



FEDERAL CONTRACTS



REPORT

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Multiple Award Schedule Contracts

Issues of scope under multiple award schedule contracts are not unique to Federal Technology Service contracts and the Iraq-related task orders that have been the subject of a number of recent government reports.

However, this recent visibility indicates that these issues need to be carefully considered by both procuring agencies and schedule contractors that offer goods and services through multiple award schedule vehicles.

Dealing With Contract Scope Issues Under GSA FSS Contracts: Issues, Risks and Responses

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Introduction

There have been a number of high-profile reports in the last year of alleged “misuse” of General Services Administration Federal Supply Schedule (“FSS”) contracts to acquire supplies or services that

were “outside the scope” of those contracts.¹ These reports have resulted in increased awareness of and emphasis on issues of contract scope that affect both contractors and procuring agencies. Because GSA has suggested that a contractor’s acceptance of out-of-scope

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¹ See, e.g., U.S. Government Accountability Office (“GAO”), *Interagency Contracting, Problems with DOD’s and Interior’s Orders to Support Military Operations* (GAO-05-201) (April 2005); GSA Office of Inspector General, *Compendium of Audits of the Federal Technology Service Regional Client Support Centers* (Dec. 14, 2004); DOD Office of Inspector General, *Contracts Awarded for the Coalition Provisional Authority by the Defense Contracting Command - Washington* (D-2004-057) (Mar. 18, 2004) (“Mar. 2004 DOD IG Report”); GSA Office of Inspector General, *Audit of Federal Technology Service’s Client Support Centers* (A020144/T/5/Z04002) (Jan. 8, 2004).

work could call into question its eligibility for future federal contract awards, contractors should review these issues carefully, and consider enhancing their policies and procedures in this area.

I. Issues Presented by Acceptance of Out-Of-Scope Work

A. Bid Protests

Bid protests challenging requests for quotations and delivery orders on the ground that the products or services being acquired are outside the scope of the applicable FSS contract are becoming more frequent. Moreover, the Government Accountability Office (“GAO”) has been closely scrutinizing contract scope issues in the FSS context.²

The adjudication of contract scope issues in the bid protest context has generally looked to the “cardinal change” doctrine and has focused on “whether the contract as modified materially departs from the scope of the original procurement.”³ In one recent case involving an FSS contract, the GAO stated that:

when concern arises that a vendor is offering services outside the scope of its FSS contract, the relevant inquiry is not whether the vendor is willing to provide the services that the agency is seeking, but whether those services are actually included in the vendor’s FSS contract as *reasonably interpreted*. If the quoted services are not listed on the vendor’s FSS contract, they cannot be purchased using FAR [Federal Acquisition Regulation] Part 8 procedures, but instead must be purchased using competitive procedures.⁴

In another case involving a Schedule 70 (IT) procurement, the GAO framed the issue as whether the supplies or services are within the type of services reasonably contemplated under the applicable GSA schedule.⁵

B. Contractor Responsibility and Suspension/Debarment

GSA has taken the position that acceptance of a task order to perform out-of-scope work under an FSS contract can raise issues regarding a contractor’s responsibility, *i.e.*, its eligibility for award of new contracts and delivery orders. For example, in 2004, GSA “invited” at least two contractors to meet with its suspension and debarment official (“SDO”) as a result of contract-

scope-related issues.⁶ More recently, GSA’s SDO summarized GSA’s position as follows:

With revenue comes responsibility

We certainly recognize that the primary responsibility is with the Federal agencies to determine contract issues such as scope, what vehicle to use, etc. Having said that, we cannot have a situation where a contractor knows or should know that something is wrong and does not at least raise the issue with the contracting officer or, if appropriate, higher authority. On a case-by-case basis, if we determine that a contractor has not followed the rules, we may take appropriate action in the context of contractor responsibility. This is a part of our ongoing and continuous process of examining contractor responsibility issues in order to ensure that we continue to do business only with responsible contractors.

