

GSA Schedule Contract Compliance

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Introduction

- Overview of Schedule Process
- Key Issues and Clauses
- Minimizing Risk
- Current Developments



Overview

- GSA Schedule Contracting (e.g., MOBIS, FABS, etc.)
 - Provides the Government With the Ability to Purchase Commonly Used, Off-The-Shelf Items/Services Easily and Inexpensively
 - Millions of Products and Services Provided By Thousands of Contractors (Exceeds \$30B)
 - Acquiring a Schedule Contract: “The Hunting License”
 - Task or Delivery Orders: Vehicles to Win New Business
 - No Agency Publication Required
 - “Fair Opportunity to be Considered” Standard
 - Orders issued by individual agency Contracting Officers; GSA merely administers Schedule Program and your contract (published pricing, modifications, etc.)



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Overview

- Acquiring a Schedule
 - Find Solicitation on Fedbizopps.gov
 - Don’t read the solicitation like a novel
 - Pre-award process is about 90-120 days
 - Contract award following GSA evaluation / acceptance of offer
- Maximizing Sales
 - Create and/or Foster the Relationship
 - Assist the Agency In Developing Its Needs
 - Demonstrate ROI
 - Current Schedule Holders/Competitors – Review GSAAvantage!



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Industrial Funding Fee

- Industrial Funding Fee (IFF)
 - Fee paid to GSA to cover GSA's administrative and program costs of administering the Schedule
 - Paid with QSRs – Make sure you file timely
 - Incorporated into contractor's price
 - IFF currently stands at .75%
 - When does an IFF audit occur?
 - Generally, annually (though, some contractors “never”)
 - Performed during CAVs, or Contractor Assistance Visits
 - If problems or inconsistencies are discovered, expect follow-up audits
 - What does the audit focus on?
 - Two main objectives: (1) To track all invoices for GSA orders and report Schedule sales correctly; and (2) correct payment of IFF to GSA



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Commercial Sales Practices

- Commercial Sales Practices (CSP)
 - GSA Solicitations and Contracts Include the CSP-1 Form, required to be completed by all offerors
 - Sets forth contractor pricing and discounting practices
 - Used by GSA to evaluate and negotiate fair and reasonable pricing based on contractor's pricing and discount practices with its commercial customers
 - Make sure that the information and data provided is supported by appropriate documentation
 - Maintain clear and extensive descriptions of sales practices, and the bases for any particular pricing and discounts that were excluded from the CSP as not comparable or relevant
 - Helps eliminate potential ambiguities
 - Must be updated during contract term
 - Not one size fits all and difficult to complete



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Commercial Sales Practices

- Failure to accurately disclose information in CSP
 - Audit purpose is to assess whether accurate commercial sales information was provided and to ensure fair and reasonable pricing
 - If contractors fail to completely disclose pricing and discounting practices for all of its customers, then there may be a false certification or fraud
 - Inaccurate pricing presents significant liability:
 - Pricing questions and reviews often lead to expansions of the audit to other compliance areas
 - Could move from an audit to an investigation by the OIG or DoJ
 - Additional civil and, perhaps, criminal liability



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Commercial Sales Practices

- Last, but certainly not least....
 - Penalties include **price adjustment** (GSAR 552.215-72):
 - For failing to provide accurate and required information
 - Providing outdated, inaccurate or incomplete information
 - Changes to pricing and discounts made after submission but prior to completion of negotiations
- Take advantage of the opportunity to identify as exceptions discounts that would otherwise trigger the price reduction clause



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Most Favored Customer

- Most Favored Customer
 - Government will seek contractor's best available price
 - This negotiation objective is known as GSA's Most Favored Customer (MFC) pricing
 - In the commercial world, this also may be known as Most Favored Nation Pricing, or Lowest Provided or Guaranteed Pricing
 - MFC pricing is based on comparable terms and conditions among a contractor's best commercial customers
 - Contracting Officer will undertake this comparison by obtaining MFC information during contract negotiations, when the contractor discloses information about its commercial pricing policies and practices via its CSP



