

Government Contracts: GSA Multiple Award Schedule Contracting

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This Practice Note explains US General Services Administration (GSA) Multiple Award Schedule (MAS) contracting, including the opportunities available to contractors through GSA MAS contracts and the bidding process required to take advantage of those opportunities. This Note also addresses key compliance requirements for GSA MAS contracts and how to prepare for an audit by the GSA.

Through its Multiple Award Schedule (MAS) program, the US General Services Administration (GSA) establishes many long-term indefinite-delivery, indefinite-quantity contracts with commercial companies to provide government agencies access to millions of commercial products and services at previously negotiated prices. Each contract is associated with a particular GSA Schedule based on the type of products or services involved. There are currently over 30 different Schedules covering over 11 million types of products and services. Each GSA MAS contract has an initial term (referred to as a base period) of five years and three potential renewal terms (referred to as option periods) of five years each.

GSA MAS contracts provide commercial contractors with considerable opportunity to sell products and services to a wide range of federal government customers, as well as some state and local government agencies, on an expedited and streamlined basis. Government acquisitions through GSA Schedules total about \$50 billion a year, representing 10% of overall federal contract spending. 80% of MAS contractors are small businesses, and these small-business contractors account for 36% of total sales through GSA MAS contracts. In Fiscal Year 2012, GSA had over 19,000 MAS contracts, and about 40% of those contracts generated sales.

OBTAINING A GSA MAS CONTRACT

Companies seeking to obtain a GSA MAS contract (referred to as offerors) must complete many steps in a process that may take several months.

IDENTIFYING THE GSA SCHEDULE AND SPECIAL ITEM NUMBER (SIN)

Offerors must first identify the Schedule applicable to the commercial products or services they intend to offer to GSA. The full list of GSA Schedules can be found by accessing the GSA eLibrary website. Following a recent consolidation of several service Schedules into the Professional Services Schedule, there are currently over 30 different GSA Schedules under which offerors can sell various commercial-item goods and services to the government. Commercial items range from hardware to office equipment to healthcare services (for more information on commercial item contracting, see Practice Note, Government Contracts: Reduced Risk Through Commercial Item Contracting (<http://us.practicallaw.com/5-532-3257>)).

Each GSA MAS contract is identified by a code number and descriptive title (for example, Schedule 71 - Furniture). The products and services within each Schedule are further categorized and identified by a specific SIN. For example, Schedule 71 - Furniture contains a SIN specifically related to cabinets for kitchen or general-purpose use (SIN 71-201).

FINDING A CURRENT SOLICITATION

After identifying the appropriate Schedule and applicable SIN, offerors can locate the most recent version of the solicitation for that GSA Schedule on the Federal Business Opportunities website. GSA MAS solicitations are continuously updated and include:

- Instructions for submitting offers.
- Descriptions of the criteria by which offers are evaluated.
- Applicable Federal Acquisition Regulation (FAR) and GSA Acquisition Manual (GSAAM) solicitation and contract clauses. The solicitations include some clauses in full text and incorporate others by reference.
- Information for each SIN, including the amount of total sales for each SIN during the preceding fiscal year.

REGISTERING IN THE SYSTEM FOR AWARD MANAGEMENT (SAM)

As a prerequisite to submitting a proposal in response to a solicitation, offerors must register in the System for Award Management (SAM) database. SAM is the primary government repository for a contractor's information, including required representations and certifications



and banking information identifying accounts in which government payments are deposited through electronic funds transfer. Before registering in SAM, offerors must obtain a Data Universal Numbering System (DUNS) number from Dun & Bradstreet, and through its SAM registration, offerors are assigned a Commercial and Government Entity (CAGE) code. Contractors must update information in SAM whenever information changes but at least annually.

PREPARING A PROPOSAL

In preparing a proposal, offerors should thoroughly review the solicitation requirements and ensure their proposals strictly comply with all those requirements. A failure to submit the required information in the appropriate format may result in the proposal being returned to the offeror or rejected.

COMPLETING THE COMMERCIAL SALES PRACTICES (CSP) FORM

GSA MAS solicitations require offerors to complete a Commercial Sales Practices (CSP) CSP-1 Form (48 C.F.R. § 515.408(b)), in which the offeror provides the GSA with its commercial sales information for the goods and services it intends to offer under the GSA MAS contract. In the CSP-1 Form, offerors must include about the offeror's commercial sales for each SIN:

- The total dollar value of sales for the products or services to the general public at a catalog price or based on an established market price during the previous 12-month period or the contractor's last fiscal year.
- The total projected annual sales to the government under the GSA MAS contract for each product or service.
- Whether the discounts and any concessions the offeror offers the government are equal to or better than the offeror's best price (discount and concessions in any combination) offered to any customer acquiring the same items regardless of quantity or terms and conditions. If not, the offeror must provide specific information regarding the customers who receive the same or better price than that offered to the government. The specific information includes:
 - the customers or category of customers that acquire the applicable products or services;
 - the discount provided to the identified customers;
 - the minimum quantity or sales volume the customers must acquire to receive the specified discount;
 - the Free on Board (FOB) delivery term for each identified customer (see Practice Note, Delivery of Goods: FOB (<http://us.practicallaw.com/6-521-8246#a149897>)); and
 - the concessions, regardless of quantity, granted to each identified customer.

