MAY 16 2005

GSA Office of the Chief Acquisition Officer

MEMORANDUM FOR JULIA WISE
DIRECTOR
CONTRACT POLICY DIVISION (VPC)

FROM: RALPH J. DESTEFANO, DIRECTOR
REGULATORY AND FEDERAL
ASSISTANCE DIVISION (VIR)

Subject: GSAR ANPR Case 2005-NO1, Waiver of Consequential Damages and "Post Award" Audit Provisions

Attached are comments received on the subject FAR case published at 70 FR 12167, March 11, 2005; 70 FR 13005, March 17, 2005; and 70 FR 19051, April 12, 2005. The comment due date was April 14, 2005.

Response Number	Date Received	Comment Date	Commenter
2005-N01-1	03/21/05	03/21/05	Whitley Law Group, P.C.
2005-N01-2	03/21/05	03/21/05	AIA
2005-N01-3	03/28/05	03/28/05	SGI Federal
2005-N01-4	05/02/05	05/02/05	Gill Marketing Co.
2005-N01-5	05/09/05	05/09/05	DSI
2005-N01-6	05/09/05	05/09/05	GSA(OIG)
2005-N01-7	05/10/05	05/10/05	GEIA
2005-N01-8	05/10/05	05/10/05	CSA

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
www.gsa.gov

Response Number	Date Received	Comment Date	Commenter
2005-N01-9	05/10/05	05/10/05	ABA (Post-Award Audit Provisions)
2005-N01-10	05/10/05	05/10/05	CODSIA
2005-N01-11	05/10/05	05/10/05	POGO
2005-N01-12	05/10/05	05/10/05	GEIA
2005-N01-13	05/10/05	05/10/05	ITAA
2005-N01-14	05/10/05	05/10/05	VA
2005-N01-15	05/11/05	05/11/05	Coalition for Government Procurement
2005-No1-16	08/17/05	07/05/05	US Senate Homeland Security and Governmental Affairs

Attachments

2005-N01-1

"Samuel Whitley"
<swhitley@whitleylawgroup.com>

03/21/2005 12:55 PM

To: gsaranpr.2005-N01@gsa.gov
cc:
Subject: GSAR ANPR 2005-N01

Please find attached our Firm's comments regarding the above advanced notice of proposed rulemaking.

Thank you.

Samuel E. Whitley
Attorney at Law

Whitley Law Group, P.C.
1001 South Dairy Ashford, Suite 100
Houston, Texas 77077

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GSA ANPR comments.doc

Whitley Law Group, P.C.
1001 South Dairy Ashford, Suite 100Houston, Texas 77077-2375
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March 21, 2005 2005-N01-1

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

Re: GSAR ANPR 2005-N01

Dear Ms. Duarte:

We are pleased to submit comments in response to the General Services Administration's ("GSA") advance notice of proposed rulemaking published on March 11, 2005 in the *Federal Register*.[1] Although our Firm represents various clients who have business dealings with the United States Government, our Firm has not been engaged to provide these comments, and we do so solely to provide our input on the ANPR.

In the ANPR, GSA requested comment on whether changes should be made to certain provisions of the Federal Acquisition Regulation, specifically those dealing with consequential damages waivers and post-award audits.[2] [3]

After reviewing the ANPR and the specific provisions and concerns noted by GSA therein, we believe that changes to the consequential damages waiver and post-award audit provisions are unnecessary. We believe that the current form of the FAR functions properly, and that changes could introduce unintended consequences.

The following are our comments regarding the ANPR and the matters of concern indicated therein.

1. FAR clause 52.212-4(p) and the "tailoring" provisions at FAR 12.302, do not reach the level of commercial standards and that unlimited consequential or other incidental or special damages are not necessary and are, in fact, counterproductive to efficient procurement, raising costs and establishing barriers to commercial companies considering whether to do business with the Federal Government.[4]

   This concern appears to be based on a false premise, namely that FAR 52.212-4(p) states that Government contractors are liable for an unlimited amount of consequential, incidental, or special damages. This is an incorrect reading of the regulation; the suggested contract clause at FAR 52.212-4(p) states exactly the

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opposite. The clause provides that the "Contractor *will not* be liable to the Government for consequential damages resulting from any defect or deficiencies in accepted items."[5]

Based on the current text of the above clause, we are frankly confused as to why changes would be needed in order to insulate a contractor from consequential damages, when the regulation, as currently written, already accomplishes this goal. We can only surmise that perhaps GSA's concern is based on contracting officers not including this provision in contracts, not on the text of the regulation itself.[6] However, if this is the case, it is far from clear from the text of the ANPR, and further guidance on GSA's concerns and intentions is necessary.

With respect to the tailoring provision found at FAR 12.302, we also believe that it provides the necessary leeway to negotiate a commercially reasonable contract.

In sum, we believe that the current text of the FAR on these matters is adequate and performs as it should, and that changes are therefore unnecessary.

2. Although FAR 12.302 permits contracting officers to tailor the limitation of liability clause at FAR 52.212-4(p), some companies assert that contracting officers are unwilling to do so, leaving contractors with a take-it or leave-it option and contracts that deviate from the commercial marketplace, making contractors in general less willing to sign on to such contracts.[7]

   This concern is based on more practical, rather than legal, aspects of the FAR. If GSA is concerned that contracting officers are refusing to insert the consequential damages waiver clause in their contracts, then GSA should identify the clause at FAR 52.212-4(p) as a mandatory clause in all GSA contracts by inserting it as a required provision at FAR 12.302(b). However, the actual text of FAR 52.212-4(p) appears to be written to accomplish its intended purpose.

   As a result, we believe that FAR 52.212-4(p) should not be changed; however, GSA may wish to include it as a required provision at FAR 12.302(b).

3. The commercial practice, unlike FAR 52.212-4(p), that waives liability for consequential damages resulting from any defect or deficiencies in accepted items, provides for a complete waiver of consequential damages.[8]

   It is difficult to identify a single commercial practice regarding consequential damages waivers which GSA should imitate. Some purchasers of commercial items demand that consequential damages not be waived, while sellers with a unique product or special price, insist that consequential damages be waived. A middle-of-the-road approach often followed is a mutual waiver of consequential damages.[9]

   If GSA desires to expand the waiver for consequential damages, we are not sure how much further the regulation could be expanded. As a result, we believe that the current text of the regulation accomplishes its intend purpose, *i.e.*, protecting

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contractors from consequential damages incurred by the Government, and as a result, we do not believe that any changes to the regulation are necessary.

4. Contractors would make risk decisions and negotiate Government contracts without having to add an uncertainty premium as to liability protection, if FAR Part 12 were appropriately amended to reflect commercial practices.[10]

As stated earlier, we believe that FAR Part 12 adequately reflects commercial practices and that no changes are necessary. We also reiterate our previous observation that it would be difficult to expand the consequential damages waiver, simply because it already is so broad. If the true nature of the problem is that contracting officers are refusing to include FAR 52.212-4(p) in GSA contracts, then this practice should be handled differently, perhaps by mandating use of this clause in GSA contracts (as suggested above).

In any event, we believe that the current text of the regulation adequately reflects commercial practices and accomplishes its intended purpose, and therefore, we do not believe that any changes to the regulation are necessary.

5. Contractors also request that we make the waiver of consequential damages for commercial products and services available under other provisions of the FAR.[11]

Of all the concerns noted in the ANPR, this is the one most worthy of further review. It indeed may be valuable to extend the waiver of consequential damages for commercial products and services to other products and services under the FAR. However, GSA will need to conduct a thorough review of which products and services would be most suited to such protection.

In sum, we believe that this suggestion deserves further review, and beyond this statement, we have no further comment.

6. Similarly, the General Accounting Office and periodically GSA's IG raise concerns regarding GSA's right to access and examine contractor records after contract award. GSA's primary vehicle for conducting post-award audits is GSAR 552.215-70, Examination of Records by GSA, that gives the Administrator of GSA, or any duly authorized representative, typically the GSA Inspector General's Office of Audits, access to and the right to examine contractor records relating to over billings, billing errors, compliance with the Industrial Funding Fee (IFF) clause of the contract, and compliance with the Price Reduction clause under MAS contracts.[12]

We have examined the audit clause contained at GSAR 552.215-70, and we believe that it reflects commercial standards, and adequately accomplishes its intended purpose, *i.e.*, allowing the Government to audit contractors' books and records to ensure compliance with contract standards and the FAR.

The commercial practice allows the reviewing party to audit the books and records of the other party, but only if the reviewing party pays the audit fees related to this request. In addition, some contracts require the reviewing party to use a third-party

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auditor of its choice, whose work is limited solely to certain items and will be conducted subject to a non-disclosure agreement.

GSAR 552.215-70 appears to be written correctly to accomplish its purpose and therefore, we do not believe that any change to this provision is necessary.

7. In addition to the GSA Examination of Records clause, GSA may use a number of other authorities to conduct a post-award review of a contractor's records. These other authorities include FAR 52.212-5 which authorizes the Comptroller General of the United States to access and examine a contractor's directly pertinent records involving transactions related to the contract; GSAR 515.209-70(b) that permits a contracting officer to modify the GSA Examination of Records clause to define the specific area of audit (e.g., the use or disposition of Government-furnished property, compliance with price reduction clause, etc.), and the right of the GSA Inspector General to issue subpoenas for contractor records under the Inspector General Act of 1978.[13]

The above concern is too broad for us to specifically comment on the matters mentioned therein. Nonetheless, we reiterate our previous comment that the above audit clauses sufficiently reflect commercial practices and allow GSA representatives (and representatives from other Government agencies) adequate authority to conduct post-award audits without unreasonable infringement on contractors' businesses, and that therefore changes are not necessary.

8. Contractors' major concerns with GSA's post-award audit authority include complaints that they are too broad and not consistent with commercial contract practices.

We respectfully disagree with this observation. As stated earlier in Section 6 above, the commercial practice allows the reviewing party to audit the records of the other party, if the reviewing party pays the audit fees associated with this request, and subject to any limitations negotiated between the parties, such as that the audit will be limited to certain matters, or that the audit will be subject to non-disclosure of certain information.

GSA's post-award authority may be broad, but we believe that it is necessarily so, given GSA's mission of procuring goods and services for the Government at reasonable prices. In any event, we do not believe that the current regulations present an unreasonable infringement on contractors' business practices, and therefore, we believe that the regulation should not be modified.

9. In consideration of the above concerns, we have questions as to how the taxpayer may benefit from any revisions to the GSAR to address contractor concerns regarding limitation of liability or post-award audits. We are also interested in learning what, if any, impact the Services Acquisitions Reform Act of 2002 and 2003 has on the issue of revising the GSAR to address limitations of liability.

With respect to taxpayer benefits from any revisions to the GSAR, we believe that

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such concerns are beyond our scope of review, and respectfully decline to comment on this matter.

We have analyzed the Services Acquisition Reform Act of 2003[14] and found that no reference is made to limitations of liability; however, the Act does direct the advisory panel to be created by the Administrator for Federal Procurement Policy to "review all Federal acquisition laws and procedures, and, to the extent practicable, government-wide acquisition policies, with a view toward ensuring effective and appropriate use of commercial practices and performance-based contracting...and make any recommendations for the modification of such laws, regulations, or policies that are considered necessary as a result of such review..."[15] [16]

As a result, based on the Services Acquisition Reform Act of 2003, the FAR should be reviewed and modified to adequately reflect commercial practices. We believe that this is what GSA is doing with the provisions noted in the ANPR; however, we believe that the regulations noted therein do not require changes.

In sum, we believe that the FAR clauses indicated by GSA in the ANPR do not require changes. We do believe that GSA should further review whether the consequential damages waiver provisions should be expanded to include other types of products and services. In all other respects, however, we believe that the FAR clauses cited in the ANPR accomplish their intended purpose. Our analysis is not changed by the Services Acquisition Reform Act of 2003.

We thank you for the opportunity to provide our comments on the matters presented in the ANPR, and hope that our comments are useful to GSA in deciding in whether to proceed with changes to the FAR.

Very truly yours,

WHITLEY LAW GROUP, P.C.

By: /s/_____
Samuel E. Whitley
swhitley@whitleylawgroup.com

[1] *General Services Administration Acquisition Regulation; Waiver of Consequential Damages and "Post-Award" Audit Provisions*, 70 Fed. Reg. 12,167 (Mar. 11, 2005) ("ANPR").
[2] Title 48, Code of Federal Regulations (2005) ("FAR").
[3] *See generally* ANPR.
[4] *Id.*, 70 Fed. Reg. at 12,168.
[5] FAR 52.212-4(p) (emphasis added).
[6] *See infra* comment 2.
[7] ANPR, 70 Fed. Reg. at 12,168.
[8] ANPR, 70 Fed. Reg. at 12,168.
[9] This approach came about because purchasers too can be liable for consequential damages to their sellers, for instance, if the product was custom-manufactured, and the custom manufacturing process caused damage to the seller's other product lines.
[10] ANPR, 70 Fed. Reg. at 12,168.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Services Acquisition Reform Act of 2003, Pub. L. No. 108-136, 117 Stat. 1392.
[15] *Id.* § 1423(c), 117 Stat. 1392, 1663, 1669 (codified at 41 U.S.C. § 405 note).
[16] We note that the proposed Services Acquisition Reform Act of 2002 (H.R. 3832) was not enacted by Congress, and consequently, we do not comment on its provisions.

2005-001-1

2005-N01-2

AEROSPACE INDUSTRIES ASSOCIATION

March 21, 2005

General Services Administration
Regulatory Secretariat (VIR)
1800 F. Street, NW, Room 4035
Attn: Laurie Duarte
Washington, DC 20405

Dear Ms. Duarte:

The Aerospace Industries Association appreciates the opportunity to provide comments on whether the General Services Administration Acquisition Regulation (GSAR) should be revised to include a waiver of consequential damages for contracts awarded for commercial items under the FAR. Our members are encouraged by the initiative to harmonize the GSA regulations with customary commercial practices of the private sector regarding audit rights and consequential damages contract clauses. The waiver of consequential damages will benefit contractors by (1) encouraging more competitors and (2) by reducing costs to the government because contractors will not have to include the cost for liability protection in their bids.

In addition we support the holding of a public meeting to address these proposals in more detail. We look forward to attending the meeting and leaning more about the initiative.

If there are any questions or if we can be of further assistance, please do not hesitate to contact me at (703) 358-1045.

Thank you.

Sincerely,

Patrick D. Sullivan

Patrick D. Sullivan
Assistant Vice President
Procurement and Finance.

Aerospace Industries Association of America, Inc.
1000 Wilson Boulevard, Suite 1700 Arlington, VA 22209-3901 (703) 358-1000 www.aia-aerospace.org

AEROSPACE INDUSTRIES ASSOCIATION

FACSIMILE TRANSMISSION

PROCUREMENT & FINANCE DEPARTMENT
GOVERNMENT DIVISION
FAX No. 703-358-1013

Date: 3/21/05

PAGES: Cover + 1

FROM:					
	Terry Marlow	703-358-1040		Information	
	Patrick Sullivan	703-358-1045	X	Action	
	Richard Powers	703-358-1042		Reply Requested	
	Kirsten Koepsel	703-358-1044		As Requested	X
	Suzette Strickland	703-358-1041			

TO: GSAR ANPR 2005-N01 **FAX #** 202-501-4067
c/o Ms. Laurie Duarte

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2005-N01-3

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An SGI Company

March 28, 2005

Ms. Lauriann Duarte
GSA Regulatory Secretariat
1800 F Street, NW, Room 4035
Washington, D.C. 20405

RE: GSAR ANPR 2005-No 1

Dear Ms. Duarte:

We are very concerned about the Advanced Notice of Proposed Rulemaking (ANPR) published in the March 11th *Federal Register,* concerning the addition of post-award audit provisions into GSA Multiple Award Schedule contracts.

Silicon Graphics Federal, Inc. has been in the GSA Schedule Contract Program for nearly twenty years. During this period, it underwent both pre-award and post-award audits as well as annual reviews regarding Industrial Fund Fee payments. We found post-award audits to be intrusive, costly, and not worth the effort expended by both the Government and contractors. Other alternatives are available to accomplish similar goals of insuring proper administration of the Schedules contract program.

We strongly oppose the re-institution of post-award audits on Multiple Award Schedule contracts. The GSA Schedules program has come a long way in the past 50 years. After 1996-1997 timeframe, the GSA Schedules Program has developed into a premier buying vehicle for the Government. The program has reduced the time and cost of acquisitions while making available goods and services at fair and reasonable prices. It offers the Government customer a choice of acquiring items efficiently, quickly, and easily. Much of this success can be attributed to the changes made by GSA to its Multiple Award Schedule Contract Program, to include the elimination of the post award audits.

When GSA considered eliminating post-award audits as a standard MAS contract oversight tool in 1996, it did not have the statutory authority to conduct post award audits and it could not make a positive case that such audits are a common commercial practice. Today, post-award audits are not a common commercial business practice. Where commercial *reviews* exist, there is no risk of incurring civil and criminal penalties that GSA schedule contractors could incur.

The Clinger-Cohen Act makes it clear that post-award audits should not be part of commercial item contracts. The issue of such audits was extensively debated during the 1996-97 rulemaking. Any remaining ambiguity over the intent of Congress was removed when a letter signed by then-Senator Cohen and then-Congressman Clinger was sent to several senior federal procurement officials confirming that the authors of the bill intended to eliminate post-award audits from such contracts.

The Administration continues to seek ways to reduce regulations and to get Government off the backs of individuals and companies. There is no statutory basis upon which to base the reinstitution of post-award audits. The law has not changed. Commercial practice has not changed. The major factors that existed in 1996 when GSA eliminated post-award audits from schedule contracts are still present.

Please note that GSA has many contract oversight tools; such as the right to examine contracts when contractor misdeeds are alleged and to examine contracts for billing errors and compliance with the schedules' Industrial Funding Fee program. These tools provide good protection for the government when suspected wrong-doing occurs. The Inspector General should not be given carte blanche authority to intrude and significantly disrupt the business activities of responsible business partners.

Rcvd
4-7-05

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sgi.com

2005-N01-3

Silicon Graphics Federal, Inc. strongly recommends that a formal rule making on post-award audits under the GSA Multiple Award Schedule Contract Program be discontinued and dropped.

Sincerely,

Harry Fuchigami
Director, Acquisition Programs, Contracts, and Security
Silicon Graphics Federal, Inc.

