



Agenda Item #:



Staff Report

City of Manhattan Beach

TO: Honorable Mayor Montgomery and Members of the City Council

THROUGH: Geoff Dolan, City Manager *GD*

FROM: Richard Gill, Director *R.G.*
Gina Allen, Recreation Services Manager *GA*

DATE: October 7, 2008

SUBJECT: Consideration of a Two Year Contract with Active Network to Provide Online Parks and Recreation Class and Facility Reservation Services (Estimated Annual Cost of \$65,300).

RECOMMENDATION:

Staff recommends that the City Council: a) waive formal bidding, b) approve a two-year contract with Active Network to provide online Parks and Recreation class and facility reservation services (Estimated Annual Cost of \$65,300) and c) authorize the City Manager to negotiate and execute contract extensions at the end of the initial two-year contract period on a year-to-year basis.

FISCAL IMPLICATION:

Staff and The Active Network representatives estimate that it will take 84 hours to train staff at a cost of \$11,300.00. These funds are already budgeted in the Parks and Recreation Department.

Below are charts for the current Class and the proposed ActiveNet software applications.

<u>Cost Comparison</u>	<u>Class (Current Solution)</u>	<u>Active (Proposed Solution)</u>
Annual Technical Support/Verisign	\$ 12,000	Included
Periodic Upgrades (Average per Year)	5,000	Included
Per Transaction Fees	-	\$ 15,354
Credit Card Processing Fees	39,239	48,730
Annual Infrastructure (Servers)	7,351	N/A
Annual Point of Sale Module Fee	1,875	1,200
Total Estimated Annual Cost	\$ 65,465	\$ 65,284

BACKGROUND:

For the past 12 years, the Parks and Recreation Department has used the Class software application for all of the department's class registrations and facility reservations. Class is an application that resides on City servers which involves annual maintenance fees, per computer licensing fees, server replacement and application upgrade fees. At the time of purchase, Class was the premier registration application. Four years ago, Active Network purchased Class and several other registration management software companies. With the advancement of technology, the Class application has become inadequate for the department's needs, especially with the Council's recent approval of a Credit Card convenience fee. Class is unable to accommodate the City's decision of passing on convenience fees to registrants.

With these requirements in mind, it has been determined that the best possible course of action for the City would be to pursue to Active Network's fully hosted Recreation application, ActiveNet.

DISCUSSION:

ActiveNet has similar functionality to Class and has the same core modules, however, offers technology that can better manage the City's needs. The vendor will remain The Active Network and we will keep the same Account and Support Manager. Based on these reasons, the purchase of ActiveNet is considered a technology upgrade.

ActiveNet is a full-featured management solution, designed to give the City secure, on-demand access to our organization's data from any computer with an Internet connection. The Active Network (TAN) hosts and manages our data securely, off-premise, using the latest technology infrastructure. This will allow the City to avoid major upfront investments in computer hardware upgrades, software licenses and web servers. There is no ongoing software maintenance or technical support fees associated with ActiveNet.

With their flexible transaction-based pricing model, our only upfront costs are for consulting services. ActiveNet helps organizations streamline operations through automated reports, financial integration and scalability.

Some of the benefits of this solution include:

- Remote web-based access, anytime
- Low upfront costs
- No license or maintenance fees
- Infrastructure fully maintained
- Quick implementation updates
- Customer-driven development
- Unlimited number of licenses and workstations that have access to the system.

The transition to ActiveNet will also allow the City to expand Parks and Recreation operations to include Point of Sale without making a significant investment in software and services. If we stay with Class, Point of Sale across the Parks and Recreation Department will cost in the excess of \$10,000. ActiveNet Point-of-Sale is fast, easy and flexible. It streamlines payment processing

and order tracking in a variety of POS environments.

The Parks and Recreation staff, Finance, Information Systems and Active Network had a live web meeting to review all of capabilities ActiveNet. It assured staff that ActiveNet will meet staff needs and service the department better than Class. The Parks and Recreation Department can improve customer service, reduce cash handling errors, and increase labor efficiency.

CONCLUSION:

Staff believes there are clear advantages switching from the Class application to ActiveNet as stated in the report. Because of the advantages of ActiveNet and the fact that there is no start up fees other than training, staff recommends approving the upgrade.

ALTERNATIVES:

There are no alternatives that meet the City's needs as effectively as ActiveNet. Therefore, staff believes the only alternative would be to stay with Class.



PRODUCT AND SERVICES AGREEMENT

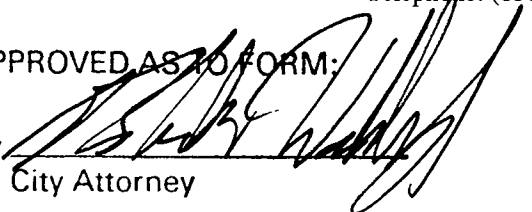
CUSTOMER INFORMATION			
ORGANIZATION NAME:	Manhattan Beach Recreation Department	ADDRESS:	1400 Highland Avenue Manhattan Beach, CA 90266
CONTACT NAME:	Gina Allen	TELEPHONE:	(310) 802-5411
EMAIL:	<u>gallen@citymb.info</u>	FAX:	
EFFECTIVE DATE:			

OVERVIEW OF AGREEMENT		
This document (the "Agreement") consists of this cover page, the attached Pricing/Estimate Form attached to the end of this Agreement, the General Terms, and the following Schedules (check all applicable Schedules):		
X	Schedule A:	Hosted Software
	Schedule B:	Licensed Software; Support and Maintenance
	Schedule C:	Third Party Products

In consideration of the mutual promises and covenants contained in this Agreement, Customer and TAN hereby agree to be bound by this Agreement. By signing below, Customer acknowledges and confirms that it has read the General Terms and all attached Schedules and understands that each forms an integral part of this Agreement.

CUSTOMER	THE ACTIVE NETWORK, INC. ("TAN")
Signature: _____	Signature: _____
Name: _____	Name: _____
Title: _____	Title: _____

The Active Network, Inc., 10182 Telesis Court, Ste. 300, San Diego, California 92121
 Telephone: (858) 543-7223, Fax: (604)432-9708

APPROVED AS TO FORM:
 By 
 City Attorney

GENERAL TERMS

GENERAL TERMS: TERMS APPLICABLE TO ALL PRODUCTS AND SERVICES

1. INTERPRETATION

1.1 **Definitions.** For the purposes of interpreting this Agreement, the following terms will have the following meanings:

(a) **“Agreement”** means this Products and Services Agreement, inclusive of all Schedules.

(b) **“Concurrent Use”** means use at the same moment in time to access a given server computer (of any kind) owned or controlled by Customer.

(c) **“Customer”** means the legal entity other than TAN entering this Agreement.

(d) **“Database Server”** means the single server computer upon which the Enterprise Database is resident.

(e) **“Enterprise Database”** means the MSDE, MS SQL Server, or Oracle database files containing customer data and that are accessed by the Licensed Software.

