



**Escendency Limited
Standard Terms & Conditions**

ESCENDENCY SOFTWARE LICENCE, SUPPORT, MAINTENANCE & HOSTING AGREEMENT

This agreement is made

between: BETWEEN:

- (1) **The Licensee** as defined in the "Subscription Proposal".
- (2) **Escendency Limited** of 21 Castle Hill, Lancaster, LA1 1YN, UK ("the Licensor")

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The Licensor has developed a Performance Management Software System ("Software") and has agreed to licence the Software to the Licensee on the terms and conditions of this agreement.

IT IS AGREED AS FOLLOWS

1.0 DEFINITIONS AND INTERPRETATIONS

1.1 In this agreement, unless the context otherwise requires, the following expressions have the following meaning:

- 1.1.1 "Charges" means the charges payable by the Licensee to the Licensor as set out in The Subscription Proposal and whether in respect of Maintenance Services and Support Services or for System Rental Charges.
- 1.1.2 "Delivery Date" means the delivery date as specified in The Subscription Proposal.
- 1.1.3 "Equipment" means the computer or computers utilised by the Licensee for the running of the Software.
- 1.1.4 "Intellectual Property Rights" means all vested contingent and future intellectual property rights including but not limited to copyright, trademarks, service marks, design rights (whether registered or unregistered) patents, know-how, trade secrets, inventions, get up, database rights and renewals and extensions thereof existing in any part of the world whether known or not known and for future credit to which the Licensor is or may be entitled.
- 1.1.5 "Licence" means the Licence granted by the Licensor.
- 1.1.6 "Licence Fee" means the charges payable by the Licensee to the Licensor for the Licence of the Software as set out in The Subscription Proposal.
- 1.1.7 "Licensee" shall be defined as set on in The Subscription Proposal.
- 1.1.8 "Licensor" shall be defined as Escendency Ltd., 21 Castle Hill, Lancaster, LA1 1YN, UK
- 1.1.9 "The Maintenance Services and Support Services" means the maintenance and support services to be provided by the Licensor to the Licensee pursuant to this agreement.
- 1.1.10 "Media" means the media on which the Software and Program Documentation are recorded or printed as provided to the Licensee by the Licensor.
- 1.1.11 "Performance Management System" means the Software, the Program Documentation and the Media.

- 1.1.12 “Program Documentation” means the operating manuals, user instructions, technical literature and all other related materials supplied to the Licensee by the Licensor for the use and application of the Performance Management System.
- 1.1.13 “Software” means the Licensor’s Performance Management System Software, the Program Documentation and the Media.
- 1.1.14 “Specification” means the specification of the Performance Management System of the Licensee describing the facilities and functions thereof as detailed on the www.escendency.com and/or www.onwardsandupwards.com websites as appropriate.
- 1.1.15 “System Rental Charges” means the charges payable by the Licensee to the Licensor for the rental of the Equipment and the Software system as set out in The Subscription Proposal.
- 1.1.16 “Use the Performance Management System” means to read all or any part of the Software on the Equipment for the storage and running of the Software and to read and process the Program Documentation in conjunction with the use of the Software and to possess the Media.
- 1.1.17 “Working Hours” means normal business working hours between 09.00 a.m. and 17.00 p.m. Monday to Friday, excluding Public and Statutory Holidays.
- 1.2 In this agreement unless the context otherwise requires:
- 1.2.1 words importing any gender include every gender;
- 1.2.2 words importing the singular number include the plural number and vice versa;
- 1.2.3 words importing persons include firms, companies and corporations and vice versa;
- 1.2.4 references to numbered clauses, appendices and schedules are references to the relevant clause in or appendix or schedule to this agreement;
- 1.2.5 reference in any appendix or schedule to this agreement to numbered paragraphs relate to the numbered paragraphs of that appendix or schedule;
- 1.2.6 the headings to the clauses, appendices, schedules and paragraphs of this agreement will not affect the interpretation;
- 1.2.7 any reference to an enactment includes reference to that enactment as amended or replaced from time to time and to any subordinate legislation or byelaw made under that enactment;
- 1.2.8 any obligation on any party not to do or omit to do anything is to include an obligation not to allow that thing to be done or omitted to be done;
- 1.2.9 any party who agrees to do something will be deemed to fulfill that obligation if that party procures that it is done.
- 1.3 General Data Protection Regulation:
- 1.3.1 A Data Controller is defined as the party that collects data and is responsible for how it is processed and used;
- 1.3.2 A Data Processor stores the data on behalf of the Data Controller.
- 1.4 In the case of conflict or ambiguity between any provision contained in the body of this agreement and any provision contained in any appendix or schedule, the provision in the body of this agreement shall take precedence.

2.0 GRANT OF THE LICENCE

- 2.1 The Licensor grants to the Licensee a non-exclusive licence to use the Performance Management System on and in conjunction with the Equipment subject to the terms and conditions contained in this Agreement.
- 2.2 The Licensee shall use the Software for processing its own data for its own business purposes only.
- 2.3 The Licence shall not be deemed to extend to any programs or materials of the Licensor other than the Performance Management System unless specifically agreed to in writing by the Licensor.
- 2.4 The Licensee acknowledges that it is licensed to use the Performance Management System only in accordance with the express terms of this Agreement and not further or otherwise.

