

# **Information Technology Policy**

## ***Non-Negotiated Software Agreements***

**Number**

OPD-SFT001A

**Effective Date**

February 17, 2023

**Category**

Office/Bureau Name

**Supersedes**

None

**Contact**

[RA-ITCentral@pa.gov](mailto:RA-ITCentral@pa.gov)

**Scheduled Review**

November 2024

### **1. Purpose**

The purpose of this Operational Document (OPD) is to provide procedural guidance for scenarios in which a software license agreement cannot be established or negotiated.

### **2. Background**

Agencies shall ensure there is either an agency-specific or enterprise software agreement in place before procuring or utilizing any Third-Party Software. Prior to an agency using or procuring any Third-Party Software, the agency's Office of Chief Counsel, in coordination with the agency, should make sure the terms and conditions of any software agreement are acceptable to the Commonwealth and in alignment with the agency's intended use of the Third-Party Software.

There are however some scenarios in which a software agreement cannot be established or negotiated. Examples include, but are not limited to:

- Opensource or freeware;
- Federal Government owned software;
- Specialized equipment where the supporting software is included with the purchase of the equipment; or
- Software manufacturers who are not willing to modify their terms for the Commonwealth.

This document provides guidance on how agencies should proceed when the Commonwealth is not able to negotiate terms and conditions or execute a software license agreement for the Third-Party Software.

### 3. Policy

Agencies shall ensure there is either an agency-specific or Enterprise software agreement in place between the Commonwealth and the publisher of any Third-Party Software that is being procured or utilized.

If there is no software license agreement in place, the agencies shall work with their Office of Chief Counsel or OA's Office of Chief Counsel (depending upon whether an agency-specific or Enterprise software agreement is negotiated) to negotiate the terms and conditions of the software agreements. The following preference with respect to negotiations applies:

- Execution of the Commonwealth's software license agreement template with a copy of any vendor terms and conditions attached as negotiated by the parties; or
- Execution of the vendor's terms and conditions that includes or incorporates the Commonwealth's software license agreements terms to modify the publisher's terms to better align with the Commonwealth's terms.

**NOTE:** If a software agreement cannot be established or the terms of the agreement cannot be adequately negotiated, agencies are strongly encouraged to select an alternate software.

Any terms and conditions binding the Commonwealth must go through form and legality review and the requirement of form and legality is a legal requirement that cannot be waived. The inclusion of certain problematic terms in terms and conditions are likely to result in the terms and conditions being rejected as to form and legality. These problematic terms include, but are not limited to:

- A requirement for the Commonwealth to indemnify.
- The choice of law is not Pennsylvania or not silent.
- The jurisdiction/venue is not Pennsylvania or not silent.
- A requirement for the Commonwealth to pay attorney's fees.
- A requirement to pay interest, late fees, and/or taxes.

In the event that another software cannot be utilized in order to comply with a state or federal statute, regulation or program requirement, agencies shall adhere to the process outlined in section 4 of this supplemental document.

Adherence to section 4 of this document does not guarantee that the procurement or use of a software will be approved. The procurement or use of a software may be denied as part of any of the review processes included in section 4.

**Note:** Some of the steps outlined in the process below, such as obtaining a DGS waiver, may be completed in parallel with other steps.

### 4. Process

This Section outlines the various processes that may be required depending upon the circumstances of the procurement. Subsection 4.1 outlines various scenarios that

agencies may frequently run into while, Subsections 4.2 through 4.6 describe the various processes that may apply.

## **4.1 Scenarios**

### **4.1.1 Renewal of Software with Non-Negotiable Vendor Terms**

#### **4.1.1.1 Terms that Can Pass Form and Legality Review**

If the producer of the software will not negotiate its terms and conditions, and the terms and conditions do not contain any provisions that preclude form and legality approval, the following should be done:

- Agencies needing to request an [IT Policy Waiver](#) shall refer to the enterprise IT Policy Waiver process as outlined in [ITP-BUS004, IT Waiver Review Process](#).
- If appropriate based upon the terms and conditions and potential risk to the Agency as determined by the Agency and Agency Office of Chief Counsel, the Agency and Agency Office of Chief Counsel can utilize the *OPD-SFT00B, Software Licensing Risk Assessment and Acknowledgement* to document any potential legal and business risks associated with the use of the software.
- The terms and conditions must route for form and legality review.

