



COTS Software Licensing

Foundational Topics Overview

October 2016

Agenda

DAY 1 MORNING – FOUNDATIONAL TOPICS

- Welcome & Agenda Review
- Introductions & Time Management
- Introduction to DoD ESI
- Information Technology (IT) Industry Overview & Ecosystem
- Intellectual Property (IP) Overview; Source Code Escrow
- Privity / Software Publisher & Reseller Contracting Methods
- Software Publisher Products and Services; Open Source / 3rd Party

Agenda

DAY 1 AFTERNOON –

- Preparing for the Acquisition – Team Approach
- Preparing for Negotiations – Strategic Guidance

CORE ELEMENTS OF A SOFTWARE LICENSE AGREEMENT

- License Grant

Parking Lot Questions

Agenda

DAY 2

CORE ELEMENTS OF A SOFTWARE LICENSE AGREEMENT (cont.)

- Pricing and License Models
- Warranty
- Maintenance and Support
- General Provisions
- General Services Acquisition Regulation Class Deviation
- Panel Discussion / Open Topics from the Class & Parking Lot
- Exercise

DoD ESI Team / Instructor Introductions

Lynda Potters | DoD ESI Training Lead
Extensive experience in software acquisition, life cycle and program management. 15+ years supporting Navy and Joint Engineering programs. Current DoD ESI Training and ITAM Lead and Navy Project Officer for Symantec and Red Hat Agreements. MS Software Engineering and BS IT Project Management.

Nick "Bucky" Thomas | DoD ESI Training Coordinator
Comprehensive experience in technology implementation, deployment, and management. 10+ years' experience in variety of private and government IT infrastructures. BS in Political Science, minor in law and policy. Current DoD ESI Training Coordinator, and Navy Project Officer for VMware.

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.

John Zettler | Pricing & Contract SME,
Contract Support to DoD ESI

30+ years in government contract costing, pricing, and program financial management, with particular expertise in IT services and enterprise software acquisition. Six years at Oracle Federal and two years at Informix Federal. Pricing, Business Approval, and Contracts experience across six different vertical industries.

Introductions

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.

Student Backgrounds

Show of Hands...

Been to ESI class before?
Contracting Officers/Contract Specialists?
Program Managers?
IT Specialists/CIO Office?
Attorneys?
Budget-Financial Managers?
Large COTS software buy?

Time Management Guidelines

- Many topics to cover in short amount of time
- We strive to stay on time
- We encourage questions and interactivity
- Recognize that students have different roles, level of experience, and interests
- Time Czar will announce cut off points

Off-topic or abundance of questions can be handled via:

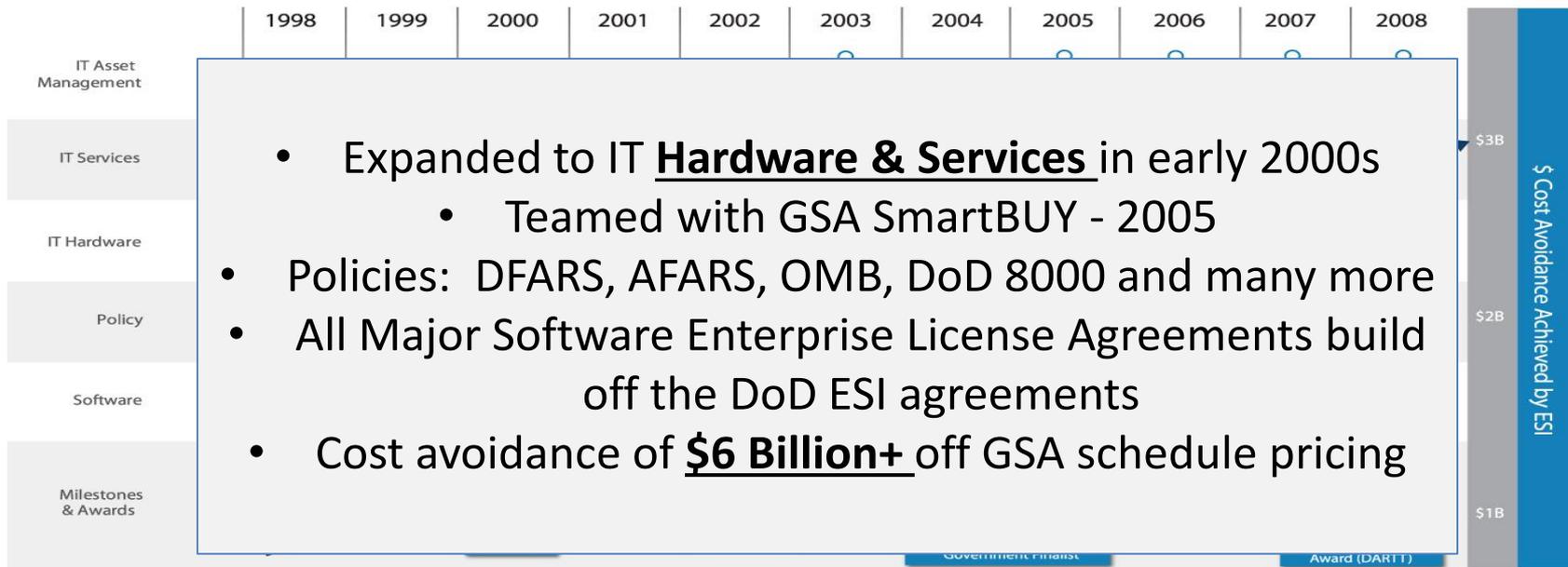
- *Defer to Future Section*
- *Parking Lot > Open Time*
- *Defer to Panel Discussion*
- *After Class on Day 1*
- *Follow-up Conference Call*
- *Webinar Topic*
- *Future Workshop on Key Topic*

Introduction to the DoD Enterprise Software Initiative (ESI)

Prepared by DoD ESI | 2016

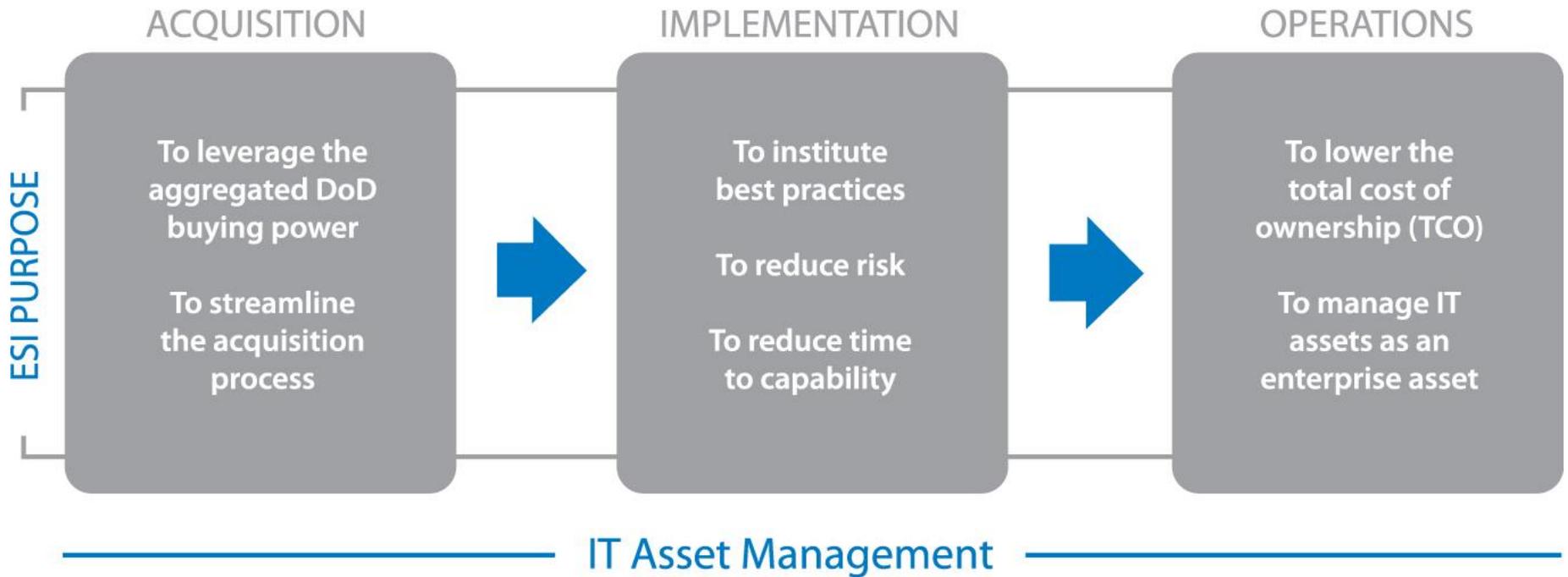
DoD ESI Key Introductory Points

- Formed in **1998** by DoD CIOs / Oversight by DoD CIO
- Serve as the **central group of subject matter experts** to negotiate with software publishers and their resellers on behalf of the DoD
- Staffed with **software product managers** from across the DoD services with specialization in a particular software company or product category



DoD ESI's Mission

Commercial Software Life-Cycle





Market Research

- Industry Knowledge
- Trends in Technology
- Product Uniformity
- License Models



Terms & Conditions

- Software Licenses
- Maintenance & Support
- Integration Services
- Cloud/SaaS



Training

- Classroom
- eLearning
- Webinars
- Workshops



Stakeholder Outreach

- Strategic Communication
- Awareness
- Education
- Sponsorship



Tools

- White Papers
- Checklists
- Web Toolkits
- Templates



Lessons Learned

- Best Practices
- Knowledge Sharing
- IT Asset Visibility
- SPM Support



Pricing

- Benchmarking
- Best Value Toolkit
- TCO Tools
- Portal



Your preferred source for IT Acquisition across the DoD

THOUSANDS OF IT PRODUCTS AND SERVICES AVAILABLE UNDER DOD ESI AGREEMENTS

Discounted Pricing and Best Terms and Conditions



- Home
- Training
- Agreements
- Ask an Expert
- Resources / Tools

New Website Launched

January 30, 2015

This notice is to inform our users that you have reached our new ESI website with improved functionality and a new look. You may find that some items and information may be missing, and we are ...

