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General Services Administration Acquisition Regulations: Transactional Data Reporting; GSAR Case 2013-G504

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Submitter Information

Name: Larry Allen
Address:
1451 Highwood Drive
McLean, VA, 22101

General Comment

Please see the attached comment letter.

Attachments

transactionaldatacomments

May 4, 2015

U.S. General Services Administration
1800 F Street NW., 2nd Floor,
ATTN: Hada Flowers
Washington, DC 20405-0001.

RE: GSAR Case 2013-G504, Transactional Data Reporting

Dear Ms. Flowers:

As a member of the Multiple Award Schedules Advisory Panel, past President of the Coalition for Government Procurement, and contributing author to two books on the Multiple Award Schedules program, I am pleased to submit these comments on the above-referenced proposal.

I am a strong supporter of the Multiple Award Schedules program. As President of the Coalition for Government Procurement, I started the Excellence in Partnership Awards to recognize the individuals and organizations that made the program great. I have defended the program before Congressional committees that wanted it, or GSA, eliminated. I have worked closely with GSA officials throughout my career on the rules and regulations governing the program and have been part of every regulatory change to it since 1990. I believe that the Multiple Award Schedules program, properly implemented and supported, is the very best program available for the acquisition of commercial solutions.

Executive Summary

While I applaud GSA's effort to eliminate one of two triggers of the Price Reductions Clause (PRC), I am concerned that opposition to the elimination of this trigger from the Inspector General (IG) community, coupled with the onerous, unworkable data collection requirements contemplated by the pilot, will create more audit liability and expense requirements for GSA Multiple Award Schedule contractors. GSA will be left with a mound of useless data that will do little, if anything, to enable customers to make accurate pricing comparisons. The Schedules program in its entirety will suffer harm, driving customers and contractors to other acquisition methods. As such, I strongly recommend withdrawing the proposed changes and pilot project.

The Price Reductions Clause should be eliminated or modified via its own case. Should GSA want to move forward with its desire to create a "prices paid" comparison pilot, there are other avenues available that will not burden contractors.

Elimination of the Basis of Award Price Reductions Clause Trigger

The Basis of Award trigger to the Multiple Award Schedule Price Reductions Clause is largely an anachronism, leftover from a time before GSA changed and codified Schedule ordering rules approximately 4-5 years ago. The original intent of the Basis of Award trigger was to ensure that Schedule prices stayed fair and reasonable based on changes in price or discount structures to a pre-identified commercial customer or class of customer. While industry has maintained for over 25 years that similar market conditions in the federal sector drive Schedule price reductions much more than changes to a selected commercial "Basis of Award Customer", GSA now has its own data suggesting that this trigger is responsible for only 3% of all Schedule price reductions. While my own belief is that the 3% number is, itself, high, it nevertheless shows that maintaining the trigger in its current form cannot possibly be justified by any sound cost benefit analysis. It simply costs too much for contractors to abide by and provides little, if any, meaningful protection to the government.

It also proves the point that industry has made all along: competition in the federal market is by far the primary factor that drives Schedule price levels. Eliminating the Basis of Award PRC trigger, as the proposed rule does, would in no way harm the government and would bring a welcome reduced burden to contractors at a time when they face more new rules and procedures governing their conduct of federal business than at any time in the past 25 plus years.

It is important to point out that government investigators still have the ability to enforce Price Reductions Clause compliance by using the defective data trigger. The government can, and should, ensure that contractor-provided information upon which the government relies to make contract award decisions is accurate and complete. Our own experience shows that it is this part of the PRC that causes most Schedule pricing audits and investigations. Indeed, the scope of such cases is considerably broader than other PRC actions, allowing the government to have protection for the vast majority of its contracting dollars. As such, auditors still have the main, and larger, tool available for use.

I am concerned that GSA leaders will cede to pressure from the Office of the Inspector General and keep the Price Reductions Clause "as is". While Inspectors General have an important role to play in ensuring compliance, that role does not grant them status as "Co-Program Manager". GSA Schedule and Acquisition Policy leaders must be clear on this point if they are going to ensure that the Schedules program does not become an unworkable morass of never-ending disclosure requirements or opportunities to penalize even companies that make substantial efforts to be compliant. Whether on the Price Reductions Clause point or any other, ceding program management responsibilities to the IG will lead to a greatly diminished Schedules program.

