August 1, 2016

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

Subject: GSAR Case 2015-G512: Unenforceable Commercial Supplier Agreement Terms Proposed Rule

Dear Ms. Flowers,

Thank you for the opportunity to provide comments in response to the General Services Administration's (GSA) proposed rule *General Services Administration Acquisition Regulation (GSAR); Unenforceable Commercial Supplier Agreement Terms*.

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 a significant percentage of the sales generated through General Services Administration ("GSA") contracts including the Multiple Award Schedules program. Coalition members are also responsible for many 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 agrees with the proposed rule's intent to streamline end user license agreement reviews and contract negotiations by ensuring that certain contract language defers to Federal law where there is a conflict with commercial terms. We are concerned, however, that in many respects, the rule goes too far.

As written, the proposed changes to the GSAR will have far-reaching, unintended negative impacts on the availability of commercial products and services to Federal agencies. We are concerned especially with the proposed rules significant change to the "order of precedence" language of the commercial item clause, as this change is inconsistent with law, regulation, and commercial practice, and it presents an unnecessary burden to contractors. This increase in burden and risk, decreases contractor incentive to bring innovative solutions to the Federal marketplace, and thus, it undermines the government's ability to achieve the very outcomes intended by issuance of the proposed rule.

This concern about incentives is not speculative. In the pending National Defense Authorization Act for Fiscal Year 2017, the Senate included a number of provisions that manifest the recognition that incentives are important to bring nontraditional firms into the government market and to promote innovation in government acquisition. In Section 896, for instance, the Senate would direct the Secretary of Defense to establish procedures for small businesses and nontraditional contractors to "engage an independent certified public accountant for the review and certification of its accounting system for the purposes of any audits required by this section." S. Rep. No. 114-255 at 232. In Section 829F, the Senate even established an award program to recognize acquisition professionals that leverage acquisition flexibilities "for their work to simplify procedures, use of commercial contracting approaches, developing public private partnership agreements, and other inventive program management techniques." *Id.* at 215.

For the final rule, the Coalition recommends that GSA:

1. Revert the Order of Precedence to that of the FAR Clause prior to the July 2015 Class Deviation
2. Revise GSAR Part 552 to reduce unnecessary and duplicative information collection burdens

Adoption of these recommendations would align the rule with law and regulation, reduce burdens for government and industry, and attract and maintain the development of innovative solutions in the Federal marketplace.

Inconsistencies with Law and Regulation

The proposed rule conflicts with the underlying statutory authority for commercial item contracting, as well as with over 20 years of regulatory implementation through the FAR.

The Federal Acquisition Streamlining Act of 1994 (FASA) requires that, to the maximum extent practicable, the agency head ensure that commercial items are procured to fulfill agency requirements, that requirements be modified so that they can be met by commercial items, that specifications be stated to enable offerors to supply commercial items, and that policies be revised to reduce the impediments to acquiring commercial items. *See* 41 U.S.C. 3077.

FASA is implemented at Part 12 of the FAR. Pursuant to FAR 12.212(a), the government is required to procure software under commercial license terms. In addition, FAR 12.212(b) limits the government's rights to, "only those rights specified in the license contained in any addendum to the contract." Further, FAR 12.301(a) stipulates that, "contracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses required by law or…[d]etermined to be consistent with customary commercial practice." Moreover, FAR 12.302(c) precludes the inclusion of, "any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures."

By adopting the order of precedence established in the July 2015 class deviation, GSA is creating a preference for government terms and conditions that appears to contradict the clear language of existing statute and

regulation. In addition, GSA has yet to address previous concerns raised by the Coalition regarding the absence of any explanation as to why customary commercial terms included in the addenda are inconsistent with the government's needs. Without such an explanation, the July 2015 class deviation, and its order of precedence utilized in the proposed rule, are defective as a procedural matter.

Increases Burden for Contractors and Creates Barriers to Innovation

Although the proposed rule states that it will streamline the negotiation process to reduce time and cost for both government and contractors, the approach likely will lead to the opposite result. Because of the change in the order of precedence, prudent contractors will be compelled to seek negotiations on each and every single contract term in an attempt to ensure their commercial terms apply consistent with law and regulation. Examples of commercial terms impacted by the change in the order of precedence are:

- Title and ownership of software intellectual property ("IP")
- Warranty and exclusion of implied warranties
- Limitations of liability and exclusive remedies
- IP indemnification

Rather than streamlining the negotiation process, at the operational level, the proposed rule will complicate and delay processing times for contracts and modifications for products with Commercial Sales Agreement terms and conditions. This complication and delay, in turn, will lead to increased administrative costs and workload for both government and contractors.

