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“High Risk” Areas in GSA Schedule Contracting: A Checklist for Prevention, Early Detection and Remediation Of Issues Commonly Audited by the GSA Inspector General

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Introduction

At last count, there were approximately 17,500 General Services Administration (“GSA”) multiple award schedule (“MAS”) contracts with reported FY 2007 MAS program sales of \$35.8 billion. The MAS

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program is the premier vehicle for the government’s acquisition of “commercial item” products and services.

Yet all is not well with the MAS program. The MAS program receives constant scrutiny from Congress, the Government Accountability Office (“GAO”)¹ and GSA’s Office of Inspector General (“OIG”). This scrutiny frequently results in allegations that MAS contract negotiators have not secured the best possible pricing and that basic competition requirements and scope restrictions applicable to MAS contracts have been ignored by government ordering agencies and MAS contractors. The GSA OIG and the Department of Justice (“DOJ”) have accelerated and expanded their investigations of noncompliance with MAS contract pricing rules and other contract requirements over the past several years. Many of these investigations have resulted in allegations of Civil False Claims Act (“FCA”) violations with the MAS contractor agreeing to pay staggering fines and penalties. In one of the more widely-publicized settlements, Oracle agreed to pay \$98.5 million to settle allegations of noncompliance with contract pricing rules. GSA OIG audits of MAS contracts appear to have

¹ See, e.g., General Accounting Office, *Rebuilding Iraq: Fiscal Year 2003 Contract Award Procedures and Management Challenges*, GAO-04-605 (2004), at 4-5 (criticizing, among other things, out-of-scope MAS orders); General Accounting Office, *Contract Management: Not Following Procedures Undermines Best Pricing Under GSA’s Schedule*, GAO 01-125 (2000), at 6 (examining DOD use of MAS contracts without following required MAS competitive procedures).

increased more than fourfold in the past several years,² and the OIG has signaled that stepped-up MAS contract audits will continue.³

The most serious MAS contract noncompliance problems tend to occur in connection with the same contract requirements, often with the same or similar root causes. This article provides a practical roadmap to help MAS contractors prevent, detect and remediate these common problems. We begin by listing five “high-risk” requirements in MAS contracting that are likely to cause the most serious exposure. We next provide (i) a summary of each requirement, (ii) common root causes for problems, (iii) suggested basic steps to avoid and limit problems, and (iv) specific, real-world examples of contractor non-compliance with the requirement. We conclude with a detailed checklist listing “red flag indicators” and recommended basic procedures to avoid and limit problems under each of these “high risk” areas. The checklist is intended to serve as a tactical tool to detect and prevent the most common and potentially expensive mistakes in MAS contracting.

MAS contractors would do well to treat the enhanced scrutiny now being applied to the MAS program as a “wake up call” to assure their compliance with key MAS contract requirements. Internal controls and monitoring systems and procedures can help MAS contractors avoid costly mistakes, large damages and penalty assessments, and the potential sanctions of contract cancellation and debarment/suspension, as well as unwanted publicity. In this regard, MAS contractors should understand that counsel to the GSA OIG and DOJ often take the position that a contractor’s submission of MAS contract invoices for payment to the government when it knows, or should know, that its underlying monitoring systems are deficient, may constitute violations of the FCA, which provides for up to treble damages and penalties of \$5,500-11,000 per invoice. Qui tam relators also may take the same position in private party actions filed under the FCA.

“High Risk” Areas For GSA Schedule Contract Non-Compliance

The most serious — and expensive — compliance problems for MAS contractors are likely to occur in connection with the following MAS contract items and requirements:

1. Commercial Sales Practices Disclosures
2. Price Reductions Clause
3. Trade Agreements Act
4. Unapproved Item Sales
5. Employee Qualifications

² According to the GSA OIG’s *Semiannual Report to the Congress*, it completed 87 full MAS contract audits between October 1, 2006 and March 31, 2007. This compares to 21 completed full MAS contract audits between October 1, 2003 and March 31, 2004.

³ Four of the five “high risk” areas addressed in this article are regularly examined during the “contract systems review” performed by GSA acquisition staff (not the OIG). See <http://vsc.gsa.gov/casi/>. The “contract systems review” does not, however, involve a review of the MAS contractor’s commercial sales practices disclosures. It is often the case that the acquisition staff will refer noncompliance matters to the OIG for audit or investigation.

We address in turn below each of these “high risk” areas in MAS contracting.

