

OPENTEXT

OPEN TEXT PROFESSIONAL SERVICES AGREEMENT

IMPORTANT - PLEASE READ CAREFULLY - BY ACCEPTING A QUOTATION OR STATEMENT OF WORK FOR PROFESSIONAL SERVICES FROM OPEN TEXT CORPORATION OR ONE OF ITS AFFILIATES (“OT”) THAT REFERENCES THIS PROFESSIONAL SERVICES AGREEMENT, OR BY RECEIVING THE SERVICES REFERRED TO IN SUCH QUOTATION OR STATEMENT OF WORK, YOU AGREE TO BE LEGALLY BOUND BY ALL THE PROVISIONS OF THIS PROFESSIONAL SERVICES AGREEMENT (“AGREEMENT”).

This Professional Services Agreement (the “**Agreement**”) is between **OT** and **Customer**, and becomes effective on the date of the receipt of the SOW or on the date of the receipt of the order document based on the Proposal (“**Effective Date**”).

Whereas, OT provides consulting, installation, implementation, configuration and other services and Customer wishes to obtain such services;

1.0 Scope of Services

1.1 Professional Services. The terms and conditions of this Agreement shall govern the professional services provided by OT to Customer (the “**Services**”) as described in a statement of work signed by both parties and referencing this Agreement (“**SOW**”) or the proposal provided by OT to the Customer referencing this Agreement (“**Proposal**”).

1.2 Order of Precedence. In the event of any conflict or inconsistency between the Agreement and a SOW or Proposal, the terms of the SOW or Proposal shall prevail.

1.3 Change Orders. SOWs or Proposals may be amended or modified by written supplementary change orders signed by both parties, and thereafter the Services set out in such SOW or Proposal shall be deemed to include the Services described in such supplementary change order.

1.4 Provision of Services. The manner and means used by OT to perform the Services are in the sole discretion and control of OT. OT may make use of subcontractors to perform any of its obligations under this Agreement, provided that the use of any such subcontractors shall not limit or restrict OT’s obligations towards Customer.

1.5 Customer Policies. In advance of the relevant engagement, Customer will provide OT with copies of any applicable Customer security or other policies. OT will not perform Services unless OT agrees to comply with such policies. OT will not be liable for any delays or non-performance to the extent caused by time needed to review any such policies or inability to comply with the policies.

1.6 Schedules and Delivery Dates. OT shall use commercially reasonable efforts to meet the schedules and delivery dates set forth in the applicable SOW or Proposal but does not commit to do so.

1.7 Licensing of OT Standard Software. Under this Agreement, OT is not providing or licensing to Customer any OT standard software programs or products, except for the deliverables specified in a SOW or Proposal. Customer may acquire licenses for other OT software products only under the terms of a separate software license agreement between the parties.

1.8 Customer Cooperation. Customer and OT agree to cooperate in good faith to achieve completion of the Services in a timely and professional manner. Customer acknowledges that failure to adhere to schedules or complete tasks within Customer’s control, or failure to provide timely access to facilities, equipment, technology or complete and accurate information may delay completion of the Services and OT shall not be liable for any such delays or inability to complete the Services to the extent caused by Customer’s non-compliance with this section.

1.9 Affiliate SOWs or Proposals. For the purposes of this Agreement, “**Affiliate(s)**” means any entity controlled by, controlling, or under common control with a party to this Agreement. Control shall exist through ownership, directly or indirectly, of a majority of the outstanding equity capital and of the outstanding shares or other securities entitled to vote generally in elections of directors or similar officials. If an entity ceases to meet these criteria, it shall cease to be an Affiliate under this Agreement. The parties agree that an Affiliate of either party may negotiate and sign a SOW or Proposal which references this Agreement and is governed by this Agreement. Customer’s Affiliates shall be considered the Customer for the purposes of such SOW or Proposal. In the event that a Customer Affiliate breaches the provisions of such a SOW or Proposal or breaches the provisions of this Agreement, the Customer shall be liable to OT as if such breach were committed directly by the Customer.

