



NetApp™

## Professional Services Standard Terms and Conditions - North America

### 1. Scope of Services

**1.1 Engagement Documents.** NetApp, Inc. ("NetApp") shall perform technical consulting services (hereinafter "Professional Services") for Customer in support of certain specific projects (each a "Project") as further described in a Sales Quote document, and/or a Service Brief or a Statement of Work as accepted and agreed upon between NetApp and Customer (each being referred to herein as an "Engagement Document"). If a Service Brief is required by NetApp, the Service Brief shall be executed by Customer and submitted to NetApp prior to expiration of the Sales Quote and prior to an obligation arising on NetApp's part to perform any Professional Services. If a Statement of Work ("SOW") is required by NetApp, a SOW shall be executed by both parties prior to the commencement of any Professional Services. Each Engagement Document shall set forth, at a minimum, a description of the Professional Services to be completed, the duration of each Project, and the applicable fees for the performance of the Professional Services. Customer agrees to submit a purchase order for approval by NetApp for all Professional Services.

**1.2 Change Orders.** Changes to the Professional Services specified in a SOW shall not be effective unless a change request form has been executed by authorized representatives of both parties ("Change Order"). If fees are owed to NetApp under a Change Order, a purchase order covering the additional or modified Professional Services will be required.

**1.3 No Unique Services.** Customer understands and agrees that the Professional Services are of a scalable, repeatable nature and, as such, the same or similar Professional Services have been and will continue to be provided to other NetApp customers. Therefore, notwithstanding any other provision herein or in any Engagement Document, the Professional Services hereunder are not contemplated to include any services that are unique to Customer or development activity of any kind ("Unique Services"). Should Customer desire for NetApp to provide any such Unique Services, then such Unique Services shall be governed by a separate written agreement executed by and between the parties. In no event shall a SOW or other Engagement Document, under this Agreement, constitute such a separate written agreement.

**1.4 No Superuser Access.** Notwithstanding any other provision herein or in the Engagement Document, in no event shall Customer grant to NetApp or any NetApp authorized representative, root or "superuser" access at a server or network level ("Superuser Access"), and NetApp shall have no responsibility or liability for loss or damage that results from or is related thereto. In the event Customer desires NetApp to perform configuration or administration services requiring Superuser Access, such services must be set forth and agreed to in writing by way of a Change Order in accordance with Section 1.2 above.

**1.5 Third Party Licenses.** Except where expressly stated otherwise in writing by NetApp, Customer shall be solely responsible for obtaining, and represents and warrants that it will obtain, all third party licenses necessary for NetApp to perform the Professional Services.

### 2. Fees and Payments

**2.1 Fees.** An Engagement Document shall state the fees to be paid to NetApp for Professional Services rendered and any related

payment schedules. Customer's signature on the Engagement Document shall indicate acceptance of the stated fees and payment schedules. No changes in fees or payment schedules shall be effective unless a Change Order is completed in accordance with Section 1.2 above. Customer shall make full payment, without set-off, within thirty (30) days of the date of NetApp's invoice. NetApp reserves the right to charge Customer interest on any delinquent balance in addition to all its other rights and remedies herein, at law or in equity. This interest shall be computed on a daily basis for each calendar day that the payment is delinquent at the lesser of 1.5% per month or the maximum rate permitted by law.

**2.2 Taxes.** Customer shall at all times be solely responsible for taxes on the performance of Professional Services (except taxes based on the gross or net income of NetApp) or provide NetApp with tax exemption and income tax withholding certificates acceptable to the taxing authorities within thirty (30) days from the date Customer places a purchase order with NetApp.

**2.3 Expenses.** In addition to the foregoing, if specified in an Engagement Document, Customer shall pay NetApp its actual out-of-pocket expenses, including travel, as reasonably incurred by NetApp during the performance of the Professional Services.

