



# Engineering Consultants Group, Inc.

*Leaders in Process Control, Monitoring and Analysis*

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## (DOMESTIC SERVICE ONLY) GENERAL TERMS AND CONDITIONS

### 1. FEES.

In consideration for the rights granted hereunder, Customer shall pay ECG support and maintenance, and professional services fees in the amounts set forth in any accepted proposal (collectively, the "Service Fees"). Customer shall be responsible for all sales taxes, use taxes and any other similar taxes imposed by any federal, state or local governmental entity on the transactions contemplated in any accepted proposal, Statement of Work and/or these Terms, excluding taxes based upon ECG's net income. When ECG has the legal obligation to pay or collect such taxes, the appropriate amount shall be invoiced to and paid by Customer unless Customer provides ECG with a valid tax exemption certificate authorized by the appropriate taxing authority. All payment obligations are noncancellable and all amounts paid are nonrefundable. Customer is responsible for paying all Service Fees whether or not such subscriptions or services are actively used. ECG charges and collects in advance for use of the Maintenance and Support and Customer agrees to pay all sums invoiced within thirty (30) days of the date of the invoice.

### 2. MAINTENANCE AND SUPPORT SERVICES.

2.1 Obligations of ECG. Provided that Customer is not in material breach of any Proposal, Statement of Work and/or these Terms and is current in its payment of all of its Service Fees, ECG agrees to respond to requests for support and maintenance services as described in any Proposal, Statement of Work and these Terms.

2.2 Performance. ECG shall use commercially reasonable best efforts in performing services under these Terms and Conditions, and any Proposal and/or Statement of Work ("Agreement"). ECG shall not be responsible for failure to perform its services if (a) there is a failure or delay by Customer or its agents in providing ECG with the necessary access to properties, documentation, information, or materials; (b) Customer or its agents fail to approve or disapprove ECG's work; or (c) if Customer causes delays in any way whatsoever. In any of these events, ECG's time for completion of its service shall be extended accordingly.

ECG shall not be responsible for failure to perform if such failure is due to any act of God, labor trouble, fire, inclement weather, act of governmental authority, failure of transportation, accident, power failure or interruption, or any other cause, reasonably beyond ECG's control. In any of these events, ECG's time for completion of its services shall be extended accordingly.

### 3. PROFESSIONAL SERVICES.

3.1 Professional Services. As part of its ongoing service to Customer, ECG may offer other professional services outside of the Maintenance and Support detailed herein, which professional services may include additional training, consulting, customization and/or implementation assistance as provided under the Proposal, any Statement of Work and these Terms (the "Professional Services"). Professional Services and any maintenance and support provided by ECG shall be subject to these Terms, including any warranty exclusions, indemnification by Customer and limitations of liability set forth in Sections 4, 5 and 6 respectively. At Customer's request and subject to ECG's availability, ECG will provide Customer with the Professional Services at ECG's then current rates plus reasonable travel and other out of pocket expenses. Fees for Professional Services are billed upon performance and shall be due thirty (30) days after the date of ECG's invoice.

3.2 Statement of Work. Prior to delivery of any Professional Services by ECG, Customer will be required to execute a proposal or purchase order (the "Statement of Work") that references and incorporates these Terms. The Statement of Work shall be prepared by ECG and will contain a description of the work to be performed, a performance schedule, the location of work, a fee schedule and any additional obligations of each party. ECG may reject, deny or refuse to prepare any Statement of Work. ECG shall own all right, title and interest in and to any and all worldwide patents, copyrights, trade secrets and other intellectual property resulting from ECG's performance of any Professional Services. In the event that any Statement of Work is terminated by either Party, ECG shall be entitled to all fees for services performed prior to termination.

### 4. WARRANTY AND DISCLAIMER.

ECG EXPRESSLY DISCLAIMS ANY WARRANTIES OR REPRESENTATIONS OF ANY AND ALL KINDS, INCLUDING BUT NOT LIMITED TO, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. FURTHERMORE, ECG AND ITS LICENSORS MAKE NO REPRESENTATION, WARRANTY OR GUARANTY AS TO THE RELIABILITY, TIMELINESS, QUALITY, SUITABILITY, TRUTH, AVAILABILITY, ACCURACY OR COMPLETENESS OF , PROFESSIONAL SERVICES. ECG DOES NOT REPRESENT OR WARRANT THAT (A) THE PROFESSIONAL SERVICES

