

AgileCraft

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

- 1. Scope.** This Carahsoft Rider and the Manufacturer Agreement 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 Agreement (www.agilecraft.com/eula.asp) 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 Agreements 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 Government contracts as set forth in Government Order 4800.2H ADM, 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 Agreement referencing termination or cancellation 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 Agreement 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 Agreement 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 Agreement 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 Agreement are hereby deemed to be deleted.
- (j) **Customer Indemnities.** All Manufacturer Agreement clauses referencing Customer Indemnities are hereby deemed to be deleted.
- (k) **Contractor Indemnities.** All Manufacturer Agreement 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 Agreement 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 Agreement 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 Agreement, 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 Agreement 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 Agreement and this Rider contain no confidential or proprietary information and acknowledges the Agreement 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.

AGILECRAFT LLC
HOSTED SUBSCRIPTION SERVICES AGREEMENT

THIS HOSTED SUBSCRIPTION SERVICES AGREEMENT (the “**Agreement**”) is made and entered into this ____ day of _____, 20__ (the “**Effective Date**”) by and between AgileCraft LLC (“**AgileCraft**”), and an Ordering Activity, an entity entitled to order under GSA Schedule contracts as defined in GSA Order ADM 4800.2H, as may be revised from time to time (“**Customer**”). Customer and its Affiliates may procure use of the AgileCraft on-line Service and other Training Services pursuant to this Agreement. Customer or a Customer Affiliate that submits an Order in accordance with the GSA Schedule contract (each an “Order”) is hereinafter referred to as a “Licensee.” Capitalized terms not otherwise defined have the meanings assigned in Section 10 below.

1. 1. Service and Software

1.1 Grant of License. AgileCraft grants to Licensee, and Licensee accepts from AgileCraft, subject to the terms and conditions of this Agreement, a nonexclusive, nontransferable, revocable license to use AgileCraft’s hosted application service (the “Service”) specified on the initial or any subsequent Order. The Service may not be used by more than the number of users indicated on all Orders (“Authorized Users”). The Service may be used only for Licensee’s internal business purposes and not as a service bureau, ASP, or other service provided to third parties. To facilitate access to the Service, AgileCraft will supply default administrator login credentials (“Login Credentials”) for Licensee to assign user names and passwords to all personnel that will access the Service. Licensee assumes sole responsibility for use of the Login Credentials. If Login Credentials are misappropriated, Licensee will notify AgileCraft support staff immediately by telephone and will concurrently provide written notice to AgileCraft whereupon AgileCraft will disable the Login Credentials reported by Licensee and issue replacement Login Credentials.

1.2 Order Pricing. The annual license fees for the Service (the “Service Fees”) are based upon the number of Authorized Users specified on the Order and the per user pricing in the GSA Schedule contract.

1.3 Ownership. AgileCraft reserves all right, title and interest in and to the Services and Documentation under all applicable federal, state and local laws of the United States and any other jurisdiction. Licensee is not acquiring any right or interest in the Service or the Documentation except the license to use the Service and the Documentation granted pursuant to Section 1.1.

1.4 Data. AgileCraft does not own any data, information, or material that Licensee submits to the Service in the course of using the Service (“Licensee Data”). Licensee has sole responsibility for the accuracy, quality, integrity, legality, reliability, appropriateness, and intellectual property ownership or right

AgileCraft may use the Licensee Data for purposes of providing the Service, providing Support Services and confirming Licensee’s compliance with the terms of this Agreement. AgileCraft will perform a full back-up of Licensee Data on a recurring schedule. AgileCraft reserves the right to withhold, remove, and/or discard Licensee Data without notice sixty days following Termination of this Agreement.

1.5 Term. Licensee’s right to use the Service and the Documentation will commence upon the applicable Order Effective Date and continue for the Initial Term, as specified on the applicable Order (the “Initial Term”). As used in this Agreement, “Service Term” means the Initial Term and each Renewal Term.

1.6 Restrictions on Use. Licensee will not, directly or indirectly, without the prior written consent of AgileCraft:

(a) sublicense, transfer, or otherwise assign its rights in the Service or the Documentation to any third-party nor allow any third-party to access or use the Service or the Documentation; (b) modify the software elements of the Service or the Deliverables; (c) create derivative works of the Service or the Documentation or any components thereof; (d) translate, reverse engineer, de-compile, or disassemble the software elements of the Service for any other reason; or (e) copy the software elements of the Service or the Documentation, in whole or in part, except as permitted by this Agreement. The Service may only be used for lawful purposes; transmission of any material which, in the sole determination of AgileCraft, is threatening, obscene, libelous, defamatory, discriminatory, or is otherwise offensive or illegal will constitute a material breach of this Agreement. Licensee must retain all legends relating to the copyright, trademarks, patents, or confidentiality on all copies of the Documentation or any print of a screen display from the Service.

2. 2. Limited Warranties and Remedies

2.1 Warranties. AgileCraft warrants to Licensee that:

(a) The Service, when used as permitted under this Agreement and in accordance with the Documentation, will conform, in all material aspects, to the Documentation;

(b) The Service will be available at least 99.5% of the time during each month, excluding Excusable Downtime (“Uptime Commitment”); and

(c) The Service does not contain any computer code that is intended to (i) disrupt, disable, harm, or otherwise impede in any manner, the operation of Licensee’s software, firmware, hardware, computer systems or network (sometimes referred to as “viruses” or “worms”), (ii) permit unauthorized access to Licensee’s network and computer systems (sometimes referred to as “traps”, “access codes” or “trap door” devices), or any other similar harmful, malicious or hidden procedures, routines or mechanisms which could cause such programs to cease functioning or to damage or corrupt data, storage media, programs, equipment or communications, or otherwise interfere with Licensee’s operations.

THE WARRANTIES SPECIFIED IN THIS SECTION 2.1 ARE EXCLUSIVE. AGILECRAFT EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES REGARDING THE SERVICE AND DOCUMENTATION, EXPRESS OR IMPLIED, INCLUDING NONINFRINGEMENT. AGILECRAFT DOES NOT WARRANT THAT THE SERVICE WILL BE ERROR FREE, MEET LICENSEE’S SPECIFIC NEEDS, OR THAT USE OF THE SERVICE WILL BE UNINTERRUPTED. THIS CLAUSE DOES NOT LIMIT OR DISCLAIM ANY OF THE WARRANTIES SPECIFIED IN THE GSA SCHEDULE 70 CONTRACT UNDER FAR 52.212-4(O). IN THE EVENT OF A BREACH OF WARRANTY, THE U.S. GOVERNMENT RESERVES ALL RIGHTS AND REMEDIES UNDER THE CONTRACT, THE FEDERAL ACQUISITION REGULATIONS, AND THE CONTRACT DISPUTES ACT, 41 U.S.C. 7101-7109.

