



U.S. General Services Administration
Office of Inspector General

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

RE: GSAR Case 2013-G504: General Services Administration Acquisition Regulation; *Transactional Data Reporting*

The GSA Office of Inspector General (GSA OIG) appreciates the opportunity to comment on the subject proposed rule. We support GSA's collection and use of Federal Supply Schedule (Schedule) transactional data as an additional tool to secure best value for customer agencies and thus, the taxpayer. As such, we agree that a pilot to assess the effectiveness and quantifiable savings resulting from the transactional data would be beneficial. However, we are concerned that the proposed alterations to the Price Reductions clause will eliminate current price protections that cannot be replaced by the collection and use of transactional data alone, thereby exposing taxpayer dollars to unnecessary risk.¹

Prior to providing specific comments on transactional data reporting, we would like to address the two GSA OIG memoranda cited in the Federal Register notice (Notice).² While addressing the issues highlighted in the memoranda will assist GSA in strengthening the Schedules Program, nothing in the memoranda suggest the elimination of the Price Reductions clause in whole or in part. Further, the Notice misquotes the GSA OIG, stating that we reported in the referenced memoranda that resellers represent more than one-third of Schedule contractors. However, these memoranda are completely silent on the topic of resellers.

Executive Summary

The information presented in the Notice raises significant concerns about transactional data reporting. Specifically:

¹ 48 C.F.R. § 552.238-75

² *Major Issues from Multiple Award Schedules Audits*, Audit Memorandum Numbers A120050-3 and A120050-4. These memoranda summarized recurring issues identified by GSA OIG preaward audits performed in fiscal year 2011 and fiscal year 2012 that required GSA management's attention.

1. The proposed alternate Price Reductions clause eliminates all price protections from the clause without justification. Further, the government experiences an immediate loss of contractual price protections without an equivalent gain.
2. Under the proposed rule, contracting officers may over rely on transactional data at the expense of commercial price analysis. Without an effective link to the commercial marketplace, customer agencies may not receive the best price.
3. The proposed rule is based upon an assumption that contractors will be able to provide complete and accurate transactional data. It also does not include an estimate of the time and resources required for systems architecture and costs associated with transactional data analyses. Moreover, the proposed rule does not contain an enforcement provision to ensure contractors comply with the data reporting requirements.
4. The expansion of transactional data reporting to services – which make up two-thirds of Schedule sales – will be challenging due to the difficulty of standardizing labor categories. Additionally, the Notice lacks specifics regarding the pilot's evaluation criteria.

While obtaining and using transactional data can benefit GSA and its customer agencies, we are concerned that the approach presented in the Notice leaves the government subjected to unnecessary risk. This affects not only GSA and customer agencies, but ultimately, the taxpayer.

Comments

1. The Notice does not justify the elimination of the government's price protections under the Price Reductions clause.

The Notice fails to explain the correlation between the collection of transactional data and the proposed revision to the Price Reductions clause. Under the proposed rule, Schedule contractors providing transactional data would be subject to an alternate version of the Price Reductions clause which, according to the Notice, solely removes the basis of award tracking requirements. However, the alternate clause included in the proposed rule removes not only that tracking requirement, but all mandatory government price protections currently afforded under the clause. The changes to the clause will eliminate key contractual controls to ensure fair and reasonable pricing for GSA's customer agencies and the efficient use of taxpayer dollars throughout the life of these multiyear contracts.

In its current form, the Price Reductions clause requires a Schedule contractor to reduce its price to the government under certain situations when the contractor has reduced its commercial price. Specifically, it is triggered when: (1) the prices on the commercial catalog, pricelist, or other document upon which Schedule prices were predicated are reduced; (2) the Schedule contractor gives more favorable discounts or

terms and conditions compared to those contained in the commercial catalog, pricelist, or other document upon which Schedule prices were predicated; or (3) the discount relationship to the basis of award customer is changed.³ Essentially, the Price Reductions clause protects the government when prices decrease in the commercial market, similar to how the Economic Price Adjustment clause protects Schedule contractors when costs increase. The proposed rule revises the Price Reductions clause by removing all mandatory price reductions and only allowing for permissive price reductions (*i.e.*, permitting the government to request price reductions and a contractor to offer price reductions during the contract period). Therefore, the protections of the Price Reductions clause will be rendered ineffective, likely to the detriment of ordering agencies and the taxpayer.

