VIA REGULATORY PORTAL AND U.S. MAIL

General Services Administration
Regulatory Secretariat (MVCB)
Attn: Ms. Flowers
1800 F Street NW, 2nd Floor
Washington, DC 20405-0001


Dear Ms. Flowers:

On behalf of the Section of Public Contract Law (Section) of the American Bar Association (ABA), I am submitting comments on the above-referenced Notice.1 The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the ABA’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of

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1 Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Anthony N. Palladino, a member of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.
the ABA and, therefore, should not be construed as representing the policy of the ABA.²

I.  INTRODUCTION

The U.S. General Services Administration’s (GSA) proposed class deviation (Deviation) to the Federal Acquisition Regulation (FAR) and the General Services Acquisition Regulation (GSAR) is intended to address terms and conditions that customarily are offered to the public by vendors of commercial item supplies or services (Commercial Supplier Agreements) that are inconsistent with or create ambiguity with federal law when included in a contract for commercial items or services awarded by GSA. Specifically, the Deviation was proposed to address common, recurring “points of inconsistency” between the terms of Commercial Supplier Agreements and federal law or the Government’s needs in 15 specifically identified areas. The Deviation would establish the order of precedence in the event of a conflict and would implement standard terms and conditions in these 15 areas in order to minimize the need for negotiating the terms of Commercial Supplier Agreements on an individual basis. The stated purpose of the Deviation is to minimize the time and resources expended by the vendor and Government tailoring individual Commercial Supplier Agreements to comply with federal law.

The Section understands that GSA, by its proposed Deviation, is seeking to address valid concerns about certain legal matters and also to maximize the efficiency of commercial item procurements. Nonetheless, the Section is concerned that the Deviation would be a significant change to commercial item purchasing terms that affect purchases by agencies across the Government and risks adversely impacting both small and large businesses. Moreover, by not following the proper rulemaking process, the Section is concerned that GSA has not clearly articulated the underlying problem it seeks to address. This hinders the ability of the Section and others in the procurement community to respond more substantively to the proposal. Accordingly, the Section recommends that GSA delay implementation of the Deviation and provide notice and seek comments under the FAR rulemaking process to address the issues the Deviation raises.

II.  BACKGROUND

The Deviation would revise the current order of precedence provision in FAR 52.212-4 to state that the terms of the commercial item clause at FAR 52.212-4 control in the event of a conflict with a Commercial Supplier Agreement. The Deviation would also implement standard terms and conditions in 15 identified areas³ and would make

² This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Commercial Products and Services.”
³ The 15 areas are: (i) the definition of contracting parties; (ii) contract formation; (iii) patent indemnity; (iv) automatic renewals of term-limited agreements; (v) future fees or penalties; (vi) taxes; (vii) payment terms or invoicing; (viii) automatic incorporation/deemed acceptance of third-party terms; (ix) state/foreign law governed contracts; (x) equitable remedies, injunctions, binding arbitration; (xi)
unenforceable any conflicting or inconsistent Commercial Supplier Agreement terms that are addressed in the Deviation, unless an express exception is authorized elsewhere by statute. The Deviation, which is scheduled to take effect May 4, 2015, would apply to all new awards for GSA acquisitions for commercial supplies or services. Existing contracts would be required to incorporate the new terms whenever an option period is exercised or the contract is otherwise modified. The scope of the Deviation includes not only GSA’s own contracts and purchase card purchases, but those of other Government agencies purchasing goods and/or services through GSA Federal Supply Schedule contracts, including Blanket Purchase Agreements, issued by other agencies through the GSA Federal Supply Schedule program, and Governmentwide Acquisition Contracts (GWACs). In Government fiscal year 2014 alone, the reported GSA and VA Federal Supply Schedule sales were approximately $33 billion and $12 billion, respectively.

III. COMMENTS

A. Use of a Class Deviation is Inappropriate for This Significant Regulatory Change.

The Section recognizes that GSA is seeking public comments on the Deviation. Nonetheless, the Section believes the Deviation is inconsistent with purpose of class deviations and, instead, GSA should pursue the changes proposed in the Deviation through the rulemaking process.

