demurrage practices and regulations, the Commission may consider whether and how regulated entities provide notice to cargo interests that cargo is available for retrieval. The Commission may consider the type of notice, to whom notice is provided, the format of notice, method of distribution of notice, the timing of notice, and the effect of the notice.

(4) Government Inspections.

(e) *Demurrage and Detention Policies.* The Commission may consider in the reasonableness analysis the existence and accessibility of policies implementing demurrage and detention practices and regulations, including dispute resolution policies. In assessing dispute resolution policies, the Commission may further consider the extent to which they contain information about points of contact, timeframes, and corroboration requirements.

(f) *Transparent Terminology.* The Commission may consider in the reasonableness analysis the extent to which regulated entities have defined the terms used in demurrage and detention practices and regulations, the accessibility of definitions, and the extent to which the definitions differ from how the terms are used in other contexts.

By the Commission.

Rachel Dickon,

Secretary.

[FR Doc. 2019–19858 Filed 9–16–19; 8:45 a.m.]

BILLING CODE 6731–AA–P

ENVIRONMENTAL PROTECTION AGENCY

48 CFR Parts 1502, 1512, 1513, 1516, 1532, 1539, and 1552

[EPA–HQ–OARM–2018–0714; FRL–9998–55–OMS]

Environmental Protection Agency Acquisition Regulation; Unenforceable Commercial Supplier Agreement Terms, Class Deviations, and Update for Fixed Rates for Services—Indefinite Delivery/Indefinite Quantity Contract

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to amend the Environmental Protection Agency Acquisition Regulation (EPAAR) to address common Commercial Supplier Agreement terms that are inconsistent with or create ambiguity with Federal Law, to create a new subpart for class deviations, and to update clause Fixed Rates for Services—Indefinite Delivery/Indefinite Quantity Contract.

DATES: Comments must be received on or before November 18, 2019.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OARM–2018–0714, at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Thomas Valentino, Policy, Training and Oversight Division, Acquisition Policy and Training Branch (3802R), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–4522; email address: *valentino.thomas@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

1. *Submitting Classified Business Information.* Do not submit CBI to EPA website *https://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI, and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The Agency may ask you to respond to specific questions or organize comments by referencing a *Code of Federal Regulations* (CFR) Part or section number.
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

II. Background

1. Incompatibility of Commercial Supplier Agreements

EPA defines Commercial Supplier Agreements (CSAs) as terms and conditions that are customarily offered to the public by vendors of supplies or services that meet the Federal Acquisition Regulation (FAR) definition of ''commercial item'' and are intended to create a binding legal obligation on the end user. CSAs are common in information technology acquisitions, including acquisitions of commercial computer software and commercial technical data, and they may apply to any supply or service.

Commercial supplies and services are offered to the public under standard agreements that may take a variety of forms, including but not limited to license agreements, terms of service, and terms of sale or purchase. These standard CSAs contain terms and conditions that are appropriate when the purchaser is a private party, but not when the purchaser is the Federal Government.

The existence of Federally-incompatible terms in standard CSAs is recognized in FAR 27.405–3(b), which is limited to the acquisition of commercial computer software. This subsection advises contracting officers to exercise caution when accepting a

contractor's terms and conditions. The use of CSAs is not limited to information technology acquisitions, as they have become common in a broad variety of contexts, from travel to telecommunications to financial services to building maintenance systems; including purchases below the simplified acquisition threshold.

Discrepancies between CSAs and Federal law, or the Government's needs, create recurrent points of inconsistency. Below are examples of incompatible clauses that are commonly found in CSAs:

- Jurisdiction or venue clauses may require that disputes be resolved in a particular state or Federal court. Such clauses conflict with the sovereign immunity of the U.S. Government and cannot apply to litigation where the U.S. Government is a defendant because those disputes must be heard either in U.S. District Court (28 U.S.C. 1346) or the U.S. Court of Federal Claims (28 U.S.C. 1491).
- Automatic renewal clauses may automatically renew or extend contracts unless affirmative action is taken by the Government. Such clauses that require the obligation of funds prior to appropriation violate the restrictions of the *Anti-Deficiency Act* (31 U.S.C. 1341(a)(1)(B)).
- Termination clauses may allow the contractor to unilaterally terminate a contract if the Government is alleged to have breached the contract. Government contracts are subject to the *Contract Disputes Act* of 1978 (41 U.S.C. 601–613). The *Contract Disputes Act* requires a certain process for resolving disputes, including terminations, and that the ''Contractor shall proceed diligently with performance of this contract, pending final resolution'' under the terms of the FAR *Disputes* clause at 52.233–1.

Additionally, the current order of precedence contained in the *Commercial Items* clause at FAR 52.212–4 is not clear on prevailing terms, and potentially allows CSAs to supersede the terms of Federal contracts, especially in those areas where Federal law is implicated indirectly. As a result, industry and Government representatives must spend time and resources negotiating and tailoring CSAs to comply with Federal law and to ensure both parties have agreement on the contract terms.

2. Value of Addressing Incompatible Commercial Supplier Agreements

EPA has identified common illegal, improper or inappropriate CSA terms that constitute the majority of the negotiated CSA terms. The outcome of the negotiations regarding these identified terms is generally predetermined by rule of law, but EPA and contractors must spend time and resources to negotiate these terms. By explicitly addressing common unenforceable terms within the *Commercial Items* clause at FAR 52.212–4 and clarifying prevailing terms in the order of precedence, it eliminates the need for negotiation of these terms.

