

**DESWIK STANDARD TERMS AND CONDITIONS (April 2017)**

**THIS AGREEMENT** is made 20  
 between **Deswik USA Inc.** of 200 Union Blvd. Suite  
 200, Lakewood Colorado 80228, United  
 States (**Deswik**)  
 and **The party identified in the Proposal**  
 (**Client**)

**RECITALS**

- A. Deswik is in the business of supplying various mining consulting services and mining software and is the owner or authorised reseller of the Software.
- B. The Client has requested certain Services and or Software on the terms of this Agreement.

**1. Supply of Services****1.1 Services**

- (a) During the Term Deswik will provide the Client with the Services in accordance with the terms of this Agreement.
- (b) The Client acknowledges and agrees that:
- (i) in providing the Services, Deswik is reliant upon the accuracy and completeness of the information provided to Deswik by the Client ('Client Inputs');
  - (ii) the description, scope, extent, quantity and timeframes and all other attributes of the Services as provided by the Client or as set out in the Proposal are a full and accurate description of the Client's requirements;
  - (iii) Deswik is entitled to rely on the Client Inputs and is not required to investigate or validate this information; and
  - (iv) Deswik is not liable to the Client for anything arising out of or in connection with any error or omission from the Client Inputs, or in connection with Deswik's use or reliance on the Client Inputs.
- (c) Subject to clause 1.1(d), Deswik must use its reasonable endeavours to provide the Services to the Customer within relevant estimated timeframes contemplated by the Proposal, and must endeavour to inform the Customer as soon as reasonably possible upon becoming aware of any matter which may delay the completion of the services.
- (d) The Customer acknowledges and agrees that any timeframes provided by Deswik in relation

to the Services are estimates only, and are not binding on Deswik.

- (e) If a Personnel at any time fails to provide the Services in accordance with this Agreement:
- (i) the Client will notify Deswik; and
  - (ii) the Client and Deswik will seek to resolve the failure; and
  - (iii) if agreed by both parties, Deswik will replace the Personnel with another person with the skills necessary to provide the Services.

**1.2 Additional or Varied Services**

- (a) Upon the agreement of both parties, Deswik may provide Additional or Varied Services to the Client from time to time at the rates applicable at the time.
- (b) If the Client requests Deswik to provide Additional or Varied Services which are significantly different from the Services:
- (i) the Client will advise Deswik of the Additional or Varied Services required by way of Deswik's Change Control process using Deswik's Change Request Forms (as provided to the Client by Deswik from time to time); and
  - (ii) Deswik will advise the Client as soon as reasonably possible of the likely additional Fees and associated terms and conditions in providing the additional or varied services.
- (c) Until the price, scope and terms for the Additional or Varied Services are agreed in writing by the parties, Deswik will not be obligated to provide the Additional or Varied Services.
- (d) The terms of this Agreement apply to the Additional or Varied Services.

**1.3 Completion of services**

- (a) The Client must:
- (i) notify Deswik in writing as soon as reasonably practicable the Client becomes aware of any defects in the Services; or
  - (ii) provide Deswik with an email or signed Project Sign Off Form confirming successful completion of any Services Deswik advises the Client have been completed.
- (b) If the Client does not notify Deswik of any defects under clause 1.3(a)(i) or provide Deswik with an email or signed Project Sign Off Form confirming

successful completion of the Services within 14 days of Deswik notifying the Client that the relevant Services are complete, the Client is deemed to have accepted the Services.

- (c) If the Client notifies Deswik of any defects under clause 1.3(a)(i), Deswik will, as soon as possible investigate and (where applicable) undertake rectification of the defects. Upon completion of any defect rectification the Client must promptly provide an email notification or signed Project Sign Off Form confirming the successful completion of the services, unless further defects exist. In this case, the Client is further required to notify Deswik of such defects.

#### 1.4 Mutual Cooperation

Both parties will:

- (a) inform the other party as soon as practicable of any unforeseen changes, new developments, or other issues that impact and influence the Services; and
- (b) wherever reasonably possible, accommodate each other's scheduling requirements.

#### 1.5 Third Party Reliance

The Services and Deliverables will be provided to the Client solely for the Client's benefit and for the purpose of the project described in the Proposal. The Deliverables:

- (a) should not be shown, communicated or disclosed to any other person nor relied upon by any other person or for any other purpose, without Deswik's prior express written consent; and
- (b) must not be quoted or referred to in any public document or filed with any person without Deswik's prior express written consent.

