



SOFTWARE BUYER'S GUIDE

October 2015

Table of Contents

Purpose of the Software Buyer's Guide

1. Acquisition Planning

- 1.1. Requirements
- 1.2. Market Research
- 1.3. Ordering Process
- 1.4. Team Approach

2. Foundational Terms and Conditions

- 2.1. General Services Administration (GSA) Federal Supply Schedule
- 2.2. DoD ESI Blanket Purchase Agreements (BPAs)

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

- 3.1. License Grant
 - 3.1.1. Parties
 - 3.1.2. Requirements
 - 3.1.3. Product Names and Functions
 - 3.1.4. Duration
 - 3.1.5. Permitted Use
 - 3.1.6. Authorized Users
 - 3.1.7. Geography
 - 3.1.8. Language
 - 3.1.9. Quantity
 - 3.1.10. Self-Audit
 - 3.1.11. Times of Conflict
 - 3.1.12. Ownership and Use Rights
- 3.2. Pricing
- 3.3. Warranties
- 3.4. Maintenance
- 3.5. General Provisions

4. Regulations and Policy Guidance

Attachments:

- A. Requirements Matrix Sample
- B. GSAR Memo July 31, 2015
- C. Sample Pricing Discount Table Based on Size of Order
- D. Master Software License Agreement Template

Purpose of the Software Buyer's Guide

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 guide was compiled to provide a standardized set of steps to follow when using the ESI contract vehicles. 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 best practices guide to use as a starting point and not to replace your Procurement Office's guidance.

Key Definitions

Throughout this guide, 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 Guide

This guide 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 Guide, 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

- 1.1.1. High quality Government requirements and securing a product that meets those requirements are often the source of significant problems in software acquisitions. If you don't know or cannot describe exactly what you need, you won't know what to buy, how to buy it, who to buy from, or how to determine if you received exactly what you paid for. This can result in inadequate competition and increased time to award due to confusion and ambiguity. Ambiguity, in turn, translates to increased risk to Sellers, which may drive up cost unnecessarily. Worse still, the software acquired may not meet the Government's needs.
- 1.1.2. The Government's requirements must be structured using a team approach (discussed further in section 1.4 below) 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.
- 1.1.3. Following a commercial best practice, the Government should produce 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 Attachment A.
- 1.1.4. The Requirements Matrix should be attached to the solicitation package. Each Seller should identify 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). It is important that the answers be reviewed carefully. If a requirement cannot be satisfied by the Seller's product, the Government will need to determine the best alternative method to meet or disregard that requirement. The Requirements Matrix should be attached to the contract used to order the software. It should be 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. The Requirements Matrix should be used to determine acceptance of the product during the testing phase.
- 1.1.5. More information about requirements gathering, definition, and management is covered in the DoD ESI video tutorials available on the ESI web site.

1.2. Market Research

- 1.2.1. When procuring any complex supplies and services, Government acquisition teams must perform thorough and objective market research to ensure they acquire the right product or service in the most effective and efficient manner. While this may sound complicated, the process is really no different than if you were buying something for yourself, like a car.

According to FAR Part 2, market research is the collection and analysis of information about capabilities within the market to satisfy agency needs. Market research is critical because it provides the foundation for all the decisions that will be made throughout the acquisition process. It can be considered the business intelligence for the acquisition team. It tells you the commercial marketplace's ability to meet your needs.

1.2.2. A team approach to market research is the most effective method to obtain the best available information. The market research team should include the same key personnel responsible for defining and refining requirements. To conduct your market research, your team needs a disciplined strategy.

1.2.3. Four-Step Approach to Market Research

1.2.3.1. Step One: Collect and Compile Basic Background Information

- 1.2.3.1.1. Review the requirement package so you can compile basic information about what you're buying. This will help you focus your attention on the particular segment of the market that offers the products or services you need.
- 1.2.3.1.2. The contracting officer will select the appropriate North American Industry Classification System (NAICS) Code in order to focus your research and assist the small business office. These codes classify business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. economy.
- 1.2.3.1.3. Your Small Business Administration Procurement Center Representative or Office of Small Business Programs use the NAICS code to advise you on the extent of small business opportunity in your requirement.
- 1.2.3.1.4. The contracting officer will also identify the appropriate Federal Product Service Code (PSC). These codes describe products, services, and research and development purchased by the Federal Government. They also indicate what was bought for each contract action reported in the Federal Procurement Data System (FPDS).
- 1.2.3.1.5. You will also need to know which DoD Supplies and Equipment (S & E) Portfolio Group your acquisition fits into. The DoD organizes its spending using a classification system based on the PSCs. The DoD's Portfolio Group Taxonomy consists of 16 portfolio groups and 70 portfolios.
- 1.2.3.1.6. All of this information will be used later in your written market research assessment or summary.

1.2.3.2. Step Two: Explain Mission Capability Fit

- 1.2.3.2.1. Provide an explanation of how the system or service you need to buy fits into your agency's mission capability and describe any special features or requirements that framed your research. The more succinctly and accurately you can explain the system and service, the easier it will be to find the best solutions.

1.2.3.3. Step Three: Develop Independent Government Cost Estimate

- 1.2.3.3.1. Develop an Independent Government Cost Estimate (IGCE). This is the estimate of the resources and price a vendor will charge in the performance of a contract. Knowing the maximum estimated value is critical because it determines the types of documents you will need to prepare and which levels of approval you must obtain during the acquisition.
- 1.2.3.3.2. See Section 3.2, Pricing, for techniques that can be employed during the development of your IGCE.

1.2.3.4. Step Four: Conduct and Document Market Research

1.2.3.4.1. Market Research Techniques

- 1.2.3.4.1.1. There are several market research techniques that acquisition teams can utilize, depending upon the complexity of the requirement. One of the simplest and most obvious methods is to review the recent market research results from other acquisition teams for similar or identical requirements. Chances are good that someone, somewhere purchased these products or services before. Another effective and familiar technique is to review vendor catalogs and industry or trade publications for a product that will meet your need. A useful, though not widely used technique, is querying the Government-wide database of ordering vehicles. This will yield reports that extract data from and provide links to FPDS. These reports for ordering vehicles can possibly be used to fulfill your requirement.
- 1.2.3.4.1.2. Additionally, the General Service Administration's (GSA) newly launched Acquisition Gateway will soon offer "best-in-class" commercial software contract vehicles as well as best practices. These are also currently available on the DoD ESI Web site. Also, GSA's Prices Paid Portal provides access to prices paid for software under various contracts across the Government. DoD ESI has collected business intelligence on software purchased through the DoD ESI since 2002. Authorized personnel can gain

access to a DoD ESI Software Product Manager and applicable data via the "Ask an Expert" feature on the DoD ESI Web site.

1.2.3.4.1.3. Other effective market research methods include contacting Government and industry experts, publishing requests for information or sources sought notices, or holding industry days or vendors conferences. These methods are typically employed for the most complex and costly acquisitions, when you are struggling with defining your requirement or making small business set-aside determinations. It is important to inform interested vendors that exchanges with industry for the purpose of market research and planning do not obligate the Government to any contractual agreement.

1.2.3.4.2. Document Results and Conclusions

1.2.3.4.2.1. As stated previously, the market research process for Government purchases and personal purchases is conceptually the same. However, there is one key difference: For a Government purchase, you have to document everything you did and learned during your market research. This is where all of your market research activities and information come together. Of course, you will want to document your research in a manner appropriate to the complexity and dollar value of the procurement.

1.2.3.4.2.2. An example of a market research report can be found embedded in DoD's Market Research Report Guide for Improving The Tradecraft In Services Acquisition:

http://www.acq.osd.mil/dpap/cpic/cp/docs/MR_report_Guide_03_MAY_2012.doc

1.2.3.4.3. At a minimum, assure that your market research documentation covers the following:

1.2.3.4.3.1. The function the product or service must do.

1.2.3.4.3.2. The performance qualities and attributes of the product or service.

1.2.3.4.3.3. Physical characteristic requirements or constraints.

1.2.3.4.3.4. Required or desired delivery schedule.

1.2.3.4.3.5. Summarize decisions that will result from your market research. For example, discuss whether there are commercial or non-developmental items available to meet your requirements and identify the value or shortcomings of each. This will form the basis of your commerciality

determination. Additionally, describe the extent to which the market offers competing solutions or whether only one source meets your needs. Finally, describe any remaining elements such as training, inspection, acceptance, and warranties.

1.2.3.4.4. Questions you may be required to answer include, but are not limited to:

1.2.3.4.4.1. Did you contact any industry experts? If so, you'll need to identify them by name and how you contacted them.

1.2.3.4.4.2. Are there any laws or regulations unique to the item being acquired? For example, if you are purchasing computer hardware as part of your software acquisition, are items available that contain recovered materials and items that are energy efficient? Are there statutory or geopolitical constraints as to where equipment, subassemblies, or spare parts may be manufactured?

1.2.3.4.4.3. What are the distribution and support capabilities of potential suppliers?

1.2.3.4.4.4. What are the sizes and types of the potential sources?

1.2.3.4.4.5. Are there standard business provisions and conditions such as terms, payment, freight, delivery, and warranties?

1.2.3.4.4.6. What is the range of prices encountered and rationale for variance?

1.2.3.4.4.7. How did you analyze your pricing data?

1.2.3.4.4.8. You will need to document how this purchase will support your agency's small business goals.

1.2.3.4.4.8.1. For example, is yours a bundled requirement?

1.2.3.4.4.8.2. Can your requirement be set-aside for a small business program?

1.2.3.4.4.8.3. You must be prepared to explain why or why not. Include the specific sources and databases you used for your conclusions. A few examples include: the System for Award Management, Federal Procurement Data System, and the Small Business Administration's Dynamic Small Business Search.

1.2.3.4.4.9. 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?

1.2.3.4.4.10. Conduct a Technical Evaluation. If multiple products will satisfy the requirements, identify the minimum functionality needed and the basis for selection of the product. It is recommended to utilize the technical staff and software Subject Matter Experts (SMEs) at this step.

1.2.3.4.4.11. Secure Brand Name Justification. If only one brand name product will satisfy the requirements, a Limited Source Justification (LSJ) or Justification and Approval (J&A) document may be required to comprehensively explain the rationale. The difference between an LSJ and a J&A is dependent on which part of the FAR you are following. If you are using GSA Schedule or a DoD ESI BPA awarded against a GSA Schedule, secure an LSJ per FAR 8.405-6. Otherwise, secure a J&A per FAR 6.302-1.

1.2.3.4.4.12. Check for Inventory or an ELA. Once the Commercial-off-the-Shelf (COTS) product solution has been determined, 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.

1.2.3.4.4.12.1. Check to see if an ELA exists for the products required. Go to www.esi.mil

1.2.3.4.4.12.2. Check 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).

1.2.4. For additional information on market research, please visit www.esi.mil to view tutorials covering market research.