Featured News

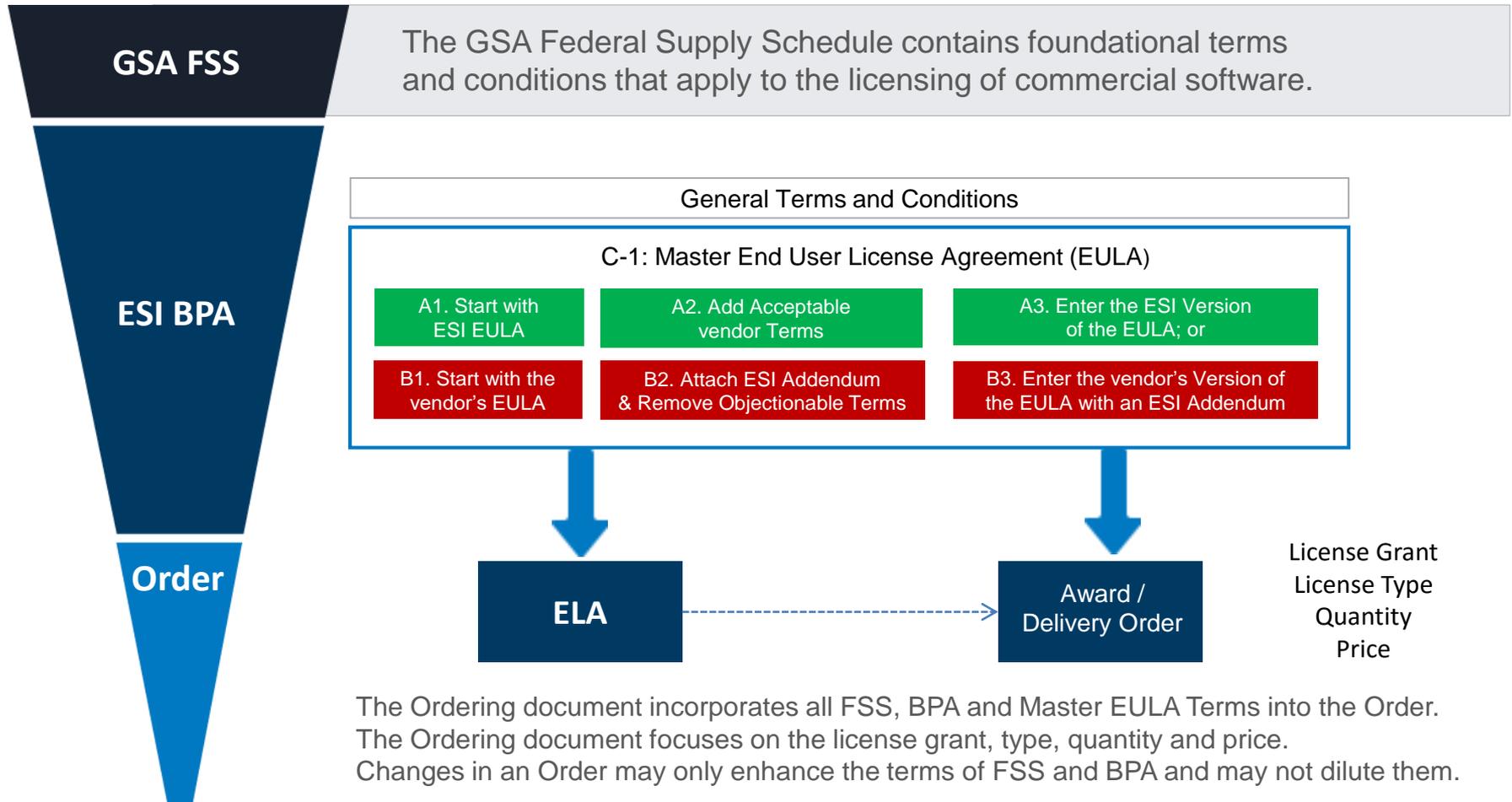
CHIPS Magazine Mobile App Now Available

January 30, 2015

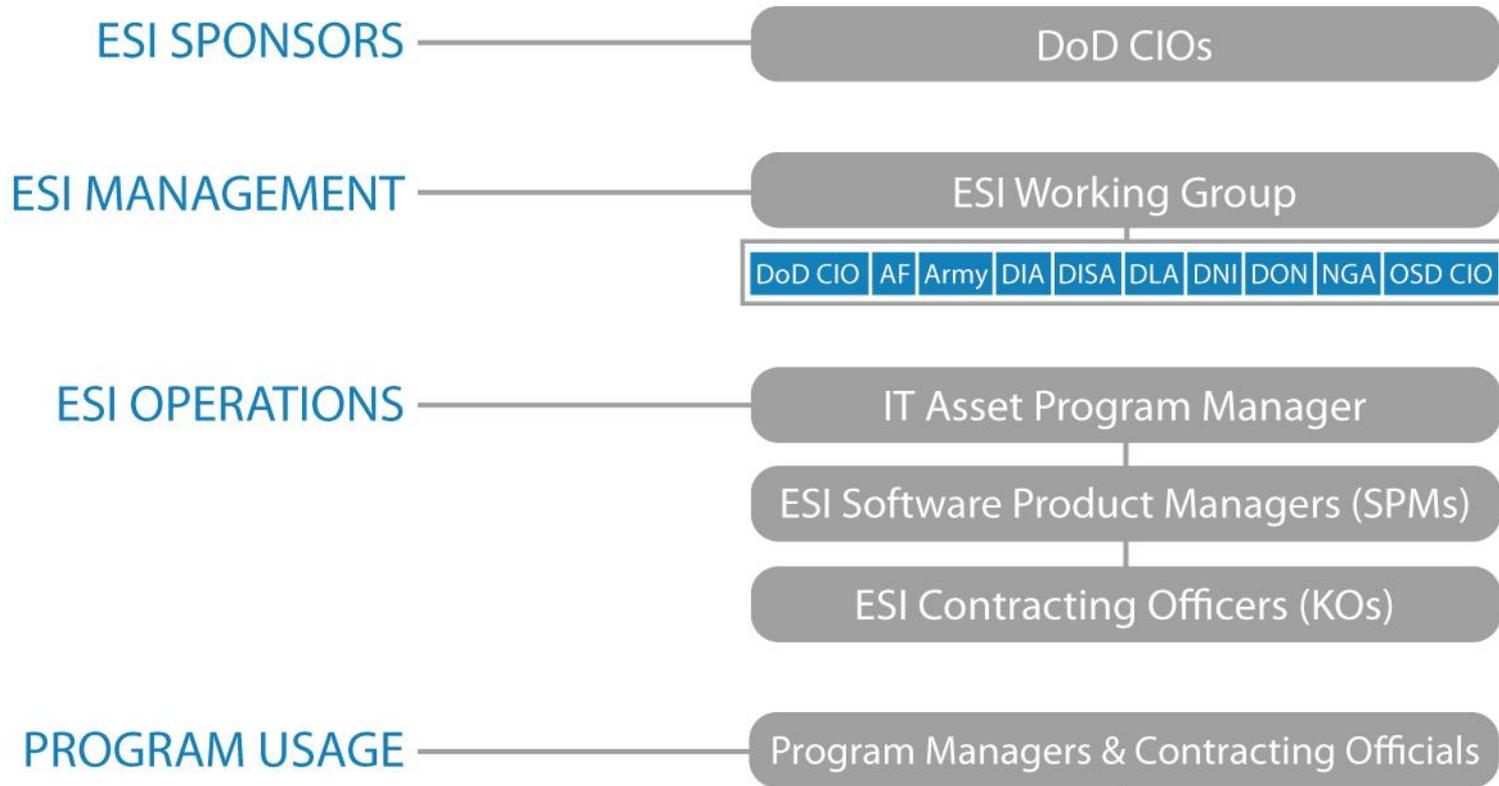
The CHIPS magazine mobile app for the Android and iOS operating systems is now available. The app is designed to provide users streamlined access to the latest articles and the ability to tag ...



Contractual Architecture Using GSA FSS and DoD ESI BPA



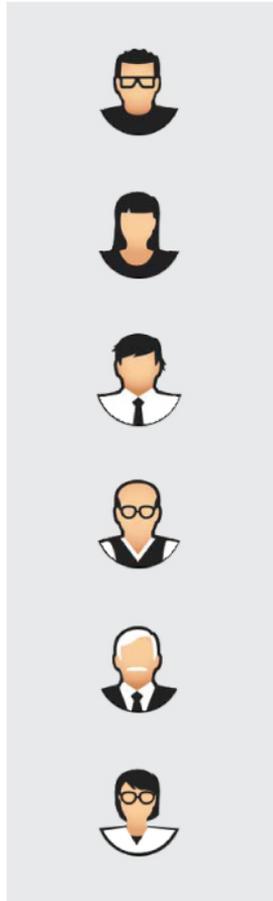
Organizational Structure



If you'd like to see a product or service added to the catalog of ESI BPAs, please contact DoD ESI Co-Chair

Training Strategy for DoD ESI

Trainees / IT Buyers



Core Solutions / Strategies

Whose EULA is driving?

Government authored EULA Template



How to arrive at best terms?

Complete template

Publisher EULA



Government addendum (Takes Precedence)

Checklist to red-line Publisher EULA

Tools, Training and Support

Training Classes and Webinars

Market Research Portal

Templates, Toolkits & Guides

Software Buyer's Checklist

Wizard

Articles & White Papers

eNewsletters

eLearning Videos/Tutorials

Desired Result

Commercial Software License Agreement

With Terms and Conditions that serve the best interest of the government

Note: FITARA & Gov EULA Template

Social Media / Collaboration / Community

FOUNDATIONAL CONCEPTS

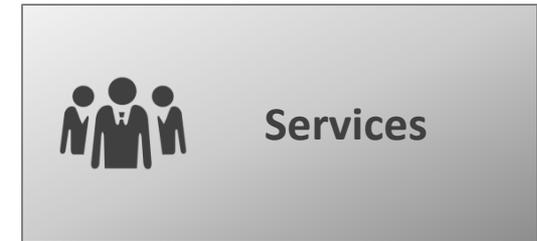
(Before Diving into the Contractual Impacts)

Prepared by DoD ESI | 2016

1.0 The IT Industry

Prepared by DoD ESI | 2016

Overview: Industry Overview / Spend Analysis



	Global Spending (Gartner Outlook)*		
2014	\$835B**	\$314B	\$955B
2015	\$790B	\$310B	\$914B
% '15	39%	15%	46%

	Federal Government Spending (est. using same % as Global Spending)***		
2015	\$31B	\$12B	\$36B
% '15	39%	15%	46%

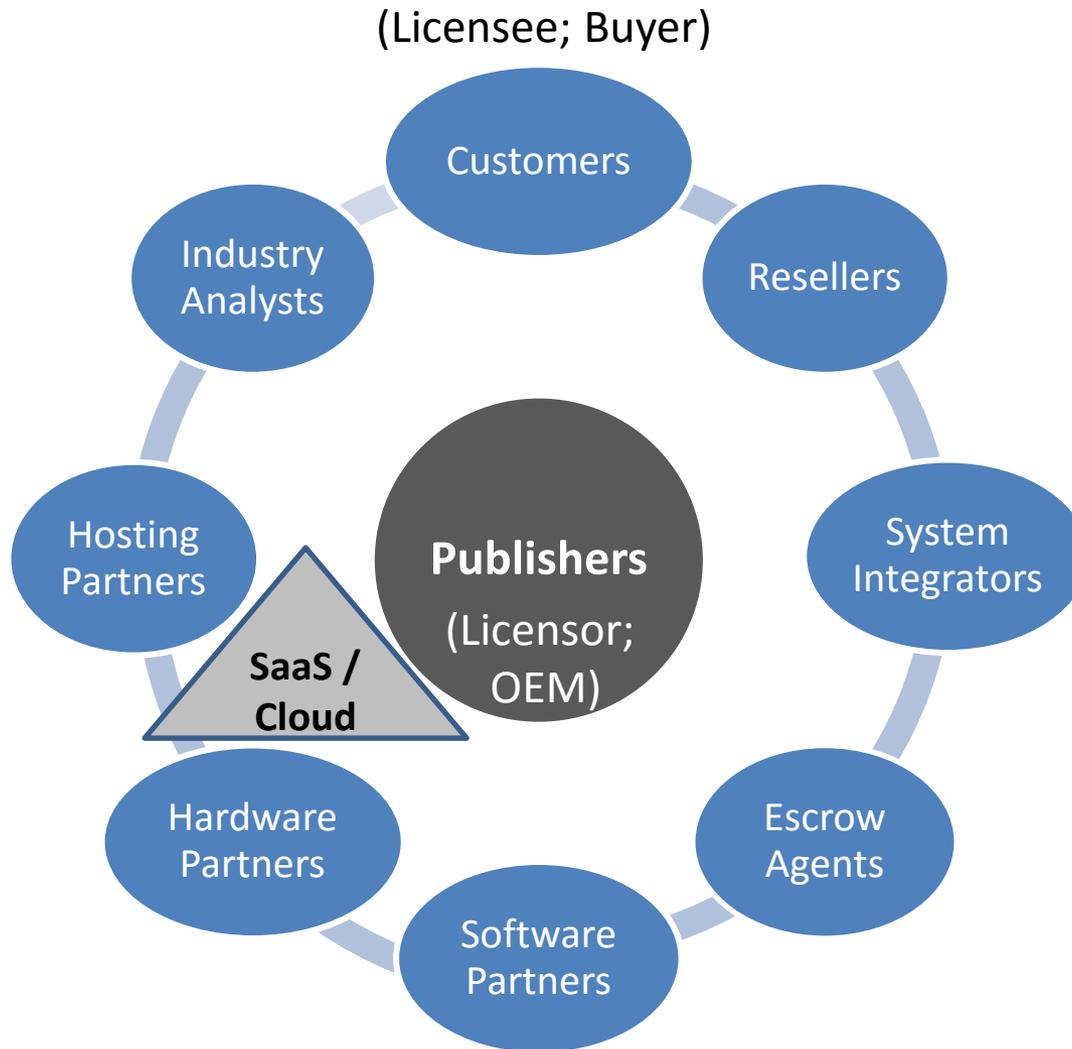
* Does not Include Communications Spending

** Includes Devices and Data Center Spending

*** Fed IT Spending Of \$79B in 2015 reflects overall IT spending cuts including DoD reduction of approximately 6%

Overview: Industry Overview / Ecosystem

The Key Players & Roles



2.0 Intellectual Property

Prepared by DoD ESI | 2016

Overview: Intellectual Property – Protection Methods

Four Ways to Protect IP

Legal
Protection



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

Overview: Intellectual Property Protection Methods for Software



Publisher Product Development / R & D

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



Object Code (Machine Readable)

Physically Protected

Licensed Software Version

Examples of Source Code & Object Code

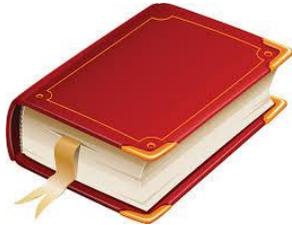
```
Import.java.servlet.http.HttpServlet.  
Request;
```

- **Binary code**
01000010011001010010000001110011
0111010101110010011001

- **Binary opened in terminal output**
^@^@^@^@^@<BC><BB><FC><^@^
@^@^@^@^@^@^@^@^@^@^@^@
^@^@^@META-INF/PK^C^D

Overview: Intellectual Property – Derivative Works Sample

Book to screenplay example



Book

Nothing Lasts Forever
Roderick Thorp



Screenplay

Screenplay by:
Steven E. de Souza &
Jeb Stuart



Movie

Produced by:
Charles Gordon, Lawrence
Gordon, & Joel Silver
Extra credit – Name the
Movie!!