**2.4 Duration and Expiration of Time and Materials Services.** NetApp will provide to the Customer a NetApp Professional Services Engineer (or a NetApp-certified partner engineer), qualified at the skill level purchased by the Customer, to perform general consulting services, either onsite at a designated and mutually agreed upon Customer site, or remotely, for the total amount of hours and/or days purchased pursuant to the Customer's purchase order. Time and Materials ("T&M") Professional Services purchased as hours will be performed in minimum increments of four (4) consecutive hours. T&M Professional Services purchased as days constitute at least four (4) hours but not more than eight (8) hours of performance in a single calendar day. T&M Professional Services will be available to the Customer for one (1) year from the date NetApp receives the Customer's purchase order for the T&M Professional Services. NetApp will use commercially reasonable efforts to notify Customer of the pending expiration of the Customer's unused T&M prior to the expiration date. At the date of order's expiration, any unused T&M, pre-paid amounts will be credited to Customer's account.

### 3. Exclusive Warranty

**3.1** NetApp warrants to Customer that the Professional Services shall be performed in a professional, workmanlike manner.

**3.2** THE FOREGOING WARRANTIES AND REMEDIES ARE EXCLUSIVE AND ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, EITHER IN FACT OR BY OPERATION OF LAW, STATUTORY OR OTHERWISE INCLUDING ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT WHICH ARE HEREBY EXPRESSLY DISCLAIMED. NETAPP NEITHER ASSUMES NOR AUTHORIZES ANY OTHER PERSON TO ASSUME FOR IT ANY OTHER LIABILITY IN CONNECTION WITH THE PROVISION OF PROFESSIONAL SERVICES.

**4. Relationship Between the Parties.** NetApp is an independent contractor; nothing herein shall be construed to create a partnership, joint venture, or agency relationship between NetApp and Customer. Under no circumstances shall any Professional Service or Professional Services Materials (as defined herein) be deemed "work made for hire" pursuant to the applicable copyright or similar laws of the jurisdiction in which the services are performed.

#### **5. Non-Solicitation of Employees**

**5.1** Customer shall not solicit the services of any NetApp employee, or any employee of a NetApp contracted partner who may have performed Professional Services in connection with an Engagement Document under these Professional Services Terms and Conditions, for a term of one (1) year after the completion or termination of the then most recent Engagement Document, unless prior approval is obtained from NetApp in writing. As a remedy for breach of this provision, Customer shall pay NetApp an amount equal to twenty percent (20%) of the solicited individual's base salary.

**5.2** Section 5.1 shall not apply to nor prohibit either party from posting job openings on its web site or otherwise advertising job openings through industry or mass-media publications, recruitment web sites, or generally advertised job fairs, or from responding to and hiring individuals who initiate contact with such party concerning job opportunities.

#### **6. Intellectual Property**

**6.1** "Intellectual Property" or "IP" means materials, information, discoveries, inventions, technical information, procedures, processes, software, firmware, scripts, technology, intellectual property and/or know-how, including any modifications thereof or thereto created by or for a party. "Pre-Existing IP" means IP owned or otherwise licensed by a party prior to this Agreement. Notwithstanding anything to the contrary hereunder, each party shall retain all right, title and interest in and to its Pre-Existing IP.

**6.2** All deliverables to be provided hereunder shall be identified in the relevant Engagement Document (the "Deliverables"). All Deliverables and IP used, generated, created, developed or reduced to practice, including any modifications thereof or thereto, by or for NetApp in connection with or related to the Professional Services (collectively "Professional Service Materials"), and all intellectual property rights therein shall be and remain the sole and exclusive property of NetApp. In no event shall Professional Services Materials be deemed to include Customer Pre-Existing IP or Customer Confidential Information (collectively, "Customer Materials").

**6.3** Customer hereby grants NetApp a non-exclusive, worldwide, royalty-free, fully paid-up license to use Customer Materials, for the sole purpose of performing or producing the Professional Services Materials.

**6.4** Upon receipt of full payment of all monies due and owing under these Professional Services Terms and Conditions, NetApp hereby grants to Customer a limited, non-exclusive, non-transferable, terminable license, with no right to sublicense, to use the Professional Services Materials solely for Customer's internal business operations to the extent necessary for Customer to receive the benefit of the Deliverables and only insofar as is expressly set forth in the relevant Engagement Document. Customer shall not distribute the Deliverables to any third parties, and shall otherwise treat the Professional Services Material as NetApp Confidential Information pursuant to Section 10.

