

PositPosit Software, PBC
Technical Account Management (“TAM”) and Technical Project Advisory (“TPA”) Program
Terms of Service

These Terms of Service, including all Order Forms, and all documents linked to therein (collectively, this "Agreement") is a legal agreement between you ("you") and Posit Software, PBC, a Delaware public benefit corporation with its principal place of business at 250 Northern Avenue, Suite 410, Boston, Massachusetts 02210 ("Posit"), that governs Posit's provision of TAM Services and TPA Services to you whether ordered directly from Posit or indirectly through an Posit authorized reseller or distributor (a "Reseller"). It is effective between you and Posit as of the Effective Date (as defined below). Your execution of an Order Form constitutes a binding noncancelable commitment to order the TAM Services and TPA Services set forth in the Order Form pursuant to these Terms of Service and the Order Form. All Order Forms, and all documents linked to therein, are incorporated into these Terms of Service by reference.

***** IMPORTANT –**

PLEASE READ CAREFULLY BEFORE YOU USE TAM SERVICES OR TPA SERVICES ***

By clicking on the “accept” button at the end of this document or by otherwise using the TAM Services and/or TPA Services, you acknowledge that you have read the Agreement, understand it and agree to be bound by its terms and conditions. If you are not willing to be bound by the terms of the Agreement, do *not* use the TAM Services or TPA Services.

If you are using the TAM Services and/or TPA Services in your capacity as employee or agent of a company or organization, then any references to “you” in the Agreement shall refer to such entity and not to you in your personal capacity. You warrant that you are authorized to legally bind the company or organization on whose behalf you are accessing the TAM Services and/or TPA Services. If you are not so authorized, then neither you nor your company or organization may use the TAM Services or TPA Services in any manner whatsoever.

1. Definitions.

1.1 "Affiliate" means any entity which directly or indirectly controls, is controlled by, or is under common control with the subject entity. "Control," for purposes hereof, means (a) the legal power to direct or cause the direction of the general management and policies of an entity whether directly or indirectly and whether through the ownership of voting securities, by contract, or otherwise, or (b) the beneficial ownership, whether direct or indirect, of fifty percent (50%) or more of the voting securities or other ownership interest or other comparable equity interests of an entity.

1.2 "Effective Date" means the effective date of the Order Form pursuant to which you ordered TAM Services and/or TPA Services, which is the date of last signature if signed manually or the date the order is placed if you ordered online using Posit's electronic Order Form.

1.3 "Order Form" means Posit's order form which is separately executed by you and Posit and which lists the TAM Services and TPA Services ordered by you, the annual subscription fees payable for such services, the Subscription Term, and any additional terms and conditions agreed to by the parties. All Order Forms, executed by the parties and their respective Affiliates, are incorporated herein by reference.

1.4 "Subscription Fees" means the fees payable and set forth in the Order Form.

1.5 "Subscription Term" means the period of time set forth on the Order Form during which you are subscribed to TAM Services and/or TPA Services in accordance with the Agreement and the Order Form and which period of time commences on the Effective Date.

1.6 "TAM Services" means any of the following services ordered by Customer pursuant to an Order Form:

- Technical Account Management Services: Posit's technical account management service offering as described herein and in the Order Form.
- Administrator Training: Posit's administrator training offering as described herein and in the Order Form.

