April 26, 2006

VIA ELECTRONIC MAIL AND FIRST CLASS MAIL

General Services Administration
Regulatory Secretariat (VIR)
1800 F Street, N.W.
Room 4035
Washington, DC 20405
Attn: Ms. Laurieann Duarte

Re: Advance Notice of Proposed Rulemaking, GSAR ANPR 2006-N01, 71 Fed. Reg. 7910 (February 15, 2006); GSAR Revision Initiative

Dear Ms. Duarte:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section's governing Council and substantive committees have 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 Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.1

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1 This letter is available in pdf format at http://abanet.org/contract/Federal/regscmmt/home.html under the topic "Commercial Items."
As part of the General Services Administration’s (“GSA”) effort to review and update the General Services Administration Acquisition Regulation (“GSAR”), the February 15, 2006 Advance Notice of Proposed Rulemaking (“ANPR”) requests comments on areas where the GSAR could be revised and simplified. The GSAR is the regulatory portion of the General Services Administration Acquisition Manual (“GSAM”), which contains both regulatory and non-regulatory guidance.

The Section has identified several areas where we would like to offer suggestions for revising the GSAR. We present our suggestions below under the following headings:

1. Establishing a Central Location for All Contract Clauses GSA Includes in Federal Supply Schedule (“FSS”) contracts and Governmentwide Acquisition Contracts (“GWACs”).

2. Suggestions to Provide Consistency With the FAR and Eliminate Redundancies and Inefficiencies.

3. Clarifying the Price Reductions Clause in Several Respects.


5. Simplifying the “Refresh” Process for FSS Contracts.


In addition, we would like to take this opportunity to note that on May 10, 2005, the Section provided two comment letters addressing potential GSAR revisions. Both letters were in response to GSA’s April 12, 2005 Advance Notice of Proposed Rulemaking requesting comments on: (1) whether GSAR should be revised to include a waiver of consequential damages for commercial item contracts awarded under the Federal Acquisition Regulation (“FAR”); and (2) whether “post award” audit provisions should be included in GSA’s Multiple Award Schedules contracts and Government-wide Acquisition Contracts. To our knowledge, GSA has taken no action with respect to those comments (or that ANPR). The Section still supports those comments and believes GSA may find them germane to this ANPR. Copies of those letters are enclosed for your convenience.
1. Establishing a Central Location for All Contract Clauses GSA Includes in FSS and GWAC contracts.

In addition to standard FAR clauses, FSS contracts and GWACs awarded by GSA contain numerous standard contract clauses. Although the GSAR contains some of those clauses, many clauses GSA includes in solicitations are not in the GSAR or the FAR. In particular, the clauses denoted as x-FSS clauses and the FAR “deviations” (i.e., standard FAR clauses that have been tailored for FSS and GWAC contracts) are not published in the GSAR. Moreover, these clauses are sometimes incorporated by reference in the contract and are difficult to locate. We recommend that GSA establish a central location—preferably on the internet—where purchasers and sellers can locate the full array of clauses used by GSA. At present, there is no single publication, website, or other resource where all of these different types of contract clauses can be reviewed. Publishing all of them in a central location will make the contract formation process more transparent and administratively less burdensome.

2. Suggestions to Provide Consistency With the FAR and Eliminate Redundancies and Inefficiencies.

The ANPR requests suggestions to revise the GSAR to make it consistent with the FAR and to eliminate inconsistencies and redundancies between the FAR and GSAR. We have reviewed the GSAR and FAR terms as used by GSA in the context of a Federal Supply Schedule (here, Schedule 70). What follows is an abstract of clause C.1, Contract Terms and Conditions – Commercial Items (FAR 52.212-4) (Oct 2003) (Tailored) (Deviation – May 2003), identifying redundant and conflicting GSAR and FAR terms. In each case, we have provided recommendations for alleviating those redundancies and conflicts.

(a) Inspection/Acceptance. The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The ordering activity reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The ordering activity may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. The ordering activity must exercise its post acceptance rights (1) within a reasonable time after the defect was discovered or should have been discovered; and (2) before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item. [GSA Deviation]
FAR Clauses on Topic

52.246-4 INSPECTION OF SERVICES-FIXED-PRICE (DEVIATION – MAY 2003) AUG 1996
52.246-6 INSPECTION-TIME-AND-MATERIAL AND LABOR-HOUR (DEVIATION – MAY 2003) MAY 2001

GSAR Clauses on Topic


Discussion

(1) The FAR and GSAR clauses conflict and are redundant with paragraph (a) of 52.212-4.

(2) GSAR 552.246-73, which invites contractors to offer their commercial warranties to address post-acceptance remedies, conflicts with the final sentence of paragraph (a) of 52.212-4.

Recommendation

(1) These clauses should be reconciled or deleted to the extent they are redundant. Paragraph (a) could be limited in application to products under particular SINs – as opposed to services – to easily alleviate the patent conflict between the FAR clauses as to the inspection and acceptance of services.

(2) The final sentence of paragraph (a) should be changed to reference the post acceptance rights contemplated under the contractor’s commercial warranty pursuant to GSAR 552.246-73. This change might read as follows: “The ordering activity must exercise any post acceptance rights pursuant to contractor’s commercial warranty incorporated into this contract under C.32. If no such commercial warranty is incorporated, then the ordering activity must exercise its post acceptance rights (1) within a reasonable time after the defect was discovered or should have been discovered; and (2) before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.” Alternatively, the final sentence of paragraph (a) should be deleted altogether as the post acceptance rights to which it refers are unclear.

* * * * *
(b) **Assignment.** The Contractor or its assignee may assign its rights to receive payment due as a result of performance of this contract to a bank, trust company, or other financing institution, including any Federal lending agency in accordance with the Assignment of Claims Act (31 U.S.C. 3727). However, when a third party makes payment (e.g., use of the credit card), the Contractor may not assign its rights to receive payment under this contract. [GSA Deviation]

**FAR Clauses on Topic**


**GSAR Clauses on Topic**


**Discussion**

GSAR 552.232-23 conflicts with and supplements paragraph (b). GSAR 552.232-23 incorporates FAR 52.232-23, but whereas FAR 52.232-23 permits assignment of any amount under the contract to a bank, trust company or financial institution, GSAR 552.232-23 changes the first paragraph of FAR 52.232-23 to permit the assignment of amounts due under any *order* of $1000 or more. Although the GSAR clause refers to the indefinite delivery/indefinite quantity nature of the GSA Schedule Contract as the rationale, it is unclear if the $1000 limitation remains relevant today; the vast majority of orders are well above $1000. The change in nomenclature between the contract and order is appropriate and provides the parties more flexibility than a reference to the entire GSA Schedule Contract might.

**Recommendation**

C.21 should be deleted and paragraph (b) should be changed to conform to the order concept. GSAR 552.232-23, including the $1000 limitation, should be eliminated. Thus, paragraph (b) might read: “The Contractor or its assignee may
assign its rights to receive payment due as a result of performance of this contract, or any order hereunder, to a bank, trust company, or other financing institution, including any Federal lending agency in accordance with the Assignment of Claims Act (31 U.S.C. 3727). Nevertheless, when a third party makes payment (e.g., use of a credit card), the Contractor may not assign its rights to receive payment under this contract.

* * * *

(c) **Changes.** Changes in the terms and conditions of this contract may be made only by written agreement of the parties. [Standard]

**FAR Clauses on Topic**

None Found

**GSAR Clauses on Topic**

None Found

**Discussion**

Paragraph (c) does not make clear whether changes to the contract may be agreed to by an ordering activity and the contractor for purposes of a particular order.

**Recommendation**

As GSA has recognized with other paragraphs in 52.212-4, the Changes Clause should clearly be made applicable to orders as well. This could be accomplished, for example, by adding a sentence to Attachment I, INFORMATION FOR ORDERING ACTIVITIES APPLICABLE TO ALL SPECIAL ITEM NUMBERS, Paragraph 15, stating such applicability, as follows: “Changes in the terms and conditions of this contract, as it relates to an order, may be made only by written agreement of the parties.”

