

GSA Transactional Data Reporting Program: Should You Do It?

Law360, New York (July 6, 2016, 1:37 PM ET) --

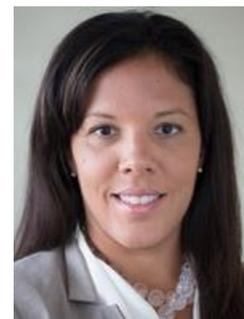
Following the U.S. General Services Administration’s announcement that it will proceed with its pilot “transactional data reporting” (TDR) program for certain Federal Supply Schedule contracts, reactions are understandably mixed. For over 30 years, to obtain fair and reasonable prices for products and services under Federal Supply Schedule contracts, the GSA has sought to rely on the concept of a “commercial price list” and standard discounts that defined a commercial supplier’s relationship with its most favored customers. Although this model has been largely abandoned in the commercial world, the GSA had clung to the model implemented through the requirements to disclose commercial sales practices (in an awkward GSA-mandated form) and to monitor, under the price reduction clause (PRC), prices and discounts offered to basis of award customers.

The TDR pilot program will potentially revolutionize the GSA’s approach to ensuring fair and reasonable prices on various multiple award contract vehicles. In lieu of commercial sales practices (CSP) disclosures and PRC monitoring, the GSA intends to rely on what it calls “horizontal pricing” by imposing on participating contractors the burden of reporting “transactional data” on sales to federal customers— data contracting officers will use to evaluate the prices and discounts being offered to them on any specific transaction. Whether this approach will produce the intended cost savings or ultimately result in a net reduction in the compliance burden FSS contractors face remains to be seen. What is certain is that those contractors required to participate in this new program will need to get up to speed quickly on the new requirements, and contractors that are eligible, but not required, to participate should carefully consider the pros and cons before taking the plunge.

Final Rule Implementing TDR

The final rule amends the GSA Acquisition Regulation (GSAR) to require the reporting of transactional data from orders placed against certain contracts. Specifically, the final rule creates two new transactional data reporting clauses — one for FSS contracts (GSAR 552.238-74, Industrial Funding Fee and Sales Reporting – Alternate I) and one for GWACs and governmentwide indefinite-delivery, indefinite-quantity (IDIQ) contracts (GSAR 552.216-75, Transactional Data Reporting). FSS contractors subject to GSAR 552.238-74 will no longer be subject to requirements of the CSP disclosures or the PRC.

In addition to the amending the GSAR, the final rule sets forth a pilot program for implementation of the



Lorraine Campos



Alan Gourley



Adelia Cliffe

new TDR clause in FSS contracts, which is set to begin “no sooner than July 1, 2016.” The pilot program will initially apply to new contracts under the following eight GSA schedules and SINs:

- Schedule 03FAC, Facilities Maintenance and Management: All SINs.
- Schedule 51 V, Hardware Superstore: All SINs.
- Schedule 58 I, Professional Audio/ Video, Telemetry/Tracking, Recording/ Reproducing and Signal Data Solutions: All SINs.
- Schedule 72, Furnishing and Floor Coverings: All SINs.
- Schedule 73, Food Service, Hospitality, Cleaning Equipment and Supplies, Chemicals and Services: All SINs.
- Schedule 75, Office Products: All SINs.
- Schedule 00CORP, The Professional Services Schedule: Professional Engineering Services (PES) SINs.
- Schedule 70, General Purpose Information Technology Equipment, Software, and Services: SINs 132 8 (Purchase of New Equipment); 132 32, 132 33, and 132 34 (Software); and 132 54 and 132 55 (Commercial Satellite Communications (COMSATCOM)).

New FSS contracts covering at least one of the affected schedules/SINs will be subject to GSAR 552.238-74 and required to participate in the pilot program. Existing contracts that include the affected schedules/SINs may voluntarily participate in the pilot program by executing a bilateral modification. While not entirely clear whether the GSA will treat five-year renewals as “new FSS contracts,” at least one senior policy adviser within the GSA has said that the GSA will only award a five-year option if the contractor accepts the new TDR clause. Accordingly, it appears likely that contractors renewing applicable FSS contracts during the pilot program period will be required to transition to TDR.

At least initially, the GSA has identified 11 standard data elements contractors must include in monthly reports: contract/blanket purchase agreement number; delivery/task order number; nonfederal entity; description of the deliverable; manufacturer name; manufacturer part number; unit measure, quantity; universal product code; price paid per unit, and total price. The clause also provides that contracting officers may require additional data elements. When reporting price paid per unit and total price, FSS contractors must include the industrial funding fee. Transactional data may be reported on the basis of invoices issued or payments received and must be submitted within 30 calendar days of the last calendar day of the month — even when there are no sales for the transaction period. The GSA has not yet provided a template spreadsheet contractors can use to organize the required data elements, and it is unclear whether the GSA will require contractors to certify that the transactional data reports are “current, accurate, and complete.”

While the GSA has stated that the pilot is a three-year program, at the end of a year, the GSA will evaluate the pilot program and its ability to effectively collect and use transactional data and price analysis to assure better pricing for the FSS customers. If the GSA determines that the pilot program does not meet its objectives, the GSA can discontinue the program and revert back to utilizing the CSPs and PRC. During the pilot, the GSA intends to add schedules and SINs to the pilot program on a rolling basis, though it has not provided detail on the anticipated schedule for the additions, with affected contractors receiving notice at least 30 days prior to taking effect. The transactional data received under the pilot program will be introduced to federal buyers in the following stages: (1) category managers; (2) FSS contracting officers; and (3) purchasing agency offices. At least some of the information will also be made public through a “public data extract, to promote transparency and competition. On July 7, 2016,

the GSA published a notice soliciting comments on the data elements it proposes to make part of the public data extract, which for now includes all 11 standard data elements except quantity and price per unit.

