Webinar Series

CCWIS Contracting and Procurement Part II

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Presenters: **Nicole Harter-Shafer,** Federal Analyst, DSS

Spencer Wilder III, Federal Contract Support, DSS

Kim Bennett, Contract Manager/Procurement Documents Reviewer, Federal Contract Support

Philip Breitenbucher, Federal Contract Support + Moderator

Philip Breitenbucher: Good morning and good afternoon. Thanks for joining us today. We see that folks are coming into the room, so we're going to let folks come on in and we will get started with the webinar in just a few moments, thanks for being here. Welcome to the Child Welfare Information Technology Systems Manager and Staff webinar. This webinar is brought to you on behalf of the Health and Human Services Administration for Children and Family Children's Bureau. My name's Phil Breitenbucher and I am your host for today's webinar. Today's discussion will be entitled Practical Guidance: CCWIS Contracting and Procurement Part II. This is the second webinar in a two-part series. During this webinar, we will briefly review part one and then continue the discussion on contracting, acquisition and managing risk.

We would like to encourage active participation in today's webinar and you have a few ways that you can participate. You are welcome to submit questions throughout the entire webinar using the question and answer feature, which will be located either at the top of your screen or the bottom of your screen. It should look like a Q&A icon, similar to the one on the right of the screen. Please go ahead and type your questions there. We will monitor those. We have a panel of analysts looking at those questions and we will try to get to all of those. You're also able to ask your question live by using the raise hand feature, which you can do by finding yourself and just clicking raise hand next to your name in the Participants window. If you are calling in by phone, you're able to just hit *9 and we will see your hand raised that way as well. And then what will happen is one of us will send you a private chat and just be sure you're ready to ask that question live. And then we will unmute your line and we will call on you to ask your question. After today's webinar, you can continue to ask questions by submitting those questions to ccwis.questions@acf.HHS.gov. You'll also be able to participate in today's webinar through the use of a couple of polling questions, which we'll get to in just a moment.

First off, I'd like to introduce our presenters for today. You'll first hear from Nicole Harter-Shafer, who is a federal analyst with DSS. And then you'll also hear from Spencer Wilder III. He's also a federal analyst with DSS. And then you'll hear again from Kim Bennett, who is a contract manager, procurements document reviewer and

federal contracts. And again, my name's Phil Breitenbucher and I will be your moderator today. I just want to quickly go over today's agenda with you so that you can see what we're going to try to cover in about the next hour or so. First, as I said earlier, we're going to do a quick welcome and follow-up from part one, which this webinar, part one was in July, if you were able to attend that. And then we will move into strategies for traditional performance-based and agile acquisition. Next, we'll cover deliverables and what we're calling the definition of done. What does the definition of done really mean when we're looking at contracting and procuring for CCWIS solutions. Fourth, then we will then cover customization or configuration, then move to acquisition as a service. And then finally, we'll close out with a discussion on contract language and how to negotiate and warranties, intellectual property rights, and terms to manage risk and change.

Alright, let's go ahead and get started with our first polling question. So, here's the first question. We're going to go ahead and launch this. We'd like for you to participate if you don't mind. Did you attend the July 28th webinar, which was called Practical Guidance: CCWIS Contracting and Procurement. So, your selection, your options are just yes, no, and I'm not even sure where I was last month. So, go ahead and respond now and we will give you a second to respond. And once we see that the majority of you responded, we'll go ahead and close out this polling question and take a look and see how many we have of you coming back for the second webinar.

Okay. Looks like, we'll give you all a second here. If you don't mind just letting us know if you were able to attend the last webinar. Hopefully you're able to see the poll. Okay. So, it looks like for some reason it's not allowing folks to respond. Let's see if we can relaunch that, Tom. Alright. Let's see if it works now.

Okay, great. And I appreciate also the participants letting us know that it's working. So, we can see now that you are able to respond, we'll give you just a second and then we will close this out. Alright, let's go ahead and close the poll now. Okay, it looks like we're pretty split. And luckily all of you know where you were last month. So, that's really great. I'm not sure I do. So, that's about a little over half attended last month's webinar, that's great. And about 44% of you are new. This is, so you weren't able to attend last month and we will share, we can share that slide deck with you. When, if you just go ahead and reach out to us. And then once it's been through the 508 process, we will post it to the website. Okay. We're going to now move to one more polling question. And this one we're asking just again, what's your primary role that you play in relation to CCWIS? And we're just asking that you select one of these options. So, go ahead and let us know.

We'll give you just a few more seconds. We appreciate those of you who've already submitted your response. Thank you. Okay. Alright, we're going to go ahead and close out now. Okay. Well, about a third of you are information technology and just under a third are program folks. And then we have folks representing our contracting and procurement and our fiscal and budget and other also making up nearly 20% of you. Alright. Well, thank you. We appreciate your participation in those polling questions, it does help us try and tailor our messaging to you as an audience so we know who's, who's with us today. So, thank you again for participating. Alright, I would now like to hand it off to Nicole Harter-Shafer, our

federal analyst.

Nicole Harter-Shafer: Thanks, Phil. So, understanding - welcome everybody - that a clear scope of work, clear pricing, and a clear order of precedents work together to support mutual understanding and dispute-free operations. Ensuring this clarity is the most important thing you can do to manage risk, to support efficient and economical project outcomes. So, from our last webinar, the three takeaways are that IT managers and program managers have the ability to significantly speed the contracting process as they influence the CCWIS outcomes. They can do that by developing a clear and comprehensive scope of work and the requirements and make sure those are included in the RFP. When the RFP is incorporated by reference into the contract for CCWIS services, those requirements become part of the contractual foundation. When it's combined with limiting expectations that bidders may take, the contract process can be streamlined with minimal negotiation, making it easier and faster because the requirements are already established.

