DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

Acquisition Bulletin No. 16-01
Date: December 22, 2015
Deviation Nos. 2016-00001 thru 00003

MEMORANDUM FOR BUREAU CHIEF PROCUREMENT OFFICERS

FROM: IRIS B. COOPER,
SENIOR PROCUREMENT EXECUTIVE,
OFFICE OF THE PROCUREMENT EXECUTIVE

Iris B. Cooper

Digitally signed by Iris B. Cooper
DN: c=US, o=U.S. Government, ou=Department of the Treasury, ou=Departmental Offices, ou=People, serialNumber=724855, cn=Iris B. Cooper
Date: 2015.12.22 09:42:42 -05'00'

SUBJECT: Class Deviation addressing common Commercial Supplier Agreement terms that conflict or are otherwise incompatible with Federal law.

1. Purpose: The purpose of this class deviation is to address common Commercial Supplier Agreement (CSA) terms that conflict or are otherwise incompatible with Federal law.

2. Effective Date: January 11, 2016

3. Expiration Date: Until superseded, incorporated in the FAR or DTAR or otherwise rescinded.

4. Background: CSA Terms (e.g. standard terms of sale or lease, Terms of Service (TOS), End User License Agreements (EULA), or other similar legal instruments or agreements) may be presented as part of a proposal or quotation response to a solicitation for a contract or order. These CSAs may include terms that are acceptable to private parties, but are improper or illegal for acceptance by the Federal Government. These commonly recurring, conflicting or ambiguous CSA terms require Treasury contracting activities to unnecessarily negotiate individual agreements to address these conflicts, often at significant cost to both the Agency and offeror/contractor.

As this is a common issue across the Government, the General Service Administration (GSA) took the lead in developing an approach to address this matter. Their efforts led to the identification of fifteen common elements of CSA terms that conflict with 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. These fifteen common elements are as follows:

1) Definition of contracting parties
2) Contract formation
3) Vendor indemnity (vendor assumes control of proceedings)
4) Automatic renewals of term-limited agreements
5) Future fees or penalties
6) Taxes
7) Payment terms or invoicing (late payment)
8) Automatic incorporation/deemed acceptance of third party terms
9) State/foreign law governed contracts
10) Equitable remedies, injunctions, binding arbitration
11) Unilateral termination of supplier agreement by supplier
12) Unilateral modification of supplier agreement by supplier

13) Assignment of supplier agreement or Government contract by supplier
14) Confidentiality of supplier agreement terms and conditions
15) Audits (automatic liability for payment)

To address this issue, the GSA Senior Procurement Executive (SPE) issued a class deviation, along with a FAR 12.302(c) class waiver, on July 31, 2015 covering these fifteen common elements. To preemptively address these fifteen common elements of conflict and ambiguity for Treasury procurements the Treasury SPE has decided it is in the best interest of Treasury[1] to issue a similar class deviation. Enacting this class deviation will protect Treasury and offerors/contractors by uniformly addressing common unacceptable terms, immediately reducing risk, reducing administrative costs, and further streamlining the acquisition process for the acquisition of commercial item supplies and services.

Additionally, the SPE has issued a waiver as prescribed by the authority under FAR 12.301(f). In accordance with FAR 12.302(c), this class waiver permits contracting officers to utilize procedures that differ from customary commercial practices to address these fifteen common elements. Contracting Officers are encouraged to review and negotiate other CSA terms and unrelated terms and conditions to ensure that the Bureau contracting activity's business needs are met.

In accordance, with FAR 1.404(a)(1) prior to issuing this deviation, Treasury requested a consultation with the Chair of the Civilian Agency Acquisition Council (CAAC). Approval to proceed with the issuance of this deviation was received from the CAAC Chair on December 18, 2015. Overall, the SPE has determined that the issuance of this class deviation to the FAR is authorized and necessary to protect the interests of the Government by proactively addressing these conflicting terms and conditions.

