



This Professional Services Agreement (“Agreement”) memorializes the terms and conditions by which E&A, LLC D/B/A Earnest & Associates (“Earnest”) provides its services pursuant to any and all Statement of Works (as hereinafter defined in Section 1.2) issued hereunder when engaged by Customer (who is identified in the Statement of Work) whereby Customer desires to engage Earnest and Earnest desires to accept such engagement, on and subject to the terms and conditions set forth herein.

**NOW, THEREFORE**, in consideration of the foregoing, the mutual promises contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Customer and Earnest, intending to be legally bound, agree as follows:

### **1.0 SERVICES ENGAGED**

- 1.1 Generally, the types of services contemplated to be provided under this Agreement are (Times stated are EST):
- 1.1.1 Technical Support Standard – Remote assistance provided to support application software on a non-scheduled basis predicated upon the availability of Earnest technical staff. This support is provided during the normal hours of 8:30AM – 5:00PM, Monday – Friday,
  - 1.1.2 Technical Support Priority – Where offered as an additional electable service option by Earnest, remote support assistance of application software provided under a priority delivery response between thirty minutes to four hours from the time of support request log-in during the business hours of 8:00AM – 8:00PM, Monday – Friday,
  - 1.1.3 Application Management – As it relates to application software and supporting databases, 1) analysis, design, programming, validation and documentation, 2) general maintenance, 3) application of fixes, 4) implementation of developer provided upgrades, and 5) foundational training,
  - 1.1.4 Application Development – As it relates to application software: 1) business process improvement & re-engineering consultation, 2) analysis, design, programming, validation and documentation of enhancements, and 3) initial and enhancement implementation,
  - 1.1.5 Network integration Support – Where offered as a service, consultation on the integration of application software with network environment and peripheral equipment existing therein,
  - 1.1.6 Business Consultation – Where offered as a service, business best practices consultation as it relates to defining and deploying business rules, policy and practice impacting operations and analytics.
  - 1.1.7 3<sup>rd</sup> Party & Proprietary Software Sales (“Product”) – General selling and sales consultation as it relates to ERP 3<sup>rd</sup> Party Software and Proprietary Software licenses. As the term is used herein, Proprietary Software means packaged software offerings internally developed by Earnest and licensed to the market at large pursuant to an Earnest software license agreement, and not: i) unique programming services provided specifically to a Customer pursuant to this Agreement or ii) software possessed by Customer pursuant to an Infor or other 3<sup>rd</sup> party software license agreement.
- 1.2 Services to be engaged and related pricing and terms of payment shall be defined in Statement of Works issued hereunder.
- 1.2.1 As the term is used herein, Statement of Work shall mean any quote, proposal, sales order, change order, PSA exhibit, sales contract or other document Earnest deems suitable, in its sole discretion, for the nature and delivery of the services to be engaged.
  - 1.2.2 A Statement of Work shall be deemed an addendum to this Agreement, is incorporated herein by reference and is subject to the terms and conditions stated herein unless otherwise specifically modified and the mutual consent to such modification of terms is acknowledged by signature of both parties on the Statement of Work.

In the case of conflict in terms, the terms and conditions stated in this Agreement shall take priority.

1.2.3 Earnest shall not be obligated to perform any service it deems in its sole discretion to be outside the scope of a defined scope of services until a formal written change order mutually agreeable to both parties is drafted and signed by both parties. For clarification purposes, NOTWITHSTANDING ANYTHING ELSE TO THE CONTRARY, any service or outcome of service not specifically stated in as in the Scope of Services defined in a Statement of Work, is deemed outside the Stated Scope of Services.

1.2.3 A Statement of Work shall not be effective until executed by Earnest’s duly authorized representative.

- 1.3 As the terms are used relative to initial implementation of ERP systems, the terms “Live” and “Go-Live” when taken together or separately shall be defined as: that point in time in the implementation process when in a production environment the purchased ERP software is suitable for operation according to the Developers’ specifications as stated in any Developer documentation, this Agreement, or Addendum to it, independent of whether Customer actually initiates into production the operation of any such software. As the term is used herein, “Developer” means the original owner/designer of the software, e.g., Infor Global Solutions or Microsoft. Evidence of “Live” or “Go Live” shall be the first successful batch generation of sales invoices either in a test or production environment.

### **2.0 NON-ACCEPTANCE OF SERVICES**

- 2.1 The following govern the redress and billing procedures for Customer’s non-acceptance of services that are quoted on a fixed price or a prepaid basis per Statement of Works issued hereunder.
- 2.1.2 Upon the receipt of any deliverable or service, or upon the receipt of invoice for services billed as incurred, Customer shall, within a period of thirty (30) days<sup>1</sup> from the occurrence of whichever of the preceding events occurs first, (the “Acceptance Period”), provide Earnest with a detailed written description of all objections relative to the deliverable or service. Earnest shall, as expeditiously as possible, provide resolution (“Rework”) for any such objections that Earnest and the Customer mutually determine fall within the defined scope of the Statement of Work. Customer shall be deemed to have accepted the deliverable or service unless the Customer provides Earnest written notice of such objections within the Acceptance Period.
- 2.1.3 Within ten (10) days after the receipt of the Rework, the Customer must notify Earnest in writing if any of the “agreed to” objections provided under Section 2.1 remain unsatisfied. If the Customer does not notify Earnest in writing of any remaining objections within the aforementioned ten (10) day period, the Rework shall be deemed to have been accepted by the Customer. If it is mutually determined that any remaining objections fall within the originally defined scope of the Statement of Work, Earnest will make additional revisions as expeditiously as possible and the process described in this Section 2 shall be repeated until the objections are resolved, subject to the provisions of Section 12.
- 2.1.4 Hours incurred for Rework as a result of factors under the control of the Customer or represent a change in the scope of the Statement of Work shall be invoiced to the Customer



