

# GINICOE

## GINICOE LICENSE AND SERVICES AGREEMENT v053012

### A. Agreement Definitions

“You” and “your” refers to the individual or entity that has executed this agreement (“agreement”) and ordered programs and/or services from Ginicoe America, Inc. (“Ginicoe”) or an authorized distributor. The term “ancillary programs” refers to third party materials specified in the program documentation which may only be used for the purposes of installing or operating the programs with which the ancillary programs are delivered. The term “program documentation” refers to the program user manual and program installation manuals. The term “programs” refers to the software products owned or distributed by Ginicoe which you have ordered, program documentation, and any program updates acquired through technical support. The term “services” refers to technical support, education, hosted/outsourcing services, consulting or other services which you have ordered.

### B. Applicability of Agreement

This agreement is valid for the order which this agreement accompanies.

### C. Rights Granted

Upon Ginicoe’s acceptance of your order, you have the non-exclusive, non-assignable, royalty free, perpetual (unless otherwise specified in the ordering document), limited right to use the programs and receive any services you ordered solely for your internal business operations and subject to the terms of this agreement, including the definitions and rules set forth in the order and the program documentation. You may allow your agents and contractors (including, without limitation, outsourcers) to use the programs for this purpose and you are responsible for their compliance with this agreement in such use. For programs that are specifically designed to allow your customers and suppliers to interact with you in the furtherance of your internal business operations, such use is allowed under this agreement. If accepted, Ginicoe will notify you and this notice will include a copy of your agreement. Program documentation is delivered with the programs, or you may access the documentation online at <http://Ginicoe.com/contracts>. Services are provided based on Ginicoe’s policies for the applicable services ordered, which are subject to change, and the specific policies applicable to you, and how to access them, will be specified on your order (except technical support services, which are as specified in section H of this agreement). Upon payment for services, you have the non-exclusive, non-assignable, royalty free, perpetual, limited right to use for your internal business operations anything developed by Ginicoe and delivered to you under this agreement; however, certain deliverables may be subject to additional license terms provided in the ordering document.

The services provided under this agreement may be related to your license to use programs which you acquire under a separate order. The agreement referenced in that order shall govern your use of such programs. Any services acquired from Ginicoe are bid separately from such program licenses, and you may acquire either services or such program licenses without acquiring the other.

### D. Ownership and Restrictions

Ginicoe or its licensors retain all ownership and intellectual property rights to the programs. Ginicoe retains all ownership and intellectual property rights to anything developed and delivered under this agreement resulting from services. You may make a sufficient number of copies of each program for your licensed use and one copy of each program media.

Third party technology that may be appropriate or necessary for use with some Ginicoe programs is specified in the program documentation. Such third party technology is licensed to you under the terms of the third party technology license agreement specified in the program documentation and not under the terms of this agreement.

You may not:

- remove or modify any program markings or any notice of Ginicoe’s or its licensors’ proprietary rights;
- make the programs or materials resulting from the services available in any manner to any third party for use in the third party’s business operations (unless such access is expressly permitted for the specific program license or materials from the services you have acquired);
- cause or permit reverse engineering (unless required by law for interoperability), disassembly or decompilation of the programs (the foregoing prohibition includes but is not limited to review of data structures or similar materials produced by programs);

- disclose results of any program benchmark tests without Ginicoe's prior written consent.

#### **E. Warranties, Disclaimers and Exclusive Remedies**

Ginicoe warrants that a program licensed to you will operate in all material respects as described in the applicable program documentation for one year after delivery (i.e., via physical shipment or electronic download). You must notify Ginicoe of any program warranty deficiency within one year after delivery. Ginicoe also warrants that services will be provided in a professional manner consistent with industry standards. You must notify Ginicoe of any services warranty deficiencies within 90 days from performance of the deficient services.

**GINICOE DOES NOT GUARANTEE THAT THE PROGRAMS WILL PERFORM ERROR-FREE OR UNINTERRUPTED OR THAT GINICOE WILL CORRECT ALL PROGRAM ERRORS.**

