

# TERMS OF PURCHASE

IF YOU ARE ENTERING INTO THIS TERMS OF PURCHASE ("TOP") ON BEHALF OF ANY ENTITY, YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO BIND SUCH ENTITY TO THESE TERMS AND CONDITIONS, IN WHICH CASE THE TERMS "YOU" OR "YOUR" SHALL REFER TO SUCH ENTITY. IF YOU DO NOT HAVE SUCH AUTHORITY, OR IF YOU DO NOT AGREE WITH THESE TERMS AND CONDITIONS, YOU MAY NOT USE THE SERVICE. YOUR USE OF THE Ariba PRODUCTS OR Ariba SERVICES SIGNIFIES YOUR ACCEPTANCE OF AND AGREEMENT WITH THESE TERMS OF PURCHASE.

## 1. DEFINITIONS

- 1.1. "**Ariba Products**" means any Online Services or Software, as identified in the applicable Order Form.
- 1.2. "**Ariba Services**" refers to any Consulting Services or Enablement Services.
- 1.3. "**Consulting Services**" means any consulting services provided to You hereunder, typically involving a scope of work, as may be identified in an applicable Order Form.
- 1.4. "**Documentation**" for Ariba Products means the authorized user and installation guides and manuals that are delivered or made available by Ariba to its customers for use with the Ariba Products.
- 1.5. "**Enablement Services**" means a set of pre-defined services offered by Ariba in association with an Online Service and purchased by You in an Order Form as part of a Solution Package (e.g. services packaged with "Ariba Sourcing, Professional Package") as identified in the Solution Package Descriptions.
- 1.6. "**Fees**" means the fees stated in any Order Form.
- 1.7. "**Intellectual Property Right**" means any patent, patent application, copyright, moral right, trade name, trademark, service mark, trade secret, and any applications or right to apply for registration therefor, internet domain names, logos, designs, slogans, and general intangibles of like nature, computer software programs or applications, tangible or intangible proprietary information, know-how, proprietary processes, formulae, algorithms, or any other intellectual property right, whether registered or unregistered, and whether first created before or after the Order Form Effective Date.
- 1.8. "**License Term**" means the period of time under which the license for an applicable Ariba Product shall be effective, as set forth in the applicable Order Form and commencing upon the applicable Order Form Effective Date.
- 1.9. "**Online Services**" means any combination of remote-access electronic services as identified in an applicable Order Form and related Documentation.
- 1.10. "**Site**" means the set of web pages through which Ariba provides access to an Online Service.
- 1.11. "**Software**" means the Ariba software program(s) provided to You (via download or CDROM) in object code format as identified in an applicable Order Form and related Documentation.
- 1.12. "**Solution Package**" means a combination of Online Services and Enablement Services.

- 1.13. "**Solution Package Descriptions**" means the description of the Online Services, Consulting Services, Enablement Services, and policies that apply to any particular Solution Package (e.g. services packaged with "Ariba Sourcing, Professional Package") and described at <http://www.ariba.com/legal/ODTOC04152006.cfm>.
- 1.14. "**Subscription Term**" means the period of time during which You may access an Online Service or receive the benefit of a Solution Package, as set forth in the applicable Order Form and commencing upon the applicable Order Form Effective Date including any Renewal Term(s).
- 1.15. "**Term**" means Subscription Term or License Term, as applicable.
- 1.16. "**Order Form**" means a separate document by which You order Ariba Products and/or Ariba Services, such as an order form or statement of work.
- 1.17. "**Order Form Effective Date**" means the date identified on an applicable Order Form upon which such Order Form becomes effective.
- 1.18. "**Technical Support Services**" or "**TSS**" means support for the Software ordered under a single Order Form provided by Ariba under Ariba's then current TSS terms and conditions for such Ariba Products ("**Support Services Policies**"). Such Support Services Policies can be found at the following uniform resource locator (URL): [https://connect.ariba.com/TechSupport\\_Policy.asp](https://connect.ariba.com/TechSupport_Policy.asp).
- 1.19. "**Ariba**" shall mean, for purposes of this TOP and any billing thereunder, the Ariba entity identified in an applicable Order Form.
- 1.20. "**Usage Limit**" means the usage limit(s) applicable to your use of the Ariba Products as specified in the applicable Order Form (e.g., number of Users, project owners, projects, geographic areas, transaction volumes, or otherwise).
- 1.21. "**You**" or "**Your**" or "**Customer**" shall mean and/or reference the party identified in an applicable Order Form as receiving the applicable Ariba Products and/or Ariba Services.
- 1.22. "**Written Notice**" is a written notice in accordance with section 16.6 (Notices).
- 1.23. "**User**" means an employee of Customer who is authorized to use the applicable Ariba Product pursuant to an Order Form.

