

# ENTERPRISE CONTRACT FOR AWS MARKETPLACE

## 1. Scope.

**1.1 Terms and Conditions.** This Enterprise Contract for AWS Marketplace (the “**Enterprise Contract**”) sets forth the terms and conditions applicable to the licensing of Software, whether deployed via AMI or SaaS, and the provision of Support Services by the Party offering the Software as an Enterprise Contract Listing (“**Seller**”) to the Party subscribing to the Software (“**Buyer**”) through the AWS Marketplace. Seller’s offer of the Software as an Enterprise Contract Listing on the AWS Marketplace, and Buyer’s purchase of the corresponding Subscription on the AWS Marketplace, constitutes each Party’s respective acceptance of this Enterprise Contract and their entry into this Agreement (defined below) with respect to the Subscription. Unless defined elsewhere in this Enterprise Contract, terms in initial capital letters have the meanings set forth in Section 11. Buyer and Seller may be referred to collectively as the “**Parties**” or individually as a “**Party**”.

**1.2 Software Subscription.** Seller will supply and sell to Buyer, and Buyer will license and purchase, respectively, a Subscription to the Licensed Materials and Services as set forth in the Enterprise Contract Listing in accordance with this Agreement. A Subscription, as described in the applicable Enterprise Contract Listing, may be for Software deployed via AMI (“**AMI Software**”) or Software deployed via SaaS (“**SaaS Software**”). Software may be targeted for specific geographic regions, and Support Services may vary by geography. A Subscription may be provided on a Metered Pricing, Entitlement Pricing or other basis through the functionality available through AWS Services. The fee or rate for the Subscription is set forth in the applicable Enterprise Contract Listing. For Subscriptions provided on a Metered Pricing basis, upon request by Buyer, Seller will provide sufficient documentation from its books and records to allow Buyer to verify the metered usage charged to Buyer for the Subscription.

**1.3 Taxes.** Each Party will be responsible, as required under applicable Law, for identifying and paying all taxes and other governmental fees and charges (and any penalties, interest and other additions thereto) that are imposed on that Party upon or with respect to the transactions and payments under this Agreement. Applicable taxes and duties may be due in addition to the fees or rates payable by Buyer. Seller may charge and Buyer will pay, where applicable, national, state or local sales or use taxes, or value added or goods and services tax, or withholding or other taxes (“**Taxes**”). Where required by local legislation, Amazon Web Services, Inc. may charge for Taxes in its own name for Subscriptions made by Buyers on the AWS Marketplace, and Buyer will pay such Taxes. Buyer will receive a compliant tax invoice, where required. Seller will be responsible for all other taxes or fees arising (including interest and penalties) from transactions and the documentation of transactions under this Agreement. Upon request, Buyer will provide such information to Seller as reasonably required to determine whether Seller is obligated to collect Taxes from Buyer. Seller will not collect (or will refund to Buyer), and Buyer will not be obligated to pay (or will be entitled to a refund from Seller), any such Tax or duty for which Buyer furnishes Seller a properly completed exemption certificate or a direct payment permit certificate or for which Seller claims an available exemption from Tax. Seller will provide Buyer with any forms, documents or certifications as may be required for Buyer to satisfy any information reporting or withholding tax obligations with respect to any payments under this Agreement.

**1.4 Agreement.** Each Subscription is subject to and governed by this Enterprise Contract, the applicable Enterprise Contract Listing, the terms and conditions of the NDA (if any), and the Privacy and Security Terms (if any) and any amendments to any of the foregoing as may be agreed upon by the Parties, which together constitute the agreement between Buyer and Seller (the

“**Agreement**”). Each Subscription is a separate agreement between Buyer and Seller. In the event of any conflict between the terms and conditions of the various components of this Agreement, the following order of precedence will apply: (1) any amendment agreed upon by the Parties, (2) the Privacy and Security Terms (if any), (3) the NDA (if any), (3) this Enterprise Contract, (4) and the Enterprise Contract Listing.

## **2. Licenses.**

### **2.1 Licensed Materials.**

**2.1.1** If the Subscription is for AMI Software, Seller hereby grants to Buyer, subject to Section 2.1.3, a nonexclusive, worldwide license under all Proprietary Rights in and to the AMI Software and AMI Image, to deploy, operate and use the AMI Software and AMI Image under Buyer’s own AWS Services account on AWS Services infrastructure in accordance with the applicable Enterprise Contract Listing and to allow its Users to access and use the AMI Software and AMI Image as so deployed.

**2.1.2** If the Subscription is for SaaS Software, Seller hereby grants to Buyer, subject to Section 2.1.3, a nonexclusive, worldwide license under all Proprietary Rights in and to the SaaS Software and SaaS Service, to access, receive and use the SaaS Software and SaaS Service in accordance with the applicable Enterprise Contract Listing and to allow its Users to access, receive and use the SaaS Software and SaaS Service.

