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## 52.212-4 Contract Terms and Conditions—Commercial Items.

As prescribed in 12.301(b)(3), insert the following clause:

Contract Terms and Conditions—Commercial Items (Feb 2007)

(a) *Inspection/Acceptance.* The Contractor (“immixTechnology, Inc.”) can only, and shall only tender for acceptance those items that substantially conform to the software manufacturer’s (“PowerSteering”) published specifications. Therefore, items delivered shall be considered accepted upon delivery. The Government reserves the right to inspect or test any supplies or services that have been delivered. The Government may require repair or replacement of nonconforming supplies or re-performance of nonconforming services at no increase in contract price. If repair/replacement or re-performance will not correct the defects or is not possible, the Government may seek an equitable price reduction or adequate consideration for acceptance of nonconforming supplies or services. The Government must exercise its post-acceptance rights—

- (1) Within the warranty period, as stated under section (o) of this clause; and
- (2) Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

(b) *Assignment.* The Contractor or its assignee may assign its rights to receive payment due as a result of performance of this contract to a bank, trust company, or other financing institution, including any Federal lending agency in accordance with the Assignment of Claims Act (31 U.S.C. 3727). However, when a third party makes payment (*e.g.*, use of the Governmentwide commercial purchase card), the Contractor may not assign its rights to receive payment under this contract.

(c) *Changes.* Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

(d) *Disputes.* This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.

(e) *Definitions.* The clause at FAR 52.202-1, Definitions, is incorporated herein by reference.

(f) *Excusable delays.* The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

(g) Invoice.

(1) The Contractor shall submit an original invoice and three copies (or electronic invoice, if authorized) to the address designated in the contract to receive invoices. An invoice must include—

- (i) Name and address of the Contractor;
- (ii) Invoice date and number;
- (iii) Contract number, contract line item number and, if applicable, the order number;
- (iv) Description, quantity, unit of measure, unit price and extended price of the items delivered;
- (v) Shipping number and date of shipment, including the bill of lading number and weight of shipment if shipped on Government bill of lading;
- (vi) Terms of any discount for prompt payment offered;
- (vii) Name and address of official to whom payment is to be sent;
- (viii) Name, title, and phone number of person to notify in event of defective invoice; and
- (ix) Taxpayer Identification Number (TIN). The Contractor shall include its TIN on the invoice only if required elsewhere in this contract.
- (x) Electronic funds transfer (EFT) banking information.
  - (A) The Contractor shall include EFT banking information on the invoice only if required elsewhere in this contract.
  - (B) If EFT banking information is not required to be on the invoice, in order for the invoice to be a proper invoice, the Contractor shall have submitted correct EFT banking information in accordance with the applicable solicitation provision, contract clause (*e.g.*, 52.232-33, Payment by Electronic Funds Transfer—Central Contractor Registration, or 52.232-34, Payment by Electronic Funds Transfer—Other Than Central Contractor Registration), or applicable agency procedures.

(C) EFT banking information is not required if the Government waived the requirement to pay by EFT.

(2) Invoices will be handled in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) prompt payment regulations at 5 CFR Part 1315.

(h) *Patent indemnity.* The Contractor shall indemnify the Government and its officers, employees and agents against liability, including costs, for actual or alleged direct or contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark or copyright, arising out of the performance of this contract, provided the Contractor is reasonably notified of such claims and proceedings.

(i) Payment.—

(1) *Items accepted.* Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract.

(2) *Prompt payment.* The Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and prompt payment regulations at 5 CFR Part 1315.

(3) *Electronic Funds Transfer (EFT).* If the Government makes payment by EFT, see 52.212-5(b) for the appropriate EFT clause.

(4) *Discount.* In connection with any discount offered for early payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the specified payment date if an electronic funds transfer payment is made.

(5) *Overpayments.* If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall immediately notify the Contracting Officer and request instructions for disposition of the overpayment.

(j) *Risk of loss.* Unless the contract specifically provides otherwise, risk of loss or damage to the supplies provided under this contract shall remain with the Contractor until, and shall pass to the Government upon:

(1) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or

(2) Delivery of the supplies to the Government at the destination specified in the contract, if transportation is f.o.b. destination.

(k) *Taxes.* The contract price includes all applicable Federal, State, and local taxes and duties.

(l) *Termination for the Government's convenience.* The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid in full for items delivered to the government and a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

(m) *Termination for cause.* The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(n) *Title.* Licensee shall display and retain PowerSteering's and/or its suppliers' copyright, trademark, proprietary, or confidentiality statement and other notices on any portion of the Software however such Software is used. Licensee acknowledges that PowerSteering retains all right, title and interest in and to the original, and any copies, of the Software and Documentation, and ownership of all patent, copyright, trade secret, trademarks and other intellectual property rights pertaining thereto, shall be and remain the sole property of PowerSteering. Licensee shall not be an owner of any copies of, nor have any interest in, the Software or Documentation, but rather, is licensed, pursuant to and subject to the limitations in this Agreement, to use such copies. Without limiting the generality of the foregoing, Licensee receives no rights and agrees that it will not itself, or through any parent, subsidiary, affiliate, agent or other third party (i) decompile, disassemble, reverse engineer or attempt to reconstruct, identify or discover any source code, underlying ideas, underlying user interface techniques or algorithms of the Software or any portion thereof, or otherwise derive its source code; (ii) modify, port, translate, localize or create derivative works of the Software; (iii) sell, lease, license, sublicense, copy, market or distribute the Software; (iv) encumber or suffer to exist any lien or security interest on the Software; and (v)

disclose the results of any performance tests or qualitative analysis on the Software to any third party without the prior written consent of PowerSteering.

(o) *Warranty.* Subject to the limitations and exceptions set forth in this Agreement, PowerSteering warrants that (a) it holds the necessary rights to enter into this Agreement and license the Software to Licensee, (b) that the services furnished shall be performed in accordance with standards of care, skill and diligence consistent with (i) recognized and sound industry practices, procedures and techniques, and (ii) all applicable laws and regulations; and (c) for a period of thirty (30) days from the delivery of the Software, or acceptance of a Deliverable (the "Warranty Period"), that when properly installed and used for the purpose and in the manner authorized by this Agreement, the Software and/or Deliverable will perform substantially in accordance with the specifications set forth in the Documentation or the Statement of Work, as applicable. The warranty is made only to Licensee and PowerSteering shall have no liability to any third party with respect to the Software or Deliverable(s) as a result of such warranty. PowerSteering's warranty obligations shall be void if any Software and/or Deliverable is modified by or through Licensee without the express prior written consent of PowerSteering. In the event of nonconformity of the Software or Deliverable, as applicable, to such specifications, Licensee shall promptly notify PowerSteering and provide PowerSteering with all information required by PowerSteering in written or electronic form so that PowerSteering can reproduce any such nonconformity. Licensee's sole and exclusive remedy and PowerSteering's sole and exclusive obligation under the warranty set forth in herein shall be, at PowerSteering's sole discretion, (i) for PowerSteering to correct any failure of the affected Software or Deliverable to perform as warranted (remedies may include, without limitation, software patches or workarounds as required), (ii) for PowerSteering to replace the affected Software or Deliverable with a new copy or Update; provided that such failure is reported to PowerSteering within the Warranty Period or (iii) termination of this Agreement and the licenses granted herein, and a refund of the fee(s) paid by Licensee for the affected Software or Deliverable, including support and maintenance, if any.

