

# VENABLE

## 2017 Outlook for GSA Schedule Contract Holders

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# Agenda

- GSA OIG Memorandum (dated Sept. 18, 2016)
- CSP disclosures are insufficient to establish fair and reasonable pricing
- The PRC was negated by ineffective basis of award customers
- GSA is failing to maximize savings identified in pre-award audits
- Contractors are providing the government with unqualified labor
- Contractors have inadequate reporting systems and are miscalculating their IFF payments
- Additional Issues



# GSA OIG Memo

- September 18, 2016, GSA OIG issued a memorandum to the FAS Commissioner, detailing numerous concerns
- The OIG lumped them in two broad categories, each with several findings:
  - The failure of the Schedules program to serve as the lowest overall cost alternative to the government
    - CSP disclosures are insufficient to establish fair and reasonable pricing
    - The PRC was negated by ineffective basis of award customers
    - GSA is failing to maximize savings identified in pre-award audits
  - Contractors' general failure to comply with their Schedule contract requirements
    - Contractors are providing the government with unqualified labor
    - Contractors have inadequate reporting systems and are miscalculating their IFF payments
- We'll discuss many of the issues under these categories today, but note, these findings are already impacting contractors and will throughout 2017

# CSP Disclosures are Insufficient to Establish Fair & Reasonable Pricing

- The OIG found:
  - 79% of audited contractors in FY 2014 submitted inaccurate CSP information to GSA for the Basis of Award of their contract.
  - 39% of audited contractors did not offer schedule pricing that was equal to or better than its most favored customer. This amounted to a total loss of nearly \$79M to the government and significant penalties for the contractors.
- Failure to accurately submit CSP information can lead to:
  - Defective pricing
  - Overbilling
  - Inaccurate reporting
  - False Claims Act violations
    - Significant civil penalties
    - If actual knowledge, potential criminal penalties
  - Suspension or debarment

# Getting your CSP Right from the Start

- Market Pricing vs Commercial Pricing for Structure
- What is your correct structure? You cannot create a commercial price list for a the sake of obtaining a GSA Schedule as it doesn't provide for fair and reasonable pricing and or pricing substantiation.
- Market Rates for service providers are overwhelming the correct structure but most claim a Commercial Price List which is incorrect.
- Market Rate is defined by FAR 2.101: (ii) "Market prices" means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors .
- The baseline for GSA to begin negotiating your contract is to have the lowest available rate for the like product or service.
- It is the responsibility of the contractor to provide the correct pricing to GSA to establish the basis of award for the GSA Schedule.


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# Reviewing an Existing CSP

- Does your CSP accurately define correct sales practices?
- The CSP offers vendors the ability to identify standard and non-standard pricing and discounting policies and terms and conditions which can be added to the Schedule for additional compliance safety.
  - Does your CSP accurately capture deviations and concessions that are standard policy for your company?
  - Deviations or Concessions would be anything that can lead to a lower price of service or product sold commercially. E.g., Free shipping to a customer is concession.
- If the CSP is not set up correctly at the outset, the vendor cannot accurately track its Basis of Award or monitor its commercial sales practices correctly.
  - These instances can lead to defective pricing, the ineffectiveness of the PRC, overbilling and inaccurate reporting.
  - Repercussions for noncompliance can be severe
  - Under the FAR's Mandatory Disclosure Rule, also obligated to affirmatively disclose these issues. Failure to disclose (among noncompliance penalties) can be a basis for suspension or debarment.

## Best Practices:

- Do you have a Basis of Award Monitoring program? 43 percent of audited contractor did not have a system in place in FY 2014.
- Did you accurately disclose your commercial pricing practices during the award phase of your GSA Schedule and any Option Renewal since award?
- Remember being a sub to a prime is considered a commercial relationship.



# GSA Failing to Maximize Savings Identified in Pre-Award Audits

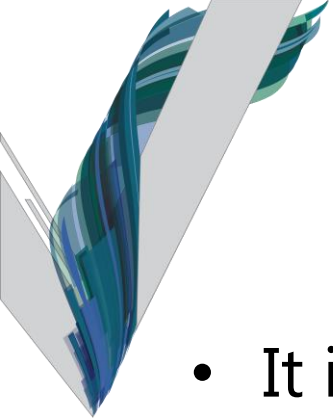
- The OIG found:
  - Across 24 audited contracts, the OIG identified during pre-award audits cost savings of approximately \$221M.
  - Notwithstanding, GSA realized only \$93M (43%) of those savings.
- What does this mean in 2017:
  - More pre-award audits as they see a benefit in identifying these savings.
  - Increased pressure to drive pricing down
- This finding, however, based on at least two fault presumptions:
  - “Fair and reasonable pricing” (the regulatory standard), is the lowest price, and
  - GSA unilaterally determines the pricing
- Both presumptions are false and should be rejected on various bases.

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# Contractors Providing the Government with Unqualified Labor

- For service contracts awarded under the Schedules Program, minimum educational requirements and/or experience qualifications are established for employees to qualify for specific labor categories (LCAT).
- By not providing qualified personnel that mapped to the agreed upon LCAT (regardless of contract type) it may be considered an overbilling.
- For FFP, contractors are required to show proposal build-ups and how they map to the LCATs on Schedule.
  - We find the failure to perform and maintain the proposal build-up is the biggest noncompliance issue we see with customers with FFP bids.
- It should be noted that during a site visit the Pricing Proposal and Resumes will be reviewed and cross walked to ensure the minimums are being met.