on a time & material basis at the applicable hourly rates mutually agreed upon in the governing Statement of Work. When feasible to do so, Earnest will define the effort and specifications to accomplish the Rework in a Change Order Statement to be agreed to in writing by Earnest and Customer in advance of providing service; such Change Order Statement being prepared pursuant to Section 3.3. Hours incurred for Rework as a result of factors under the control of Earnest shall not be billable to Customer. The determination of whether a factor is in the control of Earnest or the Customer shall be made solely by Earnest.

2.2 Unless otherwise stated in a Statement of Work issued hereunder, all services provided by Earnest are done so on a time and material basis. Time & material services are not quoted on a "not to exceed" basis. Accordingly, actual hours incurred in providing services may exceed estimated hours depending on the facts and circumstances of the engagement, and such excess hours will be invoiced to Customer as incurred.

### 3.0 BILLING PROCEDURES

- 3.1 Unless stated otherwise per a Statement of Work issued hereunder, charges incurred pursuant to this Agreement shall be invoiced to the Customer weekly as incurred.
- 3.2 Unless specifically stated otherwise on an Earnest invoice, invoice terms of payment are Net 14 from date of invoice.
- 3.3 Unless otherwise agreed in writing in advance, hours incurred by Earnest for consultation and formulation of design and specifications relative to the presentation of a quote requested by the Customer or of a change order shall be billable independent of whether the Customer elects to proceed with the quoted services; it being acknowledged by both parties that Earnest is not compelled to prepare or pursue any quote or change order for services under terms it deems un-agreeable.
- 3.4 In addition to the hours incurred for the provision of services, at Earnest's sole discretion, additional hours incurred as a result of the following may be billable to the Customer:
  - 3.4.1 Customer's failure to manage factors under its control and deemed necessary by Earnest to complete the engaged services, and/or where such failure is beyond the deliverables, risk scope or assumptions delineated in any quoted service.
  - 3.4.2 Assistance or support provided by Earnest in cases of Customer negligence, including, but not limited to non-compliance with industry standard back-up and recovery protocols, Earnest's remote access procedures (if applicable), the restoration of data, failure to follow required procedures or inadequate or poorly maintained equipment.
  - 3.4.3 The performance failure on the part of the Customer, cancellation of scheduled hours by the Customer within twenty-four (24) hours of work commencement or hours requested by Customer for Earnest to be available on a "standby" basis.
  - 3.4.7 Change in scope of services as the result of: i) identification of significant factors previously undisclosed during discovery, or ii) a change in the nature of or understanding of significant factors as they were first disclosed during discovery.
- 3.5 Time & material hours billable shall be charged to the Customer in fifteen (15) minute increments; any fractional portion of an hour less than fifteen (15) minutes shall be rounded up to the next fifteen (15) minute increment. Service hours provided outside normal business hours, 8:30AM-5:00PM Monday-Friday, or on Earnest holidays, if holiday service is available, shall be charged in thirty (30) minute increments at two (2) times the prescribed hourly rate.
- 3.6 Customer agrees to pay for the actual time incurred by Earnest for travel associated with providing the services contemplated under this Agreement which shall be invoiced at one-half (50%) of the applicable hourly rate defined herein.
- 3.7 Customer agrees to pay for the actual travel costs incurred by Earnest

associated with providing the services contemplated under this Agreement which shall be invoiced in addition to services at one hundred percent (100%) of the actual cost incurred. Travel costs include, but are not limited to: lodging, airfare, cab fees, meals, parking/tolls, rental car fees, gas or mileage at IRS standard rate for individual's auto use, long distance phone charges and incidental supplies directly related to the provision of services.

- 3.8 Customer agrees to reimburse Earnest for the costs related to subcontractor travel, travel time or incidental expenses which shall be invoiced at one hundred percent (100%) of the actual costs incurred.
- 3.9 As it relates to Technical Support Services, if service is escalated to priority service response, such service provided may be assessed a two (2) hour priority service charge in addition to the actual resolution time incurred except when, if available, the Priority Help Desk Access service option is elected by Customer.

### 4.0 EARNEST REMEDIES

The provision of services by Earnest under this Agreement is dependent upon the Customer not being in Default. Failure of Customer to make timely payment or to carry out its obligations, as defined herein, constitute Default. Should the Customer be in Default, in addition to any remedies available to Earnest at law, until such Default is resolved to the satisfaction of Earnest in its sole discretion, the following remedies are specifically conveyed to Earnest:

- 4.1 Earnest may suspend services indefinitely or until such time that the Default is resolved.
- 4.2 Customer shall pay Earnest an amount equal to the underpaid fees, if any, based on the then current Earnest price list, as well as any applicable late charges; late charges shall be assessed against any amounts due in arrears at one percent (1.0%) per month;
- 4.3 If applicable, Earnest may remove or deactivate any of its Proprietary Software under license to the Customer whether it is residing on-premises or via 3<sup>rd</sup> party hosting. If, at a later time, said Proprietary Software shall be reinstalled on Customer's equipment by Earnest, Customer shall pay Earnest for the cost of re-installation.
- 4.4 In the event that the Customer is in Default of its obligation pursuant to this Agreement, Customer hereby agrees to pay all reasonable fees, including, but not limited to, reasonable attorneys' fees, court costs, and other related professional and administrative costs, incurred by Earnest in enforcing this Agreement.
- 4.5 Should the Customer's Default remain unresolved to Earnest's satisfaction after thirty (30) days from date of issuance by Earnest of a Notice of Default, Earnest may terminate any and all Statement of Works issued hereunder. Termination does not release Customer of its obligation to make payment in full to Earnest for any and all services and/or Product provided it by Earnest through the date of termination. Earnest at its sole discretion may apply any monies paid by Customer to Earnest towards settlement of i) outstanding invoice charges ii) services and Product rendered through the date of termination not yet invoiced, iii) accrued interest on (i) and (ii) and iv) all costs incurred by Earnest to enforce this Agreement.
- 4.6 In addition to any other remedies available to it, Earnest may seek injunctive relief to enjoin acts, being specifically acknowledged by the parties that any such other remedies are inadequate.

### 5.0 CUSTOMER RESPONSIBILITIES

- 5.1 Customer is responsible for ensuring that all data, hardware and network equipment, software and applications, system documentation and relevant environmental factors, are maintained and controlled in compliance with accepted industry practice and that said items are protected against all risk of loss, damage or destruction, and if applicable, ensuring its compliance with Earnest's remote access procedures. Earnest shall be held harmless by Customer for the Customer's failure to comply with these standards.
- 5.2 Customer shall provide Earnest adequate work space and access to all personnel, equipment, software, programs, information and



documentation as deemed necessary by Earnest in order to fulfill its obligations pursuant to this Agreement upon dates and times, or other such relevant terms as may be mutually agreed upon by both parties.

- 5.3 As it relates to compliance with any and all relevant federal, state and international laws, statutes, regulations, industry accepted standards and promulgations relating to any and all financial, security and/or data privacy reporting and compliance including, but not limited to those issued by or related to: SEC, AICPA, FASB, IASB, EFRAG, IRS, ICC; FTC; ITAR; EAR; ATF; DOD; HIPAA, HITECH, EU GDPR, EU-US-Swiss Privacy Shield, Earnest's consultation on such matters is strictly advisory and Customer is solely responsible for selecting, enforcing and maintaining the protocols it deems appropriate and relevant to its business in regards to such requirements.
- 5.4 Customer acknowledges that a properly trained and engaged staff is vital to the success of any service Earnest provides. Therefore, the Customer agrees to employ whatever means are necessary to encourage and induce its staff and management to actively participate in the engagement and any process or training relating thereto.
- 5.5 Customer is solely responsible for providing and conducting validation and testing on its test and production environments of the results of the services provided by Earnest pursuant to this Agreement according to standards it deems appropriate to ensure its ultimate objectives, or are requested by Earnest to be performed, as the case may be. Customer agrees to execute written confirmations attesting to performance of such validation and testing that are deemed necessary by Earnest.
- 5.6 Customer acknowledges that a failure on its part to meet scheduled dates of performance may have a detrimental effect on meeting defined milestone dates or project objectives. In these circumstances, Earnest reserves the right to amend such milestone dates or project plans to reflect the facts and circumstances caused by such delays.

#### 6.0 SOFTWARE & HARDWARE PURCHASED ("Product")

From time to time under the performance of this Agreement, it may be necessary for the Customer to purchase software and/or hardware. In those cases, the Customer acknowledges that the following provisions shall apply to such purchases:

- 6.1 Customer acknowledges that it may be required to sign additional software license, sales or other agreements as required by the Developer as a condition of purchase. Earnest may provide the Customer with guidance on the selection of software; however, Customer acknowledges that such guidance is intended as a suggestion only and the selection of software is the sole responsibility of the Customer. If the Customer accepts delivery of software, the terms and conditions of the Software License Agreement in effect at the time of delivery will have the same force and effect as though the Software License Agreement had been signed.
- 6.2 In the event Customer requests hardware to be installed, Customer agrees to pay for the hardware and all associated costs. Earnest may provide guidance on the selection of the hardware; however, Customer acknowledges that such guidance is intended as a suggestion only and the selection of hardware is the sole responsibility of the Customer.
- 6.3 Customer acknowledges and understands that its purchase of any Products is final, non-refundable and cannot be returned or exchanged for any reason whatsoever, including but not limited to, the Customer canceling or halting any service or Statement of Work engaged under this Agreement. Earnest shall be entitled to collect, and the Customer shall be obligated to pay in full, any and all payments due on the purchase of Products.
- 6.4 Unless the Customer provides to Earnest a sales tax exemption certificate at the initiation of the sales contract, the applicable sales tax shall be included on the invoicing of any software and hardware Products. Customer agrees to pay any applicable sales tax.

- 6.5 Customer shall be responsible and agrees to pay for the cost of freight (including shipping and handling) incurred in the delivery of any Products to it.

