


AN A.S. PRATT PUBLICATION

APRIL 2019

VOL. 5 • NO. 4



PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



EDITOR'S NOTE: SPRING CLEANING FOR CONTRACTORS

Victoria Prussen Spears

GSA MOVES FORWARD WITH PLAN TO CONSOLIDATE THE FEDERAL SUPPLY SCHEDULE PROGRAM

Kristen E. Ittig, Stuart W. Turner, Amanda J. Sherwood, and Alexandra Barbee-Garrett

TRUMP'S NEW EXECUTIVE ORDER REQUIRES ADDITIONAL BUY AMERICAN PREFERENCES FOR INFRASTRUCTURE PROJECTS

E. Sanderson Hoe, Michael Wagner, and Peter Terenzio

OF HUMAN BONDAGE AND CHRISTIAN DOCTRINE

James A. Tucker

WHAT CAN BE LEARNED FROM THE DOJ'S 2018 FALSE CLAIMS ACT RECOVERIES?

Suzanne Jaffe Bloom, Benjamin Sokoly, and Cristina I. Calvar

DOJ MOVES TO DISMISS 10 KICKBACK-RELATED FALSE CLAIMS ACT COMPLAINTS AGAINST PHARMACEUTICAL COMPANIES

William S.W. Chang, Laura M. Kidd Cordova, and Spencer Churchill

NEW DECISIONS CLARIFY SMALL BUSINESS MINORITY SHAREHOLDER PROTECTIONS

Damien C. Specht, James A. Tucker, Steven Cave, and Victoria Dalcourt Angle

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 5

NUMBER 4

APRIL 2019

Editor's Note: Spring Cleaning for Contractors

Victoria Prussen Spears

101

GSA Moves Forward with Plan to Consolidate the Federal Supply Schedule Program

Kristen E. Ittig, Stuart W. Turner, Amanda J. Sherwood, and Alexandra Barbee-Garrett

104

Trump's New Executive Order Requires Additional Buy American Preferences for Infrastructure Projects

E. Sanderson Hoe, Michael Wagner, and Peter Terenzio

108

Of Human Bondage and *Christian Doctrine*

James A. Tucker

113

What Can Be Learned from the DOJ's 2018 False Claims Act Recoveries?

Suzanne Jaffe Bloom, Benjamin Sokoly, and Cristina I. Calvar

116

DOJ Moves to Dismiss 10 Kickback-Related False Claims Act Complaints Against Pharmaceutical Companies

William S.W. Chang, Laura M. Kidd Cordova, and Spencer Churchill

126

New Decisions Clarify Small Business Minority Shareholder Protections

Damien C. Specht, James A. Tucker, Steven Cave, and Victoria Dalcourt Angle

130

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Heidi A. Litman at 516-771-2169
Email: heidi.a.litman@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt);

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2019 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. Originally published in: 2015

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

MARY BETH BOSCO

Partner, Holland & Knight LLP

DARWIN A. HINDMAN III

Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

J. ANDREW HOWARD

Partner, Alston & Bird LLP

KYLE R. JEFCOAT

Counsel, Latham & Watkins LLP

JOHN E. JENSEN

Partner, Pillsbury Winthrop Shaw Pittman LLP

DISMAS LOCARIA

Partner, Venable LLP

MARCIA G. MADSEN

Partner, Mayer Brown LLP

KEVIN P. MULLEN

Partner, Morrison & Foerster LLP

VINCENT J. NAPOLEON

Partner, Nixon Peabody LLP

STUART W. TURNER

Counsel, Arnold & Porter

ERIC WHYTSELL

Partner, Stinson Leonard Street LLP

WALTER A.I. WILSON

Senior Partner, Polsinelli PC

PRATT'S GOVERNMENT CONTRACTING LAW REPORT is published twelve times a year by Matthew Bender & Company, Inc. Copyright 2019 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. All rights reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For permission to photocopy or use material electronically from *Pratt's Government Contracting Law Report*, please access www.copyright.com or contact the Copyright Clearance Center, Inc. (CCC), 222 Rosewood Drive, Danvers, MA 01923, 978-750-8400. CCC is a not-for-profit organization that provides licenses and registration for a variety of users. For subscription information and customer service, call 1-800-833-9844. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to government contractors, attorneys and law firms, in-house counsel, government lawyers, and senior business executives. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher. POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 630 Central Avenue, New Providence, NJ 07974.