Deswik accepts no duty of care or other liability in respect of the Services or the Deliverables:

- (c) to any person other than the Client (to the extent provided for in this Agreement); or
- (d) in respect of any matter outside the scope and limitations of the Proposal.

### 2. Supply of Hardware, Software, and Software Support and Maintenance Services

Where Hardware, Software or Software Support and Maintenance Services are provided:

- (a) risk in the hardware or Software passes to the Client on delivery of that hardware or software to the Client;

- (b) physical title to that hardware or Software passes to the Client on payment of all Fees attributable to that hardware or software to Deswik;
- (c) the Software will be provided on the on the terms set out in the EULA; and
- (d) the Software Support and Maintenance Services will be provided in accordance with the terms of the Software Support Agreement.

If the Client requires a licence to any Third Party Software or Deswik requires a licence to any Third Party Software for the purposes of providing the Services, the Client will be responsible for and indemnifies Deswik in respect to all costs of obtaining a licence or any other rights to use the Third Party Software.

### 3. Obligations

#### 3.1 Client's Obligations

To enable Deswik to provide the Services the Client must:

- (a) provide Deswik with:
- (i) timely access to the Client's key Personnel;
  - (ii) timely Access to all required Systems and data (including, where necessary or desirable, administrative access);
  - (iii) timely access to premises, including any necessary security clearances, where required;
  - (iv) all items identified as Prerequisites in section 4 of the Proposal;
  - (v) internal stakeholder communication and engagement;
  - (vi) internal project management;
  - (vii) details of any work standards, policies and procedures that will apply to the Personnel while working at the premises or site designated by the Client; and
  - (viii) where the Services are to be performed at the Client's site, parking and other on-site infrastructure and facilities to enable the Personnel to provide the Services.
- (b) use reasonable endeavours to respond promptly and accurately to all reasonable requests by Deswik to provide information required for the performance of the Services;
- (c) ensure that all information provided to Deswik is accurate and complete and is not incomplete or misleading;
- (d) where access to a Client's premises or site is required, ensure the Client's premises or site are safe and comply with all relevant occupational

- health and safety legislation, regulations and industry standards;
- (e) where relevant, make available to Deswik suitable Personnel of the Client to:
- (i) provide information about the Client's System and information technology environment;
  - (ii) resolve queries; and
  - (iii) provide such other information and assistance as is reasonably requested by Deswik and its personnel in relation to the provision of the Services.
- (f) coordinate and be responsible for the assignment of tasks to the Personnel; and
- (g) any other obligations as set out in the Roles and Responsibilities section of the Proposal.

The Customer acknowledges and agrees that if the Customer does not comply with this clause 3.1 then Deswik is not obliged to supply the Services to the Customer.

### 3.2 Deswik's Obligations

- (a) Deswik will ensure its personnel, when using the Client's premises or facilities:
- (i) comply with all rules, directions and procedures, including those relating to security or occupational health and safety, which are in effect at the premises or facilities;
  - (ii) avoid unnecessary interference with the passage of people and vehicles; and
  - (iii) not create a nuisance or unreasonable noise or disturbance.

## 4. Fees, Expenses and Payment

### 4.1 Fees

- (a) The Client must pay Deswik the Fees for the Services.
- (b) Fees for Services are payable on a time and materials basis.
- (c) Deswik will issue an invoice to the Client for the Fees and the Client must pay Deswik the Fee within 30 days of receipt a tax invoice from Deswik.
- (d) In addition to the Fees, Deswik must, upon presentation to the Client of receipts or other formal evidence, be reimbursed for:
- (i) all reasonable out-of-pocket expenses; and
  - (ii) all reasonable travel costs, incurred by Deswik or the Personnel in performing the Services.

- (e) Deswik may change its Fees from time to time by notification to the Client.
- (f) Deswik may charge the Client Interest on any monies owing under this Agreement which are not paid within the period specified in this Agreement.

### 4.2 Quotations

Where at any time Deswik provides a quotation to the Client (including but not limited to as part of any Proposal) the Client acknowledges and agrees that the quotation is:

- (a) based on Deswik's reasonable assessment of the time and materials required to undertake the work based on the information available to Deswik at the time of preparing the quotation; and
- (b) Services are quoted on a time and materials basis, are indicative only, and are not binding on Deswik.

### 4.3 Disputes

If at any time the Client disputes an amount included in a tax invoice, the Client must immediately pay the amount not in dispute.

