

These terms govern the services ordered from K2 Software, Inc. ("K2") by you as an individual or company or other legal entity ("Customer") as specified in the applicable order (the "Services"). By executing a K2 order form that references these terms, you agree to the terms.

1. Expiration and Cancellation.

Unless otherwise provided, Services must be used within one year of ordering, and any unused Services will expire after such one year period.

No refund will be provided. Scheduled Services may be canceled and rescheduled for no charge with five days prior notice. In the event that confirmed hourly or daily confirmed Services are cancelled within less than 5 working days before the scheduled start date it may result in a charge equal to 100% of the reserved service contract amount. Additional fees may then be due for the Services to be scheduled and performed.

2. Change Orders.

Any change to the Services as ordered by the Customer and/or a change in the assumptions and/or conditions necessary for K2 to perform the Services will require a mutually agreed-upon change order between the parties before the Services may proceed. Additional fees, expenses, terms and scheduling changes may be required as part of a change order.

3. Confidentiality. The parties acknowledge and agree that as part of the Services each party (a "receiving party") may have access to and/or receive certain Confidential Information of the other party (a "disclosing party"). "Confidential Information" shall mean information of a party that is confidential, proprietary, or would be reasonably considered confidential. Confidential Information shall not include information that

- (a) is already known by the receiving party at the time of disclosure,
- (b) becomes publicly known through no act or fault of the receiving party,
- (c) is received by the receiving party from a third party without a restriction on disclosure or use, or
- (d) is independently developed by the receiving party without reference to the Confidential Information of the disclosing party.

All Confidential Information shall remain the exclusive property of the disclosing party. The receiving party may offer suggestions or comments with respect to Confidential Information provided originally by disclosing party ("Feedback"). Both parties agree that all Feedback is and shall be given entirely voluntarily. The receiver of the Feedback shall be free to use, disclose, reproduce, license or otherwise distribute, and exploit the Feedback provided to it as it sees fit, entirely without obligation or restriction of any kind on account of intellectual property rights or otherwise. The receiving party shall

- (a) use and reproduce the disclosing party's Confidential Information only as part of the Services,
- (b) restrict disclosure of the disclosing party's Confidential Information to its employees and contractors with a need to know, and
- (c) not disclose the disclosing party's Confidential Information to any third party (including, but not limited to, any third party consultant, contractor, or agent) without first obtaining such third party's agreement to maintain the confidentiality of the disclosing party's Confidential Information under terms and conditions at least as stringent as those set forth herein.

Notwithstanding these requirements, the receiving party may disclose Confidential Information of the disclosing party to the extent it is required to do so under law or in a judicial or other governmental investigation or proceeding, provided the receiving party provides notice to the disclosing party in order that the disclosing party may seek a protective order, and that such information disclosed is for the limited scope and purpose of the investigation or proceeding.

4. Ownership and License.

K2 shall own all right, title and interest in any deliverables or other materials developed as part of the Services, excluding any information or other materials provided by the Customer to K2 as part of the Services (the "Deliverables"). K2 hereby grants to the Customer a nontransferable nonexclusive license to use such Deliverables for its internal business purposes.

5. Warranty.

K2 represents and warrants that the Services will be performed in a good, workmanlike manner in accordance with generally accepted industry standards. K2 DOES NOT WARRANT OR GUARANTEE THAT THE SERVICES OR DELIVERABLES WILL MEET THE CUSTOMER'S REQUIREMENTS, THAT THE DELIVERABLES WILL OPERATE ERROR-FREE OR UNINTERRUPTED OR THAT K2 WILL CORRECT ALL ERRORS IN THE SERVICES OR ANY DELIVERABLE. TO THE EXTENT PERMITTED BY LAW, THESE WARRANTIES ARE EXCLUSIVE AND K2 EXPRESSLY DISCLAIMS ANY EXPRESS OR IMPLIED WARRANTIES OR CONDITIONS, INCLUDING WARRANTIES OR CONDITIONS OF MERCHANTABILITY, TITLE, NON-INFRINGEMENT, QUALITY AND FITNESS FOR A PARTICULAR PURPOSE. For any breach of the specified warranty, the Customer's exclusive remedy and K2's entire liability shall be, at K2's discretion, as applicable:

- (a) reperformance of the Services; or
- (b) if K2 cannot substantially correct such breach, K2 may terminate the Services and refund to the Customer any fees the Customer has paid to K2 for the deficient Services.

