

**Carahsoft Rider to Manufacturer Commercial Supplier Agreements  
(for U.S. Government End Users)  
Revised 20161213**

- 1. Scope.** This Carahsoft Rider and the Manufacturer's Commercial Supplier Agreement (CSA) 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's CSA 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 CSA is inconsistent with the Federal Law (*See* FAR 12.212(a)), they shall be deemed deleted and unenforceable under any resultant orders under Carahsoft's Multiple Award Schedule 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 Government contracts as set forth in General Services Administration Order OGP 4800.2I, 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 General Services Administration Acquisition Regulation (GSAR) 552.238-81 Modifications (Federal Supply Schedule) (APR 2014) (Alternate I – APR 2014) and GSAR 552.212 -4 (f) Contract Terms and Conditions – Commercial Items, Excusable Delays (MAY 2015) (Alternate II – JUL 2009) (FAR Deviation – JUL 2015) (Tailored) regarding which of 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 CSA: (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 CSA. 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 CSA.
- (e) Termination.** Clauses in the Manufacturer's CSA referencing suspension, termination or cancellation of the Manufacturer's CSA, the License, or the Customer's Account are hereby deemed to be deleted. Termination, suspension or cancellation shall be governed by the GSAR 552.212-4 and the Contract Disputes Act, 41 U.S.C. §§ 601-613, subject to the following exceptions:
- Carahsoft may request cancellation or termination of the CSA 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 and the CSA will be governed by and construed in accordance with the laws of the United States. All clauses in the Manufacturer's CSA referencing equitable remedies are deemed not applicable to the Government order and are therefore deemed to be deleted.
- (g) Force Majeure.** Subject to GSAR 552.212 -4 (f) Contract Terms and Conditions – Commercial Items, Excusable Delays (MAY 2015) (Alternate II – JUL 2009) (FAR Deviation – JUL 2015) (Tailored). Unilateral Termination by the Contractor does not apply to a Government order and all clauses in the Manufacturer's CSA referencing unilateral termination rights of the Manufacturer's CSA are hereby deemed to be deleted.
- (h) Assignment.** All clauses regarding Assignment are subject to FAR Clause 52.232-23, Assignment of Claims (MAY 2014) and FAR 42.12 Novation and Change-of-Name Agreements, and all clauses governing Assignment in the Manufacturer's CSA 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 (MAY 2014), and all clauses governing waiver of jury trial in the Manufacturer's CSA are hereby deemed to be deleted.

- (j) **Customer Indemnities.** All of the Manufacturer's CSA clauses referencing Customer Indemnities are hereby deemed to be deleted.
- (k) **Contractor Indemnities.** All of the Manufacturer's CSA 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 of the Manufacturer's CSA 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 of the Manufacturer's CSA 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 GSAR 552.212-4(k) Contract Terms and Conditions – Commercial Items, Taxes (MAY 2015) (Alternate II – JUL 2009) (FAR Deviation – JUL 2015) (Tailored) and GSAR 552.212-4 (w) (1) (x) Contract Terms and Conditions – Commercial Items, Taxes (MAY 2015) (Alternate II – JUL 2009) (FAR Deviation – JUL 2015) (Tailored).
- (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's CSA, 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's CSA and to this Rider shall be resolved in accordance with the FAR, the GSAR and the Contract Disputes Act, 41 U.S.C. §§ 7101-7109. See GSAR 552.212-4 (w) (1) (iii) Contract Terms and Conditions – Commercial Items, Law and Disputes (MAY 2015) (Alternate II – JUL 2009) (FAR Deviation – JUL 2015) (Tailored). The Ordering Activity expressly acknowledges that Carahsoft, as the vendor selling the Manufacturer's licensed software, shall have standing under the Contract Disputes Act to bring such claims that arise out of licensing terms incorporated into Multiple Award Schedule Contract GS-35F-0119Y.

**(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 CSA and this Rider contain no confidential or proprietary information and acknowledges the CSA 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. The Licensee may provide information to other components of the United States Government pursuant to proper requests for such information as permitted by law, regulation or policy (e.g., disclosures to Congress, auditors, Inspectors General, etc.).

