What is the Custom Software Maintenance Contract Template?

This template provides the basis for a custom software maintenance contract between an Agency and a vendor. Custom software maintenance is distinguished from non-custom software maintenance in that custom software maintenance covers bug fixes, minor/small enhancements and technical support for application software in production that is driven by the specific needs of the Agency. In such cases, the Agency drives and specifies software maintenance release content and delivery schedules as well as the availability of technical support and service level agreements. This is referred to as Agency-driven maintenance.

Non-custom or vendor-driven maintenance is an agreement wherein the vendor, based upon input from its customer base, determines what bug fixes and minor/small enhancements will be included in its software releases and when those releases will be available to its customers. Vendors may have technical support mechanisms currently established and available to its customers depending on pre-defined technical support levels. Such arrangement is referred to as vendor-driven maintenance. As an example of vendor-driven software maintenance, Oracle offers software technical support available to its licensed customers at set rates for various service levels such as silver, gold and platinum. The vendor determines what is available to customers in terms of software upgrades and technical support defined at the aforementioned levels of service. This Custom Software Maintenance Contract template for which this guidance document is intended does not apply to vendor-driven maintenance.

The Custom Software Maintenance Contract template provides more flexibility for the Agency in terms of the types of deliverables which can be defined within the Scope of Work. Examples are included within Exhibit A for technical support services, predefined software maintenance, and minor/small enhancements and/or software fixes.
I. The Custom Software Maintenance Contract template, with DoIT approval, may be used when:

- Application software for the base system is already in production and operational and warranties for the base system have expired
- The Agency needs to make enhancements to the software to support its evolving business needs in the programs and activities supported by the application
- The scope of custom software enhancements to be implemented under the software maintenance agreement is minor/small
- The base system was developed as a custom application specifically for the business needs of the Agency.

II. The Custom Software Maintenance Contract template may not be used when:

- Application software for the base system is not already in production and operational
- The scope of custom software enhancements to be implemented under the software maintenance agreement is large, the collective cost of the enhancements is equal to or in excess of $100,000.00, impacts customers on-line access, or is deemed appropriate by the Secretary of the Department of Information Technology. This type of development effort should be handled as an implementation project and the appropriate IT Professional Services Contract template should be used.
- Custom development of a new application. This type of development effort should be handled as an implementation project and the appropriate IT Professional Services Contract template should be used.
- Customization or configuration of COTS (Customized Off the Shelf), GOTS (Government Off the Shelf) or SaaS (Software as a Service - externally hosted) applications not already in production. This type of application deployment involves the engagement of specialized professional services and should be handled as an implementation project. DoIT is currently reviewing and developing policies, procedures and criteria for the use of SaaS by Agencies.
- Procurement of software developed by the vendor is not directly associated with the baseline application, e.g., procurement of an asset inventory system where the baseline application is an electronic medical records system.
III. **Important**

The type of procurement method used to obtain software maintenance on an existing application must follow the State of New Mexico Procurement Code, the Department of Finance and Administration, State Purchasing Division and the Department of Information Technology’s rules, policies and procedures. The Software Maintenance contract is the least risky method. Risk assessment for the determination of the procurement method should take the following into consideration:

- Cost of the procurement,
- Quality of service provided by the vendor based upon past performance,
- Complexity of the application for which the support applies,
- Uniqueness of the operational environment the application runs within,
- Criticality of application availability and criticality of the business functions the application supports.

IV. **Best Practices for methods to procure maintenance contracts for uncommon circumstances will be determined by DoIT.**

To procure maintenance contracts for uncommon circumstances, circumstances outside the custom software maintenance scope and not listed within the *Types of Maintenance or Software Enhancement Contracts Matrix*, please contact DoIT for the appropriate contract template.

V. **Agency options within Terms and Conditions**

Terms and conditions based on protecting the State have been incorporated into the Custom Software Maintenance template based on known scenarios for software maintenance. The following section highlights terms and conditions that may or may not be needed depending on the specific needs of the Agency and are therefore considered optional.

**ARTICLE 2 – SCOPE OF WORK**

E. Source Code. Include this subsection if custom software will be developed by the vendor for the Agency as part of its maintenance releases to the base custom application. The base application will have been previously licensed to the Agency. The Agency should indicate whether the vendor is to deliver the application deployment package, including the developed software for the maintenance
release, to an escrow agent or to the Agency. This subsection allows the Agency to redistribute the developed source code developed for the State agency to other government entities as public domain.

