

# Software License and Maintenance Agreement Checklist

## Software License Agreement Assessment

Scope of License	Criteria To Be Applied
<b>Scope of License / Licensee Entities Covered</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Ensure that all entities contemplating usage or needing access to the software are covered as “Licensees” on license. Therefore, Global on run-time, etc. may be choices to consider.</li> <li><input type="checkbox"/> As appropriate, license should be multi-year or perpetual (place in "Term" section).</li> <li><input type="checkbox"/> If application is to be accessed over the Internet or via other externally hosted environment, special care must be taken for issues of content ownership, security, and system back-up / business interruption.</li> </ul>
<b>Appropriate Geography Covered</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> The geographic area in which the software will be used must be authorized in the license.</li> <li><input type="checkbox"/> Other optional descriptions include “Domestic” or “International”, as applicable.</li> </ul>
<b>Appropriate Languages Covered</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> The applicable language(s) (e.g. English, French, Spanish) should be identified.</li> </ul>
<b>Appropriate Modules / Functionality Covered</b>	<ul style="list-style-type: none"> <li><input type="checkbox"/> The functionality that you are licensing must be listed and described in detail, most often as comprehensive attachments to the license.</li> <li><input type="checkbox"/> Options for attachments that describe functionality include: RFP responses; product literature or brochures; minutes from appropriate meetings; hardware/non-functional specs. This will prevent functional and warranty lack of clarity and confusion.</li> </ul>

<p><b>Appropriate Materials / Devices / Media Covered</b></p>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Materials (enumerate).</li> <li><input type="checkbox"/> Devices (enumerate).</li> <li><input type="checkbox"/> Media (enumerate).</li> </ul>
<p><b>License Covers Custom Deliverables Generated From Licensor Services</b></p>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Design and functionality of custom deliverables must be defined in detail.</li> <li><input type="checkbox"/> Whenever possible they should be included in software upgrades, system maintenance, and pricing considerations (when re-use/resale of custom work/enhancements is possible).</li> <li><input type="checkbox"/> Further, they must be included on any software escrow.</li> <li><input type="checkbox"/> Finally, intellectual property ownership of custom work/enhancements must be clearly defined.</li> </ul>
<p><b>Sufficient Quantity of SW Copies Provided</b></p>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Quantity of software copies should include a minimum of 2 copies per “entity” operating the software.</li> <li><input type="checkbox"/> One copy for non-production, back-up purposes; one copy as a “conference room pilot” to test functionality (especially, newly added functionality/ enhancements/ customizations).</li> <li><input type="checkbox"/> These are minimum recommendations; additional copies may be appropriate.</li> </ul>
<p><b>Server-Based License / Sufficient Server Loads Allowed</b></p>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Main server (production use).</li> <li><input type="checkbox"/> Servers at other organization locations (production use).</li> <li><input type="checkbox"/> Back-up and disaster recovery (nonproduction use).</li> <li><input type="checkbox"/> Test and development (nonproduction use).</li> <li><input type="checkbox"/> Other (define) (nonproduction use).</li> </ul>
<p><b>Acceptable Method</b></p>	

<p><b>and Definition of Delivery</b></p>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Delivery must be clearly defined, as it is typically the milestone that “starts-the-clock” for items such as payment, warranty, etc.</li> <li><input type="checkbox"/> Delivery must include a successful installation and operational test of the software on the client’s environment. Such environment should be that recommended and warranted by vendor.</li> <li><input type="checkbox"/> It is vital that Delivery include as much of the functionality as possible.</li> <li><input type="checkbox"/> If the need for multiple deliveries exists, that should be reflected in attendant payments and warranty schedules.</li> <li><input type="checkbox"/> Ensure that internal team recognizes significance of delivery and is properly prepared.</li> </ul>
<p><b>License Extends to Appropriate Data (e.g. Non-Licensee)</b></p>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Ensure there are not restrictive (or contravening) covenants regarding what data can reside on / pass through the system (e.g. non-licensed 3d party vendors).</li> <li><input type="checkbox"/> Additionally, allowances for use of such data by third party may be needed.</li> </ul>
<p><b>Product Specifications / Configurations Attached and Incorporated Into Agreement</b></p>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Non-functional specifications (hardware requirements, additional third party software, etc.) must be clearly outlined and warranted by vendor and made a part of the License Agreement.</li> </ul>
<p><b>Web Enabled Version / Internet Use / Firewall Responsibility</b></p>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Special care in the Agreement for web / internet versions in the areas of firewall responsibility, general security, content ownership, etc. (enumerate relevant considerations).</li> </ul>
<p><b>License Fees</b></p>	<p style="text-align: center;"><b>Criteria To Be Applied</b></p>
<p><b>Price / Rate / Discount off Retail</b></p>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Pursue aggressive discounting with MFN (Most Favored</li> </ul>

