

**Carahsoft Rider to Manufacturer End User License Agreements  
(for U.S. Government End Users)**

1. **Scope.** This Carahsoft Rider and the **Verdiem** ('Manufacturer') End User License Agreement (EULA) establish the terms and conditions enabling Carahsoft to provide Software and Services to U.S. Government agencies (the "Client" or "Licensee").
2. **Applicability.** The terms and conditions in the attached Manufacturer EULA [\(Attached at separate document\)](#) are hereby incorporated by reference to the extent that they are consistent with Federal Law (e.g., the Anti-Deficiency Act (31 U.S.C. § 1341(a)(1)(B)), the Contracts Disputes Act of 1978 (41 U.S.C. § 601-613), the Prompt Payment Act, the Anti-Assignment statutes (31 U.S.C. § 3727 and 41 U.S.C. 15), 28 U.S.C. § 516 (Conduct of Litigation Reserved to Department of Justice (DOJ), and 28 U.S.C. § 1498 (Patent and copyright cases)). To the extent the terms and conditions in the Manufacturer's EULA are inconsistent with the Federal Law (*See FAR 12.212(a)*), they shall be deemed deleted and unenforceable under any resultant orders under Carahsoft's contract #GS-35F-0119Y, including, but not limited to the following:
  - (a) **Contracting Parties.** The Government customer (Licensee) is the "Ordering Activity", "defined as an entity authorized to order under GSA contracts as set forth in GSA ORDER 4800.2G ADM, as may be revised from time to time. The Licensee cannot be an individual because any implication of individual licensing triggers the requirements for legal review by Federal Employee unions. Conversely, because of competition rules, the contractor must be defined as a single entity even if the contractor is part of a corporate group. The Government cannot contract with the group, or in the alternative with a set of contracting parties.
  - (b) **Changes to Work and Delays.** Subject to GSAR Clause 552.243-72, Modifications (Federal Supply Schedule) (July 200 0) (Deviation I 2010) (AUG 1987), and 52.212 -4 (f) Excusable delays. (JUN 2010) regarding which the GSAR and the FAR provisions shall take precedence.
  - (c) **Contract Formation.** Subject to FAR Sections 1.601(a) and 43.102, the Government Order must be signed by a duly warranted contracting officer, in writing. The same requirement applies to contract modifications affecting the rights of the parties. All terms and conditions intended to bind the Government must be included within the contract signed by the Government.
  - (d) **Audit.** During the term of this Agreement: (a) If Ordering Activity's security requirements included in the Order are met, Manufacturer or its designated agent may audit Ordering Activity's facilities and records to verify Ordering Activity's compliance with this Agreement. Any such audit will take place only during Ordering Activity's normal business hours contingent upon prior written notice and adherence to any security measures the Ordering Activity deems appropriate, including any requirements for personnel to be cleared prior to accessing sensitive facilities. Carahsoft on behalf of the Manufacturer will give Ordering Activity written notice of any non-compliance, including the number of underreported Units of Software or Services ("Notice"); or (b) If Ordering Activity's security requirements are not met and upon Manufacturer's request, Ordering Activity will run a self-assessment with tools provided by and at the direction of Manufacturer ("Self-Assessment") to verify Ordering Activity's compliance with this Agreement.

(a) Error! Unknown document property name.

**(e) Termination.** Clauses in the Manufacturer EULA referencing termination or cancellation the Manufacturer's EULA are hereby deemed to be deleted. Termination shall be governed by the FAR 52.212-4 and the Contract Disputes Act, 41 U.S.C. §§ 601-613, subject to the following exceptions:

Carahsoft may request cancellation or termination of the License Agreement on behalf of the Manufacturer if such remedy is granted to it after conclusion of the Contracts Disputes Act dispute resolutions process referenced in Section Q below or if such remedy is otherwise ordered by a United States Federal Court..

**(f) Consent to Government Law / Consent to Jurisdiction.** Subject to the Contracts Disputes Act of 1978 (41 U.S.C §§ 7101-7109) and Federal Tort Claims Act (28 U.S.C. §1346(b)). The validity, interpretation and enforcement of this Rider will be governed by and construed in accordance with the laws of the United States. In the event the Uniform Computer Information Transactions Act (UCITA) or any similar federal laws or regulations are enacted, to the extent allowed by law, it will not apply to this Agreement, and the governing law will remain as if such law or regulation had not been enacted. All clauses in the Manufacturer EULA referencing equitable remedies are deemed not applicable to the Government order and are therefore deemed to be deleted.

**(g) Force Majeure.** Subject to FAR 52.212 -4 (f) Excusable delays. (JUN 2010). Unilateral Termination by the Contractor does not apply to a Government order and all clauses in the Manufacturer EULA referencing unilateral termination rights of the Manufacturer are hereby deemed to be deleted.

**(h) Assignment.** All clauses regarding Assignment are subject to FAR Clause 52.232-23, Assignment of Claims (JAN 1986) and FAR 42.12 Novation and Change-of-Name Agreements, and all clauses governing Assignment in the Manufacturer EULA are hereby deemed to be deleted.

