



Elusiva Support Programs and Subscription Services – Terms and Conditions

Under these Elusiva Support Programs and Subscription Services – Terms and Conditions (this “Agreement”) Elusiva Software (“**Elusiva**”) shall provide technical support and subscription services as more fully described herein to Customer, at the support level purchased by Customer and under the subscription program, commencing on the Effective Date. Customer, Effective Date, applicable Software, Support Level, Fees, License Administrator and Support Administrators are designated on either a Support and Subscription Services Order Form (hereinafter referred to as the “Support and Subscription Order Form”), Customer’s purchase order (“Purchase Order”) or, in the case of Customer’s purchase of Support Requests on a per incident basis (“Per Incident”), the relevant information shall be as specified in the registration form completed by Customer upon such purchase (“Per Incident Registration Form”). Elusiva may not change the terms of this Agreement during a Contract Term for which Customer has paid the applicable Fees, provided, however, that this Agreement is subject to change by Elusiva, in Elusiva’s sole discretion, upon any renewal of the Services by Customer. At each such time of renewal, Elusiva’s then-current terms and conditions for the Services shall apply.

1. Definitions.

1.1 “Additional Module” means features or functionality not made available by Elusiva in the standard release of the Software. Additional Modules are generally made available for an additional license fee to extend or enhance features or functionality and are not included in Subscription Services. Elusiva in its discretion will designate what if anything constitutes an Additional Module.

1.2 “Bug” means a defect in the Software, acknowledged by Elusiva with a bug tracking number and associated with a Support Request, that prevents the Software from operating as described in the Documentation, or causes the Software to operate in a manner materially different than described in the Documentation.

1.3 “Business Day” is defined as follows:

North America & Latin America
Alaska, Hawaii
South America
(NASA)

Mon-Fri, 6 a.m. to 6 p.m. local time zone
Mon-Fri, 6 a.m. to 6 p.m. PST
Mon-Fri, 6 a.m. to 6 p.m. EST

Europe, Middle East, Africa
(EMEA) (Central European Time)

Mon-Fri, 6 a.m. to 6 p.m.

Asia, Pacific Rim, Japan
(APJ) (Singapore Time)

Mon-Fri, 8:30 a.m. to 8:30 p.m.

1.4 “Computer” means the Customer’s workstations or Servers on which the applicable Elusiva products are installed.

1.5 “Contract Term” means the period for which Customer has purchased the Services. For Software Product Licenses for which Services are mandatory, the Contract Term shall commence on the date of purchase of the applicable Software Product License and shall continue for the period for which Customer has purchased the Services. For Software Product Licenses for which Services are optional, the Contract Term shall commence on the date of purchase of the Services and shall continue for the period for which Customer has purchased the Services. The Contract Term shall include any subsequent periods during which Customer renews Services.

1.6 “Documentation” means any user instructions, manuals or other materials, and on-line help files regarding the use of the Software that are generally provided by Elusiva in connection with the Software, as revised by Elusiva from time to time.

1.7 “Fees” are for the Services at the level specified in the Support and Subscription Order Form, Purchase Order, or Per Incident Registration Form, as applicable, and are as specified in the related invoice for the initial Contract Term.

1.8 “Fee Addendum” means the addendum to this Agreement, attached hereto as Attachment 1, specifying fees that supplement the Fees for the Services.

1.9 “Issue” or “Incident” means a problem that is experienced by the Customer in using the Software. An issue arises either from the Customer having difficulty and requiring assistance in using the Software (i.e. a general usage question) or an actual Bug.

1.10 “License Administrator” means an employee of Customer specified on the Support and Subscription Order Form, Purchase Order, or Per Incident Registration Form, as applicable, who is responsible for: (a) facilitating the election and purchase of the Services; (b) receiving and administering Software Product Licenses, Updates and Upgrades from Elusiva; (c) adherence to the license restrictions of this Agreement; and (d) renewing Services for licenses for which they have been designated as the License Administrator, if Customer elects to renew such Services.

1.11 “License Key” means a serial number or file and accompanying serial number that enables the Customer to activate and use the Software.

1.12 “Response Time” means the interval that starts when a Customer or Elusiva support staff opens a Support Request (as defined by the assignment of a unique Support Request number), and ends when Elusiva support staff initiates qualification and analysis of the Support Request.

