

General Motors' Terms and Conditions: 2013 v. 2011 Change Analysis

Subject Matter	2011 GM Terms	2013 GM Terms	Differences	Impact (H/M/L)
Contract Formation and Amendment	1. Acceptance 31. Entire Agreement	1. Effectiveness 2. Entire Agreement; Applicability	<ul style="list-style-type: none"> • § 2 includes language designed to strengthen GM position in “battle of the forms” disputes: <div style="border: 1px solid black; padding: 5px; margin: 5px 0;"> Terms and conditions proposed by Seller that are different from or in addition to the provisions of this Contract are expressly rejected by Buyer and are not a part of this Contract, and Seller’s acceptance is expressly limited to the terms of this Contract. </div> <ul style="list-style-type: none"> ○ <i>This language tracks UCC 2-207 and is customary in OEM terms, but was not in old GM Terms.</i> ○ <i>Only matters is a battle of forms dispute</i> 	L
Changes	5. Changes	10. Changes	<ul style="list-style-type: none"> • Specifies that equitable adjustments are based on “a fair cost assessment” <ul style="list-style-type: none"> ○ <i>Prior equitable adjustment language, which did not explicitly relate “equitable” to “fair costs assessment,” but probably does not change the meaning.</i> • See also, discussion of cost impact of changes to “Seller’s Property,” below. • See also, discussion of cost impact of scheduling changes in “Releases and Delivery,” below 	L
Assignment and Subcontracting	27. Non-Assignment	11 Subcontracting 38. Non-Assignment	<ul style="list-style-type: none"> • §11 is entirely new. <ul style="list-style-type: none"> ○ GM must approve every subcontract. ○ Seller warrants / guarantees subcontractor performance. <ul style="list-style-type: none"> ▪ <i>The “guarantee” exists as a matter of contract law, so is unimportant except for directed suppliers. Directed supplier agreements / RASICs should address this.</i> • §38 purports to prohibit all assignments, including “any right of payment.” <ul style="list-style-type: none"> ○ <i>Prohibition of assignment of A/R generally unenforceable under UCC 9-406(d)</i> 	M
Expiration and Termination	13 Termination For Convenience	35. Termination For Convenience	<ul style="list-style-type: none"> • New terms eliminate 90 day deadline for termination claims. No specific deadline is set. • New terms provide greater detail on the types of supporting information and documentation required for a termination claim. <ul style="list-style-type: none"> ○ <i>None of the new detail is surprising.</i> 	L
Releases and Delivery	3. Delivery Schedules 4. Premium Shipments	3. Delivery; Scheduling; Electronic Data Interchange	<ul style="list-style-type: none"> • Seller must comply with logistics requirements and use EDI. • Eliminated language from old terms stating that changes in or suspension of release “shall [not] entitle Seller to a modification of the price for goods.” <ul style="list-style-type: none"> ○ <i>No affirmative right to compensation for such release changes is given, but potentially relief can be sought as a “change of scope” under the general “Change” provision in §10.</i> 	L
Packing, Marking, and Shipping	2. Shipping, Payment And Right To Audit 10. Ingredients Disclosure; Special Warnings And Instructions	4. Shipping; Packaging 14. Ingredients Disclosure; Special Warnings And Instructions	<ul style="list-style-type: none"> • All shipping, handling, and packaging costs are included in the piece price. • Seller required to comply with marking and shipping laws of the country of manufacture and all intermediate countries of transport, (previously just country of destination). • Marking and shipping laws include those “governing the handling and transportation of dangerous goods or hazardous materials.” • See Conflict Mineral discussion in “Ingredients,” below. 	M

