Improving the General Services Administration's
Multiple Award Schedule Contracts

Statement of:

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Advisory Commission

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Thank you for this opportunity to address the General Services Administration (GSA) Advisory Commission on Multiple Award Schedule Pricing Policies. As many of you know, our public procurement law program at The George Washington University Law School is the leading program of its kind in the nation, and we in the program teach and write on the GSA Multiple Award Schedule (MAS) contracts regularly. I therefore appreciate the opportunity to review these important policy issues with the Advisory Commission.

In my brief remarks, I would like to touch on three issues.

First, that the Commission's work to improve procurement here in the United States should not be viewed in isolation: many nations around the world are struggling with similar policy questions, and I would encourage the Commission to **share lessons learned with your counterparts abroad.**

Second, that **pricing policies should be only the first step to broader reforms in the GSA schedule program**. GSA's schedule contracts represent roughly 10 percent of federal procurement, and it is absolutely imperative that the schedule contracts reflect new best practices -- not old compromises. GSA is a world leader in this type of contracting, and GSA has a moral obligation, as a leader in the field, to make the schedules as strong as possible.

Third, in improving the schedule contracting program, **it is imperative that GSA continue to improve the transparency, competition and integrity of schedule contracting.** Much of that reform is already underway; I would urge the Commission to press forward, to embrace broader reforms, to set a strong foundation for the schedule program in this century.

International Developments

As I note in a forthcoming article in the *Public Contract Law Journal*, which I previously shared with the Commission, the startling thing about reforms in this area is that they are occurring all over the world.

The European Commission in 2004 issued a "directive" which specifically endorsed what the Europeans call "framework" contracting -- what we know as "Indefinite-Delivery/Indefinite-Quantity" (IDIQ) or schedule contracting. The European Commission's directive merely confirmed the use of framework agreements, which I understand have been used in France, for example, since before that country's revolution. In the United Kingdom, the Office of Government Commerce (OGC), which is very similar to GSA, has encouraged purchasing agencies to use framework agreements, which are often sponsored by OGC.

At the same time, the United Nations Commission on International Trade Law (UNCITRAL) is rewriting the 1994 UNCITRAL model procurement law. I am an advisor to the U.S. delegation to UNCITRAL Working Group I (www.uncitral.org), which brings together procurement experts from around the world to discuss proposed reforms.

Among other things, the UNCITRAL working group hopes to bring "framework" (IDIQ) contracting into the United Nations' model procurement law. To do that, the working group has developed three different models of IDIQ (or "framework") agreements:

- Framework agreements that are awarded to a single or multiple awardees, and against which contracts (which we would call "orders") are issued *with no competition in the second round.* We rarely see IDIQ (or MAS) contracts with such rigidity in our federal system.

- Framework agreements that are *awarded to multiple vendors*; then, as requirements arise, those requirements are put out to *competition in the second round* (what the Europeans sometimes call "mini-competitions") among at least some holders of framework agreements. This two-stage process is very similar to that used with IDIQ contracts under our Federal Acquisition Regulation (FAR) Part 16.

- Framework agreements that are "always open" -- these are IDIQ-type agreements that a *vendor may join at any time.* These are called "dynamic purchasing systems" in Europe, and are of course very similar to our GSA schedule contracts. Vendors that join this system then compete against each other in "mini-competitions," as agencies float requirements for competition -- much as GSA schedule vendors compete here in the United States.

Analyzing the Three Kinds of "Framework" Agreements

By placing these three types of framework agreements side-by-side, some interesting issues have arisen, especially when we compare the second type (our FAR Part 16 IDIQ contracts) and the third type ("always open" agreements, like our GSA schedule contracts).

The side-by-side analysis shows, for example, that the second type of agreement -- agreements that can only be joined at one time, in a vigorous threshold competition -- may create artificial mini-oligopolies, especially when the number of awardees is limited. The analysis also highlights the importance of the *initial* competition to win these types of IDIQ agreements, which can be extremely vigorous.

In the third type of framework agreement -- the "always open" agreement -- it is much less likely that a small stable of vendors will be able to exert oligopolistic power. From our own experience with the GSA schedule contracts, we know that thousands of vendors can join this type of arrangement, which significantly dilutes the market leverage of any one vendor. On the other hand, because this type of arrangement is "always open," a vendor joining this type of arrangement may feel little pressure to reduce its prices at the time the vendor joins the arrangement.

Lessons for GSA Schedule Contracting

What lessons does all this hold for the GSA schedule contracts?

- It shows that the GSA MAS program is a leader in an important worldwide development. "Dynamic purchasing systems" -- framework agreements that are "always open," as the GSA schedule contracts are -- are only just beginning to take root in Europe. Here in the United States, in contrast, we have decades of experience with these types of contracts, and a thus great deal of experience (both good and bad) to share with the world.

- At the same time, this side-by-side analysis highlights an inherent weakness of the GSA schedule system: the very weak price pressures on vendors as they first join these "always open" agreements. Although the Price Adjustment and Price Reduction clauses, and the Commercial Sales Practices disclosures required by the schedule contracts, all put pressure on the vendor to reduce its prices, ultimately other, competing vendors -- the source of price pressure in any normal competition -- are essentially irrelevant when a vendor joins the MAS contracts.

