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**GENERAL SERVICES ADMINISTRATION**

**48 CFR Parts 502, 512, 513, 532, and 552**

**[GSAR Case 2015-G512; Docket No. 2016-0010; Sequence No. 1]**

**RIN 3090-AJ67**

**General Services Administration Acquisition Regulation (GSAR);  
Unenforceable Commercial Supplier Agreement Terms**

**AGENCY:** Office of Acquisition Policy, General Services Administration (GSA).

**ACTION:** Proposed rule.

**SUMMARY:** The General Services Administration (GSA) is proposing to amend the General Services Administration Acquisition Regulation (GSAR) to address common Commercial Supplier Agreement terms that are inconsistent with or create ambiguity with Federal Law.

**DATES:** Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]** to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments in response to GSAR Case 2015-G512 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by searching for "GSAR Case 2015-G512". Select the link "Comment Now" that corresponds with GSAR Case 2015-G215.

Follow the instructions provided on the screen. Please include your name, company name (if any), and "GSAR Case 2015-G512" on all attached document(s).

- Mail: General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street, NW., 2nd Floor, ATTN: Ms. Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite GSAR Case 2015-G512, in all correspondence related to this case. All comments received will generally be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check [www.regulations.gov](http://www.regulations.gov) to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** For clarification about content, contact Ms. Janet Fry, General Services Acquisition Policy Division, by phone at 703-605-3167 or by email at [Janet.Fry@gsa.gov](mailto:Janet.Fry@gsa.gov). For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite GSAR Case 2015-G512.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

A. Incompatibility of Commercial Supplier Agreements.

GSA defines Commercial Supplier Agreements as terms and conditions that are customarily offered to the public by vendors of supplies or services that meet the definition of "commercial item" and are 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.

Customarily, commercial supplies and services are offered to the public under standard agreements that may take a variety of forms, including license agreements, terms of service (TOS), terms of sale or purchase, and similar agreements. These customary, standard Commercial Supplier Agreements typically contain terms and conditions that make sense when the purchaser is a private party but are inappropriate when the purchaser is the Federal Government.

The existence of Federally-incompatible terms in standard Commercial Supplier Agreements has long been recognized in FAR 27.405-3(b), which is limited to the acquisition of commercial computer software. This clause advises contracting officers to exercise caution when accepting a contractor's terms and conditions. The use of

Commercial Supplier Agreements is not limited to information technology acquisitions; Commercial Supplier Agreements have become ubiquitous in a broad variety of contexts, from travel to telecommunications to financial services to building maintenance systems, including purchases below the simplified acquisition threshold.

Discrepancies between Commercial Supplier Agreements and Federal law or the Government's needs create recurrent points of inconsistency. Below are several examples of incompatible clauses that are commonly found in Commercial Supplier Agreements:

- Jurisdiction or venue clauses may require that disputes be resolved in a particular state or Federal court. Such clauses conflict with the sovereign immunity of the U.S. Government and cannot apply to litigation where the U.S. Government is a defendant because those disputes must be heard either in U.S. District Court (28 U.S.C. 1346) or the U.S. Court of Federal Claims (28 U.S.C. 1491).

- Automatic renewal clauses may automatically renew or extend contracts unless affirmative action is taken by the Government. Such clauses that require the obligation of funds prior to appropriation violate the restrictions of the Anti-Deficiency Act (31 U.S.C. 1341(a)(1)(B)).

- Termination clauses may allow the contractor to unilaterally terminate a contract if the Government is alleged to have breached the contract. Government contracts are subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613). The Contract Disputes Act requires a certain process for resolving disputes, including terminations, and that the "Contractor shall proceed diligently with performance of this contract, pending final resolution" under the terms of the FAR Disputes clause at 52.233-1.

Additionally, the current order of precedence contained in the Commercial Items clause at FAR 52.212-4 is not clear on prevailing terms, and potentially allows Commercial Supplier Agreements to supersede the terms of Federal contracts, especially in those areas where Federal law is implicated indirectly. As a result, industry and Government representatives must spend significant time and resources negotiating and tailoring Commercial Supplier Agreements to comply with Federal law and to ensure both parties have agreement on the contract terms.

B. Value of addressing incompatible Commercial Supplier Agreements.

GSA has identified common illegal, improper or inappropriate Commercial Supplier Agreement terms that

constitute the majority of the negotiated Commercial Supplier Agreement terms. The outcome of the negotiations regarding these identified terms is generally predetermined by rule of law, but GSA and contractors must spend significant time and resources to negotiate out these terms. By explicitly addressing common unenforceable terms within the Commercial Items clause at FAR 52.212-4 and clarifying prevailing terms in the order of precedence, it eliminates the need for negotiation on these identified terms, and makes clear to both parties the precedence of terms.