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Ingredients	10. Ingredients Disclosure; Special Warnings And Instructions	14. Ingredients Disclosure; Special Warnings And Instructions	<ul style="list-style-type: none"> • Express Conflict Mineral reporting obligation: <div style="border: 1px solid black; padding: 5px; margin-top: 5px;"> <p>Upon Buyer's request, Seller will certify to Buyer in writing the origin of any ingredients or materials in the goods. Seller will promptly provide, in writing, any information regarding the goods requested by Buyer so that Buyer may comply in a timely manner with reporting requirements under applicable law with respect to consumer protection, "conflict minerals" or similar materials or ingredients, if any.</p> </div> 	M
Inspections and Non-Conforming Parts	2. Shipping, Payment And Right To Audit 6. Supplier Quality And Development; Inspection 7. Nonconforming, Rejected, Obsolete Or Surplus Goods.	6 . Non-conforming, Rejected or Surplus Goods 16. Audit Rights; Inspection of Seller's Premises	<ul style="list-style-type: none"> • See discussion of expanded audit rights in "Audit Rights," below. • Other changes only minor. <ul style="list-style-type: none"> ○ Eliminates GM right to charge for storage of non-conforming parts if seller d/n give prompt instructions or disposition. 	L
Supplier Quality	6 Supplier Quality And Development; Inspection	12. Quality	<ul style="list-style-type: none"> • Express obligation to require sub-suppliers to conform to GM quality programs. 	L
Service Parts	20. Service and Replacement Parts	5. Service and Replacement Parts	<ul style="list-style-type: none"> • Pricing has been changed to allow for incremental packaging and logistics costs for all service parts (both current and past models). 	M
Invoices, Payment and Setoff	2. Shipping, Payment And Right To Audit 23. Setoff / Recoupment	18. Payment; Setoff and Recoupment	<ul style="list-style-type: none"> • Standard payment term (47/weekly) eliminated from terms. • Greater specificity as to content of invoices and related processes. 	L

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Taxes	None	20. Transactional Tax	<ul style="list-style-type: none"> • Entirely new provision. <ul style="list-style-type: none"> ○ All taxes must be line-itemed in the quote and contract, even if “0.” ○ Invoices must be “in line with the applicable tax laws in its country to enable the Buyer to reclaim the transactional taxes.” ○ Seller must remit applicable transaction taxes. ○ Seller must use “reasonable efforts” to apply for applicable exemptions. ○ Seller may not pass on sub-contractor tax charges which are recoverable by seller or could have been recoverable if structured differently (e.g., through a foreign affiliate.) 	M
Parts Warranty	9. Warranty	13. Product Warranty; Warranty of Performance	<ul style="list-style-type: none"> • GM has added 3 potentially important new warranty exposures. • It appears that GM has created an entirely new warranty, distinct from its usual product warranties: <div style="border: 1px solid black; padding: 5px; margin: 5px 0;"> <p>Seller warrants and guarantees that the goods covered by this Contract will not, at any time (including after expiration or termination of this Contract), pose an unreasonable risk to consumer or vehicle safety.</p> </div> <ul style="list-style-type: none"> ○ <i>The preceding comment is preceded by “it appears,” because the provision can possibly be read to effect only the duration of the warranty. In other words, it might mean that if a breach of the usual warranties renders a product unreasonably dangerous, then the warranty will survive indefinitely.</i> • GM also adds a new warranty of conformance to “quality standards,” including the seller’s own standards, if approved by GM in writing. • The duration of the warranty is also potentially extended to the later of (1) any period provided by law, (2) the duration of the consumer warranty; or (3) “the expiration of any specific warranty period or performance standard provided in any document incorporated by reference into the Contract, including in Buyer’s specifications or quality standards.” <ul style="list-style-type: none"> ○ <i>Number 3 is new and potentially important if a quality standard anticipates a longer life than the consumer warranty.</i> 	H
Recall	21. Remedies	26. Remedies; Indemnity	<ul style="list-style-type: none"> • No material changes – recall and field service campaign costs remain a recoverable form of damages. 	L

