



SOFTWARE BUYER'S CHECKLIST

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Purpose of the Software Buyer's Checklist

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 and best practices.

This checklist was compiled as a companion to the Software Buyer's Guide and the Master Software License Agreement (MSLA) template. It provides an extremely simplified subset of steps to follow when using the ESI contract vehicles. It is not an exhaustive list and should not be the only tool used to determine compliance with DoD acquisition regulations. It is a best practice checklist to use as a starting point and not to replace your Procurement Office's guidance.

Key Definitions

Throughout this checklist, we will use the term "Enterprise Software Agreements", "ESA" or "EULA" (End User License Agreement) 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. Joint ELAs (“JELAs”) cover more than one major component in the DoD or Federal Government.

Structure of this Checklist

This checklist is arranged into four key sections. First is the Acquisition Planning section, which helps Government Buyers determine what the Government requires, what sources exist that can fulfill the Government’s requirements, how to order from DoD ESAs, and the importance of building a team during a major acquisition. Second is the Foundational terms and conditions that were put in place at the time of awarding a GSA Federal Supply Schedule and the DoD ESI Blanket Purchase Agreement (BPA). The third section contains a list of key terms and conditions that should be negotiated and finalized at the time of placing an order for software against a DoD ESI BPA. Section 4 is a summary of relevant Federal and DoD policies and regulations that should be consulted when buying commercial software.

Support

If you have any questions about ESI or this Buyer’s Checklist, please contact the SPM or the Contracting Office assigned to the vendor or product you are seeking to acquire by using the feature on the ESI web site titled “Ask an Expert”.

1. ACQUISITION PLANNING

1.1. Requirements

- Does the Government requirements documentation describe what is needed?
- Are the Government's requirements structured to determine the best solution, the correct quantity, the appropriate product and license type, the most effective acquisition approach, and the most achievable negotiation strategy?
- Has the Government produced one authoritative matrix (typically an Excel spreadsheet) that defines and catalogs all the requirements to be achieved by the software (the "Requirements Matrix")? See a sample in the Software Buyer's Guide.
- Is the Requirements Matrix attached to the solicitation package?
- Has each Seller identified which of the requirements their product will satisfy, which requirements their product will not satisfy, and if there are any hybrid answers (i.e., custom subroutine or add-on)?
- If a requirement cannot be satisfied by the Seller's product, has the Government determined the best alternative method to meet or eliminate that requirement?
- Is the Requirements Matrix attached to the contract used to order the software?
- Is the Requirements Matrix referred to in the warranty provision to commit the Seller to deliver a product that meets the Government's requirements as represented in the Requirements Matrix?
- Is the Requirements Matrix used to determine acceptance of the product during the testing phase?

1.2. Market Research

- Has the Government acquisition team performed thorough and objective market research to ensure they acquire the right product or service in the most effective and efficient manner?
- Does the market research team include the same key personnel responsible for defining and refining requirements?
- Has your market research identified just one product or many that can meet your requirements? In other words, are you competing your requirement among multiple product brands or acquiring just through one limited source?

- If multiple products will satisfy the requirements, have you identified the minimum functionality needed and the basis for selection of the product?
- If only one brand name product will satisfy the requirements, will a Limited Source Justification (LSJ) or Justification and Approval (J&A) document be required to comprehensively explain the rationale?
- Once the Commercial-off-the-Shelf (COTS) product solution has been determined, have you become familiar with the contract vehicles pertinent to COTS software acquisition and potential sources of existing DoD inventory or Enterprise License Agreement (ELA) that can be leveraged?
- Have you checked to see if an ELA exists for the products required at www.esi.mil?
- Have you checked to see if "DoD Inventory Exists" at www.esi.mil in accordance with Defense Federal Acquisition Regulation Supplement and Procedures, Guidance, and Information (DFARS PGI 208.7403)?

1.3. Ordering Process

- If market research has revealed your requirement can be fulfilled by a DoD ESI BPA, have you become familiar with the process for ordering software from them?

1.4. Team Approach

- Have you assembled a cross-disciplined team early in the acquisition life-cycle?

2. FOUNDATIONAL TERMS AND CONDITIONS

2.1. General Services Administration (GSA) Federal Supply Schedule (FSS)

- Have you reviewed the terms secured in the FSS and determined which terms and conditions you will need to enhance at the time of placing an order?

2.2. DoD ESI Blanket Purchase Agreement (BPA)

- Have you checked the ESI BPA or the applicable GSA Software Center of Excellence (SCoE) formerly SmartBUY) agreement to see which terms and conditions have been addressed and which will need to be enhanced at the time of placing your order?

