

# Morgan Lewis

**STATEMENT OF SHEILA ARMSTRONG, ESQ.**

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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 Members of the Committee, my name is Sheila Armstrong. I am a partner with the law firm Morgan, Lewis & Bockius, LLP. My primary practice area is government contracts. I counsel a wide variety of businesses, both large and small, regarding issues related to commercial item contracts with the federal government. In particular, I counsel clients regarding contract compliance requirements under the General Services Administration Federal Supply Schedules (FSS) program. I also serve as a Co-Chair of the Commercial Products and Services Committee, one of the Committees of the American Bar Association's Public Contracts Law Section.

I would like to thank you Mr. Chairman and the Committee for inviting me here today to speak to you about GSA's proposed Transactional Data Rule.<sup>1</sup> GSA published its proposed Transactional Data Rule on March 4, 2015. Upon publication, the Proposed Rule immediately drew criticism from contractors, the legal community and even the GSA's own Inspector General's office. GSA also held a Public Meeting on the Transactional Data Rule on April 17, 2015 which was widely attended both in person and virtually through GSA's Internet meeting platform.

The essence of the Proposed Rule is that GSA seeks to implement a pilot program under which it will exchange a most favored customer pricing provision found in all GSA Multiple Award Schedule contracts known as the "Price Reductions Clause" for a more burdensome transactional data reporting requirement requiring contractors to report transactional data relating to all *federal* sales made by the contractor. The Proposed Rule also applies to both GSA's Federal Supply Schedule (FSS) contracts, as well as its non-FSS Indefinite Delivery Indefinite Quantity contracts and Governmentwide Acquisition Contracts. The Proposed Rule does not apply to VA FSS contracts in the pilot program.

The problems with the Proposed Rule are many. The four that I am going to discuss today are particularly relevant to small businesses. First, GSA grossly underestimates both implementation costs and compliance costs of transactional data reporting. These increased costs and burdens likely will have a disproportionate effect on small businesses who often have limited resources. Second, while GSA temporarily will suspend Price Reductions Clause compliance obligations for those contracts that are included in the Transactional Data Rule pilot program, it does not propose to suspend, and in fact

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<sup>1</sup> 80 Fed. Reg. 11619 (March 4, 2015).

potentially will expand Commercial Sales Practice (CSP) disclosure requirements, another arguably more burdensome and higher risk compliance requirement found in GSA Multiple Award Schedule Contracts. Preparation of CSPs takes a considerable amount of time and any increase in this requirement could have a disproportionate effect on resource-strained small businesses. Third, it does not appear that GSA is certain how it will use the voluminous amount of data that it seeks to collect under the Proposed Rule, but the potential for downward pricing pressure that likely will result from transactional data reporting may have a disproportionate effect on small businesses who rarely win a “race to the bottom” on pricing. Fourth and finally, it appears that GSA has not fully considered the confidential and proprietary nature of the data that it seeks to collect under the Proposed Rule. Line item pricing has long been exempt from disclosure under the Freedom of Information Act (FOIA) due to its confidential and proprietary nature. This data also is protected from disclosure under the Trade Secrets Act.

## **II. Select Concerns Regarding the Proposed Transactional Data Rule**

### **A. Estimated Implementation and Reporting Costs of the Transactional Data Rule**

GSA estimates that the public reporting burden for its contractors to initially set up systems for transactional data reporting at six hours.<sup>2</sup> This estimated six hours *includes* “the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information” as well as “training, compliance systems, negotiations, and audit preparation the new clause may require.”<sup>3</sup> GSA estimates that the monthly burden thereafter will average<sup>4</sup> approximately 0.52 of an hour or 31 minutes per month.<sup>5</sup> According to GSA: “[t]his number takes into consideration the distribution of contract values (i.e. sales) and assumes monthly reporting burden rises with vendor sales based on the distribution of sales and obligations within FSS contracts and non-FSS contracts.”<sup>6</sup> What GSA allows no time for is system enhancements that may be required should GSA elect to change the fields of data to be reported as it would have the

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<sup>2</sup> 80 Fed. Reg. 11625.

