

Transaction Services Agreement

This Transaction Services Agreement (the “**Agreement**”) is made between you, the Customer (“Customer” or “You”) and the Provider, as defined below. In consideration for the mutual promises and covenants contained herein, and such other good and valuable consideration, the sufficiency of which is hereby acknowledged, Provider and Customer hereby agree as follows:

Provider, through its employees, agents and contractors, shall perform the consulting and/or training services described in the Services Order Form, Provider Quotation, Statement of Work, or Services Order Confirmation (each a Services Order and referred to herein as an “**SO**”) into which this Agreement is hereby incorporated.

1. Definitions.

“**Affiliate**” means any legal entity controlling, controlled by, or under common control with a party to this Agreement, for so long as such control relationship exists.

“**Activities**” are consulting and/or training services to be performed by Provider pursuant to a Time and Materials SO.

A “**Description of Services**” or “**Services Offering Description**” is a document incorporated into the SO by reference which contains a description of the planned Activities for a Time and Materials SO or the Project Deliverables for a Fixed Price SO (a “**DOS**” or “**SOD**”, respectively). Unless the SOD is fully set out in the SO, the applicable SOD is as posted at <http://quest.com/legal/service-offering-descriptions.aspx> on the date the SO is executed by Customer.

A “**Day**” is eight (8) hours.

“**Documentation**” means the user manuals and documentation that Provider delivers with the Products.

An “**Engagement**” is a set of consecutive Workdays during which Provider shall perform Services at Customer’s site.

A “**Fixed Price SO**” is an SO in which Project Deliverables are provided for a set fee, regardless of the Time required to perform or create them.

“**Hardware**” means any hardware identified in the SO that has been purchased by Customer from Provider under a separate agreement.

“**Prepaid Time**” is Time for which Customer is invoiced immediately following the full execution of the SO.

“**Products**” means the Software and/or Hardware identified in the SO or DOS licensed or purchased by Customer under a separate agreement.

“**Provider**” means Quest Software Canada Inc., with its place of business at 10 Roybridge Gate, Ste. 100, Woodbridge, ON L4H 3M8.

A “**Project Deliverable**” is a discrete task to be completed or item to be created as part of a Fixed Price SO.

“**Software**” means Provider’s proprietary software products identified in the SO or DOS and licensed by Customer under a separate agreement.

“**Services**” means Activities or Project Deliverables.

“**Time**” is the quantity of Days or hours stated in a T&M SO.

A “**Time and Materials SO**” or “**T&M SO**” is the SO in which Activities are provided on a per-hour or per-Day basis.

A “**Workday**” is a calendar day during which Provider performs Services.

2. Process.

(a) **Purchase Orders.** Except as otherwise stated in the SO, Provider shall process the SO upon receipt of Customer’s purchase order (“**PO**”) for the Services and the estimated travel and living expenses, each as stated in the fees table of the SO. The estimated travel and living expenses stated in the SO shall be included as a separate line item on the PO. Provider, in its sole discretion, may waive the requirement for a PO if the estimated total fees are over twenty-five thousand dollars (\$25,000.00) or if Customer confirms in writing that it does not issue PO’s for services such as those being provided by the SO or for reimbursable travel and living expenses.

(b) **Resource Assignment.** The project team shall be assigned following Provider’s receipt of the SO executed by Customer and Customer’s PO (if required). The Services shall start upon mutual agreement of the parties. Provider shall be liable to Customer for the acts and omissions of its contractors (if any) that perform Services under the SO.

(c) **Rescheduling.** Unless stated otherwise in the SO, if Customer cancels or reschedules an Engagement less than ten (10) days before it is scheduled to begin, it shall (a) for a T&M SO, pay Provider a cancellation fee equal to three (3) Days of Activities or forfeit three (3) Prepaid Days of Activities (as applicable) or (b) for a Fixed Price SO, pay Provider for three (3) Days at Provider's then standard rate per Day. In addition, Customer shall reimburse Provider for any non-refundable travel expenses Provider incurs as a result of the cancellation or rescheduling.

Customer agrees that, except for factors beyond its reasonable control or if the Services planned for an Engagement have been completed, it shall not cancel an Engagement once it has begun. If Customer cancels the Engagement under a T&M SO once it has begun, for reasons other than those stated in the preceding sentence, it shall pay Provider for the remaining Time in the Engagement or, if applicable, forfeit the applicable Prepaid Time.

