# COTS Software Licensing

## EULA Best Practices Webinar

August 2015

# ESI Introductions

## Floyd Groce | *DoD ESI Co-Chair / DON CIO*

DON's representative to, and Co-Chair of, the DoD ESI Working Group. Leads the DON CIO Enterprise Licensing and strategic sourcing efforts for IT hardware, software and services. One of the DoD points of contact for OMB Federal Strategic Sourcing Initiative (FSSI) SmartBUY software licensing initiative. Previously, held an unlimited contracting officer warrant for IT contracting.

## Tom Crawford | *IT Contracting SME, Contract Support to DoD ESI*

20+ years in senior executive positions and consulting roles including DoD ESI. Previously VP at SAP, PeopleSoft, Oracle, and BMC. Former CEO of Cyber-Ark. Served in the U.S. Navy after graduating from the U.S. Naval Academy.

## Dee Wardle | *Software Licensing SME, Contract Support to DoD ESI*

30+ year expert in software licensing for DoD Services and Agencies mostly with the U.S. Army. Former Software Division Chief for the Computer Hardware Enterprise Software & Solutions (CHESS) Program and Program Executive Office Enterprise Information Systems (PEO EIS). Served Federal SmartBUY Programs and the DoD ESI Program.

# EULA Key Clauses / License Grant

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

## Core **License Grant** Elements

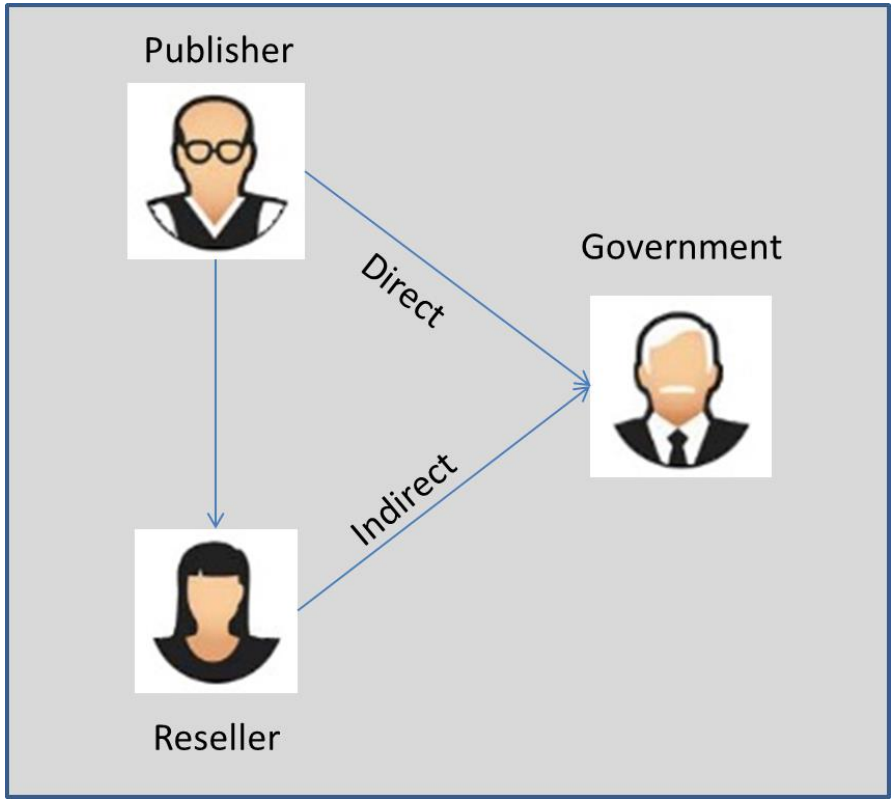
- Parties
- Authorized Users
- Requirements
- Geography
- Times of Conflict
- Product Names & Functions
- Language
- Duration
- Quantity
- Ownership & Use Rights
- Permitted Use
- Self Audit

# * EULA Key Clauses / License Grant

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

Parties

*Who is authorizing this EULA?*



# * EULA Key Clauses / License Grant

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Requirements

*What are the customer's needs for the software?*

# EULA Key Clauses / License Grant

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

Product Names & Functions

*What products will meet the customer's requirements?*

| BUSINESS PROCESSES | MODULES AND SUB-MODULES |
|---|---|
| ▪ Financial Reporting<br>▪ Management Reporting<br>▪ Closing Process<br>▪ Internal project tracking<br>▪ Entry of vendor invoices<br>▪ Check Printing<br>▪ Bank integration for ACH and wires<br>▪ Employee expense reimbursement<br>▪ Inter-company tracking<br>▪ Cost Center Planning<br>▪ Balance Sheet Planning<br>▪ P&L Planning (EXCEL Upload Capability)<br>• Consolidations (minimal requirements) | ▪ FI and CO Organizational Structures<br>▪ FI-General Ledger<br>▪ FI- Accounts Payable<br>▪ FI- Bank Accounting<br>▪ CO- Cost Center Accounting<br>▪ CO- Profit Center Accounting<br>▪ CO- Overhead Cost Controlling<br>▪ CC, B/S and P&L<br>▪ SEM-BCS for Financial Consolidations for Four legal entities<br>▪ Business Intelligence to support reporting and plan vs. actual reports<br>▪ Portal to support reporting through Business Intelligence<br>▪ Solution Manager to support environment management<br>▪ GRC to support access control management<br>▪ Exchange Infrastructure to support integrations |

*and any software required to perform the business process of x, y and z*

# EULA Key Clauses / License Grant

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

**Duration**

*How long can the software be used?*

**PERPETUAL**

**TERM / SUBSCRIPTION**

# * EULA Key Clauses / License Grant

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

**Permitted Use**

*For what purposes can the software be used?*

**Lifecycle Phases:**

| • Selection | • Implementation | • Operations |
|---|---|---|

**License Grants:**

| • Trial/Demo | • Development & Test | • EULA<br>• Operations & Business<br>• Back-up & Recovery<br>• COOP |
|---|---|---|