There can, in fact, be no logical basis for maintaining the PRC "as is". Whether through the changes contemplated through this proposed rule, or reducing the Basis of Award tracking requirement to the federal Simplified Acquisition Threshold, action must be taken that reflects today's Schedule rules. These rules have changed several times over the years, but the PRC has not. Whatever else happens, today's PRC must be updated so that it is consistent with changes made elsewhere in the program.

Transactional Data Reporting Pilot

The pilot contemplated by this section of the proposal is unworkable and will cause substantial burdens on industry. This burden is not just from the expense and time of creating new reporting systems, but from the likely creation of a new audit right whereby IG's can audit the data that is collected and reported for the population of a price comparison system.

A Price Comparison Tool and the MAS Advisory Panel

The concept of an automated Schedules price comparison tool was a topic of discussion for the Multiple Award Schedule Advisory Panel. While there was support for ensuring that government buyers had ample information to allow them to make proper buying decisions, there was no agreement that placing a new burden on industry to collect and report information was a proper avenue to pursue in this cause. Further, it is fair to say that the Panel discussions centered on the concept of a price comparison tool, without discussing many, if any, details of what such a system would look like.

Panel members did express concern over the course of multiple meetings that whatever data a system would collect would have to be of the type that would truly enable accurate pricing comparisons. Members of the Panel understood that there are multiple variables that go into contractor pricing decisions, as well as different priorities among federal buyers. There seemed to be an understanding, too, that service acquisitions would be difficult to bring into such a system given the multitude of differing ways companies go to market in this sector.

As such, GSA cannot claim a Panel recommendation mandate for pursuing the option considered by the pilot project.

An Automated Comparison Tool Is Impossible For The Majority of Schedule Business

Most Schedule sales are for IT solutions or professional services. Product sales, while important, comprise only a minority of Schedule business. By definition, solution and service business is highly variable in nature.

First, there are company-to-company variables. These include differing solution names, often consisting of specialized product configurations that, themselves, have different names and

capabilities. In addition, one service company could require its "Systems Engineer II" to have an advanced technical degree. Another, though, would allow for such a person to substitute the degree for relevant work experience. Taken a step further, whether, how much, or if a Systems Engineer II would be deployed on a specific project varies greatly from company to company given not only their own circumstances, but the approach they put forth to try and win business.

Second, there are situational variables. These include factors like end-of-quarter or end-of-month quota requirements, end-of-lifecycle product discounts, discounts – or premiums – on certain labor classifications given fluctuations in commercial and federal market supply and demand. Companies do not have the same fiscal year as the government, or even among themselves. As such, firms will make different pricing decisions based on where they are in their own business cycle. Prices available one day, therefore, may not be available afterward.

To illustrate the supply and demand point above, immediately after 9/11, translators were in high demand and pricing rose substantially for qualified people in a short period of time. The price one customer could obtain on a Tuesday was quite different for a customer wanting substantially the same service on Thursday. Today, this scenario is played out over other skilled labor sets, including demand for cyber coders.

This multi-variable pricing phenomena is not limited to the federal market. Rather, the changes reflect market forces at work in whatever market at which an observer looks. The examples above barely scratch the surface of factors that contribute to price fluctuations. They are provided here, however, to illustrate the basic point that no transactional data system will be able to provide useful information on real-time pricing available to a particular customer. It would be better to consider such information as historical data, interesting, but of limited utility for future pricing expectations.

There is simply no way that any database would be able to accurately reflect all of the variables described above to give a buyer an accurate idea of what a reasonable price would be for the services or solutions they were contemplating. This is true of whether the buyer is commercial or federal. While commercial systems, such as Amazon.com, may work for product-based comparisons, they cannot be applied to services. That may be one reason why Amazon, known for being innovative in multiple areas, has no large-scale multi-variable solution comparison tool.

To require Schedule contractors to collect and submit this information, therefore, would be folly. Even if companies could collect and transmit it in the manner desired, once collected, it could not be placed into a system that would come close to what GSA hopes for. GSA would likely spend many millions of dollars in an attempt to devise such a system. Customers would be left with a system that, at best, would provide historical data, information that would be misleading as to sale and discount information available to them at the time they make a purchase. When the deals they think they saw via the system turn out to be unavailable, GSA and the Schedules program will receive substantial blame. This likelihood, combined with predictable cost

overruns, delays, and Congressional hearings, are all powerful indicia of why GSA should not move ahead with its pilot as proposed.

