PRODUCT EVALUATION AGREEMENT

Fujitsu America, Inc., 1250 East Arques Avenue, Sunnyvale, CA 94085

Customer Name and Installation Address  Fujitsu Contact Name and Telephone Number

New Product Evaluation (see Section 1 of Terms):
Yes ☐ No ☐

Customer Contact Name and Telephone Number  Installation to be performed by:

Fujitsu ☐ Customer ☐

PRODUCT DESCRIPTION

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<th>Item No.</th>
<th>Qty</th>
<th>Site #</th>
<th>Part Number/Product ID #</th>
<th>Unit Price (Mobile)</th>
<th>Total</th>
<th>Description &amp; Serial #</th>
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Terms and Conditions

Specific Transaction/Purpose That Evaluation is being used for and Special Provisions (if any):

The parties acknowledge that the terms and conditions attached hereto are an integral part of this Product Evaluation Agreement (“Agreement”) and are incorporated herein by reference. Customer's acceptance of this Agreement by its signature below shall constitute Customer's acknowledgement that it has read and understands the terms and conditions of this Agreement, and that such terms shall exclusively govern the subject matter of this Agreement, regardless of any varying or additional terms in any Customer documents, such as a purchase order that may be issued by Customer to initiate this evaluation.

FUJITSU AMERICA, INC.  (“Fujitsu”)

By: ______________________________________
Authorized Signature
Name: ____________________________________
Title: _________________________________
Date: _________________________________

(“Customer”)

By: ______________________________________
Authorized Signature
Name: ____________________________________
Title: _________________________________
Date: _________________________________
SECTION 1 - INSTALLATION AND USE OF PRODUCTS
Fujitsu America, Inc. (“Fujitsu”) will provide Customer with temporary use of the Products specified on the face of this Agreement. “Products” shall collectively refer to any Equipment and/or Software provided by Fujitsu hereunder. Customer may use the Products, beginning upon delivery, for thirty (30) calendar days (“Evaluation Period”); the duration of the Evaluation Period may be extended by Fujitsu at its sole option communicated to Customer in writing. The Products shall be installed at the location specified on the face of this Agreement. The party responsible for installation, as indicated on the face of this Agreement, shall prepare and maintain the installation site in accordance with applicable specifications.

Certain Products may be provided to Customer for the purpose of assisting Fujitsu in evaluating a new product (“New Product Evaluation”) and will be designated as such on the face of this Agreement. Customer and Fujitsu will establish and agree upon guidelines to facilitate cooperation during the evaluation (“Evaluation and Operating Guidelines”).

SECTION 2 - CHARGES
All charges for transportation, packing and unpacking for delivery to Customer and return back to Fujitsu shall be paid by Fujitsu, unless otherwise specified on the face of this Agreement. There will be no charge to Customer for the use of the Products during the Evaluation Period.

SECTION 3 - WARRANTY DISCLAIMER
THE PRODUCTS ARE PROVIDED DURING THE EVALUATION PERIOD ON AN "AS IS" BASIS. FUJITSU MAKES NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE OR OF MERCHANTABILITY, OR ARISING FROM A COURSE OF DEALING, USAGE OR TRADE PRACTICE.

SECTION 4 - LIMITATION OF LIABILITY
Fujitsu shall have no liability to Customer for damages in any way related to the subject matter of this Agreement. This provision shall not apply to claims for personal injury or for damages to real or tangible personal property to the extent caused by Fujitsu’s fault or negligence.

IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY PUNITIVE, INCIDENTAL, SPECIAL, INDIRECT, OR CONSEQUENTIAL DAMAGES (INCLUDING, BUT NOT LIMITED TO, LOSS OF USE, LOSS OF DATA, LOSS OF BUSINESS AND LOSS OF PROFITS (OTHER THAN WITH RESPECT TO THE PAYMENTS OWING TO FUJITSU) ARISING UNDER OR IN CONNECTION WITH THIS AGREEMENT, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

SECTION 5 - MAINTENANCE
Maintenance services for Products designated for New Product Evaluation will be provided in accordance with the Evaluation and Operating Guidelines. For all other Products, Fujitsu shall provide maintenance services for the Products only pursuant to a separate agreement for maintenance service between Fujitsu and Customer.

SECTION 6 - TITLE
Title to the Products shall remain at all times during the Evaluation Period in Fujitsu and shall be kept free and clear of all claims, liens and legal processes of Customer's creditors, third parties having security or ownership interests in other data processing equipment at Customer's site, or any other party claiming through Customer. Customer shall, at Customer's expense, protect and defend Fujitsu's title thereto from all such claims, liens and processes. Upon request by Fujitsu, Customer shall execute any financing statements or other documents reasonably necessary to protect Fujitsu’s ownership interest. Customer shall maintain identification on the Products as to Fujitsu's ownership thereof.

SECTION 7 - RISK OF LOSS
During the Evaluation Period, Fujitsu shall bear all risks of loss or damage to the Products, except for the following risks for which Customer shall be responsible: (a) use of the Products for other than data processing purposes for which it is designed; (b) alterations or attachments not authorized by Fujitsu in writing; (c) or misconduct or negligence of Customer, its employees or agents.

SECTION 8 - ACQUISITION OF PRODUCTS
At the end of the Evaluation Period, unless the Products are returned to Fujitsu as specified in this Agreement, Customer shall be obligated to acquire the Products pursuant to either a separate purchase agreement between Fujitsu and Customer, if applicable, or in the absence of such agreement in accordance with the standard terms and conditions of sale attached hereto as Exhibit 1. This Agreement shall constitute Customer’s purchase order authorizing such purchase and Fujitsu’s invoice to Customer for the Products.

