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# SOFTWARE BUYER'S CHECKLIST

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### Checklist Purpose

The Department of Defense Enterprise Software Initiative (DoD ESI) has excelled at negotiating software licenses for commercial software applications for the DoD since 1998. DoD Information Technology (IT) buyers reduce buying cycle time and risk by using DoD ESI's contract vehicles. Throughout this checklist, we will use the term "enterprise software agreements" or "ESA" to represent the enhanced set of terms and conditions that were put in place at the time of awarding a DoD ESI contract vehicle. The terms of an ESA apply to all orders placed against the DoD ESI Contract Vehicle.

Enterprise License Agreements ("ELAs") are agreements that cover a wide scope of an enterprise and are typically built on top of the ESA terms and conditions.

This checklist was compiled to provide a standardized set of steps to follow when using the ESI ESAs and ELAs. It is not an exhaustive list and it should not be the only tool used to determine compliance with DoD acquisition regulations. It is a checklist to use as a starting point and not to replace your Procurement Office's guidance.



**II. General Services Administration (GSA) FSS and ESI BPAs / Foundational Terms and Conditions**

<b>Checklist Item</b>	<b>Guidance / Rationale</b>
<input type="checkbox"/> Gain knowledge of the GSA Federal Supply Schedule (FSS) and the ESI Blanket Purchase Agreements (BPAs) Terms and Conditions	<p>The GSA FSS and the ESI BPA are the foundational agreements for the end user license terms and conditions</p> <p>Check ESI/SmartBUY agreement to see what terms and conditions have been addressed. Some ESI/SmartBUY agreements have license addendums that revise the End User License Agreement (EULA).</p>
<input type="checkbox"/> Check for provisions that conflict with federal procurement laws.	<p>Software licensing is addressed in GSA Special Item Number (SIN) 132-33. A software EULA is a commercial document and must be scrubbed for conflicting provisions to those found in the Federal Acquisition Regulation (FAR)/DFARS commercial contract clauses.</p>
<input type="checkbox"/> Review the key negotiated terms already covered in the GSA FSS	<input type="checkbox"/> FAR 52.212 Contract Terms and Conditions – Commercial Items. <ul style="list-style-type: none"> <li><input type="checkbox"/> 52.212-4 (d) Disputes.</li> <li><input type="checkbox"/> 52.212-4 (g) Invoice.</li> <li><input type="checkbox"/> 52.212-4 (h) Patent Indemnity.</li> <li><input type="checkbox"/> 52.212-4 (i) Payment.</li> <li><input type="checkbox"/> 52.212-4 (j) Risk of Loss.</li> <li><input type="checkbox"/> 52.212-4 (l) &amp; (m) Termination.</li> <li><input type="checkbox"/> 52.212-4 (o) Warranty.</li> <li><input type="checkbox"/> 52.212-4 (p) Limitation of Liability.</li> <li><input type="checkbox"/> 52.212-4 (r) Compliance with Laws.</li> <li><input type="checkbox"/> 52.212-4 (s) Order of Precedence.</li> </ul> <input type="checkbox"/> 552.238-78 Scope of Contract. <input type="checkbox"/> C-FSS-370 Contractor Tasks/Special Requirements. <input type="checkbox"/> I-FSS-600. <input type="checkbox"/> Contract Price Lists. <input type="checkbox"/> Confidentiality. <input type="checkbox"/> No Oral Modification (NOM).

	<ul style="list-style-type: none"> <li><input type="checkbox"/> Severability.</li> <li><input type="checkbox"/> Choice of Laws (COL).</li> </ul> <p>See Attachment A for a list of terms and brief rationale for each.</p>
<ul style="list-style-type: none"> <li><input type="checkbox"/> Review the key negotiated terms already covered in the ESI BPA</li> </ul>	<p><b>General Terms and Conditions</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Introduction</li> <li><input type="checkbox"/> Funds Obligation</li> <li><input type="checkbox"/> Authorized Users</li> <li><input type="checkbox"/> Term and Survival</li> <li><input type="checkbox"/> BPA Organization</li> <li><input type="checkbox"/> Product and Service Offerings</li> <li><input type="checkbox"/> Pricing Terms</li> <li><input type="checkbox"/> Product and Pricing Data</li> <li><input type="checkbox"/> Ordering</li> <li><input type="checkbox"/> Contractor BPA Management</li> <li><input type="checkbox"/> Termination – Surviving Provisions</li> <li><input type="checkbox"/> Relationship of The Parties</li> <li><input type="checkbox"/> General Provisions</li> </ul> <p><u>Master Software License Agreement</u></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> License Assignment and Transfer</li> <li><input type="checkbox"/> Post-termination Restrictions/Reuse</li> <li><input type="checkbox"/> Audit</li> <li><input type="checkbox"/> Intellectual Property (IP) Rights and Data Ownership</li> <li><input type="checkbox"/> Functionality Protection</li> <li><input type="checkbox"/> Source Code Escrow</li> </ul> <p>See Attachment A for a complete list of terms and rationale.</p>

