



HELPING YOU SUCCEED WITH YOUR
DATA PROTECTION STRATEGY™

gradian

GRADIAN SYSTEMS LTD

TERMS AND CONDITIONS FOR THE SUPPLY OF SERVICES

1 INTERPRETATION

1.1 Any terms defined in the Customer Documents will have the same meaning in these terms and conditions.

1.2 In these terms and conditions, the following definitions and rules of interpretation apply:

“Cloud Services” means software as a service (being a subscription-based software delivery method that provides access to Software and functions remotely as a web-based service) and the related hosting environment provided by Us.

“Contract” means the contract between the You and Us for the supply of Services, made up of these terms and conditions and the Customer Documents.

“Contract Period” means the term of the Contract, from the Contract Start Date up to and including the latest of (a) the latest Contract Period “to” date set out in the Customer Documents; (b) any Renewal Period; or (c) the completion of the last remaining Service under these terms and conditions.

“Contract Start Date” means the earlier of (a) the earliest Contract Period “from” date set out in the Customer Documents; and (b) the start of the provision of the Services.

“Customer Order Acknowledgement” means the Customer Order Acknowledgement describing details of the services, Fees, Contract Period and other information, issued by Us.

“Customer Documents” means the Customer Order Acknowledgement and/or Scope of Work.

“Fees” means the fees and charges (including charges for time, expenses and materials (and VAT where appropriate)) payable by You to Us described in the Customer Documents including during any Renewal Period.

“Professional Services” means the services to be provided by Us set out in the Scope of Work and such other consulting and other professional services as You and We may agree from time to time in writing.

“Services” means the services set out in the Customer Documents and such other services as You and We may agree from time to time in writing, which may include Cloud Services, Software Services, Support Services and/or Professional Services.

“Software” means software programs proprietary to Us or one or more third parties (which may or may not be modified by Us). It includes the version initially licensed together with any updates included in the Services but excludes any new software feature or substantial additional functionality for which We, in Our sole discretion, generally charge customers of the Software additional charges.

“Software Services” means the provision of access to, or the use of, Software (whether by way of independent licence, as part of the Cloud Services or otherwise) to You, by Us.

“Scope of Work” means the detailed plan describing the project to be undertaken by Us for You and setting out the estimated timetable (which may include project milestones) and responsibilities of each of the parties for, or in connection with, the provision of the Professional Services in accordance with the Contract.

“Support Services” means the maintenance and support services specified in the Customer Order Acknowledgement.

“Users” means the number of Your employees, contractors, and end users authorised by You and Us to use Services other than Professional Services, as agreed between us in writing from time to time. For Services that are specifically designed to allow Your customers, suppliers or other third parties to interact with You (including via Cloud Services), such third parties will be considered “Users” subject to the terms of the Contract.

“We”, “Our”, “Us” means Gradian Systems Limited, company number 04178475 and whose registered office is at Abbey House, 282 Farnborough Road, Farnborough, GU14 7NA.

“You”, “Your” means the Customer as specified in the Customer Documents.

“Your Content” means the data provided by You, required to perform the Services.

- 1.3 (a) reference to any statute or statutory provision includes a reference to that statute or statutory provision as from time to time amended, extended or re-enacted; (b) words importing the singular include the plural, wording importing any gender include every gender and words importing persons include bodies corporate and unincorporated; and (in each case) vice versa (c) any phrase introduced by the terms including, include, in particular, or any similar expression, will be construed as illustrative and will not limit the sense of the words preceding those terms; (d) where reference is made to a party’s consent, that consent will not be unreasonably withheld, conditioned or delayed; and (e) a reference to writing or written includes email but not faxes.

