



COTS Software Licensing

Software License Agreement Best Practices

MAY 2016

EULA Key Clauses - Overview

License Grant	Pricing	Warranty	Maintenance	General Provisions
Parties	Financial Investment	What is Covered?	Scope & Levels of Support	Order of Precedence
Requirements				Confidentiality
Product Names & Functions	Metric	Who is Covered?	Timing & Duration	Integration
Duration				Term
Permitted Use	Discount	Duration	Rates	Termination
Authorized Users				Governing Law
Geography	Key Terms	Remedies	Escalation	Dispute Resolution
Language				Assignment
Quantity	Benchmarking			Relationship of the Parties
Self Audit				Limitation of Liability
Times of Conflict				Severability
Ownership & Use Rights				

EULA Key Clauses / License Grant

License Grant

Pricing

Warranty

Maintenance

General Provisions

Core License Grant Elements



Parties



Requirements



Product Names
& Functions



Duration



Permitted Use

Authorized Users

Geography

Language

Quantity

Self Audit

Times of Conflict

Ownership &
Use Rights

EULA Key Clauses / License Grant

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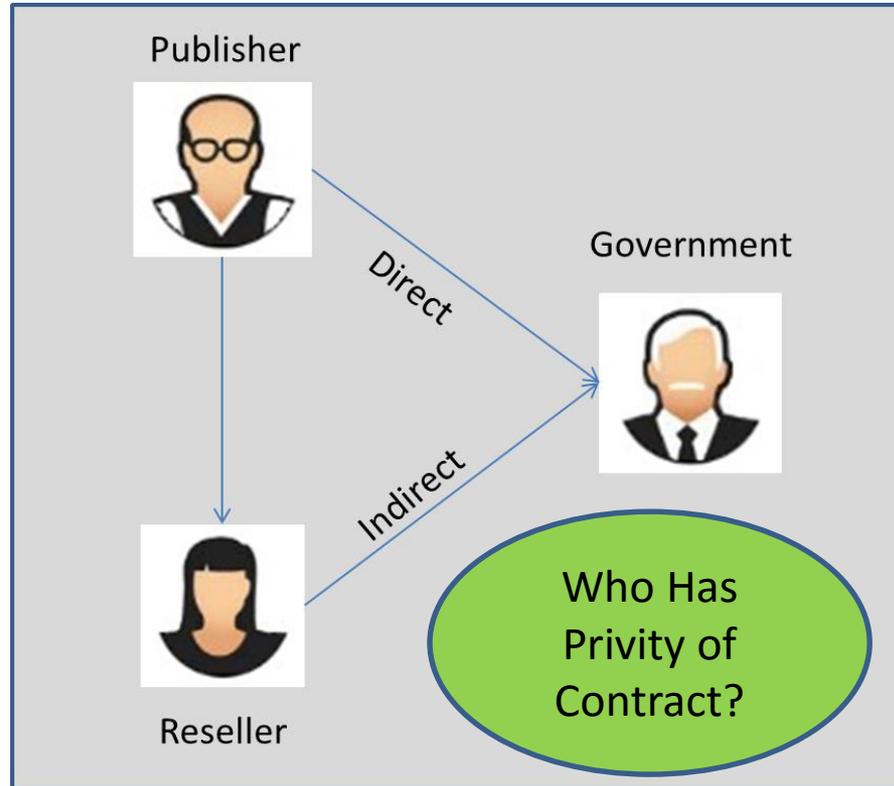
Parties

Who is authorizing and entering this EULA?

RECAP:

Privity is a _____ that exists between two or more _____ to an agreement.

_____ is required for one party to _____ the contract against the other party.



EULA Key Clauses / License Grant

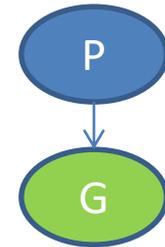
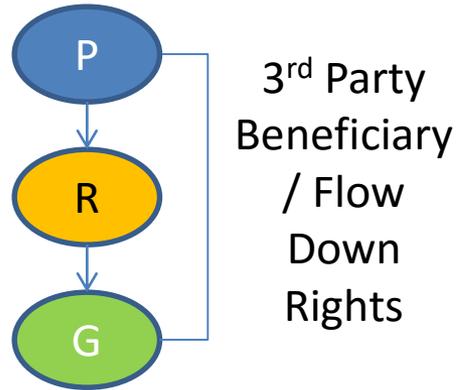
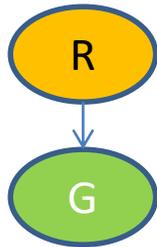
License Grant	Pricing	Warranty	Maintenance	General Provisions
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Parties

Poor Position	Zone of Compromise	Buyer's Best Position
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<p>The Government Buyer and the _____ are the sole parties</p>	<p>The Government Buyer is made a third party beneficiary to the agreement between the _____ and the _____</p>	<p>The _____ is a direct party to the license with the government</p>
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EULA Key Clauses / License Grant

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Requirements

The contract needs to clearly define the customer's requirements for the software.



1. Fit Within the Acquisition Life-Cycle

2. What Are Requirements?

3. Why Are They Important?

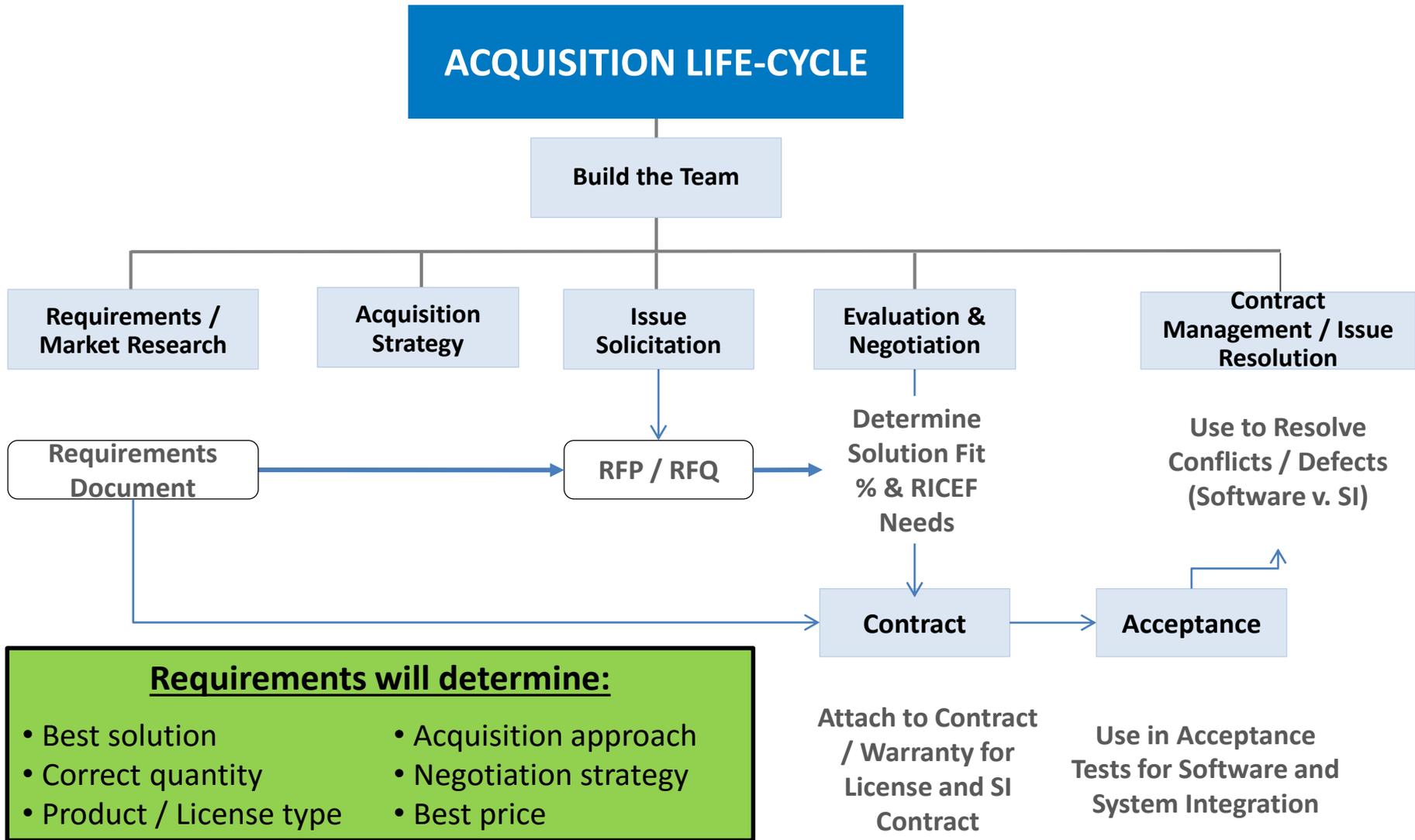
4. Pitfalls of Bad Requirements

5. Keys to Consider

6. Team Approach

Requirements Fit with Acquisition and Contracting

Fit with Acquisition Cycle



CURRENT ENVIRONMENT

- How many licenses does your organization have now?
- What contracts (s) were used to acquire the licenses?
- If the licenses bought by a contractor in support of the government, have you reviewed the contract to ensure government has licenses rights?
- Have you reviewed the EULA attached to these licenses to ensure it is a government EULA?
- What type of license model (s) do you have?
- What are the permitted use and restrictions?
- Are any of the licenses on a current option plan?
 - If yes, are there restrictions on the options such as a re-use/non substitution clause?
 - What is the ending date of the current contract?