5. <u>Applicability:</u> This class deviation applies to all Treasury acquisitions when the resultant contract or agreement is for items containing CSA terms.

6. <u>Required Contracting Officer Action</u>: The Contracting Officer shall take action based on the following:

a. **New standalone contracts or agreements (i.e. those actions not using an existing contract or agreement, such as Governmentwide acquisition contracts and multi-agency contracts).** Contracting officers shall incorporate the clauses included in Attachment A of this AB into solicitations and contracts and agreements that include items as prescribed by the instructions provided in Attachment A of this AB.

[1] Based on analysis of FY15 spend, Treasury issued awards against non-FSS contracts that likely would include these CSA terms with an approximate total value of $1,196,175,179.14 (i.e. base and all option periods) within the following Information Technology (IT) NAICS codes (e.g. 541519, 541511, 511210, and 423430). This dollar amount is not all encompassing since CSAs can be found in requirements that are not predominately IT requirements. This is especially true in instances where contracting officers are purchasing a piece of equipment that includes software.

b. In Process Solicitations. For solicitations that include items as prescribed by the instructions provided in Attachment A of this AB and that have not closed as of the effective date of this AB, Contracting Officers should strongly consider amending the solicitation to include the clauses included in Attachment A of this AB into the solicitation and resultant contract(s) or agreement(s).

c. Existing Treasury contracts or agreements. No action is required for contract actions against existing Treasury contracts or agreements entered into prior to the effective date of this AB.

d. Federal Supply Schedule (FSS) contracts or agreements/ other GSA government-wide vehicles (e.g., Alliant, Networx, and OASIS). No action is required by the Contracting Officer for contract actions against the aforementioned vehicles, as GSA has already incorporated a similar class deviation addressing this matter within their contracts and agreements.

e. Non-GSA Governmentwide acquisition contracts (GWAC) and multi-agency contracts (MAC). Contracting Officers shall take action to identify whether or not the GWAC or MAC includes similar clauses provided in Attachment A of this AB. If the Contracting Officer's action reveals that the GWAC or MAC does not include such clause then the Contracting Officer should follow the steps outlined in 6.a above.

7. **Bureau Chief Procurement Officers (BCPO) Responsibilities:** BCPOs shall
   a. Disseminate this AB to all contracting personnel;
   b. Ensure contract writing systems are updated for purposes of including the clauses provided in Attachment A of this AB in solicitations, contracts and agreements by the effective date of this AB; and
   c. Update any related Bureau policies and procedures impacted by this AB.

8. Additional Information: The point of contact for this AB is Mr. Thomas O'Linn, who may be reached at thomas.olinn@treasury.gov or at OfficeoftheProcurementExecutive@treasury.gov.

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

Attachment A-
Acquisition Bulletin No. 16-01-
Treasury Class Deviation

The baseline for this class deviation is the FAR as amended by FAC 2005-85/12-04-2015, the DTAR as amended by 80 FR 11595, March 4, 2015 and the DTAP September 2015 edition version 2.0. Asterisks (*****) indicate that there are no revisions between the preceding and following paragraphs, sections or clauses.

PART 1002-DEFINITIONS OF WORDS AND TERMS

1002.101 Definitions.

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"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 (CSA) 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 CSA 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 an offer or quotation responding to a solicitation;

(b) Regardless of the media or delivery mechanism used. For example, a CSA 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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SUBPART 1012.3-SOLICITATION PROVISION AND CONTRACT CLAUSES FOR THE ACQUISITION OF COMMERICAL ITEM

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1012.302 Tailoring of provisions and clauses for the acquisition of commercial items.

(b)(8) Commercial supplier agreements – unenforceable clauses.

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1012.301-70 Solicitation provisions and contract clauses for the acquisition of commercial items.

The contracting officer shall, when contemplating taking an action except as described in

paragraph (a) below, insert the clause at 1052.212-4, Contract Terms and Conditions-Commercial Items Alternate II (Deviation 2016-00001), in solicitations and contracts where a commercial item contract is contemplated.

