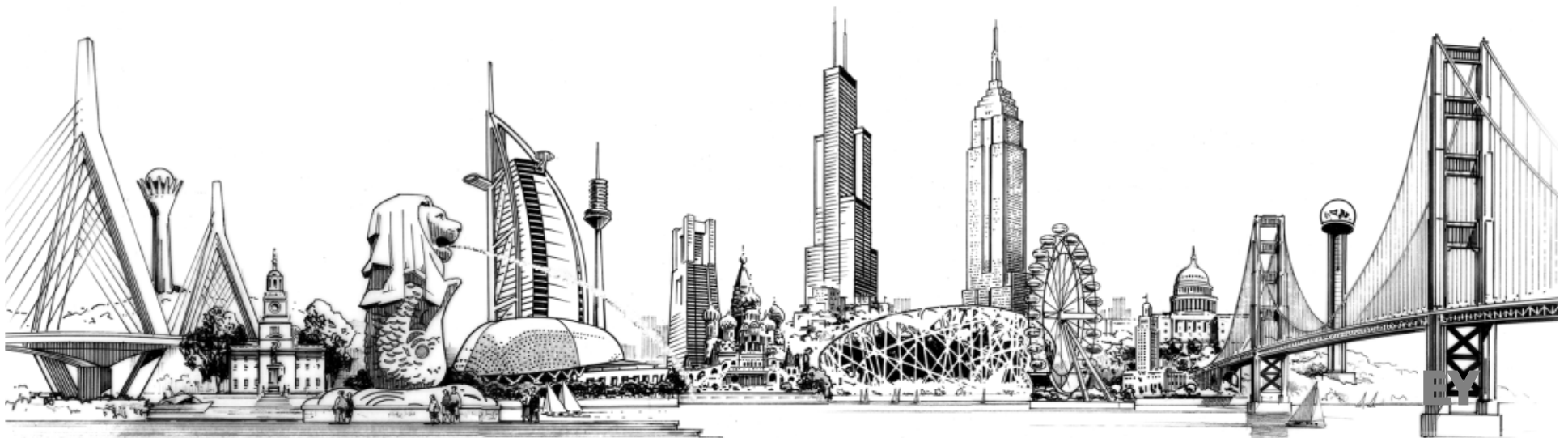


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UNDERSTANDING THE GSA: RECENT DEVELOPMENTS AND COMPLIANCE TIPS FOR TECHNOLOGY CONTRACTING

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AGENDA

- **PROPOSED TRANSACTIONAL DATA RULE**
- **UPDATE ON MANDATORY DISCLOSURE RULE**
- **VMWARE CASE**
- **Q&A**

Proposed Transactional Data Rule

- Why the proposed change?
- Requirements
- Application
- Software, tools and training
- Implementation and administration
- Implications for pricing and negotiations

Why the proposed change?

GSA's Perspective

- Recognizes that the PRC is outdated and unworkable in today's environment
- Alleges it is trying to reduce the burden of the PRC
- Believes the change will enhance visibility into federal end user pricing and promote better future pricing

Federal Marketplace Changes

- Changes over time have lessened the impact of the "identified" (or "tracking") customer mechanism contained in the PRC

Office of Federal Procurement Policy's (OFPP) Purchasing Vision

- Relies on horizontal as well as vertical purchasing through "category management"

Common Acquisition Platform (CAP)

- Manage pricing of commonly purchased goods and services throughout the Government
- To do this, government needs data pertaining to federal end user purchases

What does the proposed rule require?

- Contractors provide GSA with electronic line-item transactional data monthly
 - All direct federal sales made under contracts that include the requirements
 - FSS and other GSA IDIQ contracts
- Contractors report prices paid for all products and services delivered to the government during contract performance
 - Includes both direct orders and those placed under BPAs
- Required data fields include (among others):

- Item description
- Contractor part number
- Manufacturer name and part number
- Universal product code (if applicable)

- Contract number
- Order number
- Unit measure
- Quantity of item sold
- Prices paid per unit
- Total price

Multiple information sources may be required to be linked in order to compile the required data

Who does the proposed rule apply to?

- Immediately applied to GSA's government-wide non-FSS vehicles (GWACs/IDIQs), where transactional data is not already collected through other methods
- Commercial-off-the-shelf and related commercial products
- Commoditized services that experience high volume of repetitive purchasing under identical or substantially similar terms and conditions

Proposed Initial Schedules Include:

Hardware Superstore
(51V)

Professional
Audio/Video
Telemetry/Tracking,
Recording/Reproducing
and Signal Data
solutions (58 I)

Furnishings and Floor
Coverings (72)

Food Service,
Hospitality, Cleaning
Equipment and
Supplies, Chemicals
and Services (73)

Office
Products/Supplies and
Services and New
Products/Technology
(75)

Effective?