2.0 Intellectual Property Rights and Ownership

2.1 Intellectual Property Rights. Each party will retain all ownership rights to its previously existing intellectual property (including but not limited to trademarks, copyrights, patent rights, trade secrets, confidential or proprietary information, techniques, methods, software, technology, plans, designs, and business processes). OT will retain all

ownership rights to any work product created in connection with this Agreement, including software, documentation, training or educational materials, inventions, innovations and developments (“**Work Product**”).

2.2 License granted to Customer. With respect to the Work Product or other OT-owned intellectual property provided under a SOW or Proposal, OT grants Customer a non-exclusive, non-transferable and non assignable license for the sole purpose of allowing Customer to make use of the Services for its own internal business purposes in the manner contemplated in the applicable SOW or Proposal. Such license is subject to Customer’s payment of all fees and expenses under the related SOW or Proposal.

3.0 Defects in Quality

3.1 Defects in quality upon delivery of the Work Product. A defect in quality shall lie if a Work Product:

- does not manifest the qualities specified in the individual agreement; or
- is not suitable for use in compliance with the provisions as defined in the individual agreement.

3.2 Deadlines. Any claims based on defects in quality shall become time-barred after 12 months. The limitations period shall commence upon delivery. The relevant statutory provisions shall apply in the event of defects that have been maliciously concealed or where a guarantee is provided.

3.3 Reporting of defects. Customer shall document for OT in a clear and reproducible manner any defects that occur and shall report same to OT in writing without undue delay following discovery thereof.

3.4 Right to subsequent performance. Should defects be reported to OT, which are subject to OT’s liability for defects in quality, OT shall render subsequent performance free of charge within a reasonable period. In this respect, OT shall take into account the difficulty in rectifying the relevant defect in quality and its effect on the Customer. Defects in quality may also be rectified by way of written or telephonic instructions to Customer, through remote communications or the sending of data carriers bearing corrective software. In such cases, Customer shall be obliged to implement the relevant instructions. To the extent that this may reasonably be expected of Customer, it shall facilitate remote communications or upload the corrective software immediately following delivery thereof. A defect shall also be deemed rectified if it is circumvented, provided use of the Work Product for the purpose contemplated under the relevant agreement is not adversely affected to a significant extent, and provided Customer may reasonably be expected to tolerate a circumvention. Subsequent performance may be rendered, at OT’s choice, by rectifying the relevant defect or by rendering new delivery of the delivered programs.

3.5 Additional costs. OT shall bear the expenses necessary for purposes of subsequent performance, in particular transport, travel, work and materials costs. OT reserves the right to invoice the Customer additional costs that arise as a result of Customer transferring the Work Product to a place other than that which was stipulated for delivery.

3.6 Failure of subsequent performance. Should subsequent performance fail within a reasonable period, Customer shall grant OT a reasonable period for subsequent performance, unless Customer cannot reasonably be expected to tolerate such a grace period or OT refuses to render subsequent performance. Following expiry of such grace period, Customer must declare within a reasonable period whether it requires additional services or asserts the claims set forth below.

Customer may, at its choice, either rescind the SOW or Proposal or reduce the compensation. Customer may not rescind the Agreement if the defect in the Work Product is insignificant. In the event of rescission, OT may demand reasonable compensation for use based on the benefits derived from the Work Product by Customer. Such compensation shall be calculated on the basis of a four-year total period of use of the Work Product, less a reasonable reduction in accordance with the degree to which use of the Work Product was restricted as a result of the defect.

In addition to rescission or reduction of the compensation, Customer may demand compensatory damages instead of performance or reimbursement of fruitless expenses should fault be attributable to OT.

3.7 Exclusion of liability for defects in quality. Should Customer itself modify the Work Product or arrange to have the Work Product modified by third parties, any claims based on defects in quality shall lapse, unless Customer proves that the defects that occurred are not attributable to such modification and that the error analysis and rectification by OT will not be affected thereby.

3.8 No independent action. Customer may not itself rectify the error and demand compensation for any expenses required there for.

