

TERMS AND CONDITIONS



These Xytech Terms and Conditions (“Terms and Conditions”) apply to all Software as a Service Agreements (“Agreement”) executed by Xytech Systems, LLC or one of its subsidiaries (“Provider”) and a Customer (“Customer”). Provider and Customer may be referred to herein collectively as the “Parties” or individually as a “Party.”

1. Definitions.

- a. **“Aggregated Statistics”** means data and information related to Customer’s use of the Managed Services that is used by Provider in an aggregate and anonymized manner, including to compile statistical and performance information related to the provision and operation of the Managed Services.
- b. **“Authorized User”** means Customer’s employees, consultants, contractors, and agents (i) who are authorized by Customer to access and use the Managed Services under the rights granted to Customer pursuant to these Terms and Conditions and (ii) for whom access to the Managed Services has been purchased hereunder.
- c. **“Customer Data”** means, other than Aggregated Statistics, information, data, and other content, in any form or medium, that is submitted, posted, or otherwise transmitted by or on behalf of Customer or an Authorized User through the Managed Services.
- d. **“Documentation”** means Provider’s manuals, handbooks, and guides relating to the Managed Services provided or made accessible by Provider to Customer either electronically or in hard copy form including materials available at URL.
- e. **“Effective Date”** has the meaning set forth in the Agreement.
- f. **“Fees”** means the fees as listed in the Agreement.
- g. **“Managed Services”** has the meaning set forth in the Agreement.
- h. **“Provider IP”** means the Managed Services, the Documentation, and any and all intellectual property provided to Customer or any Authorized User in connection with the foregoing. For the avoidance of doubt, Provider IP includes Aggregated Statistics and any information, data, or other content derived from Provider’s monitoring of Customer’s access to or use of the Managed Services but does not include Customer Data.
- i. **“Support Services”** means the support services described in online Service Levels & Support, <https://www.xytechsystems.com/service-support/> of the Agreement.
- j. **“Term”** has the meaning set forth in the Agreement.
- k. **“Third-Party Products”** means any third-party products listed in the Agreement.

2. Access and Use.

- a. **Provision of Access and Document License.** Subject to Customer’s payment of Fees and compliance with all the Terms and Conditions and the Agreement, Provider shall (i) host the Managed Services and hereby grants Customer a non-exclusive, non-transferable (except in compliance with Section 12(g)) right to access and use the Managed Services during the Term and (ii) grants to Customer a non-exclusive, non-sublicensable, non-transferable (except in compliance with Section 12(g)) license to use the Documentation during the Term, each solely for the Customer’s internal business purposes and accessed and used solely by total number of Authorized Users set forth in the Agreement.
- b. **Use Restrictions.** Customer shall not use the Managed Services for any purposes beyond the scope of the access granted in these Terms and Conditions. Customer shall not at any time, directly or indirectly, and shall not permit any Authorized Users to: (i) copy, modify, or create derivative works of the Managed Services or Documentation, in whole or in part; (ii) rent, lease, lend, sell, license, sublicense, assign, distribute, publish, transfer, or otherwise make available the Managed Services or Documentation; (iii) reverse engineer, disassemble, decompile, decode, adapt, or otherwise attempt to derive or gain access to any software component of the Managed Services, in whole or in part; (iv) remove any proprietary notices from the Managed Services or Documentation; or (v) use the Managed Services or Documentation in any manner or for any purpose that infringes, misappropriates, or otherwise violates any intellectual property right or other right of any person, or that violates any applicable law.
- c. **Reservation of Rights.** Provider reserves all rights not expressly granted to Customer in the Agreement or these Terms and Conditions.
- d. **Suspension.** Notwithstanding anything to the contrary in these Terms and Conditions, Provider may temporarily suspend Customer’s or any specific Authorized User’s access to any portion or all of the Managed Services if: (i) Provider reasonably determines that for any reason (A) Customer’s use of the Services poses a security, legal or operational risk to Provider or any of its other customers; (B) subject to applicable law, Customer has ceased to continue its business in the ordinary course, made an assignment for the benefit of creditors or similar disposition of its assets, or become the subject of any bankruptcy, reorganization, liquidation, dissolution, or similar proceeding; (ii) any vendor of Provider has suspended or terminated Provider’s access to or use of any third-party services or

products required to enable Customer to access the Managed Services; or (iii) in accordance with Section 5(a)(iii) (any such suspension described in subclause (i), (ii), or (iii), a “Service Suspension”). Provider shall use reasonable efforts to provide written notice of any Service Suspension to Customer and to provide updates regarding resumption of access to the Managed Services and shall use commercially reasonable efforts to resume providing access to the Managed Services as soon as reasonably possible. Provider will have no liability for any damage, liabilities, losses (including any loss of data or profits), or any other consequences that Customer or any Authorized User may incur as a result of a Service Suspension.

