
Federal Agencies Mull Changes in Software Licensing

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The federal government is working to change the way it acquires commercial computer software. With federal government information technology purchases expected to top \$58 billion in fiscal year 2003, even minor changes in government contracting policies can have a significant impact on software vendors.

Proposed Rules Retreat from Commercial Software License Terms

In one important initiative, the government has proposed to revise the part of the Federal Acquisition Regulations, or FAR, pertaining to intellectual property rights in the products, software, and data acquired by federal agencies. Although the [proposed revisions](#) are primarily intended to “clarify, streamline, and update guidance and clauses on patents, data, and copyrights,” some of the changes, if adopted, may restrict the government’s use of commercial software licenses.

Historically, federal agencies acquired all computer software under special contract terms that specified the government’s software license rights, based upon whether the software was developed with public or private funding. This policy was relaxed in 1995, when a new rule instructed agencies to acquire most privately developed “commercial computer software” under the same license terms customarily offered to non-government customers. Commercial computer software generally means software that has non-governmental uses and has been provided or offered to the public, or will be provided or offered to the public in time to meet a federal agency’s delivery schedule, including software with commercially available modifications or “minor” modifications to meet special government requirements.

Under the new proposal, the definition of commercial computer software will be limited to software “that has been sold, leased, or licensed to the general public,” thereby excluding the pre-commercial and modified software that qualifies as “commercial” under the current rule. In addition, proposed guidance will explicitly encourage federal agencies to reintroduce the special government license terms “when there is any confusion as to whether the government’s needs are satisfied or whether a customary commercial license is consistent with Federal law.”

If adopted, these changes may make it more difficult for software vendors to use their own commercial software licenses with federal agencies. Instead, the standard government software

license terms would require the software to carry a special restrictive notice and would provide minimum rights to the government, including

- the right to use and copy the software for use with the computers for which it was acquired, replacement computer, or a backup computer;
- the right to make an archive copy of the software;
- the right to modify, adapt, or combine the software with other software; and
- the right to disclose the software to service contractors and subcontractors.

This traditional set of software license rights, commonly referred to as “restricted rights,” has been criticized because it requires federal agencies to be treated differently from other customers and does not reflect that today’s commercial software is often distributed via the Internet, may be licensed by networked “seats” rather than by individual computers and may come with different pricing options for different service plans or configurations.

The proposed revisions are open for public comment until July 28, 2003.

Agencies Seek Lower Costs through Government-wide Software Licenses

Meanwhile, federal agencies are developing the “SmartBUY” program to obtain government-wide enterprise software licenses for commercial software.

On June 5, 2003, the Office of Management and Budget issued a [memorandum](#) directing the General Services Administration to negotiate multi-agency licenses for common computer software used by federal agencies, beginning with office automation, network management, business modeling and open source software support products that are typically priced according to volume. According to OMB, the SmartBUY initiative is intended to “assure that the federal government is leveraging its immense buying power to achieve the maximum cost savings and best quality for commodity software.” The government’s buying power is immense, indeed: OMB claims that federal agencies operate more than 4 million computers, many of which use the same commercial software.

Federal agencies readily admit that SmartBUY is intended to drive down software license fees. In fact, the Defense Department has stated that its enterprise licensing program has saved over \$1 billion in software license fees since it began in 1998. Despite the pricing pressures, software vendors view enterprise licensing as an attractive way to entrench their products throughout numerous federal agencies, providing long-term advantages over rival suppliers. Incumbent software providers have gained more staying power in recent years, as multi-year, multi-agency schedule contracting programs have enabled federal agencies to select commercial software without conducting competitive procurements that are open to alternative non-incumbent vendors.

While the proposed FAR revisions, if adopted, would reinstate some traditional government license terms, the SmartBUY initiative illustrates the government’s continuing retreat from competitive—but expensive—procurements conducted by individual agencies or offices.

Hale and Dorr’s Government and Regulatory Affairs lawyers in Washington, D.C. advise companies

on all aspects of government contracting, including changes in the government's commercial computer software license rights.

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