

# **GSA Publishes Highly Anticipated Transactional Data Reporting Final Rule**

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GSA's final transactional data rule fundamentally alters the basis for negotiation and pricing of commercial items on Federal Supply Schedule (FSS) contracts and subsequent orders, with immediate impact on some of the largest FSS Schedules.

On June 23, the General Services Administration (GSA) published its highly anticipated final rule on transactional data reporting (TDR Final Rule). The TDR Final Rule is effective immediately for those Schedules and Special Item Numbers (SINs) included in the pilot program (identified below). The pilot program will begin not less than 60 days from June 23. Participation initially will be voluntary for existing Schedule holders, but mandatory for new contracts awarded under the Schedules and SINs included in the pilot program. The pilot program initially will include eight Schedules, with additional Schedules potentially added on a rolling basis. GSA will publish notification of additional Schedules entering the pilot program at least 30 days prior to inclusion on GSA's Interact website. The pilot program (including the use of a modified Industrial Funding Fee (IFF) clause containing the TDR obligations) will not be expanded or made permanent until GSA has evaluated at least one year of experience with the pilot. The TDR Final Rule applies only to the GSA FSS contracts included in the pilot and not to Veterans Affairs (VA) FSS contracts.

Significantly, contractors included in the pilot program will no longer be subject to either Commercial Sales Practices (CSP) disclosure requirements or the Price Reductions Clause (PRC). The exclusion of CSP disclosures in the Final Rule is a noteworthy and welcome departure from the proposed rule concerning TDR (TDR Proposed Rule), which arguably expanded CSP requirements. In exchange for these concessions, however, contractors will need to report certain transactional data relating to federal sales on a monthly basis. This obligation imposes new and potentially burdensome reporting and monitoring obligations on participating contractors, and likely will require implementation of new systems to ensure accurate reporting.

In a significant expansion of reporting requirements, the TDR Final Rule also applies to all new Governmentwide Acquisition Contracts (GWACs) and Governmentwide Indefinite-Delivery, Indefinite-Quantity (IDIQ) contracts. Consequently, many GWAC and IDIQ contractors that traditionally may not have been exposed to disclosure or reporting requirements will have to implement systems to

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facilitate compliance with the transactional data requirements.

## Scope and Implementation of Rule

The TDR Final Rule immediately will apply to new GSA GWAC and non-FSS Governmentwide IDIQ contract vehicles with solicitations issued on or after the effective date of the rule. Specifically, GSAR 516.506 states that the Transactional Data Reporting clause (TDR Clause) should be included in all GSA-awarded GWACs and multi-agency contracts, and permits GSA contracting officers to insert the clause in GSA-awarded IDIQ contracts other than FSS contracts.[1] Current contract vehicles that already have alternative transactional data provisions may continue using existing reporting requirements.

For FSS contracts, the rule initially will apply (beginning no later than July 1, 2016) to a “pilot” that includes eight separate Schedules and SINs:

- Schedule 03FAC, Facilities Maintenance and Management: All SINs.
- Schedule 51 V, Hardware Superstore: All SINs.
- Schedule 58 I, Professional Audio/Video, Telemetry/Tracking, Recording/Reproducing and Signal Data Solutions: All SINs.
- Schedule 72, Furnishing and Floor Coverings: All SINs.
- Schedule 73, Food Service, Hospitality, Cleaning Equipment and Supplies, Chemicals and Services: All SINs.
- Schedule 75, Office Products: All SINs.
- Schedule 00CORP, The Professional Services Schedule: Professional Engineering Services (PES) SINs.
- Schedule 70, General Purpose Information Technology Equipment, Software, and Services: SINs 132 8 (Purchase of New Equipment); 132 32, 132 33, and 132 34 (Software); and 132 54 and 132 55 (Commercial Satellite Communications (COMSATCOM)).

The addition of Schedule 70 to the list of Schedules included in the pilot program is another significant change from the TDR Proposed Rule. GSA’s original list of Schedules included in the pilot program as reported on GSA Interact included some of the smaller Schedules by revenue. Schedule 70 historically has been the largest GSA Schedule, with reported revenues of over \$14 billion per year for the past three years.

GSA contemplates that transactional data reporting requirements will be incorporated into all existing FSS contracts for pilot Schedules/SINs through bilateral modifications executed by the parties, as well as in all newly awarded FSS contracts for these Schedules/SINs, through inclusion of a modified Industrial Funding Fee and Sales Reporting clause set forth at GSAR 552.238-74 (modified IFF Clause) containing the transactional data reporting requirements. Importantly, although Professional Services Schedule and Schedule 70 contracts will only be included in the pilot program if they contained the specified SINs, once the modified IFF Clause applies to a contract, the TDR requirements apply to all SINs in that contract. As a result, contractors will be required to report sales data on a monthly basis for all SINs awarded under a contract, including those SINs not included in the pilot program.

