COTS Software Licensing

End User License Agreements (EULA) Best Practices Webinar

14 December 2016

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

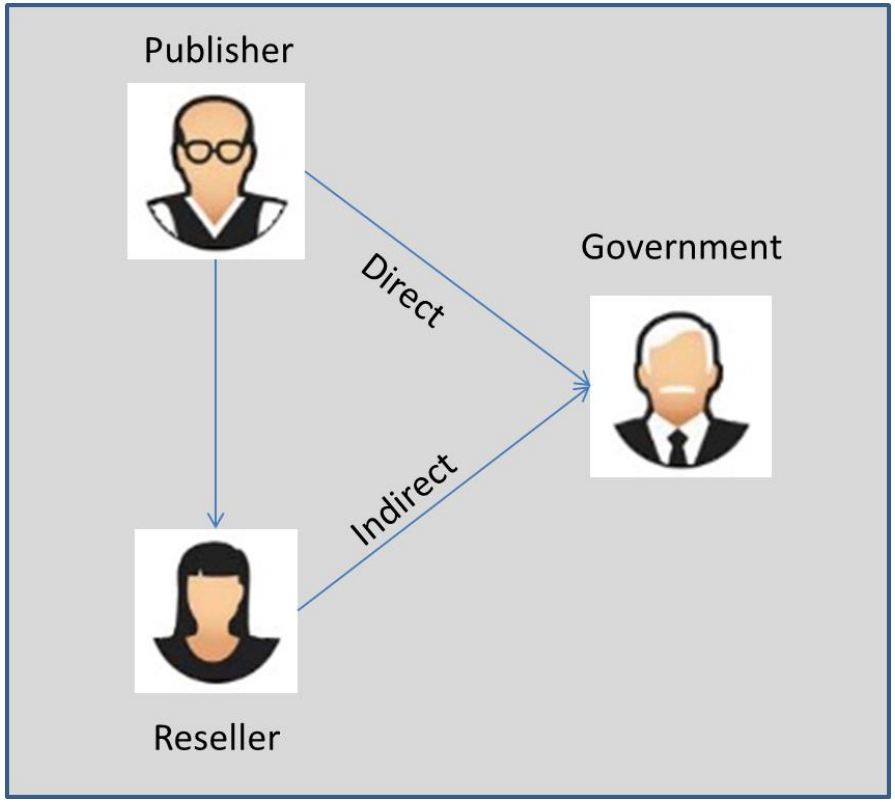
- Parties
- Authorized Users
- Requirements
- Geography
- Times of Conflict
- Product Names & Functions
- Language
- Duration
- Quantity
- Ownership & Use Rights
- Permitted Use
- Self Audit

* EULA Key Clauses / License Grant

License Grant	Pricing	Warranty	Maintenance	General Provisions

Parties

Who is authorizing this EULA?



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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 ▪ 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)	▪ 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 ▪ Exchange Infrastructure to support integrations

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

EULA Key Clauses / License Grant

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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 • Operations & Business • Back-up & Recovery • COOP

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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

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Language

What languages will the user community understand?

Software

logiciel

ソフトウェア

szoftver

* EULA Key Clauses / License Grant

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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

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Times of Conflict

What additional licenses are needed?

