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Contract Number

22-671

SAP Number

Arrowhead Regional Medical Center

Department Contract Representative	<u>William L. Gilbert</u>
Telephone Number	<u>(909) 580-6150</u>
Contractor	<u>Nutanix, Inc.</u>
Contractor Representative	<u>Aaron Boynton</u>
Telephone Number	
Contract Term	<u>July 26, 2022 to July 25, 2027</u>
Original Contract Amount	<u>see Edge Solutions & Consulting Agreement</u>
Amendment Amount	
Total Contract Amount	<u>see Edge Solutions & Consulting Agreement</u>
Cost Center	

Briefly describe the general nature of the contract: License and Software Agreement with Nutanix, Inc. for software and services to combine storage, networking and management of software related to the installation and implementation of storage infrastructure for the five-year period from July 26, 2022 through July 25, 2027.

FOR COUNTY USE ONLY

Approved as to Legal Form

Bonnie Uphold
 Bonnie Uphold, Deputy County Counsel

Date 7-20-2022

Reviewed for Contract Compliance

Date

Reviewed/Approved by Department

William L. Gilbert
 William L. Gilbert, Director

Date 7/20/22



Nutanix License and Services Agreement

This Agreement is entered into between Nutanix Inc., located at 1740 Technology Dr. Ste. 150, San Jose, CA 95110, United States, ("Us", "We" or "Our") and San Bernardino County ("You" or "Your") on behalf of Arrowhead Regional Medical Center.

1. Definitions.

- 1.1. **"Affiliates"** means any corporation or other business entity which controls, is controlled by or is under common control with You through the ownership of more than fifty percent (50%) of the outstanding voting stock of the controlled corporation or more than fifty percent (50%) of the equity interest of a non-corporate entity. If You are a public sector entity, an Affiliate is an organization over which You exercise administrative control by applicable laws, regulations or governmental decree.
- 1.2. **"Certified Hardware"** means computer equipment that has been approved and certified by Us as interoperable with Our Software. A list of that hardware can be found at <https://www.nutanix.com/products/hardware-platforms>. Other hardware may be submitted for general or limited certification.
- 1.3. **"Cloud Services"** means Our internet-based or hosted offerings.
- 1.4. **"Documentation"** means Our operating manuals and technical literature describing the features, functions, certifications and other characteristics of the Software and Cloud Services.
- 1.5. **"Delivery"** means the date on which We make the license key for the applicable Software available to You or when We make the Software or Cloud Services otherwise available to You for use.
- 1.6. **"Entitlement"** means Our statement of the SKUs, types, quantities or other metrics for Our Products provided to You. We will supply You with a copy of each Entitlement and make it available in the Portal.
- 1.7. **"Error"** means any reproducible failure of the Software or Cloud Services to substantially perform any material function as set forth in the Documentation.
- 1.8. **"FlexCredits"** means the pre-paid credits which can be redeemed against Professional Services.
- 1.9. **"Partner"** means any entity that is authorized by Us to distribute, resell, act as a service provider or otherwise provide Our Products to You.
- 1.10. **"Portal"** means Our website for the receipt by You of Support Services, management of Entitlements, download of Software etc. which can be found at <https://portal.nutanix.com>
- 1.11. **"Previews"** means Products provided for preview, evaluation, demonstration or trial purposes, or early access (e.g. alpha, beta, pre-release) versions of the Products. Previews also include Products that are provided free of charge ("No-Charge Products").
- 1.12. **"Products"** means Our Software, Cloud Services, Support Services, Professional Services and applicable Documentation.
- 1.13. **"Professional Services"** means consulting, implementation, optimization, training, certification or other services related to the Software and Cloud Services.
- 1.14. **"Service Levels"** means the availability and uptime warranties applicable to the Cloud Services which can be found at <https://www.nutanix.com/support-services/productsupport/policies> subject to planned downtime and any unscheduled emergency maintenance.
- 1.15. **"Service Provider"** means a Nutanix Partner who has entered into an agreement with Nutanix to act as a provider of a service which employs the Software or Cloud Services.
- 1.16. **"Software"** means the Nutanix-branded computer programs specified in the Entitlement, Updates and Upgrades provided as part of Support Services, and APIs, libraries, utilities, tools, add-ons, license keys and other executables related to the Software or Cloud Services.
- 1.17. **"SOW"** means a document issued by Us that describes the Professional Services.
- 1.18. **"Subscription Term"** means the duration of Your subscription to the applicable Software, Support Services and/or Cloud Services as specified in the Entitlement.
- 1.19. **"Support Guide"** means the Nutanix Worldwide Support Program Guide which can be found at <https://www.nutanix.com/content/dam/nutanix/resources/support/nutanixsupportguide.pdf>.
- 1.20. **"Support Policies"** means Our Software End of Life Policy, Our Versioning and Compatibility Matrix, Our extended Support Policy, Our Third Party Hardware and Software Policy and Our Return Material Authorization Policy, which can be found at <https://www.nutanix.com/support-services/product-support/policies>.
- 1.21. **"Support Services"** means Our Software support and maintenance offerings described in the Support Guide.
- 1.22. **"Update"** means either a Minor Release, Maintenance Release or Patch Release as defined in the Support Guide.
- 1.23. **"Upgrade"** means a Major Release as defined in the Support Guide.
- 1.24. **"Usage Capacity"** means the maximum permitted usage of the i) Software based on certain licensing metrics such as the number of raw CPU cores, raw total flash drive capacity in tebibytes, cores managed, used tebibytes, named users or concurrent users, VMs or VM packs, per node or configured node, percentage of cloud spend, vCPU of each managed database server, per cluster or per vCPU, GB RAM and DR characteristic, per edge instance, or any other applicable licensing metrics; or ii) Cloud Services based on certain metrics, as specified in the Entitlement and described in the applicable Documentation.
- 1.25. **"Your Content"** means any data, software, applications, content, websites, platforms and services that You introduce into or otherwise use in connection with the Products.