2005-N01-4

GILL MARKETING CO.
A DIVISION OF GILL GROUP, INC.
FOOD SERVICE EQUIPMENT
FEDERAL GOVERNMENT DIVISION

May 2, 2005

Ms. Lauriann Duarte
GSA Regulatory Secretariat
1800 F Street, NW, Room 4035
Washington, D.C. 20405

RE: GSAR ANPR 2005-No 1

Gill Marketing Co. ("Gill Marketing") is taking this opportunity to submit the following comments on the Advanced Notice of Proposed Rulemaking (ANPR) published in the March 11th *Federal Register*. We will focus our comments on that part of the ANPR on whether post-award audit provisions should be added into GSA Multiple Award Schedule contracts.

Gill Marketing is a Phoenix-based, small, women-owned business, which sells food-service equipment and supplies to the Federal Government through a GSA multiple award schedule contract, DLA Prime Vendor and AFNAF contracts.

Gill Marketing opposes the re-institution of post-award audits on Multiple Award Schedule contracts. We believe that such a step would drive many of the most popular schedule contractors from the program, reducing customer options and driving up the government's overall acquisition costs. Post-award audits are time and cost intensive for all involved and other steps can and should be taken before post-award audits are considered as a contract oversight method.

When GSA considered eliminating post-award audits as a standard MAS contract oversight tool in 1996 it noted that the after the passage of the Clinger-Cohen Act and related legislation (at the time referred to as the Federal Acquisition Reform Act), the Federal Property and Administrative Services Act was made silent on the agency's authority to conduct an audit of any "other than cost or pricing data" which was submitted in support of an offer resulting in a fix-priced contract. Given this lack of statutory authority, GSA then looked to commercial practice to justify its contention that post-award audits are permissible. Ultimately, however, the agency could not make a positive case that such audits are a common commercial practice.

The same is true today. Invasive post-award audits are not a common part of commercial business dealings. In no case where commercial *reviews* exist is there a risk of incurring the civil and criminal penalties a schedule contractor could incur in the schedules

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2005-101-4

environment.

In addition to this, there has been no change to procurement law governing post-award audits since passage of the Clinger-Cohen Act. This Act was clear that post-award audits should not be part of commercial item contracts. The issue of such audits was extensively debated during the 1996-97 rulemaking. Any remaining ambiguity over the intent of Congress was removed, however, when a letter signed by then-Senator Cohen and then-Congressman Clinger was sent to several senior federal procurement officials. This letter confirmed that the authors of the bill intended to eliminate post-award audits from such contracts.

For these reasons, we see no statutory basis upon which a claim for the reinstitution of post-award audits can go forward. The law has not changed. Commercial practice has not changed. Thus, the major factors, that existed in 1996-97 when GSA eliminated post-award audits from schedule contracts still govern.

It is also important to note that GSA has a significant array of contract oversight tools currently available to it. The agency, for example, always retained the right to examine contracts where allegations of contractor misdeeds were made. So too, can GSA examine contracts for billing errors and compliance with the schedules Industrial Funding Fee. These tools provide good protection for the government when suspected wrong-doing occurs without giving the Inspector General carte blanche to significantly disrupt the business activities of responsible business partners.

GSA's ability to conduct pre-award audits was also never changed. It was always anticipated that the agency would step up this type of audit to ensure the reliability of contractor-supplied information and protect legitimate government interests.

For these reasons the Gill Marketing recommends that a formal rule making on schedule post-award audits not move forward. We again appreciate this opportunity to comment.

Sincerely,

Marla Hoot
Manager, Government Contract Dept.

2005-N01-5

Tuttle, Peter

From: Tuttle, Peter
Sent: Monday, May 09, 2005 9:52 AM
To: 'gsaranpr.2005-N01@gsa.gov'
Cc: DiBenedetto, Anthony; Falcone, Ron
Subject: GSAR ANPR 2005-N01 - DSI Comments

Dear Ms. Duarte:

First of all, thank you for the opportunity to participate and provide comments.

Distributed Solutions Inc. (DSI) is a small business founded in 1992. We have recently relocated to Reston, Virginia and specialize in the manufacture of a robust contract management software solution suite of products called the Automated Acquisition Management System (AAMS). AAMS is currently deployed in over fifteen federal agencies.

DSI concurs with GSA's analysis and conclusion that FAR Part 52.212-4(p) (Limitation of Liability) and FAR Part 12.302 (Tailoring) do not provide enough protections to GSA Schedule contractors/vendors to completely eliminate the uncertainty premium to the taxpayers for goods and services due to remaining and burdensome consequential damages "issues".

It is noted that, even under the Uniform Commercial Code, questions remain about the enforceability in certain circumstances of consequential damages exclusions. Although UCC §2-719(1) (a) specifically endorses limiting a buyer's remedies to "repair and replacement of non-conforming goods", UCC §2-719(2) says that if such exclusive remedy "fails of its essential purpose" the buyer will be permitted other remedies.

Accordingly, DSI recommends that the final draft of the GSAR consequential damages waiver clause include language to ensure that the maximum total of all consequential liability awards to any party, even liability awards to those parties without privity of contract (should that ever occur due to "forseeabilty" issues), should not exceed the contract or product base-price. Language of this type is needed, especially for small businesses like DSI, to avoid any possible outcome for consequential damages like that which occurred in the well-known case of Mississippi versus American Management Systems. In that case, damages were awarded for the state's so-called loss of "expected savings". It is important to GSA's efforts to drive product and services prices lower by, again, completely eliminating *the uncertainty premium* that drives contractor/vendor costs higher.

DSI also recommends that the final draft of the GSAR consequential damages waiver clause include language that discourages Intellectual Property piracy that appears newsworthy these days. A lead-in to the final consequential liability waiver clause that says in effect, "Except for liabilities arising from intellectual property infringement", should provide some element of protection from contractors/vendors who do not have actual intellectual property rights to accomplish the service or provide goods a proposed to the government.

DSI also proposes an answer to Mr. Dave Drabkin's question, which he posed at the 4/14/2005 Public Meeting, where he asked if more risk should be placed contractors that propose solutions based on a government performance-based SOO. DSI recommends that the answer be "No" to this question because of the common law of agency. In those scenarios, legal research points to a possible "right of control" that would lead to a court finding that the government contract for anything other than pure "COTS" would create a principal/agent relationship and not a principal/independent-contractor relationship. Where there is any possibility of right-of-control, the law of agency would make the government (principal) ultimately liable for any award of damages even where the agent was directed not to do certain things and does them anyway. DSI believes it is always less costly for the government to "self-insure" to, again, avoid the uncertainty premium. Additionally, even if a contractor proposes a solution based on a SOO, the government reviews this approach as part of the proposal evaluation process. Upon award, both the government and contractor are partners who should share the risks, which are commensurate based on the type of contracting vehicle that is used. The result of inappropriately shifting performance risk to the contractor would have a chilling effect on small business participation and would likely increase the cost of products and services.

Please contact Tony DiBenedetto, Esq. or the undersigned at (703) 471-7530 if additional information is required.

Regards,

2005-N01-5

Peter G. Tuttle, CPCM
Senior Procurement/Policy Analyst
Distributed Solutions, Inc.

2005-N01-6

U.S. GENERAL SERVICES ADMINISTRATION
Office of Inspector General

May 9, 2005

FAR Secretariat (VIR)
General Services Administration
1800 F Street, NW
Room 4035
Washington, DC 20405
Attn: Laurieann Duarte

Re: Advance Notice of Proposed Rulemaking – Waiver of Consequential Damages and "Post Award" Audit Provisions

Dear Ms. Duarte:

This letter transmits the comments of the General Services Administration Office of Inspector General (OIG) on the above-captioned advance notice of proposed rulemaking (ANPR), issued at 70 Fed. Reg. 12167 (March 11, 2005) and amended at 70 Fed. Reg. 13005 (March 17, 2005) and 70 Fed. Reg. 19051 (April 12, 2005). The ANPR seeks comments on whether the General Services Administration Acquisition Regulation (GSAR) should be revised to include a waiver of consequential damages for commercial items contracts, whether postaward audit rights should be included in its Multiple Award Schedule (MAS) contracts and Governmentwide acquisition contracts (GWACs), and whether the Examination of Records clause at GSAR 552.215-71 should be modified to reinstate post award access to contractor records to verify that pricing or other data submitted during negotiations was current, accurate and complete. We have comments on both the inclusion/modification of postaward audit rights and the waiver of consequential damages.

Postaward Audit Rights

At the outset, the ANPR notes that our Office and the General Accountability Office periodically raise concerns about GSA's right to access and examine contractor records after contract award. The notice points generally to the existing contractual vehicles for conducting postaward audits, including GSAR 552.215-70, Examination of Records by GSA (giving GSA the right to examine contractor records up to three years after final payment in certain types of contracts other than MAS contracts); GSAR 515.215-71, Examination of Records by GSA (Multiple Award Schedule)(giving GSA the right to examine contractor records up to three years after final payment relating to overbillings, price reductions and compliance with the Industrial Funding Fee (IFF)), and FAR

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52-212-5 (authorizing the Comptroller General to access and examine contractor records until three years after final payment).

The ANPR notes that contractors have had "major concerns" with GSA's postaward audit authority. It is our understanding, however, that whatever concerns contractors and their trade associations have with postaward audit rights, it has never been focused on GSA's general postaward audit authority in non-MAS contracts (including GWACs),[1] nor on its authority to conduct compliance reviews of overbillings, IFF and the like, nor on the Comptroller General's authority.[2] Rather, it has focused on GSA's authority to conduct postaward audit rights over negotiation information – or the so-called "defective pricing" audit rights.

Prior to 1997, the GSA Examination of Records clause allowed contracting officers or their duly authorized representatives access to records to audit information submitted in the support of price negotiations up to three years after contract award. On August 1, 1997, GSA issued its final rule revising the MAS program, in part to implement the Federal Acquisition Streamlining Act, Pub. L. 103-355 and the Clinger-Cohen Act, Pub. L. 104-106. In that rule, mainly in response to industry concerns, GSA deleted the contractual clause that provided postaward audit authority over negotiation information. Instead, the rule devised a provision that allowed contracting officers to modify the Examination of Records clause for MAS contracts to allow such access but only after there had been a determination that there was a "likelihood of significant harm" to the government on a schedule-wide basis and there had been approval by the senior procurement executive. Even if implemented, that authority would only run up to two years after award of a contract. To date, GSA has never made a "significant harm" determination and, consequently, GSA has never exercised contractual defective pricing audit authority since the rule change. In direct contrast to GSA, immediately upon implementation of the rule, the Department of Veterans Affairs, which operates several MAS schedules related to medical supplies under a delegation of authority from GSA, concluded there was significant harm to its schedules absent access to negotiation information and activated the modification allowing such access.

The principal concerns expressed by the contractor community related to defective pricing audit authority are that such authorities are overly burdensome and are not consistent with commercial practice. We disagree on both counts. While we certainly acknowledge that postaward (and any) audits are not without

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[1] GSA OIG has no regularized postaward audit program involving GWACs. The competition engendered by the initial process of GWAC awards and, at the task order level, by the fair opportunity process is generally the government's assurance of price reasonableness. For most cost-type task orders issued under GWACs, the Defense Contract Audit Agency has audit cognizance.

[2] For the Examination of Records by GSA (Multiple Award Schedule) clause, we note that it is carefully tailored to allow postaward compliance audits of only overbillings, IFF payments and price reductions. For the Comptroller General's audit authority, we point out that this audit authority is largely unused by the Comptroller General to audit contractor records.

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burden to a contractor, we point out we have always taken steps to minimize burden on the company by tailoring what is a fairly standard audit process to accommodate a company's recordkeeping system, keep our on-site field work to reasonable time frames, and rely where possible on electronic audit techniques. When industry groups speak of "burden" they often raise the specter of potential fraud liability and its consequences when defective pricing is found and then referred to the Department of Justice. Simply stated, this concern has always been greatly exaggerated. In the last period of time we have to measure (the 1994 through 1996 time period), only 15 percent of the over 70 postaward audits with defective pricing findings issued by this Office were referred to the Department of Justice based on concerns regarding the fraudulent nondisclosure or misrepresentation of pricing information. The remaining postaward audits were referred to GSA contracting officials for administrative resolution.

As far as whether audit clauses are consistent with customary commercial practice, we had some hope that this issue had been laid to rest with the decision of the Office of Federal Procurement Policy (OFPP) Administrator on July 30, 1999, which concluded, in response to a petition of the Government Electronics and Information Technology Association (GEIA), that the defective pricing audit clause was consistent with the FAR and its requirement that acquisitions of commercial items include only those clauses that are "consistent with customary commercial practice." In that review process by OFPP, we pointed to the evidence developed by this Office and the Federal Supply Service that audit clauses do exist in various forms in the commercial world. See GSA FSS Acquisition Management Center's "Anthology of Commercial Terms and Condition" (July 1996) and GSA and VA OIGs' "Procurement Reform and the MAS Program" (July 1995).

Although GEIA argues now in the context of this ANPR, as it did in that petition process, that some of those commercial audit clauses are not as broad in scope as the defective pricing audit authority, we point out that there is no real commercial analog to the GSA MAS program; as such, it is unreasonable to expect commercial audit clauses to cover the type of pricing information used to negotiate MAS contracts. Commercial purchasing arrangements do not typically involve multiple contracts for the same or similar items with as many suppliers; in contrast, multiple awards are key to the MAS program in that they are necessary to achieve maximum choice for government users. Making multiple awards, in turn, requires the Government to rely on pricing disclosures in order to effectuate its policy of targeting most-favored customer pricing. Thus, the fundamental structure of the MAS program dictates that any meaningful audit clause must cover such pricing information. We nevertheless note that it is fairly evident from the commercial audit clauses we have reviewed that commercial contracts provide for audit authorities coextensive with the contractual requirements imposed, so that such rights cover access to any information provided by the seller to meet its obligations under the contract. We point out that these same arguments were addressed by GEIA and this Office in the petition process and

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the OFPP Administrator essentially agreed with our analysis. The OFPP Administrator pointed out that as GSA obtains pricing data from contractors in order to negotiate pricing comparable to commercial customers, instead of relying on competition (and thus limiting the number of schedule holders) to ensure fair and reasonable pricing, it is reasonable to audit the information obtained. See October 12, 1999 letter at p. 12.[3]

The Office of Inspector General strongly urges GSA to reinstate postaward access to and the right to examine information submitted by contractors to support contract negotiations. The ability of GSA to negotiate prices that are commensurate with the government's purchasing power is dependent on getting current, accurate and complete pricing data from contractors. We continue to believe that postaward audits are an important means of safeguarding the quality of pricing disclosures. Even after eight years, we are frankly astonished at GSA's ostrich-like "head in the sand" position, which is to either ignore the problem of pricing disclosures or pretend that it does not exist. In the three-year period prior to the August 1997 rulemaking, fully 84% of postaward audits contained findings of defective pricing. Although, as already stated, the majority of our audits with defective pricing findings were referred to contracting officials for administrative resolution, they were nevertheless compensable to the government. Looking only at the small numbers of audits that we referred to the Department of Justice, the government recovered over $140 million in civil fraud penalties in the eight years prior to the rule change. Every indication we have, through hotline calls and qui tam actions filed under the civil False Claims Act is that defective pricing is currently alive and well, even though the right to contractually audit for it is not. We have only to look at the postaward audit program of the Department of Veterans Affairs Office of Inspector General. As noted above, after the August 1997 rule change, the Department of Veterans Affairs has retained its ability to conduct postaward audits of negotiation information. Since that time, VA OIG has collected $151 million as a result of postaward audit recoveries.

This Office strongly supports GSA's efforts to develop a robust preaward audit program. We concur that preaward audits can and should be the preferred control on pricing disclosures. It is always better to fix problems before they begin. However, while we expect to reach almost 70 preaward audits this fiscal year,[4] after the hiring and training of additional auditors, we cannot provide anywhere near full coverage of the 16,000 MAS contracts. We believe that a critical adjunct to the preaward program is an effective and complete postaward program. The importance of postaward auditing as a safeguard cannot be

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[3] At issue also in that GEIA petition process was GEIA's longstanding argument, reiterated in the public meeting on this ANPR, that as a result of changes made in Clinger-Cohen, GSA and VA are statutorily prohibited from incorporating postaward audit clauses into contracts for commercial items. The OFPP Administrator disagreed with this view, as did GSA's Office of Acquisition Policy in its submissions to OFPP. This is consistent with GSA's position in the August 1, 1997 rulemaking that it believes it has a legal right to conduct postaward audits, notwithstanding its decision to virtually eliminate their use.

[4] In these preawards, we are trying to cover most of the larger dollar contracts.

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measured solely in terms of numbers of contracts audited and dollars recovered. We note that, even at the height of our postaward audit program in the 1990's, we conducted only approximately 40 to 50 postaward audits of negotiation information each year. Whatever the number of audits actually conducted, it is really the very existence of the audit right that serves as a deterrent to inaccurate disclosures of information. It also serves as incentive for contractors to do their own internal compliance programs and disclose to the government overcharges they might find, simply because of the potential impact in terms of False Claims Act liability and other government remedial measures. We again point to the Department of Veterans Affairs. Of the $151 million recovered by their OIG since August 1997 from postaward audits, fully $105.7 million represents recoveries directly related to voluntary disclosures made to the VA OIG.

For all these reasons, the Office of Inspector General recommends that GSA reinstate postaward access to and the right to examine information submitted by contractors to support contract negotiations. At the very minimum, we ask that GSA follow the recommendations of the General Accountability Office in its February 2005 report on "Opportunities to Improve Pricing of GSA Multiple Award Schedules Contracts" that GSA develop guidance on making the "significant harm" finding, thus triggering the modification of the Examination of Records clause to allow for postaward audits of negotiation information. We suspect that most contracting officers have no idea they can initiate a review/determination process that would allow for the clause. There also may need to be some modification of the GSAR language (at 515-106-70(b)). As it is currently drafted, it is the contracting officer who makes the significant harm determination, but that determination is supposed to be on a schedule-by-schedule basis (across many contracts). This seems an inherently inconsistent and unworkable procedure, because it requires an individual contracting officer to make a significant harm determination across many more contracts than he or she has knowledge of or responsibility for.

Waiver of Consequential Damages

The ANPR has also asked for comments on the possible revision of the current FAR clause pertaining to consequential damage liability. Currently, FAR Part 12, which covers the acquisition of commercial items, includes a provision that discusses consequential damages. The provision, found at FAR 52.212-4(p), Limitation of Liability, provides as follows: "Except as otherwise provided by an express warranty, the Contractor will not be liable to the Government for consequential damages resulting from any defect or deficiencies in accepted items."

The ANPR notes a number of industry concerns that have been raised in connection with this clause. Mainly, they boil down to a concern that the consequential damages provision does not, unlike the supposed standard commercial practice, lead to a plenary waiver of consequential damages.

