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U.S. House of Representatives
Committee on Small Business
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To: Members, Subcommittee on Contracting and the Workforce, Committee on Small Business
From: Committee Staff
Date: June 22, 2015
Re: Hearing: "GSA's Proposed Transactional Data Rule and its Effect on Small Businesses"

On Thursday, June 25, 2015 at 10:00 am in Room 2360 of the Rayburn House Office Building, the Subcommittee on Contracting and Workforce of the Committee on Small Business will meet for the purpose of receiving testimony on the General Services Administration's (GSA) March 4, 2015 proposed rule on transactional data reporting. Specifically, the Subcommittee will consider whether the proposed rule will have a deleterious effect on small contractors seeking to compete for contracts using GSA's Multiple Award Schedules (MAS or Schedules) program.

I. Introduction

On March 4, 2015, GSA issued a proposed amendment to the General Services Acquisition Regulation (GSAR),which will be referred to as the transactional data rule.[1] The proposed rule would add contract clauses to MAS contracts, GSA Governementwide Acquisition Contracts (GWAC), and GSA's Governmentwide Indefinite-Delivery, Indefinite-Quality (IDIQ) contracts, requiring the contractors to report transactional data from orders and prices paid by ordering activities.[2] To understand the proposed rule, it is first necessary to understand what the proposed rule does and the breadth of contracts to which it applies. Next, it is necessary to place it in context with recent policies issued by the Office of Federal Procurement Policy. Finally, this memorandum will discuss the potential adverse effects on small business and competition.

II. Summary of the Proposed Rule

The proposed change to the GSAR would add a transactional data reporting clause to all GSA contracts that are open to orders by other agencies.[3] GSA manages a large number of these vehicles. Specifically, GSA manages the MAS program, four GWACs including three reserved for small businesses, and numerous governmentwide ID/IQ contracts that provide everything from telephone and internet service to military logistics functions.

a. MAS

It is the mission of GSA's Federal Acquisition Service (FAS) to provide other federal agencies with contracting assistance. It does so primarily in two ways: (1) establishing contracting vehicles that other

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[1] The GSAR is GSA's supplement to the Federal Acquisition Regulation (FAR) and may be found at 48 C.F.R. § 501 *et seq.*
[2] GSAR; Transactional Data Reporting, 80 Fed, Reg, 11,619 (2015).
[3] *Id.* at 11,621.

federal agencies may use to purchase goods and services; and (2) contracting on behalf of other agencies. The most well known of the contract vehicles established by GSA are the MAS. The MAS account for approximately 10% of all federal contract dollars, which translated to approximately $ 32,842,659,165 in FY 2014.[4] Currently, there are approximately 19,000 vendors holding MAS contracts, 80 percent of which are small businesses, and they receive approximately 35 percent of the value of all MAS sales.[5]

The MAS are broken up into 31 broad categories of goods and services, each of which is known as a Schedule, and a list of which is provided as Attachment A.[6] These Schedules are subdivided into special item numbers (SINs), which further categorize the products and services being offered. For example, Schedule 70 contains all of the information technology related MAS contracts, but it is subdivided into 24 SINs which cover everything from software to hardware to commercial satellite communications.[7] While a vast oversimplification, it is perhaps easiest to compare this to the Amazon website, where Amazon will present multiple resellers of the same product, often at different price points. Amazon's search features, much like the Schedules, organize the various offerings under subtabs, subdividing them into common groups like the Schedules, and then into subgroups like the SINs.

All MAS contracts are indefinite delivery, indefinite quantity,[8] so the contracts serve as frameworks, including all necessary clauses and the maximum price negotiated between the vendor and GSA. Awardees are not guaranteed any set amount of sales during the five year base period of the contract, but instead, each is simply guaranteed a minimum sale of $2,500 over those five years, or during any of the three successive five year option periods.

Currently, if a firm wishes to be awarded a Schedule contract, it may apply at any time using the Request for Proposals (RFP) available at the Federal Business Opportunities website (FBO).[9] While the GSA Office of Small Business Programs offers courses in how to complete a Schedule offer, many businesses use expensive outside proposal preparation services, since the process requires providing detailed records of all commercial sales.[10] According to GSA, the median time to have a proposal processed is eight to nine months, with more complex items and services requiring longer processing times.[11] Thus, submitting a schedule application is not something firms undertake without deliberation.

