

Weighing The Pros And Cons Of GSA Transactional Data Rule

Law360, New York (July 27, 2016, 2:56 PM ET) --

You no doubt have heard by now about the U.S. General Services Administration's June 23 effort to "embrace modern technology while moving away from outmoded practices" — specifically, its implementation of the new transactional data reporting rule ("TDR rule") and its concurrent elimination of the price reductions clause ("PRC") and the commercial sales practices format ("CSPF"). See 81 Fed. Reg. 41104 (June 23, 2016). The new rule covers certain GSA Multiple Award Schedules as well as the agency's governmentwide acquisition contract and indefinite delivery/indefinite quantity contracts. As it represents the most significant change to the GSA MAS program since 1994 (when the GSA removed federal sales as a PRC trigger), the new rule has the potential to change significantly the way Schedule contractors (and others) do business; hence, my willingness to interrupt your otherwise enjoyable day with a treatise on GSA Schedule contracting.



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Speaking generally, the final rule, effective 60 days after June 23, reflects a trade with industry. In exchange for your willingness to accept the increased burden of tracking and reporting detailed transaction-level federal sales data, the GSA will eliminate the PRC and CSPF — and the complexity, burden and risk that comes with those two much-maligned provisions — from your contract. So, as my grandmother used to say, what's not to like?

Well, quite a bit apparently. Let's start with the PRC/CSPF side of the proposed contractual trade.

The PRC and the CSPF Sleep With the Fishes

Most within industry (and some within government) have been complaining about the PRC and the CSPF for years. Both provisions have been attacked time and again as overly complex, extremely burdensome and substantively unnecessary. In 2010, the government's own MAS Advisory Panel joined the attack by recognizing the burden and complexity of the PRC and recommending its removal from the Schedules Program. And now GSA itself seems to have seen the light as well. According to GSA, the new final rule will do away with "the complex CSP and PRC pricing disclosure requirements." (Id. at 41120).

When this bargain first was presented to contractors in the proposed rule, commentators (including yours truly) challenged it as an illusory deal. While the proposed rule did do away with the PRC, it left

the CSPF in place. In fact, it not only left it in place, it increased its scope by allowing contracting officers to request an updated CSPF at their discretion. (For more on this, see my article titled “I’m Not Dead Yet.”)

The final rule, in contrast, actually eliminates both the PRC and the CSPF. The rule announces this change as a “substantial burden reduction,” which it most certainly is. (Id. at 41104).

Under the new rule, instead of submitting a CSPF, presumably you will need to submit only your proposed Schedule pricing to your CO. The GSA then will look into its magical TDR box and use the aggregated transactional data it finds there (described below) to evaluate whether your proposed prices are fair and reasonable. The GSA’s COs also will use these data to evaluate “requests to adjust pricing and add new items to current contracts” without the submission of a CSPF. (Id. at 41113). Where the GSA believes the transactional data at its disposal are inadequate to evaluate the fairness and reasonableness of pricing, the CO retains the discretion to request additional data from the offeror, including “information other than cost or pricing data.” GSA says it will be rolling out additional guidance to COs that establishes the following order of evaluation priority:

1. Using data that are readily available, in accordance with FAR 15.404 ... including prices paid information on contracts for the same or similar items, contract-level prices on other FSS contracts or Governmentwide contracts for the same or similar items, and commercial data sources providing publicly available pricing information.
2. Performing market research to compare prices for the same or similar items in accordance with FAR 15.404
3. Requesting additional pricing information such as “data other than certified cost or pricing data” (as defined at FAR 2.101) ... from the offeror in accordance with FAR 15.404 ... when the offered prices cannot be determined to be fair and reasonable based on the data found from other sources.

The GSA explains that this guidance will help align the GSA’s procedures with the Federal Acquisition Regulation. (81 Fed. Reg. 41114). The FAR, in turn, establishes the following order of preference for price evaluations:

- Other pricing data available within the government,
- Pricing data obtained from sources other than the offeror,
- Additional pricing data obtained from the offeror, and, as a last resort,
- Cost data.