**FOR ANY BREACH OF THE ABOVE WARRANTIES, YOUR EXCLUSIVE REMEDY AND GINICOE'S ENTIRE LIABILITY SHALL BE: (A) THE CORRECTION OF PROGRAM ERRORS THAT CAUSE BREACH OF THE WARRANTY; OR, IF GINICOE CANNOT SUBSTANTIALLY CORRECT SUCH BREACH IN A COMMERCIALY REASONABLE MANNER, YOU MAY END YOUR PROGRAM LICENSE AND RECOVER THE FEES YOU PAID TO GINICOE FOR THE PROGRAM LICENSE AND ANY UNUSED, PREPAID TECHNICAL SUPPORT FEES YOU HAVE PAID FOR THE PROGRAM LICENSE; OR (B) THE REPERFORMANCE OF THE DEFICIENT SERVICES; OR, IF GINICOE CANNOT SUBSTANTIALLY CORRECT A BREACH IN A COMMERCIALY REASONABLE MANNER, YOU MAY END THE RELEVANT SERVICES AND RECOVER THE FEES YOU PAID TO GINICOE FOR THE DEFICIENT SERVICES.**

**TO THE EXTENT NOT PROHIBITED BY LAW, THESE WARRANTIES ARE EXCLUSIVE AND THERE ARE NO OTHER EXPRESS OR IMPLIED WARRANTIES OR CONDITIONS INCLUDING WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.**

#### **F. Trial Programs**

You may order trial programs, or Ginicoe may include additional programs with your order which you may use for trial, non-production purposes only. You may not use the trial programs to provide or attend third party training on the content and/or functionality of the programs. You have 30 days from the delivery date to evaluate these programs. If you decide to use any of these programs after the 30 day trial period, you must obtain a license for such programs from Ginicoe or an authorized distributor. If you decide not to obtain a license for any program after the 30 day trial period, you will cease using and will delete any such programs from your computer systems. Programs licensed for trial purposes are provided "as is" and Ginicoe does not provide technical support or offer any warranties for these programs.

#### **G. Indemnification**

If a third party makes a claim against either you or Ginicoe ("Recipient" which may refer to you or Ginicoe depending upon which party received the Material), that any information, design, specification, instruction, software, data, or material ("Material") furnished by either you or Ginicoe ("Provider" which may refer to you or Ginicoe depending on which party provided the Material), and used by the Recipient infringes its intellectual property rights, the Provider, at its sole cost and expense, will defend the Recipient against the claim and indemnify the Recipient from the damages, liabilities, costs and expenses awarded by the court to the third party claiming infringement or the settlement agreed to by the Provider, if the Recipient does the following:

- notifies the Provider promptly in writing, not later than 30 days after the Recipient receives notice of the claim (or sooner if required by applicable law);
- gives the Provider sole control of the defense and any settlement negotiations; and
- gives the Provider the information, authority, and assistance the Provider needs to defend against or settle the claim.

If the Provider believes or it is determined that any of the Material may have violated a third party's intellectual property rights, the Provider may choose to either modify the Material to be non-infringing (while substantially preserving its utility or functionality) or obtain a license to allow for continued use, or if these alternatives are not commercially reasonable, the Provider may end the license for, and require return of, the applicable Material and refund any fees the Recipient may have paid to the other party for it and any unused, prepaid technical support fees you have paid to Ginicoe for the license. If you are the Provider and such return materially affects Ginicoe's ability to meet its obligations under the relevant order, then Ginicoe may, at its option and upon 30 days prior written notice, terminate the order. The Provider will

not indemnify the Recipient if the Recipient alters the Material or uses it outside the scope of use identified in the Provider's user documentation or if the Recipient uses a version of the Materials which has been superseded, if the infringement claim could have been avoided by using an unaltered current version of the Material which was provided to the Recipient. The Provider will not indemnify the Recipient to the extent that an infringement claim is based upon any information, design, specification, instruction, software, data, or material not furnished by the Provider. Ginicoe will not indemnify you to the extent that an infringement claim is based upon the combination of any Material with any products or services not provided by Ginicoe. Ginicoe will not indemnify you for infringement caused by your actions against any third party if the Ginicoe program(s) as delivered to you and used in accordance with the terms of this agreement would not otherwise infringe any third party intellectual property rights. Ginicoe will not indemnify you for any infringement claim that is based on: (1) a patent that you were made aware of prior to the effective date of this agreement (pursuant to a claim, demand, or notice); or (2) your actions prior to the effective date of this agreement. This section provides the parties' exclusive remedy for any infringement claims or damages.

## **H. Technical Support**

For purposes of the ordering document, technical support consists of annual technical support services you may have ordered for the programs. If ordered, annual technical support (including first year and all subsequent years) is provided under Ginicoe's technical support policies in effect at the time the services are provided. The technical support policies, incorporated in this agreement, are subject to change at Ginicoe's discretion; however, Ginicoe policy changes will not result in a material reduction in the level of services provided for supported programs during the period for which fees for technical support have been paid. You should review the policies prior to entering into the ordering document for the applicable services. You may access the current version of the technical support policies at <http://Ginicoe.com/contracts>.

