

Ecessa Support Services Terms and Conditions

IMPORTANT—READ CAREFULLY: These Support Services Terms and Conditions (“Terms”) describe the terms and conditions under which Ecessa Corporation (“Ecessa”) will provide Support Services under the SLA purchased by you (“Customer”). The Terms (including all prior versions) will be displayed on Ecessa’s website, and the Terms, together with: (i) Ecessa’s acceptance of Customer’s Purchase Order for a SLA, and (ii) Ecessa’s receipt of Customer’s payment under a SLA or Ecessa’s acceptance of Customer’s Purchase Order, shall combine to constitute the Support Services Agreement (“Agreement”).

Customer’s receipt of Support Services is expressly conditioned upon Customer agreeing to the Terms, SLA and Agreement.

SUPPORT SERVICES DEFINITIONS

- A. **“Authorized Reseller”** means an Ecessa authorized reseller of Products, Support Services and other Services.
- B. **“Customer Support Portal”** means the portion of Ecessa’s website where Customer may track a Service Requests, access product documentation and other information Ecessa provides as part of the Support Services.
- C. **“Error”** means a failure of the Product to conform to the specifications for such Product as published on Ecessa’s website.
- D. **“Ecessa Hardware”** means those specific hardware products, including physical appliances, not identified as a third party products and sold by Ecessa as listed on Ecessa’s website.
- E. **“Ecessa Insight”** means web based tools used by Ecessa and the Customer to manage and support Products.
- F. **“OEM”** means the company that manufactures a given Product that is eligible for Support Services.
- G. **“Product(s)”** means Ecessa Hardware containing embedded Software, purchased or licensed by Customer through Ecessa or an Authorized Reseller, as identified on a specific Customer Purchase Order or in a specific SLA.
- H. **“Purchase Order”** means an order placed by Customer with Ecessa or an Authorized Reseller for the purchase of a SLA at a specified price.
- I. **“Release”** means new versions of Software that are provided to improve product functionality and performance.
- J. **“RMA”** or **“Return Material Authorization”** means the process, as described in the *Support* section of the Ecessa website, for replacing Ecessa Hardware under a valid SLA.
- K. **“Services”** means the professional services provided by Ecessa and its subcontractors as identified on a Statement of Work issued under a Professional Services Agreement.”
- L. **“Service Level”** means the service and support level obligations attributable to, and as set forth in, the specific SLA covering such Product(s).
- M. **“Service Level Agreement”** or **“SLA”** means the document Ecessa e-mails to Customer after Customer issues a Purchase Order for Support Services, specifying: (a) the commencement date and end date of the Support Services; (b), the part number(s), serial number(s) or description of the supported Product(s); and (c) the applicable Support Services.
- N. **“Service Request”** means a Customer initiated request for Support Services, made through the Customer Support Portal, for a Product covered under a SLA.
- O. **“Site Location”** means the physical location where the Products are installed. A Site Location shall be associated with a single street address.
- P. **“Software”** means those specific Ecessa software products, including, without limitation, Virtual Appliances or Ecessa Insight, in object code format, licensed by Customer and as set forth on each SLA.
- Q. **“Software Update”** means a formal or informal software release for a Product that incorporates functionality changes to the Product, but is not treated as a new product by Ecessa.
- R. **“Support Services”** means the technical support provided by Ecessa to Customer at the Service Level specified in and under the applicable SLA.

- S. **“Virtual Appliances”** means a software image file stored on a hardware platform provided by the Customer.
- T. **“Work Around”** means a temporary procedure by which Customer can avoid a reported Error by changes to a Product’s configuration.