2. Software.

- 2.1. **License Grant.** We grant You a limited, non-exclusive, non-transferable, worldwide license to download, install and use the Software (in object code form only) and its Documentation for Your internal business purposes only. The Software is licensed either: (a) independently of hardware nodes, portable between hardware nodes and for a fixed Subscription Term (a "Term Based License"); or (b) for use solely on the hardware node on which it was initially installed and supplied for the life of that hardware node (a "Life of Device License"), or as may be otherwise indicated in Your Entitlement. Subject to Section 13 "Term and Termination", the licenses for the Software and its Documentation expire when the: (a) subscription term ends in the case of Term Based Licenses; or (b) original hardware node is decommissioned in the case of Life of Device Licenses. Both Term Based Licenses and Life of Device Licenses are subject to the Usage Capacity.
- 2.2. **License Restrictions.** You agree not to: (a) exceed the Usage Capacity or otherwise use the Software or its Documentation in breach of the Entitlement or this Agreement; (b) transfer, resell, rent, lease, distribute, sublicense or otherwise use Software or its Documentation in a service bureau, commercial hosting service or any similar capacity unless: (i) as agreed with Nutanix in Your capacity as a Service Provider; or (ii) as otherwise explicitly permitted in the Entitlement; (c) disclose the results of any Software benchmark tests or competitive analysis; (d) decompile, disassemble or reverse-engineer any Software, or determine or attempt to determine any source code, algorithms, methods or techniques embodied in the Software, except to the extent expressly permitted by applicable law; (e) install or use the Software on (i) any hardware other than Certified Hardware and certified public cloud bare metal offerings; or (ii) grey-market hardware or components; (f) transfer or use any Life of Device Licenses on the hardware node other than that on which it was initially installed and supplied; (g) modify, adapt or create a derivative work of the Software or Documentation; or (h) remove, conceal or alter any product identification, copyright or other proprietary notices in the Software or Documentation; (i) assist or encourage any third party to do any of the foregoing or; (j) use the Products after the expiration of a Term.
- 2.3. **License Conversion.** Subject to You placing a valid purchase order for the same with a Partner, You may convert legacy Life of Device Licenses into Term Based Licenses, in which case, We will alter Your Entitlement to reflect the different usage model.
- 2.4. **Previews License Grant.** Subject to Your compliance with this Agreement, and the licenses granted hereunder, We grant You a license to Previews, for the purposes of evaluation, or as applicable, to Previews specifically identified as alpha, beta, pre-release, demonstration or preview and its Documentation for Your internal business purposes within the Usage Capacity or other licensing metrics as applicable. Previews may only be used in non-production environments and not for commercial purposes or the processing of any production data. Notwithstanding the foregoing within this section 2.4, and subject to Your compliance with the rest of this Agreement, We grant You a nonexclusive, non-transferable, non-sublicensable, terminable (in accordance with Section 13 herein) license to Use the No-Charge Products solely for internal purposes on Licensee's own premises. Previews are likely to be under development, and might not ever be generally released.

3. Support Services.

- 3.1. **General.** Depending on the software license type You purchase, Support Services are either included in the subscription (Term Based License) or available separately for a fee (Life of Device License). We will provide to You the level of Support Services specified in the Entitlement. The Support Services will be provided in the English language.
- 3.2. **Scope of Support Services.** Under a valid Support Service Entitlement, We shall: (a) provide You with access to the Portal; (b) provide telephone and web-based Support 24x7 in accordance with the Support Guide and the Support Policies; (c) respond to reported issues within the applicable timeframes in accordance with the mutually agreed priority level ascribed to the Error; (d) address Errors in the form of Updates or Upgrades, workarounds, procedural solutions, correction of Documentation errors, or other remedial measures as We may reasonably determine to be appropriate; and (e) provide You with access to the current versions of released software, including bug fixes, patches and any generally available Updates and Upgrades.
- 3.3. **Out of Scope Support Services.** Support Services exclude: (a) Software installation; (b) education, training, consulting and Professional Services; (c) services relating to third party integrations, modifications or customizations; and (d) Software that is end-of-life and no longer supported as outlined in Our Support Policies.
- 3.4. **Exclusions.** We shall have no obligation to provide Support Services for: (a) Software that is not registered and validly licensed; (b) any Errors which are attributable to third party products or modifications, alterations or repairs to the Software made by a party other than Us or a party authorized by Us; (c) any Errors which are attributable to the installation, operation or maintenance of the Software on hardware other than Certified Hardware or authorized public cloud bare metal offerings or otherwise not in accordance with the Documentation; or (d) for Software which is installed on hardware which is not currently covered under a valid support contract or if such hardware has grey market or second-hand parts installed. We do not guarantee that Software will be compatible with the hardware You purchased except for Certified Hardware in accordance with Our Support Policies.
- 3.5. **Your Responsibilities.** It is Your responsibility to: (a) register an account with Us at Our Portal, to keep Your account profile up to date and to designate, in accordance with the Support Guide, a number of authorized persons who have completed the Nutanix NP certification class ("Technical Personnel") which will be the preferred contacts for the receipt of Support Services from Us; (b) provide Us with access to Your systems, network and personnel and make available to Us data, information and other materials



necessary to perform the Support Services; (c) install Updates as reasonably directed by Us, ensure that licenses have been obtained for all Software and adhere to all licensing terms and conditions; (d) swiftly notify Us of any Error; and (e) screen first-line technical inquiries and escalate to Us only issues that Technical Personnel have not been able to resolve.

3.6. **Reinstatement of Support.** In the event that You wish to reinstate Support for Life of Device Licenses after a lapsed period, following expiration or termination of the original Support term, the applicable support fee for reinstated Support will be calculated as follows: (i) the pro rata Support fees that would have been payable at Nutanix's then applicable annual rate of Support for the lapsed Support period; and (ii) the Support fees for the future period commencing upon the reinstatement of Support.

3.7. **Support for NX Branded Hardware.** The NX brand is licensed by Us to third party hardware contract manufacturers. We do not supply or warrant NX branded hardware. If You purchase hardware Support for Your NX branded hardware, it will be governed by the Hardware Support Appendix attached to this Agreement as Appendix 1.

4. Professional Services.

You have the option to purchase Professional Services which We will deliver in accordance with the terms of this Agreement and as specified in the Entitlement and an SOW. We do not do any custom development work. You shall provide Us with any equipment, software, information, timely decisions, directions and facilities necessary for Us to perform the Professional Services. You grant Us a non-exclusive, worldwide, royalty-free license to use Your intellectual property solely for the purpose of performing the Professional Services. We grant You a license to use any deliverables provided as part of the Professional Services on the terms specified in Section 2 above. Any FlexCredits or prepaid Professional Services must be used within twelve (12) months from the purchase date, after which they will automatically expire and are non-refundable.

