



**MAXAVA**  
MAXIMUM AVAILABILITY

Maxava LLC

Standard Terms and Conditions:  
Services  
(v10.16)

Maxava Standard Terms and Conditions Services

Maxava LLC Standard Terms and Conditions - Services v.1016 030517 **Strictly Confidential to the Parties**

These terms and conditions apply in respect of services to be performed by Maxava LLC (“We”, “Our” or “Us”) for our clients (the “Client”, “You” or “Yours”) as described in a proposal or engagement letter (“the Services”).

**Maxava: Standard Terms and Conditions (Services)**

**1. Definitions**

In these Terms and Conditions, unless the context requires otherwise:

- Business Day** means any day on which banks in New York are open for business, but shall not include either Saturday or Sunday, any public holidays in New York or in the home state of the Client, or any days between the period 23 December – 5 January.
- Confidential Information** means the terms of the Services Contract (including these Standard Terms and Conditions: Services) and any information relating to the Services or to the business affairs of either Party (in whatever form) including, without limitation:
  - (a) Information disclosed by either Party to the other on the express basis that such information is confidential;
  - (b) Information or material proprietary to or property of Maxava or the Client, including the Intellectual Property, software, source codes, object codes, user manuals, programming manuals, modification manuals, flow charts, drawings, models, drafts and diagrams, Materials and Tools;
  - (c) Trade secrets and all financial, accounting, and technical information, know-how, technology, operating procedures, processes, business methods, knowledge and other information created by, belonging to or developed by either Party; and
  - (d) Information which might reasonably be expected by either Party to be confidential in nature;
 provided that where information relates exclusively to one Party, nothing in these Terms and Conditions shall require that Party to maintain confidentiality in respect of that information.
- Deliverables** means the deliverables listed in the proposal or engagement letter and any reports or advice in relation to those deliverables.
- Intellectual Property** means all rights conferred under statute, common law and equity in and in relation to inventions, designs, trademarks, trade names, software names, logos and get up, circuit layouts, confidential information, copyright and all other intellectual property rights of any nature anywhere

- Materials** means all materials developed or supplied by Us pursuant to a Services Contract which are associated with the Services, including all materials developed during the supply of the Services, but excluding Deliverables and Tools.
- Maxava, Our, Us, We** means Maxava LLC.
- Parties** means the parties to the Services Contract and “Party” means any one of the Parties.
- Services** means the services to be supplied by Us to You, as set out in a proposal or engagement letter.
- Services Contract** means the binding contract between the Parties for the supply of the Services, comprising an engagement letter or proposal (in whatever form) and these Standard Terms and Conditions.
- Tools** has the meaning set out in clause 10.(a)(ii), and excludes Deliverables.
- You, Your, Client** means the client described in a proposal or engagement letter that is Party to the Services Contract.

**1.1. General rules of interpretation**

- (a) Singular words include the plural and vice versa, and where a word or phrase is defined, its other grammatical forms have a corresponding meaning.
- (b) References to any Party shall mean and include a reference to that Party, its successor, executors or personal representatives (as the case may be), and transferees.
- (c) A reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them.
- (d) The word “person” shall include any natural person, company, corporation, firm, partnership, joint venture, society, organisation, or other group or association of persons (whether incorporated or not), trust, state or agency of state, statutory or regulatory body, local authority, government or governmental or semi-governmental body or agency (in each case whether or not having separate legal personality).
- (e) If a period of time is specified and dates from a given day or the day of an act or event, it is to be calculated exclusively of that day.
- (f) Any reference to any times or dates are references to United States Eastern Standard Time.
- (g) Unless otherwise agreed, all prices, sums of money and payments referred shall be in United States currency.
- (h) Headings are for convenience only and do not affect the interpretation of the Services Contract except for use as cross-references.

- (i) Any covenant not to do anything shall also constitute an obligation not to suffer, permit, cause or assist any other person to do that thing.

provided. You may not disclose the Materials, Tools and Deliverables to any third person without Our prior written consent.

