



GSA Contract Compliance and the Challenges Ahead

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The Tower Club



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Overview

- Mechanics of Schedule Holding
- GSA Contractor Assistance visits
- OIG Audits & Compliance Issues
- Contract Management
- Small Business Set-Asides and the Proposed Rules
- Contractor Team Arrangements
- Unresolved Issues ...

Most Favored Customer (MFC) vs. Basis of Award Customer (BOA)

Most Favored Customer

The customer or class of customers that receives your best pricing, regardless of the terms and conditions.

Basis of Award Customer

The customer or class of customers upon which the price reductions clause is predicated.

*These terms are frequently used interchangeably,
but they are not always the same.*

The Basis of Award (BOA)

- Establishes a relationship between the BOA customer's discount and the GSA discount that must be maintained for the life of the contract

	MSRP	BOA Discount	BOA Price	GSA Discount	GSA Price w/out IFF	Discount Relationship
Basis of Award	\$500.00	10.0%	\$450.00	15.0%	\$425.00	5.0%

- When this discount relationship is disturbed, then a PRICE REDUCTION has been triggered

Price Reductions, GSA Schedules

GSAR 552.238-75 Price Reductions

- Price Reductions are not really about price, rather they are about the discount
- What transactions are monitored for price reductions?

	MSRP	BOA Discount	BOA Price	GSA Discount	GSA Price	Discount Relationship
Basis of Award	\$500.00	10.0%	\$450.00	15.0%	\$425.00	5.0%
Price Reduction	\$500.00	12.0%	\$440.00	15.0%	\$425.00	3.0%
New GSA <i>Discount</i>	\$500.00	12.0%	\$440.00	17.0%	\$415.00	5.0%

Exceptions to Price Reductions

- Sales to eligible users of the GSA Schedules (ADM 4800.2G)
- Contracts with a guaranteed value in excess of the Maximum Order Threshold (MOT)
- Price reductions caused by an error in bidding
- Dissimilar terms and conditions
 - Pre-payment, trade-ins
 - Marketing considerations, exclusivity
 - Sales quotas, stocking requirements, customer support
- You must still *disclose these transactions* in your CSP

GSA Contractor Assistance Visit (CAV)

- CAVs typically occur twice each 5-year contract term, at midway point and within 6 to 12 months prior to expiration
- Conducted by a GSA Industrial Operations Analyst (IOA) a liaison between Administrative Contracting Officer (ACO) / Procuring Contracting Officer (PCO) and contractors
- CAV Objectives
 - Explain the Terms and Conditions of your Contract
 - Assist with your questions or concerns
 - *Identify and correct potential problems*
 - Gather contractor data

CAV Key Review Topics

- Key Topics:
 - System / Process to monitoring the "basis of award" pricing and discount ratio
 - System / Process for proper Schedule Sales identification, Schedule Sales Tracking, IFF Reporting and Payment
 - System / Process for GSA Task Order review (Scope, Pricing)
 - Accuracy of GSA Pricelist and online Contract Information
 - Meeting minimum sales criteria
 - Accurate identification of products with Environmental attributes
 - Trade Agreements Act (TAA) Compliance; Letters of Supply (if applicable)
 - Prompt Payment Discounts (if any)
 - Use of GSA eTools

Major Recurring Findings in OIG Audits

- Commercial sales practices data submitted to support proposed pricing, reflecting *non-current, inaccurate, and/or incomplete information* (83%)
- Commercial customers comprised <50% of the contractor's sales (43.0%)
- Contractor charged employees to labor rates for which they did not meet the minimum requirements in the contract (27.0)

Frequently Overlooked Terms and Conditions

- Prompt Payment Discounts
- Volume Discounts
- Small Business Subcontracting Plan
- Trade Agreements Act (TAA) Monitoring
- Service Contract Act Requirements
- Minimum Sales Requirement

Frequently Overlooked Terms and Conditions

- Employment Eligibility Verification (E-Verify)
- Contractor Code of Business Ethics and Conduct
- Reporting Executive Compensation and First-Tier Subcontract Awards
- VETS-100, Affirmative Action and EEO Reporting

Risks and Penalties for Non-Compliance

- Termination for Cause
- Payment of restitutions to GSA customers
- Renegotiation of GSA Discount / Basis of Award
- Significant fines and penalties
- Suspension or Debarment
- Civil Prosecution
- Criminal Prosecution
- Civil False Claims Act = \$11K per invoice plus treble damages
- Prison

The regret of knowing it was preventable!

