

## **Addendum to Commercial Agreements**

The Contractor acknowledges and agrees this Addendum will become a binding part of any contract with the U.S. Senate, Office of the Sergeant at Arms (SAA) in the event Contractor's proposal is accepted and selected for award and shall be an attachment to the Commercial License Agreement, whether called an End User License Agreement, Terms of Service, Maintenance Agreement, or another similar legal instrument or agreement (collectively referred to as "License Agreement").

The SAA accepts commercial terms in the License Agreement only to the extent that those terms do not conflict with Federal law and US Senate Procurement Regulations ("Regulations"). The following terms have been determined unacceptable to the SAA as a result of a conflict with Federal law, the Regulations or an incompatibility with the SAA or Senate needs. Any such terms in the Contractor's License Agreement will be null and void as between the Contractor and the SAA, and those terms will have no force or effect in any resulting contract. The Contractor agrees that, in the event of any conflict or inconsistency between the terms in this Addendum and the terms of the License Agreement, the terms of this Addendum will supersede and be controlling.

### **1. Unauthorized Obligations**

(a) When any supply or service acquired under this License Agreement, as modified by this Addendum, is subject to any commercial supplier agreement (as defined in 48 C.F.R. § 502.101) that includes any language, provision, or clause requiring the SAA to pay any future fees, penalties, interest, attorney fees, 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(a), the following shall govern:

- (1) Any such language, provision, or clause is unenforceable against the SAA.
- (2) No end-user authorized by the SAA or Senate 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 SAA or any SAA authorized end-user to such clause.
- (3) Any such language, provision, or clause is deemed stricken from the commercial supplier agreement.

### **2. Indemnification**

Clauses giving the Contractor control over any claims or disputes involving third party claims, including but not limited to, patent, copyright, trademark, or other intellectual property infringement are not allowable, insofar as only the United States Department of Justice is authorized to represent the U.S. Government, per 28 U.S.C. § 516. Any clause giving entire control of litigation to a contractor is hereby modified as follows:

To the extent not prohibited by law, the Contractor shall indemnify and hold

harmless the SAA from and against all third party claims, demands, money judgments, settlements, liabilities, costs and expenses, including reasonable attorneys' fees, in any way caused by or arising from an act or omission constituting fraud, gross negligence, willful misconduct of the Contractor or their employees, agents, or subcontractors or from any infringement of a third party's intellectual property rights, including but not limited to patent, copyright, trade secrets, or trademarks.

The Contractor will indemnify the SAA against liability, at the Contractor's expense, and pay all costs, damages, and attorney's fees that a court finally awards or that are included in a settlement approved by the Contractor, provided that the SAA promptly notifies the Contractor of the claim and gives the Contractor such opportunity as is offered by applicable laws, rules, and regulations to participate in the defense thereof.

The SAA shall make every effort to fully participate in the defense and/or in any settlement of such claim. However, the Contractor understands that such participation by the SAA will be under the control of the United States Department of Justice, per 28 U.S.C. § 516.

### **3. Automatic renewals**

The SAA does not agree to any automatic renewal provisions because such agreements may violate the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(B).

Automatic renewals refer to term licenses for software or software maintenance that renew automatically and renewal charges are due automatically unless the SAA takes action to opt out or terminate.

If any license or service tied to periodic payment is provided under this agreement (e.g., annual software maintenance), such license or service shall not renew automatically upon expiration of its current term without prior express written SAA approval by the contracting officer.

### **4. Audit**

Any clauses that give the Contractor the right to audit the SAA or the Senate's use of software licenses do not meet the SAA or Senate needs as a matter of security.

The Contractor can request that the SAA conduct a self-audit and provide the Contractor with results of the audit. The Contractor will not have access to the SAA's systems to conduct the audit, unless requested by the SAA in writing. Any discrepancies found during the self-audit may result in a charge to the SAA and must comply with the invoicing procedures of the underlying contract. All disputes must be resolved in accordance with Part 4 of the Regulations.