(a) *Exceptions.* The contracting officer shall not include the above clause when contemplating an action against the following-

(1) GSA government-wide vehicles (e.g., Alliant, Networx, OASIS, and Federal Supply Schedule;

(2) Existing Treasury contracts and agreements; and

(3) Other Governmentwide acquisition contracts (GWAC) and multi-agency contracts (MAC) that include the same or similar clause or clauses.

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SUBPART 1013.2-ACTIONS AT OR BELOW THE MICRO-PURCHASE THRESHOLD

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1013.202 Unenforceability of unauthorized obligations in micro-purchases.

The clause at 1052.232-39, Unenforceability of Unauthorized Obligations (Deviation 2016-00002) is required to be used in lieu of FAR clause 52.232-39, Unenforceability of Unauthorized Obligations for micro-purchases.

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SUBPART 1016.7-AGREEMENTS

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1016.702 Basic agreements.

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(b)(1)(ii) The contracting officer shall insert the applicable clause(s) as prescribed by 1012.301-70, 1032.706-370 and 1032.706-70 based on the type of supplies and services being procured (i.e. commercial items or non-commercial).

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1016.703 Basic ordering agreements.

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(c)(1)(v) The contracting officer shall insert the applicable clause(s) as prescribed by 1012.301-70, 1032.706-370 and 1032.706-70 based on the type of supplies and services being procured (i.e. commercial items or non-commercial).

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SUBPART 1032.7-CONTRACT FUNDING

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1032.706-370 Clause for unenforceability of unauthorized obligations.

The contracting officer shall insert the clause at 1032.232-39, Unenforceability of Unauthorized Obligations (Deviation 2016-00002) in all solicitations and contracts in lieu of FAR clause 52.232-39, Unenforceability of Unauthorized Obligations.

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1032.706-70 Commercial Supplier Agreements-Unenforceable Clauses.

The contracting officer shall insert the clause 1032.232-70, Commercial Supplier Agreements-Unenforceable Clauses (Deviation 2016-00003), in solicitations and contracts when not using FAR part 12.

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PART 1052-SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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1052.212-4 Contract Terms and Conditions-Commercial Items. (ALTERNATE II) (DEVIATION 2016-00001) (January 2016)

As prescribed in 1012.301-70, when a commercial item contract is contemplated substitute subparagraph (g)(2), paragraphs (e), (s), and (u) for those in the basic FAR clause; and additionally, add paragraph (w) to the basic FAR clause.

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(e) Definitions.

(1) The clause at FAR 52.202-1, Definitions, is incorporated herein by reference.

(2) As used in this clause, "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 (CSA) 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—

(i) Regardless of the format or style of the document. For example, a CSA 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 an offer or quotation responding to a solicitation;

(ii) Regardless of the media or delivery mechanism used. For example, a CSA

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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(s) *Order of precedence.* Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order:

(1) The schedule of supplies/services.

(2) The Assignments, Disputes, Payments, Invoice, Other Compliances, Compliance with Laws Unique to Government Contracts, Unauthorized Obligations, and Commercial Supplier Agreements – Unenforceable Clauses paragraphs of this clause,

(3) The clause at 52.212-5.

(4) Solicitation provisions if this is a solicitation.

(5) Other paragraphs of this clause.

(6) Addenda to this solicitation or contract, including any license agreements for computer software.

(7) The Standard Form 1449.

(8) Other documents, exhibits, and attachments.

(9) The specification.

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(u) *Unauthorized Obligations*

(1) Except as stated in paragraph (e) of this clause, when any supply or service acquired under this contract is subject to any CSA as defined in DTAP 1002.101, 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:

(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 CSA. If the CSA 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 CSA.

(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.

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(w) *Commercial supplier agreements – unenforceable clauses.* When any supply or service acquired under this contract is subject to a CSA, the following language shall be deemed incorporated into the CSA. As used herein, "this agreement" means the CSA:

(1) Notwithstanding any other provision of this agreement, when the end user is an

agency or instrumentality of the Government, the following shall apply:

(i) *Applicability.* This agreement is a part of a contract between the commercial supplier and the Government for the acquisition of the supply or service that necessitates a license (including all contracts, task orders, and delivery orders under FAR part 12).

