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402 Government Contracts for the Generalist

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Douglas J. Cole is the vice president and general counsel for ECS, Ltd. located in Chantilly, Virginia. ECS is a group of privately held companies providing geotechnical and specialty engineering, construction materials testing, environmental consulting, and facilities consulting around the country. As head of a small law department, his varied responsibilities usually focus on matters of insurance and risk management, commercial and public contracting, litigation and dispute management, intellectual property, corporate compliance, and labor and employment matters.

Prior to joining ECS, Mr. Cole also served as a partner for a small Northern Virginia firm as well as working for Electronic Data Systems Corporation and the Department of Defense. While in these roles, he provided counsel in a variety of areas including state and federal public contracting and subcontracting, commercial contracting and software licensing, export compliance, labor and employment matters, and related litigation and dispute resolution. In addition, Mr. Cole has conducted training on public contracting matters for the Department of the Army, the Department of the Air Force, as well as legal and business organizations.

He is currently active in ACC's Small Law and Employment Law Committees and is also a member of the ABA and the National Contracts Management Association.

Mr. Cole received his BS from Middle Tennessee State University and is a graduate of the American University, Washington College of Law.

Ronald L. Polasek

Ronald L. Polasek is general counsel and chief legal officer of Recon/Optical, Inc. in Barrington, IL. Recon/Optical is a privately held company providing high tech, high dollar reconnaissance sensors exclusively to the US and worldwide defense industry. In that position, Mr. Polasek is responsible for all legal matters for company business. He developed Recon/Optical's compliance program structure and monitors its effectiveness.

Prior to joining Recon/Optical, Mr. Polasek held positions as general counsel at a Reuters subsidiary in Oak Brook, IL, worked in the contracts department at Northrop Corporation, DSD in Rolling Meadows, IL, and served as a judge advocate in the US Marine Corps.

Mr. Polasek is an active member of ACC. He joined the Chicago Chapter Board and has served as Chicago chapter president and as chairperson of the chapter board of directors. Mr. Polasek served on the ACC National Advisory Committee for two years. Mr. Polasek is active in several non-profit organizations, charities, and business organizations.

Mr. Polasek received his BA from the University of Texas in Austin and his JD at the University of Texas Law School in Austin. Between his undergraduate education and law school, Mr. Polasek was an Officer in the US Marine Corps, serving as an infantry platoon commander in Vietnam.

Sean Venden

Sean Venden is assistant general counsel for Nike in Andover, Massachusetts.

Prior to joining Nike, Mr. Venden was the assistant general counsel of Dynamics Research Corporation, a leading provider of mission-critical technology management services and solutions for government programs. Prior to beginning his in-house practice, Mr. Venden was in private practice with Nixon Peabody, LLP, and Schiff Hardin & Waite LLP.

InfoPAK

Government Schedule Contracting

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Government Schedule Contracting

This InfoPAK[SM] explores the entire gamut of the most significant procurement program under which federal agencies obtain commonly used "off-the-shelf" products and services: General Services Administration ("GSA") and Department of Veterans Affairs ("DVA") "schedule" contracting. Focusing on multiple-award schedule ("MAS") contracting, the InfoPAK emphasizes key cutting-edge legal, regulatory, and policy developments that are currently making this area one of the most dynamic in the government's efforts to purchase supplies and services. The InfoPAK also provides insights for companies which do not typically do business with the Federal Government into critical liability-related topics such as the Price Reductions clause, defective pricing data, and audits and investigations.

This information should not be construed as legal advice or legal opinion on specific facts, or representative of the views of ACC or any of its lawyers, unless so stated. This is not intended as a definitive statement on the subject but a tool, providing practical, current information for the reader. The information in this InfoPAK was developed by the law firm of McKenna Long & Aldridge LLP (www.mckennalong.com) at the direction of Association of Corporate Counsel.

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I. Introduction

Sales of "commercial" products and services to the Federal Government are an extremely important source of business for many "commercial" companies. This InfoPAK explores the entire gamut of the most significant procurement program under which federal agencies obtain commonly used "off-the-shelf" products and services: General Services Administration ("GSA") and Department of Veterans Affairs ("DVA") "schedule" contracting. Focusing on multiple-award schedule ("MAS") contracting, the InfoPAK emphasizes key cutting-edge legal, regulatory, and policy developments that are currently making this area one of the most dynamic in the government's efforts to purchase supplies and services. The InfoPAK also provides insights for companies which do not typically do business with the Federal Government into critical liability-related topics such as the Price Reductions clause, defective pricing data, and audits and investigations.

The Federal Government has administered some form of a schedule program since at least 1910. That year, legislation established the General Supply Committee of the Department of the Treasury to meet the repetitive supply requirements of federal agencies in Washington, D.C. The Committee developed a General Schedule of Supplies – in effect, a catalog of items reflecting definite contracts for immediate delivery. In 1933, the functions of the Committee were transferred to the Procurement Division of the Department of the Treasury (later called the Bureau of Federal Supply), and in 1949 the functions of the Bureau of Federal Supply were transferred to the GSA. Ultimately, the GSA's schedule program became national in scope, and the GSA established MAS contracts. Today, under some 45 different GSA/DVA schedules, federal agencies place orders valued at almost $40 billion through approximately 17,500 schedule contracts each year. More than 11,000 companies sell some eleven million commercial items under these schedule programs. In recent years, the GSA has added an enormous variety of services to its schedule programs.

II. An Overview of Schedule Contracting

A. Purpose of the GSA/DVA Schedule Programs

Section 201(a)(3) of the Federal Property and Administrative Services Act of 1949[1] empowers the GSA to procure and supply personal property and nonpersonal services for the use of federal executive agencies. Within the GSA, the Federal Acquisition Service ("FAS") is responsible for the supply of all commercial items - including telecommunications and information technology ("IT") - that are made available to other customer agencies. The FAS was recently created by the merger of the GSA's former Federal Supply Service and former Federal Technology Service.

Although the GSA administers various programs through which goods and services are provided to government agencies, the FAS's Federal Supply Schedule Program – also known as the Multiple-Award Schedule ("MAS") Program - clearly represents the largest GSA business opportunity for the private sector. Under this program, the GSA issues Federal Supply Schedules specifying that ordering activities of the Federal Government shall or may, as applicable,

- issue delivery or task orders directly to the contractors listed in the schedule ("schedule contractors"),
- receive shipments or services,
- make payment directly to the contractors, and
- administer the orders without referring the transaction to the GSA.

While the GSA awards most schedule contracts, the GSA occasionally authorizes other agencies such as the DVA to award schedule contracts and publish schedules.[2] The primary advantage of the schedule programs is that ordering activities need not go through the time-consuming process of issuing an invitation for bids or a request for proposals in order to have their requirements fulfilled.

The GSA's Federal Supply Schedule Program provides federal agencies with a simplified process for obtaining commonly used supplies and services in varying quantities.[3] The program is designed to allow government agencies the option of ordering standard commercial ("off-the-shelf") items directly from the contractor while still enjoying discounts associated with volume buying and - theoretically at least - low prices. Under the Schedule Program, the schedule contracting offices award indefinite-delivery (usually indefinite-delivery, indefinite-quantity) contracts using competitive procedures to commercial firms that are then required to provide supplies and services at stated prices for given periods of time (currently five years, with the potential for up to three five-year options).[4] The schedule contracting offices also issue Federal Supply Schedules that are assembled in catalog form and contain ordering data for these contracts.[5] A schedule is issued for each commodity or service classification which – depending upon the type of schedule used - may include the names of the contractors, their addresses, the contract periods, contract numbers, geographic areas of coverage, mandatory (if any) and optional users, minimum and maximum order thresholds, prices, and any other information essential to placing orders. As noted in sections D.3 and D.4 of this chapter, use of a schedule by an ordering activity may be mandatory or optional to the extent specified in the schedule. The overwhelming majority of schedules – if not all of them – are wholly optional-use schedules.

B. Statutory/Regulatory Basis for the GSA/DVA Schedule Programs

For many years, the GSA/DVA multiple-award schedule programs existed without explicit statutory authority. Under the Competition in Contracting Act of 1984 ("CICA"), however, the GSA/DVA multiple-award schedule programs received statutory imprimatur for the first time. Under the CICA, these programs are deemed a "competitive procedure" if participation in the programs has been open to all responsible sources and schedule contracts result in the lowest overall cost alternative to meet the needs of the Government.[6]

There are three key regulatory provisions that govern the GSA/DVA schedule programs:

- subpart 8.4 of the FAR entitled "Federal Supply Schedules,"
- part 38 of the FAR entitled "Federal Supply Schedule Contracting," and
- part 538 of the General Services Administration Acquisition Regulation ("GSAR") entitled "FSS Schedule Contracting."
- Subpart 8.4 is, far and away, the most important of these provisions, and contractors should be fully conversant with this subpart.

C. Priorities for Use of Government Supply Sources

Federal agencies must generally satisfy their requirements for supplies from or through the sources and publications listed below in descending order of priority:

- agency inventories,
- excess from other agencies,
- Federal Prison Industries, Inc. (UNICOR),
- procurement lists of supplies that are available from the Committee for Purchase from People who are Blind or Severely Disabled,[7]
- wholesale supply sources such as the stock programs of the GSA, the DVA, the Defense Logistics Agency, and military inventory control points,
- mandatory Federal Supply Schedules,
- optional-use Federal Supply Schedules, and
- commercial sources.[8]

With respect to services, agencies must observe the following order of priority:

- procurement lists of services that are available from the Committee for Purchase from People who are Blind or Severely Disabled,
- mandatory Federal Supply Schedules,
- optional-use Federal Supply Schedules, and
- Federal Prison Industries, Inc., or commercial sources.[9]

Thus, mandatory and optional-use Federal Supply Schedules are always preferred sources of supply in comparison to open-market acquisitions from commercial sources.

D. Generic Types of Schedule Contracts

1. Single-Award Schedules

Historically, the GSA has awarded two major types of Federal Supply Schedules – single-award schedules and multiple-award schedules. Single-award schedules cover contracts made with one supplier at a stated price for delivery to a geographic area as defined in the schedule. A single-award schedule is appropriate if there are adequate commercial descriptions or specifications to permit competitive offers. Currently, there is only one single-award schedule (the JWOD schedule); the remainder of the GSA and DVA schedules are multiple-award schedules.

2. Multiple-Award Schedules

Multiple-award schedules are based on negotiated contracts that are established with more than one supplier for delivery of comparable commercial supplies or services. MAS contracts are awarded to firms supplying the same generic types of supplies or services at varying prices for delivery within the same geographic area. These contracts are appropriate when

- it is not practical to draft specifications or other descriptions for the required supplies or services and there are multiple suppliers able to furnish similar commercial supplies or services, or
- selectivity is necessary for ordering offices to meet their varying needs.
- Contracts are awarded on the basis of Special Item Numbers ("SINs") that individually identify generic supplies and services and collectively cover a range of related supplies and services within a schedule. Accordingly, agencies are provided with an opportunity to fill their requirements with the lowest cost item having the features that specifically meet their needs. All MAS contractors are required to prepare and distribute hard-copy and electronic pricelists and catalogs that must be used with the schedules to prepare orders. The catalogs and pricelists contain item descriptions, prices and discounts, order limitations, and delivery terms.

All responsible firms may submit offers in response to a solicitation for MAS contracts. Prices under the MAS program are based on discounts from commercial pricelists, and contracts are awarded after the schedules contracting officer ("CO") determines that the prices, terms, and conditions offered are fair and reasonable. Orders placed by ordering activities in accordance with the FAR must result in the lowest overall cost alternative to meet the needs of the Government.[10]

MAS categories eschew detailed specifications in favor of broad commercial-item descriptions. The item descriptions are designed to identify, as closely as practicable, comparable items of the particular commodity or service so that ordering activities can know what related items contractors are able to supply. Any given schedule will, therefore, encompass items with a fairly broad range of characteristics.

Under early General Accounting Office (now Government Accountability Office) ("GAO") decisions, the GSA could not award multiple-schedule contracts if two or more suppliers offered identical items or similar products with essentially the same characteristics. Currently, however, the GSA accepts offers for products that are identical to those currently awarded and will award a contract for an identical brand-name item when the offer is determined to be fair and reasonable to the Government.

3. Mandatory-Use Schedules

The GSA IT schedules have traditionally been nonmandatory-use (optional) schedules. For decades, however, GSA schedules for commodity items other than IT or telecommunications identified specific agencies in designated geographic areas for which use of the schedule was mandatory. With limited exceptions, these agencies were required to use the schedule contracts as their primary sources of supply for the supplies involved if the consignee was located within the geographic area of coverage.

In 1993, the GSA announced plans to convert all of its mandatory-use schedules to nonmandatory-use schedules. Currently, there are no GSA or DVA schedules that are completely mandatory. In the rare case in which an ordering activity is a mandatory user of a GSA or DVA schedule, the activity can "escape" the mandatory-use requirement if

- the schedule contractor is unable to satisfy the activity's urgent delivery requirement,
- the order is below the contract minimum order threshold,
- the order is above the contract maximum order threshold,
- the consignee is located outside the area of geographic coverage stated in the schedule, or
- a lower price for an identical item (i.e., same make and model) is available from another source.
- In addition, an ordering activity that is a mandatory user of a GSA or DVA schedule may submit a request for a waiver to the GSA or DVA if the activity determines that items available from the schedule do not meet its specific needs.

If use of a GSA or DVA schedule is mandatory, an ordering activity may not solicit bids, proposals, or quotations or otherwise test the market solely for the purpose of seeking alternative sources to the schedule.

4. Nonmandatory-Use (Optional) Schedules

Each Federal Supply Schedule contains provisions whereby, in addition to the agencies included under the mandatory-use provisions (if any), all other agencies and activities of the Federal Government - including the legislative and judicial branches and other activities for which the GSA is authorized to procure by law - may place orders under the schedule, and contractors may or must, as appropriate, accept such orders.[11] Optional users also include those government contractors that have been properly authorized to use the schedule. Agencies that are not subject to the mandatory-use provisions of Federal Supply Schedules are encouraged to use the schedule contracts as primary sources of supply, except where the ordering activities of these agencies have actual knowledge that the purchase can be made more advantageously to the Government from a source other than the Federal Supply Schedule after allowing for the burdens and cost of a new procurement under applicable prescribed procedures.

In general, for orders received from activities within the Executive Branch (and, assuming, of course, that the orders are within the scope of the schedule contract), a schedule contractor is obligated to deliver all supplies or services contracted for that may be ordered during the contract term. The contractor is not, however, obligated to accept orders received from activities outside of the Executive Branch. If the contractor is unwilling to accept such an order, the contractor must return it by mailing it or delivering it to the ordering activity within five working days from receipt. In an interesting case at the General Services Administration Board of Contract Appeals ("GSBCA"), a schedule contractor argued that it was only obligated to give schedule discounts to ordering offices that identified themselves as "GSA qualified" to receive the discounts.[12] The GSBCA dismissed this contention, noting that the contract assumed that ordering activities are either required to or entitled to use the schedule contract and that the contractor shoulders the burden to identify those nonmandatory users whose orders the contractor chooses not to fulfill.[13]

In Tenavision, Inc.,[14] the GAO upheld a protest of a requirement in a DVA solicitation that an offeror demonstrate that its proposed equipment was listed on a nonmandatory-schedule contract. The GAO concluded that the requirement was unduly restrictive of competition since it was only intended to ensure that the offered equipment was state-of-the-art. The GAO reasoned that the fact that equipment is on a schedule contract does not necessarily mean that the equipment is state-of-the-art and that there are other methods by which an offeror can demonstrate that it has such equipment. Additionally, in REEP, Inc.,[15] the GAO sustained a protest against an agency's issuance of task orders under a nonmandatory GSA schedule contract where the agency had issued the orders to a firm that was the only vendor on the schedule, identical services were available at a lower price

from the protestor and other vendors on another schedule, and the agency knew that the services were available under the second schedule. The GAO concluded that – since the agency was required to review reasonably available information before placing the orders – the agency should not have issued them without reviewing the vendors' prices on the second schedule.

E. Federal Supply Classifications/Industrial Groups/ Special Item Numbers

For products, the Federal Supply Classification ("FSC") system identifies each group and class of schedule items with a number. The group number – i.e., the number of the schedule - consists of two digits. Any given group consists of several classes of products, which are described by four-digit class numbers. The group number is the first two digits of the class number. For example, the FSC Group 66, Part II, Section N schedule covers general purpose laboratory instruments; chemical analysis instruments are identified as FSC class 6630. Generally, any given FSC class will include products that fall under several SIN's in the same schedule.

At the product level, each item of supply is assigned a National Stock Number ("NSN"). The NSN consists of the four-digit FSC code and a nine-digit national item identification number.

The GSA characterizes service schedules by a two-digit Industrial Group ("IG") number. For example, the IG 874 schedule describes the so-called MOBIS (Mission Oriented Business Integrated Services) schedule, the GSA's business-consulting schedule.

As previously noted, the GSA and DVA award MAS contracts on the basis of SIN's (Special Item Numbers) that individually identify generic supplies and services and collectively cover a range of related supplies and services within a schedule. The FSC 66 II N schedule, for example, consists of 32 SIN's within four FSC classes.

F. Sales Requirements

MAS contractors are not guaranteed any sales (other than a nominal – usually $2,500 – guaranteed minimum for the contract term) but must market their products and services to the Government. In general, the GSA or DVA will cancel an MAS contract if the contractor's sales do not exceed $25,000 in any given twelve-month period.

G. Determining Whether a Product or Service is a Schedule Item

The GSA's online Schedules e-Library can assist prospective schedule contractors in

determining whether a particular item is on a Federal Supply Schedule. See § XI. A. The e-Library currently lists about 45 GSA and DVA schedules. The GSA's Catalog of FSS Publications – while extremely dated and no longer published – can also assist prospective schedule contractors in determining whether a particular item is on a Federal Supply Schedule. The publication contains a 20-page alphabetical list of supplies (no services) that is cross-referenced to the particular schedule that includes those supplies. See § XI.B.

After reviewing the Schedules e-Library, a prospective schedule contractor should telephone the GSA or DVA contracting officials who are responsible for administering the schedule for more definitive information as to whether a particular item is a schedule item. Prospective schedule contractors may wish to obtain a commercial directory such as the Federal Yellow Book and/or a GSA or DVA personnel directory to assist in locating the FSS and/or DVA officials who administer the particular schedules that may be of interest.

At the request of a prospective schedule contractor and for a fee, the GSA's Federal Procurement Data Center in Washington, D.C., can prepare customized reports relating to schedule sales. Searchable fields of data include the name of the product or service, location of the buying office, and the name of the vendor. Commercial sources can also generate similar reports using commercially available software programs.

H. The Contract Formation Process for Schedule Contracts: An Overview

All procurements for MAS contracts are negotiated procurements, a type of procurement in which the "contracting" takes place through the use of competitive proposals and discussions. In this type of procurement, an entity desiring to be placed on a schedule (the "offeror") must submit a proposal to the schedule contracting office in response to a request for proposals. Depending upon the circumstances, the offeror will likely have to engage in negotiations with the office and submit a final proposal revision (best and final offer). During this period, the GSA or DVA will also conduct an evaluation of the offeror's financial responsibility. The entire process – from the initial submission of the proposal to contract award – may take several months.

By contrast, a few FSS procurements for single-award schedule contracts have historically been advertised procurements, a type of procurement in which contracts are awarded through "sealed bidding." In this type of procurement, an entity desiring to be placed on a schedule – called in this context the "bidder" – must submit a sealed bid to the schedule contracting office. Assuming that the bid is responsive to the terms of the solicitation and is low in price, the bidder's product or service will be placed on the schedule if the bidder is found to be responsible.
Under solicitations for MAS contracts, the Government may make multiple

awards to those responsible offerors whose offers conforming to the solicitation will be most advantageous to the Government, taking into consideration the multiplicity and complexity of equipment of various manufacturers and the differences in performance required to accomplish or produce required end results, reasonableness of the prices quoted, compliance with delivery requirements, and other pertinent factors. The fact that an offeror's product may be unique, however, does not entitle the offeror to the award of a schedule contract.[16] Further, the GSA or DVA may award contracts on a one-contractor-at-a-time basis rather than on a simultaneous basis.[17]

I. Eligibility to Order From the Schedules

1. 2000 GSA Order

Executive branch agencies, if any, that are identified in a schedule as mandatory users[18] and that are located in the identified geographic area of coverage must use the schedule to satisfy their normal requirements. All other federal agencies and activities – including legislative and judicial agencies as provided by law or agreement, nonappropriated fund activities for which the GSA is authorized to procure by law, the Government of the District of Columbia, and mixed-ownership government corporations – may use a schedule on an optional basis.[19] Government cost-reimbursement-type prime contractors (and, where appropriate, their subcontractors) may also use a schedule after authorization in writing from a federal agency. See § II.I.2 infra. In 2000, the GSA issued an order [see § XI.C] providing a comprehensive listing of the activities that are eligible to use GSA sources of supply and services, including schedule contracts.

2. Government Contractors

If it is in the Government's interest and if supplies or services that are required in the performance of a government contract are available from a schedule contractor, a CO may authorize a government contractor to use schedule contracts in performing (1) government cost-reimbursement contracts or (2) other types of negotiated contracts when the agency determines that a substantial dollar portion of the contractor's contracts are of a government cost-reimbursement nature.[20] Before issuing an authorization to a contractor to use schedule contracts, the CO must place a written finding in the contract file supporting issuance of the authorization.[21]

A contractor that places an order under an FSS schedule must follow the terms of the applicable schedule and authorization and include the following with each order:

- a copy of the authorization (unless a copy was previously furnished to the schedule contractor); and

- the following statement: "This order is placed under written authorization from _____ dated_____. In the event of any inconsistency between the terms and conditions of this order and those of your Federal Supply Schedule contract, the latter will govern."[22]

3. State and Local Governments (Cooperative Purchasing)

Although the Federal Acquisition Streamlining Act of 1994 authorized the GSA to permit state and local governments to use the GSA schedules, the Federal Acquisition Reform Act of 1996 delayed the GSA's implementation of cooperative purchasing for at least eighteen months. The cooperative purchasing authority was repealed in 1997, and – with rare, limited exceptions until recently[23] – state and local governments could not buy off the GSA schedules. In December 2002, however, Congress passed legislation authorizing the GSA to permit state and local governments to buy IT equipment, software, supplies, support equipment, and services off the IT (FSC Group 70) and Consolidated Schedule (formerly the Corporate Contracts Schedule).[24] On May 18, 2004, the GSA issued a final rule implementing the cooperative-purchasing program for IT.[25] Under the rule, schedule contractors may – but are not required to – participate in the program.

J. DVA Schedule Contracting Program

The Department of Veterans Affairs' National Acquisition Center in Hines, Illinois, awards schedule contracts for healthcare products under FSC Groups 65 and 89. The DVA's schedule program covers medical and dental equipment and supplies, drugs and pharmaceutical products, reagents and diagnostics, patient mobility devices, clinical analyzers, and professional medical services. DVA schedules account for annual sales in excess of $7 billion.

K. Using Government wide Acquisition Contracts Versus Schedules

During the last several years, government wide acquisition contracts ("GWACS") – contracts that one federal agency awards but makes available to all or many other agencies – have become extremely popular, especially in the IT context. Many of the GWACS programs boast estimated contract volumes in excess of $100 million. Some of the most influential GWACS programs – including, for example, the Electronic Computer Store III, ImageWorld II, and Chief Information Officers – Solutions and Partners II programs administered by the National Institutes of Health; the Scientific Engineering Workstation Procurement III program administered by the National Aeronautics and Space Administration; and the Information Technology Omnibus Procurement II program administered by the GSA – are major competitors to the GSA's Federal Supply Schedule Program. When deciding which contract vehicle to use, agencies tend to choose the vehicle that appears to offer the best value.

L. Using Simplified Acquisition Procedures Versus Schedules

Under the FASA, the FAR must include special simplified procedures for contracts for the acquisition of property and services that are not greater than the simplified acquisition threshold ("SAT"); i.e., $100,000.[26] Under the pertinent regulations, simplified acquisition procedures are to be used to the maximum extent practicable for all purchases of supplies or services not exceeding the SAT unless requirements can be met by using

- required sources of supply (e.g., Federal Prison Industries, Committee for Purchase from People who are Blind or Severely Disabled, or Federal Supply Schedule contracts),
- existing indefinite-delivery, indefinite-quantity contracts, or
- other established contracts.[27]

Simplified acquisition procedures are designed to reduce administrative costs; improve opportunities for small, small disadvantaged, women-owned, veteran-owned, HUBZone, and service-disabled veteran-owned small business concerns to obtain a fair proportion of government contracts; promote efficiency and economy in contracting; and avoid unnecessary burdens for agencies and contractors.[28] When using simplified acquisition procedures, CO's must make purchases in the simplified manner that is most suitable, efficient, and economical based on the circumstances of each acquisition.[29] CO's may use simplified acquisition procedures in acquisitions from government supply sources if their use is authorized by the basic contract or concurred in by the source.