Two - clear and comprehensive scopes of work with requirements aligned to the objectives and payments and measurable performance standards are necessary to achieve the CCWIS outcomes.

Number three - strategic acquisitions and planning are necessary to attain the best value. Use of unambiguous terms to manage risk and change are necessary to ensure that what you intended to buy is what you received at the price anticipated. So, today we're going to look at the different approaches to acquisition, including traditional and performance-based and agile contracting. We'll look at buying as a service. Each approach has its advantages and challenges. We'll consider these, talk about lessons learned, provide suggestions and help in the planning and the strategic acquisition to attain best value. Will also provide how to suggestions in areas of the procurement process that can sometimes be difficult. And drafting your deliverables, providing some suggestions for definition of done that align to the payment and the use of financial incentives. And talk about configuration versus customization. So, Kim, Phil, I think you are up next.

Philip Breitenbucher: Yeah, let's go ahead and now bring on Kim. Kim Bennett, Thank you for being with us today. You might be muted.

Kim Bennett: Hi everybody. Thank you, Nicole, and thank you, Phil. Thank you for being here. So, I'm just going to go ahead and jump right into it on the next slide. And we can look at a comparison of traditional performance-based and agile acquisition.

So, basically in traditional acquisition we’re looking for procurement of defined deliverables. They’re specified, requirements are specified. In performance-based contracting, we're looking at procurement of a specified outcome as opposed to presenting the requirements. Although there may be some requirements presented, generally speaking, what's presented is the outcome. This is what is being purchased. And the contractor who is selected is responsible for achieving the outcome. There are assessments of performance, there are standards for performance. But ultimately what's being paid for is that specified

outcome. And generally, the government is present, but from a distance, oversight, but from a distance. The contractor is very much on their own to achieve the specified outcome. Comparing that to agile, agile procurement is looking for procurement of deployable software in continuously improving iterations. Agile is cooperative and collaborative, and the government role is integral to the process. Whereas in traditional procurement, the government is defining the requirements and payment is for completion of those specific requirements. And there's very little variation, change is really not desired. The completion of the requirements is clear and what's required and expected. And likewise, in performance-based contracting, it's the completion of the outcome that's expected.

In agile, the purpose of agile contracting is to effect change as quickly as possible. And basically, instead of doing all the testing at the end of the process and going through a long linear type process with testing at the end to get up a minimum viable product right away and do testing right away. And then progressively through iterations and sprints to progressively improve upon the software and the functionalities. And all of that is very user centric with what's being contributed.

Historically, when studies have been done, agile has been shown to provide a lot of cost advantage in that the testing, because it's done upfront, actually identifies potential problems, potential failures early on in the, in the, in the process so that it can all be fixed. So, agile definitely brings that advantage, and it brings the advantage of keeping up with technology. So, in terms of contract types in traditional contracting, you can have a fixed price contract or a cost reimbursable contract or a time and materials type contract. In performance-based contract and looking at the outcome, It's typically fixed price. And in agile contracting, it also theoretically could be fixed price, cost reimbursable, or time and materials based. But agile, like performance-based contracting and traditional, a fixed price type contract is desirable because effectively that's putting risk relative to changes on the contractor.

Although there is collaboration, as we'll see, with respect to changes that will happen. Okay, so, for terminology, traditional type contracting would define what needs to be done as the statement of work. We talked about in the first webinar, the scope of work, basically the breadth of what's to be accomplished. And performance-based contracting would define the performance work statement. And that work statement would align to measurable performance standards that basically, heat up to the achievement of the outcome. And in agile, there's a statement of objectives. And again, being user centric, user stories continuously inform the Statement of Objectives. And the idea is that with continuously, continuous feedback and input at each iteration, the ultimate objectives are fed with ever improving, potentially deployable software that better meet the needs of the users.

Next, please. Thanks. Okay, so in traditional contracting, it's basically a directed process performance-based is a set of outcomes. Performance-based, like agile, tends to have minimal reporting. The agile focuses much less on documentation than on actually being flexible to support innovation and continuous process improvement. It's really about the process in agile. And that's a collaborative process. The performance-based contracting is a process that is accomplished

by the contractor and government is looking from a distance for the outcome. And traditional is a directed process. So, in agile, it's not directed, it's collaborative. As far as metrics go, the traditional contracting specifies what's needed for the deliverables.

In performance-based contracting, there's a quality assurance plan that aligns to the measurable performance standards. And in agile, again, the metrics are as stipulated for the deliverables that are required. But those deliverables may change throughout the process as there's collaborative input. Traditional contracting may have incentives. It may, for example, have cost-plus incentive fee type contracting. It might, it might not. Performance-based contracting most often does involve incentives. And the incentives typically are, are presented as performance standards, which are defined as standard, positive or negative. So, you could think of it as standard, a plus one performance, or a little less than standard, but still acceptable. And payment will actually be aligned with the actual achievement of that performance based on the quality assurance plan. So, in agile, you also might have standard positive or negative incentives based on metrics. Although, I've not been seeing that all the time in the procurement documents, it's strongly suggested by me.