WILL MEET CUSTOMER'S REQUIREMENTS OR EXPECTATIONS, (B) ANY STORED DATA WILL BE ACCURATE OR RELIABLE, (C) ERRORS OR DEFECTS WILL BE ABLE TO BE CORRECTED, OR (D) THE SOFTWARE AND THE SERVER THAT HOSTS THE SOFTWARE, IF ANY, ARE OR WILL CONTINUE TO BE FREE OF VIRUSES AND OTHER HARMFUL CODE, CONTENT AND COMPONENTS. ALL CONDITIONS, REPRESENTATIONS AND WARRANTIES WHETHER EXPRESS OR IMPLIED, STATUTORY OR OTHERWISE, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT OF ANY THIRD PARTY RIGHTS ARE HEREBY DISCLAIMED TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW BY ECG.

## **5. INDEMNIFICATION.**

Customer shall indemnify, hold harmless and defend ECG from and against any and all claims, actions, lawsuits, liabilities, obligations, damages, costs, fees (including reasonable attorneys' fees) and expenses incurred by ECG that are (a) related to, or caused in any way by, the negligence or willful misconduct of Customer, its employees or agents; (b) related to this Agreement or the work to be performed by ECG for which ECG is not expressly responsible; or (c) the expressed responsibility of Customer under this Agreement.

## **6. LIMITATION OF LIABILITY.**

NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, ECG SHALL NOT BE LIABLE FOR LOST REVENUE, LOST PROFITS, LOSS OF DATA, LOSS OF USE, COST OF PROCUREMENT OF SUBSTITUTE PRODUCTS OR SERVICES, OR OTHER INDIRECT, PUNITIVE, SPECIAL, EXEMPLARY, INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING ANY DAMAGES RESULTING FROM THE USE OF THE SOFTWARE OR ECG SYSTEMS HOWEVER CAUSED AND WHETHER BASED ON CONTRACT, TORT, OR ANY OTHER LEGAL THEORY. FURTHERMORE, IN NO EVENT SHALL ANY LIABILITY OF ECG ARISING OUT OF OR IN CONNECTION WITH ANY PROPOSAL, STATEMENT OF WORK OR THESE TERMS EXCEED THE AMOUNT PAID BY CUSTOMER TO ECG UNDER THIS TERMS FOR THE PROFESSIONAL SERVICES GIVING RISE TO SUCH LIABILITY DURING THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING ANY REQUEST FOR DAMAGES BY CUSTOMER.

## **7. CONFIDENTIALITY.**

7.1 Definition. The term "Confidential Information" shall mean any information disclosed by ECG to Customer in connection with a proposal, Statement of Work or these Terms, which may be disclosed by ECG in writing, orally or by inspection by Customer.

7.2 Obligation. Customer shall treat as confidential all Confidential Information received from ECG, shall not use such Confidential Information except as expressly permitted under these Terms, and shall not disclose such Confidential Information to any third party without ECG's prior written consent which may be withheld in the sole discretion of ECG. Customer shall take reasonable measures to prevent the disclosure and unauthorized use of Confidential Information of ECG.

## **8. TERM AND TERMINATION.**

8.1 Term. The term of the Maintenance and Support shall commence on the Effective Date and shall continue for a period of twelve (12) months unless terminated as provided herein.

8.2 Termination. ECG may terminate the Maintenance and Support Term by written notice to Customer if any of the following events occur: (a) Customer fails to pay any amount due to ECG within thirty (30) days after ECG gives Customer written notice of such nonpayment; (b) Customer is in material breach of any term, condition, or provision of any proposal, Statement of Work and/or these Terms which breach is not cured within thirty (30) days after ECG gives Customer written notice of such breach, except for a breach of Section 1 or Section 7 of these Terms which may result in an immediate termination by ECG; or (c) Customer terminates or suspends its business, becomes subject to any bankruptcy or insolvency proceeding under federal or state statutes, or becomes insolvent or subject to direct control by a trustee, receiver or similar authority.

8.3 Effect of Termination. Upon the termination of the Maintenance and Support Term for any reason: (a) all duties of ECG hereunder shall terminate; (b) Customer shall immediately pay to ECG all amounts contained in any proposal, Statement of Work and these Terms; and (c) Customer shall return to ECG all copies of any ECG Confidential Information, including but not limited to any source codes provided by ECG.

8.4 Survival. The following sections shall survive the expiration or earlier termination, for any reason, of these Terms: 1, 4, 5, 6 and 7.