1.0. ORDERING SUPPORT SERVICES

1.1 *Placement and Acceptance of an Order.* Customer may order Support Services by signing an Ecessa Quotes or by placing a Purchase Order with Ecessa or an Authorized Reseller. Upon notice of the acceptance of the Purchase Order, Ecessa shall send a SLA to the Customer

1.2 *Changes to Terms, Support Services and Renewals.* Ecessa may modify the Terms at any time without notice to Customer. Only the Terms in effect at the commencement date of the SLA shall apply to the Agreement. Any renewal or extension of an Agreement shall be subject to the Terms in effect on the renewal or extension date. Ecessa reserves the right to modify, amend or withdraw any of its Support Services without notice, **provided** that such changes shall not materially impact the scope of the Support Services under the Agreement through the end of the then-current term. Prior to the expiration of the SLA, Ecessa, or the Authorized Reseller with whom Customer placed the initial Purchase Order, may send a reminder notice to Customer. If Customer intends to renew the SLA, then Customer will provide to Ecessa, either directly or through its Authorized Reseller, a completed list of all Products and corresponding Purchase Order number(s) for the Products subject to the SLA. If a SLA renewal is not completed prior to the expiration date of the current Support Service term, then the SLA shall expire and Ecessa shall be relieved of all support obligations thereunder.

1.3 *Service Reinstatement.* In the event Customer desires to reinstate Support Services after termination or expiration of a SLA, or if Customer fails to purchase Support Services at the time of initial Product purchase, Customer must pay the Support Service fees for the period of time from the termination or expiration of the previous Support Services term (or the original manufacturer ship date if Products were not under a SLA) to the date Support Services are reinstated or purchased. Reinstatement of a SLA is: (a) at the sole discretion of Ecessa; (b) contingent upon the Product(s) passing a Product Health Check, as described below; and (c) subject to any other conditions Ecessa may impose.

1.4 *Payment.* Support charges are payable in advance. All payments will be in U.S. dollars. Customer shall not have the right to offset or withhold payments hereunder. Ecessa pricing does not include taxes. Customer shall be responsible for the payment of all applicable taxes, customs fees and duties properly due and payable related to the Support Services, with the exception of taxes imposed on the income of Ecessa.

2.0. TERM, TERMINATION AND SUSPENSION OF SUPPORT SERVICES

2.1. *Term.* The Term of the Agreement is effective upon the last to occur of: (i) Ecessa’s acceptance of a signed Ecessa Quote or a Purchase Order with payment terms specified; or (ii) Customer’s payment of the signed Ecessa Quote or a Purchase Order if Ecessa does not extend payment terms. The Agreement shall continue as specified in the SLA, unless terminated earlier as provided herein. The SLA will commence on the date specified therein.

2.2. *End of Support Services.* In the event Ecessa decides, in its sole discretion, to discontinue Products or Support Services (“End of Life”), Ecessa will post a notice on the Ecessa website. The End of Life notice will include the dates when such Products will no longer be sold or serviced, provided however that Ecessa will honor all SLAs in effect through the end of the then-current term. Failure to provide Customer notice of an End of Life date is not a breach of the Agreement. After the end of the then-current SLA Customer may continue to use the Products without Support Services or Ecessa may offer on going alternative support options at a price and on terms to be determined by Ecessa.

2.3. *Termination for Cause.* Either party may terminate the Agreement for cause if the other party fails to perform any material term or condition of the Agreement, and does not remedy the failure within thirty (30) days after receipt of written notice of such default.

2.4. *Effect of Termination of Support Services.* Termination of Support Services due to the expiration of a SLA (or End of Life) will not constitute termination of the perpetual licenses for the licensed Products, provided that Customer is not in default of the applicable software license agreement. However, termination of Support Services

does conclude Ecessa's Support Services obligations under the Agreement. The Sections of the Agreement that address confidential information, ownership, warranty, export, limitation of liability, termination, and governing law survive the expiration or termination of the Agreement.

2.5. *Suspension.* In addition to any and all other rights and remedies available to Ecessa, in the event Customer fails to return Products in accordance with Section 5 below, or pay any invoice when due, Ecessa may suspend delivery of Support Services until such noncompliance is remedied to Ecessa's reasonable satisfaction. Such suspension will not extend the term of the SLA.

3.0. ELIGIBILITY FOR SUPPORT SERVICES

3.1. *Eligibility for Support Services.* To be eligible for Support Services, the Product must contain the most current revision of Software and/or firmware that is currently supported by Ecessa. Upgrading to the most current level shall be at Customer's cost, unless such upgrade is included as a Service Level under the applicable SLA. The Product must be installed and remain in an operating environment in accordance with the Product Documentation (as defined below). Products that have been modified without Ecessa's prior written approval are not eligible for Support Services.

