



SMARTCORE SOFTWARE LICENCE, MAINTENANCE, SUPPORT & HOSTING AGREEMENT

G-Cloud 15

This Agreement is made and entered into by and between Ninth Wave Limited (hereinafter referred to as the Supplier) of 35 Berkeley Square, London W1J 5BF, United Kingdom and the Customer, whose name and address is shown below.

THE CUSTOMER:

TERMS AND CONDITIONS

1. Definitions

'Data Processor' and *'Data Controller'* shall have the same meanings given to "processor" and "controller" respectively in the European General Data Protection Regulations (*'GDPR'*) EU 2016/679. It is acknowledged that for the purposes of the Data Protection Act 1998 and the GDPR the Customer is the Data Controller and the Supplier is acting as a Data Processor on behalf of the Customer in respect of the Customer's data that is stored in the Customer's SmartCore system. For Customer data that is stored in the Supplier's internal systems (including the SmartCore WMS system that Customers have access to) the Supplier is the Data Controller.

'Data Subject' is a natural person.

'Hosted Environment' means the servers, data storage and software provided by the Supplier.

'Hosting Services' means the hosting services provided by the Supplier to the Customer under the terms and conditions of this Agreement.

'Hosting Site' means the location the Hosting Services are provided from.

'Personal Data' is defined in the GDPR as any information relating to an identifiable person who can be directly or indirectly identified in particular by reference to an identifier (as explained in Article 6 of GDPR). For example name, passport number, home address or private email address. Online identifiers include IP addresses and cookies.

'Process' and *'Processing'* means any operation or set of operations which is performed on Personal Data or on sets of Personal Data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

'Schedule' means the one or more schedules attached to this Agreement and which form part of this Agreement.

'Services' mean the Hosting Services and the Software Services.

'Software' means the software products listed in Schedule 1 including data structures, functional modules and other configuration of the software and their related documentation and including, where applicable, Third Party Software. Any configuration of or modifications to the Software whether carried out by the Supplier or by the Customer will be the copyright of the Supplier and will form part of the Software and be subject to these terms and conditions.

'Software Services' means the Software support and maintenance services provided by the Supplier to the Customer as detailed in this Agreement.

'Supplier Contact Centre' means the supplier's address and telephone number details specified in Schedule 1.

'Third Party Software' means all software owned by a third party, but legally licensed for distribution by the Supplier as part of the Software.

'Working Hours' means from 09:00 to 17:30 UK time, from Monday to Friday excluding public holidays in England.

2. Interpretation

- (a) In this Agreement, any reference to words in the singular includes the plural and vice versa and any gender includes a reference to all other genders (unless the context requires otherwise).
- (b) The headings are for convenience only and shall not affect the interpretation of this Agreement.

3. Grant

This Agreement is founded upon the agreement of the parties that:

- (a) The Software supplied by the Supplier is not sold, but the Supplier grants the Customer a non-exclusive, non-transferrable, worldwide, single server licence to use the Software for the duration of this Agreement, including, where appropriate, Third Party Software, in accordance with these terms and conditions. **TITLE TO THE SOFTWARE DOES NOT PASS TO THE CUSTOMER IN ANY CIRCUMSTANCES;** and
- (b) The Customer acknowledges that it is licensed to use the Software only for its own internal purposes in accordance with the express terms of this Agreement;
- (c) The Customer will not copy or permit the Software to be copied, except for reasonable security, standby and backup purposes;
- (d) The Customer warrants that it will take reasonable precautions to safeguard the Software against unauthorised use;
- (e) The Customer agrees to comply with any additional Third Party Software conditions which are notified to it in writing prior to signing this Agreement, and to indemnify the Supplier against the suit of a Third Party Software owner as a result of any breach by the Customer of such conditions.

