

General Terms and Conditions

This Agreement applies when we, **Promapp Incorporated ("Promapp")** agree to provide access to you for use of our Promapp process management software, a software solution that provides a central repository for managing business process information ("**Process Management Solution**").

1. DEFINITIONS

1.1 References in this Agreement to "**we**", "**our**" or "**us**" are to Promapp, as defined above. References to "**you**" or "**your**" refers to you, the customer specified in the Promapp Proposal.

1.2 In this Agreement, the following words mean the following:

"**Agreement**" means:

- a. these General Terms and Conditions (including any signature page that you sign referring to these General Terms and Conditions); and
- b. the Promapp Proposal.

"**Client Hosted Site**" means an instance of the Process Management Solution hosted on your own IT environment.

"**Fees**" means the licence, support and/or any other fees payable by you in consideration of us providing you with access to, support of, and services in relation to, the Process Management Solution and which are specifically set out in the Promapp Proposal.

"**Intellectual Property Rights**" means copyright, moral rights, rights in a design, trade marks, service marks, know how, whether or not registered.

"**IP Warranty**" has the meaning set out in clause 4.1(b).

"**Promapp Proposal**" means the document setting out the details for the provision by us of the Process Management Solution to you, including: (a) your legal name and contact details; (b) the Fees; and (c) any specific terms that apply to the provision by us of the Process Management Solution, including (without limitation) any specific services requested by you from us in relation to the implementation, training, support and/or otherwise of the Process Management Solution.

1.3 If there is any inconsistency or conflict between the General Terms and Conditions and the Promapp Proposal, then the terms of the Promapp Proposal will prevail to the extent of the inconsistency or conflict.

2. ACCESS TO PROCESS MANAGEMENT SOFTWARE

2.1 We agree to provide, and you agree to accept, access to the Process Management Solution in accordance with the terms of this Agreement. We grant you a non-transferable, non-exclusive, revocable licence to use the Process Management Solution solely for your internal business purposes, subject to clause 6.4.

- 2.2 You acknowledge that you are responsible for all computer equipment, communications links and Internet access you require to access the Process Management Solution, and for all charges in relation to those things.
- 2.3 If your use of the Process Management Solution is by way of a Client Hosted Site, as contemplated in the Promapp Proposal or as otherwise set out in writing, you acknowledge and agree that:
- a. support Fees (“**Support Fees**”) are payable in addition to the licence Fees. If you do not pay the Support Fees, we may cease providing you with access to the Process Management Solution until all outstanding Support Fees are paid;
 - b. you must update the Client Hosted Site in accordance with clause 3.1(b) and ensure that the version of the Client Hosted Site you are using at any point in time is no older than the version of the Process Management Solution generally available to you and/or our other clients in the previous 18 month period, otherwise we may cease providing support for the Client Hosted Site and/or charge you additional fees for the support of the Client Hosted Site; and
 - c. you will ensure that all of your data that is stored on the Client Hosted Site is backed up on a regular basis for disaster recovery purposes. We accept no responsibility (including for any loss of data) due to inadequate backup procedures in place at the Client Hosted Site.
- 2.4 You will not update any of your data in the Process Management Solution by any method other than via:
- a. the Process Management Solution; or
 - b. any update scripts supplied by us.

If you are in breach of this clause, we will not have any obligation to provide support to you.

3. **ADDITIONAL SUPPORT**

- 3.1 We will provide you with support for your use of the Process Management Solution as follows:
- a. we will provide you telephone or email advice (at our discretion) about the following things: what we are doing to rectify any bugs or deficiencies in the Process Management Solution; to provide you with reasonable assistance to operate the Process Management Solution (but if you need more than reasonable assistance, we will arrange for training for you at your cost); and rectifying data corruption in the Process Management Solution;
 - b. as our Process Management Solution is continually evolving, we may at any time update the Process Management Solution with new versions or updates as we think should be generally available. Some of these updates will occur automatically, while others may require you to schedule and implement the updates. You will, where required, upgrade your software and/or equipment in order to make efficient use of the Process Management Solution. We will provide you with reasonable notice of any such upgrades.
- 3.2 We may charge you additional fees at our then current hourly rates for support that results from:
- a. you requiring additional configuration or access to, or support or assistance with, the Process Management Solution;

- b. you requiring assistance in implementing new versions or updates, including data migration, testing, configuring updates or any other professional services; or
- c. you using new hardware.

We will, where it is practicable in the circumstances to do so, agree with you the additional fees payable prior to you incurring them.

- 3.3 If you ask us to visit your site for the purpose of providing support, you will pay us all reasonable travel and accommodation expenses, as well as any charge under clause 3.2 above, and we will, where it is practicable in the circumstances to do so, agree with you these expenses or charges prior to you incurring them.
- 3.4 If you are required by law to deduct or withhold taxes or charges from the amounts due to us under this Agreement, you will ensure that the amount due to us is increased so that the payment actually made to us equals the amount due to us as if no such taxes or charges had been imposed.