# * EULA Key Clauses / License Grant

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

Authorized Users

*Who can use the software?*

# EULA Key Clauses / License Grant

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

Geography

*Where can the Software be used?*

# EULA Key Clauses / License Grant

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

Language

*What languages will the user community understand?*

*Software*

*logiciel*

*ソフトウェア*

*szoftver*

# * EULA Key Clauses / License Grant

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

**Quantity**

*How many copies of the software can be used?*

# * EULA Key Clauses / License Grant

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

Self-Audit

*How will you know that the allowable quantities are being used?*

# EULA Key Clauses / License Grant

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

Times of Conflict

*What additional licenses are needed?*

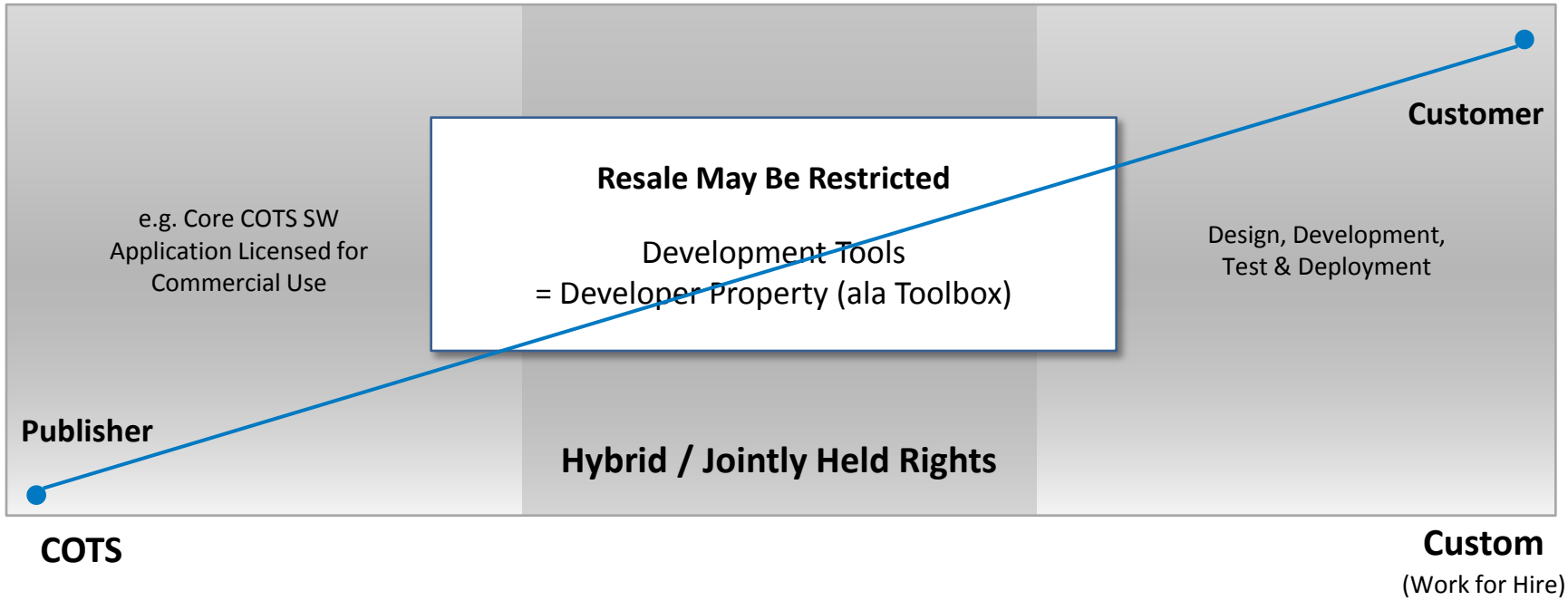
# * EULA Key Clauses / License Grant

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

Ownership & Use Rights

*Who is the owner of works derived from the software?*

**Government Always Owns the Exclusive Rights to its Data But What About Enhancements or Modifications to the Licensed Software?**




**COTS**

**Custom**
(Work for Hire)

# Intellectual Property – Standard Protection Methods

## Four Ways to Protect IP

**Patents**
protect rights for inventions, up to 20 years.

**Trademarks**
protect words, names, symbols for as long as they are being used in business.

**Copyrights**
protect works of authorship *(e.g. writing, music, art, software)* tangibly expressed.

**Trade Secrets**
protect competitive advantages.

### Software Industry Examples

| | | | |
|---|---|---|---|
| Software algorithms | Logos, icons, corporate name | Source code, screen layouts | Customer lists |

# Publisher Business Model – Traditional View

**Source Code**
(Human Readable – Secret Recipe)

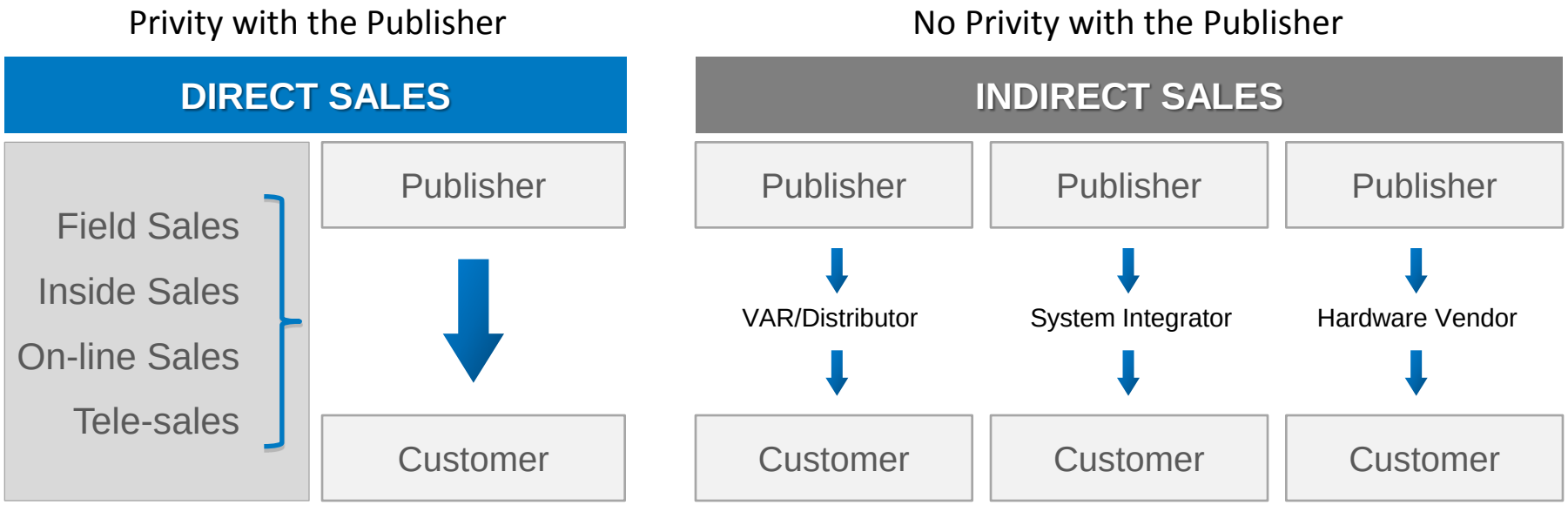
**Object Code** (Machine Readable)

