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GSA Multiple Award Schedule Contracting: Lessons From 2013

Law360, New York (December 17, 2013, 11:24 PM ET) -- The U.S. General Services Administration's multiple award schedule ("MAS") program is the largest interagency contracting vehicle in the federal government. Since fiscal year 2006, GSA schedule sales have consistently topped $35 billion. GSA schedule sales have topped $17.56 billion for the first half of 2013, suggesting that FY 2013 sales again will exceed the $35 billion sales benchmark.

The GSA manages approximately 40 schedules based upon category of offering. Until the late 1990s, the GSA schedules were product-centric, containing very few services. Today, however, four of the five top-selling schedules are services-oriented. GSA IT Schedule 70, offering solutions for information technology needs, tops the list. Second is Schedule 874 for management consulting and training services (the "Mission Oriented Business Integrated Services" or "MOBIS" schedule). Schedule 871, for professional engineering services, and Schedule 84, solutions for law enforcement, round out the four top-selling schedules.

The expanding use of professional services across the government has led to challenges in virtually all aspects of GSA's MAS service contract pricing and compliance, including pre-award disclosures, post-award compliance, and GSA Office of Inspector General audits.

We review here current compliance and performance issues that challenge government officials responsible for MAS service contracts and the many companies who offer services using these contract vehicles.

Multiple Award Schedule Contracting — The Basics

The GSA's schedule allows government customers a mechanism to buy "commercial" products. Leveraging its purchasing power, the GSA demands from vendors essentially the equivalent price (or lower) that a company offers to its most favored commercial customers or, more formally, its "Basis of Award" customer. 48 C.F.R. 552.238-75 ("Price Reductions").

To obtain a schedule contract, there are obligations to disclose "Commercial Sales Practices," cost and price information, and other data needed to establish the "Basis of Award" customer. The government may unilaterally reduce a schedule contract price if it finds that a contractor failed to be complete and truthful in those disclosures. 48 C.F.R. 552.215-72 ("Price Adjustment — Failure to Provide Accurate Information").

Once a vendor receives a schedule contract, its pricing commitment to the GSA is governed by the ongoing relationship between the GSA-negotiated price and the price given to the vendor's Basis of

Award customer. Any change in a schedule vendor's pricing or discount arrangement with the Basis of Award customer can "disturb" the pricing relationship and trigger a price reduction. A company is liable for overpayments if it lowers its pricing to the Basis of Award customer, but does not extend the same discount to government customers. Retaining such overpayments can give rise to liability under the federal civil False Claims Act.

Once a company receives a schedule contract, its offerings are available to all eligible customers at the predetermined (schedule) price. Government purchasers are free to select (from schedule vendors) supplies and services that meet their needs. By design, the process by which schedule task orders are solicited and awarded is fast and simplified.

Ideally, GSA schedules enable diverse government purchasers to reach commercial sources quickly and with "built-in" assurance that prices are "fair and reasonable." For this reason, task order solicitations under the MAS program require limited information. See FAR 8.406-1. Typically, the government customer describes its requirements and seeks offers from a number of companies preapproved to sell the desired supplies or services on a fixed price basis. Supporting documentation may be solicited, but is not required.

GSA Compliance and Auditing Practices

Practical reasons explain why GSA's compliance and auditing practices have focused at the level of the schedule contracts, rather than at the level of task and delivery order awards. As of October 2012, there were 19,600 contracts in the MAS program and more than 11 million commercial products and services were available for purchase. FY 2012 GSA Agency Financial Report ("2012 AFR").

The GSA's investigative and audit resources are limited. The GSA's OIG is staffed with approximately 270 employees — not a large number measured against the 19,600 schedule contracts and the many thousands of task orders awarded and performed annually. The GSA's OIG conducted pre-award audits of schedule contracts that recommended adjustments of over $326 million in proposed contract cost avoidances and over $9 million in recoverable overcharges. The proposed adjustments represent less than 1 percent of the $39 billion in MAS sales during the same period.

The GSA is surely interested in assuring compliance with MAS program pricing requirements. Due to constraints in audit resources, however, not all contracts that meet the GSA's audit threshold ($35 million over five years) have received an audit, the GSA admits. FY 2012 Annual Performance Report and FY 2014 Performance Plan ("2012 APR").

The GSA's resource constraints directly impact its ability to address MAS practices at the task order level. Enforcing pricing and other compliance obligations largely depends upon selective audits by the OIG, well-publicized federal investigations and prosecutions (as explained below) and, increasingly, actions brought by "whistleblowers" under the False Claims Act. While the likelihood may be small that an individual MAS contract will be audited, or that its post-award performance will be investigated, there can be very serious consequences where a vendor finds itself under hostile government scrutiny of pricing and award practices.

The March 2013 Special Report on Pre-Award Audits

In March 2013, the GSA OIG Office of Audits issued a special report based on 53 FY 2011 pre-award audits of MAS contracts with approximately $8 billion in estimated sales for their pending five-year

option periods. As a result, GSA auditors made $240 million in recommended cost avoidances to the contracting officers tasked with administering the audited contracts. The 2013 special report highlighted the three most commonly occurring “major issues” for GSA vendors.

