Attachment B

Schedule 70 EULA Matrix

Both GSA and Government ordering activities placing orders under GSA Schedule 70 contracts are required to comply with the FAR clause at 12.212(a), which provides, in relevant part, that commercial computer software and documentation shall be acquired under licenses customarily provided to the public "to the extent such licenses are consistent with Federal law and otherwise satisfy the Government's needs."

Below is a list of terms and conditions commonly occurring in software manufacturers' unmodified commercial agreements that are inconsistent with Federal law and Government needs and, therefore, with FAR 12.212(a). The terms and conditions listed below are non-compliant regardless of the type of agreement: end-user license agreements (EULAs), maintenance agreements, terms of service (TOS), etc.

In order to avoid delays caused by legal review and negotiation of each individual set of terms, or loss of business that occurs when the terms are added on Schedule unmodified and ordering activities later decline to place an order because of non-conforming terms, manufacturers (and/or dealers or resellers, where appropriate) should create compliant agreements that do not contain the clauses listed below.

	Terms and conditions	Problem/recommendation
1	Definition of contracting parties	The Government customer (licensee), under GSA Schedule contracts, is the "ordering activity," defined as an "entity authorized to order under GSA Schedule contracts as defined in GSA Order ADM4800.2G, as may be revised from time to time." The licensee or customer cannot be an individual because any implication of individual licensing triggers the requirement for legal review by Federal employee unions. Conversely, because of competition rules, the contractor must be defined as a single entity even if the contractor is part of a corporate group. The Government cannot contract with the group, or in the alternative with a set of contracting parties.
2	Contract formation via using, downloading, clicking "I Agree," etc. (commonly known as shrinkwrap/clickwrap/browsewrap), or a provision purporting to bind the Government to a set of terms posted at a	Under FAR 1.601(a), in an acquisition involving the use of appropriated funds, an agreement binding on the Government may only be entered into by a duly warranted contracting officer in writing. Under FAR 43.102, the same requirement applies to contract modifications affecting the rights of the parties. All terms and conditions intended to bind the Government must be included within the contract signed by the Government. These types of clauses should

	specified URL	be deleted from Government contracts.
3	Customer indemnities: the customer commits to defend or indemnify the vendor for various things, e.g., in connection with claimed infringement of intellectual property rights.	This is an obligation in advance of an appropriation that violates anti-deficiency laws (31 USC 1341 and 41 USC 6301), since the Government customer commits to pay an unknown amount at an unknown future time. The violation occurs when the commitment is made, i.e., when the agreement featuring this clause is incorporated into a Government contract, and not when the clause is triggered. These types of clauses should be deleted from Government contracts.
4	Contractor indemnities: the contractor commits to "defend" the Government in various types of lawsuits, typically IP-related, on condition that the Government gives the contractor "sole control" over the conduct of such proceedings	While contractor indemnities as such are desirable, especially in IT acquisitions, the undertaking to "defend" and the concept of "sole control" are contrary to the DOJ's jurisdictional statute (28 USC 516) which vests the right to defend the Government, and consequently the right to exercise sole control, solely in the DOJ. These types of clauses should be revised to provide for appropriate consultation and the contractor's right to intervene in the proceedings at its own expense through counsel of its choice.
5	Automatic renewals: term-limited products or services (e.g., term licenses for software, or maintenance) renew automatically, and renewal charges fall due automatically, unless the customer takes action to opt out or terminate	Another anti-deficiency violation. These types of clauses should be deleted from Government contracts. For term-limited products or services, every subsequent term must be purchased separately.
6	Unspecified future fees or penalties. These can take a number of forms, e.g.: • contractor's unilateral right to raise prices or to change from awarded contract prices to "then-current" commercial catalog prices; • travel costs as incurred; • various surcharges;	Another anti-deficiency violation. These types of clauses should be deleted from Government contracts. Generally, the Government should pay only the awarded contract price; any change to the contract price requires the contracting officer's approval and, specifically in Schedule contracts, is further limited as to frequency and amount. Travel costs are governed by applicable Federal travel regulations, civilian or defense depending on the ordering activity. Late payment interest is governed by the Prompt Payment Act (31 USC 3901 et seq) and Treasury regulations at 5 CFR 1315. Attorney fees are available

