

NGRAIN  
Suite 108, 100 Gateway Center Parkway  
Richmond, VA 23235

**Carahsoft Rider to Manufacturer End User License Agreements  
(for U.S. Government End Users)**

- 1. Scope.** This Carahsoft Rider and the Manufacturer End User License Agreement (EULA) establish the terms and conditions enabling Carahsoft to provide Software and Services to U.S. Government agencies (the "Client" or "Licensee").
- 2. Applicability.** The terms and conditions in the attached Manufacturer EULA are hereby incorporated by reference to the extent that they are consistent with Federal Law (e.g., the Anti-Deficiency Act (31 U.S.C. § 1341(a)(1)(B)), the Contracts Disputes Act of 1978 (41 U.S.C. § 601-613), the Prompt Payment Act, the Anti-Assignment statutes (31 U.S.C. § 3727 and 41 § U.S.C. 15), 28 U.S.C. § 516 (Conduct of Litigation Reserved to Department of Justice (DOJ), and 28 U.S.C. § 1498 (Patent and copyright cases)). To the extent the terms and conditions in the Manufacturer's EULA are inconsistent with the Federal Law (*See* FAR 12.212(a)), they shall be deemed deleted and unenforceable under any resultant orders under Carahsoft's contract #GS-35F-0119Y, including, but not limited to the following:

  - (a) Contracting Parties.** The Government customer (Licensee) is the "Ordering Activity", "defined as an entity authorized to order under GSA contracts as set forth in GSA ORDER ADM 4800.2H, as may be revised from time to time. The Licensee cannot be an individual because any implication of individual licensing triggers the requirements for legal review by Federal Employee unions. Conversely, because of competition rules, the contractor must be defined as a single entity even if the contractor is part of a corporate group. The Government cannot contract with the group, or in the alternative with a set of contracting parties.
  - (b) Changes to Work and Delays.** Subject to GSAR Clause 552.243-72, Modifications (Federal Supply Schedule) (July 200 0) (Deviation I 2010) (AUG 1987), and 52.212 -4 (f) Excusable delays. (JUN 2010) regarding which the GSAR and the FAR provisions shall take precedence.
  - (c) Contract Formation.** Subject to FAR Sections 1.601(a) and 43.102, the Government Order must be signed by a duly warranted contracting officer, in writing. The same requirement applies to contract modifications affecting the rights of the parties. All terms and conditions intended to bind the Government must be included within the contract signed by the Government.
  - (d) Audit.** During the term of this Agreement: (a) If Ordering Activity's security requirements included in the Order are met, Manufacturer or its designated agent may audit Ordering Activity's facilities and records to verify Ordering Activity's compliance with this Agreement. Any such audit will take place only during Ordering Activity's normal business hours contingent upon prior written notice and adherence to any security measures the Ordering Activity deems appropriate, including any requirements for personnel to be cleared prior to accessing sensitive facilities. Carahsoft on behalf of the Manufacturer will give Ordering Activity written notice of any non-compliance, including

the number of underreported Units of Software or Services ("Notice"); or (b) If Ordering Activity's security requirements are not met and upon Manufacturer's request, Ordering Activity will run a self-assessment with tools provided by and at the direction of Manufacturer ("Self-Assessment") to verify Ordering Activity's compliance with this Agreement.

- (e) **Termination.** Clauses in the Manufacturer EULA referencing termination or cancellation of the Manufacturer's EULA are hereby deemed to be deleted. Termination shall be governed by the FAR 52.212-4 and the Contract Disputes Act, 41 U.S.C. §§ 601-613, subject to the following exceptions:

Carahsoft may request cancellation or termination of the License Agreement on behalf of the Manufacturer if such remedy is granted to it after conclusion of the Contracts Disputes Act dispute resolutions process referenced in Section Q below or if such remedy is otherwise ordered by a United States Federal Court..

- (f) **Consent to Government Law / Consent to Jurisdiction.** Subject to the Contracts Disputes Act of 1978 (41 U.S.C §§ 7101-7109) and Federal Tort Claims Act (28 U.S.C. §1346(b)). The validity, interpretation and enforcement of this Rider will be governed by and construed in accordance with the laws of the United States. In the event the Uniform Computer Information Transactions Act (UCITA) or any similar federal laws or regulations are enacted, to the extent allowed by law, it will not apply to this Agreement, and the governing law will remain as if such law or regulation had not been enacted. All clauses in the Manufacturer EULA referencing equitable remedies are deemed not applicable to the Government order and are therefore deemed to be deleted.