Derivative Work: Requires original author's approval to write a screenplay based on the book or to make a movie based on her book.

- Would a movie about sharks terrorizing swimmers infringe on the IP in Jaws?
- Would a restaurant named Mickey Dee's with yellow arches infringe on McDonald's IP?
- What makes one piece of work a derivative of another?
- How do these examples work in the software industry?

Software Source Code Escrow

Prepared by DoD ESI | 2016

Overview

KEY RECAP POINTS

- Source Code is the _____ readable form of software written by the _____. _____ Code is machine readable form.
- Buyers don't get the _____ code when licensing COTS software.

WHEN SOURCE CODE IS NEEDED BY BUYERS

- Under certain circumstances - e.g., Publisher goes into bankruptcy or stops maintaining the software.

ONE WAY TO GAIN ACCESS TO THE SOURCE CODE

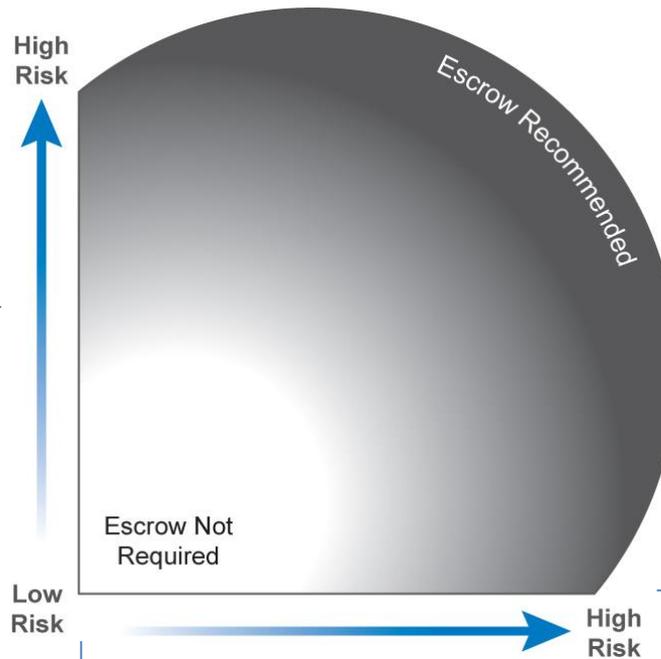
- An escrow agreement with a neutral third party gives Publishers and buyers assurance that their respective interests are protected.
- The escrow agreement specifies the events which could trigger the release of the Source Code to the buyer.

When Might Source Code Escrow Be Required?

Product Type & Mission

- < 2 Years in the market
- Mission Critical
- Low market share
- Low number of installations

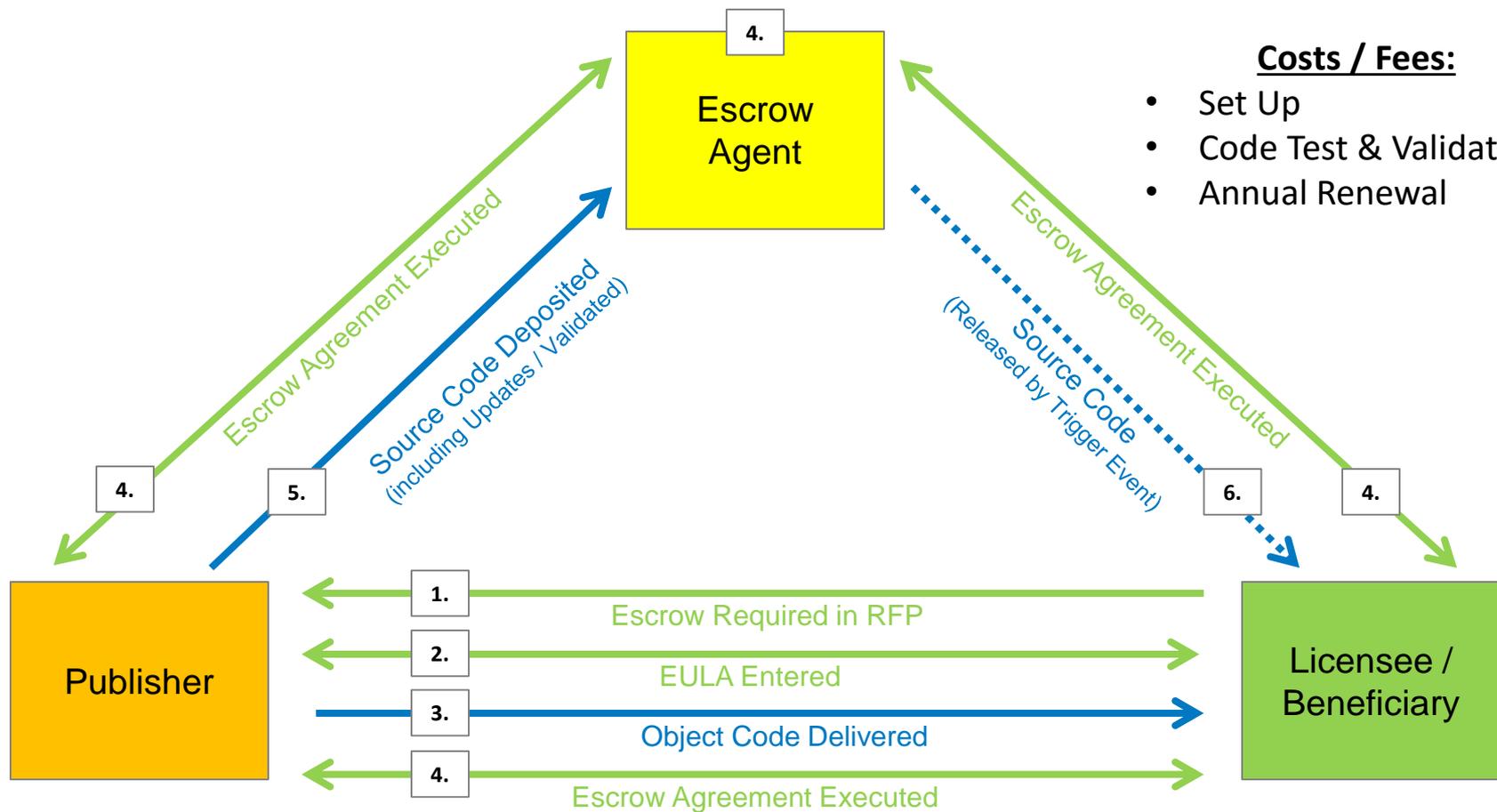
- > 5 years in the market
- Not mission critical
- High market share
- Large number of installations



Publisher (Entity) Longevity & Stability

>5 years.....	Years in Business< 2 years
>15% of Sales....	Net Income< 5% of sales
High.....	Earnings per Share Low
Moderate.....	Price-to-Earnings Ratio High
High.....	D&B Rating Low
Balanced.....	License v. Service Revenue High license v. service

Source Code Escrow—Balancing Interests



The licensee's right to the released Source Code is usually limited to a right to use it to maintain and enhance their production system. Note: Different versions of Escrow Agreements exist. Ensure terms are beneficial to buyers/licensees.

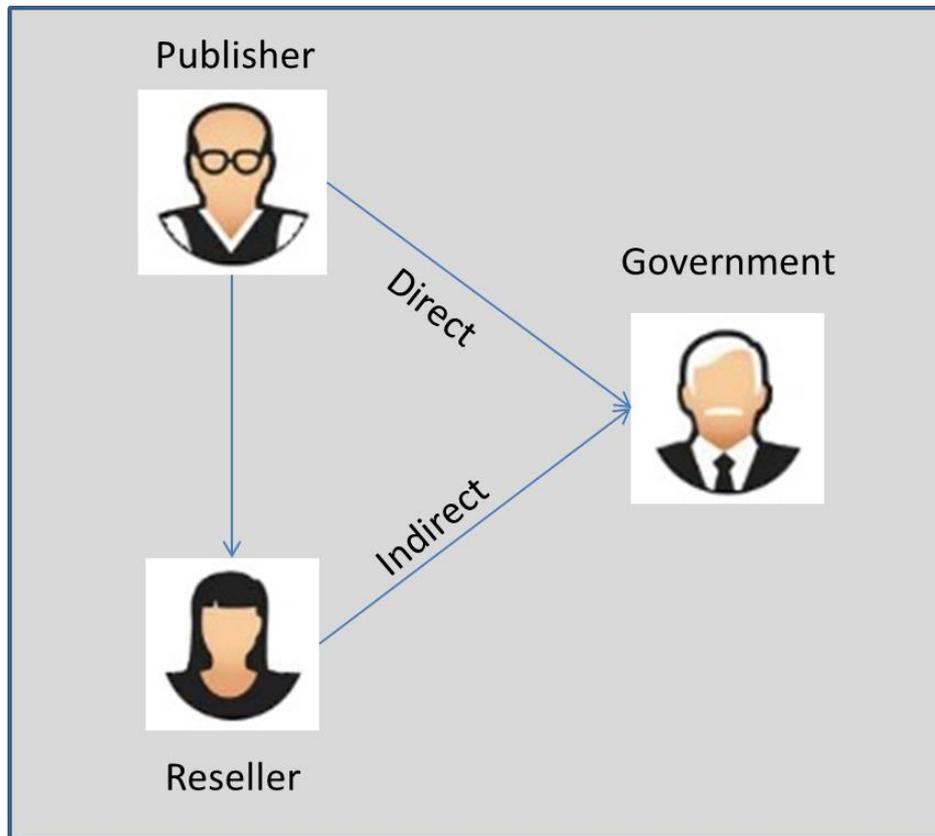
3.0 Publisher & Reseller Contracting Methods

Prepared by DoD ESI | 2016

Contracting with a Publisher and/or its Resellers

Who is authorizing the use of the software?

With whom are you entering a contract?



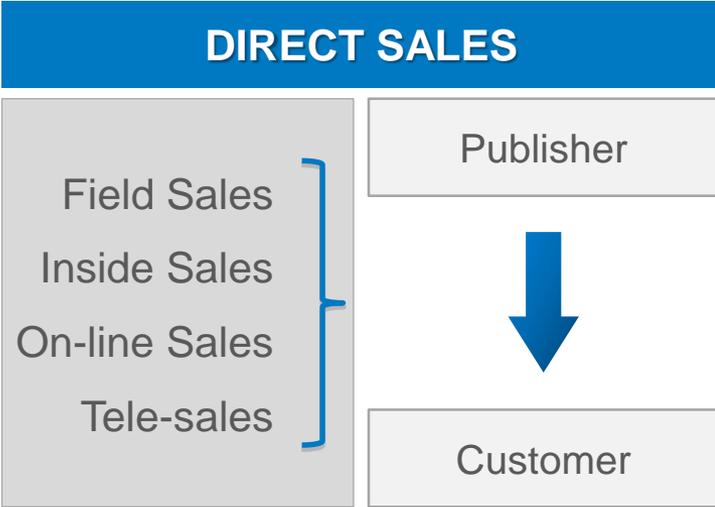
Privity of Contract (*defined*)

1. A relationship between two parties that is recognized by law.
2. A connection or bond between parties to a particular transaction.
3. The relationship that exists between two or more parties to an agreement.

