A General Guide to Commonwealth Expectations for Software License Agreements

|  |  |
| --- | --- |
| **Usage rights** | **Recommended language or expectation** |
| Definition of licensee | Commonwealth of Virginia |
| Duration of license | Irrevocable, perpetual, transferrable in the Commonwealth for commonwealth business purposes and survives the agreement. |
| Duration of agreement | Should be perpetual or until terminated by the Commonwealth. |
| End User License Agreement | If software publisher is the supplier, try to get all negotiated terms in the contract and not in a separate document, unless attached as an exhibit to the contract. If supplier is a reseller, have reseller obtain facilitate discussion with software publisher to modify terms of its licensing terms (such as a EULA) directly. In the event that the supplier, or the software publisher in the case of a supplier that is a reseller, the License Agreement Addendum (LAA) can be used to provide some protection.In either instance, the LAA is **not** the preferred method and should only be used as a last resort. If the LAA is used, it should be signed by the supplier in the first case above, and by the software publisher and acknowledged by the supplier reseller in the second case. The two versions of the LAA, reflecting both scenarios above, are located on the VITA SCM website, under the Forms section, at the following url: <https://www.vita.virginia.gov/procurement/policies--procedures/procurement-forms/> |
| Geographic use | Within any location within the Commonwealth for any government use anywhere in the U.S. if used by the Commonwealth if used by a Commonwealth employee or their agent. |
| Assignment rights | Agency should have right to assign or otherwise transfer the license at no fee to any Commonwealth public or private entity upon notice to supplier. |
| Indemnification by supplier | The Commonwealth must be held harmless in case of copyright, patent, trade secret or other IP infringement and damages, worldwide, personal injury/death, property damage. |
| Indemnification by the Commonwealth | The Commonwealth may not indemnify the Supplier. |
| Additional copies of software | Agency may make reasonable number of copies for use in training, support, demonstrations and development for no additional license fees. |
| Use by third-party maintenance provider | A third-party maintenance provider has the right to load the software for agency as an agent in a support capacity. |
| Licenses | Reusable within the Commonwealth or any location within the U.S. if by a Commonwealth employee or agent ofthCommonwealth. |

