



OFFICE OF THE COUNTY ATTORNEY

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County Executive

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County Attorney

MEMORANDUM

TO: Beatrice P. Tignor, Ph.D., Director
Edward Stockdale, Manager II
Office of Procurement

FROM: Richard H. Melnick *RM*
Associate County Attorney

DATE: March 22, 2004

RE: *Bridge Solicitation of Federal GSA Schedules*

This memorandum discusses the propriety of procuring goods or services using a bridge contract based on a GSA schedule, or a related contract.

ISSUE

Whether to use a bridge contract from a federal GSA schedule, or from a related contract.

SHORT ANSWER

The Director, Office of Procurement, has the discretion to determine whether a federal contract meets the County law requirements for a bridge contract. As a threshold matter, a Government Services Administration (GSA) schedule alone is insufficient to enter a bridge contract. And, ordinarily, a contract resulting from a GSA schedule does not arise from "adequate competition" needed to permit a bridge contract under County law. Nevertheless, the Director, in a particular case, may determine that a federal agency has adopted rules for competition in contracting with a vendor from a Multiple Award Schedule that render a bridge contract appropriate. However, these circumstances presently are not known to exist.

FACTS

From time-to-time, County agencies send requests to the Office of Procurement, asking if they can use a bridge contract solicitation method to enter into a contract with a vendor who is on a federal GSA schedule, or who has a contract resulting from a GSA schedule.

The purpose of the Federal Supply Schedule (FSS) program¹, administered by the GSA, is to provide federal agencies with a simple process for acquiring commonly used supplies and

¹41 U.S.C. 259(b) (3) (A) (this memo uses the terms "GSA schedule" and "FSS" interchangeably).

services in varying quantities at volume discounts.² A FSS is generally a catalogue of supplies or services at predetermined prices that contractors demonstrate to GSA are “fair and reasonable,” in order to afford the federal agencies flexibility in proceeding to obtain the goods and services.³

Under the FSS program, federal agencies use either a Single Award or Multiple Award Schedule (“MAS”) by directly issuing purchase orders to contractors on the schedules. Under a Single Award Schedule, designated federal agencies **must** fulfill their requirements by placing orders using the schedule. In contrast, under a MAS, some agencies are designated as mandatory users, while others are not. Under both a Single Award Schedule and a MAS, a mandatory user agency may not seek alternative sources to the schedule⁴—except as expressly provided by regulation.⁵ A federal agency not identified in a MAS as a mandatory user **may**, but is not required to, issue orders under the schedule, and contractors are encouraged (but not required) to accept those orders.⁶ A non-mandatory user agency, for the most part, must follow the same procedures as a mandatory user agency in ordering from a MAS; however, a non-mandatory user is free to issue a solicitation or test the market before ordering from the schedule.⁷

A State or local government may require a vendor to sell goods and services under a GSA schedule, only when expressly permitted under federal law.⁸ Currently, state and local governments are permitted to voluntarily purchase from only two types of federal schedules.⁹ And in the limited scenarios when permitted to do so, the state or local government’s laws,

²FAR 38.101(a).

³See FAR 8.002 (vi) - (vii) & 8.401(d).

⁴See FAR 38.101(b) & 8.404(c) (2).

⁵See FAR 8.404 (c) (3) (urgent needs; below minimum (micro threshold<\$2,500)/above maximum (varies by contract) order thresholds; outside geographic area; lower price for identical item).

⁶FAR 38.101 (c).

⁷*Columbia Diagnostics, Inc.*, Comp. Gen. Dec. B-210345, 83-1 CPD ¶ 578 (1983), cited in *Cibinic and Nash*, Formation of Government Contracts (Second Edition), p. 695 (1986).

⁸Nothing prohibits a state or local government from independently procuring goods or services under its own procurement system, at the same prices a vendor provides on a schedule.

⁹Section 211 of the E-Government Act of 2002 amends 40 U.S.C. 502 to allow a state or local government to purchase certain automated data processing equipment, software, supplies, and services from FSS 70; Section 1122 of the National Defense Authorization Act permits state and local governments to purchase certain law enforcement equipment used in the performance of counter drug activities from a FSS.

regulations, and policies govern in determining whether purchasing under a GSA schedule is appropriate.¹⁰

ANALYSIS

County law requires that contracts be awarded by competitive sealed bidding or competitive sealed proposals, except as otherwise authorized in Chapter 11B or regulations.¹¹ "Bridge Contracts" is one method of solicitation authorized by regulation that, under certain narrowly defined circumstances, permits the County to enter into a contract with a vendor, without issuing a competitive solicitation.¹² In particular:

The Director may, without competition, enter into a bridge contract with another entity if the Director determines that:

- The entity has an **existing contract with another public entity** for the goods, services, or construction which the County would like to procure;
- A bridge contract is in the **best interest** of the County; and
- the contract between the entity and another public entity was awarded as a result of **adequate competition.**¹³

The Director must find the existence of all of these criteria to permit bridging the other contract.

