NIH Policy Manual

6027 - Review and Approval of Licensing Agreements for the Use of Proprietary Commercial Products and Services Obtained by NIH Under an Acquisition

Issuing Office: OD/OM/OALM/OAMP/DAPE **Phone:** (301) 496-6014

Approving Official(s): DDM

Release Date: 1/16/2013 ?

Transmittal Notice

1. **Explanation of Material Transmitted:** This chapter is being revised to update procedures and responsibilities for the review and approval of licensing agreements for the use of proprietary commercial products and/or services obtained by NIH under an acquisition.
2. **Filing Instructions:**

   Remove: NIH Manual Chapter 6027 dated 05-22-00.
   Insert: NIH Manual Chapter 6027 dated 01/16/13.

PLEASE NOTE: For information on:

- Content of this chapter, contact the issuing office listed above
- NIH Manual System, contact the Division of Management Support, OMA on 301-496-2832, or enter this URL: http://oma.od.nih.gov/manualchapters/
- To sign up for email notification of future changes, please go to the NIH Manual Chapters LISTSERV Web page.

A. Purpose

This issuance updates procedures and responsibilities for the review and approval of licensing agreements for the use of proprietary commercial products and/or services obtained by the NIH under an acquisition, including some licensing agreements where an acquisition is merely anticipated (e.g., agreements to test a licensed product and/or service prior to purchase). This issuance does NOT apply, for example, to licensing agreements associated with interagency agreements, grants, or technology transfer agreements.

This issuance applies to commercial licensing agreements regardless of dollar value, including requirements for the use of Information Technology (IT) as well as non-IT products and/or services. The types of licensing agreements include, but are not limited to,

requirements for the use of software, electronic access to data resources and other information products, service agreements for repair and maintenance of equipment, and the licensed use of any other type of proprietary intellectual property obtained under an acquisition. Licensing agreements can be titled in a number of ways; e.g., Licensing Agreement, License, Agreement, End User Licensing Agreement (EULA), Software Maintenance Agreement, or Service Agreement.

The procedures and responsibilities included in this issuance apply regardless of method of acquisition or type of acquisition instrument [e.g., contract, task/delivery order, simplified acquisition (purchase order, GSA Federal Supply Schedule), or Government purchase card order].

B. Background

Most commercial licensing agreements are constructed under the rules of the Uniform Commercial Code (UCC) and are generally acceptable in the commercial sector. Therefore, they 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 violate Federal laws and regulations or do not meet the Government's needs. 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 and regulations and satisfies the Government's programmatic need. [See: Federal Acquisition Regulation (FAR) 27.405-3] This issuance prescribes a common approach for the review and approval of commercial licensing agreements.

It is important to understand that the Government is limited in its use of a licensed proprietary product/service to the extent specified in the applicable licensing agreement (See: FAR 12.211, and 12.212 (a) & (b). NIH Contracting Officers (COs) and Contracting Officer Representatives (CORs) need to exercise caution when accepting the provisions of a licensing agreement since they most likely will be directed to commercial sales, may include provisions that are in violation of the FAR and/or other Federal law, and include restrictive permitted uses and/or prohibited uses that may be detrimental to the Government's programmatic need for and intended use of the product/service.

C. Policy

This issuance sets forth the review responsibilities of the COR and the CO when approving commercial licensing agreements.

The NIH should not accept any licensing provision that: (2) violates mandatory FAR provisions or other Federal law; (3) departs from reasonable consumer expectations and was not disclosed by the licensor prior to agreement; (4) violates fundamental public policy; or (5) does not meet the Government's programmatic need for, and intended use of, the product/service.

