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GSA Multiple Award Schedule Contracting: Lessons From 2014

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As of Sept. 30, 2014, the U.S. General Services Administration manages approximately 17,200 multiple award schedule ("MAS") contracts. This figure is down 12.25 percent from the 19,600 active MAS contracts the GSA reported in fiscal year 2012. While MAS procurements generated more than $32.7 billion in FY 2014 sales, this was 6.58 percent less than the $35 billion annual sales average the GSA has reported since FY 2006. Nonetheless, the GSA MAS program continues to be the largest interagency contracting vehicle in the federal government.

In our 2013 year-in-review article, "GSA Multiple Award Schedule Contracting: Lessons From 2013," we addressed increasing compliance tensions. The GSA's limited staffing and constrained budget contrast with the breadth of the GSA's mission to administer, audit, and police the federal government's largest interagency contracting vehicle. During FY 2014, tighter budgets and limited resources prevented the GSA's Office of Inspector General from increasing audits and investigations, as it had intended. But many MAS contracting practices remain under critical scrutiny. In fact, the OIG's reports for FY 2014 show recurring compliance problems in areas that include contractor sales monitoring, billing systems, Price Reductions clause compliance, and disclosure of Commercial Sales Practices ("CSP").

We observed some new developments. The OIG was more aggressive in challenging the extension of existing MAS contracts where pre-award audit findings were unfavorable or inconclusive. The OIG showed more willingness to challenge a contracting officer where the CO disagreed with the OIG's pre-award audit findings. Fewer contractor disclosures were subject to OIG scrutiny in FY 2014 than in FY 2013 — yet the OIG recovered more money in FY 2014 settlements.

OIG issued two semiannual reports to Congress in FY 2014, first for the October 2013 to March 2014 reporting period and another for the April 2014 to September 2014 reporting period. Among other subjects, the OIG reported on its efforts to detect fraud and mismanagement within the GSA's programs and operations, achieving millions in settlements and recoveries for the federal government. The OIG's March 25, 2014, audit memorandum, titled "Major Issues from Multiple Award Schedule Audits," offers additional insights into compliance areas of particular interest to the OIG.

Below, we take a close look at three of the OIG's FY 2014 areas of focus — pre-award audits, contractor disclosures, suspensions and debarments. We review critical compliance issues and offer important takeaways for contractors to consider.

OIG's Use of Pre-Award Audits

Pre-award audits enable the GSA to negotiate "fair and reasonable" contract prices for the government. Pre-award audits take place prior to a contractor's initial MAS award and during the renewal of a MAS contract for a five-year option. The GSA OIG explains that it considers pre-award audits a source of "vital, current information enabling contracting officers to significantly improve the government's negotiating position to realize millions of dollars in savings." The OIG asserts that, for every dollar invested in pre-award audits, the OIG achieves at least $10 in lower prices or more favorable contract terms and conditions for the benefit of government buyers and taxpayers.

In FY 2013, the OIG conducted pre-award audits of 62 schedule contracts and recommended that more than $1.2 billion funds be "put to better use." (This is a forward-looking term of art the OIG uses to denote opportunities for cost savings and cost avoidance.) In FY2014, the OIG reported pre-award audits of 55 MAS contracts and recommended that $518 million funds be put to better use. Thus, on a year-over-year basis, the OIG has not been able to increase its pre-award audits; in fact, there was an 11.29 percent decrease in pre-award audit activity and fewer opportunities to recommend cost avoidance.

Fewer audits do not result in fewer issues under OIG scrutiny. Through its FY 2014 pre-award audits, the GSA OIG has found that:

(1) Contractors' CSP and cost buildup information was not current, accurate, or complete, reducing GSA's ability to obtain fair and reasonable pricing.

(2) Proposed labor categories were not supported by commercial sales.

(3) The Price Reductions clause was violated and controls were not in place to properly administer the clause.

(4) Price reduction provisions were ineffective where companies had no sales to the basis of award customer or a basis of award customer was not identified, such that any potential cost savings would never be realized.

(5) GSA sales were underreported resulting in underpayment of industrial funding fee ("IFF") and IFF reporting process lacked internal controls to identify and allocate schedule sales by special item number.

Citing these types of unfavorable audit findings, the OIG has recommended that contracts not be extended until contractors resolve issues discovered during the audit. This has important implications for the hundreds if not thousands of contractors who in 2015 will face audits that precede renewal of their existing MAS contracts (and those who seek new contracts). Several examples drawn from the OIG FY 2014 semiannual reports illustrate areas of scrutiny and potential contractor vulnerability:

- The OIG recommended that the contract of a technical and science equipment reseller not be extended until the reseller had fully resolved several issues cited in a pre-award audit, namely whether the reseller (1) disclosed and submitted current, accurate, and complete CSPs; (2)

maintained effective sales monitoring and billing systems that ensure proper administration of price reduction and billing terms; and (3) adequately accumulated and reported schedule sales for IFF payment purposes.

