

Professional Services Agreement

This PROFESSIONAL SERVICES AGREEMENT (“Agreement”) is entered into, by and between BCC Software, LLC (“BCC”) having a place of business at 75 Josons Drive, Rochester, New York 14623, and the customer (“Customer”).

BCC and Customer expect that from time to time Customer will wish to purchase certain professional services (“Services”) from BCC. To facilitate such purchases, the parties have agreed to this Agreement to establish the general terms and conditions that, together with a Statement of Work (“SOW”) for an individual order and the other documents described therein, will constitute the entire agreement for such order. Each SOW shall be subject to the provisions of this Agreement as though fully set forth in such SOW.

In consideration of the mutual promises and upon the terms and conditions set forth below, the parties agree as follows:

1. SERVICES

- 1.1 **SERVICES TO CUSTOMER.** BCC shall provide the Services to the Customer described in the SOW. Services will be scheduled to begin at a mutually agreeable time. Commencement dates will be scheduled no sooner than five (5) business days after the SOW is signed.
- 1.2 **PERFORMANCE OF SERVICES.** BCC shall perform the Services in a timely and professional manner. Customer shall provide in a timely and professional manner, and at no cost to BCC assistance, cooperation, complete and accurate information and data, equipment, computer and telecommunications facilities, programs, files, documentation, a suitable work environment, and other resources specified in the SOW to enable it to perform the Services (collectively, “Assistance”). BCC shall not be liable for any deficiency in performing the Services if such deficiency results from Customer’s failure to provide full assistance as required hereunder. Assistance includes, but is not limited to, designating a project manager to interface with BCC during the period in which the Services are performed.
- 1.3 **CHANGE REQUEST PROCEDURES.** Material changes to the SOW shall be made only in accordance with the following procedure:
 - (a) The party requesting a change to the SOW shall submit a written Change Request (“CR”) to the other party in accordance with the provisions of this Section.
 - (b) If the requesting party is Customer, then BCC will respond by written notice to Customer within ten (10) business days of receipt of the CR, outlining all impacts of the requested change on the deliverables, schedule, and pricing, and any other conditions upon which BCC’s willingness to accept the CR may depend (collectively, “CR Response”). If the requesting party is BCC, then the CR will identify such impacts and conditions as proposed by BCC.
 - (c) Customer shall accept, reject or propose modifications to each such CR or CR Response given by BCC within ten (10) business days of receipt thereof by Customer. Additional modifications proposed by Customer as part of such response will be handled in accordance with the provisions of Section 1.3(a) above.
 - (d) Each acceptance of a CR or CR Response must be signed by an authorized representative of each party before becoming effective as a modification to the SOW or any other part of this Agreement.

- 1.4 DELAY IN SERVICES. In the event that Services are delayed, either prior to commencement or during the period in which the Services are being performed, for a total of thirty (30) days or more, and the cause of such delay is outside of the control of BCC, the provisions of this Professional Services Agreement shall be subject to re-negotiation between the parties. In the event Customer or any party performing services on behalf of Customer shall be the cause of such delay, the event shall constitute a termination pursuant to the terms of section 3.2.

2. CUSTOMER'S DUTIES AND RESPONSIBILITIES

- 2.1 DATA AND INFORMATION. Customer shall, in a timely manner and at no charge to BCC, give BCC access to all technical data, computer facilities, networks, programs, files, documentation, test data, sample output, or other information and resources that are, in BCC's reasonable opinion, required by BCC for the performance of the Services. BCC shall work diligently to identify as soon as reasonably practicable the resources and information it expects to use. Customer will be responsible for, and assumes the risk of any problems, delays, losses, claims, or expenses resulting from the content, accuracy, completeness, and consistency of all such data, materials, and information supplied by Customer.
- 2.2 EQUIPMENT. When Services are performed on site at Customer's facility, Customer shall provide, at no charge to BCC, such office space, services, and equipment (such as copiers and fax machines) as BCC, in BCC's reasonable opinion, requires to perform the Services. BCC shall work diligently to identify as soon as reasonably practicable the equipment it expects to use.
- 2.3 FEES FOR SERVICES. Customer shall pay BCC the fees for the Services. Prepayment of Services is required prior to scheduling and start of Services.
- 2.4 AVAILABILITY OF SERVICES. Services purchased pursuant to an SOW must be used within 365 days from the date on which that SOW is signed by both parties. No full or partial refund will be given for any part of the Services that are not used within that 365 day period.
- 2.5 REIMBURSABLE COSTS. Customer shall reimburse BCC for reasonable costs and expenses, including, but not limited to, travel, mileage, lodging and applicable material and shipping fees ("Reimbursable Expenses"). Customer will be provided with an invoice for Reimbursable Expenses with payment required thirty (30) days after the invoice date. BCC will make all necessary travel arrangements.
- 2.6 TAXES. Customer shall pay or reimburse any and all federal, state or local sales, use, excise or other taxes arising from or related to this Agreement (other than taxes based on BCC's net income).