In general, each acquisition of supplies or services that has an anticipated dollar value exceeding $2,500 and not exceeding $100,000 is reserved exclusively for small business concerns and must be set aside.[30] Foreign business concerns (i.e., entities located outside the United States and its outlying areas) may not be solicited for acquisitions set aside for small business concerns.[31] If, however, the CO determines that there is no reasonable expectation of obtaining quotations or offers from two or more responsible small business concerns that will be competitive in terms of market price, quality, and delivery, the CO need not proceed with the small-business set-aside and may purchase on an unrestricted basis.[32]

For set-asides other than for construction or services, any concern proposing to furnish a product that it did not manufacture must furnish the product of a small business manufacturer unless the Small Business Administration ("SBA") has granted a waiver or an exception to the nonmanufacturer rule applies.[33] Under one of the exceptions to the nonmanufacturer rule, where the procurement of a manufactured item is processed under simplified acquisition procedures and where the anticipated cost of the procurement will not exceed $25,000, the offeror need not supply the end product of a small business concern as long as the product

acquired is manufactured or produced in the United States and the offeror does not employ more than 500 persons.[34] Thus, with respect to acquisitions in excess of $25,000 but not over $100,000, large businesses are effectively prohibited from selling commercial products to the Government except pursuant to the GSA and DVA schedule programs.

III. The Negotiation of Schedule Contracts

A. 1997 GSA Final Rule on Commercial Items

1. Multiple-Award Schedule ("MAS") Negotiating Objectives

From the inception of its Federal Supply Schedule/Multiple-Award Schedule contracting program, GSA's negotiating objective has been to get "most favored customer" ("MFC") pricing from its contractors. When the agency formulated its 1997 final rule on acquisition of commercial items in response to the Federal Acquisition Streamlining Act of 1994 and the Federal Acquisition Reform (Clinger-Cohen) Act of 1996, it retained this fundamental objective – to "seek to obtain the offeror's best price (the best price given to the most favored customer)" – despite suggestions from some commentators that the reform legislation mandated "fair and reasonable" pricing as the new standard.[35] Nevertheless, GSA now formally recognizes that the terms and conditions of commercial sales may vary, and therefore there may be good reasons why MFC ("best") pricing isn't always available. Accordingly, the more broadly stated negotiating objective is one that is "based on a review of relevant data and [a determination of] price reasonableness" in the circumstances of the particular deal.[36]

2. Treatment of Resellers

Under the 1997 final rule, dealers and resellers that do not have significant sales to the general public must provide to GSA "Commercial Sales Practices Format" information (see discussion below) from the manufacturers of the products they propose to sell under a schedule contract. The resellers must also get written authorization from each manufacturer for Government access to the manufacturer's sales records, at any time before contract award or execution of a modification to an existing contract, for the purpose of verifying the information submitted by the manufacturer. Alternatively, the information may be submitted to the Government directly by the manufacturer.[37] Also, if the offeror is a dealer or reseller, or will use dealers or resellers to perform any aspect of the contract, the offer must

include a description of the functions that the dealer or reseller will perform with regard to each item offered.[38]

B. Commerciality Requirement

1. General Policy for Determining Price Reasonableness

To determine price reasonableness, the GSA or DVA contracting officer will compare the terms and conditions of the MAS solicitation with the terms and conditions of the offeror's agreements with its commercial customers. The following factors are considered in this comparison:

- aggregate volume of anticipated purchases;
- purchase of a minimum quantity or an historical pattern of purchases;
- prices, taking into consideration any combination of discounts and other concessions offered to commercial customers;
- length of contract period;
- warranties, training, and/or maintenance included in purchase price or provided at additional cost;
- ordering and delivery practices; and
- any other relevant information, including differences between the MAS solicitation and commercial terms and conditions that may justify differences between the price offered to GSA and best prices offered to "most favored" commercial customer(s).[39]

The contracting officer may award an MAS contract with pricing less favorable than the best prices the offeror gives any commercial customer for similar purchases if the contracting officer determines that (a) prices offered to the Government are fair and reasonable, and (b) award of the contract is otherwise in the "best interest of the Government."[40]

2. Government Audit Rights (Pre-Award)

By submitting an offer in response to an MAS solicitation, the offeror gives the contracting officer or his or her authorized representative the right to examine, at any time before initial contract award, all pertinent information to verify pricing, sales and other data related to the supplies or services proposed.[41] This "pre-award" audit is conducted to determine the reasonableness of the offeror's prices. Government access does not extend, however, to the offeror's cost or profit information or other data relevant solely to the offeror's determination of prices it extends in its commercial catalog or in the commercial marketplace.[42]

C. Disclosure Obligations

One significant respect in which the Government differs from most other customers is in its requirement for the disclosure of historical sales data and other information to assist it in negotiating the "best" prices from its contractors. In the schedule contracting arena, contracting officers are authorized to require the submission of "information other than [certified] cost or pricing data" from offerors before beginning negotiations over prices and other terms and conditions.[43] The offeror usually presents this information in the "Commercial Sales Practices Format" ("CSP-1") that is provided with the solicitation, but the information may be submitted in the offeror's own format.[44] For expediency and ease of negotiations, offerors should use the Government's format to the greatest extent possible.

1. The Commercial Sales Practices Format: Commerciality

MAS contracts are contracts for the acquisition of commercial items. A "commercial item" (including services) is

> Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and . . . has been sold, leased or licensed to the general public . . . [or] offered for sale, lease, license to the general public[.][45]

The offeror for a schedule contract establishes the "commerciality" of the goods or services being proposed for sale to the Government by filling in the first part of the Commercial Sales Practices Format with the dollar value of sales of each offered item (or group of items for which the information is the same) to the general public "at or based on an established catalog or market price" during the previous 12-month period or the offeror's fiscal year.[46] If that dollar value is not an appropriate measure of sales, the offeror must provide and describe its own measure.[47]

2. The Commercial Sales Practices Format: Discount Disclosures

Following down the Commercial Sales Practices Format, the offeror must then state (by checking the "YES" or "NO" box) whether, based on its written discounting policies (or standard commercial practices if there are no such policies), the discounts and any concessions being offered to the Government are "equal to or better than [the offeror's] best price (discounts and concessions in any combination) offered to any customer acquiring the same items regardless of quantity or terms and conditions."[48] This is the "most favored customer" price that is the Government's basic negotiation objective. A "discount" is defined as "a reduction to catalog prices (published or unpublished)."[49] Discounts include, but are not limited to, rebates, quantity discounts, purchase option credits, and "any or other terms or conditions (other than concessions) which reduce the amount of money a customer ultimately pays."[50] A "concession," on the other hand, is defined as "a benefit, enhancement or privilege (other than a discount) which either reduces the overall cost [to the customer] or encourages a customer to consummate a purchase."[51] Examples of concessions include freight allowances, extended warranties,

extended price guarantees, free installation and bonus goods.[52]

If the offeror responds "YES" to the "best price/best discount" query (i.e., that the Government will receive a price equal to or less than the offeror's best commercial price), then in the next section, (4)(a), of the format the offeror must complete a chart including: the name of each customer or category of customers that receives that best price;[53] the discount that customer or category receives, with a full description of the terms and conditions, regardless of quantity purchased; the quantity or volume the customer or category must purchase to receive that discount; the applicable FOB delivery term for that customer or category; and any concessions granted to the customer or category, regardless of quantity purchased.[54]

If the offeror responds "NO" to the "best price/best discount" query (i.e., the Government is being offered a price equal to or greater than the offeror's best commercial price), then in the chart in section (4)(a) the offeror must fill in the same information for all customers that receive a price equal to or lower than the price offered to the Government.

If any deviations from the offeror's written policies or standard commercial sales practices result in better discounts (lower prices) or concessions than indicated on the section (4)(a) chart, then the offeror must disclose those deviations, explain the circumstance in which they occur and how often they occur, and discuss any controls that the offeror has in place to assure pricing integrity.[55] Typical deviations may include one-time goodwill discounts to charity organizations or disgruntled customers; limited sales of obsolete or damaged goods; sales of sample goods to new customers; or sales of prototype goods for testing purposes.[56] If such deviations are "so significant and/or frequent that the Contracting Officer cannot establish whether the price(s) offered is fair and reasonable," the offeror may be required to provide additional clarifying information, which should be "targeted" to that needed to establish the reasonableness of the offered price.[57]

The obvious intent of the Government in requiring these disclosures of prices, discounts, concessions and deviations is to use them to its advantage during the price negotiation process. This is one of the respects in which MAS contracting specifically, and some other types of Government contracting in general, differ most significantly from most types of commercial contracting. (The other significant differentiator is the Price Reductions Clause, discussed in detail below.)

While there is no requirement to certify the information disclosed on the current Commercial Sales Practices Format, as there was for its predecessor, the "Discount Schedule and Marketing Data" sheet, the Government states that it expects the offeror to provide price and discount information required by the format "that is, to the best of [the offeror's] knowledge and belief, current, accurate and complete as of 14 calendar days prior to its submission."[58] The offeror must also disclose any changes in it price lists, discounts, or discounting policies that occur after the

submission of its offer, but before the close of negotiations.[59] As these information disclosures and the contract negotiation generally are "matters" within the jurisdiction of a branch of the United States Government, they are subject to the sanctions of the False Statements Act.[60] Accordingly, the best practices to follow in filling out the Commercial Sales Practices Format are (a) disclose current, complete and accurate information, and (b) when in doubt, disclose.

D. Particular Requirements for Resellers

Some manufacturers may prefer to market their products to Government agencies through schedule contracts held by dealers or "resellers." Some advantages to this method of "getting on the schedule" include shifting the administrative burden (price negotiation, sales reporting, and paying IFF) to the reseller; specialized marketing targeted at government agencies and other authorized GSA schedule contract users; and freedom for the manufacturer to sell products that are on the schedule contract to any commercial customer at any price. Disadvantages include a lack of control over prices charged to government customers, and having to maintain a stated discount on sales to the reseller for the life of the contract. In the negotiation process with GSA, resellers are subject to particular requirements.

1. Guarantee of Source of Supply

In order for the Government to be assured that a reseller will be able to fill orders for the offered items for the life of the contract, GSA and DVA require that the reseller – the party in privity of contract with the Government – provide a Letter of Supply ("LOS") from the manufacturer or other supplier of the products. The LOS should fully describe the terms of the supply agreement between the manufacturer and the reseller, including pricing and any limitations on the volume of products to be supplied for resale under the schedule contract, and the time frames in which they will be supplied. If the contracting officer believes the LOS will not be sufficient to meet the Government's perceived needs, the reseller may be required to renegotiate the LOS with the manufacturer before negotiations with the Government may proceed.

2. Access to Supplier's or Manufacturer's Records

If the reseller itself does not have a history of significant sales of the offered items to the general public, then to establish commerciality and for price and basis of award (see discussion below) negotiation purposes, the reseller must fill out the Commercial Sales Practices Format with the manufacturer's information.[61] The reseller must also get written authorization from the manufacturer for Government access, pre-award or pre-modification, to the manufacturer's sales records to verify the information submitted on the format.[62] The contracting officer may require that the manufacturer's information be submitted on electronic media with commercially available spreadsheets. If the manufacturer's items are being offered by multiple resellers, only one copy of the requested information need be submitted

to the Government.[63]
Additionally, the reseller must submit the following along with contact information for each of the manufacturers whose items it intends to sell under the MAS contract:

- manufacturer's name;
- manufacturer's part number;
- reseller's (dealer's) part number;
- product description;
- manufacturer's list price; and
- reseller's (dealer's) percentage discount from manufacturer's list price, or reseller's net price from manufacturer.[64]

Most, if not all, of this information should be included in the manufacturer's LOS to the reseller.

Finally, if the offeror is itself a reseller (dealer), or the offeror will use resellers to perform any aspect of the schedule contract, the offeror must describe the functions that the reseller will perform.[65]

E. Basis of Award

After negotiations are concluded, the Government will prepare a basis of award document summarizing the discounts to which the parties have agreed in relation to the discounts that the offeror disclosed on the Commercial Sales Practices Format. This document will also identify the "basis of award" commercial customer (also commonly referred to as the "benchmark" or "tracking" customer) or category of customers. The basis-of-award customer is critically important because the pricing of sales of schedule contract items to that customer will determine whether the Price Reductions clause of the contract is triggered (see discussion below). Accordingly, the offeror must carefully review the basis of award document both to verify that it correctly states the discount terms and to ensure that it identifies the proper basis-of-award customer.[66]

As a practical matter, the basis-of-award customer should never be identified by such vague terms as "all commercial customers" or "the general public." For ease of administration and to reduce the possibility of even inadvertent triggering of the Price Reductions clause, the offeror should try to get the Government to agree to a customer or category of customers that is easily tracked and that will have a small likelihood of receiving discounts that will result in price reductions to schedule contract customers. Note that the Government will not usually insist on educational institutions being designated as an offeror's basis-of-award customer(s) as long as the items involved are used for educational purposes and government educational institutions receive the same pricing for them.

F. Maximum Order Thresholds

The "Order Limitations" clause of MAS solicitations includes provisions for both minimum orders and maximum orders; the latter is also known as "Maximum Order Thresholds" ("MOTs"). Maximum order thresholds are negotiated individually for each line item or group of line items for each contract based on concessions granted by the contractor. The contractor is not required to honor any order when the dollar value of any item ordered, whether separately or in combination with other items, exceeds the dollar amount set forth in the SINs included in the contract. Nevertheless, the contractor must fill any order exceeding the MOT unless the contractor returns the order to the ordering activity within five working days after receiving it, along with written notification stating the contractor's intent not to fill the refused order and the reason(s) why it will not be filled. MOTs are ordinarily listed in the contractor's basis of award document.

Under the "Requirements Exceeding the Maximum Order" clause, and in accordance with the Federal Acquisition Regulation ("FAR"),[67] before placing an order exceeding the MOT, the ordering activity should seek a price reduction from the contractor. If the contractor is amenable, it may (a) offer a new, lower price for the requirement without triggering the Price Reductions clause, (b) offer the lowest price available pursuant to the extant contract, or (c) decline the order, on written notice to the ordering activity (see above). Sales that exceed the MOT must be reported to GSA on Form 72A, "Contractor's Report of Sales," as they are subject to the Industrial Funding Fee (see discussion below).

G. Offers on Identical Products

Until recently, GSA and DVA would ordinarily include a specific product on only one MAS contract. When two or more offerors offered the identical product, the regulations provided that a contract for that product could be awarded competitively to only one offeror, based on the lowest price offered.[68] Moreover, during the initial open season for an option period, GSA had to consider any offers received for identical items that were priced equal to or lower than the current contract price, and current contractors had to be afforded the opportunity to submit offers for identical items during that initial open season.[69] Recently, however, GSA has determined that it may accept offers for identical brand-name products and award contracts for such products to multiple offerors when prices are fair and reasonable.

H. Negotiating MAS Contract Pricing Arrangements

1. Manufacturer as Offeror

There is a widespread belief that GSA and DVA prefer to award MAS contracts to manufacturers rather than resellers (dealers). In fact, the Government's real prefer-

ence is for the simpler, more direct distribution systems that many manufacturers offer. It is often easier for such manufacturers to negotiate acceptable pricing arrangements because it is usually easier for them to offer most favored customer pricing.

When the manufacturer is not willing to offer MFC pricing, it must justify the difference between its MFC discounts and the discounts it offers to the Government. When justifying such a difference, manufacturers generally follow two courses. First, the manufacturer may attempt to give a value to certain terms and conditions in its MAS offer that are more advantageous to the Government than to the manufacturer, or, for that matter, more advantageous to the Government than similar terms and conditions extended to the manufacturer's commercial customers. Such a valuation is often expressed as a percentage of the catalog price of the item. As an example, a manufacturer may offer a two-year warranty to the Government as opposed to a one-year commercial warranty. In this situation, the offering manufacturer must determine the value of the additional one-year warranty period and express that value as a percentage of the catalog price.

Second, the manufacturer may try to ascribe a value to the functions that its resellers normally perform, or the costs they incur, that otherwise would have to be performed or incurred by the manufacturer as a direct seller to the Government. (The key point here is that the costs at issue are those of the manufacturer, not the reseller.) For example, the resellers (as customers) may stock the manufacturer's products, thereby relieving the manufacturer of certain costs of carrying inventory. Again, the manufacturer should ascribe a value to the inventory stocking function, and express that value as a percentage of the catalog price of the item. Essentially, the offer is submitting a form of limited "cost or pricing data" to justify the proposed spread between its MFC price (to resellers and dealers) and the price being offered to the Government. Of course, GSA or DVA may be expected to challenge to the legitimacy of that data, or the price ascribed to the function, in an effort to get MFC pricing, and, as in many types of negotiations, the process may be protracted and frustrating to both parties.

2. Reseller as Offeror

MAS price negotiations between the Government and resellers are similar to those in which manufacturers take part, with one significant difference: the Government is not likely to be satisfied if a reseller merely offers MFC pricing. Resellers must also be prepared to justify the difference between their manufacturers' list prices and the prices the manufacturers charge them as resellers (the "dealer discount"). In such situations, resellers typically use the same techniques described above for manufacturers. That is, they often try to put a value on the price differentials based on differing terms and conditions, or the functions they perform or costs they incur as resellers. GSA and DVA are often unimpressed by reseller valuations, on the theory that the Government will not benefit from the performance of the

particular function or the particular cost cited by the offering reseller. That is, the Government places itself in the same position as any other commercial customer to which the reseller might sell the products, except that the Government's primary negotiation objective is most favored customer pricing.

3. Service Offers

Offerors negotiating MAS contracts for services typically disclose their historical labor rates – from both commercial and government agreements – for contractor personnel who will be involved in contract performance. Often, the selected basis-of-award customer is a government agency rather than a commercial customer, and government discounts for the MAS contract are calculated from those wage rates. Additionally, GSA may try to limit the number of wage categories that will be included in the schedule contract. And given the current "evergreen" nature of MAS contracts (see discussion below), offerors should be sure to get the Government to agree to acceptable wage escalation provisions.

4. Deviations

As previously noted, an offeror must provide a written explanation, as part of its Commercial Sales Practices Format submission, of any deviations from its disclosed discounting policies that result in better discounts (lower prices) than those indicated on the CSP-1 chart.[70] The offeror's objective should be full disclosure of all such deviations, but in such a manner as not to strengthen the Government's negotiating position; the disclosures should be accompanied by explanations as to why those deviations would have little, if any, practical application to a customer in the Government's position. Significant pricing practices that account for more than a marginal portion of total commercial sales, the establishment of a preferred customer, or repetitive discounts to a single customer are not, of course, typical deviations. They are commercial sales practices that must be disclosed on chart.

I. Negotiating Contractual Terms and Conditions

1. Negotiating "Commercial" Provisions and Clauses

Many of the terms and conditions in GSA and DVA solicitations for MAS contracts are negotiable – at least theoretically. The actual extent to which any particular term or condition is negotiable will depend on whether the term or condition has a statutory or regulatory basis, as well as on the proclivities of the Government negotiator. For example, "boilerplate" clauses that are incorporated by reference in the standard GSA clause "Contract Terms and Conditions Applicable to GSA Acquisition of Commercial Items"[71] are rarely, if ever, negotiable. On the other hand, a proposal that takes exception to a minor specification requirement may well be accepted. Likewise, warranty terms and conditions requested by the Government can sometimes be modified through negotiation. Additionally, some of the provisions in the FAR clause, "Contract Terms and Conditions – Commercial Items,"[72]

which is incorporated in MAS solicitations, may be susceptible to negotiation. When reviewing an MAS solicitation, the offeror should compare the provisions and clauses in the RFP against the FAR-prescribed provisions and clauses that are authorized for the acquisition of commercial items.[73] The offeror's strategy for negotiating terms and conditions should be to:

- study and understand the terms and conditions in the solicitation;
- determine whether the term or condition is mandatory;
- if the term or condition is not mandatory, determine whether it reflects the prevailing commercial practice in the industry;
- if the term or condition is different from the offeror's practice, determine the potential cost of compliance; and
- if the cost of compliance is more than the offeror wants to absorb, propose alternatives to the Government, such as alteration or deletion of the term or condition at issue.

2. Vulnerable Areas

The offeror for an MAS contract should carefully consider the following vulnerable areas when deciding which terms and conditions to negotiate with the Government:

- delivery (time; location, e.g., inside premises);
- packaging;
- warranties and remedies;
- product testing;
- services (response time; charges, i.e., fees and associated costs);
- support information (technical data: amount; type; compensation; use); and
- software licensing.

3. Representations and Certifications

While they are not necessarily negotiable, the representations and certifications that must be submitted with an offer for a MAS contract deserve at least as much attention from the offeror as the potentially alterable terms and conditions, primarily because of the False Claims Act and False Statements Act implications of making any representation, certification or warranty to the Government. The offeror should pay close attention to all the representations and certifications, and the definitions presented with them, especially the "Offeror Representations and Certifications – Commercial Items."[74] These include: taxpayer and corporate identification representations; the representation as to whether the offeror is a small business concern, and the others that follow if it is; equal employment and affirmative action representations; Trade Agreements Act certificate; certification regarding debarment or suspension from, or ineligibility for federal government contract awards; and the certification regarding the involvement of child labor in the mining, production or manufacture of certain end products.

IV. Defective Pricing Data

A. The Price Adjustment Clause

A material failure to comply with the commercial sales practices disclosure obligations of a GSA or VA solicitation is commonly referred to as "defective pricing." Schedule contracts contain a Price Adjustment Clause, which provides for a price reduction for defective pricing:

> (a) The Government, at its election, may reduce the price of this contract or contract modification if the Contracting Officer determines after award of this contract or contract modification that the price negotiated was increased by a significant amount because the Contractor failed to:
> (1) Provide information required by this solicitation/contract or otherwise requested by the Government; or
> (2) Submit information that was current, accurate, and complete; or
> (3) Disclose changes in the Contractor's commercial pricelist(s), discounts or discounting policies which occurred after the original submission and prior to the completion of negotiations.[75]

The Government will consider information to be current, accurate and complete "if the data is current, accurate and complete as of fourteen calendar days prior to the date it is submitted."[76] The Government will also seek interest on any overpayment.[77] If the contractor and the Government cannot resolve the amount due for defective pricing, the disagreement is subject to the dispute resolution procedures of the contract.[78]

B. Government Remedies for Defective Pricing

The Government has the following contractual, administrative, civil and criminal remedies to respond to defective pricing: (1) a price adjustment pursuant to the Price Adjustment Clause; (2) termination of the contract and suspension and debarment of the contractor from obtaining any further government contracts; (3) civil remedies under the civil False Claims Act for defective pricing fraud; and (4) criminal penalties. The Government will review the circumstances of the defective pricing and the contractor's actions when electing its remedy or combination of remedies.

1. Price Adjustment

In routine cases, where the Government determines that the defective pricing was not intentional or the result of reckless disregard of the contractor's pricing obligations, the Government will normally seek only a price adjustment under the Price Adjustment clause. The Government, generally through its auditors, will determine the price it would have negotiated if the contractor had disclosed current,

accurate and complete pricing information in its proposal and during negotiations. The Government will then seek a price adjustment for any future sales and repayment with interest for any amount previously paid above the adjusted price.[79] If the contractor does not agree with the Government's assessment, the dispute is subject to the contract dispute resolution procedures.[80]

2. Termination of the Contract and Suspension and Debarment from Government Contracting

The Price Adjustment clause also expressly provides that the Government "may terminate this contract for default" upon discovering defective pricing.[81] The Government also has the right to terminate the contract for the convenience of the Government.[82] The Government generally does not seek termination of the contract where the defective pricing was not intentional or extensive. In addition to termination of the schedule contract, the Government could suspend or debar the contractor from award of any future contract for defective pricing that amounts to fraud or otherwise demonstrates a lack of current responsibility.[83] Suspension would make the contractor ineligible to receive award of any Government contracts pending an investigation of, and hearing on, the grounds for debarment.[84] Debarment would result in ineligibility for up to three years.[85]

3. Monetary Damages Under the Civil False Claims Act

If the Government determines that the contractor knowingly submitted defective pricing data or acted with deliberate ignorance or reckless disregard of the accuracy of the information, the Government could proceed under the civil False Claims Act.[86] The civil False Claims Act provides for up to treble damages and a penalty of $10,000 per claim for the submission of a false claim to the Government, or relying on a false record of statement to obtain payment on a claim.[87] Violators could also be held liable for the costs of the civil action.[88] In cases where the Government finds evidence of fraud in defective pricing, it has proceeded based on a theory that every invoice submitted for payment under the contract is a false claim based on false records. In addition, the civil False Claims Act provides that a private citizen can file a qui tam case on behalf of the Government to redress fraud under government contracts.[89] These provisions of the civil False Claims Act have lead to thousands of qui tam lawsuits against government contractors that have resulted in billions of dollars in settlements and judgments.[90]

4. Criminal Prosecution

The Government invokes numerous criminal statutes to redress defective pricing intended to criminally defraud the Government into paying inflated prices under a GSA or VA contract. One criminal statute in the Government's arsenal is the criminal False Claims Act, which provides for criminal penalties of imprisonment of up to five years and fines for the knowing submission of a "false, fictitious or fraudulent claim."[91] Another criminal statute commonly used by the Government

is the False Statements Act, which provides for imprisonment of up to five years and fines for knowingly and willfully providing a false statement to the Government or concealing a material fact.[92] In addition, the Government could rely on the Major Fraud Act,[93] conspiracy,[94] mail fraud,[95] and wire fraud,[96] all of which subject a contractor to criminal fines and imprisonment.