Schedule contracts are available for use by GSA contracting officers, other federal agencies (without needing to contact GSA contracting personnel), state and local government, and certain non-profit agencies. Schedule holders are able to bid on task orders placed against those Schedules.

The fundamental tenet of federal procurement law is that competition leads to the government obtaining the best value. The existence of the Schedules does not undermine that principle. However, since each Schedule contract is based on the "best" prices from each particular contractor, these do not utilize open competition in the same ways as other contracts. Task orders under $3,000 may be placed with the Schedule holder without additional competition[12] Contracting personnel considering purchases greater than

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[4] GSA Schedule Sales Query *available at* https://ssq.gsa.gov/ReportSelection2.cfm

[5] GSA, FOR VENDORS – GETTING ON SCHEDULE, a*vailable at* http://www.gsa.gov/portal/category/100635 [*hereinafter* GETTING ON SCHEDULE].

[6] *Id.* This does not include the Schedules operated by the Department of Veterans Affairs under a delegation of authority from GSA.

[7] GSA, SCHEDULES E-LIBRARY, SCHEDULE 70 *available at.* http://www.gsaelibrary.gsa.gov/ElibMain/scheduleSummary.do?scheduleNumber=70

[8] IDIQs means that the contract will list a variety of goods and services that can be purchased, but will not guarantee any actual task orders over the five year base period for the contract.

[9] www.fbo.gov

[10] Committee research indicates that these services charge between $5,000 and $40,000 for a standard proposal, with the average price being for a basic application being approximately $15,000 to $25,000, and more complex proposals easily costing six figures.

[11] GETTING ON SCHEDULE.

[12] FAR § 8.405-1. This threshold is referred to as the micro-purchase threshold.

$3,000 but less than $150,000[13] must review the price lists or obtain quotes from at least three Schedule holders, in order to preserve a modicum of competition. Contracts in excess of the SAT may only be issued after the agency issues a Request for Quotations (RFQ) or a Request for Proposals (RFPs).[14] These RFPs or RFQs must be issued to all Schedule holders within a particular SIN using GSA's E-Buy.[15] In the alternative, the contracting officer may issue the RFP or RFQ to specific Schedule holders, but must ensure that at least three offers are received by the agency. For any of these task orders, the ordering agency can request additional discounts.

GSA does not receive appropriations to run the MAS program. Instead, it recoups its operating costs by charging a fee to agencies that use its contracts or services. In the case of the MAS, the fee is known as the Industrial Funding Fee (IFF) and amounts to 0.75 percent of the cost of each Schedule order. The IFF is factored into each of the advertised prices provided by Schedule holders, who then charge it on all orders and remit the funds quarterly to GSA.[16] Schedule holders are required to sell at least $25,000 worth of goods and services using their Schedules over the first two years of holding the contract, and then at least $25,000 a year thereafter, so that the IFF remitted will cover the costs of the program. The MAS program faces several challenges as other agencies increasingly create contracts that mirror the Schedules. However, these other contracts do not charge an IFF since they are supported by direct appropriations to the agencies that create the competitor vehicles.[17]

b. GWACs

GSA has been designated as one of the federal government's executive agencies for the acquisition of information technology, which allows it to establish GWACs.[18] It currently manages the Alliant, Alliant Small Business, VETS and 8(a) STARS GWACs, with a combined value of $75 billion, $25 billion of which is reserved for small businesses. These contracts are good for ten years, and there are currently 694 vendors, including 611 small businesses.[19] Task orders against GWACs only need be competed against the other contract holders, which speeds acquisition cycle time.

c. IDIQs

GSA manages 571 vendors with IDIQ contracts, 281 of which are small businesses.[20] Like MAS and GWAC contracts, GSA negotiates the terms and conditions for each contract in advance of agencies issuing task orders. Unlike the MAS program, the contract need not be for commercial goods or services, and unlike a GWAC, there is no requirement that the contract be for information technology. Thus, these contracts cover everything from federal telecommunications needs through the Networx contracts to professional services and logistics through the OASIS contracts. Networx and OASIS have a combined value of about $130 billion, and this does not account for all GSA IDIQ contracts.