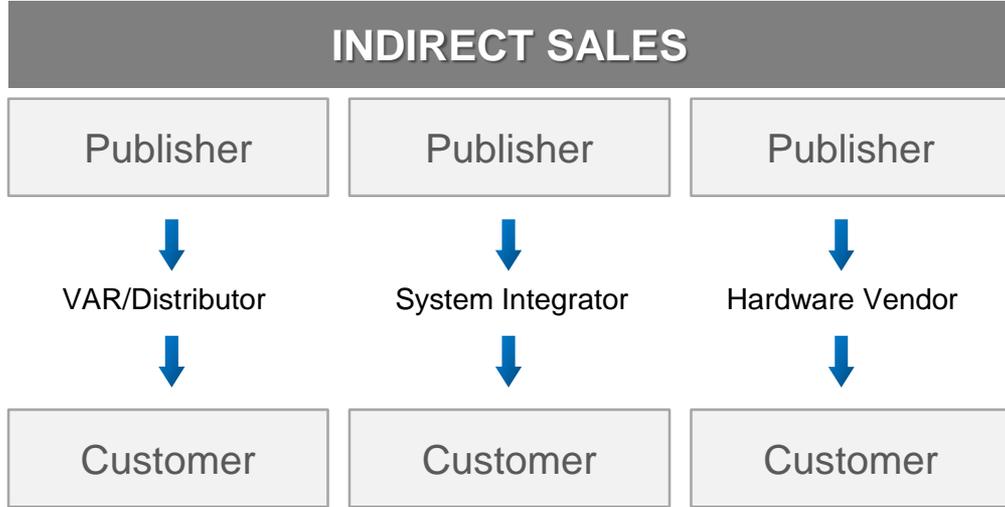
Contract law requires "privity of contract" between parties to enable either of them to enforce contract promises against the other party.

Contracting Methods & Impacts on Privity of Contract

Privity with the Publisher



No Privity with the Publisher



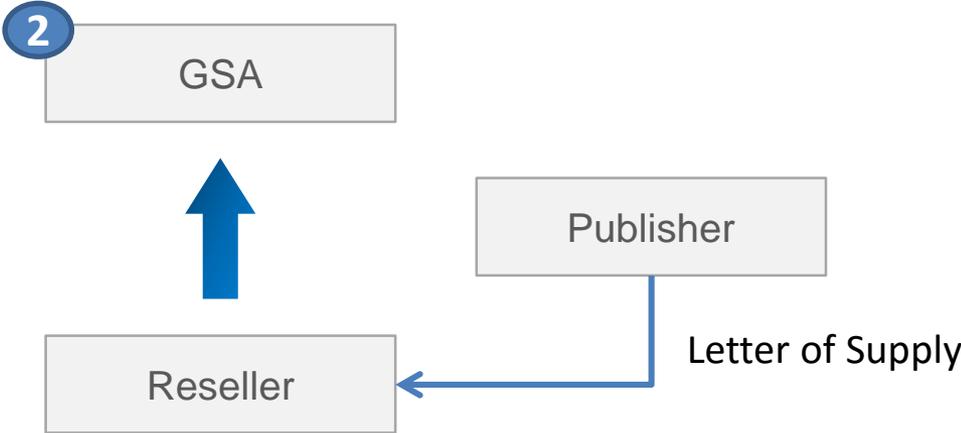
- Examples of Contract Provisions Where Privity Matters:**
- License Grants
 - Transferability of Licenses
 - Source Code Escrow
 - Ownership of Derivative Works
 - Warranty
 - Level 3 Support
 - IP Indemnification

Publisher Model / Contracting Methods

GSA's Approach to Publishers, Resellers & Privity



GSA deals directly with Publishers when possible, thereby creating privity with them.



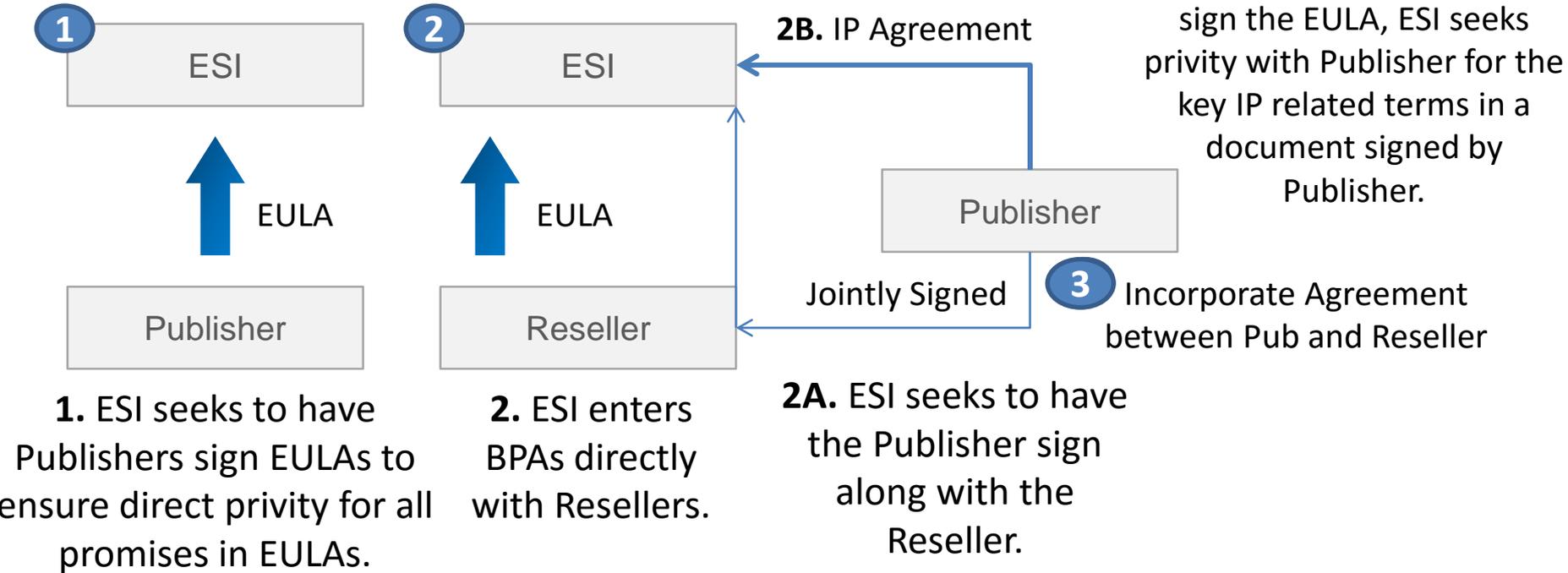
GSA also deals directly with Resellers and often accepts letters of supply as a means of tying Reseller promises to Publishers.

GSA Focus: FAR, Statutory, Regulatory (non-business terms)

Since GSA does not consider most of the IP related Ts and Cs to be within their scope of responsibility, the FSS agreements with Publishers do not address those topics – or the Publisher ensures IP related Ts and Cs in FSS agreements are favorable to Publisher.

Publisher Model / Contracting Methods

ESI's Approach to Publishers, Resellers & Privity



2B. If the Publisher will not sign the EULA, ESI seeks privity with Publisher for the key IP related terms in a document signed by Publisher.

3. If Publisher will not sign a document creating privity for IP issues, ESI seeks to incorporate the Publisher agreement with its Resellers into the ESI EULA with the Resellers.

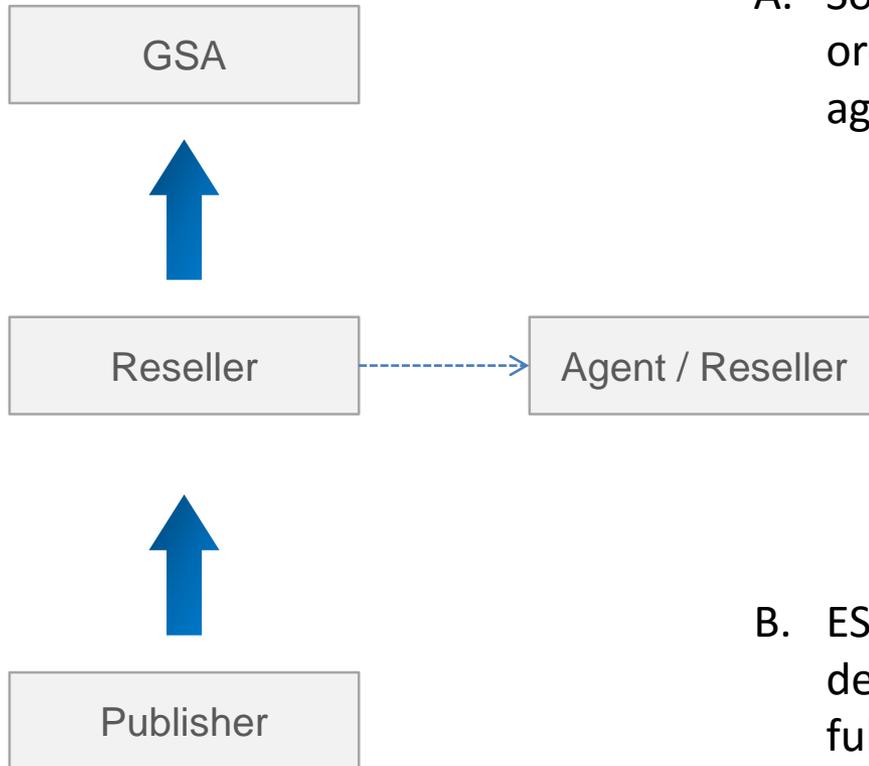
Obtain a copy of the agreement between the Publisher and its Resellers where Publisher authorizes Resellers to sell licenses, extend warranties, etc. Attach that agreement to the EULA with the Reseller and add a paragraph that incorporates it into the EULA. This is reasonable evidence of Publisher's intentions.

Publisher Model / Contracting Methods

Agents and Dealers

Why are resellers used?

1. Federal Perspective
2. Sellers' Perspective



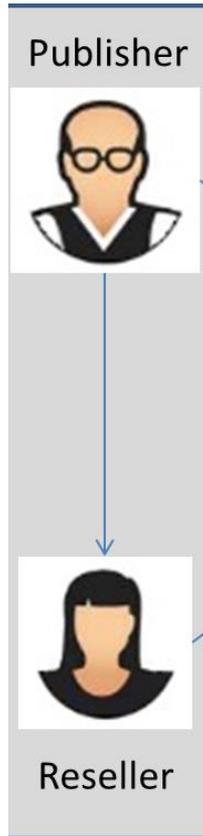
- A. Some Resellers use agents or dealers to fulfill orders and request that the government pay the agent or dealer.

This introduces two potential problems:

1. Privity is further removed from the Publisher
2. The agent or dealer may not have a contract with the government or a CAGE code to enable payment.

- B. ESI seeks to avoid dealing with agents or dealers. Resellers might use them for order fulfillment, but the Reseller (or preferably the Publisher) must remain responsible for promises in the EULA and must take payment.

Reseller & Publisher Relations- Pricing / Discounts



Publishers may:

- Offer **same discounts to all resellers.**
- Be consistent and **level the playing field.**
- **Reward** the Reseller with the **best sales** execution.
- Offer **volume discounts** to top resellers.

Resellers usually:

- **Compete on their “pass-through”**
- **Get additional discounts on larger deals as “one-off” deals.**
- Get exclusive treatment when they **“find” the sale.**
- Get same price from Publisher in response to RFP.