(d) **Assumptions and Customer Obligations.** Customer agrees to sign weekly Time and Activity reports to confirm the performance of the Activities and, if training classes are being provided under the SO, sign the course evaluation forms prior to the departure of the on-site trainer. If the weekly Time and Activity reports are not signed by Customer within five (5) days of their delivery or Customer has not submitted a written request for adjustment, they shall be considered to be correct and accepted by Customer. In addition, Customer shall:

- Commit a technical resource, as may be required, to provide Provider with the assistance required to perform the Activities or complete the Project Deliverables.
- Provide Provider consultants with adequate and appropriate accommodations at Customer's site, as well as access to Customer's servers, systems and data, as may be required, to perform the Activities or complete the Project Deliverables.
- Provide project team members with suitable business expertise, technical expertise and decision-making authority to ensure efficient project progress.
- On request, provide the Provider project manager with applicable documentation of Customer's current business practices applicable to the Services to be performed under the SO.

(e) **Completion of Project Deliverables.** *This Section 2(e) applies only to Fixed Price SO's.* Following the completion and delivery of the Project Deliverable(s), Provider shall notify Customer in writing that the Project Deliverable(s) have been performed or created and delivered. During the ten (10) day period following the delivery of the Project Deliverable(s) to Customer (the "**Completion Acknowledgement Period**"), if Customer determines that the Project Deliverable(s) have not been completed in substantial conformance with their descriptions in the SO, it shall so notify Provider and describe each non-conformance ("Notice of Non-Conformance"). Upon Provider's receipt of a Notice of Non-Conformance, Provider shall re-perform or re-create the non-conforming Deliverables and a new Completion Acknowledgment Period will begin upon delivery of the revised Deliverables. If Customer does not provide a Notice of Non-Conformance before the day following the end of the Completion Acknowledgement Period, the Project Deliverables shall be deemed completed. Nothing in this Section 2(e) shall affect Customer's rights under Section 6 (Warranty).

3. Time. A T&M SO will contain the Time that Provider has estimated in good faith to be required to perform the Activities described in the T&M SO ("**Estimated Time**"). Provider shall use commercially reasonable efforts to complete the Activities within the Estimated Time; however, Provider does not represent or warrant that it can or shall do so. Provider shall promptly notify Customer if it determines that more Time shall be required to complete the planned Activities and shall not perform Activities beyond the Time without an executed amendment to the T&M SO. Following Customer's email or equivalent approval, Provider may reallocate the Time stated in a T&M SO among the various resources stated in the fees table of the SO, provided such reallocation does not exceed the Estimated Time set forth therein. Activities shall use Prepaid Time, if any, before non-Prepaid Time.

4. Web Based Training

(a) **The Courses.** Each Web-based training course (each, a "**WBT Course**") must be started within twelve (12) months of the date it is purchased and completed within fourteen (14) days after it has been started. If the WBT Course is not started within twelve (12) months of the date it is purchased or is not completed within fourteen (14) days after it has been started, the right to take or complete the WBT Course will expire without right of refund. Each WBT Course may only be taken by one person.

(b) **Course Materials.** The materials provided during the WBT Course are Provider's Confidential Information (as defined in 8 below) and may not be copied, downloaded, "screen scraped", or otherwise duplicated without the express written consent of Provider.

(c) **Warranty.** In place of the warranty stated in the "**Warranty**" Section below, Provider warrants that each Course shall be presented in a technically correct manner and with professional diligence and skill. The foregoing warranty is valid during the WBT Course and for ten (10) days following the completion of the WBT Course (the "**WBT Warranty Period**"). All breaches of the foregoing warranty must be reported to Provider in writing during the WBT Warranty Period. Customer's exclusive remedy and Provider's sole obligation for any and all covered breaches of the foregoing warranty shall be for Provider, at its option, to allow Customer to apply the amount paid for the nonconforming WBT Course to another Course offered within nine (9) months of the non-conforming WBT Course or refund the fees paid for such WBT Course. For the purposes of this Section a "technically correct manner" means that the technical information provided during the WBT Course was substantially accurate and consistent with the applicable Documentation.

5. Fees.

(a) **Invoicing.** Unless stated otherwise in the SO, payment shall be made in full within thirty (30) days from the date of the applicable invoice. Any amounts payable by Customer that remain unpaid after the due date shall be subject to a late charge equal to one and one half percent (1.5%) of the invoice amount per month from the due date until such amount is paid, or the maximum rate permitted by law, if less. All applicable state and local taxes and travel and living expenses, if any, shall be billed as separate line items.