1. Commercial Sales Practices (“CSP”) Disclosures

The Requirement. MAS contractors must disclose to GSA, in significant detail, their sales practices for all non-federal, domestic categories of customers before initial contract award and before each five-year contract extension. The contractor provides its commercial pricing practices information using a GSA-prescribed format contained in the applicable MAS solicitation or extension proposal package, the CSP-1. The contractor is generally required to certify to GSA that the sales practices information it provides is “current, accurate and complete.”

Common Causes for Problems. Many contractors fail to thoroughly research their sales practices by examining internal pricing policies and procedures, contracts, and actual sales data, and also fail to interview key sales and bid desk staff charged with approving non-standard discounts. Careful research is necessary to provide thorough and precise sales practices information that meets the “current, accurate and complete” standard. In addition, some contractors err by simply completing GSA’s standard CSP-1 format without describing precisely their actual customer types and by failing to disclose and explain circumstances where they provide non-standard discounts and concessions.

Suggested Basic Steps. MAS contractors should conduct a careful review of their pricing policies and procedures, contracts and actual sales data, and should also interview key sales and bid desk executives to verify information about company discounting practices. MAS contractors should craft detailed narratives of their practices for granting standard and non-standard discounts and concessions, and not simply provide, without qualification, the information required by the CSP-1. MAS contractors should also make sure that the CSP-1 information conforms to the customer categories employed in their order entry systems and sales transaction documents, rather than merely relying on standard GSA or industry designations. Also, where appropriate and possible, MAS contractors should consider including language in their CSPs to exclude non-standard discounts from the application of the Price Reduction Clause.

Cautionary Tale. On October 10, 2006, Oracle agreed to pay \$98.5 million to settle allegations of defective MAS contract pricing disclosures by PeopleSoft prior to its acquisition by Oracle.⁴ The PeopleSoft disclosures allegedly understated the discounts it provided to commercial customers.

2. Price Reductions Clause (“PRC”)

The Requirement. At the time of award, the parties agree to a “tracking” customer or customer type upon which GSA’s pricing relationship will be predicated for the entire MAS contract period. The PRC is often also benchmarked to the MAS contractor’s applicable commercial list price. If the MAS contractor increases dis-

⁴ http://www.usdoj.gov/opa/pr/2006/October/06_odag_689.html

count percentages or decreases prices to a tracking customer, or reduces its applicable commercial list price, the PRC is triggered in most circumstances and GSA is then entitled to proportionately higher discounts or lower prices.

Common Causes for Problems. Many MAS contractors fail to establish procedures to monitor sales transactions with tracking customers for possible PRC triggering events. In part, this failure may result from the daunting task that PRC monitoring can represent — larger contractors may need to review literally thousands of commercial sales transactions each month for possible PRC triggering events. The review process is often further complicated because many MAS contractors settle for tracking customer designations that utilize generic customer category descriptions (e.g., all “commercial end users” or “national accounts”), rather than the specific customer categories that the MAS contractor actually employs to process sales transactions or a subcategory that may be more easily monitored. In addition, some MAS contractors overcharge MAS ordering entities because their sales staff is simply unaware of the GSA price ceiling established by GSA’s pre-negotiated discount from *current* commercial list price, inclusive of list price reductions, as required by their MAS contract terms.

Suggested Basic Steps. MAS contractors should examine their proposal and award documents to ensure that they have correctly identified their tracking customers and the customers’ corresponding prices and discounts. Contracts should identify appropriate tracking customers or categories that realistically can be monitored for PRC compliance. In the event the identified tracking customers do not match the MAS contractor’s internal customer designations, the contractor should take steps to clarify what the tracking customers “mean” relative to internal customer designations. In certain circumstances, MAS contractors should consider and negotiate alternative PRC compliance mechanisms, such as quarterly monitoring and disclosure to GSA of the contractor’s average discount percentages or non-standard discounting frequency for specific customers or customer categories. After award, MAS contractors should have effective and well-documented price monitoring procedures to identify and report, when appropriate, tracking customer transactions that might trigger a reduction to their MAS contract price. In addition, MAS contractors should establish procedures to ensure that their sales staff do not issue quotes or accept orders with pricing in excess of the current approved MAS pricelist or, if applicable, the lower price resulting from GSA’s pre-negotiated discount to current commercial list price.

