

**GENERAL SERVICES ADMINISTRATION**

**Office of Government-wide Policy**

**Commercial Supplier Agreements Class Deviation**

**General Services Acquisition Regulation (GSAR) Class Deviation**

The baseline for this class deviation is GSAR Change 62, dated January 13, 2015. Five asterisks (\* \* \* \* \*) indicate that there are no revisions between the preceding and following sections. Three asterisks (\* \* \*) indicate that there are no additional revisions between the material shown within a subsection.

**Proposed GSAR Text - CSA Deviation**

PART 502-DEFINITIONS OF WORDS AND TERMS

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 customer/licensee (sometimes defined as 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), Software License Agreement (SLA) 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.

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PART 552-SOLICITATION PROVISIONS AND CONTRACT CLAUSES

552.212-4 Contract Terms and Conditions-Commercial Items. (ALTERNATE II) (FAR DEVIATION) (DATE)

As directed in Acquisition Letter MV-2015-XX, when a commercial item contract (using FAR Part 12 procedures) is contemplated and the contract will include FAR 52.212-4, replace subparagraph (g) (2), paragraph (s), and paragraph (u) of the basic clause; additionally, add paragraph (w).

\* \* \*

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

(i) The 10<sup>th</sup> 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 10<sup>th</sup> 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 10<sup>th</sup> 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, Invoices, 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 license agreements for computer software.
- (5) Solicitation provisions if this is a solicitation.
- (6) Other paragraphs of this clause.
- (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 indemnify the Contractor or any person or entity for damages, costs, fees, or any other loss or

**Comment [CA1]:** This change is made to assure that where unacceptable language is part of a larger clause or provision, only the offending language is will be struck from the agreement, not the entire clause.

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.

**Comment [CA2]:** This change is made to assure that where unacceptable language is part of a larger clause or provision, only the offending language is will be struck from the agreement, not the entire clause.

\* \* \*

(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 ~~(or the licensor, where the commercial supplier agreement contains a license)~~ 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).

**Comment [CA3]:** This provision should be clear that this clause does not necessarily result in an agreement with the licensor for the supply or service being procured.

(ii) *Licensee or Customer.* This agreement shall bind the Government as licensee or customer 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 provision 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 provision requiring dispute resolution in a specific forum or venue that is different from that prescribed by applicable Federal law is hereby deleted. (C) Any provision prescribing a different time period for bringing an action than that prescribed by applicable Federal law in relation to a dispute is hereby deleted.

**Comment [CA4]:** This provision should clarify the intention behind the use of the term "action" in order to avoid potential ambiguity.

(iv) *Continued performance.* ~~this agreement may not be unilaterally terminated by the commercial supplier or licensor, and the provision of supplies or services under this agreement may not be unilaterally suspended unless generally withdrawn from the commercial market.~~ 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) of this clause ~~at~~ 522.212-4 (Disputes), (Disputes).

**Comment [CA5]:** This clause was revised to avoid the implication that it limited the contractors right to cancel pursuant to the underlying contract

(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 (B) 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) ~~No additional terms. No other~~ Any commercial supplier terms ~~shall bind the Government unless~~ included verbatim (not by reference (i.e. via web links, click and accept, or other electronic means) ~~in the commercial supplier agreement and added to the Government contract or order with the approval of the cognizant contracting officer, shall bind the government and authorized end users only to the extent that they comply with this clause~~ (w) *Commercial supplier agreements - unenforceable clauses*

**Comment [CA6]:** Members companies state that this provision will impact software business dramatically because the specific details of software products, technical information, details and instructions on how to use the products, installation details of upgrades and the like are all contained in documentation that is provided electronically, by reference. There are thousands of products and versions of these documents. Even if companies could print each one at the initial proposal phase they cannot manage each account and provide the updated license as each new version, release, patch is provided to customers. While we agree that the unenforceable terms should not apply, we do not believe that it is manageable for either the contractor or the government to have a process that requires the contracting officer to review and approve every change as a written contract modification. Such a process is not commercial practice and will result in a paralyzing workload for the government.

(vii) *No unilateral changes.* Any clause of this agreement claiming that one party to the agreement may unilaterally change any provision of this agreement (including prices) shall not apply.

**Comment [CA7]:** These changes are absolutely vital. We need special terms and conditions negotiated with Govt. customers on the basis of enterprise licenses for instance. These terms and conditions are tailored for the specific enterprise license which is in the Government's best interest to get the best value at the best price. Of course, we fully understand that Federal Law will take precedence.

(viii) *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.

(ix) *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 representation in the conduct of litigation in which the United States is a party or is interested is reserved for the U.S. Department of Justice in accordance with 28 U.S.C. 516.

(x) *Audits.* Any clause of this agreement permitting the commercial supplier or licensor to audit the licensee'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 52.212-4(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 commercial supplier or licensor will be performed at the commercial supplier's or licensor's expense, without reimbursement by the Government.

(xi) *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.

(xii) *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 52.212-4.

(xiii) *Confidential information.* If this agreement includes a confidentiality clause, such clause is hereby amended to state that the extent to which either (A) neither this agreement nor the final pricing agreed to by the ordering activity in the underlying Government contract or order shall be deemed "confidential information" notwithstanding marking to that effect, will be determined in accordance with the Freedom of Information Act. and (B) notwithstanding ~~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 provision language, provision or clause of this a commercial supplier agreement conflicts ~~or is inconsistent~~ with

**Comment [CA8]:** If the Contracting Officer has already made a determination and agreed to the applicability of a tax or surcharge, the contractor should not be required to continue seeking determinations unless requested by the CO in connection with his/her initial determination.

