



## **IMPORTANT NOTICE!**

BY OPENING THE PACKAGE, INSTALLING OR USING THE SOFTWARE, YOU ARE CONSENTING TO BE BOUND BY AND ARE BECOMING A PARTY TO THIS AGREEMENT. IF YOU ARE AGREEING TO THESE TERMS OF USE ON BEHALF OF A COMPANY, YOU REPRESENT THAT YOU ARE AUTHORIZED TO BIND THE COMPANY TO THE TERMS OF USE. IF YOU DO NOT ACCEPT THE TERMS AND CONDITIONS LISTED BELOW, RETURN THIS PRODUCT WITHIN 2 DAYS OF RECEIPT TO THE PLACE OF PURCHASE FOR A FULL REFUND.

Questions may be directed to, and Software may be returned to SMARTS as follows:  
Attention: Contracts Department, SMARTS, 44 South Broadway Suite 700, White Plains, New York 10601  
Telephone: (914) 948-6200 extension 8509  
Facsimile: (914) 948-6270  
Email: [contracts@SMARTS.com](mailto:contracts@SMARTS.com)

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PLEASE READ THE FOLLOWING SOFTWARE LICENSE CAREFULLY BEFORE INSTALLING OR USING ANY SOFTWARE SUPPLIED BY SYTEM MANAGEMENT ARTS INCORPORATED ("SMARTS") OR AN AUTHORIZED RESELLER OF SMARTS' PRODUCTS. THE USE OF ALL SOFTWARE SUPPLIED TO YOU DIRECTLY BY SMARTS OR AN AUTHORIZED RESELLER OF SMARTS' PRODUCTS, SHALL BE COVERED BY THE FOLLOWING TERMS AND CONDITIONS. BY INSTALLING OR USING SMARTS' SOFTWARE, YOU ARE CONSENTING TO BE BOUND BY THIS LICENSE. IF YOU DO NOT AGREE WITH THESE TERMS, YOU MAY NOT INSTALL OR OTHERWISE USE THE SOFTWARE.

### SMARTS END USER LICENSE AGREEMENT

THIS END USER LICENSE AGREEMENT sets forth the terms and conditions under which System Management Arts Incorporated, a Delaware corporation with headquarters located at 44 South Broadway, Suite 700, White Plains, New York 10601 ("SMARTS") grants to you (the "Customer") a license to use certain software and/or services as specifically identified in one or more separately executed orders hereto (the "Orders"). This Agreement and any Order or amendment hereto is subject to final review and acceptance by SMARTS. The effective date of this Agreement shall be the date of the first Order hereunder.

### GENERAL TERMS AND CONDITIONS

#### 1. LICENSE GRANT

1.1 SMARTS grants to Customer for the quantity and parameters of use set forth on any Order under this Agreement a nonexclusive, nontransferable, perpetual limited license to use the number of copies of the object code version of such software inclusive of applicable user documentation (collectively the "Software") at the Customer site specified in an Order.

1.2 Each copy of the Software licensed shall be a single copy license that allows Customer to execute one copy of the Software under one single operating system image only at the Customer site. Each copy of the Software may be used only on one Server at a time and may be used only for the internal use of Customer. Any extension of Customer's rights of use shall require payment of additional fees in accordance with SMARTS' then current terms and fees.

1.3 Customer may not charge, or allow others to charge, any party for use of the Software, and may not use the Software in the operation of a service bureau. Customer may not: (a) copy the Software, or allow others to copy, in whole or in part; (b) apply, or allow others to apply, any process or technique to the Software for the purposes of ascertaining the source code; or (c) write or develop any derivative software or any other software program based upon the Software or Proprietary Information. Customer may change the Customer site to another within the U.S. at any time upon prior written notice. Upon relocation, Customer must discontinue use of the Software at the prior Customer site.

