**Pro-Buyer AI Addendum**

**Preface**

**By Alexandria (Lexi) Lutz, Spencer Rubin, Lisa R. Lifshitz, and Ted Claypoole, in coordination with the ABA President’s Task Force on the Law and AI**

In today’s ever-evolving technology marketplace, the integration of artificial intelligence (“AI”) systems into business operations has become increasingly prevalent. As businesses license or subscribe to AI systems from vendors at the enterprise level or at other material levels of spend, it is important for those businesses to enter into, as much as practicable and commercially reasonable, pro-buyer contractual terms that adequately protect their access to and use of vendors’ AI systems.

***Key Provisions to Include***

In the realm of AI, where complexity and uncertainty often accompany technological advancements, clear and protective contractual terms are imperative for businesses procuring AI systems. These contractual terms should deal with the crucial aspects of any AI procurement, such as data ownership, data security, the vendor’s representations and warranties, the vendor’s indemnity obligations, bias mitigation, and the vendor’s liability. For the following reasons, these key concepts should be included in pro-buyer contractual terms for businesses procuring AI systems:

1. **Data Ownership Provisions:** Clearly defining a business’s ownership of data inputted to and outputted from an AI system through these provisions is crucial so that the business has the necessary rights to use, access, and control such inputs and outputs.
2. **Data Security Provisions:** Including these provisions is essential to protect a business’s sensitive information (including personally identifiable and personal information) that is processed by an AI system from unauthorized access, use, disclosure, breach, or misuse.
3. **Vendor’s Representations and Warranties:** Including representations and warranties from the vendor regarding the AI system’s functionality, performance, accuracy, noninfringement of third-party rights, compliance with laws and regulations, and adherence to high ethical standards provides a business with remedies for misrepresentation and breach of warranty if the AI system does not perform in the ways in which the vendor has promised (formally or informally) that it will (or, in some cases, in which a business believes that it will).
4. **Vendor’s Indemnity Obligations:** Requiring a vendor to indemnify a business for certain elements of liability related to its AI system protects that business from bearing the costs and the expenses of such liability, especially given that the business usually has no control over the AI system, other than its own use thereof and the selection of data to input thereto.
5. **Bias Mitigation:** Ensuring that a vendor has taken the necessary precautions so that the AI system does not produce biased output, which would result in an individual being treated differently because of a protected ground under applicable laws or other disproportionate harm to such individual, is crucial.
6. **Vendor’s Liability:** Stipulating that a vendor should bear appropriate liability with respect to its AI system is beneficial for a business customer so that it ultimately does not become liable for its use of the AI system if the underlying cause of liability originates with the vendor, its affiliates, or its subcontractors. As a result, a vendor’s liability should be as extensive as the circumstances permit.

***Key Questions to Ask***

In addition to including the key provisions discussed above, a business should approach its agreement with a vendor of an AI system with the same scrutiny and diligence applied to any other arm’s-length technology transaction. The burgeoning complexity of AI systems necessitates that businesses take a tailored approach when drafting, editing, or negotiating such agreements. Key questions to guide businesses in taking this approach include the following:

* 1. **Data Input and Protection:** What types of data (confidential information, personally identifiable information, sensitive personal data, commercially critical information, etc.) will be inputted into the AI system, and what additional protections are required?
  2. **Transparency and Ethics:** How does the business ensure that the vendor is as transparent as possible regarding the sources of training data and the use of data inputs and outputs? Are the AI system’s algorithms safe, effective, and ethically sound? How does the vendor mitigate the risk of producing biased output?
  3. **Security Standards:** What are the vendor’s cybersecurity protocols and measures, and how do they align with the business’s cybersecurity requirements, especially given that not all businesses have the same security and regulatory requirements?
  4. **Vendor’s Reputation:** What feedback regarding the AI system have other clients of the vendor made publicly available, and what is the vendor’s code of ethics regarding development and usage of AI systems? Is the vendor currently under regulatory investigation or the subject of multiple lawsuits, i.e., for intellectual property infringement, etc.?

Below is a sample template to be used in connection with an existing buyer’s master services agreement. It is not intended as legal advice. It will require additional customization depending on the fact situation.