4. Duration

- (a) This Agreement shall commence on the start date set out in Schedule 1 and will continue for a minimum term of one [1] year, unless terminated earlier in accordance with this Agreement. Subject to agreement by the Supplier, the Agreement will then automatically renew on an annual basis, subject to payment of the appropriate fees, or may be terminated by the Customer by notice given in writing at least ninety [90] days before the annual renewal date;

5. Delivery, Acceptance and Ongoing Review

- (a) The Supplier shall provide the Customer with access rights to its portal to enable Customer to access the Software.
- (b) For the duration of this agreement, the representatives of the Customer and Supplier shall meet at least once each quarter at the Customer's office, Supplier's office or via teleconference at a time to be agreed, for the purpose of discussing provision of the Services and achievement of the service levels and any other appropriate matters.

6. Title and Copyright

- (a) No title or rights of ownership, copyright or any other intellectual property in the Software is or will be transferred to the Customer;
- (b) The Customer understands that the Software contains proprietary information and agrees that except in accordance with an express written authority signed by an authorised signatory of the Supplier, it will not provide or otherwise make any of the Software and/ or related documentation available for any reason other than the Customer's business to any other person, firm, company or organisation;
- (c) Copyright subsists in the Software whether printed or stored magnetically and the Customer will not delete any proprietary marks on the Software;
- (d) The Customer will ensure that all of its relevant employees and sub-contractors are advised that the Software constitutes confidential information and that all intellectual property rights in it are the property of the Supplier, and the Customer will use all reasonable endeavours to ensure that its employees comply with all of the terms and conditions of this Agreement;
- (e) The Customer agrees to indemnify the Supplier in respect of any losses or expenses incurred by the Supplier as a result of the unauthorised use of the Software by any third party, whether through misuse

of the Software code by the Customer any other breach by the Customer of this Agreement or through the negligence of the Customer or through any other cause.

7. Customer Undertakings

The Customer undertakes:

- (a) To satisfy itself that the Software meets the needs of its organisation. It is the sole responsibility of the Customer to determine that the Software is ready for operational use in the Customer's organisation before it is so used;
- (b) To allow the Supplier to study its proprietary data used with the Software for the purpose of rectifying any problems with the Software;
- (c) To ensure that any other software with which the Software will be used is either the property of the Customer or is legally licensed to the Customer for use with the Software. The Customer will indemnify the Supplier in respect of any claims by third parties and all related costs, expenses or damages in the event of any alleged violation of third party proprietary rights that results in any claims against the Supplier.

8. Supplier's Warranty

- (a) The Software is made up of the Core System [the SmartCore 'Engine'] and one or more Application Modules [e.g. Project Management, Timesheets]. The Application Modules may be configured by the Supplier or Customer to meet the Customer's specific requirements. The Core System will be the current release at the time when it is delivered to the Customer. The Supplier's sole obligation will be to remedy any non-conformity of the Software to its specification, provided that the Supplier has been notified of the non-conformity within ninety [90] days of the date of delivery of the Software to the Customer;
- (b) The above constitutes the only warranty provided by the Supplier in respect of the Software and the Services. The obligations and liabilities of the Supplier in this Agreement are in place of, and the Customer accordingly waives, all implied guarantees and warranties, including without limitation, any warranty of merchantability or fitness for a particular purpose whether or not any purpose has been notified to the Supplier;
- (c) The Customer acknowledges that:
 - (i) The Software has not been developed to meet individual Customer specifications;
 - (ii) The Software cannot be tested in advance in every possible operating combination and environment;
 - (iii) It is not possible to produce Software known to be error-free in all circumstances.
- (d) The Customer is expressly prohibited from attempting any error correction or modification of the Software. The Customer may configure the Software using the features provided as part of the Software.

9. Modifications

The Supplier reserves the right to make improvements, substitutions, modifications or enhancements to any part of the Software.

10. Subcontractors

The Customer agrees that the Supplier may sub-contract some or all of the performance of its duties provided for herein.