Notwithstanding the GSA’s prioritized list of price evaluation techniques, which does admittedly come close to the FAR’s own prioritized list, I suspect in practice COs will look for CSPF-like submissions where they have inadequate transactional data. While they likely won’t call it a CSPF, it won’t surprise me one bit if the requests call for the same or similar vertical pricing details embraced by the current CSPF.

It also won’t surprise me if COs consistently forget the mandate of FAR Part 15.4 that they may “obtain

the type and quantity of data necessary to establish a fair and reasonable price, but not more data than is necessary.”

Regardless of the price evaluation technique applied, without the CSPF, there will be no negotiation of a "basis of award" customer, which, of course, makes sense since there will be no PRC either. Well, at least there won't be the current version of the PRC. While this is very good news, it is not all roses. In the place of today's highly complex and burdensome PRC, the new PRC provides that

the Government may request from the Contractor, and the Contractor may provide to the Government, a temporary or permanent price reduction at any time during the contract period.” (81 Fed. Reg. 41139).

What this new language suggests to me is that any time a GSA CO sees lower pricing in her magic TDR box, she can ping the vendor and say “lower your Schedule pricing now.” In other words, I'm not quite sure “request” really means “request” here. Or, in the words of the great Inigo Montoya, I do not think that word means what you think it means.

Ironically, this unfettered discretion actually moves us closer to the pre-1994 PRC when sales to federal customers had to be tracked because they could trigger the PRC. While the parallel is not perfect — since (1) it's no longer the contractor's obligation to identify such sales as PRC triggers and (2) the failure to identify and report such sales won't lead to a government charge of fraud — it now is more likely that sales to federal customers will have a price-reducing implication for vendors.

All in all, though, the elimination of the PRC and the CSPF is a good thing. But to meaningfully evaluate its worth, one first must examine the flip side of the bilateral coin. So let's now take a look at what the GSA has to say about its benefit of the proposed bargain.

Transactional Data Reporting

In exchange for the elimination of the PRC and the CSPF, the GSA's new rule requires Schedule holders (and other GSA contractors) to accept a new clause: GSAR 552.238-75 (Transactional Data Reporting). The new clause requires contractors to track and report to the GSA the following federal sales details at the line-item level:

- Contract or blanket purchase agreement number
- Order number
- Nonfederal entity (The rule is not clear what this one means, but it probably refers to authorized, non-federal purchasers like prime contractors and/or states and localities)
- Description of deliverable
- Manufacturer name
- Manufacturer part number
- Unit of measure
- Quantity
- Universal product code
- Price per unit
- Total price

COs can add other data elements to this list, but only with specified management approval.

Upon gathering these data, vendors must report them to the GSA on a monthly basis. Reports must be made 30 days following the end of the month through a new GSA portal. (industrial funding fee payments, however, still are made quarterly, adding some further complexity into the mix.) These data then will be aggregated with other vendors' data to provide an extensive new cache of business intelligence for GSA Schedule COs and government purchasers. According to the GSA, its COs will take these data "into consideration when awarding FSS contracts and evaluating requests to adjust pricing and add new items to current contracts." (81 Fed. Reg. 41113). Ordering activities likewise will be asked to consider transactional data in negotiating their task orders, delivery orders, and BPAs.

I have two primary problems with the collection and use of transactional data.

First, industry should be concerned over the cost of implementing and administering the new rule. The GSA's initial burden estimate for the TDR aspect of the rule was six hours to set up a compliance system and two minutes to four hours per month to administer. Industry rightly viewed this estimate as wholly inadequate. To its credit, the GSA upped its estimate in the final rule. Now the GSA posits the average vendor will have to spend hours setting up a manual system and 240 hours setting up an automated system; and from 15 minutes to 48 hours per month in administration time. Frankly, I have no idea whether the GSA's estimate is accurate or not; but I know of several companies who think the GSA's guess still is too low. Whether it's accurate or not, however, I'm confident the cost of maintaining a TDR reporting system will turn out to be less expensive than the cost of maintaining a PRC/CSPF compliance system.