1.4 Any use, modification, reproduction, release, performance, display or disclosure of the Software and/or the user documentation by the U.S. Government or any of its agencies shall be governed solely by the terms of this Agreement and shall be prohibited except to the extent expressly permitted by the terms of this Agreement. The Software and accompanying documentation are deemed to be "commercial computer software" and "commercial computer software documentation", respectively, pursuant to DFAR Section 227.7202 and FAR 12.212(b), as applicable. Any technical data provided that is not covered by the above provisions is deemed to be "technical data-commercial items" pursuant to DFAR Section 227.7015(a). Any use, modification, reproduction, release, performance, display or disclosure of such technical data shall be governed by the terms of DFAR Section 227.7015(b).

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## 2. PAYMENT

All fees are due and payable within thirty (30) days from receipt of SMARTS' applicable invoice. The fees identified on the Order(s) are exclusive of taxes and duties. Customer agrees to pay any and all taxes and duties that may be imposed by any taxing authority in connection with the Agreement, excluding taxes based on SMARTS' income or franchise taxes. Past due amounts are subject to a late charge equal to the lesser of 1 1/2% per month or the maximum amount allowed by law.

## 3. TITLE, CONFIDENTIALITY

3.1 The Software and all intellectual property rights related thereto (the "Proprietary Information") constitute trade secrets and proprietary data of SMARTS and any third party from whom SMARTS has received marketing rights, and nothing in this Agreement shall be construed to convey any title or ownership rights to Customer. Customer shall use best efforts to safeguard the confidentiality of the Proprietary Information and any other information marked as confidential by SMARTS. Customer agrees to receive and hold in confidence and not disclose, except as explicitly allowed hereunder, the Proprietary Information to any third parties. Customer may disclose Proprietary Information to consultants under contract with Customer, provided all such consultants are bound to Customer in writing by confidentiality terms no less restrictive than those of this Agreement. Customer shall not allow the removal or modification of any proprietary notice made part of the Software and must reproduce all proprietary rights notices on any copies of the Software made pursuant to this Agreement. Customer acknowledges that SMARTS and any third party providing marketing rights shall have the right to take all reasonable steps to protect their proprietary interests and shall be entitled to seek injunctive relief and any other legal or equitable remedies. All enhancements, intellectual property rights and/or modifications to the Software shall also be owned by SMARTS or the respective third party, shall constitute Software, and shall be subject to these provisions. SMARTS, with reasonable prior notice, shall have the right to audit the usage of the Software and Customer's compliance with this Agreement. Customer agrees to respond to semi-annual audit letters confirming the usage of the Software.

3.2 The Software may have asset protection devices that restrict installation if the Software is used or moved in an unauthorized manner.

## 4. TERMINATION

In addition to other termination rights granted herein, this Agreement may be terminated by either party upon written notice, provided the basis for such termination is a material failure by the other party to perform its obligations hereunder and such failure is not corrected within thirty (30) days from the date such notice is received. Upon termination, Customer shall promptly discontinue use of the Software and return all copies of the Software and related materials in its possession or control to SMARTS or certify to their destruction. This license will terminate automatically if you fail to comply with the limitations described herein. SMARTS may terminate this Agreement immediately should any Software become, or in SMARTS' or its licensors' opinion(s) be likely to become, the subject of a claim of infringement of any intellectual property right. On termination, you must immediately destroy all copies of the Software and Documentation. The provisions of Sections 3, 8, 9 and 12 shall survive expiration or termination.

