

# Six Open Questions About GSA's "New Vision for Federal Purchasing"

March 10, 2015

Government Contracts

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On March 4, 2015, the General Services Administration ("GSA") issued a proposed rule that aims to overhaul pricing practices and contractor reporting requirements under its multiple award schedule contracts, including the Federal Supply Schedule ("FSS"). See GSA Acquisition Regulation, Transactional Data Reporting, 80 Fed. Reg. 11,619 (Mar. 4, 2015). Calling the proposal a "new vision for Federal purchasing," GSA's announcement signals a fundamental shift away from the existing Price Reductions clause to a new framework that relies on transactional data reporting to facilitate horizontal price comparisons between vendors. Although aspects of the proposed rule -- notably the proposed abandonment of the oft-criticized basis of award monitoring requirement -- are likely to be welcomed by many in the contracting community, other features of the proposed rule present new issues that will need to be addressed as GSA considers moving forward with its new vision.

## Proposed Rule

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Underlying GSA's proposed rule is the notion that increasing visibility into the prices paid by other government buyers will enable ordering activities to make horizontal price comparisons between vendors, thereby ensuring better pricing for the taxpayer. To accomplish this goal, the proposed rule contemplates a new "transactional data reporting clause" that would be added to the GSA Acquisition Regulation ("GSAR") in Subpart 552.216. Under this clause, contractors would be required on a monthly basis to report eleven separate elements of transactional data, including the unit measure, quantity of item sold, universal product code, prices paid per unit, and total price. This data would then be sorted into various "categories" and analyzed by "category managers," who would share their information and analyses with agencies across the Federal government.<sup>1</sup> According to GSA, the receipt and analysis of this transactional data would allow government buyers to "easily evaluate the relative competitiveness of prices between FSS vendors," thereby driving better overall pricing for the government.

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<sup>1</sup> The Strategic Sourcing Leadership Council, a panel created by the President and comprised of representatives from the seven largest and highest-spending executive agencies, recently approved dividing the federal marketplace into ten categories of commonly purchased items. See [Office of Management & Budget, "Taking Category Management Government-Wide," \(Jan. 7, 2015\)](#). Presumably, these are the "categories" referenced in the GSA's proposed rule, although the rule does not say so explicitly.

Given the emphasis on reporting transactional data, the proposed rule contemplates that contractors would no longer be subject to the basis of award customer tracking provision of the existing Price Reductions clause, GSAR 552.238-75, a change that GSA believes would “significantly reduce contractor burden.” Although this shift may not be as significant for contractors that have negotiated a narrow tracking customer and developed dependable monitoring procedures, the change may offer a reprieve to the overwhelming majority of schedule contractors that struggle to comply with the requirements of the existing Price Reductions clause.<sup>2</sup> According to GSA, “replacing the price reduction clause’s tracking customer requirement with transactional data reporting could reduce the annual burden on contractors by more than 85 percent, or approximately \$51 million in administrative costs.” Obviously, savings of this magnitude would be welcomed by contractors. It is worth noting, however, that GSA’s calculations are premised on an assumption that, on average, contractors would need just 31 minutes per month to comply with the proposed transactional data reporting requirements, an aggressive assumption that may not be borne out in practice.

If adopted, the proposed rule would be introduced to the FSS program in phases, beginning with a pilot period for certain categories of products or services. The rule would apply immediately to Governmentwide Acquisition Contracts (“GWACs”) and Governmentwide Indefinite-Delivery, Indefinite-Quantity (“IDIQ”) contracts managed by GSA. It would not, however, apply to FSS contracts for medical equipment, supplies, pharmaceuticals, and services managed by the Department of Veterans Affairs.

## Open Questions

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Although GSA’s announcement of the proposed rule in the Federal Register has thus far elicited some positive responses from industry,<sup>3</sup> the proposed rule is short on detail and leaves open a number of questions that could significantly impact the operation and effect of the proposed pricing framework.

- *Online Reporting System:* The proposed rule would require contractors to electronically file transactional data reports through an online reporting system, but GSA has provided no information about what that system would look like or how it would operate. The proposed rule states only that contractors must file monthly reports through an “automated reporting system at an Internet Web site designated by the GSA.” GSA’s explanation of the proposed rule in the Federal Register is similarly vague, saying that contractors would utilize a “user-friendly, online reporting system.” As has been seen in other contexts, the functionality of online registration or reporting systems can have an outsized impact on programmatic efficiency. Without any information on the system

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<sup>2</sup> The GSA Inspector General recently found that in FY 2012, 84 percent of schedule contractors provided commercial sales practice (“CSP”) disclosures that were not current, accurate, or complete. See GSA Office of Inspector General, “Major Issues from Multiple Award Schedule Audits: Audit Memorandum Number A120050-4 (Mar. 25, 2014).

<sup>3</sup> See, e.g., [Professional Services Council, “PSC Welcomes GSA Schedules Reform; Calls for Further Implementation of MAS Panel Recs.”](#) (Mar. 4, 2015).

envisioned by GSA, it is difficult to assess the true administrative burden of the new reporting requirement on schedule contractors.

