as a result of the significant price reductions GSA was able to negotiate with vendors based on government-wide purchasing volumes and through reduced administrative costs over having agencies conduct their own procurements."

The MAS program also serves as an important source of commercial products for DOD. In an October 27, 1988 memorandum, the Office of the Assistant Secretary of Defense stated,

"DOD considers those Federal Supply Schedules (schedules) which are optional for DOD to be 'preferred sources of supplies and services'. . . There is no statutory or regulatory need to synopsise requirements, seek further competition, determine price reasonableness, or comply with small business-small purchase set-aside requirements when schedules are used. . . The use of GSA schedules offers DOD a quick and efficient way of obtaining needed requirements. This advantage led to the DOD policy that maximum use should be made of schedules."

The efficacy of the MAS program is also attested to by the reliance of state agencies and large private-sector purchasers, as well as DOD in its cost contracts, on GSA and VA schedule prices as the benchmark for price reasonableness when they procure goods and services. In addition, vendors frequently advertise that they offer "schedule pricing" as an inducement to purchasers.

### **KEY FEATURES OF RECENT PROCUREMENT INITIATIVES**

Many of the safeguards that have been built into the MAS procurement process over the years to insure low prices and to guard against loss of taxpayer dollars have become targets in the recent and still ongoing round of procurement reform initiatives. Industry has long argued against audit rights and certification requirements, but until recently those arguments have fallen mainly on deaf ears.

However, recently, under the guise of "reinventing government" and "streamlining procurement," industry proposals designed to eliminate or render ineffective key safeguards in the procurement process have found a home in FASA or in other legislation now pending before Congress. We examine four of these safeguards -- disclosure requirements, certifications, price reduction requirements, and audit rights -- in the context of FASA and pending proposals.

## **Data Disclosure Requirements**

### **a. Generally**

The primary data disclosure requirements related to government procurement are found within the Truth in Negotiations Act (TINA),<sup>9</sup> which requires the submission and certification of cost or pricing data in negotiated contracts over a certain dollar threshold.<sup>10</sup> MAS contracts are negotiated under an exemption to the TINA requirements,<sup>11</sup> although GSA and the VA are nevertheless required by regulation to conduct a price reasonableness analysis.<sup>12</sup> As part of this analysis, these agencies require the submission of information on discounts and other concessions granted to commercial customers of offerors. The agencies then seek to

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<sup>9</sup> 10 U.S.C. § 2306a. With the enactment of the Competition in Contracting Act (CICA) in 1984 (Pub. L. 98-369, §§ 2701-2753), Congress made the TINA disclosure requirements statutorily applicable to civilian agency acquisitions as well as military procurements; prior to the enactment of CICA, these requirements were applied to civilian acquisitions by way of regulation and contract clauses. See, e.g., 41 C.F.R. § 1-3.814-1 (1984). TINA was first enacted in 1962 in response to a series of GAO reports which found that contractors were receiving unwarranted profits because data they had supplied to the government was inaccurate, incomplete or out of date. S. Rep. No. 1884, 87th Cong., 2d Sess. (1962) reprinted in 1962 U.S. Code Cong. & Admin. News 2477.

<sup>10</sup> This threshold is \$100,000 for contracts entered into on or before October 13, 1994, and \$500,000 for contracts entered into after October 13, 1994.

<sup>11</sup> Exemptions to the general TINA disclosure requirements apply to contracts for which the price agreed upon is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation. FASA added an additional exemption for acquisitions of commercial items not falling under the previously existing exemptions. See 41 U.S.C. § 254b(d).

<sup>12</sup> 48 C.F.R. § 15.804-3(h).

obtain the best discount that a commercial customer with similar buying power obtains from that contractor.

The contracting community has long voiced its concerns about the MAS program's general data requirements. Some contractors have urged at the broadest level that GSA and the VA should not require them to provide any information on the discounts they provide to their customers, arguing that such disclosures are an unreasonable burden on contractors.<sup>13</sup> Although neither FASA nor the prospective regulations implementing FASA would limit data disclosure requirements, other pending proposals may affect these requirements. For example, S. 675 would authorize a pilot program of all MAS schedules for computer equipment (with an annual value of approximately \$1.7 billion) for a four-year period, under which GSA could negotiate (and presumably require the disclosure of) only terms and conditions, but not price.

What is ignored by those seeking to alleviate purportedly "burdensome" disclosure requirements is that the MAS program simply seeks the disclosure of commercial sales information that most contractors have readily available. For the most part, MAS contracts do not require detailed cost information. More important for purposes of protecting the taxpayer, the MAS disclosure requirements are the means by which GSA and the VA insure that they have a reasonable prospect of meeting their negotiation objectives and that the prices negotiated are fair and reasonable. In general terms, disclosure requirements seek to place the government negotiator and a contractor on equal footing at the bargaining table by requiring disclosure of all data available to the contractor that may pertain to the negotiation process. There is no requirement that the government be given the best price, but only that such information as is given be accurate, complete and current. It is then up to the government negotiator to obtain the best deal possible for the government.

As we have discussed, the goal of GSA and the VA in negotiating MAS contracts is to obtain discounts from a contractor's commercial price list which are equal to or greater than the contractor's most-favored commercial customer. In this manner, GSA and the VA are able to maximize the government's buying power to achieve prices commensurate with what commercial companies buying with like terms and conditions and sales are able to achieve. The inability to obtain disclosure

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<sup>13</sup> GAO, Multiple Award Schedule Contracting - Changes Needed in Negotiation Objectives and Data Requirements, GAO/GGD-93-123, pp. 66-72, note 10 (August 1993).

of pertinent discount information would severely handicap the government in its attempts to obtain the best possible prices for the goods and services it procures.

### **b. The Electronic Marketplace as a Substitute for Disclosure Requirements**

One industry response to some of the concerns we raise here is the "electronic marketplace." Already partially implemented under the electronic ordering procedures of the Federal Acquisition Computer Network (FACNET) system put into place by FASA, the concept of an electronic marketplace envisions that eventually contractors would list products and prices electronically without those prices having been negotiated by GSA and the VA, and agencies would electronically order the lowest-priced item that met their needs. Contractors, at any time, would be able to add new products and change prices. Such a system has been proposed by pending bill, S. 675, on a four-year "pilot basis" for all computer equipment MAS schedules administered by GSA, as discussed above.

As a threshold matter, it seems more than a stretch to term a "pilot program" one which covers a program worth \$1.7 billion annually for a four-year duration. More fundamentally, though, we question the assumption upon which the idea of an electronic marketplace is based -- that direct price comparison can fully substitute for disclosure requirements and price negotiation as the government's assurance of a fair and reasonable price in the context of MAS procurements.

The reality of the MAS contracting process suggests that direct price competition may be illusory. For most purchases by agency users under MAS contracts, price is not the determining factor. The agency user selects products based on a number of factors other than price, including function, familiarity with the product and brand-specific characteristics. Therefore, agency users do not, for the most part, simply "price shop." Rather, they look to buy a particular contractor's product because that product has the capabilities and functions it needs and not necessarily because it has the best price. Moreover, for many, if not most, MAS sales, agency users purchase on what is effectively a sole source basis either because additional components are being added to an existing system or

because they are purchasing updates and maintenance of existing software. In addition, for some products there is no real competitive market, either because the products are manufactured by only one company or because one company effectively dominates a particular market.

Without the negotiation of prices by a central negotiating authority such as GSA or the VA, the government may lose its ability to obtain better prices based on its volume of purchases. As we have discussed, MAS prices are negotiated based on what large commercial customers pay for products and services and are usually substantially less than retail prices. If, as is envisioned by the electronic marketplace mechanism, agency users make individual buys of goods and services similar to buys in a retail market, the government would have lost its ability to seek large volume discounts. MAS prices may then rise to the level of retail prices and one program where the government has been a "smart shopper" would be lost.

In short, we believe that the price competition envisioned by the idea of an electronic marketplace may be insufficient to insure that the government receives favorable pricing for many schedule items. The nature of agency MAS purchases is such that the key question is not what does a competitor's roughly similar product sell for, but rather what is the best price that this particular company sells this particular product for. It has been our experience, based on years of auditing MAS contracts and our knowledge of contract negotiations, that contractors do not disclose the large volume corporate pricing unless required to do so. An electronic marketplace should prove to be an invaluable means of making MAS procurements more efficient; however, we believe it should not become a substitute for price negotiations and mandated disclosures. Without these tools, the government will not be in a position to guarantee low prices to agency users of the MAS contracts.