In my experience, if you use incentives, you're much more likely to get the outcome that you want. What I have been seeing in the agile procurement documents is a very strong focus on the process and that's what agile is all about. But focus on the process to the exclusion of the outcome will ensure that what you get at the end of the day is a process as opposed to the intended outcome. So incentives is one way to make sure that you do in fact, get to that intended outcome. As far as deliverables go in traditional contracting, there's a specified deliverable. And that might be for goods or services. In performance-based contracting, it's the outcomes, again with incentives and the outcome that's desired and the units of measurement will be established and presented in the RFPs. For agile contracting and development, again, it's the deliverable really is working software on a progressive increments cycle.

Okay, so the deliverables and outcomes, basically in traditional contracting, what are you buying? You are buying something that's going to be delivered that's specified and it's delivered in accordance with the stated requirements. In performance-based contracting, it's you're buying the outcome. In agile, you're buying rapid delivery of working software and underscoring rapid delivery. But it must also meet all the contractual requirements. So, it's not without requirements, even though there's continuous refining of requirements in agile.

Traditional contracting is plan-driven. First, you have the fixed requirements that will achieve the intended outcome. And from those, the resources needed and the scheduler estimated. And a formal change process is needed for changes to requirements. Whereas Agile development is value-driven. First, you have the fixed resources in the timeframe, and the requirements are developed based on those. Traditional contracting results in value. But agile contracting actively and continuously seeks improved value through a collaborative approach.

Next, please. So, here's what they have in common. Successful outcomes are dependent upon clear, unambiguous meaning, affirmative language, plain language, consistent

definitions, alignment. And that would be alignment of the objectives all the way through the deliverables, the tasks, and all the way to payment. And successful outcomes are dependent upon measurable performance outcomes, underscoring measurable. So, all of these things, we, in the first webinar, we provided 12 strategies to manage risk and change. And all of these things that traditional, performance-based and agile contracting have in common, actually for successful outcomes, are strategies that were within the 12.

Okay, next slide, please. So, what's different about the three contracting approaches? Performance-based contracting aligns with agile because performance outcome is the agile intent. The distinction among the three is the ease of change. The ease of change to support rapid implementation in innovation. So, one of the challenges in traditional contracting has been the difficulty of making changes. In traditional contracting requirements are set at a long-complicated process requiring many approvals and justifications is needed for approval of change orders. That's been very unwieldy and it leads to slower returns and slower end products. And sometimes it can take so long that the change that was desired is actually obsolete by the time all of the approvals are obtained. In contrast, the agile approach responds to change quickly by establishing a clear process for ongoing collaborative focus on defining and redefining the requirements. The unwieldy change order process is not needed.

Still, in using agile, states are not always getting the outcomes they envisioned. In looking at the procurement documents, it seems that one of the reasons for this is sometimes the enthusiastic focus on a collaborative process to define the requirements misses the importance of having an end goal.

So, a hybrid of the three contracting approaches can achieve the intended results while also providing for flexible change. Bottom line is that agile development and any development needs an enforceable contract. Next, please.

So, a hybrid approach can bring together the best of what each of the contracting approaches offers. So, for traditional, the traditional contracting approach, a hybrid approach can bring in the focus on clearly defined deliverables with a plan to meet the requirements. It can bring in the best of agile in that, well, agile brings a deliverable of working software that is less than fully defined. It also includes a process for collaboration for the best possible outcome, and a process that's user-centric. It includes a process for reacting rapidly to change. It’s user-centric process defines minimum viable product and accomplishes changes to requirements and functionality based on the user stories. So, you can have both of these in a hybrid approach. Add to that the best of performance-based contracting, which is a required performance outcome.

Performance-based contracting establishes the performance work statement, a quality assurance plan, and performance standards that align with financial performance incentives.

Next, please. The hybrid advantage is that agile identifies potential failure earlier, enables rapid, efficient changes that will help you keep it flexible for innovation, creativity and continuous process improvement. The hybrid advantage includes performance-based contracting, as it specifies and pays for desired outcome, that will help

you get the outcome you want. And the hybrid advantage brings in traditional contracting as it actually identifies requirements and aligns to payment, that helps you maintain control to ensure payment is from the desired outputs. And some of you might be wondering at this point, well, isn't that a conflict because agile doesn't really define its requirements until it's halfway through or at each iteration, the requirements are changing. So, how can you have that plus traditional contracting with defined requirements? So, hopefully you'll see that in the next couple of slides as we go through. Next, please.

Okay, so, the deliverables and the definition of done. The contractor commitment in agile is to produce software releases with set features at set time increments. Agile seeks tangible outcomes, not progress against a plan. I think that in, in zest for the possibilities of the changes and attaining best value, sometimes that gets lost in the process, at least that's what I'm seeing with procurement documents. So, I want to underscore this again - agile seeks tangible outcomes, not progress against a plan. You can have defined requirements and should have defined requirements. They simply change through the process. Spencer, you've talked about the importance of knowing what it is you want to buy and also setting and managing expectations. Did you want to comment about that?