3.2. *Product Health Check.* Upon prior notice, Ecessa may perform a Product Health Check on the Product before commencement of Support Services hereunder to determine whether the Product is in good operating condition. Ecessa may require a Product Health Check when: (1) Customer allows Support Services to lapse and wants to reinstate Support Services for the Product; or (2) Customer did not purchase Support Services when initially purchasing the Product(s). The fees associated with the Product Health Check are non-refundable. Ecessa may deny Support Services (including any renewal thereof) in the event a device does not pass a Product Health Check.

4.0. SUPPORT SERVICES

4.1. *Coverage Generally.* Ecessa will use commercially reasonable efforts to provide assistance with the diagnosis and resolution of basic Product configuration issues and failures specific to products covered by a SLA in a production environment. All Support Services will be provided in accordance with the processes set forth on the Customer Portal including, without limitation, the proper initiation of a Service Request, priority rules, escalation paths, Workarounds, and such other processes and information as required by Ecessa to perform the Service Level applicable to the SLA covering such Product.

4.2. *Product Documentation.* Through the Customer Support Portal, at no charge to Customer, Ecessa will provide access to the Product Manual and other documentation deemed appropriate by Ecessa (collectively, the "Product Documentation") designed to enable Customer to install, maintain and operate the Product.

4.3. *Software Support.* Ecessa will provide technical support for Software and access to Software Updates for Products at the Service Level specified under a SLA. Customer's right to use the Software Update is governed by the terms and conditions set forth in the applicable software license agreement, under which the Product was purchased, as well as any other terms and conditions specified on the Customer Support Portal. As part of a current SLA, Customer may download Software Updates for the designated Product(s) covered by the SLA. Customer may be required to purchase Hardware upgrades, improvements or changes in order to install or use a Software Update that is a Release. In the event Customer demonstrates a non-conformance with Software Product Documentation that can be duplicated by Ecessa and is not addressed by a Software Update, Ecessa will use commercially reasonable efforts to remedy such non-conformance. Such remedy may include a Work Around or other temporary or permanent fix. Ecessa does not represent or warrant that all non-conformities of the Software will be corrected. Ecessa reserves the right to incorporate any remedies provided to Customer into future software revisions, in its sole discretion. The content of all Software Updates shall be determined by Ecessa in its sole discretion.

4.4. *Hardware Support.* Ecessa will provide technical support for Hardware under a SLA at the specified Service Level. In the event Ecessa replaces Hardware or parts under a SLA, all failed Hardware and parts submitted for replacement will become the property of Ecessa. Ecessa may, in its sole discretion, provide to

Customer diagnostic documentation, spare parts, tools, test equipment or other material used in performing the Support Services (collectively the “Materials”). All Materials remain the sole and exclusive property of Ecessa, and Ecessa grants no license, title or interest in or to the Materials. Upon Ecessa’s request, Customer will immediately return all Materials to Ecessa, or, at Ecessa’s option, grant immediate access to, and facilitate Ecessa’s recovery of, the Materials.

4.5. *Language:* All Support Services and Product Documentation, written or spoken, will be provided in the English language.

5.0. CUSTOMER OBLIGATIONS AND WARRANTY

5.1. *Process Compliance and Product Registration.* The Products may include features that require Customer to register the Products or components. Customer must complete any such registration requirements as instructed in the Product Manual or Customer Support User Guide (both available on the Customer Support Portal) within the time period specified for such Product or component (hereinafter “Registration Period”). If Customer fails to complete the registration requirements within the Registration Period, the Software features may become inoperable and Customer may be unable to use such features until registration is completed.

5.2. *Site Location Address.* Customer must notify Ecessa in writing of any physical moves of Products to a new location no less than ten (10) days in advance of the move. Customer is responsible for providing Ecessa with accurate Site Location address information for Products covered by guaranteed delivery Support Services. Each change in Product location will require a new site validation approval from Ecessa or an Authorized Reseller. Ecessa may terminate Support Services in the event Customer fails to obtain site validation approval. Changes to a Product’s location may result in modifications to the service level available under the applicable SLA. Failure to provide accurate Site Location information may result in additional charges to provide Support Services, and delayed delivery times.

