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[www.visible.com](http://www.visible.com)

# Visible License Terms and Agreement

## For Downloadable Software

This License Agreement (this "Agreement") is entered into by and between Visible Systems Corporation ("Visible") and the entity or person placing an order or accessing the Software (as defined below) ("Client"). The "Effective Date" of this Agreement is the date which is the earlier of (a) Client's initial access to the Software through any online provisioning, registration or order process or (b) the date on which Client accepted this Agreement by clicking an "I accept" or similar button on Visible's website. Each party expressly agrees that this Agreement is legally binding.

From time to time, Visible may modify this Agreement. Unless otherwise specified by Visible, changes become effective for existing licensee upon renewal of the then-current License Term. Visible will use reasonable efforts to notify Client of the changes through communications through email or similar means. Client may be required to click to accept the modified Agreement before using the Software in a renewal License Term, and in any event, continued use of the Software during the renewal License Term will constitute Client's acceptance of the version of the Agreement in effect at the time the renewal License Term begins.

## 1. Definitions

**1.1 "Authorized Contractor"** means a third-party contractor (a) performing services on behalf of Client under a separate written agreement with Client, (b) who has a need to access the Software in performance of duties for Client,

(c) who has agreed in writing to abide by non-disclosure, confidentiality and intellectual property obligations substantially similar to those set forth herein, and (d) who is not a direct competitor of Visible.

**1.2 "Confidential Information"** means information that Visible discloses to Client, which: (a) is marked as confidential; or (c) Client knows or should have known (based on the nature of the information or circumstances of its disclosure) is confidential. For the purposes of this Agreement, the Software will be the Confidential Information of Visible. Client's obligations herein to protect Visible's Confidential Information does not apply to information which: (a) is or becomes public knowledge other than by Client's breach of this Agreement; or (b) is in Client's possession prior to disclosure by Visible, without any confidentiality breach; or (c) Client independently develops without access to Visible's Confidential Information.

**1.3 "Deliver(y)"** means Visible making the Software available to Client, and/or the date on which Delivery occurs (as the context allows). Software will be made available in electronic form only.

**1.4 "Documentation"** means user manuals, help guides, and other materials provided by Visible to Client to support use of the Software, as may be updated from time to time.

**1.5 "Intellectual Property Rights"** means all copyrights, trademarks, service marks, trade secrets, patents, patent applications, moral rights, goodwill, rights in know-how, contractual rights of non-disclosure, and all other proprietary rights, and all applications, registrations, renewals and extensions thereof.

**1.6 "Internal Business Purposes"** means the right to install the Software on servers that are used in the performance of Client's customary business operations, which may include the provision of services for Client's customers, so long as Client is not providing direct access to Visible in a service-bureau, time-sharing, outsourcing or similar arrangement, such that the customer is accessing Client's service primarily to use the Software, without having to purchase a separate license from Visible or its distributor in order to use the Software.

**1.7 "License"** means, subject to the terms and conditions of this Agreement, including the terms of Section 2.1, the limited, non-exclusive, non-transferable, non-sublicense(s) granted by Visible to Client to use the Software for Client's Internal Business Purposes.

**1.8 "License Term"** means the period during which a given License is valid, beginning on the Effective Date and, for Trial Licenses, ending on the last day of the License enabled by the license key (or for Community Edition, continuing indefinitely), unless earlier terminated in accordance with Section 3.

**1.9 "Software"** means Visible's proprietary software and associated Documentation that Visible provides to Client, as well as updates thereto that Visible makes generally available to its similarly situated clients.

**1.10 "Support"** means the support and maintenance services, and associated upgrades, patches, enhancements, and bug fixes for the Software, that may be provided to Client by Visible, depending on the License type, pursuant to the terms of this Agreement. Support will be limited to those services regarding supporting Client's application with the use of Software, and expressly excludes any other services.

**1.11 Term.** The term ("Term") of this Agreement will begin on the Effective Date and continue unless earlier terminated in accordance with Section 10 herein. Individual Licenses may each have a License Term that is shorter than the Term, but no License Term will survive the termination of this Agreement.