If necessary, while the Agency is reviewing the terms and conditions, obtaining any necessary IT Policy Waivers, and routing the terms and conditions for review, the Agency may seek a waiver of the software license agreement requirement from the Department of General Services. Agencies shall include the DGS waiver approval and a completed *OPD-SFT00B, Software Licensing Risk Assessment and Acknowledgement* when submitting their IT Investment Request.

#### **4.1.1.2 Terms that Cannot Pass Form and Legality Review**

If the producer of the software will not negotiate its terms and conditions, and the terms and conditions contain any provisions that preclude form and legality approval, the following should be done:

- The Agency should determine what if any other software is available to replace the existing software; and
- If there is no other software that can be used, and the software is required by the Agency to ensure compliance with a federal or state statute or regulation or business requirement, Agency Office of Chief Counsel should reach out to the Office of General Counsel with that information and seek guidance.

If necessary, while the Agency is reviewing the terms and conditions, evaluating requirements and consulting with Agency Office of Chief Counsel, the Agency may seek a waiver of the software license agreement requirement from the Department of General Services. Agencies shall include the DGS waiver approval and a completed *OPD-SFT00B, Software*

*Licensing Risk Assessment and Acknowledgement* when submitting their IT Investment Request.

#### **4.1.1.3 No Terms and Conditions**

In the circumstances, where there are no terms and conditions that apply, the Agency shall do the following:

- The Agency should determine what if any other software is available to replace the existing software.
- If no other software is available, obtain any necessary IT Policy Waivers, including but not limited to, a waiver against ITP-SFT001, which includes a completed *OPD-SFT00B, Software Licensing Risk Assessment and Acknowledgement*;
- Obtain a waiver from DGS of the software license agreement requirement.

#### **4.1.2 New Software with Non-Negotiable Vendor Terms**

##### **4.1.2.1 Terms that Can Pass Form and Legality Review**

If the producer of the software will not negotiate its terms and conditions, and the terms and conditions do not contain any provisions that preclude form and legality approval, the following should be done:

- Agencies needing to request an IT Policy Waiver shall refer to the enterprise IT Policy Waiver process as outlined in [\*ITP-BUS004, IT Waiver Review Process\*](#).
- If appropriate based upon the terms and conditions and potential risk to the Agency as determined by the Agency and Agency Office of Chief Counsel, the Agency and Agency Office of Chief Counsel can utilize the *OPD-SFT00B, Software Licensing Risk Assessment and Acknowledgement* to document any potential legal and business risks associated with the use of the software.
- The terms and conditions must route for form and legality review.

##### **4.1.2.2 Terms that Cannot Pass Form and Legality Review**

If the producer of the software will not negotiate its terms and conditions, and the terms and conditions contain any provisions that preclude form and legality approval, the following should be done:

- The Agency should determine what if any other software is available to replace the existing software; and
- If there is no other software that can be used, and the software is required by the Agency to ensure compliance with a federal or state statute or regulation or business requirement, Agency Office of Chief Counsel should reach out to the Office of General Counsel with that information and seek guidance.

## 4.2 Acknowledgement of Risk

For both new software and the renewal of existing software, if a software agreement cannot be established or the terms of the agreement cannot be adequately negotiated, the risks involved in moving forward with the procurement, renewal, or utilization of the software shall be communicated to agency business owners. If the agency business owners have been notified of and understand the risks, but choose to move forward with procuring or utilizing the software, *OPD-SFT00B, Software Licensing Risk Assessment and Acknowledgement* may be required.

For renewals of existing software, or new software with no terms and conditions, *OPD-SFT00B, Software Licensing Risk Assessment and Acknowledgement* shall be completed by the software requestor in consultation with Agency Legal and the Delivery Group or Agency ISO. The completed document shall be reviewed and signed by the appropriate agency business area contact, Agency Deputy Secretary, and Agency Office of Chief Counsel.