**III. Key Terms to be Finalized at the Time of Placing an Order**

**A. License Scope**

Checklist Item	Guidance / Rationale
<input type="checkbox"/> Contractual Parties	<input type="checkbox"/> Clearly identify the entity entering the contract and placing the order (for example, major command, executive agent, activity, budget support office (BSO), etc...)  <input type="checkbox"/> Reseller  <input type="checkbox"/> Publisher
<input type="checkbox"/> Background/Purpose	<input type="checkbox"/> Requirements / objectives to be achieved by the software  <input type="checkbox"/> Narrative explanation of why this software was selected  <input type="checkbox"/> Refer to attachments
<input type="checkbox"/> Grant of License: Product Names	<input type="checkbox"/> Define the functionality to be performed by the software selected.  <input type="checkbox"/> List and describe the license grant in detail  <input type="checkbox"/> Reference and attach vendor responses, promises, representations, product literature, specifications from web, and other documentation promoting the features and benefits of the software selected.
<input type="checkbox"/> Grant of License: Authorized Users	<input type="checkbox"/> Identify the entities and personnel that are permitted to use the software: <ul style="list-style-type: none"> <li><input type="checkbox"/> Government personnel (both Military and Civilian)</li> <li><input type="checkbox"/> Contractors / third parties (as needed)</li> <li><input type="checkbox"/> DoD, Federal Agencies etc</li> </ul> <input type="checkbox"/> Fully define the authorized user terms such as Enterprise, Program, Affiliate and Subsidiary
<input type="checkbox"/> Grant of License: Geography	<input type="checkbox"/> Default position is "world-wide use"  <input type="checkbox"/> Site licenses are limited to a geographic location and should be avoided – the right to transfer should be retained in case of Base Realignment and Closure (BRAC) or other reasons such as movement of mission from one office to another which may be located at a different geographic location

<input type="checkbox"/> Grant of License: Language	<input type="checkbox"/> Identify the language(s) required to display the user interface screen views  <input type="checkbox"/> Identify the language(s) required for documentation
<input type="checkbox"/> Grant of License: Quantity	<input type="checkbox"/> Basis for counting (named users, concurrent users, processors/cores, virtual, unlimited, enterprise, etc.)  <input type="checkbox"/> Actual quantity  <input type="checkbox"/> Number and type of copies that can be made without additional cost  <input type="checkbox"/> Retain right to self-audit (also see section III. B and Attachment F of this Checklist)
<input type="checkbox"/> Grant of License: Supported platforms	<input type="checkbox"/> Check for specific license restrictions, such as software, hardware make/model or virtualization restrictions.
<input type="checkbox"/> Hosting location	<input type="checkbox"/> On the customer's / licensee's site (on-premises)  <input type="checkbox"/> On the vendor's site (off-premises)  <input type="checkbox"/> At a Government centralized hosting facility / data center

## B. Ownership and Use Rights

Checklist Item	Guidance / Rationale
<input type="checkbox"/> Data ownership	<input type="checkbox"/> Ensure that the government owns its data at all times regardless of location, retains exclusive rights to use the data, and can receive the data from Licensor upon demand when data is in the custody of the Licensor.
<input type="checkbox"/> Rights to derivative works	<input type="checkbox"/> Derivative works language is especially important when licensing COTS software. Software solutions can include customizations, enhancements, interfaces, etc. Ensure that derivative works ownership is clearly understood from the customer's requirements.  <input type="checkbox"/> See Attachment B for a sample clause specifying government ownership of derivative works.
<input type="checkbox"/> Transfer rights	<input type="checkbox"/> Check for limitations on movement or transfer of licenses within or between components, organizations, programs, etc.  <input type="checkbox"/> See Attachment C for Sample Transfer Clause.

	<input type="checkbox"/> Consider notice requirements <input type="checkbox"/> Address software rights in the event of BRAC, merger or divestiture
<input type="checkbox"/> Temporary use of software in times of conflict	<input type="checkbox"/> See Attachment D for Sample Temporary Use of Software Clause
<input type="checkbox"/> Licenses for software evaluation	<input type="checkbox"/> See Attachment E for Sample Software Evaluation Clause
<input type="checkbox"/> Self-Audit Rights	<input type="checkbox"/> As defined by the agreed-upon terms of the software license agreement, know how to count the number of licenses ordered, received, deployed or in inventory. <input type="checkbox"/> Limit the audit to not more than once each year <input type="checkbox"/> See Attachment F for Sample Self-Audit Clause <input type="checkbox"/> See the Self-Audit Checklist for more information: <a href="http://www.esi.mil/Uploads/DoD-ESI_Self-Audit_Checklist.pdf">http://www.esi.mil/Uploads/DoD-ESI_Self-Audit_Checklist.pdf</a>
<input type="checkbox"/> If Self-Audit Rights cannot be secured, at a minimum, secure the following rights to protect the government if the publisher or a third party will perform the audit:	<input type="checkbox"/> Require appropriate security clearances <input type="checkbox"/> Require advance notice of audit <input type="checkbox"/> Remove any payment obligations <input type="checkbox"/> Require a confidentiality clause to preclude “sharing” of audit results

### C. Duration

Checklist Item	Guidance / Rationale
<input type="checkbox"/> As defined by the agreed-upon terms of the software license agreement, define the length of time you are contractually allowed to use the software and the duration of time the requirement will exist (e.g. short term or recurring)	<input type="checkbox"/> Perpetual – use forever <input type="checkbox"/> Term / Subscription – for a specific period of time with an end date <input type="checkbox"/> Location <ul style="list-style-type: none"> <li><input type="checkbox"/> On-premises</li> <li><input type="checkbox"/> Off-premises</li> <li><input type="checkbox"/> Cloud</li> <li><input type="checkbox"/> Software as a Service (SaaS)</li> </ul>
<input type="checkbox"/> Consider funding issues	Term licenses (limited to a duration of time) may necessitate the use of a different color of money than for the purchase of perpetual licenses.

