

GSA

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BNA INSIGHTS: GSA's Transactional Data Reporting Pilot Program



BY LORRAINE CAMPOS, ALAN GOURLEY, ADELICIA CLIFFE AND LESLIE MONAHAN

Following the General Services Administration's announcement that it will proceed with its pilot "transactional data reporting" (TDR) program for certain Federal Supply Schedule (FSS) contracts, reactions are understandably mixed.

For more than 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 it by im-

posing requirements to disclose commercial sales practices (CSPs) — on an awkward GSA-mandated form — and to monitor, under the Price Reduction Clause (PRC), prices and discounts offered to the contractor's selected "basis of award" customers.

Many contractors will welcome the move away from the CSP disclosures and PRC monitoring. Others are uncertain about whether the shift to monthly TDR will actually represent a net reduction in the administrative and compliance burdens faced by FSS contract holders, and whether contracting officers will have the ability to use the data appropriately to determine best value. Other stakeholders wonder whether the government will achieve cost savings when GSA schedule pricing is no longer linked to contractors' pricing of commercial sales.

In addition to these significant uncertainties, there are a number of compliance pitfalls to consider in moving from one pricing model to the other. Contractors that are required to participate in this new program will need to get up to speed quickly, and contractors that are eligible, but not required, to participate in the pilot program should carefully consider the pros and cons before taking the plunge.

The Price Reduction Clause's Long and Controversial Reign

Since the 1980s, the GSA has used two primary tools to negotiate and maintain advantageous pricing for government customers under GSA Schedule contracts. First, the CSP disclosures that a contractor submits when it negotiates the contract, when it adds new products, and when it opts for each of the three available five-year extensions. Second, the PRC — which requires that a contractor, among other things, track commercial sales to a defined Basis of Award (BOA) customer (which can be a single customer, multiple customers, a category of customers, or all commercial customers). Contractors are required to provide GSA Schedule customers with a corresponding price reduction when discounts to the BOA customer affect the negotiated relationship between the GSA discount and the BOA Customer discount.

Over the years, both industry and the government have expressed their dissatisfaction with the CSP disclosures and the PRC. For industry, the extensive disclosure and ongoing monitoring requirements pose a significant administrative and compliance burden, particularly as contractors have moved away from relatively static, hard copy price lists and relatively standard discounting policies and procedures, to more dynamic and complex pricing models, margin-based pricing programs and discounting structures.

For the government, there has long been an acknowledgment that the CSP disclosures and PRC do not ensure that government customers obtain most favored customer pricing. Many contractors have successfully defined the BOA customer in a narrow manner or have successfully carved out a significant portion of nonstandard discounts from triggering the PRC. In addition, sales to other federal agencies do not trigger the PRC, resulting in wide variances of discounts across the government sector.

There has been significant pressure, both inside and outside of government, to revamp the tools used to ensure “fair and reasonable” pricing on GSA Schedule contracts. In 2010, the Multiple Award Schedule Blue Ribbon Advisory Panel formally recommended the removal of the PRC from FSS contracts. At the same time, the Government Accountability Office recommended that the GSA collect and make available to FSS contract negotiators and customer agencies “prices paid” data on other schedule orders.

These calls for reform have now dovetailed with larger acquisition reform efforts, including the Office of

Federal Procurement Policy’s category management vision (grouping commonly purchased goods and services into centrally coordinated categories for smarter and more efficient acquisitions), as well as GSA’s creation of a data analytics team and Competitive Pricing Initiative (CPI) to leverage available government transactional data to achieve greater savings.

In March 2015, the GSA published a proposed rule to implement TDR, and to eliminate the requirement that contractors monitor commercial sales to the BOA customer under the PRC. In that earlier version of the rule, however, the GSA retained the requirement to make CSP disclosures and, in fact, gave the contracting officer the authority to request updated CSP disclosures during contract performance.

Not surprisingly, while contractors applauded the partial elimination of the PRC, the consensus was that the GSA had significantly underestimated both the burden associated with setting up and complying with TDR requirements, and the negative impact of retaining (and arguably broadening) the CSP disclosure requirements.

In the final rule implementing the pilot program, the GSA has addressed many of the comments and concerns raised by contractors, most significantly by eliminating *both* the CSP disclosure requirements and the PRC.

Notably, one vocal minority against elimination of the CSP disclosures and the PRC was the GSA Office of Inspector General (OIG), which continues to tout the cost-savings benefits of these contract mechanisms. The OIG, which aggressively pursues contractual remedies and False Claims Act actions for failure to comply with the CSP and PRC requirements, through pre- and post-award audits and investigations, has cautioned that the collection of GSA transactional data through TDR will not provide the same price protections as the CSPs and PRC.

In particular, in a recent report to Congress, the OIG pointed out that the move to TDR undermines the core foundation of the FSS program, which ties the government’s purchase of commercial products and services to the terms conditions and pricing of the commercial marketplace. The OIG has also expressed concern that GSA has underestimated the costs associated with collecting, standardizing and analyzing transactional data. The OIG’s skepticism is likely to continue to be evident as the pilot program moves forward and GSA evaluates its success.

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 governmentwide acquisition contracts and governmentwide indefinite-delivery, indefinite-quantity (IDIQ) contracts (GSAR 552.216-75, Transactional Data Reporting). FSS contractors subject

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to the GSAR 552.238-74 will no longer be subject to requirements of the CSP disclosures or the PRC.