## 2. Acceptance

Where these conditions form part of a proposal, the proposal will remain open for acceptance for 14 days from the date of submission. Thereafter, acceptance is subject to reconfirmation of the terms of the proposal by Us.

## 3. Services

- (a) The Services to be supplied from time to time (and any exclusions from the scope of those Services) shall be described in a "Scope of Work" within a written proposal or engagement letter signed by the Parties.
- (b) Dates in any timetable set out in Our proposal or engagement letter are intended for planning and estimating purposes only and are not contractually binding. Estimates of time for completion of the Services are given on the assumption that We receive the co-operation described above and commitment from employees in Your organisation. If You do not provide that cooperation, or delay in providing that co-operation, You agree to pay Us any additional fees and expenses, which result.
- (c) The Services are confined to the work specified in Our proposal or engagement letter(s). Alterations to the proposed scope of work due to scope changes or delays beyond Our control will be the subject of an additional fee which either will be agreed or will be charged in accordance with Our then applicable current charge rates. Any such alteration may also impact other aspects of the Services including but not limited to Your designated responsibilities and Service delivery schedules.
- (d) You acknowledge that We may be required, in the course of providing the Services, to make assessments based on information supplied either by You, or compiled by others. We will rely on and not verify its accuracy and completeness. You agree that We will not be liable for any loss or damage You or any other person sustains, directly or indirectly, in connection with Our reliance on that information.
- (e) You will be responsible for confirming acceptance of Services. Items identified by You as incomplete or defective will be promptly remedied by Us. If We are not notified in writing of incomplete or defective Services within ten (10) days of supply of those Services, then the Services will be deemed to be accepted.

## 4. Intellectual Property

- (a) We warrant and You acknowledge that We own and retain all Intellectual Property Rights in the Materials, Tools and Deliverables or have the right to use those Materials, Tools and Deliverables in the supply of the Services.
- (b) If You have fully complied with the Services Contract, We shall grant You a perpetual, non-exclusive and non-transferable licence to use the Materials, Tools and Deliverables.
- (c) The Materials, Tools and Deliverables are provided solely for Your internal use and benefit and only in connection with the purpose for which the Services are

## 5. Our Obligations

We will:

- (a) Supply the Services in the manner described in the proposal or engagement letter;
- (b) Use reasonable skill and care in providing the Services;
- (c) If working on site at Your premises, comply with Your reasonable health and safety rules and procedures (if any) that are notified in writing to Us in advance; and
- (d) Cooperate with You and Your agents, employees or contractors involved in any activities related to the Services.

## 6. Your Obligations

The success of the Services requires Your timely co-operation. You agree to:

- (a) Provide the materials We require, and staff to work with Us, to carry out the Services;
- (b) Ensure that We have full and safe access to Your site, equipment, materials and information at all reasonable time for purposes associated with the supply of the Services;
- (c) Provide necessary communications access and infrastructure to facilitate remote access by Us;
- (d) Arrange access to third parties where applicable;
- (e) Ensure that appropriate back-up, security and virus checking procedures are in place for any computer facilities You provide;
- (f) Provide on request a suitably qualified or informed representative, agent or employee, who shall be available to Us to advise on access, use of Your resources and any other matter within Your knowledge or control which may assist Us in complying with Our obligations under the Services Contract;
- (g) Make necessary staff available for consultation on request;
- (h) Provide reasonable working facilities for Us if We are working on site at Your premises;
- (i) Make decisions promptly, to facilitate the performance of the Services;
- (j) Provide any other assistance or information set out in Our proposal or engagement letter;
- (k) Indemnify Us and hold Us harmless, together with Our directors, officers, employees, agents, related companies and partners against any liabilities, losses, claims, costs or expenses incurred as a result of a claim by a third party in connection with the provision of the Services, or in connection with any use by You of any Deliverable provided by Us under the Services Contract(s), or arising from or in relation to any contracts or supply arrangements in which You supply services using Maxava HA Software (including, without limitation, implementation and support services We agree to provide for Your customers or third parties); and

- (l) Follow all reasonable and lawful project instructions from Us.

