

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 546 and 552

[GSAR ANPR 2005–N01]

General Services Administration Acquisition Regulation; Waiver of Consequential Damages and “Post Award” Audit Provisions (Correction)

AGENCY: Office of the Chief Acquisition Officer, General Services Administration (GSA).

ACTION: Correction to advance notice of proposed rulemaking and notice of public meeting.

SUMMARY: The General Services Administration (GSA) is requesting comments from both Government and industry on whether the General Services Administration Acquisition Regulation (GSAR) should be revised to include a waiver of consequential damages for contracts awarded for commercial item under the FAR. GSA is also requesting comments on whether “post award” audit provisions should be included its Multiple Award Schedules (MAS) contracts and Governmentwide acquisition contracts (GWACs). The notice published in the *Federal Register* at 70 FR 12167, March 11, 2005, is amended to extend the public comment date to May 10, 2005, and to allow interested parties to submit presentations by April 7, 2005.

DATES: *Comment Date:* Interested parties should submit comments on or before May 10, 2005 to be considered in the formulation of a proposed rulemaking.

Public Meeting Presentation Date: Interested parties may register and submit presentations by April 7, 2005.

ADDRESSES: Submit written comments to: General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to: gsaranpr.2005–N01@gsa.gov

Submit electronic presentations via the Internet to: meeting.2005–N01@gsa.gov.

Please submit comments or presentations only and cite GSAR ANPR 2005–N01 in all correspondence related to this case. All comments received will be posted without change to <http://www.acqnet.gov/far/ProposedRules/proposed.htm>, including any personal information provided.

Public Meeting: The public meeting will be conducted at the General Services Administration, National Capital Region, 301 7th and D street, SW., Washington, DC 20407,

Auditorium, starting at 9 a.m. to 4 p.m. EST., on April 14, 2005, to ensure open dialogue between the Government and interested parties on this important topic.

Special Instructions. The submitted presentations will be the only record of the public meeting. If you intend to have your presentation considered as a public comment in the formulation of the proposed rulemaking, the presentation must be submitted separately as a public comment as instructed above.

Special Accommodations: The public meeting is physically accessible to people with disabilities. Request for sign language interpretation or other auxiliary aids should be directed to Ernest Woodson, at 202–501–3775, at least 5 working days prior to the meeting date.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, Contract Policy Division, 202–501–3775.

SUPPLEMENTARY INFORMATION:

Background

Currently, FAR Part 12, Acquisition of Commercial Items, prescribes policies and procedures unique to the acquisition of commercial items under FAR Part 12. FAR Part 12 implements the Government’s preference for the acquisition of commercial items as contained in Title VIII of the Federal Acquisition Streamlining Act of 1994 by establishing policies more closely resembling those of the commercial marketplace. The clause, FAR 52.212–4, Contract Terms and Conditions—Commercial Items, that includes terms and conditions applicable to each acquisition procured under FAR Part 12 is, to the maximum extent practicable, consistent with customary commercial practices. The clause includes a provision, FAR 52.212–4(p), Limitation of liability, that provides; “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.” Also, FAR 12.302(b) allows the contracting officer to tailor the clause at FAR 52.212–4 to adapt to market conditions of reach commercial acquisition. In addition to the limitation of liability clause and the provision at FAR 12.302, Federal contracts typically include a broad range of standard contract clauses such as warranties and liquidated damages that provide exclusive remedies for nonperformance that limit the Government to the specific remedies set forth in the clause.

Likewise, the Contract Disputes Act of 1978 provides for the resolution of any failure on the part of the Government and the contractor to reach agreement on any request for equitable adjustment, claim, appeal, or action arising under or relating to a Government contract to be a dispute to be resolved in accordance with FAR 52.233–1, disputes.

Notwithstanding specific adjustments and other remedies provided in Government contracts for contractor deficiencies or nonperformance, concerns have been raised that—

- FAR clause 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 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;

- 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;

- 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 we make the waiver of consequential damages for commercial products and services available under other provisions of the FAR.

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.

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.

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

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 Acquisition Reform Act of 2002 and 2003 has on the issue of revising the GSAR to address limitations of liability.

In this advance notice of proposed rulemaking and notice of public meeting, GSA is seeking input from both Government and industry 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 and whether GSA should modify its policy and practices with regard to the addition of post award audit clauses into contracts it awards.

Dated: March 11, 2005.

David A. Drabkin,

Senior Procurement Executive, Office of the Chief Acquisition Officer, General Services Administration.

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