5.3. *Access.* Customer will provide all necessary authorizations for remote access, and maintain sufficient equipment and technology, to facilitate Ecessa’s remote diagnostic capability and provision of Support Services.

5.4. *Technical Data.* Customer shall provide reasonable assistance to Ecessa when providing technical Support Services. Reasonable assistance may include the provision of, and access to, data from the Product in order to implement a Work Around or to minimize Customer impact and Customer’s provision of such other information as may be required by Ecessa in order to perform the Support Services.

5.5. *Product Returns.* Customer will be responsible for shipping inoperable Ecessa Hardware and parts back to Ecessa promptly after a replacement Product is received by the Customer. Ecessa will provide instructions to assist with the return of the inoperable Product including the designation of a specified return location. If the inoperable Product is not received at Ecessa’s designated return location within ten (10) business days of Customer’s receipt of the replacement Product, Customer shall pay Ecessa’s then-current list price, per unit, for the Product(s). If crossing international borders, proof of shipment is sufficient for proof of return. Customer’s failure to return Products promptly or pay any invoice hereunder will result in the suspension of Support Services.

5.6. *Customer Data.* Customer will be solely responsible for the timely performance and management of its data back-up, data recovery, and disaster recovery measures. Ecessa will not be liable for any expense or damage arising out of any erasure, damage, or destruction of Customer files, data, or programs. It is Customer’s responsibility to create and implement internal processes, procedures or requirements to ensure the protection, loss, confidentiality, or security of Customer data or information.

5.7 *Warranty Related to Third Parties.* If Customer is: (a) ordering Support Services for a third party; (b) using the Products to provide services to a third party; or (c) managing support of Products for a third party and is accepting the Agreement on behalf of such third party, then Customer represents and warrants that it: (i) has the authority to accept the terms of the Agreement on behalf of such third party; and (ii) has bound such third party to terms and conditions that are substantially similar to and no less protective of Ecessa as the terms and conditions of the Agreement. Customer agrees to indemnify, defend and hold harmless Ecessa, its shareholders, employees and agents, or subcontractors, in any and all legal actions brought against Ecessa to the extent based upon Customer’s breach of the foregoing warranties.

6.0. SUPPORT SERVICE EXCLUSIONS

The Support Services covered by a SLA will include only those items expressly defined in the Agreement, and no other services shall be implied. Without limiting the foregoing, the following services are specifically excluded from the Support Services (but may be provided by Ecessa at the request of Customer for an additional charge under a separate Statement of Work):

- Services to assist in installation and configuration of Products and interoperability with third party applications;
- Services to assist in the installation and configuration of Products anywhere other than the Site Location listed on the applicable Service Level Agreement;
- Support for any software provided by application vendors;
- Any software fixes, patches, maintenance releases, updates or new feature releases for any third party applications;
- Any work at Customer's site, other than as mutually agreed to and defined in a separate Statement of Work;
- Any services, including replacement or repair of parts, which in the reasonable opinion of Ecessa are necessitated : (i) Customer's neglect or misuse, improper programming, failure of electrical power, electrical surge, air conditioning, humidity control, transportation, accidental harm or other than normal use or causes ; (ii) Customer's utilization of replacement parts not provided by Ecessa; (iii) use of Product in a negligent manner; (iv) Product use outside the environmental range specified by Ecessa; or (v) failure to use and maintain the Product in accordance with the Product Manual;
- Support for any modifications of the Products by anyone other than Ecessa;
- Products not purchased through from Ecessa or an Authorized Reseller;
- Used, refurbished or grey Products;
- Products that have reached the Ecessa published End of Life date;
- Support for any third party software provided by application vendor;
- software fixes, patches, maintenance releases, updates or new feature releases for any third party applications;
- Support for any non-Ecessa Hardware, including, without limitation, electrical or network cabling external to the Products; accessories, attachments or any other devices not furnished by Ecessa;
- Failure to notify Ecessa of a Product defect during the term of the Agreement.

7.0. VIRTUAL APPLIANCES

7.1. Usage. Virtual Appliance are licensed for use during the Term of the Agreement. If a SLA renewal is not completed prior to the expiration date of the current Support Service term, then the SLA shall expire and the Virtual Appliance will be permanently disabled.