(f) **“Hosted Software”** means computer code and programs, in executable code form only, including related data files, rules, parameters and documentation, which have been created or licensed by TAN and are identified in the Pricing/Estimate Form as licensed (or sublicensed) to Customer by TAN in connection with this Agreement, and which reside on TAN’s servers and are accessible by Customer’s staff or Users via the Internet.

(g) **“Internet Client”** means a remote device capable of using the Internet to access selected Licensed Software on the Internet Server or the Enterprise Database on the Database Server via the Internet Server.

(h) **“Internet Server”** means a single server computer used by Customer which enables access to the Licensed Software by individuals using an Intranet or the Internet, having a minimum configuration as set out in hardware specifications previously described to Customer as applicable to the Licensed Software to be installed and used upon it.

(i) **“IVR Server”** means a single server computer used by Customer for voice-recognition and telephone-based, rather than computer-based, access to the Enterprise Database by Customer’s clients, having a minimum configuration as set out in hardware specifications previously described to Customer as applicable to the Licensed Software to be installed and used upon it.

(j) **“Licensed Software”** means computer code and programs, in executable code form only, including related data files, rules, parameters and documentation, which have been created or licensed by TAN and are identified in the Pricing/Estimate Form as licensed (or sublicensed) to Customer by TAN in connection with this Agreement, and/or which are in the future provided to Customer by TAN under any circumstances unless provided under a separate licensing agreement.

(k) **“Maintenance”** means the provision of error investigation and repair services as set out in section 22.1 and the provision of new Versions and Releases in respect of the Licensed Software all as more particularly set out in the Support and Maintenance Handbook.

(l) **“Module”** means a single module element of Licensed Software listed in the Pricing/Estimate Form.

(m) **“Online Services”** means services, such as Internet registration, that are enabled by Hosted Software and available to the public via the Internet.

(n) **“Other Services”** means Services other than Pre-Agreed Services acquired by Customer under this Agreement.

(o) **“Payment Server”** means a single server computer used by Customer to process electronic payments from its clients, having a minimum configuration as set out in hardware specifications previously described to Customer as applicable to the Licensed Software to be installed and used upon it.

(p) **“Pre-Agreed Services”** means Services which are expressly listed in the Pricing/Estimate Form as being acquired hereunder by Customer.

(q) **“Pricing/Estimate Form”** means the itemized pricing form attached to the Agreement listing the products and services provided by TAN to the Customer under this Agreement

(r) **“Products”** means all Licensed Software, Hosted Software, Third Party products, and other products (including documentation) provided to Customer by or on behalf of TAN.

(s) **“Professional Services”** means any and all types of services which TAN provides, to Customer and/or to other customers of TAN, in the course of TAN’s business, including but not limited to services relating to the installation, implementation, customization, optimization, administration, training and troubleshooting of computers, computer software including the Licensed Software, computer networks, databases, internet-related equipment and applications, but expressly excludes Support and Maintenance.

(t) **“Related Third Party Documentation”** means any end specifications, manuals, instructions, and other materials, and any copies of any of the foregoing, in any medium, related to the Third Party Products and supplied by TAN to Customer with the Third Party Products.

(u) **“Release”** means any release, update, patch, set of revisions, or bug/permanent fix or temporary bypass solution released by TAN to its customers generally during the term of this Agreement, which provides enhancements and/or error corrections to the then-current Version or Release, and where a new Version has been released and no new Release has been released since the release of that Version, that Version will also constitute a Release for the purpose of determining whether Support or Maintenance is available with respect to that Version. New Releases will be denoted by an increase to the version number to the right of the decimal point such as from Release 1.1 to Release 1.2.

GENERAL TERMS

(v) **“Services”** means all Professional Services, Support and Maintenance, Online Services, and other services provided to Customer by or on behalf of TAN.

(w) **“Services Table”** means the table of Pre-Agreed services, together with associated costs, shown in the Pricing/Estimate Form.

(x) **“Software”** means the Licensed Software and the Hosted Software as defined elsewhere in this section.

(y) **“Support”** means the ongoing telephone, email, web-based and dial-in support and problem resolution to assist Customer in the use of the Licensed Software, the Hosted Software, and other services and products of TAN as set out in the Support and Maintenance Handbook.

(z) **“Support and Maintenance Handbook”** means the documents published by TAN setting out the applicable service levels, processes, restrictions, and other particulars of Support and Maintenance provided in respect of the Software and other Services and Products of TAN, as amended from time to time upon notice to Customer.

(aa) **“Support Start Date”** means the first day of the month following the delivery of the Licensed Software.

(bb) **“System Utilities”** includes the following: Accounting Processes, Central Login, Log File, Copy Database, Edit Database, Maintain Database, MSDE Tool, Oracle Setup Utility, Query Tool, System Maintenance, Upgrade Database and View Components.

(cc) **“TAN”** means The Active Network as referenced on the first page of this Agreement.

(dd) **“Third Party Products”** means those hardware, firmware and/or software products, provided to TAN by third parties, listed in the Pricing/Estimate Form, together with all user manuals and other documents accompanying the delivery of the Third Party Products, provided that the Third Party Products shall not include software developed by TAN.

(ee) **“Third Party Products Support”** means assistance to isolate the source of problems and/or to troubleshoot difficulties resulting from sources other than TAN products or services, such as general network support (for example network access, printing, backup & restoration); PC hardware trouble shooting; PC setup, configuration and optimization; network operating system configuration and functionality; basic Microsoft Corporation “Windows” functionality (for example, using File Manager or Explorer), modem configuration & setup; data corruption due to lack of disk space; and loss of supervisor or other password, all as further set out in the Support and Maintenance Handbook.

(ff) **“User”** means a person who accesses and uses any of the Products in any manner whatsoever.

(gg) **“Version”** means a version of the Licensed Software providing a particular functionality, while a new Version of the Licensed Software will provide new/additional functionality

and/or improvements to a previous Version. New Versions will be denoted by a change to the version number to the left of the decimal point such as from Version 1.0 to Version 2.0.

(hh) **“Workstation”** means a computer attached to a local or wide-area network (including an Intranet), which accesses the Licensed Software or Enterprise Database.

1.2 **Headings.** The headings contained in this Agreement are inserted for convenience and do not form a part of this Agreement and are not intended to interpret, define or limit the scope, extent or intent of this Agreement or any provision hereof.

2. CHARGES AND PAYMENTS

2.1 **Taxes and Other Charges.** Customer will pay all shipping & handling costs and, unless exempted by law, all applicable sales, use, withholding and excise taxes, and any other assessments against Customer in the nature of taxes, duties or charges however designated on the Services and Products or their license or use, on or resulting from this Agreement, exclusive of taxes based on the net income of TAN. Sales and any other applicable taxes, duties, or any other charges in the nature of taxes and duties are not included unless specifically identified as line items in the Pricing/Estimate Form.

2.2 **Currency.** Unless otherwise indicated in the Pricing/Estimate Form, all prices are in the currency of the country in which the Customer is located.

2.3 **Freight.** Unless otherwise specified in the Pricing/Estimate Form, all prices include freight F.O.B. the shipping point.