We believe it is important that contractors work alongside Federal agencies to maintain the integrity of the procurement system.⁷

The Federal Acquisition Regulation (“FAR”) lists a number of factors that can be the basis for suspension and debarment. These include: indictment or conviction for certain enumerated offenses; “[c]ommission of any other offense indicating a lack of business integrity or business honesty”; and “any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.”⁸ GSA has not clearly articulated how acceptance of a task order for supplies or services that are “out of scope” fits within these categories. Nor is there any other regulatory provision that specifically prohibits a contractor from accepting an order to perform out-of-scope work under an FSS contract. Indeed, selection of a contract vehicle and the determination of contract scope issues have traditionally been understood to be the responsibility of the procuring agency.⁹

At one point, GSA reportedly suggested that the FAR Changes clause limited a contractor’s ability to accept out-of-scope work.¹⁰ However, some might argue that reliance on the Changes clause is misplaced, particularly in contracts for commercial items containing the clause at FAR 52.212-4, Contract Terms and Conditions, Commercial Items, which permits changes “by written agreement of the parties.”¹¹ Nor do other standard FAR Changes clauses (*e.g.*, FAR 52.243-1, Changes, Fixed Price) *preclude* a contractor from accepting arguably out-of-scope work.

Similarly, even where a contractor is required to give notice of a change, the purpose is to enable the Govern-

² See, *e.g.*, *American Sys. Consulting*, B-294644, 2004 C.P.D. ¶ 247 (Dec. 13, 2004) (sustaining protest of award of blanket purchase agreement where awardee’s quote included services that were not on its GSA contract); *Armed Forces Merchandise Outlet, Inc.*, B-294281, 2004 C.P.D. ¶ 218 (Oct. 12, 2004) (sustaining protest of delivery order on the ground that product offered by awardee was not on its GSA contract); *Information Ventures, Inc.*, B-293743, 2004 C.P.D. ¶ 97 (May 20, 2004) (sustaining protest on ground that services were outside the scope of GSA Schedule 70/Special Item Number (“SIN”) 132-51 (IT services)); see also *Altos Federal Group, Inc.*, B-294120, 2004 C.P.D. ¶ 172 (July 28, 2004) (schedule contractor cannot use subcontractors to provide services that are not offered on either the prime’s or the subcontractor’s GSA schedule contracts).

³ *AT&T Commun., Inc. v. Wiltel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993).

⁴ *American Sys. Consulting*, 2004 C.P.D. ¶ 247 at 5 (emphasis added).

⁵ See *Information Ventures, Inc.*, 2004 C.P.D. ¶ 97 at 4.

⁶ See *Federal Contracts Report* (“FCR”), Vol. 82, No. 2 at 35 (July 13, 2004); *id.*, Vol. 82, No. 5 at 121 (Aug. 3, 2004).

⁷ J. Neurauder, Suspension Debarment Official, U.S. General Services Administration, *Random Thoughts on Suspension and Debarment*, at 5, ABA Section of Public Contract Law, 11th Annual Federal Procurement Institute (Feb. 2005) (“SPCL Procurement Institute”).

⁸ FAR 9.406-2(a) & (c); see also FAR 9.407-2(a) & (c).

⁹ See, *e.g.*, Mar. 2004 DOD IG Report at 14 (stating that “[b]efore awarding contracts using the [FSS], contracting officials must ensure that the appropriate Federal Supply Schedule is used”); GAO, *Rebuilding Iraq, Fiscal Year 2003 Contract Award Procedures and Management Challenges* (GAO-04-605, 5/27/04) at 5 (stating that “[c]ontracting officers must decide whether the work described in a task order fits within the work generally described in the contract”).

¹⁰ See FCR, Vol. 82, No. 17 at 482 (Nov. 9, 2004).