Technical support is effective upon the effective date of the ordering document unless otherwise stated in your order. If your order was placed through the Ginicoe Store, the effective date is the date your order was accepted by Ginicoe.

Software Update License & Support (or any successor technical support offering to Software Update License & Support, "SULS") acquired with your order may be renewed annually and, if you renew SULS for the same number of licenses for the same programs, for the first and second renewal years the fee for SULS will not increase by more than 4% over the prior year's fees. If your order is fulfilled by a member of Ginicoe's partner program, the fee for SULS for the first renewal year will be the price quoted to you by your partner; the fee for SULS for the second renewal year will not increase by more than 4% over the prior year's fees.

If you decide to purchase technical support for any license within a license set, you are required to purchase technical support at the same level for all licenses within that license set. You may desupport a subset of licenses in a license set only if you agree to terminate that subset of licenses. The technical support fees for the remaining licenses will be priced in accordance with the technical support policies in effect at the time of termination. Ginicoe's license set definition is available in the current technical support policies. If you decide not to purchase technical support, you may not update any unsupported program licenses with new versions of the program.

## **I. End of Agreement**

If either of us breaches a material term of this agreement and fails to correct the breach within 30 days of written specification of the breach, then the breaching party is in default and the non-breaching party may terminate this agreement. If Ginicoe ends this agreement as specified in the preceding sentence, you must pay within 30 days all amounts which have accrued prior to such end, as well as all sums remaining unpaid for programs ordered and/or services received under this agreement plus related taxes and expenses. If Ginicoe ends the license for a program under the Indemnification section, you must pay within 30 days all amounts remaining unpaid for services related to such license plus related taxes and expenses. Except for nonpayment of fees, the non-breaching party may agree in its sole discretion to extend the 30 day period for so long as the breaching party continues reasonable efforts to cure the breach. You agree that if you are in default under this agreement, you may not use those programs and/or services ordered. You further agree that if you have used an Ginicoe Financing Division contract to pay for the fees due under an order and you are in default under that contract, you may not use the programs and/or services that are subject to such contract. Provisions that survive termination or expiration are those relating to limitation of liability, infringement indemnity, payment, and others which by their nature are intended to survive.

## **J. Fees and Taxes**

All fees payable to Ginicoe are due within 30 days from the invoice date. You agree to pay any sales, value-added or other similar taxes imposed by applicable law that Ginicoe must pay based on the programs and/or services you ordered, except

for taxes based on Ginicoe's income. Also, you will reimburse Ginicoe for reasonable expenses related to providing the services. Fees for services listed in an ordering document are exclusive of taxes and expenses. You agree that you have not relied on the future availability of any programs or updates in entering into the payment obligations in your ordering document; however, (a) if you order SULS for programs, the preceding sentence does not relieve Ginicoe of its obligation to provide updates under your ordering document, if-and-when available, in accordance with Ginicoe's then current technical support policies, and (b) the preceding sentence does not change the rights granted to you for any program licensed under your ordering document, per the terms of your ordering document and this agreement.

#### **K. Nondisclosure**

By virtue of this agreement, the parties may have access to information that is confidential to one another ("confidential information"). We each agree to disclose only information that is required for the performance of obligations under this agreement. Confidential information shall be limited to the terms and pricing under this agreement and all information clearly identified as confidential at the time of disclosure.

A party's confidential information shall not include information that: (a) is or becomes a part of the public domain through no act or omission of the other party; (b) was in the other party's lawful possession prior to the disclosure and had not been obtained by the other party either directly or indirectly from the disclosing party; (c) is lawfully disclosed to the other party by a third party without restriction on the disclosure; or (d) is independently developed by the other party.

We each agree to hold each other's confidential information in confidence for a period of three years from the date of disclosure. Also, we each agree to disclose confidential information only to those employees or agents who are required to protect it against unauthorized disclosure. Nothing shall prevent either party from disclosing the terms or pricing under this agreement or orders submitted under this agreement in any legal proceeding arising from or in connection with this agreement or disclosing the confidential information to a federal or state governmental entity as required by law.