Requirements /
Market Research

Requirements
Document

Excerpts from
Full-Day
Workshop on
Requirements

FUTURE ENVIRONMENT

- Is your organization growing or decreasing over the next few years?
- Has your installation been on a BRAC list in the past?
- Do you have interface requirements to other software systems? (compatibility issues)
- Will the software reside on servers? If so:
 - What is the size of the servers (how many processors/cores)?
 - Are these servers being replaced in the future and if so what size servers will be purchased?
 - Are you now or in the future virtualizing the servers? If yes obtain the details.
 - Where do the servers reside and who is managing them?
 - Do you have an MOA with the server installation?

Requirements /
Market Research

Requirements
Document

Excerpts from
Full-Day
Workshop on
Requirements

MARKET RESEARCH

- Critical Market Research Questions to Ask:
 - What is the fiscal year end and quarter end of the software publisher?
 - What types of license models does the publisher support?
 - What is the financial stability of the company?
 - Who are their Federal and DoD customers?
 - Are there examples of similar-sized transactions with details?
 - Are there any known issues with the publisher?
 - What does the maintenance cover, what type plans are available, and what is included in the maintenance agreement?
 - How often does the publisher upgrade their licenses?
 - Is there another software product required in order to reach the full potential of the software?

Requirements /
Market Research

Requirements
Document

Excerpts from
Full-Day
Workshop on
Requirements

What Are Requirements?

What are
Requirements?

- A list of issues or problems with the way you are currently performing a function or operation
- The end-goal of the system or solution you seek
- Detailed functionality and capabilities you need to achieve your end-goal system or solution

The Definition Depends on the “Definer”

- Commercial Buyer’s Definition
 - One document with many purposes and applications
- Seller’s / Offeror’s Definition
 - The details a vendor needs in order to give a price and terms to deliver a solution
- Government Buyer’s Definition
 - Many documents required in the acquisition process

What Does
“Requirements”
Mean to You?

Pitfalls of Poorly Drafted Requirements

Bad Solutions Come from Bad Requirements

- Difficult to acquire products with a good fit to actual requirements.
- Can lead to low product satisfaction.
- Can lead to performance issues, project overruns and claims for damages.

If you cannot describe exactly what you need, you won't know what to buy, how to get it, who to get it from, or how to tell when you get it.

Delays the Solicitation and Award Process

- Poor product fit can lead to longer and less efficient procurements
- Can result in inadequate competition and unfavorable pricing

Shifts Risk to the Drafter of the Requirement

- Legal principle – “Ambiguities will be construed against the drafter”
- Cause vendors to shift risk with assumptions and unfavorable terms and conditions and higher price.

If you don't do an excellent job on a PWS, SOO, SOW, PSOW, etc; how do you expect a vendor to deliver what you want and need

- If you don't know your requirements, then stop and go figure out your requirements and why you are going to spend money. Don't spend the money until you know your requirements.
- Invest the time up front to get the requirement right and avoid all the rework after contract award.
- One method is to have an internal group (not associated with your acquisition) review your requirements and draft their response based on what you wrote.
- Remember the “Four Corners of the Contract” rule – you only are entitled to what you put in the Contract/PWS.

“The best contract in the world can not fix a poorly worded, under funded requirement”, Brig General Slinkard

Identify how the team concept helps with requirements definition.
Name the common attributes of a good requirements team.

- Skills needed
- Experience needed
- Representative of (what groups?)
- Government / contractor mix
- Number of people
- Parameters / Guidelines / Principles
- Project Management disciplines:
 - goals, meetings, agendas, status, issues log, timeline

EULA Key Clauses / License Grant

License Grant

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Product Names
& Functions

What products will meet the customer's requirements?

By identifying the business process you want to automate, you place some responsibility on the software company to perform that process using their software.

BUSINESS PROCESSES	MODULES AND SUB-MODULES
<ul style="list-style-type: none"> ▪ Financial Reporting ▪ Management Reporting ▪ Closing Process ▪ Internal project tracking ▪ Entry of vendor invoices ▪ Check Printing ▪ Bank integration for ACH and wires ▪ Employee expense reimbursement ▪ Inter-company tracking ▪ Cost Center Planning ▪ Balance Sheet Planning ▪ P&L Planning (EXCEL Upload Capability) • Consolidations (minimal requirements) 	<ul style="list-style-type: none"> ▪ FI and CO Organizational Structures ▪ FI-General Ledger ▪ FI- Accounts Payable ▪ FI- Bank Accounting ▪ CO- Cost Center Accounting ▪ CO- Profit Center Accounting ▪ CO- Overhead Cost Controlling ▪ CC, B/S and P&L ▪ SEM-BCS for Financial Consolidations for Four legal entities ▪ Business Intelligence to support reporting and plan vs. actual reports ▪ Portal to support reporting through Business Intelligence ▪ Solution Manager to support environment management ▪ GRC to support access control management

By identifying the software modules you need to buy, the software company is making a representation that the business process can be performed by using that module.

This is a complete list of all software required to perform the business processes of x, y and z

EULA Key Clauses / License Grant



Product Names & Functions

Requirements

Demo in Person

Gap Analysis

A	B	C			D	E	F	G	H	I
REQUIREMENT REFERENCE	BUSINESS PROCESS	LICENSOR'S PRODUCT FIT			PRODUCT NAME	LICENSE TYPE*	UNIT PRICE	QUANTITY	TOTAL PRICE	THIRD PARTY PRODUCT(S) REQUIRED* (Y/N)
		FIT (YES)	FIT (NO)	Other				*If yes, then list third party brand name and products required		
1 - Allows download of banking data	Bank account reconciliation	X			QuickBooks Pro	Annual Subscrip	\$850	30	\$25,550	N
2 - Exports data to bank system	Bank account reconciliation		X		N/A					
3 - Print Checks	Payment Processing			X	Custom Sub-routine					

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Duration

How long can the software be used?

PERPETUAL



TERM /
SUBSCRIPTION



Duration of Licenses

- There are two primary license models – Perpetual and Term
 - A **Perpetual License** means the license is owned into perpetuity. The full price is usually paid at delivery.
 - A **Term License** means the license is owned for a specific period of time. The price is often paid in annual increments, also referred to as **Subscription Licenses** - often used for SaaS licenses.

Perpetual license

Price = \$1 million invoiced at delivery



t = infinity

Subscription License – Four year term

Price (software component) = \$250,000 annually



t=0

Yr 1

Yr 2

Yr 3

Yr 4

Key take-away

If your time horizon for the license is not the same as the pricing model used by the Vendor, you might overpay significantly.