5. Cloud Services.

5.1. **General.** If You purchase Cloud Services, We will make the Cloud Services available to You during the Subscription Term in accordance with the terms of this Agreement, the applicable Entitlement and Documentation.

5.2. **Service Levels.** The Service Levels will apply to the Cloud Services. If We fail to meet these Service Levels, Your sole and exclusive remedy will be the service credits specified therein.

5.3. **Access Right and Right to Use.** Subject to the terms of this Agreement, We grant You a limited, non-exclusive, non-transferable and revocable right to (a) access and use the Cloud Services and its Documentation for Your internal business purposes only in accordance with this Agreement and the Entitlement for the Usage Capacity and subscription term only; and (b) use any applicable Software made available to You in connection with the Cloud Services and in accordance with the Documentation on the terms specified in Section 2 above.

5.4. **Usage Restrictions.** Except as expressly permitted by this Agreement, You will not and have no rights to: (a) use the Cloud Services in excess of the Usage Capacity or otherwise in breach of the Entitlement or this Agreement, (b) use the Cloud Services, the APIs or the Software for service bureau or managed service purposes, or otherwise commercially exploit the Cloud Services unless (i) as agreed with Nutanix in Your capacity as a Service Provider; or (ii) as otherwise explicitly permitted in the Entitlement, (c) publicly communicate, transform, or sublicense the Cloud Services or otherwise assign any rights to the Cloud Services in whole or in part to any third party unless explicitly permitted in the Entitlement, (d) decompile, disassemble or reverse-engineer or determine or attempt to determine any source code, algorithms, methods or techniques embodied in the Cloud Services, the APIs or the Software, except to the extent expressly permitted by applicable law, (e) access or use disabled functions, (f) publish the results of any Cloud Services benchmark tests or competitive analysis without Our prior written consent, (g) modify, adapt or create a derivative work based on the Cloud Services, (h) use the Cloud Services for any illegal or fraudulent purposes (i) circumvent any security features; (j) use the Cloud Services in any way that poses security threats or otherwise introduces security or performance vulnerabilities into the Cloud Services, or (k) assist or encourage any third party to do any of the foregoing.

5.5. **Security and Protection of Your Content.** If the Cloud Services include the transmission and processing of Your Content by Us, then We will maintain administrative, physical and technical safeguards to protect the security, confidentiality and integrity of Your Content as specified in the Documentation. You are responsible for using and configuring the Cloud Services in such a manner that it will provide an appropriate level of security and protection from unauthorized access to Your Content.

5.6. **License to use Your Content.** By making Your Content available, You grant Us a worldwide, royalty free, non-exclusive license to use Your Content solely to provide the Cloud Services to You.

5.7. **Your Obligations.** You are solely responsible to ensure that the use of the Cloud Services and the use of Your Content by its Users is in compliance with this Agreement and all applicable laws. You represent and warrant that Your use of Your Content in connection with Your Products will not violate any third-party rights or Your obligations to any third party. It is Your sole responsibility to provision and control the credentials of Your employees, agents, contractors and other users of the Products ("User(s)").

5.8. **Transmission of Your Content.** If the applicable Cloud Services involves the transmission of Your Content, including to a third-party platform, then You are responsible for the transmission of and the security of Your Content to and from the Cloud Services.

5.9. **Acceptable Use.** You shall not use the Cloud Services to: (a) transmit or store any content that may pose threats or otherwise engage in any conduct that may disrupt the operation of the Cloud Services or interfere with any third-party; (b) manage specifically regulated data, including, but not limited to data subject to the Health Insurance Portability and Accountability Act, Basel II, Graham Leach Bliley and Payment Card Industry regulations; (c) conduct any abusive, harassing, slanderous, fraudulent, illegal, or defamatory activity; (d) violate any laws or third-party rights, including any intellectual property rights, personal data and privacy rights; or (e) conduct, directly or indirectly, any activities associated with cryptocurrency mining or similar endeavors.

5.10. **Temporary Suspension.** We may temporarily suspend Your rights to access the Cloud Services if You use the Cloud Services outside the scope of this Section 5.

6. Proprietary Rights.

6.1. **Our Products.** We and Our licensors own all worldwide right, title and interest in the Products including all related including copyrights, trademarks, service marks, patents, trade secrets, know-how, moral rights and all other proprietary rights, including registrations, applications, renewals and extensions of such rights existing anywhere in the world, whether registered or unregistered ("Intellectual Property Rights"). The Products are Our valuable trade secrets and constitute Our Confidential Information. Except for the rights explicitly granted to You in this Agreement, all right, title and interest in the Products are reserved and retained by Us, Our affiliates, and/or Our licensors. You do not acquire any intellectual property or other rights in the Products as a result of downloading, installing, accessing or using the Products except as specified in this Agreement.

6.2. **Your Content.** You or Your licensors shall own all right, title and interest in and to all of Your Content and You shall have sole responsibility for the legality, reliability, integrity, accuracy and quality of all Your Content.

6.3. **Feedback.** If You choose to give Us any ideas, suggestions, enhancement requests, recommendations or any other materials in connection with this Agreement or Our Products (collectively, "Feedback"), You grant Us a royalty-free, fully paid-up, worldwide, transferable, sub-licensable, irrevocable and perpetual license to implement, use, modify, and/or incorporate the Feedback into Our Products or otherwise commercially exploit such Feedback.

7. Warranties and Disclaimer.

7.1. **Software Warranty.** We warrant to You that for a period of ninety (90) days from the date of first Delivery of the Software ("Software Warranty Period"), the Software will perform the functions described in the Documentation when used in accordance with that Documentation. The Software is not warranted to be Error free. In the event of a breach of this warranty that is reported to Us during the Software Warranty Period, We shall at Our election either (i) repair or replace the Software so that it conforms to the foregoing warranty or (ii) terminate the license with respect to the non-conforming Software and refund the license fees paid by You for the non-conforming Software. This warranty excludes defects resulting from accidents, abuse, unauthorized repair, modifications, misapplication, or use of the Software in a manner that is inconsistent with the Documentation. If You use the Software in excess of the Usage Capacity or the scope of this Agreement, this warranty becomes void. We warrant, that at Delivery, the Software contains no known virus, malware, spyware, trojan horse or other disabling code.