In tandem with the final rule, the GSA issued new guidance in the GSA Acquisition Manual (GSAM) that contains instructions for category managers and FSS contracting officers for using the transactional data and evaluating offers, and has stated that it will provide additional training. The GSA intends to use the transactional data to determine fair and reasonable pricing on an order by order basis. The new GSAM guidance requires FSS contracting officers to use readily available information and perform market research to ensure the government is getting the best offer as opposed to the lowest price. This guidance also allows the GSA to request additional pricing information, such as “other than certified cost or pricing data” when fair and reasonable pricing cannot be determined has on the data from other sources.

Practical Considerations

For those contractors that are eligible (but not required) to opt into the pilot program, there are a number of considerations to evaluate before jumping in.

First is the effort involved in conforming the data in a contractor’s order entry and fulfillment system to the format and content required under TDR, an effort even the GSA acknowledges will be significant, estimating it to require 240 hours for the initiate setup for contractors that use automated data systems. The GSA estimates the monthly reporting time to range from 15 minutes to 48 hours per month, depending on a contractor’s sales volume and reporting system. The GSA, however, may be grossly underestimating the recurrent monthly time and resources required to ensure that the reports are accurate and complete, particularly for contractors with enterprise data that does not fit squarely within the categories and descriptions of the information to report. For example, for service providers, the information captured in the contractor’s system and relevant to evaluating price and best value (e.g., the labor category, individual qualifications and experience) are not one of the 11 data elements the GSA has said that it will capture. Whether the creation and review for accuracy and completeness of the monthly reports will be less burdensome than the information collection and review required for CSPs and the PRC is fact-specific and depends, among other things, on the products and services a contractor provides to government and commercial customers, the data currently collected in its order entry and fulfillment system, the relative scope of FSS sales as compared to BOA sales, and the contractor’s pricing and discounting policies.

A second consideration is the potential exposure under the TDR program versus the traditional CSP and PRC model. It is possible that instead of relieving contractors of potential defective pricing liability related to the CSP disclosures, the GSA has simply shifted that potential liability to a different set of data. As it stands, contractors only have to provide the CSP disclosures once every five years, or when new products are added. Under the TDR rule, contractors will submit pricing data every single month, increasing the likelihood that they will inadvertently provide inaccurate or incomplete data. Potential liability for such mistakes — particularly mistakes that may influence contracting officers in ways detrimental to the government interest — remains uncertain.

Third, bundled orders might be difficult for FSS contract holders to administer under the TDR program, as they may not fit neatly into the defined reporting elements. Bundled orders under the FSS contract typically refer to fixed-price solutions that include a variety of products and/or services to meet a more sophisticated customer need. An example may include a building security system that includes the

products, installation and maintenance for a specific period of time, thus a variety of sophisticated security products and the accompanying wire and the labor services associated with installation and monitoring. Many such products and services are bundled to provide “single-source” solutions for government customers. These bundled solutions, with a large number of unique configurations, are difficult under the traditional FSS contract with the CSP and PRC requirements. The challenges for bundles and complex systems may be magnified under the TDR.

Fourth is whether the use of TDR would disadvantage a contractor from a competitive standpoint. For example, in some cases, a contractor may offer a product or service that appears comparable to lower-priced offers from other contractors, and material differences may not be apparent based on the limited data available via TDR (e.g., a service provider may have an employee with unique experience and education tailored to a particular task). While the GSA maintains that contracting officers will make purchasing decisions based on best value, rather than low price, TDR may well create temptation to focus on primarily on price.

Finally, it appears the TDR program may well be a moving target, particularly during the first year or two. For example, the final rule provides that contracting officers can request expansion of the 11 data elements specified initially. While the GSA’s senior procurement executive must approve any data elements beyond the 11 standard elements in order for them to be included with a tailored version of the clause, there remains the uncertainty of which specific data elements will be required for which schedules.

Few will lament this bold move away from CSP disclosures and the PRC. And there may be some contractors for whom TDR is a net positive change. For example, contractors that do not have traditional price lists, with complicated pricing and discounting policies that do not lend themselves to the CSP-1 format, and who have good systems in place that are already tracking the 11 data elements for all FSS sales, might find that TDR relieves them of burdens without introducing substantial new burden and risk. However, it is clear that there are many uncertainties in terms of how TDR will ultimately be managed by both contractors and the GSA, and at least some risk that contractors will invest substantial money and resources to make the move, only to have the GSA pull the plug at the end of the pilot period. FSS contractors are well advised to think long and hard before voluntarily signing up for the TDR pilot program. Those who opt or are forced in should plan carefully, with eyes wide open to the uncertainties inherent in the shifting terrain.

—By Lorraine Campos, Alan Gourley, Adelia Cliffe and Leslie Monahan, Crowell & Moring LLP

Lorraine Campos and Alan Gourley are partners and Adelia Cliffe and Leslie Monahan are counsels in Crowell & Moring's Washington, D.C., office.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.