3.9 Defects in quality in other services. Should services other than those specified in Section 3.1 and owed by OT pursuant to an individual agreement not be provided as owed, the relevant statutory provisions shall apply. Claims based on defects in quality shall lapse in 12 months, commencing upon delivery.

4.0 Defects in Title, Third Party Intellectual Property Rights

4.1 Defects in title. A defect in title shall lie if the rights required for use of the Work Product in compliance with the relevant agreement have not been validly granted, in particular, if third party industrial property rights are infringed as a result of use in compliance with the Agreement.

4.2 Deadlines. Any claims based on defects shall become time-barred after 12 months. The limitations period shall commence upon delivery. The relevant statutory provisions shall apply in the event of defects that have been maliciously concealed or where a guarantee is provided.

4.3 Reporting of defects. Customer shall document for OT in a clear manner any defects that occur and shall report same to OT in writing without undue delay following discovery thereof.

4.4 Subsequent performance. In the event of defects in title, or should third party industrial property rights have been infringed, OT shall indemnify Customer against any legitimate third party claims in the limits of Section 8 below and shall, at its choice, either:

- procure for Customer the right to continued use of the Work Product; or
- exchange the relevant Work Product/relevant part of the Work Product, provided Customer may reasonably be expected to tolerate same; or
- modify the relevant Work Product /the relevant part of the Work Product to the extent that Customer may reasonably be expected to tolerate same such that there is no longer any infringement of intellectual property rights.

4.5 Other rights of Customer.

Should subsequent performance be impossible, OT shall withdraw the relevant functional block and shall repay Customer the compensation paid by Customer, less reasonable compensation for use that has already occurred. Should fault be attributable to OT, Customer may demand compensatory damages instead of performance or reimbursement of fruitless expenses.

Customer shall be obliged to minimize damage. In this respect, it shall:

- inform OT in good time and in writing of any claim asserted
- not of its own volition acknowledge any claim
- authorize OT to conduct and settle litigation at its own expense, in which respect, Customer shall provide OT with any necessary and reasonable support.

Should Customer itself modify the Work Product or arrange to have the Work Product modified by third parties, any claims based on defects in title shall lapse, unless Customer proves that the defects in title that occurred are not attributable to such modification and that the error analysis and rectification by OT will not be affected thereby.

5.0 Services Fees and Expenses

5.1 Services Fees, Expenses and Applicable Taxes. For the Services provided by OT, Customer agrees to pay OT: (a) the Services fees set forth in the applicable SOW or Proposal ("**Services Fees**"), (b) the travel, accommodation, lodging and out-of-pocket expenses reasonably incurred by OT in the course of providing the Services ("**Expenses**"), and (c) any applicable sales, use, consumption, goods and services, and value-added taxes imposed by the appropriate governments arising out of the provision of services under this Agreement, except taxes imposed on OT's income ("**Applicable Taxes**").

5.2 Time & Materials Model. Unless otherwise set forth in the applicable SOW or Proposal, the Services Fees shall be calculated using a Time & Materials model. For the purposes of this Agreement, "**Time & Materials**" means that Services Fees shall be calculated, invoiced and paid based on the following concepts:

- a) Services Fees shall be calculated by multiplying the number of hours/days worked by OT in respect of the Services by the applicable hourly/daily rate set forth in the applicable SOW or Proposal,
- b) Milestones and acceptance criteria set out in the applicable SOW or Proposal shall only be used for project management purposes, and shall not affect OT's ability to invoice the Customer for applicable Services Fees and Expenses,
- c) Customer is obligated to pay for completed Services as invoiced, regardless of whether all Services in the SOW or Proposal have been completed, and
- d) any reference to "total estimated services fees and expenses", "total fee", "maximum fee", "fee quote" or "quoted fee" (or other similar phrases) shall be deemed to be a good faith estimate of the aggregate Services Fees which is provided for planning and budgeting purposes only, and shall not be deemed to be a binding guarantee that all of the Services will be provided for an aggregate Services Fee equal to or less than such estimate.

