

## GSA Inspector General Takes Aim At Tech Resellers

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On July 22, 2016, the Office of Inspector General for the U.S. General Services Administration issued a report on information technology reseller contracts utilized under the GSA’s Multiple Award Schedule program. The report found that many IT MAS contracts (often known as “Schedule 70 contracts”) administered by the GSA were not providing agencies with fair and reasonable pricing and that Schedule 70 contracts with low or no sales increased government costs. As a result, the IG recommended that the GSA take remedial measures to obtain lower pricing from resellers and eliminate underused contracts. While the GSA IG does not seek the wholesale elimination of many resellers from the MAS program — as the IG for the U.S. Department of Veterans Affairs has done for many years — the impact of these findings could have the same effect.



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### GSA’s MAS Program

Under the MAS program, government agencies can place orders for products and services from commercial firms with whom the GSA has already negotiated fair and reasonable pricing. Agencies using the MAS program can place orders at prices not to exceed the negotiated MAS contract prices and are not required to obtain further competition unless the order exceeds the simplified acquisition threshold (\$150,000).



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During negotiations with potential MAS contractors, the GSA historically has required full disclosure of actual commercial sales practices so that the contracting officer can identify the most favored customer pricing granted, compare that pricing to the pricing being offered to the government, and seek to negotiate equivalent pricing. In addition, MAS contracts historically have included a “price reductions clause” under which the contractor must monitor its MAS contract pricing against an “identified customer” or customer category that is negotiated between the contracting officer and contractor at the time of award. If the contractor decreases prices or increases discounts for MAS contract items to the identified benchmark customer during contract performance, it must offer a commensurate price reduction to customers purchasing through the MAS contract.



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The IT Schedule (Schedule 70) is the largest of the program’s 24 schedules. According to the IG’s report, the GSA had 4,589 active Schedule 70 contracts as of July 2015, and FY 2015 sales were \$14.8 billion. IT schedule contracts are awarded to manufacturers and resellers of IT equipment, software, and services. A majority of the IT MAS contracts are held by resellers.

The VA administers schedules for pharmaceuticals and medical devices under a delegation of procurement authority from the GSA. The VA is required by that delegation to adhere to GSA policies and procedures in the administration of those contracts. Nonetheless, the VA IG has issued reports and urged legislation that would eliminate resellers that did not have significant sales in the commercial marketplace.[1] Many legal observers believe that the VA's unsuccessful campaign over the years violates the Competition in Contracting Act[2] and the Small Business Act[3], and congressional leaders let the VA know that its "anti-reseller" campaign did not comport with legislative desires or intent.[4]

### **GSA IG's Audit Findings**

The GSA IG had three main findings resulting from its audit. First, the IG found that many identical items on Schedule 70 had widely varying prices, which caused the IG to believe that these price variances could not be the result of fair and reasonable pricing. The IG also asserted that it had found lower prices in the commercial market for the majority of the schedule items it evaluated, indicating that MAS pricing is not competitive and may not offer the lowest overall cost to the government. Moreover, the IG claimed that the price differences were not the result of the resellers' offering additional services or concessions on higher priced items.

Second, the IG found that many IT schedule resellers had minimal or no commercial sales to be used to establish contract pricing. Although resellers without significant commercial sales are required to provide information on manufacturer sales practices, the IG claimed that resellers and manufacturers do not always provide this data to the government. The IG also found that the standard price reductions clause was sometimes modified before contract award by agreement between the GSA and the contractors so as to limit the circumstances under which price reductions would be granted to the government.

Finally, the IG found that IT schedule reseller contracts with low or no sales are a significant drain on GSA resources, because the contracts' minimum sales guarantee clause requires the government to pay the difference between the amount ordered on the contract and \$2,500. The IG also found that the MAS program's requirement to obtain \$25,000 minimum in contract sales would generate less than \$200 in revenue from the industrial funding fee, the quarterly fees that the GSA collects from MAS contractors to fund the MAS program, to the IT Center.

### **IG's Recommendations**

As a result of its findings, the IG recommended that the Federal Acquisition Service commissioner establish procedures to ensure that different prices for identical schedule items are supported by additional concessions or services on items awarded at a higher price. The IG also recommended that GSA establish controls to ensure that contracting officers obtain commercial sales practices information from the manufacturer in cases of low or no commercial sales for the reseller.

