

## TechExcel, Inc. End User License Agreement

### 1. INTRODUCTION

A. This is the software license agreement (“Agreement”) between TechExcel, Inc., a California Corporation (“TechExcel”), with its principal place of business at 3675, Mt. Diablo Blvd., Suite 330, Lafayette, CA 94549, and \_\_\_\_\_, (nature of the business entity), (“Customer”), with its offices at \_\_\_\_\_ .

B. This Agreement includes the terms and conditions set forth below and in the following Attachments:

Attachment A – Terms and Conditions of Maintenance Plan

Attachment B – Purchase Order

C. TechExcel develops and markets computer software applications including (name of software products to be licensed under this agreement) (the “Software”), which is described in the user manuals and other written materials created by TechExcel to describe the functionality and use of the Software (the “Documentation”).

D. Customer desires to purchase a license to use and reproduce the Software and Documentation for its internal business purposes only, and TechExcel desires to grant Customer the license.

THEREFORE, the parties agree as follows:

### 2. DEFINITIONS.

A. “Software” means the computer program or programs marketed and sold as (name of products). Software includes any updates, modification, bug fixes, updates, enhancements, or other modifications. It does not include any version of the Software which constitutes separate product because of the differences in function or features.

B. “Documentation” means all user manuals and other written material created by TechExcel to describe the functionality or assist in the use of the Software.

C. “License Fee” means the fee to be paid by Customer to TechExcel as consideration for the license granted under this Agreement and the right to use the Software and the Documentation.

### 3. GRANT OF LICENSE

A. In consideration of Customer’s payment of the license fee and subject to the terms and conditions set forth in this Agreement, TechExcel hereby grants Customer a nonexclusive, perpetual worldwide license to use the Software exclusively for its business purposes, and to use the Documentation solely in connection with Customer’s use of the Software.

B. Customer is to pay invoice in accordance with the Payment Terms described below.

C. Customer will receive a non-expiring software license key once payment of the License Fee is received.

- D. Customer may, and is encouraged to make a backup copy of the Software for its own use; Customer is not allowed to make unlimited copies.
- E. Customer may only install one copy of the application and the database server unless otherwise specified in the purchase agreement.
- F. The Software is configured by TechExcel to support the number of users specified in the Purchase Order (Attachment B). The program is licensed on a per user basis, with the maximum number of users permitted to use the server being that quantity specified in the Purchase Order. Customer understands that the Software enforces this limitation, and that any failure of the Software to perform in response to users in excess of the number specified in the Purchase Order is not a defect in the Software.
- G. Except as specifically granted in this Agreement, TechExcel owns and retains all right, title and interest in and to the Software, Documentation, and any and all related materials.

#### **4. ITEMS PROVIDED BY TECHEXCEL**

- A. TechExcel shall furnish Customer with the purchased TechExcel Software. Software will be made available to be downloaded in machine-readable object code form by electronic file transfer. The Documentation will be made available to be downloaded electronically as machine-readable text files suitable for printing.
- B. TechExcel shall furnish to Customer a license file that will enable the Software to operate.
- C. TechExcel shall furnish to Customer one copy of the Documentation. Upon request, at TechExcel's option, additional copies of the Documentation may be supplied to Customer at TechExcel's then-current price. Customer may copy or otherwise reproduce any Documentation, provided that all copyrights and other proprietary notices are reproduced substantially similar to the originals.
- D. Customer acknowledges and agrees that it has independently verified that the Software is appropriate for the purposes for which the Customer intends to use it, and that Customer did not rely upon any skill or judgment of TechExcel in such selection.

#### **5. LICENSE FEE AND PAYMENT TERMS**

In consideration for the License granted to Customer under this Agreement, Customer shall pay TechExcel the License Fee, as set forth in the Purchase Order attached as Attachment B to this Agreement, and under the following payment terms:

##### **Payment Terms**

- A. Payment for the entire purchase is due net thirty (30) days after date of the purchase order.
- B. Payment for professional services (training & configuration), if any, is due at time of purchase. Professional service fee(s) must be received prior to the service being rendered.
- C. Payment of expenses related to professional services (travel, lodging, meals) is due upon receipt of invoice.
- D. Annual Maintenance Plan renewal fees are due 30 days after date of purchase order.