**2.1.3** Buyer may use the Software and, as applicable, the AMI Image or SaaS Service, only: in support of the internal operations of Buyer’s and its Affiliates’ business(es) or organization(s), in connection with Buyer’s and its Affiliates’ products and services (but, for clarity, not as a stand-alone product or service of Buyer or its Affiliates), and in connection with Buyer’s and its Affiliate’s interactions with Users.

**2.1.4** Buyer may make a reasonable number of copies of the Documentation as necessary to use such Software, and as applicable the AMI Image, in accordance with the rights granted under this Agreement, provided that Buyer includes all proprietary legends and other notices on all copies. Seller retains all rights not expressly granted to Buyer under this Agreement.

**2.2 Affiliates and Contractors.** With respect to Affiliates and Contractors that Buyer allows to use the Licensed Materials: (a) Buyer remains primarily responsible for all obligations hereunder arising in connection with such Affiliate’s or Contractor’s use of the Licensed Materials. The performance of any act or omission under this Agreement by an Affiliate or a Contractor for, by or through Buyer will be deemed the act or omission of Buyer.

**2.3 Restrictions.** Except as specifically provided in this Agreement, Buyer and any other User of any Licensed Materials, in whole or in part, may not: (a) copy the Licensed Materials, in whole or in part; (b) distribute copies of Licensed Materials, in whole or in part, to any third party; (c) modify, adapt, translate, make alterations to or make derivative works based on Licensed Materials or any part thereof; (d) except as permitted by Law, decompile, reverse engineer, disassemble or otherwise attempt to derive source code from the Software; (e) use, rent, loan, sub-license, lease, distribute or attempt to grant other rights to any part of the Licensed Materials to third parties; (f) use the Licensed Materials to act as a consultant, service bureau or application service provider; or (g) permit access of any kind to the Licensed Materials to any third party.

**2.4 Open Source Software.** Subject to the requirements of Section 6.1(d), Software may contain or be provided with components that are subject to the terms and conditions of “open source” software licenses (“**Open Source Software**”). Open Source Software must be identified as such in the Enterprise Contract Listing or Documentation. To the extent required by the license to which the Open Source Software is subject, the terms of such license will apply in lieu of the terms of this Agreement with respect to such Open Source Software, including without limitation, any provisions governing attribution, access to source code, modification and reverse-engineering.

**2.5 No Additional Terms.** No shrink-wrap, click-acceptance or other terms and conditions outside this Agreement provided with any Licensed Materials or any part thereof (“**Additional Terms**”) will be binding on Buyer or its Users, even if use of the Licensed Materials, or any part thereof, requires an affirmative “acceptance” of such Additional Terms before access to or use of the Licensed Materials, or any part thereof, is permitted. All such Additional Terms will be of no force or effect and will be deemed rejected by Buyer in their entirety. For clarity, the Software, Subscription type (AMI or SaaS), fee structure (Entitlement Pricing or Metered Pricing), technical requirements for use of the Software, Support Services and Seller’s Security Policy set forth or referenced in the Enterprise Contract Listing are not Additional Terms subject to this Section.

**2.6 High-Risk Activities.** The Software is not developed or intended for use in high-risk, hazardous environments requiring fail-safe performance, including without limitation in the operation of nuclear facilities, aircraft navigation or control systems, air traffic control, or weapons systems, or any other application in which the failure of the Software could lead to severe physical or environmental damages (“**High Risk Activities**”). Buyer will not use the Software for High Risk Activities.

### **3. Services.**

**3.1 SaaS Service.** If Buyer is purchasing a SaaS Subscription, Seller will provide the SaaS Service to Buyer in accordance with the Enterprise Contract Listing promptly following purchase of the Subscription and continuing until completion of the Subscription. Seller will provide Buyer all license keys, access credentials and passwords necessary for access and use of the Software and SaaS Service (“**Keys**”) as set forth in the Enterprise Contract Listing.

**3.2 Support Services.** Seller will provide sufficient Documentation to allow a reasonably competent user to access and use the Software. Seller will provide Support Services to Buyer in accordance with the support plan set forth or incorporated into the Enterprise Contract Listing.

**4. Review.** For any Subscription with Entitlement Pricing (a) that is \$100,000 or more or (b) that has a Subscription period of one year or more, but (c) excluding any Subscription that is a renewal of an expiring Subscription or that merely increases the quantity of Buyer’s then-current use of such Software (e.g., additional hosts, CPU capacity, users or other metric) under an existing Subscription to such Software of the same deployment (i.e., AMI or SaaS) whether on a trial, free or paid basis, then this Section 4 will apply.