Second, industry should be extremely concerned that the GSA will use its new data to drive prices down to irrational levels by making apples-to-oranges pricing comparisons. Since this concern is a big one, let me illustrate the risk with four scenarios:

- Scenario One: You sell a high-quality, U.S.-made hammer for \$50. The GSA CO looks in her magic TDR data box and finds a lesser quality, foreign-made hammer for \$25. The CO then demands you either reduce the price of your hammer or take it off Schedule.
- Scenario Two: You sell a software product for \$500 that you fully support with a strong warranty, multiple customer support vehicles, and an industry-leading maintenance program. A competitor sells software with similar basic functionality, but with a far less robust warranty, no meaningful customer support, and no maintenance plan. The CO demands you either reduce the Schedule price of your software or remove it from the Schedule.
- Scenario Three: You sell a computer system on Schedule for \$5,000. You also hold a Schedule BPA and offer that same system through that BPA for \$4,500 — a 10 percent discount. Your (and your competitors') discounted BPA sales find their way into the GSA's magic TDR box and into the hands of your GSA CO. The CO demands you either reduce the Schedule price of your computer or remove it from the Schedule. A reduction of your Schedule price, however, will prompt a further reduction to your BPA price, which, in turn, will prompt ... well, you get the idea.
- Scenario Four: You manufacture a cutting-edge security product tailored specifically for the government's use, and offer it on Schedule for \$50,000. The product is a commercial item, but there are no comparable tailored products in the marketplace. Your GSA CO finds something

he/she believes to be roughly comparable in the transactional data at a lower price. The CO demands you either reduce the price of your product or remove it from the Schedule.

While these all are hypothetical scenarios, they are not spun from whole cloth. The GSA readily concedes in the final rule that its COs will be using the new data to draw imperfect comparisons. According to the final rule, “while transactional data is most useful for price analysis when comparing like items, it does not mean the data is not useful when perfect comparisons cannot be made.” (Id. at 41112).

The GSA clearly is sensitive to this concern. Indeed, one might say the GSA is a little too sensitive. The final rule repeatedly tries to assuage industry’s fear that COs will turn the MAS program into a low price/technically acceptable program, where price is king and value is marginalized if not abandoned. Here are just a few examples of the GSA’s efforts to assure industry this fear will not be realized:

- “However, transactional data does not transform the federal acquisition system into a lowest-price procurement model.” (Id. at 41108).
- “The Government’s preference will continue to be “best value”” Id.
- “Transactional data is viewed in the context of each procurement, taking into account desired terms and conditions, performance levels, past customer satisfaction, and other relevant information.” Id.
- “Training and guidance deployed in connection with this rule emphasizes the importance of considering the best overall value (not just unit price) for each procurement, taking into account desired terms and conditions, performance levels, past customer satisfaction, and other relevant information.” (Id. at 41113).
- “Contracting officers are encouraged to discuss with the offeror perceived variances between offered prices, transactional data, and existing contract-level prices, in order to evaluate whether other attributes (*e.g.*, superior warranties, quantity discounts, etc.) justify awarding higher prices.” (Id. at 41114).
- “The GSAM guidance for FSS contracts, which will be viewable on Acquisition.gov, instructs FSS contracting officers to make fair and reasonable, not lowest-price-regardless, determinations.” (Id. at 41117).
- “FSS contracting officers will be instructed to evaluate the data in the context of each offer, taking into account not only cost and quality discounts, but desired terms and conditions, unique attributes, socio-economic considerations, and other relevant information.” (Id. at 41120)

And this is a just a partial list. I can’t help feeling the vehemence of the GSA’s defense underlies an inherent realization that industry’s concerns are not overblown. GSA, thou doth protest too much.

The GSA’s defensiveness and industry’s concerns come with good cause. After all, industry had similar fears when the GSA rolled out its horizontal pricing evaluation plan (*i.e.*, its plan to evaluate an offeror’s prices by comparing them to other offerors’ prices), and those fears were realized. COs have been making apples-to-oranges comparisons and pressuring contractors to reduce their prices in precisely this

fashion since horizontal pricing came online. And remember, the GSA will be relying on its horizontal pricing tool even more than ever as it accumulates more and more purportedly comparable transactional data.