### **5. Taxes and Fees**

The SAA does not agree to any clauses purporting to make the SAA responsible for taxes. The agreed contract price represents the full and complete monetary obligation of the SAA. There shall be no separate charge and SAA is not responsible for any other charge or fee, including but not limited to late fees, termination fees, or maintenance fees.

**6. Incorporating other License Terms by Reference, Including Reference to a Website**

Terms provided in other documents or websites do not bind the SAA unless those terms are submitted with the proposal and made an attachment to the contract. Any license agreement provisions or other agreement unilaterally revised subsequent to award that are inconsistent with any material term or provision of this contract are not enforceable against the SAA.

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 contracting officer.

**7. Venue; Choice of Law**

The License Agreement, as modified by this Addendum, is governed by Federal law and the Regulations, as amended. Any language purporting to subject the SAA to the law 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 and not enforceable.

Forum and venue for all proceedings shall be dictated by Federal law and the Regulations. Any language prescribing a different period for bringing an action than that prescribed by the applicable Federal law and the Regulations, as amended, is hereby deleted and not enforceable.

**8. Dispute Resolution**

The SAA does not agree to any provisions relating to mandatory arbitration. Disputes must be resolved in accordance with Part 4 of the Regulations. Binding arbitration shall not be utilized.

Liability of either party for any breach of the terms of the License Agreement, as modified by this Addendum, or any claim arising from the terms of the License Agreement or this Addendum, or any claim, demand, suit or proceeding arising from the terms of the License Agreement or this Addendum, shall be determined under the Federal Tort Claims Act and the Regulations, as applicable. Federal Statute of Limitations provisions shall apply to any claim, demand, suit or proceeding arising from the terms of the License Agreement or this Addendum.

While a dispute is pending, the Contractor shall proceed diligently with performance of the License Agreement, as modified by this Addendum, pending final resolution of any request for relief, claim, appeal, or action arising under the contract.

Any language requiring dispute resolution in a specific forum or venue that is different from that prescribed by applicable Federal law and the Regulations, as amended, is hereby deleted and not enforceable.

**9. Equitable or injunctive remedies**

The SAA does not agree to any clauses consenting to or entitling the Contractor to equitable or injunctive relief. Equitable relief for copyright, trademark, or patent infringement by the SAA is only available to the extent permitted by Federal law.

**10. Unilateral termination by Contractor for breach**

The SAA does not agree to any clauses permitting unilateral termination of the contract or license agreement by the Contractor. The Contractor shall not unilaterally revoke, terminate, or suspend any rights granted to the SAA.

Recourse against the SAA for any alleged breach of this License Agreement, as modified by this Addendum, must be made under the terms of Part 4 of the Regulations. While a dispute is pending, the Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and must comply with any decision of the contracting officer.

**11. Unilateral modification**

The SAA does not agree to any provisions giving the Contractor the right to unilaterally change the license terms, with or without notice to the customer. Unilateral changes to the underlying License Agreement, as modified by this Addendum, are impermissible and any clause authorizing such changes is unenforceable.

For revisions that will materially change the terms of the License Agreement, as modified by this Addendum, the revised agreement must be incorporated into the underlying contract using a bilateral modification. A material change is defined as (1) terms that change SAA rights or obligations; (2) terms that increase SAA prices; (3) terms that decrease the overall level of service; or (4) terms that limit any other SAA right addressed elsewhere in the License Agreement, as modified by this Addendum.

**12. Advertisement**

The Contractor shall not make reference in its commercial advertising to the SAA's contracts on a manner that states or implies the SAA or the Senate approves or endorses the Contractor's products or services or considers the Contractor's products superior to other products or services.

