ABACO SYSTEMS
Software License Agreement – Oct Source Code

ABACO-001-01

You, as the Customer, agree as follows:

1. DEFINITIONS

“Abaco” shall mean the Abaco Systems business providing Licensed Software to Customer pursuant to this Agreement, whether Abaco Systems, Inc. or its subsidiary.

“Abaco Software” shall mean those portions of the Licensed Software owned by Abaco or its affiliate company.

“Licensed Software” shall mean the software, in object code form only, supplied by Abaco pursuant to this Agreement.

“Licensed Product” shall mean the Licensed Software and/or its accompanying documentation.

“Third Party Software” shall mean those portions of the Licensed Software owned or licensed by a third party, including but not limited to operating system code, that is embedded within the Licensed Software.

2. LICENSE

2.1 Except as provided in section 2.2 below, you are granted only a personal, non-transferable, nonexclusive license to use the Licensed Software only as embedded in or to be used on a single Abaco hardware product. You may copy the Licensed Product, for backup purposes only, in support of your use of the Licensed Software, limited to one copy. No other copies shall be made unless authorized in writing by Abaco. You must reproduce and include all applicable copyright notices on any copy. You may not compile or otherwise reverse engineer, or modify the Licensed Software. The Licensed Software, comprising proprietary trade secret information of Abaco and/or its licensors, shall be held in confidence by Customer and protected from disclosure to third parties. No title to the intellectual property is transferred. Licensed Software shall not be copied, reproduced, or used for any other purpose outside of operation of the Abaco hardware, and shall not be used on any other piece of hardware other than the Abaco hardware with which it was provided.

2.2 If you transfer the Abaco hardware product on which the Licensed Software is used, you may transfer the Licensed Software to the end user of the hardware product provided that the end user agrees to be bound by terms no less restrictive than the provisions of this Agreement, and provided that all proprietary markings are maintained. Any other transfer is void and automatically terminates this license. You shall use your best efforts to enforce such agreement and shall promptly report any violation or suspected violation to Abaco. In the event you do not enforce such agreement after a breach, you shall, to the extent permissible by applicable law, grant Abaco the right to enforce such agreement.

2.3 The Licensed Software may include Third Party Software licensed to Abaco. The owner of the Third Party Software (the “Third Party”) and its licensors are intended third party beneficiaries of this Agreement, and the provisions of this Agreement relating to the Licensed Software, as the same incorporates Third Party Software, are made expressly for the benefit of, and are enforceable by, the Third Party and its licensors. Third Party and its licensors retain ownership of all copies of the Third Party Software. Unless a pass-through warranty covering the Third Party Software is extended directly to you by the Third Party, all Third Party Software is provided “AS IS” without warranty and each such party hereby disclaims all warranties, either express or implied, including but not limited to the implied warranties of merchantability, title, non-infringement or fitness for a particular purpose with regard to the Third Party Software. The Third Party shall not have any liability for special, indirect, punitive, incidental or consequential damages. Unless otherwise expressly stated by Abaco, you must make your own provision for any required operating system software licenses even if the Licensed Software contains some operating system code.

2.4 In addition to the Licensed Software licensed above, Abaco may provide certain files embedded in or to be used on the Abaco hardware product which may be subject to the terms of the GNU General Public License (GPL) or the GNU Lesser General Public License (LGPL), the current text of which may be found at: http://www.gnu.org/ or another open source license. The Licensed Product is proprietary software not subject to the GPL or LGPL. However, if Abaco has obtained a license to the GPL or LGPL-software, Abaco may provide a copy to Customer, if no license is available under the GPL or LGPL, or to any of the Customer’s third party customers, provided that the Customer shall not be held in copyright by the Customer or any of its customers for invoking the GPL or LGPL-software. The Customer may not reverse engineer the software, either in whole or in part, although such an attempt shall not violate the implied warranty of merchantability, title, non-infringement or fitness for a particular purpose with regard to the software.

