

General Services Administration
Washington, DC 20405

ADM 2800.12B, Change 83
February 22, 2018

GSA ORDER

Subject: General Services Administration Acquisition Manual; Change 83, GSAR Case 2015-G512, Unenforceable Commercial Supplier Agreement Terms

1. **Purpose.** This order transmits a revision to the General Services Administration Acquisition Manual (GSAM).
2. **Background.** Standard Commercial Supplier Agreements (CSAs) contain terms and conditions that make sense when the purchaser is a private party but are inappropriate when the purchaser is the Federal Government. Discrepancies between CSAs and Federal law or the Government's needs create recurrent points of inconsistency. As a result, industry and Government representatives spend significant time and resources negotiating and tailoring CSAs to comply with Federal law and to ensure both parties have agreement on the contract terms and conditions.

On July 31, 2015, the Senior Procurement Executive approved a class deviation from FAR Parts 2 and 52 to address some of the most common CSA terms that conflict or are otherwise incompatible with Federal law. The class deviation provided immediate relief to GSA and contractors by removing the need to negotiate the unacceptable terms, reducing the risk to the Government by uniformly addressing the unacceptable terms, and further streamlining the acquisition process when acquiring items with CSAs.

To solidify the benefits achieved through the class deviation, GSA has published a final rule in the Federal Register at 83 FR 7631 on February 22, 2018 to amend the GSAR and include deviation clauses to address the CSA terms that are inconsistent with or create ambiguity with Federal law.

3. **Effective date.** February 22, 2018
4. **Explanation of changes.** The GSAM is amended as follows:
 - A. **Regulatory changes**

The final rule makes the following changes to the regulatory GSAR. For full text changes see the attached document.

 - > The definition of "commercial supplier agreements" has been added to 502.101 to ensure the updated clauses will be applicable to all agreements

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- regardless of format or document name (e.g. terms of service, end user license agreement).
- Regulation was added at 512.216 to clarify that paragraph (u) of the Commercial Items Clause at 552.212-4 prevents violation of the Anti-Deficiency Act.
 - A prescription for using the deviated clause 552.212-4 has been added to 512.301.
 - GSAR 513.202, Unenforceability of Unauthorized Obligations in Micro-purchases, has been added to apply the deviated 552.232-39, Unenforceability of Unauthorized Obligations, clause to acquisitions of supplies or services subject to a commercial supplier agreement and under the micro purchase threshold.
 - GSAR 512.302-5 has been added to require utilization of the unenforceability clauses 552.232-39 and 552.232-78 for simplified acquisitions.
 - GSAR 532.705 is added to clarify that “supplier license agreements” defined in the FAR 32.705 are equivalent to commercial supplier agreements.
 - GSAR 532.706-3, Clause for unenforceability of unauthorized obligations, is added to prescribe the use of the deviated clause 552.232-39 and 552.232-78 to protect the Government.
 - The deviated commercial items clause 552.212-4 has been added to the GSAR to address incompatible commercial supplier agreement terms with Federal law.
 - The deviated clause 552.232-39 incorporates commercial supplier agreement language to ensure applicability of the clause regardless of the name and format of the agreement.
 - The new clause 552.232-78 has been added to address commercial supplier agreement terms that are incompatible with Federal law in contracts that do not include clause 552.212-4.

B. Non-regulatory changes:

The following supplementary guidance changes have been made to the GSAM. For full text changes see the attached document.

- For computer software acquisitions, GSAM 512.212 has been added to incorporate the protections of the unenforceable clauses in 552.212-4.
- GSAM 512.302, Tailoring of Provisions and Clauses for the Acquisition of Commercial Items, has been updated to prevent tailoring of the Commercial Supplier Agreement - Unenforceable Clauses subparagraph of 552.212-4.

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- New guidance was included in the GSAM to clarify the contracting officer's responsibilities in relation to commercial supplier agreements.

