

UMS CONTRACT

This Contract, made and entered into by and between **FERN COMPUTER CONSULTANCY LTD**, hereinafter referred to as **FERN**, and **XYZ Limited**, hereinafter referred to as **XYZ**, is made in consideration of the mutual covenants contained herein.

NOW, THEREFORE, IT IS MUTUALLY AGREED AS FOLLOWS:

I. SERVICE

- A. **FERN** agrees to provide upgrades, maintenance and support (UMS) services identified below for the software itemised in the attached Schedule A, incorporated herein for all purposes, in accordance with the standard conditions for service set forth herein. **FERN** agrees to provide said services for a period of one year from **Jan 1, 2010** until **Dec 31, 2010**. Said maintenance to be performed during the maintenance period which extends from 9:00 am to 5:00 pm Monday through to Friday, excluding **FERN's** observed holidays which are UK Bank Holidays and the Christmas-New Year period which, unless otherwise advised in writing on or before November 1 each year, shall be the period from 5.00 pm on the last normal working day before Christmas Day until 9.00 am on the first normal working day after January 1, except where Christmas Eve is a Monday, when that day shall also be a holiday or when January 2nd is a Friday, when that day shall also be a holiday.
- B. For the maintenance services provided under this Agreement, **XYZ** agrees to pay the charges listed in schedule A (duly updated as product becomes due for support) which will be payable in advance. UMS charges are due as of the inception date and the first day of each charge period thereafter. Charges for periods of less than the charge period shall be pro-rated on the basis of a thirty (30) day month. The charge period shall be per annum. The charges may be revised at the anniversary date of this agreement to provide for the service during the forthcoming year, however, such charges will not be changed during the first year of this Contract. From time to time changes in service prices may require that the charge be either increased or decreased. Such changes in the charge will be allowable only by full compliance with the requirements set forth below in Paragraph XII excepting that price increases of an amount not exceeding the change in the Retail Price Index (RPI) for the previous calendar year, or changes in manufacturer's prices, will be allowable without affecting any other aspect of the contract renewal.

II. RESPONSIBILITIES OF FERN

- A. **FERN** will provide services on the software as described in Schedule A and located at the specified location. **FERN** will provide the Standard Cover as specified herein and précis in Schedule B, in respect of all the software listed in Schedule A and covered under this agreement, during the periods and under the terms as specified in Section I above.
- B. **FERN** will provide Extended Cover and/or Emergency Repair Service if required (at additional charge).
Extended cover is defined as periods of cover additional to that primarily contracted e.g. from 5 pm to 8 pm at night and where it is agreed and scheduled prior to the event. Emergency Repair Service is defined as customer requesting or contacting service outside **FERN's** normal service times and requiring immediate attendance. Emergency repair service has to be conditional upon engineer availability and charges would only apply to the point where normal cover resumed.
- C. **FERN** will provide qualified engineers to perform all of the labour necessary for service.
- D. **FERN** will provide all transport such that engineers and other **FERN** personnel can attend site and pay all delivery charges of all components or software required to be provided under this agreement
- E. **FERN** will respond to **XYZ's** request for service within eight (8) working hours of such request.
- F. **FERN** will provide service during the service period as set forth in Paragraph 1A. At **XYZ's** request and, given the availability of suitably qualified personnel, **FERN** will provide service at all times other than during the service period. If service is requested to begin at times other than during the service period, **FERN** will charge **XYZ** one and one-half (1½) times the hourly rate that would normally apply at that time, plus actual travel time, mileage and other expenses that would not have been incurred had the service been delivered during the normal service period.
- G. **FERN** may choose to sub-contract to other repairers the said service or direct liaison to take place directly between **XYZ** and the Original Equipment Manufacturer (OEM) concerned. Where this is proposed it shall be notified to **XYZ** whose approval shall not be unreasonably withheld.
FERN shall remain ultimately responsible for all sub-contracted work.
- H. **FERN** will endeavour to provide a resolution within 8 hours. Some software faults may take longer to resolve, e.g. where Fern has to refer said fault to an OEM, and resolution times cannot be guaranteed but Fern will expedite for a resolution to be provided as quickly as reasonably practicable.

- I. The responsibility of providing a backup for restore purposes is the customer's responsibility.
- J. **FERN** will provide **XYZ** with details of their Professional Indemnity Insurance upon request.