### **Certifications**

Recent Congressional attention has focused on government certification requirements. Under FASA, particular certification requirements were removed for certain acquisitions. Further, the proposed Federal Acquisition Reform Act of 1995, H.R. 1670, would eliminate certain statutory certifications and would require that all certifications contained in the FAR or agency supplements to the FAR that are not specifically required by statute be eliminated unless either the FAR Council or the head of the promulgating agency justifies their existence and

receives the approval of the Administrator of the Office of Federal Procurement Policy.

The government requires certifications in many different contexts, ranging from certifications supporting procurement integrity to those accompanying the reporting of lobbying efforts. Of critical importance to the procurement process are those certifications supporting data disclosure requirements during the negotiation of contracts. TINA requires contractors to certify to the accuracy of cost data they supply to the government; so, too, contractors in MAS procurements are required to certify to the accuracy of discount information they supply.

Such certifications have proven necessary to ensure that contractors accurately disclose pricing (and discount) information, as well as terms and conditions offered to the government and other customers so that the contracting officer can make price reasonableness determinations based on reliable information. In fact, certifications facilitate expeditious contract awards. The government contracting officer can accept the contractor's certified assertions without requiring the submission of records in support of each disclosure and the resulting review of voluminous documentation. Certifications also create a level playing field among competitors by ensuring that all contractors are held equally accountable for the accuracy of their disclosures on pricing practices.

More importantly, certifications serve as an integral part of the proper notice provided to the individual who signs the certification that the government relies on the accuracy of the information provided and that he or she will be held accountable for his or her failure to make a good faith effort to insure the adequacy of the disclosures. The government seeks from those who do business with it a good faith and reasonable effort to determine and disclose pricing policies and practices.

Much controversy has centered around the use of certifications as a government procurement safeguard. Industry has long argued that the use of certifications deters contractors from responding to government solicitations for fear that the government could potentially prosecute them criminally for inaccurate information accidentally submitted to the government. The reality, however, is very different. Notwithstanding the numerous certifications now required in government procurements, the number of contractors who do business with the

government on MAS contracts generally has risen.<sup>14</sup>

Furthermore, the contention of the contracting community assumes in part a lack of good faith in the exercise of government prosecutorial discretion. In fact, few contractors have ever been prosecuted criminally for the failure to accurately disclose pricing information and practices. Contrary to what is sometimes asserted, violations of certifications are not judged under a "strict liability" standard. The burden of proof remains on the government to establish beyond a reasonable doubt that the contractor intended to defraud the government by submitting false statements or false claims, a stringent threshold which discourages abusive prosecutions. Nor does the government lightly pursue contractors civilly for false statements and claims, which, even in a civil context, require the government to show much more than a mere accidental nondisclosure of information.

Contractors have also suggested that since a high percentage of contractors have been found through Inspector General and GAO audits not to have accurately disclosed their pricing information, certifications themselves have had no positive impact on the quality of disclosures over the years. On the contrary, our experience has shown that certifications are integral in providing notice to the contractor of the government's expectation of forthright disclosures and negotiations. We believe that without certifications the quality of information disclosures would drop dramatically and inevitably lead to overpricing, while, at the same time, the government would be left without the appropriate remedies for recovering taxpayer monies lost due to contractor fraud, which last fiscal year alone reached a record-breaking \$1.09 billion in civil fraud recoveries.<sup>15</sup>

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<sup>14</sup> See GAO, Multiple Award Schedule Contracting - Changes Needed in Negotiation Objectives and Data Requirements GAO/GGD-93-123 (August 1993) at 22-23, 26. This GAO study of the GSA MAS program found that the number of vendors under MAS contracts negotiated by the Federal Supply Service (that entity within GSA which administers most of the MAS contracts) increased from FY 1989 through FY 1992. *Id.* at Figure 1.6. The study also found that the number of offers from vendors under MAS contracts negotiated by the Information Technology Service (formerly the Information Resources Management Service, which administers contracts for computer products) declined during this same time period, *see* Figure 1.10, but more recent information from GSA shows that the current trend in offers is on the increase.

<sup>15</sup> U.S. Department of Justice Press Release, "A Record One Billion Dollars-Plus in Civil Fraud Awards, Settlements Recovered by the Justice Department in FY '94," (October 11, 1994).

Although this number is large, it represents only a fraction of the \$200 billion the federal government spends each year on procuring goods and services. Despite suggestions to the contrary, most contractors take their certification and disclosure obligations seriously. The ones who do not do so and who do not "play fair" either with the government, their own suppliers or their competitors, ought not be free now to do so with impunity.

### **Price Reduction Requirements**

GSA has long prescribed a price reduction clause for use in all MAS solicitations and contracts.<sup>16</sup> As we have discussed, MAS contracts are negotiated on the basis of, and prices are expressed as a discount from, a contractor's commercial price list. Contracting officers determine prices to be fair and reasonable by comparing the discounts which a contractor offers to the government with the discounts the contractor gives to its commercial customers and aligning the government to a comparable customer or category of customers.

Such a clause simply assures that the government maintains throughout the life of the contract the relative price/discount advantage negotiated in relation to the contractor's commercial customer upon which the contract award is predicated. Specifically, the price reduction clause provides that if a contractor sells any item covered by the contract at a price below the negotiated MAS contract price to the identified comparable customer, then the contractor must give the government an equivalent price reduction on all subsequent government orders for the balance of the contract period or until the price is further reduced. This, of course, assumes that the comparable customer and the MAS contract have similar terms and conditions.

Some in the contracting community have been critical of what they term the "burdensome" aspects of the clause's reporting requirements. To a large extent, GSA has been responsive to these concerns and has taken recent steps to alleviate some of the reporting requirements. For example, on August 18, 1994, GSA relaxed requirements so that contractors now need not report price decreases to the commercial customers which did not serve as the basis of contract award, but only

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<sup>16</sup> The MAS price reduction clause is to be distinguished from the remedy contained in the Price Reduction for Defective Pricing Data clause which is available to the government for violations of the data disclosure requirements during the negotiation of an MAS contract. See, e.g., Basis for Price Negotiation, section (d), M-FSS-330 (April 1984).

price decreases to those commercial customers which formed the basis of award.

Predictably, others in the contracting community continue to oppose the government's use of the price reduction clause on any basis, arguing that the clause is unnecessary and not in accordance with standard commercial practice.<sup>17</sup> Aside from the reality that price reduction requirements, in fact, are standard commercial practice for many large volume purchasers, which we discuss below, to eliminate such a clause would be to eliminate an important means by which the government insures that it receives the best pricing. As MAS contracts are often three to five years in length, price reductions insure that the government is receiving current market prices in response to changes in market demand and technology. It is really the very existence of the price reduction clause which allows MAS contracts to be of longer duration than the more typical one-year supply contract. Absent such a clause, the government would be forced to enter into contracts of shorter duration in order to maintain current pricing. The administrative costs and other burdens associated with more frequent negotiations would be increased for contractors and government alike.

The need for a price reduction clause is all the more critical for contracts of longer duration in light of FASA's new definition of what constitutes a commercial product. FASA broadened the definition of commercial products to encompass items which have not yet been offered to the public but are expected to be placed on the market. Although FASA's goal of trying to facilitate the government's ability to obtain cutting edge technology is laudable, the fact remains that these innovative products have not been purchased by the public and do not have an established fair and reasonable price. The price reduction clause would be an important mechanism in contracts for commercial items without actual sales to assure that the government does not pay an exorbitant price compared to that established by current market conditions.