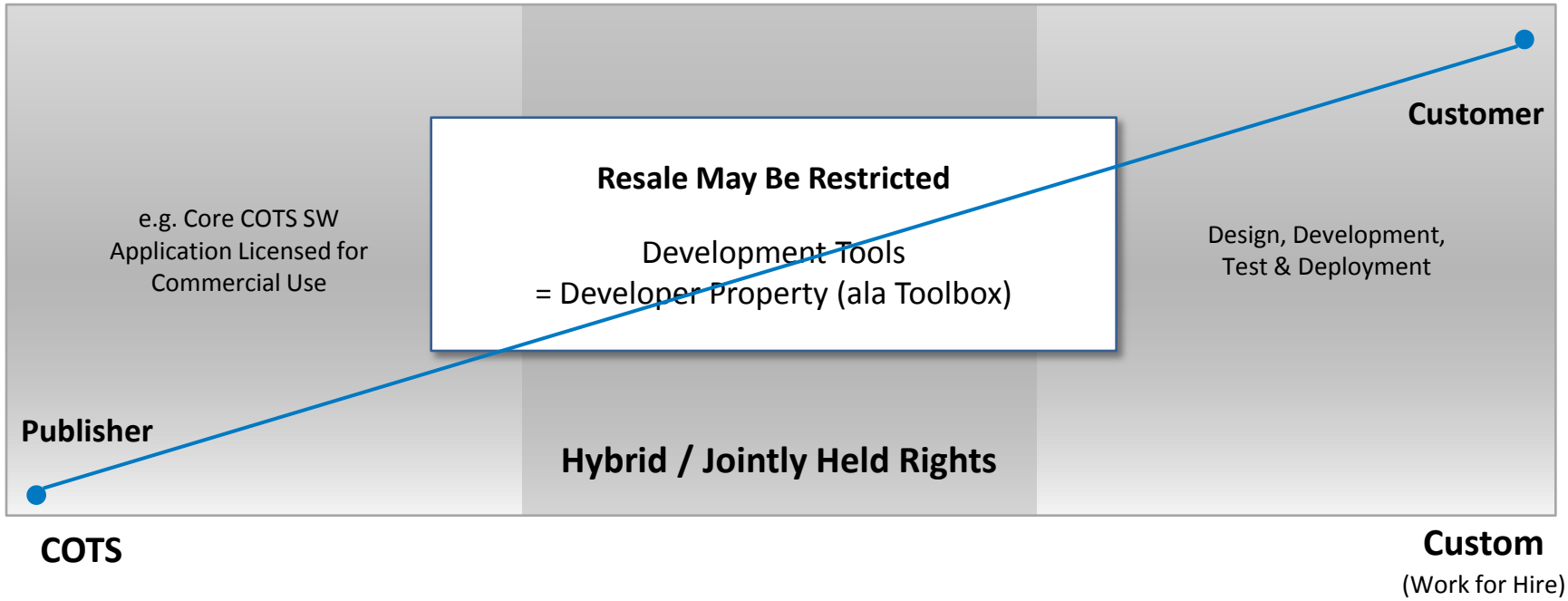
* EULA Key Clauses / License Grant

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)

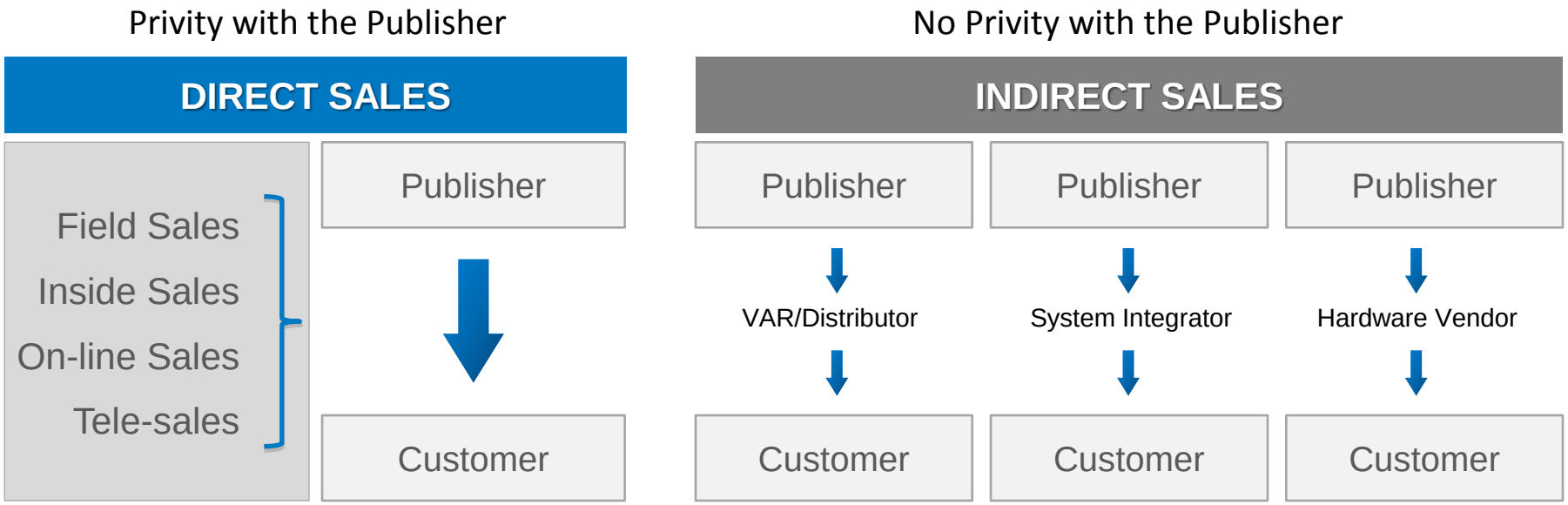
Object Code (Machine Readable)

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

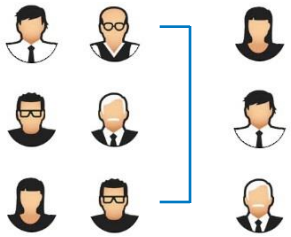
Note: *Virtualization* and *Unlimited* Issues