1) The majority of audited vendors (69 percent of those that submitted commercial sales practice disclosures) were deemed to have provided commercial sales practices information that was not current, accurate, and complete.

The GSA OIG concluded, in the special report, that erroneous disclosures adversely affected the contracting officers’ determination of “fair and reasonable” pricing for those contracts. Notably, FY 2011 was book-ended by two settlements with Oracle companies. On Jan. 31, 2011, the GSA arrived at a $46 million settlement with Oracle America Inc. to resolve, among other things, price reduction clause noncompliance by Sun Microsystems Inc., a corporation that merged with Oracle in 2010. The GSA’s Oct. 6, 2011, settlement with Oracle Corporation and Oracle America Inc., in the amount of $199.5 million, was the largest False Claims Act settlement the GSA has ever obtained. This settlement resolved, among other things, Oracle’s purported knowing failure to provide GSA with current, accurate and complete information about its commercial sales practices, including discounts offered to other customers.

2) Next, according to the 2013 special report, a significant portion (34 percent of audited vendors) had minimal (less than 5 percent) or no commercial customers for products and services offered under the MAS program.

The absence of bona fide commercial sales undermines one of the essential predicates of the MAS program. As expressed in the 2012 AFR: “In GSA’s Schedules Program, the contracting officer evaluates a contractor’s prices or discounts offered by comparing them to prices or discounts the contractor offers to commercial customers. Therefore, the contracting officer’s price analysis is a key step in determining fair and reasonable pricing.” Absent a commercial customer (or a bona fide price for a commercial product or service), this comparison is a functional nullity.

When dealers and resellers lack adequate commercial sales, the reseller must obtain and provide its manufacturer’s commercial sales data and practices, “if the manufacturer’s sales under any resulting contract are expected to exceed $500,000.” See 48 C.F.R. 515.408(b)(5). “Th[is] information is required in order to enable the Government to make a determination that the offered price is fair and reasonable.” The contracting officer may require additional supporting information, but only “to the extent necessary to determine whether the price(s) offered is fair and reasonable.” 48 C.F.R. 515.408(a)(3).

The disconnect between commercial and MAS sales should prompt contractors to regularly update their disclosed commercial sales practices and may require removal of products or services from a vendor’s schedule where there are no commercial customers. Failing to proactively resolve such disconnects may lead to audit problems and FCA liability for vendors.

3) Last, in one-third of the 21 audited service contracts cases, the GSA determined that customers were overcharged for professional services where vendors supplied labor that did not meet the minimum educational and experience qualifications proposed by the vendor and required by the contracts.

Notably, some vendors were unable to show that the offered labor categories were comparable to those offered commercially. The alternate cost buildup information they provided showed that the proposed rates were overstated in several respects. The proposed general and administrative and

overhead rates were too high, and an incorrect methodology was used in calculating the direct labor base; it included indirect and overqualified employees. In one instance, GSA auditors found that 43 percent of a vendor's employees assigned to GSA schedule task orders during the audit period did not meet the educational qualifications outlined in the contract. In another case, GSA auditors identified the use of incorrect billing rates for subcontract labor and concluded that the government was due a refund of $18.8 million.

Remarkably, in the realm of service contracting, the GSA OIG reported an increase in noncompliance from fiscal year 2010. Contractors providing unqualified labor increased from 27 percent in fiscal year 2010 to 33 percent in fiscal year 2011. Thus, according to GSA OIG, approximately one-third of MAS service contractors are providing unqualified labor under GSA contracts, and the data suggests the compliance trend is negative.

Persistent Compliance Issues Facing Service Contractors

A review of the 2012 and 2013 MAS audits, investigations, and settlement announcements published by the U.S. Department of Justice and the GSA OIG demonstrates that the problems highlighted in the 2013 special report are persistent, particularly for service contractors.

- On July 12, 2013, the Gallup Organization agreed to pay the United States $10.5 million to settle allegations that, among other things, it improperly inflated contract prices. The GSA OIG and DOJ investigated after a former Gallup employee filed a quit tam complaint alleging that Gallup knowingly overstated its estimated labor hours in proposals for contracts and task orders by the U.S. Mint and the U.S. State Department.

- On Oct. 28, 2013, Axway Inc. of Baltimore agreed to pay the United States $6.2 million to settle allegations under the False Claims Act that it and its predecessors provided GSA with defective pricing information in order to obtain and maintain a GSA MAS contract that permitted them to sell software licenses and related services to federal agencies at inflated prices. According to the settlement agreement, on Oct. 3, 2001, the GSA awarded an MAS contract to Valicert Inc. for the sale of software licenses and related services. Valicert subsequently merged in 2003 with Tumbleweed Communications Corporation, which in turn merged with Axway in 2009. GSA approved the novation of the MAS contract to these successors. From 2001 to Dec. 31, 2011, numerous federal agencies purchased products and services from Valicert, Tumbleweed and Axway based on the MAS contract pricing. The settlement resolves allegations that numerous government agencies relied on the inflated prices and overpaid for their purchases of software and related services.

