

EXAGRID SYSTEMS INC.

SYSTEM SALE, EVALUATION AND LICENSE AGREEMENT

BEFORE YOU "ACCEPT" THIS AGREEMENT, CAREFULLY READ ALL THE FOLLOWING TERMS AND CONDITIONS OF THIS AGREEMENT (THE "AGREEMENT"). IF YOU DO NOT AGREE TO ALL OF THE TERMS OF THIS AGREEMENT, DO NOT ACCEPT THIS AGREEMENT IN WRITING OR USE ANY OF THE HARDWARE OR SOFTWARE SUPPLIED TO YOU BY EXAGRID SYSTEMS, INC. ("EXAGRID") OR ITS RESELLERS. IF YOU ARE THE FIRST MEMBER OF YOUR ORGANIZATION TO ACCEPT THE TERMS OF THIS AGREEMENT, YOU WARRANT AND REPRESENT TO EXAGRID THAT YOU ARE DULY AUTHORIZED TO AGREE TO THE TERMS OF THIS AGREEMENT ON BEHALF OF YOUR ORGANIZATION AND TO BIND YOUR ORGANIZATION TO ITS TERMS.

BY BOTH PARTIES EXECUTING THIS AGREEMENT IN WRITING: (A) THE ORDERING ACTIVITY UNDER GSA SCHEDULE CONTRACTS IDENTIFIED IN THE PURCHASE ORDER, STATEMENT OF WORK, OR SIMILAR DOCUMENT ("CUSTOMER") IS CONSENTING TO BE BOUND BY AND BECOME A PARTY TO THIS AGREEMENT; AND (B) YOU ARE ACKNOWLEDGING THAT YOU ARE BOUND BY THE TERMS OF THIS AGREEMENT AND ARE ALSO AGREEING THAT THE PURCHASE, LICENSE, AND USE OF THE SYSTEM HARDWARE AND SOFTWARE AND RELATED SERVICES SHALL BE SUBJECT TO THE TERMS OF THIS AGREEMENT. AS USED IN THIS AGREEMENT THE TERM "CUSTOMER" REFERS TO ORDERING ACTIVITY UNDER GSA SCHEDULE CONTRACTS IDENTIFIED IN THE PURCHASE ORDER, STATEMENT OF WORK, OR SIMILAR DOCUMENT .

THIS AGREEMENT SHALL BE EFFECTIVE AS OF THE DATE IT AND/OR THE PURCHASE ORDER IS FIRST ACCEPTED IN WRITING BY THE CUSTOMER ("EFFECTIVE DATE").

TERMS AND CONDITIONS

1. DEFINITIONS As used in this Agreement:

1.1 "Attachment" means a document identified as an Attachment to this Agreement. The terms set forth in all Attachments shall be included as part of this Agreement.

1.2 "End Users" means persons or entities that purchase any Systems or Services for its own use and not for resale.

1.3 "Evaluation System" means a System loaned to CUSTOMER by EXAGRID for evaluation by CUSTOMER under this Agreement and configured as separately agreed by CUSTOMER and EXAGRID. Special terms, applicable to Evaluation Systems only, are set forth in Section 11 of this Agreement.

1.4 "EXAGRID Agent" means a distributor, reseller, or other entity expressly authorized by EXAGRID to act as its agent under this Agreement.

1.5 "EXAGRID Software" means the EXAGRID Intelligent Disk-based Data Protection software, in object code format only, including all copies in whole or part, backups, related documentation and manuals, information relating to the software, printed listings of code, and any Updates provided by EXAGRID to CUSTOMER under this Agreement. The term "EXAGRID Software" shall not be deemed to include any Third Party Software.

1.6 "Perpetual License" has the meaning defined in Section 5.1, as elected in the relevant Purchase Order.

1.7 "Purchase Order" means the written order document signed by CUSTOMER that is delivered to EXAGRID or an EXAGRID Agent for final acceptance pursuant to Section 2.

1.8 "Services" means any work to be performed by EXAGRID for CUSTOMER as specified in an accepted CUSTOMER Purchase Order, and shall include any documentation or other tangible items produced by EXAGRID in connection with such work.

1.9 "Subscription License" means the license defined in Section 5.2, as elected in the relevant Purchase Order.