4. **WARRANTIES AND INDEMNITIES**

4.1 We warrant that:

- a. we have the power and authority to allow you to use the Process Management Solution;
- b. to the best of our knowledge, the Process Management Solution does not infringe the Intellectual Property Rights of any third party (**IP Warranty**);
- c. when we provide services relating to your use of the Process Management Solution to you, we will do so to the standard of care and skill reasonably expected of a professional in the provision of such services;
- d. we will use all reasonable commercial endeavours to ensure the Process Management Solution is available to you 24 hours a day, 7 days a week (excepting outages for the installation of planned updates and new versions, routine maintenance, correction of errors and bug fixes) but we do not guarantee that access will be continuous or error free. You acknowledge that the availability of the internet, your communication links and your equipment are integral to the availability of the Process Management Solution and will affect your use of it.

4.2 We do not warrant:

- a. that your use of the Process Management Solution will be uninterrupted or error-free;
- b. that the Process Management Solution and/or the information obtained by you through the Process Management Solution will meet your requirements; and
- c. the accuracy, correctness, reliability and completeness of any information, formulae, or calculation provided through the use of the Process Management Solution (together referred to as **Calculations**). You acknowledge that the results from any Calculations are for informational purposes only, and that the assumptions used and figures generated are for purposes of illustration and reference only, and are subject to change depending on a variety of factors, which may not have been taken into account in the computation. To the maximum extent permitted by law, we will not be liable for any form of loss or damage, arising out of or in connection with your reliance on and use of the

Process Management Solution. You agree that you will not rely solely on the Calculations and will carry your own calculations (other than by using the Process Management Solution) to verify the accuracy, correctness, reliability and completeness of the Calculations.

- 4.3 Except for the warranties in clause 4.1, all other warranties are expressly excluded to the maximum extent permitted by law.
- 4.4 We will indemnify you against any claim that the Process Management Solution infringes the Intellectual Property Rights of any third party in respect of any amounts awarded against you in judgment or settlement of such claim, provided that:
- a. we are given prompt notice of any such claim;
 - b. you provide us with reasonable co-operation in the defence and settlement of such claim, at our expense; and
 - c. we are given sole authority to defend or settle the claim.
- 4.5 In the defence or settlement of any claim, we may procure the right for you to continue using the Process Management Solution, replace or modify the Process Management Solution so that it becomes non-infringing or, if such remedies are not reasonably available, terminate this Agreement on 10 days' notice to you without any additional liability.
- 4.6 In no event will we, our employees, agents and sub-contractors be liable to you to the extent that the alleged infringement is based on:
- a. modification of the Process Management Solution by anyone other than by us or otherwise authorised by us;
 - b. your use of the Process Management Solution in a manner contrary to the instructions we have made available to you;
 - c. your use of the Process Management Solution after notice of the alleged or actual infringement from us or any appropriate authority.
- 4.7 The foregoing states your sole and exclusive rights and remedies, and our entire obligations and liability, for infringement of the Intellectual Property Rights of any third party.

5. COMMENCEMENT DATE, TERM AND TERMINATION

- 5.1 This Agreement commences on the date we agree to provide access to the Process Management Solution to you ("**commencement date**"), and continues in force until terminated in accordance with the remainder of this clause.
- 5.2 Either of us may terminate this Agreement:
- a. by giving the other 90 days' notice in writing, provided that you may not give this notice within the first 12 months from the commencement date;
 - b. if the other party breaches any of its obligations under this Agreement and fails to remedy the breach within 14 days after notice requiring it to be remedied; or
 - c. the other party becomes bankrupt or is put into liquidation or has a receiver or statutory manager appointed over any of its assets, or becomes insolvent or ceases to carry on its business or otherwise makes any composition or arrangement with its creditors.

- 5.3 The parties acknowledge and agree that the Promapp Proposal may include provisions allowing either party to terminate this Agreement in a manner other than in accordance with clause 5.2. Accordingly this Agreement may also be terminated in accordance with those provisions.
- 5.4 If any amounts due and payable by you under this Agreement remain unpaid, or you are in breach of any of your obligations under this agreement, we may immediately suspend your ability to access and use the Process Management Solution.
- 5.5 On termination of this Agreement,
- a. you will immediately pay to us all sums due to us under this Agreement;
 - b. you must deliver to us all documentation related to the Process Management Solution, and, if you are using a Client Hosted Site, immediately return the Client Hosted Site (including the software, documentation and all other items provided to you as part of the Client Hosted Site) to us or at our request you will destroy the Client Hosted Site and certify that you have destroyed the Client Hosted Site within 5 days of our request; and
 - c. provided that you have paid all sums due to us under this Agreement, we will give you the ability, for up to 10 days following termination, to export to your own system any of your data and information that we hold as part of the Process Management Solution in our standard text, PDF or XML format, or such other format we usually transfer such data and information. You may request us to export your data and information to you and you will pay our reasonable costs and expenses on a time and materials basis if we carry out the export for you.
- 5.6 Termination of this Agreement is without prejudice to any other rights or remedies available to the parties to the Agreement, and to your payment obligations under this Agreement.