#### 7.0 OWNERSHIP RIGHTS

- 7.1 All custom applications, ideas, concepts, know-how, processes or techniques created or developed pursuant to this Agreement and any Statement of Work issued hereunder by Earnest, or collaboratively with the Customer, are done so on a non-exclusive basis and belong jointly to Earnest and the Customer, and as such, may be used by either party as they deem fit at their sole discretion; provided, however, that Customer shall not be permitted to sell the same to 3<sup>rd</sup> parties or release the same to the public.
- 7.2 Title to or license to use, as the case may be, software, custom applications and documentation, and/or hardware developed and/or sold by Earnest shall not transfer or take effect, respectively, until Customer makes payment in full to Earnest according to the terms of the Agreement.
- 7.3 Any software, computer programs, manuals, proposals, rates, related data incorporated therein and any information provided to the Customer pursuant to this Agreement are the proprietary products of its Developer.
- 7.3.1 The Customer agrees to safeguard these proprietary products with the same degree of care and skill that it accords Customer's own proprietary data. The Customer's employees or agents shall not divulge, transfer, assign, sell, license, franchise, sublicense or otherwise convey the software or any portion thereof, whether in printed, electronic, magnetic or any other form to any third party, person, or organization except as provided for under this Agreement.
- 7.3.2 The Customer further agrees to take such other reasonable steps as Earnest and/or the Developer may request from time to time in order to protect Earnest and/or the Developer's rights in the software.
- 7.3.3 In the event Customer shall attempt to use or convey any computer programs or Products or any duplication or modification thereof in a manner contrary to the terms of this Agreement, Earnest shall have the right, in addition to any other remedies available to it by law, to seek injunctive relief to enjoin such acts, it being specifically acknowledged by the parties that any such other remedies are inadequate.
- 7.3.4 The Customer acknowledges that its purchase of any Proprietary Software, as it is defined in Section 1.1.7, that is either governed by an Earnest software license agreement or otherwise issued under this Agreement conveys merely a license to use such software in the exercise of its normal business processes subject to the software license, or this Agreement, as the case may be, as amended from time to time and that in no way whatsoever, does the purchase of such Proprietary Software convey to the Customer a right of ownership to the Code of such software, it being explicitly acknowledged by both parties that such Code remains the sole and exclusive property of Earnest.
- 7.4 Customer acknowledges that services provided under this Agreement are on a non-exclusive basis and Earnest is not restricted in any way from performing similar services for other customers, either concurrent with, or subsequent to, this Agreement.
- 7.5 The Customer acknowledges that Earnest personnel provided under this Agreement are provided on a non-exclusive basis and that Earnest possesses sole control of the assignment of its personnel. The Customer acknowledges that Earnest may from time to time assign the same personnel to multiple customers, either concurrent with, or subsequent to, this Agreement.
- 7.6 The Customer warrants and agrees that it will not hire, solicit or attempt to hire or solicit Earnest personnel to work for the Customer directly, or indirectly through any associated or affiliated entity or as an independent contractor or through another IT services provider.
- 7.6.1 Customer acknowledges and understands that any attempt on the Customer's part to hire or persuade an Earnest employee to



terminate his or her employment with Earnest is a direct violation and/or interference with that employment relationship as well as any existing non-compete agreement existing between the employee and Earnest.

7.6.2 The Customer acknowledges that it shall be directly liable to Earnest for such violation/interference, and as such, shall pay a penalty to Earnest equal to three (3) times the annual base compensation of the solicited employee.

7.7 No rights are granted to Earnest hereunder to data provided by Customer or generated for the Customer on its behalf as the product of services provided by Earnest other than as is expressly set forth herein or set forth in a separate agreement between the parties, such separate agreement holding precedence in this regard.

**8.0 CUSTOMER CONFIDENTIALITY**

Subject to the following limitations, with respect to business, financial, statistical, or personnel data relating to the Customer's business which is clearly designated as confidential, or would be reasonably construed as confidential, and which is submitted to Earnest by the Customer in order to carry out this Agreement, Earnest shall keep such information confidential by using the same care and discretion that it uses with similar data that Earnest designates as confidential, but in any case no less than a reasonable standard of care.

8.1 Earnest shall not be required to keep confidential any data which is or becomes publicly available, is within Earnest's possession prior to the execution of this Agreement, is independently developed by Earnest outside the scope of this Agreement, or can be rightfully obtained from third parties.

8.2 Earnest shall not be required to keep confidential any custom applications, ideas, concepts, know-how, processes or techniques relating to data processing submitted to it or developed during the course of this Agreement by Earnest's personnel or jointly by Earnest's and Customer's personnel.

8.3 Access to confidential information shall be limited to only those Earnest employees or 3<sup>rd</sup> parties whose services are necessary to carry out this Agreement, but only after obtaining such parties' consent to abide by the confidentiality obligations stated herein. In no case shall Earnest divulge confidential information to any other party without acquiring Customer's permission in advance to do so.

8.4 Earnest has Customer's express authorization to copy and manipulate confidential information as it deems appropriate but only in so far as Earnest's use of confidential information is limited to those purposes necessary to carry out this Agreement as Earnest believes them to be.

8.5 Confidential information remains the sole property of the Customer. Earnest gains no ownership interest in confidential information by the mere fact of receiving such information from Customer.

8.6 Should Earnest become aware of disclosure of confidential information in violation of this Agreement, it will promptly notify Customer of such disclosure, and cooperate with Customer's reasonable requests to help protect its interests in the disclosed information.

8.7 At termination of this Agreement, relative to any confidential information remaining in Earnest's possession, at Customer's request, Earnest shall take reasonable steps to destroy or return to Customer such confidential information. In the case of the former, Earnest shall provide certification to Customer of such destruction.