|  |  |
| --- | --- |
| Delivery/install/acceptance | Clear and detailed delivery and installation requirements and acceptance criteria. |
| Acceptance/Acceptance testing | Determine in writing what constitutes acceptance, successful test of software in production environment is the preferred acceptance trigger. For modified or customized software, acceptance criteria must be documented in detail including milestones and associated dates and final acceptance must precede any final payment.* When fully integrated, the entire system must pass acceptance test criteria.
* Acceptance of individual milestones for modified code does not constitute acceptance of the entire system.
* Not critical for commercial off the shelf (COTS) software.
* Make sure that determination of acceptability is at the discretion of the Commonwealth and/or authorized user.
* Rejection constitutes grounds for full reimbursement of any amounts paid.
 |
| Audit Rights | The agency should negotiate control over the audit process. It is important to include any agency or Commonwealth security, confidentiality and access restrictions or parameters for any such audit, including advance notice, no disruption to agency operations, approval of any 3rd party auditors who must comply with security, confidentiality and access requirements. Agency should not have to pay for audits. Negotiate fair remedy, i.e., agency only pays for licenses not already paid for. |
| Payment | Tie payments to acceptance of project events/milestones, e.g., installation or testing, not just delivery. For modified or customized software, payment should always be tied to acceptance testing. As an incentive to supplier and protection to agency, consider withholding a percentage from each milestone payment until after final acceptance, to be billed on final bill. |
| Supplier’s software/source code | The Commonwealth or agency may need portions of source code to create interfaces. If object code is delivered, source code should be in escrow and all escrow materials, including documentation and any runtimes required to compile and operate the software, should be verified. For modified or customized software, the source code should be provided if the Commonwealth owns the software. For hosting and software as a service contract, agency may also need Data or Content Escrow for all agency metadata. |
| License pricing —* Prepaying license fees
 | If agreed to, ensure that the basis for software maintenance fees is the license fees paid for the then-current installed base, not the entire prepayment amount, which would include licenses “still on the shelf” as deployment ramps up. |
| * Basis for license fee
 | Agreement must include pricing for:* Current transaction.
* Future transactions in terms of additional users, tier, products, services, access, or operating systems.
* Specifically address hidden costs.
* Credit for upgrades if not included in support fees.
 |
| * Basis for license fee clearly defined
 | License fee should be per workstation, per server, per named user, per concurrent user, etc. |
| * Competitive pricing
 | If supplier licenses substantially similar software to a 3rd party, it will notify the Commonwealth or agency of such contract within 30 days. Upon notice, the Commonwealth has 30 days to request a contract amendment to take advantage of any more favorable terms found in the 3rd party contract. Any such amendment is only retroactive to the effective date of the 3rd party’s contract. |
| * Subscription based
 | For hosting and/or software as a service subscription licensing try to negotiate “pay as you go” or “scalable” pricing so that you pay only for actual usage should user base increase or decrease. |
| Training and documentation | Negotiate pricing for immediate and future training and documentation needs (those beyond user manuals which should be provided at no cost). |
| Software ownership | Negotiate ownership rights that are fair to both parties. If the Commonwealth is paying for software development, ownership belongs to the Commonwealth. Be sure to consider any required rights for federal use, if federal funds support the acquisition. |
| Existing software | Owned by supplier; not to be confused with the Commonwealth’s legacy systems or data, which rightfully belongs to the Commonwealth or other 3rd party suppliers. |
| New software developed during agreement by supplier | For modified or customized software, if supplier is to own, then the Commonwealth should not pay and the new software portion with modification/customization should be rolled into the license and supported by the software supplier. If the supplier assigns exclusive ownership to the Commonwealth, agency pays for modification and parties must decide who will support modification. If the Commonwealth pays the supplier to make modifications, the Commonwealth expects to own the newly created code, not the preexisting code. |
| Warranties—* Title or Ownership
 | Supplier warrants it has the right to grant license to the Commonwealth or agency. |
| * Performance
 | Supplier warrants software is fit for either the purpose stated in the RFP (fit for intended use) or the software’s documentation or the supplier will repair/replace/refund fees. |
| * Virus free
 | Supplier warrants software is free from all viruses detectable by industry standard means. |
| * Free from defects
 | Supplier warrants software is free from material defects and will correct any defect in software at no additional cost to the Commonwealth or customer agency. |
| Warranty services | Define what is covered and when the support charges begin. Negotiate a longer beneficial warranty period if possible. Agency does not pay for support during the warranty period. Typical industry warranty period for COTS software is 30 days; for custom or integration service software, agency may negotiate a longer warranty period. Ensure supplier will do the following without additional charge to the Commonwealth or agency:* Correct defects and malfunctions.
* Promptly provide copies of software documentation to reflect any enhancements made by supplier including modifications which can increase the speed, efficiency or base operation of the software or add additional capabilities or otherwise improve software functionality.
* Provide telephone support.
* Agree to a defined response time after modification of such problems and provide definite hierarchy for the response by problem type.
* Provide escalation procedure for handling warranty issues.
 |
| Software support and maintenance services | Support charges start when warranty expires. Supplier should provide same services as warranty services. Also:* Determine what is included in support fee.
* Need to be sure maintenance rates are applied against the then current net installed base.
* Fix current maintenance rate for 3 or more years and set limits on supplier’s ability to increase maintenance prices in future, such link increases to change in CPI-W. Allow Commonwealth or agency the option of buying support at a fixed price. Ensure that cancellation of maintenance services does not affect the agreement or the license grant.
* Determine where maintenance covers prior software releases in instances where the Commonwealth or agency may not have elected to upgrade to the most current release.
* Avoid supplier auto-renewal/evergreen terms.
* If agency expects project management support from supplier, negotiate that support is not paid separately, particularly on a time and materials basis.
 |
| Insurance | Supplier will carry insurance minimums in Service Level Agreement. Errors and omissions insurance and other Commonwealth required insurance minimums must apply.Application service provider/hosting and software as a service contract should include Cyber Security Liability insurance. |
| General provisions—* Governing law
 | Commonwealth of Virginia |
| * Advertising
 | Supplier will not use the Commonwealth or the name of any agency in any ad, news release, professional or trade publication without prior written approval. |
| * Bankruptcy
 | If supplier bankrupt, agencies as defined by §2.2-2006 of the *Code of Virginia* and legislative, judicial and independent agencies of the Commonwealth may terminate the agreement or suspend performance. |
| * Dispute resolution
 | Resolve; with VITA’s alternative dispute resolution procedure language. |
| * Supplier authority
 | Supplier is an independent contractor with no authority to bind or contract for the Commonwealth or any agencies as defined by §2.2-2006 of the *Code of Virginia* and legislative, judicial and independent agencies of the Commonwealth, and the Commonwealth is under no obligation to provide employment benefits.  |
| * Liability and indemnification
 | Need protection for Commonwealth if software or acts of supplier infringe on the rights of any 3rd party:* “Licensee will agree to indemnify, defend, and hold harmless the Commonwealth and agency from and against any and all liabilities, including attorneys’ fees arising out of or in connection with any act, error, omission or misconduct of licensor.
* Neither party will be liable for indirect or consequential damages unless due to gross negligence or willful misconduct.
* Licensor will indemnify, defend, and hold harmless and defend the Commonwealth or agency from any and all liabilities, including attorneys’ fees arising out of a claim that the software or documentation licensed under the agreement infringes or misappropriates any intellectual property right, foreign or domestic.”
* Supplier liability may not exceed twice the aggregate value of the contract, pursuant to [**§ 2.2-2012.1**](https://law.lis.virginia.gov/vacode/2.2-2012.1/) of the *Code of Virginia*
* Limitation of liability clauses limit the claims of both parties to amounts paid under the agreement. Expressly exclude, in any cap, claims relating to bodily injury, property damage, confidentiality, data privacy, security and intellectual property infringement.
* Contractor liability may not exceed twice the aggregate value of the contract, pursuant to [**§ 2.2-2012.1**](https://law.lis.virginia.gov/vacode/2.2-2012.1/) of the *Code of Virginia*
 |

NOTE:

(1) Supplier, or third-party software publisher, may require that an End User License Agreements (EULA) be signed. If this is the case, agency should supersede by precedence the EULA with the commonwealth’s License Agreement Addendum (LAA). The two versions of the LAA can be downloaded here:

* LAA for Supplier-required EULA/licensing terms: <https://www.vita.virginia.gov/procurement/policies--procedures/procurement-forms/>
* LAA for third-party software publisher required EULA/licensing terms: <https://www.vita.virginia.gov/procurement/policies--procedures/procurement-forms/>

(2) For Supplier-hosted Software as a Service/cloud solutions, additional Enterprise Cloud Oversight Services (ECOS) requirements must be complied with by agency. Refer to Chapter 28 of the IT Procurement Manual and this link: <https://www.vita.virginia.gov/procurement/buy-it-manual/>