

## ACCESS AND IDENTITY MANAGEMENT SERVICES FROM EDUSERV LTD

PLEASE READ THE FOLLOWING NOTES AND CONDITIONS CAREFULLY AS THE CONDITIONS WILL FORM THE BASIS OF A CONTRACT FOR SUBSCRIPTION BASED SERVICES AND ASSOCIATED SOFTWARE LICENCES.

YOU SHOULD ONLY SUBMIT AN ORDER FOR THESE SERVICES IF THESE CONDITIONS ARE ACCEPTABLE TO YOU.

### 1. The Contract

1.1 If and when we accept an Order from you, you enter into a Contract with us. The Contract is made up of:-

- these Conditions;
- the Software Licence (exhibited at the end of these Conditions);
- the Eduserv OpenAthens Terms of Use incorporating the User Conditions
- the Services Description;
- our written acceptance of your Order;
- your Order for the Services.

If there are any conflicts between these documents then priority shall be given to the documents in the order in which we have listed them above.

1.2 The Contract supersedes and overrules any other discussions held, statements made or understandings reached between you and us.

1.3 Save as provided in Condition 5, the Contract may only be changed by way of a written agreement signed by both your and our authorised representatives.

### 2. Definitions

2.1 When used in these Conditions certain words and phrases have quite specific meanings. Therefore, where the following words and phrases are used, the meanings shown below must be applied:

- "Acceptance" means a document or electronic communication that we send to you to confirm our acceptance of your Order.
- "Charges" means the charges you will be required to pay us for the Services.
- "Commencement Date" means the later of 1<sup>st</sup> August 2008 or the date on which we commence the provision of Services to you.
- "Conditions" means these conditions of contract.
- "Contract" means a contract between you and us as described in Condition 1.1.
- "Initial Period" means either the period between the Commencement Date and the next occurring 31<sup>st</sup> July or the period between the Commencement Date and the third occurring 31<sup>st</sup> July following the Commencement Date as the same may be determined from the Order.
- "Insolvency" means any one or more of a variety of events, examples of which are listed below, and which mean that either you or we are unable to pay our debts as they fall due. Insolvency includes: the cessation or threat of cessation of business; the convening of a meeting of creditors; the proposing or passing of a resolution for a voluntary winding up; the proposing or presenting of a petition for a compulsory winding up; the application for or appointment of an administrator, receiver or supervisor of a composition scheme; the issue of a receiving order in bankruptcy; sequestration; an adjudication of bankruptcy; the issue or levying of any form of seizure against premises or assets; and where you are an individual, a partner in a partnership or an unincorporated firm, the proposal or presentation of an individual voluntary arrangement or a petition of bankruptcy.

- "Licence" means the software licence appearing at the end of these Conditions. The Licence sets out your additional rights and obligations relating to your possession and use of the Software.
- "Order" means a document or electronic communication which you complete and submit to us, and by which you offer to purchase the Services from us.
- "Services" means the Services to be performed by us as described in the Services Description. Services includes the grant of a Licence and the maintenance and updating of the Software.
- "Services Description" means a document in which we describe the extent and nature of the Services to be performed by us under the Contract.
- "Software" means the software that we will provide to you and allow you to install and use on the terms set out in the Licence. Our performance of some of the Services may be dependant upon your having installed the Software.
- "Term" means the period of time between the Commencement Date and the date on which the Contract is terminated.
- "Terms of Use" means the Eduserv OpenAthens Terms of Use for the time being and from time to time and at any time appearing on our website at [http://www.athensams.net/terms\\_and\\_conditions](http://www.athensams.net/terms_and_conditions)
- "User Conditions" means the Conditions of use for Users of OpenAthens referred to in the Terms of Use from time to time and at any time appearing on our website at [http://www.athensams.net/terms\\_and\\_conditions](http://www.athensams.net/terms_and_conditions)
- "we", "our" and "us", as the context requires, refers to and means Eduserv Limited, a company registered in England and Wales (registered number 3763109). Our registered office is at Queens Anne House, 11 Charlotte Street, Bath BA1 2NE.
- "you" and "your", as the context requires, means the person, company or other organisation (named on the Order) who enters into a Contract with us for the provision of Services.