<sup>3</sup> *Id.*

<sup>4</sup> GSA estimates a range of two minutes (for contractors with \$0 in sales) and four hours (for contractors with greater than \$50 million in sales). *See id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

right to do upon 60 days notice under the Proposed Rule.<sup>7</sup> In addition, these estimates of six hours for initial set-up and 31 minutes per month for ongoing reporting are grossly underestimated.

1. *Initial Set-Up Likely Will Far Exceed Six Hours*

GSA estimates that its contractors will spend approximately six hours to set up its systems to generate the monthly report required by the Transactional Data Rule.<sup>8</sup> This six-hour estimate includes the time that GSA estimates will be required for reviewing instructions, searching existing databases and other sources of information, and gathering and reviewing the collected information.<sup>9</sup> This estimate also includes the effort that GSA anticipates contractors will be required to make to institute changes to contractor training, compliance systems, negotiations, and audit preparation—and presumably includes the time and expense required to modify data-gathering, reporting, and information-technology (IT) systems to accurately and efficiently report the data required by the Proposed Rule.<sup>10</sup> GSA’s own Inspector General’s office acknowledges that contractors likely will spend far more than six hours to set up business systems for transactional data reporting.<sup>11</sup> As the GSA Office of Inspector General notes in its comments to the Proposed Rule:

During GSA OIG preaward audits, Schedule contractors are asked to provide a sales database – including GSA transactional data – with at least 21 specific data fields for the contractor’s last complete fiscal year. We consistently find that contractors maintain their transactional data in varying systems, using multiple formats, and unique data fields. Given this, we question whether GSA’s estimate of 6 hours per contractor to configure their systems for reporting is accurate.<sup>12</sup>

This six hour estimate must assume that all data fields reside in the same IT system and that the report can be set up by one person without consultation with others inside or outside the company. However,

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<sup>7</sup> *Id.* at 11628.

<sup>8</sup> *Id.* at 11625.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> GSA Comments to GSAR Case 2013-G504: General Services Administration Acquisition Regulation; *Transactional Data Reporting*, at 6. Available at: <https://www.gsaig.gov/?LinkServID=6A41DF8F-063D-0652-27F3AAF1F2F09E33&showMeta=0>.

<sup>12</sup> *Id.*

neither of these assumptions is viable. As noted by the GSA Inspector General, contractors frequently maintain data in various systems throughout the company. Invoicing data, which will contain some of the fields required by the Transactional Data Rule, will include fields such as line item price and contractor part number; however, this system likely will not include manufacturer part number. That field instead will reside in a purchasing database. In many cases, the systems that house the various fields GSA is requesting in its monthly report are not set up to communicate with one another. Accordingly, some contractors will need to manually compile the information required for transactional data reporting, or may need to upgrade their IT systems in order to comply.

In addition, the estimated six hours of set-up time cannot possibly include time for company personnel to confer with management and contract administrators regarding the data fields required and the accuracy of reports generated. For some contractors, particularly small businesses, setting up systems to capture and report transactional data may involve consultation with professionals outside the company at hourly rates thereby increasing the costs to the contractor. These estimated costs are not factored into GSA's six hour estimate for set up.<sup>13</sup>

## 2. *GSA's Estimated Monthly Compliance Burden is Overly Optimistic*

GSA's estimate that contractors will spend an average of 31 minutes per month to report transactional data is overly optimistic. This estimated time cannot possibly include any substantive review of the data

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<sup>13</sup> As noted in the ABA's Comments to the Transactional Data Rule:

The Section suggests that the hours required will in fact be much higher. Typically, any new reporting requirement will require extensive efforts to assess the availability of data, test the accuracy of the data, and determine the system enhancements needed to accommodate the new requirement. Many contractors may require substantial changes or upgrades to business systems in order to provide the data sought by GSA in a form that will allow for meaningful and accurate pricing comparison as intended. For example, the fields required by GSA for transactional-data reporting may not reside in the same IT system; few accounting systems include both manufacturer part number and contractor part number in the same system when those part numbers differ. Thus, contractors may need custom development to merge data elements from accounting and other systems (e.g., materials management) to meet the requirements of the Proposed Rule. These and other needed changes would require coordination among functions such as the contractors' IT departments and change management teams as well as responsible executives. The time needed just to search for, extract, review, and test such data, and implement system modifications, will well exceed six hours.

