NIH POLICY MANUAL

6027 - REVIEW AND APPROVAL OF LICENSING AGREEMENTS FOR SOFTWARE AND OTHER INFORMATION PRODUCTS

ISSUING OFFICE: OA/OCM/DAPE,(301-496-6014)

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1. **Explanation of Material Transmitted:** This chapter is being issued to establish procedures and responsibilities for the review and approval of licensing agreements for software and other information products acquired by the NIH. This Chapter combines Manual Chapters 1192 and 6027.

2. **Filing Instructions:**

   Remove: Manual Chapter 6027, 02/18/94 and 1192, 04/25/97

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PLEASE NOTE: For information on:

- **content of this chapter**, contact the **Division of Acquisition Policy and Evaluation, OCM, OA,** on 301-496-6014.
- **NIH Manual System**, contact the **Division of Management Support, OMA, OA,** on 301-496-2832.
- **on-line information**, enter this URL: http://www3.od.nih.gov/oma/manualchapters/

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REVIEW AND APPROVAL OF LICENSING AGREEMENTS FOR SOFTWARE AND OTHER INFORMATION PRODUCTS

A. PURPOSE

This issuance establishes procedures and responsibilities for the review and approval of licensing agreements for software and other information products acquired by the NIH through the acquisition process as well as by means of interagency agreements.

B. BACKGROUND

Most licensing agreements for software and other information products contain written provisions that vendors expect their commercial customers to sign without change. Generally, the Government may accept standard commercial licensing agreements unless they include provisions that are in violation of the Federal Acquisition Regulation (FAR) and other Federal law. The Government should review the licensing agreement and negotiate its own provisions whenever applicable to insure that a licensing agreement is in compliance with Federal laws. This issuance prescribes a common approach for the review and approval of licensing agreements for software and other information products.

C. POLICY

This issuance sets forth the review responsibilities of the Project Officer (PO) and the Contracting Officer (CO) when approving licensing agreements.

The responsibility for the approval of a written licensing agreement for software, or any other information product, rests with the cognizant CO. The responsibility for certifying to the CO that the program staff will ensure compliance with the technical provisions of a written licensing agreement rests with the PO or other designated program official (preferably the End User).

REVIEW AND APPROVAL OF LICENSING AGREEMENTS FOR SOFTWARE AND OTHER INFORMATION PRODUCTS

The responsibilities for review and approval equally apply to licensed software and other licensed information products that involve any of the following:

1. Licenses that include provisions subject to U.S. copyright law.

2. Licenses that require the delivery of products in electronic format.

3. Licenses whereby products are acquired at no cost to the Government.

4. Licenses whereby products are acquired by means of interagency agreements.

5. Licenses whereby products are acquired by contract or simplified acquisition.

6. Licenses whereby products are acquired by Government purchase card.

D. REFERENCES (Note: This is not an exhaustive list.)

1. FAR 2.101, Definitions

2. FAR 12.212 Computer Software

3. FAR 27.4 Rights in Data and Copyrights

4. October 6, 1994, memorandum entitled “Review of Grants and Contracts by the Office of the General Counsel” from the HHS Deputy Assistant Secretary for Health Management Operations to the PHS Agency Executive Officers (which, transmitted Secretary Shalala’s August 31, 1994, memorandum to the Heads of the Operating Divisions).

5. NIH Manual Issuance 1165, Agency Agreements.

6. Executive Order 13103, COMPUTER SOFTWARE PIRACY. (This can be found at: http://cio.gov/docs/softwarepiracy.htm).

7. Implementing the Executive Order On Computer Software Piracy, SAMPLE SOFTWARE MANAGEMENT POLICY. (http://cio.gov/documents/implement_eo_13103_toolkit.html.)

E. DEFINITIONS

1. Contract - FAR Subpart 2.1 defines a contract in part, as "a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing."
2. Contracting Officer - FAR Subpart 2.1 defines a CO as "a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings."

3. License - Defines the rights of the parties involved with the acquisition to the licensed product pursuant to the Rights in Data and Copyrights Clause under FAR 27.4. As a general rule, the Data Rights Clause at 52.227-14, Rights in Data -- General, including Alternates I, II, III, IV, and V where determined to be appropriate as discussed in 27.404, is to be used for that purpose.

4. Licensed Information Product - For purposes of this issuance, a licensed information product represents any item of intellectual property, which the seller/provider (licensor) is permitting the

Government (licensee) to use under the provisions of a license. Examples are licensed software, electronic journals and subscriptions, compilations, and data files.