2 SUPPLY OF SERVICES

- 2.1 We will provide the Services to You for the duration of the Contract, in accordance with the terms of the Contract.
- 2.2 We will: (a) perform the Services with reasonable care and skill; (b) perform the Services in accordance with the Service Description; (c) use reasonable endeavours to meet delivery dates and timeframes (including project milestones) set out in the Customer Documents, but those dates and timeframes are estimates only and time will not be of the essence of the Contract; and (d) provide You with the information and assistance necessary to enable You to prepare the relevant sites and systems for the supply of the Services.
- 2.3 You will: (a) co-operate with Us in all matters relating to the Services; (b) provide in a timely manner access to the premises and data We request to enable us to perform the Services; (c) provide in a timely manner

any information We request, and ensure that such information is accurate in all material respects; and (d) be responsible (at Your own cost) for preparing the relevant sites and systems for the supply of the Services (including fulfilling any Customer Pre-requisites, and meeting Assumptions and Dependencies, set out in the Customer Documents).

- 2.4 If We are prevented from or delayed in fulfilling Our obligations under the Contract because of Your act or omission, We will not be liable for Your costs, charges or losses arising directly or indirectly from the prevention or delay, but We will still be entitled to payment of the Fees and to recover Our costs, charges or losses that arise directly or indirectly from the prevention or delay.

3 PROFESSIONAL SERVICES

- 3.1 Unless expressly agreed otherwise in writing between You and Us, Professional Services will be performed during normal business hours, Monday to Friday, 9a.m. to 5p.m. (excluding weekends and public holidays) in the time zone where the Professional Services resource is located.
- 3.2 The Work Estimates set out in a Scope of Work are Our reasonable estimates of the number of workdays required for Us to fulfil the Deliverables set out in that Scope of Work and are subject to change. Unless We are providing Professional Services for a fixed fee, if We have underestimated the time needed to fulfil those Deliverables, additional fees will be payable on a time-and-materials basis at our then-prevailing standard daily fee rate.
- 3.3 We shall be entitled to invoice You for the Fees and any charges payable by You to Us, for Professional Services, in advance of the period to which they relate.

4 SOFTWARE SERVICES AND CLOUD SERVICES

- 4.1 Your Users may use the Services at your licensed sites in Your normal course of business and You are responsible for their compliance with the Contract. In addition, Users who work at or are assigned to a licensed site may use the Services on personal computers or laptops located off-site.
- 4.2 You may make copies of the Software for backup purposes only. Each copy You make must include the copyright/proprietary rights notice(s) embedded in and affixed to the Software.
- 4.3 You may not publish, transmit, retransmit, disseminate, broadcast, circulate, sell, resell, loan, lease, distribute or transfer any part of the Services or copies of the Services to third parties, nor reverse engineer, decompile, disassemble or otherwise attempt to discern the source code of the components of the Services, nor download any part of the Cloud Services. You may not use Software, nor allow Software to be used, to provide data management or processing services for third parties. Except as expressly permitted in these terms and conditions, You may not reproduce all or any portion of the Services or any accompanying documentation, or modify, translate or otherwise create derivative works of the Services.
- 4.4 You accept sole responsibility for (and We will not be liable for) Your use of the Services, or any User's use of the Services. You will hold Us harmless and fully indemnified against any claims, costs, damages, loss and liabilities arising out of any such use.

5 MAINTENANCE AND SUPPORT SERVICES

- 5.1 We will provide maintenance and/or support as specified in the Customer Order Acknowledgement.
- 5.2 We may provide new versions of the Software to You and/or periodic Software changes or updates to the Services including for purposes of (a) providing minor enhancements and/or improvements, patches, fixes, or the like to the Software; (b) resolving technological issues related to Your then-current version of the Software; or (c) reflecting changes in technology, industry practices, patterns of system use, and availability of third party content, which will be included in the Fees. You will be responsible for installing any such new versions and/or updates.
- 5.3 You will: (a) regularly perform the various routine and preventative maintenance operations described in applicable user guides or as advised by Us; (b) keep records of usage and performance of the Services in a mutually agreed format if requested by Us; and (c) not make any modification or addition to the Services, without our prior written consent.