**4.1 Review Period.** For a period of 45 days from purchase of the Subscription (“**Review Period**”), Buyer may review, test, and evaluate the Software to determine whether the Software conforms, in all material respects, to the Software Documentation in effect when the Subscription is purchased. During the Review Period, and at no additional cost to Buyer, Seller will be available to provide consultation related to technical support of the Licensed Materials and, as applicable, the SaaS Service as reasonably requested by Buyer; however, Buyer is responsible for any

testing during the Review Period, and such consultation does not entitle Buyer to implementation or configuration services from Seller.

**4.2 Acceptance.** The Software will be deemed accepted upon conclusion of the Review Period unless Buyer has notified Seller in writing of the Software's nonconformity, in any material respect, with its Documentation during the Review Period. Buyer's acceptance of the Software does not waive or discharge any of Seller's responsibilities for the Software's compliance with the warranties set forth in this Agreement, or any of Buyer's rights and remedies or Seller's duties and obligations with respect thereto.

**4.3 Nonconformities.** If Buyer notifies Seller within the Review Period of any nonconformity of the Software, in any material respect, with its Documentation, then Seller will have a 30-day period to fix the Software to comply with its Documentation in all material respects and resubmit the Software to Buyer for review, in which case the Review Period will recommence in its entirety. If the resubmitted Software does not comply with the Documentation in all material respects, then Buyer may reject the Software, cancel the Subscription without further liability and require Seller to promptly and fully refund Buyer's payment for the cancelled Subscription. The right to cure and cure periods in Section 11 will not apply to any such termination.

## **5. Proprietary Rights.**

**5.1 Licensed Materials.** Subject to the licenses granted herein, Seller will retain all right, title and interest it may have in and to the Licensed Materials, including all Proprietary Rights therein. Nothing in this Agreement will be construed or interpreted as granting to Buyer any rights of ownership or any other proprietary rights in or to the Licensed Materials.

**5.2 Feedback.** If Buyer provides any suggestions, ideas, enhancement requests, recommendations or feedback regarding the Licensed Materials or Support Services ("**Feedback**"), Seller may use and incorporate Feedback in Seller's products and services. Buyer will have no obligation to provide Feedback, and all Feedback is provided by Buyer "as is" and without warranty of any kind.

## **6. Warranties.**

**6.1 Licensed Materials.** Seller represents and warrants that: (a) the Software, and as applicable the AMI Image or SaaS Service, will conform, in all material respects, to the Documentation, in the case of SaaS Software for the term of the Subscription and, in the case of AMI Software, until 90 days after conclusion of the Review Period (if any) and if there is no Review Period then until 90 days after Buyer's purchase of the Subscription; (b) AMI Software will not contain any automatic shut-down, lockout, "time bomb" or similar mechanisms that could interfere with Buyer's exercise of its rights under this Agreement; (c) Seller will use industry standard practices designed to detect and protect the Software against any viruses, "Trojan horses", "worms", spyware, adware or other harmful code designed or used for unauthorized access to or use, disclosure, modification or destruction of information within the Software or interference with or harm to the operation of the Software or any systems, networks or data, including as applicable using anti-malware software and keeping the anti-malware software up to date prior to making the Software (including any Software provided through Support Services) available to Buyer, and for SaaS Software, scanning the SaaS Software on a regular basis; (d) the Software, and Buyer's use thereof as permitted under this Agreement, will not be subject to any license or other terms that require that any Buyer Data, Buyer Materials or any software, documentation, information or other materials integrated, networked or used by Buyer with the

Software, in whole or in part, be disclosed or distributed in source code form, be licensed for the purpose of making derivative works, or be redistributable at no charge; and (e) the Software, and as applicable the AMI Image or SaaS Service, will conform, to the extent applicable, with then-current Web Content Accessibility Guidelines (WCAG) and any other applicable Laws.

**6.2 Services.** Seller represents and warrants that the Services will be performed in a professional manner with a level of care, skill and diligence performed by experienced and knowledgeable professionals in the performance of similar services.

**6.3 Remedies.** If any Software or Services fails to conform to the foregoing warranties, Seller promptly will, at its option and expense, correct the Software and re-perform the Services as necessary to conform to the warranties. If Seller does not correct the Software or re-perform the Services to conform to the warranties within a reasonable time, not to exceed 30 days, as Buyer's sole remedy and Seller's exclusive liability (except as provided in Section 10), Buyer may terminate the Subscription and this Agreement and receive a refund of any prepaid fees prorated for the unused portion of the Subscription and the portion of the Subscription's noncompliance, as measured from the time Buyer reports the noncompliance to Seller through Seller's support channel.

**6.4 Warranty Exclusions.** Seller will have no liability or obligation with respect to any warranty to the extent attributable to any: (a) use of the Software by Buyer in violation of this Agreement or applicable Law; (b) unauthorized modifications to the Licensed Materials made by Buyer or its Personnel; (c) use of the Software in combination with third-party equipment or software not provided or made accessible by Seller or contemplated by the Enterprise Contract Listing or Documentation; or (d) use by Buyer of Software in conflict with the Documentation, to the extent that such nonconformity would not have occurred absent such use or modification by Buyer.