**(i) Waiver of Jury Trial.** All clauses referencing waiver of Jury Trial are subject to FAR Clause 52.233-1, Disputes (JUL. 2002), and all clauses governing waiver of jury trial in the Manufacturer EULA are hereby deemed to be deleted.

**(j) Customer Indemnities.** All Manufacturer EULA clauses referencing Customer Indemnities are hereby deemed to be deleted.

**(k) Contractor Indemnities.** All Manufacturer EULA clauses that (1) violate DOJ's right (28 U.S.C. 516) to represent the Government in any case and/or (2) require that the Government give sole control over the litigation and/or settlement, are hereby deemed to be deleted.

**(l) Renewals.** All Manufacturer EULA clauses that violate the Anti-Deficiency Act (31 U.S.C. 1341, 41 U.S.C. 11) ban on automatic renewal are hereby deemed to be deleted.

**(m) Future Fees or Penalties.** All Manufacturer EULA clauses that violate the Anti-Deficiency Act (31 U.S.C. 1341, 41 U.S.C. 11), which prohibits the Government from paying any fees or penalties beyond the Contract amount, unless specifically authorized by existing statutes, such as the Prompt Payment Act, or Equal Access To Justice Act 31 U.S.C. 3901, 5 U.S.C. 504 are hereby deemed to be deleted.

**(n) Taxes.** Taxes are subject to FAR 52.212-4(k), which provides that the contract price includes all federal, state,

local taxes and duties.

- (o) **Third Party Terms.** Subject to the actual language agreed to in the Order by the Contracting Officer. Any third party manufacturer will be brought into the negotiation, or the components acquired separately under Federally-compatible agreements, if any. Contractor indemnities do not constitute effective migration.
- (p) **Installation and Use of the Software.** Installation and use of the software shall be in accordance with the Rider and Manufacturer EULA, unless an Ordering Activity determines that it requires different terms of use and Manufacturer agrees in writing to such terms in a valid task order placed pursuant to the Government contract.
- (q) **Dispute Resolution and Venue.** Any disputes relating to the Manufacturer EULA and to this Rider shall be resolved in accordance with the FAR, and the Contract Disputes Act, 41 U.S.C. §§ 7101-7109. The Ordering Activity expressly acknowledges that Carahsoft, on behalf of the Manufacturer, shall have standing to bring such claim under the Contract Disputes Act.
- (r) **Limitation of Liability: Subject to the following:**

Carahsoft, Manufacturer and Ordering Activity shall not be liable for any indirect, incidental, special, or consequential damages, or any loss of profits, revenue, data, or data use. Further, Carahsoft, Manufacturer and Ordering Activity shall not be liable for punitive damages except to the extent this limitation is prohibited by applicable law. This clause shall not impair the U.S. Government's right to recover for fraud or crimes arising out of or related to this Government Contract under any federal fraud statute, including the False Claims Act, 31 U.S.C. §§ 3729-3733.
- (s) **Advertisements and Endorsements.** Unless specifically authorized by an Ordering Activity in writing, such use of the name or logo of any U.S. Government entity is prohibited.
- (t) **Public Access to Information.** Manufacturer agrees that the EULA and this Rider contain no confidential or proprietary information and acknowledges the EULA and this Rider will be available to the public.
- (u) **Confidentiality.** Any provisions that require the Licensee to keep certain information confidential are subject to the Freedom of Information Act, 5 U.S.C. §552, and any order by a United States Federal Court.

**VERDIEM CORPORATION**  
only use the energy you need™  
**Software License and Support Agreement**  
*SURVEYOR ClickThru Rev2.2.1 (11-09)*

**IMPORTANT – Read carefully before copying, installing or using**

This Software License and Support Agreement (this “**Agreement**”) is a legal agreement between the entity by whom you are employed, or whom you represent (“**Customer**”), and Verdiem Corporation (“**Verdiem**”), regarding the use of the Verdiem software that accompanies this Agreement, and Verdiem’s provision of support and maintenance services for the software.

- BEFORE YOU CHECK THE BOX MARKED “I ACCEPT THE TERMS IN THE LICENSE AGREEMENT” BELOW AND CLICKING ON THE “NEXT” BUTTON, CAREFULLY READ THE TERMS OF THIS AGREEMENT.
- BY CHECKING THE BOX MARKED “I ACCEPT THE TERMS IN THE LICENSE AGREEMENT”, AND CLICKING ON THE “NEXT” BUTTON YOU ARE REPRESENTING AND AGREEING THAT: (1) YOU HAVE THE AUTHORITY TO BIND THE ENTITY BY WHOM YOU ARE EMPLOYED, OR WHOM YOU REPRESENT, TO THIS AGREEMENT; AND (2) THE ENTITY BY WHOM YOU ARE EMPLOYED, OR WHOM YOU REPRESENT, WILL BE BOUND BY, AND BECOMES A PARTY TO THIS AGREEMENT.
- IF YOU DO NOT AGREE TO THE TERMS OF THIS AGREEMENT, CHECK THE BOX MARKED “I DO NOT ACCEPT THE TERMS IN THE LICENSE AGREEMENT” BELOW, AND THE SOFTWARE WILL NOT BE DOWNLOADED OR, IF THE SOFTWARE IS ALREADY IN YOUR POSSESSION, INSTALLED ON YOUR COMPUTER.
  - If you already have possession of the software, but have chosen not to agree to the terms of this agreement, please destroy or delete all copies in your possession.
  - Neither you nor the entity by whom you are employed, or whom you represent may copy, install or use the software if you have chosen not to agree to this agreement.