2.4 **Invoices (Delivery and Payment).** TAN will provide invoices to Customer for all amounts owing by Customer hereunder. Such invoices are to be provided as indicated in the attached Schedules or Pricing/Estimate Form, and subsequently due within 30 days from the date of invoice.

3. CUSTOMER INFORMATION; CONFIDENTIALITY

3.1 **Customer Information.** In order to assist TAN in the successful provision of services and products to Customer, Customer shall provide to TAN all information relating to Customer's organization, technology platforms, systems configurations, and business processes and otherwise relating to Customer as is reasonably requested by TAN from time to time.

3.2 Confidential Information.

(a) In the performance of or otherwise in connection with this Agreement, one party ("Disclosing Party") may disclose to the other party ("Receiving Party") certain Confidential Information of the Disclosing Party. Confidential Information" means any information of either party, which is not generally known to the public, whether of a technical, business or other nature (including, but not necessarily limited to: trade secrets, know how, computer program source codes, and information relating to the customers, business plans, promotional and marketing activities, finances and other business affairs of such party); provided that the same is conspicuously marked or otherwise identified as confidential or proprietary information prior to,

GENERAL TERMS

upon or promptly after receipt by the other party; and provided further that the any software or software application server source code provided by TAN or its licensors shall be deemed to constitute Confidential Information without further designation by TAN. The Receiving Party will treat such Confidential Information as confidential and proprietary of the Disclosing Party and will use such Confidential Information solely for the purposes for which it is provided by the Disclosing Party and will not disclose such Confidential Information to any third party (other than a third party under contract whereby that third party has agreed in writing to keep the Confidential Information confidential).

(b) Exclusions. The obligations under this paragraph will not apply to any: (i) use or disclosure of any information pursuant to the exercise of the Receiving Party's rights under this Agreement; (ii) information that is now or later becomes publicly available through no fault of the Receiving party; (iii) information that is obtained by the Receiving Party from a third party authorized to make such disclosure (other than in connection with this Agreement) without any obligation of secrecy or confidentiality; (iv) information that is independently developed by the Receiving Party (e.g., without reference to any Confidential Information); (v) any disclosure required by applicable law (e.g., pursuant to applicable securities laws or legal process), provided that the Receiving Party will use reasonable efforts to give advance notice to and cooperate with the Disclosing Party in connection with any such disclosure; and (vi) any disclosure with the consent of the Disclosing Party.

4. WARRANTY

4.1 **Limited Warranty of Software.** TAN warrants that when utilized by Customer in a manner authorized hereunder, the Software will conform to the functional specifications set out in the user documentation accompanying the Software for ninety (90) days from delivery of the Software ("Warranty Period"). Delivery shall be deemed to have occurred upon TAN's email transmission of an FTP link to Customer permitting download of the Software from TAN's designated online site, or where delivered in the form of physical media, F.O.B. the selected shipping point or courier service. TAN's sole obligation and liability hereunder with respect to any failure to so perform will be to use reasonable efforts to remedy any non-conformity which is reported to TAN in writing by Customer within that Warranty Period. In the event TAN is unable to remedy such non-conformity within a reasonable time using reasonable efforts, a) in respect to the Licensed Software TAN may refund to Customer the license fee pertaining to the Licensed Software, subject to Customer's return of the Licensed Software, and this Agreement will be automatically terminated, or b) in respect to Hosted Software TAN may refund to Customer the fees paid by the Customer to TAN for Services provided to implement the Hosted Software, and this Agreement will be automatically terminated. All warranty service will be performed at service locations designated by TAN. This Limited Warranty is void if failure of the Software has resulted from accident, abuse or misapplication. Any replacement Software will be warranted for

the remainder of the original warranty period or 30 days, whichever is longer.

5. EXCLUSION OF WARRANTIES AND LIMITATION OF LIABILITY

5.1 **SPECIFIC EXCLUSION OF OTHER WARRANTIES.** THE EXPRESS WARRANTIES SET OUT IN THIS AGREEMENT ARE IN LIEU OF ALL OTHER WARRANTIES, AND THERE ARE NO OTHER WARRANTIES, REPRESENTATIONS, CONDITIONS, OR GUARANTEES OF ANY KIND WHATSOEVER APPLICABLE, EITHER EXPRESS OR IMPLIED BY LAW (IN CONTRACT OR TORT OR OTHERWISE) OR CUSTOM, INCLUDING, BUT NOT LIMITED TO THOSE REGARDING MERCHANTABILITY, FITNESS FOR PURPOSE, DURABILITY, CORRESPONDENCE TO SAMPLE, TITLE, DESIGN, CONDITION, OR QUALITY. WITHOUT LIMITING THE ABOVE, TAN DOES NOT WARRANT THAT ANY PRODUCTS OR SERVICES PROVIDED HEREUNDER WILL MEET THE REQUIREMENTS OF CUSTOMER OR THAT THE OPERATION OF PRODUCTS PROVIDED HEREUNDER WILL BE FREE FROM INTERRUPTION OR ERRORS.

5.2 **RESTRICTIONS ON WARRANTY.** TAN HAS NO OBLIGATION TO REPAIR OR REPLACE PRODUCTS DAMAGED BY ACCIDENT OR OTHER EXTERNAL CAUSE OR THROUGH THE FAULT OR NEGLIGENCE OF ANY PARTY OTHER THAN TAN.

5.3 **NO INDIRECT DAMAGES.** WITHOUT LIMITING THE GENERALITY OF SECTIONS 5.1 AND 5.4, IN NO EVENT WILL TAN BE LIABLE TO CUSTOMER OR TO ANY OTHER PARTY FOR INDIRECT DAMAGES OR LOSSES (IN CONTRACT OR TORT OR OTHERWISE), INCLUDING BUT NOT LIMITED TO DAMAGES FOR LOST PROFITS, LOST SAVINGS, LOST DATA, LOSS OF USE OF INFORMATION OR SERVICES, OR INCIDENTAL, CONSEQUENTIAL, OR SPECIAL DAMAGES.

5.4 **LIMITS ON LIABILITY.** IF, FOR ANY REASON, TAN BECOMES LIABLE TO CUSTOMER OR ANY OTHER PARTY FOR DIRECT OR ANY OTHER DAMAGES FOR ANY CAUSE WHATSOEVER, AND REGARDLESS OF THE FORM OF ACTION (IN CONTRACT OR TORT OR OTHERWISE), THEN:

(a) THE AGGREGATE LIABILITY OF TAN TO CUSTOMER AND ALL OTHER PARTIES IN CONNECTION WITH THE PRODUCTS AND THE SERVICES WILL BE LIMITED TO AN AMOUNT EQUAL TO THE AMOUNT PAID TO TAN HEREUNDER, DURING THE TWO YEARS PRECEDING THE LAST INCIDENT GIVING RISE TO THE LIABILITY; AND

(b) IN ANY CASE CUSTOMER MAY NOT BRING OR INITIATE ANY ACTION OR PROCEEDING AGAINST TAN ARISING OUT OF THIS AGREEMENT OR RELATING TO ANY PRODUCTS OR SERVICES PROVIDED HEREUNDER

GENERAL TERMS

MORE THAN TWO YEARS AFTER THE RELEVANT CAUSE OF ACTION HAS ARISEN.

