

**EC America Rider to Product Specific License Terms and Conditions  
(for U.S. Government End Users)**

1. **Scope.** This Rider and the attached Pivot3, Inc. ("Manufacturer") product specific license terms establish the terms and conditions enabling EC America ("Contractor") to provide Manufacturer's information technology products and services to Ordering Activities under EC America's GSA MAS IT70 contract number GS-35F-0511T (the "Schedule Contract"). Installation and use of the information technology shall be in accordance with this Rider and Manufacturer Specific Terms attached hereto, unless an Ordering Activity determines that it requires different terms of use and Manufacturer agrees in writing to such terms in a valid delivery order placed pursuant to the Schedule Contract.
2. **Applicability.** Whereas GSA and EC America agreed at the time of Schedule Contract award upon a base set of terms and conditions applicable to all manufacturers and items represented on the Schedule Contract; and Whereas, the parties further agreed that all product specific license, warranty and software maintenance terms and conditions would be submitted at the time each new manufacturer was to be added to the Schedule Contract; Now, Therefore, the parties hereby agree that the product specific license, warranty and software maintenance terms set forth in Attachment A hereto (the "Manufacturer Specific Terms" or the "Attachment A Terms") are incorporated into the Schedule Contract, but only to the extent that they are consistent with Federal law (e.g., the Anti-Deficiency Act (31 U.S.C. § 1341), the Contracts Disputes Act of 1978 (41 U.S.C. §§ 7101 *et seq.*), the Prompt Payment Act (31 U.S.C. §§ 3901 *et seq.*), the Anti-Assignment statutes (31 U.S.C. § 3727 and 41 U.S.C. § 15), DOJ's jurisdictional statute 28 U.S.C. § 516 (Conduct of Litigation Reserved to the Department of Justice (DOJ)), and 28 U.S.C. § 1498 (Patent and copyright cases)). To the extent any Attachment A Terms are inconsistent with Federal law (See, FAR 12.212(a)), such inconsistent terms shall be superseded, unenforceable and of no legal force or effect in all resultant orders under the Schedule Contract, including but not limited to the following provisions:
  - a) **Contracting Parties.** The GSA Customer ("Licensee") is the "Ordering Activity", defined as the entity authorized to order under GSA MAS contracts as set forth in GSA Order OGP 4800.2I, as may be revised from time to time.
  - b) **Changes to Work and Delays.** Subject to GSAR Clause 552.238-81, Modifications (Federal Supply Schedule) (April 2014) (Alternate I – JUN 2016) and (Alternate II – JUN 2016), and 52.212-4(f) Excusable Delays (JUN 2010) regarding which the GSAR and the FAR provisions take precedence.
  - c) **Contract Formation.** Subject to FAR 1.601(a) and FAR 43.102, the GSA Customer Purchase Order must be signed by a duly warranted Contracting Officer, in writing. The same requirement applies to contract modifications affecting the rights of the parties. All terms and conditions intended to bind the Government must be included within the contract signed by the Government.
  - d) **Termination.** Clauses in the Manufacturer Specific Terms referencing termination or cancellation are superseded and not applicable to any GSA Customer order. Termination shall be governed by the FAR, the underlying GSA Schedule Contract and the terms in any applicable GSA Customer Purchase Orders. If the Contractor believes the GSA Customer to be in breach, it must file a claim with the Contracting Officer and continue to diligently pursue performance. In commercial item contracting under FAR 12.302(b), the FAR provisions dealing with disputes and continued performance cannot be changed by the Contracting Officer.
  - e) **Choice of Law.** Subject to the Contracts Disputes Act, the validity, interpretation and enforcement of this Rider shall be governed by and construed in accordance with the Federal laws of the United States. In the event the Uniform Computer Information Transactions Act (UCITA) or any similar Federal laws or regulations are enacted, to the extent allowed by Federal law, they will not apply to this Rider or the underlying Schedule Contract.
  - f) **Equitable remedies.** Equitable remedies are generally not awarded against the Government absent a statute providing therefore. In the absence of a direct citation to such a statute, all clauses in the Manufacturer Specific Terms referencing equitable remedies are superseded and not applicable to any GSA Customer order.
  - g) **Unilateral Termination.** Unilateral termination by the Contractor does not apply to a GSA Customer Purchase Order and all clauses in the Manufacturer Specific Terms referencing unilateral termination rights of the Manufacturer are hereby superseded.
  - h) **Unreasonable Delay.** Subject to FAR 52.212-4(f) Excusable delays, the Contractor shall be liable for default unless the nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after commencement of any excusable delay, setting forth the full particulars in connection

