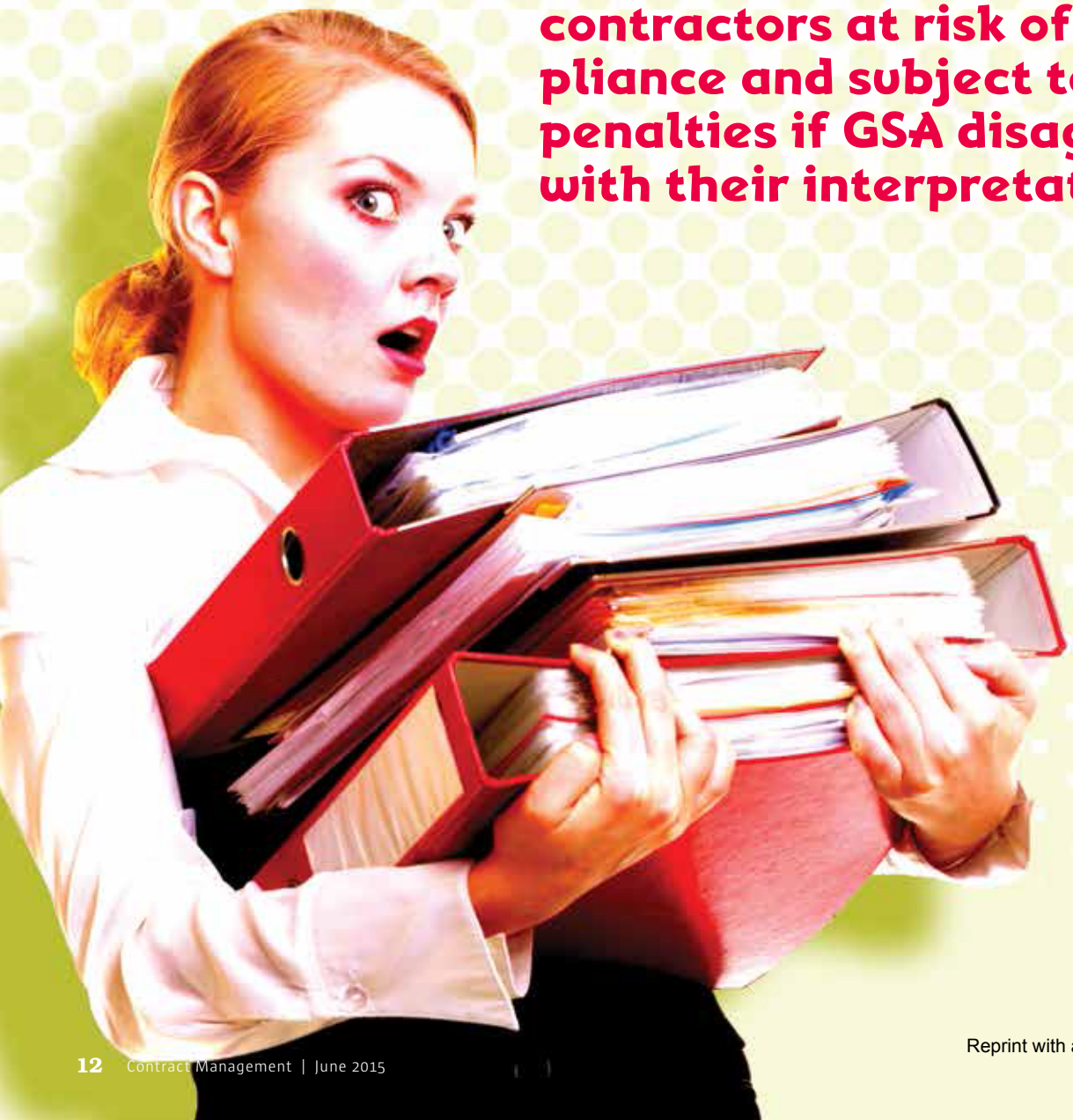
Common "Conceptions" in GSA Schedule Contracting

This article seeks to help contractors better understand their disclosure and compliance obligations by clarifying several common misconceptions in GSA Schedule contracting.

By JENN THORSON and GABE CHAMI

U.S. General Services Administration (GSA) Schedules are intended to simplify commercial item contracting. However, many contractors end up confused by poorly defined rules with little to no guidance on how to comply with them. This leaves many contractors at risk of noncompliance and subject to hefty penalties if GSA disagrees with their interpretations.



