



32nd Annual

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May 18, 2016

The Challenges of Commercial Item Contracting

Lorraine Campos

David Ginsberg

Judy Choi



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Agenda

- Challenging Legislative and Regulatory Burdens for Commercial-Item Contracts
- Category Management Initiative
- Sweeping Reforms to the Federal Supply Schedule (FSS) Program
- Enforcement Focus and Trends



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Challenging Legislative and Regulatory Burdens for Commercial-Item Contracts



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Price Reasonableness Determinations

- DoD trends
 - Limit “commercial-item” determinations
 - Increase use of cost data for price reasonableness determinations
- Congress moving in the opposite direction
 - Looking to remove impediments to commercial market entrants



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Price Reasonableness Determinations

- Failed rulemaking as DoD purported to implement FY 2013 NDAA
- FY 2013 NDAA required
 - Standards for the adequacy of prior sales data
 - Standards re extent of cost information to obtain when sales data were insufficient
 - Limitations on data obtained
 - form maintained by contractor
 - no cost information when sales data sufficient

[Pub. L. 112-239]



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Price Reasonableness Determinations

- DoD Memorandum provided interim guidance under 2013 NDAA
 - Encourages less time on whether product strictly meets commercial-item definitions and more on “am I paying a fair and reasonable price”
 - Its standard for sufficiency of data: “whether a reasonable businessman or business woman reviewing the data . . . [would] conclude that it is sufficient”
 - DCMA Cost & Pricing Center / DCAA assistance upon request



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Price Reasonableness Determinations

- DoD Proposed Rule pushes a different agenda
 - Would have required certified cost or pricing data unless (1) pricing is based on catalog prices; (2) pricing is market-based; or (3) items priced on an active FSS
 - For “market-based” pricing, expectation that 50% of sales of the “particular item” must be to nongovernmental customers
 - “Prudent person” standards for determining scope of data to require

[DFARS Case 2013-D034]



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Price Reasonableness Determinations

- Congressional Rebuke
 - “send a clear message to those in the Department who are working to maintain the current status quo that they are not only doing serious damage to our national security, but they also appear to be completely out of step ...”

[Sen. McCain to Sec’y Carter]
- DoD proposed rule rescinded / rolled into a new rulemaking



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Commercial-Item and Price Reasonableness Determinations

FY 2016 NDAA

- Consistency / Predictability in Determinations
 - Amends TINA (10 USC 2306(a)) to create presumption that prior CI determinations apply to later procurements as well
 - Centralized capability to oversee commercial item determinations
 - Public access to determinations



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Commercial-Item and Price Reasonableness Determinations

FY 2016 NDAA

- Reducing barriers to entry / Increasing commercial item use
 - Report to Congress on all defense-unique provisions of law applicable to commercial item procurements, with explanations and justifications
 - Requires guidance such that DoD may not purchase non-commercial IT products unless head of agency determines that no commercial items are suitable
 - Hurdles to converting procurements from commercial items



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Commercial-Item and Price Reasonableness Determinations

- New rulemaking to incorporate FY 2013 NDAA *and* FY 2016 NDAA requirements

[DFARS Case 2016-D006]



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Category Management Initiative



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Category Management

- Currently federal acquisition system is **fragmented**
 - Thousands of buying offices in hundreds of departments and agencies acquiring more than \$400 billion in goods and services each year
 - Acquisition professionals make purchases with little insight into what their counterparts across the government are doing
 - Very little coordination and sharing of information and best practices across the government
 - Agencies are duplicating efforts, conducting thousands of full-and-open competitions, and establishing hundreds of potentially redundant acquisition vehicles and programs
 - The acquisition community GSA serves faces an increasingly challenging buying environment requiring contracting and program professionals to have sophisticated and well rounded business skills



Category Management (cont.)