therewith, shall remedy such occurrence with all reasonable dispatch and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

- i) **Assignment.** All clauses regarding the Contractor's assignment are subject to FAR 52.232-23, Assignment of Claims (JAN 1986) and FAR 42.12 Novation and Change-of-Name Agreements (Sep. 2013). All clauses governing the Contractor's assignment in the Manufacturer Specific Terms are hereby superseded.
- j) **Waiver of Jury Trial.** Waivers of Jury Trials are subject to FAR 52.233-1 Disputes (JULY 2002). The Government will not agree to waive any right that it may have under Federal law. All clauses governing a waiver of jury trial in the Manufacturer Specific Terms are hereby superseded.
- k) **Government Indemnities.** This is an obligation in advance of an appropriation that violates anti-deficiency laws (31 U.S.C. § 1341 and 41 U.S.C. § 6301), since the GSA Customer commits to pay an unknown amount at an unknown future time. The violation occurs when the commitment is made, i.e., when the agreement featuring this clause is incorporated into a Government contract, and not when the clause is triggered. The Interim FAR Rule dated June 21, 2013 and the Office of Legal Counsel opinion dated March 12, 2012 prohibit such indemnifications. All Manufacturer Specific Terms referencing customer indemnities are hereby superseded.
- l) **Contractor Indemnities.** All Manufacturer Specific Terms that violate DOJ's jurisdictional statute (28 U.S.C. § 516) by requiring that the Government give sole control over the litigation and/or settlement to the Contractor are hereby superseded. Nothing contained in the Manufacturer's Specific terms shall be construed in derogation of the U.S. Department of Justice's right to defend any claim or action brought against the U.S., pursuant to its jurisdictional statute.
- m) **Renewals.** All Manufacturer Specific Terms that provide for automatic renewals violate the Anti-Deficiency Act and are hereby superseded. This is an obligation in advance of an appropriation that violates anti-deficiency laws (31 U.S.C. § 1341 and 41 U.S.C. § 6301), since the GSA Customer commits to pay an unknown amount at an unknown future time. The violation occurs when the commitment is made, i.e., when the agreement featuring this clause is incorporated into a Government contract, and not when the clause is triggered.
- n) **Future Fees or Penalties.** All Manufacturer Specific Terms that require the Government to pay any future fees, charges or penalties are hereby superseded unless specifically authorized by existing statutes, such as the Prompt Payment Act (31 U.S.C. § 3901 et seq.) or Equal Access To Justice Act (5 U.S.C. § 504; 28 U.S.C. § 2412).
- o) **Taxes.** Taxes are subject to FAR 52.212-4(k), which provides that the contract price includes all applicable federal, state, local taxes and duties. Contractor shall state separately on its invoices, taxes excluded from the fees, and the GSA Customer agrees to either pay the amount of the taxes (based on the current value of the equipment or services) to Contractor or provide it evidence necessary to sustain an exemption, in accordance with FAR 52.229-1 and FAR 52.229-3.
- p) **Third Party Terms.** When the end user is an instrumentality of the U.S., no license terms bind the GSA Customer unless included verbatim (not by reference) in the EULA, and the EULA is made an attachment to the underlying GSA Schedule Contract. All terms and conditions affecting the GSA Customer must be contained in a writing signed by a duly warranted Contracting Officer. Any third party manufacturer shall be brought into the negotiation, or the components acquired separately under federally-compatible agreements, if any. All Manufacturer Specific Terms that incorporate third party terms by reference are hereby superseded.
- q) **Dispute Resolution and Standing.** Any disputes relating to the Manufacturer Specific Terms or to this Rider shall be resolved in accordance with the FAR, the underlying GSA Schedule Contract, any applicable GSA Customer Purchase Orders, and the Contract Disputes Act. The Ordering Activity expressly acknowledges that EC America as contractor, on behalf of the Manufacturer, shall have standing to bring such claim under the Contract Disputes Act.
- r) **Advertisements and Endorsements.** Pursuant to GSAR 552.203-71, use of the name or logo of any U.S. Government entity is prohibited. All Manufacturer Specific Terms that allow the Contractor to use the name or logo of a Government entity are hereby superseded.
- s) **Public Access to Information.** EC America agrees that the attached Manufacturer Specific Terms and this Rider contain no confidential or proprietary information and acknowledges the Rider shall be available to the public.
- t) **Confidentiality.** Any provisions in the attached Manufacturer Specific Terms that require the Ordering Activity to keep certain information confidential are subject to the Freedom of Information Act (5 U.S.C. § 552), and any order by a United States Federal Court. When the end user is an instrumentality of the U.S. Government, neither this Rider, the Manufacturer's Specific Terms nor the Schedule Price List shall be deemed "confidential information" notwithstanding marking to that effect. Notwithstanding anything in this Rider, the Manufacturer's Specific Terms or

