

Quick Look: Software Licensing

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Agenda


Software License: Who, What, Why & How

It Takes a Village

Conducting Your Due Diligence

What's in the Fine Print?





Before we
dive in...

- The NASPO Software VAR Contract **does not** include negotiated licenses
- A quote from any reseller on the contract **does not** include the software license agreement
- Buried somewhere in the license....

*The acceptance of any purchase order placed by Customer is expressly made conditional on Customer's adherence to the terms and conditions set forth in this license, **and not** those contained in Customer's purchase order or any other business form.*



WARNING!

If you don't ask for the license up front and negotiate it, the moment the software is used the State will have accepted and will be legally bound to unseen terms and conditions.



Software Licenses

- In general...
 - Every license document is unique
 - Terms are written to protect the Licensor
- Without question...
 - If the license doesn't explicitly say you can, you can't



Who owns the software?

- Hint... it's not you
- Most software licenses are proprietary
- Title and ownership rights stay with the Licensor
- No one can use, duplicate or distribute software without permission granted by license
- Purchasing a license does not convey ownership
- Protected by U.S. patent, copyright, trade secret or similar protections



What is a Software License?

It's a contract between the Licensor (publisher, owner) of the software and the customer

Describes legal rights pertaining to authorized use of digital material

Details exclusive and reserved copyright owner rights

AKA... End User License Agreement (EULA), Software License Agreement, Subscription Agreement



Why is the License Important?

- Negotiating a license allows you to:
 - Mitigate risk
 - Ensure compliance with law
 - Reduce costs
 - Turn Licensor promises into obligations
 - Meet business needs



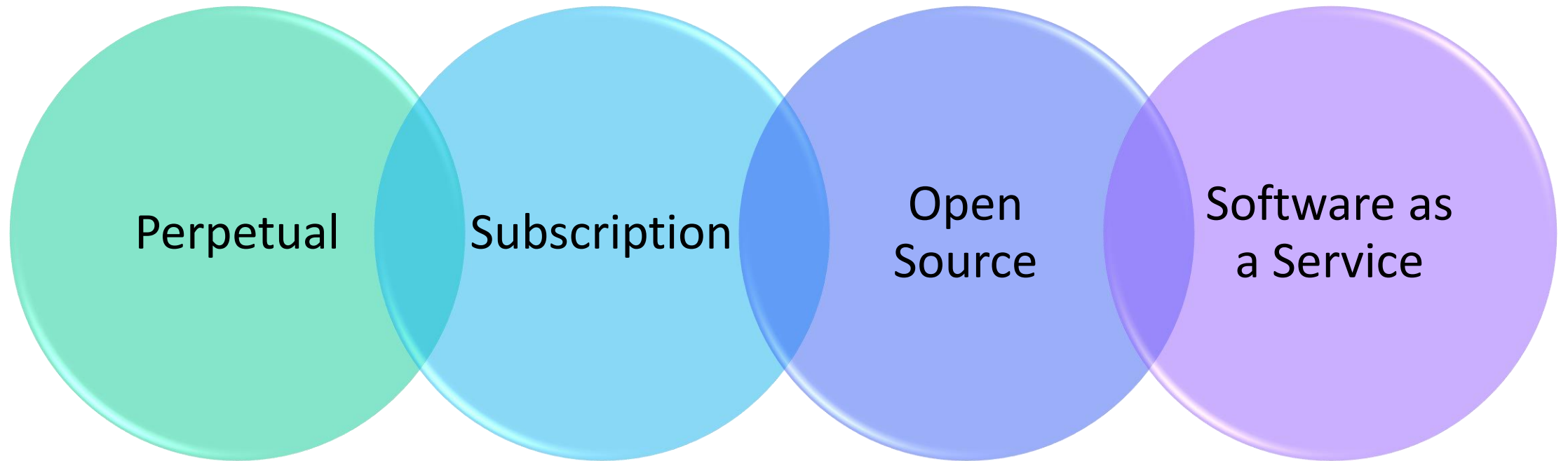
Why is the License Important?