3. KEY TERMS TO BE FINALIZED AT THE TIME OF PLACING AN ORDER

3.1. LICENSE GRANT

- Parties**

- Have you clearly identified all entities entering the contract, including the Government organization placing the order (for example, major command, executive agent, activity, budget support office (BSO), etc.)?
- Have you secured a written contractual commitment from the software Publisher for key promises in the license agreement?
- Have you secured an agreement from the Publisher limited to Intellectual Property (IP) related issues if the Publisher was unwilling to sign the entire license agreement?
- Have you incorporated in the license (and physically attached) the agreement between the Publisher and its Reseller where the Publisher authorizes the Reseller to make IP related promises such as extending warranties?
- Requirements**
 - Have you attached a requirements document to your order that ensures the Government is acquiring software that will most efficiently and effectively execute its missions, perform the business processes, and meet the requirements attached to the ordering document as a formal exhibit?
 - Is the requirements document written so that an unfamiliar person could read them and perform a test to determine if the software satisfies the requirements?
 - Have you included in your ordering document a narrative explanation of why this software was selected? Do you refer to attachments when you need to incorporate vital but lengthy documents?
- Product Names and Functions**
 - Are all products properly listed and functionality described in your ordering document? Are you leveraging content from market research, your RFP and the proposal response from the vendor?
 - Does your ordering document define the functionality to be performed by the software selected?
 - Have you referenced and attached the vendor's responses, promises, representations, product literature, specifications from web, and other documentation promoting the features and benefits of the software selected?
 - Does the ordering document contain adequate content that explains how the software will perform, meet the Government's requirements, and any other valuable information that you relied on during the selection process?

- Does the Seller guarantee that the products you are buying will meet your requirements?
- Does the Seller confirm that you are buying all the software you need to meet your requirements, whether it's from the Publisher or another Third Party?
- Does the ordering document clearly define the type of license or metric used to define the license type that you will be granted for the software you are acquiring?
- Can the Government use the software on any type of hardware, with any type of operating system, on any type of network and with any other type of software applications? If there are restrictions, have they been adequately defined?
- If there are restrictions on supported platforms, has the Government determined if they will incur additional cost to meet these exceptions (e.g. if you do not have the platforms cited)?
- How will you make sure the hardware team only loads this software on the supported hardware? This will prevent compliance issues.
- Duration**
 - Have you defined the length of time you are contractually allowed to use the software and the duration of time the requirement will exist (i.e. short term or recurring)?
- Permitted Use**
 - Are all required and anticipated uses authorized in the ordering document? For example, "the software can be used by Licensee for all lawful business purposes".
 - Are other uses required or limitations acceptable and enumerated properly?
 - Have you ensured that there are no clauses that unreasonably restrict your use of the software?
 - Have you ensured that there are no restrictions on your right to acquire competing products during or after the license grant period?
 - In some cases, the software acquired may be considered Government Furnished Equipment (GFE) that will be acquired by the Systems Integrator. In that case, have you ensured that the software license is owned by the Government so that operations will not be interrupted if management of the software solution needs to be transferred to a new party or Government organization?

- Authorized Users.**
 - Does the grant of the license extend to as broad a user base as possible and describe the authorized DoD or Federal entities that can use the software. (e.g. Enterprise, Program, Command)?
 - Does the list of authorized users include all types of personnel who may use the software, such as: Government personnel (both Military and Civilian), Contractors, and other third parties supporting the Government as needed?
 - Do third parties have use rights when working on behalf of the Government or when providing services to host Government-owned licenses?
 - Does the EULA not restrict the Government's right to transfer the license to any other organization within the Department of Defense – known as "Affiliates" of the original licensee?
 - Does the EULA allow for the transfer of licenses to any affiliated entity without any additional cost?
 - Is the term "affiliate" clearly but broadly defined in the Glossary attached to the MSLA (see Attachment A) and introduced in the MSLA to treat the Licensee as an enterprise that includes its affiliated organizations?
 - Does the EULA includes language that allows for changes in organizational names or the transfer of a mission to a new organization (e.g. BRAC) without hindering your right to use the software or imposing any additional cost?
 - Will a third party be hosting the software and therefore identified as an authorized user of the software license?
- Geography.**
 - Does the EULA allow the Government to use the software on a world-wide basis?
- Languages.**
 - Does the EULA identify the language(s) required for the following: The user interface screen views; Documentation; File names; Support desk personnel; Training classes.
 - Are multiple languages needed to support foreign coalition forces and authorized foreign nationals supporting the Government?
 - Have you specified that "American English" is the required language for the items listed above?

