



“High Risk” Areas in Multiple Award Schedule Contracting: A Checklist for Compliance

A Webinar by Matt Koehl

Thursday, August 15, 2013
9:00 – 10:00 a.m. MT

Outline

- Six “High Risk” Areas in Multiple Award Schedule (MAS) Contracting
 - Understanding the Requirement
 - Illustrating Key Concepts
 - Common Problem Areas
 - Real Life Example
 - Recommended Basic Steps for Compliance
- Attachment A – *Federal Contracts Report* article

High Risk Issue Number 1 – Commercial Sales Practices Disclosures (CSPs)

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Commercial Sales Practices (CSP) Disclosures

- The Requirement
 - Mandatory contractor disclosure of pricing/sales and discount practices
 - GSA's tool to achieve MFC pricing
 - CSP-1 Format before initial contract award + each 5-year contract extension
 - Exception to CSP submission requirements for MAS contract resellers without substantial sales to the general public

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Commercial Sales Practices (CSP) Disclosures

- Key Concepts
 - Submit CSP for all Special Item Numbers (SINs)
 - CSP Chart definitions:
 - Customers
 - Discounts
 - Concessions

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Commercial Sales Practices (CSP) Disclosures

- Key Concepts
 - CSP disclosures must be “current, accurate and complete” to avoid “defective pricing” exposure
 - “Current”: inclusive of all practices engaged in within 14 days of award
 - “Accurate”: no estimates unless identified
 - “Complete”: inclusive of pricing practices for all non-federal domestic customers

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Commercial Sales Practices (CSP) Disclosures

- Key Concepts

- Sales transaction data
 - You must understand your sales transaction data in order to prepare proper CSPs
 - Sales transaction data often does not match contract pricing and discount and pricing policy documents
 - 12 months prior to CSP date is “best practices” date range
 - Matches OIG request for Pre-Award audit

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Commercial Sales Practices (CSP) Disclosures

- Common Problem Areas
 - Incomplete research of sales practices and sales transaction data
 - Failure to archive research of sales practices and transaction data
 - Use of generic customer types vs. actual customer categories employed to process orders

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Commercial Sales Practices (CSP) Disclosures

- Common Problem Areas
 - Unexplained numeric discount information
 - Undisclosed non-standard discounts
 - Undisclosed rebate programs and other types of partner alliance benefits
 - Undisclosed customer satisfaction remedies

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Commercial Sales Practices (CSP) Disclosures

- Real-Life Example
 - On December 26, 2012, the DOJ announced that W.W. Grainger Inc. agreed to pay \$70 million to settle allegations of defective MAS contract pricing disclosures
 - Grainger's CSP disclosures allegedly understated the discounts it granted to other customers on hardware items and other supplies sold through Grainger's MAS contract
 - <http://www.justice.gov/opa/pr/2012/December/12-civ-1545.html>

Commercial Sales Practices (CSP) Disclosures

- Suggested Basic Steps to Avoid Problems
 - Review internal discounting policies and procedures
 - Review contracts for all “Customers”
 - Review raw sales data
 - Involve sales executives and employees charged with approving discounts
 - Interview and initial CSP narratives
 - Archive for pre-award “due diligence” efforts

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Commercial Sales Practices (CSP) Disclosures

- Suggested Basic Steps to Avoid Problems
 - Documented/enforced practices for standard and non-standard discounts
 - Broad disclosure and description of non-standard discounting practices
 - Conforming CSP customer designations
 - Certify to “current” and “accurate” but not “complete”

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High Risk Issue Number 2 – Price Reductions Clause (PRC)

Price Reductions Clause (PRC)

■ The Requirement

- Basis of award (BOA) established for on-going price reduction obligation
- Benchmarking to commercial list price
- Benchmarking to BOA customers
- The PRC is triggered if discounts to BOA customers or reductions to commercial list pricing “disturb” GSA’s relationship to the BOA

Price Reductions Clause (PRC)

■ The Requirement

- If the PRC is triggered, you must reduce MAS Contract price on “same date” and for “same duration” as the triggering discount
 - Designated exceptions, e.g., sales to federal agencies or sales above the Maximum Order Threshold
- PRC compliance is especially important b/c the Office of Inspector General (OIG) audits “post-award” PRC compliance during its “pre-award” review of 5-year extension proposals
- Pre-award OIG reviews have increased dramatically, mostly for pricing proposals submitted for 5-year extension

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Price Reductions Clause (PRC)

■ Common Problem Areas

- Failure to monitor sales transactions with BOA customers and commercial list price reductions
- Use of generic customer category descriptions
- Untrained sales staff
- Post-award mergers and acquisitions create ambiguity about PRC triggering events
- Poor communication between sales, finance and contract management functions

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Price Reductions Clause (PRC)