- Binds the parties to meet certain obligations
- Contains similar standard contract terms such as:
 - Pricing and payment terms
 - Governing law
 - Performance requirements
 - Grant/Use rights
 - Ownership and risk of loss



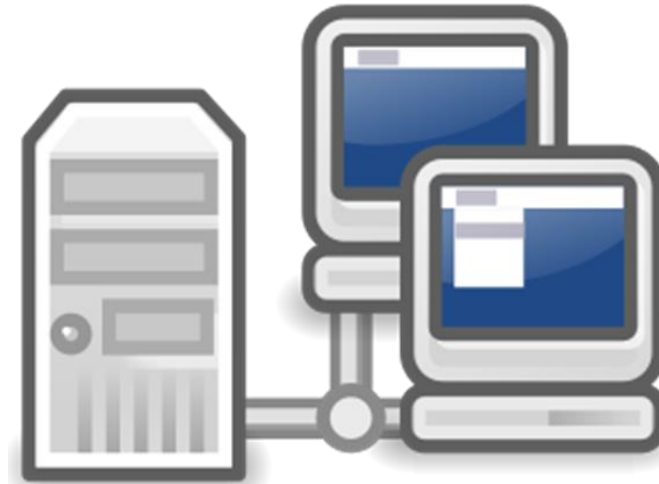
How is Software Licensed?

Software is typically licensed under the following models:



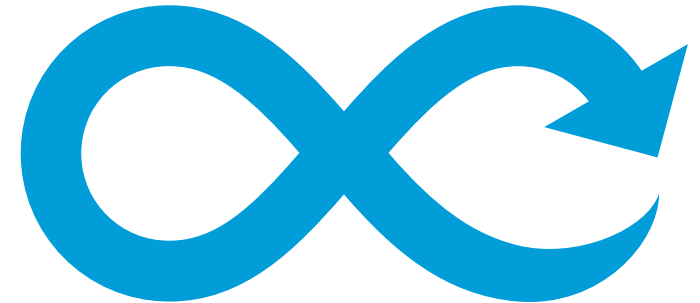
How is Software Licensed?

- Within licensing models are subcategories, such as:
 - Workstation
 - Concurrent use
 - Site/Enterprise
 - Volume
 - Server (network)
 - Seat
 - Processor



Perpetual License

- Use of current version of licensed software in perpetuity in accordance with the license
- Ability to obtain future versions should not (but may) be tied to purchase of maintenance and support
 - **Advantage:** *Often can be purchased at a significant discount, due to the large one-time investment*
 - **Downside:** *Requires larger upfront payment*



Subscription License

- Access to current version of licensed software for specific length of time
- Generally includes software support and maintenance
- Hosting models can vary (e.g., your site, vendor site)
 - **Advantage:** Lower upfront cost, usage is scalable
 - **Downside:** Increased license management costs, on-going Licensor dependency



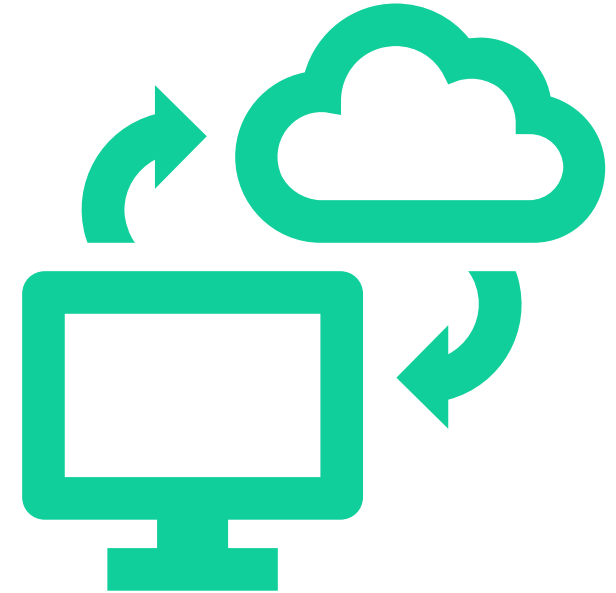
Open Source License

- Software with source code that anyone can inspect, modify, or enhance
- Decentralized software development model that encourages open collaboration
 - *Advantage: Can be modified and shared because its design is publicly accessible*
 - *Downside: Not necessarily cost-free, requires tracking, management, and sharing of any code changes*



