



Applied Control Equipment, LLLP
13705 Compark Boulevard
Englewood, CO, 80112
T 1 (303) 799 9300
www.appliedcontrolequipment.com

TERMS OF SERVICE

Last updated: 5/15/2023

1. DEFINITIONS. As used in these Phylax Terms of Service (these “Terms of Service”):

1.1 “**Access Credentials**” means login information, passwords, and security controls through which Customer accesses and uses the Seller Service.

1.2 “**Aggregate Information**” means any information, data and/or metadata derived from use of the Seller Service that (a) is not specific to a person, (b) does not include personally identifiable information, (d) cannot be used, alone or in conjunction with other information, to identify any specific person, (e) does not identify any Seller customer, user of the Seller Service, or company-specific name, and (f) is stripped of all persistent identifiers, such as device identifiers, IP addresses and cookie IDs.

1.3 “**Agreement**” has the meaning set forth in the Order Form.

1.4 “**Customer Content**” means all information, content, text, data, and other materials collected from or transmitted, uploaded, or stored by Customer in the Seller Service, including information collected from Customer Equipment. Customer Content expressly excludes all Seller Technology and Seller Service functionality, and all Seller-supplied information, content, text, data and other technology and materials.

1.5 “**Customer Equipment**” means Seller’s equipment and devices sold or otherwise provided to Customer that interact with the Seller Service, including through interaction with Seller-provided devices installed at Customer’s premises.

1.6 “**Documentation**” means text and/or graphical materials, whether in print or electronic form, that describe the features, functions and use of the Seller Service, and which are made available to Customer by Seller with or in connection with the Seller Service.

1.7 “**Intellectual Property Rights**” means any and all now known or hereafter existing: (a) rights associated with works of authorship, including copyrights, mask work rights, and moral rights; (b) trademark and service mark rights and other similar rights in trademark and service marks, together with all goodwill related thereto; (c) trade secret rights; (d) patents, patent rights, and industrial property rights; (e) layout design rights, design rights, and other proprietary rights of every kind and nature; and (f) registrations, applications, renewals, extensions, or reissues of the foregoing, in each case, in any jurisdiction throughout the world.

1.8 “**Order Form**” means the order form or quotation signed by an authorized representative of each of Seller and Customer or a reseller or other designee thereof, in each case referencing these Terms of Service.

1.9 “**Process**” means any operation or set of operations which is performed upon Customer Content, whether or not by automatic means, including accessing, altering, archiving, backing up, collecting, destroying, disclosing, disposing, distributing, extracting, maintaining, making available, processing, receiving, replicating, retrieving, storing, transferring and transmitting Customer Content.

1.10 “**Seller Offerings**” means the Seller Service, the Documentation, the Support Services, and the Seller Technology.

1.11 “**Seller Service**” means Seller’s software-as-a-service offering set forth in an Order Form that Seller makes generally commercially available to its customers, including all modifications and improvements thereto.

1.12 **"Seller Technology"** means the computer software, computer code, scripts, application programming interfaces, methodologies, templates, tools, algorithms, user interfaces, know-how, trade secrets, techniques, designs, inventions, third-party services, and other tangible or intangible technical material, information and works of authorship underlying or otherwise used to make available the Seller Service.

1.13 **"Subscription Term"** means the period of time set forth in an Order Form during which Customer has the right to access and use the Seller Service.

1.14 **"Support Services"** means the support services to be provided by Seller as described in the Order Form, if any.

2. SELLER SERVICE

2.1 **Access Grant.** Subject to Customer's compliance with the terms and conditions contained in the Agreement and the Documentation and any use limitations in the relevant Order Form, Seller grants to Customer during the applicable Subscription Term a non-exclusive, non-transferable (except to the extent permitted by Section 10.8), worldwide, revocable, non-sublicensable right to allow its authorized employees ("**Users**") to access and use the Seller Service solely to monitor Customer Equipment for Customer's internal business purposes. Subject to and in accordance with this Agreement, including payment of all applicable fees, Seller will use reasonable commercial efforts to make the Seller Service available for use and access by Customer.

2.2 **Modifications to the Seller Service.** Seller reserves the right to modify the Seller Service from time to time, including implementing new features, functionality, or other modifications thereto. Seller may condition the implementation of new features, functionality, or other modifications to the Seller Service on Customer's payment of additional fees.

