

COMMERCIAL ITEM CONTRACTING AND GSA FEDERAL SUPPLY SCHEDULES

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Overview

- Commercial item contracting
 - Policy considerations and shifts over time
 - Commercial item determinations (CIDs)
 - Pricing commercial items
- GSA Federal Supply Schedule (FSS) contracts
 - Commercial sales practices disclosures
 - Price Reduction Clause
 - Sales tracking and Industrial Funding Fee (IFF)
 - Trade Agreements Act
 - Audits and enforcement

Commercial item procurements

- Federal Acquisition Streamlining Act of 1994 (FASA)
 - Reduce regulatory burden to encourage commercial companies to supply the government
 - Provide incentive for USG and its prime contractors to source commercial products
- Clinger-Cohen Act of 1996
 - Defined subset of commercial items: commercially available off-the-shelf (COTS)

Commercial item procurements

- More favorable terms/reduced risk
 - “Changes” must be bilateral
 - Exception from the Truth in Negotiations Act (TINA) and Cost Accounting Standards (CAS)
 - Reduced audit rights
 - Fewer mandatory clauses
 - Reduced administrative burden generally
- Simplified Acquisition

Commercial item procurements

Definitions of “Commercial Item” – FAR 2.101

- 1) Of a type customarily used by the general public for purposes other than governmental purposes, and—
 - (i) Has been sold, leased, or licensed to the general public;
or
 - (ii) Has been offered for sale, lease, or license to the general public.

- 2) Technologically evolved from (1) and will be available in commercial marketplace in time.

Commercial item definition

3) Would be (1) or (2) except for modifications of a type customarily available in commercial marketplace or minor non-commercial modification made to meet Federal Government requirements.

Commercial item definition

- 4) Combinations of (1), (2), (3) and (5).
- 5) Installation, maintenance, repair, training, other services in support of (1)-(4) items, if similar services are provided contemporaneously to the general public under similar terms and conditions.
- 6) Services of a type sold in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved.
- 7) Non-developmental items, if developed exclusively at private expense and sold in substantial quantities on a competitive basis to multiple state and local governments.

Commercial item procurements

- “Of a type” analysis
 1. “Of a type” customarily used by the general public or by non-governmental entities for purposes other than governmental purposes
 - Qualifying items do not have to be identical to those in the commercial marketplace
 2. Has been offered for sale, lease, or license to the general public
 - Company does not have to show that it has made a contractual offer to a non-government customer
 - If company is able to show “various advertising and marketing efforts,” including having “standard product brochures” that may be sufficient
 - Indicia that a product has been “offered for sale” include: listing the product on a website for sale, delivering prototypes or test systems, producing and making available advertising materials

Commercial Item Service

- Any Service
 - Of a type offered and sold competitively in substantial quantities in the commercial marketplace;
 - Based on established pricing (catalog or market);
 - Specific tasks performed or achieved; and
 - Standard commercial terms and conditions.

FAR 2.101(6)

COTS – Commercially Available Off the Shelf

- A COTS item is any supply item including construction, that is:
 - A commercial item as defined in FAR 2.101(1).
 - Sold in substantial quantities in the commercial marketplace.
 - Offered to the federal contract (or subcontract) without modification, as sold in the commercial marketplace.

FAR 2.101

While COTS items are, by definition commercial items, not all commercial items are COTS.