### 4.4 Deferral of performance

If the Client fails to pay any Fees in accordance with this agreement, and such failure continues for 14 days after the Client is notified of such failure, without limiting any other remedies available to Deswik, Deswik may defer performance of all Services (whether or not relevant to those Fees), or suspend the Client's access to all Services, until the outstanding Fees are paid.

## 5. Term

- (a) Subject to clause 5(b), this Agreement has effect from the Commencement Date and, unless terminated earlier in accordance with the provisions of this Agreement, remains in force until:
- (i) the end of the Term; or
  - (ii) Deswik notifying the Client that the Services are complete.
- (b) If, prior to the end of the Term, the parties agree in writing that this Agreement is to have effect for a mutually agreed period after the end of the Term, this Agreement, unless terminated earlier in accordance with the provisions of this Agreement, remains in force until the expiration of that period.
- (c) If Deswik continues to provide Services to the Client after the end of the Term without this

Agreement being formally extended under clause 5(b), the terms of this Agreement will continue to apply and following provisions will also apply:

- (i) The Services will be provided on a month to month basis.
- (ii) The Fees may be reviewed and increased whenever Deswik determines it appropriate (taking into account its normal fees for similar goods and services at the relevant time).
- (iii) The Agreement may be terminated at any time by either party giving to the other party 30 day's notice in writing.

## 6. Taxes

### 6.1 Taxes

Any use tax, sales tax, excise tax, duty, custom, or any other Tax, fee or charge of any nature whatsoever imposed by any governmental authority, on or measured by the transaction between the Client and Deswik shall be paid by the Client in addition to the price quoted or invoiced. In the event Deswik is required to pay any such Tax, fee or charge, the Client shall reimburse Deswik for such Tax, fee or charge, or in lieu of such payment, the Client shall provide Deswik at the time this Agreement is executed an exemption certificate or other document acceptable to the taxing authority imposing the Tax, fee or charge.

### 6.2 Withholding taxes

If a party (payer) is required by any applicable law to make a deduction or withholding from a payment to the other party (payee) for or on account of any Taxes, the payer is entitled to make that deduction or withholding unless the payee provides the payer with valid documentation (received prior to the date when the payment is to be made) showing to the satisfaction of the payer that an exemption applies. If the payer is required by law to deduct or withhold, then the payer shall use its best endeavours to furnish the payee with all receipts, proof of payment and other relevant documentation for all deductions and withholding Taxes so paid to the relevant Government Authority. For the avoidance of doubt, the payer will not be liable to pay any amount to the payee on account of an amount deducted or withheld in accordance with this clause.

### 6.3 US contracts

- (a) If, in respect of a tax audit or a levied tax assessment, the appropriate government agency seeks payment of any use tax, sales tax, excise tax, duty, custom, or any other Tax, fee or

charge from Deswik for which Deswik seeks reimbursement from the Client (for which the Client would have been liable pursuant to Section 6.1, above), then, unless Deswik notifies the Client in writing of such Tax, fee or charge payable at least 30 days prior to the expiration date of the right to appeal the imposition thereof, any reimbursement by the recipient will be at its sole discretion.

- (b) Deswik shall do all things reasonable necessary to ensure that the Client remains eligible for any exemption, credit, set-off, deduction or similar amount to which the Client is entitled whether such Taxes, fees or charges are paid by Deswik or the Client. If an exemption to the payment of such Tax, fee or charge applies, the Client shall provide Deswik with a valid exemption certificate or other document acceptable to the taxing authority imposing the Tax, fee or charge.

## 7. Intellectual Property Rights

### 7.1 Deswik Background IP

- (a) The Client acknowledges that it does not own any rights (including Intellectual Property Rights) in Deswik's Background IP.
- (b) In particular, all Intellectual Property Rights in the Software are owned by Deswik, and nothing in this Agreement assigns the Client any Intellectual Property Rights in the Software.
- (c) Subject to third party rights, Deswik grants to the Client a non-exclusive license to use Deswik's Background IP (excluding the Software) to:
  - (i) receive the Services during the Term; and
  - (ii) use the Deliverables for the Client's internal business purposes.
- (d) For clarity:
  - (i) the license contemplated by clause 7.1(d) includes the right for the Client to use the Deliverables to provide a service to third party clients of the Client, but does not permit the Client to resupply the Services to third parties;
  - (ii) the Software will be provided on the terms set out in the EULA;
  - (iii) any improvements, modifications or developments that Deswik makes to the Software in connection with the Services ('Improvements'), are the exclusive property of Deswik and the Client agrees to take all necessary steps to ensure all right, title and interest in any such Improvements, including the Intellectual Property Rights, vest in Deswik; and

- (iv) use of Intellectual Property Rights relating to any Software Support and Maintenance Services will be governed by the terms of the Software Support and Maintenance Agreement.
- (e) All Intellectual Property Rights in the Proposal are owned by Deswik.