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Indemnification (excluding intellectual property).	16. Indemnification 25. Compliance With Laws; Employment / Business Practices	17. Work Performed on Buyer's Premises 26. Remedies; Indemnity 32. Compliance with law	<ul style="list-style-type: none"> • Old GM Terms only had very narrow indemnity provisions, for premises liability (§16) and non-compliance with law (§25). In addition to continuing narrow indemnity provisions (§§ 17 and 32), new terms (§26) have omnibus indemnity obligation for any breach: <div style="border: 1px solid black; padding: 5px; margin: 5px 0;"> <p>Seller will indemnify, defend and hold harmless Buyer Group against any liability, claim, demand and expense (including, without limitation, legal and other professional fees) arising from or relating to any failure of Seller to fully perform any of its obligations under this Contract.</p> </div> <ul style="list-style-type: none"> ○ <i>The practical significance of the expansive indemnity right is probably limited to: (1) creating a duty of defend; and (2) expanding the limitations period (indemnity claims do not accrue until the indemnifiable liability accrues). Otherwise, the damages available to GM in a breach of contract claim are defined so expansively that indemnity adds little to the seller's exposure.</i> • See also, Warranty discussion, above. 	M
Default and Remedies <i>Termination for Cause</i>	12. Termination for breach or nonperformance; sale of assets or change in control	34 Termination for Cause	<ul style="list-style-type: none"> • No material change. 	L
Default and Remedies <i>Other Remedies</i>	21. Remedies	26. Remedies; Indemnity	<ul style="list-style-type: none"> • Buyer's legal and professional fees incurred as a result of any breach are recoverable damages. 	M
Default and Remedies <i>Assurance of Performance</i>	None	9. Seller's Assurance of Performance	<ul style="list-style-type: none"> • New provision allowing GM to seek adequate assurances of performance. Appears indistinguishable from rights available under UCC 2-609. 	L
Default and Remedies <i>Specific Performance</i>	None	27. Specific Performance	<ul style="list-style-type: none"> • New provision for specific performance. <ul style="list-style-type: none"> ○ <i>Common provision acknowledging buyer's right to injunctive relief against a supply threat, but previously absent from GM terms.</i> 	M
Default and Remedies <i>Insolvency</i>	11. Insolvency	21. Insolvency	<ul style="list-style-type: none"> • Defines insolvency to include any "circumstance in which Seller's liabilities exceed its assets or Seller is unable to pay its debts as they come due." <ul style="list-style-type: none"> ○ <i>Seeking an accommodation likely because an act of insolvency and an immediate cause for termination and other remedies.</i> • Seller must inform GM of any insolvency event or if "Seller becomes aware of events or circumstances likely to give rise to any such events." • Seller must reimburse all insolvency related costs, including legal and other professional services. 	M

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Excusable Delays/Force Majeure	8. Force Majeure; Labor Disruption Inventory	28. Force Majeure	<ul style="list-style-type: none"> • Must give force majeure notice not > 10 days after event. • Labor disruption was identified as a force majeure event in old terms; missing from new terms. <ul style="list-style-type: none"> ○ <i>This does not mean that labor cannot be a force majeure event, but previously it was agreed upon as one.</i> • Seller has 5 days to give assurances that delay will not exceed 30 days (reduced from 10 days). 	L
Disruptions	8. Force Majeure; Labor Disruption Inventory	8. Protection Against Supply Disruptions	<ul style="list-style-type: none"> • Broad, open-ended new obligation to protect against all supply disruptions. <div style="border: 1px solid black; padding: 5px; margin: 5px 0;"> <p>Seller will, at Seller's expense, take such actions as are necessary or appropriate to ensure the uninterrupted supply of goods and services to Buyer for not less than 30 days during any foreseeable or anticipated event or circumstance, the occurrence of which could interrupt or delay Buyer's production or Seller's performance under this Contract.</p> </div> <ul style="list-style-type: none"> ○ Old terms addressed labor disruptions only. 	H
Intellectual Property <i>Ownership and licensing</i>	14. Intellectual Property	24. Intellectual Property Rights	<ul style="list-style-type: none"> • § 24 is a completely new statement of the parties' respective IP ownership and license rights <ul style="list-style-type: none"> ○ § 24 superseded if there is an existing or concurrent separate written IP agreement that expressly supersedes § 24. • Intellectual Property Rights (IPR) defined broadly to any technology, invention, patent rights, source code, software rights, and any equivalent trade secret. • IPR does not include branding or trademark rights. • § 24 distinguishes between "background" and "foreground" IPR. <ul style="list-style-type: none"> ○ Background IPR is defined as IPR that: <ul style="list-style-type: none"> ▪ existed prior to the earlier of the PO or "the date Buyer and Seller began any technical cooperation relating to the goods" or ▪ were acquired or developed after the contract independent of the other party and independent of its performance of the contract. ○ Foreground IPR is defined as those rights developed either by the Buyer or Seller independently or jointly that relates to the goods or services provided under contract. • Foreground IPR is owned by developing party or, if co-developed, jointly owned with each having the right to license the technology without any authorization or consultation or accounting. <ul style="list-style-type: none"> ○ Seller developed Foreground rights can be exploited by the Seller for use with other customers, but buyer receives an irrevocable, worldwide, nonexclusive, perpetual, royalty free, fully paid up license with the ability sublicense without limitation. • Each party retains ownership of its Background IPR. However, GM receives a "Limited License" to use seller's Background IPR for the life of the program: <ul style="list-style-type: none"> ○ Without royalty, if the contract is terminated for cause or due to a force majeure event; ○ With a reasonable royalty in any other circumstance in which GM "deems the use of the Limited License reasonably necessary to prevent the interruption or delay of Buyer's production 	H

