



**BEFORE THE
GENERAL SERVICES ADMINISTRATION**

**COMMENTS OF THE
NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.
IN RESPONSE TO GSA 'S
NOTICE OF A PUBLIC MEETING
AND REQUEST FOR COMMENTS ON PROPOSED RULE
GSAR CASE 2013-G504; DOCKET 2014-0020; SEQUENCE 1
GENERAL SERVICES ADMINISTRATION ACQUISITION REGULATION (GSAR)
TRANSACTIONAL DATA REPORTING AND CONTRACTOR ACCESS FEE**

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I. INTRODUCTION

These comments are submitted on behalf of the National Motor Freight Traffic Association, Inc., (“NMFTA”) in response to a notice of a public meeting and request for comments on a proposed rule published on March 4, 2015, and entitled “General Services Administration Acquisition Regulation (GSAR) Transactional Data Reporting, GSAR Case 2013-G504; Docket 2014-0020; Sequence 1.” With this Notice, FMCSA proposed to “require vendors to report transactional data from order and prices paid by ordering activities” that GSA does not now collect, and require all contractors who fall into this new rule to pay a new quarterly “Contractor Access Fee” (“CAF”) of an undetermined amount.

II. STATEMENT OF INTEREST

NMFTA is a nonprofit membership organization headquartered at 1001 North Fairfax Street, Suite 600, Alexandria, VA 22314. Its membership is comprised of motor carriers and transportation companies operating in interstate, intrastate and foreign commerce. NMFTA’s mission is to serve as a research and development organization providing the transportation industry with the necessary information to advance and improve their interests and welfare. NMFTA is committed to helping the industry meet transportation challenges through research, education, and publication of specifications, rules, transportation codes and the preparation and dissemination of studies, reports and analyses. NMFTA represents approximately 450 less-than-truckload (LTL) motor carriers. Numerous NMFTA members haul freight for the federal government directly or haul freight for contractors shipping freight to the federal government. Some NMFTA members are on the FSS or MAS, and other members tender rates to the Freight Management program. Although not perfectly clear, GSA’s Notice appears to suggest that some, but not all, transportation service providers may be subject to the proposed transactional data reporting requirements. The rules would have a substantial negative impact on NMFTA members who transport freight for the federal government.

III. COMMENTS OF NMFTA

A. Summary

To the extent the proposed transactional reporting requirements extend to transportation service providers for the federal government, GSA's stated purpose and goals for the new rule would reinstitute legal doctrines that were abolished by the deregulation of the trucking industry over the past 35 years. This proposal would be contrary to fundamental antitrust principles by suppressing competition and freedom to contract in the federal government's marketplace for transportation. GSA does not cite to any legal authority, and NMFTA is not aware of any legal authority, for GSA to request transactional data concerning transactions that it did not help procure or that GSA was not otherwise involved in. Finally, GSA's notice does not comply with the statutory requirements an agency must follow when it seeks to impose a fee on the public.

B. The Scope Of The Proposed Rule

Would the proposed rule apply to GSA's freight management program?

While it seems evident that the proposed rules would apply to NMFTA members who participate in the FSS or MAS, NMFTA asks GSA to clarify whether or not the proposed transactional data reporting requirements are intended to apply to rates tendered and transportation provided under GSA's freight management program. GSA confirmed in its Final Rule published in the Federal Register on April 16, 2014, that the Industrial Funding Fee regulation found at 49 C.F.R. §552.238-74, does not apply to GSA's freight management program. The proposed rule, in part, amends the same regulation.

But the proposed rule establishes an entirely new rule at §552.216-75 creating both the transactional reporting requirements and a new "Contractor Access Fee" to be imposed on contractors. The scope of transactional data being sought in this rule is less than clear. GSA's Notice makes occasional reference to the indefinite description "non-FSS contract vehicles." The Notice's Summary appears to define this term this way: "GSA's non-FSS contract

vehicles—Governmentwide Acquisition Contracts (GWACs) and Governmentwide Indefinite-Delivery, Indefinite-Quality (IDIQ) contracts.” Does this statement accurately define the entire scope of the non-FSS contract vehicles that will be subject to the new rule? This statement appears to constrain the proposal to “GSA’s...vehicles...” Are GSA TransPort Integrator and the Department of Defense’s GFM considered non-FSS contract vehicles that will be subject to this new rule?