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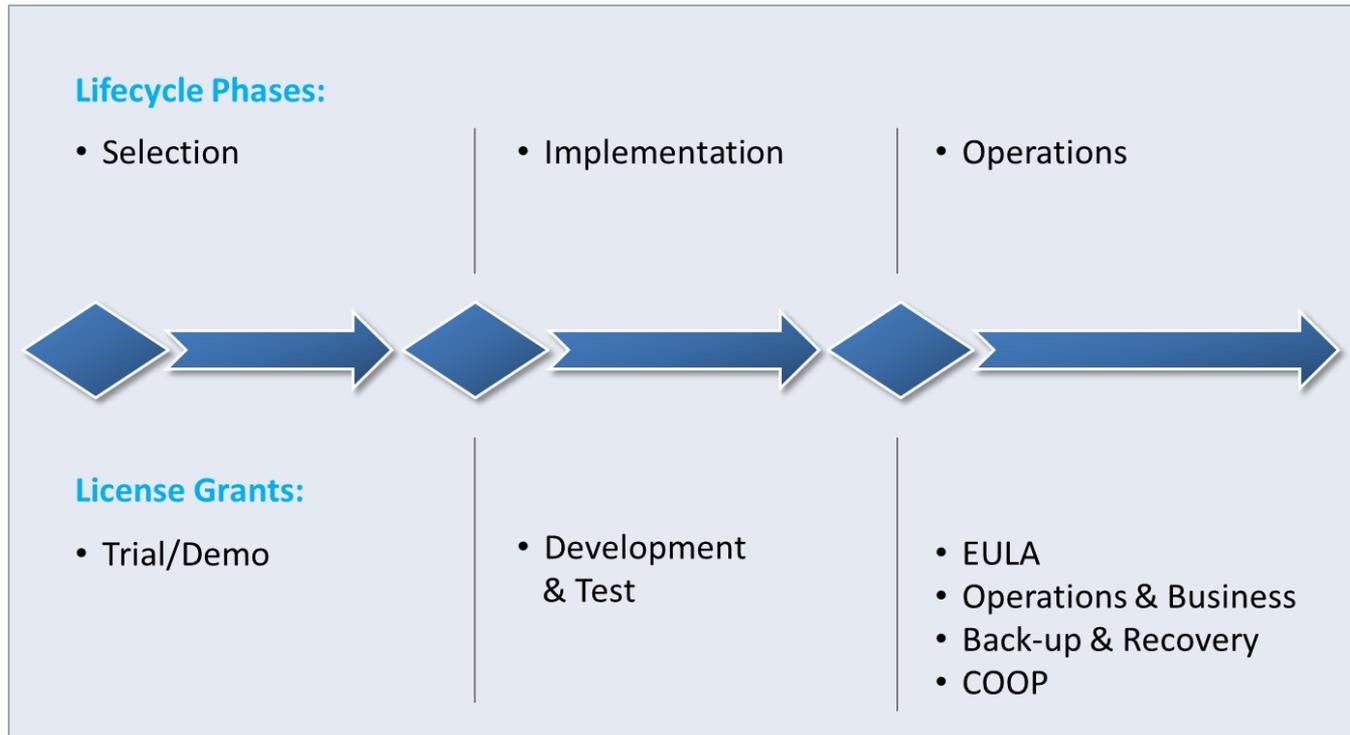
Maintenance

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Permitted Use

For what purposes can the software be used?



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Authorized Users

Who can use the software?



Remember contractors, foreign governments, reservists, & casual users

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Geography

Where can the Software be used?



Default position = "worldwide" rights to use

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Language

What languages will the user community understand?

- *Software*
- *Support Team*
- *Screens / Fields*
- *Training Classes*
- *Documentation*



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Quantity

How many copies of the software can be used?

1. Number of licenses you are buying
2. Duplicate copies allowed



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Self-Audit

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



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Self-Audit

- Audit will be done by the government on its own systems.
- Will be performed no more than once per year.
- Seller will not be allowed to perform an audit on government systems.
- Government will provide results of its audit upon request by publisher no more than once per year.

Greater success in getting “self-audit” rights if you show you have ITAM process and tools in use.

Publisher Position

Publisher may perform audit anytime

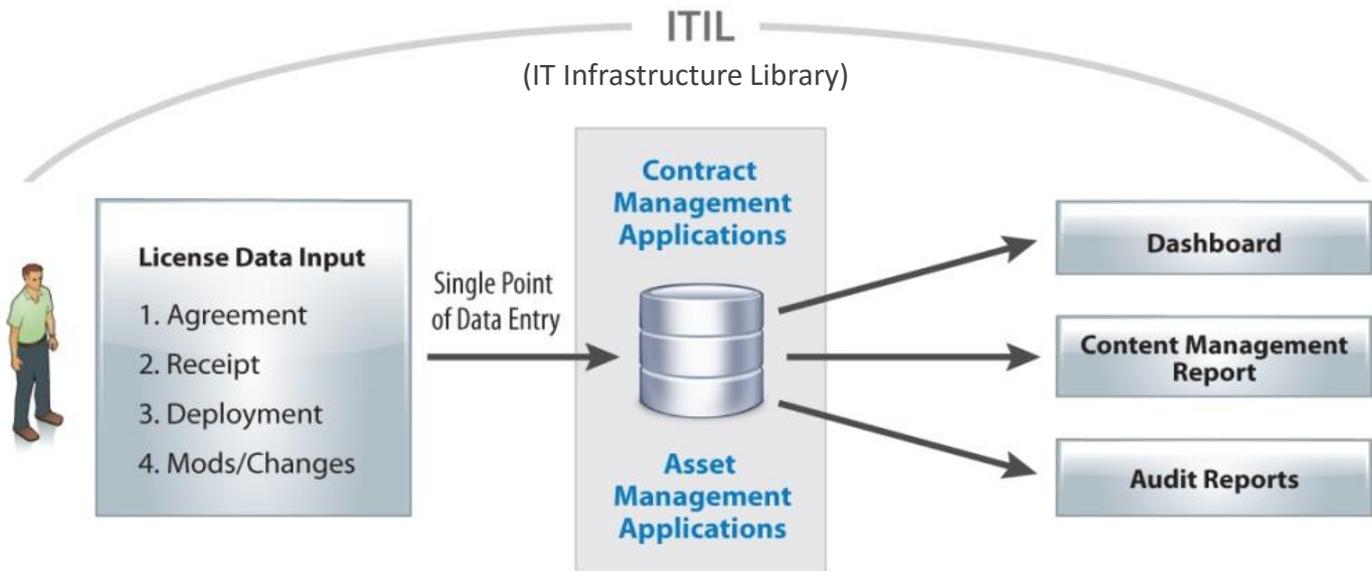
Buyer's Position

Third party may perform audit with conditions

Government will perform audit

Zone of Compromise

NOTE: Self-Audit Requires Solid ITAM & SAM Capabilities



Why Use ITIL?

- ITIL provides a comprehensive set of disciplines and processes for the orderly management of IT assets and services within an organization.

Why Change Management?

- ITIL-based Change Management processes ensure changes to the IT infrastructure are authorized, tested, and deployed properly—thereby retaining environment integrity.

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Times of Conflict

What additional licenses are needed?



EULA Key Clauses / License Grant

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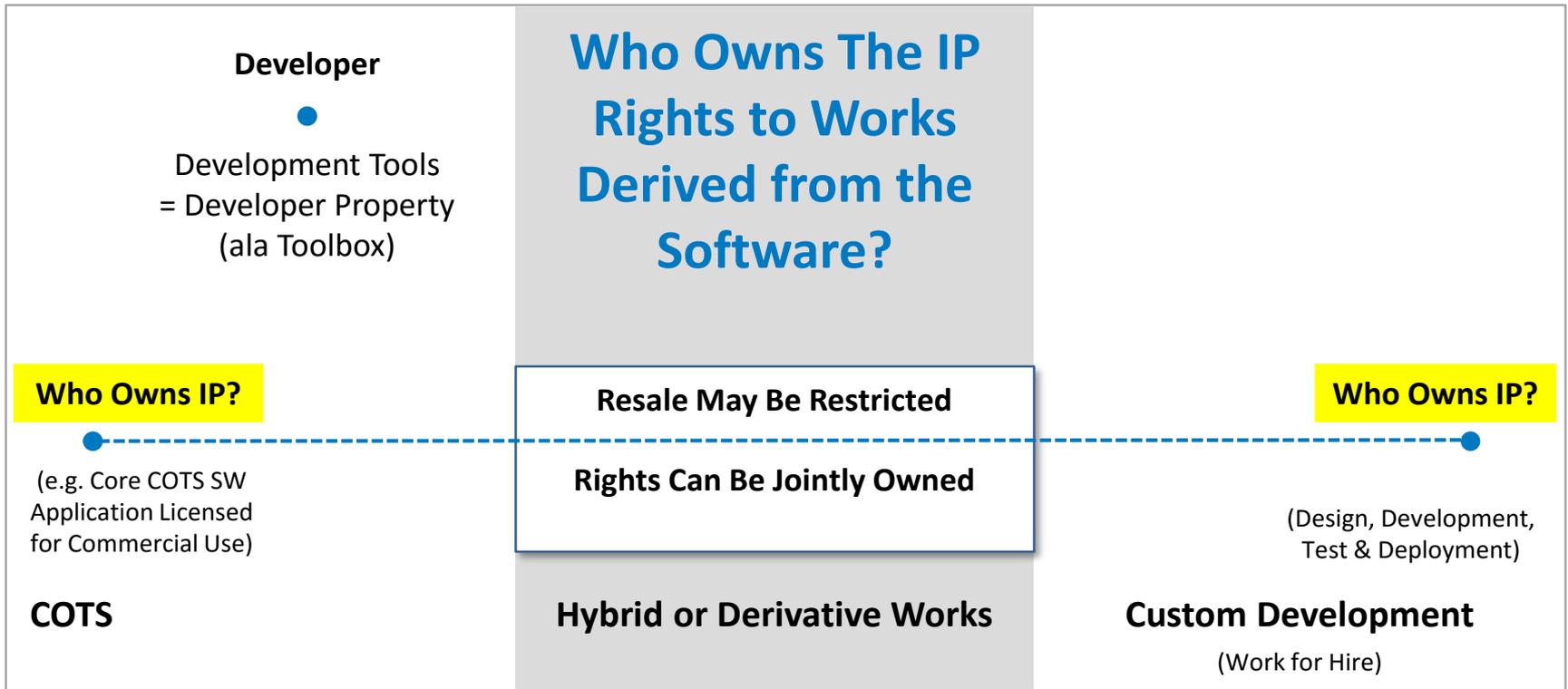
Maintenance