(b) **Expenses.** Unless the SO indicates that Travel Expenses are included in the rate or otherwise not chargeable, Customer agrees to reimburse Provider for the travel and living expenses reasonably incurred in the performance of each SO ("**Travel Expenses**"). Travel Expenses are estimated in the fees table of the SO and, unless stated otherwise in the SO, shall be subject to the following guidelines:

- Airline fares shall be coach or "Y" class fares; however, whenever possible, Provider shall purchase discounted airfares.
- Car rental shall be a midsize car or smaller. Mileage reimbursement for personal cars used, if any, shall not exceed the current Internal Revenue Service approved reimbursement per mile.
- Lodging shall be in standard hotel rooms, unless otherwise agreed to by Customer. Provider shall seek competitive lodging rates and shall attempt to take advantage of any special discounts, which may be negotiated by Customer at local hotels.
- Meals for Services performed in North America, including travel days, shall be billed at sixty dollars (\$60.00) per day; no receipts for meals shall be provided.

Customer's execution of the SO that includes Travel Expenses shall be its written approval for Provider to incur and be reimbursed for Travel Expenses up to, but not exceeding, the amount of the estimated Travel Expenses in the SO. No Travel Expenses shall be charged for Time designated as "Remote" in the SO.

(c) **Dates Valid.** The prices in the SO are valid for Activities performed within one (1) year of the date of Customer's execution of the SO. Any Prepaid Days unused after twelve (12) months from the date of the full execution of the SO shall expire without the right of refund.

(d) **Normal Business Hours, Weekends, and Holidays.** Unless otherwise agreed by the parties, Services shall be performed Monday through Friday 7:00 a.m. to 8:00 p.m. local time ("**Normal Business Hours**"), excluding weekends and holidays. Under a T&M SO, a Workday is eight (8) hours and equivalent to a Day; however, upon mutual agreement by the parties, Provider may work more than eight (8) hours in a Workday and may work four (4) ten-hour Workdays in a calendar week. For billing purposes under a T&M SO, a Workday on which Provider works ten (10) hours is equal to one and one quarter (1.25) Days; a week in which Provider works four (4) ten-hour Workdays is equal to five (5) Days.

Provider shall only perform Services after Normal Business Hours or on weekend and holiday Workdays if authorized to do so by Customer in writing. Weekend and holiday Workdays must be scheduled at least fifteen (15) days in advance and be for a minimum of one (1) Day. Under a T&M SO, if Activities are performed after Normal Business Hours or on a weekend or Provider holiday Workday, one and one half (1.5) hours shall be charged for each hour Provider performs Activities outside of Normal Business Hours, one and one half (1.5) Days shall be charged for each weekend Workday on which Activities are performed and two (2) Days shall be charged for each holiday Workday on which Activities are performed. If Activities using Prepaid Time are performed after Normal Business Hours or on a weekend or Provider holiday Workday, one and one half (1.5) hours shall be used from the estimated Time for each hour Provider performs Activities outside of Normal Business Hours, the estimated Time shall be used at the rate of one and one half (1.5) Days for each weekend Workday on which Activities are performed and two (2) Days for each holiday Workday on which Activities are performed.

6. Intellectual Property. During the performance of the Services by Provider, Provider may create certain intellectual property, including, without limitation, ideas, know-how, techniques, documentation, and software scripts (collectively, the "**IP**"). All IP shall be the sole and exclusive property of Provider. Provider retains title and full ownership rights to all such IP under the copyright laws of the United States, Canada or any other jurisdiction or under any federal, state, or foreign laws. Upon Provider's receipt of payment for the Services, Customer shall be granted a perpetual, irrevocable, royalty-free, non-exclusive, non-transferable, non-sublicensable license to use, for the benefit of itself and its Affiliates, the IP for its and its Affiliates' internal business purposes. Notwithstanding the foregoing, nothing contained in this clause shall grant Provider any ownership, use, or distribution rights to Customer's Confidential Information other than as may be required to fulfill its obligations under this Agreement or the SO.