**Background:** Customer wishes to purchase from Verdiem or from a Verdiem authorized reseller rights to license certain software from Verdiem and, if so specified in the applicable order, to purchase support and maintenance services for the software. This Agreement contains the terms and conditions applicable to Customer’s license and use of the Software. For good and valuable consideration, the receipt and sufficiency of which they each acknowledge, Verdiem and Customer have agreed to be bound by such terms and conditions.

*Terms and Conditions*

**Section 1. Definitions.**

For the purposes of this Agreement, the following capitalized words and phrases shall be ascribed the following meanings:

“**Authorized Client**” means a computer owned or controlled by Customer on which the client version of the Software has been installed, and with respect to which Verdiem has been paid a license fee for use of the Software. The maximum number of Authorized Clients is specified in each Order.

“**Confidential Information**” has the meaning ascribed to it in Section 9.

“**Documentation**” means the Software user manuals, training manuals and other documentation, including additional, updated or revised documentation, if any, supplied to Customer by Verdiem.

“**Intellectual Property Rights**” means all trade secrets, patents and patent applications, trade marks (whether registered or unregistered and including any goodwill acquired in such trade marks), service marks, trade names, copyrights, moral rights, database rights, design rights, rights in know-how, rights in confidential information, rights in inventions (whether patentable or not) and all other intellectual property and proprietary rights (whether registered or unregistered, any application for the foregoing, and all rights to enforce the foregoing), and all other equivalent or similar rights which may subsist anywhere in the world.

“**License**” means a license to use the Software to the extent and within the scope of the applicable Order.

“**License Term**” means the term of each License, as specified in the applicable Order.

“**Order**” means a completed version of Verdiem’s standard form of sales order for the Software and Support Program, or other form of order acceptable to Verdiem, that has been submitted to Verdiem by Customer or a Verdiem Authorized Reseller from whom Customer is purchasing Software license rights and, if applicable, a Support Program subscription, and that Verdiem has accepted in writing. Each Order shall specify: (i) a description of the Software to be licensed, (ii)

the term of the License and the term of Customer's subscription to the Support Program, (iii) the number of Authorized Clients, (iv) the fees to be paid to Verdiem for the Software License and the related Support Program, and (v) any additional terms and conditions as may be mutually agreed upon by Verdiem and the respective Customer or Verdiem authorized reseller.

"**Party**" means either Verdiem or Customer, individually as the context so requires; and "**Parties**" means Verdiem and Customer, collectively.

"**Software**" means the object code version of Verdiem's computer programs specified in the applicable Order, including any modifications or future releases of such software that Verdiem may provide to Customer as part of the Support Program.

"**Support Program**" means the technical support and maintenance services specified in Verdiem's then current Support Program Description and, if so specified in the applicable Order, the remote installation and configuration support services described or referenced in the Order.

"**Support Program Description**" means Verdiem's then current technical support and maintenance program, the terms and conditions of which are available from Verdiem upon request.

"**User**" means any individual who is an employee or contractor of Customer and who is authorized by Customer to use the Software pursuant to the applicable Order and this Agreement.

The following words shall be interpreted as designated: (i) "or" connotes any combination of all or any of the items listed; (ii) where "including" is used to refer to an example or begins a list of items, such example or items shall not be exclusive; and, (iii) "specified" requires that an express statement is contained in the relevant document.

## **Section 2. Rights To Use Software.**

**2.1 Copying, Installation and Operation.** Verdiem hereby grants Customer the following non-exclusive, non-transferable, worldwide, paid-up licenses, without right to sub-license, for the License Term and subject to the provisions of this Agreement,

(a) to reproduce:

(i) that number of copies of the client, web and SMS versions of the Software that corresponds to the number of Authorized Clients, web and SMS copies specified in each Order; and

(ii) such number of copies of the server versions of the Software as are reasonably necessary for Customer to operate the Authorized Clients;

(b) to distribute such copies to and install them on personal computers and servers, as applicable, owned and controlled by Customer;

(c) to run the Software on the computers described in Section 2.1(b) above, solely for Customer's internal business purposes; and

(d) to reproduce copies of the Documentation to the extent reasonably necessary for Users to use the Software, and to distribute and display such copies internally within Customer to Users.