GSA and Department of Veterans Affairs (VA) Schedules are multiple-award contract vehicles within the Federal Supply Schedules (FSS) program that provide a venue for contractors to sell commercial products and services to the U.S. federal government. Currently, there are over 19,000 contractors who offer more than 11 million products and services across more than 40 GSA Schedules. GSA Schedule contracts are awarded based on a contractor's disclosures of their commercial sales practices. As these are 20-year contracts (a five-year base contract with three five-year options), the government uses commercial market forces and various clauses (such as the "Price Reductions Clause" (PRC)[1]) to ensure they receive fair and reasonable prices throughout the life of the contract.

The following are some common "MythConceptions" about GSA Schedule contracting.

MythConception #1: The Basis of Award (BOA) and the Most Favored Customer (MFC) Must be the Same

➢ No.

While GSA contracting officers may use these terms interchangeably and many contractors have GSA Schedule contracts in which their BOA is set equal to their MFC, it is important to understand that these terms are distinct.

The MFC is simply the customer (or category of customers) that receive a contractor's best pricing. The MFC is referenced as a part of a contractor's disclosures so that the government has all necessary information in order to negotiate fair and reasonable pricing.

In contrast, the BOA is determined through contract negotiations. The BOA is a customer (or category of customers) that serves as the basis for establishing the price/discount relationship that must be preserved throughout the life of the contract. Contractors usually prefer a BOA customer group that is comprised of a very limited number of customers in order to facilitate the PRC monitoring and compliance. The general rule of thumb is that the BOA should consist of similarly situated customers who are purchasing the same offering, in a similar manner, at roughly the same sales volume as GSA buyers. For example, customers such as value-added resellers (VARs),[2] who are clearly purchasing in a different manner than GSA customers, should not be considered a comparable customer. In summary, the BOA and the MFC can be, but they do not necessarily have to be, the same.

MythConception #2: The Government Should Always Receive a Contractor's MFC Discounts

➢ Not necessarily.

While the government should receive fair and reasonable pricing, it is not necessarily entitled to the best price a contractor ever offered for a given product or service. Although GSA's stated objective is to obtain MFC pricing, it is not a requirement.

There are many reasons why GSA may not be entitled to the contractor's MFC pricing. Per *GSA Acquisition Regulation* (*GSAR*) 538.270, "Evaluation of Multiple Award Schedule (MAS) Offers," the government acknowledges that it may not be entitled to the best price:

> The government will seek to obtain the offeror's best price (the best price given to the most favored customer). However, the government recognizes that the terms and conditions of commercial sales vary and *there may be legitimate reasons why the best price is not achieved*."[3]

The clause even gives examples of circumstances where a commercial customer may receive a better price:

> [T]he customer (*e.g.*, dealer, distributor, original equipment manufacturer, other reseller) who receives the best price may perform certain value-added functions for the offeror that the government does not perform. In such cases, some reduction in the discount given to the government may be appropriate.[4]

With that said, contractors have an obligation to disclose all discounts granted to their commercial customers (and in some cases, their most favored federal customers) for any and all reasons. If a contractor believes that GSA should not be entitled to MFC discounts, it must clearly explain why the discounts offered were made under circumstances, terms, and/or conditions that are different than those to which GSA can meet or commit.

MythConception #3: Certain Sales Can be Considered "Non-Comparable" and Do Not Trigger the PRC

➢ It depends.

Understanding what can and cannot trigger the PRC is one of the more fundamental aspects of a contractor's compliance program. The PRC serves as the mechanism for ensuring that the pricing the government receives remains fair and reasonable throughout the life of the contract. Negotiated GSA Schedule discounts are tied to the disclosed BOA discounts. If a BOA customer is granted a discount (or concession) deeper than what was disclosed, the contractor must offer GSA a reduced price, maintaining the discount relationship, for the same period of time that it was extended to the BOA customer.

Many contractors believe that they have unique customers and transactions that are dissimilar from GSA purchases and, as such, should be considered non-comparable. While this may be true, contractors are still obligated to fully disclose all of their commercial sales practices to allow the government to determine what is or is not fair and reasonable pricing. As a part of negotiations, contractors can describe the reasons why such customers and transactions are unique, and attempt to have them excluded from PRC compliance.

Contractors should be mindful that the only regulatory exceptions to the PRC are:

- Sales to commercial customers under firm-fixed-price definite quantity contracts with specified delivery in excess of the maximum order threshold,
- Sales to eligible ordering activities under the contract,
- Sales made to state and local government entities purchasing through the GSA Schedule vehicle, and
- Sales caused by an error in quotation or billing.