- 5.4 You will: (a) nominate no more than two of Your staff per site as users of Our support services helpline; (b) notify Us within 60 days of a change to your nominated staff; (c) notify Us promptly of any malfunction in the Services; (d) follow the processes set out in the Guide to Gradian Support referred to in the Customer Order Acknowledgement.; (e) maintain procedures to facilitate reconstruction of any lost or altered files, data or programs to the extent deemed necessary by You.
- 5.5 The Support Services will not include: (a) the rectification of problems following a failure by You to follow Our reasonable instructions; (b) the use of Services other than that recommended by Us and set out in relevant user guides; (c) the use of Services for a purpose for which they were not intended; (d) diagnosis or rectification of problems not directly associated with the Services; and (e) rectification of lost or corrupted data arising from any reason other than Our negligence or breach of the Contract.
- 5.6 If We materially breach Our obligations in respect of Support Services, we will re-perform the defective Support Services so that they conform to the specifications provided in the Contract. This clause 5.6 contains Our entire obligation to You and Your exclusive remedy with regard to any claimed breach arising out of or based upon the Support Services.

6 WARRANTIES

- 6.1 We warrant to You that: (a) the Services will be provided with reasonable skill and care by skilled personnel in accordance with normal industry standards; (b) the Services will not infringe the intellectual property rights of any third party; (c) the Services, other than third party products, content or software, will be free from defects and materials and in the case of Software (other than third party software) will substantially perform to the appropriate Software product description for any warranty period specified in the Customer Order Acknowledgement. (or 30 days if not so specified); (d) We hold the necessary rights to grant the rights specified in these terms and conditions and (e) We have authority to enter into these terms and conditions with You.
- 6.2 We hereby assign to You (to the extent that We are permitted to do so) the benefit of any warranty given to Us in respect of third-party software.
- 6.3 Except as set out in clauses 6.1 and 6.2, the Services are provided on an “as is” and “as available” basis, without warranty of any kind, express or implied, including warranties of performance, merchantability and fitness for a particular purpose.

7 OWNERSHIP

- 7.1 You retain all ownership and intellectual property rights in Your Content. During the Contract Period You grant Us a limited, non-exclusive, non-sublicensable, non-transferable, royalty-free right to use, copy, store and display Your Content to provide the Services to You, and for the purpose of improving and enhancing the overall user experience of the Services. We will not sell, rent, or lease Your Content to third parties but We may disclose Your Content if required to do so by government agency, law enforcement agency, or as may be required by law.
- 7.2 We, or Our third-party licensors, retain all ownership and intellectual property rights to the Services and products of the Services, and to any product of the Services developed or delivered by Us or on Our behalf under the Contract. During the Contract Period We grant You and Your Users a limited, non-exclusive, non-sublicensable, non-transferable, royalty-free right to access and use the same to such extent as is necessary to enable You to make reasonable use of the Services and products of the Professional Services as is envisaged by the parties. If We terminate the Contract under clause 13.2, this licence will automatically terminate.
- 7.3 If the Services provide you with access to products or content that are owned or licensed by a third party, Your use of those products or content is subject to the relevant third party's applicable terms.
- 7.4 You will promptly inform Us if You become aware of: (a) any unauthorised use of the Services; (b) any actual, threatened, or suspected infringement of any intellectual property in the Services; and (c) any claim by any third party that the Services infringe the intellectual property or other rights of any person.
- 7.5 You will at Our request and expense do all such things as may be reasonably required to assist Us in taking or resisting proceedings in relation to any infringement or claim referred to in this clause, and in maintaining the validity and enforceability of the intellectual property in the Services.

- 7.6 If a claim of infringement is made against Us or You with respect to the Cloud Services or the Software Services, We may (for the purpose of settling such claim and at Our option) (a) substitute fully equivalent non-infringing Services; (b) modify the Services so that they no longer infringe but remain functionally equivalent; or (c) at Our expense, obtain the right for You to continue to use the Services. This clause contains Our entire obligation to You and Your exclusive remedy with regard to any claimed or actual infringement arising out of or based upon the Cloud Services and/or the Software Services.

