



Advisory Note – Virtual De-install

December 2014

I. Introduction / Background

In many cases, government access to Commercial-Off-The Shelf (COTS) software involves participation by a third party. Examples include Software as a Service (SaaS) licenses hosted by someone other than the Software Publisher or Reseller, COTS software licenses acquired by Systems Integrators (SI) on behalf of the Government for use in a Government Program, and COTS licenses acquired by Systems Integrators who operate and manage the licensed software for the Government.

In the SaaS example, the Government takes title to the license from the Publisher (or Reseller). The hosting company is viewed as a third party to the license transaction. In the other two examples, the third party Systems Integrator or other Contractor who acquires a license on behalf of the Government initially takes title to the license from the Publisher or Reseller. In both SI examples, the Government either will, or might, take title to the license later in the life of the license, so the license terms must contemplate that change in ownership.

In all three of these circumstances, the government will want to ensure it has uninterrupted use of the license and access to the software, whether it is hosted or acquired (or both) by a third party.

One important aspect of ensuring the government has this uninterrupted use and access involves what happens when the third party is replaced or is removed altogether. In the above examples, this can happen when the SaaS hosting provider is replaced - or when the SI delivers the integrated system to the government containing the COTS software it licensed for the government - or when the government decides it wants to assume operational and management control of the software from the SI.

License agreements are often silent about what happens under these circumstances – or worse, they explicitly require the software to be physically de-installed and re-installed under a new contract and a new license. This could potentially cause a disruption of service to the customer and in the more severe cases, and it could impact the integrity of complicated systems that have numerous enhancements, modifications and interfaces.

The term “virtual de-install” has been coined to mean the software publisher will not require a physical removal of their software from the hardware it is installed on, but will allow a paper change of licensee and/or hosting provider without requiring a new contract number or a new license number.



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In those cases where a physical move of the software is necessary because the hosting entity is replaced, uninterrupted use and access is ensured with contractual concepts similar to the virtual de-install clause. The referenced software will migrate intact to the new SaaS hosting provider or to the government from the SI, along with all enhancements, modifications, interfaces links and applications. As with the virtual de-install concept, these migrations will not require a new contract number or license number.

Two other important elements for ensuring the virtual de-install concepts provide the desired protection to the government are continuity of service level agreements and use of a Government End User License Agreement (EULA).

II. Scenarios Addressed in this Advisory Note

As briefly described above, there are three common scenarios where the government may need to protect itself by requiring contractual language that allows for a virtual de-installation or a physical migration under the original government contract number and license number. This note will focus on those three scenarios and will not deal explicitly with the many variations that might occur. The procurement professional is advised to thoroughly consider the applicability of the information in this Advisory Note to fact situations that are similar to the three scenarios.

A. Software as a Service Scenario

The first scenario involves SaaS licenses acquired by the Government from the Publisher or one of its Resellers. The SaaS license is hosted by a party other than the Publisher or Reseller – or the SaaS license is initially hosted by the Publisher or Reseller but the license allows for it to be moved to a third party hosting entity. Whether the third party hosting entity is selected by the Publisher/Reseller or the government, the third party hosting entity is a point of vulnerability to the government. If the hosting arrangement changes for any reason, the software may need to be physically removed (or de-installed) from the hardware where it resides and re-installed onto the new hardware owned by the replacement hosting company. That physical change should not result in any disruption of the license term or the government's access to the software. It also should not result in a new contract number or license number.

B. Integrated System Scenario

In the second scenario, a Systems Integrator or other authorized third party Contractor acquires COTS licenses on behalf of the government for use in an integrated system ordered by a government program or project office. Usually these arrangements contemplate that those licenses will be transferred to the Government at some point in the future – usually when the



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integrated system that includes the licensed COTS software is delivered to the Government. So the third party Contractor initially contracts with the Publisher or Reseller for the license and owns the license until it is transferred to the Government. In some of those cases, the hosting arrangement used by the integrator might not change, so no physical migration of the software is required. A “virtual de-install” is a way for all three parties (the Publisher, the Integrator and the Government) to acknowledge that the Government has assumed all rights and duties under the software license originally obtained by the third party. A new contract number or license number should not be necessary.

C. Systems Integrator Operation and Management Scenario

In the third scenario, a Systems Integrator licenses COTS software on behalf of the Government with the intention and contractual authorization to then operate and manage the COTS software for the government. So the SI contracts with the Publisher or Reseller for the license and takes ownership of it in the first instance. The software might be hosted on resources owned by the SI, by the Government, or by a third party, but is usually hosted on government infrastructure resources. At some point in time, the Government may decide to assume control of the software and the operational and management responsibilities for it. When that change occurs, the Government assumes ownership of the license. A virtual de-install (or a physical migration where hosting resources also change) allows the Government to continue using and accessing the software under the original contract number and license number.