11. Software Support and Maintenance Cover

- (a) Software support and maintenance services will be provided within the Working Hours of 9.00am to 5.30pm UK time, Monday to Friday, excluding public holidays;
- (b) Out-of-hours support and maintenance services can be provided by arrangement and will be charged for at the Supplier's then current extended cover rates.

12. Software Support and Maintenance Services

The Software Support and Maintenance Services comprise and are limited to the following:

- (a) Fault diagnosis and where possible recommendations for correction, subject to the limitations imposed by the contractual restrictions of any third party, following the reporting of any Software problem by the Customer to the Supplier Contact Centre. The Supplier undertakes to register and allocate a priority for the problem within one [1] working hour of receiving the Customer's call. The Supplier will, acting reasonably, classify any problem as critical or non-critical to the fundamental operation of the Software and the following procedure will apply:
Critical Problems: The Supplier will attempt to generate a fix by modifying the Software to conform to its specification and sending the modification to the Customer as soon as possible. The supplier will use all reasonable endeavours to correct any defect in the Software by reason of which it does not conform to its specification, or to modify the Software to obviate or mitigate the effect of the defect.
Non-critical problems: The Supplier will attempt to generate a fix for incorporation in the next release of the Software. Where feasible, the Supplier may provide a temporary workaround to the Customer. The Supplier will determine what action, if any, it proposes to take, based amongst other things, on the importance of the problem to the Customer, and the likely benefit of any solution.
The Supplier reserves the right to abandon attempts to correct a non-critical problem reported by the Customer where either the costs to the Supplier are likely to be excessive or the general benefits to the Supplier's customers at large are likely to be negligible, in the opinion of the reasonable business man;
- (b) Diagnosis and solution of operational problems will generally be carried out remotely from the Customer site. If it becomes necessary to carry out the Software Services at the Customer site, such work will be chargeable at the Supplier's then prevailing daily rate, along with any travel, accommodation and subsistence expenses incurred, payable monthly in arrears in accordance with the payment terms stated in this Agreement;
- (c) Licenced use of new versions of the Software and any Changes released by the Supplier.

13. Additional Software Services

The Supplier will also offer the Customer the following services at such charges and on such terms as the parties may agree from time to time:

- (a) Telephone support on the routine use and operation of the Software;
- (b) Telephone advice and assistance on user procedures and on ideas and methods intended to assist the Customer in obtaining the best possible use from the Software;
- (c) Consultation for the resolution of those problems experienced by the Customer in operating the Software and not covered by the Software Services;
- (d) On-Site services to carry out such work at the Customer site (along with any travel, accommodation and subsistence expenses incurred) as the parties may agree from time to time;
- (e) Consultation about enhancement of the Software;
- (f) Providing management information that is specific to the Customer;
- (g) Responding to surveys and questionnaires requested by the Customer.

14. Software Services Exclusions

- (a) The Supplier is not obliged to support the Software if the Customer is not using the versions of the operating system software and browser as specified by the Supplier from time to time, or if the Customer fails to maintain the Software at the Supplier's specified release level unless specifically agreed in advance with the Supplier. Should the Customer fail to upgrade fully to the specified release level within six [6] months of notification by the Supplier, or chooses to implement a software upgrade or fix 'out of sequence', then all maintenance and support for the Software may be charged at the Supplier consultancy rate;
- (b) The Software Services do not include service in respect of defects or errors resulting from any modifications or enhancements to the Software not made by the Supplier or made without the Supplier's prior written consent, or resulting from incorrect use or configuration of the Software.

- (c) The Supplier is not obliged to support the Software if malfunctions are due to incorrect use of the Software, or for any reason external to the Software including, but not limited to, failure or fluctuation of electrical supplies, hardware failures, accidents, or natural disasters;
- (d) The Software Services are not intended to supplant the Customer's day-to-day operations.

