

DoD ESI White Paper

Best Practice Clauses for Software License Grants



About DoD ESI

The DoD ESI was formed in 1998 by Chief Information Officers at the DoD. To save time and money on commercial software, a joint team of experts was formed to consolidate requirements and negotiate with commercial software companies, resulting in a unified contracting and vendor management strategy across the entire department. Today, DoD ESI's mission extends across the entire commercial IT life-cycle to include IT hardware products and services. DoD ESI has established DoD-wide agreements for thousands of products and services.

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Caveat:

This White Paper provides summary information about important contract issues. This information is not intended to be legal advice, but rather is designed to share best practices, highlight potential concerns, present recommendations for managing those concerns and encourage further research or discussions with legal counsel.

How this White Paper is structured

DoD ESI segments the key clauses of a EULA into five categories: License Grant, Pricing, Warranty, Maintenance and Support, and General Provisions. This paper focuses on the key clauses in a software license agreement that pertain to the first category – the grant of the license from a software Publisher to the Government. Each relevant clause is shown and then an instruction or rationale statement is provided in the shaded text box to help the Government buyer understand the meaning of the clause.

Before tackling the License Grant clauses per se, the paper provides guidance on a few introductory clauses important to every EULA; namely, the Parties to the Agreement and the Product Requirements and Product Fit. These topics set the stage for the discussion of the License Grant clauses.

There is also a short summary of this paper after the detailed License Grant discussion followed by a section with sample License Grant exhibits recommended for all EULAs.

When & How to use the Guidance Found in this White Paper

ESI recommends the best practices described below be employed for new software license purchases greater than \$150,000 or consolidation of software maintenance contracts with a combined annual/historical value in excess of \$150,000. Additionally, ESI recommends documenting for the contract file the analyses and rationale for deviating from or not including a best practice term or condition.

Please note that although some license grant clauses presented in this paper make reference to the other 4 categories of clauses, a detailed treatment of each of them can be found in their respective DoD ESI White Papers.

Introductory Clauses

Section 1 shown below is an introductory paragraph to the software license that defines the parties to the agreement. The structure shown includes the Publisher, who owns the intellectual property rights to the software being licensed, a Reseller who may be authorized by the Publisher to sell the Publisher's software to the Government, and the Government agency buying the software. In most cases where a Reseller is the entity selling the software to the Government, there are reasons why the Publisher tries to refrain from being a party to the agreement. It is in the Government's best interest to secure the written contractual commitment of the Publisher directly or indirectly for certain promises that only the Publisher can make. See a more detailed discussion on this topic in the companion Advisory Note on Privity of Contract.

1. Parties to this Agreement (The “Parties”)

1.1 Contact and Entity Information

This Software License Agreement (the “Agreement”) is made and entered into as of _____, 20__ (the “Effective Date”) by and among the Parties defined below.

Publisher Entity Name (“Publisher”)	Reseller Entity Name (“Reseller”)	DoD Service/Agency Name (“Licensee”)
XYZ Publishing, Inc.	ABC Reselling, Inc.	XYZ Command or equivalent
Address	Address	Address
Street, City, State, Zip	Street, City, State, Zip	Street, City, State, Zip
POC	POC	POC
Name, Phone, Email	Name, Phone, Email	Name, Phone, Email
Notification Info	Notification Info	Notification Info
Signature	Signature	Signature

1.2 Licensor Defined

The Publisher and Reseller shall be jointly referred to as the “Licensor” throughout this Agreement, obligating both firms to comply with the provisions where the term “Licensor” is used.

1.3 Enterprise Treatment

The Parties agree that the Licensee is one entity within an enterprise of multiple agencies, services, departments, coalition forces (where authorized), and components under the control or authority of the Department of Defense (DoD), each of which is considered an “Affiliate” of the Licensee. [NOTE: CHANGE DOD TO FEDERAL GOVERNMENT IF YOUR SCOPE MUST EXTEND TO THE ENTIRE FEDERAL GOVERNMENT]

1.4 Glossary

The words included in the Glossary attached as Exhibit 1 shall have the meaning and application to this Agreement as defined in the Glossary. See the companion file titled “Sample Glossary”.

2. Requirements and Product Fit

Government Requirements and Product Fit 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 tell when you receive and pay for it. This can result in inadequate competition and increased time to award due to confusion and ambiguity. Ambiguity, in turn, translates to increased risk to Licensors, which may drive up cost. Worse still, the software acquired may not meet the Government's needs.