3.0 SERVICES TO BE PERFORMED

- 3.1 The Licensor hereby agrees to provide the Maintenance Services and Support Services as follows:
- 3.1.1 delivery of error corrections, upgrades and new versions of the Software, including Program Documentation.
- 3.1.2 A support service to include telephone and e-mail including:-
- (a) a telephone answering service to provide assistance etc.;
 - (b) e-mail communication together with an on-line tracked ticket system accessed by the Licensee administrators from within the Management System. Ticket numbers are not to be limited; and
 - (c) mobile telephone numbers for out-of-hours but excluding the hours between 9.00 p.m. and 7.00 a.m.
- 3.2 Following provision of the Software or a new software version following acceptance by the Licensee, the Licensor shall provide Maintenance and Support Services in respect of the Software that is running live.
- 3.3 The Licensor will provide a backup service to the Licensee as set out in Appendix A.
- 3.4 Maintenance of any other version of the Software may be provided at the request of the Licensee and shall be subject to additional charges to be agreed between the parties.
- 3.5 The Licensor will provide to the Licensee three hosted systems, namely:
- (1) Read Only Demonstration Site
 - (2) Training System
 - (3) Live System with corporate colours and logos
- 3.6 The Licensor will provide the Licensee with training and consultancy as set out in The Subscription Proposal.
- 3.7 The Licensor will provide to the Licensee a Performance Management System for up to the number of user licences specified in The Subscription Proposal.
- 3.8 The user licences will be authorised for any mixed and devolved use by the Licensee management, officers, members, partners and other stakeholders as the Licensee sees fit.
- 3.9 The Licensee may also create any number of system administrators as part of the user limit.

- 3.10 The Licensor will use all reasonable endeavours to provide ongoing improvements to the Performance Management System to cater for the future evaluating performance management needs of the Licensee, to include emerging guidance from Central Government and any relevant best practice as identified by the Licensee and agreed by the Licensor.

4.0 CHARGES AND TERMS OF PAYMENT

- 4.1 The Licence Fee and Charges shall be paid by the Licensee as set out in The Subscription Proposal.
- 4.2 All Charges due under this agreement shall be paid by the Licensee within 30 days from receipt of an invoice from the Licensor in writing.
- 4.3 The Licence Fee and other Charges payable under this Agreement are exclusive of any applicable VAT and other sales tax which shall be payable by the Licensee at the rate and in the manner prescribed by law against submission of a valid tax invoice.
- 4.4 If the Licensee fails to pay any charges due under this agreement on the due date, interest shall accrue at the rate of 2% per month, compounded monthly until payment in full.

5.0 DURATION

- 5.1 This Agreement shall commence as detailed in The Subscription Proposal and shall remain in force for a period thereafter of six months or until terminated by the Licensee on notice.

6.0 ERROR CORRECTION

- 6.1 If the Licensee shall discover that any of the Software fails to fulfil any part of the Specification then the Licensee shall notify the Licensor pursuant to the Service Level Schedule, set out the defect or effort in question and provide the Licensor (as far as the Licensee is able) with a document example of such defect or error.
- 6.2 Upon receipt of such notification from the Licensee, the Licensor shall initiate procedures for correcting such defect or error pursuant to the Service Level Schedule set out in Appendix A.
- 6.3 The foregoing error correction service shall not include service in
- 6.3.1 defects or errors resulting from any modifications of the Software made by any person other than the Licensor
 - 6.3.2 incorrect use of the Software or operator error
 - 6.3.3 any fault in the Equipment or in its operating system referred to in the Specification or in any other programs used by the Licensee in conjunction with the Software
- 6.4 The Licensor shall make an additional charge in accordance with this Agreement for any services provided by the Licensor at the request of the Licensee which do not qualify under the aforesaid error correction service by virtue of any of the exclusions referred to in sub-clause 6.3 at the Licensor's standard rate from time to time.
- 6.5 The Licensor hereby agrees to the support of the Software under the provisions of the Service Level Schedule set out in Appendix A.
- 6.6 The Licensor does not warrant that all errors can be corrected. The Licensor shall use its reasonable endeavours to correct errors.

7.0 CONTINUATION

7.1 Subject to Clause 19 the Licensor shall provide to the Licensee the option of continuing the rental of the Performance Management System including the Maintenance and Support Services in accordance with the payment scheme as set out in The Subscription Proposal.

8.0 UPGRADES

8.1 Upgrades will be provided to The Licensee by the Licensor at no additional charge to the Licensee as set out in The Subscription Proposal.

9.0 COPYING

9.1 The Licensee may make only so many copies of the Software as are reasonably necessary for operational security and use. Such copies and the media on which they are stored shall be the property of the Licensor and the Licensee shall ensure that all such copies bear the Licensor's proprietary notice. The Licence shall apply to all such copies as it applies to the Software.

9.2 No copies may be made of the Program Documentation other than for Licensed users without the prior written consent of the Licensor. The Licensor shall provide the Licensee with copies of the Program Documentation containing sufficient information to enable proper use of all the facilities and functions set out in the Specification. If the Licensee requires further copies of the Program Documentation then these may be obtained under licence from the Licensor in accordance with its standard scale of charges from time to time in force.