Spencer Wilder III: Yeah. Thank you, Kim. I just want to say a couple of words. I think the important thing that we're trying to note here is clarity. I think the bottom line is, no matter what type of acquisition or contracted procurement process you want to go with, that is always a means to an end, it is not the end. You have to start from the, from knowing what you need that is the most important factor in all this that we're talking through. So, one of the things that I know that I have seen and we all can attest to is that when the deliverables are not clearly defined and you don't know what you really need and you're not clearly able to say what it looks like and how it does, your contract procurement process is going to flow from that. It's going to be just as muddled. So, the important thing here is to be clear about what you want and then things from that will flow very easily. So, I just wanted to put a plug in to let folks know just like we're talking with CCWIS regulations and we're really talking about starting where you are and knowing who your audience is, and building your support the work of your workers, it's really important that you have clarity around what it is this you need and what it is you're looking for. That is what is going to determine and that's what should be the basis of all your contract and procurement strategies. So, just wanted to say that. Thanks, Kim.

Kim Bennett: Okay, so, how to draft the deliverables? First, you develop division and goal. You identify the key project objectives that are going to help you obtain that goal. You move backward from the objectives to determine the actions that are needed to achieve the objectives so you can see how everything's speeding up to the vision and the goal. And then you make sure that you align those actions and deliverables to achieve, necessary to achieve the objectives, you align those with all necessary requirements and metrics. And milestones are effectively progress markers as you proceed. Lastly, you prepare an in-house estimate estimating the cost and time for each deliverable and the completed project. And that's both the deliverables and the completed project as a whole. And that in-house estimate will support your development of payment terms that then takes the alignment all the way to payment. You'll have the vision, the

objectives, the tasks, the deliverables, requirements, measurable performance standards, and payments all aligned.

And I've seen in the procurement documents that the states are doing a good job of that in particular, using Excel spreadsheets to align them. And we talked about that in the last webinar. Next, please. So for definition of done. Spencer just talked about the importance of knowing what you want to buy. Basically, when you have the definition of done, you need a minimum viable product. And that's usually established at onset. And you could look at it like you add a functionality. So, so your minimum viable product is, is the minimum functionality, the minimum deployable software for that first iteration. It's your basic, your, fundamental piece that you need. And then you have different functionalities that you could add, which would be basic plus one. So, what you want to do with agile so that you can combine having defined deliverables, but still keeping that all open to that process that allows for that collaborative change that gets you the best end result is take those plus one functionalities that are developed through user stories and use them as trade offs. So, one thing that agile does is it doesn't require that lengthy change order process and it gives more authority at the project level for IT managers, program managers to, as part of the project process, create the change to requirements. If you do that in a manner that implements those changes as trade-offs for value, you start with established minimum requirements and then as you're informed by user stories what the real needs are, then those are traded off.

You need a definition of done for every deliverable and for the whole project. And you need a definition of done that includes performance standards, performance incentives, and I want to recommend strongly that you consider a retainage for the definition of done for the entire project. So, states are often going through enthusiastically the agile process, which in theory should get you to the very best result. And sometimes there's disappointment that the end result isn't really what was expected. And we've talked in the last webinar about sometimes everybody can do a really good job on their piece, but if it's in a silo, their piece might be really great, but the pieces don't all connect.

So, if you hold back a retainage, you, for completion of that larger vision, that larger outcome, then that's what you're going to get. If you buy a process, you're going to get the process and you might get a never-ending process and feel frustrated. And sometimes contractors feel frustrated too, because they aren't exactly sure what the agency wants. But if you have definitions of done both for every deliverable and those definitions have done also speak to the requirements, and you also have a definition of done for the project as a whole and payments, final payment, final payment of retainage only happens based on that definition of done for a whole, then you're going to get what you want to buy. Next, please.

Okay, so quick discussion about an example of a procurement document that I've seen, and that's a licensing module. And it was seeking to use the agile development approach. Very, very well articulated process. Human-centered design, modular implementation. Focus on the issues. Analyze, develop, and execute solutions. They call that process discoveries, sprint testing, deployment, and basically involve development of user stories. But they started with a preliminary list of

user stories with provision for mutually agreed change process. So, there wasn't an open ended, this is our minimum viable product for the first iteration and then we're going to see what feedback we get and what user stories develop and, you know, through a series of iterations and then we'll find out what we end up with because we've defined a process that should get us there. In this particular licensing module, they defined a preliminary list of user stories. Then there's a trade off as, as the project progresses, as development progresses and input is received, there's a trade off from that preliminary list of user stories and they're prioritized. So, ultimately, nothing less than the original end result is going to be achieved in terms of value. Now one of these, one of the things that I saw on this licensing module, the set of procurement documents for licensing module is something that I see often in the procurement documents.

The assumptions, the language seemed to be largely contractor driven. The documents speak to what the contractor won't do instead of what the contractor will do. I would hope that agencies and individuals within agencies would understand that they have the ability to define what the contractors are going to do, even though it's agile, even though it's collaborative, there are still roles. And at the end of the day, the agency is still hiring the contractor. I think sometimes contractors can present as very confident - we, we don't change our terms and conditions. These are the terms and conditions we offer. This is the warranty, a warranty period we extend. And there's a sense that can't be responded to, that's cut in stone. So, I want to tell you that what I'm seeing in the procurement documents is many times there were opportunities for the agency to step back in and say, but we need a longer warranty period. And that's not done. So, I'm not sure how to say it other than don't, don't be walked over by confidence of contractors who might have more experience in this process. And that comes from a long history of agile contracting being developed sort of as a new approach that was largely contractor-driven when the elements of it were defined.

So, be aware that you have the ability to, at the end of the day, you are still the hiring entity. And contract documents should reflect that. So, one other thing I want to just mention here is that in describing what the scope of work is, this particular licensing module, like many others, said the contractor was to accomplish up to four training sessions. It was to provide up to five reports. What are they going to get? They might get one.