1.3. Ordering Process

1.3.1. If market research has revealed your requirement can be fulfilled by a DoD ESI BPA, you should become familiar with the process for ordering software from them. There are various pathways that can be taken depending on the following core factors:

1.3.1.1. Has your market research identified just one product or many that can meet your requirements?

1.3.1.2. What is the dollar value of your order?

- 1.3.1.3. Who is the buying organization?
- 1.3.1.4. Is there an Enterprise License Agreement (ELA) or inventory for the product you are seeking to buy?
- 1.3.2. Based on the answers to the questions above, you may review the Ordering Process Roadmap available on the ESI web site and select the pathway that fits your scenario.
 - 1.3.2.1. Pathway A: Inventory is Available
 - 1.3.2.1.1. FAR 8.002 lays out the priorities for use of mandatory sources and at the very top of the list are inventories of the requiring agency or excess from other agencies. Visit www.esi.mil and type "inventory" in the search box and press "enter" to see if inventory is available for the product required. If a product inventory exists, review the contract vehicles page on the ESI web site for the Publisher, Reseller, and product information.
 - 1.3.2.1.2. Next, fulfill your requirement in accordance with the inventory owner's instructions (these vary from agency to agency). Finally, receive, accept and pay for (if applicable) your product.
 - 1.3.2.2. Pathway B: ESL or ELA is in Place & Source is Limited
 - 1.3.2.2.1. This is the pathway to follow when only one brand of product meets your requirements. There are two tracks you can follow on this pathway. The first track is if an ESL exists for the Publisher AND product needed and a class Limited Source Justification (LSJ) has been executed for your specific Publisher, product and organization. If this is true in your case, then order in accordance with the procedures in the ESL, which vary from agreement to agreement. Finally, issue the award or delivery order, fulfill or activate license, receive, accept, and pay (if required).
 - 1.3.2.2.2. The second track is if a Class LSJ or J&A does not exist for your specific Publisher, product and organization. When the ESI ordering vehicle is based off a GSA FSS, you will need to secure an LSJ, post your request for quote (RFQ) along with the LSJ to GSA eBuy. When the ESI ordering vehicle is not based off a GSA FSS, then secure a J&A and post it with the RFQ to FedBizOps. Upon receipt of quotes, evaluate the terms, conditions, and pricing. Finally, issue the award or delivery order, fulfill or activate license, receive, accept, and pay (if required).

1.3.2.3. Pathway C: Limited Source / Name Brand / Price Competition

1.3.2.3.1. Use Pathway C when only one brand of product will meet your requirements. This pathway assumes there is no LSJ covering the BPA under which you plan on placing the order. There are two tracks you can follow on this pathway, depending on the estimated dollar value of your order.

1.3.2.3.1.1. If your order is expected to be greater than \$150,000, you need to secure an LSJ, post your RFQ and LSJ to GSA eBuy, and invite all DoD ESI BPA holders who hold DoD ESI BPAs for the brand name product to submit a quote. Upon receipt of quotes, evaluate terms, conditions, and pricing. Finally, issue the award or delivery order, fulfill or activate license, receive, accept, and pay for your software.

1.3.2.3.1.2. If your order is less than \$150,000, you'll need to obtain a limited source rationale in the format prescribed by your contracting office, post your RFQ and rationale to GSA eBuy, and invite all DoD ESI BPA holders who hold DoD ESI BPAs for the brand name product to submit a quote. Upon receipt of quotes, evaluate terms, conditions, and pricing. Finally, issue the award or delivery order, fulfill or activate license, receive, accept, and pay for your software.

1.3.2.4. Pathway D: Full & Open Competition

1.3.2.4.1. When multiple brands of products will meet your requirements use Pathway D, Full & Open Competition. First, work with your acquisition team to create a functional specification document to include in an RFQ. If the estimated value of your order is more than \$150,000, post your RFQ and specification to GSA eBuy and invite all DoD ESI BPA holders to submit a quote. Upon receipt of quotes, evaluate terms, conditions, and pricing. Finally issue the award or delivery order, fulfill or activate license, receive, accept, and pay for your software.

1.3.2.4.2. If the estimated value of your order is less than \$150,000, email your RFQ and specification to all DoD ESI BPA holders. Upon receipt of quotes, evaluate terms, conditions, and pricing. Finally, issue the award or delivery order, fulfill or activate license, receive, accept, and pay for your software.

1.3.2.5. Pathway E: Pre-Competed Technical Solution

- 1.3.2.5.1. If your agency has pre-competed a technical solution, work with your acquisition team to create a functional specification document to include in your RFQ. For the purpose of this guide, a pre-competed technical solution is defined as an ordering vehicle containing products and/or services acquired under full and open competition to cover your agency or component.
- 1.3.2.5.2. Next, order in accordance with the procedures in the ESL. Upon receipt of quotes, evaluate terms, conditions, pricing then issue the award or delivery order, fulfill or activate license, receive, accept, and pay for your software.
- 1.3.2.6. Pathway F: A Third Party is Ordering on the Customer's Behalf
 - 1.3.2.6.1. Occasionally a software Systems Integrator (SI) or other contractor will be acquiring the software as part of a large-scale implementation effort. For the purpose of this white paper, a large-scale implementation effort is defined as an effort requiring more than \$150,000 in new license acquisition fees. In situations like this, the contracting officer should follow the guidance at FAR Part 51 and, if appropriate, provide the SI a Letter Authorizing Use of a Government Source of Supply (in this case, DoD ESI).
 - 1.3.2.6.2. The letter should include a clause stating the software remains Government property. The SI would then follow Modified Pathways A, B, C, D, or E and in accordance with the terms of its contract.
- 1.3.2.7. For more detailed instructions on how to order from DoD ESI, please see the Ordering Process White Paper or view the tutorials available at www.esi.mil.

1.4. Team Approach

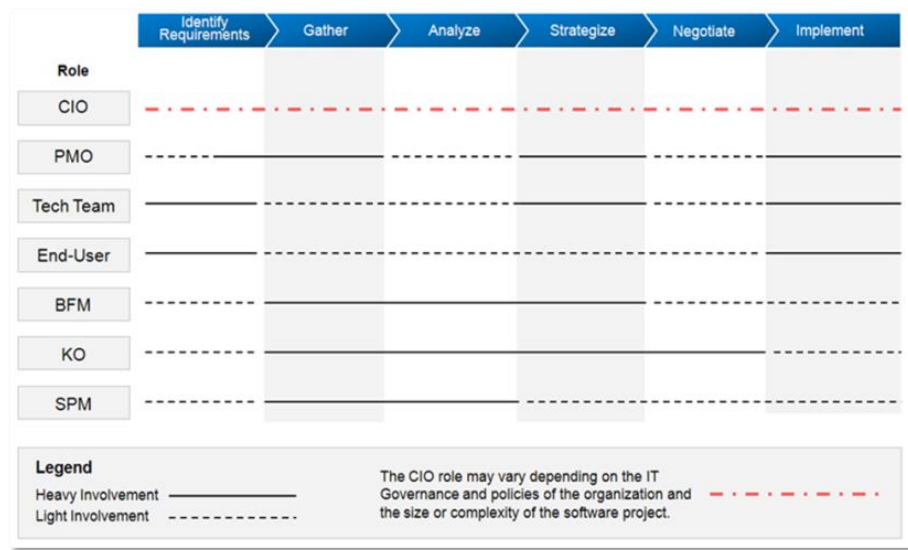
- 1.4.1. The best results in a COTS software acquisition will come from a cross-disciplined team working according to the same plan. DoD ESI recommends identifying the team early in the acquisition life-cycle. The team approach is important because, if properly composed, you will have the critical knowledge, skills, and abilities providing input into the Requirements documentation. When building a team, your initial considerations should focus on exactly which skills and experience are needed.
- 1.4.2. Sometimes all of these skills reside in Government personnel, but if necessary, contractor SMEs should be utilized. However, it is critical that the Government avoids, neutralizes, or mitigates potential conflicts of interest before awarding contracts for such services.

1.4.3. From the beginning you should establish the parameters, guidelines, and principles that will govern the team. Project Management disciplines are key to success. You should set realistic goals, hold regular meetings with concise agendas, provide regular status reports, maintain an issue tracking log, and establish a project timeline.

1.4.4. The Team Approach requires multiple acquisition disciplines. The following is a list of key roles involved throughout the acquisition process:

- 1.4.4.1. The leader of the team is the Program or Project Manager (PM), an individual from the Operations or Technical community who is responsible for successfully leading the acquisition team from requirement determination to completion.
- 1.4.4.2. A critical member of the team is the Contracting Officer, who is responsible for understanding the requirements and developing the best suited acquisition strategy to successfully obtain the required results.
- 1.4.4.3. Depending upon the size, scope, and complexity of the requirement, a representative from the organization's CIO office may join the team to ensure IT governance strategies and policies are adhered to.
- 1.4.4.4. The Contracting Officer's Representative or COR is an individual from the technical community responsible for observing and documenting contractor performance in accordance with the quality assurance surveillance plan (QASP).
- 1.4.4.5. The Software Product Manager (SPM) from DoD ESI should be leveraged at various times to gain insight into vendor and product trends and practices.
- 1.4.4.6. Rounding out your team should be representatives from the end user, Small Business, Budget, and Legal communities.

1.4.5. Each of these key personnel will have varying involvement throughout the procurement life cycle, as shown in the figure below.



2. FOUNDATIONAL TERMS AND CONDITIONS

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

2.1.1. The GSA FSS is the foundational agreement for the DoD ESI BPA and the end user license agreement (EULA) terms and conditions.

2.1.2. Software licensing is addressed in GSA Special Item Number (SIN) 132-33. A software EULA is a commercial document and must be reviewed (i.e. "scrubbed") for conflicting provisions to those found in the Federal Acquisition Regulation (FAR)/DFARS commercial contract clauses. In all cases, you should check for and nullify provisions that conflict with Federal procurement laws.

2.1.3. When GSA awarded the FSS, they did NOT negotiate all the relevant terms and conditions in the EULA. Their negotiating scope is limited to the regulatory (e.g. FAR) and statutory requirements. Therefore, it's important that you enhance certain important terms and conditions in your order that may not have been negotiated by GSA. Do not rely on GSA to have negotiated the best terms and conditions at the time the FSS was awarded.

2.1.4. You should review the terms secured in the FSS and determine which terms and conditions you will need to enhance at the time of placing an order.

2.1.5. In July 2015, a GSA Regulation (GSAR) class deviation was issued to nullify certain terms and conditions that are commonly found in a commercial supplier agreement, such as a EULA. Fifteen (15) provisions were addressed to take precedence over any conflicting term that is proposed by a vendor at any time in the acquisition life-cycle (i.e. when the FSS is awarded, when the ESI BPA is awarded, when an order is placed). The fifteen items are described more fully in the memo dated July 31, 2015 provided as Attachment B.