**6.5** In the event the Professional Services require NetApp to operate any computer systems or software owned or licensed by Customer, Customer shall obtain any and all consents from third parties required for NetApp to do so, and shall notify NetApp promptly of any failure on Customer's part to obtain any such consents prior to performance of Professional Services by NetApp.

**7. Right to Subcontract.** NetApp and Customer hereby acknowledge and agree that NetApp may subcontract some or all of the Professional Services it is performing hereunder to a third party, but NetApp shall remain responsible for ensuring performance of the Professional Services.

#### **8. Termination; Remedies for Non-Payment**

**8.1** Customer may terminate an Engagement Document for convenience, upon thirty (30) days prior written notice.

**8.2** NetApp or Customer shall have the right to terminate an Engagement Document if the other party:

8.2.1 fails to perform any material term or condition herein, including remitting payments when due, and does not remedy the failure within thirty (30) days after the receipt of written notice of such default given by the non-defaulting party; or

8.2.2 becomes insolvent, files, or has filed against it a petition under applicable bankruptcy or insolvency laws which is not dismissed within ninety (90) days; proposes any dissolution, composition or financial reorganization with creditors; makes an assignment for the benefit of creditors; or if a receiver, trustee or similar agent is appointed or takes possession with respect to any property or business of the defaulting party. Such a termination shall not relieve either party from its obligations to pay the other any sums accrued hereunder prior to such termination.

**8.3** At Customer's discretion, Customer may request that NetApp complete the Professional Services in progress after notice of termination, and, if NetApp elects to so perform, upon completion NetApp shall be entitled to full compensation for the completion of such Professional Services.

**8.4** No payment by Customer of a lesser amount than the amount of an invoice shall be deemed as acceptance of payment in full, nor shall any endorsement or statement on any check or letter accompanying any check or payment be deemed an accord and satisfaction, and NetApp may accept such check or payment without prejudice to NetApp's right to recover the balance of any amount due or pursue any other remedy provided for in these Professional Services Terms and Conditions, at law or in equity. In connection with the foregoing, NetApp shall have the absolute right, in its sole discretion, to apply any payment received from Customer to any account of Customer's which is due and/or delinquent. Upon termination for any reason, all sums accrued hereunder prior to such termination shall become immediately due. In the event of termination for convenience by Customer, such sums shall include all time, materials, costs and expenses incurred or expended by NetApp under a valid Engagement Document, notwithstanding Section 2.3. If Customer fails to make payment in accordance with the payment terms of Section 2, then, in addition to any other available remedies, NetApp shall have the right to decline to render further Professional Services to Customer.

#### **9. Insurance Policy**

**9.1** NetApp, at its own cost, shall obtain and/or maintain in force the following insurance coverage:

9.1.1 Workers' Compensation and Employer's Liability Insurance.

9.1.2 Commercial General Liability Insurance with a minimum combined single limit of \$1,000,000 for bodily injury and property damage and \$2,000,000 General Aggregate for bodily injury and property damage liability.

9.1.3 Comprehensive Automobile Liability Insurance with a minimum combined single limit of \$1,000,000 for bodily injury and property damage. Coverage shall apply to non-owned and hired vehicles.

**9.2** NetApp agrees that it shall provide Customer with a Certificate of Insurance upon request, and shall endeavor to provide Customer written notification of any cancellation or termination of the above policies.