Generally, agencies are required to provide notice and afford the public an opportunity to comment on proposed changes in agency acquisition regulations prior to enacting significant regulatory changes. FAR 1.301(b); 1.501-2. In addition, it may be appropriate to hold public meetings to solicit and obtain additional views and discussion on significant proposed regulatory revisions. FAR 1.503. Although the FAR and GSAR include provisions that permit agencies to issue deviations, if the desired regulatory change is intended to be permanent, a FAR revision should be proposed. FAR 1.404 (“When an agency knows that it will require a class deviation on a permanent basis, it should propose a FAR revision, if appropriate.”); GSAR 501.402; see also GSAR 501.404(e)(1) (noting that class deviations from the GSAR are expected to expire in 12 months unless extended). Indeed, the Court of Federal Claims has held that using a class deviation to implement a uniform contract clause violates the FAR and Office of Federal Procurement Policy Act § 22 and, therefore, may be unenforceable. If, as appears to be the case, GSA intends to issue a uniform contract clause, change its policies and procedures for commercial item contracting permanently, and change the ability of Government and contractors to tailor FAR 52.212-4, then the Section respectfully submits that the proposed regulatory revisions should be processed

through the FAR Council’s regulatory rulemaking process, and not through the use of a temporary class deviation.

The Section believes that a class deviation is inappropriate for other, more substantive reasons as well. First, this rulemaking will have a material effect beyond the internal operating procedures of GSA by affecting thousands of commercial contractors and other Government agencies. As the Deviation purports to apply to all commercial item contracts, it likely will affect the cost and risk allocation of all existing (and future) commercial item contractors. Moreover, the Notice accompanying the Deviation states that GSA intends to make the Deviation effective within 45 days after receipt of comments. We respectfully maintain that the scope of the proposed changes, as well as the breadth of coverage of the Deviation, require a longer period of consideration and broader industry and Government input prior to implementation. For these additional reasons, the Deviation should be treated as a significant regulatory revision and implemented through the regulatory rulemaking process.

Second, although the Section recognizes the administrative burden placed on the Government and industry when it is necessary to tailor the vendor’s standard Commercial Supplier Agreement terms to be consistent with federal law and address the Government’s needs, the Federal Register notice does not identify an urgent Government need that compels implementation through the use of an expedited class deviation process. Similarly, there has been no Executive Order or legislative change that compels immediate action by GSA in the form of a Class Deviation. Thus, the Section recommends that prior to implementing these significant revisions, GSA should use the rulemaking process and engage in broader dialogue with other agencies subject to these FAR requirements and industry.

Third, the Section believes that the existing regulatory framework has generally provided an effective mechanism for enabling the Government and industry to arrive at appropriate terms and conditions for specific commercial item contracts. Indeed, as our comments below demonstrate, many of the concerns identified in the Deviation are already addressed, or can be addressed, through the existing provisions in FAR Part 12. The FAR acknowledges the variety of commercial products and services purchased by Government agencies, as well as the differences in commercial practices across various industries. In recognition that it may be appropriate to tailor the commercial terms in FAR 52.212-4 to better align with commercial practices of the particular industry, FAR 12.302 permits Contracting Officers (COs) to tailor a commercial item contract to reflect market terms and conditions for each acquisition. The FAR also expressly

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5 Existing contracts whose rates and fees were negotiated based on terms and conditions that could be inconsistent with the Deviation will be required to incorporate the new terms whenever an option period is exercised or the contract is otherwise modified. This will require the Government’s Contracting Officers to enter into further negotiations with its existing contractors in order to obtain revisions to these contracts to reflect these changed terms. See, e.g., FAR 43.103 (addressing bilateral modifications).

6 The Notice states that the Class Deviation will apply to “all new awards for GSA acquisitions for commercial supplies or services. Existing contracts will be required to incorporate the new terms whenever an option period is exercised or the contract is otherwise modified.” 80 Fed. Reg. 15013.
identifies those commercial item terms and conditions contained in FAR 52.212-4 that are not subject to negotiation and therefore may not be tailored.

Fourth, use of the regulatory rulemaking process will facilitate a dialogue that could result in harmonization of the approaches taken by civilian and Department of Defense (DoD) agencies when contracting for commercial items. For example, in February 2015, the DoD issued a Class Deviation addressing certain requirements when DoD contracts for cloud computing services. Among other things, the DoD Class Deviation provides that “cloud computing services that are commercial items shall be acquired under the terms and conditions (e.g., license agreements, End User License Agreements (EULA), Terms of Service (TOS), or other similar legal instruments or agreements) customarily provided to the public, to the extent that such terms and conditions are consistent with Federal law and otherwise satisfy the Government’s needs….” See DFARS 239.9902-1 General. (DEVIATION 2015-O0011).