6. Limitation of Liability.

IN NO EVENT SHALL K2 BE LIABLE TO THE CUSTOMER FOR ANY INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE OR CONSEQUENTIAL DAMAGES, OR ANY LOSS OF PROFITS, REVENUE, DATA OR DATA USE, ARISING FROM OR IN CONNECTION WITH ANY SERVICES OR ORDER, EVEN IF K2 HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. In no event shall K2's liability under any claim made by the Customer exceed the total amount of fees paid by the Customer to K2 for the specific Services at issue in the three (3) months prior to the date of any such claim. No action, regardless of form, arising out of or in connection with the Services (other than an action by K2 for any amount due to K2 by the Customer) may be brought more than two (2) years after the cause of action has arisen.

7. Indemnification.

7.1 Indemnification by K2.

Subject to the terms specified herein, K2 will defend, indemnify and hold the Customer harmless against any third party claims that the Deliverables, excluding any information or other materials provided by the Customer, as provided as part of the Services and as used by the Customer according to these terms and the applicable order, infringes a third party's intellectual property rights.

7.2 The Customer shall promptly notify K2 in writing, not later than 30 days after the Customer receives notice of the claim, specifying the nature of the action and the total monetary amount sought or other such relief as is sought therein. The Customer shall, at K2's expense, cooperate with K2 in all reasonable respects in connection with the defense of any such action. K2 will have sole control over the defense and settlement of the action.

7.3 If K2 believes or it is determined that the Services or a Deliverable may violate a third party's intellectual property rights, K2 may choose in its discretion to:

- (a) modify the Deliverable to be non-infringing;
- (b) obtain a license for the Customer to allow for continued use of the Deliverable; or
- (c) terminate the license for the Deliverable and require its return from the Customer, and refund the fees the Customer paid to K2 for the applicable Deliverable.

7.4 K2 has no obligation to indemnify, defend or hold the Customer harmless:

- (a) if the Services or any Deliverables thereunder are altered or modified by anyone other than K2, or used outside the scope of use identified in these terms or the applicable order;
- (b) to the extent that an infringement claim is based upon any software, design, specification, instruction, data or other material not furnished by K2; or
- (c) to the extent an infringement claim is based upon the combination of the Services or any Deliverable thereunder with any products or services not provided to the Customer by K2.

7.5 This Section provides the parties' exclusive remedies and liabilities for any claim or damages involving indemnification.

8. Notices.

All notices and requests in connection with these terms shall be deemed given as of the day they are received either by messenger, delivery service, or in the U.S. mail, postage prepaid, certified or registered, return receipt requested, and shall be addressed using the information provided in the applicable order.

9. Relationship of Parties.

The parties are independent contractors under these terms. Neither party shall act, and shall not be deemed as, an agent for the other, nor shall either party have any right or power hereunder to act for or to bind the other in any respect. Notwithstanding anything to the contrary, these terms shall not be deemed to create any employer-employee, agency, franchise, joint venture or partnership relationship between the parties.

10. No Waiver.

Failure to enforce any rights hereunder, irrespective of the length of time for which such failure continues, shall not constitute a waiver of those or any other rights, nor shall a waiver by either party in one or more instances be construed as constituting a continuing waiver or as a waiver in other instances.

