



Your Preferred Source for
IT Acquisition Across the DoD

Software Licensing: A Deep Dive in These Changing Times

AKA: Measure Twice Cut Once –

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January 25, 2012

Our Approach to this Session

1. Provide Foundational Knowledge

- ESI
- Army SPM CHES
- What is a EULA?
- EULA Overview

2. Procedural Aspects of Licensing

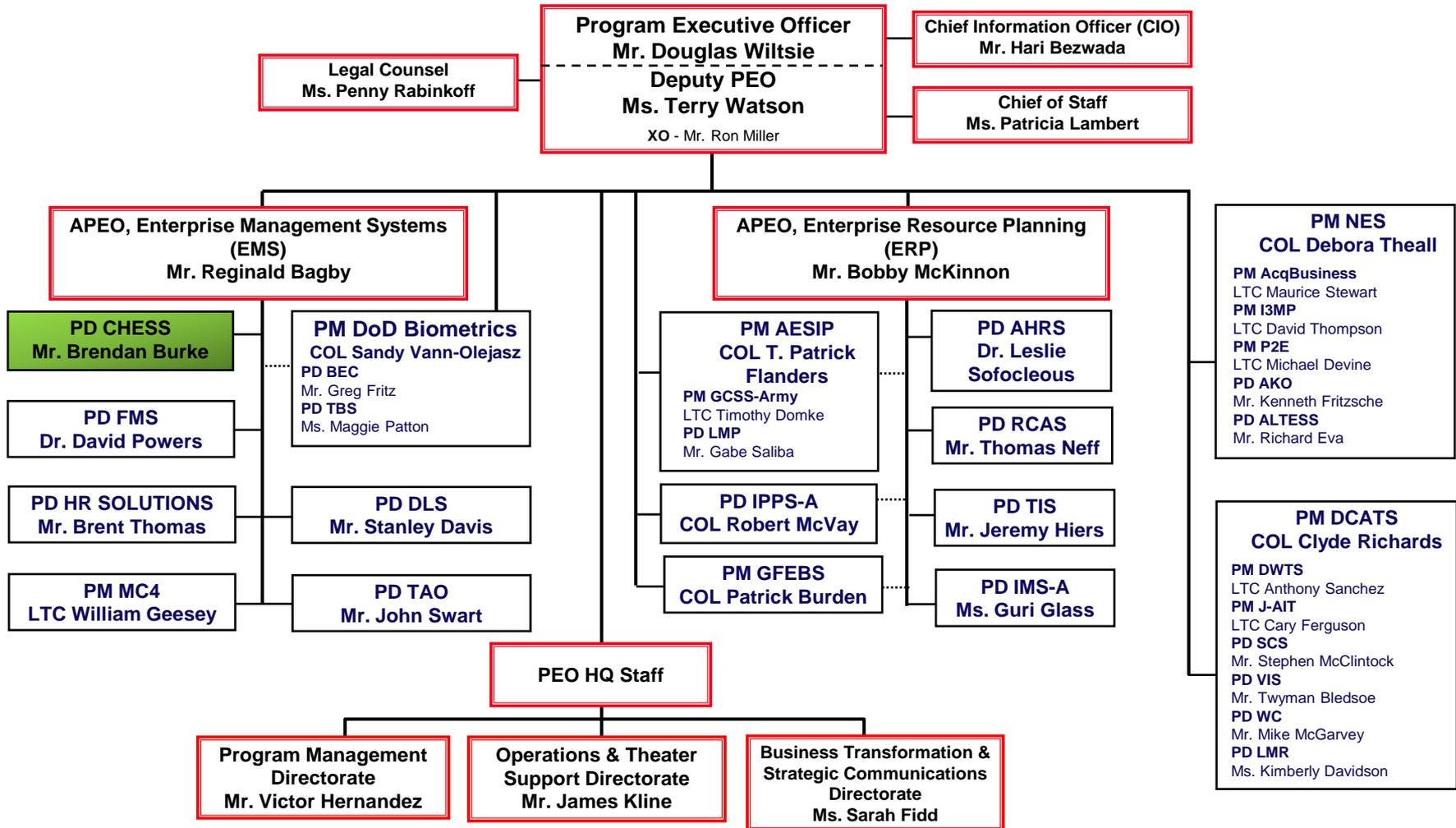
3. Structural Framework

4. Key Terms and Conditions

- Standard Publisher Starting Position
- Sample Language
- DoD Position
- Checklist

