

Oracle FSS Withdrawal Highlights Increasing Contractor Woes

By **Daniel Wilson**

Law360, Nashville (October 24, 2016, 7:49 PM EDT) -- Oracle Corp.'s decision to no longer contract with the government through the Federal Supply Schedules is the most prominent FSS withdrawal in a decade, but it is hardly alone in feeling squeezed, attorneys say, reflecting a set of compliance burdens and risks imposed by the U.S. General Services Administration that have grown sharply over time.

Although Oracle and the GSA have been publicly silent on the issue and did not respond to requests for comment from Law360, multiple reports indicate that the information technology giant pulled out of participation from the schedules program in early October, not only stopping direct sales, but also ending sales through resellers.

The FSS, also known as the Multiple Award Schedules, are broad, overarching contracts with sellers of various commercial goods and services, administered by the GSA. They are intended to cut down on the need for individual procurements and save the government money, while also making it easier for contractors to sell to multiple government clients.

But Oracle's decision to withdraw from the schedules also shows that for some FSS vendors and potential contractors, the claimed benefits of participation don't outweigh the drawbacks, particularly for companies like Oracle who only derive a small portion of their overall business from the schedules or federal contracting more broadly, attorneys said.

A growing set of compliance burdens — purportedly one of the key reasons behind Oracle's withdrawal from the schedules — that aren't typically part of commercial contracting make it difficult to get on the schedules and comply with the rules of the schedules, they claimed.

"The program's marketed as friendly to commercial companies, but it's really not; it's really a government-unique program that requires a vast investment in compliance infrastructure," Hogan Lovells partner Michael Mason said.

There are difficulties, for instance, with getting items or services placed onto or removed from a schedule contract in a timely manner — a reflection of both red tape and ongoing understaffing at the GSA — and also extensive ongoing FSS reporting requirements, such as reporting under the Commercial Sales Practices and Price Reduction Clause requirements, or CSP and PRC, attorneys noted.

The CSP and PRC clauses require companies to continually report to the GSA on their commercial pricing for the same items or services, and offer the government their best available price. While the GSA has

moved to withdraw the much-criticized reporting requirements in favor of its new Transactional Data Reporting, or TDR, rule — moving away from a pricing and reporting model based on commercial pricing to one based on other sales to the government — that TDR switch has also been cited as another likely factor behind Oracle's withdrawal.

Although the TDR rule, which will be phased in over time, should ease long-term compliance burdens for at least some contractors and may end up as a net positive for industry, there is also a significant upfront burden in switching over from systems that are currently used to comply with the CSP and PRC, which could serve as a prompt for vendors who are already ambivalent to step out of the FSS system altogether, attorneys noted.

"It's very difficult for large companies to change what they're looking at for pricing purposes and to pull together the information that's necessary under the TDR and meet it on a monthly basis," Crowell & Moring LLP partner Lorraine Campos said.

And the threat of False Claims Act liability from participation in the FSS is also something that looms heavily over contractors, attorneys said, particularly in relation to CSP and PRC reporting — and, in the future, TDR reporting — with the government in many circumstances quick to level fraud claims against what would be considered routine contract noncompliance issues in the commercial world, attorneys argued.

"Even though there are certain standards — high standards — before a company should be liable under the False Claims Act, what we've experienced in recent years is the government going after companies almost on a strict liability basis," Mason said. "For a large company to comply with the data requirements ... it is a very difficult task."

FSS deals have proven to be fertile ground for the government to pursue FCA allegations — and win settlements — in recent years, with Oracle itself facing FSS-related FCA suits twice in the past decade. It paid nearly \$100 million in 2006 to settle claims against PeopleSoft, which it had acquired, and just under \$200 million in 2011 to settle allegations that it overcharged schedule customers.

Outside of its own experience, there have been several other prominent examples that may have weighed on its decision to withdraw, such as VMWare Inc. and Carahsoft Technology Corp.'s 2015 settlement, with the companies paying a combined \$75.5 million to settle claims that they misrepresented commercial pricing on VMWare software resold by Carahsoft and thus overcharged the government.

While Oracle has largely pulled back from direct sales to the federal government, the VMWare settlement — which follows a similar 2010 settlement by Cisco Systems Inc. and reseller Westcon Group North America — is an example that even selling through resellers doesn't necessarily insulate manufacturers from FCA claims, with liability potentially opened up through issues such as potentially having to make commercial price submissions on behalf of resellers, attorneys noted.

Oracle's withdrawal is the most prominent example of a company pulling out of the FSS since the 2007 withdrawal of the former Sun Microsystems Inc., itself now part of Oracle, and attorneys said they would not be surprised to see more companies follow it out the door.

The IT giant is not alone in having concerns about the compliance burdens and risks of schedule contracting, with several attorneys saying they were at least anecdotally aware of companies quietly

withdrawing from the FSS — or deciding not to get involved in the schedules in the first place — in recent years, turning to other federal contracts with less onerous requirements or sticking solely to commercial contracting instead.

“For some clients, the cost doesn’t justify the [benefits] that they might get from the contracts,” Campos said. “I think there are a number of reasons ... but the False Claims Act liability and the compliance aspects have been very difficult for larger companies to administer and address.”

--Editing by Philip Shea and Kelly Duncan.

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