1.13 “Server” means a single physical Computer regardless of the number of processors in the Computer. Multiple Computers that share processing power or operate in a networked configuration as a single logical computer, such as in a “server farm” or similar arrangement, constitute multiple servers in the context of this Agreement.

1.14 “Services” means, collectively, Support Services and Subscription Services.

1.15 “Severity” is a measure of the relative impact an Issue has on the use of the Software, as determined by Elusiva.

1.15.1 “Severity One” is an Issue that prevents initial installation and operation of the Software due to a problem with the License Key or, after the Software is installed and operational, results in enterprise wide failure of the Computer on which the Software is installed. It also applies to a situation that renders a mission-critical application unusable, prevents booting of the Server, or results in data that is unrecoverable, corrupt, or lost. No workaround or immediate solution is available.

1.15.2 “Severity Two” describes an Issue that prohibits installation or use of a feature described in the Documentation or results in the Customer being critically restricted in the use of the Software for a particular purpose or application. A temporary workaround may be available as Elusiva attempts to resolve the Issue.

1.15.3 “Severity Three” applies to an Issue that involves partial, non-critical loss of functionality of the Software or impairs some operations, but allows Customer to continue using the Software.

1.15.4 “Severity Four” applies to cosmetic Issues, including errors in the Documentation, general usage questions, and recommendations for product enhancements or modifications.

1.16 “Software” means one or more Elusiva software products, and related Additional Modules, specified in the Support and Subscription Order Form, Purchase Order, or Per Incident Registration Form, as applicable.

1.17 “Software Product License” means a license to the Software, together with the License

Key allowing the Customer to activate and use the Software.

1.18 “Subscription Services” means the provision of Updates and Upgrades, if any, and corresponding Documentation to Customer’s License Administrator. Subscription Services do not include the provision of any Additional Modules. Additional Modules may be licensed for an additional license fee.

1.19 “Support Request” means an Issue, which is reported by a Customer that invokes the use of Elusiva Support Services. A unique number identifies each Support Request.

1.20 “Support Services” means the provision of technical assistance by Elusiva to the Support Administrator(s) with respect to the Software at the support level purchased by the Customer as indicated on the Support and Subscription Order Form or on the Purchase Order, as applicable. Support Services are further described in the attached Program Description.

1.21 “Support Administrator” means an employee of Customer specified on the Support and Subscription Order Form, Purchase Order, or Per Incident Registration Form, as applicable, who is responsible for communicating with Elusiva regarding the Services. Customer may change its Support Administrator upon written notice to Elusiva at any time.

1.22 “Update” means a version of the Software that contains error corrections or fixes, and, with respect to Elusiva products, possibly some new features. Updates are designated by means of a change of the minor number or number to the right of the decimal point (e.g. Software 5.0 >> Software 5.0.1 or Software 5.1).

1.23 “Update Service” means the provision of Updates, if any, to Customer’s License Administrator. Update Service does not include the provision of any Upgrades or Additional Modules.

1.24 “Upgrade” means a version of the Software that contains functional enhancements or extensions and that is generally made available for an additional license fee. Upgrades are designated by means of a change of the major number or number to the left of the decimal point (e.g. Software 5.0 >> Software 6.0).

2. Service Terms.

2.1 Provision of Services. If Customer is current in the payment of the applicable Fees, Elusiva shall provide the Services for which Customer has paid the applicable Fees.

2.2 Requirements.

(a) Customer may purchase Support Services only for the current release of the Software. Elusiva will provide Support Services with respect to the current release and each Upgrade release of the Software for a period of twelve (12) months after the next Upgrade release of the Software becomes available.

(b) For certain Software, Support Services and Subscription Services must be purchased together and are not sold separately.

(c) For Elusiva Terminal Server Pro and Elusiva Experience Pro products, Services must be purchased for at least a one (1) year Contract Term with each Software Product License which shall commence on the date of purchase of each such Software Product License.

(d) If support for the Software is available on a Per Incident basis and Customer purchases such support, Customer may report one (1) problem for each such Support Request that Customer purchases on a Per Incident basis, via Elusiva’s online filing form and correspond with Elusiva Support Service department via electronic mail only. Customer will receive auto acknowledgement of each such Support Request within approximately one (1) hour, and a response from a Support Engineer within approximately one (1) business day. Unused Per Incident Support Requests shall expire one (1) year after the date of purchase.