**HYPORI, INC.**  
**MASTER SOFTWARE LICENSE AGREEMENT**

IMPORTANT - PLEASE READ THIS MASTER SOFTWARE LICENSE AGREEMENT (“AGREEMENT”) CAREFULLY. BY INSTALLING, COPYING OR OTHERWISE USING THE SOFTWARE THAT ACCOMPANIES THIS AGREEMENT, YOU AGREE TO THE TERMS OF THIS AGREEMENT. IF YOU DO NOT AGREE, DO NOT INSTALL, COPY OR OTHERWISE USE THIS SOFTWARE AND, IF APPLICABLE, RETURN IT TO THE PLACE OF PURCHASE FOR A FULL REFUND.

HYPORI owns certain proprietary software programs, and Customer desires to obtain one or more licenses to use such software programs. This Agreement establishes the terms and conditions under which HYPORI shall provide mutually agreed to software and support and maintenance services.

**1. Definitions.** The following capitalized terms have the following meanings as used in this Agreement:

1.1 **“Add-on Module”** shall mean object code software module(s) for additional features or functionality that may, at any time, be added on to a Base Package license through a mutually executed Order Form therefor.

1.2 **“Affiliate”** shall mean in relation to any party, any company or other legal entity, that is controlled by, controls or is under the common control with such party.

1.3 **“Annual Maintenance and Support Fee”** shall mean the amount identified as such in the applicable Order Form.

1.4 **“Base Package”** shall mean the standard computer programs in object code form provided or to be provided by HYPORI pursuant to this Agreement.

1.5 **“Documentation”** shall mean all related user documentation and manuals, in whatever medium, regarding the proper installation and use of the Licensed Software as may be provided by HYPORI from time to time.

1.6 **“Fees”** means License Fees, Support Fees, and all other applicable charges and fees incurred hereunder.

1.7 **“Licensed Software”** shall mean the Base Package and any Add-On Modules identified in the applicable Order Form. The definition of Licensed Software also includes any enhancements, translations, modifications, Updates, Upgrades, releases, or other changes to Licensed Software which are generally provided to customers by HYPORI, or to be provided to Customer as part of the Services.

1.8 **“License Term”** shall mean the period of time during which HYPORI grants a license to Customer under the terms and conditions of this Agreement. The length of the License Term is determined by the type of license (Perpetual or Subscription) granted to Customer by HYPORI.

1.9 **“Monthly Fees”** shall mean the fees that will be invoiced to Customer on a monthly basis during the Subscription Term and as designated as such in the applicable Order Form.

1.10 **“Perpetual License”** shall mean a grant of license pursuant to Section 3.1 below with a perpetual License Term.

1.11 “**Services**” means the maintenance and support services provided pursuant to Section 4 below, and any other services mutually agreed upon by the Parties.

1.12 “**Subscription License**” means a grant of license pursuant to Section 3.1 below with a License Term equal to the Subscription Term set forth on the applicable Order Form.

1.13 “**Subscription Start Date**” means the day and year that the applicable Subscription Term starts as specified on the applicable Order Form.

1.14 “**Support Term**” shall mean the period of time during which HYPORI agrees to provide support and maintenance services to Customer.

1.15 “**Total Up-Front Fees**” shall mean the amount designated as such in the applicable Order Form.

1.16 “**Upgrade**” shall mean the release of a version of the Licensed Software containing major changes to the structure of the Licensed Software where important new features may be added. The change to an Upgrade will be recognized by an increase in value of the primary version number (e.g. version 3.x to be replaced by version 4.x).

1.17 “**Update**” shall mean the release of a version of the Licensed Software containing improvements and adjustments to the Licensed Software, however not including major structural changes and/or new important features. The change to an Update will be recognized by an increase in value of the secondary version number (e.g. version 3.0 to be replaced by version 3.1).

**2. Order Forms.** This Agreement is a master agreement pursuant to which Customer may procure licenses to various Base Packages, Add-On Modules and associated Services pursuant to one or more Order Forms, each of which is made subject to the terms and conditions of this Agreement when signed by authorized representatives of each Party.

### **3. License.**

3.1 License Grant. Subject to payment of all applicable Fees and during the applicable License Term, HYPORI grants Customer a worldwide, non-exclusive, non-transferable, and non-sublicensable license to: (i) use, execute, store, and display the Licensed Software, in object code or other machine executable format, on that number of computers and permit use of the Licensed Software by that number of users as set forth on the applicable Order Form (ii) make one (1) copy of the Licensed Software for back-up or archival purposes, provided that any copy contains all of the original Licensed Software's proprietary notices, and (iii) use and make a reasonable number of copies of the Documentation solely for internal business purposes in conjunction with Customer's authorized use of the Licensed Software.