the Schedule Contract to the contrary, the GSA Customer may retain such Confidential Information as required by law, regulation or its bonafide document retention procedures for legal, regulatory or compliance purposes; provided however, that such retained Confidential Information will continue to be subject to the confidentiality obligations of this Rider, the Manufacturer's Specific Terms and the Schedule Contract.

- u) **Alternate Dispute Resolution.** The GSA Customer cannot be forced to mediate or arbitrate. Arbitration requires prior guidance by the head of a Federal agency promulgated via administrative rulemaking according to 5 U.S.C. § 575(c). GSA has not issued any because it considers the Board of Contract Appeals to be an adequate, binding ADR alternative. All Manufacturer Specific Terms that allow the Contractor to choose arbitration, mediation or other forms of alternate dispute resolution are hereby superseded.
- v) **Ownership of Derivative Works.** Provisions purporting to vest exclusive ownership of all derivative works in the licensor of the standard software on which such works may be based are superseded. Ownership of derivative works should be as set forth in the copyright statute, 17 U.S.C. § 103 and the FAR clause at 52.227-14, but at a minimum, the GSA Customer shall receive unlimited rights to use such derivative works at no further cost.

**3. Order of Precedence/Conflict.** To the extent there is a conflict between the terms of this Rider and the terms of the underlying Schedule Contract or a conflict between the terms of this Rider and the terms of an applicable GSA Customer Purchase Order, the terms of the GSA Schedule Contract or any specific, negotiated terms on the GSA Customer Purchase Order shall control over the terms of this Rider. Any capitalized terms used herein but not defined, shall have the meaning assigned to them in the underlying Schedule Contract.

## ATTACHMENT A – PIVOT3

### END USER LICENSE AGREEMENT

#### PIVOT3

**This License Agreement (the “Agreement”) is a legal agreement between the Ordering Activity under GSA Schedule contracts (“Ordering Activity” or “End User” or “You”) and Pivot3, Inc (“Pivot3”). This Agreement governs your use of the Pivot3 Software, the Pivot3 Management Application(s), and other related software distributed with this Agreement (the “Software”) and the accompanying end-user technical documentation and help files provided by Pivot3 with the Software (the “Documentation”). You must accept the terms of this Agreement in writing before using such Software and Documentation.**

**If you do not agree to the terms of the Agreement in writing, you are not granted any rights whatsoever in the Software or Documentation. If you are not willing to be bound by these terms and conditions, do not execute this Agreement in writing.**

#### **1. LICENSE.**

**1.1 License Grant.** Subject to the terms and conditions of this Agreement, Pivot3 grants to End User a personal, limited, non-exclusive, non-transferable, non-sublicensable right and license to (a) reproduce (solely to download and install) and execute one (1) copy of the Software on a single server controlled by End User solely for End User’s internal business purposes and (b) make one (1) copy of the Software and Documentation solely for backup and/or archival purposes.