## 2. USE OF ARIBA PRODUCTS

- 2.1. **Use of Online Services.** For each Solution Package that You purchase from Ariba, Ariba grants You a non-sublicensable, non-exclusive, non-transferable right to allow the authorized number of Users to access the associated Online Service solely for support of Your internal business operations during the Subscription Term and subject to the terms and conditions of this TOP and the Order Form under which You ordered the Online Service, including Usage Limits, and online terms and policies referenced therein. The rights to use Online Services are also subject to the following: (i) Your payment of all applicable Fees; (ii) No representative of Your affiliate and/or subsidiary may access the applicable Online Services unless authorized in writing by Ariba; (iii) User accounts cannot be shared or used by more than one individual User; and (iv) the provisions of Section 2.3 below. All rights not expressly granted to you are reserved by Ariba and its licensors.

- 2.1.1. **Storage and Access to Your Data.** Storage of Your Data on the Online Service may be subject to a maximum disk space limitation. If the amount of disk storage required for Your Data exceeds these limits, you will be charged the then-current storage fees.

Ariba reserves the right to establish or modify its policies, including but not limited to those policies related to storage and retrieval of Your Data. You may obtain Your Data from an Online Service during, or at the termination or expiration of, a Subscription Term as set forth in Ariba's Data Policy (which is described within the Solution Package Description).

2.2. **Software License.** For each Software license that You purchase from Ariba, Ariba grants You a non-sublicensable, nonexclusive, non-transferable right to allow the authorized number of Users to use the applicable Software solely for support of Your internal business operations during the License Term and subject to the terms and conditions of this TOP and the Order Form under which You ordered the Software, including Usage Limits, and online terms and policies referenced therein.

2.2.1. Except for a single back-up copy for disaster recovery purposes made by You from the initially delivered Software, You may possess only one (1) copy of any Software licensed and paid for by You under this TOP and applicable Order Form. Nothing in this TOP grants You any right, title, license or interest in or relating to the source code of the Ariba Products. Any third party software embedded, included or otherwise provided by Ariba for use with the Software may be only used with such Software. The Software is designed for use with the equipment and accessories specified in the Ariba Documentation. You are solely responsible for obtaining such equipment, and for ensuring a proper environment and proper utilities for the computer system with which the Ariba Products will be used. The rights to use the Ariba Products are also subject to the following: (i) Your payment of all applicable Fees; (ii) No representative of Your affiliate and/or subsidiary may access the applicable Ariba Products unless authorized in writing by Ariba; and (iii) the provisions of Section 2.3 below.

2.3. As between the parties, Ariba retains all right, title, and interest to all Intellectual Property Rights in all Ariba Products and Ariba Confidential Information, and any copies thereof. You shall comply with the terms and use restrictions stated in the Order Form. You agree to maintain the copyright, trademark, logos, and other notices that appear on the Ariba Products on all associated media, screens, and copies thereof. You shall not, and shall not allow any third party to: (i) reverse engineer, decompile, translate, disassemble or attempt to discover any source code or underlying ideas or algorithms of any Ariba Products (except to the extent such restriction is prohibited by applicable local law in order to obtain interoperability), (ii) transfer, sell, lease, lend, disclose, or use for timesharing or service bureau purposes any Ariba Products, (iii) use, provide, or allow others to use Ariba Products for the benefit of any third party, (iv) use Ariba Products, or allow the transfer, transmission, export, or re-export of any Ariba Products, or portion thereof, in violation of the Export Administration Regulations, the International Traffic in Arms Regulations, or any other applicable export control laws or regulations administered, (v) utilize the Ariba Products to conduct a sealed bid or on-line auction for Ariba Products and/or Ariba Services or, (vi) reset or disable the Ariba Products.

### 3. **ARIBA SERVICES**

3.1. You may obtain Ariba Services under an Order Form at the rates set forth in an applicable Order Form.

3.2. You agree to provide Ariba with full, free and timely access to Your computer equipment and software, as is reasonable under the circumstances, at all reasonable times for the purpose of fulfilling its obligations under this TOP.

3.3. If you purchase Consulting Services, You shall designate a project advisor who shall be principally responsible for Your obligations set forth above and the direction and management of Your employees in connection with the direction and provision of Consulting Services.

Ariba will similarly designate a Project Advisor who shall be principally responsible for Ariba's provision of the Consulting Services.

- 3.4. Anything resulting from or arising in the course of performance of the Ariba Services shall be deemed "Work Product." You shall own all data and applications developed solely by You in connection with the Ariba Services. However, as between the parties, Ariba will own all rights, title, interest and intellectual property rights with respect to the Work Product and all derivatives, enhancements and modifications of Ariba's Products, all of which are hereby retained by it or assigned to it by You.