3.2 Restrictions. Customer will not, and will not directly or indirectly authorize or assist any third party to: (i) use the Licensed Software or Documentation for the benefit of any other person or entity other than Customer, (ii) modify, translate, reverse engineer, decompile, disassemble (except to the extent applicable laws specifically prohibit such restriction, and provided that Customer has first requested from HYPORI the tools necessary to create interoperable programs), or create derivative works based on the Licensed Software or Documentation, (iii) copy the Licensed Software or Documentation (except as expressly allowed herein), (iv) export, directly or indirectly, the Licensed Software or Documentation to any person or entity outside the United States in violation of applicable U.S. export laws, (v) sell, rent, lease, sublicense or otherwise transfer rights to the Licensed Software or Documentation, (vi) remove any proprietary notices or labels on the Licensed Software or Documentation, (vii) separate, remove or replace any components of the Licensed Software provided by third parties (“**Component Software**”), use any Component Software independently of the Licensed Software, or use the Licensed Software without the Component Software.

3.3 Reservation of Rights. HYPORI reserves all rights not expressly granted herein. Except as expressly set forth in this Agreement, no express or implied license or right of any kind is granted to Customer regarding the Licensed Software or Documentation, including, but not limited to, any right to obtain possession of any source code or other technical material relating to the Licensed Software.

3.4 Installation of Upgrade and Update. The terms and conditions of this Agreement shall apply to the initial copy of the Licensed Software as well as to any Upgrade or Update to the Licensed Software subsequently delivered to Customer. Customer must destroy all previous copies of the Licensed Software, however duplicated or archived, within thirty (30) days of installation of the Upgrade or Update. If the Upgrade or Update is to Component Software of the Licensed Software, it may be used only as part of the single Licensed Software package and may not be separated for individual use. Notwithstanding the foregoing except as expressly provided herein, HYPORI has no obligation to provide any Upgrades or Updates to the Licensed Software.

**4. Maintenance and Support.** Subject to payment of all applicable Fees, HYPORI agrees to provide the maintenance and support in accordance with Schedule A hereto during the applicable Support Term at the Support Level indicated on the applicable Order Form. HYPORI offers Standard Support and Premium Support packages, both as described on Schedule A. If Support Term is not stated on the applicable Order Form, the Support Term shall be twelve (12) months from the effective date of such Order Form. If Customer purchases a Perpetual License hereunder, Customer must also purchase a support package for a minimum of one (1) year for each user, as will be indicated on the applicable Order Form. If Customer purchases a Subscription License hereunder, the Standard Support package is included in the subscription License Fee. Under no circumstances will HYPORI be responsible for supporting or correcting any errors in the Licensed Software resulting from any modifications made to the Licensed Software by Customer, and HYPORI will not be liable for any loss or damage of any nature directly or indirectly caused by such modifications. Notwithstanding anything else contained herein, HYPORI's obligation to provide any maintenance and support is conditioned upon Customer installing all Updates that contain bug fixes made available by HYPORI. Notwithstanding anything else contained herein, HYPORI may, at its sole discretion, cease providing Maintenance and Support for any prior version of the Licensed Software six (6) months after an Upgrade is made available.

**5. Fees; Payment Terms.**

5.1 License Fees. Customer shall pay to HYPORI the license fees in the amounts set forth in the applicable Order Form ("**License Fees**"). Except as set forth in this Agreement, all License Fees are fully earned and non-refundable.

5.2 Support Fees. Customer shall pay the annual support and maintenance fees in the amounts set forth in the applicable Order Form ("**Support Fees**"). Except as set forth in this Agreement, all Support Fees are fully earned and non-refundable.

5.3 Payment Terms. The Total Up-Front Fees indicated on the applicable Order Form shall be paid within thirty (30) days of the effective date of such Order Form. Any Monthly Fees will be invoiced to Customer on a monthly basis and shall be due and payable within twenty-eight (28) days of the invoice date. Payment of all Fees shall be made by check or electronic wire transfer to a bank account to be designated in writing by HYPORI. Overdue payments shall bear interest at the rate of 12% annually, or the maximum permitted by applicable law, whichever is less. Unless otherwise expressly stated herein, all Fees are non-refundable.