#### **L. Entire Agreement**

You agree that this agreement and the information which is incorporated into this agreement by written reference (including reference to information contained in a URL or referenced policy), together with the applicable ordering document, are the complete agreement for the programs and/or services ordered by you, and that this agreement supersedes all prior or contemporaneous agreements or representations, written or oral, regarding such programs and/or services. If any term of this agreement is found to be invalid or unenforceable, the remaining provisions will remain effective and such term shall be replaced with a term consistent with the purpose and intent of this agreement. It is expressly agreed that the terms of this agreement and any Ginicoe ordering document shall supersede the terms in any purchase order or other non-Ginicoe document and no terms included in any such purchase order or other non-Ginicoe document shall apply to the programs and/or services ordered. This agreement and ordering documents may not be modified and the rights and restrictions may not be altered or waived except in a writing signed or accepted online through the Ginicoe Store by authorized representatives of you and of Ginicoe. Any notice required under this agreement shall be provided to the other party in writing.

#### **M. Limitation of Liability**

**NEITHER PARTY SHALL BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES, OR ANY LOSS OF PROFITS, REVENUE, DATA, OR DATA USE. GINICOE'S MAXIMUM LIABILITY FOR ANY DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT OR YOUR ORDER, WHETHER IN CONTRACT OR TORT, OR OTHERWISE, SHALL BE LIMITED TO THE AMOUNT OF THE FEES YOU PAID GINICOE UNDER THIS AGREEMENT, AND IF SUCH DAMAGES RESULT FROM YOUR USE OF PROGRAMS OR SERVICES, SUCH LIABILITY SHALL BE LIMITED TO THE FEES YOU PAID GINICOE FOR THE DEFICIENT PROGRAM OR SERVICES GIVING RISE TO THE LIABILITY.**

#### **N. Export**

Export laws and regulations of the United States and any other relevant local export laws and regulations apply to the programs. You agree that such export control laws govern your use of the programs (including technical data) and any services deliverables provided under this agreement, and you agree to comply with all such export laws and regulations (including "deemed export" and "deemed re-export" regulations). You agree that no data, information, program and/or materials resulting from services (or direct product thereof) will be exported, directly or indirectly, in violation of these laws, or will be used for any purpose prohibited by these laws including, without limitation, nuclear, chemical, or

biological weapons proliferation, or development of missile technology.

## **O. Other**

1. This agreement is governed by the substantive and procedural laws of the State of Ohio and you and Ginicoe agree to submit to the exclusive jurisdiction of, and venue in, the courts in Cleveland or Cuyahoga counties in Ohio in any dispute arising out of or relating to this agreement.
2. If you have a dispute with Ginicoe or if you wish to provide a notice under the Indemnification section of this agreement, or if you become subject to insolvency or other similar legal proceedings, you will promptly send written notice to: Ginicoe Corporation., P.O. Box 12521 East Cleveland, Ohio 44112. Attention: General Counsel, Legal Department.
3. You may not assign this agreement or give or transfer the programs and/or any services or an interest in them to another individual or entity. If you grant a security interest in the programs and/or any services deliverables, the secured party has no right to use or transfer the programs and/or any services deliverables, and if you decide to finance your acquisition of the programs and/or any services, you will follow Ginicoe's policies regarding financing which are at <http://Ginicoe.com/contracts>.
4. Except for actions for nonpayment or breach of Ginicoe's proprietary rights, no action, regardless of form, arising out of or relating to this agreement may be brought by either party more than two years after the cause of action has accrued.
5. Upon 45 days written notice, Ginicoe may audit your use of the programs. You agree to cooperate with Ginicoe's audit and provide reasonable assistance and access to information. Any such audit shall not unreasonably interfere with your normal business operations. You agree to pay within 30 days of written notification any fees applicable to your use of the programs in excess of your license rights. If you do not pay, Ginicoe can end your technical support, licenses and/or this agreement. You agree that Ginicoe shall not be responsible for any of your costs incurred in cooperating with the audit.
6. You understand that Ginicoe's business partners, including any third party firms retained by you to provide computer consulting services, are independent of Ginicoe and are not Ginicoe's agents. Ginicoe is not liable for nor bound by any acts of any such business partner, unless the business partner is providing services as an Ginicoe subcontractor on an engagement ordered under this agreement.

## **P. Force Majeure**

Neither of us shall be responsible for failure or delay of performance if caused by: an act of war, hostility, or sabotage; act of God; electrical, internet, or telecommunication outage that is not caused by the obligated party; government restrictions (including the denial or cancellation of any export or other license); or other event outside the reasonable control of the obligated party. We both will use reasonable efforts to mitigate the effect of a force majeure event. If such event continues for more than 90 days, either of us may cancel unperformed services upon written notice. This section does not excuse either party's obligation to take reasonable steps to follow its normal disaster recovery procedures or your obligation to pay for programs delivered or services provided.