10.0 RESTRICTIONS AND ALTERATIONS

8.1 The Licensee undertakes not to translate, adapt, vary, modify, disassemble, decompile or reverse engineer the Performance Management System without the Licensor's prior written consent.

11.0 SECURITY AND CONTROL

The Licensee shall during the continuance of the Licence:

11.1 Effect and maintain adequate security measures to safeguard the Performance Management System from access or use by any unauthorised person;

11.2 Retain the Performance Management System and all copies thereof under the Licensee's effective control;

11.3 Maintain a full and accurate record of the Licensee's copying and disclosure of the Performance Management System and shall produce such record to the Licensor on request from time to time.

12.0 PROPRIETARY RIGHTS

12.1 The Performance Management System and the Intellectual Property Rights of whatever nature in the Performance Management System are and shall remain the property of the Licensor.

12.2 The Licensee shall notify the Licensor immediately if the Licensee becomes aware of any unauthorised use of the whole or any part of the Performance Management System by any person.

13.0 INTELLECTUAL PROPERTY RIGHTS

- 13.1 The Licensor shall defend at its own expense any claim brought against the Licensee alleging that the Use of the Performance Management System infringes the Intellectual Property Rights of a third party ("Intellectual Property Claim") and the Licensor shall pay all costs and damages awarded or agreed to in settlement of an Intellectual Property Claim provided that the Licensee:
- 13.1.1 furnishes the Licensor with prompt written notice of the Intellectual Property Claim;
 - 13.1.2 provides the Licensor with reasonable assistance in respect of the Intellectual Property Claim;
 - 13.1.3 gives to the Licensor the sole authority to defend or settle the Intellectual Property Claim.
 - 13.1.4 If, in the Licensor's reasonable opinion, the Use of the Performance Management System is or may become the subject of an Intellectual Property Claim then the Licensor shall either:
 - 13.1.5 obtain for the Licensee the right to continue using the part of the Performance Management System which is the subject of the Intellectual Property Claim; or
 - 13.1.6 replace or, with the written consent of the Licensee, modify the part of the Performance Management System that is the subject of the Intellectual Property Claim so it becomes non-infringing.
- 13.2 If the remedies set out in Clause 13.2 above are not in the Licensor's opinion reasonably available, then the Licensee shall return the Performance Management System materials which are the subject of the Intellectual Property Claim and the Licensor shall refund to the Licensee the corresponding portion of the Licence Fee or System Rental Charges, as normally depreciated, whereupon this agreement shall immediately terminate.
- 13.3 The Licensor shall have no liability for any Intellectual Property Claim resulting from the Use of the Performance Management System in combination with any equipment (other than the Equipment) or programs not supplied or approved by the Licensor or any modification of any item of the Software by a party other than the Licensor or its authorised agent.

14.0 USE

- 14.1 The Software shall only be used for the Licensee's own data processing and shall not be utilised to provide a data processing service to any third party whether by way of trade or otherwise.
- 14.2 If the Software cannot be used because the Equipment or any part thereof is temporarily inoperable, then the Licence shall be deemed to apply, without any additional payment to the Licensor but at the Licensee's risk and expense, to the use of the Software on any other compatible equipment until the Equipment becomes operable without the Licensor's permission.
- 14.3 The Licensee may transfer the Software to other equipment with the consent, in writing, of the Licensor that shall not be unreasonably withheld, without any additional payment to the Licensor but at the Licensee's risk and expense.
- 14.4 The Licensee shall follow all reasonable instructions given by the Licensor from time to time with regard to the use of the Software. The Licensee shall permit the Licensor, at all reasonable times, at the Licensor's expense, to verify that the use of the Software is within the terms of the Licence.
- 14.5 The Licensee may, with the prior consent of the Licensor, (such consent not to be unreasonably withheld) use the Software on and in conjunction with any replacement equipment if the Equipment is permanently discontinued, without any additional payment to the Licensor but at the Licensee's risk and expense. Upon such consent being given the replacement equipment shall become the Equipment for the purposes of the Licence.

15.0 COPYRIGHT INDEMNITY

- 15.1 Subject to the limitations set out in Clause 18, the Licensor shall fully indemnify the Licensee against all damages, costs, charges and expenses arising from or incurred by reason of any infringement or alleged infringement in the United Kingdom of copyright in consequence of the authorised use or possession of the Performance Management System or Program Documentation supplied by the Licensor under the Licence, subject to the following:
- 15.1.1 the Licensee to promptly notify the Licensor in writing of any alleged infringement of which it has notice;
 - 15.1.2 the Licensee must make no admissions without the Licensor's prior written consent;
 - 15.1.3 the Licensee, at the Licensor's request and expense shall allow the Licensor to conduct any negotiations or litigation and/or settle any claim. The Licensee shall give the Licensor all reasonable assistance. The costs incurred or recovered in such negotiations or settled claim shall be for the Licensor's account;
 - 15.1.4 the Licensee shall be entitled to claim such reasonable expenses from the Licensor in respect of assistance given to the Licensor with regard to any negotiations or litigations that the Licensor enters into in respect of Clause 12.1.3.