#### 4. FEES AND PAYMENT

- 4.1. You agree to pay to Ariba the Fees in the amounts and at the times set forth in the applicable Order Form. Except as otherwise provided in this TOP, all Fees shall be nonrefundable. If You require a purchase order to pay vendors, You will provide Ariba with approved purchase order information and complete and accurate billing and contact information upon execution of the Order Form. If a purchase order is required, You shall ensure that its purchase order be sufficient to cover all fees in the Order Form and all variable fees that become due under the Order Form. Terms of a purchase order will not modify this TOP or any Order Form, and the content of such purchase order shall not be binding upon either party except to reaffirm Your payment obligation under the applicable Order Form. Except as otherwise provided in the applicable Order Form, all Fees shall be due on the Order Form Effective Date and payable by You in U.S. dollars (unless other currency is expressly stated in the Order Form) net thirty (30) days from the date of invoice. You agree to pay all fees and expenses payable hereunder from Your location specified in the applicable Order Form. Any amounts payable by You hereunder that remain unpaid after the due date shall be subject to a late charge equal to the lesser of 1.5% per month or the maximum legal interest rate, which interest will accrue from the due date for payment until the date of actual receipt by Ariba of the amount in cleared funds. You shall pay all fees and expenses via electronic funds transfer to Ariba's designated account.

- 4.1.1. Ariba may agree to allow You to pay fees by debit or credit card ("Payment Card"). If You pay by Payment Card, You agree to provide Ariba with an authorized Payment Card name, number and date of expiration, and proper debit authorization for purposes of allowing Ariba to charge Your Payment Card (that is, to "e-Charge") the applicable account to collect fees due under this TOP. By authorizing Ariba to e-Charge You, You are authorizing Ariba or its respective designated representatives or agents to automatically continue Charging that Payment Card (or any replacement Payment Card account if the original Payment Card is renewed, lost, stolen, or changed for any reason by the debit or credit-issuing entity, and such entity informs Ariba of such new replacement Payment Card account) for the Fees. If Your Payment Card fails to validly pay the Fees due to Ariba, Ariba will give You ten (10) days notice to supply a valid alternative Payment Card. If You fail to provide a valid alternative Payment Card within such time frame, You acknowledge that Ariba may terminate without liability to Ariba your access to or license to use the applicable Ariba Products or Ariba Services for which e-Charging was the designated form of payment of the Fees.

- 4.2. Ariba Services are invoiced and You agree to pay in accordance with the terms set forth in the applicable Order Form. Except as otherwise provided in an applicable Order Form, or if You are allowed to e-Charge the Fees pursuant to Section 4.1.1, all charges for Consulting Services will be invoiced monthly as accrued and shall be due thirty (30) days from the date of invoice. Charges for Ariba Services do not include materials or out-of-pocket expenses such as travel, which will be invoiced separately and must be reimbursed by You.

4.3. All amounts payable under this TOP are exclusive of taxes. You shall pay, or reimburse Ariba in the event it has paid, any and all taxes imposed by any government upon the amounts payable under this TOP whether invoiced by Ariba or otherwise collected, including sales, use, value-added, goods and services, consumption, personal property, withholding, duties, fees, and levies of any kind, and penalties and interest related thereto, but excluding taxes imposed upon Ariba's net income, net worth, capital, or employees. As required by applicable law or upon request by Ariba, You shall provide Ariba with original or certified copies of all receipts or other evidence of tax payments made with respect to amounts payable under this TOP. You and Ariba shall cooperate in obtaining any reduced, concessionary or otherwise favorable tax rate or treatment available with respect to amounts payable under this TOP.

## 5. DELIVERY

5.1. **Software.** You may choose to have the Software delivered electronically or by common carrier, and shall so indicate on the applicable Order Form. All deliveries will be deemed to occur at Your Ship To Address per the Order Form unless written notification is provided by You of a different download location. Unless otherwise specified in an applicable Order Form, all subsequent increases or modifications to Your order hereunder shall be deemed to be delivered under the same terms as the original license. In the event of physical delivery, title to the media only, and not to the Software or Documentation, shall pass on delivery. Your right to use each additional authorized copy of the Software, as permitted under this TOP, shall be deemed to arise at the location where the original was first installed.

5.2. **Online Services.** Online Services are a hosted internet based service which You may only access remotely. If applicable, Documentation for Online Services will be provided electronically and Ariba shall not be obligated to deliver or ship to You any software or applications as part of Online Services.