Products / Functionality / Licensed I.P.

| | |
|---|---|
| License Agreement | Parties, Grant of License, Quantity, Duration, Permitted Use, Price, Warranty, Remedies |
| Maintenance & Support | Bug Fixes, Patches, Updates |
| Services | Training, Implementation, Hosting |

# Publisher Model / Contracting Methods

## Impacts on Privity of Contract




**Examples of Contract Provisions Where Privity Matters – It's All About the IP:**

- License Grants
- Transferability of Licenses
- Source Code Escrow
- Ownership of Derivative Works
- Warranty
- Level 3 Support
- IP Indemnification

# Open Source Code

- How Publishers Use Open Source
  - Some are well-known stand-alone apps (e.g. Mozilla Firefox, Apache, Linux, OpenOffice, etc.). They can work in concert with other applications without becoming embedded in copyrighted applications.
  - Other applications (or chunks of functionality) have found their way into products published by commercial software companies who copyright their applications and sell licenses.
  - In both cases, Publishers of copyrighted software must use caution to avoid violating the Open Source standards and license provisions.

# Contract Concerns with Open Source Code & Third Party Software

- Maintenance & Support
  - *Since Open Source is collaboratively developed and peer reviewed, there might be no formal infrastructure for providing fixes, patches, enhancements and updates.*
  - *Possibly no formal support organization to assist with diagnosing/fixing problems.*
- License Rights and Intellectual Property
  - *Open Source licenses can require sharing of enhancements or derivative works.*
  - *"Encapsulation" can be used to isolate Open Source code from copyrighted IP.*
  - *Make sure the EULA includes the following covenants from the Publisher:*
    - Disclosure of all third party software (TPS) including Open Source.
    - Publisher has the right to use the TPS in the way it has been used with Publisher's IP.
    - No additional licenses or fees required to use the licensed or third party software.
    - Publisher warrants performance of its IP and the TPS included with its IP.
    - No obligation to share enhancements or derivative works of licensed software or included third-party software.

# EULA Key Clauses / Pricing

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

## Core **Pricing** Elements

- Financial Investment
- Metric
- Discount
- Key Terms
- Benchmarking

# EULA Key Clauses / Pricing

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

Financial Investment

License or Subscription Price

Maintenance and Support Price

Training or Other Services Price

# License Pricing Models – Basic Approach

**Duration**

- ☐ Specified Term
  *Month | Year*
- ☐ Perpetual
  *Forever*

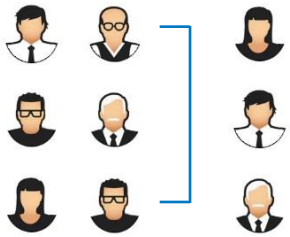
Note: *Virtualization* and *Unlimited* Issues

**Who Can Use? Count & Scope**

### Named User

Only this individual may use this license

### Concurrent User



Anyone can use these set number of licenses as long as no more than x use them at the same time

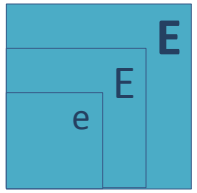
### Processor / Core Based

Based on number of processors or cores in CPU

### Site

Licenses may only be used at this geographic location

### Enterprise




Licenses may be used across the enterprise as defined in the agreement

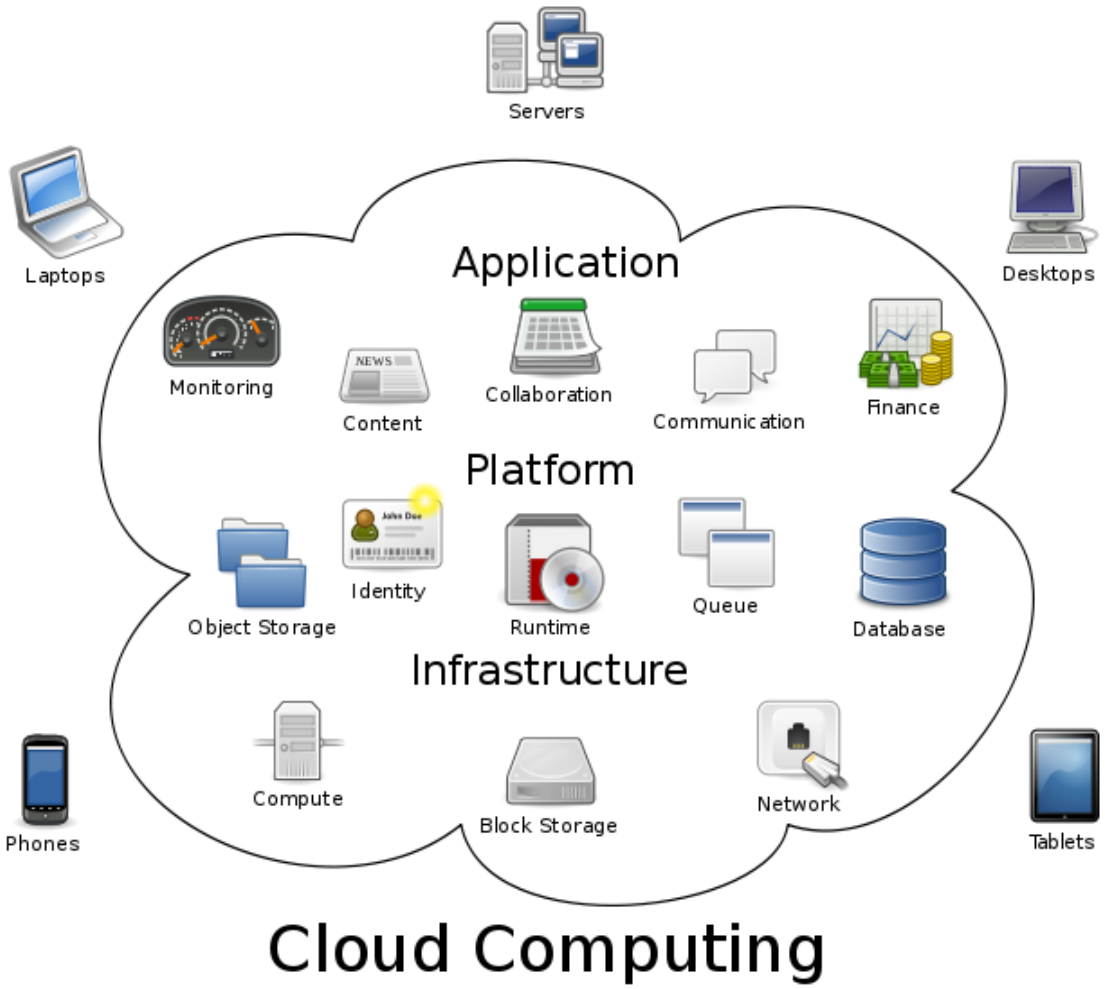
**How Managed / Delivery Model**

On Customers Premises

- ☐ Customer's Servers
- ☐ Private Cloud
- ☐ On Vendors Premises *(Public Cloud)*
- ☐ Hybrid

# License Pricing Models

- **<u>Cloud</u>** – a pricing model intended to cover all the costs of a cloud environment.