5. Mass Market License - This type of licensing agreement involves no negotiations between the licensee and licensor, nor does it involve any written, signed agreement. A mass market license can be of two types: *shrink wrap* and *click on*. By opening the seal on a shrink-wrapped package or clicking one's acceptance on-line in order to gain access to a licensed product, the user agrees to abide by the provisions of a license.

6. OGC's Review of Acquisition Documents - Department policy provides for COs to use their judgement in determining "where novel, unique or complex requirements in the proposed grant or contract raise issues involving potential legal problems" that should receive OGC review.

7. Project Officer - A PO is a program staff representative responsible for interfacing and coordinating with contracting officials and End Users on projects for which acquisition support is contemplated. The PO must ensure that program requirements are clearly defined and that the acquisition is designed to meet them. The individual must establish quality standards and delivery requirements and make sure that these are met, evaluating the contractor's technical performance.

   In instances where licensed software or other licensed information products are obtained by means of an acquisition, the PO or other designated program official (usually the End User) shall

certify to the CO that program staff will ensure compliance with the technical provisions of the licensing agreement (see Appendix 1).

F. LEGAL USE OF COPYRIGHTED OR PROPRIETARY PRODUCTS

Most information products (including software) used at the NIH are acquired under licenses. The NIH does not own these products or their related documentation and, unless authorized by the developer (distributer), does not have the right to reproduce them. The NIH is responsible for upholding all provisions, including copyright provisions, in any licensing agreement that prohibit or restrict the use and duplication of any copyrighted or proprietary product and documentation. According to U.S. copyright law, illegal reproduction of a copyrighted product can be subject to civil damages and criminal penalties.

The NIH employees, contractors and subcontractors performing work for the NIH shall abide by the restrictions on use, reproduction, transfer, distribution and disclosure of the product in the license or other agreement under which the copyrighted or proprietary product was acquired. This policy applies to the use and eventual disposition of all types of licensed products, including those involving mass market licenses.

The NIH employees who make, acquire or use unauthorized copies of proprietary products shall be disciplined as appropriate under the circumstances. Such discipline may include termination. The NIH does not condone the illegal duplication of proprietary products.

G. PROCEDURES AND RESPONSIBILITIES

1. Project Officer's Responsibilities - Review the licensing agreement for purposes of

scientific/technical terms and conditions, rights in data, royalty and computer software issues, copyright issues, delivery requirements, and other issues that may affect the Government's use of the licensed product. Should the PO be other than the End User, he/she shall obtain expert advice from the cognizant End User(s).

The PO will transmit his/her comments to the CO and, if needed, will assist the CO in subsequent discussions of issues raised with the licensor, prior to license approval. The PO or other designated program official (preferably the End User) is responsible for ensuring compliance with the technical provisions of a licensing agreement. Prior to award, the CO shall obtain a certification from the PO (or End User) that he/she will ensure compliance with the technical provisions of the licensing agreement during the period in which the licensed product is utilized by the Government (see Appendix 1).

As appropriate, the NIH management and program officials who are responsible for ensuring compliance with the technical provisions of a licensing agreement should:

a. Inform all employees using a copyrighted or proprietary software or other licensed information product that reproduction of the product without proper authorization is an infringement, and that willful copying is unlawful and may be subject to both civil and criminal sanctions.

b. Direct questions relating to the legality of duplication or use of copyrighted or proprietary software or other licensed information products

to the OGC.

c. Report unauthorized reproduction or use of copyrighted or proprietary software or other licensed information products to the Institute/ Center(IC) Information Systems Security Officer(ISSO). A list of the IC ISSOs is available in the Yellow Pages of the NIH Telephone Directory and can also be accessed via the NIH Center for Information Technology (CIT) web site under the title of Security: http://irm.cit.nih.gov/security/scroster.html

The NIH should not accept any provisions that (1) contravenes a right granted the licensee under U.S. copyright law, (2) violates the mandatory FAR provisions or other Federal law, (3) departs from reasonable consumer expectations and was not disclosed by the licensor prior to agreement, or (4) violates fundamental public policy.

2. Contracting Officer's Responsibilities - Review the licensing agreement for contractual and business issues. It is common for licensing agreements to include terms, which may be acceptable in contracts between private parties, but which are not permissible in Government contracting since they violate mandatory provisions of the FAR and other Federal law. The following are examples of licensing provisions that are unacceptable.

a. Provisions that Violate the Antideficiency Act - Any provision, which may result in the incurrence of an uncertain obligation in excess of NIH appropriation amounts may violate the Antideficiency Act. Examples of such impermissible provisions include:

(1) Any requirement that violates the Government’s sovereign immunity. For

example: Any requirement that the Government pay taxes not included in the license price.