## 6. TERMINATION

6.1. A party ("**Terminating Party**") may provide a Written Notice of default to the other party ("**Terminated Party**") to either: (i) terminate this TOP, in whole or in part, including any Order Forms or Order Forms (a) if the Terminated Party materially breaches this TOP, and the Terminated Party does not cure such material breach within thirty (30) calendar days after receipt of Written Notice of such breach; or (b) immediately following the failure to resolve the suspension of business, insolvency, institution of bankruptcy, liquidation proceedings by or against the Terminated Party, appointment of a trustee or receiver for the Terminated Party's property or business, or any assignment, reorganization or arrangement by the Terminated Party for the benefit of its creditors; or (c) immediately upon breach by the Terminated Party of either Section 2 (Use of Ariba Products) or Section 10 (Confidential Information); or (ii) terminate any individual Order Form if the Terminated Party fails to perform any provision of such Order Form and does not cure the breach within thirty (30) calendar days after receipt of Written Notice thereof.

6.2. Unless otherwise provided in a Order Form or unless a party provides thirty (30) days prior Written Notice (sent pursuant to Section 16.6), the Subscription Term for a Solution Package shall automatically extend on for successive twelve-month terms (each a "Renewal Term") subject to payment of the applicable Fees. The renewal fees for each Renewal Term shall be due on the first day of the Renewal Term and payable in accordance with Section 4 of this TOP. Renewal fees for a Renewal Term shall be based upon the Monthly Fees and Expansion Fees in place at the end of the prior Subscription Term, provided that Ariba may increase rates by no more than 5 percent (5%) from one Renewal Term to the next by giving You sixty (60) days advance Written Notice of such pricing change.

- 6.3. Upon expiration or termination of this TOP or termination of an applicable Order Form, all of Your licenses to use the Ariba Products, and all other rights, services and licenses granted by Ariba to You as set forth in this TOP, or within the terminated Order Form as the case may be, shall cease immediately (except for those rights, licenses and obligations that are expressly stated to survive termination of this TOP).
- 6.4. Within ten (10) days from the date of any termination, You shall provide Ariba with a signed written statement by You certifying that You have not retained any copies of (i) the applicable Ariba Products and any accompanying Documentation, and (ii) any Ariba Confidential Information.
- 6.5. Termination of this TOP or any license shall not limit either party from pursuing other remedies available to it, including injunctive relief, nor shall such termination relieve Your obligation to pay all Fees that have accrued or are otherwise identified as being owed by You, now or at some future date, under any Order Form.

## 7. INDEMNITIES

- 7.1. Subject to this Section 7, Ariba agrees, at its own expense, to defend You from (or at Ariba's option, settle) any claim instituted by a third party and asserted against You that the Ariba Products when used in accordance with the Documentation infringe any United States patent, copyright, trade secret, or other proprietary right of a third party ("IP Claim"), provided that You: (a) promptly notify Ariba in writing of any such IP Claim; (b) permits Ariba to control and direct the investigation, preparation, defense and settlement of the IP Claim; and (c) assist and fully cooperates in the defense of same. Ariba agrees to pay any final award of damages assessed against You resulting from such IP Claim, including any awarded costs and attorneys' fees, or any settlement amount agreed to by Ariba in writing. Ariba will not be responsible for any settlement it does not approve in writing prior to such settlement.
  - 7.1.1. Following notice of an IP Claim or any facts which may give rise to such IP Claim, Ariba may, in its sole discretion and at its option, (a) procure for You the right to continue to use the Ariba Products, (b) replace the Ariba Products, or (c) modify the Ariba Products to make it non-infringing. If Ariba determines that it is not commercially reasonable to perform any of these alternatives, Ariba shall have the option to terminate the license for the allegedly infringing Ariba Products and refund the pre-paid and unused Fees paid by You for such allegedly infringing Software, less depreciation for use assuming straight line depreciation over the License Term of the applicable Order Form(s) under which the allegedly infringing Ariba Products was licensed, or five (5) years, whichever is less.
  - 7.1.2. In no event will Ariba have any obligations under this Section 7 or any liability for any claim or action if the IP Claim is caused by, or results from: (a) Your combination or use of the Ariba Products with non-Ariba software or services, software or data, if such IP Claim would have been avoided by the non-combined or independent use of the Ariba Products, (b) modification of the Ariba Products by anyone other than Ariba if such IP Claim would have been avoided by use of the unmodified Ariba Product, (c) Your continued allegedly infringing activity after being notified thereof or after being provided modifications that would have avoided the alleged infringement, (d) Your use of the Ariba Product in a manner not strictly in accordance with this TOP, (e) Ariba's modification of the Ariba Product in compliance with Your specifications, or (f) use of other than Ariba's most current release of the Ariba Products if the claim or action would have been avoided by use of the most current release, provided You are given an opportunity to use such most current release for no additional Fee.

7.1.3. THE FOREGOING STATES Ariba's ENTIRE LIABILITY AND YOUR SOLE AND EXCLUSIVE REMEDY FOR INTELLECTUAL PROPERTY RIGHTS INFRINGEMENT OR ALLEGATIONS THEREOF.