The Government's requirements must be structured to determine the best solution, the correct quantity, the appropriate product and license type, the most effective acquisition approach, and the most achievable negotiation strategy.

Section/Title	Sample Best Practice Clause
<p>2.1 Requirements</p> <p>Instruction / Rationale</p>	<p>Licensee requires software to enable Licensee to efficiently and effectively execute its missions, perform the business processes, and meet the requirements attached hereto as Exhibit 2 (the "Requirements").</p> <p>This clause points to an Exhibit that contains the Government's requirements for the software that is being acquired. 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.</p>
<p>2.2 Licensor Software Product Capability Matrix</p>	<p>Licensor had an adequate opportunity to inspect the Requirements and completed the Software Product Capability Matrix attached as Exhibit 3 to identify the Requirements met by the Licensor's software products (the "Software") and the Requirements that may not be met by the Software.</p>
<p>Instruction / Rationale</p>	<p>During the RFP/RFQ and proposal submission process, the Licensor should provide a matrix that identifies the Government's requirements that its products will satisfy. The table shown in Exhibit 3 (or something similar) should be used to capture the Licensor's commitments to meet the Government's requirements. [NOTE: CONTRACTING OFFICERS SHOULD INCLUDE THE TABLE IN EXHIBIT 3 IN THE SOLICITATION WHEN DETAILED REQUIREMENTS ARE REQUIRED FOR SOFTWARE SELECTION.]</p>
<p>2.3 Software Capabilities Summary</p> <p>Instruction / Rationale</p>	<p>Attached hereto as Exhibit 4 is a description of the Software's capabilities and features (the "Software Capabilities Summary"), which is made a part hereof.</p> <p>Exhibit 4 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.</p>

3. License Grant Clauses

Section 3 below is focused on the actual grant of the license. It contains many key clauses that represent the core “business” terms of the license. They have significant legal implications but the details need to be defined and accepted by the ultimate user of the software. That is why the user needs to be intimately involved with the construction and review of this section as a key member of the acquisition planning team. This section refers to certain exhibits where detailed information will reside. This structure is used so that the core agreement does not get convoluted and the exhibits can be constructed by personnel who are most familiar with the content necessary for the exhibit without holding up the other elements of the agreement.

Grant of License

The Licensor hereby grants Licensee a license (the “License”) to use the Software under the terms and conditions specified herein.

Section/Title	Sample Best Practice Clause
<p>3.1 Software Products</p> <p>Instruction / Rationale</p>	<p>Licensee may use the Software products listed and described in Exhibit 3 in accordance with the terms and conditions of this Agreement.</p> <p>Ensure that all products are properly listed and described in Exhibit 3. Leverage content gained from market research, your RFP and the proposal response from the vendor.</p>
<p>3.2 Business Process and Software Modules</p>	<p>Licensor warrants that the Software products and modules listed in Exhibit 3 will meet the Requirements and execute the business processes listed in Exhibit 3 to the extent and in the manner documented in this Agreement. The Licensor further warrants that no additional software from Licensor or from other Publishers is required to execute the listed business processes, unless specifically identified in Exhibit 3.</p>
<p>Instruction / Rationale</p>	<p>This clause directly binds the seller to guaranty 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. This clause also confirms that you are buying all the software you need to meet your requirements, whether it’s from the seller 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.</p>