**DISCLAIMER.** POWERSTEERING MAKES NO OTHER WARRANTY OF ANY KIND, WHETHER EXPRESS OR IMPLIED, WRITTEN OR ORAL, EXCEPT AS EXPRESSLY STATED HEREIN. POWERSTEERING DISCLAIMS ALL OTHER WARRANTIES, EXPRESSED AND IMPLIED, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND FREEDOM FROM INFRINGEMENT WITH RESPECT TO ALL SOFTWARE, DELIVERABLES, UPDATES, UPGRADES, AND ALL OTHER PRODUCTS, SERVICES, MATERIALS AND OTHER ITEMS FURNISHED UNDER, OR IN CONNECTION WITH, THIS AGREEMENT.

**Intellectual Property Indemnification.** PowerSteering will indemnify, defend, at its own expense, any action against Licensee and hold Licensee harmless from any third party claim that the Software (excluding third party software) or a Deliverable (as

defined in Exhibit D) infringes a United States or European Union patent or copyright or involves misappropriation of a trade secret or intellectual property right. PowerSteering will pay such damages, liabilities and costs (including reasonable attorney's fees) as are finally awarded or agreed upon in a settlement (whether in judgment, mediation or arbitration) against Licensee for such infringement or misappropriation provided that Licensee gives PowerSteering: (a) prompt written notice of any such action and of all prior related claims; (b) sole control of the defense and settlement of such action; and (c) full cooperation in any defense or settlement, at PowerSteering's sole expense. PowerSteering shall not be liable for any fees, costs or damages incurred without such prior written notice, control and cooperation. Should the Software, or a Deliverable, become, or in PowerSteering's opinion be likely to become, the subject of a claim of infringement or trade secret misappropriation as set forth herein, PowerSteering shall, at its option and expense: (a) obtain for Licensee the right to continue using the affected Software or Deliverable; (b) replace or modify the affected Software or Deliverable so its use becomes non-infringing or otherwise lawful; or (c) terminate the license granted hereunder with respect to the infringing Software or Deliverable and refund the license fees paid by Licensee for the infringing Software or Deliverable, as depreciated on a straight-line sixty (60) month basis. The foregoing provisions of this Section state PowerSteering's sole obligation and Licensee's exclusive remedy in the event any such third party claim or action is commenced or is likely to be commenced.

**Exclusions; Licensee Indemnity.** PowerSteering will have no liability under this Section or the limited warranty provided for in this section for any claim or action where: (a) such claim or action would have been avoided but for modifications of the Software or Deliverable(s), or portions thereof, made after delivery to Licensee; (b) such claim or action would have been avoided but for the combination or use of the Software or Deliverable(s), or portions thereof, with other products, processes or materials not authorized by PowerSteering; (c) Licensee continues allegedly infringing activities after being notified thereof or after being informed of modifications that would have avoided the alleged infringement; (d) Licensee's use of the Software or Deliverable(s) is not in accordance with the terms of this Agreement; or (e) if the infringement or misappropriation resulted from PowerSteering's compliance with designs or specifications provided by Licensee.

(p) *Limitation of liability.* Except for PowerSteering's indemnification obligations for third party intellectual property infringement claims pursuant to Section (o) herein, PowerSteering's (and its suppliers') entire liability, and Licensee's exclusive remedy, for any and all claims arising under or in connection with this Agreement or related to any item or service provided under or in connection with this Agreement, regardless of the form of the action (including negligence), whether in breach of warranty, contract, tort, strict liability or otherwise, shall be limited to the fee(s) paid to PowerSteering by Licensee for the Software or Deliverable that is related to the claim. IN NO EVENT SHALL POWERSTEERING (NOR ANY OF ITS SUPPLIERS) BE LIABLE FOR DAMAGES

RESULTING FROM LOSS OF DATA, LOST PROFITS, BUSINESS INTERRUPTION, LOST REVENUE, OR LOST BUSINESS, IN CONNECTION WITH THE USE OF ANY SOFTWARE, DELIVERABLE OR ANY OTHER ITEM OR SERVICE PROVIDED UNDER THIS AGREEMENT, NOR FOR COSTS OF PROCUREMENT OF SUBSTITUTE GOODS, NOR FOR ANY SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF, OR IN CONNECTION WITH, THIS AGREEMENT OR ANY PRODUCT, SERVICE OR OTHER ITEM PROVIDED UNDER THIS AGREEMENT, WHETHER IN BREACH OF WARRANTY, CONTRACT, TORT, STRICT LIABILITY OR OTHERWISE (INCLUDING NEGLIGENCE), EVEN IF POWERSTEERING HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

(q) *Other compliances.* The Contractor shall comply with all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under this contract.

(r) *Compliance with laws unique to Government contracts.* The Contractor agrees to comply with 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracts; 18 U.S.C. 431 relating to officials not to benefit; 40 U.S.C. 3701, *et seq.*, Contract Work Hours and Safety Standards Act; 41 U.S.C. 51-58, Anti-Kickback Act of 1986; 41 U.S.C. 265 and 10 U.S.C. 2409 relating to whistleblower protections; 49 U.S.C. 40118, Fly American; and 41 U.S.C. 423 relating to procurement integrity.

(s) *Order of precedence.* Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order:

- (1) The schedule of supplies/services.
- (2) The Assignments, Disputes, Payments, Invoice, Other Compliances, and Compliance with Laws Unique to Government Contracts paragraphs of this clause.
- (3) The clause at 52.212-5.
- (4) Addenda to this solicitation or contract, including any license agreements for computer software.
- (5) Solicitation provisions if this is a solicitation.
- (6) Other paragraphs of this clause.
- (7) The Standard Form 1449.
- (8) Other documents, exhibits, and attachments.
- (9) The specification.

(t) Central Contractor Registration (CCR).