In a case filed against Nashua Corporation in 1984, the Government served early notice that it would criminally prosecute defective pricing under schedule contracts where appropriate.[97] The Nashua case was reported to be the first time the Government filed criminal charges for defective pricing fraud.[98] The Government alleged that Nashua failed to fully disclose pricing information when negotiating contracts with GSA.[99] Nashua pleaded guilty to two counts of false statements and was fined $20,000. Nashua also paid an additional $1.5 million in restitution to the Government.[100] Although criminal cases for defective pricing under schedule contracts are not common, the Government will seek criminal enforcement when circumstances warrant.

V. Price Reductions Clause

A. Overview of the Current Price Reductions Clause

A Price Reductions clause is a standard feature of all MAS contracts. The clause is intended to maintain the relationship that was established at the time of contract award between the Government and the offeror's customer or category of customer upon which the award was predicated. In operation, the clause is designed to ensure that – during the term of the contract – any changes in pricing practices by the contractor resulting in a less advantageous relationship between the Government and this customer or category of customer will result in a proportionate price reduction to the Government. The clause is extremely complicated to administer and frequently results in extensive monetary exposure for contractors. This chapter explores the operation of the clause and examines major liability-related issues.

The current version of the clause – found at GSAR § 552.538-75 – reads as follows:

> (a) Before award of a contract, the Contracting Officer and the Offeror will agree upon (1) the customer (or category of customers) which will be the basis of award, and (2) the Government's price or discount relationship to the identified customer (or category of customers). This relationship shall be maintained throughout the contract period. Any

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

(b) During the contract period, the Contractor shall report to the Contracting Officer all price reductions to the customer (or category of customers) that was the basis of award. The Contractor's report shall include an explanation of the conditions under which the reductions were made.

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

(d) There shall be no price reduction for sales –
(1) To commercial customers under firm, fixed-price definite quantity contracts with specified delivery in excess of the maximum order threshold specified in this contract;
(2) To Federal agencies;
(3) Made to state and local government entities when the order is placed under this contract (and the state and local government entity is the agreed upon customer or category of customer that is the basis of award); or
(4) Caused by an error in quotation or billing, provided adequate documentation is furnished by the Contractor to the Contracting Officer.

(e) The Contractor may offer the Contracting Officer a voluntary Government wide price reduction at any time during the contract period.

(f) The Contractor shall notify the Contracting Officer of any price reduction subject to this clause as soon as possible, but not later than 15 calendar days after its effective date.

(g) The contractor [sic] will be modified to reflect any price reduction

which becomes applicable in accordance with this clause.
In schedule contracts under FSC Group 70 and where a schedule contract under the Consolidated Schedule includes IT SIN's, the following paragraphs (c)(2) and (d)(2) are substituted for paragraphs (c)(2) and (d)(2) of the basic clause, respectively:

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

(d)(2) To eligible ordering activities under this contract; or[.]

The Price Reductions clause has a complex administrative history, and the current May 2004 version of the clause has evolved significantly from prior versions. In 1994, the GSA (1) eliminated any reporting requirement with respect to price reductions that do not involve a basis-of-award customer, (2) eliminated price reductions based on a low price to a federal agency, (3) required that the Government be extended price reductions under the same terms and with the same effective dates as the contractor extends to commercial customers, and (4) required that any price reduction under the clause be reflected in a contract modification. In addition, the GSA extended the period – from ten to fifteen days after the effective date of a price reduction – during which a schedule contractor must notify the CO of the reduction. The GSA also eliminated the requirement for submitting a Contractor's End-of-Contract Statement of Price Reductions. See § V.F.2. Finally, the GSA revised the language describing the triggering events for a price reduction.

Specifically, under the October 1994 clause – and the current May 2004 clause - a price reduction applies to purchases under the contract if, after the date negotiations conclude, the contractor

- revises the commercial catalog, price list, schedule, or other document upon which contract award was predicated to reduce prices,
- grants more favorable discounts or terms and conditions than those contained in the commercial catalog, price list, schedule, or other documents upon which contract award was predicated, or
- grants special discounts to the customer (or category of customers) that was the basis of award, and the change disturbs the price/discount relationship of the Government to the customer (or category of customers) that was the basis of award.

Put more simply, there are three types of price reductions:

- a price reduction to a basis-of-award customer ("category (iii)"),
- a price reduction caused by a revision of the contractor's commercial pricelist ("category (i)"), and

- a price reduction caused by the contractor's grant of more favorable commercial discounts or terms and conditions ("category (ii)").

The current May 2004 version of the Price Reductions clause differs only slightly from the October 1994 version of the clause. In particular, the current clause emphasizes that a sale to a state or local governmental entity under the GSA's cooperative purchasing program will not trigger a price reduction under the clause. The current clause also substitutes the phrase "maximum order threshold" for the phrase "maximum order limitation" in the portion of the clause that excepts sales to commercial customers under firm, fixed-price definite-quantity contracts with specified delivery in excess of the Maximum Order Threshold from the purview of the clause. See § V.C.3.

B. Transactions Covered by the Clause

1. Sales

The Price Reductions clause uses the terms "purchases" or "sales" in two locations, thus suggesting that a contractor's mere offer to sell a contract item at below-contract pricing cannot implicate the clause.

2. Rentals

Although the Price Reductions clause does not mention the terms "rental" or "lease," the GSA takes the position that the clause covers rentals and leases of contract items as well as purchases thereof. The application of the Price Reductions clause to rentals or leases (particularly in the context of the IT schedule) can present complex issues with respect to, inter alia, (1) whether price reductions which affect one but not all of a contractor's rental- or lease-pricing plans activate the clause and (2) whether current government rentals or leases of contract items (i.e., a contractor's "installed base") must be adjusted prior to their expiration to reflect a price reduction. A carefully drafted basis of award can address the first issue; an offeror's insistence that any price reduction only apply to new rentals or leases can obviate the second issue.

C. Price Reductions Covered by the Clause

1. Price Reductions to Federal Agencies

a. Reductions to Schedule Customers

Prior to the 1994 version of the Price Reductions clause, a contractor's price reduction to a schedule customer (i.e., a federal agency buying a schedule item under the schedule) always activated the clause. Under the current clause, such price reductions never activate the clause; rather, the schedule price is simply a

ceiling price, and a schedule contractor can "spot discount" at its discretion. (This assumes, of course, that a federal agency is not a basis-of-award customer as is sometimes the case with schedule contracts for services.)

b. Reductions to Nonschedule Customers

Prior to 1994, price reductions to a nonschedule federal customer (i.e., a federal agency buying a schedule item on the "open market") always activated the Price Reductions clause unless a schedule contract relating to automated data processing equipment, telecommunications, or teleprocessing services was involved. (These items were covered by FSC Groups 58 and 70.) Under the current clause, price reductions to nonschedule federal customers never activate the clause.[101] (Again, this assumes that a federal agency is not a basis-of-award customer.)

By special statutory authority, sales or leases to the Congress never activate the Price Reductions clause.[102]

2. Price Reductions to Other Customers

a. Reductions to State and Local Government Customers

Prior to 1982, the GSA's MAS contracting policy excepted sales to state and local governments from the purview of the Price Reductions clause. Today, however, such customers may serve as a basis-of-award customer. Notwithstanding such designation, where a state or local government places an order under the GSA's cooperative-purchasing program for IT, the clause is not triggered.

b. Reductions to Commercial Customers

With respect to commercial customers generally, the current Price Reductions clause requires that the contractor determine whether the commercial customer to which prices have been reduced is in the class of identified customer or category of customers upon which the contract award was predicated. If the commercial customer is a member of the identified class, the Price Reductions clause is activated.

3. Effect of Maximum Order Threshold

Until fairly recently, most Federal Supply Schedules contained a Maximum Order Limitation ("MOL") for the purpose of forcing ordering activities to attempt to obtain greater discounts for purchases in above-normal quantities. Ordering activities could not submit and contractors could not accept orders in excess of a MOL. Thus, the MOL was the dollar amount or unit quantity above which no schedule sales could be made. In recent years, the GSA replaced the MOL with a so-called Maximum Order Threshold that permits agencies to issue delivery or task orders exceeding a prescribed dollar amount or unit quantity. Maximum Order Thresholds applying to multiple-award schedules are shown in the contractor's catalog or price list and are ordinarily listed in the contractor's basis of award. Maximum Order Thresholds may be established for each item as well as for the total order and are frequently established for individual SIN's.

Ordering activities should not reduce or split their requirements simply to avoid a Maximum Order Threshold; rather, they should consolidate their requirements whenever possible in order to take advantage of price savings that are normally obtainable through definite-quantity contracts for quantities exceeding the threshold. In this regard, the GAO has held that MOL's – and presumably Maximum Order Thresholds - apply to both a single delivery order and to a series of delivery orders placed within a short period of time.[103] This rule prohibits ordering activities from evading a Maximum Order Threshold by splitting a requirement into several smaller orders, each within the dollar limit specified. In Quest Electronics,[104] the GAO upheld a protest against the award of nine consecutively numbered delivery orders for sound detection equipment totaling $455,852 on the same day to a single schedule contractor with an MOL of $250,000.[105]

Firm fixed-price definite-quantity contracts with specified delivery in excess of a Maximum Order Threshold do not activate the Price Reductions clause. Each element of this exclusion must, however, be met. For example, some schedule contractors enter into national account agreements or master agreements with commercial customers that provide for extremely low pricing based upon an expectation that above-Maximum Order Threshold sales will result. These agreements may state that such pricing is being extended to a customer based upon its high volume of previous purchases from the contractor. Although a contractor may believe that such an agreement does not trigger the Price Reductions clause, GSA or DVA auditors will likely disagree with the contractor in the context of a postaward audit. From an auditor's standpoint, the agreement will be viewed as failing to satisfy the "definite-quantity" requirement. Similarly, some national account agreements or master agreements purport to guarantee the requisite above-Maximum Order Threshold volume but do not provide for any penalty in the form of a bill-back provision if such volume is not actually achieved. In a postaward audit, GSA or DVA auditors will generally likewise conclude that these agreements also fail to satisfy the "definite-quantity" requirement.

D. Calculation of Price Reductions

As previously noted, the current Price Reductions clause is designed to ensure that the Government maintains its relative price/discount advantage throughout the term of the contract in relation to the price/discount of the contractor's commercial customer or customers upon which the contract award was predicated. Thus, any changes in pricing practices by the contractor that result in a less advantageous relationship between the Government and the customer or category of customer upon which the schedule contract was predicated result in a price reduction to the Government to the extent necessary to retain the original relationship. How, then, does the schedule contractor compute such a price reduction?

In 1982, the GSA published sample calculations in the GSAR showing how to

compute an "equivalent price reduction" under the then-new 1982 version of the Price Reductions clause.[106] Although the current GSAR does not contain this guidance, the 1982 calculations are arguably still relevant to the current clause because the GSA has never formally evidenced any intent to change the method of calculating a price reduction.

The sample calculations provide the following examples of how an "equivalent price reduction" should be computed in specific circumstances:

Example No. 1. The schedule contract is with a regular dealer, and the Government discount is 28 percent from the manufacturer's suggested retail price list. The Discount Schedule and Marketing Data ("DSMD") sheets[107] that were furnished by the dealer referenced the same price list and indicated that the dealer gives a 20 percent discount to other customers. A specific product is listed on the commercial price list furnished to the Government as the basis for negotiation at $100 per unit. This product is sold by the dealer to a customer other than the Government for $75 during the third month of the contract. What "equivalent price reduction" is due to the Government on sales of this product with respect to government orders that are placed after the $75 sale?

(1) Discounts and net prices:

	Price list price	Discount Offered (%)	Net price
To the Government	$100	28	$72
To other customers	$100	20	$80

(2) Price reduction granted other customers in third month of contract = $5 ($80 - $75)
(3) Additional price reduction to other customers = 6.25% (5/80)
(4) Comparable price reduction per unit applicable to government purchases of the product after the $75 sale to other customers = $4.50 ($72 x 6.25%)
(5) New reduced government unit price = $67.50 ($72 - $4.50)
(6) New government discount = 32.5%

$$\frac{(\$100 - \$67.50)}{\$100} = \frac{\$\ 32.50}{\$100} = 32.5\%$$

Example No. 2. The schedule contract is with a manufacturer, and the Government's discount is 30 percent from the manufacturer's suggested retail price list. The DSMD sheets indicated discounts to regular dealers of 40 percent from the same price list. The manufacturer increases its discount to dealers from 40 percent to 50 percent in the fourth month of the contract period. What "equivalent price reduc-

tion" should the Government receive?

(1) Discounts and net prices:

	Price list price	Discount Offered (%)	Net price
To the Government	$100	30	$70
To other customers	$100	40	$60

(2) Additional price reduction granted to regular dealers = $10 ($60 - $50)
(3) Price reduction percentage = 16.67% (10/60)
(4) Comparable price reduction per unit applicable to Government purchases after the reduction in price to regular dealers = $11.67 ($70 x 16.67%)
(5) New reduced Government unit price = $58.33 ($70 - $11.67)
(6) New Government discount = 41.67%

$$\frac{(\$100 - \$58.33)}{\$100} = \frac{\$\ 41.67}{\$100} = 41.67\%$$

Note that the discount ratio does not remain constant (e.g., 30%/40% is not the same ratio as 41.67%/50%); the price ratio, however, does remain constant (e.g., $60/$70 is the same ratio as $50/$58.33). It is, of course, possible to compute a price reduction keeping the discount ratio constant.

Although the 1982 sample calculations are not official GSA regulatory guidance, they are useful as negotiating tools and generally reflect the GSA's analysis as to how to compute price reductions under the current clause.[108]

E. Effective Date of Price Reductions

1. Price Reductions to Federal Agencies

As previously noted, prior to the 1994 version of the Price Reductions clause, a contractor's price reduction to a schedule customer (i.e., a federal agency buying a schedule item under the schedule) always activated the clause. Under the current clause, price reductions to a federal agency never activate the clause. (As previously noted, this assumes that a federal agency is not a basis of award customer as is sometimes the case with schedule contracts for services.)

2. Price Reductions to Other Customers

Under the current Price Reductions clause, a price reduction to a nonfederal customer (i.e., a basis-of-award customer) is effective for the Government at the same time and for the same period as extended to the commercial customer (or category of customers).

F. Reporting Requirements

1. Notification to Contracting Officer of Price Reductions

A schedule contractor must notify the CO in writing of any price reduction subject to the Price Reductions clause as soon as possible but not later than fifteen calendar days after the effective date of the reduction. Under the 1982 version of the clause, if the contractor failed to provide timely notice, the price reduction (including any temporary price reduction) would – if it triggered the clause – apply to the contract for the duration of the contract period or until the price was further reduced. While the current clause is silent on this point, a contractor that fails to notify the CO of a temporary price reduction to a basis-of-award customer will presumably suffer the same fate; i.e., the price reduction will apply to the contract for the duration of the contract period or until the price is further reduced. Any such failure may also constitute a basis for termination of the contract for cause (default). Because the Price Reductions clause does not apply to sales above the Maximum Order Threshold, however, the contractor does not have to report such sales to the CO.

Under GAO decisions, a schedule contractor is not required to submit a general price reduction to the GSA or DVA prior to offering the reduction to an ordering activity, and conversely, there is no requirement that the GSA or DVA accept such a price reduction before it becomes effective.[109] On the other hand, the burden is on the contractor to notify ordering activities of price reductions that the GSA or DVA have accepted.[110]

As previously noted, the current Price Reductions clause does not require the contractor to report price reductions to commercial customers that do not serve as the basis of award. The clause provides, however, that the contract must be modified to reflect any price reduction that becomes applicable in accordance with the clause; presumably, this requirement does not apply to price reductions to the Government.

2. An Historical Note: Contractor's End-of-Contract Statement of Price Reductions

Under the 1982 Price Reductions clause, a schedule contractor was required to furnish a statement to the CO within ten calendar days after the end of the contract period certifying either that (1) there was no applicable price reduction during the period or (2) the schedule contractor had reported any price reduction to the CO. For each reported price reduction, the contractor had to list the date

when it notified the CO of the price reduction. The Contractor's End-of-Contract Statement of Price Reductions was a major compliance issue for schedule contractors because the statement tended to "flush out" unreported price reductions. The current Price Reductions clause does not contain such a reporting requirement.

G. Sanctions for Noncompliance with the Clause

Price-reduction problems in the MAS context often also involve a contractor's submission of defective pricing data, and the Government will ordinarily pursue whatever theory (or combination of theories) offers the largest potential recovery. As in the defective pricing data area, the Government may impose various sanctions for violation of the Price Reductions clause.

1. Price Adjustment

Although, as noted, the current Price Reductions clause is silent on this point, a schedule contractor's failure to notify the GSA or DVA of a price reduction (including a temporary price reduction) to a basis-of-award customer presumably entitles the Government to an appropriate price adjustment for the remainder of the contract period (computed from the time of the reduction) or until the price is further reduced.

2. Termination for Cause (Default) or Convenience

Under the Price Reductions clause, a schedule contractor's failure to notify the GSA or DVA of a price reduction constitutes a breach of the contract, and the Government may terminate the contract for cause (default). As in the case of other government contracts, MAS contracts also contain a Termination for Convenience clause that the GSA or DVA could exercise in this context.

3. Debarment/Suspension

A schedule contractor that fails to notify the GSA or DVA of a price reduction may face debarment or suspension. Since the 1980's, the GSA's use of these sanctions has increased dramatically. In the schedules context, the GSA has suspended or proposed to debar several companies for failing to disclose price reductions, particularly with respect to undisclosed price reductions to state governments.

4. Monetary Recovery Under the Civil False Claims Act

Undisclosed price reductions can result in claims under the civil False Claims Act, subjecting the contractor to a civil penalty of up to $10,000 for each false claim plus up to three times the amount of damages that the Government sustains because of such act.[111] Violators are also liable to the Government for the costs of any civil action brought to recover any such penalty or damages.[112]

5. Monetary Recovery Under the Program Fraud Civil Remedies Act of 1986

The Program Fraud Civil Remedies Act of 1986[113] applies to false claims of $150,000 or less.[114] As such, the Act is arguably more useful in the price-reductions context than in the defective-pricing context. The Act provides for a civil penalty of not more than $5,000 for each such claim and – generally – an assessment of not more than twice the amount of such claim or the portion of such claim that is determined to violate the Act.[115]

6. Criminal Prosecution

A schedule contractor's failure to disclose a price reduction to the GSA or DVA may subject the contractor to criminal sanctions, often under the False Statements Act,[116] which proscribes the knowing and willful making of a false statement to or concealment of a material fact from the Government. Such a prosecution could also include a charge of violation of the criminal False Claims Act,[117] which proscribes the knowing submission of any false, fictitious, or fraudulent claim.[118]

VI. Audits and Investigations of Schedule Contractors

A. Types of Audits

There are two main types of audits that are conducted of MAS contracts: pre-award pricing audits and postaward compliance audits. Both are generally conducted by the Office of Inspector General's Office of Audits at the request of the contracting officer. Pre-award audits examine the accuracy and completeness of a contractor's pricing information, and are performed prior to GSA awarding or extending MAS contracts. The Office of Audits conducts postaward compliance audits under the Examination of Records (MAS). GSAR § 552.215-71. This clause allows GSA to examine a contractor's records to check for overbillings or billing errors, and to verify compliance with the contract's Price Reduction and Industrial Funding Fee clauses.

In addition to these two types of audits, GSA conducts "Contractor Assistance Visits" through its Industrial Operations Analysts ("IOAs"). Regardless of their name, these visits are audits in which the IOAs review the contractor's compliance in a range of areas.

1. Pre-Award Audits

GSA may conduct a pre-award audit of pricing, sales, or other data provided during negotiations to ensure that the data is accurate, current, and complete. The

purpose of the audit is to assist the contracting officer in negotiating the contract, modification, or extension. There has been an increase in the number of pre-award audits over the last three years. GSA conducted 14 pre-award audits in 2003; it conducted 40 in 2004; and it had a goal of approximately 70 for 2005.[119] GSA's right to access records during a pre-award audit is governed by FAR § 52.215-20 (Alt. IV) (Var. I). That clause provides that

> By submission of an offer in response to this solicitation, the Offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before initial award, books, records, documents, papers, and other directly pertinent records to verify the pricing, sales and other data related to the supplies or services proposed in order to determine the reasonableness of price(s). Access does not extend to offeror's cost or profit information or other data relevant solely to the offeror's determination of the prices to be offered in the catalog or marketplace.[120]

Thus, during an audit, GSA will typically review materials related to the contractor's commercial pricing and discount practices, including price lists, commercial contracts, sales data for a certain period, and special promotions. GSA may not, however, require access to cost or profit information that a contractor uses to determine its commercial prices and discounts.

The contractor should request a copy of a pre-award audit report. However, whether to provide a copy is within the discretion of the agency.

2. Postaward Audits

The main authority for a postaward audit lies in the clause titled Examination of Records by GSA (Multiple Award Schedule). That clause provides that:

> the Administrator of General Services or any duly authorized representative shall have access to and the right to examine any books, documents, papers and records of the Contractor involving transactions related to this contract for overbillings, billing errors, compliance with the Price Reduction clause and compliance with the Industrial Funding Fee and Sales Reporting clause of this contract.[121]

Thus, the clause does not generally provide for postaward audits of pricing, sales, or other data provided during pre-award (or modification) negotiations. However, under certain circumstances, the clause may be modified

> to provide for postaward access to and the right to examine records to verify that the pre-award/modification pricing, sales or other data related to the supplies or services offered under the contract which formed the basis for the award/modification was accurate, current, and complete.[122]

Such a modification may be made only if (1) the contracting officer finds that, absent such a modification, "there is a likelihood of significant harm to the Government," and (2) the Senior Procurement Executive approves the modification.[123] As of July 2005, GSA had never modified the clause in this fashion, although the VA has.[124] Moreover, the Government is able to obtain much of the information relevant to a pre-award audit as part of the postaward audit even in the absence of a modification. For example, auditors routinely request all sales information from the date of contract award through the date of the audit. Thus, the auditors obtain actual pricing and discount information immediately after the date of award, which provides important insight on the accuracy of contractor's disclosures in the proposal and during negotiations.

Under the general, unmodified clause, the duty to retain records related to the contract or option for a period of three years after the last payment is made pursuant to the contract or option. GSAR § 552.215-71. Under the modified clause, there is an additional duty to maintain pricing, sales, or other data for a period of two years after the award or modification. GSAR § 515.209-70(d)(1). The basic contract and each option are treated as separate contracts for purposes of determining how long records should be retained. GSAR § 552.215-71. Although not explicitly provided for under the Examination of Records Clause, GSA is increasingly including a review of compliance with the Trade Agreements Act as part of its postaward audits.

The contractor should also request a copy of a postaward audit report. However, whether to provide a copy is within the discretion of the agency.

3. Programmatic Audits

In addition to pre- and postaward audits, GSA also conducts periodic "Contractor Assistance Visits" using its IOAs. Regardless of the name, these visits are audits intended to "evaluate the contractor's performance."[125] These audits are part of GSA's Contractor Assessment Initiative ("CAsI"), which is meant to assist GSA personnel in making decisions about exercising contract options and awarding additional contracts.[126] The IOAs prepare a report card that is then made available to GSA customers.[127] In addition, the IOAs may refer issues to the Office of Audits for further auditing.

IOAs examine the records to ensure that products being provided fall within the scope of work of the contract.[128] They also examine pricing to ensure that the required discount associated with the reduction of the Industrial Funding Fee has been extended to the customer.[129] Notably, IOAs are also increasingly reviewing compliance with the Trade Agreements Act. A proposed revision to the IOA report card lists compliance with the Trade Agreements Act as the second area of review

and describes compliance in this area as "critical," such that a failure to comply "will result in an unsatisfactory rating."[130] Further, GSA has provided training regarding compliance with the Trade Agreements Act to more than 225 IOAs and Administrative Contracting Officers.[131]

B. The Audit Process

1. Contractor/Offeror Preparation for Audit

Proper preparation is crucial for a successful audit. A contractor about to be audited should take the following preliminary steps:

(1) Ask for the audit request in writing. The request should include a statement of the audit objectives, identification of the Government's audit team, and an anticipated time span for the audit.
(2) Establish a primary point of contact for the Government to respond to information requests during the audit.
(3) Provide the auditor with a suitable workspace, monitored by the designated point of contact.
(4) Arrange pre- and post audit conferences with the auditors.
(5) Request that questions that may have compliance implications be put in writing, and make arrangements to provide written responses promptly.
(6) Make a copy and create a record of each document provided to the auditor.

These procedures should be followed throughout the course of the audit. Auditors could take the position that designation of a point of contact does not preclude access to other knowledgeable contractor personnel, and that it should not cause delays or extra audit work. Auditors could also take the position that contractor actions which unreasonably restrain, restrict, or delay the audit may be deemed a denial of access to records. These procedures are not unusual, however, and do not normally result in objection by the auditors as long as contractors diligently respond to the auditors requests for information.

The contractor should also develop and implement a plan to educate the auditors concerning the nature of the contract, and the contractor's position and justification for its pricing or billing. Prior to the audit, the contractor should identify the contractor personnel that will be involved in this effort, and consult with legal counsel if appropriate.