8 CHANGE CONTROL

- 8.1 If You wish to change the scope or execution of the Services, You will provide Us with details of the requested change in writing and, within a reasonable time, We will provide You with a written estimate of: (a) the likely time required to implement the change; (b) any variations to the Fees arising from the change; (c) the likely effect of the change on delivery dates; and (d) any other impact of the change on the terms of the Contract. If You wish Us to proceed with the change, We have no obligation to do so unless and until You and We have agreed in writing on the necessary variations to the Fees and any other relevant terms of the Contract.
- 8.2 If We wish to change the scope or execution of the Services, We will provide You with details of the requested change and seek your consent to it. There will be no change to Our Fees or the other terms of the Contract because of that change, unless the change is attributable to Your non-compliance with the terms of the Contract.

9 PAYMENT

- 9.1 We will invoice you for the Contract Premium set out in the Customer Order Acknowledgement on or around the Contract Start Date.
- 9.2 Other Fees for will be invoiced according to the payment schedule set out in the Customer Documents (subject always to clause 3.3 of these terms and conditions).
- 9.3 You will pay the Fees within 30 days of the date of Our invoice.
- 9.4 Fees payable under the Contract are exclusive of VAT which will be paid by You at the rate and in the manner for the time being prescribed by law subject to receipt of appropriate VAT invoices.
- 9.5 If any sum payable under the Contract is not paid by the due date then (without prejudice to Our other rights and remedies) We reserve the right to charge interest on such sum on a day to day basis (as well after as before any judgment) from the date or last date for payment thereof to the date of actual payment (both dates inclusive) at the rate of 4% per annum above HSBC's base rate from time to time. Such interest will be paid by You on Our demand.

10 CONFIDENTIAL INFORMATION

- 10.1 Each party undertakes that it will not during the Contract, and for a period of four years after termination or expiry of the Contract, disclose to any person any confidential information concerning the business, affairs, know-how, customers, clients or suppliers of the other party, except as permitted by clause 10.2.
- 10.2 Each party may disclose the other party's confidential information: (a) to employees and third parties who need the information to carry out that party's respective obligations under the Contract, ensuring that those employees and third parties comply with this clause 10; and (b) as may be required by law, a court of competent jurisdiction or any governmental or regulatory authority.
- 10.3 No party will use the other party's confidential information for any purpose other than to exercise its rights and perform its obligations under or in connection with the Contract.

11 EXCLUSION AND LIMITATION OF LIABILITY

- 11.1 Neither We nor Our licensors make any warranty that access to the Services will be uninterrupted, secure, complete or error free.
- 11.2 We will not be responsible if the Services, or any part of them, fail due to one or more of the following: (a) the malfunction of software not provided by Us; (b) the malfunction of hardware, (c) Your negligence or fault; (d) Your failure to follow the instructions set forth in relevant user guides; (d) material changes in the

operating environment not authorised by Us; (e) modifications to or changes to the Services not made or suggested by Us; or (f) Your failure to implement and maintain a proper and adequate backup and recovery system for the Software or Your Content and associated files.

