COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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May 14, 2015

U.S. General Services Administration
Regulatory Secretariat Division (MVCB)
1800 F Street, NW, 2nd Floor
ATTN: Hada Flowers
Washington, DC 20405-0001

Re: GSAR Case 2013-G504; Transactional Data Reporting

Dear Ms. Flowers:

On behalf of the Council of Defense and Space Industry Associations (CODSIA)[1], we appreciate the opportunity to submit comments on the GSAR proposed rule entitled "Transactional Data Reporting" that was published in the *Federal Register* on March 4, 2015.[2] The rule proposes that a new Transactional Data Reporting (TDR) requirement clause be included in select GSA contracts in exchange for changes to the basis of award monitoring requirements in the current Price Reductions Clause (PRC).

We support efforts to remove the commercial sales monitoring requirements reflected in the PRC. Industry has long opposed the PRC. The commercial sales monitoring requirements imposed by the PRC on schedule holders are extremely burdensome from a cost and administration perspective, and very challenging from a compliance perspective. In order to comply with the PRC, many contractors are driven to spend significant sums on infrastructure and training for purposes of monitoring sales to "basis of award" commercial customers on a real time basis. The difficulty of this task has grown exponentially over the years as the schedules program has moved away from commodities to solutions that are sold subject to a wide range of variables. The monitoring requirements are especially challenging for contractors trying to oversee nationwide sales forces that are competing aggressively for commercial business. In fact, the PRC places GSA schedule holders at a distinct disadvantage vis-à-vis their competitors who often do not hold schedule contracts. This is a tough pill to swallow, especially for schedule holders who rely significantly on commercial market sales.

In contrast to the burdens imposed by the PRC, and as demonstrated in the notice of proposed rulemaking itself, the PRC has proven to be an ineffective pricing mechanism for GSA. The GSA's own statistics demonstrate that the PRC's pricing impact is largely to discourage schedule holders from selling to "basis of award" commercial customers below certain pricing thresholds, thereby avoiding

[1] CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues at the suggestion of the Department of Defense. CODSIA consists of six association – the Aerospace Industries Association, the American Council of Engineering Companies, Information Technology Alliance for the Public Sector, the National Defense Industrial Association, the Professional Services Council and the Chamber of Commerce of the United States. CODSIA's member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.
[2] 80 Fed. Reg. 11619, et. seq., March 4, 2015, available at http://www.gpo.gov/fdsys/pkg/FR-2015-03-04/pdf/2015-04349.pdf

triggering the price reduction requirements.[3] The GSA Office of Inspector General's (GSA OIG) reports, moreover, reflect that the GSA OIG consistently issues audit findings that involve "ineffective" PRCs. Although the PRC offers very little in terms of benefit to the government, it is discouraging commercial companies from holding schedule contracts, while imposing substantial infrastructure and administration costs that are passed to government customers for those that do hold schedule contracts.

Accordingly, we are pleased that the General Services Administration (GSA) Office of Acquisition Policy (OAP) has undertaken a path towards a partial revision of the PRC (GSAR 552.238-75) from GSA Federal Supply Schedule (FSS) contracts. Elimination of the PRC would be consistent with the 2010 recommendations of The Multiple Award Schedules Advisory Panel, which stated that the elimination of, or significant change to, the PRC clause was the most important change needed to increase effective competition and streamline the acquisition process to obtain and determine a fair and reasonable price.[4] Subsequently, the MAS Panel recommended "The GSA Administrator develop a solution that captures pricing at the order level and makes it available to the contracting officers at both the schedule and order level to conduct market research, determine fair and reasonable pricing at the contract level, and competition at the order level." [5]

CODSIA does have, however, very serious concerns regarding the remainder of GSA's proposal. We recognize that, among other things, the proposed rule responds to the new vision for federal purchasing set forth in the Office of Federal Procurement Policy's December 4, 2014 memo *Transforming the Marketplace: Simplifying Federal Procurement to Improve Performance, Drive Innovation, and Increase Savings.* [6] We are concerned about several elements of the proposed rule that would seem to ignore the tenets espoused in that memo and offer our comments and recommendations below.