### 7.2 Client Background IP

- (a) Deswik acknowledges that it does not own any rights (including Intellectual Property Rights) in the Client Background IP.
- (b) The Client grants to Deswik a non-exclusive, royalty free licence during the Term to use, reproduce, modify, adapt and further develop all Intellectual Property Rights in the Client Background IP, but only to the extent required to enable Deswik to provide the Services.
- (c) Deswik will ensure that the Client Background IP is only used, copied, supplied and reproduced as necessary for the purposes of this Agreement.

### 7.3 Project IP

- (a) Subject to clause 7.3(c), Deswik assigns to the Client all Project IP. Deswik will do all things, including executing all documents, necessary to give effect to this clause.
- (b) Notwithstanding anything else in this Agreement, the Client will own all rights, including Intellectual Property, in Project IP comprising developments to or manipulations of the Client's data, and any data files, database, documentation or records in which the Client's data is contained or which otherwise relate to the Client's data.
- (c) The Client grants to Deswik a non-exclusive, perpetual license to use the Project IP in connection with Deswik's business, including to reuse non Client-specific Project IP for other clients of Deswik; but subject at all times to Deswik's obligations of confidentiality to the Client, whether under clause 8 of this Agreement or otherwise.

### 7.4 Third Party Software

The Client acknowledges and agrees that unless expressly stated in the Proposal, Deswik does not grant the Client a licence to use any Third Party Software.

### 7.5 No use of Deswik's marks

The Client must not, and must ensure that its officers, employees, agents and subcontractors do not, use the trade marks or logos of Deswik except with the prior written consent of Deswik.

## 8. Confidentiality

### 8.1 Access to Confidential Information

Each party acknowledges that the other party, its employees or agents, may be given access to Confidential Information relating to the other parties' business or the operation of this Agreement or any negotiations relating to this Agreement.

### 8.2 Obligations of Confidence

Each party undertakes to:

- (a) hold in strict confidence all Confidential Information which comes into its possession; and
- (b) as far as commercially feasible, take the same degree of care to protect the other party's Confidential Information as the party uses to protect its own Confidential Information.

### 8.3 Survival

The obligations of confidence in this clause 8 survive expiry or termination of this Agreement.

## 9. Force Majeure

Neither party will be:

- (a) in breach of this agreement as a result of; or
- (b) liable for,

any failure or delay in the performance of that party's obligations under this Agreement to the extent that the failure is caused by a Force Majeure Event.

## 10. Termination

### 10.1 Termination by Client

Without prejudice to any rights or remedies of the Client, the Client may, by at least seven (7) days' notice in writing to Deswik, terminate this Agreement if:

- (a) Deswik breaches its obligations under this Agreement and:
  - (i) the breach is not capable of remedy;
  - (ii) if capable of remedy, the breach is not remedied within 30 days of receipt of written notice by Deswik requiring the breach to be remedied; or
- (b) an Insolvency Event occurs in respect to Deswik.

### 10.2 Termination by Deswik

Without prejudice to any rights or remedies of Deswik, Deswik may, by at least seven (7) days' notice in writing to the Client, terminate this Agreement if:

- (a) the Client fails to pay an undisputed invoice within 30 days of receipt of that invoice and persists in that failure for a period of 14 days after receipt of notice given by Deswik to the Client;
- (b) the Client breaches its obligations under this Agreement and:
  - (i) the breach is not capable of remedy;
  - (ii) if capable of remedy, the breach is not remedied within 30 days of receipt of written notice by the Client requiring the breach to be remedied,
 unless the breach, having regard to its nature and importance does not justify termination; or
- (c) an Insolvency Event occurs in respect to the Client.

### 10.3 Termination for convenience

Either party may terminate this agreement at any time by giving 30 days' notice to the other party.

### 10.4 After termination

- (a) Termination of this Agreement does not affect any accrued right or liability of either party nor will it affect the coming into force or the continuation in force of any provision of this Agreement that is expressly or by implication intended to come into or continue in force on or after the termination.
- (b) The Client must promptly pay to Deswik all money due and owing as at the date of termination of this Agreement.
- (c) Deswik must promptly deliver up or return to the Client the Confidential Information including documents, reports and records of the Client's in Deswik's possession, custody or control.
- (d) The Client must promptly deliver up or return to Deswik the Confidential Information including documents, reports and records of Deswik in the Client's possession, custody or control.
- (e) The Client must pay any Fees that Deswik notifies the Client in writing are attributable to Third Party Software for the remainder of the period for which those Fees would have been payable, but for termination.