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			<p style="text-align: center;">operations.”</p> <ul style="list-style-type: none"> GM has a royalty free right to repair, reconstruct, remanufacture, reflash or rebuild products. Seller is responsible for assuring that it has all proper intellectual property rights and/or licenses to allow Buyer to possess rights under this Contract. Seller is also responsible to assure it complies with any responsibilities under software licenses. 	
Intellectual Property <i>Indemnity</i>	14. Intellectual Property	25. Intellectual Property Indemnification	<ul style="list-style-type: none"> GM affiliates and dealers added to list of indemnified parties. 	L
Intellectual Property <i>Seller's Information</i>	15. Technical Information Disclosed To Buyer	30. Technical Information	<ul style="list-style-type: none"> Seller's information is not confidential unless there is a separate confidentiality agreement prior to the PO date: <div style="border: 1px solid black; padding: 5px; margin: 5px 0;"> Any technical or other information provided by Seller to Buyer or its affiliates will not be subject to confidentiality or nondisclosure obligations unless the parties have entered into a separate written confidentiality and nondisclosure agreement signed by their respective authorized representatives prior to the effective date of this Contract. </div> 	H
Intellectual Property <i>Buyer's Information</i>	24. No Advertising Or Posting Of GM Information	31. Confidentiality; No Advertising	<ul style="list-style-type: none"> Broad new prohibition on use or disclosure of any buyer information: <div style="border: 1px solid black; padding: 5px; margin: 5px 0;"> Seller will maintain the confidentiality of any information provided by Buyer or its representatives, and any materials or information that contain, or are based on, any such information. Seller may only use such information in connection with its performance under this Contract and will not provide such information to any third party (including, without limitation, Seller's subcontractors) without Buyer's advance written consent. </div> <ul style="list-style-type: none"> <i>On its face, this requires GM's consent not only to engage a sub-contractor, but to share discrete pieces of information with it.</i> 	M