### 6.1. Third party performance

You will be responsible for nominating an appropriate named individual within Your organisation to co-ordinate and manage Your responsibilities, including but not limited to the provision of necessary facilities, resources and/or staff. Unless agreed otherwise in writing, You will be responsible for the management of any third parties and the quality of their input and work.

### 6.2. Non-solicitation

For the duration of the Services Contract(s), and for 12 months after the termination or completion of the final Services Contract, You will not employ or engage, or procure a third party to employ or engage, any employee, contractor or subcontractor of Ours who has taken part in the performance of the Services.

## 7. Fees and Expenses

- (a) Subject to any alternative arrangement set out in a formally agreed proposal or engagement letter, Our fees are calculated on the basis of time spent on the Services at the applicable current charge. Out of pocket expenses incurred must be reimbursed to Us. Fees and expenses will be invoiced monthly and are payable within 14 days.
- (b) Our current charge rates, which We may vary from time to time, may be obtained from Us on request.
- (c) If You dispute the whole or any part of the amount claimed in an invoice submitted by Us pursuant to subclause (a):
  - (i) You shall pay the portion of the amount stated in the invoice that is not in dispute and shall notify Us in writing (within 5 Working Days of receipt of the invoice) of the reasons for disputing the remainder of the invoice;
  - (ii) If it is resolved that some or all of the amount in dispute ought properly to have been paid at the time it was first invoiced or if an invoice is unpaid without notice under this clause, then You shall pay the amount together with interest (14% per annum, calculated daily from the date of the invoice) on that amount.
  - (iii) If no dispute is notified pursuant to (a), You shall be deemed to have accepted the invoice.
- (d) Unless otherwise specified, Our fees and, where applicable, out-of-pocket expenses and other expenses (our "Billings") are exclusive of goods and services taxes, tariffs, duties or impositions of a similar nature imposed by any government or other authority. Our Billings will be increased to reflect the amount of any such tax.

## 8. Warranties and Liability

### 8.1. Warranties

- (a) We warrant that the Services and the Deliverables will be substantially free from defective workmanship, for a period of sixty (60) days from supply. This warranty is void if the Services or the Deliverables fail as a result of accident, abuse, or misapplication. If We breach this warranty, then Our entire liability and Your exclusive remedy for breach of that warranty shall be, at Our option, either:

- (i) Resupplying the Services and/or Deliverables;
  - (ii) Paying for the Services and/or Deliverables to be resupplied by a third party; or
  - (iii) Refunding the fees paid for the defective Service/Deliverable.
- (b) To the maximum extent permitted by law, We disclaim all other warranties, conditions, undertakings and representations, either express or implied, including, but not limited to, any implied warranties of merchantability or fitness for a particular purpose.

### 8.2. Limitation of Liability

- (a) If We are liable for any loss, damages, claims, costs or indemnity arising from or in relation to the Services, Deliverables or the Services Contract (including, without limitation, for breach of any obligation (statutory, express or implied) relating to the Services Contract (whether in contract, tort (including negligence), equity, statute or otherwise), Our maximum aggregate liability shall be limited to the total amount of fees paid by You for the Services in the ninety (90) day period preceding the event giving rise to the liability.
- (b) Except as expressly provided above and to the maximum extent permitted by applicable law, We shall not be liable for any damages whatsoever (including, without limitation, damages for lost revenues, loss of business profits, business interruption, loss of business information, or other pecuniary loss, or any direct, indirect, special, incidental, punitive, exemplary or consequential damages of any nature) arising out of or in relation to the Services, Deliverables or the Services Contract, even if We have been advised of the possibility of such damages.
- (c) No claim arising out of the Services Contract, regardless of form, may be brought by any Party more than two years after the event that gave rise to that right of claim.
- (d) You agree that if You make any claim against Us for loss as a result of a breach of the Services Contract and that loss is contributed to by Your own actions, then liability for that loss will be apportioned between us as is appropriate having regard to the extent to which each Party is responsible for the loss and the amount You may recover from Us will be reduced by the extent of Your contribution to that loss.