**1.12 "User"** means an individual employee or Authorized Contractor designated by Client to access and use the Software, and for whom Client has obtained a License. Client is responsible for the acts and omissions of its User(s).

## **2. License Grant and Provision of Services**

**2.1 License Grant.** Client's License rights and benefits, and Visible's obligations to Client will vary, depending on the type of License Visible is granting. If Client is unsure as to the particular nature of the License, Client should seek clarification from Visible prior to downloading the Software; in the event of a dispute, Visible's determination will be controlling.

**(a) For Limited License Term/Trial Licenses (which may be referred to as "Professional/Enterprise Edition Trial/Eval").** If Client receives free access or a trial or evaluation License to the Software (a "Trial/Eval License"), then Client may use the Software in accordance with the terms and conditions of this Agreement for the period represented by the applicable license key (typically, for seven (7) days - the "Trial/Eval Period"). Upon the expiration of the Trial Period, Visible may, in its sole discretion, elect to extend the Trial Period (and applicable Trial License) for successive renewal periods equal in duration to the Trial Period then ended; such extension will be evidenced by Visible continuing to make the Software available to Client, subject to the terms of the applicable Trial License described in this Section 2.1(a). Trial Licenses are permitted solely for Client's use to determine whether to purchase a full license to the Software. Client may not use a Trial License for any other purposes. At the end of the Trial Period, the Trial License will expire (and this Agreement will terminate as to such License), and Client will have the option to purchase a full license to the Software. If Client purchases a commercial License, Client agrees to enter into Visible's standard commercial license which will apply to such purchase and the use of the Software. Visible has the right to terminate a Trial License at any time for any reason. NOTWITHSTANDING ANYTHING IN THIS AGREEMENT TO THE CONTRARY, Visible WILL HAVE NO WARRANTY, INDEMNITY, SUPPORT, OR SLA OBLIGATIONS WITH RESPECT TO TRIAL LICENSES.

**(b) For Non-License Term-Based Licenses (which may be referred to as "Community Edition").** If Client receives a "Community Edition" or similar License, Client acknowledges and agrees that Software that is provided to Client free of charge is for Client's internal use and testing purposes, and is expressly identified by Visible as free. For the purposes of this Agreement, free software includes the Visible Community Edition Software or other Visible Software made available by Visible on a similar basis. Granting free licenses is solely at Visible's discretion, and providing one version of the Software on a free basis does not indicate that Visible will provide another version of the Software on a similar basis. Customer acknowledges and agrees that free software is not suitable for any purpose other than limited internal trial and

evaluation. Notwithstanding the foregoing, Community Edition Licenses are subject to termination as set forth in this Agreement. In addition, Client acknowledges and agrees that Community Edition Licenses are not provided with Support. NOTWITHSTANDING ANYTHING IN THIS AGREEMENT TO THE CONTRARY, Visible WILL HAVE NO WARRANTY, INDEMNITY, SUPPORT, OR SLA OBLIGATIONS WITH RESPECT TO COMMUNITY EDITION LICENSES.

**2.2 License Restrictions.** Client acknowledges that the Software and its structure, organization, and source code constitute Visible's and its suppliers' valuable trade secrets. Accordingly, except as expressly permitted, Client will not (nor will authorize any third party to): (a) allow access or use of the Software by anyone other than its employees and Authorized Contractors, or at a location outside of the Site(s); (b) distribute, sell, rent, transfer, lease, lend, sub-license, loan, assign, pledge, grant a security interest in, or otherwise make the Software available to any third party; (c) use the Software in any service-bureau, time-sharing, outsourcing or similar arrangement; (d) combine or merge the source code of the Software with or into another software product, or use the Software to create, modify, or enhance any software, disassemble, de-compile, reverse engineer or otherwise attempt to derive the structure, sequence or organization of source code, except as permitted by applicable law to achieve inter-operability given Visible does not offer the means to do so when requested by Client; (e) remove or alter product identification, copyright, trademark or other proprietary markings contained in or on the Software; (f) modify, adapt, recast, transform or otherwise prepare a derivative work of the Software or portion thereof; or (g) engage in any act designed to circumvent any restriction set forth in this Agreement, specified by Visible in writing, or represented by the applicable license key.