Against this background, all Schedule holders will have to weigh the benefit that comes from the elimination of the PRC/CSPF — in terms of compliance costs and compliance risk — against the likelihood that prices will be driven further down under the new rule.

So What Should You Do?

First, you need to figure out if the new rule applies to you. If you are a GSA GWAC or IDIQ contract holder, the new rule will apply to you right away. For Schedule holders, however, the rule is being implemented in phases as a pilot program. The new clause will not apply to all Schedule holders in the first instance. By its terms, the rule applies only to the following Schedules:

- Schedule 58 I, Professional Audio/Video, Telemetry/Tracking, Recording/Reproducing and Signal Data Solutions: All Special Item Numbers
- Schedule 72, Furnishing and Floor Coverings: All SINS
- Schedule 03FAC, Facilities Maintenance and Management: All SINS
- Schedule 51 V, Hardware Superstore: All SINS
- Schedule 75, Office Products: All SINS
- Schedule 73, Food Service, Hospitality, Cleaning Equipment and Supplies, Chemicals and Services: All SINS
- Schedule 00CORP, The Professional Services Schedule: SINS 871-1, 2, 3, 4, 5, 6, and 7 (Professional Engineering Services)
- Schedule 70, General Purpose Information Technology Equipment, Software, and Services: SINS 132-8 (Purchase of New Equipment), 132-32, 33, and 34 (Software), and 132-54 and 55 (COMSATCOM)

If you have at least one of the covered SINS, however, then your whole Schedule is covered. On the other hand, the inclusion of one Schedule does not mean your other Schedules are covered. So, for example, if you hold a Schedule 51 and a Schedule 84, your Schedule 51 is covered by the new rule, but your Schedule 84 is not. And you are not permitted to “opt in” your Schedule 84.

Even if your Schedule is covered by the pilot, however, you still have to “opt in” — at least if you are a current Schedule holder. The new rule is optional for current MAS contractors. In other words, it will be incorporated through a bilateral modification, which you will have to agree to. If you don’t want the new rule to apply to you, in the words of the late Nancy Reagan, just say no.

New Schedule contractors, on the other hand, don’t have that choice. The new clause will be incorporated into all new solicitations and apply to all new contracts following its effective date. Presumably, contract renewals also will incorporate the new clause without the vendor being given an opt in/out option.

Second, you need to figure out whether you are better off accepting the clause now or delaying its application. This decision involves a cost/benefit analysis between (1) the cost of the new TDR in terms of implementation and price pressure and (2) the cost and risk reduction from the elimination of the PRC and CSP. While every vendor will have to balance those competing costs and benefits for themselves, do not undervalue the benefits of tossing out the two most complex and burdensome

clauses of the Schedules program. But likewise do not undervalue the very real price pressure that will be put in its place.

You also should include in your deliberation the fact that you likely will be forced to accept the new rule at your next renewal anyway, so holding out may offer only a short-term benefit (if you view it as a benefit at all).

Third, you should reach out to your CO and discuss with him/her the practical issues involved in incorporating the new clause. Will your current CSPF be withdrawn? Will the CO have enough data to make a fair/reasonable assessment? If not, what additional information will she want from you? What will happen to any unique tracking/reporting structures you previously negotiated? Will those go away or linger on? These are all questions your CO should be willing to discuss with you, and they all are questions you should factor into your cost/benefit analysis. As for the timing of such a conversation, the final rule provides contractors will be given 30 days advance notice prior to the application of the new rule.

Fourth, if you do decide to opt in to the new regime (or if you are forced to do so because you are a new or renewing contractor), you will need to figure out how to implement a sensible data capture, tracking, and reporting process. The new rule recognizes that the extent of the program may be tied to the volume of Schedule sales (and recognizes that a manual program will work for some while an automated program may be necessary for others). Whether manual or automatic, though, you will need some process that will ensure current, accurate, and complete reports. (The GSA, by the way, has made reporting instructions available at its Vendor Support Center website: <https://vsc.gsa.gov>.)