15. Hosting Services

The Hosting Services comprise and are limited to the following:

- (a) Provision of one URL (in the form customer.ninthwave.net or similar) giving access to the SmartCore web server;
- (b) Provision and maintenance of appropriate SSL certificate, firewall, SmartCore web, application and database servers, operating systems and database software;
- (c) Provision and maintenance of a telecommunications link between the SmartCore web server and the Internet;
- (d) Hosting of the SmartCore application and three databases, typically 'production', 'testing/ training' and 'backup';
- (e) Daily offsite backup of the Hosted Environment, with incremental backups every 15 minutes;
- (f) Recovery from backup following hardware or software failure;
- (g) Application of SmartCore software upgrades.

16. Additional Hosting Services

The Supplier can also offer the Customer the following additional hosting services at such charges and on such terms as the parties may agree from time to time:

- (a) Recovery from backup at Customer request;
- (b) Provision of additional SmartCore databases, for example for development or training purposes;
- (c) Copying of data between SmartCore databases at Customer request.

17. Supplier Obligations in respect of Hosting Services

The Supplier shall:

- (a) Provide the Hosting Services to the Customer with reasonable skill and care and in a professional manner;
- (b) Provide the Customer with a 24-hour voicemail and email contact service in order that it may notify the Company of any interruptions or any other problems with the Hosting Service. The Supplier shall use all reasonable endeavours to respond to the Customer within one [1] Working Hour of the Customer's notification of interruptions or other problems and to rectify any problems with reasonable diligence;
- (c) Use all reasonable endeavours to ensure that access to the Customer's SmartCore system is available at an uptime level of 95% overall and 99% during UK Working Hours, monitored at the Hosting Site. The Supplier will not guarantee or be liable for any breaks in the continuity of the electricity supply, or of the telecoms link from the Customer to the servers, or in the maintenance of the servers that are provided by a third party. If the Hosting Service is suspended or interrupted the Supplier shall use all reasonable endeavours to restore the Hosting Service with minimum delay;
- (d) Backup the Hosted Environment daily. The Supplier will not be liable for any lost, corrupted or destroyed data as a result of any suspension or interruption to the Hosting Service;
- (e) Provide a reasonable speed of connection to the SmartCore system as set out in Schedule 1. If the Supplier becomes aware that the Customer's SmartCore system is using excessive bandwidth the Supplier will alert the Customer and reserves the right to make an additional charge for the Bandwidth used;
- (f) Provide data storage as set out in Schedule 1. By mutual agreement, the Customer can rent additional storage capacity from the Supplier if required.

18. Customer Obligations in Respect of Hosting Services

The Customer undertakes that:

- (a) Its SmartCore system shall not be used directly or indirectly for any unlawful purpose. Unlawful purposes are deemed to include but are not limited to:
 - i) Civil and criminal offences of copyright and trademark infringement;
 - ii) The uploading of any files that contain viruses, corrupted software or any other material that may damage the operation of another person's computer;
 - iii) Transmission or display or posting of any material in breach of the Data Protection Act 1998 (or any replacing statute) dealing with data protection or similar legislation in any other country or of any material which is confidential or is a trade secret.
- (b) It, its employees and sub-contractors will access the Ninth Wave servers and the data stored within them only through authorised means.