Fifth, as discussed in Section III.C below, one of the most important aspects of the changes implemented pursuant to the Federal Acquisition Streamlining Act of 1994 (FASA) is that it not only created a preference for commercial items, but it provided that, to the extent that it was consistent with federal law and the Government’s needs, the Government should purchase commercial items under terms that more closely resemble those found in the commercial marketplace. An underlying premise of FASA is that the shift to commercial item procurements would allow the Government to realize significant cost savings by eliminating some of the more cumbersome and expensive contract requirements that contractors often face when doing business with the Government. While the Section recognizes that there are circumstances where commercial terms are not acceptable to the Government, it encourages GSA to consider what terms are truly in contravention of federal law and what terms are simply not optimal, especially where rejection of a commercial term increases the potential cost or risk to the contractor. In such situations, it is likely that those additional costs will be passed on to the Government and deter certain valued commercial vendors from participating in Government procurements.

Finally, the Deviation may also disproportionately impact small businesses and resellers, whose ability to negotiate deviations from the standard terms and conditions of a commercial original equipment manufacturer or software provider may be attenuated. For example, a small business does not have the market leverage to influence such suppliers. Moreover, resellers may be restricted by their reseller agreements from agreeing to such directed changes. As a result, these vendors may be reluctant to do business with the Government.

In sum, if after consideration of these and other comments, GSA still believes that changes to its policies and contracting provisions with respect to commercial item contracts are required, the Section urges GSA to pursue such changes through the standard regulatory process. By doing so, GSA will ensure that interested parties, including other Government agencies, are afforded the opportunity to comment, allow a reasonable time period for consideration of comments before significant changes are
implemented, provide for the exchange of views through public meetings, and proceed in a manner that is consistent with the regulatory process established in the FAR for procurement rule changes of this magnitude.

B. The Deviation’s Proposed Changes to Standard Commercial Terms and Conditions Appear to Go Beyond What is Required to Comply with Federal Law.


FASA was designed to make federal contracts for commercial items more consistent with their commercial counterparts in order to encourage the acquisition of such items. See Pub. L. No. 103-355. Section 8002 of FASA mandates that contracts for the acquisition of commercial items include only those clauses “that are required to implement provisions of law or executive orders applicable to acquisitions of commercial items . . .” or “that are determined to be consistent with customary commercial practice” to the maximum extent practicable. Id. § 8002. The FAR includes similar requirements. FAR 12.301(a).

FASA’s mandates are addressed in FAR Part 12, the terms of which take precedence over any other part of the FAR. FAR 12.102(c); see also CGI Fed. Inc. v. U.S., 779 Fed. 3d. 1356 (Fed. Cir. 2015) (finding that FAR Part 12 takes precedence over any other part of the FAR including FAR Subpart 8.4 and striking a solicitation term that violated FAR Part 12 because it was inconsistent with customary commercial practice). Accordingly, FAR 52.212-4, which the FAR Council found consistent with commercial practices, governs commercial item contracts. FAR 12.301(b)(3). Any additional terms and conditions the CO adds must be consistent with FASA’s mandate that such clauses are required to implement provisions of law or executive orders or are consistent with standard commercial practice. FAR 12.301(e).

2. Certain Clauses in the Deviation Already Are Addressed By FAR Part 12.

FAR 12.302(b)-(c) allows COs to tailor certain clauses in FAR 52.212-4 so long as the variations are consistent with FAR Part 12 and customary commercial practice. FAR 12.302(b) also includes a list of clauses in FAR 52.212-4 that may not be tailored: Assignments, Disputes, Payments, Invoice, Other Compliances, Compliance with Laws Unique to Government Contracts, and Unauthorized Obligations. These mandatory provisions are identified in FAR 52.212-4(s), Order of Precedence, as having precedence over any addenda added to the solicitation, such as terms included in a Commercial Supplier Agreement. Accordingly, as discussed in more detail below, GSA’s proposed deviations with respect to Assignments, Disputes, Payments and automatic renewals of limited terms in violation of the Anti-Deficiency Act (ADA) are unnecessary as those provisions are mandated by FAR 12.302(b) and therefore currently have precedence over Commercial Supplier Agreements.

