

CAUTION ON “REFRESHES” OF YOUR MULTIPLE AWARD SCHEDULE CONTRACT

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The General Services Administration (“GSA”) announced on April 26, 2018 that it will require that multiple award schedule contractors accept the bilateral Commercial Supplier Agreements (“CSA”) modification through a “refresh” of the contract. This change is described in 83 Fed. Reg. 7631 (Feb. 22, 2018) and will add or update add/update clause 552.212-4 Contract Terms and Conditions Commercial Items (JAN 2017) (DEVIATION - FEB 2018) (ALTERNATE I - JAN 2017) (DEVIATION - FEB 2007).

The inclusion of this new clause involving Commercial Supplier Agreements makes certain common commercial license terms unenforceable, and invalidates them, even if they are included in your contract. These clauses often conflict with the Appropriations language in the U.S. Code. The new clause also addresses liability and assignments as well as other matters.

This blog recently commented on directed change orders to contract clauses. See “Agency’s Unilateral Modification of Funding Clause is a Breach of Contract, Not a Proper Change Order.” The blog discussed *Kelly-Ryan, Inc.*, ASBCA No. 57168, 18-1 BCA ¶36944, where the government unilaterally removed one clause and replaced it with a new clause, without attempting to negotiate with the contractor. Nor did the government grant any valuable consideration to the contractor for the change. The Board stated that this was “the very definition of a material breach of an express term of a contract.” The Board noted an earlier case which stated “if one party were to simply reduce its obligations under the contract and the other received nothing in return, there would be no consideration to the short-changed party for having waived its contractual expectations” (citing *Supply & Service Team GmbH*, ASBCA No. 59630, 17-1 BCA ¶ 36678.)

In fact, it is likely that since the material obligations of the contractor are changed, the contractor can notify the government that it will submit a request for an equitable adjustment (“REA”), or if not granted, a claim to make itself whole. GSA’s view that it can unilaterally “refresh” (change) the contract, seems inconsistent with the requirement for consideration, and contractors should look carefully at the impact of the CSA refresh.

Takeaway: Look closely at the new CSA clause, and if it impacts your material obligations in the contract, so state to the GSA in writing. Pursuant to the changes clause, notify GSA that you will seek an equitable adjustment or submit a claim for the impact, if GSA does not grant a fair equitable adjustment.

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