- (1) Unless exempted by an addendum to this contract, the Contractor is responsible during performance and through final payment of any contract for

the accuracy and completeness of the data within the CCR database, and for any liability resulting from the Government's reliance on inaccurate or incomplete data. To remain registered in the CCR database after the initial registration, the Contractor is required to review and update on an annual basis from the date of initial registration or subsequent updates its information in the CCR database to ensure it is current, accurate and complete. Updating information in the CCR does not alter the terms and conditions of this contract and is not a substitute for a properly executed contractual document.

(2)(i) If a Contractor has legally changed its business name, "doing business as" name, or division name (whichever is shown on the contract), or has transferred the assets used in performing the contract, but has not completed the necessary requirements regarding novation and change-of-name agreements in FAR Subpart 42.12, the Contractor shall provide the responsible Contracting Officer a minimum of one business day's written notification of its intention to (A) change the name in the CCR database; (B) comply with the requirements of Subpart 42.12; and (C) agree in writing to the timeline and procedures specified by the responsible Contracting Officer. The Contractor must provide with the notification sufficient documentation to support the legally changed name.

(ii) If the Contractor fails to comply with the requirements of paragraph (t)(2)(i) of this clause, or fails to perform the agreement at paragraph (t)(2)(i)(C) of this clause, and, in the absence of a properly executed novation or change-of-name agreement, the CCR information that shows the Contractor to be other than the Contractor indicated in the contract will be considered to be incorrect information within the meaning of the "Suspension of Payment" paragraph of the electronic funds transfer (EFT) clause of this contract.

(3) The Contractor shall not change the name or address for EFT payments or manual payments, as appropriate, in the CCR record to reflect an assignee for the purpose of assignment of claims (see Subpart 32.8, Assignment of Claims). Assignees shall be separately registered in the CCR database. Information provided to the Contractor's CCR record that indicates payments, including those made by EFT, to an ultimate recipient other than that Contractor will be considered to be incorrect information within the meaning of the "Suspension of payment" paragraph of the EFT clause of this contract.

(4) Offerors and Contractors may obtain information on registration and annual confirmation requirements via the internet at <http://www.ccr.gov> or by calling 1-888-227-2423 or 269-961-5757.

(u) *Licenses.* Per FAR 12.212 the items provided to the government are considered Commercial computer software or commercial computer software documentation. The following license terms control the acquisition of these items and the Standard End User License Agreement Standard Terms and Conditions attached hereto as Schedule 'A' and incorporated herein by reference, constitutes the only rights acquired by the government.



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(end of clause)

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**SCHEDULE A**  
**POWERSTEERING STANDARD END USER LICENSE AGREEMENT (WITH**  
**MAINTENANCE SERVICES) STANDARD TERMS AND CONDITIONS**

1. **Definitions**

1.1 **“Authorized User”** shall mean a named individual who is an employee, consultant, or contractor of Licensee who is registered to use and access the Software. The registration and access of each Authorized User may be transferred or reassigned by Licensee to another Authorized User, so long as the total number of Authorized Users accessing the Software does not exceed the total number of Authorized Users set forth in Exhibit A. Multiple individuals may not login under the same Authorized User account. Licensee shall be liable for an Authorized User’s compliance with the terms and conditions of this Agreement.

1.2 **“Documentation”** means the operating manuals, including a description of the functions performed by the Software, user instructions, technical literature and all other related materials in the English language, in both eye-readable and machine-readable, printable form, which may, from time to time, be supplied to Licensee by PowerSteering to facilitate the use and application of the Software.

1.3 **“Hosting Services”** means those services provided by PowerSteering for the hosting of the Software, for production servers, pursuant to the terms of this Agreement and as further set forth at [www.psteering.com/pdfs/legal/master\\_agreement\\_exhibits.pdf](http://www.psteering.com/pdfs/legal/master_agreement_exhibits.pdf)

1.4 **“Professional Services”** means those professional services to be performed by PowerSteering pursuant to the terms of this Agreement and, as further set forth at [www.psteering.com/pdfs/legal/master\\_agreement\\_exhibits.pdf](http://www.psteering.com/pdfs/legal/master_agreement_exhibits.pdf).

1.5 **“Software”** means the software and computer programs in machine-readable form (including Updates and Upgrades) ordered by Licensee and provided by PowerSteering while this Agreement is in effect, as further set forth in Exhibit A.

1.6 **“Updates”** means interim releases of the Software incorporating standard maintenance, improvements, patches, error corrections and enhancements that are provided by PowerSteering to customers who subscribe to PowerSteering’s maintenance and support services. Updates are designated by all digit(s) to the right of the decimal point (e.g., 3.x.x), and the content and timing of all Updates shall be decided upon by PowerSteering in its sole discretion.

1.7 **“Upgrades”** shall mean full product releases of the Software, which contain substantial functional enhancements, and which are marketed and priced separately by

PowerSteering. Upgrades are also provided by PowerSteering to customers who subscribe to PowerSteering's maintenance and support services. Upgrades are designated by the digit to the left of the decimal point (e.g., x.0), and the content and timing of all Upgrades shall be decided by PowerSteering in its sole discretion.

## 2. **License Grant and Restrictions**

2.1 **License Grant; Copies.** Subject to the terms, conditions and restrictions set forth in this Agreement, PowerSteering hereby grants, and Licensee hereby accepts, a non-exclusive, non-transferable, right and license, without the right to grant sublicenses, to use, solely for its internal business use (i) the Software, in object code form only, in accordance with the Documentation, and (ii) the Documentation. Licensee's access to and use of the Software at any given time may not exceed the number of Authorized Users which Licensee has licensed to use, as specified in Exhibit A. Licensee may make a reasonable number of copies of the Software for Licensee's internal back-up and archival purposes only, provided that all such copies shall bear the original and unmodified copyright, patent and other intellectual property markings as originally delivered by PowerSteering.

2.2 **Audit Rights.** If applicable, Licensee agrees to maintain records detailing the installation of the Software and to limit usage of the Software to the number of Authorized Users specified in Exhibit A. In the event number of copies or usage of the Software exceeds that licensed by Licensee, Licensee agrees to notify PowerSteering in writing and pay to PowerSteering the then-current fee associated with such additional usage. Licensee shall provide to PowerSteering upon request, a written report detailing the Software usage and installation records. PowerSteering may, upon thirty (30) days advance notice and at its expense, conduct an audit during Licensee's normal business hours, of Licensee's use of the Software and the Documentation to verify compliance with this Agreement. If the audit reveals that Licensee's usage has exceeded the authorized number of Authorized Users by five percent (5%) or more, Licensee shall promptly pay to PowerSteering any and all fees owing as a result of such discrepancy.

3. **Maintenance; Hosting; Professional Services.** Maintenance, Hosting, and Professional Services are provided pursuant to the terms of this Agreement and the websites set forth above and in Section 3.1.