**13. Confidentiality**

The Contractor will hold the information regarding the underlying contract in strict confidence and take all reasonable precautions to protect the all contract information, without limitation, from disclosure to any third party. Further, Contractor warrants and agrees to not make any use whatsoever of any form or type of information obtained under the underlying contract, except to evaluate internally its relationship with the SAA, and to not copy or reverse engineer any information obtained under the underlying contract.

**14. Data Protection After Contract Termination**

The Contractor agrees, upon termination, cancellation, expiration, or other conclusion of this License Agreement, as modified by this Addendum, within thirty (30) days to return to the SAA or if return is not feasible, destroy and not retain any copies and furnish the SAA with an appropriate Certificate of Destruction of any and all SAA or Senate information that is in the Contractor's possession. The Contractor shall not permit or allow any third parties from accessing, acquiring, or possessing SAA or Senate information.

**15. Termination for Default.**

(a) The SAA may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this License Agreement, as modified by this Addendum, in any one of the following circumstances:

(1) If Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or,

(2) If Contractor fails to perform any of the other provisions of this License Agreement, as modified by this Addendum, or so fails to make progress as to endanger performance of this License Agreement, as modified by this Addendum, in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of ten (10) days (or such longer period as the SAA may authorize in writing) after receipt of written notice from the SAA specifying such failure.

(b) If this License Agreement, as modified by this Addendum, is terminated as provided in paragraph (a) of this clause, the SAA, in addition to any other rights provided in this clause, may withhold from amounts otherwise due Contractor for such completed supplies, materials, or services performed such sum as the SAA determines to be necessary to protect the Senate. In the event of termination for cause, the SAA shall not be liable to the Contractor for any amount of services or supplies not accepted, and the Contractor shall be liable to the SAA for any and all rights and remedies provided by law.

(c) If, after notice of termination of this License Agreement, as modified by this Addendum, under the provisions of this clause, it is determined for any reason that Contractor was not in default under the provisions of this clause, or that the default was excusable under the provisions of this clause, the rights and obligations of the parties shall be the same as if a notice of Termination of Convenience had been issued.

**16. Termination for Convenience**

The SAA, by written notice, may terminate this License Agreement, as modified by this Addendum, in whole or in part, when it is in the best interest of the SAA. Should the SAA terminate this License Agreement, as modified by this Addendum, for convenience, the SAA shall be liable only for payment in accordance with the payment provisions of the License Agreement, as modified by this Addendum, for services rendered prior to the effective date of termination.

**17. Gratuities**

The SAA may, by written, notice to the Contractor, terminate for Default the right of the Contractor

to proceed under the Purchase Order if it is found gratuities (in the form of entertainment, gifts, or otherwise) were offered or given by the Contractor, or any agency or representative of the Contractor, to any employee of the Senate with a view towards securing a favorable treatment with respect to awarding or amending or the making of any determination with respect to the performing of such Purchase Order.

**18. Availability of Funds**

The SAA's obligation for payment for any work or products ordered under this License Agreement, as modified by this Addendum, is contingent upon the availability of appropriated funds from which payment for the License Agreement, as modified by this Addendum, purposes can be made. No legal liability on the part of the SAA for any payment may arise for performance under this License Agreement, as modified by this Addendum, until funds are made available to the contracting officer for performance.

**19. Headings**

The headings of the paragraphs of this Addendum are inserted for convenience only and shall not be deemed to constitute part of the License Agreement, as modified by this Addendum, or to affect the construction thereof.

**20. Assignment by Licensor**

The SAA does not agree to any license terms providing for assignment by the licensor.

Assignment of SAA contracts without the SAA's prior approval is prohibited by statute, except for assignment of payment to a financial institution, which must comply with the Assignment of Claims Act (31 U.S.C. § 3727, 41 U.S.C. § 6305).

The Contractor agrees to all the terms of this Addendum and will abide by its provisions if awarded contract as a result of the submission of its proposal.

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Signature of Authorized Representative

\_\_\_\_\_  
Date:

\_\_\_\_\_  
Name of Authorized Representative

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Name of Contractor