See ABA Public Contracts Law Section Comments on GSAR Case 2013–G504, General Services Administration Acquisition Regulation (GSAR); Transactional Data Reporting; 80 Fed. Reg. 11619 (March 4, 2015) available at: [http://apps.americanbar.org/webupload/commupload/PC407500/sitesofinterest\\_files/GSAComent.pdf](http://apps.americanbar.org/webupload/commupload/PC407500/sitesofinterest_files/GSAComent.pdf).

to ensure its accuracy prior to when the contractor reports the data to GSA. In addition, should a contractor find any anomalies in the data (as is often the case when reviewing raw data) the contractor will need to review source documentation to verify whether the transaction is accurately recorded in the contractor's IT systems. Furthermore, the estimated 31 minutes per month does not include any time allowed for ongoing maintenance of data, including but not limited to changes by GSA to the data fields required as permitted by the Proposed Rule.<sup>14</sup> Given the unknown ramifications on a contractor should it provide data to GSA that is inaccurate or incomplete, contractors will need to review the transactional data prior to submission which could take hours depending upon the size of the contract. When the contractor identifies transactions that appear to be anomalies, zero dollar transactions for example, it will be required to perform additional research to determine whether the transaction is properly recorded or whether revisions to the transaction are required.

**B. GSA's Proposed Expansion of Commercial Sales Practice Disclosure Requirements is Unduly Burdensome**

All GSA contractors must prepare and submit CSPs prior to award and at certain key times during performance of a GSA contract. For example, when a contractor seeks to increase prices or add items to the contract GSA requires either new CSPs, or a statement from the contractor that the CSPs have not changed since the time they were last submitted. In CSP submissions, GSA contractors must disclose **current, accurate and complete** information. This is one of the most critical and most burdensome requirements for all contractors participating in the Federal Supply Schedule program. A contractor's failure to submit current, accurate and complete CSPs open the contractor to unnecessary risks including potential liability under the Civil False Claims Act. Both the GSA Inspector General and the Department of Justice have settled many matters for hundreds of millions of dollars based on allegedly inaccurate CSPs submitted by a FSS contractor under the Multiple Award Schedules program. While GSA proposes to temporarily suspend Price Reductions Clause compliance requirement for those contracts that are included in the Transactional Data Rule pilot program, it has not suspended, and in fact potentially increases, CSP disclosure requirements.

GSA acknowledges in the Proposed Rule that "contractors continue to struggle to comply with the sales practice disclosure requirements."<sup>15</sup> A 2013 GSA OIG audit reports also confirm this point and highlights

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<sup>14</sup> 80 Fed. Reg. 11628.

<sup>15</sup> *Id.* at 11623.

that for the majority of the contracts audited, CSP disclosures were not current, accurate and/or complete.<sup>16</sup> Yet, the Proposed Rule does not remove contractors' obligations to prepare CSP disclosures, and, instead potentially expands this requirement. The Proposed Rule provides:

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.<sup>17</sup>

Due to the potential financial risks created by inaccurate CSP disclosures, contractors must spend considerable time reviewing sales data and preparing current, accurate and complete CSPs when they are required to do so. Even a statement that the CSPs have not changed requires extensive review of transactional sales data to confirm that this statement is correct at the time that it is made. Many contractors engage outside accounting and legal professionals at great expense to assist in preparing CSPs. This is especially true for small businesses who often do not have in-house resources available to complete this burdensome task. GSA's potential expansion of this requirement without any discussion of the estimated burden this places on contractors is unreasonable.