## 9. Deliverables

- (a) We will prepare and supply the Deliverables.
- (b) You will be responsible for confirming acceptance of Deliverables. Items identified by You as incomplete or defective will be promptly remedied or replaced by Us. If We are not notified in writing of incomplete or defective Deliverables within ten (10) days of delivery of those Deliverables, then those Deliverables will be deemed to be accepted.

## 10. Materials and Software Tools

- (a) In the course of providing the Services, We may use or provide:
  - (i) Materials; and/or
  - (ii) software, spreadsheets, databases or other electronic tools ("Tools").

- (b) If We provide the Materials and/or Tools to You, You acknowledged that the Materials and Tools were developed for Our purposes and without consideration of any purpose for which You might use them, are made available on an "as is" basis for Your use only and must not be distributed to or shared with any third party. We make no representations or warranties as to the sufficiency or appropriateness of the Materials or Tools for any purpose for which You may use them, and we shall not be liable for Materials or Tools in any way.
- (c) The Materials and Tools do not include proprietary software or other goods or services that are supplied pursuant to other licence or contract arrangements.

## 11. Internet Communications

We may communicate with You electronically. Electronically transmitted information cannot be guaranteed to be secure or error free and it can be adversely affected or unsafe to use. We will use commercially reasonable procedures to check for the most commonly known viruses before sending information electronically, but We will not be liable to You in respect of any error or omission arising from or in connection with the electronic communication of information to You.

## 12. Access to Working Papers

The working papers for any Services engagement, including electronic documents and files, are Our property and are included in the definition of Confidential Information.

## 13. Subcontractors

We reserve the right to engage subcontractors, and any reference to Our staff or employees includes subcontractors. Subject to any contrary provisions in Our proposal or engagement letter and subject to these Terms and Conditions, We will remain liable to You for any of the Services that are provided by any subcontractor.

## 14. Term and Termination

- (a) A Services Contract shall commence when both Parties have signed the proposal or engagement letter and expires upon completion of the Services under that Contract, unless earlier terminated by either Party pursuant to this clause.
- (b) Either Party may, by written notice to the other Party, terminate a Services Contract prior to completion of the Services if:
  - (i) The other Party commits a material breach of the Services Contract and fails to remedy that breach (where it is capable of being remedied) within 30 days of notice requiring it to do so; or
  - (ii) Any secured creditor of the other Party takes any step to exercise its rights in relation to that Party's assets or that Party assigns any of its property for the benefit of or enters into any arrangement with its creditors, or any step is taken to appoint a receiver, receiver and manager, liquidator, provisional liquidator or administrator over all or any part of that Party's assets or business.
- (c) If a Services Contract is terminated prior to the completion of the Services, We shall be entitled to be

paid for all Services rendered up to the date of termination, in accordance with standard hourly rates.

- (d) Upon expiration or termination of all current Services Contracts, the Parties will immediately cease to use the other Party's Confidential Information and shall, if required:
  - (i) Return the other Party's Confidential Information to that Party; or
  - (ii) At the option of the other Party, destroy all of that Party's Confidential Information.
- (e) The expiry or termination of a Services Contract will be without prejudice to any accrued rights of the Parties.
- (f) Where a Services Contract is validly terminated neither Party shall be liable to the other for any damages, compensation or any other remedy at law or equity for termination of that Services Contract.

## 15. Privacy

If You submit or upload personal information to Us or Our related companies (including personal information supplied to Us by Your customers), You consent to the collection, use, processing, transmission and disclosure of that information by Us and Our related companies. You warrant that You have obtained all necessary consents to disclose the personal information to Us and Our related companies, and for Us and Our related companies to retain and use that information for the supply of Services and any of the other purposes set out in Our current privacy statement (accessible at <http://maxava.com/privacy-policy/>). Our privacy statement may be updated from time to time. The Parties hereby agree that Our privacy statement, as may be modified from time to time by us, is incorporated into each Services Contract.