Elsewhere, in the body of the proposed rule 552.216-75, the term “Contract sale” that is subject to the proposed rule appears to be defined to include sales from “a non-FAR contract.” GSA’s use of the term “non-FSS contract” and “non-FAR contract” are imprecise terms that do not help the public understand the scope of the proposed rule. Without an affirmative statement of the contract categories that will be subject to the proposed rule (as opposed to a negative definition, i.e. “non-“) NMFTA and the public are limited in their ability to provide GSA with meaningful comments.

Evidence that this proposal does not extend to transportation services is that the transactional data points GSA would like contractors to report are not congruent with the terms and conditions of freight transportation agreements. Therefore NMFTA asks GSA to clarify: does it intend for the proposed rule to apply to transportation service providers who submit rate tenders under GSA’s Freight Management program?

Does the proposed rule apply to contracts between federal contractors and their suppliers?

In a similar, though categorically different arrangement, many federal contractors engage with transportation service providers to perform freight transportation attendant to or in support of the completion of a federal contract. These are circumstances for which transportation is not the consideration of the federal contract. NMFTA asks GSA to clarify whether it intends for this rule to apply to transactional data related to the agreements between contractors who are subject

to the proposed rule and the transportation service providers they engage as a component of performing the contract (i.e. delivering the goods sold to the federal government to a federal government property)?

Does the proposed rule cover “commercial to commercial” transactions – those between two private parties?

The Notice makes several references to GSA’s intent to compare contract pricing to “commercial benchmarks.” But GSA does not define “commercial benchmark” or reveal what data it would rely upon as a “commercial benchmark,” or how and from whom it would obtain such data. At GSA’s public meeting on this proposal on April 17, 2015, in response to a question, Mr. Jeffrey Koses clarified the proposal to state that the proposed rule would not require transactional reporting of “commercial to commercial” transactions and that such transactions were outside of the scope of this proposal. Mr. Koses clarified that the proposal only applies to government contracts. Because the transcript of that meeting has not, at this time, been made a part of the docket for this rulemaking, NMFTA requests that GSA confirm in the publication of any final rule that this rulemaking does not require transactional data reporting of private commercial transactions and to clarify what precisely the term “commercial benchmarks” means, and that it does not imply that GSA’s proposed rule intends to require the reporting of data concerning non-government transactions.

C. GSA Has Not Demonstrated That It Cannot Get The Information From Other Agencies

Under the Paperwork Reduction Act, before requiring members of the public to submit “paperwork,” GSA must certify that the collection of information:

- (A) is necessary for the proper performance of the functions of the agency, including that the information has practical utility;
- (B) is not unnecessarily duplicative of information otherwise reasonably accessible to the agency;

44 U.S.C.A. § 3506(c)(3). The purpose of these rules is to minimize and reduce the burden of such requirements placed upon the public. At GSA's public meeting of April 17, 2015, GSA acknowledged that the transactional information that is the subject of the proposed rules is already in the possession of the federal government. NMFTA is aware that GSA routinely obtains such data through its audits of federal contracts.

But in a presentation slide at the hearing, GSA simply dismissed its ability to obtain this information by asserting: “[a]gencies do not store and collect this data in a manner that can be shared readily with GSA.” This analysis is insufficient to demonstrate that the information is not reasonably accessible to the agency. GSA has not asserted or demonstrated in the administrative record how or why that the storage or collection of such data at other agencies makes access unreasonable.

By proposing this rule, GSA has asserted or aspired to a sophisticated command of data at the highest of levels. NMFTA can only assume that given the goals of this transactional data reporting rule, GSA possesses the sophistication to amass transactional data from its sister agencies. But if GSA does not command such sophistication with data, then this fact calls into question the agency's ability to reach the goals of this rule. Several presenters at the April 17, 2015, hearing presented comments calling into question GSA's ability to use such huge volumes of data to achieve the rule's purported purpose.

GSA has made no demonstration that the storage, collection, and reporting of transactional data would be any less burdensome upon the thousands of federal contractors than it might be on the far fewer number of federal agencies who now possess the data. And NMFTA is mindful that GSA already possesses a significant amount of data itself.