7.2. You shall defend and indemnify Ariba against any and all claims, costs, damages, losses, liabilities and expenses (including attorneys' fees and costs) incurred by Ariba or its third party suppliers arising out of or in connection with a claim by a third party alleging that Your Data or the Marks, or any use thereof authorized under this Agreement, infringes the rights of, or has caused harm to, a third party (Claim"); provided that Ariba (a) promptly notifies You in writing of any such Claim; (b) permits You to control and direct the investigation, preparation, defense and settlement of the Claim; and (c) assists and fully cooperates in the defense of same. You will not be responsible for any settlement you do not approve in writing prior to such settlement.

## 8. LIMITED WARRANTIES AND DISCLAIMERS

8.1. **Ariba Software Limited Warranty.** Ariba warrants that for a period of one (1) year from the Order Form Effective Date, the Software will substantially conform to the Documentation for the applicable Software that existed on the Order Form Effective Date. This limited warranty only covers problems identified in a Written Notice delivered to Ariba during the warranty period. Your sole and exclusive remedy, and Ariba's entire liability for breach of this limited warranty, shall be correction of the warranted nonconformity in the Software or, if such correction of the warranted nonconformity is commercially impractical, Ariba may, at Ariba's option, terminate the license with respect to the non-conforming Software and refund the license Fees (as identified in an applicable Order Form) paid by You for use of such non-conforming Software. This limited warranty shall not be valid to the extent the warranty nonconformity was caused by Your abuse, misuse, accident, alteration, or unauthorized modification or installation of the Software.

8.2. **Online Services Limited Warranty.** Ariba warrants that, during the applicable Subscription Term, the Online Services will substantially conform to the then current Documentation for the applicable Online Services. This limited warranty only covers problems identified in a Written Notice delivered to Ariba during the warranty period. Your sole and exclusive remedy, and Ariba's entire liability for breach of this limited warranty, shall be correction of the warranted nonconformity in the Online Services or, if such correction of the warranted nonconformity is commercially impractical, Ariba may, at Ariba's option, terminate access to the non-conforming Online Services and refund the subscription Fees for such Online Service (as identified in an applicable Order Form) paid by You for the remainder of the Subscription Term. This limited warranty shall not be valid to the extent the warranty nonconformity was caused by Your abuse, misuse, accident, alteration, or unauthorized modification or installation of the Online Service.

8.3. **Ariba Services Limited Warranty.** Ariba warrants that any Ariba Services will be performed in a workmanlike and professional manner consistent with generally accepted industry practices. For any breach of this services warranty, Your exclusive remedy, and Ariba's entire liability, shall be the re-performance of such deficient Ariba Services; and if Ariba fails to re-perform such Ariba Services as warranted, You shall be entitled to recover the Ariba Services Fees paid to Ariba for such deficient Ariba Services. You must identify in a Written Notice to Ariba any deficiencies in such Ariba Services within ninety (90) days of completion of such deficient Ariba Services in order to receive the above warranty remedies.

8.4. EXCEPT FOR THE EXPRESS LIMITED WARRANTIES PROVIDED IN THIS SECTION 8, THE Ariba PRODUCTS AND Ariba SERVICES ARE PROVIDED "AS IS," WITHOUT ANY WARRANTY WHATSOEVER. Ariba AND ITS THIRD PARTY PROVIDERS HEREBY DISCLAIM ALL OTHER WARRANTIES, EXPRESS, IMPLIED OR STATUTORY, AS TO ANY MATTER WHATSOEVER,

INCLUDING ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT. THE FOREGOING STATES ARIBA'S ENTIRE LIABILITY AND YOUR SOLE AND EXCLUSIVE REMEDY FOR BREACH OF WARRANTY. ARIBA DOES NOT WARRANT THAT THE ARIBA PRODUCTS OR ARIBA SERVICES, OR ANY PORTION THEREOF, ARE ERROR OR BUG FREE, OR THAT YOUR USE OF THE ARIBA PRODUCTS OR ARIBA SERVICES WILL BE UNINTERRUPTED. YOU ACKNOWLEDGE THAT NEITHER ARIBA NOR ITS THIRD PARTY PROVIDERS CONTROLS THE TRANSFER OF DATA OVER COMMUNICATIONS FACILITIES, INCLUDING THE INTERNET, AND THAT THE ONLINE SERVICES MAY BE SUBJECT TO LIMITATIONS, DELAYS, AND OTHER PROBLEMS INHERENT IN THE USE OF SUCH COMMUNICATIONS FACILITIES. ARIBA IS NOT RESPONSIBLE FOR ANY DELAYS, DELIVERY FAILURES, OR OTHER DAMAGE RESULTING FROM SUCH PROBLEMS.