The guidance is found at:

- GSAM 504.803(b)(23) - Adds Commercial supplier agreements to the contract file tab contents.
- GSAM 512.203 - Identifies contracting officer's responsibilities when reviewing, negotiating and documenting commercial supplier agreements.
- GSAM 543.171 - Provides guidance to the contracting officer when there are changes to commercial supplier agreements.

5. Cancellations and Rescissions:

This order cancels GSA Acquisition Letter MV-15-03 and Supplement 1, FAR Class Deviation -- Commercial Supplier Agreement Terms that Conflict or Are Incompatible with Federal Law. The questions and answers guidance provided in the letters will be made available on the GSA Acquisition Portal, Information Technology topic page (<https://insite.gsa.gov/portal/category/534601>).



Jeffrey A. Koses
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GSAR Case 2015-G512
Unenforceable Commercial Supplier Agreement Terms, Final Rule
Tab AA - GSAM/GSAR Text, Line-In/Line-Out

GSAM Baseline: Change 81 effective 3/7/17

- Additions to baseline made by proposed rule are indicated by **[bold text in brackets]**
- Deletions to baseline made by proposed rule are indicated by ~~strikethroughs~~
- Additions to baseline made by final rule are indicated by **[bold and underlined text in brackets]**
- Deletions to baseline made by final rule are indicated by ~~strikethroughs and underlined~~
- Minor revisions at Reg Sec are indicated by double underline
- Five asterisks (*****) indicate that there are no revisions between the preceding and following sections
- Three asterisks (***) indicate that there are no revisions between the material shown within a subsection

PART 502—DEFINITIONS OF WORDS AND TERMS

Subpart 502.1-Definitions

502.101 Definitions.

["Commercial supplier agreements" means terms and conditions customarily offered to the public by vendors of supplies or services that meet the definition of "commercial item" set forth in FAR 2.101 and intended to create a binding legal obligation on the end user. Commercial supplier agreements are particularly common in information technology acquisitions, including acquisitions of commercial computer software and commercial technical data, but they may apply to any supply or service. The term applies –

- (a) Regardless of the format or style of the document. For example, a commercial supplier agreement may be styled as standard terms of sale or lease, Terms of Service (TOS), End User License Agreement (EULA), or another similar legal instrument or agreement, and may be presented as part of a proposal or quotation responding to a solicitation for a contract or order;
- (b) Regardless of the media or delivery mechanism used. For example, a commercial supplier agreement may be presented as one or more paper documents or may appear on a computer or other electronic device screen during a purchase, software installation, other product delivery, registration for a service, or another transaction.]

PART 504 —ADMINISTRATIVE MATTERS

Subpart 504.8—Government Contract Files

504.803 Contents of contract files.

a. *****

b. Tab contents. The following instructions apply to contract actions up to award. Contracting activities may develop further guidance on tabbing postaward actions tailored to their requirements. Tab the contract file as specified below:

* * * * *

(23) Contract action. Include:

(i) Successful bid or proposal and all pertinent correspondence applicable to the contract action, including evidence of submission of contract award data to paying office (see 504.201).

(ii) Subcontracting plans incorporated in and made a material part of a contract, as required by FAR 19.705-5(a)(5).

[(iii) Commercial supplier agreements including referenced terms incorporated in and made a material part of a contract.]

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PART 512—ACQUISITION OF COMMERCIAL ITEMS

Subpart 512.2-Special Requirements for the Acquisition of Commercial Items

* * * * *

512.203 Procedures for solicitation, evaluation, and award.

(a) * * *

[(d) Acquisitions with Commercial Supplier Agreements. For acquisitions with commercial supplier agreements, the deviated commercial items clause 552.212-4 as prescribed in 512.301 addresses common commercial terms that conflict with Federal law and makes the terms unenforceable against the Government. The contracting officer is responsible for:

(1) Identifying objectionable terms not covered by the deviated clause;

(2) Negotiating terms as necessary to meet the Government's needs; and

(3) Documenting the full commercial supplier agreement, including referenced terms, as addenda to the contract (see 504.803(b)(23)).