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

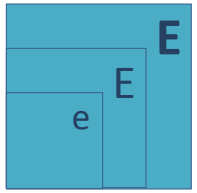
Processor / Core Based

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

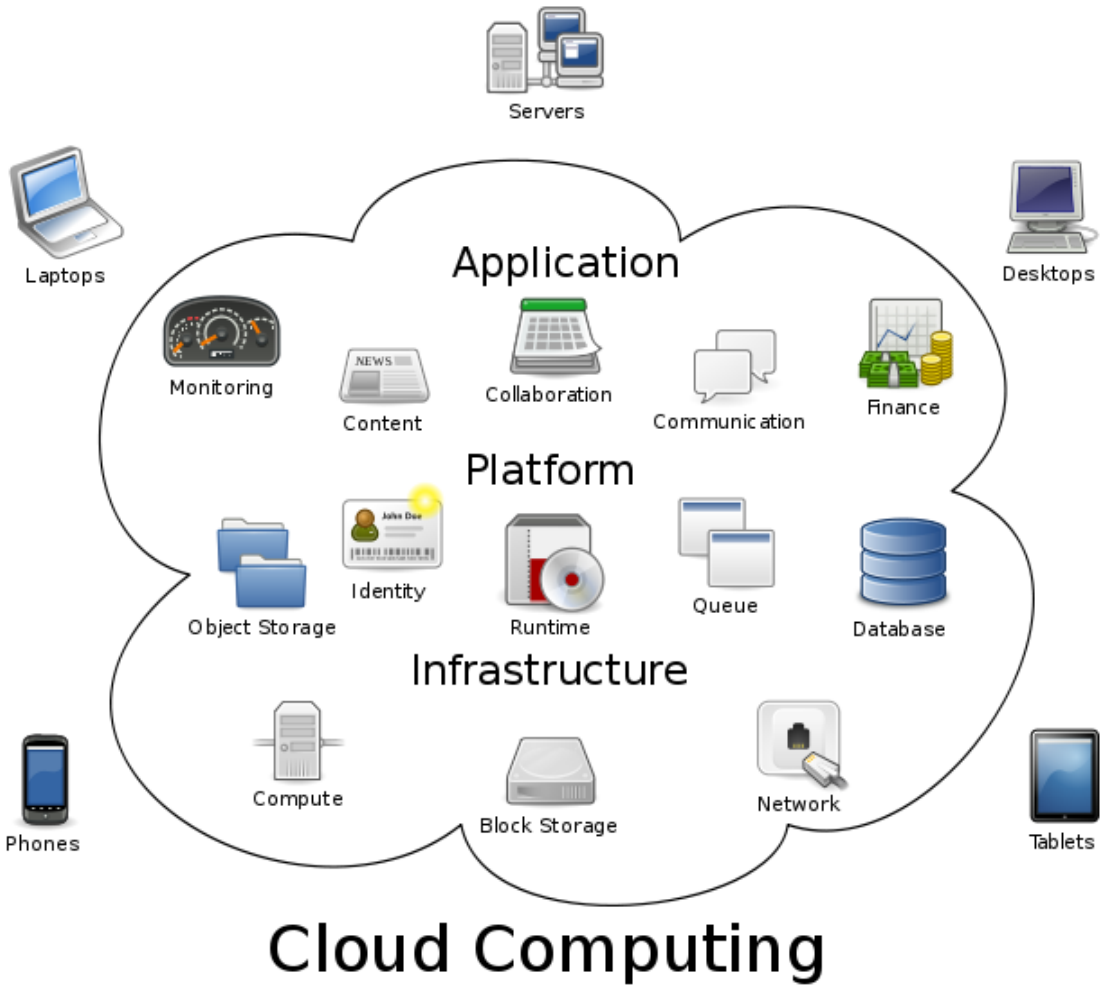
How Managed / Delivery Model