The Notice acknowledges that for many commercial-off-the-shelf products and other services, the government is not a market driver. It states that the government often receives price reductions from contractors as a result of general market forces and specifically mentions the information technology industry where intense competition exists. The government currently benefits from this competition due to the protections of the Price Reductions clause. GSA asserts that approximately 78 percent of price reductions are a result of commercial pricelist adjustments and market rate changes but classifies these as “voluntary.” We argue that some of these reductions may have been granted by contractors to comply with the Price Reductions clause.

The current benefit of the basis of award tracking requirement of the Price Reductions clause – or the entire Price Reductions clause, for that matter – cannot be determined without a meaningful analysis of the frequency and savings that result from it. In 2010, the U.S. Government Accountability Office (GAO) reported GSA did not capture sufficient quantitative data to show the frequency with which the Price Reductions clause was invoked to reduce Schedule prices.⁴ In support of this current proposed rule, GSA analyzed a limited number of Schedule modifications over 11 months to examine the frequency of the price reductions resulting from the basis of award customer. However, GSA did not quantify the savings that resulted from these modifications.

While we generally do not report and quantify contractor compliance with the Price Reductions clause, in response to GSA’s analysis and assertions regarding the value of the clause, we identified examples from recently audited contractors that illustrate the cost savings from compliance with the tracking requirement. In one example, we found a Schedule 71 contractor granted approximately \$19.3 million in price reductions over a 2-year period by complying with the requirements of the clause. We also identified another example in which a Schedule 70 contractor extended \$9.2 million in price reductions over a 7-year period. This clearly demonstrates that compliance with the tracking provision of the Price Reductions clause results in real savings to the taxpayer.

³ A basis of award customer is established at contract award and the government’s price or discount relationship to that customer is identified.

⁴ *Data and Oversight Problems Hamper Opportunities to Leverage Value of Interagency and Enterprisewide Contracts*, GAO-10-367, dated April 29, 2010.

As such, it highlights the need for a more comprehensive analysis in order to assess the value of the Price Reductions clause and quantify the monetary savings from these modifications. Without this data, there is no way to fully support or justify GSA's assertions that the changes in the federal market have lessened the impact of the tracking requirement.

While the Notice presents some potential benefits of using transactional data to impact pricing, there is no price protection provision built into the alternate language of the proposed rule. Specifically, there is no contractual requirement in the proposed rule for contractors to calibrate their prices based on the transactional data collected (*i.e.*, renegotiate their base Schedule prices). By contrast, the Price Reductions clause as it currently exists requires that Schedule customers receive the benefit of a price reduction immediately. Under the proposed rule, the government forfeits contractual price protection without any immediate, equivalent, or certain gain.

Finally, we continue to question the methodology used to calculate the burden of the Price Reductions clause as presented in the Notice.⁵ It references Office of Management and Budget Control Number 3090-0235, where GSA analyzed a survey of 25 contractors conducted by the Coalition for Government Procurement in February 2012. This survey does not appear to be a representative sample as it is based on information from less than 1 percent of the over 19,000 Schedule contractors at the time of the survey.

Although we take issue with many of the burden hours reported in the survey, the burden hours associated with audits involving the Price Reductions clause are particularly overstated. The GSA OIG's preaward audits are generally performed to provide the contracting officer with independent verification of (1) the contractor's disclosed information relating to its commercial sales practices and (2) its systems and procedures required to comply with the terms and conditions of the proposed award. The Price Reductions clause is one of many terms and conditions analyzed during the course of a preaward audit; only a fraction of the contractor's time spent in preparation for a GSA OIG audit relates to the Price Reductions clause — not the entire estimate as suggested by GSA.

2. The approach outlined in the Notice risks overreliance on reported transactional data at the expense of commercial price analysis; as a result, the government may pay more than the commercial market.