The government already possesses the data it intends to require from contractors. The justification for the proposed rule, both in the *Federal Register* and at the public meeting, focuses on GSA's need for transactional data as a means to obtain fair and reasonable prices. There is little doubt that an efficient federal contracting process could benefit from better access to market pricing information. One of the most troubling aspects of the proposed rule is that the burden for obtaining that information under this rule falls exclusively and inappropriately, once again, on industry.

The Federal government already possesses the transactional data that it intends to require from contractors. Under the proposed rule, each contractor would have to report on "transactional data elements such as unit measures, quantity of item sold, universal product code, if applicable, price paid per unit, and total price" for goods sold to the Federal government through various government contract vehicles. Considering that Federal agencies are executing purchases under these GSA contracts and actually making payments to vendors, they already possess much, if not all of, the relevant transactional data, as that term is defined in the rule. With minimal administrative or cost burden on the government, these agencies could provide the desired information to GSA directly,

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[3] 80 Federal Register at 11623; GSA states that only 3% of reported price reductions over a 1 year period involved the monitoring requirement.

[4] MAS Panel Final Report, February 2010;
http://www.gsa.gov/graphics/staffoffices/MAS_Panel_Final_Report_Signatures.pdf

[5] Recommendation 10; page 15; MAS Panel Final Report;
http://www.gsa.gov/graphics/staffoffices/MAS_Panel_Final_Report_Signatures.pdf

[6] https://www.whitehouse.gov/sites/default/files/omb/procurement/memo/simplifying-federal-procurement-to-improve-performance-drive-innovation-increase-savings.pdf

without further industry involvement in the process and without the added administrative burden of a TDR or PRC clause.

In anticipation of industry concerns on this point, government officials at GSA's public meeting stated that "Agencies do not store and collect this data in a manner that can be shared readily with GSA." In fact, commercial companies may not, as a matter of practice, readily keep such information for commercial clients, and, for those contractors that may collect similar types of transactional data for their own competitive and market intelligence purposes, their reporting systems may not be compatible with GSA's planned repository. Thus, the identification and aggregation of such information may come at a cost to GSA just as it would come at a cost to a commercial customer. This is also fundamentally true for most of the GSA Schedules holders that would be impacted by the rule. For those contractors that do collect similar types of transactional data for their own competitive and market intelligence purposes, their reporting systems may not be compatible with GSA's planned repository.

Still, GSA has identified and acknowledges that, as part of its market analysis responsibilities, it must possess its own tools to gather the information its needs. It notes in the *Federal Register* that it:

"Intends to *update* its systems in order to collect and analyze transactional data. Data submission will be enabled through multiple electronic interfaces. . . GSA also plans to implement an API [application programming interface] for buyers to benefit from using transactional data."[7][Emphasis added]

If GSA already has the ability to update an electronic portal for contractors to submit information or is planning in the near term to create such a capability with the intention for agency buyers to have access to that information, it is not clear why that effort could not be directed toward creating a portal for agencies to input their own transactional data to the same portal.

Even as a proposed rule purporting to exchange TDR for relief from the PRC, the rulemaking exposes a disconnect with other articulated Administration objectives. On April 21, 2015, Acting OMB Deputy Director Aviva Aron-Dine wrote an OMB blog post titled "*Learning More from the Data the Federal Government Already Collects*."[8] As the title suggests, 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 Federal Government 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. . . The President's 2016 Budget includes a package of proposals that would begin to address these challenges and help make additional administrative data from Federal agencies and programs legally and practically available for policy development, program evaluation, performance measurement, and accountability and transparency purposes.