The responsibility for the approval of a written licensing agreement lies with the CO. The responsibility for certifying to the CO that the program staff (1) have reviewed and concur with all the technical provisions of the licensing agreement and (2) will ensure compliance with the technical provisions of the licensing agreement lies with the COR or other designated program official (preferably the End User).
The responsibilities for review and approval equally apply to licensed proprietary products/services that involve any of the following:

1. Licenses that require the delivery of products in electronic format.
2. Licenses for products/services where an acquisition is merely anticipated (and involves no initial cost).
3. Licenses whereby products/services are acquired from non-Government sources (e.g., educational institutions, non-profits, and not-for-profits).
4. Licenses whereby products/services are acquired regardless of method of acquisition or type of acquisition instrument [e.g., contract, task/delivery order, simplified acquisition (purchase order, GSA Federal Supply Schedule), Government purchase card].
5. Licenses whereby products/services are acquired by a contractor/subcontract (i.e., "contractor-acquired licenses") under which the Government is the "licensee."

D. References

(Note: This is not an exhaustive list.)

1. FAR 2.101, Definitions
2. FAR 12.211, Technical Data
3. FAR 12.212, Computer Software
4. FAR 12.404, Warranties
5. FAR 27.4, Rights in Data and Copyrights
6. FAR 29, Taxes
7. FAR 32.2, Commercial Item Purchase Financing
8. FAR 32.4, Advance Payments for Non-Commercial Items
9. FAR 33.214, Alternative Disputes Resolution
10. FAR 42.12, Novation and Change of Name Agreements
11. NIH Manual Issuance 1743, Keeping and Destroying Records, Appendix 1
12. Executive Order 13103, COMPUTER SOFTWARE PIRACY
13. Guidelines for Implementing the Executive Order 13103 on Computer Piracy Software
14. NIH Information Technology General Rules of Behavior
15. Appendix 1, Sample Certification Letter

E. Definitions

1. **Contract** - 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. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, *et seq*. [Federal Acquisition Regulation (FAR) Subpart 2.1]

2. **Contracting Officer** - A person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. (FAR Subpart 2.1)
3. **License** - Defines the rights of the parties involved with the use of a licensed proprietary product/service. Commercial software is acquired under licenses that are customarily provided to the public provided that the licenses are consistent with Federal law and otherwise satisfy the Government's needs. FAR Clause 52.227-19-Commercial Computer Software License may be used where there is any confusion as to whether the Government's needs are satisfied or whether the Licensor's customary license is consistent with Federal law.
4. **Licensor** – the party that grants permission to use its proprietary product/service to another party under a license.
5. **Licensee** – the party that receives permission to use a proprietary product/service under a licensee.
6. **Licensed Product/Service** - For purposes of this issuance, a licensed product/service represents any item of proprietary property/service, including intellectual property that the seller/provider (licensor) is permitting the Government (licensee) to use under the provisions of a written licensing agreement that will result in an acquisition or where an acquisition is merely anticipated (and involves no initial cost). Examples include software, electronic access to data resources and other information products, service agreements for repair and maintenance of equipment, and the licensed use of any other type of proprietary intellectual property.
7. **Mass Market License** - This type of licensing agreement involves no 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. The provisions pertaining to these types of licenses are included in the product package (*shrink wrap*) or electronically posted (*click-on*) by the licensor.
8. **Office of the General Counsel (OGC) Review of Acquisition Documents** - Department policy provides for COs to use their judgment 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.
9. **Contracting Officer's Representative (COR)** - A COR is a program staff representative responsible for interfacing and coordinating with acquisition officials and End Users on requirements for which acquisition support is contemplated. The COR 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, and evaluate the contractor's technical performance.

10. **End User** – An End User is an individual(s) (a Federal, contractor, or subcontractor employee) who directly uses the licensed product/service. An End User may be other than the COR.

F. Legal Use of Copyrighted or Proprietary Products/Services

A wide variety of commercially-available products/services, including information products (e.g., software), acquired by NIH are subject to a license agreement that is made part of the Contract. Typically, the NIH does not acquire an ownership interest in a commercially licensed product (like software) or related documentation and, unless authorized by the developer (distributer), does not have the right to reproduce it.