## 16. General

### 16.1. Dispute Resolution

- (a) The Parties agree to use their best efforts to resolve any dispute which may arise under the Services Contract through good faith negotiations.
- (b) Either Party may raise a dispute by written notice to the other Party.
- (c) On receipt of a dispute notice, the Parties' authorised representatives shall meet (or otherwise communicate, if a meeting is not practicable) and attempt to resolve the dispute through good faith negotiations on a 'without prejudice' basis.
- (d) If a resolution to the dispute cannot be achieved within 5 Business Days following the commencement of negotiations between the Parties' respective representatives, then the dispute shall be escalated to the Parties' respective chief executives (or equivalent).
- (e) Where escalation occurs, the Parties' respective chief executives (or equivalent) shall meet (or otherwise communicate, if a meeting is not practicable) and attempt to resolve the dispute through good faith negotiations on a 'without prejudice' basis.
- (f) Neither Party shall commence any arbitration or litigation in relation to the Services Contract unless 10 Business Days has passed since the Parties' respective chief executives (or equivalent) have met (or otherwise communicated) and endeavoured in good faith to resolve the dispute on mutually acceptable terms.



- (g) Any dispute arising under the Services Contract which cannot be settled by negotiation between the Parties or their respective representatives shall be submitted to arbitration in accordance with the procedures specified in Schedule A. The Parties shall continue to perform their obligations under the Services Contract as far as possible as if no dispute had arisen pending the final settlement of any matter referred to dispute resolution pursuant to this clause. Nothing in this clause shall preclude either Party from taking immediate steps to seek urgent equitable relief.

### 16.2. Confidential Information

Each Party shall maintain as strictly confidential at all times and shall not at any time, directly or indirectly:

- (a) Disclose or permit to be disclosed, the Confidential Information to any person;
- (b) Use the Confidential Information for any purpose other than that for which it was provided;
- (c) Use the Confidential Information to the detriment of the Party that supplied the Confidential Information; or
- (d) Copy or record by any means, memorise or use the Confidential Information for its own benefit or the benefit of any person other than the Party that supplied the Confidential Information, except:
  - (i) As required by law;
  - (ii) As is already or becomes public knowledge otherwise than as a result of a breach of the Services Contract; or
  - (iii) As authorised in writing by the Party that supplied the Confidential Information.

The Parties may disclose these terms to their respective legal advisers, auditors, insurers and accountants. We may at any time require You to arrange for Your employees, agents or representatives involved in the performance or delivery of the Services to execute a suitable confidentiality deed. You shall arrange for all such deeds to be executed within the timeframe reasonably specified by Us. On termination of all current Services Contracts for any reason, each Party will return any property of the other (including any Confidential Information). However, for Our internal quality or audit purposes, We are entitled to retain one copy of any documentation or other material upon which the Services are based.

### 16.3. Entire Agreement

Each Services Contract (comprising Our engagement letter or proposal and these Standard Terms and Conditions – Services (v10.16)) forms the entire agreement between the Parties relating to the supply of those specific Services, replacing and superseding any previous proposals, correspondence, understandings or other communications (whether written or oral) in relation to those specific Services.

### 16.4. Waiver and Modification

No delay, neglect or forbearance by either Party in enforcing any provision of the Services Contract will be a waiver, or in any way prejudice any right, of that Party. However the rectification of any given instance of a breach of the Services Contract by the breaching Party shall operate as a waiver in respect of that particular instance rectified.

### 16.5. Notices

Any notice required to be given under a Services Contract shall be given in writing either personally, by post, by email or by document transmittal service to the recipient's address for that

type of communication as specified in the proposal or engagement letter and will be deemed effective:

- (a) after four (4) clear Business Days, if served by post, from the time of posting; or
- (b) in the case of email, on receipt of a successful delivery receipt from the recipient's information system; or
- (c) after two (2) clear Business Days if sent by any other form of recognised urgent document transmittal service such as courier or document exchange.

A Party may change its address for service by notice in writing served on the other Party. Service shall be affected in accordance with this clause.

