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Comment On: GSA-GSAR-2014-0020-0001
General Services Administration Acquisition Regulations: Transactional Data Reporting; GSAR Case 2013-G504

Document: GSA-GSAR-2014-0020-DRAFT-0013
Comment on FR Doc # 2015-04349

Submitter Information

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Submitter's Representative: Frank J. Aquino
Organization: EA Engineering, Science, and Technology, Inc., PBC

General Comment

See attached file(s)

Attachments

EAEST PBC Comments GSAR Case 2013-G504 – RIN 3090-AJ51 Transactional Data Reporting

4 May 2015

VIA FAX – 202-501- 4067
AND ELECTRONIC SUBMISSION VIA REGULATIONS.GOV

U.S. General Services Administration
Regulatory Secretariat Division (MVCB)
1800 F Street NW., 2nd Floor
ATTN: Hada Flowers
Washington, DC 20405-0001

RE: GSAR Case 2013-G504 – RIN: 3090-AJ51

Dear Ms. Flowers:

EA Engineering, Science, and Technology, Inc., PBC (EA) is pleased to submit comments to the U.S. General Services Administration's (GSA's) proposed regulations contained in "General Services Administration Acquisition Regulation (GSAR); Transactional Data Reporting" RIN: 3090-AJ51 – GSAR Case 2013-G504 published in the Federal Register, Vol. 80, No. 42, on 4 March 2015. EA has held a GSA Schedule 899 for over 15 years and as noted below has some concerns about the proposed regulation and its impact on professional services firms.

Introduction

By way of background, EA is a privately-held, small business environmental consulting and engineering firm headquartered in Hunt Valley, Maryland that provides scientific, engineering, technology, and management solutions to federal, state, and local governments, as well as industrial and other private sector clients. In performing such work, EA has developed first rate remedial and analytical technologies, planning and management services and processes. EA is a bona fide and independent small business performing sophisticated work in an ultra-competitive market.

Summary Position

EA urges the GSA to re-evaluate its analysis of the basis for the proposed rule – particularly with respect to analyzing the potential ramifications of the Transactional Data Reporting requirements on all businesses. In addition, while businesses on the whole have been longing for the day when they could celebrate the elimination of the Price Reductions Clause (PRC), even a cursory review of the proposal leads to the conclusion that the PRC in fact doesn't go away and the ongoing obligations to update a business's disclosures on its commercial sales format, at the whim of the GSA, are hefty prices to pay for supposed streamlining of the

compliance process for GSA schedule holders. A rational evaluation of the proposed rule leads to the conclusion that the GSA is instituting additional and costly regulatory requirements under the TDR rule without any true quid pro quo for the benefit of business. The inevitable outcome of the proposed rules is greater and more pervasive intrusion into commercial business practices as well as forthcoming pricing restrictions in an ongoing race to the bottom[1], the reasonable outcome of which will likely be fewer but much larger sellers to the detriment of taxpayers and small businesses. Taxpayers will bear the cost of an ultimately concentrated oligarchical marketplace and small businesses will have lost their struggle for a reasonable share of the GSA marketplace.

EA believes that if enacted, the proposed rule should not be applied to contracts and task orders for complex services or "solutions" similar to those provided by EA; that the proposed rule is unworkable since there will be substantial difficulty in standardizing labor categories and that competition at the task-order level should be sufficient in and of itself to assure best value. EA also notes that the shift to horizontal pricing analysis is a profound change from past practice and that the GSA's estimate of the burden on business from the Transactional Data Reporting requirements is ridiculously low, that contractors' confidential, sensitive and proprietary pricing information cannot be adequately protected from disclosure after transmission to the government, that liability issues facing businesses for non-compliance are not reduced and that the proposed rule will in fact provide opportunities for new enforcement opportunities for regulators, all at substantial cost to government regulators and businesses, and finally that the proposed rule is inconsistent with the Federal Acquisition Streamlining Act of 1994 (FASA).