11. Governing Law.

These terms shall be construed and controlled by the laws of the State of Washington, United States of America, and the Customer consents to exclusive jurisdiction and venue in the federal courts sitting in King County, Washington, unless no federal subject matter jurisdiction exists, in which case Customer consents to exclusive jurisdiction and venue in the Superior Court of King County, Washington. The Customer waives all defenses of lack of personal jurisdiction and forum non-conveniens. Process may be served on either party in the manner authorized by applicable law or court rule. In any action to enforce any right or remedy under these terms or to interpret any provision of these terms, the prevailing party shall be entitled to recover its reasonable attorneys' fees, costs and other expenses. The parties expressly agree that the United Nations Convention on Contracts for the International Sale of Goods will not apply to these terms or to the transactions processed under these terms.

12. Severance.

If any provision or provisions of these terms is held invalid, illegal or unenforceable by a court of competent jurisdiction, such provision(s) shall be severed, and the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby. The parties shall use all commercially reasonable efforts to agree upon a valid and enforceable provision for the severed provision(s), taking into account the intent of these terms.

13. Counterparts.

These terms may be executed in any number of counterparts (including facsimile counterparts), each of which shall be original as against the party whose signature appears thereon, but all of which taken together shall constitute one and the same instrument.

14. Force Majeure.

Neither party shall be responsible for failure or delay of performance if caused by: an act of war, hostility or sabotage; act of God; Internet, telecommunication or electrical outage that is not caused by the obligated party; government restrictions (including the denial or cancellation of any export or other license); or other event outside the reasonable control of the obligated party (collectively, "Force Majeure Events"). The parties will use reasonable efforts to mitigate the effect of any Force Majeure Events. If such Force Majeure Event continues for more than 90 days, either party may cancel unperformed services upon written notice. This Section does not excuse the Customer's obligation to pay for Services as may have already been provided.

15. Export Regulations.

The Customer acknowledges that the Services or Deliverables thereunder may be subject to United States export jurisdiction, as well as end user, end-use and destination restrictions which may be issued by the United States and other governments.

16. Non-Solicitation.

During the Term of these terms and for one year thereafter,

(i) Customer shall not, directly or indirectly, solicit, induce or cause any employee or subcontractor of K2 who has rendered Services to Customer pursuant to these terms or any Statement of Work, to leave the present employment of K2 or become employed by Customer; and

(ii) K2 shall not, directly or indirectly, solicit, induce or cause any officer or management employee of Customer which K2 was introduced to as part of the Services, to leave the present employment of Customer or become employed by SourceCode. In the event a party breaches the terms of this Section, such party will immediately pay the non-breaching party a fee equal to twice the gross base annual salary earned by the employee or subcontractor immediately prior to such employee's or subcontractor's leaving the employ of the nonbreaching party. The parties agree that any general advertisement or announcement regarding employment opportunities at a party which are not directed at the other party's employees shall not be considered a breach of this Section.

17. Entire Agreement.

These terms and the applicable order together are the complete agreement for the Services provided to Customer, and supersedes all prior or contemporaneous agreements or representations, written or oral, regarding such Services. THESE TERMS AND THE APPLICABLE ORDER SHALL SUPERSEDE THE TERMS CONTAINED IN ANY PURCHASE ORDER OR OTHER NON-K2 ORDERING DOCUMENT OR CORRESPONDENCE, REGARDLESS OF WHEN SUCH ORDERING DOCUMENT IS RECEIVED OR IF K2 SIGNS SUCH ORDERING DOCUMENT, AND NO TERMS INCLUDED IN ANY SUCH PURCHASE ORDER OR OTHER NON-K2 ORDERING DOCUMENT OR CORRESPONDENCE SHALL APPLY TO K2 OR TO THE SERVICES. These terms and the applicable order shall not be modified and the rights and restrictions contained therein shall not be altered or waived except in a writing signed by authorized representatives of the Customer and of K2. Any notice required under these terms shall be provided to the other party in writing.