

Transactional Data Reporting (TDR): Now That the Rule Is Finally Here, What Should GSA Schedule Contractors Do?

Thank you for joining us. We will begin at 12:00 PM (EDT). At this time, you will not hear any sound.

Transactional Data Reporting (TDR): Now That the Rule Is Finally Here, What Should GSA Schedule Contractors Do?

Presented by:

Tom Fuchs, BDO LLP

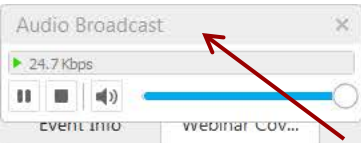
Matt Koehl, Pepper Hamilton LLP



Pepper Hamilton LLP
Attorneys at Law

July 26, 2016

Audio



Audio should stream automatically on entry through your computer speakers

Pepper Hamilton Webinar



Participants

Chat

Q&A

Speaking:

Panelists: 1

Brian Dolan (Host)

Attendees:

Webinar Guest (me)

Q&A

All (0)

Ask: All Panelists

Select a panelist in the Ask menu first and then type your question here. There is a 256-character limit.

Send

Audio

The screenshot displays the Cisco WebEx Event Center interface. At the top, the title bar reads "Cisco WebEx Event Center" with a menu bar containing "File", "Edit", "View", "Communicate", "Participant", "Event", and "Help". Below the menu bar, there are tabs for "Event Info" and "Webinar Cov...". The main content area is divided into a central slide and a right-hand sidebar. The slide features a red text overlay: "If you cannot stream audio, click phone icon and a phone number will be sent to you". Below this, a red arrow points from the text to a phone icon in the sidebar. The sidebar contains a "Participants" panel with a "Speaking:" section listing "Panelists: 1" (Brian Dolan (Host)) and "Attendees:" (Webinar Guest (me)). Below the attendees list are icons for audio, hand, and chat. A "Q&A" panel is also visible, showing "All (0)" questions. At the bottom of the slide, a logo for "Pepper Hamilton LLP" is displayed, celebrating 125 years (1890-2015) as "Attorneys at Law". The bottom status bar shows "Connected" with a green dot and the number "4".

If you cannot stream audio, click phone icon and a phone number will be sent to you

Pepper Hamilton Web

CELEBRATING
125 Years
1890 2015
Pepper Hamilton LLP
Attorneys at Law

Participants

Speaking:

Panelists: 1

Brian Dolan (Host)

Attendees:

Webinar Guest (me)

Q&A

All (0)

Ask: All Panelists

Select a panelist in the Ask menu first and then type your question here. There is a 256-character limit.

Send

4
Connected

Q&A

Cisco WebEx Event Center

File Edit View Communicate Participant Event Help

Event Info

Webinar Cov... x

Participants

Chat

Q&A

Participants

Speaking:

Panelists: 1

Brian Dolan (Host)

Attendees:

Webinar Guest (me)

?

(+)

Hand

?

Q&A

All (0)

Ask: All Panelists

Type question here...

Send

Send us questions

Pepper Hamilton Webinar



Connected

Download PPT Slides

Cisco WebEx Event Center

File Edit View Communicate Participant Event Help

Event Info Webinar Cov... x

01

Click 'File'

Pepper Hamilton Webinar

CELEBRATING
125
1890 2015
Years
Pepper Hamilton LLP
Attorneys at Law

Participants

Speaking:

Panelists: 1

Brian Dolan (Host)

Attendees:

Webinar Guest (me)