(e) If Customer purchases Services for a Software Product License, Customer must purchase the Services for each Additional Module purchased concurrently or subsequently for each such

Software Product License. If Customer purchases Services for a Software Product License for a particular Elusiva product, Customer shall purchase Services at the same support level for all Software Product Licenses for such Elusiva product.

(f) Except as otherwise expressly set forth herein, Services previously purchased will automatically renew for successive one-year terms unless either party gives written notice of its intent not to renew at least thirty (30) days prior to the end of the current Contract Term. A decision not to renew such Services will not affect the Software Product License. Regardless of when a Software Product License is ordered under this Agreement, the associated Services term, if any, will renew at the beginning of the next Contract Term.

2.3 Eligibility. Services will not include services requested by Customer with respect to the following situations:

- (a) Accident; unusual physical, electrical or electromagnetic stress; neglect; misuse; failure of electric power, air conditioning or humidity control; failure of rotation media not furnished by Elusiva; operation of the Software with other media not in accordance with the manufacturer's specifications; or causes other than ordinary use; or
- (b) Improper installation by Customer or use of the Software that deviates from any operating procedures established by Elusiva in the Documentation; or
- (c) Actual or attempted modification, alteration or addition to the Software undertaken by persons not authorized by Elusiva; or
- (d) Software or technology of any party other than Elusiva other than the interface of the Software with the other party's technology.

Any services requested as a result of these situations will be billed to Customer at Elusiva's hourly rates for consulting.

2.4 Customer Responsibilities. Elusiva's obligations regarding Services are subject to the following:

- (a) Customer shall provide supervision, control and management of the use of the Software by its end user personnel. In addition, Customer shall implement procedures for the protection of information and the implementation of backup facilities in the event of errors or malfunction of the Software or Computers on which the Software is used.
- (b) Customer shall document and promptly report all errors or malfunctions of the Software to Elusiva. Customer shall take all steps necessary to carry out procedures for the rectification of errors or malfunctions within a reasonable time after such procedures have been received from Elusiva.
- (c) Customer shall maintain a current backup copy of all programs and data.
- (d) Customer shall properly train or arrange for third party training of its end user personnel in the use and application of the Software and any Computers on which the Software is used.

3. Fees.

3.1 Fee Schedule.

- (a) The applicable Fees for the Services are indicated on the Support and Subscription Order Form, Purchase Order, or Per Incident Registration Form, as applicable, and related Elusiva invoice. Services are subject to payment of the Beta Period Fees set forth on the Fee Addendum. Except for purchases of Support Services on a Per Incident basis, and unless otherwise indicated on the Support and Subscription Order Form or the Purchase Order, as applicable, Fees are payable on the Effective Date or, in the case of a renewal term, no later than the date of commencement of the applicable Contract Term, and due in accordance with Section 3.3 below. Customer agrees that Purchase Orders do not have to be signed to be valid and enforceable.
- (b) The Fees for each renewal term will be as set forth in the Fee Addendum. If Customer elects not to renew the Services or, in the case of Elusiva products that may initially be purchased without Services, if Customer elects not to purchase the Services when Customer acquires the Software Product License, Customer may later re-enroll or enroll, as the case may be, for the Services only upon: (i) immediate payment of the applicable Fees for the current Contract Term; (ii) immediate payment of the amount of Fees that would have been paid for the period of time that Customer had not enrolled in the Services; and (iii) payment of a Premium Fee as set forth in the Fee Addendum. In addition, Customer must install the current release of the Software in order

to re-enroll, or enroll, as the case may be, in the Services. If Services have lapsed for three (3) consecutive years or more, Services may not be reinstated by Customer for the applicable Software Product Licenses, and Customer shall be required to purchase new Software Product Licenses for the then-current version of the Software at the then-current list prices and terms and conditions.

(c) For any renewal of Services, Customer may elect to make Services for all or a portion of its Software Product Licenses coterminous. In such event, Elusiva will prorate the applicable Fees for the current Contract Term based on the number of full or partial months remaining in the current Contract Term. If Customer terminates this Agreement before the end of the current Contract Term, no Fees shall be refunded to Customer.