### **Late Payment Fee**

- E. All amount not paid within ten (10) days of the date on which payment is due shall bear the charge for late payment fees of 1.5% per month or the maximum rate permitted by law charged on delinquent amounts.

### **6. Taxes**

- A. In addition to other amounts payable under this Agreement, Customer shall pay any and all federal, state, municipal, or other taxes or fees, withholding currently or subsequently imposed on Customer's use of the Software or the payment of the License Fee to TechExcel.
- B. TechExcel shall be entitled to collect from Customer, in addition to the other amounts payable under this Agreement, all federal, state, municipal or other taxes or fees (excluding taxes imposed on or measured by TechExcel's net income) levied or imposed by reason of the transaction under this Agreement. Customer shall, upon demand, pay to TechExcel an amount equal to such tax(es) actually paid or required to be collected or paid by TechExcel.

### **7. Product Return Policy**

- A. If Customer decides to return the Software within 30 days of the original purchase date, they will be refunded 100% of the purchase price, less services rendered and service related expenses.

#### **Return policy restrictions**

- B. Product return policy applies only to the initial software order and does not apply to any re-orders, updates, revisions or renewals.
- C. Fees for professional services rendered and any related expenses (travel, lodging, meals) are not refundable under any circumstances.
- D. No refunds can be made after 30 days of the Software purchase date.

### **8. INTELLECTUAL PROPERTY**

- A. Customer acknowledges and agrees that it obtains no ownership right in the Software and Documentation under the terms of this Agreement, and that TechExcel has and retains all right, title, interest and ownership in and to the Software, Documentation and other material licensed or provided to Customer under the terms of this Agreement, and in and to any copies or updates of the Software, Documentation or material whether they are made by Customer or TechExcel.

- B. Customer acknowledges that the Software, the Documentation and material under this Agreement constitutes proprietary information and trade secrets of TechExcel, whether or not any portion of the Software, the Documentation or material is or may be the subject of a valid copyright or patent.
- C. Customer may not alter any proprietary markings on the Software, including copyright, trademark, trade secret, and patent legends.
- D. Any authorized copies of the Software made by Customer shall contain a reproduction or equivalent of the copyright notice or other proprietary markings appearing on the Software and Documentation delivered by TechExcel.
- E. Customer may not decompile, reverse engineer, disassemble, or make any attempt to discover the source code of the Software.
- F. Customer may not modify, adapt, translate, rent, lease, loan, or create derivative works based on the Software or any part thereof.
- G. TechExcel shall retain the copyright to all enhancements to the Software.
- H. TechExcel will defend any action brought against Customer by a third party to the extent that it is based on a claim that the Software or Documentation supplied by TechExcel under this Agreement, when used by Customer as authorized under this Agreement, infringes any third party patent, copyright or trade secret. TechExcel will pay any award against Customer, or settlement entered into on Customer's behalf, based on such alleged infringement claim, provided that Customer promptly notifies TechExcel in writing of any such claim and allows TechExcel to control, and cooperates with TechExcel in, the defense of any such claim and all related settlement negotiations. In the event an injunction is sought or obtained against Customer's use of the Software or Documentation as a result of any such infringement claim, TechExcel may, at its sole option and expense, (a) procure for Customer the right to continue using the affected Software or Documentation, or (b) replace or modify the affected Software or Documentation so that it does not infringe provided that the functionality of the Software does not change in any material adverse way.

## **9. LIMITED WARRANTY**

- A. TECHEXCEL HEREBY WARRANTS TO CUSTOMER THAT TECHEXCEL IS THE OWNER OF THE SOFTWARE AND THE DOCUMENTATION AND HAS THE RIGHT TO GRANT CUSTOMER THE LICENSE TO USE THE SOFTWARE AND THE DOCUMENTATION IN THE MANNER AND FOR THE PURPOSES SET FORTH IN THIS AGREEMENT WITHOUT VIOLATING ANY RIGHTS OF A THIRD PARTY.
- B. EXCEPT FOR THE WARRANTIES SET FORTH ABOVE, THE SOFTWARE AND THE DOCUMENTS UNDER THIS AGREEMENT ARE PROVIDED "AS IS," TECHEXCEL GRANTS NO OTHER WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION WARRANTIES THAT THE SOFTWARE IS FREE OF DEFECTS OR ERRORS, VIRUS FREE, ABLE TO MEET ANY REQUIREMENTS OF CUSTOMER OR ANYONE ELSE, ABLE TO OPERATE ON AN UNINTERRUPTED BASIS, MERCHANTABLE, FIT FOR A PARTICULAR PURPOSE OR NONINFRINGING, UNLESS SUCH WARRANTIES ARE LEGALLY INCAPABLE OF EXCLUSION.