How GSA Monitors Compliance

Contractor Assistance Visit (CAV)	Office of Inspector General (OIG) Audit
All contractors have these	Limited number conducted per year
No subpoena power	Subpoena power
Short visit and quick turnaround	Lengthy data collection and analysis
Review of many compliance areas	Focus on pricing issues
Process review and data sampling	Extensive testing of transactions
Pre-expiration and mid-term reviews	Pre-award or post-contract
Helping contractor succeed	Looking for mistakes

GSA Office of the Inspector General's (OIG) Sobering Statistics

During Fiscal Year 2011, OIG activities resulted in:

- Almost **\$460** million in recommendations that funds be put to better use and in questioned costs. If adopted, these recommendations ultimately result in savings for the taxpayer.
- **139** audit reports and **29** audit memorandums that assisted management in improving the efficiency and effectiveness of Agency operations.
- Over **\$571** million in management decisions agreeing with audit recommendations; **\$376.1** million in criminal, civil, administrative, and other recoveries.
- **260** new investigations opened and **233** cases closed.
- **28** civil settlements.
- **85** criminal indictments/informations and **64** successful prosecutions on criminal matters referred.
- **71** case referrals (**124** subjects) accepted for criminal prosecution and **18** case referrals (**22** subjects) accepted for civil litigation.
- **88** contractor/individual suspensions and **61** contractor/individual debarments.
- **2710** Hotline calls and letters received of which **167** were referred for criminal or civil investigations, **88** were referred to other agencies for follow up, and **166** were submitted to GSA for review and appropriate administrative actions.

GSA's OIG Hotline

(800) 424-5210

fraudnet@gsaig.gov

<http://www.gsaig.gov/index.cfm/hotline/-hotLINE-FORM/>

GSA Office of the Inspector General's (OIG) Sobering Statistics

Comparing the last half of GFY11 to the first half of GFY12, the GSA OIG had a:

- 67.8% increase in settlement recoveries (\$)
- 56.0% increase in suspensions/debarments
- 31.7% increase in referrals for prosecution / litigation

Significant GSA OIG Settlements

- 12/26/12 Grainger, \$70M (faulty CSP disclosures)
- 07/09/12 ADC Telecommunications, \$1.0M (TAA)
- 03/29/12 CXtec, \$2.0M (Trade Agreements Act)
- 10/06/11 Oracle, \$199.5M+interest (inaccurate and incomplete CSP)
- 03/08/11 Black Box, \$2.85M (failure to extend volume discounts, improper freight charges)
- 01/31/11 Oracle/Sun, \$46M (defective CSP disclosures)
- 10/10/06 Oracle/PeopleSoft, \$98.5M (defective pricing disclosures)
- 12/02/05 Science Engineering Associates, \$9.5M (using unqualified employees)

Contract Management Basics

- Maintain system for accurately identifying, tracking and reporting GSA contract sales
- Report GSA contract sales and remit Industrial Funding Fee (IFF) on time
- Monitor commercial sales for compliance with Basis of Award discount relationship
- Maintain GSA price list on GSA Advantage!
- Update SAM on an annual basis

Elements of Successful Compliance Programs

- Executive Leadership
- Finance, Contracts and Administrative
- Customer-Facing Employees
- Sales Personnel
- Existing Customers
- Commercial Contracts
 - Basis of Award Customer
- Government Contracts
 - GSA Sales
 - Federal, Non-GSA Sales