**1.2 Restrictions.** End User shall not, and shall not permit any third party to: (a) distribute, sell, lease, license, rent, loan, or otherwise transfer the Software or Documentation, with or without consideration; (b) access or use the Software or Documentation except as expressly permitted above; (c) make available the Software via a timesharing, service bureau, or other arrangement; (d) reverse engineer, decompile, or disassemble the Software or otherwise attempt to derive the source code thereof; (e) modify, or create or develop derivative works based upon, the Software or Documentation, in whole or in part; (f) reproduce the Software or Documentation, except as expressly permitted in Section 1.1(b) above; (g) incorporate the Software into, or combine the Software with, other software not licensed under this Agreement; (h) remove, alter, or obscure any proprietary notices or labels on the Software or Documentation; (i) use the Software or Documentation in violation of any law or regulation; or (j) use the Software or Documentation for purposes of competitive analysis of the Software or the development of a competing software product or service.

**1.3 Third Party Software.** Certain items of software included with the Software are licensed from third parties and may have terms and conditions provided by such third parties (“Third Party Software”). The Third Party Software is not subject to the terms and conditions of Sections 1.1 and 1.2. Nothing herein shall bind the Ordering Activity to any Third Party terms unless the terms are provided for review and agreed to in writing by all parties.

**1.4 Additional Software and/or Services.** Except as expressly provided herein, neither Pivot3 nor any of its licensors or suppliers is obligated to provide any maintenance or support services or updates or upgrades to the Software. In the event that Pivot3 does provide End User with updates or upgrades to the Software, the terms and conditions of this Agreement shall apply to End User’s use of any such updates or upgrades.

**2. PROPRIETARY RIGHTS.** The Software is licensed, not sold. Pivot3 and its licensors retain exclusive ownership of all worldwide copyrights, trade secrets, patents, and all other intellectual property

rights throughout the world and all applications and registrations therefore, in and to the Software and Documentation and any full or partial copies thereof, including any additions or modifications thereto. End User acknowledges that, except for the limited license rights expressly provided in this Agreement, no right, title, or interest to the intellectual property in the Software or Documentation is provided to End User, and that End User does not obtain any rights, express or implied, in the Software or Documentation. All rights in and to the Software not expressly granted to End User in this Agreement are expressly reserved to Pivot3 and its licensors. The Pivot3 trademark and other trademarks and logos are the trademarks of Pivot3, its affiliates, and their respective licensors. This Agreement does not permit End User to use any such trademarks.

### **3. RESERVED.**

### **4. WARRANTY.**

**4.1 Performance Warranty.** For a period of ninety (90) days after delivery of the Software to End User (the "Software Warranty Period"), Pivot3 warrants that the Software, when used as permitted under this Agreement and in accordance with the instructions in the Documentation (including use on a computer hardware and operating system supported by Pivot3), will operate substantially as described in the Documentation. Pivot3 does not warrant that End User's use of the Software will be error-free or uninterrupted. Pivot3 will, at its own expense and as its sole obligation and End User's exclusive remedy for any breach of this warranty, use commercially reasonable efforts to correct any reproducible error in the Software reported to Pivot3 by End User in writing during the Software Warranty Period or, if Pivot3 determines that it is unable to correct the error, Pivot3 will refund to End User all Fees paid for such nonconforming Software, in which case this Agreement and End User's right to use such Software will terminate.