- 11.3 The following provisions set out Our entire financial liability (including any liability for the acts or omissions of Our employees, agents and subcontractors) to You in respect of: (a) any breach of the Contract however arising; (b) any use made by You of the Services, the products of the Services or any part of them; and (c) any representation, misrepresentation (whether innocent or negligent), statement or tortious act or omission (including negligence) arising under or in connection with the Contract.
- 11.4 If We materially breach Our obligations under the Contract in respect of Services which We can reasonably be expected to correct or re-perform, We will correct or re-perform the Service so that it conforms to the terms and conditions of the Contract, as long as You have notified us of the breach in writing not more than 30 days after the date on which the breach occurred. Subject to clause 11.10, this clause contains Our entire obligation to You and Your exclusive remedy with regard to any claimed breach arising out of or based upon the Services which We can reasonably be expected to correct or re-perform.
- 11.5 Subject to clauses 11.4, 11.6 and 11.10, Our total liability to You, whether in contract, tort (including negligence), for breach of statutory duty, or otherwise, arising under or in connection with the Contract will be limited to an amount equivalent to the Fees and We will not be liable for consequential, indirect or special losses.
- 11.6 Subject to clause 11.10, We will not in any circumstances be liable in any way for any of the following (whether direct or indirect): (a) any loss of profits, business, business opportunities, revenue, turnover, reputation or goodwill; (b) any loss or corruption of data or information; (c) loss of anticipated savings or wasted expenditure (including management time); or (d) any loss or liability under or in relation to any other contract.
- 11.7 The limitations of liability set out in clause 11.5 will not apply in respect of any breach of clause 10 (Confidential Information) or any breach of any publicity arrangements agreed between You and Us.
- 11.8 Subject to clause 11.10, the remedies in clauses 5.6 (Maintenance and Support Services), 7 (Ownership), 11.5 (Exclusion and Limitation of Liability), and 13.2 excluding 13.2(b) (Term and Termination) are Your exclusive remedies and are in lieu of all other legal or equitable remedies and all liabilities or obligations on Our part for damages arising out of, relating to, or in connection with the Contract.
- 11.9 Except for claims relating to non-payment of the Fees or improper use of the Services, no claim arising from the Contract may be made, nor action based upon such claim brought, by either party more than one year after the basis for the claim becomes known to the party desiring to assert it.
- 11.10 All warranties, conditions and other terms implied by statute or common law are, to the greatest extent permitted by law, excluded from the Contract. We do not limit or exclude Our liability for: (a) death or personal injury caused by Our negligence; (b) fraud or fraudulent misrepresentation; or (c) any other liability which cannot be limited or excluded by applicable law.

12 APPLICATION OF THESE TERMS AND CONDITIONS

- 12.1 Your purchase order is an offer by You to purchase services from Us on these terms and conditions. Accordingly, when we provide our Customer Documents, or if we start providing Services pursuant to the purchase order, a contract will be established for the supply and purchase of the Services on these terms and conditions.
- 12.2 These terms and conditions will apply to all contracts for the supply of goods and services by Us to You, to the exclusion of any other terms (including those contained in, or referred to in, Your purchase order, confirmation of order, or specification, or implied by law, trade custom, practice or course of dealing).
- 12.3 If there is a conflict between the terms of the documents which make up the Contract, the following order of precedence shall apply: (a) these terms and conditions, except in relation to clause 9 (Payment), which clause shall be subject to the Customer Documents; and (b) the Scope of Work in relation to Professional Services and the Customer Order Acknowledgement in relation to other Services.

13 TERM AND TERMINATION

- 13.1 The Contract will start on the Contract Start Date and continue for the Contract Period. On expiry of the Contract Period (but not on termination of the Contract by a party or completion of the Services) the Contract will be automatically renewed as specified in the Customer Documents (each a “**Renewal Period**”).
- 13.2 You may terminate the Contract at the end of the Contract Period or any Renewal Period by giving Us not less than 45 Days’ notice (105 Days’ notice if the Contract includes Proofpoint products or services) in writing to expire no later than the end of the Contract Period or then-current Renewal Period
- 13.3 Either party may terminate the Contract by giving written notice to the other if: (a) that other party commits a material breach of the Contract and in the case of a breach capable of remedy, fails to remedy the same within 14 days of receipt of a written notice giving full particulars of the breach and requiring it to be remedied; (b) the other party fails to pay any amount due under this agreement on the due date for payment and remains in default not less than seven days after being notified in writing to make such payment; or (c) the other party will have a receiver or administrative receiver appointed of it or over any part of its undertaking or assets or will pass a resolution for winding up (otherwise than for the purpose of a bona fide scheme of solvent amalgamation or reconstruction) or a court of competent jurisdiction will make an order to that effect or if the other party will enter into any voluntary arrangement with its creditors or will become subject to an administration order or notice of intention to appoint an administrator is filed at court or will cease to carry on business.
- 13.4 We may terminate the Contract: (a) upon reasonable prior notice if You fail to pay on time all undisputed amounts; (b) immediately, if You use Services in a manner that We reasonably believe to be unlawful, harmful to Us or a third party, or materially hinders performance of the Services; or (c) upon 30 days’ notice if We are unable to continue to provide the Services or any part of the Services for any reason not within Our control (including any software or any component of it reaching its end-of-life).
- 13.5 Any termination of the Contract (howsoever occasioned) will not affect any accrued rights or liabilities of either party nor will it affect the coming into force or the continuance in force of any provision hereof which is expressly or by implication intended to come into or continue in force on or after such termination.