Under the first criteria noted above, the County may not enter a bridge contract based on a GSA schedule alone. This is because a FSS is not a binding contract between the federal government and a vendor, which is necessary in order for the County to enter a bridge contract.¹⁴

¹⁰See Federal Register, Vol. 68, No. 88, GSA Rules and Regulations, May 7, 2003, p.24374 ("States and localities will need to make their own legal determinations as to whether use of the schedules is consistent with their laws, regulations, and other policies.")

¹¹See Montg. Co. Code, §§11B-9 (a) &-10 (a) (1994, as amended).

¹²Montg. Co. Code, §11B-42 (1994, as amended); Montg. Co. Proc. Regs. 4.1.15 (1994, as amended).

¹³*Id.* (Emphasis added) (In addition, "The bridge contract must also provide the County with materially the same goods, services, or construction . . . at the same prices being charged the other public entity").

¹⁴Under common law, a contract results from an offer, acceptance, and consideration. A "contract" under County Code §11B-1 (d) is "any agreement to which the County is a party for the procurement or disposal of goods, services, or construction, including any contract modification." And Procurement Regulation 2.4.20 defines "contract" as "a]ny type of documented agreement or order for the procurement . . . of goods, services, or construction or any other item which is binding on the contractor and the County."

A contract results only after the federal government selects a vendor on the FSS, and issues an order or enters a Blanket Purchase Order (BPA). Therefore, the County may not use a GSA schedule as the basis for a bridge contract.

Furthermore, the third criteria states that the underlying contract, upon which the bridge contract is based, must arise from "adequate competition." The Director must determine if "adequate competition" exists to permit a bridge contract from a GSA schedule contract. Since GSA schedule contract vendors are not usually selected through competition between the offers of multiple vendors, the Director has historically determined that these contracts do not result from "adequate competition." And the Director has found that the mere fact a vendor may have shown the federal government that its prices are fair and reasonable, to be placed on a schedule, is not enough to meet the "adequate competition" requirement under Section 11B-42 or 4.1.15.

The County Procurement Regulations define "competition" to encompass both **submitting** a proposal, as well as **selecting** the contractor, as follows:

The process by which more than one valid source of supply for goods, services, or construction is solicited through the **submission** of offers which are to be evaluated in a comparative way for the purpose of **selection** of the source or sources most advantageous to the needs of the County. (Emphasis added).¹⁵

Similarly, the federal Competition in Contracting Act requires "full and open competition." But, while the federal process for a competitive procurement resembles the County's competitive process for either Invitation for Bids (IFBs) or Requests for Proposals (RFPs),¹⁶ a FSS contract is "competitive" only to the extent that agencies must publicly request vendors to **submit** prices for inclusion on a schedule.¹⁷ In contrast to the "adequate competition" required under County law, ordering federal agencies do not issue solicitations, or otherwise conduct formal competition, for **selecting** a vendor with whom to contract from a FSS. Federal agencies are not generally required to conduct any comparative competition before placing an order,¹⁸ and are not required to select the lowest-priced supply or service.¹⁹ Agencies are not obligated to publicize their FSS

¹⁵Montg. Co. Proc. Regs. 2.4.16 (1994, as amended).

¹⁶See FAR, part 15; see also Montg. Co. Code, §§11B-9 (a) & -10 (a) (1994, as amended); Montg. Co. Proc. Regs., 4.1 & 4.2 (1994, as amended).

¹⁷41 U.S.C. §403 (7) ("Indefinite delivery contracts . . . are awarded, using competitive procedures to commercial firms. The firms provide supplies and services at stated prices for given periods . . . , for delivery within a stated geographic area . . . [and] [t]he schedule contracting office issues Federal Supply Schedules that contain information needed for placing orders.").

¹⁸FAR 8.404 (b) (2).