7.2. **Support Services Warranty.** We warrant to You that for the duration of the Support term, Support Services will be performed with industry standard care and skill and in a professional and workmanlike manner. Should You believe that Support Services have not been performed in accordance with this warranty, You must provide Us with a reasonably detailed written notice within thirty (30) days of occurrence of the nonconformance. We will reperform any nonconforming Support Services.

7.3. **Professional Services Warranty.** We warrant to You that Professional Services will be provided in a professional and workmanlike manner in accordance with good industry practice. Your sole and exclusive remedy for a breach of this warranty is reperformance of the Professional Services or at Our discretion a refund of the fees paid by You, provided that You notify Us of any non-conformity within thirty (30) days of the provision of the non-conforming Professional Services.

7.4. **Cloud Services Warranty.** We warrant that the Cloud Services will perform substantially in accordance with the Documentation during the Subscription Term. We do not warrant that the Cloud Services will be uninterrupted or Error free. This warranty shall not apply to the extent of any non-conformance which is (i) caused by use of the Cloud Services contrary to the Documentation or instructions, or modification or alteration of the Cloud Services by any party other than Us or Our duly authorized contractors or agents; or (ii) due to Your Content. If the Cloud Services do not conform with this warranty, We will, at Our expense, use all reasonable commercial endeavours to correct any such non-conformance promptly. Subject to Section 7.2 above, if a correction of such non-conformance is not possible, then We will terminate the Cloud Services and refund any prepaid subscription fees for the affected Cloud Service covering the remainder of the applicable Subscription Term after the date You notified Us of any non-conformance.

7.5. **Disclaimer.** TO THE EXTENT PERMITTED BY APPLICABLE LAWS, THE WARRANTIES IN THIS SECTION 7 ARE YOUR SOLE AND EXCLUSIVE WARRANTY AND REMEDY. EXCEPT FOR THE WARRANTY SPECIFICALLY DESCRIBED ABOVE, ALL PRODUCTS ARE PROVIDED "AS-IS" AND ALL OTHER WARRANTIES INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY, ACCEPTABLE QUALITY, TITLE, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT ARE EXPRESSLY DISCLAIMED.

7.6. **Previews Disclaimer.** THE WARRANTIES IN THIS SECTION 7 DO NOT APPLY TO PREVIEWS. PREVIEWS ARE PROVIDED "AS-IS", "WITH ALL FAULTS" AND "AS AVAILABLE". NUTANIX MAY CHANGE OR DISCONTINUE PREVIEWS AT ANY TIME WITHOUT NOTICE. WE DISCLAIM ALL LIABILITIES TO THE MAXIMUM EXTENT PERMITTED BY LAW.