**6.5 Compliance with Laws.** Each Party represents and warrants that it will comply with all applicable international, national, state and local laws, ordinances, rules, regulations and orders, as amended from time to time ("**Laws**") applicable to such Party in its performance under this Agreement.

**6.6 Power and Authority.** Each Party represents and warrants that: (a) it has full power and authority to enter in and perform this Agreement and that the execution and delivery of this Agreement has been duly authorized; and (b) this Agreement and such Party's performance hereunder will not breach any other agreement to which the Party is a party or is bound or violate any obligation owed by such Party to any third party.

**6.7 Disclaimer.** EXCEPT FOR THE WARRANTIES SPECIFIED IN THIS AGREEMENT, NEITHER PARTY MAKES ANY WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, REGARDING THE LICENSED MATERIALS, SERVICES, BUYER MATERIALS AND BUYER DATA, AND EACH PARTY HEREBY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NONINFRINGEMENT. Seller does not warrant: (a) that the Licensed Materials will meet Buyer's requirements; or (b) that the operation of the Software will be uninterrupted or error free.

## 7. Confidentiality.

**7.1 Confidential Information.** “**Confidential Information**” means any nonpublic information directly or indirectly disclosed by either Party (the “**Disclosing Party**”) to the other Party (the “**Receiving Party**”) or accessible to the Receiving Party pursuant to this Agreement that is designated as confidential or that, given the nature of the information or the circumstances surrounding its disclosure, reasonably should be considered as confidential, including without limitation technical data, trade secrets, know-how, research, inventions, processes, designs, drawings, strategic roadmaps, product plans, product designs and architecture, security information, marketing plans, pricing and cost information, marketing and promotional activities, business plans, customer and supplier information, employee and User information, business and marketing plans, and business processes, and other technical, financial or business information, and any third party information that the Disclosing Party is required to maintain as confidential. Confidential Information will not, however, include any information which: (a) was publicly known or made generally available to the public prior to the time of disclosure; (b) becomes publicly known or made generally available after disclosure through no fault of the Receiving Party; (c) is in the possession of the Receiving Party, without restriction as to use or disclosure, at the time of disclosure by the Disclosing Party; (d) was lawfully received, without restriction as to use or disclosure, from a third party (who does not have an obligation of confidentiality or restriction on use itself); or (e) is developed by the Receiving Party independently from this Agreement and without use of or reference to the Disclosing Party’s Confidential Information or Proprietary Rights. Except for rights expressly granted in this Agreement, each Party reserves all rights in and to its Confidential Information. The Parties agree that the Licensed Materials are Confidential Information of Seller.

**7.2 Obligations.** The Parties will maintain as confidential and will avoid disclosure and unauthorized use of Confidential Information of the other Party using reasonable precautions. Each Party will protect such Confidential Information with the same degree of care that a prudent person would exercise to protect its own confidential information of a like nature, and to prevent the unauthorized, negligent, or inadvertent use, disclosure, or publication thereof or access thereto. Each Party will restrict Confidential Information to individuals who need to know such Confidential Information and who are bound to confidentiality obligations at least as protective as the restrictions described in this Section 7. Except as necessary for the proper use of the Software, the exercise of a Party’s rights under this Agreement, performance of a Party’s obligations under this Agreement or as otherwise permitted under this Agreement, neither Party will use Confidential Information of the other Party for any purpose except in fulfilling its obligations or exercising its rights under this Agreement. Each Party will promptly notify the other Party if it becomes aware of any unauthorized use or disclosure of the other Party’s Confidential Information, and reasonably cooperate with the other Party in attempts to limit disclosure.

**7.3 Compelled Disclosure.** If and to the extent required by law, including regulatory requirements, discovery request, subpoena, court order or governmental action, the Receiving Party may disclose or produce Confidential Information but will give reasonable prior notice (and where prior notice is not permitted by applicable Law, notice will be given as soon as the Receiving Party is legally permitted) to the Disclosing Party to permit the Disclosing Party to intervene and to request protective orders or confidential treatment therefor or other appropriate remedy regarding such disclosure. Disclosure of any Confidential Information pursuant to any legal requirement will not be deemed to render it non-confidential, and the Receiving Party’s obligations with respect to Confidential Information of the Disclosing Party will not be changed or lessened by virtue of any such disclosure.

