

# IT Procurement: Advice on Negotiating Oracle's Ordering Document

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This research covers the primary areas that Oracle includes in its ordering document and provides advice on what to expect and areas that should be negotiated. This includes advice that will also be applicable to Oracle unlimited deals, but the unlimited deals tend to be more highly negotiated.

## Key Findings

- Oracle's ordering document takes precedent over the Oracle License and Service Agreement (OLSA).
- Oracle is often more flexible in negotiating changes in the ordering document than in the OLSA.
- Definitions and usage rights may change from one ordering document to the next and are critical to understanding license compliance.
- Other critical issues will need to be carefully negotiated such as caps on maintenance and support, price protection and definitions.

## Recommendations

- IT procurement should require completed ordering documents early in the negotiation before the final decision has been made to go forward with a deal, so there is still strong leverage to negotiate terms and conditions in the ordering document. Final products and pricing may change but a blank ordering document will be missing material terms and conditions.
- Before signing a new ordering document, review prior contracts to ensure no previously negotiated entitlements are reduced.
- IT procurement should focus on license definitions and usage rights to prevent out-of-compliance situations.

## Analysis

***Important note: Gartner is not a legal firm and does not provide legal advice. The information contained in this publication may not apply to your company and should be used for the purpose of identifying and discussing potential areas of risk with your legal department.***

### The Challenge

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IT procurement professionals need to understand best-in-class contractual terms and conditions to protect their software investment. In addition, it can be more difficult to negotiate deals with large, entrenched suppliers like Oracle where there is high dependency on a specific vendor's products and lock-in that prevents a customer from readily buying another vendor's product to replace the incumbent's. This research provides guidance and direction to help negotiate favorable entitlements to Oracle's ordering document.

Gartner analysts have reviewed many Oracle deals with clients.<sup>1</sup> In these reviews, the standard Oracle ordering document will state in the Order of Precedence section: "In the event of any inconsistencies between the agreement and this ordering document, this ordering document shall take precedence."<sup>2</sup> Because this will contain key terms and conditions, it is important to negotiate the ordering document with the same due diligence as Oracle's OLSA.

It is important to obtain a completed ordering document early in the negotiation as your Oracle sales representative may tell you something can be negotiated and yet Oracle corporate will not agree to it. If you have spent time on this deal, it will be difficult to "walk away" from the deal because you did not obtain the expected negotiated changes in the ordering document, and yet these may be key to your organization's decision to do this deal.

Leverage in obtaining these terms and conditions will vary depending on the size of the deal, the negotiating leverage of the customer (whether they can "walk away" from the deal), and how unique the requested changes are compared to what Oracle has generally been willing to negotiate.

These are some frequently negotiated entitlements in the ordering document:

#### **Master OLSA Reference**

The ordering document will reference the Oracle OLSA that will be the master agreement. Gartner analysts see deals referencing agreements in the 1990s, but other Oracle customers have been told that a new OLSA must be signed before proceeding with a new deal. If a new OLSA is referenced, that agreement must be negotiated along with the ordering document. By signing a new OLSA, customers may end up superseding and/or terminating rights granted previously. Care must be exercised to ensure that old entitlements are not lost in the transition to new OLSAs.

#### **Customer Definition**

Ensure your customer definition includes right to use for parent, subsidiary or affiliates, when needed.

## Product Description/License Type/Usage Rights

The ordering document will contain the Product Description and the License Type for a particular deal. The summary of products is the final list of products licensed in this deal.

Oracle will sometimes attach all license definitions to the ordering document, but there is no reason to have all definitions included. Ask Oracle to include only the definitions for the licensed products. Check any prior usage rights to determine if Oracle is changing usage rights from prior deals, for example, Oracle has changed some key definitions for "Processor" linking the definition to an URL rather than including the definition in the ordering document.<sup>3</sup> Another example of a change that would impact licensing requirements is Oracle's definition of "employee" (see Note 1). We recommend an employee count be limited to employees that work for the customer on a full time basis.

If the ordering document has sections on migrations and conversions of previously purchased products, and sections on new products, the summary should contain the customer's final list of licensed products and the license model that each line item will be measured by. It is also recommended that negotiators require or request line item pricing for each product.

Check all definitions carefully. Ensure all licensing minimums are met based on the definitions that are included in either the OLSA or in definitions attached to the current ordering document. Watch for any prerequisites and that Oracle's virtualization policy (see Note 2), which requires all processors to be licensed if the server is not hardware partitioned, are understood and that license minimums can be met.

Watch for limited use licenses (limited to use with only certain Oracle software) or restrictions on use such as for test and development or for failover. If the agreement includes any application-specific or limited use licenses, obtain detailed information in the contract concerning what is within usage rights and what is not within usage rights. Print off copies of any documents that reference usage rights and keep these in your contract file (see Note 3).