### **C. Use of Transactional Data Collected**

While GSA is proposing to collect voluminous amounts of data under the Transactional Data Rule “to improve GSA's ability to conduct meaningful price analysis and more efficiently and effectively validate fair and reasonable pricing on both its non-FSS and FSS vehicles,”<sup>18</sup> it has not clearly articulated, in either the Proposed Rule or at the Public Meeting, how it intends to use this data once collected. In addition, while “GSA recognizes that use of prices paid information must be done within the context of seeking to obtain the best value for the taxpayer,”<sup>19</sup> GSA's focus appears to be on driving prices down in the

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<sup>16</sup> . See Major Issues from Multiple Award Schedules Audits, Audit Memorandum Number A120050-3, Mar. 25, 2013. Available at: <http://www.gsaig.gov/?LinkServID=CBDF5C2-B1C0-0A65-5F7701BBDF9CE5D&showMeta=0>.

<sup>17</sup> *Id.* at 11621.

<sup>18</sup> *Id.* at 11621.

<sup>19</sup> *Id.*

marketplace and the savings that the Transactional Data Rule promises for GSA.<sup>20</sup> However, as GSA also recognizes in the Proposed Rule, for most commercial items, it is the commercial market and not the government market that is the market driver.<sup>21</sup> Accordingly, GSA has not explained how collection of data on **government** sales transactions from contractors will achieve this lower pricing.

Based on GSA's recent activities with its GSA contractors, it seems that GSA may use transactional data to attempt to reduce GSA **list price** which is a ceiling price that can be, and frequently is, discounted by contractors based on the terms and conditions of a particular order and competition in the marketplace. In recent weeks, GSA has been issuing communications to its FSS contractors across various FSS schedules. The sample text of these communications is attached to this Statement as **Exhibit A**. I have had several clients who have received similar communications that are transmitted with a spreadsheet showing list prices offered by other GSA contractors for what allegedly are the exact same contract items. If GSA were to implement a similar exercise using the transactional data it receives under its pilot program, which notably does not include a field to identify the reason for any additional discount that may have been granted, this downward pricing pressure could have a detrimental effect on small businesses. Small businesses often do not have the buying capacity and/or overhead structure that allows them to compete with this type of pricing pressure.

#### **D. Protection of Confidential and Proprietary Information**

The transactional data that GSA seeks to obtain through the Transactional Data Rule, in particular line item pricing information, is recognized as confidential and proprietary information under the Freedom of Information Act (FOIA)<sup>22</sup> and the Trade Secrets Act.<sup>23</sup> FOIA Exemption 4 protects "matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential."<sup>24</sup> In addition, the Trade Secrets Act prohibits unauthorized disclosure of "practically any commercial or financial data collected by any federal employee from any source in performance of the

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<sup>20</sup> See *id.* at 11622 ("The availability of prices paid information will lead to better prices for the taxpayer by improving the agency's ability to conduct price analysis. It will also improve the quality of both contract and order level competition because vendors will know that their customers have greater market intelligence on what other agencies have paid in similar situations.").

<sup>21</sup> *Id.* at 11622.

<sup>22</sup> 5 U.S.C. § 552(b)(4).

<sup>23</sup> 18 U.S.C. § 1905.

<sup>24</sup> See *Canadian Comm'l Corp. v. Air Force*, 514 F.3d 37, 39 (D.C. Cir. 2008).



duties of his or her employment.”<sup>25</sup> At a minimum, the reporting of line-item pricing contemplated by GSA under the Proposed Rule is protected from disclosure by FOIA Exemption 4 and prohibited from disclosure by the Trade Secrets Act.

The Proposed Rule does not state how GSA will protect the transactional data it receives from contractors from public disclosure. In addition, based on comments made by GSA personnel at the Public Meeting, it appears that GSA has not fully considered the confidential and proprietary nature of the data that it seeks to collect under the Proposed Rule. The type of data required by the Proposed Rule frequently is provided by contractors to the government with a legend identifying the confidential and proprietary nature of the data. GSA should consider how contractors can include such a legend when reporting confidential and proprietary data through an electronic transactional-data reporting system. GSA also should explain how it intends to ensure that this confidential and proprietary line item pricing is protected from disclosure outside of the government. Finally, the proposed rule should provide remedies for contractors in the event of improper disclosure of this protected data by GSA.