Analysis

1. Contracts and task orders for complex services or solutions should be excluded from the proposed TDR rule.[2]

The proposed TDR rule should not be applied to contracts and task orders for complex services or "solutions" since the specialized professional services and solutions provided under

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these contracts cannot fairly be (nor should they be allowed to become) commoditized. Services in these areas are mostly of a professional nature with a firm's personnel mix and their varying levels of expertise in given subject matter areas are distinguishing elements that provide competitive advantage among firms providing similar services, i.e., all such contracts involve varying degrees of uniqueness arising from the nature of the solution(s) to be provided and the specific, (non-identical) terms under which the services are provided.

Contracts for complex services or solutions, (particularly fixed-price contracts for both supplies and services (solutions)) are often bid on the basis of a cost build-up and task order pricing can feature a multiplicity of configurations for the similar but by no means identical services. These contracts can cover a wide range of service quality depending on the specific client solution needed, and will vary substantially based on the unique mix of labor categories, qualifications of personnel, geographic location, varying site conditions, scopes of work, performance objectives and milestones, risk, and security issues, etc., and the contracts (task orders) will contain wildly varying terms and conditions and are often impossible to properly categorize into blanket purchase, umbrella, or other government enterprise-wide agreements. Nonetheless, the services are shoe-horned into contract vehicles that don't match the client's needs or the contractor's best or most efficient method of providing the services. These compromises in contract adequacy result in extreme difficulty, if not impossibility for the contractor to determine unit measure, quantity of item/services sold, and price paid per service unit.

In sum, pricing information to be provided under the TDR will be unusable or, even worse, lead to misleading price comparisons over a broad variety of unique solution situations and providers, especially in cases where the services are provided on a fixed price basis.

2. There will be substantial difficulty in standardizing labor categories.[3]

EA knows that labor categories vary enormously in the solutions arena and the task of defining labor categories is best left to the contractor in response to proposal requests for a specific scope of work. Different types and scopes of work require differing assortments of specialized professional services and the contractor is in the best position to define and then match labor categories to provide the best solution for the Client's situation.

3. Competition at the task-order level should be sufficient in and of itself to assure best value.

FAR subpart 8.4 has been carefully designed to obtain full and open competition and GSA Advantage!® and e-Buy implement this by design. The current system allows for an a

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priori determination of price reasonableness and encourages further discounting based on volume, just like the commercial market.[4] Indeed, for solutions bid on a fixed price project/task order, the "unit" competed under the current regulations does undergo sufficient competition to ensure best value.

4. The shift to horizontal pricing analysis is a profound change and is a radical departure from the historical basis of vertical-pricing[5]

The proposed rule's emphasis on horizontal pricing will obscure differences in terms and conditions and reduce the Government's ability to obtain "best value." Horizontal pricing will inevitably force an offeror or schedule contractor offering Most Favored Customer (MFC) pricing to offer lower "horizontal" pricing that it doesn't offer commercially, in derogation of GSAR § 538.270(a) which provides that:

> ***The Government will seek to obtain the offeror's best price (the best price given to the most favored customer). However, the Government recognizes that the terms and conditions of commercial sales vary and there may be legitimate reasons why the best price is not achieved.***

Most importantly, the proposed rule will encourage GSA contracting officers to continually "renegotiate" schedule contracts and routinely threaten contract cancellation along with demanding the "lowest price regardless." Ostensively, the GSA "wants to have its cake and eat it too" resulting in protracted negotiations as GSA contracting officers require contractors to justify the next higher government price, the next higher government price above that, etc., etc., but if GSA really believes that the schedules program should be predicated on horizontal pricing, the GSA should revive mandatory-use, single-award schedules.

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5. GSA's estimate of the burden on business from the Transactional Data Reporting requirements is ridiculously low

GSA's burden estimate is ridiculously low and EA believes that compliance with the TDR rule will be significantly higher than its monitoring and compliance costs under the Price Reductions Clause (PRC). TDR reporting requirements will require schedule contractors (particularly service contractors) to develop expensive proprietary systems to capture transactional data and transmit it in the required format to GSA.

