

## **PESA Software Maintenance and Support Agreement**

### **1. Parties.**

PESA Inc. ("PESA" or "Licensor") and Licensee agree that the terms and conditions of this Software Maintenance and Support Agreement ("Agreement") cover maintenance and support services to be provided by PESA to Licensee for Licensed Software. Such maintenance services will be provided by PESA only with respect to Licensed Software for which Licensee has received a license and duly paid for within the maintenance period.

### **2. Definitions.**

- (a) **"Effective Date"** means the date as specified in a separate Maintenance plan. For a new installation, the effective date of the Purchased Maintenance is the date of the Delivery of the Software.
- (b) **"Licensed Software"** means all programs and associated documentation developed by PESA licensed to Licensee under one or more Licenses for Software Products between the parties. Definitions in such Licenses shall apply to this Agreement unless plainly inconsistent.
- (c) **"Maintenance Period"** means the period of purchase for a Term License or the contracted period with purchase of a Standard License Maintenance.
- (d) **"Software Product"** means a licensed program and associated documentation developed by PESA that has been licensed by PESA to the Licensee.
- (e) **"Software Update"** means a Licensed Software Update generally offered and expressly designated by PESA in its sole discretion as defined in the EULA.
- (f) **"Software Upgrade"** means a Licensed Software Upgrade generally offered and expressly designated by PESA in its sole discretion as defined in the EULA.
- (g) **"Support Class"** means a description of the Support Service available for a specific Software Product.
- (h) **"Support Service"** means the Licensed Software support service ordered by Licensee under this Agreement, as such service is available and constituted from time to time.

### **3. Support Classes and Services to be provided.**

During the term of this Agreement, PESA will furnish Support Service in accordance with the Support Class listed below.

#### **(a) Class 1 Support – for Purchased Standard License Maintenance.**

In addition to the standard warranty as defined in PESA End User License Agreement ("EULA"), below support services will be provided:

- i. Software Update - Updates shall mean any periodic software releases, additions, fixes, and enhancements thereto, release notes for the Licensed Software and related Reference Manuals, (other than those defined elsewhere in this section as Upgrades) which have no value apart from their operation as part of the Licensed Software and which add minor new functions to the Licensed Software, but none so significant as to

warrant classification as an Upgrade, which may be provided by PESA to fix critical or non-critical problems in the Licensed Software on a scheduled, general release basis. Updates to the Licensed Software ("Version") are denoted by number changes to the right of the decimal point for a version and revision number (for example going from 4.0.0 to 4.1.2). A maintenance plan is required for any Updates for a Standard License. Updates are included in the Term License. The warranty does not include software updates.

ii. PESA will notify Licensee when an update is available. Licensee may order such an update provided that Licensee is, at the time of such order, paid for Class 1 maintenance on the Software Product and it continues to order Support Services in accordance with Licensor's then current maintenance agreement and maintenance fees.

iii. Telephone support is offered from 8:00am to 5:00pm Central time.

iv. Security Patch Releases - PESA will use commercially reasonable efforts to assess and if deemed as warranted, to address security vulnerabilities found in the Licensed Software. PESA will review the vulnerabilities found and shared from time to time through the NIST's National Vulnerability Database ("NVD"). Security patches will be deployed at the reasonable discretion of PESA as refined for the Licensed Software, and may not be issued for all vulnerabilities, except if they are classified as critical or high.

Other Modifications - Should Licensee request modifications to a Software Product or any other assistance or support not specifically identified in this Agreement, Licensor shall be under no obligation to perform such services, but may agree to perform such modifications, assistance or support at its standard time and material rates then in effect.

**(b) Class 2 Support – for Term Licensed Maintenance.**

In addition to all Class 1 Support as stated above, Class 2 Support included additional benefits:

(i) Software Upgrades - Upgrades shall mean any modification to the Licensed Software made by PESA, which are so significant, in PESA's sole discretion, as to warrant their exclusion under the current Standard License grant under this Agreement for the Licensed Software. Upgrades of Licensed Software are denoted by number changes to the left of the decimal point for a release number (for example going from 3.0 to 4.0).

PESA will notify Licensee when an upgrade is available, including the terms under which either or both will be made available. Licensee may order such an upgrade if Licensee is, at the time of such order within the maintenance period.