**8. Additional SaaS Service Obligations and Responsibilities.** This Section 8 applies to Subscriptions for SaaS Software and SaaS Service only:

**8.1 Acceptable Use.** Buyer will not intentionally use the SaaS Software or SaaS Service to:

(a) store, download or transmit infringing or illegal content, or any viruses, “Trojan horses” or other harmful code; (b) engage in phishing, spamming, denial-of-service attacks or fraudulent or criminal activity; (c) interfere with or disrupt the integrity or performance of the Software or data contained therein or on Seller’s system or network; or (d) perform penetration testing, vulnerability testing or other security testing on the Software or Seller’s systems or networks or otherwise attempt to gain unauthorized access to the Software or Seller’s systems or networks.

**8.2 System Data.** Seller may collect and use System Data internally to provide and improve the Software and Services and Seller’s other products and services, provided that (a) Seller will not target any data analysis at, or otherwise use System Data to derive or attempt to derive information regarding, Buyer and its Affiliates, their businesses, operations, finances, users, customers, prospective customers, suppliers or other persons interacting with Buyer and its Affiliates; and (b) Seller will not target any development efforts, marketing, communications or promotions at Buyer and its Affiliates or any other person on the basis of the intended recipient’s relationship with Buyer or any of its Affiliates. Seller will not use or disclose System Data for any other purpose unless otherwise agreed in writing by the Parties.

**8.3 Use of Other Data.** Notwithstanding the foregoing, nothing in this Agreement will restrict: (a) Seller’s use of statistics and aggregate data derived from System Data where the derived data does not identify or permit, alone or in conjunction with other data, identification, association, or correlation of or with (i) Buyer, its Affiliates, Users, customers, suppliers or other persons interacting with Buyer and its Affiliates; or (ii) any device (e.g. computer, mobile telephone, or browser) used to access or use the Software as originating through Buyer or its Affiliates or interacting with Buyer or its Affiliates; or (b) either Party’s use of any data, records, files, content or other information related to any third party that is collected, received, stored or maintained by a Party independently from this Agreement.

**8.4 Security.**

**8.4.1** Seller will, consistent with industry standard practices, implement and maintain physical, administrative and technical safeguards and other security measures: (a) to maintain the security and confidentiality of Buyer Data; and (b) to protect Buyer Data from known or reasonably anticipated threats or hazards to its security, availability and integrity, including accidental loss, unauthorized use, access, alteration or disclosure. Seller will safeguard Buyer Data with at least the degree of care it uses to protect its own sensitive information of a like nature and no less than a reasonable degree of care.

**8.4.2** Seller will provide Buyer a copy of or online viewing access to a summary of its security practices applicable to the Buyer Data (Seller’s “**Security Policy**”) and any material updates to its Security Policy. Seller will comply in its performance of this Agreement with the Security Policy. Without limiting the generality of the foregoing, Seller will conduct regular penetration testing or other appropriate security testing and security audits and, upon reasonable request from Buyer, provide Buyer a copy of or online viewing access to reports summarizing such testing and audits. Such information may be provided as part of Seller’s Security Policy.

**8.4.3** Seller will inform Buyer promptly (but in any event within 72 hours) upon discovery of any actual or reasonably suspected compromise, unauthorized access to, alteration, loss, use or disclosure of any Buyer Data or any other breach of the confidentiality, security or integrity of Buyer Data (each, a “**Security Incident**”), will investigate and conduct a root cause analysis on the Security Incident and take all reasonable steps to prevent further compromise, access, alteration, loss, use or disclosure of such Buyer Data; provided however that no notice is required for, and Security Incidents do not include, “unsuccessful” security incidents, such as pings on a firewall, that do not represent a risk to the Buyer Data. Seller will provide Buyer written details and regular updates regarding Seller’s internal investigation of each Security Incident, and Seller will cooperate and work together with Buyer to formulate and execute a plan to rectify all confirmed Security Incidents.

**8.5 Business Continuity.** Seller will establish, implement, invoke when needed, and comply with a business continuity plan (“**Business Continuity Plan**”) that incorporates Seller’s contingency plans, recovery plans (including recovery point objective and recovery time objective) and risk controls designed to enable Seller’s continued performance under this Agreement consistent with any applicable recovery time objective specified therein and to recover Buyer Data consistent with the recovery point objective specified therein in the event that any of Seller’s hardware, software networks, systems or other facilities experience a security breach or any significant interruption or impairment of operation or any loss, deletion, corruption or alteration of data.

## **9. Indemnification and Limitation of Liability.**

**9.1 Seller Indemnity.** Seller will, at its expense, indemnify, defend and hold harmless Buyer and its Affiliates and their respective officers, directors, employees, agents and representatives (collectively “**Buyer Indemnified Parties**”) from and against any and all claims, actions, proceedings and suits brought by a third party, and any and all liabilities, losses, damages, settlements, penalties, fines, costs and expenses (including reasonable attorneys’ fees) (“**Claims**”), to the extent arising out of or relating to an allegation of any of the following: (a) infringement, misappropriation or violation of any Proprietary Rights by the Licensed Materials or Buyer’s exercise of its rights under this Agreement; and (b) any unauthorized access, use or disclosure of Buyer Data resulting from breach of Seller’s obligations under Section 8.5 or any Privacy and Security Terms.

