



NEXIDIA

All references to Nexidia in these Terms and Conditions should be read as "Contractor (immixTechnology, Inc.), acting by and through its supplier, Nexidia."

TERMS AND CONDITIONS FOR NEXIDIA PRODUCTS AND SERVICES

LICENSE AND SUPPORT AGREEMENT

1. **Definitions.** The following terms shall have the meanings stated:

1.1 **Affiliate:** Any entity not a competitor of Nexidia which now or in the future controls, is controlled by, or is under common control with Customer, with "control" defined as a more than fifty percent (50%) ownership interest. For each System Order signed by or on behalf of an Affiliate, "Customer" and "party" as used herein shall mean the Affiliate identified therein.

1.2 **Confidential Information:** Confidential or proprietary information, other than Trade Secrets, of value to its owner, generally not known to the public and any data or information defined herein as a Trade Secret but which is determined by a court of competent jurisdiction not to rise to the level of a trade secret under applicable law.

1.3 **Designated Employees:** Up to the number of Customer's employees per Site as set forth on a System Order who have received training from Nexidia. Designated Employees may be changed by notice to Nexidia.

1.4 **Documentation:** Nexidia's standard documentation including the specifications and configurations of the applicable Software and Support, as updated by Nexidia from time to time.

1.5 **Error:** A failure of the Software to substantially conform to the specifications in the Documentation that Nexidia can replicate.

1.6 **Error Correction:** Revisions, modifications, alterations, and additions to the Software, bug fixes, or workarounds provided by Nexidia to Customer to resolve Errors.

1.7 **Expenses:** All reasonable out-of-pocket expenses incurred by Nexidia in performing hereunder, excluding those expenses incurred while performing under the warranty in [Section 5.1](#) and Support in [Section 4.1](#).

1.8 **License Fee:** The amount specified in the applicable System Order for the licensing rights to the Software.

1.9 **Proprietary Information:** Collectively, Confidential Information and/or Trade Secrets of Nexidia, Customer or a third party providing such information to either of the foregoing parties.

1.10 **Site:** The physical location or locations that a System is deployed as specified in the applicable System Order.

1.11 **Software:** All Nexidia software, in executable form, identified in the applicable System Order, and Updates, if any.

1.12 **Subscribers:** Third-party end users of Customer's products or services, as specifically identified in the applicable System Order.

1.13 **Support:** The specific support services provided by Nexidia as described in the Documentation.

1.14 **Support Fee:** The fee for the Customer's right to receive Support for the applicable System during a Support Term. The amount for the Initial Support Term is as specified in a System Order.

1.15 **Support Term:** Annual or Initial Support Term, defined as follows:



NEXIDIA

a. Annual Support Term: Each one (1) year period following the Initial Support Term unless earlier terminated as provided in Section 9 below.

b. Initial Support Term: The one (1) year period beginning on the shipment of each System unless earlier terminated as provided in Section 9 below.

1.16 **System:** Collectively, Software and Documentation, and all copies of any of the foregoing.

1.17 **System Order:** An order for Software, Documentation and Support, or any portion of the foregoing, attached or added as Exhibit A.

1.18 **Territory:** The geographical area identified in the applicable System Order.

1.19 **Trade Secrets:** Information, constituting a trade secret under the Uniform Trade Secret Act.

1.20 **Updates:** Periodic improvements or additions to the Software, including Error Corrections and minor enhancements, but excluding any new Software feature or substantial additional functionality which is subject to additional license fees and/or terms.

1.21 **Version:** The System configuration identified by a number to the right of a decimal point (e.g., 5.0, 5.1). The then-current Version contains all Updates issued by Nexidia.

2. License. Nexidia grants to Customer, and Customer accepts, a nonexclusive, non-assignable, and nontransferable limited license to use the System at the Site within the Territory, solely by Customer's employees and Subscribers for Customer's business operations subject to the terms of this Agreement and appropriate System Orders. Customer's use of the Software shall at no time exceed the scope of use as specified in this Agreement and the applicable System Order. Customer and Affiliate(s) may execute System Orders; provided, however, Customer acknowledges and agrees that Nexidia has no obligation to accept a System Order from Customer or Affiliate under this Agreement. Nothing in this Agreement shall permit Customer to share or provide any or all of the Software to an Affiliate. Customer and an Affiliate shall be jointly and severally liable to Nexidia for that Affiliate's breach of this Agreement. Customer may also make a reasonable number of copies of the Software solely as needed for back-up, archival and testing purposes and of the Documentation solely as needed for Customer's business purposes as granted herein.

3. Inspection/Acceptance. The Contractor (immixTechnology, Inc.) can only, and shall only tender for acceptance those items that substantially conform to the software manufacturer's ("MANDIANT") 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; and

(2) Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.