5.5 SEPARATE ENFORCEABILITY. SECTIONS 5.1 THROUGH 5.4 ARE TO BE CONSTRUED AS SEPARATE PROVISIONS AND WILL EACH BE INDIVIDUALLY ENFORCEABLE.

6. RESTRICTIONS

6.1 U.S. GOVERNMENT RESTRICTED RIGHTS. The Products are provided with restricted rights. Use, duplication, or disclosure by the U.S. Government is subject to restrictions as set forth in subparagraph (c) (1)(ii) of The Rights in Technical Data and Computer Software clause at DFARS 252.227-7013, or subparagraphs (c) (1) and (2) of the Commercial Computer Software - Restricted Rights at 48 CFR 52.227-19, as applicable. The Manufacturer is The Active Network, Inc., Suite 300, 10182 Telesis Court, San Diego, California, United States, 92121.

6.2 Export Restrictions. The Products may include encryption software or other encryption technologies that may be controlled for import, export, or purposes under the laws and regulations of the countries and/or territories in which the Products are used (“**Applicable Law**”). Customer may not export, re-export, or assist or facilitate in any manner the export or re-export of, any portion of the Products, as determined by Applicable Law under which the Customer operates: (i) to any country on Canada’s Area Control List; (ii) to any country subject to UN Security Council embargo or action; (iii) contrary to Canada’s Export Control List Item 5505; (iv) to countries subject to U.S. economic sanctions and embargoes; and (v) to persons or entities prohibited from receiving U.S. exports or U.S.-origin items. Customer hereby represents and covenants that: (i) to the best of Customer’s knowledge Customer is eligible to receive the Products under Applicable Law; (ii) Customer will import, export, or re-export the Products to, or use the Products in, any country or territory only in accordance with Applicable Law; and (iii) Customer will ensure that Customer’s Users use the Products in accordance with the foregoing restrictions.

6.3 Third Party Software and Open Source Components. The Software may contain open source components or other third party software of which the use, modification, and distribution is governed by license terms (including limitations of liability) set out in the applicable documentation (paper or electronic) or read me files.

7. TERMINATION

7.1 Termination. This Agreement will terminate:

(a) at the option of either party if the other party materially defaults in the performance or observance of any of its obligations hereunder and fails to remedy the default within 30 days after receiving written notice thereof; and

(b) without limiting (a), at the option of TAN if Customer breaches section 2 of this Agreement, provided that the right of termination will be in addition to all other rights and remedies available to the parties for breach or default by the other.

7.2 Suspension of Obligations. If either party should materially default in the performance or observance of any of its obligations hereunder, then, in addition to all other rights and remedies available to the non-defaulting party, the non-defaulting party may suspend performance and observance of any or all its obligations under this Agreement, without liability, until the other party’s default is remedied, provided however that this section will not permit Customer to suspend its obligation to make any payments due for Products or Services that are unrelated to any default alleged against TAN.

7.3 Return of Materials. In the event of termination of this Agreement for any reason whatsoever, Customer will immediately (i) return to TAN all physical copies of Products delivered by TAN to Customer or otherwise in Customer’s possession or control, or (ii) if expressly permitted by TAN, destroy all physical copies of the Products not returned to TAN and delete all electronic copies of the Products from its systems and certify in writing to TAN that such actions have all been completed.

8. AUDIT AND MONITORING RIGHTS

8.1 TAN may, upon a minimum of 24 hours written notice to Customer, attend upon Customer’s premises and verify that the Products are being used only as permitted hereby. Such inspections may occur a maximum of twice per calendar year, and will be performed only during Customer’s regular business hours and conducted in a manner as to minimize, to the extent reasonable, interference with Customer’s business. Further, TAN may, using automatic means which do not interfere with the use of the Products by Customer or Users other than as described in this provision, monitor at any time usage of the Products by Customer and or its Users including through monitoring of the number of copies of any particular Module(s) in Concurrent Use.

9. INTELLECTUAL PROPERTY RIGHTS

9.1 Warranty of Title. TAN warrants that it has all rights necessary to make the grant of license herein by having all right, title, and interest in and to the Products (other than Third Party Products) or as licensee of all such rights from the owner thereof.

9.2 Intellectual Property. TAN and its licensors shall retain all right, title, and interest in and to the Products and the results of the Services and to all software, trademarks, service marks, logos, and trade names and other worldwide proprietary rights related thereto (“**Intellectual Property**”). Customer shall use the Intellectual Property only as provided by TAN, and shall not alter the Intellectual Property in any way, or act or permit action in any way that would impair TAN’s or its licensors’ rights in its Intellectual Property. Customer acknowledges that its use of the Intellectual Property shall not create in Customer or any other person any right, title, or interest in or to such Intellectual Property. Any goodwill accruing from the use of the Intellectual Property shall inure solely to the benefit of TAN or its licensors, as applicable.

9.3 Restrictions. Customer will not any time whether before or after the termination of this Agreement:

GENERAL TERMS

- (a) reverse engineer, disassemble, or decompile any Products or prepare derivative works thereof;
- (b) copy, transfer, display, or use the Products except as expressly authorized in this Agreement or in the applicable documentation;
- (c) disclose, furnish, or make accessible to anyone any confidential information received from TAN or make any use thereof other than as expressly permitted under this Agreement, which confidential information is deemed to include the source and executable code of the Software and all related documentation;
- (d) contest or do or aid others in contesting or doing anything which impairs the validity of any proprietary or intellectual property rights, title, or interest of TAN in and to any Products; or
- (e) obliterate, alter, or remove any proprietary or intellectual property notices from the Products in physical or electronic forms.

10. INDEMNIFICATION

(a) **Indemnified Claims.** Each Party (“Indemnifying Party”) shall fully indemnify, defend and hold harmless the other Party (“Indemnified Party”), and its respective parents, subsidiaries and affiliates and all of the foregoing entities’ officers, directors, employees, agents, contractors and licensees, and their successors and assigns, from and against any and all third party claims, actions, suits, legal proceedings, demands, liabilities, damages, losses, judgments, settlements, costs and expenses, including, without limitation, reasonable attorney’s fees, arising out of or in connection with any alleged or actual that: (i) is based upon the Indemnifying Party’s breach of a representation, warranty or obligation hereunder; (ii) arises out of the Indemnified Party’s gross negligence or wilful misconduct; (iii) is based upon the Indemnified Party’s violation of any applicable federal, state or local law or regulation; or (iv) is based upon any claim of infringement of any US or Canadian copyright, patent, trade secret or other intellectual property rights or similar rights of any third party arising out of any authorized use of any software or products licensed and/or delivered under this Agreement. In the event that a claim of infringement is established with regard to the Licensed Software, Hosted Software or Third Party Products licensed or delivered by TAN under this Agreement, or in TAN’s opinion might be held to infringe as set forth above, TAN shall, at its own expense and option, procure for Customer the right to exercise the rights and licenses granted to Customer under this Agreement or modify the Licensed Software, Hosted Software or Third Party Products such that each affected is no longer infringing. If neither of such alternatives is, in TAN’s opinion, commercially reasonable, the infringing software or product shall be returned to TAN and TAN’s sole liability, in addition to its obligation to reimburse awarded damages, costs and expenses set forth above, shall be to refund the amounts paid to TAN by

Customer for such software or product. Notwithstanding the above, and subject to the procedure set forth in section 10(b) below, TAN shall have no liability for any claim of infringement related to any software or product supplied by TAN under this Agreement that arises from: Customer’s unauthorized use of such software or product, Customer’s use of such software or product in combination with any items not supplied by TAN, or any modification by Customer or a third party of any software or product supplied by TAN.