## 9. **LIMITATION OF LIABILITY**

9.1. IN NO EVENT SHALL EITHER PARTY (INCLUDING AS IT APPLIES TO ARIBA'S SUPPLIERS) BE LIABLE: (A) UNDER ANY CONTRACT, NEGLIGENCE, STRICT LIABILITY OR OTHER LEGAL OR EQUITABLE THEORY FOR ANY SPECIAL, INCIDENTAL, PUNITIVE, EXEMPLARY, INDIRECT, OR CONSEQUENTIAL DAMAGES OF ANY KIND, INCLUDING DAMAGES RESULTING FROM INTERRUPTION OF USE, COST OF COVER, LOSS OR CORRUPTION OF DATA, YOUR LOST PROFITS OR OF YOUR AFFILIATE, LOSSES RESULTING FROM SYSTEM SHUTDOWN, FAILURE TO ACCURATELY TRANSFER, READ OR TRANSMIT INFORMATION, FAILURE TO UPDATE OR PROVIDE CORRECT INFORMATION, STOLEN OR MISUSED PASSWORDS, SYSTEM INCOMPATIBILITY OR PROVIDING INCORRECT COMPATIBILITY INFORMATION, OR BREACHES IN SYSTEM SECURITY, WHETHER OR NOT YOU OR ARIBA HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY REMEDY, ARISING OUT OF OR IN CONNECTION WITH THESE TERMS; AND (B) FOR A TOTAL AND AGGREGATE LIABILITY AMOUNT UNDER THIS TOP IN EXCESS OF (I) IN THE CASE OF ARIBA, THE AMOUNT OF FEES PAID BY YOU WITHIN ONE (1) YEAR PRIOR TO THE DATE OF SUCH CLAIM FOR THE APPLICABLE ORDER FORM GIVING RISE TO SUCH LIABILITY AND (II) IN YOUR CASE, AN AMOUNT EQUAL TO THE FEES PAID BY YOU (AND ANY ACCRUED BUT UNPAID FEES) WITHIN ONE (1) YEAR PRIOR TO THE DATE OF SUCH CLAIM FOR THE APPLICABLE ORDER FORM GIVING RISE TO SUCH LIABILITY.

9.2. The limitations set forth in section 9.1 (A) and (B) shall not apply to (i) damages due to bodily injury (including death), (ii) for violations of the other party's Intellectual Property Rights or (iii) Your breach of Section 2 (Use of Ariba Products).

## 10. **CONFIDENTIALITY**

10.1. A party (the "**Discloser**") may disclose to the other party (the "**Recipient**") information that the Discloser considers to be confidential and at the time of disclosure is identified as confidential and/or proprietary ("**Confidential Information**"). Notwithstanding anything to the contrary herein, Confidential Information shall be deemed to include the Ariba Products in any embodiment, the terms and conditions of this TOP (including pricing), and either party's technical and business information relating to inventions or software, research and development, future product specifications, implementation methodologies, engineering processes, costs, profit or margin information, and marketing and future business plans. The parties agree, unless required by law, not to use or make each other's Confidential Information available to any third party for any purpose other than as necessary to perform under this TOP, without the prior consent of the other party; provided that: Ariba may disclose Your Confidential Information to its third party providers solely to the extent necessary to provide products or services under this Agreement, provided that Ariba



has a non-disclosure agreement in place with such third party provider that protects such Confidential Information against disclosure in a manner no less protective than this Agreement. Recipient shall protect the Confidential Information of Discloser by using the same degree of care, but no less than a reasonable degree of care, that it uses to protect its own confidential information of a like nature to prevent its unauthorized use, dissemination or publication by its employees or agents. Both parties acknowledge that any breach of its obligations with respect to Confidential Information may cause the other irreparable injury for which there are inadequate remedies at law and that Discloser shall be entitled to seek equitable relief in addition to all other remedies available to it. You shall not disclose the results of any performance tests of the Ariba Products to any third party without Ariba's prior written approval. A party's Confidential Information shall not include information that: (i) is or becomes publicly available through no act or omission of Recipient; (ii) was in the Recipient's lawful possession prior to the disclosure and was not obtained by Recipient either directly or indirectly from the Discloser; (iii) is lawfully disclosed to the Recipient by a third party without restriction on Recipient's disclosure, and where Recipient was not aware that the information was the confidential information of Discloser; (iv) is independently developed by the Recipient without violation of this TOP; or, (v) which is disclosed by Recipient as needed to comply with a court order, subpoena, or other government demand (provided that Recipient first notifies Discloser and gives Discloser the opportunity to challenge such court order, subpoena, or government demand). Notwithstanding anything to the contrary herein, Ariba may use all Your Data (i) in compliance with the Ariba Data Policy applicable to such Ariba Product or Ariba Services; and, (ii) as permitted under the terms of an Order Form.

