THE COALITION
for Government Procurement

April 20, 2015

General Services Administration
Regulatory Secretariat (MVCB)
Attn: Ms. Flowers
1800 F Street, N.W., 2nd Floor
Washington, D.C. 20405

Subject: Notice of Class Deviation MVA-2015-01

Dear Ms. Flowers:

Thank you for the opportunity to provide comments on the above referenced notice of a proposed class deviation to the Federal Acquisition Regulation (FAR). The purpose of the deviation is to address common terms in commercial agreement that may be inconsistent with federal laws.

The Coalition for Government Procurement ("The Coalition") is a non-profit association of firms selling commercial services and products to the Federal Government. Our members collectively account for approximately 70% of the sales generated through the GSA Multiple Award Schedules (MAS) program and about half of the commercial item solutions purchased annually by the Federal Government. Coalition members include small, medium, and large business concerns. The Coalition is proud to have worked with Government officials for more than 35 years towards the mutual goal of common sense acquisition.

The Coalition offers the following comments on the proposed deviation.

A. Our members favor a mechanism that reduces the time required to review and negotiate the terms of end-user license agreements (EULA) and terms of service (TOS) agreements. We have advocated for such a mechanism for GSA's IT Schedules program. Conceptually, we agree with the strategy of including a standard set of terms in the solicitation that address the requirements of federal law. Contractors that accept those terms should be exempted from further review of their EULAs and TOS agreements by GSA contracting and legal officials. Currently, even contractors that offer the terms now being proposed have been required to go through a very time-consuming and lengthy review process. We applaud GSA for taking an initial step of proposing standard terms that can be included in GSA solicitations. However, we believe that first step will streamline the negotiation process, *only* if it relieves compliant contractors of the 100% legal review process.

B. In addressing this issue GSA should be cautious not to unduly restrict the authority of its own contracting staff to negotiate reasonable commercial terms. The Federal Register notice states:

> "The new clause will make unenforceable any conflicting or inconsistent Commercial Supplier Agreement terms that are addressed in the class deviation, so long as an express exception is not authorized elsewhere by Federal statute."

The term "inconsistent" could be interpreted to preclude supplemental terms that do not actually conflict with the deviation. If a contracting officer has questions as to whether supplemental terms are actually in conflict it would be preferable to seek review than to unnecessarily preclude all supplemental terms as a matter of policy.

We recommend that any implementing language be stated as follows.

> "The new clause will make unenforceable any conflicting ~~or inconsistent~~ Commercial Supplier Agreement terms that are addressed in the class deviation, ~~so long as~~ unless an express exception is ~~not~~ authorized elsewhere by Federal statute."

C. We question the efficacy of introducing these agreements into non-IT schedules. The Federal Register states that the deviation will apply to all new GSA Acquisitions. Existing contracts must be modified at renewal or when the contract is otherwise modified. We are only aware of issues regarding the evaluations of EULA's and TOS with respect to information technology contracts. On the other hand, we receive continuous antidotal feedback from our members regarding the length of time and the information burdens associated with the processing of offers and modifications. We request that GSA consider whether the benefit of adding this requirement to non IT acquisitions outweighs the time and cost of doing so.

D. Coalition members have raised a number of concerns about the particular terms included in the proposed deviation. It is the federal government's policy to acquire commercial items, using commercial terms to the maximum extent possible.[1] On a high level, the language promulgating the deviation appears to denigrate the preference for acquiring commercial items using commercial terms. According to the Federal Register notice "…customary, standard Commercial Supplier Agreements typically contain terms and conditions that make sense when the purchaser is a private party but are *inappropriate* when the purchaser is the federal government. Specifically with respect to software, however, FAR 12.212(a) states in part:

> Commercial computer software or commercial computer software documentation shall be acquired *under licenses customarily provided to the public* to the extent such licenses are consistent with Federal law and otherwise satisfy the Government's needs.

To the contractor community this discussion is more than an issue of semantics. End-user license and terms of service agreements covered by this proposal reflect, at least in part, the

[1] 41 U.S.C. 3301, FAR 12.00

intellectual property of GSA contractors. The deviation proposed must strike a balance between the requirements of federal law and the preference for the use of commercial terms. The Coalition agrees with GSA that any terms of a commercial agreement that are inconsistent with federal law is unenforceable with respect to the government. We also believe commercial terms should be utilized to the maximum extent practicable. A number of the 15 provisions articulated in the deviation do not appear to strike the appropriate balance between federal and commercial needs. Our members have not raised objections to paragraphs 1, 3, 4, 5, 6, 7 9, 10, 13, or 15. We do offer the following comments on the remaining provisions.