Q&A

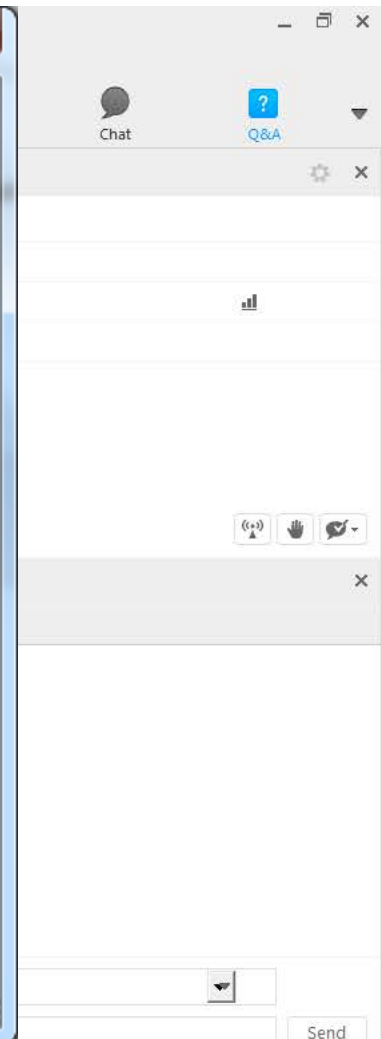
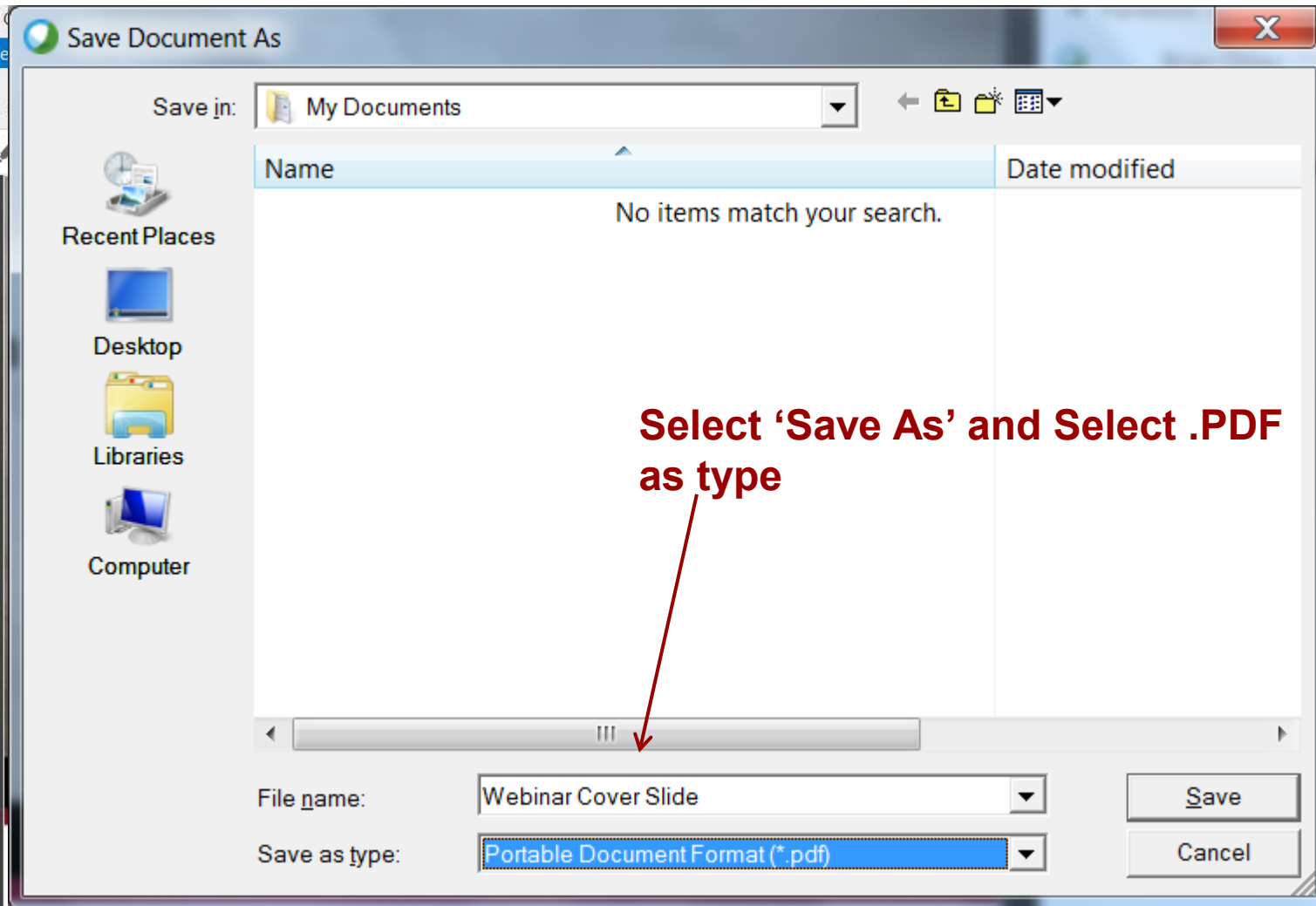
All (0)