- Quantity**
 - Have you clearly defined the basis or metric for counting the number of licenses the Government may use?
 - Have you clearly defined the actual quantity the Government may use?
 - Do you have the right to make an unlimited number of copies of the software (free of charge) for internal use in non-production instances?
 - Do you have the right to create a certain number and type of copies without additional cost for disaster recovery, continuity of operations (COOP), or other risk prevention purposes?
 - Have you secured home-use rights under certain circumstances for Government employees?
 - If virtualization is going to be used by your IT department to enhance the performance of your servers have you determined if that will impact the number of licenses you need to acquire?
- Audit Rights**
 - Have you secured the standard DoD ESI clause describing the Government's self-audit procedure as the sole means for determining compliance?
- Temporary Use of Software in Times of Conflict**
 - Have you secured the right to use and deploy additional licenses to respond to emergency situations?
- Data Ownership Rights**
 - Does the EULA ensure that the Government owns all rights to its data at all times regardless of location and that it retains the exclusive rights to use the data?
 - Is the vendor prohibited from using the Government's data for any purpose other than to meet the Government's mission?
 - If you engaged a third party to host your software or entered into a SaaS (software as a service) agreement, does the EULA ensure that your data will be transferred to you or your designated resource upon your notification and that all copies will be permanently and completely removed from the Vendor's servers coincident with the transfer?

- Have you removed any clause that allows the vendor to destroy or otherwise dispose of your data if you don't take possession of it within a limited period of time?
- Derivative Works Ownership Rights**
 - Does the order clearly define who owns the rights to derivative works created from the software originally owned by the software Publisher?
 - Does the Government really need to own the derivative work or will a license to use it meet the Government's needs?
 - Was the determination as to whether a derivative work needs to be owned or not made by experts in the end user organization who know how the derivative works will be used, along with guidance from legal counsel?
 - If it is determined that a license to use a derivative work is sufficient and exclusive ownership is not required, has the Government secured the right to a "perpetual" (this is the duration of the license), "world-wide" (geography), "royalty-free" (the price) license to use the derivative work?
- Virtual De-Installation of Software**
 - Has the Government ensured it has uninterrupted use of the license and access to the software, whether it is hosted or acquired (or both) by a third party?
 - Does the Government have this uninterrupted use and access when the third party is replaced or is removed altogether?
 - Does the EULA allow for a "virtual de-install" of the software, meaning the software Publisher will not require a physical removal of their software from the hardware it is installed on, but will allow a paper change of licensee and/or hosting provider without requiring a new contract number or a new license number?
- Source Code Escrow**
 - Has the Government determined if it needs access to the Source Code developed, owned and licensed by the Publisher if the software Publisher files for bankruptcy or ceases to support the software application, for example?
 - Does the Government require the Publisher to deposit their Source Code into an escrow account managed by an independent third party?
 - Will testing be done for all software deposited by the Publisher?

- Is the Source Code Escrow Agreement written to protect the interests of the Government?

3.2. PRICING

- Total Cost of Ownership**

- Have you analyzed the Software Acquisition Price/Cost using the concept of Total Cost of Ownership (TCO) or Life Cycle Cost (LCC)? (Tools are available on www.esi.mil)
- Has a detailed TCO/LCC estimate been performed for the software acquisition?

- Financial Investment Elements in Software Acquisition**

- Have you clearly and fully defined the License or Subscription Price?
- Have you clearly and fully defined the Maintenance and Support price?
- Have you clearly and fully defined the Training and other Services price?

- Metric Used to Determine the License Price**

- Have you clearly and fully defined the metric or measurement used to determine the price being charged?

- Discounting**

- Have you obtained the maximum discount on your order?
- Have you performed benchmarking for the best price you can arrange?
- Have you contacted the DoD ESI Software Product Manager (SPM) if ESI is not the best value?

- Key Terms Related to Pricing**

- Have you secured Most Favored Customer Treatment to receive the best price by commercial and Government Customers under comparable buying circumstances (e.g. similar quantities)?
- Have you locked in the price or discount levels for additional products?
 - Have options been included to lock in a discounted price or discount levels for your life-cycle requirements?
 - Have you locked in the Maintenance Rate beyond the first year?
- Have you secured discounts on education or other services?

- Have you included 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?