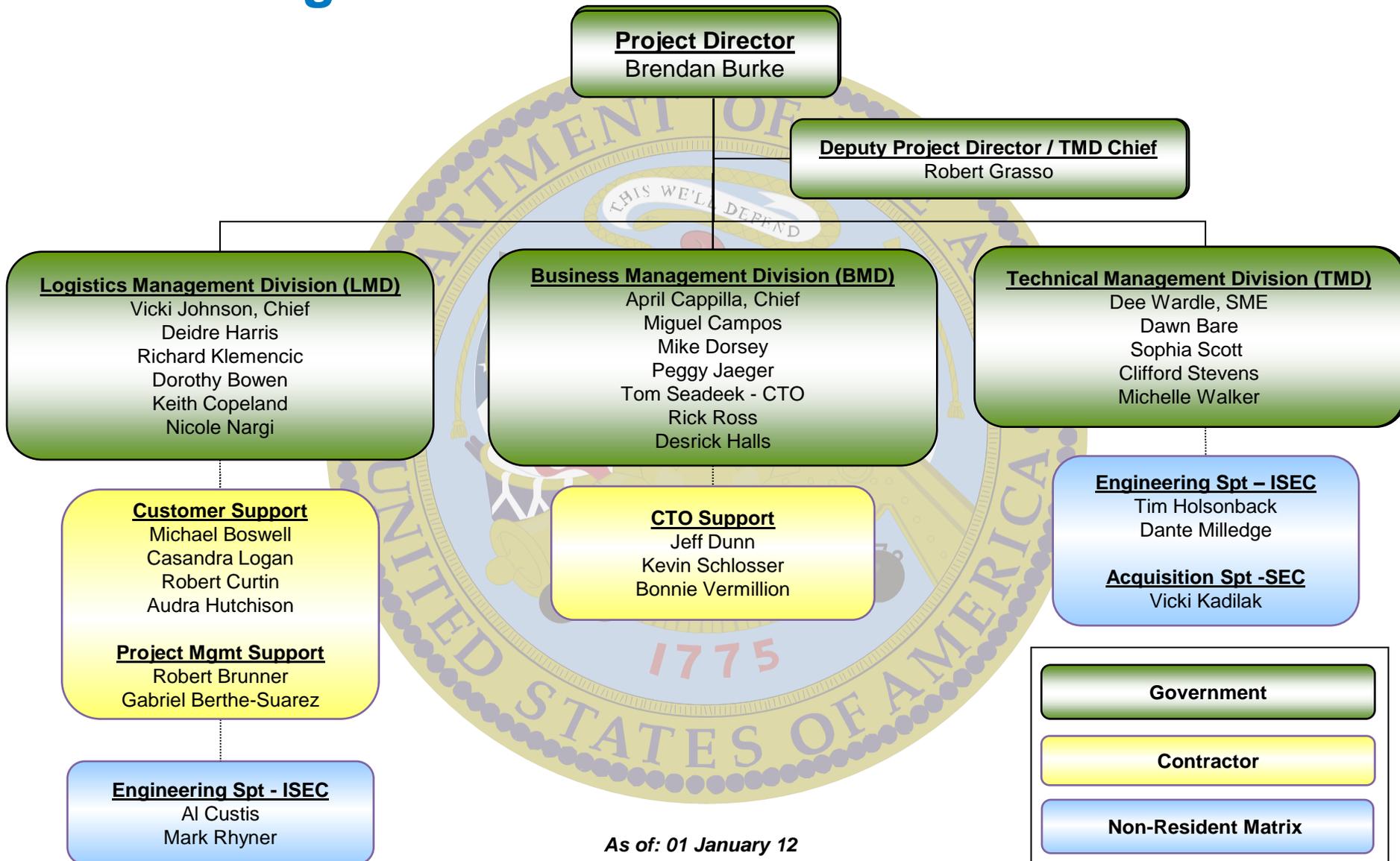


Program Executive Office Enterprise Information Systems



CHES Organizational Structure

Commercial Software Licensing:
End User License Agreements



As of: 01 January 12



Your Preferred Source for
IT Acquisition Across the DoD

What is a EULA?

- EULA means End User License Agreement
- The term “EULA” has multiple connotations for commercial software
- Other names include:
 - *Purchaser Use Rights*
 - *Software License Agreement*
 - *Software User Rights Agreement*
 - *Other*
- For this session, we will refer to EULAs as the comprehensive license agreement between the government and a Publisher or Reseller – which can extend beyond simply end user’s rights



- Commercial EULA
- GSA
- Government
- Enterprise Software Initiative (ESI) Enterprise Software Agreement (ESA) Version
- Always ask if a Government EULA is available
- Order of precedence is key



Why This Topic is Important

- Billions of dollars are invested in commercial software across the DoD
- Licensing rights are complicated and impact total cost of ownership (TCO) positively (if done right) and negatively (if done wrong)
- Agreeing to standard terms and conditions can be hazardous to your program's health and finances
- EULAs change constantly. We have to stay on top of current trends and best practices
- Consistency in our licensing approaches yields better results
- The DoD effort to function as an enterprise means we all should operate with the same commercial licensing strategies and contractual frameworks



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1. Assemble the Right Team

- Requirements personnel may understand technology but not licensing
- Requirements side may not have the enterprise perspective
- Bring contracting personnel in as early as possible

2. Define the Requirement

- What do you need to do with the software?
- Define need to manipulate data versus static data (viewing only)
- State if inward/outward sharing requirement (Netcentricity)
- Address scope of project - test and development versus full use license
- Describe your requirement – give examples and definitions to reduce ambiguity.
- Describe your customer base clearly: Government, Civilian, Military, Contractors supporting Government, non-human devices, etc.
- How many years coverage are needed?
- Has software distribution been considered?
- Is there a need for an Escrow Agreement?

3. Select Software

4. Validate Pricing

5. Document Negotiated Changes



3. Select Software

- By name vs. licensing model
- Seek advice from consultants, license experts DoD ESI Software Product Managers (SPMs), software attorney, other DoD components.
- Leverage existing contracting vehicles
- Will one product or multiple products meet the requirements?
- How will the product or vendor be determined? (get clarity on the process to decide the products to acquire).
 - Competitive -- provide technical evaluation criteria
 - Limited or sole source -- provide brand name justification