<b>Is Reasonable</b>		Nation) clauses; the right to audit pricing of vendor's client base at large; lockdown price for future functionality at current discount and pricing for minimum of one year. Keep in mind enhancements/customizations and their ownership, re-sale value, pricing.
<b>Most Favored Nation Pricing</b>		<input type="checkbox"/> Question whether the Vendor has offered better pricing to others and add language warranting that you are receiving the best pricing offered by vendor.
<b>Lock on Pricing of Existing or Future Modules</b>		<input type="checkbox"/> Include language that locks in pricing for additional vendor modules for a reasonable time period (e.g. one year).
<b>Fee Includes Pre-Go-Live Fixes</b>		<input type="checkbox"/> Vendor should warrant that all fixes prior to end of software acceptance period/"Go-Live" shall be provided at no additional charge.
<b>Payment of Fees Tied to Key Milestones</b>		<input type="checkbox"/> All payments should be tied to key (successful) milestones. For example: significant portion of license fees within "x" days of "Delivery".
<b>Late Payment Terms are Reasonable</b>		<input type="checkbox"/> Keep late payment terms to a minimum, and only for items not disputed.
<b>Late Payment Charges Apply Only When Fees Owed Are Not in Dispute</b>		<input type="checkbox"/> Verify.
<b>Warranty Issues</b>		<b>Criteria to Be Applied</b>
<b>Licensor has Ownership, Title, and Right to License in Geography</b>		<input type="checkbox"/> Vendor must warrant that it possesses undisputed ownership of the software and all items licensed (non-infringement and right to license).

<p><b>Product Will Operate Per Published Specs (Attached to Agreement)</b></p>		<ul style="list-style-type: none"> <li><input type="checkbox"/> Warranty must include operability of functionality licensed. This functionality must be clearly defined and made part of the Agreement.</li> <li><input type="checkbox"/> Further, warranty provisions should apply to all enhancements and customization to the software.</li> <li><input type="checkbox"/> Non-functional specs (hardware, 3d party software, etc) should be representative of client environment and warranted by Vendor.</li> </ul>
<p><b>No Bugs, Trojan Horses, Back Doors, Worms, Time bombs, etc...</b></p>		<ul style="list-style-type: none"> <li><input type="checkbox"/> Vendor must warranty that there are no disabling devices resident in software, and that the entire software being licensed is Y2K compliant (less of an issue today).</li> </ul>
<p><b>Term is Reasonable and Extends for Reasonable Period After Go-Live</b></p>		<ul style="list-style-type: none"> <li><input type="checkbox"/> Ensure that warranty term is long enough (HOW LONG?) and expires after “go-live”, and will be suspended (and extended accordingly) until any critical defects are repaired.</li> <li><input type="checkbox"/> Ensure adequate additional remedies are available in the event of failure to cure defects (especially critical defects).</li> </ul>
<p><b>Types of Defects are Categorized (Critical v. Noncritical)</b></p>		<ul style="list-style-type: none"> <li><input type="checkbox"/> Add a table that describes the various levels and categories of defects, including “system halting” and other terms of art.</li> </ul>
<p><b>Clarity of Required Response and Response Time for Each Category</b></p>		<ul style="list-style-type: none"> <li><input type="checkbox"/> Clearly define type of response and response times required to address each type of defect.</li> </ul>
<p><b>Warranty Period Suspended While Critical Defects are Repaired</b></p>		<ul style="list-style-type: none"> <li><input type="checkbox"/> Add language that suspends the warranty period for as long as a critical defect exists and remains uncured.</li> </ul>
<p><b>Reasonable and Clear Warranty Exclusions</b></p>		<ul style="list-style-type: none"> <li><input type="checkbox"/> Ensure clear language around warranty exclusions (e.g. solely caused or under the exclusive control of Licensee;</li> </ul>