16.0 WARRANTIES AND REPRESENTATIONS

- 16.1 The Licensor warrants and represents that:
- 16.1.1 neither the performance of the Licence, nor the supply or use of the Software and/or Program Documentation, will in any way constitute an infringement or other violation of any Intellectual Property Rights of any third party which is enforceable in the United Kingdom (or in any other country where the Performance Management System and Program Documentation are in use)
 - 16.1.2 it owns, has obtained, or will obtain valid licences of all Intellectual Property Rights which are necessary to the performance of the Licence and the supply of the Performance Management System;
 - 16.1.3 has the full capacity and authority to grant, or to procure the grant of all software licences pursuant to this Licence Agreement; and
 - 16.1.4 all obligations of the Licensor pursuant to this Licence Agreement shall be performed and rendered by appropriately experienced, qualified and trained personnel with all due skill, care and diligence.

17.0 SOFTWARE APPLICATION

- 17.1 In the event that the Licensor shall go into liquidation other than a voluntary liquidation for the purpose of reconstruction or amalgamation, the Licensor shall, in so far as it is permitted in law to do so, provide to the Licensee, at no additional charge, a copy of the Software licensed in perpetuity together with all necessary documentation with a copy of the Licensee's current database.

18.0 LIABILITY

18.1 The Licensor shall during the term of this Agreement maintain professional insurance cover with a reputable company, to a minimum of:

Public Liability	£ 5,000,000
Employer's Liability	£ 10,000,000
Professional Indemnity	£ 2,000,000
Product Liability	£ 5,000,000

18.2 The Licensor shall on request of the Licensee supply copies of the relevant certificates of insurance as evidence that such policies remain in force. The Licensor undertakes to use all reasonable commercial efforts to pursue claims under such insurance policies.

18.3 The Licensor shall indemnify the Licensee for personal injury or death caused by the negligence of its employees in connection with the performance of their duties under this agreement or by defects in any product supplied pursuant to this agreement.

18.4 The Licensor will indemnify the Licensee for direct damage to tangible property caused by the negligence of its employees in connection with the performance of their duties under this agreement or by defects in any product supplied pursuant to this agreement. The Licensor's total liability under this clause shall be limited to the limits of insurance set out above for any one event or series of connected events.

18.5 Except as provided above in the case of personal injury, death and damage to tangible property, the Licensor's maximum liability to the Licensee under this agreement or otherwise for any cause whatsoever (whether in the form of the additional cost of remedial services or otherwise) will be for direct costs and damages only and will be limited to the greater of:

18.5.1 the sum for which the Licensor carries comprehensive insurance cover pursuant to Clause 18.1 above; or

18.5.2 a sum equivalent to the price paid to the Licensor for the products or services that are the subject of the Licensee's claim, plus damages limited to 25% of the same amount for any additional costs directly, reasonably and necessarily incurred by the Licensee in obtaining alternative products and/or services.

18.6 The parties acknowledge and agree that the limitations contained in this Clause 18 are reasonable in the light of all the circumstances.

18.7 The Licensee's statutory rights as a consumer (if any) are not affected. These limitations will apply regardless of the form of action, whether under statute, in contract or tort including negligence or any other form of action. For the purposes of this clause, the Licensor includes its employees, sub-contractors and suppliers who shall all have the benefit of the limits and exclusions of liability set out above in terms of the Contracts (Rights of Third Parties) Act 1999. Nothing in this agreement shall exclude or limit liability for fraudulent misrepresentation.

19.0 TERMINATION

- 19.1 The Licensee may terminate this agreement at any time by giving at least 90 days' prior written notice to the Licensor at any time.
- 19.2 The Licensor or Licensee may terminate the Licence on giving notice in writing to the Licensee or Licensor as the case may be if:
- 19.2.1 the Licensee or Licensor commits any serious breach of any term of this agreement and (in the case of a breach capable of being remedied) shall have failed, within 30 days after the receipt of a request in writing from the Licensor or Licensee to do so, to remedy the breach (such request to contain a warning of the Licensor or Licensee's intention to terminate); or
- 19.2.2 the Licensee permanently discontinues the use of the Performance Management System.
- 19.3 Save as expressly provided in Clause 19.1 and 19.2 or elsewhere in this agreement the Licence may not be terminated.
- 19.4 Forthwith upon the termination of the Licence, the Licensee shall return to the Licensor all copies of the Software, the Program Materials and all copies of the whole or any part thereof or, if requested by the Licensor, shall destroy the same (in the case of the Software by erasing them from the magnetic media on which they are stored) and certify in writing to the Licensor that they have been destroyed. PROVIDED THAT the Licensee may extract and store any Licensee data upon a separate media for continuity purposes.
- 19.5 Any termination of the Licence or this agreement (howsoever occasioned) shall not affect any accrued rights or liabilities of either party nor shall it affect the coming into force or the continuance in force of any provision in this agreement which is expressly or by implication intended to come into or continue in force on or after such termination.

20.0 TIME OF THE ESSENCE

- 20.1 Time shall not be of the essence in the operation of the procedures set out in this agreement.

21.0 PREVENTION OF CORRUPTION

- 21.1 The Licensee may terminate the Agreement and recover all its loss if the Licensor, its employees or anyone acting on the Licensor's behalf do any of the following things:
- 21.2 Offer, give or agree to anyone any inducement or reward of this or any other agreement; or
- 21.3 Commit an offence under the Prevention of Corruption Acts 1889 to 1916 or under section 117(2) of the Local Government Act 1972
- 21.4 Commit any fraud in connection with this or any other agreement whether alone or in conjunction with the Licensee's members or employees.