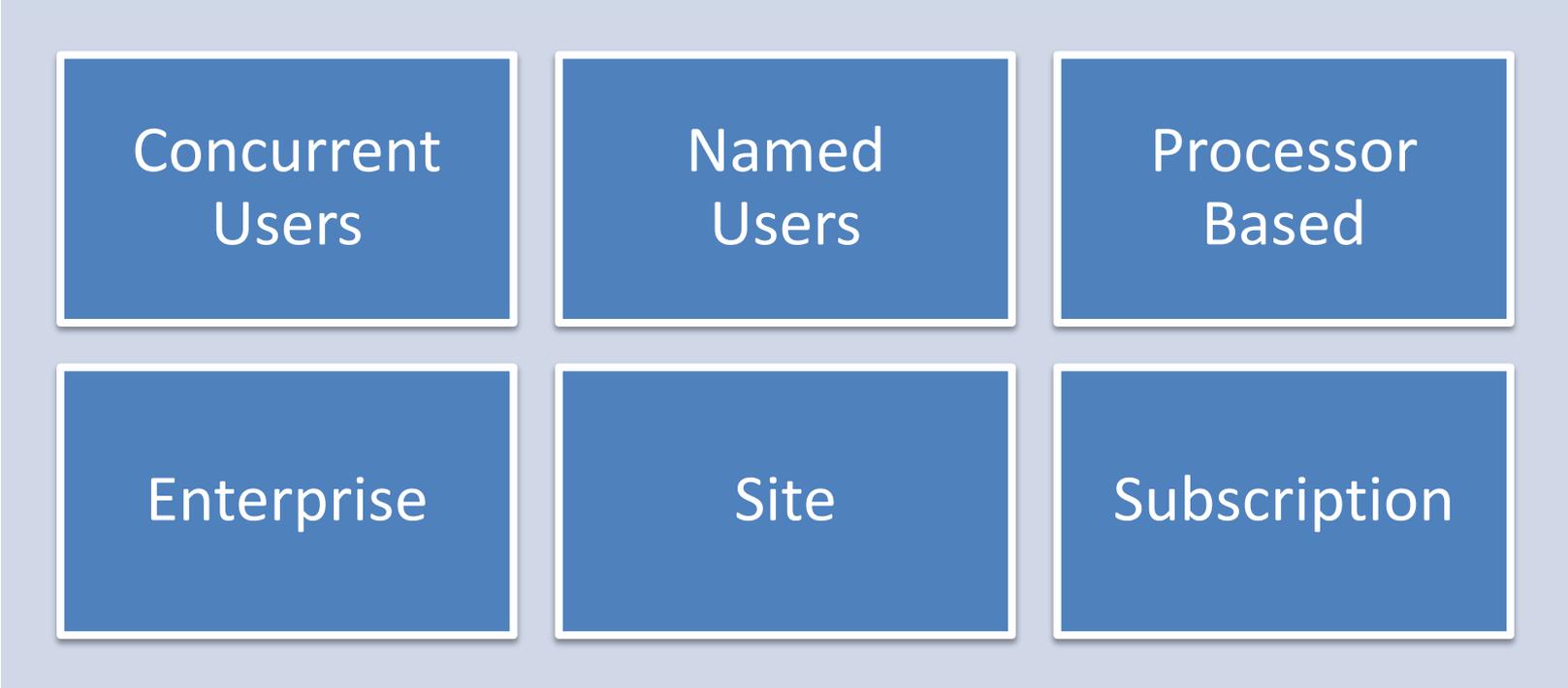
4. Validate Pricing

- Price may not be the true cost
- Best Value analysis includes, TCO, Terms & Conditions, and Price
- Obtain price estimate based on market research
- Request flat-lined maintenance
- Get the best pricing
- Conduct and consider market research findings
- Ensure discounts are appropriate for the size of the order
- Spot discounting is expected when buying large quantities
- Contact the SPM if ESI/SmartBUY is not the best value
- Ensure media is included with the license
- Consider options to fix-price future requirements
- Ensure price terms are protected under changed conditions



License Models (3.a)

3. Select Software



License Models (3.a - Further Defined)

3. Select Software

Concurrent Users

- License price is based on the maximum number of users who could be using the software at any given point in time

Named Users

- License price is based on the total number of individuals in the user population

Processor Based

- License price is based on the number of computers (CPUs) and Cores to which the software can be deployed



License Models (3.a - Further Defined)

3. Select Software

Enterprise

- License price is based on a decision to deploy the software across an entire enterprise (as defined by the customer)
- This model is used primarily with large, multi-national or global customers with large numbers of users (usually > 10,000)

Site Unlimited

- This model is used primarily with large, multi-national or global customers with large numbers of users (usually > 10,000)

Subscription

- This model calls for periodic payments instead of a lump sum payment.
- It may also be selected when a customer does not want to deploy the software within its IT environment



3. Select Software

- License Type
 - Identify how the product is licensed (named user, concurrent user, device, CPU, etc.)
 - Specify if ownership is “perpetual” versus “term”
- Use Rights
 - Identify the entities that are permitted to use the software (government and contractor)
 - Fully define terms such as: Enterprise, program, affiliate, internal use and subsidiary
 - Check for additional rights such as laptop and home use
 - Check for unusual license metrics such as use charges tied to virtual machines or remote access
 - Check for specific license restrictions such as to hardware make/model or geographic location



3. Select Software

Use Preferred Methods First

- FAR 8.002 & DFARS 208.002 specify use of Government supply sources
- Considerations most pertinent to COTS software acquisition

Inventory - check for “Inventory Box” at www.esi.mil

- ESI/SmartBUY
 - ESI specifically cited in DFARS 208.74
 - DoD SmartBUY policy memo of 22 DEC 2005
 - DoDI 5000.2, Encl. 5, para. 1.c.6
 - AFARS and AR 25-1
- GSA schedule
- Other existing contracts
- Open market



