

Client Alert

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GSA's Proposed Transactional Data Reporting Rule Has Significant Implications for Contractors with GSA Contract Vehicles

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On March 4, 2015, as part of an effort to reform its procurement process, the General Services Administration ("GSA") issued a proposed rule that would require GSA contract holders to report certain transactional data related to government orders placed against GSA contract vehicles, including the Federal Supply Schedule ("FSS") contracts, as well as other non-FSS contract vehicles. The same proposed rule would eliminate the "basis of award" customer and do away with the Price Reduction Clause found in FSS contracts. Earlier this month, GSA held a relatively rare public meeting on the proposed rule. In this Alert, we provide background on the proposed rule and details about the public meeting.

BACKGROUND

GSA administers a number of contract vehicles, including FSS contracts and non-FSS contract vehicles such as Governmentwide Acquisition Contracts ("GWACs") and Governmentwide Indefinite-Delivery, Indefinite-Quantity ("IDIQ") contracts (collectively, "GSA Contract Vehicles"). Through these GSA Contract Vehicles, companies can offer products for sale to federal government agencies (and other select public entities) at pre-approved prices and pursuant to pre-negotiated terms and conditions. GSA's goal in negotiating these contracts is to achieve for the government the same prices and terms as received by a company's most favored customer; or, at the very least, a fair and reasonable price.

In order to ensure the government customers receive the best possible price, GSA currently requires FSS contract holders to disclose extensive commercial sales practice ("CSP") information. FSS contracts also include a "Price Reductions Clause" ("PRC"). See 48 C.F.R. 552.238-75. The PRC requires that GSA and the contractor agree on a "basis of award" ("BOA") customer – that is, a customer (or category of customers) that receives from the contractor similar pricing and terms to those offered to the government. Thereafter, any discount or better term offered to the BOA customer must also be offered to government customers placing orders under the FSS contract. Failure to follow the PRC clause requirements or to extend these discounts to government customers can result in a breach of contract claim and/or False Claims Act liability.

THE PROPOSED RULE

On March 4, 2015, GSA issued a proposed rule that provides an alternative to the PRC and BOA customer tracking ("the Proposed Rule"). See 80 Fed. Reg. 11619-01. Under the Proposed Rule, GSA would require that contractors provide transactional sales data related to FSS orders as well as orders under GSA non-FSS contract vehicles. Additionally, once implemented, FSS contract holders would not be subject to PRC or BOA requirements. They would, however, continue to be required to submit CSP data.

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The Proposed Rule is part of GSA's move towards a "category management" style of procurement, in which the government shifts from managing purchases and prices individually, to managing entire categories of purchases across the government. In order to accomplish this transformation, however, GSA needs data on government sales. GSA determined it was too expensive to get that government sales data directly from the government customers, so it now proposes to obtain the data from FSS and non-FSS contractors. Contractors would be required to report data on sales of products and services placed GSA Contract Vehicles. The data to be provided includes, among other things, the purchasing entity, the price per unit, total price, quantity, manufacturer name, and part number. The contractor would enter the data monthly into an online reporting system. Contractors would *not* have to report on sales that occur through methods other than GSA Contract Vehicles.

For non-FSS contracts, many of which already contain some sort of data reporting requirement, GSA plans to implement the new clause immediately after adoption of a final rule. For FSS contracts, however, GSA would first test this transactional data approach through a pilot program. GSA would select certain schedules for participation in the pilot; participation by those schedule holders would be mandatory. GSA has indicated it would choose easily commoditized, high volume schedules for this test, including (preliminarily): Schedule 51V (Hardware Superstore), Schedule 58 I (Audio/Video); Schedule 72 (Furnishings); Schedule 73 (Food Service/Hospitality/Cleaning); and Schedule 75 (Office Products/Services). After the pilot, GSA will evaluate its success by comparing discounts received under the pilot to various benchmarks. If successful, the pilot would be expanded to all FSS contracts; if a failure, GSA would return to the status quo.

PUBLIC MEETING

On April 17, 2015, GSA held a full-day public meeting on the transactional data reporting clause Proposed Rule. In short, there was a great deal of opposition to the rule change. Nearly all commentators – including the Inspectors General for GSA and the Department of Veterans' Affairs– had serious objections to the Proposed Rule, as written.