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Industry seemingly believes that the lack of a full waiver of consequential damages adds unnecessary uncertainty, additional costs, and inefficiency to the government contracting process. For example, in a February 5, 2004 letter from the Information Technology Association of America (ITAA letter), the Association argued that the consequential damages provision "does not quite reach the level of commercial standards" and that, as a consequence, the provision results in a situation where the contractor would have to "carefully comb a solicitation and contract and to negotiate any atypical consequential damages out of the contract." The ITAA letter, however, also suggests that industry representatives would be content with the "duplication" of the FAR Part 12 consequential damages approach to FAR Part 15 contracts.

The position of the GSA OIG is that the FAR Part 12 consequential damage clause does not need to be modified. The provision already provides a sufficient waiver of consequential damages that may predictably run to government contractors. Consequential damages are generally defined as damages that are indirect, remote, and foreseeable. In the case of commercial items, the consequential damages that would be most foreseeable would be those that result from a defect or deficiency in the product. So, for example, if an electrical device that is sold to the government results in a fire that destroys government property due to a wiring deficiency, the value of that destroyed property would be a foreseeable, indirect consequence of the defective product. Those consequential damages are waived by the FAR Part 12 provision.

The provision in question, however, is not a total waiver of consequential damages because it allows the government – when it deems it necessary to do so -- to insert an express warranty governing consequential damages. We believe that the government should be allowed to add such a warranty to a commercial contract when it feels that the circumstances are such that there may be predictable, indirect damages that may result from a particular product. We believe that it is probably a rare situation. As the ITAA letter actually recognizes, the consequential damages approach employed by FAR Part 12 very closely resembles a commercial situation where the parties do, in fact, waive consequential damages. It does carve out for the government, however, the flexibility to add an express warranty when necessary. The government should be able to retain that flexibility, and the consequential damages provision should not be altered.

Please feel free to call my counsel, Kathleen Tighe, on (20) 501-1932 with any questions regarding these comments.

Sincerely,

for Daniel R. Levinson
Inspector General

2005-N01-7

Government Electronics & Information Technology Association

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May 10, 2005

Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW
Room 4035
Washington, D.C. 20405

Subject: GSAR ANPR 2005-N01, Waiver of Consequential Damages and Postaward Audit Provisions

Dear Ms. Duarte:

The Government Electronics & Information Technology Association (GEIA) appreciates the opportunity to comment on the advanced notice of proposed rulemaking (ANPR) published in the Federal Register on March 17, 2005 (Volume 70, Number 51). The ANPR was issued by the General Services Administration (GSA) on two topics: waiver of consequential damages and postaward audit provisions.

GEIA is a trade association that represents high technology industries doing business with the Federal Government. Its membership of over one hundred companies provides the Government with a complete range of electronics and information technology solutions. GEIA maintains extensive programs in market forecasting, standards development, and Government-industry relations, and serves as the Government market sector of the Electronic Industries Alliance (EIA).

We concur in full with the public comments being submitted by the Council of Defense and Space Industry Associations (CODSIA) of which GEIA is a member association and signatory on those comments. As an additional matter, however, GEIA is taking advantage of the opportunity presented by the ANPR to comment further on GEIA's petition concerning GSA defective pricing audit rights and remedies that was submitted to the Office of Federal Procurement Policy (OFPP) Administrator on June 1, 1999 (supplemented on August 3, 1999).

GEIA Petition

We had petitioned the OFPP Administrator, under Section 25 of the OFPP Act, to review two GSAR clauses that imposed defective pricing audit rights and remedies on multiple award schedule (MAS) contracts and to render a determination that the two GSAR clauses were inconsistent with the FAR. The two GSAR clauses were as follows:

- GSAR 552.215-71, "Examination of Records by GSA (Multiple Award Schedule)" - only those provisions pertaining to defective pricing audit rights

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- GSAR 552.215-72, "Price Adjustment - Failure to Provide Accurate Information"

We, accordingly, had urged OFPP to direct GSA to rescind the two GSAR clauses and to remove these clauses from existing contracts. In our view, GSA failed to comply with the limitations of FAR 1.302 concerning authorized agency acquisition regulations. That is, the defective pricing audit rights and remedies imposed by GSA were neither necessary to implement FAR policies and procedures within GSA nor necessary to satisfy the specific needs of GSA.

Furthermore, it was our belief that the two GSAR clauses did not satisfy the limitations on contract clauses established under the Federal Acquisition Streamlining Act (FASA) as being either (1) necessary to implement provisions of law or executive order or (2) consistent with customary commercial practice (see FAR 12.301). In our view, GSA's justification that the two GSAR clauses were in the "best interests" of the Government conflicted with Congress' unambiguous intent, as evidenced in the legislative and regulatory history, including the Federal Acquisition Reform Act (FARA) - subsequently renamed the "Clinger-Cohen Act." Our belief was further reinforced by actions later taken by Congress under the Defense Authorization Act for Fiscal Year 1997 and in a 1996 letter to the Director of the Office of Management and Budget (OMB) from three of FARA's architects (copy attached):

> 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***. (emphasis added)

We believed that the legislative and regulatory record was incontestable that defective pricing audits and remedies were not to be applied to contracts for commercial items. Eight other trade associations submitted letters to OFPP concurring with GEIA's petition. We were positive that GEIA's petition was well-justified under Section 25 of the OFPP Act which states that a person may request the OFPP Administrator to review any procurement regulation as being inconsistent with the FAR and, if found to be inconsistent, to take appropriate remedial action. In our view, the two GSAR clauses should be rescinded.

OFPP Decision

The OFPP Administrator denied GEIA's petition on October 12, 1999, concluding that the challenged "safeguards are consistent with commercial practice to the maximum extent practicable given the current objectives of the MAS program." Although OFPP conceded that commercial companies generally do not conduct postaward audits of proposal information, as also did GSA and the Department of Veterans Affairs (VA), OFPP thought it "reasonable for GSA and VA to verify this [commercial pricing] data when necessary through audits, including postaward 'defective pricing' audits when properly justified, and to seek price adjustments in the event of defective pricing."

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In supporting the decision, OFPP highlighted a key difference between the MAS program and central buying programs managed by commercial companies. According to OFPP, commercial companies limit their users' choices in selecting vendors in an effort to maximize buying leverage; whereas, the MAS program is structured to give Government users more choices. That is, unlike commercial companies, GSA does not channel requirements to a small number of suppliers in order to improve its bargaining position. Another difference put forth by OFPP was that GSA forgoes the opportunity to make vendors compete against one another for MAS contracts. Consequently, according to OFPP, defective pricing audits and remedies were needed for the MAS program.

OFPP noted that, as an accommodation to private industry's concerns, GSA limited the application of defective pricing audit rights and remedies to two years after award or modification. Also, defective pricing audit rights and remedies would be permitted only after the contracting officer made a determination that absent such rights there would be a likelihood of significant harm to the Government. The determination had to be approved by the Senior Procurement Executive. OFPP stated that the VA made such a determination for all of its MAS contracts.[1]

GEIA Comment

We respectfully disagree with the OFPP Administrator's determination and underlying reasoning. No satisfactory case was made by OFPP that the two GSAR clauses met FASA's criteria as either necessary to implement provisions of law or executive order or consistent with customary commercial practice. Quite to the contrary, OFPP admitted that the clauses were *not* consistent with customary commercial practice, as did GSA and VA. Furthermore, OFPP could *not* point to any law or executive order requiring defective pricing audit rights and remedies on contracts for commercial items. Simply put, OFPP's denial did not disprove GEIA's claim.

Instead, OFPP accepted that, notwithstanding FASA, it was not practicable for GSA to do without defective pricing audit rights and remedies. OFPP relied on FASA's phrase at Section 8002(b) "to the maximum extent practicable, include only those clauses ..." OFPP basically concluded that it was *not* practicable to *exclude* the two GSAR clauses. GEIA finds this reasoning to be illogical and troubling.

Inasmuch as the MAS program is the largest commercial item acquisition program in the Federal Government, OFPP determining that it was not practicable to apply Congress' commercial item acquisition reforms to the MAS program seemed incongruous. After all, if it was not practicable for GSA to exclude defective pricing audit rights and remedies on MAS contracts, then how could be it practicable to exclude such rights and remedies on any other sole source contract for commercial items awarded by any other Federal Agency?

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[1] Although products and services purchased by the VA are not necessarily an area of interest to GEIA, we would question VA's broad justification. For example, it is hard to understand how pharmaceutical vendors pose a likelihood of significant harm when drug pricing on MAS contracts is protected by the Veterans Health Care Act.

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As an active participant in the commercial item acquisition reform movement in the 1990's, GEIA cannot accept the argument put forth by GSA and VA that Congress could have expressly prohibited defective pricing audit rights and remedies on contracts for commercial items if they so desired but instead only chose to remove the statutory right to apply such protections.[2] At this time, Congress was well aware that defective pricing audit rights and remedies were a major obstacle for commercial companies desiring to enter the Federal marketplace. The record is clear that Congress took deliberate steps to remove this obstacle - first through FASA and then through the Clinger-Cohen Act. The argument is especially confounding when considering subsequent actions taken by Congress to clarify their intent (i.e., Defense Authorization Act for Fiscal Year 1997 and 1996 letter to OMB). It would seem that these subsequent actions would have been determinative in favor of GEIA's petition. Yet, they were not even mentioned in the OFPP decision.

As to OFPP's view on the uncompetitive structure of the MAS program, we find the argument unpersuasive and in many ways irrelevant. The facts simply do not support any assertion that "GSA foregoes the opportunity to make vendors compete against one another for schedule contract awards." First, the Competition in Contracting Act declared GSA's MAS program to be a competitive procedure so long as (1) the Government has opened participation in the program to all responsible sources and (2) MAS orders and contracts result in the lowest overall cost alternatives to meet the needs of the Government. Second, FAR 8.404 states that orders placed against a MAS contract are considered to be issued using full and open competition. Third, the GSA Advantage! program is GSA's online shopping and ordering system that promotes competition by providing access to "thousands of contractors and millions of services and products" (from the GSA website).

Turning to OFPP's assessment of differences from central buying programs managed by commercial companies, if the implication is that GSA does not assert maximum buying leverage in its own way, then most MAS contractors would likely disagree. Ever since the MAS policy statement was first published in 1982, GSA's negotiation strategy has been to maximize its buying leverage by requiring contracting officers to consider the aggregate volume of all Government purchases when developing GSA's negotiation objectives. That is, all orders are considered to be placed by one Government purchaser. Today, that requirement exists at GSAR 538.270. Many MAS contractors consider this an unfair policy because actually there are many Government purchasers and there are no guarantees that the MAS contractor will reach that aggregate volume of Government business. Also, contrary to the OFPP analysis, commercial companies do have purchasing programs comparable to the MAS program (e.g., master service agreements).

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[2] GSA and VA appear to misunderstand what the Clinger-Cohen Act did. FASA had added an additional commercial item exception to TINA that was above and beyond TINA's traditional catalog and market price exception. The additional exception included a postaward audit provision that expired two years after award or modification. The additional exception proved to be unworkable. The Clinger-Cohen Act replaced all of these exceptions with a single exception for contracts for the acquisition of commercial items and removed the audit provision.

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Notwithstanding the foregoing defects in OFPP's reasoning, the critical flaw in the analysis is confusing the need for negotiating leverage with the need for postaward defective pricing audit rights and remedies. Negotiating MAS pricing, as OFPP points out, is about competition and buying leverage. Defective pricing is about the quality of the commercial pricing data provided by the offeror. This is not to say that the quality of such data is unimportant. However, it does not necessarily follow that defective pricing audit rights and remedies enhances GSA's negotiating leverage when purchasing commercial items. The best expression of this point is the Truth in Negotiations Act (TINA), itself. Since its inception in 1962, TINA has excepted commercial pricing data (e.g., catalog and market pricing) from defective pricing audits and remedies. The underlying reasoning was that the forces of the commercial marketplace would ensure that the prices negotiated from the commercial pricing data would be fair and reasonable. Consequently, there would be no need to impose defective pricing audit rights and remedies.

We must stress that GEIA has never argued that the quality of the commercial pricing data is unimportant. We have, instead, suggested that there were better ways to validate the quality of commercial pricing data. In fact, as part of the GEIA petition, we offered several suggestions for improving the price negotiation and contract award process. These included the following:

- Further simplify the pricing proposal requirement so that it is less reliant on transactional data (e.g., sales orders, invoices) and more reliant on written or established discounting policies and comparable customer agreements or contracts.

- Eliminate or substantially reduce the requirement to provide commercial pricing information, especially transactional information, on concessions.

- Place greater emphasis on *preaward audits* and use of sampling techniques.

- Substantially revise the record retention requirement for commercial pricing information to not more than two years after contract award.

- Clarify and standardize contract award documentation so that there is an improved understanding on the applicable commercial price list, negotiated GSA discounts, comparable customer or customer category and corresponding baseline discount.

- Substantially revise the "Price Reductions" clause to be more consistent with customary commercial practice.

It is our impression that none of these recommendations have been acted upon, notwithstanding OFPP's call for further study. We wholeheartedly agree with CODSIA that a complete overhaul of the MAS contract pricing policies is warranted. The policies have not matched the evolution of the MAS program from commodity purchasing to total solution purchasing, as especially evident in the information technology market. Nor have the policies matched the increased size and complexity of MAS contracts. Moreover, in our view, the policies are inconsistent with the FAR which does not demand the most favored customer price as a predicate to being a fair and reasonable price.

2005-101-7

For commercial companies, there is still too much risk in the proposal submission, contract award, and contract administration process. What GSA and VA see as a need for retroactive cost recovery mechanisms, private industry sees as unjustified exposure to unfairness and conflict. The obvious goal of any defective pricing audit is to find an undisclosed lowest price or undisclosed concession, and in many cases from a vast volume commercial transactions. If found, the defective pricing remedy requires retroactive price reductions and refunds on prior billings, which might also result in a referral to the Department of Justice for potential claims under fraud statutes. For GEIA and its member companies, this is an unacceptable business risk. That OFPP found it not practicable to remove such business risk for commercial companies in the MAS program strains common sense.

GEIA continues to believe that the two GSAR clauses imposing defective pricing audit rights and remedies on MAS contracts are inconsistent with the FAR, related statutes (FASA and Clinger-Cohen Act), and Congress' unambiguous intent. The two GSAR clauses should be rescinded and removed from existing contracts. We would urge the GSA Administrator to take this action as quickly as possible.

We appreciate the opportunity to comment on the ANPR and convey our reaction to the OFPP decision on GEIA's petition. We look forward to continuing the dialog on this important subject. If you have any questions, please contract Mr. James Serafin at (703) 907-7585.

Sincerely,

Dan C. Heinemeier, CAE
President

Attachment
1. Letter to OMB Director from Senator William S. Cohen, Congressman William F. Clinger, Jr., Congressman Floyd D. Spence, September 18, 1996.

cc: Mr. David Safavian, Administrator, Office of Federal Procurement Policy
Mr. Stephen A. Perry, Administrator, General Services Administration

2005-101-7

Congress of the United States
Washington, DC 20515

September 18, 1996

The Honorable Franklin D. Raines
Director
Office of Management and Budget
Executive Office Building
Washington, DC 20503

Dear Mr. Raines:

It has come to our attention that the General Services Administration (GSA) intends to promulgate regulations which are contrary to congressional intent.

The Federal Acquisition Reform Act of 1996 (FARA) (Division D of P.L. 104-106) eliminated the authority of Federal agencies to perform post-award audits of suppliers of commercial items. The clear intent of Congress was that these audits would no longer be performed by Federal agencies. Congress clearly 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.

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.

We trust that you will ensure that the intent of Congress is properly implemented. Thank you in advance for your attention to this matter.

Sincerely,

William F. Clinger, Jr., Chairman
Committee on Government Reform and Oversight
U.S. House of Representatives

Floyd D. Spence, Chairman
Committee on National Security
U.S. House of Representatives

William S. Cohen, Chairman
Committee on Governmental Affairs Subcommittee on Oversight of
Government Management and the District of Columbia
U.S. Senate

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2005-N01-8

May 10, 2005

Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW
Room 4035
Washington, D.C. 20405

Subject: GSAR ANPR 2005-N01, Waiver of Consequential Damages and Post-award Audit Provisions

Dear Ms. Duarte:

The Contract Services Association (CSA) appreciates this opportunity to offer comments on the advanced notice of proposed rulemaking (ANPR) published in the Federal Register on March 17, 2005 (Volume 70, Number 51).

By way of background, CSA is the nation's oldest and largest association of service contractors representing over 200 companies that provide a wide array of services to Federal, state, and local governments. CSA members do over $40 billion in Government contracts and employ nearly 500,000 workers. CSA members represent the diversity of the Government services industry and include small businesses, 8(a)-certified companies, small disadvantaged businesses, women-owned, HUBZone, Native American owned firms and global multi-billion dollar corporations.

CSA has played an active role in the acquisition reform efforts of the past decade, including the 1994 Federal Acquisition Streamlining Act, the 1996 Clinger-Cohen Act, the FAR Part 15 rewrite, and the 2003 Services Acquisition Reform Act. In addition, CSA established a multi-industry Task Force to conduct an extensive review of the laws and regulations affecting service contracting. The Task Force recommendations will be released in mid-May.

For these reasons, CSA is extremely concerned over the ANPR issued by the General Services Administration (GSA). In this ANPR, GSA is requesting comments on whether the GSA Acquisition Regulation (GSAR) should be revised to include a waiver of consequential damages in contracts awarded for commercial items under various parts of the Federal Acquisition Regulation (FAR). GSA also is requesting comments on whether post-award audit provisions should be included for its Multiple Award Schedules (MAS) contracts and Government-wide acquisition contracts (GWACs).

CSA agrees with comments submitted by the Council of Defense and Space Industry Associations (CODSIA) and the Information Technology Association of America (ITAA), and has incorporated many of the same issues into our comments. CSA also supports the presentations made by the ITAA and the Government Electronics Information Association (GEIA) at a public meeting conducted by the GSA on April 14, 2005.

Waiver of Consequential Damages

The acquisition reforms of the 1990's, especially the 1994 Federal Acquisition Streamlining Act (FASA) and the 1996 Clinger-Cohen Act, mandated that Government agencies adopt processes and impose

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requirements that are consistent with customary commercial practice to the maximum extent practicable. This was further reinforced with the enactment of the 2003 Services Acquisition Reform Act (SARA).