2.2 Remedy for Breach.

(a) If either of the warranties specified in Section 2.1(a) or 2.1(c) are breached during the Service Term of this Agreement:

(i) Licensee will promptly notify AgileCraft of the breach and any associated details reasonably requested by AgileCraft in its attempt to remedy the problem. Licensee will cooperate with AgileCraft in re-creating the conditions that existed at the time the Service failed, if reasonably requested by AgileCraft.

(ii) AgileCraft will diligently and in good faith attempt to correct the reported defect by repairing or modifying the Service within a commercially reasonable period of time, not to exceed 30 days.

(iii) If any defective portion of the Service causes the entire Service to fail in its essential purpose, and if AgileCraft determines that AgileCraft is unable to cure that defect by repairing or modifying the Service as provided in Section 2.2(a)(ii), then Licensee may elect to terminate its right to use the Service, and Licensee will be entitled to a refund of the Service Fees actually paid to AgileCraft for the unexpired portion of the then current Service Term. In the case of any other breach that AgileCraft is unable to correct in the manner described in Section 2.2(a)(ii) within a commercially reasonable period of time, Licensee's exclusive remedy will be a refund of the Service Fees actually paid to AgileCraft for the unexpired portion of the then-current Service Term in respect of the defective or nonconforming portion of the Service.

(b) If Licensee believes that AgileCraft has breached the Uptime Commitment warranty in Section 2.1(b) in any month, Licensee will so notify AgileCraft and provide the dates and times that the Service was not available. If AgileCraft agrees that the Uptime Commitment was not achieved, AgileCraft will issue Licensee a credit based on the percentage of Service Fees calculated in accordance with the table below for that month. Such credit will be applied against subsequent invoice(s).

Monthly Availability	Percentage Credit
Less than 99.5% but at least 98.0%	5% of the Service Fee divided by 12
Less than 98.0% but at least 95.0%	10% of the Service Fee divided by 12
Less than 95.0%	15% of the Service Fee divided by 12

The service credit is Licensee's sole remedy for a breach of the Uptime Commitment, unless in any period of 3 consecutive months the Availability Percentage during such period is less than 95%, in which event, Licensee will have the right, upon written notice to AgileCraft, to terminate this Agreement and receive a refund of the Service Fees actually paid for the unexpired portion of the then-current Service Term.

2.3 Indemnification. AgileCraft will indemnify and hold harmless Licensee and its officers, directors, and employees against any losses, liabilities, damages and expenses (including reasonable attorneys' fees) arising out of or related to (a) any claim that the Service or the Documentation infringes any patent, copyright, trade secret, trademark or other proprietary right of a third party (an "IP Claim"); or (b) any claim relating to death, personal injury, or property damage caused by AgileCraft's negligence or

willful misconduct while performing services on Licensee's premises (an "Other Claim"). As used in this Agreement "Claim" means any IP Claim or Other Claim. AgileCraft's obligation to indemnify Licensee for a Claim is contingent upon Licensee promptly notifying AgileCraft of any such Claim, and cooperating with AgileCraft in the defense of the Claim. If an IP Claim is commenced against Licensee or is in the judgment of AgileCraft likely or Licensee's use of the Service or the Documentation is enjoined, AgileCraft may at AgileCraft's option: (1) modify or replace the Service so that it performs comparable functions without infringement; or (2) obtain a royalty-free license for Licensee to use the Service.

3. 3. MAINTENANCE AND SUPPORT

3.1 Scope of Services. During the Service Term AgileCraft will furnish Maintenance and Support Services ("Support Services") as follows:

(a) **Help Desk.** AgileCraft will provide the Licensee Representatives reasonable access to its technical support personnel between the hours of 9:00 a.m. and 7:00 p.m. eastern time, Monday through Friday, excluding company holidays. Outside of normal technical support hours, AgileCraft will provide Licensee Representatives reasonable access to its technical support staff via e-mail and voice mail. The Help Desk can be reached by e-mailing support@AgileCraft.com.

(b) **Error Correction.** AgileCraft will keep the Service performing in conformity with the Documentation in all material respects and will correct Errors related to the Service when reported to AgileCraft in accordance with the Technical Support Procedures.

(c) **Minimal Interruptions.** AgileCraft will perform the Support Services in a manner that minimizes interruptions in the availability or functioning of the Service.

3.2 Excluded Services. Support Services do not include new modules, Customizations, or support for problems resulting from: (i) the misuse, improper use, unauthorized alteration, or damage of the Service; (ii) modifications in any version of the Service not made or authorized by AgileCraft; or (iii) combination of the Service with other programming or equipment to the extent such combination has not been approved by AgileCraft. Licensee will be responsible for and will pay AgileCraft's normal charges and expenses for time or other resources provided by AgileCraft to diagnose or attempt to correct any problem described in this Section.

3.3 Technical Support Procedures.

(a) **Priority A/1 Errors.** Within 24 hours of learning of a Priority A/1 Error, AgileCraft will: (i) assign AgileCraft engineers to correct the Error; and (ii) initiate work to provide Licensee with an Error Correction. AgileCraft will provide Licensee with an Error Correction within five (5) business days from the date that AgileCraft reproduces the Error or as otherwise agreed to by the parties.

(b) **Priority B/2 Errors.** Within 24 hours of learning of a Priority B/2 Error, AgileCraft will: (i) assign AgileCraft engineers to correct the Error; and (ii) initiate work to provide Licensee with an Error Correction. AgileCraft will provide Licensee with an Error Correction within fifteen (15) business days from the date that AgileCraft reproduces the Error or as otherwise agreed to by the parties.

(c) **Priority C/3 Errors.** AgileCraft will use commercially reasonable efforts to include an Error Correction for the Error in the next major release of the Service.

(d) **Errors not Caused by the Service.** If AgileCraft reasonably believes that a problem reported by Licensee may not be due to an Error in the Service, AgileCraft will so notify Licensee, and AgileCraft will not proceed further, unless mutually agreed to by the parties.

3.4 Licensee Responsibilities. Upon the execution of each Order, Licensee will designate one or two individuals as the representatives of Licensee (the "Licensee Representatives"), whose names are set forth on each Order, and who will be authorized to make decisions and grant requests on behalf of Licensee. Licensee hereby authorizes AgileCraft to rely on all communications from and decisions of the Licensee Representatives.