(b) **Indemnification Claims Procedure.** The Indemnified Party shall promptly notify the Indemnifying Party in writing of any Indemnified Claim, specifying the nature of the action and the total monetary or relief sought therein. The Indemnified Party shall cooperate with the Indemnifying Party at the Indemnifying Party’s expense in all reasonable respects in connection with the defense of any such Indemnified Claim or Additional Indemnified Claim. The Indemnifying Party may upon written notice to the Indemnified Party undertake to control and conduct all proceedings or negotiations in connection therewith, assume and control the defense of such Indemnified Claims or Additional Indemnified Claims, and if it so undertakes, it shall also undertake all other required steps or proceedings to settle or defend any such Indemnified Claim or Additional Indemnified Claim, including the employment of counsel which shall be reasonably satisfactory to the Indemnified Party, and payment of all reasonably incurred expenses. Notwithstanding the foregoing, the Indemnified Party has the right to employ separate counsel to provide input to the defense, at the Indemnified Party’s own cost. The Indemnifying Party shall reimburse the Indemnified Party upon demand for any payments made or loss suffered by it at any time after the date of tender, based upon the judgment of any court of competent jurisdiction or pursuant to a bona fide compromise or settlement of Indemnified Claims. The Indemnifying Party shall not settle any Indemnified Claim or Additional Indemnified Claim under this section on the Indemnified Party’s behalf without first obtaining the Indemnified Party’s written permission, which permission shall not be unreasonably withheld, and the Indemnifying Party shall indemnify and hold the Indemnified Party harmless from and against any costs, damages and fees reasonably incurred by the Indemnified Party, including fees of attorneys and other professionals, that are attributable to such Indemnified Claims. The Indemnifying Party shall not be responsible for any indemnification obligations arising hereunder pursuant to the terms and conditions of any settlement of an Indemnified Claim by the Indemnified Party unless such settlement was approved by the Indemnifying Party, which approval shall not be unreasonably withheld.

11. GENERAL

11.1 **Entire Agreement.** This Agreement, including all attachments and referenced schedules, constitutes the complete and exclusive statement of the agreement between TAN and Customer with respect to the subject matter hereof. It supersedes and replaces all oral or written RFPs, proposals, prior

GENERAL TERMS

agreements, and other prior communications between the parties concerning the subject matter of this Agreement. This Agreement may not be modified or altered except by written instrument duly executed by both parties, except that TAN may fill future purchase or other orders for further goods or services available under this Agreement and, if TAN does so, the provisions of this Agreement will contain the only commercial terms applicable to such transaction despite such purchase or other order stating otherwise. Any Addendum attached hereto shall form an integral part of this Agreement and, in the event of any inconsistency between these General Terms and any Addendum, the provisions of the Addendum shall prevail.

11.2 Force Majeure. Dates or times by which either party is required to perform under this Agreement, excepting the payment of any fees or charges due hereunder, will be postponed automatically to the extent that any party is prevented from meeting them by causes beyond its reasonable control, provided such party promptly notifies the other thereof and makes reasonable efforts to perform.

11.3 Notices. All notices and requests in connection with this Agreement will be given to the respective parties in writing and will be deemed given as of the first business day of the notified party following the day the notice is faxed or sent via overnight courier, providing a hard copy acknowledgment of such successful faxed notice transmission or evidence of such courioring, as applicable, is retained. Notice may also be deposited in the mails, postage pre-paid, certified or registered, return receipt requested, and addressed to the parties as indicated on the face of this Agreement or such other address of which the party gives notice in accordance herewith, and receipt of any such notice will be deemed to be effective as of the third business day following such deposit.

11.4 Governing Law. This Agreement and performance hereunder will be governed by the laws of the jurisdiction in which the Customer is located as indicated on the face of this Agreement, except that (i) in the case of Louisiana, the laws of California will apply, and (ii) in the case of Québec, the laws of Ontario will apply.

11.5 Attorney Fees. In any action or suit to enforce any right or remedy under this Agreement or to interpret any provision of this Agreement, the prevailing party shall be entitled to recover its costs, including reasonable attorneys' fees.

11.6 Non-Assignability. Neither party may assign its rights or obligations arising out of this Agreement without the other party's prior written consent, except that TAN may assign this Agreement in connection with any sale of all or substantially all of its assets or any other transaction in which more than fifty percent of its voting securities are transferred.

11.7 Term and Survival. The term of this Agreement shall commence on the Effective Date set out on the cover page hereof and shall continue until terminated in accordance with Section 7. Sections 1.1, 5, 7.3, 9.2, 9.3, 11, 11, 29.1, and 29.2 of this

Agreement, along with all unpaid payment obligations, will survive termination and expiration of this Agreement.

11.8 No Authority to Bind. Neither party shall incur any obligations for or in the name of the other party, or have the authority to bind or obligate the other party. Neither party shall make, issue or authorize any statements (whether or oral or written) in contravention of the foregoing.

11.9 Counterparts; Delivery. This Agreement may be executed in separate counterparts and delivered by facsimile or such other electronic means as are available to the Parties. Such counterparts taken together, shall constitute one and the same original document.

11.10 Severability. If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, unenforceable, or void, the remainder of this Agreement and such provisions shall remain in full force and effect.

SCHEDULE A: TERMS APPLICABLE ONLY TO HOSTED SOFTWARE

12. HOSTED SOFTWARE

12.1 TAN will provide Customer with access to hosted versions of the products identified in the Pricing/Estimate Form and associated Online Services, and TAN hereby grants to Customer a limited, non-exclusive, non-transferable license to use the Hosted Software in accordance with the applicable documentation.

13. SUPPORT FOR HOSTED SOFTWARE

13.1 TAN will, during all periods in respect of which Customer has subscribed for Hosted Software, provide Support to Customer (and, where applicable, directly to users of Customer's own services and products who access the Hosted Software) in accordance with applicable sections of the Support and Maintenance Handbook.