2.3 **Support Services.** Subject to Seller's receipt of Customer's payment of all applicable subscription fees payable by Customer for the Seller Service, Seller shall provide Customer with Support Services. Seller shall use commercially reasonable efforts to perform all Support Services in accordance with generally accepted industry standards. Customer shall make available in a timely manner, at no charge to Seller, all technical data, computer facilities, programs, files, documentation, test data, sample output, or other information and resources required by Seller as Seller reasonably requires for the performance of Support Services. Customer will be responsible for, and assumes the risk of, any problems resulting from the content, accuracy, completeness, consistency, facilitation, or provision thereof to Seller by Customer. Seller shall have no obligation to support: (a) errors caused by Customer's failure to comply with this Agreement or any other misuse, negligence, abuse, misapplication, or other unpermitted actions or inactions; (b) use of the Seller Service other than as specified in the Documentation; (c) errors beyond the reasonable control of Seller; or (d) any third-party features, services, content, software, technology, or materials ("**Third-Party Materials**").

2.4 **Third-Party Features, Services and Content.** Use of any Third-Party Materials as may be supplied by Seller either in or accessible through the Seller Service may be subject to any applicable third-party terms and conditions made available to Customer with such Third-Party Materials (each, a "**Third-Party Agreement**"), and Seller shall have no liability for any damage or loss caused by such Third-Party Materials or for the use or performance thereof. Each Third-Party Agreement applies to Customer's use of any Third-Party Materials, and Customer agrees to comply with all Third-Party Agreements.

2.5 Data Backup.

(a) Seller will follow its standard archival procedures for storage of Customer Content. In the event of any loss or corruption of Customer Content, Seller will use commercially reasonable efforts to restore the lost or corrupted Customer Content from the latest backup of such Customer Content maintained by Seller or its third-party service provider in accordance with its archival procedures.

(b) Seller will not be responsible for any loss, corruption, destruction, alteration, or unauthorized disclosure of or access to Customer Content directly or indirectly arising from acts or omissions of Customer or a third party. SELLER'S EFFORTS TO RESTORE LOST OR CORRUPTED CUSTOMER CONTENT PURSUANT TO THIS SECTION 2.5 WILL CONSTITUTE SELLER'S SOLE LIABILITY AND CUSTOMER'S SOLE AND EXCLUSIVE REMEDY IN THE EVENT OF ANY LOSS, CORRUPTION, DESTRUCTION, ALTERATION, OR UNAUTHORIZED DISCLOSURE OF OR ACCESS TO CUSTOMER CONTENT.

2.6 Data Security and Data Privacy. Seller agrees to maintain commercially reasonable data security policies, procedures, and controls. Each party shall comply with the requirements of all applicable state, national and international laws and regulations and all applicable industry standards regarding the security, protection and confidentiality of personally identifiable information with respect to the use of or provision of the Seller Service, as applicable. Seller's privacy policy set forth at <https://www.appliedcontrol.com/privacy> shall apply to all Processing of information by the Seller Service. Seller hereby acknowledges and consents to the practices disclosed therein.

2.7 Marketing. Seller may issue a press release after the Effective Date regarding Customer's use of the Seller Service, subject to Customer's written approval thereof (such approval not to be unreasonably withheld). Seller may publicly refer to Customer as a customer of Seller, including on Seller's website and in sales presentations, and may use and display Customer's then-current logo for such purposes, subject to Customer's prior written approval thereof (not to be unreasonably withheld) and compliance with any written guidelines Customer provides to Seller. Seller's use of any trademark of Customer shall inure to the benefit of Customer.

3. ACCESS; OWNERSHIP

3.1 Customer Access. Customer's access and use of the Seller Service is dependent upon access to telecommunications and Internet products and services, including with respect to Customer Equipment. As between the parties, Customer will be solely responsible for acquiring and maintaining all telecommunications and Internet services and other hardware and software required to access and use the Seller Service, including all costs, fees, expenses, and taxes of any kind related to the foregoing. Seller will not be responsible for any loss or corruption of data, lost communications, or any other loss or damage of any kind arising from any such telecommunications or Internet services or any such hardware or software. Seller may provide notice to Customer from time to time of the then-current requirements for telecommunications and Internet products and services in order for Customer to access and use the Seller Service (e.g., supported browser versions).

3.2 Customer Content. Customer hereby grants to Seller a non-exclusive, royalty-free, fully paid, worldwide license under any and all of Customer's Intellectual Property Rights, to (a) Process Customer Content, and (b) to use, copy, execute, host, store, reformat and display the Processed Customer Content (i) during the Subscription Term in connection with the provision of the Seller Service and Support Services to Customer hereunder, and (ii) during and after the Subscription Term in connection with the creation of Aggregate Data. In addition, Seller's third-party contractors and service providers may exercise the licenses granted to Seller in this Section 3.2 for the sole purpose of performing services for or on behalf of Seller in connection with the provision of the Seller Service and Support Services to Customer. If Customer desires to protect Customer's transmission of Customer Content to Seller, it is Customer's sole responsibility to use a secure encrypted connection to communicate with and/or use the Seller Service.

