

Procurement Guidance - (4/2014)

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T3.16 Commercial Licensing Agreement Added 4/2006

A Commercial Licensing Agreement Added 4/2006

1. Commercial licensing agreements (agreements) provide terms and conditions for the FAA (we) to use various commercial software programs that we do not own. Often there are embedded terms in the agreements that could create legal problems for us or the agreements may provide terms that conflict with other contract provisions. These conflicts also have potential to create legal problems, and both issues could also cause unexpected liabilities for us.
2. The Contracting Officer (CO) should use the attached Appendix "Checklist For Review of Commercial Form Contracts" (software licenses, etc.) to examine pertinent clauses and agreement requirements to prevent unfavorable terms or conflict with our contracts. The checklist points out important actions the CO can take to minimize our risk in these agreements.
3. The CO is the only one who should enter these agreements for us.
4. The CO should consult with legal counsel to assure that we are adopting appropriate agreement terms and conditions that minimize our liability under these agreements.

B Clauses Added 4/2006

[view contract clauses](#)

C Forms Added 4/2006

[view procurement forms](#)

D Appendix Added 4/2006

Checklist for Review of Commercial Form Contracts (Software licenses, etc.)

1. Review AMS clause 3.5-18, "Commercial Computer Software-Restricted Rights," which either is, or should be added into, the basic contract. Delete all clauses and terms inconsistent with AMS, e.g., "breach," "payment," "termination," "binding arbitration."
2. Delete any "Governing Law" provision unless it specifies Federal law; i.e., "This agreement

shall be subject to the laws of the state of Michigan."

3. Scrutinize the document for any attempts to impose additional license fees, i.e., if the software is to be used by anyone in the FAA not specifically identified in the agreement or contract.
4. Check for clauses that attempt to restrict use of the software to specific machines or networks in specific locations. Delete as necessary.
5. Delete any and all indemnity or attorney's fees provisions in contractor's favor. See Anti-Deficiency and Equal Access to Justice Acts, respectively.
6. Delete integration or merger clauses; the FAA contract will govern the rights and responsibilities of the parties, not a stand-alone license agreement.
7. Avoid open items (e.g., form blanks not filled in); these items must be negotiated and recorded prior to execution.
8. No incorporation of future prices, terms, etc. (For example, software licenses cannot automatically renew each year if the FAA will become obligated to pay a yearly licensing fee.)
9. Delete any interest-for-late-payment terms varying from the Prompt Payment Act.
10. Eliminate extensive warranty disclaimers, particularly disclaimers for defects in "third party products," where a subcontractor or supplier provides input into the final contract deliverable.
11. Watch for and delete clause that give the contractor exclusive control over infringement litigation. The Department of Justice would represent FAA in any such litigation, and expect a certain amount of control.
12. Delete liquidated damages clauses.