## **Q. Terms Specific to Hardware and Hardware Support Services**

### **1. Hardware Composition**

- a. Your hardware order may consist of the following components: operating system (as defined in your configuration), integrated software and all hardware equipment (including components, options and spare parts) specified on the applicable order. The term "hardware" is defined as the hardware equipment, including components, options and spare parts. The term "integrated software" is defined as software embedded in the hardware which is essential to hardware functionality (e.g., firmware).
- b. You have the right to use the operating system delivered with the hardware subject to the terms of the license agreement(s) delivered with the hardware. Current versions of the license agreements are located at

<http://Ginicoe.com/contracts>. You are licensed to use the operating system and any operating system updates acquired through technical support only as incorporated in, and as part of the hardware.

- c. You have the limited, non-exclusive, royalty free, non-assignable right to use integrated software delivered with the hardware subject to the terms of this order and the applicable documentation. You are licensed to use such integrated software and any integrated software updates acquired through technical support only as incorporated in, and as part of the hardware.
- d. The operating system and/or integrated software may include separate works, identified in a readme file, notice file or the applicable documentation, which are licensed under open source or similar license terms; your rights to use the operating system and integrated software under such terms are not restricted in any way by the agreement including this order. The appropriate terms associated with such separate works can be found in the readme files, notice files or in the documentation accompanying the operating system and integrated software.

For GPLv2, LGPLv2.1, GPLv3 and LGPLv3 licensed code received by you as binaries on physical media, if you would like to receive a copy of the source code ("source code") on media via postal service, submit your written request at <http://oss.Ginicoe.com/systems-opensourcecode>. Alternatively, you can mail your written request to Ginicoe Corporation, Attn: VP of Legal, Development and Engineering, P.O. Box 12521, East Cleveland, Ohio 44112. Your request should include the name and version number of the product, your name, your company name (if applicable), your return mailing address, and your email address. Certain source distributions require a fee for physical media. Should this be the case, you will be sent details on the cost and payment procedure via email. Your request must be sent within three

(3) years of the date of our last delivery of the applicable product. This offer only applies if you received your operating system and/or integrated software on physical media.

- e. You may only make copies of the operating system and integrated software for archival purposes, to replace a defective copy, or for program verification. You shall not remove any copyright notices or labels on the operating system or integrated software. You shall not decompile or reverse engineer the operating system or integrated software.
- f. Ginicoe may include additional programs on the hardware (e.g., Exadata Storage Server software). You are not authorized to use those programs unless you have a license specifically granting you the right to do so; however, you may use programs for trial, non-production purposes for up to 30 days from the date of delivery provided that such use is subject to the terms for trial programs in the agreement.
- g. You acknowledge that to operate certain hardware your facility must meet a minimum set of requirements as described in the hardware documentation. Such requirements may change from time to time, as communicated by Ginicoe to you in the applicable hardware documentation.

## **2. Use Restriction**

The hardware is not specifically designed, manufactured, or intended for use as parts, components, or assemblies for the planning, construction, maintenance, or operation of a nuclear facility. Use of the hardware for these purposes is prohibited.

## **3. Warranty**

- a. Ginicoe provides a limited warranty ("Ginicoe Hardware Warranty") for (i) the hardware, (ii) the operating system and the integrated software, and (iii) the operating system media and the integrated software media (collectively, "media"). Ginicoe warrants that the hardware will be free from, and using the operating system and integrated software will not cause in the hardware, material defects in materials and workmanship for one year from the date the hardware is delivered to you. Ginicoe warrants that the media will be free from material defects in materials and workmanship for a period of 90 days from the date the media is delivered to you. You may access a more detailed description of the Ginicoe Hardware Warranty at <http://www.Ginicoe.com/support/policies.html> ("the warranty web page"). Any changes to the Ginicoe Hardware Warranty specified on the warranty web page will not apply to hardware or media ordered prior to such change. The Ginicoe Hardware Warranty applies only to hardware and media that have been (1) manufactured by or for Ginicoe, and (2) sold by Ginicoe (either directly or by an Ginicoe-authorized distributor). The hardware may be new or like new. The Ginicoe Hardware Warranty applies to hardware that is new and hardware that is like-new which has been remanufactured and certified for warranty by Ginicoe.