### **Government audit rights**

The government's long-standing audit rights, as embodied in the GAO's Examination of Records clause and agencies' audits clauses, have allowed audits of government contracts up until three years after final payment on a contract, in order to allow time for examination of contractor records after completion of contract

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<sup>17</sup> See, e.g., Robert J. Sherry, Reinventing MAS Contracting & Pricing: Some Basic Problems & Simple Solutions, Cost, Pricing & Accounting Report (February 1994).

performance.<sup>18</sup> Carving out an exception to these requirements, FASA limited audits of certain commercial product acquisitions, but not necessarily MAS acquisitions, to two years after contract award.<sup>19</sup> Recently introduced legislation, H.R. 1670, would amend FASA and would appear to effectively eliminate the government's statutory authority to audit all procurements of commercial products, including MAS contracts.<sup>20</sup>

Eliminating audit rights would strip the government of one of the most important tools it has to detect and recover contractor overpricing and leave it effectively at the mercy of the good intentions of the contracting community. This would be particularly critical in the context of the MAS program. Most of the MAS contracts are of a three to five year duration, and there is discussion within GSA of increasing the terms of MAS contracts even further.<sup>21</sup> Even just limiting audit rights to two years after contract award, as some have proposed, would obviously leave a large portion of the contract period unauditible. Removing those audit rights entirely, as espoused by H.R. 1670, would render meaningless any ability the government may still have to monitor defective pricing or price reduction requirements or even to discover and recover for simple billing errors. Eliminating such rights would be tantamount to handing the contractors "carte blanche" to violate contract terms. With overall federal procurement expenditures running at \$200 billion a year and MAS acquisitions alone amounting to over \$9 billion annually, eliminating this basic means of protecting the taxpayer's interests would not be good government, nor would it make good business sense.

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<sup>18</sup> GAO Examination of Records Clause, 48 C.F.R. § 52.215-1 (February 1993); Audit Negotiation Clause, 48 C.F.R. § 52.215-2 (February 1993).

<sup>19</sup> 41 U.S.C. § 254b(d)(3).

<sup>20</sup> H.R. 1670 would eliminate the existing TINA exemption for prices based on established catalog and market prices and substitute a blanket commercial item exemption in its place. Therefore, MAS contracts, which are let for the procurement of items that are defined by FASA as commercial, will be swept into the commercial item TINA exemption. The proposed legislation appears also to provide that these commercial items procurements would be treated like simplified acquisition threshold procurements in that they will be exempt from a variety of laws, including the government's general audit access and records examination authority. Sections 101(b) and 202(b).

<sup>21</sup> GSA's Federal Supply Service, which administers and is responsible for MAS items other than computer related items, is currently proposing to extend the terms of current MAS contracts for an additional five years at the option of the contractor.

The magnitude of the inevitable loss to the taxpayer that would result from the elimination of audit rights is reflected in the results of recent audits of MAS contracts issued by our Offices, as well as by GAO. These reports show that, in spite of existing built-in assurances such as certification requirements, contractors often tend to submit, either inadvertently or purposefully, incomplete and inaccurate disclosures.<sup>22</sup> In the past seven years alone, the GSA Office of Inspector General issued postaward audits of MAS contracts which resulted in the recovery of over \$100 million in civil fraud settlements and judgments with contractors,<sup>23</sup> largely due to inaccurate and incomplete disclosures of discount information and price reductions by contractors.<sup>24</sup> These figures are only a drop in the bucket compared to the \$1 billion recovered last year by the Department of Justice for civil fraud cases. Of this amount, fully \$578 million constitutes the recovery related to defense procurement fraud cases.<sup>25</sup>

Industry has complained about the supposedly unreasonable burden imposed on contractors by the government's right to examine contractor books and records. The argument is commonly made that providing these records is both time consuming and expensive to the contractor. However, the reality of modern audit techniques is that almost all of the information required by government auditors is down-loaded from computer sales tapes already maintained by most vendors. Information such as discount structure is necessarily maintained by most businesses in order to determine profit margins and sales practices. The majority of MAS

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<sup>22</sup> See, e.g., GAO, Multiple Award Schedule Contracting - Changes Needed in Negotiation Objectives and Data Requirements, GAO/GGD-93-123 (August 1993) at 66-67.

<sup>23</sup> See Attachment 1 to this paper.

<sup>24</sup> This amount does not reflect the many postaward audit reports which are referred to the agency for administrative recovery. The VA Office of Inspector General has issued audit reports over the last seven years which resulted in over \$50 million in recoveries for defective pricing, price reduction and related violations, most of which was recovered through administrative action. See Attachment 2 to this paper. This amount also does not reflect the considerable cost savings achieved from preaward audits performed at the request of contracting officers. In the last six years, the GSA Office of Inspector General has issued audit reports which resulted in over \$500 million in cost savings achieved by contracting officers during the negotiation of MAS contracts. See Attachment 3 to this paper.

<sup>25</sup> U.S. Department of Justice Press Release, supra n. 15.

audits require no more than two weeks of audit work at the contractor site in order to obtain the required information. Therefore, the burden on contractors can hardly be accurately labelled as excessive. Moreover, as discussed more fully in the next section, audit access is consistent with common industry practice for large volume purchasers.

## **THE GOVERNMENT AS A BUSINESS**

The success of industry in garnering support for many of its procurement initiatives is reflective of the popular misconception that the government operates in ways that are significantly different than does industry. Certainly, in some cases the government does operate differently, particularly in areas designed to promote socio-economic goals, such as prevailing wage requirements or the promotion of small and minority-owned businesses, like the 8(a) contracting program. In many other areas, though, particularly when economic self-interest is at issue, government and industry operate fairly similarly, except that industry aims to maximize profit while the government aims to reduce taxpayer costs.

Industry has long argued that data disclosure requirements, certifications and audit rights are the antithesis of standard commercial practice and that such requirements add significantly to the cost of doing business with the government. Industry, instead, has touted the competitive marketplace as the sine qua non of fair and reasonable procurement practices and as the best guarantee the government has that it will obtain the lowest possible prices for the goods and services it purchases.

It is, however, the reality of this competitive marketplace which dictates that large volume purchasers can and do set many conditions for signing a contract. Among the conditions contractors set when they act as purchasers are requirements very much the same as those conditions contractors have so vociferously argued against in their government contracts when they are acting as sellers. It has been our experience based on years of auditing commercial contractors that large volume purchasers conduct their own procurements in the same manner as do GSA and the VA in MAS procurements -- they seek to take maximum advantage of their potential purchasing power whenever possible, seeking such most-favored customer treatment, information disclosures and audit rights as may be justified by their volume of purchases from a particular seller.

Based on information disclosed in audits conducted by both the GSA and VA Offices of Inspector General, we have examined the terms and conditions contained in a representative sample of agreements between large volume purchasers and their commercial suppliers. Standard in the forty-one commercial purchase agreements we examined are the following types of clauses:

- Most-favored customer requirements: Of the forty-one agreements we examined, fully twenty of them contained most-favored customer requirements very similar to those contained in MAS contracts. These agreements typically provided that the buyer would receive prices better than or equal to any other buyer during the term of the contract. One agreement provided the following:

"[the seller] represents and warrants that the terms of this Agreement are not less favorable to [the buyer] than those given to any other of [the seller's] customers under like terms, conditions and quantity."

Another example includes the following:

"Supplier warrants and agrees that each of the charges, terms, warranties or benefits granted to [the buyer] pursuant to this Agreement or in any Purchase Order are comparable to or better than the equivalent Charge, term, warranty or benefit being offered by Supplier to any other commercial customer of Supplier procuring the same product, at the same time, pursuant to similar terms and conditions."<sup>26</sup>

- Price reduction clause: Twenty-three of the agreements also contained provisions by which a seller would commit to giving the buyer the benefit of any decreases in prices for the subject products during the term of the agreement. One typical clause provides as follows:

"In the event the Seller's prices are reduced, as of the date of reduction, the reduced prices shall apply to all current and future rentals and purchases."

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<sup>26</sup> The most favored customer clauses we found in the agreements we examined can be found in Attachment 4 to this paper.

Another agreement we looked at contained the following language:

"Seller agrees to extend at all times to Buyer and promptly make any price reductions or changes to terms necessary to give Buyer the benefit of as low and/or as favorable prices, terms, and conditions offered or given by Seller at any time during the life of this Agreement to others of similar classifications as Buyer buying items of the same quality and substantially the same quantity."<sup>27</sup>

- Audit rights: Sixteen of the commercial agreements we examined contained audit clauses much like the government's, by which buyers not only required sellers to keep applicable records but also retained the right to examine those records to verify pricing. Interestingly, many of these clauses continued this obligation for a period of time after the term of the agreement. One agreement provided as follows:

"Vendor will keep complete and accurate records of sales and net sales to [buyers] for the period of the Agreement, and for one (1) year thereafter. Vendor agrees to allow an independent accountant, agreed to by both parties, the right to examine Vendor's books and records to verify the marketing fee. . ."