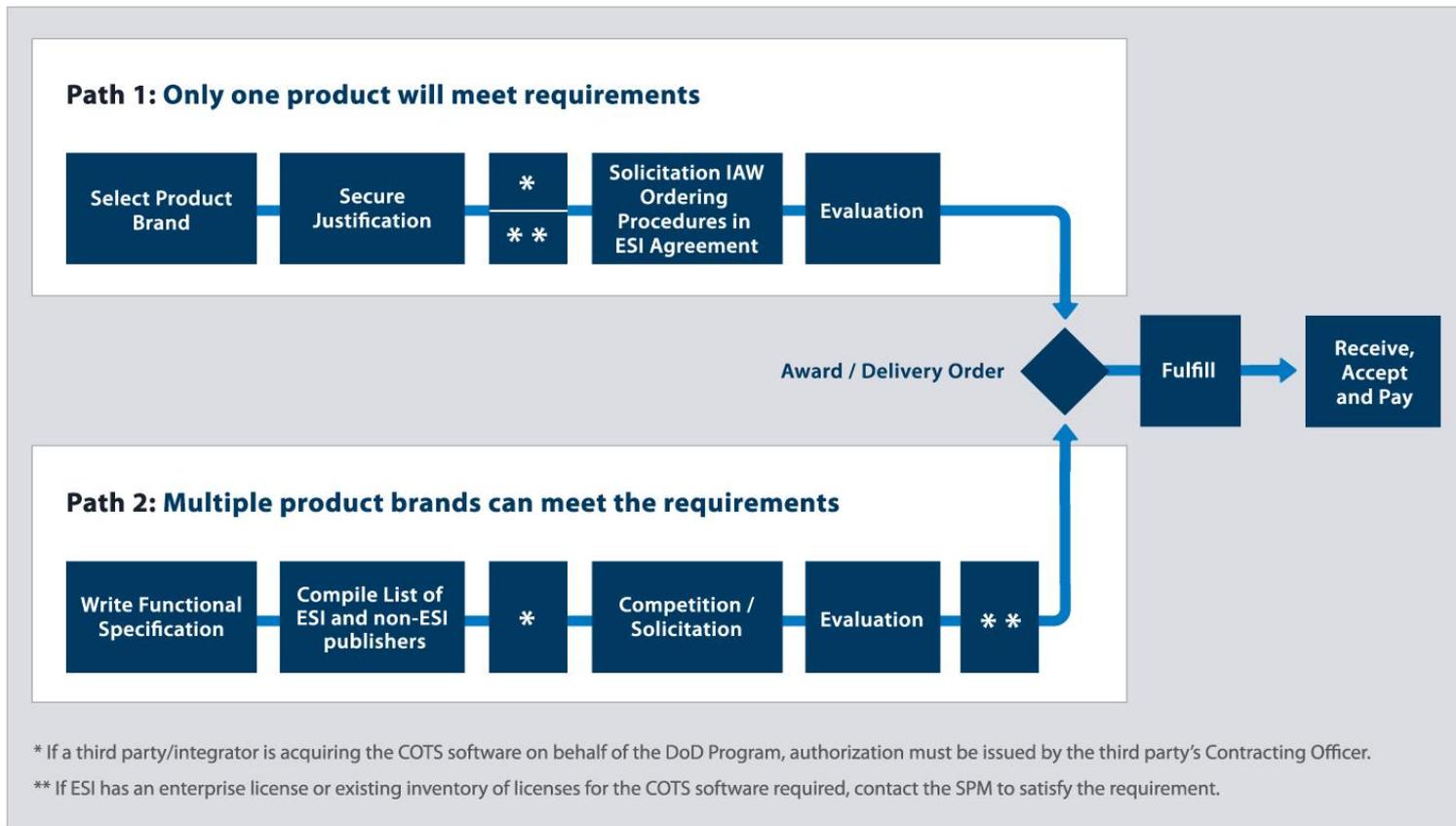
COTS Software Ordering Process

The following chart summarizes the process for a DoD Program to follow when it has been determined that:

- (a) commercial software may satisfy the DoD Program's requirement and
- (b) ESI has an agreement in place for the product(s) required.

3. Select Software

There are two basic paths that can be taken.



5. Document Negotiated Changes

- Use definitions
- Use examples to eliminate ambiguity
- Clearly define additional license rights and specify the addendum changes that are at no additional cost
- Check that a right granted in one area is not changed or removed by another provision



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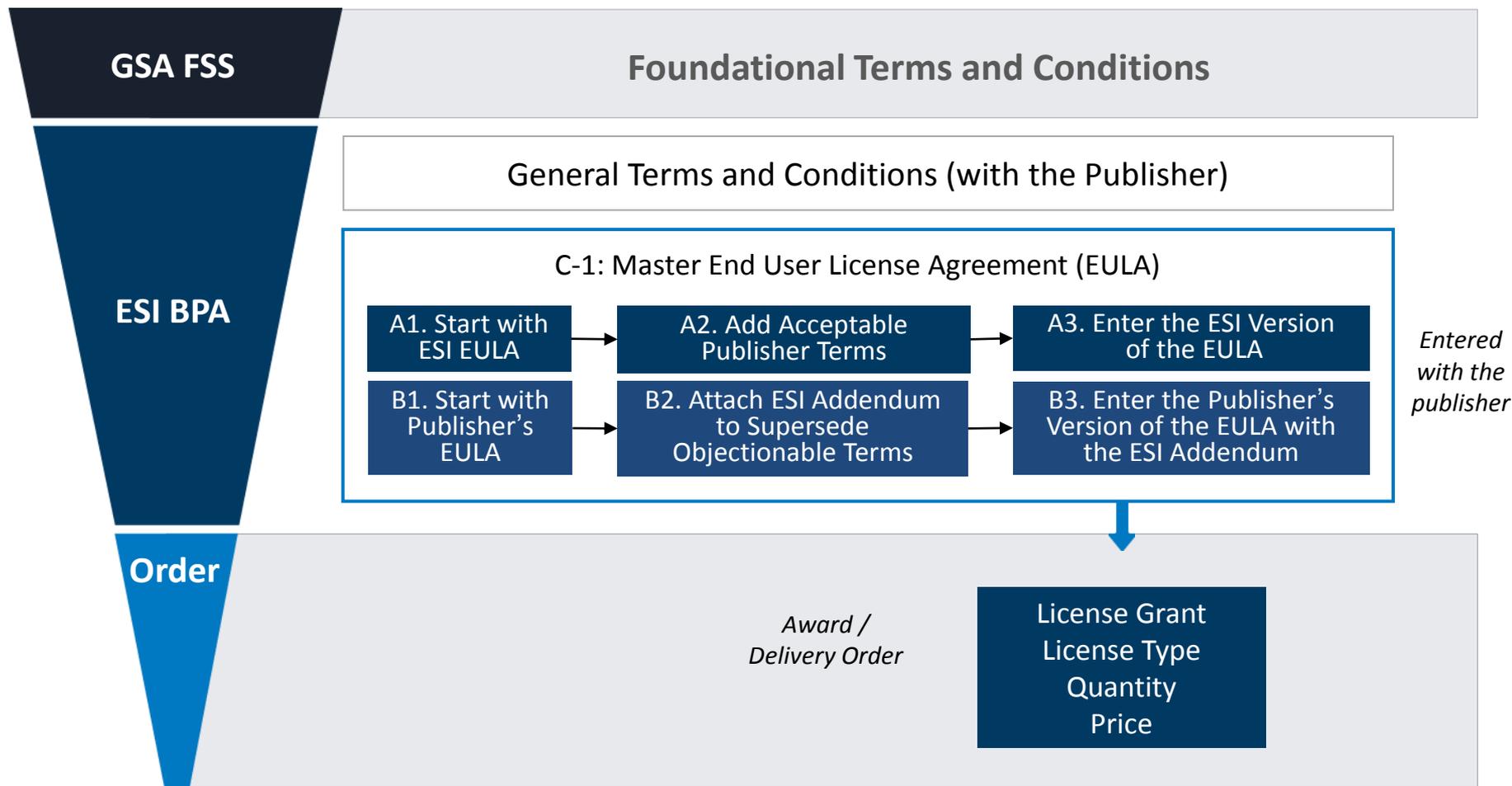
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- DoD Position
- Sample Language
- Checklist