Fifth, if you opt in, you should spend some time preparing possible responses to COs who may try to compare apples to oranges — at the GSA, the BPA or the order level. Keep in mind the following FAR mandate: In conducting a price evaluation, “the contracting officer shall limit requests for sales data relating to commercial items to data for the same or similar items during a relevant time period.” FAR 15.403-3. The FAR further provides “the contracting officer shall, to the maximum extent practicable, limit the scope of the request for data relating to commercial items to include only data that are in the form regularly maintained by the offeror as part of its commercial operations.” Id.

Remember, the final rule repeatedly says COs will be trained how to use transactional data in a way that does not convert the Schedule program into LPTA; and they will not be comparing prices where different terms and conditions justify the pricing differential. But, as suggested above, I have my doubts about the quality of that training, and about the CO community’s translation of that training into practice. I also have my doubts that the GSA’s much-touted category managers — folks who will be tasked to become commodity experts in their given areas — will transition smoothly either. We’ve seen how well-intentioned training can be lost in translation before. One simply need remember that the GSAR for years has instructed COs to consider differences in the cost of doing business with the government in evaluating proposed Schedule prices, yet GSA COs and auditors routinely ignore that requirement.

Anything Else You Need To Know?

Yes. Here are a few other things to keep on your radar screen.

Data Protection

The GSA will be collecting a lot of data here. Much of these data are proprietary and confidential. While the GSA claims it has systems in place to secure these data from inadvertent disclosure risk, keep in mind the U.S. Office of Personnel Management previously gave us the same assurances with respect to its data. What possibly could go wrong here?!

Data Sharing

The final rule says the GSA's transactional data will be made available to GSA COs, GSA category managers, ordering activity COs, and to the public. The GSA says those data will be made available at an aggregated level so as not to disclose proprietary information in violation of the Freedom of Information Act, but we have yet to see how that will work in practice.

In a recent article to its members, the Coalition for Government Procurement recognized an interesting problem for the GSA here. With respect to the public release issue, the coalition astutely asks "how, under the law, GSA will consult with FSS contractors regarding whether the contractor specific data is protected from disclosure as commercial, propriety information." That is an excellent question, which the GSA has yet to answer. FAR 15.403-3 provides:

The Government shall not disclose outside the Government data obtained relating to commercial items that is exempt from disclosure under 24.202(a) or the Freedom of Information Act (5 U.S.C. 552(b)).

Until we have an answer from the GSA as to how it intends to deal with this prohibition, vendors should take the necessary steps to protect the data they submit by marking everything proprietary and confidential / not subject to FOIA.

GSA Schedule Audits

It will be quite interesting to see what sort of pre-award and post-award audits the GSA Office of Inspector General will be conducting in light of the new rule. Since contractors simply will be offering a price to the GSA and will be saying nothing about how that offered price relates to their other commercial pricing, it's hard to see what the OIG really has to audit anymore. In fact, vendors in the middle of a current GSA audit should consider reaching out to their CO to ask that the audit be concluded and the CSPF be withdrawn. That being said, the new rule does not modify the OIG's current audit clauses. Consequently, an auditor could try to demand pricing data from a contractor during an audit. An auditor also could focus on a contractor's submission of its transactional data. It is unclear how the ensuing arguments would work themselves out, but you should keep your eyes open for audit requests that, because of the new rule, now are overly broad.

PRC Monitoring

Don't get ahead of the new rule. Until the new clause finds its way into your particular contract — either through a bilateral modification or its incorporation into a new solicitation — you still are obligated to live up to your existing PRC and CSPF obligations.

Conclusion

For many contractors, the new rule will reflect a worthwhile tradeoff. The PRC and CSPF can create significant risk even to companies with well-negotiated pricing/reporting structures. But the new rule is

not a blessing for everyone. The increased price pressure — coupled with the increased reporting burden and cost — could impose significant costs on some. Of course, we're really just talking here about the timing of the change since most folks believe the TDR pilot program is here to stay for the long term. In which case, it seems the GSA simply may have replaced one means of reducing prices with another. To borrow (and tailor) a regal phrase from the English and French, price reductions are dead; long live price reductions.

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