3.3. WARRANTIES

- Is there an express product performance warranty in the EULA that addresses the following points?
 - Who is covered by the warranty?
 - What is covered by the warranty?
 - When does the warranty begin and how long will it be in effect?
 - What are the remedies provided for a breach of the warranty?
 - Does the EULA specify that the warranty is issued or approved by the Publisher?
- Determine the acceptability of the Publisher's standard performance warranty provision based on the type of product you are licensing.
 - Is the product a "plug and play" product that will be operational and useful by merely loading it onto a computer to get started? In this case, a standard warranty clause may typically suffice due to the low risk nature of problems.
 - Does the product require implementation, configuration, integration or other complex services before it can be used in a production environment? In this case, a standard commercial warranty clause will typically NOT suffice.
 - Does the warranty refer to the Government's written requirements directly in the EULA as a formal and incorporated attachment to the EULA?
- When does the warranty begin and how long is it in effect? (aka Duration)
 - Is the warranty duration reasonable for the type of software that you are acquiring?
 - Does the start date of the warranty commence upon your formal acceptance of the software or upon first productive use by the Government in its production environment? (which should only occur upon complete and positive testing by authorized users to determine compliance with your applicable requirements)
 - Is the warranty period for a period of time that is adequate for you to discover defects in the software?

- When a defect occurs, does the warranty provision obligate the Publisher to fix bugs and defects at no charge to the Government?
 - Are the circumstances defined where the Government is entitled to return the software for a full refund?
 - Does the EULA include language that suspends (or tolls) the warranty period while defects are being addressed?
- Does the EULA incorporate by reference the warranty provisions of FAR section 52.212-4 (o) where the warranties of merchantability and fitness for a particular purpose are specified?
- Have you removed any disclaimer language by the Publisher or the Reseller that attempts to nullify this FAR warranty provision?
- Does the warranty extend to the performance of software developed or owned by a third party other than the Publisher (third party software) that is embedded in the Publisher's software product (primary software) licensed under the EULA? (This could include proprietary or open source software.)
 - Has the Publisher provided a complete list of third party products (proprietary and open source) that are included in the product you are licensing from them?
 - Has the Publisher warranted that they have the right to use all third party software embedded in their products and that the third party software will meet the Government's stated requirements?
 - Has the Publisher indemnified the Government from any obligation to (i) enter a license with or (ii) pay any fees to any other party in order to use the software acquired in the license?
- Has the Publisher warranted that they own the software and all underlying IP without limitation and that the Publisher has the unconditional and unfettered right to license the software to the Government?
 - Has the Publisher indemnified the Government against any claims made by any party alleging that the licensed software infringes the IP rights of any such party?
 - Does the indemnification clause include provisions and processes relating to the defense of such claims, the reimbursement to the Government for any losses or expenses incurred by the Government due to any claims of infringement and the obligations of the Publisher when an infringement claim is successful?

3.4. MAINTENANCE & SUPPORT

- Does the contract define the rate (usually a percentage) you will pay applied to the fully discounted Net License Price (not list price)?
- Have you conducted market research to confirm you are getting a good price?
- Is the first year of maintenance included in the license price?
- Have you limited the amount the maintenance fee can be increased in future years?
- Have you removed the requirement that all of the licensed software must be maintained, precluding the ability to reduce the quantity of software if requirements change?
- Have you reviewed the documentation for asterisks or fine print that may change what you believe are your negotiated terms and conditions? If they exist, remove them.
- Have you selected the maintenance package that fits the Government's requirements?
- If there is an internal help desk, what are their expertise and response times? Where does the request for help go when the helpdesk or whoever provides the level one response has to elevate it to that level?
- The most important level of support is the level 3. If level 1 and 2 are unable to resolve your issue the next level has to include the Publisher. Especially if you are purchasing the software from a Reseller you need to ensure that you have the rights to reach out to the Publisher when a critical level 3 issue is identified.
- Have you ensured the maintenance coverage period is clearly defined and represents the best value for the Government, taking into account the price offered and the scope of support to be provided?
- Have you determined if the term is based on the date of order or end date? Prorate prices if the maintenance term is based on a specific end date that does not accommodate a full term.
- Does your term cross fiscal years? Protect against the potential funding gap when maintenance starts during a Continuing Resolution Authority. Did you write into your contract a clause to protect the maintenance support during a continuing resolution which could impact the mission due to delay of funding?
- Have you identified the time of day and time zone required throughout each work week for your support service?
- Based on the requirements for support beyond a standard United States time zone, did you find out where the vendor's support staff is located? The "follow the sun" support

can raise security issues for DoD. As such, the Government must be vigilant and ensure that software maintenance contracts properly comply with Trade Agreement Act and address security requirements.

