

Common Terms and Conditions Guide
Section 2 – Special Technical Clauses

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Terms and Conditions of Software License

(a) Definitions.

- (1) The term "Licensed Program" shall mean the computer software program identified on the face of this contract and all related material in machine-readable, printed, or other form furnished from time to time by Licensor to Buyer to facilitate use of the Licensed Program and identified by Licensor in writing as being subject to the terms and conditions of this Agreement.
- (2) The term "Designated Equipment" shall mean the central processing unit and associated peripheral devices, identified by type and serial number in this contract.
- (3) The term "Proprietary Information" shall mean Licensor-documented information embodied in the Licensed Program, as defined in paragraph (a)(1) hereof, which at the time of its disclosure to Buyer is identified as proprietary by an appropriate stamp or legend. For purposes of this Agreement, orally disclosed Licensor information will not be considered as proprietary unless promptly reduced to writing and marked with a proprietary legend.

(b) License Grant.

- (1) Licensor hereby grants to Buyer for the term of this Agreement a nonexclusive, nontransferable license to use the Licensed Program on the Designated Equipment at Buyer's location designated by the mailing address in this contract, including use at any location of Buyer to which the Designated Equipment may be transferred pursuant to paragraph (b)(3) below.
- (2) The license of paragraph (b)(1) above shall extend to temporary use of the Licensed Program on other equipment or systems of Buyer when the Designated Equipment is inoperative or is undergoing repair, maintenance, or modification.
- (3) Upon prior written notice to Licensor, the license granted herein may be transferred at any time to replacement Designated Equipment of like configuration, or the Designated Equipment may be transferred to another location of Buyer, provided that a description of the replacement Designated Equipment or the new location of the Designated Equipment is provided to Licensor.

(c) Copies.

- (1) Buyer may copy the Licensed Program to the extent necessary for proper utilization, including archival and restart purposes.

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- (2) Buyer shall reproduce and include on all copies of the Licensed Program any trademark, copyright, or proprietary legend contained on the original copy furnished by Licensor.

(d) Protection and Security.

- (1) Buyer agrees to afford Licensor's Proprietary Information embodied in the Licensed Program the same degree of protection against unauthorized use or disclosure as Buyer normally provides for its own proprietary information of a like kind; provided, however, that Buyer's obligation hereunder shall not apply to information which (i) is known to Buyer at the time of disclosure by Licensor; (ii) is now in, or hereafter enters into, the public domain through no fault of Buyer; (iii) is developed independently by Buyer; (iv) is generally known or available from third parties without restriction; (v) is inadvertently disclosed by Buyer despite the same degree of protection against unauthorized use or disclosure which Buyer normally provides for its own proprietary information; or (vi) is lawfully required to be disclosed to any governmental agency or is otherwise required to be disclosed by law, provided that before making such disclosure Buyer shall give Licensor an adequate opportunity to assert an objection or to take action to assure confidential handling of such information.

- (2) Buyer's nondisclosure obligations shall automatically cease upon termination of this Agreement in accordance with (j)(4) below.

(e) Right to Modify.

- (1) Buyer has the right to edit, change, format, enhance, or otherwise modify the Licensed Program and to merge the Licensed Program or any portion thereof with other software programs to form an updated or derivative work.

- (2) Buyer is under no obligation to disclose to Licensor Buyer changes, modifications, enhancements, or updated work referred to in paragraph (e)(1) above, and Licensor acquires no rights thereto.

- (3) Buyer agrees to comply with the provisions of paragraph (c)(2) above with respect to any portion of the Licensed Program embodied in an updated or derivative work.

- (4) Subject to the provisions of paragraph (d)(1) above, Buyer's right to use any unmodified portion of the Licensed Program embodied in an updated work shall expire upon the cancellation or termination of this Agreement. Any modified portion shall remain as Buyer's property and continue to be used by Buyer without further restriction, except those restrictions on disclosure in paragraph (d) above.

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(f) Warranty.

- (1) Licensor represents and warrants that it owns title to the Licensed Program and has the right and authority to enter into this Agreement and to grant the rights herein described.
- (2) Licensor warrants that the Licensed Program when delivered will perform the functions described in Licensor's specifications and Licensed Program documentation. Licensor shall promptly and at its expense correct any errors or defects made known to Licensor by Buyer. If Licensor fails to correct such errors or defects or to otherwise provide to Buyer a Licensed Program that conforms to Licensor's specifications within ten days after notice from Buyer, this Agreement may be terminated by Buyer upon the expiration of that period, and Licensor shall promptly refund the license issue fee.
- (3) THESE WARRANTIES ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES OF ANY TYPE, WHETHER EXPRESS OR IMPLIED, INCLUDING THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.
- (4) Licensor expressly warrants that, except as disclosed in the Licensed Program specifications and documentation, the Licensed Program, including any codes or instructions that may be used to access, modify, delete, damage, or disable the Licensed Program or the Designated Equipment, contains no computer viruses or other contaminants. If Licensor incorporates the software of any other vendor in the Licensed Program, Licensor shall assure Buyer that comparable warranties, enforceable by Buyer, have been obtained from such vendors. Licensor expressly waives and disclaims any right or remedy to de-install, disable, or repossess the Licensed Program.