1.10 “System(s)” means a combination of interoperable computer hardware and software, and any components of that combination that is sold, licensed, and sublicensed by EXAGRID to its customers and comprised of third party hardware, EXAGRID Software, and Third Party Software.

1.11 “Third Party Software” means computer software owned by third parties, licensed to EXAGRID, and redistributed by EXAGRID to its customers as part of a System.

1.12 “Updates” means error corrections, bug fixes, patches, additions, upgrades or modified versions of the EXAGRID Software made available by EXAGRID to its customers generally.

2. ORDERS

CUSTOMER shall purchase and license Systems and Services by submitting written and signed Purchase Orders for written acceptance by EXAGRID or an EXAGRID Agent. Each Purchase Order shall reference this Agreement and specify the items and configurations of hardware, software, license type, and Services being ordered and the associated prices. Upon acceptance of the Purchase Order by EXAGRID, the purchase and license of the Systems and the provision of Services shall be governed by the terms of this Agreement.

3. DELIVERY AND SHIPMENT

EXAGRID or Reseller will notify CUSTOMER of scheduled System shipments. Delivery will be f.o.b. point of shipment and will occur when the Systems are ready for pickup by the carrier. In the absence of specific instructions from CUSTOMER, EXAGRID, its vendors, Reseller, or other contractors will select a carrier and arrange for in-transit insurance (which may be less than full value). By selecting a carrier and arranging for insurance on CUSTOMER’s behalf, neither EXAGRID, nor its vendors, contractors, or EXAGRID Agents assumes any liability for the shipment, and the carrier will not be considered their agent. All transportation and insurance charges shall be paid to EXAGRID or Reseller by CUSTOMER upon invoice. If deliveries are authorized in installments, each shipment shall be paid for when due without regard to other scheduled deliveries.

4. PAYMENT AND SECURITY INTEREST

4.1 License Payment. CUSTOMER shall remit full payment to EXAGRID or Reseller, as specified in the applicable Purchase Order, for all amounts due, including amounts then due for Services, under all respective Purchase Orders, net thirty (30) days from the System delivery date as provided in Section 3. Any amounts not paid in full within thirty (30) days of the due date shall bear interest at the rate indicated by the Prompt Payment Act (31 USC 3901 et seq) and Treasury regulations at 5 CFR 1315.

4.2 Security Interest. EXAGRID hereby reserves a security interest in the Systems as security for payment, and CUSTOMER agrees to execute any instrument required to perfect such interest. EXAGRID retains all ownership rights in and to the Systems delivered to CUSTOMER hereunder.

4.3 Payment Terms.. Vendor shall state separately on invoices taxes excluded from the fees, and the Customer agrees either to pay the amount of the taxes (based on the current value of the equipment) or provide evidence necessary to sustain an exemption, in accordance with FAR 52.229-1 and FAR 52.229-3.

5. LICENSES AND CONDITIONS

5.1 Perpetual License. Subject to the terms and conditions of this Agreement and the license and payment terms of the relevant Purchase Order, and only when a Perpetual License is purchased under a valid Purchase Order, EXAGRID hereby grants to CUSTOMER a limited, revocable, non-exclusive, personal, non-transferable license under EXAGRID intellectual property rights to use the EXAGRID Software for CUSTOMER’s internal business purposes solely upon and in connection with each System (or its temporary or permanent replacement) for which applicable Perpetual License fees have been paid. The EXAGRID Software supplied to CUSTOMER includes proprietary information owned by EXAGRID or its third party licensors and is provided to CUSTOMER solely under the license granted under this Section 5.1, and not by sale. EXAGRID and its third party licensors will continue to own their respective interests. Except for the express licenses granted herein, EXAGRID reserves all other rights to its intellectual property.

5.2 Subscription License. Subject to the terms and conditions of this Agreement and the license and payment terms of the relevant Purchase Order, and only when a Subscription License is purchased under a valid Purchase

Order, EXAGRID hereby grants to CUSTOMER, during the term of this Agreement, a limited, revocable, non-exclusive, personal, non-transferable license under EXAGRID intellectual property rights to use the EXAGRID Software for CUSTOMER's internal business purposes solely upon and in connection with each System (or its temporary or permanent replacement) for which applicable Subscription License fees have been paid. The EXAGRID Software supplied to CUSTOMER includes proprietary information owned by EXAGRID or its third party licensors and is provided to CUSTOMER solely under the license granted under this Section 5.2, and not by sale. EXAGRID and its third party licensors will continue to own their respective interests. Except for the express licenses granted herein, EXAGRID reserves all other rights to its intellectual property.