Under the proposed rule, GSA may sever the link between Schedule pricing and the commercial market by relying on transactional data from government sales. GSA asserts that the collection and use of this transactional data may be a more efficient and effective way of driving price reductions on Schedule purchases than the tracking

⁵ We previously questioned the burden hours associated with the Price Reductions clause in our official comments submitted to GSA's Regulatory Secretariat on October 22, 2012, in response to Information Collection 3090-0235, Price Reduction Clause and in our initial written comments to GSAR Case 2013-G504 on September 2, 2014.

mechanism of the Price Reductions clause. However, GSA's approach fails to recognize the differences between the commercial marketplace, the federal marketplace, and the Schedule marketplace.

The Schedules Program was established to leverage government volume buying to achieve best value for customer agencies and taxpayers based on commercial terms, conditions, and pricing (*i.e.*, the commercial marketplace). Contractors do not directly compete at the Schedule level for award; therefore, one of the mechanisms GSA uses to obtain best price is to seek the contractor's most favored customer pricing. In practice, this means GSA contracting officers compare the terms and conditions offered to the government to terms and conditions offered to similarly situated commercial customers. The Competition in Contracting Act stipulates that full and open competition is achieved for task orders if proper ordering procedures are followed, but *only* if the order results in the lowest cost alternative that meets the Government's needs [emphasis added]. We question if the prices resulting from price analyses based primarily upon government sales alone (*i.e.*, transactional data) will satisfy this requirement.

To establish fair and reasonable pricing, the Federal Acquisition Regulation emphasizes the need for price analysis, which requires the collection and evaluation of data on the prices at which the same or similar items have sold.⁶ We are concerned that contracting officers will place too great an emphasis on transactional data without similar data for the commercial market when establishing Schedule pricing. Essentially, pricing reflected in the transactional data will become the Schedule price resulting in a cyclical process. GSA believes pricing will improve because government buyers will have greater market intelligence; however, this market intelligence will largely be limited to government sales and the possibility exists that although consistent, government pricing will be inflated when compared to the commercial marketplace.

The Notice states Commercial Sales Practices disclosures will continue to be required when items are added to Schedule contracts and may now be required when commercial pricing data is insufficient to establish price reasonableness. However, we are concerned that in operation, the emphasis will shift to focus on prices paid in the Schedules marketplace and remove considerations of the commercial marketplace. Other parts of the Notice affirm these concerns. For example, the Notice states the new requirements "would allow for greater reliance on horizontal pricing in the FSS program so that GSA and its customers can easily evaluate the relative competitiveness of prices between FSS vendors."⁷ It goes on to identify transactional data as "a new, potentially more effective and less burdensome mechanism through which to ensure contract pricing is competitive and fair and reasonable, although vertical pricing analysis techniques *can* still be used [emphasis added]."⁸

⁶ FAR 15.404-1(b)(1)

⁷ General Services Administration Acquisition Regulation, Transactional Data Reporting, 80 Fed. Reg., 11619, 11623 (March 4, 2015)

⁸ 80 Fed. Reg. at 11625

Removing the current Price Reductions clause and potentially shifting away from commercial data will significantly weaken regulatory controls that connect Schedule pricing to the commercial marketplace. Ultimately, the Schedules Program will no longer provide its intended benefit – to “provide competitive, market-based pricing that leverages the buying power of the federal government.”

3. The Notice underestimates the burden and resources necessary for: (1) contractor data reporting; (2) GSA’s and ordering agencies’ use of the data; and (3) GSA’s enforcement of transactional data reporting requirements.

GSA faces significant challenges to obtain the necessary transactional data from contractors and ensure that contracting officers and their support staff are able to evaluate and analyze it accordingly. Faulty and insufficient data – or inadequate evaluation and analysis – can result in lost opportunities to leverage the government’s buying power, save taxpayer dollars, and improve performance.