2.2. DoD ESI Blanket Purchase Agreement (BPA)

2.2.1. Check the ESI BPA or the applicable GSA Software Center of Excellence (SCoE) formerly SmartBUY) agreement to see which terms and conditions have been addressed. Some ESI/SCoE agreements have license addendums that revise the EULA.

2.2.2. You should review the applicable BPA and determine which terms and conditions you will need to enhance at the time of placing an order.

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

3.1. LICENSE GRANT

3.1.1. Parties

- 3.1.1.1. Clearly identify all entities entering the contract, including the Government organization placing the order (for example, major command, executive agent, activity, budget support office (BSO), etc.)
- 3.1.1.2. Whenever possible, secure a written contractual commitment from the software Publisher for key promises in the license agreement. This is known as privity, a legal concept that requires a party to be contractually bound to another party in order to have obligations enforced against that party.
- 3.1.1.3. When there is no contract between the Government and the software Publisher, the Government could be prevented from obtaining damages or other relief from the Publisher in court, causing substantial loss of value from the license. This could be the case even when the Publisher authorizes its Resellers to make promises on its behalf.
- 3.1.1.4. The best option for preventing privity from being a problem for the Government is to create privity with the Publisher for all promises in the license agreement by getting the Publisher to sign the license along with the Reseller.
- 3.1.1.5. Since the license includes a much broader set of contract promises than the Publisher may agree to, it may be easier to get an agreement from the Publisher limited to Intellectual Property (IP) related issues than to get the Publisher to sign the entire license agreement.
- 3.1.1.6. The next best option is to incorporate in the license (and physically attach) the agreement between the Publisher and its Reseller wherein the Publisher authorizes the Reseller to make IP related promises such as extending warranties.

3.1.2. Requirements

- 3.1.2.1. The Government must obtain software to efficiently and effectively execute its missions, perform the business processes, and meet the requirements attached to the ordering document as a formal exhibit. The requirements document should be written so that an unfamiliar person could read them and perform a test to determine if the software satisfies the requirements.
- 3.1.2.2. During the RFP/RFQ and proposal submission process, the Seller should provide a matrix that identifies the Government's requirements that its products will satisfy. The table shown in Attachment A (or something similar) should be used to capture the Seller's commitments to meet the Government's requirements.
- 3.1.2.3. The table in Attachment A should be included in the solicitation for the Offerors to complete as part of their proposal submission. The percentage fit of the

proposed solution should be a key evaluation factor to determine which software should be selected.

- 3.1.2.4. When using this table, be aware of the requirements where the Offeror indicates that their product cannot meet that requirement. In that case, you will need to determine how the requirement will be met or if it will be removed from your list.
- 3.1.2.5. The ordering document should include a narrative explanation of why this software was selected. Refer to attachments when you need to incorporate vital but lengthy documents.

3.1.3. Product Names and Functions

- 3.1.3.1. Ensure that all products are properly listed and functionality described in your ordering document. Leverage content gained from market research, your RFP and the proposal response from the vendor.
- 3.1.3.2. Define the functionality to be performed by the software selected. List and describe the license grant in detail. Reference and attach vendor responses, promises, representations, product literature, specifications from web, and other documentation promoting the features and benefits of the software selected.
- 3.1.3.3. The ordering document should 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. This can include marketing and sales information contained in the vendor's proposal, on its web sites or from other sources.
- 3.1.3.4. The Seller should guarantee that the products you are buying will meet your requirements. If requirements are written poorly, it could be construed against you. So, this concept only works well if your requirements have been written in an objective and independently measurable way. The Seller should also confirm that you are buying all the software you need to meet your requirements, whether it's from the Publisher or another Third Party. If the Seller fails to list all the software needed to meet your requirements, then you could seek to recover damages from them, which would be the cost of the additional software you need.
- 3.1.3.5. The ordering document should clearly define the type of license or metric used to define the license type (see section 3.2.3) that you will be granted for the software you are acquiring. If you are acquiring many different types of products under different license models in one agreement, then identify the type of license for each product in an exhibit.

- 3.1.3.6. Generally, commercial software is designed to function on many types of hardware and with Third Party software developed by other companies, such as database software. The Government should ensure they may 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.
- 3.1.3.7. Check for specific license restrictions imposed by the software Seller limiting the type of hardware on which their software will operate or requirements to only use a certain operating system or database in order for their software to operate. However, if there are limitations that the Government must adhere to, then the Seller should list them in the ordering document. If there are restrictions on supported platforms, the Government must determine if they will incur additional cost to meet these exceptions (e.g. if you do not have the platforms cited). Make sure the hardware team only loads this software on the supported hardware. This will prevent compliance issues. This also is important when you experience issues that arise under your maintenance agreement. For example, if you are running the software on an "unsupported" platform, then the maintenance obligations may not be enforceable against the Publisher.

3.1.4. Duration

- 3.1.4.1. Define 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).
- 3.1.4.2. The most common software license is a perpetual license that allows the Government to use the software in perpetuity (i.e. forever).
- 3.1.4.3. In certain circumstances, the Government may only need to use the software for a limited duration of time. If the price makes sense, then a "term" or subscription license with a fixed end date may make sense. Term licenses (limited to a duration of time), may necessitate the use of a different categorization of funds (aka color of money) than for the purchase of perpetual licenses.

3.1.5. Permitted Use

- 3.1.5.1. All required and anticipated uses should be included. In some cases, the more general the grant language, the better. For example, "the software can be used by Licensee for all lawful business purposes".
- 3.1.5.2. When other uses are required or limitations are acceptable, they should be enumerated. Examples follow:
 - 3.1.5.2.1. "The software may be used for demonstration purposes to Licensee's internal and external Customers".

- 3.1.5.2.2. “The software may be used for testing and development of applications to be distributed by Licensee to authorized users and not for resale”.
- 3.1.5.2.3. “The License is hereby granted at no charge to allow the Licensee to perform an evaluation of the software and for no other reason”.
- 3.1.5.3. Beware of restrictions on use. Some clauses proposed by vendors may prevent the Licensee from intended and necessary uses. For example, avoid clauses such as: “the software may not be used for internet transactions or access.”
- 3.1.5.4. Product Substitution / Reuse Clause
 - 3.1.5.4.1. In certain license agreements, software Sellers try to prohibit the Government from buying a competing product after the license expires or terminates. The clause to look for is sometimes called “Substitution or Reuse”, “Product Substitution”, “Non-Substitution”, or just “Reuse”. Sometimes the language is inserted into an agreement with no title at all or it is placed somewhere in the option year clauses of multi-year agreements. At first glance, you might think the clause sets forth the Seller’s right to substitute or replace one of its products with another newer product – or that it might specify the Government’s right to reuse the Seller’s product after the end of the agreement. That is not the case. The titles do not fully describe the intended purpose of the language in the clause – language that is designed to prohibit the purchase of any product that competes with the vendor’s product for a stated period of time.
 - 3.1.5.4.2. There currently is no known Federal law or Federal Acquisition Regulation (FAR) provision prohibiting such a clause. Therefore, you could find that a “Substitution and Reuse” clause in your agreement might be upheld by a court. That possibility should be avoided by striking the clause from any agreement for hardware or software.
- 3.1.5.5. Periodically, the Government may seek to acquire a complete operational software solution that includes the software license and the services required to implement and integrate the software. The operational solution may then be managed by a third party Systems Integrator (SI). In some cases, the software may be considered Government Furnished Equipment (GFE) that will be acquired by the SI. In that case, the software license should be 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.

- 3.1.5.6. Refer to the Virtual De-Installation section 3.1.12.3 to address the third party Vendor's obligation to remove the Government's data and the software licenses from the third party's servers.

3.1.6. Authorized Users.

- 3.1.6.1. The grant of the license should 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).
- 3.1.6.2. The list of authorized users should include the type 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. Be sure that third parties have use rights when working on behalf of the Government or when providing services to host Government-owned licenses.
- 3.1.6.3. A preferred definition may be used to not limit the description of specific positions or titles and merely indicate that all personnel who support the Government's mission may use the software, subject to the quantity of licenses that are granted.
- 3.1.6.4. The EULA should 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. See the MSLA template for a sample Transfer Right clause and for a definition of "Affiliate".
- 3.1.6.5. The Government should secure the right to transfer any or all of the licenses to any "affiliated" organization within the DoD. This occurs in the commercial industry by granting the license to "entity x and any affiliate of entity x".
- 3.1.6.6. The best practice clause suggested by DoD ESI mirrors a typical commercial software license issued to a company with many operating divisions or companies. The concept of "affiliate" is used to represent a company that may be owned or controlled by the original licensee. This clause allows for the transfer of licenses to any affiliated entity without any additional cost. The term "affiliate" should be clearly but broadly defined in the Glossary attached to the MSLA (see Attachment A) and is introduced in the MSLA to treat the Licensee as an enterprise that includes its affiliated organizations.
- 3.1.6.7. Ensure that 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.

3.1.6.8. Determine if a third party will be hosting the software and therefore must be identified as an authorized user of the software license.

3.1.7. Geography. Identify the geographic location where the Government may use the software.

3.1.7.1. The default position and standard clause should allow use of the software on a world-wide basis. Only in certain exceptional circumstances should the geographic location be limited.

3.1.7.2. Site licenses are limited to a geographic location and should be avoided. The right to transfer licenses 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 moved to a different geographic location.

3.1.8. Languages. Identify the language(s) required for the following:

3.1.8.1. The user interface screen views;

3.1.8.2. Documentation;

3.1.8.3. File names;

3.1.8.4. Support desk personnel;

3.1.8.5. Training classes.

3.1.8.6. Note: Multiple languages may be needed to support foreign coalition forces and authorized foreign nationals supporting the Government. Be sure to specify that "American English" is the required language for the items listed above.

3.1.9. Quantity

3.1.9.1. Clearly define the basis or metric for counting the number of licenses the Government may use. (Refer to the license metric type section (3.2.3 Metric Used to Determine the License Price) to review definitions of named users, concurrent users, processors/cores, virtual, unlimited, enterprise, etc.)

3.1.9.2. Clearly define the actual quantity the Government may use.

3.1.9.3. Ensure that you have the right to make an unlimited number of copies of the software (free of charge) for internal use in non-production instances. Copies would not be distributed in quantity beyond the number of licenses actually paid for.

- 3.1.9.4. Ensure the Government has 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. You may need to secure home-use rights under certain circumstances for Government employees.
- 3.1.9.5. Determine if virtualization is going to be used by your IT department to enhance the performance of your servers and whether that will impact the number of licenses you need to acquire. See section 3.2.8 for information on Virtualization.