Section/Title	Sample Best Practice Clause
<p>3.3 License Type</p>	<p>Licensor grants to Licensee a perpetual License to use the Software, meaning Licensee has the right to use the Software forever (a “Perpetual License”). Licensor does not transfer any right, title or interest to the Software Source Code or other intellectual property (IP) rights owned by the Publisher, other than the rights granted in this Agreement.</p> <p>OR</p> <p>Alternative clause for a Term License:</p> <p>Licensor grants to Licensee a Term License for a period of ____ months, meaning the Licensee can use the software during the term of the license for the purposes specified under this Agreement. Licensor does not transfer any right, title or interest to the Software Source Code or other intellectual property rights owned by Publisher, other than the rights granted in this Agreement. Licensee agrees to pay Licensor a license fee during the term of the license under the payment terms specified in paragraph 4 below. Licensor recognizes the requirement to continue performance during a dispute, including a dispute over payment of invoices, until such dispute is resolved. See FAR 52.212-4 and FAR 52.233-1.</p>
<p>Instruction / Rationale</p>	<p>This clause should clearly define the type of license that you will be granted for the software you are acquiring. If you are acquiring many different types of products under different types of licenses in this one agreement, then identify the type of license for each product in Exhibit 3.</p>
<p>3.4 Authorized Quantity</p>	<p>This Agreement authorizes Licensee to grant access to the quantity of users of the Software listed in Exhibit 3.</p>
<p>Instruction / Rationale</p>	<p>For each software product you are acquiring in Exhibit 3, identify the quantity of licenses you need.</p>
<p>3.5 Authorized Users</p>	<p>Subject to the authorized quantity limitations in Exhibit 3, all persons designated as “Authorized Users” by Licensee, in its sole discretion, will be authorized users under this Agreement. Such Authorized Users might be, but are not limited to, U.S. Government civilian personnel, U.S. Government military personnel, independent contractors, coalition forces, and others as required. All such Authorized Users will be subject to and bound by the terms and conditions of this Agreement but no other agreement, including a click-through license presented by the Licensor.</p>
<p>Instruction / Rationale</p>	<p>This clause ensures that the software can be used by anyone you designate as long as you do not use more than the authorized quantity. Since the Government uses contractors for many functions, it is important that they be identified as authorized users at the outset to avoid any confusion or dispute. This language achieves that.</p>

Section/Title	Sample Best Practice Clause
<p>3.6.Transfer rights</p> <p>Instruction / Rationale</p>	<p>3.6.1 The Licensee shall have the right, without the prior written consent of the Licensor, to transfer Software Licenses or Licensee’s rights to use the Software to an Affiliate of the Licensee (a “Transferee”).</p> <p>3.6.2 Licensee agrees to notify Licensor of any transfers of licenses within 30 days of said transfer. Any such notice shall include the point of contact (POC) information for the Transferee organization(s).</p> <p>3.6.3 The Transferee shall be bound by the terms and conditions of this Agreement.</p> <p>3.6.4 Licensor agrees that any product or intellectual property (IP) warranties and Maintenance and Support coverage remaining for the transferred Licenses will accompany the transferred Licenses for use by the Transferee under the same terms and conditions and for the same term as specified in this Agreement. Transferees will not be required to sign new license agreements or provide new contract numbers as a result of the license transfer.</p> <p>This clause 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 and is introduced in Section 1.3 to treat the Licensee as an enterprise that includes its affiliated organizations.</p>
<p>3.7 Permitted Uses</p>	<p>Licensee may use the Software for any lawful purpose necessary to carry out Licensee’s mission or operational requirements. Licensee agrees it will not permit or engage in misappropriation of Licensor’s IP.</p>
<p>Instruction / Rationale</p>	<p>The Government should not be restricted in its use of the software for any purpose as long as it is lawful. Many times, a usage scenario is not known or contemplated when a license is granted. It is important that the Government be free to use software for any reason it deems appropriate during the term of the license.</p>
<p>3.8 Geography</p> <p>Instruction / Rationale</p>	<p>This license grant is for use of the Software anywhere in the world.</p> <p>The standard position going into a negotiation is that the Government should be allowed to use the software anywhere in the world. Only in very limited and financially justified circumstances should you limit the geographic area in which the Government can use the software.</p>

Section/Title	Sample Best Practice Clause
<p>3.9 Language(s)</p> <p>Instruction / Rationale</p>	<p>Licensors shall supply Licensee with the Software in the languages designated for each item listed below at no additional charge:</p> <p>3.9.1 Software field names and other literals generally available or shown on an HTML page or other electronic screen presented to users. Languages required: American English, (list others).</p> <p>3.9.2 Software documentation. Languages required: American English, (list others).</p> <p>3.9.3 Software training materials and training classes, whether delivered in Publisher classrooms, on line or at Licensee's site. Languages required: American English, (list others).</p> <p>3.9.4 Software support services whether by telephone, on line, or otherwise. Languages required: American English, (list others).</p> <p>Identify the exact languages that you will need the software screens, training, documentation and other services to be provided. List all relevant languages, such as "American English", after each type of item.</p>
<p>3.10 Supported Platforms</p>	<p>Unless otherwise noted in the exceptions list below, Licensee is not restricted to any particular platform for using the Software. Platform is defined as any hardware, networking hardware and software, operating system or other hardware or software component required to operate the Software.</p> <p>Exceptions: (List here) _____</p>
<p>Instruction / Rationale</p>	<p>Generally, commercial software is designed to function on any type of hardware and with third party software developed by other companies, such as database software. This clause ensures that the Government 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.</p> <p>However, if there are limitations that the Government must adhere to, then the seller should list them in the space provided below the "Exceptions" title.</p> <p>If there are restrictions on supported platforms, the Government must determine if they will incur additional cost to meet this 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.</p> <p>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.</p>