Even though it's, agile is collaborative, even though requirements will change collaboratively with trade-offs, the initial baseline requirements need to be established. So, instead of up to four, no less than four, or no less than three, whatever it is you need. But not up to, no less than. Okay. I think we should move on to the next. Getting a little time challenged here.

Okay, so, what good looks like? How well does the definition of done capture the functionality of user stories? How well does the process enable collaboration and change to support improvements? How well do the requirements align to measurable performance standards? Is there a definition of done for both deliverables and for the project as a whole? And how well does the definition of done align the objectives, deliverables, and payment? Because one of the difficulties that we see is sometimes that alignment is all there except for payment. Somehow

there's an alignment of what's going to happen, but then payment doesn't directly correspond to what is happening in the project process. So, full alignment and then add to that measurable performance incentives. And instead of saying standard performance, standard performance plus one will get you this incentive and this amount of payment more. Or standard performance, that's almost there, not quite what we wanted will get you effectively, what's a disincentive. Look at it as good, better, and best performance, define measurable performance standards for each of those and require better. And then your incentives would be plus one for best and plus, minus one for good. Nicole, you've talked about dependencies and the program management standpoint in definition of done and what good looks like. Did you have any comments on this?

Nicole Harter-Shafer: Thanks, Kim. Yeah. Making sure that at the end of the day, you understand your system dependencies. Understand from a program standpoint the definition of done. And also understanding the internal approvals that you need to support your IT managers and projects and their ability to get the sign-off on changes and alternatives without the obstacle of full change orders. So, just really making sure all the right people are in the room and understanding the full process to get the work done that you need is vitally important to this.

Kim Bennett: Thanks, Nicole. Okay, so, we're going to look at configuration or customization, which is one of the questions that agencies have and one of the decisions that agencies make. So, commercial off-the-shelf software, also known as COTS, is defined as those proprietary software products that are ready made and available for sale to the general public at established catalog or market prices. When we talk about configuration, we're talking about configuring commercial products. Under current regulations, agencies aren't allowed to claim federal funding for proprietary COTS products or services, but there are provisions for how a waiver can be requested that allows use of COTS. The important thing is understanding that in order to manage risk when buying commercial software, there is significant pre-planning that's needed. And we see that in, in lessons learned. That pre-planning will include not only defining the initial requirements, but developing a life-cycle support plan for the commercial software. And that's where the challenges really reside.

Understanding the intellectual property rights associated with using COTS for CCWIS solutions is important because when developing a life-cycle support plan for commercial software, the planning for continuity, upgrades, and costs will all be impacted by the intellectual property rights. The benefits of COTS are that potentially it eliminates or reduces development time. In fact, not just potentially, it does eliminate or reduce development time. Although that said, there's a lot of customization that can happen with COTS. And so the development time reduction may not be as reduced as you might think. This is why it's very important to do a full analysis before going down this path.

Another benefit is that it's easy to keep up with new technology improvements. Somebody else is handling those upgrades. And lower life-cycle cost can be possible with less upfront investment. But it's important because that's not necessarily always the case. In fact, it's been seen often that at the end of the day, because there are unbounded licensing costs that may be associated with that and costs that may

present over time as there are needs to change, it may not be so that the life-cycle costs are lower. So, it's very important that the agency looks at all of these things. Disadvantages - the systemic impacts may be difficult to anticipate. The proprietary functionality embedded in COTS may, basically results in the fact that there are limited sources who can provide it. If one source goes out of business, that can be a problem.

The ability to upgrade may be limited. The agency might need an upgrade, but there's vendor specified periods of time in which the vendor will make a unilateral decision as to whether it's going to upgrade. Limited design information may be provided to the agency. Use rights may be limited. There may be unknown future costs associated with the licensing agreements and standard terms and conditions can limit the vendors liability. There's no obligation of the seller to provide supply chain information. And the seller may well know that six months down the road, there’s going to be a major supply chain problem. And there's not necessarily any obligation to let the agency know that. So, there's limited risk visibility and potentially unforeseen costs to integrate, change, or upgrade COTS.

The things that an agency needs to do to manage these risks - and it is possible to, to mitigate the risks, sometimes I don't want to say it's always possible - an agency needs to really make its decision and to assess the risks involved with using COTS. The things that are actually required as submittals or suggested as submittals for obtaining a waiver to be allowed to use COTS, I think is a good roadmap to analyzing risk. The agency would do a feasibility study to justify the use of COTS and include business, technical and financial analysis. They would do a cost benefit study. The agency should look at how the agency is going to transition to another solution if it can no longer use the COTS product or service. And how it's going to ensure federal rights to access system documentation that goes to IP rights. It needs a risk mitigation plan that's going to address the agency's ability to meet its needs for ongoing modifications given that release schedule that's made by the vendor and the risk mitigation plans going to need to address policies and procedures for data security and confidentiality, continuity of data access and data recovery, and penalties for data misuse, unauthorized access, or security breaches. And what happens in the event of provider termination with respect to data retention and data disposition. All of these things are potential risks with COTS. So, each agency needs to assess and develop a mitigation plan if that's the road that's chosen. Next, please.

When does configuration become customization? When there is code, when there is new code that is needed to be added. Some commercial off-the-shelf products come already with the functionality that will enable them to create extensions of the base COTS software application so that they support integration. In that case, configuration of the COTS accommodates the agency need, but there's no new code. Modified COTS is customized with enhancements that meets the buyer's needs or enables it to integrate with the buyers system. COTS becomes modified COTS when there's substantive new code developed to enable integration or use. Next, please.