**D. Permitted Use**

Checklist Item	Guidance / Rationale
<input type="checkbox"/> Understand Use Rights	<input type="checkbox"/> Address License Scope, License Use, License Type. <input type="checkbox"/> All required and anticipated uses should be included. <input type="checkbox"/> In some cases, the more general the grant, the better. <input type="checkbox"/> <i>For example, "the software can be used by Licensee for all lawful business purposes by all authorized users".</i> <input type="checkbox"/> When other uses are required, they should be enumerated. <input type="checkbox"/> <i>For example, "the software may be used for demonstration purposes to Licensee's internal and external customers".</i> <input type="checkbox"/> <i>Another example: "the software may be used for development of applications to be distributed by Licensee to authorized users and not for resale".</i> <input type="checkbox"/> Beware restrictions on use – some may prevent Licensee from intended and necessary uses. <input type="checkbox"/> <i>For example, "the software may not be used for internet transactions or access." Align language with your intended use.</i>
<input type="checkbox"/> Software distribution	<input type="checkbox"/> Address software distribution in the requirement if applicable.
<input type="checkbox"/> Hard Copy Media	<input type="checkbox"/> Is hard copy media identified and included in the purchase price?
<input type="checkbox"/> Media Copies	<input type="checkbox"/> Is there a right (free of charge) to make unlimited copies of the software for internal use in non-production instances?
<input type="checkbox"/> Electronic Distribution (to permit central distribution, user access, etc.)	<input type="checkbox"/> Is electronic download available or are there special distribution scenarios that need to be addressed in the requirement and used in the evaluation for award?
<input type="checkbox"/> Protect software investment if the software publisher changes their licensing model in the future.	<input type="checkbox"/> For example, if a software company changes its licensing model from subscription to perpetual (or vice versa), the contract price should consider a certain percentage of all amounts already paid on the existing model towards the license price for the new model.
<input type="checkbox"/> Contractor Use	
<input type="checkbox"/> Consider Outsourcing – Outsourcing permits the outsourced contractor to purchase and use software in support of the government customer.	<input type="checkbox"/> Specify who owns the licenses; government or contractor.
<input type="checkbox"/> Consider 3 <sup>rd</sup> party use – Contractors working on behalf of the government are considered 3 <sup>rd</sup> parties.	<input type="checkbox"/> Be sure that 3 <sup>rd</sup> parties have use rights when working on behalf of government or when providing services to host government owned licenses.
<input type="checkbox"/> Check for additional rights (e.g. laptop and home use)	
<input type="checkbox"/> Disaster Recovery	
<input type="checkbox"/> Test & Development	
<input type="checkbox"/> Terms for Times of Conflict	

**E. Pricing**

Checklist Item	Guidance / Rationale
<input type="checkbox"/> Clearly understand and accurately define the metric or measurement used to determine the price being charged.	<input type="checkbox"/> Identify how the product is licensed / priced: <ul style="list-style-type: none"> <li><input type="checkbox"/> Fee per Named User</li> <li><input type="checkbox"/> Fee per Concurrent User</li> <li><input type="checkbox"/> Fee per Processor / Central Processing Unit (CPU)</li> <li><input type="checkbox"/> Fee per Device</li> <li><input type="checkbox"/> Fee per Site</li> <li><input type="checkbox"/> Fee for the Enterprise</li> <li><input type="checkbox"/> Fee Formula for virtualized software – e.g. you may take the number of virtual processors supporting the Virtual Machine and divide that number by the number of cores (hyperthreading off) or threads (if hyperthreading on) per physical processor to arrive at the number of processor licenses required</li> <li><input type="checkbox"/> Make sure the terminology is clearly defined; for example, clearly define Site with appropriate provisos for BRAC, etc.— clearly define Enterprise; for example, is it a command, the entire Army, all of DoD, etc.</li> <li><input type="checkbox"/> Check for unusual license metrics, such as use charges tied to virtual machines or remote access</li> </ul>
<input type="checkbox"/> License or subscription fees	<input type="checkbox"/> Obtain most favored customer treatment. <ul style="list-style-type: none"> <li><input type="checkbox"/> Ensure you are receiving the best price received by commercial and government customers under comparable buying circumstances (e.g. similar quantities).</li> <li><input type="checkbox"/> For more information, see the GSA Acquisition Regulation section 552-238-75- Price Reduction Clause.</li> <li><input type="checkbox"/> Tie payment date to milestones where applicable</li> </ul>
<input type="checkbox"/> Have additional discounts been applied to large orders?	<input type="checkbox"/> Spot discounting from the ESI/SmartBUY/GSA price is allowable and expected when buying large quantities. <ul style="list-style-type: none"> <li><input type="checkbox"/> Most agreements require a competition at the order level so spot discounting can be obtained through the solicitation process. See Attachment G - <a href="#">Sample pricing discount table</a></li> </ul>

<ul style="list-style-type: none"> <li><input type="checkbox"/> As applicable, ensure that Best Value analysis has been performed</li> <li><input type="checkbox"/> Has the Software Product Manager (SPM) been contacted if ESI/SmartBUY is not the best value?</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> See the DoD ESI Best Value Toolkit <a href="http://www.esi.mil/bestvaluetookit/index.html">http://www.esi.mil/bestvaluetookit/index.html</a></li> <li><input type="checkbox"/> See DFARS 208.74 and follow the procedures at PGI 208.7403.</li> </ul>
<ul style="list-style-type: none"> <li><input type="checkbox"/> Lock in price for future licenses</li> <li><input type="checkbox"/> Have options been included to fix price future requirements?</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Consider the duration of the requirement. If out year coverage is needed, include options in the procurement to streamline future acquisitions and competitively secure fixed prices for known future needs.</li> </ul>
<ul style="list-style-type: none"> <li><input type="checkbox"/> Maintenance and support fees</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Rate (usually a percentage of license price) applied to the fully discounted price (not list price).</li> <li><input type="checkbox"/> Start date</li> <li><input type="checkbox"/> Is the first year of maintenance included in the license price?</li> <li><input type="checkbox"/> Escalation cap for future years. Note that different software publishers may structure prices differently. Understand what is included in the base price. Or request a structure that is suited to your requirement.</li> </ul>