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OEM-Owned Tooling and Other Property	19. Buyer's Property	23. Buyer's Property	<ul style="list-style-type: none"> • Definition of "Buyer's Property" expanded to include "prototype and production" property supplied by GM (directly or indirectly); "related software"; and "accessions, appurtenances, modifications, repairs, refurbishments and replacements thereof"; • Buyer's property excludes property paid for by GM through piece price amortization. <ul style="list-style-type: none"> ○ <i>This exclusion is very puzzling. It does not seem to be in GMs interest to not have ownership or possessory rights in property which it has paid for whether through amortization or otherwise.</i> • A new "Title" provision has been added, giving GM title not later than the earlier of PPAP of first payment. • Lien waiver expanded from waiver of any "liens" to waiver of any "liens, claims, encumbrances, interests" that Seller might have "or assert on or with respect to" Buyer's Property • <u>New clause</u> grants GM fully paid, irrevocable, non-exclusive, worldwide, perpetual license in any Intellectual Property Rights owned by or licensed to Seller, with the right to grant sub-licenses, as necessary for any use of GM's Property. 	M
Supplier-Owned Tooling	18. Seller's Property	22. Seller's Property	<ul style="list-style-type: none"> • The following was deleted from the new terms: "The cost of changes to Seller's Property necessary to make design and specification changes authorized by GM shall be paid for by GM." <ul style="list-style-type: none"> ○ <i>Such costs should be pursuable under the general "Change" provisions of § 10. However, it is no longer an automatic entitlement.</i> • Seller's insurance requirements are expanded from coverage for "full fire and extended coverage for its replacement value" to "<u>all losses</u> for its replacement value." • GM has limited its option to purchase Seller's Property to termination for Cause or Insolvency 	m
Audit Rights	2. Shipping, Payment And Right To Audit 6. Supplier Quality And Development; Inspection 13. Termination for Convenience	16. Audit Rights; Inspection of Seller's Premises 35. Termination For Convenience	<ul style="list-style-type: none"> • Expansion of audit / inspection rights in §16. <ul style="list-style-type: none"> ○ Old terms give limited scope audit / inspection rights: (i) "charges" (§2); (ii) "facility, goods, materials and any property of Buyer" §6), and (iii) termination claims (§13) ○ New terms (§16) give broad rights to audit: <div style="border: 1px solid black; padding: 5px; margin: 5px 0;"> <p>Seller's compliance with the terms of this Contract (including, without limitation, charges under this Contract) or inspecting or conducting an inventory of finished goods, work-in-process, raw materials, any of Buyer's Property and all work or other items to be provided pursuant to this Contract.</p> </div> • Seller must provide, on request, "its most current income statements, balance sheets, cash-flow statements and supporting data and schedules." 	H
Duty to Inform	None	15. Duty to Inform and Notify	<ul style="list-style-type: none"> • Broad new duty to inform / disclose: (a) any failure by Seller to perform any of its obligations; (b) any delay in delivery; (c) any defects or quality problems; (d) any deficiency in Buyer specifications; (e) any failure to comply with applicable laws; (f) any likelihood of insolvency. <ul style="list-style-type: none"> ○ <i>This creates a whole new series of meta-breaches.</i> • See also, discussion of expanded audit rights in "Audit Rights." 	H

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Import and Export	22. Customs; Export Controls	19, Customs; Origins 33. Export Controls; Sanctions Compliance	<ul style="list-style-type: none"> • New obligation in §19 to comply with “recommendations or requirements of all applicable Authorized Economic Operator (AEO), governmental security/anti-terrorism and enhanced border release programs,” such as requirements of C-TPAT. • New obligation in § 33 to comply with Export Control Laws. <ul style="list-style-type: none"> ○ <i>§33 obligations were arguably within the scope of broader compliance obligations under the old terms.</i> 	M
Compliance with Laws	25. Compliance With Laws; Employment / Business Practices	32. Compliance with Laws	<ul style="list-style-type: none"> • Seller warrants performance of “subcontractors, vendors, agents or other associated third parties” against abusive labor practices (e.g., slave labor), anti-corruption law violations and commercial bribery.” Old terms subcontractors only. 	M
Applicable Law	29. Governing Law; Jurisdiction	36. Governing Law and Jurisdiction	<ul style="list-style-type: none"> • No material change. 	L
Insurance	17. Insurance	29. Insurance	<ul style="list-style-type: none"> • Seller must name GM as an additional insured or beneficiary. 	M
Title	None	7. Transfer of Title	<ul style="list-style-type: none"> • Title to Goods transfers together with risk of loss per contractual delivery terms. 	L
Relationship of the Parties	28. Relationship of Parties	39. Nature of the Relationship of Parties	<ul style="list-style-type: none"> • No material change. 	L
Waiver	26. No implied waiver	37. No Waiver	<ul style="list-style-type: none"> • No material change. 	L
Severability	30. Severability	40. severability	<ul style="list-style-type: none"> • No material change. 	L

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