3.1 **Support and Maintenance.** During the Term of this Agreement, Licensee may, upon payment of the applicable fees (as set forth in Exhibit A), subscribe to annual support and maintenance from PowerSteering, in accordance with the terms and conditions set forth in this Agreement and [www.psteering.com/pdfs/legal/master\\_agreement\\_exhibits.pdf](http://www.psteering.com/pdfs/legal/master_agreement_exhibits.pdf). At Licensee's option and for an additional fee as set forth in Exhibit A, PowerSteering will assign U.S. citizens only to support and maintain Licensee's data and software (as defined above). In

addition, customizations to the Software contracted for by Licensee will, when completed and installed, add to the base license fee value for purposes of computing the applicable support and maintenance fee.

**3.2 Limitations; Exclusive Remedy.** PowerSteering shall (a) provide support and maintenance for production servers of the Software only, and (b) not be obligated to provide support and maintenance to Licensee's customers or any other third party. In addition, PowerSteering shall not be obligated to perform support and maintenance services if the following occur: (a) any attempt at repair, maintenance or modification of any Software performed by anyone other than authorized PowerSteering service personnel; (b) if applicable, Licensee's failure to install an Upgrade or Update within six (6) months of such Upgrade's or Update's release; or (c) issues related to third-party software, excluding issues arising out of the Software's application program interface. Except as set forth above, in the event that PowerSteering fails to provide support and maintenance services according to Exhibit B, PowerSteering's only liability, and Licensee's sole remedy for such failure shall be (a) for PowerSteering to use commercially reasonable efforts, commensurate with the highest industry standards, to correct such failure through further services, or (b) refund any prepaid but unutilized support and maintenance fees.

#### 4. **Term and Termination**

**4.1 Term.** Licensee shall have the right to use the Software or receive support and maintenance and Hosting Services for the Term set forth in Exhibit A, which shall automatically renew for the same period ("Renewal Term"), unless either party provides the other of written notice of its intent not to renew within ninety (90) days of expiration of the Term or any Renewal Term. Fees payable by Licensee for use of the Software (including any license fees, hosting fees and maintenance and support fees) pursuant to a Renewal Term (or the purchase of a perpetual license) shall be on terms and conditions mutually agreed by the parties in writing.

**4.2 Termination by Either Party.** Either party may terminate this Agreement, including any and all licenses granted herein, for material breach of this Agreement by the other party, such termination to be effective following the expiration of thirty (30) days after written notice to the other party setting forth a material breach of or failure to perform any provision under this Agreement which has not been corrected within such thirty (30) day period, provided that if such material breach or failure to perform cannot reasonably be corrected or remedied within thirty (30) days, the other party may immediately terminate this Agreement, including any and all license; provided, however, that a breach by PowerSteering of its obligations under Section 8.1(c) shall not be deemed to be a material breach but instead shall be subject to the exclusive remedies set forth in Section 8.2.

## 5. Intellectual Property Rights and Confidential Information

5.1 **Intellectual Property Rights.** Except as expressly provided herein, title to, and ownership of, (i) the Software, (ii) all Intellectual Property Rights (as defined below), and (iii) the Documentation, whether owned by PowerSteering or its licensors and whether prepared by or for PowerSteering, shall at all times remain solely and exclusively with PowerSteering, or its licensors, and in no event with Licensee, notwithstanding that Licensee may contribute to the cost of or participate in the making of derivative works, translations, customized versions, updates, error corrections, enhancements, modifications, or other versions of the Software. For purposes of this Agreement, "Intellectual Property Rights" shall mean with respect to the Software, all patents, patent applications, copyrights, trade secrets, know-how and other intellectual property rights related or applicable thereto and any derivative works, translations, customized versions, Updates, Upgrades, patches, enhancements, improvements, modifications, error corrections, or other versions thereof prepared by PowerSteering, its licensors, or any other person through the date hereof and at all future times.

5.2 **Confidential Information.** Each party hereby agrees that it shall maintain in confidence all proprietary, financial, marketing, research and development, organizational, technical, business policies or practices, the terms and conditions of this Agreement, and any non-public personal or financial information relating to clients or customers of the other party (hereinafter collectively referred to as "Confidential Information"). Confidential Information disclosed to a party hereunder (each, a "Recipient") by the other party (the "Disclosing Party") (a) in tangible form clearly labeled as confidential or proprietary at the time of disclosure, (b) if disclosed in non-tangible form, identified as confidential or proprietary at the time of disclosure, and summarized in writing that is designated as confidential or proprietary and delivered to the Recipient within ten (10) days after disclosure or (c) in such a manner that a reasonable person would understand the confidential nature of the information disclosed. In addition, to the foregoing, the parties acknowledge that the following information is Confidential Information of PowerSteering: the Software, Documentation, present or proposed PowerSteering products (including but not limited to any source code, object code, user interface screens, algorithms, product designs, product architecture, file layouts, database schema), PowerSteering financial data, PowerSteering customer lists and contacts, other PowerSteering customer related matters, PowerSteering-specific pricing data, negotiations and contracts. Recipient shall not permit the disclosure of any Confidential Information to any third party, except when, after and to the extent such Confidential Information (i) was already known to Recipient prior to the disclosure of same hereunder, as evidenced by Recipient's written records prepared prior to such disclosure, without obligation of confidentiality; (ii) was in or hereafter comes within the public domain, other than by Recipient's failure to fulfill its obligations hereunder; or (iii) is made available to Recipient by a third party who has

lawfully obtained the information and does not have any obligation of secrecy to the Disclosing Party.

*Each party shall use the Confidential Information received from the other hereunder solely for purpose of exercising its rights and fulfilling its obligations hereunder.*

*Recipient shall limit the disclosure of Confidential Information received by it hereunder to those of its Affiliates, employees or agents on a need to know basis. Recipient shall advise each such Affiliate, employee or agent of the obligations of confidentiality which said Recipient has assumed under this Agreement, and shall require that each such Affiliate, agent or employee act in accordance with the terms of this Agreement. Each party shall ensure that any such persons or entities agree in writing to be bound by confidentiality and use terms similar to those in this Agreement. In addition, Licensee may only disclose or permit the disclosure of, or access to, the Software or the Documentation to Authorized Users.*

In the event that a party receives a subpoena or other validly issued administrative or judicial process requesting Confidential Information of the other party, the Recipient shall promptly notify the Disclosing Party and tender to it the defense of such demand. Upon request of the Disclosing Party, Recipient shall cooperate (at the expense of the Disclosing Party) in the defense of the demand. Unless the demand shall have been timely limited, suppressed or extended, the Recipient shall thereafter be entitled to comply with such demand to the extent required by law.