## 5. MAINTENANCE

The first annual maintenance period for Priority Maintenance ("Maintenance") shall commence upon SMARTS' acceptance of any Order. Maintenance shall automatically renew for additional terms of one (1) year each commencing on the first day following the expiration of the then-current annual maintenance period ("Renewal Date"). Annual Maintenance will be calculated at a rate equivalent to twenty-five percent (25%) of the then-current list price for the Software. Customer may terminate Maintenance for any licensed Software by providing written notification to SMARTS at least sixty (60) days prior to the next Renewal Date. Customer shall identify to SMARTS one (1) person and one (1) alternate person to serve as Customer's support contact ("Customer Contact"). Only a Customer Contact may request Maintenance from SMARTS. Customer may change the Customer Contact by prior written notice to SMARTS. Maintenance includes (i) unlimited telephone support 24 hours per day, 7 days per week, and (ii) correction of errors to keep the Software in conformance with the user documentation (e.g., releases, modifications, refinements and enhancements) which are provided to SMARTS' general client base at no additional charge (the "Refinements"). SMARTS will provide one copy of Refinements to the Customer site and Customer may copy and distribute each such Refinement to the locations at which a licensed copy of the Software is installed and in use. For so long as SMARTS is offering Maintenance for the Software, and provided Customer has paid the applicable invoice, Maintenance will be provided and renewed in accordance with SMARTS' standard Maintenance policies in effect at the time of Maintenance subscription or renewal. If Customer fails to pay any Maintenance invoice on or before the commencement of any Maintenance period, Customer's right to receive Maintenance will terminate. Such discontinuance will not affect Customer's right to use the Software or void the license rights granted hereunder. Maintenance fees are nonrefundable. SMARTS may assign its duties of Maintenance to a third party, provided that SMARTS will remain responsible for the actions of such third party.

## 6. LIMITED WARRANTY

If at any time within the period ending thirty (30) days from the date of the applicable Order, the Software delivered thereunder substantially fails to perform the functions described in the applicable Software user documentation, Customer shall promptly notify SMARTS in writing of such alleged nonconformance. To the extent such deficiency exists in a current unaltered release of the Software, SMARTS shall, at its own cost and expense, either correct such deficiency or advise Customer how to achieve substantially the same functionality with the Software through a procedure different from that set forth in the documentation. SMARTS will undertake commercially reasonable efforts to effect the correction or provide advice pursuant to the foregoing warranty within 30 days of being so notified. Should SMARTS fail to do either, Customer may, as its sole remedy, upon giving SMARTS written notice within five days of such failure terminate the license to the affected Software, return such Software and receive a refund of all license fees paid by Customer for such Software. SMARTS DOES NOT WARRANT THAT USE OF THE SOFTWARE WILL BE UNINTERRUPTED OR THAT THE OPERATION OF THE SOFTWARE WILL BE ERROR-FREE OR SECURE, AND SMARTS HEREBY DISCLAIMS ANY AND ALL LIABILITY ON ACCOUNT THEREOF EXCEPT FOR THE EXPRESS WARRANTIES IN THIS SECTION 6. SMARTS MAKES NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

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## 7. INFRINGEMENT

SMARTS will indemnify, defend and hold Customer harmless from any action brought against Customer that is based on a claim that the Software, when used within the scope of this Agreement, infringes a United States patent, copyright, or trade secret. In such event, Customer shall give SMARTS prompt written notice of any claim and SMARTS shall have sole control of the defense, settlement or compromise. Customer may elect to participate in any such action with an attorney of its own choice at its own expense. Should any Software become, or in SMARTS' opinion is likely to become, the subject of a claim of infringement, SMARTS may at its option (i) procure for Customer the right to continue using the Software, or (ii) replace or modify the Software to make it non-infringing, or (iii) terminate the license for the affected Software. Upon termination of the license, SMARTS will refund to Customer, as SMARTS' sole liability and Customer's sole remedy, all license fees paid by Customer for the terminated license less an amount equal to one sixtieth of such license fees for each month or portion thereof that has elapsed since the effective date of the applicable license. The foregoing states the entire liability of SMARTS with respect to any claim of infringement.

## 8. IMPLEMENTATION AND ALTERATION

Customer acknowledges and agrees that (i) failure to implement all Refinements supplied by SMARTS as a part of Maintenance and (ii) any attempts by Customer to alter any Software without SMARTS' written direction or consent will be at Customer's sole risk and may render the Software unusable or nonconforming to the applicable user documentation. In no event will SMARTS have any obligation to support or maintain any Software that is misused, modified without SMARTS' prior written consent, or any Software for which Refinements have not been applied. SMARTS is not be responsible or liable for warranty or infringement claims, Software errors or any nonconformance with the applicable user documentation if such claims arise out of or are related to (i) any alteration or modification made by Customer without the prior written consent of SMARTS; (ii) Customer's failure to implement any Refinements; (iii) Customer's misuse of the Software or (iv) the use or combination of the Software with software or other items not provided by SMARTS. Customer shall at all times maintain no fewer than two (2) qualified engineers trained for proper use of the Software at the Designated Location.