# EULA Key Clauses / Pricing

License Grant | **Pricing** | Warranty | Maintenance | General Provisions

Discount

Examples Only

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

# EULA Key Clauses / Pricing

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

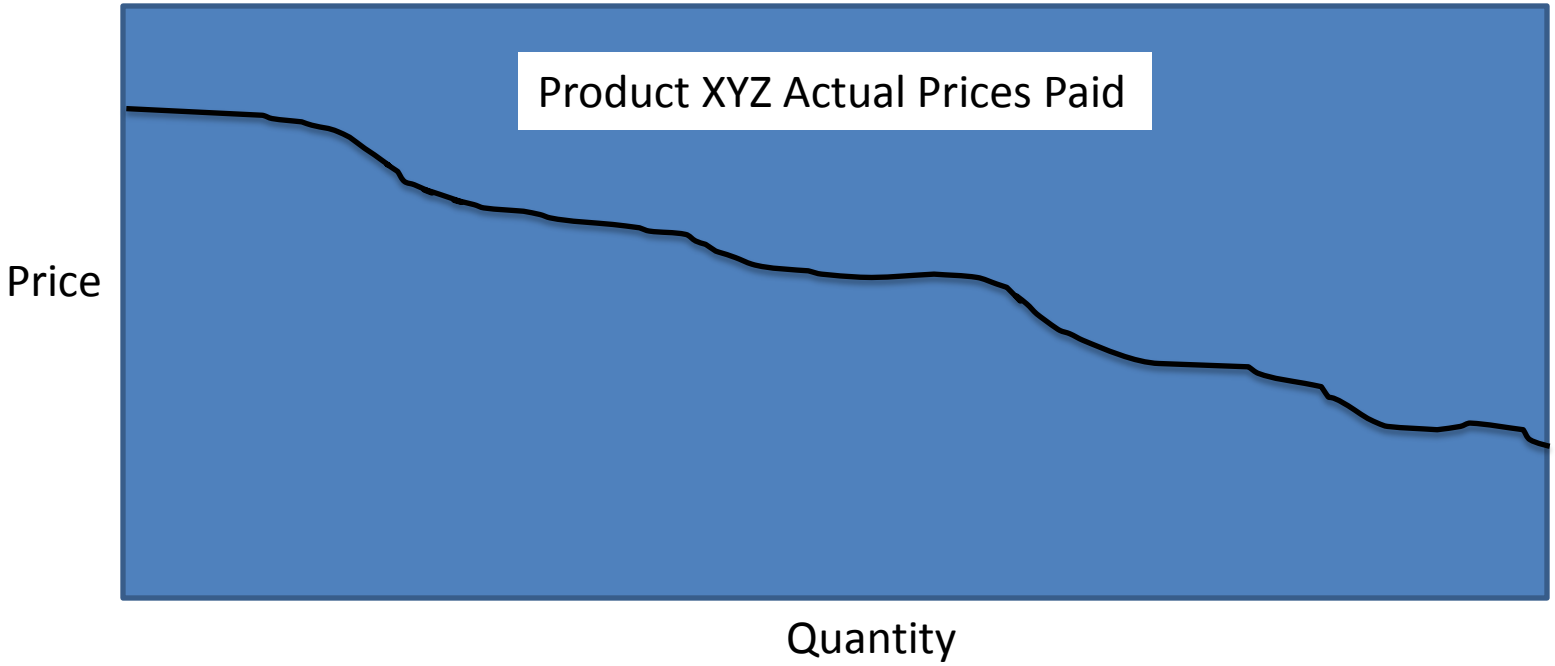
## Terms & Conditions

- Discount Pricing for Additional Products
- No Transfer or Relocation Charges
- Discount Education and Services
- Discount Maintenance Rates for New/Existing Licenses
- Most Favored Customer Provision and GSA Price Reduction Clause
- Low or Waived Escalation of Future Maintenance Rates

# EULA Key Clauses / Pricing

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

Benchmarking



# * EULA Key Clauses / Warranty

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

## Core **Warranty** Elements

- What is Covered?
- Who is Covered?
- Timing
- Remedies

# * EULA Key Clauses / Warranty

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

What is Covered?

**Express Warranty**

"The Product will meet my specs"

**Implied Warranty**

- Merchantability
- Fitness for Particular Purpose

See FAR 52.212-4(o)

**Performance Warranty**

- What is Covered
- Who is Covered
- Timing / Duration
- Defect Remedy

**Buyer's Preferred Documentation**

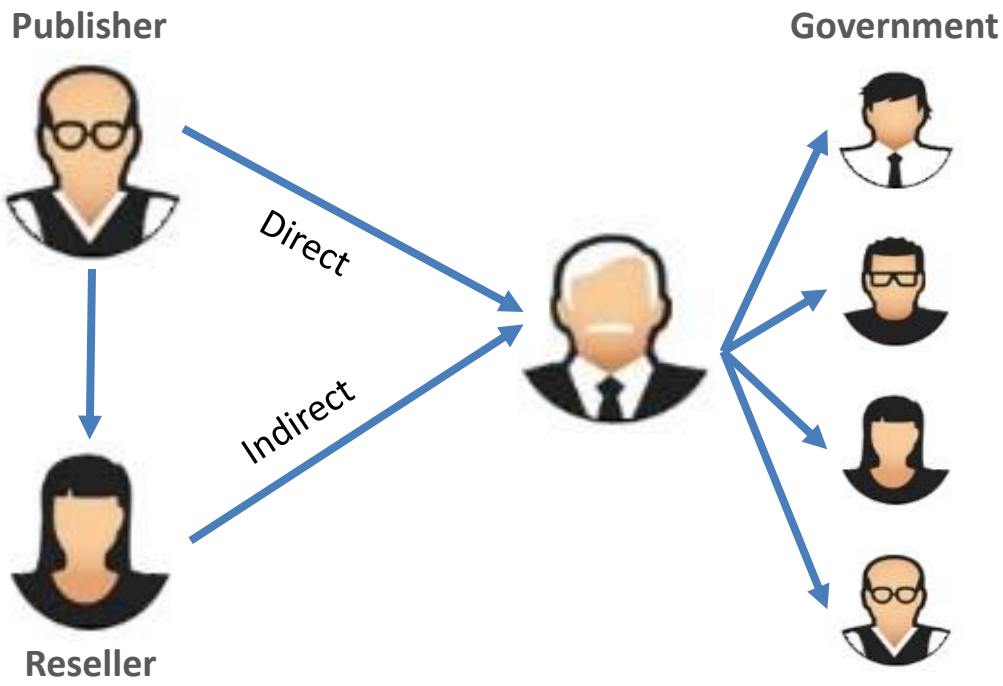
**Seller's Preferred Documentation**

"The product will perform *as specified in the documentation*"

# EULA Key Clauses / Warranty

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

Who is Covered?



