



**Headquarters, US Marine Corps
Business & Support Services, MR
3044 Catlin Ave
Quantico, VA 22134
703-784-3800**

MCX TERMS AND CONDITIONS for Resale Merchandise (9 September 2022)

The MCX Terms and Conditions are applicable to contracts for merchandise, supplies, and equipment issued by the Marine Corps Exchange. These terms and conditions apply to vendors doing business with MCX to eliminate the need for including them with each contract (as defined below) and are incorporated by reference into each appropriate contractual document. Vendors may view these terms and conditions at www.mymcx.com/partner. MCX may periodically amend these terms and conditions as necessary to remain up to date with law, policy, or other purposes. If there are any questions with reference to the clauses, please contact the contracting officer whose name appears on the contractual document.

Revision effective 09 September 2022 -- Applicable to contract documents issued after this date that incorporate or reference this document.

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1. **LEGAL STATUS.** The Marine Corps Exchange (MCX), including its offices, individual exchanges and overseas exchange system, is an activity of the Marine Corps Community Services (MCCS) and Headquarters Marine Corps, Business and Support Services Division (MR), is an integral part of the Department of Defense, and is a nonappropriated fund instrumentality (NAFI) of the United States (U.S.) Government. MCX contracts are U.S. contracts; however, they do not obligate appropriated funds of the United States except for a judgment or a compromise settlement in suits brought under the provision of the Contract Disputes Act (41 USC Chapter 71), in which event MCX will reimburse the U.S. Government (31 USC 1304(c)). MCX procurement is governed by Department of Defense Instruction (DODI) 4105.67 available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/410567p.pdf?ver=2019-03-22-095354-913> and Marine Corps Order 7010.20 available at <https://www.marines.mil/News/Publications/MCPEL/Electronic-Library-Display/Article/900392/mco-701020/>. (NOTE: The Federal Acquisition Regulation (FAR) published pursuant to the Office of Federal Procurement Policy Act of 1974, as amended, applies to procurements with appropriated funds. It does not apply to MCX procurement except for those provisions of the FAR that have been administratively adopted by MCX.)
2. **AUTHORITY TO BIND and DEFINITIONS.** As used throughout this contract, the following terms shall have the meaning set out below:
 - a. "MR" identifies the Business and Support Services Division, Headquarters, United States Marine Corps. "MCCS" identifies United States Marine Corps Community Services activities. "MCX" identifies the Marine Corps Exchange.
 - b. "Contract" as used herein refers to purchase orders, direct delivery agreements (DDAs), and consignment agreements, including modifications thereto, for resale merchandise sold to MCCS patrons through MCX activities including any modification thereto. Contract does not refer to verbal orders.
 - c. "Contracting Officer" is any person, including MCX buyers, granted authority in writing or position description to act on behalf of MCX to execute, administer, modify and terminate, and take other actions relating to contracts, purchase orders, or other agreements to the extent that funds are approved and available in the MCX "open to buy" budget. Contracting Officer includes a Contracting Officer's successor or successors. Only the Contracting Officer may waive or change contract terms; impose additional contract requirements, issue cure, show cause, or termination notices; or render final decisions according to contract terms. Retail buyers are authorized to sign purchase orders, open purchase orders for replenishment, direct delivery agreements (DDAs) and consignment agreements for resale merchandise sold to MCCS patrons through MCX activities. Retail buyers do not have authority to sign blanket purchase agreements (BPAs), short and long-term concessionaire agreements, services contracts, or revenue-generating services contracts.
 - d. Other MCCS and government officials who are by virtue of their positions concerned with the administration and operation of this contract may take other administrative actions on behalf of the Contracting Officer. These officials may conduct inspections, process and collect contract payments, make administrative decisions, and perform other duties of an administrative nature. All questions concerning the authority of other MCCS or government officials should be referred to the Contracting Officer.

- e. "Contractor" means the vendor, individual, partnership, corporation, or other entity which is a party to this contract and who is responsible for all actions, performance and work thereunder, to include that of any subcontractor.

3. ORDER OF PRECEDENCE. The following terms and conditions, as identified in the MCX Vendor Standards Guide, are applicable to the business relationship between you (the Vendor) and MCX. As Vendor supplying retail merchandise to MCX, you are required to abide by the terms of this Guide as a condition of doing business with MCX. In the event of conflict, the order of precedence shall be the MCX Purchase Order (PO) or contract (hereinafter referred to as order, purchase order, agreement, direct delivery agreement, and/or contract), the terms outlined in the MCX Vendor Trading Partner Profile (if any), the MCX Vendor Standards Guide, and the MCX Terms and Conditions). All and any Vendor terms or conditions that are contrary to this order of precedence, the MCX Vendor Standards Guide, or the MCX Terms and Conditions are hereby deleted and unenforceable against MCX, unless for good cause and by written approval of MCX. All days expressed are calendar days hereafter except when specifically referenced as business days in this guide. Appendix A shall take precedence over all Vendor terms and conditions.

4. PROCUREMENT INTEGRITY. By submission of an offer or performance of a contract with MCX, the Offeror or Contractor certifies:

- a. That no discussion, offer, or promise of future employment or business opportunity has nor will be made to MCX civilian or military personnel who personally and substantially participate in the purchase action;
- b. That no offer, promise, or gift of any gratuity, entertainment, money, or other thing of value has nor will be made to any MCX civilian or military personnel or any other employee of the U.S. Government or member of their family or household;
- c. That no proprietary information of other offerors or other purchasing information (offeror list, prices offered, technical evaluations or rankings, etc.) is sought or obtained until it is available to the public under MCX procedure.
- d. That no person or selling agency has been employed or retained to secure this contract for a commission, percentage, brokerage, or contingent fee except bona fide employees or bona fide established commercial selling agencies retained by the Contractor for the purpose of securing business.
- e. Contractor certifies that no gratuities (entertainment, gifts, money, kickbacks or other thing of value) were nor will be solicited or accepted by the Contractor, or any Contractor representative, from any subcontractor or subcontractor representative, for the purpose of obtaining or rewarding favorable treatment in connection with this contract or any subcontract under it.
- f. Contractor shall report in writing to the Branch Head, NAF Procurement, (MRB) 3044 Catlin Avenue, Quantico, VA 22134, any violation or suspected violation of this clause when there are reasonable grounds to believe a violation may have occurred. The Contractor shall cooperate fully with any federal agency investigation of a possible violation of this clause.
- g. For breach of any of the above certifications, MCX has the right to take any lawful action, including but not limited to, terminating this contract for default, deductions from amounts due under this or other contracts with MCX, charging Contractor for the total value of any

contingent fee, gratuity, or kickback or other loss to MCX arising out of the breach, or pursuing civil remedies in federal court. Suspected criminal actions will be referred to military or civilian law enforcement authorities, and/or U.S. Department of Justice.