(d) For Support Services purchased by Customer on a Per Incident basis, Elusiva shall: (i) charge Customer's credit card, as provided by Customer in the Per Incident Registration Form, or (ii) invoice Customer upon receipt of a Customer Purchase Order for such purchase.

3.2 Taxes. All Fees are exclusive of any taxes, duties, or similar charges imposed by any government. Customer shall pay or reimburse Elusiva for all federal, state, dominion, provincial, or local sales, use, personal property, excise, value added, withholding or other taxes, fees, or duties relating to the transactions contemplated by this Agreement (other than taxes on the net income of Elusiva).

3.3 Invoicing and Late Payments; Currency. All invoices issued hereunder by Elusiva are due and payable within thirty (30) days of the date of the invoice. All amounts that are not paid on time by Customer shall be subject to a late charge equal to one and one-half percent (1.5%) per month, or, if less, the maximum amount allowed by applicable law. If payment of any Fee is overdue, Elusiva may also suspend performance until such delinquency is corrected. All Fees shall be paid in United States dollars. All references to "dollars," "U.S. \$," and "\$" shall mean United States dollars.

4. Limited Warranty. Elusiva warrants that the Services to be performed hereunder will be done in a workmanlike manner and shall conform to standards of the industry. THIS WARRANTY IS GIVEN EXPRESSLY AND IN PLACE OF ALL OTHER WARRANTIES, STATUTORY, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT.

5. Limitation of Liability. ELUSIVA SHALL NOT BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, WHETHER BASED UPON CONTRACT, TORT OR ANY OTHER LEGAL THEORY, ARISING FROM ITS PERFORMANCE OR NONPERFORMANCE UNDER THIS AGREEMENT. ELUSIVA'S LIABILITY UNDER THIS AGREEMENT WILL NOT, IN ANY EVENT, EXCEED THE FEES PAID BY CUSTOMER TO ELUSIVA UNDER THIS AGREEMENT DURING THE PRECEDING CONTRACT TERM (OR IN THE CASE OF THE INITIAL CONTRACT TERM, DURING THE INITIAL CONTRACT TERM).

6. Miscellaneous. Customer may not assign or delegate this Agreement to any third party without the prior written consent of Elusiva. This Agreement shall be governed by the laws of the State of New York without regard to conflict of laws principles. The parties consent to the exclusive jurisdiction of the state and federal courts located in New York City, New York. This Agreement constitutes the entire agreement of the parties with respect to the provision of the Services by Elusiva to Customer, and supersede all prior written or oral communications, understandings and agreements. This Agreement may not be amended except in a written document signed by both parties. Any waiver of the provisions of this Agreement must be in writing to be effective. Except as expressly set forth herein, no terms of any Purchase Order or other business form that Customer may use will affect the obligations of the parties under this Agreement, and any such Purchase Order or other business form of Customer which contains additional or conflicting terms are hereby rejected by Elusiva. If any provision of this Agreement is found to be invalid or unenforceable, the remaining terms will continue to be valid and enforceable to the fullest extent permitted by law.

Attachment 1

Elusiva Support Programs and Subscription Services

Fee Addendum

1. Services

(a) Premium Fee: Customer shall be required to pay an additional premium fee of \$50.00 per Software Product License (“Premium Fee”) for: (i) the Elusiva Terminal Server Pro Software if Customer purchases the Services after Customer acquires the Software Product License(s) or if Customer elects not to renew the Services and later wishes to re-enroll in the Services; and/or (ii) for all other Software products, if Customer elects not to renew the Services and later wishes to re-enroll in the Services.

(b) Beta Period Fees: If Customer purchases Services for the Elusiva Software Products during a public beta period, Customer shall pay an additional fee of \$99.00 per Software Product License (“Beta Period Fee”). The term “public beta period” means any period of time during which Elusiva makes available a beta version of the next release of the Software that Elusiva intends to make generally commercially available.

2. Fees

(a) Fees for each renewal term will be based on the following schedule and subject to Customer’s elected level of Support Services for the Software are 15% of the current list-price of the Software for customers with Elusiva Support Subscription and \$90 per incident for wishing to use Elusiva per Incident Support.

(b) Elusiva may increase the Fees for any renewal term provided such increase in the Fees does not exceed ten percent (10%) of the previous year’s Fees.