Obtaining protection from liability for consequential damages is a routine commercial practice. This is reflected in the regulations (FAR Part 12) implementing the acquisition reforms for commercial items, as well as the clause at FAR 52.212-4(p). That clause states:

> *Except as otherwise provided by an express warranty, the Contractor will not be liable to the Government for consequential damages resulting from any defect or deficiencies in accepted items. [Underlining added]*

However, it is clear from this language that the current FAR coverage still is lacking. It is a customary commercial practice to provide for a *complete waiver* of consequential damages, not limited to defects or deficiencies, *regardless* of whether the item has been *accepted*. Section 8002 of FASA expressly limits the clauses applicable to contracts for the acquisition of commercial items, and states that such contracts shall, "to the maximum extent practicable, include only those contract clauses":

> *(A) that are required to implement provisions of law or executive orders applicable to acquisitions of commercial items or commercial components, as the case may be; or*
> *(B) that are determined to be consistent with standard commercial practice.*

This statutory direction is mirrored, virtually verbatim, in FAR 12.301. Although, as pointed out in the ANPR, FAR 12.302(b) allows the contracting officer to tailor the clause at FAR 52.212-4 to take into account market conditions for each commercial acquisition, such discretion nonetheless falls short of the mandate in FASA for the following reasons:

- The associated uncertainty on the part of contractors as to protection from liability constitutes a business risk that must be factored into a company's business decision whether to do business with the Federal government, and, by extension, the conduct of any ensuing negotiations with the Government. At a minimum, the costs of such open-ended uncertainty will be reflected in the price of any contract. In addition, under the Sarbanes-Oxley Act of 2002 (P.L. 107-204), such open-ended liability has implications for contractors in terms of financial disclosure as well as internal controls.

- The current FAR language constitutes a barrier to the willingness of commercial companies to participate in the Federal marketplace, which is contrary to the Government's interest in drawing upon the innovation and talent available in the private sector.

- Limiting such coverage hinders the Government's efforts in the "war on terrorism" since the Government needs the very best commercial solutions and technologies to combat terrorism and related security concerns, and should ensure that the maximum number of contractors participate in Government procurements.

Finally, imposition of a limitation on liability for consequential damages to protect the Government's interest is unnecessary. In the context of the acquisition of commercial items, the competitive forces of the marketplace operate as a built-in incentive on contractors to perform well; the Government has ample alternative sources available in the event it is displeased with the performance of a given contractor.

CSA
Contract Services Association

Furthermore, as pointed out in the ANPR, the Contract Disputes Act of 1978 (P.L. No. 95-563) and the clause at FAR 52.233-1 (Disputes) afford an administrative, as well as a judicial, appeals process for resolving any failure on the part of the Government and a contractor to reach agreement on any request for equitable adjustment, claim, appeal, or action arising under, or relating to, a Government contract.

For all the above reasons, CSA urges that the FAR, in particular the clause at FAR 52-212-4, be revised to provide a *complete waiver of liability for consequential damages* for all contracts – including MAS contracts and Government-wide acquisition contracts (GWACs) as well task and delivery orders, modifications, and the exercise of options on commercial items – *regardless of whether the item has been accepted and irrespective of which part of the FAR is affected.* For the sake of consistency, these changes should be effected on a Government-wide basis – in the FAR – not just in the GSAR.

Eliminating the gaps in coverage and extending the coverage will benefit the Government and the U.S. taxpayer, and encourage commercial contractors to do business with the Federal government.

Post-award Audit Provisions

While the ANPR did not propose any specific changes to the existing post-award audit clause ["Examination of Records by GSA (Multiple Award Schedule)"], GSA indicated that imposition of such audits is under consideration in response to a February 2005 report by the Government Accountability Office (GAO). In that report ("Opportunities to Improve Pricing of GSA Multiple Award Schedules Contracts), GAO found that 60% of the contract files at seven acquisition centers lacked the documentation needed to establish that the prices were effectively negotiated. Roughly 40 percent "lacked adequate price analysis or price negotiation documentation." GAO also observed that pre-award audits, which were supposed to increase after post-award audits were eliminated in 1997, have in fact greatly diminished. Based on its limited findings, GAO concluded that there is no assurance that GSA is getting "Most Favored Customer" pricing. CSA contends that the perceived problems – lack of documentation in the contract files and failure to perform pre-award audits – stem from a lack of resources as much as anything else. The acquisition workforce in GSA, as in other agencies, has decreased to the point where it is inadequate to handle the workload, and for this reason GSA recently announced its intention to contract some of the work to the private sector.

In addition, GSA has undertaken a number of steps to improve the process, including the establishment of a working group to facilitate pre-award audits. CSA believes this is much needed – and supports enhancements in the use of pre-award audits.

CSA, however, strongly opposes the imposition of further post-award requirements. Since the initial enactment of the Truth in Negotiations Act (TINA) in 1962 (P.L. 87-653), defective pricing remedies on *commercial item* contracts have been deemed not to be necessary by Congress. CSA believes the clear intent of FASA and Clinger-Cohen was to completely exempt commercial item contracts from TINA's provisions. Congress was persuaded that a commercial company's infrastructure costs and business risks had to be significantly lower in order to remain competitive in the commercial marketplace.

Therefore, CSA believes that the imposition of post-award is (1) contrary to congressional intent, (2) unfair, impractical, and counterproductive, especially as it would affect small businesses; and (3) unnecessary to protect taxpayer interests. Following is our supporting rationale for each of these assertions.

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(1) Contrary to congressional intent. There is no dispute that Clinger-Cohen eliminated post-award audits on commercial item contracts. Yet only a few months later, GSA proposed implementing regulations that would permit post-award audits of certain commercial item contracts. This action prompted the House National Security Committee to restate its intent in the committee report (H. Rept. No. 104-563) accompanying the FY 1997 National Defense Authorization Act (P.L. 104-563):

> *The committee strongly reiterates previously stated congressional intent that the only remaining authority for the government to pursue such information is the authority of the General Accounting [now Government Accountability] Office to audit contractor records.*

In another unequivocal expression of congressional intent that there be no post-award audits of commercial items, three members of Congress who were the primary architects of Clinger-Cohen (originally known at the Federal Acquisition Reform Act) wrote to Franklin D. Raines, then-director of the Office of Management and Budget (September. 18, 1996):

> *The Federal Acquisition Reform Act of 1996 eliminated the authority of Federal agencies to perform post-award audits of suppliers of commercial items. The clear intent of Congress was that these audits would no longer be performed by Federal agencies. Congress clearly 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 letter was signed by Senator William Cohen (R-Maine), then chairman of the Committee on Governmental Affairs Subcommittee on Oversight of Government Management and the District of Columbia; Representative William Clinger (R-Pa.), then chairman of the House Committee on Government Reform; and Representative Floyd D. Spence, then chairman of the Committee on National Security.

(2) Unfair, impractical, and counterproductive. According to GSA, as of March 2005, small businesses account for approximately 80 percent of all schedule contracts. Furthermore, small businesses account for 37 percent of all schedule sales. Similarly, on Schedule 70, small businesses account for 37% of sales. These figures, however, do not take into account small business participation at the subcontractor levels or small businesses teamed with primes.

To authorize post-award audits on MAS contracts would be impractical for several reasons. First, considering the volume of schedule contracts (16,941 as of March 2005) and the potential 20-year duration of such contracts (initial five-year base period plus up to three, five-year options), the cost and administrative burden of data transfer, storage, and retrieval of such data would be impractical for the Government as well as contractors. Also, the contract record is often deficient in some respect, necessitating recourse to first-hand accounts. One might reasonably expect a substantial turnover in Government and industry personnel over the course of a 20-year contract, making it very difficult, if not impossible, to reconstruct what actually transpired during pre-award negotiations.

Neither the standard three-year retention of records provision in FAR 4.703 nor the specific records retention policies of FAR 4.705-1, -2, and -3 require contractors to maintain records sufficient to permit a post-award audit more than three years after final payment. Since a contractor does not know, either at the

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time of initial award of a MAS contract or each time an extension is granted (other than the final option), what the ultimate duration of the contract will be, it is unfair to expect the contractor to retain pre-award records for 23 years (factoring in the three-year retention period after final payment) "just in case."

In addition, under the Sarbanes-Oxley Act, contractors will have to include in their financial reporting the fact that they may face a post-award audit 5, 10, 15, or more years hence, and will have to institute internal controls to address the potential associated liability.

It is reasonable to expect that contractors, confronted with the possibility of a post-award audit, will factor the associated risk into their contract/extension prices and that the associated costs will be passed on to the Government. (This is the very argument GSA advanced for eliminating liability for consequential damages for commercial items acquisitions in the same ANPR; see above).

CSA believes that the burden of complying with a post-award audit likely would have an adverse impact on small businesses, which typically lack the financial and other resources to comply with Government-unique requirements. Thus, the reinstitution of post-awards would run counter to the Administration's effort to reduce barriers to participation by the nation's small businesses in the Federal marketplace.

(3) Unnecessary to protect taxpayer interests. Reinstatement of post-award audits of MAS contracts and GWACs is unnecessary to protect taxpayer interests because the Government presently has the means to conduct post-award audits of commercial item products. FAR 52.212-5 authorizes the Comptroller General to access contractor records to conduct post-award audits. In addition, the Inspector General Act gives agency inspectors general audit access rights.

Further, the GSAR clause at 552.215-72, Price Adjustment – Failure to Provide Accurate Information, allows the Government to "reduce the price" of a contract or modification if the contracting officer determines after award that the price negotiated "was increased by a significant amount because the contractor failed to":

> (1) Provide information required by this solicitation/contract or otherwise requested by the Government; or
> (2) Submit information that was current, accurate, and complete; or
> (3) Disclose changes in the Contractor's commercial pricelist(s), discounts or discounting policies which occurred after the original submission and prior to the completion of negotiations.

In addition, GSAR 515.209-70(d) allows access to records and audit rights for two years after award or modification. Specifically, the clause allows the clause at GSAR 552.215-71 to be modified:

> *to provide for post-award access to and the right to examine records to verify that the pre-award/modification pricing, sales or other data related to the supplies or services offered under the contract which formed the basis for the award/modification was accurate, current, and complete,*

provided that the contracting officer first makes a determination that "absent such access there is a likelihood of significant harm to the Government" and obtains the approval of the Senior Procurement Executive.

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Additional post-award audit access also is unnecessary to protect taxpayer interests because items obtained through MAS contracts and GWACs are commercial in nature. As such, the competitive environment provides a built-in incentive for contractors to offer their Government customer a fair deal.

It should be emphasized that post-award audits are not a customary commercial practice. There are few cases where a commercial company would allow a buyer to second guess, at a later point in time, the information provided during contract negotiation; such an action could only lead to prolonged disputes. Generally, in the commercial market, when a contract is signed both parties are bound to its terms and conditions

The time to examine such information is during the pre-award audit process, which CSA strongly supports.

In summary, CSA respectively urges that the rulemaking effort with respect to waiver of consequential damages proceed – and that coverage be expanded. However, the rulemaking effort with respect to reinstatement of post-award audits should be withdrawn.

Again, CSA appreciates this opportunity to comment on GSA's ANPR. If you have any further questions, please contact Ms. Cathy Garman, CSA's Senior Vice President for Public Policy at 703-243-2020.

Sincerely,

Chris Jahn

Chris Jahn
President

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2005-N01-9

Defending Liberty
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2004-2005

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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/regscomm/home.html under the topic "Commercial Items."

2005-401-9

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.

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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

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[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).

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> the only remaining authority for the government to pursue such information is the authority of the General Accounting Office to audit contractor records.

H.R. Rep. No. 104-563, at 324 (1996).

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

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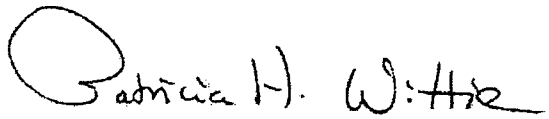
commercial market.[4] MAS contracts also contain a "Price Reductions" clause that enables the government to recover monies in the event that relevant commercial prices become inconsistent with MAS prices. These safeguards make changes to post-award audit rights practically unnecessary. In terms of efficiency 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,



Patricia H. Wittie
Chair, Section of Public Contract Law

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[4] 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.

2005-101-9

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

2005-H01-9

Congress of the United States
Washington, DC 20515

September 18, 1996

The Honorable Franklin D. Raines
Director
Office of Management and Budget
Executive Office Building
Washington, DC 20503

Dear Mr. Raines:

It has come to our attention that the General Services Administration (GSA) intends to promulgate regulations which are contrary to congressional intent.

The Federal Acquisition Reform Act of 1996 (FARA) (Division D of P.L. 104-106) eliminated the authority of Federal agencies to perform post-award audits of suppliers of commercial items. The clear intent of Congress was that these audits would no longer be performed by Federal agencies. Congress clearly 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.

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.

We trust that you will ensure that the intent of Congress is properly implemented. Thank you in advance for your attention to this matter.

Sincerely,

William F. Clinger, Jr., Chairman
Committee on Government Reform and Oversight
U.S. House of Representatives

Floyd D. Spence, Chairman
Committee on National Security
U.S. House of Representatives

William S. Cohen, Chairman
Committee on Governmental Affairs Subcommittee on Oversight of Government Management and the District of Columbia
U.S. Senate

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2005-N01-10

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May10, 2005
CODSIA Case No. 01-05

Subject: GSAR ANPR 2005-N01, Waiver of Consequential Damages and Postaward Audit Provisions

Dear Ms. Duarte:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to comment on the advanced notice of proposed rulemaking (ANPR) published in the Federal Register on March 17, 2005 (Volume 70, Number 51). Formed in 1964 by industry associations with common interests in the defense and space fields, CODSIA is currently composed of eight associations representing 4,000 member firms across the nation. Participation in CODSIA projects is strictly voluntary. A decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

The General Services Administration (GSA) requested comments on whether the GSA Acquisition Regulation (GSAR) should be revised to include a waiver of consequential damages in contracts awarded for commercial items under various parts of the Federal Acquisition Regulation (FAR). GSA also requested comments on whether postaward audit provisions should be included its Multiple Award Schedules (MAS) contracts and Government-wide acquisition contracts (GWACs).

A public meeting was conducted by GSA on April 14, 2005. Two associations made presentations at the public meeting. The Information Technology Association of America (ITAA) presented on waiver of consequential damages. The Government Electronics and Information Technology Association (GEIA) presented on postaward audit provisions. We agree with the presentations made by ITAA and GEIA and have incorporated them into our comments.

Waiver of Consequential Damages

GSA is seeking input on whether the GSAR should be revised to waive consequential damages in the purchase of commercial items under FAR Parts 12, 13, 14, and 15. GSA observed that the "Contract Terms and Conditions - Commercial Items" clause at FAR 52.212-4 includes a provision, "Limitation of Liability, which states; "Except as otherwise provided by an express warranty, the Contractor will not be liable to the Government for consequential damages resulting from any defect or deficiencies in accepted items." Other Government contracts for commercial items (i.e., FAR Parts 13, 14, and 15) include a broad range of standard contract

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clauses, such as warranties and liquidated damages, which provide limited remedies for nonperformance. Likewise, the Contract Disputes Act provides for resolution where the Government and the contractor fail to reach agreement on any request for equitable adjustment, claim, appeal, or action relating to a Government contract.

GSA stated in the ANPR that, notwithstanding specific adjustments and other remedies provided in Government contracts for contractor deficiencies or nonperformance, concerns have been raised as follows:

- The clause at FAR 52.212-4(p) and the tailoring provision at FAR 12.302 do not reach the level of commercial standards and that unlimited consequential or other incidental or special damages are not necessary and are, in fact, counterproductive to efficient procurement, raising costs and establishing barriers to commercial companies considering whether to do business with the Federal Government;

- Although FAR 12.302 permits contracting officers to tailor the clause at FAR 52.212-4(p), some companies assert that contracting officers are unwilling to do so, leaving contractors with a take-it or leave-it option and contracts that deviate from customary commercial practice, making contractors in general less willing to sign on to such contracts;

- The commercial practice, unlike the clause at FAR 52.212-4(p) that waives liability for consequential damages resulting from any defect or deficiencies in accepted items, provides for a complete wavier of consequential damages;

- Contractors would make risk decisions and negotiate Government contracts without having to add an uncertainty premium as to liability protection, if FAR Part 12 were appropriately amended to reflect commercial practices; and

- Contractors also request that the Government make the waiver of consequential damages for commercial products and services available under other provisions of the FAR.

It is a customary commercial practice for vendors to disclaim any liability for consequential damages arising from the performance of services or delivery of items. Through the acquisition reforms of the 1990's, especially the Federal Acquisition Streamlining Act (FASA) and the Federal Acquisition Reform Act (FARA), later renamed the Clinger-Cohen Act, Congress mandated that Government agencies adopt practices and impose requirements that are consistent with customary commercial practice to the maximum extent practicable.

FAR Part 12 and the clause at FAR 52.212-4(p) currently reflect customary commercial practice to the extent that these provisions protect contractors against consequential damages when the items delivered or services rendered have been *accepted* by the Government. These provisions, however, provide no protection against consequential damages where the required goods or services have *not been accepted*. Thus, these provisions are contrary to customary

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commercial practice and should be changed to provide full protection against the imposition of consequential damages.[1] Moreover, this protection should be extended to other Government contracts. We believe that such a change in coverage would benefit the Government in several ways.

- In the post-9/11 environment, the Government needs "best of breed" commercial solutions and technologies to combat terrorism and related security concerns. Impediments in the form of unusual liabilities such as consequential damages need to be eliminated in order to attract such commercial companies.

- The Sarbanes-Oxley legislation dealing with corporate responsibility and accountability obligates contractors to control, account for, and report on unusual business exposures. Potential liability for consequential damages creates not only a difficult financial reporting issue, but it also requires contractors to implement administratively burdensome controls to cover for those liabilities. These costs have to be passed on to the Government and customers in one form or another.

- The potential liability for consequential damages has the effect of limiting entry of the commercial community into Government acquisitions. This is particularly the case for software and technology companies seeking to expand their expertise to provide complex system solutions.

- Fixed-price contracts might include a contingent amount within the pricing to account for contract risks, including the risks of consequential damages. In addition, for any type of contract, to the extent insurance is reasonably available to cover consequential damages, the cost of such insurance increases the cost to the Government and the taxpayer of providing items and services.

Applying full protection against consequential damages would not be new. There is precedent for the same practice under the Brooks Act, which applied to almost all information technology procurements. The Federal Information Resources Management Regulation (FIRMR) previously stated "[i]n no event will the contractor be liable for consequential damages as defined in the Uniform Commercial Code"[2] When the FIRMR was superseded in 1996, this approach should have been incorporated in the FAR, but it was deemed unnecessary by GSA, erroneously in our view, through a deletion of the limitation of liability clause.[3]

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1 For example, FAR 52.212-4(p) might be changed to read as follows: "Except as otherwise provided by an express warranty, the contractor will not be liable to the Government for consequential damages resulting from any defect or deficiencies in the items, whether or not arising out of the negligence or tort of the contractor."