During GSA OIG preaward audits, Schedule contractors are asked to provide a sales database – including GSA transactional data – with at least 21 specific data fields for the contractor’s last complete fiscal year. We consistently find that contractors maintain their transactional data in varying systems, using multiple formats, and unique data fields. Given this, we question whether GSA’s estimate of 6 hours per contractor to configure their systems for reporting is accurate. In addition, we contend the projected burden of monthly reporting as 0.52 hours per month is also understated. We are aware of industry concerns regarding the accuracy of these figures. Accordingly, we defer to their estimates regarding initial system configuration and monthly reporting.

GSA provides little information concerning the required systems architecture for collection, manipulation, integration, and distribution of transactional data and the plan to appropriately protect this data. The Notice states that GSA intends to update its existing systems for contractor reporting; however, no cost estimate was provided. As noted in GAO’s 2015 High Risk Report, “federal IT investments too frequently fail or incur cost overruns and schedule slippages;”⁹ therefore, GSA is likely underestimating the resources necessary to implement transactional data reporting. The Notice also states that in order to increase data reporting efficiency, contractors will only be required to submit transactional data that GSA cannot access via other means, including the Federal Procurement Data System. This system has been found to contain incorrect and unreliable data according to work performed by GAO; therefore, we question the deference given to this streamlining effort.¹⁰ Additionally, the Notice is silent on controls to ensure the security of the collected proprietary data.

The Notice states that the retrieval of cumulative data for each Schedule contract would be approximately 1 hour per month. This estimate appears to only account for the literal retrieval of the data which, in and of itself, does not benefit the government. The Notice

⁹ *High Risk Series*, GAO-15-290, dated February 2015.

¹⁰ *Observations on the Government’s Contracting Data Systems*, GAO-09-1032T, dated September 2009.

explains that the data along with category managers will provide government buyers with market intelligence, expertise, and “deep-dive” analysis to improve supply chain management, pricing variances, innovation, redundancies, and unnecessary duplication of effort. However, there is no mention of the costs associated with developing this “deep-dive” analysis and little detail as to how contracting officers – at the Schedule or order level – will access, interpret, and apply the provided analysis.

While the transactional data may be beneficial for price analysis, there is no assurance GSA contracting staff will apply it effectively to improve Schedule contract pricing. Contracting officers may not be able to discern if discounts, such as prompt pay or volume, were provided simply by reviewing the transactional data. Without considering the terms and conditions of an order, transactional data may not be an accurate representation of a contractor’s Schedule sales; therefore, limiting its usefulness. In addition, GSA currently has another pricing tool available to assist in price analysis that is not being used to its fullest potential – preaward audits. Many of these audits result in recommended cost avoidances which are calculated after a thorough examination of transactional data from contractors. However, three audit memoranda issued by our office reported that many of these cost avoidances are not being achieved during contract negotiations.¹¹

Most importantly, as written, the proposed rule provides no viable enforcement provision to address contractors’ lack of compliance in providing the data. In meetings and discussions, GSA indicated to the GSA OIG that it will rely on the Cancellation clause to compel contractor compliance with the transactional data reporting requirement.¹² We have significant concerns with GSA’s commitment to use this clause as a means of enforcement when the agency is not effectively using it to enforce other contractual requirements. For instance, Schedule contractors are expected to have sales exceeding \$25,000 within the first 24 months of the contract and for each 12-month period thereafter.¹³ The government may cancel the contract in accordance with the Cancellation clause unless sales meet these levels. However, as included in the Notice, 37 percent of Schedule contracts have a contract value of \$0 leading us to believe that many of these contracts should fall under the threshold for cancellation. Furthermore, GSA does not provide any information on the process that will be used to identify cancellable situations and bring them to management’s attention. Without proper controls to ensure compliance, GSA is placing taxpayer dollars at unnecessary risk.

¹¹ *Major Issues from Multiple Award Schedules Audits*, Audit Memorandum Numbers A120050-3, A120050-4, and A120050-5.

¹² 48 C.F.R. § 552.238-73

¹³ I-FSS-639, Contract Sales Criteria

4. The pilot of this initiative and its planned expansion assume FSS offerings can be effectively standardized and rely on undefined criteria to evaluate whether the pilot is successful.