This approach will decrease the time needed for legal review prior to contract award, and will reduce costs to both the Government and contractors. EPA believes that such an approach will benefit contractors, including small business concerns, by: (1) Decreasing proposal costs associated with negotiating the identified unenforceable CSA terms; (2) facilitating faster procurement and contract lead times, therefore decreasing the time it takes for contractors to make a return on their investment; (3) reducing administrative costs for companies that maintain alternate Federally compliant CSAs; and (4) for small business concerns, it levels the playing field with larger competitors since negotiations will only be required if the CSA contains objectionable clauses outside of those already identified in proposed clause. Additionally, this approach ensures consistent application and understanding of these unenforceable terms.

3. EPA Class Deviation

EPA is issuing class deviations for two Federal Acquisition Regulation (FAR) clauses to address the order of precedence and CSA terms that are incompatible with Federal law. The class deviations not only protect EPA and contractors by uniformly addressing common unacceptable terms and reducing risk, but also by further streamlining the acquisition process and reducing administrative cost for commercial-item supplies and services. The class deviations also clarify the precedence of terms to ensure parties have a mutual understanding of the contract terms; for example, bilateral modifications to the CSAs are only required for material changes.

4. Updates to § 1516.505(b) and § 1552.216–73

The EPA is updating clause 1552.216–73, *Fixed Rates for Services–Indefinite Delivery/Indefinite Quantity Contract,* to add Alternate I (which had previously been a deviation) to the Basic form. The deviation was issued in April 2018 and provides for contractors to be paid escalated rates for optional periods of performance. The deviation is amended into an alternate version because there is an ongoing need for the deviation. The corresponding prescription in § 1516.505(b) is being updated accordingly.

5. New Subpart 1552.3

EPA is creating a new subpart 1552.3, *FAR and EPAAR Class Deviations,* that will contain FAR and EPAAR class deviations initiated by the EPA. As discussed in II.*3.* in this preamble the EPA is creating two new FAR class deviations in this proposed rulemaking that will be added to the new subpart: Class deviations for 52.212–4, *Contract Terms and Conditions—Commercial Items (FAR DEVIATION);* and 52.232–39, *Unenforceability of Unauthorized Obligations (FAR DEVIATION).*

III. Discussion and Analysis

EPA is proposing to amend the EPAAR to implement standard terms and conditions for the most common conflicting CSA terms and to minimize the need for the negotiation of these terms of CSAs on an individual basis. The proposed rulemaking will add requirements to contracts making certain conflicting or inconsistent terms in a CSA unenforceable so long as an express exception is not authorized elsewhere by Federal statute. EPA is also proposing to amend the EPAAR to modify the order of precedence contained in the *Commercial Items* clause (FAR 52.212–4) to make clear that all of the terms of the EPAAR deviated clause control in the event of a conflict with a CSA, unless both parties agree to specific terms during the course of negotiating the contract. The EPA is also proposing to amend the EPAAR to create new subpart 1552.3 for class deviations. The EPA also proposes to change the deviated version of clause 1552.216–73 into an alternate version because of its ongoing need.

These changes will be accomplished by revising guidance and clauses contained throughout the EPAAR as follows:

- EPAAR § 1502.100 is amended to provide a definition for *Commercial Supplier Agreements.*
- EPAAR § 1512.101 is created and clarifies that paragraph (u) of the deviated *Commercial Items* clause at § 1552.312–4 (FAR DEVIATION) prevents violation of the *Anti-Deficiency Act.*
- EPAAR § 1512.1070 is created to prescribe the use of the deviated *Commercial Items* clause at § 1552.312–4 (FAR DEVIATION) in lieu of FAR 52.212–4.
- EPAAR § 1513.507(b) is amended and requires the inclusion of

§ 1552.332–39 and § 1552.232–75 in all acquisitions for supplies or services that are offered under a CSA.