8.5 Remedies. Customer acknowledges that its breach of Section 7 will cause irreparable harm to ECG, the extent of which would be difficult to ascertain. Accordingly, Customer agrees that, in addition to any other remedies to which ECG may be legally entitled, ECG shall have the right to obtain immediate injunctive relief in the event of a breach of such section by Customer and Customer agrees to waive any requirement of ECG posting any bond as it relates to any such action.

## 9. MISCELLANEOUS.

9.1 Assignment. Customer may not assign any of its rights or delegate any of its obligations under any proposal, Statement of Work and/or these Terms, whether by operation of law or otherwise, without the prior express written consent of ECG which may be withheld in the sole discretion of ECG. Any such assignment without the prior express written consent of ECG shall be void. Subject to the foregoing, these Terms will bind and inure to the benefit of the parties, their respective successors and permitted assigns. ECG may assign any proposal, any Statement of Work and/or these Terms without Customer's consent to (a) a parent or subsidiary, (b) an acquirer of ECG's assets, or (c) a successor by merger or consolidation.

9.2 Waiver and Amendment. No modification, amendment or waiver of any provision of any proposal, Statement of Work and/or these Terms shall be effective unless in writing and signed by the party to be charged. No failure or delay by either party in exercising any right, power, or remedy under any proposal, Statement of Work or these Terms, except as specifically provided herein, shall operate as a waiver of any such right, power or remedy. Without limiting the foregoing, any additional or different terms and conditions which are contained on any purchase orders or similar materials submitted by Customer to ECG shall be of no force or effect.

9.3 Governing Law; Arbitration. Any proposal, Statement of Work and these Terms shall be governed by the laws of the State of Ohio and controlling United States federal law, without regard to the choice or conflict of law provisions of any other jurisdiction. To the maximum extent allowed by law, all disputes under any proposal, statement of work and/or these Terms shall be resolved by final and binding arbitration before a neutral, third-party arbitrator. Arbitration shall be conducted in accordance with the Commercial Arbitration Rules for the American Arbitration Association but the arbitration shall not be formally submitted to the American Arbitration Association for processing.

If a party files a lawsuit in court to resolve claims subject to arbitration, the party agrees that the Court shall dismiss the lawsuit and require the party to arbitrate the dispute.

If a party files a lawsuit in Court involving claims which are, and other claims which are not subject to arbitration, the party agrees that the court shall only hear the nonarbitrable claims and require that arbitration take place with respect to those claims subject to arbitration. The parties further agree that the arbitrator's decision on the arbitrable claims, including any determinations as to disputed factual or legal issues, shall be entitled to full force and effect in any later court lawsuit on any nonarbitrable claims. **In all nonarbitrable claims, the parties waive a trial by jury.**

9.4 Notices. ECG may give any notice required by any proposal, Statement of Work, and/or these Terms by means of a general notice generated by the Software, an electronic mail sent to the electronic mail address on record with ECG or by written communication sent by first-class mail, postage pre-paid, to the address on record with ECG. Such notice shall be deemed given forty eight (48) hours after being sent by first class mail or twenty four (24) hours after being sent electronically. Customer shall give any notices required under any proposal, Statement of Work and/or these Terms to ECG by sending the same via a nationally recognized overnight carrier or via pre-paid United States Certified or Registered Mail, return receipt requested, to the address of ECG contained in this Terms. Any such notice to ECG shall be deemed delivered when received by ECG.

9.5 Independent Contractors. The parties are independent contractors. Neither party shall be deemed to be an employee, agent, partner or legal representative of the other for any purpose and neither shall have any right, power or authority to create any obligation or responsibility on behalf of the other.

9.6 Severability. If any provision of any proposal, Statement of Work and/or these Terms is held by a court of competent jurisdiction to be contrary to law, such provision shall be changed and interpreted so as to best accomplish the objectives of the original provision to the fullest extent allowed by law and the remaining provisions of the proposal, Statement of Work and/or these Terms shall remain in full force and effect.

9.7 Complete Understanding. Any proposal, Statement of Work and these Terms constitutes the final, complete and exclusive agreement between the parties with respect to the subject matter hereof, and supersedes all previous written and oral agreements and communications. No terms, provisions, or conditions of any purchase order or other business form that Customer may use in connection with the acquisition or licensing of Software or services will have any effect on the rights, duties or obligations of the parties under, or otherwise modify any proposal, Statement of Work and/or these Terms, regardless of any failure of ECG to object to such terms, provisions or conditions. In the event of any conflict between any proposal, Statement of Work or these Terms, these Terms shall control.