6. OWNERSHIP AND RESTRICTIONS

- 6.1 You understand that the Intellectual Property Rights and all other rights in the Process Management Solution and the website associated with it (other than relating to data or information which you input) belong to us or our licensors, and you will not dispute our ownership of them.
- 6.2 We acknowledge that the data or information you upload when you use the Process Management Solution is your confidential information. You will have sole responsibility for the legality, reliability, integrity, accuracy and quality of the data or information which you input. We will not knowingly disclose such data or information unless we are required to do so by law, or the information is already in the public domain (other than as a result of a breach of this clause 6.2). We will, where it is practicable to do so, give you reasonable notice of our intention to disclose such data or information.
- 6.3 You acknowledge and agree that we may use your data or information that you input into, or which is generated by, the Process Management Solution for the purpose of:
- a. performing our obligations under this Agreement;
 - b. improving or enhancing the Process Management Solution;
 - c. assessing the performance of your business and processes, including comparing or benchmarking such performance against the performance of our other customers' businesses or industry practice;
 - d. assessing what other services we may provide and promote to you, including

offering services that may assist in improving performance;

e. performing data analysis on an aggregated and anonymous basis,

provided that we comply with our confidentiality obligations under clause 6.2.

6.4 You must:

a. use our Process Management Solution as we direct you from time to time;

b. not attempt to make any copy of the Process Management Solution or any part of it;

c. not share your access to the Process Management Solution or any Client Hosted Site with any third party, except with our prior consent and you will tell us immediately if you become aware of any circumstances that cause you to believe any person may have unauthorised knowledge, possession or use of the Process Management Solution or Client Hosted Site;

d. not reverse engineer, disassemble, modify, translate or make any derivative works of any type of the application used to deliver our Process Management Solution or the Process Management Solution itself;

e. not attempt to bypass any security mechanism in place on any system we use to make the Process Management Solution available to you or in the Process Management Solution itself;

f. not gain or attempt to gain unauthorised access to, or alter or attempt to modify, our Process Management Solution, our systems, or any other customers' systems, information or data.

6.5 You will:

a. ensure that all users that you authorise to use the Process Management Solution are responsible for the safekeeping of their log-in and password details, and you will ultimately be responsible for all use or access of the Process Management Solution by anyone using any of your authorised users' log-in and password details, and for payment of charges arising from that use. You will ensure that authorised users change their passwords if we request them to do so. You must contact us immediately if you suspect any unauthorised use or disclosure of any log-in and password details;

b. ensure that the Process Management Solution is used only by you, and in accordance with our guidelines for it.

6.6 You are responsible for ensuring that your hardware and software is correctly configured to enable you to use the Process Management Solution. We will use

reasonable endeavours to specify the hardware and software that you require so that you can use the Process Management Solution.

7. **LIMITATION OF LIABILITY**

7.1 We are not liable to you, whether in tort, contract or otherwise, for any loss of profits, loss of data, indirect, special, incidental, consequential or punitive damages (including without limitation, loss of use, loss of anticipated savings, loss of goodwill) however caused, arising out of or in connection with your use of the Process Management Solution or this Agreement.

7.2 To the fullest extent permitted at law, our liability to you for all claims of losses or damages under this Agreement:

a. our indemnification obligations under clause 4.4, will not exceed in aggregate the total amount of the fees paid by you under this Agreement for the 12 month period immediately preceding the time the liability arises;

7.3 You acknowledge that:

a. we may rely on the provision of services by third parties (including data centre, telecommunications and outsourcing providers) in order to provide the Process Management Solution ("**Third Party Providers**") and that the Process Management Solution may be subject to limitations, delays and other problems inherent in the use of such services provided by Third Party Providers; and

b. we will not be responsible for any delays, delivery failures, or any other loss or damage arising out of or is in connection with any services provided by Third Party Providers, including any delays, delivery failures, or any other loss or damage resulting from the transfer of data over communications networks and facilities, including the internet.

7.4 Without limiting clause 7.3(a), we will not be in default or liable to you by reason of any failure or delay in performing our obligations under this Agreement caused by any act or event beyond our reasonable control. In the event of such an event, we will use all reasonable endeavours to resume our obligations under this Agreement as soon as reasonably possible.