This approach will decrease the time needed for legal review prior to contract formation and will significantly reduce costs to both the Government and contractors. GSA believes that such an approach will benefit contractors, including small business concerns by 1) decreasing proposal costs associated with negotiating the identified unenforceable Commercial Supplier Agreement terms; 2) facilitating faster procurement and contract lead times, therefore decreasing the time it takes for contractors to make a return on their investment; 3) reducing administrative costs for companies that maintain alternate Federally compliant Commercial Supplier Agreements; and 4) for small business concerns it levels the playing field

with larger competitors since negotiations will only be required if the Commercial Supplier Agreements contains objectionable clauses outside of those already identified in proposed clause. Additionally, this approach ensures consistent application and understanding of these unenforceable terms.

C. GSA Class Deviation.

On July 31, 2015, GSA issued a class deviation to immediately address the order of precedence and Commercial Supplier Agreement terms that are incompatible with Federal law. The class deviation protects GSA and contractors by uniformly addressing common unacceptable terms, immediately reducing risk, reducing administrative cost and further streamlining the acquisition process for commercial-item supplies and services. Additionally the class deviation clarifies the precedence of terms to ensure both parties have a mutual understanding of the contract terms. For example, bilateral modifications to the commercial supplier agreements are only required for material changes to ensure the contracting officer is aware of and agrees to the changes.

A supplement to the class deviation was issued on September 30, 2015, to 1) reiterate that the change in the order of precedence protects GSA in the occasion where

unilateral license updates could change government rights, and 2) clarify that Commercial Supplier Agreement terms can be negotiated except for the improper terms addressed in paragraph (w) of the GSAR clause 552.212-4. GSA refined the language in the class deviation while developing this proposed rule to further clarify 1) unauthorized obligations and other fees; 2) unilateral termination provisions; and 3) terms incorporated by reference. These issues are discussed in greater detail in Section II of this rule.

## **II. Discussion and Analysis**

GSA is proposing to amend the General Services Administration Acquisition Regulation (GSAR) to implement standard terms and conditions for the most common conflicting Commercial Supplier Agreement terms to minimize the need for the negotiation of the terms of Commercial Supplier Agreements on an individual basis. The proposed rule will add provisions to contracts making certain conflicting or inconsistent terms in a Commercial Supplier Agreement unenforceable, so long as an express exception is not authorized elsewhere by Federal statute. GSA is also proposing to amend the GSAR to modify the order of precedence contained in the Commercial Items clause (52.212-4) to make clear that all of the terms of the GSAR



clause control in the event of a conflict with a Commercial Supplier Agreement unless both parties agree to specific terms during the course of negotiating the contract.

Both of the above changes will be accomplished by revising guidance and clauses contained throughout the GSAR. The specific changes contained in the proposed rule are as follows:

- A definition for Commercial Supplier Agreements is added at GSAR 502.101.
- GSAR 512.216 is created and clarifies that paragraph (u) of the Commercial Items clause at 552.212-4 prevents violation of the Anti-Deficiency Act.
- GSAR 512.301 is updated to prescribe the use of the deviated Commercial Items clause at 552.212-4 in lieu of FAR 52.212-4.
- GSAR 513.202 is created and will automatically apply the clause at 552.232-39 into all purchases below the micro-purchase threshold.
- GSAR 513.302-5 is created and requires the inclusion of GSAR 552.232-39 and 552.232-78 in all acquisitions for supplies or services that are offered under a Commercial Supplier Agreement.
- GSAR 532.705 is created and clarifies the definition of supplier license agreements as used in the

Unenforceability of Unauthorized Obligations clause at FAR 32.705.

- GSAR 532.706-3 is created and directs contracting officers to utilize the clause at GSAR 552.232-39 in lieu of FAR 52.232-39 and prescribes the use of the clause Commercial Supplier Agreements - Unenforceable Clauses at 552.232-78.

- The Commercial Items clause at GSAR 552.212-4 is modified to include instructions to contracting officers on how to incorporate the change in language from FAR 52.212-4.

- The order of precedence contained in paragraph (s) of the Commercial Items clause at GSAR 552.212-4 is amended to ensure that all of the terms of GSAR 552.212-4 shall control over the terms of a Commercial Supplier Agreement by moving "Addenda to this solicitation or contract, including any license agreements for computer software" down two spaces in the order of precedence, behind "Solicitation provisions as awarded if there is a solicitation" and "Other paragraphs of this clause."

- Paragraph (u) of the Commercial Items clause at GSAR 552.212-4 is amended to 1) reflect the new Commercial Supplier Agreement definition contained in GSAR 502.101, 2) to expand coverage to "language or provision" in addition

to "clause" in order to ensure that all Commercial Supplier Agreement terms are covered, regardless of terminology utilized, and 3) to include future fees, penalties, interest and legal costs as unauthorized obligations in addition to indemnification.