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

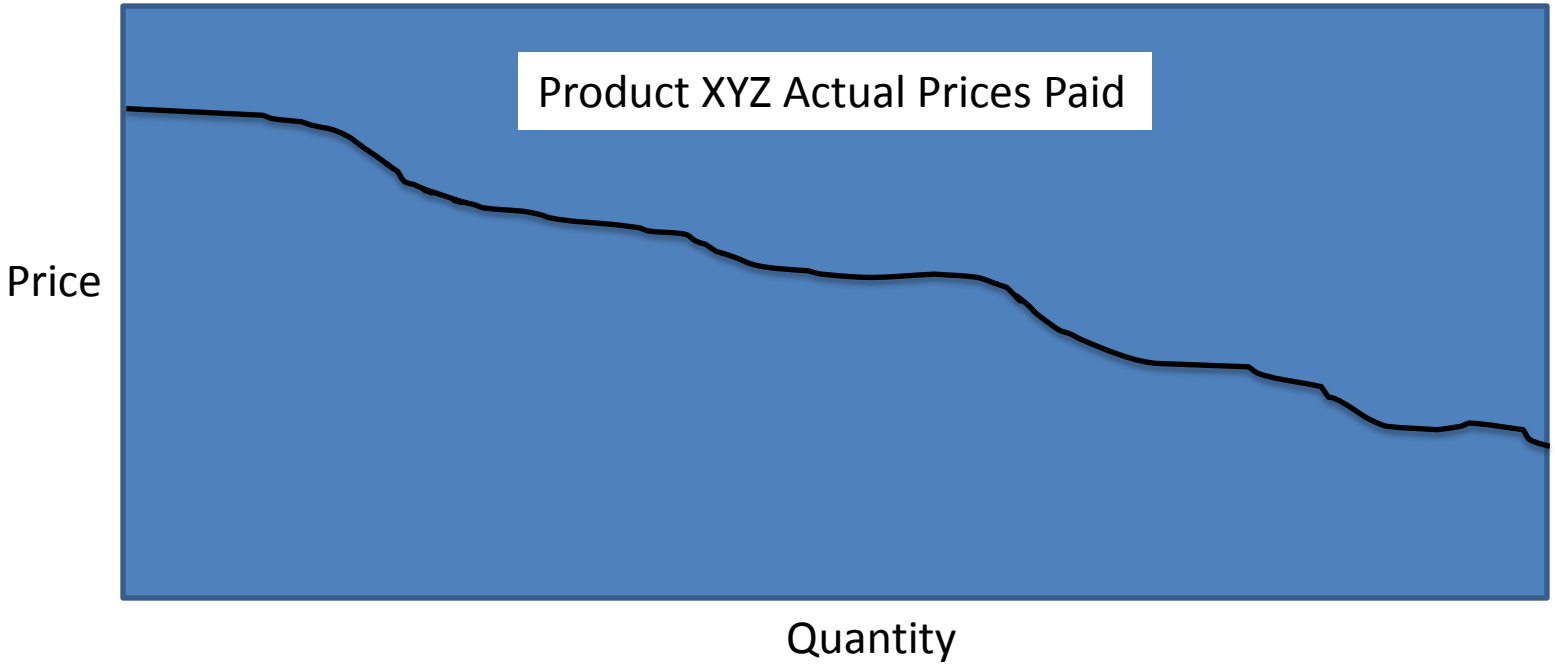
Terms & Conditions

- 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

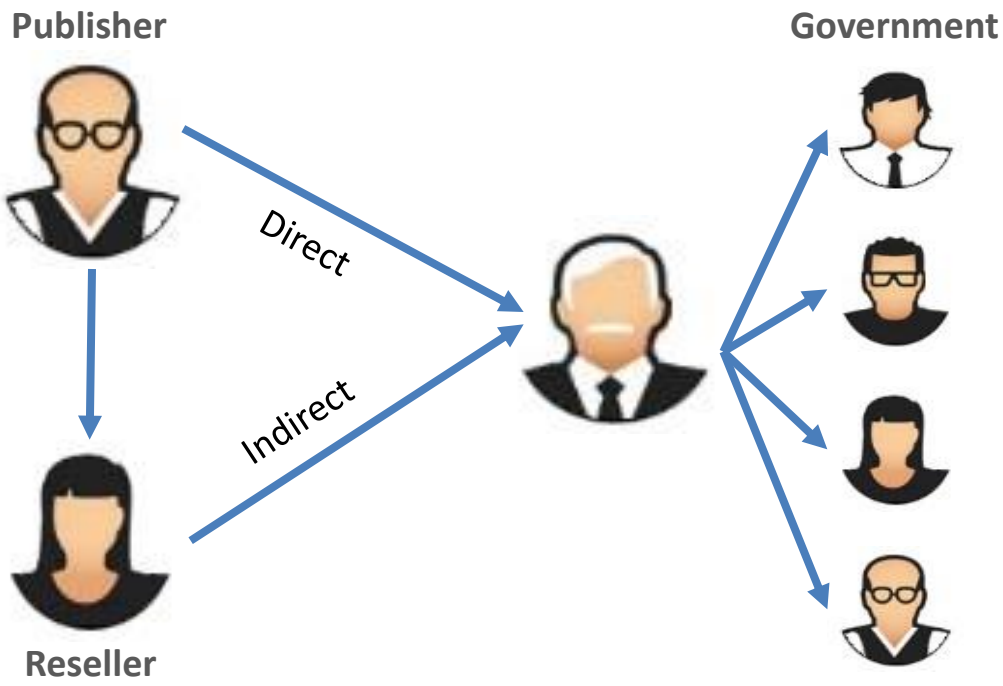