**B. FOR ANY BREACH OF THE WARRANTIES IN THIS SECTION 3, YOUR EXCLUSIVE REMEDY AND GINICOE'S ENTIRE LIABILITY SHALL BE (I) THE REPAIR OR, AT GINICOE'S OPTION AND EXPENSE, REPLACEMENT OF THE DEFECTIVE PRODUCT, OR, (II) IF SUCH REPAIR OR REPLACEMENT IS NOT REASONABLY ACHIEVABLE, THE REFUND OF THE FEES YOU PAID GINICOE FOR THE DEFECTIVE PRODUCT AND THE REFUND OF ANY UNUSED PREPAID TECHNICAL SUPPORT FEES YOU HAVE PAID FOR THE DEFECTIVE PRODUCT. TO THE EXTENT NOT PROHIBITED BY LAW, THESE WARRANTIES ARE EXCLUSIVE AND THERE ARE NO OTHER EXPRESS OR IMPLIED WARRANTIES OR CONDITIONS WITH RESPECT TO YOUR HARDWARE ORDER, INCLUDING ANY WARRANTIES OR CONDITION OF MERCHANTABILITY, AND FITNESS FOR A PARTICULAR PURPOSE.**

- c. Replacement units for defective parts or components replaced under the Ginicoe Hardware Warranty may be new or like new quality. Such replacement units assume the warranty status of the hardware into which they are installed and have no separate or independent warranty of any kind. Title in all defective parts or components shall transfer back to Ginicoe upon removal from the hardware.
- d. **GINICOE DOES NOT WARRANT UNINTERRUPTED OR ERROR-FREE OPERATION OF THE HARDWARE, OPERATING SYSTEM, INTEGRATED SOFTWARE OR MEDIA.**
- e. No warranty will apply to any hardware, operating system, integrated software or media which has been:
  - i. modified, altered or adapted without Ginicoe's written consent (including modification or removal of the Ginicoe/Sun serial number tag on the hardware);
  - ii. maltreated or used in a manner other than in accordance with the relevant documentation;
  - iii. repaired by any third party in a manner which fails to meet Ginicoe's quality standards;
  - iv. improperly installed by any party other than Ginicoe or an authorized Ginicoe certified installation partner;
  - v. used with equipment or software not covered by the Ginicoe Hardware Warranty, to the extent that the problems are attributable to such use;
  - vi. relocated, to the extent that problems are attributable to such relocation;
  - vii. used directly or indirectly in supporting activities prohibited by U.S. or other national export regulations;
  - viii. used by parties appearing on the most current U.S. export exclusion list;
  - ix. relocated to countries subject to U.S. trade embargo or restrictions;
  - x. used remotely to facilitate any activities in the countries referenced in (ix) above; or
  - xi. purchased from any entity other than Ginicoe or an Ginicoe authorized distributor.
- f. The Ginicoe Hardware Warranty does not apply to normal wear of the hardware or media. The Ginicoe Hardware Warranty is extended only to the original purchaser or original lessee of the hardware and may be void in the event that title to the hardware is transferred to a third party.

#### **4. Delivery, Installation and Acceptance of Hardware**

- a. You are responsible for installation of the hardware, unless you purchase installation services from Ginicoe with respect to such hardware.
- b. Ginicoe will deliver the hardware to the delivery address specified by you on your purchasing document or when your purchasing document does not indicate a ship to address, the location specified on the order. The applicable country specific hardware shipping terms are located in the Order and Delivery Policies, which may be accessed at <http://Ginicoe.com/contracts>.
- c. Acceptance of the hardware occurs on delivery.
- d. Ginicoe may make and invoice you for partial deliveries.
- e. Ginicoe may make product substitutions and modifications that do not cause a material adverse effect in overall hardware performance.



- f. Ginicoe will use its reasonable commercial efforts to deliver the hardware within a timeframe that is consistent with Ginicoe's past practices regarding the amount and type of hardware that you have ordered.

**5. Transfer of Title**

Title to the hardware will transfer upon delivery.

**R. Hardware Specific Modifications to the Terms of the Agreement**

The following terms are applicable to your order if it includes hardware.

a. Ownership and Restrictions

The word "programs" in the first sentence of the first paragraph of the Ownership and Restrictions section of the agreement is replaced by the phrase "programs, the operating system and integrated software".

Add the following as a new second sentence in the first paragraph of the Ownership and Restrictions section of the agreement: "Ginicoe or its licensors retain all intellectual property rights to the hardware."