So, for acquisition as a service, that is the use of COTS and it's provided as a service rather than a

product, and it's Cloud-based. These definitions are provided in this slide simply as a reference point for you to underscore the need for definitions in your contract. The definitions of Infrastructure as a Service, Platform as a Service, and Software as a Service, the three types, the three models that are used for as a service acquisition definitions in the contract documents are not always the same. So, to remind you and underscore the importance of making sure that the definitions across the contract documents are all the same, this slide prevents, presents the National Institute of Standards and Technology definitions.

So, advantages and disadvantages of acquisition as a service. Again, a form of COTS, which also will be customized but is provided as a service. The advantages are flexibility and scalability, innovation, The possibility of continuous improvement. And no, no muss, no fuss with the equipment. Cost is aligned to use with subscriptions. And effectively there's some degree of risk transfer in that there's another entity who is actually accomplishing the hosting. The disadvantages - not only the hosting but the upgrades. The subscription fee pays for license to use the software, and it also includes ongoing support and software upgrades. The disadvantages are potentially outcomes may not be what are desired. There are concerns with respect to continuity and risk management plans are needed to ensure that if the vendor goes out of business or supplier is limited, you have all of the same concerns that go with using commercial software.

Performance management. You may not have the right to oversee or control to the level that you would like to. And again, as we talked about with COTS, over the life cycle it actually may cost more. Data security may also be an issue in that there's less control for the agency. And it is important that the agency should always own its own data that's stored in the database and it will be important to make sure that that is contractually clear. Next, please.

So, key decision points for acquisition as a service are choosing the cloud service and deployment model. The deployment model, meaning, is it going to be a public cloud, a government cloud? That's probably beyond the scope of what we're talking about here, but I'm sure most of you know that that goes to securities, fedramp program. So, what you need in terms of your security is going to inform what type of model you need. Key decision points are around the base payment. Subscription is effectively a license based on use, and it's limited to the amount of time that you're purchasing. So, there's a misconception that buying COTS means that over time, you're going to have continuing rights to those upgrades. When you are acquiring as a service, you're buying based on that particular time that you've purchased. And while you may actually purchase perpetual license rights to use the product, you are not necessarily entitled to ongoing rights to upgrades.

So, agencies could be surprised with unexpected costs. We've talked about end-user terms of service and how contractors may present them as non-negotiable. I would take that with a grain of salt because really everything is negotiable. And again, at the very least, you should be negotiating the terms of conserve, terms of service and pricing or no less than what is provided to every other customer. In the first webinar, we talked about how you can effectively negotiate the terms you want without negotiating by providing them clearly in the RFP documents

within the scope of work, and allowing for very little variance.

Roles and responsibilities are very important in considering acquisition as a service, they must be clearly defined, if you leave ambiguity as to who's responsible for what, you can be sure that the agency will be responsible. And in particular, underscoring making sure roles and responsibilities are defined with respect to security and privacy, continuity and ensuring continuity. And again, that life-cycle cost and doing adequate cost, cost-benefit analysis is important. Next please.

So, this basically, there are templates available. This link provides a resource to you that gives you example terms and conditions for each of the three types of acquisition, whether it's platform or infrastructure or software as a service. And this particular guide includes a comparison of 26 clauses that have different languages, language that would be appropriate depending upon the three service types. Then I do want to caution you, I think this is good language, but I want to caution you that it's a baseline that industry stakeholders participated in the development of this language and you absolutely can improve upon the risk management language that's here as guides whenever possible. I would not recommend any blind incorporation of language from any resource documents because you can always look at what will best protect your agency. And one really short example - for example, a piece of language relative to business continuity and disaster recovery might say in this document, for example, the service provider will provide a business continuity and disaster recovery plan upon request. So, how about improving that with the service provider will provide a business continuity and disaster recovery plan that is acceptable to the agency upon request. So, I think you understand the point I'm making here, but this is a really good resource for you. Next, please.

Okay, the last section of this webinar I'm going to go through in about three minutes - negotiating contract language. And the purpose is basically to just help you understand the extent of risk transfer that can be caused by just a few words. And also that you have the ability to counter or just say no. You have more ability to stand up and achieve and realize the terms you need that are going to give you the smooth project operations that you need than you might realize. Next, please.

So, very quickly, this is the regulation that is relative to software ownership and license rights. When you're thinking about this, to make that distinction over ownership versus license rights. So, there are a couple of important things to see in this and one is that in section A here, the state or local government must include a clause and all of the procurement instruments that give the state or local government ownership rights in all software or modifications and all associated documentation that are designed, developed, or installed with federal financial participation. Simply referencing 45 CFR 95.617 really doesn't fully achieve the intent of this. The intent of this regulation is telling the state and local government, telling the government what the government must do. You must include a clause in all of the procurement instruments that assures the state these rights. So simply referencing 95.617 is confusing in that it talks about this subpart, for example. So, in a minute I'm going to give you a suggestion of how you might approach that. I want to call to your attention that section B is calling for a royalty-free, non-exclusive and irrevocable license for the federal government to reproduce, publish, and otherwise use and authorized for others

to use for federal government purposes, the software modifications and documentation. So, the first part is about the state, the second is about the federal government. All of them are about the software modifications and documentation.