2.5 For the rights granted in this Agreement, Customer shall pay to Abaco the then-current catalog price (license fee) for each copy of the Licensed Software provided by Abaco to Customer, or the price for the Abaco hardware product in which the Licensed Software is embedded, whichever is applicable. For the avoidance of doubt, copies of Licensed Software running on multiple hardware units, or on multiple processor cores or in multiple partitions (e.g., above a Hypervisor) within a hardware unit, are each subject to the payment of fees.

2.6 Customer shall pay all import duties and registration fees and all sales, use and excise taxes (and any other assessments in the nature of taxes however designated) on the Licensed Product or its license to use the Licensed Product, or resulting from this Agreement, exclusive of taxes based on Abaco’s net income.

3. WARRANTY

3.1 Abaco warrants that the Abaco Software will be in substantial conformance with Abaco’s standard published user documentation pertaining thereto as of the date of shipment by Abaco. If, within ninety (90) days of date of shipment, it is shown that the software does not meet this warranty, and such Licensed Software is returned to Abaco with a copy of your purchase confirmation, Abaco will, at its option, either correct the defect or error in the Abaco Software, free of charge, or make available to Customer satisfactory substitute software, or return to Customer all payments made as license fees (or fees paid for the hardware product in which the Licensed Software is embedded which are allocable to the Licensed Software, whichever is applicable) and terminate the license with respect to the Abaco Software affected. Abaco does not warrant that operation of the Abaco Software will be uninterrupted or error free or that it will meet Customer’s needs. All other portions of the Licensed Software are provided “as is” without warranty of any kind.

3.2 THE FOREGOING WARRANTIES ARE EXCLUSIVE AND ARE IN LIEU OF ALL OTHER WARRANTIES WITH RESPECT TO THE LICENSED PRODUCT WHETHER WRITTEN, ORAL, IMPLIED OR STATUTORY. NO IMPLIED OR STATUTORY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE SHALL APPLY. NO WARRANTY ARISING FROM COURSE OF PERFORMANCE, COURSE OF DEALING, OR USAGE OF TRADE SHALL APPLY.

4. LIMITATION OF LIABILITY

4.1 ABACO’S LIABILITY FOR ALL CLAIMS OF ANY KIND, WHETHER BASED ON CONTRACT, TRESPASS, WARRANTY, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, FAILURE OF A REMEDY TO ACCOMPLISH ITS ESSENTIAL PURPOSE, OR OTHERWISE, FOR ALL LOSSES OR DAMAGES ARISING OUT OF, CONNECTED WITH, OR RESULTING FROM THIS AGREEMENT, OR THESE TERMS AND CONDITIONS, OR FROM THE PERFORMANCE OR BREACH THEREOF, OR FROM THE LICENSED PRODUCT OR ANY PART THEREOF, OR FROM ANY SERVICE FURNISHED HEREUNDER (INCLUDING REMEDIAL WARRANTY EFFORTS), SHALL, IN THE AGGREGATE, IN NO CASE EXCEED THE LICENSE FEES FOR THE LICENSED PRODUCT OR THOSE ABACO HARDWARE PRODUCTS IN WHICH IT IS EMBEDDED, WHICHEVER IS APPLICABLE, GIVING RISE TO THE CLAIM. ALL SUCH LIABILITY SHALL TERMINATE UPON THE EXPIRATION OF THE WARRANTY PERIOD AS SET FORTH IN SECTION 3.

