



ESC Services Agreement 2009 Schedule 4 Part 2 – Licence Conditions

1. Authority

The Licensor warrants that it has the authority to grant the Licence granted hereunder.

2. Grant of Rights

The Licensor hereby grants to the Licensee a non-exclusive and non-transferable Licence to use the Services in the United Kingdom and those countries to which an Agreement pertains on the terms and conditions stated herein and for the period specified in this Schedule.

3. Cover

All Services will be performed within the Licensor's normal working hours of 8.00am to 6.00pm, Monday to Friday, excluding UK public holidays and the Nottingham Trent University closure days as detailed on the Licensor's web site. Out of hours service can be provided by arrangement and will be charged for at the Licensor's then current UK extended cover rates.

4. Services

4.1 The Services comprise and are limited to the following:

Technical support for English language versions of software produced by Microsoft Ltd and available under the Microsoft Select Agreement, including help services, fault diagnosis and, where possible, recommendations for correction (subject to the limitations imposed by contractual restrictions of Microsoft Ltd), following the reporting of any request for assistance from the Licensee by telephone or e-mail by a Named Contact named on that Licensee's Licence with ESC.

4.2 The Licensor will ask the Licensee to assign a priority to the call according to the following list:

4.2.1 High impact: severity B. Licensor will offer an initial response within two hours.

4.2.2 Standard: severity C. Licensor will offer an initial response within four hours.

4.2.3 General enquiry: severity D. Licensor will offer an initial response within eight hours.

4.3 These services will be provided by the Licensor or a third party service provider (including Microsoft Ltd) approved by the Licensor whom the Licensor may use from time to time to deliver services to the Licensee, acting on behalf of the Licensor. At the discretion of the

Licensor, technical support may be escalated on behalf of the Licensee to Microsoft Ltd at no extra cost to the Licensee, in which case this will be in accordance with the Microsoft Master Service Agreement for Premier Support, a copy of which is available to Licensees on request to the Licensor.

- 4.4** Each Licensee shall be allowed a specified number of Named Contacts who are permitted to contact the Licensor for support. Licensees choosing the 12 Call Pack option shall be allowed two Named Contacts. Licensees with a Staff FTE Count of less than 500 shall be allowed two Named Contacts. Licensees with a Staff FTE Count of between 500 and 1499 shall be allowed three Named Contacts. Licensees with a Staff FTE Count of 1500 and over shall be allowed four Named Contacts.
- 4.5** Licensees have the option of adding additional Named Contacts. For each additional Named Contact added to a Licensees' Licence the Licensee shall pay to Eduserv and Eduserv an additional £500. For Named Contacts that are added partway through a Licence Year, this payment shall be prorated according to the month in which the additional Named Contact is added. Additional contacts added to a Licence can be removed at any time but no refunds will be given. Any reduction in payments due as a result of contacts being removed from a Licence will take effect at the next annual payment.
- 4.6** The Licensor will not be obliged to support a Licensee under the following circumstances:
- 4.6.1** Requests for services for which the Licensee does not hold a licence with Microsoft Ltd for the use of the software for which support is requested.
 - 4.6.2** Requests for services for software products for which Microsoft Ltd has withdrawn support, save that the Licensor will make a best efforts endeavour to provide help where it can.
 - 4.6.3** Requests for support on behalf of a third party.
 - 4.6.4** Requests which the Licensor deems are the liability of the Licensee's own in-house technical support staff.
 - 4.6.5** Late or non-payment of an invoice from Eduserv or ESC to the Licensee.
- 4.7** Any additional services provided will be by negotiation between the Licensee and the Licensor. Any additional fees due will be billable by ESC directly to the Licensed Institution concerned.

5. Payment terms

The Licensee shall pay to Eduserv the Fees shown in Schedule 4 Part 1 or otherwise due under this Licence.

6. Intellectual Property

The Licensor and/or a third party service provider (including Microsoft Ltd) approved by the Licensor, whom the Licensor may use from time to time to deliver services to the Licensee acting on behalf of the Licensor, will retain the ownership of any work (including but not limited to bug fixes, workarounds, patches, beta fixes and builds) made available to the Licensee in the course of the provision of Services under this Licence.

7. Confidentiality

7.1 The Licensee shall be solely responsible for the security of its confidential and proprietary information and not disclose such information to the Licensor except on a 'need to know' basis for the purpose of the Licensor's performance of Services.