1. Educating Stakeholders



2. Ability to Track and Capture Transactions



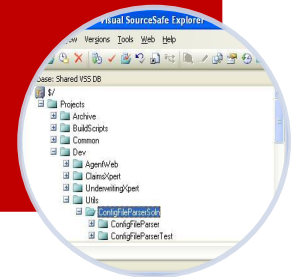
Elements of Successful Compliance Programs

- Mandatory Modifications
- Contractor-Initiated Modifications
 - Changes to CPL
 - Changes to Commercial Sales Practices
 - Administrative Changes
- Task Orders and Master Contract Documents
- Records should be retained 3 years after final payment
- Minimum 8 years

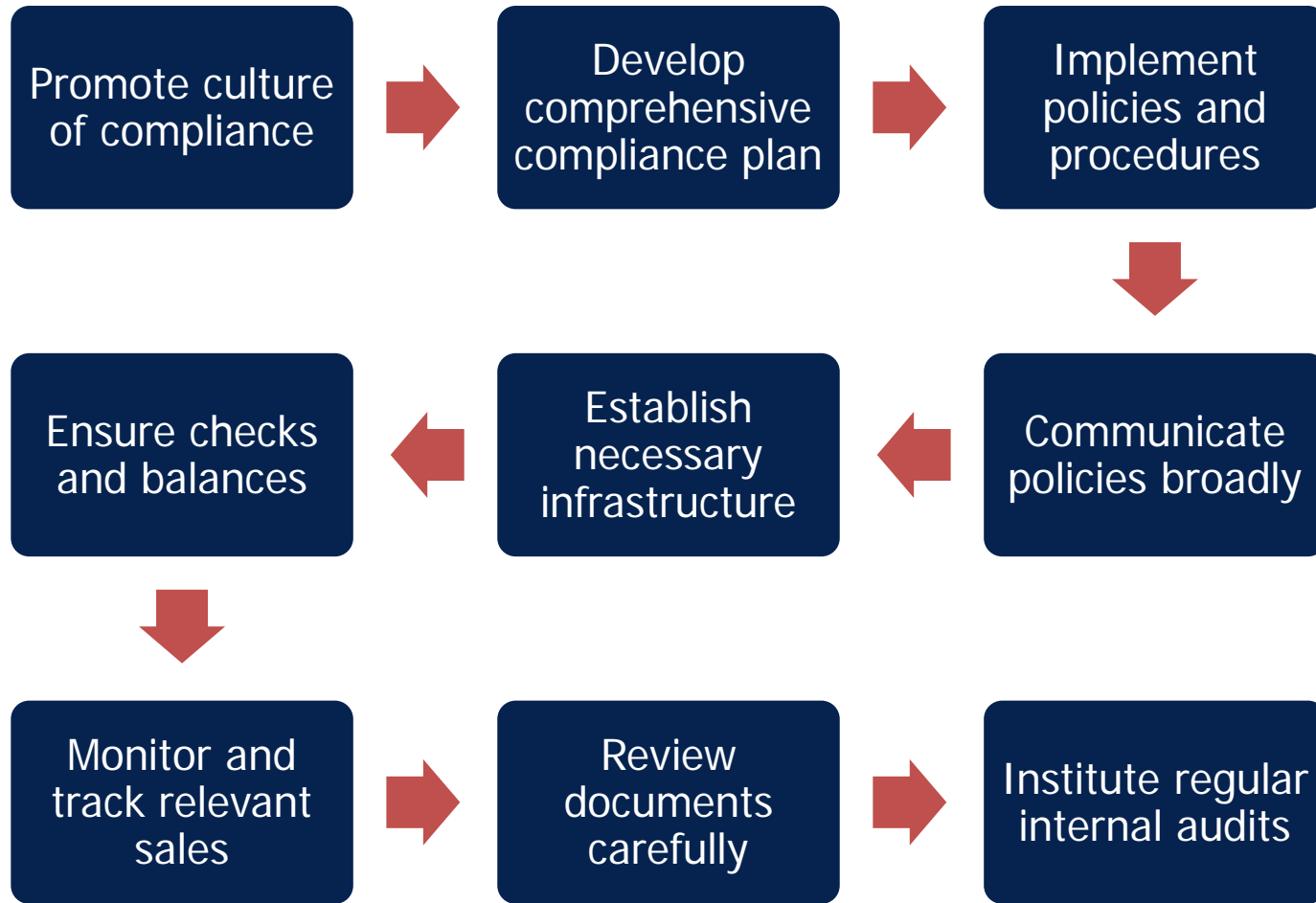
3. Modify the Contract when Required



4. Document Retention Policy



How to Mitigate Compliance Risk



Elements of Successful Compliance Programs

Conduct Periodic Internal Reviews



The Small Business Jobs Act of 2010

- The Small Business Jobs Act amended the Small Business Act to permit Federal agencies to:
 - Set-aside part or parts of multiple award contracts for small business concerns
 - Set-aside orders placed against multiple award contracts
 - Reserve one or more contract awards for small business concerns under full and open competition, when the agency intends to make multiple contract awards
- For partial set-asides, SBs are allowed to bid on:
 - Non-set-aside portion
 - Set-aside portion
 - Both
- Prior to Act, no set-asides for Schedule contracts, only “reserved” awards

The Rules Are (Rapidly) Changing

Impact of the Small Business Jobs Act:

- On May 16, 2012, SBA issued a notice of proposed rulemaking to address the use of set-asides on multiple award contracts and to clarify the regulations on bundling and contract consolidation

Preservation of Agency Discretion

There is nothing in the Jobs Act or the Proposed Rule that compels an agency to award a multiple award contract with a partial set-aside, contract reserve, or contract clause that commits (or preserves the right) to set aside orders when the rule of two is met. Agencies are only required to consider these tools before awarding a multiple award contract and, if they choose not to use any of them, document the rationale.

Proposed Rules – Additional Points

- Notes that FSS contracts now included under the umbrella definition of “multiple award contracts”
- Guidance on the assignment of NAICS codes to individual contracts and SINS