2 FIRMR Sec. 201-39-5202-6, October 1990.

3 Transmittal Circular 90-13.

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To sum, we recommend that the FAR be revised to incorporate in all appropriate FAR Parts the same protection against consequential damages that is customary in the commercial marketplace.

Postaward Audit Provisions

The ANPR did not propose any specific changes to the existing postaward audit clause at GSAR 515.209-70(c), "Examination of Records by GSA (Multiple Award Schedule)." This clause grants GSA access to records and audit rights for overbillings, billing errors, compliance with the "Price Reductions" clause and compliance with the "Industrial Funding Fee and Sales Reporting" clause. With the Senior Procurement Executive's approval, the clause may also provide access to records and audit rights for preaward proposal data (i.e., defective pricing audits), subject to other limitations and controls, where there is a likelihood of significant harm to the Government.[4] Nor were any changes proposed to GSA's version of the defective pricing remedies clause at GSAR 552.215-72 "Price Adjustment - Failure to Provide Accurate Information."

At the public meeting, GSA indicated that the ANPR was in response to a Government Accountability Office (GAO) report, "Opportunities to Improve Pricing of GSA Multiple Award Schedules Contracts."[5] GAO found that, on the basis of reviewing contract files at seven acquisition centers, 60% lacked the documentation needed to establish that the prices were effectively negotiated. In addition, GSA's efforts to ensure most favored customer (MFC) pricing have been hindered by the significant decline in the use of preaward and postaward audits of pricing proposal information, which were two independent pricing tools that "have helped GSA avoid or recover hundreds of millions of dollars in excessive pricing." GAO offered four recommendations:

1. Ensure that preaward audits are conducted when the threshold is met for both new contract offers and contract extensions;

2. Develop guidance to help contracting officers determine when postaward audits are needed;

3. Direct GSA program management to revise the Acquisition Quality Measurement and Improvement Program to measure and report on the performance of the prenegotiation clearance panels; and

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4 Reference GSAR 515.209-70(d). Access to records and audit rights are limited to two years after award or modification, and the contracting officer must make a determination that absent such access there is a likelihood of significant harm to the Government and submit the determination to the Senior Procurement Executive for approval.

5 GAO Report GAO-05-229, February 2005.

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4. Direct GSA program management to revise the Acquisition Quality Measurement and Improvement Program to broaden the scope of the quality review initiative to (1) determine the underlying causes for contract pricing deficiencies and (2) develop appropriate plans to implement corrective actions.

GAO stated that no recommendation was being offered with regard to GSA's defective pricing audit restrictions at GSAR 515.209-70(d).

The GSA Administrator responded to GAO that the report did not find that weaknesses in documentation resulted in prices that were unreasonable.[6] The Administrator remarked that GAO did not address factors that contributed to the reduction in the number of preaward and postaward audits. For example, GSA has awarded longer term MAS contracts, which has logically decreased the opportunity to perform pricing audits in comparison to previous years. The Administrator, however, agreed that improvements were warranted and listed several steps being taken by GSA.

We agree with the GSA Administrator's assessment. GAO's findings had more to do with GSA's not performing adequate price analyses as required at FAR 15.404-1(b) and not fully documenting the results as required at FAR 15.406-3. GAO, however, makes an illogical and unfounded presumption that reductions in preaward and postaward pricing audits caused a reduction in GSA's cost savings and cost recoveries, almost to the point of sensationalizing potential excessive pricing (e.g., "hundreds of millions of dollars").[7] GAO's comparison failed to consider recent improvements in the GSA MAS program, such as increased competition at the order level that has unquestionably driven prices down (e.g., GSA Advantage!) or the establishment of subordinate blanket purchase agreements (BPAs) by Government purchasing offices at more favorable pricing. It is quite likely that these improvements have *saved* the Government "hundreds of millions of dollars."

Moreover, GAO failed to consider the role of the "Price Reductions" clause plays in protecting the Government's interest on MAS contracts. If a price reduction event is detected during the postaward audit, the "Price Reductions" clause provides for retroactive cost recovery to when the event occurred. GSA postaward audits of "Price Reductions" clause compliance are commonplace, although it appeared that such audits were not counted by GAO.

Another significant defect in the GAO report is its failure to report that defective pricing audits are not supposed to be performed on contracts for commercial items because such audit rights and remedies are not customary commercial practices. FASA and the Clinger-Cohen Act,

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6 GSA Administrator letter, February 1, 2005.

7 "As the number of pre-award and postaward audits performed decreased, so too did the amount of negotiated cost savings and recoveries reported from these audits," GAO Report GAO-05-229, page 14.

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as well as their implementing rules at FAR Part 12, do not impose defective pricing audit rights and remedies on contracts for commercial items. MAS contracts are considered to be FAR Part 12 procurements and should be governed by FAR Part 12 unless different rules are needed to implement FAR policies and procedures within GSA or to satisfy the specific needs of GSA (ref. FAR 1.302).

As will be discussed later with regard to GEIA's 1999 petition to the Administrator of the Office of Procurement Policy (OFPP), CODSIA does not believe that GSA has made the case for justifying that defective pricing audits and remedies are necessary to satisfy specific needs of GSA. GAO did not mention the admonition that was expressed by Congress under the Defense Authorization Act for Fiscal Year 1997 about GSA's misapplying defective pricing audits to MAS contracts. Specifically, the House National Security Committee stated the following:[8]

> (Public Law 104–106) [Clinger-Cohen Act] 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 the only remaining authority for the government to pursue such information is the authority of the General Accounting Office [now Government Accountability Office] to audit contractor records. (emphasis added)

Nor did GAO mention a 1996 letter sent by three of FARA's architects, including Congressman Clinger and Senator Cohen for whom FARA was later renamed as the "Clinger-Cohen Act," to the Director of the Office of Management and Budget:[9]

> 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***. (emphasis added)

As GSA knows, private industry's concerns with defective pricing audit rights and remedies on MAS contracts are not new. In CODSIA's response to a February 1996 interim

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8 House Report No. 104-563, page 324.

9 Letter to OMB Director from Senator William S. Cohen, Congressman William F. Clinger, Jr., and Congressman Floyd D. Spence, September 18, 1996.

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rule, we expressed strong objection to GSA's proposed defective pricing audit rights and remedies, as did the American Bar Association (ABA).[10] Yet, despite what appeared to be an unambiguous statement of intent from Congress on defective pricing audit rights and remedies, GSA adopted a final rule on August 21, 1997 which provided for such rights and remedies.[11] In its disposition of public comments, GSA noted the controversy but pointed to the added limitations previously described. GSA stated that the limitation reflected a policy decision to make defective pricing audit provisions the exception rather than the general rule. Presently, the ANPR did not say how GSA intends to change that policy.

On June 1, 1999, GEIA submitted a formal petition to the OFPP Administrator under Section 25 of the OFPP Act.[12] The petition was supported by eight other trade associations.[13] GEIA contended that GSA's defective pricing audit rights and remedies were inconsistent with the FAR because they were neither necessary to implement FAR policies and procedures within GSA nor necessary to satisfy the specific needs of GSA. In addition, GSA's defective pricing audit rights and remedies were inconsistent with FASA and the Clinger-Cohen Act because they were neither necessary to implement provisions of law or executive order nor consistent with customary commercial practice. GEIA believed the intent of Congress was unmistakable and determinative.

The OFPP Administrator denied GEIA's petition, citing strong opposition from GSA and the Department of Veterans Affairs (VA) and the unique characteristics of the MAS program.[14] The thrust of OFPP's denial was that MAS contracts are not competitively awarded; therefore, GSA needed the protections afforded by defective pricing audit rights and remedies. In essence, OFPP determined that the MAS program, itself, was not a customary commercial practice and concluded that it was not practicable to forego such rights and remedies on MAS contracts.

CODSIA disagrees with OFPP's rationale in denying GEIA's petition. MAS contracts are FAR Part 12 contracts and should be treated the same as any other acquisition of commercial items. It is not rational to justify not applying Congress' commercial item acquisition reforms to the largest commercial item acquisition program in the Federal Government - the MAS program

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10 CODSIA letters of April 16, 1996 and September 30, 1996. See also ABA letters of April 25, 1996 and September 30, 1996.

11 Federal Register, Volume 62, Number 162, August 21, 1997, pages 44521-44522.

12 The GEIA petition was supplemented on August 3, 1999.

13 These include the Aerospace Industries Association, American Electronics Association, Coalition for Government Procurement, Contract Services Association of America, Information Technology Association of America, Integrated Dual-Use Commercial Companies, National Defense Industrial Association, and Professional Services Council.

14 OFPP Administrator letter, October 12, 1999.

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which has grown enormously in recent years. The argument put forth by OFPP runs counter to the legislative and regulatory histories of commercial item acquisition reform and what we believe is Congress' unambiguous intent. A comprehensive reaction to the OFPP decision will be presented by GEIA in separate comments to the ANPR.

To sum on postaward audit provisions, we will oppose any proposed rule to reestablish or expand GSA defective pricing audit rights and remedies. In fact, we believe existing GSAR rules need to be scaled back. We have consistently held over many years that defective pricing audits and remedies are not customary commercial practices and their inclusion in contracts for commercial items pose serious business risks to participating companies. We enthusiastically supported FASA and Clinger-Cohen Act, believing they brought much-needed solutions to difficult problems. Any move to adopt defective pricing audits and remedies would be an unacceptable retrenchment.

The ANPR on postaward audit provisions provides an opportunity to address related issues. First, we believe a complete overhaul of the MAS contract pricing policies is long overdue. What may have worked in 1982, when the MAS contract pricing policies were first announced, does not necessarily work in 2005.[15] For one thing, the business practices have become more dynamic, especially in view of the ever-expanding internet technologies. For another, MAS contracts have many more products and much longer periods of performance, making it difficult to establish long-term pricing relationships at the outset of a contract based on MFC prices - let alone administer them over a contract's full term. Also, MAS contract pricing policies, which tend to be focused on manufacturers, are difficult to apply to MAS contracts awarded to resellers. Collectively, the lack of practical MAS contract pricing policies has created needless confusion and conflict, and it appears that the condition will get worse as the MAS program expands.[16] To us, it is unthinkable to consider expanding defective pricing audits and remedies unless and until this serious problem is addressed.

In the GSA Administrator's response to the GAO report, it was observed that GSA had established a working group to facilitate preaward audits. We believe this is also much needed. For many years, we have had serious concerns about the inspector general's (IG) adherence to the Government auditing standards issued by the GAO, especially in matters involving Government claims against MAS contractors. We have also been concerned about what appears

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15 MAS Policy Statement, Federal Register, Vol. 47, No. 215, November 5, 182, pages 50242-50260.

16 For example, at the public hearing, GEIA recounted an incident where the IG was demanding a significant refund on the basis of only 5 transactions (involving 6 units) that occurred over a period of more than 440 days out of almost 7,600 commercial transactions. To the IG, this was a triggering event under the "Price Reductions" clause. The IG demanded a refund on more than 2,800 units. Similar refunds were demanded on other products based on ad hoc transactions. The net result of this "cherry-picking" approach was that the IG demanded a discount that was almost twice as that given to any commercial customer.

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to be a disturbing erosion of the contracting officer's independent decision-making authority by the IGs, who have seized too great a role in conflict resolution (e.g., interpreting contracts, reforming contracts). The erosion is so profound that administrative remedies created under the Contract Disputes Act may not actually be available to MAS contractors.

We urge GAO to conduct a peer review of GSA IG and VA IG operations in conducting audits of MAS contracts, especially those involving demands for price adjustments and refunds. Consideration should be given to consolidating the resources of the GSA IG and VA IG into a single group, preferably under GSA, who has overall responsibility for the MAS program, in order to increase the quality of audits and the fairness in the application of MAS policies. For example, consolidation might improve consistency in interpreting the GSAR and MAS contract provisions. It might also produce greater economies of scale and better application of audit resources. Another suggestion is to develop an audit guide on MAS contract audits, similar to the Defense Contract Audit Agency (DCAA) contract audit manual.

CODSIA supports the use of preaward audits for MAS contracts and welcomed the shift in emphasis by GSA in 1997. However, greater benefit from preaward audits could be achieved if they were more efficiently conducted. Based on the preaward audit instructions issued by the IG that we have observed in recent years, it appears that the commercial sales information requested far exceeds what is necessary to perform a credible and timely price analysis. The Clinger-Cohen Act only required that offerors provide "appropriate information on prices at which the same item or similar items have been previously sold that is adequate for evaluating the reasonableness of the price of the procurement."[17] FAR 15.403-3(c) also requires that the information be limited to the form regularly maintained by the offeror. But, the IGs demand much more. For example, as presented by GEIA at GSA's public hearings, a recent IG data request required a Fortune 500 company with annual sales in the billions of dollars to provide within 60 days the following on a contract that would represent less than 2% of total sales:

- Computer download of all sales transactions for the preceding year with over 20 specified data fields
- An explanation of all data codes used
- Reconciliation of sales data to the company's general ledger and a statement thereto and a copy of the latest audited financial statements
- Chart of accounts and organizational charts
- List of all commercial, state and local government, and other Federal Government contracts

17 Clinger-Cohen Act, Section 4201(a). Implemented at FAR 15.402(a)(2)(i).

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- List of top volume non- Federal Government customers with accompanying sales statistics
- All written procedures and flowcharts covering order processing and billing
- All written pricing policies and practices

We doubt that the above is really necessary to serve the purpose of obtaining "appropriate information on prices at which the same item or similar items have been previously sold that is adequate for evaluating the reasonableness of the price of the procurement." Much the same could be more quickly achieved by reviewing 90 days worth of sales transactions from regularly maintained records and selected contracts with large volume end-users, without imposing the requirement for special formats, reconciliations, and flowcharts. The burdensome requirements make the process less efficient for all parties concerned, including the IGs. This should be an area of focus for the working group.

CODSIA appreciates the opportunity to comment on the ANPR. If you have any questions, please contact Mr. Jim Serafin (703) 907-7585, Project Officer for this CODSIA case.

Sincerely,

Dan Heinemeier
President
GEIA
Electronic Industries Alliance

Peter Steffes
Vice President, Government Policy
National Defense Industrial Association

continued

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Chris Jahn

Chris Jahn
President
Contract Services Association

Alan Chvotkin
Senior Vice President and Counsel
Professional Services Council

Robert T. Marlow
Vice President, Government Division
Aerospace Industries Association

Attachment

1. Letter to OMB Director from Senator William S. Cohen, Congressman William F. Clinger, Jr., Congressman Floyd D. Spence, September 18, 1996.

2005-N01-10

Congress of the United States
Washington, DC 20515

September 18, 1996

The Honorable Franklin D. Raines
Director
Office of Management and Budget
Executive Office Building
Washington, DC 20503

Dear Mr. Raines:

It has come to our attention that the General Services Administration (GSA) intends to promulgate regulations which are contrary to congressional intent.

The Federal Acquisition Reform Act of 1996 (FARA) (Division D of P.L. 104-106) eliminated the authority of Federal agencies to perform post-award audits of suppliers of commercial items. The clear intent of Congress was that these audits would no longer be performed by Federal agencies. Congress clearly 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.

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.

We trust that you will ensure that the intent of Congress is properly implemented. Thank you in advance for your attention to this matter.

Sincerely,

William F. Clinger, Jr., Chairman
Committee on Government Reform and Oversight
U.S. House of Representatives

Floyd D. Spence, Chairman
Committee on National Security
U.S. House of Representatives

William S. Cohen, Chairman
Committee on Governmental Affairs Subcommittee on Oversight of Government Management and the District of Columbia
U.S. Senate

PRINTED ON RECYCLED PAPER

2005-N01-11

Dear Ms. Duarte:

The Project On Government Oversight (POGO) provides the following public comment to GSAR ANPR 2005-N01: "Waiver of Consequential Damages and 'Post Award' Audit Provisions" published at 70 Federal Register 12167 (March 11, 2005) (subsequent corrections published at 70 Fed. Reg. 19051 and 70 Fed. Reg. 13005). POGO investigates, exposes, and seeks to remedy systemic abuses of power, mismanagement, and subservience by the federal government to powerful special interests. POGO is concerned that any industry-driven change to acquisition regulations governing consequential damages and post-award audits for commercial items would place the government in an extremely vulnerable position. The government must protect taxpayers, and watering down or eliminating contract provisions will not perform that task.

First, contracting officers have the ability to waive the consequential damage provisions set forth in the FAR. Currently, the commercial item consequential damages provision shields vendors from liability "for consequential damages resulting from any defect or deficiencies in accepted items." 48 C.F.R. § 52.212-4(p). In addition, the FAR leaves the door open for contracting officers to tailor commercial item consequential damages provisions. See 48 C.F.R. § 12.302(b). Furthermore, 48 C.F.R. 12.302(c) states that a "contracting officer shall not tailor any clause or otherwise include any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures." Therefore, a contracting officer is already required to follow the practices of the commercial marketplace.

Any tailoring by contracting officers should be restricted to a case-by-case basis. They should depend on commercial standards for granting a complete waiver. Taxpayers could be left vulnerable without case-by-case determinations being made when a tailored exemption is provided to a contractor.

"Industry concerns" about this issue are nothing more than an effort to gain a complete exemption from consequential damages for commercial item acquisitions. POGO does not think that a blanket exemption is in the government's best interest. Rather, the government should conduct a thorough review to determine if contracting officers should tailor more consequential damage contract provisions on a case-by-case basis to meet commercial practices. Any revisions to the consequential damages provision should only be approved after the government finds evidence that the current provision is not in the government's best interest. Additionally, that evidence must also show that the lack of a complete waiver of the commercial item consequential damage provision eliminates contractors who might otherwise do business with the federal government; is counterproductive to efficient procurement; or increases costs.

Government contracts include other provisions (i.e., breach of contract, default, damages, and warranty clauses) that provide a level of protection from waste, fraud or abuse. The government, however, should utilize every contracting clause, provision, or concept legally available to ensure protection of taxpayer dollars. In essence, the government has accepted damage provisions as a cost of doing business, and a reasonable insurance policy when buying goods or services from commercial entities

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Second, POGO strongly avers that limiting or eliminating post-award audit provisions from commercial item contracts would have an immensely negative impact on holding contractors accountable. The Federal Register notice states that "Contractors' major concerns with GSA's post-award audit authority include complaints that they are too broad and not consistent with commercial contract practices." 70 Fed. Reg. at 12168. Although that concern may be technically accurate, it ignores the fundamental difference between commercial and government contracts. The government is spending taxpayer dollars and the use of post-award audit provisions helps to ensure fair and reasonable pricing, and maintains public confidence in the contracting system.