## F. Warranties

Checklist Item	Guidance / Rationale
<ul style="list-style-type: none"> <li><input type="checkbox"/> COTS Software Express Product Warranties</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Software Performance               <ul style="list-style-type: none"> <li><input type="checkbox"/> Contractor's system documentation or</li> <li><input type="checkbox"/> Customer's functional and technical specifications</li> </ul> </li> <li><input type="checkbox"/> Start date and duration               <ul style="list-style-type: none"> <li><input type="checkbox"/> At delivery for Contractor standard period or</li> <li><input type="checkbox"/> At acceptance by Government or at first productive use by Contractor or Government</li> </ul> </li> <li><input type="checkbox"/> Remedies               <ul style="list-style-type: none"> <li><input type="checkbox"/> Fix bugs and defects at no charge</li> <li><input type="checkbox"/> Return for a full refund with no additional charges</li> </ul> </li> </ul>
<ul style="list-style-type: none"> <li><input type="checkbox"/> COTS Software Implied Product Warranties</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Generally disclaimed by Contractors</li> <li><input type="checkbox"/> See FAR 52.212-4 where warranty of fitness for a particular purpose is specified</li> </ul>

<input type="checkbox"/> FAR references	<input type="checkbox"/> See especially FAR Part 12 and FAR 52.212 <input type="checkbox"/> See also DoD Warranty Guide Version 1.0 dated September 2009
<input type="checkbox"/> Other Considerations	<input type="checkbox"/> Warranties from Resellers versus Publishers <input type="checkbox"/> Contractor Intellectual Property Ownership Warranty and Indemnification <input type="checkbox"/> Contractor Third Party Software Warranties <ul style="list-style-type: none"> <li><input type="checkbox"/> Complete list from Contractor</li> </ul> <input type="checkbox"/> Rights to Use <input type="checkbox"/> No additional licenses <input type="checkbox"/> No additional license fees <ul style="list-style-type: none"> <li><input type="checkbox"/> Intellectual property indemnifications</li> </ul>

## G. Maintenance

Checklist Item	Guidance / Rationale
<input type="checkbox"/> What does software maintenance include?	<input type="checkbox"/> Understand the terms of the commercial maintenance. Know your rights. Clearly define the scope of maintenance that is included in the price, including detailed Service Level Agreements for resolving software defects.
<input type="checkbox"/> Right to all minor and major releases / upgrades and patches	<input type="checkbox"/> Updates and patches may be provided as a license right and may not require purchase of maintenance. Major releases and upgrades may be considered the right to a future version of the software and therefore would be considered software maintenance.
<input type="checkbox"/> Right to future versions of software	<input type="checkbox"/> Usually considered software maintenance.
<input type="checkbox"/> Technical support	<input type="checkbox"/> Dependent on publisher. May or may not be included in maintenance.
<input type="checkbox"/> Other benefits such as Training	<input type="checkbox"/> Dependent on publisher. May or may not be included in maintenance.
<input type="checkbox"/> Is software maintenance a product or a service?	<input type="checkbox"/> GSA Schedule definitions have changed. See GSA SINs 132-33 and 132-34.
	<input type="checkbox"/> Software maintenance is often considered "product". The determination of product/service could impact the allowable contract coverage period and funding.
<input type="checkbox"/> Is the coverage period clearly defined?	
<input type="checkbox"/> Fixed term (e.g. 1 year, 3 years)	<input type="checkbox"/> Different software publishers have different maintenance coverage periods.

<input type="checkbox"/> Term based on date of order or end date.	<input type="checkbox"/> Ensure full value for full payment. Prorate prices if the maintenance term is based on a specific end date that does not accommodate a full term.
<input type="checkbox"/> Crossing fiscal years	<input type="checkbox"/> Protect against the potential funding gap when maintenance starts during a Continuing Resolution Authority.
<input type="checkbox"/> Is there an "all or none" provision?	<input type="checkbox"/> Some publishers may require all of the licensed software to be maintained, precluding the ability to reduce the quantity of software if use requirements change.
<input type="checkbox"/> Are maintenance prices reasonable and predictable?	
<input type="checkbox"/> Maintenance escalation should be capped for a number of years	<input type="checkbox"/> Contract options may be appropriate to secure an escalation cap and/or lock-in out year maintenance prices. Check current market conditions and Consumer Price Index (CPI) for escalation rates.
<input type="checkbox"/> Maintenance priced as a percentage needs clarity	<input type="checkbox"/> Maintenance percentage should be applied to the PURCHASE price. Some commercial terms will specify list or catalog price so contracts need to be explicit. Research the market for reasonable rates. What have other organizations negotiated? What are the current metrics shown in the Research and Advisory publications?
<input type="checkbox"/> Maintenance priced as a dollar amount	<input type="checkbox"/> Do a sanity check. Check the maintenance ratio to license purchase price and measure against current market conditions.
<input type="checkbox"/> Does the right to use the software terminate when payment of maintenance or support fees stops?	<input type="checkbox"/> This situation is usually associated with term type licenses; however all license and maintenance provisions must be reviewed regardless of license type.

## H. Remedies

Checklist Item	Guidance / Rationale
<input type="checkbox"/> Remedies	<input type="checkbox"/> Tie specific remedies to each category of defect that remains uncured. <ul style="list-style-type: none"> <li><input type="checkbox"/> For example, Level 3 (high priority-high impact) defects would have more extensive remedies than Level 1 (low priority-low impact) defects.</li> </ul> <input type="checkbox"/> Require sufficient price recovery for failure to cure "critical" defects. <ul style="list-style-type: none"> <li><input type="checkbox"/> Ensure the license includes a strong indemnification provision which includes replacement of infringing components or whole systems; the right to choose defense strategies; adequate notice by Licensor in the event infringement is discovered; etc.</li> </ul>