4.2 IN NO EVENT, WHETHER BASED ON CONTRACT, INDIVIDUAL, WARRANTY, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, FAILURE OF A REMEDY TO ACCOMPLISH ITS ESSENTIAL PURPOSE, OR OTHERWISE, SHALL ABACO, ITS EMPLOYEES OR SUPPLIERS BE LIABLE FOR INDIRECT, SPECIAL, INCIDENTAL CONSEQUENTIAL, PUNITIVE OR EXEMPLARY DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS OR REVENUE, LOSS OF USE OF ANY PROPERTY, COST OF CAPITAL, COST OF PURCHASED POWER, COST OF SUBSTITUTE EQUIPMENT, FACILITIES, OR SERVICES, DOWNTIME COSTS, OR CLAIMS OF CUSTOMERS AND TRANSFERS OF THE CUSTOMER FOR SUCH DAMAGES, AND THE CUSTOMER WILL INDEMNIFY ABACO, ITS EMPLOYEES AND SUPPLIERS AGAINST ANY SUCH CLAIMS FROM THE CUSTOMER’S CUSTOMERS. IF THE LICENSED PRODUCT WILL BE FURNISHED BY THE CUSTOMER TO A THIRD PARTY OR BE USED WITH A THIRD PARTY APPLICATION, THE CUSTOMER AND A THIRD PARTY, THE CUSTOMER SHALL OBTAIN FROM SUCH THIRD PARTY A PROVISION AFFORDING ABACO AND ITS SUPPLIERS THE PROTECTION OF THIS SUBSECTION AND THE PRECEDING SUBSECTION.

4.3 The Licensed Product is not intended for use in any nuclear facility or application, or any life-support equipment or other application where failure of the products could lead directly to death, personal injury or severe physical or environmental damage. If so used, Abaco disclaims all liability for any damages arising as a result of the hazardous nature of the application in question, including but not limited to nuclear or military radiation, fire or explosion, contamination, and Customer shall indemnify, hold harmless and defend Abaco, its officers, directors, employees, and agents against all such liability, whether based on contract, warranty, tort (including negligence), strict liability, or any other legal theory, regardless of whether Abaco had knowledge of the possibility of such damages.

4.4 If Abaco furnishes Customer with advice or other assistance concerning any products or systems which is not required pursuant to this agreement, the furnishing of such advice or assistance will not subject Abaco to any liability, whether in contract, indemnity, warranty, tort, (including negligence), strict liability or otherwise.

5. INDEMNITY

5.1 Abaco warrants that the Abaco Software shall be delivered free of any rightful claim of any third party for infringement of any United States patent or copyright. If promptly notified in writing and given full authority, information and assistance, Abaco shall defend, or may settle, at its expense, any suit or proceeding against Customer so far as it may claim and any resulting infringement, and for Customer’s defense and the costs incurred by Abaco, Customer agrees to pay all such defense and costs, including counsel fees, and shall not settle any such claim or proceeding without Abaco’s prior approval.

5.2 Customer shall deliver to Abaco all claims or demands of third parties and shall assist and cooperate with Abaco in the defense of any claims or demands made against Abaco by others as a result of actions taken by Abaco, Customer or any of their respective employees, agents, licensees, or third parties acting on their behalf as to any alleged infringement of any third party’s right to use the Licensed Software, and Customer shall pay all damages and costs finally awarded therein against Customer due to such breach, other than damages and costs arising from any willful infringement by Customer after receipt of notice of the claimed infringement. Abaco shall not be responsible for any compromise or concession made by Customer without Abaco’s prior
written consent. In case the Abaco Software is in such suit held to constitute such an infringement and its use for the purpose intended for such software is enjoined, Abaco shall, at its expense and option, either procure for Customer the right to continue using said software, or replace same with non-infringing software, or modify same so it becomes non-infringing, or remove the software and refund the license fees pertaining thereto or the fees paid for the Abaco hardware product in which the Abaco Software is embedded which are allocable to the Abaco Software (less reasonable depreciation for any period of use) and any transportation costs separately paid by Customer. The foregoing states the entire liability of Abaco for patent or copyright infringement by the Licensed Product or any part thereof.

5.2 The indemnity under the preceding paragraph shall not apply if the infringement or claim is based in whole or in part upon any use of Abaco Software in conjunction with any other product in a combination not furnished by Abaco as a part of this transaction. As to any such use in such combination, or any improper or unauthorized use, modification, installation, or operation of the Abaco Software, Abaco assumes no liability whatsoever for patent or copyright infringement and Customer will hold Abaco harmless against any infringement claims arising therefrom.