Current State of Purchasing:

- Lack of coordination across agencies
- Duplicated efforts
- Many agencies; no leveraged buying power

Future State of Purchasing:

- Synchronized procurement across government
- Industry involvement in developing best category strategies
- Core competencies leveraged to match customer needs
- One common management framework





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Category Management Purpose

- Category management is a strategic approach that will enable the federal government to buy smarter and more like a single enterprise
- Brings together expertise from across the government, grouped by product or service to provide government buyers holistic view of landscape to enable data driven decisions and better purchasing options



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Category Management Goals

- Increase spend under management
- Reduce contract duplication
- Achieve volume savings
- Achieve administrative savings
- Achieve small business goals
- Reduce price variance
- Enhance transparency
- Share best practices
- Create better contract vehicles that lead to smarter purchasing
- Promote consistency



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Common Categories of Products

- Each category is ran as a mini-business with its own set of strategies led by a **Category Manager** and supporting senior team
- Category Managers develop a cooperative framework to generate interagency collaboration, promote broad-based stakeholder engagement, and assist in the development of category teams
- Category teams will be responsible for identifying core areas of spend; collectively enhancing levels of analysis and expertise; leveraging shared best practices; and providing acquisition, supply and demand management solutions to meet government-wide requirements

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Ten Common Government Spend Categories

Common Government Spend Categories 1-10 (total FY 2014 spend \$275B)

1. IT – \$49.9B	2. Professional Services - \$61.9B	3. Security and Protection - \$5.5B	4. Facilities & Construction - \$75.7B	5. Industrial Products & Services - \$10.5B
1.1 IT Software	Business Administration	Security Animals & Related	Construction Related	5.1 Machinery & Components
1.2 IT Hardware	2.1 Services	3.1 Services	4.1 Materials	Fire/Rescue/Safety/Environmental Protection
1.3 IT Consulting	2.2 Legal Services	3.2 Security Systems	Construction Related	5.2 Equipment
1.4 IT Security	2.3 Management Advisory Svcs (excl. R&D)	3.3 Security Services	4.2 Services	5.3 Hardware & Tools
1.5 IT Outsourcing	2.4 Marketing and Distribution		4.3 Facility Related Materials	Test & Measurement
1.6 Telecommunications	Public Relations and Professional		4.4 Facility Related Services	5.4 Supplies
	2.5 Communications Services		4.5 Facilities Purchase & Lease	Industrial Products
	2.6 Real Estate Services			Install/Maintenance/Repair/
	2.7 Trade Policy and Services			5.5 Rebuild
	2.8 Technical & Engineering Svcs (non-IT)			5.6 Basic Materials
	2.9 Financial Services			5.7 Oils, Lubricants, and Waxes
	2.10 Social Services			
6. Office Management - \$1.9B	7. Transportation and Logistics Services - \$26.8B	8. Travel & Lodging – \$2.7B	9. Human Capital – \$4.1B	10. Medical – \$36.0B
6.1 Office Management Products	7.1 Package Delivery & Packaging	8.1 Passenger Travel	Specialized Educational	Drugs and Pharmaceutical
6.2 Office Management Services	7.2 Logistics Support Services	8.2 Lodging	9.1 Services	10.1 Products
6.3 Furniture	7.3 Transportation of Things	8.3 Travel Agent & Misc. Services	9.2 Vocational Training	Medical Equipment &
	7.4 Motor Vehicles (non-combat)		9.3 Human Resources Services	10.2 Accessories & Supplies
	7.5 Transportation Equipment			10.3 Healthcare Services
	7.6 Fuels			

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Strategic Sourcing

- Strategic sourcing is an effective strategy that a Category Manager may implement to drive down total costs and improve overall performance for that category
- Ensures that agencies get the same competitive price and quality of performance when they are buying similar commodities under similar circumstances

	Strategic Sourcing	Category Management
Goal	Achieve savings: implement specific strategies around spend and vendor consolidation, standardization of requirements and specifications, and price benchmarking and negotiation Small business: Meet or exceed small business goals	Maximize value for spend: reduce total cost of ownership (TCO), generate supply chain-wide savings, reduce risks, improve supplier and operational performance, and boost innovation Small business: Meet or exceed small business goals
Frequency	Project driven: initiated once in three to five years based on internal demand or supply market changes	Continuous: ongoing series of projects identified and prioritized based on regular analysis and reporting
Methodology	Standard methodology: typically based on a seven- to nine-step methodology starting with assessment and ending with vendor selection and implementation	Broad framework: ongoing cycle of establishing baseline and goals, developing a strategy for category improvement, project execution, and performance management
Value	Sourcing savings: annual savings through planned demand reduction and average purchase price reduction, tracked through finance and sourcing systems	Value for spend: achievement of strategic objectives, including spend under management, price savings, TCO savings, improved supplier performance, innovation, and user satisfaction