**10. Confidentiality.** Both parties will keep all Confidential Information, as defined herein, confidential and will not, without the prior written consent of the disclosing party, publish, disclose or otherwise make available, directly or indirectly, any item of Confidential

Information to any person or entity other than its employees, agents, or contractors who have a need to know in the performance of their duties and who are under a similar written obligation limiting the use and disclosure of disclosing party's Confidential Information as stated in this Section. The receiving party further agrees that it will use the Confidential Information solely for the performance of the Professional Services or solely for internal business purposes in connection with the receipt of the Support Services. Both parties will protect and maintain all Confidential Information with the same degree of care as it employs to protect its own Confidential Information, but at least with a reasonable degree of care. Customer will not copy, duplicate, reverse engineer, reverse compile or attempt to derive the composition or underlying information of any NetApp Confidential Information. For purposes of this Agreement, "Confidential Information" means (1) any information disclosed by either party, that is marked "confidential" or "proprietary" in the manner provided herein or (2) information disclosed orally or visually that is designated "confidential" or "proprietary" at the time of disclosure, and that the disclosing party summarizes in reasonable detail in a writing delivered to the other Party within 30 days. Confidential Information does not include any data or information which: (a) was in the receiving party's lawful possession prior to the submission thereof by the disclosing party; (b) is later lawfully obtained by the receiving party from a third party under no obligation of secrecy; (c) is independently developed by the receiving party; or (d) is, or later becomes, available to the public through no act or failure to act by the receiving party. Confidential Information will remain the property of the disclosing party. Notwithstanding the foregoing, any Professional Services Materials, as defined below, technical information regarding Hardware or Software as well as any information available or accessible through the NOW Website is hereby deemed the Confidential Information of NetApp, regardless of marking or identification.

**11. Force Majeure.** NetApp shall not be liable to Customer for any alleged loss or damages resulting from the delivery of the Professional Services being delayed by the actions or inactions of Customer, acts of civil or military authority, governmental priorities, fires, floods, epidemics, quarantine, energy crises, strikes, labor trouble, war, riots, accidents, shortages, delays in transportation, or any other causes beyond the reasonable control of NetApp. In the event of any such delay or inability by NetApp to perform its obligations, NetApp shall immediately notify Customer of such delay and shall attempt to minimize potential damages to the Customer, and the Customer shall be entitled to take commercially reasonable measures to avoid or minimize the adverse effects of the inability of NetApp to perform its obligations, including immediate termination of the affected Engagement Document if provided in writing, should NetApp be unable to remedy the situation within thirty (30) days.

**12. Governing Law.** These Professional Services Terms and Conditions shall be construed in accordance with, and all disputes hereunder shall be governed by, the laws of the State of California, as applied to agreements entered into and fully performed within California, except its conflicts of laws rules. The California Superior Court at Santa Clara and/or the United States District Court of the Northern District of California at San Jose shall have jurisdiction and venue over all controversies in connection herewith, and each party hereby waives any all and claims of inconvenient forum and consents to the subject matter and personal jurisdiction of such courts.

### 13. Limitation of Liability

**13.1** IN NO EVENT, WHETHER BASED IN CONTRACT OR TORT (INCLUDING NEGLIGENCE) SHALL NETAPP BE LIABLE FOR INCIDENTAL, CONSEQUENTIAL, SPECIAL, INDIRECT, EXEMPLARY, OR PUNITIVE DAMAGES OF ANY KIND, OR FOR LOSS OR CORRUPTION OF DATA, OR LOSS OF REVENUE, LOSS OF BUSINESS OR OTHER FINANCIAL LOSS ARISING OUT OF OR IN CONNECTION WITH THE PURCHASE OR PROVISION OF PROFESSIONAL SERVICES PURSUANT TO THESE TERMS.

**13.2** NOTWITHSTANDING ANY OTHER PROVISION HEREOF, NETAPP'S MAXIMUM CUMULATIVE LIABILITY FOR ANY DAMAGES ARISING HEREUNDER SHALL NOT EXCEED THE FEES PAID TO NETAPP BY CUSTOMER FOR PROFESSIONAL SERVICES DURING THE SIX (6) MONTH PERIOD PRIOR TO THE TIME THE CLAIM AROSE.