Yes

No

Requirements expanded to
additional FSS contracts including
GWACs and IDIQ contracts

Contracts in pilot program revert
to their prior pricing model,
including use of the PRC

Software, tools and training – how will GSA collect the data?

- Data will be reported to GSA “through a user-friendly, online reporting system.”
- Data submission through multiple electronic interfaces (e.g., secure data entry, electronic file submission, or an application programming interface (API))
- Vendor Support Center (<https://vsc.gsa.gov>) will provide instructions and offer training to vendors on how to report transactional data for FSS and non-FSS orders
- Update to GSA’s relevant courseware on the Federal Acquisition Institute (FAI) and Defense Acquisition University (DAU) portals

Implementation and administration

According to the agency, the burden on contractors currently imposed by the PRC's tracking and reporting requirements could be reduced by 85 percent—\$51 million and more than 757,000 hours annually—under the proposed rule.

A survey of Coalition for Government Procurement (CGP) members indicates that “the cost burden of implementing transactional data reporting is 30 times that in the proposed rule”.

Source: Bloomberg BNA Federal Contracts Report

Implementation and administration

Initial set-up of IT systems

GSA Estimate	Industry Comments
6 hours*	<ul style="list-style-type: none">• CGP estimates an average of 1,192 hours for large and medium size contractors and an average of 232 hours for small businesses• Assumes that contractors' current IT systems already capture all required data fields• Time alone to search for, extract, review and test the data well exceeds six hours• Does not take into account labor category mapping or product mapping to SKUs, establishing internal written approval protocols or training company employees• Inclusion of maintenance activities in the estimated burden of set-up is counterintuitive as maintenance implies a repeated event

*Estimate includes "training, compliance systems, negotiations, and audit preparation the new clause may require."

Additional administration considerations

Change in CSP disclosure requirements!!!

- Contractor data review and reporting burdens for CSPs may increase due to the following:
 - GSA regulations currently require CSPs for major modifications to add products or services, or for five-year contract extensions, but not at other times during contract performance
 - GSA stated that it intends to request CSP disclosures “where commercial benchmarks or other available data on commercial pricing is insufficient to establish price reasonableness.”

Administrative aspects not addressed by proposed rule

- How bundling or differing terms and conditions should be reported or considered
- How government buyers who will have access to the data will ensure that they are protected from improper use or disclosure

Other considerations

- Proposed rule does not allow sufficient time for transactional data reporting
- PRC history may indicate that use of transactional data may not result in desired discounts

Implementation and administration

Monthly reporting

GSA Estimate	Industry Comments
.52 of an hour, or 31 minutes	<ul style="list-style-type: none">• Based on survey results, CGP estimates an average of 68 hours per month for large– and medium-sized firms and 38 hours per month for small businesses• Doesn't take into account the time required for internal review and validation of data prior to submission• Contractors may need to engage multiple internal and external resources including functions such as Legal, CIO, Internal Audit and Compliance, outside counsel for review• Estimated burdens do not account for time required to review, test and implement potential future unilateral reporting changes GSA may make

Implications to pricing and negotiations

- GSA Advantage! and market competition have already increased price pressure at the task order / BPA level
 - With the proposed rule, task orders/BPAs with common labor categories will be low hanging fruit for further analysis and price pressure
- Contracting officers may request price reductions at any time during the contract period, perpetually opening up the preaward process
- Data do not reflect terms and conditions of sale which have impact on price paid by federal end users

Mandatory Disclosure Rule (MDR)

- Governing regulations
- GSA MDR program statistics/typical issues
- Procedures
- Tips

MDR – Governing Regulations

- Suspension/Debarment Rule
 - FAR Subpart 9.4
- FAR Ethics/Disclosure Clause
 - FAR 52.203-13(b), (c)(2)(F)

MDR – FAR 9.406-2(b)(1)(vi)

- Knowing failure by a principal, until 3 years after final payment on any Government contract, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or subcontract, credible evidence of –
 - Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;
 - Violation of the Civil False Claims Act; or
 - Significant overpayment(s) on the contract, other than overpayments resulting from contract finance payments as defined in FAR 32.001
 - Includes PRC and defective pricing issues

MDR – FAR 52.203-13(b)(3)(i)