5.3 Invoicing and Payment. Unless otherwise set forth in the applicable SOW or Proposal, OT shall be permitted to invoice Customer in arrears on a monthly basis for Services Fees, Expenses incurred, and Applicable Taxes. All invoices issued under this Agreement shall be payable thirty (30) days from the date of invoice. Overdue amounts shall accrue interest at the lesser of two percent (2.0%) per month or the maximum amount permitted by law. OT may, at its option, suspend any ongoing work until any overdue account is brought current.

6.0 Term and Termination

6.1 Term. The term of this Agreement shall commence on the Effective Date and shall continue until terminated in accordance with the terms herein.

6.2 Termination for Convenience. Either party may terminate this Agreement or any individual SOW or Proposal for convenience by providing written notice to the other party indicating their intention to terminate. This Agreement or the individual SOW or Proposal (as the case may be) will automatically terminate thirty (30) days following the delivery of such notice.

6.3 Termination for Default. Either party may terminate this Agreement for default if the other party commits a material breach of the Agreement, provided (i) the non-breaching party provides the breaching party with written notice of breach and a thirty (30) day period to cure the breach ("**Cure Period**"), and (ii) the breaching party fails to cure each breach by the end of the Cure Period. Any termination of this Agreement shall be without prejudice to each right or remedy which the non-breaching party may possess against the breaching party under this Agreement, at law, in equity, or otherwise.

6.4 Effect of Termination. Upon the termination of this Agreement, any SOW or Proposal that is not expressly terminated at the same time in accordance with the terms herein shall continue to be governed by this Agreement as if this Agreement had not been terminated. In addition, upon termination of a SOW or Proposal, OT may immediately invoice Customer for all applicable Services Fees, Expenses incurred and Applicable Taxes related to the Services provided by OT up to the date of termination, and Customer shall pay such invoice in accordance with the terms of this Agreement.

6.5 Surviving Sections. The obligations of any party that have been incurred prior to the effective date of termination (including, without limitation, the obligations of Customer regarding payment of Services Fees and Expenses), and other provisions of this Agreement that by their nature extend beyond the expiration or termination of this Agreement, shall continue in full force and effect notwithstanding the expiration or termination of this Agreement and whether or not an invoice has been rendered with respect thereto.

7.0 Confidentiality

7.1 Confidentiality. By virtue of this Agreement, each party (a "**Disclosing Party**") may disclose to the other party (a "**Receiving Party**") information that is confidential and otherwise proprietary ("**Confidential Information**"). Subject to the exceptions listed below, Confidential Information shall include any information that is clearly identified in writing at the time of disclosure as confidential or confirmed as confidential in writing within thirty (30) days of disclosure, as well as deliverables, Work Product and any information that, due to the circumstances under which it is disclosed, a reasonable person would infer as confidential. Confidential Information does not include any information that: (a) is or becomes a part of the public domain through no act or omission of the Receiving Party; (b) was in the Receiving Party's lawful possession prior to the disclosure and had not been obtained by the Receiving Party either directly or indirectly from the Disclosing Party; or (c) is lawfully disclosed to the Receiving Party by a third party without restriction on disclosure; or (d) is independently developed by the Receiving Party by employees or agents without access to the Disclosing Party's Confidential Information. Each party agrees, for the term of this Agreement and for five (5) years after its termination, to hold the other party's Confidential Information in strict confidence, not to disclose such Confidential Information to third parties (other than professional advisers who are bound by appropriate obligations of confidentiality) unless authorized to do so by the Disclosing Party, and not to use such Confidential Information for any purpose except as expressly permitted hereunder. Each party agrees to take reasonable steps to protect the other party's Confidential Information to ensure that such Confidential Information is not disclosed, distributed or used in violation of the provisions of this Agreement. The foregoing prohibition on disclosure of Confidential Information shall not apply to the extent Confidential Information is required to be disclosed by the Receiving Party as a matter of law or by order of a court or by a regulatory body, provided that the Receiving Party promptly notifies the Disclosing Party so that it may seek an appropriate protective order or waive compliance with this section.