2. Entrance Conference

Contractors should arrange an entrance conference with the auditors before they begin their work to understand the parameters of the audit. As part of that conference, the auditors should, at a minimum, explain the purpose of the audit, the overall plan for its performance including the estimated duration, and generally the types of books, records, and operations data with which the auditor will be concerned. The conference should also cover the following areas:

(1) arrangements for any necessary work space and administrative support;
(2) designation by the contractor of its point(s) of contact;
(3) discussion of the contractor's contract and the nature and location of relevant records;
(4) tour of office and/or plant operating areas used in performing current and proposed contract(s);
(5) arrangements to review the planning documents, working papers, and audit reports of the contractor's internal and external auditors for any audits or reviews performed or planned that may curtail the planned scope of work;
(6) arrangements for any needed IT audit assistance;
(7) when the audit involves a subcontractor's cost representation(s), resolution of any restrictions on release of audit findings and report information to higher-tier contractors per FAR § 9-106.4.[132]

3. Conduct of Audit

The contractor should make sure that its preparation procedures are followed throughout the audit. There should continue to be a primary point of contract handling auditor requests. The auditors should be escorted throughout the premises. The contractor should respond as promptly as reasonably possible to auditor requests to prevent any claim that it is unreasonably delaying or restricting the audit. It should make copies and keep a record of all information provided to the auditors.

The contractor should also make sure that auditor requests fall within the scope of their audit authority. For instance, as indicated above, GSA auditors conducting pre-award audits are not entitled to cost or profit data that supports or justifies commercial prices or discounts.[133] Therefore, a request for such information would be inappropriate and outside the scope of the audit. Similarly, as also discussed above, GSA auditors conducting postaward audits generally do not have authority to audit pricing, sales, or other data from the period prior to contract award.[134] Therefore, a contractor should request that the auditor provide the reasons and authority for such a request given the purpose of the audit. If the request is outside the scope of the audit, the contract should consider objecting to the request to the auditor or the auditor's supervisor.

4. Exit Conference

Contractors should arrange an exit conference with the auditors. Auditors will generally provide an exit conference to a contractor even when there are no ad-

verse findings as "a minimum courtesy to the contractor and … an important part of sound contractor relations."[135] However, auditors may decline a request for an exit conference where the audit is performed in support of litigation, investigations, or voluntary disclosure verifications.[136]
During an exit conference, the auditors should

> (1) summarize the audit results;
> (2) confirm or follow up on requests for the contractor's reaction to any audit exceptions for inclusion in the audit report;
> (3) if applicable, note that the audit findings, conclusions, and recommendations are subject to normal DCAA review by the auditor's office before the audit report is issued, and that the contractor will be advised if any significant changes are made.[137]

Contractors should use the exit conference to ensure that they understand the results of the audit, and express to the auditors any disagreements with those results. The auditors are then required to include such disagreements in the audit report.[138] Contractors should also request a copy of the audit in draft form, and an opportunity to respond in writing to any concerns raised in the draft.

5. Challenging Audit Findings

Contractors should always take the opportunity to provide a written response to any concerns raised by the draft audit report. The auditors are required to include the contractor's written response as part of any final report. The audit report should reference the contractor's response in stating its results, and should also attach the full text of the response as an appendix.[139] A well-researched and presented response will be extremely valuable (and possibly essential) in any litigation over claims resulting from the audit.

C. Investigations

1. Understanding When an Audit Has Become an Investigation

a. Referral Process

An audit becomes an investigation when the auditors conclude that there are sufficient indications of fraud to warrant a referral to the Office of Inspector General, or to the Department of Justice. The DCAA Contract Audit Manual describes an auditor's responsibilities for detecting and reporting fraud as follows:

> Auditors are not trained to conduct investigations of illegal acts. This is the responsibility of investigators or law enforcement authorities. Auditors are responsible for being aware of fraud indicators, vulnerabilities, and potentially illegal expenditures and acts associated with an audit area. When an auditor obtains information that raises a reasonable suspicion of fraud or other unlawful activity that has not been previously disclosed to the Government, an investigative referral should be initiated.[140]

Although the auditors themselves are not investigators, they are always alert for indications of fraud. For schedule contracts, auditors will likely view facts or information demonstrating that a contractor negligently, knowingly or intentionally failed to fully disclose its discounting and pricing policies at the time of negotiation as a possible indicator of fraud. Auditors will also view a negligent, knowing, or intentional failure to offer the Government price reductions under the Price Reductions Clause as a possible indicator of fraud.

b. Avoiding Referrals to the GSA or DVA Office of Investigations or to the Department of Justice

Avoiding a referral is largely a matter of convincing the auditors that any concerns they might have do not rise to the level of fraud. A contractor will be more likely to be successful in such an effort if the contractor has, in the course of preparing for the audit, developed a plan for educating the auditors about its justification for pricing or billing and fully responding to any requests by the auditors.

2. Necessity for Internal Review by Contractor

If a referral is made, and an investigation begun, it is imperative that the contractor conduct its own internal investigation of the allegations. An internal investigation is important for several reasons. An internal investigation allows the contractor to evaluate its exposure and act accordingly. Further, it allows the contractor to gather the facts and present its case in the most favorable light to the investigators. Finally, a failure to conduct an internal investigation could cause the contractor to lose credibility with the investigators.

An internal investigation should generally include both a review of relevant documents and interviews of relevant employees. An investigation should be done by or at the direction of counsel in order to create and preserve privilege and should include the typical precautions of an internal investigation. For example, counsel should be careful to inform employees of the nature of the review and attorney-client relationship so that there can be no possibility that the employee could wrongly consider counsel to be the employee's personal attorney. Documents and other relevant information should be obtained and preserved.

3. Subpoena Authority of the GSA or DVA Inspector General

The Inspector General Act gives Inspectors General the authority to

> require by subpena [sic] the production of all information, documents, reports, answers, records, accounts, papers, and other data and documen-

> tary evidence necessary in the performance of the functions assigned by this Act, which subpena [sic], in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court….[141]

Thus, Inspectors General have the authority to subpoena documents related to a legitimate investigation. However, Inspectors General must go to district court in order to enforce such a subpoena. Inspectors General do not have authority to subpoena testimony. The IGA authorizes only subpoenas of "data and documentary evidence,"[142] which courts have held does not authorize subpoenas of testimony.[143]

4. Civil Investigative Demands and Grand Jury Subpoenas

In addition to an administrative subpoena power, the government also has authority to subpoena documents or testimony through a Civil Investigative Demand ("CID") as part of a civil fraud investigation under the Civil False Claims Act[144] or a grand jury subpoena as part of a criminal investigation. The Civil False Claims Act permits the issuance of the CID prior to the filing of a case under the Act "[w]henever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation . . ."[145] The Government can also issue interrogatories and require oral testimony through a CID. If the Government determines that audit findings warrant a criminal investigation, the Government could also obtain documents and testimony through a grand jury subpoena. As with any criminal investigation, the Government could use full range of investigation procedures, including, in relatively rare instances, search warrants. Prior to issuing a CID or a grand jury subpoena, government investigators may seek to interview a contractor's employees.

5. Parallel Proceedings

A contractor must always be alert for the possibility of a civil fraud or criminal investigation growing from an audit and respond accordingly to such investigations. As demonstrated above, it is possible that a contractor will have to respond to an administrative, civil and criminal proceeding in parallel based on a single issue.

a. Types of Proceedings

The Government's arsenal for seeking redress under a GSA contract includes the following: (1) a contractual claim for repayment of overpayments made by the Government, generally for defective pricing or under the Price Reductions Clause; (2) an administrative action for termination of the contract[146] and suspension or debarment of the contractor from conducting any further business with the Government[147]; (3) a civil action for violation of the Civil False Claims Act[148]; and (4) a criminal action for a violation of the criminal False Claims Act[149], False Statements Act[150] or the myriad of other criminal statutes used by the Government to

criminally prosecute government contracts fraud. These proceedings could have important consequences for the contractor, including monetary judgments, civil and criminal penalties, and exclusion from government contracting for up to three years.

b. Global Settlements

An essential aspect of any response to an investigation under a GSA or VA contract is recognizing the possibility of parallel proceedings and seeking a global settlement of all contractual, administrative, civil and criminal proceedings. A global settlement is often difficult, given the varying goals and responsibilities of the Government participants. In addition, certain Government participants either cannot or will not settle or even take a position on other proceedings. For example, a criminal prosecutor will often state that he cannot or will not settle any administrative suspension and debarment proceedings as part of a criminal plea agreement. Through awareness of the universe of liability and parallel proceedings and diligent coordination of a resolution with all government participants, however, a contractor can successfully obtain a global settlement of all potential liability.

VII. Schedule Contracting at the DVA

A. Pharmaceutical Pricing Agreements with the DVA

The Veterans Health Care Act of 1992 ("VHCA") imposes price limitations on certain drugs, biological products, and insulin (so-called "covered drugs") that are purchased by the DVA, DoD, and the Public Health Service.[151] The VHCA covers (1) most outpatient multiple-source drugs that have been originally marketed under an original new drug application that has been approved by the Food and Drug Administration and (2) most outpatient single-source drugs that have been produced or distributed under an approved new drug application.[152]

Under the VHCA, every manufacturer of covered drugs must – as a condition of receiving payment from Medicaid or the DVA, DoD, Public Health Service, or Coast Guard – enter into a master agreement with the DVA under which the manufacturer must "make available for procurement on the Federal Supply Schedule of the General Services Administration each covered drug of the manufacturer."[153] In turn, the master agreement requires the manufacturer to enter into a pharmaceutical pricing agreement ("PPA") with the DVA under which the price charged to the DVA, DoD, or Public Health Service during the one-year period beginning on the date on which the agreement takes effect generally may not exceed 76 percent of the "non-Federal average manufacturer price" (the so-called "non-FAMP") during the one-year period ending one month before such date.[154]

If the manufacturer fails to meet such requirements, the manufacturer may not receive payment for the purchase of drugs or biologicals from, inter alia, such federal agencies.[155] The term "non-Federal average manufacturer price" means "the weighted average price of a single form and dosage unit of the drug that is paid by wholesalers in the United States to the manufacturer, taking into account any cash discounts or similar price reductions during that period, but not taking into account (A) any prices paid by the Federal Government; or (B) any prices found by the [DVA] to be merely nominal in amount."[156]

B. Price Escalations

The VHCA establishes a complicated formula to limit price escalations. In general, for drugs covered under a PPA, the manufacturer must provide a discount in an amount equal to the amount by which the change in the so-called non-federal price (in essence, the yearly escalation in the non-FAMP) exceeds an amount equal to the baseline price of the drug multiplied by the percentage increase in the Consumer Price Index for all urban consumers.[157]

VIII. The Administration of Schedule Contracts

In this section we address the basic mechanics of getting your schedule contract up and running, including the many business processes and compliance requirements that will need to be maintained over the life of the contract.

A. Worldwide Scope of Contract

1. Authorized Users

As discussed in section II.I above, GSA schedules have mandatory and optional users in the Government and elsewhere. One of the administrative responsibilities of the schedule contractor is to have processes in place that implement the applicable scope provisions so that orders from entities not entitled to use the schedules are promptly rejected, and orders from in-scope entities receive appropriate treatment. Where order acceptance from in-scope users is optional, there are deadlines for order acceptance and rejection that must be adhered to. As noted, basic scope terms (for users) are found in GSAR 552.238-78, Scope Of Contract (Eligible Ordering Activities).

2. Worldwide Geographic Scope

Under the same clause, the geographic scope of the schedule contract is potentially worldwide. Under the scope clause the contractor can decide whether it is offering delivery domestically (50 states, Washington, D.C., Puerto Rico, and all U.S. territories) internationally (anyplace else), or both. Schedule users ordering from abroad, particularly the Department of Defense, also have the option of ordering for delivery to a domestic staging point from which the Government will handle overseas delivery to the ordering activity. The beginning schedule contractor may find it easier to start with only domestic sales and later request a modification to add international deliveries if the business merits such expansion.

B. Socioeconomic Requirements

The Government as a matter of policy uses its business transactions to further socioeconomic goals. There are therefore a number of laws intended to ensure that a reasonable portion of federal procurement dollars goes to small and disadvantaged business entities, and that federal contractors comply with employment-related laws that require, for example, nondiscrimination and fair wages. GSA Schedule contracts, like all federal contracts, include clauses and performance requirements that implement these laws and policies.

1. Preference for Small Business Concerns

GSA has a number of tools to implement the laws favoring small businesses. In the first instance, GSA would like nothing better than to have more capable small businesses participate directly in the schedules program. Because federal schedule users have the same small business contracting obligations, GSA actively seeks such vendors for their roster.

For large businesses, GSA wants to see the maximum practicable utilization of small, small HUBZone, small disadvantaged, small women-owned and small service-disabled veteran owned business concerns as subcontractors. These are small business categories established under a variety of laws that are administered by the Small Business Administration (SBA) and the Department of Veterans Affairs (DVA). The details of these programs (e.g., criteria for what is "small" or "service-disabled veteran owned") are outside the scope of this InfoPAK. (The labels are mostly self-explanatory; "disadvantaged" refers to minority-owned businesses and "HUBZone" refers to a program that identifies geographic areas of high unemployment.)

GSA schedule contracts include FAR clause 52.219-8, Utilization of Small Business Concerns, to implement the foregoing policy as a contract obligation. In addition, the contractor must prepare a small business subcontracting plan under which they commit to undertake good faith efforts to find and do business with eligible small businesses. A plan outline or guide generally is provided with the GSA schedule solicitation (it currently is Attachment III to the Information Technology schedule solicitation, for example). It implements and provides more

detailed guidance on compliance with FAR 52.219-9, Small Business Subcontracting Plan, and GSAR 552.219-72, Preparation, Submission, And Negotiation Of Subcontracting Plans.

The most common type of plan used by GSA schedule contractors, who are mostly providers of commercial goods and services developed without small business goals, is a "Commercial Products Plan". This allows contractors to take advantage of small business relationships throughout their organization in fulfillment of this small business subcontracting obligation.[158]

In the plan, contractors must commit to adopt practices designed to find and use qualified small businesses to supply goods or services to any part of the contractor.[159] Subcontracting goals must be identified for small businesses in general, with subsidiary goals for the specialized categories of small businesses.

As a practical matter, even for contractors whose industries have little or no small business participation, goals for every category of small business are expected. Contractors do not typically find this obligation difficult to comply with, as the contract requires only good faith efforts to achieve the goals. Such efforts may be unsuccessful, but if they are performed, then a contractor has met its obligations. Annual and biannual reports are required. Records relating to performance under this clause also are auditable by GSA.

It should be noted that in recent years GSA has been criticized about the level of small business subcontracting actually achieved. For that reason GSA now invests more energy in reviewing and negotiating plans, and will (as resources allow) follow up to ensure that good faith efforts have indeed been undertaken. Thus schedule contractors must adopt consistent and reliable processes to implement their plans and maintain records of their efforts, successes and failures for reporting and auditing purposes.

To put teeth in this performance commitment, and in particular the "good faith" obligation, schedule contracts provide that if subcontracting goals are missed due to lack of good faith efforts to meet them, the Government will be entitled to the amount by which the goal(s) were missed as liquidated damages.[160]

2. Equal Opportunity and Affirmative Action Requirements

a. E.O. 11246 Equal Opportunity

Like all federal contracts, schedule contracts may only be awarded to companies who comply with equal opportunity and affirmative action laws. These laws are administered by the Department of Labor and the details are outside the scope of this InfoPAK.[161] In summary, schedule contractors are prohibited from discriminating against employees or applicants for employment because of race, color, religion, sex or national origin and must take affirmative action to ensure that no

such discrimination occurs during employment. Reports on performance of these obligations are required both for GSA and for the Department of Labor, and on-site compliance evaluations also may be conducted. Contracts may be terminated if contractors do not comply.

b. Additional Equal Opportunity Requirements for Veterans

Contractors also may not discriminate against individuals because they are special disabled veterans, a veteran of the Vietnam era, or other veterans (as these categories are defined by the Department of Veterans Affairs and as otherwise implemented by the Department of Labor). Contractors must take affirmative action to employ, advance in employment and otherwise treat such veterans without discrimination in all employment practices.[162] There are specific requirements for contractor listing of any job openings to ensure veteran access to the information. In addition, the contractor must file annual reports reporting on all hiring activities and the number of covered veterans actually employed.[163]

c. Affirmative Action for Workers with Disabilities

Contractors may not discriminate against any qualified employee or applicant because of physical or mental disability, and must take affirmative action to employ, advance and otherwise treat such persons without discrimination based on a physical or mental disability.[164] As with the foregoing laws, applicability compliance are under the jurisdiction of the Department of Labor. Job postings must reflect this commitment.

3. The Service Contract Act

Finally, for contractors that offer service labor on the schedules, the Service Contract Act of 1965 ("SCA") may apply.[165] The SCA requires contractors to pay such service employees at least the prevailing wages and fringe benefits for the relevant geographic region. Schedule solicitations that may include services include the clause as a default. It is self-deleting if covered services are not provided. If covered services are included, each order against the schedule contract should take appropriate steps to implement the clause.

If the SCA is applicable, a wage determination (prevailing wage and fringe benefit information for each category of labor that is maintained by the Department of Labor) should be provided by the contracting officer.[166] To make SCA coverage as revenue neutral as possible to the contractor, the law provides that if a new wage determination is issued during contract performance the contractor is entitled to a price increase to cover any change in the wage determination.

Note that the SCA does not dictate what the contractor may charge for covered services; its sole purpose is to ensure the employees earn the prevailing wages and benefits. Higher (or even lower) pricing for the services is possible. Not every contracting officer understands the distinction, but it can be useful in tight competitions.

4. Flowdown of Socioeconomic Obligations to Subcontractors

One of the benefits of the simplification of government rules for procurement of commercial items during the 1990's was the elimination of most of the cumbersome government-unique clauses that contractors were required to pass on to their commercial item subcontractors. Thus, notwithstanding what some individual boilerplate government clauses still may say, there is an overriding simplified requirement for flowdown of clauses to commercial item vendors, and it focuses primarily on the socioeconomic clauses discussed in this section. (Prudent prime contractors will find that many other clauses should be passed on to their subcontractors even if they are not mandatory, in order to enable the prime to comply with its own obligations under the same clauses.)

For most government contractors, the term "subcontractor" means a supplier whose products are purchased specifically to perform a government prime contract. For many commercial item vendors, there are no such suppliers, as they purchase in bulk to support overall production and not to meet specific government requirements. However, for the socioeconomic clauses, the courts have found that "subcontractor" means pretty much anyone whose goods or services end up being delivered to the Government. Thus all suppliers of goods and services that end up in products on a contractor's schedule contract are subject to the clauses discussed here:

52.219-8 Utilization of Small Business Concerns (in subcontracts to large businesses over $500,000 where further subcontracting opportunities are available)

52.222-26 Equal Opportunity

52.222-35 Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era and Other Eligible Veterans

52.222-36 Affirmative Action for Workers With Disabilities

52.222-41 Service Contract Act (to the extent applicable under its own terms)

As the list of required clauses changes from time to time, contractors should check the flowdown obligations of their contract periodically to ensure they remain in compliance.[167]

C. Schedule Price lists

1. Basic Price list Requirements

Schedule offerors are required to submit a draft price list with their proposal materials. This document is more than just a mere price list. It is intended to reflect the proposed product and price offerings, order submission and payment instructions, ordering terms and conditions and other relevant information necessary for agencies to place orders under a schedule contract. The price list can be a markup of an existing commercial price list or a new document. Once the schedule is awarded, one of the first tasks of the contractor is to finalize and issue the approved price list.

The various schedule programs will have slightly different requirements for the content of their price lists, reflecting the nature of the products, but the basic requirements will appear in the schedule solicitation in a version of GSA clause I-FSS-600, Contract Price Lists. Submission and distribution requirements appear in related clauses (such as those related to the electronic version of the price list discussed below[168]). Some schedules also provide more detailed format information in attachments that provide guidelines or even templates for the required information. Thus, for example, the Information Technology schedule provides guidance on format and content in an attachment to the solicitation and in addition specifies basic terms and conditions for orders.

New contractors must review the relevant clauses carefully, and may study the publications of other schedule vendors, to ensure a complete understanding of the required contents of their price list. It should be noted that some ordering terms and conditions are required, and some are negotiable consistent with a seller's normal commercial practices. This paper does not permit an item-by-item discussion of how such provisions may be handled, but general guidance on what is negotiable may be gleaned from FAR § 12.302, which discusses the types of FAR clauses that are subject to "tailoring" to conform to commercial practices.[169] Contractors should not, however, expect to be able to completely conform schedule order terms and conditions to their normal commercial practices.

Upon award of the schedule contract, the contracting officer will return a copy of the final authorized price list to the contractor. The contractor is responsible for updating the price list with any final changes in accordance with agreements reached with the contracting officer.

After award, the contractor is required to distribute or make available the paper price list for its ordering activity customers. (Again requirements differ depending on the schedule. The Information Technology schedule requires distribution of paper price lists to existing schedule customers; other schedules require only that paper copies be made available upon request.) More importantly, electronic versions of the price list information must be provided to GSA in appropriate form for addition to GSA's online catalog GSA Advantage!™.

2. GSA Advantage!™

Now far from its awkward roots, GSA Advantage!™ (www.gsaadvantage.gov) is a robust database that is close to being what GSA has always wanted – an online catalog of schedule offerings. And for simple product offerings it really is just that – one can search the database for products by name, vendor, catalog number, product or product class (full text search), compare similar offerings and review prices, compare terms and conditions applicable to each vendor's offerings, and place an order.[170] Thus in addition to ensuring that correct product and pricing information is furnished to GSA for use on GSA Advantage!™, contractors must be able to accept orders submitted through GSA Advantage!™.

It is the responsibility of the contractor to ensure that its data in GSA Advantage!™ is accurate. Such data includes product descriptions, pricing and applicable terms and conditions such as warranties and license terms. GSA Advantage!™ provides company contact information and allows (indeed encourages) links to vendor websites, where additional information can be hosted. This link can be very useful because GSA Advantage!™ is not well suited to presenting related products or showing the "big picture" of a vendor's products and service solutions. The more complex an agency's needs, the more important that big picture becomes.

D. "Evergreen" Schedule Contracts

In the past, GSA schedule contracts had a fixed term (generally 5 years), were all awarded for the same time period and required complete renegotiation to award new contracts as the old ones' period expired. This approach became, given the growth of the schedules programs over the last decade, a substantial barrier to effective functioning of the schedules program. With thousands of vendors and finite numbers of contracting personnel, GSA solved this problem by turning to "evergreen" schedule contracts which can be used to extend the life of an awarded contract up to 20 years using a five-year base period and three five-year options.

As schedule contracts are readily modified to reflect changes in product offerings and pricing, and contain clauses that allow both the Government and the contractor to keep up with commercial pricing trends, the evergreen approach saves the effort of renegotiating all terms and conditions every five years.

1. Continuous Open Season

Evergreen schedule solicitations are always open for submission of new proposals. Thus mass expirations no longer occur. However, to keep up with changing markets and changing laws, the solicitations are updated (or "refreshed") periodically by GSA. Depending on the nature of such changes, current schedule holders may or may not be required to accept similar modifications to their existing contracts, although periodic modifications sweeping in such changes are often used.

2. Exercise of Options

As the end of each five year contract period approaches, the renewal provisions require that GSA revisit the contract award decision, at least briefly. Thus the contracting officer must determine that an extension is advantageous to the Government, and must confirm (in consultation with the contractor) that the schedule price list has been properly prepared and maintained, that performance has been satisfactory under the contract and that subcontracting goals have been reviewed and approved.[171] To perform this analysis, the contracting officer will often request updated commercial sales practices disclosures. This is also a good occasion for GSA to modify the contract to address changes in the laws that occurred after contract award or the last extension.

While no terms are required to change with the extension, nothing is set in stone either. Even contractors that have kept their government pricing up to date and in compliance with their Price Reduction Clause obligations may find that, due to changing market conditions, the GSA believes a different basis of award or a new pricing structure for the schedule may be needed. In addition, contractors who are concerned about past pricing issues may wish to start an option period off with a clean slate and opt to submit a brand new price proposal and disclosures rather than continue to work off updates to the original submission from five years earlier.

3. Record Retention

One major concern raised by contractors as GSA implemented evergreen contracting relates to record retention. Government contractors are subject to record retention requirements which typically extend to three years after final payment under a contract.[172] Evergreen contracts thus would seem to have the potential to create a 23+ year record retention requirement. This was resolved by a change to the GSA audit clause in the contract, which provides that records need only be retained until three years after final payment for each 5-year contract period.[173] Somewhat less clear language appears in the clause regarding Comptroller General audits,[174] although the intent appears to be the same.[175]

E. Ordering Under GSA Schedule Contracts

There are a variety of ordering methods available to schedule users. These methods range from the simple to the highly complex. The choice of what approach to use depends largely on the complexity of user needs and agency discretion. The great bulk of transactions, at least in terms of dollars, are conducted using some form of competition among schedule vendors, sometimes using formal statements of work and evaluation procedures of the type typically required for non-schedule government procurements. For agency requirements of any complexity, some form of interaction with potential vendors is necessary, whether it is a simple request for information or a detailed request for a formal quotation. We address briefly here the types of ordering practices that are authorized.

The important thing to remember when making decisions about how to manage a schedule contract is that all of these authorized ordering practices share one common element – there is no need for agencies to formally publicize a requirement or to obtain full and open competition. Thus schedule vendors are at an information disadvantage – indeed some schedule purchases can be made without revealing anything until a contractor receives an order. At the other extreme, even the most competitive schedule transactions, which will require some level of publicity, still do not require anything more than that a reasonable number of schedule vendors be allowed to compete. Sometimes, to ensure the best possible solution is obtained an ordering agency may publicize and invite all capable schedule holders to compete for a requirement, but more often there is a short list of potential contractors and only they get the opportunity to participate.