- Did you identify if support must be provided only by personnel with a certain level of clearance?
- Did you enter a service level agreement (SLA) to define clear service expectations in measurable terms and set obligations for when expectations are not met (e.g. hold harmless termination rights, liquidated damages, credits, etc.)?
- Does the SLA tie specific remedies to each category of defect that remains uncured? For example, Level 3 (high priority-high impact) defects would have more extensive remedies than Level 1 (low priority-low impact) defects.
- Does your SLA include language that allows the Government to receive a sufficient refund if the Seller fails to cure “critical” defects or chronically fails to meet SLA levels?

3.5. GENERAL PROVISIONS

- Did you remove any confidentiality clause that restricts the Government from sharing pricing or other important contract or license information internally and with authorized contractor support teams?
- Did you incorporate by reference or full text, the clauses, F.S.S. contract number, and B.P.A. number in the agreement?
- Did you ensure the General Provisions include a clause specifying the relationship of the parties is that of independent contractors and not employer –employee?
- While it is not an issue to allow a survivorship clause, the Government should take care to not allow the survivorship clause to include anything that would create an Anti-Deficiency Act violation or to otherwise bind the Government unreasonably.
- The best option that should be sought by the Government Buyer is to ensure Assignments are restricted to the one allowed by FAR 52.212-4(b).
- Commercial Agreements may provide for automatic renewal at the end of the specified term unless there is affirmative termination. The Government Buyer should use the GSAR Deviation para. D. 4 to strike any such automatic renewals as they violate the Anti-Deficiency Act.
- Did you negotiate limits of liability that reasonably protect the Government against the risk of the product or service failing? Those risks might include direct costs that exceed

the price of the product or service; for example, Government costs associated with delayed or failed software implementation projects.

- Did you ensure that the negotiated limits are included in the contract terms and conditions to avoid any ambiguity?
- Did you add a clause in the Agreement declaring click-wrap or equivalent licenses to be void and unenforceable?
- Did you ensure all termination provisions are made subject to FAR?
- Is it clear that all contract disputes are subject to the Disputes Act and FAR 52.212-4(d) and the disputes process as set forth in FAR 52.233-1?
- Is it clear that the order is governed by FAR 52.233-4, which establishes that federal law applies to cases involving federal contracts and that federal courts have jurisdiction and venue over cases involving Government contracts?
- Does the Agreement cite FAR 52.212-4(s) as authoritative on the topic of order of precedence?

4. REGULATIONS AND POLICY GUIDANCE

IT Buyers should be familiar with the following regulations and policies

TITLE	LINK	WHY IT'S IMPORTANT
DFARS 208.74—Enterprise Software Agreements	www.acq.osd.mil/dpap/dars/dfars/html/current/208_74.htm	When acquiring commercial software and related services, such as software maintenance, DoD departments and agencies shall do so in accordance with DoD ESI.
DoD SmartBUY Policy Memo of December 22, 2005 (now named Software Center of Excellence).	www.acq.osd.mil/dpap/policy/policyvault/2006-0115-DPAP.pdf	When acquiring name-brand specific commercial software and related services, DoD departments and agencies shall use SmartBUY agreements (now named Software Center of Excellence).
DoDI 5000.02, Enclosure 5	www.acq.osd.mil/asda/docs/dod_instruction_operation_of_the_defense_acquisition_system.pdf	When acquiring commercial IT, Acquisition Category (ACAT)-designated programs shall maximize leverage of and coordination with the DoD ESI.
Section 508 of the Rehabilitation Act (as implemented by FAR 39.203)	www.acquisition.gov/sites/default/files/current/far/html/Subpart%2039_2.html	When acquiring commercial IT, unless an exception applies, agencies must ensure EIT acquisitions meet the applicable Section 508 standards for accessibility.
GIG Technical Guidance Federation	https://gtg.csd.disa.mil	When acquiring new or improved IT systems within DoD, anyone involved in its management, development, or acquisition should use this online repository for information related to DoD

TITLE	LINK	WHY IT'S IMPORTANT
		IT and National Security Systems (NSS) standards.
Internet Protocol version 6 (IPv6):	https://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2005/m05-22.pdf	When acquiring new IT procurements requiring IP, all products or services must be IPv6-compliant.
2014 National Defense Authorization Act Section 935	http://www.gpo.gov/fdsys/pkg/CPRT-113HPRT86280/html/CPRT-113HPRT86280.htm	When acquiring \$5 million or more per year on any particular software title, the acquiring military department shall conduct an inventory of the title. If the inventory exceeds minimum needs or if there is a discrepancy between the quantity of software licenses purchased and those in actual use, the Military Department shall balance the inventory with the needs of the Department and in accordance with the terms of any relevant contract.