**2.3 Ownership; Reservation of Rights.** The Software is licensed, not sold. There are no implied licenses herein; Visible and its suppliers reserve all rights not expressly granted to Client. Visible and its suppliers retain, exclusively, all right, title and interest in and to all intellectual property rights embodied in or associated with the Software and any Services, and to all derivative works thereof and related materials. In addition, certain Software

may also contain open source software, which is not warranted, and may have additional limitations, as indicated in "help", "about" or similar files.

### **3. Delivery**

Visible will use commercially reasonable efforts to deliver the Software on a timely basis following the Effective Date. Client is responsible for installing Software on Client's own computer equipment. All Software is deemed irrevocably accepted upon Delivery.

### **4. Taxes**

Client will pay any sales, use, value added, surtax and personal property taxes, duties, fees and other governmental assessments or charges arising out of this Agreement and the transactions contemplated herein, excluding taxes based on Visible's net income.

### **5. Representations and Warranties**

**5.1 By Each Party.** Each party represents and warrants that it has the right to enter into this Agreement.

**5.2 Exclusions and Limitations.** Visible does not warrant that Software, Services or any deliverable will be error-free, uninterrupted or meet Client's specific requirements or that performance of the Services will be uninterrupted, or that the Software, Services or deliverables are error free and all deficiencies or defects will be corrected. Visible will have no obligation under this Agreement if Client uses Software or any deliverable other than in an environment intended or recommended by Visible, or for abuse, misuse, accident, or neglect, or for failure to use the Software or any deliverable in accordance with its Documentation and this Agreement. Software may contain functionality designed to enable Client's compliance with applicable laws and regulations. Such functionality is provided (if at all) as a convenience, and Visible disclaims liability for Client's non-compliance with laws and regulations applicable to it in the conduct of its business.

### **6. Warranty Disclaimer**

TO THE MAXIMUM EXTENT PERMITTED BY LAW, THE SOFTWARE, DOCUMENTATION, SERVICES AND ANY DELIVERABLES ARE PROVIDED "AS IS" AND VISIBLE AND ITS SUPPLIERS DISCLAIM ALL WARRANTIES AND CONDITIONS, EXPRESS, IMPLIED OR STATUTORY, WITH RESPECT THERETO, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT, AND THOSE ARISING FROM COURSE OF DEALING OR USAGE OR TRADE. CLIENT ACKNOWLEDGES THAT IT HAS NOT ENTERED INTO THIS AGREEMENT IN RELIANCE UPON ANY WARRANTY OR REPRESENTATION EXCEPT THOSE SPECIFICALLY SET FORTH HEREIN.

## **7. Indemnification**

Client will indemnify and hold Visible and its suppliers harmless against any claims, losses, liabilities, costs and expenses (including reasonable attorneys' fees) that Visible or its suppliers may incur as a result of a third-party claim arising from or related to misuse of Software by Client or any User, or any breach of this Agreement.

## **8. Limitation of Liability**

**8.1 Exclusion of Indirect Damages.** IN NO EVENT WILL VISIBLE BE LIABLE UNDER ANY LEGAL THEORY FOR ANY INDIRECT, INCIDENTAL, EXEMPLARY, SPECIAL, CONSEQUENTIAL OR SIMILAR DAMAGES, INCLUDING LOST BUSINESS; LOSS OR INTERRUPTION OF USE; LOST, DAMAGED OR INACCURATE DATA; COST OF PROCUREMENT OF SUBSTITUTE GOODS, SERVICES OR TECHNOLOGY; LOST PROFITS OR REVENUES; OR SIMILAR ECONOMIC LOSS OR LIABILITY, THAT ARISES FROM OR RELATES TO THIS AGREEMENT, REGARDLESS OF WHETHER VISIBLE KNOWS OR SHOULD KNOW OF THE POSSIBILITY OF SUCH DAMAGES, AND NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY.