## 10. LIMITATION OF LIABILITY

- A. NEITHER TECHEXCEL NOR ANYONE ELSE WHO HAS BEEN INVOLVED IN THE CREATION, PRODUCTION, OR DELIVERY OF THE SOFTWARE AND THE DOCUMENTATION SHALL BE LIABLE FOR ANY INDIRECT, CONSEQUENTIAL, OR INCIDENTAL DAMAGES ARISING OUT OF THE USE OR INABILITY TO USE SUCH SOFTWARE INCLUDING BUT NOT LIMITED TO LOST PROFITS AND LOST DATA, EVEN IN THE EVENT TECHEXCEL HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR CLAIMS. BECAUSE SOME STATES OR JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR THE LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, IN SUCH STATES OR JURISDICTIONS, TECHEXCEL'S LIABILITY SHALL BE LIMITED TO THE EXTENT PERMITTED BY LAW. IN NO EVENT SHALL TECHEXCEL HAVE ANY LIABILITY FOR ANY DAMAGES THAT EVER EXCEED THE PRICE ACTUALLY PAID BY CUSTOMER TO TECHEXCEL UNDER THIS AGREEMENT.

## 11. SOFTWARE SUPPORT

- A. No technical assistance or maintenance service is included with the purchase of the Software License.
- B. In consideration of Software Maintenance Fees paid by Customer, TechExcel will provide technical assistance and maintenance service as described in the attached Terms and Conditions of Maintenance Plan attached as Attachment A to this Agreement. The Software Maintenance Fee is an additional fee to the Software License Fee.

## 12. CONFIDENTIALITY

- A. Both parties undertake to retain in confidence the terms of this Agreement and all other non-public information and know-how disclosed pursuant to this Agreement which is either designated as proprietary and/or confidential or by the nature of the circumstances surrounding disclosure, ought in good faith to be treated as proprietary and/or confidential.

## 13. TERMINATION

- A. Customer may terminate this Agreement at any time and from time to time by giving fifteen (15) days' written notice to TechExcel.
- B. Either party shall have the right to terminate this Agreement in the event that the other party commits material breach of its obligations. Intent to terminate shall be made by written notice setting forth the details of the breach. Termination shall become effective thirty (30) days from the date that the notification of intent to terminate was given, unless the breaching party has cured the breach prior to the end of that thirty (30) day period.
- C. Notwithstanding Clause A and B above, either party shall have the right to terminate this Agreement effective immediately if a petition of bankruptcy is filed by or against the other party or a party is unable to pay its debts as they become due. Intent to terminate shall be made by a written notice, sent by certified mail or overnight courier to the party by or against which bankruptcy is filed.

- D. If this Agreement is terminated due to a material breach by Customer of its obligations under this Agreement, TechExcel may, at its sole discretion, revoke the license granted under Paragraph 3(A) of this Agreement. If TechExcel notifies Customer in writing that its license has been revoked, Customer shall, within fifteen (15) days of such notice, (i) discontinue all use of the Software; (ii) remove all copies of the Software contained in any computer memory or data storage device under the control of the Customer; and (iii) certify to TechExcel in writing that it has complied with the requirements of this Paragraph 13(D).
- E. On termination of this Agreement, all rights granted to Customer under this Agreement cease and the Customer shall, within fifteen (15) days of termination, (i) discontinue all use of the Software; (ii) remove all copies of the Software contained in any computer memory or data storage device under the control of the Customer; and (iii) certify to TechExcel in writing that it has complied with the requirements of this Paragraph 13(E).

#### 14. ASSIGNMENT AND DELEGATION

- A. Neither party may sell, transfer, assign, delegate, or subcontract any rights or obligations under this Agreement without the prior written consent of the other party. Consent shall not be unreasonably withheld.
- B. Notwithstanding clause A above, if a party sells or transfers to a single entity all or substantially all of its business to which this Agreement relates, that party may, without the other party's consent, assign or delegate its rights or obligations under this Agreement to that entity.