The new transactional data reporting clauses identify 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 seek to require additional data elements, although any such additions must be approved by the GSA's senior procurement executive.

When reporting the 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.

The GSA has not yet provided a template spreadsheet contractors can use to organize the required data elements. It is also unclear if the GSA will require contractors to certify that the transactional data reports are "current, accurate and complete." On July 7, 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, excepting, under the Freedom of Information Act, only quantity and price per unit.

The TDR Pilot Program for FSS Contracts

The amended GSAR will apply to those contracts that are part of the pilot program set to begin "no sooner than July 1, 2016." The pilot program will initially apply to new FSS contracts under the following eight GSA Schedules and Special Item Numbers (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 (COM-SATCOM)).

Contractors entering into new FSS contracts with at least one of the affected Schedules/SINs will be subject to GSAR 552.238-74 and required to participate in the pilot program. Contractors with existing contracts that include the affected Schedules/SINs may voluntarily

participate in the pilot program by executing a bilateral modification.

While it's 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 it will only award a five-year extension if the contractor accepts the TDR clause. If this suggestion becomes official GSA policy, contractors with applicable FSS contracts that are up for renewal during the pilot program period will be required to transition to TDR despite any misgivings.

At the end of a year, GSA will evaluate the pilot program and its ability to collect and use transactional data and price analysis effectively to assure better pricing for the FSS customers. If the GSA determines that the pilot program does not meet its objectives, GSA can discontinue the program and revert back to using the CSPs and PRC.

Even during the initial one-year evaluation period, however, the GSA apparently also intends to add Schedules and SINs to the pilot program on a rolling basis, 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: (i) category managers; (ii) FSS contracting officers; and (iii) purchasing agency offices.

Use of TDR in Determining Contract Pricing

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. 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 GSA to request additional pricing information, such as "other than certified cost or pricing data" when fair and reasonable pricing cannot be determined on the data from other sources. GSA has promised to initiate training of its procurement professionals on the appropriate use of transactional data in negotiating pricing for specific orders.

Practical Considerations

For those contractors that are eligible, but not required, to opt into the pilot program, there are a number of considerations.

The first is the effort involved in conforming the data as it exists in a contractor's order entry and fulfillment system to the format and content required under TDR, an effort the GSA acknowledges will be significant.

The GSA has estimated that it may require 240 hours for the initiate setup for contractors that use automated data systems and an additional 15 minutes to 48 hours each month, depending on a contractor's sales volume and reporting system to submit the monthly reports.

The GSA may, however, be grossly underestimating the recurrent monthly time and resources required to assure that the reports are accurate and complete, particularly for contractors with enterprise data that requires some amount of manipulation because it does not fit neatly 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 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 may well depend on a number of factors: 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 compared with BOA sales; and the contractor's pricing and discounting policies, including bundling.

A second consideration is whether the TDR program will reduce the potential liability exposure that contractors have faced under the CSP and PRC model. The GSA has not stated whether it will require certification that monthly transactional data is "current, accurate, and complete." Whether it does or does not, it is possible that instead of relieving commercial contractors of potential liability related to CSP and PRC disclosures, the GSA has simply shifted the 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 are submitting pricing data every month, increasing the likelihood that they will inadvertently provide inaccurate or incomplete data. Potential liability for such mistakes — particularly where such mistakes affect government customer pricing decisions — is a distinct possibility.

Third, bundled orders may well be difficult for FSS contract holders to administer under the TDR program. 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 be 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 were difficult under the traditional FSS contract with the CSP disclosure and PRC price maintenance system since each configuration may be unique. For complex systems composed of customized combinations of standard option components subject to TDR, however, it is unclear how contractors are to report unit prices of individual products or services, thereby magnifying the compliance challenge, as well as undermining the government customers' ability to use the data.

A fourth consideration is whether the use of TDR could 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 contractor's, and material differences may not be apparent based on the dis-

crete data points available via TDR (e.g., a service provider may have an employee with unique experience and education tailored to a particular product).

While the GSA maintains that contracting officers will make purchasing decisions based on best value — rather than low price — training and oversight will be necessary to ensure they look beyond the objective transaction data and dig for qualitative data that may have a significant impact on the price offered.

Finally, it appears that the TDR program may be a moving target, at least in its first few years of implementation. The fact that contracting officers can seek to add data elements to the TDR monthly reporting requirements introduces additional administrative costs and burdens. Contractors modifying their financial systems to facilitate one set of reporting obligations may subsequently be faced with additional reporting.

Apart from the GSA OIG, there are not many who lament this bold move away from CSP disclosures and the PRC. Indeed, there are likely many contractors for whom TDR is a net positive change.

For example, contractors with complicated pricing and discounting policies that do not lend themselves to the CSP format or traditional price lists — 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. In addition, contractors with limited (or no) sales to the government customer base for which monthly reporting is required will likely see this as a positive change.

Nonetheless, it is clear that there are many uncertainties in terms of how TDR will ultimately be managed by contractors and GSA, and at least some risk that contractors will invest substantial money and resources to make the move, only to have GSA pull the plug at the end of the pilot period.

While opting in may assist the GSA in its evaluation of the pilot, FSS contractors with well-established CSP and PRC compliance programs may not want to wade into the uncertainties inherent in this shifting terrain.

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