- Real-Life Example
 - On October 6, 2011, the DOJ announced that Oracle Corp. and Oracle America, Inc. (“Oracle”) had agreed to pay \$199.5 million to settle allegations that they failed to pass on “triggering” discounts that Oracle had granted to its commercial customers
 - <http://www.justice.gov/opa/pr/2011/October/11-civ-1329.html>

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Price Reductions Clause (PRC)

- Suggested Basic Steps to Avoid Problems
 - Review proposal and award documents for correct tracking customers and discounts
 - If necessary, clarify definitions of tracking customers
 - Negotiate realistic tracking customers
 - Alternative PRC compliance mechanisms
 - Average discount monitoring

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Price Reductions Clause (PRC)

- Suggested Basic Steps to Avoid Problems
 - Negotiate exclusions to PRC application
 - Spot discounts
 - New customer acquisition
 - “Etc.”
 - Final Proposal Revision (FPR) letter
 - Consider impact of mergers and acquisitions
 - Clarifying letter, e.g., sales by NEWCO employees cannot trigger PRC

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Price Reductions Clause (PRC)

- Suggested Basic Steps to Avoid Problems
 - Price and discount monitoring procedures for PRC triggering events
 - Discount approval policies and controls (enforced)
 - Training for commercial sales and bid desk staff
 - Close link from bid desk staff to MAS contract management staff

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High Risk Issue Number 3 – Trade Agreements Act (TAA)

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Trade Agreements Act (TAA)

- The Requirement
 - TAA implements several trade treaties granting equal treatment to products from member companies
 - TAA exempts product purchases from Buy American Act requirements
 - No pricing preference factors are imposed -- you either comply or you can't offer the products
 - TAA applies to all MAS contracts
 - Limited waiver for "set-aside" SINS

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Trade Agreements Act (TAA)

- The Requirement
 - FAR designated country list (FAR 52.225-5)
 - FAR TAA Certificate (52.225-6)
 - “Substantial transformation” test for products
 - Where contractor is “established” for services

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Trade Agreements Act (TAA)

- Key Concepts
 - Products are eligible for purchase if “substantially transformed” in a TAA-designated country into a new and different article of commerce
 - “Substantial transformation” test is not satisfied by simple manufacturing efforts that don’t affect the product’s “essential use”
 - Products “substantially transformed” in non-member countries ineligible for MAS contracts

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Trade Agreements Act (TAA)

- Common Problem Areas
 - Manufacturing locations for “commercial items”
 - Especially high risk product categories
 - Changes to country of origin
 - Multiple countries of origin for same product
 - Internal company systems don't archive historical information
 - Imprecise tests for certain product categories
 - Bad country of origin data from distributors

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Trade Agreements Act (TAA)

- Real-Life Example
 - On March 29, 2012, Cable Express Technology (“CXtec”) agreed to pay \$2 million to settle allegations that it supplied items under its MAS contract from non-designated TAA countries, including China, Taiwan, Indonesia, Malaysia and Thailand
 - http://www.bizjournals.com/prnewswire/press_releases/2012/04/16/PH87986
 - Other multi-million dollar “office product” MAS contract TAA settlements

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Trade Agreements Act (TAA)

- Suggested Basic Steps to Avoid Problems
 - Procedures that monitor and update country of origin status for all MAS contract products
 - Close link between contract management and procurement and operations functions
 - SKU management procedures for products with multiple possible country of origin locations
 - Archive for historical country of origin information
 - Manufacturer certification and indemnification
 - Annual reviews

High Risk Issue Number 4 – Unapproved Item Sales

Unapproved Item Sales

- The Requirement
 - Statutory status of MAS contract program allows simplified ordering procedures in FAR 8.405
 - GSA previously allowed agencies to purchase “incidental” amounts of open market items, but overruled by the courts
 - Standard FAR competition requirements now clearly apply to “unapproved” items included on an order for MAS contract items
 - Usually products, but can also refer to unapproved services and labor service categories

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Unapproved Item Sales

- Common Problem Areas
 - Sales staff unaware of approved MAS contract items
 - Training failures
 - No procedures to distinguish approved vs. unapproved items in quotes and proposals
 - Reliance by sales staff on outdated MAS contract pricelists
 - Infrequent modification submissions

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Unapproved Item Sales

- Common Problem Areas
 - Delayed GSA/VA approval of modifications
 - “2 week” standard often not met
 - “Mixed” quotes and proposals
 - MAS and non-MAS items on a single quote
 - Sales staff not segmented, e.g., same sales employee services commercial customers and some public sector customers in his region

Unapproved Item Sales

- Real-Life Example
 - On April 30, 2007, the GSA OIG announced that GovConnection had agreed to pay \$2.55 million to resolve allegations that it had sold unapproved items and failed to pay required MAS contract fees
 - GovConnection’s MAS contract was also cancelled
 - <http://www.gsaig.gov/?LinkServID=D309E74C-0AA4-7D09-AF296A1F0CAC924B&showMeta=0>