 - In assigning NAICS codes and size standards to multiple award contracts, agencies would have two alternatives under the proposed rule: (1) assign one NAICS code and size standard to the contract if all of the orders are expected to be classified under the same code: or (2) divide the contract into discrete categories and assign different NAICS codes to each discrete CLIN, SIN, etc. Orders issued under the different categories would need to have the same NAICS code assigned to that category in the contract.

Proposed Rules – Additional Points

- Amend affiliation rules found at 13 C.F.R. § 121.103 to create an exception to affiliation for teams of small businesses that pursue bundled contracts. Affiliation exception would apply so long as each team member is small under the size standard corresponding to the NAICS code assigned to the contract and there is a written, signed teaming or joint venture agreement amongst the small business concerns.
- Size status for multiple award contracts will be determined at the time of initial offer. If the contract contains multiple NAICS codes, size will be determined for each of those codes at the time of the initial offer. Thus, if an offeror for a multiple award contract is small at the time of its initial offer, the offeror will be considered small for all orders subsequently issued under the different NAICS codes that may be applicable at the order level.
 - Contracting officers retain the discretion to require size recertification at the order level, but this is not required.

Proposed Rules – Additional Points

- The “if small at the initial offer, small for the life of the contract” concept for size eligibility will also apply to program eligibility. This means that, if an offeror was HUBZone or SDVOSB eligible when it won the set-aside contract, the contractor will remain HUBZone or SDVOSB eligible for the life of the contract, even if the contractor lost its program status during the course of the contract. Like the size recertification rule, however, this does not apply to long-term contracts or when there is a merger or novation.
- If “Agreements,” such as Basic Agreements, Blanket Purchase Agreements, and Basic Ordering Agreements, are set aside, SBA will determine size at the time of the response to the solicitation for the Agreement
 - Additionally, since “Agreements” are not considered contracts, the concern must also qualify as small at the time it submits its offer or otherwise responds to a solicitation for each order