5.3 Changes to EXAGRID Software. EXAGRID reserves the right to make changes to any EXAGRID Software whenever such changes: (a) are required for safety; (b) facilitate performance in accordance with specifications; or (c) represent substitutions and modifications in accordance with applicable product performance specifications, provided however that such changes shall not impede CUSTOMER's use of any EXAGRID Software.

5.4 Limitation of Rights. CUSTOMER shall not itself, or through any affiliate, agent, or third party: (a) disassemble, reverse engineer, or decompile the EXAGRID Software or otherwise attempt to derive source code from it, except to the extent applicable laws specifically prohibit such restrictions; (b) modify, adapt, translate, or create derivative works based upon the EXAGRID Software; (c) transfer, lease, loan, sublicense, sell, resell for profit, distribute, or otherwise grant any rights in the EXAGRID Software in any form to any other party; or (d) use the EXAGRID Software on a commercial time-sharing, rental, or service bureau basis, or in any manner or for any purpose other than as described in the System documentation. CUSTOMER shall only have the rights with respect to the EXAGRID Software expressly set forth in this Agreement; all other rights are expressly reserved to EXAGRID and its licensors.

5.5 Reservation of Rights. CUSTOMER acknowledges that the EXAGRID Software, and all trade secret, copyright, patent, trademark, trade name, and other intellectual and proprietary rights in the EXAGRID Software, are and at all times shall remain the valuable property of EXAGRID and its licensors, or their respective successors or assigns. CUSTOMER agrees that, except as provided in this Section 5, nothing contained in this Agreement shall be construed as granting or conferring by implication, estoppel, or otherwise, any license or right under any patent, trademark, copyright, or other proprietary right, whether now existing or hereafter obtained, and no such license or other right shall arise from this Agreement or from any acts or omissions in connection with the execution of this Agreement or the performance of the obligations of the parties.

5.6 Use of Trademarks; Additional Technology. CUSTOMER agrees: (a) to respect and observe and not to alter, remove, or conceal any copyright, trademark, trade name, or other proprietary marking that may appear on or in the EXAGRID Software; and (b) that CUSTOMER is responsible for itself obtaining any additional software, hardware, or technologies not provided by EXAGRID under this Agreement and required to operate the Systems, including but not limited to communications devices and Internet access services.

5.7 Third Party Software. EXAGRID will redistribute certain Third Party Software to CUSTOMER for CUSTOMER's use with Systems. As a condition of its use of the Third Party Software, CUSTOMER agrees to familiarize itself with the conditions and restrictions required of software users by the owners of such Third Party Software as set forth in <http://www.exagrid.com/thirdparty/exagridthirdpartylicenseagreements.asp>. 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.

6. SERVICES

6.1 Availability. All Services shall be provided to CUSTOMER by EXAGRID. CUSTOMER may purchase Services from EXAGRID or Reseller in accordance with the terms and prices of EXAGRID's then current published Services offerings in accordance with the terms and prices of the GSA Schedule Contract. EXAGRID will not be responsible for providing Services for: (i) any Third Party Software, or hardware; or (ii) any EXAGRID Software that is not configured in accordance with the specifications set forth in the applicable Purchase Order.

6.2 Conditions. Services to be provided by EXAGRID under this Agreement require cooperation between CUSTOMER and EXAGRID, and CUSTOMER recognizes and accepts certain responsibilities. These CUSTOMER responsibilities include but are not limited to: (i) providing EXAGRID with specific details regarding CUSTOMER's business requirements and operating procedures as they relate to the application of the Services to be performed by EXAGRID; and (ii) proper installation of and timely access to all necessary computer hardware, facilities, and software in accordance with mutually agreeable and reasonable schedules.