10.2. Notwithstanding anything to the contrary in this TOP, Ariba shall not be prohibited or enjoined at any time by You from utilizing any "skills or knowledge of a general nature" acquired during the course of performing the services specified under an Order Form. For purposes of this TOP, "skills or knowledge of a general nature" shall include, without limitation, information publicly known or that could reasonably have been acquired in the conduct of similar work performed for another customer.

10.3. You acknowledge and agrees that data which identifies an individual provided to Ariba in the use of the Ariba Products may be transferred outside of the country by Ariba and/or Ariba affiliates to Ariba processing centers or other jurisdictions where You and Your Users are located to facilitate purposes permitted by this Agreement. You shall take such steps as necessary to inform and receive consent for such processing as may be required under applicable data protection regulations. Ariba's obligations regarding privacy and security shall be governed by the terms of the then-current Ariba Privacy Policy and Security Policy, Ariba reserves the right to modify its privacy and security policies in its reasonable discretion from time to time.

## 11. TRADEMARKS

11.1. Neither party grants the other party any rights to use its trademarks, service marks, or other proprietary symbols or designations ("Trademarks") without the written consent of the other party, except as otherwise described herein. Neither party will combine the other's Trademarks so as to effectively create a unitary composite mark, nor shall it use any product name or trademark in a manner that is confusingly similar to the other party's Trademark.

11.2. Ariba may identify You on its customer lists and in its marketing and advertising materials, and announce that You are a customer of the applicable Ariba Product or Ariba Service, and reproduce You company name, logo, trademark, trade name, service mark, or other commercial designations in connection therewith.

## **12. AUDIT**

If you license Software from Ariba, You agree to allow a mutually acceptable independent certified public accountant to audit and analyze the Your compliance with the terms of this TOP regarding use of any Software. You shall permit any such audit within thirty (30) days of Ariba's written request and it shall be performed during normal business hours at times mutually agreed upon by You and Ariba. Audits shall be made no more frequently than twice every twelve (12) months, and shall not unreasonably interfere with Your business activities. If an audit should reveal a discrepancy between the Fees owed Ariba and the Fees actually paid by You, You will promptly pay the difference plus any late fee under section 4.1. In the event an audit should establish an underpayment of greater than five percent (5%) of payments owed Ariba for any particular period, You shall be responsible for reimbursement of all reasonable, verifiable costs related to the performance of the subject audit.

## **13. FORCE MAJEURE**

Neither party shall be liable to the other for failure or delay in the performance of a required obligation if such failure or delay is caused by riot, fire, flood, earthquake, natural disaster, terrorist attack, electronic virus, electronic attack or infiltration, internet disturbance, government act or other similar cause beyond such party's (the "Affected Party") control (collectively, a "Force Majeure Event"), provided that Affected Party gives prompt Written Notice of such condition, uses reasonable efforts to resume its full performance as soon as possible, and provided further that the other party (the "Non-Affected Party") may terminate the affected Order Form if such condition continues for a period of one hundred eighty (180) days. During the Force Majeure Event, the Non-Affected Party may similarly suspend its performance obligations, until such time as the Affected Party resumes its performance obligations.

## **14. MODIFICATION OF TERMS.**

As to the Online Services, Ariba reserves the right to modify its operating policies relating to the Online Services at any time, effective upon posting of an updated version of such policy. You are responsible for regularly reviewing the policies. As for this TOP, neither party may modify the terms of the TOP during the Subscription Term stated in the Order Form, unless the parties mutually consent. Upon any renewal beyond the Subscription Term stated in the Order Form, the terms of the then-current TOP shall apply to such renewal.

## **15. YOUR LICENSES**

You grant to Ariba during any Subscription Term, the non-exclusive, worldwide right to use, display (a) any data, information or other materials, provided to Ariba by You in the course of Ariba's provision of Ariba Products and/or Ariba Services ("Your Data") solely to the extent necessary to provide the products and services to You and subject to Section 10 (Confidentiality), and (b) any trademarks that You provide Ariba for the purpose of including them in Your user interface for Online Services ("Marks"). You acknowledge and agree that, in providing products and services to you, Your Data may be transferred outside of the country or other jurisdiction where You and Your Users are located. You will comply with all applicable local, state, national and foreign laws, treaties, regulations and conventions in connection with receiving such services, including without limitation those related to data privacy, international communications, and the exportation of technical data. You shall have the sole responsibility for the accuracy, legality, and integrity of Your data and data transactions.

