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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.<sup>1</sup>

<sup>1</sup> This letter is available in pdf format at  
<http://www.abanet.org/contract/federal/regsgcomm/home.html> under the topic "Commercial Items."

The April 12, 2005 Advance Notice of Proposed Rulemaking (“ANPR”) seeks comments on two matters: (1) whether the General Services Administration Acquisition Regulation should be revised to include a waiver of consequential damages for contracts awarded for commercial items under the Federal Acquisition Regulation (“FAR”); and (2) whether post-award audit provisions should be included in GSA’s Multiple Award 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<sup>2</sup> -- 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.*

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<sup>2</sup> GSA MAS contracts, by definition, are for the procurement of “commercial items” as that term is defined in FAR 2.101. *See, e.g.*, GSA MAS RFP FCIS-JB-980001-B, section B.2.

FAR 12.301(a) (emphasis added.)

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

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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<sup>3</sup> FAR 52.212-5, consistent with law, does authorize the Comptroller General -- and only the Comptroller General -- to conduct post-award audits of commercial item contracts. *See* 10 U.S.C. § 2313(c) (authorizing Comptroller General access to such documents); 41 U.S.C. § 254d (c) (same).

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

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).

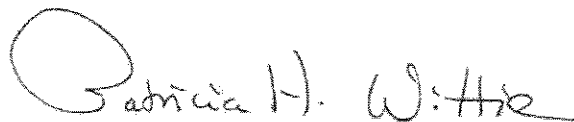
Finally, existing GSA post-award audit rights -- coupled with the agency's ability to conduct extensive pre-award proposal audits -- adequately protect the government's rights to obtain fair and reasonable pricing commensurate with the

commercial market.<sup>4</sup> 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,

A handwritten signature in black ink that reads "Patricia H. Wittie". The signature is written in a cursive style with a large, looped initial "P".

Patricia H. Wittie  
Chair, Section of Public Contract Law

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<sup>4</sup> 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.

General Services Administration

May 10, 2005

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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

**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