¹¹ FAR 52.212-4(c), Changes.

ment to decide whether it wants the work to be performed, and thus avoid possible later claims for additional work.¹² Such notice provisions are not generally understood as precluding the Government from requesting, and the contractor from accepting, the changed work. Indeed, even in the case of a “cardinal change” (i.e., one which “effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for,”¹³ and therefore constitutes a breach of the contract by the Government), a contractor is not required to refuse the work, and some attorneys have cautioned that doing so presents a risk of termination for default. Rather, in those cases, contractors have traditionally been seen as having the option of accepting the changed work, generally with a reservation of the right to seek an equitable adjustment.

Nonetheless, since GSA has now framed contract scope as a matter of contractor responsibility,¹⁴ contractors must, as a practical matter, be aware of GSA’s position on this issue.

C. Increased Audit Risk

Acceptance of clearly out-of-scope work could increase the risk of Government audits focused on the pricing of that work. Procurement laws and regulations require contracting officers to determine that prices are “fair and reasonable.”¹⁵ Further, in the case of schedule contracts, pricing is typically based on information regarding the offeror’s commercial sales practices as disclosed on its Commercial Sales Practices form.¹⁶

The award and acceptance of orders for work that is “outside the scope” of a GSA schedule contract could lead auditors to question whether the GSA contract should be relied upon to establish that the prices for that work were “fair and reasonable.”¹⁷ Whether the Government could successfully question pricing on the ground that the work was out-of-scope work is unclear. However, for the contractor, dealing with such an inquiry can be expensive, time-consuming, and disruptive.

II. Agency Reactions and Responses to the Contract Scope Controversy

Contract scope issues also present risks for agency program and contracting officials. Various agency components have been subject to intense scrutiny, including IG investigations and GAO reports, because of the alleged award of out-of-scope work. Interestingly, the Court of Appeals for the Federal Circuit recently upheld an arbitrator’s disciplinary action against a GSA Fed-

eral Technology Service (“FTS”) employee who had improperly modified the scope of a contract.¹⁸

A. “Get It Right”

GSA’s principal response to the contract scope controversy was to initiate its “Get It Right” program. That program includes regulatory enhancements, increased education and training of Government acquisition personnel, and internal (IG) audits and reviews to ensure internal compliance with policies, regulations, and procedures.¹⁹ However, GSA has also made clear that, in its view, contractors “have the responsibility for informing the government if a service or task ordered is outside the scope of your contract,”²⁰ and, as noted above, GSA’s SDO has stated that acceptance of such work can lead to a review of a contractor’s responsibility.

B. Other Agency Responses to Contract Scope Issues

1. Revised Procedures for Use of GSA Contracts

The Defense Department has implemented new policies and procedures for use of non-DOD contract vehicles, including schedule contracts. These include requiring program managers to determine that the supplies or services are within the scope of the contract and ensuring that DOD-unique terms and conditions are incorporated into the applicable order.²¹

2. “Certifications”

There have been reports that certain FTS buying authorities have asked contractors to “certify” that the products/services being offered are within the scope of the underlying contracts.²² GSA procurement officials have reportedly (and properly) stated that requests for such certifications are not permitted under existing procurement laws and regulations.²³ Providing such a certificate presents potential risks for a contractor, particularly if there is a subsequent inquiry or dispute about whether the work was “in scope.” Contractors should avoid providing such “contract scope” certificates and, if asked, elevate the issue within the user agency or to GSA’s acquisition policy office. In doing so, contractors could point to the Office of Federal Procurement Policy Act, which effectively prohibits contracting or buying offices from requesting such certifications from a contractor.²⁴

3. Contract Reviews

GSA has also announced that its Industrial Operations Analysts will begin to review contractor compliance with contract scope provisions.²⁵ This will apparently include review of controls related to scope issues and of statements of work in delivery or task orders.²⁶ What GSA intends to do with the results of these “contract reviews” is unclear—for example, whether it intends to use them in the assessment of contractor performance

¹² See FAR 43.104(a) & 52.2437(d).

¹³ *AT&T v. Wiltel*, 1 F.3d at 1205.

¹⁴ See FAR 9.103 & 9.104-1.