The Costs of the Transactional Reporting Requirement Are Overly Burdensome

Contrary to claims expressed by some at GSA, contractors do not currently collect information on every federal sale in the manner by which GSA hopes to populate its on-line system. Rather, contractors would be forced to spend hundreds of thousands of dollars, if not more, to create specially-configured, GSA-only collection systems. Particularly hard hit would be small firms, who today comprise over three quarters of all Schedule contract holders and generate fully one-third of Schedule sales.

The data collection requirement would likely drive businesses of all sizes out of the Schedules program, at least as prime contractors, reducing competition. The future viability of small businesses that specialize in serving federal customers would be particularly threatened.

For contractors that elected to stay, the costs of the new data collection burden would inevitably be passed along to government customers in the form of reduced Schedule discounts. While some in government believe that the proper answer to every new acquisition requirement is to flow the burden down to industry, it should be noted that no new cost requirements come into being without someone paying for them. This is true of any market, government or commercial. Here, the government will still be paying for the creation of its system as for-profit companies seek to remain as such.

Transactional Data Submissions Will Create A New Audit Capability

Industry is also very concerned that the requirement to collect and submit transactional sales information will create a new audit right for the Inspector General. Information companies currently submit to obtain their Schedule contract is auditable, as is information about sales to the Basis of Award customer or customer class. In addition, such information as country of origin, labor category compliance with the Services Contract Act and a host of other types of information relevant to a company's government contract is subject to audit. It is a valid concern that the information GSA seeks to collect here will be subject to audit.

Creating a new audit right creates new costs and potential liability for companies. The costs to a contractor of an audit or investigation are real. Seldom do the combined impacts of lost productivity, legal counsel, and negative publicity create an impact of under $1 million. There are legions of plaintiff attorneys as well, advertising their services for whistleblowers seeking monetary rewards for pointing out wrong doing, real or alleged.

This all adds to the potential expense the proposal will have on industry. Any Schedule contractor would have to seriously evaluate the expanded risk this proposal would create for

them. Collectively, these costs may well result in some companies believing that the risks of being a Schedule contractor outweigh the rewards and having them leave the program, at least as a prime contractor, as a result. This will reduce choice on Schedule, as well as competition, impacts opposite of what GSA was trying to achieve through the pilot.

A Comparison Tool Will Actually Decrease Spot Price Reductions

Even on simplified product acquisitions, a price comparison tool will have the unintended impact of reducing price reduction behavior on the part of Schedule contractors. As companies see their spot price decreases available for all federal agencies to view, they will likely offer fewer such reductions and, when they do, the reductions will likely be for smaller amounts.

This is not idle speculation. Up until mid-1991, GSA's Price Reductions Clause contained a provision that required a Schedule contractor to reduce its Schedule price for all federal agencies if it reduced the price to one Schedule customer. Not surprisingly, Schedule contractors thought long and hard about reducing Schedule prices. It is a simple fact of market economics that not all customers can receive a firm's "best" price without the firm possibly losing money and going out of business.

Seeing that its government customers were not getting the benefit of spot price reductions available in the commercial market, GSA leaders changed the Price Reductions Clause in 1991 to eliminate the "all or nothing" federal reduction mandate. This allowed contractors to offer spot price reductions to federal customers when circumstances warranted. This closely mirrored, and still reflects, the realities of the commercial market, where differing circumstances and competition pressures lead to differing prices. Countless Schedule customers have benefitted from the ability of contractors to give spot discounts.

There is also already tremendous transparency in the government market. Contractors within specific market segments know each other well in terms of product and pricing practices. Companies have obtained bid sheets for years in order to understand how their prices compared to others. Government buyers today benefit from this through aggressive spot discounts in competitive situations.

Making reductions totally transparent, though, will almost certainly chill the current market. GSA used the example of "True Car" at its public meeting on this proposed pilot and this is a good analogy to use here.

Why do car companies like tools like True Car? They like them because they ultimately reduce the range of discounts a dealership has to offer in order to make a sale. While some people may get a better deal because of systems like True Car, others can no longer obtain deeper discounts they were once able to get. By making all pricing information public, True Car and other services like it, have evened out the variability of discounts car dealers have to offer. They're

ultimately more in control of their pricing than they used to be. Now, more buyers may get a discount off list price, but the size of the discount they get is reduced.