- 5. LAW GOVERNING PROCUREMENTS AND FORUM.** In any dispute arising out of this contract, the decision of which requires consideration of law questions, the rights and obligations of the parties shall be interpreted and determined in accordance with the substantive laws of the United States of America.
- 6. EXAMINATION OF RECORDS.** Contracting Officer or his duly authorized representative shall have the right to examine and audit the books and records of the Contractor directly pertaining to the contract during the period of the contract and until the expiration of three (3) years after final payment under the contract. The Contractor agrees to include this clause in all its subcontracts for MCX support that exceed \$10,000.
- 7. ORAL REPRESENTATIONS.** The executed written contract is the entire agreement between the parties. MCX will not be bound by any oral or written representation not included in the contract or a change or amendment thereto. MCX will not be bound by any terms on Contractor forms or letter unless such terms are specifically agreed to and incorporated in the contract and signed by the Contracting Officer.
- 8. CHANGES.** The Contracting Officer may at any time, by a written order, make changes within the general scope of the contract, in any one or more of the following: (a) drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for MCX in accordance with such drawings, designs, or specifications; (b) time of delivery; (c) place of delivery; or (d) method of shipment or packing. If any such change causes an increase or decrease in the cost of performing this contract, the Contracting Officer shall make an equitable adjustment in the contract price and the contract shall be modified in writing accordingly. Any claim by Contractor for adjustment under this clause must be asserted no later than 30 days from the date of receipt by the Contractor of the notification of change. Claims for constructive changes to the contract will not be considered.
- 9. ADVERTISEMENTS.** The Contractor shall not represent in any manner, expressly or by implication, that products purchased under this contract are approved or endorsed by any element of the United States Government. Any Contractor advertisement, including cents off coupon, which refers to Marine Corps Exchange or MCX will contain a statement that MCX neither paid nor sponsored the advertisement, in whole or in part.
- 10. ASSIGNMENT.** Contractor shall not assign its rights or delegate its obligations under this contract without the prior written consent of the Contracting Officer.
- 11. TERMINATION BY NOTICE.** Either party may terminate any and all performance under a contract, provided such notice is given not less than thirty (30) calendar days before performance is required. Notice must be given by email or otherwise in writing.

12. DISPUTES.

- a. This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. Chapter 71). A Vendor inquiry concerning invoice, non-compliance or service fee, or any other matter (collectively, "inquiry" for purposes of this clause) as provided within the MCX Vendor Standards Guide, does not become a "dispute" subject to this clause until Vendor submits a formal "claim" in substantial conformance with this clause. Except as provided in the Contract Disputes Act, all disputes arising under or relating to this contract will be resolved under this clause.
- b. "Claim" as used in this clause means a written demand or written assertion, with all supporting data, by one of the contracting parties seeking the payment of money in a sum certain or other relief arising under or relating to this contract. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under this clause.
- c. If Contractor is not satisfied with resolution of an inquiry, and for all other monetary or other relief relating to this contract, Contractor must submit a request in writing to the Contracting Officer. The claim must specify the amount of money or the other relief requested and include all supporting data. A Contractor representative with authority to bind Contractor must sign the claim. If the claim is for over \$100,000, Contractor must submit a signed certificate reading as follows:

I certify that this request and any ensuing claim are made in good faith, that the supporting data are accurate and complete to the best of my knowledge and belief, and that any amount requested accurately reflects the amount for which Contractor believes MCX is liable.

(Signature of Individual Authorized to Bind Contractor)

(NOTE: SUBMISSION OF FALSE CLAIMS IS A VIOLATION OF
FEDERAL LAW AND MAY RESULT IN CIVIL AND OR CRIMINAL
PENALTIES.)

- d. All claims relating to this contract will be decided by the Contracting Officer who will issue a written Final Decision and mail or otherwise furnish a copy thereof to Contractor. The Contracting Officer's written decision shall include: A description of the claim or dispute; a reference to the pertinent contract terms; a statement of the factual areas of agreement and disagreement; and a statement of the Contracting Officer's decision with supporting rationale. The Contracting Officer has a reasonable time for review and issuance of a written Final Decision on a properly filed claim. Contractor may appeal the Contracting Officer's decision as follows:
 - 1) For claims of \$100,000 or less the Contractor may appeal when, the Contracting Officer has issued a written Final Decision in response to the claim or, no decision has been issued after the request is received and a written request from the Contractor has been made that a decision be rendered within 60 days.

- 2) For claims over \$100,000, the Contracting Officer will issue a decision within 60 days after receiving a certified claim; provided, however, that if a decision will not be issued within 60 days, the Contracting Officer shall notify the Contractor within 60 days and indicate within what period of time a decision will be issued. The Contractor may file an appeal if the Contracting Officer decision is not issued within a reasonable time and a written request from the Contractor has been made that a decision be rendered within 60 days.
- e. Contractor's request for a contract modification or for relief that is discretionary with the Contracting Officer will not be considered a "claim."
- f. The Contracting Officer 's decision is final and conclusive unless:
- 1) Within 90 days from the date of Contractor's receipt of the Contracting Officer's Final Decision, Contractor mails or otherwise furnishes the Contracting Officer a written appeal (two copies) addressed to the Armed Services Board of Contract Appeals (ASBCA); or
 - 2) Within 12 months from the date of Contractor's receipt of the Contracting Officer's Final Decision, Contractor brings an action in the United States Court of Federal Claims.
- g. The decision of the ASBCA is final and conclusive except:
- 1) Contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within 120 days of receipt of a copy of the decision of the ASBCA.
 - 2) The NAFI may transmit the decision of the ASBCA to the United States Court of Appeals for the Federal Circuit for judicial review within 120 days from the date of the NAFI receipt of a copy of the decision of the ASBCA.
 - 3) ASBCA decisions made under the Board's small claims (expedited) procedures (\$50,000 or less) may be set aside only in case of fraud. In all other cases, the ASBCA decisions on questions of fact may be set aside only where the decisions are fraudulent, arbitrary, capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decisions are not supported by substantial evidence. The decisions of the ASBCA on any questions of law will not be final or conclusive as to the United States Court of Appeals for the Federal Circuit.
- h. Pending final resolution on any request for relief, disputed claim, appeal, or action, related to this contract, Contractor shall proceed diligently with the performance of this contract and will comply with the Contracting Officer's decisions.
- i. If Contractor cannot support any part of its claim as a result of fraud or misrepresentation

of fact, then, in addition to other remedies or penalties provided for by law, Contractor shall pay the NAFI an amount equal to the unsupported part of the claim plus all NAFI costs attributable to reviewing that part of the claim.

