

Be Careful What You Wish For: GSA's Proposal to Replace the Price Reductions Clause Generates Widespread Criticism

Summer 2015

For years, General Services Administration (GSA) Schedule contractors and government officials alike have criticized the GSA Schedule Price Reductions Clause (PRC) as ambiguous, burdensome and ultimately ineffective. In fact, the MAS Advisory Panel—a blue ribbon panel of procurement experts representing both government and industry—issued a report in February 2010 recommending that GSA eliminate the PRC, and instead rely on competition at the task order level to establish fair and reasonable prices. In March of this year, GSA unveiled a proposal to finally eliminate the PRC and its much maligned “tracking customer” requirement, and replace it with a new “Transactional Data Reporting” clause. Unfortunately, while this proposed rule may eliminate certain compliance burdens that have plagued the PRC, it raises an entirely new set of concerns and potential compliance obligations that Schedule holders will have to grapple with if this proposed rule goes forward.

GSA's proposed Transactional Data Reporting clause is part of OFPP's broader “Category Management” initiative, which seeks to eliminate contract duplication and deliver best value to federal customers and the taxpayer by managing the government's procurement of commonly purchased goods and services on the basis of broad “categories” like information technology (IT) hardware and IT software. One element of GSA's strategy for implementing Category Management is to provide government buyers with more information regarding the prices paid by other government customers—so called “horizontal pricing information,” which according to GSA will eliminate “price variation” and drive Schedule holders to reduce

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To meet this goal, the proposed Transactional Data Reporting clause would eliminate the PRC's tracking customer requirements, and in its place require Schedule holders (as well as other GSA GWAC holders) to submit monthly reports providing detailed information regarding the prices charged to government customers, including (i) quantity, (ii) unit price, and (iii) total price. Although the proposed rule does not call for an automatic price reduction based on the prices paid by other federal customers, GSA expects the rule will drive down prices because Schedule holders "will know that their customers will have greater market intelligence on what other agencies have paid in similar situations." In addition, the proposed rule specifically allows GSA to "request from the contractor a price reduction at any time during the contract period." Finally, the preamble to the proposed rule suggests that GSA would have the ability to require Schedule holders to submit updated commercial sales practices (CSP) disclosures throughout the life of the Schedule contract, "if and as necessary to ensure that prices remain fair and reasonable in light of changing market conditions."

Although GSA's goals are laudable, and its recognition of the burdens associated with the existing PRC are a welcome development for Schedule holders, the proposed Transactional Reporting clause raises its own set of concerns, as highlighted in recent comments, public meetings, and Congressional hearings regarding the proposed rule:

Effectiveness of the Proposed Rule. Ironically, one unintended consequence of the proposed rule may actually be to limit discounting by Schedule holders at the task order level. At one time, the PRC included sales to federal customers; however, in order to encourage contractors to grant additional discounts on individual Schedule orders, sales to federal customers are excluded from the PRC. In addition, FAR 8.405-4 currently states that "Schedule contractors are not required to pass on to all schedule users a price reduction extended only to an individual ordering activity..." However, under this proposed rule, Schedule holders may actually be discouraged from offering additional "spot discounts" on individual sales transactions if they know that those discounts will now trigger across-the-board price reductions to all Schedule buyers.

Lack of Standardization. A significant challenge underlying the proposed rule is the lack of standardization, both with regards to the scope of the products and services being sold through various Schedules, as well as the myriad terms and conditions that may impact whether a Schedule contractor grants more favorable discounts on a particular transaction. While the preamble suggests that government buyers will receive "tools and training" to ensure that they consider all of the relevant information (such as terms and conditions, performance levels, customer satisfaction and "total cost") when analyzing transactional pricing reports, the proposed rule provides no mechanism for capturing this information, or standards for ensuring that Schedule buyers conduct an "apples-to-apples" comparison of pricing information.

Additional Compliance Burdens. While the preamble to the rule attempts to minimize the burden of submitting data using a "user-friendly online reporting system," even the GSA OIG has recognized that the rule will impose substantial compliance burdens on contractors to configure their existing systems to ensure that they accurately capture the required data for reporting on a monthly basis. In addition, the new rule suggests

that GSA would be able to request updated CSPs at any time during the life of a Schedule contract "to ensure that prices remain fair and reasonable in light of changing market conditions"—a significant change compared to current practice, which requires updated CSPs only at certain defined intervals (e.g., at time of renewal or in connection with certain modifications).

Confidentiality of Contractor Pricing. Finally, a number of commenters have raised concerns regarding the confidentiality of the transactional pricing information to be submitted under this proposed rule—particularly unit pricing information, which many courts have recognized as exempt from public disclosure under FOIA Exemption 4 and the Trade Secrets Act, given the risk that competitors will use such information to underbid or that customers will use it to "ratchet down" prices. Despite these concerns, GSA's website actually suggests that this information will be made available to competitors, to allow them to "see where their competition is and adjust their prices to remain competitive." (<http://www.gsa.gov/portal/content/213211>). While GSA highlights this as a way to make it easier for companies (especially small businesses) to do business with the federal government, this raises serious questions about contractors' ability to protect their proprietary information.

In light of these and other concerns, the proposed Transactional Reporting rule has generated widespread criticism from both industry and government—including the GSA OIG, which not surprisingly opposed the elimination of the PRC. Whether these concerns will result in any changes to the proposed rule remains to be seen. If GSA carries through with its proposed plan to replace the PRC, schedule holders will nonetheless face new issues and compliance requirements — proof of the old adage, "be careful what you wish for."