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[13] FAR § 8.405-1, § 8.405-2. $150,000 is the current Simplified Acquisition Threshold (SAT).
[14] FAR § 8.405-2. RFQs are simple quotes for defined products, RFPs include more detail, such as the proposed approach for meeting the requirement.
[15] E-Buy is GSA's system for issuing RFQs and RFPs to all vendors on specific SINs.
[16] This is different than the fees paid to GSA for use of its other contracting vehicles, such as the Government Wide Acquisition Contracts (GWACs) or its assisted acquisition services, where the fee is paid by the agency to GSA.
[17] The creation of these duplicative contracts requires additional explanation by the agencies creating the new contracts. Each new contract created requires time and effort on the part of government employees, and requires all businesses to spend bid and proposal money on applying for the new contracts, without any additional value to the taxpayers.
[18] 40 U.S.C. § 11,302(e) requires that the Office of Management and Budget (OMB), "(designate the head of one or more executive agencies, as the Director considers appropriate, as executive agent for Government-wide acquisitions of information technology."
[19] Information pulled from the Interagency Contract Directory, *available at* www.contractdirectory.gov
[20] *Id.*

d. Proposed Changes to MAS, GWACs and IDIQs

Under the transactional data reporting clause, MAS, GWAC and IDIQ contractors would report prices paid for products and services delivered under each order, or when blanket purchase agreements (BPAs) were placed against the contract.[21] The new contract clause would apply immediately to GWACs and IDIQs that are not MAS contracts, and for MAS contracts, the clause would be introduced in phases, beginning with a pilot for select products and commoditized services."[22] The new reports would require vendors to electronically provide "transactional data elements such as unit measure, quantity of item sold, universal product code, if applicable, prices paid per unit, and total price."[23] The intention is that agencies would use the priced paid information to obtain better order level competition and thereby lower prices.[24] However, for the MAS pilot program, GSA would waive the price reduction clause that currently requires vendors to reduce prices on its MAS contracts if it begins to give a lower price to its comparable commercial customers.[25] Instead, GSA would evaluate the transactional data provided and evaluate it against commercial benchmarks.[26] However:

> 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—which is used to negotiate pricing on FSS vehicles— where commercial benchmarks or other available data on commercial pricing is insufficient to establish price reasonableness. Price and quality metrics would be established, and commercial benchmarks identified, prior to the launch of the pilot so that GSA could perform these analyses and measure the results and impact of the pilot.[27]

After the pilot, GSA would seek feedback before expanding the requirement to all MAS contracts, but GSA is confident that the proposed rule will result in lower prices and administrative savings. The administrative savings would occur because GSA posits that if pricing is improved on the MAS, fewer duplicative open market competitions will occur, which could eliminate 600,000 open market contracts.[28]

Additionally, GSA believes replacing the price reduction clause's price reduction clause tracking customer requirement with transactional data reporting would reduce the burden on businesses, especially small businesses. Specifically, GSA asserts that the proposed rule "could reduce the annual burden on contractors by more than 85 percent, or approximately $51 million in administrative costs to contractors, when compared to the burden hours associated with the tracking customer requirement under the price reductions clause in its current configuration."[29] Likewise, GSA states that minimizing duplicative contract vehicles would "remov[e] barriers to entry into the Federal marketplace, particularly for small businesses . . . [as] the costs of being on multiple contract vehicles ranged from $10,000 to $1,000,000 due to increased bid and proposal, and administrative costs."[30]

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[21] 80 Fed. Reg. at 11,621.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* at 11,622.
[29] *Id.*
[30] *Id.*

III. Further Policy Justification for the Proposed Rule

The transactional data rule cannot simply be read alone, since it is a key component in a governmentwide initiative. On December 4, 2014, the OFPP Administrator announced her intention for the federal government to begin "buying as one through category management."[31] Specifically, the memorandum warns that "agencies often award contracts for similar goods and services."[32] When agencies award multiple contracts in a manner that does not expand the number of companies able to compete for work, OFPP is correct in asserting that they have simply created a new set of bid and proposal costs for small businesses. However, when the government insists upon limiting the number of contracts without providing a mechanism for new entrants to the market, or as a means to limit the number of companies able to compete, the risks inherent in consolidation and bundling remain.