If the software or solution requires [OPD-SEC040A, Assessment and Acknowledgement](#) be completed due to other non-licensing related risks or issues, agencies are not required to complete both SEC040A and SFT001B. Agencies shall complete OPD-SEC040A and include any license and/or contractual risks.

## 4.3 IT Policy Waiver

Agencies shall submit an IT Policy Waiver request against [ITP-SFT001, Software Licensing](#) via the enterprise IT Policy Waiver process as outlined in [ITP-BUS004, IT Waiver Review Process](#).

## 4.3 DGS Waiver

A DGS Waiver is not appropriate for new software.

For the renewal of existing software, when a Software License Agreement has not been executed, an approved DGS waiver to proceed without a software license agreement shall be obtained. DGS Waiver requests are submitted via email to the resource account: GS, IT Software [RA-GSITSOFTWARE@pa.gov](mailto:RA-GSITSOFTWARE@pa.gov). Agencies shall include the following information in a waiver request that is submitted to DGS:

- Order details (publisher, product, and whether it is on-premise or vendor hosted);
- Number of years this product has been ordered or used and previous PO number(s) (if applicable);
- How the software is used and the service it provides;
- Description of the criticality of service; and
- Chief Information Officer or Chief Technology Officer approval.

DGS shall approve or deny all requests and respond via email to the original request submission.

Agencies shall attach the DGS waiver approval to the IT Investment Review submission and also to the Purchase Order to demonstrate why the quote does not contain a Software License Agreement Number.

#### 4.4 Form and Legality Review

Any terms and conditions that apply to a software procurement shall be submitted for form and legality review, preferably via the Commonwealth's Supplier Relationship Management System (SRM) as detailed in [IT Procurement Software License Agreement For Routing](#) (Commonwealth access only). The terms and conditions must be approved as to form and legality by the Agency, Agency Counsel, Office of General Counsel, Office of Attorney General, and, if applicable, Office of Comptroller Operations.

For renewals of existing software where there has not been an executed software license agreement in place, agencies may be granted a period of one year to establish an agreement, choose a replacement software, or complete the non-negotiated software process.

#### 4.5 IT Investment Request

An IT investment request is required for all new software regardless of cost. Agencies shall submit an IT investment request as outlined in [ITP-BUS002, IT Investment Review Process](#).

Agencies shall include the following when submitting the IT investment request, when there is no software agreement or terms and conditions:

- Completed *OPD-SFT001B, Software Licensing Risk Assessment and Acknowledgement*;
- DGS Waiver approval;
- Approved IT Policy Waiver (if applicable); and
- An explanation of why there are no terms and conditions.

Agencies shall include the following when submitting the IT investment request, when the vendor terms and conditions are executed and approved for form and legality:

- Completed *OPD-SFT001B, Software Licensing Risk Assessment and Acknowledgement*, if appropriate based upon the terms and conditions and risk to the Agency;
- Approved IT Policy Waiver (if applicable); and
- A copy of the terms and conditions that were approved as to form and legality.

Renewals of existing software that meet the criteria for needing an IT Investment request, as detailed in [ITP-BUS002, IT Investment Review Process](#), shall include the following when submitting the IT investment request:

- Completed *OPD-SFT001B, Software Licensing Risk Assessment and Acknowledgement* (if applicable);
- Approved IT Policy Waiver (if applicable);
- DGS waiver approval email (unless terms and conditions have been approved for Form and Legality); and
- An explanation as to why there are no terms and conditions (unless terms and conditions have been approved as to form and legality).

This chart contains a history of this publication’s revisions.

Version	Date	Purpose of Revision
Original	02/17/2023	Base Document
Revision	11/27/2023	<p>Updated to make the distinction between enterprise and agency specific agreements.</p> <p>Added terms that will likely result in a request to purchase or use software being denied.</p> <p>Section 4.1 – Added scenarios to address renewals vs new-software and where terms can pass form and legality review vs where the cannot.</p> <p>Section 4.2 – Added reference to new supplemental document OPD-SFT001B</p> <p>Section 4.3 – Clarified DGS waiver requirement.</p> <p>Section 4.4 - Added an additional step in the process for form and legality review.</p> <p>Section 4.5 – Added additional details regarding what should be submitted as part of the IT investment request.</p>