8.8 Earnest's liability in regards to confidential information is limited to that stated in Section 13, herein.

8.9 Engagement of services by Customer serves as affirmative confirmation of Customer's authorization to share with Earnest certain company contact information of members of its organization that Customer deems necessary to involve in any and all discourse and activities related to the provision of services contemplated herein. This contact information is collected and maintained by Earnest pursuant to its Privacy Statement which provides Customer certain elections as to the care and use of the contact information provided and which can be referenced at [www.earnestassoc.com/](http://www.earnestassoc.com/).

8.10 If the parties have entered into a Non-Disclosure Agreement (NDA), and a conflict exists between any of the terms of the NDA and any of the terms of this Agreement, the terms which provide the stronger confidentiality protection requirements shall apply.

9.0 [THIS SECTION INTENTIONALLY LEFT BLANK]

10.0 [THIS SECTION INTENTIONALLY LEFT BLANK]

**11.0 DATA PRIVACY ACKNOWLEDGEMENT**

11.1 Earnest's Privacy Statement and its enumerated policies are intended to i) comply with all laws, rules, regulations, directives and governmental requirements currently in effect and as they become effective relating in any way to the privacy, confidentiality, security or protection of Personal Data, including without limitation, the GDPR, the UK Data Protection Act 2018, the UK GDPR, the Swiss Federal Act on Data Protection, as amended, replaced or superseded, and any such laws, rules, regulations, directives and governmental requirements in the United States (including the California Consumer Privacy Act of 2018 ("CCPA"), Cal. Civ. Code §§ 1798.00, et seq., its implementing regulations, and similar laws passed in other states as they become effective); GDPR defined as the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (the "Data Privacy Regulations") and ii) provide appropriate protection and care with respect to the treatment of Licensee provided contact information in accordance with such regulations.

11.2 Regarding Data Privacy Regulations, Customer acknowledges that it solely i) has the responsibility to determine the applicability of such regulations to its business, ii) bears any and all compliance obligation and liability imposed upon it as derived therefrom and iii) that its reception of services provided by Earnest pursuant to this Agreement in no way mitigates or transfers to Earnest in any degree this compliance and liability burden.

**12.0 LIMITED WARRANTIES & CUSTOMER REMEDY**

**Earnest warrants only that the services it provides shall be performed in a professional and workman-like manner conforming to commercially reasonable standards and practices within the scope of service specifications defined within any Statement of Work issued pursuant to this Agreement.**

**As it relates to 3<sup>rd</sup> Party software installation & implementation, the scope of Earnest services is to enable operation of the software's standard functionalities and processes in accordance to and within the design specifications as intended by software's Developer, unmodified by Earnest. Although, a Statement of Work issued pursuant to this Agreement may include performance of certain defined modifications, it is not implied by their inclusion, nor should it be inferred, that such modifications are intended to, or can, change or alter the software's core processes or methodologies embodied in its design. The intent of including such modifications is merely to expand to an extent possible the software's applicability in a very limited and focused manner to a Customer's operating environment. Any such modification(s) is engaged only at Customer's election and authorization to its expressed specification and except in the case of Earnest's breach of this Limited Warranty as to its workmanship, Customer is solely responsible for any and all consequences emanating from such modification(s).**

**Specifically, as it relates to a software's compliance capability with Data Privacy Regulations, as hereinafter**



defined, it is not implied by Earnest nor should it be inferred by Customer, that the services provided by Earnest pursuant to this Agreement are intended to either i) enhance such capabilities or ii) supplant Customer's sole compliance responsibility and its assumption of liability emanating therefrom.

The Customer's sole remedy with respect to an alleged breach of this services limited warranty shall be Earnest's specific performance of the defined scope of service giving rise to the alleged breach. If Earnest is unable to redress the alleged breach within a reasonable amount of time, then, subject to the limitations set forth in this Agreement, the Customer may pursue its remedies at law to recover direct damages resulting from the breach only if the Customer has paid in full all monies owed to Earnest under this Agreement or any Statement of Work issued hereunder. The remedies specified in this section are exclusive and in lieu of all other remedies, and represent Earnest's sole obligations for a breach of the foregoing services limited warranty. In order to validate this services limited warranty, the Customer must provide the appropriate notice of breach and required information as required pursuant to Section 2.0 of this Agreement.

Earnest explicitly disclaims all warranties related to Product (including equipment, content, software, data, channel enablement materials, functionality, Data Privacy compliance capability, beta features and other information made available thereon or accessed by means thereof) and to 3<sup>rd</sup> party provided services that are provided pursuant to this Agreement. All Product and 3<sup>rd</sup> party services are provided on an "As Is", "As Available", "Where Is" and "With All Faults" basis. Customer's sole and exclusive recourse for remedy for services or Product provided by 3<sup>rd</sup> parties, in equity or in law, including any alleged defect in software's data privacy compliance capability, shall be directly with the 3<sup>rd</sup> party service provider, developer or manufacturer, exclusive of Earnest, pursuant to any 3<sup>rd</sup> party warranty, as limited therein. Any Product warranty shall terminate immediately if the software or instructions pertinent thereto are modified in any manner without the expressed written permission of Earnest and/or the Developer or manufacturer. Earnest's sole liability shall be to provide corrections to Product as they are made available by the Developer or manufacturer.