GSA's estimates of a six-hour set-up, half-hour monthly reporting, and the $51 million annual-savings estimates are unsupportable and pale in comparison to projected GSA Sales figures, i.e., the costs projected are too small a percentage of projected sales and understate the burdens placed on businesses for information that either already is provided to the government in some fashion or is difficult and costly to provide in a format that complies with the proposed rule. Ironically the GSA Office of Inspector General expressed similar concerns in their presentation at the GSA public meeting on April 17, 2015 where they stated, "**The contractor burden estimates are understated. We defer to industry for a more accurate burden calculation."**[6]

By way of example, EA's spends significantly more time than the GSA TDR estimate in simply maintaining compliance with the Federal Government's System for Award Management (SAM) which is a relatively simple database that does not require the painstaking efforts to sort, and submit sales figures by rate classification and amounts, etc. as required by the TDR rule. Note also that SAM must be updated at least annually and the TDR will require at least monthly entries for every active project task order a contractor has outstanding.

6. Contractors' confidential, sensitive and proprietary pricing information cannot be adequately protected from disclosure after transmission to the government.

The TDR proposed rule requires submission of highly confidential business information – specifically detailed pricing information – long protected from disclosure under FOIA. The proposed rule provides no information about how the Government intends to protect this

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information from disclosure or worse inadvertent dissemination throughout the market place, the result of which could be catastrophic to many businesses.[7]

7. Business Liability exposures for non-compliance are not reduced and the proposed rule will provide new enforcement opportunities for regulators.

Most contractors have become comfortable with basis-of-award concept and have a "manageable" basis-of-award customer or customers. GSA seriously underestimates the percentage of price reductions that result from "involuntary" price reductions under the Price Reductions clause. Under the new TDR contractors can expect continual updating of their Commercial Sales Practices Formats (CSP-1's) along with continual government requests for price reductions. In addition, we believe the TDR rule will provide more opportunities for claims of defective pricing, audits, IG subpoenas, investigations, qui tam cases, DOJ suits, suspensions/debarments, etc. and that the basis of a horizontal pricing regime could even encourage antitrust violations (e.g., leader-follower pricing, collusion).

8. Proposed TDR rule is inconsistent with the Federal Acquisition Streamlining Act of 1994 (FASA) which is implemented by FAR Part 12[8]

7

- Certain pricing data, such as terms and conditions or discounts offered to a specific government customer under a Blanket Purchase Agreement (BPA), are sensitive and would affect competition.
- The rule is silent as to restrictions on GSA's disclosure of sensitive pricing information to competitors during price negotiations. Industry opposes the exposure of its proprietary BPA information from one offeror to another offeror by the government for negotiation purposes.
- GSA should include specific restrictions on the disclosure of sensitive pricing information and explain the safeguards it will put in place to prevent accidental exposure of such information.

Comments, National Defense Industrial Association, GSA Public Meeting Presentation Slide 64, April 17, 2015.

8 See CGI Federal Inc. v. United States, 779 F.3d 1346, 1352, No. 2014-5143 (Fed. Cir. Mar. 10, 2015)

> FAR Part 12 was created to implement FASA. FAR Part 12 states that it "**shall be used for the acquisition of supplies or services that meet the definition of commercial items.**" [emphasis added] 48 C.F.R. § 12.102(a). **FAR Part 12 implements FASA's mandate by requiring that "contracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses" required by law or "[d]etermined to be consistent with customary commercial practice."** [emphasis added] *Id.* § 12.301(a). It precludes the inclusion of "any additional terms or conditions in a solicitation or contract for

The basis for Federal Supply Schedule pricing has historically been to secure the best price for the Government in comparison to a business's pricing for identical products and services in the commercial market. The basic tenet of keeping pricing and sales practices in line with customary commercial sales practices has always been part of the regulatory scheme. The proposed TDR rule introduces new terms and reporting requirements far outside those of customary commercial sales practices and are arguably in violation of FAR Part 12, specifically FAR § 12.302(c)[9].

In CGI Federal Inc. v. United States, 779 F.3d 1346, 1352, No. 2014-5143 (Fed. Cir. Mar. 10, 2015), the Federal Appeals Court struck down as contrary to FAR Part 12 a revised payment term in an RFQ that the Court found to be inconsistent with customary commercial practices under FAR Part 12.[10]

> commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures." 48 C.F.R. § 12.302(c).