Although these are the only regulatory exceptions to the PRC, the following are examples of customers and transactions that many contractors believe are non-comparable:

- Sales to customers who sign up for multi-year contracts—The government does not typically commit to purchases spanning across multiple fiscal years. (Exceptions include contracts conditioned upon the "Availability of Funds Clause,"[5] or in accordance with statutory authorization.[6])
- Sales to customers who pay for products or services in advance—The government pays GSA contractors' invoices in arrears.
- Sales to commercial customers, such as dealers, resellers, or partners, who perform additional value-added functions for the contractor, including sales or marketing—The government does not perform sales, marketing, or any other activities on behalf of the contractor.
- Sales to commercial customers purchasing a bundled product or service solution, where pricing is established for all items in combination—GSA pricing is *generally* established on a line item basis and the government may not be purchasing all items in a solution to qualify for the bundled discount.

GSA understands and acknowledges that contractors offer a variety of discounts to their customers under various circumstances in the commercial marketplace. While contractors may believe that the government is not entitled to all of their commercially offered discounts, they still have an obligation to fully disclose those practices. Contractors should gather the necessary supporting documentation and be prepared to negotiate these positions with the government. Only exceptions that the government formally incorporates into the final contract award documentation should be considered as true exceptions to the PRC.

MythConception #4: Sales to Federal Prime Contractors are Federal Sales and Do Not Need to be Disclosed

➢ **No.**

GSA views sales to prime contractors as commercial sales, even when the federal government is the ultimate end user. The distinction is made as it relates to the contractual relationship between parties. When selling to a prime contractor, the contractual relationship is between the subcontrac-

tor and the prime contractor. Even though the government is the end user, it is not officially a party to the contract.

As an example, the "Price List Preparation" worksheet within the MOBIS solicitation[7] requires the contractor to disclose MFC information. This worksheet includes an important statement that merits contractors' attention: "Note: GSA includes federal prime contractors as commercial customers." This note is present in most, if not all, GSA Schedule solicitations. As GSA considers sales to prime contractors to be commercial sales, all discounts offered to them must be included in their commercial sales practices (CSP) disclosures.

Generally, the only instance in which sales to prime contractors can be excluded from a contractor's CSP disclosures is when the prime contractor obtains a "letter of authorization" from the government allowing the prime contractor to purchase goods or services to fulfill specific contract requirements.[8] These orders are considered to have been made pursuant to the GSA Schedule and thus these discounts do not need to be included in the CSP.

Not only are prime contractors considered to be commercial customers, but GSA also regards state and local governments as commercial customers. The primary exception is when state and local governments purchase through a contractor's GSA Schedule using cooperative purchasing or disaster recovery.[9] Many state and local governments have set up parallel contracts that are linked to GSA Schedule pricing. While these contracts appear to be very similar to GSA Schedule contracts, they are not. Contractors need to be aware of GSA's stance and ensure that state and local government customers are specifically excluded from the negotiated BOA when appropriate.

Contractors are obliged to understand which customers are included in their BOA, and to monitor sales to those customers accordingly for the life of their Schedule contracts. CSP disclosures should encompass all of a contractor's commercial customer classes, including prime contractors and state and local governments purchasing outside of the GSA Schedules. Failure by a contractor to understand which customers comprise their BOA could lead to triggering discounts resulting in costly PRC violations.

MythConception #5: The Only Way to Trigger the PRC is to Grant Prices or Discounts to BOA Customers that are Better than Those Negotiated with GSA

➢ It depends.

Every GSA Schedule contract has several key provisions that are negotiated at contract award (e.g., BOA, discount relationship, and exceptions to the PRC). Every contractor should develop a compliance program that monitors BOA sales in accordance with their specific contract provisions. The following are specific types of price reductions that need to be monitored.

Discount Relationship

Discount relationships are most often negotiated in one of two ways. The first is when the GSA discount is set equal to the BOA discount. For example, the BOA customer receives a five-percent discount[10] and GSA receives a five-percent discount (i.e., a 1:1 discount relationship). When a contract is set up in this manner, contractors can grant discounts to BOA customers up to those discounts that were negotiated with GSA without triggering the PRC.

The second most common type of relationship is one in which GSA receives a discount in addition to the BOA discount. For example, the BOA customer receives a zero-percent discount and GSA receives a five-percent discount (i.e., a five-percent discount relationship). In this case, many contractors are unaware that any discount granted to a BOA customer would disturb the negotiated relationship and be considered a trigger to the PRC, even if it does not exceed the five-percent discount received by GSA. Contractors must ensure that the

discount relationship agreed upon at contract award is maintained throughout the life of the contract.

