

# TOPdesk On Premise Subscription

## Terms and Conditions

### 1. DEFINITIONS. For purposes of this Agreement:

**1.1 "Authorized User"** means an employee of Customer who has been authorized by Customer to use the Licensed Materials.

**1.2 "Confidential Information"** means any information, whether disclosed orally, in writing, electronically, visually or otherwise, by one party (the "Disclosing Party") to the other (the "Recipient") of, relating to or in connection with this Agreement; provided that in each case the same is clearly identified to the Recipient as confidential in either written, oral or machine readable form or under the circumstances should reasonably be considered to be confidential.

**1.3 "Documentation"** means the manuals and software documentation provided to Customer by Provider with the Software.

**1.4 "Intellectual Property Rights"** means, on a worldwide basis, any and all: (i) rights associated with works of authorship, including copyrights, moral rights, mask-works and database rights; (ii) trade name, trademarks and service marks; (iii) trade secret rights; (iv) patents, designs, algorithms and other industrial property rights; (v) other intellectual and proprietary rights of every kind and nature, however designated, whether arising by operation of law, contract, license, or otherwise; and (vi) registrations, initial applications, renewals, extensions, continuations, divisions, or reissues thereof now or hereafter in force (including any rights in any of the foregoing).

**1.5 "Licensed Materials"** means the Software and Documentation, collectively.

**1.6 "Licensed Software Use"** means the scope of the license granted as set forth in Exhibit 1 and in accordance with the terms herein.

**1.7 "Service"** means configuration, technical mapping, installation, implementation, data import/export, set-up of the Software, implementation of upgrades, support and maintenance and/or training of Customer personnel regarding use of the Software.

**1.8 "Software"** means the object code of the software and modules listed on Exhibit 1.

### 2. LICENSE; RESTRICTIONS; SERVICES.

**2.1 License.** Upon execution by the parties of this Agreement and subject to payment by Customer of the license fees set forth in Exhibit 1 and compliance with the terms and conditions of this Agreement, Provider hereby grants to Customer a limited, non-exclusive, non-transferable, license, without the right to sublicense, to install and use one copy of the Licensed Materials and use such Licensed Materials for the Licensed Software Use, at the location set forth in Exhibit 1. This is a license agreement and not an agreement for sale. The Software shall be

installed at the facility identified on Exhibit 1 and on a system that meets the requirements set forth on Exhibit 1. All rights to the Licensed Materials not specifically granted herein are reserved to Provider or its licensors. Customer acknowledges and agrees that Customer is responsible for compliance with this Agreement by all Authorized Users and Customer shall be responsible for any breach of this Agreement by an Authorized User or any other employee, agent, customer or contractor of Customer. Customer also maintains all responsibility for determining whether the data or information generated from Customer's use of the Licensed Materials is accurate or sufficient for Customer's purposes. Customer shall have the right to either host the Software internally or through the third party service provider listed on Exhibit 1 ("Service Provider"); provided that such Service Provider agrees in writing to (i) use the Software only for hosting it for the Customer and shall not provide access to anyone other than its employees who are required to have access for providing the hosting services to Customer, (ii) the restrictions on use of the Software as set forth in Section 2.2 (a), (b), (c) and (d), (iii) not license, sell, rent, lease, transfer, assign, distribute, display, host (except as specifically set forth in this Section 2.1 of this Agreement), outsource, disclose, permit timesharing, operate provide as a service bureau, or otherwise commercially exploit or make the Licensed Materials available to any third party, in whole or in part, (iv); confidentiality obligations relating to protection of Licensed Materials that are similar to the terms and conditions set forth in Section 3 and (v) identify Provider as a third party beneficiary under the agreement between the Service Provider and Customer and provide to Provider the right to enforce its rights directly against Service Provider in the event of any breach of the any terms listed above. In the event Software is hosted by Customer or a Service Provider, Customer shall be responsible for providing access (including remote access) to the Software to Provider, as requested by Provider for purposes of providing any support and maintenance for the Software.