## 9. LIMITATION OF LIABILITY

EXCEPT WITH RESPECT TO SMARTS' OBLIGATIONS UNDER SECTION 7, AND NOTWITHSTANDING THE FORM IN WHICH ANY LEGAL OR EQUITABLE ACTION MAY BE BROUGHT, SMARTS SHALL IN NO EVENT BE LIABLE HEREUNDER FOR DAMAGES WHICH EXCEED THE AMOUNT OF THE LICENSE OR SERVICE FEES PAID BY CUSTOMER FOR THE SOFTWARE OR SERVICE WHICH GAVE RISE TO SUCH DAMAGES, OR IF NOT SOFTWARE RELATED, TO THE AMOUNT OF THE LICENSE FEES PAID IN THE ONE YEAR PRIOR TO THE DATE ON WHICH THE EVENT GIVING RISE TO SUCH DAMAGES OCCURRED. IN NO EVENT WILL SMARTS BE LIABLE FOR CONSEQUENTIAL DAMAGES OR FOR ANY OTHER INDIRECT DAMAGES SUCH AS, BUT NOT LIMITED TO, EXEMPLARY OR PUNITIVE DAMAGES, EVEN IF IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE LIMITATIONS, EXCLUSIONS AND DISCLAIMERS SET FORTH IN THIS SECTION 9 SHALL NOT HAVE THE OBJECT OR EFFECT OF LIMITING OR EXCLUDING SMARTS' LIABILITY FOR DEATH OR PERSONAL INJURY CAUSED BY SMARTS.

## 10. REFERENCE SITE

Subject to Customer's prior written approval on a case-by-case basis, Customer agrees: a) to be a reference site for SMARTS; b) to provide SMARTS prospects with information regarding Customer's use of the Software; c) to be the subject of a SMARTS "Success Story" and a press release to be written and published by or on behalf of SMARTS; and d) to provide SMARTS with a mutually agreeable testimonial that may be used by SMARTS in advertising and other promotional purposes.

## 11. FORCE MAJEURE

Neither party will incur any liability to the other party on account of any loss or damage resulting from any delay or failure to perform all or any part of this Agreement if such delay or failure is caused, in whole or in part, by events, occurrences or causes beyond the control and without the negligence of the parties. Such events, occurrences or causes do not include the inability to meet financial obligations.

## 12. GENERAL

If the copy of the Software you received was accompanied by a printed or other form of "hard-copy" End User License Agreement or Software License Agreement whose terms vary from this Agreement, then the hard-copy End User License Agreement governs your use of the Software if signed by all parties. Customer may not assign, delegate, sublicense, pledge or otherwise transfer its rights or obligations under this Agreement without SMARTS' prior written consent. If any provision of this Agreement is deemed illegal or unenforceable, that provision shall be severed and the remainder of this Agreement will remain in full force and effect. The headings used in this Agreement are for convenience only and shall not create any rights or obligations or affect the meaning or interpretation of this Agreement. This Agreement shall be construed and enforced in accordance with the laws of the State of New York. Customer acknowledges that the Software is subject to export controls under applicable export control regulations, including without limitation, the U.S. Export Administration Regulations. SMARTS shall be entitled to recover from Customer reasonable attorneys' fees it incurs in enforcing its rights hereunder. This Agreement supersedes all other agreements, proposals, representations and other understandings regarding the Software, whether oral or written. The terms and conditions of any purchase order or other instrument issued by Customer or its agent in connection with this Agreement that are in addition to or inconsistent with the terms and conditions of this Agreement are null and void and shall not be binding on SMARTS. All notices permitted or required under this Agreement shall be sent to the recipient party's address stated in the latest Order under this Agreement (as may be modified in writing) by certified mail, return receipt requested, or received overnight carrier. Alterations or modifications of this Agreement will be valid only if made in a writing signed by both parties.