- EPAAR Subpart 1513.6 is created and will add § 1552.332–39 to all purchases below the micro-purchase threshold.
- EPAAR § 1516.505(b) is amended to update the prescription for § 1552.216–73.
- EPAAR Subpart 1532.10 is created and clarifies the definition of ''supplier license agreements'' as used in FAR 32.705, *Unenforceability of Unauthorized Obligations.*
- EPAAR § 1532.1070 is created and directs contracting officers to utilize the clause at § 1552.332–39 in lieu of FAR 52.232–39; and prescribes the use of clause *Commercial Supplier Agreements—Unenforceable Clauses* at 1552.232–75.
- EPAAR Subpart 1539.1 is created and advises contracting officers and contract specialists to follow the relevant EPAAR rules relating to CSA procurement.
- EPAAR § 1552.216–73 is amended to add an alternate clause version.
- EPAAR § 1552.232–75 is created for non-commercial contracts and addresses the same common unenforceable CSA terms addressed in § 1552.312–4 (FAR DEVIATION) paragraph (w) described above.
- EPAAR Subpart 1552.3 is created and adds the class deviations for § 1552.312–4 and § 1552.332–39.
- The *Commercial Items* clause at § 1552.312–4 (FAR DEVIATION) in subpart 1552.3 is modified to include instructions to contracting officers on how to incorporate the change in language from FAR 52.212–4.
- The order of precedence contained in paragraph (s) of the *Commercial Items* clause at § 1552.312–4 (FAR DEVIATION) in subpart 1552.3 is amended to ensure that all of the terms of § 1552.312–4 shall control over the terms of a CSA by moving ''Addenda to this solicitation or contract, including any license agreements for computer software'' down two spaces in the order of precedence, behind ''Solicitation provisions as awarded if there is a solicitation'' and ''Other paragraphs of this clause.''
- Paragraph (u) of the *Commercial Items* clause at § 1552.312–4 (FAR DEVIATION) in subpart 1552.3 is amended to (1) reflect the new *Commercial Supplier Agreement* definition contained in EPAAR 1502.100; (2) expand coverage to ''language or provision'' in addition to ''clause'' in order to ensure that all CSA terms are covered regardless of terminology utilized; and (3) include future fees, penalties, interest and legal costs as unauthorized obligations in addition to indemnification.
- Paragraph (w) of the *Commercial Items* clause at § 1552.312–4 (FAR DEVIATION) in subpart 1552.3 is created to address the following commonplace unenforceable elements found in CSAs:
  - *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 CSA.
  - *Laws and disputes:* 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. CSA terms that require the resolution of a dispute in a forum or time period other than those expressly authorized by Federal law are deleted. Statutes of limitation on potential claims shall be governed by U.S. Federal law.
  - *Continued Performance:* Commercial suppliers may not unilaterally terminate or suspend a contract based upon a suspected breach of contract by the Government. These types of CSA terms violate 31 U.S.C. 3324, which provides that payment under a contract may not exceed the value of a service or product already delivered. A license that is prematurely terminated outside of the regular dispute resolution procedures results in the Government not receiving the value of that good or service ordered because it is no longer delivered. The removal of the contractor's right to unilateral termination does not impair the contractor's ability to pursue remedies. It preserves all the legal remedies the contractor otherwise has under Federal law, including *Contract Disputes Act* claims. Remedies through the *Contract Disputes Act* or other applicable Federal statutes align with the continuing performance requirement set forth in subparagraph (d) *Disputes.*
  - *Arbitration; equitable or injunctive relief:* A binding arbitration may not be enforced unless explicitly authorized by agency guidance or statute. Equitable remedies or injunctive relief 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*).
  - *Additional Terms:* Incorporation of terms by reference is allowed provided the full text of terms is provided with the offer. Unilateral modifications to the CSA after the time of award may be allowed to the extent that the modified terms do not materially change the Government's rights or obligations, increase the Government's prices, decrease the level of service provided, or limit any Government right addressed elsewhere in the contract. A bilateral contract modification is required for any of the above described changes to be enforceable against the Government.
  - *Automatic renewals:* Due to *Anti-Deficiency Act* restrictions, automatic contract renewal clauses are impermissible. Any such CSA clauses are unenforceable.
  - *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.
  - *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.
  - *Taxes or surcharges:* 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 of taxes whenever such a request is made.
  - *Assignment of CSA or Government contract by supplier:* The contract, CSA, 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.
  - *Confidentiality of CSA terms and conditions:* The content of the CSA 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.
- § 1552.332–39 (FAR DEVIATION) in subpart 1552.3 is created to amend the language of FAR 52.232–39 to reflect the definition of CSAs contained at EPAAR 1502.100, to expand coverage to ''language or provision'' in addition to ''clause'' in order to ensure that all CSA terms are covered, regardless of terminology utilized; and to include future fees, penalties, interest and legal

costs as unauthorized obligations in addition to indemnification.

This proposed rule will reduce risk by uniformly addressing common unacceptable CSA terms, facilitate efficiency and effectiveness in the contracting process by reducing the administrative burden for the Government and industry, and promote competition by reducing barriers to industry, including small businesses. It will also create a new EPAAR subpart for class deviations, and an alternate version for clause 1552.216–73.

IV. Proposed Rule

The proposed rule amends Part 1502, *Definition of Words and Terms,* by adding a definition for *Commercial Supplier Agreements* to § 1502.100. It adds Part 1512, *Acquisition of Commercial Items,* Subpart 1512.1, *Special Requirements for the Acquisition of Commercial Items,* § 1512.101, *Unenforceability of Unauthorized Obligations,* and § 1512.1070, *Contract Clause.* It amends Part 1513, *Simplified Acquisition Procedures,* by adding Subpart 1513.6, *Action At or Below the Micropurchase Threshold,* and amending § 1513.507(b). It amends § 1516.505(b) by adding an alternate clause version to the clause prescription. It amends Part 1532, *Contract Financing,* by adding Subpart 1532.10, *Unenforceability of Unauthorized Obligation;* and § 1532.1070, *Contract clause.* It adds Part 1539, *Acquisition of Information Technology,* and Subpart 1539.1, *Commercial Supplier Agreements.* It amends Subpart 1552.2, *Texts of Provisions and Clauses,* by adding an alternate clause version to § 1552.216–73, *Fixed Rates for Services—Indefinite Delivery/Indefinite Quantity Contract;* and adding § 1552.232–75, *Commercial Supplier Agreements—Unenforceable Clauses.* Finally, it amends Part 1552, *Solicitation Provisions and Contract Clauses,* by adding Subpart 1552.3, *FAR and EPAAR Class Deviations,* and class deviations for clauses 52.212–4 and 52.232–39. This proposed rule:

1. Amends Part 1502, *Definition of Words and Terms,* by adding a definition for *Commercial Supplier Agreements to* § 1502.100, *Definitions.*

2. Adds Part 1512, *Acquisition of Commercial Items,* and Subpart 1512.1, *Special Requirements for the Acquisition of Commercial Items,* which clarify that paragraph (u) of the *Commercial Items* clause at § 1552.312–4 (FAR DEVIATION) prevents violation of the *Anti-Deficiency Act.*

3. Adds § 1512.101, *Unenforceability of Unauthorized Obligations,* and § 1512.1070, *Contract Clause,* to prescribe the use of the deviated *Commercial Items* clause at § 1552.312–4 (FAR DEVIATION) in lieu of FAR 52.212–4.