General Provisions



Ownership & Use Rights

_____ Always Owns the Exclusive Rights to its Data
 _____ Owns Enhancements or Modifications to the Licensed Software



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Core Pricing Elements



Financial
Investment

Metric

Discount

Key Terms

Bench-
marking

EULA Key Clauses / Pricing

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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*

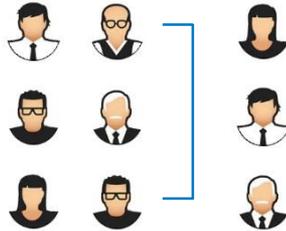
Who Can Use? Count & Scope

Named User



Only this individual may use this license (e.g., professional, self service)

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



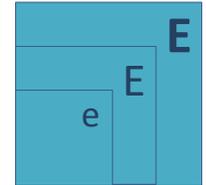
Based on number of processors or cores in CPU

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

EULA Key Clauses / Pricing

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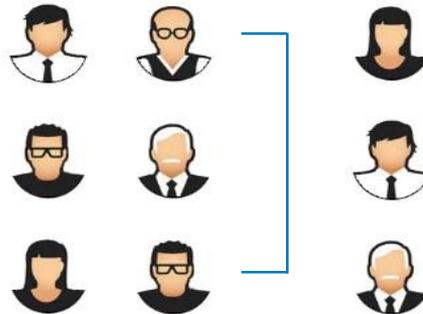
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Metrics

2000 people have a legitimate need to use the software.



Maximum user count at any point in time would be 500.

Your system utilizes 32 processors.



Per Named User
= \$100.00

Per Concurrent User
= \$500.00

Per Processor
= \$10,000.00

Given the above quantities per Licensing Metric, identify the Metric that meets total licensing requirements at the lowest price given the prices shown above.

Software Cost and Price Impact

- A software Company has a huge investment in their intellectual property and continues to invest in improving their software, mostly through a pool of software developers (and related functions) improving the functionality.
 - This pool of developers is essentially a fixed cost; it does not vary (immediately) based on how many copies/licenses of software are sold.
- What is the Marginal Cost (***the cost of producing one more unit***) of selling an additional \$1M of licenses?
 - State that in Percentage (%) terms.
 - What types of cost comprise the marginal cost of the sale?

EULA Key Clauses / Pricing

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Discount

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

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Maximize Buying Event



Time Order

Maximize
Transaction
Size

Right Metric
/ License
Model

Contract
Vehicle

Benchmark
Data

Remove
Contingencies

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Total Cost of Ownership (TCO)

REQUIREMENTS
/ FIT

PRICE

TERMS &
CONDITIONS

Terms & Conditions (relating to Price)

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

Extra Warranty
(cost)

Transfer Right (cost)

Self-Audit Right
(cost)

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Best Value Tools

Best Value
Price Factors Guide

DoD ESI Home

Home Overview How to Use Rapid Assessment Bes

Tools Library

A direct link to tools utilized throughout the Best Value toolkit are available below:

Tool	Purpose	Link / Type
Benchmark Data Gathering Checklist	Summary Level Guidance on Benchmarking	PDF
Benchmarking Elements Table	Key elements to be gathered to compare benchmark data	PDF
Best Value Price Factors Guide	Review of items that drive the price of commercial software, oriented towards Vendor's flexibility to grant better pricing based on Government's position.	PDF
Best Value Terms and Conditions Guide	In-depth review of critical Ts & Cs, applicability, risk identification, and identification of where the term or condition likely appears in contractual documents.	PDF
Contract Vehicle Utilization Checklist	Identification of available contract vehicles with guidance on their	PDF

DoD ESI Home

Best Value Price Factors Guide

Price Factor	Importance	Objective	Rationale & Recommendations
Dollar Value Size of Immediate Order	+++	Execute the largest order that makes sense from requirements and TCO perspectives, with maximum immediate revenue to the Vendor/Publisher.	Software vendors are attracted to size, specifically the amount of revenue they can immediately book. The larger the transaction, the greater discount the Vendor/Publisher will offer. However, do not buy more than needed, and evaluate all alternatives using Total Cost of Ownership (TCO)/Life-Cycle Cost Estimate methodologies. One way to achieve greater size than initially expected is to consolidate with another entity planning a similar acquisition. Periodic, aggregate purchasing provides significantly better discounts than one-off buying.
Budget	++	Establish an aggressive yet realistic budget for the acquisition.	Assume that the Vendor/Publisher will find out the budget and structure (within reason) their offer to fit the available budget. It is almost as if you need to establish "Best Value" Pricing prior to publishing the budget.

EULA Key Clauses / Warranty

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Core Warranty Elements



What is Covered?



Who is Covered?



Duration



Remedies

EULA Key Clauses / Warranty

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Products will meet a standard of performance

Sellers will fix or replace defective products

Refund money if unable to fix defect

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Commercial Product Warranties

Implied

Express

Merchantability

Fitness for
Particular Purpose

What is Covered

Who is Covered

Timing / Duration

Defect Remedy

These implied warranties automatically apply to all sales of commercial software to the government through FAR section 52.212-4 (o).

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What is Covered?

Express Warranty

The Seller's Commitment
in the EULA

Performance Warranty

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

What Documentation?

Buyer's Preferred
Documentation

Seller's Preferred
Documentation

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Who Issues the Warranty?

Who is Covered by the Warranty / Who Can Enforce It?

RECAP:

Contract Provisions Where Privity with the Publisher Matters:

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

Publisher



Flow Down



Reseller

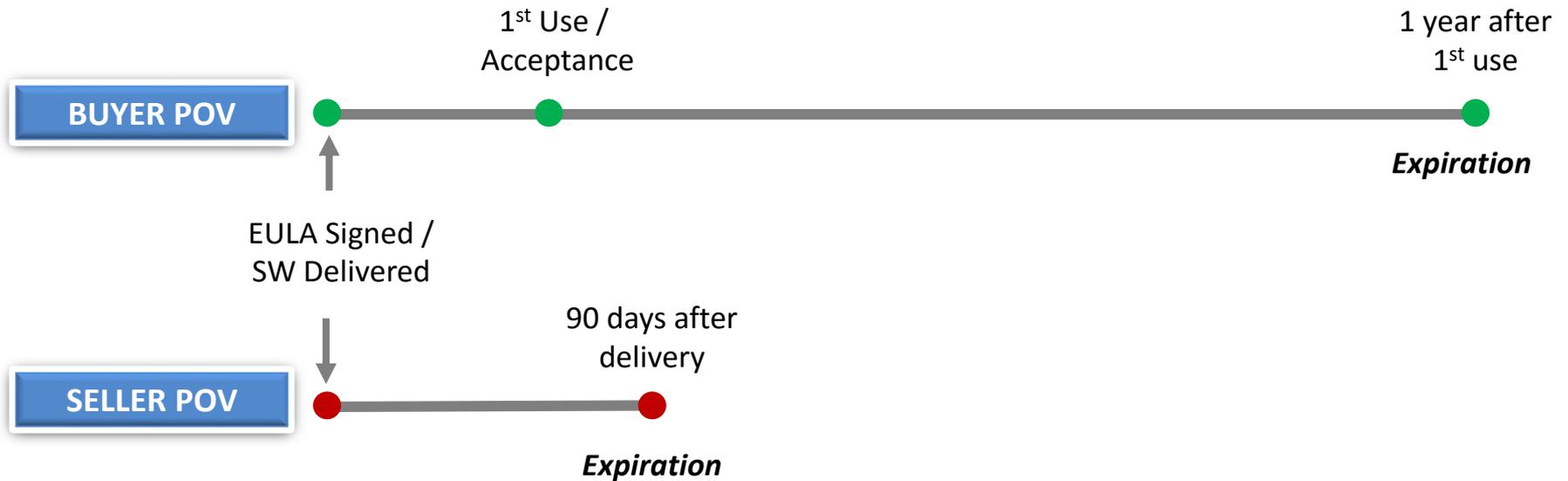
Direct

Indirect

Government



EULA Key Clauses / Warranty



EULA Key Clauses / Warranty

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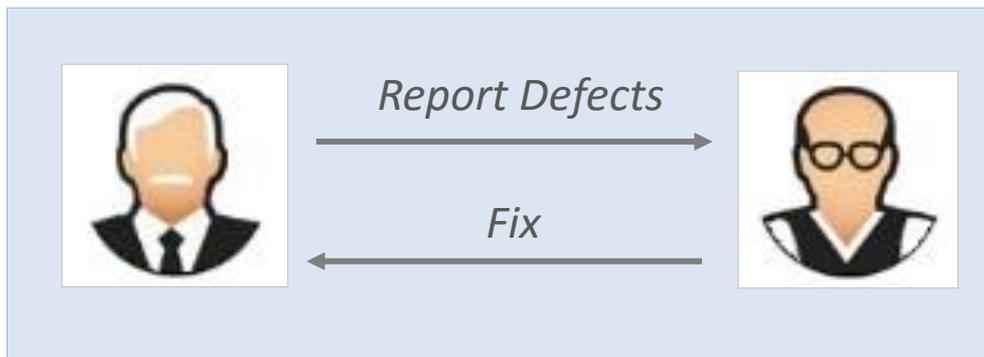
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Remedies

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

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WARRANTY

Licensor warrants for one (1) year from the date on which the Software is Accepted by Licensee, [or is first used in production by Licensee]*, that the Software will perform in all material respects the functions at the specified performance standards described in the Documentation and Standards of Performance, when operated on a Supported Platform. Documentation and Standards of Performance are defined as the Licensor's standard product documentation, the Licensee's RFP form with Licensor's RFP responses attached hereto, Licensee's Functional and Technical Requirements and Gap Analysis report attached hereto, Licensee's Features and Benefits document attached hereto, all said attachments being made a part hereof. ****[NOTE: Contracting Officer should select Acceptance or Productive Use as the start date of Warranty.]***

B. Notwithstanding Licensor's disclaimers or attempts to disclaim certain warranties, the provisions of FAR 52.212-4 (Contract Terms and Conditions – Commercial Items) apply to this Agreement, including FAR 52.212-4(o) pertaining to warranties as follows: "The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract."

C. In the event Licensee determines that the Product is a Non-complying Product during the one-year period specified above, Licensee will notify Licensor and Licensor will have ___ business days thereafter to begin remedying the non-conformance. If Licensor is unable to remedy such non-conformance within a reasonable time, Licensor agrees that Licensee may return the Product and Licensor shall

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Government



CUSTOMER VIEWS

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

Publisher



VENDOR VIEWS

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

EULA Key Clauses / Warranty

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Seller's Tactics to Limit Warranty Exposure

Implied

- **Disclaim implied warranties using language in the EULA**

Express

- **Limit liability via integration clause**
- **No express warranty**
- **Limit warranty to perform per seller's documentation**
- **Limit warranty to short duration**
- **Limit remedies**

EULA Key Clauses / Warranty

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Vendors' Perspective:

- Impose commercial clauses on government
- “Take our commercial warranty because you are buying a commercial item per FAR Part 2 definitions.”

Best Government Perspective is to Negotiate Warranty and Not Just Accept the Vendor's Clause

- Commercial practice includes negotiation of warranty provisions.
- FAR Part 12: Serve the “best interests of the government” & comply with law
- The DoD Warranty Guide says warranty is as important as price and encourages negotiation.

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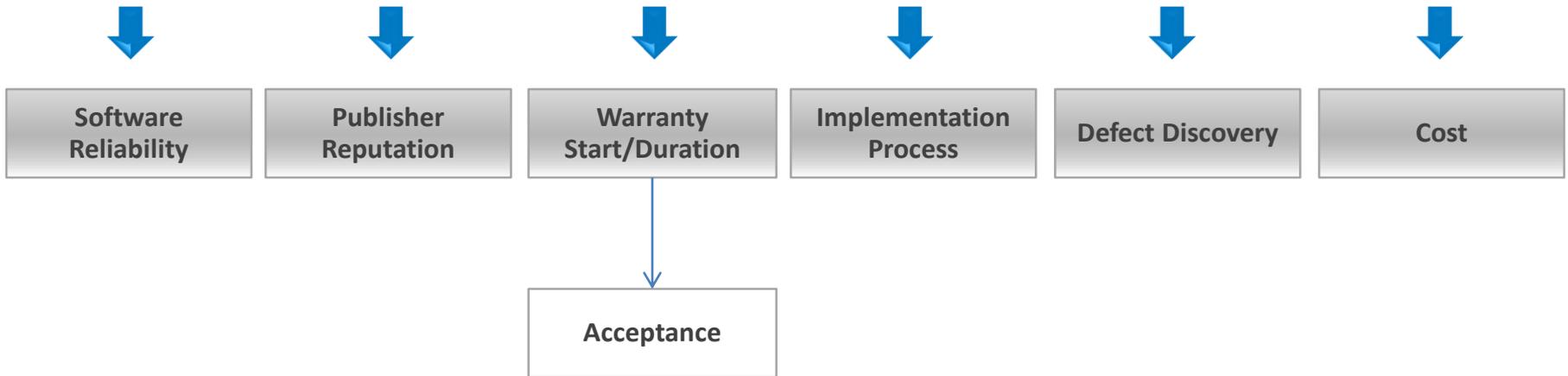
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Scope & Levels of Support



Timing & Duration



Rates



Escalation

Product Entitlements

Support Services

As shown in video tutorial

EULA Key Clauses / Maintenance

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Different Levels

Different Names

Be Familiar with Each Product and the Levels Available

Choose the Level that Best Fits Your Requirements

As shown in
video tutorial

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MAINTENANCE

As shown in
video tutorial

Licensor shall provide maintenance and support services for one (1) year from the date on which the Software is Accepted by Licensee so that the Software will perform in all material respects the functions at the specified performance standards described in the Documentation and Standards of Performance, when operated on a Supported Platform. Documentation and Standards of Performance are defined as the Licensor's standard product documentation, the Licensee's RFP form with Licensor's RFP responses attached hereto, Licensee's Functional and Technical Requirements and Gap Analysis report attached hereto, Licensee's Features and Benefits document attached hereto, all said attachments being made a part hereof.