22.0 GRATUITIES

- 22.1 The Licensor shall not whether by itself or by any other person employed by it to perform the Licence, solicit or accept any gratuity or tip or any other form of money taking or reward, collection or charge for any of the services and the Performance Management System other than the bona fide charges approved by the Licensee.

23.0 RELEASES

- 23.1 The Licensor shall promptly notify the Licensee of any improved version of the Software that the Licensor shall from time to time make.
- 23.2 Upon receipt of such notification, the Licensor shall deliver to the Licensee as soon as reasonably practicable (having regard to the number of other users requiring the new release) the new release together with the documentation.
- 23.3 The new release shall thereby become the current release and the provisions of this agreement shall apply accordingly.

24.0 ADVICE

- 24.1 The Licensor will use its reasonable endeavours to provide the Licensee with such technical advice by telephone, facsimile transmission or mail (including electronic mail), as shall be necessary to resolve the Licensee's difficulties and queries in using the current release.

25.0 CHANGES IN LAW

- 25.1 The Licensor will from time to time make such modifications to the current release as shall ensure that the current release conforms to any change of legislation or new legal requirements which affect the application of any function or facility described in the Program Documentation. The Licensor shall promptly notify the Licensee in writing of all such changes and new requirements and shall implement the modifications to the current release (and all consequential amendments to the Program Documentation which may be necessary to enable proper use of such modifications) as soon as reasonably practicable thereafter.

26.0 EXCLUDED SUPPORT AND MAINTENANCE

- 26.1 The Licensor shall be under no obligation to provide Maintenance Services or Support Services in respect of:
- 26.1.1 problems resulting from any modifications or customisation of the Software or the Equipment not authorised in writing by the Licensor. For the avoidance of doubt, modifications to the Performance Management System shall include but not be limited to changes to the logical or physical database scheme for the Performance Management System, changes to the disk layout and configuration, and hand-modified changes to the data within the database;
- 26.1.2 any software other than the Performance Management System;
- 26.1.3 incorrect or unauthorised use of the Performance Management System or operator error where these are defined as use or operation not in accordance with the Program Documentation;
- 26.1.4 any fault in the Equipment;
- 26.1.5 any programs used in conjunction with the Performance Management System;
- 26.1.6 use of the elements of the Performance Management System in any combination other than those specified in the Program Documentation;
- 26.1.7 use of the Performance Management System with computer hardware, operating systems or other supporting software other than those specified in the Program Documentation; and
- 26.1.8 the Licensee's failure to install and use upon the Equipment in substitution for the previous release and new release of the Software within 14 working days of its receipt or other timescale as agreed with the Licensor.

- 26.2 The Licensor shall upon request by the Licensee provide the Maintenance Services and Support Services notwithstanding that the fault results from any of the circumstances described in Clause 26.1 above. Any time spent by the Licensor investigating such faults will be chargeable at the Licensor's then current rates. The Licensor shall invoice such charges at its discretion and such shall be paid within 30 days of the date of said invoice.
- 26.3 The Licensor reserves the right to discontinue the Maintenance Services and Support Services for any prior version of the Software if a superseding version has been available to the Licensee.
- 26.4 The Licensor shall not be obliged to make modifications or provide support in relation to the Licensee's computer hardware, operating system software, or third party application software or any data feeds or external data.

27.0 LICENSEE'S WARRANTY

- 27.1 The Licensee warrants that it has not relied on any oral representation made by the Licensor or upon any descriptions, illustrations or specifications contained in any catalogues and publicity material produced by the Licensor, which are only intended to convey a general idea of the products and services mentioned. The Licensee has however relied upon the descriptions, illustrations, functions, specifications contained in the system administration guide, on-line help files and the www.escendency.com and/or www.onwardsandupwards.com websites as appropriate.
- 27.2 The Licensee warrants that it shall comply in all material respects with all applicable laws, regulations and codes of conduct (whether statutory or otherwise) of the United Kingdom and that all licences, permissions and consents required for carrying on its business have been obtained and are in full force and effect.

28.0 LICENSEE'S OBLIGATIONS

- 28.1 The Licensee shall:
- 28.1.1 operate the software, maintain data and the database in accordance with the user manual and operator manual;
 - 28.1.2 by arrangement, grant access to premises and/or systems at all times for support and maintenance;
 - 28.1.3 make hardware accessible to the Licensor's support staff and, when required, enable logons or passwords required for such support staff (who will have their own logons);
 - 28.1.4 permit the Licensor to install the current version of software from time to time when upgrades or fixes occur to provide a reasonable level of assistance in implementation and testing;
 - 28.1.5 provide notice of intention to change hardware or operating system or data-feeds.
- 28.2 The Licensee shall provide the Licensor with reasonable direct and remote access to the Licensee's equipment and the Software, and shall provide such reasonable assistance as the Licensor may request, including, but not limited to, providing sample output and other diagnostic information.

29 VARIATIONS

29.1 The Licensee shall be entitled, without invalidating this agreement, to issue to the Licensor instructions in writing requiring the Licensor to do all or any of the following:

29.1.1 To omit and/or cease to perform any part of the services for such period(s) as the Licensee may reasonably determine.