512.212 Computer software.

Common commercial supplier agreement terms that conflict with Federal law have been addressed in paragraphs (u) and (w) of the clause at 552.212-4.

512.216 Unenforceability of unauthorized obligations.

GSA has a deviation to FAR 12.216 for this section to read as follows:

For commercial contracts, supplier license agreements are referred to as commercial supplier agreements (defined in 502.101). Paragraph (u) of clause 552.212-4 prevents violations of the Anti-Deficiency Act (31 U.S.C. 1341) for supplies or services acquired subject to a commercial supplier agreement.]

Subpart 512.3- Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

512.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(a) * * *

[(e) GSA has a deviation to revise certain paragraphs of FAR clause 52.212-4. Use clause 552.212-4 Contract Terms and Conditions – Commercial Items (FAR DEVIATION), for acquisitions of commercial items in lieu of FAR 52.212-4 or 52.212-4 Alternate I. The contracting officer may tailor this clause in accordance with FAR 12.302 and GSAM 512.302.]

512.302 Tailoring of provisions and clauses for the acquisition of commercial items.

[(a)] FAR 12.302(c) severely limits tailoring of clauses or otherwise including additional terms or conditions in commercial item contracts in a manner that is inconsistent with customary commercial practice. Such tailoring requires a waiver approved as follows:

- [(1)]~~(a)~~ *Individual contract.* The contracting officer's supervisor approves the request.**
- [(2)]~~(b)~~ *Class of contracts.* The contracting director approves the request.**

[(b) Paragraph (w) of 552.212-4, Contract Terms and Conditions – Commercial Items (FAR DEVIATION), implements statutory requirements, clarifies the application of statutory requirements to common terms and conditions in commercial supplier agreements, sets forth a list of such terms and conditions that do not meet the Government's needs, and shall not be tailored.]

PART 513—SIMPLIFIED ACQUISITION PROCEDURES

* * * * *

[Subpart 513.2-Actions At or Below the Micro-Purchase Threshold

513.202 Unenforceability of unauthorized obligations in micro-purchases.

Clause 552.232-39, Unenforceability of Unauthorized Obligations (FAR DEVIATION), will automatically apply to any micro-purchase in lieu of FAR 52.232-39 for supplies and services acquired subject to a commercial supplier agreement (as defined in 502.101).]

Subpart 513.3 Simplified Acquisition Methods

* * * * *

[513.302 Purchase Orders

513.302-5 Clauses

Where the supplies or services are offered under a commercial supplier agreement (as defined in 502.101), the purchase order or modification shall incorporate clause 552.232-39, Unenforceability of Unauthorized Obligations (FAR DEVIATION), in lieu of FAR 52.232-39, and clause 552.232-78, Commercial Supplier Agreements – Unenforceable Clauses.]

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PART 532—CONTRACT FINANCING

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Subpart 532.7 -Contract Funding

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[532.705 Unenforceability of unauthorized obligations.

Supplier license agreements defined in FAR 32.705 are equivalent to commercial supplier agreements defined in 502.101.]

* * * * *

[532.706 Contract clauses

532.706-3 Clause for unenforceability of unauthorized obligations.

(a) The contracting officer shall utilize the clause at 552.232-39, Unenforceability of Unauthorized Obligations (FAR DEVIATION) in all solicitations and contracts in lieu of FAR 52.232-39.

(b)The contracting officer shall utilize the clause at 552.232-78, Commercial Supplier Agreements – Unenforceable Clauses, in all solicitations and contracts (including orders) when not using FAR part 12.]

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PART 543—CONTRACT MODIFICATIONS

Subpart 543.1 - General

* * * * *

[543.171 Changes in commercial supplier agreements.

a. **Commercial supplier agreements must be modified if the updated terms are material as defined in 552.212-4(w)(1)(iv) or 552.232-78(a)(6).**

b. **When authorizing a contract modification to update commercial supplier agreement terms, the contracting officer must consider the impact to the Government's rights and negotiate the terms if necessary.**

c. The contracting officer is responsible for maintaining a current copy of the commercial supplier agreement in the contract file.