# * EULA Key Clauses / Warranty

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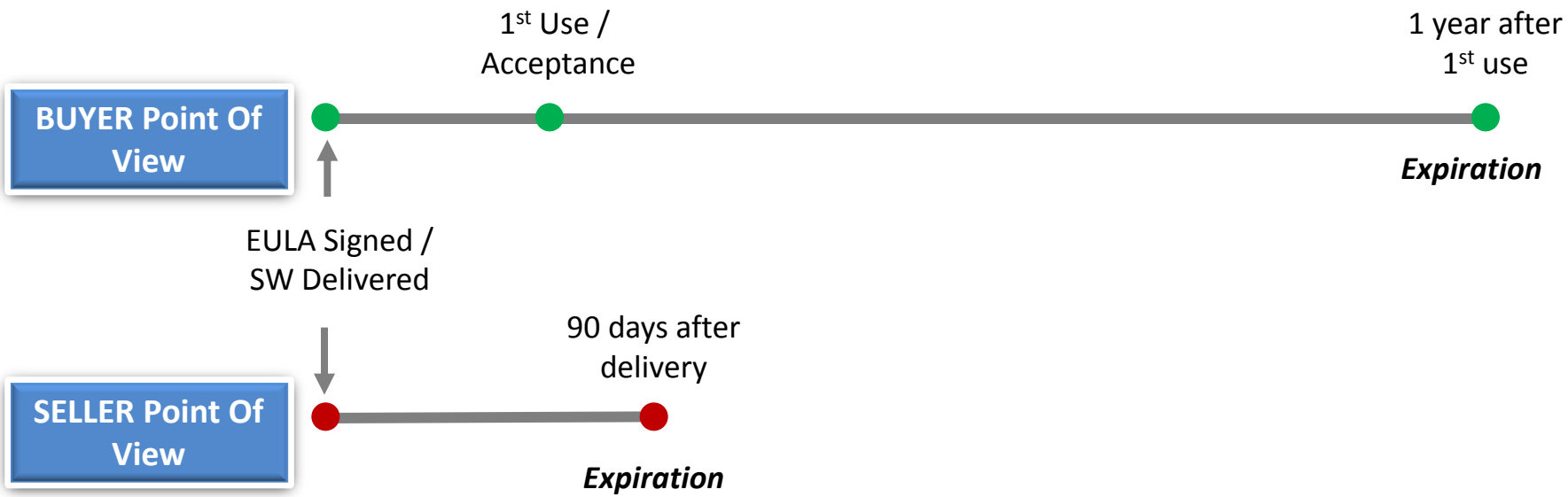
|---|---|---|---|---|

**Timing**

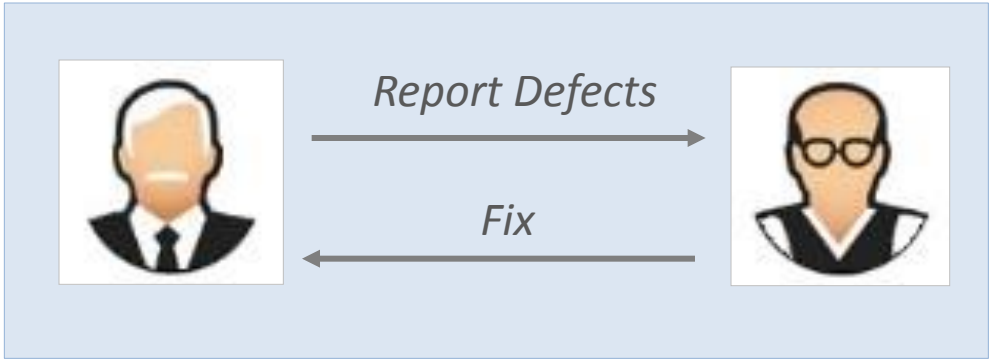


# * EULA Key Clauses / Warranty

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

Remedies

***Process for Reporting and Fixing Defects***




- Suspend warranty period while defects are addressed
- Issues addressed at no additional charge
- Specify conditions for full refund during initial warranty period

# EULA Key Clauses / Warranty

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

### Government

### Publisher

### Publisher Tactics

**CUSTOMER VIEWS**

- Product assurance
- Free from bugs & defects
- Meet requirements
- Functionality
- Performance

**VENDOR VIEWS**

- Limit liability
- Short duration / time
- Reasonable standards
- In their control
- Revenue recognition

**TACTICS TO LIMIT**

- Integration clause
- No express warranty
- Disclaim implied warranty
- Limit to Seller's documentation
- Short duration
- Limit remedies

# * EULA Key Clauses / Warranty

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

- "Best interests of the government" from FAR Part 12
- Commercial practice includes negotiation of warranty provisions
- The DoD Warranty Guide says warranty is as important as price and encourages negotiation.

# * EULA Key Clauses / Warranty

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

## Risk Analysis

- Software Reliability
- Publisher Reputation
- Warranty Start/Duration
  - Acceptance
- Implementation Process
- Defect Discovery
- Cost

# EULA Key Clauses / Maintenance

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

## Core **Maintenance** Elements

- Scope & Levels of Support
- Timing & Duration
- Rates
- Escalation

# Maintenance and Support

**Product Development / R & D**

during warranty

**License**

Version 1.0
Functional performance of product
Patches & Fixes 1.0.1 (under warranty)

**Maintenance & Support**

**Product Entitlements**

- Fixes & Patches (1.0.1)
- Updates (1.1)
- Upgrade / New Release / Version (2.0)

**Support Services**

**1.** Support Levels and Process (Who receives, diagnoses, and fixes problems?)
**2.** Issue Severity Levels
**3.** Response Times

post warranty

# EULA Key Clauses / Maintenance

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

Support Levels

***Who receives, diagnoses and fixes the problem?***

*User*

| *Help Desk* | *Product Experts* | *Development Team* |
|---|---|---|
| | | |
| 1 | 2 | 3 |