2. Services; Subscription Term. During a Subscription Term and subject to your payment of the applicable Subscription Fees, Posit will provide the TAM Services and/or TPA Services as described in the applicable Order Form(s). For the avoidance of doubt, software development services are not included as part of TAM Services or TPA Services and none will be provided by Posit. If you order TAM Services and/or TPA Services, Posit will assign a named Posit Solutions Engineer and will endeavor to maintain the same named Posit Solutions Engineer throughout the Subscription Term, but may replace this person on a temporary or permanent basis in the normal course of business. Posit personnel do not require access to your computer systems or networks or to your data and you agree that you will not provide Posit personnel with such access. Either party may terminate an Order Form and the associated Subscription Term if the other party breaches this Agreement and/or the Order Form and fails to cure the breach within thirty (30) days of receipt of written notice describing the breach in reasonable detail. Each Order Form and the associated Subscription Term for TPA Services will renew only upon mutual written agreement of the parties. Each Order Form and the associated Subscription Term for TAM Services will automatically renew without further action of the Parties for successive twelve (12) month periods. This Agreement shall continue in full force and effect until all Order Forms and Subscription Terms for TAM Services and TPA Services have terminated. **3. Fees and Payments.** You shall pay Posit the fees, charges and other amounts specified in an Order Form within forty-five (45) days from your receipt of Posit's complete, accurate and undisputed invoice. If your internal procedures require that an invoice be submitted against a purchase order before payment can be made, you shall be responsible for issuing such purchase order to Posit and your failure to do so will not extend or obviate your responsibilities to pay all fees, charges and other amounts in accordance with the Agreement and the Order Form. All Subscription Fees are exclusive of taxes and are payable in United States dollars and, except as expressly otherwise provided herein, are nonrefundable. You shall be responsible for taxes levied on any transaction under the Agreement, including all federal, state, and local taxes, levies, and assessments, excluding any taxes based on Posit's net income, employees, or property.

4. Confidentiality. During the term of the Agreement, each party will regard any information provided to it by the other party and designated in writing as proprietary or confidential to be confidential (“**Confidential Information**”). Confidential Information shall also include information which, to a reasonable person familiar with the disclosing party’s business and the industry in which it operates, is of a confidential or proprietary nature. A party will not disclose the other party’s Confidential Information to any third party without the prior written consent of the other party, nor make use of any of the other party’s Confidential Information except in its performance under the Agreement. Each party accepts responsibility for the actions of its agents or employees and shall protect the other party’s Confidential Information in the same manner as it protects its own valuable confidential information, but in no event shall less than reasonable care be used. For the avoidance of doubt, the parties expressly agree that the fees payable under an Order Form and the terms of the Agreement are the Confidential Information of Posit. A receiving party shall promptly notify the disclosing party upon becoming aware of a breach or threatened breach hereunder and shall cooperate with any reasonable request of the disclosing party in enforcing its rights. Information will not be deemed Confidential Information hereunder if such information: (i) is known prior to receipt from the disclosing party, without any obligation of confidentiality; (ii) becomes known to the receiving party directly or indirectly from a source other than one having an obligation of confidentiality to the disclosing party; (iii) becomes publicly known or otherwise publicly available, except through a breach of the Agreement; or (iv) is independently developed by the receiving party without use of or reference to the disclosing party’s Confidential Information or breach of the Agreement. The receiving party may disclose Confidential Information pursuant to the requirements of applicable law (including without limitation applicable state or federal regulations which may require you to make disclosure pursuant to and as limited by such regulations, such as freedom of information regulations), legal process or government regulation, provided that it gives the disclosing party reasonable prior written notice to permit the disclosing party to contest such disclosure, and such disclosure is otherwise limited to the required disclosure. If the receiving party discloses or uses (or threatens to disclose or use) any Confidential Information in breach of this Section 4, the disclosing party shall have the right, in addition to any other remedies available to it, to seek injunctive relief to enjoin such acts, it being specifically acknowledged by the parties that any other available remedies are inadequate.

5. Limited Warranty. Posit represents, warrants and covenants that the TAM Services and TPA Services, as applicable, will be provided in a professional manner by personnel who are skilled and experienced with Posit software products and consistent with generally-accepted industry standards. Your exclusive remedy for Posit’s breach of the foregoing warranty is that Posit will, at its option and at no cost to you, reperform the TAM Services or TPA Services, as applicable. You agree to provide Posit with reasonable assistance in remedying any noncompliance. EXCEPT AS SET FORTH IN THE FOREGOING LIMITED WARRANTY, THE TAM SERVICES AND TPA SERVICES ARE PROVIDED “AS IS” AND POSIT DISCLAIMS ALL OTHER WARRANTIES AND REPRESENTATIONS, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, AND EXPRESSLY DISCLAIMS THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT. No oral or written information or advice given by Posit, its resellers, dealers, distributors, agents, representatives or employees shall create any warranty or in any way increase any warranty provided herein.