6. **Marketing**. Licensee and PowerSteering shall mutually agree and approve any press releases issued or released dedicated to announcing Licensee as a new customer. In addition, PowerSteering may include Licensee's name and logo in marketing materials.

## 7. **General**

7.1 **Entire Agreement; Headings; Counterparts**. This Agreement constitutes the entire agreement and understanding between the parties with respect to the subject matter hereof, and supersedes all prior agreements, arrangements and undertakings between the parties. No addition to or modification of any provision of this Agreement shall be binding upon the parties unless made by a written instrument signed by a duly authorized representative of each of the parties. The terms and conditions contained in any purchase order issued by Licensee shall be of no force or effect, even if the order is accepted by PowerSteering. The headings to the sections of this Agreement are for ease of reference only and shall not affect the interpretation or construction of this Agreement. This Agreement may be executed in counterparts, each of which shall be deemed to be an original and all of which shall be deemed to be an original instrument.

7.2 **Force Majeure**. Except for the obligation to make payments, nonperformance of either party shall be excused to the extent that performance is rendered impossible by strike, fire, flood, governmental acts or orders or restrictions, failure of suppliers, or

any other reason where failure to perform is beyond the reasonable control of the non-performing party, provided such non-performance did not result from the negligence or lack of due diligence of the affected party.

**7.3 Partial Invalidity; Waiver.** If any provision of this Agreement or the application thereof to any party or circumstances shall be declared void, illegal or unenforceable, the remainder of this Agreement shall be valid and enforceable to the extent permitted by applicable law. No failure of either party to exercise any power or right given to either party hereunder or to insist upon strict compliance by either party with its obligations hereunder shall constitute a waiver of either party's right to demand exact compliance with the terms hereof.

**7.4 Notices.** All notices and correspondence under this Agreement shall be in writing and shall be delivered by personal service, confirmed facsimile, express courier, or certified mail, return receipt requested, to the addresses first set forth herein, or at such different address as may be designated by such party by written notice to the other party from time to time. All notices shall be deemed received and effective upon receipt if delivered personally or sent by express courier or confirmed facsimile, and seven (7) days after mailing if sent by certified mail.

**7.5 Relationship Between the Parties; Non-solicitation.** In all matters relating to this Agreement, Licensee and PowerSteering shall act as independent contractors. Except as may be otherwise expressly permitted hereunder, neither party will represent that it has any authority to assume or create any obligation, expressed or implied, on behalf of the other party, or to represent the other party as agent, employee, or in any other capacity. Neither party shall have any obligation, expressed or implied, except as expressly set forth herein. Without the prior written consent of PowerSteering, Licensee shall not recruit or hire any employee of PowerSteering who is or has been assigned to perform any of services, either during the term of this Agreement or any Statement of Work and for one (1) year following the completion or termination of this Agreement or any Statement of Work.

**7.6 Export Controls; Government Use.** Licensee agrees and certifies that neither the Software, Deliverables, nor any other technical data received from PowerSteering, nor the direct product thereof, will be exported or re-exported outside the United States except as authorized and as permitted by the laws and regulations of the United States. Any use of the Software and Deliverables by any agency of the U.S. Government or U.S. Government contractor or subcontractor at any tier shall be conditioned on the U.S. Government agreeing that use of the Software and Deliverables are subject to the maximum restrictions on use as permitted by FAR 52.227-19 (June 1987) or DFARS 227.7202-3(a) (Jan. 1, 2000) or successor regulations, or similar acquisition regulations of other applicable U.S. Government organizations.

## EXHIBIT B - Maintenance and Support Services

### 1. Releases

PowerSteering will apply releases: patches/fixes and upgrades for the Software:

- Standard Releases are point releases (i.e. X.1, X.2) which contain improvements or modifications to the Software that PowerSteering provides to its ASP or maintenance customers generally where such improvements or modifications are not priced as separate or new products or options.
  - PowerSteering shall provide software maintenance for any Standard Release only until six months after the next Standard Release becomes generally available. Licensee must be current with the latest Patch Release at the time of installation of a new Standard Release.
- Patch Releases are intended to address material deviations between the Software and its published specifications until a Standard Release can be made available.
  - Software maintenance will also include any patch releases that PowerSteering makes generally available to its maintenance customers.
- Version Upgrades include new Versions (4.0, 5.0, etc.), new modules, and new functionality that may incur an upgrade fee based on size and usage of new features.

### 2. Level Two HelpDesk Support (Standard)

#### 2.1 **Named Administrator Technical Support**

Licensee shall designate in writing to PowerSteering the two (2) users responsible for the administration and configuration of the Software ("Named Administrators"). These two (2) named Administrators will receive support via telephone for urgent or critical issues and to answer function and feature questions. Telephone or email support, which must be preceded by generation of a support case number via the self-service portal, generally provides the following types of remedies:

- Software installation and configuration data
- Assistance with Software usage and user interfaces
- Assistance and guidance in troubleshooting application problems
- Remote diagnosis and debugging
- Escalation of issues to engineering/specialists
- Access to product enhancement suggestion sites, user groups, and roadmap updates

#### 2.2 **Escalation Protocol**

Escalation protocol for Level Two support proceeds from the PowerSteering Helpdesk case owner to:

- the customer's PowerSteering Account Manager
- then the Vice President of Client Services



- and, finally, the CEO

### **2.3 User Phone Support**

Authorized Users can call the PowerSteering helpdesk via telephone (617-492-0707 extension 2) between 9 a.m. and 5 p.m. EST Monday to Friday, during business days, excluding PowerSteering holidays (“Normal Business Hours”). Phone calls placed during Normal Business Hours will receive response within four Normal Business Hours. Phone calls made outside Normal Business Hours will be responded to the following business day during Normal Business Hours.

### **3. Level One HelpDesk (Premium)**

Level One HelpDesk is provided upon payment of applicable fees by Licensee, as set forth in Exhibit A. With Level One Helpdesk, all users are covered by the same helpdesk access as named administrators in Level Two HelpDesk Support.

To enable PowerSteering to provide Level One HelpDesk support, Licensee shall provide a list of its key information technology professionals to whom end users can be referred if PowerSteering diagnoses a reported issue as being related to the Licensee’s network, browser, operating system, or personal computer.

### **Additional Scope of Services Provided**

Level One Help Desk Support Includes:

- Generic Portal account for all end-users and 10 additional named accounts for super-users.
- Modification of existing PowerSteering user password if required. PowerSteering will work with Licensee to enforce reasonable security checking prior to modifying an Authorized User’s password & log-in information.
- Functionality questions and “how to” related issues
- Information on system capabilities; however, PowerSteering will rely on Licensee administrators for actual modification of system settings (e.g., agents, tags, custom fields, metrics, templates)

### **4. Support Portal**

PowerSteering has put into service a secure support portal (which is available to Licensee 24x7x365, except in instances of maintenance, scheduled downtime, and other instances beyond PowerSteering’s control) where users can:

- access support documentation
- search and track existing support cases
- submit new cases on-line.