3.1.10. Audit Rights

- 3.1.10.1. Publishers typically seek the contractual right to perform audits on Government IT systems to determine if the Government is in compliance with the terms of the software license agreement. This presents several significant problems for the Government. Namely, it creates risk when anyone other than a cleared individual is performing any type of function on a Government system. Government systems should not be open to third parties for auditing without protection and protocol.
- 3.1.10.2. The DoD ESI recommendation is to not allow the Publisher the right to perform an audit that it controls. The standard DoD ESI clause describing the Government's self-audit procedure should be the sole means for determining compliance. This clause can be found in the MSLA template.
- 3.1.10.3. When seeking to secure self-audit rights, it will be helpful to explain to the Seller that the buying organization has a software license management process in place that helps the Government know how to count the number of licenses it ordered, received, deployed and has in use at any time.
- 3.1.10.4. For more information, refer to the Self-Audit Checklist on the ESI web site.
- 3.1.10.5. If Self-Audit Rights cannot be secured, then secure the following rights to protect the Government if the Publisher or a third party will perform the audit:
 - 3.1.10.5.1. The Government must approve in advance the third party who will perform the audit and the software tools to be used to execute an audit.
 - 3.1.10.5.2. Require appropriate security clearances for the personnel who will perform the audit.
 - 3.1.10.5.3. Require a reasonable amount of advance notice of an audit (e.g. 60 days).
 - 3.1.10.5.4. Limit the audit rights to not more than once each year.
 - 3.1.10.5.5. Remove any payment obligations to avoid anti-deficiency issues.

- 3.1.10.5.6. Require a confidentiality clause to preclude the publisher or any auditors from “sharing” audit results with any third parties.

3.1.11. Temporary Use of Software in Times of Conflict

- 3.1.11.1. Because the Government is in a unique position to encounter and manage major conflicts throughout the world, it needs flexibility to use software in these unique events. The Government should secure the right to use and deploy additional licenses to respond to these emergency situations.
- 3.1.11.2. If the Government determines that the licenses will be needed for an extended period of time beyond their Temporary Expeditionary Deployment (TED) time, then it may need to pay for those additional licenses at that time. This clause is most commonly applicable in an Enterprise License Agreement (ELA).
- 3.1.11.3. See the MSLA template for the recommended DoD ESI clause.

3.1.12. Ownership and Use Rights

3.1.12.1. Data Ownership Rights

- 3.1.12.1.1. 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. This clause should explicitly prohibit the vendor from using the Government’s data for any purpose other than to meet the Government’s mission.
- 3.1.12.1.2. If you engaged a third party to host your software or entered into a SaaS (software as a service) agreement, be sure 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.
- 3.1.12.1.3. Remove 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.

3.1.12.2. Derivative Works Ownership Rights

- 3.1.12.2.1. In order for commercial software to fully meet the Government’s requirements, certain customizations, enhancements, interfaces, and other custom software may need to be designed. These custom software components might be categorized as “Derivative Works” because their functions might be *derived* from the commercial software application.

- 3.1.12.2.2. As an example of derivative works, we can use the development of a screenplay by Party B based on a book written by Party A. The book is the original creative work that is copyrighted and owned by the author or the Publisher. In order to create a new work based on the copyrighted content, the screenplay writer needs to obtain the contracted permission of the book owner. This same general principle applies to software.
- 3.1.12.2.3. The ordering agreement should clearly define who owns the rights to derivative works created from the software originally owned by the software Publisher. If the agreement does not address this at all, then the general legal principle will grant the Publisher the right to all derivative works. Government Buyers can certainly negotiate the right to own the rights to derivative works.
- 3.1.12.2.4. The question to ask before negotiating for ownership of derivative works is whether the Government really needs to own the derivative work or if a license to use it will meet the Government's needs. Ownership might be necessary if the derivative work should not be in the public domain. For example, if the Government modifies a piece of gaming technology to train U.S. forces on battlefield tactics, those modifications should probably be owned by the Government. On the other hand, if a modification to financial software is created to enable funds to be seen in appropriate Government accounts, there would likely be no need to own that modification. The determination as to whether a derivative work needs to be owned or not should be made by experts in the end user organization who know how the derivative works will be used, along with guidance from legal counsel.
- 3.1.12.2.5. If it is determined that a license to use a derivative work is sufficient and ownership is not required, then the language should include the Government's right to a "perpetual" (this is the duration of the license), "world-wide" (geography), "royalty-free" (the price) license to use the derivative work. See the sample clause in the ESI MSLA.
- 3.1.12.2.6. If the Government decides ownership is required, then the Publisher is likely to seek payment for that ownership right since it will preclude the Publisher from using that derivative work in its product for other Customers. The Government should estimate the value and price it is willing to pay for owning the derivative work.

3.1.12.3. Virtual De-Installation of Software

- 3.1.12.3.1. In many cases, Government access to COTS software involves participation by a third party. Examples include Software as a Service (SaaS) licenses hosted by someone other than the Software Publisher or Reseller, COTS software licenses acquired by Systems Integrators (SI) on behalf of the Government for use in a Government Program, and COTS licenses acquired by Systems Integrators who operate and manage the licensed software for the Government.
- 3.1.12.3.2. In these scenarios, the Government may take title to the license later in the life of the license, so the license terms must contemplate that change in ownership. The Government must ensure it has uninterrupted use of the license and access to the software, whether it is hosted or acquired (or both) by a third party.
- 3.1.12.3.3. One important aspect of ensuring the Government has this uninterrupted use and access involves what happens when the third party is replaced or is removed altogether. License agreements are often silent about what happens under these circumstances – or worse, they explicitly require the software to be physically de-installed and re-installed under a new contract and a new license. This could potentially cause a disruption of service to the Government and in the more severe cases, it could impact the integrity of complicated systems that have numerous enhancements, modifications and interfaces.
- 3.1.12.3.4. The term “virtual de-install” has been coined to mean 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.
- 3.1.12.3.5. The DoD ESI MSLA template provides sample language to achieve these purposes in the three primary scenarios described above. The language is designed to be tailorable to accommodate variations in the facts of each situation encountered by the Government procurement professional.

3.1.13. Source Code Escrow

- 3.1.13.1. When licensing commercial software, the Government (as the Licensee) typically receives Object Code from the Publisher. The Publisher retains all ownership rights and possession of the Source Code to prevent unauthorized copying of their intellectual property. (refer to the video tutorials on Intellectual Property)

- 3.1.13.2. In certain situations, the Government may need access to the Source Code developed, owned and licensed by the Publisher. This need could occur if the software Publisher files for bankruptcy or ceases to support the software application, for example.
- 3.1.13.3. To protect the Government's best interest, the Government can require the Publisher to deposit their Source Code into an escrow account managed by an independent third party.
- 3.1.13.4. Under certain circumstances defined in the Escrow Agreement, the Source Code would be released to the Government for it to continue its operational use of the software.
- 3.1.13.5. Escrow agreements typically carry a small charge per year. It is recommended that the Government pay a technical expert to test the Source Code that is deposited to ensure it is the same Source Code required by the Government. Testing should be done for all new versions released and deposited by the Publisher.
- 3.1.13.6. All Source Code Escrow Agreements are not written the same. DoD ESI SPMs make available a sample Source Code Escrow Agreement Template written to protect the interests of the Licensee.

3.2. PRICING

3.2.1. Total Cost of Ownership

- 3.2.1.1. Software Acquisition Price/Cost, especially if the software is part of a system, should never be looked at solely from the perspective of the price of the initial acquisition. It must be looked at using the concept of Total Cost of Ownership (TCO). In DoD, we sometimes refer to this as Life Cycle Cost (LCC).
- 3.2.1.2. A simple old-school analogy is that of razors and razor blades. Does the price paid for the razor solely determine the Total Cost of Ownership, or is the long term cost of razor blades equally or more important?
- 3.2.1.3. Best Value analysis of software acquisition should be looked at under the umbrella concept of TCO, with analysis grouped in three areas – Requirements Fit, Price, and Terms & Conditions.
- 3.2.1.4. A detailed TCO/LCC estimate should be performed for every substantial software acquisition, especially when there are multiple solutions and offers. An offer that looks significantly less expensive based on initial acquisition cost may end up being far more expensive on a TCO basis. If nothing else, an LCC/TCO analysis provides us with budgetary estimates for current and future years.

3.2.2. Financial Investment Elements in Software Acquisition

- 3.2.2.1. License or Subscription Price. This is the acquisition price you pay (upfront) for the right to use the software for perpetuity (if a perpetual license is acquired) or for a fixed duration of time (if a term or subscription license is acquired).
- 3.2.2.2. Maintenance and support price. When licensing software on a perpetual basis, you will typically pay a fee on an annual basis to keep the software current and receive product support as needed. Typically, this is expressed as a percentage of the net license fees you negotiated to pay for the right to use the software. For term or subscription based licenses, the cost for maintenance and support is included in the base subscription price.
- 3.2.2.3. Training and other services price. These costs are incurred for the incremental support your organization may need, typically for training and consulting services. Consulting services include software configuration, interface development, customizations, custom reports required, extensions, etc.

3.2.3. Metric Used to Determine the License Price

- 3.2.3.1. Software is unique in that you can pay different prices for the exact same usage rights depending on the licensing/pricing metric you select.
- 3.2.3.2. Clearly understand and accurately define the metric or measurement used to determine the price being charged. Sample licensing metrics are shown below:
 - 3.2.3.2.1. Named User/Device
 - 3.2.3.2.2. Concurrent User/Device
 - 3.2.3.2.3. Processor / Central Processing Unit (CPU)
 - 3.2.3.2.4. Site License. Note - this type of license includes geographic restrictions. Ensure that you make appropriate provisions for off-site access, location changes, office/building moves, BRAC, etc. This is not a recommended license method.
 - 3.2.3.2.5. Enterprise. Custom definition of licensed programs and use rights, across an aggregated community acting as one Customer (e.g. command, an entire Department, all of DoD, etc.)
 - 3.2.3.2.6. Check for unusual license metrics, such as use charges tied to virtual machines or remote access.

3.2.4. Software Cost and Price Impact

- 3.2.4.1. Software Publishers have already spent the money to develop the software they are selling to you. A huge part of their ongoing cost is spent on developers refining their existing and developing new software. Thus, they incur very minimal costs for a specific sale.

- 3.2.4.2. The cost they do incur directly related to a sale is primarily sales compensation, which is not incurred if the sale does not happen. This cost structure allows software Publishers to offer significant discounts based on factors that are important to their company, especially on large acquisitions.