5.4 Taxes. All fees, of whatever kind, are exclusive of all sales taxes, use taxes, value-added taxes and any other similar taxes imposed by any federal, state, provincial or local governmental entity on the transactions contemplated by this Agreement, excluding taxes based upon HYPORI's net income. When HYPORI has the legal obligation to pay or collect such taxes, the appropriate amount shall be invoiced to and paid by Customer unless Customer provides HYPORI with a valid tax exemption certificate authorized

by the appropriate taxing authority. In the event that any withholding taxes or any other similar taxes are imposed by any federal, state, provincial or local governmental entity on the transactions contemplated by this Agreement, Customer shall pay such taxes in such amounts as are necessary to ensure that HYPORI receives the full amount of the then due fees.

**6. Delivery.** HYPORI shall deliver one copy of the Licensed Software and Documentation to Customer, including software keys necessary to enable use of the Licensed Software, unless otherwise expressly stated in the Order Form.

**7. Audit Right.** HYPORI or its designee shall have the right to have a reputable third party inspect Customer's relevant data processing systems and records for the sole purpose of verifying that Customer has complied with the terms and conditions of this Agreement. Such inspections will be made on not less than ten (10) days written notice, during regular business hours. If the inspection reveals an underpayment to HYPORI of Fees, then HYPORI or Carahsoft Technology Corporation shall invoice Customer for the deficit. HYPORI shall bear the expense of such inspection unless the inspection reveals Fees actually owed that vary more than five percent (5%) from the Fees actually paid to HYPORI, in which case the HYPORI or Carahsoft Technology Corporation shall invoice Customer for the costs associated with such inspection.

**8. Limited Warranty; Disclaimer.**

8.1 Software. HYPORI warrants that, for a period of ninety (90) days from the date of first delivery ("**Warranty Period**"), the unmodified Licensed Software will operate, in all material respects, in accordance with the Documentation when properly installed and used in accordance with its Documentation and this Agreement. HYPORI'S ENTIRE LIABILITY AND CUSTOMER'S SOLE AND EXCLUSIVE REMEDY FOR BREACH OF THE WARRANTY UNDER THIS SECTION SHALL BE TO EXERCISE ITS COMMERCIALY REASONABLE EFFORTS TO, AS DETERMINED BY HYPORI IN ITS SOLE DISCRETION, CORRECT THE MATERIAL DEFECTS IN THE DEFECTIVE SOFTWARE OR REPLACE THE DEFECTIVE SOFTWARE, PROVIDED HYPORI RECEIVES WRITTEN NOTICE DETAILING SUCH DEFECT WITHIN THE WARRANTY PERIOD, OR IN THE EVENT HYPORI IS UNABLE TO CORRECT THE MATERIAL DEFECT OR REPLACE THE DEFECTIVE SOFTWARE WITHIN A COMMERCIALY REASONABLE PERIOD OF TIME FOLLOWING HYPORI'S RECEIPT OF SUCH WRITTEN NOTICE, TO REFUND THE APPLICABLE LICENSEE FEE PAID BY CUSTOMER ATTRIBUTABLE TO THE PERIODS IN WHICH THE LICENSED SOFTWARE WAS UNUSABLE. HYPORI SHALL HAVE NO RESPONSIBILITY TO CORRECT THE MATERIAL DEFECT IN THE SOFTWARE OR REPLACE THE DEFECTIVE SOFTWARE IF THE DEFECT RESULTS FROM ACCIDENT, ABUSE, MISAPPLICATION OR USE OF THE SOFTWARE IN A MANNER FOR WHICH IT WAS NOT DESIGNED.

8.2 Exceptions. Notwithstanding anything else contained herein, HYPORI shall have no obligation or other liability with regard to any software error or non-compliance with the warranties set forth above that is caused, in whole or in part by; (a) modifications or alterations to the Licensed Software made by the Customer or a third party; (b) use of the Licensed Software by the Customer other than as expressly authorized herein; (c) products or services not provided by HYPORI; (d) Component Software; (e) the negligence or willful misconduct of Customer or third parties; (f) use of the Software not in accordance with the Documentation; or (g) electrical malfunction or other malfunction of Customer's system. HYPORI shall have no liability to the Customer under this Agreement, or otherwise, by reason of content supplied by the Customer or other third parties.