- Paragraph (w) of the Commercial Items clause at GSAR 552.212-4 is created to address the following commonplace unenforceable elements found in Commercial Supplier Agreements:

- Definition of contracting parties: Contract agreements are between the commercial supplier or licensor and the U.S. Government. Government employees or persons acting on behalf of the Government will not be bound in their personal capacity by the Commercial Supplier Agreement.

- Laws and disputes: Clauses that conflict with the sovereign immunity of the U.S. Government cannot apply to litigation where the U.S. Government is a defendant because those disputes must be heard either in U.S. District Court or the U.S. Court of Federal Claims. Commercial Supplier Agreement terms that require the resolution of a dispute in a forum or time period other than that expressly authorized by Federal law are deleted. Statutes of limitation on

potential claims shall be governed by U.S. Government law.

o Continued Performance: Commercial suppliers may not unilaterally terminate or suspend a contract based upon a suspected breach of contract by the Government. Accepting terms that can be unilaterally terminated or revoked places the Government at risk of not receiving goods or services for money it has obligated on a contract or task order, if the price paid by the Government is non-refundable. This position is in violation of 31 U.S.C. 3324, which provides that payment under a contract may not exceed the value of a service or product already delivered. A license that is prematurely terminated outside of the regular dispute resolution procedures results in the Government not receiving the value of that license because the license is no longer delivered. The removal of the contractor's right to unilateral termination does not impair the contractor's ability to pursue remedies. It preserves all the legal remedies the contractor otherwise has under Federal law, including Contract Disputes Act claims. Remedies through the Contract Disputes Act or other applicable

Federal statutes align with the continuing performance requirement set forth in subparagraph (d) Disputes.

o Arbitration; equitable or injunctive relief: A binding arbitration may not be enforced unless explicitly authorized by agency guidance or statute. Equitable remedies or injunctive relief such as attorney fees, cost or interest may only be awarded against the U.S. Government when expressly authorized by statute (e.g., Prompt Payment Act).

o Additional Terms: Incorporation of terms by reference is allowed provided the full text of terms is provided with the offer. Unilateral modifications to the Commercial Supplier Agreement after the time of award may be allowed to the extent that the modified terms do not materially change the Government's rights or obligations, increase the Government's prices, decrease the level of service provided, or limit any Government right addressed elsewhere in the contract. A bilateral contract modification is required in order for any of the above described changes to be enforceable against the Government.

o Automatic renewals: Due to Anti-Deficiency Act restrictions, automatic contract renewal clauses

are impermissible. Any such Commercial Supplier Agreement clauses are unenforceable.

o Indemnity (contractor assumes control of proceedings): Any clause requiring that the commercial supplier or licensor control any litigation arising from the Government's use of the contractor's supplies or services is deleted. Such representation when the Government is a party is reserved by statute for the U.S. Department of Justice.

o Audits (automatic liability for payment): Discrepancies found during an audit must comply with the invoicing procedures from the underlying contract. Disputed charges must be resolved through the Disputes clause. Any audits requested by the commercial supplier or licensor will be performed at supplier or licensor's expense.

o Taxes or surcharges: Any taxes or surcharges that will be passed along to the Government will be governed by the terms of the underlying contract. The cognizant contracting officer must make a determination of applicability of taxes whenever such a request is made.

o Assignment of Commercial Supplier Agreement or Government contract by supplier: The contract,

Commercial Supplier Agreement, party rights and party obligations may not be assigned or delegated without express Government approval. Payment to a third party financial institution may still be reassigned.

o Confidentiality of Commercial Supplier Agreement terms and conditions: The content of the Commercial Supplier Agreement and the Federal Supply Schedule list price (if applicable) may not be deemed confidential. The Government may retain other marked confidential information as required by law, regulation or agency guidance, but will appropriately guard such confidential information.

● GSAR 552.232-78 is created and addresses the same common unenforceable Commercial Supplier Agreement terms addressed in GSAR 552.212-4(w) described above.

● GSAR 552.232-39 is created to amended the language of FAR 52.232-39 to reflect the definition of Commercial Supplier Agreements contained at GSAR 502.101, to expand coverage to "language or provision" in addition to "clause" in order to ensure that all Commercial Supplier Agreement terms are covered, regardless of terminology utilized, and to include future fees, penalties, interest and legal costs as unauthorized obligations in addition to indemnification.

This proposed rule will reduce risk by uniformly addressing common unacceptable Commercial Supplier Agreement terms, facilitate efficiency and effectiveness in the contracting process by reducing the administrative burden for the Government and industry, and promote competition by reducing barriers to industry, particularly for small businesses.