OFPP states that category management, "can best be accomplished by managing commonly purchased goods and services—approximately half of the Federal Government's overall spend—through common categories . . . . This approach includes strategic sourcing, but also a broader set of strategies to drive performance, like developing common standards in practices and contracts, driving greater transparency in acquisition performance, improving data analysis, and more frequently using private sector (as well as government) best practices."[33] There is much to parse in this one sentence. While concerns with strategic sourcing have already been expressed by this Subcommittee, limiting the number of government unique requirements could be a benefit to small businesses that consider these barriers to entry.[34] Likewise, increased transparency and accountability will let great performers shine through, and encourage others to adopt their approach. However, when the government relies on private sector standards for procurement, it engages in fallacious logic, since the government and the private sector have different objectives and incentives in procurement.[35]

Next, the OFPP memorandum continues to state that each category of spend will have a single government executive overseeing all contract vehicles within a category. While this may at first seem efficient, it does not allow for competing visions of federal procurement. Competition inspires innovation, so having dueling approaches or thoughts on how the government will buy within a category may be wise. As seen in chart 1, on the next page, these ten categories were worth over $277 billion in FY 2013. Even the smallest of these categories is worth several billion dollars, and the largest categories exceed $50 billion each.

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[31] OFPP, TRANSFORMING THE MARKETPLACE: SIMPLIFYING FEDERAL PROCUREMENT TO IMPROVE PERFORMANCE, DRIVE INNOVATING AND INCREASE SAVINGS 2 (Dec. 4, 2014), *available at* http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/simplifying-federal-procurement-to-improve-performance-drive-innovation-increase-savings.pdf, (*last accessed* February 26, 2015).

[32] *Id.*

[33] *Id.*

[34] *See, e.g.*, Committee Memorandum *Contracting and the Industrial Base II: Bundling, Goaling, and the Office of Hearings and Appeal* (2015), *available at* http://smbiz.house.gov/uploadedfiles/3-17-2015_hearing_memo.pdf.

[35] The private sector looks to build long term, mutually profitable relationships with its vendors. Any savings accruing as the result of these relationships are reinvested by the company or, at a minimum, increase its cash on hand. In contrast, the government must engage fairly with any company wishing to do business with it. Due to the sheer size of the government, its buying power means that choosing to commit to just a few vendors will alter the industrial base of the country. It may not engage in long term contracts, since these are seen as anticompetitive. It also buys items such as weapons systems that are not purchased by the private sector, so it must ensure that it maintains a sufficient volume of companies from which it can buy. While a private sector company can sole source a contract without consequence, we expect the government to justify any such decision. Perhaps most importantly, federal appropriations are only good for a fixed period of time and a fixed purpose, so the government cannot pre-purchase supplies, invest savings elsewhere, or save its surpluses for future needs. This is not to say that the government cannot learn from the private sector, but the government must exercise care before adopting private sector best practices.

Finally, the relevant portion of the OFPP memorandum directs GSA to develop, along with the SSLC, standards for the development and execution of category management, and requiring agencies to provide the information to GSA. GSA is then required to share the information on a Common Acquisition Platform (CAP). This platform has launched, but Committee staff cannot access the platform. Thus, the extent of implementation is unknown. However, GSA has engaged in two important actions in response to this new policy.

First, GSA has announced that the Schedules are moving a horizontal pricing model. As the GSA Commissioner for the Federal Acquisition Service explained:

> In the past, offerors' prices were analyzed based solely on commercial market prices. Horizontal price analysis means GSA will be moving toward a new model that analyzes prices in comparison to market prices, including Schedule prices, for the same items. We'll be looking at pricing on current contracts as well as new offerors with the pre-award automation of pricing data. In an effort to help suppliers be as competitive as possible, GSA will be sharing information with them on how their prices compare with other vendors offering the same items. Vendors can take this information into consideration in setting or adjusting prices.[36]