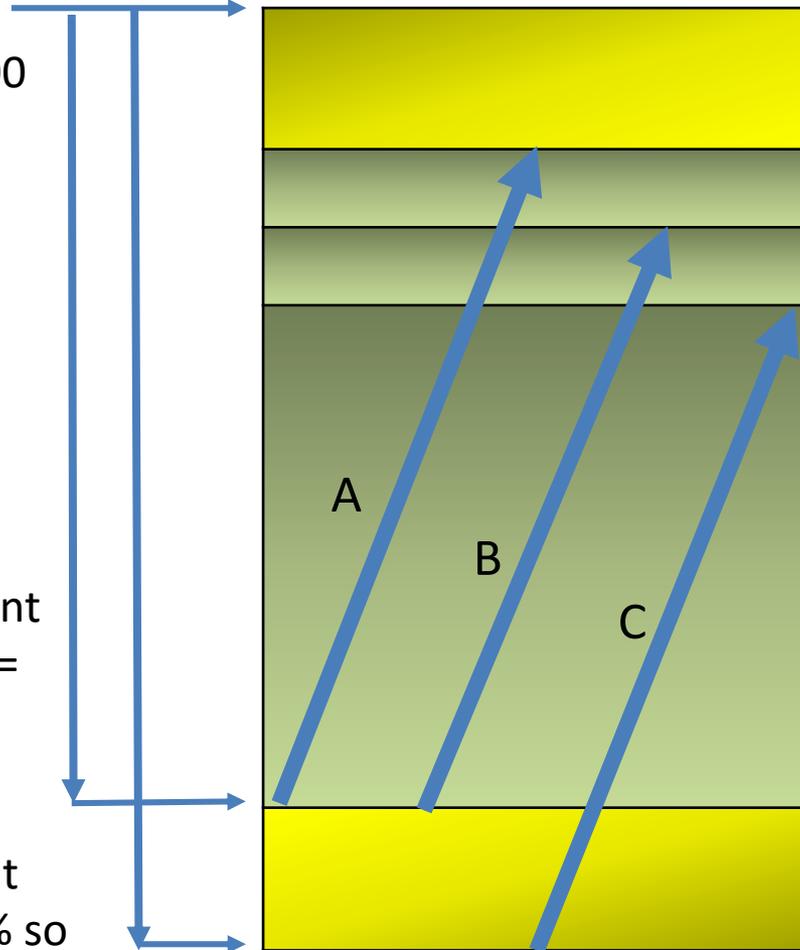
Example of Publisher Discount to Reseller & Reseller Pricing to Customers

1. List Price from Publisher = \$10,000

2. Discounts are extended by Publisher to Resellers A, B & C

3. Standard discount to Resellers A & B = 40% so price to A & B = \$6,000

4. Volume Discount to Reseller C = 45% so price to C = \$5,500



4. Reseller Mark-ups & Prices

A 20% on \$6,000 = \$7,200

B 15% on \$6,000 = \$6,900

C 20% on \$5,500 = \$6,600

Conclusion:

Reseller C is able to earn a 20% mark-up and win with low price because of a volume discount from the Publisher.

Revenue Recognition – a Frequently Used Objection

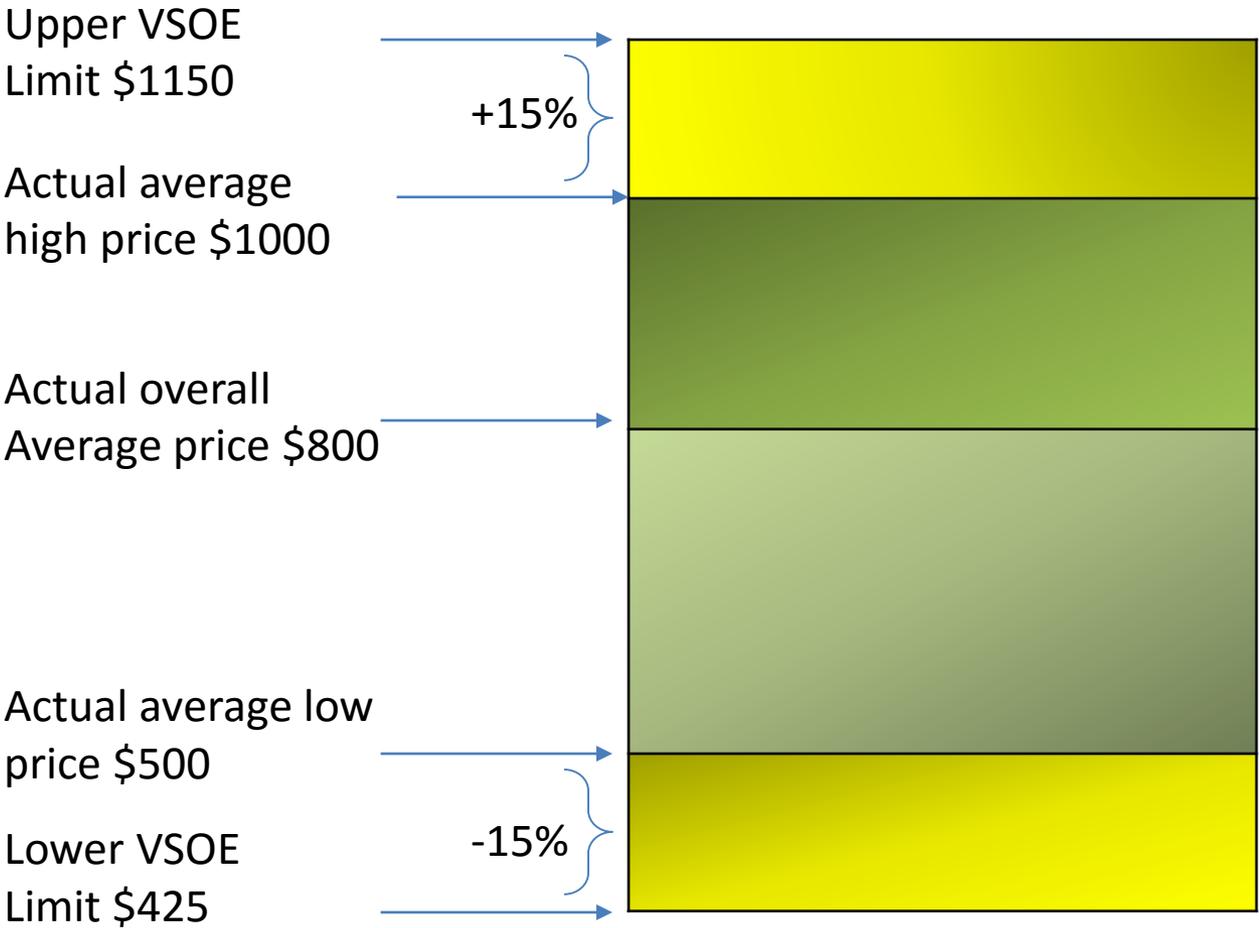
- Revenue of **PUBLICLY TRADED** software companies is closely scrutinized by the SEC. (*Rule change forthcoming in 2017*)
- Private companies have no basis to use rev rec. as an excuse to avoid discounting.
- For a publicly traded Software Publisher to recognize revenue immediately upon sale (*and not ratably over time*) certain conditions must be met.
 - Signed contract or formal agreement, with a fixed price, non-refundable provisions, and a high probability of collection.
 - Software must be delivered in usable format, accessible to end user.
 - No significant modifications required, no promise of future functionality, no promise of future products, and no deal-altering contingencies.
 - Software performance guarantee limited to standard warranty and acceptance that software will perform according to Publisher's documentation.
 - Implementation and consulting service performance cannot be tied to acceptance, return, or payment for the software licenses.

Revenue Recognition – a Frequently Used Objection

- VSOE – Vendor Specific Objective Evidence – is a revenue recognition mechanism to prevent inconsistent pricing and discounting from favoring certain classes of revenue.
 - *Funneling revenue to software licenses by giving disproportionately high discounts on services or maintenance can make the company look more valuable than it is.*
- Why should you care?
 - *Rev rec is often used as a negotiating tactic to say no to requests for discounts and certain Ts and Cs.*
 - *Very few software sales people or executives understand VSOE.*
 - *It is often a smokescreen.*
- Two easy responses
 - *Ask for specifics about how your discount or term violates VSOE.*
 - *Ask why your deal can't be one of the 20% permitted to be outside of VSOE range.*

VSOE – Vendor Specific Objective Evidence

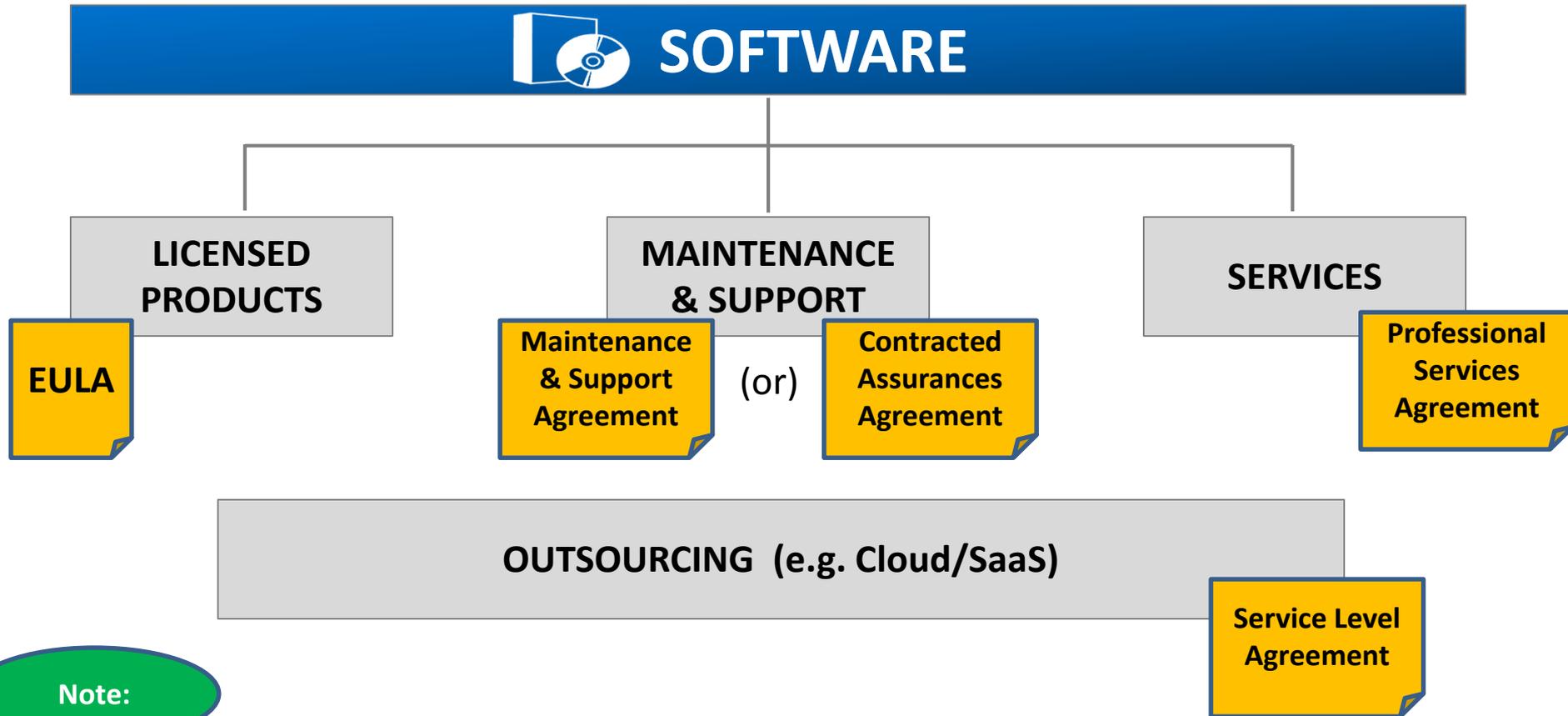
General Rule – 80% of the time, the price must be within a band that is plus or minus 15% of the average price range for a product



