



Penguin Computing Terms and Conditions of Sale and Service

These Penguin Computing Inc. ("Penguin Computing") standard Sales Terms and the Service Exhibit govern the sale, licensing, and delivery of Products and Services by Penguin to you ("Customer"). Unless Customer has another valid agreement with Penguin Computing, the following terms and conditions will apply.

A. Definitions

- i)** "Exhibits" means attachments that describe or otherwise apply to the sale or license of Products or Support.
- ii)** "Products" means hardware, software, documentation, and parts that are offered by Penguin Computing to customers.
- iii)** "License Fee" means the fee or fees, if any, designated by Penguin Computing for use of Penguin-developed Software.
- iv)** "Software" means any binary software programs purchased or delivered by Penguin Computing.
- v)** "Software License" means the Software license grant and general license terms as outlined below or as included or downloaded with the Software. Each Software License may or may not have a delineated License Fee.
- vi)** "Support" means hardware maintenance and repair and other standard support services provided by Penguin Computing.
- vii)** "Confidential Information" means any information disclosed by one party to another under this Agreement which is, prior to or at the time of disclosure, identified in writing as confidential or proprietary.

B. Delivery

All Products delivered pursuant to this Agreement shall be shipped Freight on Board origin to the customer address set forth in the sales Agreement, unless notified in writing of a different location. Targeted shipment timeframe is seven (7) to ten (10) business days or less from Order Acceptance; however, this timeframe is not guaranteed.

C. Order Acceptance

Orders are deemed accepted when Penguin Computing receives a purchase order from Customer specifying the required Products or Services and referencing the Customer's Agreement number. Orders must have a shipment request date of less than ninety (90) days from date of purchase order.

D. Change Orders

Cancelled orders and orders returned within thirty (30) days of invoice are subject to a 15% restocking fee. Rescheduled orders must have a reschedule date within ninety (90) days of the original order.

E. Prices

Product prices are as quoted at time of purchase. Prices are valid for the period quoted by Penguin Computing, and are exclusive of, and Customer agrees to pay, applicable sales or like taxes, unless Customer has provided Penguin Computing with an appropriate exemption certificate for the delivery location.

F. Payment Terms

Subject to credit approval by Penguin Computing, standard payment terms are ten (10) days from date of invoice; otherwise payment is due in full prior to order confirmation. Penguin Computing reserves the sole right to request payment in advance, in which event Penguin Computing shall promptly notify Customer and may delay shipment until payment is received.

G. Electronic Business

Customer and Penguin Computing agree that business conducted electronically in a mutually-agreed manner will be subject to the same rights, obligations and terms as are delineated in this Agreement.

H. Shipping Charges

Shipping and handling charges are extra unless otherwise expressly indicated.

I. Title and Risk of Loss

Title and Risk of Loss for hardware Products shall pass to the Customer upon shipment from Penguin Computing or to Customer's carrier. Title to software shall remain with the applicable licensor's.

J. Return Policy

This policy applies to products shipped within the United States only. If not completely satisfied with Penguin Computing Products, Customers may return them to Penguin Computing within thirty (30) days of invoice for a refund of the purchase price, less shipping and handling costs, and a 15% restocking fee. Customers must ship products back to Penguin Computing in the original packaging and condition, and prepay shipping charges. Customer agrees to follow the "Return Materials Authorization Process" (RMA Process) as outlined at <http://penguincomputing.com>. Customers assume the risk for loss or damage during shipment. Penguin Computing may, at its discretion, identify products that are non returnable. Any Product shipped internationally is not returnable, and is subject to the terms outlined in Section O.

K. Product Change/Discontinuance

Penguin Computing reserves the right to alter Product offerings at any time. Penguin Computing shall put forth all reasonable efforts to adhere to Customer specifications, but due to technological advancements and fluctuations in supplier availability, substitute conforming goods may be used to ensure quality, functionality and performance.

L. Confidential Information

A party receiving Confidential Information (Receiving Party) must keep it confidential using the same standard of care that it exercises with respect to its own information of like importance, and may use it only for the purposes for which it was provided under the Agreement. Confidential Information may be disclosed only to employees or contractors obligated to the Receiving Party under similar confidentiality restrictions.

M. Data Privacy

Customer agrees to allow Penguin Computing to store and use Customer's contact information in connection with the business relationship between Customer and Penguin Computing, including processing of orders, support information, and providing information on new products, promotions and events.

N. Geographic Scope and Governing Law

This Agreement covers sales within the United States only. This Agreement and any order issued hereunder shall be governed by the laws of the State of California. The application of the United Nations Convention on Contracts for International Sale of Goods is expressly excluded. The parties hereby agree and consent that any dispute relating to the Products sold hereunder shall be subject to exclusive jurisdiction and venue of the United States District Court for the Northern District of California, San Francisco, and the Superior and Municipal Courts of the State of California, San Francisco County.