8.0 Limitation of Overall OT Liability

OT's total liability for any and all Claims shall be subject to the limitation set out herein:

8.1 For direct damage. OT is liable for the direct damage incurred by the Customer from or in relation to the performance of this Agreement on any legal grounds whatsoever (such as delay, failure to perform or defective performance, warranty for defects), including the restoration of properly-saved data, up to the amount of the services fee paid, however up to a maximum of CHF200,000.- (two hundred thousand) per loss. The total liability under this Agreement is limited to a maximum of CHF1,000,000.00 (one million). Liability for bodily injury that has culpably been caused is excluded from this limitation.

8.2 Liability for further and indirect damage. Any further liability of OT for other or further claims and damage, in particular claims for compensation of direct, indirect or consequential damage, loss of profit, loss of use, unrealized savings, loss of earnings or production and loss of data (except for data restoration costs) - irrespective of their legal grounds - is expressly excluded as far as this is legally permissible.

8.3 Liability for loss of data. In case of a loss of data caused by OT, OT is exclusively liable for the costs of reconstructing saved data that would also have been lost if backup copies had been made at appropriate intervals. The Licensee is responsible for regularly backing up its data. Any failure to fulfill this obligation will be deemed contributory negligence.

9.0 Acceptance

If and to the extent provided by law or agreed in an individual agreement, acceptance shall be taken in accordance with the following terms and conditions:

9.1 Individual and partial services. Should the individual agreement concern several individual services that may be

used by Customer independently of one another (e.g. upgrade of several projects), acceptance shall be taken of such individual services separately and independently of one another. Should partial services be defined in the individual agreements (e.g. project milestones), acceptance shall be taken thereof separately. Total performance of a given individual agreement shall be deemed accepted upon acceptance of all individual or partial services. In the event that final acceptance is agreed to in an individual agreement, objections may be raised in relation to individual and partial services that have already been accepted only where these effect the integrative interaction of the individual and partial services.

9.2 Deadlines. Following performance of the service owed (individual or partial) OT shall provide the Work Product to the Customer for acceptance. Customer shall review the Work Product in full within a period of ten business days and shall notify OT of the result in writing. Should Customer fail to meet its obligations to take acceptance, the Work Product shall be deemed accepted after a period of thirty days. The same shall apply if Customer commences operations with parts of or complete partial services.

9.3 Degree of significance. Acceptance may not be refused where defects ascertained reduce use of the Work Product to only an insignificant degree. Such insignificant errors shall be rectified by OT within the framework of the warranty.

9.4 Rectification of Defects. Should Customer have furnished a written list of defects in good time, OT shall rectify the specified defects within a reasonable period, taking the project plan into account. OT shall again provide the Work Product for (partial) acceptance.

9.5 Record of Acceptance. The contracting parties shall prepare a record of acceptance, declaring or refusing unconditional acceptance. In the event of a refusal, the record of acceptance shall specify for each objection all grounds preventing acceptance and shall provide details of relevant evidence thereof. Both contracting parties shall confirm the record of acceptance by executing same.

10.0 Right to Perform Services for Others

10.1 Right to Perform Services for Others. Subject to OT's compliance with the confidentiality provisions stated herein, nothing in this Agreement shall restrict or limit OT from providing services which may be similar to the Services to any other entity in any industry.

11.0 Miscellaneous Provisions

11.1 Non-Solicitation. Customer agrees that at any point during the term of the related SOW or Proposal and for twelve (12) months thereafter, it will not, either directly or indirectly (for example, through a third party recruiter), solicit for employment or similar relationship, any employee or contractor of OT who has performed Services for Customer. The foregoing shall not apply in the event such individuals respond without Customer's encouragement to Customer's general recruitment activities including employment advertisements, job postings, or similar, provided they do not specifically target such individuals.

11.2 Independent Contractors. OT and Customer are independent contractors. Neither OT nor Customer shall have any authority to bind the other in any manner.