## I. General Provisions

Checklist Item	Guidance / Rationale
<input type="checkbox"/> Termination rights	Understand impact to software use and maintenance rights if order is terminated without completion of expected payments. 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.
<input type="checkbox"/> Rights of Survival clauses	
<input type="checkbox"/> Address retention of rights when vendors are bought by other companies.	Include language to ensure continued use of licensed software if a company is sold.
<input type="checkbox"/> Address repackaging of software.	Include language to ensure that there is a right to use already licensed software with no change to maintenance and support fees if the software company creates (or acquires) a substantially similar product (to the one already licensed) and markets it as a new product.
<input type="checkbox"/> Escrow agreement	Escrow is usually only applicable in critical use situations. An escrow account can be negotiated that permits customer access to the software source code under certain defined situations. Escrow agreements typically carry a small charge per year. <ul style="list-style-type: none"> <li><input type="checkbox"/> Negotiate requirements into the license purchase at no additional cost.</li> <li><input type="checkbox"/> See Attachment H: Source Code Escrow Agreement Template</li> </ul>
<input type="checkbox"/> Additional terms for consideration as appropriate	<input type="checkbox"/> Customer unique requirements such as training or development of customized reports
<input type="checkbox"/> Document negotiated changes in resultant contract	<ul style="list-style-type: none"> <li><input type="checkbox"/> Use definitions</li> <li><input type="checkbox"/> Use examples to eliminate ambiguity</li> <li><input type="checkbox"/> Clearly define additional license rights and specify the addendum changes are at no additional cost</li> <li><input type="checkbox"/> Check that a right granted in one area is not changed or removed by another provision.</li> </ul>

## IV. Regulations and Policy Guidance

<input type="checkbox"/> Applicable FAR/DFARS policies: DFARS 208.74 provides policy regarding consideration of ESI agreements
<input type="checkbox"/> DoD SmartBUY policy memo of December 22, 2005 provides guidance on the use of SmartBUY vehicles and states that SmartBUY in DoD is implemented through the ESI
<input type="checkbox"/> DoDI 5000.02, Enclosure 5 states, "When the use of commercial IT is considered viable, maximum leverage of and coordination with the DoD ESI shall be made."
<input type="checkbox"/> Section 508 of the Rehabilitation Act:
<input type="checkbox"/> Products must meet the applicable accessibility standards at 36 CFR Part 1194 as required by FAR

Case 1999-607.
<input type="checkbox"/> General information regarding the Section 508 Act can be found at the web site <a href="http://www.section508.gov">www.section508.gov</a> .
<input type="checkbox"/> DoD IT Standards Repository (DISR):
<input type="checkbox"/> The DISR is maintained by the DoD Executive Agent for IT Standards.
<input type="checkbox"/> The DoD IT standards management tool, DISRonline is available for use by CAC-equipped authorized parties and can be accessed for account requests at <a href="https://gtg.csd.disa.mil">https://gtg.csd.disa.mil</a>
<input type="checkbox"/> Internet Protocol version 6 (IPv6):
<input type="checkbox"/> Office of Management and Budget (OMB) requires that agencies enable their core networks to handle IPv6 traffic. As a part of this process, agencies must procure IPv6 compatible products.
<input type="checkbox"/> Net-Centricity:
<input type="checkbox"/> DoD is transforming the way information is managed to accelerate decision-making, improve joint warfighting and create intelligence advantages.
<input type="checkbox"/> To reach this "Net-Centric" state, DoD must exploit advancing technologies that move the enterprise from an application centric to a data-centric paradigm.
<input type="checkbox"/> OSD NII DCIO Net-Centric Checklist, located at: <a href="http://dodcio.defense.gov/Portals/0/Documents/NetCentric_Checklist_v2-1-3_.pdf">http://dodcio.defense.gov/Portals/0/Documents/NetCentric_Checklist_v2-1-3_.pdf</a> , provides information on the Net-Centric posture of their IT products and services.
<input type="checkbox"/> Common Security Configuration:
<input type="checkbox"/> OMB issued policy memorandum M-07-11, "Implementation of Commonly Accepted Security Configurations for Windows Operating Systems," which stated: "agencies with these operating systems [Windows XP and VISTA] and/or plans to upgrade to these operating systems must adopt these standard security configurations by February 1, 2008."
<input type="checkbox"/> OMB memo M-07-18, "Ensuring New Acquisitions Include Common Security Configurations," provides recommended language for agencies to use in solicitations to ensure new acquisitions include these common security configurations and IT providers certify their products operate effectively using these configurations.
<input type="checkbox"/> For more information go to <a href="http://www.csrc.nist.gov/itsec">www.csrc.nist.gov/itsec</a> .

## Support

If you have any questions about ESI, please contact the SPM or the Contracting Office assigned to the vendor or product you are seeking to acquire. Contact information is available on the ESI web site under the section titled "Ask a SPM".

[www.esi.mil](http://www.esi.mil)



**Attachment A: Terms Checklist**

The following table presents the contract terms and conditions which are provided by GSA FSS and additional terms or conditions which should be included in all ESI BPAs, orders or other contracts for software, along with a brief explanation of the term or condition and the rationale for the term.

CATEGORY NUMBER	TERM OR CONDITION	OBJECTIVE	RATIONALE/RECOMMENDATIONS	GSA	BPA	ORDER
<b>GSA TERMS AND CONDITIONS</b>						
1	FAR 52.212 Contract Terms and Conditions – Commercial Items	Specify the underlying Ts and Cs for commercial IT services and products	The FAR 52.212 series of clauses address the general contract terms and conditions for commercial items. Schedule 70 of GSA FSS addresses IT products and services.	X		
1a	52.212-4 (d) Disputes	Specify the dispute resolution mechanism.	See Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613).	X		
1b	52.212-4 (g) Invoice	Ensure invoices have all required information and meet other format requirements.	Specifies the information required for invoices.	X		
1c	52.212-4 (h) Patent Indemnity	The government should demand two types of indemnifications – 1. Indemnification against product infringement and 2.	The government’s license of the Publisher’s software carries a potential liability to other parties if it turns out the vendor does not have clear and complete IP ownership of the software. It is imperative the government receive indemnification from the vendor in	X		



