

Attachment

Department of Energy Acquisition Regulation (DEAR) Class Deviation

The baseline for this class deviation is DEAR in effect as of June 17, 2024.

Changes from the baseline are shown by **[bold bracketed additions]** and ~~striketrough~~ deletions. Five asterisks (*****) indicate that there are no revisions between the preceding and following paragraphs, sections or clauses. Three asterisks (***) indicate that there are no additional revisions between the material shown within a subparagraph.

PART 902 - DEFINITIONS OF WORDS AND TERMS

Subpart 902.1 - Definitions

902.101 Definitions.

["Commercial supplier agreement" means terms and conditions customarily offered to the public by vendors of supplies or services that meet the definition of "commercial product" or "commercial service" 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 912 - ACQUISITION OF COMMERCIAL ITEMS

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

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

[(b) Paragraph (w) of 952.212-4, Contract Terms and Conditions - Commercial Products and Commercial Services (FAR DEVIATION 52.212-4), implements statutory requirements, clarifies the application of statutory requirements to common terms and conditions in commercial supplier agreements, sets forth a list of such terms and conditions that do not meet the Government's needs, and shall not be tailored.]

PART 913 – SIMPLIFIED ACQUISITION PROCEDURES

913.3 - Actions At or Below the Micro-Purchase Threshold

[913.202 Unenforceability of unauthorized obligations in micro-purchases.

Many products or services are acquired subject to commercial supplier agreements, as defined in 902.101. The clause at 952.232-39, Unenforceability of Unauthorized Obligations (FAR DEVIATION 52.232-39), automatically applies to any micro-purchase, including those made with the Governmentwide purchase card in lieu of the FAR clause at 52.232-39.]

PART 952 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

952.212-4 CONTRACT TERMS AND CONDITIONS – COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES (FAR DEVIATION 52.212-4).

As directed in AL-2024-02, when a commercial contract / order pursuant to FAR Part 12 is contemplated and the contract / order will include FAR 52.212-4, replace paragraphs (s) and (u) of the basic FAR clause; additionally, add paragraph (w).

Contract Terms and Conditions – Commercial Products and Commercial Services (NOV 2023) (FAR DEVIATION 52.212-4) (JUN 2024)

(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, and 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) [(4)] Solicitation provisions if this is a solicitation.~~

~~(6) [(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 DEAR 902.101)]** ~~End User License Agreement (EULA), Terms of Service (TOS), or similar legal instrument or agreement~~, 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:

(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]** ~~EULA, TOS, or similar legal instrument or agreement~~. If the EULA, TOS, or similar legal instrument or 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]** ~~EULA, TOS, or similar legal instrument or agreement~~.

(2) Paragraph (u)(1) of this clause does not apply to indemnification 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 DEAR 902.101), 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 (including all contracts, purchase orders, task orders, and delivery orders under FAR Part 12) between the commercial supplier and the U.S. Government for the acquisition of the supply or service that necessitates a license.

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

(v) *Arbitration; equitable or injunctive relief.* In the event of a claim or dispute arising under or relating to this agreement, 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 commercial supplier agreement terms: if they are not material. A material change is defined as:

(1) Terms that do not materially change the Government's obligations;

(2) Terms that do not increase Government prices;

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

(5) Terms that do not limit any other Government rights 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 license 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 through paragraph (d) Disputes, of this clause; 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 the 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 invoice submission, unless specifically agreed-to otherwise in the 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 (if 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

[952.232-39 UNENFORCEABILITY OF UNAUTHORIZED OBLIGATIONS (FAR DEVIATION 52.232-39).

As directed in AL-2024-02, insert the following clause in lieu of FAR clause 52.232-39:]

Unenforceability of Unauthorized Obligations (JUN 2013) (FAR DEVIATION 52.232-39) (JUN 2024)

(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 902.101)]** ~~End User License Agreement (EULA), Terms of Service (TOS), or similar legal instrument or agreement,~~ 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 clause by virtue of it appearing in the **[commercial supplier agreement. If the commercial supplier agreement]** ~~EULA, TOS, or similar legal instrument or agreement.~~ If the ~~EULA, TOS, or similar legal instrument or 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]** ~~EULA, TOS, or similar legal instrument or agreement.~~

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

(End of clause)

[952.232-70 COMMERCIAL SUPPLIER AGREEMENTS – UNENFORCEABLE CLAUSES.

As directed in AL-2024-02, insert the following clause in all solicitations and contracts when not using FAR Part 12:

Commercial Supplier Agreements – Unenforceable Clauses (JUN 2024)

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:

(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 (including all contracts, purchase orders, task orders, and delivery orders not using FAR Part 12) between the commercial supplier and the U.S. Government for the acquisition of the supply or service that necessitates a license.

(2) *End user.* This agreement shall bind the ordering activity as the end user but shall not operate to bind a Government employee or person acting on behalf of the Government in their 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 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, 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 commercial supplier agreement terms provided: if they are not material. A material change is defined as:

(A) Terms that do not materially change the Government's obligations;

(B) Terms that do not increase Government prices;

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

(D) Terms that do not 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 license 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 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 the 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 invoice submission unless specifically agreed to otherwise in the 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 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 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 provision of this agreement conflicts or is inconsistent with the preceding subparagraph (a), the provisions of subparagraph (a) shall prevail to the extent of such inconsistency.])

End of Clause