GSA uses the CSP-1 Form to evaluate and negotiate fair and reasonable prices based on the offeror's pricing and discount practices with its commercial customers. Moreover, the CSP-1 Form provides offerors with an opportunity to distinguish sales to certain commercial customers from proposed government sales and seek GSA's agreement that those different commercial sales do not trigger the Price Reductions Clause (see Price Reductions Clause).

ENSURING INFORMATION IN THE CSP-1 FORM IS CURRENT, ACCURATE, AND COMPLETE

Offerors must certify that the information in the CSP-1 Form is current, accurate, and complete. An offeror's failure to do so complicates its ability to comply with the Price Reductions Clause (PRC). Moreover, GSA can reduce the prices in the GSA MAS contract or terminate the GSA MAS contract for default if the post-award audit reveals that the contractor:

- Failed to provide all required information.
- Provided outdated, inaccurate, or incomplete information.
- Changed pricing and discounts after submission but before the completion of negotiations.

(48 C.F.R. § 552.215-72.)

Intentionally submitting inaccurate, incomplete, or misleading pricing information can result in additional civil and criminal penalties.

NEGOTIATING A PRICE WITH GSA

After an offeror submits its proposal, including the completed CSP-1 Form, a GSA price negotiator reviews the proposal and negotiates the price with the offeror. GSA will likely seek to obtain the offeror's best price given to the offeror's most favored customer (MFC). MFC pricing is based on comparable terms and conditions among the offeror's best commercial customers (see Standard Clauses, General Contract Clauses: Most Favored Customer (<http://us.practicallaw.com/8-510-7389>)). If applicable, an offeror should be prepared to justify why GSA should not be entitled to receive the best price. These circumstances exist where, for example, sales to the MFC:

- Are subject to different terms and conditions than anticipated sales to the government (for example, different FOB terms, freight-inclusive or freight-exclusive pricing, or different warranty terms).
- Involve dealers or resellers, while sales to the government under the GSA MAS contract are direct sales.

AGREEING ON THE BASIS OF AWARD (BOA) CUSTOMER

These price negotiations also involve a discussion of the BOA customers identified in the GSA MAS contract's PRC. Under the PRC, the contractor must maintain the identified price or discount relationship between sales to the BOA customer and sales to the government. The PRC does not necessarily require a contractor to provide the BOA customer and the government the same price. Rather, it requires that if a contractor reduces its price or increases its discount to the BOA customer, it must similarly reduce its price or increase its discount to the government.

Contractors should develop a strategy for defining the BOA customer in a way that minimizes the sales that trigger a price reduction under the PRC. GSA typically seeks to define the BOA customer broadly to include all commercial customers, which complicates a contractor's contract administration by requiring the tracking of all commercial sales to identify potential price reductions and often results in multiple price reductions during the contract. Contractors should negotiate a more narrowly tailored subset of customers or even an individual customer as the identified BOA customer.

POST-CONTRACT AWARD OBLIGATIONS AND ISSUES

LISTING PRICES ON GSA ADVANTAGE

After receiving a GSA MAS contract award, contractors must post their GSA price lists on the GSA Advantage website. GSA Advantage is the online shopping and ordering system through which government purchasers place orders for products and services offered under GSA MAS contracts. Price lists under GSA Advantage are publicly available, allowing both contractors and the government to compare prices, discounts, and other terms and conditions across contractors. The website can be searched by keywords, contractor names, manufacturer names, contract numbers, part numbers, or National Stock Numbers.

CAREFULLY REVIEWING GOVERNMENT ORDERS

All federal and some state and local government agencies can purchase a contractor's goods and services included in its GSA MAS contract under the terms and conditions of that contract. Those agencies may also include additional FAR agency supplemental clauses or other terms and conditions in these orders. Contractors must carefully review orders before acceptance to:

- Confirm they do not conflict with the GSA MAS contract terms and conditions.
- Ensure compliance with any additional clauses and requirements.

If a contractor finds a conflicting supplemental clause, it should seek to negotiate with the ordering agency for the removal of that clause from the order.

