



GENERAL SERVICES ADMINISTRATION

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

[GSAR Change 83; GSAR Case 2015-G512; Docket No. 2016-0010; Sequence No. 2]

RIN 3090-AJ67

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

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

ACTION: Final rule.

SUMMARY: GSA is amending 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: Effective: **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Ms. Janet Fry, Senior Policy Advisor, GSA Acquisition Policy Division, at 703-605-3167 or janet.fry@gsa.gov. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite GSAR Case 2015-G512.

SUPPLEMENTARY INFORMATION:

I. Background

GSA published a proposed rule in the Federal Register at 81 FR 34302 on May 31, 2016, to amend the GSAR and address common

commercial supplier agreement terms that are inconsistent with or create ambiguity with Federal Law.

Standard commercial supplier agreements 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 commercial supplier agreements and Federal law or the Government's needs create recurrent points of inconsistency. 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. Explicitly addressing common unenforceable terms eliminates the need for negotiation on these identified terms.

This approach will: (1) decrease proposal costs associated with negotiating the identified unenforceable commercial supplier agreement terms; (2) facilitate faster procurement and contract lead times, therefore decreasing the time it takes for contractors to make a return on their investment; (3) reduce administrative costs for companies that maintain alternate Federally compliant commercial supplier agreements; and (4) for small business concerns, level the playing field with larger competitors since negotiations will only be required if the commercial supplier agreements contain objectionable clauses

outside of those already identified in the GSAR clause. Lastly, this approach ensures consistent application and understanding of these unenforceable terms, potentially reducing unnecessary legal costs.

II. Discussion of Proposed Rule

Two respondents submitted comments on the proposed rule. The General Services Administration has reviewed the comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of significant changes

This final rule makes the following significant changes from the proposed rule:

- GSAR 552.212-4(s)—Reverts the order of precedence to move “Addenda to the solicitation or contract, including any license agreements for computer software” back to number 4, and “Solicitation provisions of the solicitation” and “Other paragraphs of the clause” back to number 5 and 6, respectively. Additionally, language was added to clarify the Commercial Supplier Agreements-Unenforceable Clauses provision takes precedence over the commercial supplier agreement terms and conditions.
- GSAR 552.212-4(w) (1) (vi)—Deletes the requirement for providing full text terms with the offer, adds a definition

of a material change, and adds clarification on when a commercial supplier agreement must be bilaterally modified in the contract.

B. Analysis of public comments

Public comments are grouped into categories in order to provide clarification and to better respond to the issues raised.

1. Order of Precedence

Comment: Both respondents addressed concerns with the change to the order of precedence in paragraph(s) of GSAR clause 552.212-4 which places commercial supplier agreements in a lower position. The commenters stated that this could result in terms, which are not required by law or regulation, taking precedence over the standard commercial terms in a commercial supplier agreement. The commenters provided the example of a non-standard warranty contained in a solicitation provision or in 552.212-4 paragraph (o), Warranty, taking precedence over a company's standard commercial warranty contained in their commercial supplier agreement. Additional examples included title and ownership of software intellectual property ("IP"), warranty and exclusion of implied warranties, limitations of liability and exclusive remedies, and IP indemnification. One respondent stated the change in precedence creates a preference for Government terms and conditions that appears to contradict the

language of existing statute (Federal Acquisition Streamlining Act) and regulation (Federal Acquisition Regulation (FAR) part 12).

Response: The intent of the change in the order of precedence was (1) to ensure the Commercial Supplier Agreement - Unenforceable Clauses provisions take precedence over the standard commercial supplier agreements and (2) to provide clarity that awarded terms (i.e. those agreed to by both parties during contract formation), including the negotiated and awarded commercial supplier agreement, take precedence to unilateral changes to commercial supplier agreements made by the contractor. GSA reviewed the unintended impacts identified by the respondents and agrees that there are better ways to solve the problem.

Instead, GSA addressed intent (1) by adding language to 552.212-4(s) (4) to clarify that the Commercial Supplier Agreement-Unenforceable Clauses provisions take precedence over any commercial supplier agreement.