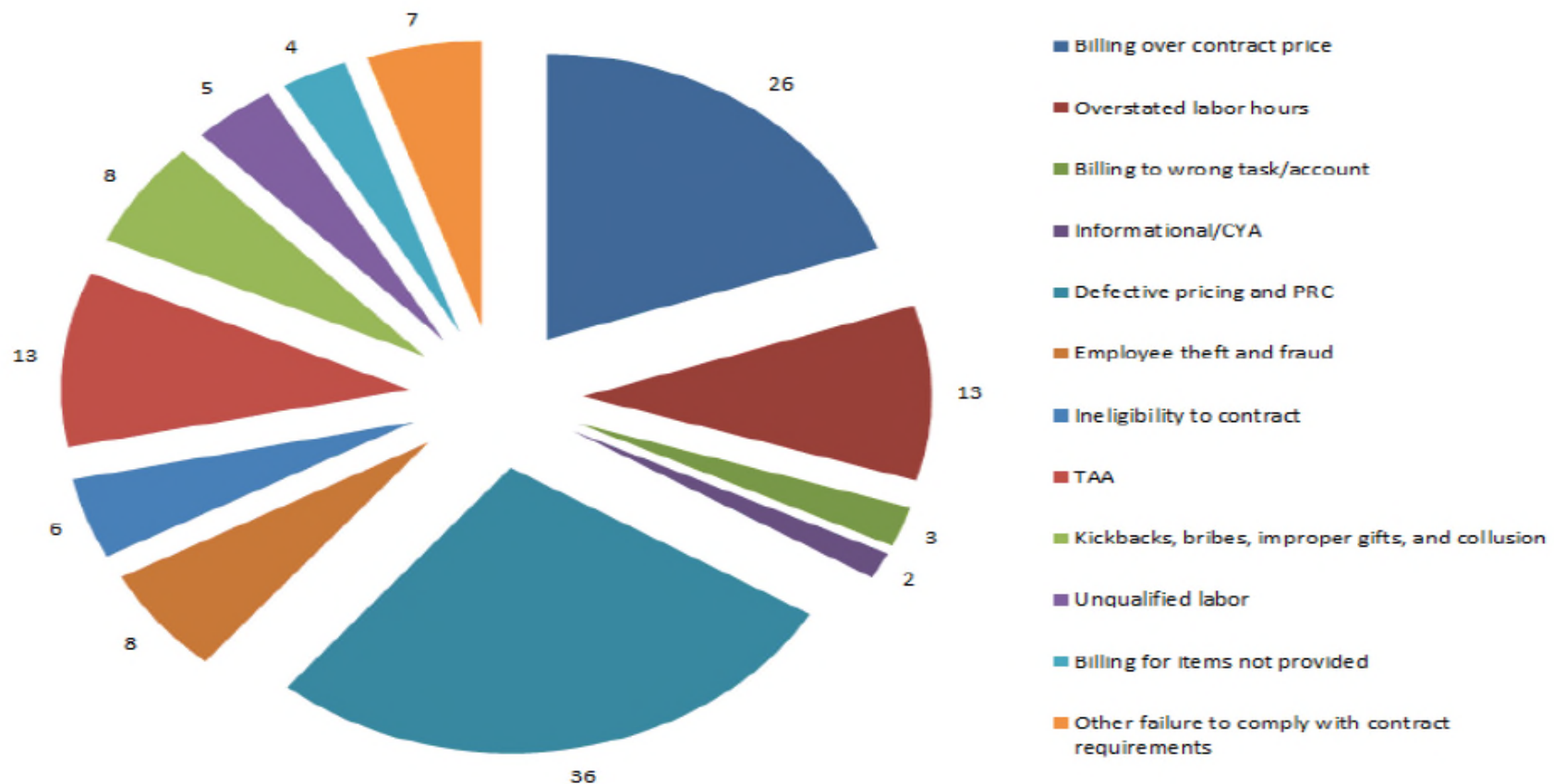
- (3)(i) The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed –
 - (A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or
 - (B) A violation of the civil False Claims Act (31 U.S.C. 3729-3733)

MDR – GSA IG MDR Program Statistics

- As of June 1, 2015:
 - Received 148 disclosures of all types
 - 12 referred by DOD
 - 18 referred by contracting officers
 - 109 closed
 - 39 open
 - Total recoveries: Roughly \$128M
 - Typical disclosure issues:
 - Noncompliance with pricing obligations (PRC, CSPs)
 - Trade Agreements Act
 - Small business misrepresentations
 - Failure to comply with EEO obligations
 - ***Our experience: disclosure eliminates/minimizes suspension/debarment, False Claims Act risk***

MDR – GSA IG MDR Program Statistics (through March 2014)

Contractor Disclosures by Subject



MDR – Procedures

- Submit disclosure in writing to agency (IG) – required by clause; prudent under suspension/debarment rule
 - Inside/outside counsel or internal ethics operation
 - Caveats
- DOD process
 - Copies to DOD stakeholders, including SDO
 - DOD IG assigns lead reviewer (e.g., CID, NCIS)
 - DOJ gets a copy of all disclosures
- GSA
 - GSA IG Office of Investigations section handles all disclosures
 - Assigned GSA IG counsel, auditors to review quantification issues
 - DOJ gets a copy of all disclosures

MDR – Procedures

- GSA IG – meeting to review disclosure is usual practice
- All agencies – review of any quantification
- All agencies – referral?
- SDO consideration?
- Payment (if monetary impact) – almost always contractual
- SDO impact?