ARTICLE 3 – RETAINAGE

D. Retainage. This paragraph is optional based on the desires of the Agency and the risks associated with the services provided. This can be marked as N/A, or can be set to a designated percentage of the compensation of one, more or all deliverables.

ARTICLE 7 – TERMINATION MANAGEMENT

A. Contractor. If the Agency desires, the following items may be removed; but before removal, the agency should consult with its attorney to ensure s/he is clear on the risk to the agency:

7.) Remit to the Procuring Agency the full amount of any reductions in the Procuring Agency’s receipt of program funds due to the Contractor’s course of performance, negligence or willful misconduct and that course of performance, negligence, or willful misconduct.

8.) Reimburse the Procuring Agency for all costs arising from hiring new contractor/subcontractors at potentially higher rates and for other costs incurred should this Agreement terminate due to the Contractor's default.

VI. Agency options within Scope of Work

EXHIBIT A – SCOPE OF WORK

I. Performance Measures

The template provides an example of Software Maintenance Service levels which the Agency can use to tailor its specific service level requirements for the application software for which they are engaging the Vendor. The identification of support levels, what is included in those support levels and responsibilities should be included.

II. Scope of Work

The template provides examples of several types of deliverables that may be included within the Scope of Work section.

Type 1: Subscription Services – Technical Support

This type of deliverable includes fee-for-service capabilities provided by the vendor and are typically
paid in advance for a designated time period, such as monthly or annually. Care should be taken in selecting the time period for service since subscription services are paid for in advance; thus, if the vendor fails to perform adequately and the Agency wishes to discontinue the service, the Agency may have little recourse to recoup the cost of the unused portion of the service. In this such cases, monthly or quarterly payments are advised to minimize risk. Which ever payment option is selected, the subscription services must be confirmed/audited periodically by the procuring agency to ensure services are being provided. Examples of subscription services are: maintenance or technical support services exclusive of enhancements, on-going fee for license renewal and maintenance of operational applications.

**Type 2: Pre-defined deliverables based Custom Software Maintenance Services**

This type of deliverable is for maintenance that the Agency defines at the time of contract development and identifies the contents and timing of a set of anticipated application releases the vendor will provide during contract execution. This is a good choice for a time period following initial deployment of an application when the Agency initially assesses the quality of the service provided by the vendor.

**Type 3: Custom Software Maintenance Services**

This type of deliverable is for maintenance the Agency defines and prioritizes to the vendor as the Agency uses and interacts with the application. The Agency determines a maximum dollar amount that can be paid to the vendor before the contract expiration date. As the Agency interacts with the application and additional business needs become apparent (e.g. a new federal requirement, a new software upgrade from a third party component such as a database), the Agency submits draft requirements for a set of Agency application enhancements or software fix requests based on specification developed and submitted by the agency to the vendor. The vendor develops and implements application enhancements or software fix requests to meet agency specifications and provides agency documentation that the enhancements or software fixes have been tested and runs as requested. Agency will review the application and documentation for approval and final acceptance. The cost of the total number of small enhancements or software fixes cannot exceed the “not to exceed” compensation associated with the contract.

**VII. Definitions of Terminology**

1) “Major Enhancement” or “large enhancement” means an enhancement in which any improvement is made to the base program or system from the time of production, the collective cost of such enhancement(s) being equal to or in excess of $100,000.00, critical or high risk, or is identified by
the Secretary of the Department of Information Technology as major enhancement. **For the purpose of using the Software Maintenance Template, only minor/small enhancements shall be included.**

2) “**Minor Enhancement**” or “small enhancement”, means an enhancement or improvement to the base program or system from the time of production, the collective cost of which is under $100,000.00, non-critical or low risk, or is identified by the Secretary of the Department of Information Technology as a minor enhancement.

3) “**Subscription Services**” means refers to the annual fee for license renewal and maintenance of operational applications or maintenance support and technical support services exclusive of enhancements. Such subscription services are required to be audited on a periodic basis by the procuring agency to determine if the services are being provided by the contractor as required by the procuring agency.