

## T-71

# PURCHASE ORDER TERMS AND CONDITIONS (SOFTWARE LICENSE AGREEMENT WITH SOURCE CODE ESCROW)

### 1. DEFINITIONS AND ACCEPTANCE OF ORDER.

- A. "Customer," "Buyer," "Licensee" or "Lessee" means the entity name listed on the Purchase Order/Subcontract. "Licensor," "Seller" or "Lessor" means the party with whom the Customer is contracting. The term "Purchase Order" means the name or title of the instrument of contracting, including all documents, exhibits and attachments referenced thereon.
- B. This Order constitutes Customer's offer. Acceptance is expressly limited to the terms of the Order and Customer hereby objects to any additional or different terms in the acceptance. This Order is accepted as written by executing the Acknowledgement or Acceptance copy of the Order, or by beginning performance.
- C. No modification of this Order (including any additional terms or different terms contained in the acceptance) shall be binding on Customer unless agreed to in writing and signed by Customer's duly authorized Purchase Representative.

### 2. ENTIRE AGREEMENT.

This Agreement, together with the Purchase Order and all appendices or other attachments referenced herein, constitutes the entire agreement between Licensor and Customer and supersedes all proposals, oral and written, between the parties on this subject.

### 3. SOFTWARE LICENSED; SERVICES; TERM.

Licensor hereby grants Customer a nonexclusive and perpetual license to use the Software described in the Purchase Order, consisting of the object code(s) and related documentation under each program element thereof. Licensor also grants to Customer a license described in the Purchase Order, subject to the terms of this Agreement; provided however, that Customer shall have complied fully with the terms of the Escrow Agreement, appended hereto and made a part hereof, prior to receiving such source code and documentation from the Escrow Agent. The Software licensed shall include in its meaning, in addition to the description contained in the Purchase Order, any improvements, additions, or modifications of the version or versions of the Software which Licensor has licensed Customer to use and materials related thereto and all materials, documentation, and technical information provided to Customer in written form and identified in the Purchase Order for use in connection with the Software. Licensor further agrees to perform certain services relating to the Software as set forth herein or in the Purchase Order.

### 4. CONFIDENTIALITY OF LICENSOR'S INFORMATION.

Notwithstanding any other provisions of this Agreement to the contrary, Customer hereby agrees that it shall use reasonable efforts to avoid disclosure

of Licensor's proprietary/confidential information to any third party other than Customer's consultants, agents and representatives having access to Customer proprietary data. Further, Licensor agrees that all such proprietary/confidential information shall be marked with a stamp or legend indicating its confidential/proprietary nature. For the purposes of the Agreement, the term "reasonable efforts" shall mean that the Customer shall treat such proprietary/confidential information in accordance with Customer's procedures regarding vendor/customer proprietary information. Further, Customer shall have the right to copy the Software for backup and archival purposes. Customer shall not be liable for use or disclosure of any such proprietary information if the same is:

- A. In the public domain at the time it was disclosed;
- B. Known to the party receiving it at the time of disclosure;
- C. Used or disclosed inadvertently provided the appropriate degree of care is exercised;
- D. Used or disclosed with the prior written approval of the other party;
- E. Independently developed by the receiving party;
- F. Becomes known to the receiving party without similar restrictions from a source other than the disclosing party having the right to disclosure.

### 5. DELIVERY AND INSTALLATION; MODIFICATION OF SOFTWARE.

Licensor shall deliver the software at the time, place and order of delivery as described in the Purchase Order. Licensor shall install the software and provide necessary support services, including training, at no additional charge. Licensor shall notify the Customer that the program is ready for acceptance testing no later than the date set forth in the Purchase Order. Licensor shall improve, add to, or otherwise modify the Software and the source code prior to or at the same time any modifications of the same are available to any of Licensor's customers.

### 6. ESCROW AND MODIFICATION OF SOURCE CODE.

Concurrent with delivery of the Software hereunder, Licensor shall place a copy of the source code for the Software into escrow pursuant to any Escrow Agreement executed by the parties and which may be appended hereto. Licensor shall improve, add to, or otherwise modify the source code prior to or at the time any modifications of the Software are available to any of Licensor's customers.

### 7. PERFORMANCE – DELAY.

Time is of the essence in the Licensor's performance of this Agreement. If at any time it appears to Licensor that it may not meet any of the performance schedules or the scheduled completion date of the services to be performed for any reason, including labor disputes, Licensor shall immediately by verbal means (to be

confirmed in writing) notify customer of the reasons for the estimated duration of such delay. If requested by Customer, Licensor shall make every effort to avoid or minimize the delay to the maximum extent possible including the expenditure of premium time. Any additional cost caused by these requirements of Customer shall be borne by Licensor, unless the delay in performance arises out of causes beyond the control and without the fault or negligence of Licensor or its subcontractors within the meaning of the Cancellation-Default clause herein. The foregoing requirements are in addition to any of Customer's other rights and remedies as may be provided by law or this Agreement.

## **8. ACCEPTANCE TESTING.**

- B. business environment, is capable of running on a variety of data without failure, and meets the run times required by Customer. If and when, in Customer's sole discretion, the acceptance tests establish that the Software is performing satisfactorily, Customer shall sign an acceptance certificate and the date of execution of such certificate shall be the date on which the term of this Agreement shall begin hereafter, the ("Acceptance Date").
- C. Failure of Acceptance Test; Retesting. If, in Customer's sole discretion, Customer determines that the Software has not successfully completed the acceptance test, Customer shall promptly notify Licensor in writing (hereafter, "first notice of failure") and shall specify with as much detail as possible in which respects the Software failed to pass the acceptance test. At Customer's option, Customer can either terminate the Agreement at that point (in which case the provisions of subsection C of this section shall apply) or request Licensor to make such necessary corrections and modifications in the Software as will permit the Software to be ready for retesting no later than ten (10) business days from the date of receipt of Customer's first notice of failure. Licensor shall notify Customer when such corrections and modifications have been made, and Customer shall commence retesting the Software and complete such retesting as quickly as possible. If, in Customer's sole discretion, the Software still fails to pass the acceptance test, Customer shall promptly notify Licensor in writing, and shall have the right, at its option, to terminate the Agreement by giving written notice of such termination to Licensor.
- D. Customer's Rights Upon Termination After Failure of First or Second Acceptance Tests. Upon Customer's termination of this Agreement after failure of the acceptance tests, Customer shall promptly return the Software and associated documentation and

- A. Commencement of Acceptance Tests; Acceptance Date. Within five (5) business days of Licensor's notification to Customer that the program has been installed and Customer's personnel have been trained to permit them to begin acceptance testing. Customer shall commence performing the acceptance tests pursuant to the procedures, criteria and descriptions set forth in the Purchase Order and shall complete such tests as quickly as practicable. Such acceptance tests shall be conducted on Customer's site and equipment in order to determine whether the Software can be effectively utilized in Customer's operating

materials to Licensor at Licensor's expense and shall have the right, for failure of the Software to pass the acceptance tests, to receive prompt reimbursement of all payments made to Licensor under this Agreement.

## **9. PAYMENT SCHEDULE; FEES AND CHARGES.**

Following successful completion of the acceptance tests, Customer shall pay Licensor the fees and charges specified in the Purchase Order hereto contingent upon Licensor's satisfactory performance of its obligations under this Agreement up to and including the day upon which such payment becomes due.

Invoices. Once each month (or as may be otherwise agreed), Licensor shall submit to Customer, in such form and with such evidence in support thereof as Customer may reasonably require, an invoice for each payment provided for in the Agreement. Payment of invoices shall not constitute approval or acceptance of services rendered. At any time prior to final payment under this Agreement, Customer may have the invoices audited as to validity. Payment of Licensor's invoices shall be subject to adjustment for any amounts subsequently found upon audit or otherwise to have been improperly invoiced.

## **10. COPIES OF SOFTWARE.**

Customer shall have the right to reproduce all of the Software and documentation described in the Purchase Order hereto for its internal use, subject to the restrictions on use and disclosure set forth herein and any exceptions to this provision stated in the Purchase Order hereto. In addition, Customer shall have the unrestricted right to transfer this Agreement to any affiliate or subsidiary of Customer without additional fee.

## **11. IMPROVEMENTS AND OTHER MODIFICATIONS.**

- A. Improvements. Improvements in the Software (which shall mean any additions or modifications made by the Licensor to or in the Software at any time after the acceptance test) which improve the efficiency and effectiveness of the basic program

function(s) described in the Purchase Order shall be furnished to the Customer at no charge.

- B. Program Changes. If, at any time after the Acceptance Date, Licensor shall develop any changes in the Software which significantly changes the basic program functions of the Software or add one or more new ones, Customer shall have the right to obtain such program changes at the lesser of (1) Licensor's standard prices then in effect for installing such changes, or (2) the difference between the then current price of the Software including such changes and the applicable fees and charges for the Software reflected herein. An applicable site or multiple copy discounts shall also apply.

**12. PRICE PROTECTION.**

The fees and charges specified herein are the total fees and charges for the services and will not be increased during the term of this Agreement except as the parties may agree in writing. Licensor represents that the price stated for services performed hereunder is at least as favorable as that charged to any other customer for the same or similar services. Any renewal of this Agreement shall be at a fee or charge which shall be the lower of (a) then prevailing prices of the Customer; or (b) the fees and charges of the previous term, increased by not more than 10 percent.

**13. TERMINATION/CANCELLATION.**

- A. Termination-Convenience. The performance of services under this Agreement may be terminated, in whole or in part, by Customer for Customer's convenience at any time and for any reason on Customer giving written termination notice to Licensor and shall pay to Licensor termination charges computed in the following manner; (1) a sum computed and substantiated in accordance with standard accounting practices for those reasonable costs incurred by Licensor prior to the date of termination for completed work, work in process, materials directly related to the Agreement, for orderly phase out of performance as requested by Customer in order to minimize the costs of the termination and for preparation and settlement of Licensor's termination claim and (2) a reasonable profit on such work performed; provided, however, that Customer shall not be liable to Licensor for any costs which would not have been charged had the Agreement not been terminated nor for any sum in excess of the total price stated in the Agreement for the terminated Software.

- B. Cancellation-Default. Except in the case of delay or failure resulting from circumstances beyond the control and without the fault or negligence of Licensor or of its suppliers or subcontractors, Customer shall be entitled, by written cancellation notice to Licensor, to cancel the whole or any part of this Agreement for default, without granting an extension of time, and to have all other rights against Licensor by reason of Licensor's default as provided by law. If it be found that Licensor was not in default, the rights and obligations of the parties shall be the same as if a Notice of Cancellation had been issued pursuant to Clause 13.A above, Termination-Convenience.
- C. Other. By written notice to Licensor, Customer may cancel the whole or part of this Agreement in the event of suspension of Licensor's business, insolvency of Licensor, institution of bankruptcy, reorganization, arrangement, liquidation proceedings by or against Licensor or proceedings for the benefit of creditors or for any failure by Licensor to provide adequate assurances (as provided for in Uniform Commercial Code, section 2-609) of its ability or willingness to perform its obligations under this Agreement. Such cancellation shall be deemed "for default" in accordance with paragraph B. of this Termination /Cancellation clause and the rights and obligations of the parties shall be determined as therein provided.
- D. Licensor shall also be deemed in default if the Software program continues to exhibit defects causing serious disruption of use and/or repeated periods of downtime, notwithstanding Licensor's remedial or maintenance efforts, over a continuous period of three months or more.
- E. Maintenance Termination. Customer may immediately terminate this Agreement upon termination or breach of any maintenance agreement between Licensor and Customer.
- F. Rights and Obligations of the Parties on Termination. In the event that this Agreement is terminated, each party shall forthwith return to the other all papers, materials, and other properties of the other party then in its possession or certify to the destruction of same.
- G. Refund of Payments After Acceptance. The Licensor shall, upon termination by Customer due to default after acceptance of the Software, return payments it received for the Software and the services according to the following schedule. The refund of

monies paid hereunder shall not be deemed the exclusive remedy of Customer in the event of a default or breach of this Agreement by Licensor.

Termination Date, After Acceptance	Percentage of License Fee to be Refunded
less than 6 months	90%
within 6–12 months	75%
within 13–24 months	50%
within 25–36 months	25%
within 37–48 months	10%
more than 48 months	0%

#### 14. WARRANTIES.

- A. Software and Services. Licensor warrants that on the Acceptance Date the Software furnished hereunder shall be free from programming errors and from defects in workmanship and materials and shall operate in conformity with the performance capabilities, specifications, functions and other descriptions and standards applicable thereto as set forth in the Purchase Order; that the services shall be performed in a timely and professional manner by qualified professional personnel; and that the services and Software shall conform to the standards generally observed in the industry for similar services and Software. This warranty shall not be affected by Customer's modifications of the Software (including source code) as long as Licensor can discharge any warranty obligations notwithstanding such modifications or following removal of such modifications by Customer.
- B. Ownership; Authority. Licensor warrants that it has full power and authority to grant the rights set forth in this Agreement to Customer with respect to the Software without the consent of any other person; and that neither the performance of the services by Licensor nor the license to use and the use by Customer of the Software and documentation (including the copying thereof) will in any way constitute an infringement or other violation of any copyright, trade secret, trademark, patent, invention, proprietary information, nondisclosure or other rights of any third party.
- C. Compliance With Laws.
- (1) Federal, State and Local Laws. Licensor warrants that in the performance of this Agreement, it shall comply with all applicable Federal, state and local laws. On its invoice or in other form satisfactory to Customer,

Licensor shall submit certification that the Software covered by this Agreement was produced in compliance with all applicable requirements of Sections 6, 7 and 12 of the Fair Labor Standards Act (29 U.S.C. 201-219) as amended and of regulations and orders of the U.S. Department of Labor issued under Section 14 thereof.

- (2) Equal Opportunity. Buyer is an "Equal Opportunity" employer and Licensor shall, therefore, comply with the provisions of the President's Executive Order 11246 as supplemented and all related regulations of the Department of Labor.

#### 15. LICENSOR'S FULFILLMENT OF WARRANTY OBLIGATIONS.

If at any time during the 12-month period immediately following the Acceptance Date Licensor or Customer shall discover one or more defects or errors in the Software or any other respect in which the Software fails to conform to the provisions of any warranty contained in this Agreement, Licensor shall, entirely at its own expense, promptly correct each such defect, error or nonconformity by, among other things, supplying Customer with such corrective codes and making such additions, modifications, or adjustments to the package as may be necessary to keep the Software in operating order in conformity with the warranties herein.

#### 16. CLEARANCE OF MATERIALS INTENDED FOR PUBLIC RELEASE.

No news release, including photographs and films, advertisement, public announcement, denial or confirmation of same, or any part of the subject matter of this Agreement or any phase of any program hereunder shall be made without prior written approval of both parties.

#### 17. PATENT, TRADEMARK, AND COPYRIGHT INDEMNITY.

Seller shall defend, indemnify, and hold Buyer, Buyer's officers, agents, employees, and customers harmless against all claims and liabilities, including costs, for infringement of any United States patent, trademark, or copyright by any Products delivered under this Order or, at Seller's option and expense, Seller shall obtain such licenses as are necessary to remove such infringement, provided that Seller is reasonably notified of such claims and liabilities. Seller's obligation shall not apply to Products manufactured by Seller pursuant to detailed designs developed by Buyer and furnished to Seller under an Order which does not require research, development, or design work by Seller.

Seller's obligation shall also not apply to any infringement arising from the use or sale of Products in combination with items not delivered by Seller if such infringement would not have occurred from the use or sale of such Products solely for the purpose for which they were designed or sold to Buyer. Seller's obligation shall extend to the U.S. Government only if and to the extent Buyer has agreed to indemnify the U.S. Government.

**18. INSPECTION.**

If this License is to be performed on premises under Licensor's control, Customer shall, at all reasonable times during the period of performance, have access to and the right to inspect all services being performed under this Agreement.

**19. TAXES.**

All prices herein, unless otherwise provided, include all applicable Federal, state and local taxes as may be assessed against Licensor except those sales or use taxes required by law to be paid by Licensee.

**20. CHANGES.**

Customer may at any time, in a written directive or order, make reasonable changes within the general scope of this Agreement in any one or more of the following: (A) definition of services to be performed, (B) Software ordered and (C) schedule of and place of performance. If any such change requires an increase or decrease in the cost of or in the time required for the performance of any part of the services under this Agreement, whether changed or not changed by any such Agreement, or otherwise affects any other provision of this Agreement, an equitable adjustment shall be made in the (1) price, (2) performance schedule and (3) in such other provisions of this Agreement as may be so affected, and this Agreement shall be changed or modified in writing accordingly. Any claim by Licensor for adjustment under this clause must be asserted within thirty (30) days from the date of receipt by Licensor of such written order or within such further time as may at any time be agreed upon in writing by the parties; provided, however, that Customer, if it decides that the facts justify such action, may receive and act upon any such claim at any time prior to final payment under this Agreement. Where the cost of Software or property made obsolete or excess as a result of a change is included in Licensor's claim for adjustment, Customer shall have the right to prescribe the manner of disposition of such Software or property. Failure of the parties to agree upon any adjustment to be made under this clause shall not excuse the Licensor from proceeding with this Agreement as changed.

**21. CHOICE OF LAW.**

This Order and any dispute arising hereunder shall be governed by the substantive and procedural laws of the State of California, except, however, that California's Choice of Law provisions shall not apply.

**22. SEVERABILITY.**

Any invalidity, in whole or in part, of any provision of this agreement shall not affect the validity of any other part or provision of this Agreement.

**23. NOTICES.**

Any notice or other communication hereunder shall be in writing.

**24. WAIVER.**

No term or provision hereof shall be deemed waived and no breach excused unless such waiver or consent shall be in writing and signed by the party claimed to have waived or consented.

**25. DELEGATION AND ASSIGNMENT.**

No delegation of any duties under this Agreement shall be binding upon Customer until its written consent thereto has been obtained. Licensor is requested to inform Customer in writing prior to any assignments of rights to monies due or to become due under this Agreement.

**26. SUBCONTRACTING.**

No Software to be delivered under this Agreement shall be procured or licensed by Licensor from a third party in completed or substantially completed form without Customer's written consent.

**27. DISPUTES.**

Either party may litigate any dispute arising under or relating to this order. Such litigation shall be brought and jurisdiction and venue shall be proper only in a state or federal district court in Los Angeles County. Pending resolution of any such dispute by settlement or by final judgment, the parties shall proceed diligently with performance.

**28. WAIVER OF RIGHT TO JURY TRIAL.**

Buyer and Seller hereby waive their respective right to trial by jury of any cause of action, claim, counterclaim or cross-complaint in any action, proceeding or hearing brought by either Seller against Buyer or Buyer against Seller on any matter whatsoever arising under, relating to, or in any way connected with this Order, the relationship of Seller and Buyer or any claim of injury or damage, or the enforcement of any remedy under any law, statute or regulation now or hereafter in effect.