**8.2 Damages Cap.** IN NO EVENT WILL VISIBLE TOTAL AGGREGATE LIABILITY ARISING FROM OR RELATED TO THIS AGREEMENT, UNDER ANY OTHER LEGAL THEORY, EXCEED FIVE HUNDRED DOLLARS (\$500).

**8.3 Limitations are a Basis of the Bargain.** CLIENT ACKNOWLEDGES AND AGREES THAT VISIBLE HAS OFFERED THE SOFTWARE, AND THAT THE PARTIES HAVE ENTERED INTO THIS AGREEMENT, IN RELIANCE UPON THE DISCLAIMERS OF WARRANTY AND THE LIMITATIONS OF LIABILITY SET FORTH HEREIN, THAT THE DISCLAIMERS OF WARRANTY AND THE LIMITATIONS OF LIABILITY SET FORTH HEREIN REFLECT A REASONABLE AND FAIR ALLOCATION OF RISK BETWEEN THE PARTIES US (INCLUDING THE RISK THAT A CONTRACT REMEDY MAY FAIL OF ITS ESSENTIAL PURPOSE AND CAUSE CONSEQUENTIAL LOSS), AND THAT THE DISCLAIMERS OF WARRANTY AND THE LIMITATIONS OF LIABILITY SET FORTH HEREIN FORM AN ESSENTIAL BASIS OF THE BARGAIN BETWEEN THE PARTIES, WITHOUT WHICH THE ECONOMIC TERMS OF THIS AGREEMENT WOULD BE DIFFERENT.

## **9. Confidential Information.**

To the extent that Confidential Information is exchanged and received in connection with the Licenses or Services, Client agrees not to use Visible's Confidential Information except in the performance of, or as authorized by, this Agreement, and not to disclose, sell, license, distribute or otherwise make available such information to third parties.

## **10. Termination**

**10.1 Termination for Cause.** In the event of a material breach of this Agreement (excluding any breaches for which an exclusive remedy is expressly provided), the non-breaching party may terminate this Agreement if such breach is not cured within thirty (30) days after written notice thereof (except that for a breach of Section 2.2 ("License Restrictions"), there will be no cure period. For clarity, exceeding the scope of any License granted



herein, violating the License restrictions, and failing to protect Confidential Information each constitute a material breach of this Agreement.

**10.2 Effect of Termination.** Upon the expiration or early termination of this Agreement: (a) all Licenses will terminate; (b) Client will immediately discontinue all use of the affected Software, erase all full and partial copies of the Software and (subject to this Section 10.2) all other tangible embodiment of Visible's Confidential Information in Client's possession or control, and promptly certify the same to Visible; (c) Visible may immediately cease providing the Services; and (d) Sections 1 ("Definitions"), 2.2 ("License Restrictions"), 2.3 ("Ownership; Reservation of Rights"), 4 ("Fees and Payment"), 5.3 ("Exclusions and Limitations"), 6 ("Warranty Disclaimer"), 7 ("Indemnification"), 8 ("Limitation of Liability"), 9 ("Confidential Information"), 10.2 ("Effect of Termination"), and 11 ("Miscellaneous") will survive.

## **11. Miscellaneous**

**11.1 Assignment.** Client may not, by operation of law or otherwise, assign or transfer any of its rights or delegate any of its duties herein without Visible's prior written consent, and any purported attempt to do so is void. Subject to the foregoing, this Agreement will be binding on and inure to the benefit of the parties and their respective successors and permitted assigns.

**11.2 Force Majeure.** If Visible's performance herein is prevented, hindered, or delayed by causes outside of its control, Visible will be excused from performance for the duration of the condition.