Commercial item procurements

- Who decides?
 - Government contracting officer
 - Higher-tier contractors
 - The Court?
- Role of certifications / dealing with certification requests

Prior commercial item determinations

- 10 U.S.C. § 2306a(b)(4) / 2016 NDAA
 - CO “may presume that a prior commercial item determination made by a military department, a Defense Agency, or another component of the Department of Defense shall serve as a determination for subsequent procurements of such item.”
 - If the CO does not make this presumption, must have review by head of contracting activity, who issues a written determination

Impact on Government Contracting

- Prime and subcontractors are only required to accept a smaller number of FAR clauses
 - Offeror Reps and Certs
 - Contract Terms and Conditions
 - Statutes and Executive Orders

Commercial item pricing

- Where procurement qualifies as a “commercial item”, CO is prohibited from requiring “certified” cost or pricing data
 - Can ask for data
- Only gets rights in data “customarily provided to the public” *except* as provided by agency specific statute

Commercial item pricing

- “Data *other than* certified cost or pricing data”
- Defined term that can include:
 - Pricing data
 - Cost data
 - Judgmental information
- What you provide likely will depend on commercial item justification

Commercial item pricing

- Catalog or Market prices
 - For same or similar items
- Managing the discussion
 - Precise description of data provided and its source and reliability
 - Provision of cost data is last resort, even if not certified

Benefits of Commercial item Contracting for Contractors

- Less onerous contract requirements
- Easier to administer
- Compliance risk reduced
- Greater subcontracting opportunities
- But . . . Still Some Risk
 - False Claim and Statements
 - Compliance Obligations

GSA Federal Supply Schedule (FSS) contracts

- Federal, state, and local government buyers spent almost \$45 billion through GSA Schedule Contracts and VA Schedule Contracts in FY2016
- Very broad range of products and services; e.g.:
 - Information technology equipment, software, and services
 - Pharmaceutical products
 - Medical devices
 - Professional consulting services
 - Professional engineering services
 - Solutions for law enforcement and security
 - Office products and supplies
 - Facilities maintenance and management
 - And more!

GSA schedule contracts



- GSA is the lead procurement agency
 - Delegation of procurement authority to VA for medical supplies and equipment
 - Veterans Health Care Act of 1992 – Section 603: the VA Pricing Program
- GSA establishes long-term “schedule” contracts with pre-negotiated prices and terms and conditions
- Contracts open Government-wide (and beyond)
 - “Cooperative Purchasing” (products and services available to State and Local government entities)
- GSA and VA MAS contracts often preferred contracting vehicle



VA | U.S. Department
of Veterans Affairs

GSA schedule contracts

- GSA Schedule contracts limited to “commercial items” under the FAR definition (FAR 2.101)
- Program not appropriate for non-commercial items such as R&D work

GSA schedule contracts

- Streamlined “simplified ordering procedures” for federal customers
- In general, ordering agencies need not:
 - Seek further competition
 - Synopsise the requirement
 - Make a determination of fair and reasonable pricing (exception = DoD)



GSA schedule contracts

- Ordering mechanics:
 - Agency issues individual Task Order (TO) or Delivery Order (DO) to the MAS contractor
 - DO/TO references the MAS Contract Number
 - No separate negotiations of terms and conditions
 - Ok to include additional terms in “best interest” of Government, so long as no conflict with MAS terms
 - Ok to offer additional discount on prices

GSA schedule contracts

- On-line resources at <http://gsa.gov>
- GSA Vendor Support Center
<http://vsc.gsa.gov/>
- GSA E-Library
<http://www.gsaelibrary.gsa.gov/ElibMain/home.do>
- VA FSS Schedule Website
<http://www.fss.va.gov/>

Compliance “hot button” risk areas



Commercial Sales Practices (CSPs)

- Requirements:
 - Mandatory contractor pricing and sales and discount disclosures
 - Disclose by customer and customer type
 - CSP-1 Form before initial contract award and with each 5-year contract extension
 - Pricing information must be “current, accurate, and complete”

Commercial Sales Practices (CSPs)

- Key concepts
 - GSA's and VA's tool for negotiating pricing for the Schedule contract
 - Contractor discloses in substantial detail its discounts and other concessions granted to all customers
 - CSP for all Special Item Numbers (SINs)



Commercial Sales Practices (CSP) Chart

Column 1 - Customer	Column 2 - Discount	Column 3 – Quantity/ Volume	Column 4 – FOB Terms (Designation or Origin)	Column 5 – Concessions (Including Prompt Pay)