In addition to accessing customer account and technical data, the portal provides templates for Licensee to include further information. Such information includes a descriptive title, an issue summary and supporting attachments. PowerSteering requests the portal user include the case severity, case type and area of the application in question.

## 5. Severity Level Definitions

PowerSteering technical support is available for reporting and responding to technical issues and seeks to achieve the estimated target response times in accordance with the following Severity Levels.

### 5.1 Severity 1 Problem

**Definition:** A Severity 1 Problem is one that causes a substantial failure or renders the Software, or, in the case of hosted customers, the hardware with which it communicates, substantially unusable in production. Severity 1 Problems should be reported through the PowerSteering ticketing system which sends an immediate page to our technicians.

**Response/Resolution Time:** PowerSteering responds to web and telephone notice of the Severity 1 Problem within two (2) hours if the Problem is reported during Normal Business Hours and four (4) hours if the Severity 1 Problem is reported outside of Normal Business Hours. PowerSteering will use commercially reasonable efforts to provide a work-around solution or a patch within 24 hours

### 5.2 Severity 2 Problem

**Definition:** A Severity 2 Problem is a major problem that causes a feature failure in the Software, or hardware on which it operates or with which it communicates.

**Response/Resolution Time:** PowerSteering responds to web and telephone notice of the Severity 2 Problem within four (4) hours if the Problem is reported during Normal Business Hours. For Severity 2 Problems reported outside of normal business hours, response will be within two (2) hours of the start of the next business day. PowerSteering will use commercially reasonable efforts to provide a work-around solution or a patch within 96 hours

### 5.3 Severity 3 Problem

**Definition:** A Severity 3 Problem is one that causes a feature or system failure that can be avoided by alternate methods by the user; or Software is usable, but inconvenience is caused to normal operations.

**Response/Resolution Time:** PowerSteering responds to web and telephone notice of the Severity 3 Problem within 24 hours if the Severity 3 Problem is reported during Licensor's normal business day. For Severity 3 Problems reported outside of normal business hours, response will be within 24 hours of the start of the next business day. PowerSteering will use commercially reasonable efforts to provide a work-around or

include the fix into the next maintenance build. Maintenance builds are released on average once a month

#### **5.4 Severity 4 Problem**

**Definition:** A Severity 4 Problem is one which causes a minor inconvenience to the user, or that does not directly affect normal operations.

**Response/Resolution Time:** PowerSteering responds to web and telephone notice of Severity 4 Problems within 48 hours. PowerSteering will consider including a fix into the next version of the Software.

### **6. Activities out of Scope for HelpDesk Support**

HelpDesk Support does not include:

- Adding or inviting a new user (vs. "how to" add or invite)
- Deleting, re-assigning or setting up new projects for end users
- Admin, Security or Configuration training, design, development or testing
- Report writing, data import or enhancement related requests
- If PowerSteering determines that a user requires end user training or business process related information, PowerSteering will refer the user to their PowerSteering account manager
- Third party software or hardware support
- On-site support

### **7. Additional Offerings**

As needed and for an additional fee (as set forth in Exhibit A, if so elected by Licensee), PowerSteering's client services team can provide the following:

- Weekly Program Review Conference Calls
- Accelerator Workshops
- Training Packages (Permissions Workshop, Administrator Training, End-User Training – Best Practices)
- Configuration Changes
- Services Upgrade Support (delta training, best practice assessments)
- Client Specific Product Enhancements
- Support Reporting
  - Case Reports
  - Solution Reports / Solution Usage
  - Helpdesk Reports / Aging & Duration (Response Metrics)
- Custom Reports

## EXHIBIT C - Hosting Terms

### 1. Operation of Hosting Services

**1.1 Operation and Maintenance.** PowerSteering shall (a) install and operate the host portion of the Hosting Services at a third party managed data center selected by PowerSteering, together with necessary operation systems and utilities, in PowerSteering's host computer system, and (b) provide Licensee with the Hosting Services via Internet facilities and protected Internet access (utilizing industry standard firewall protection software). Notwithstanding the foregoing, in order to improve and adapt the Hosting Services to changing market conditions and technology, PowerSteering reserves the right to add to, delete from or change the Hosting Services, at its sole discretion, upon thirty (30) days' prior written notice to Licensee, provided that no addition, deletion or change to the Hosting Services shall be intended to degrade the functionality of the Hosting Services. Licensee shall only use applicable hardware and software, as well as Internet connections, for accessing and using the Hosting Services as approved by PowerSteering in advance. Licensee acknowledges and agrees that PowerSteering may make improvements or modifications to the Hosting Services that may result in different system requirements for accessing and using the Hosting Services, upon thirty (30) days prior written notice to Licensee.

**1.2 Licensee Warranty.** Licensee warrants that it shall not willfully tamper with, compromise, or attempt to circumvent any physical or electronic security measures employed by PowerSteering with respect to the Hosting Services.

**1.3 Compliance with Laws/Terms of Use.** Licensee agrees to comply with U.S. export laws concerning the transmission of technical data and other regulated materials via the Hosting Services. Licensee further agrees to comply, at all times, with the terms of use as set forth below, which PowerSteering may amend with respect to the subject matter thereto, upon thirty (30) days' prior notice to Licensee.

**1.4 Licensee Responsibilities.** Licensee is responsible for the manner in which it uses the Hosting Services, including the maintenance and security of its own data extracted or derived from the Hosting Services, computer network and other facilities, as well as Licensee's choice of online content.

**1.5 Ownership.** All intellectual property rights in, to and related to the Hosting Services (exclusive of any data, research, or results generated by Licensee, which shall be the property of Licensee) shall remain the property of PowerSteering (and/or its respective suppliers/licensors if applicable), exclusively. Licensee shall have no rights in or to the Hosting Services except as expressly set forth in the Agreement or this Exhibit C.

**1.6 Provision of Custom Modification.** If PowerSteering is requested to provide custom modification, consulting, system integration or other services to Licensee, the terms for such services shall be mutually agreed upon and specified in a written and signed statement of work attached to the Agreement.

**1.7 Backup.** PowerSteering will maintain backup and recovery copies of Licensee's production database nightly for disaster recovery purposes. Backups are stored for the previous seven (7) days. Backups are also stored for the last day of the week for the past four (4) weeks, and for the last day of the month for the past six (6) months.