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PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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552.212-4 Contract Terms and Conditions-Commercial Items. [(FAR DEVIATION) (DATE)]

[As prescribed in 512.301(e), replace subparagraph (g)(2), paragraph (s), and paragraph (u) of FAR clause 52.212-4. Also, add paragraph (w) to FAR clause 52.212-4:] ~~Alternate II (FAR Deviation) (Nov 2009). When a commercial item contract is contemplated and the contract will include the clause at FAR 52.212-4, insert this Alternate II instead of subparagraph (g)(2) of the FAR clause.~~

(g)(2) The due date for making invoice payments by the designated payment office is the later of the following two events:

- (i) The 10th day after the designated billing office receives a proper invoice from the Contractor. If the designated billing office fails to annotate the invoice with the date of receipt at the time of receipt, the invoice payment due date shall be the 10th day after the date of the Contractor's invoice; provided the Contractor submitted a proper invoice and no disagreement exists over quantity, quality, or Contractor compliance with contract requirements.
- (ii) The 10th day after Government acceptance of supplies delivered or services performed by the Contractor.

[(s) Order of precedence. Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order:

- (1) The schedule of supplies/services.**
- (2) The Assignments, Disputes, Payments, Invoice, Other Compliances, Compliance with Laws Unique to Government Contracts, Unauthorized Obligations, and Commercial Supplier Agreements – Unenforceable Clauses paragraphs of this clause.**
- (3) The clause at 52.212-5.**
- (4) Addenda to this solicitation or contract, including any commercial supplier agreements as amended by the Commercial Supplier Agreements - Unenforceable Clauses provision.**
- (5) Solicitation provisions if this is a solicitation.**
- (6) Other paragraphs of this clause.**
- (6) Addenda to this solicitation or contract, including any license agreements for computer software.**
- (7) The Standard Form 1449.**
- (8) Other documents, exhibits, and attachments.**
- (9) The specification.**

(u) Unauthorized Obligations.

(1) Except as stated in paragraph (u)(2) of this clause, when any supply or service acquired under this contract is subject to any commercial supplier agreement (as defined in 502.101) that includes any language, provision, or clause requiring the Government to pay any future fees, penalties, interest, legal costs or to indemnify the Contractor or any person or entity for damages, costs, fees, or any other loss or liability that would create an Anti-Deficiency Act violation (31 U.S.C. 1341), the following shall govern:

(i) Any such language, provision, or clause is unenforceable against the Government.

(ii) Neither the Government nor any Government authorized end user shall be deemed to have agreed to such clause by virtue of it appearing in the commercial supplier agreement. If the commercial supplier agreement is invoked through an "I agree" click box or other comparable mechanism (e.g., "click-wrap" or "browse-wrap" agreements), execution does not bind the Government or any Government authorized end user to such clause.

(iii) Any such language, provision, or clause is deemed to be stricken from the commercial supplier agreement.

(2) Paragraph (u)(1) of this clause does not apply to indemnification or any other payment by the Government that is expressly authorized by statute and specifically authorized under applicable agency regulations and procedures.

(w) Commercial supplier agreements – unenforceable clauses.

When any supply or service acquired under this contract is subject to a commercial supplier agreement (as defined in 502.101), the following language shall be deemed incorporated into the commercial supplier agreement. As used herein, "this agreement" means the commercial supplier agreement:

(1) Notwithstanding any other provision of this agreement, when the end user is an agency or instrumentality of the U.S. Government, the following shall apply:

(i) *Applicability.* This agreement is a part of a contract between the commercial supplier and the U.S. Government for the acquisition of the supply or service that necessitates a license or other similar legal instrument (including all contracts, task orders, and delivery orders under FAR Part 12).

(ii) *End user.* This agreement shall bind the ordering activity as end user but shall not operate to bind a Government employee or person acting on behalf of the Government in his or her personal capacity.

(iii) *Law and disputes.* This agreement is governed by Federal law.