3.3 Users. Customer may grant access to the Seller Service only to Users that are accessing the Seller Service on Customer's behalf and who have been assigned unique Access Credentials. Customer shall be solely responsible for ensuring that all Users comply with the terms of this Agreement. Customer will promptly notify Seller of any suspected, alleged, or actual violation of the terms and conditions of this Agreement and will cooperate with Seller with respect to: (a) investigation by Seller of any suspected, alleged, or actual violation of this Agreement; and (b) enforcement of this Agreement. Seller may suspend or terminate any User's access to the Seller Service upon notice to Customer in the event Seller reasonably determines or has a good faith suspicion that such User has violated any terms of this Agreement. Customer will at all times be responsible for all actions taken under Users' accounts and for any breach of this Agreement by its Users. All acts and omissions of Users are deemed to be those of Customer.

3.4 Feedback. In the event Customer provides Seller any ideas, thoughts, criticisms, suggestions, enhancement requests, techniques, know-how, comments, feedback or other input related to the Seller Offerings (collectively "**Feedback**"), including in response to any product plans or roadmaps shared with Customer, Seller will be free to use and exploit such Feedback and Seller may, in its discretion, incorporate such Feedback into the Seller Service and/or any other service, product, technology, enhancement, documentation or other development incorporating or derived therefrom, in all cases without restriction or obligation of any kind, on account of confidentiality, Intellectual Property Rights or otherwise.

3.5 Ownership.

(a) The Seller Service, the Seller Technology, and the Documentation, all worldwide Intellectual Property Rights in each of the foregoing, and all modifications thereto and derivative works thereof, are the exclusive property of Seller and its suppliers. Except for the rights and licenses expressly granted herein, all rights in and to all of the foregoing are reserved by Seller and its suppliers. Nothing in this Agreement will be deemed to grant to Customer any right to receive a copy of software underlying the Seller Service, or any other Seller Technology, in either object code or source code form. Seller's name and logo, and all Seller product and services names, including the name of the Seller Service and any product or service associated with it, are trademarks of Seller or its licensors, and no right or license to use them is granted in this Agreement. Seller owns all right, title and interest in and to the Aggregate Information it develops and may use Aggregate Information to provide and improve Seller's products and services, and for sales, marketing and other business purposes.

(b) The Customer Content, and all worldwide Intellectual Property Rights in the Customer Content and all modifications and derivative works thereof, are the exclusive property of Customer and its suppliers. Except for the rights and licenses expressly granted herein, all rights in and to all of the foregoing are reserved by Customer and its suppliers.

4. CUSTOMER RESPONSIBILITIES.

4.1 Access Credentials; Account Security. Customer shall: (a) keep all Access Credentials secure and confidential; (b) not allow any Users to provide their Access Credentials to anyone else; and (c) not permit others to use Customer's Access Credentials. Customer will immediately notify Seller if it learns of any unauthorized access to or use of the Seller Service, Customer's account or any Access Credentials assigned to Customer or its Users, or if Customer learns of any other known or suspected breach of security with respect to the Seller Service, Customer's account or any Access Credentials assigned to Customer. Seller reserves the right, in its sole discretion and without liability to Customer, to take any action Seller deems reasonable to ensure the security of the Seller Service and Customer's Access Credentials and account, including terminating or suspending Customer's access or the access of any User, changing passwords, or requesting additional information to authorize activities related to Customer's account.

4.2 Restrictions. Customer will not, directly or indirectly: (a) provide access to or use of the Seller Service or Documentation to any third-party technical contractor or consultant, or to any other third party; (b) copy, adapt, alter, modify, improve, translate or create derivative works of the Seller Service, Seller Technology or Documentation; (c) reverse engineer, decompile, disassemble or otherwise attempt to reconstruct or obtain the source code or underlying ideas or algorithms to all or any portion of the Seller Service; (d) license, sublicense, sell, resell, rent, lease, transfer, assign, sublicense, distribute, time share or otherwise commercially exploit or otherwise provide or make the Seller Service or Documentation available to any third party (including offering the Seller Service to third parties on an application service provider or time-sharing basis, or otherwise providing third-party hosting, or third-party application integration or application service provider-type services, or for any similar services); (e) use the Seller Service in any manner inconsistent with this Agreement; (f) challenge, directly or indirectly, the right, title and/or interest of Seller in and to the Seller Service, Seller Technology or Documentation, or any Seller registration related thereto; (g) without Seller's prior consent conduct any technical security integrity review, penetration test, or vulnerability scan; or (h) access the Seller Service by any means other than through the interface that is provided by Seller for use in accessing the Seller Service.