In each of these scenarios, slightly different contractual language may be needed.

III. Software as a Service (SaaS) Scenario

To recap the first scenario, the Government has entered into a Software as a Service” (SaaS) license agreement with a Publisher. The Publisher or the Government has selected a third party infrastructure provider or hosting entity to host the COTS software. If the Publisher or the Government decides to move the software to another hosting entity, the Publisher should agree to ensure the government has uninterrupted use and access to the software, that the software can be physically migrated to the replacement hosting entity and that the migration will not require a new contract number or license number for the software.

The concern in this scenario stems from the fact that the SaaS license and the hosting services are tightly connected. In many cases, the Publisher provides the hosting services directly. When the software license and the hosting are disconnected because multiple parties are involved, there is the possibility that the Publisher will view a change in hosting providers as a change in the



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underlying license. The following clause is recommended as a means of addressing those concerns, but it requires legal counsel approval and may need to be tailored to fit the specific facts of the situation:

Version 1: The Government’s Right to Continued Use of the Software

The license agreement between the Government and the Publisher includes the provision by the Publisher of infrastructure services and access to Publisher’s software through a third party chosen by the Publisher (or the Government) and approved by the Government. Publisher reserves the right to change the infrastructure provider with adequate notice to the Government, subject to such new provider agreeing to and meeting the Government’s requirements for security of infrastructure resources, including the provider’s supply chain, as specified in Paragraph _____ (insert appropriate Paragraph number) of this license agreement. The Government reserves the right to inspect and approve the new provider’s infrastructure resources. Publisher warrants to the Government that at no time during the change of infrastructure providers will the Government lose access to or use of the licensed software, whether such software is virtually or physically de-installed and re-installed on the replacement infrastructure. All Service Level Agreements pertaining to response time and system availability will remain applicable at all times, including the period of such change in third party providers as described herein. Publisher agrees to use the Government End User License Agreement (EULA).

IV. Integrated System Scenario

In the second scenario, the Government has contracted with a Systems Integrator (SI) or other authorized third party to license COTS software as part of a systems integration project for the Government. The COTS software might be hosted by the SI, by another third party or by the Government. Notice how this scenario differs from the SaaS license Scenario. In that scenario, the Government licensed the software from the SaaS provider and the third party was the hosting entity. In this scenario, the Government does not license the software directly, but uses a third party SI to acquire the license.

It is contemplated at the outset that at some point in time (probably at delivery to and acceptance of the system by the Government), the SI will transfer the COTS licenses to the Government. This raises an interesting series of privity questions.

For example, assume the authority to buy the license is vested in the SI by the Government in the contract between the Government and the SI for the integrated system. Would a virtual de-install promise (to be done at the time of license transfer) in that agreement be binding on the Publisher or



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Reseller from whom the SI obtained the license? Does the Government need to be a party to the license agreement between the SI and the Publisher or Reseller with the virtual de-install clause included in that agreement? Should the government enter into a separate agreement with the Publisher or Reseller regarding this virtual de-install only, making sure that all other license rights granted to the SI are also transferred to the Government at the time of the license transfer and virtual de-install? If the government contracts with the Publisher directly on the issue of virtual de-install, would the Government then have a privity issue with the SI?

The best approach might be for the Government to be a party to the license agreement between the SI and the Publisher or Reseller so that all license promises, including the virtual de-install, will be in place for the Government and therefore enforceable by the Government against both the SI and the Publisher. The second best approach is probably to ensure both agreements – the one between the Government and the SI for the integrated system that includes the COTS software and the one between the SI and the Publisher for the COTS software - include a clear statement of intent by the SI and clear agreement by the Publisher to permit the license to be transferred to the Government at the discretion of the SI and the Government, and that upon such transfer all license rights will be transferred to the Government along with the right to have a virtual de-install to avoid the need for a physical de-install, a new license agreement or a new contract number. In both cases, the Government Contracting Officer should have the right to review all terms and conditions of the initial license agreement between the SI and the Publisher or Reseller before the EULA is executed. This requirement appears in the recommended clause below.

Additionally, the agreement between the Government and the SI authorizing the SI to license software on behalf of the Government should contain an express requirement that the SI use the DoD ESI Software Buyer's Checklist to ensure ESI Best Practices are used in the license acquisition.

Below is the recommended virtual de-install clause for this scenario – whether a single license agreement is signed by all three parties or whether there are separate agreements between the SI and the Publisher and between the SI and the Government. In the second case, this clause should be in both agreements with slight grammar changes for the Government's agreement with the SI. Keep in mind that the Government agreement with the SI would also include a clause requiring the SI to use the DoD ESI Software Buyer's Checklist as described above. That requirement is broader than the virtual de-install topic discussed in this Advisory Note.