III. RESPONSIBILITIES OF XYZ

- A. **XYZ** will attempt no repairs, maintenance or alteration of the software unless approved by **FERN**. Such approval would not be unreasonably withheld but where such alteration by **XYZ** results in software failure or a need for service from **FERN**, such service will be chargeable at the appropriate time & materials rates
- B. **XYZ** will assume full responsibility for software modified without prior written authorisation from **FERN**.
- C. Where **FERN's** personnel attend site under this contract:
 - i. **XYZ** will provide adequate working space and conditions for **FERN's** personnel.
 - ii. **XYZ** will provide personnel for safety purposes when reasonably requested by **FERN's** personnel.
 - iii. **XYZ** will provide full access to the software for **FERN's** personnel at the agreed time of service or immediately upon arrival on site if no set time has been agreed. Such access will include the shut-down of the equipment on which the software is operating if determined necessary by said **FERN** personnel but IN NO EVENT SHALL ANY INTERRUPTION OF THE EQUIPMENT OPERATION BE POSSIBLE WITHOUT **XYZ's** PRIOR EXPRESS APPROVAL. Should such approval delay the works for more than thirty (30) minutes, **FERN** would be entitled to charge at T&M standard rates for the period of the delay. Should such delay extend to a total delay of two (2) hours **FERN** would be entitled to move the engineer off-site to other jobs. For the purpose of clarity, Equipment shall include system / software manuals and other documentation held by the customer.
- D. **XYZ** will pay **FERN's** current hourly rate for service due to operator's errors, negligence, intentionally or unintentionally inflicted damage, accidents or acts of God not caused by **FERN's** personnel.

IV. TERM, RENEWAL AND CANCELLATION

This Service Contract is for the term indicated in Paragraph 1A. The term of this Contract will automatically renew on the renewal date (the first calendar day after the end of the term quoted in paragraph 1A) for terms of one year unless either **XYZ** or **FERN** receives from the other party, at least ninety (90) days advance notice of cancellation at the renewal date, with such notification being delivered by either, and only, recorded or registered post, and with the date of delivery being the date at which notice shall be received.

V. PAYMENT TERMS

XYZ shall pay **FERN** the charges set out in section I.B according to the terms stated therein. All such charges are due in advance (unless paid to terms on account) in the currency invoiced and with all relevant consumer taxes added thereto. Charges quoted exclude VAT.

VI. INDEMNIFICATION OF FERN

XYZ shall indemnify and hold **FERN** harmless from any cost, expense or charge not required to be provided by **FERN** under this Service Contract, including, but not limited to, sales, use, excise, property or other taxes, other charges by governmental agencies and all other service charges not authorised by **FERN**. **FERN** shall remain liable for damage caused by **FERN** personnel to the property of **XYZ**.

FERN will pay HM Customs & Excise any VAT which has been received from **XYZ**.

VII. DISCLAIMER OF LIABILITY FOR PROGRAM, DATA BASE AND SOFTWARE

In accordance with generally accepted practices and procedures, **FERN** urges **XYZ** to maintain a minimum of three (3) (and preferably additional) separate consecutive and current back-ups of software programs and data. **XYZ** recognises that the risk of destruction of software and data cannot be entirely eliminated and that the risk of destruction is particularly critical during services, maintenance and repair. Accordingly, **FERN** is not liable for the expense of replacement or reconstruction of software programs or data or the media on which they are contained, except as listed in Schedule A below.

VIII. FERN'S LIMITATIONS OF LIABILITY

As is general practice, liability as to "fit for function" would be an aspect of original supply agreements and liability as to "product use" would rest with the user and the user's competence. Accordingly, **FERN** shall have no

obligation or liability for any damages **XYZ** may sustain, whether direct, incidental or consequential resulting from the use or performance of the software supported under this maintenance contract.

IX. FERN'S RIGHT TO TERMINATE

FERN may terminate this Service Agreement for any one or more of the following reason after having given seven (7) days notice of its intention to **XYZ** and **XYZ** fails to remedy the causation within those seven days:

- A. **XYZ** makes an assignment for the benefit of XYZ's creditors of the filing of a voluntary or involuntary petition in bankruptcy by or against XYZ under any law having for its purpose the adjudication of XYZ's bankruptcy (or in the case of a partnership, the bankruptcy of any of XYZ's partners).
- B. **XYZ** defaults in payment of any **FERN** invoice when due.
- C. **XYZ** continues use of any supply item after **FERN** has notified **XYZ** to cease use.
- D. **XYZ's** violation of any other fundamental provision of this Contract.

X. XYZ'S RIGHT TO TERMINATE

XYZ may terminate this Service Agreement for any one or more of the following reason after having given seven (7) days notice of its intention to **FERN** and **FERN** fails to remedy the causation within those seven days:

- A. **FERN** makes an assignment for the benefit of FERN's creditors of the filing of a voluntary or involuntary petition in bankruptcy, liquidation or winding up by or against FERN under any law having for its purpose the adjudication of FERN's bankruptcy, liquidation or winding up.
- B. **FERN** fails to provide the service as per the terms of this contract, in which case support may be terminated in respect of such items and a period pro rata rebate will become payable by **FERN**
- C. **FERN** fails to provide emergency repair service when requested where agreed as per the terms of this contract.
- D. **FERN** violates any other principal provision of this Contract.