8. Indemnification and Insurance.



- 8.1. **Indemnification by Us.** Subject to the limitations in this Section 8, We will (a) defend and indemnify You against any third-party claim alleging that the Products infringe or misappropriate a third-party intellectual property right; and (b) pay any settlement amount or the damages and losses finally awarded against You by a court of competent jurisdiction as a result of the claim.
- 8.2. **Exclusion.** We have no obligation to indemnify You and accept no responsibility or liability for any third party infringement claims arising out of: (a) any use of the Products in a manner that is not permitted under this Agreement or the applicable Documentation; (b) any modification of the Products by anyone other than Us, except a third party acting on Our behalf; (c) the combination or use of the Products, as applicable, with any other product, service, software, data, content or method; (d) Your continued use of Products that are no longer supported by Us; or (e) any failure by You to implement Updates or Upgrades provided under Support ("Excluded Claims").
- 8.3. **Indemnification Claims.** If an infringement claim is made or appears likely to be made, We may, at Our own expense and discretion, do any of the following: (a) modify the Products so that it is no longer infringing without substantially limiting its functionality; (b) obtain a license for you to continue to use the Products; or (c) terminate this Agreement and refund the fees paid for the infringing Products. For Term Based Licenses, associated Support Services or Cloud Services, the refund will be calculated on a straightline amortisation basis over the subscription term. For Life of Device Licenses and associated Support Services, the refund will be calculated on a straightline amortization basis over five (5) years. For Professional Services, the refund will be the total fees for those services.
- 8.4. Intentionally omitted.
- 8.5. **Process.** Each party's defense and indemnity obligations in this Section 8 will apply only if the party seeking defense or indemnity: (a) gives the other party prompt written notice of the claim; (b) permits the other party to control the defense and settlement of the claim; and (c) reasonably cooperates with the other party in the defense and settlement of the claim. In no event will a party agree to any settlement of any claim that involves any admission of wrong doing or acceptance of a material obligation by the other party without the prior written consent of the other party.
- 8.6. **Entire liability and remedies.** The remedies in this Section 8 represent Our entire liability and obligation and Your sole and exclusive remedy with respect to third-party intellectual property rights infringement claims related to the Products.
- 8.7. **Insurance.** Without in anyway affecting Our indemnity obligations and in addition thereto, We agree secure and maintain throughout the Agreement term the types of insurance with limits as shown in Attachment A hereto, as incorporated herein.
- 9. Limitation of Liability.**
- 9.1. **Liability Exclusions.** Regardless of the basis of the claim or theory of liability, neither You nor Us will be liable for: (a) any special, indirect, incidental, consequential, or punitive damages, (b) damages arising from the loss of use, loss or corruption of data, lost profits, lost revenue, business interruption or cost of procuring substitute Products, or (c) unavailability of the Cloud Services.
- 9.2. **Damages Cap.** Neither Your nor Our aggregate liability shall exceed the greater of five hundred thousand United States dollars (US\$ 500,000) or the amount received by Us for the applicable Products in the twelve (12) months prior to the event giving rise to this liability.
- 9.3. **Exceptions.** Sections 9.1 and 9.2 do not apply to usage in excess of an Entitlement, a breach of Our intellectual property rights, an indemnification claim under Section 8, a breach of the confidentiality obligations set forth in Section 10, in case of gross negligence, willful misconduct, fraud, personal injury, or to any liability pursuant to an applicable legislation that does not permit to limit or exclude any liability.
- 10. Confidential Information.**
- 10.1. **Confidential Information.** Confidential Information means any non-public information disclosed by one party to the other party in connection with this Agreement, that is designated as confidential and falls within a recognized exemption to the San Bernardino County Sunshine Ordinance, County Code of Ordinances Section 19.0101, California Government Code 54950, and California Public Records Act (Government Code Section 6250). Confidential Information includes copies of such information, but excludes information that: (a) is or becomes a part of the public domain through no action or omission of the receiving party ("Recipient"); (b) was in the receiving party's lawful possession prior to the disclosure and had not been obtained by the receiving party from the disclosing party ("Discloser"); (c) is lawfully disclosed to the receiving party by a third-party without restriction on the disclosure; or (d) is independently developed by the receiving party. Subject to applicable law, the Software, pricing information and Services Data are Confidential Information.
- 10.2. **Treatment.** Confidential Information shall remain the property of the Discloser. Each Party shall have the right to use the other's Confidential Information solely for the purpose of fulfilling its obligations under this Agreement. Each party agrees: (a) to hold the other party's Confidential Information in confidence for a period of three (3) years from the date of disclosure; and (b) to disclose the other party's Confidential Information only to those employees or agents on a need to know basis provided that they are required to protect such Confidential Information against unauthorized disclosure under terms no less restrictive than those specified herein. Recipient shall protect the Confidential Information from unauthorized use, access or disclosure in the same manner as it protects its own confidential or proprietary information of a similar nature, and in any event with at least a reasonable degree of care. Recipient may disclose the other party's Confidential Information to the extent that such disclosure is required pursuant to a judicial or administrative proceeding, provided that, prior to such disclosure, Recipient gives Discloser prompt written notice thereof and the opportunity to seek a protective order or other legal remedies.
- 10.3. **Return or Destruction.** Upon termination of this Agreement or Discloser's written request, all Confidential Information (including all copies thereof) of Discloser shall be returned or destroyed and provide written certification of this destruction, unless Recipient is required to retain such information by law, and the receiving party shall certify its compliance with this Section 10.3.
- 10.4. **Injunctive Relief.** Recipient agrees that, due to the unique nature of the Confidential Information, the unauthorized disclosure or use of the Confidential Information may cause irreparable harm to the disclosing party, the extent of which will be difficult to ascertain and for which there will be no adequate remedy at law. Accordingly, Recipient agrees that Discloser, in addition to any other available remedies, will have the right to an immediate injunction and other equitable relief enjoining any breach or threatened breach of this section 10, without the necessity of posting any security. Recipient will notify Discloser in writing immediately upon the receiving party becoming aware of any breach or threatened breach.
- 11. Data Privacy.**
- 11.1. **Services Data.** Notwithstanding anything to the contrary in the Agreement (including the Data Processing Addendum <https://www.nutanix.com/legal/data-processing-addendum> ("DPA")), where applicable, You agree that We shall have the right to use data pertaining to You and Your users and data related to You and Your users' use of the Products, support and/or operation of the Products, for Our legitimate business purposes, such as billing, account management, security and support, as well as to develop, improve and market, products and services provided that We will process such data solely within the Continental United States in accordance with Applicable Privacy Law (as defined in the DPA) and our data privacy statement which can be found at <https://www.nutanix.com/legal/privacy-statement>.
- 11.2. **Data Processing.** If We process any personal data (as defined under Applicable Privacy Law) on Your behalf when performing Our obligations under this Agreement, subject to Applicable Privacy Law, You are the controller and We are the processor. Our DPA will apply when and to the extent We process Customer Data protected by Applicable Privacy Law (all as defined in the DPA). In the event of a conflict between this Agreement and the DPA, the Agreement shall control.
- 12. Compliance.**
- 12.1. **Compliance with Documentation.** You agree that You will comply with all instructions and requirements in any Product specification sheets, user guides, security best practices and policies, and other documentation that We provide or make available to You in connection with the use of the Products.
- 12.2. **Compliance with Anti-Corruption Laws.** We and You shall comply with all applicable laws and regulations including but not limited to those relating to anti-corruption or anti-bribery e.g. the U.S. Foreign Corrupt Practices Act, as amended, the U.K. Bribery Act and legislation implementing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.
- 12.3. **Export Control.** The Products are subject to export restriction in the U.S. and other jurisdictions. You are responsible to fully comply with all applicable export laws and regulations that apply to the download, installation and use of the Products in Your jurisdiction. You represent and warrant that You are not subject to sanctions or otherwise designated on any list of prohibited or restricted parties, or owned or controlled by such a party, including but not limited to the lists maintained by the United Nations Security Council, the U.S. Government (e.g., the U.S. Department of Treasury's Specially Designated Nationals List and Foreign Sanctions Evaders list, and the U.S. Department of Commerce's Entity List), the European Union or its member states, or other applicable government authority.
- 12.4. **US Government Restrictions.** You acknowledge that the Products were developed entirely at private expense and no part of the Products were first produced in the context of a government contract. The Products are provided to the U.S. Government as "commercial items," "commercial computer software," "commercial computer software documentation," and "technical data" with the same rights and restrictions generally applicable to the Products. If You are using the Products on behalf of the U.S. Government and these terms fail to meet the U.S. Government's needs or are inconsistent in any respect with federal law, You will immediately discontinue Your use of the Products. The terms "commercial item" "commercial computer software," "commercial computer software documentation," and "technical data" are defined in the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement.
- 13. Term and Termination.**
- 13.1. **Term.** The term of this Agreement is effective as of July 26, 2022 and expires July 25, 2027, but may be terminated earlier in accordance with provisions of this Agreement.
- 13.2. Intentionally omitted.
- 13.3. **Termination.** Either party has the right to immediately suspend or terminate this Agreement upon written notice to the other party if the other party: (a) is in default of any material obligation and the default has not been cured within thirty (30) days of receipt of written notice specifying the default; or (b) becomes insolvent, makes a general assignment for the benefit of creditors, suffers or permits the appointment of a receiver for its business or assets, becomes subject to any proceeding under any bankruptcy or insolvency law domestic or foreign, or has been liquidated.