- e. **Aggregated Statistics.** Notwithstanding anything to the contrary in these Terms and Conditions, Provider may monitor Customer’s use of the Managed Services and collect and compile Aggregated Statistics. All right, title, and interest in Aggregated Statistics, and all intellectual property rights therein, belong to and are retained solely by Provider. Customer acknowledges that Provider may compile Aggregated Statistics based on Customer Data input into the Managed Services. Customer agrees that Provider may (i) make Aggregated Statistics publicly available in compliance with applicable law and (ii) use Aggregated Statistics to the extent and in the manner permitted under applicable law; provided that in the case of both subsections (i) and (ii), such Aggregated Statistics do not identify Customer or Customer’s Confidential Information.

3. Customer Responsibilities.

- a. **General.** Customer is responsible and liable for all uses of the Managed Services and Documentation resulting from access provided by Customer, directly or indirectly, whether such access or use is permitted by or in violation of the Agreement or these Terms and Conditions. Customer is responsible for all acts and omissions of Authorized Users, and any act or omission by an Authorized User that would constitute a breach of the Agreement or these Terms and Conditions if taken by Customer will be deemed a breach of the Agreement or these Terms and Conditions by Customer. Customer shall cause Authorized Users to comply with all provisions of the Agreement and these Terms and Conditions.
- b. **Third-Party Products.** Provider may make Third-Party Products available to Customer. Such Third-Party Products are subject to their own terms and conditions and applicable flow-through provisions. By executing the Agreement, Customer agrees to any third-party terms and conditions applicable to Customer.

4. Service Levels and Support. The access rights granted hereunder entitle Customer to the Support Services described in the Agreement, and subject to the Agreement and these Terms and Conditions, Provider shall use commercially reasonable efforts to make the Managed Services available in accordance with the service levels set out in the online Service Levels & Support, <https://www.xytechsystems.com/service-support/> to the Agreement.

5. Fees and Payment.

- a. **Fees.** Customer shall pay Provider the Fees as set forth in the Agreement without offset or deduction. Unless agreed to otherwise by Provider in writing, Customer shall make all payments hereunder in US dollars on the schedule set forth in the Agreement. If Customer fails to make any payment when due, without limiting Provider’s other rights and remedies: (i) Provider may charge interest on the past due amount at the rate of 1.5% per month calculated daily and compounded monthly or, if lower, the highest rate permitted under applicable law; (ii) Customer shall reimburse Provider for all reasonable costs incurred by Provider in collecting any late payments or interest, including attorneys’ fees, court costs, and collection agency fees; and (iii) if such failure continues for five (5) days or more, Provider may suspend Customer’s and its Authorized Users’ access to any portion or all of the Managed Services until such amounts are paid in full.
- b. **Taxes.** All Fees and other amounts payable by Customer under the Agreement and these Terms and Conditions are exclusive of taxes and similar assessments. Customer is responsible for all sales, use, and excise taxes, and any other similar taxes, duties, and charges of any kind imposed by any federal, state, or local governmental or regulatory authority on any amounts payable by Customer hereunder, other than any taxes imposed on Provider’s income.
- c. **Auditing Rights and Required Records.** Customer agrees to maintain complete and accurate records in accordance with generally accepted accounting principles during the Term and for a period of two (2) years after the Term of the Agreement with respect to matters necessary for accurately determining amounts due hereunder. Provider may, at its own expense, on reasonable prior notice, periodically inspect and audit Customer’s records with respect to matters covered by the Agreement. If such inspection and audit reveals that Customer has underpaid Provider, Customer shall promptly pay the amounts necessary to rectify such underpayment, together with interest in accordance with Section 5(a). Customer

shall pay for the costs of the audit if the audit determines that Customer's underpayment equals or exceeds five percent (5%) for any quarter. Such inspection and auditing rights will extend throughout the Term of the Agreement and for a period of two (2) years after the Term of the Agreement.

6. Confidential Information. Customer acknowledges and agrees that Provider IP is confidential to Provider ("Provider Confidential Information"). Customer shall not disclose Provider Confidential Information to any person or entity, except to the Customer's employees who have a need to know the Confidential Information to exercise its rights or perform its obligations under the Agreement and these Terms and Conditions. On the expiration or termination of the Agreement, Customer shall promptly return to Provider all copies of Provider Confidential Information, whether in written, electronic, or other form or media or destroy all such copies and certify in writing to Provider that such copies have been destroyed. Obligations of non-disclosure with regard to Confidential Information are effective as of the Effective Date and will expire five years from the date first disclosed. An other confidentiality obligations must be provided under a separate confidentiality agreement between the Parties.