#### 15. GENERAL

- A. **Applicable Law.** This Agreement shall be governed by the laws of the State of California.
- B. **Modification.** This Agreement may not be modified or amended except by writing signed by both parties.
- C. **Entire Agreement.** This Agreement, including its Attachments, constitutes the sole and entire agreement of the parties with respect to the subject matter hereof and supersedes any prior oral or written promises or agreements. There are no promises, covenants or undertakings other than those expressly set forth in this Agreement.
- D. **Severability.** If any provision of this Agreement is found to be invalid by any court of competent jurisdiction, that portion shall be construed to reflect the parties' original intent, and the balance of this Agreement shall remain in full force and effect.
- E. **Jurisdiction and Venue.** Customer expressly agrees that jurisdiction for any suit or action brought under this Agreement resides in the federal and state courts of the State of California.
- F. **Notice.** All notices, consents and other communications under or regarding this Agreement shall be in writing and shall be deemed to have been received on the earlier of the date of actual receipt, the third business day after being mailed by first class certified air mail or the first business day after being sent by a reputable overnight delivery service. Any notice may be given by facsimile, provided that a signed written original is sent by one of the foregoing methods within twenty-four (24) hours thereafter.

Customer's address for notices is stated below. TechExcel's address for notices is stated below. Either party may change its address for notices by giving written notice of the new address to the other party in accordance with this Section.

G. **Attorney Fees.** In the event of any dispute between the parties arising out of this Agreement, the prevailing party shall be entitled, in addition to any other rights and remedies it may have, to recover its reasonable attorney's fees and costs.

H. **Effective Date.** This Agreement shall become effective upon execution by both parties.

## **SIGNATURES**

TechExcel and Customer have read this Agreement and agree to be bound by its terms, in witness whereof the authorized representatives of each party have affixed their signatures below.

### **Customer**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name (Print or Type)

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

### **TechExcel, Inc.**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name (Print or Type)

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

### **Customer's mailing address:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**TechExcel's mailing address:** TechExcel,  
Inc.  
3675 Mt. Diablo Blvd., Suite 330  
Lafayette, CA 94523, USA

## **Attachment A: Terms and Conditions of Maintenance Plan**

### **1. Services Provided under the Annual Maintenance Plan**

Customer has the option of purchasing an Annual Maintenance Plan for a Software Maintenance Fee. The Software Maintenance Fee is an additional fee to the software and license purchase fees. If Customer does not purchase an Annual Maintenance Plan, technical assistance will be charged on a per incident basis as described in section 6 below and maintenance may be purchased as described in section 5 below. In consideration of the Software Maintenance Fee paid by Customer and Customer's agreement to meet the responsibilities set forth below, TechExcel shall provide to Customer the following technical support and maintenance services for the term covered by the Annual Maintenance Plan purchased:

#### **Technical Assistance**

- A. TechExcel shall assist Customer in diagnosing errors and malfunctions that occur when Customer uses the Software.
- B. TechExcel shall provide support services to Customer to attempt to correct diagnosed errors and malfunctions. TechExcel is not responsible for errors or malfunctions caused by any hardware or any third party operating systems.
- C. All technical assistance shall be performed between 8:30 a.m. and 8:30 p.m., Eastern Standard Time, Monday through Friday, holidays excluded.
- D. TechExcel will provide technical assistance by email, telephone or Customer Web Portal.
- E. TechExcel makes the following specific commitments to respond to requests for technical assistance from Customer:
  1. To accept/acknowledge the support request via email, phone or Customer Web Portal within one (1) business day of receipt of request;
  2. To inform Customer of current known status of the problem and enter an incident in TechExcel's tracking system when appropriate;
  3. To provide a response within three (3) business days detailing TechExcel's analysis and or assessment, including options and estimated time for resolution;
  4. To make best effort, for bona fide defect, to develop a software fix or workaround in a timely fashion;
  5. For support calls identified by Customer as "urgent," to provide a proposed resolution or response within one (1) business day.

#### **Maintenance**

- F. TechExcel will make each minor and major upgrade published during the term of the Annual Maintenance Agreement available to the Customer for download. All such downloads must be initiated by the Customer.
  1. "Minor Upgrade" shall mean any defect fixes and minor feature enhancements. These will be "dot released" (other than x.5), such as 4.1, 4.2, etc.
  2. "Major Upgrade" shall mean major new features, major enhancements to existing features, bug fixes and minor feature enhancements. These will be new version releases, such as 4.0, 4.5, 5.0, 5.5 etc.