## 11. Relationship

The parties agree that this Agreement creates the relationship of principal and independent contractor and does not constitute:

- (a) a joint venture;
- (b) a partnership between the Client and Deswik;

- (c) a relationship of agency between the Client and Deswik; or
- (d) a relationship of employer and employee between the Client and Deswik or the Client and the Personnel.

## 12. No authority to bind

Deswik acknowledges that it does not have the authority to incur, and agrees not to incur, any obligation or liability on behalf of the Client, except with the express written consent or instructions of the Client.

## 13. Disclaimer and Limitation of Remedies

### 13.1 Customer Warranty

The Customer warrants that:

- (a) the Customer's premises and any other premises at which the Services are performed, and travel to and from those premises, will be safe; and
- (b) use of the Customer Material by Deswik in accordance with this agreement will not infringe the Intellectual Property Rights of any third party.

### 13.2 Accuracy and Reliance Warranties

- (a) The Customer represents and warrants, and it is a condition of this agreement, that:
  - (i) all information provided by the Customer or on the Customer's behalf to Deswik is accurate and is not, whether by omission of information or otherwise, misleading;
  - (ii) the Customer has not withheld from Deswik any document, information or other fact material to the decision of Deswik to enter into this agreement or any Proposal; and
  - (iii) the Customer did not rely upon any representation made to the Customer by Deswik or any Related Body Corporate of Deswik (if any) prior to entry into this agreement.
- (b) The Customer acknowledges that Deswik is relying on the information provided by the Customer in preparing the Proposal and any other relevant scoping documents and timeframes in connection with the Services.

### 13.3 No Warranty

- (a) Deswik takes commercial steps to provide the Services so as to meet the Client's requirements. However, Deswik gives no warranty that the

Services will be fit for any particular purpose or will be performed within any particular time.

- (b) Under no circumstances will Deswik be liable for any incidental, special, indirect, direct or consequential damages or loss of profits, interruption of business, loss of business opportunity or goodwill, any claims for indirect, special or punitive damages, third party claims or any indirect or consequential losses or related expenses which may arise from or be related to the performance of this Agreement or the installation or use of any Software, including but not limited to those resulting from defects in the Software, or loss or inaccuracy of data of any kind and whether or not Deswik has any notice of the possibility of such damages.
- (c) If Deswik breaches any provision of this agreement, Deswik's sole and exclusive maximum liability, whether based in contract, tort, or otherwise, will not in any event exceed the lesser in value of:
  - (i) re-performing the Services; or
  - (ii) re-performance of the Services by a third party reasonably acceptable to Deswik.
- (d) The Client agrees that the Client must commence any action arising out of or related to this Agreement and the Services or the Client's use of the Software or other Services within one (1) year of the loss or damage arising. After that time the Client agrees that any cause of action will be permanently barred.
- (e) Nothing in this Agreement is intended or will be construed as excluding or modifying any statutory rights, warranties or conditions which are applicable to this Agreement or the Software and which by virtue of any legislation may not be modified or excluded.

#### 14. Representatives

Each party will on the Commencement Date and from time to time if a nominated representative is replaced, advise the other party of the name and contact details of their nominated representative to:

- (a) facilitate communication between the parties and facilitate the provision of the Services;
- (b) provide any information required by a party in respect to the Services;
- (c) deal with any issues which arise in respect to the Services or this Agreement; and
- (d) receive any notices given under this Agreement.

#### 15. Non-Solicitation

Neither party will either during the Term or for a period of six months after the Term or any extension of the Term, solicit the services of any employee of the other party.

#### 16. Assignment or other Transfer

Neither party may assign all or any of its rights or obligations under this Agreement to any other person or entity without the prior written consent of the other party.

#### 17. Dispute Resolution

##### 17.1 Agreement to Participate in Dispute Resolution

The parties agree to comply with the dispute resolution provisions of this clause 17 in respect to any dispute which arises between the parties in respect to this Agreement prior to commencing any litigation or arbitration.

##### 17.2 Dispute notice

If there is a dispute between the parties, then either party may give a notice to the other succinctly setting out the details of the dispute and stating that it is a dispute notice given under this clause 17.1.

