

VENABLE

GSA Audits – From Anxiety to Zen

Wednesday, September 20, 2017

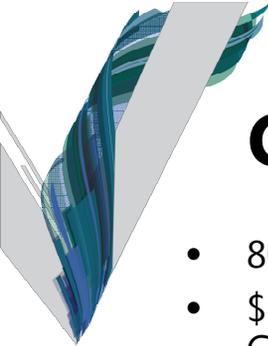
Dismas N. Locaria, Esq.
Partner, Venable LLP
dlocaria@Venable.com
202.344.8013

CPT. Scott M. Davidson, USA, Ret.
Managing Principal, The GCO Consulting Group
Scott.Davidson@govconops.com
888.732.7341, ext. 700



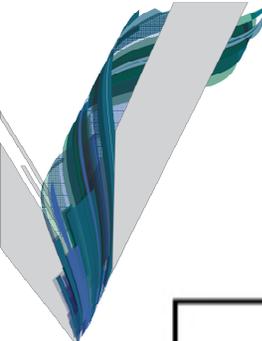
Agenda

- GSA Schedule Numbers
- OIG vs. IOA Assessments
- IOA Assessment Breakdown
- OIG Audit Breakdown
- Specific OIG Audit Areas of Concern/Mitigation
- Additional Areas of Concern/Mitigation



GSA Schedule Numbers (FY 2016 Update)

- 80% of GSA Schedule Holders are small businesses that represent 36% of sales.
- \$31,786,345,753 flowed through GSA Schedules contracts in task orders FY 2016 from Government Procurement.
- In FY16, approximately 10% of all the government needs were procured through the GSA Schedule contracts.
- GSA had 15,000 MAS contracts total in FY16.
- IT 70 Schedule had a total of \$14,747,293,780 in sales overall in FY 2016.
- The Professional Services Schedule (PSS) had a total of \$6,496,810,679 in FY 2016.
- The IT GSA Schedule can also be used to sell to all State, Local, & Tribal Governments under the Cooperative Purchasing Program (\$379,607,932 in sales to state and local in FY 2016). Same as Schedule 84.
- In a recent GSA Office of Inspector General audit the sample returned that 79% of GSA Schedule holders did not have correct compliance systems in place to meet GSA Schedule Requirements.



OIG Audit vs. IOA Assessment

OIG Audit	IOA Assessment
Subpoena power	No subpoena power
Lengthy data collection and analysis	Short assessment and quick turnaround
Focus on specific issues (e.g. pricing)	Review of many compliance areas
Complete review of transactions	Process review and spot checks
Pre-award or post-award	Annual, end of term, and special cases
Identify contractual issues	Educate and review the mechanisms the contractor has in place to comply with selected terms and conditions of the contract.



IOA Assessment Breakdown

IOA visits occur for several reasons:

- If the GSA vendor has more than \$150K in sales per year on the GSA Schedule, expect an annual virtual visit.
- If the GSA vendor is near the end of term (within 24 months), there will be an end-of-term assessment.
- IOAs will test and sample sales tracking, basis of award track, IFF reporting, labor qualifications, and TAA compliance, among the areas of review.



IOA Assessment Breakdown

- A letter is provided that must be signed by an authorized negotiator before the IOA assessment visit.
- The following statements are from the actual IOA letter:

“The Contractor Assessment (CA) is not a substitute for a vigorous internal compliance program; it remains the contractor’s responsibility to comply with all legal and contractual obligations.”

“The CA is NOT an audit, nor is it intended to be a comprehensive review of the contractor’s past and current compliance with any of the terms and conditions associated with the GSA MAS contract. Accordingly, an IOA’s failure to identify any past or current contract compliance issue does not constitute a finding of full compliance with the contract or government contracting regulations.”

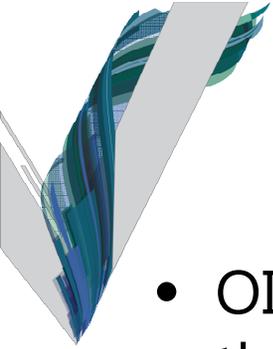
IOA Assessment Breakdown (cont.)

“Any discussion with or information given to the IOA does not constitute a report or disclosure that is required to be made to the Contracting Officer (CO) or to the GSA Office of Inspector General (OIG) under the Federal Acquisition Regulation or contract provisions.”

“Because of the limited scope of the CA, nothing contained in the Assessment Report, or in any other documentation or action pertaining to the IOA CA, precludes any claim presented by GSA or the United States relating to the contract.”

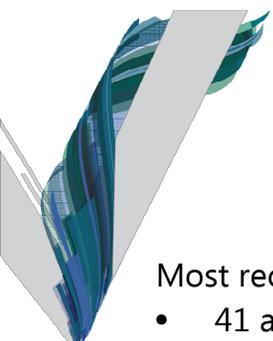
IOA Assessment Breakdown (cont.)

- Key takeaways from an CA visit:
 - Any findings and discussions with an IOA do not satisfy the requirements of mandatory disclosure or the False Claims Act.
 - The CA is not an audit, but should at a minimum should have the vendor recognize issues with their GSA Schedule that may be a disclosable event.
 - There is no substitute for a strict compliance program.



OIG Audit Breakdown

- OIG audits are significant audit events and are conducted under the authority of GSAM § 515.408(a)(4) (through FAR 52.215-21(a)(4) Alternate IV).
- OIG audits can occur for many reasons:
 - Results of a self-disclosure
 - Random selection of IFF system testing
 - Result of whistleblower action
 - Option to extend the term of the contract
 - Pre- and post-award audits



OIG Audit Breakdown

Most recent OIG audits for a 6-month period of October 1, 2016 – March 31, 2017:

- 41 audit reports issued.
- \$224.2M in financial recommendations made based upon OIG audit reports.
- The OIG audit teams' investigative efforts yielded more than \$310M in recommend financial savings and investigative recoveries during this time frame.
- The OIG also filed 36 reports where funds were recommended to be put to better use, for a total of \$465,459,598 during that time frame.

