



# **Contracting policy notice 2008-2 – Low Dollar Value (LDV) Purchases of Commercial Off-the-Shelf (COTS) Shrink-Wrap Proprietary Software and related Maintenance and Support**

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# **Contracting policy notice 2008-2 - Low Dollar Value (LDV) Purchases of Commercial Off-the-Shelf (COTS) Shrink-Wrap Proprietary Software and related Maintenance and Support**

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**Date:** June 24, 2008

**File no:** 7047-001

**To:** Functional Heads, Administration/Finance of all Departments and Agencies

**Subject:** **Low Dollar Value (LDV) Purchases of Commercial Off-the-Shelf (COTS) Shrink-Wrap Proprietary Software and related Maintenance and Support.**

## **Summary:**

1. The purpose of this Contracting Policy Notice (CPN) is to remind departments and agencies that in accordance with the Treasury Board (TB) Policy on Decision Making in Limiting Contractor Liability in Crown Procurement Contracts, purchases of the subject software, which is not listed in a PWGSC Standing Offer, can be made with departmental acquisition cards, and users may accept the terms and conditions in a license agreement regarding limitations of liability in order to activate the software.
2. Since the subject software is a 'good,' related acquisition card purchases must fall within the 'goods' delegation provided to the buying department by the Minister of PWGSC, inclusive of GST.

3. "Shrink-wrap" or "Click-wrap" software is pre-packaged software that is developed for sale to many businesses and governments. This is distinct from custom software that is developed for a specific customer.
4. These buys should be one-time purchases of the subject software. There should be no further requirement to purchase additional licenses. Requirements must not be split or otherwise structured to avoid trade agreement obligations. Prior to proceeding with these acquisition card purchases, departments are encouraged to develop a procurement strategy for software upgrades to ensure that future **aggregate** purchases are not conducted on a sole source basis unless such a procurement strategy can be justified under the Government Contracts Regulations' exceptions to competition as well as under the appropriate provisions of the trade agreements.
5. Departments should ensure that internal procedures related to acquisition card purchases address software.

**Background:**

6. Contracts for COTS shrink-wrap proprietary software involve license agreements or other terms and conditions of a contractual nature which can only be read and accepted after opening the product or downloading the software. Once purchased, shrink-wrap software products can be used as long as the purchaser wants, that is, the term of the license purchased is perpetual. The purchase price of the software usually includes related maintenance and support services.
7. The Policy on Decision Making in Limiting Contractor Liability in Crown Procurement Contracts (Policy) does not apply to low dollar value purchases undertaken with acquisition cards, where:
  - a. the only contract between the Crown and a contractor is the bill of sale; and
  - b. where transfers of liability may be a normal condition of such sales.
8. The Policy describes a risk-based approach to management and decision making with respect to indemnification and liability provisions and Crown procurement contracts and it recognizes that effective implementation of the

Policy must consider program affordability, cost-effectiveness and sound resource stewardship of taxpayers money.

9. Departments are obligated to comply with Schedule 4 of the TB Contracts Directive which identifies the commodities for which the use of PWGSC Standing Offers is mandatory – including Class N7030 for software. However, for software that is not listed in a PWGSC Standing Offer, rather than asking PWGSC to subject these buys to the rigor and high cost of the Crown procurement process, it is more cost effective for departments to undertake their own purchases of the subject software using departmental acquisition cards.
10. Where acquisition cards are used to make payments against contracts, standing offers, or supply arrangements, the indemnification or limitation of liability provisions of those contracting instruments are subject to the Policy on Decision Making in Limiting Contractor Liability in Crown Procurement Contracts, including fully developed risk assessments.

**Policy Application:**

11. This CPN applies to all departments as defined in section 2 of the Financial Administration Act (including the Canadian Forces) and to Crown procurement contracts subject to the Government Contracts Regulations and the Treasury Board Contracting Policy.
12. This CPN is to be used in conjunction with the TB Policy on Acquisition Cards. All cardholders must comply with the respective departmental policies established to ensure economical, efficient and secure use of acquisition cards.
13. All TBS publications are available online via the TBS web site at: <http://www.tbs-sct.gc.ca/>

**Enquiries:**

For further information please contact: Treasury Board Secretariat at

(613) 957-2487 or by fax at

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Executive Director

Assets and Acquired Services

Distribution: TB06, TB07, TB21, TB23, T022, T023, T024, T161

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