**2.2 Reservations.** All rights to the Software, Documentation and all related and other Intellectual Property Rights of Verdiem not expressly granted to Customer are reserved to Verdiem. Customer may not make the Software or Documentation available to any third parties as part of any rental, leasing, time-sharing, ASP, or service bureau arrangement. Customer may use the Software and Documentation only for its internal business purposes. Customer may in addition reproduce the Software, but solely to the extent necessary for bona fide non-production testing, back-up or archival purposes.

**2.3 Proprietary Rights; Reverse Engineering.** As between Verdiem and Customer, Verdiem shall own all Intellectual Property Rights in or to the Software and Documentation and any derivative works of or improvements to the Software or Documentation. Customer acknowledges that the Software (including its structure, organization and code), the Documentation and Verdiem's Confidential Information, and all technical data and information associated therewith constitute trade secrets and are the valuable property of Verdiem and its licensors and that the Software and Documentation are protected, without limitation, by copyright and trademark rights. Customer shall not remove, obscure or alter any notice of copyright, patent, trade secret, trademark or other proprietary right or disclaimer appearing in or on any Software or Documentation. Except to the extent (if any) permitted by applicable law, Customer shall not decompile, or create or attempt to create, by reverse engineering or otherwise, the source code from the object code supplied under this Agreement or use it to create a derivative work.

## **Section 3. Delivery Of Software; Provision of Support Program.**

**3.1 Software Delivery.** Verdiem has made or will make the Software and Documentation available for download from its Seattle, Washington offices, on or before the delivery date, as specified in the applicable Order, or as otherwise agreed to by the Parties and confirmed in writing. For purposes of this Agreement, the delivery date for the Software shall be the date on which Verdiem notifies Customer that a license key is available for the Software that is the subject of the applicable Order.

**3.2 Support Program.** If the applicable Order specified that Customer will subscribe to the Support Program, then Verdiem will provide Customer with the support services specified in the Support Program Description.

**3.3 Remote Installation Support.** If so specified in the applicable Order, Verdiem will provide Customer with remote Software installation support services.

#### **Section 4. Fees.**

*The provisions of Section 4.1-4.3 do not apply to Customers to the extent they have acquired their Software license rights or Support Program subscription rights from a Verdiem authorized reseller.*

4.1 Payment of Fees. Customer shall pay Verdiem the fees for the License to the Software and subscription to the Support Program (collectively, "**Fees**") as specified in the applicable Order. Unless specified otherwise in the applicable Order, Customer shall make all payments within thirty (30) days of receipt of Verdiem's invoice. Verdiem may impose a finance charge of 1.5% per month on amounts unpaid by Customer on their due date.

4.2 Sales Taxes, Etc. Customer shall be responsible for any applicable sales, use, or any value added or similar taxes ("**Sales Taxes**") payable with respect to the licensing of the Software to Customer, provision of Support Program, or otherwise arising out of or in connection with this Agreement, other than taxes based upon Verdiem's personal property ownership or net income. Unless expressly specified otherwise in any Order, all Fees, rates and estimates exclude Sales Taxes. If Customer has tax-exempt status, Customer shall provide written evidence of such status with its purchase orders.

4.3 Withholding. If Customer is required to withhold taxes imposed upon Verdiem for any payment under this Agreement by virtue of the statutes, laws, codes or governmental regulations of a country in which any Software or Support Program are delivered, then such payments will be made by Customer on behalf of Verdiem by deducting them from the payment then due Verdiem and remitting such taxes to the proper authorities on a timely basis, and the payments provided for under this Agreement will be adjusted upwards appropriately so that Verdiem actually receives the full amount of the Fees set forth in the applicable License Schedule, provided that Customer supplies Verdiem with official documentation and/or tax receipts on such withholdings supporting such taxes and such payments as may be required by Verdiem for its tax records on or before the date on which such payment is due Verdiem under this Agreement.

4.4 Verification. Upon request by Verdiem, Customer shall provide Verdiem with a report generated by the Software indicating the number of computers on which Customer has installed the Software. Unless there is a material discrepancy showing that Customer has installed the Software on a greater number of computers than the number to which Customer is entitled under its License rights, Verdiem may make such requests no more than once during any twelve (12) month period. In the event of any use in excess of the License rights for which Customer has paid, Customer shall promptly pay Verdiem Fees for such excess use at the rates specified in the applicable Order. Upon receipt of such Fees, Verdiem will extend the License to cover the excess.

#### **Section 5. Additional Rights And Obligations.**

5.1 Protection Against Unauthorized Use. Customer shall promptly notify Verdiem of any unauthorized use of any Software of which Customer becomes aware. In the event of any unauthorized use by any User, Customer shall use all commercially reasonable efforts to immediately terminate and prevent further occurrences of such unauthorized use. If Customer commences any legal proceeding in connection with such unauthorized use, then Verdiem may, at Verdiem's option and expense, participate in or control any such proceeding. In such event, Customer and Verdiem shall each provide the other with such authority, information and assistance related to such proceeding as may be reasonably necessary to safeguard Verdiem's interests and Customer's rights under this Agreement.