The GSA OIG OFFICE OF AUDITS is the investigative body you will most likely encounter first during your audit. This office is an evaluative organization staffed with auditors and analysts that provides comprehensive coverage of GSA operations through program, financial, regulatory, and system audits and assessments of internal controls. The office conducts attestation engagements to assist GSA contracting officials in obtaining the best value for federal customers and American taxpayers. The office also provides other services to assist management in evaluating and improving its programs.

THE OFFICE OF INVESTIGATIONS, a statutory federal law enforcement organization that conducts nationwide criminal, civil, and administrative investigations of illegal or improper activities involving GSA programs, operations, and personnel, is the entity the vendor is likely to work with, depending on the nature of a disclosure or complaint.



OIG Audit Breakdown

OIG audits will test multiple areas of the vendor's compliance systems. Areas may include:

- CSP accuracy
- BOA monitoring practices and process
- Price reduction clause review
- Labor qualification (down to the subcontractor level)
- Cost/price buildup for rates (fair and reasonable)
- IFF sales tracking reconciliation
- Task order review for compliance (travel, ODCs, per diem)
- Review and accuracy of the vendor's billing and information systems to verify the completeness and accuracy of statements made by the vendor



OIG Audit Breakdown

Results of the audit may lead to the following:

- Clawback of payments
- Civil penalties/fines
- Cancellation of the GSA Schedule
- Suspension and debarment
- Criminal prosecution

Specific Areas of OIG Concern for GSA Vendors

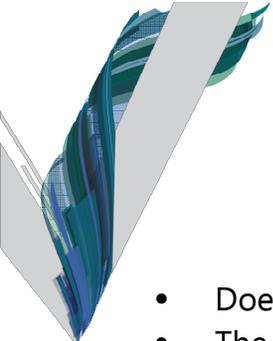
- On September 18, 2016, GSA OIG issued a memorandum to the FAS Commissioner, detailing numerous concerns.
- The OIG lumped them into two broad categories, each of which included several findings:
 - The failure of the Schedules program to serve as the lowest overall cost alternative to the government
 - 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 that these findings are already impacting contractors and will throughout 2017.

CSP Disclosures Are Insufficient to Establish Fair and 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 that offered to 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 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 that 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 a 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.

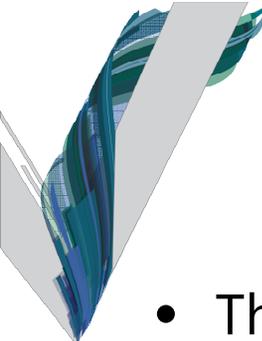


Reviewing an Existing CSP

- 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 that 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. For example, free shipping to a customer is a 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 non-compliance can be severe.
 - Under the FAR's Mandatory Disclosure Rule, also obligated to affirmatively disclose these issues. Failure to disclose (among non-compliance penalties) can be a basis for suspension or debarment.

Best Practices:

- Do you have a basis of award monitoring program? 43 percent of audited contractors 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, is 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.



Contractors Providing the Government with Unqualified Labor

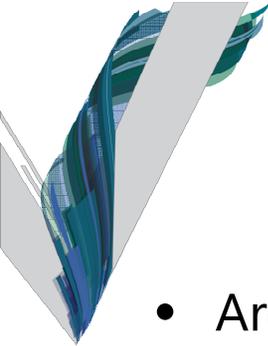
- For service contracts awarded under the Schedules Program, minimum educational requirements and/or experience qualifications are established for employees to qualify for specific labor categories (LCATs).
- By not providing qualified personnel that mapped to the agreed-upon LCAT (regardless of contract type), it may be considered an overbilling.
- For FFP, contractors are required to show proposal buildups and how they map to the LCATs on the Schedule.
 - We find the failure to perform and maintain the proposal buildup is the biggest non-compliance 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.)

- 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 cases, but the duties the person performs will determine whether the work is in scope.
- LCAT mapping should always be performed when pricing the proposal (i.e., before a task order is 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.

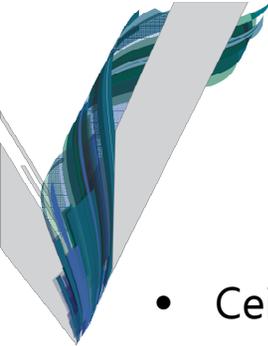
Contractors Have Inadequate Reporting Systems and Are Miscalculating Their IFF Payments

- 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.



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 it's 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 a 3-year period for a large Schedule holder.



Additional Compliance Areas For Review

- 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 is 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 (5K for DOD).
 - Must be ancillary to the other items/services being acquired.

Additional Compliance Areas for Review (cont.)

- Contractor Teaming Arrangements (CTAs)
 - 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 CTAs 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.

Additional Compliance Areas For Review (cont.)

- IOAs
 - 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 regard to all areas of compliance with the GSA Schedule on a quarterly basis.
 - Non-compliance 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. A prime contractor is not entitled to Schedule rates unless it provides you with a letter authorizing its 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, 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!

Dismas N. Locaria, Esq.

Partner, Venable LLP

dlocaria@Venable.com

202.344.8013

CPT. Scott M. Davidson, USA, Ret.

Managing Principal, The GCO

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Next Month's Government Contracts Webinar:

Suspension and Debarment

Wednesday, October 18, 2017

12:00 pm – 1:30 pm ET

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