- G. Customer is not entitled to receive any new product from TechExcel that TechExcel does not deem to be a part of purchased Software. For example, Customer is entitled to all updates and upgrades to the Software, but should TechExcel release another product with related but different functionality under a different product name, Customer would not be entitled to receive that product as an upgrade to the Software.
- H. Customer is entitled to download, at no additional cost, versions of the Software for any additional Database Platforms available from TechExcel as listed in TechExcel's published offering of products, provided that the aggregate configuration of users supported among all servers does not exceed the licensed configuration.
- I. From time to time, TechExcel may choose to cease maintenance of certain Database platforms. TechExcel will do this in two steps. First, the Database Platform will be designated as "Obsolescent," which means TechExcel will make new release available for that Database only upon explicit customer request. No less than one year after being designated "Obsolescent," the Database platform will be designated as "Discontinued," which means TechExcel will no longer make new released available for that Database platform at all. Database platforms shall be designated "Obsolescent" or "Discontinued" on TechExcel's web site; it shall be Customer's responsibility to check the web site for changes in designation of any given platform.
- J. The designation of a Database platform as either "Obsolescent" or "Discontinued" shall not affect TechExcel's obligation to provide Technical Assistance as described above.

## **2. Customer Responsibilities under the Annual Maintenance Plan**

- A. Customer will make its best efforts to keep current with the latest release of Software provided by TechExcel.
- B. Customer shall designate the appropriate number of individuals as principal contact(s) and secondary contact(s) for Software Support, as agreed by the parties. The total number of primary and secondary contacts is not to exceed four (4) contacts per hundred (100) users. Customer has the right to change the contacts at any time upon written notification to TechExcel.
- C. In the event that Customer fails to meet its responsibilities as set forth in the preceding two paragraphs, TechExcel's sole remedy shall be that it may, at its option, decline to provide technical support until Customer has complied.

## **3. Additional Purchases During the Annual Maintenance Plan Term**

- A. All additional purchases MUST be added to the existing maintenance plan.
- B. The annual maintenance price will be based on the current list price.
- C. The new price for support will be pro-rated to the expiration date of the existing plan.
- D. If Customer does not pay the maintenance plan fee for the new purchase, all payments already made for the existing plan will be applied to the new total products owned, which will move the expiration date of the plan to an earlier date.

## **4. Renewal of Annual Maintenance Plan**

- A. At any time BEFORE the plan expires, Customer may renew the Annual Maintenance Plan for any number of years based on the agreed upon pricing schedule.
- B. The price for Annual Maintenance Plan renewal will be based on the current list price of the products and modules owned at the time of renewal.
- C. Customer may not renew only a portion of the licenses currently owned.
- D. If Customer wishes to reduce their total number of licenses, due to customer's business needs such as a reduced number of users using TechExcel products, they may permanently reduce their total number of active licenses and then renew the Annual

Maintenance Plan for the remaining licenses. In the event Customer wishes to increase the number of active licenses in the future they will need to purchase new licenses.

## **5. Expiration and Renew of Annual Maintenance Plan**

### **Within One (1) Year Following the Expiration Date**

- A. If the Annual Maintenance Plan is not renewed, all benefits of the plan will cease immediately following the plan's expiration date.
- B. At any time within one (1) year following the expiration date, Customer may renew the original plan retroactive to the original expiration date, for any number of additional years, subject to a reinstatement fee.
- C. The reinstatement fee will be equal to 10% of the current list price at the time of reinstatement of all products and licenses owned at the time of reinstatement. The reinstatement fee is in addition to the renewal fees.

### **After One (1) Year Following the Expiration Date**

- D. After one (1) year following the expiration date the Annual Maintenance Plan cannot be renewed.
- E. After one (1) year following the expiration date the Annual Maintenance Plan Customer must first purchase the current upgraded version of all products currently owned for 50% of the current list price at the time of the upgrade purchase. Customer may then purchase a new Annual Maintenance Plan to cover the upgraded products for any number of years, based on the above pricing. Customer will not be charged back to the original expiration date.
- F. The new expiration date will be based on the purchase date of the upgrade.