#### **Section 6. Verdiem's Warranties.**

6.1 Warranties. Verdiem warrants to Customer that:

6.1.1 Performance. The Software as delivered by Verdiem to Customer under this Agreement will perform in all material respects in accordance with its applicable specifications specified in the Documentation for a period of sixty (60) days following delivery.

6.1.2 Viruses and Lock-Outs. Verdiem will use all commercially reasonable efforts, using then current versions of industry standard anti-virus software, to ensure that the Software as delivered by Verdiem to Customer under this Agreement contains no computer virus, Trojan horse, worm, time bomb, lock-out device, cancelbot, or other similar malicious code. Verdiem and Customer each acknowledge that the Software requires a license key from Verdiem to be operable by Customer; upon request, Verdiem will promptly provide keys as necessary for Customer to exercise its License rights.

6.1.3 Services. Verdiem will perform its obligations under the Support Program in a competent and professional manner, consistent with industry standards.

6.1.4 Infringement. The Software, as delivered by Verdiem to Customer under this Agreement, does not infringe any Intellectual Property Rights of any third party existing under the laws of the United States and Canada.

6.1.5 Bugs and Abatement; Scope. Without limiting the foregoing, Verdiem does not warrant that the Software is free from all bugs, errors, or omissions. The warranties in this Section 6.1 shall automatically abate to the extent that the Software has been (i) damaged, abused or modified by persons other than Verdiem's authorized employees or representatives, or other than at Verdiem's express direction, or (ii) combined with other software or hardware by any such persons, to the extent that Verdiem has not provided in the Documentation that such software or hardware is compatible with the Software, or otherwise so agreed in writing. The warranties in this Agreement are for the sole benefit of Customer, and may not be extended to any other person or entity.

6.2 Performance Remedy. If any Software fails to conform to the warranty set forth in Section 6.1.1 and Customer provides written notice of the non-conformance to Verdiem within the warranty period then, as Customer's sole and

exclusive remedy, Verdiem will either repair or, at its option, replace any non-conforming Software with functionally equivalent Software. If Verdiem is unable to correct the non-conformance within sixty (60) days of receipt of such written notice from Customer, then Verdiem shall promptly refund all of the License fees paid to Verdiem for such Software and terminate the License with respect to such Software, in full and final satisfaction of all and any of Customer's claims arising out of Software failure.

**6.3 Services Remedy.** If Verdiem's performance of any of its obligations under the Support Program fails to conform to the warranty set forth in Section 6.1.3 above, then Customer's sole and exclusive remedy shall be as follows: (a) following notice of non-conformance, Verdiem shall have thirty (30) days in which to correct the non-conformance at no additional charge; (b) if Verdiem has not corrected the non-conformance within such period, then Verdiem shall refund Customer the fees paid to Verdiem for the non-conforming services.

**6.4 Infringement Remedy.** Customer's sole and exclusive remedy for any non-conformance with the warranty in Section 6.1.4 above shall be Verdiem's defense and indemnification obligations under Section 7 below.

**6.5 Disclaimer Of Implied Warranties.** Verdiem makes no representation or warranty in connection with the Software or Support Program, except as set forth in Section 6.1. **TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, EXCEPT AS SPECIFICALLY SET FORTH IN THIS SECTION 6, VERDIEM DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ANY IMPLIED WARRANTY ARISING FROM COURSE OF PERFORMANCE, COURSE OF DEALING, OR USAGE OF TRADE AND ANY STATUTORY REMEDY.**

## **Section 7. Verdiem's Infringement Indemnification.**

**7.1 Defense and Indemnity.** If any third party makes any claim against Customer that the Software, as delivered by Verdiem to Customer, infringes any patent or trademark existing under the laws of the United States and Canada, or infringes any copyright, or results from any misappropriation of such third party's trade secrets by Verdiem (collectively, an "**Infringement**") then, upon notification of such claim, Verdiem shall, at its sole cost and expense, defend Customer against such claim and any related proceeding brought by such third party against Customer. Upon the occurrence of a "Determination Against Verdiem" (defined below), Verdiem shall indemnify Customer from and against any and all damages, (including taxes, fees, fines, penalties, and interest) (collectively "**Damages**") required to be paid by Customer to the third party as a result of the Infringement. Verdiem's obligations under this Section 7.1 are conditioned upon Customer's compliance with the "Indemnification Conditions" (defined below).

"**Determination Against Verdiem**" means a final determination by the tribunal conducting the proceeding that Verdiem or Customer committed an Infringement of the third party's rights, or the issuance of an interim order by any such tribunal restricting or prohibiting Customer's use of the Software as a result of an alleged Infringement, or consummation of a settlement between Verdiem and the third party in which Verdiem agrees to pay compensation to the third party for Customer's or Verdiem's Infringement of the third party's rights.