This raises itself raises several questions. First, how GSA defines market prices and the same items will be crucial in assessing the effects of the program on small businesses. For example, will all pens be considered the same item, or will refillable pens be treated differently than disposable pens? Will the comparison be made based on stock numbers, unique product identifier codes, or other information? Likewise, how will services be priced? Simply looking at labor hour prices for categories of works leads to false comparisons. Secondly, if prices are being compared to the market, what market is that? Is it the commercial market, which lacks the audit rights, document retention requirements, and criminal penalties found in all federal contracts, or is it the federal market for those goods and services. Next, is the market price for a quantity of one, or is it based on some sort of volume pricing? Finally, will vendors be required to invest in expensive data reporting systems, or will GSA finally modernize its systems so that the data is captured at time of award and again when task orders are placed? The wrong answers to any of these questions could force numerous small businesses out of the federal market, and damage the industrial base. Second, GSA issued the proposed transactional data rule. The proposed rule states that it will advance the recent OFPP category management approach by providing data to the CAP, and that a "critical component of the CAP . . . is the availability of the prices previously paid by other government.[37]

IV. Criticism of the Proposed Rule

The proposed rule has not been well received by industry or small businesses. There are four common criticisms: (1) the compliance burden for small businesses; (2) the decision to forgo federal automation of processes; (3) the protection of the data the rule requires businesses to disclose; and (4) the negative effect on small business participation in federal contracting.

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[36] Tom Sharpe, "*Collaborating with Industry and Customers to Transform the Multiple Award Schedules*" (Dec. 23, 2014), *available at* http://gsablogs.gsa.gov/gsablog/2014/12/15/collaborating-with-industry-and-customers-to-transform-the-multiple-award-schedules/, (*last accessed* February 26, 2015).

[37] 80 Fed. Reg. at 11,620-11,621.

a. Compliance Costs

GSA states that the Paperwork Reduction Act applies to this proposed rule, but estimates that the transactional data rule will result in "a net burden reduction of approximately 757,000 hours per year based on the difference in current reporting requirement" and the reporting requirement under the proposed rule.[38] Indeed, GSA believes that it will take vendors only six hours to set up a reporting system, and then only 31 minutes per month to comply with the proposed rule.[39] Recognizing that the burden depends on the volume of sales and the number of transactions processed per month, GSA believes that a vendor with no sales will only spend two minutes each month on transactional data, where as a company with $50 million in MAS sales will spend 4 hours per month reporting.[40]

Industry uniformly disagrees with these estimates. The Coalition for Government Procurement (CGP), a nonprofit representing vendors that account for approximately 70% of the sales generated through the MAS program and about half of the commercial item solutions purchased annually by the federal government, surveyed its members about the proposed compliance burden. Of those that responded to the survey, 98 percent were MAS contractors, and 42% were GWQC contractors.[41] A quarter of the respondents were small businesses. The small respondents reported that initial set up of the new reporting system would take, on average, 232 hours, not the four hours GSA estimated.[42] This is nearly six weeks of work for which the government does not propose to compensate these businesses.[43] Furthermore, the CGP asserts that ongoing compliance will exceed the 31 minutes per month estimated by GSA. The small businesses surveyed stated that it would take an average of 38 hours per month to comply.[44] This is nearly three months per year that a small business would be required to spend simply on new reporting requirements. Only nine percent of the CGP respondents thought this would be a reduction in costs over the current reporting schemes.[45] Indeed, CGP estimates that the total burden of the proposed rule exceed $873 billion the first year, where as GSA estimated that the cost to contractors would be about $15 billion.[46]
The American Bar Association's Public Contract Law Section (ABA) also believes that GSA, "has grossly underestimated the resulting compliance burden" from the proposed rule.[47] The ABA did not survey businesses, but instead relied on its expertise providing compliance assistance, and found that GSA excluded three "potentially significant costs:" (1) "recurring maintenance activities, such as data maintenance;" (2) "the potential costs of mid-contract reporting changes ordered by GSA pursuant to its proposed unilateral right to change transactional-data reporting requirements;" and (3) GSA underestimated the hourly rate for maintenance activities.[48]

Indeed, groups as diverse as the Small Business Administration's Office of Advocacy (Advocacy), the Council on Defense and Space Industry Associations (CODSIA), the National Defense Industrial Association (NDIA) and others all agreed that GSA has vastly underestimated the compliance costs