* * * *

(d) **Disputes.** This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Failure of the parties to this contract to reach agreement on any request for
equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract. [Standard]

FAR Clauses on Topic

None Found

GSAR Clauses on Topic

None Found

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(e) **Definitions.** The clause at FAR 52.202-1, Definitions, is incorporated herein by reference. [Standard]

FAR Clauses on Topic

None Found

GSAR Clauses on Topic

None Found

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(f) **Excusable delays.** The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the ordering activity in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such
occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence. [GSA Deviation]

FAR Clauses on Topic

None Found

GSAR Clauses on Topic

None Found

Discussion

(1) GSA has changed paragraph (f) of 52.212-4 by substituting the words “ordering activity” for “Government” in the standard FAR version. Although this change is appropriate in other areas of the clause, it is not appropriate to describe force majeure events. Typically, a force majeure clause recognizes that a superseding event could arise from any part of the Government rather than solely the ordering activity.

(2) The clause might be read to create automatic liability for default of the entire contract for a nonperformance event with a single order.

Recommendation

(1) Revert back to the term “Government” rather than “ordering activity.”

(2) As GSA has recognized with other paragraphs of 52.212-4, this paragraph should be changed to recognize its applicability to particular orders issued by an ordering activity. Here, GSA should consider changing the wording of the first sentence to state: “The Contractor may be liable for default for nonperformance of an order unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor . . .”

* * * *

(g) (1) Invoice. The Contractor shall submit an original invoice and three copies (or electronic invoice, if authorized,) to the address designated in the contract to receive invoices. An invoice must include-
(1) Name and address of the Contractor;
(2) Invoice date and number;
(3) Contract number, contract line item number and, if applicable, the order number;
(4) Description, quantity, unit of measure, unit price and extended price of the items delivered;
(5) Shipping number and date of shipment including the bill of lading number and weight of shipment if shipped on Government bill of lading;
(6) Terms of any discount for prompt payment offered;
(7) Name and address of official to whom payment is to be sent;
(8) Name, title, and phone number of person to be notified in event of defective invoice; and
(9) Taxpayer Identification Number (TIN). The Contractor shall include its TIN on the invoice only if required elsewhere in this contract.

Electronic Funds Transfer (EFT) banking information. The Contractor shall include EFT banking information on the invoice only if required elsewhere in this contract. If EFT banking information is not required to be on the invoice, in order for the invoice to be a proper invoice, the Contractor shall have submitted correct EFT banking information in accordance with the applicable solicitation provision, contract clause (e.g., 52.232-33, Payment by Electronic Funds Transfer – Central Contractor Registration, or 52.232-34, Payment by Electronic Funds Transfer – Other Than Central Contractor Registration), or applicable agency procedures.

EFT banking information is not required if the Government waived the requirement to pay by EFT.

(2) Invoices will be handled in accordance with the Prompt Payment Act (31 U.S.C. 3903) and the Office of Management and Budget (OMB) prompt payment regulations at 5 C.F.R. part 1315. [Standard]
FAR Clauses on Topic

D.1 52.232-33 PAYMENT BY ELECTRONIC FUNDS TRANSFER – CENTRAL CONTRACTOR REGISTRATION (OCT 2003)

GSAR Clauses on Topic

C.42 INVOICE PAYMENTS (GSAR 552.232-74) (SEP 1999)

Discussion

(1) D.1 makes clear that the Government will use EFT to make payments under the contract.

(2) Subparagraph (d) of C.42 changes the requirement in FAR 52.212-4(g)(1) from having to provide three copies of the invoice to having to provide only one original invoice.

Recommendation

(1) The unlabelled paragraph after (g)(1) but before (g)(2) of GSA’s deviation to FAR 52.212-4 addresses electronic funds transfer. D.1 should be integrated with this portion of the clause to simplify the contract. The Section recommends deleting D.1. and changing the relevant section of 52.212-4 to more assertively and clearly incorporate 52.232-33, unless an ordering activity indicates otherwise, as follows:

(2) Subparagraph (d) of C.42 should simply be integrated into FAR 52.212-4(g)(1) for simplicity’s sake and to alleviate confusion.

Electronic Funds Transfer (EFT) banking information. The Contractor shall include EFT banking information on the invoice. 52.232-33. Payment by Electronic Funds Transfer – Central Contractor Registration is incorporated herein by reference. EFT banking information is not required if the ordering activity waives the requirement to pay by EFT.

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(h) Patent indemnity. The Contractor shall indemnify the Government and its officers, employees and agents against liability, including costs, for actual or alleged direct or
contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark or copyright, arising out of the performance of this contract, provided the Contractor is reasonably notified of such claims and proceedings. [GSA Deviation]

FAR Clauses on Topic

None Found

GSAR Clauses on Topic

None Found

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(i) **Payment.**

- **Items accepted.** Payment shall be made for items accepted by the ordering activity that have been delivered to the delivery destinations set forth in this contract.

- **Prompt payment.** The Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and prompt payment regulations at 5 CFR Part 1315.

- **Electronic Funds Transfer (EFT).** If the ordering activity makes payment by EFT, see 52.212-5(b) for the appropriate EFT clause.

- **Discount.** In connection with any discount offered for early payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the specified payment date if an electronic funds transfer payment is made.

- **Overpayments.** If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the ordering activity has otherwise overpaid on a contract financing or invoice payment, the Contractor shall immediately notify the Contracting Officer and request instructions for disposition of the overpayment. [GSA Deviation]
FAR Clauses on Topic

C.2  52.232-37 MULTIPLE PAYMENT ARRANGEMENT
C.2  52.232-17 INTEREST (DEVIATION – MAY 2003)
D.1  52.232-36 PAYMENT BY THIRD PARTY (MAY 1999)

52.232-19  AVAILABILITY OF FUNDS FOR THE NEXT FISCAL YEAR
           (DEVIATION – MAY 2003), which states:

For time-and-materials orders, the Payments under
Time-and-Materials and Labor-Hour Contracts at FAR
52.232-7 (DEC 2002), (Alternate II – Feb 2002) (Deviation –
May 2003) applies to time-and-materials orders placed under
this contract. For labor-hour orders, the Payment under
Time-and-Materials and Labor-Hour Contracts at FAR
52.232-7 (DEC 2002), (Alternate II – Feb 2002) (Deviation –
May 2003)) applies to labor-hour orders placed under this
contract.

GSAR Clauses on Topic

C.16  CONTRACTOR’S BILLING RESPONSIBILITIES (GSAR 552.232-
     83) (MAY 2003)
C.17  PAYMENT BY CREDIT CARD (GSAR 552.232-79) (MAY 2003)
C.18  IMPREST FUNDS (PETTY CASH) (1-FSS-918) (MAY 2000)
C.55  PAYMENTS BY NON-FEDERAL ORDERING ACTIVITIES (GSAR
     552.232-81) (MAY 2003)
G.8   CONTRACTOR’S REMITTANCE (PAYMENT) ADDRESS (GSAR
     552.232-82) (MAY 2003)

Recommendation

None

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(j)  Risk of loss. Unless the contract specifically provides
     otherwise, risk of loss or damage to the supplies provided
     under this contract shall remain with the Contractor until,
     and shall pass to the ordering activity upon:
(1) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or  
(2) Delivery of the supplies to the ordering activity at the destination specified in the contract, if transportation is f.o.b. destination. [GSA Deviation]  

FAR Clauses on Topic

None Found  

GSAR Clauses on Topic

C.3 552.211-75 PRESERVATION, PACKAGING AND PACKING  
C.3 552.211-77 PACKING LIST (ALTERNATE 1 – MAY 2003)  
C.12 DELIVERY PRICES (F-FCI-202-G) (MAY 2003)  
C.14 URGENT REQUIREMENTS (I-FSS-140-B) (JAN 1994)  
C.15 DELIVERIES TO THE U.S. POSTAL SERVICES (F-FSS-230) (JAN 1994)  

Recommendation

The Section recommends GSA consider whether the various delivery and packaging requirements can be simplified to simply and clearly require delivery and packaging that comports with the contractor’s standard commercial practices.  

