

## Procurement Guidance - (10/2016)

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[T3.16 Commercial Licensing Agreement](#) Added 4/2006

[A Commercial Licensing Agreement](#) Revised 1/2016

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## **T3.16 Commercial Licensing Agreement Added 4/2006**

### **A Commercial Licensing Agreement Revised 1/2016**

1. Commercial Licensing Agreements (agreements) provide terms and conditions for the FAA to use various commercial software programs that the Government does not own. Often there are embedded terms in the agreements that could create legal problems for the FAA 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 cause unexpected liabilities.
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 FAA contracts.
3. Only the CO is authorized to enter into Commercial Licensing Agreements.
4. The CO must consult with legal counsel to ensure that agreement terms and conditions minimize FAA's liability, and strike a balance between the FAA's requirements needs and the contractor's proprietary interest.

### **B Clauses Added 4/2006**

[view contract clauses](#)

### **C Forms Added 4/2006**

[view procurement forms](#)

### **D Appendix Revised 1/2016**

#### **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; e.g., "This agreement must 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 clauses 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 damages and/or liability clauses which are inconsistent with FAA clauses.
13. Delete injunctive release terms that could arbitrarily stop performance.
14. Ensure that the FAA use of copyrighted material will not be considered an infringement of the copyright.