Ask: All Panelists

Type question here... Send

Connected

Download PPT Slides



G. Matthew Koehl

Partner | Government Contracts Practice Group

202.220.1243

koehlg@pepperlaw.com

- Focuses his practice on government contract and financial assistance agreement counseling, negotiations, investigations and litigation
- Has more than 20 years of experience representing commercial and defense contractors across a broad range of industries, including information technology, management consulting and construction, with an emphasis on matters relating to the federal Multiple Award Schedules (MAS) contract program
- Experience spans the entire lifecycle of government contracting and Mr. Koehl assists companies with market research and business development efforts, proposal responses, and contract negotiation with government customers and prime contractors.



Thomas M. Fuchs

Managing Director | Government Contracting Advisory Services

703.893.0600

tfuchs@bdo.com

- Significant experience with various industry pricing, contracting and data systems
- Focuses on how the relevant government regulations can be applied to the unique business environments of each client
- Member of the American Bar Association, the International Association for Contract and Commercial Management, and the Coalition for Government Procurement
- Received Master's Certificate in Government Contracting from George Washington University, School of Public Contract Law and B.A. in Political Science from the University of Rhode Island.



Agenda

- Section 1 – Background and Overview
- Section 2 – Timing and Scope
- Section 2 – Contractor Upside & Downside
- Section 3 – Forecasting TDR Problems
- Section 4 – Whether to “Opt In” and Key Takeaways
- Section 5 – Discussion/Questions

Background

- Long-standing industry objections to (i) *pre-award* pricing disclosures (CSP-1) and (ii) *post-award* commercial price monitoring and associated contract price reductions under the Price Reductions Clause (PRC)
 - Complex and often ambiguous pricing requirements
 - Unique burden as compared to other government contracts for “commercial items”
 - Inconsistent with commercial market practices
 - Large False Claims Act settlements
- Multiple Award Schedule (MAS) Advisory Panel
- Office of Management and Budget (OMB), Government Accountability Office (GAO) and others critical of GSA Schedule pricing
- Horizontal pricing analysis
 - PRC modified in 1994 to exempt sales to federal end user customers
 - TDR/horizontal pricing place new focus on order-level prices charged to federal customers

Overview

- TDR applies only to designated GSA Schedule contracts
 - N/A to Department of Veterans Affairs Schedule contracts for medical equipment, supplies and services
- TDR Tradeoff
 - CSP-1 disclosure and PRC commercial price monitoring and reduction requirements lifted
 - Schedule contractors provide monthly report of sales transactions under their GSA Schedule contracts
- Most significant change to GSA Schedule contracting rules in at least 20 years
- Note: TDR applies also to new GSA Government-Wide Acquisition Contracts (GWAC) and non-Schedule Indefinite Delivery Indefinite Quantity (IDIQ) contracts