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Most Favored Customer

- *E.g.*, during these negotiations, the CO and contractor could agree that a particular customer or category of customer,
 - "Entity X," is the basis of award (BoA),
 - such that the price that the government pays for a particular item or service will be equal to or better by Y% to "Entity X's" price, or
 - the discount provided to the government is the same or better by some measure as afforded to "Entity X"
 - "X" becomes your MFC



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The (Dreaded) Price Reduction Clause

- Price Reductions
 - The PR clause can be found at (48 CFR 552.238-75).
 - Designed to maintain the price/discount relationship negotiated at the time of award during subsequent contract performance
 - Ensures that the government obtains a proportionate PR if there have been changes to the BoA customers/MFC
 - E.g., Discount given to MFC, Entity “X” at time of award = 15%
 - Now, post-award, discount increases to 20%
 - Contractor must disclose increase to GSA, and
 - Offer government new, increased discount of 20%
 - Same applies to (i) reduction in contractor prices or (ii) offering of more favorable Ts and Cs, found in pricelists, catalogs, or other similar contractor documents



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The (Dreaded) Price Reduction Clause

- Reduction extends to the same effective date and for the same time period as extended to the particular customer
- Exceptions apply, see 48 CFR 552.238-75(d): No price reduction for sales –
 - To commercial customers under FFP definite quantity contracts with specified delivery in excess of the MOT specified in the contract
 - To Federal agencies
 - Made to State and local government entities when the order is placed under a Schedule contract (and the state and local government entity serves as the BoA)
 - Caused by an error in quotation or billing
- Can always provide the government with a price reduction under your contract



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The (Dreaded) Price Reduction Clause

- Avoid triggering the Price Reduction clause:
 - Have your price reductions provided to your BoA customer been reflected (or addressed) in your Schedule contract?
 - Have you documented who is your BoA customer and the applicable price/discount relationship to avoid PR clause disputes?
 - Maintain adequate documentation to ensure price consistency
 - Monitor orders placed by BoA customers and control pricing carefully
 - An “ounce of prevention...”
 - There will be changes on the horizon to the PR clause



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The Trade Agreements Act Clause

- Trade Agreements Act (TAA)
 - Active Enforcement yielding significant penalties
 - Schedule contractors must certify that all products and services under their contracts are made (or “substantially transformed”) in “eligible countries”
 - Substantial transformation occurs where:
 - items are combined “into a new and different article of commerce with a name, character, or use distinct from that of the articles or articles from which it was transformed.” (Note: Mere assembly does not satisfy this test)
 - Eligible countries = those that have reciprocal Trade Agreements with the U.S. (e.g., NAFTA, WTO Government Procurement Agreement Country). China is not eligible



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The Trade Agreements Act Clause

- See FAR 52.225-5 and -6, and corresponding regulations at FAR Part 25
- To establish substantial transformation, extensive review of production processes and product costs are normally required, as well as a thorough assessment of U.S. Customs and BP opinions

- Protective Measures:
 - Review and update letters of supply from manufacturer / supplier
 - Review internal sourcing and manufacturing data to ensure substantial transformation, where applicable.

- The meaning of TAA compliance is likely to undergo significant changes



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Sanctions For Noncompliance

- Potential penalties for failing to comply with Schedule contract's Ts and Cs:
 - Price Adjustment
 - Termination for Default or Convenience
 - Suspension and Debarment
 - False Claims Act liability
 - False Statements Act liability
 - Other Fraud Statutes
 - New FAR Subpart 3.10
 - Criminal Prosecution
- Compliance is complicated but critically important



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Scope of Audit

- Audit of Records may include:
 - RFQs
 - Quotes
 - Task and Delivery Orders
 - Purchase Orders
 - Invoices
 - Price Lists
 - Other Terms and Conditions
 - Underlying Data and Pricing Support
 - Agreements
- Unfortunately, many contractors Schedule contract files are incomplete...