EULA Key Clauses / Maintenance

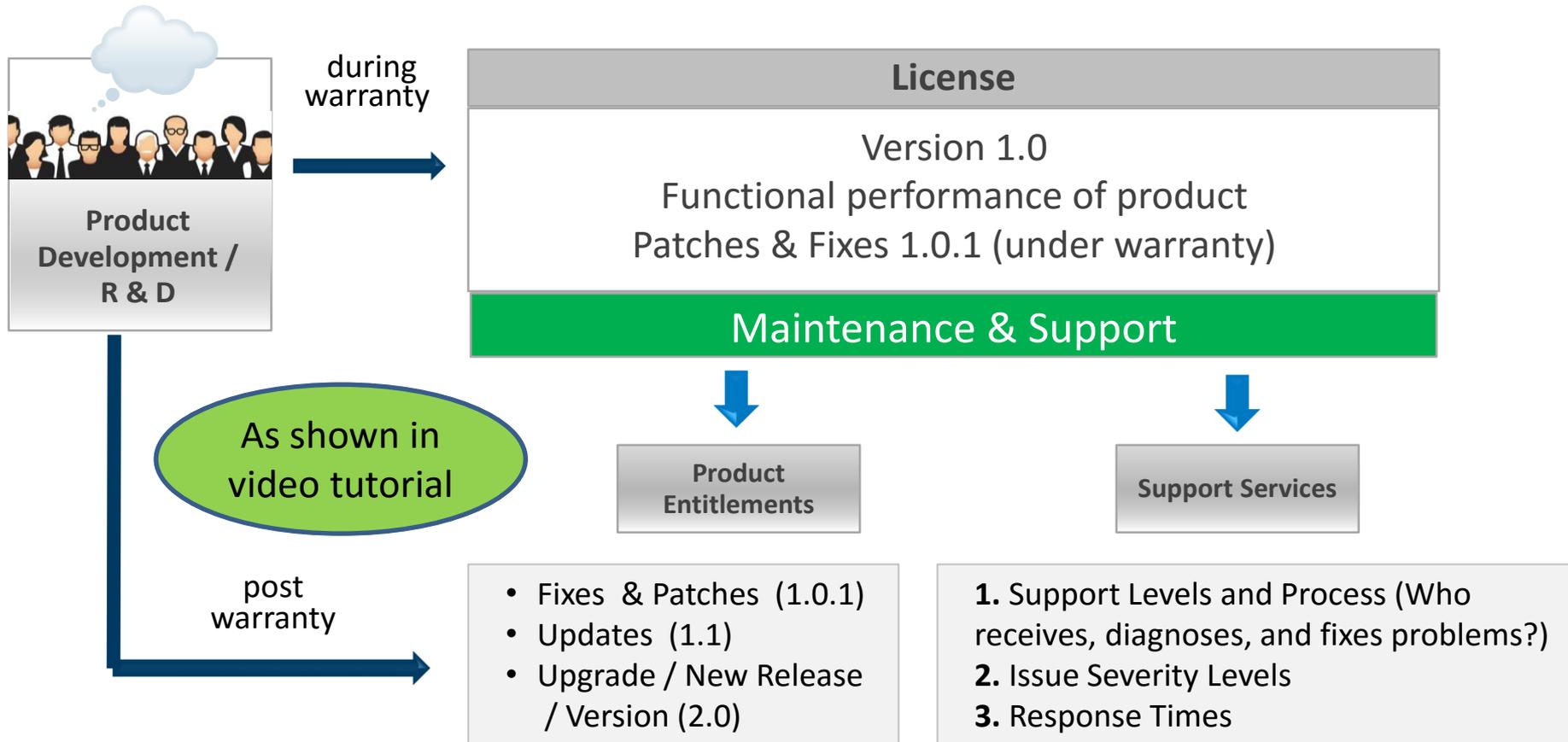
License Grant

Pricing

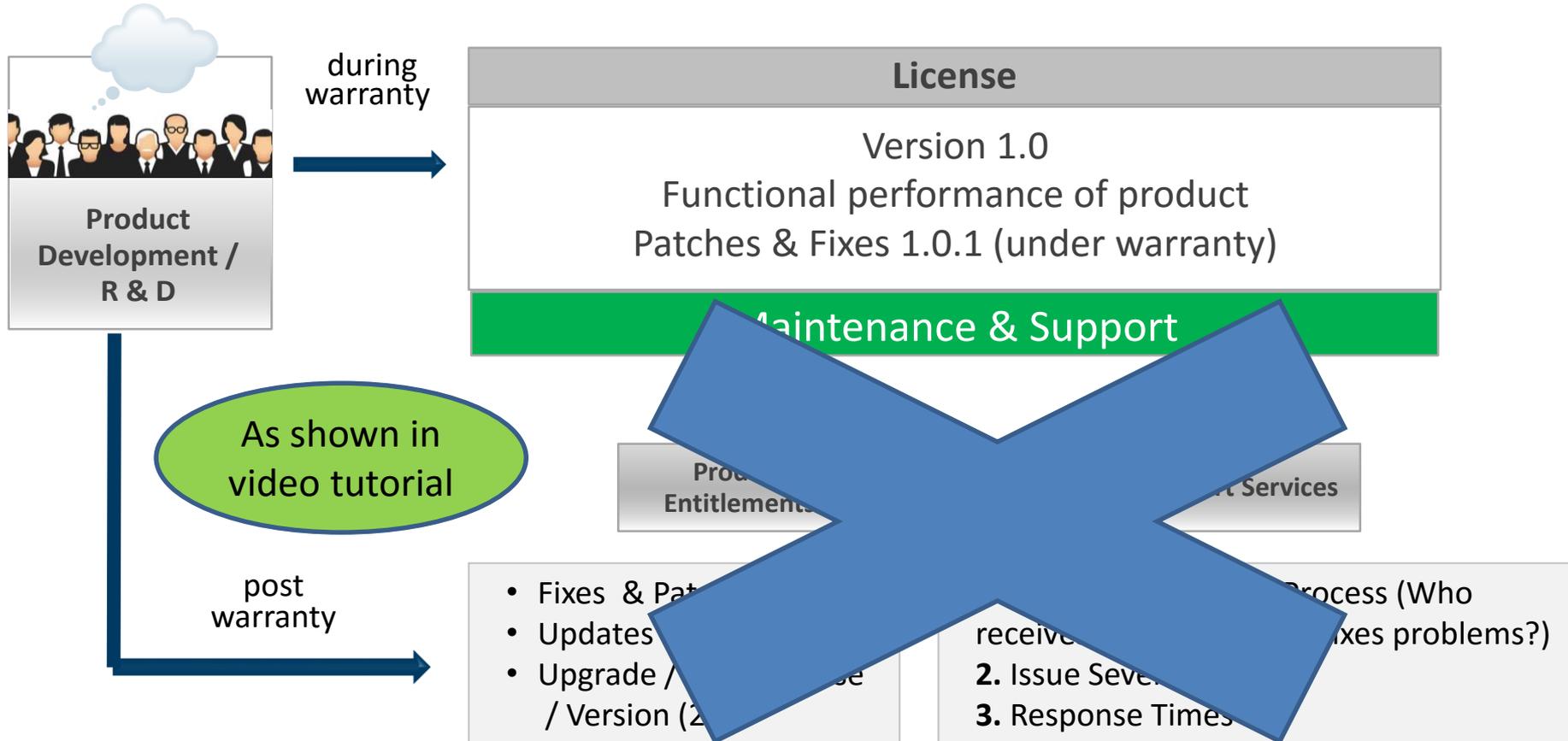
Warranty

Maintenance

General Provisions



EULA Key Clauses / Maintenance



EULA Key Clauses / Maintenance

License Grant

Pricing

Warranty

Maintenance

General Provisions



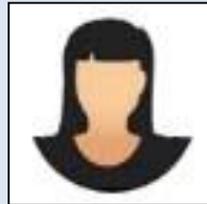
Support Levels

Who receives, diagnoses and fixes the problem?

User



Help Desk



1

Product Experts



2

Development Team



3

Support Levels

EULA Key Clauses / Maintenance

License Grant

Pricing

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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

