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GSA PROPOSES SEVERAL SIGNIFICANT CHANGES TO ITS FEDERAL SUPPLY SCHEDULE CONTRACTING PROGRAM

Background: On January 26, 2009, the General Services Administration (“GSA”) issued a proposed rule seeking to revise Part 538, Federal Supply Schedule Contracting, of the General Services Administration Acquisition Regulation (“GSAR”). 74 Fed. Reg. 4,596 (Jan. 26, 2009) (herein referred to as the “Proposed Rule” or “Rule”). Although some aspects of this Rule relate to the reorganization of Part 538, GSA also proposes several significant changes that will affect Federal Supply Schedule (“FSS”) contracting (commonly referred to as GSA Schedule contracting) in the future. In advancing this Rule, GSA received and considered 36 comments in response to the Advanced Notice of Proposed Rulemaking. The deadline for comments on the Proposed Rule, which will be considered in formulating the final rule, is March 27, 2009.

The Proposed Rule: Over the past several months, GSA has issued several proposed rules seeking to revise portions of the GSAR. Each of these rules is a result of the GSA Acquisition Manual (“GSAM”) rewrite initiative. The focus of this initiative is to “revise the GSAM to maintain consistency with the Federal Acquisition Regulation (FAR) and to implement streamlined and innovative acquisition procedures.” The GSAM incorporates the GSAR, which supplements the acquisition policies and procedures of the FAR. For instance, the FAR addresses Federal Supply Schedule Contracting at FAR Part 38, which the GSAR supplements with solicitation and contract provisions and clauses at GSAR Part 538.

FSS Contracts: The Federal Supply Schedule (“FSS”) is a program administered by GSA whereby indefinite delivery, indefinite quantity multiple award contracts are offered to commercial vendors to allow federal agencies the ability to harness the competitive nature of the commercial marketplace. This competition ensures the government receives reasonable prices, which in turn permits government agencies to use simplified competition requirements when procuring commercial products and services. This arrangement affords agencies the benefits of shorter lead-times, lower administrative costs, and reduced inventories, while promoting compliance with various environmental and socioeconomic laws and regulations.

A FSS contract does not obligate federal dollars or require contractors to perform a service or provide a product. Rather, these contracts operate as a type of pre-approval process, whereby a contractor agrees to various terms and conditions, including a pricing arrangement, against which government

agencies can place orders. Only after a purchase or task order has been issued against a contract, obligating federal dollars, is the contractor required to perform. Today, GSA administers approximately two dozen industry-specific Schedule contracts, which provide federal agencies access to over 11 million commercial products and services.

Summary of January 26, 2009 Proposed Rule: Among the various changes to GSAR Part 538, Federal Supply Schedule Contracting, GSA proposes significant changes to the Commercial Sales Practice Format, and acknowledges and addresses teaming arrangements.

- The Commercial Sales Practices (“CSP”) Format – GSA proposes changes to its Commercial Sales Practices (“CSP”) Format, which has been GSA’s longstanding method for evaluating the fairness and reasonableness of offerors’ pricing. Due to many commercial vendors no longer selling from catalog pricelists, the hallmark of the former CSP Format framework, and the large number of services being offered under FSS contracts, GSA now proposes splitting its CSP Format into two formats – one for supplies and/or services with an established catalog pricelist, and a second for supplies and/or services without an established catalog pricelist.
 - GSAR 552.238-65, Commercial Sales Practices Format—Supplies and/or Services With an Established Catalog Price (CSP-1) – CSP-1 is GSA’s traditional method for evaluating offerors’ pricing (*i.e.*, using catalog pricelists). Nevertheless, to improve the solicitation process, GSA revised the “Instructions” section to give “the contracting officer ... the discretion to change offeror estimated sales to conform to the level of sales expectancy.” The preamble of the Proposed Rule provides that the discretion of the contracting officer will be a “business decision ... based upon the contracting officer’s analysis of the offeror’s submission and a realistic evaluation of expected sales.” If used appropriately, this discretion could greatly benefit both the government and vendors, because vendors would then have a realistic expectation of sales, based upon which they could extend their best pricing.
 - GSAR 552.238-66, Commercial Sales Practices Format—Supplies and/or Services with Market Pricing Without an Established Catalog Price (CSP-2) – CSP-2 is GSA’s direct response to the growing number of commercial vendors that no longer sell off of a catalog pricelist and the large number of services offered and provided. This new format contemplates pricing without a catalog pricelist, and the pricing of professional services in accordance with the Service Contract Act. Not surprisingly, this format is substantially more complex and involved than the CSP-1 Format.
- Teaming Arrangements – Often times, various entities work, or “team,” together in order to meet the procurement needs of the federal government. Typically these arrangements are solidified through agreements between the teaming parties. Previously, the GSAM and GSAR did not discuss such arrangements or how they would be viewed or handled in the context of FSS contracting. The Proposed Rule provides guidance and requirements for these teaming arrangements, referred to in the Rule as “Contractor Partnering Arrangements:”