		amounts unpaid are “undisputed”; functionality/operability outside the scope of the published specs).
<b>Remedies</b>		<b>Criteria to Be Applied</b>
<b>Adequate Remedy for Failure to Cure Categorized Defects</b>		<input type="checkbox"/> Tie specific remedies to each category of defect that remains uncured.
<b>Recovery of Fees Upon Failure to Cure Critical Defect</b>		<input type="checkbox"/> Require sufficient fee recovery (e.g. 2x fees) for failure to remedy “critical defects”. Further protection via insurance or Vendor liability may be appropriate for business interruption concerns.
<b>Indemnity Conditions are Reasonable</b>		<input type="checkbox"/> Ensure a strong indemnification provision which includes replacement of infringing components or whole systems; right to choose defense strategy (vendor pays legal fees); adequate notice by vendor in the event of infringement; etc.
<b>Maintenance</b>		<b>Criteria to Be Applied</b>
<b>Verify Consistency with Warranty Section</b>		<input type="checkbox"/> If Maintenance services are referenced in Software Agreement, ensure consistency of timing, fees, service levels, etc.
<b>Scope of Maintenance Services is Clear and Adequate</b>		<input type="checkbox"/> Insist on tight language around maintenance services and levels. <input type="checkbox"/> For example, application may require 24 hr. availability for mission criticality. <input type="checkbox"/> Clearly delineate maintenance level responses tied to criticality of problem. <input type="checkbox"/> Tie penalties to non-compliance. <input type="checkbox"/> Maintenance should include system enhancements and upgrades made generally available to clients.

		<input type="checkbox"/> Further, include a clear pathway for maintenance of client specific custom work and enhancements along with reasonable platform migration (e.g. Client Server to internet) if desired.
<b>Coverage Period Reasonable and Adequate</b>		<input type="checkbox"/> Include language that adequately covers the timeline of your business operations and requirements.
<b>Term Commences on Go-Live</b>		<input type="checkbox"/> Ensure that term commences upon “go-live”/system acceptance versus Delivery of software. <input type="checkbox"/> If significant enhancements are being delivered incrementally, build pricing/term of maintenance to reflect their delivery timeline. Fee is Reasonable (15-18%). <input type="checkbox"/> Keep fees as reasonable percentage of license fees (approx 15 – 18%). If possible, apply percentage to discounted license fees with first payment on go-live date.
<b>First Payment Only Upon Go-Live</b>		<input type="checkbox"/> Require first maintenance payment only upon go-live date. <input type="checkbox"/> If feasible, a multi-year payment scheme may be appropriate to secure greater discounting.
<b>Fee Increase is Greater of CPI or 5% Per Year</b>		<input type="checkbox"/> Keep annual increased capped at < 5% or reasonable index (CPI).
<b>Delivery and Receipt of Maintenance Services is Reasonable</b>		<input type="checkbox"/> If desired, use language that requires a periodic maintenance log from vendor to corroborate the maintenance services received.
<b>Licensee May Cancel with Reasonable Notice with Pro-Rata Rebate</b>		<input type="checkbox"/> Ensure provision for reasonable cancellation of maintenance services, to include a pro-rata refund for all pre-paid license fees.
<b>Licensor is Locked In</b>		<input type="checkbox"/> Ensure the maintenance agreement has specific renewal