## 16. MISCELLANEOUS

- 16.1. You shall not assign, sublicense or otherwise transfer this TOP, including any Order Forms or Order Forms, in whole or in part, even in the event of merger or acquisition, without the prior written consent of Ariba.
- 16.2. The parties hereto are and shall remain independent contractors, and nothing herein shall be deemed to cause this TOP to create an agency, partnership, or joint venture between the parties hereto. Nothing in this TOP shall be interpreted or construed as creating or establishing the relationship of employer and employee between You and either Ariba or any employee or agent of Ariba. Ariba reserves the right to use third party providers in the provision of the Online Services or Solution Packages.
- 16.3. The failure of either party to act in the event of a breach of this TOP by the other shall not be deemed a waiver of such breach or a waiver of future breaches, unless such waiver is provided to the other party in writing and signed by the party against whom enforcement is sought.
- 16.4. The Ariba Products may require a license for export from the U.S. Government that requires advance disclosure of the ultimate consignee and all parties to the sale, and prohibits diversion, transshipment, or reexportation out of the United States contrary to U.S. law and regulations. You agree to furnish all documentation required by the U.S. Government in connection with obtaining any required export license, and agree that unauthorized diversion, transshipment or reexportation of the Ariba Products in violation of the export license or any applicable law shall not be permitted. This Section shall survive the termination of this Agreement.
- 16.5. In the event of termination of this TOP, the following terms will survive such termination and remain binding upon and for the benefit of the parties, their successors and permitted assignees: 4 (Fees and Payment), 6 (Termination), 7 (Indemnities), 9 (Limitation of Liability), 10 (Confidentiality), 11 (Trademarks), 12 (Audit), and 16 (Miscellaneous).
- 16.6. Notices. All notices under this TOP ("Written Notice") must (a) be in writing and in the English language; (b) be delivered by certified or registered mail, postage prepaid, return receipt requested or by an overnight courier services with delivery receipt; and (c) (in the case of a notice to Ariba) be sent to the attention of the "Chief Financial Officer" of Ariba at the address set forth on the Order Form to which the matter relates, with a copy to Ariba's General Counsel, and (in the case of a notice to You) be shall be sent to the address set forth in the address block in an applicable Order Form or to any other address You specify in writing.
- 16.7. This TOP shall be deemed to have been made in, and shall be construed pursuant to the laws of the State of California and the federal U.S. laws applicable therein, excluding its conflict of laws provisions. The parties hereby specifically exclude from application to this TOP the United Nations Convention on Contracts for the International Sale of Goods. Any legal action or proceeding relating to this TOP shall be instituted in a state or federal court in Santa Clara or San Mateo County, California (the "Selected Venue(s)"), and each party hereby consents to personal jurisdiction in such counties. In any action to enforce the provisions of this TOP the prevailing party shall be entitled to recover its reasonable attorney's fees and costs, including without limitation fees of retained expert witnesses, in connection with the resolution of such dispute. Each Party hereby irrevocably and unconditionally undertakes to take any and all steps which may be necessary in order to: (i) confer jurisdiction on the Selected Venue; and (ii) facilitate the enforcement, by a court where a Party is domiciled, of any judgment given by a court in the Selected Venue.

16.8. If any end user of the Ariba Products is an agency or department of the U.S. Government ("Government"), the use, duplication, reproduction, release, modification, disclosure, or transfer of the Ariba Products, or any related documentation of any kind, including but not limited to technical data or manuals, is restricted in accordance with FAR 12.212 for civilian agencies and DFAR Supplement 227.7202 for military agencies. The Ariba Products are commercial computer software and commercial computer software documentation. The use of the Ariba Products by the Government is further restricted in accordance with the terms of this TOP.

16.9. This TOP shall not be construed against the party preparing it but shall be construed as if both parties jointly prepared this TOP, and any uncertainty and ambiguity shall not be interpreted against any one party.

16.10. If any provision of this TOP shall be adjudged by any court of competent jurisdiction to be unenforceable or invalid, that provision shall be limited or eliminated to the minimum extent necessary so that this TOP shall otherwise remain in full force and effect and remain enforceable between the parties.

16.11. The section headings appearing in this TOP are inserted only as a matter of convenience and in no way define, limit, construe or describe the scope or extent of such section or in any way affect such section.

16.12. This TOP, including the Order Forms which are hereby incorporated by reference, constitutes a complete, absolute integration and the entire agreement between the parties hereto relating to the subject matters of this TOP, and supersedes all prior representations, proposals, discussions, and communications, whether oral or in writing, and all contemporaneous oral communications. Notwithstanding the content of any purchase order, sale order, sale confirmation or any other document or web site relating to the subject matter of this TOP, this TOP and the online Technical Support Services policies shall take precedence over any such document, and any conflicting, inconsistent, or additional terms contained therein shall be null and void. In the event of a conflict between the terms and conditions of this TOP and any individual Order Form, the Order Form shall govern.

TOP v8 Rev2 19May2006

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