7. Intellectual Property Ownership; Feedback.

a. Provider IP. Customer acknowledges that Provider owns all right, title, and interest, including all intellectual property rights, in and to the Provider IP. With respect to Third-Party Products, the applicable third-party providers own all right, title, and interest, including all intellectual property rights, in and to the Third-Party Products.

b. Customer Data. Provider acknowledges that Customer owns all right, title, and interest, including all intellectual property rights, in and to the Customer Data. Customer hereby grants to Provider a non-exclusive, royalty-free, worldwide license to reproduce, distribute, and otherwise use and display the Customer Data and perform all acts with respect to the Customer Data as may be necessary for Provider to provide the Managed Services to Customer, and a non-exclusive, perpetual, irrevocable, royalty-free, worldwide license to reproduce, distribute, modify, and otherwise use and display Customer Data incorporated within the Aggregated Statistics.

c. Feedback. If Customer or any of its employees or contractors sends or transmits any communications or materials to Provider suggesting or recommending changes to the Provider IP, including without limitation, new features or functionality relating thereto, or any comments, questions, suggestions, or the like ("Feedback"), Provider is free to use such Feedback irrespective of any other obligation or limitation between the Parties governing such Feedback. Customer hereby assigns to Provider on Customer's behalf, and on behalf of its employees, contractors and/or agents, all right, title, and interest in, and Provider is free to use, without any attribution or compensation to any party, the Feedback, for any purpose whatsoever, although Provider is not required to use any Feedback.

8. Limited Warranty and Warranty Disclaimer.

a. Provider warrants that the Managed Services will conform in all material respects to the service levels set forth in the online Service Levels & Support, <https://www.xytechsystems.com/service-support/> of the Agreement when accessed and used in accordance with the Documentation. Provider does not make any representations or guarantees regarding uptime or availability of the Managed Services unless specifically identified in the online Service Levels and Support of the Agreement. The remedies set forth in the online Service Levels & Support of the Agreement are Customer's sole remedies and Provider's sole liability under the limited warranty set forth in this Section 8(a). THE FOREGOING WARRANTY DOES NOT APPLY, AND PROVIDER STRICTLY DISCLAIMS ALL WARRANTIES, WITH RESPECT TO ANY THIRD-PARTY PRODUCTS.

b. EXCEPT FOR THE LIMITED WARRANTY SET FORTH IN SECTION 8(a), THE PROVIDER IP IS PROVIDED "AS IS" AND PROVIDER HEREBY DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE. PROVIDER SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT, AND ALL WARRANTIES ARISING FROM COURSE OF DEALING, USAGE, OR TRADE PRACTICE. EXCEPT FOR THE LIMITED WARRANTY SET FORTH IN SECTION 8(a), PROVIDER MAKES NO WARRANTY OF ANY KIND THAT THE PROVIDER IP, OR ANY PRODUCTS OR RESULTS OF THE USE THEREOF, WILL MEET CUSTOMER'S OR ANY OTHER PERSON'S REQUIREMENTS, OPERATE WITHOUT INTERRUPTION, ACHIEVE ANY INTENDED RESULT, BE COMPATIBLE OR WORK WITH ANY SOFTWARE, SYSTEM, OR OTHER SERVICES, OR BE SECURE, ACCURATE, COMPLETE, FREE OF HARMFUL CODE, OR ERROR FREE.

9. Indemnification.

a. Provider Indemnification.

1. Provider shall indemnify, defend, and hold harmless Customer from and against any and all losses, damages, liabilities, costs (including reasonable attorneys' fees) ("Losses") incurred by Customer resulting from any third-party claim, suit, action, or proceeding ("Third-Party Claim") that (i) the Managed Services, or any use of the Managed Services in accordance with the Agreement and these Terms and Conditions, infringes or misappropriates such third party's intellectual property rights or (ii) is based on negligence or willful misconduct of Provider, provided, in each instance, that Customer promptly notifies Provider in writing of such Third-Party Claim, cooperates with Provider, and allows Provider sole authority to control the defense and settlement of such Third-Party Claim.

2. If a Third Party-Claim is made or appears possible, Customer agrees to permit Provider, at Provider's sole discretion, to (A) modify or replace the Managed Services, or component or part thereof, to make it non-infringing, or (B) obtain the right for Customer to continue use. If Provider determines that neither alternative is reasonably available, Provider may terminate the Agreement, in its entirety or with respect to the affected component or part, effective immediately on written notice to Customer and shall refund any prepaid Fees.