6. TERM AND TERMINATION

6.1 You may terminate the license granted hereunder at any time by destroying the Licensed Product together with all copies thereof and notifying Abaco in writing that all use of the Licensed Product has ceased and that same has been destroyed.

6.2 Abaco may terminate this Agreement or any license hereunder upon notice to Customer if Customer breaches any of the terms and conditions of this Agreement or if Customer attempts to assign this Agreement or any license hereunder without Abaco’s prior written consent. Within twenty (20) days after any termination of this Agreement, Customer shall certify in writing to Abaco that all use of the Licensed Product has ceased, and that the same has been destroyed.

6.3 All provisions of this Agreement related to disclaimers of warranty, limitation of liability, Abaco’s intellectual property rights, or export shall survive any expiration or termination and remain in effect. Termination of this Agreement or any license hereunder shall not relieve Customer of its obligation to pay any and all outstanding charges hereunder nor entitle Customer to any refund of such charges previously paid.

7. EXPORT

7.1 If you intend to export (or reexport), directly or indirectly, the Licensed Product or technical data relating thereto or any portion thereof, it is your responsibility to assure compliance with U.S. and other applicable export control laws and to obtain any required licenses or approvals in your own name. You are also responsible for the accuracy and completeness of any information or certification you provide for purposes of export control compliance.

8. U.S. GOVERNMENT CONTRACTING

If Customer is a U.S. Government entity or elects to sell products or services provided hereunder to the U.S. Government or to a contractor selling to the U.S. Government, the following provisions apply: (a) Customer agrees that all products and services provided by Abaco meet the definition of “commercial-off-the-shelf” (COTS) or “commercial item” as defined in FAR 2.101, and that the subparagraph terms of FAR 52.212-5(e) or FAR 52.244-6 (or, for orders from the U.S. Government, FAR 52.212-5 and FAR 52.212-4 with tailoring to the extent permitted by FAR 12.302 by replacing all paragraphs except those listed in FAR 12.302(b) with these Conditions of Sale), and (subject to subsection (e) below) DFARS 252.212-7001(c) or DFARS 252.244-7000, whichever are applicable, apply only to the extent applicable to COTS or commercial items and only as appropriate for the dollar value of this order; (b) with regard to any terms related to Buy American Act or Trade Agreements, the country of origin of products is unknown unless otherwise specifically stated in writing by Abaco; (c) Customer agrees that any services offered by Abaco are exempt from the Service Contract Act of 1965 (FAR 52.222-41); (d) Customer agrees that this sale is not funded, in whole or in part, by the American Recovery and Reinvestment Act unless otherwise set forth in a written agreement of the parties; and (e) Customer is solely and exclusively responsible for compliance with any other applicable statutes or regulations governing sales to the U.S. Government, and Abaco makes no representations, certifications or warranties whatsoever with respect to the ability of its goods, services or prices to satisfy any such statutes and regulations other than those contained herein.

9. GENERAL

9.1 This Agreement shall be governed by the laws of the State of New York, without regard to its conflict of law provisions. The provisions of the United Nations Convention on the International Sale of Goods shall not apply to this Agreement.

9.2 YOU ACKNOWLEDGE THAT YOU HAVE READ THIS AGREEMENT, UNDERSTAND IT AND AGREE TO BE BOUND BY ITS TERMS AND CONDITIONS. YOU FURTHER AGREE THAT IT IS THE COMPLETE AND EXCLUSIVE STATEMENT OF THE AGREEMENT BETWEEN US AND SUPERSEDES ANY PROPOSAL OR PRIOR AGREEMENT, ORAL OR WRITTEN, AND ANY OTHER COMMUNICATIONS BETWEEN US RELATING TO THE SUBJECT MATTER OF THIS AGREEMENT. FURTHER, NO CHANGE OR AMENDMENT TO THIS AGREEMENT SHALL BE EFFECTIVE UNLESS AGREED TO BY WRITTEN INSTRUMENT SIGNED BY A DULY AUTHORIZED REPRESENTATIVE OF ABACO.

(Nov. 2015)