¹⁹See *Goddard*, *The Procurement Lawyer* (Spring 2002), citing *Draeger Safety, Inc.*, Comp. Gen. Dec. No. B-285366.2, 2000 CPD ¶ 139; see, e.g., *Quest Electronics*, Comp. Gen. Dec. B-193541, 79-1 CPD ¶ 205 (1979) (based on this FSS

buys or seek offers from all qualified sources, and FSS contractors must actively take steps to learn what agencies plan to buy, and when, and then take measures to even be considered for a given FSS buy.²⁰ Accordingly, "competition" - - as that term is understood under the County procurement system-- is generally not present in a FSS contract with a vendor.

Ultimately, the Director must determine "adequate competition," for purposes of a bridge contract, based on County law. The Director historically has found that the adequate competition needed to bridge a public entity's contract requires formal competition, or that equating it, in **selecting** a vendor. And this is not satisfied by the FSS standard of permitting vendors to **submit** "fair and reasonable prices" from which agencies may then **select** a vendor without competition.

Having said the above, a non-mandatory, MAS user agency sometimes adopts rules for competition in selecting a vendor.²¹ As a result, some FSS buys may resemble a competitive procurement, including requirements for technical proposals, and evaluation factors that an agency must consider in **selecting** the vendor from whom to order.²² In these rare instances, the Director of Procurement may consider, on a case-by-case basis, whether a particular non-mandatory, MAS agency contract resulted from "adequate competition," in determining if a bridge contract is appropriate.

CONCLUSION

A FSS itself is not an appropriate basis upon which to enter a bridge contract. In addition, the FSS contracting process does not provide for the competitive selection of a vendor with whom to contract. And this does not satisfy the County's requirement for "adequate competition" that is needed for a bridge contract. However, a non-mandatory agency using a MAS may sometimes adopt competitive procedures for selecting a vendor as a contractor. In these instances, the Director may determine whether a particular MAS contract included adequate competition in selecting the contractor, to permit a bridge contract.

framework, federal agency's determination of its needs, or choice of more expensive product, will be upheld in a protest unless "totally unreasonable").

²⁰FAR 8.404 (a).

²¹See FAR 1.301 (a) (1) ("... an agency head may issue or authorize the issuance of agency acquisition regulations that implement or supplement the FAR and incorporate, together with the FAR, agency policies, procedures, contract clauses, solicitation provisions, and forms that govern the contracting process or otherwise control the relationship between the agency, including any of its sub organizations, and contractors or prospective contractors.").

²²See, e.g., FSS Schedule 70, which applies to IT professional services, has formalized "Ordering Procedures for Services (Requiring a Statement of Work) that take precedence over the rules of FAR Part 8. We understand, in speaking with officials at the General Services Administration, that current procedures, at most, involve some informal, random competition between a very limited number of vendors.

Bridging GSA Schedules

Beatrice P. Tignor / Ed Stockdale

March 22, 2004

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✓ cc: Marc P. Hansen, Chief, General Counsel Division

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* Home * Federal Supply Schedules Listing * Basic Schedule Ordering
 * Help * GSA Advantage! 

GSA *Schedules e-Library*
 GSA Federal Supply Service

Schedule Summary
 Tuesday, March 9, 2004

Search all the words

For general schedule questions, contact:
 Stephanie Turner
 Phone: (703) 305-3038
 E-mail: stephanie.turner@gsa.gov

70 GENERAL PURPOSE COMMERCIAL INFORMATION TECHNOLOGY EQUIPMENT, SOFTWARE, AND SERVICES - Pursuant to Section 211 of the e-Gov Act of 2002, Cooperative Purchasing provides authorized State and local government entities access to information technology items offered through GSA's Schedule 70 and the Corporate contracts for associated special item numbers. Contracts with the COOP PURC icon indicate that authorized state and local government entities may procure from that contract.

[View all SINs & Contractors under Schedule](#) [View Solicitation on Fedbizopps.gov](#)

Schedule 70 SIN list:

SIN	SIN Description
132 3	Leasing of Products - SUBJECT TO COOPERATIVE PURCHASING
132 4	Daily/Short Term Rental - SUBJECT TO COOPERATIVE PURCHASING - Daily or Short Term Rental of Information Technology Equipment is from one day to 365 days.
132 8	Purchase Of Equipment - SUBJECT TO COOPERATIVE PURCHASING - Includes telephone equipment, audio and video teleconferencing equipment, communications security equipment, facsimile equipment, broadcast band radio, two-way radio, microwave radio equipment, satellite communications equipment, radio transmitters/receivers (airborne), radio navigation equipment/antennas, pagers and public address systems, communications equipment cables, fiber optic cables, fiber optic cables and harnesses, coaxial cables, desktop computers, professional workstations, servers, laptop/portable/notebook computers, large scale computers, optical/imaging systems, other systems, printers, displays, graphics (light pens, digitizers, touch screens), network equipment, other communications equipment, optical recognition I/O devices, storage devices, other I/O and storage devices, ADP support equipment, microcomputer control devices, telephone answering, voice messaging systems, ADP boards, installation of ADP equipment, installation of telephone equipment, and used equipment.