6. LIMITATION OF LIABILITY. EXCEPT FOR GROSS NEGLIGENCE, WILLFUL MISCONDUCT OR FRAUD, TO THE MAXIMUM EXTENT PERMITTED BY LAW, NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY OR ANY THIRD PARTY FOR ANY INDIRECT, SPECIAL, INCIDENTAL, EXEMPLARY, PUNITIVE, COVER, OR CONSEQUENTIAL DAMAGES (INCLUDING, BUT NOT LIMITED TO, LOSS OF BUSINESS, LOSS OF PROFITS, LOSS OF GOODWILL, LOSS OF USE, LOSS OR CORRUPTION OF DATA, INABILITY TO ACCESS OR USE EQUIPMENT, SOFTWARE OR DATA, PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, BUSINESS INTERRUPTION OR THE LIKE), ARISING OUT OF THE AGREEMENT OR THE USE OF, OR INABILITY TO USE, POSIT SOFTWARE PRODUCTS, OR BASED ON ANY THEORY OF LIABILITY INCLUDING WITHOUT LIMITATION BREACH OF CONTRACT, BREACH OF WARRANTY, TORT (INCLUDING NEGLIGENCE), PRODUCT LIABILITY OR OTHERWISE, EVEN IF SUCH PARTY OR ITS REPRESENTATIVES HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND EVEN IF A REMEDY SET FORTH HEREIN IS FOUND TO HAVE FAILED OF ITS ESSENTIAL PURPOSE. TO THE MAXIMUM EXTENT PERMITTED BY LAW, EACH PARTY’S TOTAL AGGREGATE LIABILITY UNDER THE AGREEMENT FOR ANY CAUSE WHATSOEVER WILL NOT EXCEED THE AMOUNT PAID TO POSIT FOR THE TAM SERVICES OR TPA SERVICES WHICH ARE THE SUBJECT OF THE CLAIM IN THE TWELVE MONTHS IMMEDIATELY PRIOR TO THE DATE THE CAUSE OF ACTION AROSE.

7. General.

7.1 Governing Law; Jurisdiction. The Agreement shall be governed by the internal laws of the Commonwealth of Massachusetts, U.S.A., without giving effect to principles of conflict of laws. Each party hereby irrevocably consents to the exclusive jurisdiction and venue of the state courts sitting in the Commonwealth of Massachusetts or the federal courts in the Commonwealth of Massachusetts to resolve any disputes arising under the Agreement. In each case the Agreement shall be construed and enforced without regard to the United Nations Convention on the International Sale of Goods and without regard to the Uniform Computer Information Transactions Act. **To the fullest extent permitted, each party waives the right to trial by jury in any legal proceeding arising out of or relating to the Agreement or the transactions contemplated hereby.**

7.2 Assignment. Neither party may assign any of its rights or obligations hereunder, whether by operation of law or otherwise, without the prior written consent of the other party (not to be unreasonably withheld). Notwithstanding the foregoing, either party may assign the Agreement in its entirety (including all Order Forms), without consent of the other party, to its Affiliate or to its successor in a merger, acquisition, corporate reorganization, or sale of all or substantially all of its assets, stock, or business to which the Agreement relates. Subject to the foregoing, the Agreement shall bind and inure to the benefit of the parties, their respective successors and permitted assigns.

7.3 Entire Agreement; No Third Party Beneficiaries. The Agreement contains the complete agreement between the parties with respect to the subject matter hereof, and supersedes all prior and contemporaneous agreements and understandings, whether oral or written. Any amendment to the Agreement shall be in writing and executed by a duly authorized representative of each party. Any varying or additional terms contained in a purchase order or other written notification or document issued by you in relation to the subject matter of the Agreement shall be of no effect and all such terms or conditions shall be null and void. The parties agree that there are no third-party beneficiaries to the Agreement.