7. Warranty.

(a) **Performance.** Provider warrants that the Services shall be performed in a workmanlike, technically correct manner and with professional diligence and skill and that the Project Deliverables shall substantially conform to their descriptions in the Fixed Price SO. As Customer's exclusive remedy and Provider's sole obligation for any and all breaches of the foregoing warranty, Provider shall, at its option and expense, either re-perform any nonconforming Services reported to Provider, in writing, by Customer within thirty (30) days of the performance of the Services or refund the fees paid for such nonconforming Services. For the purposes of this Section, a "technically correct manner" means that the Services have been performed accurately and in a manner which is consistent with the applicable Documentation.

(b) **Right to Perform.** Provider warrants that it has (i) all necessary licenses and permits required to perform the Services, (ii) the right to use and provide the IP used during the performance of the Services, and (iii) the right to convey any licenses granted hereunder. Customer's sole and exclusive remedy, and Provider's entire liability for any breach of the warranty in the preceding sentence, shall be for Provider to perform its obligations under the "*Third Party Claims*" Section below.

THE EXPRESS WARRANTIES AND REMEDIES SET FORTH IN THIS SECTION ARE THE ONLY WARRANTIES AND REMEDIES PROVIDED BY PROVIDER HEREUNDER. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, ALL OTHER WARRANTIES OR REMEDIES ARE EXCLUDED, WHETHER EXPRESS OR IMPLIED, ORAL OR WRITTEN, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR ANY PARTICULAR PURPOSE, AND ANY WARRANTIES ARISING FROM USAGE OF TRADE OR COURSE OF DEALING OR PERFORMANCE.

8. Confidential Information.

(a) **Definition.** "**Confidential Information**" means information or materials disclosed by one party (the "**Disclosing Party**") to the other party (the "**Receiving Party**") that are not generally available to the public and which, due to their character and nature, a reasonable person under like circumstances would treat as confidential, including, without limitation, financial, marketing, and pricing information, trade secrets, know-how, proprietary tools, knowledge and methodologies, the Software (in source code and/or object code form), information or benchmark test results regarding the functionality and performance of the Software, any Software license keys provided to Customer, and the terms and conditions of this Agreement.

Confidential Information shall not include information or materials that (i) are generally known to the public, other than as a result of an unpermitted disclosure by the Receiving Party after the Effective Date; (ii) were known to the Receiving Party without an obligation of confidentiality prior to receipt from the Disclosing Party; (iii) the Receiving Party lawfully received from a third party without that third party's breach of agreement or obligation of trust; (iv) are protected by Provider in accordance with its obligations under the *Protected Data* Section below, or (v) are or were independently developed by the Receiving Party without access to or use of the Disclosing Party's Confidential Information.

(b) **Obligations.** The Receiving Party shall (i) not disclose or permit disclosure of the Disclosing Party's Confidential Information to any third party, except as permitted in subsection (c) below, (ii) only use the Disclosing Party's Confidential Information to exercise the rights granted to it under this Agreement, and (iii) protect the Disclosing Party's Confidential Information from unauthorized use or disclosure by exercising at least the same degree of care it uses to protect its own similar information, but in no event less than a reasonable degree of care. The Receiving Party shall promptly notify the Disclosing Party of any known unauthorized use or disclosure of the Disclosing Party's Confidential Information and will cooperate with the Disclosing Party in any litigation brought by the Disclosing Party against third parties to protect its proprietary rights. For the avoidance of doubt, this Section shall apply to all disclosures of the parties' Confidential Information as of the Effective Date, whether or not specifically arising from a party's performance under this Agreement.

(c) **Permitted Disclosures.** Notwithstanding the foregoing, the Receiving Party may disclose the Disclosing Party's Confidential Information without the Disclosing Party's prior written consent to any of its Affiliates, directors, officers, employees, consultants, contractors or representatives (collectively, the "**Representatives**"), but only to those Representatives that (i) have a "need to know" in order to carry out the purposes of this Agreement or to provide professional advice in connection with this Agreement, (ii) are legally bound to the Receiving Party to protect information such as the Confidential Information under terms at least as restrictive as those provided herein, and (iii) have been informed by the Receiving Party of the confidential nature of the Confidential Information and the requirements regarding restrictions on disclosure and use as set forth in this Section. The Receiving Party shall be liable to the Disclosing Party for the acts or omissions of any Representatives to which it discloses Confidential Information which, if done by the Receiving Party, would be a breach of this Agreement.

Additionally, it shall not be a breach of this Section for the Receiving Party to disclose the Disclosing Party's Confidential Information as may be required by operation of law or legal process, provided that the Receiving Party provides prior notice of such disclosure to the Disclosing Party unless expressly prohibited from doing so by a court, arbitration panel or other legal authority of competent jurisdiction.