##### 17.3 Notice in response

Within 5 Business Days after the delivery of the dispute notice, the recipient must deliver to the other party a notice in response:

- (a) acknowledging the party's receipt of the dispute notice;
- (b) stating that it is a notice given under this clause 17.3; and
- (c) succinctly setting out any information it believes is directly relevant to the dispute.

##### 17.4 Initial meeting

- (a) The parties must meet within 10 Business Days after the date of delivery of the dispute notice and attempt to resolve the dispute.
- (b) Each party must use its best endeavours to resolve the dispute and act in good faith.

##### 17.5 Mediation

- (a) If the dispute is not resolved within 10 Business Days of the meeting held pursuant to clause 17.4 or such further period as the parties may agree, any party may refer the dispute to the American Arbitration Association (AAA) for mediation.

- (b) The mediation will be conducted in accordance with the AAA Commercial Mediation Procedures which set out the procedures to be adopted, the process of selection of a mediator and the costs involved.

### 17.6 Agreement remains in force

The parties must each continue to perform their respective obligations under this agreement pending resolution of the dispute.

### 17.7 Injunctions

Nothing in this clause 17 prevents any of the parties from commencing injunctive relief where damages may be an inadequate or inappropriate remedy.

### 17.8 Survival

This clause 17 survives rescission, termination or expiry of this Agreement.

## 18. Notices

- (a) A notice given under this agreement must be:
- (i) in writing and signed by or for the sender;
  - (ii) directed to the recipient's address specified in this agreement or as varied by written notice; and
  - (iii) left at, or sent by prepaid registered post, hand delivery or facsimile to, that address.
- (b) A notice is deemed to have been given:
- (i) if left at the recipient's address or hand delivered, on the day of delivery;
  - (ii) if sent by prepaid registered post, 5 Business Days after the date of posting; or
  - (iii) if sent by facsimile, when the sender's facsimile machine records that it has been transmitted without Error.
- (c) The provisions of this clause 18 are in addition to any other mode of service permitted by law.

## 19. Miscellaneous

### 19.1 Governing Law and Jurisdiction

This Agreement is governed by the laws applicable in the State of Colorado, and the parties submit to the jurisdiction of the Colorado courts in respect of all matters arising under or in connection with this Agreement.

### 19.2 Entire Agreement

This Agreement, the EULA, and the Software Support Agreement constitutes the entire agreement between the parties about its subject matter and supersedes all prior contracts, arrangements and understandings

in relation to that subject matter and may only be altered in writing signed by all parties.

### 19.3 Counterparts

This Agreement may be executed in any number of counterparts each of which is taken to be an original. All of those counterparts taken together constitute one instrument. An executed counterpart may be delivered by facsimile.

### 19.4 Waivers

A waiver by a party of any of its rights under this agreement must be in writing and does not operate as a waiver of any other right or as a future waiver of that or any other right.

### 19.5 Costs and expenses

Each party must pay its own costs and expenses in respect of the negotiation, preparation and execution of this Agreement and any other document executed pursuant to this Agreement.

### 19.6 Further Action

Each Party must do all things and sign all documents reasonably necessary to give effect to this agreement and the transactions contemplated by it.

### 19.7 No Merger

None of the provisions of this Agreement merge on termination, settlement or completion of this Agreement, nor are affected by the signing and/or delivery of any other document.

### 19.8 Client's Acknowledgements

- (a) Any material made available by Deswik and any statement made by Deswik in the Proposal is Deswik's own material and information. The Client in entering into this Agreement relied upon its own personal assessment and enquiries with respect to that material, those statements and the Agreement.
- (b) The Client acknowledges, before entering into this Agreement, the need for the Client to:
- (i) consider the terms of this Agreement; and
  - (ii) obtain independent legal advice on the meaning of the provisions of this Agreement and their legal or practical effect,
- including the risks of entering into this Agreement and the parties performing the transactions contemplated by the Proposal.

### 19.9 Severance

If any provision or part of a provision of this Agreement is invalid or unenforceable in any jurisdiction:



- (a) the provision must be read down for the purposes of the operation of that provision in that jurisdiction, if possible, so as to be valid and enforceable; or
- (b) if the provision cannot be read down it must be severed if it is capable of being severed, without affecting the remaining provisions of this Agreement or affecting the validity or enforceability of that provision in any other jurisdiction and the parties must consult in good faith to determine whether any amendment or substituted provision is required.