4. Amends Part 1513, Simplified Acquisition Procedures, by adding Subpart 1513.6, Action At or Below the Micropurchase Threshold, and amending § 1513.507(b), which will automatically apply the clauses at § 1552.232–75 and § 1552.332–39 to all purchases below the micro-purchase threshold.

5. Amends the currently designated § 1513.507(a) to become § 1513.507(a)(i), and the currently designated § 1513.507(b) to become § 1513.507(a)(ii), due to the addition above.

6. Amends § 1516.505(b) by adding an alternate clause version to the prescription.

7. Adds EPAAR Subpart 1532.10, *Unenforceability of Unauthorized Obligation,* that clarifies the definition of supplier license agreements.

8. Adds EPAAR § 1532.1070 and establishes the prescription for use of EPAAR clause 1552.232–75 in all procurements where supplies or services are offered under a CSA.

9. Adds Part 1539, *Acquisition of Information Technology,* and Subpart 1539.1, *Commercial Supplier Agreements.*

10. Amends Subpart 1552.2, *Texts of Provisions and Clauses,* to add an alternate clause version to § 1552.216–73, *Fixed Rates for Services—Indefinite Delivery/Indefinite Quantity Contract,* that pays the contractor escalated rates for optional periods of performance.

11. Adds EPAAR § 1552.232–75, *Commercial Supplier Agreements—Unenforceable Clauses,* that provides the terms and conditions for supplies or services offered under a CSA.

12. Adds EPAAR Subpart 1552.3, *FAR and EPAAR Class Deviations,* to contain § 1552.312–4, *Contract Terms and Conditions—Commercial Items (FAR DEVIATION);* and § 1552.332–39/ *Unenforceability of Unauthorized Obligations (FAR DEVIATION).* § 1552.312–4 updates paragraphs (s) and (u), and adds paragraph (w). § 1552.332–39 updates terms from *Terms of Sale* and *End User Licensing Agreement* to *Commercial Supplier Agreement.*

V. Statutory and Executive Orders Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a ''significant regulatory action'' under the terms of Executive Order (E.O.) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the E.O.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute; unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impact of this proposed rule on small entities, ''small entity'' is defined as: (1) A small business that meets the definition of a small business found in the Small Business Act and codified at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. After considering the economic impacts of this rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, because the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the proposed rule on small entities'' 5 U.S.C. 503 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule. This action creates a new EPAAR clause, clause alternate and class deviations that will not have a significant economic impact on a substantial number of small entities, as

discussed in Section (II)(B). We continue to be interested in the potential impacts of the rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, Pub. L. 104–4), establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, Local, and Tribal governments and the private sector. This rule contains no Federal mandates (under the regulatory provisions of the Title II of the UMRA) for State, Local, and Tribal governments or the private sector. The rule imposes no enforceable duty on any State, Local or Tribal governments or the private sector. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and Local officials in the development of regulatory policies that have federalism implications. ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government as specified in Executive Order 13132.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This rule does not have tribal implications as specified in Executive Order 13175.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045, entitled ''Protection of Children from Environmental Health and Safety Risks'' (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be economically significant as defined under E.O. 12886, and (2) concerns an environmental health or safety risk that may have a proportionate effect on children. This rule is not subject to E.O. 13045 because it is not an economically significant rule as defined by Executive Order 12866, and because it does not involve decisions on environment health or safety risks.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use'' (66 FR 28335 (May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act of 1995 (NTTAA)

Section 12(d) (15 U.S.C. 272 note) of the National Technology Transfer and Advancement Act of 1995, Public Law 104–113, directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment in the general public.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a major rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804(2) defines a ''major rule'' as any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in (1) an annual effect on the economy of $100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. EPA is not required to submit a rule report regarding this action under section 801 as this is not a major rule by definition.

List of Subjects in 48 CFR Parts 1502, 1512, 1513, 1516, 1532, 1539 and 1552

Environmental protection, Accounting, Government procurement, Reporting and recordkeeping requirements.

Dated: August 13, 2019.

Kimberly Y. Patrick,

Director, Office of Acquisition Solutions.

For the reasons stated in the preamble, 48 CFR parts 1502, 1512, 1513, 1516, 1532, 1539 and 1552 are proposed to be amended as follows:

PART 1502—DEFINITION OF WORDS AND TERMS

■ 1. The authority citation for part 1502 continues to read as follows:

Authority: 5 U.S.C. 301; Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c); and 41 U.S.C. 418b.

■ 2. Revise 1502.100 to read as follows:

1502.100 Definitions.

Chief of the Contracting Office (CCO) means the Office of Acquisition Solutions Division Directors at Headquarters, Research Triangle Park and Cincinnati. For purposes of ratification authority only, CCO also includes Regional Acquisition Managers. (See 1501.602–3(b)(3) for the criteria for this ratification authority).

Commercial supplier agreements (CSAs) mean 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. CSAs are common in information technology acquisitions, including acquisitions of commercial computer software and commercial technical data, and they may apply to any supply or service. CSAs may apply 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 a proposal or quotation responding to a solicitation for a contract or order). CSAs may also apply 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, product delivery, registration for a service, or other transaction).

Head of the Contracting Activity (HCA) means the Director, Office of Acquisition Solutions.

Senior Procurement Executive (SPE) means the Director, Office of Acquisition Solutions.

SUBCHAPTER B—ACQUISITION PLANNING

■ 3. Add part 1512 to read as follows:

PART 1512—ACQUISITION OF COMMERCIAL ITEMS

Subpart 1512.1—Special Requirements for the Acquisition of Commercial Items

Authority: 5 U.S.C. 301 and 41 U.S.C. 418b.