<p><b>and May Not Cancel for Reasonable Period</b></p>		<p>provisions, versus an “evergreen” auto-renewing dynamic.</p> <p><input type="checkbox"/> Preferably the renewal should be annual and without any significant administrative burden.</p>
<p><b>Reinstatement Fee is Reasonable</b></p>		<p><input type="checkbox"/> Ensure a reasonable maintenance re-instatement dynamic is in effect.</p> <p><input type="checkbox"/> For example, if there has been no significant software updates by vendor, re-instatement should be minimum.</p> <p><input type="checkbox"/> At maximum, re-instatement should only require approximately three months value of back fees.</p>
<p><b>Enhancements</b></p>		<p><b>Criteria to Be Applied</b></p>
<p><b>Automatic Updates for Regulated Information Without Charge</b></p>		<p><input type="checkbox"/> Include language for system enhancements provided to vendor’s client base to be included in updates (at your option) received under maintenance agreement.</p> <p><input type="checkbox"/> There should be no additional charge for these enhancements.</p> <p><input type="checkbox"/> Additionally, ensure that enhancements or customization you are installing are considered as part of the Maintenance Agreement.</p> <p><input type="checkbox"/> Further, any significant technology migration should be priced reasonably (MFN).</p>
<p><b>Migration to New Supported Platform Allowed Without Additional Charge</b></p>		<p><input type="checkbox"/> Verify.</p>
<p><b>Training</b></p>		<p><b>Criteria to Be Applied</b></p>
<p><b>Scope of Training Clearly Defined / Menu of Options</b></p>		<p><input type="checkbox"/> Verify.</p>

Attached		
Fee / Cost Structure Fixed and Clearly Defined		<input type="checkbox"/> Verify.
Payment Terms Reasonable and Clearly Defined		<input type="checkbox"/> Verify.
Training Materials Clearly Defined and Adequate		<input type="checkbox"/> Verify.
Indemnity for Infringement for Training and Materials		<input type="checkbox"/> Verify.
Warranty for Skilled Trainers Licensee May Pre-Approve Trainer's Qualls and Require Replacement		<input type="checkbox"/> Verify. <input type="checkbox"/> Add language that enables you to review and pre-approve any training staff assigned to your implementation.
Most Favored Nation Pricing / Lock-In for Additional Training Fees		<input type="checkbox"/> Verify.
<b>Consulting Services</b>		<b>Criteria to Be Applied</b>

<b>Scope of Services Clearly Defined</b>		<input type="checkbox"/> Verify.
<b>Deliverables Clearly Defined</b>		<input type="checkbox"/> Verify.
<b>Fee is Fixed and Clearly Defined</b>		<input type="checkbox"/> Verify.
<b>Payment Tied to Milestones</b>		<input type="checkbox"/> Verify.
<b>Warranty for Skilled Staff</b>		<input type="checkbox"/> Verify.
<b>Licensee May Pre-Approve Staff Qualifications and Require Replacement</b>		<input type="checkbox"/> Verify.
<b>General Provisions</b>		<b>Criteria to Be Applied</b>
<b>All Material Docs / Agreements Are Referenced for Binding Effect</b>		<input type="checkbox"/> Verify.

<b>Assignment Provision Reasonably Allows for Assignment</b>	<input type="checkbox"/>	Verify.
<b>Confidentiality / NDA</b>	<input type="checkbox"/>	Verify.
<b>Non-Solicitation</b>	<input type="checkbox"/>	Verify.
<b>Publicity</b>	<input type="checkbox"/>	Verify.
<b>Termination by Licensee Reasonable / Effect Clear</b>	<input type="checkbox"/>	Verify.
<b>Termination by Licensor Reasonable / Effect Clear</b>	<input type="checkbox"/>	Verify.
<b>Survival of Appropriate Post-Term Covenants</b>	<input type="checkbox"/>	Verify.
<b>Dispute Resolution</b>	<input type="checkbox"/>	Verify.
<b>Notices</b>	<input type="checkbox"/>	Verify.

**Most Favored Terms  
Clause**

Verify.