SECTION 9 - EXPIRATION OF EVALUATION PERIOD
Unless Customer returns the Products within fifteen (15) days after the end of the Evaluation Period, Customer shall be deemed to have purchased the Products subject to Section 8 above. If Customer elects to return the Products at the end of the Evaluation Period, Customer shall make the Products available for return to Fujitsu in good condition and repair, reasonable wear and tear excepted. All Products are to be returned in the original packing.
material. Customer agrees to pay for any missing or damaged components or packing material and/or any damages to the Products incurred during return transit due to the failure to use original packing material to return the Products.

SECTION 10 - HIGH RISK USES

Fujitsu Products are designed, developed, and manufactured as contemplated for general use, including without limitation, general office use, commercial use, and ordinary industrial use. Fujitsu Products are not designed for use in circumstances that require extremely high-level safety precautions that may involve catastrophic property damage or that could lead directly to death or severe personal injury (“High Risk Uses”) including, without limitation, uses in connection with control of nuclear reactions, aircraft and satellite flight and traffic control, mass transport control, medical treatment and life support systems, and aerospace and missile launch control in weapon systems. Customer shall not use Fujitsu Products for High Risk Uses. Fujitsu disclaims liability for the use of Fujitsu products in High Risk Use applications. Parties using Fujitsu Products for use in High Risk Use applications do so at their own risk and agree to fully indemnify and hold harmless Fujitsu for any damages resulting from such improper use.

SECTION 11 - LICENSED INTERNAL CODE

Equipment contains internal system code (“Licensed Internal Code”) that executes below the external user interface and which is integral to the operation of the Equipment. Fujitsu, or its suppliers, own all copies of Licensed Internal Code. Fujitsu hereby grants Customer, only for so long as Customer shall have use of the Equipment, a non-exclusive license to use Licensed Internal Code as part of the normal operation and maintenance of the Equipment. Customer shall not otherwise copy, print, or alter or under any circumstances reverse assemble, decode or translate Licensed Internal Code.

SECTION 12 – SOFTWARE USAGE

All Software provided to Customer is proprietary to Fujitsu or is distributed by Fujitsu pursuant to applicable distribution agreements between Fujitsu and various third party software manufacturers and vendors. Customer’s use of third party Software may be subject to terms and conditions of a separate sublicense agreement or the licensor’s end user license agreement. Such terms and conditions shall govern Customer’s use of third party Software.

Customer shall have the limited right to use the Software for the Evaluation Period on a single computer. Customer may use the Programs solely for its own internal evaluation and testing. THE EVALUATION SOFTWARE SHOULD NOT BE USED FOR PRODUCTION USE OR WITH LIVE DATA. No copies of the Software shall be made without Fujitsu’s prior written consent. Customer shall not:
(a) remove any product identification, copyright or proprietary notices, or other restrictions from the Software;
(b) use the Software for commercial purposes;
(c) transfer, sell, assign or otherwise convey the Software to another party;
(d) cause or permit reverse engineering, disassembly, or decompilation of the Software;
(e) disclose results of any benchmark tests of the Software to any third party without Fujitsu’s prior written approval;
(f) disclose the Software or any information regarding the functionality of the Software to any third party; or
(g) allow anyone other Customer or its employees to have access to, use or observe the operation of the Software.

The Software is protected by copyright and other intellectual property laws. Customer acquires only the right to use the Software as provided herein and does not acquire any rights, express or implied, in the Software or media containing the Software. Fujitsu, or its licensor, shall at all times retain all rights, title, interest, including intellectual property rights in the Software and media.

SECTION 13 - GENERAL

This Agreement states the full understanding of the Customer and Fujitsu regarding Customer’s use of the Products. This Agreement and all disputes arising hereunder will be governed by California law without reference to any terms applying to conflicts of laws and shall be settled by binding arbitration before one arbitrator from the American Arbitration Association. The prevailing party in any dispute shall be entitled to its reasonable attorney’s fees and other costs of suit.
EXHIBIT 1
TERMS AND CONDITIONS OF PURCHASE

A1. DEFINITIONS

A1.1 EQUIPMENT. “Equipment” means the hardware products specified on the applicable Order Form.

A1.2 SOFTWARE. “Software” means the Software specified on the applicable Order Form including its associated documentation related to its operation. “Software” also means any customizations, modifications, updates, or derivative works developed by Fujitsu for Customer.

A1.3 SERVICES. “Services” means any of Equipment Maintenance Services, Software Support and Maintenance Services, Professional Services, or any other services that may be performed pursuant to an Attachment subsequently added hereunder, as specified on the applicable Order Form.

A2. PAYMENT TERMS

A2.1 PAYMENT. Unless otherwise provided elsewhere in this Agreement, payments are due, and Customer shall make payment, without deduction or setoff, in United States Dollars no later than thirty (30) days from the date of Fujitsu’s invoice. Fujitsu reserves the right to revoke credit extended to Customer at any time for good cause. If Customer fails to make payment when due and the failure continues for a period of ten (10) days after Fujitsu notifies Customer in writing of the failure, in addition to any other rights or remedies that it may have at law, in equity or otherwise under this Agreement, Fujitsu may refuse to perform any further obligations and the supply of Equipment, Software, and/or Services hereunder may be suspended by Fujitsu or terminated as permitted under Section A9.2 herein. Fujitsu may charge Customer interest on overdue amounts from the date the amount became due at the lesser of the rate of one and one-half percent (1-1/2%) per month or the maximum interest rate permitted by applicable law.