4. Products & Services (What are you Buying?)

Prepared by DoD ESI | 2016

Products & Services: SOFTWARE CORE COMPONENTS & RELEVANT AGREEMENTS



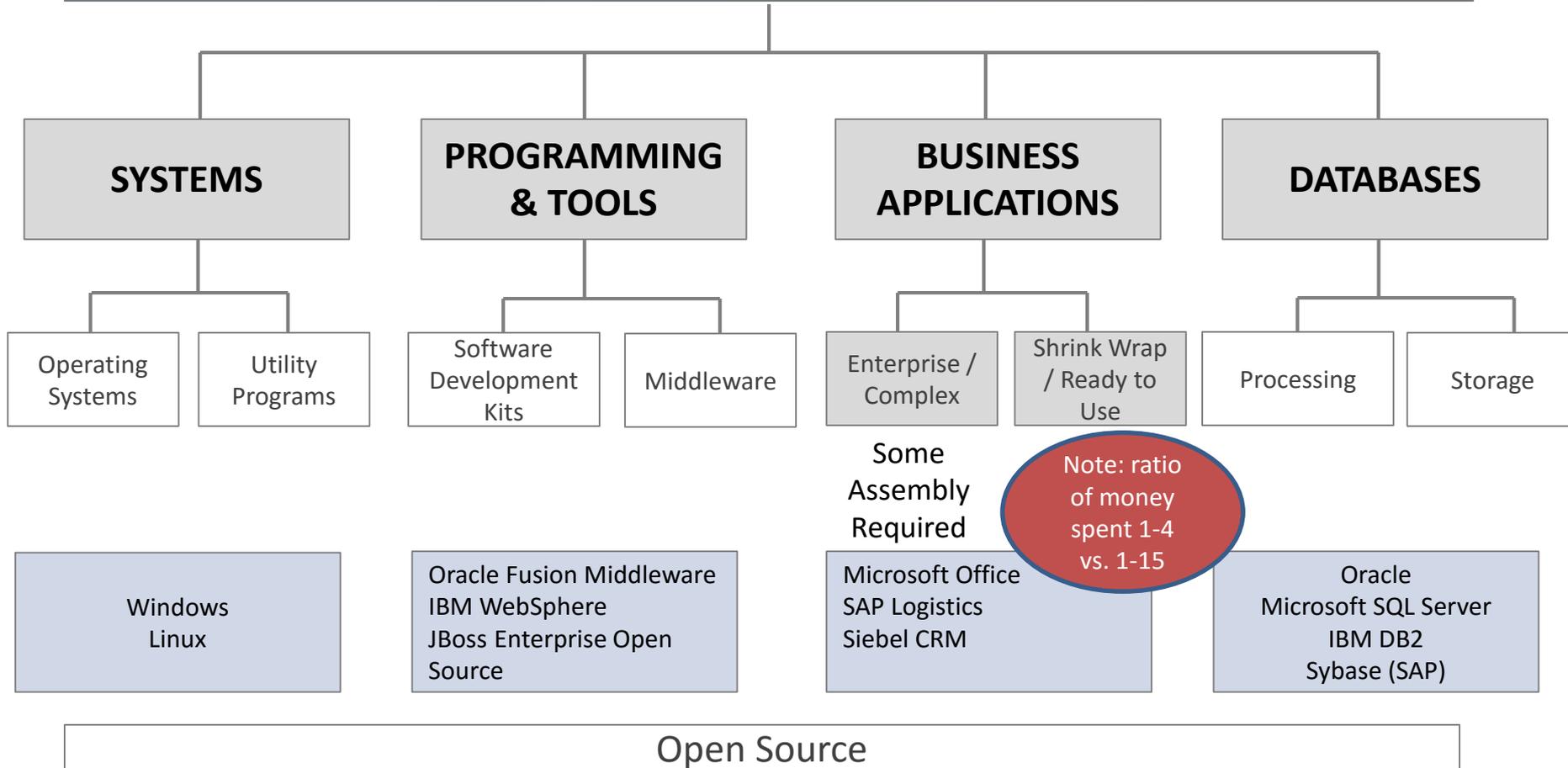
Note:

The type of product you are buying impacts the agreement structure and terms

Products & Services: Product Categories - Overview



COTS LICENSED PRODUCTS*

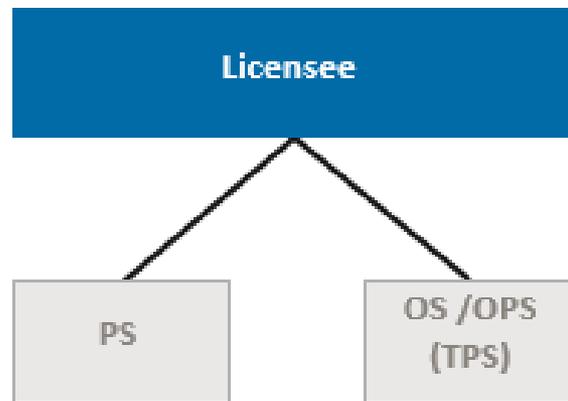


* Software can also be custom built. The focus of this course is the COTS licensed software.

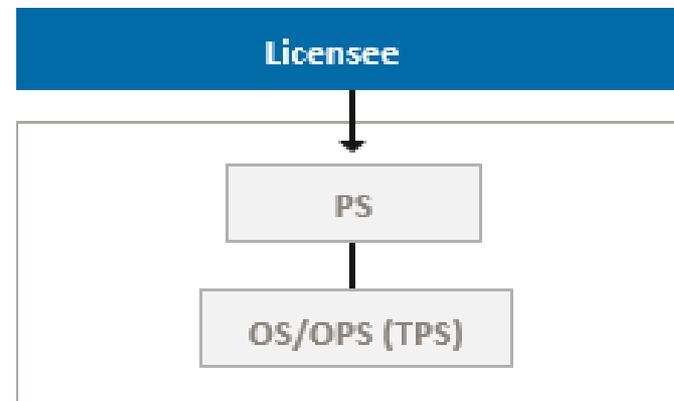
Open Source and Other Proprietary Software Licenses

- Open Source (OS) and Other Proprietary Software (OPS) (together referred to as Third Party Software - TPS) can be obtained with the primary software application (PS) being licensed in two ways:
 - As separately licensed software, e.g., Mozilla Firefox (OS) or Oracle Database (TPS)
 - As embedded software
- The embedded software case creates potential liability for the Government.

Separately licensed



Embedded software



Open Source Code and Other Proprietary Software

- Why Embedded Software Matters to You
 - Today most proprietary software includes embedded OS and some has embedded OPS. (OS and OPS are referred to collectively as TPS for convenience).
 - The Primary Software (PS) IP owner (Publisher) made the choice to embed TPS in its product.
 - In some cases, the PS Publisher doesn't know how much OS or OPS is in its PS.
 - Most PS Publishers do not address the issue of TPS in their EULAs. Those who do address it usually try to pass the risks associated with TPS to the Government.
 - The PS Publisher should retain the risks associated with the decision to include TPS (or the lack of attention to it).
- A Few Issues that Must be Addressed
 - Improperly licensed TPS could lead to third party claims of infringement.
 - Improperly licensed TPS could lead to third party claims for license fees.
 - The Government generally has no recourse with TPS Publishers for product defects.
 - OS carries a risk of little or no support and its licenses usually require a license holder to share enhancements.

Open Source & Other Proprietary Software Clauses

- ESI recommended Clauses to Address TPS Concerns
 - *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.
 - PS Publisher **indemnifies** the Government against additional licenses or license fees required to use the PS or TPS.
 - Publisher **warrants** performance of its IP and the TPS included with its IP.
 - The Government assumes **no obligation to share enhancements** or derivative works of PS or TPS.
- Other OS Considerations
 - *No Maintenance and Support Infrastructure*
 - Since Open Source is collaboratively developed and peer reviewed, there might be no formal infrastructure for providing fixes, patches, enhancements and updates.
 - *“Encapsulation” can be used to isolate Open Source code from copyrighted IP.*

ESI White
Paper
Available

4. Products and Services: Outsourcing / Cloud and Software as a Service (SaaS)

Prepared by DoD ESI | 2016



Excerpts from Full-Day
Workshop on Cloud
and SaaS

Outsourcing

Hosting / ASP /
MSP Models

Cloud

IaaS, PaaS,
SaaS

Timeline to Cloud/SaaS

As shown in video tutorial

Licensing

Use of Perpetual license model Use of Term license model Use of Subscription-based model

Technology

1950s/60s
Partitioning of mainframes (Precursor to virtualization)

1980s/90s
Client server architecture made virtualization irrelevant

1989
World Wide Web Developed

Late 1990s
Re-emergence of high infrastructure costs makes virtualization relevant again

Technology advancement in managing OS commands enables X86 architecture virtualization

Hosting

1960s
Centralized hosting begins as mainframe providers offer time-sharing and service bureaus

1990s
Hosting companies offer full scope data center and software services—ASPs/MSPs

Late 1990s
Hosting companies add virtualization and internet connectivity

Fee Based Applications Software Deployment

1990s
Migrations from Mainframe Computing to Client-Server Architectures (Enterprise Applications Suites)

~ 2003
SaaS Application Suites (e.g. NetSuite, Inc.)

2010
Research indicates 54% of public-sector respondents are investigating or interested in SaaS solutions.

1998
First "Multi-Tenant" SaaS Application

2008
Major IT companies invest in cloud computing research/infrastructure. (Google, IBM, Intel, etc.)

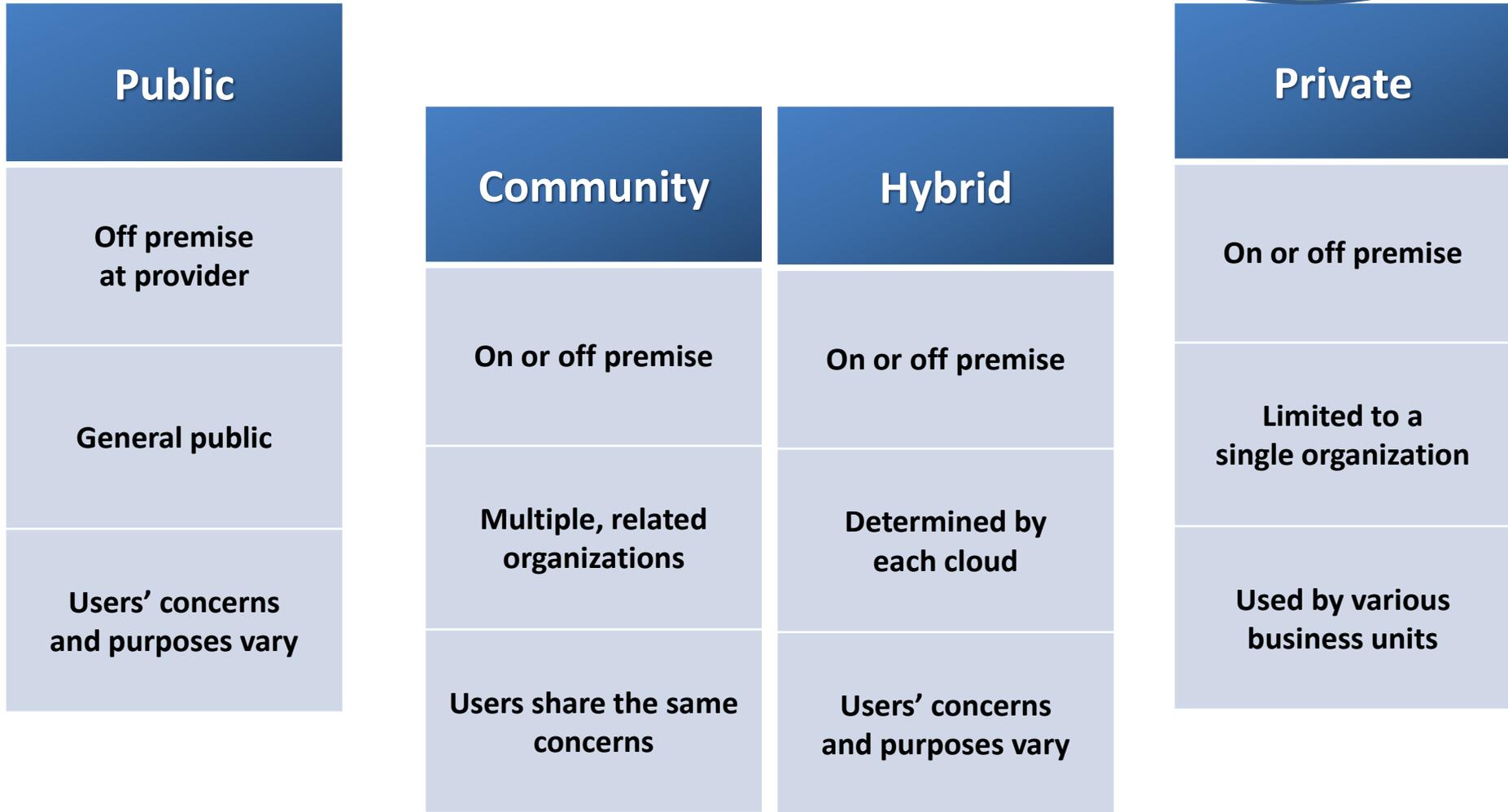
~ 2011
Federal government announces "Cloud First" policy to evaluate safe, secure cloud computing options.