This reality reinforces the need for schedule vendors to have robust sales and marketing organizations. Often the only way to get invited to compete is by interaction with potential agency customers in advance – letting them know what's available, and getting on their mailing list for future procurements.

1. Basic Ordering Requirements

The simplest schedule requirements may be addressed by an agency user's review of "reasonably available information" from at least three schedule offerors. This can be satisfied with just GSA Advantage!™ information, although any other "reasonably available" information can be used.[176] With that information (and no direct interaction with any vendor), an agency can select a product that best meets the Government's needs at a reasonable price and place an order. See FAR § 8.405-1.

This is not simply a low-cost evaluation; the agency may take into account other factors (in addition to price) to determine what appears to be a "best value" for the Government, including for example product performance, warranty considerations, life of product, unique product features, and even delivery terms if they are relevant to the agency's needs.

For the simplest schedule orders, which seek items directly on schedule at schedule prices, contractors are required to accept and perform the orders from mandatory users. (See section II.I. above regarding scope of contract.)

2. More Complex Ordering Requirements

a. Orders Over the Schedule Maximum Order Limitation

For purchases that exceed the maximum order limitation of the subject schedule (discussed in section III.F. above), or if an agency user's research indicates that it is in the agency's best interest, agencies are required to seek a price reduction from the current schedule price. In this situation the requirement to consider at least vendors who appear to offer the overall best value remains, although quotes may

be solicited from as many vendors as the agency deems necessary to obtain a good price. Note that because such orders are for requirements above the maximum order limitation or which seek a price reduction (i.e., are not "vanilla" schedule orders) contractors are not required to respond. See FAR § 8.405-1(d).

b. Orders That Involve a Statement of Work

Complex agency requirements for goods or services generally cannot be addressed with the simple ordering procedures noted above. For such requirements, agencies are required to issue a Request for Quotation (RFQ) that includes an appropriately detailed statement of work and evaluation criteria that will be used to determine the best value for the Government based upon price and other relevant factors.

RFQs are appropriate where contractor recommendations are needed to determine how best to satisfy agency needs from the products they offer, or where services are to be ordered using hourly rates and contractor judgments regarding appropriate services and quantities needed to be evaluated by the agency.

RFQs for requirements below the maximum order threshold can be issued directly to at least three potential offerors or posted publicly on Fedbizopps.gov or GSA's own electronic RFQ system e-Buy. See FAR § 8.405-2. Issuance to three contractors is the minimum requirement. Further publicizing or actively soliciting more quotes is in the agency's discretion. While the FAR does not require agencies to seek price reductions for orders below the maximum order threshold, reduced prices are commonly sought and offered. Vendor responses to RFQs are optional.

RFQs for requirements that will exceed the maximum order threshold, or for establishment of a Blanket Purchase Agreement (discussed below), must seek a little more competition. Such competition includes providing the RFQ to more potential contractors (a number appropriate to the complexity of the requirement and other relevant factors such as market research on the industry), and providing the RFQ to any schedule vendor who asks for it. The rules also require the agency to seek a price reduction.

RFQ responses must be evaluated in accordance with the criteria set forth in the RFQ. The evaluation should include assessment of the overall reasonableness of the price, and if services are being ordered, the reasonableness of the level of effort and labor mix. Award is to be made on a best value basis, i.e., to the contractor whose proposal represents the lowest overall cost alternative to meet the agency's needs. See FAR § 8.405-2(d). That does not always mean simply low cost; agency needs may justify acceptance of higher prices to obtain better products and services, or the services of better contractors. As long as there is provision for evaluation of quotes under such criteria, such award decisions are allowed.

c. Blanket Purchase Agreements

A very popular tool available under the GSA schedules is the Blanket Purchase

Agreement (BPA). The BPA makes it even easier for agencies to address repetitive needs for supplies and services. Rather than using the already-streamlined schedule contract ordering processes to address such repetitive needs individually, agencies may choose to establish a BPA with one or more schedule contractors that enables the agency to simply order goods and services as needed. BPAs may have a term up to five years if consistent with agency program requirements.[177] See FAR 8.405-3.

The RFQ process discussed above is used to select BPA contractors from among the available schedule contractors. The regulations authorize (encourage) the establishment of multiple BPAs based upon agency requirements and the potential for efficiencies, but single BPAs are allowed as well. Multiple award BPAs generally should require further competition among BPA holders and a further best value determination. While agencies achieve ordering and support efficiencies by establishing standard supply sources with BPAs, for contractors BPAs offer the potential to limit, if not eliminate, further competition over the life of the contract.

Agencies are required to review the value and effectiveness of BPAs at least annually to ensure continuing validity and value. Contractors thus may not rest on their laurels, but must be prepared to demonstrate the ongoing value of the BPA arrangement throughout its life.

3. Purchase of Nonschedule Items – Open Market or Out of Scope

One topic with great potential for confusion for schedule contractors is what to do about an agency that wants to order something to satisfy an agency requirement (or the contractor wishes to quote something) that is not available on the contractor's schedule contract. The simple answer is that such goods or services are outside the scope of the schedule and cannot simply be included in a schedule contract order. Such goods can, however, be ordered in conjunction with a schedule order, with proper identification and agency actions, as an "open market" item.

Until only a few years ago, enforcement of the proscription on adding nonschedule items to schedule orders was lax. Both GSA and the Government Accountability Office had adopted a rule that allowed "de minimis" nonschedule items to be included in a schedule order. This practice in theory allowed contractors to throw in an extra item to complete a solution if they had neglected to put it on their schedule or could not get it added in time. Over time, however, the rule came to be viewed as a real exception and was, frankly, abused by agencies and contractors. The Court of Federal Claims and GAO[178] finally put a stop to it and stated the applicable rule, which also appears in FAR § 8.404-1(d): schedule orders can only include items on the schedule contract. Out of scope items have not been reviewed or approved by GSA (on suitability or price) and hence are subject to normal competition rules.[179] We include this historical background because the open market "exception" is an urban myth that keeps reappearing in the actions of

uninformed contractors and agencies.

What does this all mean? The real de minimis rule applies – open market goods and services in an order with a value at or below the micropurchase threshold ($2,500) can be accepted by the agency with limited analysis and no competition. Anything more substantial must follow the appropriate rules in the FAR for stand alone competitive procurements.

Because agencies typically do not have encyclopedic knowledge of schedule offerings, and often it is the contractors deciding what items are needed to meet agency needs, it also falls to the contractors to clearly identify open market items in their RFQ responses. Ultimately it is the agency's obligation to ensure that competitive procurement rules are followed if they decide to accept such items.

F. Contractor Teaming

Often agency requirements cannot be satisfied through the offerings of a single schedule contractor. Agencies meanwhile may lack the knowledge or resources to contract separately and integrate the products of multiple contractors.

In nonschedule procurements this would not present a problem because a single prime contractor could bring together products or even a team of contractors to meet agency needs. The answer is not quite as simple for the schedules, because prime/sub relationships and traditional teams do not work where the orders must be placed against existing schedule contracts. Contractor A cannot place an order against Contractor B's schedule contract and treat them as a subcontractor for purposes of responding to a schedule RFQ, because the agency has to place the order with contractor B for it to be a valid schedule order.

There are a number of solutions commonly used by schedule contractors. If items are commonly purchased together, a schedule contractor may add other company's products to their own schedule contract and act as a reseller. Normal schedule rules are followed for adding and pricing the products, although such items can be priced at a markup from a reseller price granted by the manufacturer.

Another solution is a "teaming" relationship. In schedule contracting teams, contractors work together to present a "team" solution to an agency RFQ that allows the agency to place orders against multiple schedules and ensures that the team will provide the necessary integration to make it all work. As among the contractors themselves, some business relationship needs to be established to accomplish that result (perhaps a more traditional teaming arrangement of prime/sub agreements), but the agency still gets the benefit of the schedules. Each contractor must report their portion of the teamed project and pay their industrial funding fee.

G. Schedule Ordering Process Requirements

1. Order Placement

Once an appropriate contractor has been selected (through review of schedules or through a formal RFQ process), the agency issues a delivery order or task order to the contractor. Because the order is placed under the terms of the schedule contract it should contain no additional terms and conditions (barring the occasional open market item as discussed above). Often agencies are not careful about this limitation and may try to include additional clauses. They may also have unique legal obligations that drive such additions. Proposed clauses that conflict with the schedule contract should be rejected; contractors can use their discretion in deciding what to do about clauses that do not conflict, but also do not belong in the order.

As with any government contract a schedule order is required to provide certain information. This includes identification of the ordering activity, with shipping and billing addresses, GSA contract number and date, the agency order number, delivery points and time(s), inspection and acceptance terms, identification and number of items or services ordered with pricing, any discounts granted, and total price, statement of work information when required and other data addressed in the regulations. See FAR 8.406-1.

2. Order Acknowledgement

It is important that schedule contractors have systems and trained personnel in place to manage the order entry process and ensure schedule contract orders conform to the schedule contract and the applicable regulations. Typically this will include an order acknowledgement process that will, to the best of the contractor's ability, clean up discrepancies in orders at the time of receipt.

One common ordering issue is contractor receipt of orders for schedule items from authorized users that do not refer to the schedule contract. While it can be tempting to take the order as it is and just perform it, there are risks for the contractor. Often this failure is simple agency error and can be clarified and properly annotated for treatment as a schedule order in the contractor systems. Other times the lack of a proper reference is intentional, perhaps because the schedule items are incidental to a larger requirement or the agency has another contract in place to cover the products. Whatever the reason, the appropriate contract vehicle needs to be clearly documented in contractor systems to ensure that schedule sales are properly identified.

Another potential source of confusion could be receipt of orders from private sector entities that may or may not have authorization to use the schedules. Schedule contractors need to have processes in place to ensure such orders are accompanied by appropriate contracting officer authorization before they are accepted and performed.

The most immediate reason for clear order identification is to ensure accurate data is collected for reporting and payment of the Industrial Funding Fee to GSA. Poor order control also becomes an issue if GSA chooses to perform an audit, because poorly documented government orders that were not treated as schedule orders (rightly or wrongly) will be assumed to be unreported schedule orders and the contractor generally has the burden of proving otherwise even though it may be the fault of the ordering activities.

H. Invoicing and Payment

One thing that schedule contracts cannot simplify is the invoicing and payment process, as each agency will have its own payment locations and processes. The processes are generally similar, but they will differ in details.

1. Requirement for a Proper Invoice

As a condition precedent to payment by federal agencies, all vendors must register their basic identification information in the Central Contractor Registration ("CCR") system (www.ccr.gov). Invoices should link to this information and otherwise conform to the order submitted and comply with the invoice instructions in the schedule contract. See, e.g., FAR 52.212-4(t) CCR registration) and (g) (invoices for commercial item contracts); GSAR 552.232-82, Contractor's Remittance (Payment) Address. Most agencies require payment information in CCR to conform to invoices, so contractors with multiple locations or different payment addresses must ensure their data is all on CCR. Note that despite extensive automation of federal payment systems even small mismatches can lead to extended payment delays. One cannot, for example, accept an order with an error in the price and simply invoice the correct price – the error must be corrected in the agency's ordering systems as well. Attention to detail is paramount in payment paperwork for federal transactions.

2. Prompt Payment Act, EFT and Government Credit Cards

By statute, the Government sets the time periods for payment of its contractual obligations under the Prompt Payment Act of 1982. Prompt Payment Act rules do not conform to commercial practice. Thus, for example, by law the payment due date for an invoice is the later of 30 days from receipt of a proper invoice (see above) by the designated billing office, or 30 days from acceptance of supplies delivered or services performed.[180] Interest accrues on late payments at rates set by the U.S. Treasury.

GSA has established a payment mechanism via Electronic Funds Transfer (EFT) for electronically placed orders directly from GSA that offers payment within 10 days of receipt of a proper invoice by the designated billing office or 10 days from acceptance. See GSAR § 552.232-74, Invoice Payments, for more discussion of

the details. Other agencies also may use EFT (indeed EFT is the preferred payment method for the schedules), although not necessarily with the same early payment commitment. See id.

Contractors are free to offer prompt payment discounts on their schedule contracts that shorten the contractual payment period, although the Government as a matter of law cannot bind itself to pay any earlier than required by the Prompt Payment Act except in very limited circumstances. As a practical matter not all agencies are capable of meeting shortened payment periods but may attempt to do so and authorize only discounted payment amounts. This can present administrative challenges for the contractor.

Contractors must accept payment via credit card, including the Government wide commercial purchase card, for oral or written orders below the micropurchase threshold (currently $2,500). Acceptance of credit cards for purchases above the threshold is encouraged but not required. See GSAR 552.232-79, Payment By Credit Card. If any agency includes credit card payment terms in an order and the contractor is not willing to accept such terms, it must notify the ordering agency within 24 hours of order receipt. To minimize the risk that this imposes, contractors may include information about credit card acceptance in their GSA price list. The clause provides additional details for when and how such transactions may be processed.

I. Contractor's Report of Sales and Industrial Funding Fee

GSA funds its schedule programs by charging a fee on all schedule transactions. The fee is currently .75% of all sales. However the schedule contractor is responsible for collecting this fee in its purchase transactions. While the fee is not stated separately on the price lists, it should be added when schedule pricing is negotiated.[181]

To track this obligation, contractors are required to report quarterly on their schedule sales[182] and remit industrial funding fee collections therefrom. See GSAR 552.238-74, Industrial Funding Fee And Sales Reporting. Reporting can use any method consistent with the clause and the contractor's accounting systems as long as data is reported consistently. Reports are submitted via an electronic reporting system at GSA. Both reports and industrial funding fee remittance are due within 30 days of the end of each calendar quarter.

J. Schedule Contract Modifications

Schedule contracts are readily modified to address changes in market conditions, including new products and new pricing.[183] Although most modifications are bilateral, GSA is just as interested as contractors (and agency customers) in keeping schedule contracts up to date. As long as the GSA contracting officer is assured

(through supporting data submitted by the contractor) that schedule pricing and terms and conditions continue to retain their position in relation to the rest of a contractor's commercial sales, modifications should be easy to accomplish. Modifications that go to the underlying relationship may be more difficult.

Regardless of the ease or difficulty, contractors should keep in mind that GSA has limited resources to manage the thousands of modification and other transactions that are needed annually, and should allow as much lead time as possible to get modifications in place. Cultivating a cooperative relationship with assigned GSA personnel is also advisable.

Modifications may be used to:

- Add new items to the schedule (after submission of supporting Commercial Sales Practice information for the new items);
- Delete items (with explanation and limits on ability to restore so that this cannot be used as a repricing tool);
- Make price reductions – either voluntary or pursuant to the Price Reduction Clause;[184] and
- Make economic price adjustments – such as price increases driven by changes to a contractor's commercial price lists and/or the commercial market (only once per year after the initial contract year and requires supporting data; GSA disfavors price increases and negotiates hard to keep them small).[185]

Once modifications are approved by GSA, the contractor is responsible for updating price lists and electronic information (their own website and at GSA) to reflect the modifications. Regardless of when those updates are actually issued, the effective date of the modification is as specified in the modification itself.

K. Trade Agreements Act Compliance

Because Trade Agreement Act compliance has become a significant compliance topic of late we address it separately here. One frequent driver of schedule contract modifications (specifically product deletions) is a change in the country of origin of schedule items.

GSA mandates that all schedule goods and services comply with the Trade Agreements Act. Thus upon award, a contractor may have on their contract only items that are the product of the United States or of a "designated country" (a signatory of the World Trade Organization Government Procurement Agreement and several other countries with whom the United States has trade agreements).[186] GSA is not always as clear as they could be in communicating this requirement. Indeed schedule solicitations use a standard FAR clause that suggests noncompliant items could be offered, although such offers are supposed to be rejected by the contracting officer.

However, assuming that contractors meet this requirement at contract inception, recent investigations have revealed that contractors and GSA have been lax in maintaining this compliance. Sources of trouble include:

- Spare Parts – where a complete product may be TAA-compliant, individual elements may not be and thus may not be sold separately on the GSA schedules.
- Source changes – where contractor sourcing decisions change to an ineligible country but the change does not filter through to the company's schedule contract administrator(s).

GSA is increasing its oversight in this area, and is adding this topic to its industrial reviews.

L. Disputes

How are contract disputes handled under GSA contracts? Because one contracting party is the Government, disputes cannot simply be brought in any court of general jurisdiction. As a general rule, the Government is immune from suit unless it expressly waives that immunity.

For purposes of its contractual relationships, the Government has waived its immunity by establishing procedures and forums in which disputes may be heard. This authority is in the Contract Disputes Act of 1978 ("CDA"). Disputes over performance, payment, contract interpretation, termination, and the like may be heard and resolved in specialized administrative and judicial forums identified in the CDA. The Disputes clause at FAR § 52.212-4(d) is used in schedule contracts.

A unique element of GSA schedule disputes not present in other types of government contracts is the presence of two agencies who have roles in a dispute. This dual presence is important because the CDA requires all disputes to be submitted first to the contracting officer for resolution. While the ordering agency contracting personnel may seem the most likely place to seek resolution of a dispute over performance of a schedule order (and in any case is always the place to start dispute resolution efforts), in fact the GSA contracting officer is the person to whom disputes must be submitted for purposes of triggering formal CDA coverage. GSA will ordinarily seek the ordering agency's input and may direct the parties to seek dispute resolution directly with each other before taking an active role, but before further process is possible GSA must be involved.

A dispute that cannot be resolved through discussions with the contracting officer must be submitted as a formal "claim" to trigger CDA coverage. A claim must be certified by the contractor (certifying entitlement and the accuracy of all representations in the claim). The contracting officer must take formal action in response to the claim. If the claim is granted, the parties can negotiate appropriate

remedies. If a claim is denied (including claims a contracting officer fails to decide in a reasonable time frame), the contractor may appeal the denial to either an administrative board of the agency (a group of administrative judges separate from the contracting activity, in this case the GSA Board of Contract Appeals), or to the Court of Federal Claims. Decisions of either entity can be appealed to the Court of Appeals for the Federal Circuit.[187] Both provide formal adjudication processes in which each side is allowed to present its case much in the manner that cases are presented in other federal courts.

Common sources of disputes in GSA schedule contracting are the significant compliance areas noted in prior sections of this InfoPAK:

- Disputes over the existence and/or value of price reductions that a contractor allegedly failed to implement;
- Disputes over flaws in the disclosures made by a contractor when negotiating the contract which are alleged to have resulted in the GSA price being too high;
- Disputes over record keeping and reporting of the Industrial Funding Fee, such as proper identification of all schedule sales;
- Disputes with an ordering agency over order performance; and
- Disputes over defaults and contract terminations.

Because federal contract disputes are a specialized body of administrative law, consultation with experienced federal procurement counsel is recommended.

M. Protests

A unique aspect of contracting with the Government not generally found in commercial procurements is the ability of competing contractors to challenge procurement decisions. Because the Government has laws and regulations that govern how procurements must be conducted, it is also subject to suit if it fails to follow those laws and regulations. Thus there is a substantial body of law regarding the appropriate contents of procurements and the actions agencies may (and may not) take in awarding contracts.

There are currently three places a contractor may pursue a challenge of an agency procurement action or "bid protest." The first is an administrative protest to the agency contracting officer. For schedule procurements that really means the GSA contracting officer as well as the procuring agency. GSA has comparatively detailed processes available for hearing protests. See GSAR 552.233-70, Protests Filed Directly With The General Services Administration.

There are two entities outside the agencies that will also hear bid protests. They are the Government Accountability Office (GAO) and the Court of Federal Claims. These entities do not second guess matters within agency discretion such as determinations of agency requirements; they will however review the administrative processes through which competitive awards are made to ensure they comply with

procurement law.

For reasons primarily of interest to lawyers, the GAO, which is an arm of Congress, has the authority to review procurement decisions under the Competition in Contracting Act.[188] With regard to GSA schedule contracts this includes the authority to review competition issues relating to the award of overall schedule contracts as well as the award of schedule contract orders. GAO reviews protests in accordance with a statutory structure that requires decisions within 100 calendar days of protest filing. Strict timeliness rules apply (generally one must protest within 10 days of when a basis of protest is or should have been known), and contract performance is automatically suspended (if a protest is not timely filed) while the protest is being decided, to maintain the status quo.[189] Typically the protester, the agency and the contract/order awardee are all entitled to make submissions on the written record before the GAO makes a decision.

The Court of Federal Claims has similar authority to hear GSA schedule protests, under the Administrative Procedure Act.[190] Protests are handled like other APA litigation – there is no automatic suspension of performance; rather the parties must litigate the propriety of a temporary restraining order or injunction under traditional judicial standards. Thereafter judicial proceedings are held on the protest issues. While subject to usual judicial processes of complaint and answer, motions practice and hearings if appropriate, the court does try to resolve protests in a relatively timely manner.

As noted above, bid protests focus on alleged failures to comply with procurement laws and regulations or to comply with the terms of a solicitation. Any such failure, if it has the potential to have altered the outcome of a procurement, can be a basis to overturn an award decision and require re-evaluation or even recompetition. The fundamental rule at the GAO is that competitions under an RFQ must be conducted in a reasonable manner consistent with the terms of the RFQ.[191]

Common protest issues for schedule contractors include:

- Improper rejection of a proposal – timeliness; compliance with RFQ requirements; agency failure to identify evaluated proposal deficiencies when discussions are held; agency failure to follow solicitation requirements and evaluation criteria; improper best value determination under RFQ criteria; and
- Improper award to another offeror – products do not meet RFQ requirements, do not qualify as small businesses (for set-aside procurements), improper inclusion of open market items; best value determination lacks a rational basis.

N. Establishing the Compliance Program

As is clear from the foregoing, a schedule contract is not a vehicle that can be put in place and then ignored except by the sales organization. These contracts require

ongoing attention to order intake, performance, pricing and products.
In today's enforcement environment one cannot afford to be casual about these compliance obligations. The well-prepared schedule contractor will adopt uniform corporate policies designed to achieve the appropriate compliance objectives. They will:

- Ensure that accurate information is collected and provided to the Government as and when needed.
- Assign and train responsible personnel with appropriate oversight to perform schedule compliance tasks.
- Implement and maintain thorough record keeping sufficient to ensure the ability to comply and to demonstrate such compliance in later audits.
- Provide appropriate guidance and training to the sales force to ensure no departures from schedule contract commitments.

IX. Practice Tips: Keeping Your Client Out of Trouble

- Be sure to fully disclose all commercial sales practices as required by the solicitation in your proposal and during negotiations.
- Ensure that your company's sales force aggressively markets its schedule contract and does not assume that schedule sales will simply materialize once your company is on contract.
- Assume that a Government customer is authorized to purchase under your company's schedule contract and – if the "purchase order" or other ordering document fails to cite the contract number – contact the customer for clarification.
- Understand the difference between orders received from activities within the Executive Branch and those received from activities outside of the Executive Branch.
- Understand the rules that apply to schedule orders from government contractors and state and local governments.
- Know the three different triggering events under the Price Reductions clause and the company's basis of award. Have processes in place to ensure these are tracked and implemented.
- Ensure that triggering price reductions are promptly reported to the GSA or DVA.
- Know the rules for determining whether the value of a particular commercial contract is above the Maximum Order Threshold and hence outside the purview of the Price Reductions clause.
- Ensure that your company is properly and consistently calculating price reduc-

tions.

- If your company is a DVA schedule contractor, make sure that your company complies with the price ceilings mandated by the Veterans Health Care Act of 1992.
- Establish processes to ensure continuing compliance with Trade Agreements Act sourcing requirements in schedule products, including new goods and services and spare parts.
- Establish processes to ensure that good faith efforts are made to find eligible small business subcontractors and achieve the small business subcontracting goals agreed to with GSA.
- During negotiations, avoid agreeing to the Basis of Award as "all commercial customers" or "the general public;" aim for a customer or small category of customers for which sales can be easily controlled and tracked.
- Take great care to disclose current, accurate and complete pricing and discounting information on the Commercial Sales Practices Format.
- Understand the purpose for, and properly support and monitor, all audits and reviews conducted by the Government.

X. Additional Resources

Helpful Websites

1. http://fss.gsa.gov (it redirects to the entry page for GSA schedules)(Entry page for GSA schedules programs with links to programs and tools)
2. http://www.gsaadvantage.gov (GSA's online catalog of schedule products)
3. http://www.gsaelibrary.gsa.gov (GSA's online database of information about schedules and schedule contractors)
4. http://www.fedbizopps.gov (the Government central site for publicizing procurements)
5. http://www.ccr.gov (website for mandatory registration of all government contractors)

Endnotes

[1] 40 U.S.C. § 501(b)(1)(A).

[2] Federal Acquisition Regulation ("FAR") § 38.101(d).

[3] Id., § 38.101(a).

[4] Id.

[5] See id.

[6] 10 U.S.C. § 2302(2)(C), 41 U.S.C. § 259(b)(3); see FAR § 6.102(d)(3).

[7] The GSA has established a schedule for supplies that are available from the Committee for Purchase from People who are Blind or Severely Disabled. These items are referred to as JWOD (Javits-Wagner-O'Day Act) items.

[8] FAR § 8.002(a)(1).

[9] Id., § 8.002(a)(2).

[10] 41 U.S.C. § 259(b)(3); see FAR § 6.102(d)(3).