7.2. Internet Access. Virtual Appliances must maintain connectivity to the Licensing Service available via the public Internet. After Fourteen (14) days of being unable to communicate with the Licensing Service the Virtual Appliance will be permanently disabled.

7.3. Duplication. Duplication of Virtual Appliances is prohibited by this Agreement. If the Licensing Service detects duplication of Virtual Appliances the duplicate instances will be immediately and permanently disabled.

8.0. CONFIDENTIAL INFORMATION AND OWNERSHIP

8.1. *Definition.* Ecessa may provide Customer with certain information which is confidential in nature ("Confidential Information") in connection with the Support Services. Any Ecessa information identified as confidential and any information relating to any Products or Support Services of Ecessa, and any derivative information related thereto that is not generally released or otherwise made available publicly by Ecessa will be deemed Confidential Information of Ecessa. Customer shall not divulge any Confidential Information to any third party without obtaining Ecessa's prior written consent. Customer shall maintain the confidentiality of Ecessa's

Confidential Information for a period of three (3) years following receipt. Confidential Information shall not include information which: (i) now or hereafter, through no unauthorized act or failure to act on recipient's part, becomes generally known or available; (ii) is lawfully known to the recipient without an obligation of confidentiality at the time recipient receives the same from the disclosing party, as evidenced by written records; (iii) is hereafter lawfully furnished to the recipient by a third party without restriction on disclosure; (iv) is independently developed by the recipient without use of the disclosing party's confidential information; or (v) is required to be disclosed pursuant to a requirement of a governmental agency or law, so long as the recipient provides prompt notice to the disclosing party of such requirement prior to any such disclosure.

8.2. No Exchange of Customer's Confidential Information. Customer shall NOT disclose any Confidential Information to Ecessa under the SLA. Unless otherwise agreed to in writing, Ecessa is not obligated to keep any info disclosed by Customer confidential. Customer is solely responsible for the security of its own Confidential Information and for maintaining adequate procedures to protect its Confidential Information and to reconstruct lost or altered files, data and programs.

8.3. Feedback. Customer may provide suggestions, comments or other feedback ("Feedback") with respect to the Products or the Support Services. Unless otherwise agreed to in writing, Feedback shall not be considered Confidential Information and Ecessa shall not be obligated to protect the disclosure thereof even if Customer designates the Feedback as confidential. Customer hereby grants to Ecessa an irrevocable, non-exclusive, perpetual, royalty-free, transferrable license, with right to sublicense, to use, disclose, reproduce, distribute, modify and incorporate into the Software, Hardware or Support Services any suggestion, enhancement, request, recommendation, correction or other feedback provided by Customer relating to the use of the Hardware, Software or Support Services.

8.4. Ownership. Customer's license and rights to the Products and any derivative materials arising out of the Support Services, including, without limitation, the Software Updates, are limited to those expressly granted (i) in the software license agreement under which the Products were purchased or licensed, (ii) in the Agreement, (iii) as conditioned on the Customer Portal, and (iv) under Ecessa's website. Ecessa expressly reserves all rights, title and interest in and to all Products, Support Services, Confidential Information and derivative works not expressly granted to Customer, including, without limitation, all designs, engineering, details and other data pertaining thereto, all works of authorship, computer programs, fixes, updates, discoveries, inventions, patents, know-how, methodologies, sequencing and techniques, and any works developed as a result of the above.

8.5. Rights to Use Customer Data. Customer may provide information to Ecessa via registration of the Products or in the implementation, use or operation of the Products or Services purchased or licensed by Customer, in the course of Ecessa providing Support Services, or otherwise. Customer hereby authorizes Ecessa to use this information, including, without limitation, Customer contact email addresses, to send Customer other communications. Further, Customer acknowledges and agrees that Ecessa may engage other companies and individuals ("Agents") to perform functions on its behalf, such as payment processing, order fulfillment, marketing assistance and customer service.