Seller's Preferred Documentation

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

EULA Key Clauses / Warranty

License Grant	Pricing	Warranty	Maintenance	General Provisions

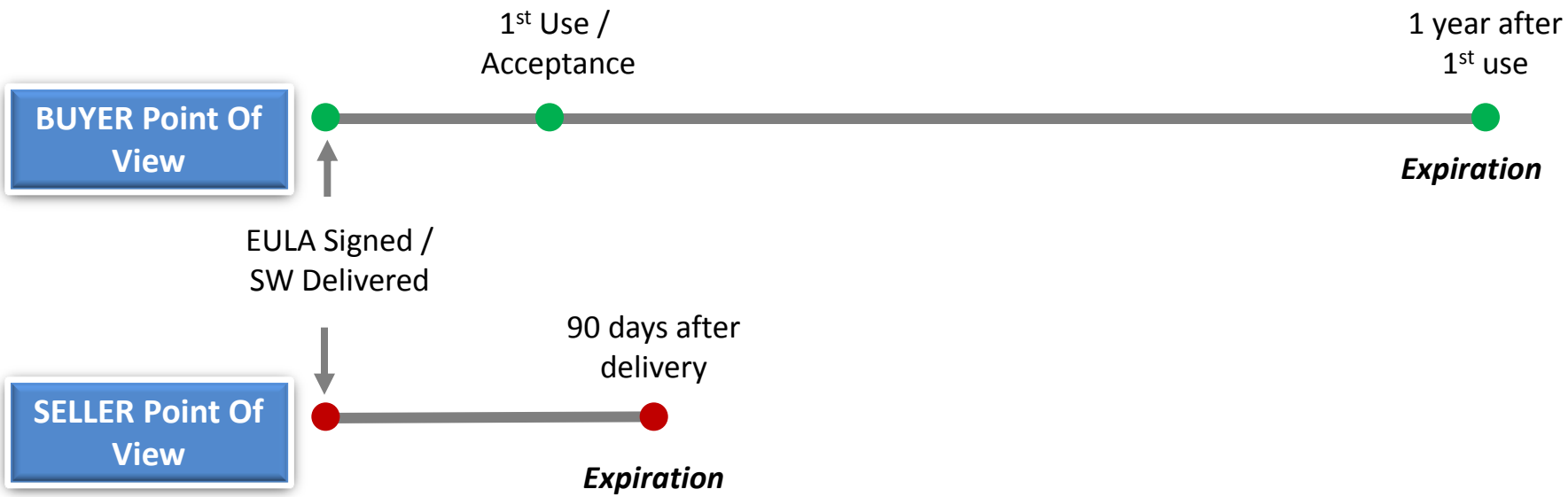
Who is Covered?