How Partial Set-Asides and Reserves Work

- Partial set-asides: Proposed rule would update the current procedures as outlined in the FAR
 - Recommends severing acquisition into discrete components or categories rather than production runs or lots
 - Partial set-aside appropriate when market research indicates that “rule of two” will not be met for the entire requirement (e.g., each CLIN or SIN)
- Reserves: Proposed rule utilizes reserves when an acquisition for multiple award contract will be conducted using full and open competition and market research indicates that:
 - At least two small businesses could perform one part of the requirement, but requirement unable to be broken down smaller, or
 - At least one small business can perform the entire requirement, but no reasonable expectation of receiving at least two offers from small businesses

Proposed Rules Regarding Total Set-Asides, Partial Set-Asides, and Reserves – Examples of How They Work

Service requirement	Total set-aside	Partial set-aside	Reserve
Description of Requirement	<ul style="list-style-type: none"> • Five year requirement for IT services and IT supplies. • No individual order expected to exceed \$250,000. • Total requirement not expected to exceed \$10 million over 5 years. 	<ul style="list-style-type: none"> • Five year requirement for IT services and IT supplies. • No orders expected to exceed \$250,000 for IT services in certain geographic regions, but some orders for IT services could exceed \$500,000 in other geographic regions and delivery of IT supplies must be accomplished in short period of time. • Total requirement not expected to exceed \$100 million over 5 years 	<ul style="list-style-type: none"> • Five year requirement for IT services and supplies. • Orders for IT services and supplies could range from \$250,000 to \$2 million. • Total requirement not expected to exceed \$100 million over 5 years.
Market Research	Shows that many small businesses can meet the projected needs.	Shows that many small businesses can provide the services and supplies in certain geographic regions and in a certain time allotment, but none can provide the IT services and supplies in other regions in the abbreviated timeframe.	Shows that many small businesses can provide IT services and supplies at certain dollar thresholds, but none can provide IT services and supplies for all orders proposed to be issued up to \$2 million.
Action	Total set-aside of contract for small businesses.	Partial set-aside for small businesses—break the requirement into separate CLINS for IT services and IT supplies in certain geographic regions. Compete orders for IT services and supplies in those regions only among small business awardees.	Reserve for small businesses—announce in solicitation that agency will make one or more awards to small businesses and if there are two or more awards to small businesses, apply the rule of two when placing orders.

Contractor Team Arrangements

- Under a Contractor Team Arrangement (CTA), two or more GSA Schedule contractors work together to meet ordering activity needs. By complementing each other's capabilities, the team offers a total solution to the ordering activity's requirement

Contractor Team Arrangements

- By using a CTA, ordering activities can:
 - Procure a total solution rather than making separate buys for each part of a requirement
 - Satisfy socio-economic procurement goals
- By forming a CTA, GSA Schedule contractors can:
 - Compete for Schedule orders for which they would not otherwise qualify
 - Increase their market share and become more competitive
 - Reduce risk by sharing responsibilities with other team members
 - Focus on the supplies (products) and services that best match their company's resources and strengths
 - Find greater success as a small and/or disadvantaged business

CTA Versus Prime/Sub Relationship

- All members of the team are equal parties to the Schedule contract
- Each team member must have its own Schedule contract
- Each team member responsible for the duties as outlined in the CTA agreement
- Each team member has privity of contract with the government, and can therefore interact with the government
- Ordering activity invoiced at each team member's unit prices or hourly rates as agreed in the task or delivery order, or GSA Schedule BPA

CTA Issues

- Make sure that CTA agreements include all required provisions
 - Specific team activities
 - Duration and terms of arrangement
 - Specific ordering procedures
- Vet CTA partners closely – it is possible that GSA could potentially cancel partner's schedule, and you need a substitute
 - The CTA should address the circumstances and procedures for replacement of team members, including the team lead
 - The CTA must also state that the team shall obtain the approval of the government prior to replacing any team members

Blanket Purchase Agreements

- Blanket Purchase Agreements may also be set-aside for small businesses and participants in the various small business programs
- Contracting officers are required to undertake market research to provide information on whether three or more schedule holders within a specific category of small businesses can provide the required products and/or services
- Ordering activities are permitted to incorporate CTAs within BPAs

Protests

- Schedule, task order, and BPA awards all subject to bid protest
 - U.S. Court of Federal Claims
 - U.S. Government Accountability Office
 - Agency or Contracting Officer Level Protest
- Important to note: No required debriefings under FAR Part 8
 - Must file GAO protest within 10 days of contract award in order to receive mandatory CICA stay of performance

OASIS and Strategic Sourcing Initiative

- Potentially hurts small business?
- Small business contractors bundled together in separate playing field
 - Efforts to drive down costs have larger impact

Unresolved Issues...