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Acquisition Gateway

- One common portal for acquisition expertise and acquisition services to help buyers navigate the process and universe of purchasing options:
 - Drive down price
 - Reduce price variability
 - Make smarter purchases
- “Category Hallways”
 - Collect and store intelligence, data, and advice about a particular category of products and services in one centralized location for agencies to review, use and refine
 - Deliver relevant and useful category-centric information to various levels of agency stakeholders
 - Offer objective comparisons (based on the category) about specific acquisition/requisition methods and contract vehicles to help purchasing agencies find the best solution





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Sweeping Reforms to the FSS Program



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Compliance “Hot Button” Issues in Schedule Contracting

- Consistent problems arise:
 - Commercial Sales Practices (CSP)
 - Price Reduction Clause (PRC)
 - Trade Agreements Act (TAA)
- Time for reform approaching



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More Attention on Competition and Pricing

- Increased scrutiny on pricing comparisons and negotiating lowest possible price
- Focus on ensuring CSP submissions are current accurate and complete for both manufacturers and resellers
- Increased use in BPAs and reverse auctions



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Proposed Transactional Data Reporting Requirement

- Ultimate Goal: Enhanced price reasonableness determinations
- Proposed Changes:
 - Elimination of PRC and tracking customer
 - Require monthly transactional data reporting
- Problems with Proposed Rule:
 - Significant administrative burdens for both contractors and GSA
 - Proprietary data concerns



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GSA's Information Collection Related to Schedule Pricing Disclosures

- November 18, 2015:
 - GSA requested an extension of a previously approved information collection requirement regarding the PRC
 - Collection effort renamed to include a burden estimate for CSP disclosures
- April 11, 2016:
 - GSA requested a second extension for same information collection
- Use of “80/20 rule” may skew analysis of contractor burden



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Trade Agreements Act

- GSA TAA Initiative
 - Renewed focused on TAA compliance
- VA's New TAA policy
 - All “covered drugs” to be offered on FSS contracts, regardless of country of origin



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Other Schedule Changes

- GSA's innovative initiatives
 - FAST Lane
 - IT Schedule 70 Springboard
- Implementation of Category Management
 - Consolidated Professional Services Schedule (PSS)
- Schedule 70
 - New GSA and DHA partnership on Health Information Technology (HIT) requirements
 - Upcoming new health IT SIN
 - GSA Class Deviation



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Implementation of GSA Class Deviation

- Issued July 31, 2015
- Creates a broad new definition of “commercial supplier agreement” (CSA)
- Generates new GSAM clauses for FSS contracts contemplating items with CSAs
- Reconciles federal requirements with the terms of standard CSAs
- Changes the order of precedence for inconsistencies
- Forces contractors to reconsider ability to enter into contracts



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CSA Terms Rendered Unenforceable

1. Definition of Contracting Parties
2. Details of Contract Formation
3. Patent Indemnity
4. Unilateral Contractor Termination for Government Breach
5. Automatic Renewal of Term-Limited Agreements
6. Unilateral Change to License Terms Without Notice
7. Equitable Remedies Against the Government
8. Automatic Incorporation/Deemed Acceptance of 3P Terms
9. State/Foreign Law Governing Contracts
10. Assignment of CSA Without Government Consent
11. Taxes
12. Future Fees and Penalties, Including Attorneys' Fees
13. Payment Terms or Invoicing (Late Payment)
14. Audits
15. Confidentiality of CSA Terms and Conditions



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Changes to Order of Precedence

1. The schedule of supplies/services.
2. The Assignments, Disputes, Payments, Invoice, Other Compliances, Compliance with Laws Unique to Government Contracts, Unauthorized Obligations, ***and Commercial Supplier Agreements – Unenforceable Clauses*** paragraphs of this clause.
3. The clause at 52.212-5.
4. Solicitation provisions if this is a solicitation.
5. Other paragraphs of this clause.
6. ***Addenda to this solicitation or contract, including any license agreements for computer software.***
7. The Standard Form 1449.
8. Other documents, exhibits and attachments.
9. The specification



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Enforcement Focus and Trends