3. TERMINATION

- 3.1 TERM. The term of this Agreement shall commence on the date that the SOW has been signed by both parties and shall continue until terminated by BCC or Customer under the terms of Section 3.2 below.
- 3.2 TERMINATION. BCC and Customer shall have the right to terminate this Agreement, with or without cause, upon thirty (30) days prior written notice to the other party. Except as otherwise expressly provided herein, each party shall have the right to terminate this Agreement for cause upon a material breach of the other party's obligations hereunder and its failure to cure such breach within ten (10) days after receipt of written notice thereof from the non-breaching party. Notwithstanding the foregoing, failure to make any payment when due which is not cured in five (5) days after receipt of written notice shall constitute termination for cause. BCC will stop all work and Services being provided upon receipt of written notice of termination from Customer. Customer will pay to BCC all Reimbursable Expenses incurred up to receipt of notice of termination, the cost of all materials and services obtained for the project which cannot be cancelled or returned plus an amount equal to the profit earned for the prorated portion of the project completed to the date of termination.

4. **NO SOLICITATION.** During the period commencing upon the date hereof and continuing until three hundred sixty-five (365) days after the termination of the term of this Agreement, neither Customer nor its agents or employees shall directly or indirectly solicit or hire (on Customer's behalf or on behalf of any third party) any of BCC's employees. For three hundred sixty-five (365) days following the termination of the Services, neither BCC nor its employees shall directly or indirectly solicit or hire any employees of Customer as long as they are still employed by Customer.
5. **RELATIONSHIP OF PARTIES**
- 5.1 **INDEPENDENT CONTRACTORS.** Each party will be and act as an independent contractor and not as an agent or partner of the other party for any purpose related to this Agreement or the transactions contemplated by this Agreement. Under no circumstances shall BCC or any of its employees, agents or authorized representatives be construed to be an employee, agent or authorized representative of Customer, and neither BCC nor any of its employees, agents or authorized representatives shall be entitled to participate in Customer's profit sharing, pension, bonus or other plans for the benefit of Customer's employees.
- 5.2 **CONTACT PERSON.** Each party will appoint in writing an employee or agent of such party to act as the "Contact Person" for all communications between the parties related to the Services. Each party may change its Contact Person upon written notice to the other.
- 5.3 **COORDINATION WITH THIRD PARTY VENDORS.** BCC understands and agrees that other persons and entities may be involved in supporting Customer's operations. BCC understands and agrees that BCC's performance may be involved in and related to the activities of such other entities, on Customer's behalf. BCC agrees that it will consult with such other persons or entities and coordinate its services and activities performed to the extent specified in the SOW and to the extent necessary to ensure provision of appropriate, cost effective solutions. Customer agrees and acknowledges that BCC shall in no event be liable for any damages, delays, errors or other liabilities caused by or attributable to the services, actions or inaction of any such third parties engaged by Customer. Further, Customer acknowledges that BCC shall not be responsible for any delays or failures in the performance of BCC's Services hereunder, to the extent that such delays or failures are caused by the actions or inactions of any such third parties engaged by Customer.
- 5.4 **NONASSIGNABILITY.** This Agreement may not be assigned by either party without the other's prior written consent, which consent shall not be unreasonably withheld or delayed, and any such attempted assignment shall be void and of no effect; provided, however, that either party may assign this Agreement to any successor by merger, consolidation or sale of all or substantially all of its assets without the consent of the other party so long as (i) the assigning party gives written notice to the non-assigning party of such assignment and (ii) any such assignment is not to a direct competitor of the non-assigning party. This Agreement will be binding upon the successors and permitted assigns of the parties and the name of a party appearing herein will be deemed to include the names of such party's successors and permitted assigns to the extent necessary to carry out the intent of this Agreement.
6. **MAINTENANCE OF CUSTOM DEVELOPMENT WORK.** Standard maintenance and support services offered by BCC do not cover any customized software or new development, including, but not limited to, mini applications, workflows, automations, or macros developed for Customer. If available, separate maintenance and support may be purchased for these items. Any troubleshooting or debugging of Customer code by BCC will be undertaken subject to Section 5 of this agreement.