Contractors should have nothing to hide when it comes to contracting with the federal government. As Justice Holmes warned many years ago: "Men must turn square corners when they deal with the Government." Rock Island, Arkansas & Louisiana R.R. Co. v. United States, 254 U.S. 141, 143, 41 S. Ct. 55, 65 L. Ed. 188 (1920) (emphasis added). Contractors lobbying for relaxed or complete exemptions from any audit provisions are in essence arguing for turning a "blind eye" to "bad deals." Until the day arrives when contractors operate without misconduct, over-billing, billing errors, or false claims, audit provisions are one of the only tools that effectively ensure that contract dollars are being spent legally and effectively.

Sincerely,

/s/

Scott H. Amey

General Counsel

scott@pogo.org

Government Electronics & Information Technology Association
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703-907-7566 • FAX 703-907-7968 • www.geia.org

May 10, 2005

2005-N01-12

Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW
Room 4035
Washington, D.C. 20405

Subject: GSAR ANPR 2005-N01, Waiver of Consequential Damages and Postaward Audit Provisions

Dear Ms. Duarte:

The Government Electronics & Information Technology Association (GEIA) appreciates the opportunity to comment on the advanced notice of proposed rulemaking (ANPR) published in the Federal Register on March 17, 2005 (Volume 70, Number 51). The ANPR was issued by the General Services Administration (GSA) on two topics: waiver of consequential damages and postaward audit provisions.

GEIA is a trade association that represents high technology industries doing business with the Federal Government. Its membership of over one hundred companies provides the Government with a complete range of electronics and information technology solutions. GEIA maintains extensive programs in market forecasting, standards development, and Government-industry relations, and serves as the Government market sector of the Electronic Industries Alliance (EIA).

We concur in full with the public comments being submitted by the Council of Defense and Space Industry Associations (CODSIA) of which GEIA is a member association and signatory on those comments. As an additional matter, however, GEIA is taking advantage of the opportunity presented by the ANPR to comment further on GEIA's petition concerning GSA defective pricing audit rights and remedies that was submitted to the Office of Federal Procurement Policy (OFPP) Administrator on June 1, 1999 (supplemented on August 3, 1999).

GEIA Petition

We had petitioned the OFPP Administrator, under Section 25 of the OFPP Act, to review two GSAR clauses that imposed defective pricing audit rights and remedies on multiple award schedule (MAS) contracts and to render a determination that the two GSAR clauses were inconsistent with the FAR. The two GSAR clauses were as follows:

- GSAR 552.215-71, "Examination of Records by GSA (Multiple Award Schedule)" - only those provisions pertaining to defective pricing audit rights

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- GSAR 552.215-72, "Price Adjustment - Failure to Provide Accurate Information"

We, accordingly, had urged OFPP to direct GSA to rescind the two GSAR clauses and to remove these clauses from existing contracts. In our view, GSA failed to comply with the limitations of FAR 1.302 concerning authorized agency acquisition regulations. That is, the defective pricing audit rights and remedies imposed by GSA were neither necessary to implement FAR policies and procedures within GSA nor necessary to satisfy the specific needs of GSA.

Furthermore, it was our belief that the two GSAR clauses did not satisfy the limitations on contract clauses established under the Federal Acquisition Streamlining Act (FASA) as being either (1) necessary to implement provisions of law or executive order or (2) consistent with customary commercial practice (see FAR 12.301). In our view, GSA's justification that the two GSAR clauses were in the "best interests" of the Government conflicted with Congress' unambiguous intent, as evidenced in the legislative and regulatory history, including the Federal Acquisition Reform Act (FARA) - subsequently renamed the "Clinger-Cohen Act." Our belief was further reinforced by actions later taken by Congress under the Defense Authorization Act for Fiscal Year 1997 and in a 1996 letter to the Director of the Office of Management and Budget (OMB) from three of FARA's architects (copy attached):

> 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***. (emphasis added)

We believed that the legislative and regulatory record was incontestable that defective pricing audits and remedies were not to be applied to contracts for commercial items. Eight other trade associations submitted letters to OFPP concurring with GEIA's petition. We were positive that GEIA's petition was well-justified under Section 25 of the OFPP Act which states that a person may request the OFPP Administrator to review any procurement regulation as being inconsistent with the FAR and, if found to be inconsistent, to take appropriate remedial action. In our view, the two GSAR clauses should be rescinded.

OFPP Decision

The OFPP Administrator denied GEIA's petition on October 12, 1999, concluding that the challenged "safeguards are consistent with commercial practice to the maximum extent practicable given the current objectives of the MAS program." Although OFPP conceded that commercial companies generally do not conduct postaward audits of proposal information, as also did GSA and the Department of Veterans Affairs (VA), OFPP thought it "reasonable for GSA and VA to verify this [commercial pricing] data when necessary through audits, including

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postaward 'defective pricing' audits when properly justified, and to seek price adjustments in the event of defective pricing."

In supporting the decision, OFPP highlighted a key difference between the MAS program and central buying programs managed by commercial companies. According to OFPP, commercial companies limit their users' choices in selecting vendors in an effort to maximize buying leverage; whereas, the MAS program is structured to give Government users more choices. That is, unlike commercial companies, GSA does not channel requirements to a small number of suppliers in order to improve its bargaining position. Another difference put forth by OFPP was that GSA forgoes the opportunity to make vendors compete against one another for MAS contracts. Consequently, according to OFPP, defective pricing audits and remedies were needed for the MAS program.

OFPP noted that, as an accommodation to private industry's concerns, GSA limited the application of defective pricing audit rights and remedies to two years after award or modification. Also, defective pricing audit rights and remedies would be permitted only after the contracting officer made a determination that absent such rights there would be a likelihood of significant harm to the Government. The determination had to be approved by the Senior Procurement Executive. OFPP stated that the VA made such a determination for all of its MAS contracts.[1]

GEIA Comment

We respectfully disagree with the OFPP Administrator's determination and underlying reasoning. No satisfactory case was made by OFPP that the two GSAR clauses met FASA's criteria as either necessary to implement provisions of law or executive order or consistent with customary commercial practice. Quite to the contrary, OFPP admitted that the clauses were *not* consistent with customary commercial practice, as did GSA and VA. Furthermore, OFPP could *not* point to any law or executive order requiring defective pricing audit rights and remedies on contracts for commercial items. Simply put, OFPP's denial did not disprove GEIA's claim.

Instead, OFPP accepted that, notwithstanding FASA, it was not practicable for GSA to do without defective pricing audit rights and remedies. OFPP relied on FASA's phrase at Section 8002(b) "to the maximum extent practicable, include only those clauses ..." OFPP basically concluded that it was *not* practicable to *exclude* the two GSAR clauses. GEIA finds this reasoning to be illogical and troubling.

Inasmuch as the MAS program is the largest commercial item acquisition program in the Federal Government, OFPP determining that it was not practicable to apply Congress' commercial item acquisition reforms to the MAS program seemed incongruous. After all, if it

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1 Although products and services purchased by the VA are not necessarily an area of interest to GEIA, we would question VA's broad justification. For example, it is hard to understand how pharmaceutical vendors pose a likelihood of significant harm when drug pricing on MAS contracts is protected by the Veterans Health Care Act.

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was not practicable for GSA to exclude defective pricing audit rights and remedies on MAS contracts, then how could be it practicable to exclude such rights and remedies on any other sole source contract for commercial items awarded by any other Federal Agency?

As an active participant in the commercial item acquisition reform movement in the 1990's, GEIA cannot accept the argument put forth by GSA and VA that Congress could have expressly prohibited defective pricing audit rights and remedies on contracts for commercial items if they so desired but instead only chose to remove the statutory right to apply such protections.[2] At this time, Congress was well aware that defective pricing audit rights and remedies were a major obstacle for commercial companies desiring to enter the Federal marketplace. The record is clear that Congress took deliberate steps to remove this obstacle - first through FASA and then through the Clinger-Cohen Act. The argument is especially confounding when considering subsequent actions taken by Congress to clarify their intent (i.e., Defense Authorization Act for Fiscal Year 1997 and 1996 letter to OMB). It would seem that these subsequent actions would have been determinative in favor of GEIA's petition. Yet, they were not even mentioned in the OFPP decision.

As to OFPP's view on the uncompetitive structure of the MAS program, we find the argument unpersuasive and in many ways irrelevant. The facts simply do not support any assertion that "GSA foregoes the opportunity to make vendors compete against one another for schedule contract awards." First, the Competition in Contracting Act declared GSA's MAS program to be a competitive procedure so long as (1) the Government has opened participation in the program to all responsible sources and (2) MAS orders and contracts result in the lowest overall cost alternatives to meet the needs of the Government. Second, FAR 8.404 states that orders placed against a MAS contract are considered to be issued using full and open competition. Third, the GSA Advantage! program is GSA's online shopping and ordering system that promotes competition by providing access to "thousands of contractors and millions of services and products" (from the GSA website).

Turning to OFPP's assessment of differences from central buying programs managed by commercial companies, if the implication is that GSA does not assert maximum buying leverage in its own way, then most MAS contractors would likely disagree. Ever since the MAS policy statement was first published in 1982, GSA's negotiation strategy has been to maximize its buying leverage by requiring contracting officers to consider the aggregate volume of all Government purchases when developing GSA's negotiation objectives. That is, all orders are considered to be placed by one Government purchaser. Today, that requirement exists at GSAR 538.270. Many MAS contractors consider this an unfair policy because actually there are many

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2 GSA and VA appear to misunderstand what the Clinger-Cohen Act did. FASA had added an additional commercial item exception to TINA that was above and beyond TINA's traditional catalog and market price exception. The additional exception included a postaward audit provision that expired two years after award or modification. The additional exception proved to be unworkable. The Clinger-Cohen Act replaced all of these exceptions with a single exception for contracts for the acquisition of commercial items and removed the audit provision.

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Government purchasers and there are no guarantees that the MAS contractor will reach that aggregate volume of Government business. Also, contrary to the OFPP analysis, commercial companies do have purchasing programs comparable to the MAS program (e.g., master service agreements).

Notwithstanding the foregoing defects in OFPP's reasoning, the critical flaw in the analysis is confusing the need for negotiating leverage with the need for postaward defective pricing audit rights and remedies. Negotiating MAS pricing, as OFPP points out, is about competition and buying leverage. Defective pricing is about the quality of the commercial pricing data provided by the offeror. This is not to say that the quality of such data is unimportant. However, it does not necessarily follow that defective pricing audit rights and remedies enhances GSA's negotiating leverage when purchasing commercial items. The best expression of this point is the Truth in Negotiations Act (TINA), itself. Since its inception in 1962, TINA has excepted commercial pricing data (e.g., catalog and market pricing) from defective pricing audits and remedies. The underlying reasoning was that the forces of the commercial marketplace would ensure that the prices negotiated from the commercial pricing data would be fair and reasonable. Consequently, there would be no need to impose defective pricing audit rights and remedies.

We must stress that GEIA has never argued that the quality of the commercial pricing data is unimportant. We have, instead, suggested that there were better ways to validate the quality of commercial pricing data. In fact, as part of the GEIA petition, we offered several suggestions for improving the price negotiation and contract award process. These included the following:

- Further simplify the pricing proposal requirement so that it is less reliant on transactional data (e.g., sales orders, invoices) and more reliant on written or established discounting policies and comparable customer agreements or contracts.

- Eliminate or substantially reduce the requirement to provide commercial pricing information, especially transactional information, on concessions.

- Place greater emphasis on *preaward audits* and use of sampling techniques.

- Substantially revise the record retention requirement for commercial pricing information to not more than two years after contract award.

- Clarify and standardize contract award documentation so that there is an improved understanding on the applicable commercial price list, negotiated GSA discounts, comparable customer or customer category and corresponding baseline discount.

- Substantially revise the "Price Reductions" clause to be more consistent with customary commercial practice.

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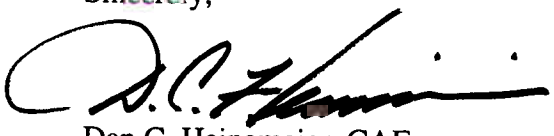
It is our impression that none of these recommendations have been acted upon, notwithstanding OFPP's call for further study. We wholeheartedly agree with CODSIA that a complete overhaul of the MAS contract pricing policies is warranted. The policies have not matched the evolution of the MAS program from commodity purchasing to total solution purchasing, as especially evident in the information technology market. Nor have the policies matched the increased size and complexity of MAS contracts. Moreover, in our view, the policies are inconsistent with the FAR which does not demand the most favored customer price as a predicate to being a fair and reasonable price.

For commercial companies, there is still too much risk in the proposal submission, contract award, and contract administration process. What GSA and VA see as a need for retroactive cost recovery mechanisms, private industry sees as unjustified exposure to unfairness and conflict. The obvious goal of any defective pricing audit is to find an undisclosed lowest price or undisclosed concession, and in many cases from a vast volume commercial transactions. If found, the defective pricing remedy requires retroactive price reductions and refunds on prior billings, which might also result in a referral to the Department of Justice for potential claims under fraud statutes. For GEIA and its member companies, this is an unacceptable business risk. That OFPP found it not practicable to remove such business risk for commercial companies in the MAS program strains common sense.

GEIA continues to believe that the two GSAR clauses imposing defective pricing audit rights and remedies on MAS contracts are inconsistent with the FAR, related statutes (FASA and Clinger-Cohen Act), and Congress' unambiguous intent. The two GSAR clauses should be rescinded and removed from existing contracts. We would urge the GSA Administrator to take this action as quickly as possible.

We appreciate the opportunity to comment on the ANPR and convey our reaction to the OFPP decision on GEIA's petition. We look forward to continuing the dialog on this important subject. If you have any questions, please contract Mr. James Serafin at (703) 907-7585.

Sincerely,



Dan C. Heinemeier, CAE
President

Attachment
1. Letter to OMB Director from Senator William S. Cohen, Congressman William F. Clinger, Jr., Congressman Floyd D. Spence, September 18, 1996.

cc: Mr. David Safavian, Administrator, Office of Federal Procurement Policy
Mr. Stephen A. Perry, Administrator, General Services Administration

Congress of the United States
Washington, DC 20515

2005-N01-12

September 18, 1996

The Honorable Franklin D. Raines
Director
Office of Management and Budget
Executive Office Building
Washington, DC 20503

Dear Mr. Raines:

It has come to our attention that the General Services Administration (GSA) intends to promulgate regulations which are contrary to congressional intent.

The Federal Acquisition Reform Act of 1996 (FARA) (Division D of P.L. 104-106) eliminated the authority of Federal agencies to perform post-award audits of suppliers of commercial items. The clear intent of Congress was that these audits would no longer be performed by Federal agencies. Congress clearly 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.

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.

We trust that you will ensure that the intent of Congress is properly implemented. Thank you in advance for your attention to this matter.

Sincerely,

William F. Clinger, Jr., Chairman
Committee on Government Reform and Oversight
U.S. House of Representatives

Floyd D. Spence, Chairman
Committee on National Security
U.S. House of Representatives

William S. Cohen, Chairman
Committee on Governmental Affairs Subcommittee on Oversight of
Government Management and the District of Columbia
U.S. Senate

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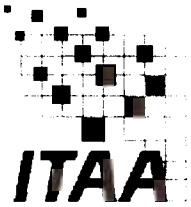
2005-401-13



May 10, 2005

Via E-mail (gsaranpr.2005-N01@gsa.gov)
General Services Administration
FAR Secretariat (VIR)
1800 F Street, N.W.
Room 4035
ATTN: Laurieann Duarte
Washington, DC 20405

Re: GSAR ANPR 2005-N01: General Services Administration's Advance Notice of Proposed Rulemaking Regarding Waiver of Consequential Damages and "Post Award" Audit Provisions (Correction), 70 Fed. Reg. 19051 (April 12, 2005)

Dear Ms. Duarte:

The Information Technology Association of America (ITAA) is pleased to respond to the General Services Administration's (GSA's) request for comments on the April 12, 2005 Advance Notice of Proposed Rulemaking (ANPR) on whether the General Services Administration Acquisition Regulation (GSAR) should be revised to waive consequential damages in the purchase of commercial items under FAR Parts 12, 13, 14, and 15, and whether GSA should modify its policy and practices with regard to the addition of post-award audit clauses in GSA's Multiple Award Schedules (MAS) contracts and Government-wide acquisition contracts. These comments supplement and expand upon the statement ITAA presented at GSA's Public Meeting held on April 14, 2005, which was submitted as part of the hearing record.

ITAA has a longstanding interest in Federal Government procurement reform and actively supported the efforts to pass the Federal Acquisition Streamlining Act of 1994 (FASA) and the Clinger-Cohen Act. ITAA through its Procurement Policy Committee has commented on most major rulemakings affecting the IT industry for the past decade. A common theme throughout ITAA's advocacy efforts is a commitment to achieving balanced terms and conditions for Government contracts—including Federal, State and Local government contracts—that more closely follow commercial practice and which help public sector customers

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gain full access to the offerings of the commercial marketplace.

To that end, and as set forth more fully below, ITAA recommends that GSA amend the GSAR so that the limitation of liability provisions now set out in FAR Part 12 be extended to protect contractors from ***all consequential damages*** that might arise from contract performance, whether based in breach or tort, and regardless of whether the Government has accepted the goods to be delivered or services to be rendered under the contract. Moreover, because the same obstacles posed to potential contractors by the possibility of consequential damages applies to contracts awarded under non-FAR Part 12 procedures, ITAA urges GSA to extend the protection from consequential damages to contracts issued under FAR Parts 13, 14, and 15.

In addition, ITAA would strongly oppose the imposition of contract provisions allowing GSA to conduct post-award audits of pre-award pricing data. The practice is contrary to Congressional intent as annunciated in the Clinger-Cohen Act, is inconsistent with customary commercial practice under FASA, would discourage commercial companies from participating in the Federal market, and otherwise would be an invitation to many disputes between Government and contractors over whether pre-award data submitted ***years earlier*** was current, accurate, and complete. The imposition of the post-award audit language would be a disaster.

I. Waiver of Consequential Damages

Contractors in the commercial marketplace routinely propose and obtain protection from exposure to the open-ended liability of consequential damages (as well as direct damages) in their contracts with customers. The limitation of consequential damages currently recognized in FAR Part 12, however, contains two significant gaps in coverage that are contrary to customary commercial practice. Moreover, the current inadequate coverage is limited to FAR Part 12, and does not extend protection against consequential damages for contractors receiving contracts issued pursuant to FAR Parts 13, 14, and 15. Eliminating the gaps in coverage and extending coverage to all procurements will benefit the Government, the taxpayer, and those contractors that wish to do business in the Federal market.