30.0 RIGHTS CUMULATIVE

30.1 All rights granted to either of the parties shall be cumulative and no exercise by either of the parties of any right under this agreement shall restrict or prejudice the exercise of any other right granted by this agreement or otherwise available to it.

31.0 SURVIVAL OF TERMS

31.1 No terms other than the clause shall survive expiry or termination of this agreement unless expressly provided.

32.0 WAIVER

32.1 The failure by either party to enforce at any time or for any period any one or more of the terms or conditions of this agreement shall not be a waiver of them or of the right at any time subsequently to enforce all terms and conditions of this agreement.

33.0 STATUS OF THE LICENSOR

33.1 During the term the Licensor and its employees, agents or sub-contractors shall be an independent contractor and not the servant or employee of the Licensee.

33.2 In such capacity the Licensor shall bear exclusive responsibility for the payment of national insurance contributions of its employees and for discharge of any income tax and VAT liability arising out of remuneration for work performed by its employees, agents or sub-contractors under this Agreement.

34.0 COSTS

34.1 Each of the parties shall pay their own costs and expenses incurred in connection with this agreement.

35.0 NO ASSIGNMENT OR SUB-CONTRACTING

35.1 This agreement is personal to the parties and neither this agreement nor any rights, licences or obligations under it may be assigned by either party without the prior written consent of the other party.

36.0 WHOLE AGREEMENT

36.1 Each party acknowledges that this agreement, including Appendices, contain the whole agreement between the Parties and that it has not relied upon any oral or written representations made to it by the other or its employees or agents and has made its own independent investigations into all matters relevant to it.

37.0 DISCRETION

37.1 Any decision, exercise or discretion, judgement or opinion or approval of any matter mentioned in this agreement or arising from it shall be binding on a party only if in writing and shall be at its sole discretion unless expressly provided in this agreement.

38.0 PROPER LAW AND JURISDICTION

- 38.1 This agreement shall be governed by English Law in every particular including formation and interpretation and shall be deemed to have been made in England.
- 38.2 Any proceedings arising out of or in connection with this agreement may be brought in any Court of competent jurisdiction in Scotland.
- 38.3 The submission by the Parties to such jurisdiction shall not limit the right of the Licensee to commence any proceedings arising out of this agreement in any other jurisdiction it may consider appropriate.
- 38.4 Any notice of proceedings or other notices in connection with or which would give effect to any such proceedings may without notice or prejudice to any other method of service be served on any party.

39.0 CHANGES IN THE LAW

- 39.1 The Licensor shall from time to time, at no cost to the Licensee, make such modifications to the Software as shall ensure that the Software conforms to any change of legislation or facility described in the Specification. The Licensor shall promptly notify the Licensee in writing of all such changes and new requirements and shall implement modifications to the Software as soon as reasonably practicable thereafter.

40.0 ARBITRATION

- 40.1 All disputes or differences which at any time arise between the Parties, whether during the agreement or afterwards, touching or concerning this agreement or its construction or effect or the rights, duties or liabilities of the parties under or by virtue of it or otherwise or any other matter in any way connected with or arising out of the subject matter of this agreement, shall be referred to a single Arbitrator to be agreed upon by the Parties, or in default of such agreement, be nominated by the President of the Chartered Institute of Arbitrators in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment of it for the time being in force.

41.0 LICENSOR'S EMPLOYEES

- 41.1 The Licensee, acting reasonably, shall in so far as it is necessary to ensure provision of their service to the contract standard or to protect the reputation of the Licensee, be at liberty and have authority to object to and require the Licensor to remove any person employed by the Licensor who, in the opinion of the Licensee misconducts himself, fails to meet the required standard or fails or conform with any particular provisions with regard to safety, or persists in any conduct which is prejudicial to safety, health or equalities, and such person shall not be prejudicial to safety, health or equalities, and such person shall not be employed in the performance of the service under the agreement without the written permission of the Licensee. The Licensee's decision shall be final and the Licensee shall submit to the Licensor a written statement of the reasons for its requirements that any employee be removed from the Agreement forthwith. This is without prejudice to the Licensor's right to employ any removed person on any that the Licensor is engaged in with any party other than the Licensee.

42.0 FREEDOM OF INFORMATION

- 42.1 The Licensor acknowledges that the Licensee is subject to the requirements of the Freedom Of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR). The Licensor shall procure that any of its employees, agents or sub-contractors shall:
- 42.1.1 transfer to the Licensee all Requests for Information that it receives as soon as practicable and in any event within two (2) working days of receiving the request for information;
 - 42.1.2 provide the Licensee with a copy of all information in its possession or power in the form that the Licensee requires within five (5) working days (or such other period as the Licensee may specify) of the Licensee's request;
 - 42.1.3 provide all necessary assistance as reasonably requested by the Licensee (at the cost of the Licensee) to enable the Licensee to respond to the request for information within the time limit for compliance set out in Section 10 of the FIOA or Regulation 5 of the EIR.
- 42.2 The Licensee shall be responsible for determining in its absolute discretion whether Commercially Sensitive Information and/or any other information is exempt from disclosure in accordance with the FOIA or the EIR.
- 42.3 This clause shall survive the performance or earlier termination of the Agreement for a period of six years or as otherwise required by a legal or regulatory requirement.