XI. ENTIRE CONTRACT

This Service Contract, except as provided for in Paragraph XII, constitutes the entire Contract between **XYZ** and **FERN** in respect of this service. Any inconsistent or additional terms and conditions in any purchase order or other document submitted by **XYZ** to **FERN** shall only be binding on **FERN** when accepted by **FERN's** authorised personnel, and vice versa. All prior contracts, proposals and understandings with respect to the subject matter of the Contract are merged herein and there are no problems, terms, conditions or obligations with respect hereto other than those set forth herein.

XII. CHANGE OF SOFTWARE

From time to time it may become necessary for **XYZ** to add or replace items listed in this contract, e.g. all new software supplied by **FERN** to **XYZ** will automatically be added. If such changes become necessary, **XYZ** and **FERN** will execute an addendum to this Contract according to the form attached hereto as Schedule A. Said executed addendum will serve to modify the terms of Paragraph 1B but, in all other respects, will be a reaffirmation of all other terms contained within this Contract. Said addendum will not affect the term of this Contract or the rights of either party to terminate this Contract. **XYZ** may remove software from the schedule subject to notification in accordance with section IV. **XYZ** automatically has the right to decline support on items supplied and newly listed in Schedule A subject to such declination being prior to the renewal date. Where support is OEM if the OEM will no longer provide a support service and **FERN** is unable to secure sub contracted support, then that item will be removed from support and a pro rata time credit given. Pricing for specialist application software (particularly those under UMS support) is normally defined by the OEM.

XIII. NON-ASSIGNABILITY

This Contract may not be assigned by either party without the written agreement of the other party.

XIV. CONFIDENTIALITY & ANTI POACHING

FERN shall keep strictly confidential, both during the term of this Agreement and thereafter, any and all technical, commercial and/or other proprietary information relating to **XYZ's** business and which it may acquire by any means during the performance of this Agreement, unless, through no fault of **FERN** this information already makes part of the public domain. **FERN** commits itself to impose the above confidentiality obligation on its

employees and subcontractors who shall be performing the services. **XYZ** shall likewise keep confidential all such information relating to **FERN's** business.

Unless otherwise agreed with **XYZ** beforehand and in writing, whilst this contract is operable or for a period of three (3) months following its termination for whatever reason, **FERN** shall not approach an employee of **XYZ** with a view to employment at **FERN** nor shall **FERN** employ a prior employee of **XYZ** within a period of six (6) months after having terminated employment at **XYZ**. **XYZ** likewise warrants that **XYZ** shall not approach or employ current or prior employees of **FERN**.

XV. LEGAL FEES

Should any litigation be commenced between the parties to this Contract concerning the terms of this Contract, or the rights and duties of either party in relation thereto, the party, **XYZ** or **FERN**, prevailing in said litigation shall be entitled, in addition to such other relief as may be granted, to a reasonable sum as and for legal fees in such litigation which shall be determined by the Court in such litigation or in a separate action but for the purpose.

XVI. LAW GOVERNING CONTRACT

This Contract shall be governed by the Laws of the United Kingdom or where such laws do not provide suitable direction or where regional laws create ambiguity the laws of England shall preside, save in that should the contract be active outside of the United Kingdom then the laws of the European Union shall take precedence over those of the United Kingdom. This contract will constitute the entire Contract between **FERN** and **XYZ** in respect of the maintenance of the system.

SPECIAL CONDITIONS:

No Special conditions apply

IN WITNESS WHEREOF, the undersigned parties have executed multiple counterparts of this Contract and the date shown below:

**Fern Computer Consultancy
Ltd**

Signed by: _____

Print

Name: KIT ELLIS

Position: CONTRACTS MANAGER

Date: 4 May 2010

XYZ Limited

Signed by: _____

Print

Name: _____

Position: _____

Date: _____

Pre-paid UMS - Schedule B

Upgrades

Upgrades are OEM software releases that provides enhancements to the product. These are normally released annually but there is no fixed time structure. The service provides, upon request by the customer, the delivery of the latest OEM issued version of software to the customer. The service does not provide for installation of same or for any data conversions that may be necessary, such work being chargeable under the standard T&M rates unless otherwise agreed. Where an OEM system has been customised by **FERN** on behalf of the customer, upgrade of the customisation would also be chargeable at the standard T&M rates.

Maintenance

Maintenance is the OEM provision of updates (e.g. bug fixes, minor code additions) that can be downloaded for use with the current software release. The service allows the customer to download and utilise any updates to the current software. The service does not provide for installation of same or for any data conversions that may be necessary, such work being chargeable under the standard T&M rates unless otherwise agreed. Where an OEM system has been customised by **FERN** on behalf of the customer, upgrade of the customisation would also be chargeable at the standard T&M rates.