**2.2 Restrictions on Use of Software.** Customer shall have no right to use any source code of the Software. Customer shall make no attempt to, and shall not permit any affiliate, Authorized User, or third party to make any attempt to: (a) alter, remove, conceal or modify any markings or any notice of Provider or its licensors' proprietary rights from any Licensed Material and shall reproduce all such markings and notices in or on all copies of the Licensed Materials made by Customer as authorized in Section 2.3; (b) make the Software or any materials resulting from the Software available in any manner to any third party for use in the third party's business operations; (c) download, reproduce, copy, republish, alter, adapt, modify, improve, translate or create derivative works from any part of the Licensed Materials or reverse engineer, disassemble, decompile, or otherwise attempt to reveal the trade secrets, know-how or other Intellectual Property Rights underlying the Software, or (d) build or support, or assist a third party in building or supporting, products, or services competitive with Provider or the Software; (e) license, sell, rent, lease, transfer, assign, distribute, display, host (except as specifically set forth in Section 2.1 of this Agreement), outsource, disclose, permit timesharing, operate or provide as a service bureau, or otherwise commercially exploit or make the Licensed Materials available to any third party, in whole or in part; and (f) use the Licensed Materials for any purpose other than the Licensed Software Use. If applicable law requires access to the source code for the Software for some purpose, such as interoperability with other software, and Customer desires access for that required purpose, Customer shall notify Provider, and Provider shall have the option, in its discretion, to (i) perform the work to derive any required information or (ii) allow Customer access to the source code of the Software solely for the legally required purpose.

**2.3 Copies.** Unless otherwise specifically set forth in the applicable SOW (as defined in section 2.6 below), Customer may only make one (1) additional copy of the Software solely as necessary for back-up and archival purposes. Any copies of the Licensed Materials made by Customer are the

exclusive property of Provider and shall include all proprietary notices included in the original copy.

**2.4 Delivery.** Provider shall deliver electronically to Customer one (1) copy of the Software made generally available by Provider promptly after this Agreement is executed by the parties (unless otherwise specified in Exhibit 1).

**2.5 Compliance.** Customer agrees to comply with the requirements of any applicable law, statute, rule, directive, regulation, order, decree, judgment or other governmental act of any domestic or foreign, federal, provincial, county or local governmental entity or regulatory agency with jurisdiction over Customer, Customer's affiliates and Authorized Users or their activities in connection with their use of the Software. Customer acknowledges that the export of any Software, technical data or other commodities is or may be subject to export or import control and Customer agrees that any Software, technical data or other commodities or the direct or indirect product thereof will not be exported (or re exported from a country of installation) directly or indirectly, unless authorized by law and with the prior written consent of the Provider.

**2.6 Services.** Subject to the terms of this Agreement, Customer may request that Provider provide certain Services related to the Software. Any Services to be provided will be included in a statement of work, which shall describe the fees, costs and expenses payable by the Customer in connection with the performance of such Services, and which shall describe the scope of such Services ("SOW"). A SOW shall be binding upon the parties only after mutual execution. Provider shall be under no obligation to perform the proposed Services until a SOW has been mutually executed. Each mutually executed SOW shall be considered an integral part of this Agreement. In case of any inconsistency, ambiguity, or conflict between this agreement and a SOW the terms of a mutually-executed SOW shall govern.

**2.7 Service Provider.** Customer shall be and shall remain primarily liable to Provider for all actions or omissions of any Service Provider. The acts or omissions of any Service Provider shall constitute the acts or omissions of Customer. Customer agrees: (i) to cause each Service Provider to comply with all applicable obligations as set forth in this Agreement, and (ii) to be liable for breach of the Agreement by any Service Provider and all consequences thereof.

### **3. CONFIDENTIALITY.**

**3.1 Duty of Confidentiality.** The Recipient agrees that, at all times during the term of this Agreement and after its termination, it shall not, nor permit any other person or entity to, disclose, copy, reproduce, transmit or otherwise use, directly or indirectly, for its own benefit or for the benefit of others, the Confidential Information of the other party, except as expressly authorized by this Agreement or the written consent of the Disclosing Party or to the extent necessary for performance of this Agreement. The Recipient shall maintain the confidentiality of the Disclosing Party's Confidential Information using the same degree of care as it takes to preserve and safeguard the confidentiality of its own confidential information of like nature, but in no event less than reasonable care. The Recipient agrees that it will disclose Confidential Information only to those of its employees and contractors who need to know such information, and, with respect to such contractors, who have previously agreed to be bound by the non-disclosure terms and conditions of this Agreement or a similar non-disclosure agreement, and, with respect to Provider, to its resellers, distributors, suppliers and third-party service providers and vendors and their employees who have a need to know the information in connection with providing the Software and/or the Services. However, the Recipient bears no responsibility for