Unapproved Item Sales

- Suggested Basic Steps to Avoid Problems
 - Internal procedures to clearly identify any unapproved items in MAS contract quotes and proposals
 - Larger companies – automated quote and order entry system for approved and unapproved items
 - Website pricelist identification of approved and unapproved MAS contract items
 - Regular MAS contract modifications
 - Seek to modify or (possibly) reject MAS contract orders that contain unidentified open market items

High Risk Issue Number 5 – Professional Employee Qualifications

Employee Qualifications – Professional Services

- The Requirement
 - MAS contracts with hourly and daily service offerings
 - MAS-approved labor categories identify employee requirements for education, experience, etc.
 - Employees billed under a MAS contract must meet labor category requirements
 - Compliance is regularly examined
 - OIG Pre-Award and Contract Systems audits

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Employee Qualifications – Professional Services

- Common Problem Areas
 - Failure to establish procedures to supply qualified personnel
 - Use of labor categories and definitions from other sources
 - E.g., cut/paste from competitor's MAS contract pricelist
 - Use of outdated and incomplete resumes
 - Failure to archive resumes
 - Use of subcontractor employees

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Employee Qualifications – Professional Services

▪ Real-Life Example

- December 2005, Science Engineering Associates agreed to pay \$9.5 million for billing unqualified employees under an IT services contract

- <http://www.gao.gov/new.items/d06547.pdf>

▪ OIG Report:

- On March 8, 2013, the GSA OIG issued a report stating:

One-third of FY 2011 MAS preaward audits found that GSA customers were overcharged for professional services [because] employees contracted to provide these services did not have the minimum educational and/or experience requirements required by their contracts

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Employee Qualifications – Professional Services

▪ Suggested Basic Steps to Avoid Problems

- Internal procedures to verify personnel experience and labor categories when assigning personnel
- Procedures to collect, verify, update and archive company employee resumes
- Procedures to collect, verify, update and archive subcontractor employee resumes
- Regular examination and modification of labor categories to match actual employee skills, experience and certifications

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High Risk Issue Number 6 – Industrial Funding Fee (IFF)

Industrial Funding Fee (IFF)

- The Requirement
 - Contract usage fee charged to MAS contract ordering agencies
 - MAS contractors collect IFF from ordering entities and remit to GSA/VA on a quarterly basis
 - All MAS contract items are subject to IFF
 - No IFF on “open market” items + travel
 - Often easier to pay than to exclude from IFF report
 - GSA: MAS contractor’s burden to prove orders for MAS contract items by authorized purchasers are not MAS contract orders

Industrial Funding Fee (IFF)

- Problem Areas
 - Use of commercial order entry system to “flag” MAS contract orders for reporting and payment
 - Inaccurate data entry by sales/operations staff
 - Inaccurate 3rd-party sales reports from MAS contract “dealers” and lease financing companies
 - Contractor Teaming Arrangements (CTAs)
 - Blanket Purchase Agreements (BPAs)

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Industrial Funding Fee (IFF)

- Problem Areas
 - Government purchase card transactions for MAS contract items
 - Especially web orders
 - Cooperative Purchasing sales
 - “Stale” lists of agreements subject to IFF
 - Eligible User orders from customers other than Executive Agencies

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Industrial Funding Fee (IFF)

■ Real-Life Example

- December 2004, GSA canceled the MAS contract held by GovConnection as a result of alleged sales of unapproved items and the underpayment of fees
- On April 20, 2007, GSA OIG reported that allegations of IFF underpayments and noncompliance with contract scope requirements relating to the GovConnection MAS contract had been settled for \$2.55 million
- <http://www.gsaig.gov/?LinkServID=D309E74C-0AA4-7D09-AF296A1F0CAC924B&showMeta=0>

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Industrial Funding Fee (IFF)

■ Steps to Avoid Problems

- Procedure to regularly update the list of agreements subject to IFF
- Procedure for booking MAS orders with correct identifier
- Procedure to timely obtain and verify 3rd-party MAS contract sales reports
- Procedures to properly capture and report/pay CTA and BPA orders
- Order management verification procedure

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Industrial Funding Fee (IFF)

- Suggested Basic Steps to Avoid Problems
 - Procedure to capture MAS contract credit card orders
 - Procedure to document contractual basis for non-MAS contract purchases of MAS contract items by MAS-eligible buyers
 - Quarterly review of raw sales data
 - Procedure to preserve and archive IFF calculation efforts

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“High Risk” Areas in Federal Supply Schedule Contracting:
Country of Origin Requirements in Federal Government Contracts

Questions?



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