***Support Levels***

# EULA Key Clauses / Maintenance

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

Severity Levels and Response Times

| Issue Severity | Response Time to Acknowledge Issue | Response Time to Fix Issue |
|---|---|---|
| **Level 1** *(Low)* No significant impact on users. | Return call or email within 8 hours. | Provide fix within 30 days. |
| **Level 2** *(Moderate)* Causes some user issues, but most processes are functional. | Return call or email within 4 hours. | Provide fix within 5 days. |
| **Level 3** *(High)* Significant impact on system use. | Return call or email within 1 hour. | Provide fix ASAP—24 hours or less. |

# EULA Key Clauses / Maintenance

| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

Timing and Duration

## Warranty in EULA

EULA Signed / SW Delivered

1st Use / Acceptance

1 year after 1st use

***Warranty Commencement***

***Warranty Expiration***

## Maintenance

Early Start Date for Maintenance – Extend for 18 Months

Deferred Start Date for Maintenance – 12 Month Term

# EULA Key Clauses / General Provisions

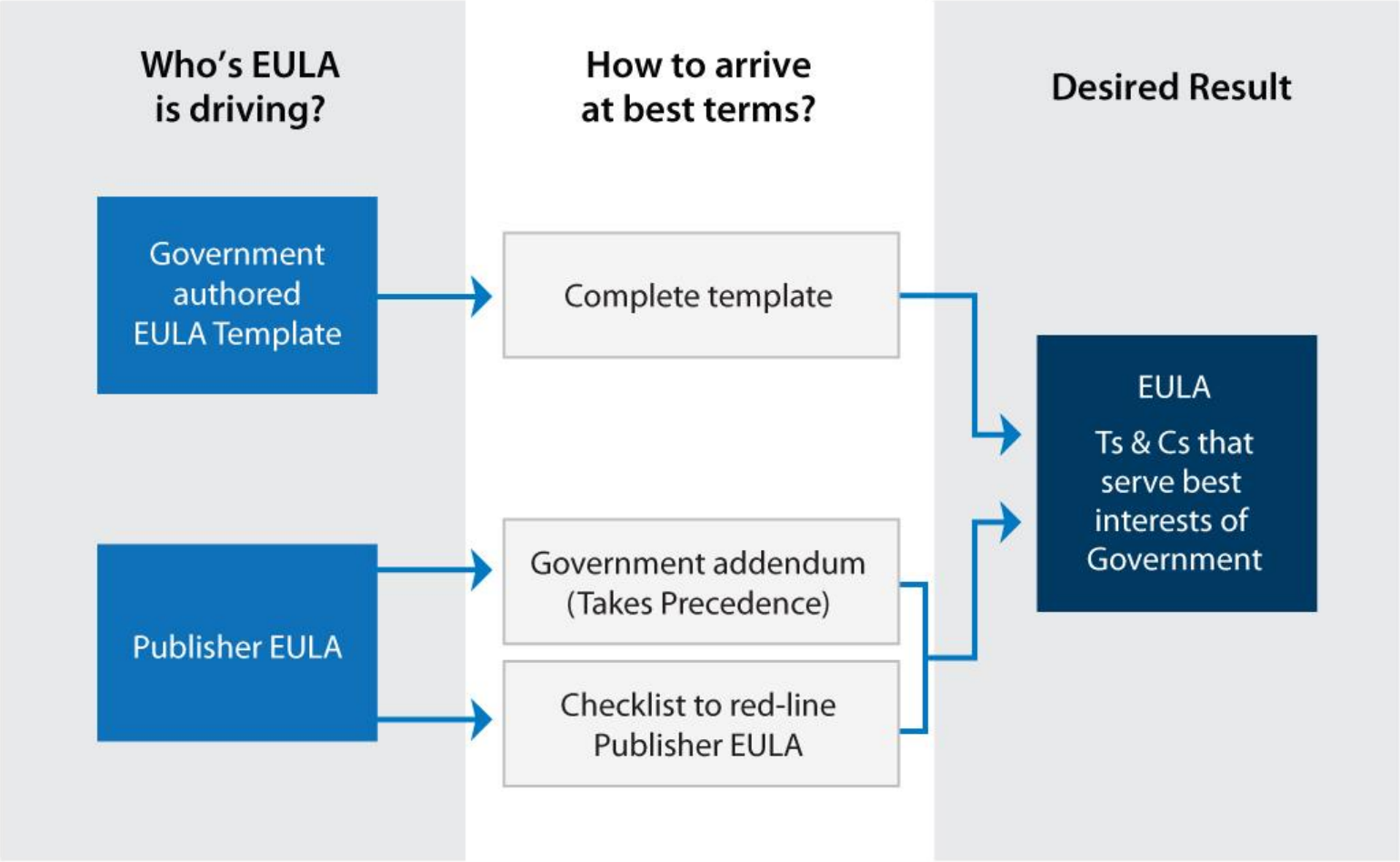
| License Grant | Pricing | Warranty | Maintenance | General Provisions |
|---|---|---|---|---|

## Sample Clauses

- Order of Precedence
- Termination
- Governing Law
- Confidentiality
- Limitation of Liability
- Dispute Resolution
- Severability
- Assignment
- Integration
- Term
- Relationship of Parties

## FAR and DFARS

# Negotiating Strategies



# The Cloud's Impact on Licensing – SLAs are Critical

| On Premise | Infrastructure (as a Service) | Platform (as a Service) | Software (as a Service) |
|---|---|---|---|
| Applications | Applications | Applications | **Applications** |
| Data | Data | Data | **Data** |
| Runtime | Runtime | **Runtime** | **Runtime** |
| Middleware | Middleware | **Middleware** | **Middleware** |
| O/S | O/S | **O/S** | **O/S** |
| Virtualization | **Virtualization** | **Virtualization** | **Virtualization** |
| Servers | **Servers** | **Servers** | **Servers** |
| Storage | **Storage** | **Storage** | **Storage** |
| Networking | **Networking** | **Networking** | **Networking** |

You Manage

You Manage

You Manage

Managed By Vendor

Managed By Vendor

Managed By Vendor

# SLAs Are Critical for SaaS/Cloud

*System Availability Example – 99.9%*

| Criteria | Measurement | Comments |
|---|---|---|
| **Minutes in a 90 day period** | **129,600 minutes** | |
| **Planned down time (assume 18 hours)** | **1080 minutes** | *This is a standard amount of time for system maintenance* |
| **Remaining minutes for scheduled up-time** | **128,520 minutes.** | |
| **SLA** | **99.9%** | *This is a moderate standard; 5 nines (99.999%) is very high* |
| **Minutes of expected up time** | **128,391.5 minutes.** | |
| **Allowable minutes of unplanned downtime** | **128.52 minutes ~ 2.1 hours over 90 days!** | *Little time for unplanned down time* |
| **Penalties** | **Varies** | *Usually a credit is given for missing the SLA* |