9 **FAR §12.302 -- Tailoring of Provisions and Clauses for the Acquisition of Commercial Items.**

(a) *General.* The provisions and clauses established in this subpart are intended to address, to the maximum extent practicable, commercial market practices for a wide range of potential Government acquisitions of commercial items. However, because of the broad range of commercial items acquired by the Government, variations in commercial practices, and the relative volume of the Government's acquisitions in the specific market, contracting officers may, within the limitations of this subpart, and after conducting appropriate market research, tailor the provision at 52.212-1, Instructions to Offerors-Commercial Items, and the clause at 52.212-4, Contract Terms and Conditions -- Commercial Items, to adapt to the market conditions for each acquisition.

(c) *Tailoring inconsistent with customary commercial practice.* The contracting officer shall not tailor any clause or otherwise include any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures. The request for waiver must describe the customary commercial practice found in the marketplace, support the need to include a term or condition that is inconsistent with that practice and include a determination that use of the customary commercial practice is inconsistent with the needs of the Government. A waiver may be requested for an individual or class of contracts for that specific item.

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> We conclude that FAR Part 12's proscription against terms inconsistent with customary commercial practice applies to the 2014 RFQs and therefore that the RFQs violate that proscription.[6] On a general level, FAR Part 12 applies to the 2014 RFQs because it makes clear that it "shall be used for the acquisition of [commercial items]." 48 C.F.R. § 12.102(a)….
>
> …More specifically, FAR § 12.302(c)'s proscription against any "solicitations or contracts" including terms "inconsistent with customary commercial practice"[7] applies to the 2014 RFQs because the RFQs are a "solicitation" and the resulting order is a "contract" as those terms are defined by FAR.

CGI Federal Inc. v. United States, 779 F.3d 1346, 1353, No. 2014-5143 (Fed. Cir. Mar. 10, 2015)

There can be little doubt that the disclosure and requirements under the proposed TDR rule are "**terms inconsistent with customary commercial practice (**emphasis added)."

The proposed TDR rule envisions a complex, burdensome and invasive system, which will only result in a loss of small business opportunities, and commoditization of important solutions-based services. We strongly urge that the rule be reconsidered.

Thank you again for the opportunity to comment on this important matter.

Sincerely,

Frank J. Aquino, Esq.
Vice President and General Counsel

2013-G504-14

EA Engineering, Science, and Technology, Inc., PBC

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Regulatory Secretariat Division (MVCB)

1800 F Street NW., 2nd Floor

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Washington, DC 20405-0001

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U.S. General Services Administration

Regulatory Secretariat Division (MVCB)

FAX: 202-501- 4067

If you do not receive all pages clearly, call Frank J. Aquino at 410-527-2446 as soon as possible.

SENT BY:

Name: Frank J. Aquino

Transmitting from: 410-771-9065

Number of Pages (including Transmittal Sheet): 9

MESSAGE:

RE: GSAR Case 2013-G504 – RIN: 3090-AJ51

REGULATIONS.GOV IS DOWN – FAX IS BEING SENT IN AN EFFORT TO PROVIDE OUR COMMENTS PRIOR TO THE DEADLINE OF TODAY MAY 4,2015

Frank J. Aquino, Esq.

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compliance process for GSA schedule holders. A rational evaluation of the proposed rule leads to the conclusion that the GSA is instituting additional and costly regulatory requirements under the TDR rule without any true quid pro quo for the benefit of business. The inevitable outcome of the proposed rules is greater and more pervasive intrusion into commercial business practices as well as forthcoming pricing restrictions in an ongoing race to the bottom[1], the reasonable outcome of which will likely be fewer but much larger sellers to the detriment of taxpayers and small businesses. Taxpayers will bear the cost of an ultimately concentrated oligarchical marketplace and small businesses will have lost their struggle for a reasonable share of the GSA marketplace.

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- Certain pricing data, such as terms and conditions or discounts offered to a specific government customer under a Blanket Purchase Agreement (BPA), are sensitive and would affect competition.
- The rule is silent as to restrictions on GSA's disclosure of sensitive pricing information to competitors during price negotiations. Industry opposes the exposure of its proprietary BPA information from one offeror to another offeror by the government for negotiation purposes.
- GSA should include specific restrictions on the disclosure of sensitive pricing information and explain the safeguards it will put in place to prevent accidental exposure of such information.