* EULA Key Clauses / Warranty

License Grant	Pricing	Warranty	Maintenance	General Provisions

Timing

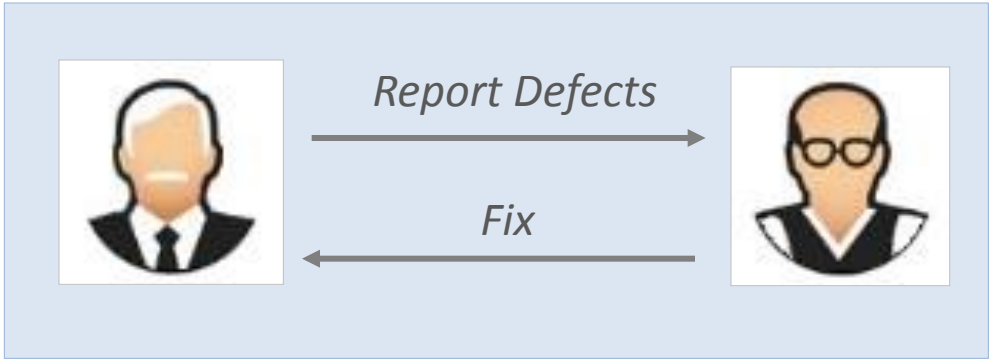


* EULA Key Clauses / Warranty

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

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

Publisher Tactics

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

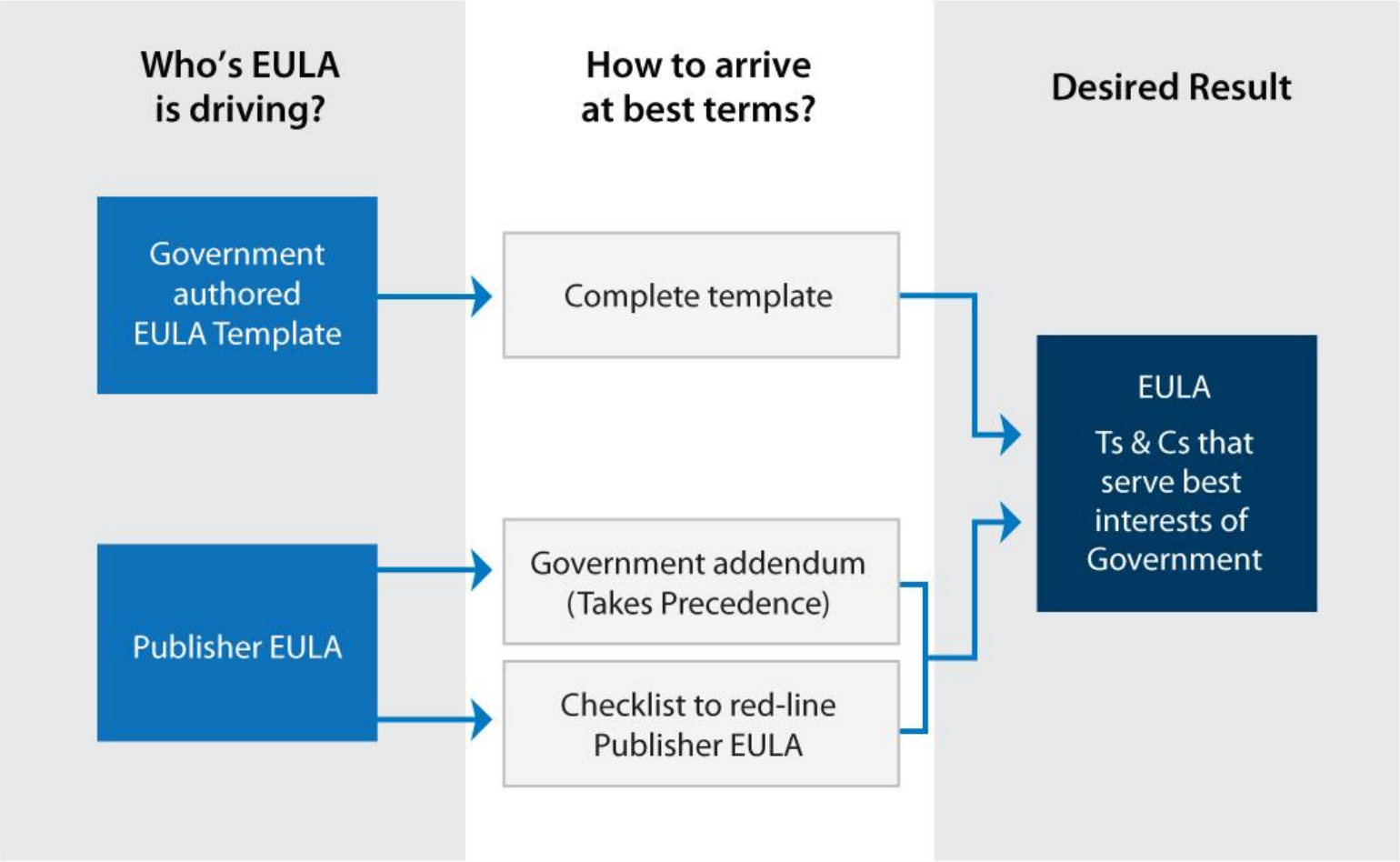
License Grant	Pricing	Warranty	Maintenance	General Provisions

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?