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Contractor Files – Maintaining Best Practices

- Contract files should contain all of the previous slide's information, plus such key documents as:
 - Original Proposal
 - Revised Proposals
 - Final Proposal Revision (FPR) memorializing negotiations
 - Contract award (signed)
 - Contract Modifications
 - Notes of discussions with Contracting Officers



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Evaluating Your Compliance

- Conduct Internal Compliance Review
 - Comprehensive review of pricing and discounting data & practices
 - Analyze sales for potential PRs to BoA customers (MFC)
 - Confirm accuracy and submission of IFF
 - Review sales data to detect any potential overcharges to the government
 - Ensure TAA compliance (continue to watch for rule change)
 - Review SB Subcontracting Plan – this is a requirement
 - Update your pricing, CSP-1 information, and other Ts and Cs as necessary (e.g., via contract modification)
 - Read your Schedule contract!



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Options to Extend Your Contract

- Handling Options
 - Evergreen Clause (I-FSS-163): Provides the government with the option to extend the contract up to 5 years (X3, for a total of 20 years)
 - GSA OIG may decide to conduct an audit around the time you submit or are planning to submit information supporting renewal of your contract.
 - Audit authority generally governed by:
 - FAR 52.215-20, Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data; and
 - GSAR 52.2.15-71, Examination of Records by GSA
 - GSA will want to usually see 12 months of sales data to assess pricing disclosures



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Options to Extend Your Contract

- Auditors will review sample sets of relevant source documents to validate your compliance
- Audit could expand to include the review of more broadly defined company pricing practices and compliance with other Schedule terms and conditions such as the TAA
- Provide yourself a sufficient amount of time to review your pricing and sales data prior to expiration of your contract (*i.e.*, at least 6 months)
 - Has anything changed with respect to your sales, pricing, or discounting practices that could impact your Schedule contract?
 - Take this opportunity to update these practices, especially if they have changed
 - Modify your CSP submission to remove any “emerging” or “existing” ambiguities that could cause difficulties in the future
- Then, if audited you will be prepared



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Options to Extend Your Contract

- Also, as discussed before, take this opportunity to review your overall GSA contracting practices:
 - What accounting/sales/contracting controls have been instituted to prevent improper price reductions?
 - What training are you providing your employees?
 - What systems are in place to assist with your compliance protocols?
 - Are sales being handled properly?
 - Are your pricing and discounting disclosures being done properly?
 - Are you compliant with the TAA?
- For those with Schedule contracts, these are several issues among others that should be addressed as part of your overall, more comprehensive compliance plan



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Current Developments

- Rewrite of the GSAR / Elimination or Change to the PR Clause
 - March 28, 2008, GSA established the GSA MAS Advisory Panel
 - Objective: To “review the MAS policy statements , implementing regulations, solicitation provisions and other related documents regarding the structure, use, and pricing for the MAS contract awards.”
 - Primary focus: Evaluating the Price Reduction Clause and MFC pricing practices
 - Membership: 11 government officials/4 industry
 - Recommendations expected to be announced in early 2009



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Current Developments

- TAA Reform
 - From substantial transformation to “tariff shift” approach for determining country of origin
 - Substantial transformation = assessed on a case by case basis where the S.T. occurred
 - Tariff shift approach = Formulaic and codified approach to determine country of origin
 - Based on the international Harmonized System used by the U.S. and all major trading partners to code all products that are exchanged in commerce throughout the world
 - If parts or materials are combined or modified such that the resulting product falls within a different classification/category than its constituent parts, then...
 - the country in which the combining/modifying occurred is the country of origin



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Current Developments

- Two tests do not always produce the same outcomes
- With tariff shifting, you do not have to conduct the rigorous examination of production and manufacturing processes (as well as U.S. Customs & BP decisions), as required under a substantial transformation analysis.
- Which approach is more favorable?
 - Depends on particular products and manufacturing processes. Remains complex
 - Review under both approaches to see if there is any concern
- Proposed Rule (73 Fed. Reg. 43385, July 25, 2008). Comments now due on Oct. 23, 2008



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