9. Protected Data. For purposes of this Section, "**Protected Data**" means any information or data that is provided by Customer to Provider during this Agreement that alone or together with any other information relates to an identified or identifiable natural person or data considered to be personal data as defined under Privacy Laws, and "**Privacy Laws**" means any applicable law, statute, directive or regulation regarding privacy, data protection, information security obligations and/or the processing of Protected Data.

Except as permitted herein or to the extent required by Privacy Laws or legal process, Provider shall not disclose Protected Data to any third party for any reason. Provider shall implement appropriate technical and organizational measures to prevent unauthorized disclosure of or access to Protected Data by third parties, and shall only store and process Protected Data as required to fulfill its obligations under this Agreement and any applicable SOs. Provider shall make reasonable efforts to comply with Customer's written instructions with respect to the Protected Data; however, Provider shall have no liability to Customer for any breach of this Section resulting from Provider's acts or omissions in accordance with any such instructions. Provider shall promptly notify Customer of any

disclosure of or access to the Protected Data by a third party in breach of this Section and shall cooperate with Customer to reasonably remediate the effects of such disclosure or access.

Customer hereby (i) represents that it has the right to send the Protected Data to Provider, (ii) consents for Provider to store and use the Protected Data worldwide for the sole purpose of performing its obligations under this Agreement and any applicable SOs, and (iii) agrees that the Protected Data may be accessed and used by Provider and its Representatives worldwide as may be needed to support Provider's standard business operations.

10. Limitation of Liability.

EXCEPT FOR (A) ANY BREACH OF THE "*CONFIDENTIAL INFORMATION*" SECTION OF THIS AGREEMENT, (B) AMOUNTS CONTAINED IN JUDGMENTS OR SETTLEMENTS WHICH A PARTY IS LIABLE TO PAY ON BEHALF OF THE OTHER UNDER THE "*THIRD PARTY CLAIMS*" SECTION OF THIS AGREEMENT, (C) CUSTOMER'S BREACHES OF THE "*INTELLECTUAL PROPERTY*" SECTION OF THIS AGREEMENT, OR (D) ANY LIABILITY TO THE EXTENT LIABILITY MAY NOT BE EXCLUDED OR LIMITED AS A MATTER OF APPLICABLE LAW, IN NO EVENT SHALL CUSTOMER, PROVIDER, PROVIDER'S AFFILIATES OR SUPPLIERS BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL LOSS OR DAMAGE OF ANY KIND, INCLUDING BUT NOT LIMITED TO LOSS OF REVENUE, LOSS OF ACTUAL OR ANTICIPATED PROFITS, LOSS OF BUSINESS, LOSS OF CONTRACTS, LOSS OF GOODWILL OR REPUTATION, LOSS OF ANTICIPATED SAVINGS, LOSS OF, DAMAGE TO OR CORRUPTION OF DATA, HOWSOEVER ARISING, WHETHER SUCH LOSS OR DAMAGE WAS FORESEEABLE OR IN THE CONTEMPLATION OF THE PARTIES AND WHETHER ARISING IN OR FOR BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), BREACH OF STATUTORY DUTY, OR OTHERWISE.

EXCEPT FOR (A) ANY BREACH OF THE "*CONFIDENTIAL INFORMATION*" SECTION OF THIS AGREEMENT, OR ANY OTHER VIOLATION OF THE OTHER PARTY'S INTELLECTUAL PROPERTY RIGHTS (INCLUDING BUT NOT LIMITED TO CUSTOMER'S BREACHES OF THE "*INTELLECTUAL PROPERTY*" SECTION OF THIS AGREEMENT); (B) THE PARTIES' EXPRESS OBLIGATIONS UNDER THE "*THIRD PARTY CLAIMS*" SECTION OF THIS AGREEMENT, (C) PROVIDER'S COSTS OF COLLECTING DELINQUENT AMOUNTS WHICH ARE NOT THE SUBJECT OF A GOOD FAITH DISPUTE; (D) A PREVAILING PARTY'S LEGAL FEES PURSUANT TO THE "*LEGAL FEES*" SECTION OF THIS AGREEMENT; OR (E) ANY LIABILITY TO THE EXTENT LIABILITY MAY NOT BE EXCLUDED OR LIMITED AS A MATTER OF APPLICABLE LAW, THE MAXIMUM AGGREGATE AND CUMULATIVE LIABILITY OF CUSTOMER, PROVIDER, PROVIDER'S AFFILIATES AND SUPPLIERS UNDER THIS AGREEMENT, WHETHER ARISING IN OR FOR BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), BREACH OF STATUTORY DUTY, OR OTHERWISE, SHALL NOT EXCEED (Y) THE GREATER OF THE FEES PAID AND/OR OWED (AS APPLICABLE) BY CUSTOMER FOR THE SERVICES THAT ARE THE SUBJECT OF THE BREACH OR (Z) FIVE HUNDRED DOLLARS (\$500.00). THE PARTIES AGREE THAT THESE LIMITATIONS OF LIABILITY ARE AGREED ALLOCATIONS OF RISK CONSTITUTING IN PART THE CONSIDERATION FOR PROVIDER PROVIDING SERVICES TO CUSTOMER, AND SUCH LIMITATIONS WILL APPLY NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY AND EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LIABILITIES OR FAILURES.