8.3 Disclaimer. EXCEPT AS EXPRESSLY PROVIDED HEREIN, THE LICENSED SOFTWARE AND DOCUMENTATION ARE PROVIDED "AS IS," WITHOUT WARRANTY OF ANY KIND. CUSTOMER ASSUMES THE ENTIRE RISK AS TO THE RESULT AND PERFORMANCE OF THE LICENSED SOFTWARE. HYPORI AND ITS LICENSORS AND SUPPLIERS MAKE NO WARRANTIES OR CONDITIONS, EXPRESS, IMPLIED OR STATUTORY, WITH RESPECT TO THE LICENSED SOFTWARE OR THE USE OR OPERATION THEREOF AND SPECIFICALLY DISCLAIM THE IMPLIED WARRANTIES OF MERCHANTABILITY, NON-INFRINGEMENT AND FITNESS FOR A PARTICULAR PURPOSE.



## 9. Indemnification.

9.1 Intellectual Property Indemnification. HYPORI shall, at its expense, defend Customer from and against all actions, proceedings, claims and demands by a third party alleging that Customer's authorized use of the Licensed Software infringes any copyright or misappropriates any trade secret (a "**Third-Party Claim**") and shall pay all settlement amounts agreed to by HYPORI or damages finally awarded against Customer in connection with such Third-Party Claim. HYPORI's obligations under this Section are conditioned upon (i) HYPORI being promptly notified in writing of any claim under this Section, (ii) HYPORI having the sole and exclusive right to control the defense and settlement of the claim, and (iii) Customer providing all reasonable assistance (at HYPORI's expense and reasonable request) in the defense of such claim. In no event shall Customer settle any claim without HYPORI's prior written approval. Customer may, at its own expense, engage separate counsel to advise Customer regarding a Third-Party Claim and to participate in the defense of the claim, subject to HYPORI's right to control the defense and settlement.

9.2 Exceptions. Notwithstanding anything to the contrary, HYPORI shall have no obligations or liability under this Section 9 or otherwise, if the Third-Party Claim is based upon, arises out of, or is related to, in whole or in part: (i) the combination of the Licensed Software with any product, software, solution, or service not developed and provided by HYPORI to Customer; (ii) use, reproduction, or distribution of the License Software outside the scope of the licenses set forth in this Agreement or in violation of any law or any restriction or limitation set forth in this Agreement with respect to the Licensed Software; (iii) any modification of the Licensed Software by any person or entity other than HYPORI; (iv) use of any version or release of the Licensed Software other than the most recent version or release made available to Customer if the Third-Party-Claim would have been avoided by the use of the most recent version or release; or (v) any Third-Party Claim related to, arising out of or connected with any third party's products, software, solutions, or services.

9.3 Mitigation. If any claim which HYPORI is obligated to defend hereunder has occurred, or in HYPORI's determination is likely to occur, HYPORI may, in its sole discretion and at its option and expense (a) obtain for Customer the right to use the Licensed Software, (b) substitute a functionally equivalent, non-infringing replacement for the Licensed Software, (c) modify the Licensed Software to make it non-infringing and functionally equivalent, or (d) terminate this Agreement and refund License Fees paid by Customer to HYPORI for the Licensed Software. In the event a third party claim of patent infringement has occurred or is likely to occur, HYPORI may do any of the foregoing, in its sole in absolute discretion.

9.4 Sole Remedy. THE TERMS IN THIS SECTION SHALL BE CUSTOMER'S SOLE AND EXCLUSIVE REMEDY AND HYPORI'S SOLE AND EXCLUSIVE LIABILITY AND OBLIGATION WITH RESPECT TO THIRD PARTY CLAIMS OF INFRINGEMENT OR MISAPPROPRIATION OF THIRD PARTY INTELLECTUAL PROPERTY RIGHTS.

**10. Limitation of Liability.** IN NO EVENT SHALL HYPORI BE LIABLE TO CUSTOMER FOR ANY INCIDENTAL, INDIRECT, SPECIAL, EXEMPLARY, PUNITIVE, OR CONSEQUENTIAL DAMAGES, INCLUDING, WITHOUT LIMITATION, DAMAGES OR COSTS INCURRED AS A RESULT OF LOSS OF DATA OR LOSS OF PROFITS, WHETHER FORESEEABLE OR UNFORESEEABLE, WHICH MAY ARISE OUT OF OR IN CONNECTION WITH THIS AGREEMENT EVEN IF HYPORI KNEW OF THE POSSIBILITY OF SUCH DAMAGES. IN NO EVENT SHALL HYPORI'S CUMULATIVE LIABILITY FOR ANY DAMAGES TO COMPANY OR ANY OTHER PARTY IN RELATION TO THIS AGREEMENT EXCEED: (I) THE LICENSEE FEE PAID BY CUSTOMER TO HYPORI HEREUNDER IF SUCH CUSTOMER PURCHASED A PERPETUAL LICENSE; (II) THE FEES PAID BY COMPANY TO HYPORI IN THE TWELVE (12) PERIOD IMMEDIATELY PRECEDING THE EVENT GIVING RISE TO SUCH LIABILITY, IF SUCH CUSTOMER PURCHASED A SUBSCRIPTION LICENSE, BOTH REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, NEGLIGENCE, STRICT LIABILITY, TORT, PRODUCTS LIABILITY, OR OTHERWISE.