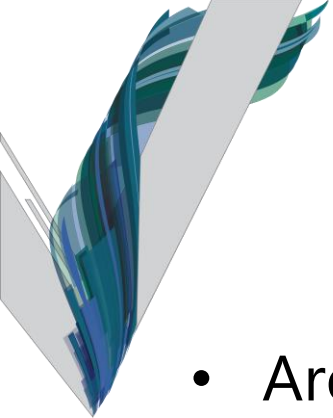


# Contractors Providing the Government with Unqualified Labor (*cont'd*)

- It is also critical that the work is in scope when mapping the position.
  - The functional description should be in the realm of reality when mapping.
  - Titles are nearly immaterial in most case but what duties the person performs will determine if the work is in scope.
- LCAT mapping should always be performed when pricing the proposal (i.e., before the a task order issued).
- “Pricers” should be trained specifically for LCAT mapping for Schedule task orders and labor matrices should be kept for each proposal for up to 7 years after submission.
- Unqualified labor being sold to the government can trigger a disclosure requirement under the Mandatory Disclosure Rule and False Claims Act liability.

# Contractors have Inadequate Reporting Systems and are Miscalculating their IFF Payments

- Schedule contractors are required to pay an Industrial Funding Fee (IFF) of 0.75 percent on all Schedule sales to GSA to fund the program.
  - Contractors should have an adequate system in place to ensure that these sales can be accumulated and reported accurately, as required by GSAR 552.238.74.
- 43% of the audited contractors did not have adequate systems in place to accurately monitor, accumulate and report Schedule sales.
- 83% of the audited contractors improperly computed IFF resulting in \$2.8 million in unpaid IFF in FY 2014.

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# Proper Reporting Systems and Correct IFF Calculations

- Are you recording government and Schedule sales as the same?
  - Separate Schedule sales from all other government-related sales.
  - Do not include sales to prime contractors unless its an authorized Schedule buy.
  - Make sure your appropriate people within the organization can identify Schedule sales.
- For FFP task orders:
  - Separate out ODCs (e.g., travel) and labor
  - ODCs are not subject to the IFF
- For labor hour task orders:
  - Are you paying the lump sum on the invoice?
  - During a customer audit we discovered on average a customer was paying the full invoice and not segregating cost which led to an overpayment of over \$5M in 3 year period for a large Schedule holder.



# Additional Issues

- Ceiling Rates
  - Your awarded GSA rates are your ceiling rates.
  - If you do not have escalation automatically built into your rates you cannot bid a fixed escalation for out years on a task order if it breaks the ceiling rate.
  - CAUTION: OIG has interpreted the concept of ceiling rates as a recognition that the rates could be lowered further.
- Economic Price Adjustment (EPA)
  - Your EPA if tied to an index or CPL, it is not guaranteed and you are at risk of an overcharge to the government if you bid escalation in your out years higher than your ceiling rates.
  - Ensure your contract reconciles with your pricing practices.
  - Ensure your “pricers” and sales staff understand how out-years should be addressed.
- Non Schedule Items/Open Market Items
  - Off Schedule items can be purchased on a Schedule order, but:
    - They must be clearly marked on the proposal as “open market” or “off Schedule”,
    - Cannot exceed \$3,500, and
    - Must be ancillary to the other items/services being acquired.

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## Additional Issues (*cont'd*)

- Contractor Teaming Arrangements (CTA)
  - All parties to a CTA need to have a Schedule.
  - You bid only your rates on your Schedule.
- CTA Admin Fee
  - Be wary of high admin fees on CTA's for team leads as it needs to be reasonable since the rates are already fully burdened.
  - Usually 5% would be very high for CTA team lead admin duties.
  - More than that would need to be clearly justified and could set off flags for IOAs or OIG auditors for the CTA team lead.
- Include in your proposal
  - Always include an executed copy of your CTA in your proposals.
- CTA IFF:
  - Each team member on the CTA is responsible for the IFF charged for the positions that have been bid.

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# Additional Issues (*cont'd*)

- IOA's
  - Be prepared! Have contract documents, sales reports, etc. organized and available.
  - Do not rely on a positive report from the IOA to mean that you are compliant.
- Self Audit
  - It is imperative that you self audit your processes and policies with regards to all areas of compliance with the GSA Schedule on a quarterly basis.
  - Noncompliance has severe ramifications and requires affirmative disclosure when discovered.
- Commercial Sales vs Government Sales
  - Unless the invoice goes directly to a federal agency it is considered a commercial sale (except under Cooperative Purchasing or Disaster Recovery if the GSA Schedule is used).
  - The biggest error we encounter is when selling services to federal prime contractor. Prime contractor not entitled to Schedule rates unless provide you with a letter authorizing their purchase off the Schedule at Schedule rates
    - Note: Must then report sales as Schedule sale and remit IFF.
- Like items
  - Remember that for labor and even for products that they have to map and meet the requirements of similar items sold on the Schedule to be considered for a Price Reduction Clause.

Questions?

Thank You!

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