14. LICENSE AND BRANDING

14.1 TAN hereby grants to Customer a limited, non-exclusive, non-transferable license to display, reproduce, distribute, and transmit in digital form TAN's name and logo in connection with promotion of the Online Services only in the manner approved of by TAN during the term of this Agreement. Customer hereby grants to TAN a limited non-transferable license to use, display, reproduce, distribute, adapt and transmit in digital or printed form information provided by Customer relating to its organization, including its name, trademarks, service marks and logo, in connection with the implementation and promotion of the Online Services; provided, however, that such use shall be as necessary to TAN's performance under this Agreement. Customer will make reasonable efforts to encourage adoption of the Online Services, including displaying TAN's name and logo or "Powered by Active" logo, in the form supplied by TAN from time to time and in a manner approved by TAN, acting

GENERAL TERMS

reasonably, in any medium used by Customer to promote its programs or services to prospective participants.

15. INFORMATION SECURITY AND PRIVACY FOR HOSTED SOFTWARE

15.1 TAN will collect information, including names, addresses, gender, phone numbers, email addresses, birth dates, financial information (for payment purposes) and other such information from individuals using the Online Services as is reasonably required to provide the Services. TAN will store such information on a secure remote server using reasonable safeguards in accordance with TAN's published online privacy policies and in compliance with all applicable laws, codes of practice, and other legal obligations associated with the collection, use, and disclosure of personal information. Customer may access this information by downloading it from TAN's servers using a Customer assigned private password and "login" identifier. Upon request TAN will make such information available to Customer via e-mail, fax or airmail. Customer will be responsible for protecting the privacy and security of any information that Customer retrieves from TAN's servers and shall prevent any unauthorized or illegal use or dissemination of such information and shall be solely responsible for ensuring compliance with any applicable data and privacy protection laws, codes of practice, and other legal obligations associated with the collection, use, and disclosure of personal information by Customer, including such disclosure to TAN as is necessary for TAN to provide the Services and Products to Customer. Customer and/or its clients shall exclusively own the personal data collected by TAN in connection with the Hosted Software; provided, however, TAN is granted a royalty-free, perpetual, non-exclusive right and license to use, reproduce, distribute and adapt the collected data as is necessary for TAN to perform its obligations under this Agreement, including for purposes of communicating with Customer or Customer's clients as necessary, fulfilling requests for products and services requested from Customer or Customer's clients, providing customized content and advertising provided in connection with the Hosted Software, conducting internal TAN research intended to improve the products and services provided by TAN and its affiliates, and to provide anonymous and aggregated reporting of non-individual data for internal and external clients of Customer or TAN. Any use of such data will conform with applicable laws related to personal privacy and best practises around permissive marketing, such as use of "opt-in" and/or "opt-out" notifications and rights.

16. FEES FOR HOSTED SOFTWARE

16.1 Transaction fees.

(a) Customer shall pay to TAN the Hosted Software service fees ("**Service Charges**").set out in the Pricing/Estimate Form

(b) In cases where TAN's banking or financial partners or similar service providers impose changes in processing costs payable by TAN, TAN reserves the right to modify Service Charges. TAN shall notify Customer at least ninety (90) days in

advance of any such changes. Customer agrees to such changes unless Customer provides TAN with written objection to such charges within thirty (30) days from the date such change is implemented. In the event Customer notifies TAN of its objection to the changes as noted above, Customer's sole remedy shall be to immediately terminate the Agreement as applied to the Hosted Software, subject to payment of any fees due prior to such notice of termination.

(c) TAN will be responsible for collecting all payments processed through the Online Services and all Service Charges assessed by TAN. All payments are Customer's exclusive property and will be sent to Customer twice a month while Service Charges shall be retained by TAN.

(d) If Customer enters transactions at fee amounts less than those actually charged to Customer's Users, thus reducing or avoiding applicable Service Charges, such action shall constitute a material breach of this Agreement.

(e) TAN shall not be responsible for processing or making any refunds. All refunds for payments processed will be assessed a \$.10 fee charged by TAN to Customer. TAN may set off against user fees collected by TAN the amount of any credit card charge backs and associated fees applicable to user transactions. To the extent that such funds are not available for set off, Customer shall reimburse TAN for any deficiency.

16.2 Subscription fees.

Customer shall pay to TAN the Hosted Software subscription fees ("**Subscription Fees**") set out in the Pricing/Estimate Form and for the term of this Agreement established in Section 18 below.

17. EXCLUSIVITY FOR HOSTED SOFTWARE

TAN will, during all periods for which Customer has subscribed for Hosted Software, be the sole and exclusive provider to Customer of the Hosted Software and Online Services, or any products or services substantially similar thereto, for the part of Customer's organization utilizing the Hosted Software and Online Services.

18. TERM FOR HOSTED SOFTWARE

18.1 Unless otherwise provided in the Pricing/Estimate Form, TAN shall provide to Customer, and Customer shall purchase from TAN, the Hosted Software for a period of two (2) years from the Effective Date of this Agreement, with automatic renewals for one (1) year terms thereafter until either party gives written notice to terminate the Hosted Software no less than ninety (90) days prior to the end of the then-current term.

GENERAL TERMS

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SCHEDULE B: TERMS APPLICABLE ONLY TO LICENSED SOFTWARE AND ASSOCIATED SUPPORT AND MAINTENANCE SERVICES

19. ACCESS TO SYSTEM AND OTHER CUSTOMER OBLIGATIONS

19.1 **Access.** Customer will provide, at no cost to TAN:

(a) subject to the security requirements of Customer, 24 hour access to Customer's system via either an always-available telephone circuit or an always available internet connection to enable TAN or its designated representative to perform any of the obligations placed upon TAN by this Agreement; and

(b) subject to the security requirements of Customer, remote dial up/internet access methods approved by TAN to allow TAN to remotely diagnose and correct errors in the Licensed Software and provide other Services.

19.2 **Customer Obligations.** Without limiting any of Customer's other obligations under this Agreement, Customer will:

(a) use its best efforts to upgrade to any new Release or Version of the Licensed Software as soon as possible after becoming aware of its availability;

(b) ensure that at all times at least one current staff person of Customer has been fully trained on the Licensed Software; and

(c) designate by written notice a single site and single person as the point of contact for telephone or other contact, which site and/or person Customer may change upon 14 days prior notice to TAN.

20. GRANT OF LICENSES AND LIMITATIONS THEREON

20.1 TAN hereby grants to Customer a non-exclusive and non-transferable right and license, subject to this Agreement, to install and/or use the Licensed Software, in the manner contemplated in the applicable user documentation, as follows:

(a) **Workstation-Based Modules.** In respect of each Workstation-based Core Module and each Workstation-based Add-on Module, Customer may install and use each Module on Workstations to access the Enterprise Database on the Database Server, provided that the number of copies of any particular Module in use does not exceed the number of licenses granted to Customer therefor as set out in the Pricing/Estimate Form.

(b) **Server-based Add-on Modules.** Customer may install and use each Server-based Module on as many Workstations as is desired by Customer, and Customer may use and permit use of such Modules by its clients, all without limit to the number of Users or transactions which simultaneously use any such Module, provided however that:

(i) in respect of each TeleReg & Voice Server Module, Customer may install one copy of each Module on one IVR Server, provided that the number of copies of any particular Module in use does not exceed the number of licenses granted to Customer therefor as set out in the Pricing/Estimate Form, and all such Modules together may be in Concurrent Use not to exceed the number of licenses granted to Customer for TeleReg Lines Modules as set out in the Pricing/Estimate Form; and

(ii) in respect of each Payment Server Module, such Modules may be in Concurrent Use not to exceed the number of licenses granted to Customer for Point of Sale Modules as set out in the Pricing/Estimate Form.

