

GUIDANCE ON SOURCE CODE ESCROW AND ESCROW AGREEMENTS

When should I require an Escrow Agreement for my contract?

There is a potential need to obtain source code for a software, application or complex solution being procured, in these situations:

- if a Supplier is or may become unable to support your investment, i.e., ongoing maintenance and support
- if a Supplier ceases to do business or enters bankruptcy proceedings
- if Supplier is purchased by another entity and that entity fails to provide ongoing support, or fails to accept any other contractual obligations by the original Supplier
- your technology asset is supporting your business continuity and cannot be quickly or easily replaced
- your technology investment is critical to your business needs and too costly to re-procure
- a contract breach by Supplier

The reputation, size or viability of the Supplier does not offer any assurance that any of the above circumstances will not occur. The bigger your loss by not having an Escrow Agreement in place is a good indicator of your need for one. Obtaining source code escrow does not apply to off-the-shelf, packaged software purchases.

How much does this cost?

Escrow Agreements may cost \$1000 to \$2000, or less or more, annually. Be sure to request the fee in your price schedule and negotiate whether the Supplier or your agency will pay this. Normally you will have to, but it is worth it.

Who provides the Escrow Agreement?

The Supplier will provide the actual Escrow Agreement because the Supplier hires his own Escrow Agent.

What language should I put in my solicitation/contract?

Below is recommended contractual language based on VITA's contractual provision. Be sure to remove all Notes to User and to customize with your public body's name or acronym before incorporating in your solicitation/contract document:

Escrow Agreement

[Note to User: Request a copy of the supplier's escrow agreement as part of supplier's proposal. Be sure that it includes source code and not object code, and is otherwise consistent with this section. NOTE: SUPPLIER MUST PROVIDE AN EXECUTED COPY OF THE ESCROW AGREEMENT PRIOR TO EXECUTION OF THIS CONTRACT.] Supplier shall maintain copies of all Software source code and related technical and user Documentation, in English, in an escrow account, and shall maintain with escrow agent the executed agreement attached hereto as Exhibit X (Escrow Agreement). (AGENCY NAME/ACRONYM) acknowledges that, prior to the Effective Date of this Contract, Supplier delivered to (AGENCY NAME/ACRONYM) and (AGENCY NAME/ACRONYM) received a copy of the executed Escrow Agreement naming the Commonwealth of Virginia as a third party beneficiary. (AGENCY

(NAME/ACRONYM) has reviewed Escrow Agreement to ensure that such Escrow Agreement does not impose upon the Commonwealth any requirements other than administrative responsibilities necessary for the operation of the Escrow Agreement. If events give rise to a need for the escrow agent to release escrowed materials to the Commonwealth, the Commonwealth's sole responsibility shall be to request the release of such materials from the escrow agent. Supplier agrees to notify (AGENCY NAME/ACRONYM) in writing not less than thirty (30) calendar days prior to termination or any modification of Escrow Agreement. [Note to User: Review Escrow Agreement for terms and procedures related to termination or modification of the agreement.] Supplier warrants that the information and materials to be kept in escrow in a media safe environment for the benefit of the Commonwealth are specifically identified and listed in Attachment A to the Escrow Agreement and include the most current version used by (AGENCY NAME/ACRONYM) of:

- i). the source code for the Software and all future release versions,
- ii). identification of the development/support technology stack, including but not limited to, every software tool, driver, script, app, etc. with versions and details needed to develop, test, support all phases of the SDLC for all tiers of the Software as used in (AGENCY NAME/ACRONYM's) solution or operating environment,
- iii). all Documentation related thereto as well as all necessary and available information, proprietary information must be in English,
- iv). technical Documentation must be in English and shall enable (AGENCY NAME/ACRONYM), or an Agent of (AGENCY NAME/ACRONYM) to create, maintain and/or enhance the Software without the aid of Supplier or any other person or reference to any other materials, maintenance tools (test programs and program specifications), or proprietary or third party system utilities (compiler and assembler descriptions); descriptions of the system/program generation; and descriptions of any Supplier tools required to enable (AGENCY NAME/ACRONYM) to continue to use the Software,
- v). all Documentation must be provided in unprotected MS Word and other commonly used formats that can be updated.