- 13.4. **Effect of Termination or Expiration of Entitlement.** Upon any termination of this Agreement or the expiration of any Entitlement issued hereunder, the rights and licenses granted to You will automatically terminate, and You agree to immediately cease using the Products, return or destroy all copies of the Products, Documentation and other Confidential Information in Your possession and certify to Us in writing completion of the return or destruction. Upon such termination, payment will be made to Us for services rendered and expenses reasonably incurred prior to the effective date of termination. Upon receipt of termination notice We shall promptly discontinue services unless the notice directs otherwise.
- 13.5. **Return of Your Content.** If the applicable Cloud Services involves the transmission of Your Content, then You may retrieve and remove Your Content in accordance with the Documentation. We shall have no obligation to provide Your Content thirty (30) days following the termination date.
- 13.6. **Previews Term and Expiration.** Unless otherwise specified in the Entitlement, Previews, except for No-Charge Products, may be used for a period not exceeding ninety (90) days from Delivery or access being granted ("Evaluation Period"). You agree to uninstall, delete and cease using such Previews at the end of the Evaluation Period. No-Charge Products may be used in accordance with this Section 13.

14. **Authorized Partners.**

The terms of the agreement between You and a Partner for the procurement of the Products applies solely between You and that Partner

15. **Governing Law and Jurisdiction.**

- 15.1. **Governing Law and Jurisdiction.** This Agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation shall be governed and construed in accordance with the laws and under the exclusive jurisdiction of the competent courts as follows:

15.2.

You are domiciled in	Nutanix contracting entity	Governing law	Courts with exclusive jurisdiction
The Americas	Nutanix Inc.	State of California and controlling United States law	Superior Court of California, County of San Bernardino, San Bernardino District
U.S. Federal Government	Nutanix, Inc.	Federal Law	US District Court or the US Court of Federal Claims
France	Nutanix Netherlands B.V.	French law	Paris
Germany	Nutanix Netherlands B.V.	German law	Munich
United Kingdom	Nutanix Netherlands B.V.	English law	England and Wales
Australia, New Zealand, Hong Kong, Korea and Taiwan	Nutanix Netherlands B.V.	State of New South Wales	Sydney
Japan	Nutanix Netherlands B.V.	Japan	District Court of Tokyo
Malaysia, Philippines, Singapore and Thailand	Nutanix Netherlands B.V.	Singapore	Singapore
China	Nutanix Netherlands B.V.	China	CIETAC Beijing
Any other country	Nutanix Netherlands B.V.	The Netherlands	Amsterdam

- 15.3. **Exclusion.** The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Agreement.

16. **Certification and Audit.**

You agree to maintain accurate records as necessary to verify Your compliance with this Agreement. Upon Our request, no more than once every twelve (12) months, You agree to furnish Us with a written certification signed by one Your authorized representatives verifying that the Products are being used in accordance with this Agreement and the Entitlement. We or Our independent third-party accountant may examine and audit Your books and records relating to this Agreement and Your access, use, and deployment of the Products to the extent necessary to verify Your compliance with this Agreement and the Entitlement. Any audit will be conducted during regular business hours at Your facilities, will not unreasonably interfere with Your business and will comply with Your reasonable security procedures. If an audit reveals that You have exceeded the Usage Capacity, Usage Limits, other licensing metrics or the scope of Your license granted during the period audited, additional fees for Your excess usage are payable net thirty (30) days.

17. **General.**

- 17.1. **Affiliates and Contractors.** You may permit Your Affiliates and/or any contractor acting on Your behalf to use the Products within the Usage Capacity as specified in the Entitlement provided that they comply with the terms of this Agreement. You will be jointly and severally liable for any breach of this Agreement by any of the foregoing users.
- 17.2. **Assignment.** Neither party may assign this Agreement or any rights hereunder without the other party's prior written consent, which shall not be unreasonably withheld. Nutanix may assign this Agreement, in whole as part of a corporate reorganization, consolidation, merger, or sale of all of its assets, provided that Nutanix provides ten (10) days' prior written notice of such assignment, or if legally prohibited from providing prior notice, within 10 days after the effective date of the assignment, and You have the right to terminate this Agreement, if required by applicable law.
- 17.3. **Third-Party and Open Source Software.** The Products may contain components of copyrighted third-party software or open source software. Third party and open source software that is delivered as part of the Software is included in the warranty, support and indemnification provisions applicable to the Software provided it is not removed or used separately from the Software. Your internal use of open source software included in the Products without modification and in compliance with this Agreement will not result in the imposition of "copyleft" obligations with respect to Your intellectual property.
- 17.4. **No Third-Party Beneficiaries.** This Agreement does not confer any rights on any person or party other than the parties to this Agreement except as set forth in Section 1.3., 2, 3, and 9.
- 17.5. **Relationship of the Parties.** We perform Support Services as an independent contractor, and not as an employee, agent, joint venturer or partner of You, and neither You or We have the authority to bind the other by contract or otherwise.
- 17.6. **Waiver.** Failure to enforce any provision of this Agreement will not constitute a waiver. Any waiver must be in writing and signed by the waiving party.
- 17.7. **Subcontractors.** We may use subcontractors, but We shall remain liable to You for all of Our obligations under this Agreement.
- 17.8. **Force Majeure.** We will not be liable for performance delays during the performance of Support Services or Professional Services or for nonperformance, due to causes beyond Our reasonable control.
- 17.9. **Severability.** If any provision in this Agreement is found to be unenforceable by a court of competent jurisdiction, the remainder of this Agreement will remain in full force and effect.
- 17.10. **Notices.** Our notice address is: Nutanix, Inc., 1740 Technology Drive, Suite 150, San Jose, CA 95110, Attn: Chief Legal Officer.
- 17.11. **Survival.** Sections 2.2, 5.4, 6, 8, 9, 10, 12, 16 and 17.9 shall survive the expiration or termination of this Agreement.
- 17.12. **Entire Agreement.** This Agreement, together with any additional terms incorporated by reference, including the Entitlement and the Appendices hereto, constitute the complete and exclusive understanding and agreement between You and Us and supersedes any written or oral prior or contemporaneous agreements, communications and understandings. Any terms and conditions contained or referenced by either party in a quote, purchase order, acceptance, invoice or any similar document purporting to modify the terms and conditions contained in this Agreement will be disregarded and have no effect unless otherwise expressly agreed to by You and Us. This Agreement may be executed in any number of counterparts, each of which so executed shall be deemed to be an original, and such counterparts shall together constitute one and the same Agreement. The parties shall be entitled to sign and transmit an electronic signature of this Agreement (whether by facsimile, PDF or other email transmission), which signature shall be binding on the party whose name is contained therein. Each party providing an electronic signature agrees to promptly execute and deliver to the other party an original signed Agreement upon request.

IN WITNESS WHEREOF, the San Bernardino County and the Contractor have each caused this Contract to be subscribed by its respective duly authorized officers, on its behalf.