- COTS software procurement generally involves multiple, and often conflicting, sets of Terms and Conditions (Ts & Cs)
 - *GSA schedule forms base for orders*
 - *ESI/SmartBUY agreement based on GSA schedule but with negotiated Ts & Cs*
 - *Every software publisher has a unique End User License Agreement (EULA)*
 - *Vendor (may be publisher's reseller) proposal may add additional Ts & Cs*
- DoD ESI license agreements resolve conflicts among Ts & Cs
- Especially when buying outside ESI, check EULA
 - *Check for provisions that conflict with Federal procurement laws*
 - *Check to ensure rights are clearly defined, quantifiable, predictable*



Three key components of the contractual documents involved in a COTS software license:



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1. Warranty
2. Transfer Rights
3. Third Party Software
4. Audit Rights
5. Click Wrap Licenses
6. Automatic Renewals
7. Termination Rights
8. Governing Law
9. Order of Precedence
10. Installation Restrictions
11. Virtualization
12. Maintenance / Assurance



1. WARRANTY

Publisher Position:

The Software company does not guarantee the software will work! (although most Publishers warrant the software will perform in accordance with the system documentation).

Sample Publisher Clause (Unacceptable)

[Click](#) to view a larger contract section sample

DoD Position:

Require a warranty stating the software shall meet specifications and requirements from go-live plus one year.

Sample DoD Clause (Acceptable)

[Click](#) to view a larger contract section sample

DoD Buyer Checklist

- Understand the warranty protection afforded by FAR
- Ensure the warranty begins with productive use, not with delivery
- Ensure the buyer's requirements are adequately documented



1. Sample Publisher Warranty Clause (Unacceptable)

“ YOU EXPRESSLY ACKNOWLEDGE AND AGREE THAT, TO THE EXTENT PERMITTED BY APPLICABLE LAW, **USE OF THE xxx SOFTWARE AND SERVICES IS AT YOUR SOLE RISK** AND THAT **THE ENTIRE RISK AS TO SATISFACTORY QUALITY, PERFORMANCE, ACCURACY AND EFFORT IS WITH YOU**. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, THE xxx SOFTWARE AND SERVICES PERFORMED BY THE xxx **SOFTWARE ARE PROVIDED "AS IS"** AND "AS AVAILABLE", WITH ALL FAULTS AND **WITHOUT WARRANTY OF ANY KIND**, AND xxx AND xxxxx LICENSORS (COLLECTIVELY REFERRED TO AS “xxxx” FOR THE PURPOSES. OF SECTIONS x AND x) **HEREBY DISCLAIM ALL WARRANTIES** AND CONDITIONS WITH RESPECT TO THE xxx SOFTWARE AND SERVICES, EITHER EXPRESS, IMPLIED OR STATUTORY, **INCLUDING**, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES AND/OR CONDITIONS OF MERCHANTABILITY, **SATISFACTORY QUALITY**, FITNESS FOR A PARTICULAR PURPOSE, ACCURACY, QUIET ENJOYMENT, AND **NON-INFRINGEMENT OF THIRD PARTY RIGHTS**.”

1. Sample DoD Warranty Clause (Acceptable)

SOFTWARE WARRANTY.

FAR 52.212-4(o)

The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract.

BPA

PUBLISHER WARRANTS FOR ONE (1) YEAR FROM THE DATE ON WHICH THE SOFTWARE SPECIFIED IN A DELIVERY ORDER DOCUMENT IS FIRST USED IN PRODUCTION BY DOD THAT THE SOFTWARE WILL PERFORM IN ALL MATERIAL RESPECTS THE FUNCTIONS DESCRIBED IN THE DOCUMENTATION WHEN OPERATED IN ACCORDANCE WITH (a) THE DOCUMENTATION ON A SUPPORTED PLATFORM [OR] (b) IN THE DOD REQUIREMENTS SPECIFIED IN THE DOD SOLICITATION.