## 20. Definitions and Interpretation

### 20.1 Definitions

In this Agreement unless the contrary intention is apparent or the context otherwise requires:

**Access** means any interaction or communication with the System by way of any communications mechanism using guided or unguided electromagnetic energy that causes the System to react or respond, in any manner whatsoever, to such interaction or communication and **Accessing** has a corresponding meaning.

**Accessible Code** means source code that is unprotected and accessible in the Software and includes, without limitation, scripts, macros, custom reports and workflows.

**Additional or Varied Services** means any additional services requested by the Client from time to time including any varied services or the provision of any Excluded Services.

**Additional Software** means updates, patches, new functionality, supplements, plugins, custom modifications or new functionality specific to the Licensee's needs, or other add-on components of the Software.

**Business Day** means a day that is not a Saturday, Sunday or a public holiday in Colorado or the state or province in which the work is being undertaken.

**Change Control Process** means Deswik's Change Control Process which forms part of the Deswik Project Management framework as notified by Deswik to the Client from time to time.

**Client** means the client identified as such at the commencement of the Proposal.

**Client Background IP** means Intellectual Property Rights owned by or licensed to the Client, which existed prior to the date of this Agreement or which were developed or acquired by the Client independently of this Agreement, and which are provided by or on behalf of the Client to Deswik for

the purposes of this Agreement. Client Background IP includes the Client Material.

**Client Material** means any material provided by or to which access is given by the Client to Deswik for the purposes of this agreement including documents, equipment, reports, technical information, studies, plans, charts, drawings, calculations, tables, trade marks, logos, schedules and data stored by any means.

**Commencement Date** means the date specified in the 'Project Resources and Timing' section of the Proposal.

**Confidential Information** means information relating to a party's Intellectual Property or to a party's business operations including, without limitation:

- (a) any information that is designated by a party as confidential;
- (b) the Software including the source codes;
- (c) all information given or obtained in circumstances where it could reasonably be inferred as being confidential;
- (d) the terms of this Agreement; and
- (e) all know-how, techniques, processes and commercial and financial information of a party, but does not include information that:
  - (f) becomes publicly available other than as a result of a breach of clause 8;
  - (g) is authorised, permitted or directed to be disclosed by the other party;
  - (h) is required to be disclosed by law; or
  - (i) is required to be disclosed to a party's legal or financial advisers.

**Deliverable** means any materials produced or supplied by or on behalf of Deswik in performance of the Agreement.

**Deswik Background IP** means Intellectual Property Rights owned by or licensed to Deswik and which are:

- (a) used by Deswik in the performance of the Services; or
- (b) otherwise made available to the Client by Deswik under or in connection with this Agreement,

and which existed prior to the date of this Agreement or which was developed or acquired by Deswik independently of this Agreement. Deswik Background IP does not include Project IP. Deswik Background IP does include the Software and the Deswik Material.

**Deswik Material** means any material provided by or to which access is given by Deswik to the Client for the purposes of this agreement including the

Deliverables, documents, equipment, reports, technical information, studies, plans, charts, drawings, calculations, tables, schedules and data stored by any means but excludes the Software and the Third Party Software.

**Embedded Software** means any third party software which may contain Accessible Code or Protected Code licensed by Deswik from a third party and embedded in the Software.

**Error** means a verifiable and reproducible failure of the Software to conform in any material respect to the published specifications under conditions of normal use.

**Error Correction** means a modification or addition that, when made or added to the Software, brings the Software into material conformity with the published specifications.

**EULA** means Deswik's End User Licence Agreement in respect to the Software.

**Excluded Services** means those excluded services and support identified in the 'Exclusions' section of the Proposal.

**Fees** means the fees set out or calculated in the manner specified in the 'Investment' section of the Proposal.

**Force Majeure Event** means any occurrence or omission outside a party's control including, without limitation:

- (a) a physical natural disaster including fire, flood, lightning or earthquake or the after-effects of a physical natural disaster (including without limitation, electricity or telecommunication disruption or travel disruptions or restrictions);
- (b) war or other state of armed hostilities (whether war is declared or not), insurrection, riot, civil commotion, act of public enemies, national emergency (whether in fact or in law) or declaration of martial law;
- (c) epidemic or quarantine restriction;
- (d) failure of a third party service provider;
- (e) failure of third party hardware or software;
- (f) confiscation, nationalisation, requisition, expropriation, prohibition, embargo, restraint or damage to property by or under the order of any government agency;
- (g) any law taking effect after the date of this agreement which has an adverse impact on Deswik's ability to provide the Services; and
- (h) strike, lock-out, stoppage, labour dispute or shortage including industrial disputes that are specific to a party or the party's subcontractors.