A2.2 TAXES; DUTIES; FREIGHT. Customer shall pay all applicable taxes (including Value Added Tax, sales taxes, use taxes, duties and any other taxes), rates or governmental levies that are payable in connection with the sale or supply of Equipment, Software and/or Services under this Agreement, excluding taxes on Fujitsu’s income. For international transactions, payments shall be made free of any tax withholding. If any tax withholding is due on payments under this Agreement, the tax shall be an additional cost for Customer who shall promptly provide Fujitsu with a certificate of taxes paid. Customer shall pay transportation, customs, duties and freight charges from Fujitsu’s point of shipment in the United States.

A2.3 RETENTION OF SECURITY INTEREST. As collateral for the payment by Customer of all amounts due to Fujitsu for a given unit of Equipment or Software purchased under this Agreement, Customer conveys and grants to Fujitsu a purchase money security interest in all of Customer’s right, title and interest in and to such unit of Equipment or Software and in applicable proceeds (including accounts receivable) thereof. At Fujitsu’s request, Customer shall execute any instrument required to perfect the security interest. Fujitsu is authorized to file or record, without Customer’s signature, this Agreement, or copy thereof, or any applicable financing statement showing Fujitsu’s interest in such unit of Equipment or Software. If Customer defaults on its payment obligations to Fujitsu under this Agreement or any Order Form with respect to such unit of Equipment or Software, Fujitsu will be entitled to exercise all rights of a secured creditor with respect to such unit of Equipment or Software under the Uniform Commercial Code or other applicable law.

A3. INDEMNIFICATION

A3.1 Each Party (for purposes of this Section A3.1, the “Indemnifying Party”) agrees to indemnify and hold harmless the other Party (for purposes of this Section A3.1, the “Indemnified Party”) from and against damages, costs and expenses (including reasonable attorneys fees) awarded against the Indemnified Party by an arbitrator or a court pursuant to an award or final judgment as a result of, and defend the Indemnified Party against, any claim of death, bodily injury, or physical damage to real or tangible personal property (excluding software, data and documentation) by third parties, to the extent caused directly by the negligence or willful misconduct of the Indemnifying Party.

A3.2 INTELLECTUAL PROPERTY RIGHTS INDEMNIFICATION. Each Party (for purposes of this Section A3.2, the “Indemnifying Party”) agrees to indemnify and hold harmless the other Party (for purposes of this Section A3.2, the “Indemnified Party”) from and against damages, costs and expenses (including reasonable attorneys fees) awarded against the Indemnified Party by an arbitrator or a court pursuant to an award or final judgment as a result of, and defend the Indemnified Party against, any claim that:
(i) with respect to Customer being the Indemnified Party, Fujitsu brand Equipment sold or Software licensed by Fujitsu, or
(ii) with respect to Fujitsu being the Indemnified Party, Fujitsu’s possession, use or...
modification of any software, documentation, data or other property provided by Customer or any Customer designs or specifications

infringes, misappropriates or violates any United States patent, copyright or other intellectual property right of a third party.

Fujitsu shall have no liability to Customer under this Section A3.2 to the extent the claim or award is based on (i) the use of such Equipment or Software in combination with equipment, software or services not supplied by Fujitsu; (ii) the use of such Equipment or Software in a manner other than according to the product documentation and the terms of this Agreement; (iii) modifications to such Equipment or Software made by persons other than Fujitsu personnel; (iv) third party software or equipment; (vi) use of a version of Software which has been superseded by a version that Fujitsu reasonably believes is non-infringing; or (vi) Customer’s design or specifications.

A3.3 MODIFICATION BY FUJITSU. If any Fujitsu-brand Equipment or Software becomes the subject of a claim under A3.2 above or in Fujitsu’s opinion is likely to become the subject of such a claim, Fujitsu may, at its sole option and expense, (i) procure for Customer the right to continue using such Equipment or Software; (ii) modify such Equipment or Software so as to avoid the infringement or misappropriation; (iii) replace such Equipment or Software with a functionally similar version, provided that Customer ceases the use of the Equipment or Software in question, or (iv) refund the Equipment purchase price or Software License charges paid to Fujitsu by Customer for such Equipment or Software less an amount for depreciation or amortization based on a five year straight line depreciation or amortization schedule, provided Customer ceases using and returns such Equipment or Software to Fujitsu.

A3.4 Section A3 states Fujitsu’s entire liability under this Agreement or otherwise with respect to infringement, misappropriation or violation of copyrights, patents and all other intellectual property rights.

A3.5 In the event of any third party claim or action for which the Indemnified Party is entitled to seek indemnification under this Section A3, (a) the Indemnified Party shall promptly notify the Indemnifying Party of the claim; (b) the Indemnifying Party may, at its option, elect to assume control of the defense and settlement of the claim; (c) the Indemnified Party shall provide the Indemnifying Party with assistance in the defense as the Indemnifying Party reasonably requests and (d) the Indemnified Party shall not incur costs or expenses for the Indemnifying Party’s account without the Indemnifying Party’s prior written consent.

A4. EXPORTS. Customer acknowledges that Equipment, Software and/or Services provided hereunder may be subject to export control laws and regulations of the United States and other countries. Customer is responsible for compliance with all applicable export control laws and regulations. Customer represents that it will not export, re-export, or transfer indirectly or directly any Equipment, Software and/or Services provided by Fujitsu to a destination outside of the United States without obtaining proper authorization from the applicable government agencies. Furthermore, Customer will not export, re-export, or transfer directly or indirectly any said Equipment, Software and/or Services either (i) to an embargoed/terrorist supporting country, including without limitation to Cuba, Iran, North Korea, Syria, Sudan, or any other such country as determined by the US government, (ii) to a person or entity barred by the US Government on export activity lists, including without limitation to persons or entities on the Treasury Department Specially Designated National List, Entities List, and Denied Persons List or (iii) to any destination for a prohibited end use. Customer agrees to defend and hold Fujitsu harmless against all claims, damages or liability resulting from breach of the foregoing.

