

THE TECH CONTRACTS HANDBOOK

Software Licenses and Technology Services Agreements for Lawyers and Businesspeople

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Form Contract

End User Software License Agreement (EULA)

You may use the form contract below, subject to the "Terms of Use" found at <http://techcontracts.com/html/privacy-policy.html>. In addition to the Terms of Use, PLEASE READ THE FOLLOWING DISCLAIMER BEFORE USING THE FORM CONTRACT:

The form contract below is general in nature and may not be sufficient for a specific contractual, technological, or legal problem or dispute. THE FORM IS NOT PROVIDED WITH ANY GUARANTY, WARRANTY, OR REPRESENTATION AS TO QUALITY OR SUITABILITY FOR ANY PARTICULAR PURPOSE. Publication of the form does not constitute the practice of law and is not legal counsel or advice. Neither the author nor the publisher of The Tech Contracts Handbook, nor anyone affiliated with the book's Website, is rendering a legal or other professional service. The form should not be relied upon as a substitute for consultation with an experienced attorney.

END USER SOFTWARE LICENSE AGREEMENT

This End User Software License Agreement (this "Agreement") is entered into as of _____, 20__ (the "Effective Date") by and between _____, a _____ ("Recipient"), and _____, a _____ ("Provider").

RECITALS

The parties have agreed that Provider will license a certain software application to Recipient and will also provide maintenance services for that application. Therefore, in

consideration of the mutual covenants, terms, and conditions set forth below, including those outlined on Attachments A, B, and C (which are incorporated into this Agreement by this reference), the adequacy of which consideration is hereby accepted and acknowledged, the parties agree as follows.

TERMS AND CONDITIONS

1. **Definitions.**

- (a) "Authorized Representative" refers to _____.
- (b) "Documentation" refers to the standard end-user manual for the Software.
- (c) "Facility" refers to Recipient's facility located at _____.
- (d) "Initial Term" is defined in Subsection 11(a) below.
- (e) "Maintenance" refers to the tasks listed in Attachment A.
- (f) "Renewal Term" is defined in Subsection 11(a) below.
- (g) "Software" refers to _____. The Software does not include source code.
- (h) "Specifications" refers to the Software technical specifications attached to this Agreement as Attachment B.
- (i) "Upgrades" refers to new versions, updates, and upgrades of the Software Provider releases commercially.
- (j) "Warranty Period" refers to the _____ period following installation pursuant to Subsection 3(a) below.

2. **License.**

- (a) *Grant of Rights.* Provider hereby grants Recipient a non-exclusive license to use the Software, provided: (i) Recipient may give no more than ___ concurrent users access to the Software; and (ii) Recipient complies with the restrictions set forth in Subsection 2(b) below.
- (b) *Restrictions.* Copies of the Software created or transferred pursuant to this Agreement are licensed, not sold, and Recipient receives no title to or ownership of any copy or of the Software itself. Furthermore, Recipient receives no rights to the Software other than those specifically granted in this Section 2. Without limiting the generality of the foregoing, Recipient will not: (i) modify, create derivative works from, distribute, publicly display, publicly perform, or sublicense the Software; (ii) use the Software for service bureau or time-sharing purposes or in any other way allow third parties to exploit the Software; or (iii) reverse engineer, decompile, disassemble, or otherwise attempt to derive any of the Software's source code.

3. Delivery, Installation, & Training.

- (a) *Delivery & Installation.* Provider will install the Software in the Facility on or before _____ days after the Effective Date.
- (b) *Training.* Provider will provide training courses on operation of the Software at the Facility at such times during business hours as Recipient may reasonably request. Each training course will last ___ hours. Recipient may enroll up to ___ of its staff-members in any training course, and Provider will provide a hard copy of the Licensed Product's standard training manual for each enrollee. Each training course will be taught by a technician with no fewer than ___ years' full-time experience operating _____ software systems. Provider will provide the first ___ trainings without additional charge and will provide additional trainings at its standard rates.

4. Maintenance and Updates & Upgrades.

- (a) *Maintenance.* Provider will Maintain the Software: (i) during the Initial Term and (ii) during each Renewal Term, unless Recipient cancels Maintenance ___ or more days before the start of any Renewal Term. After termination of Maintenance, Recipient may renew Maintenance at any time, provided Provider may charge a renewal fee of \$_____, as well as prorated Maintenance fees for any partial Renewal Term.
- (b) *Updates & Upgrades.* So long as Recipient is receiving Maintenance, Provider will provide Recipient with copies of all Upgrades without additional charge, promptly after commercial release. Upon delivery to Recipient, Upgrades will become part of the Software and will be subject to the provisions of Section 2 above and the other provisions of this Agreement.