**Insolvency Event** means:

- (a) a liquidator, receiver, receiver and manager, administrator, official manager or other controller, trustee or controlling trustee or similar official is appointed over any of the property or undertaking of the person;
- (b) the person or the person's property or undertaking becomes subject to a personal insolvency arrangement;
- (c) the person is or becomes unable to pay its debts when they are due or is presumed to be insolvent at law;
- (d) the person ceases to carry on business; or
- (e) an application or order is made for the liquidation of the person or a resolution is passed or any steps are taken to liquidate or pass a resolution for the liquidation of the person, otherwise than for the purpose of an amalgamation or reconstruction.

**Intellectual Property** includes patents, designs, registered designs, copyright, literary and artistic works, circuit layouts, registered and unregistered trademarks, trade and business names, trade secrets, applications of any of the above, as well as rights in and to inventions, discoveries, improvements, look and feel, works and names.

**Intellectual Property Rights** means the rights comprised in any Intellectual Property or other proprietary rights whether at common law or by statute, rights to apply for registration under a statute in respect of those or like rights and rights to protect goodwill or confidential information.

**Interest** means payment of interest calculated on a daily basis and capitalised monthly at the rate which is 2% in excess of the published Bank of America variable interest rate for personal loans or, if lower, any maximum rate permitted by an applicable law.

**Personnel** means the skilled personnel to be provided by Deswik to the Client to provide the Services, including the Personnel identified in the 'Project Resourcing and Timing' section of the Proposal.

**Project IP** means all Intellectual Property Rights arising or created by Deswik or a third party exclusively for the Client in performing the Services, but does not include Deswik Background IP.

**Proposal** means the proposal provided by Deswik to the Client in respect to the Services.

**Protected Code** means any source code which Deswik or a third party has taken steps to protect from Access.

**Services** means the scope of work and deliverables detailed in the 'Scope of Work and Deliverables' section of the Proposal.

**Software** means the software that accompanies the EULA, including computer software, Additional Software, Embedded Software, Accessible Code, Protected Code and associated media, printed materials, 'online' or electronic documentation, and internet based services.

**Software Support Agreement** means a Software Support and Maintenance Agreement under which Deswik provides software support and maintenance services to the Client.

**Software Support and Maintenance Services** means any software support and maintenance services to be provided by Deswik to the client

**System** means the designated information technology environment in which the Software is to be used.

**Tax or Taxes** means, unless the contrary intention is expressed, any and all taxes, including, without limitation, sales, use, excise, stamp, documentary, customs, import/export, payroll, personal, property, real property, interest equalisation, business, occupation, turnover, income, corporation, capital, profits, gains, gross receipts, or other taxes, fees, withholdings, imposts, levies, duties or other charges of any nature whatsoever or whensoever, together with any penalties, fines or interest thereon or similar additions thereto, imposed, levied or assessed by any government agency or otherwise payable.

**Term** means the term of this Agreement specified in the 'Project Resources and Timing' section of the Proposal unless extended in accordance with clause 5(b) or during any carry over period under clause 5(c).

**Third Party Software** means any software which Deswik makes available to the Client, for the purposes of providing consulting services, which is owned or supplied by a third party.

## 20.2 Interpretation

In this Agreement, unless otherwise stated:

- (a) a reference to this Agreement is a reference to this Agreement as amended, varied, novated, supplemented or replaced from time to time;
- (b) a reference to any legislation includes any amendment or replacement and all subordinate legislation;
- (c) words or expressions:
  - (i) importing the singular include the plural and vice versa;
  - (ii) importing a gender include the other genders;
- (iii) denoting individuals include corporations, firms, unincorporated bodies, authorities and instrumentalities;
- (d) a reference to a party to this Agreement or any other instrument includes that party's executors, administrators, successors and permitted assigns;
- (e) where a word or phrase is defined or given meaning, any other part of speech or grammatical form has a corresponding meaning;
- (f) a reference to a clause, schedule or annexure is a reference to a clause, schedule or annexure of this Agreement;
- (g) where an act would be required to be done, or a time limit or period would expire, on a day which is not a Business Day, the act may be done, or the limit or period will expire, on the following Business Day;
- (h) a provision of this Agreement must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of the document or the inclusion of the provision in the Agreement;
- (i) a reference to two or more persons means those persons jointly and severally.

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