## SOFTWARE BUYER'S CHECKLIST

CATEGORY NUMBER	TERM OR CONDITION	OBJECTIVE	RATIONALE/RECOMMENDATIONS	GSA	BPA	ORDER
		Indemnification against third party claims for property loss, damage, personal injuries or death caused by vendor or vendor's employees and agents.	case vendor's software infringes on IP owned by others. Additionally, the government does not want to take on liability to third parties for injuries or other damage caused by vendor. This could include, for example, a government contractor who is injured on government property by a vendor employee. The government will likely need to make these provisions mutual, as most vendors will require mutuality. The clauses proposed are intended to address this mainstream situation.*			
1d	52.212-4 (i) Payment	Ensure the requirements for payment are communicated and met.	Payment shall be made for items accepted by the ordering activity that have been delivered to the delivery destinations set forth in the contract.	X		
1e	52.212-4 (j) Risk of Loss	The government should seek to minimize risk due to loss or damage of purchased products prior to or during the delivery process.	Risk of loss rests with the Contractor until delivery to a carrier if transportation is FOB Origin or delivery to the destination specified by the ordering authority if the transportation is FOB Destination.	X		



## SOFTWARE BUYER'S CHECKLIST

CATEGORY NUMBER	TERM OR CONDITION	OBJECTIVE	RATIONALE/RECOMMENDATIONS	GSA	BPA	ORDER
1f	52.212-4 (l) & (m)Termination	The government should reserve the right to terminate for convenience. The government should not allow vendor to terminate mission critical services without government concurrence.	The two core obligations which give rise to a termination for breach are non-payment by the customer and breach of <b>warranty</b> (non-performance of product) by the vendor. These will be highlighted in the termination for breach provision. In both cases, there will be a cure period and a dispute resolution mechanism, subject to a termination for convenience provision for the government. In all cases, the government must pay for value received. In all cases, vendor must not terminate mission critical support or subscription services, subject to cure and dispute resolution for non-payment. If the government terminates for any reason, the vendor must immediately return any customer data it holds.*	X		
1g	52.212-4 (o) Warranty	The government should seek to obtain the most favorable warranty possible.	The FAR clause specifies the Contractor warrants and implies that the items delivered are merchantable and fit for use for the particular purpose described in this contract.  <b>Additional specific warranty terms regarding initiation and length are included at the order level.</b>	X		



## SOFTWARE BUYER'S CHECKLIST

CATEGORY NUMBER	TERM OR CONDITION	OBJECTIVE	RATIONALE/RECOMMENDATIONS	GSA	BPA	ORDER
1h	52.212-4 (p) Limitation of Liability	The government should have strict limits of liability to the vendor and should demand strict coverage from the vendor.	Typically the parties will mutually exclude liability for any special, incidental, indirect, consequential, exemplary or punitive damages except for obligations under indemnities, confidential information or for personal injury, death or physical damage to property. Direct damages arising from contract performance, under any legal theory, should be limited to the greater of fees paid or some dollar amount - many such contracts use \$1 million as the dollar limit.*	X		
1i	52.212-4 (r) Compliance with Laws	The government seeks to ensure all Contractors are aware of and comply with laws unique to government contracts.	This section specifies laws unique to government contracts which Contractors agree to comply with.	X		
1j	52.212-4 (s) Order of Precedence	The government should provide a mechanism for resolving inconsistencies among contract documents or laws governing government purchasing activity.	This section lists the precedence of various contracting documents and laws to resolve inconsistencies between provisions.	X		
2	552.238-78 Scope of Contract		This clause identifies those government entities which may place orders under the contract.	X		
3	C-FSS-370 Contractor Tasks/Special Requirements		This clause lists eleven Contractor special requirements including security clearances, travel, certifications, insurance, etc.	X		



## SOFTWARE BUYER'S CHECKLIST

CATEGORY NUMBER	TERM OR CONDITION	OBJECTIVE	RATIONALE/RECOMMENDATIONS	GSA	BPA	ORDER
4	I-FSS-600 Contract Price Lists		This clause provides the details for Contractor electronic contract data and the details required for price lists.	X		
5	Confidentiality		Confidentiality requirements are met by applicable law. See Far Part 3.104. Additional language can be added to the solicitation to inform all offerors and current vendors "Terms of this contract pricing may be released". This language must be approved by S70 senior management.	X		
6	No Oral Modification (NOM)	The government should not allow oral modifications to any license or other contract	The proposed clause will prohibit oral modifications and will recite the agreement to be the complete agreement between the parties.  <b>GSA: CURRENT LANGUAGE EXISTS TO STATE EVERYTHING MUST BE "WRITTEN" Clause 552.243-72 for the MAS level.</b>	X		
7	Severability	The government should allow provisions to be severable.	The proposed clause will allow unenforceable provisions to be severed and enforceable provisions to remain.*	?		
8	Choice of Laws (COL)	The government will establish the COL provisions specified in the FAR.	The FAR provisions naming appropriate administrative and other federal courts will be included.*	X		
<b>BPA TERMS AND CONDITIONS</b>						
9	Intro	Specify the BPA standard terms and conditions.	Specifies the parties and effective date.		X	



## SOFTWARE BUYER'S CHECKLIST

CATEGORY NUMBER	TERM OR CONDITION	OBJECTIVE	RATIONALE/RECOMMENDATIONS	GSA	BPA	ORDER
10	Funds Obligation	Specify the BPA standard terms and conditions.	Advises the BPA does not obligate funds.		X	
11	Authorized Users	Specify the BPA standard terms and conditions.	Identifies authorized users of the BPA.		X	
12	Term and Survival	Specify the BPA standard terms and conditions.	Sets the BPA term and identifies provisions of the BPA which survive its termination.		X	
13	BPA Organization	Specify the BPA standard terms and conditions.	Describes the organization of the BPA document into general terms and conditions and a number of attachments for the types of products and services (e.g., Software, Support Services, etc.)		X	
14	Product and Service Offerings	Specify the BPA standard terms and conditions.	Includes a table describing the various master agreement attachments in the BPA.		X	
15	Pricing Terms	Specify the BPA standard terms and conditions.	Addresses prices, additional discounts and SmartBUY.		X	
16	Product and Pricing Data	Specify the BPA standard terms and conditions.	Addresses product and pricing data submission requirements.		X	
17	Ordering	Specify the BPA standard terms and conditions.	Addresses the Ordering Guide and applicability of FARS and DFARS.		X	
18	Contractor BPA Management	Specify the BPA standard terms and conditions.	Report of Sales, PMRs, Marketing and Promotion requirements.		X	
19	Termination	Specify the BPA standard terms and conditions.	DoD reserves the right to use products beyond BPA termination.		X	