5. Payment.

- (a) *License Fees.* Recipient will pay Provider license fees of: (i) \$_____ for the Initial Term, subject to invoice upon delivery of the Software; and (ii) \$_____ for each Renewal Term, due 30 days before the start of such Renewal Term, provided Provider may increase any such fee by no more than ___% by written notice _____ or more days before the start of such Renewal Term.
- (b) *Maintenance.* For Maintenance, Recipient will pay Provider: (i) \$_____ for the Initial Term, due within 30 days of the Effective Date; and (ii) \$_____ per Renewal Term, due ___ days before the start of each such Renewal Term, provided Provider may increase any such fee by no more than ___% by written notice, _____ or more days before the start of such Renewal Term.
- (c) *Invoices.* Where fees are subject to invoice pursuant to this Section 5, Recipient will make payment within 30 days of issuance of the invoice.

6. Source Code Escrow.

- (a) *Escrow Agreement.* Concurrent with execution of this Agreement, the parties will execute a third party escrow agreement in the form attached hereto as Attachment C ("the Escrow Agreement"), in conjunction with _____ (the "Escrow Agent").

- (b) *Deposit.* Promptly after installation pursuant to Subsection 3(a) above, Provider will deposit with the Escrow Agent, pursuant to the procedures of the Escrow Agreement, the source code and Documentation for the Software. Promptly after release of each Upgrade, Provider will deposit updated source code and Documentation with the Escrow Agent. (“Deposit Material” refers to material required to be deposited pursuant to this Subsection 6(b).)
- (c) *Verification.* At Recipient’s request and expense, the Escrow Agent may at any time verify the Deposit Material, including without limitation by compiling source code, running tests to compare it to the Software, and reviewing the completeness and accuracy of any and all material. In the event that the Escrow Agent informs Recipient that the Deposit Material does not conform to the requirements of Subsection 6(b) above: (i) Provider will promptly deposit conforming Deposit Material; and (ii) Provider will reimburse Recipient for subsequent verification of the new Deposit Material (except to the extent that subsequent verification exceeds the cost of the unsuccessful verification by more than ___%). Any breach of the provisions of Subsection 6(c)(i) above will constitute material breach of this Agreement, and no further payments will be due from Recipient until such breach is cured, in addition to such other remedies as Recipient may have.
- (d) *License & Use.* Provider hereby grants Recipient a license to use, reproduce, and create derivative works from the Deposit Material, provided Recipient may not distribute or sublicense the Deposit Material or make any use of it whatsoever except for such internal use as is necessary to maintain and support the Software. Copies of the Deposit Material created or transferred pursuant to this Agreement are licensed, not sold, and Recipient receives no title to or ownership of any copy or of the Deposit Material itself. The Deposit Material includes trade secrets of Provider, and Recipient will not disclose it to any third party except to the extent required by law.
- (e) *Release Conditions.* The term “Release Conditions,” as used in the Escrow Agreement, refers to any of the following: (i) material breach by Provider of Subsection 4(a) of this Agreement, if such breach remains uncured ___ or more days after Recipient’s written notice; (ii) any failure of Provider to function as a going concern; (iii) appointment, application for, or consent to a receiver, trustee, or other custodian for Provider or its assets; (iv) Provider becomes insolvent or unable to pay its debts as they mature in the ordinary course or makes an assignment for the benefit of creditors; or (v) Provider is liquidated or dissolved, or any proceedings are commenced with regard to Provider under any bankruptcy, insolvency, or debtor’s relief law.

7. Warranties.

- (a) *Function.* Provider warrants that, during the Warranty Period, the Software will perform materially as described in the Specifications. In the event of breach of the warranty in this Subsection 7(a), Provider will promptly repair the Software or replace it with software of substantially similar functionality. The remedies set forth in this Subsection 7(a) are not exclusive of any others Recipient may have.

- (b) *Infringement/Ownership*. Provider warrants that it is the owner of the Software and of each and every component thereof, or the recipient of a valid license thereto, and that it has and will maintain the full power and authority to grant the intellectual property and other rights granted in this Agreement without the further consent of any third party.
- (c) *Harmful Code*. Provider warrants that the Software and any media used to distribute it contain no viruses or other computer instructions or technological means whose purpose is to disrupt, damage, or interfere with the use of computers or related systems.
- (d) *Right to Do Business*. Each party warrants that it has the full right and authority to enter into, execute, and perform its obligations under this Agreement and that no pending or threatened claim or litigation known to it would have a material adverse impact on its ability to perform as required by this Agreement.
- (e) *Disclaimers*. EXCEPT FOR THE EXPRESS WARRANTIES SPECIFIED IN THIS SECTION 7, PROVIDER MAKES NO WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. Provider does not warrant that the Software will perform without error or that it will run without immaterial interruption. Provider provides no warranty regarding, and will have no responsibility for, any claim arising out of: (i) a modification of the Software made by anyone other than Provider, unless Provider approves such modification in writing; or (ii) use of the Software in combination with any operating system not authorized in the Documentation or Specifications or with hardware or software specifically forbidden by the Documentation or Specifications. The warranty in Subsection 7(b) above does not apply to the extent that the infringement arises out of any of the conditions listed in Subsection 8(d) below.

