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BEFORE THE

COMMITTEE ON SMALL BUSINESS

SUBCOMMITTEE ON CONTRACTING AND WORKFORCE

UNITED STATES HOUSE OF REPRESENTATIVES

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I. Introduction

Mr. Chairman and distinguished members of the Committee, thank you for inviting me to testify. My name is John G. Horan and I am a partner at the law firm McKenna Long & Aldridge LLP. I have over twenty-five years of experience in the practice of government contracts law. My practice is focused on representing companies, both large and small, selling commercial items to the federal government, particularly through the General Services Administration and Department of Veterans Affairs Federal Supply Schedule (FSS) program. I regularly assist companies in ensuring compliance with the contract, regulatory, and statutory requirements applicable to the FSS program. I also serve as a Co-Chair of the Commercial Products and Services Committee, and as a Vice-Chair of the Health Care Contracting and Procurement Fraud Committees of the American Bar Association's Public Contracts Law Section.

In my view, GSA's proposed Rule to amend its acquisition regulations to implement a pilot program to require contractors to report transactional data of GSA FSS sales and other GSA government-wide contract vehicles – which has become known as the Transactional Data Rule – is afflicted with three of the most fundamental problems a procurement regulation can have.[1] One, it creates a significant, unnecessary, and underestimated burden on contractors – a burden that will be felt more acutely by small businesses. Two, the anticipated benefit to the government is poorly defined and is not likely to be realized. Three, the proposed Rule is subject to misuse that could result in considerable harm to contractors, particularly small business contractors.

[1] 80 Fed. Reg. 11619 (March 4, 2015).

While analyzing the proposed Rule, I reviewed many of the comments prepared by both industry groups and government agencies, and the concerns that I am expressing are shared by many of these parties. This is a rare example of a proposed Rule that is opposed by both the GSA Inspector General and industry associations.

II. The Rule Imposes a Significant, Underestimated, and Unnecessary Burden

GSA estimates that it will take six hours for a contractor to accomplish all tasks required to understand the reporting requirements, prepare its systems and personnel, and establish the procedures necessary for creating the required reports, and an average of 31 minutes per month for ongoing reporting.[2] GSA does not provide sufficient detail to analyze how these estimates are flawed, but virtually every informed party who has weighed in on these estimates believes they are inaccurate.

The Small Business Administration's Office of Advocacy reports that small businesses and their representatives are concerned that GSA "under estimates the burden and resources."[3] The Council of Defense and Space Industry Associations views the estimates as "grossly underestimated," as failing to "account for costly modifications to information systems that will be required to accurately and completely capture the data elements required by the rule" or to "sufficiently account for the time required to perform quality control on draft submissions and investigation into potential data anomalies that frequently arise with transactional data reporting."[4] Based on its experience with pre-award audits of contractor systems, the GSA

[2] 80 Fed. Reg. 11625.

[3] SBA Office of Advocacy Comments to GSAR Case 2013-G504: General Services Administration Acquisition Regulation; *Transactional Data Reporting*, at 3.

[4] CODSIA Comments to GSAR Case 2013-G504: General Services Administration Acquisition Regulation; *Transactional Data Reporting*, at 4.

Office of Inspector General "question[s] whether GSA's estimate of 6 hours per contractor to configure their systems for reporting is accurate" and "contend[s] the projected burden of monthly reporting as 0.52 hours per month is also understated."

Based on a survey of Coalition for Government Procurement's members, "small business respondents reported that it would take on average 232 hours" and "[l]arge and medium size contractors estimated that it would take on average 1192 hours" for the initial setup.[5] According to the Coalition, "small businesses reported that it would take 38 hours per month on average[,]" and "[l]arge and medium size businesses estimated that it would take an average of 68 hours per month" for the monthly reporting.

According to these comments, GSA likely failed to adequately consider one or more of the following requirements:

- the time to modify existing systems to accurately and completely capture the data required by the Rule;
- the time required to establish written procedures and protocols for the collection and reporting of the data;
- the time required for training company employees on the Rule, protocols, and their responsibilities in collecting and reporting the data;
- the time required to review, investigate and confirm the accuracy of the data.

GSA relies on a perceived offset of the burden by elimination of the burden for complying with the *Price Reductions* clause. GSA fails to recognize, however, the current burden on contractors also arises out of complying with the demands and obligations imposed by the submission of commercial sales practices data, which will remain and is expanded under the proposed Rule. GSA can require a contractor to submit updates to its commercial sales practices

[5] The Coalition for Government Procurement Comments to GSAR Case 2013-G504: General Services Administration Acquisition Regulation; *Transactional Data Reporting*, at 8.

at any time upon request under the proposed Rule.[6] Industry views the offset as illusory in light of the continued commercial sales practices burden.

Based on my experience, even without the benefit of knowing precisely how and why, GSA's estimates are grossly inaccurate. Having worked with companies gathering information for commercial sales practices and other pricing disclosures, gathering, producing and ensuring the accuracy of such data will take significantly more time and expense than estimated by GSA. In my view, a contractor cannot simply gather and report the information, but is well advised to ensure that the information gathered and reported is current, accurate and complete. Otherwise, the contractor will risk an allegation of fraud under the False Claims Act, as has been the case with essentially every other form of price or cost reports submitted by a contractor to the government. Importantly for this hearing, small businesses will bear the largest part of this burden – GSA estimated that out of 15,738 vendors holding contracts that would be subject to this Rule, 12,590 are small businesses. Small businesses are especially vulnerable to harm from these added expenses given that they often operate with fewer internal resources and lower margins than large businesses.