- (g) **Force Majeure.** Subject to FAR 52.212 -4 (f) Excusable delays. (JUN 2010). Unilateral Termination by the Contractor does not apply to a Government order and all clauses in the Manufacturer EULA referencing unilateral termination rights of the Manufacturer are hereby deemed to be deleted.

- (h) **Assignment.** All clauses regarding Assignment are subject to FAR Clause 52.232-23, Assignment of Claims (JAN 1986) and FAR 42.12 Novation and Change-of-Name Agreements, and all clauses governing Assignment in the Manufacturer EULA are hereby deemed to be deleted.

- (i) **Waiver of Jury Trial.** All clauses referencing waiver of Jury Trial are subject to FAR Clause 52.233-1, Disputes (JUL. 2002), and all clauses governing waiver of jury trial in the Manufacturer EULA are hereby deemed to be deleted.

- (j) **Customer Indemnities.** All Manufacturer EULA clauses referencing Customer Indemnities are hereby deemed to be deleted.

- (k) **Contractor Indemnities.** All Manufacturer EULA clauses that (1) violate DOJ's right (28 U.S.C. 516) to represent the Government in any case and/or (2) require that the Government give sole control over the litigation and/or settlement, are hereby deemed to be deleted.

- (l) **Renewals.** All Manufacturer EULA clauses that violate the Anti-Deficiency Act (31

U.S.C. 1341, 41 U.S.C. 11) ban on automatic renewal are hereby deemed to be deleted.

- (m) Future Fees or Penalties.** All Manufacturer EULA clauses that violate the Anti-Deficiency Act (31 U.S.C. 1341, 41 U.S.C. 11), which prohibits the Government from paying any fees or penalties beyond the Contract amount, unless specifically authorized by existing statutes, such as the Prompt Payment Act, or Equal Access To Justice Act 31 U.S.C. 3901, 5 U.S.C. 504 are hereby deemed to be deleted.
- (n) Taxes.** Taxes are subject to FAR 52.212-4(k), which provides that the contract price includes all federal, state, local taxes and duties.
- (o) Third Party Terms.** Subject to the actual language agreed to in the Order by the Contracting Officer. Any third party manufacturer will be brought into the negotiation, or the components acquired separately under Federally-compatible agreements, if any. Contractor indemnities do not constitute effective migration.
- (p) Installation and Use of the Software.** Installation and use of the software shall be in accordance with the Rider and Manufacturer EULA, unless an Ordering Activity determines that it requires different terms of use and Manufacturer agrees in writing to such terms in a valid task order placed pursuant to the Government contract.
- (q) Dispute Resolution and Venue.** Any disputes relating to the Manufacturer EULA and to this Rider shall be resolved in accordance with the FAR, and the Contract Disputes Act, 41 U.S.C. §§ 7101-7109. The Ordering Activity expressly acknowledges that Carahsoft, on behalf of the Manufacturer, shall have standing to bring such claim under the Contract Disputes Act.
- (r) Limitation of Liability: Subject to the following:**

Carahsoft, Manufacturer and Ordering Activity shall not be liable for any indirect, incidental, special, or consequential damages, or any loss of profits, revenue, data, or data use. Further, Carahsoft, Manufacturer and Ordering Activity shall not be liable for punitive damages except to the extent this limitation is prohibited by applicable law. This clause shall not impair the U.S. Government's right to recover for fraud or crimes arising out of or related to this Government Contract under any federal fraud statute, including the False Claims Act, 31 U.S.C. §§ 3729-3733.
- (s) Advertisements and Endorsements.** Unless specifically authorized by an Ordering Activity in writing, such use of the name or logo of any U.S. Government entity is prohibited.
- (t) Public Access to Information.** Manufacturer agrees that the EULA and this Rider contain no confidential or proprietary information and acknowledges the EULA and this Rider will be available to the public.
- (u) Confidentiality.** Any provisions that require the Licensee to keep certain information confidential are subject to the Freedom of Information Act, 5 U.S.C. §552, and any order by a United States Federal Court.