**9.2 Process.** The Party(ies) seeking indemnification pursuant to this Section 10 (each, an “**Indemnified Party**” and collectively, the “**Indemnified Parties**”) will give the other Party (the “**Indemnifying Party**”) prompt notice of each Claim for which it seeks indemnification, provided that failure or delay in providing such notice will not release the Indemnifying Party from any obligations hereunder except to the extent that the Indemnifying Party is prejudiced by such failure. The Indemnified Parties will give the Indemnifying Party their reasonable cooperation in the defense of each Claim for which indemnity is sought, at the Indemnifying Party’s expense. The Indemnifying Party will keep the Indemnified Parties informed of the status of each Claim. An Indemnified Party may participate in the defense at its own expense. The Indemnifying Party, without the Indemnified Parties’ prior written consent, (a) will not enter into any settlement that (i) includes any admission of guilt or wrongdoing by any Indemnified Party, (ii) imposes any financial obligations on any Indemnified Party that Indemnified Party is not obligated to pay under this Section 10, (iii) imposes any non- monetary obligations on any Indemnified Party, and (iv) does not include a full and unconditional release of any Indemnified Parties; and (b) will not consent to the entry of judgment, except for a dismissal with prejudice of any Claim settled as described in (a). The Indemnifying Party will ensure that any settlement into which it enters for any Claim is made confidential, except where not permitted by applicable Law.



**9.3 Not Limiting.** The foregoing indemnities will not be limited in any manner whatsoever by any required or other insurance coverage maintained by a Party.

**9.4 Disclaimer.** Except as may be expressly set forth otherwise in this Agreement, Seller and its respective licensors make no representations or warranties of any kind, whether express, implied, statutory or otherwise regarding the services, software, or products provided in connection with this Agreement, or that any content will be secure or not otherwise lost or damaged. Except to the extent prohibited by law, Supplier disclaims all warranties, including any implied warranties of merchantability, satisfactory quality, fitness for a particular purpose, or quiet enjoyment, and any warranties arising out of any course of dealing or usage of trade.

**9.5 Limitation of Liability.** Neither Seller, nor any of its licensors, will, under any circumstances, be liable to Buyer or any other party, for costs of procurement of substitute products or services, lost profits, loss of information or data, or any other special, incidental, punitive, indirect or consequential damages whatsoever, regardless of the form of action, even if Seller has been notified of the possibility of such damages.

**9.6 Damages Cap.** In the event Seller or its licensors are subject to any liability in connection with the software, products or any services for any reason whatsoever, whether arising from negligence, breach of contract or otherwise, neither Seller's liability nor the liability of its licensors shall exceed the sum paid or payable to Seller. This limitation shall apply even if Seller or its licensors have been advised of the possibility of such damages.

## **10. General.**

**10.1 Force Majeure.** Neither Party will be liable hereunder for any failure or delay in the performance of its obligations in whole or in part, on account of riots, fire, flood, earthquake, explosion, epidemics, war, strike or labor disputes (not involving the Party claiming force majeure), embargo, civil or military authority, act of God, governmental action or other causes beyond its reasonable control and without the fault or negligence of such Party or its Personnel and such failure or delay could not have been prevented or circumvented by the non-performing Party through the use of alternate sourcing, workaround plans or other reasonable precautions, including, in the case of a SaaS Service, Seller's Business Continuity Plan, as required under this Agreement (a "**Force Majeure Event**"). A Force Majeure Event will not excuse or suspend Seller's obligation to invoke and follow its Business Continuity Plan in a timely fashion, and to the extent that such Business Continuity Plan was designed to cover the specific force majeure, or events caused by the Force Majeure Event, the foregoing will excuse Seller's performance under this Agreement only for the period of time from the occurrence of the Force Majeure Event until Seller invokes its Business Continuity Plan. If a Force Majeure Event continues for more than 14 days for any Subscription with Entitlement Pricing, Buyer may cancel the unperformed portion of the Subscription and receive a pro rata refund for such unperformed portion. **Export Laws.** Each Party will comply with all applicable customs and export control laws and regulations of the United States and/or such other country, in the case of Buyer, where Buyer or its Users use the Software or Services, and in the case of Seller, where Seller provides the Software or Services. Each Party certifies that it and its Personnel are not on any of the relevant U.S. Government Lists of prohibited persons, including but not limited to the Treasury Department's List of Specially Designated Nationals and the Commerce Department's list of Denied Persons. Neither Party will export, re-export, ship, or otherwise transfer the Licensed Materials, Services or Buyer Data to any country subject to an embargo or other sanction by the United States.