O. Exports

Customer agrees that Products, Services, Technology, tools and technical data delivered to Customer by Penguin Computing may be subject to U.S. export controls or the trade laws of other countries. Customer agrees to strictly comply with all U.S. export control regulations and acknowledges that they have the sole responsibility to obtain any licenses required to export, re-export or import as may be required. Customer agrees not to export or re-export to restricted countries or end-users, or to end-users engaged in activities related to nuclear, missile, chemical, or biological weaponry.

Customer shall request written confirmation of Penguin Computing's ability to fulfill orders for international destinations prior to order placement, and agrees to incur and be responsible for all applicable shipping costs, duties and taxes.

P. Resale

Customer agrees and represents that purchases are for internal use only, and not for resale. Customer warrants that it will not transfer title of Products to another party by any means for a minimum of one year from the date of invoice. Customer agrees to follow required licensing transfer terms for any Software transferred with Products after the one-year period.

Q. Warranty

(i) Hardware Warranty

Penguin Computing warrants hardware Products to be free from defects in material or workmanship for a period of three years from date of invoice, for Products designated as customer installable, or from date of installation, for Products requiring installation by Penguin Computing. In the event that Customer schedules or delays installation by Penguin Computing of such Products for more than thirty (30) days after shipment, then the warranty period shall commence on the thirty-first (31) day after shipment. Penguin Computing will, at its option, repair or replace the affected Products. Customer agrees to follow the RMA Process as outlined at <http://penguincomputing.com>.

(ii) Software Warranty

Penguin Computing warrants that any Penguin Computing-owned Software shall substantially conform to its specifications when properly installed and used on a Product. During the warranty period, Penguin Computing shall provide defect-related support at no charge, provided the Customer follows the Warranty Service Procedure as outlined at <http://penguincomputing.com>. Penguin Computing warrants that any Software disks provided will be free from defects in material and workmanship for a period of ninety (90) days from date of invoice. PENGUIN COMPUTING'S RESPONSIBILITY FOR DEFECTS IN MATERIAL AND WORKMANSHIP IS LIMITED TO REPAIR OR REPLACEMENT.

For Software that is included in Penguin Computing systems but is not the Intellectual Property of Penguin Computing, Penguin Computing makes no claims or warranties.

(iii) Warranty Transfer

Subject to Section P above, if Customer transfers a Product to another end-user, warranty service is available to that end-user for the remainder of the warranty period.

(iv) Warranty Exclusions

Any warranty expressed or implied shall not apply to defects or malfunctions arising from:

- products or software supplied by a third party or Customer,
- improper or inadequate maintenance by Customer,
- unauthorized modification to Products,
- unsuitable physical or operating environment
- loss or damage in transit

Adding or changing any components against the advice of a Penguin Computing technical support representative shall void the warranty of the affected Product. Any indication that the serial number of a Product has been altered or tampered with shall also void the warranty.

Penguin Computing does not warrant that the operation of Products will be uninterrupted or error-free. Under no circumstances shall Penguin Computing be held responsible for the loss of data or software.

The warranties provided herein will apply only to those Products which are branded by Penguin Computing. Penguin Computing does not warrant any non-branded products supplied by Penguin Computing to Customer; however, Penguin Computing shall pass through to Customer any applicable warranty terms and license terms in the case of software, from the original manufacturers.

EXCEPT AS EXPRESSED IN THIS AGREEMENT, THESE WARRANTIES ARE EXCLUSIVE AND NO OTHER WARRANTY, EXPRESSED OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OR CONDITION OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT, ARE HEREBY EXCLUDED.

(v) Disposition of Materials Subject to Warranty Exclusion

In the event of defect for any cause listed in Section (iv) above, Penguin Computing shall notify the Customer of such determination within three (3) business days of receipt, at which time Penguin Computing will dispose of excluded components, or if elected by Customer, return them at Customer's expense.

(vi) Warranty Repair Shipment Charges

Warranty Repairs within Thirty (30) Days of Product Shipment: Shipment fees for the return of defective Product to Penguin Computing and return of repaired or replacement Product to Customer shall be borne by Penguin Computing, provided Customer follows the RMA Process as outlined at <http://penguincomputing.com>.

Warranty Repairs after Thirty (30) Days of Product Shipment: Customer shall pay for shipment fees for the return of defective Product to Penguin Computing. Penguin Computing shall ship repaired or replacement Product at its expense, provided Customer follows the RMA Process as outlined at <http://penguincomputing.com>.

Warranty Repairs for Products Exported by Customer: Customer agrees to incur and pay all shipping costs, duties and taxes for Products sent to Penguin Computing for repair or replacement, including costs incurred to send repaired/replaced items back to Customer.

(vii) No Fault Found

In the event that Penguin Computing determines "no fault found" for components or Products returned to Penguin Computing for warranty repair or replacement, Penguin Computing shall notify the Customer of said condition and return the components or Products to the Customer. Penguin Computing shall reserve the right to invoice the Customer for costs incurred for component testing, and shall return the components at Customer's expense.

R. Installation and Acceptance

Products are deemed to be installable by Customer, unless deemed otherwise in writing by Penguin Computing. For Products deemed Customer-installable, acceptance by Customer is date of shipment from Penguin Computing. For Products where installation is included in the purchase price, acceptance by Customer occurs upon completion of installation by Penguin Computing. If Customer schedules or delays installation for more than thirty (30) days after shipment, then Customer acceptance shall occur on the thirty-first day after shipment.