7. LIMITED WARRANTY

7.1 EXAGRID Software. EXAGRID warrants that the EXAGRID Software for which a license is purchased by CUSTOMER as part of a System will for a period of ninety (90) days from the date of shipment perform substantially as specified in the applicable System documentation. If CUSTOMER satisfactorily demonstrates to EXAGRID within such ninety (90) day period that the EXAGRID Software contains errors, then as EXAGRID's sole and exclusive liability and as CUSTOMER's sole and exclusive remedy, EXAGRID shall at its sole option use commercially reasonable efforts to correct the EXAGRID Software errors reported by CUSTOMER or replace the EXAGRID Software with substantially conforming software. EXAGRID does not warrant the results of its correction or replacement services. Correction or replacement under the immediately preceding sentence, and the issuance of any corrections, patches, bug fixes, workarounds, upgrades, enhancements, or Updates by EXAGRID to CUSTOMER, shall not be deemed to begin a new, extended, or additional warranty period.

7.2 No Other Warranties.

(i) THE LIMITED WARRANTY IN SECTION 7.1 ABOVE IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, WRITTEN OR ORAL, INCLUDING WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR NONINFRINGEMENT, AND ANY WARRANTY ARISING BY STATUTE OR OTHERWISE IN LAW, OR FROM A COURSE OF DEALING OR USAGE OF TRADE. EXAGRID SPECIFICALLY BUT WITHOUT LIMITATION DOES NOT WARRANT THAT: (A) THE EXAGRID SOFTWARE SHALL MEET ALL OF CUSTOMER'S REQUIREMENTS OR SHALL OPERATE IN ALL THE COMBINATIONS WHICH MAY BE SELECTED FOR USE BY CUSTOMER; (B) THE OPERATION OF THE EXAGRID SOFTWARE SHALL BE ERROR-FREE OR UNINTERRUPTED; OR (C) ALL ERRORS OR DEFECTS IN THE EXAGRID SOFTWARE SHALL BE CORRECTED. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF IMPLIED WARRANTIES SO THAT THE ABOVE EXCLUSIONS MAY NOT APPLY TO CUSTOMER. THIS WARRANTY GIVES CUSTOMER SPECIFIC LEGAL RIGHTS. CUSTOMER MAY ALSO HAVE OTHER RIGHTS WHICH VARY FROM JURISDICTION TO JURISDICTION.

(ii) ALL HARDWARE, THE THIRD PARTY SOFTWARE AND ANY EVALUATION SYSTEM ARE PROVIDED TO CUSTOMER "AS IS" WITHOUT WARRANTY OF ANY KIND BY EXAGRID, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NONINFRINGEMENT. Except for Evaluation Systems, in cases in which EXAGRID's vendors or licensors permit EXAGRID to pass through any warranties of such vendors or licensors to CUSTOMER, EXAGRID will use commercially reasonable efforts to help CUSTOMER accomplish such pass through, provided that CUSTOMER shall be responsible for all necessary charges or fees and for taking whatever actions are required on its part, and that any warranties passed through shall not be deemed to originate from or be binding on EXAGRID.

(iii) No representation or other affirmation of fact, whether made by EXAGRID employees, EXAGRID Agents, or otherwise, shall be deemed a warranty by EXAGRID for any purpose or give rise to any liability of EXAGRID whatever unless contained in this Agreement.

8. INFRINGEMENT

8.1 Indemnity by EXAGRID. If a third party acting against CUSTOMER claims, threatens to claim, or obtains a judicial or administrative determination that the EXAGRID Software infringes its U.S. patent, copyright, or trade secret rights, EXAGRID shall have the option, at its own expense and at its sole option, to: (i) intervene to defend CUSTOMER at EXAGRID's expense and pay all damages that a tribunal finally awards; (ii) obtain for CUSTOMER the right to continue using the infringing item; (iii) replace the infringing item or modify it so that it shall become non-infringing with no substantial degradation; or (iv) remove the infringing portion of the EXAGRID Software and refund the proportional license fee that CUSTOMER paid for such portion, pro rata, on a five-year straight-line depreciation basis, provided that CUSTOMER promptly notifies EXAGRID in writing of the claim, and allows EXAGRID to control, and cooperate with EXAGRID in, the defense and any related settlement negotiations. Nothing contained herein 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 28 U.S.C. §516. In no event shall EXAGRID's liability under this Section 8 exceed the amount paid by CUSTOMER to EXAGRID for any allegedly infringing products.