- *Management of Categories:* The proposed rule contemplates the appointment of “category managers” to oversee and analyze the transactional data that would be collected for each category of products and services established by the agency. Although the precise responsibilities of these managers are not clear, it is obvious that GSA envisions a significant role for them under the new pricing framework.<sup>4</sup> GSA contrasts this proposed approach with the current framework, under which price data analyses and comparisons are performed by the contracting officer assigned to a given contract. GSA asserts that utilizing category managers will improve purchasing efficiency, but the proposed rule offers no insight into the anticipated interplay between category managers, contracting officers, and the contractors whose pricing is being evaluated. GSA’s announcement suggests, however, that the analysis performed by newly appointed category managers will offer little, if any, opportunity for contractor involvement, meaning that vendors may find themselves losing visibility into GSA’s purchasing process.
- *CSP Disclosures and Commercial Benchmarks:* At the heart of GSA’s “new vision” for pricing and purchasing is the conclusion that horizontal price competition among vendors is a “more efficient and effective” tool than comparing the government and commercial pricing for an individual vendor. Nonetheless, GSA states that even under the new framework, vendors would still be required to disclose commercial sales practices when requesting a contract modification, and GSA “would maintain the right throughout the life of the FSS contract to ask a vendor for updates to the disclosures on its commercial sales format . . . where commercial benchmarks or other available data on commercial pricing is insufficient to establish price reasonableness.” This statement raises questions on two levels. First, it is curious that GSA would choose to retain a vestige of the existing price reduction clause given the agency’s conclusion regarding the inferiority of that system to the new proposal. Rather than a fresh start, this approach appears to call for layering two separate price protection regimes on top of each other, thereby increasing the potential for confusion and administrative burden on contractors.<sup>5</sup> Second, as a practical matter, GSA offers little guidance as to when or why it would request updated CSP disclosures. The proposed rule implies that GSA would rely on a vendor’s CSP disclosures only “where commercial benchmarks or other available data on commercial pricing [are] insufficient to establish price reasonableness,” but as a formal matter, there is nothing in the rule’s text that would prohibit GSA from seeking updated CSP disclosures in other contexts. The absence of further guidance on this point injects an additional element of uncertainty into the operation of the proposed framework.

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<sup>4</sup> GSA emphasizes, for instance that the new proposed rule would be “especially impactful when combined with the insight and expertise of category managers,” and it anticipates that these managers would provide government buyers with, among other things, “market intelligence, expertise, and deep-dive analysis.”

<sup>5</sup> Indeed, GSA’s estimated 31 minutes-per-month for transactional data reporting does not appear to account for the time required by contractors to monitor and update their CSP disclosures.

- *Phase-In of New Requirements:* GSA contemplates a phased-in implementation of the proposed rule for its FSS program, beginning with a pilot program that would apply to certain categories of FSS offerings. GSA does not, however, provide details on the length or scope of the pilot program, other than stating that the categories for the pilot would be “chosen from FSS product offerings and commoditized services where obtaining such data has the greatest potential impact to reduce price variability and help agencies secure better value.” It then notes that “[a]dditional details regarding the scope of the pilot” will be provided through a future online announcement. Schedule contractors should remain alert for further detail concerning the scope and timeline of the pilot program.
- *Confidentiality Considerations:* The proposed rule would require schedule contractors to begin reporting a trove of transaction-level data to GSA, at least some of which may well be competitively sensitive from a contractor’s perspective. Notably, the proposed rule does not address whether (or to what extent) this data will be protected from disclosure to the public or other competitors. There are any number of legitimate business reasons why a contractor may wish to protect such detailed pricing information from being disclosed under FOIA or by other means, but given the recent trend towards the publication of contractor-specific information, contractors should make sure GSA understands the confidentiality considerations and that it takes appropriate steps to ensure that their data is protected.
- *State and Local Government Buyers:* A shift to transactional data reporting presumably would also impact the many state and local governments eligible to make schedule contract purchases under the Cooperative Purchase and Disaster Recovery Purchasing programs. However, the proposed rule is silent as to whether -- and if so, how -- state and local government customers may be able to utilize the collection of transactional data. The proposed rule states only that category managers would share price information and analyses with “agency buyers across government,” but it does not clarify whether these “agency buyers” include state and local customers in addition to Federal agencies.

## The Upshot

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There is no doubt that the transactional data reporting rule, if adopted, would represent a fundamental shift in GSA’s approach to managing pricing and purchasing under its multiple award schedule contracts. In some ways, this shift is likely to be viewed by schedule contractors as a welcome, if not long-overdue, step in the right direction. However, the proposed rule also leaves open a number of questions that, in practice, could present a host of new challenges to schedule contractors. Of course, there is still time for GSA to work through these questions prior to the promulgation of any final rule, and last week’s announcement makes clear that the agency expects to spend at least the next few months soliciting and reviewing feedback from industry and other interested stakeholders. To this end, GSA will hold a public meeting on April 17, 2015 and it will accept written comments through May 4, 2015. As this administrative process moves forward in the coming weeks and months, schedule contractors would be well-advised to monitor developments and give careful consideration to the implications of the proposed changes.

## Government Contracts

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Government Contracts practice group:

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