19. Disclaimers

- (a) The Supplier will use its reasonable endeavours to perform the Services promptly but no warranty is given in respect of any times for response or performance by the Supplier and time will not be of the essence;
- (b) The Supplier is not liable for delay arising from any industrial dispute or any cause outside its reasonable control and any agreed timescale will be subject to reasonable extension in the event of such delay;
- (c) The Supplier's liability excludes liability for consequential loss, indirect damages, or corruption to other software or data, or for loss of profit, business, revenue, goodwill or anticipated savings.
- (d) To the extent that the Supplier is held legally liable to the Customer, the Supplier's liability shall not exceed the value of the Agreement.
- (e) Provision of the Service does not imply any guarantee or representation that the Supplier will be able to assist the Customer in achieving any results from any Products or Services that are not technically feasible. Subject to this, any services which are considered outside the scope of this Agreement will, at the Customer's request and at the Supplier's option, be provided at the Supplier's then current rates for such services.
- (f) Provision of the Services does not imply any guarantee that the Supplier will be successful in correcting Software malfunctions and the Supplier does not accept any liability in this connection.
- (g) The Supplier reserves the right to refuse to provide the Services at any time without refunding any sums paid by the Customer:
 - (i) If any attempt is made, other than by the Supplier, to remove any defects or deal with any errors in the Software, or
 - (ii) If any development, enhancement or variation of the Software is carried out other than by the Supplier, or
 - (iii) If the Customer has failed to pay a Supplier's invoice in accordance with the provisions of this Agreement.

20. Customer Responsibilities

The Customer will:

- (a) Use the Software correctly and in accordance with the Supplier operating instructions;
- (b) Designate primary and secondary contacts appropriately qualified and trained to an acceptable standard authorised to request Services, and inform the Supplier accordingly. Authorised use of the telephone help line is limited to these designated contacts;
- (c) Be responsible for the security of its confidential and proprietary information, and not disclose such information to the Supplier except on a 'need to know' basis for the purposes of the Supplier's performance of the Services;
- (d) Notify the Supplier promptly of any Software or Hosting Service malfunction;
- (e) Keep records of the Software's usage and performance if requested by the Supplier, in a mutually agreed format;
- (f) Provide the Supplier with access to and use of such of the Customer's information, systems, data and facilities reasonably necessary to support and maintain the Software;

- (g) Allow the Supplier to process information regarding the Customer (including Personal Data) in the Supplier's internal systems as needed to provide Services under this Agreement and to meet the Supplier's legal obligations;
- (h) Ensure that only properly trained employees use the Software in accordance with the operating instructions and manuals supplied;
- (i) Not make any modification or addition to the Software, except with the Supplier's consent, which shall not be unreasonably withheld.

21. Data Privacy

- (a) The Supplier agrees and warrants that:
 - (i) it will process Customer Personal Data only in accordance with documented instructions from the Customer (including when making an international transfer of data) unless required to do so by law;
 - (ii) it will obtain a commitment of confidentiality from anyone it authorises to process Customer Personal Data, unless they are already under a statutory obligation of confidentiality;
 - (iii) it has and will maintain appropriate operational and technological processes and procedures to safeguard against any unauthorised access, loss, destruction, theft, use or disclosure of Customer Personal Data, as required pursuant to Article 32 of the GDPR;
 - (iv) it will not engage another Data Processor without the Customer's prior written consent and only in compliance with the requirements of Article 28 of the GDPR;
 - (v) insofar as is possible, it will assist the Customer in fulfilling its obligations to data subjects under chapter III of the GDPR;
 - (vi) it will assist the Customer in ensuring compliance with its obligations under Articles 32 to 36 of the GDPR;
 - (vii) it will make available to the Customer all information necessary to demonstrate compliance with the obligations of Article 28 of the GDPR;
 - (viii) it will allow the Customer, or an auditor appointed by the Customer, to carry out audits and inspections in respect of compliance with the obligations of Article 28 of the GDPR and will contribute to such audits and inspections;
 - (ix) it will inform the Customer immediately if it considers it has been given an instruction which does not comply with the GDPR or other relevant data protection law;
 - (x) it will not transfer or Process any Customer Personal Data outside the European Economic Area without the prior written consent of the Customer.
- (b) On termination of this agreement, howsoever caused, the Supplier shall immediately cease Processing and arrange for the safe return or destruction of all Customer Personal Data (save for that required to meet the Supplier's legal obligations) in its possession or control and, where requested by the Customer, certify that such destruction has taken place.
- (c) If the Customer wishes the Supplier to assist it with any investigation or response to a specific data protection or privacy request (e.g. an audit of facilities and procedures or a Data Subject access request), and where no fault is found with the Supplier, the Supplier shall be entitled to charge the Customer for its work in accordance with its then current implementation day rates.
- (d) Nothing in this agreement relieves the Supplier of its own direct responsibilities under the GDPR.
- (e) To exercise all relevant rights, queries or complaints regarding data privacy the Customer should in the first instance contact the Supplier's directors on 0207 403 4433 or via email to partners@ninthwave.co.uk. If this does not resolve the complaint to the Customer's satisfaction, they may lodge a complaint with the UK Information Commissioners Office on 0303 123 1113 or via email to <https://ico.org.uk/global/contact-us/email/> or at the Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF, England.