### **III. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

### **IV. Regulatory Flexibility Act**

The change may have a significant economic impact on a substantial number of small entities within the meaning of



the Regulatory Flexibility Act 5 U.S.C. 601, et seq. The analysis is summarized as follows:

This effort is expected to reduce the overall burden on small entities by reducing the amount of time and resources required to negotiate Commercial Supplier Agreements. GSA believes that such an approach will disproportionately benefit small business concerns since they are less likely to retain in-house counsel and the GSAR revision will reduce or eliminate the costs associated with the negotiation of the identified unenforceable elements. Furthermore, this approach will allow small businesses that do not have Commercial Supplier Agreements tailored to Federal Government procurements to potentially utilize their otherwise compliant, standard Commercial Supplier Agreements when conducting business with the Government.

The Regulatory Secretariat Division will be submitting a copy of the Initial Regulatory Flexibility Analysis (IRFA) to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. GSA invites comments from small business concerns and other interested parties on the expected impact of this proposed rule on small entities.

GSA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (GSAR Case 2015-G512) in correspondence.

## **V. Paperwork Reduction Act**

The proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

**List of Subjects in 48 CFR parts 502, 512, 513, 532, and 552:**

Government procurement.

Dated: May 20, 2016.

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Office of Acquisition Policy,  
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Therefore, GSA proposes to amend 48 CFR parts 502, 512, 513, 532, and 552 as set forth below:

1. Add part 502 to read as follows:

**PART 502—DEFINITIONS OF WORDS AND TERMS**

**Subpart 502.1-Definitions**

502.101 Definitions.

**Authority:** 40 U.S.C. 121(c).

**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—

- (1) 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;

(2) 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 512—ACQUISITION OF COMMERCIAL ITEMS**

2. The authority citation for part 512 is revised to read as follows:

**Authority:** 40 U.S.C. 121(c).

3. Add subpart 512.2, consisting of 512.216, to read as follows:

**Subpart 512.2—Special Requirements for the Acquisition of Commercial Items**

**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.

4. Amend section 512.301 by adding paragraph (e) to read as follows:

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

\* \* \* \* \*

(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. The contracting officer may tailor this clause in accordance with FAR 12.302 and GSAM 512.302.

5. Add part 513 to read as follows:

**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.

**Subpart 513.3 Simplified Acquisition Methods**

513.302-5 Clauses.

**Authority:** 40 U.S.C. 121(c).

**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**

**513.302-5 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.

**PART 532-CONTRACT FINANCING**

6. The authority citation for 48 CFR part 532 continues to read as follows:

**Authority:** 40 U.S.C. 121(c).

7. Add subpart 532.7, consisting of 532.705 and 532.706-3, to read as follows:

**Subpart 532.7-Contract Funding**

**532.705 Unenforceability of unauthorized obligations.**

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

**532.706-3 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.

**PART 552-SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

8. The authority citation for 48 CFR part 552 continues to read as follows:

**Authority:** 40 U.S.C. 121(c).

9. Revise section 552.212-4 to read as follows.

**552.212-4 Contract Terms and Conditions-Commercial Items (FAR DEVIATION).**

As prescribed in 512.301(e), replace paragraphs (g) (2), (s), and (u) of FAR clause 52.212-4. Also, add paragraph (w) to FAR clause 52.212-4.

**CONTRACT TERMS AND CONDITIONS-COMMERCIAL ITEMS (FAR DEVIATION) (DATE)**

(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) Solicitation provisions if this is a solicitation.

(5) 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 (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 paragraph (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 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.

(B) After award, the contractor may unilaterally revise terms provided:

(1) Terms do not materially change government rights or obligations;

(2) Terms do not increase government prices;

(3) Terms do not decrease overall level of service; and

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

(C) The order of precedence clause of this contract is not enforceable against the government, notwithstanding any software license terms unilaterally revised subsequent to award that is inconsistent with any material term or provision of this contract.

(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 Government 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 through the Disputes clause at 522.212-4(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 price list 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)

10. Add section 552.232-39 to read as follows:

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

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

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)

11. Add section 552.232-78 to read as follows:

**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, 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 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 (including all contracts, task orders, and delivery orders under FAR Parts 13, 14 or 15).

(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 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 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.

(B) After award the contractor may unilaterally revise terms provided:

(1) Terms do not materially change government rights or obligations; and

(2) Terms do not increase government prices; and

(3) Terms do not decrease overall level of service; and

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

(C) The order of precedence clause of this contract notwithstanding, any software license terms unilaterally revised subsequent to award that is inconsistent with any material term or provision of this contract is not enforceable against the government.

(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 Government 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 through the Disputes clause at 52.233-1; 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 the clause at 52.232-23, Assignment of Claims.

(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 price list 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 subparagraph (a) (1), the language, provisions, or clause of subparagraph (a) (1) shall prevail to the extent of such inconsistency.

(End of clause)

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