2.2 Where words are used in the singular they shall, if the context requires, include the plural and vice versa.

2.2 The headings included in these Conditions are only included for convenience. Headings do not affect the interpretation of any Condition.

### **3. Commencement and Duration**

3.1 The Contract comes into existence on the date of Acceptance.

3.2 The Contract will continue for the Initial Period and thereafter for successive periods each of twelve months duration each commencing on 1<sup>st</sup> August until either you or we send a notice to the other stating a wish to terminate the Contract. The Contract may only be terminated in one of the ways and at the times allowed for in these Conditions.

3.3 The Licence will come to an end at the same time as the Contract.

### **4. Termination and Suspension of Services**

4.1 You have the right to terminate the Contract at any time by sending us at least three month's notice (see Condition 13) to expire on the later of: the last day of the Initial Period, or 31<sup>st</sup> July in any year after the Initial Period has expired.

4.2 We will have the right to suspend the provision of the Services without telling you if you do not pay our Charges when they are due. It is a matter for us whether or not we exercise this right. If we do exercise this right, we will not accept a financial penalty for doing so. This right is additional to any other rights and

remedies that may be available to us in the Contract or that the law allows us. Such a period of suspension will continue until the unpaid Charges and any interest that may have accrued have been paid in full;

4.3 Both you and we have the right to terminate the Contract if the other of us:

- commits a material breach of any provision of the Contract or of the Licence , or a series of breaches which, when taken together, amount to a material breach of the Contract or of the Licence, unless, in the case of a breach which is capable of remedy, the other remedies the breach or breaches within fourteen (14) days of receiving a written request to do so;
- commits or is the subject of an act of Insolvency.

4.4 We shall have the right to suspend the provision of the Services or to suspend the provision of the Services and to terminate the Contract if you manifestly and materially fail to adhere to the Terms of Use and fail to remedy such failure within fourteen (14) days of receiving our written request to do so. For the avoidance of doubt persistently recurring minor failures to adhere to the Terms of Use shall be deemed to be a manifest and material failure. In the case of suspension of the provision of Services, the period of suspension will continue until such time as you provide assurances in such form as we may reasonably require that the originating failure has been corrected and that you will adhere to the Terms of Use. In no case will you be entitled to any refund of any Charges that you have paid in respect of the period of suspension or to any period following the date of termination.

4.5 We shall additionally have the right to terminate the Contract in the manner and in the circumstances described in Condition 11.3.4.

4.6 You shall have the right to terminate the Contract by giving 14 days notice in writing to us to expire at any time in the event that we exercise the rights we have reserved in Condition 5.2 to change these Conditions or the Licence and such changes are not acceptable to you.

4.7 We intend to send you an invoice for annual Charges approximately three months before each 1st August in the Term. Following the expiry of the Initial Period, if you do not pay the Charges by the due date of payment, we shall be entitled to consider that you do not wish the Contract to continue after 31<sup>st</sup> July in that year and to terminate the Contract on that 31<sup>st</sup> July without further notice. This right is additional to our rights to suspend the provision of the Services in Condition 4.2.

4.8 If the Contract is terminated as a result of a notice by you pursuant to Condition 4.6 or as a result of a breach by us, you will be entitled to receive a pro-rated refund of the Charges you have paid. Pro-rating will apply to the period between the date of termination and the next occurring 31<sup>st</sup> July. In any other case of termination you will not be entitled to any refund of any Charges that you have paid.

4.9 Following termination of the Contract you must uninstall all copies of the Software from your System and permanently delete all and any copies of the Software in your possession. We shall permanently delete from any databases and files in our possession and control all of your user names that we may be holding. Not more than 14 days following the date of termination, you are entitled to request that we send you a copy of all such user names and passwords to you before deletion.