## Transactional Data Reporting Issues

At the heart of the TDR Final Rule is an effort to increase government saving by ensuring that government buyers are aware of the prices previously paid by other government buyers—for a similar

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product or service under similar terms and conditions—to use in determining fair and reasonable prices. The TDR Clause and modified IFF Clause impose on contractors the requirement to collect and report these data on a contract-by-contract basis for sales under any contract containing either clause. Specifically, the TDR Final Rule would require monthly reporting of the following data elements within 30 calendar days from the end of the month.<sup>[2]</sup>

- Contract or Blanket Purchase Agreement (BPA) Number
- Delivery/Task Order Number/Procurement Instrument Identifier (PIID)
- Non Federal Entity
- Description of Deliverable
- Manufacturer Name
- Manufacturer Part Number
- Unit Measure (each, hour, case, lot)
- Quantity of Item Sold
- Universal Product Code
- Price Paid per Unit
- Total Price<sup>[3]</sup>

Reportable transactions can be identified either on the basis of issuance of the invoice or receipt of payment.<sup>[4]</sup> For FSS contracts, both the unit price and total price reported are required to include the IFF.<sup>[5]</sup> Though reporting must be done on a monthly basis, the IFF will not be due until 30 days after the end of each calendar quarter, consistent with the IFF clause currently in effect.<sup>[6]</sup>

Contractors will be required to report TDR data electronically by utilizing an automated reporting system on a GSA's Interact website designated by the GSA or by uploading the data according to GSA instructions. Information regarding the required reporting mechanisms is not provided in the TDR Final Rule, but will be provided at the time a contract with the TDR Clause (or modified IFF Clause) is awarded or modified to include the requirement.<sup>[7]</sup>

The TDR Final Rule does nothing to address contractor concerns that the required TDR data elements are devoid of information regarding the circumstances of any individual transaction or group of transactions between the contractor and the government that would permit a contracting officer for the ordering agency to assess their relevance to the pricing of a subsequent transaction. A particular transaction price may not be tied to order quantity. In addition, a particular transaction could be a purchase under a long-term agreement with a minimum purchase requirement, the result of a temporary price reduction or provided under a competed blanket purchase agreement (BPA). The transaction also could reflect specific and very different terms and conditions, different configurations of a single base product offered on the contract, the bundle of products or services being procured through a specific order, or market conditions, including competition existing at the time of the order. Contractors rightfully fear that contracting officers will use the data to attempt to negotiate pricing that may be inconsistent with or ignore the circumstances of prior reported transactions.

## **Price Reductions Clause and CSP Issues**

FSS contracts traditionally have imposed unique price-related reporting obligations in the form of the post-award requirements of the PRC<sup>[8]</sup> and the pre-award requirement to submit CSP disclosures detailing the contractor's pricing, discounts, concessions, and other terms and conditions to non-federal customers.

The PRC, which is mandatory in FSS contracts, previously has required (and continues to require for

those contractors who do not participate in the TDR pilot program) that all contractors monitor GSA contract pricing to a negotiated “identified” (or benchmark) customer or group of customers upon which GSA contract pricing is based. Absent certain exceptions, if the contractor offers more favorable pricing or discounts, or terms and conditions to its identified customer(s), it must then offer a proportional price reduction to all GSA customers for the same duration that such favorable pricing or discounts are offered to the identified customer(s). The standard version of the PRC specifically states that prices to individual federal agencies under government contracts do not trigger PRC, in large part because of the chilling effect such a provision would have on the offering of lower “spot prices” to individual agencies to meet competition or lower prices for volume purchases. Compliance with the PRC has been challenging for many contractors because its provisions are difficult to understand and apply in practice. Of equal importance is that the terms of the PRC may hinder the ability of contractors to compete in commercial markets in which identified customer prices may fluctuate, including (in some cases) subcontract prices offered to government prime contractors.

Under the TDR Final Rule, for FSS contracts subject to the TDR requirements of the modified IFF Clause, the standard PRC text will be omitted and replaced with an “Alternate II” version containing two simple propositions:

1. The Government may request from the contractor a temporary or permanent price reduction at any time during the contract period.
2. The contractor may offer the Contracting Officer a voluntary government-wide price reduction at any time during the contract period.<sup>[9]</sup>

Neither of these provisions imposes any obligation on the contractor. It should be expected, however, that the submission and review of transactional data will cause contracting officers to ask in many circumstances for temporary or permanent price reductions—again, without considering the reasons why lower prices may have been offered in earlier reported transactions. Indeed, a number of FSS contracting officers already have pursued this strategy based on their review of available federal pricing information (ignoring the terms and conditions of earlier purchases) and suggested that unless the contractors lower their existing list pricing, the products may be subject to removal from FSS contracts.

FSS contract solicitations also currently require that contractors submit current, accurate, and complete CSP disclosures prior to the conclusion of contract negotiations to permit the contracting officer a basis on which to negotiate fair and reasonable prices. Failure to disclose current, accurate, and complete CSP data can give rise to False Claims Act (FCA) liability. Allegations that GSA contractors have not provided current, accurate, and complete CSP disclosures have resulted in numerous FCA settlements with both the GSA Office of Inspector General and the US Department of Justice and have caused some significant contractors to exit the GSA FSS program. Removal of the CSP requirement in the TDR Final Rule significantly will reduce the level of effort and compliance risk associated with a contractor’s submission of FSS proposals and subsequent requests to add products or services to these contracts. On the other hand, the transactional data reporting requirements will compel prudent contractors to implement new or revised systems to monitor and report transactional data—or else face the prospect of contract or FCA liability if their reports are inaccurate or incomplete.

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[1] GSAR 16.506 (81 Fed. Reg. 41136).

[2] This 30-day rule replaces the 15-day requirement in the proposed rule.

[3] GSAR 552.216-75 – Transactional Data Reporting (81 FR 41137-38); see also GSAR 552.238-74 – Industrial Funding Fee and Sales Reporting (81 FR 41138).

[4] Id.

[5] Id.

[6] GSAR 552.238-74 – Industrial Funding Fee and Sales Reporting (81 FR 41138-39).

[7] Id.

[8] GSAR 552.238-75 – Price Reductions.

[9] GSAR 552.238-75 (Alt II).

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