9.0. ECESSA LIMITED WARRANTY AND DISCLAIMER

9.1. Services Warranty. All employees of Ecessa performing Services hereunder will have the requisite skill and training to perform Ecessa's obligations in a good and workmanlike manner consistent with professional standards in Ecessa's industry. Customer's sole and exclusive remedy for any breach of the foregoing warranty shall be Ecessa's re-performance of the non-conforming Services one time or, at Ecessa's option, a refund of all fees paid by Customer for the applicable non-conforming Services. Ecessa's warranty obligations under this Section 8 are conditioned upon Customer providing Ecessa with a detailed written notice of any claimed breach of the warranty within thirty (30) days of occurrence of the alleged breach.

9.2. Mutual Representations and Warranties. Each party represents and warrants that: (i) it is duly organized, validly existing and in good standing under the laws of the state of its incorporation or formation; (ii) it has the right and full power and authority to enter into this Agreement; and (iii) it will comply, at all times, with all applicable all applicable federal, state, county, and local laws, orders, rules, ordinances, regulations and codes.

9.3. Third-Party Product Warranty. Customer receives the OEM's warranty in effect at the time of delivery with respect to any Products purchased hereunder. Said OEM warranty is Customer's sole warranty with respect

to such items. ECESSA DOES NOT MAKE ANY EXPRESS OR IMPLIED WARRANTIES WITH RESPECT TO THIRD-PARTY PRODUCTS.

9.4. **DISCLAIMERS.** EACH PARTY HEREBY DISCLAIMS ANY AND ALL OTHER WARRANTIES OF ANY NATURE WHATSOEVER, WHETHER ORAL OR WRITTEN, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY, TITLE, NON-INFRINGEMENT, AND FITNESS FOR A PARTICULAR PURPOSE. ECESSA DOES NOT WARRANT THAT THE SOFTWARE, HARDWARE, OR SERVICES WILL MEET COMPANY'S REQUIREMENTS OR THAT THE OPERATION THEREOF WILL BE UNINTERRUPTED OR ERROR FREE.

10.0. LIMITATION OF LIABILITY

10.1. Exclusion of consequential and related damages. UNDER NO CIRCUMSTANCES SHALL ECESSA BE LIABLE FOR SPECIAL, INDIRECT, PUNITIVE, INCIDENTAL OR CONSEQUENTIAL DAMAGES, WHETHER AN ACTION IS IN CONTRACT OR TORT AND REGARDLESS OF THE THEORY OF LIABILITY, EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. FURTHER ECESSA SHALL NOT BE LIABLE for: (A) ERROR OR INTERRUPTION OF USE OR FOR LOSS OR INACCURACY OR CORRUPTION OF CUSTOMER'S DATA; (B) COST OF PROCUREMENT OF SUBSTITUTE GOODS, SERVICES OR TECHNOLOGY; (c) LOSS OF BUSINESS; OR (d) FOR ANY MATTER BEYOND ECESSA'S REASONABLE CONTROL, EVEN IF ECESSA HAS BEEN ADVISED OF THE POSSIBILITY OF ANY OF THE FOREGOING LOSSES OR DAMAGES.

10.2. LIMITATION OF LIABILITY. IN NO INSTANCE SHALL EITHER PARTY'S LIABILITY TO THE OTHER PARTY FOR DIRECT DAMAGES UNDER THIS AGREEMENT (WHETHER IN CONTRACT OR TORT OR OTHERWISE) EXCEED THE FEES PAID BY CUSTOMER FOR THE SUPPORT SERVICES DURING THE SIX (6) MONTHS IMMEDIATELY PROCEEDING THE DATE THE DAMAGED PARTY NOTIFIES THE OTHER PARTY IN WRITING OF THE CLAIM FOR DIRECT DAMAGES. NEITHER PARTY MAY INSTITUTE AN ACTION IN ANY FORM ARISING OUT OF NOR IN CONNECTION WITH THIS AGREEMENT MORE THAN TWO (2) YEARS AFTER THE CAUSE OF ACTION HAS ARISEN. THE ABOVE LIMITATIONS WILL NOT LIMIT CUSTOMER'S PAYMENT OBLIGATIONS UNDER A SLA.