## **5. Amending the Services, Terms of Use and User Conditions**

5.1 We have a policy of continuously improving our Services. We may change any aspect of the Services from time to time. If we reasonably consider that such a change is likely to have a serious detrimental effect on you, then we will notify you of such change but shall not otherwise be obliged to inform you. The current version of the Services Description will be made available to view at [http://www.athensams.net/terms\\_and\\_conditions](http://www.athensams.net/terms_and_conditions)

5.2 We may change these Conditions and the terms of the Licence from time to time. Such change will be effective immediately upon publication of the modified Conditions at [http://www.athensams.net/terms\\_and\\_conditions](http://www.athensams.net/terms_and_conditions) .

5.3 We may change both the Terms of Use and the User Conditions from time to time. Such changes will be effective immediately upon publication of the modified Terms of Use or User Conditions as the case may be at [http://www.athensams.net/terms\\_and\\_conditions](http://www.athensams.net/terms_and_conditions) .

## **6. Charges and Payment**

6.1 The Charges shall be those set out at [http://www.athensams.net/terms\\_and\\_conditions](http://www.athensams.net/terms_and_conditions). Your Charges for the Initial Period are fixed and firm and not subject to change during the Initial Period. We have the right to amend the published Charges for the Services from time to time and at any time. However, following the expiry of the Initial Period, once you have paid the Charges due in respect of any subsequent year of the Term you will not be required to pay any additional or increased Charges for that year.

6.2 Payment in full shall become due and payable from you on demand. We will normally send you an invoice approximately three months before 1st August in any year of the Term (please also see Condition 4.7). We shall be entitled to charge you interest on overdue payments at the rate of 4% per annum above the then current base lending rate of the Royal Bank of Scotland plc. Interest shall accrue on a daily basis from the date the payment became due until you make payment of the overdue amount.

## **7. Our Obligations**

7.1 Subject to these Conditions, we will throughout the Term:

- perform the Services as described in the last published edition of the Services Description using the reasonable skill and care of a competent provider of such services;
- grant you a non-exclusive royalty free Licence to install and use the Software;
- provide you with the a copy of the Software and issue any new versions or upgrades if and when such new versions or upgrades are made available to the generality of our customers.

7.2 We undertake not to deal in any personal data you provide to us if you require us to maintain a database of user names and passwords on your behalf.

## **8. Your Obligations**

8.1 You will pay the Charges when they fall due without deduction or set-off.

8.2 You will adhere to the then current Terms of Use at any time.

8.3 If, as part the Services we will perform, you require us to maintain a database of user names and passwords on your behalf you will ensure that you secure such permissions from each data subject as may be necessary for our holding personal data. In holding such personal data we consider that we will be acting as a data processing bureau under the direction of your data controller under your registration under the Data Protections Acts of 1984 and 1998.

8.4 If the provision of Services are dependant upon your having the Software installed and in use on your computer systems and servers then you will install the Software. If we make any new versions or updates available to you, you will, within a reasonable time, obtain copies of those new versions and updates and install them.

## **9. Limitation of Liability**

9.1 Neither you nor we exclude or limit our liability for death or personal injury resulting from our own negligence, or for fraudulent misrepresentation.

9.2 Except for the circumstances described in Condition 9.1, we shall not be liable, to the maximum extent permitted by applicable law, for any of the following losses or damage (whether arising in contract, tort (including negligence), strict liability or otherwise and whether such losses or damage were foreseen, foreseeable, known or otherwise):

- loss of revenue;
- loss of actual or anticipated profits (including loss of profits on contracts);
- loss of anticipated savings;
- loss of business;
- loss of opportunity;
- loss of goodwill;
- loss of reputation;
- loss of, damage to, or corruption of data or software;
- wasted expenditure; or
- any indirect or consequential loss or damage (including, for the avoidance of doubt, where such loss or damage is of the type specified above)

9.3 Except for the circumstances described in Condition 9.1, our entire liability under the Contract shall not exceed the total Charges paid by you for the Services provided in the 12 month period immediately preceding the event or series of events causing the liability to arise.