43.0 CONFIDENTIALITY

- 43.1 Subject to Clause 42 above, any confidential information exchanged between the Licensee and the Licensor in connection with this Agreement shall be kept confidential by the recipient except insofar as such information has to be communicated to third parties in connection with the performance of the Agreement or insofar as may be authorised in writing by the party from whom the information came.
- 43.2 This obligation shall not be rendered void by suspension, termination or expiry of this Agreement for whatsoever cause but shall be rendered void in the event that the said information (a) becomes known generally in the relevant sector or (b) is revealed pursuant to a legal or regulatory requirement.
- 43.3 This Clause shall survive the performance or earlier termination of this Agreement for a period of six years or otherwise required by a legal or regulatory requirement.

44.0 DATA PROTECTION

- 44.1 Data produced under this agreement may be subject to the General Data Protection Regulation 2016/679 (GDPR) and any subsequent re-enactment or Regulations made thereunder.
- 44.2 The Licensor will, at the date of supply of the Software and thereafter during the term of this agreement, be the **Data Processor** of that Software for the purpose of the GDPR Legislation.
- 44.3 Both parties warrant that they will duly observe and co-operate with each other to ensure the observance of all their obligations under GDPR Legislation which arise in connection with this agreement.
- 44.4 Where in the course of performing this agreement the Licensor has access to personal data for which the Licensee is the **Data Controller** as defined under GDPR, the Licensor must ensure that such data is used only for the purpose of performing the contract. The Licensor will provide appropriate technical and organisational measures against unauthorised or unlawful processing, accidental loss or destruction of, or damage to, such data.
- 44.5 Subject to Clause 42 above, this clause shall survive the performance or earlier termination of the Agreement for a period of six years or as otherwise required by a legal or regulatory requirement.

- 44.6 All data held by the data processor including 'special category' data is the responsibility of the data controller. Only the data controller may create or destroy that data unless explicit authorisation is given to the data processor to act on their behalf. The data processor will only act on the written instructions of the controller (unless required by law to act without such instructions).
- 44.7 In order to support the data controller in the purpose of using the software, employees of the data processor will have access to the data insofar as is needed to expedite that support. No copy of the licensee's data (as a whole or in part) will be copied to or held on external devices except with the express permission of the data controller on the understanding that it will be destroyed subsequent to its intended purpose. All employees of the licensor agree to, and are committed to, a duty of confidence.
- 44.8 The data processor will give all assistance necessary for the data controller to comply with GDPR regulations including the destruction of special category or other data.
- 44.9 The data processor will submit to audits and inspections, providing the data controller with whatever information it needs, and tell the data controller immediately if it is asked to do something infringing GDPR or other data protection law of the EU or a member state. Nothing within the contract between the licensor and licensee relieves the data processor of its own direct responsibilities and liabilities under GDPR
- 44.10 Upon the termination of the contract between the data controller and data processor, all data stored within their OnwardsandUpwards system will be returned to the data controller and, where maintained and stored by the data processor, destroyed unless express instructions are given otherwise by the data controller.
- 44.11 On request, the data processor will disclose to the data controller the nature and extent of the destruction of their data held within the OnwardsandUpwards software.

45.0 THIRD PARTY RIGHTS

- 45.1 A person which is not a party to this Agreement has no rights under the Contracts (Rights of Third Party) Act 1999 to enforce any terms of this Agreement.

46.0 HUMAN RIGHTS ACT 1998

- 46.1 The Licensor shall not:

46.1.1 do or permit or allow to be done any act or thing or omission in connection with this Agreement which would either cause or give proper grounds for an action to be brought against the Licensee under Section 7 of the Human Rights Act 1998 or any other amendment or re-enactment of that Act or

46.1.2 give grounds for a person to rely upon such act or thing or omission on the part of the Licensor in his defence in any proceedings brought against a third party by the Licensee

provided always that the proper performance of the service by the Licensor shall not be deemed to be a breach of this condition.

47.0 HEALTH AND SAFETY

- 47.1 The Licensor must comply at all times with the Health and Safety at Work Act 1974 and the regulations made under the Act, and all other legal, health, safety and welfare requirements applicable to this agreement. The Licensor shall also ensure that its employees, agents and sub-contractors observe any Local Government arrangements for fire, health, safety, welfare, hygiene and security.

48.0 EQUAL OPPORTUNITIES

48.1 The Licensor shall operate an equal opportunities policy and warrants that this policy shall comply with all relevant law. A copy of the Licensor's policy shall be made available on request by the Licensee.

49.0 FORCE MAJEURE

49.1 Neither party shall be liable for failure to perform its obligations under the Licence if such failure results from circumstances beyond the party's reasonable control.

Performance Management Software Licence

APPENDIX A HOSTING, BACKUP AND SUPPORT

1. Fault Response Time

Faults are defined by priority. The following priorities are applied when the fault is within the Licensor's sphere of responsibility.

- a) A Priority 1 issue is any issue, whether reported by the Licensee or discovered by the Licensor, which impairs, or has the potential to impair, the Licensor supplied service to the Licensee to the point where loss of basic functionality has occurred or may occur. Examples of functionality are: access to the website via the public internet, ability to update the website, ability to access the server, server down. The target fix time is 4 Working Hours.
- b) A Priority 2 issue is any issue, whether reported by the Licensee or discovered by the Licensor, which partially impairs the Licensor supplied service to the Licensee but does not result in a loss of basic functionality. The target fix time is 8 Working Hours.
- c) A Priority 3 issue is any issue, whether reported by the Licensee or discovered by the Licensor, which could be considered to be a 'software bug' but does not affect the basic operability of the system. These issues will be logged as known issues and will be dealt with in the normal software upgrade release cycle.