11.0. GENERAL

11.1. *General.* For all purposes of the Agreement each party shall be and act as an independent contractor and not as partner, joint venture, or agent of the other and shall not bind nor attempt to bind the other to any contract. All notices under the Agreement shall be in writing, and shall be deemed given when personally delivered, when sent by confirmed fax, or three days after being sent by prepaid certified or registered mail to the address of the party to be noticed as set forth herein or such other address as such party last provided to the other by written notice. As used herein, the term 'day' shall refer to a business day that does not fall on a weekend or holiday. Customer shall not have any right or ability to assign, transfer, or sublicense any obligations or benefit under the Agreement without the written consent of Ecessa (and any such attempt shall be void). The failure of either party to enforce its rights under the Agreement at any time for any period shall not be construed as a waiver of such rights. It is the intention of the parties that the Agreement be controlling over additional or different terms of any purchase order, confirmation, invoice or similar document, even if accepted in writing by both parties, and that waivers and amendments shall be effective only if made by non-pre-printed agreements clearly understood by both parties to be an amendment or waiver. The Agreement supersedes all proposals, oral or written, all negotiations, conversations, or discussions between or among parties relating to the subject matter of the Agreement and all past dealing or industry custom. In the event that any provision of the Agreement shall be determined to be illegal or unenforceable, that provision will be limited or eliminated to the minimum extent necessary so that the Agreement shall otherwise remain in full force and effect and enforceable. Neither party is liable for failure or delay due to strikes, wars, and acts of terrorism, fires, floods, natural disasters, labor shortages, government regulations, or other causes beyond its reasonable control. The Agreement shall be governed by and construed in accordance with the laws of the State of Minnesota without regard to the conflicts of law's provisions thereof. In any action or proceeding to enforce rights under the Agreement, the prevailing party will be entitled to recover costs and attorney's fees. Headings herein are for convenience of reference only and shall in no way affect interpretation of the Agreement. Where approval, acceptance, consent or similar action by either party is required under this Agreement, such action shall not be unreasonably delayed or withheld. Ecessa will not be liable for any

damages or penalty for delay in delivery or for any failure to perform under this Agreement if the delay or failure is caused by Customer or Customer's employees, subcontractors or agents. Ecessa and Customer acknowledge that they operate independent of each other. Nothing in this Agreement shall be deemed or construed to create a joint venture, partnership, agency, or employee/employer relationship between the parties for any purpose, including, but not limited to, taxes or employee benefits. Each party will be solely responsible for the payment of all taxes and insurance for its employees and business operations. Ecessa has the sole right to control the method, details, and manner of performing the Services, including the right to hire and manage Ecessa's own personnel; provided, however, Ecessa may subcontract its obligations under this Agreement without Customer's prior written consent.

11.2. *Arbitration.* All disputes, claims, and controversies between the parties arising out of or related to the Agreement or the breach thereof (except for non-payment and breach of any obligation of confidentiality or infringement of any intellectual property right for which an injunction may be sought) shall be settled by arbitration. The arbitration shall be conducted by a panel of three (3) arbitrators under the then current Commercial Arbitration Rules of the American Arbitration Association in Hennepin County, MN. One arbitrator is to be selected by each party and the third arbitrator is to be selected by the other two arbitrators. The power of the arbitrators shall be limited to that possessed by a trial level judge in the place of arbitration. The arbitrators are prohibited from awarding damages or remedies in excess of those allowed by the provisions of the Agreement. The decision of the arbitrators shall be final and binding and judgment on the award so rendered may be entered in any court having jurisdiction thereof.

11.3. *Export Regulations.* All Hardware, Software, Documents, technical data, and any other materials delivered under the Agreement are subject to U.S. export control laws and may be subject to export or import regulations in other countries. Customer, on behalf of itself and any subsidiary or affiliate, agrees to comply strictly with these laws and regulations and acknowledges that Customer has the responsibility to obtain any licenses as may be required to operate or use any Hardware or Software after delivery to Customer. Without limiting the foregoing, Customer agrees that it will not export, re-export, transfer or divert any Products, Software, Ecessa Confidential Information or technical data, or any derivative product thereof, to any country or resident of any country to which such exports are restricted or embargoed under US export control laws without first obtaining all licenses and approvals required by the United States government.