4.3 Customer Content Restrictions. Customer is responsible for providing all Customer Content. Customer represents, warrants and covenants that: (a) Customer has all rights and licenses necessary to upload or otherwise make available the Customer Content to the Seller Service, and to grant the rights to use the Customer Content for purposes of performing the Seller Service for Customer; and (b) the Customer Content will not and does not (i) infringe any Intellectual Property Rights; (ii) violate the privacy, publicity, or other right of any third party, or any other law, statute, ordinance or regulation; (iii) disclose or provide information protected under any law, agreement or fiduciary relationship, including payment card data, information subject to HIPAA or other regulatory requirement, or other proprietary or confidential information of any third party; or (iv) contain or transmit any virus, Trojan horse, spyware, malware, worm, time bomb, cancelbot, or other disabling devices or other harmful component intended to damage, detrimentally interfere with, surreptitiously intercept or expropriate any system, data or personal information.

5. FEES AND PAYMENT.

5.1 **Fees.** In consideration for the rights granted hereunder, Customer will pay to Seller the fees set forth in each Order Form in accordance with the payment schedule set forth in such Order Form. Seller reserves the right to increase the subscription fees, effective immediately following the end of the then-current Subscription Term, by providing Customer with at least 30 days' prior written notice thereof.

5.2 **Payment.** Unless otherwise specified in any Order Form, all subscription fees are automatically paid using Customer's ACH information on a monthly basis and on the date set forth on the Order Form. Customer will be responsible for submitting accurate and up-to-date payment information and Customer authorizes Seller and Seller's service providers, including payment networks and processors, to obtain, provide and use such payment information to automatically process Customer's payments. All fees are nonrefundable, except as expressly otherwise set forth herein, must be paid in U.S. dollars, and exclude all applicable sales, use, and other taxes.

5.3 **Nonpayment.** In the event that Customer does not pay any fees when due, Seller may do one or more of the following, at its sole election: (a) charge Customer interest at 1.5% per month or the maximum rate permitted by applicable law, whichever is less, from the due date until paid; (b) suspend the provision of the Seller Service until such payment has been made in full; or (c) if Customer participates in the Amortization Program, terminate Customer's participation and invoice Customer for any remaining amount due for the Customer Equipment, which invoice Customer agrees to pay in full within 30 days of receipt. In the event of any dispute of an invoice, Customer shall notify Seller within 15 days of receipt of the invoice of the disputed amount and the reason for the dispute, and the parties agree to negotiate promptly and in good faith a reasonable settlement of the disputed amount. Amounts not disputed within such 15-day period will be deemed valid and may not later be disputed.

5.4 **Taxes.** Customer will be responsible for, and will promptly pay, all taxes and duties of any kind (including sales, use and withholding taxes), if any, associated with this Agreement or Customer's receipt or use of any Seller Offering, except for taxes based on Seller's net income, employees or property. In the event that Seller is required to collect or pay any tax for which Customer is responsible, Seller will invoice Customer and Customer will pay such taxes and duties directly to Seller, unless Customer provides Seller with a valid tax exemption certificate authorized by the appropriate taxing authority.

6. WARRANTIES.

6.1 **Seller Service Warranty.** Seller represents and warrants that the Seller Service will materially conform to the Documentation. In the event of a breach of the foregoing representation or warranty, Customer's sole and exclusive remedy and Seller's sole liability shall be, at Seller's election, to (a) repair or otherwise modify the Seller Service so that it materially conforms to the Documentation or (b) terminate this Agreement and provide Customer with a pro-rata refund. Notwithstanding the foregoing, Seller shall have no liability for any nonconformity resulting from Customer's or any of its Users' acts or omissions, or from any Customer Content or interoperability of Customer infrastructure or Customer Content with the Seller Service.

6.2 DISCLAIMER OF WARRANTIES. EXCEPT FOR THE EXPRESS WARRANTIES IN THIS SECTION 6, SELLER MAKES NO OTHER REPRESENTATIONS OR WARRANTIES, WHETHER, EXPRESS, IMPLIED, OR STATUTORY, INCLUDING REGARDING THE SELLER OFFERINGS OR OTHERWISE WITH RESPECT TO THE SUBJECT MATTER OF THIS AGREEMENT, AND SELLER EXPRESSLY DISCLAIMS THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT OF THIRD-PARTY RIGHTS, AS WELL AS ANY WARRANTY ARISING FROM COURSE OF DEALING OR USAGE OF TRADE.

