



Commercial Software Licensing

CHAPTER 7:

End User License Agreements (EULAs)

Prepared by DoD ESI | January 2013

- EULA means End User License Agreement but can be referred to using other names, such as:
 - *Software License Agreement.*
 - *Product Use Rights Agreement.*
- The term “EULA” has multiple connotations for commercial software.
- ESI refers to EULAs as the comprehensive license agreement between the government and a Publisher or Reseller—which can extend beyond simply end user’s rights.
- For consistency, ESI has created a standard EULA as a sample best practice form to use with Publishers.
- In some cases, ESI will start with the Publisher’s EULA and modify it, as necessary, to meet government legal/contractual requirements.



- Publishers use click-wrap licenses to obtain consumer consent to license terms/conditions for shrink-wrap and on-line applications
- When those same Publishers sell to corporations or other legal entities—including the government—they negotiate written license agreements
- Typically, negotiated license agreement terms vary from those of click-wrap licenses. Since users can encounter a click-wrap license after a negotiated license is signed, that can create a legal conflict
- The ESI EULA includes specific language, ensuring its terms take precedence over any conflicting terms in a click-wrap license



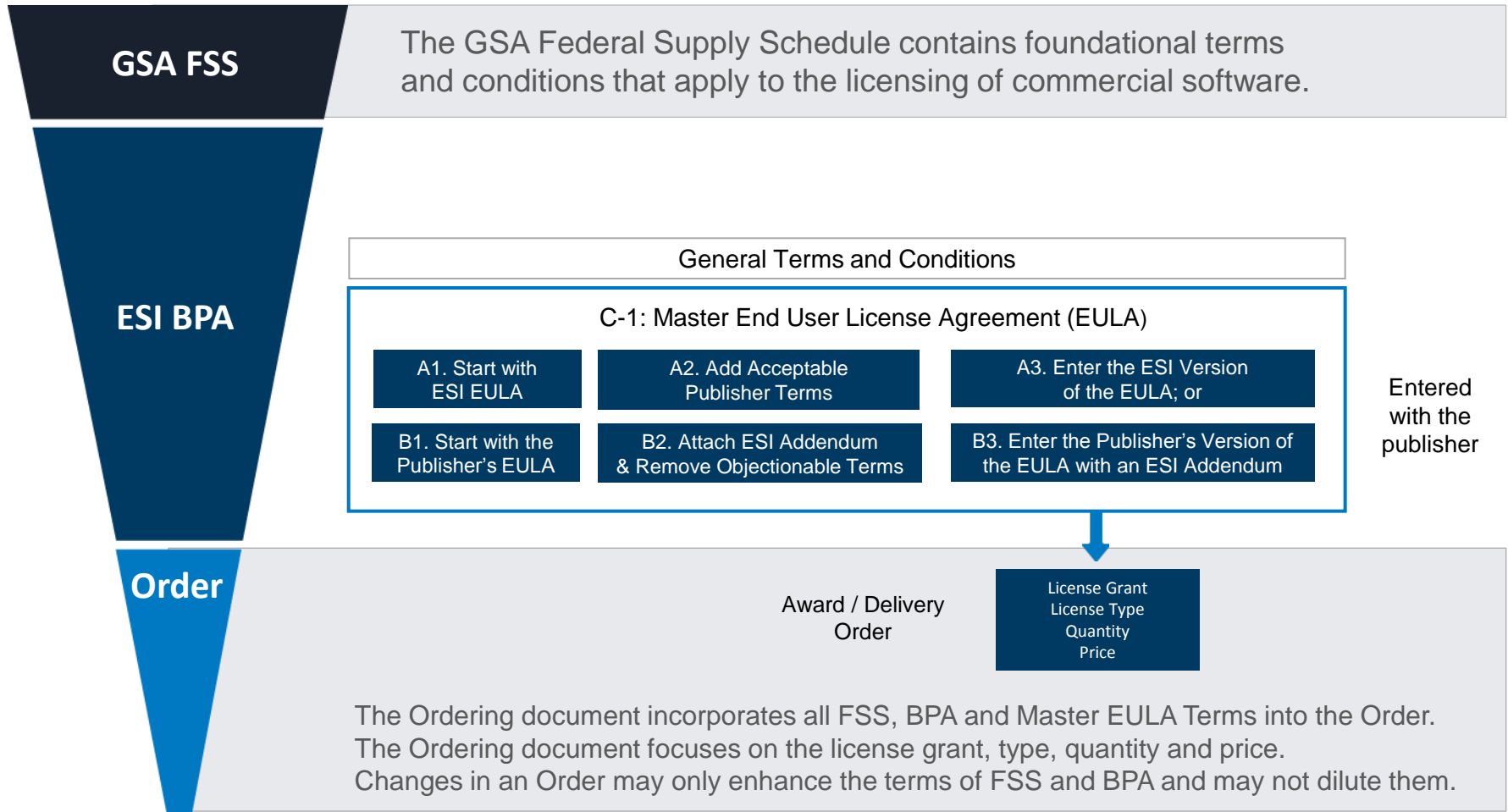
Primary Purpose

- Although EULA can mean different things in commercial use, ESI defines EULAs as the primary software license vehicle at the BPA and Order levels.