**10.2 Government Rights.** As defined in FARS §2.101, the Software and Documentation are “commercial items” and according to DFARS §252.227 and 7014(a)(1) and (5) are deemed to be “commercial computer software” and “commercial computer software documentation”. Consistent with FARS §12.212 and DFARS §227.7202, any use, modification, reproduction, release, performance, display or discourse of such commercial software or commercial software documentation by the U.S. government will be governed solely by the terms of this Agreement and will be prohibited except to the extent expressly permitted by the term of this Agreement.

**10.3 Headings.** The headings throughout this Agreement are for reference purposes only, and the words contained therein will in no way be held to explain, modify, amplify or aid in the interpretation, construction or meaning of the provisions of this Agreement.

**10.4 No Third-Party Beneficiaries.** Except as specified in Section 10 with respect to Buyer Indemnified Parties and Seller Indemnified Parties, nothing express or implied in this Agreement is intended to confer, nor will anything herein confer, upon any person other than the Parties and the respective successors or assigns of the Parties, any rights, remedies, obligations or liabilities whatsoever.

**10.5 Notices.** To be effective, notice under this Agreement must be given in writing. Each Party consents to receiving electronic communications and notifications from the other Party in connection with this Agreement. Each Party agrees that it may receive notices from the other Party regarding this Agreement: (a) by email to the email address designated by such Party as a notice address for the Enterprise Contract; (b) by personal delivery; (c) by registered or certified mail, return receipt requested; or (d) by nationally recognized courier service. Notice will be deemed given upon written verification of receipt.

**10.6 Nonwaiver.** Any failure or delay by either Party to exercise or partially exercise any right, power or privilege under this Agreement will not be deemed a waiver of any such right, power or privilege under this Agreement. No waiver by either Party of a breach of any term, provision or condition of this Agreement by the other Party will constitute a waiver of any succeeding breach of the same or any other provision hereof. No such waiver will be valid unless executed in writing by the Party making the waiver.

**10.7 Publicity.** Neither Party will issue any publicity materials or press releases that refer to the other Party or its Affiliates, or use any trade name, trademark, service mark or logo of the other Party or its Affiliates in any advertising, promotions or otherwise, without the other Party’s prior written consent.

**10.8 Relationship of Parties.** The relationship of the Parties will be that of independent contractors, and nothing contained in this Agreement will create or imply an agency relationship between Buyer and Seller, nor will this Agreement be deemed to constitute a joint venture or partnership or the relationship of employer and employee between Buyer and Seller. Each Party assumes sole and full responsibility for its acts and the acts of its Personnel. Neither Party will have the authority to make commitments or enter into contracts on behalf of, bind, or otherwise oblige the other Party.

**10.9 Severability.** If any term or condition of this Agreement is to any extent held invalid or unenforceable by a court of competent jurisdiction, the remainder of this Agreement will not be affected thereby, and each term and condition will be valid and enforceable to the fullest extent permitted by law.

**10.10 Subcontracting.** Seller may use Subcontractors in its performance under this Agreement, provided that: (a)) Seller remains responsible for all its duties and obligations hereunder and the use of any Subcontractor will not relieve or reduce any liability of Seller or cause any loss of warranty under this Agreement; and (b) Seller agrees to be directly liable for any act or omission by such Subcontractor to the same degree as if the act or omission were performed by Seller such that a breach by a Subcontractor of the provisions of this Agreement will be deemed to be a breach by Seller. The performance of any act or omission under this Agreement by a Subcontractor for, by or through Seller will be deemed the act or omission of Seller. Upon request, Seller will identify to Buyer any Subcontractors performing under this Agreement, including any that have access to Buyer Data, and such other information reasonably requested by Buyer about such subcontracting.

## **11. Definitions.**

**11.1 “Affiliate”** means, with respect to a Party, any entity that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with such Party.

**11.2 “AMI”** means a way that the Software offered by Seller under an Enterprise Contract Listing may be provisioned to Buyer where the Software is delivered in a machine image using the Amazon Machine Image functionality of AWS Services. Buyer deploys and runs the AMI Image containing the AMI Software under Buyer’s own AWS Services account on AWS Services infrastructure.

**11.3 “AMI Image”** means the specific machine image in which AMI Software is delivered to Buyer using the Amazon Machine Image functionality of AWS Services, including the AMI Software, the operating system and all applications, services and information included therein.

**11.4 “AWS Marketplace”** means the software marketplace operated by Amazon Web Services, Inc. located at <https://aws.amazon.com/marketplace/> as it may be updated from time to time.

**11.5 “AWS Services”** means the cloud computing services offered by Amazon Web Services, Inc. as they may be updated from time to time.

**11.6 “Buyer Data”** means all data, records, files, information or content, including text, sound, video, images and software, that is (a) input or uploaded to, or collected, received, processed, generated or stored by, the Software in connection with this Agreement, or (b) derived from (a). Buyer Data is Confidential Information of Buyer.