CTAs and Affiliation

- Small businesses encouraged to form CTAs in order to form “total solutions” for schedule procurements
- However, since FAR Part 19 applies to schedules, will contractors be subject to affiliation determinations based on CTAs?
 - Will SBA treat CTAs similarly to joint ventures for affiliation purposes?
 - Will CTAs count toward a “totality of the circumstances” determination?
 - For 8(a) set-asides, will CTA members need to seek SBA approval?

Size Recertification Issues...

- Small business size certification supposedly good for the life of the contract (or for first five years of the contract for multiple award schedule contracts per 13 C.F.R. § 121.404(g)), except if the small business undergoes a “triggering” event
 - Small businesses do not have to recertify size for orders issued from multiple award contracts unless solicitation “explicitly requires” them to do so, 13 C.F.R. § 121.404(g)(3)(v)
- However, unclear what constitutes an “explicit request”
 - Language of solicitation?
 - Incorporation of FAR clauses representing updated certifications?
- Ability to protest size of awardee?

Deemed Certification?

- Does submission of a proposal for a small business set-aside task order when you are no longer small run afoul of the “deemed certification” provision of the Jobs Act?
 - Mere submission of a proposal on a small business set-aside “shall be deemed an affirmative, willful, and intentional certification of small business size status”? 15 U.S.C. § 632(w)(2)
 - Does this provision apply to task orders as well? Statute conflicts with the regulations if requiring offerors to certify size and status on every task order proposal submission

Multiple NAICS Codes

- Many solicitations have multiple NAICS codes assigned
- Does a firm need to be small under all NAICS codes assigned to the procurement, or only for those SINs it wishes to bid for?
- Is it ok to submit proposals for task orders issued under schedule for which you are small at the time of award of underlying schedule contract, but you are not small for the NAICS code assigned to the task order?

Language from Proposed Rule – Assignment of NAICS Codes

SBA has seen instances where an agency assigns a NAICS code to a multiple award contract and then issues orders using a different NAICS code with a different, lower size standard or issues an order with no NAICS code or size standard assigned. The agency then counts each of the orders as an award to a small business even if the business represented it was small for the higher size standard corresponding to the NAICS code assigned to the contract and not for the lower size standard assigned to the order. In other instances, SBA has seen that an agency will assign multiple NAICS codes to a multiple award contract where a business concern may be small for one or more of the NAICS codes, but not all, and the agency receives credit on an order for an award to a small business even though the business is not small for the NAICS code assigned or that should have been assigned to that particular order.

- However: FAR 8.405-5 states “an ordering agency may only take credit if the awardee meets a size standard that corresponds to the work performed. Ordering activities should rely on the small business representations made by schedule contractors at the contract level.”

Size Status for Consolidated Schedules?

- GSA guidance states that “the single Schedule Special Item Number NAICS, with the greatest historical sales, will determine the business size for the...Consolidated Schedule.”
 - This is consistent with SBA regulations. 13 CFR 121.402(b) states that the NAICS code for a contract is that which “best describes the principal purpose of the product or service being acquired” and that is selected “according to the component which accounts for the greatest percentage of contract value.”
 - Further, the NAICS and size standard that applies to task orders must “correspond to [the] NAICS code and size standard assigned to the underlying long-term contract.” 13 CFR 121.404(g)(3)(iv).
 - Thus, how does a contracting officer assign a code to a task order where consolidated schedule holders may bid, and which size standard applies?



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QUESTIONS?