Software as a Service (SaaS)

- Software that is owned, delivered and managed remotely by a provider, i.e., cloud computing
- Allows data to be accessed from any device with an internet connection and web browser
- Pay-for-use/subscription cost model
 - *Advantage: Low upfront costs, provider is responsible for software and hosting infrastructure and maintenance*
 - *Downside: Loss of operational control due to internet accessibility and connectivity*



Questions?



It Takes a Village



Procurement

Business Lead

Legal

End Users



Software
Publisher

Subcontractor



Resellers

Third Party
Maintainers



Internal Due Diligence

- Ask questions and more questions:
 - What is the software supposed to do?
 - Who will use the software?
 - Where will the software be used?
 - What hardware will be involved?
- Answers will drive how you approach the license review and how to prioritize required terms



Internal Due Diligence



If you weren't there, find out what the vendor promised in meetings and presentations



Glossy brochures, websites and demonstrations are designed to induce a purchase



Marketing material often differs from the documentation Licensor is willing to commit to (which is usually the technical manual)



IF IT'S NOT IN THE CONTRACT, IT'S NOT IN THE DEAL!!





External Due Diligence

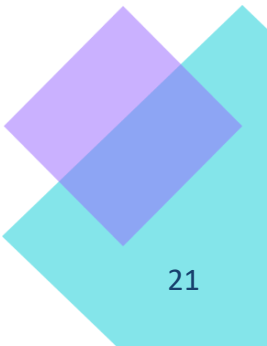
- Conduct research on the seller **and** the publisher
 - Are they small or a niche player that is likely to be purchased by a larger company?
 - Are they a young company that may be looking to strike a good deal just for the opportunity?
 - Are they a company that is new to government business and may need more explanation as to how agencies purchase and license?





External Due Diligence

- Where do I start?
 - Google
 - Trade publications/websites
 - User groups
 - Colleagues in similar organizations
 - Other vendors



Questions?



What's in the Fine Print?

Recital	Definitions	License Grant	License Term
Warranties & Representation	Viruses, Disabling Devices & Illicit Code	Intellectual Property (IP) Rights	Remedies
Support & Maintenance	Limitation of Liability	Indemnification	Audit
Assignment	Confidentiality	License Fees	Termination



Definitions

- Outline the meaning of capitalized terms used in the license
- Purpose is to achieve clarity without needless repetition, no need to define ordinary words that are used in their usual dictionary meaning
- Recommended source:
 - International Business Software Management Association (IBSMA)
<http://www.ecpmedia.com/glossary.html>





Super Important Definition

- Define what is being licensed (e.g., “Software,” “Product,” “Licensed Product”)
- Definition should be broad enough to cover current and future use
- For example:
 - *Licensed Software shall mean the Executable Code version of the computer programs including all updates, releases, bug fixes, and enhancements to the Licensed Software.*



Key to Licensing Terms

 = Explanation of the term

 = *What the Licensor wants*

 = Preferred language

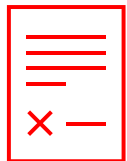


License Grant



The license grant details what you can and can't do with the software. Information may include:

- Version of software
- Types of users (everyone, named users)
- Purposes of use (internal business)
- Manner of use (number of installs, type of hardware)
- Location of use



You can't use our stuff, think of using it or even stare at it with the intention of doing something we didn't give you permission to do.



