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New GSA Rule For Commercial Supplier Contracts: A Mixed Bag

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Commercial supplier agreements (CSAs) are used to simplify and standardize business transactions in both the commercial market and in the sales to federal customers through multiple award schedule contracts. CSAs take a variety of forms, including license agreements and terms of service, and are commonly used in federal information technology acquisitions, such as acquisitions of commercial computer software and commercial technical data. CSAs may also be used in procurements of travel services, telecommunications, financial services, building maintenance systems and even purchases below the simplified acquisition threshold. As prolific as they are, CSAs often contain terms and conditions familiar to and accepted by private purchasers — but which may be deemed objectionable by a federal customer.

On July 31, 2015, the U.S. General Services Administration's senior procurement executive issued a class deviation intended to reconcile federal requirements with the terms of standard CSAs.[1] In issuing the deviation, the GSA sought to resolve the most common problems in one fell swoop, by declaring that 15 terms regularly seen in CSAs are deemed unenforceable against the federal government even if they accompany a CSA that is incorporated by reference in a federal purchase agreement. This was a positive goal, as past conflicts between federal law and CSA terms frequently produced prolonged, expensive and frustrating negotiations to resolve which contract terms federal purchasers could accept from commercial suppliers.

Although the GSA published notice of a proposed class deviation on March 20, 2015, and invited comments, using a class deviation approach meant that the GSA avoided full notice-and-comment rulemaking. In this article, we break down the details of the class deviation and explore how it will affect the sales practices of sellers of commercial goods and services. We also address how a little-noticed change to the “Order of Precedence” clause will work against goals that the GSA and commercial suppliers share.

Sources of Recurring Conflict

Following the 1994 enactment of the Federal Acquisition Streamlining Act, there has been a statutory preference for acquisition of commercial items, a preference implemented in FAR Part 12. Nonetheless, contracting officers are instructed by the FAR to proceed with caution when relying on a seller's standard commercial terms. FAR 27.405-3(b), for example, advises COs purchasing commercial computer software to "exercise caution in accepting a vendor's terms and conditions, since they may be directed to commercial sales and may not be appropriate for Government contracts." Similarly, FAR 12.212(a) provides that commercial computer software and documentation shall be acquired under licenses customarily provided to the public but only "to the extent such licenses are consistent with federal law and otherwise satisfy the Government's needs."

This tension produced chronic complaints by federal schedule buyers that CSAs offered through the GSA's IT Schedule 70 were noncompliant with federal law, and persistent objections by vendors that COs were diverting from commercial norms by insisting on different terms. The GSA responded by requiring review and approval of each supplier agreement for all new Schedule 70 contracts. Because this legal review proved to be costly, lengthy and frustrating, it worked against another premise of commercial source contracting — namely that purchase from commercial sources would be faster and cheaper.

Over time, both sides came to recognize a "fail list" of provisions that GSA legal consistently found to be objectionable.[2] As we explain, in the July 31 class deviation, the GSA sought to resolve for all commercial purchases many of these chronic issues. The deviation deals specifically with every one of the 15 "fail list" provisions. Conceptually, the class deviation is straightforward — but upon examination of the details, looks prove deceiving.

Elements of the Deviation

The class deviation is now in effect.[3] It adds to the GSAM, at 502.101 a broad new definition of "commercial supplier agreement" that reaches "terms and conditions customarily offered to the public" by vendors of commercial supplies or services, "regardless of the format or style of the document." This new definition identifies, as examples, terms of service (TOS) and end user license agreements (EULA), and applies regardless of media or delivery mechanism used. The class deviation also creates a new clause, 552.212-4 ("Contract Terms and Conditions — Commercial Items"), reflecting the substance of the deviation, which GSA COs are instructed to incorporate into all contracts. The deviation also advises that a "mass modification" will be issued to "ensure that all FSS contracts" contain the new clauses.

The new GSAM 552.212-4 also changes the "Order of Precedence" of the underlying FAR clause (as further discussed below), revises subparagraph (u) to clarify that CSA terms that purport to cause the government to indemnify a contractor are unenforceable where they create an Anti-Deficiency Act violation, and add a new subparagraph (w) ("Commercial supplier agreements — unenforceable clauses") that specifies that certain provisions often seen in CSAs will not be enforceable against or apply to the Government.