13. INDEMNIFY AND HOLD HARMLESS.

a. Contractor shall indemnify, hold harmless and defend the NAFI and all other agencies and instrumentalities of the United States, their agents, representatives, employees and customers from any and all suits, judgments and claims, including those established by or pursuant to court decisions, to international agreements, or duly promulgated regulations of the United States Government, and all charges and expenses incident thereto which arise out of or in connection with:

- 1) The alleged or established violation, infringement, or claim of any patent, copyright or trademark rights or any other misuse of Intellectual Property asserted by any third party with regard to items or services provided by Contractor;
- 2) Any loss, death, damage or injury alleged or established to have arisen out of or in connection with products, services, or equipment provided by Contractor, unless such loss, death, damage, or injury was caused by or resulted solely from the acts or omissions of the NAFI, its agents, representatives, or employees.
- 3) Any loss, death, damage, or injury alleged or established to have arisen out of or in connection with any other acts or omissions of the Contractor, the Contractor's subcontractors, representatives, agents, or employees.

b. The NAFI will give Contractor notice and an opportunity to defend.

c. Notwithstanding anything else contrary herein, if Contractor experiences a loss of individual customer personal information or data covered by any federal or state law, Contractor shall indemnify and hold harmless the NAFI from and against any and all liability, loss, claim, injury, damage, penalty, fine, settlement or expense, including, without limitations, costs of remediation efforts and reasonable attorneys' fees and costs arising from or relating to any action, claim or allegation of or with respect to that loss of customer personal information or data.

14. EQUAL EMPLOYMENT OPPORTUNITY. The Contractor agrees to comply with regulations of the Secretary of Labor contained in Title 41, Code of Federal Regulations, Part 60, which are incorporated by reference.

15. AFFIRMATIVE ACTION AND NONDISCRIMINATION FOR WORKERS WITH DISABILITIES. If the contract or if orders during a calendar year equal or exceed \$10,000 and are not otherwise exempt, the Contractor agrees to comply with the regulations of the Department of Labor and the Affirmative Action clause as set out in Title 41, Code of Federal Regulations, Part 60-741, which are incorporated herein by reference.

16. CONVICT LABOR. In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment except as provided by Executive Order 11755, December 29, 1973, as amended by Executive Order 12608, September 9, 1987; and Executive Order 12943 of December 13, 1994. 48 CFR § 52.222-3 is incorporated by reference

17. TAXES. The Contractor assumes complete and sole liability for all federal, state and local taxes applicable to the property, income and transactions of the Contractor. The prices charged MCX will be deemed to include all applicable taxes. It will be the sole responsibility of the Contractor to explain, to the reasonable satisfaction of the Contracting Officer, the applicability and amount of any taxes that they have included in the prices charged. The Contracting Officer, upon request, will furnish additional documentation to support tax exemptions if required by an appropriate tax authority. The prices charged will not include any amount for taxes that are not applicable:

- a. Because of MCX legal status as an instrumentality of the United States Government.
- b. Because of MCX immunity from direct state or local taxation; or
- c. Because of federal, state, or local tax exemptions for sales to the Federal Government;
- d. Because such as items are purchased for export.

18. MAILING LIST AND PERSONALLY IDENTIFIABLE INFORMATION (PII). Under no conditions shall Contractor sell or otherwise disseminate name, email addresses, and address information on MCX customers to other persons or firms, nor disseminate to its affiliates. The Contractor agrees to restrict its use of such information to the performance of this contract.

19. ENVIRONMENTAL PROTECTION. The Contractor will comply with all applicable Environmental Protection federal, state, and local government laws and regulations.

20. WARRANTY. Contractor warrants that:

a. The items furnished will be merchantable, fit and sufficient for the intended use. "Seconds," "imperfect," or "irregulars," as those terms are normally understood in the trade, will be accepted only when specifically required in the contract. This warranty will survive MCX acceptance of the items and is in addition to other warranties of additional scope given to MCX by the Contractor. Any warranty given by the Contractor will be at least as good as the warranty offered to other agencies and instrumentalities of the United States.

b. The items or service furnished are covered by the most favorable warranties the Contractor gives to any customer for such items or services, and that the rights and remedies provided in the Contractor's warranties are in addition to and do not limit any rights afforded to MCX by any other clause of this contract.

c. The Contractor shall provide the Contracting Officer, upon request, a copy of applicable warranties. Nothing contained in the Contractor's warranty shall supersede or restrict the warranty contained in the MCX Warranty clause. MCX will accept Contractor's warranty provisions that are more favorable than the Exchange Warranty clause. The Contractor shall furnish a copy of the warranty with each item. When providing warranties the Contractor shall comply with the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 et seq which is incorporated into this Contract by reference.

d. Item warranty, packing, and packaging will comply with all contract terms and all laws, rules, and regulations applicable to delivery for domestic resale.

21. ITEM SUBSTITUTION AND VARIATION IN QUANTITY. No substitution or variation in the quantity of any item called for by this contract will be accepted unless authorized by the Contracting Officer.

22. INSPECTION/QUALITY ASSURANCE.

a. Contractor shall maintain an in-process and end-item quality control program to ensure MCX shipments do not include defective/nonconforming items. MCX reserves the right to review and evaluate the program. Review and evaluation may include in-process inspections and initial pilot inspections as deemed appropriate at Contractor's or subcontractor's facility.

b. Items furnished under this contract are subject to inspection and test at all reasonable times, to include verification inspection, and at all reasonable places including but not limited to the manufacturing or assembly plant, shipping point, depot, and the using or selling activity. MCX may, at its option, inspect in accordance with any commercial or military inspection procedure.

c. If items purchased are defective/nonconforming, the contacting officer may take any of the following actions:

1) Prior to acceptance - the Contracting Officer may:

(a) Reject items and return them to Contractor.

(b) Reject items and require the Contractor to repair or replace them in a reasonable specified time;

(c) Accept the items at an equitable adjustment in price as determined by the Contracting Officer.

2) After acceptance - the Contracting Officer may revoke acceptance and proceed under subparagraph 1) above.

d. If items furnished are defective/nonconforming, the Contracting Officer may take any of the following actions:

- 1) Prior to acceptance - the Contracting Officer may:
 - (a) Reject and return the item to Contractor.
 - (b) In lieu of rejection, screen (100% inspect) the items; items meeting contract requirement will be accepted; defective/nonconforming items will be treated as indicated in subparagraph "c" above;
 - (c) Reject and require Contractor to screen all items and repair or replace defective/nonconforming items in a reasonable specified time;
 - (d) Accept and have the items repaired for Contractor's account; or
 - (e) Accept at an equitable adjustment in price as determined by the Contracting Officer.

- 2) After acceptance - the Contracting Officer may:

- (a) Revoke acceptance for any reasonable group of items available for inspection and proceed as in d. (1) above; or
- (b) Revoke acceptance of items and proceed as in "c" above for rejected items.

- e. If items are shipped/delivered late, the Contracting Officer may:

- 1) Reject the items and return them to Contractor; or
- 2) Accept the items at an equitable adjustment in price.
- 3) If it is necessary to cover in part or totally because of late shipment/delivery, the Contracting Officer may compute the NAFI's reasonable costs of cover in determining the equitable adjustment even though the contract has not been terminated. Associated handling and freight costs incurred by NAFI will be charged back to the Contractor for all rejected shipments.

f. Exercising of any of the options in the INSPECTION/QUALITY ASSURANCE paragraph, will not preclude action under other clauses of the contract (e.g., Defaults, Returns, etc.) or in accordance with general provisions of law.

g. Invoices, for due dating and prompt payment discount qualifying purposes, will be considered received on the date inspection is completed.