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Enforcement

- Commercial item contractors exempt from some of most onerous government contracting provisions (e.g., certified pricing, CAS)
- Some traditional government-contract provisions apply:
 - Applicable import/export restrictions
 - Requirements related to socio-economic policies (Equal Employment Opportunity, Prohibition on Human Trafficking, etc.)
 - TAA
 - Special Pricing Provisions



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Oversight

- Procuring Agency
 - Contracting Office/COTR
 - Suspension and Debarment Official
- Agency Office of Inspector General
 - Special agents
 - Auditors
- Department of Justice
- Local United States Attorney
- Whistleblowers



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VMware and Carahsoft

- Carahsoft Technology Corp. had a MAS contract with the GSA to sell software licenses and services; in 2007, modified contract to add VMware Inc.'s products and services
- Both Carahsoft and VMware submitted CSP-1 forms to GSA
- Allegations that from 2007 to 2013, they made false statements on the CSP-1 forms; Carahsoft failed to notify GSA that VMware offered greater discounts than indicated in CSP-1; presented false claims for payment for VMware products
 - Stemming from *qui tam* action filed by former VP of America Sales at VMware



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VMware and Carahsoft (cont.)

- In June 2015, VMware and Carahsoft paid **\$75.5M** to settle allegations that they violated the FCA by misrepresenting commercial pricing practices
 - Wrongful termination suit by whistleblower still pending
- One of largest FCA recoveries against a technology company



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Medtronic

- Medtronic plc and affiliated Medtronic companies (“Medtronic”) sell medical devices to VA and DoD through the VA FSS Program
- Medtronic certified that devices were made in the U.S. or other designated country pursuant to the Trade Agreements Act
- Allegations that devices were manufactured in China and Malaysia, prohibited countries under TAA
 - Stemming from *qui tam* action by 3 whistleblowers
- Medtronic paid **\$4.41M** to settle allegations that it violated FCA by making false statements regarding the devices’ countries of origin



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AvKARE v. U.S., No. 15-1015C

- AvKARE Inc. sells variety of pharmaceutical products that are packaged and sold under AvKARE label
- Awarded Schedule 65 B I contract as manufacturer; seeks to renew contract
- OIG investigation concludes AvKARE is distributor, not manufacturer



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AvKARE (cont.)

- VA request CSP information for distributor
- AvKARE says it is manufacturer; impossible or impractical to obtain suppliers' commercial sales data
- COFC says AvKARE is distributor; indirect sales to government entities is not commercial sales



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Enforcement Trends

- TAA Compliance
 - VA's new TAA Policy
 - GSA's TAA Initiative
- GSA Preaward Audits
- Continued focus on healthcare fraud



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VA's New TAA Policy

- Mandates “covered drugs” under Veterans Health Care Act to be offered on FSS contracts - regardless of country of origin
- Reopens sales of covered drugs with API from non-designated countries
- June 6, 2016 deadline to get non-TAA compliant products on 65 I B FSS contract



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GSA TAA Initiative

- Renewed focus on TAA compliance
- May 5, 2016 letter require response within 5 business days
 - Copy of the Certificate of Origin; or
 - Certification on manufacturer's official letterhead verifying TAA compliance
- Threaten removal of contractor's entire GSAdvantage file and contract termination for non-compliance



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GSA TAA Initiative (cont.)

- GSA letter in response to FOIA and congressional inquiries regarding failed compliance with TAA in which allegations were confirmed
- Underscores importance for contractors to continually re-evaluate their supply chain, especially for products that fall under the “substantial transformations” rules for establishing COO under TAA
- TAA compliance for direct representations to government as well as third-party seller representations



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GSA Audits

- Importance of pre-award audit findings
 - Audit findings can drive compliance efforts
- FY 2013, most recent audit report, finds CSP disclosures were not current, accurate, and/or complete
 - Contractors submitted flawed CSP disclosures in 77% of audited contracts
 - GSA estimates accurate CSP information would result in \$895M in savings



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Other Enforcement Trends

- Continuing focus on healthcare industry
 - Recent enforcement actions in medical device manufacturers for TAA compliance
 - Healthcare industry provides majority of FCA recoveries
 - E.g., Health Care Prevention and Enforcement Action Team

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Contacts

Lorraine Campos
Partner

202-624-2786

lcampos@crowell.com



David Ginsberg
Partner

213-443-5545

dginsberg@crowell.com



Judy Choi
Associate

213-443-5564

jchoi@crowell.com