NEXIDIA

4. Support.

4.1 Support. Subject to Section 5 below and provided Customer has paid all applicable Support Fees, during any Support Term, Nexidia shall provide Support in accordance with Nexidia's Documentation to Designated Employees. Nexidia shall provide Customer Updates, that Nexidia generally offers in its sole discretion to its supported customers and shall use commercially reasonable efforts to provide Error Corrections.

4.2 Version Support. Nexidia shall provide Support only for the then-current Version, or for the immediately preceding Version for a period of six (6) months after the then-current Version is made generally available.

4.3 Exclusions. Notwithstanding Nexidia's warranty and support obligations hereunder, Nexidia shall have no responsibility or liability of any kind, whether for breach of warranty or otherwise, arising or resulting from:

a. Customer's failure to (i) report Errors promptly in writing in English; (ii) provide sufficient information to Nexidia for Nexidia to duplicate the circumstances indicating a reported Error (iii) promptly incorporate Updates to the Software, (iv) provide all reasonable cooperation and full information to Nexidia with respect to Nexidia providing Support under this Agreement

b. Customer's failure to prepare customer's environment prior to Software installation or to maintain the customer environment and other requirements as set forth in the Documentation.

c. Customer's failure to grant security authorization or to provide necessary dial-in communications mechanisms; or Internet connection problems.

d. Errors resulting from misuse, abuse, negligence, or improper use of all or any part of the System; or problems to or caused by products or services not provided by Nexidia.

e. System modification, amendment, revision, or change by any party other than Nexidia or Nexidia's authorized representatives.

f. Data or data input, output, integrity, storage, and back-up, which shall be deemed under Customer's exclusive control. Any use of or reliance on data or data output is Customer's sole responsibility.

5. Limited Warranty and Disclaimers.

5.1 Limited Performance Warranty. Nexidia warrants to Customer that the Software as initially shipped under a System Order shall operate substantially in accordance with the specifications in the Documentation for a period of ninety (90) days after its shipment.

5.2 Disclaimer. THE LIMITED WARRANTY SET FORTH IN SECTION 5.1 IS MADE FOR THE BENEFIT OF CUSTOMER ONLY AND IS EXPRESSLY SUBJECT TO SECTIONS 4.2 AND 4.3, AND NEXIDIA MAKES NO (AND HEREBY DISCLAIMS ALL) OTHER WARRANTIES OR REPRESENTATIONS OR CONDITIONS, WHETHER WRITTEN OR ORAL, EXPRESS, IMPLIED, OR STATUTORY, WITH RESPECT TO THE SUBJECT MATTER HEREOF, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, NONINFRINGEMENT, TITLE, OR FITNESS FOR A PARTICULAR PURPOSE. NEXIDIA DOES NOT WARRANT THAT ALL ERRORS CAN BE CORRECTED, OR THAT OPERATION OF THE SOFTWARE SHALL BE UNINTERRUPTED OR ERROR-FREE. STATEMENTS MADE BY NEXIDIA'S SALES REPRESENTATIVES OR IN PROMOTIONAL MATERIALS DO NOT CONSTITUTE WARRANTIES.



NEXIDIA

6. Limitation of Liability.

6.1 Exclusive Remedy. Customer's remedy under Sections 4.1 and 5.1 shall be for Nexidia to use commercially reasonable efforts to either, provide Error Corrections or replace the nonconforming portion of the Software; provided, however, if Nexidia cannot provide either remedy for an Error reported during the applicable period specified in (1) Section 5.1, upon receipt of the nonconforming portion of the Software, Nexidia shall refund Customer the License Fee paid for such nonconforming portion of the Software; (2) Reserved.

6.2 Limitation of Liability. Nexidia's maximum liability arising out of or in any way connected to this Agreement shall be in the aggregate and limited to Customer's direct actual damages not to exceed the actual License Fees and Support Fees paid to Nexidia hereunder for the nonconforming Software or Support during the immediately preceding twelve (12) month period for such Software, or Support, reduced by any amount due Nexidia. **IN NO EVENT SHALL NEXIDIA, ANY PARENT, SUBSIDIARY, OR AFFILIATE, OR ANY OF THEIR OFFICERS, DIRECTORS, EMPLOYEES OR REPRESENTATIVES, BE LIABLE TO ANY THIRD PARTY FOR DAMAGES OF ANY KIND OR NATURE OR IN ANY MANNER WHATSOEVER, OR TO CUSTOMER FOR ANY CONSEQUENTIAL, INDIRECT, EXEMPLARY, INCIDENTAL, PUNITIVE OR SPECIAL DAMAGES OR COSTS (INCLUDING ATTORNEYS' FEES) REGARDING THIS AGREEMENT OR RESULTING FROM OR IN CONNECTION WITH THE USE, MISUSE, OR INABILITY TO USE THE SOFTWARE, SUPPORT, OR OTHER PRODUCTS OR SERVICES, EVEN IF NEXIDIA HAS BEEN ADVISED OF THE POSSIBILITY THEREOF.**

6.3 Survival. This Section 6 shall survive and continue in full force and effect despite any failure of essential purpose, termination, consideration, or an exclusive remedy.