**11. Customer's Representations and Warranties.** Customer represents and warrants that: (i) it has the corporate authority necessary to enter into this Agreement and carry out its obligations hereunder; and, (ii) Customer is a corporation duly organized and existing (and in good standing) under the laws of the country or state of its incorporation.

**12. Proprietary Rights.**

**12.1 Title.** HYPORI and its licensors and suppliers expressly retain title, all ownership rights, and any and all worldwide intellectual property rights, including without limitation, design, trade secrets, know-how, patent rights, trademarks, and copyrights, in and to the Documentation, Licensed Software, source code of the Licensed Software, and any modifications, adaptations, derivative works, and enhancements made thereto by HYPORI and its licensors. Copyright laws and international copyright treaties protect the Licensed Software and Documentation. Title, ownership rights, and intellectual property rights in and to the content accessed through the Licensed Software is the property of the applicable content owner and may be protected by applicable copyright or other law. This Agreement gives Customer no rights to such content. Except as expressly provided herein, all right, title and interest in and to the Licensed Software remains with HYPORI and its licensors and suppliers.

**12.2 Feedback.** As used herein, "Feedback" means any and all: (i) ideas, requests, feedback, information, reports, suggestions or recommendations made by Customer to HYPORI, in writing, orally, by demonstration or otherwise, relating to the Licensed Software or Documentation. To the extent that Customer provides any Feedback to HYPORI and its personnel, all such Feedback and the intellectual property rights embodied therein shall vest in and be the sole and exclusive property of HYPORI, and HYPORI shall be permitted to use and otherwise exploit such Feedback for any and all purposes.

**13. U.S. Government-Restricted Rights.** The Licensed Software is a "commercial item" as that term is defined in 48 CFR 12.101 (Oct. 1995), consisting of "commercial computer software" and "commercial computer software documentation" as such terms are used in 48 CFR 12.212 (Sept. 1995). Consistent with 48 CFR 12.212 and 48 CFR 227.7202-1 through 227.7202-4 (June 1995), all U.S. Government End Users acquire the Software with only those rights explicitly set forth herein.

**14. Press Releases and Other Promotions.** Neither party shall issue any press release concerning the relationship of the Parties hereunder without the other Party's prior written consent.

**15. Confidentiality.** Each of the Parties acknowledge that in the course of performance of its obligations pursuant to this Agreement, it may obtain confidential and/or proprietary information of the other party. "Confidential Information" means information that is of value to its owner and is treated as confidential by its owner or where such information should, by its nature, be reasonably considered to be confidential. Confidential Information of HYPORI shall include the Licensed Software and Documentation. Each party hereby agrees that all Confidential Information communicated to it by the other party shall be and is received in strict confidence, shall be used only for exercising its rights or carrying out its obligations under this Agreement, and shall not be disclosed without the prior written consent of the disclosing party. This provision shall not apply to Confidential Information which the receiving party can demonstrate is: (i) already known by the receiving party without an obligation of confidentiality, (ii) publicly known or becomes publicly known through no unauthorized act of the receiving party, (iii) rightfully received from a third party without obligation of confidentiality, or (iv) approved by the disclosing party for disclosure. A disclosure by the disclosing party either (a) in response to a valid order by a court or other governmental body, or (b) as otherwise required by law, shall not be considered a breach of this Section by such receiving party nor a waiver of confidentiality for other purposes; provided, however, the receiving party shall provide prompt prior written notice thereof to the disclosing party to enable the disclosing party to seek a protective order or otherwise prevent such disclosure.

## **16. Term and Termination.**

16.1 Term. This License Agreement will become effective on the Effective Date and will remain in effect until there are no longer any active License Terms unless earlier terminated in accordance with the following paragraph.