¹⁵ See, e.g., FAR 15.403-3(c)(1) (providing that “the contracting officer must use price analysis to determine whether the price is fair and reasonable whenever the contracting officer acquires a commercial item”); see also FAR 2.101 (defining “commercial item”).

¹⁶ See GSAM 515.408; see also GSAM 538.271(a) - (b) (providing that “MAS awards will be for commercial items as defined in FAR 2.101,” and that COs are to determine that the prices offered are fair and reasonable).

¹⁷ See Mar. 2004 DOD IG Report at 34.

¹⁸ *Hursh v. GSA*, 2005 WL 566429 (Fed. Cir. 2005) at *2.

¹⁹ See, e.g., *GSA Steps* (Sept. 2004).

²⁰ *Id.* at 2.

²¹ See OSD Memo, *Proper Use of Non-DOD Contracts* (Oct. 29, 2004); see also P.L. 108-375 (Ronald W. Reagan National Defense Authorization Act for FY 2005) §§ 802, 854; DFARS 217.7802, 70 Fed. Reg. 29,642 - 43 (May 24, 2005).

²² See The Coalition for Government Procurement, *Friday Flash* (Mar. 4, 2005).

²³ See *id.*

²⁴ See 41 U.S.C. § 425 (b) & (c).

²⁵ *GSA Steps*, *supra*, at 2.

²⁶ *Id.* See FAR 42.1503(b).

and/or to make them available for use in connection with evaluation of past performance in subsequent procurements. Similarly, it is not clear whether GSA intends to comply with regulatory requirements affording contractors an opportunity for notice and comment on such assessments.²⁷

4. Outsourcing of Acquisition and Contract Support

Recent reports indicate that GSA is planning to outsource certain acquisition and contract administration support functions.²⁸ This is reportedly because the Government is having difficulty finding trained contracting officers and acquisition specialists. Regardless of the merits of outsourcing acquisition functions, it adds another layer of complexity to the contract scope issue.

III. Government Expectations and Contractor Responses

As discussed above, contract scope issues are the subject of increased visibility and scrutiny within GSA and procuring agencies. Many of the Government's initiatives are focused on internal Government processes and procedures. However, as noted above, GSA has indicated that acceptance of out-of-scope work could raise questions regarding a contractor's responsibility and that it will consider this on a case-by-case basis.

A. Determining Whether Work Is In or Out of Scope

Whether a particular task order is within the scope of a GSA contract is an issue of contract interpretation and judgment.²⁹ In some cases, determining whether a particular task order is "in scope" may be fairly straightforward. The more difficult questions will arise in the grey areas. In that regard, GAO has noted that there are "no statutory or regulatory criteria or procedures that guide a contracting officer [or contractor] in [determining whether the task orders are within the scope of a contract]."³⁰ GAO and judicial bid protest decisions provide some guidance, e.g., suggesting that contractors should look at whether the work being solicited is included under a "reasonable interpretation" of the particular schedule contract or special item number ("SIN"), although, as the Federal Circuit has observed, "a broad original competition may validate a broader range of later modifications without further bid procedures."³¹ In addition, because contract scope determinations involve issues of contract interpretation, the prior course of conduct between the parties may also be relevant to those determinations.³²

B. Consulting With the "Government"

GSA also has taken the position that a contractor should inform the "government" if a delivery or task order calls for work that is outside the scope of the con-

tract.³³ However, there is no regulation that requires such notice or that tells the contractor whom to notify. In the FSS context, while the contract is awarded by GSA, the user agencies define their requirements, select the contract vehicle, and prepare statements of work for task and delivery orders. GSA appears to be of the view that notice to the "government" of contract scope issues includes notice to the GSA contracting officer.³⁴

C. Refusing Work?

GSA has also sent mixed signals on whether a contractor has an obligation to refuse to perform out-of-scope work. GSA has stated: "Please understand that GSA is not telling you to turn down work; we are simply informing you that if the work doesn't fit under your contract, don't do it."³⁵ Note, however, that others might argue that refusing to accept orders or to perform work that is "out of scope" runs afoul of language in the Disputes clause, which requires the contractor to continue performance pending the resolution of any dispute.³⁶ Also, some contractors might be concerned with the potential consequences of refusing to accept an order on future evaluations of its past performance.