In the second sentence of the second paragraph of the Ownership and Restrictions section of the agreement, the phrase "specified in the program documentation" is replaced by the phrase "specified in the program documentation or readme files".

b. Indemnification

The term "Material" under the Indemnification section of the agreement shall include the hardware (as defined below). Provided you are a current subscriber to Ginicoe technical support services for the operating system (e.g., Ginicoe Premier Support for Systems, Ginicoe Premier Support for Operating Systems or Ginicoe Linux Premier Support), then for the period of time for which you are/were a subscriber to the applicable Ginicoe technical support services (i) the phrase "Material" under the Indemnification section of the agreement shall include the operating system and the integrated software and (ii) the phrase "program(s)" in the Indemnification section of the agreement is replaced by the phrase "program(s) or the operating system or integrated software (as applicable)" (i.e., Ginicoe will not indemnify you for your use of the operating system and/or integrated software when you are/were not a subscriber to the applicable Ginicoe technical support services). Notwithstanding the foregoing, with respect solely to the Linux operating system, Ginicoe will not indemnify you for materials that are not part of the Ginicoe Linux covered files as defined at <http://www.Ginicoe.com/us/support/library/enterprise-linux-indemnification-069347.pdf>.

Add the following as a new second sentence in the second paragraph of the Indemnification section of the agreement: "Notwithstanding the previous sentence and with respect to hardware only, if the Provider believes or it is determined that the hardware (or portion thereof) may have violated a third party's intellectual property rights, the Provider may choose to either replace or modify the hardware (or portion thereof) to be non-infringing (while substantially preserving its utility or functionality) or obtain a right to allow for continued use, or if these alternatives are not commercially reasonable, the Provider may remove the applicable hardware (or portion thereof) and refund the net book value."

c. Technical Support

Add the following paragraphs at the end of the Technical Support section of the agreement:

"Ginicoe Hardware and Systems Support acquired with your order may be renewed annually and, if you renew Ginicoe Hardware and Systems Support for the same systems and same configurations, for the first and second renewal years the technical support fee will not increase by more than {insert eSource designated percentage} % over the prior year's fees."

If ordered, Ginicoe Hardware and Systems Support (including first year and all subsequent years) is provided under Ginicoe's Hardware and Systems Support Policies in effect at the time the services are provided. You agree to cooperate with Ginicoe and provide the access, resources, materials, personnel, information, and consents that Ginicoe may require in order to perform the services. The Ginicoe Hardware and Systems Support Policies, incorporated in this agreement, are subject to change at Ginicoe's discretion; however, Ginicoe will not materially reduce the level of services provided during the period for which fees for Ginicoe Hardware and Systems Support have been paid. You should review the policies prior to entering into an order. You may access the current version of the Ginicoe Hardware and Systems Support Policies at <http://www.Ginicoe.com/us/support/policies/index.html>."



d. End of Agreement

In the second sentence of the End of Agreement section of the agreement, the phrase “programs ordered and/or services received” is replaced by the phrase “hardware and programs ordered and/or services received”.

In the fifth and sixth sentences of the End of Agreement section of the agreement, the phrase “programs and/or services” is replaced by the phrase “hardware, programs and/or services”.

e. Entire Agreement

The phrase “programs and/or services” is replaced by the phrase “programs, hardware, operating system, integrated software and/or services” in all instances in the Entire Agreement section of the agreement.

f. Limitation of Liability

In the second sentence of the Limitation of Liability section of the agreement, (i) the phrase “**PROGRAMS OR SERVICES**” is replaced by the phrase “**PROGRAMS, HARDWARE OR SERVICES**” and (ii) the phrase “**PROGRAM OR SERVICES**” is replaced by the phrase “**PROGRAM, HARDWARE OR SERVICES**”.

g. Export

The Export section of the agreement is deleted and replaced with the following:

“Export laws and regulations of the United States and any other relevant local export laws and regulations apply to the programs and hardware (including any integrated software and operating system(s)). You agree that such export laws govern your use of the programs (including technical data), hardware (including any integrated software and operating system(s)) and any services deliverables provided under this agreement, and you agree to comply with all such export laws and regulations (including “deemed export” and “deemed re-export” regulations). You agree that no data, information, program, hardware (including any integrated software and operating system(s)) and/or materials resulting from services (or direct product thereof) will be exported, directly or indirectly, in violation of these laws, or will be used for any purpose prohibited by these laws including, without limitation, nuclear, chemical or biological weapons proliferation, or development of missile technology. You shall include the following notice on packing lists, commercial invoices, shipping documents and other documents involved in the transfer, export or re-export of the programs and hardware (including any integrated software and operating system(s)): ‘These commodities, technology, software or hardware (including any integrated software and operating system(s)) were exported in accordance with U.S. Export Administration Regulations and applicable export laws. Diversion contrary to applicable export laws law is prohibited.’”