Support

Support is the provision of remote support during the agreed normal service hours

Unlimited number of remote (e.g. telephone, email) based enquiries.

Direct access to engineer as soon as they are available

Where **FERN** considers it beneficial to the resolution of the support call **FERN** may request internet/VPN based access to the customer's systems. In this case the customer may either provide or decline to provide said access. If the customer declines said access and **FERN** cannot effect a resolution without said access then, unless the customer engages a chargeable site visit, Fern's liability in respect of that support issue shall cease.

9.00 am to 5.00 pm Mon-Fri (excl public holidays and Company Christmas closure – see 1A)

If the office is manned and an engineer is available, cover extends outside these hours though such extensions would be chargeable if other than telephone hot line is required

Exclusions: Where the answer is readily available in the manual

Where the user requires training on the applications software or its underlying systems if knowing them is relevant

Where the software is networked, the System Manager is to be competent in the operation and set up of the system and the software.

Service Rates where not covered by pre-paid UMS contract

Maintenance calls not covered by the standard contract will be charged at the following rates. (per hour, door-to-door basis)

Premium rates (other than standard) will only apply if the engineer is required and authorised by the customer to continue work outside the standard rate period. If the engineer chooses to continue work on his own authorisation then the premium rate will not be applied.

<u>Monday - Friday</u>	09:00-17:00	Standard Rate (min 1 hour)		
		thereafter in ½hr steps	Hourly rate	Daily rate (7.5 hours)
			£ 50 job charge	No job charge
		Hardware/systems software	£ 90	£ 595
		CAD	£ 100	£ 650
	CAE Analysis	£ 110	£ 695	
	17:01-22:00	Standard rate + 50%		
	22:01-09:00	Standard rate + 100%		
<u>Saturday</u>	09:00-17:00	Standard rate + 50%		
	17:01-22:00	Standard rate + 100%		
	22:01-09:00	Standard rate + 150%		
<u>Sunday &</u>	All hours	Standard rate + 150%		

Company Holidays

- a) All out of hours cover must be by prior agreement with **FERN**.
- b) The minimum charge per call-out is 1 hour, including travel time. Each part of an hour beyond the initial period will be charged upward to the nearest half hour.
- c) Mileage is charged at £0.55 per mile.
- d) Any parts used will be charged at current prices.
- e) For reference, it is **FERN**'s policy that the engineer in attendance is rewarded with half all premiums paid by customer
- f) VAT will be charged at the applicable rate.

Installation, de-installation and Commissioning

FERN will upon request and at the agreed pricing, provide installation, de-installation and commissioning as required. This can include installation and configuration of Network Hardware (excluding building structural modifications for cable routing), Workstations, Operating System Software, Applications Software, Peripherals and all other hardware, software or services required.

Definitions

As the terms "Installation" and "Commissioning" are used by different suppliers in different ways we have taken the opportunity to clarify the service that we offer as "Installation and Commissioning"

Our interpretation is as follows:

Installation: Software installation is the installing of the software onto the network server or stand alone workstation on which the software is to initially operate.

Hardware Installation is the physical installation of the hardware into the location where it will be used including the connection to the network where one is fitted.

Commissioning: Software commissioning is the initial setting up of the software so that the user can immediately use the software in a meaningful and productive manner (assuming that the user was adequately skilled in the use of the software). Commissioning does not include specific customisation of the software.

Hardware commissioning is the setting up of the hardware so that it can operate as stand alone or communicate properly with other machines or peripherals. It also includes the setting up of operating system files so that the hardware performance is not compromised.

Basis of works

The following issues are stated:

- a) **FERN** is not responsible for data. Where work is carried out on customer's existing equipment **FERN** strongly recommend that customer takes data backups before any work is carried out.
- b) **FERN** do not warrant that customers existing hardware and network cabling is directly compatible with new hardware/software. Fern is entitled to charge on a T&M basis for additional works required.

Summary Terms:

Prices exclude VAT, Import Duties, Taxes and Delivery unless otherwise stated

Consultancy available but not included unless expressly quoted

Quotation valid for 30 days subject to manufacturers price changes

Payment with order please unless credit account (30 day) agreed (bank account details below)

Goods remain the property of Fern until paid for in full

Maintenance (UMS) provided on basis of contract (<http://www.ferncc.com/Downloads/UMSTermsEG.pdf> or on request)

Training invoiced for payment in advance, substitution allowed

Standard conditions of sale apply (<http://www.ferncc.com/Downloads/ConditionsOfSale.pdf> or on request)

Original 20080501

Rev 1 20080625 P5 - Pre Paid UMS – Support – Modem and PCAnywhere removed in favour of suitable internet/VPN based connectivity

Rev 2 20081119 Clause IV - To clarify that "give" reflects "receipt" and to avoid any issues relating to the performance of the postal system.