GSA Office of Governmentwide Policy

OCT 21 2015

Mr. Roger Waldron, President
The Coalition for Government Procurement
1990 M Street, NW
Washington, DC 20036

Dear Roger:

Thank you for your September 30, 2015, letter expressing concern with the class deviation regarding commercial supplier agreement (CSA) terms that conflict or are incompatible with federal law (Acquisition Letter MV-15-03). Specifically, you expressed concern that the change to the Order of Precedence clause was a step away from commercial practice.

The class deviation addressed 15 common terms or conditions, often found in software license agreements, which were inconsistent with Federal law. In addition, the class deviation amended the order of precedence in paragraph (s) of clause 52.212-4 by issuing a deviated clause 552.212-4. Specifically the change placed the terms of the solicitation rank higher than the terms in a software license.

Commercial software license terms are changed frequently, and often include a check or click box which the end user accepts to use the software. Through our conversations, Coalition members, and others, made it clear that these changes were not intended to change the rights of the Government. The changed license terms were simply a common business practice. Coalition members also expressed a goal of speeding up the modification process.

The class deviation is intended to achieve exactly this goal. We expect an overwhelming majority of license term updates to proceed without need for Government action. Thus, the deviation ensures we can stand out of the way, and don't need to review each license update.

Based on the information we've been given, there should be relatively few license updates which change Government rights and which conflict with underlying schedule terms or conditions. For those few updates, the contractor will need to propose a modification to the contracting officer.

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As you suggested throughout your letter, GSA strongly supports the FAR preference for commercial item contacting. I understand your concern and have issued a supplement to the acquisition letter to emphasize the key point that (except for those which conflict with federal law) license terms are negotiable. The import point is for the CO to know and specifically consider any unique terms the contractor proposes.

The best approach is for both parties to know and agree up front, to the terms and conditions for the contract. If, after award, the contractor makes a change which will impact a Government right, that should be addressed by a knowledgeable Contracting Officer.

I appreciate your on-going interest and suggestions and always welcome the dialogue.

Sincerely,

Jeffrey A. Koses
Senior Procurement Executive