Another agreement provides as follows:

"Supplier shall maintain complete and accurate records of all amounts billable to and payments made by Customer hereunder in accordance with recognized accounting practices. Supplier shall retain such records for a period of one (1) year from the date of final payment for Products covered hereby . . . During the terms of this Agreement and the respective periods in which Supplier is required to maintain such records, Customer and its authorized agents and representatives shall have access to such records for purposes of audit during Supplier's normal business hours. The correctness of Supplier's billing shall be determined as a result of such audits."<sup>28</sup>

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<sup>27</sup> The price reduction clauses we found in the agreements we examined can be found in Attachment 5 to this paper.

<sup>28</sup> The audit rights clauses we found in the agreements we examined can be found in

It is obvious that large companies purchase in ways quite similar to the federal government and require many of the same protections against overpricing that they seem so reluctant for the government itself to have. It is equally obvious that large volume purchasers take maximum advantage of their size and potential purchasing power to obtain the most favorable terms possible in the marketplace. In short, industry includes provisions such as price reduction clauses and audit rights because the provisions make good economic sense. We do not believe there is any reason why the government, as the single largest procurer of goods and services, should be denied the same protections.

### **CONCLUSION**

In sum, recent procurement initiatives have made great progress in both streamlining the procurement process and moving away from government-unique specifications toward commercial product acquisitions. In so doing, however, these initiatives threaten to dilute the concept that the government should use its volume purchasing power in order to take advantage of economies of scale. The taxpayer clearly expects the government to get the best prices available in the marketplace, and GAO reports have consistently recommended that the government take advantage of its paramount bargaining position. The MAS program has demonstrated that, with its significant buying power, the government can and does purchase at prices significantly lower than individual consumers at discount stores. We should not jeopardize the government's ability to continue doing so as we move to increase the government's reliance on commercial products to meet the government's needs.

In order to effectively harness its buying power as it does in the MAS program, the government needs to maintain the necessary tools to guard against contractor overpricing. These tools include some of the mechanisms we have discussed here -- audit rights, price reduction and disclosure requirements and certifications. Although industry maintains that such requirements do not "add value" to the procurement process, we believe that the facts are otherwise. Most obviously, the value of these mechanisms lies in their ability to help the government insure that it is getting a fair and reasonable price for the goods and services it

procures. To those who would say that the competitive marketplace is the single best mechanism for regulating price for the government as well as industry, we respond that industry itself does not depend solely on the competitive marketplace to determine pricing, but instead relies on many of the very same audit, most-favored customer and price reduction requirements which it would deny the government.

## RECOMMENDATIONS

The OIG recommends the following legislative/regulatory actions to address the concerns expressed in this paper:

- A clear statement that the government shall have audit access rights for a period up to three years after final contract payment in all negotiated procurements;<sup>29</sup>
- At a minimum, a retention of all certifications relating to pricing or related information disclosures presently required on acquisitions, including MAS acquisitions, exempt from TINA cost or pricing data requirements;<sup>30</sup>

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<sup>29</sup> We suggest adding the following language to proposed Section 101(b) of H.R. 1670, as amended by Section 202(b) of the bill, to explicitly provide for the government's statutory right to audit with respect to Multiple Award Schedule contracts:

"(e) SIMPLIFIED PROCEDURES - (1)(A) In order to promote efficiency and economy in . . . , the Federal Acquisition Regulation shall provide for special simplified procedures for purchases of commercial items and property and services for amounts not greater than the simplified acquisition threshold.

**(B) However, the Federal Acquisition Regulation shall not contain any restrictions on the government's authority to audit commercial item procurements above the simplified acquisition threshold.**

<sup>30</sup> We also propose deleting Section 302(b) of H.R. 1670 which would prevent agencies from requiring certifications not specifically authorized by statute or approved by the Office of Procurement Policy Administrator. Although H.R. 1670 would not prohibit regulatory certifications per se, we believe the discretion to include certifications should be vested completely

- A statement recognizing that the price reduction clause is commonly included in private sector commercial contracts and will be included in all MAS contracts;<sup>31</sup>
- A requirement for price review and adjustment after a reasonable period for commercial item contracts for cutting-edge technologies which do not yet have actual sales; and
- The following changes to S. 675:
  - The establishment of clear limitations on the scope and duration of the "pilot" automation program proposed in Section 2 of S. 675, including the inclusion of maximum dollar values.
  - The amendment of Section 2(b) of S. 675 to clearly allow GSA the discretion to conduct price negotiations in the event it determines that the lack of competition for a particular item on a schedule would warrant it.
  - The amendment of the price adjustment language of Section 2(b)(2) of S. 675, to indicate clearly that during the pendency of any pilot program, contractors may adjust their prices on covered MAS contracts only downward, in order to protect the government from unjustified price increases.
  - The inclusion of a mechanism to alert potential users of lower prices for that same item offered to the public or to another federal agency.

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in particular agency heads. Agencies are in the best position to determine what certifications are necessary to protect the government's interest in the context of specific procurement programs.

<sup>31</sup> We suggest that the regulations to be promulgated pursuant to Section 1093 of FASA, intended to discourage the use of nonstandard clauses, identify the price reduction clause as a standard commercial clause.

## Attachment 1

### GSA MAS Postaward Audits

<u>FY</u>	<u>Recoveries</u> Note 1
1995*	\$8,423,651
1994	4,029,446
1993	22,272,360
1992	27,837,094
1991	20,122,593
1990	15,772,766
1989	4,389,397
Total	\$102,847,307

\* Through 5/31/95

1. This column reflects recoveries (settlements or judgments) based on audit reports that had been referred to the Department of Justice for civil fraud prosecution. Virtually all of the recoveries are the result of contractors' failure to disclose accurate, complete, or current data in the negotiation of their multiple award schedule contracts and their failure to report and offer price reductions.

## Attachment 2

### VA MAS Postaward Audits

<u>FY</u>	<u>Recoveries</u> Note 1
1995*	\$7,943,730
1994	24,800,000
1993	170,000
1992	196,000
1991	910,000
1990	11,090,000
1989	5,083,000
Total	\$50,092,730

\* Through 6/21/95

1. This column reflects recoveries (settlements or judgments) based primarily on audit reports that were referred to the agency for administrative settlement. It also includes several that had been referred to the Department of Justice for civil fraud prosecution. Virtually all the recoveries are the result of contractors' failure to disclose accurate, complete, or current data for their multiple award schedule contracts and their failure to report and offer price reductions.

**Attachment 3**

**GSA MAS Preaward Audits**  
**Funds Put To Better Use (Avoidance)**

<u>FY</u>	<u>Mgmt. Commitments</u> Note 1
1995*	51,490,267
1994	141,940,648
1993	43,285,136
1992	117,769,567
1991	109,340,891
1990	56,033,971
Total	519,860,480

\* Through 5/31/95

1. This column represents the amount of Funds Put to Better Use that were recommended in OIG audit reports because of inaccurate or incomplete disclosures of data; these savings to the government were sustained by contracting officers in negotiations with offerors for MAS contracts.

## Attachment 4

**The remaining attachments are actual clauses that have been taken verbatim from commercial contracts. XXX indicates redacted privacy sensitive information.**

### **MOST-FAVORED CUSTOMER CLAUSES**

\* \* \* \* \*

#### **SAMPLE MOST-FAVORED CUSTOMER CLAUSE**

Seller represents and warrants that the prices established as the result of the discount(s) set forth in this Agreement are as low as those Seller has charged to its other customers for the same or similar Product/Service of the same quantity/type for delivery/Service during the same periods of time in the same general geographical area and under the same or similar conditions. In the event that during the period of this Agreement Seller reduces said prices or increases said discounts to any of its other customers or Buyer's organizations for the same or similar Products/Service of the same quantity/type for delivery during the same periods of time in the same general geographical area and under the same or similar conditions, then Seller shall notify Buyer in writing of such reductions and Buyer shall modify in writing the discount(s) specified in this Agreement to reflect the reduced prices or increased discounts effective as of the date of the lower price(s)...