Also keep in mind that variations on this scenario might require different language providing the same kind of rights for the Government:



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Version 2: License Transfer Rights and Virtual De-install

Publisher understands that ABC Company is entering into this license agreement for Publisher's software with the intention of transferring the software to the Government. Publisher agrees that ABC may transfer the license, in whole or in part, to the Government at ABC's discretion at any time during the term of this license. ABC agrees to provide notice to Publisher of such transfer as a matter of information and not as a condition to the right to transfer. Publisher agrees that all license rights and remaining term granted herein shall transfer to the Government coincident with the license transfer from ABC to the Government. Publisher agrees that the ABC Company will utilize a government EULA when acquiring the software licenses, subject to Government Contracting Officer review and approval of the EULA terms and conditions before the ABC Company executes the EULA with Publisher. Publisher agrees that the Government may, but is not required to enter into a license term extension or a new license with Publisher at the time of transfer under the same price and the same terms and conditions contained in this license agreement. The Government reserves the right to negotiate lower price or better terms and conditions at the time of the license transfer. Publisher agrees that at the time of the license transfer, ABC or the Government or any third party authorized by them, may perform a virtual (or physical, if the software must be physically migrated) de-install and re-install of the software to enable uninterrupted access to the software and to allow for continued use by the Government under the same license and contract numbers as may be issued or assigned by any of the parties to this license agreement. Publisher agrees to maintain all Service Level Agreements regarding response times and system availability during and after the license transfer and virtual or physical de-install and re-install.

V. Systems Integrator Operation and Management Scenario

The third scenario is another case where a Systems Integrator or other authorized third party licenses software for or on behalf of the Government. The SI or Contractor enters into a license agreement with the Publisher or Reseller and takes ownership of the license. Unlike Scenario 2, in this scenario 3 the SI installs the software on Government owned infrastructure resources and provides various services to the Government that are associated with the software. Some of those service activities might be to install, modify, enhance, operate and maintain the software for Government use. In this scenario, the SI has been contracted by the Government to continue ownership of the license for an unspecified time and to continue providing the Government with access to the software. At some point in time – either at the end of the services agreement between the Government and the SI or at any other point in time when the Government terminates that services agreement – the Government might want to assume ownership and control of the



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license from the SI. Similar to Scenario 2, in this Scenario 3 the Government must ensure the original license agreement acquired by the SI from the Publisher or Reseller contemplates that such a transfer might occur and that a virtual de-install is authorized to help ensure continuity of use and access by the Government.

Version 3: License Transfer Rights and Virtual De-install

Publisher acknowledges, agrees and provides in the license grant in this license agreement with ABC Company that ABC Company is licensing Publisher's software as part of a contract between ABC and the Government for the purpose of providing the Government with certain services and with access to the software. Publisher agrees that the ABC Company will utilize a government EULA when acquiring the software. Publisher agrees and understands that this Government EULA is subject to Government Contracting Officer review and approval before ABC Company executes the EULA. ABC Company reserves the right to install the licensed software on its infrastructure resources, on Government owned resources or on other third party resources as part of the contract between ABC and the Government.

Publisher understands and agrees that the Government reserves the right in its agreement with ABC Company to take ownership of the license granted to ABC Company in this license agreement at any time. Publisher further agrees that this license can be transferred by ABC to the Government with all rights granted under this license at any time at no additional cost to ABC or the Government.

Publisher agrees to allow ABC and the Government to perform a virtual de-install coincident with any such license transfer (or a physical migration where a change in physical infrastructure resources makes a physical migration necessary), thereby allowing the Government to have uninterrupted access to the software without requiring a new license agreement. Publisher agrees that this license agreement with ABC Company is Publisher's Government EULA.

VI. SUMMARY

The government often acquires access to or use of software through third parties. Examples include SaaS licenses hosted by third parties, COTS software acquired by Systems Integrators as part of a government program and COTS software acquired by SIs that they operate and manage for the government. When the hosting or license ownership arrangements change in these scenarios, the government's access and use can be jeopardized.

In order to preserve the government's access and use rights with little or no disruption – to avoid privacy issues where ownership of the licenses changes - and to ensure the original contract and



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license numbers can be continued despite changes in hosting or ownership –the government must ensure certain contract language is included in the agreements used for the initial licenses. One of the key concepts in this language is known as a virtual de-install, meaning that a paper change in license ownership can be used in lieu of a physical de-install and re-install. When a physical migration is required because of a physical change in hosting providers, the same concept for license continuation is used.

DoD ESI provides sample language to achieve these purposes in the three primary scenarios described above. The language is designed to be tailorable to accommodate variations in the facts of each situation encountered by the Government procurement professional.