I'M NOT DEAD YET

(or A Brief Look At The Future Of The Price Reductions Clause In Light Of GSA's Proposed Transactional Data Reporting Rule)

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Not enough Government Contracts blogs incorporate movie trivia. So here's my contribution to fill this obvious gap in the procurement blogosphere: Is the following quotation (a) from a famous *Monty Python* skit or (b) from a conversation between two Government auditors discussing GSA's recently-proposed effort to do away with (at least in part) the Price Reductions Clause?

"It's not dead!"

"'Ere, he says it's not dead."

"Yes it is."

"It's not."

"It isn't."

"Well, it will be soon, it's very ill."

"It's getting better."

"No it's not, it'll be stone dead in a moment."

"Well, I can't take it like that. It's against regulations . . . ."

Before giving you the answer, let me offer a bit of context for those who aren't regular readers of the Federal Register – or regular watchers of *Monty Python* comedies.

As you likely know, since the 1980s, most GSA Schedule contracts have incorporated a "Price Reductions Clause." (GSAR 552-238-75) The Clause, long a favorite of Inspectors General everywhere, was developed to ensure the Government receives fair and reasonable pricing throughout the term of the Schedule contract. The Clause quickly became the bane of every Schedule vendor's existence, causing untold heartburn among compliance officers, CFOs, sales managers, contracts administrators, and, of course, lawyers. It is a clause that is extremely confusing, burdensome, expensive, and, frankly, nearly impossible to comply with if read literally. Yet, try as industry might, GSA and its love affair with the Price Reductions Clause continued unabated.

On March 4, 2015, however, GSA signaled that love affair may be on the rocks with the announcement of a pilot program to do away with the Clause in limited circumstances. (GSAR Case 2013-G504; 80 Fed. Reg. 11,619 (Mar. 4, 2015)) Well, not exactly to do away with it; more like put it aside while the Agency flirts with alternative approaches to Schedule pricing. Dost my eyes deceive me, you say? No they dost not. According to GSA, the time has come to *consider* bidding farewell to the Price Reductions Clause *for certain types* of commodities, and replacing it with a new "transactional data" reporting obligation.

GSA described the forthcoming transition as a proposal

> to amend the [GSAR] to include clauses that would require vendors to report transactional data from

> orders and prices paid by ordering activities … The new clause will be paired with changes to the basis of award monitoring requirement of the existing price reductions clause … (80 Fed. Reg. 11619)

The new rule would apply to GSA-awarded Government-wide non-Schedule contract holders immediately upon issuance, but would be phased in for Schedule contractors "beginning with a pilot for select products and commoditized services." The Schedule pilot would encompass select "commercial products and commoditized services that experience high volume of repetitive purchasing under identical or substantially similar terms and conditions." (80 Fed. Reg. 11624) The proposed rule would *not* apply to the VA Schedule. (The VA's love affair with the Price Reductions Clause runs even deeper than GSA's.)

The new transactional data reporting clause would require Schedule vendors (and other vendors holding GSA-issued, non-Schedule Government-wide contracts) to report on a monthly basis

> prices paid [by ordering activities] for products and services delivered during the performance of the contract, including under orders and blanket purchase agreements (BPAs) through a user-friendly, online reporting system.

According to GSA, "the report would include transactional data elements such as unit measures, quantity of item sold, universal product code, if applicable, price paid per unit, and total price." (80 Fed. Reg. 11621) While it's against my nature, I'm going to resist for now the urge to make a flippant comment about how "user-friendly" the Government's new online reporting system is likely to be.

I will not, however, resist the urge to make a flippant comment regarding GSA's calculation of the burden the new collection and reporting obligation will impose. According to GSA, the new transactional data requirement will impose upon contractors "a one-time initial set-up burden of 6 hours," and a subsequent burden of 31 minutes per month. I submit these figures are grossly under-estimated. It's as though the folks making these rules never have spent time outside the Government actually performing the tasks they impose on others . . . .

In any event, GSA intends to use the resulting data from the new "user-friendly" system to perform "horizontal pricing" analyses – that is, to compare one company's federal prices to another's, which GSA began doing a few years ago as part of its standard pricing analysis. Federal purchasers would use these data to "take advantage of prices paid information and the more rigorous order level competition it generates" to reduce the prices they pay for commodity items. In other words, or in my words at least, the new data will be used by the Government to drive prices down without regard to service, terms, conditions, or value. As industry has seen for itself over the last few years, this is precisely how GSA's "horizontal pricing" evaluation works in practice.

GSA promises the newly captured federal "prices paid" data will be "especially impactful when combined with the insight and expertise of category managers to provide agency buyers across government with market intelligence, expertise, and deep-dive analysis to improve supply chain management, pricing variances, innovation, redundancies, and unnecessary duplication of effort." The regulation does not make clear who these commercial market experts will be, what powers they will have, or how they will interact with GSA's existing contracting officers. Nor does it make clear whether the mounds of data to be turned over to the Government by vendors will be protected from disclosure under the Freedom of Information Act ("FOIA").

In exchange for the burden (and expense) of capturing and reporting all these new federal "prices paid" data (some of which, admittedly, already must be captured by vendors holding certain GSA-issued non-Schedule contracts), participants in GSA's pilot program would be exempt from the Basis of Award ("BOA") tracking requirement of the Price Reductions Clause. At first blush, this would appear to be a significant benefit. But hold onto that thought for now. I'll come back to it.