A. GSA Should Fix the Gaps in the Existing Limitation of Liability Language.

It is an accepted practice in the commercial marketplace for vendors to disclaim any liability for consequential damages arising from the performance of services, delivery of items, or any breach of the contract's terms. Through the acquisition reforms of the 1990s—especially including FASA and the Clinger-Cohen Act—Congress mandated that Government agencies adopt practices and impose requirements that are to the maximum extent practicable consistent with customary commercial practice. As a result, the law currently requires:

1. That Government purchasing agencies define their requirements so that, to the

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maximum extent practicable, the procurement results in the acquisition of a commercial item.

2. That Government purchasing agencies revise, to the maximum extent practicable, their procurement policies, practices, and procedures not required by law to reduce impediments to the acquisition of commercial items.

3. That Government purchasing agencies ensure that commercial item contracts contain only those terms and conditions that are required by law or that are customary in the commercial marketplace.

FAR Part 12 and FAR 52.212-4(p) currently reflect customary commercial practice to the extent that these provisions protect contractors against consequential damages when the items delivered or services rendered have been accepted by the Government. These provisions, however, contain two significant gaps in protection against consequential damages that are inconsistent with customary commercial practice. First, the current FAR language provides no protection against consequential damages where the required goods or services have not been accepted. This language is contrary to customary commercial practice, and should be changed to provide full protection against the imposition of consequential damages. Second, a strict interpretation of FAR 52.212-4(p) would not prevent the imposition of consequential damages on a contractor when an ancillary contract term is breached (e.g., breach of an incorporated confidentiality agreement). Thus, to bring the language in line with commercial practice, ITAA recommends that the waiver of consequential damages should apply to any consequential damages arising from contract performance.

B. GSA Should Extend the FAR Part 12 Protection Against Consequential Damages to all Contracts.

ITAA also recommends that the protection available in FAR Part 12 be extended to contracts under FAR Parts 13, 14, and 15. The same benefits the Government gains under ITAA's recommended approach for FAR Part 12 contracts will also be gained under FAR Parts 13, 14, and 15.

The benefits to the Government are at least several-fold. First, in the post 9/11 environment, the Government needs "best of breed" solutions, including those based on commercial technologies, to combat terrorism and related security concerns and ensure that the maximum number of contractors participate in Government procurements. Impediments in the form of unusual liabilities such as consequential damages should be eliminated.

Second, Sarbanes-Oxley—which significantly changed the environment when it comes to

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corporate responsibility and accountability—obligates contractors to control, account for, and report on unusual business exposures. The prospect of liability for consequential damages—which in many cases could be a "bet the company" proposition—creates not only a difficult reporting issue, but also requires contractors to implement administratively burdensome controls to cover for those liabilities. These costs have to be passed on to Government customers in one form or another, to the detriment of the Government and its mandate to increase competition and its number of supply sources.

Third, the potential liability for consequential damages has the effect of limiting entry of the commercial community into Government acquisitions. This is particularly the case for software and technology companies seeking to expand their expertise to provide complex system solutions.

Fourth, and finally, for contracts with fixed-priced aspects, contractors often include a contingent amount within their pricing to account for contract risks, including the risks of consequential damages. Although it is Government policy to "self insure," a practical effect of this is that the Government is paying an insurance-type premium for those contracts that permit consequential damages. Moreover, for any type of contract, to the extent insurance is reasonably available to cover consequential damages (it sometimes is not), the cost of such insurance increases the cost to the Government and the taxpayer of providing items and services. This result provides for inefficiencies in the Federal procurement system.

Applying full protection against consequential damages for contracts awarded under FAR Parts 12, 13, 14, and 15 would not be a new approach. There is precedent for the same practice under the Brooks Act, which applied to virtually all IT procurements. The Federal Information Resources Management Regulation (FIRMR) in relevant part stated "[i]n no event will the contractor be liable for consequential damages as defined in the Uniform Commercial Code..." FIRMR Sec. 201-39-5202-6 (October 1990). A near identical clause had been included in the Department of Defense FAR Supplement (DFARS). Near or upon the demise of the FIRMR, this approach should have been carried through to FAR Part 15 as well as Part 12, but it was in our view erroneously deemed unnecessary by GSA through a deletion of the limitation of liability clause in its Transmittal Circular 90-13 in 1996. GSA stated that the FAR's guidance was more comprehensive than the FIRMR, but that was not the case. Nowhere in FAR Part 15 is a contractor's exposure to consequential damages squarely addressed.

C. Recommended Approach.

ITAA requests that GSA amend the GSAR to modify the current limited waiver of consequential damages language currently provided for in FAR 52.212-4(p). 1/ Specifically, ITAA recommends that GSA adopt the following language similar to that originally proposed as

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part of the implementation of FASA, and that existed prior to 1995 in the FIRMR and the DFARS.

LIMITATION OF DAMAGES

Except as expressly set forth in writing in this agreement, and except for the implied warranty of merchantability, there are no warranties expressed or implied.

In addition, in no event will the contractor be liable to the Government for consequential damages arising from contractor performance of the contract, including:

(a) Any loss resulting from the general or particular requirements and need of which the seller or service provider 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 contract performance.

Compare 60 Fed. Reg. 11197 (March 1, 1995); DFARS 252.270-7001 (FEB 1983); FIRMR 201-39.5202-6 (1991).

II. "Post-Award" Audits of Pre-Award Information

GSA also requested comment on an issue that has been debated in the Federal procurement community for nearly a decade. That is, whether GSA's contract provisions should permit "post-award" audits of contractor's "pre-award" pricing, sales, or other data which formed the basis for the contract award. ITAA's position on this issue is well known, yet we are compelled once again to voice our strong objection to the prospect that such post-award audits might be imposed. First, Congress previously expressed its opposition to permitting this type of post-award audit of a commercial item contractor's pre-award information. Second, post-award audits of the type contemplated by the ANPR are contrary to customary commercial practice, and would strongly discourage participation by commercial contractors in GSA's MAS contracts and Government-wide acquisition contracts programs.

The ANPR suggests that there has been concern expressed by the Government Accountability Office and perhaps others regarding what ITAA believes to be GSA's prudent and sound decision ***not*** to impose contract terms permitting post-award audits of pre-award

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pricing data. ITAA believes that any concern regarding the non-use of such post-award audits is unwarranted, and if acted upon would be contrary to the acquisition reform goals of both FASA and the Clinger-Cohen Act.

Since the enactment of the Truth in Negotiations Act in 1962, defective pricing remedies on commercial item contracts have been deemed unnecessary by Congress. In fact, Congress made this clear through the Clinger-Cohen Act, which was enacted in 1996. The House Report to the National Defense Authorization Act for FY 1997 provided:

> The National Defense Authorization Act for Fiscal Year 1996 (Public Law 104-06) 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.

House National Security Committee, Defense Authorization Act for FY 1997, House Report No. 104-563, 104th Congress 2nd Session, p. 324.

Moreover, when GSA sought to impose an interim rule including the post-award audit language at issue, the principal architects of the Clinger-Cohen Act, Senator Cohen and former Representatives Spence and Clinger, wrote to the Director of the Office of Management and Budget, and emphasized that:

> The Federal Acquisition Reform Act of 1996 … eliminated the authority of Federal agencies to perform post-award audits of suppliers of commercial items. ***The clear intent of Congress was that these audits would no longer be performed by Federal agencies.*** Congress clearly 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.

Attachment 1 (emphasis added).

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Accordingly, Congressional intent is clear on this issue, "the only remaining authority for the government to pursue post-award audits of contractor records regarding the purchase of commercial items is the G[overnment] Account[ability] Office." *Id.*

In addition, as stated above, both FASA and the FAR mandate that Federal agencies, to the maximum extent practicable, use only those terms and conditions that are required by law or that are customary in the commercial marketplace, and to revise practices and procedures not required by law so as to reduce impediments to the acquisition of commercial items. The post-award audit provision being contemplated is neither required by law nor customary in the commercial marketplace. With respect to the latter requirement, it is extremely rare that companies in the commercial market would allow a buyer to later second guess the data provided during negotiations leading to contract formation. As a general rule, once the contract is signed, both parties are committed to its terms and conditions. Allowing a party years later to re-examine and second guess the data that formed the basis of the bargain is a recipe for disputes. In other words, any questions regarding the basis for the bargain are settled prior to contract formation.

Here, GSA has a right to conduct pre-award audits. Clearly, GSA's use of its pre-award audit authority would be much more efficient and desirable than the use of intrusive post-award audits that will result in disputes.

Any revision to the Examination of Records clause to extend GSA's right to audit records to verify pre-award pricing information would create an unnecessary burden on vendors, and would dissuade potential vendors from doing business with GSA. Therefore, ITAA strongly recommends that GSA refrain from taking any steps to modify GSAR 552.215-71, and ***not*** take any other action to permit post-award audits of pre-award pricing information.

****

ITAA provides global public policy, business networking, and national leadership to promote the continued rapid growth of the IT industry. ITAA consists of over 400 corporate members throughout the U.S. and a global network of 50 countries' IT associations. The Association plays the leading role in issues of IT industry concern including information security, taxes and finance policy, digital intellectual property protection, telecommunications competition, workforce and education, immigration, online privacy and consumer protection, government IT procurement, human resources, and e-commerce policy. ITAA members range from the smallest IT start-ups to industry leaders in the Internet, software, IT services, ASP, digital content, systems integration, telecommunications, and enterprise solution fields. For more information visit www.itaa.org.

ITAA greatly appreciates this opportunity to provide our comments.

2005 N01-13

Respectfully submitted,

Harris T. Miller
President,
Information Technology Association of America

Attachment

2005-N01-13

1/ At the Public Meeting on April 14, 2005, GSA requested comment on the impact of expanding the waiver of consequential damages in performance-based contracts. ITAA does not believe that the expansion of the waiver would negatively impact the Government's ability to enter performance-based contracts for two primary reasons. First, performance-based contracts are also used in the commercial marketplace. However, there is generally no exception to the waiver of consequential damages in those contracts. Second, given the nature of performance-based contracts, the expansion of the waiver should not affect the Government's ability to structure appropriate performance incentives to encourage contractors to increase efficiency and maximize performance.

2005-101-13

Congress of the United States
Washington, DC 20515

September 18, 1996

The Honorable Franklin D. Raines
Director
Office of Management and Budget
Executive Office Building
Washington, DC 20503

Dear Mr. Raines:

It has come to our attention that the General Services Administration (GSA) intends to promulgate regulations which are contrary to congressional intent.

The Federal Acquisition Reform Act of 1996 (FARA) (Division D of P.L. 104-106) eliminated the authority of Federal agencies to perform post-award audits of suppliers of commercial items. The clear intent of Congress was that these audits would no longer be performed by Federal agencies. Congress clearly 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.

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.

We trust that you will ensure that the intent of Congress is properly implemented. Thank you in advance for your attention to this matter.

Sincerely,

William F. Clinger, Jr., Chairman
Committee on Government Reform and Oversight
U.S. House of Representatives

Floyd D. Spence, Chairman
Committee on National Security
U.S. House of Representatives

William S. Cohen, Chairman
Committee on Governmental Affairs Subcommittee on Oversight of
Government Management and the District of Columbia
U.S. Senate

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2005-401-14

May 10, 2005

FAR Secretariat (VIR)
General Services Administration
1800 F Street, NW
Washington, DC 20405
Attn: Laurieann Duarte

Re: Advance Notice of Proposed Rulemaking – Waiver of Consequential Damages and "Post-Award" Audit Provisions

Dear Ms. Duarte:

The Department of Veterans Affairs (VA) and the VA Office of Inspector General (OIG) take this opportunity to provide a statement in response to the Advance Notice of Proposed Rulemaking and Notice of Public Meeting (Notice) first published in the Federal Register on March 11, 2005, again with an amendment on March 17, 2005, and with another amendment on April 12, 2005.

The Notices request comments on two issues: (1) whether General Services Administration Acquisition Regulation (GSAR) 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). The April 12, 2005 amendment to the Notice modified the second issue by adding whether the Examination of Records clause at GSAR 552.215-71 should be modified to reinstate post-award access to and the right to examine records to verify that preaward/modification pricing, sales, or other data related to the supplies or services offered under a contract which formed the basis for an award/modification was accurate, current, and complete.

For the reasons stated below, VA and VA OIG do not believe there is any justification for revising the GSAR to mandate a waiver of consequential damages for all commercial item contracts. VA and VA OIG strongly believe the evidence supports modifying the Examination of Records clause at GSAR 552.215-71 to reinstate post-award access to and the right to examine records to verify that preaward/modification pricing, sales, or other data relating to the supplies or services offered under a contract, and which formed the basis for award/modification was accurate, current, and complete.

2005-401-14

Issue 1: Waiver of Consequential Damages

The Notice states that concerns have been raised that FAR clause 52.212-4(p) and the "tailoring" provisions at FAR 12.302 "do not reach the level of commercial standards and that unlimited consequential and other incidental or special damages are not necessary and are, in fact, counterproductive to efficient procurement, raising costs and establishing barriers to commercial companies considering whether to do business with the Federal Government." The Notice provides no specific evidence to support the claim that the current clauses do not reach the level of commercial standards.

A review of the current paragraph (p) of 52.212-4 shows that it already concedes all of the Government's rights to obtain consequential damages as the result of the failure of a commercial product. It appears that some IT vendors are upset that Government Contracting Officers are allowed to tailor paragraph (p) to limit or remove the waiver of consequential damages, as permitted by FAR 12.302(b), and that the existing waiver is not broad enough.

In response to a request from VA for an informal opinion on the impact and desirability of using 52.212-4 (p) in all VA drug and medical device contracts, Department of Justice (DOJ) Torts Branch advised that the waiver in (p) might be interpreted to preclude any recovery of consequential damages caused by a vendor's negligence in producing its commercial products. DOJ informally recommended that VA modify the paragraph to indicate that VA does not waive its rights to bring an action against the manufacturer for consequential damages to persons or property caused by a dangerous commercial health care product. Based on DOJ's advice, VA's National Acquisition Center has tailored 52.212-4 (p) in all solicitations for drugs and other products that could be dangerous to patients or medical staff by adding the limiting language that DOJ proposed. VA believes that it is necessary to continue to have the ability to tailor paragraph (p) in solicitations for potentially dangerous healthcare products, in order to protect the Government's interests against potential vendor negligence.

To obtain additional information relating to the origin of this issue, VA OIG contacted GSA and requested documentation of the concerns raised by industry relating to this issue. We received one 15-page document consisting of a letter and an attachment from the Information Technology Association of America (ITAA). The letter was dated February 5, 2004, more than 1 year prior to GSA's Notice.

We reviewed the letter and attachment and found that it contained a number of generalizations about commercial practices. However the letter did not provide sufficient evidence to support the claim it is never a commercial practice to hold Contractors liable for consequential damages or to support the concerns raised regarding the "tailoring" provisions of FAR 12.302.

With respect to consequential damages, the submission from ITAA does not provide any support for the general claim that it is not a commercial practice to hold contractors liable for consequential damages. Also, it is unclear whether the alleged commercial practices

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referenced in the attachment apply to a broad commercial market, are limited to Information Technology (IT), or are limited to one area or specialty within the IT industry. ITAA did not provide or identify any commercial contracts or agreements to support the general assertions.

VA's experience with the pharmaceutical industry refutes ITAA's position on this issue. Rather than seeking to protect themselves from damages arising from potential negligent manufacturing, many pharmaceutical manufacturers routinely offer their best customers (including the Government) complete indemnity clauses for damages and legal fees, up to the amount of their liability insurance. VA does not believe that the Government, one of the largest buyers of commercial products, should be treated differently by being forced through regulations to waive all consequential damages in all commercial product procurements, even if the damages were caused by a vendor's gross negligence. We further note that GSA's 1996 "Anthology of Commercial Terms and Conditions" states that big businesses, when acting as buyers, frequently demand and receive broad protection against claims and damages caused by a seller's breach of warranty or negligence. This suggests that it is not a commercial practice to waive liability for consequential damages.

To support the claim that the waiver of consequential damages is a commercial practice, ITAA references a provision that was included in a legislative proposal introduced in Congress as the Services Acquisition Reform Act (SARA) 2002 (H.R. 3832). The provision required contracts and solicitations for property and services to include a statement barring payment of consequential damages. SARA 2002 was not passed by the Congress and the provision limiting liability for consequential damages was not included in the successor bill, SARA 2003 (H.R. 1837). ITAA offers no explanation why SARA 2002 failed to be enacted or why this provision was not included in the successor legislation. Nonetheless, the provision that barred consequential damages did not become law which in some respects invalidates the argument that it is a widespread commercial practice. ITAA's reliance on a known defunct legislative proposal to support its position, without any suggestion that the proposal would be revived, seriously undermines its argument.

ITAA also claims that companies do not do business with the Government because of the risks associated with the liability for consequential damages and contractors who do elect to do business increase prices to include an "uncertainty premium." ITAA does not provide any specific information or detail to support these claims. For these claims to be given any credibility, the following information needs to be provided: how many contractors do not do business with the Government solely because of the risk of consequential damages; what services or products are involved; has this created a deficiency in the number of responsible contractors who offer the same products and services and do have or seek contracts with the Government; and, how has this affected the Government's price compared to prices offered to commercial customers? Based on our experience with the markets relating to contracts awarded by VA, there are and always will be contractors who choose not to do business with the Government for any number of reasons; however, unless it can be shown that this has a significant impact on

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the Government's ability to obtain needed products and services, there is no compelling reason to amend regulations that protect the Government's interest.

Until and unless ITAA and others can provide market specific data showing that it is a widespread accepted commercial practice in all major industries that supply commercial products to the Government to waive all liability for consequential damages and that the Government's ability to obtain products or services from responsible contractors at fair and reasonable prices is hindered by the provisions of FAR 52.212-4(p) or FAR 12.302, there is no justification to support amending the FAR.

Issue 2: Post-Award Audit Clause

The Notice of Proposed Rulemaking identifies two issues relating to post-award audits of vendors' information provided pre-award or in support of a modification that is relied on by the Government to establish contract prices. The first issue is whether post-award audits should be prohibited. The second issue is whether the clause that was deleted by the August 21, 1997 Final Rule should be reinstated.