Commercial Sales Practices (CSP)

- “Customer” = all purchasers except the federal government
 - OEMs, VARs, state and local government agencies, distributors, educational institutions, national accounts, consumers, dealers
- “Discount” – any reduction to published or unpublished catalog prices (GSAR 552.212-70(a)); includes:
 - Rebates
 - Quantity/volume discounts
 - Purchase option credits
 - Any other T&Cs that reduce the end user’s overall acquisition cost for the product or service
- “Concession” – any benefit, enhancement or privilege (other than a “discount”) that reduces overall acquisition costs or encourages the customer to consummate a purchase (GSAR 552.212-70(a)); includes:
 - Freight allowances
 - Extended warranties
 - Extended price guarantees
 - Free installation
 - Bonus goods



Commercial Sales Practices (CSP)

- You must understand your sales transaction data in order to properly prepare CSPs
- Sales transaction data often does not match contract pricing and discount and pricing policies and procedures
- “Best practices” is to use sales transaction data for date range of 12 months prior to CSP date

Commercial Sales Practices (CSP)

- Understanding sales transaction data
 - What are “standard” discounts?
 - What are range and frequency of “non-standard” discounts?
 - What are average discounts by customer and customer type?
 - Different ways of describing discounts (ranges, maximum, maximum at various percentiles, average, weighted average)

Commercial Sales Practices (CSP)

- Standards for MAS contract pricing:
 - GSA/VA must make “fair and reasonable” pricing determination (FAR Subpart 15.4)
 - Negotiating objective begins at MFC pricing
 - Most Favored Customer (also known as Tracking Customer and Customer of Comparability) pricing not required where sales data demonstrates that MFC is not appropriate

Commercial Sales Practices (CSP)

- Distinguishing your MFC :
 - Volume commitments
 - Less favorable non-price T&Cs
 - Customer relieves you of tasks you perform for GSA customers
 - Customer purchase history
 - Other factors



Commercial Sales Practices (CSP)

- Proposed Basis of Award (BOA) customer(s) may be identified in CSP submission
 - Negotiated
- Keep BOA customers as narrow as possible
 - Customers vs. customer groups
 - Avoid “all commercial customers”!
 - Individual contracts if your customers are mostly Government
 - Different BOA allowed for each item and SIN

Commercial Sales Practices (CSP)



- Selecting proposed BOA
 - Will have to justify if you don't proposed MFC customer categories for BOA
 - Systems must be capable of tracking all “discounts” and “concessions” granted to BOA customers
 - Propose a BOA that you can track using existing systems and processes
 - Expressly exclude from application of the Price Reduction Clause ad hoc discounts and concessions that you cannot reasonably track

Commercial Sales Practices (CSP)

- CSP preparation and submission:
 - Review internal pricing policies and procedures
 - Review contracts
 - Review raw sales data
 - Talk to sales people/account teams
 - Keep a copy of “due diligence” efforts (in case of audit)

Price Reductions Clause (PRC)

- On-going obligation to GSA/VA
- Price reductions triggered if:
 - Reductions in commercial price list
 - Discounts to BOA customers that “disturb” the BOA-GSA/VA relationship
 - Important to understand the relationship and what constitutes a triggering event!
 - Use CSPs and Final Proposal Revision (FPR) to define what triggers PRC, negotiate alternative PRC compliance mechanisms (e.g., average discount monitoring)
 - If PRC is triggered, contractor must reduce GSA/GSA Schedule contract price on “same date” and for “same duration” as the triggering discount

Price Reductions Clause (PRC)

- Risk areas
 - Failure to monitor BOA sales transactions
 - Reliance on outdated or inaccurate pricelists
 - Untrained sales and order entry staff
 - Poor communication between sales, contract management, and finance



Transactional Data Reporting (TDR)