# Questions?

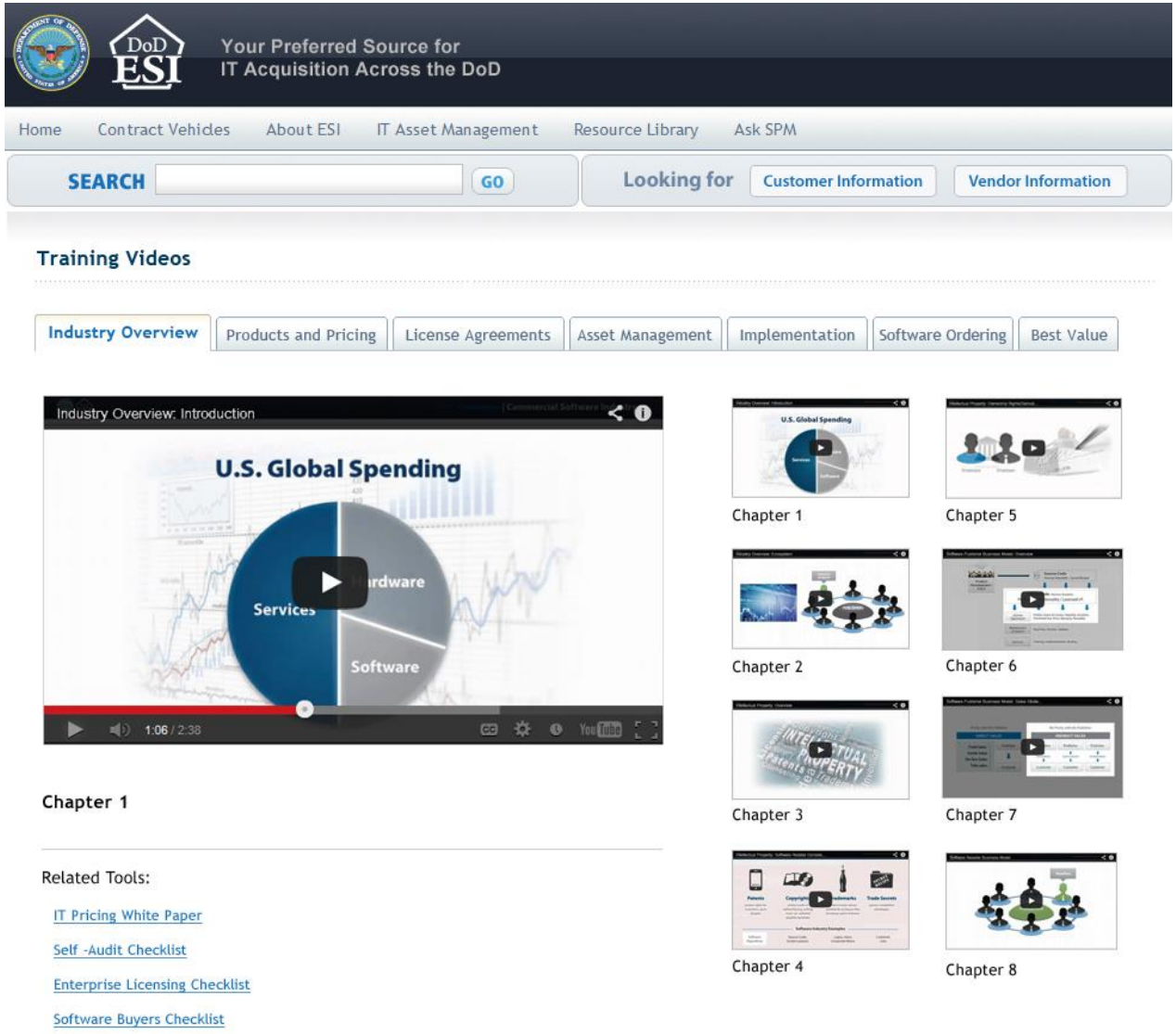
# Training Information on DoD ESI Web Site

Please visit the following page on the ESI web site to:

- Register for ESI training
- Provide training feedback
- Request a consultation with an ESI Software Licensing SME
- Download training materials

http://www.esi.mil/ContentView.aspx?ID=395&type=2

# DoD ESI Tools: eLearning Tutorials (In process)

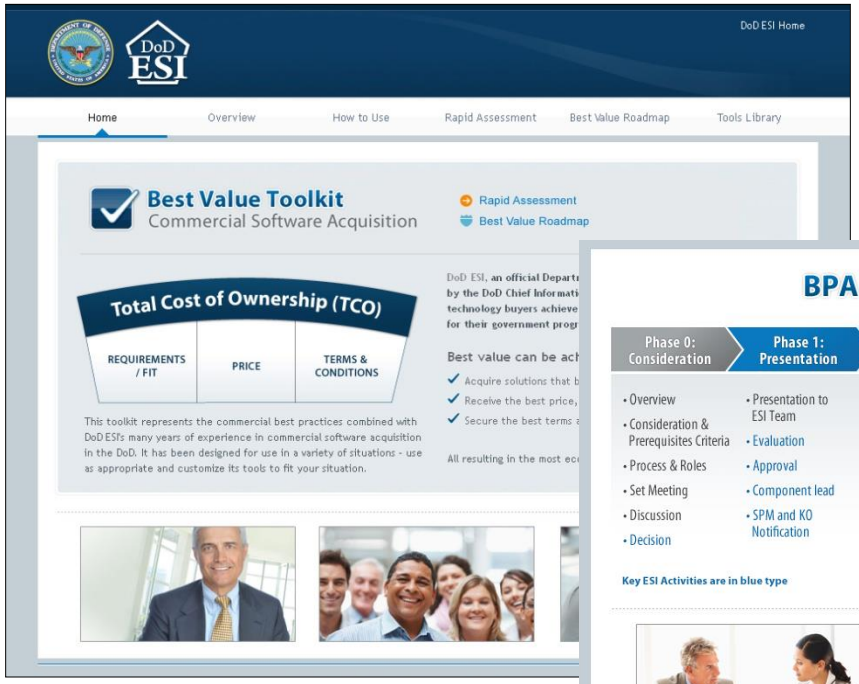



Up to 8 Modules per Chapter

- Industry Overview
- Products & Pricing
- License Agreements
- Asset Management
- Implementation
- Ordering
- Best Value