GSA addressed intent (2) by adding a new subparagraph to 552.212-4(w) (1) (vi) to clearly state that material changes to a commercial supplier agreement after award must be bilaterally modified into the contract to be enforceable against the Government. Additionally, subparagraph (C) was updated to more clearly state that unilateral revisions that are found to be

inconsistent with a material term of the contract are not enforceable against the Government (i.e. awarded commercial supplier terms will take precedence over terms updated unilaterally). Equivalent changes were made to the language at GSAR 552.232-78.

2. Full Text Terms

Comment: Both respondents voiced concerns about the burden on contractors to provide full text for all terms. Commercial supplier agreements may include terms by reference which can be voluminous. The terms may change at any time and providing full text would unduly delay awards and modifications. One respondent stated the requirement to submit the terms in writing seemed to imply they will be fixed terms, and that providing full text terms is not a commercial practice.

Response: The intent of this language was to ensure that the Government fully understands the terms and conditions agreed upon during contract formation.

As stated in the public comments, referenced terms on a website can be changed at any time, which is problematic during contract formation for the Government. The time between an offer and award of a contract could be several weeks. There is no assurance that the referenced terms reviewed early in contract formation have not changed. When awarding contracts, contracting

officers must be fully aware of the terms that will bind the Government, which is why static full text terms were proposed.

After consideration of the public comments, GSA decided that maintaining the commercial practice of providing the commercial supplier agreement with referenced terms and by improving internal controls for intake and management of commercial supplier agreements could reduce Government risk and accomplish the intended outcome.

For this reason, GSA has deleted the language in 552.212-4(w)(1)(vi)(A) which required full text for all terms. An equivalent change was made to the language at GSAR 552.232-78. GSA will add supplementary guidance in the General Services Acquisition Manual to clarify the contracting officer's responsibilities regarding commercial supplier agreement reviews, negotiations and documentation.

3. Enforceability of unilateral revisions

Comment: One respondent stated the intent of 552.212-4(w)(1)(vi)(C) is unclear. If the intent is the order of precedence clause of the contract is not enforceable with respect to any software license terms unilaterally revised subsequent to award, then the respondent recommends the Paragraph be revised for purposes of clarity.

Response: The intent of the clause is to ensure material changes to the term of the contract are agreed to by both

parties. 552.212-4(w)(1)(vi)(C) has been revised to more clearly state the intent, and an additional paragraph has been added to require bilateral modifications for material changes to commercial supplier agreements after contract award.

4. Significant regulatory action

Comment: One respondent stated "the proposed rule is a significant action, due to the change in the order of precedence, which should be subject to OMB review" pursuant to Executive Order 12866.

Response: As previously addressed, the order of precedence will be reverted back to the order enumerated in the FAR 52.212-4 based on the unintended impacts brought to light by the respondents. Therefore, this rule is not a significant change, and is not subject to Office of Management and Budget (OMB) review pursuant to Executive Order 12866.

5. Burdensome information collection

Comment: One respondent believes the requirement to provide full text of terms is an unnecessary and burdensome information collection and subject to the Paperwork Reduction Act (PRA).

Response: GSA has removed the requirement to provide all full text terms and therefore this rule is not subject to the PRA.

C. Other changes

This final rule makes the following additional changes from the proposed rule:

- GSAR 512.301, Solicitation provisions and contract clauses for the acquisition of commercial items, a conforming change is made to subparagraph (e) to clarify the applicability of the deviated language to FAR 52.212-4 Alternate I.
- GSAR 552.212-4(w)(1)(ix), Audits, a typographical error in the disputes clause reference was fixed.
- GSAR 552.232-78, Commercial Supplier Agreements - Unenforceable Clauses, is renumbered and amended to make conforming changes.
- GSAR 552.232-78(a)(4), previously (a)(1)(iv), Continued performance, is revised to correct the reference of the disputes clause from "subparagraph (d) (Disputes)" to "FAR 52.233-1, Disputes."
- GSAR 552.232-78(a)(6), Updating terms, previously (a)(1)(vi), Additional terms, is updated to reflect equivalent text changes previously described for subparagraph (w)(1)(vi) of 552.212-4.

III. Expected Cost Savings of this Final Rule

Information was gathered from GSA's Information Technology Category (ITC) business line and GSA's Office of General Counsel (OGC) to estimate total annualized cost savings associated with

reviewing and negotiating the 15 incompatible CSA terms for both industry and Government. A 7 percent discount rate was used for all calculations.