3.5 Training and Consulting Services. If so indicated on an Order, AgileCraft will provide to Licensee training services ("Training") and/or the consulting services identified on a Statement of Work attached to the Order and executed by Licensee and AgileCraft ("Consulting"). Training and Consulting are sometimes collectively referred to as "Professional Services." If Licensee requires a change in the Professional Services delivery dates, AgileCraft will use reasonable efforts to accommodate the change and schedule alternatives; however, if the Professional Services are not rescheduled for completion prior to the expiration of the Training Credits (if any, as set forth on the applicable Order), the Training Credits will be cancelled and not available to Licensee. ;

AgileCraft hereby grants Licensee a non-exclusive, non-transferable license to use and modify all documentation, reports, and any other deliverables delivered as a result of the Professional Services ("Deliverables") solely for Licensee's internal use. AgileCraft warrants that Professional Services will be performed in a workmanlike, professional manner by qualified personnel, and that Consulting will be performed in conformity with the terms of the applicable Statement of Work. In the event of a breach of this warranty, Licensee will notify AgileCraft of the breach within ninety (90) days of completion of the Professional Services and AgileCraft will promptly re-perform the Professional Services at no additional cost to Licensee. If AgileCraft is unable to correct the deficient performance of Professional Services within a commercially reasonable time, Licensee may terminate the applicable Statement of Work (if the Professional Services are Consulting) and receive a refund of amounts paid in respect of the deficient Professional Services.

4. 4. Service Fees, Payments

4.1 Service Fees. Licensee agrees to pay to AgileCraft the Service Fees for the Service and fees for Professional Services ("Professional Services Fees") as specified on each Order.

4.2 Payment Terms. See GSA Schedule contract..

4.3 Taxes.

4.4 Verification of Usage. AgileCraft reserves the right to verify that Licensee's Use of the Service has not exceeded the cumulative number of Authorized Users under all of Licensee's Orders. If AgileCraft determines that Licensee's Use of the Service has exceeded the cumulative number of Authorized Users under all of Licensee's Orders, AgileCraft will so notify Licensee in writing, and Licensee will submit an Order for a sufficient number of Authorized Users required to establish compliance with the terms of this Agreement within thirty (30) days after receipt of the AgileCraft's written notice.

5. 5. Essential Purpose

The essential purpose of Section 6 is to limit the potential liability of the parties arising under this Agreement. The parties acknowledge that the limitations set forth in this Section 6 are intricate to the amount of consideration levied in connection with the license of the Services and that, were Contractor to assume any further liability, such consideration would out of necessity, been set much higher.

6. 6. Limitation of Liability

IN NO EVENT WILL EITHER PARTY, ITS AFFILIATES OR THEIR RESPECTIVE DIRECTORS, OFFICERS OR EMPLOYEES BE LIABLE TO THE OTHER PARTY, ITS AFFILIATES OR THEIR RESPECTIVE DIRECTORS, OFFICERS OR EMPLOYEES FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, PUNITIVE, OR EXEMPLARY DAMAGES, INCLUDING LOST PROFITS, LOST REVENUE, BUSINESS INTERRUPTION, LOSS OF DATA, OR LOSS OF USE IN ANY WAY RELATED TO THIS AGREEMENT, THE PERFORMANCE OF ANY TRAINING SERVICES OR PROFESSIONAL SERVICES PURSUANT TO THIS AGREEMENT, OR USE OF THE SERVICE, WHETHER IN AN ACTION IN CONTRACT, BREACH OF WARRANTY OR TORT, EVEN IF SUCH PARTY HAS BEEN ADVISED OF, OR COULD HAVE REASONABLY FORESEEN, THE POSSIBILITY OF SUCH DAMAGES.

IN NO EVENT WILL EITHER PARTY'S LIABILITY TO THE OTHER EXCEED THE AMOUNTS PAID TO AGILECRAFT PURSUANT TO THE ORDER FOR THE SERVICE OR PROFESSIONAL SERVICES THAT GAVE RISE TO THE CLAIM OR DAMAGE, REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, NEGLIGENCE, TORT, OR OTHERWISE. THE FOREGOING LIMITATION OF LIABILITY WILL NOT APPLY TO (A) AGILECRAFT'S INDEMNIFICATION OBLIGATIONS IN SECTION 2.3, (B) EITHER PARTY'S BREACH OF ITS CONFIDENTIALITY OBLIGATIONS PURSUANT TO SECTION 7, OR (C) LICENSEE'S BREACH OF SECTION 1 AND SECTION 4.4.

THIS CLAUSE SHALL NOT IMPAIR THE U.S. GOVERNMENT'S RIGHT TO RECOVER FOR FRAUD OR CRIMES ARISING OUT OF OR RELATED TO THIS CONTRACT UNDER ANY FEDERAL FRAUD STATUTE, INCLUDING THE FALSE CLAIMS ACT, 31 U.S.C. 3729-3733. FURTHERMORE, THIS CLAUSE SHALL NOT IMPAIR NOR PREJUDICE THE U.S. GOVERNMENT'S RIGHT TO EXPRESS REMEDIES PROVIDED IN THE GSA SCHEDULE CONTRACT (E.G., CLAUSE 552.238-75 – PRICE REDUCTIONS, CLAUSE 52.212-4(H) – PATENT INDEMNIFICATION, AND GSAR 552.215-72 – PRICE ADJUSTMENT – FAILURE TO PROVIDE ACCURATE INFORMATION).

7. 7. Confidentiality

7.1 Confidential Information. Unless required by law, each recipient of Confidential Information (the "Recipient") agrees that it will not disclose, provide, or otherwise make available any Confidential Information of the other Party (the "Disclosing Party") during the Service Term and for a period of 5 years thereafter, and in the case of Confidential Information that constitutes a trade secret under applicable law, for as long as such Confidential Information remains a trade secret. Each Recipient agrees that it will obtain a written confidentiality agreement from each third party (consultant or any other person) not governed by this Agreement who is provided access to the Confidential Information of the Disclosing Party. In addition, each Recipient agrees that it will *not*:

(a) Use the Disclosing Party's Confidential Information for any purpose beyond the scope of this Agreement;

(b) Copy any part of the Confidential Information or disclose any part of the Confidential Information to any third party

other than Recipient's employees or consultants who need the information to perform their duties;

(c) Authorize or permit any such employee or consultant to use or disclose any part of the Confidential Information in violation of this Agreement;

(d) Reverse engineer, de-compile, or disassemble any of the Confidential Information nor use any of the Confidential Information for the purpose of reverse engineering, de-compiling, or disassembling the Service, the software elements of the Service; or

(e) Produce any product nor offer any service of any nature whatsoever based in whole or in part on the Confidential Information nor cause or assist any third party in doing so.

7.2 Exclusions. The Recipient's obligations under this Agreement will not apply to any portion of the Confidential Information that:

(a) At the time of disclosure to Recipient, was in the public domain or subsequently becomes a part of the public domain through no breach of this Agreement;

(b) Recipient had in its possession at the time of disclosure by the Disclosing Party, as established by written documentation in existence at that time, and that was not acquired directly or indirectly from the Disclosing Party or with knowledge of confidentiality restrictions;

(c) Recipient subsequently acquires by lawful means from a third-party who is under no obligation of confidentiality or non-use owed to Disclosing Party; or

(d) Recipient subsequently independently develops without any use of or reference to the Confidential Information.