Earnest will have no obligation to the extent that any alleged breach of any of the foregoing warranties is caused by: i) modification of Product by the Customer, ii) Customer's failure to promptly implement changes that Earnest provides to correct or improve Product, iii) information provided by the Customer and relied upon by Earnest is determined to be incorrect, iv) the Customer fails to adequately and thoroughly test the deliverables to the specifications detailed in this Agreement, a Statement of Work or Change Order issued hereunder and/or to standards commonly accepted within and deemed reasonable by industry standards, or to do so within a reasonable amount of time, v) the Customer's internal policies, protocols, actions or inactions is deemed by Earnest to undermine the full adoption and utilization of Product, or iv) the use or combination of Product with any computer, computer platform, operating system and/or data base management system other than the equipment specified in the Customer's Profile or Statement of Work issued under this Agreement. To the extent that an alleged breach of warranty concerns a Third Party Product that is subject to a more limited warranty than specified in this Agreement, Earnest's obligations hereunder shall be further limited, in accordance thereto.

The limited warranties specified in this section are Customer's sole and exclusive warranties. Earnest makes no other warranties, what so ever, either expressed or implied, in whole or in part, or any other matter under this Agreement. Earnest explicitly disclaims all warranties of non-infringement, merchantability, and/or fitness for a particular purpose. Earnest expressly does not warrant that services or Product will function, in whole or in part, will be error free, will operate without interruption, will be compatible with any hardware or software systems configurations, will be compatible with any regulatory compliance obligation of Customer or will meet Customer's requirements.

The parties have agreed that the limitations specified herein under Sections 12 and 13 shall survive Termination of the Agreement and apply even if any limited remedy specified in this Agreement is found to have failed in its essential purpose and regardless of Customer's acceptance or non-acceptance of services or Product under this Agreement.

### 13.0 LIMITATION ON LIABILITY

Customer acknowledges and agrees that Earnest's liability pursuant to this Agreement is strictly limited to the specific performance of the scope of services defined and engaged pursuant to this Agreement.

Fees due Earnest by Customer under this Agreement and any Statement of Work issued hereunder for services and Product rendered are not subject to any claim of off-set by the Customer and are payable by Customer to Earnest in full independent of the ultimate results. Non-Acceptance of Earnest work product by Customer does not constitute valid grounds for non-payment of any fees due Earnest.

In no event, including, but not limited to the delay in the rendering of services or Product, neither Earnest, nor its affiliates, shall be held liable to Customer in contract, tort or otherwise or for any damages or restitution, including without limitation lost profits, loss of use, business interruption, loss of data, cost of cover, cost of recovery, punitive, direct, indirect, special, incidental, or consequential damages of any kind arising out of or in connection with the furnishing, performance or use of services and/or Product or third party data privacy claim under this Agreement, or Statement of Work issued hereunder, whether alleged as a breach of contract, tortious conduct or otherwise including negligence, even if Earnest has been advised of the possibility of such damages.

In any event should any provision of this limitation of liability be held invalid, illegal or unenforceable in any respect, or for any other reason, Earnest's liability arising out of any kind of legal claim, whether in contract, tort or otherwise, in connection with this Agreement is limited to the aggregate amount actually paid by Customer to Earnest through the date of alleged breach of limited warranty, or if no discreet amount is identified, the amount reasonably ascribed by Earnest in connection with such claim.

### 14.0 GENERAL TERMS

14.1 The terms and conditions of this Agreement shall supersede any conflicting provisions proposed by the Customer in its terms and conditions of its purchase orders, contract or other notifications. Any payment received by Earnest or performance by Earnest shall not be deemed to be, or be evidence of, Earnest's assent to any terms and conditions other than the terms and conditions stipulated in this Agreement. Payment made by the Customer



shall be deemed to be, and shall evidence, Customer's assent to the terms and conditions of this Agreement.

14.2 This Agreement, NDA and Statement of Works and Exhibits issued hereto or hereinafter (listed in order of precedence) together comprise a single Agreement and constitute the entire understanding between the parties with respect to the subject matter hereof, and supersedes any and all prior and contemporaneous agreements, understandings, negotiations, representations by Earnest, and discussions of the parties, whether oral or written. Any statement, agreement, representation or other communication of expression not contained herein is without authorization of, and shall not be binding on, Earnest.

14.3 [This Section Intentionally Left Blank]

14.4 No amendment, modification or waiver of this Agreement by the Customer shall be binding unless executed in writing by the parties hereto, or in the case of a waiver, by the party granting such waiver.

14.5 No waiver of any provision of this Agreement shall constitute a waiver of any other provision of this Agreement, whether or not similar, nor shall such waiver constitute a continuing waiver unless otherwise expressly provided in writing.

14.6 This Agreement is executed and delivered in the State of Maryland. The rights of the parties granted under this Agreement shall be governed, construed, and enforced under the laws of the State of Maryland without reference to its conflict of laws rules.

14.7 The parties consent to exclusive jurisdiction of the state and federal courts situated in Maryland as to all claims or disputes arising hereunder. All parties agree that venue shall be proper in the District Court of Maryland for Baltimore County, the Circuit Court of Baltimore County in the State of Maryland, or the United States District Court for the District of Maryland, Northern Division and waive any right to object to such jurisdiction on any basis, including but not limited to forum non conveniens.

14.8 The parties knowingly and voluntarily waive any and all rights to a jury trial in any proceeding involving any dispute or matter arising pursuant to this Agreement.

14.9 The Customer shall not be permitted to file a lawsuit of any kind or make any claim against Earnest for any reason unless all payments claimed by Earnest, pursuant to invoices, Statements of Work or works in progress, are paid in full. This provision is a condition precedent to any suit by Customer against Earnest.