As presented in the Notice, GSA is relying on the reported success of the 2nd Generation Office Supplies Solution (OS2) as validation of its proposal to move towards a horizontal pricing model. The Schedules Program offers millions of products, services, and solutions from over 18,000 contractors with fiscal year 2013 sales of over \$35 billion; whereas OS2 consisted of 15 contractors offering common office supply products with fiscal year 2013 sales of \$246 million. This sales volume is less than 1 percent of the Schedules Program.¹⁴ The Notice states that transactional data reporting requirements will be piloted on Schedules with product offerings and commoditized services. However, there are many products that cannot be standardized. In fact, in a recent preaward audit of a Schedule 56 contractor, we noted that materials are chosen based on a customer's statement of work for a specific structure, and have literally hundreds of thousands of material line items from which to choose. The contractor itself stated, "Every project is unique in various ways and it is rare, if ever, two projects can be directly compared in terms of price."

The proposed planned expansion to services, which represent two-thirds of annual Schedule sales, creates a new set of challenges. In order to draw comparisons between labor categories for services contracts, GSA's transactional data initiative would require a multitude of labor categories to approach a point at which accurate comparisons could be drawn between different contractors. Federal Acquisition Service personnel have acknowledged that they could not apply this data analysis to services without adaptation and the result would not be a true, equal comparison. Similarly, it is unclear whether customized solutions – which are an integration of commercial products and/or services offered to customer agencies under the Schedules Program – can be standardized. Thus, we question the utility of the transactional data reporting requirements when program-wide implementation would likely be ineffective.

The Notice does not mention the planned duration of the pilot and/or a time at which the pilot will be evaluated. Per the Notice, the evaluation of the pilot's success will be based upon metrics such as savings rates, customer satisfaction, and small business utilization. GSA then plans to benchmark the results against available commercial data sources. However, no specifics are provided for the metrics or the data used for benchmarking. Without sufficiently defined metrics, GSA lacks the means to effectively evaluate whether the pilot is successful.

GSA consistently notes the absence of data as a reason for implementing transactional data reporting. Thus, we question how valid savings rates would be calculated. If commercial data sources are currently available, GSA should use that data to improve

¹⁴ Another difference between the Schedules Program and OS2 is that OS2 is a mandatory source of supply for a number of Federal agencies (e.g., U.S. Department of Homeland Security, U.S. Department of Veterans Affairs, U.S. Department of Commerce). This captive market provides OS2 contractors with incentive to align with the prices paid and reduce their prices accordingly.

Schedule pricing immediately. Further, if commercial data sources are used, it is imperative to note the price offered in the commercial marketplace is often different than the price paid by a commercial customer.

Lastly, the Notice states that if transactional data is not an effective pricing model, contracts would revert back to their current state with the original Price Reductions clause. This situation is clearly over-simplified by the Notice in that it does not account for the time or resources spent by contractors and the government in the event that this initiative fails.

Conclusion

We support GSA's consideration and use of transactional data to improve Schedule pricing; however, we have significant concerns with the proposed rule as it exposes the government to excessive risk. We disagree with the proposal to obtain transactional data at the expense of the Price Reductions clause, as this clause is instrumental to the safeguarding of taxpayer dollars under the Schedules Program. There are a number of other actions that GSA could take to improve Schedule pricing while maintaining the safeguards of the Price Reductions clause. In fact, GSA is nearing the nationwide implementation of a dynamic pricing initiative to reduce price variability using Schedule, or GSA catalog, rates instead of transactional data rates. Although we have not evaluated this initiative, these efforts require no additional data from contractors, maintain the protections afforded by the Price Reductions clause, and could result in improved pricing at the Schedule level.

On behalf of the GSA OIG, I would like to thank you for the courtesies extended to us as we have worked to submit this response. We look forward to continuing to work with you on this important initiative. Should you or your staff have any questions, please contact Brian J. Gibson, Program Director, at brian.gibson@gsaig.gov/(202) 273-7278 or me at ted.stehney@gsaig.gov/(202) 501-0374.

Respectfully,



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