(2) Any requirement that automatically renews a license for which the Government has to pay.

(3) Any requirement whereby the Government agrees to indemnify or hold the licensor or a third party harmless.

(4) Any requirement whereby the Government agrees to represent the licensor, or pay attorneys fees and expenses, in litigation.

b. Entire Agreement Provisions - Any provision essentially stating that the license agreement constitutes the entire agreement between the licensee and licensor, that the license agreement is a final expression of the agreement between the parties, or that the license agreement supersedes all prior agreements between the parties (including all oral and written proposals) is unacceptable. The terms and conditions and FAR clauses of the acquisition govern and cannot be superseded by a licensing agreement.

c. Provisions Permitting Licensor's Termination of Agreement - Any provision that allows the licensor to unilaterally terminate the agreement without regard to the Contract Disputes Act procedures, including any provision limiting the Government's rights under a termination, is unacceptable since it conflicts with the FAR disputes and termination clauses of the acquisition. Examples of such impermissible provisions include:

(1) Any provision allowing the licensor to terminate the agreement immediately should the Government fail to pay the license fees or other amounts when due.

(2) Any provision stating that termination for any reason would not affect the amount due or paid to the licensor.

(3) Any provision limiting the Government's remedy should the Government be dissatisfied with the licensed product.

d. State Law Provisions - Any provision stating that the license agreement will be interpreted in accordance with the laws of a particular State should be amended by adding: "to the extent that they do not conflict with Federal law."

e. Provisions Affecting Sovereign Immunity - Any provision that permits the licensor the right to seek injunctive relief against the Government's breach of an agreement is unacceptable since it could result in the Government waiving its sovereign immunity. Such provisions should be deleted or made subject to the disputes clause of the acquisition.

f. Provisions Limiting the Government's Rights Under U.S. Copyright Law - Any provision that limits the Government's rights provided under U.S. copyright law (e.g., fair use, reproduction, and archiving) should be rejected.

g. Other Provisions in the License that Conflict with the FAR - Any other provision that conflicts with the FAR should be rejected. Examples of unacceptable provisions are:

(1) Any provision that unduly limits the

Government's rights in data.

(2) Any provision limiting the Government's warranties thereby conflicting with the FAR warranty clause of the acquisition.

(3) Any provision making delivery contingent upon some future date or event thereby conflicting with the delivery requirements of the acquisition.

h. The CO shall ensure that:

(1) Acquisitions contain provisions to protect the NIH from civil and criminal liabilities should contractor or subcontractor employees reproduce copyrighted or proprietary information products without proper authorization in the performance of the acquisition.

(2) Contractors, in the performance of their official contractual duties, recognize that they are responsible for ensuring that their employees or subcontractors do not make unauthorized use of copyrighted information products under their acquisition.

(3) The rights specified in FAR 52.227-19 in accordance with FAR 27.405(b)(2) are normally obtained when acquiring computer software.

Based on the PO's comments and the CO's review, the CO determines if the licensing agreement raises issues involving potential legal problems (per Item E.6. above) and should, therefore, be reviewed by the Business and Administrative Law Division Office of the General Counsel (BAL/OGC) prior to its approval. If a determination is made that BAL/OGC's

review is required, the CO shall transmit the PO's/CO's comments to the BAL/OGC, requesting that a legal review be performed.

The CO shall sign and date the written licensing agreement.

3. End User Responsibilities - The NIH employees, contractors and subcontractors performing work for NIH need not follow the review and approval procedures described in this section of this issuance when acquiring licensed products subject to mass market licenses. However:

   a. Review the terms and conditions of mass market licenses beforehand to determine if they contain any provisions detrimental to the programmatic requirements.

   b. Be responsible for strict adherence of all licensing agreements between manufacturers and NIH, and of all relevant software copyrights, for products that they use.

   c. Take immediate steps to correct any inadvertent breach of these software agreements by destroying unauthorized copies and/or purchasing necessary licenses.

   d. Report unauthorized reproduction or use of copyrighted or proprietary computer software to their supervisor and the IC ISSO. (See information under Item G. 1. c. above.)

   e. Create a backup copy of the copyrighted or proprietary software or other licensed information product, when authorized by copyright law or by the licensing agreement.

   f. Prohibit the unauthorized duplication, transfer,

distribution and use of copyrighted or proprietary software or other licensed information products.