3. This Section 9(a) will not apply to the extent that the alleged infringement arises from: (A) use of the Managed Services in combination with data, software, hardware, equipment, or technology not provided by Provider or authorized by Provider in writing; (B) modifications to the Managed Services not made by Provider; or (C) Customer Data.

b. Customer Indemnification.

1. Customer shall indemnify, hold harmless, and, at Provider's option, defend Provider from and against any Losses resulting from any Third-Party Claim based on Customer's or any Authorized User's negligence or willful misconduct, provided that Customer may not settle any Third-Party Claim against Provider unless such settlement completely and forever releases Provider from all liability with respect to such Third-Party Claim or unless Provider consents to such settlement, and further provided that Provider will have the right, at its option, to defend itself against any such Third-Party Claim or to participate in the defense thereof by counsel of its own choice.

c. Sole Remedy. THIS 9 SETS FORTH CUSTOMER'S SOLE REMEDIES AND PROVIDER'S SOLE LIABILITY AND OBLIGATION FOR ANY ACTUAL, THREATENED, OR ALLEGED CLAIMS THAT THE MANAGED SERVICES INFRINGE, MISAPPROPRIATE, OR OTHERWISE VIOLATE ANY INTELLECTUAL PROPERTY RIGHTS OF ANY THIRD PARTY.

10. Limitations of Liability. IN NO EVENT WILL A PARTY BE LIABLE UNDER OR IN CONNECTION WITH THE AGREEMENT UNDER ANY LEGAL OR EQUITABLE THEORY, INCLUDING BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, AND OTHERWISE, FOR ANY: (a) CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL, ENHANCED, OR PUNITIVE DAMAGES; (b) INCREASED COSTS, DIMINUTION IN VALUE OR LOST BUSINESS, PRODUCTION, REVENUES, OR PROFITS; (c) LOSS OF GOODWILL OR REPUTATION; (d) USE, INABILITY TO USE, LOSS, INTERRUPTION, DELAY, OR RECOVERY OF ANY DATA, OR BREACH OF DATA OR SYSTEM SECURITY; OR (e) COST OF REPLACEMENT GOODS OR SERVICES, IN EACH CASE REGARDLESS OF WHETHER THE PARTY WAS ADVISED OF THE POSSIBILITY OF SUCH LOSSES OR DAMAGES OR SUCH LOSSES OR DAMAGES WERE OTHERWISE FORESEEABLE. OTHER THAN THE PROVIDER'S INDEMNIFICATION OBLIGATIONS FOR INTELLECTUAL PROPERTY INFRINGEMENT OR MISAPPROPRIATION AND EACH PARTY'S CONFIDENTIALITY OBLIGATIONS HEREUNDER, IN NO EVENT WILL EITHER PARTY'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THE AGREEMENT UNDER ANY LEGAL OR EQUITABLE THEORY, INCLUDING BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, AND OTHERWISE EXCEED THE TOTAL AMOUNTS PAID AND AMOUNTS ACCRUED BUT NOT YET PAID TO PROVIDER UNDER THE AGREEMENT IN THE TWENTY-FOUR (24) MONTH PERIOD PRECEDING THE EVENT GIVING RISE TO THE CLAIM.

11. Termination. In addition to any other express termination right set forth in these Terms and Conditions, (i) Provider may terminate the Agreement, effective on written notice to Customer, if Customer: (A) fails to pay any amount when due hereunder, and such failure continues more than fifteen (15) days after Provider's delivery of written notice thereof; or (B) breaches any of its obligations under Section 2(c) or 6; (ii) either Party may terminate the Agreement, effective on written notice to the other Party, if the other Party materially breaches the Agreement or these Terms and Conditions, and such breach: (A) is incapable of cure; or (B) being capable of cure,

remains uncured for thirty (30) days after the non-breaching Party provides the breaching Party with written notice of such breach; (iii) either Party may terminate the Agreement, effective immediately upon written notice to the other Party, if the other Party: (A) becomes insolvent or is generally unable to pay, or fails to pay, its debts as they become due; (B) files or has filed against it, a petition for voluntary or involuntary bankruptcy or otherwise becomes subject, voluntarily or involuntarily, to any proceeding under any domestic or foreign bankruptcy or insolvency law; (C) makes or seeks to make a general assignment for the benefit of its creditors; or (D) applies for or has appointed a receiver, trustee, custodian, or similar agent appointed by order of any court of competent jurisdiction to take charge of or sell any material portion of its property or business; or (iv) either Party may terminate the Agreement with thirty (30) days advance notice of the end of the Initial Term or any Renewal Term.