Supplier warrants that all items, including future versions, deposited in escrow for (AGENCY NAME/ACRONYM) shall be verified by the Escrow Agent within 30 days after deposit to validate the completeness, accuracy and functionality of the Supplier's escrow deposits. The verification process to be performed by the Escrow Agent for the original deposit and subsequent deposits shall be detailed in the Escrow Agreement and a detailed report of all tests of such verification shall be submitted in writing to (AGENCY NAME/ACRONYM) within 10 business days of completion. To perform such verification, Escrow Agent shall conduct a verification process that includes but is not be limited to:

- i). File List Test - To ensure the deposited items are catalogued and confirm they are readable and virus free, and if encrypted, that the Escrow Agent has the decryption keys on deposit.
- ii). Inventory and Analysis Test – To provide a complete audit and inventory of the deposit including analysis of deposited media to verify the presence of build instructions, to identify all of materials necessary to recreate the original development environment and to confirm the presence of all build instructions, file classification tables, database schema and listings.
- iii). Compile Test – To validate whether the development environment can be recreated from the deposited documentation and files; to identify third-party

libraries, to recreate the Supplier's development environment; to compile source files and modules, to recreate executable code and to prepare a complete list of any hardware or software configurations.

- iv). Binary Comparison Test – To test the functionality of the compiled deposit materials by comparing the files built in compile testing to the licensed, executable file running at (AGENCY NAME/ACRONYM's) site.
- v). Full Usability Test – To confirm the source code placed in escrow will be fully functional in the event of a release and to perform a relevant series of tests to ensure that replicated software runs properly in the required (AGENCY NAME/ACRONYM) environment.
- vi). Final Operability Test – To perform a final demonstration of the functioning software.
- vii). Fault Remedy – To collaborate with Supplier on fixing any faults discovered during the testing, to obtain corrected escrow items and to re-perform any verification tests as necessary until all tests are successful, with written detailed reports to (AGENCY NAME/ACRONYM).

Supplier warrants that the Escrow Agreement provides for, among other items, the release of the list of items on Attachment A of the Escrow Agreement upon the happening of certain events, including, but not limited to, Supplier's failure to carry out its support and maintenance obligations imposed by this Contract for a period of sixty (60) days, Supplier's breach or default under this Contract, Supplier's bankruptcy, Supplier's failure to continue to do business in the ordinary course. Supplier agrees to pay all expenses associated with establishing and maintaining the escrow account and the contents mentioned above.

Subject to the information and materials listed on Attachment A of the Escrow Agreement being released to the Commonwealth pursuant to the terms of the Escrow Agreement, Supplier hereby grants to the Commonwealth a royalty-free, perpetual, irrevocable license, that permits disclosure to a third party support-vendor of a complete and accurate copy of then-current source code for the Software licensed hereunder, along with all related documentation.

(Note to User: If your public body is not included in the entity listing below as referenced in title 2.2 of the Code of Virginia, replace the above paragraph with the one below.)

(AGENCY NAME/ACRONYM) is not an agency, board, commission, or other quasi-political entity of the Commonwealth of Virginia or other body referenced in Title 2.2 of the Code of Virginia. Subject to the information and materials listed on Attachment A of the Escrow Agreement being released to AGENCY NAME/ACRONYM, Supplier hereby grants AGENCY NAME/ACRONYM a royalty-free, perpetual, irrevocable license, that permits disclosure to a third party support-vendor of a complete and accurate copy of then-current source code for the Software licensed to AGENCY NAME/ACRONYM, along with all related documentation.

If I need more help determining whether to require an Escrow Agreement, who do I contact?

Please refer to the section regarding Source Code Escrow in Chapter 25, IT Contract Formation, of VITA's online *IT Procurement Manual: BUY IT*, located at this URL: <http://www.vita.virginia.gov/scm/default.aspx?id=6442474486>

If you cannot find your answer there, you may send your questions to: scminfo@vita.virginia.gov. The final determination is a business call for your agency, based on the value of your technology investment and business continuity needs. If you are really unsure, please discuss this matter, as well as any negotiations, with your OAG.