2. TRANSFER RIGHTS

Publisher Position:

You may not transfer the software.

Sample Publisher Clause (Unacceptable)

xxx Software Company grants to Customer a nonexclusive and nontransferable license.

DoD Position:

Allow for software license transfer rights within the DoD.

Sample DoD Clause (Desirable)

[Click](#) to view a larger contract section sample

DoD Buyer Checklist

- Add language in the Terms and Conditions of your order with those Ts & Cs taking precedence over the EULA that allow for transfer of your licenses within an affiliate of DoD
- At a minimum, obtain transfer rights within your component (e.g. Navy)

Other Implications:

Check inventory available before licensing new software



2. Sample DoD Transfer Rights Clause (Desirable)

The Department of Defense (DoD) shall have the right, without the prior written consent of the Publisher or its Authorized Resellers, to assign, reassign, or transfer software licenses or DoD's rights in the Software to an "Affiliate" of DoD, to include any governmental organization or commercial entity that is managed, operated or controlled by the DoD.

Such authorization includes sublicensing, assignment or transfer among or between "Authorized Users". In the event an Authorized User is reorganized or restructured such that its responsibilities and operations are transferred to another DoD agency, the agency shall have the right to assign the affected program licenses to a successor. The licensed agency and the successor agency agree to be bound to this EULA. The transferee shall be bound by the license metrics and limitations in this license. DoD shall complete any required Licensor documentation required to facilitate the transfer of license and continuation of support for the transferee .

3. Third Party Software

Publisher Position:

You shall agree to third party Publisher's terms for software embedded or used with the software you are purchasing.

Sample Publisher Clause (Unacceptable)

[Click](#) to view a larger contract section sample

DoD Position:

DoD must be aware of third party software requirements embedded within the EULA and weigh the risk to their procurement.

Sample DoD Clause (Desirable)

[Click](#) to view a larger contract section sample

Other Implications:

Embedded third party software could increase the cost of procuring this software over time



3. Third Party Software (may include a Click Wrap) (Unacceptable)

- Sample EULA
 - *“For non xxx software and documentation delivered in connection with this agreement which is separately licensed by a third party. Customers rights and responsibilities with respect to such software or documentation shall be governed in accordance with the third party’s applicable software license. Customer shall, on request, enter into one or more separate “click accept” license agreements or third party license agreements as part of the installation and/or download process which shall supersede this agreement with respect to the non xxx branded software or documentation covered by such license”*
- Bottom Line: Click it you accept it and do you know what you just did? Can we say potential compliance problems!
- What do you do? Clearly understand what separate third party agreements they are referencing. Understand what those EULAs state and try to eliminate this requirement in your Terms and conditions with those taking precedence

[BACK](#)



3. Third Party Software (may include a Click Wrap) (Desirable)

- Publisher has obtained all necessary licenses for DoD to any Third Party Materials (including without limitation, all Open Source licenses) provided with each Product;
- Publisher complies with and shall continue to comply with all third party licenses (including, without limitation, all Open Source licenses) associated with any Third Party Materials provided with each Product;
- To the extent any Third Party Materials are provided with a Product, DoD's use of such Product as provided by Publisher and in accordance with this Agreement or any Delivery Orders issued hereunder will not be in conflict with any third party license requirements and will satisfy all conditions on use, modification or distribution of any such Third Party Materials without the need for any additional, unanticipated action or license fees on DoD's part;
- DoD does not and will not need to procure any rights or licenses to any patents or other third-party intellectual property rights to use as intended in this Agreement or any Delivery Orders issued hereunder the Product delivered by Publisher.

4. AUDIT RIGHTS

Publisher Position:

You shall pay for an audit and the software company can audit whenever they want.

Sample Publisher Clause (Unacceptable)

[Click](#) to view a larger contract section sample

DoD Position:

Buyer shall perform self-audits and report no more than once per year.

Sample DoD Clause (Desirable)

[Click](#) to view a larger contract section sample

DoD Buyer Checklist

- Audit clauses will be self audit clauses and not allow access to a government network without prior consent and cleared individuals
- Audit reports will not occur more than once per year
- Audit clauses may not contain language that obligates the government to pay for the audit

Other Implications:

Put in place a process for IT asset management or “True up/True down” counting system. Know how to count actual use in your organization



4. Sample Publisher Audit Clause (Unacceptable)

“You agree that xxx software company may audit your use of the Software for compliance with these terms at any time, upon reasonable notice. In the event that such audit reveals any use of the Software by you other than in full compliance with the terms of this Agreement, you shall reimburse xxx software company for all reasonable expenses related to such audit in addition to any other liabilities you may incur as a result of such non-compliance.”

“In lieu of any audit provisions in the license agreement, Licensee may perform an internal audit and will use its best efforts to keep full and accurate accounts that may be used to properly ascertain and verify numbers of licenses in use.”

At least, protect Government rights:

- Require appropriate security clearances

- Require advance notice of audit

- Remove any payment obligations

- Include confidentiality clause to preclude sharing results

5. CLICK WRAP

Publisher Position:

You shall click it and accept it.

Sample Publisher Clause (Unacceptable)

[Click](#) to view a larger contract section sample

DoD Position:

Click wrap licenses have no force or effect. The signed EULA takes precedence over any click wrap licenses.

