

**FINDINGS AND DETERMINATION for  
CLASS DEVIATION (FAR 1.404) and  
CLASS WAIVER for TAILORING INCONSISTENT WITH CUSTOMARY  
COMMERCIAL PRACTICE (FAR 12.302(c))  
concerning COMMERCIAL SUPPLIER AGREEMENTS**

**Purpose**

The objective of this class deviation is to address common Commercial Supplier Agreement terms that conflict or are otherwise incompatible with Federal law.

**Background**

The Department of Energy (DOE) awards numerous contracts and orders for products and services that meet the definition of commercial product and commercial service at FAR 2.101, including computer software and other information technology (IT) supplies and services. Customarily, commercial products and services are offered to the public under standard template agreements that may take a variety of forms, including license agreements, terms of service (TOS), End User License Agreement (EULA), terms of sale or purchase, and other similar agreements. “Commercial Supplier Agreement” is a general term used to describe such standard commercial terms and conditions that vendors often provide with their commercial offerings. These customary, standard Commercial Supplier Agreements typically contain terms and conditions that are lawful when the purchaser is a private party but inappropriate when the purchaser is the Federal Government, and the agreement is incorporated into a Government contract. Inconsistencies between Commercial Supplier Agreements and Federal law or the Government’s needs create recurrent points of conflict in Federal contracts that place agencies at risk of violating anti-deficiency laws, provide for dispute resolution mechanisms not authorized by statute, or are otherwise inappropriate.

**Findings**

The use of Commercial Supplier Agreements has 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. As a result of the risk associated with the conflicting terms of standard commercial agreements, DOE contracting officers are required to review the terms and conditions of such commercial license agreements, TOS, EULA, terms of sale or purchase, and other similar agreements, and engage legal counsel, if necessary, to determine whether inconsistent terms and conditions need to be removed or modified, and negotiate federally-compatible supplemental agreements with vendors. This arduous process increases acquisition lead times, reduces competition, and puts a strain on DOE’s limited resources.

DOE has identified fifteen (15) common elements of Commercial Supplier Agreement terms that conflict or are incompatible with Federal law that must be resolved to align

with Federal law or Government requirements in order for a valid contract to be formed. This class deviation / waiver is intended to preemptively address those 15 common areas of conflict and ambiguity, thereby obtaining the same contracting result while saving significant time and resources. The 15 common areas are provided below with a summary of how they will be addressed via a class deviation / waiver:

1. *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.
2. *Contract formation*: Commercial Supplier Agreements may be integrated into a contract, so long as the terms are included verbatim and are not incorporated by reference. The terms of the deviated clause and other identified elements will supersede any conflict with the Commercial Supplier Agreement. This order of precedence will allow for the incorporation of Commercial Supplier Agreements, with certain clauses being stricken as unenforceable, without the need to individually negotiate agreements. “Click-wrap”, “Browse-wrap” and other such mechanisms that purport to bind the end-user will not bind the Government or any Government authorized end-user.
3. *Patent 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.
4. *Automatic renewals of term-limited agreements*: Due to Anti-Deficiency Act restrictions, automatic contract renewal clauses are impermissible. Any such Commercial Supplier Agreement clauses are unenforceable.
5. *Future fees or penalties*: Future fees, 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).
6. *Taxes*: 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 whenever such a request is made.
7. *Payment terms or invoicing (late payment)*: Any Commercial Supplier Agreement term that purport to establish payment terms or invoicing requirements that contradict the terms of the Government contract will be unenforceable. Discrepancies found during an audit must comply with the invoicing procedures from the underlying contract.
8. *Automatic incorporation/deemed acceptance of third party terms*: No third party terms may be incorporated into the contract by reference. Incorporation of third party terms after the time of award may only be performed by bilateral contract modification with the approval of the cognizant contracting officer.
9. *State/foreign law governed contracts*: 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 other than that expressly authorized by Federal law are deleted. Statutes of limitation on potential claims shall be governed by U.S. Government law.

10. *Equitable remedies, injunctions, binding arbitration*: Equitable remedies, injunctive relief and binding arbitration clauses may not be enforced unless explicitly authorized by agency guidance or statute.
11. *Unilateral termination of Commercial Supplier Agreement by supplier*: Commercial suppliers may not unilaterally terminate or suspend a contract unless the supplies or services are generally withdrawn from the commercial market. Remedy from contractual breach by the Government must be pursued under the Contract Disputes Act.
12. *Unilateral modification of Commercial Supplier Agreement by supplier*: Unilateral changes of the Commercial Supplier Agreement are impermissible and any clause authorizing such changes is unenforceable.
13. *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.
14. *Confidentiality of Commercial Supplier Agreement terms and conditions*: The content of the Commercial Supplier Agreement and the final contract pricing 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.
15. *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.

Enacting this class deviation / waiver will protect DOE and contractors by uniformly addressing common unacceptable terms, thereby reducing risk, administrative costs, and further streamlining the acquisition process.

## **Determination**

It is hereby determined that a class deviation / waiver (using the attached FAR Deviation Text) is appropriate to allow greater efficiency and consistency to the Department of Energy acquisition workforce by standardizing terms and conditions for use in procuring commercial products and services that are accompanied by standard Commercial Supplier Agreement terms that may conflict with or otherwise be incompatible with Federal law. It is in the Government's best interest to waive these commercial practices because they place agencies at risk of violating anti-deficiency laws, provide for dispute resolution mechanisms not authorized by statute, or are otherwise inappropriate. Once processed, the Department will share the deviation widely among its workforce to ensure full awareness of and compliance with the revisions to affected regulations. This class deviation is effective upon the date of signature and will remain effective until cancelled.

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Attachment: FAR Deviation text