The NIH is responsible for complying with all provisions, including copyright provisions, in any licensing agreement that prohibit or restrict the use and duplication of any copyrighted or proprietary product/service and documentation. According to U.S. copyright law, illegal reproduction of a copyrighted product can be subject to civil damages and, where infringement is willful, criminal penalties (Reference 17 USC 501 et. seq.).
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/service specified in the licensing agreement under which the copyrighted or proprietary product/service was acquired. This policy applies to the use and eventual disposition of all types of licensed products/services, including those involving mass market licenses.

However, provisions in commercial licensing agreements that limit certain rights already granted to a licensee under U.S. Copyright law should be rejected. For example, some licensing agreements may include a provision that attempts to eliminate an agency's right under law to make a limited number of some copyrighted products for instructional purposes. Other unacceptable provisions may try to limit a licensee's U.S. copyright law rights involving fair use or making an archival copy of the product.

The NIH employees who make, acquire or use unauthorized copies of proprietary products/services may 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. **COR's Responsibilities** - Review the licensing agreement's permitted and prohibited uses of the product/service 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/service. Should the COR be other than the End User, he/she may obtain expert advice from the End User(s).

   The COR or other designated program official (usually the End User) shall certify to

the CO that program staff (1) has reviewed the technical provisions of the licensing agreement and determined that they meet the Government's programmatic need for and intended use of the product/service, and (2) will ensure compliance with the technical provisions of the licensing agreement. The certification may be provided to the CO as part of an internal checklist, by a written certification (see Appendix 1), or in some other form for the acquisition record which is acceptable to the CO.
In reviewing the licensing agreement's permitted and prohibited uses of the product/service, the COR should ensure the following:

a. The purpose of the licensing agreement is clearly stated.
b. The parties to the licensing agreement are clearly defined.
c. A clear definition of the individual(s) authorized to use the proprietary product/service (i.e., the "End User") is included. [Federal employees, contractor/subcontractor employees, consultants]
d. Any limitation on the number of users is clearly stated.
e. Specify if the license is "term" or "perpetual."
f. Any limitation of "fair use" of the proprietary product/service otherwise provided under copyright law should be clearly stated.
g. Any restriction on the rights of users is clearly stated.
h. Any limitation on accessing the proprietary product/service should be clearly stated.
i. Any limitation on the locations where the proprietary product/service can be accessed should be clearly stated.
j. For site licenses, a definition of "site" should be included.
k. Any limitations on downloading, copying, or archiving the proprietary product/service should be clearly stated.
l. The receipt of any revisions (updates) to the proprietary product/service should be addressed.
m. Any action required to be taken to preclude unauthorized access to the proprietary product/service should be clearly stated.
n. Any requirements for safeguarding the proprietary product/service should be clearly stated.
o. Any requirement to safeguard the confidentiality of a user's identity and the information the person accessed should be clearly stated.
p. The disposition of copyrighted information after expiration of the license should be addressed.
q. Any attempt to "reach through" to intellectual rights of the End-User or the Government is identified and addressed.

The COR 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 and award of the acquisition. The COR 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 COR (or End User) shall submit a certification to the CO that he/she will ensure compliance with the technical provisions of the licensing agreement during the period in which the licensed product/service is utilized

by the Government. The certification may be provided to the CO as part of an internal checklist, by a written certification (see Appendix 1), or in some other form for the acquisition record which is acceptable to the CO.

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 product (e.g., software or other licensed information product) that the reproduction of the product or creation of a derivative work without proper authorization may be an infringement 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).

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 acquisitions since they violate mandatory provisions of the FAR and other Federal law. The following are examples of licensing provisions that are unacceptable.

   The CO should not accept any licensing provision that (1) violates mandatory FAR provisions or other Federal law, (2) departs from reasonable consumer expectations and was not disclosed by the licensor prior to agreement, (3) violates fundamental public policy, or (4) does not meet the Government's programmatic need for and intended use of the product/service.

   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, 31 U.S.C. 1341. Such provisions create the potential for an unlimited, indefinite, and open-ended obligation of appropriations, and may create a violation of the act. The act prohibits contracts purporting to bind the Government beyond the obligation availability period or in excess of the amount of the appropriation charged by the Federal agency.