8.2 Exception. Notwithstanding the provisions of Section 8.1 above, EXAGRID shall have no obligation to CUSTOMER for any claim arising from the license or use of any EXAGRID Software: (i) that has been modified by a party other than EXAGRID; (ii) used to practice any process, or used in combination with other products not provided by EXAGRID where such infringement would not have occurred but for such use in combination with such other products; (iii) from failure of CUSTOMER to use updated EXAGRID Software provided by EXAGRID for avoiding such infringement; or (iv) that is part of any Evaluation System. EXAGRID shall not be bound by any settlement of any charge of infringement made without the prior written consent of EXAGRID.

8.3 Reserved.

8.4 Limitation. THIS SECTION 8 STATES THE ENTIRE LIABILITY OF EXAGRID, EXAGRID AGENTS, AND EXAGRID LICENSORS TO CUSTOMER AND ANY AND ALL THIRD PARTIES, WHETHER FOR DAMAGES OR OTHERWISE, FOR INFRINGEMENT OF ANY COPYRIGHT, PATENT, TRADE SECRET, OR OTHER INTELLECTUAL PROPERTY RIGHT WITH RESPECT TO ANY PRODUCT OR SERVICES FURNISHED BY EXAGRID UNDER THIS AGREEMENT.

9. LIMITATION OF LIABILITY

9.1 Limitation. It is expressly agreed that each party's maximum liability for damages to the other party under or in connection with this Agreement, regardless of the form of legal action, whether in contract or in tort, shall in no event exceed the actual payments received by EXAGRID or Reseller for the EXAGRID Software, Systems, or Services that caused such damage or that are directly related to the cause of action, except that no such limitation on damages shall apply to losses due to CUSTOMER's violation of EXAGRID's intellectual property rights or breach of any of the licenses, license restrictions, or confidentiality obligations set forth in this Agreement. 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.

9.2 No Consequential Damages. IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR SPECIAL, INDIRECT, OR CONSEQUENTIAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS, LOSS OF REVENUE, LOSS OF USE, OR LOSS OF DATA, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH LOSS, OR, IF REASONABLY FORESEEABLE, INCURRED BY THE OTHER PARTY OR CLAIMED AGAINST THE OTHER PARTY BY ANY OTHER PARTY, EXCEPT THAT NO SUCH LIMITATIONS ON CONSEQUENTIAL DAMAGES SHALL APPLY IN THE EVENT OF VIOLATION OF EXAGRID'S INTELLECTUAL PROPERTY RIGHTS OR BREACH BY CUSTOMER OF ANY OF THE LICENSES, LICENSE RESTRICTIONS, OR CONFIDENTIALITY OBLIGATIONS CONTAINED IN THIS AGREEMENT. EXAGRID'S LIABILITY FOR DEATH OR PERSONAL INJURY RESULTING FROM THE NEGLIGENCE OF EXAGRID OR THAT OF ITS EMPLOYEES OR AGENTS OR IN RELATION TO ANY OTHER LIABILITY THAT MAY NOT BY APPLICABLE LAW BE EXCLUDED OR LIMITED IS NOT EXCLUDED OR LIMITED AND NOTHING IN THIS AGREEMENT SHALL BE CONSTRUED AS AN ATTEMPT TO EXCLUDE OR LIMIT SUCH LIABILITY.

10. TERM; TERMINATION

10.1 Perpetual License Term. To the extent the applicable Purchase Order specifies that the EXAGRID Software is subject to a Perpetual License, this Agreement shall be effective from the Effective Date, and shall continue in full force and effect for a period of one (1) year thereafter. This Agreement may be renewed upon its anniversary date for successive one (1) year periods by exercising an option, or by both parties executing a new purchase order in writing. After the initial one year term, either party may, at its discretion, terminate this Agreement at any time by notifying the other party of its decision to terminate in writing not less than thirty (30) days prior to the proposed termination date.

10.2 Subscription License Term. To the extent the applicable Purchase Order specifies that the Systems, Services, and EXAGRID Software are subject to a Subscription License, and subject to timely payment of applicable Subscription License payments under Section 4.2 of this Agreement and as specified in the applicable Purchase Order, this Agreement shall be effective from the Effective Date, and shall continue in full force and effect for a period of one (1) year thereafter. This Agreement may be renewed for one (1) year terms following: (i) receipt by Reseller, of a Purchase Order renewing such Subscription License; and (ii) timely payment of any Subscription License payment or fee due therefor, unless and until terminated as set forth elsewhere in this Agreement.