H. Records Retention and Disposal

All records (e-mail and non-e-mail) pertaining to this Chapter must be retained and disposed of under the authority of the NIH Manual Chapter 1743, Keeping and Destroying Records, Appendix 1, NIH Records Control Schedule, Items 2600-A, Procurement, 2600-B, Public Buildings and Space; and 6000, Research Records.

NIH E-Mail Messages: The NIH e-mail messages (messages, including attachments that are created on the NIH computer systems or transmitted over the NIH networks) that are evidence of the activities of the agency or have informational value are considered Federal records. These records must be maintained in accordance with current NIH Records Management guidelines. Contact your IC Records Officer for additional information. All e-mail messages are considered Government property, and if requested for a legitimate Government purpose, must be provided to the requester. Employees' supervisors, the NIH staff conducting official reviews or investigations, and the Office of Inspector General may request access to or copies of the e-mail messages. E-mail messages must also be provided to Congressional Oversight Committees if requested and are subject to the Freedom of Information Act requests. Since most e-mail systems have back-up files that are retained for significant periods of time, e-mail messages and attachments are likely to be retrievable from a back-up file after they have been deleted from an individual's computer. The back-up files are subject to the same requests as the original messages.

I. MANAGEMENT CONTROLS

The purpose of this Manual Issuance is to provide

guidance to ensure that software and other information products are acquired and used according to statute and policy.

1. Office Responsible for Reviewing Management Controls Relative to this Chapter: The Division of Acquisition Policy and Evaluation, Office of Contracts Management, and the CIT.

2. Frequency of review: On-going review.

3. Method of review:

   The Division of Acquisition Policy and Evaluation, Office of Contracts Management, will maintain appropriate oversight through reviews of the IC preaward contract files conducted by the NIH Board of Contract Awards. The NIH Board of Contract Awards reviews a percentage of contract actions from each IC. Software and information technology issues identified by the NIH Board of Contract Awards are provided to the IC for corrective action. When repetitive issues are identified, these are brought to the attention of the Acquisition Management Committee, which is responsible for addressing and resolving common acquisition issues. In addition, the Principal Official Responsible for Acquisition (PORA) is routinely apprised of any difficulties in the IC implementation of policy. Depending on the nature and extent of the problem, the PORA may recommend additional review, policy guidance and/or training of the contract staff.

4. Review Reports are sent to: PORA

REPLACES: Appendix 1 (Revision 02-18-94)
ISSUING OFFICE: DAPE, OCM (301-496-6014)

REVIEW AND APPROVAL OF LICENSING AGREEMENTS FOR SOFTWARE AND OTHER INFORMATION PRODUCTS

CERTIFICATION

Date:

To: Contracting Officer

From: Project Officer (or End User)

Subject: Responsibility for Compliance with the Technical Provisions of an Information Product License

As the designated ☐ Project Officer ☐ end user, I will serve as the Government's designated program official responsible for ensuring compliance with the technical provisions of the licensing agreement and acquisition listed below and attached hereto.

License Title: _____
Licensed Product: _____
Licensor Name: _____
Licensor Address: _____
_____
_____

Acquisition Number: _____

In addition to ensuring the Government's compliance with the technical provisions of the licensing agreement and acquisition, I understand that my responsibilities include:

- Prohibit the unauthorized duplication, transfer, distribution and use of the copyrighted or proprietary licensed information product.

REPLACES: Appendix 1 (Revision 02-18-94)
ISSUING OFFICE: DAPE, OCM (301-496-6014)

REVIEW AND APPROVAL OF LICENSING AGREEMENTS FOR SOFTWARE AND OTHER INFORMATION PRODUCTS

- Inform all employees using the copyrighted or proprietary licensed information product that unauthorized reproduction or use of the product, without proper authorization, is an infringement and that willful copying is unlawful and may be subject to both civil and criminal sanctions.

- Direct questions relating to the legality of duplication or use of the copyrighted or proprietary licensed information product to the NIH Legal Advisor for Intellectual Property, Office of the General Counsel, 402-2840.

- Report unauthorized reproduction or use of the copyrighted or proprietary licensed information product to the Institute/Center (I/C) Information Systems Security Officer (ISSO).

- Create a backup copy of the copyrighted or proprietary licensed information product, when authorized by copyright law or by the licensing agreement.

I further understand that my responsibilities shall be in effect during the period in which the copyrighted or proprietary licensed information product is utilized by the Government, unless they are rescinded or transferred to another program official as evidenced by the submission of a certification to the Contracting Officer.

_____
Signature of the ☐ Project Officer ☐ End User

_____
Title

Attachments (End User)