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(k) Taxes. The contract price excludes all State and local taxes levied on or measured by the contract or sales price of the services or completed supplies furnished under this contract. The Contractor shall state separately on its invoices taxes excluded from the contract price, and the ordering activity agrees either to pay the amount of the taxes to the Contractor or provide evidence necessary to sustain an exemption. See FAR clauses 52.229-1 State and Local Taxes [SEE C.2]; 52.229-3 Federal, State, and Local Taxes [SEE C.2]; and 52.229-5 Taxes—Contracts Performed in U.S. Possessions or Puerto Rico [SEE C.2] which are incorporated by reference. [GSA Deviation]
FAR Provisions on Topic

52.229-1 STATE AND LOCAL TAXES (DEVIATION – MAY 2003) APR 1984
52.229-3 FEDERAL, STATE, AND LOCAL TAXES (DEVIATION – MAY 2003) APR 2003
52.229-5 TAXES-CONTRACTS PERFORMED IN U.S. POSSESSIONS OR PUERTO RICO APR 1984
52.229-71 FEDERAL EXCISE TAX – DC GOVERNMENT SEP 1999

GSAR Provisions on Topic

C.49 FOREIGN TAXES AND DUTIES (I-FCI-314) (MAY 2003)

Discussion

(1) These clauses appear to be redundant and conflict, although a careful reading makes clear GSA’s apparent intent to exclude all applicable federal, state, and local taxes and duties, except after imposed or relieved federal taxes.

(2) FAR 52.229-71, which is incorporated into the contract in C.2, is not reflected in current regulations.

Recommendation

(1) A simpler and more straightforward approach to accomplish GSA’s intent would be to delete any reference to 52.229-1, retain paragraph (k) of 52.212-4 (as revised by GSA currently (Deviation – May 2003)) except for the reference to 52.229-1, and modify 52.229-3 (as revised by GSA currently) by deleting paragraph (b) thereof.

(2) The reference to FAR 52.229-71 should be deleted.

* * * * *

(1) Termination for the Ordering Activity’s convenience.
The ordering activity reserves the right to terminate an order, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the
terms of this contract, the Contractor shall be paid a percentage of the order price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the ordering activity using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the ordering activity any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided. [Refer to FAR 8.406-5] [GSA Deviation]

FAR Provisions on Topic

None Found

GSAR Provisions on Topic

None Found

Discussion

(1) The clause is ambiguous due to the use of the word "hereof"; it could be read to suggest that the ordering activity has the ability to terminate the underlying GSA Schedule Contract, rather than merely the order.

Recommendation

(1) The first sentence should be clarified, consistent with GSA’s intent by referring to an “order” rather than the GSA Schedule Contract, by changing the word “hereof” to “thereof” and “hereunder” to “there under”.

* * * * *

(m) Termination for cause. The ordering activity may terminate an order, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract or order terms and conditions, or fails to provide the ordering activity, upon request, with
adequate assurances of future performance. In the event of termination for cause, the ordering activity shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the ordering activity for any and all rights and remedies provided by law. If it is determined that the ordering activity improperly terminated this contract for default, such termination shall be deemed a termination for convenience. [Refer to FAR 8.406-4]

FAR Provisions on Topic

None Found

GSAR Provisions on Topic

C.34 DEFAULT (I-FSS-249-B) (MAY 2000)

Discussion

As with the termination for convenience provision, the use of the word “hereof” in this clause is somewhat ambiguous concerning the ordering activity’s ability to terminate the underlying GSA Schedule Contract, rather than merely the order.

Recommendation

(1) The first sentence should be clarified, consistent with GSA’s intend by referring to an “order” rather than the GSA Schedule Contract, by changing the word “hereof” to “thereof”.

* * * * *

(n) **Title.** Unless specified elsewhere in this contract, title to items furnished under this contract shall pass to the ordering activity upon acceptance, regardless of when or where the ordering activity takes physical possession.

FAR Provisions on Topic

None Found
GSAR Provisions on Topic

None Found

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(o) **Warranty.** The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract. [Standard]

FAR Provisions on Topic

None Found

GSAR Provisions on Topic

C.17 PAYMENT BY CREDIT CARD (GSAR 552.232-79) (MAY 2003)

Discussion

(1) This provision, which is unchanged from the FAR 52.212-4, clearly conflicts with the GSAR references above. The Warranty provision appears to be inconsistent with commercial practice, which typically involves the parties relying upon express warranties in lieu of the implied warranties of merchantability and fitness for a particular purposes. This is especially the case in the information technology industry. Consistent with commercial practice and FAR Part 12, GSAR 552.246-73 invites contractors to offer their standard commercial warranty terms.

(2) Paragraph (d) of C.17 contains a requirement that “Unless the cardholder requests correction or replacement of a defective or faulty item under other contract requirements, the Contractor must immediately credit a cardholder’s account for items returned as defective or faulty.” This clause may conflict with the contractor’s standard commercial warranty, which is incorporated into the contract under C.32.
Recommendation

(1) The Section suggests that GSA simply delete paragraph (o) altogether and cross-reference GSAR 552.246-73, or replace the text in paragraph (o) with the text in GSAR 552.246-73.

(2) The second sentence of paragraph (d) of C.17 should be changed to read: “If a credit becomes due under an order in which payment was made by credit card (e.g., under the warranty clause of the contract), such credit shall be made to the credit card as appropriate.” The language “as appropriate” is necessary in the event a credit expires after the purchase and before the credit becomes due.

* * * * *

(p) **Limitation of liability.** Except as otherwise provided by an express or implied warranty, the Contractor will not be liable to the ordering activity for consequential damages resulting from any defect or deficiencies in accepted items. [GSA Deviation]

FAR Provisions on Topic

None Found

GSAR Provisions on Topic

None Found

Discussion

GSA’s deviation to this paragraph of 52.212-4 does not permit an exclusion of consequential damages for implied warranty claims. The FAR version of this clause does not include the language “or implied warranty” in the first sentence of the clause, thereby excluding consequential damages from implied warranty claims. There does not seem to be any reason for GSA’s different approach, particularly because most companies exclude all implied warranties in their commercial warranty provisions -- exclusions that GSA presumably accepts under GSAR 552.246-73, which, as explained above, invited the contractor to provide its commercial warranty.
Recommendation

The clause should at least revert to the standard paragraph (p) at FAR 52.212-4 – GSA’s deviation does not make sense in the context of GSAR 552.246-73. Moreover, as suggested previously by the Section, the limitation of the exclusion of consequential damages to only defects or deficiencies in accepted items provides a gap in coverage for unaccepted items, which is inconsistent with commercial practice and prior versions of the clause. See ABA Section comments dated May 10, 2005 Re: Advance Notice of Proposed Rulemaking GSAR ANPR 2005-N01, 70 Fed. Reg. 19051 (April 12, 2005); GSAR Revision Regarding Limitation on Consequential Damages, enclosed herewith.

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(q) **Other compliances.** The Contractor shall comply with all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under this contract. [Standard]

FAR Provisions

None Found

GSAR Provisions

None Found

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FAR Provisions on Topic

None Found

GSAR Provisions on Topic

None Found

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(s) **Order of precedence.** Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order: (1) the schedule of supplies/services; (2) the Assignments, Disputes, Payments, Invoice, Other Compliances, and Compliance with Laws Unique to Government Contracts 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; and (9) the specification. [Standard]

FAR Provisions on Topic

None Found

GSAR Provisions on Topic

None Found

**Discussion**

The standard order of precedence clause in FAR 52.212-4 is not clear in the FSS context. The references to the schedule of supplies/services might be read to refer to the Schedule Pricelist, the schedule placed in an ordering activity’s order, or Section B of the Solicitation. Further, although E.4 (f) contemplates that an offeror may propose certain clarifications and exceptions, nowhere is the final negotiated clarifications and exceptions document incorporated into the resultant contract; nor is its precedence established in paragraph (s) of 52.212-4.
Recommendation

Change the order of precedence document to read as follows:

Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order: (1) the contractor's approved FSS Pricelist; (2) the Assignments, Disputes, Payments, Invoice, Other Compliances, and Compliance with Laws Unique to Government Contracts 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; and (9) the specification. Any negotiated and accepted clarifications and exceptions documents shall be incorporated into this contract and made a part hereof with precedence overriding each of the documents set forth above.

* * * *

(t) **Central Contractor Registration** (CCR).

(1) Unless exempted by an addendum to this contract, the Contractor is responsible during performance and through final payment of any contract for the accuracy and completeness of the data within the CCR database, and for any liability resulting from the Government's reliance on inaccurate or incomplete data. To remain registered in the CCR database after the initial registration, the Contractor is required to review and update on an annual basis from the date of initial registration or subsequent updates its information in the CCR database to ensure it is current, accurate and complete. Updating information in the CCR does not alter the terms and conditions of this contract and is not a substitute for a properly executed contractual document.

