

THE MYTH OF MOST FAVORED CUSTOMER PRICING

By Andrew Mohr and Kelly Kroll

With more and more frequency, we run into manufacturers and other vendors who are interested in obtaining a GSA Schedule contract but are turned off by the thought of having to provide their very best price to GSA customers. These vendors have been told that GSA, as the world's biggest customer in the aggregate, must get the absolute best pricing regardless of terms or conditions. How can it be, a vendor asks, that GSA has to get a better price for a quantity one sale than my commercial customers for volume sales, when GSA will not guarantee a single sale under the Schedule, provides me with no services in return, demands more favorable terms, and has thousands of procurement offices spread across the country that I have to individually contend with?

The answer is you don't. It's a myth, a cruel fiction, a fairy tale of the scary kind – witches, goblins, the whole bit. The truth is that GSA simply cannot ignore material differences in terms when negotiating a GSA Schedule. GSA cannot insist on obtaining a vendor's best pricing unless GSA is willing to accept the same terms as those offered to commercial customers. GSA must treat contractors fairly and must negotiate with these contractors in keeping with GSA's stated policies and practices. GSA's true mandate is to obtain pricing that is "fair and reasonable" in comparison to the vendor's commercial customers – not the absolute lowest price the contractor can afford without giving it away free.

It has long been GSA's policy to consider the terms and conditions of a contractor's sales to its commercial customers when negotiating a GSA Schedule. Administrators at GSA recognize the importance and more importantly, value, of a contractor's commercial terms and conditions. To this end, in a Procurement Information Bulletin ("PIB") to GSA procurement

officials, in which GSA announced its policy on the negotiation of Schedule contracts, GSA counseled that:

In conducting price analysis, the CO should start with the price(s) (discounts and concessions in any combination) that are better than the price(s) offered the Government. During the analysis, the CO should consider variances in the terms of commercial sales. There may be legitimate reasons why the best price given to commercial customers is not an appropriate negotiation objective.

PIB 97-14 (September 3, 1997). A report on GSA Schedule price negotiations by the Government Accountability Office (formerly the General Accounting Office, same initials), likewise found that GSA is supposed to take the standard terms and conditions of a vendor's sales to its commercial customers into account when determining a fair and reasonable price. GAO/GGD 93-123 (August 1993).

In practice, the GSA Schedule solicitation document requires a contractor to fully disclose its Commercial Sales Practices, including not only the discounts it provides to its commercial customers, but also the conditions under which those customers buy. This includes warranty, freight, payment, concessions and other terms material to the Contractor's commercial sales. The obvious reason for requesting such non-price information is to understand the true economics of the sale apart from the discount itself. If GSA's true mandate was to concern itself with nothing more than price then there would be no need to disclose any terms other than price.

As proof that terms and conditions matter, the Price Reduction clause contained in the solicitation for all GSA Schedule contracts specifically states that, in addition to a decrease of discount, a variance in the terms and conditions can result in triggering the clause:

(c) (1) A price reduction shall apply to purchases under this contract if, after the date negotiations conclude, the Contractor— ...

(ii) Grants more favorable discounts or terms and conditions than those contained in the commercial catalog,

pricelist, schedule or other documents upon which contract award was predicated; or

It is nonsensical that a variance in terms and conditions would justify a price reduction after contract award but that salient differences in these same terms and conditions have no bearing before award.

The truth is, in full keeping with GSA policy and practice, that differences in terms and conditions do matter and must be a consideration. GSA is not always entitled to the lowest price. It's a myth. Unfortunately, some representatives at GSA not only do nothing to dispel the myth, but actually perpetuate it by their continued failure to recognize the salient differences in terms offered to commercial customers and those mandated by the GSA Schedule solicitation. In these situations, all one can do is to point out the significant differences and where possible, assign each difference a value in terms of the overall cost of the good being purchased. Freight, for example, can typically cost anywhere from 2% or more of the value of the good being shipped. GSA Schedule terms, in most cases, insist that freight be included in the offered price, whereas commercial customers are usually charged the additional freight costs. This difference in terms translates into a real number that most GSA contracting officers can enter into their equation of what is fair and reasonable. The value added services that resellers provide to a manufacturer can also be assigned a value and most GSA contracting officers understand that dealers provide services that GSA simply does not. Even factors that cannot be easily quantified, such as long term customer relations, still have value and should be pointed out during negotiations.

So what does a vendor do when the GSA myth of most favored pricing rears its very ugly head? Call upon Saint George or a hobbit to slay the dragon? Start by pointing out GSA's own policy statement in its Procurement Information Bulletin 97-14 that GSA must take terms and conditions into account when determining most fair and reasonable pricing. Next, remind GSA

that it must comply with its own policies when negotiating with vendors. Prompt GSA with a copy of the GAO's report on Schedule price negotiations. If absolutely necessary, ask to speak to a supervisor. Don't let the GSA hobgoblin of most favored pricing deter you from getting a Schedule at fair and reasonable pricing.

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