

## **GSA MULTIPLE AWARD SCHEDULE CONTRACTS: PRICE REDUCTION CLAUSE COMPLIANCE**

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GSA federal supply schedule (“FSS”) contracts are a flexible and convenient method for companies to sell commercial products to U.S. Government agencies. However, doing business under GSA FSS contracts presents a number of compliance issues, one of the most important being the Price Reduction Clause (“PRC”) that is included in every GSA contract. Contractors need to understand the requirements of the PRC and have adequate procedures in place to ensure compliance.

The PRC requires that the contractor and contracting officer (“CO”) agree on (1) a basis of award customer, and (2) the Government’s discount relationship to that customer. See GSA Acquisition Regulation (“GSAR”) 552.238-75(a). It requires the contractor to maintain that relationship “throughout the contract period” and to disclose to the Government any price reductions to its basis of award customer. GSAR 552.238-75(b).

A price reduction that results in prices to the basis of award customer that are *below* the prices disclosed to the GSA during the contract negotiation process will trigger a price reduction. However, because the PRC requires the contractor to “maintain the relationship” between the prices given to its basis of award customer and the Government, reducing prices to the basis of award customer can trigger a price reduction, even if the net price to the basis of award customer remains *higher* than the Government’s price. This can occur if, for example, if there is a “gap” between the contractor’s disclosed prices to the basis of award customer and its GSA prices and the contractor offers a price reduction to the basis of award customer that narrows the gap. See

generally 41 C.F.R. § 5A-73.217-5(c) (1982) (Example No. 1). Likewise, the Government might argue that the relationship has been disturbed where GSA has accepted a lower discount (higher price) than that given to the basis of award customer (*e.g.*, dealers) and the contractor subsequently increases its discount (reduces the price) to that customer, thus ***increasing the spread*** between the GSA's and the basis of award customer's price/discount. See *id.* (Example No. 2).

Contractors should pay careful attention to the identification of the basis of award customer when negotiating a FSS contract, and avoid overbroad definitions of the basis of award customer, *e.g.*, all commercial accounts. Contractors should also disclose any facts, assumptions or interpretations relating to their commercial sales practices and/or to their compilation or submission of information regarding those practices that is relevant to the subsequent interpretation or application of the PRC. Likewise, a contractor should disclose any limitations in the capability of the IT or other data-processing system that will be used in monitoring, collecting and/or reporting data relating to PRC compliance.

While extending lower prices or higher discounts than are provided in the GSA contract to customers outside the basis of award customer class will not trigger a price reduction under the PRC, those lower prices will have to be disclosed in connection with future proposal submissions and could impact negotiations regarding pricing or the definition of the basis of award customer class. In addition, any changes outside the basis of award class of customer should be considered before a company makes certain representations associated with modifications to add products or pass along price increases. In these cases, the CO may ask the contractor to represent that its commercial sales practices have not changed since it disclosed its standard commercial sales practices in connection with the initial contract award.

## **Recommendations:**

A company that has or anticipates submitting a proposal for the award of a FSS contract should have appropriate personnel, policies and procedures in place that are sufficient to give adequate assurance of compliance with applicable price-reduction requirements. While those personnel and/or policies and procedures must be tailored to the particular products, sales and marketing practices, and data-processing capabilities of the company, the following are illustrative of the types of personnel and/or procedures that should be in place as a prerequisite to multiple award schedule contracting:

- Order-entry procedures and controls for tracking and identifying sales of FSS contract items to “basis of award” customer(s) at prices which could alter the relationship between the basis of award customer price and the GSA contract price for that item, including procedures for taking appropriate action before the approval of such sales.
- Procedures for reviewing sales with a dollar amount above the contract’s Maximum Order Threshold to ensure that they comply with all requirements applicable to that exception to the PRC.
- Procedures for identifying and informing the CO in a timely manner of situations presenting good-faith questions of interpretation and application of the PRC that arise in the course of contract performance and explaining how the contractor plans to treat those situations.
- Procedures for providing notification to the CO of transactions that are subject to the PRC as soon as possible, and, in any event, no later than 15 days after the transaction creating the price reduction occurs or such other time as agreed to in the contract.
- Procedures for applying any price reduction to which the Government is entitled under the PRC to all Government orders of the affected product(s) as of the date of the price reduction (including retroactively, if necessary).
- Procedures for identifying and notifying the Government of errors in quotation or billings.
- Procedures for notifying the CO of all relevant promotions or temporary price reductions and offering the same terms to the Government through the expiration date.

- Procedures for retention of all records relating to price reductions to which the Government has a right of access under applicable laws, regulations and/or contract clauses.

PRC compliance is an important consideration for any GSA FSS contractor. GSA regularly conducts post-award audits to ensure PRC compliance. See GSAR 552.215-7 (providing for such audits). If the GSA discovers violations of the PRC, it will demand retroactive, dollar-for-dollar refunds for all affected products/services, going back to the date(s) of the price reduction(s). In addition, when GSA demands PRC refunds, it may also demand multiple damages and penalties under the civil False Claims Act.