Provider's Affiliates and suppliers shall be beneficiaries of this "*Limitation of Liability*" Section.

11. Third Party Claims

(a) **Infringement.** Provider shall, at its own expense, defend or settle any claim, suit, action, or proceeding brought against Customer by a third party to the extent it is based on an allegation that any IP provided hereunder directly infringes any patent, copyright, trademark, or other proprietary right enforceable in the country in which the IP is delivered to Customer, or misappropriates a trade secret in such country (an "**IP Claim**"). Additionally, Provider shall pay any judgments finally awarded against Customer under an IP Claim or any amounts assessed against Customer in any settlements of an IP Claim, and reasonable administrative costs or expenses, including, without limitation, reasonable attorneys' fees necessarily incurred by Customer in responding to the IP Claim. Provider's obligations under this Section are conditioned upon Customer (i) giving prompt written notice of the IP Claim to Provider; (ii) permitting Provider to retain sole control of the investigation, defense or settlement of the IP Claim, and (iii) providing Provider with such cooperation and assistance, as Provider may reasonably request, from time to time, in connection with the investigation, defense or settlement of the IP Claim.

Provider shall have no obligation hereunder to defend Customer against any IP Claim (i) resulting from use of the IP other than as authorized in this Agreement, (ii) resulting from a modification of the IP other than by Provider, (iii) based on Customer's use of the IP after Provider recommends discontinuation because of possible or actual infringement, (iv) based on Customer's use of a superseded or altered release of IP, if the infringement would have been avoided by use of a current or unaltered release of the IP made available to Customer, or (v) to the extent the IP Claim arises from, or is based on, the use of the IP with other products, services, or data not supplied by Provider, if the infringement would not have occurred but for such use. If Customer's use of the IP is enjoined as a result of an IP Claim, Provider shall, at its expense and option either (i) obtain for Customer the right to continue using the IP, (ii) replace the IP with a functionally equivalent non-infringing product, (iii) modify the IP so that it is non-infringing, or (iv) accept the return of the infringing IP and refund the fee paid for the infringing IP, pro-rated over a sixty (60) month period from the date of delivery of the IP. This Section states the entire liability of Provider, and Customer's sole and exclusive remedy, with respect to an IP Claim.

(b) **General.** At a party's request (the "**Defended Party**"), the other party (the "**Defending Party**") shall, at its own expense, defend or settle any claim, suit, action, or proceeding brought against the Defended Party by a third party which primarily alleges that the Defending Party's negligent or wrongful acts or omissions have directly harmed such third party ("**Claim**"). Additionally, the Defending Party shall pay any judgments on a Claim finally awarded by a court of competent jurisdiction or any settlements reached and the Defended Party's reasonable and necessary administrative expenses in responding to the Claim, including, but not limited to, reasonable attorneys' fees.

The Defending Party's obligations under this Section (b) are conditioned upon the Defended Party (i) giving prompt written notice of the Claim to the Defending Party; (ii) permitting the Defending Party to retain sole control of the investigation, defense or settlement of the Claim, and (iii) providing the Defending Party with such cooperation and assistance, as it may reasonably request, from time to time, in connection with the investigation, defense or settlement of the Claim.