Subpart 1512.1—Special Requirements for the Acquisition of Commercial Items

1512.101 Unenforceability of unauthorized obligations.

EPA deviates from FAR 52.212–4 by using the term ''Commercial Supplier Agreements'' (defined in 1502.100) for commercial contracts instead of ''supplier license agreements''. Paragraph (u) of clause 1552.332–39 (FAR DEVIATION) prevents violations of the *Anti-Deficiency Act* (31 U.S.C. 1341) for the acquisition of supplies or services subject to a Commercial Supplier Agreement.

1512.1070 Contract clause.

EPA deviates from FAR 52.212–4 by revising paragraphs (s) and (u) and adding paragraph (w). Contracting officers shall use clause 1552.332–39, Contract Terms and Conditions-Commercial Items (FAR DEVIATION), for acquisitions of commercial items in lieu of 52.212–4 or 52.212–4 Alternate I. The contracting officer may tailor this clause in accordance with FAR 12.302.

PART 1513—SIMPLIFIED ACQUISITION PROCEDURES

■ 4. The authority citation for part 1513 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c).

■ 5. Revise section 1513.507 to read as follows:

1513.507 Contract clauses.

(a)(1) It is the general policy of the Environmental Protection Agency that contractor or vendor prescribed leases or maintenance agreements for equipment shall not be executed.

(2) The contracting officer shall, where appropriate, insert the clause at 1552.213–70, *Notice to Suppliers of Equipment,* in orders for purchases or leases of automatic data processing equipment, word processing, and similar types of commercially available equipment for which vendors, as a matter of routine commercial practice, have developed their own leases and/or customer service maintenance agreements.

(b) Where the supplies or services are offered under a Commercial Supplier Agreement (as defined in 1502.100), the purchase order or modification shall incorporate clause 1552.332–39, *Unenforceability of Unauthorized Obligations* (FAR DEVIATION), in lieu of nondeviated clause 52.232–39, and clause 1552.232–75, *Commercial Supplier Agreements-Unenforceable Clauses.*

■ 6. Add subpart 1513.6, consisting of 1513.6XX, to read as follows:

Subpart 1513.6—Actions at or Below the Micro-Purchase Threshold

1513.6XX Unenforceability of unauthorized obligations in micro-purchases.

Unenforceability of unauthorized obligations in micro-purchases. Clause 1552.332–39, *Unenforceability of Unauthorized Obligations* (FAR DEVIATION), will automatically apply to any micro-purchase in lieu of nondeviated FAR 52.232–39 for supplies and services acquired subject to a commercial supplier agreement (as defined in 1502.100).

PART 1516—TYPES OF CONTRACTS

■ 7. The authority citation for part 1516 continues to read as follows:

Authority: 5 U.S.C. 301 and 41 U.S.C. 418b.

■ 8. Amend section 1516.505 by revising paragraph (b) to read as follows:

1516.505 Contract clauses.

* * * * *

(b) The contracting officer shall insert clause substantially the same as 1552.216–73, *Fixed Rates for Services—Indefinite Delivery/Indefinite Quantity Contract,* in solicitations and contracts to specify fixed rates for services. Contracting officers may use Alternate I for procurements that will have order performance periods longer than one year. Alternate I has a different paragraph (c) from the Basic form. Contracting officers must use the Basic form as prescribed for procurements that will have orders with performance periods of one year or less. Contracting officers may use both the Basic form and Alternate I for procurements that will have mixed-length orders, where some are for one year or less, and others are for longer than one year. In such cases contracting officers must include procurement language that the Basic form applies to orders less than one year, and Alternate I applies to orders longer than one year.

PART 1532—CONTRACT FINANCING

■ 9. The authority citation for part 1532 continues to read as follows:

Authority: 5 U.S.C. 301 and 41 U.S.C. 418b.

■ 10. Add subpart 1532.10 to read as follows:

Subpart 1532.10—Unenforceability of Unauthorized Obligations

Subpart 1532.10—Unenforceability of Unauthorized Obligations

1532.10XX Definitions.

Supplier license agreements defined in FAR 32.705 are equivalent to *Commercial Supplier Agreements* defined in 1502.100.

1532.1070 Contract clause.

The contracting officer shall utilize the clause at 1552.332–39, *Unenforceability of Unauthorized Obligations* (FAR DEVIATION) in all solicitations and contracts in lieu of nondeviated FAR 52.232–39.

Subchapter F—Special Categories of Contracting

■ 11. Add part 1539, consisting of subpart 1539.1, to subchapter F to read as follows:

PART 1539—ACQUISITION OF INFORMATION TECHNOLOGY

Authority: 5 U.S.C. 301 and 41 U.S.C. 418b.

Subpart 1539.1—Commercial Supplier Agreements

1539.1XX History.

(a) *Background*—(1) *Commercial Supplier Agreements (CSAs)* are defined at 1502.100 in part as terms and conditions that are customarily offered to the public by vendors of supplies or services that meet the definition of ''commercial item'' and are intended to create a binding legal obligation on the end user. CSAs are common in information technology acquisitions, including acquisitions of commercial computer software and commercial technical data, and they may apply to any supply or service.