**IMPORTANT – READ CAREFULLY:** This End-User License Agreement (“EULA”) is a legal agreement between you (the GSA Customer) and NGRAIN (Canada) Corporation (“NGRAIN”, “we”, “our”, or “us”) for the NGRAIN software that accompanies this EULA, which includes computer software and may include associated media, printed materials, and “online” or electronic documentation (“SOFTWARE”).

IF YOU DO NOT AGREE, DO NOT INSTALL, COPY, DISTRIBUTE, OR USE THE SOFTWARE.

## **1. GRANT OF LICENSE**

### **1.1 NGRAIN® Producer®, Producer® Pro, and Production Suite Software.**

NGRAIN hereby grants you the right to, with respect to any SOFTWARE referred to as “Producer”, “Producer Pro”, “Production Suite”, NGRAIN “Integration Kit”, “VTT Builder”, “VTR Builder”, “VI Builder”, and “Power Tools” (“AUTHORING SOFTWARE”), install, use, access, display, and run one copy of the AUTHORING SOFTWARE on a single computer. You may also make one copy of the AUTHORING SOFTWARE as may be necessary for backup and archival purposes.

### **1.2 NGRAIN® Viewer Software.**

NGRAIN hereby grants you the right to, with respect to any SOFTWARE referred to as NGRAIN “Viewer”, or otherwise as a “Viewer” (“VIEWER SOFTWARE”), use and distribute VIEWER SOFTWARE (i) on intranets or other networks, (ii) on CD or DVD media, (iii) pre-installed on computer hardware devices, (iv) embedded in applications, or (v) through an unattended installer.

### **1.3 NGRAIN® Application Software.**

NGRAIN hereby grants you the right to, with respect to any SOFTWARE referred to as NGRAIN “Virtual Task Trainer” (or “VTT”), “Virtual Task Refresher” (or “VTR”), “Virtual Index” (or “VI”), “Virtual Damage Assessment” (or “VDA”) or any other of its SOFTWARE containing any 3KO® 3D Knowledge Objects, animations, videos, photos, documentation, or other content customized by NGRAIN or an authorized third party of NGRAIN for inclusion in the SOFTWARE (“APPLICATION SOFTWARE”) use and distribute the APPLICATION SOFTWARE (i) on intranets or other networks, (ii) on CD or DVD media, or (iii) pre-installed on computer hardware devices. NGRAIN hereby grants you the right to use the APPLICATION SOFTWARE with the customized content within or intended for the APPLICATION SOFTWARE at the time of delivery, and use NGRAIN SOFTWARE to make edits or modifications to such content.

### **1.4 User-Created Application Software.**

NGRAIN hereby grants you the right to create application SOFTWARE for commercial or personal purposes using AUTHORING SOFTWARE, where NGRAIN retains full rights and ownership to the APPLICATION AND AUTHORING SOFTWARE with the exception of the user-created content contained therein.

### **1.5 Software Development Kits.**

NGRAIN hereby grants you the right to, with respect to any SOFTWARE referred to as an NGRAIN Software Development Kit, including, but not limited to, NGRAIN “Constructor” (“SOFTWARE DEVELOPMENT KIT”), install, use, access, display, and run one copy of the SOFTWARE on a single computer. You may also make one copy of the SOFTWARE DEVELOPMENT KIT as may be necessary for backup and archival purposes. NGRAIN hereby grants you the right to, with respect to any SOFTWARE DEVELOPMENT KIT, develop or construct applications based on such SOFTWARE DEVELOPMENT KIT for commercial purposes, provided you enter into a separate licensing agreement with NGRAIN which expressly grants you such rights.

## **2. DESCRIPTIONS OF OTHER RIGHTS AND LIMITATIONS**

In addition to the foregoing license grants, the following rights and/or limitations shall apply with respect to your installation and use of the SOFTWARE:

### **2.1 Media Samples.**

NGRAIN hereby grants you the right to, with respect to any non-customized, sample media included in the SOFTWARE, such as 3KOs, code samples or templates, models, photographs, clip art, shapes, animations, sounds, music, video clips or other media (“MEDIA SAMPLE”), use the MEDIA SAMPLE solely for test, demonstration, and evaluation purposes.