3.2.5. Discounting

- 3.2.5.1. Obtain discounts on large orders. Discounting greater than the ESI/SmartBUY/GSA price is not only allowable it is expected when buying quantities greater than one license. Most agreements require a competition at the order level, so spot discounting can be obtained through the solicitation process.
- 3.2.5.2. See recommended discount levels in the table provided in Attachment C based on the size of your order.
- 3.2.5.3. Maximize your buying event. You will have the best chance to get the better pricing when some or all the following circumstances exist:
 - 3.2.5.3.1. You place your order near the end of the Publisher's fiscal year or fiscal quarter.
 - 3.2.5.3.2. You can consolidate buying and orders within your organization or in conjunction with another organization to form one much larger order.
 - 3.2.5.3.3. You select the best licensing metric (See Section 3.2.3 above) for your requirements and situation.
 - 3.2.5.3.4. You leverage a contract vehicle, such as DoD ESI for pre-negotiated terms and conditions.
 - 3.2.5.3.5. You remove contingencies from the order, such as requiring new functionality to be delivered prior to acceptance. This will allow the Publisher to recognize the revenue from your sale in the current period.
- 3.2.5.4. Ensure you are getting the Best Value.
 - 3.2.5.4.1. Perform Benchmarking. Find out from peers, KOs, SPMs, and other software acquisition personnel within DoD who have recently acquired the Publishers software. Research other applicable transactions and develop a sense of what the real market price is, and what drove the price.
 - 3.2.5.4.2. As applicable, ensure that Best Value analysis has been performed.
 - 3.2.5.4.3. See the DoD ESI Best Value Toolkit at the following link: www.esi.mil

- 3.2.5.4.4. Contact the DoD ESI Software Product Manager (SPM) if ESI is not the best value. See DFARS 208.74 and follow the procedures at PGI 208.7403.

3.2.6. Key Terms Related to Pricing

- 3.2.6.1. Obtain Most Favored Customer Treatment. Ensure you are receiving the best price received by commercial and Government Customers under comparable buying circumstances (e.g. similar quantities). For more information, see the GSA Acquisition Regulation section 552-238-75-Price Reduction Clause.
- 3.2.6.2. Lock in 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? Consider the duration of the requirement. If out-year coverage is needed, include options in the procurement to streamline acquisitions and competitively secure fixed prices for known out-year needs of existing products.

Do not include undeveloped products or promised but not yet existing functionality—these are referred to as “Future Products” and cause significant issues for the Publishers financial measures. If they do grant access to future products, expect a far smaller discount on any acquisition that commits them to “Future Products or Functionality”

- 3.2.6.3. Lock in the Maintenance Rate beyond the First Year. (see more below in the maintenance section)
- 3.2.6.4. Secure Discounts on Education or other Services.
- 3.2.6.5. 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.

3.2.7. Benchmarking

- 3.2.7.1. It is important to define and measure the criterion that determines whether you are achieving best value for the Government in each transaction. To assist in this effort, a benchmarking tool is offered by DoD ESI. You may adapt the criteria proposed in the tool to fit your transaction. The criteria includes factors such as the percentage fit of the proposed product to your requirements, pricing information, and terms and conditions to be used in assessing software capabilities and comparing alternate products and approaches. It is important to validate this criterion with the end-user community, PMO, technical resources, and software licensing SMEs. Once the criterion is defined, you will be ready to conduct market research and determine commercial standard practices of the applicable Publisher/Vendor.

- 3.2.7.2. To populate the Benchmark Table, search (available in the Best Value Toolkit) Government and commercial industries for sources of transaction data. A best practice is to use 2-4 similar transactions as this will offer a better insight into Vendor practices. On an item by item basis, assign a score for that transaction's result on that item compared to the "Best Case" for that element. Using a weighting of the individual data element scores (high weight to more important items), establish an overall transaction score. Note any potentially risky or negative elements of the transaction. Use the Benchmark Table to establish your negotiating position, including desired results and fallback positions.

3.2.8. Virtualization

- 3.2.8.1. Virtualization can be defined as the process of making one physical asset behave like more than one asset. To allow I.T. resources to be shared, Virtualization software can create and manage multiple logical views or virtual devices from just one physical device.
- 3.2.8.2. Each virtual device can be assigned to different users in one or more organizations, each with its own characteristics and capabilities. The physical capacity of the device can be shared across those virtual views.
- 3.2.8.3. Virtualization can have an effect on almost every clause of a EULA. It can impact, for example, the scope of the License Grant, the responsibilities for Maintenance and Support, and the applicability of Service Level Agreements, to name a few.
- 3.2.8.4. Publishers are aware that their software might be used more efficiently with virtualization. While that is generally a good thing, it could result in less revenue for them. Most Publishers have devised ways to prevent lost revenue by adjusting their pricing. This is especially true for software that is priced on the basis of processors instead of users, particularly database software. Sometimes the pricing algorithms are very confusing. Accordingly, be sure you understand the impact of virtualization on your license price.

3.3. WARRANTIES

- 3.3.1. There are three warranties that every EULA should include:
 - 3.3.1.1. A product performance warranty
 - 3.3.1.2. A third party product warranty
 - 3.3.1.3. An intellectual property warranty

- 3.3.2. There should be an express product performance warranty in the EULA that addresses the following points:
- 3.3.2.1. Who is covered by the warranty?
 - 3.3.2.2. What is covered by the warranty?
 - 3.3.2.3. When does the warranty begin and how long will it be in effect?
 - 3.3.2.4. What are the remedies provided for a breach of the warranty?
- 3.3.3. Who is covered by the warranty and the importance of Privity of Contract to the enforceability of the warranty?
- 3.3.3.1. The EULA should specify that the warranty is issued by the Publisher and that the Government and its authorized users are covered by the warranty.
 - 3.3.3.2. If the EULA is entered into with a party other than the Publisher (e.g., a Reseller), the warranty promise could be unenforceable because of a lack of privity of contract between the Government and the Publisher. See the section on “Privity with the Publisher” in section 3.1.1 above for more information about the importance of privity and how it can be created.
 - 3.3.3.3. If the EULA is entered into with a party other than the Publisher –and the product performance warranty is not the Publisher’s standard warranty (see the section below re “What is covered” and the discussion of non-standard warranties)- then the privity issue becomes extremely important. It is mandatory that the Publisher explicitly agree in writing to the terms of a non-standard warranty.
- 3.3.4. What is covered by the warranty? What is the scope of Performance Warranty Coverage?
- 3.3.4.1. In addition to the standard protections against bugs and defects in software performance, the Government may need the warranty to cover the ability of the software to perform specific functions promised by the Publisher. The Publisher’s standard warranty language may not be sufficient to provide this protection.
 - 3.3.4.2. Determine the acceptability of the Publisher’s standard performance warranty provision based on the type of product you are licensing.
 - 3.3.4.2.1. Is the product a “plug and play” product that will be operational and useful by merely loading it onto a computer to get started (Let’s call this “Simple Software”)? Microsoft Office would be one example of this type of software. In this case, a standard warranty clause may typically suffice due to the low risk nature of problems.

- 3.3.4.2.2. Does the product require implementation, configuration, integration or other complex services before it can be used in a production environment? (Let's call this "Complex Software".) In this case, a standard commercial warranty clause will typically NOT suffice.
 - 3.3.4.2.2.1. For complex software, secure a warranty provision similar to the clause recommended by DoD ESI in the MSLA Template.
 - 3.3.4.2.2.2. The warranty should refer to the Government's written requirements directly by including them in the EULA as set forth in the MSLA template or, if the requirements are in one or more separate documents, as a formal and incorporated attachment to the EULA.
 - 3.3.4.2.2.3. Where a non-standard warranty is required, the scope of performance defined in the warranty clause should ensure that the software acquired will meet the Government's functional and technical requirements.
 - 3.3.4.2.3. Incorporate any relevant documentation that the Seller provided to market and used to sell their product to the Government.
 - 3.3.4.2.4. Beware of a warranty provision that commits the Publisher or the Reseller to a performance standard that is defined in THEIR documentation. They can disguise or disclaim any true obligations within the documentation they write about their product.
- 3.3.5. When does the warranty begin and how long is it in effect? (aka Duration)
- 3.3.5.1. Determine if the warranty duration is reasonable for the type of software that you are acquiring.
 - 3.3.5.2. The start date of the warranty should commence upon your formal acceptance of the software, which should only occur upon complete and positive testing by authorized users to determine compliance with your applicable requirements or upon first productive use by the Government in its production environment.
 - 3.3.5.3. The warranty period should be for a period of time that is adequate for you to discover defects in the software. For Complex Software, a warranty period of one year after your acceptance of the software should be sought or a period of time that gives you a reasonable period to discover any defects.
- 3.3.6. Remedies**
- 3.3.6.1. When a defect occurs, the warranty provision should obligate the Publisher to fix bugs and defects at no charge to the Government.

- 3.3.6.2. Define the circumstances where the Government is entitled to return the software for a full refund. At a minimum, these circumstances should include the failure of the software to meet the Government's requirements as documented in the EULA. If the Publisher attempts to define the circumstances for returning the product for a full refund as "a failure to substantially meet" the requirements, it would be advisable to define in the EULA what is meant by that language. In some cases, where the expenditure of funds for software and implementation services is "substantial", it might be worthwhile negotiating a remedy that includes more than a full refund of the money spent on the software license. The expenditures on contractor services and internal Government costs for implementation might be considered for reimbursement. In this case, the provisions of FAR 52.212-4 (p) regarding a prohibition against consequential damages should be specifically cited as not applicable to the expenditures for contractor services and internal Government costs since they are not "consequential" but are direct expenses.
- 3.3.6.3. Include language that suspends (or tolls) the warranty period while defects are being addressed.
- 3.3.7. **FAR Warranty Provisions.** Incorporate by reference the warranty provisions of FAR section 52.212-4 (o) where warranty of merchantability and fitness for a particular purpose are specified. Beware of (and seek to disallow) a disclaimer by the Publisher or the Reseller to nullify this FAR warranty provision.
- 3.3.8. Third Party Software Warranty**
- 3.3.8.1. The warranty should 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.
- 3.3.8.2. The Government should request that the Publisher provide a complete list of third party products (proprietary and open source) that are included in the product you are licensing from them.
- 3.3.8.3. The Publisher should warrant 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.
- 3.3.8.4. The Publisher should indemnify 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.
- 3.3.9. Intellectual Property Infringement Warranty**

- 3.3.9.1. The “basis of the bargain” involved in licensing software includes the Publisher’s ownership of the software (actually the ownership of the intellectual property underlying the software). Without that ownership, the legal right and ability to sell licenses to use the software would be questionable, if not non-existent.
- 3.3.9.2. The Government should require a warranty from the Publisher stating that the Publisher owns the software and all underlying IP without limitation – and that the Publisher has the unconditional and unfettered right to license the software.
- 3.3.9.3. The Government should require the Publisher to also indemnify the Government against any claims made by any party alleging that the licensed software infringes the IP rights of any such party. The indemnification should 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. The MSLA template includes the EULA language that should be used to cover this topic.

