

ASSOCIATION OF CORPORATE COUNSEL

TITLE: Using General Services Administration Schedule Contracts to Sell to the Federal Government

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MODERATOR: John G. Horan, McKenna Long & Aldridge LLP

John Horan: Hello, everyone, this is...

Operator: Just a reminder, today's conference is being recorded.

Female: Welcome to this ACC webcast.

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 type of contracts.

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 Jay 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 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. 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, which 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.

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 Jay 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.

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 its 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 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.

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.

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 important antitrust 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.

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 Jay Carey and he is going to take you to the end here.

Jay 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 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.

Jay 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 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 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 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 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.

Jay 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.

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