Government cost savings

Based on the ITC CSA data for Fiscal Year 2016 (FY16), GSA estimates approximately 600 CSAs will be reviewed each year. CSAs must be reviewed for each procurement because terms of CSAs are updated often. Therefore, the review of a CSA for a new procurement is not eliminated by a previous review of a CSA for the same item purchased previously.

GSA ITC subject matter experts and GSA OGC were consulted to identify the activities associated with the review of CSAs and the hourly estimates for the activities in relation to the 15 CSA terms. It is estimated that on average OGC review takes 0.9 hours and contracting officer review and negotiation takes 2.7 hours for each CSA. Using the 2017 General Schedule, average pay rates were identified for attorneys and contracting officers and fringe benefits were included. The estimated annualized cost savings for the Government is \$119,103.

Public cost savings

Apparent successful offerors have at least a negotiator and an attorney participate in the review and negotiation of a CSA prior to award. It is assumed, at a minimum, the time required by an offeror's attorney and negotiator to review the 15 CSA

terms are equivalent to the Government legal and contracting officer hours; 0.9 and 2.7 hours respectively. Fully burdened labor rates equivalent to the Government were used to estimate industry cost savings. Therefore for industry the estimated annualized cost savings is \$119,103.

The total annualized cost savings of this rule is estimated at \$238,206.

IV. 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.

V. Executive Order 13771

This final rule is considered an E.O. 13771 deregulatory action. Details on the estimated cost savings can be found in Section III-Expected Cost Savings of this Final Rule.

VI. Executive Order 13777

This final rule was identified by GSA's Regulatory Reform Task Force as a rule that improves efficiency by eliminating procedures with costs that exceed the benefits as described in Section IV.

VII. Regulatory Flexibility Act

GSA does not expect this rule to 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.

GSA has prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA 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 in GSA contracts. 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. No comments were received on the Initial Regulatory Flexibility Analysis (IRFA) from the Chief Counsel for Advocacy of the Small Business Administration.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VII. Paperwork Reduction Act

The final 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: February 14, 2018

Jeffrey A. Koses
Senior Procurement Executive
Office of Acquisition Policy

Therefore, GSA is amending 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

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—

(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 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 section 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. 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 or 52.212-4 Alternate I. 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
Sec.

513.202 Unenforceability of unauthorized obligations in micro-purchases.

Subpart 513.3 Simplified Acquisition Methods

513.302 Purchase orders.
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 part 532 continues to read as follows:

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

7. Add subpart 532.7 to read as follows:

Subpart 532.7—Contract Funding

Sec.

532.705 Unenforceability of unauthorized obligations.
532.706-3 Clause for unenforceability of unauthorized obligations.

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 552 continues to read as follows:

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

9. Amend section 552.212-4 by-

a. Revising the section heading, introductory text, and date of the clause; and

b. Adding paragraphs (s), (u), and (w).

The revisions and additions read as follows:

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

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.

CONTRACT TERMS AND CONDITIONS-COMMERCIAL ITEMS (FAR DEVIATION) (FEB. 2018)

* * * * *

(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.

(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) Updating terms. (A) After award, the contractor may unilaterally revise terms if they are not material. A material change is defined as:

(1) Terms that change Government rights or obligations;

(2) Terms that increase Government prices;

(3) Terms that decrease overall level of service; or

(4) Terms 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) Any agreement terms or conditions unilaterally revised subsequent to award that are 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.

(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); 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.

(xii) Confidential information. If this agreement includes a confidentiality clause, such clause is hereby amended to state that neither the agreement nor the 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)

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) (FEB. 2018)

(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 (FEB. 2018)

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).

(2) 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.

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

(i) 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.

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

(iii) 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.

(4) 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, Disputes.

(5) 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).

(6) Updating terms. (i) After award, the contractor may unilaterally revise terms if they are not material. A material change is defined as:

(A) Terms that significantly change Government rights or obligations; and

(B) Terms that increase Government prices;

(C) Terms that decrease overall level of service;

or

(D) Terms 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.

(iii) Any agreement terms or conditions unilaterally revised subsequent to award that are 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.

(7) 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.

(8) 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.

(9) 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:

(i) 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.

(ii) 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.

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

(10) 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.

(11) 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.

(12) Confidential information. If this agreement includes a confidentiality clause, such clause is hereby amended to state that neither the agreement nor the 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.

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

(End of clause)

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