(A) Any language purporting to subject the U.S. Government to the laws of a U.S. state, U.S. territory, district, or municipality, or a foreign nation, except where Federal law expressly provides for the application of such laws, is hereby deleted.

(B) Any language requiring dispute resolution in a specific forum or venue that is different from that prescribed by applicable Federal law is hereby deleted.

(C) Any language prescribing a different time period for bringing an action than that prescribed by applicable Federal law in relation to a dispute is hereby deleted.

(iv) *Continued performance.* The supplier or licensor shall not unilaterally revoke, terminate or suspend any rights granted to the Government except as allowed by this contract. If the supplier or licensor believes the ordering activity to be in breach of the agreement, it shall pursue its rights under the Contract Disputes Act or other applicable Federal statute while continuing performance as set forth in subparagraph (d) (Disputes).

(v) *Arbitration; equitable or injunctive relief.* In the event of a claim or dispute arising under or relating to this agreement, a binding arbitration shall not be used unless specifically authorized by agency guidance, and equitable or injunctive relief, including the award of attorney fees, costs or interest, may be awarded against the U.S. Government only when explicitly provided by statute (e.g., Prompt Payment Act or Equal Access to Justice Act).

(vi) ~~Additional~~ Updating terms.

~~(A) This commercial supplier agreement may incorporate additional terms by reference, provided that the full text of the terms are provided with the offer.~~

~~(AB) After award, the contractor may unilaterally revise commercial supplier agreement terms provided: if they are not material. A material change is defined as:~~

(1) Terms ~~do not materially that~~ change Government rights or obligations;

(2) Terms ~~do not that~~ increase Government prices;

(3) Terms ~~do not that~~ decrease overall level of service; or

(4) Terms ~~do not that~~ limit any other Government right addressed elsewhere in this contract.

~~(B) For revisions that will materially change the terms of the contract, the revised commercial supplier agreement must be incorporated into the contract using a bilateral modification.~~

~~(C) The order of precedence clause of this contract is not enforceable against the government, notwithstanding a Any software agreement license terms or conditions unilaterally revised subsequent to award that are is inconsistent with any material term or provision of this contract shall not be enforceable against the Government, and the Government shall not be deemed to have consented to them.~~

(vii) *No automatic renewals.* If any license or service tied to periodic payment is provided under this agreement (e.g., annual software maintenance or annual lease term), such license or service shall not renew automatically upon

expiration of its current term without prior express consent by an authorized Government representative approval.

(viii) *Indemnification.* Any clause of this agreement requiring the commercial supplier or licensor to defend or indemnify the end user is hereby amended to provide that the U.S. Department of Justice has the sole right to represent the United States in any such action, in accordance with 28 U.S.C. 516.

(ix) *Audits.* Any clause of this agreement permitting the commercial supplier or licensor to audit the end user's compliance with this agreement is hereby amended as follows:

(A) Discrepancies found in an audit may result in a charge by the commercial supplier or licensor to the ordering activity. Any resulting invoice must comply with the proper invoicing requirements specified in the underlying Government contract or order.

(B) This charge, if disputed by the ordering activity, will be resolved in accordance with subparagraph (d) (~~Disputes~~) ~~through the Disputes clause at 552.212-4(d).~~ no payment obligation shall arise on the part of the ordering activity until the conclusion of the dispute process.

(C) Any audit requested by the contractor will be performed at the contractor's expense, without reimbursement by the Government.

(x) *Taxes or surcharges.* Any taxes or surcharges which the commercial supplier or licensor seeks to pass along to the Government as end user will be governed by the terms of the underlying Government contract or order and, in any event, must be submitted to the Contracting Officer for a determination of applicability prior to invoicing unless specifically agreed to otherwise in the Government contract.

