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New GSA Reporting Rule May Not Deliver Alleged Benefits

By **Daniel Wilson**

Law360, Washington (June 23, 2016, 10:26 PM ET) -- Uncertainty surrounding the application of the General Services Administration's new rule requiring vendors to submit monthly transactional data reports leaves attorneys questioning if it will provide the benefits the GSA claims, for either contractors or the government.

In its final transactional data reporting rule, formally published on Thursday, the GSA will require vendors to report to it monthly regarding certain transactional data from orders placed under the Federal Supply Schedules — excluding the U.S. Department of Veterans Affairs' FSS — and other governmentwide acquisition contracts, or GWACs, and governmentwide indefinite-delivery, indefinite-quantity contracts, or IDIQs. This would include item descriptions, part numbers, quantities sold and prices, among other information.

The GSA claims the TDR rule — the most significant change to the schedules in more than two decades — will be a win-win for both the government and contractors, increasing price competition while reducing compliance burdens, eliminating existing "cumbersome, duplicative" reporting requirements and saving vendors an estimated $29 million a year in total.

But attorneys said they are skeptical about whether the rule will result in the claimed net benefits, either for contractors or for the government itself. Many questions remain open regarding how the rule will be applied in practice and whether it will actually reduce contractor burdens or be a more effective way for the government to choose vendors, they claimed.

"There's a lot of unresolved questions associated with this new rule," Crowell & Moring LLP partner Lorraine Campos said. "I think it could be a benefit for many contractors, but for others it could be extremely burdensome, especially those contractors that have invested significant time and expense to comply with their current GSA ... requirements."

While noting they were still fully digesting the 180-page rule, attorneys said that the elimination of the current commercial sales practices disclosures and the price reductions clause basis of award monitoring requirements — the former cut after feedback on a proposed version of the rule — would both clearly be welcome changes for contractors, nixing what had become burdensome requirements after initially being introduced in the mid-1990s as a less onerous way to do business with the government.

"Eliminating the [PRC] is a clear positive, from my perspective — that is a significant compliance obligation that I think has long outlived its usefulness," Covington & Burling LLP of counsel Jason

Workmaster said.

The complicated CSP and PRC requirements have also served as particularly rich sources for False Claims Act allegations, in many cases effectively turning honest mistakes into allegations of fraud, according to Hogan Lovells partner Michael Mason.

But the new reporting requirements could be similarly burdensome, with the GSA likely underestimating the reporting burden — and overestimating the cost savings — from the new TDR rule, which requires substantial amounts of data to be submitted on a monthly basis, attorneys said.

The new reporting regime may simply close one avenue for significant potential FCA liability while opening up another one, they claimed.

"I very much doubt that the audit community and the Justice Department are going to lose their interest in the schedule program," Workmaster said.

Many contractors will likely have to make significant investments in information technology systems to handle the new reporting requirements, as well as hiring staff to oversee those systems, which could be particularly burdensome on smaller contractors, attorneys said.

And a subset of contractors who participated in governmentwide GWAC and IDIQ deals but were not part of the FSS will also feel the sting of increased costs — something the GSA itself has admitted. CSP and PRC requirements applied only to FSS contracts, and not other multiaward deals, unlike the new rule, which will apply across the board to all multiaward, governmentwide vendors.

The government may also get less of a benefit from the new rule than it is looking for, attorneys said. While it gets access to more horizontal pricing data across vendors — theoretically putting itself in a position "to act more as an intelligent buyer and not reply upon government-unique and antiquated requirements," according to Mason — several attorneys noted that this means contracting officers will also no longer have access to data they have historically relied upon in negotiating.

How the new data taken in by the GSA will be used, including any potential data analysis methods, and applied is also uncertain, and could play a large part in how effective the new reporting regime is, Rogers Joseph O'Donnell PC shareholder Robert Metzger noted.

"Giving the contracting officers more and different data doesn't necessarily produce better or quicker decisions, and attention must be given to how the data will be collected and the means by which it will be assessed before we can decide that the government will benefit from this change," he said.

Further, the type of data being requested by the GSA may not fit all orders that the FSS is used for, several attorneys noted, saying the new model is seemingly geared particularly toward circumstances where the lowest price is the prime factor for determining best value.

Although this model may work for fungible items, like office supplies, it is inappropriate for "apples to apples" comparisons of items where there is significant variance between ostensibly similar vendor bids — such as information technology hardware — and for bundled products, as well as for many services contracts, where determining best value can require a complicated analysis that does not fit neatly within the "lowest-priced technically acceptable" model, they argued.

"I wish to stress my appreciation that contracting officers ... have a responsibility — in some cases, a legal duty — to do their very best to assure they are paying a fair and responsible price," Metzger said. "But we should not believe that we can substitute data-driven outcomes for best-value determinations across the broad range of federal purchasing. Even if this works perfectly well for floor coverings and furniture ... it does not work so well for professional services."

While contracting officers can request additional data from vendors beyond the TDR reporting requirements if they believe it is needed, this takes away some of the claimed upside of the rule and may discourage companies from seeking to become a government vendor at all, attorneys said.

The GSA, for its part, claimed in the final rule that it had incorporated extensive tweaks made in response to comments on its proposed rule and noted that it will phase in the new requirements through pilot programs over at least a year, giving it a chance to work out any further kinks before the program is applied across the board.

"GSA's senior procurement executive will regularly evaluate progress against [certain] metrics in consultation with the administrator for federal procurement policy and other interested stakeholders to determine whether to expand, limit or discontinue the program," it said.

--Editing by Katherine Rautenberg and Aaron Pelc.