(2) (i) If a Contractor has legally changed its business name, "doing business as" name, or division name (whichever is shown on the contract), or has transferred the assets used in performing the contract, but has not completed the necessary
requirements regarding novation and change-of-name agreements in FAR subpart 42.12, the Contractor shall provide the responsible Contracting Officer a minimum of one business day's written notification of its intention to (A) change the name in the CCR database; (B) comply with the requirements of subpart 42.12; and (C) agree in writing to the timeline and procedures specified by the responsible Contracting Officer. The Contractor must provide with the notification sufficient documentation to support the legally changed name.

(ii) If the Contractor fails to comply with the requirements of paragraph (t)(2)(i) of this clause, or fails to perform the agreement at paragraph (t)(2)(i)(C) of this clause, and, in the absence of a properly executed novation or change-of-name agreement, the CCR information that shows the Contractor to be other than the Contractor indicated in the contract will be considered to be incorrect information within the meaning of the “Suspension of Payment” paragraph of the electronic funds transfer (EFT) clause of this contract.

(3) The Contractor shall not change the name or address for EFT payments or manual payments, as appropriate, in the CCR record to reflect an assignee for the purpose of assignment of claims (see Subpart 32.8, Assignment of Claims). Assignees shall be separately registered in the CCR database. Information provided to the Contractor's CCR record that indicates payments, including those made by EFT, to an ultimate recipient other than that Contractor will be considered to be incorrect information within the meaning of the “Suspension of payment” paragraph of the EFT clause of this contract.

(4) Offerors and Contractors may obtain information on registration and annual confirmation requirements via the internet at http://www.ccr.gov or by calling 1-888-227-2423 or 269-961-5757. [Standard]

FAR Clauses on Topic

None Found
GSAR Clauses on Topic

None Found

3. Clarifying the Price Reductions Clause in Several Respects

FSS Solicitations currently contain GSAR 552.238-75 – Price Reductions, commonly referred to as the “Price Reductions Clause.” This clause establishes a framework under which FSS contract pricing effectively is “tied” to identified commercial pricing throughout the contract period so that price reductions provided to a commercial customer or category of commercial customer may result in reductions to FSS pricing. This commercial customer or category of customers is commonly referred to as the “tracking customer(s) or “basis of award customer(s)” (hereinafter “tracking customer(s)” ). The stated purpose of this relationship is to permit the Government to obtain the benefit of commercial price reductions during the course of the contract.2

As currently drafted, the Section submits that the Price Reductions Clause requires clarification as to the following:

(1) the identity of the tracking customer(s) and whether it is required to be the most favored customer (“MFC”);

(2) the circumstances under which the clause will be considered to be “triggered” such that commercial pricing must be reported to the contracting officer and an FSS price reduction applied;

(3) when exactly the FSS price reduction is required to take effect, assuming the clause has been triggered;

(4) how to determine if a triggering event occurs if the basis of award did not establish a specific ratio or percentage to express the price/discount relationship between the prices available to ordering activities (i.e., the Schedule prices) and the tracking customer(s); and

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2 By letter dated March 9, 2006, the Section commented on the Price Reductions Clause as part of the Section’s response to the Department of Veterans Affairs (“VA”) proposed rule to conform the Veterans Affairs Acquisition Regulation to plain language principles (71 Fed. Reg. 2342 (January 13, 2006)). The Section’s comments contained in this letter are consistent with our comments to the VA.
(5) the Price Reductions Clause does not apply to the contractor’s manufacturer.

We discuss these concerns in turn below. Following that discussion we have provided a full text version of the Price Reductions Clause showing all the changes we recommend in these comments, as well as several non-substantive changes we believe are necessary to make the clause more understandable and consistent with current practices.

1. According to the current version of the Price Reductions Clause included in Schedule 70 Solicitation, GSAR 552.238-75 (Sep 1999) (Alternate I – May 2004), the Offeror and Contracting Officer are to agree during negotiations upon the “customer (or category of customers) which will be the basis of award . . . .” The GSA generally has interpreted this to mean that a customer or class of customers is identified as the “tracking customer(s)” that is monitored throughout the contract period. There has been some misunderstanding regarding whether this tracking customer is required to be the MFC for a particular product or group of products or service. We understand that the identity of the tracking customer is subject to negotiation and that it does not necessarily have to be the MFC. Nonetheless, there has been considerable misunderstanding on this issue both in the Government and industry. Additional text in the clause could clarify this matter.

We suggest revising section (a) of the Price Reductions Clause by adding the language in bold typeface, as follows:

(a) Before award of a contract, the Contracting Officer and the Offeror will agree upon (1) the customer (or category of customers) which will be the basis of award, and (2) the Government’s price or discount relationship to the identified customer (or category of customers). This relationship shall be maintained throughout the contract period. Any change in the Contractor’s commercial pricing or discount arrangement applicable to the identified customer (or category of customers) which disturbs this relationship shall constitute a price reduction.

The identified customer or category of customers may be, but is not required to be, the Offeror’s most-favored customer.

2. The Section submits that the circumstances under which the Price Reductions Clause is to be triggered also requires clarification. As reflected in
GSAR 538.272, the purpose of the Price Reductions Clause is to establish a relationship between tracking customer(s) pricing and FSS pricing. Specifically, the Price Reductions Clause is intended to require:

the contractor to maintain during the contract period the negotiated price/discount relationship (and/or term and condition relationship) between the eligible ordering activities and the offeror’s customer or category of customers on which the contract award was predicated . . . . If a change occurs in the contractor’s commercial pricing or discount arrangement applicable to the identified commercial customer (or category of customers) that results in a less advantageous relationship between the eligible ordering activities and this customer or category of customers, the change constitutes a “price reduction.”

GSAR 538.272 (emphasis added).

Paragraph (a) of the Price Reductions Clause is largely consistent with the language, in that it specifically provides that “[a]ny change in the Contractor’s commercial pricing or discount relationship applicable to the identified customer (or category of customers) which disturbs [the established price or discount] relationship shall constitute a price reduction.” GSAR 552.238-75(a) (emphasis added). This language is inconsistent with GSAR 538.272, however, to the extent that a “price reduction” is not specifically limited to those changes that “result[] in a less advantageous relationship.” We recommend that GSAR 552.238-75(a) be revised consistent with GSAR 538.272 to make clear that a change in the price/discount relationship between the eligible ordering activity and the tracking customer(s) does not trigger a price reduction under the clause unless that change also “results in a less advantageous relationship” for the Government.

The Section’s other concern centers on the language located in paragraph (c)(1) of the Price Reductions Clause. Specifically, we are concerned that paragraph (c)(1) could be interpreted as defining a “price reduction” and requiring the attendant reporting requirements even in situations where a change occurs that does not result in a less advantageous relationship between the eligible ordering activities and the tracking customer(s). The Price Reductions Clause currently provides:
(c)  
(1) A price reduction shall apply to purchases under this contract if, after the date negotiations conclude, the Contractor—  
(i) Revises the commercial catalog, pricelist, schedule or other documents upon which contract award was predicated to reduce prices;  
(ii) Grants more favorable discounts or terms and conditions than those contained in the commercial catalog, pricelist, schedule or other documents upon which contract award was predicated; or  
(iii) Grants special discounts to the customer (or category of customers) that formed the basis of award, and the change disturbs the price/discount relationship of the Government to the customer (or category of customers) that was the basis of award.

The literal language in paragraphs (c)(1)(i) and (c)(1)(ii) of the clause references the “commercial catalog, pricelist, schedule or other documents upon which contract award was predicated,” but not the pricing to the “customer” or “category of customers” (i.e., the tracking customer). The language could be read—although erroneously in our view—to indicate a price reduction triggering event (with the attendant reporting requirements) even if the revision to the commercial catalog, pricelist, schedule or other documents, or the granting of more favorable discounts or terms and conditions than those reflected in those documents, is distinct from “a change . . . in the contractor’s commercial pricing or discount arrangement applicable to the identified commercial customer (or category of customers) that results in a less advantageous relationship between the eligible ordering activities and this customer or category of customers . . .” (Emphasis added.) In our view, the text in these two paragraphs is confusing because it can be read to suggest that two tracking relationships are to be monitored: one with the tracking customer (discussed in (iii)), and yet another with a separate commercial catalog or pricelist for which a revision may have no effect on contracted pricing to the tracking customer.