Industry also views the imposition of the burden as unnecessary because the data, or similar pricing data, is already available within the government. The purchasing agencies, of course, have access to the transaction data for their own transactions and could report this data to GSA. Existing GSA databases, such as GSA Advantage! permit price comparisons and commercial databases that we are all familiar with, provide commercial pricing data. Ironically,

[6] 80 Fed. Reg. 11624.

GSA rejected modifications to its own databases to fully capture this data as too costly and unreliable.[7]

III. The Anticipated Benefit is Poorly Defined, and Not Likely to be Realized

GSA anticipates that the transactional data will "improve GSA's ability to conduct meaningful price analysis and more efficiently and effectively validate fair and reasonable pricing" on its contracts and will permit government purchasers "to compare prices prior to placing orders."[8] GSA also recognizes a point very important to industry – that price paid is only one of many "information points" in determining the best value to the government.[9] Equally important are other considerations, "such as total cost, desired performance levels, delivery schedule, unique terms and conditions, time considerations, and customer satisfaction."[10] We can also add customer service, product support services, warranty, and other terms to this list. GSA "envisions that this [price paid] information would be used as one information point in conjunction with [these] other considerations.[11] GSA and the proposed Rule fail to define how GSA or government purchasers will use the transactional data in conjunction with these other considerations to determine best value to the government.

The proposed Transactional Data Rule is not structured to permit buyers to fulfill GSA's "vision." Despite GSA's recognition of the importance of these other factors to determining best value to the government and taxpayers, the Rule provides no means to obtain this other equally important information. GSA does not even suggest any basis for a government purchaser to

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[7] 80 Fed. Reg. 11625.

[8] 80 Fed. Reg. 11621.

[9] 80 Fed. Reg. 11623.

[10] *Id*.

[11] *Id*.

connect the prices obtained through this Rule with this other equally important information and industry does not see any basis. So, according to GSA's own analysis, this burden imposed on contractors will provide the government with only one of the necessary information points – transactional price – without any means to obtain the other information points necessary to evaluate price. Without access to, and consideration of, this other important information, the price information is of little value at best and can be very misleading at worst. In short, the data required by this Rule will be of little or no value in determining best value to the government and taxpayers without these other terms and conditions applicable to the transaction, and the Rule provides no means to obtain this other information.

In my view, the inability of the Rule to capture these other non-price factors could be especially harmful to small businesses. Small businesses often operate as value-added resellers or otherwise distinguish themselves in the competitive market based on the value they add to a transaction, such as customer and product service capability, that is not captured by transaction price. The Rule has no means to capture or account for this value. Thus, small businesses, as well as other contractors, are likely to assessed only by the price they offer and not the other value they bring to the transaction.

GSA attempts to gloss over this likely consequence to the competitiveness of small business by stating that "[t]he reduction in duplicative and inefficient procurement transactions removes barriers to entry into the Federal marketplace," primarily by reducing the administrative costs of holding multiple contracts.[12] This benefit, if realized, fails to consider that small businesses likely will be less competitive under these fewer contracts if best value decisions are based entirely on price.

[12] 80 Fed. Reg. 11622.

IV. The Rule is Subject to Misuse that Could Result in Considerable Harm

Perhaps the most fundamental concern of industry is that the Rule is subject to misuse that could result in considerable harm to contractors. Again, small businesses would be especially vulnerable to this harm. Industry's fundamental concern is that GSA and government buyers will use the transactional data to drive down prices across all contractors to the lowest transactional price without consideration of the other terms and conditions that provide value to the government purchaser. Armed with this pricing data and having no access to the other value terms of the transaction – such as customer service, product service, delivery speed, and warranty – GSA will eliminate higher-priced, higher-value items and services from the contracts, or buyers will refuse to purchase items or services at a higher price regardless of the other value offered by the contractor along with the higher prices. Contractors that offer and rely on the other valuable terms and conditions will be unable to compete and will eventually leave the government market. In my view, small businesses are most vulnerable to this consequence because they often find it more difficult to compete purely on price.

This is not an unfounded concern. My colleagues and I have seen government purchasers ignore these other considerations and focus entirely on price repeatedly in contract negotiations, and GSA acknowledges that it has used transactional data, when available under strategically sourced contracts, to drive down prices further from the fair and reasonable prices established by competition.[13]

A second fundamental concern of industry, shared by small businesses, is whether the transactional data will be afforded adequate protection from disclosure by GSA and government buyers. Elements of the transactional data, including transactional prices and customer lists, are

[13] 80 Fed. Reg. 11621.

fundamental components of a contractor's business, pricing and proposal strategies for both the government and commercial market. Not surprisingly, industry views this information as competition sensitive and is concerned that contractors will be harmed in both the government and commercial market by disclosure to competitors. The Rule does not describe the procedures that will be used to obtain access to, disclose, or protect the data submitted by contractors. In the absence of any description of the protection of this highly sensitive data, industry is concerned that it will make its way into the hands of competitors either through Freedom of Information Act requests, disclosure during negotiations, breach of GSA's systems, or other unintended disclosures.

V. Conclusion

In my view, GSA has failed to consider the burden the proposed Rule will place on contractors, particularly small business contractors, the benefit to GSA and government purchasers of the proposed Rule, or the potential harm of misuse of the proposed Rule, especially to small businesses. Until GSA has addressed these fundamental issues, GSA should withdraw the proposed Rule.