8. Indemnity.

- (a) *Indemnified Parties & Claims*. The “Indemnified Parties” are Recipient and its officers, directors, shareholders, parents, subsidiaries, agents, insurers, successors, and assigns. An “Indemnified Claim” is any third party claim, suit, or proceeding against the Indemnified Parties arising out of, related to, or alleging infringement of any patent, copyright, or other intellectual property right by the Software.
- (b) *Indemnity*. Provider will indemnify, defend, and hold the Indemnified Parties harmless against any Indemnified Claim, provided Recipient gives Provider prompt notice of such Indemnified Claim. Provider’s obligations set forth in the preceding sentence include, without limitation, retention and payment of attorneys and payment of court costs, as well as settlement at Provider’s expense, payment of judgments, or both.
- (c) *Litigation*. Provider will control the defense of any Indemnified Claim, including appeals, negotiations, and any settlement or compromise thereof; provided Recipient will have the right to approve the terms of any settlement or

compromise that restricts its rights granted under this Agreement or subjects it to any ongoing obligations.

- (d) *Exclusions.* Provider's obligations set forth in Subsection 8(b) above do not apply to the extent that the Indemnified Claim arises out of:
- (i) Recipient's violation of this Agreement;
 - (ii) revisions to the Software made without Provider's written consent;
 - (iii) Recipient's failure to incorporate Software updates or upgrades that would have avoided the alleged infringement, provided Provider offered such updates or upgrades without fees or charges not otherwise required pursuant to this Agreement.
 - (iv) use of the Software in combination with hardware or software not provided by Provider: (A) that is specifically forbidden by the Documentation or Specifications; or (B) that is not designated in the Documentation or Specifications as available for interface with the Software, unless such hardware or software is a host computer, operating system, or other type of hardware or software necessary for the Software to perform a function listed in the Documentation or Specifications.

9. Limitation of Liability.

- (a) *Limitations.* Except as provided below in Subsection 9(b): (i) IN NO EVENT WILL PROVIDER'S LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT EXCEED THE AGGREGATE OF FEES PAYABLE TO PROVIDER PURSUANT TO THIS AGREEMENT (INCLUDING FEES BOTH PAID AND DUE) AT THE TIME OF THE EVENT GIVING RISE TO THE LIABILITY; AND (ii) IN NO EVENT WILL PROVIDER BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, INCIDENTAL, OR PUNITIVE DAMAGES. THE LIABILITIES LIMITED BY THIS SUBSECTION 9(a) APPLY: (A) TO LIABILITY FOR NEGLIGENCE; (B) REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT, STRICT PRODUCT LIABILITY, OR OTHERWISE; (C) EVEN IF PROVIDER IS ADVISED IN ADVANCE OF THE POSSIBILITY OF THE DAMAGES IN QUESTION AND EVEN IF SUCH DAMAGES WERE FORESEEABLE; AND (D) EVEN IF RECIPIENT'S REMEDIES FAIL OF THEIR ESSENTIAL PURPOSE. If applicable law limits the application of the provisions of this Subsection 9(a), Provider's liability will be limited to the maximum extent permissible.
- (b) *Exclusions.* Subsection 9(a) above does not apply to (i) claims pursuant to Section 8 (Indemnity) or (ii) claims for attorneys' fees and other litigation costs Recipient becomes entitled to recover as a prevailing party in any action.

- 10. Software Audit.** Provider may audit Recipient's use of the Software on ___ days' advanced written notice. Recipient will cooperate with the audit, including by providing access to any books, computers, records, or other information that relate or may relate to use of the Software. Such audit will not unreasonably interfere with Recipient's business activities. In the event that an audit reveals unauthorized use of the Software, Recipient will reimburse Provider for the reasonable cost of the audit,

in addition to such other rights and remedies as Provider may have. Provider will not conduct an audit more than once per _____.