(2) Commercial supplies and services are offered to the public under standard agreements that may take a variety of forms, including, but not limited to, *license agreements, terms of service,* and *terms of sale or purchase.* These standard CSAs contain terms and conditions that are appropriate when the purchaser is a private party, but not when the purchaser is the Federal Government. The existence of Federally-incompatible terms in standard CSAs is recognized in FAR 27.405–3(b), which states contracting officers should exercise caution in accepting a vendor's terms and conditions, since they may be written for commercial sales and not appropriate for Government contracts. *(Note that the use of CSAs is not limited to information technology acquisitions, as they have become common in a broad variety of contexts, from travel to telecommunications to financial services to building maintenance systems; including purchases below the simplified acquisition threshold.)*

(b) *Policy.* The EPAAR includes standard terms and conditions for the most common conflicting CSA terms, and contracting officers and contract specialists must follow the relevant rules in parts 1512, 1513, and 1532 when purchasing information technology that includes a CSA.

PART 1552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 12. The authority citation for part 1552 continues to read as follows:

Authority: 5 U.S.C. 301 and 41 U.S.C. 418b.

Subpart 1552.2—Texts of Provisions and Clauses

■ 13. Revise section 1552.216–73 to read as follows:

1552.216–73 Fixed rates for services–indefinite delivery/indefinite quantity contract.

As prescribed in 1516.505(b), insert the following clause:

Fixed Rates For Services—Indefinite Delivery/Indefinite Quantity Contract (Date)

(a) The following fixed rates shall apply for payment purposes for the duration of the contact.

Personnel classification	Skill level	Fixed hourly rate

(b) The rate, or rates, set forth in paragraph (a) of this clause, cover all expenses, including report preparation, salaries, overhead, general and administrative expenses, and profit.

(c) The Contractor shall voucher for only the time of the personnel whose services are applied directly to the work called for in individual Orders and accepted by the EPA Contracting Officer's Representative (COR). The Government shall pay the Contractor for the life of the Order at rates in effect when the Order was issued, even if performance under the Order crosses into another period. The Contractor shall maintain time and labor distribution records for all employees who work under the contract. These records must document time worked and work performed by each individual on all Orders.

(End of clause)

Alternate I (date). As prescribed in 1515.505(b), modify the Basic form of the clause by changing paragraph (c) to the following:

(c) The Contractor shall voucher for only the time of the personnel whose services are applied directly to the work called for in individual Orders and accepted by the EPA Contracting Officer's Representative (COR). The Government shall pay the Contractor at rates in effect when the work is performed by the Contractor. The Contractor shall maintain time and labor distribution records for all employees who work under the contract. These records must document time worked and work performed by each individual on all Orders.

■ 14. Add section 1552.232–75 to read as follows:

1552.232–75 Commercial supplier agreements—unenforceable clauses.

As prescribed in 1513.507(b) and 1532.1070 insert the following clause:

Commercial Supplier Agreements—Unenforceable Clauses (Date)

When any supply or service acquired under this contract is subject to a Commercial Supplier Agreement (CSA, as defined in 1502.100), the following language shall be deemed incorporated into the CSA. As used herein, ''this agreement'' means the CSA:

(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 between the commercial supplier and the U.S. Government for the acquisition of the supply or service that necessitates a license or other similar legal instrument (including all contracts, task orders, and delivery orders under FAR parts 13, 14 or 15).

(2) *End user.* This agreement shall bind the ordering activity 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.

(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 FAR 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, a 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 terms if they are not material. A material change is defined as:

(A) Terms that significantly change Government rights or obligations; and

(B) Terms that increase Government prices;

(C) Terms that decrease overall level of service; or

(D) Terms that 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 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 FAR 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 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 invoicing unless specifically agreed to otherwise in the Government 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 FAR 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, as 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.

(b) If any language, provision or clause of this agreement conflicts or is inconsistent with paragraph (a) of this clause, the language, provisions, or clause of paragraph (a) of this clause shall prevail to the extent of such inconsistency.

(End of clause)

■ 15. Add subpart 1552.3 to read as follows:

Subpart 1552.3—FAR and EPAAR Class Deviations

Authority: 5 U.S.C. 301 and 41 U.S.C. 418b.

Subpart 1552.3—FAR and EPAAR Class Deviations

1552.312–4 Contract terms and conditions–commercial items (FAR deviation).

As prescribed in 1512.1070, the contracting officer shall insert clause 1552.332–39, Contract Terms and Conditions-Commercial Item*s* (FAR DEVIATION), for acquisitions of commercial items in lieu of 52.212–4 or 52.212–4 Alternate I. The contracting officer may tailor this clause in accordance with FAR 12.302.

Contract Terms and Conditions—Commercial Items (FAR Deviation) (Date)

(a) *Inspection/acceptance.* The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. If repair/replacement or reperformance will not correct the defects or is not possible, the Government may seek an equitable price reduction or adequate consideration for acceptance of nonconforming supplies or services. The Government must exercise its post-acceptance rights—

(1) Within a reasonable time after the defect was discovered or should have been discovered; and

(2) Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

(b) *Assignment.* The Contractor or its assignee may assign its rights to receive payment due as a result of performance of this contract to a bank, trust company, or other financing institution, including any Federal lending agency in accordance with the Assignment of Claims Act (31 U.S.C. 3727). However, when a third party makes payment (*e.g.,* use of the Governmentwide commercial purchase card), the Contractor may not assign its rights to receive payment under this contract.

(c) *Changes.* Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

(d) *Disputes.* This contract is subject to 41 U.S.C. chapter 71, Contract Disputes. Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the

clause at FAR 52.233–1, Disputes, which is incorporated herein by reference. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.