"**Indemnification Conditions**" means the following obligations of a party entitled to defense and/or indemnification under this Agreement: (i) the indemnified party notifies the indemnifying party in writing of any claim that might be the subject of indemnification promptly after any executive officer of the indemnified party or member of the indemnified party's legal department first knows of the claim, provided, however, that no failure to so notify an indemnifying party shall relieve the indemnifying party of its obligations under this Agreement except to the extent that such failure materially prejudices defense of the claim, and except to the extent of damages incurred by the indemnifying party as a result of the delay; (ii) the indemnifying party is given primary control over the defense and settlement of the claim (subject to the foregoing, the indemnified party may nonetheless participate in the defense at its sole cost and expense); (iii) the indemnified party makes no admission of liability (except as required by applicable law) nor enters into any settlement without the indemnifying party's prior written agreement; (iv) the indemnified party provides such assistance in defense of the proceeding as the indemnifying party may reasonably request, at the indemnifying party's reasonable expense; and (v) the indemnified party complies with any court order or reasonable settlement made in connection with the proceeding.

**7.2 Verdiem's Mitigation Rights.** If use of the Software is, or in Verdiem's reasonable opinion is likely to become, the subject of a claim of infringement of any Intellectual Property Right of any third party, then Verdiem shall have the right to: (i) procure the continuing right for Customer to use the Software; (ii) replace or modify the Software in a functionally equivalent manner so that it no longer infringes; or (iii) if the rights under (i) and (ii) above are not available on terms that are commercially reasonable for Verdiem, terminate the applicable License and refund to Customer an amount equal to the depreciated License Fees paid by Customer for such Software (calculated on a straight line basis over a five (5) year life, beginning on the delivery date).

**7.3 Exclusions.** Notwithstanding the foregoing, Verdiem will have no obligation under this Section 7 or otherwise with respect to any infringement or misappropriation claim to the extent based upon (a) any use of the Software not in accordance with this Agreement or the Documentation, (b) any use of the Software in combination with other products, equipment, software, services or data not supplied by Verdiem to the extent the infringement would not have occurred but for such combination, (c) Verdiem's compliance with Customer's unique hardware or software requirements, specifications or instructions, (d) any use of any release of the Software other than the most current release made available to Customer after notice from Verdiem that Customer must upgrade to such release to avoid an infringement or misappropriation claim and Customer has had a reasonable time in which to implement such upgrade, or (e) any modification of the Software not made by Verdiem or at its express direction.

## **Section 8. Term and Termination.**

8.1 Term – Orders. Each Order shall become effective when accepted in writing by Verdiem, and shall continue in effect through the expiration date for the Licenses granted under such Order, unless sooner terminated in accordance with Sections 8.2 or 8.3 below.

8.2 Customer's Termination For Convenience. Customer may terminate any Order for convenience, upon notice to Verdiem. If Customer terminates any Order under this Section 8.2, Customer shall not be entitled to any refund of Fees paid or payable under such Order.

8.3 Termination for Cause. If either Party materially breaches any of its obligations under this Agreement and fails to cure such breach within thirty (30) days from the date it receives from the non-breaching Party a notice of the breach and a demand for cure, then the non-breaching Party may thereafter terminate all or any affected Orders or Licenses immediately on notice. Without limiting the foregoing, Customer's failure to pay fees and expenses owed by Customer to Verdiem, if any, within fifteen (15) days of receipt of a written notice of late payment shall constitute a material breach of the applicable Order and the License. If Customer has not cured a material breach within the applicable cure period then, until Customer has cured the breach in full, Verdiem may, in its sole discretion, and without prejudice to its other rights following material breach and failure to cure, do any or all of the following: (i) suspend performance of some or all of Verdiem's obligations under the applicable Order, including obligations to provide Support Program; and (ii) suspend the Licenses granted pursuant to the applicable Order. Notice of termination for any Order shall not be interpreted to be notice of termination for any other Order.

8.4 Obligations on Termination. Upon any termination or expiration of a License Schedule, (i) Customer shall destroy all copies of the Software and the Documentation within its custody or control within twenty (20) days of such termination, and immediately thereafter provide Verdiem with a written statement signed by an authorized representative of Customer certifying that all copies of the Software have been destroyed and all use of the Software has been discontinued; and (ii) each Party shall return or destroy all copies of any Confidential Information of the other, as certified by an authorized representative of the returning party.

8.5 Effect of Termination. No expiration or termination of this Agreement or of any Order shall relieve Customer of its obligation to pay any amounts accruing under such Order prior to such expiration or termination.

8.6 Survival. The provisions of Sections 2.3, 4.2-4.4, 5, 8.4-8.6, 9, 10, 11.3-11.5, 11.9, 11.12 and 11.14 of this Agreement, shall survive any termination or expiration of this Agreement.

## **Section 9. Confidential Information**

9.1 Restrictions on Use and Disclosure. Verdiem and Customer shall each retain in confidence all information transmitted to it by the other party pursuant to or in connection with this Agreement that the disclosing party identifies as being proprietary and/or confidential or that, by the nature of the circumstances surrounding the disclosure, ought in good faith to be treated as proprietary and/or confidential ("**Confidential Information**"), and will make no use of such Confidential Information except under the terms and during the term of this Agreement. Verdiem's Confidential Information includes information regarding products, pre-release products, software, pricing, marketing and business plans and financial information. Verdiem and Customer shall treat the terms and conditions of this Agreement as confidential; however, either party may disclose such information in confidence to its immediate legal and financial consultants as required in the ordinary course of that party's business.