\* \* \* \* \*

SAMPLE MOST-FAVORED CUSTOMER CLAUSE

MOST FAVORED CUSTOMER

XXX represents and warrants that the terms of this Agreement are not less favorable to XXX than those given to any other of XXX's customers under like terms, conditions, and quantity. If more favorable terms are provided to any other customer, then equivalent terms will be offered promptly to XXX under this agreement, without any requirement to modify this Agreement in any other respect.

\* \* \* \* \*

SAMPLE MOST-FAVORED CUSTOMER CLAUSE

AS FAVORABLE CUSTOMER

XXX agrees that the prices offered in this XXX to XXX for the Products, Distributed Software and Services purchased hereunder will be as favorable as those made available to any other commercial customer contemporaneously purchasing the same Products, Distributed Software and Services in like quantities under similar terms, conditions, and circumstances. This provision shall not apply when such lower price is given to meet the price offered by a competitor of XXX to the other customer.

\* \* \* \* \*

SAMPLE MOST-FAVORED CUSTOMER CLAUSE

PRICES

The initial prices listed in Exhibit D are not subject to increase during the first 12 months after the effective date of this Agreement. Supplier represents that the initial prices for Products and services set forth in the applicable Schedule or Order, and any increases thereof, are and shall be as low as those offered by Supplier to any of its other similarly situated commercial customers for comparable products and services during the term of this...

\* \* \* \* \*

SAMPLE MOST-FAVORED CUSTOMER CLAUSE

Prices, charges and rates applicable to this Contract are contained within the attached Appendices. Prices are for the duration of this Contract. All prices contained within Section VII, Appendix A, are net prices.

Seller warrants that any unit prices charged herein do not exceed the unit prices charged by Seller to the Government or other customers in substantially similar transactions.

Seller represents and warrants that the prices in the attached Appendices are as low as those Seller has charged its other customers for the same or similar products or service of the same quality for delivery during the same periods of time in the same geographical area and under the same or similar conditions. In the event that during the same period of this Contract, Seller reduces said prices to any of its other customers or Buyer's organization for the same or similar products or services of the same or similar quantity for delivery within the same geographical area and under the same or similar conditions, then Seller shall notify Buyer in writing of such reductions or increases.

\* \* \* \* \*

SAMPLE MOST-FAVORED CUSTOMER CLAUSE

Seller warrants that the prices charged for the Products are not in excess of the lowest prices charged by Seller to other similarly situated customers for similar quantities of products of like quality.

\* \* \* \* \*

SAMPLE MOST-FAVORED CUSTOMER CLAUSE

MOST FAVORED NATION PROVISION

All of the prices, warranties, benefits and terms granted by Seller to Buyer hereunder are hereby warranted by Seller to be comparable to, or more favorable to Buyer than, the equivalent prices for specified quantities, warranties, benefits and material terms that: (a) have been offered by Seller to any of its other customers purchasing/renting any copiers and supplies or (b) are being and will be offered by Seller to any of its other customers purchasing/renting any copiers and supplies developed therefrom during the agreement Period. If at any time during the Agreement Period the Seller shall contract, or have contracted, with any other customer purchasing/renting any copiers and supplies developed therefrom on a basis that provides prices, warranties, benefits or terms to such other customer more favorable than those provided to Buyer hereunder, then (I) Seller shall within thirty (30) calendar days after the effective date of such other contract notify Buyer in writing of such fact, explaining the more favorable basis in detail, and (II) regardless of whether such notice is sent by Seller or received by Buyer, this Agreement shall be deemed to be automatically amended, effective retroactively to the date of such separate Agreement, to provide the same prices, warranties, benefits, or terms to Buyer; provided that Buyer shall have the right and option at any time to decline to accept any such change and provided that the granting of such lower price to Buyer would not be in violation of law in which event such automatic amendment shall be deemed to be null and void effective retroactively to the date of a separate agreement and (III) Buyer may terminate this Agreement in whole or in part without liability providing, however, that the Seller is first given an opportunity to meet such competitive prices or services. The provisions

of this Article shall survive the termination of this Agreement in regard to any Purchase Order issued prior to the termination of this Agreement.

\* \* \* \* \*

SAMPLE MOST-FAVORED CUSTOMER CLAUSE

SELLERS REDUCTION

CONTRACTOR agrees that it will not provide MATERIALS and SERVICES comparable or superior to those covered herein to third parties (excluding U. S. government) at better terms or at fees lower than those set forth herein, without offering such terms or fees to XXX.

\* \* \* \* \*

SAMPLE MOST-FAVORED CUSTOMER CLAUSE

Seller warrants that the prices shown on Pricing Schedule A and the price charged for any Goods not presently shown on Schedule A but for which a Purchase Order is issued under this Master Agreement, will be priced in accordance with the Schedule A published as an addendum to this Master Agreement. Seller further warrants that if at any time the nationally published price for any Goods listed in Pricing Schedule A decreases, Seller shall immediately notify Buyer in writing, and the price on Pricing Schedule A shall be modified accordingly. Seller further warrants that the price to Buyer for any Goods ordered under this agreement shall be no higher than the price charged any other customer of Seller who purchases a comparable volume of Goods from Seller.

\* \* \* \* \*

SAMPLE MOST-FAVORED CUSTOMER CLAUSE

MOST FAVORED CUSTOMER

XXX represents that the discounts received herein by XXX are no less than those routinely offered to a competitor of XXX for like Products and quantities under similar terms, conditions, and circumstances; XXX will advise XXX in writing in

the event greater discounts are offered XXX's competitors for like Products and quantities under similar terms, conditions, and circumstances.

\* \* \* \* \*

SAMPLE MOST-FAVORED CUSTOMER CLAUSE

Discount. XXX shall sell and barter all XXX product to XXX at a price with at least as favorable a discount off list price as XXX or any of its affiliates grants on sales to non-XXX affiliates of comparable quantities of the given product (the end user destination for which product is within the Territory) during the sixty day period beginning thirty days prior to any particular order by XXX and ending thirty days following any such order by XXX and ending thirty days following any such order (collectively, where appropriate, with "Barter Value", as defined in the Master Agreement, "Best Pricing"). Where a representative quantity of such XXX product has not been ordered by a non-XXX affiliate within the sixty day period used to calculate Best Pricing, Best Pricing shall be at least as favorable a discount off list price as XXX or any of its affiliates grants on sales or comparable product to non-XXX affiliates at comparable quantities. In all events, quantities of XXX purchases and barter of given XXX product lines shall be calculated on at least as favorable a basis to XXX as an annualized basis. XXX shall deliver to XXX an estimate in writing of its prospective purchases or barter of XXX product over the next...

\* \* \* \* \*

SAMPLE MOST-FAVORED CUSTOMER CLAUSE

Provision of Most Favorable Terms. Supplier warrants and agrees that each of the Charges, terms, warranties or benefits granted to XXX pursuant to this Agreement or in any Purchase Order are comparable to or better than the equivalent Charge, term, warranty or benefit being offered by Supplier to any other commercial customer of Supplier procuring the same product, at the same time, pursuant to similar terms and conditions. If Supplier shall enter into arrangements with any customer of Supplier providing for more favorable Charges, terms, warranties or benefits, then this Agreement or the applicable Purchase Order shall thereupon be deemed amended to incorporate the more favorable Charges, terms, warranties or benefits and supplier shall immediately notify XXX of such more favorable Charges, terms, warranties or benefits.

\* \* \* \* \*

SAMPLE MOST-FAVORED CUSTOMER CLAUSE

XXX warrants that prices charged hereunder are not in excess of the lowest prices charged by XXX to other purchasers of the same products in like quantities and under similar circumstances. In the event XXX makes lower prices available to another purchaser in equal or lesser quantities under the same or similar conditions, XXX shall promptly notify XXX each time that this occurs and such lower prices shall immediately be made available to XXX on each such occasion. Such lower pricing shall apply to all products then on order and to those subsequently ordered by XXX during the period of time the lower price is in effect.