SAN BERNARDINO COUNTY

(Print or type name of corporation, company, contractor, etc.)



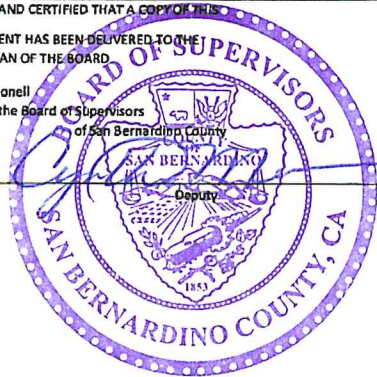
Curt Hagman

Curt Hagman, Chairman, Board of Supervisors

Dated: JUL 26 2022

SIGNED AND CERTIFIED THAT A COPY OF THIS DOCUMENT HAS BEEN DELIVERED TO THE CHAIRMAN OF THE BOARD

Lynna Monell
Clerk of the Board of Supervisors
of San Bernardino County



By _____

DocuSigned by:

Aaron Boynton

(Authorized signature - Sign in blue ink)

By

Aaron Boynton

(Print or type name of person signing contract)

Name

VP, Corporate Controller

(Print or Type)

Title

7/5/2022

Dated:

1740 Technology Drive, Suite 150
San Jose, CA 95110

Address

FOR COUNTY USE ONLY

Approved as to Legal Form <i>Bonnie Uphold</i>	Reviewed for Contract Compliance	Reviewed/Approved by Department <i>William L. Gilbert</i>
County Counsel <i>BONNIE UPHOLD, COUNTY COUNSEL</i>		
Date <i>7-18-2022</i>	Date	Date <i>7/19/22</i>



**ATTACHMENT A
INSURANCE REQUIREMENTS**

We agree to provide insurance set forth in accordance with the requirements herein. If We use existing coverage to comply with these requirements and that coverage does not meet the specified requirements, We agree to amend, supplement or endorse the existing coverage to do so.

1. Without in anyway affecting any indemnity obligations provided and in addition thereto, We shall secure and maintain throughout the Agreement term the following types of insurance with limits as shown:
 - a. Workers' Compensation/Employer's Liability – A program of Workers' Compensation insurance or a state-approved, self-insurance program in an amount and form to meet all applicable requirements of the Labor Code of the State of California, including Employer's Liability with \$250,000 limits covering all persons including volunteers providing services on Our behalf and all risks to such persons under this Agreement. If We has no employees, We may certify or warrant to You that We do not currently have any employees or individuals who are defined as "employees" under the Labor Code and the requirement for Workers' Compensation coverage will be waived by Your Director of Risk Management. With respect to contractors that are non-profit corporations organized under California or Federal law, volunteers for such entities are required to be covered by Workers' Compensation insurance.
 - b. Commercial/General Liability Insurance – We shall carry General Liability Insurance covering all operations performed by or on Our behalf providing coverage for bodily injury and property damage with a combined single limit of not less than one million dollars (\$1,000,000), per occurrence. The policy coverage shall include:
 - i. Premises operations and mobile equipment.
 - ii. Products and completed operations.
 - iii. Broad form property damage (including completed operations).
 - iv. Personal injury.
 - v. Contractual liability.
 - vi. \$2,000,000 general aggregate limit.
 - c. Automobile Liability Insurance – Primary insurance coverage shall be written on ISO Business Auto coverage form for all owned, hired and non-owned automobiles or symbol 1 (any auto). The policy shall have a combined single limit of not less than one million dollars (\$1,000,000) for bodily injury and property damage, per occurrence. If We are transporting one or more non-employee passengers in performance of Agreement services, the automobile liability policy shall have a combined single limit of two million dollars (\$2,000,000) for bodily injury and tangible property damage per occurrence. If We own no autos, a non-owned auto endorsement to the General Liability policy described above is acceptable.
 - d. Umbrella Liability Insurance – An umbrella (over primary) or excess policy may be used to comply with limits or other primary coverage requirements. When used, the umbrella policy shall apply to bodily injury/property damage, personal injury/advertising injury and shall include a "dropout" provision providing primary coverage for any liability not covered by the primary policy. The coverage shall also apply to automobile liability.
 - e. Professional Liability – Professional Liability Insurance with limits of not less than one million (\$1,000,000) per claim and two million (\$2,000,000) aggregate limits
 or
Errors and Omissions Liability Insurance – Errors and Omissions Liability Insurance with limits of not less than one million (\$1,000,000) and two million (\$2,000,000) aggregate limits.
 - f. Cyber Liability Insurance - Cyber Liability Insurance with limits of no less than \$1,000,000 for each occurrence or event with an annual aggregate of \$2,000,000 covering privacy violations, information theft, damage to or destruction of electronic information, intentional and/or unintentional release of private information, alteration of electronic information, extortion and network security. The policy shall protect the involved County entities and cover breach response cost as well as regulatory fines and penalties.

If insurance coverage is provided on a "claims made" policy, the "retroactive date" shall be shown and must be before the date of the start of the contract work. The claims made insurance shall be maintained or "tail" coverage provided for a minimum of five (5) years after contract completion.

2. **Additional Insured.** All policies, except for Worker's Compensation, Errors and Omissions and Professional Liability policies shall contain additional endorsements naming San Bernardino County and its officers, employees, agents and volunteers as additional named insured with respect to liabilities arising out of the performance of services hereunder. The additional insured endorsements shall not limit the scope of coverage for You to vicarious liability but shall allow coverage for You to the full extent provided by the policy. Such additional insured coverage shall be at least as broad as Additional Insured (Form B) endorsement form ISO, CG 2010.11 85.
3. **Waiver of Subrogation Rights.** We shall require the carriers of required coverages to waive all rights of subrogation against You, Your officers, employees, agents, volunteers, contractors and subcontractors. All general or auto liability insurance coverage provided shall not prohibit Us and Our employees or agents from waiving the right of subrogation prior to a loss or claim. We hereby waive all rights of subrogation against You.
4. **Policies Primary and Non-Contributory.** All policies required herein are to be primary and non-contributory with any insurance or self-insurance programs carried or administered by You.
5. **Severability of Interests.** We agree to ensure that coverage provided to meet these requirements is applicable separately to each insured and there will be no cross-liability exclusions that preclude coverage for suits between Us and You or between You and any other insured or additional insured under the policy.
6. **Proof of Coverage.** We shall furnish Certificates of Insurance to the County Department administering the Agreement evidencing the insurance coverage at the time the Agreement is executed, additional endorsements, as required shall be provided prior to the commencement of performance of services hereunder, We shall maintain such insurance from the time We commence performance of services hereunder until the completion of such services. ,
7. **Acceptability of Insurance Carrier.**, insurance shall be written by insurers authorized to do business in the State of California and with a minimum "Best" Insurance Guide rating of "A- VII".
8. **Failure to Procure Coverage.** In the event that any policy of insurance required under this Agreement does not comply with the requirements, is not procured, or is canceled and not replaced, You have the right but not the obligation or duty to cancel the Agreement or obtain insurance if You deem necessary and any premiums paid by You will be promptly reimbursed by Us or Your payments to Us will be reduced to pay for Your purchased insurance.