### **2.2 Trial Software.**

NGRAIN grants you the right to, with respect to SOFTWARE labeled or identified as Release Candidate, Evaluation, Trial, Beta, “Not-for-Resale” or NFR (“TRIAL SOFTWARE”), use the TRIAL SOFTWARE solely for

test, evaluation, and demonstration purposes, subject to any terms of use for the TRIAL SOFTWARE that may be communicated to you by NGRAIN.

### **2.3 Support Services.**

NGRAIN may provide you with support services related to the SOFTWARE ("Support Services"). Any supplemental software code provided to you as part of the Support Services shall be considered part of the SOFTWARE and subject to the terms and conditions of this EULA. In the event you require any SOFTWARE or password retrieval support in association with your use of the SOFTWARE, and you do not have a current maintenance and support agreement with NGRAIN for Support Services, NGRAIN may invoice the GSA Customer at the rate established by the underlying GSA Schedule Price List for any such SOFTWARE or password retrieval support provided by NGRAIN.

### **2.4 Software Transfers.**

1) Internal: You may move the SOFTWARE referred to as "Producer", "Producer Pro", "Production Suite", NGRAIN "Integration Kit", "VTT Builder", "VTR Builder", "VI Builder", and "Power Tools" and SOFTWARE DEVELOPMENT KIT to a different computer within your organization or home. After the transfer, you must completely remove the SOFTWARE from the former computer. 2) Transfer to Third Party is not allowed unless agreed to in writing by NGRAIN.

### **2.5 Reservation of Rights and Ownership.**

The SOFTWARE and any authorized copies that you make are the intellectual property of and are owned by NGRAIN. The structure, organization and code of the SOFTWARE are the valuable trade secrets and confidential information of NGRAIN. The SOFTWARE is protected by law, including but not limited to the copyright laws of the United States and other countries, and by international treaty provisions, including U.S. patents 6,867,774; 7,050,054; 7,218,323; 7,317,456; 7,420,555; 7,965,290. Except as expressly stated herein, this agreement does not grant you any intellectual property rights in the SOFTWARE and all intellectual property rights not expressly granted are reserved by NGRAIN. The SOFTWARE is licensed, not sold.

## **3. RESTRICTIONS ON USE**

### **3.1 Maintenance of Copyright Notices.**

You must not remove or alter any trademark, copyright, or other notices on any copy of the SOFTWARE that you are permitted to make hereunder.

### **3.2 Prohibition on Reverse Engineering, Decompilation, and Disassembly.**

You may not reverse engineer, decompile, disassemble, or otherwise modify the SOFTWARE or the 3KO® 3D Knowledge Object file architecture and specification, except and only to the extent that such activity is expressly permitted by applicable law notwithstanding this limitation.

### **3.3 Modifications, Integrations, and Derivative Works.**

Unless otherwise expressly licensed to do so pursuant to Section 2 hereof, you may not (i) modify the SOFTWARE, (ii) embed, integrate, or merge all or any part of the SOFTWARE into other software, programs, or applications, or (iii) create derivative work based on the SOFTWARE.

### **3.4 Rental.**

You may not rent, lease, or lend the SOFTWARE.

### **3.5 Compliance with Applicable Laws.**

You must comply with all applicable laws regarding use of the SOFTWARE.

### **3.6 Export Restrictions.**

You shall observe all applicable United States and foreign laws and regulations (if any) with respect to the export, re-export, diversion or transfer of the SOFTWARE, related technical data and direct products thereof, including, without limitation, the International Traffic in Arms Regulations (ITAR), the Export Administration Regulations, and the Controlled Goods Directorate.

## **4. TERMINATION**

### **4.1 Breach.**

### **4.2 Recourse against the United States for any alleged breach of this agreement must be made under the terms of the Federal Tort Claims Act or as a dispute under the contract disputes clause (Contract Disputes Act) as applicable. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer. Voluntary Termination**

You may terminate this EULA at any time by destroying the SOFTWARE and any associated documentation, including any backup or archival copy of the SOFTWARE.