SELLER SHALL NOT BE RESPONSIBLE FOR ENSURING, AND DOES NOT REPRESENT OR WARRANT THAT: (A) THE SELLER OFFERINGS WILL MEET CUSTOMER'S BUSINESS REQUIREMENTS; (B) THE SELLER OFFERINGS WILL BE ERROR-FREE, TIMELY, SECURE OR UNINTERRUPTED, (C) THE RESULTS OBTAINED FROM USE OF THE SELLER OFFERINGS WILL BE ACCURATE OR RELIABLE; OR (D) ALL DEFICIENCIES IN THE SELLER OFFERINGS CAN BE FOUND OR CORRECTED. SELLER WILL NOT BE RESPONSIBLE FOR: (I) ANY FAILURE CAUSED BY INTEROPERABILITY OF CUSTOMER CONTENT OR CUSTOMER INFRASTRUCTURE WITH THE SELLER OFFERINGS; (II) LOSS OR CORRUPTION OF DATA; OR (III) THE INABILITY OF CUSTOMER TO ACCESS OR INTERACT WITH THE SELLER OFFERINGS DUE TO ANY INTERNET OR NETWORK FAILURE.

7. INDEMNIFICATION.

7.1 Seller Indemnity. Seller shall at Seller's expense defend, indemnify and hold Customer, its affiliates, and its and their employees, officers and directors harmless from and against any liability, loss or damage (including reasonable attorneys' fees) incurred in connection with any claim, suit, or proceeding brought by a third party ("**Claim**") against Customer or its officers, directors or employees contending that Customer's use of the Seller Service in accordance with the Documentation infringes any valid Intellectual Property Right of a third party, and Seller shall pay all damages finally awarded by a court of competent jurisdiction or agreed to by Seller in settlement of the Claim. In the event that the Seller Service or any part thereof becomes, or, in Seller's sole opinion, is likely to become, the subject of an infringement-related Claim: (a) Seller may at its option and expense procure for Customer the right to continue using the Seller Service, or modify the Seller Service to make it non-infringing; or (b) if Section 9.1(a) is not commercially reasonable, then Seller may terminate this Agreement and all Order Forms with notice to Customer, and Seller will provide Customer with a refund of any prepaid fees for the unexpired portion of the remaining Subscription Term. Notwithstanding the foregoing, Seller shall have no liability for any Claim or demand arising from: (i) an allegation that does not state with specificity that the Seller Service is the basis of the Claims; (ii) the use or combination of the Seller Service or any part thereof with software, hardware, or other materials not developed by Seller, if the Seller Service or use thereof would not infringe without such combination; (iii) modification of the Seller Service by a party other than Seller, if the use of unmodified Seller Service would not constitute infringement; (iv) a breach by Customer or any User of any obligation under this Agreement, or a use of the Seller Service by Customer or any User in a manner outside the scope of any right granted herein or not in accordance with the Documentation, if the claim would not have arisen but for such breach or unauthorized use; (v) an allegation made against Customer arising out of or related to any Customer Content; or (vi) an allegation made against Customer prior to the Effective Date or any allegation based upon any action by Customer prior to the Effective Date (the foregoing (ii) through (vi), collectively, the "**Customer Obligations**"). **The foregoing states Seller's entire liability and Customer's exclusive remedy for Intellectual Property Rights infringement.**

7.2 Customer Indemnity. Customer shall at Customer's expense defend, indemnify and hold Seller, its affiliates, and its and their employees, officers, and directors harmless from and against any liability, loss, or damage (including reasonable attorneys' fees) incurred in connection with any Claim: (a) arising out of or related to any Customer Obligation or Customer Content, including any claim that any Customer Content infringes the Intellectual Property Right of, or has otherwise harmed, a third party; (b) based upon Customer's or any User's use of the Seller Service not in accordance with the terms hereof, or not in accordance with the Documentation, or in violation of Section 3 or 4; or (c) based on any failure or alleged failure of the Customer or any User to comply with any applicable law, rule, regulation or guideline in connection with its use of the Seller Service, including any data privacy and security laws.

7.3 Indemnification Process. The foregoing indemnification obligations are conditioned on the indemnified party: (a) notifying the indemnifying party promptly of each Claim; (b) reasonably cooperating and assisting in the defense of each Claim at the indemnifying party's expense; and (c) giving sole control of the defense and any related settlement negotiations to the indemnifying party; provided, that the indemnifying party may not settle any claim that imposes any duty on or diminishes any right of the indemnified party without the indemnified party's prior consent. The indemnified party shall have the right to participate in the defense and settlement negotiations of such claim through its own counsel at its own expense.