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[38] *Id.* at 11,625.
[39] *Id.*
[40] *Id.*
[41] CGP, Comments to Transactional Data Rule 8 (2015), *available at* http://www.regulations.gov/#!documentDetail;D=GSA-GSAR-2014-0020-0019 [hereinafter, CGP Comment].
[42] *Id.*
[43] 80 Fed. Reg. at 11,627.
[44] CGP Comment at 9.
[45] *Id.* at 10.
[46] *Id.* at 11.
[47] ABA, Comments to Transactional Data Rule 3, *available at* http://www.regulations.gov/#!documentDetail;D=GSA-GSAR-2014-0020-0020 [hereinafter ABA Comment].
[48] *Id.* at 6.

associated with its current rules.[49] In particular, the groups all agree that given the scope of the costs GSA imposing, the vendors should have the ability to be reimbursed for the increased burdens.

b. Option of GSA Automation

Rather than requiring vendors to report to GSA on all transactions, GSA posits that an alternative would be "to enhance or combine existing GSA systems to collect the data."[50] However, GSA rejected this option due to the cost to the government, but only after it first declined to use its own online ordering portal or the government's credit card system to capture transaction data. Finally, GSA concluded that of the possible federal system modifications, the best government-focused action would be to upgrade the Federal Procurement Data System (FPDS) to collect transactional data.[51] GSA states that this would require that the FAR be revised, and that the FPDS modifications would result in tens of millions of dollars in system changes, so GSA concludes that the current proposal is preferable.[52] While the analysis in the prior selection belies the idea that the proposed rule is more cost effective, GSA also ignores the potential benefits of collecting the data through FPDS or through its own systems. As NDIA points out:

> [r]ather than propose a rule or process whereby the government will gain insight into its own transactional data in an automated fashion, the government has instead proposed to require industry to manually enter that data into a new system. This proposal is outdated and delays the investment that the government must eventually make in an automated system. The sooner that investment is made, the better, both in terms of insight into prices paid by the government for products and services and also for reduced administrative burdens on industry. Replacing [the price reduction clause] with an automated system would constitute a "win-win."[53]

Indeed, the current MAS systems date to the early 1980s, and are still programmed using COBOL, a programming system developed in 1959. If GSA were to modernize its systems, it could expedite the manner in which contracts are awarded and modified, and better capture the fees it charges on each order. It could reduce the auditing staff that visits contractors to ensure compliance, since it would already possess the necessary data.

Likewise, CODSIA cites acting OMB Deputy Director Aviva Aron-Dine as saying that "OMB is advocating for the practice of government agencies taking advantage of the information they collect instead of relying upon outside sources for that information: [M]aking better use of the administrative data the [f]ederal [g]overnment already collects has huge potential to provide the public with better information and help government agencies learn which approaches work best so that they can further improve government programs. Often, using administrative data lets us produce more reliable information at a lower cost than if government relied solely on more expensive and time-consuming data collection methods, like surveys."[54]

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[49] Advocacy, Comments to Transactional Data Rule, *available at* http://www.regulations.gov/#!documentDetail;D=GSA-GSAR-2014-0020-0022 [hereinafter Advocacy Comment].; CODSIA, Comments to Transactional Data Rule, *available at* http://www.regulations.gov/#!documentDetail;D=GSA-GSAR-2014-0020-0014 [hereinafter CODSIA Comment]; NDIA Comments to Transactional Data Rule, *available at* http://www.regulations.gov/#!documentDetail;D=GSA-GSAR-2014-0020-0007 [hereinafter NDIA Comment].

[50] 80 Fed. Reg. at 11,625.

[51] *Id.*

[52] *Id.* While modifying FPDS may cost tens of millions, the current rule will cost businesses hundreds of billions.

[53] NDIA Comment at 2.

[54] CODSIA Comment a3, *citing* https://www.whitehouse.gov/blog/2015/04/21/learning-more-data-federal-government-already-collects.