A5. WARRANTY DISCLAIMER. THE WARRANTIES PROVIDED IN THIS AGREEMENT ARE IN LIEU OF, AND FUJITSU EXPRESSLY DISCLAIMS, ALL OTHER WARRANTIES, EXPRESS, IMPLIED OR STATUTORY, INCLUDING WITHOUT LIMITATION, IMPLIED WARRANTIES OF TITLE, NON-INFRINGEMENT, MERCHANTABILITY AND FITNESS FOR ANY PARTICULAR PURPOSE; AND THOSE ARISING BY STATUTE OR OTHERWISE IN LAW FROM A COURSE OF DEALING OR USE OR TRADE. FURTHER FUJITSU DOES NOT WARRANT IN ANY MANNER ITS EQUIPMENT OR SOFTWARE FOR ANY HIGH RISK USES AS DESCRIBED IN SECTION A9.12.

A6. LIMITATION OF LIABILITY.

A6.1 Fujitsu’s liability for any and all claims, including, without limitation, claims based in contract, in tort (including but not limited to negligence and strict liability), at law or in equity shall not exceed the following, as applicable:

(a) Customer-paid fees for the applicable unit of Equipment that directly relate to the claim;
(b) Customer-paid license fees for applicable Software that directly relate to the claim; or
(c) Customer-paid fees for Equipment Maintenance Services or Software Support and Maintenance Services on the applicable unit of Equipment or Software for the twelve (12) months before the occurrence that directly relates to the claim; or
(d) with respect to Professional Services, the total fees paid by Customer for such Professional Services during the preceding six (6) month period under the applicable Order Form to which such liability relates.

A6.2 Fujitsu shall have no responsibility or liability for equipment, software or services supplied by persons other than Fujitsu or for modifications to any Equipment or Software that are made by persons other than Fujitsu personnel.

A6.3 IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY PUNITIVE, INCIDENTAL, SPECIAL, INDIRECT, OR CONSEQUENTIAL DAMAGES (INCLUDING, BUT NOT LIMITED TO, LOSS OF USE, LOSS OF DATA, LOSS OF BUSINESS AND LOSS OF PROFITS (OTHER THAN WITH RESPECT TO THE PAYMENTS OWING TO FUJITSU) ARISING UNDER OR IN CONNECTION WITH THIS AGREEMENT, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE LIMITATION OF DAMAGES AND REMEDIES AS PROVIDED IN THIS SECTION A6 CONSTITUTE CUSTOMER’S SOLE AND EXCLUSIVE REMEDIES AND MEASURE OF DAMAGES.

A7. EMPLOYEES. During the term of the applicable Order Form in which Fujitsu renders any Services thereunder and, for the twelve (12) months thereafter, neither party shall, directly or indirectly, solicit for employment or engagement or employ or engage, whether as an employee or independent contractor, or accept services provided by, any employee, officer or independent contractor of the other party who performed any work in connection with or related to the Services under such Order Form. The Parties agree that they do not have an adequate remedy at law in the enforcement of this Section’s provisions, and agree that, in addition to any other remedies to which the non-breaching Party may be legally entitled, the provisions of this Section may be enforced by injunctive relief.

A8. CONFIDENTIAL INFORMATION. In the event the Parties have separately executed a non-disclosure agreement (“NDA”) apart from this Agreement, which in intended to encompass disclosures made in the performance of this Agreement, the provisions of such NDA shall prevail over this Section A8.

Each Party (in such instance, the “Receiving Party”) agrees to protect from disclosure any business and technical information of the other Party (in such instance, the “Disclosing Party”) disclosed or made available to it which in the exercise of reasonable judgment, should be recognized by the Receiving Party as confidential (“Confidential Information”) by using the same degree of care Receiving Party uses to protect its own proprietary information similar in nature, but not less than a reasonable degree of care. Receiving Party shall not disclose Confidential Information to any person other than directors, officers, employees and consultants of Receiving Party or of its parent companies or affiliates (affiliates being entities under common control and ownership with Receiving Party) who have a need to know the Confidential Information, who are informed by Receiving Party of the confidential nature of the Confidential Information and who are bound by obligations of confidentiality either by written agreement or by professional duty of confidence. Confidential Information disclosed under this Agreement may be used by the Receiving Party solely for the purpose of performing its obligations under this Agreement and shall not use it for any other purpose. The obligation of confidentiality shall not apply to information which;

(a) is or becomes part of the public domain through no fault of the Receiving Party;
(b) becomes known or available to the Receiving Party without restriction from a source other than the Disclosing Party or without breach of any agreement with the Disclosing Party;
(c) is disclosed with prior written approval of the Disclosing Party;
(d) is independently developed by the Receiving Party without the use of any Confidential Information of the Disclosing Party; or
(e) is previously known to the receiving Party on a non-confidential basis.

The Receiving Party may disclose Confidential Information of the Disclosing Party to the extent disclosure is required by court order or government agency, in which case, the Receiving Party will give the Disclosing Party as much notice as is reasonably practical so that the Disclosing Party may seek a protective order or other confidential protection. The Receiving Party will reasonably cooperate with the Disclosing Party, at the Disclosing Party’s expense, in the Disclosing Party’s efforts to obtain an order or protection.
A9. GENERAL

A9.1 CHANGE CONTROL. Customer may at any time request and Fujitsu may at any time recommend change(s) to the Services in an Order Form. Each Party’s requested or recommended change(s) shall be addressed in writing to the other Party’s project manager. Fujitsu will advise Customer in writing of the likely impact of any requested or recommended change(s) to the price or schedule and the Parties shall negotiate in good faith a change order to reflect such change request. Neither Party will be obligated to agree to any change order; and until any change is formally agreed to in writing and signed by the Parties, subject to any of its other rights set forth in the Agreement, Fujitsu will continue to perform and be paid for Services as if the change(s) had not been requested or recommended. Change orders that have been fully executed by the Parties will become supplements to the applicable Order Form.