The use of a GSA Deviation to remove clauses also poses difficulties with regard to the tiered nature of certain commercial item acquisitions. In some cases, the Deviation may reject commercial terms and conditions that the prime contractor has agreed to in its supplier agreements. If the prime contractor is unable to renegotiate its supplier terms and conditions to harmonize the terms imposed on it by the Deviation, it may be at risk for additional potential liabilities for products and/or services supplied by subcontractors under its prime contract. The risks created by any of these “gaps” between the terms and conditions under which the prime contractor purchases goods and services from its commercial suppliers and those under which it sells to the Government likely will be passed on to the Government by the prime contractor.

Certain terms and conditions that are appropriate or even mandatory at the prime contractor level are not mandatory, and in some cases are not appropriate at the second or lower-tiers. As one example, the prime contractor will be subject to FAR 52.233-1, Disputes, as required by the Contract Disputes Act of 1978 (CDA). Yet, the CDA defines a “contractor” as the party in a contractual relationship with the Government, and not a party that is in a contractual relationship with another private party. See, e.g., 41 U.S.C. § 7101(7). Accordingly, a lower-tier contractor is not subject to, and may reasonably reject, inclusion of FAR 52.233-1 in its subcontract. In this regard, it is unclear the extent to which an end user license agreement creates sufficient direct privity between the Government and a lower tier supplier to allow the application of FAR 52.233-1 without sponsorship by the prime contractor. A lower-tier contractor may be reluctant to have FAR 52.233-1 as its sole remedy and relinquish remedies under federal laws, such as 28 U.S.C. § 1498 or the Lanham Act.

C. The Fifteen Examples of “Incompatible Clauses” that are Purportedly “Inappropriate When the Purchaser Is the Government” Should Be Addressed Through Rulemaking.

The Deviation identifies 15 “incompatible clauses” that are purportedly “inappropriate when the purchaser is the Federal Government.” See 80 Fed. Reg. 15011, 15011. As discussed below, most of these clauses are not “incompatible.”

1. Definition of contracting parties

Contract agreements are between the commercial supplier or licensor and the U.S. Government. Government employees or persons acting on behalf of the Government will not be bound in their personal capacity by the Commercial Supplier Agreement.

Comment:

A supplier often has no way of knowing if a buyer is a Government employee purchasing in his or her personal capacity or if a Government employee is purchasing on behalf of the Government. Because only a CO has the authority to bind the
Government, FAR 1.602-1, if a Government employee who is not a CO purports to enter into a contract on behalf of the United States, and that contract is not “ratified” by an authorized CO, the Government is not bound by that commitment and cannot use the product or enjoy the benefit of the service. If a Government employee who lacks the actual authority to bind the United States purports to enter into a contract with a Government contractor, under applicable state law, that Government employee may be bound by the terms of that contract in his or her “personal capacity” as an individual. Finally, even where a CO signs a Commercial Supplier Agreement on behalf of the Government, the scope of permitted usage, by virtue of the terms of that Commercial Supplier Agreement, may be restricted to a more narrow sub-entity, such as a particular office or command.

2. **Contract formation**

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:

As a threshold matter, nothing prohibits a CO from agreeing to a license that incorporates terms by reference. In fact, the Government routinely incorporates contract terms by reference in its contracts. Although express incorporation may be preferable, there are some practical considerations. For example, often commercial software incorporates third party and/or open source software. In such cases, a contractor’s capacity to license to the Government is limited by those third party and open source licenses. Moreover, in some cases, it is simply impractical to include physical copies of third party and open source licenses. The Section agrees that there needs to be some mechanism whereby the Government and contractor have a clear understanding of the terms of the license agreement. The precise mechanism is one that the Section believes should be addressed in a rulemaking or else deferred to negotiation by the parties to the particular contract to allow for the development of a workable solution given the complexity of certain licenses.