We believe the intent of sections (i), (ii), and (iii) is to recognize a triggering event as any affirmative step by the contractor that results in a less advantageous relationship between the tracking customer(s) and the Government—as that relationship is defined in the contract—whether it be a revision to a catalog or schedule that sets the price for the tracking customer or category of customer, or “more favorable discounts or terms and conditions” granted to a tracking customer or category of customers. The reduction of prices set forth in a standard
commercial catalog that has no effect on pricing to the tracking customer(s) should not, however, trigger the clause. We therefore suggest that section (c) of the clause be clarified to indicate that only changes to the commercial pricelist that disturb the established price/discount relationship to the tracking customer(s) will be considered to trigger the clause.

Moreover, the list of “non-triggering” events in paragraph (d) of the Price Reductions Clause should be revised consistent with the purpose of the clause. For example, the list of non-triggering events in paragraph (d) should include orders received from any customer that is not a tracking customer. The Price Reductions Clause does not apply to discounts granted to a customer that is not a tracking customer. Because paragraph (c) purports to be a list of the types of sales that do not represent “price reductions,” orders to non-tracking customers should be expressly included on the list.

In addition, other situations should be included on the list of non-triggering events. Some examples include those situations where the tracking customer is offered reduced pricing in return for new and different consideration not contemplated in the terms of the FSS contract, such as exclusivity, market share, purchase volume commitment, or value-added services to be provided by the customer. Ad hoc concessions and discounts—such as the provision of free hardware or a discount to settle a dispute with a dissatisfied customer—should also be included on the list. Other examples of non-triggering events include: (1) time and materials service contracts with estimated values over the maximum order threshold; (2) sales outside the scope of the Schedule contract; and (3) sales for charitable or philanthropic purposes.

3. The Section submits the Price Reductions Clause also requires clarification as to the appropriate time period during which an FSS price reduction is required to take effect, assuming the clause has been triggered. As currently written, the clause provides:

(2) The Contractor shall offer the price reduction to the Government with the same effective date, and for the same time period, as extended to the commercial customer (or category of customers).

The Price Reductions Clause requires the contractor to notify the Contracting Officer of a tracking customer price reduction within 15 days of its effective date. Nevertheless, it often takes weeks or months before the FSS contract is formally modified by the Contracting Officer to reflect the price reduction. Accordingly, it is not feasible or realistic to require the contractor to make a revised price available
to the Government with the "same effective date" as for the tracking customer. We therefore suggest that the following text be deleted: "with the same effective date, and..." We also suggest that the text "time period" be replaced with "number of days" to ensure the Government is offered an equivalent price reduction. This would result in the new Government price being applicable only upon modification of the contract, but available to the Government for the same total number of days offered to the tracking customer(s).

4. The Price Reductions Clause requires the contractor to maintain an established price/discount relationship between the Government and the tracking customer(s) during the life of the contract. Oftentimes, however, the parties fail to establish exactly what that relationship is in the basis of award. Without an express ratio or percentage to express that relationship it is impossible to objectively determine whether it has been "disturbed." To alleviate this difficulty, we suggest the GSAR be clarified to require that the parties express the relationship in the basis of award as a specific percentage or ratio – or any other objective measurement.

5. The May 2004 Alternate to the Price Reductions Clause in Schedule 70 solicitations and contracts defines "Contractor" to include a contractor’s manufacturer when the contractor’s award was based on the information provided by the manufacturer. Thus, a price-reduction-triggering event will occur as a result of the manufacturer’s actions – over whom the reseller presumably has no control or influence, and with whom GSA has no privity of contract. Is the contractor supposed to contractually require the manufacturer to comply with the Price Reductions Clause and the basis of award to which that contractor has agreed? This is patently unworkable, not to mention unfair to both the contractor and the manufacturer. This requirement interferes with the contractual relationship between the manufacturer and the manufacturer’s reseller by creating burdensome obligations on the manufacturer and potential liability on the part of the manufacturer to the reseller if the information provided by the manufacturer is later determined to have been deficient or in error.

Moreover, it is the Section’s understanding that GSA sometimes requests commercial sales practices information from manufacturers of GSA resellers regardless of whether the reseller has significant sales to the general public, in an attempt to ascertain whether the reseller’s proposed prices are fair and reasonable. First, if the reseller has significant commercial sales, the need for its manufacturer’s sales information is negated. Such requests for pricing information should be limited to pricing or other than cost and pricing information provided by the reseller, who already has an existing competitive commercial sales practice. Second, in the event the reseller does not have significant commercial sales or
otherwise lacks relevant pricing information, GSA may request other information from the reseller, such as the reseller’s cost basis from the manufacturer, pricing information available under other GSA Schedules, or sales by other resellers of the manufacturer’s products. Requiring pricing information from manufacturers is unnecessary and a source of considerable confusion within GSA and industry.

The following text of the Price Reductions Clause delineates all the changes we have suggested above (new text is underlined and deleted text is in strikethrough format):

**PRICE REDUCTIONS (GSAR 552.238-75) (SEP 1999) (ALTERNATE I – MAY 2004)**

(a) Before award of a contract, the Contracting Officer and the Offeror will agree upon and identify in writing (1) the customer (or category of customers) that will be the basis of award, and (2) the Government’s price or discount relationship to the identified customer (or category of customers), and (2) the commercial catalog, pricelist, schedule or other pricing document upon which contract award was predicated. This relationship shall be maintained throughout the contract period. Any change in the commercial catalog, pricelist, schedule or other pricing document, pricing or the price or discount arrangement applicable to the identified customer (or category of customers) that results in a less advantageous relationship between the Government and the identified customer (or category of customers) shall constitute a price reduction. The identified customer or category of customers may be, but is not required to be, the Offeror’s most-favored customer.

(b) During the contract period, the Contractor shall report to the Contracting Officer all price reductions to the customer (or category of customers) that was the basis of award. The Contractor’s report shall include an explanation of the conditions under which the reductions were made.

(c) A price reduction shall apply to purchases under this contract if, after the date negotiations conclude, the Contractor...

(i) Revises the commercial catalog, pricelist, schedule or other pricing document upon which contract award was predicated to reduce prices that results in a less advantageous relationship between the Government and the identified customer (or category of customers) that was the basis of award;
(ii) Grants more favorable discounts or pricing terms and conditions to the basis of award customer (or category of customers) than those contained in the commercial catalog, pricelist, schedule or other pricing documents upon which contract award was predicated; or

(iii) Grants special discounts to the basis of award customer (or category of customers) that formed the basis of award, and the change disturbs the price/discount relationship of the Government to the customer (or category of customers) that was the basis of award results in a less advantageous price/discount relationship between the Government and the identified customer (or category of customers) that was the basis of award.

(2) The Contractor shall offer the price reduction to the eligible ordering activities with the same effective date, and for the same time period—number of days, as extended to the commercial basis of award customer (or category of customers).

(d) There shall be no price reduction for sales-

(1) To commercial the basis of award customer(s) (or category of customers); and:

   a. under firm, fixed-price definite quantity contracts with specified delivery in excess of the maximum order threshold specified in this contract; or

   b. under time and materials contracts with a bona fide estimated value in excess of the maximum order threshold specified in this contract; or

   c. to settle customer disputes or satisfaction issues; or

   d. outside the scope of this contract; or

   e. for charity or for philanthropic purposes; or

   f. under substantially differing terms and conditions than those reflected in this contract; or

   g. caused by an error in quotation or billing.
(2) To eligible ordering activities under this contract; or

(3) Made to State and local government entities when the order is placed under this contract (and the State and local government entity is the agreed-upon customer or category of customers that is the basis of award); or

(4) Caused by an error in quotation or billing, provided adequate documentation is furnished by the Contractor to the Contracting Officer.

(e) The Contractor may offer the Contracting Officer a voluntary price reduction at any time during the contract period.

(f) The Contractor shall notify the Contracting Officer of any price reduction subject to this clause as soon as possible, but not later than 15 calendar days after its effective date.