Top federal government cloud strategists meet at GovCloud2011 to share best practices.

Commercial Software Industry

Cloud Deployment Models

As shown in video tutorial



What Does it Mean to Deploy to the Cloud?

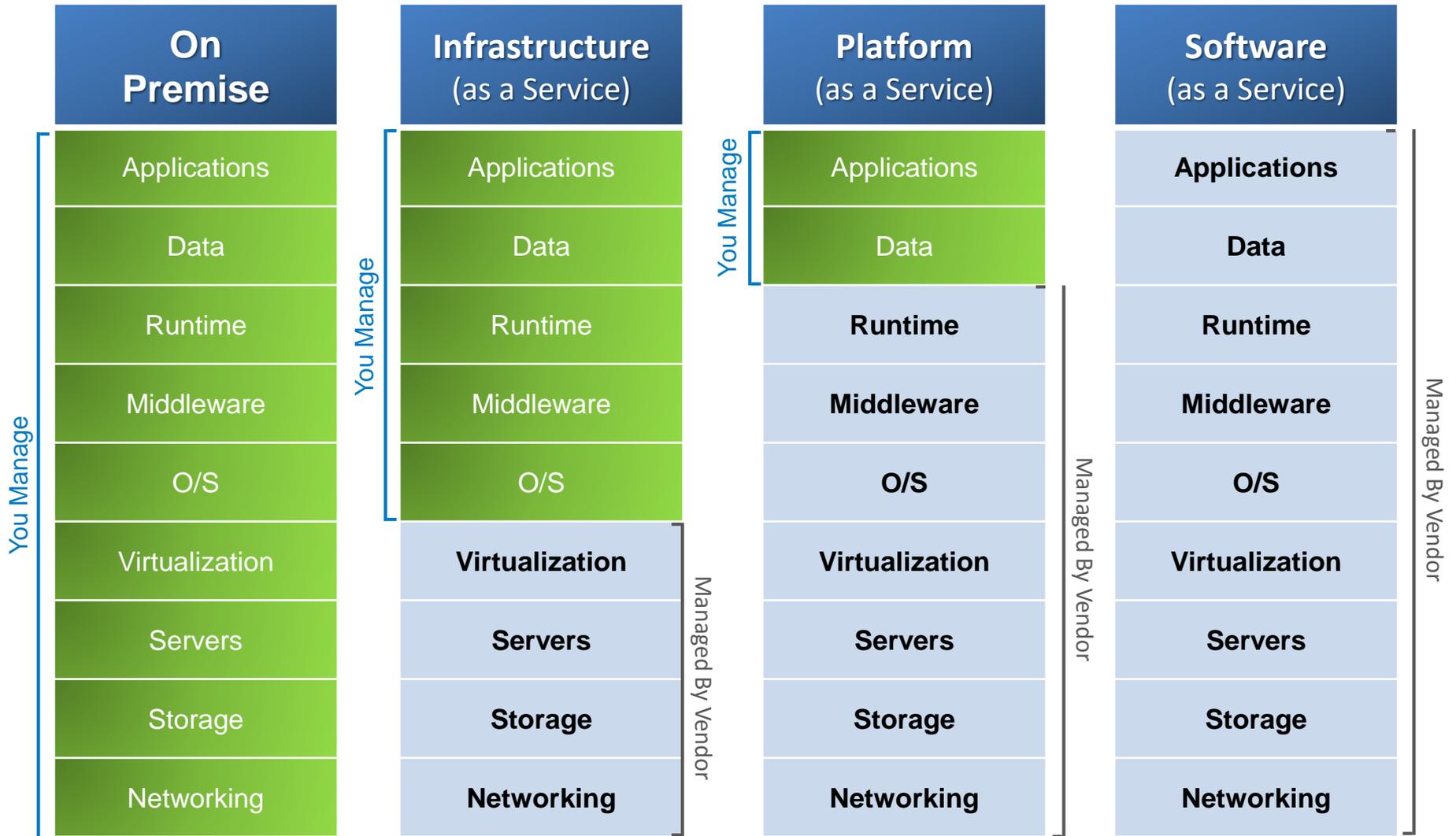
- True or False—cloud computing and SaaS are synonymous.
- True or False—a perpetual license can be deployed to the cloud.
- Cloud computing requires which of the following?
 - *Internet connections*
 - *Virtualization*
 - *SaaS licenses*
 - *Remote data storage*
 - *A special operating system*



See Virtualization
Video Tutorial #1

See Virtualization
Video Tutorial #2

The Cloud's Impact on Licensing



Licensing Considerations – Perpetual versus SaaS

Factor	Perpetual License	SaaS License
Payment	One-time payment at delivery	Usually subscription based
License Duration	Into perpetuity – a permanent fixture	Use while subscription is current – like a utility
Physical Custody	Yes	No
Customizations	At Licensee discretion	At Licensor discretion
Security	Depends on Licensee or subcontractor	Depends on Licensor skills
Data Ownership	Licensee owns data & has custody & control	Licensee owns data but may not have custody or control
SLAs	Vendor response to issues only	Vendor response to issues and to system availability
Hosting Location	Usually on premises but can be outsourced	Usually off premises
Upgrades	Applied at Licensee's discretion	Applied at Licensor's discretion

Why Use the Cloud?

As shown in
video tutorial

- Aside from the OMB mandate, what are key business reasons for deploying to the cloud?



Cost Reduction



Flexibility



Collaboration



Speed



Heightened Security

- Each of these factors may be valid, but we should examine them in detail.

Pricing Comparison Example – SaaS Versus Perpetual

Perpetual Price	Technology Stack	SaaS Price	Issues
\$1 million	Application	\$250K per year	What happens after year 4?
\$ 150K per year	Data Management	\$100K per year	<p>There are potential savings in each of these categories with SaaS because of shared resources and virtualization BUT</p> <ol style="list-style-type: none"> 1. Does the Government already own any of these resources? 2. Are they available for this application? 3. If so, will those resources go away or be deployed for another application? 4. If not, will the Government pay twice? 5. What happens when there are multiple SaaS licenses with multiple vendors ?
\$ 200K	Runtime	\$ 150K	
\$ 100K	Middleware	\$ 75K	
\$ 50K	O/S	\$ 40K	
\$ 50K	Virtualization	\$ 40K	
\$ 300K	Servers	\$ 75K	
\$ 200K	Storage	\$ 100K	
\$ 100K allocated per year	Networking	\$75K	
\$100K allocated per year	Facilities	\$75K 	

Other Factors to Consider About Cloud Benefits

- Flexibility

- *Switching SaaS vendors could be less costly than switching perpetual vendors, but...*

- ...would it be as easy to switch email providers as it would be to switch ERP SaaS vendors?

- *What about customizations?*

As shown in
video tutorial

- *What about control over the timing of upgrades?*

- *Is virtualization limited to the cloud?*

- *How do you put a price on flexibility gained or lost?*

Other Factors to Consider About Cloud Benefits

See: *Federal Cloud Compliance Committee for Recommended Clauses*

- Heightened Security

- *Even if all infrastructure is outsourced, does it make sense to outsource data security?*
- *Is data outside of the Government's custody as secure as data that is in the Government's custody?*
- *What about security of the Vendor's premises? What about their supply chain?*

- Analytical Approaches



- *A consistent approach to analyzing prices and internal costs is a mandatory prerequisite to gauging cost savings.*
- *Should savings be measured on a deal basis or a collective basis?*

Key Cloud/SaaS License Considerations

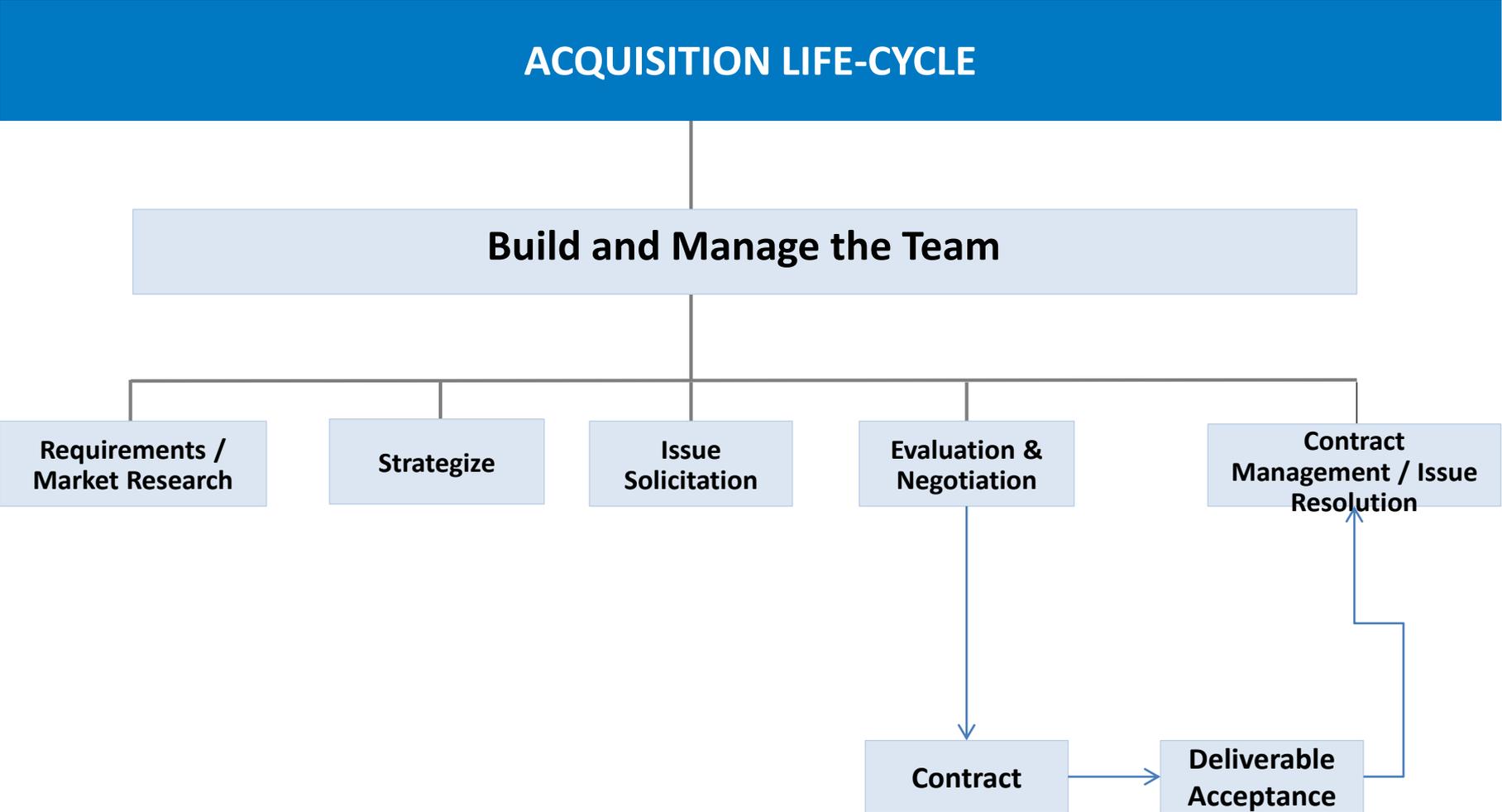
As shown in
video tutorial

- SLAs
 - *Dependence on the Vendor makes SLA clauses extremely important*
 - *Ensure measurable performance standards for system up time and issue response are clear.*
- Upgrades
 - *If the timing of upgrades is important, include the right to delay upgrades at your discretion.*
- Customizations
 - *If you know customizations will be required, ensure there is a clause addressing your right to have customizations in your instance of the software.*
- Some licenses claiming to be SaaS are not true SaaS applications.
 - *One large software Publisher requires customers to download software instead of remotely accessing it – and they require system access for monitoring.*
- Government funding might impact multi-year subscriptions.
 - *What happens to your SaaS app if year 2 funding disappears?*