7.3 Disclosure Pursuant to Legal Process. If Recipient is legally compelled to disclose any portion of the Confidential Information in connection with a lawsuit or similar proceeding or to any governmental agency, Recipient will give Disclosing Party prompt notice of that fact, including in its notice the legal basis for the required disclosure and the nature of the Confidential Information that must be disclosed. Recipient will cooperate fully with Disclosing Party in obtaining a protective order or other appropriate protection relating to the disclosure and subsequent use of the Confidential Information. Recipient will disclose only that portion of the Confidential Information that is legally required to be disclosed.

7.4 Return of Confidential Information. Upon request by the Disclosing Party, the Recipient will return any portion of the Confidential Information that Recipient no longer has the right to use, including all copies of that Confidential Information, and all abstracts, summaries or documents produced using that Confidential Information, or, if so directed by the Disclosing Party in writing, the Recipient will destroy all copies of that Confidential Information (including abstracts, summaries or documents produced using that Confidential Information) and will certify to the Disclosing Party in writing that all copies, abstracts, summaries, and documents have been destroyed.

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8.2 Effect of Termination.

(a) *Termination of Orders.* Within 30 days of the expiration of the Service Term or termination of an Order, Licensee must reduce its use by the number of Authorized Users specified in such Order or, if Licensee is party only to a single Order, cease all Use of the Service.

(b) *Termination of Agreement.* Termination of the Agreement terminates this Agreement and all Orders hereunder. Within 30 days of the termination of this Agreement, Licensee must cease all Use of the Service.

(c) *No Refunds.* Except as provided in Section 2.2 and Section 2.3 Service Fees are non-refundable.

(d) *Licensee Data.* Upon Customer's written request and subject to availability of resources, AgileCraft will extract Licensee Data for conversion to another system ("Deconversion Services") at AgileCraft's then current time and material rates for Deconversion Services. Successful completion of Deconversion Services is subject to the cooperation of Customer, the vendor of the system or service to which Licensee intends to migrate, and specific written, specific definition of the data fields and formats and to be extracted.

8.3 Survival. The provisions of Sections 1.3, 1.4, 2.3, 4, 6, 7, 8, and 9 of this Agreement will survive and continue in full force and effect notwithstanding the termination or expiration of this Agreement.

9. 9. General Provisions

9.1 No Assignment. Neither Party may assign or transfer its rights and obligations under this Agreement without prior written approval of the other.

9.2 Force Majeure. Neither Party will be in default by reason of any failure in performance of this Agreement if such failure arises, directly or indirectly, out of causes reasonably beyond the direct control or foreseeability of such Party, including acts of God or of the public enemy, U.S. or foreign governmental acts in either a sovereign or contractual capacity, fire, flood, epidemic, restrictions, strikes, and/or freight embargoes.

9.3 No Waiver. Any failure by either Party to detect, protest, or remedy any breach of this Agreement will not constitute a waiver or impairment of any such term or condition, or the right of such Party at any time to avail itself of such remedies as it may have for any breach or breaches of such term or condition. A waiver can only occur pursuant to the prior written express permission of an authorized officer of the other Party.

9.4 Notices. All notices, communications, and deliveries under this Agreement (other than routine support calls) must be made in writing, signed by the Party making the same, must specify the Section under this Agreement pursuant to which it is given or being made (if applicable), and will be given or made to the address(s) specified as the "Address for Notices" on the signature page to this Agreement.

9.5 Severability. If any provision hereof is declared invalid by a court of competent jurisdiction, such provision will be ineffective only to the extent of such invalidity, so that the remainder of that provision and all remaining provisions of this Agreement will continue in full force and effect.

9.6 Governing Law. This Agreement and the rights of the Parties hereunder will be governed by and construed in accordance with the laws of the United States of America, without regard to conflicts of laws provisions thereof.

9.7 Export. Licensee represents and warrants that Licensee is not (a) located in an embargoed country as designated by the Office of Foreign Asset Control of the Treasury Department (an "Embargoed Country"), or (b) listed on the prohibited persons list maintained by the Bureau of Industry and Security of the Department of

Commerce (the "Prohibited Persons List"). Licensee will not export or re-export, or allow the export or re-export of the Software or any copy, portion or direct product of the foregoing, in violation of any export laws, restrictions, national security controls or regulations of the United States or other applicable foreign agency or authority.

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9.10 **Publicity.** Except as otherwise provided herein, each party agrees to submit to the other party all press releases and other publicity matters or materials relating to this Agreement, or mentioning or implying the trade names, logos, trademarks or service marks of the other party, and each party further agrees not to publish or use such press releases or publicity matters or materials, without the prior written consent of other party except to the extent that a Party determines that a disclosure is required by applicable law.

9.11 **Interpretation of Agreement.** The following rules of interpretation must be applied in interpreting this Agreement: (a) the section and subsection headings used in this Agreement are for reference and convenience only, and will not enter into the interpretation of this Agreement, (b) all references to Sections and Exhibits are to the Sections in this Agreement and Exhibits to this Agreement, as the case may be, (c) the provisions of the Exhibits are incorporated in this Agreement, and (d) as used in this Agreement, the term "including" will always be deemed to mean "including without limitation."

9.12 **Independent Contractors.** In the performance of this Agreement, each party is an independent contractor, and the employees, officers and agents of one party will act only in the capacity of representatives of that party and not as employees, officers or agents of the other party.

10. 10. Definitions

"Affiliate" means any entity directly or indirectly controlling, controlled by, or under common control with Customer, where "control" means ownership of at least 50% of the equity or beneficial interests of such entity or the right to vote for or appoint a majority of the board of directors or other governing body of such entity.

"Customization" means any modification or addition to the Service that changes its utility, efficiency, functional

capability, or application, but that does not constitute an Error Correction or New Module. Customization is not included in Support Services and is subject to a separate charge.

"Confidential Information" means all business or technical information of the disclosing Party that is not generally known to the public and that derives value from not being generally known, whether such information is disclosed orally or in writing. Confidential Information may include any software, documentation, flow-chart, logic diagram, design proposal, screen shot, screen shot concept, algorithm, device, compilation of information, method, technique, or process. Notwithstanding this Agreement, the Service and the Documentation constitute Confidential Information of AgileCraft, Inc., and its licensors.

"Documentation" means the on-line information and materials, relating to the use of the Service made available to Licensee in connection with the license of the Service.

"Error" means a programming error, logic error, or defect within the Service which causes it to operate incorrectly or otherwise not in conformity with the associated Documentation and that is reproducible by AgileCraft from the deliverables furnished by Licensee.

"Error Correction" means either a modification or addition that, when made or added to the Service, brings the Service into conformity with its Documentation in all material respects or a procedure or routine that, when observed in the regular operation of the Service, avoids the practical adverse effect of such nonconformity.