**11.7 “Buyer Materials”** means any property, items or materials, including Buyer Data, furnished by Buyer to Seller for Seller’s use in the performance of its obligations under this Agreement.

**11.8 “Contractor”** means any third-party contractor of Buyer or other third-party performing services for Buyer, including outsourcing suppliers.

**11.9 “Documentation”** means the user guides, manuals, instructions, specifications, notes, documentation, printed updates, “read-me” files, release notes and other materials related to the Software (including all information included or incorporated by reference in the applicable Enterprise

Contract Listing), its use, operation or maintenance, together with all enhancements, modifications, derivative works, and amendments to those documents, that Seller publishes or provides under this Agreement.

**11.10 “Enterprise Contract Listing”** means an offer by Seller, as set forth in the detail page on the AWS Marketplace, to license Software and provide Support Services subject to this Enterprise Contract.

**11.11 “Entitlement Pricing”** means a pricing model for AMI Software or SaaS Software Subscriptions where Buyer purchases a quantity of usage upfront.

**11.12 “Licensed Materials”** means the Software, Documentation and any other items, materials or deliverables that Seller provides, or is obligated to provide, under this Agreement.

**11.13 “Metered Pricing”** means a pricing model for AMI Software or SaaS Software Subscriptions where Buyer pays as it goes based on the quantity of its usage of the Software.

**11.14 “Personnel”** means a Party or its Affiliate’s directors, officers, employees, non-employee workers, agents, auditors, consultants, contractors, subcontractors and any other person performing services on behalf of such Party (but excludes the other Party and any of the foregoing of the other Party).

**11.15 “Proprietary Rights”** means all intellectual property and proprietary rights throughout the world, whether now known or hereinafter discovered or invented, including, without limitation, all: (a) patents and patent applications; (b) copyrights and mask work rights; (c) trade secrets; (d) trademarks; (e) rights in data and databases; and (f) analogous rights throughout the world.

**11.16 “SaaS”** means a way that the Software offered by Seller under an Enterprise Contract Listing may be provisioned to Buyer where the Software is delivered to Buyer on a software-as-a-service basis. The SaaS Seller deploys the hosted Software under Seller’s account on the AWS Services infrastructure and is responsible for granting Buyer access to and use of the Software and SaaS Service.

**11.17 “SaaS Service”** means the SaaS Software as deployed and hosted by Seller on the AWS Service infrastructure, any software and other technology provided or made accessible by Seller that Buyer is required or has the option to use in order to access, receive and use the SaaS Software as hosted by Seller, including any software or technology that Buyer is required or has the option to install, operate and use on Buyer’s systems for its use of the SaaS Software, and all related services, functions or responsibilities of Seller inherent in, and necessary for, the proper performance of such software-as-a-service.

**11.18 “Services”** means all services and tasks that Seller provides, or is obligated to provide, under this Agreement, including without limitation Support Services.

**11.19 “Software”** means the computer software identified in the applicable Enterprise Contract Listing and any other software, including any patches, bug fixes, corrections, remediation of security vulnerabilities, updates, upgrades, modifications, enhancements, derivative works, new releases and new versions of the Software that Seller provides, or is obligated to provide, under this Agreement.

**11.20 “Subcontractor”** means any third-party subcontractor or other third party to whom Seller delegates any of its duties and obligations under this Agreement.

**11.21 “Subscription”** means a subscription ordered by Buyer in the AWS Marketplace for the licensing and provision of AMI Software or SaaS Software listed in a Seller Enterprise Contract Listing.

**11.22 “Subscription Entitlement”** means the specified quantity of use of the Software with Entitlement Pricing that Buyer purchases upfront as specified in the applicable Enterprise Contract Listing. The Subscription Entitlement may be based on time, number of hosts, users (and variants thereof) or other parameters.

**11.23 “Support Services”** means the support and maintenance services for the Software that Seller provides, or is obligated to provide, as described in the Enterprise Contract Listing.

**11.24 “System Data”** means data and data elements (excluding Buyer Data) collected by the SaaS Software, SaaS Service or Seller’s computer systems regarding configuration, environment, usage and performance of the SaaS Software or SaaS Service that may be used to generate logs, statistics and reports regarding performance, availability, integrity and security of the SaaS Software.

**11.25 “User”** means an employee, non-employee worker or other member of Buyer or any of its Affiliates’ workforces, Contractor of Buyer or any of its Affiliates or other person or software program or computer systems authorized by Buyer or any of its Affiliates to access and use the Software as permitted under this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement:

**Four Points Technology, LLC**

By: 

Print Name: Amy Moss

Title: Senior Director of Contracts

Date: May 20, 2020

**Commvault Systems, Inc.**

By:   
Sean Mulhern (May 15, 2020)

Print Name: Sean Mulhern

Title: Head of Worldwide Deal Desk

Date: May 15, 2020