Significantly, the IG recommended canceling Schedule 70 reseller contracts that do not meet the \$25,000 minimum sales requirement of the MAS program, increasing the \$25,000 minimum sales threshold to a level that offsets the government's costs, and finding alternatives to the \$2,500 minimum payment clause in IT schedule contracts.

### **Potential Consequences**

The IG report's findings could have huge import for IT companies that sell their products and services to the federal government through resellers, particularly the report's recommendation that reseller participation in the schedules program be curbed because the reseller contracts result in increased costs to the government. Like the prior VA IG recommendations, the conclusions of the report are arguably inconsistent with existing laws such as the Competition in Contracting Act and the Small Business Act and could result in diminished product availability and choice for government buyers. The recommendations also are inconsistent with certain government mandates to employ small businesses in federal procurement. However, as the GSA maintains statutory authority for MAS policy, it is unlikely that Congress will interfere with this effort to reduce reseller participation, unlike prior efforts by the VA IG. The GSA has taken other steps to reduce reseller participation, such as the much-publicized Federal Strategic Sourcing Initiative program, without legislative interference or judicial review.

### **Effect of Transactional Data Reporting**

In June 2016, the GSA published a final rule to implement a pilot program under which GSA MAS contract holders may trade the commercial sales practice disclosure requirements and ongoing obligations under the price reductions clause for monthly reports of specified transactional data elements for all GSA MAS contract sales.<sup>[5]</sup> Significantly, IT Schedule 70 contracts are included in the pilot program with an anticipated effective date of Jan. 1, 2017. Schedule 70 is one of two schedules where only limited product offerings will be included in the pilot program; however, the program will include all hardware, software, and software maintenance, which account for a significant portion of Schedule 70 sales.

The transactional data reporting (TDR) rule requires vendors to electronically report certain data points for all sales made under the contractor's MAS contract. For contractors who agree to this transactional data reporting requirement, the MAS contract is modified to eliminate both the commercial sales practices disclosure requirements and the price reductions clause from those contracts. Thus, the IG's recommendation that the GSA ensure that contracting officers obtain commercial sales practice disclosure from manufacturers when resellers do not have significant sales to the general public have been overtaken by the TDR, at least for hardware, software and software licenses.

### **Conclusion**

The IG report reflects a gradual erosion by the GSA of its MAS program. While reductions to nonproductive contracts with low or no government sales make economic sense, this trend could at some point result in significant reduction to small and minority business participation in federal contracting, in contravention of government policy. Furthermore, the TDR and its effect on contract pricing should be allowed to play out before additional cutbacks in reseller schedule participation occur.

In the meantime, companies should examine their MAS program sales to assess whether they will be affected by the IG report recommendations, particularly the recommendation to eliminate reseller contracts with low or no sales. They may be able to work with the GSA's Productive Contracts Team to convince the FAS of the continued benefit of maintaining their contract through the potential for future sales.

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[1] See <http://www.va.gov/oig/pubs/VAOIG-05-01670-04.pdf>.

[2] In accordance with FAR 6.102(d)(3), use of GSA's MAS Program is considered a "competitive procedure" under the Competition in Contracting Act so long as participation in the program has been open to all responsible sources, and orders and contracts under those procedures result in the lowest overall cost alternative to meet the needs of the Federal Government. See 41 U.S.C. § 152(3).

[3] To the "maximum extent practicable," procurement strategies used by a Federal department or agency having contracting authority are required to "facilitate the maximum participation of small business concerns as prime contractors, subcontractors, and suppliers". See 15 U.S.C. §644(e)(1).

[4] See [http://www.gsa.gov/graphics/staffoffices/GSA\\_Panel\\_supporting\\_docs\\_R2-tK2-g\\_0Z5RDZ-i34K-pR.pdf](http://www.gsa.gov/graphics/staffoffices/GSA_Panel_supporting_docs_R2-tK2-g_0Z5RDZ-i34K-pR.pdf).

[5] Certain GSA Indefinite Delivery Indefinite Quantity and Government-wide Acquisition contracts are also subject to the Transactional Data Rule but that application is beyond the scope of this article.