**4. Support Service Term.**

(a) Licensor will begin Support Service for each Software Product on the date of delivery of an End User Term License Agreement ("EUTLA"). Licensor will begin Support Service for each Software Product for an End User Standard License with the purchase of a separate Maintenance Plan ("EUSLA").

Licensor will continue to furnish Support Service for both the EUTLA and EUSLA for the

Period set forth in the purchase agreement.

(b) **Termination.**

Except as otherwise provided herein:

i. Either party may terminate this Agreement as of the end of any contracted Maintenance Period by giving written notice to the other, such notice to be given by Licensor not less than sixty (60) days before the end of the Maintenance Period, or by Licensee as to any specific Software Product at any time before the end of the Maintenance Period. No updates, patches, nor security enhancements are made available post termination.

ii. Either party may terminate this Agreement at any time if the other party fails or defaults in the performance of any of its material obligations hereunder or under the EULA, effective upon such party giving written notice of termination to the defaulting party.

iii. This Agreement shall terminate automatically upon termination or expiration of all Licenses for Software Products.

**5. Customer Responsibilities**

(a) **Interface.**

Licensee shall be responsible for the interface (other than the standard PESA supplied API) between PESA Software Products and other originated Software for which Support Service is available, and all other software used by Licensee, whether or not such software is licensed to Licensee by Licensor or by others or has been developed by Licensee. The Licensor is responsible for the PESA Developed software and API (application Programming Interface).

(b) **Installation and Operation.**

Licensee is responsible for installing, managing, and operating any Support Service elements delivered under this Agreement. PESA can be contracted to perform installation services under separate service agreement.

(c) **Software License Limitations.**

Licensee agrees that the rights granted to Licensee, the use limitations, and Licensee's responsibilities to prevent unauthorized disclosure specified in the License for Software Products between Licensor and Licensee apply equally to all Support Service elements, such as corrective code, enhancements and updates furnished under this Agreement.

(d) **Modifications by Licensee.**

In no event shall Licensor have any responsibility to correct any errors or damage resulting from changes to or modification of a Software Product made by Licensee.

(e) **Uninstalled Updates.**

Licensor shall not be responsible for correcting any alleged error if Licensee fails to incorporate in a Software Product any Software Update and/or Software Upgrade that Licensor has provided to Licensee.

**6. Charges**

(a) **Price and Payment Terms.**

Licensee agrees to pay Licensor the charges for maintenance and other fees as stated in individual proposal presented to the Licensee. No invoice under this Agreement shall be subject to credit for any period of non-use by Licensee for any reason, including defects in the Licensed Software. If Licensee commences maintenance coverage at a time later than original purchase, licensee agrees to also fully pay for the uncovered period as past updates and certifications, of which are being installed, require compensation.

(b) **Changes.**

Licensor will propose the maintenance price for all or any Software Product effective upon the expiration of the contracted Maintenance Period or at the end of any calendar month thereafter, by giving at least ninety (90) days written notice prior to the end of the Maintenance Period.

(c) **Taxes.**

Licensee will pay any and all taxes pertaining to the maintenance and support services provided hereunder by Licensor during the term of this Agreement, including but not limited to property and/or use taxes, and will reimburse Licensor on Licensor's request if Licensor is required to pay any such tax.

**7. Limitation of Liability and Remedies**

(a) **No Warranty.**

EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN THIS AGREEMENT, LICENSOR MAKES NO REPRESENTATIONS OR WARRANTIES WHATSOEVER AND LICENSEE HAS NOT RELIED ON ANY REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, ENFORCEABILITY, NON-INFRINGEMENT, OR ARISING FROM COURSE OF PERFORMANCE, DEALING, USAGE OR TRADE.

(b) **Limitation of Remedy.**

If Licensor fails to fulfill its obligations under this Agreement, Licensee's sole and exclusive remedy is the right to terminate Support Service immediately for the affected Software Product(s). In such event, Licensor will refund Support Service charges paid in advance for the terminated portion of the recurring period plus an amount equal to one (1) month's Support Service charges for the Software Product for which Support Service is terminated. EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN THIS AGREEMENT, THE REMEDIES PROVIDED IN THIS SECTION 7(b) ARE LICENSEE'S SOLE AND EXCLUSIVE REMEDIES FOR ANY BREACH OF THIS AGREEMENT.