## **5. LIMITATION OF WARRANTIES AND LIABILITY**

### **5.1 Limited Warranty.**

With the exception of SOFTWARE provided free of charge by NGRAIN to you, NGRAIN warrants that the SOFTWARE will perform substantially in accordance with the accompanying materials for a period of ninety (90) days from the date of receipt. If an implied warranty or condition is created by your state /jurisdiction and federal or state/provincial law prohibits disclaimer of it, you also have an implied warranty or condition, BUT ONLY AS TO DEFECTS DISCOVERED DURING THE PERIOD OF THIS LIMITED WARRANTY (NINETY DAYS). AS TO ANY DEFECTS DISCOVERED AFTER THE NINETY-DAY PERIOD, THERE IS NO WARRANTY OR CONDITION OF ANY KIND. Some states/jurisdictions do not allow limitations on how long an implied warranty or condition lasts, so the above limitation may not apply to you. Any supplements or updates to the SOFTWARE provided to you after the expiration of the ninety day Limited Warranty period are not covered by any warranty or condition, express, implied or statutory.

LIMITATION ON REMEDIES; NO CONSEQUENTIAL OR OTHER DAMAGES. Your exclusive remedy for any breach of this Limited Warranty is as set forth below. Except for any refund elected by NGRAIN, YOU ARE NOT ENTITLED TO ANY DAMAGES, INCLUDING BUT NOT LIMITED TO CONSEQUENTIAL DAMAGES, if the SOFTWARE does not meet NGRAIN'S Limited Warranty, and, to the maximum extent allowed by applicable law, even if any remedy fails of its essential purpose. The terms of Section 5.3 ("Exclusion of Incidental, Consequential and Certain Other Damages") are also incorporated into this Limited Warranty. Some states /jurisdictions do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you. This Limited Warranty gives you specific legal rights. You may have other rights which vary from state/jurisdiction to state/jurisdiction. YOUR EXCLUSIVE REMEDY. NGRAIN'S entire liability and your exclusive remedy for any breach of this Limited Warranty or for any other breach of this EULA or for any other liability relating to the SOFTWARE shall be, at NGRAIN'S option from time to time exercised subject to applicable law, (a) return of the amount paid (if any) for the SOFTWARE, or (b) repair or replacement of the SOFTWARE, that does not meet this Limited Warranty and that is returned to NGRAIN with a copy of your receipt. You will receive the remedy elected by NGRAIN without charge, except that you are responsible for any expenses you may incur (e.g. cost of shipping the Software to NGRAIN). This Limited Warranty is void if failure of the SOFTWARE has resulted from accident, abuse, misapplication, abnormal use or a virus. Any replacement SOFTWARE will be warranted for the remainder of the original warranty period or thirty (30) days, whichever is longer, and NGRAIN will use commercially reasonable efforts to provide your remedy within a commercially reasonable time.

### **5.2 Disclaimer of Warranties.**

The Limited Warranty that appears above is the only express warranty made to you and is provided in lieu of any other express warranties or similar obligations (if any) created by any advertising, documentation, packaging, or other communications. Except for the Limited Warranty and to the maximum extent permitted by applicable law, NGRAIN provide the SOFTWARE and support services (if any) AS IS AND WITH ALL FAULTS, and hereby disclaim all other warranties and conditions, whether express, implied or statutory, including, but not limited to, any (if any) implied warranties, duties or conditions of merchantability, of fitness for a particular purpose, of reliability or availability, of accuracy or completeness of responses, of results, of workmanlike effort, of lack of viruses, and of lack of negligence, all with regard to the SOFTWARE, and the provision of or failure to provide support or other services, information, software, and related content through the SOFTWARE or otherwise arising out of the use of the SOFTWARE. ALSO, THERE IS NO WARRANTY OR CONDITION OF TITLE, QUIET ENJOYMENT, QUIET POSSESSION, CORRESPONDENCE TO DESCRIPTION OR NON-INFRINGEMENT WITH REGARD TO THE SOFTWARE.