**13.3** THIS DISCLAIMER OF LIABILITY FOR DAMAGES SHALL NOT BE AFFECTED IF ANY REMEDY PROVIDED HEREUNDER SHALL FAIL OF ITS ESSENTIAL PURPOSE. CUSTOMER HAS ACCEPTED THE DISCLAIMER OF LIABILITY FOR DAMAGES AS PART OF A BARGAIN TO LOWER THE PRICE OF THE PROFESSIONAL SERVICES AND UNDERSTANDS THAT THE PRICE OF THE PROFESSIONAL SERVICES WOULD BE HIGHER IF NETAPP WERE REQUIRED TO BEAR ADDITIONAL LIABILITY FOR DAMAGES.

### 14. General Indemnification

**14.1** Customer expressly agrees to defend, indemnify and hold harmless NetApp, its affiliates, employees, officers, directors and contractors from any claims, losses, liabilities, expenses, costs, suits or damages, including reasonable attorney's fees, court costs, and claims of infringement (hereinafter referred to as the "Claims"), arising from or in connection with (a) Customer's breach of this Agreement (as defined in Section 28). The foregoing indemnification obligation shall not apply to Claims, if and only to the extent, such the Claims are finally adjudicated to have been solely and proximately caused by the gross negligence or willful misconduct of NetApp.

**14.2** NetApp may employ counsel, at its own expense to assist NetApp with respect to any such claims, provided that if such counsel is necessary because of a conflict of interest with Customer or its counsel or because Customer does not assume control of the defense of a claim for which Customer is obligated to indemnify NetApp hereunder, Customer shall bear such expense. Customer shall not enter into any settlement that affects NetApp's rights or interests without NetApp's prior written approval. NetApp will provide such assistance and cooperation as is reasonably requested by Customer or its counsel in connection with such indemnified claims.

**15. Waiver.** A waiver of any default, or of any of these Professional Services Terms and Conditions, shall not be deemed to be a waiver of any other default or of any other term or condition, but shall apply solely to the instance to which such waiver is directed. The exercise of any right or remedy provided hereunder shall be without prejudice to the right to exercise any other right or remedy provided by law or equity.

**16. Notice.** Any notice required or permitted to be given to NetApp hereunder shall be given in writing and delivered in person or by express courier, or shall be deposited postage prepaid via registered or certified United States mail, at the address below. All notices shall be deemed to have been given and received on the earlier of actual delivery or (3) three days from the date of postmark. All notices shall be directed to Customer to the address set forth in an Engagement Document, or in a subsequent change of address notice submitted by Customer, and to NetApp as follows:

NetApp, Inc.  
Attn: Legal Department  
495 East Java Drive  
Sunnyvale, CA 94089

**17. Data and Recovery.** Customer shall be solely responsible for management and adequacy of its data back-up, data recovery, and disaster recovery measures. Notwithstanding anything to the contrary herein, NetApp shall not be responsible or held liable for any Customer internal processes, procedures, or requirements, or otherwise to insure the protection against loss or corruption, availability, confidentiality, or security of data or information or lack thereof.

**18. Compliance with Law.** NetApp and Customer shall comply with all applicable federal, state, local and foreign laws, regulations, including but not limited to, all export laws, restrictions and regulations of the Department of Commerce or other United States or foreign agency or authority, the Occupational Safety and Health Act of 1970 (29 U.S.C. Sections 651, 678), the Fair Labor Standards Acts of 1938 (29 U.S.C. Sections 201-219), the Work Hours and Safety Act of 1962 (40 U.S.C. Sections 327, 333), the Equal Employment Opportunity (42 U.S.C. Sections 2000e, et seq.) and U.S. Federal regulations governing affirmative action programs.

**19. Export.** Customer acknowledges that the Professional Services and Deliverables supplied by NetApp under these Professional Services Terms and Conditions are subject to export controls under the laws and regulations of the United States and other countries as applicable, and that the Professional Services Materials, Deliverables and associated technology may include encryption. Customer agrees to comply with such laws and regulations, including but not limited to those governing use, export, re-export (to embargoed countries and entities), and transfer of the Deliverables and associated technology.