If a final judgment of the Claim allocates or attributes some or all of the liability, fault, or responsibility under the Claim to the Defended Party ("**Defended Party Liability**"), the Defended Party shall reimburse the Defending Party in proportion to the Defended Party Liability for (i) reasonable and necessary expenses the Defending Party incurred in defending or settling the Claim, including, but not limited to, reasonable attorneys' fees, and (ii) any amounts awarded to the third party in the settlement or final judgment. Additionally, the amount payable by the Defending Party to the Defended Party under the first paragraph of this Section 11(b) for the Defended Party's administrative expenses in handling the Claim shall be reduced in proportion to the Defended Party's Liability.

12. Term and Termination.

(a) **The Agreement.** Either party may terminate this Agreement for any reason, including, but not limited to the other party's uncured breach of the Agreement, with thirty (30) days written notice. If the Agreement is terminated, it shall remain in force for any SOs which are not completed or are not separately terminated.

(b) **T&M SOs.** A T&M SO may be terminated (i) by Customer for convenience with ten (10) days written notice or (ii) by either party for a breach of the SO by the other party which, if capable of being cured, the breaching party fails to cure to the non-breaching party's reasonable satisfaction within thirty (30) days following its receipt of notice of the breach. If a T&M SO is terminated, Customer shall (x) pay Provider for all fees and expenses incurred up to the effective date of termination and (y) shall not be entitled to a refund of any unused prepaid fees purchased by such SO unless the termination is for Provider's uncured breach.

(c) **Fixed Price SOs.** A Fixed Price SO may be terminated by either party for a breach of the Fixed Price SO by the other party which, if capable of being cured, the breaching party fails to cure to the non-breaching party's reasonable satisfaction within thirty (30) days following its receipt of notice of the breach. If Provider terminates a Fixed Price SO as permitted by the preceding sentence, Customer shall pay Provider for all documented hours Provider has worked on uncompleted Deliverables at Provider's then current hourly rate.

(d) The Sections titled *DEFINITIONS, INTELLECTUAL PROPERTY, WARRANTY, CONFIDENTIAL INFORMATION, LIMITATION OF LIABILITY, THIRD PARTY CLAIMS, FEES AND GENERAL* shall survive the termination of this Agreement.

13. Insurance. Insurance. Provider will maintain at its expense the following insurance during the term of this Agreement and any SO:

(i) Worker's Compensation Insurance, including occupational illness or disease coverage, and Employer's Liability Insurance with a minimum limit of \$1,000,000 per accident.

(ii) Commercial General Liability Insurance, including Products, Completed Operations, Personal Injury Liability and Contractual Liability, covering bodily injury and property damage with a minimum combined single limit of \$1,000,000 per occurrence and \$2,000,000 general aggregate.

(iii) Automobile Liability Insurance covering use of owned, non-owned, and hired automobiles with a minimum combined single limit of \$1,000,000 per accident for bodily injury and property damage.

(iv) Umbrella Liability Insurance with a minimum limit of \$5,000,000 per occurrence and aggregate in excess of the insurance under Provider's employers liability, commercial general liability and automobile liability insurance policies.

(v) Professional Liability / Errors and Omissions insurance with limits not less than \$5,000,000 per claim and aggregate.

Customer will be included as an additional insured on all coverage listed above with the exception of Workers' Compensation and Professional Liability / Errors and Omissions policies as respects insurable liabilities assumed by Provider under this Agreement. Upon Customer's request, Provider shall furnish certificates of insurance evidencing such coverage.

14. General.

(a) **Governing Law and Venue.** This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada, excluding its conflicts of laws principles. Any action seeking enforcement of this Agreement or any provision hereof shall be brought exclusively in the state or federal courts located in the Province of Ontario, Canada. The parties agree that the United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Agreement.

(b) **Assignment.** Except as otherwise set forth herein, Customer shall not, in whole or part, assign or transfer any part of this Agreement, the licenses granted under this Agreement or any other rights, interest or obligations hereunder, whether voluntarily, by contract, by operation of law or by merger (whether that party is the surviving or disappearing entity), stock or asset sale, consolidation, dissolution, through government action or order, or otherwise without the prior written consent of Provider. Any attempted transfer or assignment by Customer that is not permitted by this Agreement shall be null and void.

(c) **Severability.** If any provision of this Agreement shall be held by a court of competent jurisdiction to be contrary to law, such provision will be enforced to the maximum extent permissible by law to effect the intent of the parties and the remaining provisions of this Agreement will remain in full force and effect. Notwithstanding the foregoing, the terms of this Agreement that limit, disclaim, or exclude warranties, remedies or damages are intended by the parties to be independent and remain in effect despite the failure or unenforceability of an agreed remedy. The parties have relied on the limitations and exclusions set forth in this Agreement in determining whether to enter into it.