With regard to the requirement for the OMB to determine that the information requested “is necessary for the proper performance of the functions of the agency, including that the information has practical utility” under 44 U.S.C.A. § 3506(c)(3)(A), NMFTA joins with the

other commentors at the April 17, 2015, hearing to express doubt that transactional data, that is unrelated to the contracts that GSA is directly involved in, is necessary for GSA to properly perform the functions of the agency. First, NMFTA does not believe it is “proper performance” for GSA to demand transactional information on contracts that it did not help arrange. Such activity is outside of GSA’s jurisdiction and statutory authority. Additionally, as NMFTA describes below, GSA’s goal to control pricing for the entire federal marketplace, beyond its own authority, would otherwise violate several anti-trust principles and would create an anticompetitive marketplace. For those reasons, while GSA argues that the goal to get good prices on appropriate goods and services for the federal government may be within its statutory mission, the rule it is creating is not the “proper” way for it to achieve that goal.

D. The transactional data requested by the proposal is proprietary business information.

GSA cannot assure contractors that it will maintain the privacy of proprietary transactional data that GSA seeks through this rule. Under the Freedom of Information Act (“FOIA”) and FOIA case law, the public has the right to request final contract prices. As for individual subcomponents of the final contract price and contract conditions, to prevent public disclosure, the burden is on the contractor to demonstrate that release of such information would cause substantial harm to the bidder’s competitive position. GSA does not have the authority to draft a rule that exempts itself from FOIA law.

If GSA could not keep its promise to maintain the confidentiality of transactional data under FOIA, it would become a one-stop shop for all of a contractor’s market information. Competitors would not only learn prices, but what other agencies might be a marketplace for their goods. Customers could learn what other customers are paying and be able to strengthen their bargaining position. And this effect on the marketplace might work both ways. Federal contractors may find themselves unfairly undercut by their competitors, and GSA may see some

contractor's prices rise to the level of a large contractor who sets the standards in the marketplace. NMFTA objects to GSA's gathering and potential dissemination of proprietary transactional data.

E. The Purpose Of The Proposed Rule Is An Unwarranted Expansion Of The Former Alternation Of Rates Doctrine.

GSA's proposal would have a uniquely negative impact on the freight transportation industry by reestablishing rules that Congress specifically overturned when it deregulated the motor carrier industry beginning 35 years ago. The central purpose of deregulation was to permit motor carriers to compete by 1) vacating the requirement that motor carriers file their rates with the Interstate Commerce Commission for approval, and 2) abandoning the so-called filed rate doctrine which gave those rates the force and effect of a federal regulation. Also abandoned was the prohibition against rate discrimination, which combined with the filed rate doctrine, gave rise to the so-called alternation of rates doctrine. This doctrine was embedded by the regulations mandated by the former Interstate Commerce Commission ("ICC").

Under the non-alternation of rates doctrine, motor carriers were required to charge all customers the same rate for a particular route and service (exactly what GSA states that it hopes to achieve for the entire federal government through the proposed rules). Deregulation and the abolishment of the filed rate doctrine and the concomitant non-alternation of rates doctrine created greater competition in the motor carrier industry. It prompted more innovation and efficiency than previously pursued by motor carriers and created lower prices and better value for shippers. GSA's proposal would suppress competition in the federal contracting marketplace by establishing what Congress sought to abolish through motor carrier deregulation.

Furthermore, GSA appears to taking on a function long abolished with the ICC – the determination of rate reasonableness. Under that regulatory scheme, a motor carrier would file its rates with the ICC, and the ICC would make a finding of whether that rate was reasonable to

charge the public. Then under the filed-rate doctrine, motor carriers were required to charge everybody those approved, reasonable rates, as a matter of law.

This return to rate regulation, even just for the federal marketplace, would distort market forces that have promoted innovation, efficiency, and competition in the motor carrier industry. Motor carriers will be less willing to give better rates to certain agencies if there is a chance GSA will hold them to those rates for all agencies.

NMFTA is concerned that GSA's use of this data will not take into account the many variables that go into offers of different rates to different customers under different circumstances. The Notice does not explain how the "category managers" will be able to appreciate the different and changing environmental and marketplace costs of providing transportation services. GSA staff participants in the April 17, 2015, public forum professed a sensitivity to market issues and an understanding that price is not the only factor in federal acquisition decisions. But the proposed rules do not establish the framework for the use of transactional data – they only establish the requirement for its submission. When the underlying policy for the use of such data is only contained in the preface to a proposed rule and in a public statement, contractors may not rely upon them as contractual terms or the law.