23. ROBINSON – PATMAN ACT. The Robinson-Patman Act makes it unlawful to discriminate in price between different purchasers if it may substantially lessen competition or create a monopoly. The Robinson- Patman Act does not apply to sales to MCX or other element of the U.S. Government. Contractors may legally offer MCX prices more favorable than they

offer to other customers. Neither the offer by the Contractor nor the acceptance by MCX is a violation of the Robinson-Patman Act.

24. PRICES.

a. Contractor warrants that during this contract, the net price to MCX (considering unit price, discounts, allowances, co-op advertising, rebates, and other terms and conditions) for each item purchased will be as favorable as, or better than, the price the item is being sold by Contractor, to other customers under the same or similar conditions and in the same general geographical area pursuant to agreements made during the same period. In the event Contractor subsequently agrees to sell the item to another customer at a lower price, Contractor is obligated to promptly offer the lower price, in writing, to the Contracting Officer. If requested by the Contracting Officer, the Contractor shall provide evidence (invoices, price lists, etc. of recent sales to other customers) to establish that the price meets the warranty.

b. In the event Contractor subsequently extends special offers e.g., vendor price reductions (VPR's), rebates, coupons or other special terms to other customers, the Contractor is obligated to promptly extend them, under the same conditions, in writing, to the MCX Contracting Officer. If the Contracting Officer accepts, Contractor's obligation under subparagraph a., and this subparagraph, will be to provide a net price as favorable as the terms (as set forth in subparagraph a. and herein) extended to other customers.

c. Price changes must be submitted in writing or sent electronically. Notification, along with justification, must be given to the Contracting Officer 60 days prior to the requested price increase effective date. Granting of any price increase is at the sole discretion of the Contracting Officer. In the event the Contractor submits price protection pricing, the reductions will be taken on stock on-hand, on-order and in-transit.

d. The prices will remain firm for the contract period. However, written requests for adjustment may be considered, when accompanied by documentation substantiating significant and unforeseen cost increases which occurred after the date of award. Granting of any price increase is at the sole discretion of the Contracting Officer.

e. The above warranty and obligations may be modified only by written agreement between Contractor and the Contracting Officer, based upon written justification acceptable to the Contracting Officer.

25. RETURNS. In any case where items are to be returned (e.g., as defective/nonconforming, late, or under another clause) the contract value of the goods, as of the date the items are returned, will be charged back to the Contractor and the following will apply:

a. The Contracting Officer shall notify Contractor of the Contracting Officer decision to return the item and request disposition instructions. Returns of items with a cost price under \$250 may be made without prior notification. The Contracting Officer may request refund of any payments and an advance to cover the costs of Contractor's instructions (e.g. transportation and other related expenses). Title and risk of loss pass to Contractor upon shipment from the MCX

facility.

b. MCX will deduct the cost of returned items including any transportation costs, from any payment due the Contractor. If no money is due the Contractor to offset the cost of the returns, a notice of the balance due will be sent to the Contractor. The Contractor must reimburse MCX within thirty days of the date of the notice. In the event this thirty day period expires and the Contractor's debt has not been paid by check or deducted from payments due the Contractor, MCX will begin to accrue interest against the balance for each thirty days thereafter. The interest charge will be calculated using the balance due at the end of each thirty day period. The interest rate will be prime plus one percentage point.

c. Unless otherwise provided, MCX will retain earned discounts and allowances, such as, but not limited to: prompt payment discounts, distribution allowances, bottom line discounts, special allowances, advertising allowances, discounts in lieu of warranty, and freight allowances. With the exception of freight allowances, all of these discounts or allowances may be credited the Contractor on a pro rata basis in conjunction with the return of defective/nonconforming items resulting from inspection and rejection.

d. If Contractor fails to provide instructions within five days or such other reasonable time as the Contracting Officer allows, refuses to accept returned items or fails to provide a requested or refund of payment, the Contracting Officer may, at Contracting Officer option and in addition to other remedies specified elsewhere in the contract: take any and all lawful commercially reasonable actions not prohibited by Department of Defense regulations to advertise such items to remove from inventory in a manner that is in the best interest to MCX; or dispose of the items in accordance with its practice of disposing abandoned property; or turn the item over to a government property disposal office. The costs to advertise, dispose, or transfer may be charged to the Contractor.

e. MCX will credit Contractor for any surplus over the amount due from Contractor for payment for the goods and incidental and consequential damages.

f. Contractor shall notify the Contracting Officer in writing within 90 days after a request for payment, or a deduction from payments is made, if returned merchandise is not received or is received in quantities or at prices different from the document supporting a deduction. Claims against MCX for non-receipt will not be honored after this 90 day period.

26. CONTRACTOR LIABILITY. In addition to the liabilities specifically provided for in other clauses, Contractor shall be liable as follows for failing to fully and timely perform in accordance with all contract provisions:

a. Incidental damages, including expenses reasonably incurred in inspection, receipt, packing, rejection or screening of goods in lieu of rejection, care and custody of goods rightfully rejected, transportation, and any other reasonable expenses incident to Contractor's failure to fully and timely perform in accordance with all contract provisions.

b. Contractor shall not be liable for incidental damages if the failure to perform arises out of causes beyond the control and without the fault or negligence of the Contractor and any

subcontractors and suppliers. Such causes may include acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather. In such case, Contractor must provide prompt written notice to the Contracting Officer. The Contracting Officer may accept late, partial or substituted performance, or may terminate the contract in whole, or in part, effective immediately upon receipt of written notice by Contractor.

27. SURVEILLANCE. MCX may perform electronic or other types of surveillance in MCX facilities. Contractor shall inform its employee representatives that such surveillance may be conducted and that individuals implicated in improprieties may be found unacceptable for employment in any MCX facility, may be debarred for access to military installations, and prosecuted in Federal court for any resulting law violation.

- a. Contractor agrees to notify its employees, representatives, and subcontractors of such surveillance activities and consequences for improper or illegal acts.
- b. Contractor is responsible for the acts of its employees and subcontractors and shall pay MCX for losses under this contract detected by surveillance or otherwise discovered when losses are attributable to its employees and subcontractors.

28. WITHHOLDING. MCX may withhold payment for:

- a. Amounts due or creditable to MCX under this contract (e.g., returns, damages, etc.).
- b. Amounts otherwise due or creditable to MCX. Any dispute will be processed under the Disputes clause unless it became due pursuant to another contract which included a Disputes clause.
- c. In conjunction with any withholding, MCX will retain the benefit of all earned discounts and allowances including, prompt payment discounts, rebates, distribution allowance, discounts in lieu of warranty, and freight allowances. Prompt payment discounts and rebates will also be considered earned if they would have been earned except for the withholding.