(c) **Server-based On-line (Internet) Modules.** In respect of each Server-based On-line (Internet) Module, Customer may:

(i) install one copy of each Module on one Internet Server, provided that the number of copies of the Module in use does not exceed the number of licenses granted to Customer therefor as set out in the Pricing/Estimate Form; and

(ii) subject to 20(d), permit Users to access and use such Modules to access the Database Server via Internet Clients connecting via a licensed Internet Server, and all such Modules together may be in Concurrent Use not to exceed the number of licenses granted to Customer for Online Client Access Modules as set out in the Pricing/Estimate Form multiplied by twenty-five (25).

(d) **Cumulative Workstation-based Modules.** In respect of each Cumulative Workstation-based Module, Customer may:

(i) install one copy of each Module on a single Workstation for each license granted to Customer therefor as set out in the Pricing/Estimate Form; and

(ii) permit Users using such licensed Workstation(s) to use such Module(s) provided, for greater certainty, that the Modules may be in Concurrent Use not to exceed the number of licenses granted to Customer therefor as set out in the Pricing/Estimate Form.

(e) Customer hereby acknowledges that the mechanism utilized by the Licensed Software to control the number of Users or Online Client Access which can simultaneously access and use Server-based On-line (Internet) Modules is based upon the number of Users who have at any time logged into Customer's computer network using their passwords, such that any User so logged into such network in a manner that would enable the User to access and use such Modules will reduce by one the number of Users able to simultaneously access those Modules, regardless of whether or not such User is in fact accessing or using any such Module. Customer hereby waives any claim, and releases

GENERAL TERMS

TAN from any such claim and from any losses or damages Customer suffers in relation thereto, in connection with the inability of Users to simultaneously access such Modules where such inability is the result of inactive logged-in Users absorbing available login access.

20.2 Additional Copies. Customer will not make any copies of the Licensed Software except as necessary for the installation permitted hereby and except for:

- (a) copies of each Module licensed hereunder for training and testing purposes, and
- (b) one copy of each Module licensed hereunder for backup purposes, provided that all electronic copies made include screen displays of TAN's proprietary or intellectual property notices as recorded on the original copy provided by TAN and Customer affixes a label to each disk, reel, or other housing for the medium on which each physical copy is recorded setting out the same proprietary and intellectual property notices as appear on the unit of Licensed Software from which the copy is made in the same manner as those notices appear on that original copy.

21. LICENSED SOFTWARE FEES

21.1 In respect of each Module, Customer shall pay to TAN all applicable Licensed Software fees listed in the Pricing/Estimate Form upon delivery of the Licensed Software.

22. MAINTENANCE SERVICES

22.1 TAN will develop new Releases and new Versions of Licensed Software in accordance with the procedures and other particulars set out in the Support and Maintenance Handbook.

22.2 Provided that Customer continues to subscribe for Support and Maintenance in respect of a particular Licensed Software Product, TAN will provide to Customer, either in physical form by mail or courier or in electronic form via the Internet, new Releases and Versions (and appropriate documentation) for such Licensed Software Products as such Releases or Versions (and documentation) become available.

23. EXCLUDED SUPPLIES AND SERVICES

- (a) Without limitation, the following supplies and services are excluded from Support and Maintenance:
 - (b) Services which are required to remedy problems that stem from changes to or defects in system configuration upon which the Licensed Software was initially installed;
 - (c) Services which are required to remedy problems which do not stem from any defect in Licensed Software;
 - (d) Services which are required to remedy problems caused by lack of training of Customer's personnel or improper treatment or use of the Licensed Software;
 - (e) Full report customization service;
 - (f) Any and all hardware support, maintenance or troubleshooting issues, except as described in section 28.1 regardless of the source of such hardware.

24. FEES FOR SUPPORT AND MAINTENANCE

24.1 Support and Maintenance services begin on the Support Start Date. The cost for Support and Maintenance services is payable annually in advance and is due in its entirety thirty (30) days from date of the TAN's delivered invoice. Customer may elect to specify a preferred alternate Support Renewal Date by so notifying TAN in writing. If an alternate preferred Support Renewal Date is specified, the cost of Support and Maintenance will be prorated from the anniversary of the Support Start Date to the specified Support Renewal Date. Thereafter, the Support and Maintenance fee is payable in advance on every annual anniversary of the Support Start Date or, if there is a Support Renewal Date, every anniversary of the Support Renewal Date (the applicable anniversary being the "Support Renewal Date"). TAN will provide invoices to Customer for all such amounts, such invoices due on the later of (a) the Support Start Date or applicable Support Renewal Date, as applicable, and (b) 30 days from the date of the invoice.

24.2 Support and Maintenance pricing shall be 25% of the gross license rates as they exist on the effective date hereof for the initial one-year term. Thereafter, Support and Maintenance fees shall renew at 25% of the gross license rates as they exist on the Support Renewal Date provided that, excluding increases due to Support and Maintenance of additional Software from one contractual year to the next, any increase in costs hereunder from one contractual year to the next may not exceed ten (10) percent of the Support and Maintenance fees payable for the prior years term. TAN will provide invoices to Customer for renewal fees up to 60 days prior to expiration of each term.

24.3 The Support and Maintenance fees identified in the Pricing/Estimate Form are applicable only upon the date of entry into this Agreement, and are subject to change thereafter in accordance with this Agreement's terms.

24.4 In consideration of the Support and Maintenance provided hereunder, Customer agrees to pay TAN the fees described in the Pricing/Estimate Form, as modified explicitly pursuant to this Agreement. In the event Customer requires Support and Maintenance for additional Licensed Software, Customer agrees to pay TAN the additional Support and Maintenance fees applicable based upon the fees then in effect, prorated from the date of agreement to acquire such services to the Support Renewal Date.

24.5 Unless the Pricing/Estimate Form indicates otherwise, the fees charged hereunder are applicable to Support and Maintenance of Licensed Software used with respect to only a single database of Customer data. If Customer, after entering this Agreement, places in service one or more additional databases to be used in relation to the Licensed Software, then for each such additional database an additional 25% of all Support and Maintenance fees charged hereunder, exclusive of such extra database fees, will be payable. Customer will notify TAN as soon as reasonably possible of the installation or use of any such additional database(s).

GENERAL TERMS

24.6 TAN may terminate and suspend performance of all Support and Maintenance if Customer fails to pay any past due

TAN invoice within 30 days of written notice of such failure, in the event of any other material breach by Customer which remains uncured 30 days after notice thereof or if any of the Licensed Software ceases to be subject of a valid Software License Agreement.