Section/Title	Sample Best Practice Clause
<p>3.11 Software Installation</p> <p>Instruction / Rationale</p>	<p>Licensee is permitted to install Software at Licensee’s premises on its own equipment or at the location of any third party that is designated by the Licensee to manage or host the Software on Licensee’s behalf.</p> <p>The Government may need to install the software at different locations throughout the term of the license. This may include a Government managed location on Government-owned hardware or a contractor-managed location on contractor-owned or Government-owned hardware. This clause allows the Government to install the software in either of these environments without violating the license terms. You should include language to fit your scenario if it’s not covered by this sample clause.</p>
<p>3.12 Self-Audit</p>	<p>Notwithstanding Licensor audit provisions or practices to the contrary, Licensee agrees it will perform an internal audit of Software quantities in use not more than once a year and will use its best efforts to keep full and accurate accounts that may be used to properly ascertain and verify numbers of licenses and authorized use. Upon Licensor’s written request, Licensee may provide audit reports to Licensor from Licensee’s internal audit records not more than once a year as the sole means of satisfying the Licensor’s requests for audit.</p>
<p>Instruction / Rationale</p>	<p>Publishers and their resellers typically want to have the right to audit the Government’s systems to confirm that the Government is using only the authorized amount of software licensed from the Publisher. This is an issue for the Government since Government systems should not be open to third parties for auditing without protection and protocol. The best practice clause shown above disallows an audit by the publisher or any third party and commits the Government to perform its own internal audit to verify its usage is in line with its contractual rights. DoD ESI has created the DoD Self-Audit checklist, which guides the Government through the entire self-audit process (see: http://www.esi.mil/Uploads/DoD-ESI_Self-Audit_Checklist.pdf).</p>

Section/Title	Sample Best Practice Clause
<p data-bbox="121 741 358 842">3.13 Temporary Use of Software During Times of Conflict</p> <p data-bbox="121 1472 391 1499">Instruction / Rationale</p>	<p data-bbox="469 302 1490 688">As part of Temporary Expeditionary Deployments (TEDs), during the term of this Agreement, Licensee may temporarily deploy and install or use Software on, or access from qualified desktops, laptops, mobile devices or servers, a reasonable number of Licensor’s Software products in addition to those previously licensed under this Agreement at no additional cost (“TED Licenses”). TEDs are limited to deployments away from in-garrison locations (any military post or Government office where troops or civilian Government personnel are at a permanent location), war games, exercises, real world contingencies, and emergency situations such as Hurricane Katrina or similar to the terrorist attacks on 9/11/2001, where temporary duty stations were needed due to the destruction of Government offices or Government mission to support the emergency situation.</p> <p data-bbox="469 741 1463 842">For licenses connected to a Licensee network server, on a semi-annual basis, Licensor shall provide an additional temporary license pool equal to the quantity of network versions purchased, which may be accessed during a TED event.</p> <p data-bbox="469 898 1479 999">For computers not connected to a Licensee network server, the Licensor shall provide, on a quarterly basis, a pre-activated temporary (ninety) 90 day single seat network license which can be copied for use on any number of computers.</p> <p data-bbox="469 1056 1463 1283">After the TED, or within twelve (12) calendar months of the start of any TED licenses, whichever is shorter (“Temporary Use Period”), the Licensee will provide a written certification that the TED Licenses have either been removed from service, or payment has been made under this Agreement to purchase additional licenses equal to the number of TED Licenses not removed from service. Licensee agrees to use the TED Licenses in accordance with the terms contained in this Agreement.</p> <p data-bbox="469 1352 1490 1619">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. This clause allows the Government to use and deploy additional licenses to respond to these emergency situations. If the Government determines that the licenses will be needed for an extended period of time beyond their 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).</p>