(xi) *Non-assignment.* This agreement may not be assigned, nor may any rights or obligations thereunder be delegated, without the Government's prior approval, except as expressly permitted under subparagraph (b) of this clause ~~at 552.212-4.~~

(xii) *Confidential information.* If this agreement includes a confidentiality clause, such clause is hereby amended to state that neither the agreement nor the ~~Federal Supply Schedule contract price list, as applicable,~~ shall be deemed "confidential information." Issues regarding release of "unit pricing" will be resolved consistent with the Freedom of Information Act. Notwithstanding anything in this agreement to the contrary, the Government may retain any confidential information as required by law, regulation or its internal document retention procedures for legal, regulatory or compliance purposes; provided, however, that all such retained confidential information will continue to be subject to the confidentiality obligations of this agreement.

(2) If any language, provision, or clause of this agreement conflicts or is inconsistent with the preceding paragraph (w)(1), the language, provisions, or clause of paragraph (w)(1) shall prevail to the extent of such inconsistency.

End of Clause]

* * * * *

[552.232-39 Unenforceability of Unauthorized Obligations (FAR DEVIATION).

As prescribed in 513.302-5 and 532.706-3, insert the following clause:

552.232-39 Unenforceability of Unauthorized Obligations. (FAR DEVIATION)(DATE)

(a) Except as stated in paragraph (b) of this clause, when any supply or service acquired under this contract is subject to any commercial supplier agreement (as defined in 502.101) that includes any language, provision, or clause requiring the Government to pay any future fees, penalties, interest, legal costs or to indemnify the Contractor or any person or entity for damages, costs, fees, or any other loss or liability that would create an Anti-Deficiency Act violation (31 U.S.C. 1341), the following shall govern:

(1) Any such language, provision, or clause is unenforceable against the Government.

(2) Neither the Government nor any Government authorized end user shall be deemed to have agreed to such language, provision, or clause by virtue of it appearing in the commercial supplier agreement. If the commercial supplier agreement is invoked through an "I agree" click box or other comparable mechanism (e.g., "click-wrap" or "browse-wrap" agreements), execution does not bind the Government or any Government authorized end user to such clause.

(3) Any such language, provision, or clause is deemed to be stricken from the commercial supplier agreement.

(b) Paragraph (a) of this clause does not apply to indemnification or any other payment by the Government that is expressly authorized by statute and specifically authorized under applicable agency regulations and procedures.

End of Clause]

* * * * *

[552.232-78 Commercial Supplier Agreements – Unenforceable Clauses.

As prescribed in 513.302-5 and 532.706-3 insert the following clause:

Commercial Supplier Agreements – Unenforceable Clauses (DATE)

~~(a)~~ When any supply or service acquired under this contract is subject to a commercial supplier agreement (as defined in 502.101), the following language shall be deemed incorporated into the commercial supplier agreement. As used herein, "this agreement" means the commercial supplier agreement :

~~(a)~~ Notwithstanding any other provision of this agreement, when the end user is an agency or instrumentality of the U.S. Government, the following shall apply:

~~(1)~~ *Applicability.* This agreement is part of a contract between the commercial supplier and the U.S. Government for the acquisition of the supply or service that necessitates a license or other similar legal instrument (including all contracts, task orders, and delivery orders under FAR Parts 13, 14 or 15).

(2ii) End user. This agreement shall bind the ordering activity as end user but shall not operate to bind a Government employee or person acting on behalf of the Government in his or her personal capacity.

(3iii) Law and disputes. This agreement is governed by Federal law.

(iA) Any language purporting to subject the U.S. Government to the laws of a U.S. state, U.S. territory, district, or municipality, or foreign nation, except where Federal law expressly provides for the application of such laws, is hereby deleted.

(iiB) Any language requiring dispute resolution in a specific forum or venue that is different from that prescribed by applicable Federal law is hereby deleted.

(iiiC) Any language prescribing a different time period for bringing an action than that prescribed by applicable Federal law in relation to a dispute is hereby deleted.

(4iv) Continued performance. The supplier or licensor shall not unilaterally revoke, terminate or suspend any rights granted to the Government except as allowed by this contract. If the supplier or licensor believes the ordering activity to be in breach of the agreement, it shall pursue its rights under the Contract Disputes Act or other applicable Federal statute while continuing performance as set forth in FAR 52.233-1, ~~subparagraph (d) (Disputes)~~.