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

(f) *Excusable delays.* The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

(g) *Invoice.* (1) The Contractor shall submit an original invoice and three copies (or electronic invoice, if authorized) to the address designated in the contract to receive invoices. An invoice must include—

(i) Name and address of the Contractor;

(ii) Invoice date and number;

(iii) Contract number, line item number and, if applicable, the order number;

(iv) Description, quantity, unit of measure, unit price and extended price of the items delivered;

(v) Shipping number and date of shipment, including the bill of lading number and weight of shipment if shipped on Government bill of lading;

(vi) Terms of any discount for prompt payment offered;

(vii) Name and address of official to whom payment is to be sent;

(viii) Name, title, and phone number of person to notify in event of defective invoice; and

(ix) Taxpayer Identification Number (TIN). The Contractor shall include its TIN on the invoice only if required elsewhere in this contract.

(x) Electronic funds transfer (EFT) banking information.

(A) The Contractor shall include EFT banking information on the invoice only if required elsewhere in this contract.

(B) If EFT banking information is not required to be on the invoice, in order for the invoice to be a proper invoice, the Contractor shall have submitted correct EFT banking information in accordance with the applicable solicitation provision, contract clause (*e.g.,* 52.232–33, Payment by Electronic Funds Transfer—System for Award Management, or 52.232–34, Payment by Electronic Funds Transfer—Other Than System for Award Management), or applicable agency procedures.

(C) EFT banking information is not required if the Government waived the requirement to pay by EFT.

(2) Invoices will be handled in accordance with the *Prompt Payment Act* (31 U.S.C. 3903) and Office of Management and Budget (OMB) prompt payment regulations at 5 CFR part 1315.

(h) *Patent indemnity.* The Contractor shall indemnify the Government and its officers, employees and agents against liability, including costs, for actual or alleged direct or contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark or copyright, arising out of the performance of this contract, provided the Contractor is reasonably notified of such claims and proceedings.

(i) *Payment*—(1) *Items accepted.* Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract.

(2) *Prompt payment.* The Government will make payment in accordance with the *Prompt Payment Act* (31 U.S.C. 3903) and prompt payment regulations at 5 CFR part 1315.

(3) *Electronic Funds Transfer (EFT).* If the Government makes payment by EFT, see 52.212–5(b) for the appropriate EFT clause.

(4) *Discount.* In connection with any discount offered for early payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the specified payment date if an electronic funds transfer payment is made.

(5) *Overpayments.* If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall—

(i) Remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment including the—

(A) Circumstances of the overpayment (*e.g.,* duplicate payment, erroneous payment, liquidation errors, date(s) of overpayment);

(B) Affected contract number and delivery order number, if applicable;

(C) Affected line item or subline item, if applicable; and

(D) Contractor point of contact.

(ii) Provide a copy of the remittance and supporting documentation to the Contracting Officer.

(6) *Interest.* (i) All amounts that become payable by the Contractor to the Government under this contract shall bear simple interest from the date due until paid unless paid within 30 days of becoming due. The interest rate shall be the interest rate established by the Secretary of the Treasury as provided in 41 U.S.C. 7109, which is applicable to the period in which the amount becomes due, as provided in (i)(6)(v) of this clause, and then at the rate applicable for each six-month period as fixed by the Secretary until the amount is paid.

(ii) The Government may issue a demand for payment to the Contractor upon finding a debt is due under the contract.

(iii) Final decisions. The Contracting Officer will issue a final decision as required by 33.211 if—

(A) The Contracting Officer and the Contractor are unable to reach agreement on the existence or amount of a debt within 30 days;

(B) The Contractor fails to liquidate a debt previously demanded by the Contracting Officer within the timeline specified in the demand for payment unless the amounts were not repaid because the Contractor has requested an installment payment agreement; or

(C) The Contractor requests a deferment of collection on a debt previously demanded by the Contracting Officer (see 48 CFR 32.607–2).

(iv) If a demand for payment was previously issued for the debt, the demand for payment included in the final decision shall identify the same due date as the original demand for payment.

(v) Amounts shall be due at the earliest of the following dates:

(A) The date fixed under this contract.

(B) The date of the first written demand for payment, including any demand for payment resulting from a default termination.

(vi) The interest charge shall be computed for the actual number of calendar days involved beginning on the due date and ending on—

(A) The date on which the designated office receives payment from the Contractor;

(B) The date of issuance of a Government check to the Contractor from which an amount otherwise payable has been withheld as a credit against the contract debt; or

(C) The date on which an amount withheld and applied to the contract debt would otherwise have become payable to the Contractor.

(vii) The interest charge made under this clause may be reduced under the procedures prescribed in 32.608–2 of the Federal Acquisition Regulation in effect on the date of this contract.

(j) *Risk of loss.* Unless the contract specifically provides otherwise, risk of loss or damage to the supplies provided under this contract shall remain with the Contractor until, and shall pass to the Government upon:

(1) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or

(2) Delivery of the supplies to the Government at the destination specified in the contract, if transportation is f.o.b. destination.

(k) *Taxes.* The contract price includes all applicable Federal, State, and local taxes and duties.

(l) *Termination for the Government's convenience.* The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost

accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

(m) *Termination for cause.* The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(n) *Title.* Unless specified elsewhere in this contract, title to items furnished under this contract shall pass to the Government upon acceptance, regardless of when or where the Government takes physical possession.

(o) *Warranty.* The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract.

(p) *Limitation of liability.* Except as otherwise provided by an express warranty, the Contractor will not be liable to the Government for consequential damages resulting from any defect or deficiencies in accepted items.

(q) *Other compliances.* The Contractor shall comply with all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under this contract.