16.2 Termination for Cause. In the event that either Party materially or repeatedly defaults in the performance of any of its duties or obligations set forth in this Agreement, and such default is not substantially cured within forty-five (45) days (except that the cure period of non-payment of Fees shall be 30 days) after written notice is given to the defaulting Party specifying the default, then the Party not in default may, by giving written notice thereof to the defaulting Party, terminate this Agreement and all then-active License Terms hereunder as of a date specified in such notice of termination.

16.3 Termination for Insolvency. Either Party may immediately terminate this Agreement and all then-active License Terms by giving written notice to the other party in the event of (i) the liquidation or insolvency of the other Party, (ii) the appointment of a receiver or similar officer for the other Party, (iii) an assignment by the other Party for the benefit of all or substantially all of its creditors, (iv) entry by the other Party into an agreement for the composition, extension, or readjustment of all or substantially all of its obligations, or (v) the filing of a meritorious petition in bankruptcy by or against the other Party under any bankruptcy or debtors' law for its relief or reorganization..

16.4 Effect of Termination. All licenses granted hereunder shall terminate automatically upon the termination of this Agreement. Following the termination of this Agreement, for whatever reason, Customer shall promptly return to HYPORI any and all Licensed Software or Documentation and any copies or reproductions of the foregoing. Further, upon termination of this Agreement, each Party shall promptly, and in any event within thirty (30) days following termination, return to the other Party all other property and Confidential Information belonging to the other, in all forms partial and complete, in all types of media and computer memory, and whether or not merged with other materials, or to the extent such return is not reasonably practical, will destroy the foregoing and provide the originating Party with a certificate by an officer of the company certifying destruction.

16.5 Survival. All terms of this Agreement that by their nature extend beyond its termination remain in effect until fulfilled, and apply to respective successors and assigns.

## **17. Miscellaneous.**

17.1 Force Majeure. Neither Party shall be liable to the other for any delay or non-performance of its obligations (other than payment of Fees) due to causes beyond its reasonable control, including without limitation acts or omissions of government or military authority, acts of God, shortages of materials, transportation delays, fires, floods, labor disturbances, riots or wars.

17.2 Independent Contractors. Nothing in this Agreement shall create, evidence or imply any agency, partnership, joint venture or employee/employer relationship between the parties. Neither Party shall act or describe itself as the agent of the other nor shall it represent that it has any authority to make commitments on the other's behalf.

17.3 Severability. If any provision of this Agreement is declared by any judicial or other competent authority to be void, voidable, illegal or otherwise unenforceable then the remaining provisions of this Agreement shall continue in full force and effect. The judicial or other competent authority making such determination shall have the power to limit, construe or reduce the duration, scope, activity and/or area of such provision, and/or delete specific words or phrases as necessary to render such provision enforceable.

17.4 Assignment. Neither this Agreement nor any rights or obligations hereunder, may be assigned, delegated or otherwise transferred by Customer, in whole or in part, without the prior written consent of HYPORI, and any attempt by Customer to assign, delegate or otherwise transfer the Agreement or any of its rights or obligations hereunder, without the written consent of HYPORI, shall be void and of no effect.

Notwithstanding the foregoing, Customer may assign its rights and obligations under this Agreement to an Affiliate, or to any third party which succeeds by operation of law to, or purchases or otherwise acquires all or substantially all of the assets of Customer and which assumes the Customer's obligations hereunder. HYPORI may freely assign this Agreement and its rights and obligations hereunder.

17.5 Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

17.6 Notices. Except as may be otherwise provided herein, all notices, requests, demands, waivers and other communications made pursuant to this Agreement shall be in writing and shall be conclusively deemed to have been duly given upon receipt: (i) if delivered by hand or (ii) if delivered by DHL or similar internationally recognized overnight courier or (iii) if delivered by certified mail return receipt requested. Notices are to be sent to HYPORI to the address as stated on top of the Order Form, Attn. Legal Department. Notices to the Customer are to be sent to the address set forth in the Order Form.

17.7 Waiver. All waivers must be in writing. The failure of either Party to insist upon strict performance of any provision of this Agreement, or to exercise any right provided for herein, shall not be deemed to be a waiver for the future of such provision or right, and no waiver of any provision or right shall affect the right of the waiving party to enforce any other provision or right herein.