Addressing the "Fail List"

As implemented through the new subparagraph (w) of GSAM 552.212-4, the class deviation requires that each of the 15 terms on the "fail list" are to be treated as unenforceable. In support of the class waiver request, the GSA issued a Determination and Findings (D&F) to explain each point of failure along with a summary of how the term would be treated going forward.

1. Definition of Contracting Parties

In past negotiations, the GSA took the position that the licensee or customer could not be an individual, presumably to avoid triggering the requirement for legal review by federal employee unions. Furthermore, federal competition rules required that the contractor be defined as a single entity even if the contractor was part of a corporate group. In the D&F, the GSA resolves this point of failure by stating that contracts shall be 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 CSA.

2. Details of Contract Formation

The GSA previously objected to contract formation via users downloading or clicking "I Agree" (commonly known as "click-wrap" or "browse-wrap" provisions) because an agreement binding the government may only be entered by a dully warranted contracting officer. The D&F reiterates that such mechanisms purporting to bind the end user will not bind the government or any government-authorized end user. The terms and conditions intended to bind the government may be incorporated by reference, but must be available in full at referenced locations, must not materially change government obligations, increase prices, decrease the overall level of service, or limit any other government right addressed elsewhere in the contract.

3. Patent Indemnity (Contractor Assumes Control of Proceedings)

In these provisions, a contractor commits to "defending" the government in intellectual property litigation on condition that the government gives the contractor "sole control" over the conduct of such proceedings. The undertaking to "defend" and the concept of "sole control" are contrary to the jurisdictional statute governing the U.S. Department of Justice, 28 U.S.C. § 516, which vests the right to defend the government, and consequently the right to exercise sole control, solely in the DOJ. In the past, GSA legal required that these types of clauses be revised to provide for appropriate consultation and the contractor's right to intervene in the proceedings at its own expense through counsel of its choice. Under the deviation, any clause insisting that the commercial supplier or licensor control any litigation arising from the government's use of the contractor's supplies or services is deleted because, when the government is a party, such representation is reserved by statute to the DOJ.

4. Provisions Allowing Unilateral Contractor Termination for Government Breach

In the past, these provisions were deemed inconsistent with the disputes clause at FAR 52.233-1, which requires contractors to submit a claim to the CO when they believe the government is in breach, and to continue performance during the pendency of the claim. Unilateral termination by the contractor could be viewed as nonperformance and reported as such in PPIRS (Past Performance Information Retrieval System). In commercial item contracts, the FAR specifies the procedures for the government's right to terminate for breach or convenience. As such, these types of clauses were typically deleted from government contracts. The GSA's D&F explains that commercial suppliers may not unilaterally terminate or suspend contract performance unless their supplies or services are generally withdrawn from the commercial market, and that remedies for contractual breach by the government must be pursued under the Contract Disputes Act.

5. Provisions Regarding Automatic Rrenewal of Term-Limited Agreements

In the past, the GSA objected to provisions calling for automatic renewal of term licenses for software or maintenance, where renewal charges would fall due automatically unless the customer took action to opt

out or terminate. The GSA's class deviation treats these provisions as an obligation ahead of appropriation — a violation of the Anti-Deficiency Act. As such, every subsequent term of term-limited products or services must be purchased separately. COs are free to enter into agreements that incorporate CSAs knowing that such "automatic renewal" terms are rejected ab initio (for each contract) and en masse (for every contract).

6. Provision Permitting the Vendor to Unilaterally Change the License Terms With or Without Notice to the Customer

These provisions violated the contract formation rules of FAR 1.601(a) and 43.102 (establishing that only duly warranted COs are empowered to execute contracts and contract modifications on behalf of the government), permitted vendors to introduce objectionable terms, and removed the government's ability to control the terms by which it was bound. As such, GSA legal counsel regularly required that such provisions be deleted. The D&F reiterates the point that unilateral changes of the CSA are impermissible and any clause authorizing such changes is unenforceable.