3.3.10. Negotiability of the Warranty Clause

- 3.3.10.1. Beware of the Publisher taking the position that the Government must accept the standard commercial warranty provision offered by a Publisher because the Government is buying a commercial item (see FAR Part 12).
- 3.3.10.2. The standard commercial practice is to negotiate the warranty provision to meet the needs of the Customer.
- 3.3.10.3. Also, the DoD Warranty Guide (Version 1.0 September 2009) encourages negotiation of the warranty clause, stating that warranty is as important as price. (See <http://www.acq.osd.mil/dpap/pdi/uid/guides.html>)
- 3.3.10.4. In addition to striving for standard commercial terms when buying commercial items, FAR Part 12 also requires that the terms and conditions of agreements meet the best interests of the Government. This includes the warranty terms and conditions.

3.3.11. Risk Analysis

- 3.3.11.1. General statement. A contract can be thought of as a document that allocates risk between the parties. This is especially true of warranty. The key question to consider – and the one that should be clearly answered by the warranty provision is - who should bear the risk of loss if the product doesn’t “work”? One aspect of answering that question is to ask which party is in the best position to correct a defect in performance. Determining whether the product “works” should be an

objective exercise of measuring product performance against a thoroughly documented set of standards. As discussed above, when the product is a widely used standard product with well-known capabilities (think of Microsoft Office) –and when the Government's requirements coincide closely with those capabilities –there is no need for a non-standard warranty. But when the requirements are not standard and the software is not standard, a non-standard warranty is required to cover the performance of the Government's requirements –and thorough requirements documentation is required.

3.3.11.2. Key Risk Factors related to warranty. When evaluating whether to negotiate for a stronger warranty than the standard "the product will conform to the Publisher's documentation", the following factors should be considered:

3.3.11.2.1. What is the product's reputation in the marketplace for reliability?

3.3.11.2.2. What is the Publisher's reputation in the marketplace for creating reliable products and standing behind their quality and performance?

3.3.11.2.3. Given the complexity of the software and the time it will take to make it productive, is the warranty start time and length sufficient to allow a reasonable opportunity to discover defects?

3.3.11.2.4. Does the software require a relatively long and complex implementation process to make it usable for the Government? The longer and more complex the implementation, the more likely a more robust warranty is needed.

3.3.11.2.5. What is the estimated cost to support the product after the warranty expires versus the cost for a more robust warranty?

3.3.11.3. Tools and other methods to evaluate risk are available. ESI has created a Risk Assessment Tool to aid in evaluating the risk of EULA Terms and Conditions, including warranty.

3.4. MAINTENANCE & SUPPORT

3.4.1. Base Year Pricing

3.4.1.1. Define the rate (usually a percentage) you will pay applied to the fully discounted Net License Price (not list price). Some commercial terms will specify list or catalog price so contracts need to be explicit. Note that different software Publishers may structure prices differently.

3.4.1.2. How do you know if you are getting a good price?

- 3.4.1.2.1. Research the market for reasonable rates. What have other organizations negotiated? What are the current metrics shown in the Research and Advisory publications?
- 3.4.1.2.2. Do a sanity check. Check the maintenance ratio to license purchase price and measure against current market conditions for the size of your order.
- 3.4.1.3. Is the first year of maintenance included in the license price?

3.4.2. Future Year Pricing (escalation or flat-lining)

- 3.4.2.1. Seek to limit the amount the maintenance fee can be increased in future years. Seek to “cap”, “flat-line” (0% escalation) or keep the maintenance rate the same for the first few years (2-4).
- 3.4.2.2. Contract options may be appropriate to secure an escalation cap and/or lock-in future year maintenance prices. Check current market conditions and Consumer Price Index (CPI) for escalation rates.
- 3.4.2.3. Does the right to use the software terminate when payment of maintenance or support fees stops?
 - 3.4.2.3.1. This situation is usually associated with term type licenses; however all license and maintenance provisions must be reviewed regardless of license type.
- 3.4.2.4. Is there an “all or none” provision?
 - 3.4.2.4.1. 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.
 - 3.4.2.4.2. Government Buyers should review the End User License Agreement (EULA) for all maintenance terms as well as all documentation that describes in detail the maintenance entitlements that are provided by the Publisher even if buying through a Reseller. The Publisher is responsible for the majority of software maintenance to include upgrades, patches and fixes.
- 3.4.2.5. Review the documentation for asterisks or fine print that may change what you believe are your negotiated terms and conditions. If they exist, remove them.
- 3.4.2.6. As part of the market research on maintenance rates, contact ESI using the “Ask an Expert” function (<http://www.esi.mil/AskAnExpert.aspx>) for historical information on maintenance rates. Also review the maintenance white papers and videos ESI has posted on the website.

- 3.4.2.7. Even if the maintenance price is included in the first year license price request a breakout of the license cost and the maintenance cost. Request that the percentage of the license price to maintenance cost percentage be included in the quote. This will assist you in determining price reasonableness as well as assuring that you are being quoted the correct percentage cost in the license price. Also, going forward you will know that the maintenance % and quoted price for out-year maintenance does not use a price for a first year license that includes a maintenance price.
- 3.4.2.8. There are many End User License Agreements (EULAs) that will have maintenance escalation percentages listed. If you are able to negotiate the flat-lined maintenance remove the percentages in the EULA. If you are not successful in negotiating a reduced percentage or flat lined escalation for the maintenance you should review any escalation percentages that exist in the Publishers EULA with the goal to modify that section of the EULA to decrease the possibility of a large maintenance percentage increase.
- 3.4.2.9. If you acquire a perpetual license and the EULA has termination language that restricts the use of the software if maintenance is not paid, then this term must be removed from the contract. Use of a perpetual license should never be tied to continuation of maintenance payments.

3.4.3. The Scope of Product Entitlements to be Provided

- 3.4.3.1. Customers should gather and analyze the scope of product improvements and fixes that are included in each type of maintenance offering. Generally, no two maintenance offerings are the same and carry different names. For certain Publishers, updates, fixes and patches may be provided as a right under the license agreement and may not require purchase of maintenance. This is rare but worth investigating.
- 3.4.3.2. Major releases and upgrades may be considered the right to a future version of the software and therefore may be included in your software maintenance price.
- 3.4.3.3. Select the maintenance package that fits the Government's requirements best.
- 3.4.3.4. Understand what is included in the base maintenance price or request a structure that is suited to your requirement.
- 3.4.3.5. In your order, clearly define the scope of maintenance that is included in the price. Include a detailed Service Level Agreement for resolving software defects.

- 3.4.3.6. 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.

3.4.4. The Scope of Support Services to be Provided

- 3.4.4.1. Typically, a software maintenance agreement also includes a certain level of support services from the Publisher or the Reseller. This may include phone-based technical support from product experts. It is important that you understand what support is available both internally and externally. 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.
- 3.4.4.2. Understand the different levels of support that are offered and when it's vital that the Publisher be under contract to provide level 3 (or equivalent) support for the product. Sample definitions of support levels are offered below:
 - 3.4.4.2.1. Level 1 support is usually provided by someone within the Buyer's organizations, such as an internal help desk. At this level, there is very little impact to the Customer with minimal interruption of usage of the system.
 - 3.4.4.2.2. Level 2 support would be needed when an issue that is more impactful to a Customer and most processes are functional. The support would be raised to level 2 if level 1 was unable to resolve the issue. This level of support could be from your internal Information Technology Department, a Reseller or the Publisher.
 - 3.4.4.2.3. Level 3 support is required when there is a significant impact on the system use and level 1 and 2 have not been able to resolve the issue. When this occurs, only the Publisher can address and resolve the issue because access to the source code by the software developers may be required to diagnose and fix the problem. Only the Publisher can perform support at level 3.
- 3.4.4.3. Technical support and other benefits such as training may or may not be included in maintenance. It will be dependent on the Publisher.

- 3.4.5. **Identify Host System and Party Managing Maintenance Updates.** It is important that the Customer know who is hosting their system and managing the maintenance updates. This information is important when negotiating the software contract so all the terms and

conditions include your environment which identifies the primary and backups that are authorized to contact the Publisher when required. Some EULAs restrict the number of contacts on maintenance calls to one which is unreasonable. It is recommended that a Service level Agreement (SLA) be entered into with the hosting/data center organization whether Government or a Software as a Service (SaaS) provider in order to control down time, response time, updates, upgrades and patches and fixes that could impact the Customer. DoD has developed a white paper on SLAs that can be accessed from the DoD ESI website (www.esi.mil).

- 3.4.5.1. On the Customer's / Licensee's site (on-premises)
- 3.4.5.2. On the Vendor's site (off-premises)
- 3.4.5.3. At a Government centralized hosting facility / data center

3.4.6. Timing and Duration of Your Maintenance & Support Coverage

- 3.4.6.1. Ensure 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.
- 3.4.6.2. Different software Publishers have different maintenance coverage periods.
- 3.4.6.3. Determine 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.
- 3.4.6.4. Does your term cross fiscal years? Protect against the potential funding gap when maintenance starts during a Continuing Resolution Authority. 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. This is critical for a SaaS environment where the Customer does not have control of the software licenses. You need to check with your local financial support and legal to determine impacts of maintenance when defined as a service or a product. GSA has determined that the majority of software maintenance is a product.
- 3.4.6.5. Determine the cost that would be incurred if the Government employed personnel to perform certain support services that could be removed from the scope of services offered by the Publisher, such as level one help desk support via an internal hot-line.

3.4.7. Location, Time Zone, and Clearance Requirements of Software Support Personnel

- 3.4.7.1. Each Customer should identify the time of day and time zone required throughout each work week for your support service. You will need to determine if support is required on weekends.

- 3.4.7.2. Vendors may be required to provide support on a 24-hour basis using personnel located around the world in strategic time zones. This support is known as “Following the Sun” since live personnel are operating during the local normal business hours while the sun is up.
- 3.4.7.3. Based on the requirements for support beyond a standard United States time zone, 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.
- 3.4.7.4. Your requirements should identify if support must be provided only by personnel with a certain level of clearance.

3.4.8. Service Level Agreements (SLAs)

- 3.4.8.1. SLAs provide standards for the delivery of a wide variety of services in many environments, including certain aspects of software.
- 3.4.8.2. Appropriately designed software SLAs 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.). Normally, SLAs attach to an underlying agreement, such as a Master Services Agreement or Software License Agreement, in the form of an Annex or Attachment.
- 3.4.8.3. SLAs for software generally are designed to address two things: software performance and software (or system) availability.
 - 3.4.8.3.1. Within the first category - software performance - there are two aspects that can be measured: 1) software defect management which consists of the response time to acknowledge reported defects or product performance issues and the time to provide fixes; and, 2) the response time measured from executing a function or transaction (by hitting the enter key or otherwise) and the conclusion of the transaction.
 - 3.4.8.3.1.1. Defect management usually uses a three tier prioritization schema based on the severity of the issue and the impact of the outage it causes. The more severe the issue and the greater its impact, the shorter the SLA time to acknowledge the issue and provide a fix for it.
 - 3.4.8.3.1.2. System response time is usually an actual measurement of time, such as milli-seconds, tenths of a second or full seconds.