Overview

- TDR is effective immediately on a “pilot program” basis
 - Evaluate success no sooner than 1 year
- Implemented via *Alternate I* to *GSAR 552.238-74, Industrial Funding Fee (IFF) and Sales Reporting*
 - Specifies monthly TDR reporting requirements
 - IFF payments remain on a quarterly basis
- “Alternates” to other standard Schedule contract clauses to implement TDR (i.e., PRC)
- Final TDR rule as published in the Federal Register is *Attachment A* to course materials

Timing and Content of TDR Reports

- Contractors submit a monthly report of sales orders placed against their Schedule contract(s)
 - Invoice date or payment date at contractor's election
- “Transactional data” is defined as “the historical details of the products or services delivered by the Contractor during the of task or delivery orders issued against the this contract.” *GSAR 552.216-75(b)*
- Monthly reports must include the following data elements (if applicable):
 - *Contract or blanket purchase agreement (BPA number)*
 - *Delivery/task order number/procurement instrument identifier (PIID)*
 - *Non-federal entity*
 - *Description of deliverable*
 - *Manufacturer name*
 - *Manufacturer part number*
 - *Unit measure (each, hour, case, lot)*
 - *Quantity of item sold**
 - *Universal product code*
 - *Price paid per unit **
 - *Total price*

* Designated as exempt under The Freedom of Information Act (FOIA). The other 9 data fields are designated as non-exempt and subject to public release. GSA is accepting comments on FOIA designations for the TDR data fields through August 29, 2016. *81 Federal Register 44305 (July 7, 2016)*

Scope of the TDR Pilot Program

- Contracts under the following GSA Schedule solicitations and Special Item Numbers (SINs) are subject to TDR:
 - Schedule 03FAC, Facilities Maintenance and Management (All SINs)
 - Schedule 51 V, Hardware Superstore (All SINs)
 - Schedule 58 I, Professional Audio/Video, Telemetry/Tracking, Recording/Reproducing and Signal Data (All SINs)
 - Schedule 72, Furnishing and Floor Coverings (All SINs)
 - Schedule 73, Food Service, Hospitality, Cleaning Equipment and Supplies, Chemicals and Services (All SINs)
 - Schedule 75, Office Products (All SINs)
 - Schedule 00CORP, Professional Engineering Services (SINs 871-1, 2, 3, 4, 5, 6, 7)
 - Schedule 70, General Purpose Information Technology Equipment, Software, and Services (SINs 132-8, 132-32,33, 34, 132-54, 55)
- If the contractor accepts the TDR clause under its contract, requirements apply to all contract SINs, including SINs not designated for TDR coverage

Scope of the TDR Pilot Program

- Does TDR apply to you?
 - All new Schedule contracts awarded under TDR-designated solicitations/SINs will include the TDR contract clause
 - 5-year Schedule contract renewal modification request format for TDR-designated solicitations/SINs will likely include the TDR clause as mandatory condition of extension
 - Schedule contractors with existing contracts under TDR-designated solicitations/ SINs may elect to “opt in” to TDR *via* bi-lateral modification

Contractor Upside

- Relief from burden of researching and preparing CSP-1 disclosures + associated defective pricing risk for faulty CSP-1 disclosures
- Relief from burden of PRC monitoring + associated risk for non-compliance with price reduction duties
- GSA estimates an estimated \$44 million per year reduction to contractor administrative burden
- Consistency between various reporting requirements that contractors may be exposed to across their contract portfolios
- Access to order-level pricing of competitors
- Ability to analyze consumption patterns
- Reduced barriers to entry for small business concerns

Contractor Downside

- Submission of inaccurate TDR data could result in contractual penalties and extraordinary penalties
 - Similar to penalties for failure to meet CSP-1 and PRC requirements
 - May be more difficult to show that defective TDR data affected the price ultimately paid by the government (vs. CSP-1/PRC claims)
- Enhanced government leverage in price negotiations
- Competitor access to most order-level data in monthly reports
- Time and cost to implement the system and procedure modifications necessary to retrieve TDR data fields
 - 8 hours for a manual system and 240 hours for an automated system

