



September 30, 2015

Jeff Koses
Deputy Chief Acquisition Officer/SPE
GSA Office of Acquisition Policy
1800 F St NW, NW, #2223D
Washington, DC 20405

RE: Request to Rescind Class Deviation Addressing Commercial Supplier Agreement Terms that Conflict or Are Incompatible with Federal Law (Acquisition Letter MV-15-03)

Dear Jeff,

On behalf of the membership of the Coalition for Government Procurement (the Coalition), I am writing to request that GSA rescind the recent class deviation addressing commercial supplier agreement (CSA) terms that conflict or are incompatible with federal law (Acquisition Letter MV-15-03), and reopen discussions with GSA's industry partners on the matter. To this end, Coalition members stand ready to engage in a dialogue with GSA to ensure that GSA arrives at a balanced, legally sufficient approach to CSA terms and conditions that streamlines the negotiation process and addresses any apparent conflicts with Federal law.

GSA's openness and transparency regarding the deviation, from its publication in the Federal Register, to its subsequent outreach to contractors, has been very much appreciated by the Coalition. Unfortunately, the final language of the deviation includes a fundamental change in the order of precedence under schedule contracts. This change was not discussed with GSA's industry partners prior to its inclusion in the final class deviation, and it is of great concern to GSA contractors.

I. Background

The deviation establishes a new GSAR Clause 552.212-4, Contract Terms and Conditions—Commercial Items in lieu of standard FAR Clause 52.212-4. According to the Federal Register notice, the intent of the proposed deviation was to ensure that the contract language clearly provided that, in the event of a conflict between federal law and a commercial term, the federal law would take precedence. Like GSA, the Coalition appreciated and continues to appreciate that, in cases where a CSA term conflicts with federal law, the federal law controls.

Subsequent to the Federal Register notice, and to its credit, GSA engaged in discussions with industry partners regarding the terms of the deviation. The focus of these discussions was on draft deviation language that specifically identified certain CSA terms that were unenforceable due to a conflict with federal law. The draft deviation specifically called out those CSA terms and amended to 52.212-4(s)(2), Order of precedence, to add a reference to "Commercial Supplier Agreements - Unenforceable Clauses paragraphs of the clause." The draft deviation did not otherwise change the order of precedence.

Unexpectedly, the final deviation made a further, very significant change in the order of precedence, dropping commercial terms in order below the other paragraphs of 52.212-4 and solicitation terms, leaving it just above the SF1449. In contrast, under the standard FAR Clause 52.212-4, commercial terms are in order above the other paragraphs of 52.212-4 and the solicitation provisions. The following chart highlights the differences between the standard FAR clause and the final deviation:

Current FAR Clause
<p>(s) Order of precedence. Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order:</p> <ul style="list-style-type: none"> (1) The schedule of supplies/services. (2) The Assignments, Disputes, Payments, Invoice, Other Compliances, Compliance with Laws Unique to Government Contracts, and Unauthorized Obligations paragraphs of this clause; (3) The clause at 52.212-5. (4) Addenda to this solicitation or contract, including any license agreements for computer software. (5) Solicitation provisions if this is a solicitation. (6) Other paragraphs of this clause. (7) The Standard Form 1449. (8) Other documents, exhibits, and attachments. (9) The specification.
New GSAR Clause Deviation issued July 31, 2015
<p>(s) Order of precedence. Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order:</p> <ul style="list-style-type: none"> (1) The schedule of supplies/services. (2) The Assignments, Disputes, Payments, Invoice, Other Compliances, Compliance with Laws Unique to Government Contracts, Unauthorized Obligations[, and Commercial Supplier Agreements – Unenforceable Clauses] paragraphs of this clause, (3) The clause at 52.212-5, (4) Solicitation provisions if this is a solicitation. (5) Other paragraphs of this clause. (6) Addenda to this solicitation or contract, including any license agreements for computer software. (7) The Standard Form 1449. (8) Other documents, exhibits, and attachments. (9) The specification.