7. PROPERTY RIGHTS AND CONFIDENTIALITY.

- 7.1 CREATIONS. Except as subject to Section 7.3, all software programs, source and object codes, specifications, designs, processes, techniques, concepts, improvements, discoveries, ideas, expression, work, findings analyses, conclusions, opinions, recommendations, know-how, designs, programs, tools, applications, interfaces, enhancements, other technical information and inventions, whether or not patentable, used, made or arising in connection with the Services (collectively "Creations") and all patents, copyrights, trade secrets and other intellectual property rights related thereto, will be the sole and exclusive property of BCC. BCC agrees that it will not license or deliver to any other person or entity any custom software code sequences containing Customer's Confidential Information and will protect such Confidential Information pursuant to this Section. Nothing contained in this Agreement shall be construed as conferring by implication, estoppel or otherwise upon Customer any license or other right, title, or interest in or to the Creations and/or the intellectual property related thereto except to the extent that a Creation is a created in the course of performing the Services, in which case it shall be licensed solely as provided in this Section. Nothing in this Agreement shall be construed to create an obligation to provide to Customer or its end users any updates or upgrades to any Creation.
- 7.2 FURTHER ASSISTANCE. Customer agrees to assist BCC, at BCC's sole cost, as reasonably requested to assign, evidence, perfect, register and enforce BCC's rights in and ownership of all patents, copyrights and other intellectual property relating to the Creations in any and all countries, including without limitation the execution of additional instruments of conveyance and assisting BCC with applications for patents, copyrights or other intellectual property registrations.
- 7.3 LICENSE. BCC hereby grants to Customer a fully paid, non-exclusive, non-transferable, license (without the right to grant sublicenses) to use the Creations for internal purposes only and to make such copies of the Creations as may be reasonably necessary for such internal use. Nothing contained in this Agreement shall be construed as conferring by implication, estoppel or otherwise upon Customer any license or other right, title, or interest in or to the Creations (including without limitation, the right to reproduce, sell, or distribute the Creations) except those expressly granted in this Section. BCC retains the right, subject to the provisions regarding Confidential Information in this Agreement, to use any Creations developed as part of the Services in any manner, whether commercially or internally.
- 7.4 CONFIDENTIAL INFORMATION.
- (a) Definition. The term "Confidential Information" shall mean any information disclosed by one party to the other in connection with this Agreement which is in oral, written, graphic, machine readable or other tangible form including but not limited to customer information or lists. Confidential Information may also include information that is disclosed orally, provided that in the case of oral disclosures, such information is designated as confidential at the time of disclosure.
- (b) Obligation. Each party shall treat as confidential all Confidential Information received from the other party, shall not use such Confidential Information except as expressly permitted under this Agreement, and shall not disclose such Confidential Information to any third party without the other party's prior written consent. Without limiting the foregoing, each party shall use at least the same degree of care which it uses to prevent the disclosure of its own confidential information of like importance, but in no event with less than reasonable care, to prevent the disclosure of Confidential Information disclosed to it by the other party under this Agreement.

(c) Exceptions. Notwithstanding the above, the restrictions of this Section shall not apply to information that: (1) was independently developed by employees, contractors or other agents of the receiving party without any use of the Confidential Information of the other party; (2) becomes known to the receiving party, without restriction, from a source other than the other party hereto without breach of this Agreement and otherwise not in violation of the other party's rights to the best knowledge of the receiving party; (3) was in the public domain at the time it was disclosed or has come into the public domain through no act or omission of the receiving party, its employees, contractors, agents or representatives; (4) was known to the receiving party, without restriction, at the time of disclosure; or (5) is disclosed pursuant to the order or requirement of a court, administrative agency, or other governmental body, provided, however, that the receiving party shall provide prompt notice thereof to the other party and shall use its reasonable efforts to obtain confidential treatment of such Confidential Information in consultation with the other party.

(d) Customer Content. Subject to the terms and conditions of this Agreement, Customer hereby grants BCC a limited, non-exclusive, non-transferable royalty free license for the term of this Agreement to use its Confidential Information internally only as required in order for BCC to perform the Services hereunder. BCC shall have the right, subject to the prior written consent of Customer, not to be unreasonably withheld, to sublicense to its permitted subcontractors Customer's rights under this license grant solely as required to perform the Services hereunder and only in accordance with the terms of this Agreement. Customer warrants and represents that the content of any Confidential Information or other material and data it provides to BCC shall not: (a) infringe any third party's copyright, patent, trademark, trade secret or other proprietary rights or rights of publicity or privacy; (b) violate any law, statute, ordinance or regulation (including without limitation the laws and regulations governing export control, unfair competition, anti-discrimination or false advertising); (c) be defamatory, trade libelous, unlawfully threatening or unlawfully harassing; (d) contain obscenity or pornography; or (e) contain any viruses, Trojan horses, worms, time bombs, cancelbots or other computer programming routines that are intended to damage, detrimentally interfere with, surreptitiously intercept or expropriate any system, data or personal information.