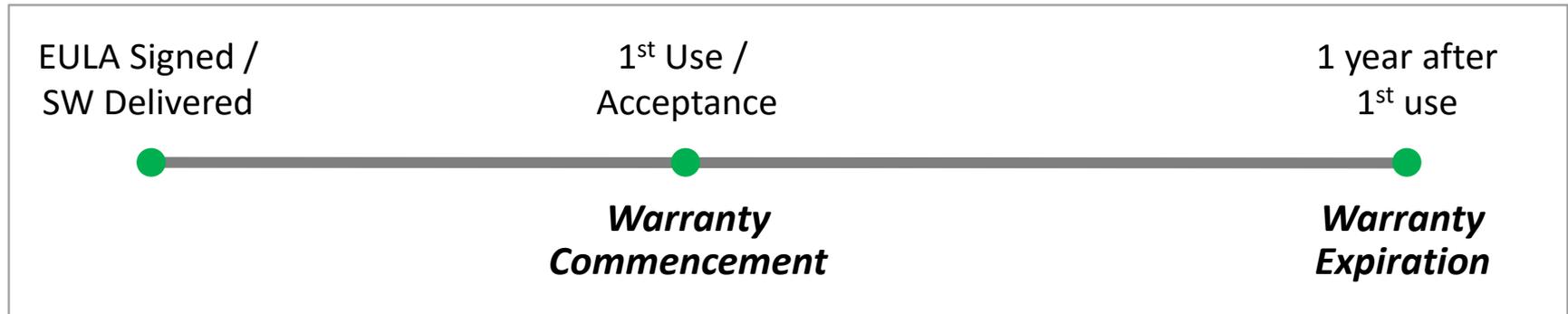
Maintenance

General Provisions

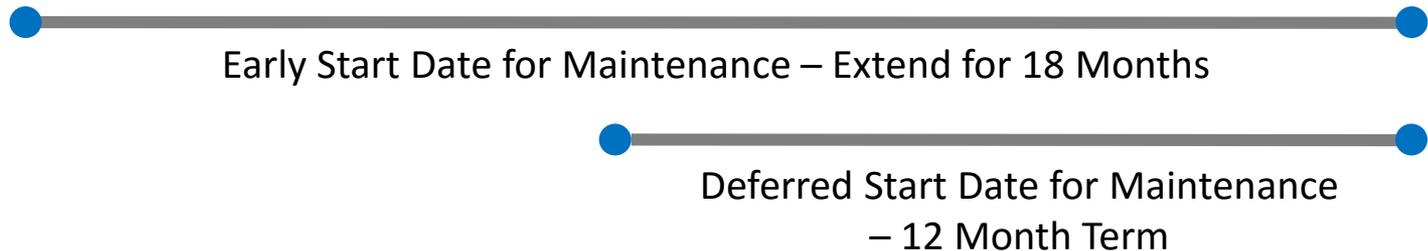


Timing and
Duration

Warranty in EULA



Maintenance



EULA Key Clauses / Maintenance

License Grant

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Rates

Escalation

Initial Maintenance Fee Range

18-22% of net license fees (NLF)

Research the vendor's practices, and negotiate the lowest percentage possible under the most favored customer clause.

Escalation on Maintenance Fee

0% for first two years
2% each year thereafter

Limit your annual escalation to a published economic index (e.g. 2%), and try to achieve an initial period of no escalation (perhaps 1 or 2 years).

Important Issues for the Government re Maintenance

-  Opting out of Maintenance may save money in the short term, but probably not in the long term.
-  The color of money can be important – is Maintenance a Product or a Service?
-  Publishers may try to release a major change/version as a “New Product”, not included under S/W Maintenance and requiring new license fees.
-  Also watch for combining existing programs into a “New Product”. Example; separate programs a, b, and c get combined into product D, which must be bought if you don’t already license all three (a, b, and c).
-  **Check with Industry Analysts to determine whether these practices are acceptable industry-wide.**

Maintenance & Support Agreements

SLAs for Response Time to Reported Issues

- Refers to the requirement imposed on the Contractor for responding to Customer reports of deficiencies.
- Usually contained in packaged offerings from Contractor with response tied to severity of the issue.

SLAs for System Performance

- Refers to system performance as delivered by a hosting provider.
- Usually expressed as a percentage of system availability out of total potential availability.
- Levels of service can vary significantly.

Selecting the Right Package

- Because higher SLAs can be expensive, the Customer should weigh carefully the need for quick response time or substantial availability.

EULA Key Clauses / Maintenance

License Grant

Pricing

Warranty

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General Provisions



ESI White Paper

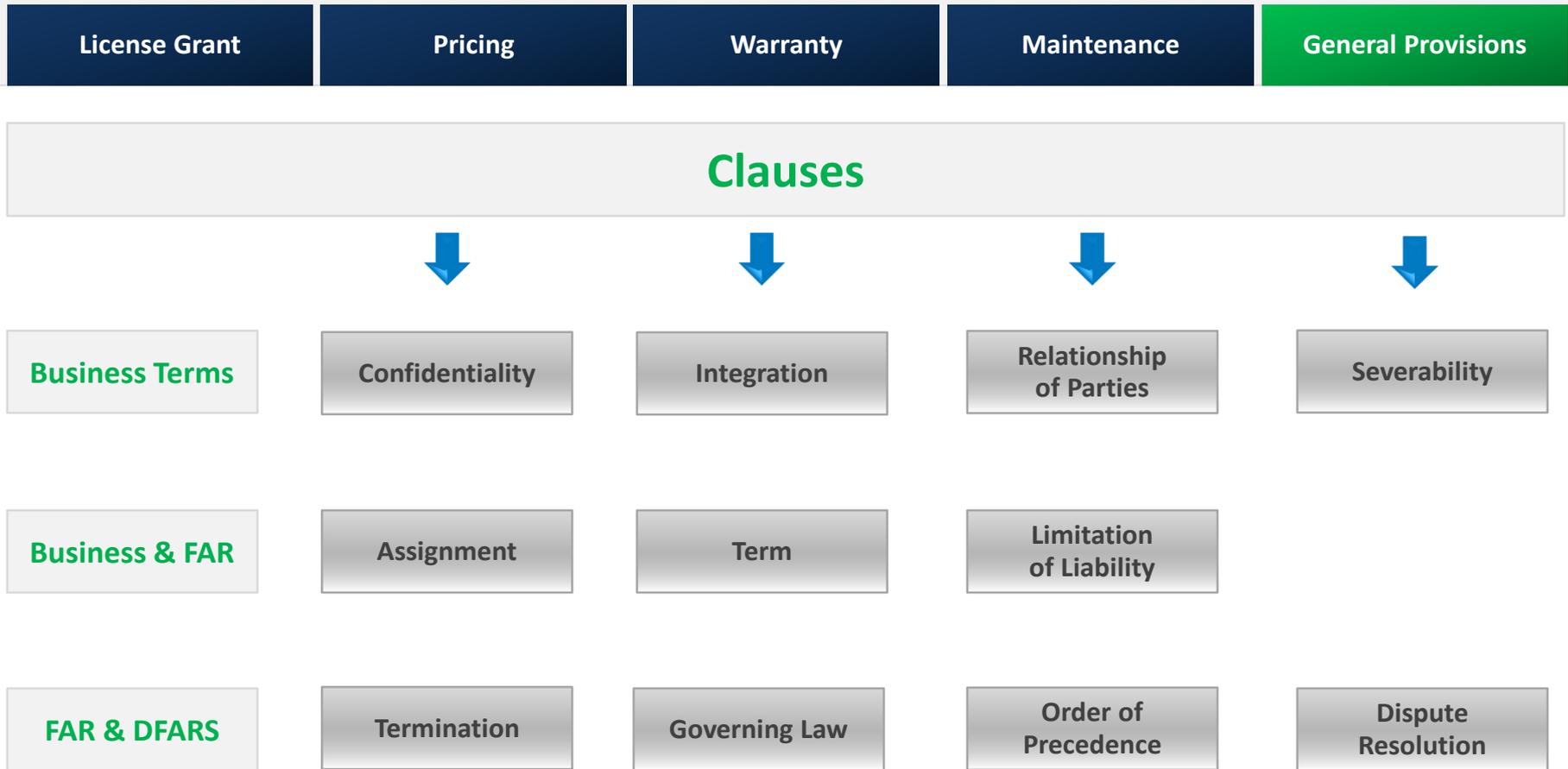


Comparing Warranty & Maintenance

License Grant	Pricing	Warranty	Maintenance	General Provisions
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	Licensed Product Warranty	Maintenance & Support
Price / Cost	Warranty Cost is included in Initial License Fee; fix defects at no cost	Cost is in addition to Initial License Fee
Coverage	Software capabilities and performance standards will be met	Commitment to fix defects; meet service levels
Product Entitlements	Fixes & Patches (1.0.1)	Fixes & Patches (1.0.1) Updates (1.1) Upgrade / New Release / Version (2.0)
Timing	During defined warranty period; can run concurrently with Maintenance	Can start at time of entering license or first use of software;
Remedies	Fix defect / return product for refund	Fix Defect

EULA Key Clauses / General Provisions



The Commercial approach to General Provisions often contradicts rights granted to the Government in FAR and DFARS. DO NOT OVERLOOK THESE CLAUSES!!

EULA Key Clauses / General Provisions

License Grant

Pricing

Warranty

Maintenance

General Provisions



Business Terms

Confidentiality

- Publishers seek to prevent buyers from misusing or otherwise disclosing Publishers' confidential information.

Integration

- Only terms and conditions incorporated—integrated—into agreement by reference or text are enforceable.

Relationship of Parties

- Defines parties to agreement as independent contractors so as to avoid an employment relationship.

Severability

- If one clause, term, or condition is found unenforceable by a court of law, it does not negate the entire agreement.