7. Provisions Purporting to Provide Equitable Remedies Against the Government

GSA legal counsel were concerned by the sovereign immunity issue raised by these types of provisions. This is because equitable remedies are generally not available against the government under federal statutes. In its D&F, the GSA explains that equitable remedies, injunctive relief and binding arbitration clauses may not be enforced unless explicitly authorized by agency guidance or statute.

8. Automatic Incorporation/Deemed Acceptance of Third-Party Terms

Where a vendor's offering included components provided by other manufacturers, or where the contractor was a dealer or reseller of other vendors' products, a CSA might state that the government customer agreed to be bound by the terms and conditions established by such third party, without an opportunity for the government customer to object to or negotiate the terms. The contractor or reseller, on the other hand, was not a party to the third-party terms and would disclaim all responsibility, while the third party might claim it was a beneficiary entitled to enforce the contract. The GSA objected to these provisions on the basis that they introduced offensive terms and removed the government's ability to control the terms to which it is bound. In its D&F, the GSA explains that 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 CO.

9. State/Foreign Law Governing Contracts

These provisions triggered sovereign immunity questions because, depending on the cause of action (e.g., tort, breach of contract, infringement of copyright or patent), both venue and the statute of limitations are usually mandated by applicable Federal law, while arbitration requires prior guidance by head of agency promulgated via administrative rulemaking. In its D&F, the GSA explains that clauses that conflict with the government's sovereign immunity cannot apply; disputes in which the government is a defendant must be heard either in U.S. district court or the U.S. Court of Federal Claims. The deviation deletes CSA terms that require the resolution of a dispute in a forum other than that expressly authorized by federal law, and states that the statute of limitation on potential claims shall be governed by federal law.

10. Assignment of Supplier Agreement Without Government Consent

The Anti-Assignment Act, 41 U.S.C. 6305, prohibits the assignment of government contracts without the government's prior approval. Procedures for securing such approval are set forth in FAR 42.1204. Provisions purporting to permit the licensor or contractor to assign the agreement, or its rights or obligations thereunder, without the government's consent were deleted in past negotiations with the GSA. Consistent with these past practices, the GSA explains in its D&F that contractors may not assign the contract, CSA, or any party rights/obligations without express government approval. Payment to a third-party financial institution may still be reassigned.

11. Provisions Purporting to Make Government Liable for Taxes

Pursuant to the Supremacy Clause of the U.S. Constitution, the government is exempt from state and local taxes whose "legal incidence" falls on the federal government. The applicability of a particular tax calls for a case by case determination by the CO. Further, FAR 52.212-4(k) provides that the contract price includes all applicable gederal, state and local taxes and duties. Accordingly, clauses purporting to make the government customer responsible for all taxes (even excepting the vendor's corporate income tax) were deleted, and any charge the vendor believed to be payable by the government had to be submitted individually to the CO for adjudication. The deviation reflects GSA's long-standing position on this issue; any taxes or surcharges to be passed along to the government will be governed by the terms of the underlying contract. The cognizant CO must make a determination of applicability whenever such a request is made.

12. Future Fees and Penalties, Including Attorneys' Fees

In the past, the GSA maintained that this type of provision violated anti-deficiency laws by committing the government customer to paying an unknown amount at an unknown future time — a classic obligation in advance of appropriation. In its D&F, the GSA explains that, going forward, future fees (such as attorney fees, cost or interest) may only be awarded against the U.S. government when expressly authorized by statute.

13. Payment Terms or Invoicing (Late Payment)

GSA legal has previously taken the position that the government should pay only the awarded contract price, and any change to the contract price required the CO's approval. As with other future fees, late payment penalties were deemed an anti-deficiency violation. Given that late payment interest is governed by the Prompt Payment Act (31 U.S.C. 3901 et seq) and Treasury regulations at 5 C.F.R. 1315, CSA terms regarding late payment interest were deemed objectionable. Under the deviation, terms that purport to establish payment terms or invoicing requirements that contradict the terms of the government contract will be unenforceable.

14. Audits (Automatic Liability for Payment)

Automatic government liability to pay for audits in the past has been deemed an anti-deficiency violation. The GSA explains that, going forward, any audits requested by the commercial supplier or licensor will be performed at supplier or licensor's expense. Furthermore, discrepancies found during an audit must comply with the invoicing procedures from the underlying contract, while contested charges must be resolved through the Disputes clause.