- The FY 2014 semiannual reports featured an example where the OIG was unable to "accomplish the audit objectives" because the telecommunications company being audited "did not provide the information necessary to perform the audit." Due to the lack of data, the OIG recommended that the company's MAS contract not be extended. Just as a negative audit finding will cause the OIG to recommend against contract extension, the same result can occur if the pre-award result is inconclusive because of resistance or noncooperation on the part of the MAS contract holder.

- Even where the assigned CO disagrees with negative findings, rather than defer to the CO, the OIG instead may escalate to agency management. In conducting a pre-award audit of a construction company's MAS contract extension, the OIG reported negatively on CSP, sales monitoring, price reductions and IFF issues. After multiple meetings, the CO continued to disagree. The OIG escalated to agency management for resolution above the CO.

In light of OIG's focus on pre-award audits, contractors should take the following measures (at least) to prepare for closer scrutiny by OIG.

First, contractors should ensure that systems for sales monitoring, billing, and price reductions are adequate. In its March 2014 audit memorandum, OIG reported that nearly half of contractors whose sales and billing systems were reviewed in a pre-award audit showed deficiencies against which OIG recommended monetary recoveries for the government.

Contractors preparing for OIG audits should make certain that sufficient controls are in place to ensure recognition of GSA orders, appropriate billing of GSA schedule prices, compliance with the billing provisions of the MAS contract, and proper administration of the Price Reductions clause. Contractors should be alert to performance history that shows the company had no sales to the basis of award customer or a basis of award customer was not identified. This creates exposure to an OIG finding that the price reductions clause in the MAS contract is "ineffective," because the government could not realize any potential cost savings afforded by the clause. If these conditions are found, a prudent contractor should act either to make the requisite sales or, at least, prepare to negotiate a different basis of award customer.

When their CSPs change, contractors must ensure that only current, accurate, and complete disclosures are submitted to the GSA. In the March 2014 audit memorandum, the OIG expressed concern that a majority of audited contractors made flawed CSP disclosures. The OIG reported one instance in which a contractor did not submit proposed pricing for installation services on its CSP because the service is performed by dealers. Yet the contractor provided free installation services for two of the three national account agreements the OIG reviewed. Had the CO been able to negotiate the same free installation, the government could have realized $21.4 million in savings. In short, the OIG is looking closely at contractors' CSP disclosures. Contractors must be particularly diligent in updating and timely submitting

to the GSA their revised CSPs — especially those nearing renewal, if only because the pre-award audit likely will reveal these discrepancies.

Contractors should prepare for tougher negotiations with MAS COs. Throughout its semiannual reports, the OIG touts the fact that both agency management and COs overwhelmingly agree with the cost avoidances the OIG recommends in its pre-award audits. Yet, according to the same reports and audit memoranda, MAS COs are achieving less than half of the OIG's recommended cost avoidances when options to renew a MAS contract are awarded.

In one instance, the OIG's audit noted that a flawed negotiation technique was used in awarding the renewal option, realizing zero percent of the OIG's recommended cost savings. After the OIG brought this to the attention of GSA management, negotiations were reopened and 100 percent of the auditor-recommended cost savings ($49.6 million) was achieved. This indicates that the OIG will pressure COs to recover more of costs questioned and to negotiate better deals for the federal buyer. Contractors are well advised to be vigilant in monitoring performance before the audit and negotiations take place, so that few issues arise that could be obstacles to renewal.

OIG's Contractor Disclosure Program

The Federal Acquisition Regulation requires contractors to disclose credible evidence of a violation of federal criminal law as well as credible evidence of a violation of the civil False Claims Ac in connection with the award, performance, or closeout of a government contract. A contractor risks suspension or debarment should it knowingly fail to disclose such violations in a timely manner. The GSA OIG has developed procedures to process, evaluate, and act on these disclosures and created a website for self-reporting. The OIG examines each submission and determines what actions, if any, are warranted.

During FY 2014, the OIG received 17 new contractor disclosures. These concerned:

- failure to comply with contract requirements, including CSP disclosures, billings, price reduction monitoring, and the Trade Agreements Act;
- excess labor charges and unqualified labor;
- false representation of eligibility;
- billing errors; and
- employee fraud.

The 17 new disclosures in FY 2014 were fewer than the 22 disclosures made in FY 2013. In FY 2014, the OIG was able conclude its evaluation of 27 disclosures. It recovered $45,782,598 in settlements for the government — much more than the $8 million recovered in FY 2013.