PREPARING FOR THE ACQUISITION

Prepared by DoD ESI | 2016

Acquisition Process Flow



The Government Team & Their Involvement in the Process



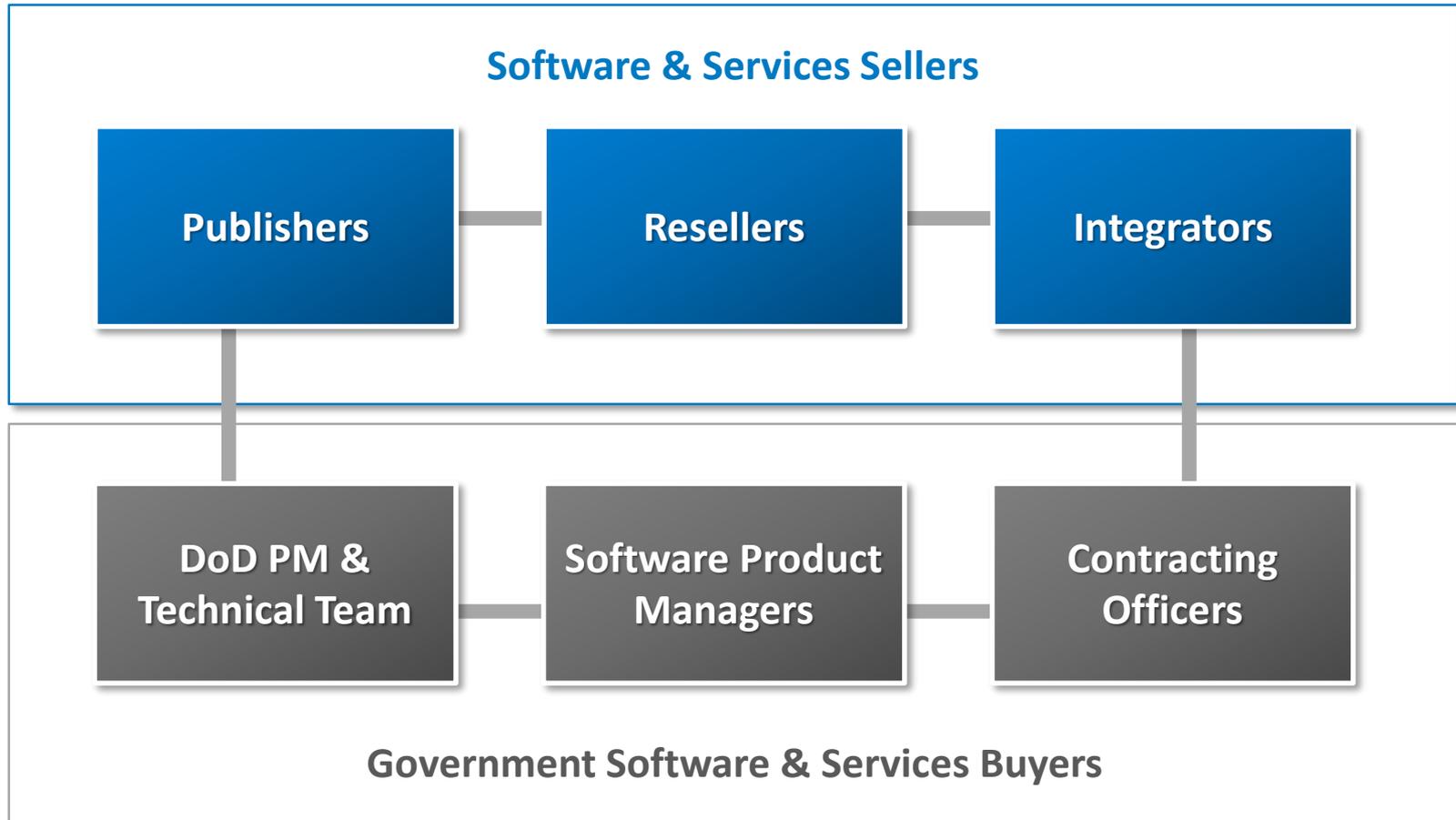
Legend

Heavy Involvement —————

Light Involvement - - - - -

The CIO role may vary depending on the IT Governance and policies of the organization and the size or complexity of the software project. - - - - -

Key Software License Negotiation Players



Sales Process

As Aligned to DoD Acquisition Process

Software Sales Process

- Identify Customer Requirement
- Provide Product Data
- "Sell" the Customer on Products
- Determine How Much Customer Can/Will Pay
- Identify and Work any \$ or Terms Issues
- Determine Acquisition Vehicle
- Negotiate Price and Ts & Cs
- Execute Order
- Ensure all Programs Delivered

DoD Acquisition Process

- Determine Requirement Exists
- Gather Data on Requirements Fit and Products
- Establish Best Solution for Requirement
- Establish Budget and Funding Sources
- Establish "Must Have" Ts & Cs and \$ Ceiling
- Determine Contract to be Used
- Negotiate Price and Ts & Cs
- Obtain Approvals and Sign Contract Order
- Accept Products

Note: There are hundreds of variables in each Process

STRATEGIC NEGOTIATIONS

Prepared by DoD ESI | 2016

Excerpts from Full-Day
Workshop on
Negotiations Strategy

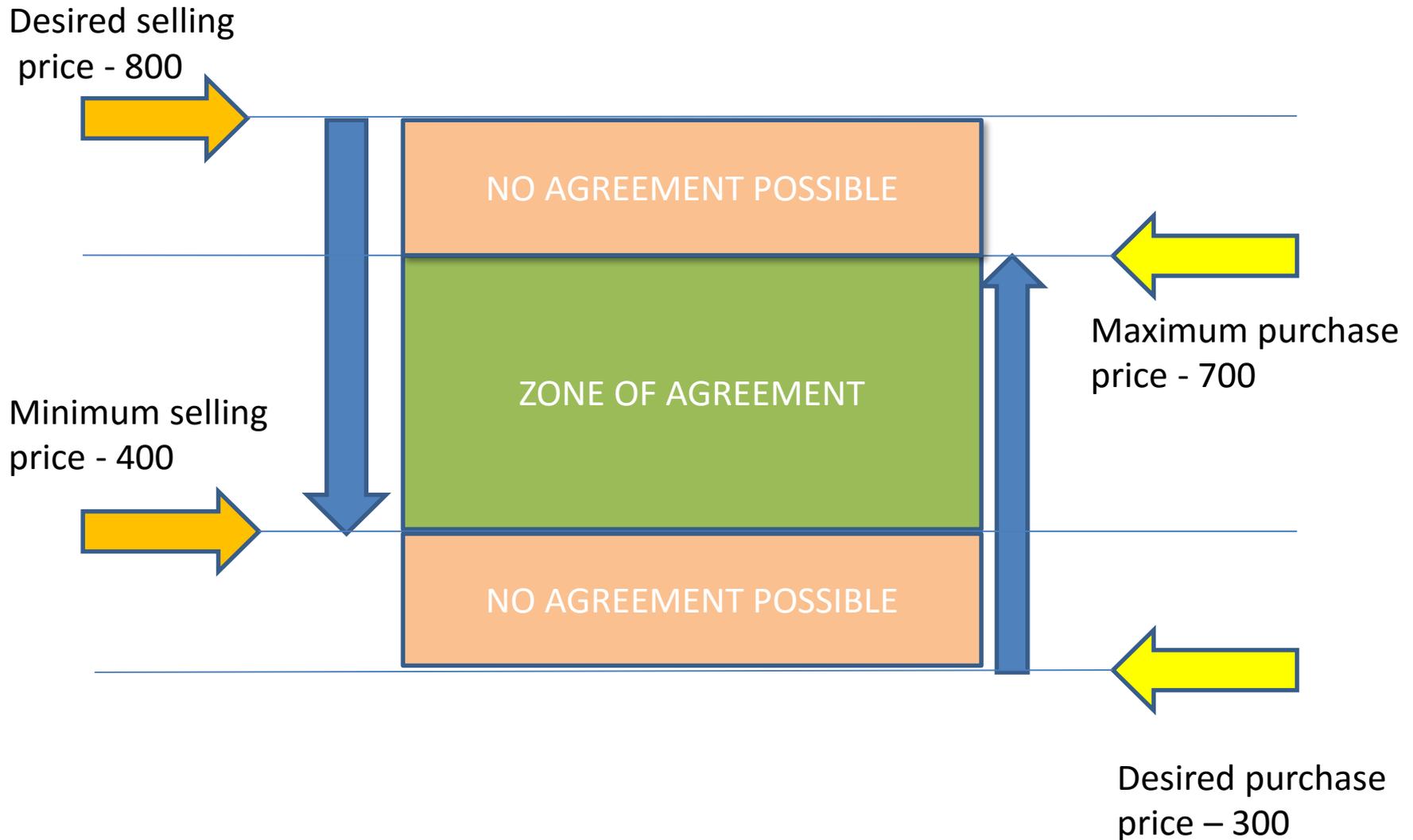
Preparing a Negotiating Strategy

- Evaluate the parties
 - Recurring negotiation versus one-offs
 - Is competition still a factor or has the vendor been selected?
 - Relative strength and leverage of the parties
 - Establishing face-off strategies (roles to be served)
- Establish objectives & alternatives / **Term Sheet**
 - Assign target values (desired outcome – objective) for both qualitative and quantitative issues
 - Create one or two back-up positions for every important issue
 - For example, Ts and Cs might require alternative language
 - Is there a BATNA in case it is needed?
- Identify and prioritize the issues
 - Assuming a commercial transaction, price is only one issue
 - Take a comprehensive view of the issues from the perspective of both parties

Preparing a Negotiating Strategy

- Assessing your strengths and weaknesses
 - How solid is our information?
 - Are there time limits to reach agreement?
 - Are there negotiating limits imposed by law or regulation?
 - Conduct a senior management review
 - This will ensure integrity of the strategy
 - It will also ensure management buy-in
- Find Zones of Agreement
 - Establish a walk away position or Reservation Price for each objective
 - Use the back-up positions to create a zone of potential agreement
 - Prepare strategies for mutual discovery of zones of agreement

Reservation Price and The Zone of Agreement



Executing and Concluding the Negotiation

- Logistics
 - Selecting the venue – the Paris Treaty story
- Presenting desired outcomes
 - Selecting a spokesperson
 - Who goes first – does it really matter?
- Tactics
 - Using conditional agreements to make progress – If I do X will you do Y?
 - Using “intervenor” and “ratifiers”
 - Asking questions for fact-finding
 - Caucusing & Concessions
- Finalizing the agreement
 - Documenting positions and agreements (or tentative agreements)
 - Closing the deal – getting to a final document with signatures

Key Contract Drafting and Construction Principles

- People leave their jobs often – write for the replacement who has to figure out the intent of the original drafters / parties;
- Package documents up for presentation to the Judge or jury in future litigation;
- Use contract template in RFQ/RFP with buyer-focused or project success terms; deviations are to be noted in the proposal / response and used as an evaluation factor; competitive process is the greatest moment of leverage to impose the terms that benefit the buyer (who has the money);
- OR first drive to a term sheet of business terms; agree in principle; add legal terms after business terms are finalized
- Write using plain English;
- When buying deliverables, point to samples to align the parties' expectations and to be used in the acceptance process

Key Contract Drafting and Construction Principles

- No (or minimal) assumptions
- Don't ignore contradictions in language – resolve them
- Don't leave in clauses that are irrelevant or not permitted by FAR – take them out or change them
- Make sure you have all documents and reconcile them to each other
- Don't allow for web links to be referenced that can be changed
- Don't ignore the boilerplate or assume that it is standard and reasonable language that serves your best interest
- Include recorded and digital items with relevant information or promises (voice mail, email, YouTube videos, product tutorials, testimonials, case studies, social media, etc...)

Recap, Questions and Parking Lot Items