(g) The contract will be modified to reflect any price reduction which becomes applicable in accordance with this clause.

*NOTE: For the purposes of this clause, “contractor” includes the contractor’s manufacturer(s) where the contractor’s awarded pricing was based on manufacturer’s information provided in accordance with solicitation provision G.4 Commercial Sales Practices Format, subparagraph 5.*

4. Clarifying the Application of Buy American Act and Trade Agreements Act

The ANPR requests suggestions to improve the GSAR. In terms of changing the FAR, we understand that GSA cannot change that of its own accord. We recommend, however, that GSA consider revising the GSAR to implement supplemental guidance to clarify the application of the Buy American Act (“BAA”), 41 U.S.C. §§ 10a-10d and Executive Order 10582, December 17, 1954, and the Trade Agreements Act (“TAA”), 19 U.S.C. § 2501 et seq., to FSS and GWAC contracts.

Contractors seek consistency in treatment under the law and applicable regulations. Knowing when the BAA and TAA apply and how their respective tests will be applied to products or services is of great importance to contractors. Contractors selling commercial items to the federal government generally do not manufacture their products based on the origin of supplies or manufacturing
locations. The Government, however, requires such contractors to consider these things when they contract to sell commercial products to the Federal Government. Making it easier for contractors to know and understand how the rules will be applied can only improve the procurement system. This is particularly important because an inaccurate certification can result in loss of monies, contracts, serious civil and criminal penalties, or both.

Currently there is uncertainty as to whether the BAA or TAA applies to a procurement. The TAA dollar-value applicability threshold, which is set out in FAR 25.402, can vary according to whether country of origin is a Free Trade Agreement ("FTA") country and whether the contract is for supplies, services, or construction. Generally, the BAA applies to contracts below the applicable threshold, and the TAA waives application of the BAA to contracts at or above the applicable TAA threshold. But it is unclear in the FSS and GWAC context whether the TAA threshold applies to the total contract value, the individual Contract Line Item value, or the delivery or task order value.\(^3\)

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\(^3\) In an attempt to clarify whether BAA and the Berry Amendment, 10 U.S.C. §2533a, apply to orders that the Department of Defense ("DOD") places against FSS schedule contracts, DOD issued a memorandum and Procurement Letter ("PROCLTR") providing guidance to its buying community. First, on March 2, 1999, the DOD Director of Defense Procurement issued a memorandum directing contracting officers to comply with the requirements of BAA and the Berry Amendment, and noting that these restrictions also apply to orders placed under a Federal Supply Schedule (FSS) contract. The General Services Administration (GSA) is not subject to the Berry Amendment and, therefore, does not impose the requirements of the Berry Amendment in a FSS contract. Contracting officers shall not place orders under an FSS contract if the procurement would fail to comply with either the Buy American Act or the Berry Amendment.

"Compliance with the Buy American Act and Other Statutory Restrictions on Foreign Acquisition" (March 2, 1999). Second, in July 1999, the DOD Executive Director of Procurement Management reinforced this prohibition by issuing a PROCLTR that stated "[c]ontracting officers shall not place orders under an FSS contract if the procurement would fail to comply with either the Buy American Act or the Berry Amendment." PROCLTR 99-07 (July 8, 1999) (emphasis in original). Consequently, DOD has made clear that its contracting offers are required to apply the BAA and Berry Amendment restrictions to FSS purchases. Unfortunately, the current absence of guidance from GSA on the subject may send conflicting messages. Specifically, GSA’s apparent position that TAA applies to all FSS orders regardless of value is in direct conflict with DOD’s guidance to its purchasing agents. The Section recommends that GSA consider implementing clarification that would resolve this conflict.
FAR 25.402(b) and 25.403(b) identify the TAA and FTA thresholds and how they ought to apply to specific types of contracts, but it is our understanding that contracting officers routinely (and perhaps not unreasonably) interpret these provisions differently. Is it GSA’s belief that the TAA applies to FSS and GWAC procurements, and that it applies to each order regardless of order amount? Is the putative reason for this a belief that (1) the threshold applies to the aggregate contract value, as opposed to individual order value, or (2) there is no FSS or GWAC contract that has an aggregate value less than the threshold (currently $193,000 for supply and services contracts)? Are these rebuttable presumptions? None of this is explicitly set forth in the GSAR or any other regulations. If the current FSS solicitations lack an express contract clause to implement the BAA or include other provisions, this may not be conclusive.⁴ The Section believes that clearer guidance regarding GSA’s understanding of the application of BAA and TAA to FSS and GWAC contracts would remove uncertainty and assure more consistent treatment of this issue.

5. **Simplifying the “Refresh” Process for FSS Contracts.**

The Section recommends that GSA consider changing the way in which it administers updates to the Federal Supply Schedules. The current “refresh” process requires GSA to issue periodic modifications to update applicable regulations and contract clauses to ensure that all Schedule contractors maintain current terms. The process, however, is administratively burdensome for Schedule contractors and GSA contracting officers alike, and can create considerable confusion concerning which set of terms applies to a particular task or delivery order. For example, it is not clear the extent to which changes to the underlying Schedule contract are intended to apply to orders that are currently being performed or to options not yet exercised under outstanding orders. Even if modifications to the Schedule contract, or published Schedule, are intended to apply only to subsequently issued orders and option periods, the Schedule contractor is required to manage to numerous disparate sets of terms and conditions at the same time.

Furthermore, these periodic modifications often implicate complexities and nuanced legal issues in a contractor’s particular business environment. Even changes that may appear to be simple or straightforward cause ripple effects in GSA Schedule contractors’ businesses and can result in significant change management and implementation costs. For example, when GSA reduced the Industrial Funding Fee (IFF) on current GSA Schedule contracts from 1% to .75%,

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⁴ This position is not entirely satisfactory, however, because the *Christian* Doctrine has been applied to incorporate the BAA construction clause into a contract by operation of law. See *S.J. Amoroso Constr. Co. v. United States*, 12 F.3d 1072 (Fed. Cir. 1993).
this change caused some contractors significant contract administration risk and process and system change costs. Resolving such complex issues often requires input from GSA’s contracting officers and both sides working closely together. Having GSA contracting officers respond to every inquiry concerning changes that are so broadly implemented significantly increases the administrative burden on both the contractor and GSA’s contracting officer and delays implementation of the modification.

The Section recommends that GSA implement a simpler and clearer process for refreshing GSA Schedule solicitations and updating current Schedule contracts. The Section believes that a significantly less administratively burdensome process is possible and would be appropriate and fair to all Schedule contractors and potential contractors. Several possibilities exist, including the following: (1) GSA could refresh the solicitation applicable to new Schedule contracts and update outstanding Schedule contracts only at each five-year renewal option; (2) GSA could refresh the solicitation applicable to new Schedule contracts, allow current Schedule holders to opt in to update modifications as they are released, and require Schedule contractors to address updates at each five year renewal option; or (3) GSA could compile updates and release them for both the solicitation and outstanding contracts only once per year.

The Section believes that the second option is the most advantageous and fair approach because it relieves the administrative burden on GSA and GSA contractors associated with updating current contracts, while permitting Schedule contractors to rely on the contract terms they bargained for a specified period. It also has the advantage of providing the flexibility to allow Schedule contractors to manage change in an appropriate manner within their business environment. This process would be fair, because each Schedule contractor would only be required to perform against the terms and conditions the contractor bargained for, but permits an update if more favorable terms and conditions are released. At the time of each renewal option, GSA could require the Schedule contractor to address all outstanding updates released since its contract or previous option was entered into. Aside from significant administrative benefits, this process aligns more closely to the contracting practices of other government contracting activities that normally do not continuously update regulatory provisions and contract clauses once a contract has been awarded.
6. **Examining Alternative 1 of GSAR Clause 552.232-77, Payment by Governmentwide Commercial Purchase Card, and GSAR Clause 552.232-79, Payment by Credit Card, for Their Impact on Small Businesses.**

With the exception of FSS Schedule 70 (Information Technology) contracts, GSAR 532.7003 requires contracting officers to insert Alternate 1 of the clause at GSAR 552.232-77 in FSS schedule solicitations and contracts. For FSS Schedule 70 solicitations and contracts, GSAR 532.7003 requires contracting officers to include Clause 552.232-79. Clause 552.232-77, without Alternate 1, permits government orders using the Governmentwide commercial purchase card if agreeable to the contractor. Alternate 1 of that clause, however, provides that the FSS contractor *must* accept the Governmentwide commercial purchase card for payments equal to or less than the micro-purchase threshold ($2500). Likewise, Clause 552.232-79 provides that Schedule 70 contractors *must* accept credit card orders (including the Governmentwide commercial purchase card) for payments equal to or less than the micro-purchase threshold.