8. LIMITATION OF LIABILITY.

8.1 Limitation of Liability. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT SHALL SELLER'S OR ITS AFFILIATES' AGGREGATE TOTAL LIABILITY TO EITHER CUSTOMER OR ANY THIRD PARTY FOR ALL CLAIMS ARISING OUT OF OR RELATED TO THIS AGREEMENT, REGARDLESS WHETHER ARISING UNDER STATUTE, CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, EXCEED THE AMOUNTS ACTUALLY PAID BY CUSTOMER TO SELLER UNDER THE APPLICABLE ORDER FORM UNDER WHICH THE CLAIM AROSE DURING THE 12 MONTHS PRIOR TO THE DATE ON WHICH SUCH CLAIM OR CAUSE OF ACTION AROSE. THE FOREGOING LIMITATIONS ARE CUMULATIVE AND NOT PER INCIDENT.

8.2 Exclusion of Indirect Damages. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT SHALL EITHER SELLER OR ANY OF ITS AFFILIATES HAVE

ANY LIABILITY TO CUSTOMER OR TO ANY THIRD PARTY FOR ANY (A) LOSS OF ACTUAL OR ANTICIPATED PROFITS, (B) LOSS OF BUSINESS, (C) LOSS OF, DAMAGE TO, OR CORRUPTION OF, DATA, (D) LOSS OF USE, (E) COST OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, OR (F) ANY INDIRECT, SPECIAL, EXEMPLARY, INCIDENTAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES, HOWEVER CAUSED, REGARDLESS WHETHER (I) ARISING UNDER STATUTE, CONTRACT, TORT (INCLUDING NEGLIGENCE) OR UNDER ANY OTHER THEORY OF LIABILITY, (II) SELLER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE, (III) SUCH DAMAGE WAS FORESEEABLE OR IN THE CONTEMPLATION OF THE PARTIES, OR (IV) A REMEDY FAILS OF ITS ESSENTIAL PURPOSE.

8.3 Savings Clause. SOME JURISDICTIONS DO NOT ALLOW LIMITATIONS ON DURATION OR THE EXCLUSION OF AN IMPLIED WARRANTY, SO THE LIMITATIONS HEREIN MAY NOT APPLY.

8.4 Allocation of Risk. The fees set forth in this Agreement reflect the allocation of risk between the parties – including the disclaimer of warranties in Section 6, the limitation of liability in Section 8.1, and the exclusion of consequential and related damages in Section 8.2. Seller would not enter into this Agreement without these limitations on its liability.

9. TERM AND TERMINATION.

9.1 Term. This Agreement is effective during the Subscription Term. Following the end of the "Initial Term" designated in the Order Form, Customer may terminate the Agreement for any or no reason upon 30 days' prior written notice to Seller. Without limiting any other remedy of Seller in this Agreement or at law, Seller may terminate this Agreement in its entirety or one or more Order Forms if Customer fails to timely make any payment due hereunder and fails to cure such default within 15 days after receiving notice from Seller of such failure (regardless whether Seller avails itself of its right to suspend the Seller Service pursuant to Section 9.3 hereof). Subject to the foregoing, either party (the "**Non-breaching Party**") may terminate this Agreement upon notice to the other party (the "**Breaching Party**"), if the Breaching Party breaches any provision of this Agreement and does not cure the breach within 30 days after receiving notice thereof from the Non-breaching Party.

9.2 Termination Upon Bankruptcy or Insolvency. Either party may, at its option, terminate this Agreement immediately upon notice to the other, in the event that: (a) the other party becomes insolvent or unable to pay its debts when due; (b) the other party files a petition in bankruptcy, reorganization or similar proceeding, or, if filed by a third party, such petition is not removed within 90 days after such filing; (c) the other party discontinues its business; or (d) a receiver is appointed or there is an assignment for the benefit of the other party's creditors.

9.3 Suspension of Services. At any time during the Subscription Term, Seller may immediately upon notice to Customer suspend Seller's performance under this Agreement or suspend any and all access to the Seller Service for any (a) material breach or threatened material breach of this Agreement; or (b) reasonable threat to the technical security or technical integrity of any Seller Offering, in each case as determined by Seller in its sole and absolute discretion.

9.4 Outstanding Fees. Expiration or termination shall not relieve Customer of the obligation to pay any fees accrued or payable to Seller prior to the effective date of expiration or termination. In the event of termination by Customer pursuant to Section 9.1, Seller shall refund to Customer on a pro-rata basis any prepaid fees paid by Customer for the remainder of the then-current term under the terminated Order Forms. In the event of termination by Seller pursuant to Sections 9.1 or 9.2, all amounts payable by Customer under this Agreement will become immediately due and payable.