7. IP & Confidentiality.

7.1 Ownership. Nexidia owns or has the right to license the System, and Customer acknowledges and agrees that all right, title, and interest in the System and all information and materials related to the System and Nexidia's business, regardless of form, including all copyrights, trademarks, service marks, logos, patents, Proprietary Information, and other intellectual property rights pertaining thereto (collectively, "**Nexidia IP**") are and shall remain vested in Nexidia or its licensor(s). Customer further acknowledges that the Software and Documentation are unpublished and constitute Nexidia copyrights and Trade Secrets. Customer does not claim any ownership or other proprietary rights in or to any Nexidia IP.

7.2 Protection of Nexidia IP. Customer shall not itself nor permit any other party to:

a. Disassemble, decompile, decrypt, or reverse engineer, or in any way attempt to discover or reproduce source code for any part of the System; alter, modify, or prepare derivative works based on any Nexidia IP; or use any Nexidia IP to create any computer program or other material that performs, replicates, or utilizes the same or substantially similar functions as the System.

b. Use the System in a time sharing, outsourcing, or service bureau arrangement.

c. Alter, remove or suppress any copyright or other proprietary notices or marks or any confidentiality legends embedded or otherwise appearing in or on any Nexidia IP; or fail to ensure that all such notices and legends appear on all full or partial copies of Nexidia IP or any related material.

d. Sell, sublicense, lease, assign, transfer, distribute, encumber, or otherwise transform any Nexidia IP, this Agreement or any of Customer's rights hereunder.



NEXIDIA

7.3 Confidentiality. The unauthorized disclosure or use of Proprietary Information of the other party would cause great injury and harm to its owner. Therefore, each party agrees to take all appropriate action to ensure the confidentiality and security of the other party's Proprietary Information, but in any event no less than the same standard of care it uses to protect its own Proprietary Information of like kind and value. Without limiting the generality of the foregoing, and in addition to Customer's obligations in Section 7.2, Customer and Nexidia each agree that it: **(a)** shall maintain the other's Proprietary Information in the strictest confidence, including compliance with reasonable remote access security requirements; **(b)** shall not disclose, display, publish, transmit, or otherwise make available such Proprietary Information or the benefit thereof, in whole or in part, except in confidence to its own employees on a need-to-know basis; **(c)** except as expressly permitted hereunder, shall not copy, duplicate, replicate, transform, or reproduce such Proprietary Information.

7.4 Applicability. The restrictions set forth in this Section 7 shall apply during the Term of this Agreement, and shall remain in full force and effect after any termination: **(a)** for Trade Secrets and any Confidential Information that rises to the level of a Trade Secret, as long as such information qualifies as a Trade Secret; and **(b)** for all other Confidential Information, during a period of five (5) years after initial disclosure.

8. Indemnity. To the extent allowed by law, Nexidia will defend any action (or portion thereof) brought by a third party against Customer based solely on a claim that the Software infringes a U.S. patent or copyright or misappropriates a proprietary trade secret of a third party. Nexidia will indemnify Customer against damages awarded against Customer in such actions which are directly attributable to such claim, provided that Customer is not in material breach of this Agreement and that Nexidia is given prompt written notice of such claim, reasonable assistance from Customer, and sole authority to defend or settle such claim. If Software becomes, or in Nexidia's opinion is likely to become, the subject of a claim of infringement, Nexidia may, at its option, procure for Licensee the right to continue to use the Software, replace or modify the Software to make it non-infringing, or refund the License Fees paid with respect for the Software during the prior twelve (12) month period. Nexidia will have no liability for any claim based on (i) any modification of the Software, except with respect to modifications performed by Nexidia; (ii) any use of the Software other than as provided in this Agreement; or (iii) any use of third-party products not licensed from Nexidia or the combination of any third party products not licensed from Nexidia with the Software. This Section sets forth Nexidia's complete liability with respect to infringement of intellectual property rights.

9. Term & Termination.

9.1 Agreement Term. This Agreement shall commence on the Effective Date and continue unless earlier terminated as provided in Section 9.4.

9.2 Termination of System Order.

a. A System Order may be terminated only:

(1) By Nexidia if any payment owed under a System Order remains due and unpaid seven (7) days after Nexidia's written notice thereof.