GSA Moves Forward with Plan to Consolidate the Federal Supply Schedule Program

*By Kristen E. Ittig, Stuart W. Turner, Amanda J. Sherwood,
and Alexandra Barbee-Garrett**

The General Services Administration announced that it will consolidate all 24 Multiple Award Schedules into a single schedule. The authors of this article discuss the consolidation, which will impact all contractors with this type of schedule contract and will dramatically alter the process by which contractors apply for and government stakeholders purchase from the schedules.

The General Services Administration (“GSA”) currently operates 24 Multiple Award Schedules (“MAS”), under which it awards largely pre-negotiated contracts on largely commercial-item terms for a dizzying array of products and services. The current schedules are organized by industry or type of service, with individual schedules covering areas both broad (Schedule 70, IT procurement), narrow (Schedule 78, sports equipment, signs and trophies), and potentially duplicative (Schedule 71, furniture/Schedule 72, furnishings and floor coverings).

CONSOLIDATION

The GSA recently announced that it will abolish this fractured landscape.¹ Rather than maintain its current 24 MAS rubrics as separate entities, GSA announced it will consolidate all 24 into a single schedule. Stephanie Shutt, the Director of GSA’s MAS Program Management Office, described this change as part of a “mass reform project” to “ensure MAS is easy, efficient, and modern.”² This announcement impacts all contractors with this type of schedule contract and will dramatically alter the process by which contractors apply for and government stakeholders purchase from GSA schedules.

* Kristen E. Ittig (kristen.ittig@arnoldporter.com) is a partner at Arnold & Porter Kaye Scholer LLP representing large and small clients in government contracts matters, including compliance counseling, bid protests, investigations, audits and self-disclosures, claims and disputes, terminations, and other issues impacting government contractors and federal grantees. Stuart W. Turner (stuart.turner@arnoldporter.com), counsel at the firm and a member of the Board of Editors of *Pratt’s Government Contracting Law Report*, has extensive experience in litigation and counseling for companies that work with the federal government. Amanda J. Sherwood (amanda.sherwood@arnoldporter.com) and Alexandra Barbee-Garrett (alexandra.barbee-garrett@arnoldporter.com) are associates at the firm handling a wide range of government contracts matters.

¹ <https://www.gsa.gov/about-us/newsroom/news-releases/gsa-announces-transformation-of-multiple-awards-schedules>.

² <https://vimeo.com/gsavisualcommunications/review/303044538/72603a37b0>.

GSA utilizes MAS to establish long-term, government-wide contracts with private companies offering a variety of commercial items for sale to government parties. More than 10 million products currently appear on GSA schedules.³ Federal, state, and local agencies may place orders for listed products directly with schedule contractors or through GSA's online shopping system (GSA Advantage!), using the simplified acquisition procedures of Federal Acquisition Regulation ("FAR") subpart 8.4. The GSA MAS program represents a large and active marketplace, and a critical point of entry for small businesses and non-traditional commercial contractors to sell to the federal government. The GSA reports that approximately \$31 billion is spent through its MAS contracts each year.⁴

The focus of each of the 24 MAS contracts on a particular subject matter means that vendors selling different products or services under multiple schedules must comply with different terms and conditions for each. The division of items between schedules can likewise lack logic—for example, agencies can purchase certain telecommunications items from Schedule 70, but others from Schedule 58—and can cause frustrations when contractors wish to sell services and products in unison.

A SINGLE, COMPREHENSIVE MAS

GSA's proposed consolidation will eliminate the sector-specific contracts and replace them with a single, comprehensive MAS covering all items from logistics, to staplers, to computer products. GSA has not yet issued the timeline for this consolidation, but has indicated it anticipates taking a phased approach lasting approximately two years.⁵ At an Industry Day event held on December 12, 2018, Ms. Shutt explained that during the first phase, to be completed in fiscal year 2019, existing contractors will continue to sell through their existing contracts, while new contracts will be established on the new consolidated schedule.⁶ In the second phase, scheduled for 2020, GSA will move existing schedule contractors onto the new, consolidated schedule by means of a mass modification, so that the same contract number remains in place.⁷ This means

³ <https://www.gsa.gov/about-us/newsroom/news-releases/gsa-announces-transformation-of-multiple-awards-schedules>.