11.3 Waiver, Amendment, Assignment. No failure or delay by any party in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege. No waiver of any provision of this Agreement is binding on either party unless set out in a mutually signed written waiver. This Agreement shall only be amended by a written document signed by OT and Customer stating such document is an amendment or an addendum hereto. This Agreement may be assigned by OT to an Affiliate of OT or to a successor-in-interest/title of OT without consent. This Agreement shall not be assigned by Customer, in whole or in part, and whether by operation of law, change of control or in any other manner, without OT's prior written consent.

11.4 Vienna Convention. All provisions of the United Nations Convention On Contracts For The International Sale of Goods are hereby rejected by the parties and excluded from this Agreement in their entirety.

11.5 Governing Law. This Agreement shall be governed by the laws of Switzerland, excluding its conflicts or choice of law rules. Except for injunctive relief required by either party to protect its intellectual property (which may be sought in any relevant jurisdiction), all related litigation shall occur in the courts located in such jurisdiction. If Customer or OT commence any litigation or proceeding against the other related to this Agreement, the prevailing party shall be entitled to an award of its reasonable attorneys fees and court costs.

11.6 Force Majeure. Except for (i) payment obligations or (ii) any obligations relating to the protection of or restrictions applicable to the other party's Confidential Information or intellectual property, neither party shall be liable to the other or in breach of this Agreement due to any failure or delay in performance of its obligations to the extent the failure or delay arises (and only for the duration that the affected party is precluded from performing) as a result of acts of God, fire, disaster, explosion, vandalism, storm, adverse weather conditions, strikes, labor disputes or disruptions, epidemics, wars, national emergencies, riots, civil disturbances, shortages of materials, actions or inactions of government authorities, terrorist acts, lockout, work stoppages or other labor difficulties, border delays, failures or interruptions of utilities or telecommunications equipment or services, system failures or any other cause that is beyond the reasonable control of that party.

11.7 Severability. Should any provision of this Agreement be deemed contrary to applicable law or unenforceable by any court of competent jurisdiction, the provision shall be considered severed from this Agreement but all remaining provisions shall continue in full force.

11.8 Export Laws. Services may be subject to export control laws, including the U.S. Export Administration Act and its associated regulations. Customer agrees to comply strictly with all such regulations and acknowledges that it has the responsibility to obtain licenses to export, re-export, or import Services.

11.9 Press Release. Customer agrees OT may use and disclose Customer's name and the nature of this Agreement and associated SOWs or Proposals in OT public press releases and marketing materials.

11.10 Entire Agreement. This Agreement, together with each written schedule, SOW or Proposal, amendment or written addendum to this Agreement signed by OT and Customer, sets forth the entire agreement between OT and Customer with respect to the subject matter hereof, and supersedes all prior related oral and written agreements and understandings between the parties.

11.11 Third Party Rights. No term of this Agreement is intended to confer a benefit on, or to be enforceable by, any person or entity who is not a party to this Agreement; provided that either party's Affiliate which enters into a SOW or Proposal shall be deemed a party to the Agreement for the purposes of that SOW OR PROPOSAL.

11.12 Legal Review and Interpretation. It is acknowledged that this Agreement was initially prepared by OT. Both parties, however, have had an opportunity for legal review of all terms. The parties therefore agree that, in interpreting any issues which may arise, any rules of construction related to who prepared the Agreement shall be inapplicable, each party having contributed or having had the opportunity to clarify any issue. In addition, the headings used in this Agreement are for convenience only and do not in any way limit or otherwise affect the meaning of any terms of this Agreement.

11.13 Notices. Any notice under this Agreement must be given by a party in writing and is deemed effective when sent via FedEx or other commercial courier to the other party's address specified at the beginning of this Agreement or on the most recent SOW or Proposal, addressed to General Counsel or Chief Legal Officer. Notices with respect to Services should be sent to the contact persons listed in the relevant SOW or Proposal.

11.14 Calculation of Dates. For the purposes of this Agreement, a day shall mean a calendar day.