3.4.8.3.2. The second category – software availability – measures the amount of time the system (the software) is actively available for executing transactions or functions.

3.4.8.3.2.1. Usually availability is measured by taking the total time in a period, for example the number of minutes in any 3 month period, then subtracting the minutes of planned down time for system maintenance during the same period, and using the result as the base number for 100% availability.

3.4.8.3.2.2. If the Government wants extremely high availability because the software is mission critical – for example, it is used in the operation of a critical weapons system – then system availability might need to be 99.999% - often referred to as “five nines”. This generally means that in any 3 month period, the system is expected to have only a handful of minutes of unplanned down time.

3.4.8.3.2.3. For less critical systems, the availability might be expressed as 99.0% (two nines) or even less – for example, 98% or 97%.

3.4.8.3.2.4. The higher the expected availability, the more expensive the SLA will be since it takes more resources to achieve it.

3.4.8.4. The DoD ESI Service Level Agreement (SLA) Best Practices and Contractual Considerations White Paper is available on the DoD ESI website. The paper can assist with creating both performance and availability SLAs. The paper includes examples of how SLAs can be structured, calculated, and managed.

3.4.8.5. DoD ESI has developed a Master Software License Agreement (MSLA) template that addresses all the best practices that should be included in a software license. The document includes a Maintenance and Support Addendum Template. The purpose of this document is to describe the Support and Maintenance obligations of each party for Software provided to Licensee. It also includes sample SLAs for defect management, system response time and system availability.

3.4.9. Remedies for Defects

3.4.9.1. The SLA should 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.

3.4.9.2. Include language that allows the Government to receive a sufficient refund if the Seller fails to cure “critical” defects or chronically fails to meet SLAs.

3.4.10. Categorization of Maintenance as a Product or Service

- 3.4.10.1. Whether software maintenance is classified as a product or service is important because it will determine the package of documents required to be drafted and approved to execute the acquisition, how the contract will be administered, and the type of funds that may be used. A White Paper on this subject is available on the ESI web site.
- 3.4.10.2. GSA Approach to Software Maintenance as a Product
- 3.4.10.2.1. GSA holds that software maintenance is a supply that can be billed at the time of purchase when it is for the “purpose of maintaining the operability and usability of the software product by utilizing published fixes to bugs via patches, updates, or upgrades.” It may also include other “no charge” support that is included in the purchase price of the product in the commercial marketplace. No charge support includes items such as user blogs, discussion forums, on-line help libraries, Frequently Asked Questions (FAQs), hosted chat rooms, and limited telephone, email and/or web-based general technical support for a user’s self-diagnostics.
- 3.4.10.2.2. Furthermore, GSA has placed software maintenance as a product in the GSA Schedule terms and conditions sections for Special Item Numbers (SINs) 132-32 and 132-33, which are used to cover software products. As such, this classification would seem to allow for software maintenance to be deemed a product.
- 3.4.10.3. GSA Approach to Software Maintenance as a Service
- 3.4.10.3.1. Software maintenance is considered a service by GSA and placed under SIN 132-34 when it “is purchased for the purpose of solving user identified problems using technical support outside the scope of software maintenance as a product.” This usually occurs “when problems arise after software implementation, such as when the software is incompatible with the organization's IT infrastructure.” This is separate and distinct—or over and above—the routine patches, bugs, fixes, updates, or upgrades Publishers provide under the “product” classification.
- 3.4.10.3.2. Another form of software maintenance defined as a service would be when a Publisher ceases to support a product, either due to the product’s age or the Publisher going bankrupt. In these cases, you may need a service contract with a third party to provide patches and fixes to mitigate

vulnerabilities. Software maintenance categorized as a service is billed in arrears.

3.4.10.4. When GSA's determination described above does not apply or it's not accepted by a Government attorney, comptroller, disbursing clerk, etc. In this case, you may apply the following analytical approach:

3.4.10.4.1. Consider How the Federal Acquisition Regulation (FAR) Differentiates Services and Supplies:

3.4.10.4.1.1. According to FAR 37.101, a service contract "directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply." Conversely, no clear-cut definition exists for a supply or product. However, one can infer from FAR 37.101 that a product or supply contract means a contract that engages a contractor to deliver an end item of supply, which, in the case of software maintenance, would be the fixes, patches, updates, and upgrades to the licensed intellectual property.

3.4.10.4.1.2. So, this would utilize the same style of analysis that GSA suggests. If you are engaging a contractor to perform a task based on a level of effort by individuals rather than furnish a supply at a fixed price, then maintenance would be deemed a service.

3.4.10.4.2. Consider How the Government Classifies Software Maintenance in Product or Service Codes

3.4.10.4.2.1. The Federal Procurement Data System (FPDS) didn't start tracking this data until October 1, 2011. With the FY12 introduction of Product or Service Code (PSC) D319, Service: IT and Telecom-Annual Software Maintenance Service Plans, the Federal Government created the means for contracting activities to report software maintenance plan spending data.

3.4.10.4.2.2. However, the establishment of this PSC also inadvertently adds to the confusion as to whether software maintenance is a product or service. This is because PSC D319 is a services PSC, while the PSC for the software itself is 7030 (Automatic Data Processing (ADP) Software), is a supply PSC. Furthermore, the apparent appropriate North American Industrial Classification System (NAICS) code for software, 511210 (Software Publishers), is an employee-count

metric NAICS code, generally reserved for the purposes of small business set-aside decisions for supply contracts.

- 3.4.10.4.2.3. Services contracts, by contrast, use revenue as the basis for set-asides. So, the assignment of NAICS code 511210 provides support that software, in general, is a supply. There are no NAICS codes currently assigned to software maintenance providers.

3.4.10.5. Comparison Summary Table

SUPPORTING INFO THAT MAINTENANCE IS A PRODUCT	SUPPORTING INFO THAT MAINTENANCE IS A SERVICE
Contractor’s primary obligations are product entitlements.	Contractor’s primary obligations are solving user problems beyond the scope of product entitlements.
Contractor is delivering an end item of supply (fixes, patches, updates, and upgrades to the licensed intellectual property).	You’re engaging the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply.
The proper PSC Code for the initial purchase of software, 7030, indicates software is a supply.	The proper—or most accurate—PSC Code for software maintenance, D319, indicates that software maintenance is a service.
OMB considers software a capital asset, which by its very nature is a supply, and, since software maintenance is just more of the same, it, too, is a supply	The proper way to buy software maintenance in one fiscal year, when most of the performance will be in the following fiscal year is to treat it as a service.
GSA treats most software maintenance contracts as supply buys.	The appropriate NAICS code, 511210, indicates that software maintenance is a service.
The FAR definition for services does not apply to the product entitlements Publishers provide with standard, commercial software maintenance contracts.	

3.5. GENERAL PROVISIONS

3.5.1 Background

3.5.1.1 The General Provisions in any Agreement are often referred to as “boilerplate clauses” because they are fairly standard in all Agreements. In Government software Agreements, the General Provisions that are found in commercial software licenses tend to deviate significantly from FAR. A convenient way to address these clauses is to segment them into three categories:

- 3.5.1.1.1 Those that are only business terms;
- 3.5.1.1.2 Those that are partially business and partially governed by FAR;
- 3.5.1.1.3 Those that are governed exclusively by FAR.

3.5.1.2 This Buyer's Guide will address the General Provisions by grouping them into these three segments. Please note this grouping is not necessarily the sequence of the clauses found in a commercial software license.

3.5.2 Business Only Terms

3.5.2.1 Confidentiality

3.5.2.1.1 Confidentiality clauses protect information from being disclosed to third parties. The Government should not agree to a contract term that says the Government is not permitted to share pricing or other important contract or license information internally and with authorized contractor support teams.

3.5.2.1.2 The best case option that should be sought by the Buyer is to rely on the GSAR Deviation recently issued. Note - When it becomes part of FAR, the GSAR will change the category from business only to partially business and partially FAR. In the GSAR Deviation, para. D. 14 specifically allows for sharing contract information inside the Government. Additionally, it holds the Government to the commercial standard of protecting other commercial confidential information.

3.5.2.2 Integration

3.5.2.2.1 Most contracts include an integration or entire agreement clause that restricts the valid, binding, enforceable agreement to only the terms and conditions explicitly stated in the "four corners" of the written contract. This prevents claims based on implied warranties, verbal statements, or other actions and documents outside of the written contract.

3.5.2.2.2 For example, Customer product requirements and Vendor demonstrations or product brochures are not part of the contract, unless the parties explicitly include them in the terms and conditions.

3.5.2.2.3 G.S.A., F.S.S., E.S.I., B.P.A., FAR and DFARS clauses are incorporated and integrated into the contract and have binding legal effect when an order is placed.

3.5.2.2.4 The best option that should be sought by the Government Buyer is to incorporate by reference or full text, the clauses, F.S.S. contract number, and B.P.A. number in the order. The Buyer should also

print out and include in the order any hyperlinked and referenced documentation. Finally, in cases where Government requirements might not be met substantially by the COTS software, the Government should fully document its requirements in the Agreement to make them into enforceable obligations on the part of the vendor.

3.5.2.3 Relationship of the Parties

3.5.2.3.1 This clause defines the parties as independent contractors to avoid an employment relationship. In an employment relationship, the employer is responsible for a number of obligations not present in independent contractor relationships. Some examples include taxes and employee benefits.

3.5.2.3.2 The best option for the Government Buyer is to ensure the General Provisions include a clause specifying the relationship of the parties is that of independent contractors and not employer – employee. The IRS regulations governing this relationship should be provided to internal Customers to avoid having their conduct override the language of the clause.

3.5.2.4 Severability

3.5.2.4.1 Severability clauses keep the rest of an agreement enforceable when one provision is removed because it has been determined to be unenforceable.

3.5.2.4.2 The Government Buyer can allow for the standard commercial clause, but should be wary of attempts by the Vendor to extend the language beyond the basic clause.

3.5.2.5 Rights of Survivorship

3.5.2.5.1 The rights of survivorship pertain to the clauses that can remain enforceable beyond the term of the Agreement. Commercial examples include things like confidentiality provisions and IP protections.

3.5.2.5.2 While it is not an issue to allow a survivorship clause, the Government Buyer 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.