Appendix 1: Hardware Support for NX Branded Hardware

1. **Scope of Hardware Support Services.** We will only provide Hardware Support for NX branded hardware ("Hardware") under a valid Entitlement. If We determine that replacement parts are required for Hardware Support, then We will replace any failed part with a functional equivalent that will have equal or higher specifications. Replacement parts may be new or refurbished, at Our option. All defective parts must be returned following Nutanix's return material authorization ("RMA") policy which can be found at <https://www.nutanix.com/support-services/product-support/policies>. If You have purchased the Nutanix non-return disk option, all defective parts except the relevant disks must be returned following the Nutanix RMA policy. If You do not follow Nutanix's RMA policy, Nutanix may invoice You through its Partners the full cost of the replacement part(s). Returned and defective parts become Our property.
2. **Exclusions.** We shall have no obligation to provide Support Services for Hardware (a) that has been mishandled, altered or damaged due to willful or negligent acts or omissions or force majeure, or operation of the Hardware other than as specified in the documentation accompanying the Hardware; (b) modified, altered or repaired by a party other than Us or a party authorized by Us; (c) that was subjected to fire suppression discharge or a power failure; that was subjected to abnormal physical or electrical stress, abnormal environmental conditions or environmental and storage conditions (including temperature and/or humidity ranges) which are not in accordance with the documentation accompanying the Hardware; or (d) that has installed Software which is subject to Nutanix's Software End of Life Policies which can be found at <https://www.nutanix.com/support-services/product-support/policies>.



Appendix 2: Direct Purchase Terms

The following terms apply only if You purchase Products directly from Us.

1. Definitions.

- 1.1. "Delivery" means the date when We make the license key for the applicable Software available to You or when We make the Software otherwise available to You or when We render the Professional, Support and Cloud Services.
- 1.2. "Flexcredits" means the pre-paid credits which can be redeemed against Professional Services.
- 1.3. "Price List" means Our the-current list of Products and their associated prices as amended from time to time.
- 1.4. "Purchase Orders" means the electronic or written order issued by You directly to Nutanix consistent with the corresponding price quotation for the purchase of the Products.

2. Orders & Acceptance

- 2.1. **Purchase Orders.** You shall issue binding, non-contingent, written or electronic Purchase Orders consistent with the corresponding price quote for the purchase of the Products. Your Purchase Orders shall refer exclusively to these Terms and the NLSA or any version thereof negotiated between You and Us.
- 2.2. **Acceptance.** Acceptance by You of the Software occurs upon Delivery. Acceptance of Professional, Support and Cloud Services occurs when such services are rendered unless otherwise agreed between You and Us in a separated document.

3. Pricing & Payments

- 3.1. **Pricing.** We may change in Our sole discretion the prices specified in Our price list and add or remove items at any time. A Purchase Order received after the effective date of a price change, but pursuant to a valid and unexpired quote shall be invoiced at the price stated on that quote.
- 3.2. **Payment Terms.** You shall make full payment in the currency specified in the invoice not later than sixty (60) days from the date of Our invoice. The rights to use the Software and Documentation, access the Cloud Services, receive the Support Services and Professional Services are subject to payment in accordance with this Section 3.2.
- 3.3. **Credit Cards.** Cloud Services may also be purchased via a credit card through the Nutanix billing center available in the MyNutanix portal which may be found at <https://my.nutanix.com>.

4. Flexcredits

You may use FlexCredits, as specified below, to purchase Professional Services. FlexCredits, identified by SKU FLEX-CST-CR on Our price list, or such other SKU as We may determine from time to time, may only be used for packaged or custom Professional Services, technical account manager or resident consultant resources, education offerings, including certifications or any additional services as We may determine at Our discretion. Additional information on Professional Services against which FlexCredits may be utilized is available at: <https://www.nutanix.com/support-services/consulting-services> for consulting services and for education and certification. The cost of FlexCredits is as per the then current price list. FlexCredits expire twelve (12) months from the purchase date, are non-refundable and can be applied to any Professional Services made available by Us at the time of redemption. Balances can be pooled toward a single redemption and may be purchased upfront. You don't have to select in advance the Professional Services against which FlexCredits are to be redeemed.

5. Taxes & Duties

You are solely responsible for the payment of taxes, fees, withholding, duties and charges and all related penalties and interest that arise from utilization of or provision of the Software, Cloud Services, Support Services and Professional Services including any taxes that arise on the provision of products to Your affiliates. Taxes include, without limitation, VAT, Service tax, GST, excise taxes, sales and transaction taxes or any other like taxes that are owed with respect to any order placed under this agreement. If You are tax-exempt, provide us with tax exemption certificates or other documentation acceptable to the taxing authorities not later than thirty (30) days from the date you give us an Order. All payments pursuant to this Agreement shall be made without any withholding or deduction of any withholding tax or other tax or mandatory payment to government agencies. If you are legally required to make any such withholding or deduction from any payment due to us under this Agreement, the sum payable by you upon which such withholding or deduction is based shall be increased to the extent necessary to ensure that, after such withholding or deduction, We receive and retain, free from liability for such withholding or deduction, a net amount equal to the amount We would have received and retained in the absence of such required withholding or deduction. A valid Tax registration number is required for all Non-US orders.

6. Conflicting Terms

The above terms prevail over any conflicting or additional terms referred to in any Purchase Order, quote or similar communication between You and Us. Purchase Orders issued by You shall be deemed to incorporate these Terms except where You and Us have expressly agreed in writing to variations thereto.