(e) Notification. Each party agrees to notify the other promptly in the event of any breach of its security pursuant to which disclosure or misappropriation of the other party's Confidential Information might occur. Each party shall, upon request of the other, take all other reasonable steps necessary to recover and prevent the misuse or further disclosure of any misappropriated or disclosed Confidential Information disclosed to or placed in the possession of each party by virtue of this Agreement.

(f) Remedies. Unauthorized use by a party of the other party's Confidential Information will diminish the value of such information. Therefore, if a party breaches any of its obligations with respect to confidentiality or unauthorized use of Confidential Information hereunder, the other party shall be entitled to equitable relief to protect its interest therein, including but not limited to injunctive relief, as well as money damages.

8. **WARRANTY.** BCC will perform the Services rendered hereunder in a professional and workmanlike manner. Except as expressly set forth in this Agreement, BCC makes no warranties written or oral, either express, implied or statutory, including, without limitation, any warranty or merchantability or fitness for a particular purpose.

9. **LIMITATIONS OF LIABILITY.** NEITHER PARTY SHALL, UNDER ANY CIRCUMSTANCES, HAVE ANY LIABILITY TO THE OTHER FOR ANY INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES (INCLUDING, WITHOUT LIMITATION, LOSS OF REVENUE OR PROFITS, OR LOSS OF BUSINESS OR BUSINESS INTERRUPTION) EVEN IF SUCH PARTY HAS BEEN MADE AWARE OF THE POSSIBILITY OF SUCH DAMAGES, AND ANY SUCH CLAIM IS HEREBY WAIVED BY THE PARTIES. IN ADDITION, BCC WILL NOT BE LIABLE FOR ANY DAMAGES CAUSED BY DELAY IN DELIVERY OR FURNISHING OF THE SERVICES. IN NO EVENT SHALL THE AGGREGATE LIABILITY OF BCC HEREUNDER EXCEED THE AMOUNT OF FEES ACTUALLY RECEIVED BY BCC UNDER THE SOW GIVING RISE TO A CLAIM.

10. **INDEMNITY.** Customer shall indemnify and hold BCC harmless from and will defend against any and all judgments, costs, and expenses reasonably incurred, including without limitation reasonable attorneys' fees, of BCC therefore, as a result of any claims, suits, actions, demands, and threats (collectively, "Claims") related to or arising out of or in connection with (a) the use or combination of any Service or Creation, or any derivative work thereof with any other documentation, goods, or services of Customer, its End Users, or any third party other than a third party contractor of BCC acting at the request of BCC (including but not limited to Customer's content); (b) the improper use of any Service or Creation or any derivative work thereof, or the failure to use an update or superseding version as and when provided by BCC, or (c) any modification or alteration of any Creation, an update or any derivative work thereof other than by or on behalf of BCC, where such Claim would not have arisen except for such use, combination, modification or alteration.
11. **DISPUTE RESOLUTION: GOVERNING LAW.** Should a dispute arise between the parties under or relating to this Agreement, each party agrees that prior to initiating any formal proceeding against the other (except for the seeking of injunctive relief), the parties will comply with the following dispute resolution process: Each party will initially designate a representative for purposes of seeking to amicably resolve the dispute. The parties' representatives will arrange to promptly meet and discuss in good faith the resolution of the dispute. If the parties' representatives are unable to resolve the dispute within fifteen (15) business days, either may, upon written notice to the other party, require that the dispute be submitted to more senior representatives within each party ("Senior Representatives"). The Senior Representatives of each party will meet as soon as possible to negotiate in good faith to resolve the dispute. If the Senior Representatives are unable to resolve the dispute within fifteen (15) business days after submission of the dispute to them, or such longer period for resolution as may be mutually agreed in writing by the Senior Representatives, the parties may seek resolution of the dispute by nonbinding arbitration administered by and under the then-current rules of American Arbitration Association ("AAA"), or in jurisdictions where the AAA is not present, an equivalent independent arbitration organization. The location of the proceeding will be in Monroe County, New York State.
- This Agreement shall be governed by and construed in accordance with the laws of the State of New York without giving effect to principles of conflicts of laws.
12. **ENTIRE AGREEMENT.** This Agreement, along with any SOWs into which it is incorporated by reference, represent the entire agreement of the parties, merging herein and superseding all prior negotiations and agreements between them as to such subject matter. Any and all terms, conditions, and provisions contained in any purchase order, acknowledgment, form or other communications that Customer uses with respect to the transactions contemplated by this Agreement, whether prior or subsequent to the date hereof are agreed to be surplusage and without any force or effect.