## SOFTWARE BUYER'S CHECKLIST

CATEGORY NUMBER	TERM OR CONDITION	OBJECTIVE	RATIONALE/RECOMMENDATIONS	GSA	BPA	ORDER
20	Relationship of the Parties	Specify the BPA standard terms and conditions.	Standard Far provisions establish the Contractor has an independent contractor status with the government – not an employer/employee relationship.		X	
21	General Provisions	Specify the BPA standard terms and conditions.	An assortment of standard or 'boilerplate' terms, e.g., severability.		X	
22	License Assignment and Transfer	The government should have the right to transfer licenses to 'affiliates' across the DoD enterprise.	The concepts of 'affiliate' and 'enterprise' are borrowed from the commercial world to enable DoD to transfer licenses.		X	
23	Post-termination restrictions / reuse	The government should not agree to restrict its rights to acquire and use a product competitive to Publisher's product after ceasing or terminating the use of Publisher's software.	Some vendors, usually resellers, will attempt to insert a clause in a license agreement prohibiting the government from procuring the same or similar software for some period (usually one year) after the government terminates a license. The rationale often has to do with resellers protecting themselves from losing money in long term agreements where early years of the agreement are at pricing favorable to the government. This is more common in subscription agreements than other license types. The government should never limit its ability to license competitive or similar software.		X	
24	Audit	The government must limit audit rights.	Audit is an important provision requiring special attention because it deviates from the commercial standard. DoD will not allow inspection of its internal systems, so user audits to ascertain contract compliance will rely on inspection of DoD's internal audit records.		X	



## SOFTWARE BUYER'S CHECKLIST

CATEGORY NUMBER	TERM OR CONDITION	OBJECTIVE	RATIONALE/RECOMMENDATIONS	GSA	BPA	ORDER
25	IP Rights and Data Ownership	DoD should have the right to own innovations in functionality. Data ownership must be retained.	This section addresses DoD ownership of new features suggested by DoD which are subsequently incorporated into Contractor's Programs and makes clear the Government's sole ownership and control of the Government's data.		X	
26	Functionality Protection	The government should be protected from a software company suddenly ending a set of features or functions critical to the government.	In the event the Publisher stops supporting a product or discontinues it, the Functionality Protection clause requires the software publisher to provide alternative product or functions to the government.		X	
27	Source Code Escrow	The vendor should agree to escrow its software for access by the government in certain circumstances.	<p>The government should take advantage of the broad array of software applications available in the market. Some vendors are large, some small, some have been in business for years while others are relatively new. All are subject to the financial risks of the marketplace. In many instances the government uses software for mission critical business processes and technical infrastructure, so it can't afford to lose the use of this software. In every case, the government takes a risk the software publisher will not continue in business or otherwise lose its ability to support the software or provide subscription services. An escrow agreement provides the ability to access the vendor's source code software (the human readable form before compiling or interpreting to object or machine readable code) under specified conditions (e.g., bankruptcy, other business interruptions) so the government can continue unfettered use and maintenance despite the vendor's business condition.</p> <p>One of the key elements of an escrow agreement should be the requirement for the escrowed code to be tested</p>		X	



## SOFTWARE BUYER'S CHECKLIST

CATEGORY NUMBER	TERM OR CONDITION	OBJECTIVE	RATIONALE/RECOMMENDATIONS	GSA	BPA	ORDER
			to ensure it performs as expected, thereby ensuring the software would be useful for its intended purpose if it necessary to retrieve and use it.			
<b>ORDER TERMS AND CONDITIONS</b>						
28	License grant and type	A license grant should generally provide the government with broad rights to operate, use, customize & modify the software.	<p>There are three primary types of software licenses:</p> <p>1. Perpetual; 2. Term; 3. Subscription.</p> <p>For perpetual and term licenses, the government can take physical possession of the software. In the subscription case, the Publisher sells a right to use an application hosted by the Publisher or an authorized third party for a monthly fee. License grants should provide the government unfettered rights to use the software within the boundary definition of the license. This usually includes the right to use all software capabilities, make modifications or customizations to the software and in some cases copy and distribute the software within the user population.</p>			X
29	License unit of measure		<p>There are five primary ways to define the boundaries of use: 1. Named users (each user ID is counted); 2. Concurrent users (an upper limit of user IDs can access the system at one time); 3. Processors (the number of CPUs where the software can be loaded); 4. Site licenses for use at a specific location; and, 5. Enterprise licenses for use across an enterprise, regardless of the number of users or processors.</p>			X



## SOFTWARE BUYER'S CHECKLIST

CATEGORY NUMBER	TERM OR CONDITION	OBJECTIVE	RATIONALE/RECOMMENDATIONS	GSA	BPA	ORDER
30	Product or Service Warranty	It is important for the government to maximize its warranty rights.	The start date and length of product or service warranty should be specified. With enterprise software, the start date can be negotiated because the initial use may be many months after delivery if complicated implementation is required before productive use can begin.			X
31	IP Rights	The government may want to reserve certain IP rights for custom work or the creation of derivative works by a Contractor.	Additional definitions of IP rights to derivative products and other types of IP can be defined at the order level.			X
32	Third party/Open Source Software	The government should ensure all third party and open source software is identified by the vendor and that the government's license for the vendor's software provides all rights to use, modify, customize and operate the software, including any open source or third party software.	The government must ensure it does not have to procure additional licenses or risk liability for direct or indirect infringement of third party IP. This is especially important for GPL (General Public License) software.*			X
33	Quantity		The number of users, processors, etc. (depending on unit of measure selected) must be specified.			X
34	Price		The price should be taken from the BPA attachment as a starting point. Discounts should be negotiated further.			X



\*GSA periodically updates the Schedule 70 IT Open Solicitation and related policies. IT hardware and software buyers should check the IT Schedule contract or with the DoD ESI Software Product Manager for any updates.