While usage limited to test and development or for failover can usually be tracked, the limited use rights for software limited to use only with certain Oracle products (such as middleware usage with Oracle applications) will often end up out of compliance due to transfers of customer data from one system to another. Include examples in the ordering document of what will be within compliance and what will be out of compliance with limited use licenses. Do not consider verbal discussions, PowerPoint presentations or e-mails as protections against vague usage rights in the ordering document.

## License Migration and New Licenses

These are usually broken into sections of the ordering document. One section will be on products that have been converted or migrated from older license models or product names and reflect this conversion. If adding products that were on previous ordering documents but have no changes, these will be added in another section. Be cautious in agreeing to add previously licensed products onto a new ordering document as this will now result in all those products being subject to Oracle's

repricing policy, which states that if partial licenses are dropped from support, then the remaining items on the ordering document (or purchased under price protection) will be subject to increases in maintenance and support.<sup>4</sup> An additional problem with incorporating the old licenses in new agreements is that the older products will now fall under the new OLSA terms and conditions, which often are less favorable to customers especially for licenses under Oracle acquired software vendors with highly negotiated agreements. There will also be another section for additional products being licensed under this ordering document.

### **Customer Reference**

Oracle will usually include a clause that states the customer is agreeing to be a reference site for the products listed and that it can refer to you as a customer in its sales and marketing material. Some organizations have no problem in agreeing to this, but if your organization would prefer not to be a reference site or have their name included in marketing material, this will usually not have any impact on the pricing. If you agree to be a reference site, include some limitations on how often this will be done, and the right to limit your obligation to do so.

### **Assignment Rights**

If the OLSA does not include the customer's rights to assign the licenses due to a merger or acquisition, this would be a good place to include these rights, which Oracle generally does allow. Also, if there is any possibility of a divestiture, include the right to process for a divested entity for 12 months. Oracle seems to resist the contractual right to actually transfer licenses to a divested entity but has done so in reality. However, it generally will not agree to this in the actual contract because the right to transfer licenses to a divested entity seems to be a business decision by Oracle (sometimes it will do this and sometimes it will not). If the organization has strong leverage to negotiate these rights, a good approach is to include in the language that the licenses and associated maintenance will be pro-rated according to the division of the existing systems between the two entities.

### **Maintenance and Support Caps**

Oracle will reference its current copy of its technical support policies, which should be printed out and kept in the contract file (see Note 4). The ordering document is also where Oracle will include a cap on maintenance and support increases for the listed products. Negotiate for caps on increases for as long as possible. Generally organizations are able to get at least five years with some cap. Aim for caps for one to three years at 0% to 3%, and additional years capped at 3% to 4%. Oracle will generally only negotiate caps longer than five years for very large deals with customers with strong negotiating leverage. Maintenance and support increases based on consumer price indexes have generally been refused by Oracle.

### **Price Protection**

Include price holds for additional capacity or software products for a one- to two-year period, or for customers doing large deals, sometimes longer. However, if Oracle renames, rebundles or changes

the license model of products on price hold, Oracle generally will not allow the customer to purchase off that price hold.

## **Territory**

The territory will generally be the country where the licenses were purchased, but most organizations would be safer having worldwide usage rights as it will provide flexibility in the future. The only restriction is that there will be reasonable limitations based on the U.S. and/or other country export laws.

## **Functionality Replacement Clauses**

Negotiate for rights to follow-on versions and functionality as long as you are paying maintenance and support. For example, Oracle is starting early release programs for the Fusion E-Business Suite of products. If using the current Oracle ERP software and you expect to move to Fusion, we recommend documenting the licensed functionality with rights to that functionality in future products. Keep white papers and other documentation that clarifies and defines the product functionality.

## **Sections Generally in the OLSA That May be Included in an Ordering Document**

References may be included as to Oracle's technical support policy which cover repricing of maintenance and support, reinstatement fees and license set definitions. Download and keep a copy of these policies. Oracle will not negotiate changes to these policies, but they can have a significant impact on future cost. For example, one primary issue is the repricing of maintenance and support if partial licenses are removed from support. Oracle's license set definition will make it difficult to get any type of support cost reduction for organizations wanting to drop support for old versions of Oracle or reduce maintenance and support due to shelfware (software that was licensed but is not being used).

We recommend that customers push to get the right to drop maintenance and support on products that are not in use without incurring the repricing clause. However, Oracle is adamant about both the enforcement of this clause, so that customers are basically charged increased fees for the remaining products. Oracle justifies this by stating that discounts are based on the size of the deal and larger deals receive higher discounts, however the recalculation of support fees does not reflect the discounts that could have actually been obtained for the smaller sized deal.

## **Oracle's Trial Product Policy**

Oracle allows downloads of all software for a 30-day trial period. At the end of the 30-day period, the customer must buy the product, or alternatively stop using and deinstall the products. Customers deciding to license a product will also be subject to user minimums that are included in the definitions sections which could lead to significant additional cost beyond a single product license. There is also a limited use license for development purposes through the Oracle Technology Network offering (see Note 5), though the use restrictions often preclude use for many IT projects. IT Asset Management must work with business units and technical staff to understand

the risk of downloading non-licensed software. Customers should put strong processes in order to ensure that trial programs are strictly tracked and controlled.