The analogy presented by GSA personnel at the public meeting held on April 17th that compared the transactional data reporting rule to that of an internet based car buying service is fundamentally flawed

[7] 80 Federal Register 11624
[8] https://www.whitehouse.gov/blog/2015/04/21/learning-more-data-federal-government-already-collects

because it reflects a business model and transaction scheme different from that established under the schedules pursuant to procurement law. In the case of the internet-based service, providers of that data do so voluntarily in order to spur more business to their site and not as a condition of an underlying transaction, and certainly not under the terms, conditions, and regulatory schema of the schedules program. While acknowledging the importance of seeking out relevant historic transactional data as a key element of the acquisition process, CODSIA 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.

The burden reduction appears overstated. The proposed rule states that "GSA believes 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…"

Yet, GSA estimates that contractors will be subject to only a one-time burden of 6 hours for implementing the reporting requirement and only a monthly burden of 31 minutes thereafter for submitting data. We believe that these estimates are grossly underestimated. The estimates do not account for costly modifications to information systems that will be required to accurately and completely capture the data elements required by the rule (previously noted as costing in the millions of dollars), nor do they 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. Industry is especially concerned that inaccuracies in data reports will be yet another platform for turning innocent mistakes into allegations of fraud under the civil False Claims Act. In light of the risks and liabilities that could result from erroneous submissions, companies will invest heavily in time and manpower to ensure accurate reporting, making GSA's assumption that contractors will spend only 6 hours to establish and only 31 minutes per month to maintain these reports irrational.

GSA's own Office of Inspector General (OIG) challenged GSA's conclusion regarding burden reduction. Speaking at the public meeting, the GSA Office of Inspector General's Office of Audits stated that GSA's "contractor burden estimates are understated. We defer to industry for a more accurate burden calculation." We agree with the OIG's assessments; the burdens are understated and should rely on industry estimates. A large contractor would have a significant number of contracts and transactions to review and provide data for, while a small contracting concern might not have the personnel or resources to automate or establish a reporting tool and would have to retain a vendor to meet that need.

Also, GSA's estimates do not account for the proposed rule's anticipation of more frequent Commercial Sales Practices (CSP) submissions. As evidenced by recent GSA OIG findings and litigation, the government takes a very strict—in our review unreasonably strict—interpretation of what constitutes a current, accurate, and complete CSP disclosure. Government auditors often apply the clause in oversight activities with a heavy hand and point to transactional data and/or informal practices utilized in a single part of an organization or program as a basis for claiming contractor liability. The government's strict interpretation of the CSP, in turn, is driving contractors to spend substantial resources on the CSP submission process. Depending on the size and complexity of the business, a contractor's cost of preparing a single CSP could cost in the hundreds of thousands of dollars.

In our view, while the proposed burden reduction from elimination of the PRC's monitoring requirements would be substantial, those substantial reductions would be offset and in some cases

more than offset by the burdens imposed by the proposed transactional data reporting requirements and the expected increase in CSP submissions.

The reporting burden must be reimbursed. The rule and new clause (552.216-75) are unclear about the mechanism for contractor accounting for commercial price increases or added costs due to the increased GSA reporting burden. Whatever the government chooses to do to implement TDR, the costs it imposes on contractors should be fully recoverable by contractors. This reporting requirement was not imposed at the time the contracts were awarded, and thus, represents a significant change for contractors.

The government should not shift the burden onto contractors. According to the proposed rule, "the Federal Acquisition Regulation (FAR) has long emphasized the *need for contracting officers* to conduct price analysis as part of their responsibility to establish that offered prices are fair and reasonable" (emphasis added). "GSA proposes," however," to address this [requirement] through the use of a transaction data reporting clause. Under the clause *contractors would be required* to report historical information…" [Emphasis added]. Thus, GSA proposes, through this rule, to shift its responsibility for establishing price reasonableness from contracting officers to contractors, and thereby, add administrative burden and cost to the process. Shifting the burden, especially without allowing for reimbursement or accounting for such costs, eliminates the government's incentive to improve the system overall and to enhance the market knowledge and expertise of its contracting personnel, which they need to have to fulfill their statutory duty. Furthermore, shifting the burden from the government to contractors undermines the goal of the Paperwork Reduction Act. As mentioned above, if the TDR is a mechanism to build institutional market intelligence capability within GSA and affiliated agencies that use their contract vehicles, GSA, in concert with OFPP and other agencies, should plan out a strategy to build that capability on their own without regard to the merits of the PRC, which we have recommended above should be eliminated or phased out as recommended in the MAS panel's final report.