Sub-Categories (not all vendors have been placed within the following subcategories. To view a complete list of vendors, click on the SIN)

[Boards](#)

[Cables](#)

Desktop Computers
Digital Cameras
Display, Monitors
Drives/Storage Devices
Equipment for Physically Challenged
IT Support Equipment
Laptop/Portable/Notebook Computers
Large Scale/Mainframe Computers
Media
Memory
Microcomputer Control Devices
Modems
Graphic Related Equipment
MP3 Devices
Networking
Optical Imaging Systems
Optical Recognition I/O Devices
Other Communications Equipment
Other I/O and Storage Devices
PDA's
Power Protect
Printers
Professional Workstations
Projectors
Scanners
Servers
Speakers
Used Equipment
Video Cards
Web Cams
Airborne Radar Equipment
Broadcast Band Radio

Microwave Radio Equipment

Radio Navigation Equipment/Antennas

Radio Transmitters/Receivers, Airborne

Satellite Communications Equipment

Two-Way Radio

Telephone Equipment

Audio and Video Teleconferencing Equipm.

Communications Security Equipm.

Facsimile Equipment

Telephone Answering and Voice Messaging

Pagers and Public Address Systems

Misc. Communication Equipment

132 12 Equipment Maintenance - SUBJECT TO COOPERATIVE PURCHASING - Includes maintenance of radio/telephone equipment and maintenance of computer equipment.

132 32 Term Software License - SUBJECT TO COOPERATIVE PURCHASING - Includes operating system software, application software, EDI translation and mapping software, enabled E-Mail message based products, Internet software, database management programs, and other software.

Sub-Categories (not all vendors have been placed within the following subcategories. To view a complete list of vendors, click on the SIN)

Application

Business Mgmt

Communication

Educational

Electronic Commerce/Internet

Entertainment

Financial Management

Graphics

Home & Ref.

Kid's Center

License Center

Macintosh

Multimedia

Office Suites

Operating SystemsPDA SoftwareProgrammingUtilityVirus DetectApplication Software (large scale computers)Communication Software (large scale computers)EC Software (large scale computers)Financial Management (large scale computers)Operating Systems (large scale computers)Utility Software (large scale computers)

- 132 33 Perpetual Software License - SUBJECT TO COOPERATIVE PURCHASING - Includes operating system software, application software, EDI translation and mapping software, enabled E-mail message based products, Internet software, database management programs, and other software.
- 132 34 Software maintenance - SUBJECT TO COOPERATIVE PURCHASING - Includes maintenance of software.
- 132 50 Classroom Training - SUBJECT TO COOPERATIVE PURCHASING - Includes training.
- 132 51 Information Technology Services - SUBJECT TO COOPERATIVE PURCHASING - Includes resources and facilities management, database planning and design, systems analysis and design, network services, programming, millennium conversion services, conversion and implementation support, network services project management, data/records management, subscriptions/publications (electronic media), and other services.

Sub-Categories (not all vendors have been placed within the following subcategories. To view a complete list of vendors, click on the SIN)

Auto. Info. System Design & IntegrationAutomated News, Data and other Info. ServicesCAD/CAM ServicesDesktop ManagementIT Backup and Security ServicesIT Data Conversion ServicesIT Facility Operation and MaintenanceIT Network Management ServicesIT Systems Analysis ServicesIT Systems Development ServicesInformation Assurance

Programming Services

132 52 Electronic Commerce Services - SUBJECT TO COOPERATIVE PURCHASING - Includes value added network services, e-mail services, Internet access services, and other data transmission services.

Sub-Categories (not all vendors have been placed within the following subcategories. To view a complete list of vendors, click on the SIN)

E-Mail Services

Internet Access Services

Navigation Services

Other Data Transmission Services

Value Added Network Services

132 53 Wireless Services - SUBJECT TO COOPERATIVE PURCHASING