EULA Key Clauses / General Provisions

License Grant

Pricing

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Business & FAR
Terms

Assignment

Term

Limitation
of Liability

- Assignment clauses generally state that one party cannot assign rights or duties to a third party without consent of other parties. FAR 52.212-4(b) *only* covers assignment of claims (payment).
- Commercial practice is that the term of the agreement is limited to whatever the contract says. FAR 17.204(e) limits most contracts to five years. Perpetual licenses are just that—perpetual. However, ensure the term is consistent with the License Grant—Duration clause.

EULA Key Clauses / General Provisions

License Grant

Pricing

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FAR & DFARS

Assignment

Term

Limitation
of Liability

- Commercial agreements limit damages to Express Warranty limitations.
- Publisher is not liable to Government for consequential damages resulting from any defect or deficiencies in accepted items.
- FAR 52.212-4(p) is consistent with commercial terms, but weaker than “non-commercial” terms.
- FAR 52.246-23, Limitation of Liability, allows exception for “willful misconduct” of contractors’ managerial personnel.

EULA Key Clauses / General Provisions

License Grant

Pricing

Warranty

Maintenance

General Provisions



FAR & DFARS

Termination

Governing Law

Order of
Precedence

Dispute
Resolution

- Commercial agreements spend significant space defining conditions that justify termination by either party.
- Those agreements use even more space defining what happens to parties when a termination occurs, including the adjudication of disputes.
- FAR 52.212-4 (l) & (m) provide Government powerful termination rights.
- The Government can terminate for cause or convenience.

EULA Key Clauses / General Provisions

License Grant

Pricing

Warranty

Maintenance

General Provisions



FAR & DFARS

Termination

Governing Law

Order of
Precedence

Dispute
Resolution

- Most Commercial agreements include a Governing Law or Choice of Laws clause.
- Those clauses usually specify that unresolved disputes will be heard in the state courts where one party is headquartered – (usually the Publisher’s home state in the case of software licenses) – and that state’s laws will be applied.
- FAR 52.233-4 and DFARS 252.233-7001 specify that unresolved disputes will be heard in U.S. Federal Court and that federal law will be applied.

EULA Key Clauses / General Provisions

License Grant

Pricing

Warranty

Maintenance

General Provisions



FAR & DFARS

Termination

Governing Law

Order of
Precedence

Dispute
Resolution

- Order of Precedence (OOP) is used to reconcile contradictions among the documents or clauses of a EULA.
- Commercial companies negotiate this and usually allow the more specific document or clauses to overrule less specific ones.
- FAR 52.212-4 (s) specifies OOP. For Government license agreements...
 - (1) Schedule of Supplies/Services.
 - (4) Addenda, including EULAs
 - (9) Specification

EULA Key Clauses / General Provisions

License Grant

Pricing

Warranty

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FAR & DFARS

Termination

Governing Law

Order of
Precedence

Dispute
Resolution

- Most Commercial agreements specify dispute resolution mechanisms.
- These often include some form of arbitration and conditions for suing in a court of law.
- FAR 52.212-4 (d) and the Disputes Act of 1976
 - Disputes must be referred initially to the Contracting Officer for resolution. See FAR 52.233-1 for the specific process.
 - Contractor must continue performance of contract obligations until the dispute is fully resolved.

General Services Acquisition Regulation (GSAR) Class Deviation

Prepared by DoD ESI | 2016

GSAR Class Deviation

Reference:

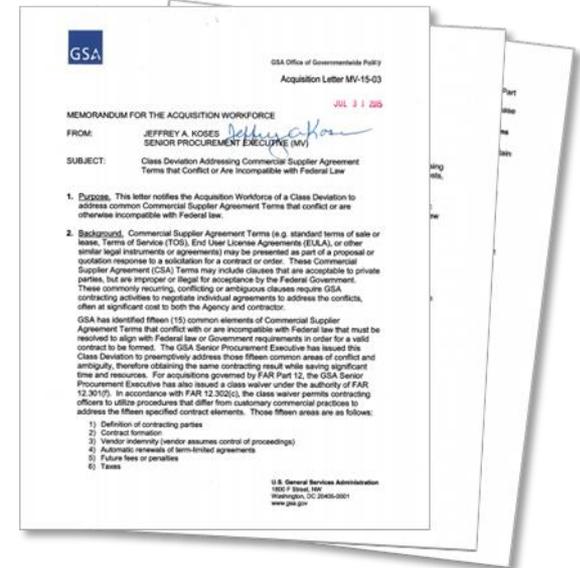
- Acquisition Letter MV-15-03 dated July 31, 2015

Situation:

- Commercial Supplier Agreement Terms may include clauses that are improper or illegal for Government to accept
- Conflicting & recurring clauses cause contracting personnel to waste time repeatedly having to negotiate these terms.

Solution:

- GSA identified 15 common clauses conflicting with Federal Law or Government requirements.
- GSA Senior Procurement Executive issued class deviation to address preemptively those 15 common clauses as well as Order of Precedence.
- Deviation uniformly address common unacceptable terms, reduces risk and costs, and streamlines the acquisition process.
- Note: Applies only to GSA contracts and orders made against GSA contracts.



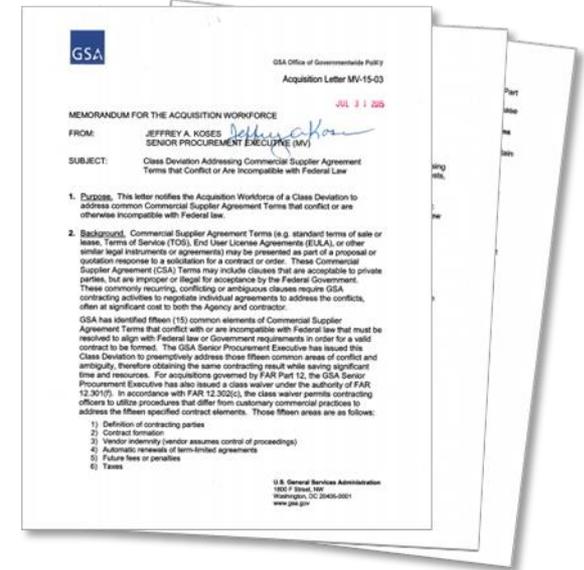
GSAR Class Deviation

Policy:

- KOs are
 - instructed to incorporate the clauses in Attachment A of the letter into all contracts
 - 552.212-4 Contract Terms & Conditions—Commercial Items
 - 552.232-39 Unenforceability of Unauthorized Obligations
 - 552.232-78 Commercial Supplier Agreements
 - still encouraged to review and negotiate other terms to ensure the ordering activity's business needs are met.

Terms

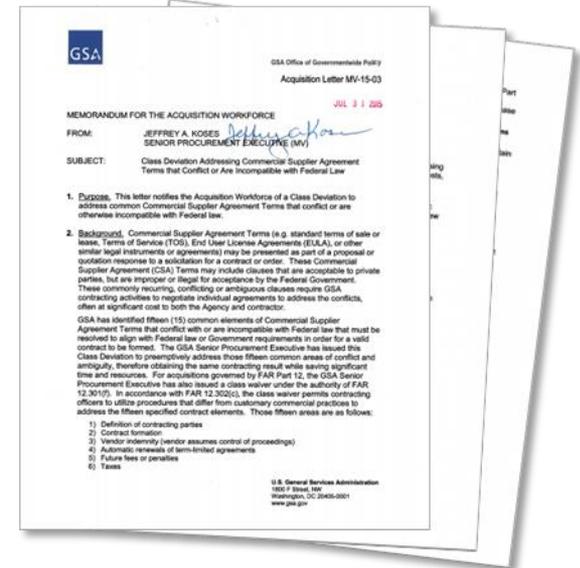
- Definition of contracting parties
- Contract formation
- Vendor indemnity
- Automatic Renewals of term-limited agreements
- Future fees or penalties



GSAR Class Deviation

Terms

- Taxes
- Payment terms or invoicing (late payment)
- Automatic incorporation / deemed acceptance of third party terms
- State / foreign law governed contracts
- Equitable remedies, injunctions, binding arbitration
- Unilateral termination by supplier
- Unilateral modification by supplier
- Assignment by supplier
- Confidentiality of terms and conditions
- Audits (automatic liability for payment)
- Order of Precedence



Acquisition Letter MV-15-03 expires when these changes are incorporated into the GSA Acquisition Manual (GSAM) and FAR. Supplement #1 provides clarification

Wrap-Up

- Any last questions?
- Any thing you'd like to share?
- Please complete class evaluation and exchange for certificate.