## **2. Maintenance of Hosting Services; System Availability**

**2.1 Scheduled Maintenance.** All regularly scheduled maintenance will be performed outside the hours of 8:00 am to 7:00 p.m. Boston, MA time weekdays, or anytime during a weekend, and will be performed as mutually agreed.

**2.2 Emergency Maintenance Notifications.** On rare occasions, PowerSteering may experience the need for emergency maintenance, during which time the Hosting Services will be unavailable to Licensee ("Service Outage"). PowerSteering will use commercially reasonable efforts to notify Licensee a minimum of fifteen (15) minutes prior to any emergency maintenance.

**2.3 System Availability and Service Interruption.** PowerSteering shall provide system availability of at least 99.9%, excluding commercially reasonable scheduled downtime and downtime due to an inability to connect to a Licensee provided services (e.g. authentication to an LDAP server). Licensee will notify PowerSteering of service interruptions or delays that may be known to Licensee. PowerSteering will provide Licensee's technical contact with notice of any Service Outage (as defined above) of the Hosting Services after PowerSteering becomes aware of such Service Outage. Licensee will provide access to its designated contacts to assist PowerSteering with correcting any Service Outage problems in a timely manner. PowerSteering will also provide updates to Licensee until the Service Outage has been corrected. Upon learning of any Service Outage, PowerSteering will correct the Service Outage and restore Hosting Services availability.

## **3. Disclaimers**

**3.1 Internet Link.** The parties expressly recognize that Internet servers and links are susceptible to crashes and down time. PowerSteering represent that it shall maintain a consistent link with the Internet for accessing the Hosting Services via Internet facilities, but PowerSteering cannot and does not warrant that it shall maintain a continuous and uninterrupted link.

**3.2 Security.** The parties expressly recognize that it is impossible to maintain flawless security, but PowerSteering shall take reasonable steps to prevent security breaches in PowerSteering's server interaction with Licensee's network, and security breaches in PowerSteering's server interaction with resources or users outside of any firewall that may be built into PowerSteering's server. However, Licensee is solely responsible for any damage caused by unauthorized access. Licensee agrees that it will only access and use the Hosting Services via authorized access provided by PowerSteering (e.g. password protected access) and Licensee indemnifies and holds PowerSteering harmless for any unauthorized access to or use of the Hosting Services.

**3.3 Downloading of Data or Files.** The parties expressly recognize that PowerSteering cannot and does not guarantee or warrant that files available for downloading through the Hosting Services will be free of infection, viruses, worms, Trojan horses or other code that manifests contaminating or destructive properties. Licensee agrees that it shall be solely responsible for implementing sufficient procedures to satisfy Licensee's particular requirements for accuracy of data input and output, and for maintaining a separate means for the reconstruction of any lost data.

**3.4 Accuracy Disclaimer.** Licensee is solely responsible for the accuracy and integrity of its own data, reports, and documentation. PowerSteering or third parties may provide links to other World Wide Web sites or resources as part of the Hosting Services. PowerSteering does not endorse and is not responsible for any data, software or other content available from such sites or resources. Licensee acknowledges and agrees that PowerSteering shall not be liable, directly or indirectly, for any damage or loss relating to Licensee's use of or reliance on such data, software or other content.

## **4. Terms of Use**

**4.1 Non-Exclusive List.** The examples of prohibited use set forth below are non-exclusive, and are provided as guidelines to Licensee. Violation of the terms of this Section 4 is strictly prohibited. In the event of any actual or potential violation, PowerSteering reserves the right to suspend or terminate, either temporarily or permanently, any or all services provided by PowerSteering, to block any abusive activity, or to take any other actions deemed appropriate by PowerSteering in its sole discretion.

**4.2 Illegal Use.** The Hosting Services may be used only for lawful purposes. The transmission, distribution, or storage of any information, data, or material in violation of any applicable law or regulation is prohibited. Without limitation of the foregoing, it is strictly prohibited to create, transmit, distribute, or store any information, data, or material which a) intentionally infringes any copyright, trademark, trade secret, or other intellectual property right (or after written notification of such infringement, fails to remedy same in a timely manner), b) is obscene or constitutes child pornography, c) is

libelous, defamatory, hateful, or constitutes an illegal threat or abuse, d) violates export control laws or regulations, or e) encourages conduct that would constitute a criminal offense or give rise to civil liability.

**4.3 Circumvention of Security Measures.** Violations of system or network security are prohibited, and may result in criminal and civil liability. PowerSteering will investigate potential security violations, and may notify applicable law enforcement agencies if violations are suspected. It is strictly prohibited to attempt to circumvent the authentication procedures or security of any host, network, network component, or account (i.e. "cracking") to access data, accounts, or servers which the Licensee (or its users) is not expressly permitted or authorized to access. This prohibition applies whether or not the attempted intrusion is successful, and includes unauthorized probes or scans performed with the intent to gather information on possible security weaknesses or exploitable configurations.

**4.4 Attacks.** Licensee is prohibited from interfering or attempting to interfere with service to any other user, host, or network on the Internet ("denial of service attacks"). Examples of such prohibited activity include without limitation (a) sending massive quantities of data with the intent of filling circuits, overloading systems, and/or crashing hosts, (b) attempting to attack or disable any user, host, or site, or (c) using, distributing, or propagating any type of program, script, or command designed to interfere with the use, functionality, or connectivity of any Internet user, host, system, or site (for example, by propagating messages, via e-mail, Usenet posting, or otherwise, that contain computer worms, viruses, control characters or Trojan horses).

**4.5 E-Mail.** Licensee is prohibited from engaging in improper use or distribution of electronic mail ("e-mail") over the Internet.

## **5. Disk Space**

For each Licensee, PowerSteering allocates at no charge to Licensee 10GB of Database Storage and 40GB of File Storage.

Items in the recycle bin do not count against the storage limits. Additional storage is sold at the rate of \$250/GB per month for Database Storage and \$75/GB per month for File Storage.

System Administrators can review how much space Licensee is using, and can also provide usage information by users and record types. Once Licensee reaches 90% of its storage limit, an email notification shall be sent every week to its system administrator(s) with the following suggestions:

1. Archive old data - Clean out old leads and contacts by exporting them to a CSV file and then deleting them; and/or.

2. Purchase additional storage.

Once Licensee reaches its storage limit, notifications shall be sent by PowerSteering every day. Licensee shall not be able to create new records until its storage usage lowers or additional storage is purchased.

## EXHIBIT D - Professional Services

### 1. Definitions

**1.1 "Acceptance Criteria"** shall mean, with respect to any Deliverable, the mutually acceptable tests and other acceptance criteria set forth in the applicable Statement of Work describing such Deliverable.