22. Publicity

- (a) Both parties shall agree on the form and content on an initial press release regarding the execution of this Agreement;
- (b) Thereafter the parties shall consult with each other before issuing any press release or otherwise making any public statement with respect to this Agreement and shall give the other party the opportunity to review and comment on such press release or other announcement;
- (c) Both parties may make any public disclosure regarding this Agreement required by law;
- (d) The Supplier may include the Customer in its customer list and the Customer may include the Supplier in its supplier list;
- (e) The Supplier may ask the Customer to provide references to other prospective customers.

23. General

- (a) Neither this agreement, nor any rights hereunder, in whole or in part, shall be assignable or otherwise transferable by the Customer without the Supplier's prior written consent.
- (b) This agreement contains the entire understanding of the parties hereto and neither it nor the rights and obligations hereunder may be changed, modified, or waived except by an instrument in writing signed by the parties hereto.
- (c) If any of the terms of this agreement is or becomes invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining terms shall not in any way be affected or impaired.
- (d) A failure or delay by either party to exercise any right or remedy under this agreement shall not be construed or operate as a waiver of that right or remedy nor shall any single or partial exercise of any right or remedy preclude the further exercise of that right or remedy.
- (e) This agreement may be executed in any number of counterparts but shall not be effective until each party has executed at least one counterpart. Each counterpart when executed shall be an original, but all the counterparts together shall constitute one document.
- (f) Notices between the parties relating to this agreement must be in writing and must be delivered personally or sent by registered mail or courier to the address of the parties set out in this agreement. Alternative details may be notified by a party for the purposes of this clause.

24. Governing Law

This Agreement shall be governed by, and construed in accordance with the laws of England and shall be subject to the jurisdiction of the English courts to which both parties hereby submit.

In witness whereof, the parties have executed this SmartCore Software Licence, Maintenance, Support & Hosting Agreement as of this day of 20.. .

Authorised signatories:

SUPPLIER
Ninth Wave Limited

CUSTOMER

Name:

Name:

Title:

Title:

Signature:

Signature:

Date:

Date:



NINTH WAVE



SMARTCORE SOFTWARE LICENCE, MAINTENANCE,
SUPPORT & HOSTING AGREEMENT

SCHEDULE 1

Start date:

Software licenced:

SmartCore system for	...	Full users
	...	Light users
	...	Timesheet users
	...	Read-only users

SmartCore configuration as implemented by Ninth Wave.

Network connection at hosting site:

Data and document storage at hosting site:

Software fees:	£....+VAT per calendar month
(for Software Licence, Support, Maintenance and Hosting)	Minimum 12 months
	Invoiced quarterly in advance

Implementation fees:	£....+VAT
	Invoiced monthly in arrears

Payment terms:	Net 30 Days
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Customer site:

Site telephone no:
Customer primary contact:
Customer secondary contact:

Supplier contact centre:

Ninth Wave Ltd., 35 Berkeley Square, London W1J 5BF
Support contacts: 0207 403 4433 support@ninthwave.co.uk

Authorised signatories:

SUPPLIER
Ninth Wave Limited

CUSTOMER

Name:

Name:

Title:

Title:

Signature:

Signature:

Date:

Date: