



Contract Number
24-371

SAP Number

Innovation and Technology Department

Department Contract Representative	Jeremiah Thomas
Telephone Number	(909) 388-0641
Contractor	Hewlett Packard Enterprise, Inc.
Contractor Representative	N/A
Telephone Number	N/A
Contract Term	The period commencing on the date of first use of the software and continuing until terminated.
Original Contract Amount	N/A
Amendment Amount	N/A
Total Contract Amount	N/A
Cost Center	1200604048

Briefly describe the general nature of the contract: Non-financial Terms of Service, including non-standard terms, with Hewlett Packard Enterprise, Inc. for the use of open-source CloudPhysics software used to identify the optimal configuration of new and existing information technology cloud infrastructure, for the period commencing on the date of first use of the software and continuing until terminated.

FOR COUNTY USE ONLY

Approved as to Legal Form

► *Bonnie Uphold*
Bonnie Uphold, Supervising Deputy County Counsel

Date 4/26/2024

Reviewed for Contract Compliance

►

Date _____

Reviewed/Approved by Department

►

Date _____



Terms of Service

HPE CloudPhysics Terms of Service

THIS AGREEMENT ("AGREEMENT") GOVERNS YOUR SUBSCRIPTION AND USE OF OUR SERVICES. IF YOU REGISTER FOR A FREE TRIAL FOR OUR SERVICES, THIS AGREEMENT WILL ALSO GOVERN THAT FREE TRIAL.

BY ACCEPTING THIS AGREEMENT, EITHER BY (I) SUBMITTING A REGISTRATION FORM AND CLICKING ON THE "AGREE", "ACCEPT" OR SIMILAR BUTTON, OR (II) BY EXECUTING AN ORDER THAT REFERENCES THIS AGREEMENT, YOU ACCEPT AND AGREE TO THE TERMS AND CONDITIONS OF THIS AGREEMENT. IF YOU ARE ENTERING INTO THIS AGREEMENT AS AN EMPLOYEE OR AGENT OF A CORPORATION OR OTHER LEGAL ENTITY, YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO BIND SUCH ENTITY TO THESE TERMS AND CONDITIONS, IN WHICH CASE THE TERMS "YOU" OR "YOUR" SHALL REFER TO SUCH ENTITY. IF YOU DO NOT HAVE SUCH AUTHORITY, OR IF YOU DO NOT AGREE WITH THESE TERMS AND CONDITIONS, CLICK ON THE "CANCEL" BUTTON, OR EXIT FROM THIS WEBPAGE, AS APPLICABLE, AND THE REGISTRATION OR INSTALLATION PROCESS WILL CEASE AND YOU MAY NOT USE THE SERVICES. In this Agreement, "we" "us" or "our" means HPE CloudPhysics, a product of Hewlett Packard Enterprises, Inc. (HPE); "Services" means the online, web-based applications referenced in the Order and that are further described in the applicable Documentation; "Order(s)" means the ordering document(s), including addenda thereto, for subscriptions to the Services that are entered into by us and you from time to time; and "Documentation" means our current end-user manuals, operating instructions and installation guides generally provided for use with the Services, but Documentation does not include sales brochures, proposals, training materials or marketing information. "Server" means a single physical computer owned or operated by you and that is under our management.

1. FREE TRIAL/FREE ASSESSMENT

If you register for a free trial or HPE/HPE Partner funded assessment, we will make one or more Services available to you on a trial basis free of charge until the earlier of (a) 30 days after you registered for your trial of the Services or (b) the start date of any paid Subscription Term (as defined below) for the same Services. Additional trial terms and conditions may appear on the registration web page. Any such additional terms and conditions are incorporated into this Agreement by reference and are legally binding.

DURING YOUR FREE TRIAL OR FREE ASSESSMENT, ANY DATA YOU ENTER INTO THE SERVICES AND ANY ANALYSES AND RESULTS OBTAINED IN THE COURSE OF YOUR USE OF THE SERVICES MAY BE PERMANENTLY LOST UNLESS YOU PURCHASE A SUBSCRIPTION TO THE SAME OR UPGRADED SERVICES AS THOSE COVERED BY

THE TRIAL BEFORE THE END OF THE TRIAL PERIOD. YOU CANNOT TRANSFER SUCH DATA, ANALYSES OR RESULTS ENTERED OR OBTAINED DURING THE TRIAL PERIOD TO A SERVICE THAT WOULD BE A DOWNGRADE FROM THAT COVERED BY THE TRIAL; THEREFORE, IF YOU PURCHASE A SERVICE THAT WOULD BE A DOWNGRADE FROM THAT COVERED BY THE TRIAL, ANY ANALYSES AND RESULTS BEFORE THE END OF THE TRIAL PERIOD OR SUCH DATA, ANALYSES AND RESULTS MAY BE PERMANENTLY LOST. NOTWITHSTANDING SECTION 8 (WARRANTIES AND DISCLAIMERS), DURING THE FREE TRIAL THE TRIAL SERVICES ARE PROVIDED "AS-IS" WITHOUT ANY WARRANTY WHATSOEVER.

2. SERVICES

2.1. Registration. In order to access the Services you must register an account on our website ("Account"). You agree to (1) provide true, accurate, current and complete information about yourself as prompted by the Services' registration form (the "Registration Data"); and (2) update the Registration Data promptly upon any change to keep it true, accurate, current and complete. If you provide any information that is untrue, inaccurate, not current or incomplete, or we have reasonable grounds to suspect that such information is untrue, inaccurate, not current or incomplete, we have the right to immediately suspend or terminate your Account and refuse any and all current or future use of the Services. Our use of your Registration Data is covered by our privacy policy available at www.cloudphysics.com/privacy.html, which is incorporated into and made part of this Agreement.

2.2. User Subscriptions. Subject to the terms and conditions of this Agreement, you may authorize individuals who are your employees or agents (each, a "User") to use the Services, solely on your behalf for your internal business purposes, by directing your "superuser" to issue a user identification and password to each User as further described in the Documentation. You will be responsible for maintaining the security of all User identifications and passwords. You agree that (i) if an Order specifies a number of Users, Services may be accessed by no more than the specified number of Users, (ii) if an Order specifies a number of Servers, Services may be used to manage no more than the specified number of Servers, and (iii) additional User subscriptions and/or additional Servers may be added during the Subscription Term at the same pricing as that for the pre-existing subscriptions, prorated for the remainder of the Subscription Term in effect at the time the additional User subscriptions and/or additional Servers are added. User-based subscriptions are for designated Users and cannot be shared or used by more than one User but may be reassigned to new Users replacing former Users who no longer require ongoing use of the Services. Note that use of the Services for the delivery of Assessments are considered User Subscriptions and as such are covered by this section 2.2.

2.3 Provision of Services. We shall make the Services available to you, at the tier and for the number of Users and/or Servers you select on the applicable Order, pursuant to this Agreement and the relevant Order during the subscription term specified in the applicable Order (the "Subscription Term").

2.4. Use of the Services. You shall (i) be responsible for Users' compliance with this Agreement, (ii) be solely responsible for the accuracy, quality and integrity of any data or information submitted by you to the Services and the output of such data or information (collectively, "Your Data"), and of the means by which you or your Users acquired Your Data, and for ensuring the collection, transfer or use of Your Data (including personal data) does not infringe the rights or privacy of any individual or third party and does not violate any applicable law, regulation or directive, (iii) use diligent efforts to prevent unauthorized access to or use of the Services, and notify us promptly of any such unauthorized access or use, and (iv) use the Services only in accordance with the Documentation and applicable laws and government

regulations. We reserve the right to modify Services, add new Services, or discontinue providing any Services at any time.

2.5 Support. We will: (a) provide support (as described at /contact/) for the Services to two (2) of your internal technical contacts at no additional charge during our normal business hours, and (b) use commercially reasonable efforts to make the Services available 24 hours a day, 7 days a week, except for: (i) planned downtime (of which we will give at least 8 hours' notice via email or through the Services themselves, and which we will schedule to the extent practicable during the weekend or in the evening from 6:00 p.m. to 3:00 a.m. Pacific time, or (ii) any unavailability caused by circumstances beyond our reasonable control, including without limitation, acts of God, acts of government, flood, fire, earthquakes, civil unrest, acts of terror, strikes or other labor problems (other than those involving our employees), or hosting or internet service provider failures or delays. Any configuration, integration or similar work must be quoted by our professional services organization separately and agreed by you and us in writing.

3. CARD BUILDER

3.1 Card Builder. You may use the Card Builder feature of the HPE CloudPhysics Services to create on-demand applications that are developed and run on the Services ("Cards"), subject to the following terms. Cards may be private, unpublished or published to the Card Store.

3.2 Publishing Cards. Before any Card can be published, you must submit it to us for review and certification. Details regarding how to submit Cards, and of the certification program, can be found at /product/works/. We reserve the right, in our sole discretion and for any reason at any time, to refuse to publish any Card. For your Card to be eligible for publication, each card interface must conform to our current published guidelines.

3.3 Card Store License Terms. Any Card you submit may be freely reproduced, distributed, transmitted, used, modified, built upon, or otherwise exploited by or on behalf of HPE CloudPhysics or its affiliates, any customer or partner of HPE CloudPhysics or its affiliates, or any developer of Cards or other applications that interface with the HPE CloudPhysics Platform or Card Store, for any purpose, commercial or non-commercial, related to use of the HPE CloudPhysics Platform or Card Store, and in any way, including by methods that have not yet been invented or conceived.

4. THIRD-PARTY PRODUCTS AND SERVICES.

Any acquisition by you of third-party products or services, including but not limited to VMWare products, or implementation, customization and other consulting services, and any exchange of data (including Your Data) between you and any third-party provider, is solely between you and the applicable third-party provider. You agree to comply with any license or agreement applicable to such third-party products or services. We do not warrant or support third-party products or services. We provide functions that allow you to control who may access Your Data and the level of such access. If you allow any third party (including third party Users) to access Your Data, we shall not be responsible for any disclosure, modification, use, or deletion of Your Data, or any other acts or omissions of such third party, resulting from any such access.

5. FEES AND PAYMENT FOR SERVICES

5.1. Fees. You shall pay all fees specified in all Orders hereunder. Except as otherwise specified herein or in an Order, (i) fees are quoted and payable in United States dollars, (ii) payment obligations are non-cancelable and fees paid are non-refundable, and (iii) the number of User or Server subscriptions purchased cannot be decreased during the relevant Subscription Term stated on the Order.

5.2. Invoicing and Payment. You will provide us with valid and updated credit card information, or with a valid purchase order or alternative document reasonably acceptable to us. If you provide credit card information to us, you authorize us to charge such credit card for all Services listed in the Order for the initial Subscription Term and any renewal Subscription Term(s). Such charges shall be paid in advance, either annually or in accordance with any different billing frequency stated in the applicable Order. If the Order specifies that payment will be by a method other than a credit card, we will invoice you in advance and otherwise in accordance with the relevant Order. Unless otherwise stated in the Order, invoiced charges are due net 30 days from the invoice date. You are responsible for maintaining complete and accurate billing and contact information in the Services.

5.3. Overdue Charges. If any charges are not received from you by the due date, then at our discretion, such charges may accrue late interest at the rate of 1.5% of the outstanding balance per month, or the maximum rate permitted by law, whichever is lower, from the date such payment was due until the date paid.

5.4. Suspension of Service and Acceleration. If any amount owing by you under this Agreement for our Services is 30 or more days overdue (or 10 or more days overdue in the case of amounts you have authorized us to charge to your credit card), we may, without limiting our other rights and remedies, accelerate your unpaid fee obligations so that all such obligations become immediately due and payable, and suspend our Services to you until such amounts are paid in full.

5.5. Taxes. Our fees do not include any taxes, levies, duties or similar governmental assessments of any nature, including but not limited to value-added, sales, use or withholding taxes, assessable by any local, state, provincial, federal or foreign jurisdiction (collectively, "Taxes"). You are responsible for paying all Taxes associated with your purchases hereunder. If we have the legal obligation to pay or collect Taxes for which you are responsible under this paragraph, the appropriate amount shall be invoiced to and paid by you, unless you provide us with a valid tax exemption certificate authorized by the appropriate taxing authority. For clarity, we are solely responsible for taxes assessable against us based on our income, property and employees.

6. PROPRIETARY RIGHTS

6.1. Application. In order to utilize certain Services, you may need to download our proprietary software program ("Application"). Subject to your compliance with this Agreement, we grant you a limited non-exclusive, non-transferable, non-sublicensable, revocable internal use license during the term of the Agreement to download, install, use, display, execute and perform the Application, for the sole purpose of enabling you to use the Services in the manner permitted by this Agreement. You acknowledge and agree that (a) we shall not be responsible for loss or alteration of programs, data or other information resulting from your use of the Application or Services; and (b) the Application contains a "phone home" feature that remotely connects to our technical support facility for the purpose of automatically updating the Application.

6.2. Restrictions. You agree that you will not, and will not allow any User to, (i) reproduce, modify, distribute, transfer, disclose, or make available to any third party any portion of the Application (or any Documentation) in any form; (ii) permit any third party to access the Services except as permitted herein or in an Order; (iii) reverse engineer the Services or the Application or decompile, disassemble, or otherwise attempt to derive the source code for the Application; (iv) publish or otherwise distribute to third parties the results of any performance or benchmark tests or analyses relating to the Application, the Services or the use thereof or of any third party product or service; (v) rent, sell, lease, or use the Application or Services in any service bureau or time-sharing arrangement; (vi) create derivative works based on the

Application or Services; (vii) copy, frame or mirror any part or content of the Services, other than copying or framing on Your own intranets or otherwise for your own internal business purposes; (viii) use the Services to store or transmit any harmful or malicious code; or (ix) use the Application or Services for any purpose not expressly authorized in this Agreement. You may not access the Services or the Application if you are our direct competitor, except with our prior written consent. In addition, you may not access the Services or Application for purposes of monitoring their availability, performance or functionality, developing a competitive product or service, or for any other benchmarking or competitive purposes.

6.3. Ownership. You acknowledge that the Application and the Services constitute our valuable trade secrets. The Services, Application and Documentation, all copies and portions thereof, and all improvements, enhancements, modifications and derivative works thereof, and all intellectual property rights therein, are and shall remain our sole and exclusive property. Your rights to use the Services, Application and Documentation shall be limited to those expressly granted in this Agreement and any applicable Order. No other rights with respect to the Services, Application and Documentation or any related intellectual property rights are implied. You are not authorized to use (and shall not permit any third party to use) the Services, Application, Documentation or any portion thereof except as expressly authorized by this Agreement or the applicable Order.

6.4. Feedback. We may periodically request that you provide, and you or your Users may provide to us, feedback regarding the use, operation and functionality of the Application, Services or Documentation including, without limitation, any information about operating results, known or suspected bugs, errors, compatibility problems or suggested features ("Feedback"). You agree that you will remove all of your Confidential Information, personal data, or third-party confidential or proprietary information from any Feedback prior to submission to us. You grant us a non-exclusive, perpetual, irrevocable, worldwide, royalty-free license, with the right to sublicense, to use, reproduce, create derivative works, publicly display, publicly perform, and distribute such Feedback through multiple levels of distribution, and you agree that we have no obligations (including without limitation obligations of confidentiality) with respect to such Feedback.

6.5. Operational Metadata and Public Cloud Billing Data. You acknowledge and agree that, as part of the Services, the Application will transmit certain infrastructure operations, infrastructure configuration and infrastructure performance data regarding your computing environment (collectively, "Operational Metadata"), as well as Public Cloud platform Billing and Usage Data, to us. We will not distribute any such Operational Metadata or Billing and Usage Data to any third party unless you authorize the distribution of such Operational Metadata or Billing and Usage Data to such third party. However, we reserve the right to produce and have produced statistical analyses of large distributions of anonymized Operational Metadata or Billing and Usage Data from multiple customers that cannot be reasonably used to identify you or any User ("Statistical Analyses"), and to reproduce, create derivative works, publicly display, publicly perform, and distribute such Statistical Analyses through multiple levels of distribution. Certain Services may enable you to specify the level at which such Services restrict access to your Operational Metadata or Billing and Usage Data. You are solely responsible for applying the appropriate level of access to your Operational Metadata or Billing and Usage Data.

7. CONFIDENTIALITY

7.1. Definition. As used herein, "Confidential Information" means all confidential information disclosed by a party ("Disclosing Party") to the other party ("Receiving Party"), whether orally or in writing, that is designated as confidential or that reasonably should be understood by the Receiving Party to be confidential given the nature of the information and the circumstances of disclosure. Without limiting the foregoing, the Application, Services and Documentation and

their pricing; our product and marketing plans, research and development, business strategy, financial information, and Statistical Analyses will be deemed to be our Confidential Information, and Your Data and Operational Metadata, to the extent they contain information that could reasonably be used to identify you or any User, will be deemed to be your Confidential Information. You agree that Statistical Analyses shall not be deemed to be your Confidential Information. Confidential Information shall not include any information that (i) is or becomes generally available to the public without breach of any obligation owed to the Disclosing Party, (ii) was known to the Receiving Party prior to its disclosure by the Disclosing Party without breach of any obligation owed to the Disclosing Party, (iii) is received from a third party without breach of any obligation owed to the Disclosing Party, or (iv) was independently developed by the Receiving Party without use of the Disclosing Party's Confidential Information.

7.2. Protection of Confidential Information. Except as otherwise permitted in writing by the Disclosing Party, (i) the Receiving Party will not use the Disclosing Party's Confidential Information except for the express purposes of this Agreement, (ii) the Receiving Party shall use the same degree of care that it uses to protect the confidentiality of its own confidential information of like kind (but in no event less than reasonable care) not to disclose or use any Confidential Information of the Disclosing Party for any purpose outside the scope of this Agreement, and (iii) the Receiving Party shall limit access to Confidential Information of the Disclosing Party to those of the Receiving Party's employees, contractors and agents who need such access for purposes consistent with this Agreement and who have signed confidentiality agreements with the Receiving Party containing protections no less stringent than those herein. The obligations of the Receiving Party under this Section with respect to any particular Confidential Information of the Disclosing Party will continue in effect for three (3) years from the date of first disclosure to the Receiving Party of such Confidential Information.

7.3. Protection of Your Data. Without limiting the above, we shall maintain appropriate administrative, physical, and technical safeguards for protection of the security, confidentiality and integrity of Your Data. We shall not (a) disclose Your Data except as compelled by law in accordance with Section 7.4 (Compelled Disclosure) or as expressly permitted in writing by you, or (b) access Your Data except to provide the Services or prevent or address service or technical problems, or at your request in connection with customer support matters. Notwithstanding the foregoing, you are solely responsible, and we will have no responsibility or liability, for any configuration of the Application or Services made by or for you that allows third parties to view Your Data in unanonymized form.

7.4. Compelled Disclosure. The Receiving Party may disclose Confidential Information of the Disclosing Party if it is compelled by law to do so, provided the Receiving Party gives the Disclosing Party prior notice of such compelled disclosure (to the extent legally permitted) and reasonable assistance, at the Disclosing Party's cost, if the Disclosing Party wishes to contest the disclosure. If the Receiving Party is compelled by law to disclose the Disclosing Party's Confidential Information as part of a civil proceeding to which the Disclosing Party is a party, and the Disclosing Party is not contesting the disclosure, the Disclosing Party will reimburse the Receiving Party for its reasonable cost of compiling and providing secure access to such Confidential Information.

8. WARRANTIES AND DISCLAIMERS

8.1. Our Warranties. We warrant that the Services shall perform materially in accordance with the Documentation, provided that the Application has been properly installed and the Services have been used in accordance with the Documentation. Your exclusive remedy and our sole obligation for any breach of such warranty shall be as provided in Section 11.2 (Termination for Cause) and Section 11.3 (Refund or Payment upon Termination).

8.2. Mutual Warranties. Each party and each individual signing this Agreement represents and warrants that they have the legal power to enter into this Agreement, and that this Agreement constitutes their legally binding obligation and that of the entity they purport to represent.

8.3. Disclaimer. EXCEPT AS EXPRESSLY PROVIDED HEREIN, NEITHER PARTY MAKES ANY WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, AND EACH PARTY SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING ANY WARRANTIES OF MERCHANTABILITY, NONINFRINGEMENT OR FITNESS FOR A PARTICULAR PURPOSE, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW. WE MAKE NO WARRANTY, REPRESENTATION OR CONDITION THAT THE APPLICATION OR THE SERVICES WILL MEET YOUR REQUIREMENTS OR WILL BE UNINTERRUPTED OR ERROR-FREE. THE SERVICES MAY BE SUBJECT TO LIMITATIONS, DELAYS AND OTHER PROBLEMS INHERENT IN THE USE OF THE INTERNET. YOU AGREE THAT WE ARE NOT RESPONSIBLE FOR ANY DELAYS, DELIVERY FAILURES, LOSS OF DATA, OR OTHER DAMAGE RESULTING FROM SUCH PROBLEMS. YOU FURTHER AGREE THAT WE HAVE NO LIABILITY IN CONNECTION WITH, AND YOU WILL BE SOLELY RESPONSIBLE FOR, ANY DECISIONS OR ACTIONS THAT YOU MAY TAKE BASED ON THE RESULTS, ANALYSES OR REPORTS GENERATED BY OR THROUGH YOUR USE OF THE SERVICES.

9. INDEMNIFICATION

9.1. Indemnification by Us. We will defend you against any claim, demand, suit, or proceeding ("Claim") made or brought against you by a third party alleging that the use of the unmodified Application or Services as permitted hereunder infringes or misappropriates the intellectual property rights of a third party, and shall indemnify you for any damages finally awarded against, and for reasonable attorney's fees incurred by, you in connection with any such Claim; provided, that you (a) promptly give us written notice of the Claim; (b) give us sole control of the defense and settlement of the Claim (provided that we may not settle any Claim unless the settlement unconditionally releases you of all liability); and (c) provide to us all reasonable assistance, at our expense.

9.2. Indemnification by You. You shall defend us against any Claim made or brought against us by a third party alleging that Your Data, or your or your Users' use of the Services, infringes or misappropriates the intellectual property rights or rights of privacy of a third party, violates applicable law, or breaches any agreement between you and a third party, and shall indemnify us for any damages finally awarded against, and for reasonable attorney's fees incurred by, us in connection with any such Claim; provided, that we (a) promptly give you written notice of the Claim; (b) give you sole control of the defense and settlement of the Claim (provided that you may not settle any Claim unless the settlement unconditionally release us of all liability); and (c) provide to you all reasonable assistance, at your expense.

9.3. Exclusions and Mitigation. Notwithstanding the foregoing, in the case of a Claim for infringement or misappropriation, the indemnifying party will not be responsible for, and the foregoing indemnity obligations shall not apply to (a) any use of the allegedly infringing item(s) in combination with any other device, product, service, process, equipment, infrastructure or material not furnished by the indemnifying party, (b) any use of the allegedly infringing item(s) that is not their intended use; or (c) any modification of the allegedly infringing item(s) by anybody other than the indemnifying party. In the event that the indemnifying party believes that any Claim is likely to occur, the indemnifying party may, at its sole option and expense, either (i) secure for indemnified party the right to continue using such item(s), (ii) replace such item(s) with non-infringing item(s), or (iii) terminate this Agreement by written notice and require the indemnified party to cease use of the allegedly infringing item(s).

9.4. Exclusive Remedy. This Section 9 (Indemnification) states the indemnifying party's sole liability to, and the indemnified party's exclusive remedy against, the other party for any type of Claim described in this Section.

10. LIMITATION OF LIABILITY

10.1. Limitation of Liability. EXCEPT FOR A BREACH OF SECTION 6.2 (RESTRICTIONS) OR THE INDEMNIFICATION OBLIGATIONS UNDER SECTION 9 (INDEMNIFICATION), IN NO EVENT SHALL EITHER PARTY'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, EXCEED THE TOTAL AMOUNT PAID OR PAYABLE BY YOU FOR THE SERVICES IN THE 12 MONTHS PRECEDING THE INCIDENT. THE FOREGOING SHALL NOT LIMIT YOUR PAYMENT OBLIGATIONS UNDER SECTION 5 (FEES AND PAYMENT FOR SERVICES).

10.2. Exclusion of Consequential and Related Damages. EXCEPT FOR A BREACH OF SECTION 6.2 (RESTRICTIONS) OR THE INDEMNIFICATION OBLIGATIONS UNDER SECTION 9 (INDEMNIFICATION), IN NO EVENT SHALL EITHER PARTY HAVE ANY LIABILITY TO THE OTHER PARTY FOR ANY LOSS OF DATA, BUSINESS INTERRUPTION, LOST PROFITS OR REVENUES OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, COST OF COVER, EXEMPLARY OR PUNITIVE DAMAGES HOWEVER CAUSED, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, AND WHETHER OR NOT THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE FOREGOING DISCLAIMER SHALL NOT APPLY TO THE EXTENT PROHIBITED BY APPLICABLE LAW.

11. TERM AND TERMINATION

11.1. Term of Agreement. This Agreement commences on the date you accept it and continues until all User subscriptions granted in accordance with this Agreement have expired or been terminated. Except as otherwise specified in the applicable Order, all User subscriptions shall automatically renew for additional periods equal to the expiring Subscription Term or one year (whichever is shorter), unless either party gives the other notice of non-renewal at least 30 days before the end of the relevant Subscription Term. The per-unit pricing during any such renewal Subscription Term shall be the same as that during the prior Subscription Term unless we have given you written notice of a pricing increase at least 30 days before the end of such prior Subscription Term, in which case the pricing increase shall be effective upon renewal and thereafter. If you elect to use the Services for a free trial period and do not purchase a subscription before the end of that period, this Agreement will terminate at the end of the free trial period.

11.2. Termination for Cause. A party may terminate this Agreement for cause: (i) upon 30 days written notice to the other party of a material breach if such breach remains uncured at the expiration of such period, or (ii) if the other party becomes the subject of a petition in bankruptcy or any other proceeding relating to insolvency, receivership, liquidation or assignment for the benefit of creditors.

11.3. Refund or Payment upon Termination. Upon any termination for cause by you, we shall refund you any prepaid fees covering the remainder of the applicable Subscription Term after the effective date of termination. Upon any termination for cause by us, you shall pay any unpaid fees covering the remainder of the Subscription Term of all Orders after the effective date of termination. In no event shall any termination relieve you of the obligation to pay any fees payable to us for the period prior to the effective date of termination.

11.4. Return of Your Data. Upon request by you made within 30 days after the effective date of termination of a subscription, we will make available to you for download a file of Your Data.

After such 30-day period, we shall have no obligation to maintain or provide any of Your Data.

11.5. Surviving Provisions. Sections 3.3, 4, 5, 6.2 – 6.5, 7, 8.3, 9, 10, 11.4, 11.5 and 12 shall survive any termination or expiration of this Agreement.