14.10 By executing any Change Order or other subsequent document, the Customer acknowledges that all services provided prior to execution of the Change Order or subsequent documents conform to Customer's request(s) and that the Customer does not have any claims against Earnest.

14.11 If any provision or part of any provision of this Agreement shall for any reason be held invalid, illegal, or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions or the remaining part of any effective provisions of this Agreement, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision or part thereof had never been contained herein, but only to the extent of its invalidity, illegality, or unenforceability.

14.12 This Agreement may not be assigned by the Customer without the prior written consent of Earnest; such consent shall not be unreasonably withheld or delayed by Earnest. This Agreement shall be binding upon and inures to the benefit of the successors and assigns of Earnest.

14.13 This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same agreement. This Agreement may be executed and delivered via facsimile or e-mail transmission with the same force and effect as if it were executed and delivered by the parties in the presence of one another.

14.14 The parties have reviewed and commented on this Agreement. The normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party may not be employed in the interpretation of this Agreement.

14.15 Throughout the course of the negotiations leading to the execution of this Agreement, both parties acknowledge that they have had the opportunity to consult with legal counsel of their own choice regarding the provisions of this Agreement.

14.16 Section headings or captions are used in this Agreement for convenience only and do not limit or otherwise affect the meaning of any provision of this Agreement.

14.17 Unless otherwise provided in this Agreement, any notice required or permitted hereunder to the parties hereto will be deemed to have been duly given if delivered in writing personally or mailed first class, registered or certified mail to Customer and/or Earnest at the addresses set forth below:

If to Earnest:	If to Customer:
Earnest & Associates	As identified on the Statement
Attn: Timothy Earnest	of Work issued hereunder
808 Landmark Drive, Suite 110	
Glen Burnie, Maryland 21061	

14.18 Earnest reserves the right from time to time during the term of this Agreement to amend any of its terms, including, but not limited to the monthly fees and hourly rates stated herein.

14.19 Earnest shall be excused for the period of any delay in the performance of any obligation hereunder when prevented from so doing by cause or causes beyond Earnest's control which shall include, without limitation, all labor disputes, civil commotion, war, warlike operations, invasion, rebellion, hostilities, military or usurped power, sabotage, governmental regulations or controls, fire or other casualty, inability to obtain any material or services or through acts of God.

14.20 The parties acknowledge that they have mutually agreed to the terms of payment stipulated herein and that such amounts and due dates defined herein are not subordinate to or dependent upon the execution of any terms or conditions existing outside this Agreement, in particular, but not restricted to, those terms and conditions that may exist in any financing or leasing arrangement engaged in by the Customer with any person or entity not a party to this Agreement.

14.21 Both parties agree and acknowledge that time is of the essence respecting performance of ones obligations pursuant to this Agreement.

14.22 Each party will maintain insurance in amounts which are sufficient to cover any claims or liabilities which could reasonably be expected to arise out of or relate to its obligations under this Agreement, including commercial general liability, product liability, and all property risk insurance and will, upon request, provide the other party a certificate of insurance as evidence of such insurance.

14.23 Earnest shall be an independent contractor for all purposes hereunder and neither party shall have the authority to bind the other party in any manner. Customer shall leave exclusively to Earnest the methods and details of performance, Customer, being interested only in the results obtained and having no control over the manner and method of performance.

14.24 Any provision of this Agreement which either expressly or by its terms is intended to survive the termination or expiration of this Agreement shall so survive and remain in full force and effect.

**15.0 PREFERRED PSA TERMS**

NOT WITHSTANDING ANYTHING ELSE STATED TO THE CONTRARY, the following terms relate only to the administration of service hours pursuant to Earnest's Preferred Professional Service Option as procured by the Customer on Exhibit A and are incorporated herein for reference,

**15.1 PSA BILLING PROCEDURES \***

15.1.1 The Quarterly Fees will be invoiced in advance of the quarter in the amount selected above. Under the Base Rate Option, the



Quarterly Fee is due in full on the first day of the first month of the quarter. Under the ACH Rate Option, collection of the Quarterly Fee is to be allocated across the quarter in three equal installments, each installment being due upon the first day of each month in the quarter. For example, a Quarterly Fee of \$1,800.00 for the fourth quarter would be collected in three equal installments of \$600.00 due on Oct. 1<sup>st</sup>, Nov 1<sup>st</sup> and Dec 1<sup>st</sup>.

- 15.1.2 Hours provided in excess of "Available PSA hours", as hereinafter defined (Sec 15.2.3), the T&M Hourly Option and other charges incurred pursuant to this Agreement shall be invoiced to the Customer weekly as incurred.
- 15.1.3 **Term.** Issuance of Preferred PSA terms is subject to a minimum twelve (12) month contract commitment (the "Term"). Unless Earnest is otherwise provided notice to cancel by the Customer as provided for herein, the Term shall renew automatically upon its anniversary date for another twelve (12) month Term.
- 15.1.4 **Cancellation.** i) Customer may cancel Preferred PSA terms at the end of a term predicated upon Customer providing written notice of its intent to cancel being received by Earnest no less than thirty (30) days prior to the expiration of Term. ii) Upon written notice by Earnest to the Customer of a change in the rates and/or fees stated herein, the Customer may at its election cancel Preferred PSA terms prior to the expiration of the Term provided that it provides written notice to Earnest of its intent to cancel at least ten (10) days prior to the effective date of such rate and/or fee change.