Concessions

Non-price-related concessions, in addition to price-based discounts, need to be included in a contractor's CSP disclosures. Examples of non-price-based concessions include, but are not limited to:

- Additional/extended warranties,
- Longer payment terms, and
- Free or discounted shipping charges.

These transactions must be monitored and reported if they are provided to a BOA customer in excess of the initial disclosure.

Commercial List Price

Another element to PRC compliance is a contractor's commercial price list. A reduction in the commercial price of an item listed on the contractor's GSA Schedule must be passed on to GSA. The PRC states that contractors have an obligation to notify the contacting officer in writing of any price reduction no later than 15 calendar days after its effective date.

GSA Schedule contractors must understand their PRC obligations in order to properly negotiate[11] their contract and to set up an adequate compliance program. In the absence of this understanding, contractors may find themselves vulnerable to significant monetary consequences that could be caused by as little as a single transaction at a discount deeper than that which was disclosed.

MythConception #6: It is Sufficient to Simply Submit the Contractor's Standard Policies and Procedures as Representative Support for a Contractor's CSPs

➢ **No.**

While a contractor's written policies and procedures may provide a surface-level view into what may be considered its standard practices, a review of documents alone does not provide a contractor enough information to prepare current, accurate, and complete disclosures to the government. As these disclosures form the basis for negotiations and compliance, contractors need to fully understand and clearly explain all aspects of their CSPs—not just the policies and procedures. More often than not, these policies and procedures prove to be an inaccurate or incomplete representation of actual sales practices.

When developing CSP disclosures, it is a best practice to perform a review of at least

12 months of commercial invoiced transactions to determine standard sales practices as well as the frequency and magnitude of deviations from those standard sales practices. This analysis will likely reveal information that would have otherwise been missed by simply reviewing a contractor's written policies and procedures as the sole source of CSP information.

Conclusion

GSA Schedule contracting can become unnecessarily complicated if contractors do not completely understand their obligations. The amount of time and effort necessary to prepare current, accurate, and complete disclosures, as well as to comply with GSA Schedule contracts, should not be underestimated. If issues arise, contractors may face hefty fines and penalties, reputational risk, possible consultant and attorney fees, and/or, in the worst case scenario, suspension and debarment. However, with proper time and effort up front, these remain an excellent venue with many attractive opportunities for contractors to gain and maintain access to the federal space. **CM**

ABOUT THE AUTHORS

JENN THORSON and GABE CHAMI are both managers in Baker Tilly's Government Contractor Advisory Services practice. They assist clients with matters relating to FSS proposal preparation, contract modifications, option extensions, audit and litigation support, and contract compliance. They have experience in a wide range of industries including IT services, computer software and hardware, healthcare, staffing, engineering, manufacturing, and professional services.

Send comments about this article to cm@ncmahq.org.

ENDNOTES

1. *GSA Acquisition Regulation* (*GSAR*) 552.238-75, "Price Reductions (May 2004)."
2. VARs are companies that purchase contractors' products/services, and add value to them before reselling them to the ultimate end user.
3. GSAR 538.270(a) (emphasis added).
4. GSAR 538.270(c)(7).
5. *Federal Acquisition Regulation* (*FAR*) 32.703-2, "Contracts Conditioned Upon Availability of Funds."
6. *See* FAR 32.703-3(a): "A contract that is funded by annual appropriations may not cross fiscal years, except in accordance with statutory authorization" (e.g., 41 U.S.C. 11a, 31 U.S.C. 1308, 42 U.S.C. 2459a, and 42 U.S.C. 3515)."
7. See document #7, "Price List Preparation," *available at* **www.fbo.gov/index?s=opportunity&mode=form&id=4dce0e54fce7513fb34ed3ee5474a51c&tab=core&_cview=1**.
8. *See* FAR 51.1, "Contractor Use of Government Supply Sources."
9. GSA Order ADM 4800.2H, "Eligibility to Use GSA Sources of Supply and Services (7-d-6)—Use of certain Federal Supply Schedules by state and local governments" (June 2013).
10. Discounts are calculated on a line item basis, by dividing the commercial list price at the time of the transaction by the unit sell price.
11. Contractors should ensure that any negotiated deviations to the PRC are memorialized in the final proposal revision or in the contract award documentation.