9.5 Rights and Obligations Upon Expiration or Termination. Upon expiration or termination of this Agreement, Customer's right to access and use the Seller Service will immediately terminate, and Customer shall immediately cease all use of the Seller Service. Seller may destroy any Customer Content in its possession or control; provided, that Customer shall have at least 30 days following the effective date of expiration or termination of this Agreement to (a) download its Customer Content from the Seller Service or (b) request for Seller to provide, at Customer's cost and expense, a copy of Customer Content in a format reasonably requested by Customer. Notwithstanding the foregoing, Seller will not provide access to the Customer Content from Customer's account if Seller believes that such Customer Content violates the rights of Seller or third parties, or if Customer has not paid all undisputed fees owing to Seller.

9.6 **Survival.** Sections 1, 3.2, 3.4, 3.5, 5.3, 5.4, 6.2, 7, 8, 9.4, 9.5, 9.6 and 10 shall survive any termination or expiration of this Agreement.

10. GENERAL.

10.1 **Governing Law; Jurisdiction.** This Agreement and all matters arising out of or relating to this Agreement, shall be governed by, and construed in accordance with, the laws of the State of Colorado, other than such laws (including case law) that would require or permit the application of the Laws of any jurisdiction other than those of the State of Colorado. Any litigation under this Agreement shall be brought and maintained in the appropriate courts in Denver, Colorado. Each party irrevocably submits to the exclusive jurisdiction of these courts, agrees to file all pleadings in connection with the subject matter of this Agreement in such courts, and waives any objection to the laying of the venue of any legal action brought under or in connection with the subject matter of this Agreement in such courts. EACH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LEGAL ACTION ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.

10.2 **Export; Anti-Corruption.** Each party shall comply with the export laws and regulations of the United States and other applicable jurisdictions in providing and using the Seller Service. Without limiting the foregoing: (a) each party represents that it is not named on any U.S. government list of persons or entities prohibited from receiving exports; and (b) Customer shall not permit Users to access or use Seller Service in violation of any U.S. export embargo, prohibition or restriction. Both parties agree to fully comply with the provisions of the United States Foreign Corrupt Practices Act and the Organization for Economic Cooperation and Development prohibiting foreign bribery and improper payments. Without limiting the generality of the foregoing, each party represents and warrants that it has not and shall not at any time during the Subscription Term pay, give, or offer or promise to pay or give, any money or any other thing of value, directly or indirectly, to or for the benefit of any government official, political party, or candidate for political office, or any other person, firm, corporation or other entity, with knowledge that some or all of that money or other thing of value will be paid, given, offered or promised to a government official, political party or candidate for political office, for the purpose of obtaining or retaining any business, or to obtain any other unfair advantage, in connection with this Agreement.

10.3 **Government Rights.** If the Seller Offerings are acquired by or on behalf of a unit or agency or the United States Government this Section 10.3 applies. The Seller Service and Seller Technology: (a) were developed at private expense, are existing computer software, and no part of them were developed with government funds; (b) comprise trade secrets of Seller, having its principal place of business at 13705 Compark Boulevard, Englewood, CO 80112, for all purposes of the Freedom of Information Act; (c) are "restricted computer software" submitted with restricted rights in accordance with subparagraphs (c) through (d) of the Commercial Computer Software-Restricted Rights clause at 52.227-19 and its successors; and (d) in all respects are proprietary data belonging to Seller. All rights are reserved under the copyright laws of the United States. For units of the Department of Defense (DOD) the Seller Service and Seller Technology is licensed only with "Restricted Rights" as the term is defined in the DOD Supplement to the Federal Acquisition Regulation 52.227-7013(c)(i)(ii) and use, duplication or disclosure is subject to restrictions as set forth in subdivision (c)(i)(ii) of the Rights in Technical Data and Computer Software clause at 52.227-7013.

10.4 **Severability.** If any provision of this Agreement is, for any reason, held to be invalid or unenforceable, the other provisions of this Agreement will remain enforceable, and the invalid or unenforceable provision will be deemed modified so that it is valid and enforceable to the maximum extent permitted by law.

10.5 **Waiver; Remedies.** Any waiver or failure to enforce any provision of this Agreement on one occasion will not be deemed a waiver of any other provision or of such provision on any other occasion. Other than as expressly stated herein, the remedies provided herein are in addition to, and not exclusive of, any other remedies of a party at law or in equity.