3.5.3 Partially Business and Partially FAR-Governed

3.5.3.1 Assignment

3.5.3.1.1 Assignment occurs when a party transfers some or all of its contract rights or delegates some or all of its contract obligations to a third party.

3.5.3.1.2 Most commercial agreements prohibit assignment by either party without the written consent of the other party.

3.5.3.1.3 FAR 52.212-4(b), *Assignment*, allows Contractors to assign the right to receive payment.

3.5.3.1.4 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). The recently issued GSAR reinforces the assignment permitted in the cited FAR clause. It also allows for assignment of other rights and obligations by express Government approval. See GSAR para. D. 13.

3.5.3.2 Term

3.5.3.2.1 The time between the start and end dates specified in a contract is the term of the contract or the EULA. Most Government contracts have a limit of five years. FAR 52.217-9 provides the conditions for extending the term of a contract.

3.5.3.2.2 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.

3.5.3.3 Limitation of Liability

3.5.3.3.1 Commercial Limitation of Liability clauses restrict the type and amount of liability imposed on a Vendor for the failure of its product or service. There are generally three different types of damages that a party can recover when a product fails: direct, consequential and punitive.

3.5.3.3.2 Direct damages are the difference between the value of the performance received and the value of the performance promised

as specified in the contract. Direct damages are the only type permitted in most agreements.

3.5.3.3.3 Consequential damages are damages you can prove occurred as a result of the failure of one party to meet a contractual obligation. The Government prohibits claims of consequential damages against Contractors in FAR 52.212-4(p), *Limitation of Liability*.

3.5.3.3.4 Punitive damages are damages awarded that go beyond direct or consequential damages and are intended to punish the offender.

3.5.3.3.5 Most contracts limit the amount of damages to the original amount paid for the software or services. FAR is silent about any dollar or percentage limitations on the amount of damages.

3.5.3.3.6 The best practice - and the best option that should be sought by the Government Buyer – is to 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.

3.5.3.3.7 The Government Buyer must ensure that the negotiated limits are included in the contract terms and conditions to avoid any ambiguity.

3.5.3.4 Click-Wrap Licenses

3.5.3.4.1 A click-wrap license is often encountered when initializing or installing software on a device. It purports to be a license agreement that requires consent before allowing the install process to continue or before allowing access to the software. ESI recommends that Buyers add a clause in the GP section of an Agreement declaring such click-wrap or equivalent licenses to be void and unenforceable. GSA has created a draft FAR Deviation that accomplishes that objective.

3.5.3.4.2 The best case scenario that should be sought by the Government Buyer is to follow the ESI recommendation regarding click-wrap licenses. Additionally, the GSAR Deviation, paragraph D. 2, specifically makes click-wrap or similar licenses unenforceable against the Government or its authorized end users.

3.5.4 FAR Governed

3.5.4.1 Termination

- 3.5.4.1.1 Termination rights in commercial agreements are based on material breaches. In Government contracts, the FAR defines termination rights and responsibilities.
- 3.5.4.1.2 The Government can terminate a contract for convenience or for cause. See FAR 52.212-4(l), *Termination for the Government's Convenience* and FAR 52.212-4(m), *Termination for Cause*.
- 3.5.4.1.3 These FAR provisions provide significantly more protection to the Government than the standard commercial practice would. For example, there is no requirement for the Government to find a material breach to terminate the contract.
- 3.5.4.1.4 The Government Buyer should ensure all termination provisions are made subject to FAR. Further, the recent GSAR Deviation prohibits unilateral termination of an agreement by the Supplier unless the supplies or services are generally withdrawn from the market. The GSAR makes the important connection between Supplier termination and the requirement for continued performance until a dispute is resolved. See the Disputes Act and the clause at FAR 52.212-4 (d) and associated FAR provisions.

3.5.4.2 Dispute Resolution

- 3.5.4.2.1 All contract disputes are subject to the Disputes Act and FAR 52.212-4(d).
- 3.5.4.2.2 The dispute process is set forth in FAR 52.233-1.

3.5.4.3 Governing Law

- 3.5.4.3.1 The governing law in a contract refers to the law that will be used to decide a dispute. The choices in commercial contracts are usually federal law or state law. This topic also deals with jurisdiction and venue for court cases.
- 3.5.4.3.2 FAR 52.233-4 establishes that federal law applies to cases involving federal contracts.
- 3.5.4.3.3 Federal law also states that federal courts have jurisdiction and venue over cases involving Government contracts.

3.5.4.3.4 Commercial software contracts often have a governing law clause assigning jurisdiction and venue to the state where the Publisher's headquarters is located.

3.5.4.3.5 The best practice is to remove these clauses from agreements, even though the federal law would supersede them even if they remain in the contract.

3.5.4.4 Order of Precedence

3.5.4.4.1 An Agreement entered into between the Government and a Contractor (whether a software Publisher or a software Reseller) often is comprised of multiple documents. For example, there can be a schedule of supplies/services, a license agreement for software, a solicitation, and a Delivery Order. It is possible that some of the terms and conditions in one document are inconsistent with the terms and conditions in one or more of the other documents. The Order of Precedence (OOP) clause in a contract or a license agreement (EULA) defines the priority or sequence of the documents that should be used for resolving those contradictions or inconsistencies. Many commercial EULAs propose a resolution process or a priority of documents that differs from FAR 52.212-4(s). The Government procurement professional must comply with FAR.

3.5.4.4.2 The best case scenario that should be sought by the Government Buyer is to ensure that the OOP clause in the Agreement cite FAR 52.212-4(s) as authoritative on this topic. Additionally, it would be advisable to use the ESI MSLA template instead of the commercial vendor's EULA. Be aware of the following potential issues when citing FAR 52.212-4(s):

3.5.4.4.3 Since the only substantive document that takes precedence over the software license agreement (EULA) as listed in FAR 52.212-4(s) is the schedule of supplies/services, the Government Buyer should take special care in noting that when creating the schedule of supplies/services, GSA does not concern itself with the business terms proposed by commercial vendors. Examples of business terms include expanded warranty, transferability of licenses and self-audit of license use. GSA focuses on compliance with FAR. Therefore, allowing potentially unfair or undesirable business terms to stand unchallenged in the schedule of supplies/services might give them the highest priority if they conflict with the terms

and conditions in other addenda, including a software license agreement.

3.5.4.4.4 FAR 52.212-4(s) refers to “addenda to this solicitation or contract, including any license agreements for computer software” as having the fourth position in the list of priorities. What if the Agreement consists of multiple addenda that have inconsistent terms? The clause is silent as to how to resolve those inconsistencies among several addenda. The Government Buyer should consider identifying addenda and giving them a priority for that category of document.

3.5.4.4.5 FAR 52.212-4(s) refers to the priority or sequence of documents. What happens when inconsistencies occur within a single document? Since FAR is silent on this point, ESI recommends that the Government Buyer create a process for resolving those inconsistencies by giving the highest priority to the terms and conditions in the ESI template.

3.6. ADDITIONAL TERMS FOR CONSIDERATION AS APPROPRIATE.

3.6.1. Government unique requirements such as training or development of customized reports, interfaces, conversions of data, and enhancements or extensions.

3.6.2. Document negotiated changes in resultant contract.

3.6.2.1. Use definitions

3.6.2.2. Use examples to eliminate ambiguity

3.6.2.3. Clearly define additional license rights and specify the addendum changes are at no additional cost

3.6.2.4. Check that a right granted in one area is not changed or removed by another provision.

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.

TITLE	LINK	WHY IT'S IMPORTANT
DoD SmartBUY Policy Memo of December 22, 2005.	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.
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 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 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.

Attachment A: REQUIREMENTS MATRIX - SAMPLE TABLE


Licensors' Product Capabilities Matrix Mapped to Licensee Requirements

A	B	C		D	E	F	G	H	I
REQUIREMENT REFERENCE	BUSINESS PROCESS	LICENSOR'S PRODUCT		PRODUCT NAME	LICENSE TYPE*	UNIT PRICE	QUANTITY	TOTAL PRICE	THIRD PARTY PRODUCT(S) REQUIRED (Y/N)
		FIT (YES)	NO FIT (NO)						If yes, then list third party brand name and products required
1		X		ABC Product		\$	#	\$	
2			X						

Licensors warrants that the licensed products and modules listed above will execute the business processes listed above and that no additional software from Licensor or from other Publishers is required to execute the listed business processes unless listed above in column I.

[THE TABLE ABOVE IS AN EXAMPLE OF THE KEY ELEMENTS TO INCLUDE IN YOUR REQUIREMENTS / PRODUCT MATRIX. IF YOUR COMPONENT HAS ITS OWN TEMPLATE, REPLACE THIS TABLE WITH YOUR VERSION]

Attachment B: GSAR CLASS DEVIATION MV-15-03: MEMORANDUM OF CLASS DEVIATION ADDRESSING COMMERCIAL SUPPLIER AGREEMENT TERMS THAT CONFLICT OR ARE INCOMPATIBLE WITH FEDERAL LAW (JULY 31, 2015)



GSA Office of Governmentwide Policy
Acquisition Letter MV-15-03
JUL 31 2015

MEMORANDUM FOR THE ACQUISITION WORKFORCE

FROM: JEFFREY A. KOSES *Jeffrey A. Koses*
SENIOR PROCUREMENT EXECUTIVE (MV)

SUBJECT: Class Deviation Addressing Commercial Supplier Agreement
Terms that Conflict or Are Incompatible with Federal Law

- Purpose.** This letter notifies the Acquisition Workforce of a Class Deviation to address common Commercial Supplier Agreement Terms that conflict or are otherwise incompatible with Federal law.
- Background.** Commercial Supplier Agreement Terms (e.g. standard terms of sale or lease, Terms of Service (TOS), End User License Agreements (EULA), or other similar legal instruments or agreements) may be presented as part of a proposal or quotation response to a solicitation for a contract or order. These Commercial Supplier Agreement (CSA) Terms may include clauses that are acceptable to private parties, but are improper or illegal for acceptance by the Federal Government. These commonly recurring, conflicting or ambiguous clauses require GSA contracting activities to negotiate individual agreements to address the conflicts, often at significant cost to both the Agency and contractor.

GSA has identified fifteen (15) common elements of Commercial Supplier Agreement Terms that conflict with or are incompatible with Federal law that must be

This GSR Memo and its supplemental document can be accessed from the DoD ESI website at www.esi.mil by searching for “GSAR Class Deviation”, and is found under the Resources/Tools tab

Attachment C: 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

Attachment D: MASTER SOFTWARE LICENSE AGREEMENT TEMPLATE

For a current version of the DoD ESI Master Software License Agreement Template, navigate to the “Ask an Expert” page of the DoD ESI website at www.esi.mil, choose the last option titled “I have a question about a topic not addressed above”, and request a copy.