a. Effect of Expiration or Termination. Upon expiration or earlier termination of the Agreement, Customer shall immediately discontinue use of the Provider IP and, without limiting Customer's obligations under 6, Customer shall delete, destroy, or return all copies of the Provider IP and certify in writing to the Provider that the Provider IP has been deleted or destroyed. No expiration or termination will affect Customer's obligation to pay all Fees that may have become due before such expiration or termination or entitle Customer to any refund.

b. Survival. This Section 11(b) and 1, 5, 6, 7, 8(b), 9, 10, and 12 survive any termination or expiration of the Agreement. No other provisions of the Agreement or these Terms and Conditions survive the expiration or earlier termination of this Agreement.

12. Miscellaneous.

a. Entire Agreement. The Agreement, together with the Terms and Conditions and any other documents incorporated herein by reference and all related Exhibits, constitutes the sole and entire agreement of the Parties with respect to the subject matter of the Agreement and supersedes all prior and contemporaneous understandings, agreements, and representations and warranties, both written and oral, with respect to such subject matter.

b. Notices. All notices, requests, consents, claims, demands, waivers, and other communications hereunder (each, a "Notice") must be in writing and addressed to the Parties at the addresses set forth on the first page of the Agreement.

c. Force Majeure. In no event shall either Party be liable to the other Party, or be deemed to have breached the Agreement or these Terms and Conditions, for any failure or delay in performing its obligations under the Agreement or these Terms and Conditions, if and to the extent such failure or delay is caused by any circumstances beyond such Party's reasonable control, including but not limited to acts of God, flood, fire, earthquake, epidemic, explosion, war, terrorism, invasion, riot or other civil unrest, strikes, labor stoppages or slowdowns or other industrial disturbances, or passage of law or any action taken by a governmental or public authority, including imposing an embargo.

d. Amendment and Modification; Waiver. No amendment to or modification to the Agreement or these Terms and Conditions is effective unless it is in writing and signed by an authorized representative of each Party.

e. Severability. If any provision of the Agreement or these Terms and Conditions is invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability will not affect any other term or provision of the Agreement or these Terms and Conditions.

f. Governing Law; Submission to Jurisdiction. The Agreement is governed by and construed in accordance with the internal laws of the State of California without giving effect to any choice or conflict of law provision or rule that would require or permit the application of the laws of any jurisdiction other than those of the State of California. Any legal suit, action, or proceeding arising out of or related to the Agreement or the licenses granted hereunder will be instituted exclusively in the federal courts of the United States or the courts of the State of California in each case located in the city of Chatsworth, California and County of Los Angeles, and each Party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action, or proceeding.

g. Assignment. Customer may not assign any of its rights or delegate any of its obligations under the Agreement or these Terms and Conditions, in each case whether voluntarily, involuntarily, by operation of law or otherwise, without the prior written consent of Provider, which consent shall not be unreasonably withheld, conditioned, or delayed. Any purported assignment or delegation in violation of this Section will be null and void. No assignment or delegation will relieve the assigning or delegating Party of any of its obligations hereunder. The Agreement and these Terms and Conditions are binding upon and inure to the benefit of the Parties and their respective permitted successors and assigns.

h. Export Regulation. Customer shall comply with all applicable federal laws, reg-

ulations, and rules, and complete all required undertakings (including obtaining any necessary export license or other governmental approval), that prohibit or restrict the export or re-export of the Managed Services or any Customer Data outside the United States.

i. United States Government Rights. Each of the Documentation and the software components that constitute the Managed Services is a "commercial product" as that term is defined at 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. Accordingly, if Customer is an agency of the United States Government or any contractor therefor, Customer only receives those rights with respect to the Managed Services and Documentation as are granted to all other end users, in accordance with (a) 48 C.F.R. § 227.7201 through 48 C.F.R. § 227.7204, with respect to the Department of Defense and their contractors, or (b) 48 C.F.R. § 12.212, with respect to all other United States Government users and their contractors.

j. Equitable Relief. Each Party acknowledges and agrees that a breach or threatened breach by such Party of any of its obligations under 6 or, in the case of Customer, Section 2(c), would cause the other Party irreparable harm for which monetary damages would not be an adequate remedy and agrees that, in the event of such breach or threatened breach, the other Party will be entitled to equitable relief, including a restraining order, an injunction, specific performance, and any other relief that may be available from any court, without any requirement to post a bond or other security, or to prove actual damages or that monetary damages are not an adequate remedy. Such remedies are not exclusive and are in addition to all other remedies that may be available at law, in equity, or otherwise.