10.6 **Entire Agreement.** To the maximum extent permitted by applicable law, this Agreement, together with the documents referenced herein, constitute the entire agreement between the parties as to its subject matter, and supersede all previous and contemporaneous agreements, proposals or representations, written or oral, concerning the subject matter of this Agreement. No representation, undertaking or promise shall be taken to have been given or be implied from anything said or written in negotiations between the parties prior to this Agreement except as expressly stated in this Agreement. Neither party shall have any remedy in respect of any untrue statement made by the other upon which

that party relied in entering into this Agreement, unless such untrue statement was made fraudulently. No modification, amendment, or waiver of any provision of this Agreement shall be effective unless in writing and expressly acknowledged and agreed by the party against whom the modification, amendment, or waiver is to be asserted. Customer's agreement hereunder is not contingent upon the delivery of any future functionality or features not specified herein or in an Order Form, or dependent upon any oral or written, public or private comments made by Seller with respect to future functionality or features for the Seller Service. In the event of any conflict between the provisions in this Terms of Service and any Order Form, the terms of such Order Form shall prevail. No terms or conditions stated in a Customer purchase order or in any other Customer order documentation shall be incorporated into or form any part of this Agreement, and all such terms or conditions shall be null and void.

10.7 Attorney's Fees. Customer shall pay on demand all of Seller's reasonable attorney fees and other costs incurred by Seller to enforce this Agreement or to collect any fees or charges due Seller under this Agreement following Customer's breach of its payment obligations under this Agreement.

10.8 No Assignment. Except as set forth below, neither party may assign, subcontract, delegate, or otherwise transfer this Agreement, or its rights and obligations herein, without obtaining the prior consent of the other party, and any attempted assignment, subcontract, delegation, or transfer in violation of the foregoing will be null and void. Notwithstanding the foregoing, without the other party's prior consent, either party may assign this Agreement to its affiliate or in connection with a merger, acquisition, reorganization or change of control, including a sale of all or substantially all of such party's assets, stock or business. Seller may engage third-party subcontractors, service providers or agents in performing Seller's duties and exercising its rights hereunder. The terms of this Agreement will be binding upon the parties and their respective successors and permitted assigns.

10.9 Force Majeure. Any delay in the performance of any duties or obligations of either party (except the payment of money owed) will not be considered a breach of this Agreement, if, and only to the extent, such delay is caused by a labor dispute, strike, pandemic, epidemic, public health emergency, shortage of materials, fire, earthquake, flood, terrorism, Internet disruption, failure of an ISP, utility or telecommunications disruption, denial of service attack, failure of supplier, or any other event beyond the control of such party, provided that such party uses reasonable efforts under the circumstances to notify the other party of the cause of such delay and to resume performance as soon as commercially practicable.

10.10 Independent Contractors. Seller's relationship to Customer is that of an independent contractor, and neither party is an agent or partner of the other. Neither party will have, and will not represent to any third party that it has, any authority to act on behalf of the other party.

10.11 No Third Party Beneficiaries. Except as set forth in Section 7, this Agreement is intended for the sole and exclusive benefit of the signatories, and is not intended to benefit any third party. Only the parties to this Agreement may enforce it.

10.12 Notices. All notices, consents, and other communications required or permitted under this Agreement shall be in writing in order to be binding. All notices shall be given and deemed effective: (a) by delivery in person; (b) by a nationally recognized next-day courier service with tracking notice of delivery; (c) by first class, registered or certified mail, postage prepaid with tracking notice of delivery; or (d) by electronic mail to the address of the party specified in the applicable Order Form with explicit acknowledgment of receipt by the intended recipient (other than an automated response). Each party may change its address for receipt of notice by giving notice of such change to the other party.

10.13 Construction. The titles of the sections of this Agreement are for convenience of reference only, and are not to be considered in construing this Agreement. Unless the context of this Agreement clearly requires otherwise: (a) references to the plural include the singular, the singular the plural, and the part the whole; (b) "or" has the inclusive meaning frequently identified with the phrase "and/or"; (c) "including" has the inclusive meaning frequently identified with the phrase "including but not limited to" or "including without limitation"; and (d) references to "hereunder," "herein" or "hereof" relate to this Agreement as a whole. Any reference in this Agreement to any statute, rule, regulation or agreement, including this Agreement, shall be deemed to include such statute, rule, regulation or agreement as it may be modified, varied, amended or supplemented from time to time. The parties agree that this Agreement shall be fairly interpreted in accordance with its terms without any strict construction in favor of or against either party, and that ambiguities shall not be interpreted against the drafting party.