**1.2 "Deliverable"** means the various items to be prepared and/or delivered by PowerSteering as described in an applicable Statement of Work.

**1.3 "Milestone Date"** shall mean a date set forth in a Statement of Work upon which PowerSteering shall deliver the applicable Deliverable to Licensee.

**1.4 "Specifications"** shall mean, with respect to any Deliverable, the functions to be performed by such Deliverable and expressly referenced in the relevant Statement of Work.

**1.5 "Tools" and/or "Utilities"** shall be defined as software code and/or a portion of code that: (a) accelerates the pace of application development, implementation or installation or (b) accelerates any data conversion process.

### 2. Interpretation

In the event of a conflict between any provision of this Exhibit D and any applicable Statement of Work, the provisions of the Statement of Work shall prevail.



### 3. Engagement

**3.1 Engagement of PowerSteering.** Subject to the terms and conditions of the Agreement and this Exhibit D, Licensee may retain PowerSteering for the provision of professional services, pursuant to a mutually agreed Statement of Work.

**3.2 Change Order Requests.** Either PowerSteering or Licensee may initiate a Change Request as follows: a Change Request may be requested for any reason, including without limitation, the following: a material modification, addition or deletion is required in the services or deliverables; a material required task is not identified within one of the specifications; a task identified in one of the specifications has materially changed or is no longer required; Licensee makes a material change to its operating environment; or material modifications are required to the project scope, schedule or implementation plan. All proposed Change Requests shall be submitted in writing. Each proposed Change Request will specify the nature of the proposed change requested, the reason for the proposed change, and any subsequent impact to schedules, deliverables and cost. A Change Request will not be implemented until all terms regarding such Change Request are mutually agreed upon in writing by PowerSteering and Licensee and executed by the authorized representative of each party.

**3.3 Use of Third Party Contractors.** PowerSteering may, from time to time, engage another third party to render services in connection with PowerSteering's development of the Deliverables; provided, however, that all such third parties who perform work in furtherance of such development shall execute appropriate documents to ensure that the PowerSteering's obligations to Licensee hereunder will be satisfied with respect to such work. PowerSteering shall at all times have the sole right and obligation to supervise, manage, contract, direct, procure, perform, or cause to be performed all work to be performed by PowerSteering hereunder unless otherwise provided herein.

**3.4 Licensee Obligations.** Licensee shall provide the work, services, material, facilities and other items required to be provided by Licensee according to the terms set forth in the applicable Statement of Work.

### 4. Acceptance of Deliverables

**4.1 Acceptance of Deliverables.** (a) PowerSteering shall inform Licensee as it completes development of each Deliverable. Within 5 days (the "Acceptance Period") after receipt of a Deliverable, Licensee may, upon written notice (the "Rejection Notice") to PowerSteering, reject any such Deliverable that fails materially to satisfy the Acceptance Criteria for such Deliverable. In any such Rejection

Notice, Licensee shall document in reasonable detail the relevant part of the Acceptance Criteria to which the Deliverable failed materially to satisfy.

(b) PowerSteering shall use all commercially reasonable efforts to correct any material failure(s) to satisfy the applicable Acceptance Criteria that both: (i) are documented in a Rejection Notice that Licensee provides in compliance with Section 4.1(a) and (ii) the existence of which PowerSteering has confirmed; and to deliver the corrected Deliverable to Licensee within fifteen (15) business days of receiving such Rejection Notice. Upon re-delivery of the Deliverable, Licensee shall have an additional Acceptance Period to re-perform tests and establish that the corrected Deliverable conforms with applicable Acceptance Criteria and may give a Rejection Notice to PowerSteering within such additional Acceptance Period of any continuing failure(s) materially to satisfy Acceptance Criteria. The foregoing acceptance/rejection/correction process shall be repeated until all such failures have been corrected by PowerSteering and Licensee's acceptance of the Deliverable; provided, however, that if, after repeated attempts PowerSteering is unable to correct material failure(s) to satisfy Acceptance Criteria, Licensee may reject the Deliverable. In the event of such rejection, Licensee shall return such rejected Deliverable, including any copies thereof, and the related documentation, including any copies thereof, to PowerSteering. In such event, unless the parties otherwise agree in writing, Licensee shall be under no obligation to remit any further payment and PowerSteering shall be under no obligation to continue to produce Deliverables for the Statement of Work for which the rejected Deliverable was produced.

(c) Notwithstanding anything to the contrary in this Section 4.1, a Deliverable will be deemed accepted and the associated fees shall be due immediately if either (i) Licensee starts using such Deliverable prior to the end of any relevant Acceptance Period; or (ii) PowerSteering receives no Rejection Notice within a relevant Acceptance Period.

## **5. Rights To Deliverables**

**5.1 Rights to Deliverables.** Upon acceptance and payment of the applicable fees therefore, PowerSteering shall be deemed to have granted to Licensee a non-exclusive, non-transferable, worldwide and perpetual (subject to the terms of Section 5 of the Agreement) right and license to use all Deliverables (any documentation provided in connection therewith) only with the applicable Software, or as may be otherwise set forth in the Statement of Work, and for internal use only pursuant to the license terms set forth herein. Licensee's access to and use of the Deliverables may not exceed any restrictions, if any, set forth in an applicable Statement of Work or Exhibit A.

Notwithstanding anything in this Agreement to the contrary, PowerSteering shall retain all rights, title, and interest, including all copyrights, patent, trade secret and other intellectual property rights throughout the world, in and to such Deliverables, software, or other related features, derivatives or deliverables developed hereunder, including to

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any new enhancements to any Software that results directly or indirectly from the work contemplated hereunder.

**5.2 Techniques.** Notwithstanding anything in this Agreement to the contrary, nothing in this Agreement shall transfer ownership of methodology, or other intellectual property of PowerSteering or limit in any way PowerSteering's ownership or right to use the methodologies or design concepts, techniques, knowledge or know-how resulting from PowerSteering's performance of the work contemplated by, or employed or produced under, this Agreement. Further, PowerSteering hereby retains all right, title and interest in and to, including all copyrights and patents, any Tools or Utilities developed by or on behalf of PowerSteering in whatever form under a Statement of Work for Licensee. Upon acceptance of the applicable Deliverable, PowerSteering will be deemed to have granted to Licensee a worldwide, nonexclusive, nontransferable, royalty-free, perpetual (subject to the terms of Section 5 of the Agreement) license to use such Tools and/or Utilities in object code form for internal research purposes only pursuant to the license terms set forth herein and the Agreement.

**5.3 Restrictions.** The restrictions set forth in Section 3.3 of the Agreement shall apply to Licensee's use of the Deliverables.