

# THE TECH CONTRACTS HANDBOOK

## Software Licenses and Technology Services Agreements for Lawyers and Businesspeople

by David W. Tollen

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### *Form Contract*

### Software License and Integration Services Agreement

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### SOFTWARE LICENSE AND INTEGRATION SERVICES AGREEMENT

This Software License and Integration Agreement (this "Agreement") is entered into as of \_\_\_\_\_, 20\_\_ (the "Effective Date") by and between \_\_\_\_\_, a \_\_\_\_\_ ("Recipient"), and \_\_\_\_\_, a \_\_\_\_\_ ("Provider").

### RECITALS

Provider provides a software application known as \_\_\_\_\_ (the "Base Application"), and the parties have agreed that Provider will modify the Base Application to fit certain needs of Recipient. The parties have also agreed that Provider will provide

maintenance and support services related to such modified software. 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 Base Application as modified by Provider pursuant to this Agreement.
- (c) "Facility" refers to Recipient's facility located at \_\_\_\_\_.
- (d) "Maintenance" refers to maintenance of the Software so that it performs materially in accordance with the Specifications. Maintenance includes, without limitation, the tasks listed in Part II of Attachment A.
- (e) "Software" refers to the Base Application as modified by Provider pursuant to this Agreement. The Software does not include source code.
- (f) "Specifications" refers to the Software technical specifications attached to this Agreement as Attachment B.
- (g) "Upgrades" refers to new versions, updates, and upgrades of the Software (including without limitation of the Base Application) released commercially.
- (h) "Warranty Period" refers to the \_\_\_\_\_ period following Acceptance (as defined in Section 4).

### 2. **Services.**

- (a) *Customization & Integration.* Provider will: (i) design and develop the Software so that it performs materially in accordance with the Specifications; and (ii) write the Documentation. Provider will provide the services required in this Subsection 2(a) on the schedule set forth in Part I of Attachment A.
- (b) *Maintenance.* Provider will provide Maintenance during the term set forth in Subsection 13(a) below. Any bug-fixes or other modifications of the Software created pursuant to this Subsection 2(b) will become part of the Software and will be subject to the provisions of Section 3 below and the other provisions of this Agreement.
- (c) *Training.* During the term of this Agreement, Provider will provide such training on use of the Software as Recipient may reasonably request, at the Facility, without additional charge. The parties will negotiate in good faith regarding the time(s) of such training.

**3. License.**

(a) *Grant of Rights.* Effective upon receipt of the Final Milestone payment listed in Subsection 6(a) below, Provider grants Recipient a non-exclusive license to reproduce and use the Software as necessary for Recipient's internal business purposes, provided Recipient complies with the restrictions set forth in Subsection 3(b) below. Such internal business purposes do not include use by any parent, subsidiary, or affiliate of Recipient, or any other third party, and Recipient will not permit any such use.

(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 3. 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.

**4. Delivery & Acceptance.** Provider will install the Software in the Facility on or before \_\_\_\_\_ days after the Effective Date ("Delivery"). The Software will be considered accepted ("Acceptance") (a) when Recipient provides Provider written notice of acceptance or (b) \_\_\_ days after Delivery, if Recipient has not first provided Provider with written notice of rejection. Recipient may reject the Software only in the event that it materially deviates from the Specifications. In the event of such rejection, Provider will correct the deviation and redeliver the Software within \_\_\_ days. Re-delivery pursuant to the previous sentence will constitute another Delivery, and the parties will again follow the acceptance procedures set forth in this Section 4, except that after any subsequent failure of the Software to perform according to the Specifications, either party may terminate this Agreement by written notice (up until such time as the parties agree to continue the acceptance procedures of this Section 4). In the event of such termination, Provider will promptly refund all amounts paid pursuant to this Agreement, as Recipient's exclusive remedy, and Recipient will promptly return all copies of the Software.

**5. Updates & Upgrades.** During the term of Maintenance pursuant to Subsection 13(a) below, 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 3 above and the other provisions of this Agreement.

**6. Payment.**

(a) *Development Services & License.* Recipient will pay Provider the following amounts, each subject to invoice upon the milestones listed in Part I of Attachment A:

(i) Milestone 1: \$\_\_\_\_\_.

(ii) Milestone 2: \$\_\_\_\_\_.

(iii) Final Milestone: \$\_\_\_\_\_.

(b) *Maintenance*. For Maintenance, Recipient will pay Provider \$\_\_\_\_\_ per \_\_\_\_\_, due \_\_\_ days before the start of each Maintenance term, as set forth in Subsection 13(a) below. After \_\_\_ Maintenance terms, Provider may increase the price for each subsequent Maintenance term by \_\_%, by written notice delivered \_\_\_ or more days before the renewal date.

(c) *Expenses*. Recipient will reimburse Provider for reasonable out-of-pocket expenses incurred by Provider and its employees and contractors in provision of the Services.

(d) *Invoices*. Provider will submit itemized invoices to Recipient for the payments required in this Section 6, and all invoices will be due and payable within 30 days.