The government should use automated, not manual, processes. According to the proposed rule, "the current lack of transparency on prices paid by government customers has led to significant price variation, sometimes 300 percent or more, for identical purchases by federal agencies from the same commercial vendor as well as the unnecessary duplication of contract vehicles." This purported "lack of transparency" describes the government's insight into *its own transactional data*. Rather than propose a rule or process whereby the government will gain insight into its own transactional data in an automated fashion, the government instead has proposed to require industry to manually enter that data into a new system. This proposal thus seeks to delay the inevitable and increase costs in the process. The sooner that government 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.

Current levels of competition are sufficient to reduce prices. According to the proposed rule, "GSA found that only about 3 percent of the total price reductions received under the [PRC] came as a result of commercial pricelist adjustments and market rate changes, with the balance for other reasons," in particular, competition. For the sake of argument, if the TDR can contribute to improved competition, then GSA needs to understand fully whether any benefit associated with that improvement is vitiated by the administrative and cost burden arising from the implementation of the TDR and impact on market participation. Right now, that data does not exist, and, as noted above, the GSA IG stated that GSA's estimate is understated. Further, as the MAS Panel found, if the vast majority of price reductions already occur as a result of competition, then the current competitive environment at the task order

level should be sufficient. FAR 15.404-1(b)(1) states, "Price analysis may include evaluating data other than certified cost or pricing data obtained from the offeror or contractor *when there is no other means for determining a fair and reasonable price*" [emphasis added]. If 97 percent of current price reductions result from task order competition, not from the PRC, other means do exist to determine a fair and reasonable price: effective task order competition. The implication for the PRC is the same as it is for the rule: it should be eliminated as an artifact of an acquisition environment at GSA that fosters strict compliance as the only way that government could achieve the levels of price competition that we have observed for the past decade at the task order level.

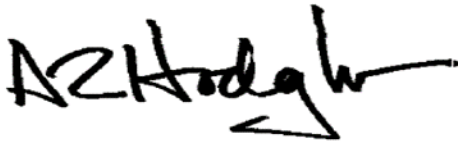
Horizontal price comparison poses risks. The horizontal price comparison proposed by GSA may not lead to "apples-to-apples" comparisons of products and services. Complex service offerings are priced according to very specific circumstances related to risk, security requirements, geographic area of performance, time, exigency, and the qualifications of the individuals performing the work. Further, the wide product quality variation in a category like "laptop computers" suggests that such comparisons will be equally difficult for customized or complex products. Horizontal price comparisons may not take these specific circumstances into account when looking at prices paid by different government customers. Grouping products and services by categories will likely lead to inappropriate price comparisons in some cases.

The government must protect proprietary information. Certain pricing data, such as terms and conditions or discounts offered to a specific government customer under a Blanket Purchase Agreement (BPA) and other unique, transaction-specific conditions, are sensitive and would affect competition. The proposed rule is silent as to restrictions on GSA's disclosure of sensitive pricing information to competitors during price negotiations. CODSIA opposes the exposure of companies' proprietary information to other offerors by the government for negotiation purposes. GSA should add to the proposed rule specific restrictions on the disclosure of sensitive pricing information and explain the safeguards it will put in place to prevent accidental exposure of such information.

We welcome the opportunity to further discuss these concerns with you but we are opposed to the rule in its current form. If you have any questions or need additional information, please contact Bettie McCarthy, CODSIA's Administrative Officer at codsia@pscouncil.com, , or Trey Hodgkins at ITAPS, the case manager for this proposed rule, at thodgkins@itic.org.

Respectfully submitted,

R. Bruce Josten
Executive Vice President, Government Affairs
Chamber of Commerce of the U.S.



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