

Calabrio, Inc.

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

1. **Scope.** This Rider and the attached Calabrio, 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 IT 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, including but not limited to GSAR 552.212-4 Contract Terms and Conditions-Commercial Items. 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extent any Attachment A Terms are inconsistent with Federal law (See, FAR 12.212(a)), such inconsistent terms shall be superseded, unenforceable and of no legal force or effect in all resultant orders under the Schedule Contract, including but not limited to the following provisions: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 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.
- 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.

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.

END USER LICENSE AGREEMENT

This End User License Agreement (the “Agreement”) is made by and between the company signing this Agreement or an order incorporating this agreement (“You,” “you” or “your”) and Calabrio, Inc. (“Calabrio”) and governs your use of Calabrio software (including any upgrades, modified versions, updates, additions and copies thereof) (“Software”) and any related explanatory materials, program documentation, user manuals, price lists, handbooks and other materials describing the use, design, installation, operation, and maintenance of the Software (“Documentation”).

LICENSE GRANT

Subject to the terms and conditions of this Agreement (including the conditions set forth in the “Restrictions” section below), Calabrio hereby grants you a limited, non-exclusive [perpetual, transferable, assignable] license to use the Software in object code or other machine readable executable format and the Documentation during the Term. The Software and the Documentation may only be used or accessed in connection with the number of different physical devices for which you are licensed as set forth on a separate written agreement or purchase order and you agree that you will not exceed such use. You may copy the Software and the Documentation for back-up and archival purposes, provided that any copy contains all of the original Software’s proprietary notices, the original and each copy remain in your possession, that your installation and use of the Software and Documentation does not exceed your authorized use.

RESTRICTIONS

The Software and the Documentation are proprietary to Calabrio and Calabrio remains the owner of all right, title and interest in and to the Software and the Documentation, including without limitation, all intellectual property rights in and to the foregoing. You will not and will not authorize or suffer any third party to: (i) access, view, use, copy, modify or prepare derivative works of any part of the Software or the Documentation, except as expressly authorized in this Agreement; (ii) resell, distribute, rent, lease, sublicense, lend, give, market, commercialize, assign or otherwise transfer rights or usage of all or any part of the Software or Documentation to any third party, except as expressly authorized in this Agreement; (iii) reverse engineer, translate, disassemble, decompile, disable security measures or cause or allow discovery of the source code (except to the extent that such a restriction would be a breach of applicable law) for any part of the Software or attempt to do so; (iv) remove, obscure or alter the copyright, trademark or other proprietary notices affixed to or contained in the Software or the Documentation; (v) place the Software onto a server so that it is accessible via a public network such as the Internet; or (vi) export the Software to any person or entity outside the United States in violation of applicable U.S. export laws.

The terms and conditions of this License Agreement shall apply to the initial copy of the Software as well as to any Upgrade or Update subsequently delivered to you. You must destroy all previous copies of the Software, however duplicated or archived, within thirty (30) days of installation of the Upgrade or Update.

TRANSFERS

You may not assign or otherwise transfer this Agreement or any other rights or obligations herein without the express written consent of Calabrio, except that you may assign this Agreement to an entity purchasing all or substantially all of your assets or voting securities so long as the acquiring party has reasonably complied with all terms and conditions of this Agreement and the assigning party provides prompt written notice to Calabrio of such

assignment. This Agreement shall be binding upon and inure to the benefit of each of the parties hereto, their successors and assigns.

You may, however, transfer the Software to a different physical device within your organization, provided that you transfer this Agreement, the Software (including all copies, updates and prior versions) and the Documentation (including any archival copies) to such physical device and provided that you retain no copies, including copies stored in computer memory, on the previously licensed computer.

LIMITED WARRANTY

Calabrio warrants that for a period of 90 of days after delivery of this copy of the Software to you: (i) the media on which this copy of the Software is provided to you will be free from defects in materials and workmanship under normal use and service; and (ii) the Software will perform in substantial accordance with the Documentation.

To make a warranty claim, you must provide Calabrio with written notice of the claim within the 90 day warranty period. Calabrio's entire liability and your exclusive remedy for in the event that such media is proven to be defective shall be, at Calabrio's option, to either: (i) return the price you paid; or (ii) repair or replace the media that does not meet the foregoing warranty, provided that you return the media. If failure of such medial or any part of the media has resulted from accident, abuse or misapplication of the Software or Documentation, then Calabrio shall have no obligation to replace the media or any such part of the media under this limited warranty.

EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, THE MEDIA, THE SOFTWARE AND THE DOCUMENTATION ARE PROVIDED "AS IS" WITHOUT REPRESENTATION OR WARRANTY OF ANY KIND WHATSOEVER. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING AND TO THE FULLEST EXTENT PERMISSIBLE UNDER APPLICABLE LAW, CALABRIO, ITS AFFILIATES AND ITS SUPPLIERS MAKE NO WARRANTIES, EXPRESS, IMPLIED, STATUTORY OR ARISING BY COURSE OF DEALING, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT OR TITLE, IN CONNECTION WITH THE MEDIA, THE SOFTWARE, THE DOCUMENTATION OR ANY RELATED PRODUCTS AND SERVICES PROVIDED TO YOU HEREUNDER, AND ALL SUCH WARRANTIES ARE HEREBY DISCLAIMED. FURTHER, CALABRIO AND ITS SUPPLIERS DO NOT AND CANNOT WARRANT THE PERFORMANCE OR RESULTS YOU MAY OBTAIN BY USING THE SOFTWARE OR THE DOCUMENTATION. NO EMPLOYEE, AGENT, RESELLER, DEALER OR DISTRIBUTOR OF CALABRIO IS AUTHORIZED TO MODIFY THIS LIMITED WARRANTY, NOR TO MAKE ANY ADDITIONAL WARRANTIES WITH RESPECT TO THE MEDIA, THE SOFTWARE OR THE DOCUMENTATION, NOR TO MAKE ADDITIONAL REPRESENTATIONS WITH RESPECT TO THE SOFTWARE OR THE DOCUMENTATION THAT DO NOT APPEAR IN THE CALABRIO-APPROVED DOCUMENTATION.

GENERAL TERMS

IN NO EVENT WILL CALABRIO BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES (INCLUDING PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, LOSS OF USE, LOSS OF DATA, LOST PROFITS, LOST SAVINGS OR BUSINESS INTERRUPTION) HOWEVER CAUSED AND ON ANY THEORY OF LIABILITY, WHETHER IN CONTRACT, STRICT LIABILITY OR TORT (INCLUDING NEGLIGENCE OR OTHERWISE) ARISING IN ANY WAY FROM THE USE OF OR INABILITY TO USE THIS SOFTWARE OR THE DOCUMENTATION, EVEN IF CALABRIO OR AN AUTHORIZED DEALER OR DISTRIBUTOR HAS BEEN ADVISED OF OR SHOULD HAVE

KNOWN OF THE POSSIBILITY OF SUCH DAMAGE, AND WITHOUT REGARD TO THE SUCCESS OR EFFECTIVENESS OF OTHER REMEDIES. YOU ACKNOWLEDGE THAT CALABRIO COULD NOT MAKE THE SOFTWARE AVAILABLE TO YOU ON THE TERMS SET FORTH IN THIS AGREEMENT IF CALABRIO'S LIABILITY AND THAT OF THIRD PARTIES WERE NOT LIMITED AS SET FORTH IN THIS AGREEMENT. THE FOREGOING EXCLUSIONS SHALL NOT APPLY TO ANY LIABILITY ARISING OUT OF OR IN CONNECTION WITH ANY LIABILITY OF CALABRIO THAT CANNOT BE EXCLUDED UNDER APPLICABLE LAW. THE FOREGOING LIMITATION OF LIABILITY SHALL NOT APPLY TO (1) PERSONAL INJURY OR DEATH RESULTING FROM LICENSOR'S NEGLIGENCE; (2) FOR FRAUD; OR (3) FOR ANY OTHER MATTER FOR WHICH LIABILITY CANNOT BE EXCLUDED BY LAW.

This Agreement will be governed under the Federal laws of the United States. The United Nations Convention on Contracts for the International Sale of Goods will not apply to this Agreement. This Agreement may not be amended except by a written agreement executed by you and Calabrio. The failure of either party hereto at any time to require performance of any provision of this Agreement or to exercise any right provided for herein will not be deemed a waiver of such provision or such right. If any provision of this Agreement is held by a court of competent jurisdiction to be contrary to law, such provision will be changed and interpreted so as to best accomplish the objectives of the original provision to the fullest extent allowed by law and the remaining provisions of this Agreement will remain in full force and effect. As used in this Agreement, the word "or" is not exclusive and the words "including" or "include" are not limiting. This Agreement has been written in the English language, and the parties agree that the English version will govern.

Customer Name

By _____

Name _____

Title _____

Date _____