A9.2 INDEPENDENT CONTRACTOR. Fujitsu is, and shall act as, an independent contractor and not as an agent or employee of Customer. Neither this Agreement, nor its terms or conditions, shall be construed as creating a partnership, joint venture, agency or franchise relationship between the Parties.

A9.3 TERMINATION. Either Party may terminate its performance under one or more Order Forms issued hereunder in the event of the other Party’s breach of any material duty or obligation under the applicable Order Form(s); and such other Party fails to cure such breach within thirty (30) days following receipt of written notice from the non-breaching Party with the particularities of such breach (or if such breach reasonably cannot be cured in thirty (30) days, such longer period of time as may be reasonably necessary to effect such cure if the defaulting party furnishes to the non-defaulting party within such thirty (30) day period a feasible plan demonstrating that it is capable of curing the breach and diligently proceeds to implement such plan to completion).

A9.4 ASSIGNMENT. Neither Party shall assign or transfer this Agreement, even in connection with or as a result of any merger, sale, acquisition or dissolution, without the other Party’s prior written consent; provided, however, that an assignment or transfer to an entity which is under common control and ownership with the Party making such assignment or transfer shall be deemed accepted upon written notice without the need of the other Party's prior written consent.

A9.5 NOTICES. All notices under this Agreement must be in writing and sent by certified mail, postage prepaid, return receipt requested or commercially acceptable overnight delivery service. Notices shall be addressed to the Parties at their respective addresses under this Agreement or at another address as specified in writing by either Party. Notices shall be deemed given upon receipt or refusal.

A9.6 INTEGRATION; ENTIRE AGREEMENT. This Agreement together with any attachments, exhibits, Order Forms and addenda is the complete agreement between the Parties with respect to its subject matter and supersedes all representations, promises, quotes and proposals, whether oral or written, between the Parties; provided, that any pre-existing non-disclosure or confidentiality agreement executed by the Parties shall continue in force. Any terms and conditions in any Customer order or other communication shall be without effect. Unless otherwise explicitly agreed in writing by the Parties, all orders placed by Customer are subject to the terms and conditions of this Agreement regardless of how or in what form the orders are placed. Additionally, any Customer purchase order is subject to acceptance or rejection by Fujitsu, provided, that Fujitsu’s acceptance or rejection shall be promptly communicated to Customer. To the extent there are any conflicts or inconsistencies between this Attachment A and any other Attachment hereto, the provisions of such other Attachment shall govern and control. To the extent there are any conflicts or inconsistencies between any Attachment to this Agreement and any Order Form, the provisions of the Order Form shall govern but only with respect to such Order Form. This Agreement may be modified only by written instrument executed by both Parties.

A9.7 WAIVER. No terms or conditions under this Agreement shall be deemed waived and no breach or default excused unless the waiver or excuse is in writing and signed by the Party to be charged.

A9.8 THIRD PARTY SERVICE. Fujitsu reserves the right to provide services under this Agreement through Fujitsu-authorized dealers, Fujitsu-authorized service companies and Fujitsu affiliates.

A9.9 ACCESS; FACILITIES. Customer shall provide Fujitsu with reasonable access to Customer facilities, network, equipment, and software at all reasonable times to provide applicable services. Customer, at its own expense, shall make available to Fujitsu appropriate staff who are familiar with Customer’s equipment, network, software and/or applications, and shall provide suitable working space, reasonable communication privileges, including internet access, and other facilities as Fujitsu reasonably requires. Customer will, at its expense, provide onsite high speed data line access and cabling as Fujitsu reasonably requires to provide the applicable services.

Fujitsu Control No.:__________
Customer shall keep available to Fujitsu the latest issue of software used by Customer.

A9.10 NEGOTIATED AGREEMENT. The Parties agree that the terms and conditions of this Agreement are the result of negotiations between the parties and that this Agreement shall not be construed in favor of or against any Party by reason of the extent to which any Party or its professional advisors participated in the preparation of this Agreement.

A9.11 DISPUTE RESOLUTION. Any controversy arising out of or relating to this Agreement shall be settled before one arbitrator by binding arbitration in Dallas, Texas under the auspices of the American Arbitration Association ("AAA"), in accordance with the AAA’s Commercial Arbitration Rules then in effect. Any claim must be brought within eighteen (18) months of when the claim first arose or it shall be deemed waived. The prevailing party in any arbitration or other legal proceeding (including an action to enforce the arbitrator’s award) shall be entitled, in addition to any other rights or remedies it may have, to reimbursement of all reasonable costs and expenses incurred thereby, including reasonable attorneys’ fees, arbitrator’s fees, and witness fees including those of expert witnesses. Nothing in this Agreement limits the right of either Party to apply to a court or other tribunal having jurisdiction to: (a) enforce the provisions of this Section A9.11; (b) seek provisional or temporary injunctive relief, in response to an actual or impending breach of Section A7 or A8 of this Agreement or otherwise so as to avoid irreparable damage or maintain the status quo, until a final arbitration decision or award is rendered or the dispute is otherwise resolved; (c) challenge or vacate any final arbitration decision or award that is prohibited by this Agreement or applicable law or (d) enforce the arbitrator’s award.