7.2 The Licensor undertakes to ensure that any information provided to the Licensor by the Licensee in order to provide Services to the Licensee will remain confidential to the Licensor and/or any third party service provider (including Microsoft Ltd) approved by the Licensor whom the Licensor may use from time to time to deliver services to the Licensee acting on behalf of the Licensor. However, any technical information derived from providing Services to the Licensee may be made available in anonymous form through the Licensor's website knowledge base.

7.3 The Licensee shall keep confidential for a period of five years from disclosure any information the Licensor and/or any third party service provider (including Microsoft Ltd) approved by the Licensor whom the Licensor may use from time to time to deliver services to the Licensee acting on behalf of the Licensor, supplies to the Licensee which the Licensor designates as being confidential.

7.4 The Licensor and the Licensee may divulge confidential information of the other party only to those employees, agents or subcontractors bound under equivalent conditions of confidence who are directly involved in the use of the Services, and shall ensure that such persons are aware of and undertake to comply with these obligations of confidentiality.

7.5 The provisions of this Clause 7 shall not apply to any information which:

7.5.1 is or becomes public knowledge other than by breach of this Clause;

7.5.2 is in the possession of the receiving party without restriction before the date of receipt from the disclosing party;

7.5.3 is obtained from a third party who is lawfully authorised to disclose the same.

7.6 The obligations of both parties as to disclosure and confidentiality shall continue in force notwithstanding the termination of this Licence for any reason whatsoever.

8. Warranty

8.1 The Licensor warrants that the Services will be provided with reasonable care and skill but no warranty is given in respect of response or performance by the Licensor and time will not be of the essence.

8.2 The Licensee warrants that it will nominate Named Contacts who will be appropriately qualified and trained to an acceptable standard. Only these Named Contacts will be able to request service from the Licensor.

9. Limitations of Liability

9.1 The Licensor shall indemnify the Licensee in respect of any liability for death or personal injury to any person or loss of or damage to the Licensee's tangible property caused by the Licensor's negligence, provided that the Licensor's liability in respect of loss or damage to property shall not exceed the amount of £100,000 (one hundred thousand pounds), or such greater sum as may be agreed between the Licensor and Licensee, in respect of any one incident or series of incidents attributable to the same cause.

9.2 The Licensor shall not in any circumstances be liable whether in contract, tort or otherwise for any consequential or indirect loss or damage howsoever arising and of whatsoever nature suffered or incurred by the Licensee including (without limitation) loss of profits, loss of contracts, loss of data, loss of operation time or loss of use of any equipment or process suffered indirectly by the Licensee and loss of anticipated savings.

9.3 Save as provided in Sub-clause 10.1, and excluding negligence resulting in death or injury for which no limit applies, the liability of the Licensor to the Licensee for direct loss or damage whether in contract, tort or otherwise arising out of or in connection with its performance or its total or partial failure to perform in accordance with the terms of this Licence, shall in respect of any one incident or series of incidents attributable to the same cause be limited to and shall not in any circumstances exceed the sum of £25,000 (twenty five thousand pounds) or the charges shown in Schedule 4 Part 1, whichever is the greater.

9.4 Save as otherwise provided in this Clause 10, the Licensor shall not be liable to the Licensee either in tort, contract or otherwise whatsoever for any loss, damage, injury or expense howsoever arising out of or in connection with the supply or use of the Service or the manner of performance of this Licence.

9.5 The Licensee will indemnify the Licensor in respect of any claim for loss, damage or injury of any person or property occasioned by the act, neglect or default of the Licensee except, and insofar as the Licensor is liable as aforesaid.

9.6 Provision of the Services covered by this Licence does not imply any guarantee or representation that the Licensor will be able to assist the customer in achieving any results from any supported software which are not technically feasible.

10. Copyright Indemnity

10.1 The Licensor shall indemnify the Licensee against any damages, costs, claims or expenditure incurred by the Licensee as a result of any infringement or alleged infringement of copyright or any intellectual property rights of a third party when the Service is used by the Licensee for the purposes licensed hereunder provided that:

10.1.1 the Licensor shall be promptly notified by the Licensee upon the Licensee becoming aware of any such alleged infringement and, at its own expense, the Licensor shall conduct all negotiations for settlement of such allegations and any litigation that may arise therefrom;

10.1.2 the Licensee shall, at the request of the Licensor, give all reasonable assistance for the purposes of courtesy and defending such claims or demand or action and shall be indemnified against all costs and expenses in so doing;

10.1.3 the Licensee shall not make any admissions which may be prejudicial to the defence of such claim or demand or action.