### **5.3 Exclusion of Incidental, Consequential and Certain other Damages.**

TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT SHALL NGRAIN BE LIABLE FOR ANY SPECIAL, INCIDENTAL, PUNITIVE, INDIRECT, OR CONSEQUENTIAL DAMAGES WHATSOEVER (INCLUDING, BUT NOT LIMITED TO, DAMAGES FOR LOSS OF PROFITS OR CONFIDENTIAL OR OTHER INFORMATION, FOR BUSINESS INTERRUPTION, FOR PERSONAL INJURY, FOR LOSS OF PRIVACY, FOR FAILURE TO MEET ANY DUTY INCLUDING OF GOOD FAITH OR OF REASONABLE CARE, FOR NEGLIGENCE, AND FOR ANY OTHER PECUNIARY OR OTHER LOSS WHATSOEVER) ARISING OUT OF OR IN ANY WAY RELATED TO THE USE OF OR INABILITY TO USE THE SOFTWARE, THE PROVISION OF OR FAILURE TO PROVIDE SUPPORT OR OTHER SERVICES, INFORMATION, SOFTWARE, AND RELATED CONTENT THROUGH THE SOFTWARE OR OTHERWISE ARISING OUT OF THE USE OF THE SOFTWARE, OR OTHERWISE UNDER OR IN CONNECTION WITH ANY PROVISION OF THIS EULA, EVEN IN THE EVENT OF THE FAULT, TORT (INCLUDING

NEGLIGENCE), MISREPRESENTATION, STRICT LIABILITY, BREACH OF CONTRACT OR BREACH OF WARRANTY OF NGRAIN OR ANY SUPPLIER, AND EVEN IF NGRAIN OR ANY SUPPLIER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

**5.4 Limitation of Liability and Remedies.**

Notwithstanding any damages that you might incur for any reason whatsoever (including, without limitation, all damages referenced herein and all direct or general damages in contract or anything else), the entire liability of NGRAIN under any provision of this EULA and your exclusive remedy hereunder (except for any remedy of repair or replacement elected by NGRAIN with respect to any breach of the Limited Warranty) shall be limited to the greater of the actual damages you incur in reasonable reliance on the SOFTWARE up to the amount actually paid by you for the SOFTWARE or US\$5.00. The foregoing limitations, exclusions and disclaimers (including Sections 5.1, 5.2 and 5.3) shall apply to the maximum extent permitted by applicable law, even if any remedy fails its essential purpose. The foregoing exclusion/limitation of liability shall not apply to (1) personal injury or death resulting from NGRAIN's negligence; (2) for fraud; or (3) for any other matter for which liability cannot be excluded by law.

**6. NOTICE TO U.S. GOVERNMENT END USERS**

The SOFTWARE is "Commercial Items," as that term is defined at 48 C.F.R. paragraph 2.101, consisting of "Commercial Computer Software" and "Commercial Computer Software Documentation," as such terms are used in 48 C.F.R. 12.212 or 48 C.F.R. 227.7202, as applicable. Consistent with 48 C.F.R. 12.212 or 48 C.F.R. 227.7202-1 through 227.7202-4, as applicable, the Commercial Computer Software and Commercial Computer Software Documentation are being licensed to U.S. Government end users (a) only as Commercial Items and (b) with only those rights as are granted to all other end users pursuant to the terms and conditions herein. Unpublished-rights reserved under the copyright laws of the United States. Contractor/manufacturer is NGRAIN (Canada) Corporation, 200 - 740 Nicola St, Vancouver, BC, Canada, V6G 2C1.

**7. APPLICABLE LAW**

This EULA is governed by United States Federal law. Venue and statute of limitations are governed by applicable United States Federal law. This EULA will not be governed by the conflict of law rules of any jurisdiction or the United Nations Convention on Contracts for the International Sale of Goods, the application of which is expressly excluded.

**8. ENTIRE AGREEMENT; SEVERABILITY**

This EULA, together with the underlying GSA Schedule Contract, Schedule Price List, and applicable GSA Customer Purchase Orders, is the entire agreement between you and NGRAIN relating to the SOFTWARE and it supersedes all prior or contemporaneous oral or written communications, proposals and representations with respect to the SOFTWARE or any other subject matter covered by this EULA. This Agreement, however, shall not take precedence over the terms of the underlying GSA Schedule Contract or any specific, negotiated terms on the GSA Customer's Purchase Order. If any provision of this EULA is held to be void, invalid, unenforceable or illegal, the other provisions shall continue in full force and effect.