Contractors may only sell those goods and services actually included in their GSA MAS contracts. Any other goods and services are open market items subject to the traditional full and open competition requirements under the FAR, absent an applicable exception (for more information, see Practice Note, Federal Government Contracts: Overview: Different Types of Procurements (<http://us.practicallaw.com/9-599-6946#a425431>)).

MAXIMIZING POST-AWARD SALES

The time and effort required to receive a GSA MAS contract is only valuable if the contractor takes action to maximize sales after contract award. Contractors should consider:

- Creating and fostering relationships with current and potential government customers.
- Assisting agencies in identifying and developing their needs.
- Monitoring offers from competitors by reviewing their price lists on GSA Advantage.
- Responding to agency solicitations through the GSA e-Buy system where federal government agencies post opportunities available only to GSA MAS contract holders.

KEY COMPLIANCE REQUIREMENTS

GSA MAS contracts include several key clauses with which contractors must comply, such as clauses pertaining to most favored customer pricing, the reporting and payment of an administrative fee to GSA, domestic sourcing requirements, and the government's right to audit the contractor's compliance with all these requirements.

PRICE REDUCTIONS CLAUSE

The purpose of the PRC is for the contractor to maintain the price-discount relationship between sales to the government and sales to the BOA customer that was negotiated at the time of the award throughout the term of the GSA MAS contract. The PRC requires the contractor to:

- Notify the government if, during contract performance, it reduces its price list or otherwise provides an increased discount or other concession to the BOA customer.
- Offer the government a corresponding price reduction or increased discount.

(48 C.F.R. § 552.238-75.)

The price reduction applies to all sales to the government under the GSA MAS contract from the date of the price reduction to the commercial customer through the end of the GSA MAS contract. A contractor can always offer a lower price to the federal government, and these sales do not trigger a price reduction under the PRC.

Under the PRC, no price reduction is required for sales:

- To commercial customers under firm-fixed-price and definite-quantity contracts with specified delivery above the maximum order threshold specified in the GSA MAS contract.
- To federal agencies.
- Made to state and local government entities when the order is placed under a GSA MAS contract.
- Caused by an error in quotation or billing.

(48 C.F.R. § 552.238-75(d).)

Contractors can seek additional exceptions during contract negotiations, such as sales to non-profit entities or universities or other unique categories of customers.

Contractors can also seek to avoid triggering the PRC by:

- Implementing robust policies and procedures to ensure compliance, such as requiring various internal approvals for commercial sales that would trigger the PRC.
- Training all government and commercial sales employees regarding which sales trigger the PRC.
- Implementing internal controls to track sales and signal red flags when a commercial sale to a BOA customer may violate the PRC.
- Clearly documenting any additional discounts or concessions to BOA customers and why they do not trigger the PRC (for example, a sale over the maximum order threshold or a quotation or billing error).
- Promptly notifying the contracting officer of any price reduction, even if it is the result of a quotation or billing error (notice does not necessarily mean that the GSA requires a corresponding price reduction).

ECONOMIC PRICE ADJUSTMENT CLAUSE

Under the Economic Price Adjustment (EPA) Clause (48 C.F.R. § 552.216-70), contractors may request an increase in the price of goods or services in the GSA MAS contract to correspond with an increase in their commercial catalog or pricelists or another increase in commercial prices that formed the basis for the contract award.

However, the price increases are limited in that:

- Price increases are not permitted during the first 12 months of the contract.
- No more than three price increases can be considered for each subsequent 12-month period.
- The price increases must be requested before the last 60 days of the contract period.
- At least 30 days must lapse between requested price increases.
- Aggregate price increases over any 12-month period cannot exceed the specified percentage in the contract.
- GSA reserves the right to negotiate a decreased price or request that the item be removed from the GSA MAS contract.

Once the EPA is agreed between the contractor and GSA, the GSA MAS contract should be bilaterally modified to reflect the price increases and their effective date. The contractor must also update its pricing information on its price list in GSA Advantage to reflect the new contract prices.

INDUSTRIAL FUNDING FEE AND SALES REPORTING CLAUSE

The Industrial Funding Fee (IFF) is a fee paid by a contractor to cover GSA's costs of administering GSA MAS contracts. The IFF is:

- Incorporated into a contractor's price.
- Paid quarterly to GSA by the contractor.

To comply with the requirements of the IFF Clause, a contractor must:

- Implement a sales tracking system to track GSA MAS contract sales.
- Report contract sales under the GSA MAS contract to GSA within 30 calendar days after the completion of each reporting quarter.
- Submit IFF payments to GSA within 30 days after the completion of each calendar quarter.

(48 C.F.R. § 552.238-74.)