	• various penalties, e.g., for late payment (including interest), for late shipment of defective part for repair, or for hiring a contractor's employee; • liquidated damages; • audit costs; • lapsed maintenance reinstatement fees; • Government payment of contractor's attorney fees	only to certain small business claimants as set forth in the Equal Access to Justice Act (5 USC 504)
7	Taxes	Under a line of GAO (U.S. Government Accountability Office) cases based on the Supremacy Clause of the US Constitution, the Government is exempt from state and local taxes whose "legal incidence" falls on the Federal Government. The applicability of a particular tax to the Government is a case by case determination for the contracting officer. Further, FAR 52.212-4(k) provides that the contract price includes all applicable Federal, state and local taxes and duties. Accordingly, clauses purporting to make the Government customer responsible for all taxes (even excepting the manufacturer's or contractor's corporate income tax) should be deleted from the contract, and any charge the vendor believes to be payable by the Government should be submitted individually to the contracting officer for adjudication.
8	Third-party terms: where the vendor's offering includes components provided by other manufacturers, or where the contractor is a dealer or reseller of other manufacturers' products, the agreement will often say that the customer agrees to be bound by the terms and conditions established by such manufacturer, without an opportunity for the customer to object to or negotiate the terms. The contractor or reseller is not a party to the third-party	This also introduces potentially offensive terms and removes the Government's ability to control what terms it is bound by. These types of clauses should be deleted from Government contracts. Alternatively, the third-party manufacturer should be brought into the negotiation, or the components acquired separately under Federally-compatible agreements, if any. Contractor indemnities do not constitute effective mitigation.

	terms and disclaims all responsibility, while the manufacturer may become a third-party beneficiary of the contract.	
9	Contract to be governed by state/foreign law, litigated in state/foreign courts, or arbitrated; contractual limitation on actions	A sovereign immunity issue. Depending on the cause of action (e.g., tort, breach of contract, infringement of copyright or patent), both venue and the statute of limitations are usually mandated by applicable Federal law (e.g., the Federal Tort Claims Act, 28 USC 1346(b); the Contract Disputes Act, 41 USC 7101 et seq; the Tucker Act, 28 USC 1346(a)(1)). Arbitration requires prior guidance by head of agency promulgated via administrative rulemaking (5 USC 575(c)); none has been issued by GSA because GSA considers the Board of Contract Appeals to be an adequate, binding ADR alternative. These types of clauses should be deleted from Government contracts. In a narrow subset of claims where U.S. District Courts have concurrent jurisdiction with the U.S. Court of Federal Claims (generally for claims under $10,000), it is acceptable (if otherwise in the Government's interests) to agree to venue in a U.S. District Court located in a specific state.
10	Equitable remedies, injunctions	A sovereign immunity issue. Equitable remedies are generally not available against the Government under Federal statutes. These types of clauses should be deleted from Government contracts.
11	Unilateral termination by contractor for breach	Inconsistent with FAR 52.233-1, which requires the contractor to submit a claim to the contracting officer if it believes the Government to be in breach, and to continue performance during the pendency of the claim. In commercial item contracts, the FAR also specifies the procedures for Government termination for breach or convenience. Under FAR 12.302(b), the FAR provisions dealing with dispute and continued performance cannot be changed by the contracting officer. Moreover, unilateral termination by the contractor may be viewed as non-performance and reported as such in PPIRS (Past Performance Information Retrieval System). These types of clauses should be deleted from Government contracts. The law provides the contractor with other remedies short of termination, e.g., a direct cause of action

		against the Government for an alleged copyright or patent infringement under 28 USC 1498.
12	Unilateral modification: the vendor reserves the right to unilaterally change the license terms or terms of service, with or without notice to the customer	This allows the vendor to introduce offensive terms in the future and removes the Government's ability to control what terms it is bound by. Also violates the contract formation rules of FAR 1.601(a) and 43.102. These types of clauses should be deleted from Government contracts.
13	Assignment by licensor	The Anti-Assignment Act, 41 USC 6305, prohibits the assignment of Government contracts without the Government's prior approval. Procedures for securing such approval are set forth in FAR 42.1204. Provisions purporting to permit the licensor or contractor to assign the agreement, or its rights or obligations thereunder, without the Government's consent should be deleted. The only exception is an assignment of claims to a financial institution, which is permitted under the 31 USC 3727 and FAR clause at 52.212-4(b).
14	Ownership of derivative works	Derivative works do not fall within the definition of commercial item in FAR 12.212 and therefore within the scope of GSA Schedule contracts. Ownership of derivative works should be as set forth in the copyright statute, 17 USC 103, and the FAR clause at 52.227-14, as may be modified by mutual written agreement between the licensor and the ordering activity at the task order level. Provisions purporting to vest exclusive ownership of all derivative works in the licensor of the standard software on which such works may be based should be deleted from master Schedule contracts.