15. Confidentiality of Supplier Agreement Terms and Conditions

In earlier negotiations, GSA legal objected to blanket provisions requiring that the government keep

confidential certain information, including the terms of an order. As such, in accordance with the D&F, a CSA's terms 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.

In the past, the painstaking review of the above "fail list" required government and industry to engage in lengthy and costly negotiation of contract terms in order to avoid CSA terms that conflicted with or were incompatible with federal law. Both sides expended considerable time and resources before coming to agreement. Thus, the deviation's treatment of the "fail list" seemed poised to alleviate the burdens of the pre-existing regime and to expedite access to commercial services and supplies.

The GSA expects that the deviation will reduce risk by uniformly addressing common unacceptable CSA terms, facilitate efficiency and effectiveness in the contracting process by reducing the administrative burden for the government and industry, and promote competition by reducing barriers to industry, particularly small businesses. The acquisition workforce may also view the class deviation as a positive development.

Changes to the Order of Precedence Clause

In the final deviation, the GSA included a seemingly technical change, to the "Order of Precedence" clause, without any prior discussion with industry.[4] Many contractors will find this has a painfully adverse consequence, because it will lead to just the kind of negotiations, over which CSA terms might conflict with the Commercial Items clause, that the deviation sought to avoid. The GSA appears to have acted without awareness of the practical impact of the change to the Order of Precedence. The GSA should be strongly encouraged to correct this error.

The Order of Precedence clause has been changed to establish that, should there be any inconsistencies, terms of the new commercial item clause at GSAM 552.212-4 control over terms of a CSA (including any license agreement for computer software).

All parties can agree, presumably, that the federal government should resort to its own required provisions where a CSA term is in actual conflict with federal law. And the added subparagraph (w) to GSAM 552.212-4 identifies and explains more than a dozen specific instances where there is such a conflict.

Unfortunately, the seemingly minor change to the hierarchy of the Order of Precedence clause goes beyond these identified clauses where actual conflict is present to put in doubt the effectivity or enforceability of many other CSA clauses — thus reopening the door to uncertainty if not dispute that the new GSAM sought to close.

GSAM 552.212-4 revises the Order of Precedence clause in FAR 52.212-4 to move from fouth to sixth (of nine items) the ranking of CSAs, i.e., "Addenda to this solicitation or contract, including any license agreements for computer software."

As revised, five categories are more important than and control over CSAs ("Addenda," including "any license agreements"). This is important because many commercial companies, especially those who sell information technology hardware, services and software, include in such "Addenda" and "license agreements" crucial provisions intended to protect their commercially competitive position and to align their performance obligations to commercial business norms. Far from being inconsequential appendages, standard commercial EULAs and TOS are routinely included as "Addenda" and/or "license agreements"

accompanying federal sales orders. They are often highly nuanced, very carefully crafted and represent key business decisions on allocation of responsibility, cost and risk. Relegating these to the proverbial "back of the bus" changes transaction economics for many commercial sources and will cause some to retreat from federal markets, some to raise prices, and some to push back by insisting upon further negotiations (the avoidance of which was a central purpose of the class deviation).

How can it be that "demotion" of such "Addenda" and "license agreements" has such adverse consequences? It is because these now are behind in precedence both "solicitation provisions if this is a solicitation" and "other provisions of this clause" — where "this clause" refers to FAR 52.212-4, the lengthy "Contract Terms and Conditions – Commercial Items" clause which contains no fewer than twenty-four (24) separate categories of subjects – ranging from "Assignment" through "Unauthorized Obligations." Apart from and in addition to the specified terms that are trumped by the new subparagraph (w) of GSAM 552.212-4, a given CO can assert that any and all of the 24 items in FAR 52.212-4 now prevail over any counterpart terms in a contractor's EULA, TOS or other CSA form. Many commercial companies will accept the wisdom of the class deviation as to the fifteen items on the "fail list." But they will not agree that COs can ignore other provisions in CSAs if and when they choose to. The sweep of issues encompassed within the FAR "Commercial Items" clause practically encourages unilateral actions by individual COs to assert that conflict is presented by other terms in the "Addenda" or "license agreements." Commercial companies cannot do business with the government if they are at risk that, on individual orders, COs will treat key CSA provisions as mere "surplusage" to disregard. Prudent companies may decide not to take a business risk that leaves to individual CO discretion when, whether and on what basis to object to CSA terms beyond the items on the "fail list."