14 GENERAL PROVISIONS

- 14.1 **Notices:** All notices, requests, demands or other communications to or upon the parties will be in writing and: (a) if given or made by letter sent by first class prepaid post and, when applicable, by airmail, will be deemed to have been given 24 hours (in the case of domestic post) and 72 hours (in the case of airmail) after being posted and in proving such service it will only be necessary to prove that the notice request demand or other communication was properly addressed stamped and posted; (b) if given or made by letter delivered by hand at the address of the addressee, will be deemed to have been given or made at the time of delivery; (c) if given or made by email will be deemed to have been given or made when sent, unless it was sent before 9 am or after 5pm Monday to Friday UK time (excluding UK public bank holidays) in which case it will be deemed to have been given or made at the start of the next working day; and (d) will be given at the respective addresses as provided by the parties as its address from time to time to the other parties.
- 14.2 **Force Majeure:** Notwithstanding anything else contained in the Contract, neither party will be liable for any delay in performing its obligations hereunder if such delay is caused by circumstances beyond its reasonable control (including any delay caused by any act or omission of the other party). Subject to the party so delayed promptly notifying the other party in writing of the reasons for the delay (and the like duration of the delay), the performance of such party’s obligations will be suspended during the period that the said circumstances persist and such party will be granted an extension of time for performance equal to the period of the delay. Save where such delay is caused by the act or omission of the other party (in which event the rights, remedies and liabilities of the parties will be those conferred and imposed by the other terms of the Contract and by law): (a) any costs arising from such delay will be borne by the party incurring the same; and (b) either party may, if such delay continues for more than five weeks, terminate the Contract by giving notice in writing to the other in which event neither party will be liable to the other by reason of such termination save that You will pay Us a reasonable sum in respect of any work carried out by Us prior to such termination and for that purpose We may deduct such sum from any amounts previously paid by You under the Contract (the balance (if any) of which will be refunded to You whether paid by way of a deposit or otherwise).
- 14.3 **Survival:** Clauses 9 (Payment), 10 (Confidential Information), 11 (Exclusions and Limitation of Liability), and 14 (General Provisions) will survive any termination or expiry of the Contract.

- 14.4 **Assignment:** Neither party will be entitled to assign its rights under the Contract without the prior written consent of the other.
- 14.5 **Amendment:** Any amendment to the provisions of the Contract will be in writing signed by the parties or their duly authorised representative.
- 14.6 **Third Parties:** Nothing in this Agreement confers or purports to confer on any third party any benefit or any right to enforce any term of this Agreement.
- 14.7 **Waiver:** No failure or delay by You or Us to exercise any right or remedy provided under the Contract or by law will constitute a waiver of that or any other right or remedy.
- 14.8 **Entire Agreement:** These terms and conditions and the Customer Documents constitute the whole Contract between You and Us and supersede any previous arrangement, understanding or agreement between Us relating to the subject matter of the Contract.
- 14.9 **Severability:** If the whole or any part of any provision of the Contract may prove to be illegal or unenforceable the other provisions of the Contract and the remainder of the provision in question will remain in full force and effect.
- 14.10 **Law and Jurisdiction:** The Contract and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation will be governed by and construed in accordance with the law of England and each party irrevocably agrees that the courts of England and Wales will have exclusive jurisdiction to settle the same.