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*Comment:* To the extent the Government retains and uses the product or enjoys the benefit of the service, it may be required to provide compensation to the product or services provider, either under quantum meruit, as a taking, or through the processes set forth in 28 U.S.C. § 1498(b).
Similarly, “click-wrap” and “browse-wrap” licenses, while possibly not a “best practice” or even practical for Government end-users, are neither illegal nor beyond the authority of a CO’s ability to bind the Government. “Click-wrap” and “browse-wrap” licenses are commonly used in the commercial marketplace. The validity of “click-wrap/shrink wrap” licenses for commercial computer software has been upheld by many courts.8

Although some agencies have suggested that “click-wrap” licenses are inconsistent with federal law because acquisitions involving appropriated funds may only be entered into by a duly warranted CO in writing, agencies may more persuasively oppose “click-wrap” licenses because of the users’ needs issue. The Government certainly wants to avoid scenarios like the one implied by the GSA Fail Chart9 where various software users – many, if not most, of whom are not COs – may be “agreeing” to various versions of a commercial computer software license. The Government also legitimately wants to avoid potential ratification issues that may arise when a CO is aware of “unauthorized commitments” such as when program personnel routinely are accepting “click-wrap” licenses. The “users’ needs” also includes avoiding the potential for federal officials to make themselves personally bound – and liable – under a particular commercial computer software license when their intent is solely for use in the performance of their official duties, and the availability of the relevant and appropriate protections available for such use.

Although a “click-wrap” license potentially can be used to bind the Government, the practical reality is that commercial computer software providers generally should eschew the use of click-wrap licenses with the Government. This way the software provider can ensure that the Government is properly bound by the officials who lawfully can bind the Government, without embarrassing the customer with a ratification dilemma. Ultimately, the commercial computer software provider can avoid the potential for a software license to be void ab initio, which is a potential outcome if the license is accepted on behalf of the Government by someone without actual authority and there is no ratification. For example, the “click-wrap” language does not necessarily have to be physically removed from the commercial computer software

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8 ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (terms contained within a license that displayed onscreen when software was installed off a CD Rom disk were accepted by clicking through the dialog box and selecting “Yes”); Hotmail Corp. v. Van Money Pie Inc., C98-20064 (N.D. Ca., Apr. 20, 1998) (defendants were bound by Terms of Service posted on a website as a result of their act of clicking on a button labelled “I agree.”); Specht v. Netscape Communis. Corp., 150 F.Supp.2d 585 (S.D.N.Y. 2001), aff’d, 306 F.3d 17 (2d. Cir. 2002) (click-wrap software licenses are enforceable); In re Real Networks, Inc. Privacy Litigation, No. 00-1366, 2000 WL 631341 (D. Ill. May 8, 2000) (upholding an arbitration clause); but see Schnabel v. Trilegiant Corp., 2012 WL 3871366 (2d Cir. Sept. 7, 2012) (arbitration provision not enforceable or valid when not included in the particular software license terms and conditions set forth at the time of the “click-wrap” agreement, but included instead in a “follow-up” e-mail promptly sent after initial license agreed to by “click”).

9 The GSA Fail Chart is an internal guideline developed by the Government to identify “unacceptable” provisions and standards. GSA has used the Chart historically to assess End User License Agreements. http://www.gsa.gov/portal/mediadl/151519/fileName/Schedule_70_-_Quarterly_Industry_Meeting_-_Nov_1_2012.action. To our knowledge, the Chart was not developed through rulemaking processes.
provider’s customary license, but language could be added in the license agreement, or an addendum, to make it clear that Government licensees will not be bound solely by acceptance of a “click-wrap” license. This further indicates the need for thoughtful discussion on such practices whether on a global or individualized basis.

Finally, the order of precedence provision included (“[t]he terms of the deviated clause and other identified elements will supersede any conflict with the Commercial Supplier Agreement”) is unclear. The provision should further define the meaning of the phrase “terms of the deviated clause and other identified elements.” To the extent the Government is purchasing a commercial product, it cannot simply substitute different material terms by operation of law without negotiation as the provision contemplates.

3. Patent indemnity (contractor assumes control of proceedings)

Any clause requiring that the commercial supplier or licensor control any litigation arising from the government’s use of the contractor’s supplies or services is deleted. Such representation when the Government is a party is reserved by statute for the U.S. Department of Justice.

Comment:

The Deviation would operate to delete any patent indemnity terms that would allow a “commercial supplier or licensor [to] control any litigation arising from the government’s use of the contractor’s supplies or services . . . .” the Section believes this approach is consistent with existing law. In the event of a patent infringement claim based on the Government’s use of an item, the United States would be named as a defendant as the alleged infringing party. Only the Attorney General and his or her delegates have the authority to direct litigation in which the United States is a party. Therefore, the Government already has the sole right to direct litigation of cases in which a Commercial Supplier Agreement’s patent indemnity clause would apply and any contract language to the contrary is unenforceable.