## **10.0 Limited Warranty**

10.1 You acknowledge and agree that computer and telecommunications systems are not uninterrupted or fault free and we do not make any representation or warranty in relation to such systems. You further acknowledge and agree that occasional periods of downtime for repair, maintenance and upgrading may be required and we cannot therefore guarantee uninterrupted provision of all of the Services. We will take all commercially reasonable steps to minimise any such periods of interruption or non-availability.

10.2 You acknowledge that the Software in general is not error-free and agree that the existence of such errors shall not constitute a breach of the Licence.

10.3 Although we do not warrant that the Software shall be free from known viruses we will use commercially reasonable efforts to check for the most commonly known viruses before providing the Software to you. Nevertheless you are solely responsible for virus scanning the Software.

10.4 We warrant that there are no disabling programs or devices in the Software.

10.5 All conditions and warranties stated in the Contract shall replace all other conditions, warranties or other terms concerning the supply or purported supply of, failure to supply or delay in supplying the Services which but for this Condition 10.5 have effect between you and us or would otherwise be implied into or incorporated into the Contract, whether by statute, common law or otherwise, all of which shall be excluded to the maximum extent permitted by law (including, without limitation, the implied conditions, or warranties).

## **11. Software Indemnity**

11.1 We agree to indemnify, save harmless, and defend you, at our own expense, from and against any and all claims of infringement of copyright, patents, or other intellectual property rights affecting the Software PROVIDED THAT you shall:

- not have done, permitted to be done anything which may have been or become an infringement of any rights in any copyright, patent or other rights; and
- have exercised a reasonable standard of care in protecting the same; failing which, you shall indemnify us against all actions, proceedings, costs, claims and expenses incurred in that respect.

11.2 You undertake to give us prompt notice of any claim specified in Condition 11.1 that is made against you. We shall have the right to defend any such claims and make settlements in our own discretion. You shall give us such assistance as we may reasonably require to settle or to oppose any such claims.

11.3 In the event that any such infringement occurs or may occur, we may in our sole option and at our own expense:

- 11.3.1 procure for you the right to continue using the Software or infringing part thereof; or

- 11.3.2 modify or amend the Software or infringing part thereof so that the same becomes non-infringing; or
- 11.3.3 replace the Software or infringing part thereof by other software of similar capability; or
- 11.3.4 repay to you the Charges paid by you in the 12 month period prior to the notice of the infringement and terminate the Contract.

## **12. Force Majeure**

- 12.1 We shall not be liable in respect of any breach of any Contract due to any cause beyond our reasonable control.

## **13. Notices**

- 13.1 Any notice or other communication required to be given or served for the purposes of a Contract shall be in writing and shall be taken to have been duly given and served if sent by post or delivered by hand. Notices that are required to be "in writing" or "written" must not be given by email.
- 13.2 Your and our addresses for service shall respectively be the address shown on your Order and in these Conditions or an address either of us notifies to the other as an address to which bills or notices may be sent or your or our usual or last known place of business or, if applicable, your or our last known registered office.

## **14. Rights of Third Parties**

- 14.1 A person who is not a party to a Contract has no rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of the Contract but this does not affect any right or remedy of a third party which exists or is available apart from that Act.

## **15. General**

- 15.1 You shall not assign or otherwise dispose of all or any of your rights or obligations under a Contract without obtaining our prior written consent.
- 15.2 Failure of either you or we to assert our respective rights in relation to any breach of Contract shall not constitute a waiver of such rights, nor will any such waiver be implied.
- 15.3 Each provision of these Conditions shall be read separately and shall be severable from these Conditions. If any provision of these Conditions (or portion thereof) is invalid, illegal or unenforceable, the validity, legality or enforceability of the remainder of these Conditions will not be affected.

## **16. Applicable Law and Jurisdiction**

- 16.1 The Contract and the Licence shall be governed by the laws of England and the Courts of England and Wales shall have exclusive jurisdiction to hear disputes arising out of the Contract.

## THE SOFTWARE LICENCE

We are either the sole and exclusive owner of the OpenAthens suite of software (the "Software") or we have the consent of the respective owners of those parts of the Software not owned by us to incorporate those parts into the Software or to redistribute those parts with the Software upon and subject to the provisions of this Licence or the respective Owners' licences as the case may be.