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**By Spencer Rubin, Alexandria (Lexi) Lutz, Lisa R. Lifshitz, Ted Claypoole, Charlyn Stanberry, Nikki Edmunds, Conner LeBlanc, and Jim Wiley, in coordination with the ABA President’s Task Force on the Law and AI**

Under Master Services Agreement: [\_\_\_] (the “**Agreement**”)

This AI Addendum is hereby added to, and becomes part of, the Agreement as additional terms, and this AI Addendum should be read together with the Agreement as one document. Capitalized terms not defined in this AI Addendum have the meanings given to them in the Agreement.

1. **Definitions.**
   1. “**AI Addendum**” means these additional terms between the Contractor and Company governing the Contractor’s provision of AI Services to Company pursuant to the Agreement.
   2. “**AI Services**” means the services to be provided through the AI System pursuant to the Agreement.
   3. “**AI System**” means the Contractor’s proprietary technological system that, autonomously or partly autonomously, processes data through the use of a genetic algorithm, a neural network, machine learning, large language models, or other techniques in order to generate content or make decisions, recommendations, or predictions—including all computer software (and all modifications, updates, and upgrades thereto); physical hardware; and associated specifications, Documentation, and Training Instructions, as may be further described in an Order or Statement of Work. *[Drafting Note: This definition could also reference any third-party systems used by the Contractor.]*
   4. “**Biased Output**” means any Output that adversely differentiates, directly or indirectly and without justification, in relation to an individual on one or more of the prohibited grounds of discrimination under relevant law, or on a combination of such prohibited grounds, but excluding any Output the purpose and effect of which is to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds.
   5. “**Company Data**” means data provided or made available by Company, or any third party on behalf of or at the direction of Company, to the AI System under or in connection with the Agreement, including any Confidential Information and Company Personal Data.
   6. “**Documentation**” means the technical documentation and instructions to be provided by the Contractor to Company to accompany the AI System and Output, as applicable.
   7. “**Harm**” means (a) physical, emotional, or psychological harm to an individual; (b) damage to an individual’s or entity’s property, whether real, tangible, or intangible; or (c) economic loss to an individual or entity.
   8. “**Inputs**” means all information, data, materials, work, and other content that are uploaded, submitted, posted, transferred, transmitted, or otherwise received by the AI System from a source external to the AI System, including Company Data.
   9. “**Output**” means all information, data, product, content, and results generated by the AI System and AI Services, including, as applicable, any related Deliverables.
   10. “**Requirements**” means those requirements of Company for the Deliverables as described in the applicable Order or Statement of Work.
   11. “**Training Data**” means the data and datasets that the Contractor, or its licensors, uses or provides in order to train or develop the AI System.
   12. “**Training Instructions**” means any and all documentation, methodologies, and training materials or instructions developed or used by the Contractor, or its licensors, for the purpose of training the AI System.
2. **General.**
   1. At all times during the Term, the Contractor shall ensure that the AI System and the AI Services will (a) comply with the Documentation and Requirements (if any) and (b) deliver Output that complies with the Documentation and Requirements (if any).
   2. Prior to its use of the AI System on behalf of Company or provision of the AI Services, the Contractor will carry out testing, in accordance with good industry practice and appropriate to the intended purpose of the AI System and AI Services, to identify any Training Data, Training Instructions, or Output that may result in Biased Output, an individual being treated differently on the basis of a protected ground under applicable laws, or other Harm to such individual.
3. **Grant of Rights.**
   1. The Contractor grants to Company a worldwide, nonexclusive right to access and use the AI Services during the Term. This includes the right, if agreed to by the parties, to use the Contractor’s application programming interface (“**API**”) to integrate the AI Services into Company’s applications, products, and services (each a “**Company Application**”) and to make Company Applications available to end users, in each case in accordance with the terms and conditions of an API license agreement mutually executed by the parties.
   2. If the parties agree in an Order or Statement of Work that the Contractor will provide AI Services to Company with custom Inputs, Training Data, or other algorithms (whether or not trained using Company Data (a “**Custom Service**”)), then the Contractor grants to Company an exclusive right to access and use the Custom Service during the Term, and upon the termination or expiration of the Agreement for any reason, the Contractor shall delete the custom Inputs, Training Data, and other algorithms that are part of the Custom Service. Under no circumstances shall the Contractor have the right to use any custom Inputs, Training Data, or other algorithms that are part of a Custom Service within any public-facing AI Services or any private third-party instances of the AI Services.