There are some instances in which parties other than the Attorney General are authorized to direct the conduct of litigation in which the United States is a party, and these are exceptions to 28 U.S.C. § 516. Nonetheless, we are unaware of any exceptions that apply to defense of a patent infringement claim. Regardless, the Deviation’s patent indemnity provision could be overly broad by making such an indemnity term invalid per se. If GSA moves forward with the Deviation, the Section suggests revising the Deviation to state that “any provisions requiring the licensor to indemnify a Federal Government Licensee shall be subject to 28 U.S.C. § 516.” This change would accomplish the goal of the Deviation, while preserving needed flexibility to accommodate future exceptions to the statute.
Finally, Rule 14(b) of the Court of Federal Claims provides a mechanism for indemnifying contractors to participate in those proceedings. See, e.g., Uusi, LLC v. United States, 110 Fed. Cl. 604 (2013). This rule requires a contractual connection that aligns the Government’s indemnity interest with the supplier’s indemnity interest; this connection could be lost if the provision is simply struck.


Due to Anti-Deficiency Act restrictions, automatic contract renewal clauses are impermissible. Any such Commercial Supplier Agreement clauses are unenforceable.

Comment:

GSA’s concern regarding automatic renewals of term-limited agreements included in Commercial Supplier Agreements has arguably already been addressed by the FAR Council through the addition of FAR 52.212-4(u) Unauthorized Obligations. FAR 52.212-4(u) provides that any commercial terms “requiring the Government to indemnify the Contractor or any person or entity for damages, costs, fees, or any other loss or liability that would create an Anti-Deficiency Act violation ...” is unenforceable against the government and is stricken from the contract. See FAR 52.212-4(u)(1) (emphasis added). FAR 12.203 provides that the CO may not tailor FAR 52.212-4(u). Furthermore, this clause takes precedence over any terms included in a Commercial Supplier Agreement attached as an addendum to a contract. See FAR 52.212-4(s). To the extent that there is any ambiguity regarding whether this clause applies to purported automatic renewals of term-limited agreements in violation of the ADA, the Section recommends that in lieu of the Deviation provision, the FAR Council clarify that FAR 52.212.-4(u) strikes from commercial agreements any clause that violates the ADA.

5. Future fees or penalties

Future fees – such as attorney fees, cost or interest – may only be awarded against the U.S. Government when expressly authorized by statute (e.g. Prompt Payment Act).

Comment:

A CO is not prohibited from agreeing to pay any future fees or penalties under existing law. Indeed, there are certain types of fees and penalties that are permitted and would not run afoul of the ADA, such as where a CO could agree to pay a higher rate if he or she delays in exercising an option or orders a lesser quantity. GSA’s concern regarding future fees or penalties appears to be similar to that discussed above for automatic renewals of term-limited agreement in that the Government is prohibited by the ADA from accepting a contract provision that creates future liability for the
Government unless specifically authorized by statute. As discussed above, FAR 52.212.-4(u) addresses this concern.

6. Taxes

Any taxes or surcharges that will be passed along to the Government will be governed by the terms of the underlying contract. The cognizant contracting officer must make a determination of applicability whenever such a request is made.

Comment:

The notice accompanying the Deviation does not explain the need for this provision. FAR 52.212.-4(k) requires that “[t]he contract price includes all applicable Federal, State, and local taxes and duties.” Nevertheless, FAR 12.203 allows the CO to tailor this clause. Accordingly, existing law already provides that a CO may agree to allow contractors to pass on costs associated with taxes and surcharges.

7. Payment terms or invoicing (late payment)

Any Commercial Supplier Agreement terms that purport to establish payment terms or invoicing requirements that contradict the terms of the Government contract will be unenforceable. Discrepancies found during an audit must comply with the invoicing procedures from the underlying contract.

Comment:

We believe that GSA’s concern regarding payment or invoicing terms included in Commercial Supplier Agreements is addressed already by FAR 52.212-4(g) Invoice and FAR 52.212-4 (i) Payment. FAR 12.203 provides that the CO may not tailor FAR 52.212-4(g) or (i). Furthermore, these clauses take precedence over any terms included in a Commercial Supplier Agreement attached as an addendum to a contract. See FAR 52.212-4(s). Accordingly, the Section recommends that if GSA proceeds with a Deviation, it should delete this provision.