10.3 General.

When the End User is an instrumentality of the U.S., recourse against the United States for any alleged breach of this Agreement must be brought as a dispute under the contract Disputes Clause (Contract Disputes Act). During any dispute under the Disputes Clause, EXAGRID shall proceed diligently with performance of this Agreement, pending final resolution of any request for relief, claim, appeal, or action arising under the Agreement, and comply with any decision of the Contracting Officer.

10.4 Consequences. In the event of expiration or termination of this Agreement for any reason, CUSTOMER shall promptly: (i) discontinue all use of the EXAGRID Software; (ii) erase or destroy any EXAGRID Software

contained in the computer memory or data storage apparatus under the control of CUSTOMER; (iii) return to EXAGRID all copies of the EXAGRID Software provided by EXAGRID in CUSTOMER's possession; and (v) certify in writing to EXAGRID, within thirty (30) days of termination of this Agreement, that CUSTOMER has complied with the foregoing.

10.5 Survival. Sections 1, 4, 5.4, 5.5, 5.6, 7 through 10, 11.6, 11.7, 11.8 and 12 shall survive any termination of this Agreement. In addition, Section 5.1 shall survive solely to the extent that CUSTOMER fully paid for a Perpetual License hereunder.

11. SPECIAL TERMS APPLICABLE TO EVALUATION SYSTEMS ONLY

11.1 Components and Terms. CUSTOMER and EXAGRID shall agree separately on the components comprising the Evaluation System and the length of the evaluation period. The use of the Evaluation System and the provision of any related Services shall be governed by the terms of this Agreement.

11.2 Delivery and Shipment. EXAGRID or EXAGRID Agent will notify CUSTOMER of scheduled Evaluation System shipments, and all transportation and insurance charges shall be paid by EXAGRID.

11.3 System Loan. EXAGRID shall loan the Evaluation System to CUSTOMER at no charge. Title to the Evaluation System shall at all times remain in EXAGRID and its licensors.

11.4 CUSTOMER Responsibilities.

11.4.1 CUSTOMER shall: (i) provide appropriate space in its facility for the Evaluation System, including necessary electrical and communications connections; (ii) be responsible for the proper use and deployment of the Evaluation System, and for training anyone using the Evaluation System on its proper use in accordance with any System use procedures; (iii) use the Evaluation System solely for the limited purposes of conducting its own internal tests to evaluate the performance and functionality of the Evaluation System in CUSTOMER's internal business environment or for CUSTOMER's business purposes; (iv) make the Evaluation System available for maintenance and support purposes as requested by EXAGRID on a reasonable basis, subject to mutual agreement between the parties on scheduling; (v) take appropriate action, by means of agreement, instruction or otherwise, with respect to its employees or other third parties permitted access to the Evaluation System in furtherance of its permitted use to ensure that all of its obligations under this Agreement are satisfied; and (vi) return the Evaluation System to EXAGRID at the conclusion of the evaluation in the same condition in which it was delivered, normal wear and tear excepted.

11.4.2 CUSTOMER shall not: (i) use or permit third parties to use the Evaluation System for production purposes or other commercial purposes; (ii) modify or attempt to maintain or repair the Evaluation System without first obtaining EXAGRID's prior written permission; (iii) permit the imposition of any lien, charge or encumbrance on the Evaluation System while in CUSTOMER's possession, or move the Evaluation System from its initial installation location without first obtaining EXAGRID's prior written permission; (iv) publicly disclose performance information, test results or analyses created by or for CUSTOMER (including, without limitation, benchmarks) relating to the Evaluation System, which restriction shall survive any termination of this Agreement.

11.5 Availability of Services. EXAGRID shall provide such maintenance and support Services as it shall determine in its sole discretion are necessary or desirable, at no charge to CUSTOMER. EXAGRID will not be responsible for providing Services for (i) any Third Party Software, or hardware, or (ii) any EXAGRID Software that is not configured in accordance with the specifications separately agreed to by the parties.