7.4 Independent Contractors. Posit is performing the services as an independent contractor. Neither party shall be deemed to be an employee, agent, or other legal representative of the other party for any purpose whatsoever or have the right or authority to assume or otherwise create any obligation or responsibility, express or implied, on behalf of the other party or to bind the other party in any manner whatsoever.

7.5 Severability; Waiver. If any provision of the Agreement shall be held by a court of competent jurisdiction to be contrary to law that provision will be enforced to the maximum extent permissible and the remaining provisions of the Agreement will remain in full force and effect. A waiver by either party of any term or condition of the Agreement or any breach thereof, in any one instance, shall not waive such term or condition or any subsequent breach thereof. The failure or delay of a party to exercise any of its rights under the Agreement or upon any breach of the Agreement shall not be deemed a waiver of those rights or of the breach. No Reseller or Posit dealer or agent is authorized to make any amendment to the Agreement. The parties may amend the Agreement by mutual written agreement executed by duly authorized representatives of the parties.

7.6 Notices. Notices must be in English, in writing, and will be deemed given upon receipt, after being sent using a method that provides for positive confirmation of delivery to the physical address or email address set forth in the Order Form, including without limitation through automated receipt or by electronic log.

7.7 Effect of Termination. Termination of the Agreement shall not limit either party from pursuing any remedies available to it, including injunctive relief, or relieve you of your obligation to pay all undisputed Subscription Fees, without right of refund. Sections 1, 3, 4, 6 and 7 shall survive any expiration or termination of the Agreement.

7.8 Intellectual Property. Posit and its licensors retain ownership of all right, title, and interest in and to the TAM Services and TPA Services including without limitation all intellectual property rights therein and thereto, but expressly excluding your Confidential Information. Posit hereby grants you a limited, nonexclusive right and license to use the TAM Services and TPA Services solely in connection with your licensed use of Posit software products and subject to all restrictions on use set forth in your license agreement with Posit for such Posit software products. Posit reserves all rights not specifically granted in the Agreement. You and you Users may, from time to time, voluntarily make known to Posit suggestions, enhancement requests, techniques, know-how, comments, feedback, or other input to Posit with respect to Posit products and services (collectively, "Suggestions"). Unless otherwise agreed to in writing by the parties with respect to any Suggestion, Posit shall have a royalty-free, worldwide, irrevocable, perpetual license to use, disclose, reproduce, license, distribute, and exploit any Suggestion without restriction or obligation of any kind, on account of confidential information, intellectual property rights, or otherwise, and may incorporate into its services any service, product, technology, enhancement, documentation, or other development ("Improvement") incorporating or derived from any Suggestion with no obligation to license or to make available the Improvement to you or any other person or entity.

7.9 Counterparts; Electronic Signatures; Construction. The Agreement (including any Order Form) may be executed in counterparts, which taken together shall form one legal instrument. A manually or electronically signed copy of the Agreement (or any Order Form) delivered by facsimile, e-mail or other means of electronic transmission shall be deemed to have the same legal effect as delivery of an original signed copy of the Agreement (or Order Form). The titles of the sections of the Agreement are for convenience of reference only and are not to be considered in construing the Agreement. Unless the context of the Agreement clearly requires otherwise: (i) references to the plural include the singular, the singular the plural, and the part the whole, (ii) "or" has the inclusive meaning frequently identified with the phrase "and/or," (iii) "including" has the inclusive meaning frequently identified with the phrase "including but not limited to" or "including without limitation," and (iv) references to "hereunder," "herein" or "hereof" relate to the Agreement as a whole. The parties agree that the Agreement shall be fairly interpreted in accordance with its terms without any strict construction in favor of or against either party and that ambiguities shall not be interpreted against the drafting party.