And the last section is about proprietary software. It speaks to the fact that FFP is not available, the federal financial participation is not available for proprietary software. But in the beginning we talked about how a waiver can be requested there. My suggestion to you - because simply citing 95.617 doesn't adequately convey the software ownership and license rights that are needed - my suggestion is that you use something like notwithstanding anything to the contrary in the contract documents, the contractor grants all rights of ownership and license rights specified in 45 CFR 95.617a and b to the state and federal government. Okay. Next, please.

Okay. So, warranty - one of the things that contractors will do with a warranty is they will try and start them as late as they possibly can. So, you want to look at not only the amount of time that a warranty extends, but also when it starts and be on the lookout for attempts to shift that in the proposal. Ideally, all warranties will commence upon final acceptance of the project. And again, I want to go back to if you establish your requirements upfront in the RFP, you won't bogged down by trying, needing to negotiate these things later. They're already established.

Now, I do want to point out too, that many times contractors are taking the position our warranty is for one year. You do have the ability to ask for more. And it's not unfair that they provide more. Requiring warranties for commercial products that are commercially fair is important, but it does seem that contractors are driving lesser warranty periods than they give commercial customers. So, make sure in a competitive situation that the same requirement is extended to all vendors because warranties do have value. So, if you ask for one warranty period in your RFP and a vendor comes back and says, well, we can do this, we've got the best price for you, but our warranty is lower, keep in mind there's a value trade off there and you need to keep fair competition that keeps everybody on the same page. Watch out for changes to indemnities. I've seen many proposals that are eliminating indemnities entirely or last minute, last minute requests for changes by contractors that seem innocuous to the agency but actually remove significant protections. Your legal departments have done a fine job overall of drafting standard terms and conditions. If you require these within your RFP and don't change them, that's your best, your best footing. Watch out for these changes and simply don't allow them with respect to indemnities, one thing that they will do is they might remove a simple word like defend. So, instead of saying the contractor will indemnify, defend, and hold harmless the agency from all these potential damages, they will simply say, will, hold harmless the agency, and you've lost the payment for the defense.

So, watch out for these subtle changes. The biggie is limit of liability. The indemnities provided, the protections provided are only as strong as the limit of liability. And in all likelihood, at the very end, the number one thing that contractors are looking for is to reduce that limit of liability to the extent that they can. So, be on the lookout for that. Likewise, the insurance in many cases is only as good as the limit of liability. So, you might have what appears to be a $5 million piece of

insurance, but if your terms have been modified at the end such that the limit of liability isn't there, they're not accountable. So, again, the message here really is establish what you want in the RFP and do not allow variance from that. And we showed some examples in the first webinar of how that can be done and how states have done that effectively. Okay, I think we're almost at the last slide here.

Okay, a biggie is deemed acceptance. And negotiating - and, and when I say negotiating again, I mean establishing terms - effectively establishing terms and not allowing changes to those established terms is the same thing as negotiating what you want. One thing I'm seeing is that via proposals, there's negotiation happening that suddenly there's deemed acceptance. Acceptance is important. It should always be at the sole discretion of the state. Be careful not to allow for the incorporation of deemed acceptance if the state doesn't respond. Termination for convenience is required under the regulations. So, language needs to speak to that, and there need to be remedies for that.

And let's see, the last three bullets are contractual terms that provide protections that relate to high risk points of transition. Force majeure -be on the lookout in force majeure clauses. And those are the clauses that basically say that in the event that either party is unable to perform any of its obligations under the contract because of natural disaster or flood, or public enemies, acts of God, terrorism strikes, fires, et cetera, et cetera., essentially that the parties are off the hook for performance. That's, that's the force majeure clauses provide for that. But be careful because contractors will often try to remove their responsibility for their subcontractors within that clause. So, be very careful that you read those words and don't allow changes. You always want the right to direct changes, that's critical to continuity and there can always be equitable adjustment made after the fact. So, watch out for potential requests for language that void or do not, that take away or remove the right for the agency to direct changes and really secure that continuity that is essential. Next slide, please.

Okay, and this is, this is the conclusion. This, these are the takeaways from webinar part one and part two. There are three. The first is agile acquisition offers rapid response to change that can keep pace with technology while fostering innovation and continuous process improvement that are integral to CCWIS. States have not always received the anticipated results due to organizational systems designed to support traditional rather than agile procurement. But a hybrid approach, combining elements of traditional performance-based and agile acquisition can overcome challenges to achieve the intended outcomes.

Knowing what you want to buy and articulating that clearly in the contract is key to achieving the desired outcome. If using an agile process, always ensure that the contractual commitment is to produce software releases with specified features at specified time increments, working software reflecting required outcomes, not progress against a plan. And in all CCWIS contracting regardless of acquisition approach - that would be the next slide.

In all CCWIS contracting regardless of acquisition approach, the contractual foundation that is clear, unambiguous, and comprehensive with aligned requirements and measurable performance standards is essential to achieving the intended

outcomes. Strategic acquisition and planning are essential to attaining best value. Effective negotiation of terms to manage risk and change will ensure that the intended outcome is received at the price anticipated. That can be achieved by specifying requirements and the scope of work within the RFP and limiting exceptions. IT managers and program managers have the ability to streamline negotiation, make contracting faster and easier, and prepare a contractual foundation for dispute-free operations with few change order requests by developing comprehensive scope of work requirements that are incorporated into the RFP and contract to become part of the contractual agreement. And that is what we have for webinar part 1 and part 2. Phil?