A9.12 THIRD PARTY SOFTWARE. Certain software supplied by Fujitsu may be licensed from third parties. Customer’s use of third party software may be subject to terms and conditions of a separate sublicense agreement or the licensor’s end user license agreement. Such terms and conditions shall govern Customer’s use of third party software.

A9.13 HIGH RISK USES. Customer understands and agrees that the Fujitsu Equipment, Software and Services purchased hereunder are designed and manufactured as contemplated for general use, including without limitation, general office use, personal use and household use, general industrial use, and are not designed, manufactured as contemplated for use, which requires extremely high safety, accompanying fatal risks or dangers that, unless extremely high safety is secured could lead directly to death or severe physical damage ("High-Safety Required Use"), including without limitation, nuclear power core control at nuclear power plant, airplane automatic flight control system, air traffic control, mass transport operation control, medical equipment for life-support system, missile launching control of weapon system. Customer shall not use the products purchased hereunder for any High-Safety Required Use without taking any required measures for the High-Safety Required Use securing the sufficient safety required for such use. In addition, Fujitsu shall not be liable to Customer and/or any third party for any claims or damages arising in connection with the High-Safety Required Use of any product purchased under this Agreement and Customer agrees to fully indemnify and hold harmless Fujitsu for any damages resulting from such improper use.

A9.14 REFERENCES/MARKETING. Fujitsu shall have the right to utilize Customer’s name in proposals, customer listings, web sites and other marketing materials solely to indicate that Customer is or has been a customer of Fujitsu. In all other matters, upon Fujitsu’s reasonable request, Customer shall cooperate and provide Fujitsu with reasonable assistance with marketing activities undertaken by Fujitsu for products and services provided to Customer under this Agreement. Marketing assistance may include providing references, case studies, testimonials, and cooperating with the issuance of press releases. Except as set forth herein, each Party will obtain the other Party’s prior approval, which approval shall not be unreasonably withheld, before using the other Party’s name, logos or trademarks in any marketing material.

A9.15 FORCE MAJEURE. Fujitsu will not be liable for any delay or for failure to perform its obligations under this Agreement resulting from any cause beyond Fujitsu’s reasonable control, including but not limited to: Customer’s failure to timely supply Fujitsu with necessary data, information or specifications; any changes in data, information or specifications made by Customer; third party equipment manufacturer design defects, flaws or errors; acts of God; Internet blackouts or brownouts; severe weather; fire; explosions; floods; strikes; work stoppages; slowdowns or other industrial disputes; accidents; riots or civil disturbances; acts of war, sabotage or terrorism; dangerous conditions which present a threat to the safety or health of Fujitsu personnel; acts of government; inability to obtain any license or consent necessary in respect of any third party software; and delays by suppliers or material shortages. Scheduled performance dates shall be extended for these causes.

A9.16 GOVERNING LAW. This Agreement, including related disputes, shall be governed by the laws of the State of Texas without regard to principles on conflicts of law.
The Parties agree to exclude, in its entirety, the application of the United Nations Convention on Contracts for the International Sale of Goods.

A9.17 SEVERABILITY. If the scope of any provision of this Agreement is too broad to permit enforcement to its full extent, then such provision shall be enforced to the maximum extent permitted by law, and the scope may be judicially modified to the extent necessary to conform to law. Any term or provision of this Agreement which is invalid or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such invalidity or unenforceability without rendering invalid or unenforceable the remaining terms and provisions of this Agreement or affecting the validity or enforceability of any of the terms or provisions hereof in any other jurisdiction.

A9.18 SURVIVAL. The expiration or earlier termination for any reason of all or part of this Agreement shall not affect the other provisions that are expressly or by implication intended to come into force or continue in force on or after the expiration or earlier termination, including but not limited to the provision of Sections A2, A3, A6, A7 and A8.

A9.19 HEADINGS. Headings in this Agreement are for reference only, and have no effect on any provision’s meaning.

A9.20 COUNTERPARTS. This Agreement (and any Order Forms) may be signed in counterparts, each of which shall be deemed an original, but both of which taken together shall constitute one and the same instrument. To expedite order processing, the Parties agree that the other party may treat documents faxed or scanned as original documents; nevertheless, either Party may require the other to exchange original signed documents.

Terms & Conditions Applicable to Equipment

B1. PURCHASE AND SALE. Fujitsu shall sell and Customer shall purchase Equipment in the quantities and at the prices stated on the applicable Order Form.

B2. DELIVERY AND INSTALLATION

B2.1 DELIVERY. Unless otherwise specified by Customer, Fujitsu shall arrange for shipment of Equipment to Customer’s premises. Title to and risk of loss of and damage to Equipment shall pass to Customer upon delivery to the common carrier by Fujitsu.

B2.2 DELIVERY SCHEDULE. Equipment shall be delivered on or about the dates stated on the Order Form.

All orders of Equipment are firm; however, Customer and Fujitsu shall each have the right to delay originally scheduled delivery dates by up to thirty (30) days provided that the Party desiring delay gives the other Party written notice of the delay not later than thirty (30) days before the originally scheduled delivery date.

B2.3 STORAGE. Customer-requested storage of Equipment by Fujitsu will be subject to Fujitsu’s then-current storage and warehousing rates and policies.

B2.4 SUBSTITUTE. Fujitsu may make Equipment substitutions or modifications if the substitutions or modifications are substantially equivalent or better in performance and capabilities to Equipment originally ordered.