# DoD ESI Tools: HTML Toolkits and Software Buyer's Checklist

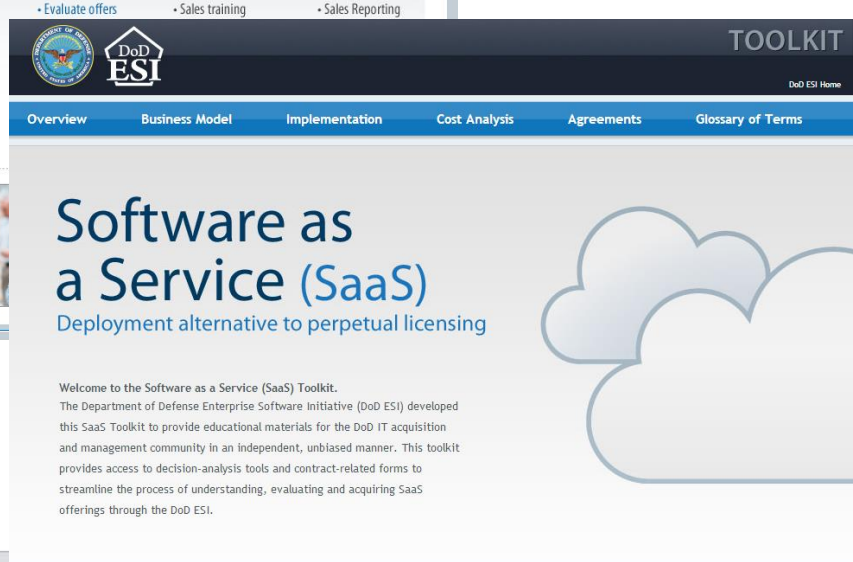
Best Value Toolkit




BPA Toolkit

Software Buyer's Checklist

SaaS Toolkit



# DoD ESI Tools: White Papers

## IT Virtualization Technology

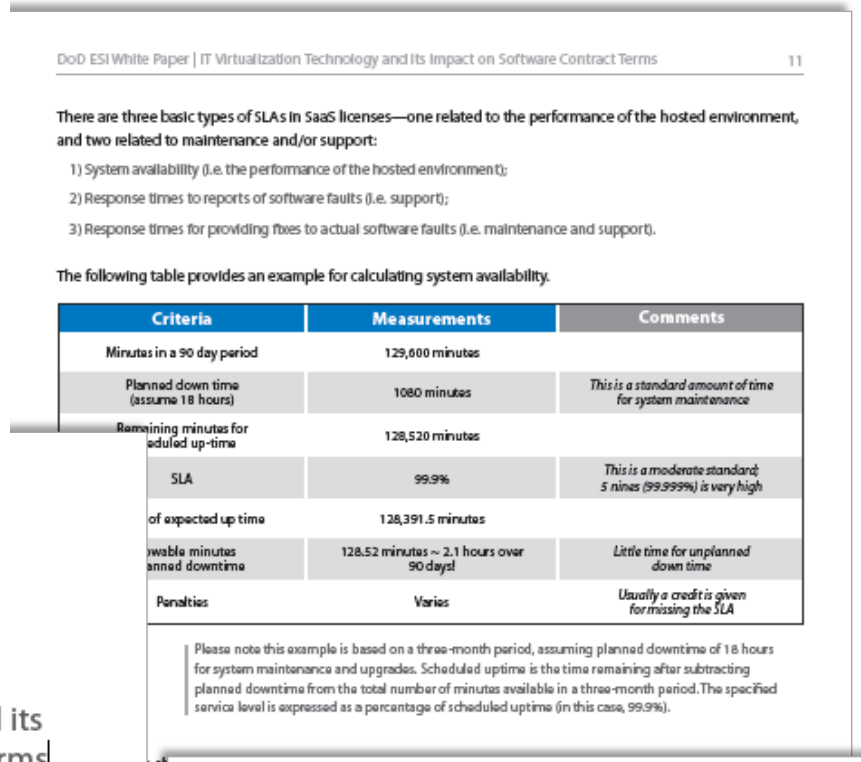
## Cloud-Based Software Contracts

## Open Source Software

## Third Party Software

## Software Warranties

## Software Maintenance (Spring 2014)



DoD ESI White Paper | IT Virtualization Technology and Its Impact on Software Contract Terms 11

There are three basic types of SLAs in SaaS licenses—one related to the performance of the hosted environment, and two related to maintenance and/or support:

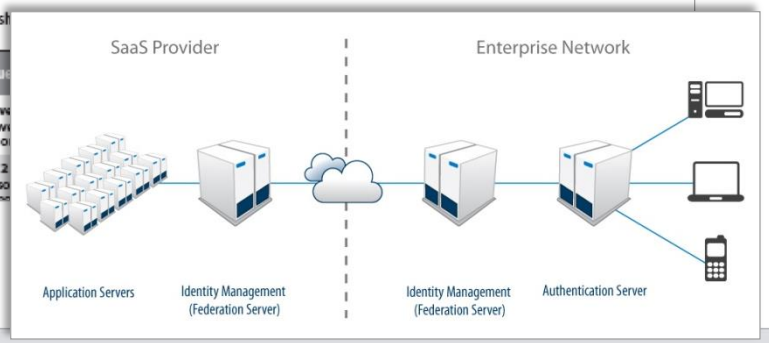
1) System availability (i.e. the performance of the hosted environment);
2) Response times to reports of software faults (i.e. support);
3) Response times for providing fixes to actual software faults (i.e. maintenance and support).

The following table provides an example for calculating system availability.

| Criteria | Measurements | Comments |
|---|---|---|
| Minutes in a 90 day period | 129,600 minutes | |
| Planned down time (assume 18 hours) | 1080 minutes | *This is a standard amount of time for system maintenance* |
| Remaining minutes for scheduled up-time | 128,520 minutes | |
| SLA | 99.9% | *This is a moderate standard; 5 nines (99.999%) is very high* |
| of expected up time | 128,391.5 minutes | |
| owable minutes anned downtime | 128.52 minutes ~ 2.1 hours over 90 days! | *Little time for unplanned down time* |
| Penalties | Varies | *Usually a credit is given for missing the SLA* |

Please note this example is based on a three-month period, assuming planned downtime of 18 hours for system maintenance and upgrades. Scheduled uptime is the time remaining after subtracting planned downtime from the total number of minutes available in a three-month period. The specified service level is expressed as a percentage of scheduled uptime (in this case, 99.9%).

DoD ESI White Paper

IT Virtualization Technology and its Impact on Software Contract Terms

Contractual protections to consider before taking advantage of popular virtualization technology solutions.