Section/Title	Sample Best Practice Clause
<p>3.14 Licenses for Software Evaluation</p> <p>Instruction / Rationale</p>	<p>If Licensee wishes to evaluate any Software generally available from Licensor, Licensee may order trial Software which Licensee may use for trial non-production purposes only.</p> <p>Licensee's right to use such Software shall be at no additional charge and shall be: (i) subject to the terms of this Agreement, (ii) solely for trial, non-production purposes only, and (iii) on an "AS IS" basis, without warranties or Maintenance Services of any kind. Licensor shall specify the duration of time for the evaluation. Following the end of the evaluation period, Licensee will cease using and will delete any such trial software from its computer systems. Use of the evaluation software does not constitute an agreement to purchase any software.</p> <p>This clause allows the government to evaluate software, prior to a formal acquisition process, in the Government's environment at no additional cost. At the same time this clause will provide notice to the Publisher that the Government's trial of their software does not guarantee a purchase at any future point in time. Without this clause, you could potentially be subject to an unauthorized obligation, bona-fide need, or anti-deficiency issues.</p>
<p>3.15 Permitted Software Copies</p>	<p>Licensor grants Licensee permission to make a reasonable number of copies of the Software and Documentation for legitimate business or mission purposes, including, but not limited to: testing, development, "golden" master discs, multiple production environments, disaster recovery, and continuity of operations (COOP). Licensee is responsible for ensuring that all copyright notices, trademarks and other restrictive legends are maintained on such copies. Licensee is also responsible for reporting to Licensor if Licensee learns of the misuse or mishandling of the Software or the Documentation copied as authorized by this section.</p>
<p>Instruction / Rationale</p>	<p>The Government must be allowed to make copies of software for special reasons without additional cost. These reasons include disaster recovery and the list shown in the clause. Back-up and risk mitigation should be considered when drafting the right language for your situation.</p>

Summary

In this White Paper, DoD ESI has presented fifteen clauses that usually comprise the License Grant from the Publisher or Reseller to the Government, along with the best practice language for each and the rationale for the DoD ESI recommendation. You may encounter EULAs that organize or categorize the License Grant clauses differently. In fact, it is more often the case that these clauses are spread throughout the EULA rather than presented as a cohesive set of license grant clauses. In many cases, one or more of these clauses might be missing altogether. The main point of this paper is to make sure all of the topics presented here are included in every EULA, that the language used in each clause conforms as closely as possible to the DoD ESI recommendations, and buyers are equipped to document the contract file whenever the best practices are not fully employed. The DoD ESI Software Buyer's Checklist accessible at www.esi.mil is also a good resource for making sure all important EULA clauses are included, using the best practice language for each.

Exhibits

The following section presents samples or templates of the Exhibits mentioned in this License Grant White Paper.

1. **Glossary** [See separate Word file]
2. **Licensee Requirements**
3. **Licensor's Software Product Capabilities Matrix**
4. **Software Capabilities Summary**
5. **Third Party Software List** [To be completed by the seller at the time of entering the license]

2. Licensee Detailed Requirements List and Description

Number	Title	Description
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		

3. Licensor's Product Capabilities Matrix Mapped to Licensee Requirements

A	B	C		D	E
REQUIREMENT REFERENCE	BUSINESS PROCESS	LICENSOR'S PRODUCT		PRODUCT NAME	LICENSE TYPE*
		FIT (YES)	NO FIT (NO)		
1		X		ABC Product	
2			X		

F	G	H	I
UNIT PRICE	QUANTITY	TOTAL PRICE	THIRD PARTY PRODUCT(S) REQUIRED (Y/N)
			If yes, then list third party brand name and products required
\$	#	\$	

Note: Third Party Software is not being solicited through this action unless explicitly stated as a requirement in the solicitation. Licensor 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]

4. Software Capabilities Summary

[ADD KEY SECTIONS OF THE LICENSOR'S PROPOSAL THAT EXPLAIN HOW THE SOFTWARE WILL MEET THE GOVERNMENT'S REQUIREMENTS AND PROMOTE THE KEY FEATURES AND BENEFITS OF THEIR PRODUCTS AND ANY ADDITIONAL BENEFITS OR SERVICES THAT THEY WILL PROVIDE TO THE GOVERNMENT AS PART OF THEIR PROPOSAL]

5. Third Party Software List



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