## **7. 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 receipt of the Final Milestone payment listed in Subsection 6(a) above, Provider will deposit with the Escrow Agent, pursuant to the procedures of the Escrow Agreement, the source code for the Software, as well as the Documentation and names and contact information for each programmer involved in creation of the Software. Promptly after release of any patch, bug-fix, or other revision created pursuant to Maintenance, and promptly after release of any Upgrade, Provider will deposit updated source code, documentation, names, and contact information with the Escrow Agent. (“Deposit Material” refers to material required to be deposited pursuant to this Subsection 7(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 7(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 7(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 constitutes Confidential Information of Provider pursuant to Section 11 (Nondisclosure) of this Agreement (provided the provisions of Subsection 11(d) calling for return of Confidential Information before termination of this Agreement will not apply to the Deposit Material).

- (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 2(b) 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.

## **8. 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 8(a), Provider will promptly repair the Software or replace it with software of substantially similar functionality. The remedies set forth in this Subsection 8(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. If the Software becomes, or in either party’s reasonable opinion is likely to become, the subject of any claim, suit, or proceeding arising from or alleging infringement of any intellectual property right, or in the event of any adjudication that the Software infringes any such right, Provider, at its own expense, will promptly take the following actions: (i) secure for Recipient the right to continue using the Software; or (ii) replace or modify the Software to make it noninfringing, provided such modification or replacement will not materially degrade any functionality relied upon by Recipient. The remedies set forth in the preceding sentence are not exclusive of any others Recipient may have at law or in equity.
- (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 intended to disrupt, damage, or interfere with the use of computers or related systems.

- (d) *Services Performance.* Provider warrants that all services provided pursuant to this Agreement will be performed in a workmanlike manner.
- (e) *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.
- (f) *Disclaimers.* EXCEPT FOR THE EXPRESS WARRANTIES SPECIFIED IN THIS SECTION 8, 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 8(b) above does not apply to the extent that the infringement arises out of any of the conditions listed in Subsection 9(d) below.

## **9. 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: (i) infringement of any patent, copyright, or other intellectual property right by the Software; or (ii) injury to or death of any individual, or any loss of or damage to real or tangible personal property, caused by the negligence of Provider or of any of its agents, subcontractors, or employees.
- (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 9(b) above do not apply to the extent that a Subsection 9(a)(i) Indemnified Claim arises out of:
  - (i) Recipient’s violation of this Agreement;

- (ii) revisions to the Software made without Provider's written consent;
- (iii) Provider's modification of the Software in compliance with technical specifications provided by Recipient, or in compliance with a method or process provided by Recipient for implementing such specifications, unless Provider knew of the potential infringement at the time of such modification and did not notify Recipient;
- (iv) 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.
- (v) 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 necessary for the Software to perform a function listed in the Documentation or Specifications.

**10. Limitation of Liability.**

- (a) *Limitations.* Except as provided below in Subsection 10(b): (i) IN NO EVENT WILL PROVIDER'S LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT EXCEED \$\_\_\_\_\_ ; AND (ii) IN NO EVENT WILL PROVIDER BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, INCIDENTAL, OR PUNITIVE DAMAGES. THE LIABILITIES LIMITED BY THIS SUBSECTION 10(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 10(a), Provider's liability will be limited to the maximum extent permissible.
- (b) *Exclusions.* Subsection 10(a) above does not apply to (i) claims pursuant to Section 9 or (ii) claims for attorneys' fees and other litigation costs Recipient becomes entitled to recover as a prevailing party in any action.

**11. Nondisclosure.**

- (a) *Confidential Information.* "Confidential Information" refers to the following items one party to this Agreement (the "Disclosing Party") discloses to the other (the "Receiving Party"): (i) any document the Disclosing Party marks "Confidential"; and (ii) any information the Disclosing Party orally designates as "Confidential" at the time of disclosure, provided the Disclosing Party confirms such designation in writing within \_\_\_ business days. Notwithstanding the foregoing, Confidential Information does not include information that: (A) is in the Receiving Party's possession at the time of disclosure; (B) is independently developed by the

Receiving Party without use of or reference to Confidential Information; (C) becomes known publicly, before or after disclosure, other than as a result of the Receiving Party's improper action or inaction; or (D) is approved for release in writing by the Disclosing Party.