8. Automatic incorporation/deemed acceptance of third party terms

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 Section recommends that GSA review this requirement. Although there is nothing to preclude a CO from insisting on the inclusion of third party contract terms as an attachment to the contract, there are practical considerations that the Deviation may not reflect. For example, in this era of electronic contracting, it may be more efficient for terms to be incorporated by reference. Furthermore, commercial software often incorporates third party and/or open source software. A simple commercial license agreement may require the inclusion of hundreds of pages of license terms to incorporate all third party licenses. Finally, as a practical matter, a contractor’s ability to negotiate the terms of commercial third party agreements may be attenuated, or, as in the case of certain open source software, impossible. Thus, the Government may have no choice but to accept certain third party terms if it wants the commercial product or service at issue.

9. State/foreign law governed contracts

Clauses that conflict with the sovereign immunity of the U.S. Government cannot apply to litigation where the U.S. Government is a defendant because those disputes must be heard either in U.S. District Court or the U.S. Court of Federal Claims. Commercial Supplier Agreement terms that require the resolution of a dispute in a forum other than that expressly authorized by Federal law are deleted. Statutes of limitation on potential claims shall be governed by U.S. Government law.

Comment:

The Section agrees with the sentiment of this provision. Nonetheless, the Section believes that this clarification should apply to commercial item contracts on a Government-wide basis and not only to GSA contracts. This clarification highlights the benefit of utilizing the regulatory rulemaking process.

10. Equitable remedies, injunctions, binding arbitration

Equitable remedies, injunctive relief and binding arbitration clauses may not be enforced unless explicitly authorized by agency guidance or statute.

Comment:

The Section agrees that “[e]quitable remedies, injunctive relief and binding arbitration clauses may not be enforced unless explicitly authorized by . . . statute.” As the Deviation contemplates, there are circumstances where equitable remedies are authorized by law. For example, equitable remedies are potentially available for certain
causes of action, such as disclosure of confidential or proprietary information. See, e.g., *Megapulse, Inc. v. Lewis*, 672 F.2d 459 (D.C. Cir. 1982). Similarly, equitable remedies may be available against the Government under causes of action based on the Lanham Act. Nevertheless, FAR 12.302(b) references the Disputes clause as one that cannot be tailored. Accordingly, the Section does not believe this provision of the Deviation is required.

11. **Unilateral termination of Commercial Supplier Agreement by supplier**

Commercial suppliers may not unilaterally terminate or suspend a contract unless the supplies or services are generally withdrawn from the commercial market. Remedy from contractual breach by the Government must be pursued under the Contract Disputes Act.

**Comment:**

We are unaware of a law or regulation that prohibits the unilateral termination of a Government contract by the contractor in circumstances other than when the supplies or services are generally withdrawn from the commercial market, so long as the contract expressly provides for such unilateral termination. For example, all GSA Multiple Award Schedule contracts include GSAR 552.238-73 Cancellation which expressly contemplates unilateral termination by a contractor:

Either party may cancel this contract in whole or in part by providing written notice. The cancellation will take effect 30 calendar days after the other party receives the notice of cancellation. If the Contractor elects to cancel this contract, the Government will not reimburse the minimum guarantee.

GSAR 552.238-73. The Section believes that the current regulatory provision adequately addresses the parties’ rights and does not require the more narrow applicability set forth in the Deviation.

12. **Unilateral modification of Commercial Supplier Agreement by supplier**

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

**Comment:**

The Section suggests that GSA revisit this provision as well. For example, in some industries terms and conditions may change as a standard commercial practice.
Moreover, we are aware of no impediment to a CO agreeing to a contract or license that reserves the right to modify terms over time. Given the potential length of some commercial item contracts where options to extend the term of the contract are exercised at the Government’s discretion, the ability to modify terms and conditions in the future may be desirable for both parties. Although contract administration may be facilitated by contract terms that are frozen in time at the time of execution or modification, by engaging in the FAR notice and comment rule making process, the Government will gain better insight into the potential impact on both the Government and contractors of this proposed provision.

13. **Assignment of Commercial Supplier Agreement or Government contract by supplier**

The contract, Commercial Supplier Agreement, party rights and party obligations may not be assigned or delegated without express Government approval. Payment to a third party financial institution may still be reassigned.