Forecasting TDR Problems

- Likelihood of misleading price comparisons
- TDR order pricing will not provide information about factors that legitimately justify lower pricing, *e.g.*:
 - Competitively awarded BPAs providing unique access to the BPA customer
 - Volume commitments
 - “Specials” and other temporary price reductions
- Generic TDR item descriptions will not account for significant differences between some orders for the “same” item, *e.g.*:
 - Items purchased as a “bundle” created by the manufacturer rather than a customer-configured item
 - Configuration differences not reflected in the item descriptions
 - Differences in terms and conditions (*e.g.*, Prompt Payment Discount)
- High likelihood of “apples vs. oranges” comparisons and associated demands for unreasonable price concessions

Forecasting TDR Problems

- TDR's only focus is order-level pricing, no TDR mechanism to measure value provided in connection with the order, *e.g.*:
 - Warranty terms
 - Customer service and support options
 - Return policy
 - Material quality
- Why incur the extra cost of value features if the government buyer is not measuring value - foreseeable "race to the bottom"
- TDR is unsuited to effectively verifying pricing for professional services
 - Professional service engagements involve highly customized and unique work requirements that make "apples to apples" comparisons very difficult
 - TDR report will not contain the data necessary even to meaningfully attempt to perform this difficult comparative analysis (*e.g.*, employee skills, qualifications)

Forecasting TDR Problems

- How quickly will government buyers take to TDR and horizontal pricing analysis?
 - Ordering agency buyers and GSA contracting officers will need training to effectively use TDR and horizontal pricing analysis
 - GSAM Guidance. *Attachment B* to course materials.
- Effectiveness of TDR has yet to be determined
 - This rule is set to run for one year so that the GSA can assess its effectiveness

Deciding Whether to “Opt In” To TDR

- *Key Contractor-Specific Factors to Consider:*
 - Quality of CSP-1 disclosures on file with GSA
 - Effort required to research and prepare updates to CSP-1 disclosures
 - Do you have formal, monitored and enforced discounting procedures
 - Complexity of negotiated PRC mechanism
 - Burden associated with monitoring commercial pricing (breadth of “basis of award” and size of applicable commercial sales both factor into this)
 - Do GSA pricing restrictions hamper commercial sector sales efforts
 - Anticipated pricing pressure from government buyer access to TDR data
 - Competitive harm from public access to non-exempt TDR data elements
 - Extent of system and procedure modifications required to prepare timely and accurate monthly reports

Major Takeaways For Schedule Contractors

- Contractors must set up systems for capturing transactional data now if one is not already in place
- Contractors cannot stop monitoring commercial pricing and discounts
- Contractors should be wary of how their data will be protected and disclosed
- It is not yet clear how the new rule will work for complex products and services
- It is not clear what the government will do with the data it collects
- This data shared will be made available to the GSA's COs, GSA's category managers, ordering activity COs, and the public

Questions & Answers

BDO is the brand name for BDO USA, LLP, a U.S. professional services firm providing assurance, tax, advisory and consulting services to a wide range of publicly traded and privately held companies. For more than 100 years, BDO has provided quality service through the active involvement of experienced and committed professionals. The firm serves clients through 63 offices and more than 450 independent alliance firm locations nationwide. As an independent Member Firm of BDO International Limited, BDO serves multi-national clients through a global network of 1,408 offices in 154 countries.

BDO USA, LLP, a Delaware limited liability partnership, is the U.S. member of BDO International Limited, a UK company limited by guarantee, and forms part of the international BDO network of independent member firms. BDO is the brand name for the BDO network and for each of the BDO Member Firms. For more information please visit: www.bdo.com.

Material discussed is meant to provide general information and should not be acted on without professional advice tailored to your firm's individual needs.

© 2016 BDO USA, LLP. All rights reserved.