9.2 Exclusions. Confidential Information shall not include information that the receiving party can establish: (i) has entered the public domain without the receiving party's breach of any obligation owed to the disclosing party; (ii) has been rightfully received by the receiving party from a third party without confidentiality restrictions; (iii) is known to the receiving party without any restriction as to use or disclosure prior to first receipt by the receiving party from the disclosing party hereunder; or (iv) has been independently developed by the receiving party.

9.3 Disclosure Required By Law. If any applicable law, regulation or judicial or administrative order requires the receiving party to disclose any of the disclosing party's Confidential Information (a "**Disclosure Order**") then, unless otherwise required by the Disclosure Order, the receiving party shall promptly notify the disclosing party in writing prior to making any such disclosure, in order to facilitate the disclosing party's efforts to protect its Confidential Information. Following such notification, the receiving party shall cooperate with the disclosing party, at the disclosing party's reasonable expense, in seeking and obtaining protection for the disclosing party's Confidential Information.

9.4 Independent Development. The terms of confidentiality under this Agreement shall not limit either party's right to independently develop or acquire products without use of the other party's Confidential Information.

## **Section 10. Dispute Resolution**

10.1 Governing Law. This Agreement shall be governed by and interpreted in accordance with the internal laws of the State of Washington, and, where such laws are preempted by the laws of the United States, by the internal laws of the United States, in each case without regard to (a) conflicts of laws principles, and (b) the applicability, if any, of the United Nations Convention on Contracts for the International Sale of Goods.

10.2 Venue and Jurisdiction. In the event of any controversy or claim arising out of or relating to this Agreement, or the breach or interpretation thereof, the parties shall submit to the exclusive jurisdiction of and venue in the Superior Court of King County, Washington, or the Federal District Court for the Western District of Washington, and appeal courts



therefrom. Each party hereby waives all defenses of lack of personal jurisdiction and forum nonconveniens. Process may be served on either party in the manner authorized by applicable law or court rule.

10.3 Legal Expenses. If any proceeding is brought by either party to enforce or interpret any term or provision of this Agreement, the substantially prevailing party in such proceeding shall be entitled to recover, in addition to all other relief arising out of this Agreement, such party's reasonable attorneys' and other experts' (including without limitation accountants) fees and expenses.

#### **Section 11. Miscellaneous Provisions.**

11.1 Publicity; References. Provided that Verdiem complies with any trademark usage requirements notified to it by Customer, Verdiem may refer to Customer as one of Verdiem's customers and use Customer's logo as part of such reference. With Customer's prior written approval, not to be unreasonably withheld, Verdiem may issue a press release announcing the relationship between Verdiem and Customer. Customer agrees to be a reference account for Verdiem, provided, however, that Verdiem shall provide Customer with reasonable notice and obtain Customer's consent before scheduling any reference calls or site visits.

11.2 Compliance With Laws; Export Control. Verdiem and Customer shall comply with all applicable laws and regulations with respect to this Agreement, including U.S. export control laws. Verdiem informs Customer that the U.S. export control classification number for the Software is ECCN-5D002. Neither party shall have any liability to the other for any non-performance of their obligations under this Agreement to the extent that the non-performance is mandated by applicable law.

11.3 Exclusion of Certain Claims. **EXCEPT WITH RESPECT TO (i) VERDIEM'S INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT, (ii) ANY INFRINGEMENT OR MISAPPROPRIATION BY EITHER PARTY OF ANY OF THE OTHER'S INTELLECTUAL PROPERTY RIGHTS (INCLUDING MISUSE OR WRONGFUL DISCLOSURE OF CONFIDENTIAL INFORMATION), OR (iii) A PARTY'S GROSS NEGLIGENCE, WILLFUL MISCONDUCT OR FRAUD, IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY, OR TO ANY THIRD PARTY FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, INCIDENTAL OR EXEMPLARY DAMAGES, WHETHER FORESEEABLE OR UNFORESEEABLE (INCLUDING DAMAGES FOR LOSS OF DATA OR PROFITS), EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, ARISING OUT OF (i) THE PERFORMANCE OR NON-PERFORMANCE OF THIS AGREEMENT, THE SOFTWARE OR ANY SERVICES, OR (ii) ANY CLAIM OR CAUSE OF ACTION UNDER THIS AGREEMENT, MISREPRESENTATION, STRICT LIABILITY, OR OTHER TORT.**

11.4 Limitation of Liability. Except with respect to (i) Verdiem's indemnification obligations under this Agreement, (ii) any infringement or misappropriation by either Party of any of the other's Intellectual Property Rights (including misuse or wrongful disclosure of Confidential Information), (iii) a Party's gross negligence, willful misconduct or fraud, or (iv) Customer's obligations to pay Fees when due and payable, neither Party's entire liability arising out of each Order shall in any event exceed the fees paid by Customer to Verdiem under such Order during the twelve (12) month period immediately preceding the injured Party's first assertion against the other of any claim under such Order, regardless of whether any action or claim is based in contract, misrepresentation, strict liability, or other tort.