### 16.6. Assignment

We may assign any or all of Our rights and obligations under the Services Contract, including any subsidiary rights associated with the Intellectual Property (for example the right to Fees) to any affiliated company or reputable third party at any time, by notice to You.

### 16.7. Governing Law and Jurisdiction

The Services Contract is governed by and shall be construed in accordance with the United States federal laws of New York without regard to the conflict of laws provisions. You submit to the exclusive jurisdiction and venue in the federal courts in the Southern District of New York.

### 16.8. Services not exclusive

We will not be prevented or restricted by anything in any Services Contract from providing services for other clients. We will take steps to ensure that Confidential Information communicated to Us during the course of the Services will be maintained confidentially and separate from partners and staff assigned to Services in which there is a manifest competing interest of another client.

### 16.9. Conflicts

If there is any conflict or discrepancy between the terms of these Standard Terms and Conditions and Our engagement letter or proposal, the terms of Our engagement letter or proposal will prevail.

### 16.10. Severance

If any provision of the Services Contract is held to be invalid, illegal or unenforceable, such provision will be severed and the remainder of the Services Contract will remain in full force and effect.

### 16.11. Force Majeure

Except for an obligation to pay money, neither Party will be liable for any act, omission, or failure to fulfil its obligations under the Services Contract to the extent that such act, omission or failure arises from any cause reasonably beyond its control including acts of God, strikes, lockouts, riots, acts of war, terrorist attacks, epidemics, governmental action after the date of the Services Contract, fire, communication line failures, power or hardware failures, earthquakes or other disasters (called "Force Majeure").

The Party unable to fulfil its obligations due to Force Majeure will immediately notify the other in writing of the reasons for its failure to fulfil its obligations and the effect of such failure and use its reasonable endeavours to avoid or remove the cause and perform its obligations.



#### 16.12. Variation

The Services Contract(s) may be varied by agreement in writing and any such variation will form part of the Services Contract.

#### 16.13. Relationship of the Parties

The Parties are independent contractors only. There is no joint venture, partnership, agency or fiduciary relationship existing between the Parties, and the Parties do not intend to create any such relationship by entering into a Services Contract.

#### 16.14. Survival of Terms

The covenants, conditions and provisions of the Services Contract which are capable of having effect after the expiration or termination of the Services Contract shall remain in full force and effect following the expiration or termination of the Services Contract.

## Schedule A – Disputes Resolution Procedure

### 1. Application of Dispute Resolution Procedure

Any dispute, controversy or claim arising out of or relating to this contract shall be determined by arbitration in accordance with the following procedures and conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association except where those rules conflict with this schedule, in which case this schedule prevails.

### 2. Initiation of Dispute Resolution

Any Party may refer a dispute to arbitration by giving notice to the other Party that it seeks a matter in dispute to be referred to arbitration. The notice shall set out the matter in dispute in sufficient detail to enable the other Party to be adequately informed as to the nature of the dispute.

### 3. Arbitration Procedure

- (a) The arbitration shall be conducted before a single arbitrator unless the amount in dispute exceeds \$250,000. If the amount in dispute exceeds \$250,000, it shall be decided by three arbitrators, one to be selected by each party and the two party appointed arbitrators to agree upon the third. Under no circumstances are the arbitrators authorized to award damages contrary to Section 8 of these Standard Terms and Conditions – Services (v10.16).
- (b) The arbitration shall be held in New York City, New York.
- (c) In absence of agreement of the Parties for discovery, or an order by the arbitrator(s) based upon compelling evidence of need, there shall be no discovery in the arbitration.
- (d) The arbitrators shall be authorized to award costs and attorney's fees or to allocate them between the parties.
- (e) Any court with jurisdiction shall enforce this clause and enter judgment on any award.
- (f) The terms of appointment of the arbitrator shall, if the Parties fail to agree, be fixed by the American Arbitration Association.

### 4. Decision of Arbitrator

- (a) Any determination of the Arbitrator will be binding and shall not be reviewable in any court of law except to the extent that it may involve an error of law.
- (b) Unless the decision of the Arbitrator contains an award of costs, the Parties shall bear all the costs of the arbitration equally.