11.6 Exclusion of Warranties. THE EVALUATION SYSTEM IS PROVIDED TO CUSTOMER STRICTLY ON AN "AS IS" BASIS, AND EXAGRID DISCLAIMS ALL WARRANTIES WITH RESPECT TO THE EVALUATION SYSTEM, EXPRESS OR IMPLIED, WRITTEN OR ORAL, INCLUDING WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NONINFRINGEMENT, AND ANY WARRANTY ARISING BY STATUTE OR OTHERWISE IN LAW, OR FROM A COURSE OF DEALING OR USAGE OF TRADE. This risk allocation reflects the lack of charges for the use of the Evaluation System.

11.7 Confidentiality

11.7.1 Each party acknowledges that by reason of its relationship to the other party under this Agreement it may have access to certain information and material concerning the other party's business, plans, customers, technology, and products that are confidential and of substantial value to the disclosing party ("Information"), which value would be impaired if such Information were disclosed to third parties. Each party agrees to maintain all Information received from the other, both orally and in writing, in confidence and agrees not to disclose or otherwise make available such Information to any third party without the prior written consent of the disclosing party. Each party further agrees to use the Information only for the purpose of performing this Agreement. No Information shall be deemed confidential unless so marked if given in writing or, if given orally, identified as confidential orally prior to disclosure, except that CUSTOMER agrees that any Information in whatever form relating to: (i) the design, functionality, operational methods or coding of EXAGRID Software, including but not limited to any complete or

partial source or object code versions; and (ii) performance information, test results or analyses created by or for CUSTOMER (including, without limitation, benchmarks) relating to the Evaluation System, shall be deemed confidential Information of EXAGRID regardless of the presence or absence of any confidential markings or identification.

11.7.2 The parties obligations of non-disclosure under this Agreement shall not apply to Information that the receiving party can demonstrate: (i) is or becomes a matter of public knowledge through no fault of or action by the receiving party; (ii) was rightfully in the receiving party's possession prior to disclosure by the disclosing party; (iii) subsequent to disclosure, is rightfully obtained by the receiving party from a third party who is lawfully in possession of such Information without restriction; or (iv) except as otherwise provided in Section 11.7.1(ii) above, is independently developed by the receiving party without resort to Information. EXAGRID recognizes that Federal agencies are subject to the Freedom of Information Act, 5 U.S.C. 552, which may require that certain information be released, despite being characterized as "confidential" by the vendor.

11.7.3 Whenever requested by a disclosing party, a receiving party shall immediately return to the disclosing party all manifestations of the Information or, at the disclosing party's option, shall destroy all such Information as the disclosing party may designate. Recipient's obligation of confidentiality shall survive this Agreement.

11.8 **Consequences of Termination.** In the event of termination of this Agreement or the evaluation for any reason, CUSTOMER shall promptly: (i) discontinue all use of the Evaluation System; (ii) erase or destroy any EXAGRID Software and CUSTOMER data contained in the computer memory or data storage apparatus under the control of CUSTOMER; (iii) return to EXAGRID all copies of the EXAGRID Software provided by EXAGRID in CUSTOMER's possession; and (iv) promptly make the Evaluation System available for removal by EXAGRID.

11.9 **Conversion to Purchase.** In the event CUSTOMER elects to purchase the Evaluation System prior to its removal by EXAGRID, CUSTOMER shall do so in accordance with the provisions of Sections 2 and 4 above and the terms and conditions of this Agreement (or an applicable written EXAGRID agreement or Purchase Order provided by an EXAGRID Agent) shall govern such purchase.

12. GENERAL

12.1 **Notices.** All notices required or permitted under this Agreement will be in writing and will be deemed given: (i) when delivered personally; (ii) when sent by confirmed telex or facsimile; (iii) five (5) days after having been sent by registered or certified mail, return receipt requested, postage prepaid; or (iv) one (1) day after deposit with a commercial overnight carrier specifying next day delivery, with written verification of receipt. All communications will be sent to the principal office of each party or to such other address as may be designated by a party by giving written notice to the other party pursuant to this Section 12.1. If the communication is from CUSTOMER to EXAGRID, it shall be addressed to "Attn: President." If the communication is from EXAGRID to CUSTOMER, it shall be addressed to the Chief Executive Officer of CUSTOMER.