29. NONWAIVER OF DEFAULTS. Failure by MCX at any time, or from time to time, to enforce or require strict performance of any terms or conditions of this contract will not constitute waiver thereof, and will not affect or impair such terms and conditions in any way, or MCX's right at any time to avail itself of such remedies as it may have for breach or breaches of such terms and conditions.

30. DEFAULTS.

- a. The Contracting Officer by written notice of default, may terminate any bilateral contract in whole or in part for Contractor's failure to:
 - 1) Ship/deliver conforming items or provide conforming services within the time specified.

- 2) Timely comply with other contract requirements including, e.g., the obligation to provide disposition instruction, repair, or replace defective items.
 - 3) Make progress such that performance of the contract is endangered, provided Contractor does not cure such failure within 10 days (or such other period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.
- b. In the event of default, the Contracting Officer may “cover” by making, in good faith and without unreasonable delay, any reasonable purchase of, or contract to purchase, goods or services in for those due from Contractor. Substitute items need not be identical, or the same or similar, as long as they meet the same general needs of MCX at the time of cover, as determined by the Contracting Officer.
- c. Except as to performance terminated in accordance with the above, Contractor is obligated to continue to perform the procurement.
- d. Time is of the essence in performance of MCX contracts.

31. RESTRICTIONS ON PURCHASES OF FOREIGN GOODS.

- a. The Contractor shall not acquire for use in the performance of this procurement any merchandise, equipment, supplies or services originating from, processed in or transported from or through the countries prohibited from commerce by the U.S. Government. A current list of restricted countries is available on the U.S. Department of Treasury webpage at <http://www.treasury.gov>. This restriction includes merchandise, equipment, supplies or services from any other country that is restricted by law, regulation or executive order at any time during performance of the procurement.
- b. The Contractor agrees to insert the provisions of this clause, including this paragraph, in its subcontracts.

32. BUY AMERICAN ACT / TRADE AGREEMENT ACT. These Acts do not apply to MCX contracts for resale merchandise. These Acts are applicable to all other MCX contracts/orders in excess of \$3,000.00, in which case the Contractor shall comply with the requirements of 41 USC Chapter 83 which is incorporated by reference in this contract/order.

33. AUTOMATIC DATA PROCESSING VIRUS.

- a. "Automatic data processing" or "ADP" means data processing performed by a system of electronic or electronic machines so interconnected and interacting as to minimize the need for human assistance or intervention. "Automatic data processing equipment" or "ADP equipment" or "Hardware" means automatic equipment that accepts and stores data, performs calculations and other processing steps, and produces information. This includes:

- 1) Electronic digital computers;
- 2) Peripheral or auxiliary equipment used in support of electronic computers;
- 3) Data transmission or communications equipment, and,
- 4) Data input equipment.

b. Contractor furnished Automatic Data Processing (ADP) products must be virus free. ADP products includes but is not limited to, firmware (e.g. cash registers, modems, printers, personal and mainframe computers), packaged software programs, software programs tailored for MCX, demonstration diskettes, subscribed data bases, electronic mail, drawings, reports, Electronic Data Interchange systems and maintenance diskettes.

c. Contractor warrants that the ADP products provided have been controlled and protected to avoid virus contamination. This warranty will end no less than ninety calendar days after proper product installation unless Contractor changes (modifies, upgrades or provides approved substitutes) the product. If a change occurs, the warranty will end ninety calendar days after such changes are installed on MCX property.

d. If there is evidence reasonably tracing a virus contamination to the product provided under this contract, MCX will notify the Contractor. The Contractor will be liable for all costs incurred by MCX in removing the virus, correcting damaged ADP products and including labor, repair costs and replacement ADP products.

e. Contractor warrants that all software sold to MCX for retail sales is virus free. Contractor warrants that ADP products have been controlled and protected to avoid virus contamination. If a Contractor product is returned to MCX by a customer because of virus contamination, Contractor agrees to accept return of the product, regardless of when it was purchased by MCX or shipped by Contractor, and to replace it at no cost to MCX or the customer. Claims against MCX as a result of virus contaminated retail productions shall be handled in accordance with the Indemnify and Hold Harmless Clause of this agreement.

34. DATE COMPLIANT

a. The Contractor warrants that all forms of information technology (software, hardware, microcode, firmware, etc.) supplied under the procurement are able to accurately and efficiently process date and time data including, but not limited to, calculating, comparing and sequencing date and time data from, into and between the 20th and 21st centuries, and leap year calculations through at least December 31, 2101. The supplied information technology, when used in combination with other information technology, will accurately and efficiently process date and time data if the other information technology properly exchanges date and time data. No human intervention is needed to invoke the date compliance (i.e., rebooting the hardware or restarting the software). To be date compliant, the information technology methods must run fault free (no abnormal exiting applications and error free results) and be transparent to the user.

b. If the information technology supplied under this procurement relies on other information technology to accurately and efficiently process date and time data, then the Contractor must disclose this reliance before entering into any agreement or allowing any procurement addition or substitution (as may be authorized by the Contracting Officer).

35. MCX/VENDOR PARTNERSHIP MARKETING PROGRAM. The MCX Marketing program consists of numerous elements to enhance the sale of consumer products and services. At the Contractor's request, MCX will give the Contractor the opportunity to participate in selected elements of the Program. All participation will be in conjunction with the sale of authorized products and services to authorized customers. MCX reserves the right to limit the degree of participation based on availability, designated themes of special events, and the overall goals of the program.

36. MCX RETAIL PRICE. Any reference to MCX sell or retail prices are solely for MCX information and internal purposes and do not constitute an agreement to sell any product at a particular price.

37. CONFORMANCE WITH APPLICABLE LAWS AND REGULATIONS. By contracting with MCX, Contractor warrants that it has complied with all applicable laws and regulations governing the manufacture, sale, packing, shipment, and delivery of the merchandise. Contractor certifies that it, its subcontractors, and its suppliers have complied with applicable labor laws, including, but not limited to, the Fair Labor standards Act (FLSA). Contractor will notify subcontractors that MCX requires merchandise be made in compliance with the FLSA and will provide subcontractors with information regarding the requirements of FLSA. If requested by the Contracting Officer, Contractor will promptly provide subcontractor names and manufacturing sites. Contractor will have an effective monitoring program for it, and its subcontractors and suppliers, and will display Wage and Hour Division posters in workers' language and other appropriate material, provided by U.S. Department of Labor (DOL) through MCX, at U.S. work sites inviting workers to make inquiries about the FLSA. Further, the Contractor shall be responsible to comply with any and all laws which may from time to time be in effect governing the hours, wages, labor relations (including collective bargaining), workmen's compensation, working conditions and other matters pertaining to labor standards of the country, or political matters pertaining to labor standards of the country, or political subdivision thereof, where this contract is performed.