      Examples of such impermissible provisions include any requirement:

      1. that violates the Government's sovereign immunity. For example: Any requirement that the Government must pay taxes or other charges imposed by Federal, State, or local government agencies not included in the purchase price.
      2. that automatically renews a license for which the Government has to pay.

3. whereby the Government agrees to indemnify, defend, or hold the licensor or a third party harmless for any liability incurred in connection with the use of the license product/service. Government agencies need specific statutory authority to indemnify and the Department has taken a strong policy position against providing for indemnification of contractors.
4. whereby the Government agrees to represent the licensor, or pay attorney fees and expenses, in litigation. The government will only pay attorneys' fees if specifically required to do so by statute or regulation. Additionally, while most of these agreements are fixed price, the prohibition against recovery of attorneys' fees in connection with prosecution of a claim against the government is specifically disallowed in cost type contracts.
5. whereby the Government agrees to purchase maintenance services in the future. The government cannot incur a liability for fees that are not included in the purchase price of the product/service and for which the Government has not obligated funds, as this may result in an Anti-Deficiency Act violation. If the Government requires maintenance in the future, the parties need to take an affirmative action, e.g., the exercise of an option (with negotiated prices) (at the time the maintenance is needed) to purchase maintenance in future years.
6. for the automatic renewal of an agreement without pre-determined option prices being established prior to the initial award.

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. The licensing agreement should include an "Order of Precedence" provision which specifies that the terms and conditions of the Government's acquisition take precedence over the provisions of the licensing agreement. (*See* FAR Clause 52.212(s)-Order of Precedence.)

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 (41 U.S.C. 601 *et seq*.) procedures, including any provision limiting the Government's rights under a termination, is unacceptable since it conflicts with the FAR disputes and termination clauses that govern commercial acquisitions. (*See* FAR Clause 52.212-4 (d)-Disputes, FAR Clause 52.212-4 (l)-Termination for the Government's Convenience and FAR Clause 52.212-4 (m)-Termination for Cause. Examples of such impermissible provisions include any that:

1. allow the licensor to terminate the agreement immediately should the Government fail to pay the license fees or other amounts when due.
2. state that termination for any reason would not affect the amount due or paid to the licensor.

3. limit the Government's remedy should the Government be dissatisfied with the licensed product/service.

d. **State Law Provisions** - Any provision stating that the license agreement will be interpreted in accordance with the laws of a particular State without providing precedence to Federal law violates the doctrine of sovereign immunity. Such provisions should be amended by adding: "to the extent that they do not conflict with Federal law."

e. **Other Provisions**

1. Any provision that permits the licensor the right to seek injunctive relief against the Government's breach of an agreement is unacceptable. Such provisions should be deleted or made subject to the *Disputes* provision under FAR Clause 52.212-4(d).
2. Any provision specifying that in case of an infringement suit the contractor agrees to defend the Government so long as the Government permits the contractor at its sole discretion to determine the legal course to follow is unacceptable. A contractor cannot assume sole control of the defense of any claims against the Government. The Department of Justice must be consulted on all Government litigation and settlements, and determines what the Government's participation will be if HHS is a party to a lawsuit filed in court.
3. Any provision that includes a claim to copyright information that cannot be copyrighted under the law (e.g., material created by the U.S. Government or by its employees as part of their official duties) should be rejected.

f. **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 any provision that:

1. unduly limits the Government's rights in data.
2. limits the Government's warranties thereby conflicting with the FAR Clause 52.212-4(o)-Warranty clause of the acquisition.
3. makes delivery contingent upon some future date or event thereby conflicting with the delivery requirements of the acquisition.
4. requires payment in a manner inconsistent with the payment provisions specified under FAR Clause 52.212-4(i)-Paymentt.
5. specifies the licensor's unilateral right to assign its rights and obligations which is a violation of the Assignment of Claims Act. The Anti-Assignment Act, 41 U.S.C. 15, prohibits the transfer of government contracts to a third party. If a contractor wishes to transfer its rights and obligations, the proper vehicle would be a novation agreement pursuant to FAR Part 42.12, Novation and Change of Name Agreements. However, under the Assignment of Claims Act, a contractor may assign moneys due or to become due under an acquisition if the assignment is made to a bank, trust company, or other financial institution, among other requirements.