4. **Ownership.**
   1. **Company Data and Ownership of Output.** Company and Company’s end users may provide Company Data to the AI Services and receive Output from the AI Services. As between (a) Company and (b) the Contractor or any other of the Contractor’s users, and to the extent permitted by applicable law, Company (i) retains all right, title, and interest (including, but not limited to, all Intellectual Property Rights) in and to Company Data; and (ii) owns all right, title, and interest (including, but not limited to, all Intellectual Property Rights) in and to Output, including any related Deliverables provided under a Statement of Work. For greater clarity, the Contractor hereby transfers and assigns to Company now and forever, free of any encumbrances, all right, title, and interest (including, but not limited to, all Intellectual Property Rights), if any, in and to all Output, and the Contractor represents and warrants that it has all necessary rights, licenses, and permissions to make such assignment in favor of Company, and to waive any moral rights or similar rights that it may have in favor of itself, regarding such Output.
   2. **Documentation.** The Contractor grants Company a perpetual, irrevocable, royalty-free, worldwide, nonexclusive license to use the Documentation in connection with any Output.
   3. **The Contractor’s Obligations for Company Data.** The Contractor will process and store Company Data in accordance with the Agreement and will only use Company Data as necessary to provide Company with the AI Services and comply with applicable law. The Contractor will not use Company Data or Output to develop, train, or otherwise improve the AI Services, the AI System, or other artificial intelligence systems *[except solely for the benefit of Company]*.
5. **Data Security.**
   1. **The Contractor’s Security Program.** The Contractor will maintain an adequate information security program (including the adoption and enforcement of internal policies and procedures) and technological, organizational, and physical measures designed to (a) protect the AI Services, the AI System, each Custom Service (including the Inputs, Training Data, and other algorithms thereof), and Company Data (collectively, the “**Sensitive Assets**”) against accidental or unlawful loss, access, or disclosure; (b) identify reasonably foreseeable risks to the security of the Sensitive Assets, including unauthorized access thereto or use thereof; and (c) minimize security risks to the Sensitive Assets, including through regular risk assessments and testing (collectively, the “**Measures**”). The Contractor shall maintain and upgrade the AI System and the AI Services as often as reasonably necessary for the proper functioning and security of the Sensitive Assets in accordance with the Measures, industry-best practices, and applicable laws.
   2. **The Contractor’s Security Obligations.** As part of the Contractor’s Measures, the Contractor will: (a) implement and enforce security policies related to electronic, network, and physical monitoring and data storage, transfer, and access; (b) deploy production infrastructure behind VPNs where possible; (c) require multifactor authentication for employees and contractors; (d) configure network security, firewalls, accounts, and resources for least-privilege access; (e) maintain a logging and incident response process; (f) maintain corrective action plans to respond to potential security threats; and (g) conduct periodic audits of the Measures to ensure that the Measures are aligned to industry-best practices and are compliant with applicable laws.
   3. **Data Protection Addendum.** Without limiting the Contractor’s obligations set forth in Sections 5.1 and 5.2, the Contractor shall comply with all security requirements for Company Data that are set forth in a data protection addendum agreed upon by the parties in writing (the “**DPA**”), and in the event of any conflict between any provision of this AI Addendum and any provision of the DPA, the provision of the DPA will control the subject matter of any such conflict.
6. **Privacy.** If Company uses the AI Services or the AI System to process personal information within the Company Data, all applicable provisions of the Agreement and the DPA will apply to the processing of such personal information.
7. **The Contractor’s Representations and Warranties.** The Contractor additionally represents and warrants that:
   1. It willprovide the AI Services and AI System to Company in accordance with any Documentation provided to Company and any other Requirements mutually agreed to with Company.
   2. It will comply with all applicable laws relating to the development and provision of the AI Services and the AI System, including all applicable data protection laws.
   3. Any AI System used by the Contractor will be fit for purpose; of satisfactory quality; free from defects; and developed by the Contractor with reasonable care and skill, in accordance with industry-best practices, and compliant with any Requirements.
   4. It has and will continue to ensure that it has obtained all necessary permissions and licenses for the provision and use of the AI Services (including Custom Services) and AI System, as well as the Training Data and Contractor Training Instructions used to train the AI System and any other non-Company-Data Inputs uploaded or otherwise used with the AI System.