D. Enhancing Policies and Procedures

Thus, even though contractors may not be legally required to police agency decisions on what contract vehicle to use and related contract scope issues, the increased visibility and scrutiny of out-of-scope work suggests that contractors should review and, if necessary, enhance internal processes and controls relating to contract scope-of-work issues. In light of GSA's views, this might well include some mechanism for raising and addressing contract scope issues. Potential processes and procedures that contractors could consider with respect to scope-of-work issues in connection with schedule (or other) contracts might include:

- Raising the awareness of contract scope issues within the company's sales, marketing and contracts organizations, and emphasizing the potential risks to the company of accepting clearly out-of-scope work;
- Requiring the elevation of contract scope issues to the contractor's contracts and/or legal functions;
- Discussing with the customer (user agency) issues or concerns regarding the work, contract scope, and possible alternatives, and, in appropriate cases, suggesting that the customer (or the contractor) seek guidance from the GSA schedule contracting officer on the issue;
- Proposing that some (or possibly all) of the supplies or services be excluded from the schedule order and acquired on an "open market" basis or through

³³ See *GSA Steps*, *supra*, at 2.

³⁴ See David A. Drabkin, Deputy Chief Acquisition Officer, Senior Procurement Executive, General Services Administration, *Mitigating Risk in the Federal Marketplace*, SPCL Procurement Institute ("Drabkin").

³⁵ *GSA Steps*, *supra*, at 3; see also *id.* at 2 (where, in discussing its "Get It Right" initiative as it relates to contractors, GSA stated that "[n]ot all revenue is good revenue. Revenue that places you under heightened scrutiny, that endangers your contract, or that forces you to defend yourself is not good revenue"); Drabkin, *supra* (indicating that one "risk mitigation" strategy for dealing with contract scope issues is to "walk away").

³⁶ See, e.g., FAR 52.212-4(d), Disputes.

²⁷ See FAR 42.1503(b).

²⁸ See *GSA to Hire Outside Contracting Help*, www.GOV-EXEC.com, Daily Briefing (Feb. 16, 2005).

²⁹ See GAO-04-605, *supra*, at 15.

³⁰ *Id.*

³¹ *AT&T v. Wiltel*, 1 F.3d at 1205.

³² See *G&H Mach. Co. v. United States*, 16 Cl. Ct. 568, 577-78 (1989) (where the **Government** argued that the course of dealing between the contractor and user agency should be given "controlling weight" on an issue of contract scope under a GSA supply schedule contract).

some other non-schedule contract vehicle (which could require the agency to use competitive procedures or prepare a sole-source justification, if warranted); and

- Considering whether the work fits within another available schedule contract. In addition, if the contractor does not have its own schedule contract that includes the supplies or services in question, it might explore entering into a GSA teaming agreement with another contractor that has the appropriate schedule contract.

GSA also has suggested that contractors consider seeking modifications to their schedule contracts to add supplies or services (or SINS) to existing contracts.³⁷ While this may not be feasible in the short term, given the time that is typically required to add a new product

or service to a GSA contract, it may be attractive if a contractor foresees other opportunities for the supplies or services at issue. Finally, some attorneys might argue that a contractor should consider declining an order under its schedule contract in particular cases.

Where a user agency decides to proceed under a schedule contract notwithstanding questions about whether the supplies or services are within the scope of the contract, and the contractor decides to accept the order, it might be advisable for a contractor to document any efforts that were made to address scope-of-work issues with the customer and/or GSA, as this could be important in the event of later audits or reviews of contractor responsibility. Finally, where an order involves work that may present unusual scope issues, a contractor might consider providing the customer with additional information to support the fairness and reasonableness of prices for that work.

³⁷ See *GSA Steps*, *supra*, at 2.