\* \* \* \* \*

SAMPLE MOST-FAVORED CUSTOMER CLAUSE

Favored Customer Pricing. Notwithstanding anything to the contrary contained herein, Vendor will insure that XXX will have the most competitive national pricing, terms and conditions structure offered to any healthcare organization, excluding the U. S. Federal Government, during the duration of this Agreement, which does not have a committed program.

\* \* \* \* \*

SAMPLE MOST-FAVORED CUSTOMER CLAUSE

Most Favored Customer Status XXX Technology

XXX agrees to sell to XXX equipment products at prices that are equal to or less than XXX's lowest price to other customers buying like items at like volumes and at similar contractual commitments.

\* \* \* \* \*

SAMPLE MOST-FAVORED CUSTOMER CLAUSE

Favored Customer Pricing. Notwithstanding anything to contrary contained herein, the prices for each Product will be no greater than the lowest price charged by Vendor for such Product during the term hereof for comparable quantities except to local, state and federal government purchases.

\* \* \* \* \*

SAMPLE MOST-FAVORED CUSTOMER CLAUSE

Pricing

The Vendor represents and warrants that the prices contained in the Bid are neither (i) higher than the prices charged a comparable purchaser within the past \_\_\_\_\_ months no (iii) higher than the prices offered to any Eligible Participant within the past \_\_\_\_\_ months.

\* \* \* \* \*

SAMPLE MOST-FAVORED CUSTOMER CLAUSE

CERTIFICATION OF PRICE QUOTATIONS

AT THE TIME OF THESE PRICE QUOTATIONS, WE HEREBY CERTIFY THAT THE PRICES HEREIN SUBMITTED ARE AS LOW AS PRICES CURRENTLY QUOTED TO ACCOUNTS IN THE SAME CLASS OF TRADE, UNDER THE SAME CONDITIONS OF SALE. EXISTING CONTRACTS FOR THE SAME CLASS OF TRADE MAY BE LOWER BASED ON THE PRICES AT THE TIME OF EXECUTION, AS WELL AS ANNUAL VOLUME.

\* \* \* \* \*

SAMPLE MOST-FAVORED CUSTOMER CLAUSE

The Bidder represents and warrants that the product prices set forth in its Bid are not higher than:

- i. The prices it charged any distributor within the past sixty days.

- ii. The prices it charged any comparable purchaser within the past sixty days.
- iii. The prices offered to XXX within the past sixty days. "Past sixty days", as used herein, shall mean the sixty days immediately preceding the posted date of the Bid.

If, from the Bid Opening Time until the expiration of the Term of the Purchasing Agreement, the Vendor offers XXX a price for products of the type covered by the Purchasing Agreement that is lower than the Award Price, then the Award Price shall automatically be amended to reflect the lower price.

\* \* \* \* \*

SAMPLE MOST-FAVORED CUSTOMER CLAUSE

XXX Corporation certifies that the prices bid are as low as any other bid prices offered in like quantity reflecting market conditions at time of offer.

Favored Customer Pricing. Notwithstanding anything to the contrary contained herein, the price for each Product under this Agreement will be no greater than the lowest price charged by Vendor during the term hereof for such Product or any product which, except for the labeling thereof, is identical to such Product.

**Attachment 5**

**PRICE REDUCTION CLAUSES**

\* \* \* \* \*

**SAMPLE PRICE REDUCTION CLAUSE**

Seller represents and warrants that the prices established as the result of the discount(s) set forth in this Agreement are as low as those Seller has charged to its other customers for the same or similar Product/Service of the same quantity/type for delivery/Service during the same periods of time in the same general geographical area and under the same or similar conditions. In the event that during the period of this Agreement Seller reduces said prices or increases said discounts to any of its other customers or Buyer's organizations for the same or similar Products/Service of the same quantity/type for delivery during the same periods of time in the same general geographical area and under the same or similar conditions, then Seller shall notify Buyer in writing of such reductions and Buyer shall modify in writing the discount(s) specified in this Agreement to reflect the reduced prices or increased discounts effective as of the date of the lower price(s)...

\* \* \* \* \*

**SAMPLE PRICE REDUCTION CLAUSE**

**MOST FAVORED CUSTOMER**

XXX represents and warrants that the terms of this Agreement are not less

favorable to XXX than those given to any other of XXX's customers under like terms, conditions, and quantity. If more favorable terms are provided to any other customer, then equivalent terms will be offered promptly to XXX under this agreement, without any requirement to modify this Agreement in any other respect.

\* \* \* \* \*

SAMPLE PRICE REDUCTION CLAUSE

Prices, charges and rates applicable to this Contract are contained within the attached Appendices. Prices are for the duration of this Contract. All prices contained within Section VII, Appendix A, are net prices.

Seller warrants that any unit prices charged herein do not exceed the unit prices charged by Seller to the Government or other customers in substantially similar transactions.

Seller represents and warrants that the prices in the attached Appendices are as low as those Seller has charged its other customers for the same or similar products or service of the same quality for delivery during the same periods of time in the same geographical area and under the same or similar conditions. In the event that during the same period of this Contract, Seller reduces said prices to any of its other customers or Buyer's organization for the same or similar products or services of the same or similar quantity for delivery within the same geographical area and under the same or similar conditions, then Seller shall notify Buyer in writing of such reductions or increases.

\* \* \* \* \*

SAMPLE PRICE REDUCTION CLAUSE

In the event Seller's prices are reduced, as of the date of reduction the reduced prices shall apply to all current and future rentals and purchases.

\* \* \* \* \*

SAMPLE PRICE REDUCTION CLAUSE

MOST FAVORED NATION PROVISION

All of the prices, warranties, benefits and terms granted by Seller to Buyer hereunder are hereby warranted by Seller to be comparable to, or more favorable to Buyer than, the equivalent prices for specified quantities, warranties, benefits and material terms that: (a) have been offered by Seller to any of its other customers purchasing/renting any copiers and supplies or (b) are being and will be offered by Seller to any of its other customers purchasing/renting any copiers and supplies developed therefrom during the agreement Period. If at any time during the Agreement Period the Seller shall contract, or have contracted, with any other customer purchasing/renting any copiers and supplies developed therefrom on a basis that provides prices, warranties, benefits or terms to such other customer more favorable than those provided to Buyer hereunder, then (I) Seller shall within thirty (30) calendar days after the effective date of such other contract notify Buyer in writing of such fact, explaining the more favorable basis in detail, and (II) regardless of whether such notice is sent by Seller or received by Buyer, this Agreement shall be deemed to be automatically amended, effective retroactively to the date of such separate Agreement, to provide the same prices, warranties, benefits, or terms to Buyer; provided that Buyer shall have the right and option at any time to decline to accept any such change and provided that the granting of such lower price to Buyer would not be in violation of law in which event such automatic amendment shall be deemed to be null and void effective retroactively to the date of a separate agreement and (III) Buyer may terminate this Agreement in whole or in part without liability providing, however, that the Seller is first given an opportunity to meet such competitive prices or services. The provisions of this Article shall survive the termination of this Agreement in regard to any Purchase Order issued prior to the termination of this Agreement.

\* \* \* \* \*

#### SAMPLE PRICE REDUCTION CLAUSE

#### SELLERS REDUCTION

CONTRACTOR agrees that it will not provide MATERIALS and SERVICES comparable or superior to those covered herein to third parties

(excluding U.S. government) at better terms or at fees lower than those set forth herein, without offering such terms or fees to XXX.

\* \* \* \* \*

SAMPLE PRICE REDUCTION CLAUSE

Seller warrants that the prices shown on Pricing Schedule A and the price charged for any Goods not presently shown on Schedule A but for which a Purchase Order is issued under this Master Agreement, will be priced in accordance with the Schedule A published as an addendum to this Master Agreement. Seller further warrants that if at any time the nationally published price for any Goods listed in Pricing Schedule A decreases, Seller shall immediately notify Buyer in writing, and the price on Pricing Schedule A shall be modified accordingly. Seller further warrants that the price to Buyer for any Goods ordered under this agreement shall be no higher than the price charged any other customer of Seller who purchases a comparable volume of Goods from Seller.