License Grant

Together Forever Software, LLC (Licensor) grants to Customer a perpetual, nonexclusive, worldwide license **to install, have access to, benefit from, copy, test, and display** the Software **on any hardware** at **any Customer site** and to make **back-up** and **archival copies** of the software **as needed**. There shall be **no limit** to the number of machines, number of users, number of locations or size of the hardware on which Customer can operate the Software. Customer may provide **access to** the Software by its **authorized consultants**. **Unless directed by Licensor**, Customer will not modify or create derivative works based on the Software; or disassemble, reverse engineer, or decompile the Software.



Representations and Warranties



A representation is an assertion as to a fact, true on the date the representation is made, that is given to convince you to enter into a contract or take some other action. A warranty is a promise of indemnity if the assertion is false.



- *License typically says that product is being provided “as is”*
- *There is more language devoted to exclusions and disclaimers*
- *And, they yell at you in ALL CAPS basically saying if the product doesn't work, too bad for you*



Representations and Warranties

WE CAN'T GUARANTEE THAT OUR SOFTWARE WON'T BREAK YOUR COMPUTER. WE TRY OUR BEST, BUT THAT'S ALL YOU GET JUST LIKE WHEN YOU BUY SOMETHING AT A RANDOM GARAGE SALE...YOU'RE BUYING IT "AS IS." SO EVEN IF SOMETHING TERRIBLE AND CATASTROPHIC HAPPENS BECAUSE YOU USED OUR STUFF, YOU CAN'T SUE US. SO, WE'RE DISCLAIMING ALL WARRANTIES AND LIABILITY FOR ANYTHING AND EVERYTHING, WHETHER OR NOT WE KNEW OR SHOULD HAVE BEEN PSYCHIC AND KNOWN. WHEN YOU USE THE SOFTWARE, YOU PLAY BY OUR RULES AND IF WE END UP BEING RESPONSIBLE FOR SOMETHING, WE'RE NOT GOING TO PAY YOU A PENNY MORE THAN WHAT YOU MAY HAVE PAID US IN THE PAST MONTH, OR \$50 WHATEVER IS SMALLER.

(Source: Snapterms.com)





Remedies

Remedies are the contractually required response to an unmet warranty or representation



- Warranties without Remedies won't get your problem fixed
- Unless documented, your only remedy may be the Licensor saying, "Oops, my bad."



Remedies

*If Software does not conform to the warranties made by Licensor in this Agreement, or is otherwise defective, **Licensor shall correct the errors or non-conformities within ten (10) days** of notice from Customer. If Licensor does not remedy any and all Software defects within such period, **Customer may elect to terminate** this Agreement without penalty and shall be entitled to return of the **all License Fees paid**.*



Viruses, Disabling Devices & Illicit Code



Viruses, etc., are malicious software coding that when executed can corrupt or destroy data and systems

- Disabling code allows vendor to remotely shut down access



Licensors pick this moment to keep quiet and say nothing, zip, zilch, nada

If you're lucky they will say they'll try to prevent a virus but can't promise





Viruses, Disabling Devices & Illicit Code

Licensor represents and warrants that the Software and all patches, updates and upgrades shall not contain any viruses, disabling devices or illicit code. Licensor shall use all commercially reasonable measures to screen the Software to avoid introducing any virus or other destructive programming that will permit unauthorized access or use by third parties to the software installed on Customer systems.



Limitation of Liability

- Limitation of Liability is the term that limits the amount and types of damages one party can recover from the other party
 - At a minimum it should be mutual
 - Damages ideally should cover your hard and soft dollar costs and exclude:
 - Claims for bodily injury
 - Damages recovered by licensor's insurance policies
 - Breaches of confidentiality
 - Breaches of representation of warranties
 - Indemnification provision



Limitation of Liability

IN NO EVENT SHALL LICENSOR BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY OR PUNITIVE DAMAGES, OR DATA LOSS, LOSS OF USE OR EVEN IF THE SOFTWARE FAILS ITS ESSENTIAL PURPOSE. LICENSOR'S LIABILITY SHALL NOT EXCEED \$20 OR THE AMOUNT YOU PAID US IN THE LAST 12 MONTHS, WHICHEVER IS LESS AND ONLY IF THE INCIDENT OCCURS ON THE FOURTH MONDAY IN FEBRUARY.