11. Term & Termination.

- (a) *Term.* This Agreement will remain in effect for _____ months from the date of installation of the Software pursuant to Subsection 3(a) above (the “Initial Term”). Thereafter, it will renew for successive _____ periods (each a “Renewal Term”), unless either party refuses such renewal by written notice 30 or more days before the end of the current term.
- (b) *Termination for Cause.* Either party may terminate this Agreement for material breach by written notice, effective in 30 days unless the other party first cures such breach.
- (c) *Effects of Termination.* Upon termination of this Agreement, the licenses granted in Sections 2 and 6(d) will terminate and Recipient will cease all use of the Software and delete all copies in its possession or control. The following provisions will survive termination of this Agreement: (i) any obligation of Recipient to pay for services rendered before termination; (ii) Subsections 7(b) and 7(e) and Sections 8 through 10 of this Agreement; and (iii) any other provision of this Agreement that must survive termination to fulfill its essential purpose.

12. Miscellaneous.

- (a) *Notices.* Notices pursuant to this Agreement will be sent to the addresses below, or to such others as either party may provide in writing. Such notices will be deemed received at such addresses upon the earlier of (i) actual receipt or (ii) delivery in person, by fax with written confirmation of receipt, or by certified mail return receipt requested.
 - (i) For Provider: _____.
 - (ii) For Recipient: _____.
- (b) *Independent Contractors.* The parties are independent contractors and will so represent themselves in all regards. Neither party is the agent of the other and neither may bind the other in any way.
- (c) *No Waiver.* Neither party will be deemed to have waived any of its rights under this Agreement by lapse of time or by any statement or representation other than (i) by an Authorized Representative and (ii) in an explicit written waiver. No waiver of a breach of this Agreement will constitute a waiver of any prior or subsequent breach of this Agreement.
- (d) *Force Majeure.* To the extent caused by force majeure, no delay, failure, or default will constitute a breach of this Agreement.
- (e) *Assignment & Successors.* Neither party may assign this Agreement or any of its rights or obligations hereunder without the other’s express written consent, except that either party may assign this Agreement to the surviving party in a merger of that party into another entity. Except to the extent forbidden in the

previous sentence, this Agreement will be binding upon and inure to the benefit of the respective successors and assigns of the parties.

- (f) *Choice of Law & Jurisdiction.* This Agreement will be governed solely by the internal laws of the State of _____, without reference to such State's principles of conflicts of law. The parties consent to the personal and exclusive jurisdiction of the federal and state courts of _____, _____.
- (g) *Severability.* To the extent permitted by applicable law, the parties hereby waive any provision of law that would render any clause of this Agreement invalid or otherwise unenforceable in any respect. In the event that a provision of this Agreement is held to be invalid or otherwise unenforceable, such provision will be interpreted to fulfill its intended purpose to the maximum extent permitted by applicable law, and the remaining provisions of this Agreement will continue in full force and effect.
- (h) *Bankruptcy Rights.* The rights and licenses granted to Recipient in Sections 2 and 6(d) of this Agreement are licenses to "intellectual property" rights, as defined in Section 365(n) of the United States Bankruptcy Code (11 U.S.C. Section 101, et seq.). If Provider is subject to any proceeding under the United States Bankruptcy Code, and Provider as debtor in possession or its trustee in bankruptcy elects to reject this Agreement, Recipient may, pursuant to 11 U.S.C. Section 365(n)(1) and (2), retain any and all of the rights granted to it under Sections 2 and 6(d) of this Agreement to the maximum extent permitted by law. This Subsection 12(h) will not be construed to limit or restrict any right or remedy not set forth in this Subsection 12(h), including without limitation the right to retain any license or authority this Agreement grants pursuant to any provision other than Sections 2 or 6(d).
- (i) *Conflicts among Attachments.* In the event of any conflict between the terms of this main body of this Agreement and those of any attachment, the terms of this main body will govern.
- (j) *Execution in Counterparts.* This Agreement may be executed in one or more counterparts. Each counterpart will be an original, but all such counterparts will constitute a single instrument.
- (k) *Construction.* The parties agree that the terms of this Agreement result from negotiations between them. This Agreement will not be construed in favor of or against either party by reason of authorship.
- (l) *Entire Agreement.* This Agreement sets forth the entire agreement of the parties and supersedes all prior or contemporaneous writings, negotiations, and discussions with respect to the subject matter hereof. Neither party has relied upon any such prior or contemporaneous communications.
- (m) *Amendment.* This Agreement may not be modified except (i) by Authorized Representatives of each party and (ii) in a written contract signed by both parties.

IN WITNESS THEREOF, the parties have executed this Agreement as of the Effective Date.

RECIPIENT

PROVIDER

By:

By:

(signature)

(signature)

Name:

Name:

(print)

(print)

Title:

Title:

Attachment A: Maintenance Tasks

[insert]

Attachment B: Specifications

[insert]

Attachment C: Escrow Agreement

[insert]