### **Attachment B: Derivative Works Sample Contract Language**

Licensee may create modifications, customizations or other enhancements to Licensor's software designed to work together with the software, generally referred to as "Derivative Works". In cases where Licensor's software is wholly or partly a Software Development Kit (SDK), the essence of the license agreement is to permit Licensee to create applications or other Derivative Works designed to work with Licensor's software. In recognition of Licensee's unique requirements for confidentiality and mission integrity, whether Licensee creates Derivative Works directly, through Licensor or through other third parties, whether they are "Works for Hire" or not, whether they are based on SDKs or transactional software or other types of software, Licensee shall retain all right, title and interest to such Derivative Works free of any claims by Licensor to title, restrictions on use, royalties, or other fees. Licensor has no claim to these Derivative Works and hereby covenants to keep them confidential, to not incorporate them into Licensor's products or to otherwise distribute them in whole or in part to any third party.

### **Attachment C: License Assignment and Transfer**

The Government shall have the right, without the prior written consent of the Publisher or the Reseller, to assign, reassign, or transfer software licenses or Government's rights in the Software to an "Affiliate" of the Government, to include any governmental organization or commercial entity that is managed, operated or controlled by the Government. The Government is authorized to sublicense, assign or transfer the Software or the Government's rights in the Software, and 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 Government 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 Agreement. The transferee shall be bound by the license metrics and limitations in this Agreement.



### **Attachment D: Temporary Use of Software During Times of Conflict**

During Temporary Expeditionary Deployments ("TEDs"), an enrolled affiliate during the term of this agreement may temporarily deploy and install or use on, or access from qualified desktops or servers, the, Standard Desktop Configuration, Enhanced Desktop Configuration, Enhanced Desktop with SQL Configuration, Enhanced Desktop with Enterprise CAL Configuration, or Enterprise Desktop Configuration and the additional products, all described in Attachment A (the "Software") on an unlimited number of qualified desktops or servers being used as part of the TEDs ("Temporary Use"). For purposes of this subsection, the term "Temporary Expeditionary Deployments" or "TEDs" shall refer to any number of software licensed products enrolled under this agreement which may be used at no additional cost by the DoD enrolled affiliate. The coverage will extend to deployments away from in-garrison locations (any military post or government office where troops or civilian government personnel are at a permanent location), deployment locations in support of war games, exercises, real world contingencies, and emergency situations similar to the terrorist attacks on 9/11/01 where temporary duty stations were needed due to the destruction of government offices. Each enrolled affiliate will make a record of the count of each category of license used while deployed and the period of use. After the TED and upon request, the count and duration information, but not the deployed location information, will be provided to the contractor for auditing purposes. Such Temporary Use of the software is limited to a period equal to the length of the TED or six (6) calendar months, whichever is shorter ("Temporary Use Period"), unless a different time period is agreed to in writing by the contractor. At the end of the six month period or as mutually agreed to, the DoD enrolled affiliate will provide a written certification that the licenses have either been destroyed or payment has been made under this agreement. The enrolled affiliate agrees to use the products in accordance with the terms contained in this Agreement and the applicable version of the License Agreement - Product Use Rights. If the DoD enrolled affiliate requires use of the Software beyond the Temporary Use Period and Microsoft has not approved such extended use, the enrolled affiliate shall purchase the products in accordance with the pricing terms of this Enterprise Agreement.

### **Attachment E: Licenses for Software Evaluation**

If Licensee wishes to evaluate any Software generally available from Publisher, Licensee may order trial Software which Licensee may use for trial non-production purposes only. Licensee's right to use such Software shall be at no additional charge and shall be: (i) subject to the terms of this Agreement, (ii) solely for trial, non-production purposes only, and (iii) on an "AS IS" basis, without warranties or Maintenance Services of any kind. Publisher shall specify the duration of time for the evaluation. Following the end of the evaluation period, Licensee will cease using and will delete any such trial software from its computer systems. Use of the evaluation software does not constitute an agreement to purchase the software.

### **Attachment F: Self-Audit**

Notwithstanding Publisher audit provisions or practices to the contrary, the Government is obligated to only perform an internal audit of Software use not more than once a year and will use its best efforts to keep full and accurate accounts that may be used to properly ascertain and verify numbers of licenses, users or subscription parameters in use. Upon Publisher written request, the Government may provide audit reports to Publisher from Licensee's internal audit records not more than once a year as the sole means of satisfying Publisher's requests for audit.



Attachment G: Sample pricing discount table based on Size of Order

Size of Order (List)	Potential Discount (From List)	Comments
\$1 - \$9,999	10% - 30%	GSA/ESI (Based on Qty 1)
\$10,000 - \$49,999	20% - 40%	Perhaps Better than GSA/ESI is Available
\$50,000 - \$249,999	25% - 50%	Definitely Seek Additional Discount from GSA/ESI
\$250,000 - \$999,999	35% - 60%	This will likely be a Field Sales Transaction
\$1,000,000 - \$9,999,999	45% - 75%	This is a Large Transaction for the Publisher
\$10,000,000 - \$99,999,999	60% - 90%	Significant Publisher Corporate Attention
\$100,000,000+	75% - 95%	One of the Top Publisher Transactions for Year