24.7 If at any time after Customer has initially licensed any of the Licensed Software from TAN, Customer's right to receive Support and Maintenance, or comparable services, from TAN under this Agreement or a comparable agreement has lapsed for any reason whatsoever, voluntarily or otherwise, and Customer wishes to receive Support and Maintenance from TAN, Customer will pay to TAN, prior to re-instatement of Support and Maintenance services:

(a) a reinstatement fee equal to the greater of 50% of the current annual support fee or the sum of the unpaid support fees that would have been payable hereunder had this Agreement been in force during the time in which Support and Maintenance rights had so lapsed to the date of reinstatement, and

(b) at least one additional year of Support and Maintenance from the date of reinstatement.

25. TERM FOR SUPPORT AND MAINTENANCE

25.1 **Term.** TAN shall provide to Customer, and Customer shall purchase from TAN, Support and Maintenance for a period commencing on the Support Start Date and, subject to termination as provided herein, continuing until the following Support Renewal Date or anniversary of the Support Start Date, with automatic renewals for one (1) year terms thereafter until either party gives written notice to terminate Support and the Maintenance no less than ninety (90) days prior to the end of the then-current term, provided however that the fees payable in respect of the Services and the Products may be revised by TAN in accordance with this Agreement.

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SCHEDULE C: TERMS APPLICABLE ONLY TO THIRD PARTY PRODUCTS AND SERVICES

26. PURCHASE AND SALE; DELIVERY

26.1 **Purchase Commitment and Price.** TAN hereby agrees to sell to Customer, and Customer hereby agrees to purchase from TAN, the Third Party Products listed in the Pricing/Estimate Form in the volumes and at the prices described therein.

26.2 **Delivery.** TAN will ship all or any part of the Third Party Products to Customer as soon as reasonably practicable (or, if the below-described purchase order documentation does not seek immediate shipping, at the time TAN considers reasonable in order to meet the desired delivery date described) after receipt by TAN of a purchase order from Customer specifying the particular Third Party Products sought, the number of such Third Party Products sought, the price payable therefor, and the desired

date and location of delivery thereof. Any such purchase order must, at a minimum, reference quantity, description and price.

26.3 **Changes by Customer to Delivery Schedule.** Following delivery by Customer of any purchase order documentation described in section 26.2, no changes by Customer to the shipment schedule described therein will be permitted unless TAN is notified thereof in writing at least ninety (90) days in advance of the delivery date sought in such purchase order documentation.

26.4 **Acceptance of Purchase Orders.** Purchase orders delivered by Customer to TAN in respect of Third Party Products are not binding upon TAN until accepted by TAN in writing. In any case, despite any indication to the contrary contained in any such purchase order documentation, no terms or conditions on purchase order documentation issued by Customer, other than the information required by TAN as set forth expressly in this Agreement, will be binding upon TAN, nor will any such terms or conditions modify or supplement this Agreement in any way, notwithstanding the fact that TAN may accept or otherwise approve such purchase orders. TAN reserves the right to refuse any such purchase order for any reason not contrary to this Agreement, including without limitation pricing differences as described in section 27.2.

26.5 **Additional Third Party Products.** Customer may purchase Third Party Products in addition to those listed in Pricing/Estimate Form by issuing additional purchase order documentation as described herein, provided that the supply (or non-supply) of such additional Third Party Products will be subject to this Agreement as though such additional Third Party Products had been included in the Pricing/Estimate Form on the date of execution of Pricing/Estimate Form subject to the following:

(a) the price for such additional Third Party Products is subject to agreement between the parties each in their own absolute discretion, and

(b) TAN shall have the right to discontinue delivery of such additional Third Party Products upon at least ninety (90) days written notice to Customer without any liability to Customer whatsoever for such discontinuance.

27. CHARGES AND PAYMENTS

27.1 **Prices.** The pricing applicable to Third Party Products is as set out in the Pricing/Estimate Form in the form finally agreed to by the Parties.

27.2 **Pricing Variability.** Customer acknowledges that:

(a) the prices described in Pricing/Estimate Form are applicable for six (6) months after the date of execution hereof, and such prices are based upon Customer taking delivery of the full number of any particular Third Party Product listed in Pricing/Estimate Form in a single shipment

(b) and Customer hereby agrees that after the expiry of such initial six-month period or, in case of Customer seeking, in a

GENERAL TERMS

particular shipment, delivery of less than all of the Third Party Products of a particular type listed Pricing/Estimate Form, the actual prices may be higher. Prior to shipment of any Third Party Products that would be subject to pricing that differs from that described in the Pricing/Estimate Form, TAN will notify Customer of any such different pricing and Customer will accept such different pricing, as mutually agreed between Customer and TAN, in writing.

28. SUPPORT FOR THIRD PARTY PRODUCTS

28.1 For the purpose of isolating support issues and responsibility in respect of Third Party Products and their interaction with any Products, TAN will provide initial first-tier support, to a maximum of fifteen (15) minutes per support inquiry, for Third Party Products, as further specified in the Support and Maintenance Handbook.

29. PROPRIETARY RIGHTS

29.1 **Third Party Proprietary Rights and Indemnity by Customer.** Customer acknowledges that any Third Party Products supplied by TAN hereunder are supplied by TAN as a reseller thereof and that the Third Party Products are subject to the intellectual property rights of the various third party developers and/or manufacturers thereof, as applicable, including without limitation copyright, trade secret, trademark, and patent rights. Customer will maintain in confidence and not use or disclose any and all confidential business or technical information connected with any Third Party Product except as specifically permitted by a party having legal control of such rights, and Customer will defend or settle any claim made or any suit or proceeding brought against TAN insofar as such claim, suit, or proceeding is based on an allegation that any Third Party Product provided to Customer hereunder has been installed, used, or otherwise treated by Customer or any client or customer of Customer in violation of the proprietary rights of any third

party or on an allegation that Customer or any client or customer of Customer has disclosed or used any confidential business or technical information connected with any Third Party Product, provided that TAN will notify Customer in writing promptly after the claim, suit, or proceeding is known to TAN and will give Customer such information and assistance as is reasonable in the circumstances. Customer will have sole authority to defend or settle any such claim at Customer's expense. Customer will indemnify and hold TAN harmless from and against any and all such claims and will pay all damages and costs finally agreed to be paid in settlement of such claim, suit or proceeding.

29.2 **Third Party Products which are Software.** Customer acknowledges that the possession, installation and use of all Third Party Products which are software shall be governed by the terms of the software license(s) of the persons other than TAN who possess the rights to control such possession, installation and use.

30. WARRANTY

30.1 **Warranty.** TAN warrants to Customer that TAN has the right to deliver the Third Party Products subject to any documentation accompanying such Third Party Products at the time of delivery and/or any licensing mechanisms, physical, electronic or otherwise, included in any Third Party Products that are software.

30.2 **Warranties Provided by Third Party Suppliers.** Third Party Products are warranted by the manufacturers thereof in accordance with the warranty statements accompanying delivery of the Third Party Products, and Customer agrees that Customer will rely solely on such Third Party Product warranties and Customer shall make no claim against TAN on account of any warranty, express or implied, which may apply to any Third Party Product.