Cautionary Tale. On July 24, 2004, Snap-On Tools agreed to pay \$10 million to settle allegations that it failed to observe the PRC and billing requirements under two MAS contracts.⁵ It is now especially important to pay attention to PRC compliance because the OIG regularly audits “post-award” PRC compliance during its “pre-award” review of pricing proposals submitted by MAS contractors seeking to extend their existing contracts. PRC compliance also has recently been

added to the “Report Card” checklist for contractor system reviews conducted by GSA acquisition personnel. We fully expect that the result will be an increase in referrals by the acquisition staff to the OIG for further audit or investigation.⁶

3. Trade Agreements Act (“TAA”)

The Requirement. The TAA implements several trade treaties granting nondiscriminatory treatment to products from signatory countries. MAS contractors are prohibited from supplying end products manufactured in non-signatory countries. To comply with the TAA, the MAS contractor must ensure, throughout the potential 20-year term of its MAS contract, that each of the “end products” it sells has been last “substantially transformed” in the United States or a designated TAA country.

Common Causes for Problems. TAA compliance can be problematic because many of the commercial items sold in connection with the MAS program are now manufactured in non-TAA designated countries, such as China, Taiwan and Malaysia. Compounding this problem, product country of origin can change frequently based on factors such as cost, factory capacity and product availability. Moreover, a single product stock-keeping unit (SKU) can sometimes have more than one country of origin. Sourcing TAA-compliant items is especially difficult for certain industry categories, including information technology, medical supplies and paper products. Many contractors fail in this area because their procurement function does not regularly track information about product country of origin and/or does not provide such information to company personnel responsible for administration of the MAS contract.

Suggested Basic Steps. MAS contractors’ procurement functions should have established procedures to monitor and to provide updated product country of origin information to the company’s MAS contract administrators on a periodic and systematic basis. This procedure should also ensure that historical product country of origin information is properly archived and available for future retrieval. An MAS reseller should obtain a written commitment from its manufacturers to supply only TAA-compliant end products for MAS orders, and, if possible, indemnification for damages the MAS reseller incurs as a result of the manufacturers’ failure to meet this commitment. MAS resellers must be careful to obtain a manufacturer’s TAA commitment even if they are purchasing the manufacturer’s products through a distributor.

Cautionary Tale. On May 5, 2005, OfficeMax agreed to pay \$9.8 million to settle allegations that it supplied items under its MAS contract from non-designated TAA countries, including China.⁷ TAA non-compliance under the MAS program currently is the subject of numerous other ongoing GSA OIG investigations involving a variety of MAS contractors, including a number of information technology companies.⁸

⁶ http://vsc.gsa.gov/fq/GSA_Steps15_June2007.pdf

⁷ http://www.usdoj.gov/opa/pr/2005/May/05_civ_278.htm

⁸ For a detailed analysis of the TAA issues that confront information technology vendors in their dealings with the fed-

⁵ <http://corporate.snapon.com/display/DocMgmtDisplayFile.aspx?fileid=271>

4. Unapproved Item Sales

The Requirement. The MAS program permits eligible ordering entities to purchase commercial products and services using only limited competitive ordering procedures, based upon GSA's prior approval of the MAS items and prices. GSA MAS contract terms require eligible ordering entities to identify any unapproved items included on a MAS contract quote or proposal. Current MAS contract terms also mandate that if a contractor identifies MAS supplies or services on its own website, the website must distinguish clearly between awarded (approved) MAS items and any other unapproved ("open market") items offered by the contractor.

Common Causes of Problems. Some MAS contractors fail to establish procedures to inform their sales staff of current MAS-approved items or to ensure that the sales staff clearly distinguishes between approved and unapproved items when providing oral or written quotes or proposals. Infrequent modification submissions and/or slow GSA approval of modifications to add new products sometimes results in a gap between older, approved products and newer, unapproved products available in the commercial marketplace. This gap (between what is approved and what the agency buyers want) can result in the sale of unapproved items. Finally, MAS contract quotes and proposals for "mixed" orders, i.e., orders with both approved and unapproved items, pose a special risk. Some contractors include a MAS contract number or identifier in the header for a mixed quote or proposal without specifically identifying the unapproved line items contained therein. GSA considers this practice unacceptable, as it does any other actions by sales personnel that do not clearly convey to eligible ordering entities which items are on the MAS contract and which are not.