(r) *Compliance with laws unique to Government contracts.* The Contractor agrees to comply with 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracts; 18 U.S.C. 431 relating to officials not to benefit; 40 U.S.C. chapter 37, *Contract Work Hours and Safety Standards;* 41 U.S.C. chapter 87, *Kickbacks;* 41 U.S.C. 4712 and 10 U.S.C. 2409 relating to whistleblower protections; 49 U.S.C. 40118, *Fly American;* and 41 U.S.C. chapter 21 relating to procurement integrity.

(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) Paragraphs (b), (d), (g), (i), (q), (r), (u) and (w) of this clause.

(3) The clause at 52.212–5.

(4) Addenda to this solicitation or contract, including any commercial supplier agreements as amended by the Commercial Supplier Agreements—Unenforceable Clauses provision.

(5) Solicitation provisions if this is a solicitation.

(6) Other paragraphs of this clause.

(7) The Standard Form 1449.

(8) Other documents, exhibits, and attachments.

(9) The specification.

(t) [Reserved]

(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 1502.100) that includes any language, provision, or clause requiring the Government to pay any future fees, penalties, interest, 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), 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 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.

(2) Paragraph (u)(1) of this clause does not apply to indemnification or any other payment by the Government that is expressly authorized by statute and specifically authorized under applicable agency regulations and procedures.

(v) *Incorporation by reference.* The Contractor's representations and certifications, including those completed electronically via the *System for Award Management* (SAM), are incorporated by reference into the contract.

(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 1502.100), 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 between the commercial supplier and the U.S. Government for the acquisition of the supply or service that necessitates a license or other similar legal instrument (including all contracts, task orders, and delivery orders under FAR part 12).

(ii) *End user.* This agreement shall bind the ordering activity 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 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) of this clause (*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 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 terms if they are not material. A material change is defined as:

(*1*) Terms that change Government rights or obligations;

(*2*) Terms that increase Government prices;

(*3*) Terms that decrease overall level of service; or

(*4*) Terms that limit any other Government right 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 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 in accordance with 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 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 invoicing unless specifically agreed to otherwise in the Government 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 list, as 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 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)

1552.332–39 Unenforceability of unauthorized obligations (FAR deviation).

As prescribed in 1513.507(b) and 1532.1070, use clause 1552.332–39 (FAR DEVIATION) instead of the nondeviated version for purchase orders, modifications and contracts that include commercial supplier agreements.

Unenforceability of Unauthorized Obligations (Far Deviation) (Date)

(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 1502.100) that includes any language, provision, or clause requiring the Government to pay any future fees, penalties, interest, 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), 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 language, provision, or 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 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.

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

(End of clause)

[FR Doc. 2019–19575 Filed 9–16–19; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Parts 571 and 585

[Docket No. NHTSA–2019–0085]

RIN 2127–AL93

Federal Motor Vehicle Safety Standard No. 141, Minimum Sound Requirements for Hybrid and Electric Vehicles

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to amend Federal Motor Vehicle Safety Standard (FMVSS) No. 141, *Minimum Sound Requirements for Hybrid and Electric Vehicles,* to allow manufacturers of hybrid and electric vehicles (HEVs) to install a number of driver-selectable pedestrian alert sounds in each HEV they manufacture. This proposal responds to a petition for reconsideration of the FMVSS No. 141 final rule published December 14, 2016. NHTSA is proposing to remove the limit to the number of compliant sounds that a manufacturer may choose to install in a vehicle. Drivers would be able to select the sound they prefer from the set of sounds installed in the vehicle. NHTSA is also seeking comment on whether interested parties believe that the agency should establish a limit to the number of compliant sounds from which a driver may select that a manufacturer may choose to install in a vehicle.

This document also makes technical changes.

DATES: Comments on this proposal must be received no later than November 1, 2019.

ADDRESSES: All comments and other information relating to this notice should refer to the docket number in the heading of this document and be submitted to: Administrator, National Highway Traffic Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: You may contact Mr. Thomas Healy, NHTSA Office of the Chief Counsel, at 202–366–2992 (FAX: 202–366–3820) or Mr. Michael Pyne, NHTSA Office of Crash Avoidance Standards, at 202–366–4171 (FAX: 202–493–2990).

SUPPLEMENTARY INFORMATION: NHTSA is proposing to amend FMVSS No. 141, Minimum Sound Requirements for Hybrid and Electric Vehicles (the ''Quiet Vehicles'' final rule) to remove the current limitation of one sound per vehicle model. Under the proposal, there would not be a limit to the number of compliant sounds a manufacturer could install in a vehicle. NHTSA is also requesting comment on whether there should be a limit to the number of compliant sounds that a manufacturer can install in a vehicle and what that limit should be.

Under FMVSS No. 141 currently, the HEV pedestrian alert sounds are allowed to vary with vehicle operating condition (stationary, reverse, 10 km/h, 20 km/h, and 30 km/h), but only one sound per operating condition is allowed for all vehicles of the same model, model year, body type and trim level. This proposal responds to a petition for reconsideration of the FMVSS No. 141 final rule published on December 14, 2016.[1] In a joint petition [2] submitted to NHTSA in January 2017, the Alliance of Automobile Manufacturers (Alliance) and Global Automakers (Global), the two main automotive industry groups in the U.S. representing most light vehicle manufacturers, requested several amendments.[3] One of the requested

[1] Final Rule, Federal Motor Vehicle Safety Standards; Minimum Sound Requirements for Hybrid and Electric Vehicles [81 FR 90416], effective September 5, 2017; docket No. NHTSA–2016–0125.

[2] Docket item no. NHTSA–2018–0018–0004.

[3] NHTSA issued a final rule on February 26, 2018, to address the other requested actions in the