Limitation of Liability

IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY OR PUNITIVE DAMAGES. NOTHING IN THIS PARAGRAPH IS INTENDED TO LIMIT OR RESTRICT THE INDEMNIFICATION RIGHTS OR OBLIGATIONS OF ANY PARTY, OR DAMAGES AVAILABLE FOR BREACHES OF THE OBLIGATIONS SET FORTH IN THIS AGREEMENT. THE LIABILITY OF THE PARTY RESPONSIBLE FOR A BREACH SHALL EXCEED THE GREATER OF (1) THREE TIMES THE FEES PAID, PAYABLE, OR TO BE PAID BY LICENSEE UNDER THIS AGREEMENT, OR (2) \$1,000,000.





Indemnification



Indemnification is the promise by one party to cover the other's losses if they do something to harm the other

- Should be in addition to other remedies in the license
- Generally, government entities don't indemnify



Licensor will attempt to make it very one-sided and put all the responsibility on you to make everything right for them



Indemnification



You agree to indemnify and hold us harmless for any and all claims by you or anybody you know. You agree that this indemnity extends to requiring you to pay for our attorneys' fees, court costs, travel expenses, a new Xbox, and a pony.



Indemnification



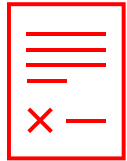
Licensor agrees to indemnify and hold Us harmless from and against anybody trying to sue Us because of something dumb they did. We'll provide Licensor the assistance and information needed to defend the suit BUT Licensor will pay Us back for reasonable expenses that we incurred in providing that assistance.



IP Indemnification



The purpose of Intellectual Property (IP) indemnification is to protect the Customer from liability if the Licensor is sued for IP infringement based on our use of their product.



Cue crickets...Licensors want to avoid this clause so it's either not mentioned at all or if it is, it is so general as to be useless



IP Indemnification

Licensor will defend, at its expense, a legal action, suit or proceeding against Customer to the extent that the Software infringes a valid U.S. patent or copyright provided (1) Customer notifies us promptly in writing of the Claim, (2) Licensor has sole control over the defense or settlement, and (3) Customer fully cooperates with us. In the meantime Licensor will replace or modify the infringing Software or replace it with something as good or better at no cost to us and if doesn't happen in 45 days we can end our relationship with no penalty and Licensor will refund all the money we ever paid them.





Audit Provision



The audit provision allows the Licensor to verify you're using their software (intellectual property) as permitted under the license



We can look into how you use our stuff whenever we want and if we don't like what we see, you have to pay a fine and immediately pay for the extra stuff at whatever price we're charging for it now or you have to stop using all of it right this minute.



Audit Provision

You say, “Fine and dandy, we got nothing to hide BUT...

- You need to call us 90-days ahead to make sure we’re not busy.
- You can’t visit more than once a year.
- You don’t get free run of the joint, we’ll let you look at report that shows how much of your stuff we have and where it is.
- If we screwed up and have more than we paid for, we’ll pay the difference based on the cost we paid in the first place.
- Oh, and you just can’t send anyone you want in your place. We’re cool with one of those fancy accounting firms, but we get to make the final decision on who gets access to our stuff.



Maintenance & Support

Maintenance and support refers to any software upgrades, annual updates, patches and fixes needed to improve functionality and keep the software in working order.



- Make sure all maintenance and support obligations are spelled out in detail in the agreement
 - Should apply to all patches, updates and upgrades
- Cost is usually based on a fixed percentage of license fee (e.g., 25%)
- Avoid URL link to another document
 - If unavoidable, include and date the document for inclusion as an exhibit to the license



Maintenance & Support

- Support may be cancelled or not provided if...
 - The software was used in a way it was not intended
 - Customer modifies it or uses with third party product not approved by licensor
 - Payment is late
- Warning...if you elect not to renew support there may be charged reinstatement fees and back support fees if support is needed in the future



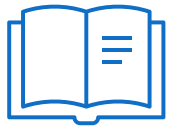


Maintenance & Support

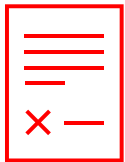
Maintenance shall be 18% of the net price of the Software, i.e., the actual License fee paid by Customer. At the end of each Support Period, prices are subject to increase at the time of the renewal based upon the Maintenance fee paid by the Customer in the previous year. Such increase shall not exceed three percent (3%).