F. GSA'S Stated Goals Plainly Seek To Violate Anti-Trust Principles.

Although the federal government is immune from the anti-trust laws when it performs governmental functions, this immunity is waived when it becomes a market participant. Without question, GSA is a market participant in this rulemaking, and thus it must be mindful of the rules that govern market participants, including the anti-trust laws. Through this proposed transactional reporting rule, however, GSA seeks to violate several important antitrust principles. The Notice is clear that the very purpose of the rule is to give GSA a market advantage over contractors by amassing and using for its advantage, nearly complete proprietary information about

sales conducted in the entire federal government marketplace. NMFTA believes this would have several deleterious effects on the federal contracting marketplace:

- GSA’s transactional reporting requirement would quash a competitive marketplace for federal contracts.
- GSA’s system would be a restraint of trade – by pressuring federal contractors to not tailor their prices to specific situations and market conditions.
- If GSA optimizes its use of transactional data for its stated goals, it would be tantamount to the unlawful price fixing in a significant marketplace.
- The provision § 552.238-75, “Price Reductions” reserving the right for GSA to “request” a contractor’s price at any time effectively voids all contracts. Agreements that do not define the consideration owed by one party for the duration of the contract, fail as contracts because there effectively is not a meeting of the minds as to a key element of the contract.

G. GSA Appears To Be Implementing And Entirely New Fee On All Contracts That Are Subject To The Propose Rule.

In proposed rule §552.216-75(c), GSA is creating a “Contractor Access Fee” modeled after the Industrial Funding Fee in § 552.238-74, but applicable to all of the transactional data to be reported under this rule. Just as with the Industrial Fund Fee, NMFTA members believe that the proposed Contractor Access Fee would be an unauthorized burden on federal contractors, and that the proposed rule is unjustified, vague, and legally unsustainable.

GSA intends to impose the Contractor Access Fee upon members of the public: federal contractors. Federal agencies are only authorized to impose a fee for a service or thing of value provided by the agency if the fee is prescribed by regulation, is fair, and based on the costs to the Government, the value of the service or thing to the recipient, the public policy or interest served, and other relevant facts. 31 U.S.C. §9701 (b)(1) & (2).

The proposed Contractor Access Fee meets none of these requirements, and the proposed changes to the rule simply compound its legal deficiencies. 31 U.S.C. §9701 provides, in pertinent part:

(a) It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation) to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible.

(b) The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be--

(1) fair; and

(2) based on--

(A) the costs to the Government;

(B) the value of the service or thing to the recipient;

(C) public policy or interest served; and

(D) other relevant facts.

31 U.S.C. §9701. GSA's proposed rule meets none of these requirements. And GSA does not establish a factual basis for the Contractor Access Fee to comply with this statute. The problems with the proposed rule include:

- GSA does not cite to any statutory authority to impose a fee upon contractors or to establish the CAF regulation.
- The Notice does not identify the service or thing of value being provided by the agency to the contractor under Section 9701.
- The Notice does not attempt to demonstrate that the CAF would be fair.
- The Notice does not attempt to explain how the CAF would be based on the costs to the Government, the value of the service or thing to the recipient, a public policy or interest served; and other relevant facts.
- The Notice does not propose the amount of the fee.
- Instead of complying with Section 9701 by justifying the amount of the fee to be imposed, the proposed rule itself specifically defers from quantifying the amount of the fee, claiming for GSA the authority to establish the amount of the fee outside of the rulemaking process.
- Not only does the Notice not quantify the amount of the fee, under the proposed rule GSA gives itself the authority to set the fee at a level that allows it to be applied to "operating costs." The amount of the fee is limited only by GSA's initiative and imagination to create its programs.

IV. CONCLUSION

NMFTA members oppose the proposal that would require them to give up their proprietary business information to GSA. GSA's proposed use of such information revives principles of market regulation that Congress specifically abolished in the trucking industry. Finally, GSA has no legal or policy justification to create a new fee on all federal contracts that it does not have any role in and cannot justify the fee as required by statute.

Respectfully submitted,

DATE: May 11, 2015

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Your comment was submitted successfully!

The **General Services Administration (GSA)** Proposed Rule: **General Services Administration Acquisition Regulations: Transactional Data Reporting: Extension of Time for Comments**

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