[11] See also FAR § 38.101(c).

[12] See Photon Tech. Int'l, Inc. v. GSA, GSBCA No. 14,918, 99-2 BCA (CCH) ¶ 30,456 (June 23, 1999).

[13] Id. at 150,469-70.

[14] Comp. Gen. Dec. No. B-216274, 85-1 CPD ¶ 427 (1985).

[15] Comp. Gen. Dec. No. B-290665, 2002 CPD ¶ 156 (2002).

[16] ModuForm, Inc., Comp. Gen. Dec. No. B-214582.2, 84-1 CPD ¶ 641 (1984).

[17] Federal Sales Serv., Inc., Comp. Gen. Dec. No. B-198452, 80-1 CPD ¶ 316, aff'd on reconsideration, 80-1 CPD ¶ 418 (1980).

[18] As noted in Section I.D.3, the GSA has converted its former mandatory-use schedules to nonmandatory-use schedules.

[19] As noted in section I.D.3, a schedule contractor is ordinarily obligated to deliver all articles or services contracted for that may be ordered during the contract term by activities within the Executive Branch.

[20] FAR § 51.101(a)(1)-(2).

[21] Id., § 51.102(a).

[22] Id., § 51.103(a).

[23] Under the National Defense Authorization Act for Fiscal Year 1994, state and local governments may purchase law-enforcement equipment suitable for counterdrug activities off the GSA schedule. See 10 U.S.C. § 381 (added by the National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 1122, 107 Stat. 1547, 1754-55).

[24] See E-Government Act of 2002, Pub. L. No. 107-347, § 211, 116 Stat. 2899, 2939-40.

[25] See 69 Fed. Reg. 28,063 (2004).

[26] 41 U.S.C. § 427(a).

[27] FAR § 13.003(a).

[28] Id., § 13.002.

[29] Id., § 13.003(g).

[30] Id., § 13.003(b)(1).

[31] See id., § 19.001 (definition of "[c]oncern").

[32] FAR § 19.502-2(a).

[33] Id., § 19.502-2(c).

[34] 13 C.F.R. § 121.406(d) (2005); see FAR §§ 19.102(f)(7), 19.502-2(c).

[35] 62 Fed. Reg. 44518, 44519, 44523-24 (Aug. 21, 1997).

[36] General Services Administration Acquisition Regulation ("GSAR") § 538.270(a), -(b).

[37] 48 C.F.R. § 515.408(b)(5).

[38] Id., § 552.212-70(c)(5).

[39] Id., § 538.270(c).

[40] Id., § 538.270(d).

[41] Id., § 515.408(a)(4).

[42] Id.

[43] GSAR § 515.408(a).

[44] Id., § 515.408(a)(2).

[45] FAR § 2.101 (acquisition definitions).

[46] GSAR § 515.408(b)(1).

[47] Id.

[48] GSAR § 515.408(b)(3).

[49] Id., § 552.212-70(a).

[50] Id.

[51] Id.

[52] Id.

[53] See GSAR § 515.408(c) (Figure 515.4, "Instructions for Commercial Sales Practices Format," Column 1; categories include, but are not limited to, OEMs, value-added resellers, state and local governments, distributors, educational institutions, dealers, national accounts, and end users).

[54] See GSAR § 515.408(c) (Figure 515.4, "Instructions for Commercial Sales Practices Format," Columns 1-5).

[55] GSAR § 515.408(b)(4)(b), -(c) (Column 5).

[56] Id., § 515.408(c) (Column 5).

[57] Id.

[58] GSAR § 515.408(c) (Figure 515.4).

[59] Id.

[60] See 18 U.S.C. § 1001 (criminal penalties for knowing and willful false, fictitious or fraudulent statements or representations).

[61] GSAR § 515.408(b)(5).

[62] Id.

[63] Id.

[64] Id.

[65] GSAR § 552.212-70(c)(5).

[66] To ensure accuracy, the offeror may even attempt to reach an agreement with the contracting officer to draft its own basis of award document for submission to the Government for review.

[67] See FAR § 8.405-1(d).

[68] GSAR § 552.212-73 (Alt. 1).

[69] Id.

[70] See GSAR § 515.408(b)(4)(b), -.408(c).

[71] GSAR § 552.212-71.

[72] FAR § 52.212-4.

[73] See generally FAR Subpart 12.3.

[74] FAR § 52.212-3.

[75] GSAR § 552.215-72.

[76] Id.

[77] Id.

[78] Id.

[79] Id.

[80] Id.

[81] Id.

[82] FAR § 52.212-4.

[83] FAR §§ 9-406-2, 9-407-2.

[84] FAR § 9.407-4.

[85] FAR § 9.406-4.

[86] 31 U.S.C. § 3729.

[87] Id.

[88] Id.

[89] Id.

[90] The Government could also proceed against a contractor under the Program Fraud Civil Remedies Act of 1986, 31 U.S.C §§ 3801-12 in cases where the alleged false claims do not exceed $150,000. See generally § V.G.5. The Govern-

ment most often proceeds under the civil False Claims Act, however.

[91] 18 U.S.C. § 287.

[92] 18 U.S.C. § 1001.

[93] 18 U.S.C. § 1031.

[94] 18 U.S.C. § 1341.

[95] 18 U.S.C. § 286.

[96] 18 U.S.C. § 371.

[97] Sun, Copy Machine Supplier is Fined. Wash. Post, Feb 28, 1984 (1984 WL 2048527).

[98] Id.

[99] Id.

[100] Id.

[101] See, however, the discussion of the Photon decision at text accompanying notes 12 to 14 supra.

[102] 2 U.S.C. § 111b.

[103] Secretary of the Army, 46 Comp. Gen. 713, 718 (1967).

[104] Comp. Gen. Dec. No. B-193541, 79-1 CPD ¶ 205 (1979).

[105] Prior to the GSA's elimination of its synopsizing requirements on pending orders for IT resources in 1995, an ordering activity could not split its requirements for IT resources in an effort to evade its obligation to synopsize an intended order in excess of $50,000 in the then-existing Commerce Business Daily. In Digital Services Group, Inc., GSBCA No. 8735-P, 87-1 BCA ¶ 19,555 (1987), the GSBCA rejected an agency's argument that the synopsis requirement did not apply to six delivery orders because each order was for a different office. The evidence showed that the agency had placed thirteen orders within a four-week period from September 2 to 30, 1986; that twelve of those orders were placed from September 17 to 30, 1986; and that the six orders relating to the different offices were placed on two working days – Friday, September 26, 1986, and Monday, September 29, 1986. The GSBCA concluded that the agency "split the requirement into separate orders to avoid the lapse at year's end of appropriations, a legally insufficient reason as [the agency's] officials knew well." 87-1 BCA ¶ 19,555 at 98,838. See also ISYX, GSBCA No. 9407-P, 88-2 BCA ¶ 20,781 (1988) (an agency violated the Commerce Business Daily synopsizing requirement by issuing two separate delivery orders for IT against the same GSA schedule contract on the same day). But cf. North American Automated Sys. Co., GSBCA No. 9122-P, 87-3 BCA ¶ 20,208 (1987) (evidence that an agency made 34 purchases of IT in amounts of less than $50,000 each for its various subdivisions did not prove that the agency had fragmented its requirements in an attempt to stay below the then-$300,000 threshold for seeking a delegation of procurement authority from the GSA). The above decisions are instructive in the Maximum Order Threshold context as well.

[106] See 41 C.F.R. § 5A-73.217-5(c) (1982).

[107] The DSMD sheets were the precursor to the current Commercial Sales Practices Format in GSA and DVA solicitations for schedule contracts.

[108] See also Gelco Space, GSBCA Nos. 7916, 7917, 91-1 BCA (CCH) ¶ 23,387 (1990) (GSBCA remanded a government claim under the Price Reductions clause to the CO for a calculation of the amount due to the Government because – even though the Government had purchased both schedule and nonschedule items – the Government was only entitled to a price reduction with respect to sales of the schedule items, and the GSBCA was unable to determine the amount of such sales).

[109] Lanier Business Prods., Inc., Comp. Gen. Dec. No. B-211641, 83-2 CPD ¶ 493 (1983); see also Kaset Int'l, Comp. Gen. Dec. No. B-255084, 94-1 CPD ¶ 76 (1994) (a schedule contractor may offer a price reduction at any time and by any method, even without approval by the GSA).

[110] Dictaphone Corp., Comp. Gen. Dec. No. B-210692, 83-2 CPD ¶ 26 (1983). In Dictaphone Corporation, Comp. Gen. Dec. No. B-254920.2, 94-1 CPD ¶ 75 (1994), the GAO determined that the DVA – after issuing delivery orders to the protestor and then concluding that its request for quotations did not specify all of the agency's minimum needs – properly took corrective action by (1) suspending performance of the delivery orders, (2) advising the firms that initially submitted quotes of the agency's additional requirements, (3) requesting revised quotes from these firms, and (4) accepting a revised quote that offered a price reduction. The GAO noted that – while the protestor objected to the DVA's consideration of the price reduction because the GSA had approved it after the initial closing time for the receipt of quotations and after the original delivery orders were issued to the protestor – a schedule contractor may offer a price reduction at any time and by any method without prior or subsequent approval by the GSA.

[111] 31 U.S.C. § 3729(a). See generally § IV.B.3 supra.

[112] Id.

[113] 31 U.S.C. §§ 3801-12.

[114] Id., § 3803(c)(1).

[115] Id., § 3802(a)(1).

[116] 18 U.S.C. § 1001.

[117] Id., § 287.

[118] See generally § IV.B.4 supra.

[119] GSA – Is the Taxpayer Getting the Best Deal?: Hrg. Before the Subcomm. on Federal Financial Mgt., Gov't Information, and Int'l Security of the Senate Comm. on Homeland Security and Governmental Affairs, ____ Cong. (July 26, 2005) (statement of Emily W. Murphy, Chief Acquisition Officer, U.S. General Services Administration) (available at http://www.gsa.gov/Portal/gsa/ep/contentView.do?pageTypeId=8199&P=S&channelId=-13338&contentType=GSA_BASIC&contentId=19320).

[120] FAR § 52.215-20 (Alt. IV) (Var. I).

[121] GSAR § 552.215-71.

[122] GSAR § 515.209-70(d).

[123] Id.

[124] GSA – Is the Taxpayer Getting the Best Deal?: Hrg. Before the Subcomm. on Federal Financial Mgt., Gov't Information, and Int'l Security of the Senate Comm. on Homeland Security and Governmental Affairs (July 26, 2005) (statement of Kathleen S. Tighe, Counsel to the Inspector General, U.S. General Services Administration) (available at http://hsgac.senate.gov/_files/072605Tighe.pdf)

[125] Acquisition Programs Audit Office, General Services Administration, Audit of FSS's Contractor Assessment Initiative (CAsI) Report No. A040252/F/A/V05002, at i (Sept. 29, 2005) (available at http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/A040252_R2-z-d3-c_0Z5RDZ-i34K-pR.pdf).

[126] Id.

[127] Id. at Appx. A-1 & B-1.

[128] Office of the Chief Acquisition Officer, General Services Administration, GSA Acquisition Workforce Forum, Southeast Sunbelt Region Gets It Right (Spring 2005) (available at http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/AWF-7_R22P1-o_0Z5RDZ-i34K-pR.htm#12).

[129] Id.

[130] Id. at Appx. B-1.

[131] Office of the Chief Acquisition Officer, General Services Administration, GSA Acquisition Workforce Forum, FSS Contract Management 1st National Training Conference, at 10 (Fall 2005) (available at http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/AWF-9_R22P1-o_0Z5RDZ-i34K-pR.htm)

[132] DCAA Audit Manual § 4-302.1.

[133] FAR § 52.215-20 (Alt. IV) (Var. I).

[134] GSAR § 552.215-71.

[135] Id., § 4-304.1.

[136] Id., §§ 4-304.1, 4-304.7, 4-702.5, 4-707.3.

[137] Id., § 4.304.1.

[138] Id., § 10-210.5.e(1)(b).

[139] Id., § 10-210.5.e(1)(d).

[140] DCAA Contract Audit Manual § 4-702.2b (citations omitted).

[141] 5 U.S.C. App. § 6(a)(4).

[142] Id.

[143] Burlington N. R. Co. v. Office of Inspector General, R. Retirement Bd., 983 F.2d 631, 641 (5th Cir. 1993) ("[A]n Inspector General's subpoena powers do not encompass the authority to compel the attendance of a witness"); United States v. Iannone, 610 F.2d 943, 945 (D.C. Cir. 1979) (interpreting another inspector general statute with the same language, and concluding that "the language is directed at the production of documentary evidence, as contrasted to oral testimony").

[144] 31 U.S.C. § 3733.

[145] Id.

[146] FAR § 52.212-4(m).

[147] FAR §§ 9.406 - 9.407.

[148] 31 U.S.C. §§ 3729, et seq.

[149] 18 U.S.C. § 287.

[150] 18 U.S.C. § 1001.

[151] See 38 U.S.C. § 8126.

[152] Id., § 8126(h)(2).

[153] Id., § 8126(a)(1).

[154] Id., § 8126(a)(2).

[155] Id., § 8126(a)(4)(B).

[156] Id., § 8126(h)(5). In order to determine the accuracy of reported drug prices, the DVA may audit the contractor's records or those of any wholesaler that distributes a particular drug. Id., § 8126(e)(3).

[157] Id., § 8126(c), (d).

[158] Other plan types include the Individual Contract Plan, which is appropriate when a contract presents direct subcontracting opportunities that the contractor can establish goals for. Companies may also adopt a Master Plan that is incorporated in individual contracts as they are awarded, with goals tailored to the particular contract.

[159] This can include small businesses who only indirectly support the contractor's own business – e.g., as vendors of office supplies or building maintenance, not just as suppliers of components for contractor products.

[160] See FAR 52.219-16 Liquidated Damages—Subcontracting Plan.

[161] The laws discussed here have thresholds for applicability and other exemptions not discussed here.

[162] See FAR 52.219-35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans.

[163] See FAR 52.219-37, Employment Reports on Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans.

[164] See FAR 52. 219-36, Affirmative Action for Workers with Disabilities.

[165] Applicability is determined in the first instance by the contracting officer and subject to review by the Department of Labor.

[166] The details of implementation, including how to implement the wage and benefit obligation and what to do if there is no wage determination, are matters under the jurisdiction of the Department of Labor and outside the scope of this InfoPAK.

[167] At the moment this includes 52.222-39 Notification of Employee Rights Concerning Payment of Union Dues and, if a subcontract meets certain criteria detailed in the clause, 52.247-64, Preference for Privately Owned U.S.-Flag Vessels.

[168] See, e.g., I-FSS-597, GSA Advantage!™; GSAR 552.238-71, Submission and Distribution of Authorized FSS Schedule Price lists.

[169] Not all clauses are subject to tailoring even to conform to commercial practices. Thus while commercial warranties and liability limitation clauses are commonly accepted, no changes or substitutions for domestic sourcing clauses (discussed in section VIII. E below) can be accepted.

[170] It is important to keep in mind that in most cases government buyers cannot simply buy the first item they see on a schedule. While GSA has done the work of getting basic pricing and terms and conditions in place, buyers generally must take at least one more step before making a purchase to ensure they are getting a product that meets their needs at a reasonable price. We discuss basic ordering processes in part VIII.E. below.

[171] See (I-FSS-163), Option To Extend The Term Of The Contract (Evergreen).

[172] See generally FAR Subpart 4.7.

[173] See GSAR § 552.215-71, Examination Of Records By GSA (Multiple Award Schedule).

[174] See FAR § 52.212-5, Contract Terms And Conditions Required To Implement Statutes Or Executive Orders-Commercial Items.

[175] Whether it really will work the same way has not been tested.

[176] Low-value purchases below the Government's "micropurchase threshold" do not even need this much analysis.

[177] This is true even if the contractor's current schedule contract does not have five years left, as long as there are options available that would cover the full term of the BPA.

[178] ATA Defense Indus., Inc. v. United States, 38 Fed. Cl. 489 (1997); Pyxis Corporation, B-282469, 99-2 CPD ¶ 18.

[179] More specifically the regulations provide that the item is subject to normal competition rules (and their exceptions). As is the norm for such procurements, the contracting officer also must find the price fair and reasonable. The items must be clearly marked as not being on schedule and the contracting officer must include in the resulting order all clauses applicable to the nonschedule items.

[180] Further, the payment date is deemed the date on the check or the date of a funds transfer, not the date of receipt. See FAR § 52.212-4(i) in the GSA schedule contracts incorporates by reference the Prompt Payment (31 U.S.C. § 3903) and regulations at 5 C.F.R. part 1315. See also generally FAR subpart 32.9 on Prompt Payment.

[181] GSA can unilaterally change this fee, but contractors can revise contract pricing to reflect any changes.

[182] This includes all sales to authorized users unless made under other contractual vehicles and sales to state and local governments under cooperative purchasing rules on the Information Technology schedules.

[183] See GSAR 552.243-72, Modifications (Multiple Award Schedule).

[184] See GSAR 552.238-75, Price Reductions.

[185] See, e.g., GSAR 552.216-70, Economic Price Adjustment (for products and/or services that are awarded based on a Commercial Catalog Price).

[186] Designated countries and the rules for determining country of origin are set forth in FAR Part 25; see also FAR § 52.225-5(a). For items not completely sourced in an eligible country, the basic test is one of "substantial transformation" – noncompliant components may be acceptable if they are substantially transformed in manufacturing the end product in an eligible country. This law does not consider the cost of components or labor although such information may be helpful in the overall analysis.

[187] Supreme Court review is available but contract disputes rarely present constitutional issues that merit Supreme Court consideration.

[188] This authority originally stemmed from GAO's general responsibility to advise Congress on how funds it has appropriated are spent, although the authority is now codified in law in the Competition in Contracting Act.

[189] Agencies can override the suspension although such action is frowned upon.

[190] Recently one member of the court made a comment in dicta that questioned the court's jurisdiction to hear protests of schedule orders, despite a history of doing so and GAO's long practice in this area. Binding precedent on this issue at the court is not yet available.

[191] The GAO in fact imports fair competition principles developed under the more detailed competition requirements of other parts of the FAR, to help decide whether agencies have acted reasonably. See Comark Fed. Sys., B-278343, B-278343.2, January 20, 1998, 98-1 CPD ¶ 34.

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Using General Services Administration Schedule Contracts to Sell to the Federal Government
February 5, 2008

Presented by McKenna Long & Aldridge LLP

Faculty: John A. Burkholder, McKenna Long & Aldridge LLP; **Jason A. Carey**, McKenna Long & Aldridge LLP; **Alison L. Doyle**, McKenna Long & Aldridge LLP

Moderator: John Horan, McKenna Long & Aldridge LLP

John Horan: Hello, everyone, this is Jack Horan from McKenna Long & Aldridge, and I'm going to serve as the moderator today. And I want to add my welcome to everyone to the webcast on using GSA schedule contracts to sell to the federal government.

I'm told I should start off by taking care of two technical issues. One is to tell you how to ask questions. You will see a box in the lower left hand corner of your Webpage. You can type your question there, then hit submit and we will be able to see it. In addition, at the end of the webcast, we request that you fill out the webcast survey which you will see as the number one link in the link box on the left in the middle – left-middle of the screen.

I have the pleasure of presenting the panelists. All three are members of McDermott's government contracts department and all have extensive experience in – I'm sorry – McKenna's government contracts department and all have extensive experience and expertise in GSA contracting, which makes them leaders in the field. We have divided up the presentation into three sections, tracking what in our experience are the three major compliance areas for these types of contracts.

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First, you'll hear from John Burkholder, who will explain the unique disclosure requirements of GSA solicitations. John is a former judge of the GSA Board of Contract Appeals, as well as an experienced litigator in all aspects of government contracts law. He frequently advises clients on the very issues that he will speak about today. These clients are in virtually all market segments and industries including hardware and software developers and manufacturers, systems integrators, pharmaceutical manufacturers and distributors, food service distributors and chemical manufacturers. John is currently co-chair of the Federal Procurement Division of the Abu's Public Contract Law section and is currently the editor of the section's quarterly newsletter, "The Procurement Lawyer.' He is also a member of the ABA's bid protest and strategic alliances teaming and subcontracting committees. He has served on the faculty of DOJ's Legal Education Institute.

Our second speaker will be Alison Doyle and she'll speak on compliance with the price reduction clause and the industrial funding fee. Although Alison is experienced in all aspects of government contracts, she focuses her practice on issues relating to government and enterprise acquisition of commercial goods and services, particularly information technology hardware and software. She has experience in MAS or GSA schedule contracts and with schedule contracts with the Veterans Administration. She also has experience with other government wide acquisition vehicles. Alison could have presented essentially any of the topics that we're going to talk about today. She frequently advises on commercial item contracts on such issues as contract interpretation, proposal issues, negotiations, audits, and investigations. In addition, Alison has written on GSA contracting issues, including articles on multiple award schedule contracting, a guide for business and government and an article entitled, "GSA Multiple Award Schedule Contracts; Program, Pitfalls and Reforms."

And our final presenter is Jason Carey who will present on GSA audits and contract liability for – and contractor liability for non-compliance. In addition to counseling clients on GSA issues, Jay focuses practice on defending contractors who are under audit or investigation or in litigation for non compliance with GSA schedule contracts and Jay also counsels clients on making voluntary disclosures to GSA when the contractor discovers that it failed to provide information required in the solicitation, which is essentially the part that John's going to talk about or if the contractor failed to comply with the price reduction clause or IFF requirements, which is the part Alison's going to talk about. Along with John and Alison, Jay authored the ACC info pack on GSA schedule contracting and he regularly lectures on government contract issues, including primarily GSA schedule contracts. Jay is also a member of the ABA contract law section.

I'm going to give you a little background on the GSA schedule program before I turn it over to John Burkholder. The GSA schedule program offers tremendous opportunities to contractors. There are approximately 11 million commercial products and services available under the GSA schedule program and 19,000 contractors are currently participating in the program. From a business point of view, the government spends over $30 billion annually through the program. So for those on the phone who do not sell to the federal government, this is an excellent opportunity to increase your business reach and to open up another market.

There are also, though, tremendous pitfalls with the GSA schedule program and Jay is going to talk about these in detail when we get to them. There are severe sanctions for failure to comply with essentially any part of the requirements that we're going to talk about here today, the least of which is a loss of revenue because you may be subject to a repricing of

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your goods or services by the government. The worst of which are criminal investigations or criminal prosecutions for fraud and to make that exposure worse is there's a common and widespread misunderstanding of the GSA requirements, a misunderstanding we're going to attempt to correct today in this webinar.

The GSA office of inspector general testified before congress and noted that for the audits conducted by GSA, GSA has discovered 84 percent of contractors participated in what is called defective pricing, essentially not providing the government with the pricing information that is required under the GSA solicitation. So 84 percent of contractors, based on the GSA inspector general, have done it wrong when they filled out the solicitation.

That's a good intro to John Burkholder's section because he's going to tell you how not to do it wrong in filling out the solicitation and I now turn it over to John.

John Burkholder: Thank you, Jack.

I am going to talk about the disclosure obligations that contractors have – offerers have when they are responding to solicitations for GSA contracts. But the GSA schedule contract solicitations are done a rolling basis. They have no set dates for submission of proposals. There's – one of the most significant differences between GSA schedules and other types of government contracts or commercial contracts is this disclosure obligation that you have to divulge historical sales data and other information that will enable the government to negotiate to see if they can get what they call the best price or the lowest price given to any customer for the particular items or services that you're selling on your GSA schedule. This is, I think, one of the – along with the price reductions clause, this is one of the aspects of

GSA schedule contract that most distinguishes it from regular commercial contracting and most other types of government contracting, as well.

Where you disclose this information is on a form, an eight page form including instructions that is included in every solicitation for a GSA schedule contracts called, "The Commercial Sales Practices Format' or the CSP 1 Form. And you can take a look at this, if you're interested, by going to the GSA e-library and looking at any solicitation that's listed there at www.gsaelibrary.gsa.gov and when I'm finished with my oral presentation, I'll type that into the box so you can all see it. One of the purposes of the CSP 1 Form, "The Commercial Sales Practices Format,' is to establish the commerciality of the item, the product or service that you're offering to the government via the GSA schedule. Commerciality is important because these GSA contracts are governed by FAR Part 12, the Federal Acquisition Regulation Part 12, which controls how the government buys commercial items. The way that you establish that commerciality, that's one of the first purposes – one of the prime purposes of the CSP 1– is to state the dollar value of sales of items to the general public, that is exclusive of the federal government, at established or catalog – established catalog or market prices over the previous 12 months. You can use your own fiscal year, if you have some reason to do that or some other measure of sales, if you can convince the GSA contracting officer that they should accept that.

Then, the next thing that you're required to state on the CSP 1 Form goes to another prime purpose of the disclosures of your prices to GSA during the negotiation phase. This is to state whether discounts and concessions that are offered are equal to or better than the best price offered to any customer for the same items regardless of quantity or terms and conditions. This is what's called, most favored customer pricing. This is what GSA wants.

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This is what they're aiming for. This is what they call their best price. If you do state that you are offering GSA this most favored customer pricing, then in the next section, you complete the following chart on the CSP 1 with the information on most favored customers. If you state no in that section of the CSP 1 Form, then you complete the chart for all of your customers that get a price that is equal to or lower than the price offered the government. The information that you have to disclose includes the name of each customer or category of customers, the discount they receive with terms and conditions, the quantity or volume they have to sell to be eligible for the discount, the FOB delivery term and any concessions.