Comments, National Defense Industrial Association, GSA Public Meeting Presentation Slide 64, April 17, 2015.

8 See CGI Federal Inc. v. United States, 779 F.3d 1346, 1352, No. 2014-5143 (Fed. Cir. Mar. 10, 2015)

> FAR Part 12 was created to implement FASA. FAR Part 12 states that it "**shall be used for the acquisition of supplies or services that meet the definition of commercial items.**" [emphasis added] 48 C.F.R. § 12.102(a). **FAR Part 12 implements FASA's mandate by requiring that "contracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses" required by law or "[d]etermined to be consistent with customary commercial practice."** [emphasis added] *Id.* § 12.301(a). It precludes the inclusion of "any additional terms or conditions in a solicitation or contract for

The basis for Federal Supply Schedule pricing has historically been to secure the best price for the Government in comparison to a business's pricing for identical products and services in the commercial market. The basic tenet of keeping pricing and sales practices in line with customary commercial sales practices has always been part of the regulatory scheme. The proposed TDR rule introduces new terms and reporting requirements far outside those of customary commercial sales practices and are arguably in violation of FAR Part 12, specifically FAR § 12.302(c)[9].

In CGI Federal Inc. v. United States, 779 F.3d 1346, 1352, No. 2014-5143 (Fed. Cir. Mar. 10, 2015), the Federal Appeals Court struck down as contrary to FAR Part 12 a revised payment term in an RFQ that the Court found to be inconsistent with customary commercial practices under FAR Part 12.[10]

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commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures." 48 C.F.R. § 12.302(c).

9 **FAR §12.302 -- Tailoring of Provisions and Clauses for the Acquisition of Commercial Items.**

(a) *General.* The provisions and clauses established in this subpart are intended to address, to the maximum extent practicable, commercial market practices for a wide range of potential Government acquisitions of commercial items. However, because of the broad range of commercial items acquired by the Government, variations in commercial practices, and the relative volume of the Government's acquisitions in the specific market, contracting officers may, within the limitations of this subpart, and after conducting appropriate market research, tailor the provision at 52.212-1, Instructions to Offerors-Commercial Items, and the clause at 52.212-4, Contract Terms and Conditions -- Commercial Items, to adapt to the market conditions for each acquisition.

(c) *Tailoring inconsistent with customary commercial practice.* The contracting officer shall not tailor any clause or otherwise include any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures. The request for waiver must describe the customary commercial practice found in the marketplace, support the need to include a term or condition that is inconsistent with that practice and include a determination that use of the customary commercial practice is inconsistent with the needs of the Government. A waiver may be requested for an individual or class of contracts for that specific item.

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> We conclude that FAR Part 12's proscription against terms inconsistent with customary commercial practice applies to the 2014 RFQs and therefore that the RFQs violate that proscription.[6] On a general level, FAR Part 12 applies to the 2014 RFQs because it makes clear that it "shall be used for the acquisition of [commercial items]." 48 C.F.R. § 12.102(a)....
>
> ...More specifically, FAR § 12.302(c)'s proscription against any "solicitations or contracts" including terms "inconsistent with customary commercial practice"[7] applies to the 2014 RFQs because the RFQs are a "solicitation" and the resulting order is a "contract" as those terms are defined by FAR.

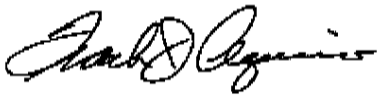
CGI Federal Inc. v. United States, 779 F.3d 1346, 1353, No. 2014-5143 (Fed. Cir. Mar. 10, 2015)

There can be little doubt that the disclosure and requirements under the proposed TDR rule are "**terms inconsistent with customary commercial practice** (emphasis added)."

The proposed TDR rule envisions a complex, burdensome and invasive system, which will only result in a loss of small business opportunities, and commoditization of important solutions-based services. We strongly urge that the rule be reconsidered.

Thank you again for the opportunity to comment on this important matter.

Sincerely,



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