12.2 **Assignment.** The parties may not assign, delegate or otherwise transfer this Agreement or any of its licenses, rights or duties under this Agreement, whether by operation of law or otherwise, without the prior written consent of the other party. Any attempt to transfer or assign this Agreement without such written consent will be null and void.

12.3 **Waiver.** The failure of either party to enforce in any one or more instances any of the terms and conditions of this Agreement shall not be construed as a waiver of future performance of any such term or condition. Waiver of any term or condition shall only be deemed to have been made if expressed in writing by the party granting such waiver.

12.4 **Severability.** If any provision of this Agreement shall be held by a court of law of competent jurisdiction to be illegal, invalid, or unenforceable, that provision shall be reformed, construed, and enforced to the maximum extent permissible and the remaining provisions shall remain in full force and effect.

12.5 **Governing Law and Jurisdiction.** This Agreement shall be governed by and construed under the Federal laws of the United States..

The United Nations Convention on Contracts for the International Sale of Goods does not apply.

12.6 Entire Agreement. This Agreement and its Attachments, any separate agreement referenced in Sections 1.3 and 11.1, and the Third Party Software restrictions and conditions referred to in Section 5.3 above, together with the underlying GSA Schedule Contract, Schedule Pricelist, Purchase Order(s), constitute the entire understanding between the parties, and supersede all prior discussions, representations, understandings or agreements (including any pre-existing nondisclosure agreement, except as to its surviving terms), whether oral or in writing, between the parties with respect to the subject matter of this Agreement. In the event of any conflict between the terms of this Agreement and terms other than quantity, price, and the like set forth in an accepted Purchase Order, the terms of the Purchase Order shall prevail. Any modification or amendment to this Agreement must be in writing and signed by authorized representatives of both parties. Except as otherwise provided in Section 5.3 above, any item or service furnished by EXAGRID in furtherance of this Agreement, although not specifically identified in it or in a Purchase Order referencing this Agreement, shall nevertheless be covered by this Agreement unless specifically covered by some other written agreement executed by CUSTOMER and an authorized representative of EXAGRID. The headings and captions used in this Agreement are for convenience only, and shall not affect the interpretation of the provisions of this Agreement.

12.7 U.S. Government Restricted Rights. In the event that CUSTOMER is an agency of the United States Government, or that the license granted under this Agreement is pursuant to a contract with either a defense or civilian agency of the United States Government, CUSTOMER agrees that the EXAGRID Software is provided with restricted rights and that the EXAGRID Software and all other software that forms a part of any System is a "commercial item," as that term is defined in 48 C.F.R. 2.101, consisting of "commercial computer software" and "commercial computer software documentation," as such terms are used in 48 C.F.R. 12.212. Consistent with 48 C.F.R. 12.212, all U.S. Government End Users acquire the EXAGRID Software with only those rights set forth in those C.F.R. provisions or equivalent and in this Agreement.

12.8 Export Control. CUSTOMER agrees to comply with all applicable export and re-export control laws and regulations, including the Export Administration Regulations ("EAR") maintained by the United States Department of Commerce. CUSTOMER agrees to indemnify EXAGRID, to the fullest extent permitted by law, from and against any fines or penalties that may arise as a result of CUSTOMER's breach of this provision. This export control clause shall survive termination of this Agreement.

12.9 Use of Customer Name. EXAGRID may include CUSTOMER's name as an EXAGRID customer in a list of representative customers to the extent permitted by the General Services Acquisition Regulation (GSAR) 552.203-71. EXAGRID agrees to display the CUSTOMER's name or logo in compliance with any publishing standards defined by CUSTOMER. Prior to developing and publicizing any profile, case study or similar document published on EXAGRID's Web site or in hardcopy describing how EXAGRID's products are used by CUSTOMER, EXAGRID Software agrees to obtain CUSTOMER's specific approval.

12.10 Independent Contractors. The relationship of EXAGRID and CUSTOMER established by this Agreement is that of independent contractors, and nothing contained in the Agreement will be construed to constitute the parties as partners, joint venturers, co-owners, or otherwise as participants in a joint or common undertaking. For a period of one year following the completion of any Services performed for CUSTOMER under this Agreement, CUSTOMER shall not directly or indirectly employ, solicit for employment, or contract with any EXAGRID personnel performing Services for CUSTOMER under this Agreement.