Suggested Basic Steps. MAS contractors should establish procedures to ensure that their sales staff is able to easily identify currently approved MAS items. MAS contractors should submit regular modifications as necessary to reflect changes in their commercial offerings, preferably in advance of commercial release, in order to allow time for GSA approval. MAS contractors should also establish procedures to specifically identify unapproved items included in quotes or proposals provided to eligible ordering entities so that the ordering entities do not mistakenly believe that they are purchasing only GSA preapproved items. Larger contractors with significant numbers of product SKUs should consider modifying their quote and order entry systems to automatically identify approved and unapproved line items based upon the current approved MAS pricelist, thereby removing the potential for human error present in a manual procedure for providing notice of unapproved items. We firmly believe that the best practice is for contractors to ensure that their MAS quotes and invoices identify unapproved ("open market") items on a line-item basis, and that contractors accept only those purchase orders from eligible ordering entities that also identify open market items on this basis. MAS contractors also should ensure that any MAS-related content

on their websites clearly distinguishes between approved and unapproved items.

A Cautionary Tale. In November 2003, GSA canceled the MAS contract held by GovConnection as a result of alleged sales of unqualified items and the underpayment of required fees.⁹ The allegations of noncompliance relating to the GovConnection contract were settled in December 2006 for \$2.55 million.¹⁰

5. Employee Qualifications

The Requirement. MAS contracts that contain hourly (or daily) services offerings have GSA-approved labor categories with associated hourly (or daily) rates. Each labor category contains specific minimum educational, experience and/or industry certification requirements. MAS contractors must supply individuals that meet the applicable minimum requirements for the labor categories charged to MAS contract task orders.

Common Causes of Problems. Some contractors simply fail to establish procedures to ensure that they supply only qualified personnel when bidding and performing MAS task orders. Some MAS contractors propose labor category descriptions taken entirely from another approved MAS contractor's pricelist, so that the minimum requirements do not closely match their employees' actual qualifications, which can make compliance especially difficult. Finally, some MAS contractors have basic procedures to verify personnel qualifications at the time of performance, but fail to properly archive resumes for their employees and, therefore, have difficulty documenting to GSA their compliance with employee qualification requirements.

Suggested Basic Steps. MAS contractors should establish procedures to verify that their personnel meet the minimum requirements for the applicable labor category, both at the time of proposal submission and, at least periodically, prior to invoicing against MAS task orders. MAS contractors should establish procedures to collect employee resumes at the time of hire, ensure that the resumes contain information that matches up with MAS contract requirements, and periodically collect updated resumes from their employees. The human resources function should also establish procedures to archive employee resumes for orderly retrieval in the future.

A Cautionary Tale. On December 2, 2005, Science Engineering Associates agreed to pay \$9.5 million for billing unqualified employees under an information technology services contract.¹¹ The OIG has recently indicated that it is focusing attention on whether contractors are supplying only qualified personnel under MAS task orders. This issue is also regularly examined as part of the MAS contract systems audit. Accordingly, MAS contractors should dedicate appropriate attention to compliance with this requirement.

eral government, see Sean P. Bamford, *A Perfect Asymmetry: The Interplay Between the Buy American Act's Information Technology Exception and the Trade Agreements Act*, 43 THE PROCUREMENT LAWYER 2 (Winter 2008).

⁹ <http://www.shareholder.com/Common/Edgar/1050377/1193125-06-68834/06-00.pdf>

¹⁰ <http://www.shareholder.com/common/edgar/1050377/1193125-06-248751/06-00.pdf>

¹¹ <http://www.gao.gov/new.items/d06547.pdf>

Conclusion

Given the increased scrutiny being applied to the MAS program — including the stepped-up OIG audit program — MAS contractors would be well-served to focus attention on their compliance with MAS contract requirements, especially those areas presenting the greatest degree of risk. The “high risk” compliance areas described above are not new or obscure. However, the consequences of failing to avoid and to limit prob-

lems in these areas can be severe, as the “cautionary tales” identified above illustrate.

We conclude below with a detailed checklist listing “red flag indicators” and recommended basic steps companies can take to avoid and limit problems under each of these “high risk” areas in MAS contracting. The checklist is intended to serve as a tactical tool to avoid and limit exposure to the most common and potentially expensive mistakes in MAS contracting.