38. HEAVY METAL LEACHING. If there are products furnished under this contract that can reasonably be used to carry food or liquid for human consumption and are made of a substance prone to heavy metal leaching, such as and to include, pewterware, earthenware, ceramicware, chinaware, ironware, lacquerware, bronzeware, brassware, leaded crystalware and coated/plated items with a heavy metal base, the Contractor warrants that any such product contains no leachable levels of metals dangerous to users. Maximum leachable levels and test methods are established by the U. S. Food and Drug Administration (FDA). The NAFI reserves the right to test Contractor products on an unannounced basis. If a heavy metal leaching failure is found, the Contractor agrees to reimburse the NAFI for all follow-up costs to sample/test the remainder of his items for the duration of the contract. The Contractor further warrants that such

products have been tested by either the FDA or a nationally recognized, independent test laboratory and found to be in compliance with the current FDA action levels and test methods. Test data will be furnished upon request by the Contracting Officer and who may direct that the data be furnished to external sources for review.

39. FIRE RETARDANT PRODUCT. The Contractor warrants that all products required to be fire-retardant by applicable State and Federal law are flame-retardant or noncombustible according to National Fire Protection Association glossary of terms and meet Consumer Product Safety Commission Requirements.

40. UNDERWRITERS LABORATORIES. Where applicable, U.S. made items furnished under this contract are manufactured in accordance with Underwriter's Laboratories, Inc. (U.L.) standards or equivalent. If manufactured overseas, items furnished must meet the U.L. standards or equivalent or more stringent overseas standards. The applicable items or component items, regardless of where manufactured, must carry the appropriate U.L. or equivalent seal or listing mark.

41. INSURANCE. The Contractor shall maintain, during any contract period, insurance coverage as stated in this contract, with insurance company(ies) acceptable to MR, MCCS, and MCX. Acceptable is defined as a carrier that is A rated by A.M. Best, Inc., or equivalent. All liability insurance coverage will name the United States, Business and Support Services Division (MR), MCCS, and MCX as additional and several insureds for claims, demands, suits, judgments, costs, charges, and expenses arising out of or in connection with any loss, damage, or injury resulting from the negligence or other fault of Contractor, or Contractor's agents, representatives, or employees. The certificate of insurance will carry an endorsement waiving the Contractor's right to subrogation against the United States, MR, MCCS, and MCX. If not otherwise indicated in the purchase order or contract, Contractor shall maintain, the following types and minimum amounts of insurance; however, in no event shall the coverage be less than the minimum requirements established by applicable state and local regulations and laws for the risk associated with the supplies or services to be provided by the contract:

a. Comprehensive General Liability Insurance.

\$1,000,000 per occurrence / \$2,000,000 Total Policy Aggregate
\$1,000,000 Personal Injury/Advertising Injury
\$2,000,000 Products and Completed Operations Aggregate

b. Workers' Compensation and Employer's Liability Insurance. The Contractor shall carry a workers' compensation and employer's liability policy which provides statutory benefits covering all their employees in those states where they are located and working at MCCS or MCX facilities, or in support of MCCS or MCX. Contractor shall maintain the greater of the following types and minimum amounts of insurance:

\$1,000,000 per employee / per claim / per occurrence
\$1,000,000 per claim / per occurrence for occupational illness or disease

c. Automobile Bodily Injury and Property Damage Liability Insurance. The Contractor

shall maintain business auto insurance covering all owned, non-owned, and leased vehicles with a combined single limit of \$1,000,000 and a \$2,000,000 aggregate policy limit.

42. PERMITS AND LICENSES. Contractor shall, without additional expense to the NAFI, obtain all necessary permits, give all notices, pay all license fees and comply with all laws, rules, ordinances, and regulations relating to the preservation of the public health or applicable to the service or business carried on under this contract. The burden of determining applicability of licensing requirements, laws, ordinances, and regulations for Contractor and his employees rests with the Contractor. The Contractor shall also be responsible for all damages to persons or property that occur as a result of the Contractor's fault or negligence, and shall take proper safety and health precautions to protect the work, the workers, the public, and property of others. The Contractor shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work, which may have been accepted under the procurement.

43. NON-EXCLUSIVE CONTRACT. Unless specified in writing by MCX, this contract does not establish Contractor as the sole supplier of goods or services to be provided on installation or area under the control of the Marine Corps.

44. PERSONAL IDENTIFICATION OF CONTRACTOR PERSONNEL. If Contractor will access a Marine Corps installation or area under the control of the Marine Corps in support of the purchase order or contract, Contractor and any subcontractors are required to comply with applicable MR, MCCS, or MCX identity verification procedures, installation access requirements, and security clearance policies.

45. DRUG-FREE WORK PLACE. The Contractor will comply with the requirements of the Drug Free Workplace Act of 1988 (41 USC Chap 81).

46. INVOICING AND PAYMENT. Invoicing Instructions. In order to be considered proper invoices for purposes of the Prompt Payment Act, invoices must be submitted as follows:

a. Contractor must prepare a separate numbered invoice for each order or part of an order. Do not consolidate multiple purchase orders on one invoice. Additionally, when partial shipments are authorized, use a separate invoice. Do not duplicate an invoice number used for prior billings.

b. Invoices must be issued by the company whose name is on the contract/order (unless otherwise authorized by Contracting Officer) and must contain the following minimum information to enable timely payment:

- 1) Name of Contractor.
- 2) Invoice date. This cannot be a date earlier than the ship date required by the contract or purchase/delivery order. In the event that the invoice date is a date earlier than the required ship date, MR, MCCS, or MCX retains the right either to return the improper invoice to the Contractor for correction or to change the

invoice date to be the required ship date. In the event that an improper invoice is returned to a Contractor because the date on the invoice is earlier than the required ship date or because the invoice is improper for any other reason, the invoice date, for purposes of prompt payment discounts, will be considered to be the date of receipt of the corrected, proper invoice.

- 3) Contract or purchase/delivery order number.
- 4) Item description and quantity shipped/delivered.
- 5) Contract/order line item cost and total.
- 6) Shipping and discount terms, including prompt payment discounts, and special allowance(s) if included in the contract. Prompt payment discounts and special allowances must be shown on the invoice using percentage figures only. Do not deduct any of these from the item cost or from the invoice total.
- 7) "Ship To" address as shown on order or contract.

c. Correcting invoices and credit memos must be marked as such and must cross- reference the corrected invoice.

d. Payment Invoice.