As a result of this change, all commercial software terms, like those related to title and ownership, warranties, and remedies, are subordinated to the government's terms and conditions in the solicitation. Therefore, rather than addressing the specific areas of conflict, as GSA intended, the deviation undoes any preference for commercial software license terms and conditions under GSA contracts.

Moreover, the language undoes any preference for any commercial terms to the extent they are included in an addenda to a solicitation or contract.

II. The Deviation is Inconsistent with Law and Regulation

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

FAR 1.402 authorizes deviations “[u]nless precluded by law, executive order or regulation...” The Federal Acquisition Streamlining Act of 1994 (FASA) requires the head of the agency to ensure, to the maximum extent practicable, that commercial items may be procured to fulfill agency requirements, that requirements be modified so 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. FAR 12.212 (a) provides that the government shall acquire software under commercial license terms. FAR 12.212(b) states, in part, that “the government shall have only those rights specified in the license contained in any addendum to the contract.” FAR 12.301(a) provides, in part, 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.” 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.”¹

The plain language of the statute and regulations mandates a preference for commercial item contract terms and conditions. Unfortunately, the deviation, itself counter to the law and regulation, creates a preference for government terms and conditions.

III. Impact on Negotiations

Although one of the goals of the deviation was to assist in streamlining the contract negotiation process, an unintended consequence of the deviation will be the opposite result. Prudent contractors will be compelled to seek negotiations on each and every contract term, including, but not limited to, software license terms, in an attempt to ensure their commercial terms apply consistent with law and regulation. At an operational level, this result means that, rather than streamlining the negotiation process as intended, the deviation likely will complicate and delay processing times for contracts and modifications for new software and other products with CSA terms and conditions. The impact will cut across all schedules that include the deviation, resulting in increased transactional/administrative costs and increased workload for GSA contracting officers, agency counsel, and their counterparts in the private sector.

The long-term consequences of the deviation will be to eliminate commercial item contracts from the MAS program, as well as the entire portfolio of GSA government-wide contract vehicles. The barriers created by the deviation will reduce competition and agency access to commercial products, services, and innovative solutions through the MAS program.

IV. The Deviation Creates Barriers to Entry

¹ As a matter of law, the deviation is inconsistent with the underlying statutes and regulations. In addition, the deviation is also defective as a procedural matter. The waiver must address why use of a customary commercial term is inconsistent with the government’s needs. The deviation raises all government-unique terms above all customary commercial terms without addressing why the customary commercial terms included in the addenda are inconsistent with the government’s needs.

Narrowing the definition of a commercial item will have far-reaching implications for the procurement system. It risks reducing the government's access to innovative services and solutions by creating a new, significant barrier to entry for firms already offering those services and solutions in the commercial marketplace. Such a barrier is inconsistent with the Office of Federal Procurement Policy (OFPP) December 14, 2014 memorandum, *Transforming the Marketplace: Simplifying Federal Procurement to Improve Performance, Drive Innovation, and Increase Savings*. In that memorandum, OFPP Administrator Rung stated:

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.

[Emphasis added.]

In a September 3, 2015 GSA Blog, GSA Administrator Turner Roth made a similar commitment as part of her vision of GSA as an economic catalyst nationwide. In the blog, she stated that GSA "will be looking for ways to ease the path to government business, especially for small business" by reducing burdens, improving policies, automating steps, and streamlining processes.

In contrast to the intent of the December 2014 memorandum and recent statements by the GSA Administrator, the deviation risks reducing access to cutting edge technologies needed by GSA and the agencies that rely on its contract vehicles. Given the government's current focus on increasing access to innovative technologies and capabilities from the commercial market, we request that GSA rescind the class deviation and revisit with industry partners the steps actually needed to mitigate risk to the government while avoiding the serious unintended consequences associated with the change to the order of precedence.

As always, the Coalition stands ready to work with GSA to address this important issue in a balanced, sound manner that meets the government's needs while preserving the fundamental imperative of commercial item contracting. Should you have any questions regarding this matter, please contact me at (202) 315-1053 or rwaldron@thecgp.org. In the meantime, we look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to be 'RWaldron', with a long horizontal flourish extending to the right.

Roger Waldron
President