Key Points

- The ESI EULA includes all necessary software license terms and conditions; it is not restricted to end user rights.
- An ESI EULA can be achieved in one of two ways:
 - 1.) By starting with the Publisher EULA, enhancing it with ESI required clauses, and removing unacceptable ones, or
 - 2.) By having the Publisher accept the ESI standard EULA.
(See diagram on next slide.)
- At order time, the EULA is enhanced with the actual license grant, license type, quantity, and price.





When the Publisher EULA is Part of the Agreement (Part 1 of 3)

Key Publisher EULA Clauses to Remove or Scrub

- The overriding consideration is this - the government contract terms, BPA terms and EULA take precedence over the Publisher's EULA.
- As a precaution against potential conflict post contract, scrub or remove the following Publisher Ts and Cs.
- Termination clauses should not violate Federal Acquisition Regulation (FAR) clause 52.212-4.
- Controlling law and jurisdiction shall reflect that federal law will apply to the government contract and therefore federal courts will have jurisdiction on disputes.
- Severability clauses should not violate FAR 52.212-4(1).
- Remove references to taxes - they do not apply to the federal government.



When the Publisher EULA is Part of the Agreement (Part 2 of 3)

Key Publisher EULA Clauses to Remove or Scrub

- Remove statements pertaining to automatic yearly renewals.
- Remove statements pertaining to advance payment for services.
- Remove statements pertaining to fees owed to the vendor as this would create a potential violation to the Anti-Deficiency Act.
- Audit clauses may not contain language that state the government will pay for the audit.
- Audit clauses will be self audit clauses and not allow access to a government network without prior consent and cleared individuals.
- Audit reports will not occur more than once per year.



When the Publisher EULA is Part of the Agreement (Part 3 of 3)

Key Publisher EULA Clauses to Remove or Scrub

- Assignment Clause (See FAR 42.12) cannot be counter to the anti-assignment provisions in the FAR. As FAR 41.1204 notes, 41 U.S.C. 15 prohibits transfer of Government contracts from the contractor to a third party. We may recognize a “successor in interest,;” but a mere transfer of the contract is not authorized and we cannot allow for this unless under the terms of 42.12.
- Any restriction that the software license may only be used on a specific name-brand hardware make/model needs to be identified to the customer.
- Any vague terms such as “internal use” need to be clearly defined.



Click-Wrap License Defined

- Publishers of shrink-wrap software or on-line applications generally use click-wrap licenses to obtain end user consent. (*Mostly focused on consumers.*)
- When the customer is a corporation or other legal entity, there is often a negotiated written license agreement, in addition to the click-wrap license.
- In some cases, “click-wrap license” and “EULA” have been used synonymously.
- ESI refers to all software licenses as EULAs and refers to click-wrap licenses as one specific kind of EULA.

Avoiding Conflict

- Publishers who use both EULAs and click-wrap licenses seldom change the terms of the click-wrap licenses.
- Negotiated written licenses may inadvertently or purposely end up with terms contradicting the click-wrap language.
- The government needs to ensure BPAs and Order documents include language voiding the terms and conditions of click-wrap licenses.



IMPORTANT - READ CAREFULLY: This ANCHORTM Click-Wrap License Agreement (hereinafter “Agreement”) is a legal contract between you (either an individual or a single business entity, hereinafter referred to as “Licensee”) and Compass IRB, LLC, an Arizona limited liability company (hereinafter “Compass”), for the THE ANCHORTM IRB software (the “Software”) in object code only. The term “Software” also includes any supplied corrections, bug fixes, enhancements, updates or other modifications created and supplied by Compass and any user manuals or other documentation supplied by Compass in conjunction with the Software.

BY CLICKING THE “ACCEPT” BUTTON BELOW, OR BY DOWNLOADING, INSTALLING OR OTHERWISE USING THE SOFTWARE, YOU AGREE TO BE BOUND BY THE TERMS OF THIS AGREEMENT. IF YOU DO NOT AGREE TO THE TERMS OF THIS AGREEMENT, DO NOT DOWNLOAD, INSTALL, OR USE THE SOFTWARE

https://www.compassanchor.com/CIRB_Docs/AnchorLicenseAgreement.pdf



Define and discuss the term “End User License Agreement” (EULA).

Discuss the ESI approach to EULAs.

Describe the process ESI uses to create a EULA.

Discuss the reasons ESI might start with a Publisher EULA instead of insisting on using the ESI standard EULA.

Identify and discuss some of the key terms the government requires in its EULAs.

Describe the content and uses of a click-wrap license.

Describe how a click-wrap license differs from a EULA.

Discuss how ESI avoids potential conflicts between a EULA and a click-wrap license.