**11.3 Law; Disputes.** This Agreement will be governed by and construed under the laws of the State of Massachusetts without regard to conflict of laws principles that would require the application of the laws of another jurisdiction. UCITA AND THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS WILL NOT APPLY TO THIS AGREEMENT. Any action or proceeding arising from or relating to this Agreement must be brought exclusively in a court of competent jurisdiction, federal or state, located in Suffolk County, Massachusetts, and in no other jurisdiction. Each party irrevocably submits to the personal jurisdiction and venue of, and agrees to services of process issued or authorized by, such

courts, and waives any objection thereto. Except as set forth herein, the parties' rights and remedies are cumulative. The parties agree that injunctive relief (without bond) is an appropriate remedy for threatened breaches of Sections 2, 7, or 9, which will constitute immediate, irreparable harm.

**11.4 Severability; Waiver; Construction.** If a court of competent jurisdiction adjudges any provision of this Agreement to be invalid or unenforceable, the remaining provisions of this Agreement, if capable of substantial performance, will continue in full force and effect without being impaired or invalidated in any way. The parties agree to replace any invalid provision with a valid provision that most closely approximates the intent and economic effect of the invalid provision. All waivers must be in writing. A party's consent to, or waiver of, enforcement of this Agreement on one occasion will not be deemed a waiver of any other provision or such provision on any other occasion. In this Agreement, the word "including" means "including but not limited to. No presumption will operate in favor of or against any party as a result of its role in drafting this Agreement.

**11.5 Independent Contractors.** The parties are independent contractors. No agency, partnership, franchise, joint venture or employment relationship is intended or created by this Agreement. Neither party has the power or authority to create or assume any obligation, or make any representations or warranties, on behalf of the other party.

**11.6 Publicity.** Visible may use Client's name and logo in Visible's sales and marketing materials, including in business presentations, client lists, and on websites. Neither party will issue a press release regarding this Agreement without the other party's prior written consent, not to be unreasonably withheld. If the party seeking to issue a press release has not received a response to a request for consent within five (5) business days, the request will be deemed approved. Neither party will disclose the terms of this Agreement to any third party, except as required by law.

**11.7 Notice.** Any notice, consent or waiver herein must be in writing, addressed to a member of the party's executive team at the address set forth above, and delivered by personal delivery, reputable rapid courier, or certified/registered mail, return receipt requested, and will be deemed given

upon personal delivery, one (1) day after deposit with an overnight domestic courier, two (2) days after deposit with an international courier, or five (5) days after deposit in the certified or registered mail. A party may specify a new address by providing notice to the other party in accordance with this Section.

**11.8 Compliance with Law; Export.** Each party will comply with all applicable laws, regulations and orders of any governmental authority of competent jurisdiction in its performance under this Agreement. Without limiting the foregoing, Client acknowledges that the laws and regulations of the United States restrict the export and re-export of commodities and technical data of United States origin, including the Software. Client will comply fully with all applicable export and trade laws and regulations of the United States and other applicable jurisdictions. Client will hold Visible and its suppliers harmless from and against any violation of laws or regulations by Client or any of its agents, officers, or employees or Authorized Contractors.

**11.9 Supremacy; Modification.** This Agreement will prevail over any written instrument submitted by Client; the terms of any purchase order, acknowledgement, or similar document submitted by Client to Visible will have no effect. This Agreement cannot be varied or supplemented by course of dealing or by usage of trade. All modifications or amendments to this Agreement must be in writing and signed by both parties.

**11.10 Matching Service Levels.** When acquiring technical support, all licenses in any given license type must be supported under the same technical support service level (e.g., Community Edition unsupported or Professional/Enterprise/Student/Instructor/University Edition supported). Client may not request that Visible support a subset of licenses within a license set, and Visible will not be required to do so.

**11.11 Entire agreement.** This Agreement (inclusive of Exhibits) in its original English text, sets forth the complete, exclusive and final agreement of the parties concerning the subject matter hereof, supersedes, replaces and merges all prior and contemporaneous agreements, communications and understandings, both written and oral, between them concerning the subject matter hereof. This Agreement may be executed in counterparts.

## Contact Us

Please feel free to contact us with any comments, questions, complaints or suggestions you might have regarding the information practices described in this statement. You may send us an e-mail at [info@visible.com](mailto:info@visible.com) or write to us Visible Systems Corporation, 711 Atlantic Avenue, Boston, MA 02111 telephone: +1 781 778-0200.