MDR – Tips

- Internal procedure to review/investigate for potential MD
 - Review should be covered by privilege/work product
 - Accounting review: inside or outside
- Submission by inside/outside counsel or internal ethics organization
 - Caveats
- One or two disclosures? Timing an issue
- MDRs should be carefully considered: properly done, they minimize risk

VMWare Case

- Background
- Complaint allegations
- Settlement provisions
- Lessons learned

VMWare Case – Background

- Technology companies may sell directly to GSA, indirectly through a reseller or a two-tier distribution model, or both direct and indirect
- Common view: Indirect model is a safe harbor for manufacturer from potential GSA contract pricing risks
 - “Defective pricing” – failure to provide accurate disclosures during negotiations
 - “Price reductions” – failure to improve pricing during GSA contract performance when pricing is improved for “tracking” or “identified” customer
 - Implemented by Price Reductions Clause (PRC)

VMWare Case – Background

- Technology manufacturer may have obligation to disclose commercial sales practices to GSA even when contract is held by reseller
 - GSAM 515.408(b): reseller “should” provide manufacturer commercial sales practices information if:
 - Sales of manufacturer’s products are expected to exceed \$500K under reseller’s GSA contract
 - Reseller lacks “significant” sales of those products to general public
 - “Significant” is undefined in the regulations
 - GSA not consistent, but often insists on receiving such data from manufacturer

VMWare Case – Background

- Commercial sales practices information -- broadly construed and may include:
 - Discounts: a reduction to list price – e.g., rebates, quantity discounts, credits, other terms or conditions which reduce the amount of money a customer ultimately pays
 - Concessions: condition which either reduces overall cost or encourages customer to make a purchase – e.g., extended warranties/price guaranties

VMWare Case – Complaint Allegations

- Filed by former employee/whistleblower
- VMware and Carahsoft violated the False Claims Act (FCA) by, among other things:
 - Submitting/causing false claims for payment by government because prices were inflated by nondisclosures
 - Retaliation for pursuing FCA action

VMWare Case – Complaint Allegations

- VMware CSP discount nondisclosures:
 - Nonstandard enterprise license agreements
 - Special pricing forms
- Consequently GSA paid higher price
- Other issues
 - Blanket purchase agreement (BPA) prices higher as a result of nondisclosure
 - BPA also contained separate MFC pricing provision
 - “[A]t least as low as the prices...under any other contract...under like terms and conditions.”
 - Intentionally overrepresenting number of licenses that government needs (consolidation ratios)
 - Carahsoft arrangement was “nothing but a sham to attempt to shield VMware from liability for its knowing violations of pricing rules”
 - Allegation doesn’t hold water: reseller sales absolutely permitted assuming proper disclosure, compliance (DOJ made same argument in Oracle case)
 - Creating government-only SKUs sold at a higher price when product was the same as commercial

VMWare Case – Settlement

- June 2015 settlement of false claims allegations among Carahsoft, VMWare, United States
- Carahsoft and VMWare to pay an aggregate amount of \$75.5M to United States
- Whistleblower reserves retaliation claims and California FCA claims
 - ***Future issues: federal FCA claims on behalf of state/local customers; also claims under state FCA acts***
- Settlement agreement indicates principal areas of government concern (allegations):
 - VMWare: False CSP forms
 - Carahsoft: Failure to comply with PRC
 - Both parties: False statements relating to use of unique government part numbers (SKUs)

VMWare Case – Lessons Learned

- CSPs submitted should be based on actual transactions that occurred during the CSP period identified on the form
- Identify any concessions a customer may receive based on sales made during the CSP period and fully disclose in the CSPs
- Include a narrative that includes exculpatory language
- Have policies and procedures in place to explain why non-standard discounts are granted to commercial customers (and if true, why don't apply to GSA customers)
- Do not represent that the CSPs have not changed since last submitted unless the company has done its due diligence to ensure the accuracy of that statement
- Manufacturers should qualify any CSPs provided to state that they are current, accurate and complete for the period identified and the manufacturer makes no representations for sales made outside that period

Questions?

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**THANK
YOU**

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