Sample DoD Clause (Acceptable)

[Click](#) to view a larger contract section sample

DoD Buyer Checklist

- The ESI EULA includes language giving precedence of the ESI EULA over a click wrap license, thereby voiding any conflicting click wrap license terms and conditions

Other Implications:

Users can click 'accept' if necessary without jeopardizing the terms of the ESI EULA



5. Sample Publisher Click Wrap Clause (Unacceptable)

“NOTICE TO ALL USERS: PLEASE READ THIS CONTRACT CAREFULLY. BY CLICKING THE ACCEPT BUTTON OR INSTALLING THE SOFTWARE, YOU (EITHER AN INDIVIDUAL OR A SINGLE ENTITY) AGREE THAT THIS AGREEMENT IS ENFORCEABLE LIKE ANY WRITTEN CONTRACT SIGNED BY YOU. IF YOU DO NOT AGREE, CLICK ON THE BUTTON THAT INDICATES THAT YOU DO NOT ACCEPT THE TERMS OF THIS CONTRACT AND DO NOT INSTALL THE SOFTWARE. IF YOU PURCHASED THE SOFTWARE ON TANGIBLE MEDIA (e.g., CD) WITHOUT THE OPPORTUNITY TO REVIEW THIS LICENSE AND YOU DO NOT ACCEPT THIS CONTRACT, YOU MAY OBTAIN A REFUND OF THE AMOUNT YOU ORIGINALLY PAID IF YOU: (A) DO NOT USE THE SOFTWARE AND (B) RETURN IT, WITH PROOF OF PAYMENT, WITHIN THIRTY (30) DAYS OF THE PURCHASE DATE TO THE LOCATION FROM WHICH IT WAS OBTAINED.”

5. DoD Click Wrap Clause (Acceptable)

The terms and conditions of this EULA take precedence over any conflicting Publisher license terms and conditions including those found in a Publisher or Third Party Software Click Wrap license, whether presented in writing or electronically; whether presented prior to or subsequent to executing this EULA. DoD and its users shall not be bound by the terms of a Click Wrap license encountered during installation or at any time thereafter, notwithstanding DoD users clicking 'Accept' in order to continue using the Software.

Click-Wrap License Defined

- Publishers of shrink-wrap software or on-line applications generally use click-wrap licenses to obtain end user consent (*Mostly focused on consumers.*)
- When the customer is a corporation or other legal entity, there is often a negotiated written license agreement, in addition to the click-wrap license
- In some cases, “click-wrap license” and “EULA” have been used synonymously
- ESI refers to all software licenses as EULAs and refers to click-wrap licenses as one specific kind of EULA

Avoiding Conflict

- Publishers who use both EULAs and click-wrap licenses seldom change the terms of the click-wrap licenses
- Negotiated written licenses may inadvertently or purposely end up with terms contradicting the click-wrap language
- The government needs to ensure BPAs and Order documents include language voiding the terms and conditions of click-wrap licenses



6. RENEWAL RIGHTS

Publisher Position:

You shall have automatic renewals.

Sample Publisher Clause (Unacceptable)

[Click](#) to view a larger contract section sample

DoD Position:

Buyer shall not accept automatic renewal provisions.....

DoD Buyer Checklist

- Avoid automatic renewal clauses. Potential anti-deficiency issues could arise

Other Implications:

DoD needs a mechanism for alerting license holders when subscriptions or Maintenance and Support agreements are about to expire



6. Sample Publisher Renewal Clause (Unacceptable)

“Automatic renewal: Unless you terminate your software in accordance with this Agreement and the Software Purchase Agreement, xxx **software company will automatically renew your Subscription License** at the end of the agreed subscription period/term, for a like period of time, by directly charging your credit card or debiting your debit card for the then current renewal price for the Software. Any renewal term and your right to receive Software support and Software updates during a renewal term will be effective only after our receipt of the foregoing payment and conditioned upon the foregoing payment constituting and continuing to be valid and good funds. Unless and until this Agreement and your license is cancelled in accordance with the terms of this Agreement and the Software Purchase Agreement, you hereby authorize xx software company to charge your credit card (or other approved facility) to pay for the renewed subscription. If you have selected a method of payment other than credit card or debit card, your subscription will only be renewed if you provide us with a valid payment prior to the date of renewal. We will email you prior to this date to remind you to renew your account.”

Publisher Position:

You shall be terminated.

Sample Publisher Clause (Unacceptable)

[Click](#) to view a larger contract section sample

DoD Position:

Buyer shall adhere to the checklist items below.

Sample DoD Clause (Acceptable)

[Click](#) to view a larger contract section sample

DoD Buyer Checklist

- Understand the impact to software use and maintenance rights if an order is terminated without completion of expected payments
- Address retention of rights when vendors are bought by other companies or when products are re-packaged
- Beware of any clause that gives the vendor the right to terminate or limit the Government's rights upon termination

Other Implications:

Make sure all parties using the software understand how the software is to be used. Is this particular software worth the risk?



7. Sample Publisher Termination Clause (Unacceptable)

““This License is effective until terminated. Your rights under this License will terminate automatically or otherwise cease to be effective without notice from xxx software company if you fail to comply with any term(s) of this License. Upon the termination of this License, you shall cease all use of the xxx Software.”

7. Sample DoD Termination Clause (Acceptable)

FAR

FAR 52.233-1, requires the contractor to submit a claim to the contracting officer if it believes the Government to be in breach, and to continue performance during the pendency of the claim.

BPA General Ts and Cs

Effect of Termination by Contractor. Notwithstanding any termination of this Agreement by Contractor, including any Attachments to this Agreement, DOD shall have the right to continue use of any Products and Documentation that were purchased by a Delivery Order issued prior to the termination of the Agreement.

BPA Attachment C-1 EULA

Licensor may not terminate this Agreement for non-payment.

The DoD may terminate this Agreement without cause by giving Licensor thirty (30) calendar days prior written notice whenever the DoD shall determine that such termination is in the best interest of the DoD.

8. GOVERNING LAW

Publisher Position:

You shall be governed by the controlling law and jurisdiction referenced in the EULA.

Sample Publisher Clause (Unacceptable)

[Click](#) to view a larger contract section sample

DoD Position:

Federal Law shall apply and govern the terms of the software license.