(ii) *End user.* This agreement shall bind the Government 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 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.* If the supplier or licensor believes the Government 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) of this clause.

(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 Government only when explicitly provided by statute (e.g., Prompt Payment Act or Equal Access to Justice Act).

(vi) *Additional terms.*

(A) This agreement may unilaterally incorporate additional terms by reference. Terms may be included by reference using electronic means (e.g., via web links, click and accept, etc.). Such terms shall be enforceable only to the extent that:

(1) When included by reference using electronic means, the terms are readily available at referenced locations; and

(2) Terms do not materially change government obligations; and

(3) Terms do not increase government prices; and

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

(5) Terms do not limit any other Government rights addressed elsewhere in this contract.

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

(vii) *No automatic renewals.* If any license or service tied to periodic payment is provided under this agreement (e.g., annual software maintenance or annual lease term), such license or service shall not renew automatically upon expiration of its current term without prior express Government approval.

(viii) *Indemnification.* Any clause of this agreement requiring the commercial supplier or licensor to defend or indemnify the end user is hereby amended to provide that the U.S. Department of Justice has the sole right to represent the United States in any such action, in accordance with 28 U.S.C. 516.

(ix) *Audits.* Any clause of this agreement permitting the commercial supplier or licensor to audit the end user's compliance with this agreement is hereby amended as follows:

(A) Discrepancies found in an audit may result in a charge by the commercial supplier or licensor to the Government. 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 Government, will be resolved through paragraph (d) of this clause; no payment obligation shall arise on the part of the Government 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 and must be performed within the parameters of the Government's security procedures.

(D) The Contractor must notify the Contracting Officer of any audit request.

(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 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 underlying 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 paragraph (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 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) of this clause, the language, provisions, or clause of paragraph (w)(1) of this clause shall prevail to the extent of such inconsistency.

(End of clause)

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1052.232-39 Unenforceability of Unauthorized Obligations. (Deviation 00002)(January 2016)

As prescribed in 1032.706-370, insert the following clause:

1052.232-39 Unenforceability of Unauthorized Obligations. (Deviation 00002)(January 2016)

(a) *Definition.* As used in this clause-
"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 (CSA) are particularly common in information technology acquisitions, including acquisitions of commercial computer software and commercial technical data, but they may apply to any supply or service. The term applies–

(1) Regardless of the format or style of the document. For example, a CSA 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 an offer or quotation responding to a solicitation;

(2) Regardless of the media or delivery mechanism used. For example, a CSA 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.

(b) Except as stated in paragraph (c) of this clause, when any supply or service acquired under this contract is subject to any CSA, 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 CSA. If the CSA 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 CSA.

(c) Paragraph (b) 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)

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1052.232-70 Commercial Supplier Agreements-Unenforceable Clauses. (Deviation 00003) (January 2016)

As prescribed in 1032.706-70, insert the following clause:

Commercial Supplier Agreements–Unenforceable Clauses (Deviation 00003) (January 2016)

(a) *Definition.* As used in this clause-
"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 (CSA) are particularly common in information technology acquisitions, including acquisitions of commercial computer software and commercial technical data, but they may apply to any supply or service. The term applies–

(1) Regardless of the format or style of the document. For example, a CSA 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 an offer or quotation responding to a solicitation;

(2) Regardless of the media or delivery mechanism used. For example, a CSA 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.

(b) When any supply or service acquired under this contract is subject to a commercial supplier agreement, the following language shall be deemed incorporated into the commercial supplier agreement. As used herein, "this agreement" means the commercial supplier agreement:

(1) Notwithstanding any other provision of this agreement, when the end user is an agency or instrumentality of the Government, the following shall apply:

(i) *Applicability.* This agreement is part of a contract between the commercial supplier and the Government for the acquisition of the supply or service that necessitates a license (including all contracts, task orders, and delivery orders under FAR Part 12).