7.5 All claims under this Agreement must be made within 12 months of the cause of action arising.

8. **CHARGES AND PAYMENTS**

8.1 You agree to pay our Fee and any additional fees or costs payable under these terms and conditions (including pursuant to clause 3) for use of the Process Management Solution and for any ancillary services.

8.2 We may change our Fee and standard hourly rates from time to time by giving you no less than 30 days' prior written notice.

8.3 Unless otherwise specified in the Promapp Proposal, you must pay us the Fees by direct credit in advance on a monthly basis. All other fees or costs will be payable in advance or, where provided on a time and costs basis, invoiced monthly in arrears and payable by the 20th of the month following the date of invoice.

8.4 If you require us to submit our invoices to a third party payment system or in any other manner that differs from our standard invoicing process, we will charge you an administration fee of \$180 per invoice.

- 8.5 If we provide services such as implementation or training for you, we will tell you how much those services will cost (or, where those services are provided on a time and costs basis, we will provide you with a cost estimate).
- 8.6 All fees and other costs payable under this Agreement are exclusive of sales tax (where applicable) unless otherwise stated, and you will be liable for any sales tax payable on such fees and costs. We will provide a valid tax invoice for all fees and other costs payable under this Agreement.
- 8.7 If you do not pay any amount payable under this Agreement by the due date for payment, we may do any or all of the following:
- a. charge you interest on the unpaid amount from the due date for payment until the date you pay it. The interest rate will be 2% above our bank's then- standard business overdraft rate;
 - b. suspend the provision of the Process Management Solution in accordance with clause 5.5;
 - c. place the debt in the hands of a debt recovery agency (which may affect your credit rating) and/or seek to recover the debt through any dispute tribunal or other court. You will indemnify us against all fees incurred by us in collecting the debt including: (i) lodgment fees with our debt collection agency; (ii) any recovery costs that are on-charged to us by our debt collection agency; and (iii) any court filing fees incurred in filing debt recovery proceedings against you.

9. Audit

- 9.1 You will allow us to actively monitor and audit the Process Management Solution in order to establish whether the Process Management Solution is being used in accordance with this Agreement. We may, as part of our rights under this clause generate, or ask you to generate, reports on your use of the Process Management Solution.
- 9.2 We may promptly disable any login account if we discover (through undertaking the monitoring and audits referred to in clause 9.1) that any login details have been provided to any party that is not authorised to use the Process Management Solution.
- 9.3 You will, pay us an amount of any underpayment of Fees discovered by us through undertaking the monitoring and audits referred to in clause 9.1.

10. DISPUTES

- 10.1 If a dispute arises out of this Agreement, a party may not commence court or arbitration proceedings unless it has complied with the remainder of this clause.
- 10.2 A party claiming a dispute has arisen must give written notice to the other party specifying the nature of the dispute. On receipt of that notice, the parties will use all reasonable endeavours to resolve the dispute by discussion, consultation, negotiation or other informal means.
- 10.3 If the dispute is not resolved within 15 business days of notice being given, either party may by giving written notice to the other party, require the dispute to be determined by the arbitration of a single arbitrator. The arbitrator will be appointed by the parties or, failing agreement within five days of the notice requiring arbitration, by the American Arbitration Association on application of either party.

10.4 Nothing in this clause 10 prevents a party seeking urgent interlocutory relief.

11. **GENERAL**

11.1 We may give you notice by email, post or by fax to the address you have given us when you have registered. Any communication by email or fax is deemed to be received when transmitted to the correct email or fax address of the recipient. Communication in writing is deemed to be received 3 days after posting, or when left at the specified address.

11.2 We may amend this Agreement at any time without notice to you but we will use reasonable efforts to publish or communicate each amendment before it becomes effective. We will ensure that the most up-to-date version of this Agreement is published on the Process Management Solution. If any amendment is unacceptable to you, you may terminate the Agreement between you and us by giving us 30 days' notice. If you continue to use the Process Management Solution after the effective date of each amendment, you will be deemed to have accepted such amended version of this Agreement.

11.3 State of California law governs this Agreement.

11.4 This Agreement constitutes the entire agreement between us in relation to the Process Management Solution.

11.5 You may not assign or transfer this Agreement, or your access or use of the Process Management Solution, or any of your other rights and obligations under this Agreement without our prior written consent.

11.6 The provisions of clauses 5.6, 6, 7, 8, 9, 10 and this clause 11 will survive termination or expiry of this Agreement.

11.7 If any provision of this Agreement is invalid or unenforceable the remaining provisions of this Agreement are not affected and continue in full force.

11.8 Any unlawful provision in this contract may be severed, and the remaining provisions remain enforceable.

11.9 No delay or failure to act is a waiver of any other or any subsequent breach. The failure of a party to enforce a provision of this Agreement is not to be interpreted as a waiver of that provision. No waiver is effective unless it is in writing.