Paragraph 2 – Contract Formation

Requirement: Commercial Supplier Agreements may be integrated into a contract, so long as the terms are included verbatim and are not incorporated by reference. The terms of the deviated clause and other identified elements will supersede any conflict with the Commercial Supplier Agreement. This order of precedence will allow for the incorporation of Commercial Supplier Agreements, with certain clauses being stricken as unenforceable, without the need to individually negotiate agreements. "Click-wrap", "Browse-wrap" and other such mechanisms that purport to bind the end-user will not bind the Government or any Government authorized end-user.

Comment: The deviation should allow incorporation of documents by reference.

It is common practice among software vendors to incorporate documents/terms, etc. by reference and allow for the vendor to update these documents at their discretion. Common documents incorporated by reference are technical support/maintenance policies, product lists, and others. Software offerings are always evolving and their associated technical policies are always evolving to keep up with industry trends and best practices and these types of documents need to be flexible and updatable without having to go through the contract modification process every time they change. The interest of the government in assuring compliance with applicable law could be protected by explicitly stating that the order of precedence is applicable to the contract and any documents incorporated therein by reference.

Paragraph 8 – Automatic Incorporation/deemed acceptance of third party terms

Requirement: No third party terms may be incorporated into the contract by reference. Incorporation of third party terms after the time of award may only be performed by bilateral contract modification with the approval of the cognizant contracting officer.

Comment: The deviation should allow third party terms to be incorporated by reference and should allow such terms to be updated without a bilateral modification.

As written, paragraph 8 is problematic for all software vendors who may have third party software (including Open Source) embedded in or otherwise delivered with their software. The third party licensor or open source license terms frequently require the licensor to flow through the third party terms as written. Major software publishers have products with additional license terms incorporated by reference using a link to a third party software provider or using other methods. These products are subject to a separate license agreement.

There are a number of options that protect the government's interest without a wholesale exclusion of third party software by reference. Similarly to our comments on Paragraph 2 above, the interest of the government in assuring compliance with applicable law could be protected by stating that the order of precedence is applicable to the contract and any documents incorporated therein by reference. Alternatively, the GSA solicitation could contain language explicitly stating that:

> Any third party license agreement included or incorporated by reference which contains terms that (a) allow for the automatic termination of a License; (b) allow for the automatic renewal of fees; (c) require the governing law to be anything other than Federal law; (d) require the government to indemnify Company or any third party; and/or (e) otherwise violate applicable law, shall not apply.

Paragraph 11–Unilateral Termination of Commercial Agreement by Supplier

Requirement: This Paragraph would prevent a contractor from terminating a contract unless the supplies or services are withdrawn from the commercial market.

Comment: This provision seems inconsistent with the terms of the underlying GSA Schedule contract which allow the contractor to terminate, with notice, for any reason. This provision should be deleted or revised to reflect the actual intent of the government.

Paragraph 12 – Unilateral modification of Commercial Supplier Agreement by supplier

Requirement: Unilateral changes of the Commercial Supplier Agreement are impermissible and any clause authorizing such changes is unenforceable.

Comment: This requirement does not reflect commercial reality in the rapidly evolving world of IT. See comments above regarding Paragraph 2.

The interest of the government in assuring compliance with applicable law could be protected by explicitly stating that the order of precedence is applicable to the contract and any documents incorporated therein by reference. This approach would more appropriately balance the realities of the commercial market with the needs of government.

Paragraph 14–Confidentiality of Commercial Supplier Agreement terms and conditions

Requirement: This provision would prohibit the content of commercial agreements and pricing from being deemed confidential.

Comment: This provision does not appear to be required by a federal statute. In some instances, application of this provision could result in the release of commercial proprietary data. We would like to know GSA's rationale for this provision. Absent a compelling Federal interest, we recommend that it be deleted.

E. Finally, the Coalition requests an opportunity to review the exact language of the revised commercial item clause that will result from the deviation.

We thank you for the opportunity to comment and would welcome the opportunity to work with GSA further as it finalizes this policy.

Sincerely,

Roger Waldron
President