(ii) *End user.* This agreement shall bind the Government 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 Government to the laws of a U.S. state, U.S. territory, district, or municipality, or foreign nation, except where Federal law expressly provides for the application of such laws, is hereby deleted.

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

(C) Any language prescribing a different time period for bringing an action than that prescribed by applicable Federal law in relation to a dispute is hereby deleted.

(iv) *Continued performance.* If the supplier or licensor believes the Government 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 the clause at FAR 52.233-1, 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 (B) equitable or injunctive relief, including the award of attorney fees, costs or interest, may be awarded against the Government only when explicitly provided by statute (e.g., Prompt Payment Act or Equal Access to Justice Act).

(vi) *Additional terms.*

(A) This agreement may unilaterally incorporate additional terms by reference. Terms may be included by reference using electronic means (e.g., via web links, click and accept, etc.). Such terms shall be enforceable only to the extent that:

(1) When included by reference using electronic means, the terms are readily available at referenced locations; and

(2) Terms do not materially change government obligations; and
(3) Terms do not increase government prices; and
(4) Terms do not decrease overall level of service; and
(5) Terms do not limit any other Government right addressed elsewhere in this contract.

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

(vii) *No automatic renewals.* If any license or service tied to periodic payment is provided under this agreement (e.g., annual software maintenance or annual lease term), such license or service shall not renew automatically upon expiration of its current term without prior express Government approval.

(viii) *Indemnification.* Any clause of this agreement requiring the commercial supplier or licensor to defend or indemnify the end user is hereby amended to provide that the U.S. Department of Justice has the sole right to represent the United States in any such action, in accordance with 28 U.S.C. 516.

(ix) *Audits.* Any clause of this agreement permitting the commercial supplier or licensor to audit the end user's compliance with this agreement is hereby amended as follows:

(A) Discrepancies found in an audit may result in a charge by the commercial supplier or licensor to the Government. 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 Government, will be resolved through the clause at FAR 52.233-1, Disputes; no payment obligation shall arise on part of the Government 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.

(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 contract 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 underlying contract.

(xi) *Non-assignment.* This agreement may not be assigned, nor may any rights or obligations thereunder be delegated, without the Government's prior approval, except as expressly permitted under the clause at FAR 52.232-23, Assignment of Claims.

(xii) *Confidential information.* If this agreement includes a confidentiality clause, such clause is hereby amended to state that neither the agreement nor the price list shall be deemed "confidential information." Issues regarding release of "unit pricing" will be resolved consistent with the Freedom of Information Act. Notwithstanding anything in this agreement to the contrary, the Government may retain any confidential information as required by law, regulation or its internal document retention procedures for legal, regulatory or compliance purposes; provided, however, that all such retained confidential information will continue to be subject to the confidentiality obligations of this agreement.

(2) If any provision of this agreement conflicts or is inconsistent with the

preceding subparagraph (b)(1) of this clause, the provisions of subparagraph (b)(1) of this clause shall prevail to the extent of such inconsistency.

(End of clause)

Attachment B-
Acquisition Bulletin No. 16-01-
Treasury Class Deviation Guidance

Questions and Answers.

Question No. 1: Do Contracting Officers still need to negotiate out the 15 identified elements?

Answer No. 1: No, the new clauses prescribed by this class deviation ensure that any of the 15 elements identified therein are automatically unenforceable, even if included in a commercial supplier agreement (CSA). Therefore, contracting officers should not spend time negotiating these terms out of CSAs.

Question No.2: If this class deviation provides protection against inappropriate or illegal terms being incorporated into contracts, do Contracting Officers even need to review the CSA?

Answer No. 2: Absolutely, Contracting Officers should always thoroughly review CSAs (and all documents that are incorporated into any Treasury contract). Contracting Officers may seek guidance from their respective Office of General Counsel, if they are unsure about the legality of the terms in the CSA.