\* \* \* \* \*

SAMPLE PRICE REDUCTION CLAUSE

PRICE PROTECTION FOR PRODUCT IN XXX INVENTORY - In the event XXX decreases pricing on Product, which at the time of the decrease is contained in XXX's inventory in the XXX in XXX shall provide XXX with a credit for the difference between the XXX purchase price of the Product, purchased within the past thirty (30) days of the price announcement date, and the new price of the Product.

\* \* \* \* \*

SAMPLE PRICE REDUCTION CLAUSE

Seller agrees to extend at all times to Buyer and promptly make any price reductions or changes in terms necessary to give Buyer the benefit of as low and/or as favorable prices, terms, and conditions offered or given by Seller at any time during the life of this Agreement to others of similar classifications as Buyer buying items of the same quality and substantially the same quantity.

Seller represents that the prices to be charged Buyer pursuant to this Agreement are, to the extent that the same may be lower than those charged other customers of Seller, justified by the differences in the methods of selling and delivering products to this Agreement.

\* \* \* \* \*

SAMPLE PRICE REDUCTION CLAUSE

MOST FAVORED NATIONS/COMPETITIVE PRICING

If during the term of this Agreement Seller shall sell to any third party, excluding Seller's subsidiaries and affiliates, for the same end use, any Products in the United

States, of identical quality and grade, in like quantities, and upon the same terms and conditions, but at a lower price (F.O.B. shipping Point) than that which a Purchasing Entity is required to pay under this Agreement, then Seller shall adjust said price to Buyer and the operating facility for such Product to such lower price. In determining whether a third party sale shall have been made upon the same terms and conditions, Seller may take account of differences in the cost of delivery resulting from differing methods in which such Products are shipped and/or delivered to any third party purchaser thereof, as well as factors which may influence price such as, but not limited to, the term of the contracts, differing credit or payment terms or commitment for minimum or take-or-pay quantities or packaging and/or special promotional activities. The foregoing also shall not apply to (a) discounted models and/or (b) sales to local, state, or federal government or to any other quasi-government entity.

\* \* \* \* \*

SAMPLE PRICE REDUCTION CLAUSE

Provision of Most Favorable Terms. Supplier warrants and agrees that each of the Charges, terms, warranties or benefits granted to XXX pursuant to this Agreement or in any Purchase Order are comparable to or better than the equivalent Charge, term, warranty or benefit being offered by Supplier to any other commercial customer of Supplier procuring the same product, at the same time, pursuant to similar terms and conditions. If Supplier shall enter into arrangements with any customer of Supplier providing for more favorable Charges, terms, warranties or benefits, then this Agreement or the applicable Purchase Order shall thereupon be deemed amended to incorporate the more favorable Charges, terms, warranties or benefits and supplier shall immediately notify XXX of such more favorable Charges, terms, warranties or benefits.

\* \* \* \* \*

SAMPLE PRICE REDUCTION CLAUSE

XXX warrants that prices charged hereunder are not in excess of the lowest prices charged by XXX to other purchasers of the same products in like quantities and under similar circumstances. In the event XXX makes lower prices available to another purchaser in equal or lesser quantities under the same or similar conditions, XXX shall promptly notify XXX each time that this occurs and such lower prices shall immediately be made available to XXX on each such occasion. Such lower pricing shall apply to all products then on order and to those subsequently ordered by XXX during the period of time the lower price is in effect.

\* \* \* \* \*

SAMPLE PRICE REDUCTION CLAUSE

If published prices are decreased on any or all models during the Contract period,

Customer is eligible to receive these price decreases with corresponding adjustments to the terms, conditions, and contract concessions.

\* \* \* \* \*

SAMPLE PRICE REDUCTION CLAUSE

For the period of this Agreement, Manufacturer agrees to keep prices competitive with the general market, with regard to market price erosion. In the event that the market price of a contracted product declines, the Manufacturer will be given the first right of refusal to respond to the new market conditions. After notification, Manufacturer will have two (2) weeks in which to respond to XXX. If the Manufacturer chooses not to respond to the market change, it forfeits its right to the contract award of the product(s) in question and XXX may, at its discretion, award the product(s) to an alternate manufacturer.

\* \* \* \* \*

SAMPLE PRICE REDUCTION CLAUSE

The prices established herein shall prevail--be maximum--for the term of this agreement with the benefit of any general reduction in commodity price during said period being passed onto XXX.

If during the term of any resulting agreement, a lower price is offered by awardee to any other purchasing group similar to XXX awardee agrees to make that same lower price available to XXX members.

\* \* \* \* \*

SAMPLE PRICE REDUCTION CLAUSE

The manufacturer/supplier agrees that if, during the contract period, they offer to sell any products awarded to them by XXX to any participating institution at a lower price than that which has been provided to XXX on this contract, it will simultaneously reduce the price on the same products to XXX in its entirety.

\* \* \* \* \*

SAMPLE PRICE REDUCTION CLAUSE

If, from the Bid Opening Time through the Term of the Purchasing Agreement, the Vendor offers to any Eligible Participant a price for goods or services of the type subject to the Purchasing Agreement that is lower than the price for such goods or services under the Purchasing Agreement, then the price provision of the Purchasing Agreement shall automatically be amended to reflect such lower price.

\* \* \* \* \*

SAMPLE PRICE REDUCTION CLAUSE

The Bidder represents and warrants that the product prices set forth in its Bid are not higher than:

- i. The prices it charged any distributor within the past sixty days.
- ii. The prices it charged any comparable purchaser within the past sixty days.
- iii. The prices offered to XXX within the past sixty days. "Past sixty days", as used herein, shall mean the sixty days immediately preceding the posted date of the Bid.

If, from the Bid Opening Time until the expiration of the Term of the Purchasing Agreement, the Vendor offers XXX a price for products of the type covered by the Purchasing Agreement that is lower than the Award Price, then the Award Price shall automatically be amended to reflect the lower price.

\* \* \* \* \*

SAMPLE PRICE REDUCTION CLAUSE

BID PRICES AND DELIVERY POINT: Prices quoted shall be maximum and the State shall be protected against any increase in price during the life of the contract. However, should there be a reduction in the price or prices during the life of the contract, it is agreed that the State shall receive any price decrease which may occur during the contract period. In the event of any price reduction, the vendor shall advise this department in writing. Also, if during the contract period the vendor establishes a lower price to a purchasing group similar to our group, it is agreed that price is to be given to our group.

\* \* \* \* \*

## SAMPLE PRICE REDUCTION CLAUSE

Should Supplier at any time during the term of the Group Purchasing Agreement contact any XXX member institution (whether or not such institution has purchased any Contract Items) and offer to that institution a price lower than those quoted in its Proposal to XXX in response to this Request for Proposal, Supplier shall offer similar pricing arrangements to all XXX member institutions. Failure to extend the same pricing arrangements to XXX member institutions under the Group Purchasing Agreement shall be grounds for immediate termination of the Group Purchasing Agreement and may result in the suspension of Supplier from any future XXX bidding processes.

\* \* \* \* \*

SAMPLE PRICE REDUCTION CLAUSE

Should a successful Contractor offer any individual participant a contract price lower than the group's contracted price, that price will then become XXX's contract price throughout the term of the contract.

\* \* \* \* \*

SAMPLE PRICE REDUCTION CLAUSE

The prices indicated are firm and binding for the entire Bid Period. However, XXX will be kept "market competitive" during the entire Contract Period.

\* \* \* \* \*

SAMPLE PRICE REDUCTION CLAUSE

Price Reduction. The parties agree to meet, at the request of either party, no less frequently than once in any ninety (90) day period during the term of this Agreement to discuss whether or not a price reduction for any Product can be agreed upon by both parties.

**Attachment 6**

**AUDIT RIGHTS CLAUSES**

\* \* \* \* \*

**SAMPLE AUDIT RIGHTS CLAUSE**

Buyer shall have the right at all times with reasonable notice to Seller to inspect Seller's published price books, invoices and documentation to substantiate the correctness of the invoices and catalogs pertaining to this Agreement and work hereunder, and shall have the right to determine the correctness and propriety of the charges billed by Seller. Buyer shall be limited to verification of catalog pricing and proper discount allowances. The Seller's price list, a catalog regularly maintained by the Seller, is the primary source of pricing information. If any such inspection discloses any mispricing resulting in overpayment by Buyer, the amount thereof shall be refunded to Buyer promptly upon demand. Buyer may, as its option, withhold such overpayment from any amounts otherwise due from Buyer to Seller.