(c) **Limitation of Damages.**

IN NO EVENT WILL LICENSOR BE LIABLE TO LICENSEE FOR ANY INCIDENTAL, INDIRECT, CONSEQUENTIAL, SPECIAL, EXEMPLARY OR PUNITIVE DAMAGES OF ANY KIND (INCLUDING, BUT NOT LIMITED TO, LOST REVENUES OR PROFITS) ARISING FROM OR RELATING TO THIS AGREEMENT BASED ON CONTRACT, TORT OR ANY OTHER LEGAL THEORY, REGARDLESS OF WHETHER LICENSOR WAS ADVISED, HAD OTHER REASON TO KNOW, OR IN FACT KNEW OF THE POSSIBILITY THEREOF, EVEN IF A REMEDY SET FORTH

HEREIN IS FOUND TO HAVE FAILED OF ITS ESSENTIAL PURPOSE. NO ACTION SHALL BE BROUGHT BY LICENSEE FOR ANY CLAIM RELATING TO OR ARISING OUT OF THIS AGREEMENT MORE THAN ONE YEAR AFTER THE ACCRUAL OF SUCH CAUSE OF ACTION.

## **8. General**

### **(a) Force Majeure.**

Each party shall be excused from delays in performing or from its failure to perform hereunder to the extent that such delays or failures result from causes beyond the reasonable control of such party. Performance times shall be considered extended for a period of time equivalent to the time lost because of such delay. This Section shall be inapplicable to any failure to make a payment then due under this Agreement.

### **(b) Licensee Forms and Non-Waiver.**

Any provision of Licensee's order that is in any way inconsistent with or in addition to the terms and conditions of this Agreement shall not bind Licensor, and Licensor's failure to object to any such provision shall not be construed as a waiver of the terms and conditions of this Agreement, nor as an acceptance of any such provision.

### **(c) Assignability.**

Neither this Agreement nor any of the rights, interests or obligations under this Agreement may be assigned or delegated, in whole or in part, by operation of law or otherwise, by either party without the prior written consent of the other party, and any such assignment without such prior written consent will be null and void. This Agreement will be binding upon and inure to the benefit of the parties named herein and their respective successors and permitted assigns.

### **(d) Amendments; Waivers.**

This Agreement may not be modified or amended except by a written instrument signed by the parties. In addition, no waiver of any provision of this Agreement will be binding unless set forth in a writing signed by the party granting the waiver. Any waiver will be limited to the circumstance or event specifically referenced in the written waiver document and will not be deemed a waiver of any other term of this Agreement or of the same circumstance or event upon any recurrence thereof.

### **(e) Notices.**

Any notice required or permitted to be given under this Agreement will be in writing and addressed to the parties at the addresses set forth on any written agreement referencing this agreement and terms or to such other address that may be designated by the receiving party in writing. All Notices shall be delivered by personal delivery, nationally recognized overnight courier (with all fees pre-paid), electronic transmission (with confirmation of transmission) or certified or registered mail (in each case, return receipt requested, postage prepaid). Except as otherwise provided in this agreement, a Notice is effective only (a) upon receipt by the receiving party, and (b) if the party giving the Notice has complied with the requirements of this Article.

(f) **Governing Law.**

This Agreement and any dispute arising or related to this Agreement will be construed and enforced in accordance with the laws of the State of Alabama, without reference to its rules of conflicts of laws. The parties hereby consent to the exclusive jurisdiction of any federal or state court having jurisdiction within the state of Alabama for resolution of any such dispute and waive any objection which to venue or forum non conveniens.

(g) **Waiver of Jury Trial.**

EACH OF THE UNDERSIGNED DO HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE THE RIGHT TO TRIAL BY JURY IN ANY ACTION OR PROCEEDING BASED ON OR WITH RESPECT TO THIS AGREEMENT OR ANY OF THE TRANSACTIONS CONTEMPLATED HEREBY OR RELATING OR INCIDENTAL HERETO.

(h) **Severability.**

Each provision of this Agreement is intended to be severable. If any term or provision hereof is illegal or invalid for any reason whatsoever, such illegality or invalidity will not affect the legality or validity of the remainder of the Agreement.

(i) **Entire Agreement.**

This Agreement contains the entire understanding among the parties and supersedes any prior written or oral agreements between them respecting the subject matter of this Agreement. There are no representations, agreements, arrangements, or understandings, oral or written, between the parties relating to the subject matter of this Agreement that are not fully set forth herein.