6. requires the Government to pay in advance prior to using the product/service. The Government does not make advance payments except in very specific circumstances, which would not normally apply to a licensing agreement. See FAR 32.4, Advance Payments for Non-Commercial Items.
7. specifies that disputes among the parties will be governed by arbitration, since that requirement conflicts with FAR Clause 52.212-4(d), Disputes,

g. **Provisions in the License that Conflict with Other Federal law** – Any provision that conflicts with other Federal law s*hou*ld be rejected. An example of an unacceptable provision is any provision restricting the release of information held in the Government's possession without an exemption for disclosures "required by law or regulation" to avoid, for example, a conflict with the requirements of the Freedom of Information Act (5 U.S.C. 552).

The CO will also ensure the following:

a. 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.
b. Contractors, in the performance of their official contractual duties, recognize that they are responsible for ensuring that their employees and subcontractors do not make unauthorized use of copyrighted information products/services under their acquisition.
c. Acquisitions should be specific with respect to the purchase or deliverable, or the statement of work or other detailed document explaining the purchase or deliverable should be incorporated into the acquisition. Do not rely on the licensing agreement to describe the product/service required.
d. If a down payment will be made and it is for financing the purchase of a commercial item, ensure that the requirements of FAR 32.2, Commercial Item Purchase Financing are met. If not, carefully consider whether making a down payment and incremental payments is appropriate for the acquisition, and request legal advice before making your decision.
e. If the purchase is for a commercial item the Contracting Officer can tailor some of the clauses in FAR 52.212-4. FAR 12.302 provides guidance as to which clauses can be tailored and under what circumstances. For instance, the government is prohibited from tailoring paragraphs in FAR 52.212-4 that address assignments, disputes, payment (except as provided in FAR Subpart 32.11), invoice, other compliances, and compliance with laws unique to government contracts. Any tailoring must be consistent with commercial practices and if the Contracting Officer wishes to tailor clauses that are inconsistent with commercial practices, the Government may not do so unless a waiver is approved in accordance with agency procedures, pursuant to FAR 12.302(c). In addition, FAR 12.302(d) requires that tailoring be accomplished by addenda to the solicitation and award document.

f. With respect to warranty terms, while a Contracting Officer may tailor the language in a license agreement to include warranty terms that are not the same as the terms in the warranty clause at FAR 52.212-4(o), the Contracting Officer must consider the requirements in FAR 12.404(b). FAR 12.404(b) requires: "To the maximum extent practicable, solicitations for commercial items shall require offerors to offer the Government at least the same warranty terms, including offers of extended warranties, offered to the general public in customary commercial practice. Solicitations may specify minimum warranty terms, such as minimum duration, appropriate for the Government's intended use of the item." Therefore, Contracting Officers may accept commercial warranties that exclude or limit express warranties; however such a warranty must be customary commercial practice. As a result, in order to incorporate a limited warranty into an acquisition, Contracting Officers must conduct market research to determine whether the limited warranty is in fact "customary commercial practice." If the product is unique, making market research difficult, at the very least, we recommend obtaining a letter from the contractor stating (1) that the warranty is in accordance with customary commercial practice, and (2) that the warranty offered to the Government is the same as the warranty the contractor extends to all of its other commercial customers. If the Contracting Officer does not wish to accept the warranty terms already in the agreement, it is recommended that the parties insert the warranty clause at FAR 52.212-4(o).
g. Incorporate the appropriate Rights in Data or Commercial Software clauses into the license agreement or award document, unless the contractor's standard agreement governing commercially developed technical data or the contractor's standard license governing commercial software will meet the government's needs. FAR §§ 27.409(b)(ii) and 27.409(b)(f) provides guidance on the use of FAR Clause 52.227-18-Rights in data-Existing Works. FAR 27.405-3(a) advises that, when acquiring existing software, FAR 52.227-19, Commercial Computer Software-Restricted Rights, may be used in the solicitation and award document and that the Contracting Officer shall assure that the agreement contains terms to obtain sufficient rights for the Government to fulfill its need and is otherwise consistent with Federal law.