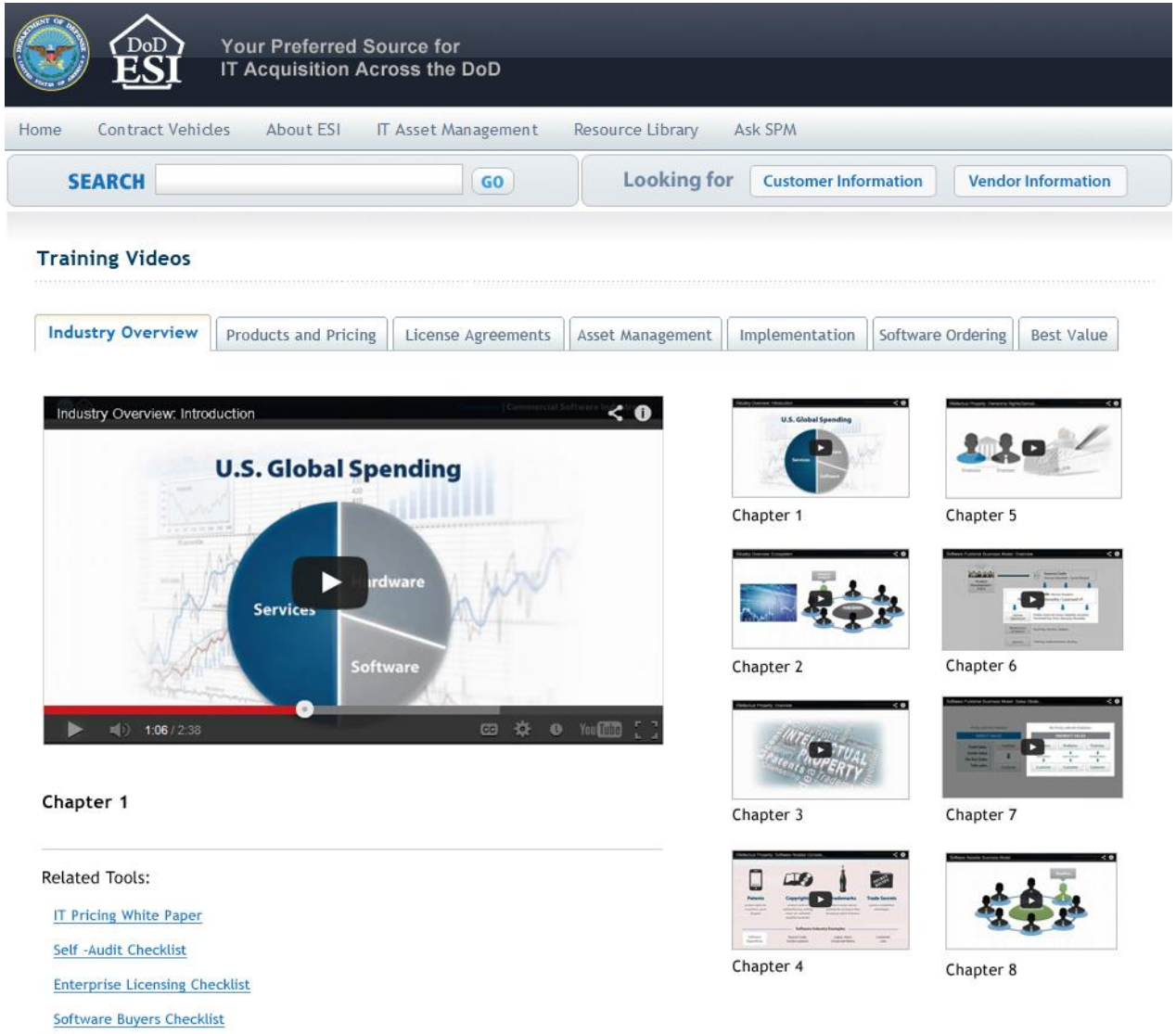
Training Information on DoD ESI Web Site

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/

DoD ESI Tools: eLearning Tutorials (In process)