- Any competitive pressure on schedule vendors must, therefore, come from other sources: from the vendor's own commercial price discounts (through the Price Adjustment and Price Reduction clauses), and from the "mini-competitions" held between schedule holders, as they compete for specific opportunities.

Enhancing Price Pressures on Vendors

Thus, we can see that there are two sources of price pressure on GSA schedule vendors: (1) their own commercial pricing (which exerts downward pressure through the Price Adjustment and Price Reduction clauses), and (2) the "mini-competitions" held among vendors.

As I am sure the Commission will hear, using a most favored customer clause (the Price Reduction clause) as a means of ensuring reasonable prices is very cumbersome and expensive. It means subjecting vendors to extensive auditing, and it drives away vendors that fear the costs and liability of compliance. Using a most favored customer clause means employing a small army of auditors, which may explain why we almost never see this solution in developing nations, or even elsewhere in our own government. Finally, a most favored customer clause can have the perverse effect of *discouraging* discounts in the private sector, for vendors will be reluctant to drop their commercial prices if it means corresponding reductions in their government prices. In other words, the Price Reduction clause, as a most favored customer clause, can have the unintended consequence of *artificially inflating* prices in the commercial sector.

What would happen, then, if GSA abandoned the Price Reduction clause (the most favored customer mechanism), as the Section 1423 panel suggested GSA do for certain information technology services contracts? Doing so would mean GSA could shed the costs and difficulties created by a most favored customer clause. At the same time, however, abandoning the protections of the Price Reduction clause would point up some very serious faults in second-stage competitions -- the "mini-competitions" among schedule holders that are so important in an "always open" arrangement.

Transparency: The most obvious problem with the "mini-competitions" held among schedule contract holders is the lack of transparency. Although billions of dollars flow through the schedule system, there is no requirement that opportunities, competitions or awards under schedule contracts be transparent -- although transparency of that kind is a standard requirement in even the most primitive procurement systems around the world. As a result, it is almost impossible to monitor failures in the MAS system.

Competition: Second, the competitions that occur under the GSA schedule contracts are all too often hollow and meaningless. FAR Subpart 8.4 allows customer agencies enormous discretion, and all too often the competitive procedures are twisted to accommodate a favored vendor. Because there is so little transparency, it is difficult to monitor or correct these failures in competition.

Integrity and Accountability: Finally, because the competitive rules are so lax, and there is so little transparency, integrity and accountability suffer. In a perverse twist, vendors are effectively *encouraged* to break procurement integrity and ethics rules, to gain access to insulated procurements, because there is so little true transparency or competition. And while there is increasing accountability through bid protests, that has taken years to achieve, and the accountability still has significant gaps.

How, then, should GSA remedy all this?

1. GSA should increase transparency in competitions for schedule orders. This probably means mandating the use of the GSA e-Buy system to publicize opportunities and awards -- to the world. This could perhaps be accomplished by requiring that all schedule opportunities and awards be posted on e-Buy, and that those opportunities and awards be republished worldwide through www.fedbizopps.gov.

2. GSA should ensure fair and open competition for schedule orders. This would mean giving many more vendors notice of opportunities -- especially larger opportunities -- and structuring competitions to accommodate competition, rather than a favored vendor. This would probably mean, as a practical matter, that GSA would have to dictate to its customer agencies how competitions must be run, or GSA could facilitate competitions, for example by hosting online reverse auctions for commodities.

3. If transparency and competition are enhanced, greater integrity will almost certainly follow. At the same time, GSA should ensure greater accountability in schedule contracting, by making it clear that slipshod contracting practices can and will be stopped by protests.

The Need to Take the High Road: GSA's Imperative

Why, though, should GSA take the high road on these issues? Why shouldn't GSA simply accommodate its customer agencies by letting lax procedures undermine transparency, competition, integrity and accountability?

The answer is actually surprising, and goes to the heart of GSA's survival. I am convinced that GSA stands at a crossroads. GSA can take the low road, and allow its contracting practices to sprawl out of control. In the short term, that may attract customer agencies hoping to reduce transaction costs and to purchase from favored vendors. In the long term, however, that would likely doom GSA to irrelevance.

I am convinced that GSA must instead take the high road, if it is to survive. It would be far too easy for a private company -- an Amazon.com, for example -- to replicate loose procedures, with lax transparency, mock competitions, and little accountability. If GSA is to avoid being replaced by a commercial company, GSA must ensure that its processes guarantee maximum transparency, competition and integrity, and that its contracting systems fully accommodate the many other requirements that set federal contracting apart. Ultimately, a private company (an Amazon.com, for example) could not hope to take on that role. If GSA can prevail in that role, as the leading centralized purchasing agency in the largest procurement system in the world, it will continue to play an important part in federal procurement for many, many years to come.

Thank you, again, for the opportunity to address the Commission. I would be glad to take any additional questions you may have.