"Excusable Downtime" means time that the Service is not available to Licensee because of (a) scheduled maintenance, (b) outages caused by misuse of the Service by Licensee, (c) failure of the Internet and/or public switched network, and (d) events that are beyond AgileCraft's reasonable control.

"Priority A/1 Error" means an Error that renders the Service inoperative or causes the Service to substantially fail in routine daily processing activities.

"Priority B/2 Error" means an Error that substantially degrades the performance of the Service or materially restricts use of the Service in routine daily processing activities.

"Priority C/3 Error" means an Error that causes only a minor impact on the use of the Service.

AGILECRAFT LLC
ON-PREMISE SOFTWARE LICENSE AND SERVICES AGREEMENT

THIS SOFTWARE LICENSE AND SERVICES AGREEMENT (the "**Agreement**") is made and entered into this ____ day of _____, 2014 (the "**Effective Date**"), by and between AGILECRAFT LLC ("**AgileCraft**") and an Ordering Activity, an entity entitled to order under GSA Schedule contracts as defined in GSA Order ADM 4800.2H, as may be revised from time to time ("**Customer**"). The Customer and its Affiliates may procure Software, Support Services and Professional Services pursuant to this Agreement. Customer or a Customer Affiliate that submits an Order is hereinafter referred to as "**Licensee**." Capitalized terms not otherwise defined have the meanings assigned in Section 10 below.

11. LICENSE OF SOFTWARE

11.1 Grant of License. AgileCraft grants to Licensee and Licensee accepts from AgileCraft, subject to the terms and conditions of this Agreement, a fully paid-up, perpetual (subject to termination as provided in "Termination" below), non-exclusive, and non-transferable license to: (a) Install the software described on each Order accepted by AgileCraft (the "Software") in machine-readable form on computers owned or controlled by Licensee, and (b) use the Software and Documentation (collectively, the "Licensed Materials") for Licensee's internal business purposes and not as a service bureau, ASP, or other service provided to third parties. Licensee may (i) make a reasonable number of copies of the Software (in object code form) for backup and archival purposes, and to support Licensee's use of the Software as permitted by this Agreement, and (ii) make additional copies of the Documentation, solely for Licensee's internal training and support purposes. The Software may not be used by more than the number of users indicated on all Orders ("Authorized Users"). "Use" means that Licensee may access, run, or otherwise interact with the Software in accordance with the Documentation and the rights granted herein by AgileCraft. Unless otherwise specified by AgileCraft, the Software shall be delivered electronically from AgileCraft's Secure File Service.

11.2 Order Pricing. The license fees for the Software (the "License Fees") are based upon the number of Authorized Users specified on an Order and the per user pricing in the GSA Schedule contract.

11.3 Ownership. AgileCraft reserves all rights not expressly granted to Licensee and retains all right, title and interest in and to the Licensed Materials under all applicable federal, state and local laws of the United States or any other jurisdiction. Except as provided in Section 3.7, AgileCraft is not obligated to provide, and Licensee acquires no right of any kind with respect to, the source code of the Software.

11.4 Restrictions. Except as expressly permitted under this Agreement, Licensee will not, directly or indirectly, (a) sublicense, transfer, or otherwise assign its rights in the Licensed Materials to any third-party nor allow any third-party to access or use the Licensed Materials; (b) modify the Software or Deliverables, create derivative works of the Software or Deliverables, or translate, reverse engineer, de-compile, or disassemble the Software or Deliverables to develop any other computer program or for any other reason; or (c) copy the Licensed Materials or Deliverables, in whole or in part, without the prior written consent of AgileCraft. The original and all copies of the Licensed Materials remain the sole property of AgileCraft, subject to all of the confidentiality and other restrictions set forth in this Agreement. Licensee must retain all legends relating to copyright, trademarks, patents, or confidentiality on all copies of the Licensed Materials.

12. WARRANTIES AND INDEMNIFICATION

12.1 Warranties. AgileCraft warrants to Licensee that:

(a) For a period of ninety days (the "Warranty Period") after the Effective Date the Software, when used as permitted under this Agreement and in accordance with the Documentation, will conform, in all material aspects, to the Documentation;

(b) except for license keys limiting the number of Authorized Users in accordance with the Orders, the Software does not contain any computer code that is intended to (i) disrupt, disable, harm, or otherwise impede in any manner, including aesthetic disruptions or distortions, the operation of the Software, or any other associated software, firmware, hardware, computer system or network (sometimes referred to as "viruses" or "worms"), (ii) permit unauthorized access to the Software (sometimes referred to as "traps", "access codes" or "trap door" devices), or any other similar harmful, malicious or hidden procedures, routines or mechanisms which could cause such programs to cease functioning or to damage or corrupt data, storage media, programs, equipment or communications, or otherwise interfere with Licensee's operations.

THE WARRANTIES SPECIFIED IN THIS SECTION 2.1 ARE EXCLUSIVE. AGILECRAFT EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES REGARDING THE LICENSED MATERIALS, EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NONINFRINGEMENT. AGILECRAFT DOES NOT WARRANT THAT THE SOFTWARE WILL BE ERROR FREE OR WILL MEET LICENSEE'S SPECIFIC NEEDS OR THAT USE OF THE SOFTWARE WILL BE UNINTERRUPTED.

12.2 Remedy for Breach. If the warranty specified in Section 2.1(a) is breached during the Warranty Period, or the warranty specified in Section 2.1(b) is breached during the Term of this Agreement:

(a) Licensee will promptly notify AgileCraft of the breach and any associated details reasonably requested by AgileCraft in its attempt to remedy the problem. Licensee will cooperate with AgileCraft in re-creating the conditions that existed at the time the Software failed, if reasonably requested by AgileCraft.

(b) AgileCraft will diligently and in good faith attempt to correct the reported defect by repairing or modifying the Software within a commercially reasonable period of time, not to exceed 30 days.

(c) If any defective portion of the Software causes the entire Software to fail in its essential purpose, and if AgileCraft determines that AgileCraft is unable to cure that defect by repairing or modifying the Software as provided in Section 2.2(b), then Licensee may elect to terminate its right to use the Licensed Materials and return the Licensed Materials to AgileCraft. Licensee will then be entitled to recover all License Fees paid to AgileCraft pursuant to the applicable Order with respect to the Software.

12.3 Indemnification. AgileCraft will indemnify and hold harmless Licensee and its officers, director and employees against any losses, liabilities, damages and expense (including without limitation, reasonable attorneys' fees) arising out of or related to (a) any claim that the Software infringes any patent, or a copyright, trade secret, trademark or other proprietary right of a third party (an "IP Claim"); or (b) any claim relating to death, personal injury, or property damage caused by AgileCraft's negligence or willful misconduct while performing services on Licensee's premises (an "Other Claim"). As used in this Agreement "Claim" means any IP Claim or Other Claim. AgileCraft's obligation to indemnify Licensee for a Claim is contingent upon Licensee promptly notifying AgileCraft of any such Claim, and cooperating with AgileCraft in the defense of the Claim. If an IP Claim is commenced against Licensee or is in the judgment of AgileCraft likely or Licensee's use of the Software is enjoined, AgileCraft may, at AgileCraft's option, (a) modify or replace the Software so that it performs comparable functions without infringement; or (b) obtain a royalty-free license for Licensee to use the Software.