\* \* \* \* \*

**SAMPLE AUDIT RIGHTS CLAUSE**

Seller shall maintain a copy of all pricing, catalogs, and supporting documentation utilized for pricing under this Agreement for at least four (4) years after the expiration date of this Agreement.

\* \* \* \* \*

## SAMPLE AUDIT RIGHTS CLAUSE

### RECORDS AND AUDITS

Supplier shall maintain accurate records of all matters which relate to Supplier's obligations hereunder in accordance with generally accepted accounting principles and practices uniformly and consistently applied in a format that will permit audit. Supplier shall retain such records for a period of four years from the date of final payment, made by XXX under this Agreement, to which such records relate. XXX and its authorized representatives shall have access to such records for inspection and audit at reasonable times during normal business hours.

\* \* \* \* \*

SAMPLE AUDIT RIGHTS CLAUSE

RECORDS

Supplier shall maintain complete and accurate records of all amounts billable to and payments made by Customer hereunder in accordance with recognized accounting practices. Supplier shall retain such records for a period of one (1) year from the date of final payment for Products covered hereby. Supplier agrees to provide reasonable supporting documentation concerning any disputed amount of an invoice to Customer within thirty (30) days after Customer provides written notification of the dispute to Supplier. Supplier shall retain Contract documentation for a period of seven (7) years from date of inception.

During the term of this Agreement and the respective periods in which Supplier is required to maintain such records, Customer and its authorized agents and representatives shall have access to such records for purposes of audit during Supplier's normal business hours. The correctness of Supplier's billing shall be determined as a result of such audits.

\* \* \* \* \*

SAMPLE AUDIT RIGHTS CLAUSE

Audit Rights

Notwithstanding any termination or expiration of the DEA, XXX shall retain the information specified in Subparagraph 2.27.1 for a period of at least two (2) years from the date of resale, and the information specified in Subparagraph 2.27.2 for the duration of XXX's license of any sublicense granted by XXX, whichever is longer. If XXX requests reports from XXX as provided in the Software License Paragraph of the U.S. Standard Terms and Conditions, XXX may, at its option, require that such reports be certified by an officer of XXX or XXX.

\* \* \* \* \*

## SAMPLE AUDIT RIGHTS CLAUSE

### RECORDS AND AUDIT

Seller shall maintain until three years after final payment under this Agreement, complete and accurate books, records, documents and other evidence of the time worked, costs, expenses, and allowance pertaining to this Agreement (hereinafter collectively called "records") to the extent and in such detail as will properly reflect all net costs (direct and indirect) of labor, materials, equipment, supplies and services and other costs and expenses of whatever nature for which payment may be claimed under the provisions of the Agreement. Such records shall be made available to Buyer only in the case of an audit conducted by the United States government.

\* \* \* \* \*

SAMPLE AUDIT RIGHTS CLAUSE

Verification: Independent Accountants.

All costs and expenses billed to XXX under this Agreement shall be subject to verification by representatives of XXX.

\* \* \* \* \*

SAMPLE AUDIT RIGHTS CLAUSE

who shall, for such purpose, be granted reasonable access during normal business hours to all relevant books and records of XXX. XXX shall maintain such books and records for at least two (2) years from and after the date on which a related bill or statement is submitted to XXX.

\* \* \* \* \*

SAMPLE AUDIT RIGHTS CLAUSE

Audit - Lessor and its subcontractors and vendors shall maintain true and complete records in connection with the services and all transactions related thereto and shall retain all such records for at least 24 months after the end of the calendar year in which the services are performed. In the event costs are to be reimbursed under this Lease Agreement, Company may from time to time and at any time during the foregoing period of record retention make an audit of all records of Lessor and its subcontractors and vendors.

\* \* \* \* \*

SAMPLE AUDIT RIGHTS CLAUSE

Books and Records, Audit. Vendor will keep complete and accurate records of

sales and net sales to XXX Members and Affiliates for the period of the Agreement, and for one (1) year thereafter. Vendor agrees to allow an independent accountant, agreed to by both parties, the right to examine Vendor's books and records to verify the marketing fee. The books and records shall be available for audit at any time, but not more than once in any calendar year. The cost of this audit would be shared equally by both parties, Vendor and XXX.

\* \* \* \* \*

SAMPLE AUDIT RIGHTS CLAUSE

Books and Records, Audit. Vendor agrees to keep, maintain and preserve complete, current and accurate books, records and accounts of the transactions contemplated hereby and such additional books, records and accounts as are necessary to establish and verify Vendor's compliance hereunder. All such books, records and accounts shall be available for inspection and audit by XXX and its authorized representatives at any time during the term of this Agreement and for two (2) consecutive twelve month periods and only during reasonable business hours and upon reasonable notice. The exercise by XXX of the right to inspect and audit is without prejudice to any other or additional rights or remedies of either party hereto.

\* \* \* \* \*

SAMPLE AUDIT RIGHTS CLAUSE

Audit of Pricing

The Vendor shall allow XXX or its representatives to make periodic visits for the express purpose of auditing invoices to ensure correct pricing and performance under the Purchasing Agreement. All visits will be at a mutually agreed upon time.

\* \* \* \* \*

SAMPLE AUDIT RIGHTS CLAUSE

AUDIT

Customer shall, at all times, keep and maintain accurate books, records and files with respect to any information relative to the dispensing, administration or sale of XXX's products. Upon customer's receipt of written request from XXX customer

shall make such information available, through pharmacies or otherwise, in a manner mutually satisfactory to XXX and customer, for inspection by XXX's representatives or its designated auditors during regular business hours.

\* \* \* \* \*

SAMPLE AUDIT RIGHTS CLAUSE

Books and Records, Audit - XXX agrees to keep, maintain and preserve complete, current and accurate books, records and accounts of the transactions contemplated hereby and such additional books, records and accounts as are necessary to establish and verify XXX's compliance hereunder, but in no event shall XXX be required to share any books or records related to sales to non-XXX Members or Affiliates. All such books, records and accounts shall be available for inspection and audit by XXX and its authorized representatives at any time during the term of this Agreement and for two (2) years thereafter, but no more frequently than twice in any consecutive 12 month period and only during reasonable business hours and upon reasonable notice. The exercise by XXX of the right to inspect and audit is without prejudice to any other or additional rights or remedies of either party hereto. XXX shall provide XXX a monthly report of sales under this Agreement to member hospitals by the 20th day after the close of each month.

\* \* \* \* \*

SAMPLE AUDIT RIGHTS CLAUSE

XXX agrees to supply products pursuant to any contract made as a result of this proposal directly to any institution identified by XXX as an Eligible Member so long as the institution: 1) has an account in good standing with XXX or, if it does not have an account, meets XXX's criteria for opening an account and in fact opens an account if it chooses to purchase direct from XXX; 2) agrees in writing to make available to XXX upon XXX's request access to all books and records deems necessary to verify the volume of products shipped by XXX any designated prime vendor or any other entity in connection with any contract made as a result of this proposal and further that XXX shall have the right to inspect such books and records during the term of any such contract and for three (3) months thereafter; and 3) agrees in writing that all product purchased directly from XXX or through a designated prime vendor under any contract made as a result of this proposal are for the institution's own use as therapy for inpatients or for the vaccination of hospital employees.

\* \* \* \* \*

## SAMPLE AUDIT RIGHTS CLAUSE

Books and Records, Audit. Vendor agrees to keep, maintain and preserve complete, current and accurate books, records and accounts of the transactions contemplated hereby and such additional books, records and accounts as are necessary to establish and verify Vendor's compliance hereunder. All such books, records and accounts shall be available for inspection and audit by XXX and its authorized representatives at any time during the term of this Agreement and for two (2) years thereafter, but no more frequently than twice in any consecutive twelve month period and only during reasonable business hours and upon reasonable notice. The exercise by XXX of the right to inspect and audit is without prejudice to any other or additional rights or remedies of either party hereto.