Therefore CODSIA asserts that it "supports efforts by the government to collect and aggregate its own data before any steps are taken to create new or redundant information collection requirements of vendors and contractors."[55]

c. Privacy

Advocacy notes that given GSA's expressed intention to share this transactional data across the government, "small businesses are concerned that the proposed rule does not contemplate privacy issues nor other proprietary business concerns [and are] concern[ed] about how transactional data will be protected from competitors."[56] Likewise, CGP warns that it "will be difficult to protect confidential information from improper use when so many buyers will have the broad access contemplated by the rule. This is kind of publication and its associated risk, fundamentally, is not a good business proposition and, potentially, a losing proposition for both government and industry."[57] Given the recent track record with data security, the fears of small businesses are merited.

d. Industrial Base

The Subcommittee has previously examined the declining small business participation rate in federal contracting, and the proposed rule is likely to exacerbate that problem. As the ABA notes, the "initial and recurring costs [of the transactional data rule] will likely have a disproportionate effect on small businesses [that are] typically less capable of absorbing increased administrative burdens and overhead."[58] Further, the ABA warns that the proposed rule may result in a competitive disadvantage for small businesses that would affect the government's ability to comply with federal laws and policy on small business contracting. The Subcommittee is concerned that the proposed rule creates a barrier to entry for small firms. If CGP is correct and the transactional data rule will require a small business to devote three months of an employee's time to complying with the rule each year, that is a cost many small businesses will defer. Therefore, the Subcommittee believes there are merits in the ABA's suggestion that, "GSA appears to have given limited consideration to these burdens even though small businesses make up the vast majority of GSA's contractor community [and thus these] disproportionate effects should be reconsidered."[59]

V. Issues Before the Subcommittee

a. Will the Proposed Rule Meet GSA's Objectives

GSA asserts that the proposed rule will allow agencies to negotiate better prices. However, volumes of data lacking context may not provide GSA with the advantage it seeks. Unless the data compared is for the exact same item at the same point in the lifecycle of that item, and with identical terms and conditions, the price comparison is meaningless. Thus, the Subcommittee wishes to learn if the witnesses believe the proposed ruled could be modified to better meet GSA's objectives.

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[55] CODSIA Comment a3.
[56] Advocacy Comment at 3.
[57] CGP Comments at 13.
[58] ABA Comment at 6.
[59] *Id.*

b. What Affect Does the Proposed Rule Have on the Small Business Supplier Base?

As previously discussed, the transactional data rule will significantly impact small businesses. However, Advocacy asserts that the transactional data rule lacks "sufficient data for the public to examine the potential impact of the rule on small entities" and "does not provide [small businesses] with a clear understanding of GSA's legal framework for requiring this new system."[60] Therefore, the Subcommittee expects the witnesses to provide greater insight into the effects of the rule on small businesses.

c. What is the Cost of the Proposed Rule to the Government and to Industry?

Even the GSA's Inspector General believes that, "the proposed rule underestimates the burden and resources necessary for: contractor data reporting; GSA's and ordering agencies' use of the data; and GSA's enforcement of transactional data reporting requirements."[61] The Subcommittee wishes to learn more about the actual costs to businesses and the government, and what components of those costs are particularly arduous.

d. Does the Proposed Rule Adequately Protect Confidential Information?

A small business cannot risk that the government will inadvertently disclose its prices to its competitors, and order level pricing may be protected by the Freedom of Information Act.[62] Therefore, the Subcommittee wishes to learn what types of protections the witnesses would consider sufficient.

e. Are there Better Alternatives?

GSA has a legitimate interest in decreasing the prices the federal government pays, but it must assess if there are less burdensome ways to meet the same objectives. Thus, the Subcommittee wishes to receive testimony from the witnesses on alternative means to meet GSA's objectives.

VI. Conclusion

Given that GSA contracts are often a principle source of federal revenue, any rulemaking that will adversely affect this population should be undertaken with the utmost caution. Therefore, the Subcommittee hope the hearing will provide greater clarity regarding the consequences of the proposed transactional data rule.

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[60] Advocacy Comment at 3.

[61] Brian Gibson, GSA Office of Audits, Office of the Inspector General, Public Meeting Presentation: Transactional Data Reporting (2015). *available at* http://www.gsaig.gov/?LinkServID=C82E3F6B-D054-1D53-16D86346751A2527&showMeta=0.

[62] *Honeywell v. N.A.S.A.*, Nos. 76-353, 76-377 (D.D.C. 1976).