The mandatory disclosure route is much better for contractors than taking the risk that the government will find noncompliance through an audit or as a result of a whistleblower complaint. MAS contract holders, familiar with the complexities of the regulatory scheme and the administrative difficulty of ensuring complete compliance, should recognize that self-assessment and self-reporting will produce less costly results than risking an FCA action and potentially a "qui tam" whistleblower suit. This point is made by the following three recent cases involving MAS contract practices:

- In May 2014, the U.S. Department of Justice announced that it had filed a complaint against CA Inc. for FCA violations in connection with its MAS contract to provide software licenses, software

maintenance, training and consulting services to various government agencies. The complaint alleges that, since at least 2006, the company knowingly overcharged the government for software licenses and maintenance by: providing incomplete and inaccurate information during negotiation of its contract extensions; failing to truthfully update its discounting practices during the life of the MAS contract when its discounts to commercial customers had increased; and failing to monitor sales to its basis of award customer, incorrectly monitoring sales to its basis of award customer, and failing to pass on corresponding discounts to the government. In a press release, the government explained "We expect companies that do business with the government to comply with their contractual obligations. ... As this case demonstrates, we will take action against those who seek to abuse the government's procurement process."

- On Nov. 20, 2014, a former employee of Siemens USA filed a whistleblower retaliation suit in New Jersey, accusing the company for firing him for questioning the company's allegedly improper contract terms with the New York Office of General Services. The employee alleges that Siemens had been offering the same prices under the state contract as it did under its GSA schedule contract, and that this arrangement violated the Price Reductions clause of the GSA contract "which required that the Federal Government receive the lowest prices for certain items and/or services" (presumably because Siemens' basis of award customer included state and local governments and the sales to New York triggered the price-discount relationship Siemens negotiated). (Importantly, the government has not intervened in this case, which remains pending.)

- Similarly, a whistleblower suit brought against Symantec Corporation alleges that Symantec knowingly submitted false statements regarding pricing and discount programs during negotiations with GSA, resulting in overpayments by buyers in Florida, California, and the federal government. Both states and the federal government have intervened in the whistleblower's suit, which is pending in the U.S. District Court for the District of Columbia. The government claims that Symantec did not provide full and accurate presentation of its discounting policies to commercial customers and did not inform the government about its "Rewards" buying program. The whistleblower alleged that she alerted her supervisors, but Symantec took no actions to alert the GSA. She further alleged that during the course of the GSA contract, the company conducted several audits to review widespread discounting by sales staff for commercial customers, but no findings were disclosed to the government. (On Dec. 10, 2014, Symantec urged dismissal of state and federal FCA claims, but no decision has been issued as of the date of this publication.)

Suspension and Debarment Initiative

The FAR authorizes agencies to suspend or debar individuals or companies for the commission of any offense indicating a lack of business integrity or business honesty that directly affects the present responsibility of a government contractor or subcontractor.

Over FY 2014, the OIG made 195 referrals for consideration of suspension/debarment to the GSA Office of Acquisition Policy. As a result, GSA management debarred 82 contractors/individuals and suspended

97 contractors/individuals. Notably, these statistics represent a decline from the FY 2013 figures when the OIG made 366 referrals for suspension/debarment and, as a result, 337 suspension and debarment actions were issued. Thus, the OIG made 46.72 percent fewer suspension/debarment referrals in FY 2014 than in FY 2013.

Nevertheless, OIG continues to make it a priority to process and forward referrals to the GSA Office of Acquisition Policy "so GSA can ensure that the government does not award contracts to individuals or companies that lack business integrity or honestly." Contractors should not take the reduced FY2014 suspension/debarment figures as an indication that GSA is no longer interested in pursuing these cases. Instead, contractors should consider themselves on notice that OIG will continue its efforts in this area, and improve their contracting procedures accordingly.

Conclusion

The GSA OIG oversees the MAS program by conducting pre-award, post-award and performance audits. It is responsible for initiating actions to prevent fraud, waste, and abuse and to promote economy and efficiency. It makes criminal referrals to the DOJ and other authorities for prosecutorial consideration, and civil referrals to the DOJ's Civil Division or to U.S. attorneys for enforcement consideration. When systemic issues are identified during investigations, including wrongdoing on the part of contractors or private individuals doing business with the government, OIG makes administrative referrals to GSA management for appropriate corrective action.

Notably, the GSA's investigative and audit resources are limited. In our 2013 year-in-review article, we observed that the OIG was staffed with approximately 270 employees. As of Sept. 30, 2014, the OIG's on-board staffing level was 283 employees, an increase of only 13 employees. The GSA's limited staffing and constrained budget does affect the OIG's mission to administer, audit and police the federal government's largest interagency contracting vehicle.

The GSA nevertheless maintained close scrutiny of MAS contract holders throughout FY 2014. Among other results, the OIG's work realized $114 million in FY 2014 criminal, civil, administrative and other recoveries for the federal government. Looking ahead, prudent contractors will maintain their schedule compliance programs, improve their reporting capabilities, and be prepared for pre-award, post-award, and performance audits. Contractors seeking exercise of GSA options to renew their MAS contracts should prepare for close scrutiny. Our perspective is that self-assessment and voluntary reporting, and disclosure when the facts warrant, are the recommended course of action in order to have the highest assurance that audits and negotiations will lead to successful schedule contract renewal.

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