(g) Property Right Indemnity.

- (1) Licensor will indemnify and hold harmless Buyer from any and all claims that Buyer's use of the Licensed Program, within the scope of this Agreement, infringes any U.S. patent, copyright, trade secret, or similar property right of a third party.
- (2) Upon reasonable notice, Licensor will appear and defend Buyer, at Licensor's cost and expense, in any suit at law or equity relating to such infringement claims and pay any costs, damages, or settlements, including attorneys' fees, arising out of or in conjunction with such claims. In the event Licensor defends against such claims of infringement, Licensor shall have control of the litigation and Buyer agrees to cooperate with Licensor to the extent reasonably necessary in such defense.
- (3) Licensor shall have no obligation to defend Buyer or to pay any costs, damages, or attorneys' fees for any claim to the extent that such claim is based

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upon the use of any version of the Licensed Program other than that furnished to Buyer by Licensor under this Agreement.

(4) In the event any such claim of infringement has occurred or, in Licensor's opinion, is likely to occur, Buyer agrees to permit Licensor, at Licensor's option and expense, to procure for Buyer the right to continue using the Licensed Program or replace or modify the Licensed Program so that it becomes noninfringing.

(5) THE FOREGOING STATES THE ENTIRE OBLIGATION OF LICENSOR WITH RESPECT TO INFRINGEMENT OF PATENTS, COPYRIGHTS, TRADE SECRETS, OR SIMILAR PROPERTY RIGHTS. THIS SECTION WILL SURVIVE TERMINATION OF THIS AGREEMENT.

(h) Limitation of Liability.

LICENSOR WILL NOT BE LIABLE FOR ANY LOST PROFITS, INTERRUPTION OF SERVICE, OR CONSEQUENTIAL DAMAGES OR, EXCEPT AS PROVIDED IN SECTION (g), FOR ANY CLAIMS AGAINST BUYER BY ANY THIRD PARTY.

(i) Delivery of Licensed Program.

(1) Licensor, at its expense, will deliver or cause to be delivered the Licensed Program to Buyer within 30 days from and after the effective date of this Agreement.

(2) Licensor's delivery of the License Program to Buyer prior to the effective date of this Agreement will be at Licensor's sole risk. Licensor will bear the risk of loss for the Licensed Program until delivery to and acceptance by Buyer.

(j) Term and Termination of Agreement.

(1) This Agreement will come into full force and effect upon the last date of execution by the parties hereto (the "effective date") and will remain in effect indefinitely unless canceled or terminated as provided herein.

(2) Buyer may terminate this Agreement at any time by giving Licensor 30 days advance written notice. If the terminated Agreement is for an annually renewable license, Buyer will be entitled to a pro rata refund of the license fee paid. If a one-time fee is paid, Buyer will be entitled to a refund of the license fee paid prorated over 24 months unless the Licensed Program was expressly designed, developed, or modified by Licensor for Buyer.

(3) Either party may terminate this Agreement if the other is in material default of any of the terms and conditions hereof and does not remedy the default within ten days from the date of receipt of the other party's written notice citing the default.

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(4) Upon termination or cancellation of this Agreement, Buyer will either destroy or return to Licensor the Licensed Program and all copies made therefrom. Notice of destruction will be provided to Licensor in writing.

(k) General Provisions.

(1) This Agreement is not assignable or transferable by either party without the prior consent of the other. Subject to the foregoing, this Agreement will inure to the benefit of, and be binding upon, the successors of Licensor and Buyer. Buyer may assign this License to another business that acquires all or substantially all of Buyer or any of its divisions or subsidiaries (or their assets) using the Licensed Program under this Agreement.

(2) Failure by Buyer to assert its rights to "retain its benefits" to the intellectual property encompassed by the Licensed Program, pursuant to Sec. 365(n)(1)(B) of Title 11, U.S.C., under an executory contract rejected by the trustee in bankruptcy, will not be construed by the courts as a termination of the contract by Buyer under Sec. 365(n)(1)(A) of the Bankruptcy Code.

(3) All notices required or permitted to be given under this Agreement will be deemed to have been given when received. They may be mailed (postage prepaid), telefaxed (with receipt confirmed), or delivered by hand and addressed to the party to receive such notice at such address as the receiving party may have directed in writing.

(4) Licensor and Buyer are independent contractors hereunder and nothing contained herein will be construed to mean that either party hereto is acting as an employee, partner, or agent of the other.

(l) Entire Agreement.

This Agreement and the other terms and conditions of this contract represent the entire understanding between the parties hereto, and they may not be modified by an oral agreement or representation or otherwise than by an instrument in writing executed by both parties by their duly authorized representatives.