safeguarding the Confidential Information of the Disclosing Party that Recipient can document is: (a) publicly available other than through breach of this Agreement by the Receiving Party; (b) already in the Recipient's possession prior to disclosure by the Disclosing Party and not subject to an obligation of confidentiality; (c) obtained by the Recipient from a third party who has full right of disclosure; or (d) independently developed by the Recipient without any reference to the Confidential Information of the Disclosing Party. The foregoing prohibition on disclosure of Confidential Information shall not apply to the extent any Confidential Information is required to be disclosed by the Recipient pursuant to a valid order of a court or other governmental, administrative or regulatory body; provided, however, that the Recipient shall, as applicable: (A) provide prior written notice to the Disclosing Party of any such obligation to disclose; (B) provide the Disclosing Party, at the Disclosing Party's sole cost and expense, a reasonable opportunity to interpose an objection or obtain a protective order requiring that the Disclosing Party's Confidential Information so disclosed be used only for the purposes for which the order was issued; and (C) cooperate with the efforts of the Disclosing Party and provide assistance as reasonably requested by the Disclosing Party. The Licensed Materials and the terms and conditions of this Agreement shall be deemed Confidential Information of Provider.

**3.2 Remedies; Survival.** Any failure by either party to comply with the requirements of this Section 3 may cause irreparable injury to the other party without an adequate remedy at law. Accordingly, each party agrees that the other party shall be entitled, in addition to any other remedies that may be available in law, equity or otherwise, to obtain specific performance of, or an injunction against any breach or threatened breach of, this Section 3, or the continuation of any such breach, in each case, without the necessity of posting a bond or other security, as remedies for any such breach. The provisions of this Section 3 shall survive the termination of this Agreement.

**4. OWNERSHIP.** Customer acknowledges and agrees that Provider and its third-party suppliers own all worldwide right, title and interest in and to the Licensed Materials and all Intellectual Property Rights embodied in the Licensed Materials, data and Confidential Information of Provider or its third party suppliers made available to Customer, and any and all improvements, derivative works, updates and modifications thereto, whether or not made in conjunction with this Agreement. Customer agrees any updates, patches, bug fixes, workarounds, upgrades and enhancements to the Licensed Materials furnished by Provider to Customer shall be the sole and exclusive property of Provider, subject to use by Customer in accordance with the terms and conditions of this Agreement including the Licensed Software Use.

## **5. TERM AND TERMINATION.**

**5.1 Term.** Unless earlier terminated as provided herein, this Agreement shall commence as of the first day of the month following the effective Date and remain in effect for the period mentioned on the order confirmation (the "Initial Term"). The initial Term shall be automatically renewed for successive 1 year periods (each a "renewal Term"), unless either party notifies the other party in writing of its intention not to renew this Agreement at least thirty (30) days prior to the end of the Initial Term or any Renewal Term, as the case may be. The Initial Term and each Renewal Term shall be collectively referred to as the "Term".

**5.2 Termination for Cause.** This Agreement may be terminated at any time during the Term by either party upon the material breach by the other party of any of such other party's obligations

hereunder, which material breach has not been cured within thirty (30) days after the breaching party has received written notice thereof.

**5.3 Effect of Termination.** Upon expiration or termination of this Agreement for any reason, any amounts owed to Provider under this Agreement before such termination or expiration, if any, will be immediately due and payable (whether or not invoiced), all licenses and access rights granted herein shall immediately terminate and Customer shall purge from its electronic systems or other storage facilities all copies of Licensed Materials. Upon the expiration or termination of this Agreement, each party shall return (or if requested by the Disclosing Party, destroy) all Confidential Information, documents, manuals and other materials provided by the Disclosing Party to the Recipient hereunder. The following Sections shall survive the termination or expiration of this Agreement: 2.7 (Service Provider) 3 (Confidentiality), 4 (Ownership), 5.3 (Effect of Termination), 7 (Disclaimer of Warranties), 8 (Limitation of Liability), and 9 (Miscellaneous).

## **6. FEES AND PAYMENT.**

**6.1 Fees.** In consideration of the license granted by Provider hereunder and provision of Services provided to Customer under this Agreement, Customer shall pay to Provider the fees and charges set forth in Exhibit 1 to this Agreement and the applicable SOW. All fees referenced under this Agreement shall be shown, invoiced and payable in Canadian Dollars, unless otherwise expressly indicated on the applicable SOW. Unless otherwise stated in the SOW, all fees are exclusive of out-of-pocket expenses.