   5. It has obtained and will continue to ensure that it has obtained all rights, licenses, and permissions required to provide Output from the AI Services and grant the rights (including Intellectual Property Rights) in the Output to Company as required by Section 4.1 above.
   6. It will comply with all rules with respect to artificial intelligence that are promulgated by any industry self-governing organization and that are binding upon the AI Services or AI System.
   7. It will develop and make available the AI Services solely in accordance with the highest ethical principles, and neither the AI System nor the AI Services will (a) provide any Biased Output or (b) cause any Harm.
   8. It will ensure that any Inputs, Training Data, and other algorithms used in the AI System or AI Services are materially accurate, complete, and truthful.
   9. Neither the AI System nor Company’s use of the AI Services will infringe the Intellectual Property Rights of any third party.
   10. None of the AI System, AI Services, or Output will contain any viruses, disabling code, malware, or malicious software, and no use by Company of the AI System, AI Services, or Output will cause any loss or damage to Company’s data, systems, hardware, records, programs, or other property.
8. **Indemnity.**
   1. The Contractor additionally agrees to indemnify, defend, and hold harmless the Indemnified Parties from and against any Claims arising out of (a) an allegation that any of the AI Services, the AI System, Inputs, Training Data, or Output infringes, misappropriates, or otherwise violates any Intellectual Property Right or other rights of any third party, or (b) any breach by the Contractor or any of its employees, agents, or subcontractors of any applicable law or of Sections 4–6 of this Addendum. If the Contractor reasonably believes that all or any portion of the AI Services, AI System, Inputs, Training Data, or Output is likely to become the subject of any infringement Claim, the Contractor (i) will procure, at the Contractor’s expense, the right for Company to continue using the AI Services, AI System, Inputs, Training Data, or Output in accordance with this Agreement, or (ii) will replace or modify the allegedly infringing components of the AI Services, AI System, Inputs, Training Data, or Output with functional equivalents so that the AI Services, AI System, Inputs, Training Data, or Output are noninfringing.
   2. If the Contractor (a) cannot successfully implement the solutions outlined in Sections 8.1(i) and (ii) above within thirty (30) days (or as otherwise agreed with Company) from the date that the Indemnified Parties cease use of the AI Services, AI System, or Output or (b) receives a judicial order preventing or enjoining the Indemnified Parties from using the AI Services, AI System, or Output as contemplated hereunder, then Company may (i) notify the Contractor in writing that it considers the failure to implement such solutions a default by the Contractor of the Agreement; and (ii) opt to terminate (A) all affected Orders and Statements of Work or (B) the Agreement. In the event of such a termination, the Contractor shall (I) reimburse to Company all fees previously paid by Company with respect to the infringing AI Services, AI System, or Output and (II) pay such other damages as Company may suffer as a consequence of its inability to use the infringing AI Services, AI System, or Output, without prejudice to any other rights and remedies as may be available to any of the Indemnified Parties under this Agreement, or at law or in equity.
9. **Liability.** To the extent that Company uses the AI Services within the scope of this Agreement, including any Documentation and Requirements agreed to by the parties, the Contractor shall be liable for any damages or losses arising from Company’s reasonable and customary use of the AI Services and the Output, including all related Deliverables provided under any Statements of Work. This includes liability for any damages or losses arising from the AI Services’ or AI System’s performance, even if such issues are due to unpredictable behavior of the AI System’s algorithms.
10. **Insurance.** During the Term, in addition to the insurance described in the Agreement, the Contractor acknowledges and agrees that it shall obtain and maintain in force during the Term, at its sole cost and expense, a cyber-liability insurance policy with limits of not less than five million dollars ($5,000,000) per occurrence and ten million dollars ($10,000,000) in the annual aggregate, and such policy must include Company and its Affiliates as additional insureds.
11. **Effect of Termination.** Upon termination or expiry of the Agreement for any reason, Company shall promptly cease all use of the AI Services and AI System, and the Contractor shall immediately return to Company, or at Company’s request, immediately and irrevocably delete and destroy all copies of Company Data, Output (including any related Deliverables), and Custom Services in its and its employees’, agents’, and subcontractors’ possession and shall certify in writing to Company within fifteen (15) days of such termination or expiration that this has been done.
12. **Survival.** For avoidance of doubt, Sections 4, 6–9, 11, and 12 of this AI Addendum shall survive any termination or expiration of the Agreement.