Philip Breitenbucher: Yeah. Thank you, Kim. Wow, some great information you've presented to us. I just wanted to make everyone aware that we will have some additional resources available for you once we're able to post this to the website. So, you can be on the lookout for references available to the contract and procurement process that will be posted as an appendix once we are able to post this webinar. Also, procurement regulations applicable to CCWIS with identification of flow-down requirements, conditions for federal financial participation, and request for a waiver of requirements will also be available as an appendix on the website. Alright. So, this again is a chance for us to encourage some participation. We did see a few questions that have come in to the, to the Q and a function. Thank you for submitting those. You can continue to submit your questions using that Q&A or question answer feature at the top and bottom of your screen. It looks like that icon that we have to the right. Or you can also raise your hand and we can unmute you. And some of you may think well, a question comes to you right after the webinar has ended and you can either e-mail that question to CCWIS.questions@ACF.HHS.gov or you can also, of course, follow up with your analyst. And I think there was one question that did just come into the Q&A function. And I think there's one that, it looks a little specific and we're going to encourage you to take that question to your analyst to make sure that we give you the right response. So, Kim, we do have a few minutes left before we go ahead and close up. There were a couple of questions - you had talked earlier in the webinar about the contracts and maybe even RFPs sometimes say that the contractors, that it tells the contractor what they can’t do or should not do or won't do, but does not always say what they will. I was just wondering, or the question asked, could you give an example of something like that? Go ahead and unmute yourself.

Kim Bennett: Okay, here we are, sorry. Let's see, what I'm seeing in the scopes of work is much content around what the agency needs to do. I'm seeing scopes of work that if you were to bullet the responsibilities, they are far heavier on the side of what the agency is responsible for than the contractor. So, for example, the agency needs to provide its acceptance or its reasons for not accepting with a turnaround of three business days. But effectively, there's no timeframe in which the deliverable must be provided by the contractor. So, on the face of it, if you look quickly, it appears that there's a timeframe, you know, maybe the contractor has to provide it, a specific deliverable within 10 days of something else happening. But when you really read the language as, as it ends up, there's all kinds of caveats that essentially allow the contractor to not meet that timeframe. Yet the agency is still bound in many cases to timeframes that sometimes even appear almost on the edge of unachievable. I'm not sure it's

ever reasonable to guarantee that something will be turned around within three days.

So, that's what I'm seeing very consistently in the contract documents is what appears to be the contractors really driving that, how that final scope of work is, is conveyed. And so, I would just hope to convey to everybody that it doesn't need to be that way. That defining requirements in the RFP, requiring fair requirements and keeping in mind that in fact, regardless of the level of collaboration that's desired and is planned for - and collaboration is of course a good thing - the agency is still the hiring entity. And the scope of work should be affirmatively saying, the contractor will do this and they will do that. And for example, the contractors will also say in their proposals, our solution has the capacity to do this, our solution can do this, our solution can do that. Many times, the clarity is not there that the solution will do this or the solution will do that. And it's required that the solution as part of what it's going to be providing in exchange for that fixed price. It's not always clear that that's going to happen. So, hopefully that answers the question.

Philip Breitenbucher: Yeah, thank you. And I'll just, again, any of these questions and if Spencer or Nicole want to jump in, that's great, too. Just a reminder. If you use the raise hand feature, which is great, we will send you a private chat just to confirm that you actually do want to ask a question live so that way we don’t put anyone on the spot. So, thank you for monitoring your chat if you have your hand up. I think, Kim, you can take a stab at this and others, as well. It looks like we do have just a couple more minutes for questions. So, here it is. What is an example - you talked about this earlier, too, Kim - what's an example of supply-side changes in COTS that you might want to try to mitigate down the road or, or be careful about.

Kim Bennett: Okay. So, for example, a company can simply go out of business. That's right, right off the bat. What happens if your supplier goes out of business or if they're sold? So, you could develop a list of possible alternate resources. What happens if your supplier of COTS stops providing technical support to their product but the system is still dependent upon that fundamental product. So, the ways to mitigate this are simply to develop alternatives. And if there aren't enough alternatives, then maybe making a decision that that's not the way to go.

Philip Breitenbucher: Awesome. Well, thank you. Okay. I'm not seeing any other questions right now. So, I'm just going to move us forward here a bit and just kind of allow Nicole and/or Spencer both to provide some closing remarks. And I want to turn first to Nicole.

Nicole Harter-Shafer: Yeah, thanks, Phil, just thank everybody for attending today. And as always, your best source of information is your federal analyst that is working with you because they know the intricacies of your state. So, definitely reach out if you have any questions that weren't answered today or as Phil mentioned as you're thinking about the webinar, come up later for you.

Philip Breitenbucher: Awesome. Thank you, Nicole. And, Spencer did you want to add anything else?

Spencer Wilder III: Just seconding what Nicole said just thank you for attending and just make sure if there are any questions please reach out to us. That's what we do. We're here to partner with you and try to figure out the best way to use CCWIS, so feel free to reach out and ask those questions.

Philip Breitenbucher: Awesome. Well, thank you both. Thank you, Nicole. Thank you, Spencer. And again, big thanks to Kim. That was some great information that you provided. And also, we appreciate all of you participants out there and for the work you're doing on behalf of children and families. Thank you for your important work and thanks for attending our webinar today. That will conclude today's webinar. We appreciate you being here.

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