Sample DoD Clause (Acceptable)

[Click](#) to view a larger contract section sample

DoD Buyer Checklist

- The terms and conditions of the EULA or the ordering documents shall reflect that federal law will apply to the government contract and therefore federal courts will have jurisdiction on disputes
- Buyers should be careful not to allow a COL provision from the Publisher. Such a provision would be invalid by law, but it could cause an unnecessary controversy with the Publisher



8. Sample Publisher Governing Law Clause (Unacceptable)

“Controlling Law, Jurisdiction: If you acquired, by reference to the address on the purchase order accepted by the Approved Source, the Software in the United States the Agreement and warranties are controlled by and construed under the laws of the State of California, United States of America”

Governed by FAR

Depending on the cause of action (e.g., tort, breach of contract, infringement of copyright or patent), both venue and the statute of limitations are usually mandated by applicable Federal law (e.g., the Federal Tort Claims Act, 28 USC 1346(b); the Contract Disputes Act, 41 USC 7101 et seq; the Tucker Act, 28 USC 1346(a)(1)). Arbitration requires prior guidance by head of agency promulgated via administrative rulemaking (5 USC 575(c)); none has been issued by GSA because GSA considers the Board of Contract Appeals to be an adequate, binding ADR alternative. These types of clauses should be deleted from Government contracts. In a narrow subset of claims where U.S. District Courts have concurrent jurisdiction with the U.S. Court of Federal Claims (generally for claims under \$10,000), it is acceptable (if otherwise in the Government's interests) to agree to venue in a U.S. District Court located in a specific state .

9. ORDER OF PRECEDENCE

Publisher Position:

You shall accept the EULA as the ruling document over the Terms and Conditions of your contract/order.

Sample Publisher Clause (Unacceptable)

[Click](#) to view a larger contract section sample

DoD Position:

DoD terms shall take precedence over any conflicting terms in a vendor's agreement.

Sample DoD Clause (Acceptable)

[Click](#) to view a larger contract section sample

DoD Buyer Checklist

- If you are not able to change the EULA, have the terms of your order take precedence over the EULA
- If you are working with a reseller, get a letter from the publisher/OEM indicating that they have agreed to this



9. Sample Publisher Order of Precedence Clause (Unacceptable)

This Agreement shall control over any additional or conflicting terms contained in a purchase order for the Software submitted by You, or contained in any Terms and Conditions submitted by You, and such additional or conflicting terms are expressly rejected unless they have been specifically accepted and agreed to in writing by xxx or its subsidiaries.

9. Sample DoD Order of Precedence Clause (Acceptable)

FAR 52.212-4(s)

Order of precedence. Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order: (1) the schedule of supplies/services; (2) the Assignments, Disputes, Payments, Invoice, Other Compliances, and Compliance with Laws Unique to Government Contracts paragraphs of this clause; (3) the clause at 52.212-5; (4) addenda to this solicitation or contract, including any license agreements for computer software; (5) solicitation provisions if this is a solicitation; (6) other paragraphs of this clause; (7) the Standard Form 1449; (8) other documents, exhibits, and attachments; and (9) the specification.

BPA – General Terms and Conditions

In the event of any inconsistency between the general terms and conditions of this Agreement and the terms and conditions of any Attachment to this Agreement, the general terms and conditions shall take precedence over the terms and conditions of any Attachment, unless the parties specifically agree in writing that a term or condition of an Attachment has precedence over the corresponding term or condition in the general terms and conditions of the BPA.

All orders placed against this BPA shall incorporate the terms and conditions of this BPA, including all Attachments. In the event of a conflict between an ordering document (including the Contractor's license, support, maintenance, or services agreements) and this BPA, the BPA shall take precedence.

10. INSTALLATION RESTRICTIONS

Publisher Position:

You shall only install the software on hardware approved by the software vendor.

Sample Publisher Clause (Unacceptable)

[Click](#) to view a larger contract section sample

DoD Position:

Be aware of restrictions since they could impose significant cost.

Other Implications:

This is a risk that you may not overcome. It should weigh on your decision to acquire the software



10. Sample Publisher Installation Restriction Clause (Unacceptable)

“Licensee agrees to install the Software only on hardware identified by Licensee pursuant to this Agreement that has been previously approved by Reseller in writing or otherwise officially made known to the public as appropriate for Use or interoperation with the Software”

11. VIRTUALIZATION

Publisher Position:

You shall buy software licenses for your virtualized hardware.

Sample Publisher Clause

[Click](#) to view a larger contract section sample

DoD Position:

Be aware of this requirement as it can impact your total cost considerably.

DoD Buyer Checklist

- Negotiate in your Terms and Conditions ratios for the virtualization
- Remember when you virtualize the hardware you still need a software license for the virtualized servers

Other Implications:

You could be non-compliant and require additional funding if larger servers are acquired without proper coordination



11. Sample Publisher Virtualization Clause

•“XXX Software is designed for use with a Windows operating system. Single-user licenses may not be installed or used in a virtualized environment in order to or in a manner that circumvents the single user license type as specified in Sections xxx and xxx herein. Not all virtualization methods may be supported. The use of licenses with virtualized environments will be at the Licensee’s own risk.”

Measure Twice Cut Once

- Use the Software Buyer's Checklist
- The government contract and delivery order terms and conditions will take precedence over the publisher's standard EULA
- If a new EULA comes out, there might be terms that try to impose the new version of the EULA when it comes into effect – this is not acceptable
- Be aware of added expense due to terms that are restrictive or need to have a certain environment or other third party products to make the software work
- Consult with your experts



Your Speakers:

- Dee Wardle, adelia.wardle@us.army.mil, 703-806-8263
- Suzi Ellison, susan.ellison@navy.mil, 619-524-9663
- Floyd Groce, floyd.groce@navy.mil, 703-695-1917