- On Nov. 12, 2013, CA Inc., of Islandia, New York, agreed to pay the United Sates $8 million in connection with its contract to provide software maintenance services, including upgrades and technical assistance. The government's investigation established that CA knowingly double-billed federal agencies by charging for periods of software maintenance for which the agencies had already paid. Specifically, when federal customers entered into software maintenance renewal agreements with CA, the company began the renewal periods on the day CA processed the order, rather than the day after the expiration of the customer's then-existing maintenance period. In response to the settlement, GSA Inspector General Brian D. Miller said "The federal government cannot afford to be overcharged. We need to save every taxpayer dollar we can."

For government and industry alike, the compliance challenges present in GSA schedule contracting for services (and solutions) reflect a fundamental tension. A key premise of schedule contracting is that a schedule price is deemed "fair and reasonable" by reference to an established and verifiable commercial sales price. If — for illustration — MAS awards were limited only to supplies, validation of the commercial pricing basis would be relatively straightforward; the MAS schedule price could be checked against the relevant commercial price list.

By their very nature, services are less susceptible to "commoditization" because services involve variable and qualitative elements, such as "productivity" or "skill level." The MAS advisory panel final report, in February, observed that: "The current pricing structure and organization of the MAS program is not designed to facilitate the acquisition of solutions. A majority of the panel observed that the MAS program was originally contemplated to be used for the purchase of goods."

The business practices and pricing used by professional services contractors do not perfectly align with the GSA contracting model. Labor categories used commercially often do not align with (i.e., do not "map to") GSA labor categories. In contrast to the "static" character of services on the GSA schedule, in commercial work, service contractors frequently do not use (and may not have) a published commercial pricelist for services.

Pricing actions may reflect a panoply of business and resource situations that fit the context of a given job opportunity, and decision-making authority may be dispersed to channel or sector executives rather than centralized. All of these "real world" commercial conditions create inevitable difficulties when forced to fit the eligibility, disclosure and compliance requirements for a GSA MAS contract. Various reports to and from GSA reflect recognition of these challenges. The 2012 AFR observes:

It has been our experience that many Schedule contractors sell exclusively to the federal government or create corporate structures to organizationally segregate their commercial business from their government business. We have also found that when a commercial market exists for a contractor's services, the work is performed on a firm-fixed price basis, which is not comparable to the hourly labor rates proposed on a time and materials basis under GSA Schedules. These scenarios present challenges to a contracting officer's ability to perform valuable price analyses.

Yet, the GSA intends to enforce schedule contract requirements as best it can, given its available resources. The 2012 APR commits the agency to increase the number of pre-award audits. It also notes the GSA's concern that some Schedule contractors do not fully comply with the terms and conditions of their schedule contracts —70 percent of commercial sales practices documents, according to this report, contained data that was not current, accurate, or complete. The GSA also found that vendors have misrepresented their actual sales prices.

The GSA's OIG is motivated to perform pre-award, post-award and performance audits; it observes, in the 2013 OIG report: "Historically, for every dollar invested in our preaward audits, we achieved at least $10 in lower prices or more favorable contract terms and conditions for the benefit of the Government."

Based on the GSA OIG's special report and the trend in settlement announcements, the agency's enforcement resources know that compliance and pricing issues frequently arise in MAS service and solution contracts. Resource constraints probably will mean that enforcement actions will focus at the schedule contract level and upon those contracts of highest dollar value.

In the 2013 special report, the GSA OIG recommended in relevant part that contracting officers evaluate the labor qualifications of service contractor employees, the discount information included with contractors' commercial sales practices disclosures, and the systems contractors use to accumulate and report schedule sales.

Vendors should anticipate, in 2014, increased scrutiny of labor qualifications and the existence of bona fide commercial customers and services. The government has a many means to "motivate" industry compliance, including contractual, administrative, civil and criminal remedies, and debarment/suspension. We may see acts by the government to further encourage (and publicize) "whistleblower" actions about MAS contract practices — as a way to "privatize" enforcement pressure through the exposure and liabilities of the False Claims Act.

MAS service contractors have many reasons to self-assess and act to improve compliance, but a strain exists between the structure and rules of the MAS system and the actual (but very different) business practices of representative service providers.

Pursuing technical discrepancies in labor qualifications or imperfect alignment of commercial and schedule pricing may be an unwise use of GSA's investigative resources where the schedule service provider has satisfied its customer's objectives at a fair and reasonable price.

This invites a further question that eventually ought to be resolved by updating the MAS system — when a customer purchases services or solutions off a schedule, should compliance be a function of the "inputs" (e.g., expected costs or composition of labor) or the "outputs" (delivery of the results contemplated by the order)?

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