- 1) A proper invoice is an invoice which contains all of the information/documentation specified in paragraph b.(2) above, and
- 2) Is sent to the address specified in the contract or purchase/delivery order for the designated MR or MCCS paying office. Improper invoices may be returned without payment to the Contractor.

e. The net payment date for MR, MCCS, and MCX contracts is established at 30 days after receipt of a proper invoice. Discounts for prompt payment, if included in the contract, will be applied as follows:

- 1) If the contract or purchase order specifies a prompt payment discount period of less than 30 days, the discount will be taken if payment can be made within the stated period otherwise the net payment will be due 30 days after receipt of a proper invoice.
- 2) If the contract or purchase order specifies a prompt payment discount period of 30 days or more, the discount will be taken if payment can be made within the stated period otherwise the net payment will be due 30 days after the prompt payment discount period ends.
- 3) If the contract fails to specify any prompt payment discount, then net payment

will be due 30 days after receipt of a proper invoice.

f. In the event that a prompt payment discount, or other special discounts or allowances specified on Contractor's invoice are better than that specified in the contract or purchase order, MR, MCCS, or MCX may take the more favorable discounts and/or allowances.

g. For the purpose of determining whether payment is timely made by MR, MCCS, or MCX a "day" is counted for each calendar day. When payments fall due on Saturday, Sunday or legal Federal holidays, payments made the following business day will not incur late payment interest penalties.

h. A discount for prompt payment can be taken by MR, MCCS, or MCX if the discounted payment is made within the discount period specified. The prompt payment discount period begins to run on the date of the invoice. Computation of the period for prompt payment discounts begins with the date of invoice; computation for net payment begins with receipt of a proper invoice.

i. Payment is made:

- 1) The date a check for payment is dated.
- 2) The date an electronic fund transfer is received, regardless of the date the financial institution posts the transfer.
- 3) The date a withholding authorized by the contract is initiated by MR, MCCS, or MCX.

j. Payment by check will be mailed to the address shown on the contract, unless the Contractor provided a different "remit to" address to the Contracting Officer at the time the terms were negotiated or the contract was issued.

- 1) If a Contractor needs to change the address (e.g., street, P.O. box, city/state) to which payment should be sent or wishes its payments to also reflect a factor's name and be sent to the factor's address, the request must be in writing, signed by a responsible official of the Contractor, and submitted to the Contracting Officer . All such requests must clearly establish which division or subsidiary of a corporation such changes apply to and the address which is superseded by the changes. These changes will become effective on the date determined by MR, MCCS, or MCX, normally 30 days after approval. Changes will be done on an accommodation basis only, with the understanding that no legal obligation is imposed on MR or MCCS for failure to make payment to the new payee/address.
- 2) Any request by the Contractor to change the name shown on the contract or to delegate its obligation under the contract must be sent to the Contracting Officer within 30 days of the change.

k. Any questions or inquiries concerning invoice payments should be directed to the MR, MCCS, or MCX paying office designated on the contract or purchase/delivery order.

l. Any interest penalties due to Contractors will be computed in accordance with the Prompt Payment Act, 31 U.S.C. 3901-3907, as amended.

47.COMBATING TRAFFICKING IN PERSONS. For administrative convenience of MCX, this contract incorporates by reference FAR 52.222-50, Combating Trafficking in Persons. All references to “government” therein shall refer to MCX. If this contract is valued over \$500,000, Contractor shall notify the contracting officer if supplies, other than commercially available off the shelf items, are acquired outside the United States, or if services provided under this contract are to be performed outside the United States.

**48.CONSUMER PRODUCT SAFETY IMPROVEMENT ACT (CPSIA)
FEDERAL REQUIREMENTS FOR DIRECT IMPORT SUPPLIERS.**

a. Toys/children’s products (for ages 12 and younger). Suppliers providing imported or private label products to MCX, where MCX is the importer of record, must have all finished products tested to CPSIA requirements by an accredited third party laboratory. The supplier is responsible for all product testing costs. To substantiate compliance, a valid lab report and a General Certificate of Conformity (GCC) must be submitted to MCX electronically at least 10 days prior to the purchase order (PO) “ship date.” Lab reports and GCCs must also be submitted to our shipping agent (Freight Forwarder) at the time of the actual shipment along with the required customs documentation. Please note that the supplier will be assessed/charged back any fees or costs incurred by MCX due to federal non-compliance issues. For further information see the Marine Corps Exchange Vendor Standards Guide at <http://www.mymcx.com/myMCX/assets/File/MCX%20VENDOR%20STANDARDS%20GUIDE%20%2001%20JAN%202019.pdf>

b. Other products federally regulated by the Consumer Product Safety Commission (CPSC). Suppliers providing imported or private label products to MCS (not including children’s products), where MCX is the importer of record, must certify that all products meet CPSIA requirements via a reasonable testing program. To substantiate compliance, a GCC denoting the applicable ban and/or regulation must be submitted in the same manner as the document submission process described for children’s products, above. Non-compliance issues will be the supplier’s responsibility. A comprehensive list of regulated products can be found at the following website: <https://www.cpsc.gov/Business--Manufacturing/Business-Education>.

49.VENDOR STANDARDS GUIDE. Addition Terms and Conditions and responsibilities of Contractor are set out in the MCX Vendor Standards Guide which is incorporated by reference. The vendor Standards Guide may be found at <http://mymcx.com/index.cfm/about/partner/>

50.NOTIFICATION OF DEBARMENT/SUSPENSION STATUS. The Contractor shall provide immediate notice to the Contracting Officer in the event of being suspended, debarred, or declared ineligible by any other Federal department or agency, or upon receipt of

a notice of proposed debarment from another Federal agency, during the performance of this procurement.

51. MODIFICATIONS AND ADDITIONS. Except, as otherwise provided in this procurement, all changes, modifications, additions, and deletions to this contract will be made in writing.

52. PURCHASE DESCRIPTIONS. The Contractor will provide the brand name products listed in the purchasing or delivery contract which are the Contractor's existing regular commercial products. Items furnished must comply with all requirements of this procurement and equal or exceed the quality of the samples submitted to the Contracting Officer; such samples may be used as a basis for ensuring items subsequently furnished are as called for by this procurement. Additionally, product descriptions and specifications contained in the Contractor's catalog trade offerings will apply to items furnished, to the extent they do not reduce the quality of the Contractor-furnished samples.

53. LIMITATION ON EXCHANGE BRAND, LOGO, DESIGN OR NAME. Items produced or furnished with packaging that bears the Marine Corps Exchange or MCX brand, logo, design or name will not be sold or released to another party. This prohibition includes, but is not limited to, quality control rejects, production overruns and overstocks. The items may be sold only if repackaged with the brand, logo, design, or name removed.