B2.5 INSTALLATION. Equipment installations performed by Fujitsu shall be at the designated locations and at the rates and times stated on the Order Form. Standard installations are performed between 8:00 a.m. and 5:00 p.m. local time, Monday through Friday (excluding Fujitsu designated holidays). The “Equipment Installation Date” is defined as the day after Fujitsu installs the unit of Equipment in question and it passes Fujitsu installation tests. If Equipment is not installed by Fujitsu, the Equipment Installation Date is defined as fifteen (15) days after the unit of Equipment is shipped to Customer.

B2.6 SITE PREPARATION. Customer shall, at its expense and before the installation date, install all cabling, electrical and communications wiring and otherwise prepare the designated locations for Equipment installation.

B3. EQUIPMENT WARRANTY.

B3.1 WARRANTY. Fujitsu warrants each unit of Equipment to be new or like-new and to be free from defects in material and workmanship under normal use and operating conditions for ninety (90) days after the applicable Equipment Installation Date, or such other warranty period as may be indicated on the Order Form. During the warranty period, Fujitsu shall perform Warranty Service as defined in Section B3.2.

B3.2 EQUIPMENT WARRANTY SERVICE. Equipment Warranty Service (“Warranty Service”) consists of repairs, replacements, and adjustments in the United States as are necessary to maintain Equipment in compliance with applicable specifications under normal use and operating conditions. If Customer has contracted for on-site Equipment Maintenance for the Equipment, then Warranty Service shall also be performed on-site. Otherwise, Warranty Service shall be performed at
Fujitsu’s designated depot; and Customer shall, at its expense, deliver Equipment to such depot, properly packed and with a description of the issue to be resolved, in reasonable detail. Upon receipt of Equipment, Fujitsu will evaluate the need for service. If Fujitsu determines the need for service is not covered by Warranty Service, Fujitsu shall promptly notify Customer to verify if Customer desires Fujitsu to perform the repairs. If Customer does not desire Fujitsu to perform non-warranty repairs, Fujitsu will return the unrepairable Equipment to Customer at Customer’s expense. Fujitsu shall return repaired Equipment to Customer at Fujitsu’s expense. Customer assumes the risk of loss of and damage to Equipment while in transit. To facilitate on-site Warranty Service, Customer must promptly notify Fujitsu in writing of any changes in site location of Equipment under warranty.

B3.3 EXCLUSIONS TO EQUIPMENT WARRANTY SERVICE.

B3.3.1 Equipment Warranty Service does not include repairs, replacement, adjustments, or increased service time required as a result of (a) improper installation (unless installation is made by Fujitsu or its authorized representatives); (b) failure to operate Equipment according to the applicable end user manual; c) misuse or abuse; d) negligence; e) accident; f) modifications, alterations, attachments or services made by persons other than Fujitsu personnel or authorized representatives; g) use of equipment, programs or accessories with the Equipment that have not been approved by Fujitsu or Equipment manufacturer; h) failure to use supplies or materials meeting Fujitsu’s or the Equipment manufacturer’s approval; or i) third party vendors’ design flaws or errors.

Equipment Warranty Service does not include the following: a) installations or de-installations; b) help desk support; c) service time if no failure is found at the site; d) software support and maintenance; e) preventive maintenance; f) the repair or replacement of non-defective cables; g) modifications due to government requirements (i.e. currency changes, weights/measures changes, etc.); or h) low voltage, high voltage or telecommunication lines. Customer shall supervise, data transmission speed specifications, if any, is subject to limitations imposed on the use of telecommunications lines by the entity furnishing the lines and to the availability of telecommunications equipment and lines.

B3.3.2 Equipment added to this Agreement may be subject to Fujitsu’s prior inspection and certification at its then current rates. Fujitsu reserves the right to charge Customer at Fujitsu’s then-current rates for consumable or expendable parts required by Customer.

B4. LICENSED INTERNAL CODE. Equipment contains internal system code ("Licensed Internal Code") that executes below the external user interface and which is integral to the operation of the Equipment. Fujitsu, or its suppliers, owns all copies of Licensed Internal Code. Fujitsu hereby grants Customer, only for so long as Customer shall use the Equipment, a non-exclusive license to use Licensed Internal Code as part of the normal operation of the Equipment. Customer shall not copy, print, or alter or under any circumstances reverse assemble, decode or translate Licensed Internal Code. Customer is permitted to transfer Licensed Internal Code only in conjunction with and as part of the sale of the Equipment to a third party. Customer agrees that these provisions shall also apply to any copies of Licensed Internal Code in equipment it acquires from third parties.

B5. DIAGNOSTIC MATERIALS. Fujitsu may lend to Customer “Diagnostic Materials” which may include diagnostic and test routines, software, manuals, documentation and data. Diagnostic Materials are not the subject of any license granted to Customer for its own use but shall be stored at Customer’s site as an aid to carry out services by Fujitsu. Customer shall use Diagnostic Materials solely in the manner and for the purposes specified by Fujitsu and shall follow Fujitsu’s advice for their use. Customer shall keep Diagnostic Materials, including the results obtained by their use, confidential and shall not disclose same to any third party. Customer shall permit Fujitsu at all reasonable times to audit the use of Diagnostic Materials and to remove Diagnostic Materials. Under no circumstances may Customer provide such Diagnostic Materials to any third party, other than Fujitsu Authorized Support Providers (ASP) as directed or allowed by Fujitsu.

B6. DATA TRANSMISSION. The ability of Equipment to meet its data transmission speed specifications, if any, is subject to limitations imposed on the use of telecommunications lines by the entity furnishing the lines and to the availability of telecommunications equipment and lines.

B7. CARE AND USE. Customer shall use Equipment in accordance with the applicable product description and operator’s and/or user’s manual. Customer shall supervise, manage and control the proper use of Equipment (including routine Customer maintenance that Fujitsu reasonably specifies) according to the terms of this Agreement. Customer shall ensure that properly trained staff use Equipment and follow related advice and recommendations from Fujitsu. Customer is responsible for all backup, disaster recovery, restart procedures, checks for accuracy, and security of data.