**4.2 Disclaimer.** THE EXPRESS WARRANTIES IN SECTION 4.1 ARE IN LIEU OF ALL OTHER WARRANTIES, WHETHER EXPRESS, IMPLIED, OR STATUTORY, REGARDING THE SOFTWARE OR DOCUMENTATION, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, NON-INFRINGEMENT, TITLE, QUIET ENJOYMENT, QUIET POSSESSION, OR FITNESS FOR A PARTICULAR PURPOSE. EXCEPT FOR THE EXPRESS WARRANTIES STATED IN SECTION 4.1, THE SOFTWARE IS PROVIDED "AS-IS" AND WITH ALL FAULTS, AND THE ENTIRE RISK AS TO SATISFACTORY QUALITY, RELIABILITY, AVAILABILITY, ACCURACY, AND EFFORT IS WITH END USER. END USER ACKNOWLEDGES AND AGREES THAT END USER HAS NOT RELIED ON ANY ORAL OR WRITTEN INFORMATION OR ADVICE, WHETHER GIVEN BY PIVOT3, ITS SUPPLIERS, LICENSORS, AGENTS, OR EMPLOYEES.

### **5. RESERVED.**

**6. CONFIDENTIAL INFORMATION.** The Software and Documentation and the structure, organization, and source code of the Software, including but not limited to the shell scripts of the Software, are confidential and proprietary information ("Confidential Information") of Pivot3 and/or its licensors. End User agrees to (a) safeguard such Confidential Information with the same degree of care that End User uses to safeguard its own confidential and proprietary information of a similar nature, but with no less than reasonable care; (b) not disclose or make available such Confidential Information to anyone except End User's employees having a need to know for purposes related to this Agreement and only insofar as such persons are bound by nondisclosure agreements consistent with these non-disclosure terms; and (c) not use the Confidential Information except to exercise the license rights expressly granted in this Agreement. Pivot3 recognizes that Federal agencies are subject to the Freedom of Information Act, 5 U.S.C. 552, which requires that certain information be released, despite being characterized as "confidential" by the vendor.

**7. TERM AND TERMINATION.** This Agreement will remain in effect until terminated in accordance with the Federal Acquisition Regulation and Contract Disputes Act.

**8. EXPORT CONTROLS.** End User acknowledges and agrees that the Software and Documentation which is the subject of this Agreement may be controlled for export purposes. End User agrees to comply with all United States export laws and regulations including, but not limited to, the United States Export Administration Regulations, International Traffic in Arms Regulations, directives and regulations of the Office of Foreign Asset Control, treaties, Executive Orders, laws, statutes, amendments, and supplement thereto. End User assumes sole responsibility for any required export approval and/or licenses and all related costs and for the violation of any United States export law or regulation.

**9. U.S. GOVERNMENT END USERS.** The Software is a “commercial item” as that term is defined at 48 C.F.R. 2.101 (OCT 1995), consisting of “commercial computer software” and “commercial computer software documentation” as such terms are used in 48 C.F.R. 12.212 (SEPT 1995). Consistent with 48 C.F.R. 212, all U.S. Government End Users acquire the Software with only those rights set forth herein.

**10. MISCELLANEOUS.** This Agreement, together with the underlying GSA Schedule Contract, Schedule pricelist and applicable purchase orders, is the complete and exclusive agreement between the parties relating to the Software and Documentation, and supersedes all prior or contemporaneous proposals, representations, understandings, or agreements relating thereto, whether oral or written. Software shall be deemed irrevocably accepted by End User upon installation. All waivers must be in writing and signed by both parties. The waiver of a breach of any term hereof will in no way be construed as a waiver of any other term or breach hereof. The headings in this Agreement do not affect its interpretation. This Agreement shall be interpreted without giving effect to any presumptions against the drafting party. Neither party may assign or transfer any of its rights or obligations under this Agreement to a third party without the prior written consent of the other party. If any provision of this Agreement is held by a court of competent jurisdiction to be unenforceable, the remaining provisions of this Agreement will remain in full force and effect. The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Agreement. Should you have any question about this Agreement, or if you desire to contact Pivot3, please contact us by mail at Pivot3, Inc, 221 West 6<sup>th</sup> St., Suite 750; Austin, TX 78701.