- Final rule implementing pilot program:
10/13/2016

Schedule	Description	SINs
58 I	Professional Audio/Video	All
72	Furnishings & Floor Coverings	All
03FAC	Facilities Maintenance & Management	All
51V	Hardware Superstore	All
75	Office Products/Supplies	All
73	Food Service, Hospitality, Cleaning Equipment	All
70	Information Technology	132-54, 132-55, 132-32, 132-33, 132-34, 132-8
00CORP	Professional Services Schedule (PSS)	Services

TDR

- Requires contractors to submit monthly reports detailing transaction-level data on sales to federal customers of items on the Schedule
 - 11 data elements to submit
 - Format options
- No PRC clause (no tracking of BOA customer)
- No CSPs.... BUT
 - Not required to provide or maintain CSPs. However, contracting officers have the option of requesting additional data to make fair and reasonable price determination
- Challenges:
 - Configuring reports
 - Complex items and special terms and conditions

Industrial Funding Fee (IFF)

- 0.75% fee for GSA
- 0.5% fee for VA (except 1% for 2 schedules (services) 621I and 621II)
 - based on dollar value of sales under the contract charged to ordering agencies
- Contractors remit to GSA or VA on quarterly basis
- Problem areas:
 - Identifying GSA/VA schedule orders in order entry system
 - Ensuring accurate data entry by sales and operations



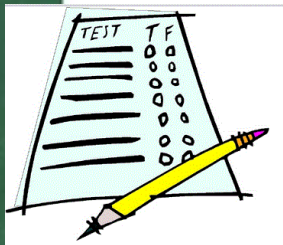


Trade Agreements Act (TAA)

- Waives BAA and opens procurement to end products from “designated countries”
- TAA applies to all MAS contracts
 - And all orders under a MAS contract, regardless of order value
- Absolute prohibition on acquisition of end products and services from “non-designated” countries (e.g., China, Malaysia, India)
 - Unlike the BAA, there is no unreasonable cost exception!

Trade Agreements Act (TAA)

- Rule of origin
 - Country in which article was “substantially transformed” into a new and different article
 - Yes = manufacturing processes complex and meaningful
 - No = assembly minimal or simple
 - Difficult test to apply, fact-specific
- U.S. Customs And Border Protection (CBP) has authority to make binding country of origin determinations for purposes of the TAA



Trade Agreements Act (TAA)

- Risk areas:
 - “Substantial transformation” challenging to apply
 - Spares and ancillary parts
 - Changes in supply chain
 - Multiple countries of origin

TAA Unique Compliance Risks for VA Schedule Contracts

- Difficulty with the Active Pharmaceutical Ingredient (“API”)
- The VHCA requires manufacturers of covered drugs to offer them for sale on the FSS contract as a condition of participation in Medicaid
 - Classifications “ineligible” for TAA
 - Offer on the VA FSS
- VA view – it is the responsibility of the manufacturer to correctly classify the offered products

Other TAA issues - VA

- Determination of unavailability or inefficient supply of pharmaceuticals
- Risk of product shortfalls
- Non-FSS purchasing agreements
- Prime Contracts

Audits

- Types of audits and reviews
 - Pre-award audits
 - Post-award audits
 - IFF audits
 - Contractor Assistance Visits (CAVs)
- Audit Risks
 - Proposal pricing disclosures/defective pricing
 - PRC monitoring
 - TAA compliance
 - Labor qualifications
 - IFF payments



Enforcement mechanisms

- Mandatory disclosure
- False Claims Act
- Suspension and debarment
- Contract termination
- Past performance reviews and ratings



How to minimize risk

- Full disclosure! Make sure CSPs are current, accurate, and complete
- Carefully define BOA customer and PRC triggering events
- Track sales to BOA customer(s)
- Monitor supply chain; maintain country of origin certifications
- Implement a robust compliance program
 - Policies and procedures
 - Training
 - Audits/reviews



QUESTIONS?

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