This mandate may be problematic for some companies. We understand from reports that credit card companies do not permit companies participating in their programs to discriminate by accepting their cards from some customers and not others. Consequently, the requirement contained in Alternative 1 of GSAR 552.232-77 and in GSAR 552.232-79 for contractors to accept Government payment by the Governmentwide commercial purchase card may have the effect of compelling these contractors to accept credit cards for payments from all commercial customers as well.

The Section recommends that GSA examine the current requirement in Alternative 1 of the clause to determine its impact and the burden it poses for contractors and potential contractors, especially small businesses that have chosen not to accept payment by credit card from their commercial customers in order to avoid the fees charged by the credit card companies.
The Section appreciates the opportunity to provide these comments. We are available to provide additional information or assistance as you may require.

Sincerely,

Robert L. Schaefer
Chair

Enclosures

cc: Michael A. Hordell
    Patricia A. Meagher
    Michael W. Mutek
    Carol N. Park-Conroy
    Patricia H. Wittie
    Hubert J. Bell, Jr.
    Mary Ellen Coster Williams
    John S. Pachter
    Council Members
    Co-Chairs and Vice Chairs of the
    Commercial Products and Services Committee
    David Kasanow
May 10, 2005

VIA E-MAIL AND FIRST CLASS MAIL

General Services Administration
FAR Secretariat
1800 F Street, N.W., Room 4035
Washington, DC 20405

Attention: Laurieann Duarte

RE: Advance Notice of Proposed Rulemaking GSAR ANPR
2005-N01, 70 Fed. Reg. 19051 (April 12, 2005); GSAR Revision Regarding Limitation on Consequential Damages

Dear Ms. Duarte:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section’s governing Council and substantive committees have 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 Association’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.¹

¹ This letter is available in pdf format at http://www.abanet.org/contract/federal/regscomm/home.html under the topic “Commercial Items.”
The April 12, 2005 Advance Notice of Proposed Rulemaking ("ANPR") seeks comments on two matters: (1) whether the General Services Administration Acquisition Regulation should be revised to include a waiver of consequential damages for contracts awarded for commercial items under the Federal Acquisition Regulation ("FAR"); and (2) whether “post award” audit provisions should be included in GSA’s Multiple Award Schedules contracts and Government-wide acquisition contracts. This letter offers comments only on the first matter. The Section is submitting a separate letter addressing the second matter.

The Section strongly encourages GSA to move forward with a proposed rule to amend the GSAR to supplement and expand the limited waiver of consequential damages currently provided for in FAR 52.212-4 “Contract Terms and Conditions – Commercial Items”. The Section also recommends that the FAR Council amend FAR 52.212-4 to provide for the same change, thereby making the GSAR amendment unnecessary.

The commercial item clause at FAR 52.212-4 was first issued as a proposed regulatory clause on March 1, 1995, as part of the implementation of the Federal Acquisition Streamlining Act of 1994. When the proposed rule was issued in March 1995, it provided for a broad waiver of a contractor’s liability for consequential damages and had included that waiver as part of the warranty clause as follows:

Warranty. Except as expressly set forth elsewhere in this contract and except for the implied warranty of merchantability, there are no warranties express or implied. In no event will the contractor be liable to the Government for consequential damages resulting from the seller’s breach including (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty.

When the final rule was issued in September 1995, the regulatory clause at FAR 52.212-4 changed the proposed rule with respect to waiver of consequential damages and separated it out from the warranty clause in an apparent attempt to broaden the waiver of consequential damages. 60 Fed. Reg. 48231, Sept. 18, 1995. Nevertheless, the final rule for FAR 52.212-4 provides for a waiver of consequential damages for contractors only for defects or deficiencies in accepted items:

(p) Limitation of liability. Except as otherwise provided by an express or implied warranty, the Contractor will not be liable to the Government for consequential damages resulting from any defect or deficiencies in accepted items.

This remains the current language provided for in FAR 52.212-4(p).

The explanatory notes that accompanied the September 1995 final rule explained the change from the proposed rule as follows:

The limitation of contractor liability language, which appeared in the proposed rule in the ‘warranty’ paragraph of the clause at 52.212-4, has been moved to a separate paragraph to clarify that the limitation does not apply solely to liability relating to any warranty.

60 Fed. Reg. at 48234, Sept. 18, 1995. As the explanatory note indicates, the change apparently was an attempt to broaden the application of the waiver of consequential damages beyond breach of warranty, but the final rule does not do so because it still limits the waiver to defects or deficiencies in accepted items.

The legislative acquisition reforms set forth in the Federal Acquisition Streamlining Act and the Clinger-Cohen Act addressing the Government’s acquisition of commercial items require, among other things, that the Federal Government, to the maximum extent practicable, “revise the executive agency’s procurement policies, practices and procedures not required by law to reduce any impediments in those policies, practices, and procedures to the acquisition of commercial items.” 41 U.S.C. § 264b(b)(5). FAR 52.212-4(p) represents such an impediment because it fails to provide protection to a commercial contractor from all consequential damages, as is customary in the commercial marketplace. As recognized in the commentary to the ANPR, although FAR 12.302 permits
contracting parties to tailor the terms of FAR 52.212-4(p), some contracting officers are unwilling to do so. FAR 52.212-4(p) should, at a minimum, be revised to state clearly that a commercial contractor will not be liable for any consequential damages, not just consequential damages resulting from a defect or deficiency in accepted items.

The Section urges GSA and the FAR Council to take action now to further broaden the waiver of consequential damages provided for in FAR 52.212-4(p) to make it clear that commercial companies doing business with the Government will be protected from exposure to open-ended and unlimited liability of consequential damages that may arise from the performance of commercial services or delivery of commercial items. Such potential open-ended, unlimited liability poses a significant barrier to commercial companies desiring to do business with the Government. This is especially true given that statutory and regulatory requirements have been strengthened in recent years to impose increased corporate responsibility and accountability to their stockholders and other constituents. As a result, many companies feel that they can no longer assume the risk of open-ended, unlimited potential liability. The Section understands that it is an accepted and common practice in the commercial marketplace for vendors to disclaim not only any liability for consequential damages arising from the performance of services or delivery of items, but also to include limitations on direct damages.

Furthermore, it may reasonably be assumed that contractors include a risk premium when contracting with the Government to account for the risk of consequential damages. Especially for those procurements where consequential damages could amount to a “bet the company” proposition, the risk premium amount (sometimes referred to as a “contingency”) included in contractor pricing may be substantial. The natural tendency for contractors to price this risk, as well as the potential for reduced competition resulting from the specter of consequential damages, could lead to increased Government costs. The Government could avoid such increased costs if the contract terms completely protected contractors from consequential damages. Moreover, a complete waiver would be consistent with the Government’s general policy to “self insure” against contract-related risks.

The ANPR also implicates an important fairness issue. It has long been recognized and held that, absent statutory authority, the Federal Government itself may not be bound to similar open-ended, unlimited liability because this would constitute a violation of both the Anti-Deficiency Act, 31 U.S.C. § 1341 and the Adequacy of Appropriations Act, 41 U.S.C. § 11. See GAO Principles of Federal Appropriation Law, 2nd Ed., Chapter 6, at pages 6-30 through 6-42. It is the Section’s view that it is inappropriate for the Federal Government to impose, by contract, this same type of open-ended, unlimited liability on its commercial-item
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contracting partners when the Government itself may not agree to corresponding, mutual liability. Indeed, assignment of such differing levels of risk to the contracting partners is inconsistent with the American Bar Association’s Principles of Allocating Risk in the Formation of Public Procurements.