As a result, new firms will be discouraged from entering the Federal marketplace, as they will confront higher costs with shrinking opportunities for success. This outcome flies in the face of the Administration's policy agenda as described in the Office of Federal Procurement Policy ("OFPP") December 2014 Memorandum, which states:

> ***In particular, greater attention must be paid to regulations related to procurements of commercial products and services****, as the Government is typically not a market driver in these cases and* ***the burden of Government-unique practices and reporting requirements can be particularly problematic, especially for small businesses. Within 180 days of the date of this memorandum, OFPP, in consultation with the Chief Acquisition Officer Council and the FAR Council, will make recommendations to the Deputy Director for Management on specific actions that can be taken to reduce burden in commercial item acquisitions, especially for small businesses, and increase the use of effective commercial solutions and practices by the Government.***
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> [Emphasis Added]

In addition, the revision of GSAR 552 in the proposed rule requires that the full text of the terms must be provided for every referenced site with the offer. In the case of software, in addition to the End User License

Agreement (EULA) itself, the EULA may incorporate third party licenses, including open source licenses. The full text of the terms would constitute an excessive and unreasonable amount of information for vendors to be required to submit to the government.

The Coalition believes that this unnecessary and burdensome information collection requirement should be subject to the approval of the Office of Management and Budget ("OMB"). Pursuant to Section 6(a)(3)(A) of Executive Order 12866, an agency is required to provide a list of planned regulatory actions, indicating which it believes are significant, to the Office of Information and Regulatory Affairs ("OIRA"). Once submitted, OIRA has ten days to review and amend the submissions. We believe that the proposed rule is a significant regulatory action, due to the change in the order of precedence, which should be subject to OMB review.

Information collection requirements in the proposed rule should also be subject to OMB approval. Pursuant to Section 3506(c)(3) of the Paperwork Reduction Act, agencies must review each collection before submission to OIRA and certify that each collection of information is:

i. Necessary for the performance of the agency
ii. Not unnecessarily duplicative of information otherwise reasonably accessible to the agency
iii. To the extent practicable and appropriate, reduces the burden for the providers of the information
iv. Implemented in ways consistent and compatible, to the extent practicable, with existing reporting and recordkeeping practices of those who are to respond

Standard practice in the commercial market allows for the incorporation of additional terms by reference. Moreover, the Government itself regularly incorporates by reference terms and conditions as a regular course of business without including the full text as part of solicitations. GSA's determination that the proposed rule does not contain any information collection requirements for OMB approval is troubling, as it appears to circumvent the proposed rule's certifications and determinations being subject to further scrutiny, and possible amendment, by OIRA. Consequently, the Coalition believes that this proposed rule should be submitted for OIRA review.

Recommendations

1. Reverse the Change to the Order of Precedence

The Coalition recommends that GSA reverse the change to the order of precedence and return to the FAR clause language that existed prior to the July 2015 class deviation. The changes made by the July 2015 class deviation contradict both law and regulation and go beyond what is necessary for GSA's purposes (especially considering that GSA enumerated the provisions that it needed). By establishing a preference for government terms and conditions, the changes introduced in the July 2015 class deviation contradict numerous FAR clauses, as well as FASA, which mandates a preference for commercial terms and conditions, and thus, provides fertile ground for wasteful conflict resolution.

Along these lines, it should be noted that the Department of Justice (DOJ) Office of Legal Counsel (OLC) opinion *Memorandum for Barbara S. Fredericks, Assistant General Counsel for Administration, United States*

Department of Commerce provides that the inclusion of indemnification clauses in terms of service (TOS) or EULAs would not be enforceable against the government. Therefore, the changes to the order of precedence contained in the July 2015 class deviation go beyond what is needed to protect the interests of the Federal government.

To ensure that the proposed rule is consistent with law and regulation, as well as to open the marketplace to innovation and small business participation, and to align the proposed rule with its intended objectives, the Coalition believes that GSA should revert the order of precedence to that of the FAR clause prior to the July 2015 class deviation.

2. Revise GSAR Part 552

To reduce the burden borne by commercial vendors, the Coalition recommends that GSA revise the proposed 48 CFR part 552 as follows:

> GSAR 552.212-4(w)(vi)(A) This commercial supplier agreement may incorporate additional terms by reference ~~provided that the full text of the terms are provided with the offer~~, *in the event of a conflict between the terms referenced in the commercial supplier agreement and the terms of GSAR 552.232-78, the terms of this GSAR shall apply.*
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> GSAR 552.232-78(a)(vi)(A) This commercial supplier agreement may incorporate additional terms by reference ~~provided that the full text of the terms are provided with the offer~~, *in the event of a conflict between the terms referenced in the commercial supplier agreement and the terms of GSAR 552.232-78, the terms of this GSAR shall apply.*

It is standard commercial practice to incorporate website links into a EULA or TOS. If contractors were to be required to print the documentation from these linked websites, which have several links within them, the result would be an excessive amount of information that would be incredibly burdensome for both contractors and the government. Indeed, were GSA to review all of this information and possibly include legal review, a simple addition could take months. If GSA's concern is focused on terms that are not enforceable per Federal law, the above revision should satisfy this concern, while also limiting the burden for both government and industry.

Thank you for the opportunity to provide public comments in response to the proposed rule. If there are any questions, please contact me at (202) 331-0975 or rwaldron@thecgp.org.

Sincerely,

Roger Waldron
President