**20. Publicity.** No advertising, publicity releases, or similar public information concerning these Professional Services Terms and Conditions or the Professional Services to be performed hereunder, shall be published or caused to be published by NetApp or Customer without the prior written consent of the other party, which consent shall not be unreasonably withheld.

**21. Survival.** The following provisions shall survive any expiration or termination: Sections 2.2, 4, 5, 6, 8, 10, 12-20, 22 and 24-27.

**22. Severability.** In the event any provision hereunder is found to be invalid, illegal or unenforceable, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

**23. Assignment.** Subject to Section 7 herein, Assignment of these Professional Services Terms and Conditions shall be prohibited without the express written consent of NetApp. Any other attempted assignment in violation of this provision shall be null and void. These Professional Services Terms and Conditions shall be binding upon and inure to the benefit of the parties hereto and their lawful successors and assigns.

**24. Reseller Purchases.** With respect to Professional Services purchased through a NetApp authorized reseller ("Authorized Reseller"), these Professional Services Terms and Conditions shall govern and be binding between NetApp and Customer for all such Professional Services, with the exception of Section 2, Fees and Payments, and may not be modified or superseded without the express, written consent of NetApp, specifically identifying this Agreement by name, the Engagement Document to which it applies and effective date of the Engagement Document. Fees and payment terms shall be agreed upon directly between the Authorized Reseller and Customer.

**25. Government Acquisition; Restricted U.S. Government Rights.** If END USER is the United States Government, or NetApp Software and accompanying Documentation is being procured on behalf of the United States Government, special provisions apply. NetApp Software is a Commercial-Off-The-Shelf ("COTS") product developed at private expense; no portion of the Software has been developed with U.S. Government, State or other public-sector funds; the Software contains trade secrets and confidential commercial or financial information exempt from disclosure by 5 U.S.C. Section 552(B) (3) and (4) (Freedom Of Information Act) and 18 U.S.C. Section 1905 (Trade Secrets Act); and the ownership of the Software and any reproductions shall remain with NetApp. NetApp Software is provided to U.S. Government Agencies other than the U.S. Department of

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**26. Order of Precedence.** Except as expressly set forth in these Professional Services Terms and Conditions, in the event of any conflict between these Professional Services Terms and Conditions and any relevant Engagement Document, these Professional Services Terms and Conditions shall prevail. With respect to different or additional terms set forth in an Engagement Document, such terms shall be interpreted, applied and enforced in a manner consistent with these Professional Services Terms and Conditions.

**27. Entire Agreement.** THESE PROFESSIONAL SERVICES TERMS AND CONDITIONS, INCLUDING ANY EXHIBITS OR ATTACHEMENTS, TOGETHER WITH ANY AND ALL SUBSEQUENT ENGAGEMENT DOCUMENTS CONSTITUTE THE ENTIRE AGREEMENT ("AGREEMENT"), SUPERCEDE ANY AND ALL OTHER PRIOR AGREEMENTS BETWEEN THE PARTIES RELATING TO THE SUBJECT MATTER HEREOF AND SHALL GOVERN ALL TRANSACTIONS CONTEMPLATED HEREUNDER IN LIEU OF ANY TERMS ON ANY PURCHASE ORDER OR OTHER DOCUMENT SUBMITTED BY CUSTOMER, WHICH SHALL BE NULL AND VOID. IN CASE OF CONFLICT, THE TERMS HEREIN SHALL GOVERN IN LIEU OF ANY CONFLICTING TERMS IN AN ENGAGEMENT DOCUMENT. ANY PURPORTED OR PROPOSED CHANGES TO THE TERMS STATED HEREIN EITHER THROUGH A PURCHASE ORDER OR OTHERWISE, SHALL BE NULL AND VOID, UNLESS MUTUALLY AGREED UPON AND SIGNED BY AN AUTHORIZED REPRESENTATIVE OF EACH PARTY. PRE-PRINTED LANGUAGE ON EACH PARTY'S FORMS, INCLUDING PURCHASE ORDERS, SHALL NOT CONSTITUTE PART OF THIS AGREEMENT AND SHALL BE DEEMED UNENFORCEABLE.