Checklist for Avoiding Contract Compliance Problems in “High Risk” MAS Contract Compliance Categories

“High Risk” Category	Description of Requirement	Red Flag Indicators	Suggested Minimum Steps
Commercial Sales Practices (CSP) Disclosures	The contractor provides detailed information about its sales practices before initial MAS contract award and 5-year contract extensions. This detailed sales practices information must be “current, accurate and complete” or it can result in “defective pricing.”	<ol style="list-style-type: none"> 1. CSP uses generic customer descriptions (e.g., end user) that don’t match the contractor’s internal customer designations 2. CSP indicates that the contractor “never” grants non-standard discounts 3. CSP provides numeric discount information without a narrative attachment explaining and qualifying that information 	<ol style="list-style-type: none"> 1. Perform a thorough review of internal commercial pricing policies, contracts and sales data before submitting CSPs 2. Interview sales executives and bid desk personnel to confirm sales practices descriptions before submission to GSA 3. Prepare a carefully crafted narrative describing – and qualifying – the sales practices detailed in the CSP, using internal designations to identify customers
Price Reductions Clause (PRC)	MAS contracts include “tracking” customers upon which GSA’s pricing relationship is based. The PRC is often also benchmarked to a commercial list price. If the MAS contractor increases discount percentages or decreases prices to a tracking customer, or reduces the applicable list price, the PRC is triggered and GSA is then entitled to higher discounts or lower prices.	<ol style="list-style-type: none"> 1. No procedure for approving or monitoring commercial sales orders for possible PRC triggering events 2. “Tracking customers” in the award documents don’t match the contractor’s internal customer designations 3. Sales staff relying upon outdated GSA pricelists that don’t match commercial pricelists 	<ol style="list-style-type: none"> 1. Examine proposal and award documents to ensure tracking customers and prices/discounts are correctly identified 2. If the identified tracking customers do not match internal customer designations, clarify what the tracking customers mean relative to internal designations 3. Establish effective and well-documented price monitoring procedures to identify tracking customer transactions that might trigger a MAS contract price reduction 4. Establish procedures to ensure that sales staff timely grant list price reductions to MAS ordering agencies
Trade Agreements Act (TAA)	The TAA implements trade treaties granting nondiscriminatory treatment to products from signatory countries. MAS contractors are restricted from supplying end products from non-signatory countries. The TAA restriction on non-compliant products is absolute and not just a pricing preference.	<ol style="list-style-type: none"> 1. Failure to maintain accurate, updated country of origin information for MAS products 2. No procedure for the company’s procurement function to inform MAS contract administrators of changes to product country of origin 3. Resellers purchasing from distributors without manufacturer TAA compliance certification 	<ol style="list-style-type: none"> 1. Establish procedures to monitor and to provide updated product country of origin information to the company’s MAS contract administrators 2. Establish procedures to archive historical product country of origin information for future retrieval 3. MAS resellers should obtain a written TAA certification from manufacturers, as well as indemnity for non-compliance

“High Risk” Category	Description of Requirement	Red Flag Indicators	Suggested Minimum Steps
Unapproved Item Sales	GSA’s approval of MAS contract items means the items meet the applicable “fair and reasonable” pricing standard and are eligible for purchase using only limited competition. Contractors must identify unapproved items included on quotes provided to MAS ordering agencies, so that these agencies do not mistakenly believe that they are purchasing only GSA pre-approved items.	<ol style="list-style-type: none"> 1. Infrequent submission and/or approval of product and pricing update modifications 2. Sales staff relying upon outdated GSA pricelists that don’t match commercial pricelists 3. No clear procedure to inform MAS contract sales staff of current approved products or procedure to ensure that sales staff specifically identify unapproved products in oral or written quotes 4. MAS contract quotes containing some unapproved line items but not specifically identified as such 5. Acceptance of purchase orders that do not specifically identify unapproved items on a line-item basis 	<ol style="list-style-type: none"> 1. Establish procedures to ensure that sales staff are always aware of the currently approved MAS items 2. Submit regular modifications as necessary to reflect changes in commercial item offerings, preferably in advance of commercial launch to allow time for GSA approval 3. Establish procedures to specifically identify unapproved items in “mixed” quotes or proposals including both approved and unapproved items
Employee Qualifications	MAS contractors selling hourly services use labor categories with minimum educational, experience and/or industry certification requirements, each with a GSA-approved rate. MAS contractors must supply individuals that meet the applicable minimum requirements for their labor category.	<ol style="list-style-type: none"> 1. No procedure for collecting and archiving employee resumes 2. No procedure for verifying that employees proposed or actually used on a project meet the requirements for the labor category used to bill their time 	<ol style="list-style-type: none"> 1. Establish procedure to collect resumes from new employees and updated resumes from existing employees, and to archive resumes for future retrieval 2. Establish procedures to verify employee qualifications at the time of proposal submission and at least periodically when invoicing against a MAS task order 3. Examine approved labor category descriptions to assess whether minimum requirements are tailored to the types of categories typically used for company employees’ qualifications