**Comment [CA9]:** This type of agreement contains can contain a vast amount of details, some of which may be confidential. Contractors should not have to give up rights to confidentiality in order to supply the government.

the preceding paragraph (w) (1), the language, provision or clause  
~~provisions of~~ paragraph (w) (1) shall prevail to the extent of  
~~such inconsistency~~ the conflict.

(End of Clause)

\* \* \* \* \*

**Comment [CA10]:** The term “inconsistent” could be interpreted to preclude supplemental terms that do not actually conflict with the deviation.

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

As directed in Acquisition Letter MV-2015-XX, insert the following clause in lieu of FAR 52.232-39:

(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 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 by the Government that is expressly authorized by statute or applicable agency regulations and procedures.

(End of Clause)

\* \* \* \* \*

552.232-78 Commercial Supplier Agreements - Unenforceable Clauses.

As directed in Acquisition Letter MV-2015-XX, insert the following clause into all contracts for the acquisition of commercial items or services when using the policies and procedures of FAR Parts 13, 14 or 15:

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 licensee/customer 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 ~~(or the licensor, where the commercial supplier agreement contains a license)~~ and the U.S. Government for the acquisition of the supply or service that necessitates a license

**Comment [CA11]:** This change is made to assure that where unacceptable language is part of a larger clause or provision, only the offending language is will be struck from the agreement, not the entire clause.

**Comment [CA12]:** This provision should be clear that this clause does not necessarily result in an agreement with the licensor for the supply or service being procured

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

(ii) *Licensee or Customer.* This agreement shall bind the ordering activity as licensee or customer 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 provision 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 provision requiring dispute resolution in a specific forum or venue that is different from that prescribed by applicable Federal law is hereby deleted. (C) Any provision prescribing a different time period for bringing an action than that prescribed by applicable Federal law in relation to a dispute is hereby deleted.

**Comment [CA13]:** This provision should clarify the intention behind the use of the term "action" in order to avoid potential ambiguity

(iv) *Continued performance.* ~~In accordance with subparagraph (i) of the clause at 52.233-1 (Disputes), this agreement may not be unilaterally terminated by the commercial supplier or licensor, and the provision of supplies or services under this agreement may not be unilaterally suspended unless generally withdrawn from the commercial market.~~ 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 such subparagraph ~~(i)~~ (i) of the clause at 52.233-1 (Disputes).

**Comment [CA14]:** This clause was revised to avoid the implication that it limited the contractors right to cancel pursuant to the underlying contract

(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 (B) 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).

**Comment [CA15]:** Members companies state that this provision will impact software business dramatically because the specific details of software products, technical information, details and instructions on how to use the products, installation details of upgrades and the like are all contained in documentation that is provided electronically, by reference. There are thousands of products and versions of these documents. Even if companies could print each one at the initial proposal phase they cannot manage each account and provide the updated license as each new version, release, patch is provided to customers. While we agree that the unenforceable terms should not apply, we do not believe that it is manageable for either the contractor or the government to have a process that requires the contracting officer to review and approve every change as a written contract modification. Such a process is not commercial practice and will result in a paralyzing workload for the government.

(vi) ~~No additional terms. No other~~ Any commercial supplier terms ~~shall bind the Government unless~~ included ~~verbatim~~ (not by reference) i.e. via web links, click and accept, or other electronic means in the commercial supplier agreement ~~and added to the Government contract or order with the approval of the cognizant contracting officer. Shall bind the government and authorized end users only to the extent that they comply with this clause 552.232-78 Commercial Supplier Agreements - Unenforceable Clauses~~

**Comment [CA16]:** These changes are absolutely vital. We need special terms and conditions negotiated with Govt. customers on the basis of enterprise licenses for instance. These terms and conditions are tailored for the specific enterprise license which is in the Government's best interest to get the best value at the best price. Of course, we fully understand that Federal Law will take precedence.

(vii) *No unilateral changes.* Any clause of this agreement claiming that one party to the agreement may unilaterally change any provision of this agreement shall not apply.

(viii) *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.

(ix) *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 representation in the conduct of litigation in which the United States is a party or is interested is reserved for the U.S. Department of Justice in accordance with 28 U.S.C. 516.

(x) *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 commercial supplier or licensor will be performed at the commercial supplier's or licensor's expense, without reimbursement by the Government.

(xi) *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.

(xii) *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.

(xiii) *Confidential information.* If this agreement includes a confidentiality clause, such clause is hereby amended to state that ~~(A) neither the extent to which either~~ this agreement nor the final pricing agreed to by the ordering activity in the underlying Government contract or order shall be deemed "confidential information"

**Comment [CA17]:** This type of agreement contains can contain a vast amount of details, some of which may be confidential. Contractors should not have to give up rights to confidentiality in order to supply the government.

will be determined in accordance with the Freedom of Information Act.

**Comment [EA18]:** Same comment as on page 6.

~~notwithstanding~~ Notwithstanding marking to that effect; and  
(B) notwithstanding anything in this agreement to the contrary, the Government may retain any confidential information as required by law, regulation or its bona fide 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.

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

**Comment [CA19]:** The term "inconsistent" could be interpreted to preclude supplemental terms that do not actually conflict with the deviation.

(End of Clause)