(5v) Arbitration; equitable or injunctive relief. In the event of a claim or dispute arising under or relating to this agreement, a binding arbitration shall not be used unless specifically authorized by agency guidance, and equitable or injunctive relief, including the award of attorney fees, costs or interest, may be awarded against the U.S. Government only when explicitly provided by statute (e.g., Prompt Payment Act or Equal Access to Justice Act).

(6vi) Updating Additional terms.

(A) ~~This commercial supplier agreement may incorporate additional terms by reference, provided that the full text of the terms are provided with the offer.~~

(iB) After award, the contractor may unilaterally revise commercial supplier agreement terms ~~provided~~; if they are not material. A material change is defined as:

(A1) ~~Terms do not materially~~ that significantly change Government rights or obligations;

(B2) ~~Terms do not~~ that increase Government prices;

(C3) ~~Terms do not~~ that decrease overall level of service; or

(D4) Terms do not that limit any other Government right addressed elsewhere in this contract.

(ii) For revisions that will materially change the terms of the contract, the revised commercial supplier agreement must be incorporated into the contract using a bilateral modification.

(iiiC) ~~The order of precedence clause of this contract notwithstanding a~~ Any software license agreement terms or conditions unilaterally revised subsequent to award that ~~are is~~ inconsistent with any material term or provision of this contract shall ~~is~~ not be enforceable against the Government, and the Government shall not be deemed to have consented to them.

(7vii) *No automatic renewals.* If any license or service tied to periodic payment is provided under this agreement (e.g., annual software maintenance or annual lease term), such license or service shall not renew automatically upon expiration of its current term without prior express consent by an authorized Government representative approval.

(8viii) *Indemnification.* Any clause of this agreement requiring the commercial supplier or licensor to defend or indemnify the end user is hereby amended to provide that the U.S. Department of Justice has the sole right to represent the United States in any such action, in accordance with 28 U.S.C. 516.

(9ix) *Audits.* Any clause of this agreement permitting the commercial supplier or licensor to audit the end user's compliance with this agreement is hereby amended as follows:

(iA) Discrepancies found in an audit may result in a charge by the commercial supplier or licensor to the ordering activity. Any resulting invoice must comply with the proper invoicing requirements specified in the underlying Government contract or order.

(iiB) This charge, if disputed by the ordering activity, will be resolved through the Disputes clause at FAR 52.233-1; no payment obligation shall arise on the part of the ordering activity until the conclusion of the dispute process.

(iiiC) Any audit requested by the contractor will be performed at the contractor's expense, without reimbursement by the Government.

(10x) *Taxes or surcharges.* Any taxes or surcharges which the commercial supplier or licensor seeks to pass along to the Government as end user will be governed by the terms of the underlying Government contract or order and, in any event, must be submitted to the Contracting Officer for a determination of applicability prior to invoicing unless specifically agreed to otherwise in the Government contract.

(11xi) *Non-assignment.* This agreement may not be assigned, nor may any rights or obligations thereunder be delegated, without the Government's prior

approval, except as expressly permitted under the clause at FAR 52.232-23,
Assignment of Claims.

~~(12xii)~~ *Confidential information.* If this agreement includes a confidentiality clause, such clause is hereby amended to state that neither the agreement nor the Federal Supply Schedule contract price list, as applicable, shall be deemed “confidential information.” Issues regarding release of “unit pricing” will be resolved consistent with the Freedom of Information Act. Notwithstanding anything in this agreement to the contrary, the Government may retain any confidential information as required by law, regulation or its internal document retention procedures for legal, regulatory or compliance purposes; provided, however, that all such retained confidential information will continue to be subject to the confidentiality obligations of this agreement.

(b2) If any language, provision or clause of this agreement conflicts or is inconsistent with the preceding subparagraph (a)~~(1)~~, the language, provisions, or clause of subparagraph (a)~~(1)~~ shall prevail to the extent of such inconsistency.

End of Clause]