(d) **Use by U.S. Government.** The Software is a "commercial item" under FAR 12.201. Consistent with FAR section 12.212 and DFARS section 227.7202, any use, modification, reproduction, release, performance, display, disclosure or distribution of the Software or Documentation by the U.S. government is prohibited except as expressly permitted by the terms of this Agreement. In addition, when Customer is a U.S. government entity, the language in Subsection (ii) of the first paragraph of the *Infringement* Section of this Agreement and the *Injunctive Relief* Section of this Agreement shall not be applicable.

(e) **Notices.** All notices provided hereunder shall be in writing and addressed to the legal department of the respective party or to such other address as may be specified in the SO or in writing by either of the parties to the other in accordance with this Section. Except as may be expressly permitted herein, notices may be delivered personally, sent via a nationally recognized courier or overnight delivery service, or mailed by first class mail, postage prepaid. All notices, requests, demands or communications shall be deemed effective upon personal delivery or, if sent by mail, four (4) days following deposit in the mail in accordance with this paragraph.

(f) **Disclosure of Customer Status.** Provider may include Customer in its listing of customers and, upon written consent by Customer, announce Customer's selection of Provider in its marketing communications.

(g) **Waiver.** Performance of any obligation required by a party hereunder may be waived only by a written waiver signed by an authorized representative of the other party, which waiver shall be effective only with respect to the specific obligation described therein. 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.

(h) **Injunctive Relief.** Each party acknowledges and agrees that in the event of a material breach of this Agreement, including but not limited to a breach of the *Intellectual Property*, *Restrictions* or *Confidential Information* Sections of this Agreement, the non-breaching party shall be entitled to seek immediate injunctive relief, without limiting its other rights and remedies.

(i) **Force Majeure.** Each party will be excused from performance for any period during which, and to the extent that, it is prevented from performing any obligation or service as a result of causes beyond its reasonable control, and without its fault or negligence, including without limitation, acts of God, strikes, lockouts, riots, acts of war, epidemics, communication line failures, and power failures. For added certainty, this Section shall not operate to change, delete, or modify any of the parties' obligations under this Agreement (e.g., payment), but rather only to excuse a delay in the performance of such obligations.

(j) **Equal Opportunity.** Provider Software Inc. is a federal contractor and Affirmative Action employer (M/F/D/V) as required by the Equal Opportunity clause C.F.R. § 60-741.5(a).

(k) **Headings.** Headings in this Agreement are for convenience only and do not affect the meaning or interpretation of this Agreement. This Agreement will not be construed either in favor of or against one party or the other, but rather in accordance with its fair meaning. When the term "including" is used in this Agreement it will be construed in each case to mean "including, but not limited to."

(l) **Legal Fees.** If any legal action is brought to enforce any rights or obligations under this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees, court costs and other collection expenses, in addition to any other relief it may be awarded.

(m) **Entire Agreement.** This Agreement is intended by the parties as a final expression of their agreement with respect to the subject matter thereof and may not be contradicted by evidence of any prior or contemporaneous agreement unless such agreement is signed by both parties. In the absence of such an agreement, this Agreement and the applicable SO shall constitute the complete and exclusive statement of the terms and conditions and no extrinsic evidence whatsoever may be introduced in any judicial or arbitral proceeding that may involve the Agreement. Each party acknowledges that in entering into the Agreement it has not relied on, and shall have no right or remedy in respect of, any statement, representation, assurance or warranty (whether made negligently or innocently) other than as expressly set out in the Agreement. In those jurisdictions where an original (non-faxed, non-

electronic, or non-scanned) copy of an agreement or an original (non-electronic) signature on agreements such as this Agreement or the SO is required by law or regulation, the parties hereby agree that, notwithstanding any such law or regulation, a faxed, electronic, or scanned copy of and a certified electronic signature on this Agreement or any SO shall be sufficient to create an enforceable and valid agreement. In the event of a conflict between the terms of this Agreement and the terms contained in the SO, the terms of a SO shall control. Neither this Agreement, nor the SO, may be modified or amended except by a writing executed by a duly authorized representative of each party. No other act, document, usage or custom shall be deemed to amend or modify this Agreement or the SO.