At the public meeting conducted by GSA on April 14, 2005, concerning this ANPR, the GSA officials requested specific input on the impact of expanding the waiver of consequential damages in performance-based contracts. Performance-based contracts are intended to ensure that the required performance quality levels are achieved and that total payment to the contractor is related to the degree that services performed meet contract standards. See FAR 37.601. Also, performance-based contracts are required, to the maximum extent practicable, to include performance incentives, either positive or negative, to encourage contractors to increase efficiency and maximize performance. See FAR 37.602-4; FAR 16.402-2. There is no reason to anticipate that expanding the existing waiver of consequential damages currently provided for in FAR 52.212-4(p) would impair the Government’s ability to structure adequate performance incentives for inclusion in performance-based contracts in order to encourage contractor efficiency and maximum performance. Moreover, the Section is unaware of any indication that the existing waiver of consequential damages in FAR 52.212-4(p) has had any negative effect on the Government’s ability to successfully utilize performance-based contracts.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

[Signature]

Patricia H. Wittie  
Chair, Section of Public Contract Law

cc:  Robert L. Schaefer  
     Michael A. Hordell  
     Patricia A. Meagher  
     Carol N. Park-Conroy  
     Hubert J. Bell, Jr.
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Mary Ellen Coster Williams
Council Members
Co-Chairs and Vice-Chairs of the Commercial Products and Services Committee
David Kasanow
May 10, 2005

VIA E-MAIL AND FIRST CLASS MAIL

General Services Administration
FAR Secretariat
1800 F Street, N.W., Room 4035
Washington, DC 20405

Attention: Laurieann Duarte

RE: Advance Notice of Proposed Rulemaking GSAR ANPR
2005-N01, 70 Fed. Reg. 19051 (April 12, 2005); GSAR Revision Regarding Post-Award Audit Provisions

Dear Ms. Duarte,

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section’s governing Council and substantive committees have 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 Association’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.¹

¹ This letter is available in pdf format at http://www.abanet.org/contract/federal/regscominfom/under the topic “Commercial Items.”
The April 12, 2005 Advance Notice of Proposed Rulemaking ("ANPR") seeks comments on two matters: (1) whether the General Services Administration Acquisition Regulation should be revised to include a waiver of consequential damages for contracts awarded for commercial items under the Federal Acquisition Regulation ("FAR"); and (2) whether post-award audit provisions should be included in GSA’s Multiple Award Schedule ("MAS") contracts and Government-wide acquisition contracts ("GWACs"). This letter offers comments only on the latter. The Section is submitting a separate letter addressing the issue of consequential damages.

The Section is concerned that GSA once again may be considering expanding the scope of post-award audits in a manner that is largely -- if not completely -- unsupported by law.

By way of background, it should be noted that the Federal Acquisition Streamlining Act ("FASA") was, among other things, designed to make federal contracts for commercial items more consistent with their commercial counterparts in order to encourage the acquisition of such items. See Public Law No. 103-355, 108 Stat. 3243. Section 8002 of FASA mandated that contracts for the acquisition of commercial items -- including all GSA MAS contracts\(^2\) -- to the maximum extent practicable 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." Public Law No. 103-355, § 8002 (41 U.S.C. § 264 (note)) (emphasis added.)

Consistent with this statutory mandate, the FAR provides that:

[C]ontracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses —

(1) Required to implement provisions of law or executive orders applicable to the provision of commercial items; or

(2) Determined to be consistent with customary commercial practice.

\(^2\) GSA MAS contracts, by definition, are for the procurement of "commercial items" as that term is defined in FAR 2.101. See, e.g., GSA MAS RFP FCIS-JB-980001-B, section B.2.
FAR 12.301(a) (emphasis added.)

FAR 12.301 further provides that FAR 52.212-5—a clause required in commercial item contracts such as GSA MAS contracts—"incorporates by reference only those clauses required to implement provisions of law or executive orders applicable to the acquisition of commercial items." FAR 12.301(b)(4) (emphasis added). Neither portion of this regulation provides any statutory basis for the expansion of post-award audit rights.\(^3\)

Indeed, expansion of post-award audit rights would be inconsistent with commercial practice. GSA and VA previously have reviewed commercial practices to determine whether they permit post-award audits of data submitted during contract negotiations for the potential purpose of retroactively adjusting contract prices. See GSA Office of Inspector General and VA Office of Inspector General, *Procurement Reform and the MAS Program – Safeguarding the Taxpayer’s Interest* (July 1995); Federal Supply Schedule Management Center, *An Anthology of Commercial Terms and Conditions* (July 1996). Neither of these reviews uncovered evidence providing any indication that post-award audits of pre-award data is a customary commercial practice.

Moreover, the expansion of post-award audit rights would be contrary to the expressed intent of Congress. This is clear from an examination of legislative history. In its report on the FY 1997 National Defense Authorization Act, the House of Representatives Committee on National Security stated that:

The National Defense Authorization Act for Fiscal Year 1996 (Pub. Law No. 104-106) eliminated certain rights by the government to audit information to be supplied by commercial suppliers in lieu of certified cost or pricing data. In taking this action, Congress clearly and willfully did not intend that this statutory change permit federal agencies to subsequently determine through agency supplements to the Federal Acquisition Regulation whether and to what extent post-award audit access is appropriate on commercial item contracts. The committee strongly reiterates previously stated congressional intent that

\(^3\) FAR 52.212-5, consistent with law, does authorize the Comptroller General -- and only the Comptroller General -- to conduct post-award audits of commercial item contracts. See 10 U.S.C. § 2313(c) (authorizing Comptroller General access to such documents); 41 U.S.C. § 254d (c) (same).
the only remaining authority for the government to pursue such information is the authority of the General Accounting Office to audit contractor records.


This clearly expressed Congressional intent was reinforced in a September 18, 1996, letter by the chairs of three cognizant Congressional committees:

The Federal Acquisition Reform of 1996...eliminated the authority of Federal agencies to perform post-award audits of suppliers of commercial items...Congress clearly did not intend that this statutory change permit Federal agencies to subsequently determine through agency supplements to the [FAR] whether and to what extent post award audit access is appropriate on commercial item contracts.

GSA is considering a final rule which would amend the GSA Acquisition regulation to permit post-award audits of certain commercial item contracts. We believe this is inappropriate and contrary to Congress' clear intent. Therefore, for the purpose of this specific regulation related to GSA's Multiple Award Schedule, we reiterate previously stated congressional intent that the only remaining authority for the government to pursue post-award audits of contractor records regarding the purchase of commercial items is the General Accounting Office.

September 18, 1996 letter from Representatives Clinger and Spence and Senator Cohen to Hon. Franklin D. Raines, Director, OMB (Attachment 1 hereto) (emphasis added).

Finally, existing GSA post-award audit rights -- coupled with the agency's ability to conduct extensive pre-award proposal audits -- adequately protect the government’s rights to obtain fair and reasonable pricing commensurate with the
commercial market. MAS contracts also contain a "Price Reductions" clause that enables the government to recover monies in the event that relevant commercial prices become inconsistent with MAS prices. These safeguards make changes to post-award audit rights practically unnecessary. In terms of efficiency in the procurement system, post-award audit rights of pre-award data may be viewed as inviting second guessing as to the basis of the bargain, leading to disputes that could have been avoided if the Government had taken advantage of its pre-award audit rights.

In sum, any contemplated expansion of post-award audit rights finds no basis in law or executive order and, in fact, is contrary to expressed legislative intent. Should Congress now reverse itself and determine that GSA (and VA) should have the right to conduct post-award audits of pre-award data in commercial item contracts, that certainly is its prerogative. Nevertheless, any such expansion of audit rights is a matter for Congress -- and not the agencies -- to legislate.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

[Signature]

Patricia H. Wittie
Chair, Section of Public Contract Law

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The existing post-award audit rights that GSA employs under MAS contracts relate strictly to contract performance. They include examination of a contractor's records for compliance with the Price Reductions clause and the Industrial Funding Fee clause that appear in those contracts, as well as to review potential overbillings or billing errors. GSAR 552.215-71. For purposes of these comments, the Section offers no opinion at this time on whether these existing post-award audit rights are consistent with law, executive order, or customary commercial practice.
cc: Robert L. Schaefer
    Michael A. Hordell
    Patricia A. Meagher
    Carol N. Park-Conroy
    Hubert J. Bell, Jr.
    Mary Ellen Coster Williams
    Council Members
    Co-Chairs and Vice Chairs of the Commercial
    Products and Services Committee
    David Kasanow