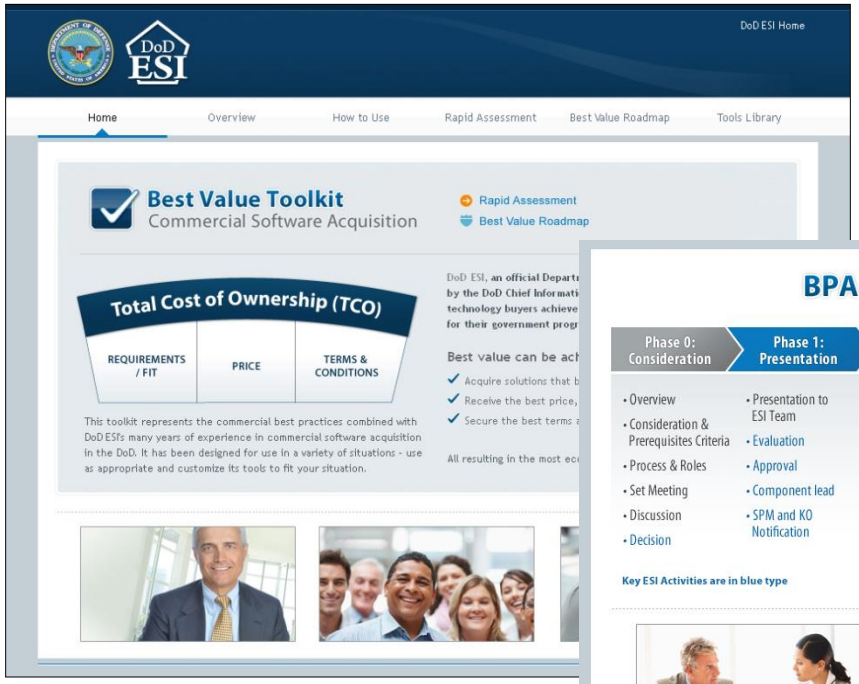


Up to 8 Modules per Chapter

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

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

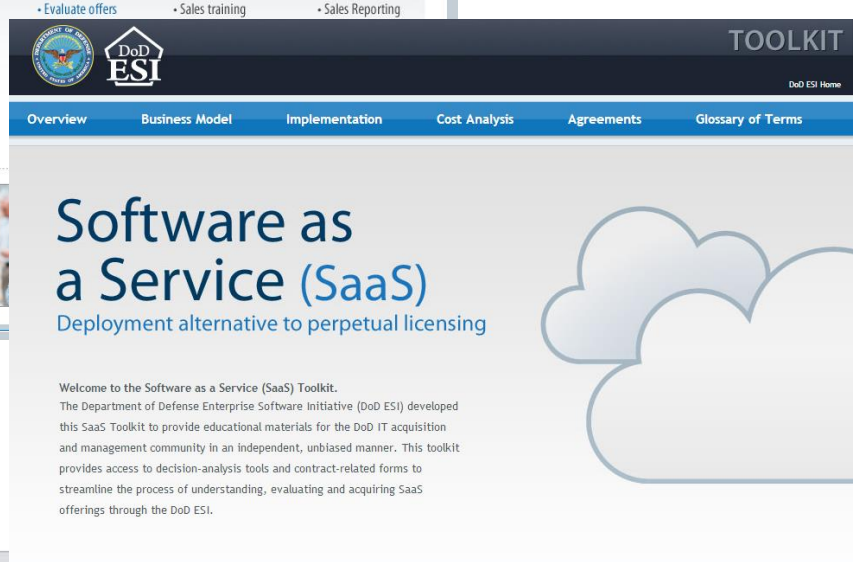
Best Value Toolkit



BPA Toolkit

Software Buyer's Checklist

SaaS Toolkit



DoD ESI Tools: White Papers

IT Virtualization Technology

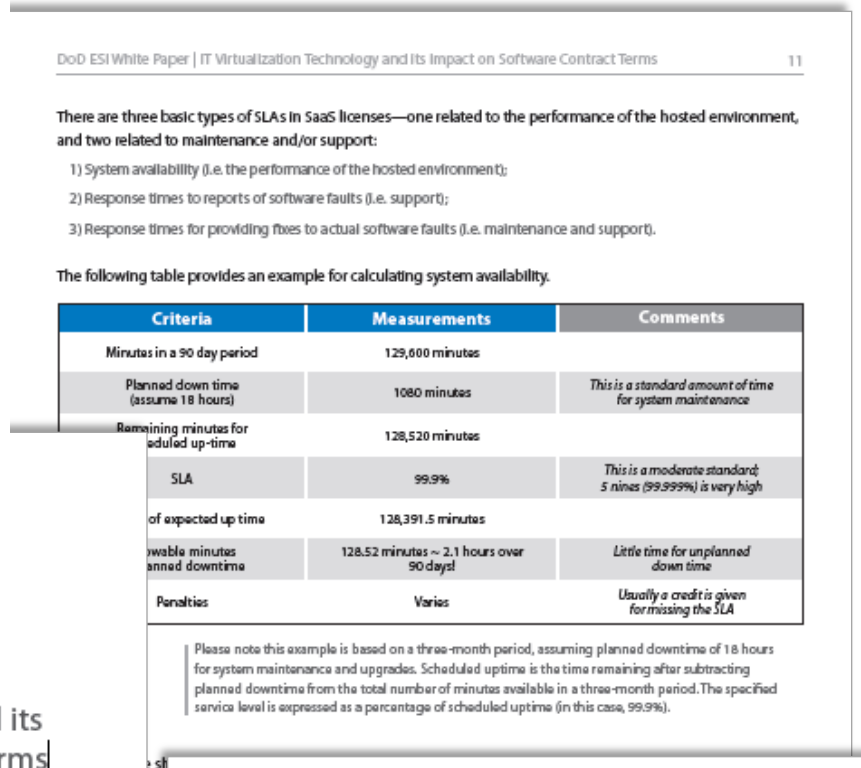
Cloud-Based Software Contracts

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:

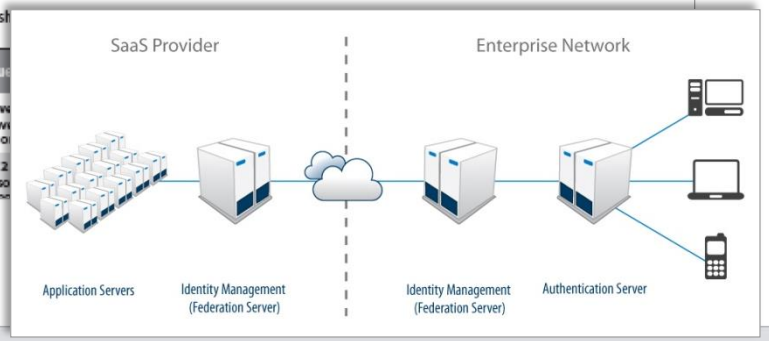
1) System availability (i.e. the performance of the hosted environment);
2) Response times to reports of software faults (i.e. support);
3) Response times for providing fixes to actual software faults (i.e. maintenance and support).

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.