- (b) *Nondisclosure Obligations.* The Receiving Party will not use Confidential Information for any purpose other than to facilitate the provision of service pursuant to this Agreement (the "Purpose"). The Receiving Party: (i) will not disclose Confidential Information to any employee or contractor of the Receiving Party unless such person needs access in order to facilitate the Purpose and executes a nondisclosure agreement with the Receiving Party, with terms no less restrictive than those of this Section 11; and (ii) will not disclose Confidential Information to any other third party without the Disclosing Party's prior written consent. Without limiting the generality of the foregoing, the Receiving Party will protect Confidential Information with the same degree of care it uses to protect its own confidential information of similar nature and importance, but with no less than reasonable care. The Receiving Party will promptly notify the Disclosing Party of any misuse or misappropriation of Confidential Information that comes to the Receiving Party's attention. Notwithstanding the foregoing, the Receiving Party may disclose Confidential Information as required by applicable law or by proper legal or governmental authority. The Receiving Party will give the Disclosing Party prompt notice of any such legal or governmental demand and reasonably cooperate with the Disclosing Party in any effort to seek a protective order or otherwise to contest such required disclosure, at the Disclosing Party's expense.
- (c) *Injunction.* The Receiving Party agrees that breach of this Section 11 might cause the Disclosing Party irreparable injury, for which monetary damages would not provide adequate compensation, and that in addition to any other remedy, the Disclosing Party will be entitled to injunctive relief against such breach or threatened breach, without proving actual damage or posting a bond or other security.
- (d) *Termination and Return.* The obligations of Subsection 11(b) above will terminate \_\_\_\_\_ after the Effective Date. Upon termination of this Agreement or upon the Disclosing Party's written request, the Receiving Party will return all copies of Confidential Information to the Disclosing Party or certify, in writing, the destruction thereof.
- (e) *Retention of Rights.* This Section 11 does not transfer ownership of Confidential Information or grant a license thereto. Except to the extent that another section of this Agreement specifically provides to the contrary, the Disclosing Party will retain all right, title, and interest in and to all Confidential Information.

**12. Arbitration.** Any claim arising out of or related to this Agreement, including without limitation claims related to the parties' negotiations and inducements to enter into this Agreement, will be submitted to mandatory, binding arbitration under the auspices of \_\_\_\_\_ (the "Arbitration Association"), in \_\_\_\_\_, with the parties sharing equally the costs of arbitration. Arbitration will proceed according to

the standard \_\_\_\_\_ rules of the Arbitration Association. This Section 12 does not limit either party's right to provisional or ancillary remedies from a court of competent jurisdiction before, after, or during the pendency of any arbitration, and the exercise of any such remedy does not waive either party's right to arbitration. Judgment on an arbitration award may be entered by any court with competent jurisdiction.

### **13. Term & Termination.**

- (a) *Term.* This Agreement will continue until terminated by either party as specifically authorized herein. Provider will provide Maintenance for a period of \_\_\_\_\_, starting at the end of the Warranty Period. Thereafter, the Maintenance term will renew every \_\_\_\_\_, unless Recipient notifies Provider of its intent not to renew \_\_\_ or more days before any renewal date. After the Maintenance term has renewed \_\_\_\_\_ times, Provider may refuse any subsequent renewal by written notice \_\_\_\_\_ days before the next renewal date.
- (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) *Termination for Convenience.* Recipient may terminate this Agreement for any reason or no reason upon \_\_\_ days' advanced written notice. On the date of such termination, Recipient will pay Provider an early termination fee calculated as follows: \_\_\_\_\_.
- (d) *Effects of Termination.* Upon termination of this Agreement, the licenses granted in Sections 3 and 7(d) will terminate, Recipient will cease all use of the Software and delete all copies in its possession or control, and each party will promptly return any property of the other's. The following provisions will survive termination of this Agreement: (i) any obligation of Recipient to pay for services rendered before termination; (ii) Sections 9 through 12 of this Agreement; and (iii) any other provision of this Agreement that must survive termination to fulfill its essential purpose.

### **14. 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. The parties agree that no Provider employee or contractor will be an employee of Recipient. Provider will be responsible for all employment rights and benefits of Provider employees,

including without limitation: (i) federal, state, and local income and employment taxes and social security contributions; (ii) workers' compensation, health benefits, vacation pay, holiday pay, profit sharing, retirement, pension, disability benefits, and other health and welfare benefits, plans, or programs; and (iii) insurance.

- (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) Technology Export. Recipient will not export the Software or otherwise remove it from the United States except in compliance with all applicable U.S. laws and regulations.
- (f) 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.
- (g) Choice of Law & Jurisdiction. This Agreement will be governed solely by the internal laws of the State of \_\_\_\_\_, without reference to: (i) such State's principles of conflicts of law; (ii) the 1980 United Nations Convention on Contracts for the International Sale of Goods; or (iii) other international laws. The parties consent to the personal and exclusive jurisdiction of the federal and state courts of \_\_\_\_\_, \_\_\_\_\_.
- (h) 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.
- (i) Bankruptcy Rights. The rights and licenses granted to Recipient in Sections 3 and 7(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 3 and 7(d) of this Agreement to the maximum extent permitted by law. This Subsection 14(i) will not be construed to limit or restrict any right or remedy

not set forth in this Subsection 14(i), including without limitation the right to retain any license or authority this Agreement grants pursuant to any provision other than Sections 3 or 7(d).

- (j) 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.
- (k) 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.
- (l) 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.
- (m) 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.
- (n) 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: Services Description**

Part I: Customization & Integration Schedule & Milestones

[insert]

Part II: Maintenance & Support Tasks

[insert]

## **Attachment B: Specifications**

[insert]

## **Attachment C: Escrow Agreement**

[insert]