Assignment



Determines whether rights, obligations and duties under Agreement may be transferred in whole in or part to another party.



Licensor says, “We can transfer our rights and obligations in this Agreement whenever and to whomever we want, and we might tell you about it ahead of time.”



You say, “Oh, yeah? So can we, and guess what, all these terms and conditions stay in place until we both agree they don’t.”

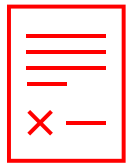


Order Forms



Order forms are the seemingly harmless-looking document listing of what is being purchased

- Number of licenses
- Support and maintenance
- Additional services (e.g., installation and training)



The acceptance of any purchase order placed by Customer is expressly made conditional on Customer's adherence to the terms and conditions set forth in this license, and not those contained in Customer's purchase order or any other business form.



Order Forms

The parties to this Contract understand and agree that standard forms or templates may be used for various purposes, including but not limited to, purchase orders, invoices, quotes, ‘Website Terms and/or Conditions’ or ‘click to accept’ agreement(s), some of which may contain boilerplate or standard terms and conditions (“Other Documents”). However, any use of Other Documents are not a part of this Contract and are deemed to be for administrative convenience only and the terms therein are of no effect, have no force of law and do not modify the terms of this Contract.





License Fee Changes

- Generally found on Order Form or quote from Reseller
 - Specify the allowable percentage increases to support and maintenance and, if applicable, license fee
 - Watch for penalties and back payment for reinstatement of software support and maintenance
- Subject increases to prior notice, negotiation and approval
- Payment terms should mirror your standard payment term (e.g., for State, 30 days from receipt of a properly submitted invoice)
- Payment trigger should be Acceptance



Termination

- Agreement may be terminated for:
 - Cause, or convenience
 - Typically written to allow the Licensor to terminate with little to no notice to the customer
- Must be mutual rights, written and advance notice, right to cure problems
- If truly a perpetual license, termination doesn't affect perpetual grant
- Generally no refunds shall be offered for fees already paid



More Important Stuff

- Survivability
 - Terms that remain in effect even after the contract ends
- Non-Appropriation
 - What happens when the elected officials cut your budget
- Governing Law
 - Determines the location of the court room if one of you sues the other



More Important Stuff

- Severability
 - Says even if one term is found to be unlawful all the other terms stay in place
- Force Majeure
 - Licensor says if the weather gets bad they don't have to live up to the agreement
 - Make it mutual and be sure that if they're not performing, you aren't paying





Resources

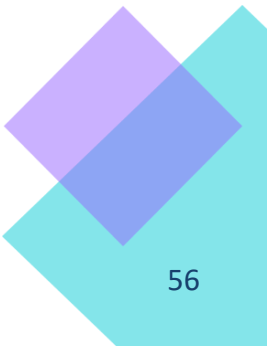
- [Software Licensing: Move from Defense to Offense](#)
- [Software License Agreements: A Practical Guide](#)
- [Cloudy with a Chance of Success: Contracting for the Cloud in Government](#)
- [Public Cloud Service Agreements: What to Expect and What to Negotiate \(Cloud Standards Customer Council\)](#)
- [Nine Golden Rules for Software Contract Negotiations – The Complexities and Pitfalls](#)
- [Best Practice Guide for Cloud and As-a-Service Procurements](#)





Parting Thoughts

- There's no such thing as too many questions
- If the license doesn't say you can, you can't
- Make friends with your technical staff
- If it's not in the contract, it's not in the deal
- Software is one of just two types of businesses that call their customers users



***Contact us
if you need to!***

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