(2) By either party if the other party fails to perform any material obligation set forth in a System Order, and such non-performing party does not cure such failure within thirty (30) days after



NEXIDIA

written notice of such failure. Permitted termination of a System Order shall not terminate this Agreement.

b. Upon termination of a System Order, Nexidia shall have no further responsibility or liability thereunder; provided, however, all other provisions, including licensed uses and payment obligations under this Agreement and other System Orders, shall remain in full force and effect.

9.3 Termination of Support.

a. Reserved.

b. Termination of Support shall not constitute termination of the Agreement or any System Order.

9.4 Termination of Agreement.

a. This Agreement may be terminated only:

(1) reserved.

(2) reserved.

(3) By written notice from Customer to Nexidia.

b. Upon termination of this Agreement for any reason: (i) all outstanding amounts shall be immediately remitted to Nexidia; (ii) Customer shall immediately cease all uses of the System, remove all copies from any equipment on which they have been installed, return them with all Documentation and other Nexidia Proprietary Information, and provide Nexidia written certification of the foregoing; and (iii) the license and all other rights and obligations of the parties shall immediately terminate except for the provisions hereunder that by their sense and context are intended to survive termination, including Sections 3, 5.2, 6, 7, 9, 10 and 11, which provisions shall so survive.

9.5 No Toll. A cure period exercised hereunder shall not serve to toll, release, or reduce the parties' respective obligations or liability.

10. Reserved.

11. General.

11.1 Headings/Counterparts. Section headings are for convenience only. This Agreement may be executed in one or more counterparts, each of which shall for all purposes be deemed to be an original and all of which shall constitute the same instrument.

11.2 Consent. Wherever consent or other approval is required, such consent shall not be unreasonably withheld or delayed; provided, however, it shall not be considered unreasonable for Nexidia to withhold its consent if consent could serve to jeopardize the confidentiality of and/or Nexidia's interests in Nexidia IP.

11.3 Assignment. Customer shall not assign this Agreement without the prior written consent of Nexidia.

11.4 Force Majeure. Except for obligations of confidentiality and payment, neither party shall be liable for any delay or failure in performance if caused by any factor beyond its reasonable control, and performance shall be deferred until such cause of delay is removed.



NEXIDIA

11.5 **No Agency.** Nothing herein shall make either party the agent of the other for any purpose whatsoever.

11.6 **Notices.** Notices and other communications required hereunder must be in writing, delivered by hand delivery or nationally recognized overnight courier or certified or registered mail with postage prepaid and addressed to the addressees set forth in the applicable System Order, and if to Nexidia, with a copy to the attention of the Legal Department, or to such other address or title by giving proper notice thereof. Notices will be deemed given when delivered, if hand delivered, and on the next business day after deposit if sent by nationally recognized overnight courier or 48 hours after being deposited in the mail, if certified or registered mail. Notices may only be sent in this manner.

11.7 **Waiver.** Any failure or delay by either party in exercising any right or remedy shall not be deemed a waiver of any further, prior, or future right or remedy hereunder.

11.8 **Severability.** Any provision of this Agreement that is prohibited or unenforceable in any jurisdiction will, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining portions hereof or affecting the validity or enforceability of such provision in any other jurisdiction. The invalidity or unenforceability of any provision shall not constitute a failure of consideration hereunder.

11.9 **Entire Agreement/Modification.** This Agreement and its Exhibits together constitute the entire agreement between Nexidia and Customer, and supersede all prior agreements and understandings, whether oral or written, relating to the subject matter hereof. No other agreements shall be effective to change, modify, or terminate this Agreement in whole or in part unless in writing specifically referencing this Agreement and duly signed by authorized representatives of both parties. Nexidia reserves all rights not expressly granted to Customer hereunder. No terms, provisions or conditions of any purchase order, invoice or other business form or written authorization used by either party will have any effect on the rights, duties or obligations of the parties under, or otherwise modify, this Agreement, regardless of any failure of either party to object to such terms, provisions or conditions. In case of any conflict between this Agreement and any Exhibit or other attachment hereto, the provisions of this Agreement shall control.

11.10 **Government Rights.** Software acquisition is limited to commercial computer software defined in FAR Part 2.101 For licenses with agencies of the United States Department of Defense, the Government's rights in the Software and Documentation shall be governed, pursuant to 48 C.F.R. 227.7201 through 227.7202-4, by this standard commercial license. Technical data other than software or software documentation shall be governed by 48 C.F.R. 252.227-7015(b). For licenses with U.S. Government agencies other than the Department of Defense agencies, the Government's rights in the Software and Documentation shall be governed, pursuant to 48 C.F.R. 2.101 and 12.212, by this standard commercial license. Technical data other than software and software documentation shall be governed by 48 C.F.R. 52.227-14 including, where applicable Alternatives I or II

NEXIDIA



immixTechnology
government channel representation