⁴ <https://gsa.federalschedules.com/resources/gsa-schedule-sales-fiscal-year-2017/> (not a government resource); <https://www.gsa.gov/about-us/newsroom/news-releases/gsa-announces-transformation-of-multiple-awards-schedules>.

⁵ <https://interact.gsa.gov/blog/gsa-announces-transformation-multiple-awards-schedules>.

⁶ <https://interact.gsa.gov/sites/default/files/FMP%20Industry%20Day%20-%20FINAL.pdf>.

⁷ *Id.*

that while current GSA contractors can rest assured their contracts will not change immediately, these contractors should pay careful attention as GSA sets up the new consolidated contract and experiments with new contractors. In a third phase, also to be completed in 2020, GSA will consolidate contracts for the approximately 1,500 contractors holding multiple schedule contracts.⁸

MAS contracts and purchases are intended to be more efficient than other forms of federal contracting. GSA explained that it is making this change to further that efficiency, and make the MAS system more user-friendly for companies and federal purchasers alike. GSA's Federal Acquisition Service Commissioner, Alan Thomas, explained that, from the government's point of view, "[a] single schedule for products and services will make it easier for customers to find and purchase the solutions they need to meet their respective missions."⁹ GSA Administrator, Emily Murphy, quipped "You shouldn't need a Ph.D. in GSA to find the solution you want."¹⁰ As for MAS sellers, providing a single entry point to MAS will "save vendors from the burden of managing contracts on multiple schedules."¹¹ Ms. Murphy added: "Reforming our schedules will improve customer service, make it easier for small businesses to access the schedules program, reduce duplication for all our vendors, and allows GSA's workforce to focus on delivering solutions."¹²

The consolidation is not unexpected. At a June 2018 Industry Day discussing e-commerce portals, Commissioner Thomas stated that a team at GSA was studying consolidation.¹³ He said that the multi-schedule approach was an "artificial construct," and cited "consistency issues" facing "companies who are managing multiple schedules." But, as always, the devil is in the details, many of which have yet to be revealed.

While GSA addressed several important issues at its December 12, 2018 Industry Day, many questions of potentially critical importance to current and prospective schedule holders linger:

⁸ *Id.*

⁹ <https://www.gsa.gov/about-us/newsroom/news-releases/gsa-announces-transformation-of-multiple-awards-schedules>.

¹⁰ <https://interact.gsa.gov/sites/default/files/Federal%20Marketplace%20Industry%20Day%20Transcript-12-12-18.pdf>.

¹¹ <https://www.gsa.gov/about-us/newsroom/news-releases/gsa-announces-transformation-of-multiple-awards-schedules>.

¹² <https://www.gsa.gov/about-us/newsroom/news-releases/gsa-announces-transformation-of-multiple-awards-schedules>.

¹³ Transcript of GSA June 21 Industry Day at 16–17, transcript *available at* https://interact.gsa.gov/sites/default/files/Public%20Meeting%20Transcript%20062108_0.pdf.

- During “Phase 1” of the consolidation, GSA has stated it will review every term and condition in existing schedule contracts to determine which should carry over to the new contracts.¹⁴ But, where terms and conditions differ between schedules, which will prevail in the consolidated version?
- Will the new contracts be reset as new 20-year contracts, or will expiration dates remain the same?
- Will companies be required to recertify small or disadvantaged business status to obtain one of the new contracts?
- Will GSA seek to “weed out” inactive or otherwise improper contracts as it consolidates, or simply assign new consolidated contracts to every current nominal schedule holder?
- The Veteran’s Administration (“VA”) is authorized by GSA to operate nine schedules of its own, and many contractors hold MAS contracts with both the GSA and VA. The GSA’s consolidation action is not planned to affect the VA’s MAS program, but will VA follow suit?
- While GSA has stated it does not anticipate the contracting officer for contractors with single contracts will change as a result of the consolidation,¹⁵ if a contractor deals with multiple COs across multiple schedules, how will GSA assign COs to the single new contracts?
- And many more.

CONCLUSION

It remains to be seen what benefits in efficiency and ease of use these reforms will actually add to the schedule contracting process. What is clear is that GSA’s reform effort seeks to lessen the perception of the GSA schedule system as unnecessarily byzantine, consistent with a government-wide effort to attract nontraditional contractors to the government market.

¹⁴ https://interact.gsa.gov/sites/default/files/Federal%20Marketplace%20Industry%20Day%20Transcript-12-12-18_0.pdf.

¹⁵ *Id.*