11.5 Equitable Relief. Each of Customer and Verdiem acknowledges that damages will be an inadequate remedy if the other violates the terms of this Agreement pertaining to protection of a Party's Intellectual Property Rights or Confidential Information. Accordingly, each of them shall have the right, in addition to any other rights each of them may have, to obtain in any court of competent jurisdiction, temporary, preliminary and permanent injunctive relief to restrain any breach, threatened breach, or otherwise to specifically enforce any of such obligations in this Agreement.

11.6 Force Majeure. If the performance of this Agreement is adversely restricted or if either party is unable to conform to any warranty by reason of any circumstances beyond the reasonable control and without the fault or negligence of the party affected, then, except with respect to obligations to pay Fees, the party affected, upon giving prompt written notice to the other party, shall be excused from such performance on a day-to-day basis to the extent of such restriction (and the other party shall likewise be excused from performance of its obligations on a day-to-day basis to the extent such party's obligations relate to the performance so restricted); provided, however, that the party so affected shall use all commercially reasonable efforts to avoid or remove such causes of non-performance and both parties shall proceed whenever such causes are removed or cease.

11.7 Captions and Headings. The captions and headings are inserted in this Agreement for convenience only, and shall not be deemed to limit or describe the scope or intent of any provision of this Agreement.

11.8 Severability; Invalidity. If any provision of this Agreement is held to be invalid, such invalidity shall not render invalid the remainder of this Agreement or the remainder of which such invalid provision is a part. If any provision of this Agreement is so broad as to be held unenforceable, such provision shall be interpreted to be only so broad as is enforceable.

11.9 Waiver. No waiver of or with respect to any provision of this Agreement, nor consent by a party to the breach of or departure from any provision of this Agreement, shall in any event be binding on or effective against such party unless it be in writing and signed by such party, and then such waiver shall be effective only in the specific instance and for the purpose for which given.

11.10 Third Party Beneficiaries. Except as expressly set forth in this Agreement, no provisions of this Agreement are intended nor shall be interpreted to provide or create any third party beneficiary rights or any other rights of any kind in any other party; provided, however, that Verdiem's suppliers of products and services delivered hereunder shall enjoy the

same disclaimers of warranty, limitations on liability and similar exculpatory provisions with respect to such products and services as does Verdiem.

11.11 Assignment. Customer shall not assign any of its rights under this Agreement without the prior written consent of Verdiem, which shall not be unreasonably withheld. Subject to the foregoing restriction on assignment by Customer, this Agreement shall be binding upon, inure to the benefit of and be enforceable by the parties and their respective successors and assigns.

11.12 U.S. Government Rights In The Software. The Software is "Commercial Computer Software" for purposes of acquisition by or on behalf of the U.S. Government. If Customer is acquiring this Commercial Computer Software on behalf of the U.S. Government, the following provisions apply: (i) if this Commercial Computer Software is supplied to the Department of Defense ("DOD") or any DOD agency or service, DOD's rights regarding use, reproduction and disclosure are set forth in DOD FAR Supplement (DFARS 227.7202); and (ii) if this Commercial Computer Software is supplied to any other unit or agency of the U.S. Government, these Government rights are set forth in Federal Acquisition Regulation ("FAR") 52.227-19. Use, duplication or disclosure by the Government is subject to the restrictions set forth in such sections. Manufacturer is Verdiem Corporation at 1601 2<sup>nd</sup> Avenue, Suite 701, Seattle, WA 98101.

11.13 Notices. Any notice or other communication under this Agreement given by either party to the other party shall be deemed to be properly given if given in writing and delivered by (i) US Mail, certified or registered, return receipt requested, or (ii) nationally recognized air express courier (e.g., Federal Express), properly addressed and prepaid, to the recipient at the address identified on the first page of this Agreement. Notice periods shall begin on the day following delivery. Either party may from time to time change its address by giving the other party notice of the change in accordance with this Section.

11.14 Entire Agreement; Amendments; Conflicts. This Agreement constitutes and embodies the entire agreement and understanding between the parties with respect to the subject matter hereof and supersedes all prior or contemporaneous written, electronic or oral communications, representations, agreements or understandings between the parties with respect thereto. This Agreement may not be modified or amended except by a written instrument executed by both parties. All Software and Support Program subscriptions licensed or purchased, as applicable, by Customer under this Agreement shall be subject to the terms and conditions of this Agreement. With the exception of order quantities and Fees, any terms or conditions appearing on the face or reverse side of any purchase order, acknowledgment, or confirmation that are different from or in addition to those specified in this Agreement shall not be binding on the Parties, even if signed and returned, unless both Parties agree in a separate writing to be bound by such different or additional terms and conditions. In the event of any conflict between the terms of this Agreement and any Order, or any exhibit, the following order of precedence shall apply: (a) the Agreement, (b) the applicable Order, and (c) the exhibits.