APPENDIX A

MCCS and MCX Unenforceable Commercial clauses



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3044 CATLIN AVENUE
QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:
July 2022

SUBJECT: MARINE CORPS COMMUNITY SERVICES AND MARINE CORPS EXCHANGE -
UNENFORCEABLE COMMERCIAL CLAUSES

Some terms and conditions common to commercial agreements are unenforceable against the Government as a matter of law, or contrary to Department of Defense regulation. By contracting with the Marine Corps Community Services (MCCS) and/or Marine Corps Exchange (MCX), a Nonappropriated Fund Instrumentality (NAFI) of the Department of the Navy, (MCCS/ MCX are hereinafter referred to as "the NAFI"), the Contractor (also hereinafter referred to as "commercial supplier") is hereby put on notice and agrees that notwithstanding any language in Contractor licenses, end user agreements, and all other Contractor terms and conditions, the provisions below supercede and take precedence to the extent of such inconsistency:

1. As used herein, "this agreement" refers collectively to the contract, delivery order, task order, purchase order, request for quote, request for proposal, or any other NAFI contracting instrument, along with any other incorporated documents, agreements, licenses, or other commercial supplier terms and conditions.
2. **Applicability.** This agreement is part of a contracting instrument between a commercial supplier and the NAFI for the procurement of the supply or service (including but not limited to all contracts, task orders, purchase orders, licenses, and delivery orders).
3. **End user.** This agreement shall bind the ordering NAFI activity as end user but shall not operate to bind a MCCS/MCX employee or person acting on behalf of the NAFI in his or her official capacity.
4. **Law and disputes.** This agreement is governed by Federal law. (A) Any language purporting to subject the NAFI or other U.S. Government entity to the laws of a U.S. state, U.S. territory, district, or municipality, or foreign nation, except where Federal law expressly provides for the application of such laws, is hereby deleted; (B) Any language requiring dispute resolution in a specific forum or venue or that waives or limits rights or remedies 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; and (D) any language requiring the NAFI waive or otherwise consent to a waiver of sovereign immunity that is authorized by the United States Congress, is hereby deleted.
5. **Continued performance.** If the supplier or licensor believes the ordering activity to be in breach of the agreement, it shall pursue its rights under the Disputes Clause in the NAFI contract, or as applicable, the Marine Corps Exchange Terms and Conditions, while continuing performance as set forth in this agreement.

SUBJECT: MARINE CORPS COMMUNITY SERVICES AND MARINE CORPS EXCHANGE -
UNENFORCEABLE COMMERCIAL CLAUSES

6. 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 apply or be used unless specifically authorized by the NAFI in accordance with Secretary of the Navy Instruction 5800.15A, and (B) 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, Equal Access to Justice Act, etc.).

7. Additional terms

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

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

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

(3) Terms do not increase NAFI prices; and

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

(5) Terms do not limit any other NAFI right addressed elsewhere in this agreement.

b. The order of precedence clause of this contract notwithstanding, any Contractor term and condition unilaterally revised subsequent to award that are inconsistent with any material term or provision of this contract is not enforceable against the NAFI.

8. 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 NAFI written approval.

9. Indemnification and Waiver of Judicial Procedural Rights. 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, Conduct of litigation reserved to Department of Justice. Any clause of this agreement requiring the NAFI to waive rights afforded in any judicial proceeding (e.g., jury trial) is deleted as not enforceable in accordance with 28 U.S.C. § 516 and Department of Justice regulations. Additionally, any clause of this agreement requiring indemnification of or for benefit of commercial supplier for acts or omissions arising in tort are governed in the manner and to the extent provided by the Federal Tort Claims Act, as amended (28 U.S.C. sections 2671-2680).

SUBJECT: MARINE CORPS COMMUNITY SERVICES AND MARINE CORPS EXCHANGE -
UNENFORCEABLE COMMERCIAL CLAUSES

10. **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 NAFI contract or order. (B) This charge, if disputed by the ordering activity, will be resolved through the Disputes Clause in this agreement or as applicable, the Marine Corps Exchange Terms and Conditions; 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. (D) Contractor representatives requiring access to a military installation to conduct such audits are subject to installation security access requirements.

11. **Taxes or surcharges.** Any taxes or surcharges which the commercial supplier or licensor seeks to pass along to the NAFI as end user will be governed by the terms of the underlying NAFI 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 NAFI contract.

12. **Non-assignment.** Department of Defense regulation requires all nonappropriated fund (NAF) contracts be with responsible companies and in the best interest of the NAF Instrumentality. This requirement places an obligation on the MCCS Contracting Officer to know the name of any Assignee. Contractor shall notify or cause an Assignee to notify the MCCS Contracting Officer that an assignment will occur or has been made so that the Contracting Officer can make appropriate determination that the Assignee is a responsible company and the contract with Assignee is in the best interest to MCCS. MCCS will not unreasonably withhold or delay making such determination. If the MCCS Contracting Officer determines the Assignee is responsible, a novation will be executed through a bi-lateral agreement. However, if the determination is made that the affiliate is not responsible, the MCCS Contracting Officer may terminate the contract for convenience without penalty.

13. **Confidential information.** If this agreement includes a confidentiality clause, such clause is hereby amended to state that neither the agreement nor any included price list shall be deemed "confidential information." Issues regarding release of "unit pricing" will be resolved consistent with the Freedom of Information Act. Notwithstanding anything in this agreement to the contrary, the NAFI or other Governmental entity 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.

14. **Unauthorized Obligations.** If this agreement includes any language, provision, or clause requiring the NAFI 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

SUBJECT: MARINE CORPS COMMUNITY SERVICES AND MARINE CORPS EXCHANGE -
UNENFORCEABLE COMMERCIAL CLAUSES

create a violation of 31 U.S.C. §§ 1341-42, 1511-19, The Antideficiency Act, or 10 U.S.C. § 2783, Nonappropriated fund instrumentalities: financial management and use of nonappropriated funds, the following shall govern:

a. Any such language, provision, or clause is unenforceable against the NAFI.

b. Neither the NAFI nor any NAFI 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 any terms or conditions included in this agreement are invoked through an "I agree" click box or other comparable mechanism (e.g., "clickwrap" or "browse-wrap" agreements), execution does not bind the NAFI or any NAFI authorized end user to such terms or conditions.

c. Any such language, provision, or clause is deemed stricken from this agreement.

d. Paragraph (14) does not apply to indemnification or any other payment by the NAFI that is expressly authorized by statute and specifically authorized under applicable agency regulations and procedures.

15. **Use of Name, Logos, Marks, etc.** If this agreement includes any clause authorizing Contractor to utilize MCCS or MCX names, logos, or marks for Contractor's publicity, marketing, or advertising purposes, except for the specific purpose of identifying MCCS or MCX as a customer, such clause is hereby amended to provide that Contractor must receive written approval from the NAFI contracting officer prior to such use. Any use by Contractor of Government names, logos, or marks must comply with 5 C.F.R. Part 2635, The Standards of Ethical Conduct, and 32 C.F.R. Part 84, The Joint Ethics Regulations. The NAFI does not have authority to approve or consent to Contractor use of United States Marine Corps names, logos, or marks.

16. **Personal Data Protection Laws.** If this agreement includes any language subjecting the NAFI to foreign or State laws, rules, regulations, directives, and governmental requirements relating in any way to the privacy, confidentiality, security, integrity, and protection of Personal Data inconsistent with the laws of the United States, such language is deleted. The European Union (EU) General Data Protection Regulation, EU ePrivacy Directives, and the Personal Information Protection and Electronic Documents Act of Canada, as amended or superseded, do not apply to the federal government, including the NAFI. "Personal Data" means information that identifies, relates to, or describes, directly or indirectly, a particular individual, such as: name, address, email address, or phone number. The NAFI protects all personal data in accordance with the Privacy Act of 1974, as amended, and Department of Defense implementing regulations.