S. High Risk Applications

Products are not designed or tested for use in high-risk activities. Penguin Computing shall not have any liability for, and customer shall indemnify and hold Penguin Computing harmless from all loss, damage, expense or liability, in connection with the use of Products in any high risk activity, including, but not limited to, the operation of nuclear facilities, medical systems, life support systems, weapons systems, aircraft navigation or communication systems, or air traffic control.

T. Limitation of Liability and Remedies

PENGUIN COMPUTING DOES NOT ACCEPT LIABILITY BEYOND THE REMEDIES SET FORTH HEREIN, INCLUDING BUT NOT LIMITED TO ANY LIABILITY FOR PRODUCTS NOT BEING AVAILABLE FOR USE OR FOR LOST OR CORRUPTED DATA. PENGUIN COMPUTING SHALL NOT BE LIABLE FOR LOST PROFITS, LOST BUSINESS, LOST SOFTWARE OR DATA, OR OTHER CONSEQUENTIAL, SPECIAL, INDIRECT OR PUNITIVE DAMAGES. UNDER NO CIRCUMSTANCES, SHALL PENGUIN COMPUTING BE LIABLE FOR ANY THIRD-PARTY CLAIMS AGAINST THE CUSTOMER. YOU AGREE THAT FOR ANY LIABILITY RELATED TO THE PURCHASE OF PRODUCT, PENGUIN COMPUTING IS NOT LIABLE OR RESPONSIBLE FOR ANY AMOUNT OF DAMAGES ABOVE THE AMOUNT INVOICED FOR THE APPLICABLE PRODUCT.

U. Software

(i) License

For Penguin-developed Software: Penguin Computing grants Customer a non-exclusive and non-transferable license to use Software provided to Customer for its internal use only, subject to any restrictions outlined in the supplemental license terms accompanying the Software, such as, but not limited to, number of users and number of CPU's. By opening or breaking the seal on the Software package, installing or downloading the Software, or using the Software that has been preloaded or embedded on a system, Customer agrees to be bound by the terms of this agreement.

For Third Party-developed Software: Third Party-developed Software is subject to the licensing terms of the original manufacturer.

Freeware: Penguin Computing may provide freeware to Customers, as well as provide support on a contract basis. Provision of freeware is subject to the warranty exclusions in Section Q (iv).

(ii) Copying

Penguin Computing authorizes you to copy Penguin-developed Software for archival purposes, including a backup copy for disaster recovery. Customer must reproduce all Copyright notices, and maintain a record of all copies made. Customer shall not copy Penguin-developed Software onto any public or distributed network.

(iii) Modification

Customer agrees not to modify, reverse-engineer, or decompile Penguin-developed Software. In the event such restriction is prohibited by law, Customer agrees to inform Penguin Computing of any intended modification.

(iv) License Transfer

Customer's Software License for Penguin-developed Software is transferable after a one-year period, or subject to Penguin Computing's prior written approval. Customer shall notify Penguin Computing of such transfer, and transferee must agree in writing to the terms of Customer's Software license. Customer's Software license shall automatically terminate upon transfer.

(v) License Termination

Penguin Computing may terminate Customer's or any transferee's Software license upon evidence of failure to comply with any of its terms. Upon notification, Customer or transferee must return or destroy all copies of the Software.

(vi) Commercial Software Notice

If Software is being acquired by or on behalf of the U.S. Government or by a U.S. Government prime contractor or subcontractor, then the Government's rights in Software and accompanying documentation are only as set out in this Agreement; this is in accordance with 48 CFR 227.7201 through 227.7204-4 (for Department of Defense acquisitions) and with 48 CFR 2.101 and 12.212 (for non-DOD acquisitions)

V. Assignment

Neither party may assign or otherwise transfer any of its rights or obligations under this Agreement without the prior written consent of the other party. Assignment of the agreement, in whole or in part, to a successor organization, due to a merger or acquisition does not require the consent of the other. Penguin Computing may assign its right to receive payment, and may use subcontractors in the performance of its obligations, in which case Penguin Computing will remain responsible for the performance of its subcontractors.

W. Agreement Termination/Modification

This Agreement will automatically renew on an annual basis, unless either party provides written notification to the other of its intent to cancel ninety (90) days prior to the anniversary date of the agreement. Penguin Computing may modify the terms of this Agreement prospectively by providing ninety (90) days written notice of the change and effective date; however, any changes will apply only to new orders received after the effective date. Either party may terminate this Agreement if the other does not comply with any of its terms, provided the other has notified the party who is not complying in writing of the breach and given sufficient time, but not more than thirty (30) days, to remedy the breach.

X. Survivorship

Any lack of validity of a clause or provision in this agreement does not invalidate all. Any right or obligation which by its nature should survive will remain in effect after termination or expiration of the agreement.

Agreed to:
Customer Company Name:

Agreed to:
Penguin Computing Inc.

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____