TRADE AGREEMENTS ACT CLAUSE

The Trade Agreements Act (TAA) applies to sales of goods and services under all GSA MAS contracts. The TAA requires the contractor to deliver end products made only in the US or a designated country (48 C.F.R. § 52.225-5) (for more information on the TAA, see Practice Note, *Buying American: Country of Origin Requirements in US Government Contracts: Trade Agreements Act* (<http://us.practicallaw.com/7-573-3545>)). If a contractor intends to provide a foreign end product, it must disclose its intent to do so in its Trade Agreements Certificate (see Standard Document, *Trade Agreements Act Certificate* (<http://us.practicallaw.com/0-581-4465>)) submitted with its proposal in response to the GSA solicitation (48 C.F.R. § 52.225-6). However, GSA accepts proposals for foreign end products only under limited circumstances, and this acceptance must be incorporated into the GSA MAS contract.

The Government actively enforces the requirements of the TAA Clause. This enforcement has resulted in significant penalties, including:

- Termination for default.
- Civil and criminal penalties for false certifications.
- Suspension or debarment.

To ensure compliance with the TAA Clause and avoid these penalties, a contractor should take protective measures both before proposal submission and during contract performance, including:

- Reviewing internal sourcing and manufacturing data to ensure the end product is a US-made or designated-country end product.
- Requiring manufacturers of end products to comply with the TAA Clause. This is especially important for distributors and resellers since they do not manufacture the end product themselves. All non-manufacturers of end products should:
 - obtain letters of supply from manufacturers and suppliers certifying that end products comply with the TAA Clause (a letter of supply provides explicit permission to a GSA MAS contractor to list the manufacturer's products on the GSA MAS contract and commits the manufacturer to provide the contractor a sufficient quantity of the products); and
 - require manufacturers and suppliers of end products to provide indemnification for TAA violations for which they are responsible.

CONDUCTING INTERNAL COMPLIANCE REVIEWS

Periodically, but at a minimum before an option renewal, contractors should conduct internal compliance reviews of their pricing and discounting sales data and practices to minimize compliance risks. As part of this review, the contractor should:

- Analyze sales to BOA customers for potential price reductions.
- Confirm the accuracy of IFF reports.
- Confirm timely submission of IFF payments.
- Review GSA MAS orders to detect any potential overcharges to the government.
- Check compliance with the TAA Clause.
- Determine whether anything has changed regarding the contractor's sales, pricing, or discounting practices that could affect the GSA MAS contract (for example, discontinuance of sales to the BOA customer).
- Update these practices, especially if they have changed.
- Update the information in the CSP-1 Form.
- Modify the CSP-1 Form to remove any emerging or existing ambiguities that could cause difficulties in the future.

PREPARING FOR A GSA AUDIT

Under the GSA audit clause, GSA may audit a contractor's records to determine whether the contractor complied with the GSA MAS contract requirements related to:

- Pricing of government orders under the GSA MAS contract.
- CSP disclosures.
- Compliance with the PRC.
- Quarterly GSA MAS contract sales reports.
- Remittance of IFF payments.

(48 C.F.R. § 552.215-71.)

The audit can occur for up to three years after the contractor's receipt of final payment under the GSA MAS contract. For applying the audit clause, the base award and each option period are considered separate contracts.

The GSA's Office of Inspector General (OIG) may also conduct an audit about one year before the expiration of a contractor's GSA MAS contract before GSA decides whether to exercise an option to extend the term of the contract. In this audit, GSA's OIG typically requests to see 12 months of commercial and government sales data to assess the contractor's compliance with GSA MAS contract requirements.

In preparation for this audit, contractors should ensure that their GSA MAS contract files contain:

- The original proposal.
- Any revised proposals.
- Disclosures of CSP data.
- The final proposal revision memorializing negotiations.
- The signed contract award, including the final CSP-1 Form.
- Any contract modifications.
- All key correspondence with the contracting officer.
- Commercial price lists.
- IFF reports and evidence of payment.
- Notes of discussions with the contracting officer.

Key documents related to task or delivery orders include:

- Requests for quotes.
- Quotes.
- Task and delivery orders.
- Purchase orders.
- Invoices.
- Key correspondence regarding discounts and concessions.
- Memoranda to the file regarding bases for discounts and concessions.

POTENTIAL PENALTIES FOR NON-COMPLIANCE WITH KEY REQUIREMENTS

It is important for contractors to comply with the key requirements in GSA MAS contracts. If non-compliance with a key requirement is revealed through a GSA audit or otherwise, the contractor may be subject to many significant penalties, including:

- Cancellation of the contract.
- A price reduction.
- Termination for default.
- Suspension or debarment.
- Civil liability under the False Claims Act.
- Criminal liability under the False Statements Act.
- Liability under other fraud statutes.

To avoid being subject to these significant penalties, contractors must have a clear understanding of the requirements in their GSA MAS contracts and implement robust policies and procedures.

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