The new rule seemingly is the culmination of several long-in-coming realizations by GSA.

- **GSA Realization No. 1.** The current Price Reductions Clause is a HUGE burden on Schedule contractors. Really?! Vendors (and Government officials, in candid moments) have been saying this for years. The Government Electronics Information Technology Association, a prominent industry group, even pushed the Office of Federal Procurement Policy to drastically restructure the Clause back in the late 1990s due, in part, to its burdensome, non-commercial nature. More recently, in 2008, the ABA's Public Contract Law Section revitalized that push, informing GSA's MAS Advisory Panel the Price Reductions Clause has "created ***significant burden*** . . . for contractors and government officials alike." Despite hiding its head in the sand for years on the issue, GSA now concedes the Price Reductions Clause is a significant burden. Even GSA's FAS Commissioner Tom Sharpe described the Clause as imposing a "burdensome tracking and reporting requirement." Indeed, according to GSA's own analysis, Schedule contractors spend over 860,000 hours a year (at a cost of approximately $58.5 million) on compliance with the Price Reductions Clause, and that eliminating the PRC "could reduce the annual burden on contractors ***by more than 85 percent*** . . . ." (80 Fed. Reg. 11622)
- **GSA Realization No. 2.** The current Price Reductions Clause is CONFUSING. Another "discovery" of something vendors discovered long ago. The Price

Reductions Clause is extremely confusing, and is subject to wildly inconsistent and ever-evolving Government interpretations. Just ask any of the many Government contracts consultants and lawyers from coast to coast who spend a good part of their lives trying to help their clients understand and comply with the Clause. But GSA finally has come around. According to a recent study conducted by the GSA OIG, 84% of Schedule vendors screw up their "Commercial Sales Practices Format" submission – the disclosure that ultimately guides the selection of the BOA for Price Reductions Clause purposes. Nearly half of all Schedule vendors screw up their PRC monitoring systems. While I suspect the Government might argue these figures reflect fraud rather than confusion, I don't buy it. I've spent my professional life working with Government contractors and can say, without hesitation, those data reveal confusion with the rules, not a flouting of the rules.

- **GSA Realization No. 3.** The current Price Reductions Clause does not result in better pricing for the Government. GSA is three for three. Vendors (and many within Government) have recognized for years the market drives prices down, not the Price Reductions Clause. GSA now is on board. Indeed, the Agency recently analyzed the issue and found that "only about 3 percent of the total price reductions received under the price reductions clause were tied to the 'tracking customer' feature." (80 Fed. Reg. 11623)

These realizations, however, have not quite yet put the nail in the Price Reductions Clause coffin. As I noted above, the new approach is only a pilot program. "If the results of the pilot reveal that using transactional data is not an effective pricing model, contracts would revert back to using the tracking customer provisions of the price reductions clause." (80 Fed. Reg. 11621)

Moreover, GSA has made clear the proposed rule does <u>not</u> do away with the Commercial Sales Practices Format ("CSPF"). In fact, not only is GSA maintaining its CSPF disclosure requirements – to the delight, no doubt, of relator's counsel everywhere – but the new rule makes clear GSA will "maintain the right throughout the life of the FSS contract to ask a vendor for updates to the disclosures on its commercial sales format . . . where commercial benchmarks or other available data on commercial pricing is insufficient to establish price reasonableness." While the survival of the Schedule CSPF obligations has been underplayed by GSA's pilot program promoters, vendors should not overlook the importance of this vestige.

- First, the CSPF is as burdensome an obligation as the Price Reductions Clause.
- Second, the CSPF is as confusing an obligation as the Price Reductions Clause.
- Third, GSA's reservation of its rights to require vendors to update their CSPF disclosures at GSA's discretion maintains much of the burden and risk many had hoped would evaporate with the Price Reductions Clause.
- Fourth, if vendors must continue tracking their commercial sales, what has the elimination of the Price Reductions Clause really bought us? Indeed, one might say the introduction of the transactional data reporting obligation along with the continuation of the CSPF obligation only has increased the burden on vendors.

In other words, a celebration of the death of the Price Reductions Clause and the arrival of reason may be premature. Be that as it may, a select group of Schedule contractors are going to have the chance to experience life in a purportedly PRC-free world, and see for themselves whether the new rule is all that GSA is making it out to be.

Which brings us back to the main purpose of this blog post – the introduction of movie trivia into the procurement blogosphere. Thus, without further ado, here is the answer to my trivia question: The quotation is (with some poetic license) adapted from a wonderful little Monty Python film, as most of you probably knew. Although, I must admit I vividly can see in my mind's eye a group of GSA auditors conversing in hushed tones over their Diet Mountain Dews: *"It's not dead! Yes it is. It isn't. Well, it will be soon, it's very ill. It's getting better."*

Time will tell who's right, of course. In the meantime, if you'd like to have a say in the matter, GSA is holding a public meeting to discuss the new program on April 17, 2015.

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Jonathan is the co-managing partner of Sheppard Mullin's Washington, DC office, and has been practicing government contracts law since 1994. He is the co-author of the GSA Schedule Handbook (West Publishing), teaches on a variety of Government Contracts topics across the country, is a frequent speaker at Coalition events, and is a Monty Python fan. When not reading, writing, speaking about, or practicing Government Contracts law, he often can be found in New Orleans where he was appointed by the United States District Court for the Eastern District of Louisiana as the federal monitor over the New Orleans Police Department pursuant to a Consent Decree with the Department of Justice.

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