B8. INTELLECTUAL PROPERTY RIGHTS. Copyright, patent rights, database rights, trademarks,
service marks and other intellectual property rights in Equipment, or other items supplied by Fujitsu under this Agreement, will remain Fujitsu’s property or its licensor’s property unless otherwise explicitly agreed to in writing by the Parties. Customer shall follow all reasonable instructions that Fujitsu gives with regard to use of Fujitsu’s or its licensors’ intellectual property, which may include, without limitation, instructions pertaining to notice of ownership rights.

Terms and Conditions Applicable to Software

C1. LICENSE GRANT.

C1.1 LICENSE. In consideration of the payment by Customer of the Software License charges stated on the Order Form, and subject to Customer’s compliance with the Agreement’s terms and conditions, Fujitsu grants to Customer a nontransferable, perpetual and nonexclusive license ("License") to use the Software in object code form only for Customer’s internal use.

C1.2 LIMITATIONS ON USE. Customer will use Software for its internal use only, according to the terms of this Agreement, and for no other purpose. Customer may only use copies of Software for which License charges have been paid to Fujitsu. Customer shall not (a) use Software to process the data of third parties or in a manner other than for its own internal use; (b) reproduce Software except as provided in Section C1.3; or (c) modify, sublicense, sell, rent, transfer or otherwise distribute Software.

C1.3 COPIES. Customer may make a reasonable number of copies of Software for archival and security purposes. No other copies of Software may be made by Customer without Fujitsu’s prior written consent. Customer may not use a copy of the Software for cold or hot stand-by purposes on another machine without the written consent of Fujitsu and payment of any applicable license fees. Customer may make a reasonable number of copies of any documentation delivered to Customer in connection with a Software License if the copies are for Customer’s internal use only. Customer shall reproduce the Fujitsu copyright and other proprietary notices on any and all copies of Software and documentation made by Customer.

C2. DELIVERY OF SOFTWARE. Fujitsu shall provide to Customer an executable copy of Software licensed under this Agreement either electronically or via a storage medium at Customer’s option. Where customer elects a storage medium, Fujitsu shall arrange for shipment of Software to Customer unless otherwise agreed in writing by Fujitsu and Customer. Risk of loss of and damage to Software media will pass to Customer on delivery of Software by Fujitsu to the common carrier. Customer will pay applicable Software transportation and freight charges.

C3. INSTALLATION OF SOFTWARE. Responsibility for installation of Software shall be as agreed by the Parties in writing or as specified in an applicable documentation. Software installation performed by Fujitsu shall be at Fujitsu's then current T&M rates unless otherwise agreed on the Order.

C4. SOFTWARE WARRANTY. Fujitsu warrants that if within ninety (90) days after Software is first delivered to Customer it is reported to Fujitsu that Software does not conform to its specifications as set forth in its documentation. Fujitsu shall use commercially reasonable efforts to remedy such non-conformance by way of error correction or avoidance action. The error correction or avoidance action shall be delivered to Customer as is appropriate under the circumstances. Due to the nature of Software, no guarantee is given of uninterrupted or error free operation or that all errors will be rectified by error correction or avoidance action. The Software warranty does not include error correction or avoidance action due to:

(i) the use of Software in combination with third party equipment or software that do not meet Fujitsu’s written approval;
(ii) the use of Software in combination with services not supplied by Fujitsu or Fujitsu’s authorized representative;
(iii) the use of Software in a manner other than according to its product description and the terms of this Agreement;
(iv) modifications to Software made by persons other than Fujitsu; or
(v) design or specifications provided by Customer.

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C5. PROPRIETARY RIGHTS. Software is proprietary to Fujitsu. All applicable common law and statutory rights in Software, including but not limited to, rights in confidential and trade secret material, object code, source code, trademarks, service marks, patents and copyrights, will be Fujitsu’s sole property. To the extent Software contains third party software, the foregoing is subject to the rights of Fujitsu’s licensors and any other terms of this
Agreement or its Attachments. Third party licensors are deemed to be third party beneficiaries under this Agreement.

C6. LICENSE TERMINATION. Notwithstanding any language to the contrary under this Agreement, Fujitsu may terminate the Software License if Customer breaches its obligations under the Software License. Within five days of the Software License termination, Customer shall, as Fujitsu directs, return or destroy Software, including whole or partial copies in any and all forms, and shall certify to Fujitsu in writing that this action has been taken.

C7. CONFIDENTIAL INFORMATION; TRADE SECRETS. Customer acknowledges that Software is Fujitsu Confidential Information and may contain Fujitsu trade secrets. Customer must not disclose or make available Software, in whole or in part, to any person, in any form, except in confidence under a non-disclosure agreement and to facilitate Customer’s use. Customer shall not and shall not permit any third party to decompile, disassemble or reverse engineer the Software object code.

C8. REPORTS; AUDIT RIGHTS. Customer shall provide Fujitsu with an annual report in a mutually agreed format for purposes of verifying Software installations. Fujitsu may conduct an audit and/or inspection of applicable Customer records and facilities to verify Customer-issued reports, if applicable, and Customer’s compliance with the terms of this Agreement. The audit and/or inspection shall be conducted during normal business hours and at Customer’s facilities. Customer agrees to provide Fujitsu’s designated audit or inspection team access to relevant Customer records and facilities. Customer will immediately pay Fujitsu the full amount of any underpayment revealed by an audit and/or inspection plus interest from the date the payments were due according to Section A2.1.