We hereby grant you and you hereby accept a royalty-free, non-exclusive, non-transferable Licence to "Use" (as hereinafter defined) the Software during such times and for such periods as you subscribe to our Access And Identity Management Services on the Conditions that immediately precede this Licence. This grant is subject to the terms and conditions following.

This Licence entitles you to:

- receive one copy of the Software for Use [together with the necessary documentation to install and Use the same];
- load, install and Use the Software by unlimited users on your computer systems and networks (your "System");
- Use the Software in accordance with the provisions of Clause 1 of this Licence;
- receive reports (if any) of errors and "patches" and receive such new updates of the Software incorporating the same;
- receive information on upgraded versions of the Software.

For the purposes of this Licence upgraded versions of the Software means enhancements, improvements or modifications to the Software.

## SOFTWARE LICENCE

### 1. Use of Software

For the purposes of this Licence, "Use" means and includes:

- utilisation of the Software by copying, transmitting or loading the same into the temporary memory (RAM) or installing into the permanent memory (e.g. hard disk, CD ROM or other storage device) of the System for the processing of the system instructions or statements contained in such Software;
- copying the Software which is in machine-readable form for Use by you on the System for the purposes only of understanding the contents of such machine-readable material and for back-up;
- storing the whole or any part of the Software on the System or other storage unit or disk;
- utilising the instructional and/or operational manuals relating to the Software

### 2. Your Additional Undertakings

Except to the extent (and only to the extent permitted by law) you undertake not to perform any of the following acts:

- not to copy the Software other than for normal system operation and as specified nor otherwise reproduce the same provided that you may copy the Software for back-up purposes or incidentally, in the course of converting the Software;
- not to translate, adapt, vary, or modify the Software;

- not to disassemble, decompile or reverse engineer the Software provided however that in the case of decompilation, you may incidentally decompile the Software only if it is essential so to do in order to achieve interoperability of the Software with another software program ("Permitted Purpose") and provided the information obtained by you during such decompilation is only used for the Permitted Purpose and is not disclosed or communicated to any third party to whom it is not necessary to disclose or communicate such information without our prior written consent and is not used to create any software which is substantially similar to the expression of the Software nor used in any manner which would be restricted by copyright.

In addition, you undertake:

- to supervise and control Use of the Software in accordance with the terms of this Licence;
- to replace the current version of the Software with the updated or upgraded version forthwith upon receipt;
- not to provide or otherwise make available the Software in whole or in part (including but not limited to program listings, object and source program listings, object code and source code), in any form to any person other than your employees without prior written consent from us;
- to abide by the terms of any third party licences for software incorporated into or distributed with the Software but not owned by us.

### **3. Intellectual Property Rights**

You acknowledges that any and all of the copyright, trade marks, trade names, patents and other intellectual property rights subsisting in or used in connection with the Software including all documentation and manuals relating thereto, are and shall remain our sole property. You shall not during or at any time after the expiry or termination of this Licence in any way question or dispute our ownership nor the ownership of third party owners.

### **4. Confidential Information**

All information, data, drawings, specifications, documentation, software listings, source or object code which we may have imparted and may from time to time impart to you relating to the Software (other than the ideas and principles which underlie the Software) is proprietary and confidential. You hereby agrees that you shall use the same solely in accordance with the provisions of this Licence and that you shall not at any time during or after expiry or termination of this Licence, disclose the same, whether directly or indirectly, to any third party without our prior written consent.

Subject only to the specific, limited provisions above, you further agree that you shall not yourself or through any subsidiary, agent or third party use such confidential information to copy, reproduce, translate, adapt, vary, modify, decompile, disassemble or reverse engineer the Software nor shall you sell, lease, license, sublicense or otherwise deal with the Software or any part or parts or variations, modifications, copies, releases, versions or enhancements thereof or have any software or other program written or developed for itself based on any confidential information supplied to you by us.

The foregoing provisions shall not prevent the disclosure or use by you of any information which is or hereafter, through no fault of you, becomes public knowledge or to the extent permitted by law.