17.8 Entire Agreement. This Agreement and the terms and conditions of Carahsoft Technology Corporation's GSA Multiple Award Schedule 70 contract represents the complete agreement concerning the subject matter hereof and supersedes all prior agreements and representations between the parties. Any modification, amendment, supplement, or other change to this Agreement must be in writing and signed by duly authorized representatives of HYPORI and Customer. As used herein, the term "Agreement" shall include any such future modifications, amendments, supplements or other changes hereto.

17.9 Choice of Law and Forum. This License Agreement, its interpretation, performance or any breach thereof, will be construed in accordance with, and all questions with respect thereto will be determined by the federal laws of the United States.

## Schedule A

### **HYPORI Support and Maintenance**

#### **1. Overview**

This Schedule sets forth the interface between HYPORI and the Customer regarding the resolution of problems with the HYPORI Product.

Annual Maintenance and Support Fee(s) shall entitle the Customer to the maintenance services described in the Terms and Conditions as well as telephone, e-mail and Web-based support as defined in this Schedule, for Customers who purchase maintenance and support. By way of example, the Annual Maintenance and Support Fee does not include on-site technical support, Tier 1 support, training, professional services or related travel expenses.

#### **2. Support Response Objectives**

A knowledgeable HYPORI support engineer will respond to a Customer's request for problem resolution based on the case severity level, as described below.

Issue Severity	Standard Support	Premium Support
1	Within 2 business hours after logging the issue.	Within 1 hour after logging the issue
2	Within 4 business hours after logging the issue.	Within 2 business hours after logging the issue.
3	Within 1 business day after logging the issue.	Within 4 business hours after logging the issue.
4	Within 2 business days after logging the issue.	Within 1 business days after logging the issue.

#### **3. Support Provided**

Support Offering	Standard Support	Premium Support
Email Support	Yes	Yes
Support Portal	Yes	Yes
Telephone Support	No	Yes
24x7 Support (Severity 1 issues only)	No	Yes
Administrator training	For an additional fee	1 day included
End user training	For an additional fee	0.5 day included

#### **4. Problem Resolution**

Resolution will consist of a Work Around, an Interim Solution, or a Permanent Solution. Problems that require an Interim Solution will be considered resolved when the test used to reproduce the problem demonstrates the corrected behavior.

*Note: HYPORI is not responsible for resolving problems arising from errors in equipment or software not provided by HYPORI or errors made by individuals who are not HYPORI employees or contractors.*

## **5. Severity Definitions**

Severity 1 – Critical: Complete unavailability of the full system. No users can login and access the virtual device or all virtual devices are completely non-functional.

Severity 2 – Major: Complete unavailability of a part of the system. Some users are unable to login at all or all users are prevented from performing some significant feature or function of the application.

Severity 3 – Minor: Partial unavailability of some part of the system or services are available but materially degraded. All users can access the virtual device but some small number of apps are non-responsive or all applications are performing poorly.

Severity 4 – Cosmetic: All system functions are available but could be improved or some small portion of functionality is degraded. Also includes feature requests and product enhancements.

## **5. Escalation within HYPORI**

Once HYPORI Technical Product Support is notified as above, the HYPORI support organization will be notified and will start verifying the problem. Once the problem is verified by the HYPORI support organization, the request will be handed over to product development if no resolution is immediately available.

The assigned support engineer is responsible for working the issue internally within HYPORI and will according to the resolution objectives set forth above attempt to send out work-around, Interim, or Permanent Solutions.

## **6. Definitions**

“**Bug**” means an inconsistency between HYPORI Product behavior and HYPORI Product Documentation.

“**Interim Solution**” means a short-term code-fix delivered as a hotfix or a patch from HYPORI to the customer.

“**Business Day**” means the hours between 9 am and 5 pm US Central time, Monday through Friday exclusive of US Federal Holidays.

“**Permanent Solution**” means, an Update of the HYPORI Product in which the problem has been resolved to conform to the HYPORI Product specification contained in the Documentation.

“**Reproducible Test Case**” means a test case that demonstrates in a small code sample, usually less than 100 lines, or in a detailed text format, the specific syntax or case that causes the problem. The test case must demonstrate the inconsistencies with the HYPORI Product Documentation.

“**Work Around**” means a temporary solution to a problem. A Work Around will be replaced with a Permanent Solution unless otherwise agreed to by Customer.

Other capitalized terms have the meanings assigned to them in the Agreement.