2. Ticket System

Normal comments or suggestions for system upgrades are made and logged online via the Performance Management System by the Licensee's system administrator(s).

3. System Uptime Report

- a) System status availability will be monitored 24/7 and this report will be made available to the Licensee's system administrator(s) on demand or on a regular agreed frequency. Typically this is and will be close to 100% availability.
- b) Scheduled system downtimes should avoid the hours of 8am to 9pm on any working day.

4. Escalation Procedures

- a) For faults occurring during or outside working hours, a first line and a second (management) line mobile phone number will be made available to the Licensee's system administrator(s).

5. Backups

- a) Backup servers are in place. Daily backups of all the Licensee data will be made at least every 24 hours. In the case of disaster, the system can be brought back up in a worst-case situation to a previous point within the last 24 hours within 8 working hours.
- b) A copy of the Licensor's current system application with installation scripts and instructions will be made available to the Licensee's IT Department and licensed to for the Licensee's sole Intranet use in the event of the Licensor or its legal provider failing to supply a system hosted service whilst contracted to do so or in case of the Licensor or any subsequent Intellectual Property owner ceasing to trade.
- c) A copy of the Licensee's performance management database will be made available for downloading on demand during the hosted contracted period.

6. Hosting

- a) Escendency hosting servers are located within a purpose built data centre offering the highest levels of physical and electronic security and reliability. Additionally, pro-active monitoring and management ensure excellent levels of application availability and performance.
- b) Access to the building is gained via a card and combination key press security system designed specifically for the data centre by Group 4.
- c) CCTV Monitoring is performed by 16 colour cameras around the facility. Images are simultaneously recorded and monitored by both onsite security personnel and a remote facility.
- d) Unauthorised activity in restricted areas can be detected via the intrusion detection system that detects movement and alerts security.
- e) The data centre is manned 24x7 by both security personnel and technical staff.
- f) Climate control systems monitor and adjust temperature and moisture levels. The suite uses tightly controlled gas based air conditioners each of which is of a dual circuit design with two chillers, compressors and condensers providing therefore two completely independent circuits for maximum availability.
- g) There is ample *redundancy* in the calculation should a unit fail, within the current configuration of 7x40Kw Airedale down flow units. The units are N+1 redundant ensuring that the environment is maintained at 20C and 50% relative humidity even in the event of equipment failure.
- h) An automatic fire detection system has been installed throughout the operational area of the premises to provide people, property and system protection.
- i) There is ample 'redundancy' in the calculation should a unit fail, within the current configuration of 7x40Kw Airedale down flow units. The units are N+1 redundant ensuring that the environment is maintained at 20C and 50% relative humidity even in the event of equipment failure.
- j) An automatic fire detection system has been installed throughout the operational area of the premises to provide people, property and system protection.
- k) The fire prevention system is constructed of strategically placed detectors (smoke and heat) creating 'zones' within the floor and ceiling voids. The system works on a 'double knock' basis, comprising ionization and smoke detectors.
- l) Fire suppression is provided by FM-200 gas which is released into the atmosphere from tanks located around the building.
- m) Two 160KVA uninterruptible power supplies (UPS) protect servers from power outages and condition the power output to sensitive equipment. In the event of a failure of the utility power, the UPS will immediately take the load of all servers and network hardware, supplying uninterrupted electricity from large batteries.
- n) In the event of a utility power outage lasting more than a few minutes, an 800KVA diesel generator starts automatically, providing power to our systems. An 11,000 litre on-site fuel tank provides enough diesel to run the data centre independently for at least 48 hours in the event of an extended power outage.
- o) Multiple redundant network connections help to ensure reliable Internet access to the data centre. Additionally, a fully redundant Internet backbone is maintained, to ensure availability in the event of a critical network infrastructure failure.

- p) To ensure maximum reliability and to protect application data, our servers use hardware based raid arrays with data mirrored across disk drives, ensuring no data is lost in the event of a disk failure. Additionally mirrored disks are hot-swappable, allowing failed disks to be replaced without affecting system availability.
- q) In the event of a catastrophic server failure, redundant servers are available to allow rapid recovery, with daily server and database backups taken to minimise risk of data loss. Backups are stored at two separate physical locations (in different parts of the United Kingdom) to ensure that systems and data can be recovered in the event of the total destruction of the data centre.
- r) To ensure the security of our servers, a combination of Cisco hardware firewalls and rigorous IP Security Policies monitor and control all network traffic to prevent malicious access to the system.
- s) Administrative access to Escendency servers can only be obtained from within Escendency's own corporate networks, which are themselves protected by robust security measures.
- t) To further ensure reliable and secure operation, servers are pro-actively monitored to rapidly identify performance or security problems. System and security patches are regularly applied by support engineers.
- u) In addition to the security and reliability of the physical servers we also use a continuous availability monitoring system running from multiple points to ensure that both websites and databases are functioning correctly and to an acceptable level of performance. Escendency support staff are notified automatically in the event of any service interruption.