Now, these categories of customer that are included in the CSP 1 normally include, but they're not limited to necessarily, original equipment manufacturers, value added resellers, state and local governments, distributors, educational institutions, dealers and national accounts and end users. Those are the sample that most often people refer to when they're giving this information on the categories of customers. Discounts are defined by GSA in the CSP 1 as the reduction from catalog prices, whether published or unpublished and that's an important distinction. In your – gathering your information to fill out this Commercial Sales Practices Format, you have to be sure that you uncover and disclose all of the discounts that have been given over the past 12 months from your established catalog or market prices for every type of customer, every customer or every category of customer that you're using to respond to the form. If you don't, that's where what Jack mentioned before comes in, the defective pricing aspect that could possibly be triggered by your failure to do that.

Concessions, along with the discounts, are – they have to be disclosed and concessions are defined as a benefit or enhancement or privilege other than a discount that either reduces

overall cost to the customer or encourages the customer to consummate the deal. Freight allowances – some common concessions are freight allowances, extended warranties, extended price guarantees, free installation, or bonus goods. Now, another purpose of the Commercial Sales Practice Format comes into play here and that is to give the government – to give GSA the information they need to negotiate their basis of award or often called a benchmark or tracking customer for purposes of enforcing the price reductions clause, which Alison will talk about a little bit later.

Also, on the Commercial Sales Practices Format, you have to disclose deviations from any written policies or standard commercial sales practices with an explanation of why you deviated from your standard policies. Usually, you've written the policies or your other standard policies. Some typical deviations that can be disclosed – that have to be disclosed are one time good will discounts to charity organizations or perhaps to disgruntled customers, limited sales of obsolete or damaged goods, sales of samples to new customers and sales of prototypes for testing. If you give competition – if you give discounts to meet the competition, in certain limited circumstances, they may be deviations. They may be one-time deals that you don't ordinarily do. If, however, you establish a pattern of giving meet comp or discounts to meet the competition, those necessarily should be disclosed as part of your discounting practices, your standard or regular discounting practices. So they're not just deviations at that point. And then, if deviations are so significant and/or frequent as to bring into question the fairness and reasonableness of the prices that you've offered, the contracting officer can require you to submit more information to clarify exactly what you're doing with these discounts.

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Well, the government uses the disclosures ((inaudible)), as I said, of these prices, discounts and concessions and deviations for it's advantage in price negotiations and this, as I said before, is one of the two significant differentiators of GSA schedule contracting from commercial pricing – from commercial contracting along with the price reductions clause. Now, there used to be in the old days before the competition and contracting act and so forth, there used to be a requirement to certify that the information disclosed on this CSP 1 was current, accurate and complete. There is no longer an affirmative certification requirement, but GSA says up front in the CSP 1 Form that it expects the offerer to provide the required information that is to the best of the (offerers') knowledge and belief current, accurate and complete as of 14 days prior to its submission. And if you have any changes in your information, if there are any changes that update the information in your price lists or discounting or discounting policies or concessions that you offer to your commercial customers or other customers that you haven't previously disclosed, you have an obligation to submit that information up to the time of the close of negotiations. Up to the time that you agree with the government on the prices that you will be offering them on your GSA schedule contract.

Now, all information disclosures on this CSP 1 are matters within the jurisdiction of the branch of the U.S. government and therefore, they're subject to the False Statements Act, 18 U.S. Code 1001 and Jason Carey will certainly talk about some of the pitfalls that can – that await you if you do not make disclosures as required on the CSP 1 Form. So the best practice when you're filling out this form is to disclose the current, accurate and complete prices information and when in doubt, always disclose, if you have any doubt at all.

CSP 1 information is subject to pre-award audit and Jay will discuss that below. All GSA schedules incorporate by reference the (GSAR 552.215-72), that's in 48 CFR. The price adjustment failure to provide accurate information, the so called defective pricing clause both prospective and retroactive sanctions for that, if they uncover defective pricing, say for instance in a pre-award audit, before you price anything, the prices will be raised to reflect the price that the government believes that they would have negotiated had they known that information. Retroactively, any goods that were sold based on the pricing that was negotiated pursuant to the information previously disclosed will be subject to being raised retroactively, that is you will owe the government the difference between the lower price – the higher price and the lower price. And also, under the defective pricing clause, this (552.215-72), you may even be subject to a termination for default if it is egregious enough. And as Jay will tell you also, there is always the danger of a False Claims Act prosecution whenever you're selling goods and services to the federal government based on deliberate ignorance or reckless disregard of the truth or falsity of the information submitted. Basically, what that means is if you don't have systems in place to ensure that you're giving the government current, accurate and complete information when you're filling out your CSP 1 Form, there's always a possibility through either a key (TAM) action or direct government action of facing a False Claims Act investigation and possibly lawsuit – a civil lawsuit.

And with that, I will hand it off to Alison Doyle, who will talk about ...

Alison Doyle: Oh, post-award issues. But Jack had a comment first.

John Burkholder: Yes. Yes. OK.

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John Horan: I do have a comment, John. First of all, there's – I have a comment and then there's a question that was sent ...

John Burkholder: Yes. I saw that. I was going to answer that later.

John Horan: Oh, OK. We can address those at the end. The comment I had, though, is and I want your view on is it seems to me with the risk of defective pricing as you have indicated that a contractor in filling out these – their proposal and response to the solicitation should go to great pains to basically identify any of it's sales activity, either as a commercial sales practice or a deviation. And the real issue is whether it is a commercial sales practice or a deviation. Do you agree with that?

John Burkholder: I agree. That's true.

John Horan: Yes. And the reason for that, again, for clarification, is the government at some point is going to look at what's been disclosed and point to anything that has occurred that hasn't been disclosed. So if it's something that only happens once or twice, do it – disclose it as a deviation. If it's more common, the question is commercial sales practice or deviation? But get it disclosed.

John Burkholder: Yes. And as I mentioned before, if – it all depends on, as you say, it depends on the frequency of occurrence and depends on whether you've established a pattern of doing this kind of thing on an arguably regular basis. If so, then it's a practice. It's not just a deviation.

John Horan: Correct.

John Burkholder: Yes.

John Horan: And you're going to answer the question at the end, so we'll ...

John Burkholder: I will do that.

John Horan: ... turn it over to Alison at this ...

John Burkholder: Yes, absolutely. Alison is now your leader. Thank you.

Alison Doyle: I am now the leader. There we go. I'm now going to present the next phase of this. You've done all of the work that John laid out for you and if you look at the solicitation, you'll see there's actually, obviously, a great deal more to be done to obtain that schedule contract. But now you have the contract and of course, in the government world, nothing is as easy as that. There's actually plenty of ongoing compliance obligations beyond what your typical commercial contract would require and I'm going to talk a little bit about some of the major compliance issues that arise or clauses and the issues that arise relating to them during the (performance) of your schedule contract.

The first area and one that, frankly, presents the most difficulty for contractors after the disclosure issue that John discussed is the price reductions clause. This is a clause that's mandatory for GSA schedule contracts and so everyone will – regardless of what products you're selling to the – choosing to sell through the schedules, you will have this clause in

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your contract. This is a clause that implements an agreement between the contractor and GSA regarding what the clause calls an identified customer or category of customers. John referred to them also as a basis of award customer. Frankly, in years past, they often called it also a most favored customer and that's actually a phrase that has a lot currency in the commercial world. So generally, when you hear most favored customer, you sort of understand the kind of concept we're talking about here. The idea is that you identify the most favored customer and then, the clause mandates that GSA – the GSA pricing maintain a fixed relationship with that MFC over the life of the contract.

Oops, sorry. Next slide. I apologize.

So what is a price reduction? What are we doing here? Well, actually, let me back up just for a moment and then say that when we talk about identified customer or category customers here, what typically happens the most frequent choice for most favored customer is actually going to be typically an entire customer category, such as your end user pricing or your national account pricing, looking at the whole discount structure that you may offer national accounts and then, negotiating a discount with GSA based upon that pricing. GSA frequently has priced to negotiate the best possible discount.

A well prepared contractor has come with reasons why GSA should not get the very best discount and at some point, you reach an agreement on price and you establish a relationship between the most – for example, my example here, the national account customer category and the GSA discount and just so you have something in your in head to keep in mind as we talk through this, say, for example, that your national accounts get anywhere from 10 to 30 percent. Depending on volume, GSA negotiates a fixed discount of

20 percent because you mutually agree that they are similar to your mid-range national account customers and thereafter, your agreement is and this is part of the question, is how do you maintain that relationship between the most favored customer, the national account discounts and the GSA discount?

So what is a price reduction? Price reductions are any change to your sales practices that disturbs the relationship between then GSA and MFC pricing. So for example, in a case where you've told GSA that your national accounts get 10 to 30 percent and all of the sudden one day new price structure comes out, new products and you decide to give your national accounts 40 percent, that's a change. That's a disturbance in the relationship. Now, GSA is not getting the middle discount between the 10 and 30 percent you previously disclosed. It is now getting substantially less than the best discount.

So one of the issues that arises when you've got a price reduction clause and something that needs to be agreed upon at the beginning of the contract is an agreement on exactly how that relationship is going to be maintained between you and the MFC. In this case, I just said 20, but the – what you really need to say is it's going to be 10 percent better than your lowest discount, is it going to be 10 percent less than your best discount, whatever that relationship was and in this case, let's just say that you agreed that they would get 10 percent less than the best discount. So now that this relationship has been disturbed, your MFC now gets up to 40 percent. Your price reduction has occurred and the GSA, by default, discount must now increase to 10percent less than the 40 percent or 30 percent. So you'll see that this requires substantial – this obligation requires substantial internal controls to ensure that triggering transactions are only made when approved.

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This is a very common problem in GSA schedule contract, reaching agreement on the GSA discounts and then, not having the kind of controls on the sales force, on your discounting structure, on your sales teams that enables you to prevent people from giving discounts that would trigger this price reduction because the reality is that once you trigger this price reduction, you're going to have an across the board impact on your contract potentially for the life of the contract unless you control it very carefully.

So how does a price reduction work? If you have a triggering transaction, the price reduction will be triggered at the same time from the same moment that you've given the price reduction to your most favored customer and for the same period of time. Now, fortunately, this, for example, gives you luxury to have year end sales of your products, everything goes on sale for a month at the end of the year, as long as the government gets that same discount for that same time period. You're not talking about across the board reductions, you're just talking temporary price reduction connected with a sale.

But here's some transaction – the three main ways that you can trigger a price reduction; do you reduce the price or increase your discounts to the MFC? That was the example I gave you. That's the direct increase to that MFC category. There's also price reductions that are caused by a revision of the commercial price list you disclosed during negotiations. This often tends to take care of itself because if you've negotiated a discount, then the government is always getting a discount off of whatever your newest price list price is, but again, if you revise your commercial price list and the MFC is getting better pricing, this can trigger it whether or not you actually focused on, in my example the national account impact. And the third one is a price reduction caused by a grant of more favorable terms and conditions than those disclosed during negotiations. You'll recall John mentioned that

among your commercial sales practice disclosures, you want to tell them about favorable terms and conditions, concessions you may offer. If you introduce a new concession into your terms and conditions such that if in effect your most favored customers are getting better pricing by getting faster shipping, for example, things like that, then that can be a price reduction, as well. So you can see how broad the overview of your pricing practices must be to ensure that you always know where your exposure is on these issues.

What doesn't trigger a price reduction under the clause? Price reductions to other federal – to federal customers in general. For people who perhaps have been involved in government sales in the past, you might recall and this is actually now many years ago, there was a time when even sales to the federal government could trigger a price reduction. So vendors would go into the GSA schedules and they could never reduce their prices because it would mean an across the board reduction on all future scheduled sales. Now, that's not a problem. They'd love you to discount freely to any federal customer. Thank heavens no price reduction consequences.

Another way to avoid a price reduction is if you have firm fixed priced definite quantity sales to the most favored customer category which are over the maximum order thresholds. The maximum order threshold is a dollar amount that's set in the schedule contract. It's not negotiable. It's something the GSA sets for the schedule and what GSA does with that essentially says if you get a fixed order over, let's say in our example 1 million bucks from another customer or from your national account customer, that will not trigger a price reduction. That's a big enough sale that it takes it out of the universe of the kind of transactions we're talking about. On the schedules, that's not a price reduction.

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There's a quirk here; the schedules have special access to the schedules for state and local governments for information technology that may cause a price reduction if for some reason you were to negotiate the – your state and local discounting practices as being the most favored customer, that's another area where you can avoid a price reduction. Errors in quotation or billing, if fully documented to the contracting officer, again, there's a need for internal controls to make sure you catch those and don't find out about them and the audit at the end of the contract when it's far too late to apologize. And as I mentioned earlier, we do have temporary price reductions such as sales. The clause requires that contractors report price reductions within 15 days and price reductions that are not reported, as I have been mentioning, risk permanent application. This is one of the – the business that Jay and Jack are often in is long after the fact, finding these price reductions and trying to negotiate the consequences of these, whether permanent or short term. So, obviously, very serious obligation here in this price reductions clause for all vendors.

The other area we mentioned is the industrial funding fee. This is a commitment, again, it applies to all of GSA schedules. The contractors are required to collect a 0.75 percent industrial funding fee on all schedule sales. Typically, what happens is this is part of the original pricing negotiation. You put your discounts on the table, you throw in 0.75 percent to recoup this cost for the government. This is how GSA actually pays for its own operations. This is what they charge other agencies for the convenience of providing this program for them. So the – everybody has to do it. Contractors have to submit quarterly reports and remit the IFF on a quarterly basis. This is all handled online these days, but more importantly, this is, again, highlights the very import antinternal control requirement which is the ability to capture your schedule contracts orders separate from commercial sales

and your ability to review all government orders for possible inclusion in your total quarterly sales so that you can make the appropriate reports.

A few other obligations I just want to touch upon. The contract is by no means simple. If you go to GSA, pull one of those solicitations, you'll see lots of clauses you may never have seen before. If you haven't dealt with government sales, I'll just mention a few highlights here. Because these lead into performance issues, one of the problem – one of the things you'll need to do is that you have the ability to timely confirm that orders are from authorized users of schedules. That certain federal entities are allowed to use schedules, they can also authorize certain prime contractors to use schedules under only certain circumstances. There are clauses that discuss when this can happen and periodically, you'll find people trying to use schedules that can't, so again, that's something that needs to be addressed carefully.

You need a process to identify and address orders and include items that are not available on your schedule contract. And this is a significant area of difficulty because often vendors and agencies alike they have (find) a solution, they discover three products in addition to their solution that is not available in schedule. How do you handle that? There is a process for dealing whether – what that's called is out of scope orders. You have to actually price them separately, carefully identify them and make sure you never give the ordering agency the impression that these items are actually available on schedule because they have to follow different procedures to order additional material not available on the schedules – on your schedule. You'll find unless you are already a small business that you'll have to enter into a small business subcontracting plan in which you're going to make some commitments about driving business to small – to driving business to small businesses. It may not necessarily be, especially in the commercial world, specific subcontracts under the schedule, but they want to see that you're actually using small businesses.

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Every contract will have some socioeconomic clauses, such as equal opportunity and affirmative action laws you'll see, there will be. If you do use subcontractors, mandatory clauses you have to slowdown so there will be some contract administration obligations there. And there are some domestic sourcing requirements. In the Trade Agreements Act, you'll see referred to here that a very important and significant issues in this world and frankly, don't have time to deal with it today, but that's one area that if you do get into a situation where you need to make domestic sourcing commitments or reporting sourcing issues relating to your products on the schedules, this is an area that you're going to have ongoing obligations in regard to.

I beg your pardon here. I have a cold and I really need to cough.

Sorry about that.

These are more mundane obligations that the schedule requires you to issue an approved price list that you're going to have to run by the contracting officer and it's going to include mandatory terms and conditions that all agencies have to accept. That's the nice thing about GSA is essentially you've negotiated with GSA and what you're doing with the agencies may be – individual agencies is statement of work stuff, but not underlying terms and conditions. You'll have to maintain information about your product offerings on the GSA Web site, on GSA Advantage, which is their merchant's Web site, searchable facility there online. Over time, we find these days, especially in the commercial world, ongoing

obligations to add and delete products as they become obsolete as you introduce new products. That's a paperwork job, but it's important to keep it up because you can't just substitute, add new stuff when you stop making old things.

And finally, and again, a typical government difficulty here, record retention. Three years from final payment on your contract. I mention here each five year performance period, we didn't discuss the GSA contracts are actually evergreen, they can last for a very long time. Typically, they go with five year renewals. So you're talking a minimum of eight years of document retention from the beginning of the performance of a contract.

So that's just a selection of the more interesting stuff that goes on in these schedules. That does it for me here and I'm going to hand off to Jason Carey and he is going to take you to the end here.

Jason Carey: Thank you, Alison.

I would like to spend some time talking about GSA audits and potential liability. GSA audits, of course, are GSA's method for checking on compliance with the disclosure obligations that John spoke about and some of the continuing compliance obligations that Alison spoke about.

There are generally three kinds of GSA audits, pre-award audits, post award audits, and contractor assistance visits, which are, frankly, more for the assistance of GSA than for the contractor. Taking pre-award audits first. Pre-award audits are geared towards checking on

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the disclosure obligations or making sure that the contractor has made the proper disclosures in negotiating the contract. OK.

John Horan: We're making a change of headphones so that you can hear Jay better.

Jason Carey: OK. I'm – I think I'm back. Sorry about that, folks.

Let me take a step back. I'm going to cover GSA audits and liability in case of noncompliance. Audits are GSA's method for checking on compliance with the disclosure obligations that John spoke about and with the continuing compliance obligations that Alison spoke about. There are generally three kinds of audits, pre-award audits, post-award audit and contractor assistance visits and I'm going to take a few minutes to talk about each kind of audit and then, talk about some recommended procedures for audits generally.

Moving first to pre-award audits, pre-award audits are GSA's review of the pricing disclosures in the course of negotiation prior to award. In past years, GSA has increased the number of pre-award audits. The – in 2003, there were 14 pre-award audits. In 2004, there were 40. In 2005, there were 70. And I believe in 2006, there were about 125. I think so. During the pre-award audits, GSA will review materials related to commercial pricing and discount practices and in the course of the audit, it's important for the contractor to ensure that all disclosures are complete, accurate and current and John spoke to those obligations to make sure that the disclosures are appropriate.

Notably, GSA has no right to obtain cost or pricing data or information and that's a specific term of (art) in contracting with the government. For many stand alone contracts, there is a

requirement that you justify your cost of pricing to the government by showing how you built up that price and what your costs are that go into that price. Here with GSA's schedules, the government has no right to get that information. All they get is the information that John spoke about, which is what your commercial prices are and what your discounts are. The government doesn't get – have any right to insight into how you built up those prices and discounts. Finally, whenever you're – you go through a pre-award audit, you should request a copy of the pre-award audit report, though GSA is not required to provide it.

I'd like to turn now to post award audits. Post award audits focus on the compliance – continuing compliance obligations that Alison spoke about. They cover overbillings, billing errors, compliance with price reduction and the IFF clauses and they can also cover other things like the Trade Agreement's Act compliance. They generally do not cover the pre-award pricing, but GSA can often get information relevant to pre-award pricing. In essence, GSA will ask for all documents related to prices and discounts for the period shortly after the contract was awarded and if they see pricing and discounts that are – that vary from what was disclosed in the pre-award audit, that will cause them to question whether the disclosures were complete and accurate. Under the normal clauses, there's a duty to maintain records for three years after the last payment. That clause can sometimes be modified, but that's highly unusual.

Finally, I'd like to touch on the contractor assistance visits and note that despite their name, these should be viewed as audits and they are – they can include review of the products being offered to ensure that they fall within the scope of the schedule. As Alison mentioned a few minutes previously, it's important that when you offer items that are not on the

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schedule, you have to follow certain procedures and the contractor assistance visits can look at that issue. They can also look at the pricing and the payment of the IFF and they can look at Trade Agreement's Act compliance along with other issues.

I'd like to talk for a little bit now about the importance of following audit procedures whenever you are going to be subject to a GSA audit. There are three important reasons to be prepared for the audit and follow established procedures. One is that you want to identify and develop any responses to any existing or underlying – for underlying fraud concerns. And by that, I mean any failure of a disclosure or failure to maintain compliance without – I'm sorry – during the course of the contract. You want to look at any failure in either one of those areas and determine whether there are any indications of fraud that you need to be looking at and prepared to respond to.

Secondly, you also want to prevent any claims of fraud or obstruction based on the audit itself. In other words, you want to go through the audit, provide the government with, again, full and accurate and complete responses and do that in a timely manner so that the government does not claim any fraud based on the audit itself. And then finally, you want to protect your rights in the audit and we'll talk a little bit more about how to do that and what those are as we move on.

At this point, I'd like to talk a little bit about what then bases of liability can be if fraud or other wrongdoing is uncovered during the course of an audit and there are three main kinds; there's criminal, civil, and administrative liability. The criminal liability, the main acts involved are the False Claims Act, the False Statements Act, which John mentioned, Obstruction of a Federal Audit and Conspiracy. On the civil side, the False Claims Act is

also important and I would note there that that Act opens up the contractor to the possibility for ((inaudible)) damages. So whatever the government alleges as it's sort of direct or single damages, the False Claims Act provides for((inaudible)) of that figure and that it also provides for a penalty of, I believe, a range from $5,500 to $11,000 per false claim and a false claim can be construed as – it has been construed in some context as each separate invoice being a false claim. So you can see how that penalty can add up significantly. Finally, on the administrative side, there could be disallowances and penalties related to your contract and of course, there can also be termination as we mentioned previously.

I'd like to talk a little bit now about preparation for the audit. It's important to obtain the audit request in writing. The audit request should state the type and scope of the audit. It should identify the audit team. It should estimate the amount of time that's going to be required for the audit. And it may also include a preliminary request for documents or files. It's also wise to conduct an internal pre-audit review once you have an idea of what the scope of the audit is and what documents will be involved that will help you identify what, if any, issues are out there and allow you to be prepared to react and respond to any questions that the auditors may have.

Third, it's important to establish a primary point of contact who will receive all documents and information requests, will gather information responsive to the requests, take the lead on ensuring the accuracy and completeness of the responses and then, provide the response to the auditors. And that's important for a couple of reasons; one, you want to control the flow of information to the auditors. You want to know what information the auditors are getting and you also want to make sure that the information is provided in a timely fashion

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with the least amount of disruption to your business. It's also good to establish a workplace for the audit team. The workplace should be an appropriate place for the audit team to do their work and it should also be a place where they are – ideally a place where they're somewhat separate and not mingling with your employees. Again, you want to control the flow of information to the auditors. And I guess one final point I would add to the bullets on this page is that you should always make sure that the auditors are escorted when they are in your facility.

You should always request an entrance conference as part of the audit process. As you can see in the entrance conference, you should identify the point of contact, discuss the procedures that you've set up for documents and information, discuss procedures for copies and you should also request an exit conference and a copy of the draft audit.

During the audit, you should use the point of contact. You should try to respond within a reasonable period of time so that the auditors don't become concerned about obstruction or delay. You should also, to protect your own rights, ensure that requests are within the scope of the audit. And within the scope of the audit as it was described in the audit request, the written audit request. If you have concerns that the document request is outside the scope of the audit, you should ask the auditor to state the reasons for the request and the authority for the request. And once you receive that response, you should consider whether or not an objection is appropriate. You can also object and negotiate the request if it's burdensome or unreasonable and sometimes you can negotiate with the auditors to provide a sample of documents or a particular time period or narrow the request in some other way. Finally, you, of course, want to identify any potential issues and begin your preparation of a response to any concerns the auditors may have.

At the end of the audit procedure, you have an exit conference. During the exit conference, the auditors should summarize the results of their audit and inform you of the procedures for the issuance of their final report. You should express your position on any issues the auditors have raised. You should request a copy of the draft audit report and you should request an opportunity to respond in writing. The opportunity to respond in writing can be an important one, it's your first opportunity to respond in a detailed and comprehensive manner and that will become an important document depending on where things go with the audit. If it proceeds to investigation, it can be reviewed by the investigators, the prosecutor or judge/jury. So you should take care in preparing that response.

And then, finally, I have here some bullet points on how to recognize when an audit has become an investigation and I know we're a little short on time, so I will leave it at that. And we can take any outstanding questions.

Alison Doyle: That's great. We had a couple of questions come in and I think the first one was something that John Burkholder ...

John Burkholder: Yes.

Alison Doyle: ... could address.

John Burkholder: Yes. Let me repeat the question to you because I know you can't all see it. The question is, "If a party is the subcontractor that is not directly contracting with the U.S. government, does it have the same disclosure obligations when dealing with the prime

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contractor?' The answer is no, subcontractors or suppliers are not in (privity) of contracts with GSA and the government, therefore they don't have the disclosure obligation. But, the answer changes a little bit if the contractor – the prime contractor is a reseller that doesn't have a history of significant sales of the item that they're offering to GSA to the general public, in other words, if they can't establish commerciality, then to establish commerciality and for negotiation purposes for price and basis of award or what Alison called MFC negotiation purposes, the reseller must fill out the CSP 1 with the manufacturers, that is the suppliers or the subcontractor information. So to that extent, when you are a supplier to a reseller that doesn't have a significant history of selling, then you do – the prime contractor will have to fill that out with your information as the subcontractor.