So, too, would it likely be with GSA's system. Reductions would still be possible in competitive circumstances, but "quantity of one" discounts or particularly deep discounts would be much less frequently available than they are today. Some customers would end up paying more, some less. While it is very possible that this paradigm would attract a few companies that will try to "buy" specific market segments through consistently deep discounts, no company would find that practice sustainable. Any benefit for the government would be similarly short lived. Companies would either fail to provide adequate customer support, supply products or solutions that did not comply with federal rules, or simply go out of business when they lost too much money over time.

The Pilot Could Lead to Disclosure of Proprietary Data

There is also a valid concern that the transactional data provided by companies could be inadvertently shared with competing contractors. The depth and breadth of information GSA seeks to collect via this pilot makes the possibility of a contractor having to supply proprietary pricing information very real. Once in the government's hands, this information becomes potentially releasable via a Freedom of Information Act (FOIA) request. Though companies are usually provided with the opportunity to review and redact information before a FOIA request is fulfilled, this is not always the case. Similarly, sensitive information already leaks out from time to time, despite the government's best attempts at due diligence.

By collecting more sensitive pricing information the likelihood that more proprietary information could be made public increases. This can put effected companies at a competitive disadvantage and require extensive re-working of their business development strategies. Intellectual property, as well, is at enhanced risk. This is yet another potential contractor cost that could be imposed should the pilot move forward.

If GSA is asking companies to provide more, and more sensitive, information – and establish new collection and remittance systems – it must be prepared to say what new and innovative systems it will implement to ensure that sensitive information is used only for its intended purpose. GSA must take the proper steps to build a workable system and protection of proprietary information must be at the center of this effort. Industry must have these assurances before it can begin to contemplate handing over some of its most sensitive business information.

Alternatives to Contractor-Supplied Spending Data Exist

There are at least two alternatives to having contractors supply transactional data to GSA that could help determine the utility of a price comparison tool, even on a limited basis.

First, is data the government already collects from purchase card transactions. The government has long-required companies to provide "Level 3" data when accepting government purchase cards. This information goes right back to the government user under the terms of purchase card contracts. The information shows who purchased what, from whom, how much was brought, and other information. Unit pricing may also be provided, or can be easily determined, for product purchases via simple math.

A robust pilot test could be conducted using this data. It would quickly give GSA a good idea of how useful a price comparison tool would be and what limits, in terms of scope, there might be based on an analysis of complex purchase card transactions. This could be done at little cost to GSA and at no cost to industry.

Second, GSA also already has information on prices paid on complex IT and professional services purchases via its Assisted Acquisition Services operation. This part of GSA routinely works with customer agencies to manage complex acquisitions. As with purchase card information, the "who, what, when, where and why" data is already collected. GSA can currently compare winning bids for the same or similar solutions by merely collecting data from its various assisted service functions. This would provide analysis much more quickly, and determine the efficacy of the proposed approached much sooner as well, than the pilot proposed here.

Conclusion

The Multiple Award Schedules program has worked for over 60 years because GSA and industry have understood that a two-way partnership must exist in order for both groups to best serve their common customer: federal agencies. By seeking additional information from contractors, with some in GSA believing the request should be theirs "by right", this partnership is at risk for being thrown out of balance. Contractors need GSA to provide a reasonable conduit through which they can reach government customers without having to create new contracts for each sale, but GSA needs contractors as well if it is to have sufficient solutions to offer customers. This is especially true in the competitive federal IT market.

While the proposal to eliminate the Basis of Award trigger of the Price Reductions Clause is a move in the right direction, there is reasonable concern as to whether GSA's operational bureaus will prevail in this matter in the face of strong IG opposition. The proposed pilot program would cost GSA and industry millions of dollars, with little, if anything, to show for it at the pilot's conclusion. Alternatives exist that allow the agency to pilot a prices-paid database that do not create new burdens on industry.

For these reasons, I recommend strongly that the GSA withdraw this proposal, pursue Price Reductions Clause reform on its own merits and seek an alternative path to the data collection it contemplates via the pilot.

Thank you for your time and consideration of these comments. I look forward to working with you on this, and other, Schedule issues.

Sincerely,

-E-signed -
Larry Allen
President