Conclusion

The class deviation and the new GSAM were on track to resolve issues arising from the 15 "fail list" terms. The Order of Precedence change, unfortunately, exposes many other terms in CSAs to uncertainty if not controversy. The federal government, as expressed at FAR 12.101(c), is to "[r]equire prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial items or nondevelopmental items as components of items supplied to the agency." As concerns solicitation provisions and contract clauses for the acquisition of commercial items, FAR 12.301 again insists that, "to the maximum extent practicable," the federal government shall include "only those clauses … [r]equired to implement provisions of law or executive orders applicable to the acquisition of commercial items" or those "[d]etermined to be consistent with customary commercial practice." The cited change to the Order of Precedence clause subverts these principles.

Compounding the problem is the interplay between the changed Order of Precedence clause and the new subparagraph (w), "Commercial supplier agreements — unenforceable clauses," which now rates second in the Order of Precedence hierarchy, four positions above the deference given to a vendor's "Addenda" or "license agreements." Through this subparagraph (w), the GSA excludes specific commercial terms that it has found to violate federal law. The class deviation as implemented was accompanied by instructions in the form of "questions and answers."

One question the GSA answered in its July 31 memorandum was whether COs still need to review CSAs since the class deviation provides protection against inappropriate or illegal terms being incorporated to contracts.[5] The response was: "Absolutely." It continued: "COs should always thoroughly review CSAs (and all documents that are incorporated into any GSA contract)."[6] This may encourage COs to characterize as "inappropriate" or "illegal" aspects of potentially complex commercial EULAs, TOS or other "Addenda" or "license agreements." While COs may seek guidance from the Office of General Counsel of

GSA, they are not obligated to do so. Should COs object to CSA terms beyond those on the "fail list," the result will be just the uncertainty, disagreement and dispute, with resulting costs, delays, and frustration. No law or regulation mandated this change in the Order of Precedence. The class deviation should be revised to restore "addenda in this solicitation or contract, including any license agreements or computer software" to the fourth position in the Order of Precedence. This will promote achievement of the intent of the deviation — to remove hurdles that have frustrated both government and industry in contracting for commercial supplies and services where the vendor employs a CSA (in any form) with terms distinct from those mandated by federal law.

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An earlier and less complete version of this article, "Hits and Misses: GSA's Class Deviation for Commercial Supplier Agreements," was published on the website of the Coalition for Government Procurement at http://thecgp.org/hits-and-misses-gsas-class-deviation-for-commercial-supplier-agreements.html.

[1] The class deviation is explained in a memorandum authored by Jeffrey A. Koses, GSA Sr. Procurement Executive, Acquisition Letter MV-15-03, "Memorandum for the Acquisition Workforce: Class Deviation Addressing Commercial Supplier Agreement Terms that Conflict or Are Incompatible with Federal Law" (July 31, 2015) available athttps://interact.gsa.gov/sites/default/files/AL%20MV-15-03%20Signed.pdf.

[2] GSA legal created a "Fail Chart" as part of an internal guideline for identifying "unacceptable" provisions and standards in End User License Agreements. Contractors could request a copy from their GSA COs. See "Q1 2013 Quarterly Industry Meeting: Center for IT Schedule Program" at slide 15 (Nov. 1, 2012) available athttp://www.gsa.gov/portal/mediaId/151519/fileName/Schedule_70_-_Quarterly_Industry_Meeting_-_Nov_1_2012.action.

[3] The new GSAM provisions are at https://interact.gsa.gov/sites/default/files/Commercial%20Supplier%20Agreements%20-%20Draft%20Deviation%20Text%2003262015%20(1)PDF.pdf.

[4] We acknowledge Roger Waldron's CGP Blog of Sept. 3, 2015, "FAR and Beyond," which addresses this subject at http://thecgp.org/the-status-of-commercial-supplier-agreement-terms-under-gsa-contracts.html.

[5] Koses, supra note 2, at 3.

[6] Id. (emphasis added).
