

## Another Proposal From GSA is Class Deviation for Commercial Agreements

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March has been a busy month for the **GSA (*General Services Administration*)** in its efforts to implement what it has touted as a “new vision for Federal purchasing.” On March 5, 2014, GSA announced a proposed rule to reform pricing practices and contractor reporting requirements under multiple award schedule contracts. In its latest move, on March 20, 2015, the GSA issued a proposal to streamline the negotiation of Commercial Supplier Agreements, which are commonly used in acquisitions of software and other information technology. Such agreements typically contain standard contract terms that GSA regards as inappropriate in the context of a sale to the government. As a result, protracted negotiations with GSA are often necessary to reach agreement on acceptable terms before software and other items can be offered for sale on the *Federal Supply Schedule*.

The GSA seeks to minimize the need for such time-consuming and expensive negotiations through a proposed class deviation to the *Federal Acquisition Regulation* (“*FAR*”) and the *General Services Acquisition Regulation* (“*GSAR*”). The class deviation would implement a new standard contract clause containing provisions in 15 areas where Commercial Supplier Agreement terms typically present problems for the government: definition of contracting parties; contract formation; patent indemnity; automatic renewals; future fees or penalties; taxes; payment terms or invoicing for late payment; automatic incorporation of third party terms; applicability of state or foreign law; equitable remedies, injunctive relief, and binding arbitration; unilateral termination rights, unilateral modification rights; assignments to other parties; confidentiality terms; and audits. The new clause would override any conflicting Commercial Supplier Agreement terms in these areas. It would be incorporated in all new awards for GSA acquisitions for commercial supplies or services, and in existing contracts whenever an option period is exercised or the contract is otherwise modified.

The GSA’s proposal is a positive development for contractors, such as software vendors, that sell commercial items to the federal government pursuant to Commercial Supplier Agreements. In the past, the GSA has tried to facilitate the process by providing contractors with a list of unacceptable provisions called a “Fail Chart,” but revised terms still had to be painstakingly negotiated with the GSA contracting officer and agency counsel. In the proposed class deviation, the GSA has taken many of the problematic terms identified in such Fail Charts and created standard provisions that are

acceptable to the government. That approach is likely to be more successful in reducing the cost and complexity involved in getting software and other similar items on Schedule and other GSA contracts. Contractors, of course, will need to be mindful that some of their standard commercial terms (such as most forum selection clauses, choice of law provisions, and customer/user indemnification) may not be applicable when they sell to the government.

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