**6.2 Payment Terms.** All fees and expenses reimbursable by Customer to Provider shall be due and payable within thirty (30) days of the invoice date. Customer will reimburse Provider for reasonable expenses related to providing any Services. Fees are exclusive of taxes and expenses. All fees due under this Agreement are non cancelable and the sums paid nonrefundable. Provider shall have the right to increase (not more than once annually) the recurring fees payable by Customer by giving thirty (30) days' notice of such increase to Customer.

**6.3 Taxes.** Fees do not include applicable taxes, including but not limited to sales, service, use, value added, duties, assessments, excise or other taxes, based on this Agreement, or use or receipt of the Licensed Materials or Services ("Taxes"). Customer shall be responsible for and agrees to timely pay all Taxes, excluding taxes based on Provider's income. If Provider is obligated by law or otherwise to collect any such Taxes from Customer, then the appropriate amount will be added to Customer's invoice, and such Taxes shall be timely paid by Customer. Customer shall also pay any interest or penalties assessed on such Taxes and agrees to hold Provider harmless from all claims and liability arising from Customer's failure to report or pay any such Taxes

**6.4 Late Interest Charges.** Any fees or charges not paid in full when due shall bear daily interest at the rate lesser of one and a half percent (1.5%) per month, i.e., 18% per year, and the maximum rate allowed by applicable law.

## **7. DISCLAIMER OF WARRANTIES.**

**7.1** The Licensed Materials, and all other data, information, reports and materials made available by Provider or accessed by Customer and its Authorized Users in connection with this Agreement are provided "AS IS" and "AS AVAILABLE" without representations or warranties of any kind.

PROVIDER AND ITS SUPPLIERS EXPRESSLY DISCLAIM ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING THOSE RELATED TO MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, OR ANY IMPLIED WARRANTIES ARISING OUT OF COURSE OF PERFORMANCE, COURSE OF DEALING OR USAGE OF TRADE. PROVIDER SPECIFICALLY DOES NOT WARRANT THAT THE LICENSED MATERIALS SHALL MEET CUSTOMER'S REQUIREMENTS OR SHALL OPERATE IN ALL COMBINATIONS WHICH MAY BE SELECTED FOR USE BY CUSTOMER; THAT THE OPERATION OF THE LICENSED MATERIALS SHALL BE ERROR-FREE OR UNINTERRUPTED; OR THAT ALL ERRORS OR DEFECTS IN THE LICENSED MATERIALS SHALL BE CORRECTED. Neither Provider, nor its affiliates, directors, officers, employees, contractors, resellers, distributors or suppliers shall have any liability whatsoever for the accuracy, completeness, or timeliness of any data, reports, materials and/or information, or for any decision made or action taken by Customer, any Authorized User, or any third party in reliance upon any data, materials, reports or information that is generated from the use of the Licensed Materials.

**8. LIMITATION OF LIABILITY.** NEITHER PARTY, NOR ITS AFFILIATES, DIRECTORS, OFFICERS, EMPLOYEES, CONTRACTORS, RESELLERS, DISTRIBUTORS OR SUPPLIERS, SHALL BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS, LOSS OF REVENUE, LOSS OF USE OR LOSS OF DATA, OR COSTS OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES ARISING OUT OF THIS AGREEMENT, HOWEVER CAUSED AND UNDER ANY THEORY OF LIABILITY (INCLUDING NEGLIGENCE), EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. PROVIDER'S MAXIMUM LIABILITY FOR ANY DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER IN CONTRACT OR TORT, OR OTHERWISE, SHALL IN NO EVENT EXCEED, IN THE AGGREGATE, THE TOTAL AMOUNTS ACTUALLY PAID TO PROVIDER DURING THE SIX (6) MONTHS PRIOR TO THE FIRST EVENT OR OCCURRENCE GIVING RISE TO SUCH LIABILITY. ANY DAMAGE IN CUSTOMER'S FAVOR AGAINST PROVIDER SHALL BE REDUCED BY ANY REFUND OR CREDIT RECEIVED BY CUSTOMER UNDER THE AGREEMENT AND ANY SUCH REFUND AND CREDIT SHALL APPLY TOWARDS THE LIMITATION OF LIABILITY.

## **9. GENERAL PROVISIONS.**

**9.1 Independent Contractors.** Provider is as an independent contractor, and nothing contained in this Agreement shall be construed to create or imply a partnership, joint venture, principal-agent or employment relationship between the parties. Neither party shall take any action or permit any action to be taken on its behalf which purports to be done in the name of or on behalf of the other party and shall have no power or authority to bind the other party or to assume or create any obligation or responsibility, express or implied, on the other party's behalf or in its name, nor shall such party represent to any one that it has such power or authority.

