O4-12 LICENSE OF SOFTWARE AND OTHER INTELLECTUAL PROPERTY

I. OVERVIEW

A license provides the right to use an asset. Unlike a lease which grants exclusive rights to utilize an asset, a license provides a *non-exclusive* right to use an asset, intending that the asset also could be used by other parties, either at the same time or at different times during the term of the license. Under a license, the party that authorizes the use of the asset is the “licensor.” The party that receives the right to use the asset is the “licensee.” Typically, the licensee pays for the right to use the asset for a specified period of time, which could be unlimited in duration. A license is often used for “selling” the right to use computer software or other so-called “intellectual property,” such as copyrighted material or patented processes.

Since a licensee does not own the licensed property but only possesses the right to use it, the licensee typically does not have the right to sell or otherwise transfer the property to another party, such as through an assignment, without the express permission of the licensor.

II. PROCESS

A. A license of software or other intellectual property that qualifies as educational material for student instructional may be procured without soliciting competitive bids or proposals pursuant to Education Code section 81651. The procurement of licenses for all other types of software and other intellectual property costing more than the statutory bid threshold must be accomplished through competitive methods in accordance with Education Code section 81645. Licenses costing less than the bid threshold are to be procured in the same manner as purchases of supplies, materials and equipment under the bid threshold.

B. A large computer system software license or other similar intellectual property is generally procured by an RFP through the District Contracts and Purchasing Section. Small purchase of single user license for commercial “off the shelf” software satisfying the following criteria below may be purchased by college or College Purchasing Specialist.

   1. Is intended for a single-user application.
2. Requires installation on a single-user computer desktop or laptop and does not involve the purchase of a site license or installation on a network server.

3. Costs less than the statutory bid threshold.

An “off the shelf” software license is generally entered into the purchasing system as a purchase order (PO) document type, whereas a larger-scale software license purchase, including any software maintenance agreement, is entered as a Request for Contract (RFC) document type. The PO is subject to the approval of the Vice President of Administrative Services even if the user agrees to the license when installing or downloading the product. These transactions are initiated at the Colleges and require approval by the Vice President of Administrative Services. Contracts not requiring formal bid are routed by the College to either the College Procurement Specialist (accompanied by any quotes collected) to review, release and convert. Contracts requiring formal bid or involving special circumstances are sent directly to the District Contracts & Purchasing Manager to review, release and complete.

C. When engaging in transactions involving software and intellectual property licenses the purchaser must consult with and receive prior approval from their local information technology department in order to determine whether the license provisions are applicable and reasonable in relation to the software asset being licensed. In addition, the local information technology department will evaluate whether the software is compatible with the existing operating system targeted for installation, if the software is free from possible viruses, and whether the local information technology department can support such a program.

D. Large software systems are often licensed through complex agreements that are thoroughly negotiated by the parties. When considering such agreements, particular attention should be paid by District negotiators to the following contractual issues:

1. **Duration:** Whether the license term is in perpetuity (unlimited) in exchange for a one-time payment or for a period of subscription while incremental payments are made. Specify events that could terminate the license prematurely.

2. **Users:** The number of users permitted and whether this is defined as “concurrent users”, a maximum number of named users, or whether license used is based by location or overall customer. Consider the process and cost for adding additional users, whether individually or in blocks.

3. **Product:** The specific software applications included, the exact release and version of the software is being licensed, and the functionality of the
various applications expected. Whether source or object code is being furnished and what the rights of the user are to modify or change the source code, either by itself or by a third-party configuration consultant.

4. **Delivery:** Agreement on when the software is to be delivered, under what conditions (e.g., partial payment), and in what medium. (In California, the license of software delivered in intangible form such as electronically directly to a server or on disk loaded directly onto a server by the licensor is exempt from sales and use tax.)

5. **Installation/implementation:** Specification of who is to install, configure, or implement the software and what their responsibilities are for the performance of the software relative to the licensor and licensee. If a third-party implementation contractor is engaged, permission from the licensor must be secured under the license and warranty responsibilities allocated between the licensor and implementation contractor for the correct functioning of the software.

6. **Compatibility:** Whether the software warranty covers the specific hardware used by the licensee. If the software must interact with other software such as enterprise applications software exchanging information with database software furnished by another licensor needs to have compatibility with the interacting software and should be confirmed as part of the license.

7. **Acceptance testing:** The tests to be conducted before the software product is deemed accepted by the District as licensee.

8. **Documentation:** Technical manuals, the number of copies of such manuals and other documentation to be furnished by the licensor in support of the software.

9. **Training:** Training curriculum and number of hours of training to be provided to licensee's technology staff, users and internal trainers; number of staff eligible for training and location of classes and the availability of supplemental training, either within the license or for additional fees.

10. **Warranty:** Scope and duration of warranty, including methods and timing of licensor's response to software malfunctions. Events that invalidate or lessen licensor's warranty obligation (e.g., modification of software by party other than licensor). Coordination of the warranty period with any maintenance contract purchased by the licensee (some licenses provide for the maintenance term to overlap the warranty that comes with the software license, thereby effectively providing no warranty period).

11. **Rights in data:** Obligations for nondisclosure of protected information by either party to the license and penalties for disclosure. Ownership of new intellectual property developed under the license, such as modifications to the software paid for by the licensee and proposed for inclusion by the licensor in a future release of the software. Access to source code in the event licensor goes out of business (some licenses provide for the licensor to deposit source
code in an escrow account, with the code automatically released by the escrow holder to licensees in the event of liquidation of the licensor’s business).

12. Default: Define events that constitute default of the license by either party and the rights and remedies of the injured party to recover damages.

13. Maintenance: Term (commonly one year), scope and cost of maintenance services purchased under separate contract; whether maintenance includes entitlement to new releases and versions of the licensed software and whether modifications to the earlier version will be supported under the maintenance contract.

E. The software license and its related maintenance agreement should be filed together and kept by the procurement area responsible for the software license purchase.

III. LEGAL AUTHORITY AND CITATIONS

Education Code 81645, 81651
04-02 Types of Transactions
B-27 and B-28 Administrative Regulation