Based on the COR's comments and the CO's review, the CO determines if the licensing agreement raises issues involving potential legal problems (per Item G.2. above) and should, therefore, be reviewed by the General Law Division, Office of the General Counsel (GLD/OGC) prior to its approval. If a determination is made that GLD/OGC's review is required, the CO shall transmit the COR's /CO's comments to the GLD/OGC, requesting that a legal review be performed.

The CO (never the COR or an End User) shall sign and date the written licensing agreement. The agreement, including any revisions made prior to award, shall be incorporated by reference into the acquisition.

3. **End User Responsibilities** – NIH employees, contractors and subcontractors performing work for NIH shall comply with the following review and approval

procedures when using acquired licensed products/services for official Government purposes, including products/services subject to mass market licenses.

a. Assist the COR in reviewing the technical provisions licensing agreements beforehand to determine if they meet the Government's programmatic need for and intended use of the products/services.
b. Be responsible for strict adherence of all licensing agreements between manufacturers and NIH, including all relevant software copyrights, for products/services that they use.
c. Take immediate steps to correct any inadvertent breach of any licensing agreement provisions 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, applicable items found in 1100-L, Patents, Inventions, and Licensing; 2600-A, Procurement, 2600-B, Public Buildings and Space; and 6000, Research Records.

NIH E-Mail Messages, including attachments that are created on the NIH computer systems or transmitted over the NIH Network (NIHNet) 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 Liaison 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. Back-up files are subject to the same requests as the original messages.

I. Internal Controls

The purpose of this Manual Issuance is to provide guidance to ensure that proprietary products/services subject to licensing agreements are acquired and used according to statute and policy.

1. **Office Responsible for Reviewing Internal Controls Relative to this Chapter:** The Division of Acquisition Policy and Evaluation, OAMP, OALM, and the Information Technology Policy and Review Office (ITPRO), Office of the Chief Information Officer (OCIO).
2. **Frequency of review:** On-going review.
3. **Method of review:**
   The Division of Acquisition Policy and Evaluation will maintain appropriate oversight through reviews of the IC preaward acquisition files conducted by the NIH Board of Contract Awards. The NIH Board of Contract Awards reviews a percentage of acquisitions from each IC. Issues identified by the NIH Board of Contract Awards relevant to this policy manual chapter 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 Head of the Contracting Activity (HCA) for NIH is routinely apprised of any difficulties in the IC implementation of policy. Depending on the nature and extent of the problem, the HCA may recommend additional review, policy guidance and/or training of the acquisitions staff.
4. **Review Reports are sent to:** Head of the Contracting Activity.

Appendix 1: Sample Certification Letter

Date:

To: Contracting Officer

From: Contractor Officer's Representative (COR) (or End User)

Subject: Responsibility for Compliance with the Technical Provisions of a Licensing Agreement As the designated [***insert COR or End User***]

I will serve as the Government's program official responsible for ensuring compliance with the technical provisions of the licensing agreement listed below and attached hereto.

I hereby certify that I (1) have reviewed the technical provisions of the licensing agreement and determined that they meet the Government's programmatic need for and intended use of the product/service, and (2) will ensure compliance with the technical provisions of the licensing agreement.

License Title:

Licensed Product/Service:

Licensor Name:

Licensor Address:

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/service.
- Inform all employees using the copyrighted or proprietary licensed information product/service 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/service to the Contracting Officer.
- Report unauthorized reproduction or use of the copyrighted or proprietary licensed information product to the Contracting Officer.
- 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/service 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 [***insert COR or End User***] Title

Attachment: Licensing Agreement