**9.2 Assignment.** Customer shall not assign, delegate, or otherwise transfer any portion of its rights, duties, or obligations under this Agreement, in whole or in part, whether by operation of law or otherwise, without the prior written consent of Provider and any attempt to do so shall be void. Customer agrees that Provider may subcontract certain Services to be performed in connection with this Agreement; provided that any such subcontracting arrangement will not relieve Provider of any of its obligations hereunder. In addition, Provider may assign this Agreement, including its rights and duties hereunder, without the prior consent of Customer.

**9.3 Third Party Products.** Third party products supplied under this Agreement are provided for use solely with the Software licensed to Customer under this Agreement and may not be used on

a stand-alone basis or with any other third party products. The third party terms and conditions that accompany such third party products shall govern Customer's use thereof. Provider shall not be responsible for, or have any liability with respect to, such third party products.

**9.4 Audit.** Provider may, for purposes of verification of Customer's compliance with the Licensed Software Use and this Agreement, request an accounting of such use and upon at least five (5) days prior written notice conduct an audit (either physical or electronic) of Customer's use of the Licensed Materials or request certification that the use does not exceed the Licensed Software Use or violate any other terms of this Agreement. Customer shall fully cooperate with Provider in connection with such audit, including scheduling any on-site audit. Customer agrees to pay within 30 days of written notification any fees applicable to Customer's use of the Licensed Materials in excess of Customer's rights. If Customer does not pay, Provider shall have the right to terminate this Agreement for cause. Customer agrees that Provider shall not be responsible for any of Customer's costs incurred in cooperating with the audit.

**9.5 Entire Agreement; Waiver.** This Agreement sets forth the entire understanding and agreement of the parties, and supersedes any and all prior or contemporaneous oral or written agreements or understandings between the parties, as to the subject matter of this Agreement. This Agreement may be amended, modified or changed only by a writing signed by both parties. The waiver of a breach of any provision of this Agreement will not operate or be interpreted as a waiver of any other or subsequent breach.

**9.6 Force Majeure.** If performance hereunder (other than payment) is interfered with by any condition beyond a party's reasonable control, such as exceptionally severe weather, fire, explosion, war, acts of terrorism, civil disorder, labor disputes (whether or not involving employees of either party) or acts of local or central government or other competent authorities, the affected party, upon giving prompt notice to the other party, shall be excused from such performance to the extent of such condition.

**9.7 Governing Law.** This Agreement will for all purposes be solely and exclusively governed, construed and enforced in accordance with the laws of Ontario and federal laws of Canada applicable therein (without regard to the conflicts of law provisions thereof). The Parties submit to the exclusive jurisdiction of the courts of Ontario.

**9.8 No Implied Licenses.** There are no implied licenses under this Agreement, and any rights not expressly granted hereunder are reserved. Customer shall not exceed the scope of the licenses granted hereunder.

**9.9 Notice.** Any notice under this Agreement will be in writing and delivered by personal delivery, overnight courier, facsimile or email confirmed by sender's transmission device as having been transmitted completely and free of errors, or certified or registered mail, return receipt requested, and will be deemed given upon personal delivery, one (1) day after deposit with an overnight courier, five (5) days after deposit in the mail, or upon such confirmation of transmission by facsimile or email. All notices hereunder shall be delivered to the addresses as set forth below on the signature page, provided that either party may, by notice to the other party, change the address or fax number to which such notices are to be given.

**9.10 Severability.** If any provision herein is held to be invalid or unenforceable for any reason, the remaining provisions will continue in full force without being impaired or invalidated in any way. The parties agree to replace any invalid provision with a valid provision that most closely approximates the intent and economic effect of the invalid provision.

**9.11 Customer Reference.** Customer agrees (i) that Provider may identify Customer as a licensee and/or recipient of Service and use Customer's name and logo in sales presentations, marketing materials, Company's website and press releases, and (ii) to develop a brief customer profile for use by Provider for promotional purposes on any websites owned and/or controlled by Provider.

**9.12 Language.** The Parties have required that this Agreement and all documents relating thereto be drawn up in English. Les parties ont demandé que cette convention ainsi que tous les documents qui s'y rattachent soient rédigés en anglais.

**9.13 No Third-Party Beneficiary.** No third party shall be deemed a third-party beneficiary of this Agreement.

**TOPdesk Canada Inc.**

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