#### 15.2 PSA SUPPORT UTILIZATION

- 15.2.1 The annual amount of PSA Support Hours elected by the Customer as defined in Exhibit A shall be apportioned into four (4) equal hourly increments; each increment representing the hours available for use by Customer in each calendar quarter ("Allotted Hours.") The Allotted Hours of the initial calendar quarter shall be equal to 100%, 66% or 33% of the Allotted Hours dependent upon the Effective Date of this Agreement. For example, if the Agreement Effective Date is November 1<sup>st</sup> then the initial calendar quarter will have 66% of the Allotted Hours available for use in that quarter.
- 15.2.2 Actual PSA Support Hours shall be deducted from the Allotted Hours as those hours are provided by Earnest to the Customer.
- 15.2.3 **"AVAILABLE PSA HOURS"** PSA Support Hours remaining unutilized at the end of a calendar quarter shall be carried forward and added to the succeeding calendar quarter's Allotted Hours subject to the following:
  - 15.2.3.1 The underlying presumption governing the procurement and the preferred pricing of service hours is that the hours will be fully utilized by the Customer within a reasonable time frame from their date of purchase. Accordingly, procured service hours are available for use for up to twenty-four months (24) following their date of purchase. Unutilized service hours older than twenty-four (24) months from their purchase date are no longer available for use and will be deducted from the Available PSA Hours balance to arrive at a new Available PSA Hours carryforward balance.
  - 15.2.3.2 Available PSA Hours have no cash value, are not eligible for cash refund in whole or in part and can be exchanged only for services.

#### 15.3 PREFERRED PSA HOURS UTILIZATION AFTER CANCELLATION

- 15.3.1 Customer's right to use, and Earnest's obligation to perform on, Available PSA Hours after Cancellation is predicated upon:
  - 15.3.1.1 Customer being in full compliance with, and not in default of, the Agreement at time of Cancellation, otherwise all Available PSA hours shall expire upon the Effective Cancellation Date and are no longer eligible for use, and
  - 15.3.1.2 The eligible Available PSA hours balance remain eligible for

use by the Customer for the twenty-four (24) consecutive month period commencing with the Effective Cancellation Date (the "Eligibility Period"). Upon completion of the Eligibility Period, any remaining Available PSA hours shall expire and shall cease to be eligible for use by the Customer.

- 15.3.1.3 NOTWITHSTANDING anything to the contrary herein, for the purposes of this Section 15.3, Customer is defined as the legal entity that is party to this Professional Services Agreement and the original purchaser of PSA hours up through the time of Cancellation. The right to use Available PSA Carryover Hours during the Eligibility Period does not inure to the benefit of successors or assigns of the Customer.
- 15.3.1.4 The amount of Available PSA Hours eligible to be carried over for use by Customer after Cancellation shall be the resultant calculated as: the sum of the FIFO dollar value of the Available PSA Hours existing at the time of the Effective Cancellation Date less the dollar value of the remaining monthly PSA monthly installment billings left in the Term not yet invoiced divided by the Customer's current PSA Hourly Rate in effect at time of Cancellation.
- 15.3.1.5 During the Eligibility Period, the Available PSA Hours balance being carried forward is subject to restatement to reflect I) any PSA Hourly Rate increases put into effect. The restated Available PSA Hours balance shall be the resultant calculated as the dollar value of the Available PSA Hours before the restatement divided by the PSA Hourly Rate to be put into effect and ii) reduction of those hours older than twenty-four (24) months from their purchase date.

#### 15.4 PSA SUPPORT SERVICE LEVEL CHANGES

- 15.4.1 Changes to a lower PSA Support Level are allowable only at the time of renewal of a Term predicated upon Customer forwarding written notice of intent to change to Earnest at least thirty (30) days prior to the expiration of the Term.
- 15.4.2 Changes to a higher PSA Support Level are allowable at any time predicated upon Customer forwarding written notice of intent to change to Earnest.
- 15.4.3 The revised PSA monthly Allotted Hours and the PSA Support Monthly Fee billing shall take effect: a) the first (1<sup>st</sup>) day of the month following Earnest's acknowledgement of receipt or its approval, as the case may be, for changes within Term or b) the first (1<sup>st</sup>) day of the new Term for changes at Term renewal ("Effective Change Date.")
- 15.4.4 Carryover of Previous PSA Support Level Available PSA Hours:
  - 15.4.4.1 For increases in the PSA Support Level, the Available PSA Hours balance existing as of the Effective Change Date accrued under the previous support level, shall carryover in full and be added to the revised Allotted Hours to calculate the opening balance of Available PSA Hours under the new PSA Support Level.
  - 15.4.4.2 For decreases in the PSA Support Level, the carryover amount of the Available PSA Hours balance existing as of the Effective Change date accrued under the previous support level, shall be reduced. This Adjusted Available PSA Hours balance shall be added to the revised Allotted Hours to calculate the opening balance of Available PSA Hours under the new PSA Support Level. The amount of the adjustment reduction to the Available PSA Hour carryover balance is that hour amount calculated by:
    - 15.4.4.2.1 dividing the current PSA Hourly Rate in effect before the support level change into,
    - 15.4.4.2.2 the product calculated as the number of months remaining in the Term not yet invoiced times the difference in the PSA Support Monthly Fee Billing Amounts between the two PSA Support Levels.