- Subpart 538.9, Contractor Qualifications – The Proposed Rule adds Subpart 538.9, which consists solely of section 538.906-3, Roles and Responsibilities of a Contractor Partnering Arrangement. As the title indicates, this provision provides guidance on the roles and responsibilities of partners operating under a FSS purchase or task order, as well as advising that the partnering agreement “outline all FSS partners.” Implicitly, the Rule requires a “lead partner” be chosen. This lead partner will be responsible for serving as the government’s point-of-contact. Furthermore, the Rule states that “[e]ach partner is responsible for the terms and conditions of its respective FSS contract, including any proposed unit prices or hourly rates.” Finally, the provision provides that any partnering agreement can not conflict with the underlying terms of each partners’ FSS contract, and that the government is not a party to any partnering agreement.
- Subpart 538.42, Contract Administration – The Proposed Rule adds Subpart 538.42, which includes section 538.4201-3, IFF and Contractor Partnering Arrangements. This provision provides that “[c]ontractors participating in Contractor Partnering Arrangements ... abide by ... their respective contracts, including compliance with clause 552.238-74, Industrial Funding Fee and Sales Reporting.” This requirement will be incorporated into FSS contracts through the use of GSAR Clause 552.238-55, Contractor Partnering Arrangements (I-FSS-40). Notably, this clause is not applicable to purchase or task orders issued by the Department of Veterans Affairs.
- Other Changes. In addition to the above issues, the Proposed Rule includes many other changes, as well as commentary regarding other aspects of Federal Supply Schedule Contracting. The changes and commentary are in response, in some cases, to those who responded to the Advanced Notice of Proposed Rulemaking. Some of the other notable changes and commentary include:
 - The reorganization of the GSAR to move the solicitation provisions to Subpart 538.12, Acquisition of Commercial Items, to conform to the FAR. In doing so, GSA also included “an overarching prescription that directs the contacting officer to insert appropriate provisions and clauses when applicable.”
 - The revision of the Price Negotiation Memorandum at GSAR 538.1506-2. GSA’s intent for this revision is to clarify “the [basis of award or pricing] relationship of the parties in terms of a percentage or ratio.”
 - The rejection of a commenter’s recommendation that GSA provide guidance on “establishing relationships with dealers/distributors/resellers under the FSS Program in terms of tracking customer selections.” GSA explained that such a revision was not necessary because the Price Reductions Clause can track customers in dealer/distributor/reseller situations through the “category of customers” component.

- The response to a commenter’s request to clarify the application of the Buy American Act (“BAA”) and the Trade Agreements Act (“TAA”). Specifically, the commenter felt the GSAR failed to explain “whether the TAA threshold applies to the total contract value, the individual Contract Line Item value, or the delivery or task order value.” GSA explained that pursuant to FAR 25.403(b)(3) “the TAA and BAA apply to the total value of the contract,” making clarification unnecessary.

Practitioner’s Tips: Although the GSAM rewrite initiative and the reorganization of Part 538 of the GSAR are welcome developments, the Proposed Rule could have significant implications for current FSS contract holders, as well as those seeking to obtain an FSS contract. For example:

- GSA’s changes to the CSP Format are welcome, however, the changes merely create new and equally rigid tables that fail to accommodate the myriad of pricing methodologies of the commercial marketplace. Further, the CSP-2 Format for services poses new hurdles and requirements not previously foisted upon contractors without catalog pricelists. Indeed, the continually evolving CSP Format approach has become exceedingly complex and problematic for contractors.
- The contract provisions and clauses relating to Contracting Partnering Arrangements are a step in the right direction; however, it fails to address several substantive issues. First, the Rule does not explain what the “outlin[ing] of all FSS partners” means. Further, the Rule does not advise contractors on numerous practical and complex issues. For example, should invoices be submitted separately or through the lead partner? If they go through the lead partner, what documentation will be required of the lead partner’s invoices so that the Industrial Funding Fee (the fee that contractor’s pay to GSA to defray its expenses of administering the FSS program) fees can be properly allocated?
- The “overarching prescription” of the contracting officer to include “appropriate provisions and clauses when applicable” in contracts for commercial items and services appears to be quite broad and without concrete limitations. This could lead to more onerous contracts, a disparity between contracts, and ultimately a less streamlined and simplified contracting regime, which defeats the purpose of the FSS Program.
- Interestingly, the Proposed Rule fails to address the implementation of these changes. Some affect the solicitation process, which would have no bearing on current contract holders. While some provisions have implications for current contracts, there is no discussion or consideration as to how the final rule will be implemented, something that generally warrants public comment and considerable discussion.
- The Proposed Rule signals that significant changes with FSS contracts are coming. Furthermore, with the new Administration, the next iteration of the rule may include even more sweeping changes. If you are a current FSS contract holder, or are contemplating an FSS contract, you may wish to seek advice on how these changes and other possible changes may directly affect your business.

- Any comments to the proposed rules must be made to GSA Regulatory Secretariat by March 27, 2009. Comments may be submitted electronically through the www.regulations.gov site by referencing GSAR Case 2006-G507. Comments may also be submitted by fax to (202) 501-4067 or by mail to: General Services Administration, Regulatory Secretariat (VPR), 1800 F. Street, NW, Washington, DC 20405.

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