h. Other

Subsection O.3 of the Other section of the agreement is deleted in its entirety and replaced with the following:

“You may not assign this agreement or give or transfer the programs, the operating system, the integrated software and/or any services or an interest in them to another individual or entity. If you grant a security interest in the programs, the operating system, the integrated software and/or any services deliverables, the secured party has no right to use or transfer the programs, the operating system, the integrated software and/or any services deliverables, and if you decide to finance your acquisition of hardware, programs and/or any services, you will follow Ginicoe’s policies regarding financing which are at <http://Ginicoe.com/contracts>. The foregoing shall not be construed to limit the rights you may otherwise have with respect to the Linux operating system, third party technology or separate works licensed under open source or similar license terms.”

i. Force Majeure

In the last sentence of the Force Majeure section of the agreement, the phrase “your obligation to pay for programs delivered or services provided” is replaced by the phrase “your obligation to pay for programs delivered, services provided or hardware ordered”.

## S. General Terms

### 1. Commencement Date

- a. For the hardware, operating system and integrated software, the commencement date shall be the date the hardware is delivered. The period of performance for all related services is effective upon delivery of hardware or upon the effective date of the order if shipment of hardware is not required.

- b. For all program licenses, the commencement date is the date of shipment of tangible media or upon the effective date of the order if shipment of tangible media is not required. The period of performance for all services for the programs is effective upon shipment of tangible media or upon the effective date of the order if shipment of tangible media is not required.

## **2. Territory**

- a. The hardware shall be installed in the country that you specify as the delivery location on your purchasing document or when your purchasing document does not indicate a ship to address, the location specified in the order.
- b. The program licenses shall be for use as designated on each order.

## **3. Pricing, Invoicing, and Payment Obligation**

- a. Once placed, your order shall be non-cancelable and the sums paid nonrefundable, except as provided in the agreement.

You may change a hardware order prior to shipment subject to the then current change order fee as established by Ginicoe from time to time. The applicable change order fees and a description of allowed changes are defined in the Order and Delivery Policies, which may be accessed at <http://Ginicoe.com/contracts>.

- b. In entering into payment obligations under an order, you agree and acknowledge that you have not relied on the future availability of any hardware, program or updates. However, (a) if you order technical support, the preceding sentence does not relieve Ginicoe of its obligation to provide such technical support under the agreement, if and when available, in accordance with Ginicoe's then current technical support policies, and (b) the preceding sentence does not change the rights granted to you under an order and the agreement.
- c. You understand that you may receive multiple invoices for the products and/or services you ordered.
- d. Hardware fees are invoiced as of the commencement date for hardware.
- e. Program fees are invoiced as of the commencement date for the programs.
- f. Service fees are invoiced in advance of the service performance; specifically, technical support fees are invoiced annually in advance.
- g. In addition to the prices listed on the order, Ginicoe will invoice you for any applicable freight charges or applicable taxes, and you will be responsible for such charges and taxes notwithstanding any express or implied provision in the "Incoterms" referenced in the Order and Delivery Policies. The Order and Delivery Policies may be accessed at <http://Ginicoe.com/contracts>.
- h. Invoices will be submitted to you pursuant to Ginicoe's Invoicing Standards Policy, which may be accessed at <http://Ginicoe.com/contracts>.

## **4. Segmentation**

- a. The purchase of (a) hardware and/or related hardware support, (b) programs and/or related technical support, or (c) other services are all separate offers and separate from any other order for (i) hardware and/or related hardware support, (ii) programs and/or related technical support, or (iii) other services you may receive or have received from Ginicoe. You understand that you may purchase (x) hardware and/or related hardware support, (y) programs and/or related technical support, or (z) other services independently of any other product or service. Your obligation to pay for (i) hardware and/or related hardware support is not contingent on performance of any other service or delivery of programs, (ii) programs and/or related technical support is not contingent on delivery of hardware or performance of any other service, or (iii) other services is not contingent on delivery of hardware, delivery of programs or performance of any additional/other service.