12. GENERAL PROVISIONS

12.1. Export Compliance. Each party shall comply with the export laws and regulations of the United States and other applicable jurisdictions in providing and using the Application and the Services. Without limiting the foregoing, (i) each party represents that it is not named on any U.S. government list of persons or entities prohibited from receiving exports, and (ii) You shall not permit Users to access or use Services in violation of any U.S. export embargo, prohibition or restriction.

12.2. Governing Law and Venue. This Agreement and any action related thereto will be governed, controlled, interpreted, and defined by and under the laws of the State of California, without giving effect to any conflicts of laws principles that require the application of the law of a different state. Each party hereby expressly consents to the personal jurisdiction and venue in the state and federal courts for Santa Clara County. The United Nations Convention on Contracts for the International Sale of Goods does not apply to this Agreement.

12.3. Notices. All notices under this Agreement will be in writing and will be deemed to have been duly given when received, if personally delivered; when receipt is electronically confirmed, if transmitted by facsimile or e-mail; and upon receipt, if sent by express courier with a tracking system, or by certified or registered mail (return receipt requested), postage prepaid. Notice to you shall be addressed to the system administrator designated by you for your relevant Account.

12.4. Relationship of the Parties. The parties are independent contractors. This Agreement does not create a partnership, franchise, joint venture, agency, fiduciary or employment relationship between the parties. Neither party will have the power to bind the other or incur obligations on the other's behalf without the other's prior written consent.

12.5. No Third-Party Beneficiaries. There are no third-party beneficiaries to this Agreement.

12.6. Waiver and Cumulative Remedies. No failure or delay by either party in exercising any right under this Agreement shall constitute a waiver of that right. Other than as expressly stated herein, the remedies provided herein are in addition to, and not exclusive of, any other remedies of a party at law or in equity.

12.7. Severability. If any provision of this Agreement is held by a court of competent jurisdiction to be contrary to law, the provision shall be modified by the court and interpreted so as best to accomplish the objectives of the original provision to the fullest extent permitted by law, and the remaining provisions of this Agreement shall remain in effect.

12.8. Attorney Fees. You shall pay on demand all of our reasonable attorney fees and other costs incurred by us to collect any fees or charges due us under this Agreement.

12.9. Government Users. The Application and the Service is comprised of "commercial items", "commercial computer software", and "commercial computer software documentation" as such terms are as defined in FAR 2.101 and DFARS 252.227-7014(a)(1). The Application and the Service is provided to any federal, state or local government agency only subject to the terms and conditions of this Agreement and such additional terms as are agreed by the parties in a properly executed writing and that are consistent with (a) the policies set forth in 48 C.F.R. 12.212 (for federal, state and local civilian agencies); or (b) the policies set forth in 48 C.F.R. 227.7202-1 and 22.7202-3 (for units of the Department of Defense).

12.10. Assignment. Neither party may assign this Agreement or any of its rights or obligations under this Agreement without the prior written consent of the other party, which will not be unreasonably refused. Notwithstanding the foregoing, either party may assign this Agreement to the surviving entity in a merger, consolidation or other similar corporate reorganization in which it participates or to the purchaser of all or substantially all of its assets. Subject to the foregoing, this Agreement is binding upon, inures to the benefit of and is enforceable by the parties and their respective successors and assigns.

12.11. Entire Agreement. This Agreement, including all exhibits and addenda hereto and all Orders, constitutes the entire agreement between the parties and supersedes all prior and contemporaneous agreements, proposals or representations, written or oral, concerning its subject matter. No modification, amendment, or waiver of any provision of this Agreement shall be effective unless in writing and either signed or accepted electronically by the party against whom the modification, amendment or waiver is to be asserted. However, to the extent of any conflict or inconsistency between the provisions in the body of this Agreement and any exhibit or addendum hereto or any Order, the terms of such exhibit, addendum or Order shall prevail. Notwithstanding any language to the contrary therein, no terms or conditions stated in your purchase order or other order documentation (excluding Orders) shall be incorporated into or form any part of this Agreement, and all such terms or conditions shall be null and void.

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