Alison Doyle: Great. OK. Let's book along a little bit here because we really are running short. The next question, someone asked about being – whether or not they should give GSA pricing to someone who has a prime vendor contract with DLA. This is very, very fact specific.

John Burkholder: Yes.

Alison Doyle: The contracting officer generally has the authority to authorize contractors – other contractors to use the GSA schedules and so in fact, if you get an appropriate letter with the language that the clause provides, then sure, the CO can authorize that. But a caveat to something like that is that actually the clause only specifies certain situations where other contractors can be authorized to use your schedules. This actually doesn't sound like one of those situations, so I would, frankly, call GSA, as well. I mean there may well be a good reason for that just it sounds odd, so I would double check.

Another question raised, “Please explain the concept of triggering,” that was me, I’m sure, talking about triggering price reductions and I wanted to throw out very briefly, triggering means, frankly, making a sale that gives a better price to your most favored customer. That's a triggering transaction, triggers the price reduction. You have an obligation from there on to give the price reduction to the government and I wanted to point out one other factor. One other common misconceptions in this area with price reductions is people – we find this in audits when they come back later or investigations– and they say, “Well, I told them that I gave up to 30 percent and they negotiated 20percent, so as long as I don't give the – as long as don't give the most favored customer” – Oh, I'm sorry, I'm mixing this up.

A situation where you'd negotiate actually a better discount for the government than your most favored customer, say your most favored customers get up to 20, you give the government 30, 10 percent better. Across the board, we find contractors sometimes coming in and saying, “So, OK, as long as I don't give anybody else more than 30, I don't have a price reduction.” The answer is no, you have to maintain the margin between the 20 and 30 percent and footnote, sometimes there's a question of whether you're maintaining the percentage ratio or whether you're maintaining the 10 percent differential. That's another issue you'd want to nail down and actually have a specific agreement on.

We have one more question and I don't know, “Do MBEs have to provide the same 10percent reduction?” If you mean just – I'm not sure what those are. Minority business entities? There's no reason why they would be treated any differently. If they have a most favored customer commitment on a schedule contract, they will have a price reduction

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unless they negotiate something different with GSA. So I'm not sure what the difference might have been there.

We are about to run out of time here. And I throw it to Jay here to wrap up.

Jason Carey: Thanks, Alison.

I'd like to thank you all for attending and encourage you, again, as Jack mentioned at the beginning, to fill out the webcast survey, which you will find in the middle left-hand side of your screen under links. Again, thank you for attending and this presentation is now concluded. You may disconnect.

END

Best Practices for Complying with Price Reductions Under Federal Contracts

If your company is considering pursuing US government contracts or already does business with the federal government, it will likely opt to obtain a Federal Supply Schedule (FSS) contract from the General Services Administration (GSA) or the Department of Veterans Affairs (VA). The FSS program covers a spectrum of commercial products and services. GSA delegates authority to the VA to administer the FSS program for biomedical and health products. The FSS program is advantageous to contractors and the government alike because it reduces what can be a lengthy federal procurement cycle under the Federal Acquisition Regulations in Part 48 of the Code of Federal Regulations (FAR) by allowing ordering agencies to use abbreviated competition procedures to purchase a wide variety of commercial items.

A commercial item is defined under the FAR to include a wide variety of supplies and services available in the commercial marketplace. The FSS program is based on the premise that for the US government's smaller orders of commercial items, it can forego head-to-head competition. For example, the maximum order threshold is $500,000 per order for most information technology products and services. Above the maximum order threshold, a federal government contracting officer is required to request reductions in price and conduct an informal—as opposed to full and open—competition.[1] This less-rigorous competition is permissible because:

- the government scrutinizes pricing information obtained from each contractor up front to ensure that only fair and reasonable prices are included in FSS contracts;
- the government requires contractors to publish FSS contract prices and allows price reductions at any time for any order; and
- the contracts impose a price maintenance obligation on the contractor to ensure that FSS contract prices are automatically reduced when the contractor's commercial prices are reduced.[2]

Paul S. Ebert and Jeffrey S. Robinette

Say That Again, Please?

The price maintenance obligation imposed under FSS contracts is contained in a contract clause referred to as the Price Reductions Clause (PRC), which is found in GSA's supplemental regulations to the FAR.[3] As explained below, this clause is complicated and ambiguous. Indeed, the American Bar Association's Section of Public Contract Law submitted comments to the General Services Administration on April 26, 2006, pursuant to a federal register request by GSA for public input to improve the FSS program. The ABA pointed out several ambiguities with the PRC, and provided suggestions for clarifying it.

To participate in the federal market, government contractors must exercise diligence to ensure compliance with various unique federal contract clauses, regulations, and laws. Clearly, the highest risk and most onerous clause in any FSS contract—including GSA's well-subscribed Schedule 70 for information technology products and services—is the PRC. Simply stated, the PRC requires FSS contractors to monitor and report to the government any "price reduction" which occurs in its commercial sales and discounting practices after the contract award and continuing throughout the life of an FSS contract, and make comparable price reductions to the prices charged under the FSS contract thereafter. FSS contracts typically contain a five-year base period and three five-year option periods.[4]

While the PRC frequently is referred to as a most favored customer clause, its requirements can be more difficult to interpret and monitor than the most favored customer warranties sometimes found in commercial contracts. The PRC establishes a relationship between commercial pricing and the FSS contract pricing at the time of contract award, and imposes an ongoing monitoring, reporting, and price reduction requirement in the event the relationship is disturbed. Because of the vagaries of the PRC, this relationship can be disturbed (or "triggered") by minor changes to a contractor's commercial practices and procedures. Indeed, in some respects, the Clause's requirements are so nebulous that there is disagreement within the industry as to its application. For example, there is considerable debate in the industry whether a price reduction event can occur from a single transaction or only from a discounting pattern displayed by a predominant number of transactions. This debate generally arises when the contract contains a large class of customers as the basis of award, and a price reduction event is asserted to arise from a single anomalous transaction that does not fairly reflect the contractor's commercial pricing practices.

The risks associated with failing to comply with the PRC are severe because a single commercial sales transaction may trigger the PRC and thereafter impact the price for all subsequent FSS contract orders for the same item. This risk is exacerbated when a contractor has significant commercial sales transactions, segregates executive sales management for its commercial and government business segments, maintains a dynamic or complicated pricing model, or conducts its commercial business in a highly competitive industry.

The clause can be synopsized into three types of price reduction events:

1. Basis of Award Customer Transactions

The primary obligation under the PRC requires that the contractor notify the government any time the price for a product or service on its FSS contract is reduced for specific commercial customers designated as the basis of award. This type of price reduction event can only be interpreted in the context of the FSS contract negotiations, the contract award documents, and the company's commercial business practices. At the time of award, the government and the contractor are required to agree to a customer or class of customers to serve as the basis of award for purposes of administering the PRC. The PRC requires the contractor to monitor all sales to the basis of award customer(s) and reduce its FSS contract prices to maintain the *price or discount relationship* between such customer(s) and the FSS contract price or discount. This requirement is only triggered by orders with the basis of award customer(s) not exceeding a specified threshold referred to as the maximum order threshold[5] for products and services on the FSS contract. Exclusions apply under the PRC and additional exclusions frequently can be interpreted to apply based on the particular contract award documentation and the contractor's business practices. Clearly, however, the broader the basis of award customer(s), the more complicated and difficult this requirement is to monitor. This component of the clause can be exceptionally burdensome to interpret if it is not specifically defined at the time of contract award. Unfortunately, GSA's default position is that *all* commercial customers should constitute basis of award customers in order to assure the government of most favored customer status, and many contractors, eager to obtain an FSS contract, do not negotiate this position.

2. Price List Reductions

The second type of price reduction mandated by the PRC requires that the contractor notify the contracting officer any time its commercial pricing is reduced, and thereafter provide a commensurate reduction in FSS contract pricing. This requirement is the simplest of the three price maintenance components of the PRC. At the time of award, the contracting officer and the contractor are required to specifically agree to the commercial price list(s) or other document(s) upon which award is predicated. If the prices or discounts reflected in these documents are later reduced, the PRC requires that a commensurate price reduction be made immediately to FSS contract pricing for the same items. This requirement is generally rather formulaic, but can be complicated, absent clarification, by frequent product changes, bundling and unbundling of product components, and for services that are not well defined in a commercial price list. It also may be unclear whether the PRC is intended to apply only to those price list(s) or document(s) upon which award was predicated, which also impact the basis of award customer(s) specifically, or which impact commercial customers generally. This issue can be exacerbated when, for example, temporary discount promotions are granted to specific non-federal market segments. The confusion arises from the clause itself, which defines a price reduction first in subparagraph (a) and then further defines when it applies in subparagraph (c)(1). A conservative approach is to read these sections independently and consider subparagraph (a) and (c)(1)(iii) somewhat redundant. A less conservative approach is to assume that subparagraph (c)(1) only applies in the context of subparagraph (a), which dictates that the events in subparagraph (c)(1)(i) and (ii) only apply if they disturb the relationship established between the FSS contract price and the basis of award customer(s) price or discount defined in subparagraph (a).

3. Concessions in Terms

The third type of price reduction event under the PRC, and perhaps the most frequently overlooked, requires that notification be provided to the government if more *favorable terms* are provided than are reflected in the price list(s) or other document(s) upon which award is predicated. This component of the PRC is difficult to interpret because it contemplates monitoring unquantifiable, disparate, and frequently unidentified concessions in terms and conditions, rather than pricing or discounts that can be reduced to a numeric equation. Only a detailed contract and business practices analysis can ascertain the types of non-discount based terms that might trigger this component of the PRC. Any such analysis should consider the extent to which terms and conditions are material to price or discount, and the extent to which federal government customers are capable of accepting concessions under like terms and conditions. The government may not be capable of agreeing to certain terms that are routinely accepted by commercial customers in association with a concession. As noted previously with respect to price list reductions, it may not be entirely clear the extent to which this requirement applies if favorable terms are provided to commercial customers generally, but not to the basis of award customer(s).

> **The government** may not be capable of **agreeing** to certain terms that are routinely accepted by **commercial customers** in association with a **concession**.

This synopsis highlights the three primary price maintenance obligations associated with FSS contracts pursuant to the PRC. However, a contractor's specific requirements can only be understood fully by reviewing the award documentation supporting the FSS contract in the context of the contractor's pricing disclosures, negotiations, and commercial business practices. In application, these requirements can be difficult for even the most seasoned professionals to interpret.

What's at Stake?

Noncompliance with the PRC is risky. A contractor's failure to comply is not handled as an administrative price adjustment by GSA or VA contracting officers in many cases. More likely, the potential cumulative impact of a price reduction event results in increased scrutiny, including investigations by the offices of the GSA and VA inspectors general. The inspectors general, in turn, may refer claims to the Department of Justice as potential civil or criminal actions under the False Claims Act.[6] Or, cases may be brought directly to the Department of Justice as *qui tam* suits filed by current or former employees under the False Claims Act. Under these scenarios, what might be perceived by a contractor as a contract claim can end up construed as potential fraud against the government. With remedies such as damages multiples under the False Claims Act, suspension and debarment,[7] defending these cases can become a "bet the business" proposition. At the same time, ambiguities are inherent in the clause, particularly when it is reduced to actual practice. This ambiguity makes for unsure legal footing. These stakes are simply too high for most contractors to litigate purported wrongdoing under the PRC. Claims are typically settled, explaining the dearth of case law interpreting the PRC.

Components of the Price Reductions Clause

Contract interpretation and compliance with the PRC depends entirely on the manner in which a company discloses its pricing practices[1] and negotiates its FSS contract pricing and terms at the time of contract award. The general requirements of the PRC arise from two paragraphs:

(a) Before award of a contract, the contracting officer and the offeror will agree upon (1) the customer (or category of customers) which will be the basis of award, and (2) the Government's price or discount relationship to the identified customer (or category of customers). This relationship shall be maintained throughout the contract period. Any change in the contractor's commercial pricing or discount arrangement applicable to the identified customer (or category of customers), which disturbs this relationship shall constitute a price reduction.

(c) (1) A price reduction shall apply to purchases under this contract if, after the date negotiations conclude, the contractor:

(i) Revises the commercial catalog, pricelist, schedule or other document upon which contract award was predicated to reduce prices;

(ii) Grants more favorable discounts or terms and conditions than those contained in the commercial catalog, pricelist, schedule or other documents upon which contract award was predicated; or

(iii) Grants special discounts to the customer (or category of customers) that formed the basis of award, and the change disturbs the price/discount relationship of the Government to the customer (or category of customers) that was the basis of award.

(2) The contractor shall offer the price reduction to the eligible ordering activities with the same effective date, and for the same time period, as extended to the commercial customer (or category of customers).[2]

NOTES

1. FSS solicitations contain significant disclosure requirements. See, e.g., clause entitled "G.4. Commercial Sales Practices Format (CSP-1)" in GSA Schedule 70 Solicitation FCIS-JB-980001-B – REFRESH #20 (Issued 1/16/2007).
2. 48 C.F.R. 552.238-75 Price Reductions.

Best Practices

The only sure-fire way to mitigate the risks associated with the PRC is to get it right, up-front, at time of contract negotiation and formation. Counsel should be involved in the proposal preparation process, early in the process, and ensure that the risks associated with the clause are being addressed adequately to mitigate future exposure. If a significant level of due diligence is not exercised at time of proposal preparation and during negotiations, a contractor is unlikely to protect itself against the ambiguities associated with the clause, and in-house counsel may find him/herself in the unwanted position of initiating an internal investigation to solve non-compliance concerns. The following reflects six best practices, which can be used by counsel as an outline to help define his/her contribution and role during the proposal process for an FSS contract:

1. Assemble a Complete Proposal Team

A dedicated proposal team comprised of talented professionals should be responsible for all aspects of preparing, submitting, and negotiating an FSS contract proposal. Team participants should include legal, contracts, sales, business operations and accounting personnel who maintain a broad view of the company's overall business, including its government and commercial business segments. The proposal team and management should be briefed by counsel or outside experts on the risks associated with FSS contracts, including the PRC in particular. In many circumstances, depending on the complexity of the company's business practices and in-house counsel's familiarity with federal government contracting, outside counsel should be retained to participate on the team. For many companies, the FSS contract proposal ultimately becomes the terms under which all federal, as well as significant state and local, business transactions will be conducted. For many contractors, the event of obtaining an FSS contract is the single, best opportunity to structure the contractual aspects of the company's public sector business and to develop risk mitigation strategies. Unfortunately, many companies fail to recognize the strategic importance of the event.

2. Executive Commitment and Team Indoctrination

Counsel can play a key role in ensuring future corporate responsibility and compliance, particularly PRC compliance, by ensuring that company executives make compliance a stated objective of the proposal effort. Frequently, companies seek an FSS contract in the same manner they approach other proposal and sales projects. Counsel's participation on the team can ensure that management and the other team members

fully consider how the company will comply with FSS contract terms in the context of the overall business. In-house counsel also can serve as a constant reminder to team members about how their respective inputs to the proposal effort contribute to the overall contract compliance picture for the company.

ACC Extras on… Federal Contracts

InfoPAKs℠

- *Government Schedule Contracting* (2006). This InfoPAK explores the entire gamut of the most significant procurement program under which federal agencies obtain commonly used "off-the-shelf" products and services: General Services Administration (GSA) and Department of Veterans Affairs (DVA) schedule contracting. Focusing on multiple-award schedule (MAS) contracting, cutting-edge legal, regulatory, and policy developments that are currently making this area one of the most dynamic in the government's efforts to purchase supplies and services is emphasized. *www.acc.com/resource/v7548*

Program Materials

- *Government Contracting Toolbox* (Annual Meeting 2005). Want to get into the government contracting business, but don't know how? Our contracting experts will give you all the law you need to fill your personal toolbox. You will learn how to distinguish between a do-it-yourself project and when you need to hire a specialist; how the law of contracting with federal agencies, state governments, and government-owned companies differs from the law of contracting with any other customer; how to determine which statutes and regulations apply to your contract; and how signing a public contract can alter how you do business and may affect your property rights. *www.acc.com/resource/v6931*

Sample Forms and Policies

- *Contractor Teaming Agreement Form* (2005). *www.acc.com/resource/v6543*
- *GSA Schedule Teaming Agreement* (2005). *www.acc.com/resource/v6544*

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3. Disclose Only Current, Accurate, and Complete Information

A company cannot comply with the PRC unless it meets its burden under the FSS contract's terms to disclose "current, accurate, and complete" information.[8] Counsel must ensure that an appropriate standard of disclosure is developed, understood, and implemented by the entire team throughout the proposal process. FSS solicitations contain significant disclosure requirements regarding commercial sales and business practices. One of in-house counsel's primary purposes as a team member should be to ensure adequate disclosure as well as documentation of adequate disclosure pursuant to the terms of the solicitation. Questions regarding the adequacy of disclosure should permeate the entire proposal process, particularly for larger companies with significant commercial sales and business practices information. A contractor's failure to disclose current, accurate, and complete information is a key line of inquiry pursued by GSA and VA inspectors general when investigating PRC compliance, and has resulted in whopping fines and settlements. For example, a Department of Justice Press Release dated October 10, 2006, announced that Oracle Corporation paid $98.5 million dollars to settle a *qui tam* suit brought by a former employee relating to an inadequate disclosure by Peoplesoft USA, Inc.[9]

4. Document Appropriate Clarifications and Exceptions, and Scope the Price Reductions Clause

Contractors are afforded the opportunity to make clarifications and take exceptions to FSS solicitation terms in their proposals.[10] Another key function well served by counsel involvement is to contemplate required clarifications and exceptions, and ensure they are documented appropriately in the proposal. The contractor must either be prepared to change its commercial business practices for federal business, or reconcile or address any discrepancies between its commercial practices and the requirements reflected in the FSS solicitation. Reconciliation is done by making written clarifications to the FSS solicitation to interpret the requirements in a manner that allows compliance. Exceptions should be taken if FSS solicitation terms simply cannot be met. This effort can be an intense task because FSS contract requirements permeate every aspect of a company's business processes, including for example, unique packing and shipping requirements, non-standard reporting requirements, subcontracting, and non-commercial payment and invoicing terms.

With respect to the PRC, counsel involvement in this inquiry is crucial. All aspects of the clause, including each of the three types of price reduction events outlined above, may need to be clarified to achieve an express agreement that leaves little room for dispute later concerning what constitutes a price reduction event in the context of the contractor's business. Government contracting officers are typically willing to consider well reasoned clarifications, but are understandably more hesitant when it comes to even the most cogently described exception.

The clarifications sought by contractors regarding the PRC depend on the contractor's overall business. However, counsel should consider three questions when advising the proposal team and management concerning clarifications and exceptions to the clause:

- Does the proposal clearly define the price list(s) or other documents upon which award will be predicated and clearly identify the customer(s) that will serve as the basis of award? Obviously, the smaller the number of customers in the basis of award, the easier it will be to interpret the clause and comply with it during contract administration.
- Does the proposal clearly define the "relationship" to be established between the basis of award customer(s) and the proposed FSS contract pricing or discounting?
- Does the proposal identify the types of transactions and concessions which occur in the company's commercial business under terms and conditions or circumstances that differ significantly from the federal business so as to support a proposed exclusion of unique circumstances as price reduction events? The clause excludes certain types of transactions pursuant to subparagraph (d) already. Depending on the nature of the company's commercial business, other types of commercial transactions may be distinguishable from federal business occurring under the FSS contract. For example, transactions conducted with resellers in the commercial market may be distinguishable from transactions occurring directly with federal end users under a FSS contract; transactions with commercial customers that provide for payment in advance may be far more advantageous to the company compared to federal government payment terms; and transactions with commercial companies outside the US may be distinguishable because terms, conditions, laws and regulations may significantly differ from the terms applicable to federal procurement.

It may be useful to frame only clarifications concerning the PRC and to do so in a positive manner that states the contractor's compliance obligations in the context of the contractor's business, rather than trying to carve out exceptions or exclusions to the clause. Taking this approach will allow government negotiators to understand and document what is being proposed, while adding the definition and clarity sought by the contractor.

5. Avoid the Primrose Path

Legal involvement on the proposal team is also important to ensure that the government stays on point during any pre-award audit and with respect to supplemental requests for information which frequently occur during negotiations. Government auditors, negotiators, and contracting officers tend to pursue numerous and diverse lines of inquiry prior to award, and during the negotiation process such inquires can be burdensome and may blur the company's ability and obligation to provide only current, accurate and complete information. For example, government procurement officials may make loosely defined requests for "best" or "most favored" pricing or discounting information, or for "master agreements," or use other terms that are not defined well or which do not translate within the company's business. In-house counsel is typically skilled at identifying such ambiguities, and may be the team member best able to redefine the scope of such inquiries to ensure that the company's response is meaningful and helpful and at the same time current, accurate and complete. Explain your concerns to government representatives and negotiate a more appropriate line of inquiry. Finally, legal involvement is crucial to guard against government inquiries that fall beyond a reasonable scope of inquiry associated with considering the proposal and the contractor for contract award. In particular, in-house counsel should guard against inquiries focused on finding past non-compliance under a predecessor FSS contract.

> **Finally,** legal involvement is crucial to guard against government **inquiries that fall beyond** a reasonable scope of **inquiry** associated with considering the **proposal** and the contractor for **contract award.**

6. Follow-Up

Once negotiations have concluded and a contract award has been made, in-house counsel's efforts to mitigate risk associated with the new FSS contract should not end. Two subsequent matters warrant legal involvement. The first entails documenting the contract award. Work with the company's contract manag-

ers to ensure that the final contract award documents are clear and reflect a complete contract file. Follow-up with the government may be required to ensure the contract award is complete in all respects. Recognized ambiguities may require management briefing and consideration. Retain documents and correspondence exchanged during the proposal and negotiation process for future reference even if such documents would not normally be retained under corporate record retention policies. Such backup documentation may reflect reasonable assumptions made to respond to government inquiries. While contract managers may be primarily responsible for establishing and maintaining the contract file, legal involvement and review in setting the baseline assures that all loose ends are identified and that appropriate diligence is exercised to retain appropriate documentation of the contract award. This record could become essential should a dispute arise in the future concerning the adequacy of the company's disclosure or the intent of the parties concerning clarifications or exceptions; a complete record is important with respect to the clause.

A second function served by in-house counsel's involvement during the post-award phase is to put in place appropriate processes and procedures to ensure compliance with the requirements of the clause. The contract award documents and any clarifications and exceptions agreed to during negotiations should serve as a blue-print for developing processes and procedures. Numerous unforeseen details may arise during implementation, however. In-house counsel should be consulted to interpret operational nuances, review proposed processes and procedures, and to help train company personnel that may be impacted by new compliance systems. Training concerning PRC compliance not only impacts the effectiveness of any compliance processes and procedures, but may prevent *qui tam* allegations by employees concerning future or past activities. For most companies, it is important to establish and maintain procedures that are capable of screening all potential triggering events under the PRC and escalating such events for appropriate management consideration. Only by putting in place thorough screening mechanisms for transactions, price list changes, and concessions—each of the three general price maintenance obligations described above—can a contractor effectively manage Price Reductions compliance.

In-house Counsel's Key Role in FSS Contracts

For companies that do business in the federal market, the FSS program provides a valuable and highly sought after contract vehicle and sales tool. However, FSS contracts are based on price disclosures and contain price maintenance obligations that can be ambiguous and complicated. In order to best mitigate compliance risk, in-house counsel can play a key role in helping to structure these contracts, particularly with respect to pricing issues. Companies doing business under the FSS program should take the potential for non-compliance with the clause, and the ramifications associated with non-compliance, seriously. It is imperative that FSS contractors understand the Clause and address ambiguities associated with it as early as possible in the proposal process, if possible. Following contract award of an FSS contract, diligence must be exercised to put in place and maintain adequate compliance systems to screen, report, and make appropriate price adjustments when a price reductions event occurs.

It may be **appropriate** to retain documents and correspondence **exchanged during the** proposal and negotiation process **for future reference** even if such documents **would not** normally be retained under corporate **record retention** policies.

NOTES

1. See 48 C.F.R. 8.4.
2. Currently, pursuant to 48 C.F.R. 6.102(d), full and open competition is deemed to exist because these requirements are met. A recent study by the Section 1423 Acquisition Advisory Panel assembled pursuant to Section 1423 of the Services Acquisition Reform Act of 2003 suggested that this process is inadequate and proposed more formal head-to-head competition requirements for FSS contract orders in addition to these requirements.
3. 48 C.F.R. (GSAR) 552.238-75
4. See, e.g., clause entitled "Option to Extend the Term of the Contract (Evergreen)(I-FSS-163) (APR 2000)" in GSA Solicitation FCIS-JB-980001-B – REFRESH #20 (Issued 1/16/2007)
5. See id at (d)(1).
6. See 31 U.S.C. § 3729 et seq.
7. See 48 C.F.R. Subpart 9.4.
8. See 48 C.F.R. 552.215-72 Price Adjustment—Failure to Provide Accurate Information.
9. *www.usdoj.gov/opa/pr/2006/October/06_odag_689.html*
10. See, e.g., clause entitled "E.4 Submission of Offers-Additional Instructions (CI-FCI-2) (Mar 2004) in GSA Solicitation FCIS-JB-980001-B – REFRESH #20 (Issued 1/16/2007)

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