### **Oracle Audit Policy**

Oracle's audit language is fairly standard overall, but there is one item that should be changed. According to the clause, customers agree to pay within 30 days of written notice any fees applicable to the use of the products. Customers should include language that states they will pay undisputed fees, and that Oracle will not cut off technical support while both parties are making good faith efforts to resolve issues. Additional suggestions for audit language can be found in "IT Procurement: Improve Software Contract Audit Clauses to Avoid Unexpected IT Spending."

### **Track and Compare Old and New Contracts**

The ordering document, even though amended from time to time, has a fixed structure. The first section of the ordered programs and services will list the license products and licensing metrics, and fees for maintenance and support. Then there is a section with the general terms that contain the standard Oracle ordering document issues. There will often be optional sections that contain special provisions, for example for Oracle Unlimited deals or for future purchasing options. For many countries, Oracle has recently started to repeat principle licensing rules in a final section, where general references to technical support policies and user-minimums are quoted. In many cases, the ordering document also contains additional exhibits that reflect price hold product tables or subsidiary lists for the license usage rights.

IT procurement are finding it useful to use workflow and document management tools to compare a new ordering document before signing with previous ordering documents and extract the essential pricing information to feed ITAM systems or proprietary spreadsheet overviews, and to track the assets. Organizations will need asset management processes and tools to ensure contractual rights are honored throughout the lifetime of the product's life cycle and the life of the contract.

Customers have found that a seamless tracking of negotiated terms and conditions allows for re-instituting rights that were given earlier, or have not been properly documented. Where Oracle changes policies, license usage rights, or renames or rebundles products, it is important to document what was in place at the time the deal was originally negotiated.

Plan for the time required for Oracle to respond to change requests in its ordering document as many changes have to go to higher levels for approval. Reviewing previously negotiated contracts and ordering documents will provide insight as to what has been negotiated in prior deals and may give you leverage in obtaining these same rights for current deal.

## **Recommended Reading**

*Some documents may not be available as part of your current Gartner subscription.*

"IT Procurement: Negotiate Oracle's License and Services Agreement to Reduce Unexpected Cost"

"IT Asset Management: Stay Compliant to Avoid Oracle Audit Surprises"

"Survey Analysis: Survey Shows Another Increase in Software Vendor Audits; IT Asset Managers Should Prepare Now"

"Oracle Reduces SPARC Server Licensing Cost to Enhance TCO Against HP and IBM"

### Evidence

<sup>1</sup> Gartner's Sourcing, Procurement, and IT Asset Management Group took 1,314 calls from our clients seeking advice related to Oracle between October 2009 through January 2011.

<sup>2</sup> The standard Oracle ordering document states: "In the event of any inconsistencies between the agreement and this ordering document, this ordering document shall take precedent."

<sup>3</sup> See Oracle's [processor core definitions](#) as of March 2011.

<sup>4</sup> From page 3 of Oracle's [technical support policies](#), dated 1 February 2011:

### "Pricing following Reduction of Licenses or Support Level

Pricing for support is based upon the level of support and the volume of licenses for which support is ordered. If a subset of licenses on a single order is terminated or if the level of support is reduced, support for the remaining licenses on that license order will be priced at Oracle's list price for support in effect at the time of termination or reduction minus the applicable standard discount. Such support price will not exceed the previous support fees paid for both the remaining licenses and the licenses being terminated or unsupported, and will not be reduced below the previous support fees paid for the licenses continuing to be supported. If the license order from which licenses are being terminated established a price hold for additional licenses, support for all the licenses ordered pursuant to the price hold will be priced at Oracle's list price for support in effect at the time of reduction minus the applicable standard discount."

### Note 1 Oracle Employee Definition

The definition will include not only full and part-time employees, but temporary employees, agents, contractors, consultants and all employees, agent, contractors and consultants that are providing outsourcing services for the organization. (See "Oracle's New Definition for 'Employee' Can Cause Unexpected Expense When Outsourcing" for more information.)

### Note 2 Oracle's Virtualization Policy

For more information on Oracle's virtualization policy, see "Understand Oracle's Virtualization Policy to Avoid Unexpected Costs." Since this document was published, some of Oracle's website links listed in it have changed: Oracle's [core factor table](#), and Oracle's [virtualization policy](#).

### Note 3 Examples of Usage Entitlements

Oracle's [Licensing Rules and Restrictions for Applications](#).

Links to policies and definitions that are mentioned in the [Oracle License and Services Agreement](#).

### Note 4

[Oracle's Technical Support Policies](#)

### Note 5 Oracle Development Licenses

Oracle does offer free development licenses out of Oracle Technology Network (OTN) to use any of these products for development and prototyping, but if you plan to use them in production environments, you will need to license them from Oracle. All software downloads from OTN are free and each comes with a Development License that allows developers to use full versions of the products at no charge while developing and prototyping applications (or for strictly self-educational purposes). See Oracle's [Software Downloads](#) more information.



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