With respect to the first issue, GSA did not provide us with any documentation in support of GSA's assertion (in the Notice) that "contractors' major concerns with GSA's post-award audit authority include complaints that they are too broad and not consistent with commercial contract practices." Neither VA nor VA OIG is aware of any specific complaints from industry since the Petition from the Government Electronics & Information Technology Association (GEIA) was submitted to the Office of Management and Budget's Office of Federal Procurement Policy (OFPP) in 1999. In addition, VA FSS sales have increased since 1997, not decreased as would be expected if post-award audits were broad and not a commercial practice as claimed.

The issue of eliminating post-award audits was argued extensively prior to the August 21, 1997 Final Rule and again in response to the 1999 Petition to OFPP. It was then and is now the position of VA and the VA OIG that there is no basis for eliminating the Examination of Records clause, which allows the post-award review of vendors' information that the Government relied on to establish initial contract pricing and pricing via modifications to the contract.

Whether post-award audits are a commercial practice is not the deciding factor on this issue. The deciding factor is, and should be, what is in the best interest of the Government. There are many aspects of Government contracting that are not commercial practices. One of the best examples is that there is no commercial equivalent to the MAS/FSS program. The goal of procurement reform in the mid-1990's was to have the Government act more like a commercial customer to the maximum extent practicable. However, the law does not mandate that every Government program or practice mirror commercial practices. Commercial practices vary not only from industry to industry but often with different commercial customers within an industry. As such, it would be

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impractical, if not impossible, for every aspect of a Government procurement to be consistent with all commercial practices.

There are many benefits in Government contracting that do not exist in the commercial market; yet industry has not requested that these procedures be changed to better reflect commercial practices. For example, the commercial market does not provide contractors with the opportunity to file a protest challenging the award process and the Competition in Contracting Act provides industry with broader opportunities to compete for Government business. In practice, the intent of the MAS/FSS program is to expand contracting opportunities for both large and small businesses with the Government making multiple awards for like or similar items to vendors. Conversely, in the commercial sector, single awards to a specific vendor for a portion of the vendor's product line are common place. In those instances where the Government makes a single award (winner take all), post-award audits are not included in the contract.

The argument that the Government should be precluded from conducting post-award audits of MAS/FSS vendors because these audits are not a commercial practice is simply insufficient. The appropriate test is whether post-award audits are in the best interests of the Government considering how the Government contracts for the items it acquires. Based on the results of two reports published by the Government Accountability Office (GAO) in the past year, we believe the evidence not only supports retaining the post-award audit clause, but reinstating the pre-Final Rule clause for use in all FSS contracts.

When GSA published the Final Rule on August 21, 1997, 62 FR 44518, which implemented the Federal Acquisition Streamlining Act of 1994 (Pub.L. 103-355), the clause that provided post-award audit rights for pricing information in all FSS contract was deleted. The new rule provided the contracting officer the opportunity to modify the Examination of Records by GSA (Multiple Award Schedule) clause to provide for post-award access to records to verify the pre-award/modification pricing, sales, and other data submitted, which related to supplies or services offered under the contract. This modification could only be made after the contracting officer determined that there was a likelihood of significant harm to the Government without access to verify the information and also obtained the approval of the Senior Procurement Executive at VA or GSA that the contracts were at risk.

In response to the Final Rule, VA reviewed its schedules, identified those that were at risk, and took the action necessary to include the post-award examination of records clause in those schedules. As a result, VA has continued to conduct post-award audits. On the other hand, GSA did not take such action and the post-award audit clause was not included in contracts awarded by GSA. The results of two reviews conducted by the GAO of VA's FSS program and GSA's FSS program show the impact of the decisions made by VA and GSA. The results of the GAO reviews also support reinstating the Examination of Records clause that was deleted by the Final Rule.

The first GAO report, "Contract Management – Further Efforts Needed to Sustain VA's Progress in Purchasing Medical Products and Services," was issued on June 24, 2004.

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The report states:

> Post award audits also help VA protect against overcharging by vendors. They often result in recovery of money from vendors who overcharged VA. Most post-award audits are prompted by vendor's voluntary disclosures that prices charged to the Government were too high.
> The financial benefits attributed to these audit efforts have been significant. During fiscal years 1999-2003, VA audits identified $151 million in cost-avoidances from pre-awards and $90 million in recoveries from post-awards.[1]

On February 11, 2005, GAO issued a report detailing its findings of a review of GSA's FSS program, "Contract Management – Opportunities to Improve Pricing of GSA Multiple Award Schedule Contracts." In contrast to VA's program, GAO found that:

> GSA's efforts to ensure most favored customer pricing have been hindered by the significant decline in the use of pre-award and postaward audits of pre-award pricing information, two independent pricing tools that have helped GSA avoid or recover hundreds of millions of dollars in excessive pricing. In fiscal year 1995, GSA conducted 154 pre-award audits; by 2004 the number of pre-award audits fell to 40. Postaward audits —which resulted in an annual recovery of $18 million in the early 1990's —were discontinued in 1997 when GSA revised its MAS contract audit policies to increase the use of pre-award audits—an increase that never materialized.[2]

GAO further concluded in its review of GSA's program:

> Despite the cost avoidance realized through pre-award audits, the number of these audits decreased dramatically between fiscal years 1992 and 2003—from 130 to14. Between fiscal years 1992 and 1996, the average number of pre-award audits conducted annually was about 125; for fiscal years 1998 through 2003, the average number of pre-award audits conducted annually fell to 18. In 2004, pre-award audits rose slightly to 40.
>
> As the number of pre-award audits performed decreased, so did the amount of negotiated savings. Between fiscal years 1992 and 1997, the GSA Inspector General reported a total of nearly $496 million in savings —on average of nearly $83 million per year. Between fiscal years

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[1] **GAO Report "Contract Management—Further Efforts Needed to Sustain VA's Progress in Purchasing Medical Products and Services." p.2.**
[2] **GAO Report "Contract Management—Opportunities to Improve Pricing of GSA Multiple Award Schedules Contracts."**

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> 1998 through 2004, the total savings reported had dropped to about $125.9 million-an average of nearly $18 million per year. According to Inspector General and MAS contracting officials, the decline in pre-award audits was largely due to an organizational culture that stressed making awards quickly and because pre-award audits were not emphasized institutionally in GSA.[3]

During the 2 years preceding the August 21, 1997, Final Rule, VA, VA OIG, GSA OIG, and the Department of Justice argued vigorously to retain post-award audit rights because of the impact this had on the integrity of the program. We argued that the risk of a post-award audit was an incentive for contractors to disclose overcharges relating to defective pricing and other related contract violations. Time has proven this to be true as evidenced in VA's recoveries and in the decline in GSA's recoveries. Since 1997, post-award audits by VA OIG have resulted in the recovery of more than $151 million, of which $105.7 million (70 percent) is directly related to voluntary disclosures by contractors who initially offered $33.2 million. In contrast, GSA's voluntary disclosures declined significantly, as did its recoveries.

The fact that 70 percent of VA's recoveries were the result of post-award audits initiated in response to contractor's voluntary disclosures refutes industry's contention that post-award audits are burdensome. In these cases the contractor conducted a self-initiated audit and reported findings to the VA OIG for verification.

To include post-award audit rights in GSA-awarded FSS contracts under the existing GSAR, GSA would have to follow the process set forth in the August 21, 1997 Final Rule. It is VA and VA OIG's position that this cannot be done without modifying the Examination of Records clause at GSAR 552.215-71 to reinstate post-award access to, and the right to examine, records to verify that pre-award/modification pricing, sales, or other data related to supplies or services offered under a contract which formed the basis for an award/modification was accurate, current and complete. Unless the current GSAR is modified, industry can argue that the inclusion of the prior post-award audit provisions is not consistent with the Final Rule. The Final Rule states that "GSA anticipates that such instances [where the clause would be modified to include the post-award examination of records clause] would involve a limited number of schedules." One of the arguments made to OFPP in the 1999 Petition by GEIA was that VA's inclusion of the clause in most of its FSS schedules violated the "limited number of exceptions" language in the Final Rule. VA's rebuttal, which was ultimately accepted by OFPP, was that VA's schedules represented a limited number of the total schedules; therefore, VA's actions did not violate the Final Rule. However, if GSA modifies its solicitations to include the post-award audit provisions for its schedules, the number of schedules that have been modified will most likely exceed a reasonable interpretation of a "limited number" of schedules.

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[3] *Id.*, pp. 14-16

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It is the position of VA and VA OIG that it would be in the best interests of the Government to modify the Examination of Records clause at GSAR 552.215-71 to reinstate the post-award access to and the right to examine records that was deleted by the August 21, 1997 Final Rule.

Thank you for the opportunity to provide comments to the Advance Notice of Proposed Rulemaking. Please feel free to contact Ms. Maureen Regan, Counselor to the Inspector General at (202) 565-8623 if you have any questions regarding our comments.

Sincerely,

C. Ford Heard
Acting Deputy Assistant Secretary for
Acquisition and Materiel Management

Richard J. Griffin
Inspector General

2005-401-15

May 11, 2005

Ms. Lauriann Duarte
GSA Regulatory Secretariat
1800 F Street, NW, Room 4035
Washington, D.C. 20405

RE: GSAR ANPR 2005-No 1

Dear Ms. Duarte:

The Coalition for Government Procurement is pleased to have this opportunity to comment on the Advanced Notice of Proposed Rulemaking (ANPR) published in the March 11th *Federal Register*. We believe this notice raised two items of vital importance to commercial item contractors.

The Coalition is a multi-industry non-profit association of companies selling commercial services and products to the federal government. Our members include small and large businesses offering a wide array of items. Coalition members account for approximately half of all commercial purchases made by the federal government each year and 70% of all sales made through GSA's Multiple Award Schedule program. The Coalition has worked with officials in and out of government for over 25 years toward common sense government acquisition policies.

Limitation of Liability

The Coalition supports amending the General Services Acquisition Manual (GSAM) so that the limitation of liability provisions in Part 12 of the FAR are extended to protect contractors from all consequential damages that might arise from contract performance. Contractors in the commercial market negotiate and receive protection from exposure to the potentially unlimited liability risk arising from consequential damages in their contracts with commercial market customers. We believe these contractors should have the same protection when selling in the government market.

Current regulations in this area, however, are not sufficient. As a result, commercial item contractors are exposed to risks in the federal market that they do not otherwise have. The Coalition believes strongly that these gaps should be closed in FAR parts 12 and 15 and any other regulations pertaining to commercial item acquisition. Eliminating current loopholes by extending coverage to all procurements will benefit GSA, government customers and contractors by helping keep costs low and competition high.

Post-Award Audits

The Coalition strongly opposes the re-institution of post-award audits on Multiple Award Schedule contracts. We believe that such a step would drive many of the most popular

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schedule contractors from the program, reducing customer options and driving up the government's overall acquisition costs. It would also place a significant burden on small businesses that now comprise 80% of all schedule contract holders. Post-award audits are time and cost intensive for all involved and other steps can and should be taken before post-award audits are considered as a contract oversight method.

When GSA considered eliminating post-award audits as a standard MAS contract oversight tool in 1996 it noted that the after the passage of the Clinger-Cohen Act and related legislation (at the time referred to as the Federal Acquisition Reform Act), the Federal Property and Administrative Services Act was made silent on the agency's authority to conduct an audit of any "other than cost or pricing data" which was submitted in support of an offer resulting in a fix-priced contract. Given this lack of statutory authority, GSA then looked to commercial practice to justify its contention that post-award audits are permissible. Ultimately, however, the agency could not make a positive case that such audits are a common commercial practice.

According to Coalition members the same is true today. Invasive post-award audits are not a common part of commercial business dealings. In no case where commercial *reviews* exist is there a risk of incurring the civil and criminal penalties a schedule contractor could incur in the schedules environment.

Further, commercial item contracts awarded under FAR Part 12 do not contain post-award audit provisions. Contracts awarded under this portion of the FAR are for many of the same items purchased through the schedules program, even from many of the same companies. We believe this is further evidence that post-award audits are not needed and further strengthens our case that Congress did not intend for commercial item contracts to contain these provisions when it passed the Clinger-Cohen Act.

In addition to this, there has been no change to procurement law governing post-award audits since passage of the Clinger-Cohen Act. This Act was clear that post-award audits should not be part of commercial item contracts. The issue of such audits was extensively debated during the 1996-97 rulemaking. Any remaining ambiguity over the intent of Congress was removed, however, when a letter signed by then-Senator Cohen and then-Congressman Clinger was sent to several senior federal procurement officials. This letter confirmed that the authors of the bill intended to eliminate post-award audits from such contracts.

For these reasons, the Coalition sees no statutory basis upon which a claim for the reinstitution of post-award audits can go forward. The law has not changed. Commercial practice has not changed. Thus, the major factors, that existed in 1996-97 when GSA eliminated post-award audits from schedule contracts still govern.

Reinstituting post-award audits will have a devastating impact on small and large business participation. Small businesses face potentially significant disruptions to their business operations by hosting an auditor for weeks or months at a time. These businesses are the backbone of the program and provide valuable services to government

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customers. Disrupting their operations will slow the business of government and drive impacted small firms from the schedules program as their costs escalate and ability to focus on fulfilling customer missions is diminished.

Large firms, too, face a disruptive presence from post-award audits. These are among the most popular schedule contract holders. Losing these contractors should post-award audits be reinstituted is a very real, but unnecessary, possibility as most such firms have extensive contract compliance programs in place. Several of the largest schedule contract holders have told the Coalition that they will strongly consider leaving the schedules program over this issue, especially if just one such firm is "made an example" of by an over-zealous auditor.

In either case, the schedules program runs the very real risk of losing small and large businesses upon which government customers rely to meet their core missions. Driving such businesses away from the schedules will increase the government's own acquisition costs, increase procurement lead times, and reduce the range of timely solutions available through the government's best commercial item procurement program. At a time when GSA itself must hire outside contracting help to meet current workload the Coalition does not feel that new burdens should be added that make the contracting process more costly and time consuming.

This is especially the case when GSA already has a significant array of contract oversight tools currently available to it. The agency, for example, always retained the right to examine contracts where allegations of contractor misdeeds were made. So to can GSA examine contracts for billing errors and compliance with the schedules Industrial Funding Fee. These tools provide good protection for the government when suspected wrong-doing occurs without giving the Inspector General carte blanche to significantly disrupt the business activities of business partners who are overwhelmingly responsible and make great strides to be compliant.

GSA's ability to conduct pre-award audits was also never changed. It was always anticipated that the agency would step up this type of audit to ensure the reliability of contractor-supplied information and protect legitimate government interests. Anecdotally, the Coalition believes that this did happen for several years. At the time, we supported the use of this type of audit over post-award actions. The Coalition today still supports the use of reasonably conducted pre-award audits. We recommend their use in lieu of invasive post-award actions.

In any case, the Coalition believes it is critical that an accurate cost-benefit analysis be conducted before post-award audits for schedule contracts are seriously considered. Since 1996-97 the government has moved strongly to ensure that any new regulation with a significant cost associated with it will deliver a benefit greater than the cost of initiating the action. There is a cost associated with maintaining a specially trained and fully staffed Office of the Inspector General. We recommend, therefore, that the GSA Inspector General be directed to maintain the same types of records that government contractors must maintain to ensure that time and cost of each function, including labor

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hours, is appropriately tracked. Only with this information will the government know whether the time and cost associated with increased post-award audit activity has a reasonable expectation of out-pacing any potential recoveries. Until it is known whether the potential recovery significantly outweighs the costs of maintaining a sufficiently trained and staffed IG, the Coalition recommends that post-award audits not be reinstituted.

For these reasons the Coalition strongly recommends that a formal rule making on schedule post-award audits not move forward. We again appreciate this opportunity to comment.

Sincerely,

Larry Allen
Executive Vice President

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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510–6250

June 7, 2005

Ms. Emily W. Murphy
Chief Acquisition Officer
Office of the Chief Acquisition Officer
General Services Administration
1800 F Street, NW, Room 4040
Washington, DC 20405

ENRE: [GSAR ANPR 2005 – NO1]

Dear Ms. Murphy:

I am writing in response to the General Services Administration's (GSA) request for comments on the April 12, 2005 Advance Notice of Proposed Rulemaking [GSAR ANPR 2005 – NO1] on whether "post award" audit provisions should be included in GSA's Multiple Award Schedules (MAS) contracts and Government acquisition contracts.

The Subcommittee on Federal Financial Management, Government Information, and International Security, which I chair, has direct oversight responsibility regarding the effectiveness and efficiency of Federal financial management. Since the Government Accountability Office (GAO) has found that pre- and post- award audits have helped GSA avoid or recover hundreds of millions of dollars in excessive pricing, I encourage your agency to increase the use of pre-award audits and the use of post-award audits to verify pre-award pricing information used to negotiate the agreed upon contract.

One of the major goals of GSA during contract negotiations should be to ensure that vendor pricing information is accurate, complete and up-to-date <u>before</u> the contract is awarded. Pre-award audits during contract negotiations have proven to be the most effective method for achieving the best prices because it helps avoid unnecessary costs by providing the agency with detailed information about vendors' commercial sales and marketing. GSA's Office of Inspector General reported that as the number of pre-award audits performed decreased, so did the amount of the negotiated savings. Other evidence that points to the use of pre-award audits as a tool for cost avoidance comes from the Department of Veterans Affairs (VA). When the GAO performed audits in

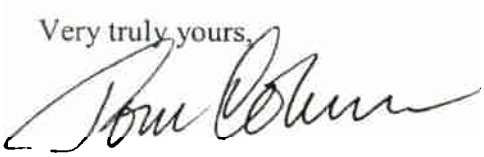
2004 and 2005 on the VA's pre- and post-award audit programs, it found these programs to be a best practice resulting in millions of dollars in savings to VA.

When GSA issued a final rule modifying its policy in 1997, the agency eliminated automatic post-award audit rights for pre-award pricing information in every MAS contract. According to GAO's "Contract Management: Opportunities to Improve Pricing of GSA Multiple Award Schedules Contract" report issued in February 2005, GSA's rationale for making this change was its belief that a decrease in post-award audits would be offset by an increase in the number of pre-award audits. However, GAO recently reported there has in fact been a decrease in the number of pre-award audits.

Despite resistance on the part of commercial contractors to the use of post-award audits, this tool is the most effective means available to verify that vendors are not overcharging the American taxpayers. We know from both the GAO and the GSA's Office of Inspector General that savings due to pre- and post-award audits have saved the Government hundreds of millions of dollars.

I share your commitment for improving GSA's contract negotiation practices and look forward to working with you to ensure that the Federal Government is receiving the most value for the taxpayer's dollar.

Very truly yours,



Tom Coburn
Chairman
Subcommittee on Federal Financial
Management, Government Information, and
International Security