13. MAINTENANCE AND SUPPORT

13.1 Scope of Services. During the Service Term AgileCraft will furnish Maintenance and Support Services ("Support Services") as follows:

(a) **Help Desk.** AgileCraft will provide the Licensee Representatives reasonable access to its technical support personnel between the hours of 9:00 a.m. and 7:00 p.m. eastern time, Monday through Friday, excluding national holidays. Outside of normal technical support hours, AgileCraft will provide Licensee Representatives reasonable access to its technical support staff via e-mail and voice mail. The Help Desk can be reached by e-mailing support@AgileCraft.com.

(b) **Error Correction.** AgileCraft will keep the Software performing in conformity with the Documentation in all material respects and will correct Errors when reported to AgileCraft in accordance with the Technical Support Procedures described below.

(c) **New Releases & Updates.** AgileCraft may, from time to time, issue new Releases or Updates and will make available to Licensee such Releases or Updates promptly after AgileCraft makes such Release or Update commercially available.

(d) **Support for Current Release.** AgileCraft will provide Support Services for the then current Release of the Software (the "**Current Release**") and the four Releases of the Software immediately preceding the Current Release.

13.2 Excluded Services. Support Services do not include new modules, Customizations, support of Releases other than as provided in Section 3.1(d) or support for problems resulting from: (i) the misuse, improper use, unauthorized alteration, or damage of the Software; (ii) modifications in any version of the Software not made or authorized by AgileCraft; (iii) combination of the Software with such other programming or equipment to the extent such combination is not supported by AgileCraft. Licensee will be responsible for and will pay AgileCraft's normal charges and expenses for time or other resources provided by AgileCraft to diagnose or attempt to correct any problem described in this Section 3.2.

13.3 Cooperation of Licensee. Licensee will notify AgileCraft promptly following the discovery of any Error, and, if requested by AgileCraft, will (a) submit to AgileCraft a listing of output and any other data that AgileCraft may reasonably require in order to reproduce the Error, and (b) provide screen shots, and initiate a "webex" or similar presentation that will permit AgileCraft personnel to observe the operation of the Software in Licensee's environment.

13.4 Technical Support Procedures.

(a) **Priority A/1 Errors.** Within 24 hours of learning of a Priority A/1 Error, AgileCraft will: (i) assign AgileCraft engineers to correct the Error; and (ii) initiate work to provide Licensee with an Error Correction. AgileCraft will provide Licensee with an Error Correction within five (5) business days from the date that AgileCraft reproduces the Error or as otherwise agreed to by the parties.

(b) **Priority B/2 Errors.** Within 24 hours of learning of a Priority B/2 Error, AgileCraft will: (i) assign AgileCraft engineers to correct the Error; and (ii) initiate work to provide Licensee with an Error Correction. AgileCraft will provide Licensee with an Error Correction within fifteen (15) business days from the date that AgileCraft reproduces the Error or as otherwise agreed to by the parties.

(c) **Priority C/3 Errors.** AgileCraft will use commercially reasonable efforts to include an Error Correction for the Error in the next major release of the Service.

(d) **Errors not Caused by the Software.** If AgileCraft reasonably believes that a problem reported by Licensee is not an Error, AgileCraft will so notify Licensee, and AgileCraft will not proceed further, unless mutually agreed by the parties. If after mutual agreement, AgileCraft proceeds and the problem is diagnosed and determined to NOT be due to an Error, AgileCraft will, at AgileCraft's option, bill Licensee at its then current rates for the time and expenses that AgileCraft incurs in connection with the diagnosis and cure of said problem.

13.5 Licensee Responsibilities. Upon the execution of each Order, Licensee will designate up to two individuals as the representatives of Licensee (the "Licensee Representatives"), whose names are set forth on each Order, and who are authorized to make decisions and grant requests on behalf of Licensee. Licensee hereby authorizes AgileCraft to rely on all communications from and decisions of the Licensee Representatives.

13.6 Training and Consulting Services. If so indicated on an Order, AgileCraft will provide to Licensee training services ("Training") and/or the consulting services identified on a Statement of Work attached to the Order and executed by Licensee and AgileCraft ("Consulting"). Training and Consulting are, collectively, the "Professional Services." Licensee will pay the fees for the Services as set forth on the applicable Order. If Licensee requires a change in the Professional Service delivery dates, AgileCraft will use reasonable efforts to accommodate the change and schedule alternatives; however, if the Professional Services are not rescheduled for completion prior to the expiration of the Training Credits (if any, as set forth on the applicable Order), the Training Credits will be cancelled and not available to Licensee. AgileCraft hereby grants Licensee a non-exclusive, non-transferable license to use and modify all documentation, reports, and any other deliverables delivered as a result of the Professional Services ("Deliverables") solely for Licensee's internal use. AgileCraft warrants that Services shall be performed in a workmanlike, professional manner by qualified personnel, and that Consulting will be performed in conformity with the terms of the applicable Statement of Work. In the event of a breach of this warranty, Licensee will notify AgileCraft of the breach within ninety days after completion of the Professional Services and AgileCraft will promptly re-perform the Professional Services at no additional cost to Licensee. If AgileCraft is unable to correct the deficient performance of Professional Services within a reasonable time, Licensee may terminate the applicable Statement of Work (if the Professional Services are Consulting) and receive a refund of amounts paid in respect of the deficient Professional Services.

13.7 Source Code Release. AgileCraft will deliver a copy of the source code of the Software to Licensee within fifteen (15) days of Licensee's request if: (a) AgileCraft: (i) no longer generally makes Support Services available to its customers, or (ii) ceases to do business in the ordinary course for a period of at least thirty (30) consecutive days and there is no successor to the business and assets of AgileCraft, (b) Licensee is then entitled to receive Support Services; and (c) Licensee has not materially breached any provision of this Agreement, which breach remains uncured as of the proposed date of release of the Source Code. If the source code of the Software is released to Licensee, the source code will be subject to all of the terms and conditions of this Agreement, provided that the source code may be Used solely to maintain the Software as necessary for Licensee's continued use of the Software.

14. FEES AND PAYMENT

14.1 Software and Services Fees. Licensee will pay to AgileCraft the Fees as specified in each Order.

14.2 Payment Terms. See GSA Schedule contract.

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14.4 Verification of Usage. Promptly following the written request of AgileCraft, Licensee will furnish to the server hosting AgileCraft using WebEx or a similar screen sharing technology. If the Licensing data reflects that Licensee's Use of the Software has exceeded the cumulative number of Authorized Users under all of Licensee's Orders, Licensee will submit an Order for the number of Authorized Users required to establish compliance with the terms of this Agreement within thirty (30) days after receipt of the AgileCraft's written request for the Licensing Details report.