### **III. Conclusion**

As discussed in my statement, and as is evident from reading the comments submitted on the Transactional Data Rule, the Proposed Rule, as drafted, raises significant concerns for all types of parties involved in GSA contracting. GSA should refrain from issuing a final rule unless and until it is able to address the concerns raised in the various comments submitted. In addition, GSA should further analyze the actual cost of compliance to contractors, as well as the additional costs that will be incurred by GSA to manage the tremendous amount of data that it would receive, and compare that to the benefits that GSA believes it actually will receive from the data collected under the Proposed Rule. As proposed, it appears that the costs of the Proposed Rule will far outweigh any perceived benefit that GSA will receive.

Mr. Chairman, I again thank you for inviting me to speak to the Committee today and I am happy to answer any additional questions.

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<sup>25</sup> *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1140 (D.C. Cir. 1987).

## Exhibit A

Subject: RESPONSE REQUIRED WITHIN [XX] DAYS – Addressing Price Variability under the Federal Supply Schedules Program

The Federal Acquisition Service (FAS) is committed to providing a Federal Supply Schedules (FSS) program that continues to deliver to our customers a best-in-class contract solution for commercial items that is adaptable and competitive in the Federal marketplace.

Our customers tell us they turn to the FSS program for its speed, compliance, and access to small businesses. They also tell us that they want a more competitive pool of contractors at the contract level to improve competition at the task order level.

An analysis of the FSS program has revealed wide pricing disparities across identical items. This has resulted in customer confusion and decreased confidence in the ability of the FSS program to provide best-value solutions. In response to these customer concerns and changing market conditions, FAS will be working with our FSS suppliers on an initiative to review the wide range of prices for identical products that are offered to our customers.

This competitive pricing initiative is aimed at identifying and addressing price variability across the FSS program. This will be accomplished with the help of a pricing tool that has the ability to perform in-depth horizontal pricing analyses of the more than 45 million awarded items on GSA Advantage! and eMall. Horizontal pricing analysis simply means that offered prices will be compared to other awarded FSS prices for the exact same item. FAS recognizes that both price and non-price factors (such as contract terms, warranties, etc.) play an important role in the determination of competitive pricing. The horizontal pricing tool is a market research resource that aids in the identification of potentially uncompetitive pricing. The tool “flags” supplies in cases where an item has an awarded price that greatly exceeds prices awarded for identical items. This flag is cause for a further review, wherein the contracting officer seeks additional information from the contractor in order to determine the rationale for the higher price.

A recent pilot program making use of the pricing tool and analysis demonstrated that some suppliers provided with competitive pricing intelligence were able to make price adjustments that increased their Federal revenue.

FAS needs your help to further improve and expand the FSS program. By addressing price variability, the program will better meet our customers' expectations and help you be more competitive in the Federal marketplace.

You are receiving this letter because we have identified supplies on the referenced contract with prices that are much higher than other FSS partners for the same item. We recognize that pricing is but one component of best value, and would like to work with you to ensure that FSS pricing is competitive.

Please review the identified items and data in the attached spreadsheet and consider what the pricing intelligence reveals about your competitiveness in the marketplace. We are undertaking this effort in partnership with our suppliers in order to help the FSS program remain the go-to solution for our Government customers and to help you grow your business through increased sales and revenue.

If you feel there is additional information that supports the competitiveness of the currently awarded price, you may submit this information for consideration under the "Comments/Justification" column. Alternatively, you may propose a reduced price under the "Revised Schedule Price" column. Responses should only be entered under these two columns - do not alter the remainder of the spreadsheet. Please notify your Schedule contracting officer if any identified items are included under established Blanket Purchase Agreements (BPAs) that would be affected by pricing changes.

I would appreciate a response to this request by [date] and am happy to discuss and work through this process with you.

Thank you, in advance, for your cooperation, as we partner to make the FSS program the obvious first-choice solution for Government buyers. We are happy to answer any questions you may have regarding this request – please contact [name] at [contact information] for further assistance.