10.2 If at any time an allegation of infringement of copyright is made in respect of the Service the Licensor may at its own expense modify or replace the Service with a service of equivalent performance so as to avoid infringement.

10.3 The foregoing states the entire liability of the Licensor with respect to infringement or alleged infringement of any third party proprietary rights by the Service.

11. Publicity

Both the Licensee and Licensor may use the name of the other in advertising or publicity relating to the Services subject to prior written consent having been obtained. Such consent shall not be unreasonably withheld.

12. Termination

12.1 Either party may terminate this Licence by written notice to the other if the other party is in breach of its obligations under the Licence, and in the event of a breach capable of being remedied, fails to remedy the breach within 30 days of receipt of notice in writing specifying the nature of the breach.

12.2 Further, the Licensee may terminate this Licence on written notice if the Licensor shall make an arrangement with or assignment in favour of its creditors or shall go into liquidation (other than a voluntary liquidation for the purposes of amalgamation or reconstruction) or have a receiver appointed of its property or assets or any part thereof.

13. Post Termination

Termination of this Licence howsoever caused shall not affect the rights of either party under this Licence which may have accrued up to the date of termination.

14. Force Majeure

Neither party hereto shall be liable for delay or failure to perform any obligation under this Licence insofar as the performance of such obligation is prevented by an industrial dispute which is beyond the reasonable control of either party, or any other cause for which the party in default is not responsible or could not have reasonably prevented.

15. Assignment

The Licence is personal to the Licensee and the Licensee may not assign or otherwise transfer its rights or obligations under this Licence without the prior written consent of the Licensor.

16. Notices

All notices must be sent by hand, email, first class post or fax. Email will only be deemed to have been delivered on receipt of a reply email expressly acknowledging the content of the notice. Notices by post will be deemed delivered on the next but one working day, notices by fax on confirmation of delivery.

17. Severability

If any provision of this Licence shall finally be held illegal or unenforceable such provisions shall be severed and the remainder of the Licence shall remain in full force and effect unless the business purpose of the Licence is substantially frustrated thereby.

18. Waiver

No waiver of any breach of this Licence shall constitute a waiver of any other breach of the same or other provision of this Licence and no waiver shall be effective unless made in writing.

19. Recovery of Sums Due

Whenever, under the Licence any sum of money shall be recoverable from or payable by the Licensor, the same may be deducted from any sum then due or which at any time thereafter may become due to the Licensor, under this Licence or any contract with the Licensee.

20. Licensor's Personnel

20.1 The Licensee reserves the right to refuse to admit to premises occupied by or on behalf of the Licensee a person employed by the Licensor, or by a sub-contractor, whose admission would be, in the opinion of the Licensee, undesirable.

20.2 If and when directed by the Licensee, the Licensor shall provide a list of names and addresses of all the persons who may at any time require admission in connection with the performance of the contract, to any premises occupied by or on behalf of the Licensee, specifying the capacities in which they are concerned with the contract and giving such other particulars as the Licensee may reasonably require.

20.3 The decision of the Licensee as to whether any person is to be refused admission to the Licensee's premises and as to whether the Licensor has failed to comply with the provisions in 22.2 of this Condition shall be final and conclusive.

21. Arbitration

All disputes, differences or questions between the parties to the Licence with respect to any matter or thing arising out of or relating to the Licence, except those for which the decision of the Licensee or any other person is by the Licence expressed to be final and conclusive, shall, after written notice by either party to the Licence, to the other, be referred to a single arbitrator agreed for the purpose, or in default of such agreement to be appointed at the request of either party by the President of the British Computer Society. Such reference shall be deemed to be a submission to arbitration under the Arbitration Act 1950 and 1979 or any statutory modification or enactment thereof.

22. Law

This Licence shall be considered as a contract made in England and subject to English law and to the exclusive jurisdiction of English courts.

23. Entire Agreement

This Licence together with the Agreement constitutes the entire contract between the Licensor and the Licensee as to the subject matter hereof and supersedes all previous communications, representations and arrangements, either written or oral, and the Licensee hereby acknowledges that no reliance is placed on any representation made but not embodied in this Licence or the Agreement.