15. Essential Purpose

The essential purpose of Section 6 is to limit the potential liability of the parties arising under this Agreement. The parties acknowledge that the limitations set forth in this Section 6 are intricate to the amount of consideration levied in connection with the license of the Services and that, were Contractor to assume any further liability, such consideration would out of necessity, been set much higher.

16. LIMITATION OF LIABILITY

IN NO EVENT WILL EITHER PARTY, ITS AFFILIATES OR THEIR RESPECTIVE DIRECTORS, OFFICERS OR EMPLOYEES BE LIABLE TO THE OTHER PARTY, ITS AFFILIATES OR THEIR RESPECTIVE DIRECTORS, OFFICERS OR EMPLOYEES FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, PUNITIVE, OR EXEMPLARY DAMAGES, INCLUDING LOST PROFITS, LOST REVENUE, BUSINESS INTERRUPTION, LOSS OF DATA OR LOSS OF USE IN ANY WAY RELATED TO THIS AGREEMENT, THE PERFORMANCE OF ANY SERVICES PURSUANT TO THIS AGREEMENT, OR USE OF THE SOFTWARE, WHETHER IN AN ACTION IN CONTRACT, BREACH OF WARRANTY OR TORT, EVEN IF SUCH PARTY HAS BEEN ADVISED OF, OR COULD HAVE REASONABLY FORESEEN, THE POSSIBILITY OF SUCH DAMAGES.

IN NO EVENT WILL EITHER PARTY'S LIABILITY TO THE OTHER EXCEED THE AMOUNTS PAID TO AGILECRAFT PURSUANT TO THE ORDER FOR THE SOFTWARE OR SERVICES THAT GAVE RISE TO THE CLAIM OR DAMAGE, REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, NEGLIGENCE, TORT, OR OTHERWISE. THE FOREGOING LIMITATION OF LIABILITY SHALL NOT APPLY TO (a) AGILECRAFT'S INDEMNIFICATION OBLIGATIONS IN SECTION 2.3, (b) EITHER PARTY'S BREACH OF ITS CONFIDENTIALITY OBLIGATIONS PURSUANT TO SECTION 7, OR (c) LICENSEE'S BREACH OF SECTION 1 OR SECTION 4..

THIS CLAUSE SHALL NOT IMPAIR THE U.S. GOVERNMENT'S RIGHT TO RECOVER FOR FRAUD OR CRIMES ARISING OUT OF OR RELATED TO THIS CONTRACT UNDER ANY FEDERAL FRAUD STATUTE, INCLUDING THE FALSE CLAIMS ACT, 31 U.S.C. 3729-3733. FURTHERMORE, THIS CLAUSE SHALL NOT IMPAIR NOR PREJUDICE THE U.S. GOVERNMENT'S RIGHT TO EXPRESS REMEDIES PROVIDED IN THE GSA SCHEDULE CONTRACT (E.G., CLAUSE 552.238-75 – PRICE REDUCTIONS, CLAUSE 52.212-4(H) – PATENT INDEMNIFICATION, AND GSAR 552.215-72 – PRICE ADJUSTMENT – FAILURE TO PROVIDE ACCURATE INFORMATION).

17. CONFIDENTIALITY

17.1 Confidential Information. Unless required by law, each recipient of Confidential Information (the "Recipient") agrees that it will not disclose, provide, or otherwise make available any Confidential Information of the other Party (the "Disclosing Party") during the term of this Agreement and for a period of 5 years thereafter, and in the case of Confidential Information that constitutes a trade secret under applicable law, for as long as such Confidential Information remains a trade secret. Each Recipient agrees that it will obtain a written confidentiality agreement from each third party (consultant or any other person) not governed by this Agreement who is provided access to the Confidential Information of the Disclosing Party. In addition, each Recipient agrees that it will *not*:

- (a) Use the Disclosing Party's Confidential Information for any purpose beyond the scope of this Agreement;
- (b) Copy any part of the Confidential Information or disclose any part of the Confidential Information to any third party other than Recipient's employees or consultants who need the information to perform their duties;
- (c) Authorize or permit any such employee or consultant to use or disclose any part of the Confidential Information in violation of this Agreement;
- (d) Reverse engineer, de-compile, or disassemble any of the Confidential Information nor use any of the Confidential Information for the purpose of reverse engineering, de-compiling, or disassembling the Software; or
- (e) Produce any product nor offer any service of any nature whatsoever based in whole or in part on the Confidential Information nor cause or assist any third party in doing so.

17.2 Exclusions. The Recipient's obligations under this Agreement will not apply to any portion of the Confidential Information that:

- (a) At the time of disclosure to Recipient, was in the public domain or subsequently becomes a part of the public domain through no breach of this Agreement;
- (b) Recipient had in its possession at the time of disclosure by the Disclosing Party, as established by written documentation in existence at that time, and that was not acquired directly or indirectly from the Disclosing Party or with knowledge of confidentiality restrictions;
- (c) Recipient subsequently acquires by lawful means from a third-party who is under no obligation of confidentiality or non-use owed to Disclosing Party; or
- (d) Recipient subsequently independently develops without any use of or reference to the Confidential Information.

17.3 Disclosure Pursuant to Legal Process. If Recipient is legally compelled to disclose any portion of the Confidential Information in connection with a lawsuit or similar proceeding or to any governmental agency, Recipient will give Disclosing Party prompt notice of that fact, including in its notice the legal basis for the required disclosure and the nature of the Confidential Information that must be disclosed. Recipient will cooperate fully with Disclosing Party in obtaining a protective order or other appropriate protection relating to the disclosure and subsequent use of the Confidential Information. Recipient will disclose only that portion of the Confidential Information that is legally required to be disclosed.

17.4 Return of Confidential Information. Upon request by the Disclosing Party, the Recipient will return any portion of the Confidential Information that Recipient no longer has the right to use, including all copies of that Confidential Information, and all abstracts, summaries or documents produced using that Confidential Information, or, if so directed by the Disclosing Party in writing, the Recipient will destroy all copies of that Confidential Information (including abstracts, summaries or documents produced using that Confidential Information) and will certify to the Disclosing Party in writing that all copies, abstracts, summaries, and documents have been destroyed.