Comment:

As discussed above, GSA’s concern regarding an assignment term included in Commercial Supplier Agreements is addressed by FAR 52.212-4(b) Assignment. FAR 12.302 provides that the CO may not tailor FAR 52.212-4(b). Furthermore, this clause takes precedence over any terms included in a Commercial Supplier Agreement attached as an addendum to a contract. See FAR 52.212-4(s). Thus, the Section suggests that this Deviation provision is not necessary.

14. **Confidentiality of Commercial Supplier Agreement terms and conditions**

The content of the Commercial Supplier Agreement and the final contract pricing may not be deemed confidential. The Government may retain other marked confidential information as required by law, regulation or agency guidance, but will appropriately guard such confidential information.

Comment:

The Section recommends that if GSA proceeds with a Deviation, it clarify this provision. Although GSA may be implementing requirements of the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), we believe that the Deviation is overbroad and could be applied in a manner that is inconsistent with FOIA exemptions and court decisions interpreting the applicability of those exemptions. For example, courts have held that certain pricing information is exempt from FOIA – even though the pricing
information was incorporated in a public contract. See, e.g., Canadian Comm’l Corp. v. Air Force, 514 F.3d 37 (D.C. Cir. 2008). Where, as here, the Deviation does not define the term “final contract pricing,” it could be interpreted to include the type of pricing information that has been held as exempt from disclosure under FOIA. Accordingly, the Section submits that GSA should either eliminate this portion of the Deviation or harmonize this provision with the protections offered by FOIA.

15. **Audits (automatic liability for payment)**

Discrepancies found during an audit must comply with the invoicing procedures from the underlying contract. Disputed charges must be resolved through the Disputes clause. Any audits requested by the commercial supplier or licensor will be performed at supplier or licensor’s expense.

Comment:

The Section agrees that no law prohibits a Commercial Supplier Agreement from containing an audit clause where such audit is at the commercial supplier’s expense, and that discrepancies found during an audit must comply with the invoicing procedures of the underlying contract. However, there is no law that requires a lower-tier contractor to use the Disputes clause in order to dispute charges as a result of an audit. In this regard the Government, too, frequently benefits from not making the Disputes clause mandatory to lower-tier subcontractors since the Government generally seeks to avoid privity of contract with such lower-tier subcontractors.

We also note that audits present certain practical considerations that the parties may need to consider. In this regard, the reality often is that it is not practical for a commercial supplier to attempt to obtain audit rights against a Government licensee under the same terms and conditions used with a non-governmental licensee. For example, there are laws and regulations, such as the industrial security laws, that may prohibit or constrain the ability of a commercial computer software provider to gain physical access to the premises where the Government may have licensed software installed. Similar laws, together with data assurance requirements, may also prohibit or constrain the ability of a commercial computer software provider to access its licensed software being used by the Government. The data assurance and related requirements will also typically prohibit “remote” monitoring or access of commercial software on a federal system or network even though the this type of monitoring occurs routinely in the commercial marketplace. Finally, legitimate Government user needs may limit a software provider’s preferred means of auditing.

In lieu of the common “audit rights” provision in a commercial computer software license, the Government can, and on a case-by-case basis should, consider agreeing to audit its use in comparison to its license rights (using either the Agency’s own resources or with assistance from the Defense Contract Management Agency
(DCMA) where appropriate), and to provide candid periodic reports of its self-audit to the commercial computer software provider.

D. Other Issues Not Identified In the Deviation That Would Benefit From Rulemaking Process/Public Discussion.

The Section also believes there are other provisions tied to commercial item contracting that might benefit from review and consideration in the context of a FAR rulemaking notice and comment process. For example, there are commercial risk-shifting provisions that should be the subject of public comment before adjustments are made. In determining commercial pricing, contractors take into consideration risk shifting provisions, such as warranty provisions and limitations on liability. Changes to these provisions would disrupt the current expectations of commercial item contractors. The Section recommends a more comprehensive review of such commercial terms and conditions as part of such a rulemaking.

IV. CONCLUSION

For the reasons stated above, the Section recommends that GSA consider withdrawing the Deviation and issuing a notice of proposed rulemaking that explains the basis for GSA’s proposed action and permits the opportunity for comment and a broader dialogue among Government and industry concerning the proposed revised approach to commercial item contracting. The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Stuart B. Nibley
Chair, Section of Public Contract Law

cc:
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