Below we summarize some of the more significant discussions from the April 17 meeting:

GSA's Presentation

GSA was represented by the Senior Procurement Executive, the Deputy Commissioner of the Federal Acquisition Service, and the Deputy Director of the Office of General Services Acquisition, and joined by the Administrator of the Office of Federal Procurement Policy. It presented the Proposed Rule and described the rationale behind it, as also set out in the Federal Register. A question and answer period followed. Significant questions included:

- **Freedom of Information Act:** There were concerns regarding how GSA would protect contractor transactional data from release under FOIA. GSA representatives stated GSA would attempt to protect unit price transactional data, but said that GSA would have to follow the normal FOIA processes. Furthermore, GSA indicated that in some cases it might reveal certain aspects of a contractor's transactional data as part of negotiations, to show other contractors if they were above or below market. GSA clarified, however, that it intended only to reveal a "competitive position," not the detailed data itself.

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- **CSPs:** In response to questions, GSA indicated it had no intention of eliminating the CSP disclosures. It took the position that, especially without a PRC and BOA, it needs the CSP as a means to examine schedule holder's commercial transactions.
- **Tracking Complex or Non-Standard Products and Services:** A reoccurring theme throughout the meeting was how GSA intended to apply this transactional data model to complex products and services that were not necessarily comparable or competed only on price. GSA responded that it could track complex products and meaningfully compare them because it has "sophisticated" modeling capability. Furthermore, GSA indicated that it did not see why the Proposed Rule would lead to competition purely on price, as past performance information and product information would remain available to allow agencies to make selection decisions based on quality of the item or service.
- **Audits:** After implementation of the Proposed Rule, as part of its standard audit process, GSA would evaluate whether vendors properly provided all transactional data.
- **Requiring Contractors to Provide the Data:** GSA agreed that, in theory, it could acquire most if not all of the same data from Government agencies, but because this would require extensive updates to agency systems, software, etc., GSA thinks it is more expedient and cost effective to require industry to gather the data.

Inspectors General

Both the GSA Inspector General's Office, represented by the Program Director of the Office of Audits, and the Veterans' Affairs Inspector General's Office, represented by the Counselor to the Inspector General, were against the Proposed Rule as written. The GSA OIG had four areas of concern:

- **Elimination of PRC.** The representative of the GSA OIG expressed the GSA OIG's belief that elimination of the PRC will eliminate significant incentives for vendors to provide the Government with discounts. The GSA OIG refuted GSA's evidence that purports to show the ineffectiveness of the PRC, and suggested that GSA would have to do a broader study of how much money the PRC saves the government before GSA could determine if the PRC was more or less effective than the Proposed Rule.
- **Divorce from Commercial Pricing.** The GSA OIG is concerned that elimination of the PRC and BOA would divorce the government schedule price from commercial pricing, and result in the government paying more than commercial customers. Continuing the CSP process, together with additional efforts to gather separate commercial sales data could mitigate this concern, but not entirely.
- **Burden of Reporting.** The GSA OIG believes GSA is underestimating the burden to contractors and the government in reporting this data. Contractors would likely spend more time than GSA estimates. Additionally, GSA would have to create a system to collect the data, and mechanisms for enforcing the new rule, which the GSA OIG believes GSA has not fully taken into account when describing the costs of the Proposed Rule.

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- **Non-Standard Products/Services.** The GSA OIG highlighted the difficulty in comparing non-standard products and services. Any product or service that cannot be effectively standardized will break the model. The GSA OIG does not have GSA's confidence in its ability to track and compare such products and services.

The representative of the VA OIG expressed similar concerns, and added, among other things, that if GSA eliminates the PRC, the VA OIG believes the Economic Price Adjustment clause should also be modified or eliminated. Otherwise, the Economic Price Adjustment clause would allow schedule prices to grow out of control, unchecked by a BOA.

Industry

Industry representatives included the Coalition for Government Procurement and the National Defense Industrial Association. Industry representatives objected to the cost and necessity of the Proposed Rule, as well as the lack of protection for contractor data. Industry offered alternative ideas to GSA, including a suggestion that it gather the transactional data from government customers (building a new system to do so, if necessary) or that it scrap both the PRC and the Proposed Rule, and simply rely upon the competitive process to result in fair pricing.

Conclusion of Public Meeting

GSA indicated that the commentary had raised some concerns, particularly the opposition of the GSA and VA OIGs, as well as industry's worry that GSA is underestimating the burden of the reporting process. GSA emphasized, though, that the FSS project would begin with a "pilot." Further, GSA indicated that the choice for the FSS still seems to be between "the Devil we know [PRC], or the devil we don't [transactional data]."

CONCLUSION

Formal comments on the Proposed Rule are due May 4, 2015. After that, GSA will make a decision whether to move forward to implement the Proposed Rule (including the pilot for certain FSS contracts), to modify the Proposed Rule, or to revert to the status quo.

We will continue to monitor ongoing developments and to work with our clients to ensure that their contract reporting meets all regulatory requirements.

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