18. TERMINATION

18.1 Effect of Termination.

- (a) Termination of Orders. Within 30 days of the termination of an Order for Software, Licensee must reduce its use by the number of Authorized Users specified in the Order or, if Licensee is party only to a single Order, cease all Use of the Licensed Materials and delete the Licensed Materials from all computers systems, devices, and media on which the Licensed Materials are then resident. Licensee shall certify to AgileCraft in writing that it has complied with the preceding sentence.
- (b) Termination of Agreement. Within 30 days of the termination of this Agreement, Licensee must cease all Use of the Licensed Materials and delete the Licensed Materials from all computers and media on which the Licensed Materials are then resident. Licensee shall certify to AgileCraft in writing that it has complied with the preceding sentence. Section 6 (Limitation of Liability) and Section 7 (Confidentiality) shall survive the expiration or termination of this Agreement.
- (c) No Refunds. Except as provided in Section 2.2(c), Section 2.3, Section 3.5 and Section 3.7, all fees paid in respect of the Licensed Materials, Support Services and Professional Services are non-refundable.

19. GENERAL PROVISIONS

19.1 No Assignment. Neither Party may assign or transfer its rights and obligations under this Agreement without prior written approval of the other.

19.2 Force Majeure. Neither Party will be in default by reason of any failure in performance of this Agreement if such failure arises, directly or indirectly, out of causes reasonably beyond the direct control or foreseeability of such Party, including acts of God or of the public enemy, U.S. or foreign governmental acts in either a sovereign or contractual capacity, fire, flood, epidemic, restrictions, strikes, and/or freight embargoes.

19.3 No Waiver. Any failure by either Party to detect, protest, or remedy any breach of this Agreement shall not constitute a waiver or impairment of any such term or condition, or the right of such Party at any time to avail itself of such remedies as it may have for any breach or breaches of such term or condition. A waiver can only occur pursuant to the prior written express permission of an authorized officer of the other Party.

19.4 Notices. All notices, communications, and deliveries under this Agreement (other than routine support calls) must be in writing, signed by the Party making the same, must specify the Section under this Agreement pursuant to which it is given or being made (if applicable), and will be given or made to the address(s) specified as the "Address for Notices" on the signature page to this Agreement.

19.5 Severability. If any provision hereof is declared invalid by a court of competent jurisdiction, such provision shall be ineffective only to the extent of such invalidity, so that the remainder of that provision and all remaining provisions of this Agreement will continue in full force and effect.

19.6 Governing Law. This Agreement and the rights of the parties hereunder shall be governed by and construed in accordance with the laws of the United States of America, without regard to conflicts of laws provisions thereof.

19.7 Export. Licensee represents and warrants that Licensee is not (a) located in an embargoed country as designated by the Office of Foreign Asset Control of the Treasury Department (an "Embargoed Country"), or (b) listed on the prohibited persons list maintained by the Bureau of Industry and Security of the Department of Commerce (the "Prohibited Persons List"). Licensee shall not export or re-export, or allow the export or re-export of the Software or any copy, portion or direct product of the foregoing, in violation of any export laws, restrictions, national security controls or regulations of the United States or other applicable foreign agency or authority.

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19.10 Publicity. Except as otherwise provided herein, each party agrees to submit to the other party all press releases and other publicity matters or materials relating to this Agreement, or mentioning or implying the trade names, logos, trademarks or service marks of the other party, and each party further agrees not to publish or use such press releases or publicity matters or materials, without the prior written consent of other party except to the extent that a Party determines that a disclosure is required by applicable law.

19.11 Rights in Bankruptcy. All rights and licenses granted under or pursuant to any section of this Agreement are, and shall be deemed to be, for purposes of Section 365(n) of the Bankruptcy Code, 11 U.S.C. § 101 et seq., licenses of rights to "intellectual property" as defined under Section 101(35A) of the Bankruptcy Code; and the Software is, and shall be deemed to be, "embodiment[s]" of "intellectual property" for purposes of same. Licensee shall retain and may fully exercise all of its rights and elections under the Bankruptcy Code or equivalent legislation in any other jurisdiction. Without limiting the generality of the foregoing, AgileCraft acknowledges that the rights and license granted to Licensee pursuant to this Agreement shall not be affected by AgileCraft's rejection of this Agreement in bankruptcy, and shall continue subject to the terms and conditions of this Agreement.

19.12 Interpretation of Agreement. The following rules of interpretation must be applied in interpreting this Agreement: (a) the section and subsection headings used in this Agreement are for reference and convenience only, and will not enter into the interpretation of this Agreement, (b) all references to Sections and Exhibits are to the Sections in this Agreement and Exhibits to this Agreement, as the case may be, (c) the provisions of the Exhibits are incorporated in this Agreement, and (d) as used in this Agreement, the term "including" will always be deemed to mean "including without limitation."

9.13 Independent Contractors. In the performance of this Agreement, each party is an independent contractor, and the employees, officers and agents of one party will act only in the capacity of representatives of that party and not as employees, officers or agents of the other party.

20. DEFINITIONS

"Affiliate" means any entity directly or indirectly controlling, controlled by, or under common control with Customer, where "control" means ownership of at least 50% of the equity or beneficial interests of such entity or the right to vote for or appoint a majority of the board of directors or other governing body of such entity.

"Confidential Information" means all business or technical information of the disclosing Party that is not generally known to the public and that derives value from not being generally known, whether such information is disclosed orally or in writing. Confidential Information may include any software, documentation, flow-chart, logic diagram, design proposal, screen shot, screen shot concept, algorithm, device, compilation of information, method, technique, or process. Notwithstanding this Agreement, the Software and Documentation constitutes Confidential Information of AgileCraft, Inc., and its licensors.

“Customization” means any modification or addition to the Software that changes its utility, efficiency, functional capability, or application, but that does not constitute an Error Correction or New Module.

“Documentation” means the on-line information and materials, relating to the use of the Software made available to Licensee in connection with the license of the Software.

“Error” means a programming error, logic error, or defect within the Software which causes it to operate incorrectly or otherwise not in conformity with the associated Documentation and that is reproducible by AgileCraft from the deliverables furnished by Licensee.

“Error Correction” means either a modification or addition that, when made or added to the Software, brings the Software into conformity with its Documentation in all material respects or a procedure or routine that, when observed in the regular operation of the Software, avoids the practical adverse effect of such nonconformity.

“New Module” means a new module related to the Software which contains business logic not offered or contained in the then current version of the Software and is offered by AgileCraft as a separate option or features and is priced separately.

“Order” means a mutually acceptable ordering document submitted by Licensee to AgileCraft identifying the Support Services, Professional Services and/or Software to be licensed and such other terms and conditions as may be applicable.

“Priority A/1 Error” means an Error that renders the Service inoperative or causes the Service to substantially fail in routine daily processing activities.

“Priority B/2 Error” means an Error that substantially degrades the performance of the Service or materially restricts use of the Service in routine daily processing activities.

“Priority C/3 Error” means an Error that causes only a minor impact on the use of the Service.

“Release” means a new version of the Software that includes improvements to the efficiency, functional capability, or application of the Software and/or Error Corrections.

“Update” means any update to the Software that is not a Release.